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QUICK LINKS

CMA conditionally clears Cellnex/CK Hutchison merger with divestments

On 3 March 2022 the Competition and Markets Authority (CMA) announced it has conditionally cleared the anticipated acquisition of the UK passive infrastructure assets of CK Hutchison Networks Europe Investments S.À R.L by Cellnex UK Limited, subject to the divestment of over 1,000 sites.

BACKGROUND

Passive infrastructure assets consist of sites containing structures, such as towers and masts, to which mobile network operators (MNOs) and other wireless communication network providers attach electronic equipment so as to operate their networks. MNOs obtain access to passive infrastructure from three key sources: (i) sites leased or owned and operated by the MNO itself; (ii) sites that are leased or owned and operated by the MNO in a joint venture (JV); and (iii) sites supplied by third parties.

Cellnex falls into limb (iii), being an owner/operator of sites containing passive infrastructure in the UK. It owns and operates sites used by mobile communication providers including the UK's four MNOs. CK Hutchison is a multinational conglomerate headquartered in Hong Kong which operates an MNO - 3UK - in the UK. 3UK has an infrastructure-sharing JV with BT/EE - Mobile Broadband Network Limited, or MBNL - which operates macro sites. 3UK also owns passive infrastructure assets outside of the JV.

In November 2020 Cellnex and CK Hutchison agreed a series of six proposed transactions - worth a total of €10 billion - pursuant to which Cellnex would acquire passive infrastructure assets from CK Hutchison across the UK, Italy, Ireland, Austria, Sweden and Denmark. As part of the UK acquisition, Cellnex would procure the economic benefit of 3UK's interests in respect of macro sites in MBNL, as well as the passive infrastructure assets owned by 3UK outside the JV.

Whilst the non-UK transactions have completed, the CMA launched a Phase 1 investigation into the UK deal on 17 May 2021 and a Phase 2 investigation on 27 July 2021.

PHASE 2 FINDINGS

In keeping with its provisional findings published in December 2021, the CMA concluded in its final report on 3 March 2022 that the proposed transaction raised significant competition concerns.

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COUNTERFACTUAL

In establishing the counterfactual, the CMA considered the full set of strategic options available to CK Hutchison at the time it agreed the overall commercial deal with Cellnex.

The CMA's view was that CK Hutchison had a strong incentive to commercialise its passive infrastructure assets. Absent the proposed transaction, the CMA considered that the most likely outcome was a sale of CK Hutchison's UK assets to an alternative purchaser with the incentive to operate them in direct competition with Cellnex's passive infrastructure assets. The CMA also considered that other options could have been pursued in the absence of a sale that, if successfully implemented, would also have resulted in CK Hutchison's passive infrastructure assets being operated in competition with Cellnex.

Overall, the CMA established that the most likely counterfactual was one in which there would have been stronger conditions of competition between Cellnex and the owner of CK Hutchison's UK assets.

COMPETITIVE ASSESSMENT

The CMA assessed the proposed transaction's impact on competition in light of the counterfactual outlined above. It found that, in the counterfactual, the owner of CK Hutchison's UK assets would be the third largest operator in the market, with an extensive portfolio of sites and a considerable geographic footprint. These sites would amount to a significant proportion of sites capable of being a substitute for Cellnex sites, with such overlap sites potentially amounting to significant competitive constraints on the price of sites generally. The merger would therefore result in the loss of a significant competitive constraint on Cellnex.

In assessing competition from alternative suppliers the CMA found that, while Cornerstone Telecommunications Infrastructure Limited, or CTIL (a JV between Vodafone and O2) would become an increasingly significant constraint on the merged entity in future, the constraint from smaller portfolios in the market was unlikely to increase significantly in the future.

The CMA also noted that there was unlikely to be any entry and/or expansion by third parties in response to the transaction that would be timely or sufficient in scale to mitigate or prevent any lessening of competition arising from the merger.

The CMA concluded that the transaction may be expected to result in a significant lessening of competition resulting from horizontal unilateral effects. The CMA expressed concern that, while the consequences may not be immediately visible to MNOs and consumers, even small increases in the costs of passive infrastructure or a deterioration in quality of service would likely persist over many years, with the cumulative effect being potentially significant.

REMEDIES

In order to remedy these concerns, Cellnex proposed the divestment of all of its sites which geographically overlap with the CK Hutchison assets it has agreed to purchase (offering to divest over 1,000 sites in total). These sites will be sold as a package to a purchaser approved by the CMA. The CMA concluded that this divestment is an effective and proportionate means to address the substantial lessening of competition and the resulting adverse effects of the transaction.

OTHER DEVELOPMENTS

ANTITRUST

CMA PUBLISHES DECISION TO ACCEPT COMMITMENTS IN ELECTRIC VEHICLE CHARGEPOINTS CASE

Following the CMA's launch of an investigation on 23 July 2021 into suspected breaches of competition law relating to long-term exclusivity in the supply of electric vehicle chargepoints on or near motorways, the CMA has secured legally-binding commitments from Gridserve, owner of The Electric Highway - a major chargepoint operator in Great Britain.

The investigation focussed on exclusivity rights Gridserve agreed with various motorway services around the UK, including Extra, MOTO and Roadchef, which together span two-thirds of motorway services in the UK. The CMA was concerned that the exclusivity rights formed a barrier to entry to the market for, and disincentivised opportunities to invest in, chargepoints. To address these concerns, Gridserve has now agreed not to enforce exclusive rights in contracts with these three motorway services after November 2026, reducing the initial agreed period of exclusivity with MOTO by around 2 years and with Roadchef by around 4 years (though leaving the arrangement with Extra unaffected as this is due to end in 2026). Gridserve also agreed not to enforce exclusivity rights at any of these motorway services' sites which are granted funding under the UK government's Rapid Charging Fund - a fund which will launch in 2023 and future-proof grid capacity through a one-off investment at motorway service areas, amongst other things. Competitor chargepoint operators will therefore be allowed to install chargepoints at those locations regardless of the Gridserve exclusivity agreements.

This action by the CMA follows its market study, published on the same day as the start of the Gridserve investigation, which revealed concerns that chargepoint rollout in some areas of the UK was "*too slow*" given the UK government's planned ban on sales of new petrol and diesel cars by 2030 and forecasts suggesting ten times the number of chargepoints were needed by this year.

Ann Pope, the CMA's Senior Director of Antitrust, commented *"Today's commitments strike the right balance. Gridserve will continue to invest in the much-needed roll-out of chargepoints across the country but the exclusivity linked to its investment won't be an undue barrier to others competing in the near future*".

HKCC ANNOUNCES INVESTIGATION INTO CAR WARRANTY TERMS

On 3 March 2022 the Hong Kong Competition Commission (HKCC) announced it was investigating agreements between certain car manufacturers and their respective importers, distributors and authorised dealers in Hong Kong. The HKCC is investigating whether the agreements impose restrictive warranty terms on car owners, tying the warranty to cars being repaired only at authorised repair centres. The HKCC is considering whether such terms may mean car owners are less likely to use independent repair centres during their warranty period, meaning such independent repair centres are less able to compete. The HKCC is concerned this ultimately reduces choice for car owners meaning they pay higher prices for repairs to their vehicles.

This area has been considered by a number of other competition regulators, including the Competition Commission of Singapore, which launched an inquiry into car warranty terms in 2017, the Malaysia Competition Commission, which opened a public consultation on motor vehicle warranties in 2021, and the European Commission, in the Supplementary Guidelines to the Motor Vehicle Block Exemption.

The HKCC has requested views of car owners, independent car repair workshops, and other interested parties.

GENERAL COMPETITION

DG COMP RELEASES 2022 MANAGEMENT PLAN

On 7 March 2022 the European Commission released its 2022 management plan, headlining the need to protect the EU Single Market and also build competition values in order to aid recovery from the pandemic and achieve a resilient, green and more digital EU economy. The planned outputs will help achieve the three General Objectives set by President von der Leyen: a 'European Green Deal', a 'Europe fit for the digital age' and 'an economy that works for people'. A focus on the amendment of current legislation and regulation, engagement with market stakeholders and continued investigation into possible breaches of antitrust are key ways the Commission aims to implement its plan.

To pursue its goal of strengthening competition enforcement in support of a Europe fit for the digital age, the Commission will continue to expand its *ex-officio* strategy to continue cartel and antitrust enforcement in all sectors, including digital ones. The Commission will also further develop digital investigation methodologies to detect and prosecute competition infringements and strengthen its cooperation with other national non-competition enforcers, like police forces and prosecutors investigating economic and financial matters.

Also according to the plan, the European Parliament and the Council are expected to adopt the Digital Markets Act later this year. This will entail the need to set up digital solutions to support notifications and case handling as well as a case registry. Further, the Commission will continue to support the negotiations on the Commission proposal for a Foreign Subsidies Regulation in the Council and in Parliament. In parallel, the Commission will prepare the implementation of this regulation, in particular by preparing guidance documents on specific elements of it.

The Commission also said it will continue its focus on the energy sector and environmental issues. In light of the recent increase in energy prices, DG Competition will continue to closely monitor related developments in the EU gas and Emissions Trading System markets to identify and address possible breaches of the EU competition rules. In the environment sector, the Commission announced that it will focus on ensuring effective competition in circular economy industries to help improve the reuse, recovery and recycling of resources for a more sustainable economy.

In relation to merger control, the Commission will continue engaging in discussions with stakeholders and the national competition authorities on the best use of Article 22, following the publication of its guidance on the application of Article 22 of the EUMR to certain categories of cases in March last year.

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