

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**

SUPPLEMENTARY SUBMISSION ON PROPOSED REMEDY

26 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, the Parties' response to the Provisional Findings and the Parties' response to the Remedies Notice.

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1. INTRODUCTION AND EXECUTIVE SUMMARY

- 1.1 Since submission of the Parties' response to the Remedies Notice on 10 January 2022 (the "**Remedies Notice Response**"), in responding to the CMA's RFI 6 and RFI 7 it has come to the Parties' attention that the Proposed Remedy did not include theoretical overlaps with [confidential] sites [confidential]. Under the terms of the transaction agreements, [confidential] sites [confidential]. This means that the maximum number of [confidential] sites that Cellnex could acquire is [confidential] Cellnex will only acquire half of the MBNL Sites as part of the Proposed Transaction (i.e., half of the combination of the [7,000-8,000] sites within the MBNL JV and [confidential] sites [confidential]). Despite this, in order to ensure that the Proposed Remedy is as comprehensive as possible, CRA has updated the overlap analysis to additionally include any theoretical overlaps with the [confidential] sites. It has done so by applying the same methodology as it did originally - to include all [confidential] sites [confidential], even though this is significantly more than the number of [confidential] sites that Cellnex expects to acquire.
- 1.2 This additional analysis, applying the same methodology used to identify the overlaps for the original Proposed Remedy, identifies an additional [100-300] potential overlaps which are included in the Proposed Remedy (the "**Supplementary Overlap Sites**", together with the sites that formed part of the Proposed Remedy, the "**Overlap Sites**"). A list of the Supplementary Overlap Sites is provided at Annex 1, and Cellnex will provide the information that the CMA requested in respect of the Proposed Remedy in RFI 6 and RFI 7 in respect of the Supplementary Overlap Sites later this week.

- 1.3 The total number of overlapping sites that Cellnex is now proposing to divest as part of the Proposed Remedy is [1,100-1,300]. Indeed, the number of Overlap Sites is greater than the number of [*confidential*] that Cellnex will acquire on completion of the Proposed Transaction (or, in the CMA's counterfactual, the alternative purchaser would [*confidential*]).
- 1.4 The addition of the Supplementary Overlap Sites should be considered as representing a modification to the original Proposed Remedy. Cellnex understands that the CMA's preference is for any enhanced remedy proposal, if required, to be made following receipt of the remedies working paper. The Parties will consider the CMA's views as set out in the remedies working paper carefully and will assess at that point whether an enhanced remedy may be required to address any residual concerns the CMA may continue to have.
- 1.5 Further to the discussion at Cellnex's Response Hearing and the questions raised by the Panel, this submission also explains:
- 1.5.1 why the Proposed Remedy fully addresses the CMA's concerns in respect of existing sites;
 - 1.5.2 why any residual concerns the CMA may have beyond existing sites are unevicenced and unfounded; and
 - 1.5.3 in any event, why the Proposed Remedy addresses any residual concerns the CMA may have beyond existing sites by providing a remedy taker with a high-quality national portfolio of sites that will allow it to compete effectively on a national basis.
- 1.6 In addition, Cellnex comments on the third-party submissions published by the CMA on 21 January 2022.

2. THE PROPOSED REMEDY FULLY ADDRESSES ALL OF THE CMA'S CONCERNS IN RESPECT OF EXISTING SITES

2.1 The Proposed Remedy as amended addresses any potential theoretical concern that the CMA might have had that the Proposed Remedy was not sufficiently comprehensive in removing potential geographic overlaps between the Cellnex Sites and the Transaction Sites. In summary, and further to the discussion at Cellnex's Response Hearing, the Proposed Remedy comprehensively addresses the alleged SLC in the Provisional Findings for the following reasons:

2.1.1 The Provisional Findings state that the key question is "*how the removal of overlaps in the Merger will affect competition*" and explain how "*the removal of the overlap from the CK Hutchison Assets would significantly lessen*" the threat imposed by the owner of the Transaction Sites in the CMA's counterfactual. Therefore, in accordance with the logic of the Provisional Findings, divestment of all geographic overlaps between existing Cellnex sites and the Transaction Sites would comprehensively address the SLC.

2.1.2 The Provisional Findings are predicated on the assumption that even a limited geographic overlap (which the Provisional Findings accept is "*likely to be numerically limited*")¹ between Cellnex and the Transaction Sites could be leveraged by a customer to drive large discounts on renegotiation of large contracts with the incumbent supplier. The CMA uses this assumption to conclude that, in the counterfactual, if these Transaction Sites were operated by an alternative purchaser, that alternative purchaser would impose an important competitive constraint on Cellnex.

¹ Provisional Findings, paragraph 8.83.

- 2.1.3 However, whilst MNO contracts may be national in scope, they are fundamentally local in make-up. Any discount that can be theoretically extracted depends fundamentally on the number of sites which can be threatened, which (following the logic of the Provisional Findings) is directly related to the size of the overlap. It does not matter how many towers a WIP has if they are not in the right location for the customer's requirement. By way of illustrative example, it is self-evident that a WIP with sites solely in Scotland would not compete with a WIP with sites solely in England through its existing site portfolio.
- 2.1.4 A WIP will not necessarily have a site in the right location for a customer's requirements simply because it has a large number of sites. Because of the narrow scope of customers' search areas and the size of the UK, the increased likelihood - and any such perceived benefit that Cellnex could potentially enjoy over its rivals by virtue of the number of sites it owns - is negligible.
- 2.1.5 More fundamentally, however, the alleged economies of scale advantage for existing sites raised in the Provisional Findings are comprehensively addressed by the Proposed Remedy. By definition, if all overlaps are divested then the remedy taker has every single site that is in the right location to compete with Cellnex, and therefore could possibly be used to impose a competitive constraint on Cellnex.
- 2.1.6 Any ancillary arguments about economies of scale in existing sites are comprehensively addressed by divestment of all geographic overlaps. For example, it is self-evident that it would be worth negotiating with a supplier that had overlapping sites if, as the Provisional Findings state, they allowed a customer to negotiate a significant discount.
- 2.1.7 It is therefore clear that the Proposed Remedy addresses the CMA's concerns in respect of existing sites, including as regards scale.

2.2 Should the CMA disagree with Cellnex that the Proposed Remedy comprehensively addresses the SLC as set out in the Provisional Findings, Cellnex asks that these concerns are explained in detail in the remedies working paper to allow it to consider whether those residual concerns can be addressed in response to the remedies working paper.

3. **ANY RESIDUAL CONCERNS THE CMA MAY HAVE BEYOND EXISTING SITES ARE UNFOUNDED AND UNEVIDENCED**

3.1 Cellnex understands from its discussions with the Panel at Cellnex's Response Hearing that the CMA may have some other theoretical concerns regarding a broader loss of competition beyond economies of scale in existing sites. In particular, Cellnex understands that the CMA may have concerns regarding:

3.1.1 the loss of competition between Cellnex and the alternative purchaser of the Transaction Sites on the basis of competition between non-overlapping sites, as even where there are not close overlaps an MNO may threaten to switch a collection of sites in an area to a rival by adopting a new network configuration; and/or

3.1.2 the loss of competition between Cellnex and the alternative purchaser of the Transaction Sites for the provision of BTS, due to alleged economies of scale.

3.2 The Provisional Findings present no credible evidence as to either the nature or extent of these alleged scale concerns, relying almost exclusively on self-serving, unsubstantiated and unreliable statements made by Cellnex's competitors. Moreover, there has been no apparent attempt by the CMA to gather and assess evidence to quantify the alleged economies of scale in the provision of BTS - despite the fact that the CMA could have done so as part of its Phase 1 or Phase 2 review - nor has evidence of a single instance of an MNO reconfiguring its network in order to switch to non-overlapping sites been provided. As was explained by Cellnex at Cellnex's Response Hearing, in the Parties' response to the Provisional Findings, and in the Remedies Notice Response, these concerns are simply unrealistic and do not accurately reflect commercial reality. It would be irrational and highly disproportionate for the CMA to prohibit the Proposed Transaction on the basis of these unevidenced and theoretical

concerns, or indeed to require a remedy that goes beyond the divestment of overlapping sites, given that the Proposed Remedy comprehensively addresses the CMA's primary concern of the loss of competition from the loss of existing overlaps.

- 3.3 Cellnex has requested that the CMA provides greater clarity as to either the nature or extent of any alleged scale concerns beyond existing sites, and some insight as to what number of sites it believes a divestment remedy would need to include, above removal of all overlapping sites, in order to allow a remedy taker to benefit from such so-called scale advantages. No such insight has been forthcoming to date. However, should the CMA disagree with the Parties that the Proposed Remedy comprehensively addresses the CMA's scale concerns, Cellnex asks that these concerns are explained in detail, and quantified, in the remedies working paper to allow Cellnex to consider whether those residual concerns can be addressed in response to the remedies working paper.

4. **THE PROPOSED REMEDY INVOLVES A HIGH-QUALITY NATIONAL PORTFOLIO OF SITES THAT WILL ALLOW A REMEDY TAKER TO COMPETE EFFECTIVELY ON A NATIONAL BASIS**

- 4.1 As discussed at Cellnex's Response Hearing, the Proposed Remedy involves a high-quality and national portfolio of sites which, following the logic of the Provisional Findings, will be available to be used by the remedy taker to impose a strong and immediate competitive constraint upon Cellnex. In response to the questions raised by the Panel at Cellnex's Response Hearing, the reasons why this is the case are explained below:

- 4.1.1 *First*, the remedy taker will immediately be able to compete with Cellnex on the same basis as the alternative purchaser would have in the CMA's counterfactual through leveraging the overlaps between its portfolio and Cellnex's portfolio (irrespective of whether the remedy taker has an existing presence in the UK. Importantly, the Overlap Sites are significantly more effective in addressing the alleged SLC identified in the Provisional Findings than any other selection of sites. Following the logic of the Provisional Findings, an arbitrary selection of [1,100-1,300] sites would clearly not allow an alternative purchaser to constrain Cellnex to the same extent as the [1,100-1,300] Overlap Sites. Indeed, the

number of Overlap Sites is greater than the number of [confidential] that Cellnex will acquire on completion of the Proposed Transaction (or, in the CMA's counterfactual, that the alternative purchaser would [confidential]).

- 4.1.2 *Second*, the remedy taker will have immediate access to the Overlap Sites and will be able to use them to compete with Cellnex on expiry of Cellnex's contracts with both CTIL and MBNL. In the CMA's counterfactual, the alternative purchaser would not have access to the majority of the Transaction Sites until 2031 and would be unable to compete for these contracts.
- 4.1.3 *Third*, the Overlap Sites form a high-quality package of assets, most of which were designed as shareable infrastructure and with a high overall tenancy ratio. As explained Cellnex's response to question 1 of RFI 7, and as appears to be supported by the anonymous submissions made by willing remedy takers, WIPs generally look to acquire sites that have high tenancy ratios as this equates to higher revenues. [confidential].
- 4.1.4 *Fourth*, the Overlap Sites are made up of a variety of different site types – [confidential]% rooftops, [confidential]% towers and [confidential]% light monopoles - which are geographically dispersed, and therefore they represent a material and diverse national portfolio of assets. By way of evidence, please refer to Figures 1 and 2 below which demonstrate how the Overlap Sites are dispersed across rural, urban and suburban locations across the entirety of the UK, and the different types of sites that they are.²
- 4.1.5 *Fifth*, the Overlap Sites have tenants subject to long-term agreements.

² These site maps exclude the unidentified streetworks sites where the location is not yet known.

Figure 1: Site map showing site type of Overlap Sites

[confidential]

Figure 2: Site map showing geographical dispersion of Overlap Sites

[confidential]

5. COMMENTS ON THE THIRD PARTY RESPONSES TO THE PROVISIONAL FINDINGS AND REMEDIES NOTICE

5.1 Cellnex notes that seven third party submissions in response to the Provisional Findings and notice of possible remedies were published by the CMA on 21 January 2022. Cellnex submits that six of these submissions are clearly self-serving and should be given limited weight by the CMA. Cellnex would make the following comments in this regard:

5.1.1 *First*, it is striking that not a single customer of Cellnex has made a submission to the CMA that alleges actual or likely harm would be caused by the Proposed Transaction, and neither has the sectoral regulator Ofcom. This aligns with the Parties' belief that the Proposed Transaction is clearly pro-competitive and a positive for its customers and for end-consumers.

5.1.2 *Second*, the submission by BT aligns with the Parties' understanding that BT no longer has any concerns with the Proposed Transaction. The Parties agree that BT should not be negatively impacted by any remedy that is ultimately required, and they will work with the CMA and with BT to ensure that this is not the case.

5.1.3 *Third*, the responses by Virgin Media O2 and by CTIL that try to recharacterise the market position of CTIL are clearly and transparently motivated by a view to any future review by the CMA of a transaction involving the sale of CTIL.

5.1.4 *Fourth*, the responses by four anonymous willing remedy takers should not be given any weight as they are clearly and transparently motivated by a desire to acquire any sites divested by Cellnex. There are two points to make in this regard:

- (a) It is obvious that a potential remedy taker – particularly one that is already a rival of Cellnex - would want the CMA to find an SLC and require a divestment, and to require a divestment that is larger than what would otherwise be required to address the alleged SLC.
- (b) It is important for the CMA to consider that none of the four willing remedy takers appears to explicitly desire to acquire the MBNL Sites, at least prior to 2031 – which runs contrary to the conclusions in the Provisional Findings on the counterfactual. This is not surprising given the complexities explained by CK Hutchison in numerous previous submissions.

6. CONCLUSION

- 6.1 In conclusion, the Proposed Remedy clearly and comprehensively addresses the alleged SLC set out in the Provisional Findings.
- 6.2 In including the Supplementary Overlap Sites, the Proposed Remedy ensures that there is no possibility of a theoretical potential overlap remaining between Cellnex's existing sites and the Transaction Sites following completion of the divestment of the Overlap Sites to a remedy taker.
- 6.3 Insofar as the CMA continues to insist that other scale concerns beyond existing overlaps remain, with which the Parties strongly disagree, the Proposed Remedy also resolves those concerns as the Proposed Remedy involves a high-quality national portfolio of sites that will give an alternative purchaser a platform to compete effectively on a national basis. This would be even more clearly the case should the Overlap Sites be divested to a WIP with an existing presence in the UK, [*confidential*].

6.4 That being said, if the CMA continues to have residual concerns that the Proposed Remedy does not address Cellnex asks that these are explained in full, and quantified, in the remedies working paper to allow it to consider whether those residual concerns can be addressed in response to the remedies working paper.

Clifford Chance LLP

26 January 2022