



**ME/6917/20**

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

**RESPONSE TO THE PROVISIONAL FINDINGS**

**14 JANUARY 2022**



## **CONFIDENTIALITY**

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

## **DEFINITIONS**

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



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**RESPONSE TO THE PROVISIONAL FINDINGS**

**1. EXECUTIVE SUMMARY**

- 1.1 This submission is made in response to the Competition and Market Authority's ("CMA") provisional findings (the "**Provisional Findings**") of 16 December 2021, in relation to the anticipated acquisition by Cellnex UK Limited (together with Cellnex Telecom, S.A., "**Cellnex**") of the passive infrastructure assets of CK Hutchison Networks Europe Investments S.à.r.l. in the UK (the "**Proposed Transaction**").<sup>1</sup>
- 1.2 The Provisional Findings disclose no proper basis for the provisional conclusion that the Proposed Transaction gives rise to a realistic prospect of a substantial lessening of competition (an "**SLC**") in the supply of access to developed macro sites and ancillary services to mobile network operators ("**MNOs**") and other wireless communication providers ("**non-MNOs**") in the UK. Cellnex and CK Hutchison have serious concerns that the CMA's inquiry group (the "**Panel**") made critical errors in its gathering and assessment of relevant evidence, which has resulted in an irrational SLC finding, not supported by evidence and not demonstrated on the balance of probabilities.
- 1.3 In summary, the Parties understand from the Provisional Findings that the CMA is concerned that:
- 1.3.1 the structure of the relevant market is likely to remain highly concentrated in the long term; and
- 1.3.2 the sale of the CK Hutchison Group's passive infrastructure assets in the UK to Cellnex may prevent the emergence of a third major national player, leaving customers with a choice of only two major suppliers (which could mean higher prices or worse terms for mobile operators and their customers).<sup>2</sup>

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<sup>1</sup> This response should be read in conjunction with the previous submissions made by Cellnex and CK Hutchison Holdings Limited and its subsidiaries ("**CK Hutchison Group**" and, together with Cellnex, the "**Parties**") to the CMA, including but not limited to the response to the issues letter of 16 June 2021 ("**Issues Letter Response**"), the response to the issues letter of 16 June 2021 on the counterfactual ("**Response on Counterfactual**"), CK Hutchison's initial submission of 20 August 2021 ("**Initial Submission**"), the response to the issues statement submitted on 2 September 2021 ("**Issues Statement Response**"), the Parties' response to the annotated issues statement and working papers submitted on 27 October 2021 ("**Response to the AIS and WPs**") and the Parties' response to the notice of possible remedies of 16 December 2021 (the "**Remedies Notice Response**").

<sup>2</sup> See the CMA's press release here: <https://www.gov.uk/government/news/uk-telecoms-tower-merger-risks-higher-mobile-costs>.



- 1.4 The CMA incorrectly identifies an SLC on the basis of an overlap between the Parties' passive infrastructure sites that the Provisional Findings itself accepts is "*likely to be numerically limited*".<sup>3</sup> This approach is misguided and overlooks the real impact of the Proposed Transaction on competition, which is to enable 3UK to compete more effectively in the retail mobile market to the enormous benefit of UK consumers.
- 1.5 In any event, in reaching such a misguided conclusion, the CMA has failed to give due and proper weight to all of the available evidence and has mischaracterised the evidence submitted by the Parties and third parties. In particular, the Parties consider that the CMA's assessment is significantly flawed in the following respects:
- 1.5.1 First, the CMA has presented a wholly speculative counterfactual, involving a hypothetical and re-imagined sale process, to conclude that the Proposed Transaction prevents the emergence of a third major national WIP and to manufacture an artificially increased level of competition in the counterfactual brought about by the Transaction Sites that is far removed from the reality absent the Proposed Transaction. This approach to the counterfactual contravenes the CMA's guidelines and is not supported by the evidence of any party's actual behaviour or approach. Therefore, the Provisional Findings proceed on the basis of an error of law and manifest errors of assessment. CK Hutchison's detailed response to the counterfactual is submitted in a separate document.
- 1.5.2 Second, the Provisional Findings fail to provide any evidence of actual or potential harm that customers (MNOs or non-MNOs) or end consumers will face as a result of the Proposed Transaction. The Merger Assessment Guidelines (the "**MAGs**") make clear that protecting customers - and ultimately therefore consumers - is "*at the heart of what the CMA does*".<sup>4</sup> In this case the Proposed Transaction was actually initiated by one of the major MNO customers, and none of the other customers (whether MNOs or non-MNOs) – all substantial and sophisticated businesses – have expressed any material concerns with the Proposed Transaction. The same lack of concern is apparent from the industry regulator, Ofcom, and DCMS, who would be expected to be in a good position to assess any impact on the supply of passive infrastructure following a substantial review of telecoms infrastructure in 2018. Similarly, to the Parties' knowledge, no consumer body has expressed any concerns, and no informed observer outside the CMA believes that the Proposed Transaction is likely to give rise to an SLC on the balance of probabilities. Despite the assertions outlined in the press release, that "*UK telecoms tower merger risks higher mobile costs*", the CMA does not present any evidence or economic analysis to show how the Proposed Transaction could result in "*higher prices or worse terms for both mobile operators and their customers*". In the absence of such evidence, the CMA has relied upon generic and self-serving statements from competitors.

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<sup>3</sup> Provisional Findings, paragraph 8.83.

<sup>4</sup> CMA129, 18 March 2021, paragraph 1.3.



- 1.5.3 Third, the CMA has failed to take a rational approach to the evidence before it relating to the very significant competitive constraints imposed by customer self-supply and the supply of build to suit ("BTS") sites by other WIPs. The CMA argues that these present a limited constraint, in particular because it calculates that a relatively low share of new site demand has been supplied using BTS sites. However, this calculation ignores the clear evidence before the CMA – specifically, a number of significant contract wins comprising or including self-supply and BTS – and therefore the CMA fails to recognise that the overwhelming number of new points of presence ("PoPs") have been fulfilled using customer self-supply of BTS sites. This is a fundamental misapprehension which undermines the entirety of the CMA's competitive assessment. The Parties note that the CMA has made the same omission in its assessment of share of supply information and bidding data, which fails to even consider the relevance or extent of customer self-supply.
- 1.5.4 Fourth, the CMA relies heavily on its contention that scale provides a significant competitive advantage in this market. Yet it fails to properly understand the different ways in which customers may seek to drive competition and how scale is relevant to each. For example, the CMA suggests that MNOs might change their network configuration in order to switch a collection of sites in a given area, such that existing sites which cannot be substituted on an individual basis can be substituted on a collective basis,<sup>5</sup> something which has no basis in evidence. This has led it to apply an irrational approach to the evidence on this point, and to ignore evidence that smaller suppliers provide important and effective constraints. This is most clearly demonstrated by the fact that: (i) Cellnex's share of supply by flow is lower than its share of supply by stock, which means that Cellnex is in fact losing market share to smaller WIPs over time, demonstrating that scale is not a significant advantage, and (ii) the CMA's own analysis of EBITDA margins shows that smaller WIPs have enjoyed higher EBITDA margins than Cellnex/Arqiva, which is clear evidence that there are no significant economies of scale in the relevant market. The CMA also purports to identify a range of specific – yet spurious – advantages of scale, such as an increased likelihood of having a site in the right location, customer preferences of dealing with larger players and the ability to deploy BTS sites, to conclude that larger WIPs have a general competitive advantage over smaller WIPs. However, as elaborated below, to the limited extent that such advantages may exist, they have no material impact on WIPs' ability to compete in practice, as demonstrated by the ability of smaller suppliers to win key contracts.

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<sup>5</sup> Provisional Findings, paragraph 8.97.



- 1.5.5 Fifth, the Provisional Findings do not adequately account for countervailing factors that may prevent or mitigate any hypothetical SLC arising from the Proposed Transaction. Specifically, the Provisional Findings have ignored the substantial and consistent detailed evidence provided by the Parties in the course of the CMA's investigation on the significant and certain merger-specific benefits that would accrue to downstream end consumers through material new investment in 5G in the UK (particularly in relation to 3UK's 5G network), which will enhance 3UK's competitive position on the downstream mobile market to the benefit of end consumers. In doing so, the Provisional Findings have overlooked a key impact of the Proposed Transaction on competition, which is to enable 3UK to compete more effectively in the retail mobile market to the enormous benefit of UK consumers. Even if the analysis of the Provisional Findings were entirely correct (which the Parties strongly dispute), these merger-specific benefits to competition and UK consumers would greatly outweigh any supposed SLC in the passive telecoms infrastructure market resulting from the Proposed Transaction.
- 1.6 In addition, from a procedural standpoint, the Parties are disappointed that the CMA did not share its analysis with respect to third parties' share of supply information prior to publishing its Provisional Findings. In particular, despite repeated requests from the Parties, the CMA refused to disclose share of supply information from third parties at the annotated issues statement ("AIS") and working papers ("WPs") stage, reducing the ability of the Parties to make meaningful representations on the Panel's emerging views of the Proposed Transaction that could have been taken into account before the Provisional Findings were published. Cellnex also notes that it has still not been provided with any bidding data from third parties, and it is unclear whether the CMA received or even requested such information from other market participants. Similarly, there are still multiple sections of redacted text throughout the Provisional Findings (which the Parties and their advisers have not had access to, even though they have offered to receive limited access through the confidentiality rings in place), which has prevented the Parties from understanding or responding to some of the submissions made by third parties. CK Hutchison has raised further concerns regarding procedural unfairness relating to the CMA's counterfactual assessment which are outlined in CK Hutchison's separate response to the counterfactual.
- 1.7 In light of the above, and as explained in more detail in the sections set out below, the CMA has failed to establish to the requisite standard that the Proposed Transaction is likely to give rise to an SLC. On the contrary, the evidence demonstrates that customers will be unaffected, and able to secure their wireless infrastructure needs on a fully competitive basis regardless of the Proposed Transaction.



## 2. INTRODUCTION

2.1 The CMA's concerns with the structure of the market and its desire to see the emergence of a third major national WIP go beyond its remit, which is to prevent relevant merger situations from giving rise to SLCs as established in the Enterprise Act 2002 (the "EA02"). Instead, the CMA's Provisional Findings stray into industrial policy, which is properly the remit of the UK Government and Parliament.

### Regulatory framework for telecoms

2.2 The UK Government and Parliament are responsible for setting the overall policy and regulatory framework for telecoms in the UK.<sup>6</sup> As the UK's independent regulatory authority, Ofcom is responsible for implementing the framework and for making regulatory decisions under its statutory duties.<sup>7</sup>

2.3 In 2018, the UK Government undertook the Future Telecoms Infrastructure Review ("FTIR")<sup>8</sup> to ensure that the UK becomes a world leader in digital connectivity, by increasing competitiveness, boosting productivity and meeting future demands of consumers and businesses. The Secretary of State for DCMS was clear that, in pursuing the UK's national strategy, *"regulation [should be] limited to where it is necessary, and provides the longer-term stability and predictability that investors need. The UK must become the easiest and the most attractive place to invest in new digital infrastructure."*<sup>9</sup>

2.4 As part of the FTIR, the UK Government had extensive discussions with industry, consumer groups and investors, undertook detailed market analysis, and drew lessons from what has worked (and not worked) in other countries. In relation to passive infrastructure, the UK Government found the following:

2.4.1 Sharing of sites and network infrastructure, such as masts and antennas, could make the deployment of 5G more cost-effective. As a result, the UK Government would look to support industry initiatives to build on current MNO commercial agreements to share infrastructure, provided network sharing agreements do not restrict competition in the market.<sup>10</sup>

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<sup>6</sup> The Digital Economy Act 2017 sets out the UK Government's role in defining the strategic priorities and outcomes in relation to telecoms through a Statement of Strategic Priorities, which Ofcom must have regard to when carrying out its regulatory functions.

<sup>7</sup> The Communications Act 2003 (the "CA03") states that Ofcom's principal duty is *'to further the interests of citizens in relation to communications matters, and to further the interests of consumers in relevant markets, where appropriate by promoting competition.'* Ofcom was established under the Office of Communications Act 2002 and, other than the CA03, operates under the following Acts of Parliament: the Wireless Telegraphy Act 2006, the Broadcasting Acts 1990 and 1996, the Digital Economy Acts 2010 and 2017 and the Postal Services Act 2011.

<sup>8</sup> Department for Digital, Culture, Media & Sport ("DCMS"), FTIR, 23 July 2018: see <https://www.gov.uk/government/publications/future-telecoms-infrastructure-review>.

<sup>9</sup> See Ministerial Forward, DCMS, FTIR, 23 July 2018.

<sup>10</sup> DCMS, FTIR, 23 July 2018, paragraph 202.





- 2.4.2 Different infrastructure models may be needed in different areas as demand evolves. There are many potential forms of 'neutral host' infrastructure which could help boost network coverage.<sup>11</sup>
- 2.4.3 Wholesale infrastructure providers play an important role in delivering investment, which the UK Government has recognised through its approach to reforming the Electronic Communications Code (the "Code").<sup>12</sup> With respect to the Code, the UK Government is clear that it *"does not want to increase regulation and risk disruption of market incentives for investment in passive infrastructure"* and that *"the UK's independent regulator for telecommunications, Ofcom is responsible for ensuring effective competition in telecommunications markets."*<sup>13</sup>
- 2.5 There is no indication throughout the FTIR that there could be any concerns in relation to passive infrastructure or in relation to the supply of access to developed macro sites and ancillary services. Despite extensive discussions with industry and having undertaken detailed market analyses, the UK Government did not find 'highly concentrated markets' (or potential concerns in the long-term) among WIPs, even though Arqiva was a large independent supplier at the time and CTIL had not yet been commercialised.
- 2.6 The CMA should also note that neither MNOs nor other WIPs appear to have made submissions relating to the structure of the market as part of the UK Government's call for evidence, let alone raise concerns about market dynamics. On the contrary, WIG, for example, welcomed the results of the FTIR.<sup>14</sup> To the extent there would have been any issues relating to economies of scale and the size of WIPs' portfolios, these would have been raised and/or addressed by customers and competitors at the time and considered carefully by DCMS and Ofcom.
- 2.7 The CMA's views on the structure of the market are entirely at odds with DCMS' assessment in 2018. While the Provisional Findings include Ofcom's comments on discrete questions of 5G rollout, licence conditions and planning permission, it contains no indication that the CMA has requested or taken into account any views on the functioning and competitiveness of the market or the lack of actual or potential harm the Proposed Transaction will cause for customers and end consumers (see section 5 below for further details on the Parties' procedural concerns) from either DCMS or Ofcom, the regulator responsible for ensuring effective competition in the telecommunications markets. To the Parties' knowledge, neither DCMS nor Ofcom have expressed any concerns with respect to the Proposed Transaction. In fact, nothing in the Provisional Findings suggest that Ofcom has raised concerns in any of its

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<sup>11</sup> DCMS, FTIR, 23 July 2018, paragraphs 203 and 204.

<sup>12</sup> DCMS, FTIR, 23 July 2018, paragraph 205.

<sup>13</sup> DCMS, A New Electronic Communications Code, May 2016, paragraph iv: see [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/523788/Electronic\\_Communications\\_Code\\_160516\\_CLEAN\\_NO\\_WATERMARK.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/523788/Electronic_Communications_Code_160516_CLEAN_NO_WATERMARK.pdf).

<sup>14</sup> Press release, WIG, *Wireless Infrastructure Group welcomes DCMS Future Telecoms Infrastructure Review (FTIR)*, July 2018: see <https://www.wirelessinfrastructure.co.uk/wireless-infrastructure-group-welcomes-dcms-future-telecoms-infrastructure-review-ftir/>.



discussions with the CMA in the context of this review. On the contrary, Ofcom appears to have corroborated key submissions on sectoral realities including in relation to [confidential].<sup>15</sup> In the absence of any merger-specific harm resulting from the Proposed Transaction, the CMA's industrial policy approach is not only an inappropriate extension of its remit but also entirely misconceived.

**CMA's legal framework and statutory duties**

- 2.8 The CMA's stated aim is to promote competition for the benefit of consumers.<sup>16</sup> Its merger control procedures are designed to fulfil this duty in an efficient manner, while ensuring that the merger parties' rights to due process are fully respected. The CMA is also required to balance the rights of the merger parties with those held by third parties.<sup>17</sup>
- 2.9 As set out in the legal framework, a reference of an anticipated merger is made under s.33 of the EA02<sup>18</sup> and the questions to be decided by the CMA are prescribed by s.36 of the EA02.<sup>19</sup> In addition, when conducting Phase 1 and Phase 2 investigations, the CMA "will have regard to the Merger Assessment Guidelines".<sup>20</sup>
- 2.10 During a Phase 2 investigation, the CMA's statutory duty is to decide, on the balance of probabilities and on the basis of objective evidence, whether the Proposed Transaction has resulted or may be expected to result in an SLC.<sup>21</sup>
- 2.11 As outlined in the MAGs, and as noted by the CAT in *JD Sport Fashion plc v Competition and Markets Authority*,<sup>22</sup> the CMA has a wide margin of discretion in its use of evidence given the case-specific nature of merger investigations and it can depart from the MAGs where it considers it is appropriate to do so. However, as established by the CAT, "nothing in this approach absolves the CMA from determining the statutory questions in a rational and lawful manner, properly supported by the evidence and sufficiently reasoned" (emphasis added).<sup>23</sup>
- 2.12 In *Tobii AB (publ) v. Competition and Markets Authority* ("**Tobii AB**") the CAT held that the relevant legal test is the rationality test, according to the ordinary domestic standard of rationality. Applying that standard requires the CMA to have a sufficient basis, in light of the totality of the evidence available to it, for making its assessments and in reaching its decisions.<sup>24</sup> As such, the CMA needs to properly consider the evidence submitted by the Parties, which the Provisional Findings fail to do. Insofar as

<sup>15</sup> See for example, Provisional Findings, paragraphs 3.34, 3.73 and 5.82.

<sup>16</sup> See <https://www.gov.uk/government/organisations/competition-and-markets-authority/about>.

<sup>17</sup> S.25(3) Enterprise and Regulatory Reform Act 2013; CMA, Mergers: Guidance on the CMA's jurisdiction and procedure, December 2020.

<sup>18</sup> S.33 of the EA02.

<sup>19</sup> S.36 of the EA02.

<sup>20</sup> MAGs, revised 18 March 2021, paragraph 1.12 (s.106 of the EA02 requires the CMA to prepare and publish guidance concerning the making and consideration of references).

<sup>21</sup> CMA, the MAGs, March 2021, paragraph 2.36.

<sup>22</sup> *JD Sport Fashion plc v Competition and Markets Authority* [2020] CAT 24, paragraphs 96 and 97.

<sup>23</sup> *JD Sport Fashion plc v Competition and Markets Authority* [2020] CAT 24, paragraph 98.

<sup>24</sup> *Tobii AB (publ) v. Competition and Markets Authority*, [2020] CAT 1 – see paragraph 329, relying on *BAA Limited v. Competition Commission* [2012] CAT 3, paragraphs 20(4) and 20(5).



the conclusions reached by the CMA in its Provisional Findings are neither properly supported by the evidence nor sufficiently reasoned, the CMA has acted in an irrational and unlawful manner.

- 2.13 This is not a sector in which the CMA is restricted in its ability to gather evidence relevant to the impact of the Proposed Transaction (such as may be the case in sectors that are characterised by fast-moving technological and commercial developments). In this case, the telecommunications sector is continuously under review by the UK Government (given the UK's national strategy) and was recently reviewed by the CMA in connection with the anticipated acquisition by Cellnex UK Limited of Arqiva Services Limited ("**Cellnex/Arqiva**"), which was cleared unconditionally by the CMA on 22 April 2020 and which closed on 8 July 2020.<sup>25</sup> Had there been any concerns with the structure of the market, Ofcom and/or DCMS would have raised them during the CMA's review of *Cellnex/Arqiva* and/or the Proposed Transaction, the UK Government's FTIR, or otherwise in the ordinary course. Given the absence of any such concerns and the wide range of evidence before the CMA which supports the Parties' submissions (from the Parties, customers and other third parties), the CMA's conclusions in the Provisional Findings are inconsistent with the full body of evidence before it. The CMA's provisional SLC finding is therefore wholly inconsistent with its statutory duties.
- 2.14 As detailed further in the following sections, the Provisional Findings fail to show evidence of any actual or potential harm that could ensue to customers as a result of the Proposed Transaction. Instead, the CMA has:
- 2.14.1 given undue weight to unsubstantiated assertions from third parties (primarily competitors);
  - 2.14.2 relied on evidence that the CMA has misunderstood or mischaracterised;
  - 2.14.3 ignored entirely the absence of merger-specific customer concerns; and
  - 2.14.4 failed to obtain any evidence<sup>26</sup> or conduct appropriate economic analysis to identify any actual or potential benefits or harm to customers or end consumers.<sup>27</sup>

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<sup>25</sup> The full text decision is available on the CMA's website: see [https://assets.publishing.service.gov.uk/media/5ec246ffe90e071e29d537f6/Cellnex\\_Arqiva\\_full\\_text\\_decision\\_PDFaa.pdf](https://assets.publishing.service.gov.uk/media/5ec246ffe90e071e29d537f6/Cellnex_Arqiva_full_text_decision_PDFaa.pdf).

<sup>26</sup> For example, the CMA failed to collate third parties': (i) bidding data, and (ii) price difference data between upgrading existing sites and using BTS sites, to properly assess Cellnex's submissions and analysis in relation to competitive dynamics in the market.

<sup>27</sup> Despite the assertions outlined in the press release that the "*UK telecoms tower merger risks higher mobile costs*", the CMA does not present any evidence or analysis to show how the Proposed Transaction could result in "*higher prices or worse terms for both mobile operators and their customers*": see <https://www.gov.uk/government/news/uk-telecoms-tower-merger-risks-higher-mobile-costs>.



2.15 Given the insufficient evidence used to inform its assessment and the lack of weight given to the actual objective evidence before it, the CMA has acted irrationally in reaching the conclusions set out in the Provisional Findings.<sup>28</sup>

### 3. THE COMPETITIVE ASSESSMENT

#### **The Provisional Findings fail to show customer harm**

3.1 The Provisional Findings fail to establish that customers (MNO or non-MNOs) will face actual or potential harm as a result of the Proposed Transaction. The CMA indicates that it is concerned that the Proposed Transaction could result in higher prices and worse contractual terms, however it does not provide any evidence to support this statement.

3.2 Overall, the analysis of customers' positions at paragraphs 8.52 to 8.67 of the Provisional Findings illustrates the artificial nature of the CMA's provisional SLC finding. The views of customers, who are best placed to understand the effects of a merger transaction on the market, are typically accorded significant weight by the CMA (and merger control authorities globally). Customers, with in-depth experience of the relevant market, are inevitably better placed than a regulatory body to understand the competitive and commercial implications of a potential transaction. As the CMA accepts, the relevant customers in this case are some of the largest and most sophisticated businesses in the UK.<sup>29</sup> Notwithstanding this, the Provisional Findings state that the CMA has placed "*limited weight on the lack of concern expressed by the MNOs and some of the non-MNO customers*".<sup>30</sup> The purported basis for dismissing the views of large and sophisticated customers is that they are said to have "*no practical experience of assessing*" the conditions of competition that have been constructed in the Provisional Findings. However, the CMA is not better placed than large and sophisticated customers to understand conditions of competition relevant to their business.

3.3 To the extent that customers do not recognise the hypothetical conditions of competition deriving from the CMA's analysis of the counterfactual, the obvious and only reasonable conclusion that can be drawn is that the Provisional Findings are not realistic, not that customers are incapable of understanding their own interests or the markets in which they operate.

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<sup>28</sup> In *Tobii AB*, with respect to Tobii's fifth ground of appeal - SLC as a result of vertical foreclosure effects – the CAT found that the CMA acted irrationally. It was unreasonable for the CMA to not try to obtain evidence as to what impact a wholesale price increase would have on the merged entity's downstream rivals. [...] Furthermore, the CMA had not obtained any evidence or conducted any economic analysis to identify whether such a partial foreclosure strategy would be profitable for the merged entity. Therefore, the totality of the evidence did not support a conclusion that the merged entity had the ability and/or incentive to engage in a partial foreclosure strategy. This was a clear case where the evidence available on the file did not support the CMA's specific theory of harm – see paragraphs 394 to 445.

<sup>29</sup> Provisional Findings, paragraph 8.52.

<sup>30</sup> Provisional Findings, paragraph 8.53.



(i) No adverse effects on MNO customers

3.4 The CMA acknowledges that MNOs, which are the largest and most important customers of Cellnex, have no concerns with the Proposed Transaction.<sup>31</sup> In particular:

3.4.1 Vodafone and O2 will not be affected because of their existing network arrangements with CTIL and none of the Transaction Sites are likely to be well suited to their respective network configurations in any event. In the Provisional Findings the CMA notes that Vodafone and O2 "*are not likely to be particularly affected by a loss of competition*" since they "*have historically relied less on Cellnex, through CTIL, than MBNL relies on Cellnex;*"<sup>32</sup>

3.4.2 BT/EE has told the CMA that [*confidential*];<sup>33</sup> and

3.4.3 3UK will use the proceeds from the Proposed Transaction to support faster and more extensive investment in 3UK's 5G rollout resulting in significant consumer benefits. CK Hutchison views the Proposed Transaction as the key enabler for 3UK to overcome the challenges it faces as the smallest MNO in the UK, in order to capitalise on its relative 5G spectrum advantage and compete effectively in the UK mobile market. CK Hutchison has clearly entered into a transaction that it considers to be in the best commercial interests of 3UK. 3UK's position is more than adequately protected by the terms of [*confidential*] agreed with Cellnex [*confidential*]. It is unsustainable for the CMA to state that it can only give "*limited weight*" to 3UK's views on the Proposed Transaction because it has received "*mixed evidence*" from 3UK. The CMA has not received mixed evidence from 3UK on the effects of the Proposed Transaction. 3UK's evidence from the site visit in September 2021 as well as in its written submissions has consistently been that the effects of the Proposed Transaction are overwhelmingly and strongly in 3UK's commercial and competitive interests and can have no adverse effects on competition. Indeed, [*confidential*]. There is no evidence before the CMA that 3UK considered that the Proposed Transaction could have any conceivable adverse effect on it. The CMA's statement in the Provisional Findings that 3UK has given mixed evidence is incorrect and without any basis.

3.5 Customers are protected in both the short and longer term by the many ways in which they can drive competition to supply their passive infrastructure needs.

3.6 As the CMA notes, long-term framework agreements are a feature of the market. In this regard, in the Provisional Findings the CMA indicates that customers "*typically sign up to long-term framework contracts which provide MNOs with certainty on the price and service levels in relation to existing and any additional sites that may be required from a supplier over the term of the agreement*" and accepts that in return this

<sup>31</sup> Provisional Findings, paragraphs 8.52 and 8.53.

<sup>32</sup> Provisional Findings, paragraph 8.60.

<sup>33</sup> In addition, BT/EE has its own portfolio of approximately [*confidential*]. Therefore, it could not be negatively impacted by the Proposed Transaction in any event.



*"provide[s] suppliers with predictable, committed revenues for the duration of the contracts".<sup>34</sup>*

3.7 The Parties believe that the CMA has misunderstood the nature and operation of such long-term framework contracts, which has contributed to the incorrect and unfounded conclusions of the Provisional Findings. In this regard, Cellnex would like to clarify some key points:

3.7.1 First, contrary to the CMA's characterisation, 'additional sites' (which the Parties understand to mean new sites) are not within the scope of long-term framework agreements and any new deals for BTS will be contracted separately (or as a contract variation). Framework agreements may provide for a customer to place additional PoPs on existing sites of the WIP, but in Cellnex's experience they do not provide a framework for new sites to be built by that WIP. Given the importance of location for customers and the low probability of an MNO's radio plan requirements overlapping precisely with the location of an existing site that is capable of hosting additional PoPs (as is explained in more detail in paragraphs 3.17.1 and 3.32 below), in Cellnex's experience it is uncommon for MNOs to agree to such commitments within framework agreements for access to existing sites. By way of supporting evidence, [*confidential*].

3.7.2 Second, while churn is a key variable in negotiating long-term framework agreements, it is not a competitive variable in that WIPs do not compete to provide customers with the highest levels of churn in their contracts. Instead, churn allowances are designed to ensure that there is a fair allocation of contractual risk between WIPs and their customers. Cellnex's (and any other WIP's) business model is to make significant upfront investments in its sites in order to ensure that they are suitable for co-location by their anchor tenant(s), but then recoup these investments over a long period through the opex fee. The fact that Cellnex incurs a significant upfront cost but only recovers a proportion of that cost every year means that Cellnex will not recover these upfront costs until a substantial time period into the contract. During this period, if a customer were to decide that it no longer wished to rent a site, Cellnex would be left with a stranded asset – an asset which no other customer may want – and for which it cannot make a return. As such, putting limits on the amount of churn reduces the likelihood of Cellnex having a significant stranded asset base, which would increase its costs and therefore require Cellnex to increase its prices to its customers. As such, the greater the certainty that Cellnex has that its upfront costs will be covered during the lifetime of the contract, the lower the prices it can charge. Conversely, the greater the risk that its upfront costs will not be recovered, the higher the prices Cellnex (or any other WIP) would need to charge to cover this risk.

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<sup>34</sup> Provisional Findings, paragraph 66.



- 3.7.3 Lastly, it is important to note that, contrary to the CMA's conclusions in the Provisional Findings,<sup>35</sup> Cellnex does not charge a penalty to customers for leaving a contracted site earlier than the contracted term. The charge that Cellnex levies on customers is designed to recover the investment costs that it has made. This is made clear by the fact that [*confidential*].
- 3.8 Long-term framework agreements provide customers with certainty, and the robust contractual provisions that have been agreed with Cellnex's sophisticated customers ensure that there can be no harm as a result of the Proposed Transaction. The CMA rightly notes that MNOs "*appear to place material weight on the protections that can be provided by their contractual arrangements with suppliers.*"<sup>36</sup> However, the CMA goes on to dismiss the significance of contractual protections (and the MNOs' continued reliance on such protections) by noting that its concern is "*the structure of the market and competition over the longer-term, and therefore [the CMA places] only limited weight on the contractual arrangements (even in long-term contracts).*"<sup>37</sup>
- 3.9 In dismissing the significance of the contractual protections that customers themselves negotiate and rely upon in the ordinary course of business, the CMA ignores the significant countervailing buyer power and negotiating strength of MNO customers, which it has explicitly recognised on numerous previous occasions.<sup>38</sup>
- 3.10 Throughout the Provisional Findings, the CMA inexplicably dismisses the MNOs' complete understanding of the critical passive infrastructure on which they depend and the important contractual protections that MNOs are able to secure. MNOs in the UK compete fiercely in relation to price, network quality and customer service. Reliability, coverage, and data speeds are the most important factors for network quality. As noted by the CMA, MNOs rely on passive infrastructure to support the provision of high-quality mobile communication services to their customers.<sup>39</sup> To the extent the Proposed Transaction could give rise to any potential competition concerns that could result in higher prices, worse contractual terms or worse network quality in the future, all MNOs (as well as Ofcom) would undoubtedly have raised concerns during the course of the CMA's investigation. However, despite the lack of concerns raised by such "*large and sophisticated businesses*",<sup>40</sup> the CMA has implausibly noted that MNOs "*have no practical experience of assessing how an owner of the CK Hutchison Assets would compete with Cellnex.*"<sup>41</sup> Notwithstanding this conclusion, the CMA appears to believe that it does have the requisite practical and commercial experience to make that assessment, despite clearly having less practical experience of competition in the UK passive telecoms infrastructure market than the MNOs.

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<sup>35</sup> Provisional Findings, paragraph 9.19(b).

<sup>36</sup> Provisional Findings, paragraph 8.56.

<sup>37</sup> Provisional Findings, paragraph 8.53.

<sup>38</sup> *Cellnex/Arqiva*, Final Decision, paragraph 83; Anticipated acquisition by BT Group plc of EE limited ("*BT/EE*"), Final Report, paragraph 16.147; and the Anticipated JV between Liberty Global Plc and Telefónica S.A ("*VMO2*"), Final Report, paragraph 8.157.

<sup>39</sup> Provisional Findings, paragraph 22.

<sup>40</sup> Provisional Findings, paragraph 8.53.

<sup>41</sup> Provisional Findings, paragraph 8.54.

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- 3.11 Although MNOs have vast experience in operating passive infrastructure assets, self-supply a significant proportion of their sites,<sup>42</sup> and will continue to be able to self-supply following the Proposed Transaction, the CMA also appears to have concerns that MNOs will not be able to assess whether future contracts "*might not protect all ways in which they could be harmed*"<sup>43</sup> at the point in which these framework agreements are renegotiated or terminated. Here, the CMA fails to give proper weight to the ability of MNOs to assess the risks to their own businesses, drive negotiations with their suppliers, and exert significant competitive constraints on prices and contractual terms including as a result of the threat of self-supply (as explained further below). Equally, the CMA ignores the fundamental importance of MNOs to WIPs (including Cellnex) as their largest customers by a significant margin. Vodafone, Telefónica/O2 and CK Hutchison all operate in multiple countries and have more than sufficient experience in operating MNOs and managing passive infrastructure assets to address any such concerns.<sup>44</sup> Long-term framework agreements, which typically offer approximately 15 to 20 years of contractual protection, do not in any way lock in customers. In reality, they give the MNOs guaranteed long-term access to critical passive infrastructure assets at a fixed cost and on fixed terms, which ensures an appropriate level of commercial security for the MNOs.
- 3.12 In previous Phase 2 cases relating to the telecommunications sector, the CMA has undertaken a thorough review of contractual protections between operators and infrastructure suppliers to assess potential theories of harm.<sup>45</sup> In this case, throughout the Provisional Findings, there is little reference to and / or analysis of the long-term framework agreements between MNOs and WIPs, in particular: (i) the contractual protections included therein, and (ii) the exhaustive negotiations which are undertaken to agree them.<sup>46</sup>
- 3.13 Finally, the Proposed Transaction cannot plausibly result in higher prices for end consumers and the CMA has not provided any evidence to show why this would be the case. Passive infrastructure is largely a fixed cost because any increase/decrease in the number of end customers does not result in a corresponding and proportionate increase/decrease in passive infrastructure costs, and because costs are determined by long-term contracts. For example, in [*confidential*] agreed between CK Hutchison and Cellnex, the price is locked in for [*confidential*] years and [*confidential*] can only increase [*confidential*]. Similarly, presentations prepared by Vantage Towers indicate that O2 and Vodafone are protected by a 32-year master services agreement with a 3% cap on inflation. In fact, O2 and Vodafone have incremental cost saving

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<sup>42</sup> As a result of sites leased or owned and operated by the MNO itself or through a JV with another MNO.

<sup>43</sup> Provisional Findings, paragraph 8.57.

<sup>44</sup> For example, the operations and commercial strategy of Vodafone in relation to Vantage Towers and Telefónica/O2 in relation to its recent disposal of Telxius are examples of this knowledge and experience in their respective groups.

<sup>45</sup> See CMA's investigation of *BT/EE*, Provisional Findings report (paragraphs 37, 14.96, 14.207, 14.234 and 14.273); and the CMA's investigation of *VMO2*, Provisional Findings report.

<sup>46</sup> Cellnex has provided details of the contractual protections included in framework agreements and the exhaustive negotiations to agree them in Cellnex's Response to RFI 1, dated 27 July 2021; Cellnex's Response to RFI 3, dated 21 September 2021 and Cellnex's response to RFI 4, dated 22 September 2021.





mechanisms/incentives which imply that their costs will likely reduce over the long term.<sup>47</sup>

3.14 The CMA has dismissed the significance of long-term contractual protections and has placed limited weight on the absence of concerns from Cellnex's MNO customers, whom the CMA itself characterises as sophisticated. This clearly demonstrates that the CMA's concerns are non-existent, and the Proposed Transaction in no way amounts to an SLC. It is also evident that the CMA's concern in relation to higher prices for end customers of MNOs is entirely unevicenced and unfounded. The approach the CMA has taken is not only irrational, but rather seems to be driven by a desire to restructure the relevant market to create a third major national WIP, which (as explained above) is beyond the remit of the CMA.

(ii) MNOs' self-supply exerts a significant competitive constraint

3.15 Although the Parties have submitted a considerable body of evidence which contradicts the CMA's assessment, the CMA considers that "*customers' self-build is likely to be a constraint of last resort in the absence of better options*" on the basis that the CMA has "*found that customers prefer using existing sites over new ones*"<sup>48</sup> since building sites can be a costly and lengthy process. The CMA fails to recognise the evidence submitted by Cellnex showing the impact of self-supply on its pricing decisions and the fact that it is unlikely that MNOs' (mostly very narrow) location requirements will be met by WIPs' existing sites. The Provisional Findings also disregard evidence from 3UK which clearly demonstrates that it self-evidently did not prefer existing third party sites over new sites in all of its most recent site enhancement projects.

3.16 In addition, the Provisional Findings fail to take into account the evidence submitted by the Parties and the MNOs which shows that self-supply has been preferred in reality and will continue to be a strong choice for MNOs going forwards. While the CMA does recognise that historically self-supply has been the MNOs' preferred option – as shown by the fact that the vast majority of sites in the UK were originally self-supplied by MNOs – however it does not give any reasons as to why that will not continue, especially given the recent evidence it has received.

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<sup>47</sup> For example, O2 and Vodafone will receive 70% of ground lease savings (CTIL will only retain 30%) and will receive discounts to their service fees if another tenant joints the site. See section 16.4.6 of the Vantage Towers prospectus dated 8 March 2021, available here: <https://www.vantagetowers.com/sites/tower-co-y2/files/vantage-towers-prospectus-v3.pdf>.

<sup>48</sup> Provisional Findings, paragraph 8.205.



- 3.17 The CMA has ignored the evidence submitted by 3UK that it does not have any set preference for existing third party sites over self-supply when sourcing new sites. In reality, 3UK takes the following three key factors into account when assessing an additional site:
- 3.17.1 *[confidential]*;
- 3.17.2 *[confidential]*<sup>49</sup> *[confidential]*; and
- 3.17.3 *[confidential]*.
- 3.18 It is also helpful to consider the only two programmes where 3UK required a significant number of additional sites in the last five years *[confidential]*: (i) 3UK's decision to build its own streetworks monopolies using third party contractors (*[confidential]*) as part of its network densification plan,<sup>50</sup> and (ii) 3UK's programme to fill Partial Not Spots ("PNS") as part of the Shared Rural Network ("SRN"). These examples show that, for both its major programmes, 3UK actively considered all available options (including existing third party sites) and decided to satisfy the vast majority of its demand for new sites via self-supply. Together these programmes represent *[confidential]* of both 3UK's demand for new sites over the past five years and anticipated future requirements (excluding the ongoing requirement to replace sites in response to notices to quit ("NTQs") from landlords, as outlined further in paragraph 3.19 below). The CMA has inexplicably disregarded this evidence on the purported basis that 3UK's requirements are "atypical".<sup>51</sup> 3UK's approach to each of these programmes and ultimate decision to self-supply is set out below:<sup>52</sup>
- 3.18.1 **3UK's streetworks programme:** While 3UK is the smallest MNO in the UK with significant network congestion, the decision to self-supply its densification programme is far from "atypical". 3UK needed a certain number of sites in a certain number of locations within a certain timeframe; this is no different to every network assessment made by MNOs when increasing site numbers to meet their network planning needs. Therefore, 3UK's decision was the rational outcome of an assessment based on the three key factors set out in paragraph 3.17 above to meet these needs. The other MNOs will take the same three factors as 3UK into account when assessing how to source additional sites and will similarly not have a predetermined preference for existing third party sites. While 3UK has limited knowledge of competing MNOs' unilateral site rollouts, 3UK is aware that BT/EE is building a large number of new sites for the Emergency Services Network ("ESN") via self-supply (more than 950 masts are being constructed and c. 19,000 sites are being upgraded in total, with a number of the additional sites being built directly by the UK Government).<sup>53</sup>

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<sup>49</sup> The new tenant can bear the upgrade costs either upfront (a capex model) or as part of the rental cost (an opex model).

<sup>50</sup> See *[confidential]* and *[confidential]*.

<sup>51</sup> Provisional Findings, paragraph 8.198(c).

<sup>52</sup> For further detail, see paragraphs 4.21 to 4.28 of the Parties' Issues Statement Response.

<sup>53</sup> See <https://www.gov.uk/government/publications/the-emergency-services-mobile-communications-programme/emergency-services-network>.



- 3.18.2 **SRN programme:** To meet the PNS targets under the SRN (i.e., the part of SRN that is not funded by public money), Telefónica, 3UK, and Vodafone agreed to build 222 sites together by 2024.<sup>54</sup> From these, 3UK will build 74 sites itself, whereas the remaining 148 sites will be built by CTIL. In other words, all three MNOs decided that the most attractive option was to self-build as opposed to using a WIP. BT/EE is satisfying its SRN obligations through upgrading existing sites, as the sites it is building or has built under the ESN provide BT/EE with a significant advantage over the other MNOs in rural network coverage. The Parties have provided evidence that [confidential] which is clear evidence of [confidential].<sup>55</sup>
- 3.19 In terms of NTQs, there have been [confidential] in the last five years. For over [confidential]% of these sites the shareholders decided to self-build a new site. Less than [confidential]% of replacement sites were provided by WIPs (either by providing an existing site or by building a new site in the required location). In terms of the Unilateral Sites: (i) to date there have been [confidential] NTQs on the Streetworks Sites, and (ii) NTQs on UKB Sites have [confidential].
- 3.20 It is unreasonable for the CMA to dismiss the weight of evidence demonstrating the significant use of self-supply by MNOs in circumstances where [confidential] of 3UK's requirements for additional sites have been met by way of self-supply in the last five years and all MNOs have engaged in significant self-supply activities in recent years. The Provisional Findings recognise that both Vodafone and O2 are not likely to be particularly affected by any "loss of competition" from the Proposed Transaction in any event and that their decisions as to whether to self-supply will therefore not be materially affected by the Proposed Transaction in future.<sup>56</sup> Moreover, it is of no assistance to state that the counterfactual would include three large WIPs instead of only one. The location of existing sites will not change in any counterfactual regardless of the number of large WIPs and, since site location and speed of execution have been key drivers of MNO decisions to self-supply, these factors will not change under any counterfactual.
- 3.21 Throughout the Provisional Findings, the CMA has not provided clear evidence in relation to other MNOs and the programmes they have pursued in recent years.<sup>57</sup> It has also largely ignored the impact of the proposed changes to planning regulations which will make self-supply even more attractive as they expand the deployment options for streetworks.<sup>58</sup>

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<sup>54</sup> See <https://www.mobileuk.org/news/update-all-four-nations-of-the-united-kingdom-are-set-to-benefit-from-a-major-investment-via-the-shared-rural-network>.

<sup>55</sup> Issues Letter Response, paragraphs 3.27.5(a), 3.27.5(b) and 4.4.1.

<sup>56</sup> Provisional Findings, paragraph 8.60.

<sup>57</sup> This is despite the Provisional Findings including statements from MNOs that they have a preference for self-supply. For example, at paragraph 46 of Appendix F it is stated that an MNO said, "*that they prefer to self-build rather than requesting a BTS from a WIP*". At paragraph 115 of Appendix F, it is stated that an MNO explained that "*usually WIPs are used when a quick solution is required and a self-build option is either not commercially viable or not possible in the geographic region*", suggesting a preference for self-supply where feasible.

<sup>58</sup> See paragraph 3.18 below.



(iii) No adverse effects on non-MNO customers

- 3.22 The Parties note that, based on the evidence presented by the CMA,<sup>59</sup> Cellnex's non-MNO customers have not raised any material concerns that are specific to the Proposed Transaction. In fact, several non-MNOs have either stated that they have no particular view on the Proposed Transaction, or that the Proposed Transaction will have no impact on their business at all.
- 3.23 As submitted by the Parties, the number of options available to non-MNO customers is much wider given that their active equipment is much smaller, and their technical requirements tend to be less strict. As such, any potential harm as a result of the Proposed Transaction would be minimal.<sup>60</sup>
- 3.24 In addition, since the active equipment of non-MNOs tends to be smaller and lighter (compared to the active equipment of MNOs), they can more easily self-supply by using alternatives to macro sites, since it is not a requirement for these to be specialised elevated structures. Non-MNOs can rely, for example, on wooden telegraph poles to meet their demand.
- 3.25 In light of paragraphs 3.1 to 3.24 above, it is clear that the CMA's provisional SLC finding is not based on customer concerns and ignores substantial evidence which indicates that: (i) MNOs will continue to be protected through contractual arrangements, (ii) self-supply will continue to exert a significant competitive constraint on the merged entity, and (iii) non-MNOs have not raised any concerns specific to the Proposed Transaction. As such, the Provisional Findings' conclusion of an SLC is not supported by the weight of the available evidence and is certainly not made out on the balance of probabilities.

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<sup>59</sup> Provisional Findings, Appendix F, paragraphs 158 to 167.

<sup>60</sup> See the Cellnex site visit slides, provided to the CMA by email on 17 September 2021.



**The Provisional Findings give undue weight to the scale of suppliers**

- 3.26 The statement in the Provisional Findings that customers have a preference to contract with large suppliers rather than multiple smaller providers (and that customers therefore prefer suppliers that can offer a bundle of existing and new sites) implies that MNOs prefer a 'one-stop shop'.<sup>61</sup> Whilst the Parties have not been provided with one of the two customer comments referenced by the CMA, the comment from the other MNO appears to be a theoretical and unevicenced comment which, in any event, provides no detail on how small a WIP would have to be in order for it not to be worth negotiating a framework contract with them.<sup>62</sup> In fact, any notion that MNOs have a strong preference to supply from a single source is clearly contradicted by the direct evidence before the CMA of how customers behave in practice.
- 3.27 Smaller WIPs appear to have already entered into framework agreements with MNO customers. For example, in paragraph 6.19(b) of the Provisional Findings, the CMA has stated that "*FreshWave said that it sets prices on the basis of framework agreements entered into with each MNO and MNO JV*" (emphasis added) despite the fact that FreshWave has only [confidential] sites in the UK.<sup>63</sup> The fact that MNOs are happy to use multiple smaller WIPs for BTS is also evidenced by the fact [confidential]. In Cellnex's experience, customers will generally prefer to have multiple BTS providers to manage risk rather than choosing to rely on a single provider.<sup>64</sup> Cellnex has also submitted evidence to the CMA which shows that [confidential].<sup>65</sup> Given the number of existing providers of BTS sites in the UK, the Proposed Transaction cannot lead an SLC in the supply of access to developed macro sites and ancillary services.
- 3.28 It is clear that an MNO's preference for suppliers is not dependent on whether the supplier has a large portfolio of existing sites. MNOs depend on such critical infrastructure and will clearly place weight on a supplier's ability to deliver and manage it. However, the CMA appears to view a supplier's track record and / or expertise as intrinsically linked to its existing scale in the UK. This is simply incorrect, and is clearly contradicted by *inter alia* the fact that WHP Telecoms won the Scottish 4G Infill opportunity, despite not having a large portfolio of existing sites in the UK.<sup>66</sup> As further examples of smaller players securing large opportunities, WIG has deployed towers at Scottish Water sites in rural Scotland in partnership with Telefónica/O2.<sup>67</sup> In the case of Cellnex itself, its track record in winning bids cannot purely be the result of the size

<sup>61</sup> Provisional Findings, paragraphs 7.34 and 7.36(b).

<sup>62</sup> Provisional Findings, paragraph 7.34.

<sup>63</sup> Provisional Findings, Table 1.

<sup>64</sup> For example, with respect to the Home Office ESN opportunity, the Home Office decided that it wanted to manage and run the 200 sites itself (i.e., self-supply) and use third parties to construct the sites, rather than to acquire site access services from WIPs.

<sup>65</sup> **Annex 1** to the Issues Statement Response – [confidential].

<sup>66</sup> See [http://www.whptelecoms.com/case\\_study/whp-telecoms-wins-the-prestigious-scottish-4g-infill-programme-s4gi/](http://www.whptelecoms.com/case_study/whp-telecoms-wins-the-prestigious-scottish-4g-infill-programme-s4gi/).

<sup>67</sup> See <https://www.wirelessinfrastructure.co.uk/highlands-mobile-not-spots-targeted-by-wig-o2-and-scottish-water/>



of its portfolio in the UK as part of it pre-dates *Cellnex/Arqiva*, at which time Cellnex only had a small presence in the UK.<sup>68</sup>

3.29 The [confidential] is another recent example which clearly evidences that scale and existing coverage is not a key criterion for MNOs when evaluating different suppliers of passive infrastructure. [confidential] and Cellnex's internal documents clearly evidence that [confidential].<sup>69</sup> Therefore, smaller WIPs (and even those not yet present in the UK) are clearly credible competitors and are well placed to satisfy the limited expected demand for new sites going forward.

3.30 The additional evidence relied upon by the CMA to support its view that the size of a supplier's portfolio of existing sites is a determinant of its competitiveness in the market (in particular that suppliers monitor the number of sites in other suppliers' portfolios of sites)<sup>70</sup> is purely anecdotal and unconvincing. The CMA specifically refers to a Cellnex internal document to support this statement.<sup>71</sup> However, that internal document actually shows that [confidential]. These other factors are typically more relevant than a WIP's number of existing sites and include: [confidential].<sup>72</sup> [confidential]<sup>73</sup> [confidential].

(i) Scale advantage from existing sites is unfounded

3.31 The CMA submits that the available evidence shows that larger suppliers are stronger competitors because they are more likely to have an existing site in the right location.<sup>74</sup> This conclusion is misguided.

3.32 Although WIPs with a large network of existing sites are statistically more likely to have an existing site in precisely the right location to meet an MNO's coverage requirements, in reality the increase in likelihood of this happening (even with a significantly larger portfolio of sites) is negligible given the size of the UK and the very narrow location requirements that MNOs generally have for sites. MNOs typically require a site within a tight search area (to meet their radio plan requirements), and it is very unlikely that Cellnex, or any other WIP, will have an existing site in the required location. Indeed, the radio plan will be specific to each MNO, which means that even when using the upper bounds of the conservative catchment areas in the Parties' Geographic Overlap Analysis (as defined in paragraph 3.55 below), an existing site that may be suitable for one MNO may not be suitable for another. Each MNO holds

<sup>68</sup> Prior to the acquisition of Arqiva, Cellnex signed a major portfolio deal with BT for marketing rights to their High Tower estate (worth £100 million) and was also successful in securing Brighton Mainline, a major infrastructure investment opportunity, see: <https://www.cellnextelecom.com/en/noticia-114/> and <https://www.cellnextelecom.com/en/cellnex-uk-awarded-25-year-network-rail-contract-to-provide-continuous-connectivity-along-the-brighton-mainline-route/>.

<sup>69</sup> Slide 27 of Appendix 2 to the Response to the AIS and WPs.

<sup>70</sup> Provisional Findings, paragraph 7.28.

<sup>71</sup> Provisional Findings, paragraph 7.28(a).

<sup>72</sup> See, for example, **Annex 10.5** to the Merger Notice [confidential].

<sup>73</sup> See, for example, **Annex 10.5** to the Merger Notice [confidential].

<sup>74</sup> Provisional Findings, paragraphs 67(d) and 7.47.

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differing spectrum and uses different active equipment; therefore, all radio plans are different and unique.

- 3.33 The limited likelihood of an existing site meeting an MNO's coverage requirements was evidenced by the slide presented at Cellnex's main party hearing (the "Cellnex MPH"), which showed that [confidential].<sup>75</sup> Accordingly, it is simply incorrect to conclude that larger suppliers are stronger competitors because they are more likely to have a site in the right location.
- 3.34 The CMA further asserts that WIPs can compete with existing sites even where they are not sufficiently close to be substitutable on an individual basis, as MNOs may threaten to switch a collection of sites in an area to a rival by adopting a new network configuration.<sup>76</sup> This is fundamentally incorrect and is based on an entirely unrealistic assessment of commercial reality that is not supported by the available evidence. For example, the Provisional Findings accept that "*location is a key requirement of customers*",<sup>77</sup> and note that one MNO customer said that "*whether a new supplier has a large number of existing sites is not likely to be significant when negotiating a framework agreement because of the small likelihood of moving a large number of sites at any one time*".<sup>78</sup> For an MNO, passive infrastructure is a consequence of a radio and network plan and not the driver of it.<sup>79</sup> It is wholly implausible to consider that an MNO would reconfigure its network to accommodate site provision when decision-making is taken by MNOs from the opposite perspective, particularly in light of the potential risks this would raise in terms of service disruption and customer experience.
- 3.35 [confidential].
- 3.35.1 [confidential].
- 3.35.2 [confidential].
- 3.36 In addition, in 3UK's experience, [confidential]. By way of example, after relocating sites in response to receiving NTQs in:
- 3.36.1 [confidential];
- 3.36.2 [confidential]; and
- 3.36.3 [confidential].
- 3.37 The level of service disruption and deteriorated customer experience, resulting in end customer churn, is directly correlated to the number of sites being switched and will be greater where an MNO is required to switch a larger number of sites. It is therefore clear that MNOs are highly unlikely to switch large numbers of sites unless forced to do so when adopting a new network configuration, which only happens in truly

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<sup>75</sup> This slide was provided as **Annex 1** to the Parties' Response to the AIS and WPs.

<sup>76</sup> Provisional Findings, paragraph 8.97.

<sup>77</sup> Provisional Findings, paragraph 8.217.

<sup>78</sup> Provisional Findings, paragraph 7.36(d).

<sup>79</sup> See slide 28 of 3UK's site visit presentation dated 8 September 2021.



- exceptional circumstances.<sup>80</sup> A reduction in passive infrastructure costs would not constitute an exceptional circumstance.
- 3.38 It is also clear that MNOs' requirements would be more efficiently met through self-supply and BTS, instead of reconfiguring their networks (which have been planned carefully and in advance to meet their existing 4G and new 5G rollout objectives).<sup>81</sup>
- 3.39 In a similar vein, the CMA asserts that "*the main focus of competition occurs when contracts come up for renewal, at which point a greater proportion of sites may be switched from one WIP to another. However, the existence of switching costs means that switching will generally only represent a proportion of the total sites governed by the contract, which can occur immediately or over time.*"<sup>82</sup> However, the number of sites that could be switched (i.e., churn) will only ever be a very small proportion of the total sites governed by the contract. Churning sites also requires significant investment to upgrade existing sites or build new sites and move equipment from an existing site to a new site. [confidential]. Switching cannot occur "*immediately*" as claimed by the CMA.
- 3.40 Throughout the Provisional Findings, the CMA has understated the competitive constraint exerted by BTS and has placed significantly more weight on the constraint apparently imposed by existing sites. The CMA acknowledges that BTS was a constraint during the MBNL negotiations, [confidential].<sup>83</sup> However, the Provisional Findings state that BTS was only part of the constraint alongside other WIPs' existing sites, and therefore it is difficult to disentangle the extent of constraint attributable to BTS. The Provisional Findings note [confidential].<sup>84</sup> According to the CMA, to the extent BTS exerted some competitive constraint, the MBNL contract renegotiation does not shed light on the relative competitive strength of BTS versus existing sites as there were no other rivals with a large portfolio of existing sites at the time.

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<sup>80</sup> For instance, the creation of CTIL would be the type of exceptional circumstance that would have justified investing in new network configuration, despite the risks associated with such seismic change.

<sup>81</sup> It is clear from the third-party evidence collected by the CMA that it is not feasible for an MNO to reconfigure its network to switch a large number of sites from an incumbent WIP: at paragraph 107 of Appendix F of the Provisional Findings, it states that an MNO told the CMA that "*moving many sites from an incumbent WIP whilst continuing to provide a service is very disruptive for its customers and costly during transition where a greater number of sites must be operated in total and paid for over a period of time, depending on the contractual terms*".

<sup>82</sup> Provisional Findings, paragraph 7.10.

<sup>83</sup> Provisional Findings, paragraph 8.185.

<sup>84</sup> Provisional Findings, paragraph 8.185(b).





- 3.41 However, the CMA fails to consider the following:
- 3.41.1 The Parties' previous submissions<sup>85</sup> and Arqiva's internal documents show there is no evidence that Arqiva was concerned that WIPs' existing sites combined with BTS were a competitive constraint. Arqiva was [confidential].<sup>86</sup> As such, it is factually incorrect and entirely misleading to suggest that BTS was only part of the constraint during the MBNL negotiation.
  - 3.41.2 With respect to the statement that BTS was [confidential], this was simply a matter of economics rather than the underlying ability for BTS to be a constraint. BTS was viewed as a threat [confidential]. To the extent Arqiva's price had been higher, BTS would have been a threat for a larger proportion of sites. Arqiva [confidential]. It is clearly illogical to conclude that BTS is not a constraint given that [confidential].
  - 3.41.3 Whilst the Provisional Findings state that BTS was only a threat [confidential], the CMA ignores the fact that existing Transaction Sites could only be a potential threat for a considerably smaller proportion of Cellnex's sites – less than [confidential]%. On this basis, the Parties fail to understand how the CMA can argue that BTS is merely a limited constraint because it is only a threat for [confidential]% of sites, whilst simultaneously asserting that existing Transaction Sites are a material competitive constraint to Cellnex despite being a threat for less than [confidential]% of Cellnex's sites. In this respect, it is clear that the aggregate threat from BTS during a contract negotiation is substantially higher than the aggregate threat from existing sites, and therefore given much greater weight.
  - 3.41.4 Moreover, in order to determine whether there is a realistic prospect of an SLC, the relevant question is not whether existing sites are preferred to BTS but the strength of any such preference. Specifically, in relation to the [confidential]% of Transaction Sites that the CMA claims could be used in place of an existing Cellnex site, the key consideration should be the strength of the preference for that existing site compared to the use of a BTS site. To the extent that the preference is weak, there can be no SLC given that merely having an existing site provides limited additional benefit. In this respect, the CMA's analysis provides no evidence of the magnitude of the preference for existing sites versus BTS and there is no indication throughout the Provisional Findings that the CMA has considered this vital question or followed up with third parties in this regard. On the other hand, Cellnex has provided evidence that from the relevant point of view of the total cost of ownership (the "**TCO Analysis**"), the price difference between: (i) using an existing site (and having to upgrade it to ensure it can take the necessary equipment), and (ii) using a BTS site, is relatively small

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<sup>85</sup> Page 57 of the Parties' detailed rebuttal of the CA WP (submitted as Appendix 1 to the Parties' Response to the AIS and WPs) states that "*it is clear from the [Arqiva] internal documents that there was never a concern that WIP existing sites were a threat*".

<sup>86</sup> See **Annex 15.1** to the Merger Notice, [confidential]; **Annex 2** to the Issues Letter Response, [confidential]; **Annex 00000131** to Cellnex's response to the CMA's section 109 notice dated 27 July 2021, [confidential], slide 7.



over 10 years. Furthermore, the CMA acknowledges that over 20 years it is cheaper to use a BTS site than to use an existing site.<sup>87</sup>

3.41.5 In this regard, the CMA's evidence supporting the view that the cost of building new sites is higher than upgrading existing sites is also defective. There is no suggestion throughout the Provisional Findings that the CMA has followed up with third parties, both customers and competitors, to properly test the TCO Analysis produced by Cellnex. Although the CMA appears to have asked third parties about the cost of building the sites versus upgrading, it does not appear to have asked third parties about the total cost of the different options over the lifetime of the contract.<sup>88</sup> The capital costs for building a new BTS site or self-supplied site will obviously be higher compared to existing sites, however given the rental charge is significantly lower, only a TCO calculation provides a meaningful comparison between the two options. There is no evidence that the CMA has collected evidence on this basis.

3.41.6 The CMA's claim that "[confidential]" only to the extent and because "*there were no other rivals with a large portfolio of sites*"<sup>89</sup> is manifestly incorrect. It is clear from Cellnex's internal documents that it did assess the threat of [confidential] existing sites<sup>90</sup> – [confidential]. In any event, even if the Transaction Sites in operation at the time of the [confidential] had been held by a rival at the time, they could not have imposed a constraint on Arqiva during the negotiations. [confidential] were already tenants on the [confidential] and as such they are incapable of being an alternative to the sites Cellnex supplies to [confidential]. As such, it is apparent that the Provisional Findings have mischaracterised the evidence from the MBNL negotiation in diminishing the significance of BTS as a competitive constraint.

3.42 The CMA also submits that the available evidence shows that larger suppliers are stronger competitors because they benefit from economies of scale.<sup>91</sup> The Provisional Findings appear to consider that the importance of scale is demonstrated by the fact that Cellnex [confidential]. These include [confidential].<sup>92</sup>

3.43 This inference in the Provisional Findings is incorrect.

3.43.1 First, some of the UK savings do not relate to the Proposed Transaction. For example, as previously submitted to the CMA,<sup>93</sup> the ground lease renegotiations are efficiencies expected to be realised by Cellnex due to the Code application in the UK and as such they are not specific to the Proposed Transaction.

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<sup>87</sup> Provisional Findings, paragraph 8.180(b).

<sup>88</sup> Provisional Findings, paragraph 8.180(a).

<sup>89</sup> Provisional Findings, paragraph 8.185(c).

<sup>90</sup> See page 59 of the Parties' detailed rebuttal of the CA WP (submitted as Appendix 1 to the Parties' Response to the AIS and WPs).

<sup>91</sup> Provisional Findings, paragraphs 67(d) and 7.47.

<sup>92</sup> Provisional Findings, paragraph 7.29.

<sup>93</sup> Response to question 22 of the S109 notice dated 23 February 2021.



- 3.43.2 Second, the majority of these savings are fixed cost savings with only a small element (maintenance costs) related to a reduction of variable costs. Indeed, it is clear that the CMA does not consider these fixed cost savings to be variable savings, and it therefore excludes them as relevant customer benefits.<sup>94</sup> If the CMA does not consider that these savings affect retail prices downstream (and therefore does not consider them to be rivalry-enhancing), logically it cannot assert that they are relevant to the cost base of Cellnex's rivals. Cost reductions that are simply the result of having fixed costs spread over a larger volume have no impact on prices, and therefore do not provide any competitive advantage with respect to customers.
- 3.43.3 Finally, the maintenance cost saving in the model are very small (less than [confidential]%) compared to total costs, and therefore cannot be considered significant. However, to the extent that the CMA considers that these savings are relevant variable cost savings giving rise to scale benefits and the ability to charge lower prices, then logically they should also be considered as part of the efficiencies of the Proposed Transaction and included as a relevant customer benefit.
- 3.44 Finally, the MNOs' submissions have not highlighted in any respect the importance of size or scale. Instead, in accordance with the Parties' submissions, the MNOs have stated that the most important factor is whether the supplier (whether large or small) can offer a site in the right location.<sup>95</sup>
- (ii) No economies of scale in BTS
- 3.45 In its Provisional Findings, the CMA reaches the conclusion that "*when offering BTS, [larger suppliers] will be able to take advantage of economies of scale in building and operating sites, have more credibility in the eyes of customers and be able to offer customers the ease of purchasing BTS sites alongside existing ones in a smaller number of overarching framework agreements*".<sup>96</sup> However, elsewhere in the Provisional Findings, the CMA describes the evidence in support of this conclusion as "*mixed*".<sup>97</sup> An analysis of the evidence presented in the Provisional Findings shows that the view that there are economies of scale in BTS is flawed and unsupported by the available evidence.
- 3.46 The argument that BTS can be cross-subsidised by existing sites is entirely unfounded.<sup>98</sup> Based on Cellnex's BTS internal documents, [confidential].<sup>99</sup>

<sup>94</sup> Provisional Findings, paragraph 9.33.

<sup>95</sup> Provisional Findings, Appendix F, paragraphs 35 to 37.

<sup>96</sup> Provisional Findings, paragraph 8.100.

<sup>97</sup> Provisional Findings, paragraph 7.36.

<sup>98</sup> Provisional Findings, paragraph 7.36(a).

<sup>99</sup> See Cellnex's response to question 1, including **Annex 1**, to RFI 3 dated 21 September 2021. **Annex 1** to RFI 3 clearly shows that Cellnex set its pricing proposal with reference to [confidential].

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- 3.47 The statement made by competing WIPs that the number of existing macro sites, alongside BTS sites, gives rise to significant economies of scale via the ability to negotiate lower prices with suppliers of site construction and volume discounts is incorrect for the following reasons:<sup>100</sup>
- 3.47.1 Cellnex [*confidential*].
- 3.47.2 In the UK, small works contractors typically construct BTS sites for WIPs and MNOs. All WIPs, irrespective of their size, have access to these contractors.
- 3.47.3 Existing sites do not improve a WIP's ability to negotiate more favourable pricing or contractual terms with these small works contractors, as the number of existing sites in its portfolio is irrelevant to the number of BTS sites a WIP intends to construct.
- 3.47.4 Small WIPs can and do win BTS contracts (as evidenced by the CMA's own share of supply analysis).<sup>101</sup> The Parties are also aware that WHP Telecoms won the Scottish 4G Infill opportunity,<sup>102</sup> and Lendlease won an opportunity to supply 292 sites for the purposes of delivering the ESN once it moves to EE's network, despite not having large portfolios of sites.<sup>103</sup> In contrast, Cellnex (and previously Arqiva) [*confidential*]- see **Table 1** (Shares of supply by number of macro sites in the UK and BTS wins) below.<sup>104</sup>
- 3.47.5 Any theoretical discount provided in BTS would logically depend upon the number of BTS sites being constructed and not on the number of existing sites. As set out in paragraph 3.53 below, Cellnex has supplied [*confidential*] BTS sites [*confidential*] and therefore clearly would not have any economies of scale advantage.
- 3.48 The CMA's conjecture that WIPs with large numbers of existing sites will also have better options over new site locations when offering BTS, and that these will provide a significant advantage relative to other WIPs, is unfounded.

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<sup>100</sup> Provisional Findings, paragraph 7.35(c).

<sup>101</sup> Provisional Findings, Appendix E, Tables 3 and 4.

<sup>102</sup> See [http://www.whptelecoms.com/case\\_study/whp-telecoms-wins-the-prestigious-scottish-4g-infill-programme-s4gi/](http://www.whptelecoms.com/case_study/whp-telecoms-wins-the-prestigious-scottish-4g-infill-programme-s4gi/).

<sup>103</sup> See <https://www.nao.org.uk/wp-content/uploads/2019/05/Progress-delivering-the-Emergency-Services-Network.pdf> at page 42.

<sup>104</sup> The evidence provided to the CMA shows that several WIPs have ambitious growth plans predicated on BTS. For example, paragraph 124 of Appendix F states that [*confidential*]; paragraph 126 of Appendix F states that a WIP has a five year plan to [*confidential*]; and paragraph 129 of Appendix F states that a WIP intends to compete aggressively to build as many new sites as it can based on tenant demand in the next 10 years, and that said WIP has taken steps to facilitate such expansion (although the nature of such steps is redacted). This conflicts with the suggestion that the merger will make it difficult for those WIPs to compete, including through BTS.



- 3.49 First, insofar as undeveloped sites held by a WIP are concerned, these have limited commercial relevance considering the impact of the Code.<sup>105</sup> As previously submitted, [confidential].<sup>106</sup> Importantly, even if undeveloped sites were valuable, there is no link between the number of undeveloped sites and the number of existing sites in a WIP's portfolio. It is worth noting that [confidential].
- 3.50 Second, there is no contractual evidence to support the CMA's conjecture. The statement that Arqiva [confidential] is entirely incorrect and appears to be based on a misunderstanding [confidential]. As noted above (see paragraph 3.7.1), in Cellnex's experience, options for new sites are not included within the scope of framework agreements and any new deals for BTS will be contracted separately (or as a contract variation). In limited instances, framework agreements may provide for additional PoPs on existing sites of the supplier (but not newly built sites). [confidential]. However, this was entirely unrelated to new BTS sites and does not provide any evidence with respect to economies of scale in BTS sites. Moreover, as Cellnex has indicated previously,<sup>107</sup> [confidential], reflecting the fact that the probability of an existing site being suitable for new demand is extremely small. [confidential]<sup>108</sup> [confidential]. In any event, other (smaller) WIPs also have framework contracts with their customers. [confidential].
- 3.51 The CMA has also failed to consider a range of other important evidence which demonstrates that there are no economies of scale in offering BTS solutions to customers. In particular, Phoenix Tower (backed by the US private equity firm Blackstone Group) reached an agreement to construct and operate c. 4,000 sites across France for Bouygues Telecom, despite having no material presence in the French market beforehand.<sup>109</sup> This suggests the primary factor behind a WIP's ability to compete for a large number of BTS sites is financial backing and the Parties note that several smaller WIPs in the UK are well-funded, being backed by large and sophisticated financial investors.<sup>110</sup> As a result, if demand for such a large number of new sites were to arise in the UK, there is no reason why a small WIP or a new entrant could not compete for the opportunity alongside larger WIPs such as CTIL and Cellnex.
- 3.52 Finally, evidence from the shares of supply and win rates do not support the CMA's view that there are economies of scale in BTS. Specifically, if the CMA's theory were true, one would expect a large-scale provider such as Cellnex to enjoy a material advantage over smaller rivals and therefore be more successful than its rivals when competing for new sites. However, the CMA's analysis of shares of supply information and bidding data from Cellnex and third parties shows that smaller WIPs have a

<sup>105</sup> See paragraphs 2.54.7 to 2.54.9 of the Merger Notice dated 13 May 2021.

<sup>106</sup> As previously submitted, [confidential] – see paragraph 2.54.7(b) of the Merger Notice dated 13 May 2021.

<sup>107</sup> See Cellnex's response question 1 of RFI 4, dated 22 September 2021.

<sup>108</sup> [confidential].

<sup>109</sup> See: <https://phoenixintl.com/blackstone-backed-phoenix-tower-international-closes-agreement-with-bouygues-telecom-to-own-and-operate-up-to-4000-sites-across-france/>.

<sup>110</sup> Examples include Atlas Towers (Kingsley Capital Partners), WIG (Brookfield Infrastructure), Freshwave Group (Digital Colony), WHP Telecoms (Equistone), and Shared Access (Goldman Sachs). Shared Access also recently secured £300 million of long term growth financing, stating that "[a]ctivity will be focused on Shared Access's tower business and its in-building connectivity offering": see <https://www.sharedaccess.com/shared-access-secures-300-million-in-growth-financing/>.



significantly higher market share by flow than market share by stock, which suggests that they are gaining market share over time.<sup>111</sup> For example, despite having only [confidential] sites (i.e., an [5-10]% share of supply by stock),<sup>112</sup> the CMA's analysis suggests that WIG has a market share of [20-30]% (in the supply by flow for BTS, including renewals), and [30-40]% (in the supply by flow for BTS, excluding renewals).<sup>113</sup> This is set out below, using the CMA's data to provide information on each WIP's size (measured in their number of existing sites)<sup>114</sup> and their success in competing for new sites (measured by the number of wins for BTS).<sup>115</sup>

**Table 1: Shares of supply by number of macro sites in the UK (2020) and BTS wins (2017-2020)**

	Number of Sites	Number of Sites (%)	BTS wins	BTS wins (*)
Cellnex	[confidential]	[80-90]%	[confidential]	[40-50]%
WIG <sup>116</sup>	[confidential]	[5-10]%	[confidential]	[40-50]%
Shared Access	[confidential]	[0-5]%	[confidential]	[0-5]%
Freshwave	[confidential]	[0-5]%	[confidential]	[0-5]%
Britannia Towers	[confidential]	[0-5]%	[confidential]	[5-10]%
WHP Telecoms	[confidential]	[0-5]%	[confidential]	[0-5]%
AP Wireless	[confidential]	[0-5]%	[confidential]	[0-5]%
<b>Total</b>	<b>[confidential]</b>	<b>100%</b>	<b>[confidential]</b>	<b>100%</b>

Source: Provisional Findings, Appendix E, Tables 1 and 3.

3.53 Importantly, even the figures above substantially overestimate Cellnex's strength in BTS, [confidential]. Despite Cellnex being [confidential] times larger than WIG in terms of number of existing sites, its win rate for BTS contracts is similar to WIG, with Cellnex winning [confidential] tenancies and WIG winning [confidential]. These figures suggest that WIG has a competitive advantage over Cellnex and wins a [confidential] higher rate of BTS contracts compared to its scale relative to Cellnex. In light of the evidence presented above, it is self-evident that scale does not materially improve a WIP's ability to offer and deploy BTS solutions.

<sup>111</sup> Provisional Findings, Table 4.

<sup>112</sup> Provisional Findings, Appendix E, Table 5.

<sup>113</sup> Provisional Findings, Appendix E, Table 1.

<sup>114</sup> Provisional Findings, Appendix E, Table 1

<sup>115</sup> Provisional Findings, Appendix E, Table 3.

<sup>116</sup> [confidential].



**The extent of competition between Cellnex and 3UK assets is greatly exaggerated**

(i) Limited degree of overlap does not support the CMA's conclusion

- 3.54 The Provisional Findings assess the Parties' analysis on the geographic overlap between Cellnex's existing sites and 3UK's assets and broadly agree with the position that "*the size of the overlap between the Parties' sites is likely to be numerically limited (that is, accounting for a relatively small proportion of each Party's sites)*".<sup>117</sup> However, based on this analysis, the CMA makes a number of factually inaccurate observations.
- 3.55 The CMA states that "*the analysis is likely to underestimate the degree of geographic overlap between Cellnex and the CK Hutchison Assets, as it excludes about [confidential] of the Streetworks Sites that have not yet been built. These account for about [confidential]% [20-30%] of the Transaction Sites and are therefore a sizeable proportion of the CK Hutchison Assets.*"<sup>118</sup> CRA has re-run the analysis using the location of the [confidential] of the 2,600 Streetworks Sites that have been built or acquired by 3UK as of 18 December 2021 (the "**Geographic Overlap Analysis**"), provided to the CMA as **Annex 2** to the Remedies Notice Response, and has also provided estimates of the likely overlap once all 2,600 Streetworks Sites are built. Based on this updated version of the Geographic Overlap Analysis, it is evident that the overlaps do not account for a sizeable proportion of Cellnex's portfolio.<sup>119</sup>
- 3.56 In actual fact, after taking account of the Streetworks Sites, the Parties consider that the geographic overlap is likely to *substantially overstate* the number of local areas where the Parties could compete in the counterfactual to provide access to additional tenants. This is for two reasons:
- 3.56.1 First, the catchments used are overly conservative and will pick up many Transaction Sites which simply do not overlap with Cellnex's sites. [confidential]. As such, it is clear that the overlap analysis is clearly highly conservative.
- 3.56.2 Second, because the overlap analysis assumes that all existing sites could accommodate a new tenant and their equipment. In reality, in many cases the cost of strengthening the site, or the need to rebuild the site (for example on a rooftop), may significantly outweigh the cost of building a new site and would therefore not be economical. Furthermore, in some cases it may be the case that the necessary planning permission is refused. This is especially true in respect of the Streetworks Sites which are designed, and will have planning permission, to host only one tenant (3UK). Moreover, as 3UK outlined at the CK Hutchison

<sup>117</sup> Provisional Findings, paragraph 8.83.

<sup>118</sup> Provisional Findings, paragraph 8.82(a).

<sup>119</sup> The updated Geographic Overlap Analysis shows that the weighted proportion of overlaps between Cellnex and CK Hutchison Assets (comprising the [confidential] UKB Sites, the [confidential] known locations of Streetworks Sites and 50% of the economic benefit associated with the MBNL Sites) is [confidential]%. Assuming that the Unidentified Streetworks Sites (i.e., the Streetworks Sites for which a location is not yet determined, as defined in the Remedies Notice Response) will overlap with Cellnex in the same proportions as the [confidential] Streetworks Sites constructed or acquired as of 18 December 2021, the weighted proportion of overlaps is still only [confidential]%.



main party hearing, [confidential]. As such only a subset of the overlapping existing sites will be substitutes with each other in reality, and the results of the Geographic Overlap Analysis should therefore be considered a highly conservative upper bound.

- 3.57 Another concern set out in the Provisional Findings is that "*since the Transfer Sites will be identified only when the MBNL JV is dissolved, the precise degree of overlap between Cellnex and the CK Hutchison Assets will depend on this allocation process.*"<sup>120</sup> Whilst the Parties acknowledge that the exact number of overlaps will depend upon the allocation process, there is no reason to suppose that the allocation process will favour a significantly greater proportion of overlaps than the Geographic Overlap Analysis suggests. Indeed, even if Cellnex were able to determine the location of each Transfer Site (which it would not), it is unlikely that Cellnex would be motivated to choose a site where it already has a site, given that doing so would simply duplicate its existing network.
- 3.58 Notwithstanding this, and in order to address any doubts or concerns, the updated Geographic Overlap Analysis (submitted as **Annex 2** to the Parties' Remedies Notice Response) looks at the overlap between Cellnex and [confidential], thus identifying any overlap with the [confidential].
- 3.59 The CMA also argues that "*the degree of overlap will also vary by customer, since only a subset of each WIP's sites are used by each customer.*"<sup>121</sup> This appears to be a theoretical point as the CMA has not provided any evidence to show that there will be customers who will have a significantly larger number of overlaps than others. Cellnex cannot think of any reasons why a customer will have any tendency towards having sites where there is an increased likelihood of facing an overlap with the Transaction Sites than on average.
- 3.60 The Provisional Findings also indicate that, because suppliers set prices and other terms at a national level without flexing their offerings on a local or regional basis, competition should be analysed on a national basis. Therefore, the loss of competition for a limited number of sites can affect prices and other commercial terms for the entire national portfolio.<sup>122</sup> While Cellnex does not dispute this, this does not mean that there is no relationship between the number of overlaps and the overall price or commercial terms. In reality, the opposite applies. The number of sites subject to the threat of switching is precisely the variable that determines a supplier's willingness to provide discounts or more favourable commercial terms across the contract. If there were no sites subject to such threat, then there would be no threat to the portfolio and consequently no incentive to offer a discount on the portfolio. In this respect, the magnitude of any discount or improved negotiation for customers with the additional option of 3UK in the counterfactual, is directly proportional to the magnitude of the overlap that Cellnex has with 3UK: the smaller the overlap, the smaller the scope to use that overlap to leverage better terms.

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<sup>120</sup> Provisional Findings, paragraph 8.82(b).

<sup>121</sup> Provisional Findings, paragraph 8.82(b).

<sup>122</sup> Provisional Findings, paragraph 8.86.





- 3.61 The CMA also appears to argue that the concern is not related to the absolute number of overlaps between Cellnex and 3UK, but rather the relative number of overlaps between the Parties compared with the number of overlaps third parties have with Cellnex. This is incorrect. If there was only one overlap between the Parties it would not matter if there were zero overlaps between third parties and Cellnex: just this one overlap would not allow customers to negotiate significant reductions in their portfolio prices, and therefore would not be considered an SLC. As such, it is the absolute number of overlaps that drive whether there is an SLC rather than the relative. More fundamentally, the Provisional Findings confuse the fact that third party overlaps with Cellnex will be complements rather than substitutes for the customer. Even if Cellnex and 3UK had 100 overlaps, and WIG had only 20 with Cellnex, the likelihood of those 20 overlaps with WIG being in the same location as the 100 overlaps with 3UK is incredibly small. Given the different locations, the customer would always consider the additional 20 overlaps as complementary to their negotiation position with Cellnex and not as a substitute.
- 3.62 The CMA further asserts that WIPs can compete with existing sites even where they are not sufficiently close to be substitutable on an individual basis, as MNOs may threaten to switch a collection of sites in an area to a rival by adopting a new network configuration.<sup>123</sup> As mentioned in paragraph 3.33 above, this is fundamentally incorrect, is not reflective of commercial reality and is not supported by the available evidence. In reality, a customer would not switch to a site that would require it to adopt a new network configuration absent exceptional circumstances (as explained above).
- (ii) The extent to which Cellnex could add capacity to the Transaction Sites is limited
- 3.63 The Provisional Findings consider that "*a significant proportion of the Transaction Sites could accommodate an additional tenant and be able to compete to attract business*".<sup>124</sup> However, as previously submitted by the Parties,<sup>125</sup> the ability of Cellnex to expand capacity on the Transaction Sites will be limited.

#### ***MBNL Sites***

- 3.64 In respect of the MBNL Sites, whilst the CMA accepts [*confidential*] it concludes that "*this does not preclude the MBNL Sites from being capable of providing some limited additional competition before the dissolution of the MBNL JV if BT/EE were to agree*."<sup>126</sup> This conclusion is highly speculative and is not supported by evidence.
- 3.65 [*confidential*].
- 3.66 Cellnex's internal documents [*confidential*]. In particular, both [*confidential*].

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<sup>123</sup> Provisional Findings, paragraph 8.97.

<sup>124</sup> Provisional Findings, paragraph 8.125.

<sup>125</sup> Issues Statement Response, paragraphs 1.10.1, 2.15, 3.4 and 4.4.

<sup>126</sup> Provisional Findings, paragraph 8.117.

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- 3.67 In any event, as 3UK outlined at the site visit, [confidential]. Identifying the [confidential] number of sites that may have some scope for further co-location would require [confidential] analysis which is not possible in the time available. Given that 3UK and BT/EE built these sites for their own network needs [confidential]. Neither 3UK nor BT/EE had, or has, [confidential] which either 3UK or BT/EE (or MBNL) engages in. This is evidenced by the [confidential].
- 3.68 Furthermore, the unevidenced statement in paragraph 8.115 of the Provisional Findings that "[confidential]" is inconsistent with the conclusion in paragraph 8.148 of the Provisional Findings that, based on evidence from BT/EE, BT/EE will "[confidential]".
- 3.69 Based on the above, it is clear that the MBNL Sites will not confer any significant competitive advantage on Cellnex during the lifetime of the JV. Even once the JV dissolves in 2031, the CMA's analysis of future competition is speculative. There is no basis for the CMA to assume that in ten years, radio networks will rely on current network configurations which were developed for 4G radio spectrum.

***Streetworks Sites***

- 3.70 With respect to the Unilateral Sites, the CMA finds that "*whilst there may be some constraints on the degree of co-location on the Streetworks sites which may be more significant than for the MBNL Sites, some material degree of sharing would nonetheless be feasible.*"<sup>127</sup> The Parties consider that the ability to add capacity to these sites without significant further investment, planning and disruption is very limited.
- 3.71 During the sales process, Cellnex had plans to turn some Streetworks Sites into multi-tenant sites, however, as noted previously, [confidential]. The Streetworks Sites are being built by 3UK as single-tenant streetworks monopolies, as such upgrading sites that have already been deployed will require significant capex (and time) and will be subject to constraints including planning permission. In addition, upgrading an existing streetworks monopoly to be shareable would involve [confidential], and could therefore be significantly disruptive to 3UK's network and therefore the quality of service it provides to its retail customers.
- 3.72 The CMA has clearly given more weight to the evidence of third parties in relation to monopolies in the Provisional Findings. This is a patently flawed approach as third parties cannot comment with any knowledge, far less authority, on the specific Streetworks Sites being built by 3UK, for 3UK's own network needs. While monopolies (and even streetworks monopolies) generally can be built to host multiple tenants, this is not the case for the 3UK Streetworks. From a technical perspective, accommodating a second tenant would require:
- 3.72.1 *continued compliance with electromagnetic radiation limits*: given that the Streetworks Sites are located in dense urban areas, there are strict regulations on the electromagnetic radiation limits and proximity to residential areas

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<sup>127</sup> Provisional Findings, paragraph 8.124.



(compliance with ICNIRP guidelines ("**ICNIRP Compliance**")).  
[*confidential*];

3.72.2 *new poles*: [*confidential*]. In any event, the existing pole is simply not sufficiently strong to accommodate a second tenant's equipment. Replacing the existing pole to one that can accommodate a second tenant (in addition to 3UK) would require further planning permission. Obtaining planning permission is a difficult and time-consuming process [*confidential*]. It could also be significantly disruptive to 3UK's network and therefore the quality of service it provides to its retail customers;<sup>128</sup>

3.72.3 *new cabinets*: further cabinet space for both power and radio equipment would be required to host additional tenants. Adding further cabinets onto pavements is seen as an obstacle by local authorities and makes planning permission even more difficult to obtain; and

3.72.4 *additional power supplies*: while there is typically some excess power capacity, it is likely that further upgrades to the power supply would be required to host a second tenant with comparable active equipment to 3UK.

3.73 As an MNO, 3UK does not [*confidential*], and instead uses them for self-supply.<sup>129</sup> [*confidential*]. The [*confidential*] was a key driver for 3UK's decision to self-supply these monopolies, and any theoretical attempt to increase the scope for third party co-location would significantly [*confidential*] the rollout and prevent 3UK from achieving its [*confidential*].

3.74 Following the Proposed Transaction, [*confidential*].

#### ***UKB Sites***

3.75 The UKB Sites are predominantly rooftop sites, many of which are unsuitable for further commercialisation. This is because:

3.75.1 adding further tenants would typically require building a new structure on a different part of the rooftop and thus require further planning permissions and entail significant additional costs;

3.75.2 it is therefore often more attractive for a customer to negotiate with the building owner directly rather than through a third party; and

3.75.3 approximately two thirds of rooftop sites typically already have multiple tenants limiting the available space for further structures.<sup>130</sup>

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<sup>128</sup> [*confidential*].

<sup>129</sup> [*confidential*] (see CK Hutchison's response to question 1 of S109 #1 dated 4 August 2021 and the Internal Documents provided).

<sup>130</sup> [*confidential*].

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3.76 In any event, there are only a very small number of UKB Sites (accounting for only [confidential]% of the Transaction Sites) and as such the number of UKB Sites which might allow for co-location is *de minimis* in number.

*Co-location generally*

3.77 As demonstrated above in respect of the MBNL Sites, the Streetworks Sites and the UKB Sites, the CMA's statements regarding Cellnex's ability to accommodate an additional tenant on the Transaction Sites following the Proposed Transaction are misplaced. Indeed, throughout the Provisional Findings, the CMA makes a number of assumptions regarding this which are simply not correct.

3.78 The CMA incorrectly states that "*once built, it is typical for no further planning permission to be required to add another MNO's active assets to a tower which already hosts an occupant and no extension to the tower is required. If an extension or upgrade of the tower is needed to host another MNO's active equipment, planning permission may be needed.*"<sup>131</sup> The CMA also incorrectly relies on the Code by stating that "*MNOs have a positive obligation to support and enable sharing of their infrastructure, so one MNO can request access to a tower owned by another.*"<sup>132</sup> The inaccuracy of these statements is addressed in detail below, but in summary:

3.78.1 planning laws and the Code are two separate areas of law that govern two separate relationships;

3.78.2 given the necessary scale of any upgrade required to co-locate another MNO's active equipment, permitted development rights might not be applicable and therefore additional planning permission is likely to be required and exercising rights under the Code continue to require the agreement of the landlord;

3.78.3 MNOs are not required to support and enable sharing of their infrastructure under the Code; and

3.78.4 As a result, neither planning laws nor the Code confer any advantage on co-locating on existing sites as compared to BTS. Therefore, customers of passive infrastructure assets do not generally prefer co-location on an existing site over developing a new site.

3.79 First, planning laws and the Code are two separate areas of law and govern two separate relationships: planning permission concerns the relationship between the party seeking to do the build (upgrade or new-build) and the planning authority – it does not involve the landowner; the Code concerns the private relationship between the Code operator and the landowner – it does not generally involve the planning authority, although Code operators may have obligations to inform the planning authority in certain situations and in such circumstances the planning authority may have the opportunity to object to certain Code applications.

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<sup>131</sup> Provisional Findings, paragraph 3.61.

<sup>132</sup> Provisional Findings, paragraph 3.59.

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- 3.80 Second, regarding the impact of planning laws on co-location, the CMA alleges that once a site is built, it is typical for no further planning permission to be required to add another MNO's active assets to a tower which already hosts an occupant and no extension to the tower is required.<sup>133</sup> This completely ignores 3UK's submissions on this topic. [confidential] of the Streetworks Sites and the [confidential] as the infrastructure would need to be upgraded to do so. This is due to a number of reasons:
- 3.80.1 the absence of sufficient space on the existing infrastructure for the new MNO's active equipment;
  - 3.80.2 the need to strengthen the infrastructure to be able to hold the extra equipment;
  - 3.80.3 compliance with International Commission on Non-Ionizing Radiation Protection ("ICNIRP") guidelines;
  - 3.80.4 the coverage area the new MNO is looking to achieve by co-locating on the tower; and
  - 3.80.5 the location of the tower (including whether it is located in a protected area such as a conservation area or an area of outstanding natural beauty).
- 3.81 In [confidential] instances in which 3UK has examined co-locating on an existing site on which another MNO's active equipment was already present, the work involved would have required new planning permission. Ignoring this evidence would clearly be a material oversight.
- 3.82 It is also important to note that WIPs in no way enjoy preferential status in respect of securing planning permission. WIPs need to seek planning permission on exactly the same basis as MNOs to effect upgrades. For example:
- 3.82.1 In May 2018, a minor addition to an existing Arqiva site for new Thames Water transmitters in Westminster required a full planning application due to the location being within a conservation area.
  - 3.82.2 The existing Arqiva site noted in (b) above, which already had a stub tower installed, was being upgraded. The upgrade required a further full planning application in April 2019 (despite the minor nature of the proposal).
  - 3.82.3 [confidential].
- 3.83 Third, regarding the impact of the Code on co-location, the CMA has drawn incorrect and incomplete conclusions where it states that "*MNOs have a positive obligation to support and enable sharing of their infrastructure, so one MNO can request access to a tower owned by another*".
- 3.84 The Code does provide for the right of a Code operator to share their site with another Code operator (subject to satisfying statutory criteria) should they wish to. There is no

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<sup>133</sup> Provisional Findings, paragraph 3.61.



*obligation* under the Code requiring Code operators (i.e., in this instance MNOs) to support / enable sharing of their infrastructure and no right of access to a Code operator's site.<sup>134</sup> For example, [*confidential*]. Moreover, these rights can only be exercised where the site is covered by a Code agreement entered into after December 2017.

- 3.85 The CMA also claims that the Code allows persons to whom it applies to "*construct communications infrastructure which is classified as 'permitted developments' under Town and Country Planning legislation (such as certain types of masts, poles and cabinets) without the need to apply for planning permission*".<sup>135</sup> This incorrectly conflates the Code (i.e., having Code rights as a Code Operator) with the need to secure planning permission. Simply being a Code Operator does not confer the right to build all infrastructure falling within the scope of permitted development, without the need for planning permission – it is the planning laws themselves and the dimension of the proposed build that determines the type of planning permission that will be required.
- 3.86 The CMA also appears to have disregarded 3UK's submissions regarding the site acquisition process, specifically that it applies to any party (WIP or MNO) seeking to upgrade their site to allow for co-location (as well as, for completeness, building new sites) and that a critical part of it involves ICNIRP Compliance. ICNIRP Compliance is an MNO licence obligation that MNOs must comply with to ensure a minimum exclusion zone around the site. As previously explained, 3UK's sites are only built to serve the needs of 3UK. That includes ensuring height and power are at the appropriate level to meet the desired output of the respective radio plan whilst also ensuring ICNIRP Compliance. Consequently, from an ICNIRP Compliance perspective, installing another MNO's active equipment on an existing site would require upgrade work.
- 3.87 Finally, the CMA claims that customers of passive infrastructure assets generally try to secure co-location on an existing site before developing a new site.<sup>136</sup> This again disregards 3UK's submissions on co-location. As explained to the CMA, [*confidential*]. Even if it is, 3UK does not have a preference for securing co-location on that site before pursuing the option of BTS. As explained, [*confidential*] will be critical factors that must be considered. This is evidenced by:
- 3.87.1 The build programme that 3UK, O2 and Vodafone are pursuing to meet their respective PSN targets, which includes substantial new self-build;
- 3.87.2 3UK's decision to self-build its monopoles; and

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<sup>134</sup> Even the general requirement in Condition 3(4) of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 provides that operators are only required to share infrastructure "*where practicable*", and this is always subject to agreement between providers.

<sup>135</sup> Provisional Findings, paragraph 3.69.

<sup>136</sup> Provisional Findings, paragraph 3.60.



3.87.3 The NTQ data in respect of the shared network which confirms that the MBNL JV shareholders agreed to move to new self-built sites for over [confidential]% of replacement sites.

3.88 In light of the above, the conclusions reached by the CMA regarding the ability of WIPs and/or MNOs to increase co-location are unfounded and cannot be sustained. Therefore, given the limited ability to commercialise the Transaction Sites through additional co-location, the extent of competitive interaction between the Transaction Sites and existing Cellnex sites has been greatly exaggerated in the Provisional Findings.

**CMA's analysis of shares of supply overstate Cellnex's competitive strength**

3.89 The Provisional Findings argue that "*the size of a supplier's portfolios of sites is an important determinant of its competitive strength.*"<sup>137</sup> To assess the competitive strength of Cellnex (and the owner of the 3UK assets in the counterfactual), the CMA presents evidence on historical and forward-looking shares of supply by stock and by flow.<sup>138</sup> The Provisional Findings conclude that "*Cellnex (previously, Arqiva) historically had a very high share of supply and faced limited competition from much smaller rivals.*"<sup>139</sup>

3.90 For the counterfactual, the CMA argues that "*in the counterfactual the owner of the CK Hutchison Assets would be the third largest supplier of access to developed macro sites with a share of [10-20]% and would be many times larger than the next-largest firm.*"<sup>140</sup> The Provisional Findings conclude that "*compared to the counterfactual, the Merger would significantly reinforce the CTIL-Cellnex duopoly, leaving two large (and similarly sized suppliers) accounting for almost all of the market with some very small rival WIPs.*"<sup>141</sup>

<sup>137</sup> Provisional Findings, paragraph 8.12.

<sup>138</sup> Throughout the Provisional Findings, the CMA has also failed to consider how competition will operate over time as MNO networks and demand evolves with new technology. Within the next ten years, there will be: (i) a greater use of higher frequencies spectrum, as technology developments open up opportunities for more innovative users, (ii) potentially smaller electronics for antenna, as reliable solutions become necessary for system and network performance, and (iii) a substantial increase in IoT services (which is expected to grow from \$139.24 billion in 2020 to \$381.16 billion in 2025 at a CAGR of 24%: see <https://technologymagazine.com/data-and-data-analytics/iot-market-expected-grow-due-increase-iot-use-cases>). Together, these changes will likely result in increasing densification on new smaller structures, which the proposed planning changes will make easier and therefore result in new entrants. See Ofcom, "Statement: Supporting the UK's wireless future – Our spectrum management strategy for the 2020s" dated 19 July 2021, page 14 – changing technology: [https://www.ofcom.org.uk/data/assets/pdf\\_file/0017/222173/spectrum-strategy-statement.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0017/222173/spectrum-strategy-statement.pdf).

<sup>139</sup> Provisional Findings, paragraph 8.212.

<sup>140</sup> Provisional Findings, paragraph 8.75.

<sup>141</sup> Provisional Findings, paragraph 8.76.



- 3.91 The Parties consider that both the historical and forward-looking shares of supply presented in the Provisional Findings significantly overstate the competitive strength of Cellnex for the following reasons:
- 3.91.1 The shares of supply do not capture the key constraint from self-supply. Their inclusion would result in the shares being significantly smaller.
  - 3.91.2 The shares of supply exclude BTS through other WIPs.
  - 3.91.3 The shares of supply by stock focuses on renewals rather than new contracts. In order to consider if there is an SLC on the balance of probabilities, the CMA should have looked at contracts subject to competition and not contract renewals which were not tendered or subject to competition.
- (i) Shares of supply ignore the constraint from self-supply
- 3.92 On the constraint from BTS through self-supply, the CMA accepts that "*customers' self-build may exercise some competitive constraint on the Merged Entity's BTS for new build opportunities.*"<sup>142</sup> However, the Provisional Findings argue that this constraint is weak on the basis "*it is likely to be a constraint of last resort in the absence of better options.*"<sup>143</sup> This conclusion is not consistent with the evidence submitted by the Parties. For example, most recently, [*confidential*].<sup>144</sup>
- 3.93 Evidence from the bidding data also does not support the conclusion in the Provisional Findings that self-supply is a weak constraint. The bidding data from Cellnex shows that there were a number of opportunities for which Cellnex submitted a bid or registered interest, yet the customer chose to self-supply – suggesting that options other than self-supply were available to the customer and yet the customer chose to self-build – see paragraph 3.18 above.
- 3.94 To incorporate the constraint from self-supply, **Table 2** below makes two adjustments to the shares of supply provided in the Provisional Findings. These adjustments are made to both the pre-merger and forward-looking shares of supply.
- 3.94.1 First, the constraint from CTIL (which was commercialised at the beginning of 2021) is included in both the pre-merger market shares and the forward-looking shares.
  - 3.94.2 Second, the constraint from the self-supply option is estimated using the size (in terms of number of sites) of BT/EE.
  - 3.94.3 Third, other constraints from independent providers (such as Police of Scotland and Airwave) that operate their own sites and provide, or are able to provide, access to third parties.

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<sup>142</sup> Provisional Findings, paragraph 8.202.

<sup>143</sup> Provisional Findings, paragraph 8.205.

<sup>144</sup> See **Annex 2** to Cellnex's response to RFI 3, dated 21 September 2021.





3.95 Whilst it is not possible to quantify all self-supply options, Cellnex believes that the BT/EE and Airwave adjustments provide a rough proxy for the self-supply option of other MNO and non-MNO customers.

**Table 2: Shares of supply by number of sites – including BT/EE self-supply and other constraints**

Competitor	Number of sites pre-merger	%	Number of sites 2031	%
Cellnex	[confidential]	[20-30]%	[confidential]	[20-30]%
CKH Unilateral (*)	[confidential]	[0-10]%	[confidential]	[0-10]%
CKH Transfer (**)	[confidential]	[0-10]%	[confidential]	[0-10]%
<b>CKH Total</b>	[confidential]	<b>[10-20]%</b>	[confidential]	<b>[10-20]%</b>
<b>Cellnex + CKH</b>	[confidential]	<b>[30-40]%</b>	[confidential]	<b>[30-40]%</b>
CTIL (***)	[confidential]	[40-50]%	[confidential]	[30-40]%
BT/EE – self-supply (**)	[confidential]	[10-20]%	[confidential]	[10-20]%
FreshWave	[confidential]	[0-10]%	[confidential]	[0-10]%
WIG	[confidential]	[0-10]%	[confidential]	[0-10]%
Shared Access	[confidential]	[0-10]%	[confidential]	[0-10]%
Britannia Towers	[confidential]	[0-10]%	[confidential]	[0-10]%
WHP Telecoms	[confidential]	[0-10]%	[confidential]	[0-10]%
AP Wireless	[confidential]	[0-10]%	[confidential]	[0-10]%
Others (****)	[confidential]	[0-10]%	[confidential]	[0-10]%
<b>Total</b>	[confidential]	<b>100%</b>	[confidential]	<b>100%</b>

Source: Provisional Findings, Table 5 adjusted to include self-supply.

Notes: (\*) Includes [confidential] UKB Sites as well as [confidential] Streetworks Sites acquired as of 18 December 2021. (\*\*) Estimates for BT/EE and CKH Transfer sites are based on the assumption that BT/EE and CKH will have half the MBNL sites each. It is assumed that BT/EE currently has [confidential] in addition to that half of the MBNL Sites (i.e., [confidential] sites). (\*\*\*) Pre-expansion number of sites for CTIL not available as information is redacted from Appendix F of the Provisional Findings. (\*\*\*\*) Includes c. [confidential] sites owned by Airwave and [confidential] owned by Police of Scotland.

3.96 As set out in **Table 2** above, incorporating the self-supply option, the share of Cellnex is [20-30]% pre-merger or [20-30]% in 2031 (the reduction is driven by Cellnex's modest expansion plans compared to others).

(ii) Shares of supply ignore the constraint from BTS

3.97 The shares of supply entirely ignore the important constraint from BTS. The CMA acknowledges the constraint exists noting that "*BTS supplied by WIPs will exercise some competitive constraint on the Merged Entity's existing sites, but that this will be relatively weak*".<sup>145</sup> Despite the evidence submitted by the Parties and the CMA's own admission that BTS was a constraint during the MBNL negotiations (see paragraphs 3.40 and 3.41 above and paragraph 8.185 of the Provisional Findings), the Provisional Findings conclude that "*the evidence available to us consistently shows that BTS has*

<sup>145</sup> Provisional Findings, paragraph 8.188.



*not been a significant constraint in previous competitive interactions and there is no basis to suggest that it is likely to be a meaningfully different constraint in future.*"<sup>146</sup> To support this statement the CMA includes evidence on the threat exercised by BTS during the MBNL renegotiation and an analysis of the tenancy data to derive an estimate for win rates for BTS.<sup>147</sup>

3.98 With respect to the Provisional Findings' analysis of the tenancy data, the CMA argues that the "*analysis of tenancies recently competed for shows little evidence of BTS competing effectively against existing sites. In particular BTS, which was historically offered by small suppliers, won only [0-5%] of all the available tenancies between 2017 and 2020. Even excluding renewals, [%] of new tenancies were won by existing sites, with only [5-10%] of all new tenancies available being served by BTS*".<sup>148</sup> However, the CMA's analysis fails to fully capture the constraint imposed by BTS for a number of reasons.

3.98.1 First, the analysis of past win rates needs to exclude renewals. As explained by the Parties in **Annex 4** to the Response to the AIS and WPs this is because, for straightforward renewals, the existing provider will always have an advantage given that there are significant costs to moving equipment to a new site (as well as possible network disruption) – regardless of the scale of the existing provider or the new provider.<sup>149</sup> As such, including them will understate the strength of BTS as a constraint on existing sites. The CMA does not agree with this and argues that "*looking at the proportion of all competitive interactions won by BTS allows us to assess the competitive constraint that BTS supplied by WIPs would exercise on the Merged Entity, which will have a large network of existing sites.*"<sup>150</sup> However, the majority of renewal opportunities are bilateral negotiations for existing sites, not competitive interactions that involve other competitors, and as such are not in competition with BTS or solutions of other competitors.

3.98.2 Second, any analysis of win rates to inform whether BTS is a constraint needs to capture all BTS wins (not only active tenancies of WIP suppliers). This includes BTS won by other WIPs and self-supply. As such the table in the Provisional Findings must be adjusted to consider the following BTS wins:

- (a) [confidential].<sup>151</sup>
- (b) BT/EE ESN self-supply: the ESN involves the construction of more than 950 new sites, which BT/EE decided to self-supply.<sup>152</sup>

<sup>146</sup> Provisional Findings, paragraph 8.188.

<sup>147</sup> Provisional Findings, paragraph 8.185.

<sup>148</sup> Provisional Findings, paragraph 8.185(e) and Appendix E, Table 4.

<sup>149</sup> For completeness, whilst the existing provider will have an advantage on the renewal of an agreement, the advantage applies regardless of the overall scale of the existing provider and applies equally to smaller WIPs as it does to larger WIPs.

<sup>150</sup> Provisional Findings, paragraph 8.187.

<sup>151</sup> See also paragraph 15.77.1 of the Merger Notice.

<sup>152</sup> See Appendix 4 to Cellnex's Response to the AIS and WPs.

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- (c) 3UK's streetworks programme self-supply: 3UK's self-supply of [confidential] Streetworks Sites in order to fulfil its 5G rollout requirements.
- (d) SRN by O2, 3UK, and Vodafone self-supply: 222 rural sites that Telefónica, 3UK, and Vodafone agreed to build together for the Shared Rural Network by 2024. From these, 3UK will build 74 sites themselves, whereas the remaining 148 sites will be built by CTIL.<sup>153</sup>
- (e) Home Office ESN:<sup>154</sup> One further opportunity [confidential] the Home Office decided that it wanted to manage and run the [confidential] sites itself (i.e., self-supply) and use third parties to construct the sites, rather than to acquire site access services from WIPs. This refers to Home Office's opportunity for [confidential] sites [confidential].<sup>155</sup>
- (f) Scottish 4G Infill Program (S4GI):<sup>156</sup> in July 2018, WHP was appointed as the infrastructure provider for this program to deliver 4G LTE infrastructure and services to "not spots" in Scotland. WHP's scope is to acquire, design, and build the telecommunicates sites. To Cellnex's knowledge, WHP is in the process of completing up to [confidential] sites.<sup>157</sup>
- (g) Other non-MNO self-supply: Two further opportunities from Cellnex's bidding data were replaced by self-supply: CityFibre 2021 ([confidential] sites) and WND<sup>158</sup> 2019/20 (initial [confidential] sites, further phases in 2020/21). More generally and as submitted previously to the CMA, Cellnex is aware of rural broadband providers opting to build their own sites – for example, Quickline has used sites from Cellnex and its competitors, while also building their own poles ([confidential] sites).<sup>159</sup>

3.99 Taking the above into account, the proportion of wins for Cellnex changes substantially. Importantly, it also shows that the share of BTS versus existing sites for new contracts is massively skewed towards BTS rather than existing sites.

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<sup>153</sup> See Cellnex's bidding data and Appendix 4 to Response to the AIS and WPs reflecting three opportunities for SRN 74 sites each for H3G, Vodafone, and Telefónica. The construction of the new masts commenced in 2021 but the total number of sites completed to date is unknown. See also: <https://newscentre.vodafone.co.uk/press-release/o2-three-and-vodafone-agree-new-deal-to-enhance-rural-coverage-sm/>.

<sup>154</sup> See also paragraph 3.28.1(b) of the Issues Letter Response.

<sup>155</sup> This opportunity was recorded in Cellnex's data pre-merger with Arqiva. A similar opportunity [confidential].

<sup>156</sup> See [https://www.whptelecoms.com/case\\_study/whp-telecoms-wins-the-prestigious-scottish-4g-infill-programme-s4gi/](https://www.whptelecoms.com/case_study/whp-telecoms-wins-the-prestigious-scottish-4g-infill-programme-s4gi/)

<sup>157</sup> See also paragraph 3.31.4 of to the Issues Letter Response. Cellnex anticipates that [confidential] of these [confidential] sites have been fully built to date with customers in occupation with the remainder being in either build or acquisition phase.

<sup>158</sup> See Table 3 from Appendix 4 to the Response to the AIS and WPs.

<sup>159</sup> Response to the Issues Letter, paragraph 3.28.1(g).



**Table 3: Shares of supply by number of sites in – Adjusted to include BTS wins through WIPs and self-supply**

Competitor	Wins for all sites, excl. renewals	Wins for BTS	%
Cellnex	[confidential]	[confidential]	[0-10]%
Shared Access	[confidential]	[confidential]	[0-10]%
WIG	[confidential]	[confidential]	[30-40]%
WHP Telecoms	[confidential]	[confidential]	[0-10]%
Britannia Towers	[confidential]	[confidential]	[30-40]%
AP Wireless	[confidential]	[confidential]	[0-10]%
Freshwave	[confidential]	[confidential]	[0-10]%
Atlas BTS (2019) <sup>160</sup>	[confidential]	[confidential]	[90-100]%
Cellnex BTS (pre-Arqiva) (2019)	[confidential]	[confidential]	[90-100]%
BT/EE ESN - self supply (2017 to present) <sup>161</sup>	950	950	100%
3UK Streetworks - self supply (2021 to present)	[confidential]	[confidential]	[90-100]%
O2 SRN – self-supply (2020)	[confidential]	[confidential]	[90-100]%
Vodafone SRN – self-supply (2020)	[confidential]	[confidential]	[90-100]%
H3G SRN – self-supply (2021)	[confidential]	[confidential]	[90-100]%
Home Office ESN – self-supply (2017-2018)	[confidential]	[confidential]	[90-100]%
Scottish 4G Infill Program (S4GI) (2018)	[confidential]	[confidential]	[90-100]%
Other self-supply (2019-2021)	[confidential]	[confidential]	[90-100]%
<b>Total</b>	<b>[4,500-5,000]</b>	<b>[4,000-4,500]</b>	<b>89%</b>

Source: Provisional Findings, Table 4 of Appendix E – adjusted to include BTS wins through WIPs and self-supply.

- 3.100 **Table 3** above shows that when BTS opportunities won by other WIPs and self-supply are included, the win rate for BTS increases to 89%, versus only 11% for existing sites. This is entirely consistent with the Parties' statement that, for new sites, the probability of having an existing site at a suitable location is extremely small. As such, BTS is the predominant constraint for new sites.
- 3.101 Third, the Provisional Findings' analysis of tenancies fails to capture instances where BTS was a competitive threat even if it did not win the competition tender. Such an example is the MBNL tender, [confidential]. This tender is not treated as a BTS opportunity in the CMA's analysis, even though BTS was [confidential] constraint on Arqiva during its negotiations with MBNL.
- 3.102 In order to properly assess the constraint from BTS, the Parties' economic advisors have revisited the previously submitted bidding data to capture all known instances of where BTS was offered as an alternative solution to the customer and therefore would have exercised a constraint in negotiations over existing sites, even if this option was not taken up by the customer. The Parties note that, whilst the CMA collected bidding data from Cellnex, no bidding data appears to have been requested or collated from third

<sup>160</sup> Response to the Issues Letter, paragraph 3.27.5.

<sup>161</sup> As of August 2020, 500 sites were built, see: <https://newsroom.ee.co.uk/ee-reaches-500th-site-milestone-for-emergency-services-network/>.



parties, in relation to which the Parties have concerns that the CMA's analysis is not "properly supported by the evidence and sufficiently reasoned" (see section 5 below for further details on the Parties' procedural concerns).<sup>162</sup> This means that whilst BTS offered by Cellnex will be reflected in the CMA's data, BTS offered by other WIP competitors and MNO's self-supply will not be reflected unless Cellnex also bid for the same opportunities with a BTS solution. As such, the analysis below is likely to significantly understate the constraint from rival BTS in the market, as Cellnex has been unsuccessful in bidding for BTS compared to rivals.

3.103 Notwithstanding the limitations of focusing on Cellnex's bidding data, this data is still consistent with BTS being a constraint on existing sites. A summary of these data is contained in **Table 4** below which looks at the proportion of Cellnex's new opportunities where a BTS solution was offered by Cellnex. Renewals on existing sites again are excluded because as mentioned above, straightforward renewals are not competitive interactions that involve other competitors or solutions such as BTS. In addition, when looking at the data of one supplier (in this case Cellnex), including renewals makes no sense given Cellnex would never bid with BTS to renew a contract on its existing sites (even if other WIPs or MNOs may do so).

**Table 4: % Cellnex's new business opportunities through BTS from 2017**

Outcome	Tender	BTS	% (tender)	Value (total) (£m)	Value (BTS) (£m)	% (value)
Win	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]
Loss	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]
Abandoned	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]
Ongoing	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]
Other	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]
Did not compete	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]
<b>Total</b>	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]

Source: CRA analysis using the CMA's confidentiality ring - [confidential]. See also Appendix 4 of the Response to the AIS and WPs, Table 4.

3.104 **Table 4** above shows that even just looking at Cellnex, BTS accounted for a significantly greater proportion of the value of new opportunities considered by Cellnex ([confidential]% by total value). Even given the data limitations discussed above, these results are consistent with Cellnex facing significant constraint from BTS. The lower

<sup>162</sup> *JD Sport Fashion plc v Competition and Markets Authority* [2020] CAT 24, paragraph 98.



rate for BTS in the data from Cellnex compared to the rate for BTS in the market (as reflected in the higher win rate for BTS in the previous table) is also consistent with the relatively weak BTS proposition of Cellnex.

(iii) Shares of supply by stock materially overstate Cellnex's competitive strength

3.105 Finally, even if one incorrectly ignored the constraint from BTS through other WIPs and self-supply and focussed solely on a narrow view of existing sites, the competitive strength of Cellnex using shares of supply by stock presented in the Provisional Findings is overstated. Such shares of supply by stock do not reflect the current competitive constraints faced by Cellnex. In order to consider the current competitive strength of Cellnex relative to its rivals, one needs to consider the shares of wins as a proportion of recent competitive interactions i.e., shares of supply by flow. **Table 5** below includes a comparison of the shares of supply by stock and by flow presented in the Provisional Findings. Given that most renewals are bilateral negotiations that do not involve a competitive interaction, these are excluded.

**Table 5: Shares of supply (# PoPs) by stock (2020) and by flow (2017-2020)**

WIP	By stock: Number of PoPs	By stock: Number of PoPs (%)	By flow: Wins ex renewals	By flow: Wins ex renewals (%)
Cellnex	[confidential]	[80-90]%	[confidential]	[50-60]%
WIG	[confidential]	[10-20]%	[confidential]	[10-20]%
Shared Access	[confidential]	[0-5]%	[confidential]	[10-20]%
Freshwave	[confidential]	[0-5]%	[confidential]	[0-5]%
Britannia Towers	[confidential]	[0-5]%	[confidential]	[0-5]%
WHP Telecoms	[confidential]	[0-5]%	[confidential]	[5-10]%
AP Wireless	[confidential]	[0-5]%	[confidential]	[0-5]%
<b>Total</b>	<b>[confidential]</b>	<b>100%</b>	<b>[confidential]</b>	<b>100%</b>

Source: Provisional Findings, Appendix E, Tables 1 and 2

3.106 **Table 5** above shows that based on the evidence in the Provisional Findings, Cellnex has had a share of supply of [80-90]% by number of sites. Assuming this figure properly reflects its competitive strength, Cellnex would be expected to win [80-90]% of new business. Furthermore, if the CMA's theory that a large scale provider such as Cellnex enjoys a material advantage over smaller rivals and is more successful than its rivals when competing for new sites, its win rate should be greater than the share implied by its relative size i.e., greater than [80-90]%. However, as the table above shows, Cellnex's share of supply by flow is [50-60]%, which implies that Cellnex is consistently losing market share (even ignoring BTS and self-supply). This loss of market share over time is wholly inconsistent with Cellnex having a substantial economies of scale advantage relative to other WIPs and no customer evidence that scale impacts their choice of supplier. Indeed, in practice, there are numerous examples of smaller WIPs (some with no material presence in the UK) such as Atlas, Cellnex (prior to *Cellnex/Arqiva*), WHP Telecoms and WIG winning large contracts (see paragraphs 3.27 to 3.29 above). This dynamic is replicated in other jurisdictions, for



example Phoenix Tower recently won a contract for c. 4,000 sites in France despite having no material presence in the country (see paragraph 3.51 above).

(iv) The CMA's reference to profit margin as a measure of competition is inappropriate

- 3.107 In relation to the competitive structure of the market, notwithstanding the Parties' submissions that the CMA's analysis of shares of supply overstate Cellnex's competitive strength, the CMA's reliance on supposedly high profit margins<sup>163</sup> to support a finding of high levels of historical market concentration has no logical basis.
- 3.108 The CMA notes throughout the Provisional Findings that Cellnex was the only large WIP in the UK with a share of supply of [80-90]% (by stock and number of sites), while the next largest competitor, WIG, had a share of only [10-20]% on the same basis and that no other competitor had a meaningful share of supply. In terms of profit margins, the CMA relies on EBITDA as the measure, which shows that the margins of Cellnex UK (previously Shere), WIG and Arqiva (now Cellnex) were [confidential]%, [confidential]% and [confidential]% respectively. The CMA ultimately finds that there has been limited competition in the supply of access to developed macro sites in the UK and that this has allowed most WIPs to earn substantial profit margins.<sup>164</sup>
- 3.109 If the Provisional Findings were correct that smaller WIPs are unable to compete with Cellnex (which the Parties do not accept), the Parties would expect smaller WIPs to have much lower margins than Cellnex/Arqiva, and yet this is not true. Under the CMA's theory it should be the case that only Cellnex/Arqiva should be making substantial profit margins, with smaller WIPs struggling behind and eventually being forced out of the market. The CMA's statement that "*most WIPs make substantial profit margins*" is not consistent with the CMA's concern of highly concentrated markets and does not serve as evidence that smaller WIPs have lower profit margins than larger WIPs. Instead, these figures show that WIP EBITDA margins are entirely independent of their size and scale.
- 3.110 In any event, EBITDA is not the typical measure of performance in the industry as it is impacted by several accounting rules and it includes elements which are not necessarily recurring or cash-driven. By way of example, because EBITDA excludes depreciation of fixed assets and amortisation, the EBITDA margin of any WIP will inevitably be distorted from its true profit margin.
- 3.111 Since the CMA does not set out the basis of any merger-specific effects on the profit margins of Cellnex and other WIPs, the CMA's analysis is not capable of supporting an SLC finding.

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<sup>163</sup> Provisional Findings, paragraph 8.18.

<sup>164</sup> Provisional Findings, paragraph 8.19.



#### 4. COUNTERVAILING FACTORS

##### Countervailing buyer power

- 4.1 In its Provisional Findings, the CMA fails to consider the countervailing effects of the significant buyer power held by Cellnex's customers (in particular its MNO customers). In Cellnex's experience, the closest and typically binding competitive constraint on negotiations with customers usually comes from the threat of self-supply. Cellnex's internal documents [*confidential*], which the CMA has failed to take into account.<sup>165</sup> In addition, the fact that the MNOs do not have any concerns in relation to the Proposed Transaction is itself evidence of their strong buyer power.
- 4.2 Given that the Proposed Transaction will have no impact on customers' ability to self-supply, the Proposed Transaction cannot result in any lessening of customers' buyer power, and Cellnex will continue to be constrained by customer self-supply following completion of the Proposed Transaction.

##### Significant customer benefits

- 4.3 The SLC finding in the Provisional Findings is predicated on the unprecedented 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 doing so, the Provisional Findings have overlooked the real impact of the Proposed Transaction on competition which is to enable 3UK to compete more effectively in the retail mobile market to the enormous benefit of UK consumers.
- 4.4 Therefore, the artificial analysis in the Provisional Findings has ignored UK consumers and their interests. No consumer body, regulator or customer has provided evidence to the CMA of any concerns arising from the Proposed Transaction and no informed observer outside the CMA believes that the Proposed Transaction is likely to give rise to a substantial lessening of competition. Notwithstanding this, the Provisional Findings have ignored the Parties' consistent evidence provided in detail in the course of the CMA's investigation on the significant and certain merger-specific benefits that would accrue to end consumers through the material new investment in 5G in the UK (particularly in relation to 3UK's 5G network), which will enhance 3UK's competitive position on the downstream mobile market to the benefit of end consumers, in terms of price, quality and innovation. These are very material benefits and will be realised in a market which is of great significance to UK consumers.

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<sup>165</sup> As previously explained to the CMA: [*confidential*].



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- 4.5 As set out in greater detail in section 6 of the Issues Statement Response, 3UK is the smallest of four MNOs and faces considerable challenges [*confidential*]. A strong 5G offering can be a turning point, but this [*confidential*] of capital investment. [*confidential*]. Therefore, if the Proposed Transaction is prohibited, 3UK's investment in its 5G network roll-out plan will be [*confidential*], and 3UK will [*confidential*] to the detriment of consumers. Accordingly, CK Hutchison views the Proposed Transaction as the key enabler for 3UK to overcome the challenges it faces as the smallest MNO in the UK, capitalise on its relative 5G spectrum advantage, and compete effectively in the UK mobile market.
- 4.6 Even if the analysis of the Provisional Findings was entirely correct (which the Parties strongly dispute) these merger-specific benefits to competition and UK consumers would dwarf any supposed SLC in the upstream passive infrastructure market from the Proposed Transaction.
- 4.7 The Provisional Findings have therefore ignored the Parties' consistent and detailed evidence on the significant and certain merger-specific benefits that would accrue to downstream end consumers through material new investment in 5G in the UK (particularly in relation to 3UK's 5G network), which will enhance 3UK's competitive position on the downstream mobile market to the benefit of end consumers. Please see section 6 of the Issues Statement Response for the Parties' detailed submissions on these significant customer benefits.

**Barriers to entry and expansion**

- 4.8 As explained in the Issues Statement Response and in the Merger Notice, and given the substitutability of BTS for existing sites, there are low barriers to entry or expansion and a wide range of potential providers are capable of providing access to developed macro sites. This is consistent with the CMA's own findings in *Cellnex/Arqiva*,<sup>166</sup> and there is no compelling evidence of any increase in barriers to entry or expansion since then. Indeed, the Provisional Findings "*recognise that there has been entry by WIPs in the UK, suggesting that barriers to entry are not high, and there are a number of smaller WIPs that seek to compete in the provision of macro sites*".<sup>167</sup>

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<sup>166</sup> See in particular paragraphs 200 and 140, where the CMA found that: "*the CMA also considers that a number of other WIPs have received investment and are well-positioned to expand in future*"; and that the industry has been characterised by "*recent entry and expansion*", and "*entry and expansion are expected in the future*."

<sup>167</sup> Provisional Findings, paragraph 9.12.



- 4.9 However, the Provisional Findings incorrectly consider that a WIP must be of a particular scale to be an effective competitor. This ignores the key implication of demand for new sites being limited in the foreseeable future, which is that BTS sites (which can either be self-supplied by customers or supplied by a WIP) form an effective competitive constraint on existing sites. As set out at paragraphs 3.26 to 3.53 above, this means that existing and future competitors do not require a large portfolio of existing sites or national coverage to credibly compete and creates significant opportunities for entry and expansion. Indeed, there are numerous examples of smaller WIPs such as Atlas, Cellnex (prior to *Cellnex/Arqiva*), WHP Telecoms and WIG (sometimes with no material presence in the UK) winning large contracts (see paragraphs 3.27 to 3.29 above). Further afield, Phoenix Tower recently won a contract for c. 4,000 sites in France despite having no material presence in the country (see paragraph 3.51 above). It is clear that, if attractive opportunities arise in the UK, there is no reason why a small WIP or a new entrant could not compete for and win such contracts. This is further evidenced by the fact that Cellnex's share of supply by flow is lower than its share of supply by stock, which means that Cellnex is in fact losing market share to smaller WIPs over time, demonstrating that scale is not a significant advantage.
- 4.10 Section 21 of the Merger Notice explains in detail why there are significant opportunities for new entrants to enter the UK market (or for existing competitors to expand their offerings), which the CMA has failed to consider.

### Efficiencies

- 4.11 The Provisional Findings state that the Parties have made no representations that any synergies would be passed through to customers, which the CMA should consider as rivalry-enhancing efficiencies in its assessment.<sup>168</sup> This is incorrect, as the Parties made clear in the Merger Notice that "*given the buyer power of Cellnex's customers (particularly the MNOs), any commercial benefit (i.e. reduced costs) [resulting from the Proposed Transaction] would be passed through to end-customers*".<sup>169</sup> The ability of Cellnex's customers to extract cost reductions from WIPs such as Cellnex is evident from their significant countervailing buyer power (see paragraphs 4.1 and 4.2 above), in particular their ability to extract ground lease savings from WIPs.<sup>170</sup>

<sup>168</sup> Provisional Findings, paragraph 9.32.

<sup>169</sup> Merger Notice, paragraph 17.10; see also Cellnex's response to RFI 1 dated 23 February 2021, paragraph 8.6.

<sup>170</sup> As an example (and as mentioned in paragraph 3.13 above), pursuant to the master services agreement between CTIL, Vodafone and O2, which entered into force on 1 January 2021, despite its commercialisation CTIL will only retain 30% of ground lease savings (with the remaining 70% being passed on to Vodafone and O2). In addition, both Vodafone and O2 will receive discounts to their service fees if another tenant joints the site. See section 16.4.6 of the Vantage Towers prospectus dated 8 March 2021, available here: <https://www.vantagetowers.com/sites/tower-co-v2/files/vantage-towers-prospectus-v3.pdf>.



**5. PROCEDURAL UNFAIRNESS**

- 5.1 The Parties have a number of significant concerns as to procedural unfairness during the CMA's review of the Proposed Transaction.
- 5.2 First, the Parties and their advisers have not had access to third parties' bidding data (even through the use of confidentiality rings). The Parties note that, whilst the CMA collected bidding data from Cellnex, it is unclear whether the CMA ever requested or collated bidding data from third parties, in relation to which the Parties have concerns that the CMA's analysis is not "*properly supported by the evidence and sufficiently reasoned*".<sup>171</sup> The Parties note that the CMA redacted the bidding data from its competitive assessment working paper (the "**CA WP**"), though it appears from the Provisional Findings that the CMA is now solely commenting on Cellnex's Bidding Analysis Paper.<sup>172</sup>
- 5.3 As discussed at length during the Cellnex MPH, Cellnex was unable at that time to "*comment on how [the CMA] have analysed the data of other parties without knowing the methodology that they have employed.*"<sup>173</sup> Despite requests from Cellnex's advisers requesting this information, noting that Cellnex could not respond meaningfully to the CA WP without it,<sup>174</sup> the CMA reverted noting that "*the provisional findings report [would] contain the CMA's provisional decisions and the underlying reasoning, and it is typically at this point that the CMA will consider whether it is necessary to disclose confidential information, or other underlying information to give the 'gist' of the case which the merger parties have to answer.*"<sup>175</sup> As of yet, Cellnex has not seen this information, which is unfair to Cellnex and has prevented it from being able to respond to the Provisional Findings in a meaningful and effective manner. However, had the CMA shared its underlying data and methodology before publishing its Provisional Findings, Cellnex would have been able to identify key deficiencies in the CMA's data (including the lack of collated third party information).
- 5.4 There continues to be redacted text throughout the Provisional Findings which has not been disclosed to the Parties or their advisers (even though they have offered to receive limited access through the confidentiality rings in place). As a result, the Parties are unable to test, confirm or respond to some of the submissions made by third parties. This is very concerning and unfair to the Parties, given that there is a wide range of generic and unsubstantiated statements made by Cellnex's competitors throughout the Provisional Findings to which the CMA has given significant weight.
- 5.5 In addition, despite the Parties' submissions during the information gathering stage and repeated requests for disclosure,<sup>176</sup> the CMA chose not to share its thinking or analysis with respect to third parties' share of supply information at the stage of providing its

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<sup>171</sup> *JD Sport Fashion plc v Competition and Markets Authority* [2020] CAT 24, paragraph 98.

<sup>172</sup> See Appendix 4 to the Response to the AIS and WPs.

<sup>173</sup> Transcript of Cellnex MPH – see page 29 (line 25) to page 33 (line 11).

<sup>174</sup> See, for example, the emails from Clifford Chance to the CMA on 15 and 19 October 2021, and the letter from Clifford Chance to Alison Gold dated 22 October 2021.

<sup>175</sup> Letter from Alison Gold to Clifford Chance dated 25 October 2021.

<sup>176</sup> See, for example, the emails from Clifford Chance to the CMA on 15 and 19 October 2021, and the letter from Clifford Chance to Alison Gold dated 22 October 2021.

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AIS and WPs.<sup>177</sup> As a result, Cellnex was not given an opportunity to make representations of the CMA's approach in advance of the Provisional Findings.

- 5.6 The Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973 (CC7 Revised) states, at paragraph 5.2(c), that the CMA should have regards to *inter alia* "the need to disclose information supplied to the [CMA] so that interested persons (main parties or other interested persons) are able to comment on matters affecting them and so that they can draw to the [CMA's] attention any inaccuracies, incomplete or misleading information". It has also been judicially recognised that commenting on the working papers is a significant step in the CMA's Phase 2 process, and that it would be too late to revise the underlying analysis in light of inaccuracies or incompleteness following publication of the provisional findings (emphasis added):

5.6.1 *"While the Applicants, along with third parties, have a later opportunity to comment on the CMA's Provisional Findings, it seems to us that this does not diminish the significance of comments on the Working Papers. As Mr McIntosh explains, the purpose of sharing the Working Papers is essentially two-fold. First, it enables the Applicants to submit representations on the Group's emerging thinking, "that the Group could take into account ahead of producing its Provisional Findings"; and he refers to the Working Papers as comprising analysis that may "form some of the building blocks" of those Provisional Findings. Although the Applicants will in due course be able to make submissions in response to the Provisional Findings, we think it is unrealistic to suggest that once the Group has reached provisional conclusions based upon those underlying analyses, the Group would readily require the CMA staff to adopt a different methodology, or even significantly to revise the underlying analysis. That stage of the inquiry will effectively be passed."<sup>178</sup>*

- 5.7 Finally, CK Hutchison has raised further concerns regarding procedural unfairness relating to the CMA's counterfactual assessment. These concerns are outlined in CK Hutchison's detailed response to the counterfactual which is submitted separately.

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<sup>177</sup> Once the CMA chose to disclose the WPs to Cellnex and invited comments, Cellnex's procedural rights were engaged – see *J Sainsbury PLC and Asda Group Limited v The Competition and Markets Authority* [2019] CAT 1, paragraph 63.

<sup>178</sup> *Ibid*, at paragraph 64.



**6. CONCLUSION**

- 6.1 The Parties disagree with the Provisional Findings' conclusion that the Proposed Transaction gives rise to a realistic prospect of an SLC in the supply of access to developed macro sites and ancillary services to MNOs and non-MNOs in the UK. It is clear that this conclusion is premised on: (i) a wholly speculative counterfactual, (ii) self-serving and unsubstantiated statements made by WIPs, and (iii) a failure by the CMA to give due and proper weight to evidence submitted by the Parties and third parties (in particular the MNOs), in a thinly veiled attempt to create a third major national WIP. In doing so, the CMA has gone beyond its proper remit and, if it makes a final SLC decision on this basis, it would be acting in an irrational and unlawful manner.
- 6.2 Given the nature of the market and the very significant competitive constraints that already exist (and will remain post-merger), there is no conceivable prospect of the Proposed Transaction allowing Cellnex to maintain its prices at higher levels, or its service quality, range, and/or innovation at lower levels than would have arisen in any counterfactual. The Proposed Transaction therefore cannot be said to give rise to an SLC of any kind on the balance of probabilities, which is self-evident from the absence of merger-specific concerns raised by customers or government bodies (such as Ofcom and DCMS). Instead, the Proposed Transaction will give Cellnex the opportunity to drive future investment that is important to support the deployment of 5G networks and the expansion of rural coverage in the UK, and it will enable 3UK to become a stronger competitor in the mobile market (particularly in relation to 5G) which will lead to significant consumer benefits in the UK mobile market overall.

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

14 January 2022