

Anticipated acquisition by Cellnex UK Limited of the passive infrastructure assets of CK Hutchison Networks Europe Investments S.À R.L.

Final report

Notified: 3 March 2022

© Crown copyright 2022

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence.

To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/ or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: publicsectorinformation@nationalarchives.gov.uk.

Website: www.gov.uk/cma

**Members of the Competition and Markets Authority
who conducted this inquiry**

Richard Feasey (*Chair of the Group*)

Mark Thatcher

Maria da Cunha

Chief Executive of the Competition and Markets Authority

Andrea Coscelli

The Competition and Markets Authority has excluded from this published version of the report information which the Inquiry Group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [X]. Some numbers have been replaced by a range. These are shown in square brackets. Non-sensitive wording is also indicated in square brackets.

Contents

	<i>Page</i>
Summary	5
The reference	5
The Parties	5
The Merger	6
Industry background	7
Relevant merger situation	7
Competitive effects	9
Countervailing factors	17
Remedies	18
Remedy effectiveness	18
Remedy proportionality	19
Conclusion on remedies	19
Conclusions	20
Findings	21
1. The reference	21
2. The Parties, the Merger and its rationale	21
Introduction	21
The Parties	22
Cellnex	22
CK Hutchison	23
The Merger	24
Merger rationale	27
Cellnex	27
3. Industry background	29
Introduction	29
Passive and active infrastructure for mobile networks	29
Types of infrastructure	29
Providers of passive infrastructure	32
Overview of developed macro sites in the UK	32
Roll-out of 5G networks	35
Growth of new infrastructure for mobile networks	37
Mobile telecommunications services in the UK	39
Network capacity and coverage	39
Overview of relevant public policy and regulation	42
Planning	42
Electronic Communications Code	44
4. Relevant merger situation	46
Enterprises ceasing to be distinct	48
TowerCo	48
Transfer Sites	49
MBNL Sites	49
Single or multiple relevant merger situations	53
Conclusion on relevant merger situation	54
5. Counterfactual	54
Framework for our assessment	54
Defining the appropriate counterfactual	56
Parties' views	56
Our approach	57

Scope of the counterfactual	58
Parties' views.....	58
Our assessment	60
Conclusion on scope of counterfactual.....	64
CK Hutchison's rationale and incentives for the Merger	65
Parties' views.....	65
Our assessment	68
Conclusion on the rationale and incentives for the Merger.....	73
CK Hutchison's ability to implement options available to it absent the Merger ...	74
Overview of our approach	74
Sale of passive infrastructure assets to an alternative purchaser.....	75
Other options to commercialise the assets	89
Conclusion on the counterfactual.....	96
6. Market definition.....	101
Product scope	101
Geographic scope.....	103
Conclusion on market definition	104
7. Nature of competition.....	105
Contracts for passive infrastructure	105
Customers' choice of macro sites	107
Geographic location.....	108
Pricing	109
Suppliers' scale	109
Suppliers' track record	114
Conclusions on factors influencing customer choice	115
Competition between suppliers of macro sites.....	116
Competition for existing sites.....	116
Competition for new sites	119
Conclusions on competition between suppliers of macro sites.....	119
8. Competitive assessment.....	120
Our approach to the assessment of competitive dynamics in an evolving market	121
Pre-Merger market outcomes	123
Closeness of competition between Cellnex and the owner of the CK Hutchison Assets.....	126
Parties' submissions.....	127
Parties' internal documents	131
Third parties' views.....	132
Forward-looking shares of supply amongst WIPs.....	137
Our assessment of closeness of competition	138
Competition from alternative suppliers.....	151
Constraint from CTIL and BT/EE	152
Constraint from other WIPs	154
Constraint from customers' self-build and BTS.....	158
Our conclusions on competition from alternative suppliers.....	167
Impact of Cellnex's material influence on the MBNL Sites.....	168
Conclusion	168
9. Countervailing factors	171
Barriers to entry and expansion	171
Parties' submissions and evidence.....	171
Third-party views on entry and expansion	173

Our assessment	173
Conclusion on barriers to entry and expansion	176
Efficiencies.....	177
Conclusion on efficiencies	178
Conclusions on countervailing factors.....	178
10. Conclusion	178
11. Remedies.....	178
Framework for the assessment of remedies	178
Nature of the SLC	179
Overview of remedy options	180
Parties' proposed remedy.....	182
Prohibition – assessment of effectiveness	183
Description.....	183
Views of the Parties.....	183
Views of third parties	183
Our conclusion of the effectiveness of prohibition	184
The Proposed Remedy – assessment of effectiveness	184
Description of remedy.....	184
Views of Parties and third parties	185
Remedy design issues	186
Scope of the Proposed Remedy.....	187
Conclusion on the scope of the Proposed Remedy.....	210
Identification and availability of suitable purchasers	210
Views of the Parties and third parties	210
Application of criteria for purchaser suitability to the current case.....	212
Likely availability of suitable purchasers.....	213
Conclusion on the identification and availability of suitable purchasers.....	214
Ensuring an effective divestiture process.....	214
Timescale allowed for divestiture.....	215
Views of the Parties and third parties	216
Our assessment	217
Provision for the appointment of a Monitoring Trustee	218
Need to specify an upfront buyer.....	221
Provision for appointment of a Divestiture Trustee	224
Other issues	225
Conclusion on divestiture process	225
Conclusion on effectiveness of the Proposed Remedy	226
Our conclusion on remedy effectiveness	226
Relevant customer benefits	226
Framework for assessment of RCBs	227
Parties' and third parties' views on RCBs.....	228
Our assessment of RCBs	230
Our conclusion on RCBs	231
The proportionality of effective remedies	232
Our framework for assessment.....	232
Views of the Parties.....	233
Our assessment	234
Conclusion on proportionality	235
Remedy decision	235
Remedy implementation	235

Appendices

- A: Terms of reference and conduct of the inquiry
- B: Cost of developed macro sites
- C: Relevant Merger Situation
- D: Overview of the transaction process
- E: Shares of supply and bidding analysis
- F: Third party evidence
- G: MBNL contract renegotiation
- H: Proposed remedy

Glossary

Summary

Overview

1. The Competition and Markets Authority (CMA) has found that the anticipated acquisition (the Merger) by Cellnex UK Limited, part of the Cellnex group (Cellnex) of the passive infrastructure assets in the UK of the CK Hutchison group (CK Hutchison) may be expected to result in a substantial lessening of competition (SLC) as a result of horizontal unilateral effects arising from overlaps between the Parties in the supply of access to developed macro sites and ancillary services to mobile network operators (MNOs) and other wireless communication providers in the UK.
2. The CMA has decided that a divestiture by Cellnex of those macro sites which overlap with CK Hutchison sites would be an effective and proportionate remedy to address the SLC and the resulting adverse effects that we have found.

Background

The reference

3. On 27 July 2021, the CMA, in exercise of its duty under section 33(1) of the Enterprise Act 2002 (the Act), referred the anticipated acquisition by Cellnex of the passive infrastructure assets in the UK of CK Hutchison (together, the Parties) for further investigation and report by a group of CMA panel members.

The Parties

4. Cellnex is a wireless telecommunications infrastructure and services company headquartered in Spain and operating across Europe, including in Austria, Denmark, Spain, Sweden, Switzerland, Italy, the Netherlands, France, Ireland, Poland, Portugal and the UK.
5. In the UK, Cellnex is an owner and operator of sites containing passive infrastructure used by mobile communication providers, primarily the UK's four mobile network operators (MNOs) but also other mobile communication providers.
6. Cellnex entered the UK market in 2016 through its acquisition of 540 sites and passive infrastructure from Shere Group Limited. In 2020, Cellnex acquired 7,113 developed macro sites through its acquisition of Arqiva Services Limited

(Arqiva) and became the largest wireless infrastructure provider (WIP) in the UK.

7. CK Hutchison is a multinational conglomerate headquartered in Hong Kong. Its activities include ports and related services, retail, infrastructure and telecommunications. In the UK, CK Hutchison operates an MNO, 3UK.
8. 3UK and another MNO, BT/EE, have an infrastructure-sharing joint venture (JV) to manage their shared networks, Mobile Broadband Network Limited (MBNL). MBNL was established in 2007 and operates [7,500-8,500] macro sites. 3UK also owns passive infrastructure assets outside of the MBNL JV.

The Merger

9. The Merger is one of six transactions whereby Cellnex is acquiring passive infrastructure assets from CK Hutchison. As well as in the UK, Cellnex has acquired assets in Austria, Denmark, Ireland, Italy, and Sweden. The five non-UK transactions have completed.
10. On completion of the Merger, Cellnex will acquire:
 - (a) The entire issued share capital of 3UK's passive infrastructure assets outside of the MBNL JV (held by TowerCo), which includes the following passive infrastructure assets:
 - (i) [100-200] developed macro sites that were previously owned by UK Broadband, a wholly-owned subsidiary of 3UK (the UKB Sites);
 - (ii) 2,600 monopoles which host, or will host, 3UK active wireless telecommunications equipment. The monopoles that have been constructed at completion will transfer to Cellnex at that time. The legal title in the remaining monopoles will transfer to Cellnex once they have been built; and
 - (b) the economic benefit of the interests to which 3UK is entitled in respect of [7,000 – 7,500] macro sites in the MBNL joint venture (the MBNL Sites). Cellnex will also bear the costs associated with these interests. At completion, the Parties will enter into three agreements which specify the nature of the economic benefit and associated costs and set out the legal framework for their transfer and oversight.
11. In addition, following the dissolution of the MBNL JV, scheduled to take place in 2031, 3UK will transfer legal title to a subset of the MBNL Sites to Cellnex, subject to a minimum of 3,000 sites and a maximum of half of the number of MBNL Sites to Cellnex (the Transfer Sites). The exact number and identity of

the Transfer Sites will be determined at the termination of the MBNL joint venture.

Industry background

12. Mobile communications services are a vital part of most people's lives in the UK, both for work and leisure. Consumers buy mobile services either from one of the UK's four MNOs (BT/EE, O2, Vodafone or 3UK) or from a mobile virtual network operator (MVNO) such as Sky or Virgin Mobile, that uses an MNO's network.
13. In order to provide their services, MNOs have UK-wide networks of physical infrastructure to support the combination of wireless and fixed technologies which are used to deliver their services. The physical infrastructure includes various types of tower structures which host MNOs' antennae, services such as power supplies and the land on which these structures are located. These towers or sites are referred to as 'passive' infrastructure while the antennae and other electronic equipment that the towers host are 'active' equipment.
14. MNOs obtain access to passive infrastructure from three main sources:
 - (a) Sites that are leased or owned and operated by the MNO itself;
 - (b) sites that are leased or owned and operated by the MNO in a JV with another MNO; and
 - (c) sites supplied by third-party WIPs.
15. While their mobile networks are mature, the MNOs continue to expand their coverage and capacity, including, since 2019, rolling out the latest generation of mobile technology, 5G.

Our findings

Relevant merger situation

16. An anticipated merger must meet two criteria to constitute a relevant merger situation (RMS) pursuant to section 23 of the Act:
 - (a) First, there must be arrangements in progress or in contemplation which will, if carried into effect, lead to two or more enterprises ceasing to be distinct; and
 - (b) second, either the UK turnover of the enterprise which is being acquired exceeds £70 million, or the enterprises which cease to be distinct supply

or acquire goods or services of any description and, after the merger, together supply or acquire at least 25% of all those particular goods or services of that kind supplied in the UK or in a substantial part of it. The merger must also result in an increment to the share of supply or acquisition (the share of supply test).

17. In terms of the first criterion:

- (a) The sale and purchase agreement between Cellnex and CK Hutchison Networks Europe Investments S.À R.L. of November 2020 provides that Cellnex will acquire the entire issued share capital of TowerCo upon completion of the Merger, resulting in Cellnex and TowerCo ceasing to be distinct.
- (b) The ancillary agreements to the sale and purchase agreement provide that Cellnex will acquire the economic benefit of the MBNL Sites. We consider that the arrangements in the round amount to material influence over the MBNL Sites, as defined by section 26 of the Act as being able 'directly or indirectly ... materially to influence the policy of a body corporate ... without having a controlling interest in that body corporate', resulting in Cellnex and the MBNL Sites ceasing to be distinct.
- (c) The ancillary agreements to the sale and purchase agreement provide that Cellnex will acquire the Transfer Sites on dissolution of the MBNL JV, resulting in Cellnex and the Transfer Sites ceasing to be distinct.

18. With regard to the second criterion, the combined turnover of TowerCo and the MBNL Sites (including the Transfer Sites) in the UK in 2019 exceeded £70 million. The share of supply test is also satisfied as Cellnex has a pre-Merger share of supply of at least 25% in the supply of access to developed macro sites and ancillary services to MNOs and other wireless communication providers in the UK, which will increase further as a result of the Merger.

19. The acquisition of TowerCo, the economic benefit of the MBNL Sites and subsequent acquisition of the Transfer Sites constitute a single commercial transaction and are interlinked and inter-conditional. Therefore, we consider that the Merger constitutes a single commercial transaction and results in a single RMS.

20. Therefore, we have found that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of an RMS under the Act.

Competitive effects

Counterfactual

Scope of the assessment

21. In order to assess the effects of the Merger, we have considered the prospects for competition with the Merger against what would have been the competitive situation without the Merger. This is the counterfactual. This is not a statutory test but rather an analytical tool used to answer the question of whether a merger gives rise to an SLC.
22. We select the most likely conditions of competition as the counterfactual against which to assess the merger. These may be the prevailing conditions of competition or conditions of competition that involve stronger or weaker competition between the merger firms. If two or more possible counterfactual scenarios lead to broadly the same conditions of competition, we do not need to select the particular scenario that leads to the counterfactual.
23. We need to determine what the most likely conditions of competition would have been absent the Merger. The fact that CK Hutchison's non-UK assets cannot now be sold to an alternative purchaser if the Merger does not go ahead because they have already been sold to Cellnex does not prevent us from considering counterfactual scenarios involving the sale of these assets.
24. So we have considered whether the sale of the remainder of CK Hutchison's passive infrastructure assets to Cellnex would have proceeded absent the Merger agreement to sell the UK assets to Cellnex.
25. On this point, we consider that the sale of the non-UK and UK assets formed part of an overall commercial transaction between the Parties. The evidence shows that, in the absence of agreement to acquire the UK assets, the overall deal between CK Hutchison and Cellnex – including in relation to the non-UK assets – would not have been done in its current form. As a result, the sale of the non-UK assets can be considered a consequence of the Merger within the meaning of our guidance.
26. On that basis, we conclude that our assessment of the counterfactual can consider the full set of strategic options open to CK Hutchison at the time it entered into the overall commercial transaction with Cellnex, which involved both the UK and non-UK assets. These options included an alternative purchaser acquiring CK Hutchison's UK assets either alone or as part of a wider portfolio including some or all of its other European passive infrastructure assets.

Our assessment of the counterfactual

27. We have found that, in both the UK and other jurisdictions, many owners of passive infrastructure assets have sought to realise an uplift in the value of those assets through some form of commercialisation of them.
28. CK Hutchison reorganised its European passive infrastructure assets into a separate tower company between 2019 and 2020 in order to realise an uplift in their value. It also identified a need to invest in 3UK, its UK MNO, including in the rollout of its 5G network. It submitted to us that the Merger would raise the necessary proceeds for this investment.
29. In our view, both the uplift in value and the realisation of some or all of that value as cash proceeds provided CK Hutchison with a strong incentive to commercialise its passive infrastructure assets.
30. We considered the options available to CK Hutchison to achieve its objectives absent the Merger. We considered the credibility of the alternative options available to it in order to inform our view of the overall likelihood of a counterfactual in which CK Hutchison's passive infrastructure would have been operated in direct competition with that of Cellnex.
31. The evidence available to us shows that CK Hutchison had a range of credible opportunities to commercialise its assets. We found that passive infrastructure assets are generally considered to be attractive and highly marketable assets, and we have identified a number of businesses with a strong interest and established track record in investing in such assets, including in the UK. Other owners of similar assets have found ways to realise an uplift in their value and have taken various approaches to doing so, including outright sale, obtaining minority investments or establishing joint ventures. In addition, the UK is an attractive market for investors in such assets and CK Hutchison's UK assets represented one of a limited number of opportunities for investors to acquire a substantial interest in the UK market.
32. CK Hutchison itself considered various options to realise the uplift in the value of its passive infrastructure assets and generate cash proceeds. Some options were not mutually exclusive and could have been pursued sequentially.
33. In this assessment we are not limited to considering alternative scenarios that would have occurred at exactly the same time as the developments that gave rise to the Merger. Instead, we have considered the options available over an extended period of time, during which CK Hutchison's commercial incentives would be to find a way to realise an uplift in value from its passive assets and obtain cash proceeds if it could. We have seen no evidence that the sales

process that CK Hutchison ran was considered by it to be a 'one shot' process that excluded the pursuit of other options (either individually or in combination) at later points in time and we do not consider that it would have been.

34. We have found that credible alternative purchasers were interested in acquiring the assets within the timeframe of the sales process that CK Hutchison ran. We also note that its alternative options were not limited to the outcome of the sales process that it ran and that, had that sales process not resulted in an acceptable outcome, it would have had a variety of alternative ways in which it could have realised its commercial objectives. In particular, it could have run another sales process and/or made changes to the proposed transaction structure so as to appeal to the wider range of potential acquirers of the assets.
35. We consider that a sale of CK Hutchison's UK assets (either individually or as part of a wider package of assets) to an alternative purchaser with the incentive to operate them in direct competition with Cellnex's passive infrastructure assets would have been the most likely outcome absent the Merger.
36. Our view is that such a sale could have been made either within CK Hutchison's original sales process or through a modified and/or extended sales process that it would have had strong incentives to pursue and would have taken place in the short- to medium-term.
37. We consider that, absent the Merger, even if alternative purchasers had not been willing to transact [X], CK Hutchison might have been willing to transact [X] and which it might have accepted.
38. We consider that any alternative purchaser would have obtained control over CK Hutchison's UK assets in the substantively same sequence as envisaged by the Parties pursuant to the terms of the Merger, that is: the Unilateral Sites on completion of the transaction; legal title to the Transfer Sites on dissolution of MBNL, scheduled for 2031 and within the timeframe considered in our assessment of the competitive effects of the Merger.
39. The evidence available to us shows that CK Hutchison gave some consideration to options other than a sale. However, given that it focussed on a sale, the evidence available to inform our assessment of these other options is more limited.
40. The evidence also shows that CK Hutchison considered some options to be less attractive than a sale of the UK assets and some may have raised practical difficulties so could ultimately not have been pursued. However, we found that these alternatives were regarded as credible options by other

market participants, and we believe they could have been given more detailed consideration by CK Hutchison (in light of its incentives) had it encountered difficulties selling the UK assets.

41. We have seen no evidence to suggest that CK Hutchison gave serious consideration to continuing to own and operate its UK passive infrastructure assets as it had before.
42. While we consider it is more likely that CK Hutchison would have sold its UK assets, either through the original sales process or a modified and/or extended sales process, we consider that, in the absence of a sale, other options could have been pursued that would, if successfully executed, have resulted in CK Hutchison's passive infrastructure assets in the UK being operated in competition with Cellnex.

Conclusion on counterfactual

43. We have assessed the likelihood of CK Hutchison realising its strong incentives to achieve a significant uplift in the value of its UK passive infrastructure assets and realise cash proceeds. We have found that it had a number of different options available to it to do so.
44. We also assessed the incentives of potential buyers to find an approach which worked, the existence and credibility of potential counterparties with whom CK Hutchison could engage and the strategic and commercial incentives which CK Hutchison had to do so.
45. We considered the likelihood that CK Hutchison would instead be unable to pursue any of the options we have identified, or that, having done so, it would nonetheless have preferred to retain the UK passive infrastructure assets in their current form.
46. We conclude that the most likely counterfactual in this case is one in which there would have been stronger conditions of competition between Cellnex and the owner of CK Hutchison's UK assets. This is because we consider that the most likely outcome, absent the Merger, is that CK Hutchison's UK passive infrastructure assets would have been operated in direct competition with Cellnex's passive infrastructure assets. This outcome would be achieved through the successful pursuit by CK Hutchison of one or more of the options that were available to it to commercialise its passive infrastructure assets.

Market definition

47. Market definition provides a framework for the CMA's analysis of the competitive effects of the merger. The relevant market (or markets) is that within which the merger may give rise to an SLC and contains the most significant competitive alternatives available to the customers of the merged companies.
48. On the basis of the Parties' submissions on product market definition and our own assessment, we found that the effects of the Merger should be considered within the market for the supply of access to developed macro sites (including BTS sites) and ancillary services to MNOs and other wireless communication providers.
49. Also, on the basis of the Parties' submissions and our own assessment, we consider that the geographic market is national.

Conclusion on market definition

50. We therefore conclude that the relevant market for the assessment of the Merger is the supply of access to developed macro sites and ancillary services to MNOs and other wireless communication providers in the UK.

Competitive assessment

Nature of competition

51. The market for the supply of access to developed macro sites is complex and has a number of unusual features. Before we assess the impact of the Merger on competition, we first consider in more detail the nature of competition in this market.
52. MNOs are the main customers for developed macro sites, although there are also other types of customers. The MNO joint ventures (CTIL and MBNL) are also major customers of WIPs, as well as supplying their own sites and, in CTIL's case, becoming more of a direct competitor of WIPs.
53. In this market, customers typically sign up to long-term (around ten to 20 years) framework contracts which provide certainty to customers on the price and service levels they are likely to receive for both their existing and any additional tenancies they may require over the term of the agreement. In return, long-term contracts provide suppliers with predictable, committed revenues for the duration of the contracts.

54. We found that the drivers of choice of macro sites are similar amongst MNOs and other customers. The evidence available to us shows that these are geographic location of sites, price, scale of the supplier and its track record.
- (a) The geographic location of a site is important since the location will determine the coverage that can be provided and the extent to which the site can be incorporated into the rest of the network without disruption, or the extent of any disruption.
 - (b) Prices of existing sites in a WIP's portfolio are primarily agreed in long-term national framework contracts with suppliers, which are periodically renewed. These agreements are an important focus of our competitive assessment.
 - (c) Suppliers with a large number of existing sites are likely to be present in more locations and therefore are likely to be better placed to meet customers' needs with an existing site. Beyond this, we have not seen sufficient evidence to suggest that scale will significantly affect other aspects of suppliers' competitiveness in this market.
 - (d) A supplier's track record is important to customers, in particular when they require the building of new sites, but this is unlikely to be linked only to the supplier's existing scale in the UK.
55. We assessed the implications of these factors, which determine how competition works in this market for existing sites and for new site opportunities. In doing so, we took into account of the fact that while Cellnex may have been the only large WIP competing to retain sites in the past, it is likely to face competition from CTIL when large contracts come to be renewed in the future.
56. This situation, in which a large WIP faces competition from several other large WIPs, has not arisen in the UK before. This makes it more challenging for third parties, who have no experience against which to assess how an owner of the CK Hutchison Assets would compete with Cellnex in practice, to provide informed views on the impact of the Merger.
57. We also found that switching macro sites is costly and, as a result, does not occur often or unless tenants are required by a landlord to quit. As a result of the existence of high switching costs, being a customer's current supplier of existing sites provides a significant incumbency advantage over rivals seeking to attract those customers to alternative sites.
58. However, while a customer running a tender for supply of a large number of sites is unlikely to want or be able to migrate all of its existing sites away from

its current supplier, we have seen evidence that it will use the threat of switching some sites to alternative suppliers to improve the terms that it receives for all sites from its current supplier. Customers may also make use of a site churn allowance to reduce their dependency on their current supplier by switching a proportion of sites to another supplier over the term of the contract.

Competitive assessment

59. We assessed the Merger's impact on competition, using the counterfactual set out above of stronger conditions of competition between the owner of the CK Hutchison Assets (these are the Transaction Sites under alternative ownership in the counterfactual) and Cellnex.
- *Our approach to the assessment of competitive dynamics in an evolving market*
60. In light of our counterfactual and the long-term nature of framework contracts, as set out above, we have undertaken a forward-looking assessment, which looks at the market over the longer term, including after Cellnex gains control of the Transfer Sites which is scheduled to be in 2031.
61. We have considered a wide range of evidence from several sources in order to come to a view on the impact of the Merger in the market. We have placed limited weight on the lack of explicit customer concerns because of our more competitive counterfactual and the fact that the Merger would bring about a permanent change in market structure with potential effects well beyond the duration of any existing customer contracts.
- *Pre-Merger market outcomes*
62. As set out above, we found that a larger supplier would be more likely to have existing overlap sites with any other supplier. Assessing the historical evidence of suppliers' portfolios therefore provides us with a starting point for understanding their relative strength and the overall extent of competition in the market, albeit one that must be supplemented with a consideration of ongoing industry developments. Until the commercialisation of CTIL at the beginning of 2021, Cellnex was the only large WIP in the UK, with a share of [80-90]% while the next largest competitor had a share of only [5-10]%, and no other competitor had a meaningful share of supply.
63. Taking into account CTIL's commercialisation, we found that the market would still be likely to remain highly concentrated by 2031 with the Merged Entity and CTIL each having a share of [40-50]%.

- *Closeness of competition between Cellnex and the owner of the CK Hutchison Assets*

64. We have found that, in the counterfactual, the owner of the CK Hutchison Assets would be a close competitor to Cellnex. It would be the third largest operator in the market, after CTIL and Cellnex, with a large portfolio of existing sites and an extensive geographic footprint.
65. As a result, the CK Hutchison Assets would represent a significant proportion of the aggregate overlap of sites which are capable of substituting for Cellnex sites. We have found that competition at overlap sites can provide a significant competitive constraint on the price of all sites, provided there is scope to accommodate additional tenants on them.
66. A very significant proportion of the MBNL Sites that overlap and a lesser proportion of the Unilateral Sites that overlap could be used to compete with Cellnex for additional tenants.
67. Beyond this, Cellnex and the owner of the CK Hutchison Assets would not be particularly close competitors when competing on the provision of BTS or for opportunities arising from network redesign as there is only limited evidence to suggest that scale significantly affects suppliers' competitiveness in this market and as discussed below, BTS supplied by other WIPs and customers' self-build would be strong constraints on the Merged Entity's BTS offering.
68. In the counterfactual, the owner of the CK Hutchison Assets would therefore be a close competitor to Cellnex at those locations where their sites overlap and the Merger would result in the removal of the CK Hutchison Assets and the loss of a significant competitive constraint on Cellnex.

- *Competition from alternative suppliers*

69. CTIL will become an increasingly significant constraint on the Merged Entity in future and will be able to compete for its shareholder MNOs and for other customers with its extensive portfolio of existing sites.
70. Other WIPs exercise some competitive constraint, but they all have a much smaller portfolio of existing sites. The scale and therefore constraint imposed by other WIPs is unlikely to increase significantly in future.
71. We have found that both BTS by WIPs and customers' self-build will be relatively weak constraints on the Merged Entity's existing sites. But we consider that both can exercise a significant constraint on the Merged Entity's BTS offering: there are several suppliers of BTS services that would be well

placed to compete with it and it would be further constrained by customers' ability to self-build.

Conclusion on competitive assessment

- 72. We conclude that, subject to our findings on countervailing factors, the Merger may be expected to result in an SLC as a result of horizontal unilateral effects, arising from overlaps between the Parties, in the supply of access to developed macro sites and ancillary services to MNOs and other wireless communication providers in the UK.
- 73. We consider that, while the consequences that might arise from a loss of competition arising from the Merger may not be immediately visible to the MNOs and their customers, even small increases in the costs of passive infrastructure or a deterioration in quality would be likely to persist over many years. The cumulative effect of these, which we would expect to be borne by consumers of mobile services, could be significant.

Countervailing factors

- 74. Countervailing factors – barriers to entry and/or expansion and/or rivalry-enhancing efficiencies - may prevent or mitigate any SLC arising from a merger.

Entry and/or expansion

- 75. Our competitive assessment has taken into account the future plans of suppliers of macro sites which we consider will be pursued irrespective of whether the Merger proceeds. We also consider whether, in response to the Merger, there may be additional entry or expansion by third parties which would be timely, likely and sufficient to mitigate or prevent the SLC from arising.
- 76. We have found that, while the barriers to entering the market at small scale are low, as evidenced by the existence of several small WIPs in the UK market, the barriers to expansion are considerably higher. This is because there are few, if any, opportunities for smaller WIPs to be able to expand through either purchase of a large portfolio of existing sites (as Cellnex has been able to do through its transaction with Arqiva and with the Merger) or through meeting demand for new sites using BTS.
- 77. We conclude that barriers to entry and expansion are such that it is not likely that entry or expansion of sufficient scale would occur in a timely and

sufficient manner to mitigate or prevent an SLC arising as a result of the Merger.

Rivalry-enhancing efficiencies

78. The Parties submitted that Cellnex expects to realise a number of revenue and cost synergies from the Merger. However, the Parties have not submitted that there would be any synergies that would be passed through to customers and that we should consider as rivalry-enhancing efficiencies in our assessment.
79. We have concluded that it is not likely that any rivalry-enhancing efficiencies arise from the Merger which would prevent an SLC from arising.

Remedies

80. Having found an SLC, we are required to consider what, if any, action should be taken to remedy, mitigate or prevent that SLC or any adverse effect resulting from the SLC. In line with our statutory duty, we have sought to achieve as comprehensive a solution as is reasonable and practicable to address the SLC and any adverse effects resulting from it.

Remedy effectiveness

81. We have considered, including consulting with the Parties and third parties, two remedy options to the SLC we have found:
- (a) Prohibition of the Merger: we would prohibit the acquisition by Cellnex of the passive infrastructure assets in the UK of CK Hutchison so that the Merger would not take place; and
 - (a) The divestiture of a package of developed macro sites and ancillary services.
82. The Parties proposed the divestiture of approximately [1,100-1,300] Cellnex sites which overlap with the Transaction Sites. The Parties identified overlaps of existing sites and have proposed a method for identifying those where the transaction site is, as yet unknown due to being held within the MBNL JV or being an unbuilt site. This is the 'Proposed Remedy'.
83. We have assessed the Parties' Proposed Remedy alongside prohibition of the Merger.
84. We have concluded that prohibition would prevent the creation of the RMS and thereby prevent the SLC we have identified from arising. It would

therefore be an effective remedy which would comprehensively address the SLC that we identified and prevent any of its adverse effects.

85. We have concluded that the Proposed Remedy would also be effective. This is on the basis of our assessment that:

- (a) Its scope addresses the SLC we have found, as it includes Cellnex sites at every potential location of overlap with the CK Hutchison sites;
- (b) it is likely that a suitable purchaser can be found;
- (c) the divestiture can be completed within our standard divestiture time period; and
- (d) the risks, for example relating to the transfer of customer contracts and landlord agreements, of a carve-out divestiture can be overcome, including by appointment of a Monitoring Trustee.

Remedy proportionality

86. Having found two effective remedies to the SLC, we have considered the costs and proportionality of each. We have concluded that the Proposed Remedy would be less onerous as it would allow the Merger to proceed.

87. This conclusion included our having regard to the effects of remedial action on any relevant customer benefits (RCBs). Having considered the Parties' submissions on these, we have concluded that there is insufficient evidence that the claimed RCBs are merger-specific. We also do not consider that the Parties have provided convincing evidence of the nature and scale of the claimed RCBs to satisfy the standard set out in our guidance. We note the Parties' submission that the claimed RCBs would materialise if the Merger were to be approved subject to the Proposed Remedy.

Conclusion on remedies

88. We conclude that the Proposed Remedy would be both effective and proportionate to address the SLC and resulting adverse effects we have found.

89. We retain prohibition of the Merger as a fallback remedy, should the Proposed Remedy fail to be implemented within the divestiture period.

Conclusions

90. We have found that the anticipated acquisition by Cellnex of the passive infrastructure assets in the UK of CK Hutchison may be expected to result in an SLC as a result of horizontal unilateral effects arising from overlaps between the Parties in the supply of access to developed macro sites and ancillary services to MNOs and other wireless communication providers in the UK.
91. We have decided that a divestiture by Cellnex of approximately [1,100-1,300] macro sites would be an effective and proportionate remedy to address the SLC and the resulting adverse effects that we found.

Findings

1. The reference

- 1.1 On 27 July 2021, the Competition and Markets Authority (CMA), in exercise of its duty under section 33(1) of the Enterprise Act 2002 (the Act), referred the anticipated acquisition (the Merger) by Cellnex UK Limited, part of the Cellnex group (Cellnex) of the passive infrastructure assets in the UK of the CK Hutchison group (CK Hutchison) (together, the Parties) for further investigation and report by a group of CMA panel members (the Inquiry Group).
- 1.2 In exercise of its duty under section 36(1) of the Act, the CMA must decide:
- (a) Whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
 - (b) if so, whether the creation of that relevant merger situation may be expected to result in a substantial lessening of competition (SLC) within any market or markets in the United Kingdom for goods or services.
- 1.3 We are required to prepare and publish a final report by 7 March 2022.
- 1.4 Our terms of reference, along with information on the conduct of the inquiry are set out in Appendix A.
- 1.5 This document, along with its appendices, constitutes the Inquiry Group's findings, published and notified to the Parties in line with the CMA's rules of procedure.¹ Further information can be found on our webpage.

2. The Parties, the Merger and its rationale

Introduction

- 2.1 In this chapter, we provide an overview of:
- (a) The Parties' operations and key financial information;
 - (b) The Merger; and

¹ Rules of procedure for merger, market and special reference groups: CMA17, paragraphs 11.1 to 11.7.

- (c) The rationale for the Merger for Cellnex. CK Hutchison's rationale is set out in Chapter 5.

The Parties

Cellnex

- 2.2 The Cellnex Group² is a wireless telecommunications infrastructure and services company headquartered in Spain and listed on the Spanish stock exchange. It operates across Europe, including in Austria, Denmark, Spain, Sweden, Switzerland, Italy, the Netherlands, France, Ireland, Poland, Portugal and the UK.
- 2.3 The Cellnex Group provides infrastructure management services for wireless telecommunications through the following business segments:
- (a) Telecom infrastructure services (79% of 2020 revenue).
 - (b) Broadcasting networks (14%).
 - (c) Network services and others (7%).³
- 2.4 In the UK, Cellnex is an owner and operator of sites containing passive infrastructure used by wireless communication providers. All of Cellnex's revenue in the UK is generated from telecom infrastructure services.⁴
- 2.5 Cellnex's core customers are mobile network operators (MNOs), although its passive infrastructure is also used by other communication providers who are not MNOs (see Chapter 3 for details of these).
- 2.6 Cellnex entered the UK market in 2016 through its acquisition of 540 sites and passive infrastructure from Shere Group Limited.
- 2.7 Through its acquisition of Arqiva Services Limited in 2020, Cellnex acquired 7,113 developed macro sites. Arqiva was a large and well-established supplier of access to developed macro sites in the UK.⁵ Cellnex acquired Arqiva's telecommunications infrastructure division only, so Arqiva still operates as a separate entity in the provision of broadcasting and other infrastructure.

² Cellnex Telecom S.A. and its subsidiaries.

³ [Cellnex Group Annual Report 2020](#), page 23.

⁴ [Cellnex Group Annual Report 2020](#), page 129.

⁵ Cellnex's acquisition of Arqiva was reviewed and cleared at Phase 1 by the CMA in 2020. See [Anticipated acquisition by Cellnex UK Limited of Arqiva Services Limited](#) (2020).

- 2.8 In 2020, Cellnex had worldwide revenue of £1,550 million and UK revenue of £250 million.
- 2.9 In November 2021, Cellnex Telecom SA had a market capitalisation of €35.81 billion.⁶

CK Hutchison

- 2.10 The CK Hutchison Group⁷ is a multinational conglomerate headquartered in Hong Kong and listed on the Stock Exchange of Hong Kong. The largest shareholder (with a circa 26% shareholding) is Li Ka-Shing Unity Trustee Company Limited.
- 2.11 The CK Hutchison Group has four core business areas:
- (a) Ports and related services (8% of global revenue and 5% of European revenue);
 - (b) retail (40% and 40%);
 - (c) infrastructure (13% and 14%); and
 - (d) telecommunications (24% and 41%).^{8,9}
- 2.12 In the UK, CK Hutchison's telecommunications division operates an MNO, 3UK. 3UK supplies [10-20]% of mobile customers in the UK¹⁰ which is the smallest market share of the four MNOs.
- 2.13 Between 2019 and July 2020, CK Hutchison conducted an internal reorganisation of its telecommunications division in Europe. As part of this reorganisation, CK Hutchison set up CK Hutchison Networks Holdings Limited to group its European tower assets into separately managed entities or divisions, where each entity manages passive infrastructure assets in its respective country.
- 2.14 In the UK, in October 2020 CK Hutchison incorporated CK Hutchison Networks (UK) Limited (TowerCo) to hold 3UK's Unilateral Sites. TowerCo is now a wholly owned subsidiary of CK Hutchison Networks Europe

⁶ [FT.com](#) (accessed 8th November 2021)

⁷ CK Hutchison Holdings Limited and its subsidiaries, including CK Hutchison Networks Europe Investments S.À.R.L., CK Hutchison Group Telecom Holdings Limited, Hutchison 3G UK Holdings Limited, 3UK and CK Hutchison Networks (UK) Limited.

⁸ CK Hutchison Group Annual Report 2020, page 4.

⁹ Energy and Finance make up the remaining 15% of global revenue.

¹⁰ Anticipated joint venture between Liberty Global Plc and Telefónica S.A. Final Report, 20 May 2021, page 140.

Investments S.À R.L. which, in turn, is a wholly owned subsidiary of CK Hutchison Networks Holdings Limited.

- 2.15 TowerCo was established for the purpose of holding 3UK's passive infrastructure assets in the UK outside of Mobile Broadband Network Limited (MBNL) which is an infrastructure sharing joint venture between 3UK and BT/EE to manage their shared networks. MBNL was established in 2007 and currently operates [7,000 – 7,500] sites.
- 2.16 TowerCo controls [100-200] developed macro sites previously owned by UK Broadband, a wholly-owned subsidiary of 3UK, and will control a further 2,600 new monopoles once they have all been built ([§] have been built as at 4 February 2022) to host its network.
- 2.17 In 2020, CK Hutchison's worldwide revenue was £40.546 billion and its UK revenue in telecommunications operations revenue was approximately £2.355 billion.
- 2.18 In November 2021, the CK Hutchison Group had a market capitalisation of HK\$199.30 billion.¹¹

The Merger

- 2.19 The Merger is one of six transactions whereby Cellnex is acquiring passive infrastructure assets from CK Hutchison. As well as in the UK, Cellnex has acquired assets in Austria, Denmark, Ireland, Italy, and Sweden.
- 2.20 CK Hutchison told us that these transactions were negotiated and signed as part of the same deal, but they were structured as a series of transactions because each country has different legal and regulatory requirements.
- 2.21 The Parties told us that each transaction is subject to its own terms and conditions and completion of each transaction is on a standalone basis as each transaction is independent and not inter-conditional upon the others.
- 2.22 Cellnex told us that all individual transactions, apart from the UK, have already closed. Completion of the transactions in Austria, Denmark and Ireland took place in December 2020; completion of the transaction in Sweden took place in January 2021; and completion of the transaction in Italy took place in June 2021.

¹¹ [FT.com](#) (accessed 8 November 2021)

- 2.23 In relation to the UK assets, Cellnex, as buyer, and CK Hutchison Networks Europe Investments S.À R.L. (CK Hutchison), as seller, entered into a sale and purchase agreement on 12 November 2020.
- 2.24 On completion of the Merger:
- (a) Cellnex will obtain the entire issued share capital of TowerCo from CK Hutchison. TowerCo holds or will hold:
 - (i) [100-200] developed macro sites that were previously owned by UK Broadband, a wholly-owned subsidiary of 3UK (the UKB Sites);
 - (ii) 2,600 monopoles (the Streetworks Sites) consisting of [X] completed monopoles¹² (as at 4 February 2022) and [X] monopoles that 3UK is currently building but which have not yet been completed (as at 4 February 2022).
 - (b) Cellnex (through its subsidiary OnTower) will obtain the economic benefit of the interests to which 3UK is entitled in respect of approximately [7,000-8,000] sites that are the subject of the MBNL joint venture (the MBNL Sites).¹³ Cellnex will also bear the costs associated with these interests.
 - (c) In addition, following dissolution of MBNL, 3UK will transfer legal title to approximately half of the MBNL Sites, including certain assets¹⁴ located on those sites, (subject to a minimum of 3,000 sites and a maximum of half of the number of MBNL Sites) to Cellnex in accordance with the allocation and transfer provisions of the [X] (the Transfer Sites).¹⁵ The exact number and identity of the Transfer Sites will be determined once the processes specified in the MBNL joint venture (JV) Agreements for the termination of the MBNL joint venture are completed. The default term of the MBNL joint venture expires on 31 December 2031.
- 2.25 The UKB Sites and the Streetworks Sites are referred to collectively as the Unilateral Sites. The Unilateral Sites and the Transfer Sites are referred to collectively as the Transaction Sites or the CK Hutchison Assets.

¹² See Chapter 3 for definition of monopoly.

¹³ The MBNL Sites also include [X]. The MBNL Sites do not include: [X].

¹⁴ [X] these assets include [X].

¹⁵ The remaining [X].

TowerCo

- 2.26 TowerCo management accounts for 2020 show that it had revenue of £[REDACTED] and EBITDA of £[REDACTED].
- 2.27 3UK pays TowerCo a service fee on a per-site basis for the use and management of the Unilateral Sites that are currently in existence. The service fee is agreed on [REDACTED].
- 2.28 At completion of the Merger, the CK Hutchison group entities and a Cellnex group entity will enter into three agreements which specify the nature of the economic benefit and associated costs and set out the legal framework for their transfer and oversight.

Preparation for the transaction

- 2.29 In August 2019, CK Hutchison announced an internal reorganisation, which set up CK Hutchison Networks Holdings Limited.
- 2.30 CK Hutchison told us that the announcement of the reorganisation made it clear that it was open to proposals to monetise the assets including a sale. After the announcement, it was approached by several parties including Cellnex, [REDACTED].¹⁶

Negotiations with Cellnex

- 2.31 CK Hutchison told us that it held the following discussions with Cellnex:
- (a) In [REDACTED], Cellnex delivered a management presentation to CK Hutchison and CK Hutchison shared high level business plans with Cellnex and in [REDACTED], Cellnex held follow up due diligence sessions.
 - (b) In [REDACTED], Cellnex sent a non-binding offer to CK Hutchison.
 - (c) On [REDACTED], the Parties signed an exclusivity agreement; discussions continued.
 - (d) On 9 November 2020, the Parties announced they were in discussions.
 - (e) On 12 November 2020, the Parties signed the transaction documents for all of the deals in the UK and Europe.

¹⁶ See Chapter 5 for details

Consideration

- 2.32 CK Hutchison's European tower assets were valued [X].
- 2.33 The consideration for the Merger involves a mix of cash and Cellnex shares whereas the transactions in the other European countries involved cash consideration only.
- 2.34 The consideration for the acquisition of TowerCo will be €[X] in cash and shares in Cellnex equal to €[X] (which constituted around [X] of Cellnex's share capital). Consideration for the interests in the MBNL Sites and legal title over the Transfer Sites will be €[X] in cash.
- 2.35 CK Hutchison told us that the [X].
- 2.36 CK Hutchison also told us that [X].
- 2.37 Cellnex told us, consistent with the submission from CK Hutchison above, that [X].

Merger rationale

Cellnex

- 2.38 Cellnex told us that its strategy relating to the Merger has three parts:
- (a) Expansion: growing its geographical footprint through M&A;
 - (b) Densification: growing its presence in existing markets; and
 - (c) Extension: diversifying into adjacent assets such as indoor solutions, fibre, and shared active equipment.
- 2.39 Cellnex told us that its rationale for the Merger was:
- (a) An opportunity for it to expand its presence in the UK to increase its customer base and revenue.
 - (b) To enhance its platform to drive future investment to support:
 - (i) Deployment of 5G networks;
 - (ii) Expansion of rural coverage in the UK; and
 - (iii) Diversification into other business lines.

- 2.40 Cellnex told us that the Merger was consistent with its business strategy of expanding its operations by acquiring tower operators and large portfolios of sites rather than through organic growth.
- 2.41 Cellnex told us that the UK tower market is mature in the sense that MNOs have extensive coverage already (see Chapter 3 for details), and organic growth opportunities are therefore (and are expected to remain) limited.
- 2.42 The Parties told us that Cellnex, as an independent WIP that was acquiring sites that were not currently operated by WIPs, would increase the likelihood that co-location¹⁷ occurred on those sites, to the extent feasible.
- 2.43 Cellnex told us that it expected the following synergies to be realised from the Merger:
- (a) [REDACTED]:
- (i) [REDACTED]¹⁸ [REDACTED]
- (ii) [REDACTED]
- (iii) [REDACTED]
- (b) [REDACTED]:¹⁹,
- (i) [REDACTED]
- (ii) [REDACTED].
- (iii) [REDACTED]²⁰ [REDACTED]

CK Hutchison

- 2.44 CK Hutchison's rationale for the Merger is set out in Chapter 5.

¹⁷ Co-location is when more than one network operator uses the same passive infrastructure asset (e.g. a tower) to host their active equipment. Co-location can therefore offer the opportunity for more income to be made from a single asset than single occupation of the asset would.

¹⁸ [REDACTED]

¹⁹ Note that overlap in site locations between Cellnex and the Transaction sites is explored in Chapter 8

²⁰ PoPs refer to points on a network where active equipment is hosted on a passive infrastructure asset

3. Industry background

Introduction

- 3.1 This chapter sets out relevant background information on passive infrastructure assets for mobile telecommunications. Passive infrastructure assets are a key input into the provision of retail mobile telecommunications services and are the focus of this Merger.
- 3.2 Mobile communications services are a vital part of most people's lives in the UK, both for work and leisure. Consumers buy mobile services either from one of the UK's four MNOs (EE (BT/EE), O2, Vodafone or 3UK) or from a mobile virtual network operator (MVNO) such as Sky or Virgin Mobile, that uses an MNO's network.
- 3.3 Together the four MNOs supply around 90% of the retail mobile customers in the UK, with the remainder being supplied by around 150 MVNOs, including Virgin Mobile and Sky Mobile.²¹
- 3.4 In order to provide their services, MNOs have UK-wide networks of physical infrastructure to support the combination of wireless and fixed telecom technologies which are used to deliver their services. The physical infrastructure includes various types of tower structures which host MNOs' antennae and services such as power supplies.

Passive and active infrastructure for mobile networks

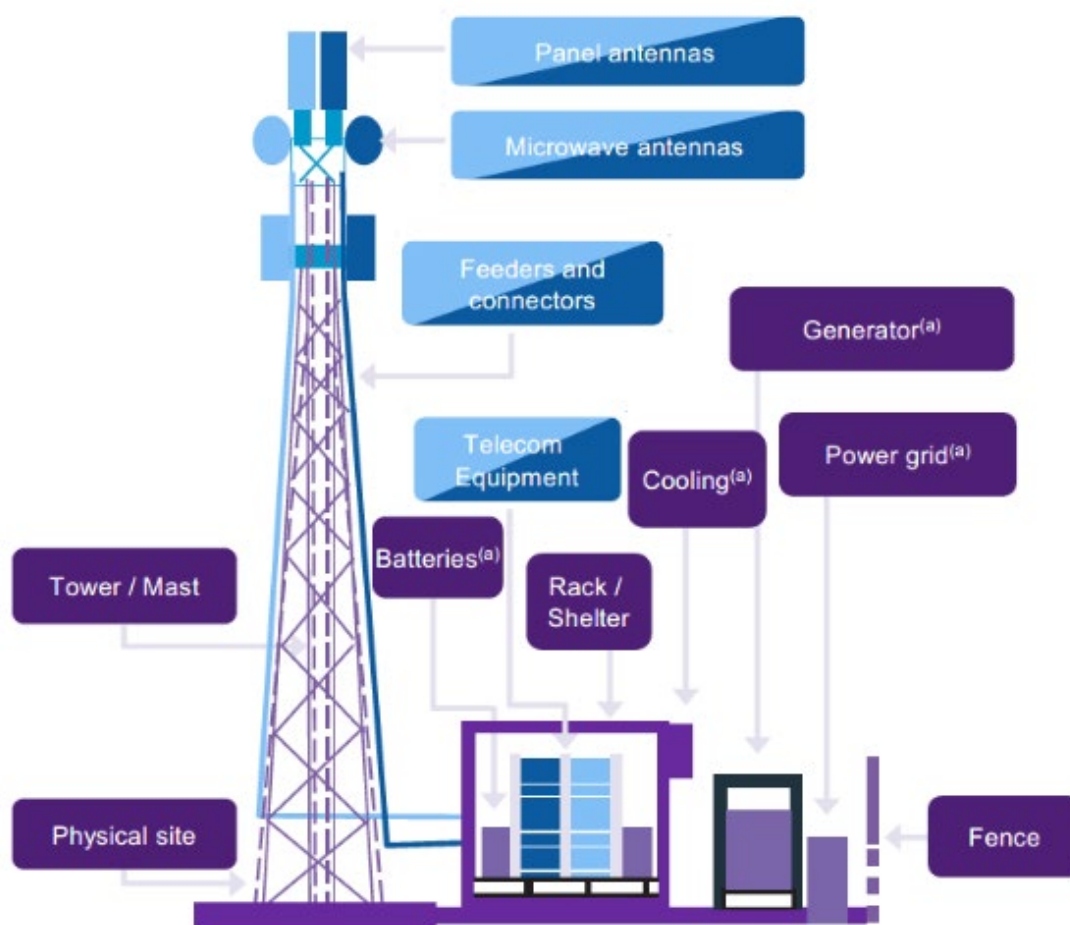
Types of infrastructure

- 3.5 MNOs use different infrastructures to deliver their services but there are broadly two types of infrastructure:
- (a) Passive infrastructure, such as towers, poles, power supplies, fences and cabinets; and
 - (b) Active infrastructure, such as radio antennae, cables and other equipment.
- 3.6 The difference between passive and active infrastructure is shown in the diagram of a tower in Figure 3-1 below. The purple elements are passive

²¹ [Liberty Global plc and Telefonica SA Final report](#), page 8.

infrastructure, and the remainder (with diagonal lines) are active infrastructure.

Figure 3-1: Diagram of passive and active infrastructure on a tower



Source: [X]

- 3.7 Passive infrastructure enables signals from the active equipment to be sent in both directions between mobile handsets and the active equipment located on a base station/tower. These then link, via either microwave, the MNO's own fixed network or a line leased from another operator, to the core MNO network. Passive infrastructure assets are therefore required by MNOs to enable them to provide both coverage (the availability of a signal at different locations) and capacity (the ability for multiple users to communicate when a signal is available) to their customers.
- 3.8 Passive infrastructure can take several forms, such as purpose-built towers, rooftops, monopoles, lamp posts or other street furniture. Monopoles are single-pole structures that are typically used in urban areas. Towers are taller lattice-type structures that are able to support more equipment than monopoles. The difference can be seen in Figure 3-2 below.

Figure 3-2: Example of a monopole structure (left) and a tower structure (right)



Source: [X]

- 3.9 Towers that are shared and can be shared by multiple tenants provide for multiple revenue streams and for costs to be spread across tenants.
- 3.10 Passive infrastructure also comprises the following types of equipment:
- (a) Macro sites host high power macrocells²² and provide broad coverage. They are generally sites on tower structures, rooftops or monopoles.
 - (b) Micro sites (also called sub-macro sites) that host lower power microcells and fill in coverage in ‘gaps’ left between macrocells or provide additional capacity in high use areas (such as in urban locations). Micro sites include small cell sites and distributed antennae systems (DAS):
 - (i) Small cells are types of micro sites that are primarily deployed outside, such as on street furniture like lampposts and bus shelters. Small cells have lower radio power, capacity, coverage and ability to deliver multiple technologies and spectrum than macro sites, meaning that a number of small cells would be required to replace one macro site. Small cells are not suitable for coverage beyond about 300 square metres.
 - (ii) DAS are primarily deployed inside buildings, for example within football stadiums, train stations and shopping centres. DAS, similar to small cells, also have lower radio power, capacity and coverage

²² A macrocell is a cell used in cellular networks with the function of providing radio coverage to a large area. A macrocell differs from a microcell by offering a larger coverage area and having higher power output.

compared to macro sites and are suitable only for similarly limited coverage areas to small cells.

3.11 Passive infrastructure is also used by other organisations who require wireless coverage and capacity for their services. Examples of these include Airwave, Aquila (Air Traffic Management) and Network Rail. We refer to these as 'non-MNOs'. They use passive infrastructure to host their communications equipment, and their need for these sites is primarily fulfilled through WIPs.²³

3.12 As set out in Chapter 6, the focus of this inquiry is on macro sites.

Providers of passive infrastructure

3.13 MNOs obtain their passive infrastructure from three main sources:

- (a) Sites that are leased or owned and operated by the MNO itself;
- (b) Sites that are leased or owned and operated by the MNO in a JV with another MNO.
 - (i) Both (a) and (b) above are considered to be 'self-supply' by the MNO. Where a new site is built in this process, it is known as self-build.
- (c) Sites supplied by third party WIPs.
 - (i) Where a new site is built by a WIP for an MNO, this is known as build to suit (BTS)

Overview of developed macro sites in the UK

3.14 Table 3-1 shows the number of developed macro sites in the UK (2020).

²³ [Cellnex Arqiva full text decision](#), paragraph 106.

Table 3-1: Number of sites in the UK owned by MNOs, MNO JVs and WIPs

		<i>Number of sites</i>
MNOs:		
a.	BT/EE	[X]
b.	3UK	[X]
c.	Vodafone	[X]
d.	O2	-
MNO JVs:		
a.	MBNL	[X]
b.	CTIL	[X]
WIPs ²⁴ :		
a.	Cellnex	[X]
b.	WIG	[X]
c.	Shared Access	[X]
d.	Freshwave	[X]
e.	Britannia Towers	[X]
f.	WHP Telecoms	[X]
g.	AP Wireless	[X]
Total		36,302

Source: CMA analysis of Cellnex and third parties' data.

3.15 Table 3-1 above shows that the majority of sites in the UK are today provided by the MNO JVs, and a significant number by WIPs.

3.16 As explained below, all UK MNOs originally relied upon their own sites but later combined them with sites owned by other MNOs to form JVs.²⁵ Only BT/EE retains a significant number of sites outside of a JV. WIPs account for a growing number of sites in the UK.

MNO joint ventures

3.17 There are two MNO joint ventures in the UK:

- (a) BT/EE and 3UK's JV MBNL; and
- (b) Vodafone and O2's JV is Cornerstone Telecommunications Infrastructure Limited (CTIL).

3.18 These JVs primarily supply their shareholder MNOs, although they also provide some sites to other MNOs and non-MNO customers on a commercial basis.

²⁴ Source: CMA analysis of Cellnex and third parties' data. Refer to the Competitive Assessment paragraph 8.7 for further information.

²⁵ CTIL is referred to as an MNO JV in Table 3-1 and below but, as explained in Chapter 8, is expected in future to operate as a WIP, meaning that the majority of sites will be supplied by WIPs.

MBNL

- 3.19 MBNL was established by T-Mobile and 3UK in 2007. Following Orange's merger with T-Mobile in 2009, it became an MBNL partner in 2010 as Everything Everywhere (now EE).²⁶ Since the merger between BT and EE in 2016, the MBNL JV has been between 3UK and BT/EE.
- 3.20 3UK and BT/EE use MBNL to manage their shared 3G, 4G and some 5G passive infrastructure assets in the UK, as well as their 3G active infrastructure assets. The JV is due to terminate on 31 December 2031 unless there is agreement to end it earlier.
- 3.21 [X]. MBNL is not the legal owner of any of the tower assets as they are owned by 3UK and BT/EE. [X].

CTIL

- 3.22 CTIL was set up in 2012 to create and manage a single network of passive infrastructure by O2 and Vodafone alongside agreements between O2 and Vodafone to share active and passive radio access network (RAN) assets in the UK (except for 2G and 3G RAN in London). For the purpose of active infrastructure sharing and subject to certain limited exceptions, O2 and Vodafone divided the UK into two regions, with each operator being responsible for the deployment and operation / management of active equipment in its region, including those of the relevant operator. Vodafone is responsible for the West of the UK and O2 is responsible for the East.
- 3.23 However, Vodafone and O2 gradually unwound their active sharing arrangements in respect of 4G in London and have also agreed to unwind a number of large cities with populations above 100,000 inhabitants. Vodafone announced in 2018 that the arrangements for sharing in London would be unwound for 5G, with each company having its own active equipment. O2 and Vodafone agreed in 2019 to strengthen the partnership to include 5G radio equipment sharing at joint sites outside of the UK's 24 largest cities, while each will deploy separate radio equipment in those larger cities on approximately 2,700 sites.²⁷
- 3.24 In January 2021, Vodafone and O2 announced that they would commercialise CTIL by each entering into long-term Master Services Agreements (MSAs) with it.

²⁶ mbnl.co.uk

²⁷ [Vodafone news release: Vodafone and O2 finalise 5G UK network agreement](#)

(a) The MSAs leave Vodafone and O2 as ‘anchor’ tenants that provide the majority of CTIL’s revenue, whilst allowing CTIL to pursue more opportunities to earn revenue from third parties.²⁸ The main consequence of these changes is that CTIL is no longer a cost centre for its shareholders but aims to make a profit margin on its services.

(b) CTIL told us [REDACTED].

3.25 Since this announcement, Vodafone has raised capital from its 50% equity stake in CTIL by transferring this to its subsidiary Vantage Towers which was then admitted to the Frankfurt Stock Exchange in an IPO in March 2021. The IPO raised approximately €2.3 billion with Vodafone retaining an 81% stake in Vantage Towers. Vodafone therefore retains its interest in CTIL, indirectly, through its interest in Vantage Towers.

3.26 Vodafone told us that the rationale for creating Vantage Towers to hold Vodafone’s stake in CTIL was two-fold:

(a) For the market to better recognise the value of the tower assets by placing them in a separate tower company; and

(b) to monetise the towers more effectively by transferring them into a separate, commercial organisation which would be more focused on increasing third party tenancies and making profits.

3.27 CK Hutchison told us that it expects there to be continued radio access network or active equipment sharing between O2 and Vodafone as CTIL evolves following its commercialisation. CK Hutchison told us that such sharing will mean that CTIL’s towers only have one set of active equipment on them and therefore have capacity for additional tenants’ equipment.

WIPs

3.28 WIPs active in the UK include Cellnex, Wireless Infrastructure Group (WIG), Shared Access, Radius, Freshwave and Britannia Towers. As set out above, since January 2021 CTIL has started to operate like a WIP.

Roll-out of 5G networks

3.29 Cellnex told us that MNOs will need to upgrade and densify their existing networks for the rollout of 5G, in order to increase coverage and capacity.

²⁸ Vodafone Group announcement, Cornerstone UK press release, 11 January 2021

They also stated that these efforts will be focused on urban areas, where demand for 5G is anticipated to be highest.

3.30 Cellnex also said that it does not anticipate material increased demand for new, traditional macro sites, with the features of the 5G rollout from the MNOs being:

- (a) All MNOs are following a 'macro-first' approach to the rollout of 5G networks which involves upgrading macro sites on which they are currently co-locating 4G active equipment to also host 5G active equipment.
- (b) The vast majority of 5G requirements are expected to be met by existing sites, though in some instances there will be existing sites which are no longer suitable (that is, upgrade is not feasible from a technical perspective or because capacity is at its limit).
- (c) MNOs will also need new sites to add capacity and coverage (in-fill), for example, by adding new locations based on their own radio plan or where it is not feasible to upgrade a site on which they are currently co-locating, with greater need in urban areas. Due to fewer planning restrictions and lower lease costs, MNOs are expected to deploy newly-built monopoles (potentially complemented by small cells) either through self-build or BTS, rather than using existing or macro sites.
- (d) In rural areas, the expectation is that 5G rollout will be relatively limited in the next five to ten years. There is already broad coverage of 4G networks, with remaining total and partial not spots being targeted by the Shared Rural Networks project.²⁹ MNOs are therefore unlikely to consider it cost effective to deploy 5G in rural areas in the short to medium term.

3.31 CK Hutchison stated that its 5G deployment will be delivered by [REDACTED].

3.32 Other MNOs told us that they will use their existing sites for much 5G roll-out in the next few years.

3.33 Ofcom also told us that it expects initial 5G rollout to involve using existing sites to host 5G equipment. In the medium term, an increase in demand for mobile services may lead to a densification of MNOs' networks, leading to an increase in the number of sites.

²⁹ See paragraphs 3.59 to 3.61 below.

Growth of new infrastructure for mobile networks

- 3.34 Each MNO uses around 19,000 macro sites across the UK, providing similar and overlapping geographic coverage.³⁰ As MNOs' networks are mature and cover most (although not all) of UK premises and the UK landmass, the passive infrastructure sites that host them are also well established.
- 3.35 Additional sites may, however, be required when a site landlord gives a notice to quit (NTQ) because, for example, it wishes to redevelop the site location. Others are built because the MNO (or other customer) wishes to develop their network to provide extra capacity or coverage.
- 3.36 Demand for additional sites is limited by long term contracts which mean tenants remain on sites they currently occupy. Leaving existing sites is therefore primarily driven by notices to quit (NTQs) from landlords, sites becoming obsolete or the need to get additional/enhanced capacity.
- 3.37 When an MNO requires an additional site, this can either take the form of an existing site (on which the MNO may become a new tenant) or the construction of a new site.

Existing sites

- 3.38 Existing sites will already host active equipment for other tenants. The advantages of using an existing site include:
- (a) The required planning permission for the site will generally already have been obtained;³¹
 - (b) Critical services, such as power and transmission, will already be connected; and
 - (c) As a result of (a) and (b), the new customer can secure access faster than if a new site has to be built.
- 3.39 The Parties submitted that in many cases existing sites will need upgrading to provide access to additional tenants or to accommodate new equipment for current tenants. This is especially so where 5G equipment is being added to infrastructure, as this tends to weigh more than existing 3G and 4G equipment.

³⁰ [REDACTED]

³¹ Where an additional tenant is seeking to be added to a developed site this may require planning permission for example if an extension or upgrade of the site is needed.

- 3.40 BT/EE told us that its network upgrade to 4G was quicker than the 5G upgrade currently underway because it didn't need to change antennae or feeders from previous technology. BT/EE also told us that 5G requires a larger and heavier antenna than 4G.

New sites

- 3.41 Building new sites involves constructing passive infrastructure to meet the customers' needs (in the case of BTS) or suppliers' own needs (in the case of self-build) at a location where no existing site exists. This will typically be done where there are no other existing sites near to that location. Before building starts, the site itself will first need to be acquired or a lease agreement entered into with a landlord.
- 3.42 Planning permission is usually needed for new sites.³²
- (a) CTIL told us that building a new site entails finding a suitable plot of land, negotiating the right to build a tower with the landlord, getting the relevant planning permissions, the design and engineering capability to create a suitable tower for the customer's equipment (historically its own shareholders); the ability to get fibre or microwave transmission and a power connection; and enabling the equipment supplier to install the MNO's active equipment on the tower.
- (b) Figures provided by a UK WIP show the timescales required to build or upgrade a site, as shown in Figure 3-3 below. This shows that a new site may take 12-18 months, while adding capacity to an existing site may take three to six months.

Figure 3-3: Illustrative timeline for building a new site and upgrading an existing site

	<i>New Site (BTS) (months)</i>	<i>Existing Site (capacity added) (months)</i>	<i>Comment</i>
Radio Planning			Not included
Site search	2–3	n/a	
Site acquisition and landlord agreement / consents	3–4	0–1	May run in parallel with Site Search and Design
Design / GA drawings	2–3	2	
Planning consent	2–3	0–1	
Deployment	2–3	1	
Power and Backhaul installation	2–3	0–1	May run in parallel with other activities
Total elapsed time	12–18	3–6	

Source: [X]

³² We set out from paragraph 3.59 how planning works for new or upgraded sites, including requirements and certain exemptions

Mobile telecommunications services in the UK

Network capacity and coverage

- 3.43 Network capacity and geographic coverage are both important in the provision of retail mobile services. The capacity and speed of mobile networks is affected by the amount of spectrum available to an operator and for a given amount of spectrum, transmission speed is affected by the number and location of users within a particular mobile cell and their demands for capacity.
- 3.44 Additional spectrum can be used to serve more simultaneous users at a certain level of data transfer speed or to provide a set number of users with higher speeds. The available capacity in a specific geographic area can be further increased by deploying additional infrastructure on a site or by adding additional sites.
- 3.45 MNOs seek to provide both broad geographic coverage and sufficient capacity. Typically, mobile operators will deploy larger macrocells in areas with lower population density, where the challenge is achieving sufficient geographic coverage, and smaller cells in areas with higher population density, where the challenge is providing sufficient capacity to serve the larger number of users.³³
- 3.46 This means that MNOs have radio access network plans³⁴ with specific requirements for sites at appropriate locations (and, in respect of their other sites), to help optimise their network's capacity and coverage.
- 3.47 If an MNO is required to change the location of a macro site within its network, this will have implications for its requirements from other neighbouring sites, given the interdependencies between cells within its radio access network. Any resulting 'gaps' in coverage can lead to interruption of service as users move from one location to another.
- 3.48 Poor mobile reception/coverage is the most important factor that impacts consumer satisfaction with mobile services.³⁵ The strength and quality of mobile network capacity and coverage are therefore crucial issues for all MNOs.

³³ [Ofcom Mobile Data Strategy](#), 2016

³⁴ MNOs have radio access network (RAN) plans to determine where their active equipment should be located in order to achieve the coverage and capacity they need

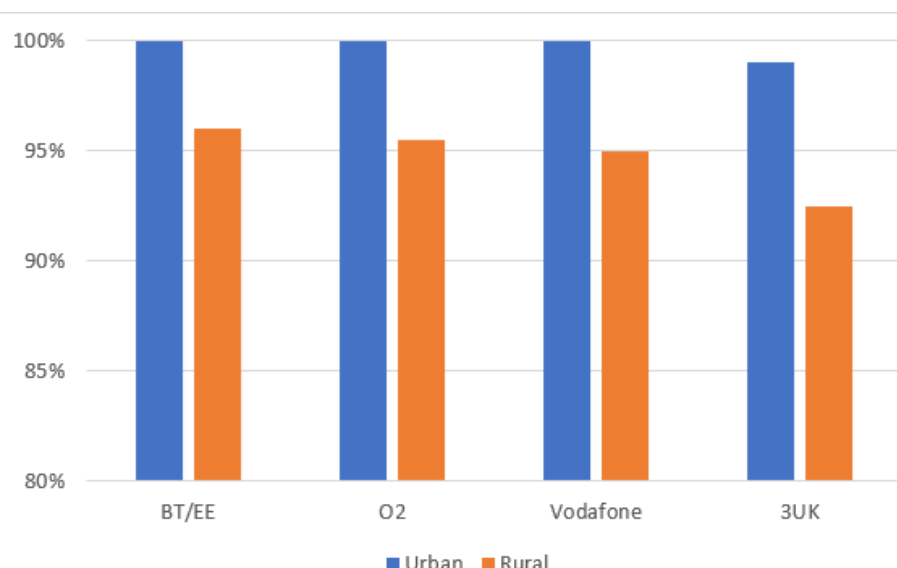
³⁵ Ofcom Consumer Satisfaction Tracker 2020 ([Ofcom CSAT](#)), Table 77

- 3.49 As noted earlier, the networks of the MNOs in the UK are mature and mobile network coverage in the UK is very widespread but not entirely comprehensive: it extends across almost 100% of urban premises, and approximately 95% of rural premises. As a further indicator of coverage, 4G mobile is available from all MNOs outside 99% of premises in urban areas, compared with around 87% of rural premises.³⁶
- 3.50 The four MNOs have similar levels of network coverage for their 4G networks across the UK, with 3UK's performance slightly below that of other MNOs for rural premises, as shown in Figure 3-4 and 3-5 below.
- 3.51 Mobile coverage levels are generally lower in rural areas compared to urban areas, and across the extent of the UK landmass, individual operator coverage ranges between 79% (for 3UK) and 85% (for BT/EE).³⁷

³⁶ Ofcom – Connected Nations 2020 report, p39 [Ofcom Connected Nations report](#)

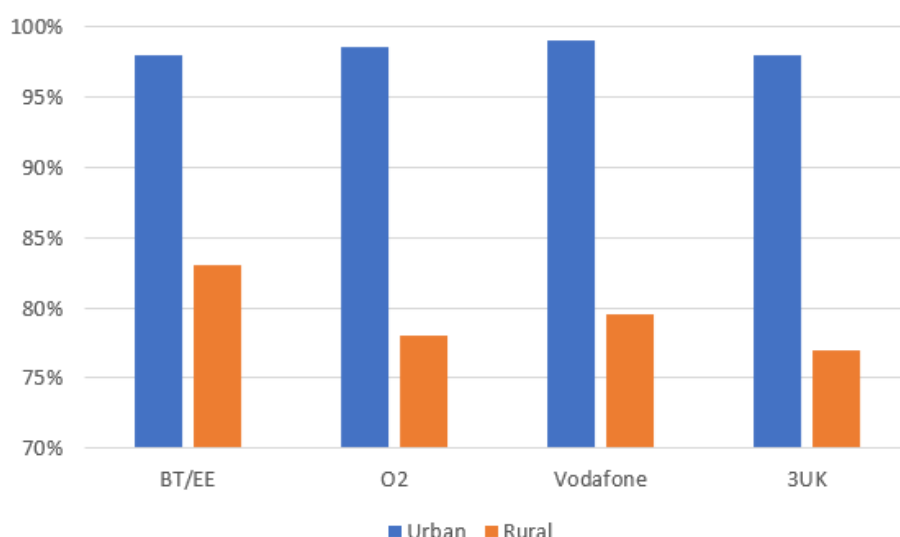
³⁷ [Ofcom Connected Nations report](#), p4 & p39

Figure 3-4: MNOs' UK network premises coverage of 4G data services 2020 (% of premises)



Source: Ofcom – Connected Nations 2020 report, p39-41 [Ofcom Connected Nations report](#)

Figure 3-5: MNOs' UK network geographic coverage of 4G data services 2020 (% of UK landmass)



Source: Ofcom – Connected Nations 2020 report, p39-41 [Ofcom Connected Nations report](#)

Shared Rural Network

- 3.52 The UK Government has a policy to increase mobile coverage to rural areas. In March 2020, it made an agreement with the four MNOs to provide grant funding to them to deliver a Shared Rural Network (SRN) to increase this coverage.
- 3.53 The SRN aims to make 4G available to 95% of the UK landmass and extend mobile coverage to an additional 280,000 premises, offering improvements to mobile coverage in rural communities. The SRN will cost over £1 billion to

build and operate, with the UK Government contributing £500m and the MNOs contributing £532m.

3.54 The programme has two elements:

- (a) For those areas where there is some 4G coverage, but not from all four operators, known as 'partial not-spots', the MNOs are investing in extending coverage, by upgrading their existing networks.
- (b) The publicly funded element will see new masts being built to target the hard-to-reach areas with no mobile coverage at all, known as 'total not-spots'. The UK Government will pay for the infrastructure and masts to be built and all four MNOs will use these masts to provide coverage to their customers.³⁸

Overview of relevant public policy and regulation

3.55 The main areas of public policy and regulation relevant to the sector are planning law and regulation, the Electronic Communications Code (ECC) and spectrum regulation in the mobile telecommunications industry.

Planning

- 3.56 Planning policy and regulations are an important consideration for owners of passive infrastructure assets, as they must usually apply for planning permission to build or upgrade new sites.
- 3.57 Before granting planning permission for a new site, local authorities will consider availability of existing towers and will need to be satisfied that co-location on them is not feasible before allowing the development of a new site in the same area.
- 3.58 Further, under the ECC MNOs are required to share infrastructure where practicable, subject to agreement between providers.³⁹
- 3.59 Customers of passive infrastructure are therefore incentivised to secure co-location on an existing site before developing a new site.
- 3.60 Ofcom told us that, once built, it is typical for no further planning permission to be required to add another MNO's active assets to a tower as long as no

³⁸ [SRN Shared Programme Summary](#)

³⁹ There is a general requirement in Condition 3(4) of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 that provides that operators are required to share infrastructure "where practicable"

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.

3.61 Planning regulation for tower development is set out in the UK Government's Permitted Development Code, which has three categories of requirements:⁴⁰

- (a) Towers over 20 metres in height require a full planning application.
- (b) Towers up to and including 20 metres in height are permitted but require prior approval from the planning authority via a streamlined process.
- (c) Towers up to 15 metres in height must be notified and become permitted after 28 days if no issues are raised.

3.62 The UK Government's National Planning Policy Framework (NPPF) sets out requirements for planning applications for electronic communications equipment, including:

- (a) For an addition to an existing mast or base station, a statement that self-certifies that the cumulative exposure, when operational, will not exceed International Commission guidelines on non-ionising radiation protection; and
- (b) For a new mast or base station, evidence that the applicant has explored the possibility of erecting antennas on an existing building, mast or other structure and a statement that self-certifies that, when operational, International Commission guidelines will be met.⁴¹

3.63 Reforms to the Permitted Development Code are being consulted on which would allow relaxed requirements.⁴² Specific reform proposals include:

- (a) Existing mobile masts to be strengthened without the need for prior approval, so that they can be upgraded for 5G and shared between mobile operators. This would allow increases to the width of existing masts by up to either 50% or 2 metres (whichever is greatest), and in unprotected areas⁴³ allow increases in height up to a maximum of 25

⁴⁰ [Information on how phone masts and renewable energy sources are impacted by planning permission. \(ashford.gov.uk\)](https://www.ashford.gov.uk)

⁴¹ [National Planning Policy Framework, updated July 2021](#)

⁴² [Government response to the consultation on proposed reforms to permitted development rights to support the deployment of 5G and extend mobile coverage \(publishing.service.gov.uk\)](#)

⁴³ Protected areas are locations with an environmental designation, such as Conservation Areas, Areas of Outstanding Natural Beauty, National Parks, and World Heritage Sites

metres with permitted development rights (previously 20 metres). Greater increases will also be permitted subject to approval by the local authority.

- (b) New masts to be built up to five metres higher – meaning a maximum of 30 metres in unprotected areas and 25 metres in protected areas, subject to approval by the planning authority.
- (c) Greater freedoms for slimline ‘monopole’ masts up to 15 metres in height, which are less visually intrusive than standard masts and used for 5G rollout, in unprotected areas. This could mean operators notifying local authorities of their intention to proceed without needing prior approval. This would align it with current rights that telecoms operators have for telegraph poles.
- (d) Building-based masts to be placed nearer to highways to bring better mobile coverage to road networks, subject to prior approval, and in unprotected areas smaller building-based masts to be permitted without prior approval.
- (e) Cabinets containing radio equipment to be deployed alongside masts without prior approval and to allow greater flexibility for installing cabinets in existing compounds – fenced-off sites containing masts and other communications equipment – to support new 5G networks.⁴⁴

3.64 These changes are designed to increase sharing on passive infrastructure assets, support upgrades to 5G and extend coverage on transport routes.

Electronic Communications Code

3.65 The ECC is a set of rights that are designed to facilitate the installation and maintenance of electronic communications networks.⁴⁵

3.66 The ECC confers rights on providers of such networks and on providers of systems of infrastructure to install and maintain apparatus on, under and over land.⁴⁶

3.67 In connection with these rights, the ECC allows persons to whom the ECC applies to:

⁴⁴ [New laws to wipe out rural mobile ‘not spots’ and speed up rollout of next-generation 5G technology - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/new-laws-to-wipe-out-rural-mobile-not-spots-and-speed-up-rollout-of-next-generation-5g-technology)

⁴⁵ The Electronic Communications Code is set out in Schedule 3A of the Communications Act 2003.

⁴⁶ [Ofcom website information for industry: Electronic Communications Code](#)

- (a) Construct and maintain electronic communications networks and infrastructure (such as ducts, cabinets and poles) on public highways without the need to obtain a street works licence to undertake such works;
- (b) 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;
- (c) In the event that agreement cannot be reached with the owner or occupier of private land, the ECC allows an operator to apply to the Court to impose an agreement which confers the ECC right being sought or for the ECC right to bind the landowner or occupier; and
- (d) Claim compensation from a local authority in circumstances where that local authority has obstructed access to electronic communications apparatus in certain stipulated circumstances.⁴⁷

3.68 In 2017 the ECC was updated to make it easier for network operators to share sites and build infrastructure (such as phone masts, exchanges and cabinets) on public and private land.⁴⁸ The key changes were:

- (a) Site Sharing: telecoms operators have the right to share sites without the landowner's consent (regardless of the terms of any written agreement).
- (b) Assignment: operators have the right to assign (i.e. transfer) their leases without landowner consent (regardless of the terms of any written agreement).
- (c) Upgrades: operators have the right to upgrade equipment without landowner consent (provided there is no more than a minimal adverse visual impact and no additional burden on the landowner).
- (d) Valuations: the valuation basis for telecoms sites changed from an open market basis to one that treats the land as if it didn't have existing telecoms leases and rights.
- (e) Landlord and Tenant Act 1954: leases for passive infrastructure will no longer be covered by the secure business lease regime contained in the Landlord and Tenant Act 1954. New telecoms leases will only be protected by the Code.⁴⁹

⁴⁷ Ofcom website information for industry: [Electronic Communications Code](#)

⁴⁸ Ofcom website information for industry: [Electronic Communications Code](#)

⁴⁹ See [Michelmores.com](#)

- 3.69 The Lands Tribunal rulings on the application of the ECC are expected to result in lower land rental costs for site operators.⁵⁰ BT/EE told us that the implication of this change was expected to be a [✂]% reduction in rents
- 3.70 Further detail on this is provided by a Vantage Towers presentation to investors,⁵¹ which set out the impact of the ECC change as:
- (a) Significant ground lease cost saving opportunity over the long term on existing and new sites.
 - (b) Under the ECC, rental fees will be determined by market value of the land for non-telecom purposes, thus reducing rents where sites have low non-telecom market values.
 - (c) The aim of the changes is to provide additional capital to further the rollout of next-generation digital networks in the UK, making it easier and less expensive to roll-out or upgrade broadband and telecoms infrastructure on public and private land.
 - (d) Acceleration in renegotiation expected as legal precedent is established – applies to leases on renewal.
- 3.71 Ofcom includes a condition in licences which requires MNOs to comply with the International Commission on Non-Ionizing Radiation Protection limits for the protection of the general public from electromagnetic fields (EMF). MNOs must take account of these limits when planning new deployments, or making changes to existing deployments, and ensure the location and power levels do not emit EMF levels above these limits.

4. Relevant merger situation

- 4.1 In accordance with section 36 of the Act and pursuant to our terms of reference, we are required to investigate and report on two statutory questions: (i) whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation (RMS); and (ii) if so, whether the creation of that situation may be expected to result in an SLC within any market or markets in the UK for goods or services.
- 4.2 We address the first of the statutory questions in this chapter.

⁵⁰ [✂]. Note that the relevant courts are The Upper Tribunal (Lands Chamber) in England and Wales, the Lands Tribunal for Scotland and the Lands Tribunal for Northern Ireland. For simplicity we refer to these collectively as the Lands Tribunal.

⁵¹ [Results, reports and presentations | Vantage Towers](#) presentation to investors, 11 January 2021, p13

- 4.3 An anticipated merger must meet the following two criteria to constitute an RMS for the purposes of the Act:
- (a) First, there must be arrangements in progress or in contemplation which will, if carried into effect, lead to two or more enterprises ceasing to be distinct; and
 - (b) Second, either:
 - (i) The UK turnover associated with the enterprise which is being acquired exceeds £70 million (the turnover test), or
 - (ii) The enterprises which cease to be distinct supply or acquire goods or services of any description and, after the merger, together supply or acquire at least 25% of all those particular goods or services of that kind supplied in the UK or in a substantial part of it. The merger must also result in an increment to the share of supply or acquisition (the share of supply test).⁵²
- 4.4 Cellnex and CK Hutchison entered into a sale and purchase agreement on 12 November 2020. The SPA provides for certain ancillary agreements, agreed by the Parties in short form, to be entered into on or prior to completion of the Merger, in particular, the [X] and the [X].⁵³ Accordingly, we consider that arrangements are in progress or contemplation within the meaning of [section 36\(1\)\(a\)](#) of the Act.
- 4.5 The combined turnover of TowerCo and the MBNL Sites (of which the Transfer Sites are a subset) in the UK in the financial year ending 31 December 2019 exceeded £70 million.⁵⁴ Therefore, we consider that the turnover test is satisfied for the purposes of section 23(1)(b)(i) of the Act. We also consider that the share of supply test is satisfied as we consider that Cellnex has a pre-Merger share of supply of at least 25% in the supply of access to developed macro sites and ancillary services to MNOs and other wireless communication providers in the UK, which will increase further to the Merger.⁵⁵

⁵² The Act, [section 23](#).

⁵³ See further detail in Appendix C.

⁵⁴ [X]

⁵⁵ See Chapter 8 which shows that Cellnex's share of supply in the market for the supply of access to developed macro sites and ancillary services to MNOs and other wireless communication providers in the UK by WIPs exceeds 25% and that the acquisition of the Unilateral Sites and the Transfer Sites would each result in an increment.

- 4.6 The remainder of this chapter therefore focuses on the first limb of the RMS test from [section 23\(1\)\(a\)](#) of the Act; whether the Merger results in two or more enterprises ceasing to be distinct.

Enterprises ceasing to be distinct

- 4.7 [Section 26\(1\)](#) of the Act provides that ‘any two enterprises cease to be distinct if they are brought under common ownership or common control’.
- 4.8 The Act defines an ‘enterprise’ as ‘the activities or part of the activities of a business.’ A business is defined as including ‘a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge’.⁵⁶ This does not mean that the enterprise in question need be a separate legal entity: it simply means that the activities in question could be carried on for gain or reward.⁵⁷ In making a judgement as to whether or not the activities of a business, or part of a business, constitute an enterprise under the Act, the CMA will have regard to the substance of the arrangement under consideration, rather than merely its legal form.⁵⁸
- 4.9 This section assesses whether the following enterprises will cease to be distinct as a result of the Merger:
- (a) Cellnex;
 - (b) TowerCo (the entity that holds the Unilateral Sites);
 - (c) The Transfer Sites; and
 - (d) The MBNL Sites.
- 4.10 Cellnex is a business active in the supply of access to developed macro sites and ancillary services, from which it generates revenue. Therefore, we consider that Cellnex is an enterprise.

TowerCo

- 4.11 TowerCo is similarly a business active in the supply of access to developed macro sites to 3UK, from which it generates revenue. Therefore, we consider that TowerCo is an enterprise.

⁵⁶ [Section 129\(1\) and \(3\)](#) of the Act.

⁵⁷ [CMA2](#) Revised, paragraph 4.10.

⁵⁸ [CMA2](#) Revised, paragraph 4.11.

- 4.12 Cellnex will acquire the entire issued share capital of TowerCo upon completion of the Merger. As a consequence, the enterprises will be under the common ownership and control of Cellnex. Therefore, we consider that Cellnex and TowerCo will cease to be distinct on completion of the Merger.

Transfer Sites

- 4.13 On completion of the Merger, Cellnex will acquire a binding right to receive legal title over the Transfer Sites following dissolution of MBNL.⁵⁹ Upon dissolution of MBNL, 3UK is required to transfer legal title over the Transfer Sites to Cellnex.⁶⁰ Therefore, we consider that the Transfer Sites constitute a business carried on for gain or reward and as a result the Transfer Sites (which are a subset of the MBNL Sites) constitute an enterprise.
- 4.14 The MBNL JV agreements provide that MBNL will terminate on 31 December 2031 (or earlier if agreed) [X].⁶¹ The [X] is not conditional on any other events occurring and consideration for the Transfer Sites will be paid in full upon completion of the Merger.⁶² [X].⁶³ Therefore, we consider that, as a result of these arrangements, Cellnex and the Transfer Sites cease to be distinct.⁶⁴

MBNL Sites

Enterprise

- 4.15 The [X] identifies the MBNL Sites, the economic benefit to which Cellnex is entitled is based, as:
- (a) Consisting of: (i) the [X] sites (or such other number agreed in writing) that either 3UK or BT/EE own solely or jointly pursuant to MBNL, or sites that 3UK is granted the right to use; and (ii) [X];⁶⁵ and

⁵⁹ [X], Schedule 1, paragraphs 1 and 35.

⁶⁰ Subject to a minimum of 3,000 sites and a maximum of half of the number of MBNL Sites.

⁶¹ The agreement can be terminated early if BT/EE agrees.

⁶² [X], Schedule 1, paragraph 4.

⁶³ [X], Schedule 1, paragraph 43 and 34 respectively.

⁶⁴ The CMA notes that the transfer of legal title to the Transfer Sites takes place in the future after the dissolution of MBNL when MBNL's term expires in 2031, or earlier if the MBNL shareholders agree to dissolve MBNL at an earlier date. [Section 27\(2\)](#) of the Act provides that: 'The time when the parties to any such arrangements or transaction become bound to such extent as will result, on effect being given to their obligations, in the enterprises ceasing to be distinct enterprises shall be taken to be the time at which the two enterprises cease to be distinct enterprises'. Cellnex submitted that the transfer of the Transfer Sites is not subject to any option and the transfer will take place for nil consideration (consideration being paid on completion of the Merger): Cellnex, Request for information dated 2 November 2021 response, question 1. In the alternative, the CMA notes the relevant merger situation will nonetheless arise in the future in 2031 or earlier when the legal title to the Transfer Sites is transferred to Cellnex upon dissolution of MBNL.

⁶⁵ [X], Schedule 1, paragraph 5 and 8.

(b) Excluding, amongst other things: (i) the [REDACTED] sites supplied to MBNL by third parties;⁶⁶ (ii) sites acquired or built by 3UK and/or BT/EE after the [REDACTED] comes into effect; and (iii) any MBNL active infrastructure (the Excluded Activities).⁶⁷

4.16 The MBNL Sites form part of the activities of MBNL.⁶⁸ MBNL is a business active in the supply of developed macro sites (predominantly to its shareholders, 3UK and BT/EE). Therefore, we consider that the MBNL Sites constitute a business carried on for gain or reward and as a result the MBNL Sites constitute an enterprise.

Ceasing to be distinct

4.17 On completion of the Merger, Cellnex will acquire the 'economic benefit' of the MBNL Sites that 3UK is currently entitled to. There is no transfer of legal control over the MBNL Sites on completion of the Merger.

4.18 [Section 26](#) of the Act distinguishes three levels of interest that can constitute control: (i) material influence, (ii) de facto control, and (iii) a controlling interest (also known as 'de jure', or 'legal control').⁶⁹

4.19 De facto control refers to situations where an entity controls a company's policy, notwithstanding that it does not hold a majority of voting rights (e.g. situations where an entity has, in practice, control over more than half of the votes actually cast at a shareholder meeting). De facto control requires the ability to unilaterally determine (as opposed to just materially influence) a company's policy.⁷⁰

4.20 We consider that the rights that Cellnex will acquire in relation to the MBNL Sites do not give rise to either legal control or de facto control over the MBNL Sites. The MBNL Sites are owned by MBNL, and we note in this context that MBNL is structured as a 50/50 JV [REDACTED].

4.21 Material influence is described in the Act as being able 'directly or indirectly ... materially to influence the policy of a body corporate ... without having a controlling interest in that body corporate...'.⁷¹

⁶⁶ [REDACTED] of which are supplied by Cellnex.

⁶⁷ [REDACTED], Schedule 1, paragraph 5. In addition, the following are excluded from the MBNL Sites: [REDACTED].

⁶⁸ [REDACTED], Schedule 1, paragraph 5. The [REDACTED] identifies the MBNL Sites, and therefore the economic benefit to which Cellnex is entitled, as consisting of (i) the [REDACTED] sites that either 3UK or BT/EE own, or sites that 3UK is granted the right to use, and (ii) [REDACTED].

⁶⁹ [CMA2 Revised](#), paragraph 4.20.

⁷⁰ [CMA2 Revised](#), paragraph 4.37.

⁷¹ [Section 26\(3\)](#) of the Act.

- 4.22 Our guidance explains that the ‘policy of the target in this context means the management of its business, and thus includes the strategic direction of a company and its ability to define and achieve its commercial objectives’.⁷²
- 4.23 The ability materially to influence a target’s policy is not an ability to control it. In particular, it does not amount to an ability to drive policy in a direction that other shareholders, management or the board object to. Rather, it is the ability materially to influence relevant strategic or commercial matters, either *positively* (that is, by persuading the company to pursue particular courses of action) or *negatively* (that is, by dissuading the company or its management from pursuing particular courses of action).⁷³
- 4.24 The CMA’s assessment of whether a transaction is likely to result in the ability to exercise material influence requires a broad, case-by-case analysis of the overall relationship between the acquirer and a target, and will depend on the facts and circumstances of each case.⁷⁴ The CMA will look at the overall effect of the arrangements in practice, in keeping with the ‘general principle that the purpose of UK merger control is to enable the CMA to consider the commercial realities and results of transactions and that the focus should be on substance and not legal form’.⁷⁵
- 4.25 In particular, the CMA can take a broad view and consider all potential sources or factors (in addition to shareholding or board representation) that might enable an acquirer to materially influence the target’s policy.⁷⁶ Our guidance explains that ‘there are no fixed types of agreement that will (or will not) be relevant to this assessment’ and notes that, for example, material influence may arise ‘as a result of the ability to influence the board of the target, and/or through other arrangements: that is, without the acquirer necessarily being able to block votes at shareholders’ meetings’.⁷⁷
- 4.26 The Parties submitted that the Merger will not result in Cellnex acquiring material influence over the MBNL Sites.⁷⁸
- 4.27 The Merger does not involve the acquisition of a direct shareholding or board representation in MBNL; the target enterprise, the MBNL Sites, is not a stand-alone company and there is therefore no separate shareholder or board structure in place. Therefore, we conducted our assessment of material influence based on an assessment of ‘other sources’ of potential

⁷² CMA2 Revised, paragraph 4.21.

⁷³ Amazon/Deliveroo, Final Report, 4 August 2020, paragraph 4.12.

⁷⁴ CMA2 Revised, paragraph 4.22.

⁷⁵ CMA2 Revised, paragraph 4.28.

⁷⁶ CMA2 Revised, paragraph 4.35.

⁷⁷ CMA2 Revised, paragraphs 4.35 and 4.23 respectively.

⁷⁸ Parties’ response to issues statement, paragraph 3.2.

material influence as described in our guidance, considering the specific factual circumstances of the arrangements between the Parties.⁷⁹

- 4.28 As part of our assessment, we consider the following factual circumstances as relevant to our assessment of material influence:
- (a) The overall context of the Merger and the commercial reality of the arrangements. We consider that the rights Cellnex will gain in relation to the MBNL Sites should be understood in the light of the restrictions on divesting or acquiring a shareholding in the MBNL joint venture and the intended commercial purpose, which was to put Cellnex in as close a position as possible to ownership despite those restrictions;
 - (b) Cellnex's ability to exert influence through contractual mechanisms in the agreements with 3UK and 3UK Holdings. We consider that the rights Cellnex will acquire from contractual mechanisms in relation to general decision making, shareholder [REDACTED], the new Governance Board between Cellnex and 3UK Holdings and the rights related to MBNL dissolution provide Cellnex with the ability to exert influence in relation to the MBNL Sites; and
 - (c) Other sources of influence. We consider that the wider commercial relationship between the Parties, in particular the fact that 3UK has agreed [REDACTED] with Cellnex, and that Cellnex will become the ultimate owner of the Transfer Sites, provides Cellnex with a source of influence in relation to the MBNL Sites.
- 4.29 Appendix C sets out our more detailed assessment of these factors.
- 4.30 We also considered whether Cellnex's ability to exert influence relates to the policy of the MBNL Sites.⁸⁰ We consider that the contractual mechanisms and the other sources outlined above and in more detail at Appendix C, are broad and enable Cellnex to influence the strategic and commercial policy of the MBNL Sites (for example, in relation [REDACTED]).
- 4.31 For the reasons set out above, and in more detail in Appendix C, our conclusion is that the arrangements described above, together and in the round, give rise to the ability for Cellnex to exercise material influence over the MBNL sites.

⁷⁹ CMA2 Revised, paragraphs 4.35 and 4.36.

⁸⁰ Appendix C sets out a description of (i) the rights Cellnex is acquiring in relation to the MBNL Sites further to the [REDACTED] and [REDACTED], and (ii) MBNL's structure and decision-making.

- 4.32 We note that the nature of Cellnex's rights and the JV decision-making structure means that Cellnex's ability to influence voting through contractual mechanisms is limited to its ability to exert negative influence. The impact of that influence is considered as part of the assessment of competitive effects.
- 4.33 Therefore, our conclusion is that Cellnex and the MBNL Sites have ceased to be distinct for the purposes of [section 23](#) of the Act.

Single or multiple relevant merger situations

- 4.34 As explained above, we consider that there are three enterprises that cease to be distinct from Cellnex as a result of the Merger: TowerCo, the MBNL Sites and the Transfer Sites.
- 4.35 Our guidance explains that: 'It may, in certain limited circumstances, be appropriate to treat a single commercial transaction as giving rise to more than one relevant merger situation ... In contrast, in some circumstances it may be appropriate to treat more than one commercial transaction as a single relevant merger situation'.⁸¹
- 4.36 We consider that the Merger constitutes a single commercial transaction; the sale and purchase agreement provides for the acquisition of TowerCo and (as a condition to completion) the execution of the [X] and the [X], all of which relate to the economic benefit of the MBNL Sites and subsequent acquisition of the Transfer Sites. We consider that these transactions are interlinked and inter-conditional.
- 4.37 The Parties submitted that the Merger involves two interlinked and inter-conditional elements that amount to a single RMS. Firstly, the acquisition of control over TowerCo (which holds the Unilateral Sites); and, secondly, the acquisition of material influence and control over the Transfer Sites upon dissolution of the MBNL JV. The Parties submitted that the acquisition of interests in the MBNL Sites does not form part of the RMS.⁸²
- 4.38 As the Merger constitutes a single commercial transaction, contrary to the Parties' submissions, we consider that the Merger gives rise to a single RMS (rather than three separate RMS in the light of the three enterprises involved) pursuant to which Cellnex, TowerCo, the MBNL Sites and the Transfer Sites all cease to be distinct. We do not consider that there are circumstances that make it more appropriate to treat the Merger as giving rise to more than one RMS; in this regard, we note that the acquirer of control in respect of each

⁸¹ [CMA2](#), footnote 18.

⁸² [Parties' response to issues statement](#), paragraph 3.2.

enterprise is the same (Cellnex) and therefore the competitive assessment is not materially affected by whether there is a single RMS or multiple RMSs.

Conclusion on relevant merger situation

- 4.39 In light of the above assessment, we have found that the Merger, if carried into effect, will result in the creation of a relevant merger situation under the Act.

5. Counterfactual

- 5.1 To assess the effects of the Merger, we have considered the prospects for competition with the Merger against what would have been the competitive situation without the Merger. This is called the counterfactual.

- 5.2 In this chapter, we set out:

- (a) The CMA's framework for assessing the counterfactual;
- (b) the views of the Parties on the appropriate counterfactual; and
- (c) our assessment of the counterfactual.

Framework for our assessment

- 5.3 At phase 2, the CMA has to make an overall judgement as to whether or not an SLC has occurred or is likely to occur.⁸³ Applying the SLC test involves a comparison of the prospects for competition with the merger against the competitive situation without the merger: the counterfactual. The counterfactual is not a statutory test but rather an analytical tool used in answering the question of whether the merger gives rise to an SLC.⁸⁴
- 5.4 To help make the SLC assessment, the CMA will select the most likely conditions of competition as its counterfactual against which to assess the merger.⁸⁵ The counterfactual may consist of the prevailing, or pre-merger, conditions of competition, or conditions of competition that involve stronger or weaker competition between the merger firms than under the prevailing

⁸³ [Merger Assessment Guidelines \(CMA129\) \(MAGs\)](#), paragraph 3.13.

⁸⁴ [MAGs](#), paragraph 3.1.

⁸⁵ [MAGs](#), paragraph 3.13.

conditions of competition.⁸⁶ The appropriate counterfactual may increase or reduce the prospects of an SLC finding by the CMA.⁸⁷

- 5.5 The counterfactual is not intended to be a detailed description of the conditions of competition that would prevail absent a merger. Those conditions are better considered in the competitive assessment.⁸⁸ The counterfactual assessment will often focus on significant changes affecting competition between the parties.⁸⁹
- 5.6 The CMA is likely to only focus on significant changes where there are reasons to believe that those changes would make a material difference to its competitive assessment. The example cited in the CMA's guidance involves a firm that is being acquired which could, in the counterfactual, have remained an independent competitor by raising external funding, or alternatively could have remained an independent competitor by being acquired by a firm with no current or potential activities in the relevant sector. The guidance indicates that the CMA would be unlikely to seek to consider the relative likelihood of those scenarios arising since both lead to the same conditions of competition.⁹⁰ The same principle applies in this case to different transaction structures and different transaction counterparties that might ultimately lead to broadly the same conditions of competition.
- 5.7 Accordingly, the CMA will generally conclude on the counterfactual conditions of competition broadly – that is, prevailing conditions of competition, conditions of stronger competition, or conditions of weaker competition. If two or more possible counterfactual scenarios lead to broadly the same conditions of competition, the CMA may not find it necessary to select the particular scenario that leads to its counterfactual.⁹¹
- 5.8 Establishing the appropriate counterfactual against which to assess a merger is an inherently uncertain exercise and evidence relating to future developments absent the merger may be difficult to obtain. Uncertainty about the future will not in itself lead the CMA to assume the pre-merger situation to be the appropriate counterfactual.⁹²

⁸⁶ The conditions of competition before a merger in anticipated acquisitions are generally referred to as the 'prevailing conditions of competition' and in completed acquisitions as the 'pre-merger conditions of competition'.

⁸⁷ MAGs, paragraph 3.2.

⁸⁸ MAGs, paragraph 3.7.

⁸⁹ MAGs, paragraph 3.8.

⁹⁰ MAGs, paragraph 3.9.

⁹¹ MAGs, paragraph 3.9. For an application of this principle (under the previous Merger Assessment Guidelines) see [Final Report, Completed acquisition by PayPal Holdings, Inc. of iZettle AB](#), 12 June 2019 at paragraphs 7.32-7.35 and [Final report, Anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo](#), 4 August 2020 at paragraph 6.169.

⁹² MAGs, paragraph 3.14.

- 5.9 As part of its assessment, the CMA may consider the ability and incentive (including but not limited to evidence of intention) of the merger parties to pursue alternatives to the merger, which may include reviewing evidence of specific plans where available.⁹³
- 5.10 The time horizon that the CMA considers when describing the counterfactual will be consistent with the time horizon used in the CMA's competitive assessment and depend on the context. In some markets, relevant developments may not take place for some years.⁹⁴ This means that, while there is a need for overall consistency between the time horizon for assessing the counterfactual and competitive effects of a merger, the CMA is not limited to considering alternative scenarios that would have occurred at exactly the same time as the developments that give rise to the merger under review.⁹⁵

Defining the appropriate counterfactual

Parties' views

- 5.11 CK Hutchison told us that, if the Merger was blocked by the CMA, the (appropriate) counterfactual would be that it would continue to own and operate its UK passive infrastructure assets. It also told us that in the absence of a sale of the UK passive infrastructure assets to Cellnex, it would have retained those assets.
- 5.12 CK Hutchison told us that all of its passive infrastructure assets in the EU had been sold and the counterfactual could therefore only be assessed in relation to any transaction relating to the UK alone.⁹⁶
- 5.13 CK Hutchison told us that it [✂].⁹⁷
- 5.14 Submissions from the Parties on specific points are covered in the relevant sections below.

⁹³ MAGs, paragraph 3.14. In appropriate circumstances, evidence of ability and incentive may be sufficient to establish a counterfactual even if explicit documentary evidence is not available. See [Amazon/Deliveroo](#) at paragraph 6.201.

⁹⁴ MAGs, paragraph 3.15.

⁹⁵ See [Amazon/Deliveroo](#) report, paragraph 6.202.

⁹⁶ [Initial submission](#) by CK Hutchison, 20 August 2021, paragraphs 2.2 and 2.3.

⁹⁷ [Parties' response to issues statement](#), paragraph 2.43

Our approach

- 5.15 In order to assess whether the Merger may be expected to give rise to an SLC, we have assessed which of the following counterfactual scenarios is the most likely and, therefore, the appropriate counterfactual in this case:
- (a) Prevailing conditions of competition. Under this scenario, absent the Merger, the Parties would have continued under separate, independent, ownership. CK Hutchison would have retained ownership of its passive infrastructure assets to be used to service its own mobile network, 3UK, and the MBNL joint venture, such that the assets would not have been operated in direct competition with Cellnex's passive infrastructure assets.⁹⁸
 - (b) Conditions of stronger competition. Under this scenario, absent the Merger, CK Hutchison would have pursued an alternative method to the Merger to realise value from its passive infrastructure assets in the UK. This would have resulted in these assets being operated in direct competition with Cellnex's passive infrastructure assets resulting in stronger competition between Cellnex and CK Hutchison's assets as compared to the prevailing conditions of competition.
- 5.16 The Parties made several submissions about the appropriate framework for our assessment of the counterfactual, in particular in relation to the scope of our assessment (that is, the range of counterfactuals that the CMA is able to consider) and the extent to which the sale of the non-UK assets that were also sold by CK Hutchison to Cellnex should be relevant to our assessment.
- 5.17 In order to determine which counterfactual scenario should be considered most likely for the purposes of our assessment, we first considered these threshold questions.
- 5.18 We then considered the rationale for the Merger and how this affects CK Hutchison's incentives to realise value from its passive infrastructure assets.
- 5.19 We then considered CK Hutchison's ability to implement the strategic options available that would allow it to realise value from its passive infrastructure assets in line with these incentives.

⁹⁸ We note that the prevailing conditions of competition are themselves dynamic. See [MAGs](#), paragraph 3.3. Under this counterfactual scenario, CK Hutchison would have retained ownership of its passive infrastructure assets and maintained a broadly consistent business model but may have, for example, sought to increase co-location on those assets to a limited extent.

- 5.20 Our guidelines provide that the CMA will generally conclude on the counterfactual conditions of competition broadly (see paragraphs 5.6 and 5.7 above). In particular, if two or more possible counterfactual scenarios lead to broadly the same conditions of competition, the CMA may not find it necessary to select the particular scenario that leads to its counterfactual.⁹⁹
- 5.21 Accordingly, our analysis of the counterfactual by which the Merger should be assessed does not require us to specify the exact route CK Hutchison would have taken absent the Merger, but rather to consider the credibility of the alternative options available to CK Hutchison in order to inform the overall likelihood of a counterfactual in which CK Hutchison's passive infrastructure would have been operated in direct competition with that of Cellnex.
- 5.22 Also, the CMA is not limited to considering alternative scenarios that would have occurred at exactly the same time as the developments that give rise to the merger under review (see paragraph 5.10 above).
- 5.23 In this case, reflecting the evidence in relation to the considerations driving CK Hutchison's commercial incentives, we have sought to consider the options available to CK Hutchison over an extended period of time (that is, beyond the time CK Hutchison conducted the sales process that gave rise to the Merger).
- 5.24 This is because, as set out in more detail below, our view of the evidence we have seen is that it does not indicate that the sales process that CK Hutchison ran was considered to be a 'one shot' process that excluded the pursuit of other options (either individually or in combination) at later points in time.

Scope of the counterfactual

Parties' views

- 5.25 In relation to the range of counterfactuals that the CMA is entitled to consider in this inquiry, the Parties submitted that:
- (a) 'The counterfactual must be assessed in the light of the relevant factual situation that would apply if the [Merger] does not proceed. Importantly, those facts include that all of CK Hutchison's passive telecommunications assets in Europe (the EU) have now been sold and could not form part of any other hypothetical transaction.'¹⁰⁰ Accordingly, '[t]he counterfactual

⁹⁹ MAGs, paragraph 3.9.

¹⁰⁰ Initial submission by CK Hutchison, 20 August 2021, paragraph 2.2.

can therefore only be assessed in relation to any transaction relating to the UK alone.’¹⁰¹

- (b) ‘The CMA’s [phase 1] assessment was based on an erroneous factual and legal assessment, and crucially ignored the fact that all of CK Hutchison’s passive telecommunications assets in Europe have now been sold and could not form part of any other realistic counterfactual.’¹⁰²

- 5.26 CK Hutchison submitted that it would be incorrect to include the non-UK assets in the counterfactual, as it told us ‘[...] unless the evidence demonstrates on the balance of probabilities that the sale of the non-UK assets was a ‘consequence’ of the sale of the UK assets – that is, would not have occurred absent the [Merger] – the CMA cannot legally or rationally adopt a counterfactual in which the non-UK assets remain available to a third-party purchaser or investor.’
- 5.27 In support of its position that the CMA could not include the non-UK assets in the counterfactual, CK Hutchison cited CMA guidance, which states that ‘[o]nly events that would have happened in the absence of the merger under review – and are not a consequence of it – can be incorporated into the counterfactual.’
- 5.28 CK Hutchison submitted that the Parties entered into ‘[...] a series of carefully structured transactions which provided for the separate sale of CK Hutchison’s passive infrastructure assets in various European jurisdictions’ and that the ‘[...] legal and natural persons involved were each content for the non-UK assets to be sold even if the [Merger] did not occur’ and that ‘[...] the non-UK assets have all now been sold.’ CK Hutchison submitted that these facts evidence ‘[...] what the relevant legal and natural persons would have done [absent the Merger], actually planned to do and ultimately did do.’
- 5.29 In response to our Provisional Findings, CK Hutchison submitted that ‘[...] even if there was one overall commercial discussion with Cellnex involving all of CK Hutchison’s tower assets, this cannot override the key fact [...] that the terms of that transaction did in fact contemplate that the sale of the European assets would proceed independently of both the UK and individually by country, irrespective of completion of the sale of the UK assets.’ It ‘[...] deliberately and carefully structured the transactions with Cellnex separately in the knowledge that they would likely complete at different times and on terms that provided for the sale of the European assets to proceed [✂].’

¹⁰¹ [Initial submission](#) by CK Hutchison, 20 August 2021, paragraph 2.3.

¹⁰² [Parties' response to issues statement](#), paragraph 2.3.

- 5.30 In CK Hutchison's view, '[...] the terms of the [Merger] are the clearest and most reliable articulation of the nature of the commercial transaction, and these provided for separate sales in Europe and the UK' and '[...] the only reasonable conclusion that can be drawn from this [is] that the sale of the European assets was not a consequence of the sale of the UK assets.'
- 5.31 In response to our Provisional Findings, CK Hutchison also submitted that our approach to the counterfactual in this case is 'inconsistent with the statutory scheme' because: (i) the relevant merger situation over which the CMA has exercised jurisdiction is the acquisition of the UK assets; (ii) other competition authorities had jurisdiction in respect of the transactions involving the non-UK assets, such authorities did not raise objections and those transactions have now completed; (iii) the geographic scope of the relevant market subject of the CMA's investigation is the UK; and (iv) the non-UK assets could not be part of any remedy ordered by the CMA because they have now been sold.

Our assessment

- 5.32 As our guidance (which reflects the relevant case law) makes clear, the counterfactual is an analytical tool, intended to establish the conditions of competition that would have prevailed in the absence of the Merger.¹⁰³
- 5.33 Accordingly, the question we need to answer when determining the appropriate counterfactual is not, as CK Hutchison submitted, 'what factual situation [...] would apply if the [Merger] does not proceed' or what the counterfactual would be '[i]f the [Merger] is blocked by the CMA.'¹⁰⁴
- 5.34 Instead, we are required to determine what the most likely conditions of competition would have been absent the Merger (a transaction which, as explained below, formed part of the broader set of commercial arrangements between CK Hutchison and Cellnex).

¹⁰³ In this context, we note that CK Hutchison's submission that the balance of probabilities test applies specifically to the determination of the counterfactual is not correct. It is settled law that the balance of probabilities test applies to the statutory questions the CMA must answer but "[i]t does not have to be applied separately to each element in the analysis which is used to reach a conclusion on each of these points." *BSkyB and Virgin Media v CC and BERR* [2010] EWCA. Civ 2, paragraph 69. Contrary to CK Hutchison's submissions, this conclusion is not undermined by the fact the counterfactual forms the 'bedrock' of our subsequent assessment of whether the Merger gives rise to an SLC. The counterfactual (i.e. the competitive situation without the merger) is always the benchmark against which the competitive effects of a merger are assessed. As recognised in our guidance, the appropriate counterfactual may increase or reduce the prospects of an SLC finding by the CMA. See [MAGs](#), paragraph 3.1-3.2. This does not, however, imply that this element of the CMA's assessment is, in itself, subject to the balance of probabilities test (in contradiction to the clear principle set out by the Court of Appeal in *BSkyB and Virgin Media v CC and BERR*).

¹⁰⁴ [Initial submission](#) by CK Hutchison, 20 August 2021, paragraphs 2.2 and 1.7.1.

- 5.35 On this basis, the fact that the non-UK assets cannot now be sold to an alternative purchaser if the Merger does not go ahead because they have already been sold does not prevent us from considering counterfactual scenarios involving the sale of non-UK assets.
- 5.36 As the Parties note, our guidance states that the counterfactual can incorporate only events that would have taken place absent a merger (and are not a consequence of it).¹⁰⁵ In assessing whether events are a consequence of a merger, we consider its impact broadly. For example, as our guidance makes clear, where the decision to enter into a merger changes the merger parties' intentions to invest in particular activities or leads them to divest certain lines of business (even if not required to do so by the merger agreements), such actions would typically be disregarded for the purposes of determining the counterfactual where those actions would not have been taken in the absence of the merger.¹⁰⁶
- 5.37 Similarly, in the present case, we do not consider the fact that the Parties ultimately structured the transactions such that the sale of assets outside the UK could proceed independently of the sale of the UK assets is determinative. To accept CK Hutchison's submission to the contrary would, in effect, allow merger parties to determine the relevant counterfactual through their chosen approach to structuring a merger transaction. The question of whether events are a consequence of a merger under review is fact-specific and is not determined by the transaction structure chosen by the merger parties.¹⁰⁷
- 5.38 The key question for our assessment is whether the sale of the remainder of CK Hutchison's passive infrastructure assets to Cellnex would have proceeded absent the Merger agreement to sell the UK assets to Cellnex.
- 5.39 In order to address this, we have first assessed the extent to which, at the time the EU and UK asset sales were agreed, they were considered by the

¹⁰⁵ MAGs, paragraph 3.4.

¹⁰⁶ MAGs, footnote 55.

¹⁰⁷ For an application of this principle see [Final Report, Reckitt Benckiser / K-Y brand](#), 12 August 2015. In that case "J&J argued that the counterfactual is the situation that it has effectively brought about by the way it has structured the transaction; namely a stranded UK brand. It claimed that the counterfactual is the situation without the relevant merger situation and that the relevant merger situation in this case relates only to the UK element of the global transaction because the transaction was referred for an in-depth review as an 'anticipated merger' after the parties had completed in most of the world" (paragraph 7.3). In rejecting this mechanistic approach, the CMA concluded that "[...] the counterfactual cannot be conditioned by the particular transaction structure chosen by the parties in this way". In response to our Provisional Findings, CK Hutchison submitted that the approach to different facts in another case cannot determine the assessment of the facts of the present case (and highlighted a number of features which it says distinguish Reckitt Benckiser / K-Y brand from the present case). It is correct that the assessment of the counterfactual is fact-specific and carried out in the context of each case. We do not consider, nor did our Provisional Findings suggest, that the outcome in Reckitt Benckiser / K-Y brand determines the assessment in the present case.

Parties as part of an overall commercial transaction, notwithstanding the different conditions precedent that ultimately applied to the sale and purchase agreements entered into in respect of the different elements of the overall commercial transaction.

5.40 CK Hutchison told us that:

(a) [REDACTED];

(b) [REDACTED] and

(c) the Parties subsequently agreed to structure the overall transaction as six standalone transactions. Each transaction was subject to different conditions precedent, including different regulatory processes. [REDACTED]

5.41 In our view, while the overall commercial transaction between the Parties was structured in such a way that different packages of assets were subject to different conditions precedent, the above evidence shows that the Parties considered each country-specific transaction to form part of an overall commercial transaction.

5.42 This view is supported by evidence from CK Hutchison who told us that:

(a) The overall commercial deal with Cellnex was '[...] a €10 billion transaction involving all of [CK Hutchison's] tower assets across Europe and in the UK [...]. The transactions were structured, of course, as a series of transactions, simply because each country would have different legal and regulatory requirements [...]. And the UK, as it turns out... is the last one, just in terms of timing, right, to come forward. But it's important that you understand that this was for [CK Hutchison] a transaction that involved the whole of [CK Hutchison's] towers. And I believe the same will be said by Cellnex as well... It was not a UK-specific transaction, it was a transaction that included... the UK.'

(b) '[T]he transaction with Cellnex was negotiated as a deal for all of CKH Networks' European assets. And it was structured as a series of transactions, essentially to optimise the execution speed. Knowing that regulatory legal compliance requirements would be different in different jurisdictions, closing sequentially... in each of those jurisdictions made sense.'

5.43 Similarly, the evidence provided by Cellnex demonstrates that the Merger formed part of an overall commercial transaction that included the UK assets and the non-UK assets. Cellnex told us:

(a) '[X]

- 5.44 In light of the evidence above, we consider that the series of legally separate transactions entered into between CK Hutchison and Cellnex in relation to CK Hutchison's passive infrastructure assets formed part of a single overall commercial transaction between the Parties.
- 5.45 We note the Parties' submissions that the transactions forming part of the overall commercial transaction were structured as legally separate transactions subject to different conditions precedent and were therefore capable of completing independently of each other (as has happened in practice).
- 5.46 While that is the case, we do not consider that a contractual structure that allows certain parts of an overall commercial transaction to proceed ahead of others equates to agreeing a transaction that does not include the UK assets at all. This is consistent with the commercial reality of the transaction according to CK Hutchison, which, as noted in paragraph 5.43(a) above, explicitly told us that this was 'not a UK specific transaction' but rather 'a transaction that included [...] the UK.' Similarly, as noted above, Cellnex told us that '[X].'
- 5.47 Looking beyond the legal form of the transactions, we have considered the available evidence (summarised in paragraphs 5.40 to 5.43 above) in relation to the rationale for, and negotiation of, the overall commercial transaction entered into by the Parties. We believe that this evidence shows that, in the absence of an agreement to acquire the UK assets, the overall deal between CK Hutchison and Cellnex – including in relation to the non-UK assets – would not have been done in its current form.
- 5.48 Given that the sale of the non-UK assets and the UK assets formed part of the overall commercial transaction between the Parties, we consider that the sale of the non-UK assets can be considered a consequence of the Merger within the meaning of our guidance.
- 5.49 On this basis, we also consider that it is open to us to consider a counterfactual that would have included the sale of both the non-UK assets and the UK assets to an alternative purchaser.
- 5.50 We recognise that, within the scope of the existing overall commercial transaction, the Parties were willing to take the risk that some or all of the non-UK assets might ultimately be sold without the UK assets. This demonstrates that alternative options available to CK Hutchison absent the Merger might also have included separate sales of some or all of the non-UK assets (including potentially to Cellnex) and the UK assets.

- 5.51 This is consistent with a CK Hutchison internal document from April 2019 relating to the internal reorganisation of its telecommunications division. The document shows that CK Hutchison [✂] (emphasis added).¹⁰⁸
- 5.52 In our view, the available evidence demonstrates that CK Hutchison considered realising an uplift in value in the assets either as a series of transactions or as a single transaction. Accordingly, we consider that, in addition to counterfactuals that would have included the sale of both the non-UK assets and the UK assets, it is also open to us to consider a counterfactual that would have included the sale of only the UK assets to an alternative purchaser.
- 5.53 CK Hutchison submitted in response to our Provisional Findings that our approach to the counterfactual is ‘inconsistent with the statutory scheme’ (see paragraph 5.31 above).¹⁰⁹
- 5.54 As set out above, the counterfactual is an analytical tool used to analyse events that would have occurred in the absence of a merger and how these impact on the competitive situation over which the CMA has jurisdiction. We are required to determine what the most likely counterfactual would have been absent the transaction between CK Hutchison and Cellnex, which resulted in the sale of the UK and non-UK assets to Cellnex. It is against that counterfactual that we assess the competitive effects of the Merger.
- 5.55 The fact that the CMA has not taken jurisdiction over the transactions involving the non-UK assets and the other factors cited by CK Hutchison in support of its submission that our approach to the counterfactual is inconsistent with statutory scheme do not preclude us from determining that the transactions involving the non-UK assets are a consequence of the Merger for the purpose of determining the appropriate counterfactual in the case. As noted above, to conclude to the contrary would allow merger parties to determine the relevant counterfactual through their chosen approach to structuring a merger transaction.

Conclusion on scope of counterfactual

- 5.56 We conclude that our assessment of the counterfactual can consider the full set of strategic options open to CK Hutchison at the time it entered into the

¹⁰⁸ ‘CKHH’ refers to CK Hutchison Holdings and ‘CK Networks’ refers to CK Hutchison’s telecommunications infrastructure company that grouped its tower assets, CK Hutchison Networks Holding’.

¹⁰⁹ We note that CK Hutchison did not expressly submit that these alleged inconsistencies prevent us from considering a counterfactual that includes the non-UK assets.

overall commercial transaction with Cellnex, which involved both the UK and non-UK assets.

- 5.57 These options included an alternative purchaser acquiring CK Hutchison's UK assets either alone or as part of a wider portfolio including some or all of its non-UK passive infrastructure assets.
- 5.58 It is within this context that we considered whether the UK assets would have been commercialised under alternative scenarios and, if so, whether this would have led to a more competitive counterfactual than the pre-Merger situation.

CK Hutchison's rationale and incentives for the Merger

- 5.59 We now consider CK Hutchison's incentive (including but not limited to evidence of intention) to pursue alternatives to the Merger. This is intended to help inform our assessment of CK Hutchison's likely actions in the absence of the Merger in light of the credibility of the range of alternative options that were available to it.
- 5.60 We first outline the Parties' submissions on the rationale for the Merger before providing our assessment of the available evidence in relation to the transaction rationale, as well as CK Hutchison's wider strategic incentives that underpin that rationale.

Parties' views

Overview of rationale and incentives

- 5.61 With regard to the background to the Merger, CK Hutchison submitted that:
- (a) It conducted an internal reorganisation of its telecommunications division between February 2019 and July 2020, which involved grouping its ownership or economic interests in its European tower assets from each of its local MNOs into separately managed entities or divisions in each relevant jurisdiction under a single holding company.¹¹⁰
 - (b) The purpose of this re-organisation was to identify and extract value from underutilised assets within CK Hutchison's telecommunications division, and (should it decide to do so) to help prepare CK Hutchison Group Telecom to access cost efficient capital either through the capital markets

¹¹⁰ [Parties' response to issues statement](#) Page 13 paragraph 2.8.

or the potential sale of CK Hutchison Networks Europe Investments S.À R.L.¹¹¹

(c) With regard to the Merger itself, in the UK in particular, the proceeds from the Merger would enable 3UK to focus on developing its mobile network and facilitate the rollout of 5G.¹¹²

(d) Cellnex met CK Hutchison's strategic needs given 3UK's long term reliance on and contractual commitment to these assets.¹¹³

5.62 Cellnex told us that the Merger was an opportunity for it to expand its presence in the UK and that, as a dedicated WIP, it has a strategy of acquiring assets not currently operated by WIPs and increasing the value of these assets through increasing the likelihood of co-location on them.¹¹⁴

5.63 With regard to the overall commercial transaction between the Parties including the non-UK assets, Cellnex told us that the fact [REDACTED]

5.64 The Parties also told us that the Merger reflected worldwide market trends, whereby MNOs are divesting their passive infrastructure assets or outsourcing the management of those assets to independent WIPs.¹¹⁵

Establishment of a tower company and realising an uplift in the value of the assets through commercialisation

5.65 CK Hutchison told us that the initial rationale for reorganising its European tower assets into a tower company was to seek to realise an uplift in their value. CK Hutchison considered that the reorganisation would 'surface the value of the assets', and that the reorganisation gave it the opportunity to explore all of the options available to it to maximise their value.

Need to realise funding to invest in 3UK's network

5.66 CK Hutchison told us that, [REDACTED], as there was a significant need to invest in 3UK's network. [REDACTED]:

(a) [REDACTED];

¹¹¹ [Parties' response to issues statement](#) Page 13 paragraph 2.8.

¹¹² [Parties' response to issues statement](#) Page 5 paragraph 1.4.

¹¹³ [Parties' response to issues statement](#) Pages 5 and 6 paragraph 1.6.

¹¹⁴ [Parties' response to issues statement](#) Page 4 paragraph 1.3.

¹¹⁵ [Parties' response to issues statement](#), paragraph 1.2.

- (b) the designation of Huawei as a High-Risk Vendor by the UK government, [REDACTED]; and
- (c) [REDACTED].
- 5.67 CK Hutchison submitted that the Merger would provide funding for 5G rollout [REDACTED].
- 5.68 CK Hutchison told us that:
- (a) 3UK has the largest 5G spectrum holdings in the UK and investment in its 5G network would allow it to enhance its network capacity and compete more effectively against the other MNOs;¹¹⁶
- (b) this opportunity could only be realised if significant investment was made very rapidly to upgrade 3UK's radio network for 5G;¹¹⁷
- (c) [REDACTED]; and
- (d) [REDACTED].
- 5.69 CK Hutchison told us that 3UK's network had suffered from significant congestion [REDACTED]. This involved:
- (a) [REDACTED]; and
- (b) [REDACTED]
- 5.70 CK Hutchison told us that, [REDACTED].
- 5.71 CK Hutchison also told us that a sale of the assets represented [REDACTED]. It told us that it could raise the equivalent of equity [through this transaction] [REDACTED]. It said: [REDACTED].
- 5.72 CK Hutchison also told us that [REDACTED].
- 5.73 CK Hutchison told us that, in relation to an alternative source of funding, sourcing investment funding through debt could lead to a downgrade of its credit rating.¹¹⁸

¹¹⁶ Parties' response to issues statement.

¹¹⁷ Parties' response to issues statement.

¹¹⁸ Parties' response to issues statement, paragraph 6.4.6.

The requirement for a suitable counterparty

5.74 CK Hutchison told us that:

- (a) At the time of its internal reorganisation and before the deal with Cellnex was in discussion, it considered that [REDACTED].
- (b) [REDACTED].
- (c) [REDACTED].
 - (i) The [REDACTED] are long term in nature with each having an initial term of 12 to 15 years, and renewable going forward. CK Hutchison required a partner that was established and had long-term plans for the assets; and
 - (ii) a suitable counterparty would need to be stable and hold onto the assets for at least 15 years. A partner that would seek to sell on the assets in the short term [REDACTED].

Our assessment

Realising an increase in the value of passive infrastructure assets

- 5.75 The evidence available to us suggests that CK Hutchison had a strong incentive to increase shareholder value through commercialising its UK passive infrastructure assets either under its own or a third party's ownership.
- 5.76 This is due to the significant difference in valuation these assets attract depending on whether they sit within an MNO or whether they form part of a separate entity (either owned by the MNO's wider group or a third party) through which the owner seeks to commercialise them further.
- 5.77 For example, Deutsche Telekom told us that [REDACTED]. It told us that, [REDACTED]. [REDACTED].
- 5.78 CK Hutchison's internal documents from the first half of 2019 set out the rationale for its re-organisation in which its passive infrastructure assets were moved into a separate holding company:
- (a) [REDACTED].
 - (b) [REDACTED].
- 5.79 This uplift in value is also reflected in Cellnex's valuation of the UK and non-UK passive infrastructure sites of CK Hutchison, with the agreed price of €10 billion representing a [REDACTED].

5.80 Looking at the wider market context, we note that CK Hutchison's strategic objective to commercialise passive infrastructure assets reflects broader global market trends involving telecoms operators that held such assets. For example:

- (a) In May 2020: Phoenix Tower International (PTI) reached a deal with the Irish MNO 'eir' to acquire Emerald Tower Ltd, which owns eir's portfolio of 650 sites, for €300m.¹¹⁹ PTI and eir established a long-term partnership whereby eir will occupy the sites for at least twenty years.¹²⁰ eir stated that the transaction allows it to accelerate the roll-out of expanded 4G and 5G networks and increases its capacity to invest in its mobile network.¹²¹
- (b) In January 2021: Telefónica's subsidiary Telxius signed an agreement with American Tower Corporation for the sale of its towers division in Europe (Spain and Germany) and in Latin America (Brazil, Peru, Chile and Argentina) for €7.7 billion in cash. This involved two separate sales of the European and Latin American businesses, which combined had approximately 30,722 tower sites. This transaction formed part of Telefónica's stated strategy to create value and reduce debt.¹²² American Tower Corporation stated that it represented an EBITDA multiple of 'less than 26 times'.¹²³
- (c) In January 2021: Vodafone sold its 50% equity stake in CTIL to Vantage Towers, Vodafone's European tower business, whose shares were subsequently admitted to the Frankfurt Stock Exchange in an IPO in March 2021. This IPO raised approximately €2.3 billion, with Vodafone retaining an approximately 81% stake in Vantage Towers. Vodafone therefore retained its interest in CTIL indirectly, through its shares in Vantage Towers.¹²⁴
- (d) In July 2021: Cellnex acquired Polkomtel Infrastruktura, the infrastructure division of Polkomtel, a Polish MNO. The €1.6 billion deal involved the acquisition of approximately 7,000 tower sites, as well as the active equipment used in Polkomtel's network. Polkomtel stated that the reasons

¹¹⁹ [Phoenix tower international enters the Irish market with the acquisition of eirs towers](#). eir is the third largest MNO in Ireland in terms of revenue and customers

¹²⁰ [Blackstone backed phoenix tower international signs agreement with eir to own and operate tower sites across Ireland](#)

¹²¹ [25 May 2020 Strategic Partnership with Phoenix Tower International](#)

¹²² [Telefonica sells telxius tower division to American Tower Corporation at record multiples for 7.7billion euros](#)

¹²³ [American Tower press release 13 Jan 2021](#)

¹²⁴ [NASDAQ, 'Vodafone's Vantage Towers climbs after Germany's biggest IPO in three years' & Vantage Towers Annual Report 2020/21, p107](#)

for this transaction were to allow for faster and more cost-efficient deployment of connectivity services and more 5G sites.¹²⁵

- (e) In November 2021: Vodafone stated that it was considering a combination of the passive infrastructure assets in its Vantage Towers portfolio with those of another MNO such as Orange or Deutsche Telekom in which it would seek 'co-control'.¹²⁶ Vodafone stated that this would allow it to further monetise this entity through selling down further stakes whilst retaining co-control with a partner.¹²⁷
- (f) In November 2021: following an announcement in February 2021 that it was establishing a separate tower company to service Orange and other MNOs,¹²⁸ Orange announced that its European tower company, TOTEM, was operational. This held approximately 26,000 tower assets across France and Spain. TOTEM was intended to be a neutral operator with its management and operations separate from local MNOs and completely independent.¹²⁹ Orange said that the aim was to grow revenue and increase operational efficiency, with an increase in co-location rates. It also said that it would target other MNOs both to host on existing sites and for the deployment of new sites. The entity would aim for organic and inorganic growth.¹³⁰

- 5.81 These trends appear to be consistent with Cellnex's view of industry dynamics, [§].
- 5.82 Cellnex told us that there is pressure [from investors in telecoms operators] over the multiples by the market to create value from these assets on the balance sheet and hidden in a market valuation. [§].
- 5.83 The share of towers controlled by WIPs in Europe has grown from 13% (in 2014) to 35% in 2021, with an acceleration in the last two years.
- 5.84 Our view is that the evidence above shows that the strategic incentive to significantly increase shareholder value through creation of an independent tower company is broadly recognised in the industry, with a number of companies already having sought to separate their MNO and tower businesses or being in the process of doing so.

¹²⁵ [Cellnex closes the acquisition of polkomtel infrastruktura](#)

¹²⁶ [Vodafone H1 FY22 Results live Q&A pages 5 and 10](#)

¹²⁷ [Vodafone H1 FY22 Results live Q&A pages 5 and 10](#)

¹²⁸ [Orange takes a major step forward with the creation of TOTEM, its European TowerCo | Corporate](#)

¹²⁹ [Orange announces the operational launch of TOTEM, its European TowerCo | Corporate](#)

¹³⁰ [Orange takes a major step forward with the creation of TOTEM, its European TowerCo | Corporate](#)

- 5.85 Based on this evidence, we consider that one of the main drivers for the overall transaction (which includes the Merger) entered into by the Parties was to enable CK Hutchison to realise the significant uplift in asset value that would arise from commercialising its passive infrastructure assets.
- 5.86 On this basis, we consider that, in the absence of the Merger, there would have been a strong incentive for CK Hutchison to realise a significant uplift in value by alternative means. We consider that this incentive is separate to CK Hutchison's incentive to raise funding to support 3UK's 5G rollout, as discussed below.

Need for funding for 3UK's network and upgrade to support 5G rollout

- 5.87 CK Hutchison told us that while it initiated a reorganisation of its European passive infrastructure assets into a separate tower company to realise an uplift in value through some form of commercialisation, [REDACTED]. As noted in paragraph 5.68 above, it told us that [REDACTED].
- 5.88 This need for investment is consistent with other evidence available to us:
- (a) Ofcom told us that, [REDACTED].
 - (b) Ofcom also told us that [REDACTED]. In addition, it stated that there were other investment demands on all four UK MNOs in the short term resulting from the need to deliver licence and service obligations in relation to the Shared Rural Network and the UK government's requirement for MNOs to remove high risk vendor equipment.
 - (c) In respect of the timescale for the 5G element of this investment, Ofcom noted that, whilst customer demand for services that require 5G networks is unclear, it may be initially focused on the business segment and therefore private networks. Ofcom said that, [REDACTED]. However, whilst it noted that investment in the 5G core network would be necessary to deliver the full benefits of 5G it did not think that 5G would require a 'step change' in investment [REDACTED].
 - (d) CK Hutchison's public documents have consistently noted the importance of network investment. For example:
 - (i) In its 2019 and 2020 Annual Reports, the Chairman's statement set out key developments at group level: 'Members of 3 Group Europe are in varying stages of introducing 5G capabilities, with strong

network and spectrum assets available to support development of emerging 5G opportunities'.¹³¹

- (ii) In its half year 2021 results, 3UK announced that it had increased capital expenditure by 60% to £307 million as a result of increased investment in the network and that it was continuing to invest in its network to 'transform infrastructure and deliver the fastest 5G network as part of a five-year programme'.¹³²

5.89 We therefore consider that this investment appears to be particularly important for 3UK due to its stated aim to invest in 3UK's network, including its rollout of 5G.¹³³ We note that this aim is consistent with broader industry trends, with other operators across Europe facing increased capital expenditure to support the roll out of 5G networks.

3UK's long-term reliance on the assets

5.90 CK Hutchison submitted that 3UK required a stable, longer-term partner to ensure operational continuity for its mobile businesses (that is, for a minimum of 15 years, [REDACTED]).¹³⁴

5.91 Our view is that CK Hutchison would need to consider these needs alongside its incentives to realise the significant uplift in asset value that arises from commercialising its passive infrastructure assets and facilitate funding for investment in 3UK.

5.92 In our view, the available evidence shows that CK Hutchison thought that it was not necessary for it to retain control of the assets, but that sufficient protection could be obtained either through contractual protections or governance arrangements.

(a) CK Hutchison told us that [REDACTED].

(b) CK Hutchison's analysis [REDACTED].

(c) CK Hutchison told us that [REDACTED].

(d) CK Hutchison told us that [REDACTED].

5.93 In our view, CK Hutchison could take the opportunity to realise shareholder value from its passive infrastructure assets (through a sale or otherwise with

¹³¹ [CK Hutchison Annual Report 2019](#), page 13 and [CK Hutchison Annual Report 2020](#), page 13.

¹³² [Three UK reports H1 21 results](#), 5 August 2021.

¹³³ [Parties' response to issues statement](#), paragraph 1.4.

¹³⁴ [Parties' response to issues statement](#), paragraph 2.23.

an appropriate counterparty) while appropriately safeguarding the interests of its MNO without having to retain control of the assets.

- 5.94 We also recognise that 3UK's ongoing reliance on the assets would be expected to influence CK Hutchison's consideration of potential counterparties for a transaction and have taken this into account in our assessment of alternative transactions.

Conclusion on the rationale and incentives for the Merger

- 5.95 The evidence available to us shows that CK Hutchison had a strong incentive to commercialise its passive infrastructure assets to realise additional value from them. The commercialisation of these assets would be consistent with a broader industry trend, in both the UK and other jurisdictions, in which owners of passive infrastructure assets have sought to realise a significant uplift in value through some form of commercialisation.
- 5.96 In pursuit of this objective, CK Hutchison undertook a reorganisation of its European passive infrastructure assets into a separate tower company. This enabled CK Hutchison to explore the range of opportunities available to it.
- 5.97 It also identified a need to increase funding of 3UK including the rollout of its 5G network. In our view, this meant that CK Hutchison preferred an option that would raise the necessary cash proceeds for this investment.
- 5.98 We note that CK Hutchison wanted a stable long-term partner for the assets due to 3UK's reliance on them. The evidence available to us indicates that this could be addressed through a range of mechanisms, such as contractual protections, that would sufficiently protect the interests of its MNO business. In our view these considerations would be expected to influence the range of potential counterparties that CK Hutchison would be willing to consider in relation to a transaction and we take this into account in this next part of our assessment.
- 5.99 By contrast, the evidence does not suggest that maintaining the status quo position, in which the pre-Merger situation would continue for the foreseeable future (so CK Hutchison's passive infrastructure assets would continue to be used in the same way as they were prior to commercialisation to primarily service CK Hutchison's MNO), was given serious consideration by CK Hutchison.

CK Hutchison's ability to implement options available to it absent the Merger

Overview of our approach

- 5.100 We have considered the options available to CK Hutchison to achieve its objectives absent the Merger.
- 5.101 When other owners of passive infrastructure have implemented strategies to realise an uplift in the value of their assets, they have adopted various approaches (including outright sale, obtaining minority investments, or establishing joint ventures).
- 5.102 For the purposes of establishing the counterfactual in this case, consistent with our framework for analysis, we have considered the viability of the options that were, or would be, available to CK Hutchison with a view to determining whether the most likely counterfactual is that CK Hutchison's UK assets would be operated in direct competition with Cellnex's passive infrastructure assets.
- 5.103 For the reasons set out above, when assessing CK Hutchison's ability to implement alternative options we have considered the full set of strategic options that were available to it at the time that it entered into the Merger (as part of a broader transaction) with Cellnex.
- 5.104 Also, as explained above, our framework does not limit our consideration of the counterfactual to assessing whether the sales process that CK Hutchison ran could have produced an alternative purchaser at the precise point in time that the Merger was entered into. In accordance with our guidance, we have, therefore, considered the options available to CK Hutchison over an extended period of time, in particular because, as set out in more detail below, the evidence we have seen suggests that the sales process that it ran was not considered to be a 'one shot' process that excluded the pursuit of other options – either individually or in combination – at later points in time.
- 135
- 5.105 We have considered a number of possible routes that CK Hutchison could have taken that would have resulted in it realising increased value from its passive infrastructure assets, including:

¹³⁵ Which provides that the time horizon for describing the counterfactual should be consistent with the time horizon used in the competitive assessment. [MAGs](#), paragraph 3.15.

- (a) The sale of its passive infrastructure assets, including the UK assets which formed part of the Merger, to an alternative purchaser at the end of the original sales process run by CK Hutchison.
- (b) An alternative sales process at a later date and/or with an alternative transaction structure so as to appeal to a broader set of potential acquirers.
- (c) Options other than a sale that were given some consideration by CK Hutchison and/or regarded as credible courses of action by other market participants, such as:
 - (i) A combination of CK Hutchison's passive infrastructure assets with a strategic partner to create a separate tower company operating at arms-length from the MNO;
 - (ii) Retaining ownership of the assets while commercialising them through a separate tower company operating at arms-length from the MNO; and
 - (iii) An IPO of the assets.

Sale of passive infrastructure assets to an alternative purchaser

Parties' views

5.106 The Parties told us that there was no evidence to suggest that, in the absence of the Merger, CK Hutchison might have sold its UK and non-UK passive infrastructure assets to another party. The Parties told us that there was significant evidence to the contrary. In particular:

- (a) There was no credible alternative offer for the passive infrastructure assets at the time when CK Hutchison agreed to sell them to Cellnex.
- (b) CK Hutchison's need for the purchaser to be a sophisticated partner with a proven track record of executing large-scale tower transactions, [REDACTED], limited the number of potential purchasers significantly.
- (c) [REDACTED].¹³⁶

¹³⁶ Parties' response to issues statement paragraphs 1.4 and 1.8.3

- (d) The 'vast majority' of the relevant passive infrastructure assets in the UK were tied up in the MBNL joint venture for another ten years, which prevented them from being divested.¹³⁷
- (e) That its announcement of an internal reorganisation made clear to potential bidders that it was open to a sale. This was shown by:
 - (i) Approaches from groups such as [REDACTED] and
 - (ii) Its receipt of unsolicited pitch documents prepared by investment banks and analyst reports that considered the option of a sale.

5.107 CK Hutchison told us [REDACTED]:

- (a) [REDACTED].
- (b) [REDACTED].
- (c) a formal process [REDACTED]; and
- (d) CK Hutchison knew everybody who had the financial capacity for the transaction.

5.108 CK Hutchison told us that any counterparty needed the financial capacity for the transaction and to be desirable as a partner [REDACTED]. We set out its views on potential international counterparties below.

5.109 The Parties also told us that CK Hutchison's UK passive infrastructure assets were unattractive to potential purchasers because:

- (a) [REDACTED].
- (b) the specific assets allocated upon termination of the MBNL JV are unknown;
- (c) post dissolution the majority of former MBNL Sites will continue to host equipment from both 3UK and BT. This would limit the ability of any alternative purchaser to commercialise the assets with additional tenants; and
- (d) the Unilateral Sites are not attractive to alternative purchasers, due to being single tenant sites with limited scope for increased co-location.¹³⁸

¹³⁷ [Parties' response to issues statement](#), paragraph 1.8.3. See Chapter 2 for description of MBNL

¹³⁸ [Parties' response to issues statement](#), paragraph 2.1.3 & paragraph 2.9

5.110 CK Hutchison also told us that [REDACTED].

5.111 CK Hutchison told us that as the key features of the MBNL JV agreement (set out above) are not in the public domain, any comments in respect of these by third parties should be treated with caution.

5.112 CK Hutchison told us that [REDACTED].

CK Hutchison's views on specific purchasers

5.113 CK Hutchison mentioned [REDACTED].

5.114 CK Hutchison stated in respect of [REDACTED]

(a) [REDACTED].

(b) [REDACTED].

(c) [REDACTED].

(d) [REDACTED].

5.115 CK Hutchison told us, in respect of [REDACTED], that:

(a) [REDACTED] which made clear that it was not interested in the tower assets. CK Hutchison told us: [REDACTED].

(b) [REDACTED]

(i) [REDACTED]

(ii) [REDACTED]

5.116 CK Hutchison told us that [REDACTED].

5.117 CK Hutchison told us that it had discussions with [REDACTED].

5.118 CK Hutchison told us that [REDACTED] was not a suitable partner [REDACTED].

CK Hutchison's views on an alternative transaction structure and timing

5.119 CK Hutchison told us that, as the commercial imperative for the transaction [REDACTED].

5.120 CK Hutchison told us that, as it was not a forced seller, it would not have engaged in a sale that did not meet all of its requirements nor would it [REDACTED].

5.121 It said that, if the Merger were blocked, [REDACTED]. It told us that [REDACTED].

Our assessment

5.122 In assessing CK Hutchison's ability to achieve its objectives through a sale of passive infrastructure assets to an alternative purchaser, we have considered the following matters:

- (a) The attractiveness of CK Hutchison's passive infrastructure assets to potential purchasers, including the attractiveness of the UK assets;
- (b) the potential implications for the prospects of a sale of including assets held within the MBNL JV;
- (c) the impact of Cellnex's offer on the sales process run by CK Hutchison;
- (d) the prospects of achieving a sale to an alternative purchaser drawn from those third parties that had engaged with CK Hutchison during the sales process it had run; and
- (e) the prospects of achieving a sale to an alternative purchaser by altering or extending the sales process.

Overall attractiveness of CK Hutchison's passive infrastructure assets

5.123 Third parties consistently told us that passive infrastructure assets are an attractive asset class to invest in and that there is substantial interest in acquiring such assets, both generally and specifically in the UK. For example:

- (a) [REDACTED] told us that it 'considers the UK an attractive investment market'. It also told us that it [REDACTED]. Data infrastructure such as towers are of major interest to it.
- (b) [REDACTED] told us that the UK was an 'attractive market' and that the CK Hutchison assets represented a potential opportunity for it to [REDACTED].
- (c) Vodafone has stated publicly that there is a lot of interest from strategic investors and infrastructure funds in investing in Vantage Towers, the tower company in which Vodafone has a majority stake.¹³⁹

5.124 There is evidence that the size and scale of the transaction, whether in terms of the UK and non-UK assets or the UK assets in isolation made it attractive to certain investors.

- (a) A report prepared for Cellnex [REDACTED].

¹³⁹ [Vodafone results Q&A, 16th November 2021](#)

(b) Cellnex described the deal as '[REDACTED]'.

5.125 We note that there are no other expected opportunities for suppliers of macro sites to expand in the UK through the acquisition of large portfolios of existing sites in the foreseeable future:

(a) CTIL has been commercialised by its shareholders, Vodafone and O2, with each entering into long-term Master Services Agreements with it and Vodafone having raised capital from its 50% equity stake in CTIL by transferring it to its subsidiary Vantage Towers.¹⁴⁰

(b) [REDACTED] (see chapter 8).

5.126 We consider that there is evidence to show that CK Hutchison could have sold either its UK assets in isolation or together with the non-UK assets below the price agreed with Cellnex and still have realised a significant uplift in the value of the assets as they are currently included in CK Hutchison's overall market valuation:¹⁴¹

(a) Internal documents show that CK Hutchison [REDACTED]. We note that Cellnex [REDACTED]. Therefore, in our view [REDACTED].

(b) [REDACTED].

(c) CK Hutchison's internal documents show that [REDACTED].

5.127 Our view is that, whilst CK Hutchison would not be a 'forced seller', it would have strong incentives to accept an offer from a suitable counterparty that represented a significant uplift in value and realised cash proceeds for 3UK. This could be the case for an offer for the UK assets at a price that was lower than the price offered by Cellnex.

Inclusion of assets from the MBNL JV

5.128 Cellnex told us that [REDACTED].

5.129 However, Cellnex also told us that CK Hutchison informed it in a presentation [REDACTED]. Cellnex also told us that, prior to entering into discussions with CK

¹⁴⁰ See Chapter 3, Industry Background

¹⁴¹ As set out in our guidance, we do not need to restrict our analysis to alternative purchasers who would have been willing to pay the same or similar price that was agreed between the Parties. MAGs, paragraph 3.30. While this section of the MAGs relates to alternative purchasers in an exiting firm scenario, the same considerations appear relevant in the present context as long as any alternative transaction generated sufficient value for CK Hutchison to achieve its commercial objectives.

Hutchison, it was familiar with the general mechanics of the UK market including with the MBNL which is a major Cellnex customer.

- 5.130 CK Hutchison told us [REDACTED].
- 5.131 Cellnex told us that, [REDACTED][REDACTED].
- 5.132 CK Hutchison told us that [REDACTED].
- 5.133 We note that [REDACTED].
- 5.134 We also note that [REDACTED] and [REDACTED]. In our view, this suggests that Cellnex saw value in the assets and was prepared to assume the risks associated with them. We consider that other investors with access to the same information and ability to negotiate similar protections would also see this value and would be prepared to assume similar risks as Cellnex.
- 5.135 Our view is that, while the MBNL JV adds an additional layer of complexity to the sale of CK Hutchison's UK assets and may make these less attractive to purchasers than [REDACTED], on the basis of the evidence we have seen, we do not consider that this would have prevented a sale of the UK asset to a party other than Cellnex.
- 5.136 Our view is that the available evidence does not support a finding that only Cellnex had the incentives, experience or financial capability to reach an agreement with CK Hutchison. We consider that there were other potential purchasers who had the skills and experience and given the opportunity, may have been able to reach a similar agreement.
- 5.137 We note that the Merger in respect of the MBNL Sites comprises two parts: Cellnex is provided with the right to future cashflows until 2031 and ownership rights thereafter.
- 5.138 In our view, the fact that Cellnex was willing to enter into the Merger shows that the package of rights has value, and arrangements could be found to provide sufficient commercial certainty, to make it, or alternative structures involving the MBNL assets, also attractive to alternative purchasers at an appropriate price.
- 5.139 In respect of the Parties' submission that [REDACTED]. It said that [REDACTED]. In our view, this shows that [REDACTED].
- 5.140 Our view that, based on the evidence we have seen from third parties, the Transaction Sites, would still have had sufficient value to attract other investors. While we recognise that they would not be aware of the full details of the MBNL agreement, evidence from third parties suggests that the

existence of the MBNL JV (some aspects of which are already in the public domain) would not have prevented an alternative transaction.

5.141 For example:

- (a) [REDACTED] told us that it would have been interested in the assets irrespective of the MBNL JV structure and that [REDACTED] they were familiar with the arrangement.
- (b) [REDACTED].
- (c) [REDACTED] told us that issues around the MBNL JV related to the valuation of the assets rather than the viability of agreeing a deal in relation to them. It told us that [REDACTED].

5.142 On the basis of the evidence set out above, we consider that, whilst including the MBNL Sites may add an additional level of complexity to a sale to an alternative purchaser, it would not prevent (or make materially less likely) that the CK Hutchison's UK assets could be sold, either on a standalone basis or as part of a wider package.

5.143 We see no reason why other credible purchasers could not assess and address the specific risks relating to the MBNL assets in the same way that Cellnex was able to do, or that they would be any less willing or able than Cellnex to accept these risks given the nature of the commercial opportunity which the assets represented.

5.144 Moreover, to the extent that MBNL-related risks would be reflected in the offer of a lower purchase price than that offered by Cellnex, we have concluded above that CK Hutchison could still have strong incentives to accept a lower price.

The impact of Cellnex's offer on the sales process run by CK Hutchison

5.145 The available evidence indicates that CK Hutchison believed that [REDACTED]. A CK Hutchison internal document from November 2020 states that [REDACTED].

5.146 Soon after the receipt of this offer, CK Hutchison entered into an exclusivity agreement with Cellnex relating to agreement of the Merger.

5.147 We consider that, following receipt of this offer, CK Hutchison was primarily focused on Cellnex as the purchaser of the assets and so had only limited engagement with other potential purchasers and it therefore did not engage as fully with alternative purchasers as it would, absent this offer. We set this out in more detail below.

The prospect of achieving a sale to an alternative purchaser through the original sales process

5.148 The evidence available to us shows that other credible purchasers took an active interest in acquiring CK Hutchison's passive infrastructure assets.

5.149 [REDACTED].

- [REDACTED]

5.150 CK Hutchison considered [REDACTED] as a potentially credible alternative purchaser, as set out above.

5.151 The evidence available to us shows that [REDACTED] has a strong track record in operating passive infrastructure assets, demonstrated strong interest in the CK Hutchison tower assets and has all the necessary capabilities to execute a transaction of this nature.

(a) [REDACTED].

(b) [REDACTED].

(c) [REDACTED].

(d) [REDACTED].

5.152 The suitability of [REDACTED] as a counterparty is also reflected in evidence from the Parties: whilst CK Hutchison stated that '[REDACTED]' it also told us that '[REDACTED]' and that it would have been only '[REDACTED]' than Cellnex.

5.153 CK Hutchison stated that [REDACTED] was not interested in acquiring the assets. However, evidence set out above from CK Hutchison suggests to us that [REDACTED].

5.154 Internal documents, from [REDACTED] provide a fuller overview of contacts between CK Hutchison and [REDACTED] in relation to the assets.

5.155 [REDACTED] documents show that it had considerable interest in CK Hutchison's non-UK and UK assets. [REDACTED] told us that it was 'persistent in these contacts with CKH' and that 'there was never really any strong engagement from CK Hutchison'.

5.156 [REDACTED] told us that:

(a) [REDACTED].

(b) [REDACTED] It subsequently learned in November 2020 that the assets had been sold to Cellnex.

(c) [REDACTED]

(d) [REDACTED]

(e) The UK market was attractive and that the UK assets would have been [REDACTED]. It stated the UK assets would likely also be attractive in isolation although it had not examined in detail the MBNL arrangement.

5.157 We consider that [REDACTED] had a strong track record in this sector and an interest in CK Hutchison's non-UK and UK tower assets.

5.158 We have also considered whether its ability to pursue a transaction with CK Hutchison would have been inhibited by [REDACTED].¹⁴²

5.159 [REDACTED]

5.160 [REDACTED] stated that the €10bn transaction price for CK Hutchison's European and UK assets [REDACTED]. It noted that it [REDACTED]

5.161 We note that Cellnex internal documents suggest that it considered [REDACTED] and that Cellnex's market capitalisation of approximately €27bn¹⁴³ is significantly lower than [REDACTED].

(a) For example, at [REDACTED].

5.162 With regard to CK Hutchison's submission on [REDACTED].

(a) We note the [REDACTED].

(b) We note that [REDACTED].

(c) In this context, as set out above, we consider that there is evidence to show that CK Hutchison could have sold its European tower portfolio for a price below that offered by Cellnex yet still received significant value.

5.163 The evidence we have seen shows that [REDACTED] had a strong interest in the UK assets (whether in isolation or as part of a broader deal alongside the non-UK assets). It also shows that [REDACTED] would not necessarily have been prevented from acquiring CK Hutchison's UK assets [REDACTED].

¹⁴² CK Hutchison began discussions with Cellnex in [REDACTED], with exclusivity signed in [REDACTED] and the deal concluding in November 2020. [REDACTED]

¹⁴³ Source [Cellnex Telecom, S.A. \(CLNX.MC\) Stock Price, News, Quote & History - Yahoo Finance](#) as at 25th February 2022

- [REDACTED]

5.164 [REDACTED] took an interest in CK Hutchison's UK and non-UK passive infrastructure assets.

(a) [REDACTED].

(b) [REDACTED]

5.165 CK Hutchison told us that [REDACTED] was not interested in the assets as, when CK Hutchison suggested the topic, [REDACTED] CEO did not 'pick up on it'.

5.166 However, evidence provided by [REDACTED] provides a fuller overview of contacts between CK Hutchison and [REDACTED] in relation to the assets:

(a) In response to a rumour that CK Hutchison was trying to monetise its European passive infrastructure investments, [REDACTED] contacted CK Hutchison in [REDACTED]. While the call was not specific to CK Hutchison's passive infrastructure assets, these were discussed. [REDACTED] told us: 'It was more of a relationship call than a transaction call and was not specific to the CK Hutchison tower assets in Europe. They discussed [REDACTED] and how they might partner together. They mentioned briefly [REDACTED].

(b) [REDACTED] told us that they also discussed [REDACTED].

(c) [REDACTED] told us that the UK was an attractive market to it and that [REDACTED].

(d) [REDACTED] told us that [REDACTED]

(e) [REDACTED] emailed CK Hutchison 'to reiterate its interest in CKH's European towers and suggesting some options relating to the 'potential separation of CK Hutchison's European towers.' [REDACTED] told us that it received no response to this email prior to the public announcement of the transaction with Cellnex. After the announcement, in November 2020, [REDACTED] considered there was 'no significant traction' for it with CK Hutchison.

5.167 [REDACTED] also told us, [REDACTED]:

(a) [REDACTED]

(b) [REDACTED]

5.168 [REDACTED] told us that the biggest single investment it has made to date in infrastructure assets is \$[REDACTED] billion [REDACTED]. It told us that, for large opportunities, [REDACTED].

- 5.169 We consider that, at the time [REDACTED] sought to engage with CK Hutchison on this matter, CK Hutchison was already in advanced talks with Cellnex. Therefore, it is difficult for us to determine how any discussions with [REDACTED] would have evolved in the absence of the Merger as these were not pursued by CK Hutchison at the time.
- 5.170 In the absence of discussions progressing, we do not know which [REDACTED].
- 5.171 We consider that, in the absence of the transaction with Cellnex, CK Hutchison would have had an incentive to engage with [REDACTED] in relation to one of:
- (a) An acquisition of all, or a subset of, the assets, possibly through a syndicate or consortium of investors. We note in this respect that [REDACTED] told us that there were [REDACTED]; or
 - (b) A minority stake in a tower company actively targeting third party MNOs (discussed in more detail below).
- 5.172 We consider that CK Hutchison could have considered [REDACTED] as an alternative purchaser for the assets because:
- (a) [REDACTED]
 - (b) [REDACTED]
- The prospects of achieving a sale to an alternative purchaser through a modification or extension to the original sales process*
- 5.173 Given CK Hutchison's incentives, we consider that, in the absence of concluding a sale of the UK assets (either individually or as part of a wider transaction including the non-UK assets) within the transaction process described above, CK Hutchison would have re-examined the options available to it to realise its strategic objectives.
- 5.174 This is due to the significant incentive for MNOs to realise the uplift in value from commercialisation of their tower assets which is independent of CK Hutchison's aim to invest in 3UK's network.
- 5.175 Furthermore, we note that its incentive to commercialise the tower assets would remain even if the alternative options set out in paragraph 5.121 [REDACTED] were explored.
- 5.176 Also [REDACTED] (as set out in paragraphs 5.87 to 5.89). [REDACTED].

5.177 Our view is that CK Hutchison could have looked at a range of alternative methods to achieve a sale of these assets:

- (a) In broad terms, these could have included alternative transaction structures and/or running a wider sales process, in each case to accommodate a wider pool of purchasers as well as re-engaging with parties that had expressed interest previously.
- (b) It could also have sought to extend or delay the timing of any sale, for example to overcome any short-term issues that might have arisen with specific purchasers.
- (c) As well as pursuing a sale in the longer-term, CK Hutchison could also have pursued other options to realise value in the meantime, such as partnering before a subsequent sale or selling different assets at different points in time.

- *Alternative transaction structure and sales processes*

5.178 Alternative transaction structures could have included:

- (a) Seeking purchasers for subsets of, or minority investors in, its passive infrastructure assets rather than a single package of the UK and non-UK assets in combination (as suggested as an option [REDACTED], above at paragraph 5.169(c)); and/or
- (b) Assessing a wider range of investors, including private equity, either in isolation or in a combination or syndicate (as mentioned in paragraph 5.176(a)) above; and/or
- (c) Running a broader or more formal sales process to attract a wider investment pool.

5.179 The evidence available to us is consistent with CK Hutchison considering that there were a range of options. For example:

- (a) A CK Hutchison internal document [REDACTED]¹⁴⁴ [REDACTED].
- (b) A document prepared by CK Hutchison's advisers, [REDACTED]. This presentation then [REDACTED]. The covering email noted [REDACTED].

¹⁴⁴ These ranged from [REDACTED].

(c) An email between CK Hutchison's senior management in February 2020 noted: [REDACTED]

- 5.180 We consider that these entities could have been approached in any wider sales process either for the whole assets, a subset or as a minority investor in a wider group.
- 5.181 We accept that CK Hutchison's reorganisation of its telecommunications division may have indicated to some in the market that its passive infrastructure assets could be for sale. However, we note that CK Hutchison's announcements did not explicitly state that it was seeking to sell its passive infrastructure assets¹⁴⁵ and that its internal documents from the time of the announcement indicate that a range of options, of which the sale of assets was only one, were still being considered.
- 5.182 While some potential counterparties approached CK Hutchison at a relatively early stage, others only approached it after it had received a (non-binding) offer from Cellnex in July 2020.¹⁴⁶
- 5.183 We therefore consider that the evidence available to us indicates that a broader or more formal sales process could have attracted additional purchasers, a number of which are identified by CK Hutchison as viable options within its own internal documents with an interest in acquiring passive infrastructure assets.
- 5.184 We also consider that deeper engagement with other prospective purchasers would have provided a better understanding of possible transaction structures that would appeal to alternative purchasers.
- *Timing*
- 5.185 We consider that conducting an alternative sales process could have enabled CK Hutchison to manage or overcome any timing issues limiting the involvement of particular bidders.

¹⁴⁵ CK Hutchison's announcement of its reorganisation in August 2019 set out that 'the new structure will allow the Group to focus on optimising the asset portfolio, achieving cost synergies, as well as maximising returns on invested capital' (CK Hutchison, [2019 Interim Report](#), page 25). In CK Hutchison's announcement of 2019 results, CK Hutchison stated that reorganisation 'enables an effective management of these infrastructure-like assets across the European operations and provides optionality for CKH Group Telecom to rationalise and optimise capital efficiency going forward' (CK Hutchison, [Announcement of 2019 results](#), page 7). In its 2020 interim results published on 6 August 2020, CK Hutchison stated that it had completed the reorganisation and that CK Hutchison 'continues to actively explore options to maximise the value to the Group of this important business' (CK Hutchison, [2020 Interim Report](#), page 10).

¹⁴⁶ We note, for example, that [REDACTED] in response to rumours at that time that it was seeking to monetise its passive infrastructure assets and subsequently raised this [REDACTED] and that [REDACTED].

- 5.186 For example, to the extent that [REDACTED].
- 5.187 Furthermore, to the extent that any additional time would have been required to arrange funding options (where, for example, a syndicate would be arranged) a later or longer sales process could have facilitated this.
- 5.188 In respect of CK Hutchison's submissions (set out in paragraphs 5.72 and 5.119 above) that any alternative sale would have been required to be [REDACTED], our view is that a later sale would still have been an attractive option for CK Hutchison in the absence of the Merger. This is because:
- (a) Even absent the desire to invest in 3UK's 5G network, there remained a significant incentive for CK Hutchison to realise the uplift in value of the tower assets through a sale (or the other options outlined below). The realisation of that uplift did not require an [REDACTED] sale of the assets.
 - (b) [REDACTED] (see paragraphs 5.120 to 5.121).
 - (c) Its overall incentive to commercialise the tower assets would have remained even if alternative options relating to [REDACTED].
 - (d) There is no indication in the evidence we have seen that the sales process CK Hutchison ran was regarded by it as a 'one shot' or '[REDACTED]' process.
 - (e) The evidence available to us does not indicate that 3UK's additional funding requirements for 5G are required [REDACTED] (see paragraphs 5.87 to 5.88). CK Hutchison told us that it envisaged this investment [REDACTED], with Ofcom [REDACTED].

Conclusion on prospects of a sale of the UK assets to an alternative purchaser

- 5.189 We are not limited to considering alternative scenarios that would have occurred at exactly the same time as the developments that gave rise to Merger and so have considered the options available to CK Hutchison over an extended period of time (see paragraph 5.10 above).
- 5.190 The evidence available to us shows that CK Hutchison had a strong incentive to realise the value of its passive infrastructure assets and that credible potential purchasers were available with strong incentives to engage with CK Hutchison, either within the original sales process or through a modified and/or extended sales process.
- 5.191 On this basis, we conclude that a sale of the UK assets, either individually or as part of a wider package of assets, to an alternative purchaser with the

incentive to operate CK Hutchison's UK assets in direct competition with Cellnex's passive infrastructure assets would have been the most likely alternative outcome absent the Merger.

5.192 Given CK Hutchison's incentives, we conclude that any sale to an alternative purchaser (either within the original sales process or through a modified and/or extended sales process) would have been conducted in the short to medium-term following CK Hutchison's initial decision to sell its passive infrastructure assets to a third party.¹⁴⁷

5.193 Accordingly, we conclude that any alternative purchaser of CK Hutchison's UK assets in the counterfactual would have obtained control over these assets in substantively the same sequence as envisaged by the Parties pursuant to the terms of the Merger (that is, (a) the Unilateral Sites on completion of the transaction; and (b) legal title to the Transfer Sites on dissolution of MBNL, scheduled for 2031) and within the timeframe considered in our assessment of the competitive effects of the Merger as set out in Chapter 8.

Other options to commercialise the assets

5.194 We consider that several other options may also have been available to CK Hutchison had it not been able to achieve a sale of its passive infrastructure assets on satisfactory terms. We consider these below.

Parties' views

Combination of passive infrastructure assets with a strategic partner

5.195 CK Hutchison told us that:

- (a) Its reorganisation of its European assets allowed it to fully explore all options;
- (b) when it considered the suitability of potential partners it considered [REDACTED];

¹⁴⁷ In this context, by 'short- to medium-term', we mean a period of time consistent with CK Hutchison's strong incentives to pursue the commercialisation of its passive infrastructure assets as summarised in paragraphs 5.96-5.99. In our Provisional Findings, we indicated that this referred to a period of up to approximately three years from CK Hutchison's initial decision to sell its passive infrastructure assets to a third party. This was primarily driven by our understanding of CK Hutchison's incentives to invest in its 5G network (including, for example, its stated objective to [REDACTED]). We note, however, that CK Hutchison also had a broader incentive to commercialise its passive infrastructure assets to realise additional value from them and told us that [REDACTED]. On this basis, we consider that the period of time over which an alternative sales process could have taken place should be consistent with our assessment of CK Hutchison's overall incentives, so should not be limited to a three-year period and, in light of the fluid nature of CK Hutchison's business planning, is most accurately described as a 'short- to medium-term' period rather than by reference to a specific number of years.

(c) [REDACTED];

(d) [REDACTED] and

(e) [REDACTED].

5.196 Cellnex told us that [REDACTED].

5.197 Cellnex told us that [REDACTED].

5.198 CK Hutchison told us that it had discussions with [REDACTED]. It told us that they [REDACTED]. It told us that it [REDACTED].

5.199 CK Hutchison told us that [REDACTED]:

(a) [REDACTED];

(b) [REDACTED];

(c) [REDACTED].

5.200 CK Hutchison told us that it also suggested [REDACTED].

IPO

5.201 CK Hutchison submitted that an IPO of its UK passive infrastructure assets was never a realistic prospect and it did not give any consideration to this.¹⁴⁸ It told us that this was for the following reasons:

(a) [REDACTED]

(b) [REDACTED]; three years of historical audited financial information, which would imply a listing [REDACTED] at the earliest. This [REDACTED]

(c) [REDACTED] and

(d) an IPO would only facilitate the sale of a partial stake in a business [REDACTED].

5.202 The Parties told us that the listing of Vantage Towers was, in their view, not a relevant comparator as it did not involve the same complexity as the inclusion of the MBNL JV, and it was therefore possible for the regulators to approve the listing and also much easier for prospective investors to understand.¹⁴⁹

¹⁴⁸ Parties' response to issues statement, paragraph 2.34.

¹⁴⁹ Parties' response to issues statement, paragraph 2.38.

Other forms of commercialisation

5.203 CK Hutchison told us that:

- (a) 3UK only used its passive infrastructure sites for its own radio network and did not actively market those sites to other MNOs or other third parties;
- (b) 3UK had no plans to [REDACTED]
- (c) [REDACTED] and
- (d) even once the MBNL JV had been dissolved, 3UK considers that the potential for co-location on the MBNL Sites (including the Transfer Sites) without material investment will be limited given the sites currently host 3UK and BT/EE, and already require significant capex for structural enhancements to allow 3UK and BT/EE to host 5G equipment.¹⁵⁰

5.204 CK Hutchison told us that, after the internal reorganisation, it did not market the non-UK or UK assets as a host for third party tenants. It told us that operating its passive infrastructure assets as an independent WIP was [REDACTED].

5.205 CK Hutchison told us that its internal reorganisation and establishment of its tower companies took a year, by which time its [REDACTED].

Our assessment

5.206 In assessing the extent to which options other than a sale could have been pursued by CK Hutchison absent the Merger, we have examined:

- (a) The extent to which any alternative options were explored by it prior to the Merger and the extent to which any issues were identified that would affect its ability to implement them; and
- (b) other options potentially available to it, that have been pursued by other market participants or that were identified in the Parties' internal documents.

5.207 In assessing these alternative options, we note that they are not necessarily mutually exclusive, and some could be used in conjunction or sequentially with others.

¹⁵⁰ [Parties' response to issues statement](#), page 7

Exploration of alternative options by CK Hutchison

5.208 The evidence available to us indicates that CK Hutchison took some steps to explore at least one alternative to a sale of its passive infrastructure assets: [REDACTED].

5.209 CK Hutchison discussed [REDACTED]. We have also seen evidence of [REDACTED].

5.210 In our view, there is evidence to suggest that a combination, rather than a sale, was initially CK Hutchison's preferred option:

(a) [REDACTED]

(b) The Cellnex board discussed in June 2020 that, in respect of its discussions to acquire CK Hutchison's non-UK and UK assets, CK Hutchison [REDACTED].

5.211 However, as set out above, [REDACTED] both to meet Cellnex's desire to be an independent tower operator and CK Hutchison's emerging need to raise funding.

5.212 There was limited traction in discussions between CK Hutchison and [REDACTED] in respect of a combination with [REDACTED]

5.213 By contrast, discussions with [REDACTED] about a possible combination did make some progress. As set out above (paragraph 5.200), CK Hutchison's view was that [REDACTED].

5.214 [REDACTED] told us that:

(a) [REDACTED]

(b) [REDACTED]

(c) [REDACTED].

(d) [REDACTED].

(e) [REDACTED].

(f) [REDACTED]

(g) [REDACTED]

(h) [REDACTED]

(i) [REDACTED]

(i) [REDACTED]

5.215 We note that the end of these discussions coincided with the submission of a [REDACTED] which CK Hutchison perceived as being [REDACTED]. As a consequence, it is difficult to ascertain whether, in the absence of this offer, CK Hutchison would have sought to explore [REDACTED] position more fully and find a way to reach agreement.

5.216 Similarly, an initial discussion with [REDACTED] envisaged an arrangement in which [REDACTED] [REDACTED], based on the respective value of their passive infrastructure assets. It is difficult to ascertain whether CK Hutchison would have sought to explore a combination more fully with [REDACTED] in the absence of the Cellnex sale.

5.217 We note, however, CK Hutchison initially perceived that [REDACTED] as a way to realise the value of its passive infrastructure assets.

5.218 Furthermore, we note that, whilst [REDACTED].

5.219 Evidence from internal documents provided by CK Hutchison suggests the idea was to create a [REDACTED] [REDACTED].

5.220 We consider that the option for a combination to be attractive and workable absent the Merger is consistent with recent market developments:

(a) Vodafone stated publicly in November 2021 that it is considering a combination of the passive infrastructure assets in its Vantage Towers portfolio with those of another MNO such as Orange or Deutsche Telekom in which it would seek 'co-control'.¹⁵¹ Vodafone noted that this could also potentially allow it to further monetise these assets through the sale of a further stake, whilst retaining co-control with a partner.¹⁵²

(b) Orange has also stated publicly that it was willing to consider combinations with its passive infrastructure network 'TOTEM' as part of what it also saw as a consolidation in this area.¹⁵³

5.221 We consider that this shows that such combinations are considered as a realistic option by industry participants and, in addition, that strategic concerns around control arrangements over passive infrastructure assets can be overcome.

5.222 Although it is difficult to assess the extent to which any combination could be successfully pursued given that CK Hutchison gave it limited consideration

¹⁵¹ [Vodafone H1 FY22 Results live Q&A pages 5 and 10](#)

¹⁵² [Vodafone H1 FY22 Results live Q&A pages 5 and 10](#)

¹⁵³ [Orange Annual Report Investors presentation](#) at 1hr and 29 minutes

once it started engaging with Cellnex on the Merger, the fact that CK Hutchison pursued this option prior to engaging with Cellnex, in our view means that it is an option CK Hutchison could revisit in the absence of the Merger.

- 5.223 Therefore, the evidence available to us suggests that this was an option that was initially considered by CK Hutchison, is considered to be an attractive and workable option by other industry participants and could have been subject to further consideration absent the Merger.

Other options not fully explored by CK Hutchison

- 5.224 We note that, in addition to the options that were explored by CK Hutchison, there are other options that other MNOs have used, either in isolation or in conjunction, in order to commercialise their passive infrastructure assets.

- (a) Vodafone completed an IPO of Vantage Towers in March 2021, in a move that was described by industry commentators as ‘benefiting from strong investor appetite’.¹⁵⁴ Vodafone told us that the objective of the Vantage Towers listing was to recognise the value of the tower assets within the Vodafone group and to place all the group’s tower assets under a single management team dedicated to build that business. It told us that [REDACTED]
- (b) Prior to this, Vodafone had organically grown its European passive infrastructure business through co-location, with 84% of revenue coming from Vodafone group companies prior to the IPO and the remaining revenue generated from other MNOs.¹⁵⁵ Despite Vodafone retaining an 82%¹⁵⁶ interest in the company, third-party revenues have grown.¹⁵⁷
- (c) With respect to the complexity of the arrangements that form part of the Vantage Towers portfolio, we note that the Vantage Towers business that was the subject of the IPO [REDACTED].¹⁵⁸
- (d) Orange established a separate tower company ‘TOTEM’ for its French and Spanish passive infrastructure assets. While it continues to own these assets fully, it has put in place a governance structure to separate it from its MNOs and seeks to grow revenue through increasing tenancy ratios on its assets from 1.3 to 1.5 in 2026 through attracting co-location from other MNOs.¹⁵⁹ It stated that it will seek M&A tower company

¹⁵⁴ [Vodafone vantage towers climbs after Germanys biggest ipo in three years](#)

¹⁵⁵ [Vantage Towers Prospectus March 2021](#)

¹⁵⁶ [Vodafone H1 FY22 Results live Q&A pages 5 and 10](#)

¹⁵⁷ [Vantage Towers HY22 results presentation page 8](#)

¹⁵⁸ [Vantage Towers Annual Report 2020/21, page 56.](#) [REDACTED]

¹⁵⁹ [FY 20 Presentation - EN - vdef.pdf \(orange.com\)](#) slide 34

opportunities in other parts of Europe and that it will seek to fund these through debt and equity from its tower company.¹⁶⁰ Orange also stated that the option of an IPO was ‘very open’ but they would wish to retain a controlling stake either alone or with another operator.¹⁶¹

- (e) As set out above, Deutsche Telekom has also established a separate tower company for its German and Austrian passive infrastructure assets and has organically grown third party revenues on these sites to the extent that they now account for [REDACTED] of revenues.

5.225 Options including an IPO or commercialising while retaining ownership were suggested to CK Hutchison [REDACTED] following its announcement of its internal reorganisation to establish a separate passive infrastructure asset company.

5.226 Evidence available to us indicates that CK Hutchison did not fully explore these options because, in our view, it preferred other options at that time. There is therefore more limited evidence available to inform our assessment of whether or not such strategies would have been pursued absent the Merger, or would have been successful if pursued.

5.227 We have seen some evidence that [REDACTED]. We also note that [REDACTED].

5.228 It is unclear to us, in the absence of an IPO being explored further by CK Hutchison, whether the constraints it has mentioned would have made this unfeasible, or whether these could have been overcome, for example by seeking a listing outside the UK or in some other way.

5.229 Whilst we consider that an IPO may not have been a preferred option for CK Hutchison, it may have been preferable to the status quo and therefore an option that could have been explored further absent the Merger.

5.230 Similarly, in relation to retaining ownership and commercialising the assets, we note the success that other market participants have had in doing so. There is also some evidence in CK Hutchison’s internal documents that, [REDACTED].

- (a) A CK Hutchison presentation on its internal reorganisation in April 2019 states that [REDACTED].

- (b) Its documents also provide some indication that [REDACTED].¹⁶²

¹⁶⁰ [Orange Annual Report Investors presentation](#) at 1hr and 17 minutes

¹⁶¹ [Orange Annual Report Investors presentation](#) at 1hr and 30 minutes

¹⁶² See, for example, [REDACTED].

- 5.231 We note that it took two years for Deutsche Telekom to set up a separate tower company in Austria but less time in Germany where the management team needed to be recruited but legal entities were already established.
- 5.232 We also note that, as Vodafone did, this option could be pursued in order to demonstrate to the market the ability to increase revenue through attracting third party MNOs, possibly as part of a route to an IPO.
- 5.233 In the absence of CK Hutchison pursuing this option, there is limited evidence available to inform our assessment of whether or not it would be successful. However, given the success of other market participants in pursuing similar options, our view is that, in the absence of a sale, these are also options that CK Hutchison could have pursued further.

Conclusion on options other than a sale of the assets

- 5.234 The evidence available to us shows that while CK Hutchison did not fully explore options other than a sale, it did give some consideration to alternatives. The evidence available to inform our assessment of other options is more limited, given that CK Hutchison's efforts ultimately focussed on the sale of its passive infrastructure assets.
- 5.235 We note that these options were considered by CK Hutchison to be less attractive than a sale of the UK assets (and may also have raised certain practical difficulties). However, we note that these options have been used by other owners of passive infrastructure to realise an uplift in the value of their assets and we consider that some or all of these options would have been given more detailed consideration by CK Hutchison, given its incentives, had been unable to sell the UK assets, either alone or as part of a wider package.
- 5.236 For these reasons, while we consider it is more likely that CK Hutchison would have sold the UK assets to a third party, either through the original sales process or through a modified and/or extended sales process, we believe that, in the absence of a sale, other options could have been pursued and would, if successfully executed, have resulted in CK Hutchison's passive infrastructure assets being operated in direct competition with those of Cellnex.

Conclusion on the counterfactual

- 5.237 The evidence available to us shows that CK Hutchison had a strong incentive (irrespective of the Merger) to commercialise its passive infrastructure assets and a number of ways to realise significant additional value from them. The commercialisation of these assets would be consistent with a broader

industry trend, seen in both the UK and other jurisdictions, in which owners of passive infrastructure assets have sought to realise an uplift in value through some form of commercialisation.

- 5.238 In pursuit of this objective, CK Hutchison, as a first step, initiated a reorganisation of its European passive infrastructure assets into separate tower companies. This enabled CK Hutchison to explore the range of opportunities available to it.
- 5.239 CK Hutchison subsequently identified a need to increase funding of its mobile network in the UK, including the rollout of 5G. In our view, this meant that its preferred commercialisation option should raise the necessary cash proceeds it needed.
- 5.240 The evidence available to us shows that CK Hutchison had, and would retain in the counterfactual, a strong commercial incentive to find a way to commercialise its passive infrastructure assets.
- 5.241 By contrast, the evidence that we have seen does not suggest that the status quo position, in which CK Hutchison's passive infrastructure assets would continue to be used in the same way as they were prior to commercialisation, was an option that it gave serious consideration to.
- 5.242 We considered the options available to CK Hutchison to achieve its objectives absent the Merger. Our analysis of the counterfactual by which the Merger should be assessed does not require us to specify the exact route CK Hutchison would have taken absent the Merger, but rather to consider the credibility and range of alternative options available to it in order to inform our view on the overall likelihood of a possible counterfactual in which CK Hutchison's UK passive infrastructure would have been operated in direct competition with that of Cellnex.
- 5.243 We believe that the evidence available to us shows that CK Hutchison had a number of opportunities to commercialise its assets which were likely to be credible. By way of context, we note that passive infrastructure assets are generally considered to be attractive and highly marketable assets, and that a wide range of existing industry players and financial investors have a strong interest and established track record in investing in such assets, including in the UK. Where other owners of passive infrastructure have implemented strategies to realise an uplift in the value of their assets, various approaches (including outright sale, obtaining minority investments or establishing joint ventures) have been adopted.
- 5.244 The evidence available to us shows us that CK Hutchison itself considered various options, over time, to realise the uplift in the value of its UK passive

infrastructure assets. We consider that many of these options were not mutually exclusive and that they could have been pursued sequentially (which again reflects the approach previously taken, in practice, by other owners of passive infrastructure).

- 5.245 We are not limited to considering alternative scenarios that would have arisen at exactly the same time as the developments that give rise to the merger under review. In this case, reflecting the evidence in relation to the considerations driving CK Hutchison's commercial incentives, we have considered the options available to CK Hutchison over an extended period of time.
- 5.246 There is no indication in the evidence we have seen that the sales process that CK Hutchison ran was considered to be a 'one shot' process that would have excluded the pursuit of other options (either individually or in combination) at later points in time.
- 5.247 Of the various options available to CK Hutchison, it ultimately decided to sell its passive infrastructure assets in the UK (to Cellnex), for a mix of cash and shares. This, in our view, was its preferred way of realising the uplift in value and obtaining cash proceeds. We do not consider, however, that the price offered by Cellnex for the UK assets would be the only or minimum price at which CK Hutchison would have been willing to transact in the absence of the Merger. In other words, CK Hutchison would have achieved its commercial and strategic objectives under alternative scenarios involving lower purchase prices and/or cash proceeds, even if those scenarios were not its preferred approach.
- 5.248 The evidence available to us shows that credible alternative purchasers showed an interest in acquiring the assets within the sales process that CK Hutchison ran.
- 5.249 However, the evidence shows that CK Hutchison believed that Cellnex's offer [X], which in our view explains why it did not engage as fully with alternative purchasers as might otherwise have been the case absent this offer. We consider that, absent the Merger, [X], they may have been willing to transact at prices which CK Hutchison may have accepted.
- 5.250 We further consider that CK Hutchison's alternative options were not limited to the outcome of the sales process that was run. The evidence available to us suggests that CK Hutchison would, if the original sales process had not resulted in an acceptable outcome, have had a variety of alternative options to explore in order to realise the value from its passive infrastructure assets.

- 5.251 In particular, we note that CK Hutchison could have run another sales process. This could have included adapting possible transaction structures and/or running a wider sales process, in each case to accommodate a wider pool of purchasers, as well as re-engaging with parties that had expressed interest previously. It could also have sought to extend or delay the timing of any sale, for example to overcome any short-term issues that might have arisen with specific purchasers. As well as pursuing a sale, CK Hutchison could also have pursued other options to realise value in the meantime, such as partnering before a subsequent sale or selling different assets at different points in time.
- 5.252 Given CK Hutchison's commercial incentives, the range of options available, and the existence of credible potential purchasers associated with those options, we consider that a sale of the UK assets (either individually or as part of a wider package of assets) to an alternative purchaser with the incentive to operate CK Hutchison's UK assets in direct competition with Cellnex's passive infrastructure assets would have been the most likely outcome absent the Merger.
- 5.253 Such a sale could have been realised either within the original sales process or through a modified and/or extended sales process that we consider would, in light of CK Hutchison's commercial incentives, have taken place in the short- to medium-term following its initial decision to sell its passive infrastructure assets to a third party.
- 5.254 Accordingly, any alternative purchaser would have obtained control over the assets in substantively the same sequence as envisaged by the Parties pursuant to the terms of the Merger: that is, (a) the Unilateral Sites on completion of the transaction; and (b) legal title to the Transfer Sites on dissolution of MBNL, scheduled for 2031 and within the timeframe considered in our assessment of the competitive effects of the Merger in Chapter 8.
- 5.255 The evidence available to us shows that CK Hutchison also gave some consideration to other options (which, as noted above, have been used by other owners of passive infrastructure to realise an uplift in the value of their assets). We note, for example, that CK Hutchison discussed [REDACTED].
- 5.256 The evidence available to inform our assessment of these other options is limited, given that CK Hutchison's efforts ultimately focussed on a sale. We note, in addition, that some evidence indicates that these options were considered by it to be [REDACTED]. However, evidence also shows that these other options were broadly regarded as credible options by market participants, and we believe that they would have been given more detailed consideration

by CK Hutchison (in light of its commercial objectives) had it encountered difficulties in securing the sale of the UK assets.

- 5.257 On that basis, while we consider it is more likely that CK Hutchison would have sold the UK assets to a third party, either through the original sales process or an alternative sales process, our view is that, in the absence of a sale, other options, such as a combination of assets, IPO or organic commercialisation, could have been pursued and, if successful, would have resulted in CK Hutchison's UK passive infrastructure assets being operated in direct competition with those of Cellnex.
- 5.258 As noted above, we recognise that some of the alternative options may have yielded lower cash proceeds than the Merger or might have been less attractive for CK Hutchison for other reasons. However, our assessment is concerned with the options CK Hutchison would have pursued in the absence of the Merger, not whether it would prefer such options, relative to the Merger. We consider that CK Hutchison had strong strategic incentives to pursue a wide range of alternative options even if some might prove impractical or infeasible on further examination or others might allow CK Hutchison to achieve its objectives only partially and/or take longer to do so.
- 5.259 Our overall assessment of the likelihood of CK Hutchison realising a significant uplift in the value of its UK passive infrastructure assets reflects the number of different options available to it that might enable it to achieve this, the incentives of both the seller and potential buyers to find an approach which worked, the existence and credibility of potential counterparties with whom CK Hutchison could engage and the strategic and commercial incentives for CK Hutchison to do so. We have compared this to the likelihood that CK Hutchison would instead be unwilling or unable to pursue any of the options we have identified, or that having done so it would nonetheless have preferred to retain the UK passive infrastructure assets in their current form.
- 5.260 Having done this, we conclude that the most likely counterfactual in this case, based on the evidence available to us, is one in which there would have been stronger conditions of competition between Cellnex and the owner of the CK Hutchison UK assets. This is because we conclude that the most likely outcome, absent the Merger, is that CK Hutchison's UK passive infrastructure assets would have been operated in direct competition with Cellnex's passive infrastructure assets.
- 5.261 This outcome would be achieved through one or more of the options, as set out above, that were available to CK Hutchison to commercialise its passive infrastructure assets.

6. Market definition

- 6.1 This chapter assesses the relevant market for the assessment of the Merger. The purpose of market definition is to provide a framework for the CMA's analysis of the competitive effects of the merger. The relevant market (or markets) is the market within which the merger may give rise to an SLC and contains the most significant competitive alternatives available to the customers of the merged companies. Within that context, the assessment of the relevant market(s) is an analytical tool that forms part of the analysis of the competitive effects of the merger and should not be viewed as a separate exercise.¹⁶³
- 6.2 Market definition involves identifying the most significant competitive alternatives available to customers of the merger firms and includes the sources of competition to the merger firms that are the immediate determinants of the effects of the merger.
- 6.3 As part of our analysis of the competitive effects of the Merger, we have considered the product and geographic scope of the market.

Product scope

- 6.4 The Parties have made no submissions on market definition in phase 2 of this inquiry and we have not received any submissions from third parties on this matter. Our assessment of the relevant markets has not changed from the assessment made in phase 1.
- 6.5 In phase 1, the Parties submitted that there was no reason to depart from the CMA's decision in *Cellnex/Arqiva*¹⁶⁴ and that the narrowest plausible candidate market is the market for the provision of site access to developed macro sites and ancillary services to MNOs and other wireless communication providers.
- 6.6 In its *Cellnex/Arqiva* decision, the CMA considered it appropriate to assess macro sites and micro sites as separate frames of reference and define separate frames of reference for developed and undeveloped sites.¹⁶⁵
- 6.7 In that decision, the CMA excluded MNOs and MNO JVs' self-supply, site sharing by MNOs and MNO JVs and supply by MNO JVs to non-MNO customers from the frame of reference, instead taking these into account as

¹⁶³ [MAGs](#), paragraph 9.1

¹⁶⁴ [Cellnex/Arqiva](#)

¹⁶⁵ [Cellnex/Arqiva](#), paragraphs 57 to 64 and paragraphs 71 to 74.

an out-of-market constraint in the competitive assessment.¹⁶⁶ While the CMA acknowledged that self-supply constrained independent tower companies to some extent, it noted that self-supply was not among the most immediate sources of competition to the merging parties.¹⁶⁷ Taking into account, in particular, the evidence of Arqiva benchmarking its pricing against MNOs' costs for self-build, the CMA considered that self-supply by MNOs and MNO JVs should be characterised as a 'price ceiling' for the merging parties, at least in the near-term.¹⁶⁸

- 6.8 In *Cellnex/Arqiva*, the CMA concluded that BTS sites, all structure types (monopoles, towers, etc) and ancillary services were within the product frame of reference.¹⁶⁹
- 6.9 With regard to BTS sites, the *Cellnex/Arqiva* decision set out that, while BTS sites may be a substitute to existing sites to an extent, some customers had noted that it is important whether a site is already constructed, as it affects the cost-competitiveness and the time to access/deploy the site.¹⁷⁰
- 6.10 With regard to the constraint from BTS sites, we note that in *Cellnex/Arqiva*, the CMA assessed the merger between Cellnex, which had a small number of existing sites and competed mainly by seeking to supply BTS sites, and Arqiva, which had a large number of existing sites but a limited offering of BTS sites.¹⁷¹ In that context, the CMA sought to understand the extent to which BTS sites and existing sites competed at all, and it was not necessary for the CMA to come to detailed conclusions about the strength of the constraint from BTS sites relative to the constraint from existing sites.
- 6.11 In this case, as the Merger involves two enterprises with large holdings of existing sites, we have, in our competitive assessment, primarily assessed the relative importance of BTS as a constraint on suppliers with large numbers of existing sites.
- 6.12 Further, evidence we have gathered in this inquiry supports the product frame of reference findings in *Cellnex/Arqiva* in relation to the distinction between macro and micro sites:

(a) For instance, Cellnex's internal documents [X].

¹⁶⁶ [Cellnex/Arqiva](#), paragraph 107.

¹⁶⁷ [Cellnex/Arqiva](#), paragraph 93.

¹⁶⁸ [Cellnex/Arqiva](#), paragraph 91.

¹⁶⁹ [Cellnex/Arqiva](#), paragraphs 70, 77 and 81.

¹⁷⁰ [Cellnex/Arqiva](#), paragraph 68.

¹⁷¹ [Cellnex/Arqiva](#), paragraph 172.

(b) [REDACTED].

- 6.13 On this basis, we have considered the effects of the Merger on the supply of access to developed macro sites (including for the avoidance of doubt, BTS sites) and ancillary services to MNOs and other wireless communication providers.

Geographic scope

- 6.14 The Parties submitted that the geographic scope of the supply of access to developed macro sites is national. The Parties said that given the need for wireless communication providers to address capacity and coverage in particular local areas, sites in one locality are not substitutable with sites in another. However, they also said that there is a substantial national element to customers' purchasing considerations, notably that (i) WIPs (including Cellnex) have entered into framework agreements with MNOs and non-MNOs that require coverage across the UK, and (ii) having a broad range of sites with national coverage is helpful in winning large tenders.
- 6.15 The Parties submitted that customers typically negotiate long-term contracts – or framework agreements – with WIPs for site access. These agreements give customers long-term protection and certainty as to the terms of the service provision and pricing. Such agreements typically have a term of [REDACTED] and may either be negotiated bilaterally and/or put out to tender.
- 6.16 In addition, the Parties also said that pricing by WIPs tends to be based on national rate cards [REDACTED]. The Parties also submitted that this is consistent with the CMA's decision in *Cellnex/Argiva*, in which the CMA noted that important elements of pricing are set across portfolios of sites and any local variations in competition tend to be accounted for in aggregate for larger purchases.¹⁷²
- 6.17 Both competitors and customers agreed that pricing does not vary on the basis of local factors, such as local competition or geography, and most WIPs price on a national basis. In addition, they told us that other commercial terms, such as churn allowance, were considered important factors and are applied on a national basis.
- 6.18 Customers confirmed that pricing typically occurs on a national basis, which they told us makes transactions with suppliers easier. For example:

¹⁷² For example, prices may vary according to whether a site is located in an urban or rural area.

- (a) Vodafone said that national rate cards reduce the need to enter into negotiations for each individual site.
- (b) CTIL said that, as a WIP customer, it would usually pay a price for each site set under a long-term umbrella agreement, or rate card, instead of negotiating on a site-by-site basis.

6.19 Competitors also told us that pricing is national. For example:

- (a) WIG said that, for customers with more than one site and in particular for MNOs, pricing is typically structured around a national framework. WIG also said that pricing does not necessarily reflect how busy or attractive a particular location is, how hard or expensive a site may be to build or operate or what height is being used by the customer. In WIG's view this model is preferred by MNOs and reflects their preference to deal with larger portfolios, [X]
- (b) Similarly, FreshWave said that it sets prices on the basis of framework agreements entered into with each MNO and MNO JV, which have individually negotiated terms and rate cards.

6.20 Some small suppliers said that they were not large enough to be able to offer pricing on a national basis to their customers. For example:

- (a) Britannia Towers said that, since it is a small WIP, it tends to price by site and on the basis of customer requirements.
- (b) WHP sets prices at a local level as its portfolio of sites is relatively small and specialised.

6.21 On the basis of the evidence summarised above, we have considered the impact of the Merger on the supply of access to developed macro sites and ancillary services to MNOs and other wireless communication providers in the UK.

Conclusion on market definition

6.22 For the reasons set out above, we conclude that the relevant market for the assessment of the Merger is the supply of access to developed macro sites (including for the avoidance of doubt, BTS sites) and ancillary services to MNOs and other wireless communication providers in the UK.

7. Nature of competition

- 7.1 The market for the supply of access to developed macro sites is complex and has a number of unusual features. Before we assess the impact of the Merger on competition, we therefore first consider in more detail the nature of competition in this market.
- (a) First, we describe the contracts for passive infrastructure, which play a key role within the supply of access to developed macro sites and ancillary services.
 - (b) Second, we describe how customers choose macro sites and the suppliers of them. We assess the evidence on what matters to customers, and the implications of this for the nature of competition between suppliers and which firms are best placed to win business.
 - (c) Third, we describe the implications of this for how competition between suppliers of macro sites operates in practice. We identify an important distinction between competition for existing sites and competition for new sites and discuss the role for competition in both contexts.

Contracts for passive infrastructure

- 7.2 As noted in Chapter 3, two groups of customers purchase access to developed macro sites: MNOs (either unilaterally or through their JVs) and other (non-MNO) customers.
- 7.3 Cellnex submitted that MNOs are, by a significant margin, the largest and most important customers for it and rival WIPs and represent the vast majority [X] of its revenue from macro sites.
- 7.4 As set out in Chapter 6, customers typically sign up to long-term framework contracts which are intended to allow them to simplify their commercial arrangements, in particular with large suppliers.¹⁷³ This is because, under framework agreements, customers do not then need to negotiate access for each individual site and have certainty on the price and service levels they are likely to receive for both their existing and any additional PoPs they may require on existing sites of the same supplier over the term of the agreement. In return, long-term contracts provide suppliers with predictable, committed revenues for the duration of the contracts.

¹⁷³ See paragraph 6.15 above.

- 7.5 MNOs typically require access to many sites across a wide range of locations. As discussed in Chapter 3, MNOs self-supply a large proportion of these sites by themselves or through JVs that they have entered into. The remaining MNO demand is generally not met by a single WIP, but MNOs will typically need to enter into a number of framework agreements with different suppliers. As we explain in more detail in Chapter 8, competition in this market does not generally involve MNO customers considering whether to terminate a relationship with one supplier and switch all of their sites to an alternative supplier.
- 7.6 Framework agreements may include commitments to use more sites from the supplier's portfolio during the term of the contracts.
- 7.7 Contracts may also allow customers to vacate a relatively small proportion of sites during the term of the contract, if the contract includes a 'churn allowance'. This recognises both the needs of MNOs to evolve their networks in ways which they cannot predict at the outset of a contract and their wish to maintain pressure on their existing supplier by having the ability to switch at least some of their sites to another supplier prior to the expiry of the contract. However, even if there is a churn allowance, MNOs are typically committed to remain on the majority of the sites they occupy for the entire term of the contract.
- 7.8 The Parties submitted that, whilst churn is a key variable in negotiating long-term agreements, WIPs do not compete to provide customers with the highest level 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. They said that WIPs make significant upfront investments in their sites to ensure that sites are suitable for co-location by their anchor tenants, but then recoup these investments over a long period through the opex fee. Putting limits on the amount of churn reduces the likelihood of a WIP having a significant stranded asset which would increase its costs.
- 7.9 Evidence shows that the proportion of sites that qualify under the 'churn allowance' is important to customers and something they consider when assessing suppliers' offers. For example:
- (a) An MNO indicated that a churn allowance is '[REDACTED]'. It also told us that '[REDACTED]'.
- (b) The churn allowance '[REDACTED]'. In that context:

(i) [REDACTED].¹⁷⁴

(ii) [REDACTED].

(c) Another MNO submitted that to avoid being too reliant on a supplier which could expose it to higher prices, [REDACTED].

(d) Cellnex's internal documents also show that [REDACTED].

(i) For example, a Cellnex internal document [REDACTED].

(ii) The same document [REDACTED].

7.10 Framework agreements do not generally relate to new, as yet unbuilt sites, which are normally procured by customers under a separate BTS arrangement. However, as we set out in paragraph 7.41 below, framework agreements may include commitments for customers to contract a minimum number of future new tenancies with the same supplier, if the customer's need arises.¹⁷⁵

7.11 Competitive dynamics are discussed in more detail in Chapter 8 but, in broad terms, contractual commitments means that relatively few sites can be competed for by other WIPs whilst a contract is in place.

7.12 As discussed further below, 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 only a minority of the total sites governed by the contract will be switched, either immediately at the point of renewal or over time.¹⁷⁶

7.13 The remainder of sites which customers do not switch are then likely to remain with the incumbent supplier, on terms which will be determined by the competitive conditions at the point of renewal.

Customers' choice of macro sites

7.14 The evidence we gathered shows that the main factors influencing customers' choice of macro site suppliers are: (i) geographic location, (ii) pricing, (iii) the supplier's scale, and (iv) its track record. We discuss each of these in turn before providing our overall conclusions on the importance of

¹⁷⁴ Appendix G, paragraph 33.

¹⁷⁵ We discuss future growth in macro sites in paragraphs 8.115 to 8.117 below.

¹⁷⁶ See paragraphs 7.60 to 7.65 below.

factors influencing customer choice. We found that the drivers of customer choice are broadly consistent across both MNO and non-MNO customers.

Geographic location

- 7.15 There was a broad consensus between the Parties and third parties that geographic location is a very important factor affecting customers' choice of macro sites.
- (a) The Parties submitted that MNO and non-MNO customers' primary consideration in their choice of sites is location, which is driven by factors including geography, licensing requirements, coverage requirements, traffic volume, customer service issues, the frequency to be used and adjacent cell frequencies.
 - (b) The Parties also said that MNOs plan their networks by determining the ideal location for new active communication equipment, which is determined by geography, coverage requirements, traffic volume and other factors.
 - (c) In relation to non-MNOs, the Parties stated that, although their key requirement is generally still location, they may have a greater degree of flexibility in location than MNOs, as they are not always seeking to create a mesh network in the same way.
- 7.16 As set out in Chapter 3, MNOs have mature networks with a number of established and interdependent macro sites which provide almost full geographic coverage. In this context MNOs submitted that, when they need to replace an individual site, they look for replacements close to their existing site to minimise the disruption to their network.
- 7.17 However, we have also heard that MNO networks are not static, but gradually evolve over time. As we discussed in Chapter 3, MNOs will roll out 5G primarily by using and upgrading existing sites, but also partly by adding new sites, such as monopoles, to add capacity and coverage in the next few years, in particular in urban areas.¹⁷⁷
- 7.18 In summary, the geographic location of a site is important as it will determine the coverage that can be provided and the extent to which the site can be incorporated into the rest of the network without disruption, or the extent of any disruption. Where sites are required to extend coverage, enhance

¹⁷⁷ We discuss in Chapter 8 the impact that this might have on competition.

capacity and/or accommodate new technologies, then their location and their relationship to the rest of the network will also be a key consideration.

Pricing

- 7.19 As discussed in Chapter 6, suppliers and customers typically negotiate framework agreements which use national rate cards to determine the prices for site access, use, installation, maintenance, and other associated services. National rate cards are used to derive a price per site.¹⁷⁸ Rate cards are set on the basis of negotiations with individual customers and differ for each customer.
- 7.20 Cellnex submitted that [REDACTED].
- 7.21 In relation to new customers, Cellnex submitted that [REDACTED].
- 7.22 Cellnex also said that [REDACTED].

Suppliers' scale

Parties' submissions

- 7.23 Cellnex submitted that WIPs' scale, whether in geographic or in absolute terms, is not an important factor of competition and does not give a material advantage when competing for opportunities for new customers. It said that, for demand for new sites, customers will require a site within a small search area to meet their radio planning needs and that it is very unlikely that Cellnex, or any other WIP, will have an appropriate site in a location to replace an existing site.
- 7.24 Cellnex also submitted that there are two main scenarios where very limited economies of scale may be considered to arise: first, in the outsourcing of costs of operating an existing portfolio of sites and, second, in deploying new sites. However, Cellnex said that economies of scale are not material in either scenario.¹⁷⁹

¹⁷⁸ National rate cards, which are used to derive a price per site, are then applied to the WIP's entire portfolio of existing sites, meaning that there is not a site-by-site negotiation of prices based on local factors.

¹⁷⁹ In response to our provisional findings, the Parties submitted that Cellnex's share of supply by flow is significantly lower than its shares by number of sites (see Appendix E, Table 1 and Table 2) which indicates that Cellnex is losing market shares over time which is inconsistent with Cellnex having a significant economies of scale advantage relative to other WIPs.

Our assessment

- 7.25 Suppliers with scale, in terms of a large portfolio of existing sites, have a large customer base and are more likely to be present in locations where customers need sites and in close proximity to rivals' sites. Beyond this, scale could advantage suppliers in other ways and we assess the evidence of these below.
- 7.26 First, we consider the Parties' and third parties' internal documents and what these tell us about the role that scale plays in this market. Then, we consider other ways in which scale may contribute to suppliers' competitiveness and, for each, discuss the evidence we have received from Parties and third parties.

Internal documents

- 7.27 Some internal documents provided by both the Parties and third parties show that suppliers and customers monitor the number of sites in competitors' and suppliers' portfolios of sites. For example:
- (a) A Cellnex internal document provides a description of the European market and of the portfolios of Cellnex's competitors by looking, amongst other factors, [REDACTED].
 - (b) Internal documents provided by a WIP and an MNO, [REDACTED].
- 7.28 In response to our provisional findings, Cellnex submitted that its internal document, mentioned above, shows that [REDACTED]. It noted that other factors include [REDACTED].
- 7.29 However, other Cellnex internal documents indicate that scale is important and explain some of the advantages that a supplier with material scale might hold. For example:
- (a) A document [REDACTED] produced by Arqiva in 2017 states [REDACTED].
 - (b) The same document states that [REDACTED].

Meet customers' demands

- 7.30 All WIPs and some MNOs told us that suppliers with many existing sites can have a greater ability to meet customer demand as they are more likely to be present where customers need sites.¹⁸⁰ For example:
- (a) An MNO said that the wider the geographic footprint a supplier has, the more likely it would have a suitable site, which could provide a 'cumulative advantage over competitors'.
 - (b) A WIP submitted that the number of existing sites in a supplier's portfolio can make a meaningful difference to the ability to capture new business (both new sites and share of major upgrade programmes). This is driven by both the ability of larger portfolios to satisfy more of a customer's needs under a single contract with the wider range of commercial levers a larger portfolio has available to structure a deal such as [REDACTED]. The WIP also said that a scale supplier will have the ability to satisfy a significant portion of new demand of the MNO with one strategic engagement and MNOs prefer scale suppliers. [REDACTED].
 - (c) Another WIP submitted that the volume and geographic location of WIP assets is a key determinator of the attractiveness of a WIP and significantly affects negotiating power with MNO customers. In its view, if the portfolio is large, there is a greater likelihood of having an asset that meets MNO customer requirements.
- 7.31 In response to our provisional findings, the Parties submitted that, although WIPs with existing sites are statistically more likely to have an existing site in precisely the right location to meet an MNO's coverage requirement, in reality the increase in likelihood of this happening is negligible given the size of the UK and the very narrow location requirements that MNOs generally have for sites.
- 7.32 In support of this, the Parties submitted an example which shows that [REDACTED].

Economies of scale

- 7.33 We found that, although there are some economies of scale which may advantage larger suppliers, these are likely to be relatively limited.

¹⁸⁰ See Appendix F, paragraphs 23 to 28 and paragraphs 35 to 38.

7.34 Several smaller WIPs told us that large WIPs can enjoy some advantages from economies of scale, which may enable them to offer better deals to customers.¹⁸¹ For example:

- (a) A WIP explained that a WIP that owns a significant number of existing sites is able to offer sites on shortened deployment timelines compared to the extended acquisition planning and build process of new site development. The WIP also explained that having existing sites on scale also enables more efficient site access and maintenance continuity and programming, thus lower per site maintenance and site access costs.
- (b) Another WIP submitted that the number of existing macro sites, alongside new BTS sites, a WIP can offer is a critical factor in winning contracts as this gives rise to significant economies of scale generated by the ability to negotiate lower prices with suppliers of site construction, such as volume discounts, operational maintenance and health and safety checks.

7.35 However, third parties expressed mixed views on the extent to which economies of scale may also play a role when competing for BTS sites.¹⁸² For example:

- (a) A WIP submitted that it is important for a WIP to have scale in existing sites that can be utilised for new network roll-out and these sites can help subsidise any new BTS sites required. It said that a scale portfolio will have several levers such as existing sites, options over new sites, economies of scale and the ability to inject momentum quickly into an MNO rollout [✂].
- (b) An MNO submitted that suppliers which can offer a bundle of existing and new sites would be a more attractive BTS suppliers, assuming the existing sites are in suitable locations.
- (c) Another MNO [✂]
- (d) However, another MNO 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.

¹⁸¹ See Appendix F, paragraphs 29 to 34.

¹⁸² See Appendix F, paragraphs 100 to 110.

- 7.36 The synergies which Cellnex expects from the Merger, in the form of [REDACTED], could be informative on the existence and size of any economies of scale.¹⁸³
- 7.37 However, in response to our provisional findings, the Parties submitted that these synergies are non-Merger specific and largely fixed cost savings. They acknowledge that there are some savings on variable costs – maintenance costs – but stated that these are very small (less than [REDACTED]%) compared to the total costs and therefore cannot be considered significant.
- 7.38 We agree with the Parties that the forecast cost savings which we would expect to be capable of affecting prices charged to customers as a result of the Merger are likely to be limited.¹⁸⁴

Preference to contract with large suppliers

- 7.39 Although customers use multiple suppliers, some MNO customers expressed views showing a preference to contract with large suppliers:
- (a) [REDACTED]
- (b) Another MNO said that it may not be worth negotiating framework agreements with a small-scale supplier.
- 7.40 In response to our provisional findings, the Parties submitted that both the fact that smaller WIPs have already entered into framework agreements with the MNOs and the [REDACTED] provide direct evidence that MNOs do not have a strong preference to supply from a single source. In support of their views, they stated [REDACTED].
- 7.41 Some WIPs also told us that large suppliers have an advantage in being able to secure future commitments to new tenancies or sites, which smaller suppliers are not able to:
- (a) A WIP told us that minimum commitment growth clauses can only be achieved by scale operators [REDACTED].
- (b) Another WIP told us that it was [REDACTED].
- 7.42 In this regard, we note that Cellnex (Arqiva at the time), which was the only large scale supplier in the market at the time, as part of its contract negotiations with CTIL in 2014, [REDACTED].

¹⁸³ These synergies are set out in more detail in Chapter 2 above.

¹⁸⁴ However, we also note that given that both Cellnex and CK Hutchison already manage and maintain a large number of existing sites, any substantial cost savings are likely to have already been realised in the past.

7.43 The Parties submitted that [REDACTED].

Conclusions on the role of scale

7.44 Suppliers with a large portfolio of existing sites have a large and entrenched customer base and, as a result, a significant market position. Scale increases their likelihood of having sites in close proximity of rivals' sites and being a strong alternative for customers in those areas. In addition, suppliers with scale are more likely to be present in locations where customers need sites and rivals do not have sites. Therefore, large WIPs are likely to be stronger competitors as their scale leads to many more overlaps with rivals as opposed to smaller suppliers.¹⁸⁵

7.45 Beyond this, although we consider there are some benefits from scale in relation to the costs of maintaining existing or new sites, the evidence we have suggests that these are relatively modest. More generally, evidence on the ability of small WIPs to compete with larger WIPs and the mixed views of MNOs provide only limited evidence that scale confers significant competitive advantages in this market.

7.46 We return to the implications of scale for competition for existing sites and new sites in our assessment of closeness of competition between Cellnex and the owner of the CK Hutchison Assets in Chapter 8.¹⁸⁶

Suppliers' track record

7.47 There is evidence that suppliers' previous track record is another factor affecting customers' choice of macro sites, in particular when choosing providers of BTS sites.

(a) [REDACTED].

(b) [REDACTED]¹⁸⁷

7.48 For example, in the context of the MBNL contract renegotiation, Cellnex, which was a small WIP at the time with limited track record in the UK, provided a [REDACTED].¹⁸⁸

¹⁸⁵ We discuss suppliers' scale in more detail and the role it plays when they compete with one another in Chapter 8.

¹⁸⁶ The CK Hutchison Assets are referred to previously as the Transaction Sites. In the counterfactual, we term these the CK Hutchison Assets

¹⁸⁷ Further evidence on the importance of suppliers' track record is set out in Chapter 5.

¹⁸⁸ See more detail in Appendix G, paragraph 30.

- 7.49 In addition, having worked with an operator in the past can be an advantage because it provides customers with an indication of what it might be like to work with that operator when, for example, commissioning new sites.
- 7.50 In response to the provisional findings, the Parties submitted that, although MNOs depend on such critical infrastructures and clearly place weight on a supplier's ability to deliver and manage sites, a supplier's track record and/or expertise are not linked to its existing scale in the UK. In support of their view, they said that WHP Telecoms won the Scottish 4G infill opportunity, despite not having a large portfolio of existing sites in the UK. The Parties also said that WIG has deployed towers at Scottish Water sites in rural Scotland in partnership with O2 and that, prior to Cellnex/Arqiva (at which point Cellnex only had a small presence in the UK), Cellnex signed a major portfolio deal with BT/EE for marketing rights to their High Tower estate (worth £100 million) and was also successful in securing Brighton Mainline, a major infrastructure opportunity.
- 7.51 Overall, the evidence available to us highlights that a supplier's track record is a relevant aspect of that supplier's commercial offering, particularly in negotiations for framework agreements.

Conclusions on factors influencing customer choice

- 7.52 The evidence shows that the geographic location of a site is important, since this will determine the coverage that can be provided and the extent to which the site can be incorporated into the rest of the network without disruption, or the extent of any disruption. Where new sites are required to extend coverage, enhance capacity and/or accommodate new technologies, their location and their relationship to the rest of the network will be a key consideration.
- 7.53 There is evidence that pricing is another important element of competition. In practice, prices for existing sites are primarily negotiated in the context of long-term national framework agreements which are periodically renewed. These agreements are therefore an important focus of our assessment.
- 7.54 The evidence also shows that scale means that suppliers with a large number of existing sites are present in more locations and can therefore be strong alternatives in those locations. Beyond this, we have seen only limited evidence to suggest that scale will significantly affect the other aspects of suppliers' competitiveness in this market.

- 7.55 Lastly, there is evidence that suppliers' track record is important to customers, in particular when they require the building of new sites, but this is unlikely to be linked only to a suppliers' existing scale in the UK.

Competition between suppliers of macro sites

- 7.56 Having assessed the factors that determine customers' choice of macro sites, in this section we go on to assess the implications of these for our assessment.
- 7.57 As discussed above, the passive infrastructure sites that host MNO networks are already well established and a very large proportion of customer demand which is met by WIPs is contracted for under long term framework agreements. Although these contracts are infrequently tendered or renegotiated, contracts with MNOs are valuable and therefore particularly important opportunities for which suppliers compete.
- 7.58 There are also opportunities for suppliers to offer new macro sites which occur on a more regular basis as the result of NTQs and as MNOs evolve their networks to offer greater capacity and coverage. These new opportunities have historically been smaller than those provided by existing contracts. For example, [REDACTED].¹⁸⁹
- 7.59 We have therefore assessed separately the nature of competition for existing sites and for new site opportunities.

Competition for existing sites

- 7.60 In considering how competition can be expected to work in relation to these or other contracts, we have looked at evidence on past large contracts and how suppliers competed for them. We have also taken into account recent developments in the market. In particular, while Cellnex may have been the only large WIP competing to retain sites in the past (for example, in relation to the renewal of the MBNL contract in 2019), it is likely to face competition from other large WIPs when large contracts come to be renewed in the future.¹⁹⁰ In the foreseeable future, renewals of large contracts are expected to occur in [REDACTED].

¹⁸⁹ See Appendix E, Table 8.

¹⁹⁰ This is discussed in more detail in Chapter 8 below.

Parties' submissions

- 7.61 The Parties submitted that there is expected to be limited competition for the renewal of large-scale contracts for existing sites between WIPs and MNOs and MNO JVs for four main reasons.
- (a) First, there would generally only be a very small number of existing sites (if any) that would be suitable for an MNO to switch to, as the replacement site would need to be geographically extremely close to the current site.
 - (b) Second, even if there is an alternative existing site that is sufficiently close to the current site to be suitable, the cost of taking down the customer's equipment and moving onto a new site, and the associated operational disruption, may be significant.
 - (c) Third, additional costs may be incurred to strengthen the alternative existing site. A large proportion of existing sites were designed for 2G and 3G and needed to be strengthened before they could accommodate additional equipment of existing tenants (in particular to host 5G equipment).
 - (d) Fourth, whilst switching for small numbers of sites may in principle be feasible in terms of planning and logistics, switching on a large scale would require long lead times in order to ensure that the process is smooth and does not create disruptions in the network and coverage.
 - (i) The Parties said that competitive tension in such contract renewals is maintained through the threat of customers' self-supply and churn over time and not through switching large numbers of sites.
 - (ii) However, it is possible for customers to switch a large number of sites away to BTS sites on expiry of a large framework agreement, if sufficient time to prepare is allowed. Cellnex submitted that, [REDACTED].
- 7.62 Cellnex submitted that an existing customer is not likely to switch away from an existing site without a catalyst to do so due to the costs and time involved. In addition, Cellnex submitted that, as switching costs are the same for each site, the incumbency advantage is the same for smaller WIPs as it is for larger ones, so it is as difficult for a large WIP to win existing sites from a small WIP as vice versa.
- 7.63 Cellnex also said that, as a result, competition for switching large numbers of existing sites tends to be very limited, with competition centred on those sites where a catalyst causes the customer to move. However, Cellnex submitted that, even where it may not be feasible for customers to switch a large

number of sites at one time, there will always be the threat of gradually losing churned sites over a longer period and/or no longer being considered for incremental site requirements.

Our assessment

- 7.64 Evidence from customers, competitors and the Parties' internal documents was consistent with the Parties' view that switching macro sites is costly and potentially disruptive to services and, as a result, does not occur often.¹⁹¹ As a result of the existence of high switching costs, being a customer's current supplier of existing sites provides a significant competitive advantage over rivals seeking to attract those customers to new sites (an 'incumbency advantage').¹⁹² For example, data submitted by Cellnex shows that Cellnex [REDACTED].¹⁹³
- 7.65 We agree with the Parties' submission that there are high switching costs and that current suppliers enjoy a material incumbency advantage. We also note that customers may have to work hard to introduce competition into the process. However, we consider that the evidence available to us indicates that competition for existing sites can play an important role in driving customer outcomes.
- (a) When existing contracts expire or are close to expiring, customers may run competitive tenders so as to introduce a visible competitive threat for the current supplier and thereby improve the terms for renewal. For example, when its contract with Arqiva (now part of Cellnex) was close to expiring, MBNL engaged in a long and multi-stage tender process for [REDACTED] sites to which it invited multiple suppliers to bid and evaluated their proposals in detail, which put competitive pressure on [REDACTED].¹⁹⁴
- (b) The renegotiation of the MBNL contract also shows that [REDACTED], and was an important driver of commercial decisions, including the level of prices, relating to its entire portfolio of sites.
- (c) As discussed above, the churn allowance included in framework agreements is a lever for customers to maintain competitive pressure on their existing suppliers. Although the annual churn allowance may be small, its cumulative effect over the long life of contracts can be significant: as discussed above, it has accounted for between [REDACTED] and

¹⁹¹ See Appendix F, paragraphs 49 to 54.

¹⁹² See Chapter 9.

¹⁹³ See Table 8 in Appendix E.

¹⁹⁴ The MBNL contract renegotiation is described in more detail in Appendix G and our assessment of this evidence is discussed below.

[X] in previous contracts. A churn allowance therefore allows customers to (have the option to) migrate marginal sites over time, reducing their reliance on their existing suppliers.

Competition for new sites

- 7.66 The Parties submitted that anticipated demand for new macro sites by MNOs is, and is expected to remain, limited because MNOs have mature networks (or have already committed to increased coverage in rural areas) and the cost of switching and re-planning their entire radio networks means that they will not switch sites unless there is a catalyst that forces them to do so. As such, they said that, even with the deployment of 5G, MNOs are only expected to require limited numbers of additional macro sites for the purposes of network densification.
- 7.67 The Parties also stated that smaller WIPs are as well placed as larger WIPs (such as Cellnex) to offer targeted BTS solutions to MNO customers and, in any event, MNO customers have a demonstrated capacity to self-supply.
- 7.68 On the basis of the evidence we have gathered, set out in paragraphs 8.115 to 8.118 below, we broadly agree with the Parties that demand for new macro sites is largely driven by MNOs' 5G densification programmes, increased coverage in rural areas and NTQs on existing sites and is likely to be limited in the future.¹⁹⁵

Conclusions on competition between suppliers of macro sites

- 7.69 The most important focus of competition in this market is for large framework agreements with MNO customers. This will primarily take place between suppliers with extensive portfolios of sites, which are more likely to have sites in close proximity of rivals across a large number of areas.
- 7.70 The evidence shows that switching macro sites is costly and as a result does not occur often. However, although customers are unlikely to want or be able to migrate all of their sites away from their current supplier, they can engineer competitive processes to improve the terms on which they obtain access to sites provided by their current supplier in future. Customers can also evolve their networks over time by making use of churn allowances to reduce their dependency on an existing supplier.

¹⁹⁵ See more detail in Appendix F and paragraphs 8.128 and 8.129 below on the impact that the deployment of 5G is likely to have on macro sites and small cells.

- 7.71 We consider the issue of competition between large WIPs further in our assessment of the closeness of competition between the Parties in Chapter 8.

8. Competitive assessment

- 8.1 In this chapter we assess the Merger's impact on competition. We have done so against the counterfactual we have found, namely stronger conditions of competition between the owner of the CK Hutchison Assets and Cellnex, for example through the sale of the CK Hutchison Assets to an alternative purchaser either within the original sales process or through a modified and/or extended sales process, that would have been conducted by CK Hutchison in the short to medium-term.
- 8.2 As set out in Chapter 4, the Merger constitutes a single, interlinked and inter-conditional commercial transaction. The sale and purchase agreement provides for: (i) the acquisition of TowerCo; (ii) the execution of the [X] and the [X], which relate to the economic benefit of the MBNL Sites (which in turn gives rise to material influence); and (iii) the subsequent acquisition of the Transfer Sites.¹⁹⁶
- 8.3 As explained in Chapter 4, we have found that the Merger gives rise to a single RMS. It has therefore not been necessary for us to conclude on whether Cellnex's acquisition of material influence over the MBNL Sites would, on a stand-alone basis, give rise to an SLC in the period prior to Cellnex acquiring ownership of the Transfer Sites. Instead, our analysis set out below has primarily focussed on the long-term impact of the Merger on the structure of the market and competition.
- 8.4 Specifically, our assessment focuses on the impact of the two structural changes the Merger will give rise to:
- (a) The first will arise from the transfer of the Unilateral Sites to Cellnex, which will occur when the Merger is completed; and
 - (b) the second, and more significant, will occur when Cellnex gains control of the Transfer Sites when the MBNL JV is dissolved, which is scheduled to occur in 2031.

¹⁹⁶ This is the same sequencing we consider in our counterfactual as discussed in Chapter 5.

8.5 While we have examined both of these changes in detail, in considering the overall effect of the Merger we have assessed the impact of all factors collectively.

8.6 The structure of this chapter is as follows:

- (a) First, we consider how the state of competitive evolution in the market affects the evidence available to us to assess the competitive impact of the Merger. We briefly explain how we assess the evidence available to us in this case within the applicable framework for our analysis.
- (b) Second, we briefly describe pre-Merger market outcomes, as this provides an important starting point for our assessment.
- (c) Third, we assess how closely the owner of the CK Hutchison Assets would compete with Cellnex (taking into account the appropriate counterfactual in this case).
- (d) Fourth, we consider the strength of the competitive constraints exercised by alternative suppliers, including how these are evolving over time.
- (e) Finally, we provide our conclusion on whether the Merger may be expected to result in an SLC.

Our approach to the assessment of competitive dynamics in an evolving market

8.7 Our competitive assessment in this case has involved a number of evidential challenges.

8.8 First, our counterfactual means that we must consider how the CK Hutchison Assets might be commercialised absent the Merger and used by a WIP to compete for new tenants, including after the MBNL Sites have been divested in 2031. This requires us to take a view of how these assets might be utilised differently to how they have been in the past and means that our assessment extends well beyond 2031.

8.9 Second, we have considered evidence of past competition for one of the small number of major customer contracts which Cellnex (Arqiva at the time) has renewed in recent years, as well as competition for a relatively small number of new customer opportunities for Cellnex. In these cases, and as further discussed below, Cellnex faced competition from a number of small WIPs (as well as the possibility of customer self-build). However, for future contract renewals, Cellnex will, in addition to those existing small WIPs, face competition from CTIL and, in the counterfactual, also an alternative owner of

CK Hutchison Assets. This situation, in which a large WIP like Cellnex faces competition from several other large WIPs, has not arisen in the UK before. This makes it more challenging for third parties, who have no experience against which to assess how an owner of the CK Hutchison Assets would compete with Cellnex in practice, to provide informed views on the impact of the Merger. We note, however, that the absence of this kind of evidence should not be taken to suggest that a merger does not raise competition concerns, and we have instead sought to inform our assessment from the wide range of evidence that is available.¹⁹⁷

- 8.10 In this regard, we have considered evidence from several sources, including shares of supply, tender data, evidence from previous tenders (noting that such tenders occurred when there was only one established WIP of national scale), internal documents, and views and other information submitted by the Parties and third parties, in order to come to a view about the relative strength of different competitive constraints under market conditions which we cannot directly observe and which no market participant has experienced.
- 8.11 As in any merger investigation, we note that some of the views that we have received from third parties may be affected by the incentives of the businesses or individuals that provided those views. We have considered those incentives when assessing the weight that should be attached to those views, as well as considering the extent to which such views are consistent with other evidence that we have gathered during our investigation.
- 8.12 We note, in addition, that the potential competitive effects of the Merger would be likely to play out in different ways over time. In particular, the sector is characterised by the existence of long-term agreements between suppliers and customers and the Transfer Sites will not come under the full control of Cellnex (or an alternative purchaser in the counterfactual) until the MBNL JV ends (whether in 2031 or earlier if mutually agreed by the JV partners).
- 8.13 In keeping with the CMA's established approach to competitive assessment, we are considering the impact of the Merger on the structure of the market (as summarised in paragraph 8.4) and competition over the longer-term. We have also, in keeping with our remit to consider the overall impact of the Merger on rivalry over time and the continued evolution of customer demand,¹⁹⁸ sought to avoid an unduly static assessment of competition based on customer's immediate needs or motivations.

¹⁹⁷ The absence of certain types of evidence such as historical data will not in itself preclude the CMA from concluding that the SLC test is met on the basis of all the available evidence assessed in the round. See [MAGs](#), paragraph 2.28.

¹⁹⁸ See [MAGs](#), paragraph 2.6.

- 8.14 Specifically, in this case we are concerned about competitive effects over the long term in a market which has remained and is expected to remain relatively stable over time. Major contracts for macro sites are renewed approximately every ten to 20 years, after which MNOs remain committed to their suppliers for most of their sites until the next renewal. Demand for, and opportunities to compete for, new macro sites in the period between contract renewals is expected to remain quite limited.
- 8.15 We are also mindful that the CK Hutchison Assets are likely to be, alongside sites owned by BT/EE, the only significant portfolio of macro sites in the UK that are capable of being commercialised. Therefore, any loss of competition arising from the sale of the CK Hutchison Assets to Cellnex rather than to another purchaser would be expected to remain a long-term feature of the market.
- 8.16 In addition, although the consequences of poorer contractual terms for MNOs that might arise from a loss of competition arising from the Merger may not be immediately visible to the customers of the MNOs, even small increases in the costs of passive infrastructure or a deterioration in quality would be likely to persist over many years. The cumulative effect of these, which we would expect to be borne by consumers of mobile services, could be significant.¹⁹⁹

Pre-Merger market outcomes

- 8.17 In our assessment of the nature of competition in Chapter 7, we found that the larger the size of a supplier's portfolios of sites is, the more overlaps the supplier would have with its rivals. Assessing the historical evidence on suppliers' portfolios therefore provides us with a starting point for understanding their relative strength and the overall extent of competition in the market – albeit one that must be supplemented with a consideration of ongoing industry developments.
- 8.18 As described in Chapter 3, MNOs have historically self-supplied a significant proportion of their sites through JVs – MBNL and CTIL – which have mainly served the needs of their respective shareholders.²⁰⁰ WIPs provide the majority of the remainder of their developed macro sites.
- 8.19 Through its acquisition of Arqiva in 2020, Cellnex became by far the largest WIP in the market and, until the commercialisation of CTIL at the beginning of 2021, it was the only large WIP.

¹⁹⁹ [X]

²⁰⁰ BT/EE also self-supplies a significant proportion of sites outside of the MBNL JV.

8.20 Table 8-1: WIPs' shares of supply (2020) below shows that Cellnex had a share of [80-90]% while the next largest competitor had a share of only [5-10]%, and no other competitor had a meaningful share of supply.

Table 8-1: WIPs' shares of supply (2020)

<i>Competitor</i>	<i>Number of sites</i>	<i>Share</i>	<i>Annual Revenues (£m)</i>	<i>Share</i>	<i>PoPs</i>	<i>Share</i>
Cellnex	[REDACTED]	[80-90]%	[REDACTED]	[90-100]%	[REDACTED]	[80-90]%
WIG	[REDACTED]	[5-10]%	[REDACTED]	[5-10]%	[REDACTED]	[10-20]%
Shared Access	[REDACTED]	[0-5]%	[REDACTED]	[0-5]%	[REDACTED]	[0-5]%
FreshWave	[REDACTED]	[0-5]%	[REDACTED]	[0-5]%	[REDACTED]	[0-5]%
Britannia Towers	[REDACTED]	[0-5]%	[REDACTED]	[0-5]%	[REDACTED]	[0-5]%
WHP Telecoms	[REDACTED]	[0-5]%	[REDACTED]	[0-5]%	[REDACTED]	[0-5]%
AP Wireless	[REDACTED]	[0-5]%	[REDACTED]	[0-5]%	[REDACTED]	[0-5]%
Total	[REDACTED]	100%	[REDACTED]	100%	[REDACTED]	100%

Source: CMA analysis of Cellnex and third parties' data.

8.21 Consistent with this position, the evidence available to us from the Parties' internal documents, third parties' internal documents and the other information that third parties have provided during our investigation show that Cellnex (previously, Arqiva) holds a strong market position compared to rival WIPs. For example:

- (a) Cellnex's internal documents recognise its market-leading position, noting that [REDACTED] and that it is '[REDACTED]'.
[REDACTED]
- (b) In terms of the size of its position, a Cellnex (Arqiva at the time) internal document notes that [REDACTED].
[REDACTED]

8.22 We were also told by both its customers and competitors that Cellnex was the largest independent WIP in the UK.²⁰¹ For instance:

- (a) A WIP submitted that Cellnex is a very strong competitor [REDACTED] and a number of smaller WIPs [REDACTED] are weak or very weak competitors in the UK.
[REDACTED]
- (b) Another WIP submitted that Cellnex 'dominates the market' and there are a number of smaller WIPs.
[REDACTED]
- (c) An MNO internal document lists Cellnex (Arqiva at the time) as the third largest player, after CTIL and MBNL, but the first WIP at the time, in terms of number of sites.
[REDACTED]

²⁰¹ See Appendix F, paragraphs 56 to 73.

(d) CTIL identified Cellnex as the main supplier of access to developed macro sites in the UK.

- 8.23 Our analysis shows that these very high levels of historic market concentration have been associated with high profit margins. Looking at EBITDA, a measure of profit margin widely used in this industry, we found that the margins of Cellnex UK, WIG and Arqiva (now Cellnex) were [REDACTED], 61% and [REDACTED] respectively.^{202, 203}
- 8.24 In response to our provisional findings, the Parties submitted that this does not serve as evidence that smaller WIPs have lower margins than larger WIPs. The Parties also submitted that EBITDA is not the typical measure of performance in the industry as it is impacted by several accounting rules and includes elements that are not cash driven.
- 8.25 Because of the lack of information on margins earned by smaller WIPs and limitations of the metric used to measure profitability in this sector, we accept that comparisons on the levels of profitability between suppliers involve a number of challenges. Nonetheless we consider that there is evidence of high margins being earned in this market pre-Merger, which would be consistent with our findings in paragraph 7.64 above that owners of existing sites enjoy a significant ‘incumbency advantage’.²⁰⁴
- 8.26 Overall, the evidence shows that pre-Merger there has been limited competition in the supply of access to developed macro sites in the UK. Cellnex (previously, Arqiva) has had a very high market share and, along with high costs of switching and significant barriers to entry, this has allowed several WIPs to earn substantial profit margins.^{205, 206}
- 8.27 We recognise that there are limits to the inferences that can be drawn from these pre-Merger market outcomes, in particular because there are other important ongoing market developments. Most notably, CTIL started to commercialise in 2021 and would represent the largest WIP in the market.

²⁰² Cellnex (Group annual report 2020, p58) and Vantage Towers ([IPO Prospectus](#), p153) both state EBITDA is commonly used by industry analysts. Examples of analysts using EBITDA include Credit Suisse, Morgan Stanley and Berenberg.

²⁰³ EBITDA margin has been calculated on the basis of EBITDA/Revenue for 2020. Cellnex (UK) data includes Arqiva data (for the telecoms business) for part of 2020 (following the closing of that transaction). Arqiva data (for telecoms business) is for the part of the year before sale to Cellnex.

²⁰⁴ [Cellnex annual report 2020](#). Cellnex state that the Company uses Adjusted EBITDA as an operating performance indicator of its business units and [Adjusted EBITDA] is widely used as an evaluation metric among analysts, investors, rating agencies and other stakeholders. Adjusted EBITDA was also used by Vantage Towers in the Prospectus for their IPO [VT Prospectus](#) (p153), saying that it is commonly used by analysts and investors.

²⁰⁵ See Chapter 9 for a description of switching costs and barriers to entry.

²⁰⁶ In response to our provisional findings, the Parties submitted that both the historical and the forward-looking shares of supply, significantly overstate the competitive strength of Cellnex as the shares of supply do not capture constraint from self-supply, which if included would reduce Cellnex’s share of supply to 21% in 2031). We discuss further below the competitive constraint exercise by customers’ self-build.

This is an important development we discuss in detail in our assessment of competition from alternative suppliers at paragraphs 8.160 to 8.165 below.²⁰⁷

8.28 However, even taking into account the entry of CTIL, as shown in the table below, the market would still remain highly concentrated.²⁰⁸ We have found no evidence to suggest that there has been or will be any change to other features of the market, such as the high costs of switching or significant barriers to entry.²⁰⁹

8.29 We also note, by way of context to our assessment, that even the loss of only a limited constraint can give rise to competition concerns where markets are already highly concentrated and/or where scope for competition appears to be limited, at least to some extent, for other reasons.^{210, 211}

Table 8-2: Shares of supply by number of sites adjusted for foreseeable changes in market structure up to 2031

<i>Competitor</i>	<i>Number of sites</i>	<i>Share</i>
Cellnex	[X]	[20-30]%
CK Hutchison Sites:	[X]	
a. Unilateral sites	[X]	[5-10]%
b. Transfer sites	[X]	[10-20]%
CK Hutchison Assets	[X]	[10-20]%
<i>Merged Entity</i>	[X]	[40-50]%
CTIL	[X]	[40-50]%
FreshWave	[X]	[0-5]%
WIG	[X]	[0-5]%
Shared Access	[X]	[0-5]%
Britannia Towers	[X]	[0-5]%
WHP Telecoms	[X]	[0-5]%
AP Wireless	[X]	[0-5]%
Total	[X]	100%

Source: CMA analysis of data provided by the Parties and third parties.

Closeness of competition between Cellnex and the owner of the CK Hutchison Assets

8.30 In this section, we assess the extent to which Cellnex and the owner of the CK Hutchison Assets would be close competitors in the counterfactual we have found.

²⁰⁷ See Chapter 3 for a description of CTIL commercialisation.

²⁰⁸ We discuss in paragraphs 8.160 and 8.167 below CTIL and O2's views and other evidence on CTIL position in the market going forward.

²⁰⁹ See Chapter 9 for a description of barriers to entry.

²¹⁰ See [MAGs](#), paragraph 4.39.

²¹¹ See paragraphs 7.64 and 7.65 above.

- 8.31 Generally, the closer two firms are, then the stronger the competitive constraint they impose on each other, and the more likely it is that the loss of this competition as a result of a merger could create an incentive to increase prices and/or reduce service quality.
- 8.32 This section is structured as follows:
- (a) First, we set out the Parties' submissions on closeness of competition.
 - (b) Second, we set out the evidence on this from the Parties' internal documents.
 - (c) Third, we set out the relevant evidence from third parties.
 - (d) Fourth, we present shares of supply on a forward-looking basis, taking into account firms' expansion plans.
 - (e) Then, building on all of this evidence, we set out our assessment of closeness of competition between Cellnex and the owner of the CK Hutchison Assets.
 - (f) Finally, we set out our conclusions on closeness of competition.

Parties' submissions

Extent of current overlaps between Cellnex and the owner of the CK Hutchison Assets

- 8.33 The Parties submitted that alternative existing sites have a limited impact on Cellnex as demand is local and the likelihood of overlaps, even for a WIP with large numbers of sites, is minimal. The Parties said that it is very unlikely that Cellnex, or any other WIP, will have an appropriate site in a location to replace an existing site of a rival WIP.
- 8.34 In support of their view, the Parties submitted an overlap analysis which they said shows that there is no meaningful overlap between Cellnex's existing sites and the Transaction Sites, and that having a large number of existing sites does not make a material difference to the likelihood that a WIP will have a site in the right location for a customer.
- 8.35 They said that, even using the largest catchment area, their analysis shows that only around [REDACTED] of Cellnex's sites overlap with the Transaction Sites and therefore could be feasibly be subject to competition in the counterfactual.
- 8.36 In response to our provisional findings, the Parties provided an updated overlap analysis using the location of [REDACTED] of the 2,600 Streetworks Sites that

have been built or acquired by 3UK as of 18 December 2021 and also estimating the likely overlap once all 2,600 Streetworks Sites are built.²¹² The Parties said this updated analysis shows that the overlaps do not account for a sizeable proportion of Cellnex's portfolio – only [REDACTED].

- 8.37 The Parties also said that the geographic overlap analysis is likely to substantially overstate the number of local areas where the Parties could compete in the counterfactual for two reasons. First, the catchment areas are overly conservative and will pick up many Transaction Sites which would not represent viable substitutes for Cellnex's sites. Second, they said that only a subset of the overlapping existing sites will be substitutes with each other because the costs of strengthening or rebuilding many sites may significantly outweigh the cost of building new sites and therefore be uneconomical. In addition, they said that planning permissions may be refused and, lastly, they submitted that the [REDACTED].

Scope to increase co-location on the Transaction Sites

- 8.38 CK Hutchison told us that the scope for additional co-location on the [REDACTED] Unilateral Sites is, and will continue to be, limited irrespective of the Merger and, in any event, [REDACTED]. The Parties also said that [REDACTED].
- 8.39 In response to our provisional findings, the Parties submitted that [REDACTED]. The Parties also submitted that 3UK and BT/EE built these sites for their own network needs [REDACTED].
- 8.40 More specifically in relation to the MBNL Sites, [REDACTED]. The Parties said that [REDACTED].
- 8.41 With regard to monopolies, the Parties submitted that the Streetworks Sites are being built by 3UK as single-tenant monopolies, and, as such, upgrading sites that have already been deployed will require significant costs, time and will be subject to constraints including planning permissions.
- 8.42 The Parties also said that:
- (a) The Streetworks Sites [REDACTED].
 - (b) Cellnex told us that it has [REDACTED]. We consider this further when discussing the Parties' internal documents below.

²¹² This updated analysis include [REDACTED] UKB Sites, the [REDACTED] known locations of Streetworks Sites ('Known Streetworks Sites') and the economic benefit associated with the MBNL Sites as well as the Streetworks Sites whose locations is unknown but assuming that they will overlap with the Cellnex's sites in the same proportion as the 'Known Streetworks Sites'.

- 8.43 Cellnex told us that to upgrade [X] for additional tenants would require significant capex and disruption to the existing tenants' networks and that planning permission would be required. Specifically:
- (a) Cellnex submitted that 3UK estimated that the average expected cost per [X] Cellnex estimated the costs of upgrading these sites to be between [X] for sites which have not been deployed yet. They also provided a wide estimate range between [X] and [X] to upgrade [X], depending on the [X] and site. They said the lower end of the range was to upgrade poles and reconfigure sites, while the estimates on the upper bound were for cases that required to replace the pole, strengthen the foundations, and reconfigure the site.
 - (b) Cellnex also told us that the capital expenditure required is a secondary issue in terms of its ability to upgrade, with planning permissions being the primary issue.
 - (c) CK Hutchison submitted that [X].
- 8.44 The Parties also submitted that an alternative purchaser could not realistically replace 3UK on the Unilateral Sites because they would not have the right to do so. Even if such a theoretical right to replace 3UK existed, market dynamics make it unrealistic for a WIP to replace an anchor tenant. This is because there are significant costs to moving active equipment to different sites and disruption to MNOs' network services would be inevitable. If a WIP attempted such a strategy, it would be unable to attract MNO customers.
- 8.45 The Parties submitted that many of the UKB Sites, which are very small in number and as a proportion of the Transaction Sites, are unsuitable for further co-location as they are predominantly rooftop sites which would require significant planning and capex and it is often more attractive for a customer to negotiate with the rooftop owner directly than through a third party. The Parties also submitted that approximately two-thirds of the rooftops on which the UKB Sites are located already host another MNO in addition to 3UK, limiting the space available for further tenants.

Extent of competition between Cellnex and the owner of the CK Hutchison Assets for new sites

- 8.46 As mentioned in chapter 7, Cellnex submitted that there are two main scenarios where very limited economies of scale may be considered to arise. One of these related to the deployment of new sites.

8.47 In response to our provisional findings, the Parties submitted that there are no economies of scale in BTS and pointed to the following evidence in support of their view:

- (a) Cellnex's BTS internal documents clearly [REDACTED].
- (b) Cellnex does [REDACTED].
- (c) Small WIPs can and do win BTS contracts and the Parties provided some examples. In contrast, they said that Cellnex (and previously Arqiva) [REDACTED] despite its scale. The Parties also stated that, as a result of the [REDACTED] BTS sites that Cellnex supplied [REDACTED], Cellnex would not have any economies of scale advantages, as the extent of any theoretical economies of scale would logically depend upon the number of BTS sites being constructed and not the number of existing sites that the WIP operates.
- (d) Phoenix Tower (backed by the US private equity firm Blackstone Group) reached an agreement to build and operate circa 4,000 sites in France, despite having no material presence in the French market. The Parties said that this shows that 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.

8.48 The Parties also submitted that if scale was an advantage, 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. To test this proposition, the Parties compared WIPs' shares of supply in BTS with their shares of supply by number of sites ('shares by stock'). These are shown in the table below.

Table 8-3: WIPs' shares of supply by number of sites (2020) and BTS wins (2017-2020)

<i>Competitor</i>	<i>Number of sites</i>	<i>Number of sites (%)</i>	<i>BTS wins</i>	<i>BTS wins</i>
Cellnex	[REDACTED]	[80-90]%	[REDACTED]	[40-50]%
WIG	[REDACTED]	[5-10]%	[REDACTED]	[40-50]%
Shared Access	[REDACTED]	[0-5]%	[REDACTED]	[0-5]%
FreshWave	[REDACTED]	[0-5]%	[REDACTED]	[0-5]%
Britannia Towers	[REDACTED]	[0-5]%	[REDACTED]	5-10]%
WHP Telecoms	[REDACTED]	[0-5]%	[REDACTED]	[0-5]%
AP Wireless	[REDACTED]	[0-5]%	[REDACTED]	[0-5]%
Total	[REDACTED]	100%	[REDACTED]	100%

Source: Parties' response to provisional findings.

8.49 The Parties stated that the share of supply and win rates show that smaller WIPs are gaining market share over time which therefore suggests that scale does not materially improve a WIP's ability to offer and deploy BTS solutions.

Parties' internal documents

- 8.50 We have gathered and analysed a wide range of the Parties' internal documents. These provide evidence on a number of issues relevant to the assessment of closeness of competition between Cellnex and the owner of the CK Hutchison Assets in the counterfactual.
- 8.51 First, in terms of understanding how WIPs develop their business to compete with each other within the context of an evolving market, we note that some of Cellnex's internal documents highlight the [REDACTED]. For example, a Cellnex internal presentation from 2020 notes that [REDACTED].
- 8.52 Similarly, some of Cellnex's internal documents indicate that the [REDACTED]. For example:
- (a) A presentation prepared for Cellnex in the context of the Merger [REDACTED].
 - (b) A Cellnex (then Arqiva) internal document [REDACTED] [REDACTED].
- 8.53 On the potential for the owner of the CK Hutchison Assets to compete for business against other WIPs, we have also considered internal documents relating to Cellnex's plans and ability to increase utilisation on the Transaction Sites.
- 8.54 In this regard, several of Cellnex's internal documents show that Cellnex has plans to [REDACTED] on the Transaction Sites in order to increase revenues generated from [REDACTED]. For instance:
- (a) A Cellnex internal document produced during the early stages of assessing the Merger provides for tenancies to '[REDACTED]' in 2025. Revenue forecast to grow at [REDACTED].
 - (b) In relation to [REDACTED], Cellnex's valuation model anticipates the possibility of [REDACTED]. In particular, Cellnex's valuation model [REDACTED].
- 8.55 Lastly, on the extent of competition between different sets of sites, we have also seen a number of Cellnex (then Arqiva) documents on the MBNL contract renegotiation which discuss the contract renegotiation process, the perceived competitive constraints and Arqiva's changing offering over time. These are set out in detail in Appendix G; in summary, they broadly show that:
- (a) [REDACTED].
 - (b) [REDACTED].

(c) [REDACTED].

8.56 We have also seen two internal documents [REDACTED].

Third parties' views

8.57 Third parties provided evidence on two key issues relating to closeness of competition: the effectiveness of the CK Hutchison Assets and the extent to which monopolies can host multiple tenants. Third parties also provided views on the impact of the merger.

8.58 As noted in paragraph 8.9 and 8.11 above, we have also, more broadly, considered the extent to which weight can be attached to third party views in circumstances where:

- (a) third party WIPs and customers do not have experience against which to assess how an owner of the CK Hutchison Assets would compete with Cellnex in practice; and
- (b) the commercial incentives of WIPs and customers may impact their views of the Merger on the structure of the market and competition over the longer-term.

8.59 We consider this in more detail below at paragraphs 8.69 to 8.81 when assessing third party evidence on the impact of the Merger.

Effectiveness of the CK Hutchison Assets

8.60 The majority of third parties submitted that, if the CK Hutchison Assets were to be operated by an independent supplier of macro sites, the owner of these assets would be a strong competitor and/or a viable alternative to Cellnex.²¹³

8.61 WIPs submitted that the owner of the CK Hutchison Assets would compete strongly or moderately strongly with Cellnex, emphasising the large national portfolio of sites which it would operate.

8.62 Two WIPs also highlighted that the share of the MBNL Sites transferred at the dissolution of the MBNL JV (that is, the Transfer Sites) would exercise the most effective competitive constraint as a result of the number and nature of these sites.

- (a) A WIP submitted that, with the acquisition of the Unilateral Sites, including those which will be built by 2022, the owner of the CK Hutchison Assets

²¹³ More details in Appendix F, paragraphs 56 to 73.

would achieve a national portfolio of scale and become the second largest independent portfolio (not taking into account the entry of CTIL). [X] told us that it was possible that the Unilateral Sites alone, given the nature of many of them, would 'lack the depth and capacity to create a national' supplier. However, it said that together with the ongoing interest in the MBNL portfolio and the transfer of sites in 2031, at the dissolution of the MBNL JV, the owner of the CK Hutchison Assets would have more than 6,000 sites placing it in the 'national portfolio of scale category'.

- (b) Another WIP said that the owner of the CK Hutchison Assets would have a very limited competitive effect compared to the current status quo until the Transfer Sites are added to its portfolio. It said this was because many of the Unilateral Sites would only be able to host 3UK as, in its view, they include non-shareable structures as the Streetworks Sites. However, [X] was also of the view that, after the end of the MBNL JV, the owner of the CK Hutchison Assets would become an independent supplier 'with sufficient scale to rival Cellnex and other players and therefore significantly increase competition in the market.'

8.63 Some MNOs indicated that they would consider the owner of the CK Hutchison Assets as an alternative to Cellnex, provided that it met other requirements including site location, price and past track record. For example:

- (a) An MNO said that it would consider the owner of the CK Hutchison Assets as a supplier if the sites were located in their required search areas and met its other criteria. The MNO also said that a critical consideration in deciding whether or not to deploy with them would be the ability of the owner of CK Hutchison Assets to perform as an independent supplier.
- (b) Another MNO told us that if CK Hutchison Assets operated towers in locations suitable to them, it would consider this a further option.

8.64 Five out of the eight non-MNO customers told us that they would consider the CK Hutchison Assets as an alternative to Cellnex.²¹⁴ For example:

- (a) A non-MNO customer said it would consider the CK Hutchison Assets.
- (b) Another non-MNO customer said that the CK Hutchison Assets would represent a strong portfolio with a wide geographic spread which would make the portfolio attractive.

²¹⁴ See Appendix F, paragraph 66 to 73.

- 8.65 Three other non-MNO customers said they would not consider the owner of the CK Hutchison Assets as an alternative to Cellnex due to concerns related to robustness of service capability, experience and specific site requirements.²¹⁵

Multiple tenants on monopoles

- 8.66 Upon completion of the planned roll-out, the Streetworks site monopoles will represent a significant proportion of the CK Hutchison Assets.
- 8.67 We asked third parties whether monopoles could accommodate more than one tenant and what proportion of the monopoles included in their portfolio host multiple tenants.²¹⁶
- (a) Data provided by CTIL shows that around half of its monopole sites host two or more tenants.
 - (b) Data submitted by other WIPs similarly indicate that some of their monopoles accommodate more than one customer. For example, [REDACTED].
- 8.68 WIPs also told us that monopoles have the capacity to host multiple customers, including MNOs with 4G or 5G active equipment, and capacity can be increased where this is not already available. For example:
- (a) A WIP said that, although there are different types of monopoles with different levels of capacity, 'even a basic monopole has the capacity (in some cases subject to further investment) to support at least two customers and some monopoles can go significantly further than this'. It also said that [REDACTED]. It also stated that it is also accurate to say that (all other things being equal) a portfolio comprising basic monopoles will contain on average less capacity and opportunity than a portfolio of lattice structures.
 - (b) Another WIP submitted that monopoles are a 'design-to-suit product' and can therefore be designed for future multi-tenant occupation. It also said that planning authorities prefer to support monopoles designed to suit the known requirement, rather than speculatively, and consider future redevelopment plans at the point where additional demand arises.
 - (c) Another WIP submitted that monopoles are able to accommodate multiple tenants whether MNO or non-MNO customers, including either 4G and 5G equipment. It also said that if monopoles are not designed to hold a

²¹⁵ See Appendix F, paragraphs 68, 69 and 71.

²¹⁶ See Appendix F, paragraphs 74 to 80.

large amount of equipment, structural upgrade works can be completed to hold more equipment rather than building a new structure.

Impact of the Merger

8.69 Several WIPs expressed concerns about the impact of the Merger on Cellnex and other WIPs' competitiveness in the market.²¹⁷ For example:

- (a) A WIP told us that the combination of the CK Hutchison Assets with Cellnex's existing portfolio of sites would result in the loss of a competitive constraint in the supply of access to macro sites and strengthen Cellnex's 'dominant position' and make it harder for other suppliers to compete with Cellnex.
- (b) Another WIP stated that the Merger would 'further entrench Cellnex's dominant position' and remove the opportunity for an independent WIP to acquire the CK Hutchison Assets and 'become a material competitor to Cellnex, both now and in the future'.
- (c) Another WIP submitted that the Merger would remove a key driver of competitive pricing amongst WIPs when negotiating future tenders for long-term supply contracts.

8.70 We note, however, as explained at paragraph 8.15, commercial incentives may impact WIPs' views on the Merger; in particular we note that the CK Hutchison Assets is likely to be one of the few remaining significant portfolios of macro sites in the UK that is capable of being commercialised and may therefore be of interest to other WIPs were it to be available for acquisition.

8.71 MNO customers did not raise explicit concerns and the Parties submitted that the CMA has incorrectly dismissed the lack of concerns noted by MNO customers in relation to the Merger, including by not giving weight to protections negotiated in contracts between MNOs and WIPs.

8.72 We recognise that the MNOs are large and sophisticated businesses that are able to take an informed view on the commercial implications of the Merger. However, as with the WIPs, we note the role of commercial incentives and, as explained above at paragraph 8.9, that with a more competitive counterfactual, third parties have no practical experience of assessing how an owner of the CK Hutchison Assets would compete with Cellnex.

²¹⁷ See further Appendix F, paragraphs 148 to 152.

- 8.73 In this regard, we note that two of the MNOs – Vodafone and O2 – are not, because of their existing network arrangements with CTIL, likely to be particularly affected by a loss of competition between Cellnex and the owner of the CK Hutchison Assets, at least in the near term. Vodafone and O2 have historically relied less on Cellnex, through CTIL, than MBNL (and hence BT/EE and 3UK) has.²¹⁸
- 8.74 We also note that BT/EE raised concerns about the potential impact of the Merger on competition at the start of our Phase 2 investigation,²¹⁹ [REDACTED].
- (a) BT/EE [REDACTED] told us that ‘[if] completed in its notified form, the Merger would represent a significant development in the UK wireless telecommunications sector, raising serious competition concerns that will adversely affect the supply of access to developed macro wireless telecommunications sites and ancillary services to BT/EE and other UK wireless communication providers.’
- (b) [REDACTED].
- 8.75 [REDACTED].
- 8.76 In this regard, we note that the Merger would bring about a permanent change in market structure, and, as set out in our guidance, contractual protections (even long-term ones) should only be given limited weight in assessing the overall loss of competition that a merger will bring about.²²⁰ As explained above at paragraph 8.71, we recognise the Parties’ submission that MNOs are sophisticated customers able to assess the risks to their business; however, as set out in our guidance, contracts may not completely remove a firm’s ability to harm its customers, given that certain customers might not be covered by these contracts, the contracts might not protect all ways in which they could be harmed, and the contracts may be of limited duration.²²¹ Moreover, as our guidance sets out, over time contracts may be renegotiated or terminated, and firms may waive their rights to enforce any breaches in light of their overall bargaining position (reflecting the change in market structure brought about by a merger).²²²
- 8.77 In this case, our assessment involves consideration of the terms which MNOs and other customers may expect to achieve upon the renewal of their existing contracts with Cellnex under the Merger and the counterfactual. The long-

²¹⁸ See Table 3-1 in Chapter 3.

²¹⁹ [BT Response to Issues statement](#)

²²⁰ See [MAGs](#), para. 7.15.

²²¹ [REDACTED].

²²² [MAGs](#), para 7.15

term nature of existing contracts means that renewal negotiations for some contracts will not commence for some years into the future and that subsequent renewals may occur many years after that.

- 8.78 We also note that the other MNO customer that is most likely to be affected by the Merger, 3UK, is part of CK Hutchison, and therefore has a significant incentive to support the successful completion of the Merger. We note that 3UK [REDACTED].
- 8.79 When we raised this with CK Hutchison during this inquiry, it told us that [REDACTED].[REDACTED].
- 8.80 Given [REDACTED] on Cellnex's position in the market (taking into account the evidence provided [REDACTED], and in light of their broader incentives, we have placed limited weight on 3UK's views on the Merger.
- 8.81 We have therefore placed limited weight both on the lack of concern expressed by the MNOs and some of the non-MNO customers in our assessment of the loss of competition that would result from the Merger and on the concerns expressed by WIPs.²²³ We also note that customers have typically not identified significant alternative suppliers to Cellnex and the owner of the CK Hutchison Assets (other than CTIL) or submitted evidence to suggest that our understanding of Cellnex's existing or expected market position is incorrect.²²⁴

Forward-looking shares of supply amongst WIPs

- 8.82 To help us assess the impact of the Merger on Cellnex's position and the wider market structure, we have calculated forward-looking shares of supply. To do so, we have considered the impact of the Merger over a relatively longer term, including after Cellnex gains control of the Transfer Sites in 2031.
- 8.83 Our starting point has been the market for access to developed macro sites which, as defined in Chapter 6, excludes sites that MNOs and MNO JVs use for their own needs ('self-supply'). We have assessed whether MNOs, in particular BT/EE, are likely to enter the market for access to developed macro sites from paragraph 8.160 below.

²²³ See Appendix F, paragraphs 147 to 167.

²²⁴ Customers' size and sophistication can be the base for customers' buyer power, as set out in the MAGs, paragraph 4.20.

- 8.84 We consider that forward-looking shares of supply are a useful indicator of the impact of owner of the CK Hutchison Assets in the market and Cellnex's position.
- 8.85 Table 8-4 shows our estimated shares of supply by 2031 adjusting for Cellnex, the owner of the CK Hutchison Assets and competitors' long-run entry and expansion plans.

Table 8-4: WIPs' shares of supply by number of sites adjusted for foreseeable changes in market structure by 2031

<i>Competitor</i>	<i>Number of sites</i>	<i>Share</i>
Cellnex	[X]	[20-30]%
CK Hutchison Sites:	[X]	
a. Unilateral sites	[X]	[5-10]%
b. Transfer sites	[X]	[10-20]%
CK Hutchison Assets	[X]	[10-20]%
<i>Merged Entity</i>	[X]	[40-50]%
CTIL	[X]	[40-50]%
FreshWave	[X]	[0-5]%
WIG	[X]	[0-5]%
Shared Access	[X]	[0-5]%
Britannia Towers	[X]	[0-5]%
WHP Telecoms	[X]	[0-5]%
AP Wireless	[X]	[0-5]%
Total	[X]	100%

Source: CMA analysis of data provided by the Parties and third parties.

- 8.86 This shows 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.

225

Our assessment of closeness of competition

- 8.87 In this section we present our assessment on the extent to which the owner of the CK Hutchison Assets would be a close competitor to Cellnex in the counterfactual, drawing on the evidence set out above. We do this in two steps:

- (a) First, we consider the extent of competition between Cellnex and the owner of the CK Hutchison Assets in the counterfactual. Here we assess the Parties' submission that there is only a minimal overlap between the

²²⁵ We discuss in paragraphs 8.160 to 8.167 below CTIL and O2's views and other evidence on CTIL position in the market going forward.

two sets of sites, and that this means there could be only limited competition between them.

- (b) Second, we consider the effectiveness of the CK Hutchison Assets in the counterfactual. Here we assess the Parties' submissions that there is only limited scope to increase co-location on the CK Hutchison Assets.

Extent of competition between Cellnex and the owner of the CK Hutchison Assets

8.88 In order to assess the extent of competition between Cellnex and the owner of the CK Hutchison Assets in the counterfactual we have:

- (a) Considered the extent of current overlaps between the two portfolios of sites, and also the extent to which this overlap (even if limited) would have an impact on competition in the supply of macro sites within the UK.
- (b) In keeping with our remit to consider the overall impact of the Merger on rivalry over time,²²⁶ also assessed the extent to which other aspects of the offering provided by Cellnex and the CK Hutchison Assets, beyond the areas of current overlaps between their existing sites, form part of the overall competitive constraint that the Parties provide on each other (and on rival WIPs).

8.89 We then present our conclusions on the extent of competition between Cellnex and the CK Hutchison Assets in the counterfactual.

8.90 We undertake this assessment whilst being mindful that, when assessed against the counterfactual, the Merger would remove one of only three large WIPs from a market in which profits appear to be high and significant barriers to entry have resulted in stable market positions.^{227, 228}

Current overlaps

8.91 As set out in Chapter 7, large WIPs are more likely to have sites overlapping with rivals' existing sites. In the counterfactual, Cellnex and the owner of the CK Hutchison Assets would be the second and third largest suppliers, respectively, and we found that their portfolios of existing sites overlap.

8.92 We have examined the Parties' submissions on the degree of geographic overlap between Cellnex's existing sites and the CK Hutchison Assets which,

²²⁶ MAGs, paragraph 2.6.

²²⁷ See Table 8-1 above for our analysis on future market structure.

²²⁸ See Chapter 9 for a description of barriers to entry.

in their view, shows no meaningful overlap – estimated at [X] % of the Cellnex portfolio.

- 8.93 We note 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.
- 8.94 In their response to the provisional findings, the Parties acknowledged this fact but stated that there is no reason to suppose that the allocation process will favour a significantly greater proportion of overlaps than suggested by their analysis.
- 8.95 Notwithstanding the limitation on our ability to predict the exact degree of overlap in any particular set of circumstances, we broadly agree with the Parties' position that the size of the overlap between their sites is likely to account for a relatively small proportion of each of their sites.
- 8.96 Indeed, we note that in this industry the extent of overlaps between current sites is often limited because of the nature of the assets at issue and public policies, including the application of planning regulations, which seek to discourage duplication of assets and to promote sharing.²²⁹
- 8.97 However, the key question, in our view, for our analysis is not the precise degree of overlap between the Cellnex and the CK Hutchison Assets sites, but rather how these overlaps affect commercial decision making and competition in practice and therefore how the removal of overlaps in the Merger will affect competition.
- 8.98 We have already concluded that suppliers set prices and other commercial terms at a national level, without flexing their offerings on a local or regional basis and we have found, in keeping with the Parties' submissions, that competition in this market should be analysed on a national basis.²³⁰ This means that a loss of competition for a limited number of sites can nevertheless potentially affect prices and other commercial terms for the entire national portfolio of sites.
- 8.99 Moreover, as discussed in Chapter 7, it is not the case that competition in this market involves customers considering whether to switch all of their sites to an alternative supplier, even in the long run. Instead, customers will require access to sites from several different suppliers in order to meet their overall needs but may switch some sites between them.

²²⁹ See Chapter 3.

²³⁰ See Chapter 6 for our assessment on the geographic boundaries of the market.

- 8.100 We therefore consider that the Parties' submission, that 'any competition to switch away from Cellnex's existing sites will need to involve a BTS or self-supply option as an alternative to at least [X] of Cellnex's sites' (because existing overlaps only account for [X] of sites), is incorrect.²³¹
- 8.101 Instead, the evidence available to us shows that the threat of losing even a relatively limited number of sites (of the magnitude that we have identified as between Cellnex and the Transaction Sites) can be an important driver of commercial decision-making and an important determinant of customer outcomes.
- (a) In this regard, the renegotiation of the MBNL contract is a particularly important piece of evidence (analysed in detail in Appendix G), which shows that [X]. For example, as part of the renegotiation process, [X].²³² [X].²³³
- (b) Although we consider that the MBNL contract renegotiation is an important and recent example of the renegotiation of a large contract with a major customer, we also note that this evidence is likely to understate the impact that the threat of losing sites to rivals may have on competitive outcomes post-Merger (taking into account the counterfactual against which the impact of the Merger should be considered).
- (c) That is because, in the MBNL tender, although the number of sites that Cellnex (then Arqiva) considered to be at risk [X], there were, at the time, no other WIPs with a large portfolio of existing sites actively competing to win its business. While CTIL [X], it had not been commercialised at the time and there was therefore [X].²³⁴
- 8.102 A range of other evidence also shows that the threat exercised by rivals' existing sites is an important competitive constraint and a more direct and immediate threat than that exercised by other constraints.²³⁵ This is discussed in more detail in paragraphs 8.207 to 8.212 below, but in summary the evidence shows that the majority of customers have a strong preference to use existing sites, where available, due to the time, costs and risks

²³¹ The Parties' submission related to an earlier analysis of the overlaps between the Parties. This has been superseded by their more recent analysis discussed at paragraph 8.92 above. Regardless the specific degree of overlap between the Parties, we disagree with their views for the reasons explained in this section.

²³² See Appendix G, paragraph 34.

²³³ See Appendix G, Table 1.

²³⁴ See Appendix G, paragraph 7 and 10.

²³⁵ We discuss in detail the constraint exercised by customers' self-build and BTS supplied by WIPs at paragraphs 8.196 to 8.236 below.

involved in building new sites. In addition, the sharing of existing sites is more economically efficient than new sites built for one customer.

- 8.103 In the counterfactual, both CTIL and the owner of the CK Hutchison Assets would represent a threat to Cellnex at those locations where their sites overlap with Cellnex. The overlaps between Cellnex and the CK Hutchison sites, although limited as a proportion of Cellnex's entire site portfolio, account for a significant proportion of the Cellnex sites that overlap with any of its rivals. It therefore represents an important competitive constraint in relative terms, with the only other significant overlap with existing sites being provided by CTIL.²³⁶
- 8.104 With regard to the threat from CTIL, we noted in paragraph 8.56 above that the overlap between CTIL and Cellnex appears to be of the order of [X] of Cellnex sites.²³⁷ In this regard, the Merger is likely to have a major impact on the aggregate overlaps that Cellnex would have with other WIPs. Compared to the counterfactual, the Merger would remove one of only two large rival WIPs that Cellnex will face.²³⁸ In this context, the loss of a rival imposing a constraint on a limited number of sites may nevertheless result in a substantial lessening of competition in the market more broadly.²³⁹
- 8.105 The significance of the loss of competition between Cellnex and the CK Hutchison Assets is corroborated by other evidence we have collected. In particular:
- (a) Cellnex's internal documents generally indicate that [X]. For instance, as shown in paragraph 8.52 above, [X].
 - (b) Another Cellnex (then Arqiva) internal document states that [X].
- 8.106 We have considered Cellnex's view that these internal documents were produced by an external consultant, are historical and/or did not reflect Cellnex's views or plans [X].
- 8.107 Whilst we agree that some care must be taken in interpreting internal documents in their appropriate context, these documents nevertheless provide an insight into the extent to which a rival's ownership of assets can

²³⁶ See, for example, paragraph 8.56 above and Table 8-1 above on the WIPs' shares of supply.

²³⁷ This is not comparable to the overlap between Cellnex and the CK Hutchison Assets at paragraph 8.92 above as it is done on a different basis. However, if the same catchment area is applied, we note that the overlap between Cellnex and the CK Hutchison Assets is around [0-10]% while that between Cellnex (Arqiva then) and CTIL is around [0-10]%.

²³⁸ See Table 8-3 above.

²³⁹ While the focus of the CMA's assessment is on the change in the competitive constraints on the merger firms arising from a merger, where one merger firm has a strong position in the market, even small increments in market power may give rise to competition concerns. See [MAGs](#), paragraphs 4.12(a) and 4.39.

be a competitive threat. We also note that this is consistent with third parties' views and Parties' internal documents which highlight the importance of inorganic growth for WIPs.²⁴⁰

- 8.108 The majority of third parties were of the view that the CK Hutchison Assets would be a relatively strong competitor and/or an alternative for Cellnex's customers, notwithstanding the position, as noted above, that the extent of overlap for any customer is likely to be limited.²⁴¹
- 8.109 Overall, the evidence shows that, while in the counterfactual the overlaps between Cellnex and the owner of the CK Hutchison Assets would be limited in number, the overlaps would mean that the owners of the sites would exercise a significant competitive constraint on one another.
- 8.110 The Merger would therefore result in the loss of a supplier able to offer an alternative to Cellnex at a material number of (Streetworks) sites in the short term, and, in the longer term, in a significant reduction in the aggregate number of overlaps that Cellnex has with its competitors.²⁴²

Other aspects of competition

- 8.111 Alongside competing with their existing portfolios of sites in the areas where these overlap, the evidence indicates that there may be other aspects to the rivalry between competing WIPs (including Cellnex and the owner of the CK Hutchison Assets). While these aspects of competition have played a less prominent role in customers' decision-making to date (within the context of a market in which there was only one large WIP), we have considered how rivalry in this market will operate over time, as networks and demand evolve with new technology.
- 8.112 We do this by considering two ways in which WIPs (and hence Cellnex and the owner of the CK Hutchison Assets) may compete with one another over time:
- (a) First, WIPs may compete in the provision of BTS in areas where customers require a new site and no WIP has an existing site. As discussed in Chapter 7, this need can come about from 5G densification programmes, the need for increased coverage in rural areas and NTQs on existing sites.

²⁴⁰ See paragraph 8.51 above and Appendix F, paragraphs 123 to 130.

²⁴¹ See Appendix F, paragraphs 56 to 73.

²⁴² Our assessment on the scope to increase co-location on the Unilateral and MBNL Sites is discussed in the section below.

- (b) Second, WIPs may compete with their existing sites even when these do not closely overlap with those of rivals. This is because, rather than switching only individual sites, MNOs may threaten to switch at once a large collection of sites in an area to a rival by redesigning their network configuration, as long as this would still provide coverage over the same region. In this way a package of local sites offered by a rival WIP can be an alternative, even if its sites are not sufficiently close to be substitutable on an individual basis.²⁴³

8.113 We discuss each of these and the extent of rivalry between Cellnex and the owner of the CK Hutchison Assets on these aspects of competition below.

- *Provision of BTS sites*

8.114 In this section, we consider whether Cellnex and the owner of the CK Hutchison Assets are likely to exercise a significant competitive constraint on one another when competing to build BTS sites for customers. We discuss the extent to which BTS supplied by WIPs, including Cellnex and the owner of the CK Hutchison Assets, may constrain existing sites in paragraphs 8.207 to 8.223 below.

8.115 First, in order to understand the importance of any such competition we consider the extent of any BTS demand. We note that in the past four years a very limited number of BTS sites – fewer than [REDACTED] – have been built, although some more BTS contracts were awarded.^{244, 245}

8.116 To assess whether this is likely to increase in the future, we asked WIPs and MNOs whether they expect that the deployment of 5G and/or other market developments would lead to future increases in demand for new sites. Their responses were mixed and did not consistently indicate that future demand is likely to be significant.

8.117 In particular, third parties indicated the following:

- (a) WIPs indicated that they expect greater BTS opportunities in the future. For example:

- (i) A WIP told us that [REDACTED]. However, the WIP said that [REDACTED]

²⁴³ See Appendix F, paragraphs 105 to 110.

²⁴⁴ See Appendix E, Table 3.

²⁴⁵ An example of a BTS contract which was awarded but has not led to the building of new sites is the contract awarded by MBNL to [REDACTED] and Cellnex.

- (ii) Shared Access said that the number of BTS opportunities is expected to be 50-100 times greater in the next ten years simply by virtue of the fact that there have been no formal BTS projects / opportunities implemented in the UK until now. They said that two key trends are driving MNOs to now adopt BTS, which are tower disposals and the requirements of 5G.
 - (b) However, MNOs told us that they do not expect a significant increase in the number of new macro sites in the future, whether self-built by customers or built by WIPs. In particular:
 - (i) BT/EE told us that [REDACTED].
 - (ii) O2 said that [REDACTED].
 - (iii) Vodafone submitted that [REDACTED].
- 8.118 Second, we assessed whether scale provides a competitive advantage when WIPs compete for BTS opportunities. Since there are already several suppliers offering BTS services in the market, competition concerns could arise if scale provided a significant competitive advantage to suppliers such that Cellnex and the owner of the CK Hutchison Assets, as the second and third largest WIPs in the market, would be close competitors in the provision of BTS services to customers.
- 8.119 As set out in Chapter 7, we have received some evidence, albeit mixed, suggesting that economies of scale advantages for large suppliers may play a role when competing for BTS sites and that large suppliers may have an advantage in securing future commitments for new tenancies, which may have otherwise be competed for as BTS opportunities.
- 8.120 However, we consider that the evidence provided by the Parties following our provisional findings, specifically on shares of supply in BTS (shown in paragraph 8.48 above) and synergies arising from the Merger (shown in paragraphs 7.36 to 7.38 above), provide further support for the position that scale effects, although present, are not significant and are unlikely to materially affect WIPs' ability to compete and win BTS contracts.²⁴⁶
- 8.121 Overall, we consider that there are likely to be relatively few BTS opportunities in the future and that, although suppliers with scale may have

²⁴⁶ However, we note that there are few caveats on the Parties' submissions namely that the shares of supply in BTS is based on a very small number of opportunities and that any substantial cost savings is likely to have already been realised in the past such that we would not expect the Merger would necessarily give rise to significant synergies.

some limited advantages when competing for them, these are unlikely to be a material aspect of competition. As a result, Cellnex and the owner of the CK Hutchison Assets are unlikely to be close competitors in the provision of BTS sites but to be two of a significant number of credible providers which would be able to offer BTS services in the future.²⁴⁷

8.122 We discuss the extent to which BTS supplied by WIPs, including the Parties, may constrain suppliers' existing sites, at paragraphs 8.207 to 8.223 below. We also discuss whether customers' self-build may also constrain the provision of BTS sites by WIPs at paragraphs 8.225 to 8.236 below.

- *Competition beyond overlaps due to network redesigns*

8.123 In this section, we consider whether Cellnex and the owner of the CK Hutchison Assets are likely to compete with their portfolios of existing sites in areas other than those where they currently overlap. This may be because, rather than switching only individual sites, MNOs may threaten to switch at once a large collection of sites in an area to a rival WIP by redesigning their network configuration, as long as this would still provide coverage over the same region. In this way a package of local sites offered by a rival WIP could be an alternative, even if its sites were not sufficiently close to be substitutable on an individual basis.²⁴⁸

8.124 In response to our provisional findings, the Parties submitted that it is wholly implausible to consider that an MNO would reconsider its network to accommodate site provision when passive infrastructures are a consequence of a radio and network plan rather than the driver, particularly in light of the potential risks this would raise in terms of service disruption and customer experience. In support of this, the Parties stated that [REDACTED].

8.125 The Parties also stated that, [REDACTED].

8.126 As set out in Chapter 7, MNO networks are not static but can evolve over time, in particular when new technologies are introduced. To understand whether the deployment of 5G would lead to a significant increase in number of macro sites and therefore a greater ability for MNOs to redesign their networks, we gathered evidence from third parties.

²⁴⁷ We discuss these competitors in paragraphs 8.153 to 8.195 below.

²⁴⁸ See Appendix F, paragraphs 105 to 110.

- 8.127 MNO customers all indicated that network redesign is disruptive and costly, and MNOs have generally no appetite to redesign their networks absent exceptional circumstances. In particular:
- (a) One MNO stated that [REDACTED].
 - (b) Another MNO stated that [REDACTED]. The MNO also said [REDACTED]
 - (c) Another MNO said that [REDACTED] Notwithstanding this, the MNO stated that [REDACTED]
- 8.128 Ofcom told us that in the past the main step changes in MNOs' radio network configurations were the formation of the MNO JVs and the merger between T-Mobile and Orange. Beyond that, it said that growth in sites has been organic in the past and that generally MNOs do not like to move between sites.
- 8.129 The evidence set out above indicates that the deployment of 5G would not lead to a significant increase in the number of macro sites and therefore MNOs' ability and willingness to redesign their networks, is unlikely to increase. Ofcom has said publicly that, in the next five years, 5G will make existing sites insufficient at which point MNOs could aim to densify their networks and grow the use of small cells to add capacity on their networks.²⁴⁹ Ofcom told us that it does not expect this to occur in rural areas in the next five years and what will happen beyond the next five years is uncertain, both in urban and rural areas.
- 8.130 This is consistent with views expressed by MNOs, which indicated that [REDACTED].
- 8.131 Overall, the evidence shows that MNOs are unlikely to significantly redesign or threaten to redesign their networks over time by switching a large number of sites at once to a rival WIP. As a result, we conclude that the ability of Cellnex and the owner of the CK Hutchison Assets to offer extensive portfolios of existing sites beyond the areas of current overlaps is unlikely to be an important aspect of competition going forward.

Conclusions on the extent of competition between Cellnex and the owner of the CK Hutchison Assets

- 8.132 In the counterfactual, while the overlaps between Cellnex and the owner of the CK Hutchison Assets would be limited in number, overlaps in existing sites are important competitive constraints, where they exist, and the threat of

²⁴⁹ Ofcom, [Discussion paper: Meeting future demand for mobile data](#), paragraphs 5.45 and 5.60.

small losses of sites can affect customer outcomes significantly. The Merger would therefore result in the loss of a supplier able to offer an alternative to Cellnex with a material number of sites in the short term, and, in the longer term, in a significant reduction in the aggregate number of overlaps that Cellnex has with its competitors.²⁵⁰

8.133 However, the evidence does not indicate that Cellnex and the owner of the CK Hutchison Assets would be particularly close competitors when competing on other aspects, such as the provision of BTS and with offerings outside of areas of current overlaps.

8.134 We discuss the remaining competitive constraints exercised by CTIL and other rivals in the section on competition from other suppliers further below.

Effectiveness of the CK Hutchison Assets

8.135 In order to assess the extent to which the owner of the CK Hutchison Assets would compete with Cellnex at the overlap sites in the counterfactual, we have in this section also assessed whether the Transaction Sites could accommodate additional tenants and so be used to compete for customers.

8.136 Since the Transfer Sites will be identified only at the dissolution of the MBNL JV, we have considered whether co-location on the MBNL Sites, in general, can be increased. We have then considered the same issue in relation to the Unilateral Sites.²⁵¹

Scope to increase co-location on MBNL Sites

8.137 The vast majority of MBNL Sites are currently used by 3UK and BT/EE, but [X] sites (less than [X]) already host an additional tenant. Third party co-location on these sites is by [X] and a small number of other third parties. The Parties submitted that Cellnex, as an independent WIP acquiring sites that are not currently operated by a WIP, will increase the likelihood that co-location occurs on the sites to the extent feasible.

(a) This is consistent with Cellnex's internal analysis during the early stages of assessing the Merger, which indicates that the [X].²⁵²

(b) This position is also consistent with a BT/EE internal document, [X].

²⁵⁰ Our assessment on the scope to increase co-location on the Unilateral and MBNL Sites is discussed in the section below.

²⁵¹ We have not seen evidence or have reasons to believe that the overlap sites would be any different, in terms of the scope to increase co-location, than non-overlap sites.

²⁵² See paragraph 8.54 above.

8.138 We have considered the Parties' view that Cellnex's internal documents in paragraph 8.53 were produced at an early stage of the negotiation between the Parties, before the complexity of the MBNL Sites was fully understood, and/or did not reflect Cellnex's plans. However, we interpret these documents as evidence of a general ability and incentive to expand co-location on these sites (which appears to have formed part of Cellnex's rationale for the Merger), rather than as definitive and specific plans on the extent to which co-location would be increased. In addition, we note that the Parties did not provide evidence [REDACTED] or contemporaneous records suggesting that Cellnex subsequently considered these plans to be incorrect.

8.139 We note that:

(a) Cellnex internal documents show that [REDACTED].²⁵³

(b) In the Parties' view, Vodafone and O2 will share their active equipment in relation to 5G such that CTIL will have increasingly more capacity which will create room to share passive infrastructures with new customers. The situation is different for MBNL, where BT/EE and 3UK do not plan to share 5G active equipment.

8.140 Lastly, we have also considered the Parties' submissions on [REDACTED].²⁵⁴

8.141 Once the JV has been dissolved and the identity and ownership of the Transfer Sites agreed, the owner of the CK Hutchison Assets could offer third party tenancies on the Transfer Sites [REDACTED]. As noted in paragraph 8.3 above, our competitive assessment is being undertaken over the long term and extends beyond the dissolution of the MBNL JV, even if that were not to occur until 2031.

Conclusion on scope to increase co-location on MBNL Sites

8.142 Overall, our view is that [REDACTED]. However, we consider that, after the end of the MBNL JV, the owner of the CK Hutchison Assets could more easily and readily increase co-location on the Transfer Sites.

Scope to increase co-location on Unilateral Sites

8.143 The Unilateral Sites comprise [100-200] UKB Sites (which account for less than [REDACTED]% of the Transaction Sites) and 2,600 Streetworks Sites, [REDACTED]. The Streetworks Sites are being built as part of 3UK's network densification

²⁵³ The Parties' internal documents on the threat of CTIL are discussed in paragraphs 8.156 to 8.159 below.

²⁵⁴ See paragraph 8.137(b) above.

strategy and are therefore designed solely with 3UK's network needs in mind.²⁵⁵

- 8.144 The Parties have submitted that monopolies 'may' only be able to host a single tenant, and that upgrading the monopolies would require some investment (and to secure planning permission).
- 8.145 We note that the views and data submitted by third parties, in relation to monopolies in their portfolios of sites which are currently or were in the past shared between tenants, indicate that a significant proportion of monopolies can accommodate more than one tenant.²⁵⁶
- 8.146 We also note that Cellnex had plans to turn some of the Streetworks Sites into multi-tenant sites and this view was supported by its valuation model which provides for an increase in third party tenancies on the Streetworks Sites.²⁵⁷
- 8.147 We have considered the [X], similarly to paragraph 8.138 above, we interpret the valuation model as evidence of a general ability and incentive to expand co-location on these sites co-location, rather than as a definitive and specific plan on the extent to which co-location would be increased.

Conclusion on scope to increase co-location on Unilateral Sites

- 8.148 Our view is that, whilst we recognise 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 appear to be feasible.

Conclusions on scope to increase co-location on the Transaction Sites

- 8.149 Overall, our view is that a significant proportion of the Transaction Sites could accommodate an additional tenant and be able to compete to attract additional business. Although some sites may require additional capital and planning permission in order to increase third-party co-location, these are unlikely in themselves to prevent them being used to compete in appropriate circumstances.

²⁵⁵ As of 31 October 2021, [X] monopolies have been built, [X] are being prepared for build or are in the process of being built and the remainder are at earlier stages.

²⁵⁶ See paragraphs 8.66 to 8.68 above and Appendix F, paragraphs 74 to 80.

²⁵⁷ Our assessment of the Parties' views on the internal documents is set out in Chapter 7.

- 8.150 We recognise that there are some factors which will limit the extent to which some of the Transaction Sites may be used to compete for additional tenants.
- 8.151 We consider, however, that the proportion of sites that could support additional tenants on competitive terms is sufficient, when considered alongside the overall number of overlapping sites, to mean that the owner of the CK Hutchison Assets in the counterfactual would represent a significant competitive constraint on Cellnex.

Conclusions on closeness of competition between Cellnex and the owner of the CK Hutchison Assets

- 8.152 In summary, the evidence we have assessed on closeness of competition shows that, in the counterfactual:
- (a) The owner of the CK Hutchison Assets would be the third largest operator in the market, after CTIL and Cellnex, with a large portfolio of sites and an extensive geographic footprint.
 - (b) The CK Hutchison Assets would represent a significant proportion of all the existing sites that overlap with Cellnex sites. Competition at overlap sites can provide a significant competitive constraint on the price of all sites, provided there is scope to increase co-location on them.
 - (c) A very significant proportion of the MBNL Sites and a lesser proportion of the Unilateral Sites that overlap could be used to compete with Cellnex for additional tenants.
 - (d) In the counterfactual, the owner of the CK Hutchison Assets would therefore be a close competitor to Cellnex at those locations where their sites overlap.
 - (e) This is consistent with the Parties' internal documents and evidence from third parties' views that indicate that the owner of the CK Hutchison Assets would be expected to be a close competitor to Cellnex. The Merger would therefore remove a significant competitive constraint on Cellnex.

Competition from alternative suppliers

- 8.153 In this section, we assess the alternatives available to customers and the extent to which they would constrain the Merged Entity.
- 8.154 As part of our forward-looking assessment, which looks at the market over a longer term, including after Cellnex gains control of the Transfer Sites, we

have taken into account ongoing market developments that might materially change the nature of the competitive constraints on the Merged Entity, such as MNOs commercialising their assets.

8.155 This section is structured as follows:

- (a) First, we consider the constraint exercised by CTIL and BT/EE;²⁵⁸
- (b) Second, we assess the constraint from other WIPs;
- (c) Third, we assess the extent to which customers' ability to self-build and WIPs' BTS offering would be a competitive constraint; and
- (d) Finally, we set out our conclusions on competition from alternative suppliers.

Constraint from CTIL and BT/EE

Parties' submissions

8.156 The Parties submitted that, since its decision to commercialise in January 2021, CTIL is a direct and growing competitor to Cellnex, as evidenced by its public statements and a range of other evidence.

8.157 The Parties said that they expect that CTIL [REDACTED].

8.158 The Parties also told us that Cellnex is particularly concerned that [REDACTED].²⁵⁹

8.159 With regard to BT/EE, the Parties submitted that BT/EE could look to sell its tower assets outside of MBNL in order to raise capital to support its fibre broadband network upgrade programme and, as a result, other passive infrastructure assets could become available for purchase in the UK in the future. Separately, the Parties submitted that we should consider the size of BT/EE as a rough proxy for the constraint posed by self-supply and that customer self-supply (including self-supply by BT/EE) is a binding constraint on the Merged Entity.²⁶⁰

²⁵⁸ We do not consider Vodafone or O2 as they would not offer a competitive constraint to Cellnex since they do not themselves own any material number of sites, outside of CTIL. Following the Merger, 3UK would also not retain any sites for itself. Its shares of the MBNL Sites form part of the CK Hutchison Assets which we have considered above.

²⁵⁹ For example, an [REDACTED].

²⁶⁰ We discuss the competitive constraint exercised by customers' self-build further below.

Our assessment on constraint from CTIL

- 8.160 In January 2021, Vodafone and O2 took steps to commercialise CTIL. Given CTIL's large portfolio of existing sites, we have investigated the extent to which CTIL will compete for customers going forward. We have considered CTIL's internal documents, alongside internal documents of its shareholders, to understand its future strategy.
- 8.161 CTIL documents indicate that it has [REDACTED].²⁶¹
- 8.162 CTIL submitted that [REDACTED].
- 8.163 CTIL, Vodafone and O2's internal documents [REDACTED].
- 8.164 [REDACTED].²⁶²
- 8.165 Based on the evidence above, we consider that, as a result of its scale and recent commercialisation, CTIL is now a direct competitor and is likely to grow over time to become an increasingly significant competitive constraint in the market.²⁶³
- 8.166 We note CTIL and O2's submissions that it will initially focus on serving the needs of its shareholders, but we also note that CTIL, Vodafone and O2's internal documents forecast that [REDACTED]. This is also consistent with the fact that, prior to the IPO of Vantage Towers, despite Vodafone retaining an 82% interest in Vantage Towers, third party revenues grew.²⁶⁴
- 8.167 As noted in paragraph 8.3 above, our competitive assessment is being undertaken over the long term and extends beyond the dissolution of the MBNL JV, even if that were not to occur until 2031. With this horizon in mind, we consider that in the long-run CTIL is likely to compete increasingly for other customers as well.

Our assessment of the constraint from BT/EE

- 8.168 The network of sites owned by BT/EE remains the only other large portfolio of sites owned by an MNO which has yet to be commercialised. Given the scale of the portfolio and therefore potential impact on the structure of the market if these were to be commercialised, we have considered BT/EE's plans for the future use of these assets.

²⁶¹ See Appendix F, paragraphs 141 to 146.

²⁶² See Appendix F, paragraph 144.

²⁶³ We included CTIL when calculating our shares of supply above and undertook our assessment on this basis.

²⁶⁴ See paragraph 5.225 in Chapter 5 for a discussion of Vodafone

- 8.169 We note the context of the broader industry trend, in both the UK and other jurisdictions, in which owners of passive infrastructure assets have sought to realise an uplift in their value through some form of commercialisation which suggests that BT/EE would have some incentive to commercialise its assets.²⁶⁵
- 8.170 This is [REDACTED] BT/EE's internal documents, [REDACTED].²⁶⁶
- 8.171 The evidence available to us shows that [REDACTED].
- 8.172 BT/EE's internal documents indicate, [REDACTED].
- 8.173 BT/EE told us that [REDACTED].
- 8.174 Overall, on the basis of the evidence summarised above, we consider that BT/EE will [REDACTED].
- 8.175 While all MNO holders of passive infrastructure assets have incentives to commercialise these assets, [REDACTED] and CK Hutchison, where concrete steps have already been taken and decisions made to commercialise the assets.

Constraint from other WIPs

- 8.176 In this section we set out the Parties' submissions and our assessment of the constraint the Merged Entity will face from other WIPs. We start by considering the current market position of each supplier and the constraint that other WIPs may provide on the Merged Entity, through their existing sites. Given our forward-looking assessment, we then also assess their expansion opportunities and plans. In the next section, we consider the extent to which BTS supplied by WIPs may constrain the Merged Entity.

Parties' submissions

- 8.177 The Parties submitted that Cellnex faces competition from a range of other suppliers such as [REDACTED] and from WIPs including WIG and BAI Communications.
- 8.178 The Parties also said that smaller WIPs are as well placed as larger WIPs such as Cellnex to offer BTS solutions to MNO customers and, in any event, MNO customers have a demonstrated capacity to self-supply.

²⁶⁵ See examples in other jurisdictions in Chapter 5

²⁶⁶ See Appendix F, paragraphs 131 to 134.

8.179 Cellnex internal documents show that it (then Arqiva) recognised that [REDACTED].²⁶⁷

8.180 The Parties submitted that there are limited organic growth prospects for UK sites, and noted that this is a consequence of the limited demand for additional sites and is not evidence of geographic scale being an important parameter of competition, nor is it a merger-specific competition concern. However, they submitted that competitors or potential new entrants can gain market share organically through capturing demand for additional sites or demand from churn of existing sites and that this acts as a competitive constraint on Cellnex. They noted examples including BAI Communications winning a tender with TfL and CTIL's expansion plans. One competitor also submitted that it intends to grow organically by supplying a proportion of the sites that MNOs need renewed each year with a BTS sites programme.

Current market position

8.181 As shown in Table 8-1 above, WIG has historically been the largest WIP after Cellnex but has had a significantly smaller market position. This is an important factor, given our finding that the scale of suppliers is an important determinant of their likelihood of having an overlapping site and therefore the strength of the constraint that they exercise on rivals' portfolios of existing sites.²⁶⁸

8.182 Several third parties indicated that Cellnex was a strong or very strong competitor and that [REDACTED] WIPs are unable to exercise an effective competitive constraint on Cellnex.²⁶⁹ For instance:

(a) A WIP submitted that [REDACTED].

(b) Another WIP submitted that Cellnex 'dominates' the market and there are a number of smaller WIPs, which exercise a weak competitive strength, with only WIG being a competitor of moderate strength

(c) An MNO submitted that CTIL is a very strong alternative to Cellnex, [REDACTED] and

(d) A non-MNO customer, Airwave identified [REDACTED] as [REDACTED] alternative to Cellnex because of their extensive portfolios of sites. Airwave also identified [REDACTED] as a [REDACTED] alternative because of its [REDACTED].

²⁶⁷ For example, an Arqiva internal document sets out that [REDACTED]. Another internal document drafted by Arqiva [REDACTED].

²⁶⁸ See paragraphs 7.25 to 7.46 above

²⁶⁹ See detail in Appendix F, paragraphs 82 to 97.

8.183 We have also considered the extent to which rival WIPs (excluding CTIL which was not an active WIP until recently) have historically been able to win tenancies such that in the future they may become stronger rivals through their portfolio of existing sites than suggested by looking at their current market position.

8.184 Table 8-5 shows the results of our analysis of tenancies won by Cellnex and its competitors up to 2020, both including and excluding renewals.²⁷⁰

Table 8-5: WIPs' shares of supply of tenancies won, including and excluding contract renewals (2017-2020)

Competitor	Incl. renewals		Excl. renewals	
	Volume	Share	Volume	Share
Cellnex	[X]	[90-100]%	[X]	[50-60]%
WIG	[X]	[0-5]%	[X]	[10-20]%
Shared Access	[X]	[0-5]%	[X]	[10-20]%
WHP Telecoms	[X]	[0-5]%	[X]	[5-10]%
AP Wireless	[X]	[0-5]%	[X]	[0-5]%
Britannia Towers	[X]	[0-5]%	[X]	[0-5]%
FreshWave	[X]	[0-5]%	[X]	[0-5]%
Total	[X]	100%	[X]	100%

Source: CMA analysis of Cellnex and third parties data

8.185 As shown in the table above, Cellnex has won nearly all available tenancies, with rivals winning less than [0-10%] of tenancies in aggregate. We consider this reflects both Cellnex's competitive strength and scale, and the advantages of incumbents when existing large contracts come up for renewal. We note that a very significant proportion of Cellnex's tenancies arise from renewals, rather than from new tenancies.

8.186 If we exclude renewals and consider only the new available tenancies that arose in the past few years, [X] and [X] shares are higher than indicated by looking at their current market position (see Table 8-1 above). This suggests that these WIPs are able to compete with Cellnex to some extent for new tenancies, for which Cellnex's share is lower ([50-60]% than its current [80-90]% shares.²⁷¹

8.187 However, new tenancies account for a small proportion [5-10]% of all the tenancies competed for in the last four years. In addition, even for these new

²⁷⁰ See Appendix E, Table 2. As it is prior to 2021, it does not include CTIL, whose competitive constraint on the Merged Entity we have assessed in paragraphs 8.160 to 8.167 above.

²⁷¹ See Table 8-1 above.

tenancies, Cellnex obtains [50-60]% share and is the strongest competitor by some margin.^{272, 273}

- 8.188 To understand whether these competitors may be able to exercise a stronger competitive constraint on the Merged Entity in the future we have considered Cellnex's view of these rivals, through its internal documents, as well as the WIPs' expansion plans.

Expansion opportunities and plans

- 8.189 Cellnex internal documents identify [REDACTED] and other WIPs as rivals but we have not seen evidence suggesting that the competitive constraint that these WIPs exercise has increased or is expected to increase significantly in the future.
- 8.190 Both the Parties and third parties agree that there are limited opportunities for organic expansion because of the limited customer demand for BTS sites, which allow suppliers to build sites on-demand, rather than speculatively.²⁷⁴
- 8.191 Therefore, some WIPs were of the view that their ability to grow substantially could only be driven by acquisitions of existing pools of assets.²⁷⁵ For example:
- (a) A WIP stated that there are only two ways to expand in the UK by a material amount which is through the acquisition of towers from MNOs and/or by capturing large scale BTS programmes. Because of this, [REDACTED]
 - (b) Another WIP said that a challenge it faces when looking to expand is that WIPs include future sites in the form of BTS programmes in their MNO offer which prevent [REDACTED] from having the opportunity to tender for these sites.
- 8.192 To further investigate the growth prospects of alternative WIPs, we have assessed their expansion plans.
- 8.193 WIPs have limited plans to expand in the future as the UK market is mature and there will be limited opportunities for organic expansion through BTS in the next five to ten years. It follows that rival WIPs to the Merged Entity will likely be unable to significantly increase their shares beyond the modest levels projected in Table 8-5 above.

²⁷² See Chapter 7 for a description of competition for existing and new sites.

²⁷³ See Chapter 7 for a description on large existing

²⁷⁴ Paragraph 8.180 above and Appendix F.

²⁷⁵ A more detail summary of third parties' growth plans is set in Appendix F, paragraphs 122 to 130.

8.194 We have not seen any evidence of further opportunities for inorganic expansion, which would allow rival WIPs to grow, that would be of sufficient scope and magnitude to constrain the Merged Entity so as to offset the loss of competition from the Merger.^{276 277}

Conclusion on constraint from other WIPs

8.195 In light of the evidence summarised above, our view is that all other rival WIPs are, and will likely remain, small. As a result, the likelihood that WIPs' sites would overlap with and therefore constrain the Merged Entity's portfolio of sites is small and they would therefore impose only a very weak competitive constraint on the Merged Entity.

Constraint from customers' self-build and BTS

8.196 In this section we have assessed the extent to which customers' ability to self-build sites and WIPs' ability to build sites to the specification of customers (as BTS) exercise a competitive constraint on the Merged Entity.²⁷⁸

8.197 Although there are certain differences between customers' self-build and BTS supplied by WIPs, both entail the building of new sites.

8.198 We have therefore first considered the constraint from new sites in general. We have then more specifically assessed the competitive constraint from BTS supplied by WIPs and from customer's self-build separately.

Parties' submissions

8.199 The Parties submitted that BTS (either supplied by WIPs or customers' self-build) is the binding constraint on Cellnex when competing for either new demand or to retain existing customers and that therefore the size of Cellnex's existing portfolio of sites does not give it a material advantage over smaller sites when competing.

(a) The Parties noted that in the two largest recent contracts for new sites – the SRN and 3UK's Streetworks programme – 3UK chose to build sites itself over the use of existing sites. The Parties also noted that 3UK's approach to building its Streetworks Sites is evidence of the choices

²⁷⁶ MAGs, paragraph 8.31.

²⁷⁷ More details are set out in out Chapter 9.

²⁷⁸ In this section we consider whether the ability of customers to self-build sites would exercise a competitive constraint on the Merged Entity. In Chapter 9 we discuss whether third party entry would replace the constraint eliminated by the Merger. See MAGs, paragraph 4.16.

available to MNOs in site selection. They noted that 3UK is building its Streetworks sites using third party contractors, rather than WIPs, [REDACTED].

- (b) The Parties said that, because of the very local demand for site access, having a large portfolio of sites provides minimal advantages and that BTS represents the overwhelming majority of a suppliers' offering, with the small difference between the portion of existing sites (between large and small suppliers) making very little difference to the competitiveness of their overall offer. They submit that, for example, a firm with [REDACTED] overlaps would still need to have a BTS offering for [REDACTED] of sites, whilst a firm with [REDACTED] overlaps would need to have a BTS offering for [REDACTED] of the customer demand.
- (c) The Parties submitted that WIPs are able to compete for MNO customers on the basis of BTS and therefore do not need a large portfolio of existing sites or national coverage to credibly compete for opportunities.
- (d) They note that there are very few non-MNOs with national coverage requirements, and national coverage is therefore simply not required and, even for the very few non-MNOs that do have national coverage, they do not generally formally tender for a large number of sites at once.
- (e) Cellnex submitted that, even if there is an existing site in the right location that is appropriate for co-location, [REDACTED]. In support of this position, Cellnex submitted Arqiva's internal documents which it considers indicate that [REDACTED]. The Parties noted that Cellnex (then Arqiva) [REDACTED].
- (f) Although BTS sites can be made available to non-MNO customers, Cellnex said that generally it is not economic to offer BTS solutions to these customers, although there are circumstances in which this can occur.

8.200 The Parties submitted that [REDACTED].

8.201 They said that [REDACTED].

8.202 In the Parties' view, the evidence shows that Arqiva [REDACTED]. The Parties submitted that [REDACTED]. The Parties also said that [REDACTED].

8.203 With regard to customers' ability to self-build, the Parties submitted that MNO and non-MNO customers have a demonstrated capacity to self-supply. They also said that self-supply is a form of BTS as it involves the customer building a new site in order to meet its own demand. They provided internal documents showing that, in preparing its BTS solution for customers, [REDACTED].

- 8.204 In response to provisional findings, the Parties submitted that demand arising from the only two programmes where 3UK required a significant number of additional sites in the last five years - 3UK's Streetworks and SRN programme – was satisfied to a large extent via self-supply. The Parties submitted that for both these programmes 3UK actively considered all the options, including existing third-party sites, but decided to satisfy the vast majority of its demand for new sites via self-build.
- 8.205 In relation to the SRN programme, the Parties submitted that the Partial Not Spots (PNS) part of the SRN programme provides a clear example where MNOs, not just 3UK, have chosen to self-build rather than use sites of both existing and BTS WIP sites. They also submitted that [REDACTED]. The Parties also said that [REDACTED].
- 8.206 As further evidence that customers' self-build exercises a strong competitive constraint, the Parties submitted that over the last five years there have been [REDACTED] NTQs for MBNL and that over [REDACTED] of these sites were replaced by sites built by the customer.

The general constraint from new sites

- 8.207 With regard to building new sites, the evidence shows that the majority of customers have a strong preference to use existing sites, where available, rather than building new sites.²⁷⁹ For example:
- (a) BT/EE told us that, when replacing a site, [REDACTED]
 - (b) Vodafone submitted that it will normally choose to self-build sites only when there is no suitable site available within the location it needs.
 - (c) A non-MNO customer, Electricity North West, told us that as the electricity network is static in terms of locations, where there is no existing infrastructure, it will build itself, otherwise it uses 'third party sites generally hilltop'.
- 8.208 However, in response to our provisional findings, the Parties submitted that 3UK does not have any set preference for existing third-party sites over self-build when sourcing new sites. The Parties also submitted that 3UK takes the following factors into account when assessing an additional site: [REDACTED].
- 8.209 The costs of building new sites can vary significantly but can be substantial, and, in most cases, are higher than the costs of using an existing site, even if

²⁷⁹ See Appendix F, paragraphs 116 to 121.

it needs to be upgraded to, for example, host 5G equipment or an additional tenant. In this regard:

- (a) MNOs were of the view that, in general, upgrading a site is cheaper than building a new one. For example:
 - (i) Vodafone submitted that this is the case due to the costs of the build and other factors affecting the time to deploy the site, including planning the cost of the power and transmission that are required, which in rural areas can be particularly substantial.
 - (ii) O2 submitted that [REDACTED].
- (b) A cost analysis submitted by the Parties shows that upgrading a site is cheaper than building a new one over a ten-year period, but more expensive over a longer timeframe of 20 years. This is because the operational costs of upgrading a site are greater than the saving in capital expenses.²⁸⁰

8.210 Furthermore, building a new site requires significant time, planning permissions and landlord negotiations, which are the main reasons why customers have a strong preference to use existing sites. For example, BT/EE told us that [REDACTED] The impact of planning regulation on WIPs' expansion is discussed in more detail in Chapter 9 and the efforts by policymakers and planning authorities to encourage the sharing of existing sites, where feasible, is discussed in Chapter 3.

8.211 Lastly, new sites built for one customer are likely to be less economically efficient than those which already exist and host multiple tenants. As discussed in Chapter 3, sites which host multiple tenants are likely to be more profitable for suppliers, who can get incremental revenue with minimal extra cost. This is consistent with the commercial behaviour of WIPs, which is generally to seek to increase co-location on existing sites wherever possible. The efficiencies which WIPs can obtain from co-location may be shared with tenants, who may be offered a lower rent. They enable the supplier of an existing site to be more competitive than a supplier of a new site (who must recover all of their costs of a new site from a single customer or who must themselves subsidise the site until other tenants are found).

8.212 Overall, this evidence shows that new sites, whether built by the customers' themselves or WIPs, are considered a second-best option by customers, who prefer to use suppliers' existing sites where available. Therefore, in those

²⁸⁰ See Appendix B.

overlap locations where other existing sites are available, we consider that these will generally be a stronger competitive constraint on the Merged Entity compared to that exercised by the possibility of building new sites.

Constraint from BTS supplied by WIPs

- 8.213 In this section, we consider to what extent BTS supplied by rival WIPs could constrain the Merged Entity's portfolio of existing sites.
- 8.214 As discussed above, all rival WIPs, with the exception of CTIL, are small and have limited plans to expand in the future. CTIL is a large supplier which as explained above, will initially focus on serving the needs of its shareholders, but increasingly compete for other customers as well.
- 8.215 We note the following:
- (a) The evidence from Arqiva's renegotiation of the MBNL contract shows that [REDACTED]. Although it is difficult to disentangle the exact constraint exercised by each, we consider that this is evidence that [REDACTED].²⁸¹
 - (b) However, the MBNL contract renegotiation also shows that [REDACTED]. Although all sites could in principle be competed for with BTS sites, Arqiva thought that [REDACTED]. For the majority of sites, [REDACTED] (see Appendix G).
 - (c) To the extent that [REDACTED], it is important to consider the context in which this occurred: namely there were no other rivals with a large portfolio of existing sites. As a result, we consider that this evidence does not shed much light on the relative competitive strength of existing sites and BTS sites, for which we have principally looked at other evidence.
- 8.216 In response to our provisional findings, the Parties submitted that BTS was viewed as a threat [REDACTED]. To the extent the Arqiva's price had been higher, BTS would have been a threat for a large proportion of sites. The Parties submitted that Arqiva [REDACTED]. The Parties also submitted that the CMA argued that BTS is merely a limited constraint because it is only a threat for [REDACTED] of sites, whilst considering that existing Transaction Sites are a material competitive constraint despite being a threat for less than [REDACTED] of Cellnex's sites.
- 8.217 In this regard, we note that the evidence above (paragraphs 8.208 to 8.210) shows that customers prefer to use existing sites when available, because of the costs, time and risks involved in building new sites.

²⁸¹ See Appendix G.

- 8.218 Our 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.²⁸²
- 8.219 We have considered the Parties' submissions that, when looking at past win rates for BTS, we should consider only new opportunities subject to competition rather than renewals because existing suppliers always have an advantage given that there are significant costs to moving equipment to a new site (as well as possible network disruption). As such, they said that including these opportunities would bias the number of Cellnex wins and understate the strength of BTS as a competitive constraint.
- 8.220 However, we consider 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.
- 8.221 In response to our provisional findings, the Parties also submitted that our analysis fails to fully capture the constraint imposed by BTS because it excludes BTS won by other WIPs and customers' self-supply. In particular the Parties stated we should have included the following: (i) [%], (ii) BT/EE SRN, (iii) 3UK's Streetworks programme, (iv) SRN, (v) Home Office Emergency Services Network, (vi) Scottish 4G Infill Programme and (vii) other non-MNO self-build. When all of these BTS and self-supplied wins are included, the Parties submitted that the win rate for BTS increases to 89% versus only 11% for existing sites.
- 8.222 We make the following observations on the Parties' submission:
- (a) The majority of the opportunities included in the Parties' analysis above, which also account for the largest number of BTS won according to the Parties, were won by customers' self-supply rather than BTS supplied by WIPs. Therefore, the inclusion of these opportunities does not shed light on the past win rates of BTS supplied by WIPs. We assess the extent to which customers' self-build exercise a competitive constraint on the Merged Entity in paragraphs 8.225 to 8.236 below. As part of that assessment, we also consider some opportunities discussed by the Parties, namely 3UK's Streetworks programme and the SRN.

²⁸² See Appendix E, Table 3 and Table 4.

- (b) Two of the three remaining opportunities included by the Parties relate to BTS won by rival WIPs, for which we have used data directly provided by third parties.
- (c) In relation to the last opportunity included by the Parties on the BTS won by Cellnex and [REDACTED] in the MBNL contract renegotiation, we have excluded this opportunity as our analysis of tenancies considers BTS deployed between 2017 and 2020 and [REDACTED] As a framework BTS contract may be subject to subsequent amendments and renegotiations, we focused our analysis on BTS sites that have already been deployed. For instance, we note that [REDACTED].

8.223 On the basis of this evidence, we consider that BTS supplied by WIPs will exercise some competitive constraint on the Merged Entity's existing sites, but that this will be relatively weak in comparison with existing sites. The evidence available to us consistently shows that BTS has 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.

8.224 As discussed in paragraph 8.114 to 8.121 above, when competing for BTS opportunities although suppliers with scale may have some limited advantages, these are unlikely to be a material aspect of competition. As a result, Cellnex and the owner of the CK Hutchison Assets are unlikely to be close competitors in the provision of BTS sites and other WIPs, irrespective of the size of their existing portfolios of sites, are likely to compete on an equal footing with the Parties for the provision of BTS sites.

Constraint from customers' self-build

8.225 In this section, we have considered whether customers' ability to self-build could constrain the Merged Entity in two ways: first, by being an alternative to the Merged Entity's existing sites; and second, by constraining the Merged Entity's BTS solutions.

8.226 For the reasons set out above, new sites, whether built by the customers themselves or WIPs, are considered a second-best option by customers, who prefer to use suppliers' existing sites where available.

8.227 In addition, we consider that the MBNL contract renegotiation provides evidence of the ability of MNO's self-build to constrain existing sites. We note

that in the initial phase of the MBNL contract renegotiation Cellnex (then Arqiva) [REDACTED]. The documents also show that Arqiva [REDACTED].²⁸³

8.228 However, as set out above, the documents suggest that Cellnex's (then Arqiva) [REDACTED].

8.229 We also considered the Parties' submissions on 3UK's decision to build Streetworks Sites instead of using, at least in part, existing sites as evidence of the choices available to MNOs in site selection.

8.230 We agree with the Parties that customers' self-build is a viable option for MNOs and may be the preferred option in some instances, as discussed further below. However, the key question, in our view, is not simply whether customers' ability to self-build would be a competitive constraint, but rather the strength of this constraint and whether it would sufficiently constrain, individually and/or jointly with other constraints, the Merged Entity's existing sites.

8.231 In relation to 3UK's Streetworks programme, we make the following observations:

- (a) First, 3UK's Streetworks Sites are monopolies which typically require fewer planning permissions, have lower lease costs and do not require potentially lengthy negotiations with landowners. As a result, self-build monopolies may be easier to build compared to other types of developed macro sites, such as lattice towers, for which existing sites may be a more attractive alternatives for customers.
- (b) Second, 3UK's decision to self-build needs to be assessed in the context of the market structure, where there was only one large WIP. In the counterfactual, and given CTIL's commercialisation in 2021, there would be three large suppliers with extensive networks of existing sites which could be available across a broad geographic area. Therefore, we consider that 3UK's decision was taken under materially different conditions of competition and is unlikely to provide much insight into the competitive constraint that customers' self-build would exercise on the Merged Entity's existing sites.
- (c) Third, 3UK's requirements may be atypical and not representative of other customers. 3UK is the smallest of the four MNOs in the UK and the scale and speed of its densification programme could be different from those

²⁸³ See Appendix G, Figure 3 and paragraph 10.

expected by other MNOs in the coming years, given their different network coverage and capacity requirements.

- (d) Last, CK Hutchison told us that it took the decision to fund the Streetworks Sites [REDACTED]. We therefore consider that [REDACTED] may have affected CK Hutchison's decisions on, for example, how to carry out this programme. [REDACTED].

8.232 We have also considered the Parties' submissions on the SRN programme as evidence that customers prefer to self-build sites. Although we agree with the Parties that customers may prefer to build new sites in certain instances, we also note that certain features of this programme may nonetheless limit our ability to generalise the strength of the competitive constraint exercised by customers' self-build outside of this example. In particular we note the following:

- (a) Shared Access submitted that 'the SRN programme is being tendered and managed by the UK government directly with the four MNOs. In the most recent bid, the government has asked for either conventional acquisition, design and build (ADB) pricing, or what is termed "managed services" submissions. [...] This over-narrow specification has equally not allowed BTS structures to compete';

- (b) [REDACTED]

- (c) Cellnex told us that the SRN programme is 'peculiar' in that, for total not-spots (and not partial not-spots), the government subsidises the building of new sites, but the ownership of those sites is retained by the party which builds the sites. As a result of this, Cellnex believes that, from a financial point of view, it is more attractive for MNOs to self-build instead of sourcing BTS sites from WIPs.

8.233 In order to assess the extent to which customers' self-build constrains WIPs' BTS offerings, we asked MNOs about their rationale for building sites, either independently or through their JVs, as compared to using WIPs. Their responses were mixed and suggest that different options are used in different circumstances:

- (a) In some instances where MNOs need new sites, they may prefer to self-build sites as it gives them greater control over site locations and, in their view, it is usually faster for MNOs to do than using a WIP. In these cases, WIPs' BTS offering is unlikely to be considered a good option by customers.

(b) However, customers tend to prefer the use of BTS supplied by WIPs where they want to avoid significant upfront costs and/or in circumstances in which WIPs can build faster. This is the case, for example, when a WIP has already started the planning process or is ahead in the design and building process. In these circumstances, customers' self-build can constrain WIPs' BTS offerings, to some extent, but is unlikely to be a customer's preferred approach.

8.234 We also note that Cellnex's internal documents show that [REDACTED].

8.235 Lastly, we recognise that the Parties' evidence shows that the majority of NTQs for MBNL in the last five years were replaced by self-build sites.

8.236 In the round, the evidence indicates that customers' self-build exercises a relatively weak competitive constraint on the Merged Entity's existing sites. In instances where new sites need to be built, the costs and time required are not a disadvantage as there are no existing sites available. Therefore, in these instances, customers' ability to self-build can exercise a significant competitive constraint on the Merged Entity's BTS offering.

Our conclusions on competition from alternative suppliers

8.237 As a result of its commercialisation in 2021, CTIL will become an increasingly significant competitive constraint on the Merged Entity. Given its scale, which exceeds that of each of the Cellnex and the CK Hutchison Assets, it will be able to compete for its shareholders and for other customers with its extensive portfolio of existing sites.

8.238 Other WIPs exercise some competitive constraint, but they all have a much smaller portfolio of existing sites. Moreover, their scale and therefore constraint imposed by other WIPs is unlikely to increase significantly in future.

8.239 In relation to the constraint from BTS by WIPs and customers' self-build on the Merged Entity's existing sites, there is clear evidence that customers prefer using existing sites over new ones. Building sites can be costly and a lengthy process, and BTS has won very few of the opportunities competed for in the last four years. This means that both BTS supplied by WIPs and customers' self-build are both relatively weak constraints (compared to the existing sites of a large WIP).

8.240 In relation to the constraint from BTS by WIPs and customers' self-build on the Merged Entity's BTS offering, the evidence shows they will impose a significant competitive constraint. There are several suppliers of BTS services that would be well placed to compete with the Merged Entity's BTS

offering,²⁸⁴ which would be further constrained by customers' ability to self-build.

Impact of Cellnex's material influence on the MBNL Sites

- 8.241 As set out in Chapter 4, we have found that the Merger constitutes a single, interlinked and inter-conditional commercial transaction and that it gives rise to a single RMS.
- 8.242 In the analysis set out above, we have primarily focussed on the long-term impact of the Merger on the structure of the market and competition and therefore on the acquisition of TowerCo and the Transfer Sites.
- 8.243 For the reasons set out in this chapter, we conclude below that, subject to our findings on countervailing factors, the Merger gives rise to an SLC in the supply of access to developed macro sites and ancillary services to MNOs and other wireless communication providers in the UK. Having reached this conclusion, it has not been necessary to conclude on whether Cellnex's acquisition of material influence over the MBNL Sites would, on a stand-alone basis, also give rise to an SLC.

Conclusion

- 8.244 In this chapter we have assessed the Merger's impact on competition. We have done so against a counterfactual of stronger conditions of competition between the owner of the CK Hutchison Assets and Cellnex. As set out in Chapter 5, we consider that this could be achieved through a number of potential routes including the sale of the CK Hutchison Assets to an alternative purchaser.
- 8.245 The Merger will give rise to two structural changes in the market. The first will arise from the transfer of the Unilateral Sites to Cellnex, which will occur when the Merger is completed. The second, and most significant, will occur when Cellnex gains control of the Transfer Sites when the MBNL JV is dissolved, which is scheduled to occur in 2031. While we have examined both of these changes in detail, in ultimately considering the overall effect of the Merger, we have assessed the impact of all factors collectively.
- 8.246 As important context for our assessment, we have found that there has been limited pre-existing competition in the supply of access to developed macro sites in the UK. Cellnex (previously, Arqiva) historically had a very high share

²⁸⁴ See paragraphs 7.33 to 7.38 in Chapter 7 for our analysis of economies of scale in BTS.

of supply and faced limited competition from much smaller rivals. High switching costs, and the existence of barriers to entry, have limited the extent of competition, despite the efforts of some customers to promote competition through competitive tenders.

- 8.247 We have therefore been particularly mindful of the likely evolution of the structure of the market, over the longer term, including after Cellnex gains control of the Transfer Sites. If it was to remain highly concentrated and to retain the other features we identified, then the loss of a rival imposing even a limited constraint may result in a substantial lessening of competition.²⁸⁵
- 8.248 In light of our theory of harm and counterfactual, we have undertaken a forward-looking assessment, which looks at the market over the relatively longer term, including after Cellnex gains control of the Transfer Sites. This means that, while we have collected a wide range of evidence, there are limitations to the degree of weight that can be placed on certain pieces of historical evidence. In particular, given our counterfactual we would not expect there to be evidence of competition between the Cellnex and CK Hutchison pre-Merger.
- 8.249 More generally, given the high degree of historical concentration, the lack of recent renewals of contracts, and the very recent commercialisation of CTIL, we have not seen evidence of the effect of competition between large WIPs with extensive portfolios of sites, or of customers using this as a negotiation strategy when renewing large contracts. The absence of such evidence does not in and of itself tell us anything about the likely impact of the Merger, which we have instead assessed based on the evidence that is available.²⁸⁶
- 8.250 Competition mostly takes place for large framework agreements with MNO customers, which occurs infrequently but is important. Here we found that, despite high switching costs, the threat of losing tenants on even a limited number of sites generates significant rivalry between suppliers and will influence the commercial terms for all sites in the portfolio, as shown by the MBNL contract renegotiation. There is also competition for a more limited number of new build sites.
- 8.251 Considering competition for large framework agreements, the evidence shows that large suppliers with an extensive portfolio of existing sites are the most effective competitors and would compete most closely with each other. This is because location is a key requirement of customers, and large

²⁸⁵ MAGs, paragraphs 4.12(a) and 4.39.

²⁸⁶ MAGs, paragraph 2.28.

suppliers are likely to have overlapping sites with rivals across a larger number of geographic areas.

- 8.252 We agree with the Parties that the overlap between the Cellnex sites and the CK Hutchison Assets will be comparatively small. However, as noted above, the evidence shows that even small overlaps can impose significant competitive constraints across suppliers' entire portfolios of sites (since prices are generally set nationally).
- 8.253 We have therefore found that, in the counterfactual, the owner of the CK Hutchison Assets would be a close competitor to Cellnex. It would be the third largest operator in the market, after CTIL and Cellnex, with a large portfolio of existing sites and an extensive geographic footprint. CTIL would likely have a greater number of overlap sites with Cellnex than the owner of the CK Hutchison Assets would have, but either would represent a significant proportion of the aggregate number of Cellnex sites that overlap. The removal of the CK Hutchison Assets would therefore remove a significant proportion of the competitive constraint on Cellnex provided by overlap sites.
- 8.254 There would be only one other supplier that would impose a strong constraint on the Merged Entity. Following its commercialisation, CTIL has a very large portfolio of existing sites and would become a significant competitor in the longer term.
- 8.255 In contrast, we have found that all of the other rival WIPs are, and will likely remain, small and would therefore impose only a very weak competitive constraint on the Merged Entity.
- 8.256 We consider that new sites impose only a relatively weak constraint on existing sites. The time, costs and risks involved in building new sites mean that customers have a clear preference for using existing sites where these are available. As a result, both BTS supplied by WIPs and customers' self-build will provide a weak constraint on the Merged Entity's portfolio of existing sites.
- 8.257 Turning to competition for new sites, the evidence shows that Cellnex and the owner of the CK Hutchison Assets are unlikely to be close competitors in the provision of BTS, there are several other suppliers of BTS sites, and customers' self-build is a significant competitive constraint on BTS.
- 8.258 On the basis of the evidence set out above, taken in the round, we conclude that, subject to our findings on countervailing factors, the Merger may be expected to result in an SLC, arising from overlaps between the Parties, in the supply of access to developed macro sites and ancillary services to MNOs and other wireless communication providers in the UK.

9. Countervailing factors

- 9.1 Countervailing factors may prevent or mitigate any SLC arising from a merger. There are two main ways in which this may happen: through the entry and/or expansion of third parties in reaction to the effects of a merger; or through merger efficiencies.²⁸⁷
- 9.2 Therefore, before concluding on the Merger, in this section we assess whether there are any countervailing factors which would prevent an SLC from arising despite the findings of our competitive assessment discussed in Chapter 8.

Barriers to entry and expansion

- 9.3 As part of the assessment of the effect of a merger on competition we examine whether, in the event of worsening prices and/or non-price terms to customers, entry or expansion by third parties would be timely, likely and sufficient to mitigate or prevent an SLC from arising.

Parties' submissions and evidence

- 9.4 The Parties submitted that the CMA, in its Phase 1 decision, erroneously found that barriers to entry are high and this was despite geographic scale not being an important parameter of competition and the CMA finding in its assessment of the Cellnex/Arqiva merger that barriers to entry for the supply of access to developed macro sites were low.²⁸⁸
- 9.5 The Parties also submitted that the CMA's Phase 1 decision failed to account for the threat of new entry being high through BTS or acquisition with there being numerous credible entrants, with these including international WIPs and investors.
- 9.6 In response to our provisional findings, the Parties submitted that there are low barriers to entry or expansion and a wide range of potential providers are capable of providing access to developed macro sites.²⁸⁹ The Parties also stated that BTS sites form an effective competitive constraint on existing

²⁸⁷ [MAGs](#), paragraph 8.1.

²⁸⁸ We note that the CMA did not conclude on barriers to entry or expansion in its [Phase 1 decision](#) in relation to the anticipated acquisition by Cellnex UK Limited of Arqiva Services Limited, as that merger was found to not give rise to competition concerns, CMA, 22 April 2020, paragraph 230.

²⁸⁹ [Cellnex and CK Hutchison Response to provisional findings](#), paragraph 4.8.

sites, which means that existing and future competitors do not require a large portfolio of existing sites or national coverage to credibly compete.²⁹⁰

9.7 The Parties identified a number of factors that lead to these views:

- (a) It is relatively easy for providers without existing sites to enter the market with a proposition of building new sites.
- (b) The development and expansion of sites has low regulatory barriers and the government is pursuing policies to reduce further the regulatory burden.
- (c) There is a large number of potentially marketable macro sites and it is common for additional sites to be identified by MNOs for the location of wireless telecommunications equipment.
- (d) WIPs not currently active in the UK can acquire concessions to operate and market sites owned by others. [✂].
- (e) There are opportunities for new entrants to enter the UK through bidding as part of a consortium of bidders.
- (f) Required levels of capex to build new sites does not prevent entry as genuine potential new entrants are well-funded organisations with sufficient capital and existing providers need to incur capex to build new sites. As such there is limited incumbency advantage.
- (g) The recent trend of vertical disintegration, whereby MNOs divest passive infrastructure provides an opportunity for entry: the commercialisation of CTIL is an example.
- (h) The roll-out of 5G provides further opportunities for entrants to provide site access to MNOs.

9.8 The Parties also submitted 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.²⁹¹

²⁹⁰ [Cellnex and CK Hutchison Response to provisional findings](#), paragraph 4.9.

²⁹¹ [Cellnex and CK Hutchison Response to provisional findings](#), paragraph 4.9.

Third-party views on entry and expansion

- 9.9 Some smaller WIPs submitted to us that barriers to entry and expansion are significant. For example:
- (a) A WIP (Radius) submitted that requirements around the planning regime, including the ECC²⁹² raise barriers to entry and expansion. These requirements include that for suppliers seeking to construct new sites, they must obtain planning permissions, obtain Civil Aviation Authority permissions, construct new fibre or microwave backhaul and ensure fibre connectivity to the sites and obtain cost-effective power distribution.
 - (b) Another WIP, submitted that planning restrictions were one of the main barriers to expansion.
 - (c) Another WIP noted that the recent introduction of new measures by the UK government had made obtaining land and planning permissions for new sites easier.
- 9.10 Incumbency advantages and scale of operations were also cited by a number of WIPs as presenting a barrier to entry and expansion. For example, Radius submitted that the presence of high barriers to entry is supported by Cellnex itself having actively lobbied DCMS to increase permitted tower heights.
- 9.11 Radius also told us that the Parties' claims that barriers to entry are low was contradicted by Cellnex's public comments and provided a specific example from Cellnex's 2019 Annual Report which stated that Cellnex's consolidation in Europe 'presents significant barriers to entry into its main markets' and that Cellnex had referred to its business model being 'protected by commercial and regulatory barriers to entry in the tower market' when Cellnex acquired Swiss Towers AG in 2017.

Our assessment

- 9.12 We have considered whether entry or expansion in the provision of passive infrastructure by third parties would be timely, likely and sufficient to mitigate or prevent an SLC from arising.²⁹³
- 9.13 We consider there are four main sources of barriers to entry and expansion in the provision of passive infrastructure:

²⁹² See Chapter 3 for description of the ECC

²⁹³ [MAGs](#), paragraphs 8.28 to 8.46.

- (a) Economies of scale;
- (b) Incumbency advantage;
- (c) Maturity of the market; and
- (d) Public policy and regulation.

9.14 In considering these four main sources, we 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.

Economies of scale

9.15 We considered the importance of scale in Chapter 7 and the evidence shows that the benefits from scale in relation to the costs of maintaining existing or new sites are relatively modest.

9.16 More generally, the evidence we have collected does not provide sufficient evidence to show that scale confers significant competitive advantages in this market.

9.17 We found that suppliers with many existing sites can have a greater ability to meet customer demand as they are more likely to be present in close proximity to rivals' sites and where customers need sites. Therefore, large WIPs are likely to be stronger competitors as their scale leads to many more overlaps with rivals as opposed to smaller suppliers.

Incumbency advantages

9.18 In Chapter 7, we found that as a result of the existence of high switching costs, being a customer's current supplier of existing sites provides a significant competitive advantage over rivals seeking to attract those customers to new sites ('incumbency advantage'). This is for two main reasons:

- (a) There are additional costs associated with a customer switching to an alternative provider, whether at another existing site, or to a new site through self-supply or BTS. These can include the costs of taking down and relocating equipment to a new site, disruption to operations when relocation is being undertaken and costs associated with any required upgrade to the alternative site. These factors together mean that the incumbent provider has a high likelihood of winning a contract renewal;

- (b) An MNO may have in place existing arrangements with a passive infrastructure provider such as for example, Cellnex or the CTIL or MBNL JV, which can increase barriers to switching. These can include churn allowance, which restrict the number of sites which can be vacated by the customer without fee recovery during the term of the contract,²⁹⁴ as well as preferential arrangements such as minimum commitment growth provisions, whereby a customer commits to contract access to a minimum number of future new tenancies with the same supplier during the course of an existing contract. The inability to churn from existing sites, combined with the long duration of the contracts relating to those sites (approximately ten to 20 years), serve to minimise opportunities for switching and can significantly limit the ability of independent WIPs to expand, or for new WIPs to enter the market.

Market maturity and limited demand

- 9.19 As explained in Chapter 3, MNO networks are mature and MNOs' demand for new macro sites is limited. This, together with customers' strong preference to use existing sites where these are available mean that BTS opportunities, which could provide a route for a new entrant or smaller WIP to expand their geographic footprint through organic growth, arise relatively infrequently and are often modest in size.²⁹⁵
- 9.20 It is also the case that opportunities for entry and expansion are largely reliant on these limited BTS opportunities, as there are no opportunities for WIPs to expand their geographic footprint in the foreseeable future through the acquisition of a large portfolio of existing sites:
- (a) If the Merger were to proceed, CK Hutchison's sites will be acquired by Cellnex.
- (b) CTIL has been commercialised by Vodafone and O2, with each entering into long-term Master Services Agreements with it and Vodafone having raised capital from its 50% equity stake in CTIL by transferring it to its subsidiary Vantage Towers.²⁹⁶
- (c) [REDACTED].

²⁹⁴ Cellnex told us that it 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. [REDACTED]. findings, paragraph 3.7.3

²⁹⁵ See Chapter 8 and Appendix F for evidence on customers' views on the use of new and existing sites.

²⁹⁶ See Chapter 3

- 9.21 However, we have found that in the past four years a very limited number of BTS sites have been built to enable WIPs to expand meaningfully. In addition, as set out in chapter 8, third parties' responses indicate that BTS demand is unlikely to be significant in the future.

Public policy and regulation

- 9.22 As noted in Chapter 3, the main areas of public policy and regulation relevant to the sector are the planning regime, the ECC and the regulation of electromagnetic spectrum.
- 9.23 There are various constraints on the ability of a passive infrastructure provider to build new infrastructure and make it available to customers. These include obtaining planning permission from the relevant local authority and restrictions on the height of tower infrastructure which in turn limits the propagation of the spectrum (as all else equal higher towers provide for greater coverage). When planning permission is requested to develop a new site, local authorities will first consider the availability of existing towers within the vicinity and will need to be satisfied that co-location is not feasible before granting permission for new infrastructure to be constructed.
- 9.24 There have been recent amendments made and proposed to the planning regime in terms of changes to the ECC and Permitted Development Code which may have the effect of reducing to some extent the costs and barriers associated with new network deployments. However, some of these changes are also intended to lower barriers to the sharing of existing sites which, if successful in achieving this objective, might be expected to lower demand for new sites and therefore growth opportunities for WIPs.
- 9.25 The planning regime is only one step that influences the overall timescales that are required for a WIP to establish a new site to provide services to a customer. Other steps additional to securing the relevant planning permissions include: time to search for suitable site locations, acquiring the site (or agreeing terms with the landlord), designing the requirements for the passive infrastructure, building the site and installing power and backhaul to the site so that it is ready to enable the customer to carry out its activities at handover.

Conclusion on barriers to entry and expansion

- 9.26 On the basis of the available evidence, we conclude that it is not likely that entry or expansion of sufficient scale would occur in a timely manner to mitigate or prevent an SLC from arising as a result of the Merger.

- 9.27 Our conclusion takes into account the evidence we have in relation to economies of scale, incumbency advantages, the maturity of the market and the impact of public policy and planning regulation. Our conclusion also takes into account relevant interactions between these factors.
- 9.28 We also note that the Parties have not provided analysis to support a conclusion that if barriers to entry are not high, that entry and/or expansion would be timely, likely and sufficient to mitigate or prevent an SLC from arising.

Efficiencies

- 9.29 Efficiencies arising from a merger may enhance rivalry with the result that the merger does not give rise to an SLC.²⁹⁷ In order for us to take efficiencies into account we must expect that they would be timely, likely and sufficient to prevent an SLC from arising (having regard to the effect on rivalry that would otherwise result from the merger) and the efficiencies must be a direct consequence of the merger.²⁹⁸
- 9.30 The Parties submitted during the CMA's Phase 1 investigation that Cellnex expected to realise a number of revenue and cost synergies from the Merger. These can be summarised as:
- (a) [REDACTED].
- (b) [REDACTED].
- 9.31 The Parties stated that given the buyer power of Cellnex's customers (particularly the MNOs), any commercial benefit (such as reduced costs) [resulting from the Merger] would be passed through to end-customers.²⁹⁹
- 9.32 The Parties added that the ability of Cellnex's customers to extract cost reductions from WIPs such as Cellnex is evident from their significant countervailing buyer power, in particular their ability to extract ground lease savings from WIPs.³⁰⁰ We have not however received evidence that such efficiencies would be timely, likely and rivalry-enhancing.³⁰¹

²⁹⁷ MAGs, paragraph 8.4.

²⁹⁸ MAGs, paragraph 8.8.

²⁹⁹ See chapter 8 for assessment of customers' ability to self-build and the other forms of buyer power, as defined in MAGs, paragraph 4.20 which do not result in new entry.

³⁰⁰ Cellnex and CK Hutchison Response to provisional findings, paragraph 4.11.

³⁰¹ Rivalry enhancing efficiencies are defined in MAGs as 'Efficiencies that change the incentives of the merger firms and induce them to act as stronger competitors to their rivals—for example, by reducing their marginal costs giving them the incentive to provide lower prices or a better quality, range or service.'

- 9.33 A WIP submitted that it agreed with our provisional view that it is highly unlikely that the benefits of any synergies from the Merger would be passed on to customers. This WIP cited public statements that were made by Cellnex that it intends to implement a strategy of capacity closures (i.e. decommissioning of tower sites, to consolidate single tenant sites into multi-tenant sites) in order to increase profits by having fewer towers in operation, where the cost savings will not be passed on to consumers.^{302, 303}

Conclusion on efficiencies

- 9.34 Our conclusion, given the lack of evidence provided, is that it is unlikely that rivalry enhancing efficiencies will arise from the Merger to prevent an SLC from arising as a result of the Merger.

Conclusions on countervailing factors

- 9.35 We have not found any countervailing factors which would prevent the SLC that we found in Chapter 8 from arising.

10. Conclusion

- 10.1 We conclude that the Merger may be expected to result in a SLC, arising from overlaps between the Parties, in the supply of access to developed macro sites and ancillary services to MNOs and other wireless communication providers in the UK.

11. Remedies

Framework for the assessment of remedies

- 11.1 Where the CMA finds an SLC, it must decide what, if any, action should be taken to remedy, mitigate or prevent that SLC or any adverse effect resulting from the SLC.³⁰⁴
- 11.2 The CMA is required, when considering possible remedial actions, to ‘in particular, have regard to the need to achieve as comprehensive a solution

³⁰² This WIP cited [Cellnex's Q1 2021 results presentation](#) on 7 May 2021 (slide 11), where it noted its “2021-2025 efficiencies/synergies plan”, which included a plan for “Leases and capex reduction thanks to two or more anchor tenant networks allowing for decommissioning of redundant sites and a single BTS for more than one anchor tenant simultaneously.”

³⁰³ [Company D response to notice of possible remedies](#).

³⁰⁴ Enterprise Act 2002 (the Act), Section 36(2).

as is reasonable and practicable to the SLC and any adverse effects resulting from it'.³⁰⁵

- 11.3 To fulfil this requirement, the CMA will seek remedies that are effective in addressing the SLC and any resulting adverse effects. The CMA will assess the effectiveness of remedies in addressing the SLC and resulting adverse effects before going on to consider the costs likely to be incurred by the remedies.³⁰⁶
- 11.4 In determining an appropriate remedy, the CMA will consider the extent to which different remedy options will be effective in remedying, mitigating or preventing an SLC and any resulting adverse effects. The effectiveness of a remedy is assessed by reference to its:
- (a) impact on the SLC and the resulting adverse effects;
 - (b) duration and timing – remedies need to be capable of timely implementation and address the SLC effectively throughout its expected duration;
 - (c) practicality in terms of implementation and any subsequent monitoring; and
 - (d) risk profile, relating in particular to the risk that the remedy will not achieve its intended effect.³⁰⁷
- 11.5 Once the CMA has identified the remedy options that would be effective in addressing the SLC, the CMA will select the least costly and intrusive remedy that it considers to be effective. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.³⁰⁸ The CMA may also have regard, in accordance with the Act,³⁰⁹ to the effect of any remedial action on any relevant customer benefits arising from the merger.

Nature of the SLC

- 11.6 We have found that in the counterfactual, the owner of the CK Hutchison Assets would be a close competitor to Cellnex. While the overlaps between Cellnex and the owner of the CK Hutchison Assets would be limited in number, we found that overlaps in existing sites are important competitive constraints and the threat of the loss of a limited number of sites can impose

³⁰⁵ Section 36(3) of the Act.

³⁰⁶ [Merger remedies guidance](#), CMA87 (13 December 2018), paragraph 3.5.

³⁰⁷ [Merger remedies guidance](#), CMA87 (13 December 2018), paragraph 3.5.

³⁰⁸ [Merger remedies guidance](#), CMA87 (13 December 2018), paragraph 3.6.

³⁰⁹ Section 36(4) of the Act.

significant competitive constraints across suppliers' entire portfolios of sites (since prices are generally set nationally) and affect customer outcomes significantly.

- 11.7 We have therefore concluded that the Merger would result in the loss of a supplier able to offer an alternative to Cellnex at a material number of sites in the short term and, in the longer term, in a significant reduction in the aggregate number of overlaps that Cellnex has with its competitors.³¹⁰ We have not found any countervailing factors which would prevent the SLC from arising.
- 11.8 On this basis, we have concluded that the anticipated acquisition by Cellnex of the passive infrastructure assets in the UK of CK Hutchison may be expected to result in a SLC, arising from overlaps between the Parties, in the supply of access to developed macro sites and ancillary services to MNOs and other wireless communication providers in the UK.³¹¹

Overview of remedy options

- 11.9 In the Notice of Possible Remedies (Remedies Notice),³¹² we set out the following remedy options:
- (a) Prohibition of the Merger.
 - (b) The divestiture of a package of developed macro sites and ancillary services. We noted that such a divestiture package could in principle take a number of forms, including:
 - (i) A subset of the CK Hutchison developed macro sites and ancillary services proposed to be acquired by Cellnex; or
 - (ii) Some or all the UK developed macro sites and ancillary services currently operated by Cellnex.
- 11.10 We also invited views on aspects of remedy design which might be needed to make a divestiture remedy effective and to ensure that no new competition concerns would arise. These may include requirements relating to the scope of any divestiture package, the process of selecting the assets to be divested,

³¹⁰ See Chapter 8, paragraph 8.110

³¹¹ See Chapter 8, Conclusion section from paragraph 8.243

³¹² The [Remedies Notice](#) sets out the actions which the CMA considers it might take for the purpose of remedying the SLC and resulting adverse effects identified in the [Provisional Findings](#).

the identification of suitable potential purchaser(s), and the divestiture process including the timing of divestiture.

- 11.11 As explained in Chapter 5, we have found a counterfactual which envisages more competitive conditions than prevailed prior to the Merger. This means that a divestiture remedy would need to provide a purchaser with the means to compete effectively and independently at a national level in the supply of developed macro sites and ancillary services to wireless communications providers.³¹³
- 11.12 In coming to our decision on remedy options we have considered:
- (a) The Parties' submissions and responses to our questions on remedies, evidence from each of the Parties at our Response Hearings and the Parties' response to our Remedies Working Paper;
 - (b) written and oral submissions from third parties to our public consultation on possible remedy options as set out in our Remedies Notice; and
 - (c) written submissions from third parties on the Parties' proposed remedy as set out in the Parties' response to our Remedies Notice.³¹⁴
- 11.13 As in any case, we note that the views of both the Parties and of third parties may be influenced to some extent by commercial or other incentives. We also note that, in a case involving a more competitive counterfactual such as this, third parties will have not had experience of the more competitive conditions of competition that our SLC is based on. For these reasons, we considered carefully the weight to attach to these submissions in the light of all the available evidence.
- 11.14 We also note that submissions from third parties provided in response to both the Remedies Notice and the Parties' response to the Remedies Notice were premised on a provisional SLC which was broader than the SLC we have now concluded on (see Chapter 8).
- 11.15 In the Remedies Notice, we said that behavioural remedies on their own appeared unlikely to be effective in addressing the SLC that we have found. We said that we were willing to consider any behavioural remedies that were put forward as part of the consultation, but none were proposed by any of the

³¹³ [Remedies Notice](#), paragraph 10.

³¹⁴ Three third parties submitted written responses to the Parties' proposed remedy following publication of the [Parties' response to the Remedies Notice](#). Six third party calls were held prior to publication of the Parties' response to the Remedies Notice, and one third party call was held after publication.

respondents to the consultation. We have therefore not considered behavioural remedies further.

Parties' proposed remedy

- 11.16 In response to the Remedies Notice, the Parties proposed the divestiture of approximately [1,100-1,300] Cellnex macro sites.³¹⁵ In response to the Remedies Working Paper, the Parties provided further details on their proposed remedy, including their proposed process on how the divestiture would be implemented and the transfer of customer contracts and landlord agreements.³¹⁶ We refer to this proposal from the Parties as the Proposed Remedy.
- 11.17 The package of sites to be divested would consist of all existing Cellnex sites that overlap with the CK Hutchison Assets that Cellnex could acquire as a result of the Merger (that is, reflecting the uncertainty in relation to the number and identity of the Transfer Sites that will be transferred to Cellnex on termination of the MBNL joint venture and in relation to those Unilateral Sites in respect of which the location has not yet been identified).³¹⁷
- 11.18 We focus the remainder of this chapter on assessing the effectiveness of two remedy options:
- (a) Prohibition of the Merger; and
 - (b) the Proposed Remedy.
- 11.19 We then consider whether we should take into account any relevant customer benefits (RCBs) in our assessment, before turning to an assessment of proportionality of any remedies that we consider to be effective at addressing the SLC we have identified. Finally, we set out our conclusions on what we consider to be the least costly remedy that is effective in addressing the SLC we have identified.

³¹⁵ See paragraph 1.3 of [Supplementary submission to the Parties' response to the remedies notice](#).

³¹⁶ [Parties' response to the Remedies Working Paper](#).

³¹⁷ See Appendix H for details. The Parties told us that their approach to identifying the overlap sites results in the Proposed Remedy involving the divestiture of all existing Cellnex sites that overlap with any MBNL Site. The Parties submitted that this approach therefore involves the divestment of twice as many sites as are expected to be required in order to remove any overlaps between the existing Cellnex sites and the Transfer Sites.

Prohibition – assessment of effectiveness

Description

- 11.20 This remedy option would involve us prohibiting the acquisition by Cellnex of the passive infrastructure assets in the UK of CK Hutchison. The Merger would thus not take place.

Views of the Parties

- 11.21 The Parties did not comment on whether prohibition would be effective in addressing the SLC, instead limiting their submissions to whether prohibition would be a proportionate remedy.³¹⁸ As discussed below, the Parties consider that there are significant relevant customer benefits (RCBs) that would flow from the Merger and submit that these RCBs would be lost if the Merger were prohibited (but would be realised if the Proposed Remedy were to be accepted).
- 11.22 The Parties consider that prohibition of the Merger would be disproportionate.

Views of third parties

- 11.23 We received responses to our Remedies Notice from five third parties and spoke to four WIPs operating in the UK or other territories and three MNO customers.

Views from WIPs

- 11.24 A WIP told us that it considers that a divestiture would be better for the market than prohibition as it would lead to more sites being independently operated rather than MNO owned.
- 11.25 Another WIP told us that prohibition of the Merger would represent a comprehensive solution to the SLC we identified. It also stated that any remedy should be based on maintaining Cellnex's pre-transaction market share on a net basis, and prohibition would achieve this.
- 11.26 Another WIP told us that it is very difficult for it to judge the effectiveness of a prohibition in remedying the SLC.

³¹⁸ [Parties' response to the Remedies Notice](#)

11.27 Another WIP told us that a divestiture will create a more competitive outcome than retaining the status quo via a prohibition of the Cellnex/CK Hutchison transaction.

Views from MNO customers

11.28 An MNO told us that the effectiveness of prohibition would depend on what CK Hutchison did with the assets subsequently. This MNO believes that CK Hutchison would be incentivised to commercialise the assets, and that the impact on competition of a future sale of the assets would depend on who purchased them.

11.29 Another MNO told us that although it has no [REDACTED].

Our conclusion of the effectiveness of prohibition

11.30 Prohibiting the Merger would prevent the creation of the relevant merger situation and thereby prevent the SLC we have identified from arising. Prohibition would therefore be an effective remedy which would comprehensively address the SLC that we identified and prevent any of its adverse effects.

The Proposed Remedy – assessment of effectiveness

Description of remedy

11.31 The Proposed Remedy would involve Cellnex divesting [1,100-1,300] sites which overlap with the CK Hutchison Assets which would be acquired through the Merger (Overlap Sites).³¹⁹

11.32 The Proposed Remedy would require Cellnex to divest all of its rights and obligations relating to the Overlap Sites to the purchaser and for Cellnex to use its best endeavours to (i) divest the Overlap Sites with the full benefit of all existing customer contracts, and (ii) obtain all necessary landlord and customer consents to effectively implement the divestiture.³²⁰

11.33 The Parties told us that Cellnex anticipates that [REDACTED].

³¹⁹ Parties' response to the Remedies Notice, Supplementary submission to the Parties' response to the remedies notice. See Appendix H for details of these sites.

³²⁰ Parties' response to the Remedies Notice

Views of Parties and third parties

- 11.34 The Parties submitted that the Proposed Remedy would comprehensively address the SLC because it would address the loss of competition arising from the removal of overlaps by divesting all of the Cellnex sites which overlap with the CK Hutchison sites that Cellnex is acquiring through the Merger.³²¹
- 11.35 The Parties submitted that the Proposed Remedy is a structural remedy that clearly and comprehensively addresses the SLC identified by the CMA and would, in any event, restore competition to pre-Merger levels because it would result in (more than) the divestment of all sites that, based on the logic of the Provisional Findings, are capable of being used by Cellnex to compete with the CK Hutchison Assets. As a result, the Proposed Remedy would create a new or enhanced competitor able to exert the same competitive constraint on Cellnex on a national basis as the CK Hutchison Assets would in our counterfactual.
- 11.36 The Parties submitted that the Proposed Remedy would involve the divestiture of assets which would be immediately exploitable by the purchaser, and as such would bring about an immediate structural change to the market, creating an additional competitor - or strengthening an existing competitor - that would be in a position to impose an important competitive constraint on Cellnex and other market participants.³²²
- 11.37 The Parties also submitted that the Proposed Remedy is effective because it has a low risk profile and there would be a wide pool of suitable purchasers.³²³
- 11.38 Some third parties told us that a partial divestiture remedy could potentially be effective, though this view was subject to the detailed composition of the divestiture package, including the following aspects:
- (a) Scope of sites, including the number of sites and number of customers/ points of presence (PoPs) served by the sites;
 - (b) breadth of asset types, including a mix of different sites e.g. lattice towers, rooftops and monopoles;
 - (c) quality of assets including customer revenue and shareability; and

³²¹ [Parties' response to the Remedies Notice](#)

³²² [Parties' response to the Remedies Notice](#)

³²³ [Parties' response to the Remedies Notice](#)

(d) inclusion of associated customer contracts and transfer of landlord agreements.³²⁴

11.39 Following publication of the Proposed Remedy³²⁵ some third parties told us what would be needed for the Proposed Remedy to be effective:

- (a) A sufficient number of sites;
- (b) ability to compete for new sites;
- (c) a geographic mix across the UK; and
- (d) quality of sites including sufficient shareable macro sites.

11.40 We cover these aspects and other remedy design issues below, before considering issues related to purchaser suitability and the divestiture process.

Remedy design issues

11.41 A successful divestiture will effectively address at source the loss of rivalry resulting from the Merger by changing or restoring the structure of the market.³²⁶

11.42 There are three categories of risk that could impair the effectiveness of any divestiture remedy, namely composition risk, purchaser risk and asset risk:³²⁷

- (a) Composition risk arises if the scope of the divestiture package is too narrowly constrained or not appropriately configured to attract a suitable purchaser, or does not allow a purchaser to operate as an effective competitor;
- (b) purchaser risk arises if a divestiture is made to a weak or otherwise inappropriate purchaser, or if a suitable purchaser is not available; and
- (c) asset risk arises if the competitive capability of the divestiture package deteriorates before completion of the divestiture.

11.43 An effective divestiture remedy must give us sufficient confidence that these practical risks can be properly addressed in its design. We therefore consider the following design issues:

³²⁴ [Company D response to notice of possible remedies](#)

³²⁵ The initial Proposed Remedy was published on 21 January 2022 and the supplement thereto was published on 2 February 2022. Most third parties commented by reference to the initial Proposed Remedy

³²⁶ [Merger remedies guidance](#), CMA87 (13 December 2018), paragraph 3.38.

³²⁷ [Merger remedies guidance](#), CMA87 (13 December 2018), paragraph 5.3.

- (a) The appropriate scope of the divestiture package;
- (b) the identification and availability of suitable purchasers; and
- (c) ensuring an effective divestiture process.

Scope of the Proposed Remedy

- 11.44 In this section, we explore the issues relating to scope of the package of assets to be divested.
- 11.45 In considering the appropriate scope for a divestiture package, the CMA seeks to ensure that it:
- (a) Is sufficiently broad in scope to address all aspects of the SLC and resulting adverse effects;
 - (b) would enable the eventual purchaser to operate the divested business as an effective competitor; and
 - (c) is sufficiently attractive to potential purchasers.
- 11.46 In defining the scope of a divestiture package that will satisfactorily address an SLC, the CMA will normally seek to identify the smallest viable stand-alone business that can compete successfully on an ongoing basis and that includes all the relevant operations pertinent to the area of competitive overlap. This may comprise a subsidiary or a division or the whole of the business acquired.³²⁸
- 11.47 Our Remedies Notice stated that the scale and scope of any divestiture package needs to provide a purchaser with the means to compete effectively and independently at a national level.³²⁹
- 11.48 The Proposed Remedy would be a divestiture of sites from Cellnex's portfolio of passive infrastructure assets. Consequently, it would not comprise a stand-alone business, but rather a package of assets that would be sold to a purchaser and subsequently operated by the purchaser in order to compete on an ongoing basis.

³²⁸ [Merger remedies guidance](#), CMA87 (13 December 2018), paragraph 5.7.

³²⁹ [Notice of Possible Remedies](#), paragraph 10.

Parties' approach to scoping the Proposed Remedy

11.49 The Parties explained how they have identified the sites to be included within the Proposed Remedy, as follows:

- (a) The Proposed Remedy involves the divestment of all geographic overlaps between Cellnex and the Transaction Sites. Those overlaps have been identified, or will be identified, by applying the overall most conservative (and therefore what the Parties described as the most 'pro-competitive') methodology, that is the set of catchment areas which identifies the largest number of overlapping sites.³³⁰
- (b) overlaps are identified on the basis of four potential consolidation catchment areas. The Parties have used the most conservative of these catchment areas, that is the set of catchment areas which identifies the largest number of overlapping sites, in identifying the Overlap Sites for divestment.^{331, 332}
- (c) As the Parties will not know the precise identity (and thus location) of the Transfer Sites until dissolution of the MBNL JV in 2031, the Proposed Remedy involves the divestment of all existing Cellnex sites that overlap with any MBNL Site. This approach therefore involves the divestment of twice as many sites as are expected to be required in order to remove any overlaps between the existing Cellnex sites and the Transfer Sites.^{333, 334}
- (d) There are also a number of Streetworks Sites that have yet to be built by 3UK and which are expected to overlap with Cellnex sites, but whose precise location is currently unknown. The Parties are not able to identify at this point in time the precise identity of those existing Cellnex sites that overlap with the Streetworks Sites for which a location has not yet been determined (the Unidentified Streetworks Overlap Sites).³³⁵ Therefore, the Proposed Remedy involves a binding commitment to divest at the end of each calendar month following divestment completion each

³³⁰ [Parties' response to the Remedies Notice](#).

³³¹ This is notwithstanding (a) the Parties' view that the overall most conservative of the catchment areas is significantly wider than the distance in which competition can take place, and (b) the fact that (i) some of the Overlap Sites will face competition from rival WIPs' sites in the same catchment area and (ii) it is not feasible to share many of the Overlap Sites [§] with which they overlap, in any event.

³³² [Parties' response to the Remedies Notice](#)

³³³ In addition, the alternative purchaser will obtain the overlapping sites immediately rather than in 2031 [§], thereby ensuring that these sites will provide an immediate structural change in competitive conditions. Divestment of these sites will therefore enable the alternative purchaser to exert a competitive constraint on Cellnex and other market participants with effect from the time of the divestment to the alternative purchaser, notwithstanding that any lessening of competition in respect of these overlaps (even on the CMA's case in the Provisional Findings) will not arise until 2031.

³³⁴ [Parties' response to the Remedies Notice](#)

³³⁵ As set out in Appendix H, there are an estimated [§] Unidentified Streetworks Overlap Sites that will overlap with those Streetworks Sites yet to be located by CK Hutchison

Unidentified Streetworks Overlap Site identified during the previous month, with 3UK committing to inform Cellnex by the 20th day of each calendar month of those Unidentified Streetworks Sites for which it has identified the location during the previous calendar month.

- (e) The [X] sites have been identified by applying the same methodology as explained above. The method includes all [X], even though this is significantly more than the number of [X] that Cellnex expects to acquire.³³⁶

Factors relevant to the consideration of the scope of the divestiture package

11.50 We have identified the following factors as being important for informing our assessment of whether the Proposed Remedy would be effective and would comprehensively address the SLC:

- (a) Volume of sites;
- (b) nature and geographic scope of sites, including the geographic location and the geographic spread of sites;
- (c) quality of sites;
- (d) migration of customer contracts;
- (e) migration of landlord agreements; and
- (f) whether other assets should be included within the Proposed Remedy.

11.51 We set out below evidence relating to each of these factors in turn and give our assessment. We consider that these factors (and elements within them) are interdependent to some extent so we also provide a cumulative assessment of issues relating to the scope of the divestiture package as a conclusion to this section.

Volume of sites

Views of the Parties and third parties

11.52 The Parties submitted that the Proposed Remedy would enable a purchaser to compete with Cellnex effectively and independently at the national level, by

³³⁶ [Supplementary submission to the Parties' response to the remedies notice](#)

providing a purchaser with sufficient sites to impose an important competitive constraint on Cellnex.³³⁷

- 11.53 As a point of comparison, Cellnex told us that it acquired between 230 sites (in France) and 7,000 sites (in Poland) when it entered each geographic market it now operates in. (See Appendix H for details.)
- 11.54 Third parties gave us their views on the volume of sites necessary to remedy the provisional SLC set out in our Provisional Findings and establish an effective national competitor in the UK:
- (a) A WIP considered that a WIP would require between 3,000 and 4,000 ‘good’ sites to compete nationally.
 - (b) Another WIP told us that when entering a new market in Europe (not just the UK), it would likely aim for a minimum of 1,000 sites to enable it to put in place a staffed organisation in that market. This could allow an operator to compete at a national level in the UK. This WIP also stated that if it were to enter a new market, it would need to be able to identify a route to becoming the first or second largest wireless infrastructure provider in the market through organic or inorganic opportunities – 1,000 sites on its own would be considered to be a sub-scale business.
 - (c) Another WIP submitted on the specific Proposed Remedy that divesting approximately 1,000 sites would be ‘woefully inadequate’ in terms of replacing the competitive constraint that would exist in the counterfactual on a national basis.
 - (d) Another WIP did not suggest a number of sites which would need to be divested to enable a WIP to be an effective competitor to Cellnex, but suggested it was important for a WIP to have an extensive portfolio of sites to enable it to compete for new business. Further, this WIP submitted that scale is important in that having more sites enables a WIP to compete more cost-effectively, by spreading its operating and capital expenditure costs across a wider pool of assets.³³⁸ It told us that the Proposed Remedy’s divestment would be fundamentally sub-scale and is not a viable standalone package.
 - (e) Another WIP submitted that if a divestiture package were to be composed of the 2,800 Unilateral Sites to be acquired by Cellnex and 600 BTS Sites to be constructed in the future, that would create a strong player in the UK

³³⁷ [Parties’ response to the Remedies Notice](#)

³³⁸ [Company D response to notice of possible remedies](#)

market and create a substantially competitive new entrant.³³⁹ Having reviewed the Proposed Remedy, this WIP told us that it does not consider that the number of sites proposed for divestment would be a sufficient number.

- (f) Another WIP told us that a substantial divestiture of sites would be likely to counteract the negative effects of the Merger. This WIP submitted that a divestiture which resulted in the new entity being roughly no larger, in terms of market share, than the situation absent the Merger would be effective in addressing the SLC.³⁴⁰
- (g) An MNO told us that a supplier needs to be big enough to engage with it in terms of its portfolio of sites. A purchaser would need sufficient experience, resource, and financial backing to supply it.
- (h) Another MNO told us that it does not consider the number of sites to be particularly relevant compared to the type of site and their location.
- (i) Another MNO told us that the number of sites which can be offered by a WIP is not so important. It is more important that any divestiture should be of a diverse mix of assets.

Our assessment

- 11.55 The SLC that we identified arose from the loss of competition resulting from the removal of overlaps between the Cellnex and the CK Hutchison Assets. This means that, for the Proposed Remedy to be effective in remedying the SLC, it would need to enable a purchaser to replicate the rivalry that would have been provided by the CK Hutchison Assets absent the Merger within the areas of overlaps between the Parties.
- 11.56 The SLC which arises from the overlaps between the Parties is not addressed by divesting a specific volume of sites, but by divesting sites at every potential overlap location which then results in a certain volume of sites to be divested.
- 11.57 The volume of sites in the Proposed Remedy reflects divestiture of a Cellnex site at every potential overlap location and would therefore be sufficient for that purpose.

³³⁹ [Company C response to notice of possible remedies and provisional findings](#)

³⁴⁰ [Company B response to notice of possible remedies](#)

Nature and geographic scope of sites

11.58 The nature and geographic scope of sites relates to:

- (a) The different types of structures that host customers' active equipment;
- (b) the geographic location of sites (e.g. rural or urban); and
- (c) the geographic spread of sites.

- *Views of Parties and third parties*

11.59 The Parties told us that the sites which would compose the Proposed Remedy include many former Arqiva sites and are likely to be significantly valuable to a purchaser.

11.60 The Parties explained that these sites are a mixture of lattice towers and rooftop sites which were designed and built as shareable passive infrastructure, and which already host active equipment of one or more customers and so will provide a purchaser with an immediate revenue stream as well as being immediately available to the purchaser to compete with Cellnex following completion of the divestiture.³⁴¹

11.61 The Parties submitted details of the sites which comprise the Proposed Remedy and we have compared these with the CK Hutchison Overlapping Sites in Table 11-1 and Table 11-2 below.

Table 11-1: Type of sites in Proposed Remedy and CK Hutchison Overlapping Sites (excluding Unidentified Streetworks Overlap Sites)

Type of site	Proposed Remedy		CK Hutchison Overlapping Sites ¹
	Number of sites	% of total	% of total
Tower sites	[X]	71%	[X]
Rooftop sites	[X]	27%	[X]
Monopoles/Streetworks	[X]	3%	[X]
Total	[1,100-1,300]	100%	100%

Source: [X].

Note 1: The Table excludes the Unidentified Streetworks Overlap Sites which, when added, brings the total to [1,100-1,300] sites.

Note 2: As explained above, the Proposed Remedy involves the divestment of all existing Cellnex sites that overlap with any MBNL Site. The Parties state that this approach therefore involves the divestment of twice as many sites as are expected to be required in order to remove any overlaps between the existing Cellnex sites and the Transfer Sites. This results in the proportion of tower sites within the proposed remedy being higher than would otherwise be the case.

Note 3: 3UK does not record its site data using the specific categorisations shown in Table 11-1. Accordingly, the CMA has produced Table 11-1 by using 3UK's site data and applying its own site categorisation.

³⁴¹ Parties' response to the Remedies Notice

Table 11-2: Type of site location in Proposed Remedy and CK Hutchison Overlapping Sites (excluding Unidentified Streetworks Overlap Sites)

<i>Type of location</i>	<i>Proposed Remedy % of total</i>	<i>CK Hutchison Overlapping Sites¹ % of total</i>
Urban/suburban	28%	[REDACTED]
Rural	69%	[REDACTED]
Unclassified in N Ireland	3%	[REDACTED]
Total	100%	100%

Source: [REDACTED].

Note 1: Excludes the location of the estimated [REDACTED] Unidentified Streetworks Overlap Sites.

11.62 The Parties submitted that the Proposed Remedy sites cover the four nations of the UK, with [REDACTED]% in England, [REDACTED]% in Scotland, [REDACTED]% in Wales and [REDACTED]% in Northern Ireland. This compares to the population proportions within the four nations of the UK of 84% in England, 8% in Scotland, 5% in Wales and 3% in Northern Ireland.³⁴²

11.63 With regard to the location and type of the Unidentified Streetworks Overlap Sites, the Parties told us that they expect to have identified the locations of all the Unidentified Streetworks Overlap Sites [REDACTED].

11.64 The Parties also told us that they expect all 2,600 of the Streetworks Sites, including the Streetworks Overlap Sites³⁴³ specifically, to be built by [REDACTED].

Table 11-3: Status for Streetworks Sites rollout as at 4 February 2022

<i>Status</i>	<i>Number of sites</i>
Sites with planning application approved	[REDACTED]
Sites accessed	[REDACTED]
Foundations complete / cabinets installed	[REDACTED]
Poles erected	[REDACTED]
Sites built	[REDACTED]
Sites hosting active equipment	[REDACTED]
Live/connected	[REDACTED]
Sites without planning application approved	[REDACTED]
Total	2,600

Source: [REDACTED]

³⁴² CMA analysis of [Office for National Statistics population estimates for mid-2020](#).

³⁴³ Streetworks Overlap Sites consist of Identified and Unidentified Streetworks Overlap Sites.

Table 11-4: Status for overlapping Streetworks Sites as at 4 February 2022

Status	Number of sites
Sites built	[REDACTED]
Sites with location identified but not built	[REDACTED]
Total number of Identified Streetworks Overlap Sites	[REDACTED]
Estimated number of sites yet to be identified (Unidentified Streetworks Overlap Sites)	[REDACTED]
Total	[REDACTED]

Source: [REDACTED]

11.65 WIPs and MNOs told us that it is important for WIPs to be able to offer a portfolio of different types of infrastructure so that they can best meet the needs of customers. For example:

- (a) A WIP told us that it would generally prefer not to be a niche operator, for example having a rooftop-only (urban) or tower-only (rural) portfolio, but to have a spread of asset categories, with a national spread, so to be able to provide a more meaningful service to MNO customers.
- (b) Another WIP told us that any divestiture package would need to be of 'good quality' assets (covered in more detail in the following sub-section) and an element of this would be having a mix of asset types. This WIP also submitted that a mix of assets which included lattice towers over 20 metres high would be of good quality as these can be more readily shared than, for example, some rooftop sites and monopoles.
- (c) Another WIP told us that the location of sites could be important and that the level of importance could vary depending on the acquirer of the sites. A purchaser with existing sites may wish to avoid a lot of overlaps between the sites to be acquired and its existing sites. A purchaser will wish that the sites being acquired through a divestiture will not be terminated as part of any decommissioning plan that would result from overlaps and they will want to ensure that the divested sites remain in use for the longer term, to meet customers' needs. In response to the publication of the Parties' Proposed Remedy, this WIP stated that 60-70% of sites being in rural locations is not an appropriate mix for a competitor to compete with Cellnex post-Merger. It also stated that nearly half of the sites in the Proposed Remedy appear to relate to an overlap with Streetworks sites, which is not likely to lead to the creation of an effective competitor to Cellnex as it will not replicate the competitive constraint imposed by CK Hutchison and offers far less competitive potential than many of the sites Cellnex is acquiring.

- (d) This WIP also stated that the package must be sufficient to enable the creation of a supplier who can compete on a national scale. It told us that to help ensure this, the mix of the quality of the assets (which includes the different type of asset structure, together with other dimensions of quality discussed in the next sub-section) will be an important consideration. It said this could inform a decision on whether to focus any divestiture package solely on the assets from a previous acquisition, and it understood that Cellnex's acquisition of Arqiva in 2020, involved the geographic location and type of the assets which would provide for broad geographic coverage and enable a purchaser to compete effectively on a national basis.
- (e) Another WIP told us that the Proposed Remedy would not comprehensively address the SLC identified by the CMA in its Provisional Findings, because it does not consider that such divestment sites should be selected from among the existing Cellnex sites but should instead incorporate BTS sites.
- (f) An MNO submitted that it would be important that any divestiture package would need to be of a diverse mix of assets and that it would require a WIP to have a good spread of assets across the UK, with a mix of rooftops, monopoles, etc in its portfolio. This MNO stated that a niche operator, which has a particular type of asset, is less useful for it as a customer. This is because a WIP with a breadth of assets across the broad geography of the UK has incentives to offer good access terms in prime locations, in order to maintain custom in less prime locations.
- (g) Another MNO told us that it considers that the type and geographic location of sites and their quality (such as urban or rural, capacity on sites or anything that affected their ability to be monetised downstream) would be more important than the number of sites.

Our assessment

- 11.66 Our assessment of the scope of sites covers both the mix of the different types of structures within the Proposed Remedy and the geographic spread of those sites.
- 11.67 Evidence submitted by the Parties shows that the sites in the Proposed Remedy package differ from the CK Hutchison Overlapping Sites in terms of type ([✂] towers and [✂] monopoles) and site location ([✂] rural and [✂] urban or suburban). Nevertheless, it shows that the Proposed Remedy has a range of types of site and are in a range of locations.

- 11.68 We consider that the sites included within the Proposed Remedy appear to be no worse in terms of being shared and shareable than the CK Hutchison Overlapping Sites, due to the [X] proportion of towers and lower proportion of monopoles included.
- 11.69 The location of the CK Hutchison Overlapping Sites is determined by the location of the overlaps between the Cellnex Sites and the CK Hutchison Sites. Since we consider the overlaps are correctly identified, the resulting sites are in the right locations. In any event, the geographic spread of the Proposed Remedy sites appears broad across the UK.
- 11.70 We note that an estimated [X]% of the sites included in the Proposed Remedy are Unidentified Streetworks Overlap sites. Lack of precision about the identity of these sites, their characteristics, or the timescale over which they would be divested would represent a risk factor for the Proposed Remedy.
- 11.71 We expect that if there remain any Unidentified Streetworks Overlap Sites at the completion of a divestiture to a purchaser, these would, consistent with the approach proposed by Cellnex, be transferred to the purchaser at the time (or shortly after) the location of the CK Hutchison Streetworks Sites become known. As proposed by Cellnex, each Unidentified Streetworks Overlap Site would be divested the month after the location of the overlapping site has been identified by 3UK, and in each case before the overlapping Streetworks Site has been built and transferred to Cellnex from CK Hutchison.
- 11.72 This approach avoids a scenario whereby Cellnex would have acquired the Streetworks Sites from CK Hutchison but have not yet divested the associated Unidentified Streetworks Overlap Sites to a purchaser.
- 11.73 We also note that divestment of these Unidentified Streetworks Overlap Sites is expected to complete by [X] (that is, [X] after 3UK informing Cellnex that it has identified the location of all the Unidentified Streetworks Overlap Sites, which is expected to be by [X]) and that there will be a Monitoring Trustee to oversee this process. We also note that any Unidentified Streetworks Overlaps Site for which the location is identified before completion of the divestment of Overlap Sites to the acquirer of the divestiture package ('Divestment Completion') would be divested at Divestment Completion.
- 11.74 In relation to the divestment of Unidentified Streetworks Overlap Sites, we consider that the Parties' process for identifying and divesting these sites mitigates the associated risks to a sufficient extent, when overseen by a Monitoring Trustee.

- 11.75 While we note some of the differences in the geographic scope and nature of the sites included in the Proposed Remedy compared with the Transaction Sites, we consider that the Proposed Remedy sites would represent a broadly based and coherent network of sites.
- 11.76 As such, and on balance, we do not consider that this aspect of the scope of the Proposed Remedy represents a material risk to its effectiveness.

Quality of sites

- 11.77 The quality of a site (and in turn the quality of a portfolio of sites within a divestiture package) will be informed by a number of factors. These include:
- (a) The number of customers served by the site as these affect the level of revenue per site. The potential for a site to deliver revenue growth, including whether it has spare capacity so can bid for new customers;
 - (b) the terms by which customers on a site are provided with a service and the length of customer contracts; and
 - (c) whether the site requires investment. The age of the site and associated requirement for maintenance or upgrade expenditure.

Views of the Parties and third parties

- 11.78 The Parties submitted that the Proposed Remedy sites would be 'immediately exploitable' by a purchaser and given the high-quality of the divestiture package, including the mix of tower structures, provide the purchaser with a strong basis to compete directly with Cellnex.³⁴⁴
- 11.79 Cellnex told us that, [REDACTED].
- 11.80 The Parties submitted the following in terms of the quality of the sites in the Proposed Remedy:
- (a) The sites in the Proposed Remedy form a high-quality package of assets, as they were designed as shareable infrastructure and have a high overall tenancy ratio.³⁴⁵ Cellnex stated that WIPs generally look to acquire sites that have high tenancy ratios as this equates to higher revenues.³⁴⁶ It told us that the Proposed Remedy [REDACTED].³⁴⁷

³⁴⁴ [Parties' response to the Remedies Notice](#)

³⁴⁵ Tenancy ratio refers to the number of tenants on each site.

³⁴⁶ [Supplementary submission to the Parties' response to the remedies notice.](#)

³⁴⁷ [Supplementary submission to the Parties' response to the remedies notice.](#)

- (b) Cellnex provided us with the end dates of each of the customer contracts currently attached to the sites included in the Proposed Remedy. From this information, we calculated an average contract length remaining of [REDACTED] years. As a comparator, for its main customer contracts in the UK, Cellnex told us that the MBNL framework was signed for [REDACTED] years; (CTIL expires in [REDACTED]; Airwave runs to [REDACTED] and Arqiva is a [REDACTED]). It told us that contracts for other enterprise clients would be typically between three and ten years.
- (c) Cellnex also told us that the sites in the Proposed Remedy would provide the purchaser with a long-term secure revenue stream far beyond the duration of the customer agreements to which the Overlap Sites are subject, as the purchaser would be in a favourable position to renew those agreements upon their expiry due to high switching costs for customers.
- (d) Cellnex told us that the average age (since the later of construction or upgrade) for the sites in the Proposed Remedy is approximately [REDACTED] years. Cellnex also told us that it does not currently have any material or long-term planned maintenance in respect of the sites in the Proposed Remedy.

11.81 A WIP told us that the terms within the contracts with customers need to be sustainable. [REDACTED], upon renewal, which would lead to a weakening of its overall portfolio.

11.82 Two WIPs identified understanding the length of term remaining on a customer contract as being an important determinant of the quality of a site:

- (a) A WIP told us that if a divestiture package were to include sites with no customers or only a few years left on a single customer contract, then it would typically consider this to be poorer quality and the site could end up being decommissioned.
- (b) Another WIP stated that sites which have shorter customer leases would be less attractive than sites with longer leases.
- (c) A WIP commented on the need for investment in the Proposed Remedy sites. It submitted that Cellnex assets should not be included within any divestiture package. This was on the basis that they were largely built by Arqiva prior to 2015 to serve 2G, 3G or 4G use cases and that they are often not ideally located for 5G use cases. This WIP submitted that, while these sites may be upgraded to be able to provide 5G services to MNOs, they are unlikely to be optimal, will be unattractive to third parties and that the owner of these sites is likely to have significantly less competitive

impact than might appear to be the case based on the number of sites alone. It stated that therefore the sites in the Proposed Remedy have little or no appeal to MNOs for densification or 5G, and thus offer few, if any, prospects for revenue growth.³⁴⁸

- 11.83 An MNO told us that rooftop sites, which can be particularly useful in urban areas, suffer from capacity constraints and regulatory issues which prevents their ability to be upgraded, including for hosting heavier 5G equipment.

Our assessment

- 11.84 Our observations on the quality of the sites to be included within the Proposed Remedy are that:
- (a) The tenancy ratio of the Proposed Remedy sites is similar to the CK Hutchison Overlapping Sites.
 - (b) The average remaining length ([REDACTED] years) and the average annual revenue [REDACTED] of existing customer contracts on the Proposed Remedy sites indicate that the purchaser would acquire material revenue streams going forward. We note that Cellnex told us (see chapter 6) that its customer agreements tend to have a term [REDACTED], which would indicate an average length at opening of around [REDACTED].
 - (c) The average age since the later of construction or upgrade for these sites ([REDACTED] years) indicates that the sites are not, on average, new assets. This could have implications for required maintenance works, although we note that Cellnex had not planned material or long-term maintenance for these sites before they were included in the Proposed Remedy. We would expect that the cost of expected maintenance works would be a factor considered by the acquirer when making an offer to purchase the divestiture package and appropriately reflected within the terms of a sale and purchase agreement.

Migration of customer contracts

- 11.85 We normally seek to identify the smallest viable, stand-alone business that can compete successfully on an ongoing basis and that includes all the relevant operations pertinent to the area of competitive overlap.³⁴⁹

³⁴⁸ [Company C response to notice of possible remedies and provisional findings](#)

³⁴⁹ [Merger remedies guidance](#), CMA87 (13 December 2018), paragraph 5.7.

- 11.86 We note that the Proposed Remedy would not involve the sale of a standalone business, but instead the sale of assets which would require the carving out of [1,100-1,300] sites from Cellnex's existing portfolio of circa [X] sites. A potential consequence of this approach is that customer contracts will not necessarily transfer automatically with the divested sites, in the same way that they would with divestiture of a stand-alone business.
- 11.87 As stated above, the Parties told us that Cellnex anticipates that [X].
- 11.88 Cellnex told us that where it provides services to customers such as an MNO, its usual practice is for services across the whole portfolio of its sites to be provided on the terms of a master framework agreement. These agreements tend to be in place for a relatively long period of time ([X]) and cover the main terms of supply for different types of infrastructure, including maintenance and upgrade terms. The provision of services at individual sites then tends to be under site specific agreements attached to them, which cover other aspects of service.
- 11.89 As the Proposed Remedy would require the carve out of a collection of sites from such a framework agreement, our view is that this could introduce risks to the divestiture process, including for example if a customer were to withhold consent to the transfer of a contract to a purchaser because it considered that it would be negatively affected.

Views of the Parties and third parties

- 11.90 Cellnex told us that any risks associated with the transfer of customer contracts resulting from a divestiture would be manageable. Cellnex highlighted an example of a carve out divestiture in Portugal, where customers were transferred to a purchaser and told us that there were no significant issues encountered in that transaction.
- 11.91 Cellnex also told us that there had been many divestments of similar assets by MNOs throughout Europe, where a common approach would be for the MNO to set up a separate company, assign the assets to be divested to the separate company and then to divest the separate company. It stated that the administration side could be 'painful' but on the whole it would be a manageable process.
- 11.92 Cellnex told us that, where there was a transfer of sites on which Cellnex was in the process of undertaking works on a site for a customer (in-flight works), its general approach would be to discuss with the purchaser and the customer to coordinate the transfer of sites to ensure that the customer is not affected. Cellnex also told us that [X].

- 11.93 Cellnex told us that the terms within a contract that it has with a customer would be assigned to the purchaser of a divestiture package such that the customer at a site would be served on the same terms post divestiture. Cellnex also told us that it could enter into a transitional services agreement [TSA] with the purchaser to coordinate whatever activity that allows and supports them to take control of the assets and that this approach would be common in every transaction.
- 11.94 Cellnex told us that:
- (a) [REDACTED].
 - (b) [REDACTED].³⁵⁰
 - (c) [REDACTED].
 - (d) [REDACTED], which demonstrate that its proposed mechanism is viable and will be effective.
 - (e) [REDACTED].
- 11.95 Cellnex also told us that there are [REDACTED] Overlap Sites on which in-flight works are currently ongoing and/or scheduled to commence in 2022. Of those [REDACTED] sites, [REDACTED] have a forecast completion date for the in-flight works prior to October 2022, [REDACTED] have a forecast completion date later in 2022 and [REDACTED] have a completion date in 2023. For the remaining [REDACTED], Cellnex does not at this stage have an estimated completion date.
- 11.96 Cellnex also told us that there are [REDACTED] Overlap Sites on which MNOs have planned to swap out equipment to meet their high-risk vendor government obligations. Cellnex expects that the majority of such swaps will be complete before Divestment Completion, and where they are not completed by that time the process would be subject to the same process as other in-flight works ongoing at the point of divestment.
- 11.97 Regarding in-flight works ongoing at the point of divestment, Cellnex told us that two options could be pursued with the choice between options lying with each customer. The options are:
- (a) Cellnex continues the works after Divestment Completion (and either transfer each site to the purchaser after the works have been completed,

³⁵⁰ [REDACTED].

or transfer the site to the purchaser at Divestment Completion and complete the works pursuant to a TSA); or

- (b) Cellnex oversees the installation or upgrade project until a specific milestone, at which point the responsibility for completing the works would transfer to the purchaser. Cellnex considers the most appropriate milestone to be completion of the 'access phase' (i.e. the point at which all designs, permissions, and rights have been completed), at which point project moves to planning and implementing the physical works (which typically takes approximately three months).

11.98 Third parties gave views about the potential risks that could be associated with a carve out of customer contracts required for a divestiture:

- (a) A WIP told us that a divestiture which required the splitting of an existing portfolio and carving out contracts would create a significant risk that an effective remedy would not be achieved within the time period the CMA would have due to the potential requirement for the purchaser to renegotiate agreements across thousands of sites with landlords and MNOs/customers. The WIP told us that it would be relatively straightforward for a purchaser to acquire a pre-existing, standalone portfolio of sites which would include portfolio-wide contracts with MNOs, agreements with landlords for each site, back office (IT, finance, accounts) and staffing for the portfolio, as well as customer contracts.
- (b) This WIP also told us that another challenge of splitting a portfolio of customer contracts would be that most long-term contracts for a portfolio of sites would provide the MNO with a churn allowance. If a portfolio (such as the sites Cellnex acquired from Arqiva) was split as the result of a divestiture, the MNO's churn allowance which would be contained within the long-term framework agreement, would be split between two suppliers (Cellnex and the purchaser of the divestiture package), so the MNO's interests might be harmed.
- (c) Another WIP told us that, as a general view on the question of the ease of divestiture of Cellnex sites, it might be preferable for a package to cover a package of sites which had been recently acquired by Cellnex, for example based on the sites acquired from Arqiva or from Shere, as customers of some Cellnex sites will still be on the previous supplier contracts and have a less strong relationship with Cellnex. This WIP also told us that it is less complex to acquire a package of sites that have previously been grouped together in one entity and subject to a recent transaction.

(d) Another WIP was less concerned about the additional risks that could be associated with a divestiture which required the carve out of customer contracts. This WIP told us that arrangements can be put in place, typically through the establishment of trust and management provisions, to ensure that the economic risks and benefits of ownership are transferred to the purchaser together with management control. This helps ensure, to the extent to which there are any delays in formally assigning customer contracts for sites (and landlord agreements) (discussed in the next sub-section) to the purchaser, completion of a transaction is not delayed.

11.99 Three MNOs had concerns about the potential for any carve out of Cellnex sites which they use being transferred to a purchaser in terms of causing disruption to their own operations, although all felt that these concerns could be mitigated by Cellnex.

(a) An MNO told us [REDACTED].

(b) This MNO also told us that if the divestiture package were to include sites on which there were 'in-flight' works ongoing [REDACTED] then it would be preferable for these sites to remain with Cellnex until Cellnex had fulfilled its contractual obligations to the MNO and works completed.

(c) Another MNO told us that it plans its network upgrades and changes over a long time period and so changes in availability of sites, via a transfer of ownership, can be operationally disruptive and can create costs for it via delays, etc. This MNO attempts to deal with such issues by agreeing to 'draw a line' at a certain date, with works commenced before that date being the responsibility of the seller to complete in order for them to fulfil their contractual obligations to the MNO.

(d) Another MNO told us that the impact of a sale of sites on any framework agreement would depend on the terms of the agreements that it had for the use of such carved-out sites. This MNO told us that in general it might expect some short-term challenges from a change of ownership but it is not uncommon that sites change ownership. This MNO also told us that if it was mid-way through a process of any site upgrades it would expect any SLAs or similar contractual obligations to be honoured by Cellnex and the new owner. This MNO would not expect any transfer of ownership to result in any impact on the MNO or any end customer disruption.

Our assessment

- 11.100 As the Proposed Remedy represents a carve out of assets, rather than the sale of a stand-alone business, we have considered the associated risks carefully. In particular, we have considered the concerns raised by third parties, particularly MNO customers, regarding potential disruption to their own services and obligations.
- 11.101 Resulting issues, including in particular the need to transfer customer relationships to a purchaser, could increase the time frame for the divestiture to be completed and may also affect the ability of the purchaser of the divested sites to compete effectively while various transitional issues are resolved.
- 11.102 In respect of the transfer of customer contracts and obtaining customer consents, we consider that the Proposed Remedy contains sufficient protections to mitigate these risks. In particular, [X] allows for the economic benefits of customer contracts to flow to the purchaser and the purchaser will also have the ability to commercialise the site. This, and the provision for a TSA, would enable the purchaser to compete with Cellnex autonomously.
- 11.103 The risks around in-flight works, as identified by customers, are addressed by the provision for a dual approach, as set out at paragraph 11.97 above. We consider this approach would enable customers to choose between Cellnex or the purchaser completing works, according to the needs of each site.
- 11.104 We also conclude that the appointment of a Monitoring Trustee to provide effective oversight of the divestiture process, including regarding the migration of customer contracts, will be a further important mitigation to the risks in this area.

Migration of agreements with landlords

- 11.105 The ability of a purchaser of the divestiture package to be able to access land on which their assets are located and obtaining the relevant consents from landlords, is an important factor in our assessment of whether the Proposed Remedy could be effective in addressing the SLC.³⁵¹

³⁵¹ [X] Overlap Sites are owned by Cellnex freehold.

Views of the Parties and third parties

11.106 Cellnex submitted that, to the extent that consents from landlords are required, it would use its best endeavours to obtain all necessary landlord consents to effectively implement the divestment.³⁵²

11.107 Cellnex referred to issues of landlord lease assignment using the example of its experience of acquiring Arqiva assets. It told us:

- (a) [REDACTED] of the sites acquired required absolute landlord consent, which is the “slightly more painful side” but is an administrative task that can be completed within a year.
- (b) 18 months on from the acquisition of Arqiva, it has [REDACTED] sites (out of [REDACTED] sites with landlords) that had a prohibition on assignment. These cases are not an issue for Cellnex because it currently manages these sites under an agency arrangement and can issue licences such that legally Cellnex can operate as if the sites are its own.
- (c) The ECC provides that, when a lease comes up for renewal, there is a statutory right for the site operator to assign the right to the lease on certain terms without consent. The right to assign at code renewal therefore constitutes a worst-case backstop for lease assignment.
- (d) In the UK, there are mechanisms available, through a trust, to manage the transfer of leases in favour of the purchasing company, which allows the purchasing company to obtain the beneficial rights on the ground leases. Meanwhile, in parallel, Cellnex would be running the assignment. This is something that is easier in the UK than in other jurisdictions.
- (e) From a customer side, in terms of complaints, it has had no issues with landlord lease assignment.
- (f) Where there are instances of landlords refusing to give consent to assign a lease to an acquirer, for example because the landlord is unwilling to incur associated legal expenses, Cellnex would offer to cover such expenses (in general a few hundred pounds) to facilitate the assignment.

11.108 Cellnex also told us in relation to the Proposed Remedy:

- (a) [REDACTED]

³⁵² [Parties' response to the Remedies Notice](#)

(b) [REDACTED]

(c) [REDACTED]

(d) [REDACTED]

(e) [REDACTED]³⁵³ [REDACTED]³⁵⁴,

(f) [REDACTED]³⁵⁵,

(g) it has [REDACTED]; and

(h) the Parties are willing to agree to the appointment a Monitoring Trustee to oversee this process.

11.109 Third parties raised some potential challenges relating to landlord agreements with us:

(a) A WIP stated that it would expect the ground lease to be assigned over in the event of an asset sale. It also noted that transactions in the industry can be structured to enable landlord agreements to be formally assigned post completion, ensuring a transaction is not held up waiting for such consents.

(b) Another WIP told us that it would be time-consuming if completion of asset transfer required consent from landlords.

(c) An MNO told us that the contents of the contracts with landlords could be a factor that could lead to a longer timeframe for divestiture to be completed.

(d) Another MNO told us that site owners' relationship with landlords is changing as the ECC has changed, which could create a complication during divestment.

Our assessment

11.110 We understand that the rules and processes governing the rights and obligations of tower operators to be able to access land on which their assets are located can be complex and differ depending on the specifics of the site and the provisions under which the land can be accessed. This means that

³⁵³ For approximately [REDACTED] of the Overlap Sites, Cellnex has marketing rights pursuant to a marketing rights agreement and does not necessarily have a site-specific landlord agreement for each of these Overlap Sites.

³⁵⁴ [REDACTED]

³⁵⁵ [REDACTED]

when sites are transferred from one operator to another, there could be substantial delays, risking interruptions/ detrimental impacts for customers and delay in completion of a divestiture.

11.111 As the Proposed Remedy represents a carve out of assets, rather than the sale of a stand-alone business, we have considered these risks carefully.

11.112 In respect of the transfer of landlord agreements and obtaining landlord consents, including in relation to those Overlap Sites for which Cellnex has marketing rights pursuant to a marketing rights agreement, we consider that the Proposed Remedy has sufficient protections to mitigate these risks. In particular, the provision for trust arrangements to be used in the event of a transfer not being agreed allows for the purchaser to receive the benefits of managing sites. This, and the backstop offered by the ECC, would enable the purchaser to take control of the sites and compete with Cellnex autonomously.

11.113 The evidence we have seen in relation to similar transactions indicates that the issues associated with the transfer of landlord agreements is chiefly administrative and should not result in a purchaser of the divested sites being prevented from providing a service to its customers and using the sites to compete with Cellnex (and other WIPs) or from receiving the economic benefits of customer revenues.

11.114 We also conclude that a Monitoring Trustee will be required to provide effective oversight of the divestiture process and thereby further mitigate risks to the divestiture process from the migration of landlord agreements.

Other assets to be included within the Proposed Remedy

11.115 If the Proposed Remedy package was bought by a purchaser without an existing UK operation, the purchaser may wish to acquire additional assets, to enable it to undertake maintenance and management functions, such as IT systems, buildings, staff and vehicles.

Views of the Parties and third parties

11.116 Cellnex's view was that there should be no requirement for a divestiture package to include staff or additional assets such as buildings or vehicles. It told us that the purchaser of the Proposed Remedy would need to have a management team already in the UK and some organisational infrastructure.

11.117 Cellnex told us that it currently outsources its maintenance arrangements and that a purchaser could have its own outsourced maintenance arrangements,

which could incorporate new sites acquired through a divestiture process. It also told us that everything needed operationally for a site would be transferred, including the power supply. However, Cellnex said that if required, it could put in place a transitional services agreement to help ensure continuity of maintenance provision for a transitional period following completion of a divestiture.

11.118 Cellnex told us that in completed deals across Europe with CK Hutchison, such as Austria, it had two to three staff members at first, then had a transitional services agreement, then hired the remainder of the team. It worked with only two to three staff because all of the acquired sites ran smoothly, the ancillary arrangements were in place, and the outsourced maintenance contracts were already in place.

11.119 Cellnex confirmed that the divestiture of assets within the Proposed Remedy would also include the transfer of ancillary service contracts necessary for the purchaser of the divestiture package to operate the Overlap Sites and provide related services to customers. Specifically, this would include the associated supporting infrastructure contracts that allow the business to be operated (such as electricity and backhaul contracts).³⁵⁶

11.120 Third parties gave the following views on whether there would be a need to include additional assets within any divestiture package:

- (a) A WIP told us that it has experience of entering new territories and building up its presence through asset acquisitions, but that it helps if a portfolio of sites come with some management and support capability. This WIP told us that entry can be done in the absence of such capabilities being attached to an asset portfolio, but such an approach introduces further risk or challenge.
- (b) Another WIP which is present in the UK said that it would not require any staff, buildings or vehicles (or similar items) if it were to purchase a divestiture package.
- (c) Another WIP highlighted that supporting infrastructure contracts, such as backhaul contracts, form part of the competitive position CK Hutchison has today. This WIP told us that within a divestiture package it was critical that the sites are sold together with the existing customer contracts and the supporting infrastructure contracts that allow the business to be operated (such as backhaul contracts). This WIP was concerned that the

³⁵⁶ These ancillary service contracts will be partially transferred, where they relate to the Overlap Sites and to sites which Cellnex will retain.

Proposed Remedy appeared to not include supporting infrastructure contracts such as backhaul contracts.³⁵⁷

- (d) An MNO told us that a new market entrant would need to be able to establish the UK entity and overheads required to run a portfolio of sites, whereas an existing WIP would already have the management and other overheads in place.

Our assessment

11.121 We have considered whether any further assets or personnel would need to be included in the scope of the divestiture.

11.122 In coming to a view on this issue we have taken account of:

- (a) the range of potential purchasers that could be interested in acquiring the assets within the Proposed Remedy and approved by the CMA;
- (b) submissions from the Parties and third parties on past instances where Cellnex and other WIPs have entered a market through acquisition without also acquiring additional assets such as buildings or vehicles or taking on staff; and
- (c) that Cellnex told us that its approach is to outsource its maintenance of its sites so does not require an extensive maintenance staff, sites or vehicles.

11.123 We note that where WIPs, including Cellnex, have entered a market, be that in the UK or other jurisdictions, this has been successfully achieved without them needing to acquire other assets. Also, as Cellnex currently outsources its maintenance activities to third parties, this is an approach that could be adopted by a purchaser to enable it to service and maintain the acquired sites and provide service to its customers.

11.124 Therefore, we consider that the Proposed Remedy does not need to provide for a purchaser to also acquire additional assets in order for it to be able to compete effectively.

11.125 However, while these additional assets would not be required to be included within the scope of the Proposed Remedy, the scope of the assets to be

³⁵⁷ This WIP noted that the Proposed Remedy included a commitment that ‘Cellnex will divest all of its rights and obligations relating to the Overlap Sites to the alternative purchaser and will use its best endeavours to (i) divest the Overlap Sites with the full benefit of all existing customer contracts, and (ii) obtain all necessary landlord and customer consents to effectively implement the divestment’ and that this did not include supporting infrastructure contracts.

included within the Proposed Remedy would be required to include not only the site and the passive infrastructure, but also any and all other ancillary services necessary for a purchaser of the sites to operate and provide services to customers, including the associated supporting infrastructure contracts that allow the business to be operated (such as electricity and backhaul contracts).

Conclusion on the scope of the Proposed Remedy

11.126 The SLC we have identified arises from the overlap between the Parties. The scope of the Proposed Remedy addresses this by including Cellnex sites at every potential overlap location and includes sufficient mitigations in relation to risks associated with Unidentified Streetworks Overlap Sites, the migration of customer contracts and the migration of landlord agreements.

Identification and availability of suitable purchasers

11.127 In our Remedies Notice, we invited views on whether there were any specific factors to which we should pay particular regard in assessing purchaser suitability, and whether there were risks that a suitable purchaser was not available.³⁵⁸

Views of the Parties and third parties

11.128 The Parties consider that all potential credible purchasers for the Proposed Remedy will already have management and operational structures capable of constructing, operating and managing the Proposed Remedy divestiture and would, therefore, be suitable purchasers.³⁵⁹

11.129 The Parties state that it is not essential for a purchaser of the Proposed Remedy divestiture to have an existing portfolio of UK assets, as a purchaser with experience of operating passive infrastructure assets in another jurisdiction will have the required management and operational structure and will be viewed by customers as a credible competitor.³⁶⁰

11.130 Cellnex also told us that when a WIP is considering entering a country, scale does not matter, but stated that it is important for a WIP to have financial backing as well as being able to establish commercial relationships and be credible with customers. Cellnex also told us that WIPs with experience of successfully operating passive infrastructure assets in other jurisdictions will

³⁵⁸ [Notice of Possible Remedies](#)

³⁵⁹ [Parties' response to the Remedies Notice](#)

³⁶⁰ [Parties' response to the Remedies Notice](#)

already have the requisite management and operational structure and would be viewed by customers as a credible competitor when operating the Overlap Sites.

11.131 The key points raised by third parties related to a purchaser's experience in the industry and its financial resources were:

- (a) A WIP told us that a purchaser would require experience owning towers and financial capacity to invest in them. It also told us that a purchaser with existing operations in the UK would be able to compete effectively in the market sooner than a purchaser that was a new entrant, due to having existing platforms, services and relationships in place.
- (b) Another WIP told us that a purchaser would require existing UK presence in the market, as well as access to capital to fund ongoing investments in the acquired assets (such as upgrades to host 5G active equipment).
- (c) Another WIP told us that a suitable purchaser would require sufficient financial resources, operational experience in the market and experience of executing large transactions. [REDACTED].
- (d) An MNO told us that divestiture of Cellnex assets to a new entrant could be counterproductive if they go to an inexperienced new entrant. Divestment would have minimal impact if the assets go to an existing WIP, as that WIP would replicate the service Cellnex would have offered to customers. In this MNO's view the purchaser of a divestiture package would need to be knowledgeable and capable of engineering works to make towers shareable, or access for customers could be worse than it is today.
- (e) Another MNO told us that any purchaser would need to be capable, competent, and financially sound; able to provide at least the same level and scope of service as Cellnex currently does; and offer it fair and reasonable terms of occupation/access, particularly around price, churn and delivery. This MNO also told us that the UK market is highly regulated and operating a UK tower company requires knowledge of these conditions. Therefore, it would be complicated for a financial purchaser to buy these assets.
- (f) Another MNO [REDACTED] told us that a new market entrant would need to be able to establish the UK entity and overheads required to run a portfolio of sites but it might be less concerned about the location of sites as it would have no risk of overlap of its existing assets. It said that an existing WIP (in the UK) would already have the management and other overheads in place, but it might be concerned with overlap with its existing sites and

interested in how the sites would enhance its asset base. It was agnostic in terms of the provider of its sites as long as it has access to the right sites which allow it to provide its mobile services.

Application of criteria for purchaser suitability to the current case

11.132 We considered how the criteria for a prospective purchaser, as set out in our guidance,³⁶¹ should apply in the current context.

11.133 In considering suitable purchasers, the CMA will wish to be satisfied that a prospective purchaser:³⁶²

- (a) Is independent of the Parties. The purchaser should have no significant connection to either CK Hutchison or Cellnex that may compromise the purchaser's incentives to compete with the Merged Entity (for example, an equity interest, common significant shareholders, shared directors, reciprocal trading relationships or continuing financial assistance).
- (b) Has the necessary capability to compete. The purchaser must have access to appropriate financial resources, expertise (including managerial, operational and technical capability (including understanding of the regulatory regime)) and assets to enable the assets comprising the Proposed Remedy to be an effective competitor in the market. This should be sufficient to enable the purchaser of the divestiture package to continue to develop as an effective competitor. For example, a highly-leveraged acquisition of the divestiture package which left little scope for competitive levels of capital expenditure or product development is unlikely to satisfy this criterion. The proposed purchaser will be expected to obtain in advance all necessary approvals, licences and consents from any regulatory or other authority. We would expect companies with an existing track record of owning or operating passive infrastructure assets, either in the UK or elsewhere to be able to readily demonstrate the technical capacity to compete effectively. If a purchaser is viewed by a customer as not having the necessary capabilities to compete, then this would increase the likelihood that it would be unable to obtain the necessary consents from customers.
- (c) Is committed to competing in the relevant market. We will wish to be satisfied that the purchaser has an appropriate business plan and objectives for competing in the relevant market and that the purchaser has the incentive and intention to maintain and operate the relevant

³⁶¹ [Merger remedies guidance](#), CMA87, paragraph 5.21.

³⁶² [Merger remedies guidance](#), CMA87, paragraph 5.21.

business as part of a viable and active business in competition with the Merged Entity and other competitors in the market.

- (d) That divestiture to the purchaser will not create further competition or regulatory concerns. Divestiture to the purchaser should not create a realistic prospect of further competition or regulatory concerns.

11.134 We considered whether a suitable purchaser should be required to have existing UK passive infrastructure assets in order to increase the national scale of the purchaser of the assets comprising the Proposed Remedy in order to achieve an effective divestiture. In reference to the SLC we have found, it does not appear necessary, in order to address our competition concerns associated with the overlap sites, that a purchaser should have a substantial network of existing sites. Given this position, our view is that it would not be necessary to require divestiture to a purchaser with substantial existing UK assets.

Likely availability of suitable purchasers

11.135 As part of the counterfactual assessment, we examined the level of interest in purchasing passive infrastructure assets. We found that there were significant levels of interest in acquisitions of passive infrastructure assets. We also consider below our assessment of the likely availability of suitable purchasers specifically for the Proposed Remedy.

Views of the Parties and third parties

11.136 The Parties told us that, as the CMA's Provisional Findings found that 'passive infrastructure assets are generally considered to be attractive and highly marketable assets, and a wide range of industry players and financial investors have a strong interest and established track record in investing in such assets', the CMA can have no doubt as to the viability or attractiveness to purchasers of a package of passive infrastructure assets or that there is only a limited pool of suitable purchasers.³⁶³

11.137 Cellnex told us that it has [REDACTED]. It told us that it [REDACTED]. It submitted that [REDACTED]. It submitted that [REDACTED].

11.138 Cellnex submitted that [REDACTED]. [REDACTED].

11.139 Separately, [REDACTED] told us that [REDACTED].

³⁶³ Parties' response to the Remedies Notice

11.140 Cellnex also told us that [REDACTED] it has the full package already available to engage [REDACTED], and there are interested buyers for the sites that it is divesting.

11.141 A number of WIPs have told us that they would be interested in purchasing a divestiture package.³⁶⁴

(a) A WIP told us it would be very interested in purchasing the divestiture package if one arose from this remedies process. It also stated that there would be a number of suitable industry purchasers for a divestiture package of either CK Hutchison or Cellnex assets. At an industry level, this WIP told us that the market for passive infrastructure globally is active.

(b) Another WIP told us that it would be interested in purchasing the divestiture package if one arose from this remedies process, and that there would be a number of different interested parties from within and outwith the UK market.

(c) Another WIP told us that it considers the UK to be an attractive market and will continue to look at opportunities in it.

Our assessment

11.142 Based on the information available, we consider it likely that a suitable purchaser could be found for the Proposed Remedy.

Conclusion on the identification and availability of suitable purchasers

11.143 We conclude that, according to our criteria, a suitable purchaser of the Proposed Remedy could be identified.

Ensuring an effective divestiture process

11.144 An effective divestiture process will safeguard the competitive potential of the divestiture package before disposal and will enable a suitable purchaser to be secured in an acceptable timescale, as well as allowing prospective purchasers to make an appropriately informed acquisition decision.³⁶⁵

11.145 The incentives of merger parties may serve to increase the risks of divestiture. Although merger parties will normally have an incentive to maximise the disposal proceeds of a divestiture, they will also have

³⁶⁴ These expressions of interest were provided to us prior to WIPs knowing the detail of the Parties' proposed local overlap divestiture remedy.

³⁶⁵ [Merger remedies guidance](#), CMA87 (13 December 2018), paragraph 3.51.

incentives to limit the future competitive impact of a divestiture on themselves. Merger parties may therefore seek to sell their less competitive assets/businesses and target them to firms which they perceive as weaker competitors. They may also allow the competitiveness of the divestiture package to decline during the divestiture process.³⁶⁶

11.146 The circumstances of this case raise the following issues for consideration in relation to the divestiture process:

- (a) The appropriate timescale for divestiture to take place;
- (b) whether there is a need to appoint a Monitoring Trustee to support the CMA in overseeing the process of divestiture of Cellnex assets to a purchaser;
- (c) whether there is a need for the divestiture to a purchaser to complete prior to the completion of the Merger, that is whether there should be a requirement for an upfront buyer; and
- (d) whether, and if so under what circumstances, there is a need to appoint a Divestiture Trustee to complete a divestiture and mitigate the risk that the divestiture does not complete within the timescales specified.

11.147 We consider these in turn below.

Timescale allowed for divestiture

11.148 We note Cellnex's submission that it [✂] (see paragraph 11.137 above). We note in this context that the process for implementation of a remedy, and purchaser approval, takes place after the CMA issues its Final Report and includes a period of formal public consultation.³⁶⁷

11.149 We considered what would be an appropriate timescale to allow Cellnex to implement any required divestiture (the Initial Divestiture Period). This would normally run from the acceptance of final undertakings or the making of a final order until legal completion of an effective divestiture (that is, a completed sale to a purchaser, approved by the CMA).

11.150 In considering an appropriate Initial Divestiture Period, our guidance states that we 'will seek to balance factors which favour a shorter duration, such as minimising asset risk and giving rapid effect to the remedy, with factors that favour a longer duration, such as canvassing a sufficient selection of potential

³⁶⁶ [Merger remedies guidance](#), CMA87 (13 December 2018), paragraph 5.4.

³⁶⁷ [Merger remedies guidance](#), CMA87 (13 December 2018), paragraph 4.67.

suitable purchasers and facilitating adequate due diligence'. Our guidance also states that the Initial Divestiture Period will normally not exceed six months.³⁶⁸

Views of the Parties and third parties

11.151 Cellnex told us that it would commit to completing the divestiture of the Proposed Remedy, other than the Unidentified Streetworks Overlap Sites, [X] of the date of the final undertakings.³⁶⁹

11.152 The Parties told us that Cellnex would commit to divest to the purchaser at the end of each calendar month following Divestment Completion each Unidentified Streetworks Overlap Site identified during the previous month, and that 3UK would inform Cellnex by the 20th day of each calendar month of those Unidentified Streetworks Sites for which it has identified the location during the previous calendar month so as to allow Cellnex to implement the divestment of the relevant Unidentified Streetworks Overlap Sites.

11.153 The Parties stated that it is expected that 3UK will have identified the locations of all Unidentified Streetworks Overlap Sites by [X].

11.154 Cellnex told us that it will continue to be responsible for all in-flight works prior to Divestment Completion. Cellnex told us that all sites in respect of which in-flight works complete prior to Divestment Completion will be transferred to the purchaser of the divestiture package at Divestment Completion. For those sites where there are in-flight works ongoing at the point of Divestment Completion, the purchaser will have the choice of either Cellnex continuing with the works following Divestment Completion or taking over responsibility for completing the works itself after a specific milestone. Cellnex told us that it does not expect in-flight works to materially impact the ability of the purchaser to compete Cellnex following the divestiture.

11.155 A WIP told us that it would be possible to complete a divestiture [X].

11.156 Another WIP stated that a divestiture could be completed in a relatively short time frame [X]. It told us that from having a remedy package identified and due diligence materials released, terms between the divestor (Cellnex) and the acquirer could be reached as quickly as two to four weeks.

³⁶⁸ [Merger remedies guidance](#), CMA87 (13 December 2018), paragraph 5.41.

³⁶⁹ [Parties' response to the Remedies Notice](#)

- 11.157 This WIP also noted that transactions in the industry can be structured to enable landlord and customer agreements to be formally assigned post completion, ensuring a transaction is not held up waiting for such consents.
- 11.158 Another WIP told us that the time to complete a divestiture would vary depending on the nature of the assets being divested, with the most relevant factor being whether it was an entity being divested or a subset of assets (with the latter taking longer). It also told us that [REDACTED].
- 11.159 Another WIP told us that a typical process could take around four months from initiation to deal signing, with more time needed for deal completion, involving handover of control of the assets involved. It stated that deals for assets themselves can take longer to complete than those where only shares have been purchased.
- 11.160 This WIP also told us that it would be time-consuming if completion of asset transfer required consent from customers and landlords.
- 11.161 An MNO told us that it plans its network upgrades and changes over a long time period so changes in availability of sites, due to a transfer of ownership, can be operationally disruptive and create delays to upgrades or other activities on the transferred sites which are already in flight. This MNO would attempt to deal with such issues by agreeing to 'draw a line' at a certain date, with works commenced before that date being the responsibility of the seller.
- 11.162 Another MNO told us that it [REDACTED]. For example, in 2022 the high-risk vendor government obligations require swapping out of one provider's equipment for another with various assessments required and possible changes to the towers needed. This MNO would need reassurance that such projects would not face slippage as these could affect its own obligations. As well as civil engineering and other build works, there may be transfer of tenancy with landlords and potentially also planning permissions that are in train. For these reasons, timing and possible phasing of site transfer (as sites' pipeline work is completed) will be important to this MNO as a customer.
- 11.163 Another MNO told us that it had no firm view on how long it would take to complete a divestiture of a portfolio of sites. This MNO highlighted that the contents of the contracts with landlords could be one factor that could lead to a longer timeframe being necessary to complete a divestiture process.

Our assessment

- 11.164 We have reviewed the evidence from the Parties and third parties on the time required for a divestiture, based on past examples in the UK and other

jurisdictions and potential implications for customers relating to potential disruption of their activities.

11.165 The evidence we have seen indicates that a period of [X] is likely to be sufficient to run a sales process and agree terms with a preferred purchaser.

11.166 We have considered a number of issues in our decision related to the composition/scope of a divestiture package which could impact the timescale for completing a divestiture in this specific context, in particular:

- (a) Identification and disposal of Unidentified Streetworks Overlap Sites;
- (b) transfer of customer contracts;
- (c) completion of in-flight projects; and
- (d) transfer of landlord agreements.

11.167 As explained in previous sections above, we expect that these issues would be resolved to our satisfaction by the point at which the divestiture is implemented. We consider that some follow-up action by Cellnex, in relation to one or more of these factors (such as concluding an in-flight project on a particular site to achieve necessary consent), may be required on a small number of sites following divestiture.

11.168 The views of the Parties and third parties therefore do not give cause for us to consider [X].

Provision for the appointment of a Monitoring Trustee

11.169 In our Remedies Notice we invited views on whether the Parties should be required to appoint a Monitoring Trustee to oversee any divestiture and to ensure that the assets to be divested are maintained during the course of the process.³⁷⁰

Views of the Parties and third parties

11.170 The Parties told us that the Proposed Remedy does not give rise to material composition, asset and/or purchaser risks and therefore has a relatively low risk profile. Insofar as such risks materialise, these can be managed such that a comprehensive solution to the SLC could be achieved. The Parties stated that:

³⁷⁰ Remedies Notice, paragraph 36.

- (a) The CMA's view in its Provisional Findings that "passive infrastructure assets are generally considered to be attractive and highly marketable assets" and the CMA has already identified a number of businesses with "a strong interest and established track record in investing in such assets."
- (b) The Proposed Remedy involves the divestment of a portfolio of existing Cellnex assets which are already operated independently and effectively on the relevant market.
- (c) The Proposed Remedy does not involve a 'mix-and-match' style remedy.
- (d) The Proposed Remedy involves the divestment of any potential overlaps between Cellnex's existing sites and the Transfer Sites immediately.³⁷¹

11.171 The Parties stated that the divestment of the Overlap Sites will occur within a relatively short period following approval of the Merger. The Parties therefore consider that there is no need for a Monitoring Trustee to be appointed in respect of the divestment of these sites.³⁷² Notwithstanding this, the Parties told us to resolve any potential concerns the CMA may have as to the effectiveness of the Proposed Remedy, they would agree to the appointment of a Monitoring Trustee.

11.172 A WIP told us that there is a material risk that Cellnex could seek to decommission towers that are part of the divestiture package in the period before completion of the divestiture, and such risk could be guarded against by the appointment of a Monitoring Trustee.³⁷³

11.173 Another WIP told us that an important consideration in a divestiture will be whether a change of control (of sites) will require consent from customers, or landlords – which can sometimes be time-consuming and potentially expensive to secure.

11.174 Another WIP stated that a divestiture of a subset of assets involving carving out contracts/agreements would create a significant risk that an effective remedy would not be achieved within the time period the CMA would have to effect the remedy (due to the potential renegotiation of agreements across thousands of sites with landlords and MNOs).

11.175 Another WIP stated that it is essential to have a controlled process, under the close supervision of a Monitoring Trustee, to ensure that a transfer of assets

³⁷¹ [Parties' response to the Remedies Notice](#)

³⁷² [Parties' response to the Remedies Notice](#)

³⁷³ [Company D response to notice of possible remedies](#)

is undertaken in a neutral efficient, diligent and cooperative manner. Risks highlighted include:

- (a) Transfer of site data being undertaken excessively slowly due to deliberate and unnecessary bureaucracy, which could result in lost opportunities for the buyer of the assets to onboard MNO customers; and
- (b) absent a Monitoring Trustee the assets and their contractual environment could not be maintained to optimum standard prior to their transfer which would add costs for the acquirer and potentially reduce its ability to invest in competitive sites elsewhere.

11.176 As set out earlier in this chapter, all of the MNOs we spoke with told us that they would assume that the terms of their customer agreements for any sites that were included in a divestiture would pass over to the purchaser for the purchaser to fulfil on the same terms and that their services would not be disrupted.

Our assessment

11.177 In our discussion of the scope of the remedy, we identified a number of risks associated with the composition of the remedy, including those associated with the Unidentified Streetworks Overlap Sites, the migration of customer contracts, in-flight works and migration of landlord agreements.

11.178 Given these elements of complexity and risk associated with the divestiture process, we consider that it would be necessary for the effective implementation of a divestiture based on the Proposed Remedy to include provisions for the appointment of a Monitoring Trustee so that risks to the divestiture process can be effectively managed. This would help enable the CMA to have confidence that any sale and purchase agreement (SPA) reached between Cellnex and a purchaser would result in an outcome consistent with the aims of the remedy.

11.179 A Monitoring Trustee would actively monitor, on behalf of the CMA:

- (a) The progress that Cellnex and the purchaser are making on the transfer of sites;
- (b) the progress that is being made on the building of the unbuilt Streetworks Sites and the associated identification and subsequent divestment of the Unidentified Streetworks Overlap Sites; and
- (c) potential impacts on timescales from the progress and for completion of the divestiture.

11.180 A Monitoring Trustee could also undertake due diligence on the SPA between Cellnex and the purchaser, which would give effect to the divestiture remedy. This would assist the CMA in identifying risks that the divestiture process agreed between Cellnex and the purchaser was not adequately mitigating risks to customers. It would also help ensure that the divestiture could not be completed until these risks were adequately mitigated, to the satisfaction of the CMA.

11.181 We envisage that a Monitoring Trustee would be appointed up to at least the point of divestment completion. However, there may be a requirement for the Monitoring Trustee to be retained for a period beyond this date, in particular if there remain a substantial number of sites for which there are continuing issues around the migration of customer contracts or agreements with landlords, or if there remain, contrary to current expectations, Unidentified Streetworks Overlap Sites. The mandate to appoint a Monitoring Trustee should include provisions for such an arrangement.

Need to specify an upfront buyer

11.182 In the Remedies Notice we set out that we expected that it will be necessary to require that any divestiture to a suitable purchaser be completed before the Merger is allowed to complete. A requirement for an upfront buyer would help guard against some forms of composition and purchaser risks.

Views of the Parties and third parties

11.183 The Parties do not consider that there needs to be an upfront buyer for its Proposed Remedy divestiture as the CMA's Provisional Findings find that 'passive infrastructure assets are generally considered to be attractive and highly marketable assets, and that a wide range of industry players and financial investors have a strong interest and established track record in investing in such assets'.

11.184 The Parties state that the CMA can therefore have no doubt as to the viability or attractiveness to purchasers of a package of passive infrastructure assets or that there is only a limited pool of suitable purchasers.³⁷⁴

11.185 The Parties also submitted that, notwithstanding the above, to resolve any potential concerns the CMA have as to the effectiveness of the Proposed Remedy, they are prepared to accept the CMA's requirement for an upfront buyer. Cellnex added that [REDACTED].

³⁷⁴ [Parties' response to the Remedies Notice](#)

11.186 A WIP told us that:

- (a) There is a low risk of there not being purchaser appetite for a range of packages.
- (b) The assets were unlikely to deteriorate in the short term although medium to longer-term the sites needed maintenance of the asset and careful attention to management of the customer service levels and contracts.
- (c) It was not aware of factors that would devalue the assets in the short term.
- (d) An experienced UK tower operator would be able to take a good view on package composition, although newer or smaller players may struggle to do this.

11.187 Another WIP told us that:

- (a) A divestiture to a suitable purchaser should be completed before the Merger completes, to guard against adverse effects on competition in the period between CMA conditional clearance and completion of the divestiture. It has concerns that there are risks that the competitive capability of the divestiture package could deteriorate before completion of the divestiture, in particular as the result of deliberate actions taken by Cellnex.
- (b) It notes that Cellnex has publicly announced a strategy of capacity closures (such as decommissioning of tower sites), to consolidate customers on to fewer towers and thereby increase profits.
- (c) It understands that Cellnex has built in rights to pursue this strategy into the long-term supply agreements that it will enter into with CK Hutchison / 3UK pursuant to the Merger; namely, by including in the contracts a right to decommission towers and move its tenants to a consolidated site. There is therefore a material risk that Cellnex could seek to decommission towers that are part of the divestiture package in the period before completion of the divestiture.³⁷⁵
- (d) Having an upfront buyer would guard against any risk of Cellnex seeking to divest to a purchaser that would not impose a strong competitive constraint.³⁷⁶

³⁷⁵ Company D response to notice of possible remedies

³⁷⁶ Company D response to notice of possible remedies

- 11.188 Another WIP told us that it does not think that the Parties should complete the Merger before any divestiture remedy is completed. It considers that there could otherwise be considerable scope for delay of the divestiture.
- 11.189 This WIP also told us that it considers that there is material purchaser risk. In particular, in order to remedy the SLC, a purchaser would need to acquire a significant number of sites, many times more than any WIP (other than Cellnex) currently operates. The integration of such a portfolio, while maintaining business as usual, requires certain commercial qualities, for example relevant experience and expertise, and adequate financial and personnel resources. In this WIP's view, not all WIPs possess all of these requirements and as such considers that an upfront buyer is necessary in this case to mitigate the increased purchaser risk.
- 11.190 Another WIP told us that:
- (a) Purchaser risk would probably be quite low as there appears to be quite a lot of interest in the market from various types of buyers (strategic like itself or financial investors) in this asset class;
 - (b) the risk of deterioration in the quality of a set of assets is a risk but a knowledgeable buyer, conducting thorough due diligence should be able to appraise this; and
 - (c) composition risk seems low as there are likely to be parties in the UK who would be interested in an acquisition, even at a smaller scale, to complement their existing portfolio.

Our assessment

- 11.191 We note that third parties have raised that there are risks of asset deterioration and delays to completion. Submissions from the Parties and third parties suggest that there is limited purchaser risk, though we have identified a number of potential composition risks relating to the scope of the remedy. We are also mindful of the need to put in place incentives that will ensure a timely disposal, to help mitigate asset risks.
- 11.192 While we consider that the risks associated with the Proposed Remedy are capable of being effectively managed, we consider that an upfront buyer is required in order to maintain incentives to achieve a timely disposal, to guard against an increase in the risk profile of the remedy and to maintain the potential to implement a fallback remedy of prohibition of the Merger if circumstances meant this was required.

11.193 Therefore we conclude that Cellnex should be required to achieve an effective divestiture to a suitable purchaser, to the satisfaction of the CMA, before the Merger can proceed.³⁷⁷

Provision for appointment of a Divestiture Trustee

11.194 It is the CMA's standard practice to provide for the appointment of a Divestiture Trustee to dispose of the divestiture package, if the merger parties fail to achieve an effective disposal within the Initial Divestiture Period, or if the CMA has reason to be concerned that such disposal will not achieve an effective disposal within the Initial Divestiture Period. In the present case, this would help ensure that Cellnex has a sufficient incentive to implement the Proposed Remedy promptly and effectively.

11.195 In our Remedies Notice, we invited views on whether the circumstances of this Merger necessitated the appointment of a Divestiture Trustee.³⁷⁸

Views of the Parties

11.196 The Parties told us that they do not agree that a Divestiture Trustee would be required under any circumstances. Nonetheless, to resolve any potential concerns the CMA have as to the effectiveness of the Proposed Remedy, the Parties do not object to the CMA providing for the appointment of a Divestiture Trustee.

Our assessment

11.197 As set out above, an upfront buyer would be required for the Proposed Remedy. In the event that the Proposed Remedy was agreed but failed to complete, we would prohibit the Merger.³⁷⁹ Therefore, in those circumstances there would be no need for a Divestiture Trustee.

11.198 We therefore see the upfront buyer criteria as being the primary means of driving a timely implementation of the Proposed Remedy. However, as an additional risk mitigation to ensure a timely and effective completion of a divestiture remedy, we conclude that the CMA should reserve its right to appoint a Divestiture Trustee if:

³⁷⁷ This would exclude the divestiture of any remaining Unidentified Streetworks Overlap Sites at the time of Divestment Completion. Divestiture of any remaining Unidentified Streetworks Overlap Sites would be governed by the process set out above and would be transferred to the purchaser at later dates.

³⁷⁸ [Remedies Notice](#), paragraph 39.

³⁷⁹ See next section.

- (a) Cellnex fails to complete the divestiture process within the Initial Divestiture Period;
- (b) the CMA reasonably believes that there is a risk that the divestiture process would be delayed or fail to complete within the Initial Divestiture Period;
- (c) Cellnex is not engaging constructively with the divestiture process; and/or
- (d) there is a material deterioration in the sites to be divested during the divestiture process.

11.199 In line with the CMA's normal practice,³⁸⁰ if appointed, a Divestiture Trustee should be tasked with completing the divestiture of the Proposed Remedy to a potential purchaser approved by the CMA and at no minimum price.


Other issues

Specification of a fallback remedy

11.200 To guard against the risk that the divestiture failed to complete within the Initial Divestiture Period, prohibition of the Merger will be provided for as a fallback remedy to a divestiture.

Conclusion on divestiture process

11.201 Based on the above analysis, we reached the following conclusions on the necessary characteristics of an effective divestiture process:

- (a) An Initial Divestiture Period of ;
- (b) Appointment of a Monitoring Trustee to support the CMA in overseeing the divestiture process;
- (c) A requirement for an upfront buyer, such that divestiture would need to be completed before the Merger could complete;
- (d) No requirement to appoint a Divestiture Trustee from the outset, but the CMA would reserve the right to appoint a Divestiture Trustee in certain circumstances;

³⁸⁰ [Merger remedies guidance](#), CMA87 (13 December 2018), paragraph 5.43.

- (e) A fallback remedy of prohibition of the Merger should an effective divestiture not be completed within the Initial Divestiture Period.

Conclusion on effectiveness of the Proposed Remedy

11.202 We have concluded that the Merger would result in the loss of a supplier able to offer an alternative to Cellnex at a material number of sites in the short term and, in the longer term, in a significant reduction in the aggregate number of overlaps that Cellnex has with its competitors.³⁸¹

11.203 The Proposed Remedy covers Cellnex's sites that overlap with the sites that it would acquire from CK Hutchison. We conclude that the Proposed Remedy would be an effective remedy which would comprehensively address the SLC that we identified and prevent its adverse effects.

Our conclusion on remedy effectiveness

11.204 We have found that prohibition of the Merger would be effective in remedying the SLC and adverse effects that we have found.

11.205 We have also found that the Proposed Remedy would be effective in remedying the SLC and adverse effects that we have found.

11.206 Having identified which remedies would be effective, we next consider whether there are any RCBs which should affect our decision on remedies, before considering the issue of proportionality.

Relevant customer benefits

11.207 When deciding on remedies, the CMA may have regard to the effects of remedial action on any relevant customer benefits (RCBs).³⁸²

11.208 An effective remedy to an SLC could be considered disproportionate if it prevents relevant customers from securing substantial benefits arising from the Merger, where these benefits outweigh the SLC and any resulting adverse effects. Insofar as these benefits constitute RCBs for the purposes of the Act, we may take them into account when we decide whether any remedy is appropriate.

11.209 RCBs that will be foregone due to the implementation of a particular remedy may be considered as costs of that remedy. The CMA may modify a remedy

³⁸¹ See [Provisional Findings](#), paragraph 8.106.

³⁸² [Merger remedies guidance](#), CMA87 (13 December 2018), paragraph 3.15.

to ensure retention of an RCB or it may change its remedy selection. For instance, it may decide to implement an alternative effective remedy, or it may, in rare cases, decide that no remedy is appropriate.³⁸³

Framework for assessment of RCBs

11.210 RCBs are defined as a benefit to relevant customers in the form of lower prices, higher quality, or greater choice of goods or services in any market in the UK, or greater innovation in relation to those goods or services.³⁸⁴ For these purposes, relevant customers are direct and indirect customers (including future customers) of the merger parties at any point in the chain of production and distribution – they are not limited to final consumers.

11.211 The CMA is not required to investigate RCBs and the burden of proof of whether RCBs arise from a merger is on the merging parties. Our guidance states that the ‘merger parties will be expected to provide convincing evidence regarding the nature and scale of RCBs that they claim to result from the merger and to demonstrate that these fall within the Act’s definition of such benefits’.³⁸⁵ In practice the CMA will consider whether the merger parties’ evidence is sufficient to demonstrate that the claimed benefit could not be achieved by plausible less anti-competitive alternatives to the merger.

11.212 As set out in our guidelines, RCBs are benefits to UK customers resulting from a merger, other than through improved competition in the market related to the SLC finding—for example, greater levels of innovation resulting from the combination of unique assets of the merger firms applying to products other than those where the firms compete.³⁸⁶

11.213 As shown in previous cases in which the CMA has considered RCBs, in exercising its discretion to decide whether the claimed RCBs are such as to outweigh the SLC concerned and any adverse effects of the SLC, the CMA has regard both to the magnitude of the benefits and the probability of them occurring and sets this against the scale of the identified anti-competitive effects of the merger and the probability of them occurring.³⁸⁷

11.214 In order to constitute an RCB, a benefit must be expected to accrue to relevant customers in the UK within a reasonable period as a result of the

³⁸³ [Merger remedies guidance](#), CMA87 (13 December 2018), paragraph 3.16.

³⁸⁴ Section 30(1) of the Act.

³⁸⁵ [Merger remedies guidance](#), CMA87 (13 December 2018), paragraph 3.20.

³⁸⁶ [Merger Assessment Guidelines](#) (18 March 2021), CMA129, paragraph 8.3(b).

³⁸⁷ [Anticipated merger between Derby Teaching Hospitals NHS Foundation Trust and Burton Hospitals NHS Foundation Trust](#), Phase 1 Decision, 15 March 2018, paragraph 177.

creation of the relevant merger situation. It must also be unlikely to accrue without the creation of that situation or a similar lessening of competition.³⁸⁸

11.215 When assessing the merger parties' evidence on the claimed benefits, the CMA must therefore consider whether:

- (a) Each claimed benefit may be expected to accrue as a result of the merger; and
- (b) whether that benefit is unlikely to accrue without the merger or a similar lessening of competition.

Parties' and third parties' views on RCBs

11.216 The Parties submitted that the Merger gives rise to RCBs that would be lost by its prohibition:

- (a) If the Merger is prohibited, [REDACTED].³⁸⁹ CK Hutchison stated that [REDACTED] [REDACTED].
- (b) 3UK is the smallest of the four MNOs in the UK and faces considerable challenges. [REDACTED].³⁹⁰ A strong 5G offering can be the turning point for 3UK and can only be realised if significant investment of approximately £[REDACTED] is made rapidly to upgrade 3UK's radio network for 5G. 3UK's investment plans are predicated on the basis that the Merger will proceed. [REDACTED].³⁹¹

11.217 The Parties submitted that:

- (a) The CMA has ignored evidence in relation to CK Hutchison's financial and investment policies, which demonstrate that regardless of CK Hutchison's size, [REDACTED].
- (b) CK Hutchison [REDACTED]. [REDACTED].

11.218 According to the Parties, the Merger will give rise to significant customer benefits that meet the RCB criteria within the scope of the Enterprise Act and the CMA's guidance on the basis that they:

- (a) Will arise in the form of improved quality and greater innovation for consumer and business mobile customers, which is supported by evidence CK Hutchison has submitted;

³⁸⁸ Section 30(3) of the Act.

³⁸⁹ [Parties' response to the Remedies Notice](#)

³⁹⁰ [Parties' response to the Remedies Notice](#)

³⁹¹ [Parties' response to the Remedies Notice](#)

- (b) will accrue shortly after completion of the Merger, in accordance with 3UK's [REDACTED] plans for 5G investment. The plans set out [REDACTED] investments predicated on completion of the Merger with the full Streetworks Sites programme to be completed by [REDACTED] if the Merger completes, which the Parties submit is within a reasonable period from the creation of the relevant merger situation;
- (c) would not accrue without the creation of the relevant merger situation (i.e. the RCBs are merger-specific) since [REDACTED] the Merger will complete and CK Hutchison has provided evidence in the form of [REDACTED].
- (d) CK Hutchison further submitted that:
 - (i) The claimed benefits could not be achieved by plausible less anti-competitive alternatives to the Merger since [REDACTED].³⁹²
 - (ii) The submissions that the CMA has received from WIPs in relation to CK Hutchison being able to fund 3UK's 5G roll-out from other sources are incorrect, unfounded and plainly self-serving.

11.219 CK Hutchison provided us with information to support its position on these points, this included excerpts from various documents, including [REDACTED]. We considered this information in our assessment of whether there are RCBs in this case.

11.220 CK Hutchison also told us that while the Merger gives rise to RCBs that would be lost by its prohibition, the alleged RCBs would continue to materialise if the Merger were to be approved subject to the Proposed Remedy and that it would bear no significant costs if the Proposed Remedy is accepted.

11.221 A WIP submitted to us in its response to the Parties' Proposed Remedy, that the Parties' suggestions that the RCBs were merger-specific and could not be achieved by less anti-competitive alternatives to the Merger, are not credible given that CK Hutchison has in excess of £17 billion cash and liquid assets on its balance sheet and, in 2020, generated profits over £2.5 billion; and that it could have sold the assets to an acquirer that did not raise competition concerns.

³⁹² Parties' response to the Remedies Notice

Our assessment of RCBs

- 11.222 We have considered the Parties' submissions on RCBs although, as noted below, RCBs do not have a determinative impact in this case.
- 11.223 For the reasons set out below, we do not consider that the submissions we have received are sufficient to meet the criteria for RCBs to be accepted in this case. In particular, we note the requirement for convincing evidence that the claimed level of additional investment in 3UK's 5G roll-out is merger-specific.³⁹³
- 11.224 In this regard, we do not consider that CK Hutchison has established that it would be [REDACTED] without the Merger or that the [REDACTED]. Rather, CK Hutchison's submissions have indicated that it has financial and investment policies whereby, [REDACTED]. [REDACTED], [REDACTED].
- 11.225 We consider that CK Hutchison has some discretion to alter its investment policies and strategies. We do not accept that a firm's discretionary internal policies and decisions about its strategic approach to growth (or the fact that the firm may have [REDACTED] of an anti-competitive merger) can require the CMA to conclude that no other sources of funding are available to it to fund a capital expenditure programme.
- 11.226 In this context, we note that prohibition of the Merger [REDACTED]. However, as noted, this appears from the evidence available, to be predicated on CK Hutchison's current investment policies and commercial strategies.
- 11.227 CK Hutchison has not provided convincing evidence to demonstrate why, as a large multinational company, it would be unable, other than through adherence to these policies and strategies, to find alternative sources of revenue to fund a strategically important investment which has a positive business case.
- 11.228 We also note that CK Hutchison has already made investments in 3UK's 5G roll-out. For example, as set out in Table 11.3 above, as at 4 February 2022, [REDACTED] of the 2,600 Streetworks sites had gained planning approval, with these sites being at various stages of development, with [REDACTED] being categorised as 'live/connected'. Therefore, any customer benefits that could be expected to arise from investments in these sites made to date can be expected to be realised if the Merger were to be prohibited.

³⁹³ [Merger remedies guidance](#) CMA87, paragraph 3.19-20.

- 11.229 Given that CK Hutchison has not established that there are no alternative means by which it might have funded future additional investments in 3UK, any benefits that might flow to customers from such additional investment are unlikely to be merger specific.
- 11.230 We also considered the quality of evidence provided in relation to the nature and scale of the proposed benefits. We accept that the roll-out of 5G across the UK by MNOs will bring benefits to consumers and businesses within the UK, although we consider that it is difficult to quantify these benefits or to attribute them to specific types of investments. CK Hutchison provided some evidence to support its submissions that its own [redacted] investment could lead to improved quality and greater innovation for UK mobile customers. However, the nature of this evidence falls below what we would generally consider to be ‘convincing evidence of the nature and scale’ required for consideration as RCBs. For example, there is little supporting evidence to demonstrate how additional investments in 5G by one MNO relate to an increase in quality and innovation for UK mobile customers in general or why these benefits are necessarily contingent on [redacted].
- 11.231 Little evidence has been provided to demonstrate whether and to what extent [redacted] would have a detrimental impact on UK customers so as to allow for a comparison with the adverse effects of the SLC we have identified. In particular, CK Hutchison has not provided evidence of what purposes its proposed capital expenditure, which it claims depends on the Merger, would be applied to. Without this it is not possible to assess the extent of any benefit that might be associated with it. This stands in contrast to previous cases in which the CMA has exercised its discretion to accept RCBs, for which the type of evidence accepted included implementation plans, reviewed and monitored by the applicable sector regulator, detailing specifically the benefits arising from the merger to offset the anti-competitive effects of the merger.³⁹⁴

Our conclusion on RCBs

- 11.232 Given our view that CK Hutchison has not substantiated that there are no alternative means by which it could fund future investment in 3UK if it wished to do so, we consider that any benefits that might flow to customers from such investments are unlikely to be merger-specific. In addition, we do not consider that the Parties have provided convincing evidence of the nature

³⁹⁴ [Central Manchester University Hospitals / University Hospital of South Manchester \(2017\)](#); [Derby Teaching Hospitals NHS Foundation Trust / Burton Hospitals NHS Foundation Trust \(2018\)](#).

and scale of the claimed RCBs to satisfy the standard set out in the Act and in our guidance.

11.233 We note that the Parties have told us that the claimed RCBs would be lost if the Merger were to be prohibited, but they would materialise if the Merger were to be approved subject to the Proposed Remedy and that CK Hutchison would not bear significant costs if the Proposed Remedy is accepted.

11.234 Given this, and our conclusion set out below that the Proposed Remedy is a more proportionate solution to the SLC than prohibition, our view on RCBs does not have a determinative impact.

The proportionality of effective remedies

Our framework for assessment

11.235 In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, that it considers will be effective. If the CMA is choosing between two remedies which it considers will be equally effective, it will select the remedy that imposes the least cost or that is least restrictive (we call this the ‘least onerous effective remedy’). In addition, the CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.³⁹⁵

11.236 To achieve this, we first consider whether there are any relevant costs associated with each effective remedy option. When considering relevant costs, the CMA's considerations may include (but are not limited to):

- (a) distortions in market outcomes;
- (b) compliance and monitoring costs incurred by the Parties, third parties, or the CMA; and
- (c) the loss of any RCBs that may arise from the Merger which are foregone as a result of the remedy.³⁹⁶

11.237 Our guidance states that ‘[as] the merger parties have the choice of whether or not to proceed with the merger, the CMA will generally attribute less significance to the costs of a remedy that will be incurred by the merger parties than the costs that will be imposed by a remedy on third parties’.³⁹⁷

³⁹⁵ [Merger remedies guidance](#), CMA87 (13 December 2018), paragraph 3.6.

³⁹⁶ [Merger remedies guidance](#), CMA87 (13 December 2018), paragraph 3.10.

³⁹⁷ [Merger remedies guidance](#), CMA87 (13 December 2018), paragraph 3.8.

11.238 Having identified the least onerous effective remedy, we then consider whether this remedy would be disproportionate to the SLC and its resulting adverse effects. In doing so, we compare the extent of harm associated with the SLC with the relevant costs of the remedy.³⁹⁸

Views of the Parties

11.239 The Parties submitted that the Provisional Findings accepted 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). As a result, the scale of the SLC (if any) is similarly likely to be limited. On this basis, they submitted that a remedy which prohibits the Merger in its entirety would be disproportionate to address the SLC identified, given its limited scale. Indeed, any lessening of competition, even on the case put forward in the Provisional Findings, is minor. The Parties submitted that prohibiting the Merger would be unduly intrusive.³⁹⁹

11.240 The Parties stated that the Provisional Findings accept that the most significant structural change in the market will take place when Cellnex gains control of the Transfer Sites in 2031 and so the Parties considered that the lessening of competition identified by the CMA will, for the most part, arise in 2031. The Parties, therefore, consider that it is disproportionate to prohibit the Merger now given the SLC will only take effect in nearly a decade.⁴⁰⁰

11.241 The Parties stated that the Provisional Findings acknowledge that CTIL is likely to compete strongly to attract large customers (in particular for large contracts) to its extensive portfolio of existing sites and its BTS solutions. This is a fundamental change in the market structure which will result in a substantial competitive constraint on Cellnex. The Parties, therefore, told us that it would be disproportionate for the CMA to ignore this change and prohibit the Merger.⁴⁰¹

11.242 The Parties told us that the Merger gives rise to RCBs and that prohibition of the Merger would prevent these from being realised. They stated that a remedy which fails to realise the significant customer benefits associated with the Merger would be disproportionate.⁴⁰²

³⁹⁸ [Merger remedies guidance](#), CMA87 (13 December 2018), paragraph 3.6.

³⁹⁹ [Parties' response to the Remedies Notice](#)

⁴⁰⁰ [Parties' response to the Remedies Notice](#)

⁴⁰¹ [Parties' response to the Remedies Notice](#)

⁴⁰² [Parties' response to the Remedies Notice](#)

11.243 The Parties submitted that the Proposed Remedy is more proportionate than prohibition.⁴⁰³

Our assessment

11.244 In our assessment of proportionality, we first identified those remedies that are likely to be effective and then selected the least onerous effective remedy. We then considered whether this remedy was disproportionate to the SLC and its adverse effects.

Identification of the least onerous effective remedy

11.245 We identified the following remedies as being effective solutions to the SLC and adverse effects that we have found:

- (a) Prohibition; and
- (b) the Proposed Remedy.

11.246 Of these, the Proposed Remedy would be less onerous as it would allow the Merger to proceed. It is therefore a more proportionate solution.

Is the remedy disproportionate to the SLC and / or adverse effects?

11.247 We considered whether the Proposed Remedy would be disproportionate to the SLC and its adverse effects.

11.248 We have found that the Merger may be expected to result in an SLC, arising from overlaps between the Parties, in the supply of access to developed macro sites and ancillary services to MNOs and other wireless communication providers in the UK. Failure to achieve an effective solution to the SLC is likely to result in less competition and worse outcomes in an important market for UK customers.

11.249 The Parties submitted that the SLC will largely arise in 2031 when Cellnex gains control of the Transfer Sites. However, we consider that the CMA has jurisdiction to review the Merger now and our duty is to achieve a comprehensive solution to all aspects of the SLC. We therefore do not consider it disproportionate to seek to ensure that our remedy is effective throughout its duration including after 2031.

⁴⁰³ [Parties' response to the Remedies Notice](#)

11.250 The Parties have submitted that there are RCBs that would be lost as a result of prohibition, but that these RCBs would be realised if their Proposed Remedy were to be accepted. We have not identified any RCBs or other relevant costs, such as market distortions, associated with the Proposed Remedy. In addition, implementation of the Proposed Remedy would not incur material ongoing compliance or monitoring costs.

11.251 We therefore consider that the Proposed Remedy would not be a disproportionate response to the SLC we have found and its resulting adverse effects.

Conclusion on proportionality

11.252 We conclude that the Proposed Remedy is an effective and proportionate remedy to the SLC and its adverse effects.

Remedy decision

11.253 We conclude that the Proposed Remedy is an effective and proportionate remedy to address the SLC we have identified and its adverse effects. It is our preferred remedy.

Remedy implementation

11.254 Having identified our preferred remedy, we now consider how it should be implemented.

11.255 The CMA has the choice of implementing any final remedy decision either by accepting final undertakings pursuant to section 82 of the Act if the Parties wish to offer them, or by making a final order under section 84 of the Act. Either the final undertakings or the final order must be implemented within 12 weeks of publication of our final report (this time period may be extended once by up to six weeks under exceptional circumstances),⁴⁰⁴ including the period for any formal public consultation on the draft undertakings or order.⁴⁰⁵

11.256 We expect to implement the Proposed Remedy by seeking suitable final undertakings from the Parties. As indicated above, the CMA has the power to issue a final order if unable to obtain satisfactory undertakings.

⁴⁰⁴ [Section 82](#) (final undertakings) and [Section 84](#) (final order) of the Act.

⁴⁰⁵ As specified in [Schedule 10](#) of the Act.