

Determination of Merger Notification

M/24/018 - Phoenix/Cellnex

6 February 2025



Coimisiún um
Iomaíocht agus
Cosaint Tomhaltóirí

Competition and
Consumer Protection
Commission

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1. INTRODUCTION

Introduction

1.1 On 21 March 2024, in accordance with section 18(1)(a) of the Competition Act 2002, as amended (the “Act”), the Competition and Consumer Protection Commission (the “Commission”) received a merger notification form (the “Merger Notification Form”) concerning a proposed acquisition whereby Phoenix Tower International Holdco, LLC (“Phoenix”),¹ through its indirectly wholly owned subsidiary, JorMadheary Holdco 39 Limited,² would acquire the entire issued share capital, and thus sole control, of Cellnex Ireland Limited (“CIL”)³ and Cignal Infrastructure Limited (“Cignal”)⁴ (together “Cellnex”) (the “Proposed Transaction”). CIL and Cignal are both wholly owned subsidiaries of Cellnex Telecom S.A. (“Cellnex Telecom”).⁵ Phoenix and Cellnex are the parties to the Proposed Transaction (the “Parties”).

The Proposed Transaction

1.2 The Proposed Transaction is to be implemented by way of a share purchase agreement dated 5 March 2024 (the “SPA”). Pursuant to the SPA, Phoenix, through JorMadheary Holdco 39 Limited,⁶ will acquire the entire issued share capital, and sole control, of Cellnex.

The Undertakings Involved

The Acquirer – Phoenix

¹ Phoenix is registered in Delaware, United States of America.

² JorMadheary Holdco 39 Limited is incorporated in the State under registered number 753316. On 4 November 2024, the Commission was informed that, prior to completion, the acquisition entity for the Proposed Transaction will be Phoenix Tower Ireland Limited, a wholly owned subsidiary of Phoenix, but that this change to the acquisition entity does not in any way affect the jurisdictional or substantive position of the Proposed Transaction. Phoenix Tower Ireland Limited is incorporated in the State under registered number 669292.

³ CIL is incorporated in the State under registered number 676741.

⁴ Cignal is incorporated in the State under registered number 562020.

⁵ Cellnex Telecom is registered in Barcelona, Spain.

⁶ As described above, on 4 November 2024, the Commission was informed that, prior to completion, the acquisition entity for the Proposed Transaction will be Phoenix Tower Ireland Limited instead of JorMadheary Holdco 39 Limited. Phoenix Tower Ireland Limited is a wholly owned subsidiary of Phoenix. This change to the acquisition entity does not in any way affect the jurisdictional or substantive position of the Proposed Transaction.

- 1.3 Phoenix is a subsidiary of Phoenix Tower US Holdings L.P.,⁷ which is the holding company for the Phoenix Tower International group.
- 1.4 The Phoenix Tower International group is a privately-owned wireless infrastructure group of companies, which currently owns a portfolio of approximately 25,000 wireless infrastructure sites operating across Latin America, the Caribbean, Europe, and the United States. As of 27 March 2024, following an acquisition of a minority interest in Phoenix Tower US Holdings L.P. by Grain Management LLC and BlackRock Alternatives Management LLC, Phoenix is jointly controlled by Grain Management LLC (“Grain”) and funds and/or investment vehicles managed by and/or advised by affiliates of Blackstone Inc.⁸ (“Blackstone”).⁹
- 1.5 Phoenix entered the Irish passive infrastructure sector in 2020, following its acquisition of Emerald Tower Limited (“Emerald”),¹⁰ which owned the passive infrastructure portfolio of Eircom Limited¹¹ (trading as *eir*) (“eir”).¹² At the date of notification of the Proposed Transaction, Phoenix’s portfolio consisted of [REDACTED] macro passive network infrastructure sites located across the State.¹³ In the Merger Notification Form, the Parties submitted that Phoenix’s portfolio also comprised [REDACTED] micro passive network infrastructure sites.¹⁴ However, as explained in paragraph 3.12 below, this number had resulted from an internal mis-categorisation of sites and Phoenix’s portfolio did not comprise any micro passive

⁷ Phoenix Tower US Holdings L.P., is registered in Delaware, United States of America.

⁸ Blackstone is registered in Delaware, United States of America.

⁹ This explanation of the ownership structure of Phoenix was provided to the Commission in a document entitled ‘M 24 18 – Confidentiality Submissions.pdf’, which was an attachment to an email from Phoenix to the Commission dated 9 August 2024.

¹⁰ Emerald is incorporated in the State under registered number 669209.

¹¹ The acquisition by Phoenix of sole control of Emerald Tower Limited was cleared by the CCPC in its determination in M/20/018 – Phoenix Tower/Emerald (eir), available at: <https://www.ccpc.ie/business/mergers-acquisitions/merger-notifications/m-20-018-phoenix-tower-emerald-eir/>.

¹² eir is incorporated in the State under the registered number 98789.

¹³ A macro passive network infrastructure site is a site that hosts high power macrocells. Macrocells are used in cellular networks with the function of providing radio coverage to a large area. Macro passive network infrastructure sites are generally located on towers and rooftops.

¹⁴ A micro passive network infrastructure site is a site that hosts lower power microcells and fills in coverage in gaps left between macrocells or provides additional capacity in high usage areas (such as urban locations).

network infrastructure sites at the date of notification.¹⁵ However, since then, Phoenix has received planning permission to build [REDACTED] micro passive network infrastructure sites.

1.6 In addition to hosting eir's active network equipment¹⁶ [REDACTED]
[REDACTED]
[REDACTED], Phoenix's main customers include [REDACTED]
other mobile network operators ("MNOs") active in the State,¹⁷ namely Vodafone Ireland Limited ("Vodafone"),¹⁸ and Three Ireland (Hutchinson) Limited (trading as 3) ("Three"),¹⁹ and fixed wireless access ("FWA") operators.²⁰

1.7 For the financial year ending 31 December 2022, the total worldwide consolidated turnover of Phoenix was approximately €[REDACTED] million, of which approximately €[REDACTED] million was generated in the State.²¹

Blackstone

1.8 Blackstone is a global asset manager headquartered in the United States with offices in Europe and Asia, which operates as an investment management firm. Each Blackstone-controlled portfolio company has its own board of directors, which generally includes Blackstone representatives. Each company in Blackstone's investment portfolio is independently managed and financed and has different investors (although the investors in different Blackstone funds may overlap).²²

¹⁵ The Commission uses the terms 'macro passive network infrastructure sites' and 'macro sites' interchangeably, as synonyms, throughout this Determination. Similarly, the Commission uses the terms 'micro passive network infrastructure sites' and 'micro sites' interchangeably, as synonyms, throughout this Determination.

¹⁶ Active network equipment means radio antennas and other similar equipment, which is used by MNOs to transmit or relay communications signals. Active network equipment is deployed on passive infrastructure such as towers, rooftop sites and poles.

¹⁷ MNOs are telecommunications service providers that provide wireless voice and data communication for their subscribed mobile users.

¹⁸ Vodafone is incorporated in the State under registered number 326967.

¹⁹ Three is incorporated in the State under registered number 316982.

²⁰ The Commission uses the terms 'FWA operators' and 'FWA providers' interchangeably, as synonyms, throughout this Determination.

²¹ Merger Notification Form, page 10, paragraph 33.

²² Merger Notification Form, page 1, paragraph 5.

Grain

- 1.9 Grain is a private equity firm focused on investments in the communication sector, headquartered in Washington, D.C. in the United States, and with offices in New York, Sarasota and London. Grain has significant investments in the United States, Canada and Europe. Neither Grain nor any of the portfolio companies controlled by Grain is active in the provision of hosting services on macro passive network infrastructure sites in the State.²³

The Target – Cellnex

- 1.10 Cellnex, which consists of CIL and Cignal, is ultimately owned by Cellnex Telecom.
- 1.11 Cellnex Telecom entered the Irish passive infrastructure market in 2019, following its acquisition of Cignal from InfraVia Capital Partners.²⁴ Cignal was originally established in 2015 when Coillte Cuideachta Ghníomhaíochta Ainmnithe sold a portfolio of roughly [REDACTED] macro passive sites to InfraVia Capital Partners.²⁵
- 1.12 In 2021, Cellnex Telecom completed the acquisition of an additional 1,150 macro passive network infrastructure sites in the State from CK Hutchison Networks (Ireland) Limited,²⁶ as part of a major international transaction covering multiple jurisdictions, including Ireland.
- 1.13 At the date of notification, Cellnex owned and operated a portfolio of [REDACTED] macro passive network infrastructure sites and [REDACTED] real estate-only sites in the State. Cellnex's primary customers in the State include [REDACTED] MNOs and FWA operators.
- 1.14 In addition to [REDACTED]
[REDACTED]
[REDACTED]

²³ Merger Notification Form, page 8, footnote 6.

²⁴ InfraVia Capital Partners is a French *société par actions simplifiée* registered with the Paris *Registre du Commerce et des Sociétés* under registered number 502 203 953.

²⁵ Coillte Cuideachta Ghníomhaíochta Ainmnithe is incorporated in the State under registered number 138108.

²⁶ CK Hutchison Networks (Ireland) Limited, which is now On Tower Ireland Limited, is registered in the State under registered number 667282.

Three's passive infrastructure sites [REDACTED]

Cellnex has commercial agreements with [REDACTED] other MNOs active in the State, namely Vodafone and eir, and FWA operators.

- 1.15 For the financial year ending 31 December 2023, the total worldwide consolidated turnover of Cellnex was approximately €[REDACTED] million, the vast majority of which was generated in the State.²⁷

Rationale for the Proposed Transaction

- 1.16 The Parties stated the following in the Merger Notification Form in relation to the rationale for the Proposed Transaction:

"The Proposed Transaction" [REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED] "28

"From Cellnex's perspective, the Proposed [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 29

Preliminary Investigation (“Phase 1”)

Contact with the undertakings involved

- 1.17 On 1 May 2024, pursuant to section 20(2) of the Act, the Commission served a requirement for further information on each of Phoenix (the “Phoenix Phase 1 RFI”) and Cellnex Telecom (the “Cellnex Phase 1 RFI”) (together, the “Phase 1 RFIs”). The service of the Phase 1 RFIs adjusted the deadline within which the

²⁷ Merger Notification Form, page 10, paragraph 34.

²⁸ Merger Notification Form, page 2, paragraph 8.

²⁹ Merger Notification form, page 2, paragraph 9.

Commission had to conclude its assessment of the Proposed Transaction in Phase 1.

- 1.18 Phoenix provided a full response to the Phoenix Phase 1 RFI on 12 June 2024 (the “Phoenix Phase 1 RFI Response”).
- 1.19 Cellnex Telecom provided a full response to the Cellnex Phase 1 RFI on 17 June 2024 (the “Cellnex Phase 1 RFI Response”).
- 1.20 Upon receipt of a full response to each of the Phase 1 RFIs issued to each of Phoenix and Cellnex Telecom, the “*appropriate date*” (as defined in section 19(6)(b)(i) of the Act) became 17 June 2024.³⁰
- 1.21 During the Phase 1 investigation, the Commission requested and received further information and clarifications from the Parties.
- 1.22 On 16 July 2024, the Commission’s case team made a site visit to two of Phoenix’s macro passive network infrastructure sites. In advance of this site visit, on 12 July 2024, Phoenix submitted an “Economic assessment” of the Proposed Transaction (the “RBB Report”), prepared by RBB Economics (“RBB”).

Third party submissions

- 1.23 Two third party submissions were received during the Commission’s Phase 1 investigation. One submission was made by a competitor of the Parties in the State,³¹ and the other was made by a stakeholder in the macro passive network infrastructure industry that wished to keep its identity anonymous (“Third Party 1”). These submissions have been fully considered by the Commission insofar as they related to the potential effects of the Proposed Transaction on competition in markets for goods or services in the State.

Market enquiries

³⁰ The “appropriate date” is the date from which the time limits for making both Phase 1 and Phase 2 determinations begin to run.

³¹ Hibernian Cellular Networks Limited (“Hibernian Towers”) is incorporated in the State under registered number 404503.

1.24 The Commission also conducted market enquiries during the Phase 1 investigation and engaged with third parties in relation to its assessment of the competitive effects of the Proposed Transaction. This engagement included carrying out calls with third parties. Among the third parties contacted by the Commission were those third parties that made submissions, and several other stakeholders including:

- (i) State and international agencies;³²
- (ii) MNOs;³³
- (iii) non-MNO customers of the Parties;³⁴ and
- (iv) other providers of macro passive network infrastructure sites, also referred to as wireless infrastructure providers (“WIPs”) (i.e., competitors of the Parties).³⁵

1.25 During the Phase 1 investigation, the Commission contacted two State agencies and the European Commission in relation to the Proposed Transaction and received responses from all three. The Commission contacted the three MNOs operating in the State and two non-MNO customers of the Parties and received responses from all three MNOs and one non-MNO customer. The Commission contacted four WIPs with activities in the State, and all of these responded.

The Phase 1 Determination

1.26 Having considered all the available information in its possession at the time, the Commission was unable to form the view, at the conclusion of its Phase 1

³² The European Commission’s Directorate-General for Competition (“DG COMP”), the Office of Public Works (the “OPW”), and the Commission for Communications Regulation (“ComReg”).

³³ Vodafone, Three, and eir.

³⁴ [REDACTED] an FWA Operator, and [REDACTED]

³⁵ Vantage Towers Limited, Towercom Limited, Hibernian Towers, ESB Telecoms Limited.

investigation, that the result of the Proposed Transaction would not be to substantially lessen competition in any market for goods or services in the State.

- 1.27 Therefore, on 25 July 2024, the Commission determined, in accordance with section 21(2)(b) of the Act, to carry out a full investigation of the Proposed Transaction under section 22 of the Act.

Full Investigation (“Phase 2”)

Third Party Submissions

- 1.28 Two third party submissions were received by the Commission during the Phase 2 investigation. One submission was made by a competitor of the Parties in the State,³⁶ and the other was made by a stakeholder in the macro passive network infrastructure industry that wished to keep its identity anonymous (“Third Party 2”). These submissions have been fully considered by the Commission insofar as they related to the potential effects of the Proposed Transaction on competition in markets for goods or services in the State.

Market Enquiries

- 1.29 During the Phase 2 investigation, the Commission continued the process initiated during the Phase 1 investigation of seeking the views of, and engaging with, relevant third parties in relation to the potential competitive effects of the Proposed Transaction. During the Phase 2 investigation, the Commission engaged with a number of those third parties:

- (i) State and international agencies;³⁷
- (ii) MNOs;³⁸
- (iii) Third Party 1;

³⁶ Shared Access (Ireland) Limited is incorporated in the State under registered number 457872.

³⁷ ComReg, the OPW, Córas Iompair Éireann, and the UK’s Competition and Markets Authority (the “CMA”).

³⁸ Vodafone, Three, and eir.

- (iv) Third Party 2; and
- (v) other providers of macro passive network infrastructure sites, also referred to as WIPs (i.e., competitors of the Parties).³⁹

Contact with the undertakings involved

- 1.30 During the Phase 2 investigation, the Commission requested and received, on an ongoing basis, further information and clarifications from the Parties.
- 1.31 On 15 August 2024, pursuant to section 20(2) of the Act, the Commission served a requirement for further information on each of Phoenix (the “Phoenix Phase 2 RFI”) and Cellnex Telecom (the “Cellnex Phase 2 RFI”) (together, the “Phase 2 RFIs”). The issuance of the Phase 2 RFIs had the effect of adjusting the deadline by which the Commission was required to issue its assessment of the Proposed Transaction in Phase 2.
- 1.32 Phoenix provided a full response to the Phoenix Phase 2 RFI on 26 September 2024 (the “Phoenix Phase 2 RFI Response”).
- 1.33 Cellnex Telecom provided a full response to the Cellnex Phase 2 RFI on 26 September 2024 (the “Cellnex Phase 2 RFI Response”).
- 1.34 On 29 October 2024, Phoenix submitted a written response to points raised by the Commission’s case team during a call on 18 October 2024 (the “Phoenix October Written Submission”).
- 1.35 The Commission issued its preliminary assessment of the Proposed Transaction (the “Assessment”) to the Parties on 8 November 2024 in accordance with paragraph 3.13 of the Commission’s Mergers and Acquisitions Procedures.⁴⁰ In

³⁹ Shared Access (Ireland) Limited, Vantage Towers Limited, Towercom Limited, Hibernian Towers, ESB Telecoms Limited, RTÉ Transmission Network Designated Activity Company (incorporated in the State under registered number 364909), Wireless Infrastructure Group Limited (incorporated in the UK under registered number 05435379), Tower Ventures CRE, LLC (incorporated in Delaware, United States of America, under registered number 5700455), Asterion Industrial Partners SGEIC SA (incorporated in Spain under registered number 138) and SBA Communications Corporation (incorporated in Florida, United States of America, under registered number P16000077513).

⁴⁰ Competition and Consumer Protection Commission (2023) *Mergers and Acquisitions Procedures*, dated 1 August 2023 (the “Mergers and Acquisitions Procedures”), paragraph 3.13. Available at: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2023/07/CCPC-Mergers-and-Acquisitions-Procedures-2023.pdf>.

accordance with paragraph 3.3 of the Commission's Access to the File Procedures,⁴¹ on 8 November 2024 the Commission also provided the Parties with a schedule of all of the Parties' documents and all of the third-party documents included in the file on 8 November 2024.

- 1.36 According to the Access to File Procedures, parties to whom an assessment has been addressed are to be given access to documents on the Commission's file as soon as is practicable upon request, and in the case of a merger investigation within 5 working days of receipt of a request for access to documents on the File.⁴²
- 1.37 Cellnex requested and was granted access to all non-confidential third-party documents and the correspondence between the Commission and Phoenix on 13 November 2024. Cellnex did not request access to the information provided as part of the Phoenix Phase 1 RFI Response or the Phoenix Phase 2 RFI Response.
- 1.38 Phoenix requested access to all third-party documents and all Cellnex documents on 13 November 2024. Access to all non-confidential third-party documents was granted to Phoenix on 13 November 2024. Access to all Cellnex documents was granted to Phoenix on 14 November 2024.
- 1.39 According to paragraph 3.19 of the Mergers and Acquisitions Procedures, within five working days of the furnishing of the Assessment, any undertaking involved in the merger who wishes to make oral submissions shall notify the Commission in writing that it intends to do so, and the Commission will fix a date to hear the submissions. Phoenix requested an oral submission on 15 November 2024.
- 1.40 Within 15 working days of the delivery of an assessment, the undertakings involved in the merger may respond in writing to the assessment.⁴³ On 29 November 2024, Phoenix submitted a written response to the Assessment (the

⁴¹ Competition and Consumer Protection Commission (2023) *Access to the File Procedures*, dated 1 August 2023 (the "Access to File Procedures"). Available at: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2023/07/CCPC-Access-to-the-File-Procedures.pdf>.

⁴² Access to File Procedures, paragraph 3.4.

⁴³ Merger and Acquisitions Procedures, paragraph 3.17.

“Parties’ Written Response”),⁴⁴ as well as a report entitled ‘*Annex on critical losses*’ prepared by RBB (“the RBB Annex”).⁴⁵

1.41 The Parties made oral submissions to Commission Members on 9 December 2024 (the “Oral Submission”).⁴⁶

1.42 Following the Parties’ written submissions described above, and the Oral Submission, the Commission undertook additional market enquiries to address several points raised by the Parties. The Parties were given access to all additional non-confidential information gathered in this regard.⁴⁷

Information Sources Relied Upon

1.43 In forming its conclusions on the Proposed Transaction, the Commission has considered all the relevant information available to it at the time of making its Determination and in particular, all information provided by the Parties including responses to the Commission’s RFIs and information requests, submissions made by the Parties, information obtained from third parties, and other information available in the public domain.

1.44 Throughout the Commission’s investigation, the Commission sought expert economic advice and analysis from DotEcon Ltd., which is incorporated into the Commission’s analysis of the Proposed Transaction. While the Commission benefited from this expert advice, the Commission alone is responsible for the views expressed in this Determination.

Phase 2 Proposals

⁴⁴ Submission on behalf of the Parties in response to the Assessment, ‘*The Parties’ response to the Assessment issued by the CCPC on 8 November 2024*’, dated 29 November 2024, document entitled ‘M 24 018 – Response to the Assessment (29.1.2024).pdf’.

⁴⁵ Submission on behalf of the Parties in response to the Assessment, RBB (2024) ‘*Annex on critical losses*’, dated 29 November 2024, document entitled ‘M 24 018 – Response to the Assessment (29.1.2024) - Annex.pdf’.

⁴⁶ The Oral Submission included responses to the Assessment from both Phoenix and Cellnex. A transcript of the Oral Submission was prepared and provided to the Parties on 20 December 2024.

⁴⁷ This non-confidential information comprised copies of emails exchanged between the Commission and eir, Vodafone, Three, Córas Iompair Éireann, and RTÉ Transmission Network Designated Activity Company.

- 1.45 On 18 September 2024, pursuant to section 20(3) of the Act, Phoenix submitted proposals to the Commission aimed at ameliorating any effects of the Proposed Transaction on competition in markets for goods or services in the State. The submission of these proposals extended the deadline within which the Commission was required to make its determination in respect of the Proposed Transaction in Phase 2. The extension added 15 working days to the Phase 2 period, bringing the review period to a total of 135 working days, in accordance with section 22(4B) of the Act.
- 1.46 Following a thorough assessment of the proposals submitted by Phoenix, on 18 October 2024, during a call with the Commission, Phoenix was informed that the proposals would not be likely to address the concerns that the Proposed Transaction would result in a substantial lessening of competition (“SLC”) identified by the Commission. Following ongoing engagement with the Commission, including the issuance of the Assessment, on 17 December 2024, Phoenix submitted revised proposals to the Commission. Over the period from 6 January 2025 to 14 January 2025, the Commission market tested these revised proposals. The market testing is discussed in further detail in paragraphs 6.4 to 6.5 below.
- 1.47 The Commission communicated the feedback of the market testing to Phoenix and, following further engagement, on 5 February 2025, Phoenix submitted final proposals to the Commission under section 20(3) of the Act (the “Proposals”) with a view to the Proposals becoming binding on Phoenix if the Commission took the Proposals into account and stated in writing that the Proposals formed the basis or part of the basis of its determination under section 22 of the Act in relation to the Proposed Transaction. The Proposals are appended to this Determination.

Overview of the Legislative Framework and Relevant Case Law and Guidelines

Introduction

- 1.48 The legislative framework within which the Commission conducts its review of mergers and acquisitions notified pursuant to section 18 of the Act is set out below and includes a summary of relevant guidelines published by the Commission and relevant case law. All statutory references in this section are to the Act, unless otherwise stated.

Legislative Framework

- 1.49 When a merger or acquisition within the meaning of section 16 is notified to the Commission pursuant to section 18 (a “Notified Transaction”) the Commission is required to assess the effect of the Notified Transaction on competition in the State, pursuant to section 20. The applicable legal test at that stage is set out in section 20(1)(c) which provides that the Commission:

“shall form a view as to whether the result of the merger or acquisition would be to substantially lessen competition in markets for goods or services in the State.”

- 1.50 Following notification, the Commission has 30 working days after the appropriate date within which to decide whether it can clear a Notified Transaction without having to carry out a full investigation under section 22, known as a “Phase 2 Investigation”.⁴⁸ This decision is taken on the basis of the evidence available to it, including the submissions of the parties to the Notified Transaction and third parties.⁴⁹ If the Commission has been unable at the end of the Phase 1 period, on the basis of the information before it, to form the view that the result of the Notified Transaction will not be to substantially lessen competition in markets for goods or services in the State, it must carry out a Phase 2 Investigation under section 22.

⁴⁸ The appropriate date may be reset pursuant to section 19(6)(b); and it may be extended pursuant to section 21(4).

⁴⁹ Section 21(2)(b) of the Act and paragraph 3.1 of the Mergers and Acquisitions Procedures.

1.51 Where the Commission has decided to carry out a Phase 2 Investigation, it must make a determination within 120 working days of the appropriate date.⁵⁰ Upon completion of a Phase 2 Investigation, the Commission must make a determination that the merger:

“(a) may be put into effect;

(b) may not be put into effect; or

(c) may be put into effect subject to conditions specified by it being complied with,

on the ground that the result of the merger or acquisition will or will not, as the case may be, be to substantially lessen competition in markets for goods or services in the State, or, as appropriate, will not be to substantially lessen such competition if conditions so specified are complied with.” (emphasis added)

The Commission’s Approach to the SLC Test

1.52 Under the Act, the Oireachtas has entrusted to the Commission the task of investigating competition issues raised by Notified Transactions. The Act imposes on the Commission a duty to act but has set the terms upon which the Commission must act in such a way as to afford the Commission a wide latitude in its assessment of the competition issues upon which it is required to decide as well as in relation to the remedial decisions it must take.

1.53 Each stage in the Commission’s decision-making process (e.g., whether there is a merger or acquisition within the meaning of section 16; whether the merger will or will not result in an SLC under section 22(3); and whether remedies will ameliorate any effects of the merger on competition in markets for goods or

⁵⁰ The term “appropriate date” is defined in section 19 of the Act. Section 22(4A) of the Act suspends the 120 working day timeframe referred to in section 22 where the Commission has issued a requirement to provide information pursuant to section 20(2) of the Act. Section 22(4B) provides that the Commission shall furnish a copy of the written determination to the notifying parties within 135 working days after the appropriate date where the notifying parties submit proposals to the Commission in accordance with section 20(3) of the Act.

services in the State under section 20) necessarily involves a predictive exercise and involves an important element of judgement. Thus, in carrying out its duties to assess whether there is a merger, to identify any SLC and to assess potential remedies, the Commission has a wide margin of appreciation which is recognised both in the Irish and EU courts.⁵¹

- 1.54 In this regard, the Commission refers to *Rye Investments Ltd. v The Competition Authority* [2009] IEHC 140 (“*Rye Investments*”). This case concerned the Commission’s predecessor the Competition Authority. In his judgment, Cooke J held:

“in a case such as the present, where primary findings of fact have not been put in issue, the Court considers that a determination by the Authority that a merger or acquisition will result in a substantial lessening of competition ought not to be set aside by this Court unless:-

(a) The Authority is shown to have committed a serious error in drawing inferences or conclusions from facts, such that the inferences or conclusions become untenable or unsound by reason of the error having been made; or

(b) It is demonstrated that the Authority has failed to take into consideration or adequately to consider, relevant information or data such that an inference or conclusion material to the determination is unsupported by or is rendered inconsistent with the clear force and effect of the available evidence taken as a whole; or

(c) A significant appraisal of economic or technical factors material to the functioning of competition in the relevant market is shown to be so inconsistent with the available evidence as to be manifestly unreasonable and unsound; or

⁵¹ See, for example, *Rye Investments Ltd. v The Competition Authority* [2009] IEHC 140, paragraph 5.18; and Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4389 upheld on appeal by the Court of Justice in Case C-12/03P *Commission v Tetra Laval* [2005] ECR I-1047.

(d) *The Authority's statement of its reasons for reaching conclusions material to the basis of the determination is lacking in cogency or coherence or is contradicted by the evidence which was available to it; or*

(e) *The Authority has made a material error of law either in the construction and application of the Act or by otherwise infringing some applicable principle of constitutional or natural justice.*

...

"...where the Authority has, without committing significant error, exercised its specialist expertise in making judgments as to the prospective consequences of the economic and commercial factors which govern or influence competition in the relevant market, this Court should not intervene even if it is demonstrated that an opposite conclusion might plausibly have been reached by placing weight on different aspects of the available evidence or data or by attributing different or greater significance to other pertinent factors in the economic assessment."

...

*"Accordingly, the Court considers that even if it might be said that the Authority is taking the most favourable view of the information at its disposal, the Court does not consider that it has gone beyond the margin of judgment which it is accorded in such matters and has not committed any obvious or significant error of assessment in respect of the material before it."*⁵²

1.55 The Commission considers that, in the test set out in section 22(3) quoted above, the relevant standard of proof is the ordinary civil standard, i.e., the balance of probabilities. In other words, in order to decide whether the result of the merger

⁵² *Rye Investments*, paragraphs 5.20, 5.21 and 8.21.

or acquisition will (or will not) be an SLC, the Commission must decide that it is more likely than not that an SLC will occur.⁵³

- 1.56 The application of the balance of probabilities test is also recognised in the Commission's '*Guidelines for Merger Analysis*'.⁵⁴ For example, paragraph 1.16 explains that in applying the SLC test, the Commission investigates the likely effect of a merger not only by reference to current competitors, but also by reference to potential competitors. Similarly, paragraph 1.19 provides that the Commission requires sufficient reliable evidence from the merging parties regarding the likely competitive effects of the merger.
- 1.57 Furthermore, it is important to recognise that the concept of a standard of proof provides a framework within which, for example, the Commission conducts its assessment of the effects of a merger. Such an assessment is, however, a matter of judgement and evaluation and an unduly technical or rigid approach to the application of the standard of proof is not helpful or appropriate.
- 1.58 Where the range of ways in which an SLC could be made manifest is wide and, indeed, necessarily unpredictable, the Commission's assessment must be carried out in the round by looking at all the relevant factual material, including the incentives which those involved might have to act to reduce competition, and then making an overall assessment of the likelihood of the merger resulting in an SLC.
- 1.59 Accordingly, any Commission finding in relation to the presence or absence of an SLC will be based on all available information to the Commission "*considered in the light of all credible theories of consumer harm arising from possible adverse competition effects*".⁵⁵

⁵³ In this regard, and for the avoidance of doubt, where the Commission refers to the "likely" results of the Proposed Transaction in this Determination, this should be understood as meaning that it is more likely than not that result will occur.

⁵⁴ Competition and Consumer Protection Commission (2014) *Guidelines for Merger Analysis*, dated 31 October 2014 (the "Commission's Merger Guidelines"). Available at: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/CCPC-Merger-Guidelines-1.pdf>.

⁵⁵ The Commission's Merger Guidelines, paragraph 1.7.

- 1.60 The Commission has in mind the relevant civil standard in considering the statutory question of whether, in its view, the result of the merger will be an SLC, and it applies that standard in reaching its conclusion as to the likelihood of possible outcomes. While the Commission may use quantitative measures to assist in analysing whether a merger is likely to result in an SLC, the Commission will assess each merger on its merits. Paragraph 1.8 of the Commission's Merger Guidelines states as follows:

"While certain quantitative measures can be used to assist in analysing whether a merger is likely to result in an SLC there are no standard measures of competitive effects that can determine definitively, on their own, whether a given merger is likely to have such an effect. Each proposed merger needs to be assessed on its merits and in its own particular circumstances."

- 1.61 Paragraph 1.9 of the Commission's Merger Guidelines goes on to make the important point that, in applying the SLC test, the Commission analyses not only the effect on the price of affected products but also other effects that can impact on consumers, such as changes to output (quantity), quality, consumer choice and innovation (e.g., development of new products or enhancements to existing products).
- 1.62 Chapters 2 to 9 of the Commission's Merger Guidelines set out the Commission's approach to the key elements of merger review, such as an analysis of market definition, horizontal merger effects, barriers to entry and expansion, countervailing buyer power, efficiencies and failing firm arguments. The remainder of this Determination will summarise the applicable principles which the Commission considers relevant to its analysis of the Proposed Transaction.

2. INDUSTRY BACKGROUND

Introduction

2.1 The purpose of this section is to provide context for the identification of relevant product markets and for the Commission's assessment of the potential competitive effects of the Proposed Transaction set out later in this Determination. This section sets out the relevant background information on the following:

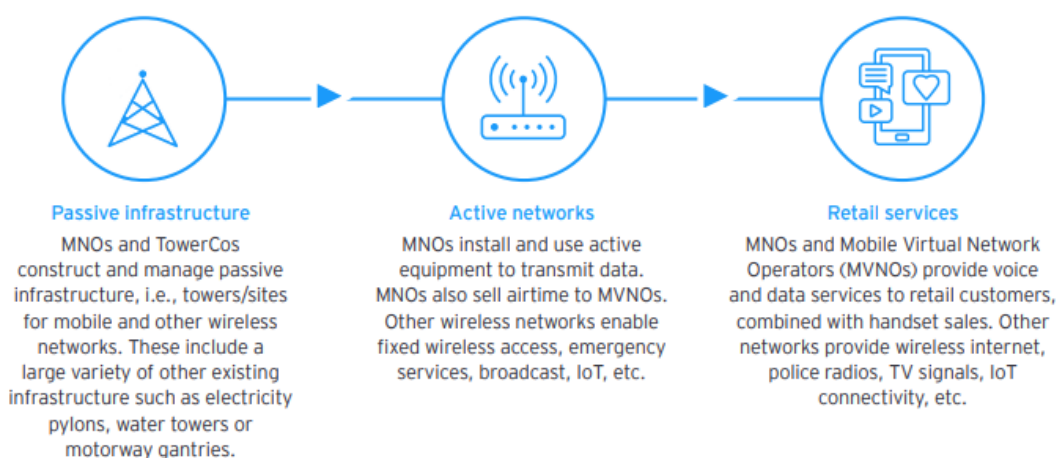
- (i) the development of passive infrastructure for wireless services;
- (ii) the types of infrastructure used to provide wireless services;
- (iii) the demand for passive infrastructure;
- (iv) an overview of telecommunications services in the State; and
- (v) an overview of planning permission and telecommunications regulation.

Development of passive infrastructure for wireless services

2.2 Phoenix and Cellnex own and operate passive infrastructure which is used to host the active equipment of operators of wireless services. Operators of wireless services include MNOs, FWA providers, emergency services, TV and broadcast, and wireless broadband providers. Further detail of wireless service operators as customers for passive infrastructure is provided below in paragraphs 2.32 to 2.46. While there are a number of types of customers for wireless infrastructure, over 85% of wireless infrastructure revenue comes from MNOs, and MNOs are therefore the most significant customer type for passive infrastructure.⁵⁶ The value chain for passive infrastructure is shown in Figure 1 below.

⁵⁶ In the Phoenix Phase 1 RFI Response, Phoenix stated that [REDACTED] MNOs accounted for [REDACTED]% of its revenue in 2023. Similarly, in the Cellnex Phase 1 RFI Response, Cellnex stated that [REDACTED] MNOs accounted for roughly [REDACTED]% of Cellnex's revenue in 2023.

Figure 1: value chain of the passive infrastructure industry.



Source EY-Parthenon for the European Wireless Infrastructure Association “The economic contribution of the European wireless infrastructure association”, May 2024.⁵⁷

2.3 Over the last 5 years, each of the three Irish MNOs has divested its tower assets, and in fact this type of divestment has been a common pattern across Europe. Phoenix and Cellnex became active in the State by acquiring the wireless infrastructure assets of eir and Three, respectively. In 2020, Vodafone divested its passive infrastructure sites to Vantage Towers Limited (“Vantage”),⁵⁸ a subsidiary of Vantage Towers AG. Vantage Towers AG is a joint venture arrangement in which Vodafone GmbH has a controlling shareholding.⁵⁹ The key rationale for MNOs to divest their tower portfolios has been the release of capital. According to a recent study, around €26bn in capital has been released to MNOs in Europe since 2018 via the sale of tower portfolios by MNOs.⁶⁰ While there is an on-going requirement to improve and upgrade mobile networks (for example, to facilitate 5G roll-out), most of the money released by divestment has been used by MNOs to pay off debt.⁶¹

⁵⁷ Referred to as the “EY-P European Industry Report”.

⁵⁸ Commission’s written record of a remote meeting with Vodafone on 23 April 2024 (“Vodafone Call Note 23.04.2024”), page 1.

⁵⁹ See further paragraph 2.21 below.

⁶⁰ EY-P European Industry Report, page 4.

⁶¹ For example, Merger Notification Form, page 2, paragraph 9 “

- 2.4 Initially, MNOs built their own infrastructure on which to host their active network equipment, but the last few years have seen a divestment of towers directly owned by MNOs into some form of separated ownership, such that just under 40% of towers across Europe are no longer owned by MNOs.⁶² In Ireland, towers are now not owned by MNOs. This ownership separation means that MNOs are no longer vertically integrated into the passive infrastructure on which they rely. Rather, each of the three WIPs that acquired the tower assets of the three MNOs in the State entered into a long-term MSA with the MNO from which they acquired the assets. This is discussed further below in paragraphs 2.47 to 2.59.
- 2.5 There are different models across Europe for tower ownership. Some MNOs have carved out their tower portfolios into separate companies which remain under the ownership and control of the MNO. For example, in France in 2021, Orange S.A carved out its passive infrastructure assets into a separate entity known as TOTEM which is its wholly owned subsidiary. Some MNOs have created a joint venture (“JV”) where the MNO retains a shareholding in the JV. In Ireland, Vodafone and Vantage are an example of this JV model. Finally, some MNOs have divested their towers to independent tower companies. Independent tower companies are generally owned by international institutional investors and private equity companies and not by telecom companies. This final model is the route chosen by eir and Three in their divestments to Phoenix and Cellnex, respectively.
- 2.6 The changing ownership structure brought about by the divestment of MNO towers assets means that previously, where MNOs could be considered to compete on the basis of competing infrastructure as well as competing services, this is no longer the case. The locus of competition for MNOs in the State is therefore now more limited to the provision of retail mobile services.

Types of infrastructure used to provide wireless services

Active and passive infrastructure

⁶² EY-P European Industry Report, page 12.

- 2.7 **Active infrastructure** refers to components like radio antennae, cables and other equipment essential for signal transmission and network functionality. The MNO or FWA operator is responsible for providing the active infrastructure on a passive site and connecting the active infrastructure to its network.
- 2.8 **Passive infrastructure** encompasses various physical assets – including towers, monopoles, power supplies, street furniture, fences and cabinets – upon which an MNO deploys its active infrastructure. Passive infrastructure is needed by MNOs and FWA operators to enable them to provide network coverage and capacity to their customers.
- 2.9 In urban areas, monopoles – single-pole structures – are prevalent, whereas lattice-type towers, which can accommodate more equipment, are generally preferred for achieving broader coverage in rural areas.
- 2.10 A WIP's passive infrastructure may host active equipment for several MNOs and/or FWA operators and other operators. The majority of the revenue that a WIP generates in the provision of hosting services comes from MNOs. The WIP's ownership of the passive infrastructure does not result in, or entitle it to, any operation of the network itself.
- 2.11 There are two broad categories of passive infrastructure sites provided by WIPs and utilised by MNOs and FWA operators:
- (a) **Macro sites:** These sites accommodate high-power macrocells and are pivotal in delivering broad coverage.⁶³ They are generally located on elevated structures such as towers, rooftops or monopoles;⁶⁴ and
 - (b) **Micro sites (also called sub-macro sites)** These sites host lower power microcells and are essential for filling coverage gaps between macrocells

⁶³ Merger Notification Form, page 12, "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."

⁶⁴ Merger Notification Form, page 12, paragraph 39.

or for providing additional capacity in areas with high demand, such as dense urban environments. Micro sites can be segmented as follows:⁶⁵

- (i) **Small cells** are micro sites primarily deployed in outdoor settings, including locations like street furniture, lamp posts and bus shelters. They are characterized by lower radio power, coverage and capacity compared to macro sites. Consequently, multiple small cells are required to replace the coverage and capacity of a single macro site. Typically, small cells are effective within an area of approximately 300 square meters;⁶⁶ and
- (ii) **Distributed Antenna Systems (“DAS”)** are primarily deployed inside buildings (e.g., sports stadia, train stations and shopping centres). Similar to small cells, DAS have less radio power, capacity and coverage compared to macrocells and are more suited for limited coverage areas similar to small cells.⁶⁷

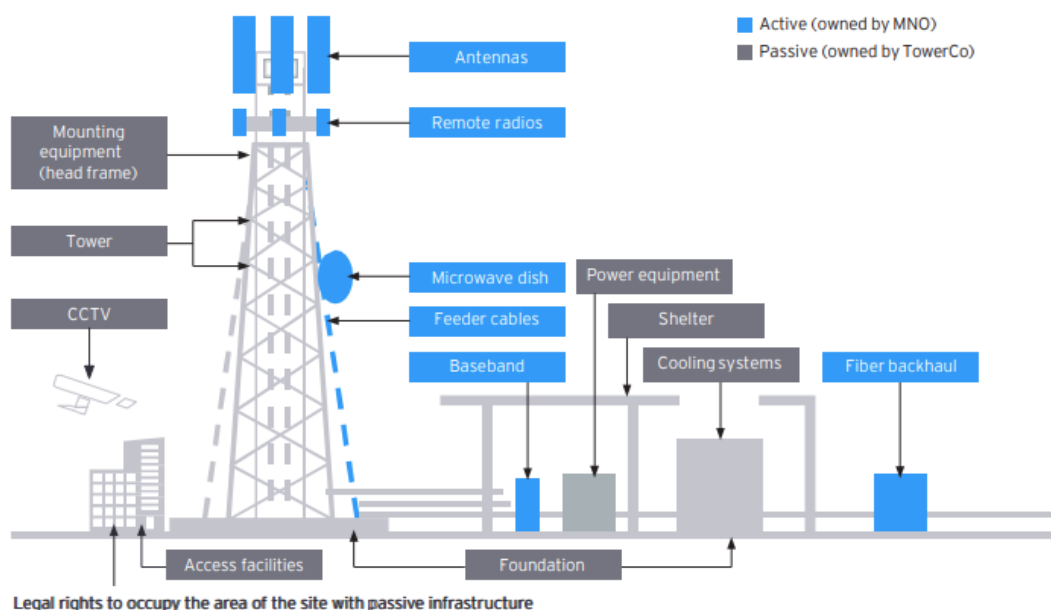
2.12 In the Merger Notification Form, the Parties submitted that their provision of micro sites was very limited. Figure 2 below illustrates the different types of infrastructure that can be found on a macro site, with active infrastructure in blue and passive infrastructure in grey.

⁶⁵ Merger Notification Form, page 12, paragraph 39.

⁶⁶ Merger Notification Form, page 12, paragraph 39.

⁶⁷ Merger Notification Form, page 12, paragraph 39.

Figure 2: Diagram of active and passive infrastructure on a macro site.



Source: EY-P European Industry Report

Demand for passive infrastructure

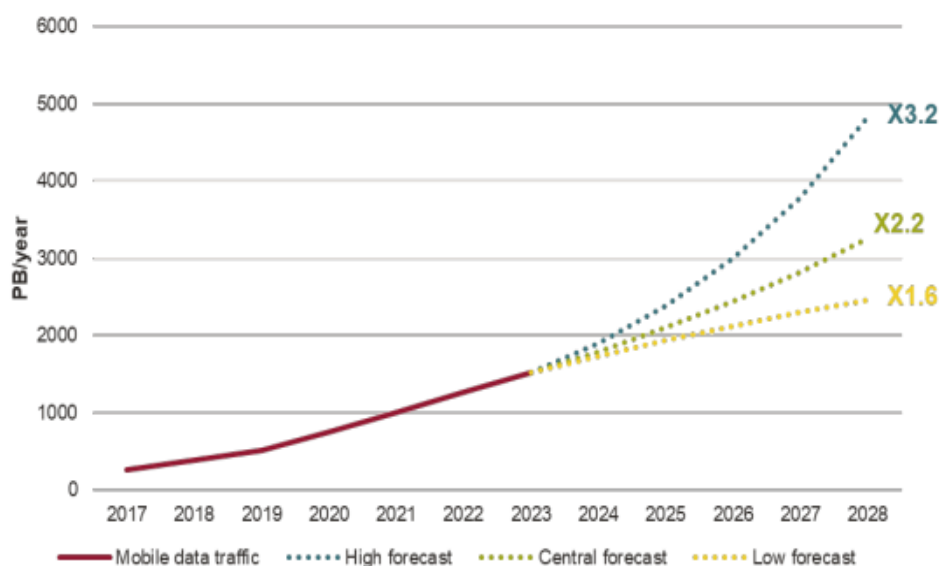
2.13 The current provision of passive infrastructure across the State has allowed the three MNOs to achieve high levels of population and geographic coverage for 4G mobile services. Population coverage conditions were part of the 4G spectrum awards.⁶⁸ Both Three and Vodafone have achieved 99% population coverage for 4G and eir has 98%. The key drivers of future demand for passive infrastructure are likely to be the rollout of 5G, and the continuing increase in data-hungry applications. As geographic coverage is already (almost) ubiquitous, future demand is most likely to be associated with the need for denser coverage. This may require additional or upgraded sites where existing sites may not be able to

⁶⁸ In Ireland, ComReg is responsible for designing and implementing spectrum awards, including setting the conditions for spectrum use, such as coverage obligations and service quality standards. In 2012, ComReg ran the 4G spectrum award, known as the Multi-Band Spectrum Award (the "MBSA"). This auction allocated spectrum in the 800 MHz, 900 MHz, and 1800 MHz bands to MNOs. Vodafone, Three, and Meteor (now eir) secured spectrum, with obligations to meet specific coverage and service quality standards, including 70% population coverage within three years and achieving 90% population coverage within seven years. In 2022, ComReg ran another spectrum auction, the Multi Band Spectrum Award 2022 (the "MBSA2"), which allocated spectrum in the 700 MHz, 2.1 GHz, 2.3 GHz, and 2.6 GHz bands to providers including Vodafone, Three, and eir. The national coverage obligations associated with this award of spectrum included achieving 95% population coverage and 92% geographic area coverage within seven years.

host more active equipment, and sites providing infill to allow for the increased bandwidth demands of 5G services.

- 2.14 The level of demand for passive infrastructure is related to the likely increase in demand from MNOs due to their traffic growth, particularly the growth of mobile data services. A recent study examined past growth trends and forecast an annual mobile traffic growth of 16.5% from 2023-2028.⁶⁹

Figure 3: Previous and forecasted total mobile data traffic in the State, in petabytes per year.



Source: Frontier Economics, 'Mobile Data Traffic Forecast for Ireland (2024-2028)'.

Status of macro passive network infrastructure

- 2.15 As of 31 December 2023, there were approximately [REDACTED] macro passive network infrastructure sites in the State.⁷⁰ Each macro passive network infrastructure site hosts multiple radio access network ("RAN") slots.⁷¹

⁶⁹ Frontier Economics, 'Mobile Data Traffic Forecast for Ireland (2024-2028)', page 6. Available at: <https://www.comreg.ie/media/2024/07/ComReg-2458.pdf>

⁷⁰ This number was calculated by the Commission using information provided by the Parties and third-party WIPs active in the State.

⁷¹ RAN identifies a potential active infrastructure slot available on a passive infrastructure site.

Existing Sites

- 2.16 Existing sites facilitate faster and easier location of new RAN deployments by WIPs' customers. This is because the passive infrastructure required to host RAN (including connectivity to the MNO network) will already be in place and there will be no need to negotiate leasing agreements with local landlords. WIPs' customers will be able to deploy the required active infrastructure more rapidly as the appropriate planning permissions will have already been obtained in establishing the existing site.

New Sites

- 2.17 The construction of new sites requires WIPs to obtain the correct planning permission, potentially negotiate leasing agreements with local landlords, and construct the passive network infrastructure, as well as other site-specific infrastructure that may be required, such as power, road access, water access, etc.

Providers of macro passive infrastructure in the State

WIPs

- 2.18 WIPs have been active in the State since the early 2000s, building and providing passive network infrastructure sites initially to supplement the portfolio of sites built and owned by MNOs, and to serve other customers requiring passive infrastructure. Recent developments in this sector, which resulted in each MNO deciding to sell its portfolio of macro passive network infrastructure sites, have led to three new entrants (namely Cellnex, Vantage, and Phoenix), establishing themselves as the three largest WIPs in the State.

Cellnex

- 2.19 With over [REDACTED] sites,⁷² Cellnex is the largest WIP in the State based on number of macro sites owned. The activities of Cellnex are detailed in paragraphs 1.10 to 1.15 in Section 1 above.

⁷² Merger Notification Form, page 20, paragraph 61.

Vantage

- 2.20 Vantage is a private company limited by shares and was incorporated in the State in 2020 under registered number 665742. With roughly 1,300 sites,⁷³ Vantage is the second-largest WIP in the State based on number of macro sites owned.
- 2.21 Vantage is part of a wider network of WIPs, ultimately owned by Vantage Towers AG, which has over 84,000 sites across ten countries in Europe.⁷⁴ Similar to the Parties, Vantage Towers AG acquired the majority of its sites in the State and abroad when an MNO – in this instance, Vodafone Plc – decided to divest its passive infrastructure sites. However, unlike the Parties, who are both independent WIPs, Vodafone Plc retains a controlling shareholding in Vantage Towers AG through its interest in Oak Holdings GmbH: a JV between Vodafone GmbH, Global Infrastructure Partners and KKR & Co. Inc.

Phoenix

- 2.22 With over [REDACTED] sites,⁷⁵ Phoenix is the third-largest WIP in the State based on number of macro sites owned. The activities of Phoenix are detailed in paragraphs 1.3 to 1.7 in Section 1 above.

Towercom Limited (“Towercom”)

- 2.23 Towercom is a private company limited by shares and was incorporated in the State in 2007 under registered number 438951. As of 25 October 2024, the date on which it furnished the Commission with the geolocation data related to its portfolio, Towercom operated [REDACTED] macro sites in the State, meaning it is the fourth-largest WIP in the State based on number of macro sites owned. Towercom

⁷³ [vantagetowers.com](https://www.vantagetowers.com/en/our-european-markets/ireland), Ireland market description, available at: <https://www.vantagetowers.com/en/our-european-markets/ireland>

⁷⁴ [vantagetowers.com](https://www.vantagetowers.com/en/our-european-markets), European market description, available at: <https://www.vantagetowers.com/en/our-european-markets>

⁷⁵ Merger Notification Form, page 19, paragraph 58.

seldom develops new sites and does so only when an MNO has provided requirements or specifies a new location where it wishes to locate.⁷⁶

- 2.24 In 2023, the Commission approved the acquisition of Towercom by KKR & Co. Inc., via John Laing Group Limited, which KKR & Co. Inc. controls indirectly.⁷⁷

ESB Telecoms Limited (“ESB Telecoms”)

- 2.25 ESB Telecoms is a private company limited by shares and was incorporated in the State in 2007 under registered number 339991. ESB Telecoms offers wholesale services over its fibre network, and in addition, as of 29 October 2024, has [REDACTED] wireless infrastructure sites.⁷⁸ As of 29 October 2024, the date on which it furnished the Commission with the geolocation data related to its portfolio, [REDACTED] of these [REDACTED] sites were macro sites.⁷⁹ ESB Telecoms is the fifth-largest WIP in the State based on number of macro sites owned. Approximately, 75% to 80% of ESB Telecoms revenues are derived from the three MNOs in the State. In terms of expansion, ESB Telecoms aims to produce [REDACTED] to [REDACTED] sites annually.⁸⁰

Shared Access (Ireland) Limited (“Shared Access”)

- 2.26 Shared Access is a private company limited by shares and was incorporated in the State in 2008 under registered number 457872. As of 24 October 2024, the date on which it furnished the Commission with the geolocation data related to its portfolio, Shared Access operated [REDACTED] macro sites in the State. Shared Access has outlined a desire to expand but noted that this is extremely difficult given the

⁷⁶ Commission’s written record of a remote meeting with Towercom on 28 May 2024 (“Towercom Call Note 28.05.2024”), page 2.

⁷⁷ See the Commission’s Determination in M/23/005 – John Laing/Towercom, available at: <https://www.ccpic.ie/business/wp-content/uploads/sites/3/2023/02/2023.05.31-M23.005-John-Laing-Towercom-Determination-Public.pdf>

⁷⁸ Commission’s written record of a remote meeting with ESB Telecoms on 23 May 2024 (“ESB Telecoms Call Note 23.05.2024”), page 2.

⁷⁹ Email from ESB Telecoms to the Commission dated 29 October 2024.

⁸⁰ ESB Telecoms Call Note 23.05.2024, page 1.

existence of agreements for build to suit (“BTS”)⁸¹ sites between MNOs and certain WIPS.⁸²

RTÉ Transmission Network Designated Activity Company (trading as 2rn) (“2rn”)

2.27 2rn is a designated activity company limited by shares and was incorporated in the State in 2002 under registered number 364909. As of 22 November 2024, the date on which it furnished the Commission with the geolocation data related to its portfolio, 2rn operated [REDACTED] macro sites in the State.

Hibernian Towers

2.28 Hibernian Towers was incorporated in the State in 2005 and is registered under registered number 488004. As of 31 October 2024, the date on which it furnished the Commission with the geolocation data related to its portfolio, Hibernian Towers operated [REDACTED] macro sites in the State. Hibernian Towers currently builds in the region of [REDACTED] to [REDACTED] towers a year with expressed desires to build more. Approximately half of its business is from MNOs.⁸³

The Office of Public Works (the “OPW”)

2.29 The OPW is an Irish government office that delivers public services for flood protection, managing government properties and heritage services.⁸⁴ The passive network infrastructure sites in the OPW’s portfolio are predominantly deployed atop Garda Stations. As of 22 January 2025, the date on which it furnished the Commission with the geolocation data related to its portfolio, the OPW operated [REDACTED] macro sites in the State.

Wireless Infrastructure Group (“WIG”)

⁸¹ A BTS site is one which is constructed in an area selected by an MNO to the specification determined by the MNO and generally constructed by the WIP. BTS sites and agreements are discussed in greater detail in paragraph 2.52 below.

⁸² Shared Access Meeting Note 06.09.2024, page 6.

⁸³ Commission’s written record of a remote meeting with Hibernian Towers on 11 June 2024 (“Hibernian Towers Call Note 11.06.2024”), page 4.

⁸⁴ Information regarding the OPW’s activities in the State is available at: <https://www.gov.ie/en/organisation-information/019c0e-about-the-office-of-public-works/>

2.30 WIG is a private company incorporated in the UK under registered number 05435379 that has been active in the State for ten years. As of 31 October 2024, the date on which it furnished the Commission with the geolocation data related to its portfolio, WIG operated [REDACTED] macro sites in the State. WIG has a large portfolio of sites in the UK and was the remedy taker of the divestment package following the CMA's review of the *Cellnex/CK Hutchison UK towers* acquisition.⁸⁵

Córas Iompair Éireann ("CIÉ")

2.31 CIÉ was founded on 1 January 1945 under the Transport Act 1944 and was transformed into a semi-State body by the Transport Act 1950. Through its subsidiaries, *Dublin Bus*, *Bus Éireann*, and *Iarnród Éireann*, CIÉ is Ireland's largest public transport provider.⁸⁶ As of 29 November 2024, the date on which it furnished the Commission with the geolocation data related to its portfolio, CIE has [REDACTED] sites in the State.

Customers of passive infrastructure

MNOs

2.32 As described in footnote 17 above, an MNO is a telecommunications service provider that provides wireless voice and data communication for its subscribed mobile users. As discussed in paragraph 2.2 above, MNOs deploy their active infrastructure on WIPs' passive infrastructure in order to provide mobile services.

2.33 As mentioned in paragraph 2.4 above, the three MNOs historically built their own infrastructure sites in the State based on network requirements and coverage obligations. In recent years, there has been vertical separation in the sector whereby each MNO has sold the portfolio of towers it built for itself to a WIP.

2.34 As part of this divestment of infrastructure sites, each WIP entered into a long-term agreement with the MNO from which it procured the infrastructure sites. The

⁸⁵ UK, Competition and Markets Authority, Anticipated acquisition by Cellnex UK Limited of the passive infrastructure assets of CK Hutchinson Networks Europe Investments S.À R.L., Final Report. Available at: https://assets.publishing.service.gov.uk/media/62221304d3bf7f4f0ec9b75e/Cellnex_CK_Hutchison_-_Final_Report.pdf.

⁸⁶ Information regarding CIE's activities in the State is available at: <https://www.cie.ie/en-ie/>.

MNO from which the WIP purchased the infrastructure sites is referred to as that WIP's "*anchor tenant*", as this MNO is a tenant on the vast majority of that WIP's sites.

- 2.35 It is worth noting that, although each MNO is an anchor tenant of one of the three largest WIPs, MNOs are, in theory, not precluded from installing their active infrastructure on other WIPs' sites. It is in a WIP's interest to host multiple customers on a site in order to achieve a higher margin, given that the costs associated with operating an infrastructure site are relatively fixed.
- 2.36 This means that, although each of the three largest WIPs has one of the MNOs as an anchor tenant, it is possible for the WIPs to also have additional long-term agreements with the other MNOs. It is noted that, in most cases, those long-term contracts between WIPs and MNOs who are not that WIP's anchor tenant pre-date the MNOs' divestiture of their passive infrastructure. These agreements existed between smaller WIPs and multiple MNOs to facilitate the construction of infill sites where the construction and occupation of a site by a single MNO was not cost effective. Therefore, these agreements allowed smaller market players to create sites which allowed for co-location of multiple MNOs, which made the site financially viable, while also allowing MNOs to fulfil their coverage obligations associated with their spectrum allocations.⁸⁷
- 2.37 The agreements between the Parties and the MNOs are discussed in greater detail in the section entitled *Agreements between WIPs and MNOs* below.
- 2.38 There are other providers of retail wireless voice and data communication services in the State, such as Tesco Mobile, GoMo, An Post Mobile, 48 and Virgin Mobile. These providers are mobile virtual network operators ("MVNOs") and are distinguished from MNOs on the basis that they utilise the mobile networks belonging to the MNOs when providing these wireless voice and data communication services to mobile customers. For instance, Tesco Mobile operates using Three's network. As a result, while the MVNOs compete downstream with

⁸⁷ Commission's written record of a remote meeting with Three on 23 May 2024 ("Three Call Note 23.05.2024"), page 3.

the MNOs in the provision of mobile services to customers, the MVNOs are not direct customers of the WIPs. As such, they are not discussed further in this Determination.

Three

2.39 According to ComReg data, Three is the largest MNO in the State with a 46.5% share of the market for mobile subscriptions in the first quarter of 2024.⁸⁸ Three is a business name owned by Three Ireland Services (Hutchison) Limited.

Vodafone

2.40 According to ComReg data, Vodafone is the second-largest MNO in the State with a 30.6% share of the market for mobile subscriptions in the first quarter of 2024.⁸⁹

eir

2.41 According to ComReg data, eir is the third-largest MNO in the State with a 14.7% share of the market for mobile subscriptions in the first quarter of 2024.⁹⁰

FWA Operators

2.42 FWA is a type of high-speed internet connection that uses wireless technology to deliver broadband services to fixed locations such as homes and businesses. Unlike traditional broadband services that rely on wired connections like DSL, fibre, or cable, FWA uses radio signals to provide internet connectivity.⁹¹

2.43 FWA operators mainly provide broadband services in areas with little or no access to fixed internet. An example of such an operator is Imagine, a Dublin-based FWA operator, which provides retail broadband services primarily in rural areas.⁹²

⁸⁸ ComReg quarterly key data report, page 12, available at: <https://www.comreg.ie/media/2024/06/ComReg-2444.pdf>. The market for mobile subscriptions in the State comprises 9,848,149 subscriptions in total: (i) 385,099 mobile broadband subscriptions; (ii) 3,683,536 machine to machine subscriptions; and (iii) 5,779,514 mobile voice subscriptions.

⁸⁹ ComReg quarterly key data report, page 12, available at: <https://www.comreg.ie/media/2024/06/ComReg-2444.pdf>.

⁹⁰ ComReg quarterly key data report, page 12, available at: <https://www.comreg.ie/media/2024/06/ComReg-2444.pdf>.

⁹¹ ITUonline.com, 'What is Fixed Wireless Access (FWA)', available at: [What Is Fixed Wireless Access \(FWA\)? - ITU Online](https://www.ituonline.com/What-Is-Fixed-Wireless-Access-FWA/).

⁹² Imagine Broadband Limited, available at: <https://www.imagine.ie/about-us/>.

Another example of an FWA operator is Wireless Connect Limited which is based in County Tipperary and provides retail broadband services.⁹³

Other passive infrastructure customers

TETRA Ireland Communications Limited ("TETRA")

- 2.44 TETRA was appointed by the Department of Finance to build and operate the National Digital Radio Service (the "NDRS") following a competitive tender process in 2006.⁹⁴ The NDRS infrastructure is a purpose-built secure digital mobile radio network, developed using terrestrial trunked radio to meet the needs of security, fire and safety, health, government and public service agencies.⁹⁵
- 2.45 TETRA's customers in the State include national security and enforcement agencies, health and emergency services, state utilities, county councils and voluntary organisations.⁹⁶
- 2.46 The NDRS is government-mandated to provide superior security, coverage in rural areas, and a robust and resilient network. The NDRS has an obligation to provide land mass coverage which encompasses buildings and land areas regardless of population coverage.⁹⁷

Overview of telecommunications services in the State

Agreements between WIPs and MNOs

- 2.47 As noted in paragraphs 2.34 to 2.37 above, all three MNOs in the State have long-term agreements with at least one WIP. These agreements are referred to as Master Service Agreements (defined above as MSAs), Master Site Share

⁹³Information regarding Wireless Connect Limited's activities in the State is available at: <https://wirelessconnect.ie/rural-wifi/why-fixed-wireless-is-the-best-solution-for-rural-wifi-in-ireland/>.

⁹⁴Information regarding TETRA's activities in the State is available at: <https://tetraireland.ie/why-tetra>.

⁹⁵Information regarding TETRA's activities in the State is available at: <https://tetraireland.ie/why-tetra>.

⁹⁶Information regarding TETRA's activities in the State is available at: <https://tetraireland.ie/why-tetra>.

⁹⁷Information regarding TETRA's activities in the State is available at: <https://tetraireland.ie/why-tetra>.

Agreement (MSSAs) or Master Licence Agreements (MLAs).⁹⁸ The Parties described the long-term agreements as follows:

“Each MNO currently meets the bulk of its national macro sites’ requirements via a master service agreement (“MSA”) or similar with one main WIP, of which it is the anchor tenant. These agreements govern the prices and terms of hosting services for multiple sites, and in practice cover virtually all sites hosted by each main WIP for its anchor tenant. They not only cover the provision of hosting services on WIPs’ existing sites, but also future sites such as Build-to-Suit (“BTS”) sites built to the specification of MNOs.”⁹⁹

- 2.48 The long-term agreements are broadly framework agreements which apply to a portfolio of sites, and which set out the terms and conditions (including price) that will apply across the portfolio of sites for the duration of the agreement. The long-term agreements may be made up of a number of separate contracts (for example, as discussed in paragraph 2.59 below, Cellnex has three separate contracts with eir).
- 2.49 Table 1 and Table 2 below summarise some of the key features of the long-term agreements that Phoenix and Cellnex have with MNOs.
- 2.50 WIP contracts with non-MNO customers are generally shorter than their contracts with MNOs. For example, [REDACTED] has a [REDACTED]-year licence period with Phoenix which began on 1 January [REDACTED].¹⁰⁰ [REDACTED] has a [REDACTED]-year contract with Cellnex.¹⁰¹ WIPs

⁹⁸ Reference in this document to “long-term contracts” and “long-term agreements”, irrespective of the specific title given to the particular contract, refers to a framework contract for hosting services for multiple sites between a WIP and a customer and which lasts for longer than 5 years.

⁹⁹ RBB Report, page 3.

¹⁰⁰ According to annex 22.2 of the Merger Notification Form, [REDACTED].

¹⁰¹ Commission’s written record of a remote meeting with Imagine on 15 May 2024 (“Imagine Call Note 15.05.2024”), page 2.

such as the OPW and Towercom stated that their contracts with customers are typically for [REDACTED] years.¹⁰²

2.51 The long-term contracts between WIPs and MNOs typically include a commitment both to provide and to purchase BTS sites; and may also include built to fit (“BTF”) sites.

2.52 BTS agreements typically oblige WIPs to construct macro passive network infrastructure sites as designated by MNOs. The MNO selects the location and design of the BTS site. As such, a BTS site is one which is constructed in an area selected by an MNO to the specification determined by the MNO and generally constructed by the WIP.¹⁰³ BTS contracts also typically oblige MNOs to require a particular number of BTS sites over a set period and once built, the site becomes part of the WIP’s portfolio.

2.53 For example, in the Merger Notification Form Phoenix stated that:

“[Phoenix]’s portfolio also includes [REDACTED] work-in progress sites and a planned program of [REDACTED] build-to-suit (“BTS”) sites, to be developed over the next [REDACTED] years. The development of these work-in-progress and BTS sites also forms part of the [REDACTED].”¹⁰⁴

2.54 Cellnex stated that:

“Cellnex Ireland’s portfolio also includes [REDACTED] BTS sites to be deployed by 2028, of which [REDACTED] BTS sites form part of [REDACTED].”¹⁰⁵

2.55 Under the BTF agreements in place between the Parties and MNOs, the WIP (i.e., Phoenix or Cellnex, as the case may be) may propose a certain number of potential

¹⁰² Commission’s written record of a remote meeting with OPW on 15 May 2024 (“OPW Call Note 15.05.2024”), page 1; and Towercom Call Note 28.05.2024, page 2.

¹⁰³ In some instances, eir (but not the other MNOs) may undertake the physical construction of the site, and ownership on completion passes to the WIP.

¹⁰⁴ Merger Notification Form, page 16, paragraph 59.

¹⁰⁵ Merger Notification Form, page 20, paragraph 61.

sites to an MNO in a given year. The MNO can accept the proposal of any of the sites and require the WIP to construct it for them, but it is not obliged to accept any of the sites proposed by the WIP. Once built, the site becomes part of the WIP's portfolio. The Commission understands that very few BTF sites have, to date, been built.

2.56 The term of a BTS agreement is generally shorter than the term of the MSA. For example, as shown in Table 1 below, [REDACTED]

2.57 As the Parties pointed out: *“Build-to-suit (BTS) commitments in contracts that have already been agreed between MNOs and WIPs mean that MNO’s demand for future-build sites have been locked-in with the relevant WIPs.”*¹⁰⁶

Phoenix's agreements with MNOs

2.58 Phoenix has long-term agreements [REDACTED], detailed in Table 1 below. Phoenix has the following agreements with [REDACTED] MNOs:

[illegible]

¹⁰⁶ RBB Report, page 4.

¹⁰⁷ Phoenix Phase 2 RFI Response, Question 22.

[illegible]

Quality of service		[REDACTED]
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Source: the Commission, based on copies of agreements provided by Phoenix

Cellnex's agreements with MNOs

- 2.59 Cellnex's long-term agreements with [REDACTED] MNOs are detailed in Table 2 below. Cellnex has the following agreements with [REDACTED] MNOs:

[REDACTED]
[REDACTED]
[REDACTED]

Table 2: Overview of Cellnex's agreements with [REDACTED], [REDACTED], and [REDACTED].

Cellnex's MSAs/Agreements

	¹¹⁰	¹¹¹	¹¹²
Start date			
Duration			
Option to extend			
BTS provision/New sites			
Churn			

¹¹⁰ ¹¹⁰, provided by email to the Commission on 3 September 2024.

¹¹¹ ¹¹¹ Merger Notification Form, Annex 4.5 (c).

¹¹² ¹¹² Merger Notification Form, Annex 4.5 (e).

¹¹³ ¹¹³ provided by email to the Commission on 3 September 2024.

	1.1 The company has a policy of not disclosing any information that may be detrimental to its competitive position. This policy is applied consistently across all business units and is reviewed annually.	1.2 The company has a policy of not disclosing any information that may be detrimental to its competitive position. This policy is applied consistently across all business units and is reviewed annually.	1.3 The company has a policy of not disclosing any information that may be detrimental to its competitive position. This policy is applied consistently across all business units and is reviewed annually.
Pricing	2.1 The company has a policy of not disclosing any information that may be detrimental to its competitive position. This policy is applied consistently across all business units and is reviewed annually.	2.2 The company has a policy of not disclosing any information that may be detrimental to its competitive position. This policy is applied consistently across all business units and is reviewed annually.	2.3 The company has a policy of not disclosing any information that may be detrimental to its competitive position. This policy is applied consistently across all business units and is reviewed annually.
Change control	3.1 The company has a policy of not disclosing any information that may be detrimental to its competitive position. This policy is applied consistently across all business units and is reviewed annually.	3.2 The company has a policy of not disclosing any information that may be detrimental to its competitive position. This policy is applied consistently across all business units and is reviewed annually.	3.3 The company has a policy of not disclosing any information that may be detrimental to its competitive position. This policy is applied consistently across all business units and is reviewed annually.

114 [REDACTED]
[REDACTED] provided by email to the Commission on 3 September 2024.

	[REDACTED]	[REDACTED]	[REDACTED]
Quality of service	[REDACTED]	[REDACTED]	

Source: the Commission, based on copies of agreements provided by Cellnex

Overview of planning permission and telecommunications regulation

Planning permissions

- 2.60 In general, planning permission is required in respect of any development of land¹¹⁵ (with the exception of “exempted development”)¹¹⁶ in the State.¹¹⁷ Such permission is generally sought from the relevant local authority in whose jurisdiction the proposed development is to take place or, in certain cases, from An Bord Pleanála. Planning permission may be granted or refused or granted subject to certain conditions (specified by the planning body) being complied with. Local authorities are required to prepare a “County Development Plan” for their respective area every six years.¹¹⁸ Planning policy, at a national and local level, and the implementation of that policy have a significant influence on the passive network infrastructure sector. WIPs cannot build passive network infrastructure without the relevant permissions.
- 2.61 The County Development Plans (and Local Area Plans) aim to specify and control the types of development which may take place on certain land. They may specify the “Zone” or “Zoning Objectives” of areas of land which specify broad objectives of land use and use classes in that area.¹¹⁹
- 2.62 County Development Plans (and therefore the zoning and re-zoning of land) must be adopted by the elected members of local authorities whereas applications for planning permission are dealt with by officials of the local authorities as an administrative matter. This means that the need for re-zoning of land represents a high barrier for change of land use.
- 2.63 The addition of telecommunication equipment to a roof is considered a ‘development’ for planning permission purposes and may or may not be exempt from the requirement to obtain planning permission depending on the following:

¹¹⁵ Pursuant to Section 32 of the Planning and Development Act 2000 as amended (the “Planning and Development Act”), with such permission being sought in accordance with Part III of the Planning and Development Act.

¹¹⁶ Planning and Development Act, Section 4.

¹¹⁷ The term “development” is defined in section 3 of the Planning and Development Act and includes, inter alia: “the carrying out of any works in, on, over or under land, or the making of any material change in the use of any land or structures situated on land”.

¹¹⁸ Planning and Development Act, section 9(1).

¹¹⁹ An example of land use is ‘Residential’ and use classes elaborate on land use objectives (for example, ‘Residential’ zoning may include housing, educational facilities, and retail spaces as related use classes permitted in principle).

the nature of the roof; the building use; the nature of the equipment; the proposed location of the equipment on the roof; and the location of the building. The extent to which the proposed passive network infrastructure site satisfies these requirements will determine whether the addition of telecommunication equipment to a rooftop is subject to planning constraints.¹²⁰

- 2.64 The average amount of time required to receive planning permission for the construction of new macro passive network infrastructure sites can take approximately 12 to 18 months.¹²¹

Telecom regulation

- 2.65 Wireless passive infrastructure is not subject to the same regulatory oversight as fixed passive infrastructure. For example, following a market review of the market for Physical Infrastructure Access (“PIA”) carried out by ComReg, a full suite of ex ante remedies was put in place governing access to Eircom Limited’s passive fixed infrastructure.¹²² However, wireless passive infrastructure is not subject to a similar level of regulatory control. For example, Regulations 26, 42 and 55 of the European Union (Electronic Communications Code) Regulations 2022 grant ComReg the power to impose some forms of access obligation on wireless passive infrastructure, but the power is limited to certain types of undertaking under certain conditions, and does not apply to WIPs.
- 2.66 The EU Broadband Cost Reduction Directive (“BCRD”) (Directive 2014/61/EU) was implemented to address factors inhibiting the rapid roll-out of high-speed broadband services across the EU. The core aim of the BCRD was to facilitate infrastructure sharing, information sharing and coordination of civil works between telecom operators and utilities. It therefore had limited applicability to WIPs.

¹²⁰ Department of the Environment and Local Government, ‘Telecommunications Antenna and Support Structures – Guidelines for Planning Authorities’, available at: [1996-Telecommunications-Antennae-Support-Structures-1.pdf](#)

¹²¹ Shared Access Meeting Note 06.09.2024, page 3.

¹²² ComReg, ‘Physical Infrastructure Access (PIA) Market Review’, Decision D03/24, dated 18 January 2024.

2.67 However, the BCRD is set to be replaced by the EU Gigabit Infrastructure Act (the “GIA”), due to be fully enforceable from November 2025.¹²³ Of particular relevance is the extension of the definition of network operator to include providers of associated facilities, including providers of passive infrastructure i.e., WIPs. This would mean that WIPs would be subject to obligations put in place on foot of the GIA, including a requirement to provide access on fair, reasonable and non-discriminatory (“FRAND”) terms.

¹²³ Regulation (EU) 2024/1309 of the European Parliament and of the Council of 29 April 2024 on measures to reduce the cost of deploying gigabit electronic communications networks, amending Regulation (EU) 2015/2120 and repealing Directive 2014/61/EU (Gigabit Infrastructure Act).

3. RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

Introduction

3.1 In this section, the Commission identifies the potential product and geographic markets that are relevant for the assessment of the likely competitive effects of the Proposed Transaction. This section sets out:

- (a) relevant principles that apply to market definition;
- (b) horizontal and vertical overlaps between the activities of the Parties;
- (c) potential relevant product markets;
- (d) potential relevant geographic markets; and
- (e) the Commission's conclusions on relevant market definition.

3.2 Market definition provides a framework for assessing the competitive effects of a merger; it is a means to an end. The boundaries of a market do not in themselves determine the outcome of the analysis of competitive effects to be assessed by the Commission in its merger review, as there may be competitive constraints on the merging parties from outside the relevant market or segmentation within the relevant market or other ways in which some constraints will be more significant than others.¹²⁴ The Commission takes such factors into account in its assessment of competitive effects, where relevant.

Relevant principles

3.3 The role of market definition is explained in the Commission's Merger Guidelines as follows:

"Market definition is a conceptual framework within which relevant information can be organised for the purposes of assessing the competitive effect of a merger. Identifying the precise relevant market

¹²⁴ The Commission's Merger Guidelines, paragraphs 2.1 and 2.3.

*involves an element of judgement. It is often not possible or even necessary to draw a clear line around the fields of rivalry. Indeed, it is often possible to determine a merger's likely impact on competition without precisely defining the boundaries of the relevant market."*¹²⁵

3.4 According to the Commission's Merger Guidelines:

*"The relevant product market is defined in terms of products rather than producers. It is the set of products that customers consider to be close substitutes. In identifying the relevant product market, the Commission will pay particular attention to the behaviour of customers, i.e., demand-side substitution. Supply-side substitution (i.e., the behaviour of existing and/or potential suppliers in the short term) may also be considered."*¹²⁶

3.5 The relevant market contains the most significant alternatives available to the customers of the merging parties. Identifying the precise relevant market involves an element of judgement, with appropriate weight being given to factors on both the demand and supply side.¹²⁷

3.6 The Commission's Merger Guidelines note that:

*"Whether or not a product is a close substitute of a product supplied by one or more of the merging parties will depend on the willingness of customers to switch from one product to the other in response to a small but significant and non-transitory increase in price (or an equivalent decrease in quality). This will involve an assessment of the characteristics and functions of the products in question".*¹²⁸

¹²⁵ The Commission's Merger Guidelines, paragraphs 2.3.

¹²⁶ The Commission's Merger Guidelines, paragraph 2.8.

¹²⁷ The Commission's Merger Guidelines, paragraph 2.2.

¹²⁸ The Commission's Merger Guidelines, paragraph 2.9.

- 3.7 The standard economic test for defining the relevant market is the small but significant non-transitory increase in price (“SSNIP”) test.¹²⁹ The SSNIP test seeks to identify the smallest group of products and geographic areas within which a hypothetical monopolist could profitably impose a SSNIP (usually 5-10%), or an equivalent decrease in quality, without a sufficient number of consumers/service purchasers switching to alternative products to render the price increase non-profitable. However, the Commission notes that the SSNIP test is just one of the tools used in defining the relevant product market, and its applicability varies depending on pricing practices in the market. A substantial emphasis should also be placed on product characteristics, price and intended use as well as observed substitution patterns between various products that can potentially be included in the same product market.
- 3.8 As noted in the Commission’s Merger Guidelines: *“Market definition should not restrict the range of competitive effects to be assessed by the Commission in its merger review.”*¹³⁰ In coming to a view of the relevant product and geographic markets, the Commission may therefore *“consider segmentation within the relevant market or factors outside the relevant market that impose competitive constraints on firms in the relevant market.”*¹³¹
- 3.9 Ultimately, the Commission’s definition of the relevant market or markets depends on the specific facts, circumstances, and evidence of the merger or acquisition under investigation.¹³²

Horizontal and Vertical Overlaps

Horizontal overlaps

- 3.10 In the Merger Notification Form, the Parties addressed the horizontal overlaps between their respective activities as follows:

¹²⁹ The SSNIP test is discussed in detail in the Commission’s Merger Guidelines, paragraphs 2.9-2.14.

¹³⁰ The Commission’s Merger Guidelines, paragraph 2.1.

¹³¹ The Commission’s Merger Guidelines, paragraph 2.1.

¹³² The Commission’s Merger Guidelines, paragraph 2.6.

“the Proposed Transaction gives rise to a horizontal overlap between [Phoenix] and Cellnex [...] in relation to the provision of hosting services on macro passive network infrastructure sites in the State.”¹³³

3.11 In the Merger Notification Form, the Parties noted that there is a minor horizontal overlap only between their activities in relation to micro passive network infrastructure sites in the State; Phoenix had [REDACTED] micro sites at the date of notification ¹³⁴ and Cellnex had [REDACTED] DAS and repeaters, which accounted for a *de minimis* revenue of €[REDACTED] in 2023. In the Merger Notification Form, the Parties submitted that this minor overlap is not worthy of further consideration.

3.12 Phoenix later stated that it *“does not currently operate any micro sites in the State”* and that the statement in the Merger Notification Form that it operated [REDACTED] micro passive network infrastructure sites in the State was an error that had occurred as a *“result of an internal mis-categorisation of certain sites.”¹³⁵*

3.13 Therefore, the Commission considers the following horizontal overlap in the activities of the Parties to be relevant for its assessment of the Proposed Transaction:

- the provision of hosting services on macro passive network infrastructure sites in the State.

Vertical overlaps

3.14 In the Merger Notification Form, the Parties addressed vertical overlaps as follows:

“The Proposed Transaction does not give rise to any significant vertical relationships between [Phoenix] and Cellnex [...] In particular, neither [Phoenix] nor Cellnex [...] operates as an MNO or is otherwise active in any other aspect of the electronic communications sector in Ireland, in

¹³³ Merger Notification Form, page 21, paragraph 63.

¹³⁴ In footnote 19 of the Merger Notification Form, it is stated that Phoenix has *“received grants of planning permission for a further [REDACTED] micro sites.”*

¹³⁵ Phoenix Phase 1 RFI Response, page 19.

particular retail mobile markets (i.e. the supply of retail mobile communication services), wholesale mobile markets (i.e. whole [sic] access and call origination services on mobile networks, retail or wholesale fixed internet access services or backhaul services).’’¹³⁶

- 3.15 However, the Parties have noted that, for completeness, Phoenix rents a small number of land/real sites from Cellnex (i.e., as a landowner/customer relationship) on commercial terms. In the Merger Notification Form, the Parties stated that, out of the total number of [REDACTED] macro passive network infrastructure sites in its portfolio at the date of notification, Phoenix rented less than [REDACTED] sites from Cellnex, amounting to a total rental income of €[REDACTED] million annually. Furthermore, in the Phoenix Phase 1 RFI Response, Phoenix stated that it rented [REDACTED] land/real estate sites from third parties (i.e., landlords, including Cellnex) in 2023.¹³⁷ In the Merger Notification Form, the Parties argued that this vertical relationship is minor and not worthy of further consideration, given the *de minimis* landholding of Cellnex and the small value of rent attributable to Phoenix.
- 3.16 The Commission has concluded that the minor vertical relationship between the Parties which relates to the lease or rental of land would not in itself give rise to any foreclosure concerns following implementation of the Proposed Transaction. As such, vertical relationships and potential vertical effects are discussed briefly in Section 7 below.

Potential Relevant Product Markets

Previous Commission decisions

- 3.17 The Commission has previously considered several mergers in the telecommunications sector that are of some relevance to the assessment of the Proposed Transaction. The following examples are included as background to the current analysis:

¹³⁶ Merger Notification Form, page 21, paragraph 64.

¹³⁷ Phoenix Phase 1 RFI Response, page 33, Table 27.1.

- (a) M/23/005 - *John Laing/Towercom*;¹³⁸
- (b) M/20/018 - *Phoenix Tower/Emerald (eir)*;¹³⁹
- (c) M/18/081 - *Speed Fibre/GMC-D-OH (Ireland)*;¹⁴⁰ and
- (d) M/17/045 - *IIF/GMC*.¹⁴¹

3.18 The Commission most recently – in M/23/005 - *John Laing/Towercom* – considered the acquisition of a WIP operating in the State and determined that it did not need to come to a definitive view on the precise relevant product market in that case. This was based on its conclusions that the likely competitive impact of the proposed acquisition would be unaffected. In assessing the competitive effects of the proposed acquisition, the Commission examined the potential market for the provision of hospitality services¹⁴² on macro passive network infrastructure sites.

3.19 The Commission, in M/20/018 - *Phoenix Tower/Emerald (eir)*, considered the competitive impact of the notified transaction by reference to the supply of passive infrastructure to wireless and fixed line operators. The Commission did not need to determine the precise boundaries of the market for the supply of passive infrastructure to wireless and fixed line operators in this case, as there was no horizontal overlap in the State between the business activities of the notifying parties.

3.20 In each of M/18/081 - *Speed Fibre/GMC-D-OH (Ireland)* and M/17/045 - *IIF/GMC*, the Commission considered the vertical relationship between the parties with

¹³⁸ M/23/005 - *John Laing/Towercom*. Available at: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2023/02/2023.05.31-M23.005-John-Laing-Towercom-Determination-Public.pdf>

¹³⁹ M/20/018 - *Phoenix Tower/Emerald (eir)*. Available at: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2020/06/M.20.018-Phoenix-Emerald-eir-Public.pdf>

¹⁴⁰ M/18/081 - *Speed Fibre/GMC-D-OH (Ireland)*. Available at: https://www.ccpc.ie/business/wp-content/uploads/sites/3/2018/10/2018_10_31-M.18.081-IIF_GMC-Determination-Final.pdf

¹⁴¹ M/17/045 - *IIF/GMC*. Available at: https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/08/M_17_045-IIF-GMC-Determination.pdf

¹⁴² The Commission uses the terms ‘hosting services’ and ‘hospitality services’ interchangeably, as synonyms, throughout this Determination.

respect to the provision of passive tower infrastructure services without reaching a conclusion on product market definition.

Previous European Commission decisions

3.21 The European Commission has also considered the telecommunications sector under its merger review process. In *M.9674 Vodafone Italia/TIM/INWIT JV*,¹⁴³ the European Commission concluded that general hospitality services (i.e., the leasing of space on passive network infrastructure) on macro sites are in a separate product market from hospitality services on micro sites. The European Commission drew this distinction on the basis that micro sites are complementary to, rather than substitutable for, macro sites, as micro cells are used in combination with macro cells to improve coverage in densely occupied areas or in an area for which normal infrastructure is insufficient.

3.22 In this decision, the European Commission considered various possible segmentations of the market. Ultimately, the European Commission analysed the impact of the transaction considering both a general market for hospitality services on macro-sites to customers other than TV and radio broadcasters, as well as distinct markets for hospitality services on macro-sites to (i) MNOs and (ii) FWA suppliers.

Previous decisions of other national competition authorities

3.23 The UK national competition authority, the Competition and Markets Authority (the “CMA”), has also considered cases in the telecommunications sector that are of relevance to the assessment of the Proposed Transaction under its merger review process. In *Cellnex/CK Hutchison UK towers*,¹⁴⁴ the CMA considered two product markets:

¹⁴³ European Commission, *M.9674 Vodafone Italia/TIM/INWIT JV*. Available at https://ec.europa.eu/competition/mergers/cases1/202037/m9674_516_3.pdf.

¹⁴⁴ UK, Competition and Markets Authority, *Anticipated acquisition by Cellnex UK Limited of the passive infrastructure assets of CK Hutchinson Networks Europe Investments S.À R.L., Final Report*. Available at https://assets.publishing.service.gov.uk/media/62221304d3bf7f4f0ec9b75e/Cellnex_CK_Hutchison_-_Final_Report.pdf.

- (a) the market for the supply of access to developed macro sites (including BTS); and
- (b) the market for the supply of ancillary services to MNOs and other wireless communication providers.¹⁴⁵

3.24 In that case, the CMA took a similar approach to the European Commission and concluded that: (i) BTS sites; (ii) all structure types (i.e., monopoles, towers, etc.); and (iii) ancillary services provided by the tower companies, all fell within the product reference frame.

3.25 The CMA's conclusion on the market definition in *Cellnex/CK Hutchison UK towers* stemmed from an earlier case also involving Cellnex, *Case ME/6860/19 Cellnex/Arqiva*, in which the CMA considered the product frame of reference in relation to:

- (a) the supply of access to macro sites; and,
- (b) the supply of access to small cell sites.¹⁴⁶

However, the CMA did not find it necessary to reach a conclusion on these product frames of reference in this case as “*no competition concerns [arose] on any plausible basis.*”¹⁴⁷

3.26 As well as the European Commission and the CMA, other European national competition authorities (“NCAs”) reached similar conclusions on product market definition in relation to mergers in this area.¹⁴⁸

¹⁴⁵ UK, Competition and Markets Authority, *Anticipated acquisition by Cellnex UK Limited of the passive infrastructure assets of CK Hutchinson Networks Europe Investments S.À R.L.*, Final Report, paragraph 6.13. Available at https://assets.publishing.service.gov.uk/media/62221304d3bf7f4f0ec9b75e/Cellnex_CK_Hutchison_-_Final_Report.pdf.

¹⁴⁶ ME/6860/19 Anticipated acquisition by Cellnex UK Limited of Arqiva Services Limited, paragraph 117. Available at [Cellnex Arqiva full text decision](#).

¹⁴⁷ ME/6860/19 Anticipated acquisition by Cellnex UK Limited of Arqiva Services Limited, paragraph 187. Available at [Cellnex Arqiva full text decision](#).

¹⁴⁸ C12358 - Cellnex Italia/CK Hutchinson Networks Italia, paragraph, 30. Available at [https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/43D62DA3967F26DDC125870900523FBE/\\$File/p29717.pdf](https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/43D62DA3967F26DDC125870900523FBE/$File/p29717.pdf); C12357 - Phoenix Tower International Holdco/Towertel, paragraph 23. Available at <https://www.agcm.it/dotcmsdoc/bollettini/2021/16-21.pdf>. Decision 21-DCC-197 of 25 October 2021 relating

Views of the Parties

- 3.27 In the Merger Notification Form, the Parties stated that *“the provision of hosting services on macro passive network infrastructure sites is also the appropriate product frame of reference in this case, without the need for further segmentation.”*¹⁴⁹
- 3.28 The Parties also stated that no distinction should be made between the provision of hosting services to the various wireless network operators, arguing that the *“requirements for hosting services on macro sites are largely the same for suppliers of mobile services and FWA”*.¹⁵⁰
- 3.29 In the Merger Notification Form, the Parties stated that *“wireless network operators (including MNOs) availing of hosting services on macro sites are likely to consider hosting services on micro sites as a complement to, rather than an alternative for, their network deployment requirements.”*¹⁵¹
- 3.30 Furthermore, the Parties stated that there are a broad range of asset types which are substitutable for tower structures, including TV towers and rooftops.¹⁵² As such, the Parties did not consider there to be any need for the Commission to further distinguish between asset types and considered it appropriate to include all asset/structure types within the same product frame of reference.

Views of third parties

Hibernian Towers

to the acquisition of sole control of Hivory by Cellnex France Groupe, paragraphs 6-25. Available at: <https://www.autoritedelaconurrence.fr/fr/decision-de-controle-des-concentrations/relative-la-prise-de-controle-exclusif-de-la-societe-hivory>.

¹⁴⁹ Merger Notification Form, pages 26-27, paragraph 83.

¹⁵⁰ Merger Notification Form, pages 26-27, paragraph 83.

¹⁵¹ Merger Notification Form, page 27, paragraph 84.

¹⁵² Merger Notification Form, page 27, paragraph 85.

- 3.31 In its submission to the Commission dated 8 April 2024, Hibernian Towers provided its views on the characterisation of the potential market affected by the Proposed Transaction.
- 3.32 Hibernian Towers noted that passive infrastructure sites are key inputs for two types of wireless telecommunications networks, namely mobile telecommunications networks and fixed wireless access networks.¹⁵³

Commission's analysis of relevant product markets

- 3.33 In the following section, the Commission has taken the core horizontal overlap between the activities of Phoenix and Cellnex as the starting point for identifying the scope of the appropriate potential product market for the purposes of assessing the competitive effects of the Proposed Transaction. The narrowest core overlap that the Commission considers appropriate is the provision of hosting services on macro passive network infrastructure sites in the State. Taking into account the Commission's past findings, and the views of the Parties, and considering all information available to it, the Commission has considered the following questions in reaching its views on the relevant product market(s):
- (i) Should the potential market for the provision of hosting services on macro passive network infrastructure sites be widened to include the provision of hosting services on micro passive network infrastructure sites?
 - (ii) Should the potential market for the provision of hosting services on macro passive network infrastructure sites be segmented by customer type?
 - (iii) Should the potential market for the provision of hosting services on macro passive network infrastructure sites include BTS sites?

¹⁵³ London Economics, *Note on Competition Concerns in the Irish Telecom Towers Market*, on behalf of Hibernian Towers, page 6.

Should the potential market for the provision of hosting services on macro passive network infrastructure sites be widened to include the provision of hosting services on micro passive network infrastructure sites?

Demand side substitution

- 3.34 In accordance with the Commission's Merger Guidelines, the Commission begins its analysis by considering demand side substitution. That is, whether an entity that avails of hosting services on a macro passive network infrastructure site would consider hosting services on a micro passive network infrastructure site to be a close substitute for this service, such that they would switch to a micro passive network infrastructure site, rendering a licence fee increase on the macro passive network infrastructure site unprofitable.
- 3.35 In principle, the provision of hosting services on micro passive network infrastructure sites and the provision of hosting services on macro passive network infrastructure sites would be in the same market if customers considered both types of sites to be sufficiently similar. That is, if customers considered that the characteristics, functionality and pricing were comparable to the degree that they would be willing to switch from a macro site to a micro site in response to a SSNIP or equivalent decrease in quality of the hosting services.
- 3.36 Based on its investigation, the Commission is of the view that the basic characteristics of macro and micro sites differ. As described in paragraph 2.11 above, macro passive network infrastructure sites are typically located on elevated structures such as towers, rooftops and monopoles, whereas micro passive network infrastructure sites are primarily deployed either: (i) outdoors, on street furniture, lamp posts and bus shelters; or (ii) indoors, in places such as sports stadia, train stations and shopping centres.
- 3.37 The Commission is of the view that while both macro and micro sites can host the active equipment of MNOs and FWA operators, they are functionally different. A macro passive network infrastructure site accommodates high-power macrocells and is essential in delivering broad coverage, while a micro passive network infrastructure site hosts lower power microcells and is used primarily as a means

of filling in coverage gaps between macrocells. This coverage in-fill is particularly relevant for areas with high demand.

- 3.38 In general, it is not feasible or cost-effective for even a large number of micro passive network infrastructure sites to replace a macro passive network infrastructure site, due to the number of sites which would be required, in specific locations and with specific characteristics, to deliver the same broad coverage. The Commission therefore considers that it is unlikely that customers of passive network infrastructure sites would view macro sites and micro sites as substitutes for each other, owing to the need for these customers to have access to both to ensure a high degree of coverage for end users.

Supply side substitution

- 3.39 In setting out the Commission's approach to assessing potential supply side substitution, the Commission's Merger Guidelines state that:

"The boundaries of the relevant product market are generally determined by reference to demand-substitution alone. The reaction of suppliers to price changes is generally considered in the analysis of the competitive effects of the merger, either under rivalry or potential new entry, rather than as part of market definition. However, there may be circumstances where the Commission will consider the responses of suppliers to changes in price.

*A product is a supply-side substitute for another in cases where the capacity for producing that product could profitably be switched to supply the other product quickly and without significant investment in response to a small price increase by the hypothetical monopolist. The precise period for determining whether suppliers would switch to supplying the relevant products will vary from market to market."*¹⁵⁴ (emphasis added)

¹⁵⁴ The Commission's Merger Guidelines, paragraphs 2.15-2.16

- 3.40 While the boundaries of the relevant product market are generally determined by reference to demand-substitution alone, for completeness the Commission has also considered the extent to which a provider of hosting services on a micro passive network infrastructure site would switch to providing hosting services on a macro passive network infrastructure site in response to a SSNIP in the licence fee on a macro passive network infrastructure site, and whether such a switch could be done: (i) quickly; and (ii) without significant investment.
- 3.41 The information obtained through the Commission's investigation suggests that a provider of hosting services on a micro passive network infrastructure site would not be able to switch to providing hosting services on a macro passive network infrastructure site quickly:
- (a) in paragraph 38.9 of the Phoenix Phase 1 RFI Response, Phoenix estimated that *"there is a lead time of 4-36 months (depending on a number of factors) associated with developing and constructing new sites for the purposes of hosting macro passive network infrastructure"*;¹⁵⁵
 - (b) during a meeting with the Commission, Shared Access estimated that it takes between 12 and 18 months to receive planning permission for the construction of a macro passive network infrastructure site;¹⁵⁶
 - (c) when asked by the Commission how many sites it builds annually, ESB Telecoms stated that it builds between ■■■ sites and ■■■ sites per year but that these figures are targets and that it may not achieve these targets *"due to a multitude of reasons such as planning permissions or access to suitable land"*;¹⁵⁷ and

¹⁵⁵ Phoenix Phase 1 RFI Response, paragraph 38.9

¹⁵⁶ Shared Access Meeting Note 06.09.2024, page 3.

¹⁵⁷ ESB Telecoms Call Note 23.05.2024, page 3.

- (d) during a call with the Commission, Towercom stated that planning requirements mean that *“it is easier to expand a site if a company already has the site, than it is to build new ones”*.¹⁵⁸

3.42 During calls with the Commission, each of: (i) Three; (ii) Vantage; and (iii) Third Party 1, stated that the development of new sites in the State is capital intensive. In a call with the Commission, Three stressed that, historically, MNOs *“would have built their own sites, which meant [MNOs] needed to cover all the overhead costs of acquiring areas for the sites to be built on, construction, and maintenance of the sites”*.¹⁵⁹ Third Party 1 stated in a call with the Commission that a *“green field site is an expensive exercise with costs ranging from €120,000 to €150,000 per site in addition to costs associated with landlords and legal fees”*.¹⁶⁰ Vantage stated in a call with the Commission that costs can vary based on location, explaining that *“sites in urban areas can be more expensive due to the costs implemented by the landlords”*.¹⁶¹

3.43 Based on the information obtained during the Commission’s investigation, including from third parties, the Commission has formed the view that it is unlikely that a provider of hosting services on a micro passive network infrastructure site could, in a timely fashion and without significant investment, switch to providing hosting services on a macro passive network infrastructure site in response to a small but significant price increase by a hypothetical monopolist.

3.44 Based on all the information available to it, the Commission is of the view that, due to differences in characteristics and functionality, the provision of hosting services on micro passive network infrastructure sites is not a demand or supply side substitute for the provision of hosting services on macro passive network infrastructure sites. As such, the Commission agrees with the Parties’ views as set

¹⁵⁸ Towercom Call Note 28.05.2024, page 3.

¹⁵⁹ Three Call Note 23.05.2024, page 3.

¹⁶⁰ Commission’s written record of a remote meeting with Third Party 1 on 9 September 2024 (“Third Party 1 Call Note 09.09.2024”), page 3.

¹⁶¹ Commission’s written record of a remote meeting with Vantage on 15 May 2024 (“Vantage Call Note 15.05.2024”), page 3.

out in paragraph 3.27 above, and is of the view that it is not necessary to widen the potential market for the provision of hosting services on macro passive network infrastructure sites to include the provision of hosting services on micro passive network infrastructure sites.

Should the potential market for the provision of hosting services on macro passive network infrastructure sites be segmented by customer type?

3.45 In the Merger Notification Form, the Parties stated that:

“the provision of hosting services on macro passive network infrastructure sites is also the appropriate product frame of reference in this case, without the need for any further segmentation. In particular, the parties do not consider there to be any distinction to be drawn in the provision of hosting services to different types of wireless network operators (e.g. as between MNOs and FWA providers such as Imagine and Dense Air).”¹⁶²

3.46 The Commission considered whether the potential market for the provision of hosting services on macro passive network infrastructure sites should be further segmented by customer type. This could arise, for example, if there are differences within the potential market for the provision of hosting services on macro passive network infrastructure sites in terms of demand or supply by different customer groups.

3.47 As outlined in footnote 56 above, MNOs are responsible for the vast majority of revenue generated by WIPs. In the Phoenix Phase 1 RFI Response, Phoenix stated that [REDACTED] MNOs accounted for [REDACTED]% of its revenue in 2023.¹⁶³ Similarly, [REDACTED] MNOs accounted for roughly [REDACTED]% of Cellnex’s revenue in 2023.¹⁶⁴

3.48 During a call with Imagine, Imagine informed the Commission that it meets with “all the tower providers” for the purposes of identifying new macro passive

¹⁶² Merger Notification Form, page 26, paragraph 83.

¹⁶³ Phoenix Phase 1 RFI Response, page 27, table 20.1.

¹⁶⁴ The Commission calculated the proportion of Cellnex’s revenue attributable to the MNOs using Table 5 of the Cellnex Phase 1 RFI Response, which provided a breakdown of Cellnex’s total revenues.

network infrastructure sites onto which it could move.¹⁶⁵ Imagine also explained that the types of agreements it has with WIPs typically last between [REDACTED] and [REDACTED] years.¹⁶⁶ When asked to describe the relevant factors it considers when looking for new sites, Imagine stated that its primary consideration is location, followed by the associated costs (i.e., rent and operational costs).¹⁶⁷

3.49 Therefore, in terms of an FWA operator looking for a provider of hosting services on macro passive network sites in the State that is capable of servicing its needs, in terms of the duration of a licence agreement between an FWA operator and a WIP, and in terms of the factors an FWA operator considers when looking for a new site, it is clear that an FWA operator's requirements of, and engagements with, WIPs are similar to those of an MNO.

3.50 On this basis, notwithstanding the fact that MNOs account for the vast majority of the revenue generated by each of the Parties, the Commission agrees with the Parties' views as set out in paragraph 3.45 above and considers that both MNO and non-MNO customers require a similar service offering from WIPs. As such, the Commission is of the view that there is no need to segment the potential market further and, as such, the potential market should not be segmented by customer type.

Should the potential market for the provision of hosting services on macro passive network infrastructure sites include BTS sites?

3.51 As discussed in paragraphs 2.47 to 2.59 above, MNOs have long-term agreements with WIPs. Often, as part of these long-term agreements, the WIP will commit to delivering a certain number of new macro passive network infrastructure sites for a customer under a BTS arrangement.

¹⁶⁵ Imagine Call Note 15.05.2024, page 2.

¹⁶⁶ Imagine Call Note 15.05.2024, page 3.

¹⁶⁷ Imagine Call Note 15.05.2024, page 3.

3.52 Once built, there is no difference between a newly built BTS site and an existing macro passive network infrastructure site in terms of functionality and characteristics:

- (a) from the perspective of the WIP that has constructed the site, the incentive is to house more than just the anchor tenant on the site to try to optimise usage and maximise revenues, just as it would do on a non-BTS site;
- (b) from the perspective of a customer that is not the anchor tenant, it does not matter whether it is co-locating on a BTS site or on a non-BTS site; and
- (c) although there is a slight difference between a BTS site and a non-BTS site from the anchor tenant's perspective (as the BTS site has been constructed to the specifications of the anchor tenant, in an area identified by the anchor tenant, and the anchor tenant has the right to choose where on the site its active network infrastructure is erected), it is possible for this customer to be an anchor tenant on a non-BTS site. This suggests that, even from the perspective of an anchor tenant, it is still possible for both BTS and non-BTS sites to have largely the same functionality and characteristics.¹⁶⁸

3.53 Therefore, the question as to whether or not BTS sites should be included in the potential market for the provision of hosting services on macro passive network infrastructure sites comes down to the fact that many of these sites do not yet exist, as opposed to there being any key differences between the functionality and characteristics of BTS and non-BTS sites.

3.54 In considering whether BTS sites should be included in the potential market for the provision of hosting services on macro passive network infrastructure sites, the Commission notes that, while many of these BTS sites have not yet been built, the

¹⁶⁸ This can occur in situations where, for example, a site is delivered on an ad hoc basis by a WIP in response to search rings sent by a customer.

BTS agreements are legally binding contracts which require the MNO to commit to lease a specific number of sites and the WIP to deliver such sites by a certain date.

3.55 For instance, in paragraph 7.2 of the Phoenix Phase 1 RFI Response, Phoenix stated that the [REDACTED]

[REDACTED]¹⁶⁹

According to Clause [REDACTED]

[REDACTED] In paragraph 23.1 of the Phoenix Phase 1 RFI Response, Phoenix noted that the BTS sites that have been delivered to date have been delivered in [REDACTED] tranches and [REDACTED] BTS sites have been delivered thus far. This means that Phoenix is contractually obliged to add a further [REDACTED] sites to its portfolio in accordance with its [REDACTED]

[REDACTED] Given that Phoenix's portfolio currently comprises [REDACTED] macro passive network infrastructure sites, the addition of [REDACTED] further sites will constitute a [REDACTED]% increase in the size of its portfolio.

3.56 Furthermore, [REDACTED] provides for the delivery of at least [REDACTED] BTS sites by [REDACTED] As part of [REDACTED]

it is required to deliver [REDACTED] BTS sites by [REDACTED] Annex 23.1 of the Cellnex Phase 1 RFI Response shows that Cellnex has delivered [REDACTED] BTS sites [REDACTED] [REDACTED] with each of the [REDACTED] MNOs since 2020.

3.57 Based on the information obtained by the Commission over the course of its review, the Commission has formed the view that the delivery of BTS sites: (i) is a legally binding commitment in the form of a contractual obligation between a WIP and an MNO; (ii) provides an important competitive constraint on other macro passive network infrastructure sites; and (iii) is an important aspect of the development of the potential market for the provision of hosting services on macro passive network infrastructure sites. As such, the Commission's view is that the potential market for the provision of hosting services on macro passive network infrastructure sites includes BTS sites.

¹⁶⁹ Phoenix Phase 1 RFI Response, paragraph 7.2.

Commission's conclusion on the relevant product markets

3.58 The Commission has considered both demand-side and supply-side substitution with respect to the provision of hosting services on macro passive network infrastructure sites. Having considered the views of the Parties and third parties, the Commission has identified the provision of hosting services on macro passive network infrastructure sites as the relevant product market for the purposes of assessing the Proposed Transaction which:

- (a) does not include the provision of hosting services on micro passive network infrastructure sites;
- (b) should not be segmented by customer type; and
- (c) includes BTS sites.

3.59 Therefore, based on the reasons outlined above, the Commission's view is that the relevant product market is for:

- the provision of hosting services on macro passive network infrastructure sites, including BTS sites.

Potential Relevant Geographic Markets

Relevant principles

3.60 The role of geographic market definition is explained in the Commission's Merger Guidelines as follows:

"The product market(s) affected by a merger may be geographically bounded if geography limits some customers' willingness or ability to switch products or some suppliers' willingness or ability to supply to customers. The relevant geographic market is usually defined in terms of the location of suppliers and it includes those suppliers that customers

consider to be feasible substitutes. The relevant geographic market may be local, regional, national or wider.”¹⁷⁰

“The approach to defining the relevant geographic market is similar to that of product market definition. Both can use the SSNIP tests as an analytical tool.”¹⁷¹

3.61 According to the Commission’s Merger Guidelines:

“The relevant geographic market consists of all supply locations that would have to be included for the hypothetical monopolist to find it profitable to impose a small but significant non-transitory increase in price. Beginning with the location of each of the merging parties, the SSNIP test is applied by considering what would happen if a hypothetical monopolist of the relevant product at that location imposed a small but significant non-transitory increase in price. If enough customers switch to suppliers in other locations, the next closest location where customers can purchase the relevant product is included. The SSNIP test is thus iteratively applied until a hypothetical monopolist could profitably increase the price of the relevant product in a location or group of locations by a small but significant non-transitory amount. This location or group of locations is thus defined as the relevant geographic market.”¹⁷²

Previous Commission decisions

3.62 The Commission has previously issued determinations related to the provision of hosting services on macro passive network infrastructure sites but did not come to a definitive view on the relevant geographic market. In M/23/005 – *John Laing Group/Towercom*, the Commission did not come to a definitive conclusion on the

¹⁷⁰ The Commission’s Merger Guidelines, paragraph 2.19.

¹⁷¹ The Commission’s Merger Guidelines, paragraph 2.20.

¹⁷² The Commission’s Merger Guidelines, paragraph 2.21.

relevant geographic market and examined the competitive impact of the proposed transaction by reference to the State.

- 3.63 In M/17/045 – *IIF/GMC*, the Commission also assessed the likely impact of the proposed transaction by reference to the State. In M/18/081 – *Speed Fibre/GMC-D OH (Ireland)*, the Commission did not deem it necessary to depart from its previous approach in M/17/045 – *IIF/GMC*.

Previous decisions of the European Commission

- 3.64 In Case M.9675 *Vodafone Italia/TIM/INWIT JV*, the European Commission considered the relevant geographic market for the provision of hospitality services on passive network infrastructure to market operators. In this case, the European Commission determined that, despite some WIPs charging prices at a local level, “all the other elements [pointed] to a national dimension of the market.”¹⁷³ The European Commission also noted that it would consider a possible distinction between rural and urban areas in its analysis.
- 3.65 The European Commission has in previous decisions considered that the market for hospitality services to market operators is not wider than national in scope because it is driven by nationally licensed MNOs and the relevant planning rules are guided by national law¹⁷⁴ and because all the site hosting activities are subject to a national regulatory environment.¹⁷⁵
- 3.66 The European Commission also noted that MNOs generally approach a tower company to manage their entire networks or to provide access to a set of locations across the territory under its licence. As such, the tower companies are required to provide a diversified portfolio of assets located across the country in question.¹⁷⁶

¹⁷³ Case M.9675 - Vodafone Italia/TIM/INWIT JV, paragraph 88.

¹⁷⁴ Case COMP/ 38.370 – O2 UK Limited / T-Mobile UK Limited (“UK Network Sharing Agreement”), paragraph 52; Case COMP/38.369 – T-Mobile Deutschland/O2 Germany: Network Sharing Rahmenvertrag, paragraph 56.

¹⁷⁵ Case M.2925 – Charterhouse/CDC/Telediffusion de France SA, paragraph 27.

¹⁷⁶ Case M.9675 - Vodafone Italia/TIM/INWIT JV, paragraph 82.

Previous decisions of other national competition authorities

3.67 In *Cellnex/CK Hutchison UK towers*, the CMA considered the relevant geographic market as being the supply of access to developed macro sites and ancillary services to MNOs and other wireless communication providers in the UK. In this case, the CMA determined the relevant geographic market based on: (i) the network needs of their MNO and non-MNO customers which require national coverage; and (ii) WIPs' pricing being based on national rate cards.¹⁷⁷ The CMA concluded that the geographic market was national in scope.¹⁷⁸

3.68 The CMA also considered the geographic market in *Cellnex/Arqiva* to be national in scope. In determining the relevant geographic market in this case, the CMA considered national versus local price flexing to determine the parameters of competition. The CMA concluded that price, quality, range, service and investment are:

“largely set centrally and uniformly on a national basis, with some limited flexing in response to competitive conditions at more local levels.”¹⁷⁹

3.69 The approach taken by the CMA in *Cellnex/Arqiva* is also in line with how other European national competition authorities defined the geographic market for the provision of hosting services on passive network infrastructure sites, namely national in scope.¹⁸⁰ Notwithstanding its conclusion that the geographic market was national in scope, the French Autorité de la Concurrence (“AdIC”), when

¹⁷⁷ UK, Competition and Markets Authority, *Anticipated acquisition by Cellnex UK Limited of the passive infrastructure assets of CK Hutchinson Networks Europe Investments S.À R.L.*, Final Report, page 103. Available at: https://assets.publishing.service.gov.uk/media/62221304d3bf7f4f0ec9b75e/Cellnex_CK_Hutchison_-_Final_Report.pdf.

¹⁷⁸ UK, Competition and Markets Authority, *Anticipated acquisition by Cellnex UK Limited of the passive infrastructure assets of CK Hutchinson Networks Europe Investments S.À R.L.*, Final Report, paragraph 49. Available at: https://assets.publishing.service.gov.uk/media/62221304d3bf7f4f0ec9b75e/Cellnex_CK_Hutchison_-_Final_Report.pdf.

¹⁷⁹ UK, Competition and Markets Authority, *Anticipated acquisition by Cellnex UK Limited of the passive infrastructure assets of CK Hutchinson Networks Europe Investments S.À R.L.*, Final Report, page 11, paragraph 46. Available at: https://assets.publishing.service.gov.uk/media/62221304d3bf7f4f0ec9b75e/Cellnex_CK_Hutchison_-_Final_Report.pdf.

¹⁸⁰ C12358 Cellnex Italia/CK Hutchinson Networks Italia, paragraphs 61-63. Available at: [https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/43D62DA3967F26DDC125870900523FBE/\\$File/p29717.pdf](https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/43D62DA3967F26DDC125870900523FBE/$File/p29717.pdf); and C12357 Phoenix Tower International Holdco/Towertel, paragraph 28. Available at: <https://www.agcm.it/dotcmsdoc/bollettini/2021/16-21.pdf>.

reaching a determination on market definition in the case of *Cellnex/Hivory*,¹⁸¹ distinguished between the supply of passive infrastructure in urban areas, peri-urban areas and rural areas on the basis that rooftop sites are more common in urban areas, whereas tower sites are more common in peri-urban and rural areas. The AdIC formed this view based on the premise that conditions for access to land are different depending on the area, resulting in it being more difficult to develop new sites in urban areas.

Views of the Parties

3.70 In the Merger Notification Form, the Parties stated the following in respect of geographic market definition:

“Active equipment deployed on individual passive infrastructure sites will propagate a wireless signal over a certain defined area (depending on the type of active equipment, the nature of the radio spectrum being used, data demand within the area and other factors such as population density and topography). Wireless network operators therefore utilise a network of sites in order to provide the required levels of coverage in a given area. The precise composition of the site type (e.g. the mix of tower, rooftop, monopole) and the providers of passive infrastructure will depend on the needs of the wireless network operator/MNO, based on the characteristics of their network design and their coverage requirements in a particular area.”¹⁸²

3.71 The Parties submitted that, on this basis, the Commission has previously found the supply of hosting services on macro passive network infrastructure is national in scope. The Parties submitted that this is the appropriate geographic market for three reasons:

¹⁸¹ Decision 21-DCC-197 of 25 October 2021 relating to the acquisition of sole control of Hivory by Cellnex France Groupe, paragraphs 26-27. Available at: <https://www.autoritedelaconcurrence.fr/fr/decision-de-controle-des-concentrations/relative-la-prise-de-controle-exclusif-de-la-societe-hivory>.

¹⁸² Merger Notification Form, page 27-28, paragraph 87.

- (i) the structure of demand for hosting services on passive infrastructure is driven by nationally licensed providers of electronic communications services. This is reflected in the long-term MSAs and access agreements between MNOs and providers of hosting services, which are negotiated and agreed on a national basis;
- (ii) the relevant regulatory rules are organised on a national basis. In respect of the provision of mobile/wireless communication services, no distinction is made within the State on a geographic basis between the provision of services in different regions; and,
- (iii) in general terms, all suppliers provide, or are capable of providing, hosting services across the State and will determine their strategies for the development of their portfolios centrally on a national basis and not by reference to specific conditions of competition in individual locations of macro sites.

3.72 The Parties concluded that the Proposed Transaction should be analysed by reference to the provision of hospitality services¹⁸³ on macro passive network infrastructure sites in the State (i.e., that the geographic market is national in scope).

Should the relevant geographic market be narrower than national?

3.73 The Commission agrees with the Parties' views in terms of scope of the relevant geographic market. This notwithstanding, the Commission has also considered whether it may be necessary to consider the geographic market on a local level.

3.74 The Commission notes that, as part of MNOs' spectrum obligations,¹⁸⁴ whereby a certain proportion of the population must receive a certain level of coverage, the

¹⁸³ As explained in footnote 142 above, the Commission considers 'hosting services' and 'hospitality services' to be synonymous and interchangeable.

¹⁸⁴ Spectrum obligations are conditions in spectrum awards and vary according to the spectrum bands awarded. For example, the 700 MHz band obliges licensees to offer a 3 Mbit/s service to 99% of the population and a 30 Mbit/s service to 95% of

MNOs developed portfolios of macro passive network infrastructure sites across the State, which were subsequently sold to Phoenix, Cellnex and Vantage. In developing these national portfolios, the MNOs had to consider coverage received by end users at a local level. The development of each macro passive network infrastructure site is done with a view to providing coverage within the local range of the site.

3.75 Furthermore, the information obtained during the course of the Commission's investigation suggests that switching between macro passive network infrastructure sites can only be done on a local level:

- (a) in paragraph 32.2 of the Phoenix Phase 1 RFI Response, Phoenix stated that, when switching from one macro passive network infrastructure site to another, an MNO *"must take account of the need to ensure that new sites align within the existing network configuration of the [MNO] and allow it to continue to meet its coverage needs"*;
- (b) the Parties and third parties have referenced the use of "search rings" when identifying suitable locations for the construction of a macro passive network infrastructure site:
 - (i) in paragraph 17.3 of the Phoenix Phase 1 RFI Response, Phoenix stated that, when an MNO needs to build a site in a certain location, it will typically provide a geographic radius (referred to as a search ring) within which the new site is required. The search ring is dictated by factors such as the MNO's coverage requirements and morphology of the area in which the site is needed (e.g., whether it is a rural or urban site);
 - (ii) in paragraph 8.2 of the Cellnex Phase 1 RFI Response, Cellnex provided the following table which outlines its typical search rings

the population, with specific locations such as motorways, hospitals to be served (source: ComReg, 'ComReg to hold Multi-Band Spectrum Award' [2020] available at: <https://www.comreg.ie/comreg-to-hold-multi-band-spectrum-award/>).

when asked to construct a macro passive network infrastructure site for a customer:

Table 3 :Typical search rings for macro passive network infrastructure sites used by Cellnex

No.	Demographic Type	Macro Search Ring Size
1.	Dense Urban	c. [REDACTED] – [REDACTED] metre search ring
2.	Urban	c. [REDACTED] – [REDACTED] metre search ring
3.	Suburban	c. [REDACTED] metre – [REDACTED] km search ring
4.	Rural	c. [REDACTED] km – [REDACTED] km search ring

Source: Cellnex Phase 1 RFI Response, page 9.

- (iii) during a call with the Commission, Towercom noted that MNOs provide the search area for the location of the BTS site they want and ask the WIP to find the exact location;¹⁸⁵
- (iv) during a call with the Commission, when asked to explain its estimates that: (i) “approximately 40% of Cellnex’s rooftop sites have at least one [Phoenix] site within 100m”¹⁸⁶; and (ii) “[c]urrently, over 90% of these overlapping rooftop sites are co-located on the same property”,¹⁸⁷ Third Party 1 stated that WIPs and MNOs are often concentrated on the same locations in urban areas given the narrow search rings used in these areas. Third Party 1 also noted that, in rural areas, a typical search ring might be 2km; and
- (v) during its engagement with the Commission, [REDACTED]
[REDACTED]
[REDACTED]

¹⁸⁵ Towercom Call Note 28.05.2024, page 3.

¹⁸⁶ Third Party 1 Call Note 09.09.2024, page 2.

¹⁸⁷ Third Party 1 Call Note 09.09.2024, page 2.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁸⁸

- 3.76 The above information suggests that there is also a local element to competition, owing to MNOs’ coverage requirements being considered on a local level and macro sites only being substitutable for each other within a certain geographic radius.

Commission’s conclusion on the relevant geographic market

- 3.77 The Commission’s view on the geographic scope of the market accords with that of the Parties: the relevant geographic market is national. Notwithstanding this, the Commission is of the view that there is also a local element to the market, whereby sites within a certain radius compete with each other. Therefore, the Commission considers that the competitive effects of the Proposed Transaction can be analysed at both a national and a local level, which will be considered further in Section 5 below.

Overall conclusion on relevant market definition

- 3.78 Having regard to the evidence available to it, the Commission concludes that the relevant market for the competitive assessment of the Proposed Transaction (the “Relevant Market”) is:

- the provision of hosting services on macro passive network infrastructure sites, including BTS sites, in the State.

¹⁸⁸ Email from Three to the Commission dated 7 February 2025.

4. RELEVANT COUNTERFACTUAL

Introduction

4.1 The test in section 22(3) of the Act requires an assessment of whether a merger will, or will not, on the balance of probabilities, result in a substantial lessening of competition (an “SLC”) in a relevant market. In assessing the likely effects of a merger on competition, the Commission typically compares the competitive situation that may be expected to arise following the merger with that which would have prevailed without the merger. The market situation without the merger is often referred to as the “counterfactual”. The Commission generally adopts the prevailing conditions of competition as the counterfactual against which it assesses the impact of the merger.¹⁸⁹

4.2 The Commission’s Merger Guidelines state that:

“The term ‘counterfactual’ refers to the state of competition without the merger or acquisition. In other words the “actual” situation is the merger being put into effect and the “counterfactual” is the situation in the absence of the merger being put into effect. The counterfactual provides the reference point, or the point of comparison, for assessing competitive effects arising from a merger.”¹⁹⁰

4.3 The competitive assessment then asks whether the merger compared to the counterfactual will lead to an SLC. Inevitably there is a degree of uncertainty as regards hypothetical future events, and the Commission will consider all the evidence adduced by the parties as to whether there is likely to be an SLC in the future.

4.4 Paragraph 1.15 of the Commission’s Merger Guidelines states the following:

¹⁸⁹ The Commission’s Merger Guidelines, paragraph 1.12.

¹⁹⁰ The Commission’s Merger Guidelines, paragraph 1.12.

“[T]he Commission will expect the merging parties to substantiate any counterfactual they propose with objective evidence supported, where necessary, by independent expert analysis. Such evidence and analysis should obviously be consistent with the parties’ own internal pre-merger assessments of the likely counterfactual.”

4.5 The Commission sets out below:

- (a) Views of the Parties;
- (b) Views of third parties;
- (c) The Commission’s assessment of the appropriate counterfactual; and,
- (d) Views of the Commission.

Views of the Parties

4.6 No submission was made to the Commission by the Parties in the Merger Notification Form concerning the relevant counterfactual.

4.7 In the Phoenix Phase 1 RFI Response, Phoenix stated the following in respect of the relevant counterfactual to the Proposed Transaction:

[REDACTED]

¹⁹¹ In this instance, as explained in paragraph 5.2 on page 9 of the Phoenix Phase 1 RFI Response, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ”¹⁹²

- 4.8 In response to the Cellnex Phase 1 RFI, Cellnex Telecom stated the following in respect of the relevant counterfactual to the Proposed Transaction:

“On the basis of the information before it, Cellnex considers the relevant counterfactual to be:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ”¹⁹³

- 4.9 Cellnex Telecom subsequently clarified that in its view, the most likely counterfactual is that, in the absence of the Proposed Transaction, [REDACTED]
- [REDACTED]
- [REDACTED]:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ”¹⁹⁴

- 4.10 Cellnex Telecom explained that its initial view of a counterfactual [REDACTED]
- [REDACTED]

¹⁹² Phoenix Phase 1 RFI Response, page 9, paragraph 5.3.

¹⁹³ Cellnex Phase 1 RFI Response, page 6, paragraph 5.1.

¹⁹⁴ Email from Cellnex to the Commission dated 14 October 2024.

[REDACTED]

Views of third parties

4.11 The Commission received no third-party views explicitly commenting on a counterfactual.

The Commission's assessment of the appropriate counterfactual

4.12 The evidence shows that Cellnex Telecom intended [REDACTED].¹⁹⁵ Cellnex Telecom [REDACTED] in respect of the sale of its portfolio of passive infrastructure sites in the State. [REDACTED] in addition to Phoenix, expressed their interest in acquiring the assets.¹⁹⁶ The Commission has seen no evidence to suggest that, in the absence of the Proposed Transaction, Cellnex Telecom would not have proceeded to engage with and conclude a sale with [REDACTED].

Views of the Commission

4.13 The Commission has formed the view that, for the purposes of assessing the Proposed Transaction, the evidence¹⁹⁷ supports a relevant counterfactual that, absent the Proposed Transaction, Cellnex would have been sold to an alternative purchaser who would have provided hosting services on macro passive network infrastructure sites in the State as set out in Section 3.

¹⁹⁵ Email from Cellnex to the Commission dated 14 October 2024.

¹⁹⁶ As part of the Cellnex Phase 1 RFI Response, documents detailing [REDACTED]

¹⁹⁷ The evidence considered by the Commission includes internal documents furnished to the Commission by Cellnex as part of the Cellnex Phase 1 RFI Response. These documents included:

[REDACTED]

- 4.14 The Commission notes that, whether the counterfactual is that Cellnex Telecom sold its portfolio of passive infrastructure sites in the State to an alternative purchaser or that it remained in the market, there would be a WIP operating Cellnex's existing portfolio in competition with Phoenix. The precise form of the counterfactual is therefore of limited relevance for the assessment of competitive effects.

5. COMPETITIVE ASSESSMENT

HORIZONTAL UNILATERAL EFFECTS

Introduction

- 5.1 In this section, the Commission sets out its analysis of the likelihood of horizontal unilateral effects occurring from the implementation of the Proposed Transaction in the market for the provision of hosting services on macro passive network infrastructure sites in the State.
- 5.2 Unilateral effects, as explained in paragraph 4.8 of the Commission's Merger Guidelines, occur when *"a merger results in the merged entity having the ability and the incentive to raise prices at its own initiative and without coordinating with its competitors."*
- 5.3 In addition, the EC Horizontal Merger Guidelines state the following in respect of *"Non-coordinated effects"*.¹⁹⁸

*"A merger may significantly impede effective competition in a market by removing important competitive constraints on one or more sellers, who consequently have increased market power. The most direct effect of the merger will be the loss of competition between the merging firms. For example, if prior to the merger one of the merging firms had raised its price, it would have lost some sales to the other merging firm. The merger removes this particular constraint. Non-merging firms in the same market can also benefit from the reduction of competitive pressure that results from the merger, since the merging firms' price increase may switch some demand to the rival firms, which, in turn, may find it profitable to increase their prices. The reduction in these competitive constraints could lead to significant price increases in the relevant market."*¹⁹⁹

¹⁹⁸ As noted in footnote 27 of the EC Horizontal Merger Guidelines, *"non-coordinated effects"* are also often called *"unilateral effects"*.

¹⁹⁹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31, 5.2.2004, paragraph 24.

The likelihood of unilateral effects

5.4 In considering the likelihood of the implementation of the Proposed Transaction resulting in unilateral effects, the Commission assessed the arguments put forward by the Parties and the evidence collected from the Parties and third parties. Following that assessment, the Commission has identified one potential theory of harm (i.e., how the Proposed Transaction is likely to result in an SLC). This is:

- **Theory of Harm** – the Proposed Transaction will result in the removal of Cellnex from the Relevant Market resulting in higher prices and reduced quality of service for customers, and ultimately consumers.

5.5 The Commission assesses this potential theory of harm below.

Theory of Harm - the Proposed Transaction will result in the removal of Cellnex from the Relevant Market resulting in higher prices and reduced quality of service for customers, and ultimately consumers.

Introduction

5.6 For the reasons set out in Section 4, for the purposes of assessing the Proposed Transaction, the Commission considered in its Assessment that the relevant counterfactual is that Cellnex would have sold its portfolio to an alternative purchaser to Phoenix that would have operated Cellnex's portfolio of macro passive network infrastructure sites in competition with Phoenix in the Relevant Market. The Proposed Transaction necessarily precludes this Relevant Counterfactual. As a result of the Proposed Transaction, competition between Phoenix and Cellnex would be lost and consequently the competitive constraint exerted on Phoenix by Cellnex would be lost.

5.7 In the Commission's view, this loss of competition is substantial and counteracting factors would not be sufficient to replace it and to prevent an SLC. Passive infrastructure is a significant part of the MNO cost stack and so, ultimately, of the

price of retail mobile services. Any increase in cost to MNOs is therefore highly likely to be passed on to consumers.

5.8 In setting out and analysing its theory of harm, the Commission considered the likely effect of the Proposed Transaction in three separate key areas of the Relevant Market, in which the Commission considers that competition will be affected by the Proposed Transaction. These are:

- (a) Competition for ‘incremental new sites’, i.e. competition between WIPs to meet an MNO’s demand for new sites (e.g., because the MNO is expanding/densifying its network) through building new macro passive network infrastructure sites;
- (b) Competition for ‘national contracts’, i.e. competition between WIPs at the beginning or end of an MSA to meet an MNO’s entire demand (or a significant proportion of its demand) for the provision of hosting services across the State; and
- (c) Competition for ‘incremental existing sites’, i.e. competition between WIPs to meet an MNO’s demand for new sites (e.g., because it is expanding/densifying its network) through co-location on existing macro passive network infrastructure sites.

These are described in further detail in the section ‘*The nature of competition in the relevant market*’, which is set out in paragraphs 5.52 to 5.82.

5.9 The Commission considers that competition will be affected by the Proposed Transaction in each of these three areas individually. While there is certainly overlap in terms of the impact of the Proposed Transaction in respect of each, for the avoidance of doubt, the Commission does not consider its concerns in respect of any one of these areas to be dependent on its findings in respect of the others.

5.10 The Commission now explains how it has carried out its assessment and the basis on which it has reached its view on the extent to which the Proposed Transaction is likely to raise unilateral effects concerns.

5.11 The Commission's analysis of its Theory of Harm is structured as follows:

- (A) First, the Commission sets out the views of the Parties on whether the Proposed Transaction is likely to lead to an SLC and provides a summary of the Parties' submissions in this regard.
- (B) The Commission then considers the views of third parties on whether the Proposed Transaction is likely to lead to an SLC and provides a summary of third parties' submissions in this regard.
- (C) The Commission then assesses the factors which it considers relevant to whether the Proposed Transaction will likely result in an SLC. The Commission's assessment includes the following:
 - (i) impact of the Proposed Transaction on market structure and concentration;
 - (ii) the nature of competition in the Relevant Market;
 - (iii) closeness of competition between the Parties;
 - (iv) whether other competitors could replace the competitive constraint provided by Cellnex;
 - (v) barriers to entry and expansion in the Relevant Market;
 - (vi) regulation as a potential out of market constraint; and
 - (vii) whether countervailing buyer power is sufficient to negate an SLC.

(A) Views of the Parties on whether the Proposed Transaction is likely to lead to an SLC

5.12 In the Merger Notification Form, the Parties stated that the Proposed Transaction will not give rise to an SLC for the following reasons:

- (a) *“Although [the Parties] operate nationally, their site portfolios have different geographic focuses (in particular due to the historic build of the networks) and the actual degree of competitive overlap between the parties at a site level is therefore limited. In particular, [Phoenix]’s sites are mainly deployed in [REDACTED] locations, while [Cellnex]’s portfolio is distributed broadly across the State with a substantial proportion of sites located in [REDACTED] areas.”²⁰⁰*
- (b) *“There are a number of significant competing passive infrastructure providers active in the State. [...] MNOs and other customers of passive infrastructure services will therefore continue to be able to choose from a range of large international and domestic infrastructure providers, including Vantage Towers (“Vantage”), ESB, Towercom, Shared Access and 2rn, as well as having the outside option to self-supply.”²⁰¹*
- (c) *“In any case, the configuration of the parties’ respective site portfolios, as well as decisions regarding future infrastructure deployment, is predominantly a function of network design by the parties’ customers, i.e. MNOs and other operators (either historically through their prior ownership of the parties’ passive infrastructure portfolios or via the terms of more recent access agreements), and not determined by the presence of other providers of hosting services in particular areas. This will continue to be the case following the completion of the Proposed Transaction.”²⁰²*
- (d) *“These dynamics reflect the fact that the customers for hosting services on passive communications infrastructure are typically large and highly sophisticated purchasers, including MNOs, fixed network operators and wireless broadband network operators. These customers will continue to have a range of infrastructure providers to choose from and would also have the option of developing and/or further supplementing their own*

²⁰⁰ Merger Notification Form, pages 2-3, paragraph 12.

²⁰¹ Merger Notification Form, page 3, paragraph 12.

²⁰² Merger Notification Form, page 3, paragraph 12.

passive infrastructure portfolios now and in the future to optimise the performance of their mobile networks.”²⁰³

- (e) *“In particular, the parties’ primary customers are [REDACTED] MNOs operating in the State, namely Vodafone, Three and eir (formerly Meteor). Each of these MNOs already has in place long-term (e.g. 10-20 years) and very MNO-friendly Master Services Agreements (“MSA”) or similar access arrangements with passive infrastructure providers [which] [...] are heavily weighted in favour of the MNOs and protect against any worsening of the terms of access to passive infrastructure, including because they are non-exclusive in nature and do not require the MNOs to use only one infrastructure provider.”²⁰⁴*
- (f) *“The long-term agreements in favour of MNOs and other wireless operators mean that passive infrastructure providers would have no ability in practice to undermine the price or service levels offered to their customers. Moreover, as providers of hosting services, the parties have a strong incentive to ensure that there is as little unrented/vacant space as possible on their passive infrastructure. [...] In addition, as neither [Phoenix] nor [Cellnex] is active in the provision of retail or wholesale mobile services, the parties have no reason or incentive to restrict or deny access to their infrastructure to any operator (in fact the commercial incentive is the opposite).”²⁰⁵*
- (g) *“Finally, in addition to existing open access obligations under Irish and EU telecommunications law, forthcoming regulatory changes concerning communications infrastructure – in particular the European Commission’s proposed Gigabit Infrastructure Act (“GIA”) – will copper fasten this position and provide further certainty that providers of electronic*

²⁰³ Merger Notification Form, page 3, paragraph 12.

²⁰⁴ Merger Notification Form, page 3 and 4, paragraph 12.

²⁰⁵ Merger Notification Form, page 4, paragraph 12.

*communications services will have access to the parties' infrastructure on fair, reasonable and non-discriminatory terms."*²⁰⁶

5.13 During a call between the Commission's case team and Phoenix's legal representatives, held on 18 October 2024, the Commission's case team explained that, on a preliminary basis, the Commission had concerns regarding the effect that implementation of the Proposed Transaction may have on: (i) competition for incremental business in the Relevant Market; and (ii) competition for national contracts in the Relevant Market. Both of these areas of concern are discussed in detail in the subsection entitled '*The nature of competition in the Relevant Market*' below.

5.14 As explained in paragraph 1.33 above, following the 18 October call, the Parties submitted the Phoenix October Written Submission. The Phoenix October Written Submission focused on competition for national contracts in the Relevant Market and set out the Parties' view on why there was no prospect of the Proposed Transaction giving rise to an SLC, in particular because:

- (a) this preliminary concern "*purports to deal with a situation that essentially arises only upon the expiry of the existing agreements between [Phoenix], Cellnex and their MNO customers or upon the entry of a new MNO to the Irish market.*"²⁰⁷ Phoenix submitted that "[n]either is likely to occur on any reasonable time horizon for merger control assessment"²⁰⁸ as: (i) the long-term agreements between WIPs and their MNO customers will not expire for years, or even decades, after implementation of the Proposed Transaction, meaning that this preliminary concern is "*premised on speculation about entirely hypothetical conditions of competition many years into the future*";²⁰⁹ and (ii) no MNO has entered the Irish market since 2005 and there is no indication that entry is likely in the medium-

²⁰⁶ Merger Notification Form, page 4, paragraph 12.

²⁰⁷ Phoenix October Written Submission, page 2, paragraph 4.

²⁰⁸ Phoenix October Written Submission, page 2, paragraph 4.

²⁰⁹ Phoenix October Written Submission, page 2, paragraph 4.

term, given the results of ComReg's most recent multi-band spectrum auction;²¹⁰

- (b) by the point in the time when this preliminary concern may become relevant, *"the prevailing conditions of competition will be influenced by a large number of factors that are likely to have a significant bearing on the need for hosting services on macro passive infrastructure and which cannot be ascertained at this stage. These factors include, inter alia, changes in the technology used in the delivery of communications services [...], the spectrum allocations (if relevant) as between MNOs for later generation broadband networks, the propagation and data density of such networks, the increased use of micro cells and DAS sites (in preference to macro sites) for the deployment of services on those networks, as well as macroeconomic factors such as changes in the population of the State."*²¹¹ Phoenix suggested *"more fundamental changes in communications technology"* are likely to reduce MNOs' demand to use macro sites in the future.²¹² These fundamental changes included: less reliance on mobile infrastructure to carry data; increased usage of cloud-based mobile network infrastructure in place of physical network infrastructure; entry by companies that will provide mobile broadband services to customers using satellite-based technology; and the allocation of millimetre wave spectrum which will place an emphasis on micro sites;²¹³
- (c) neither of the Parties would be able to increase prices or reduce service levels due to the significant protections contained in their MSAs with the MNOs.²¹⁴ Phoenix reiterated that these MSAs are *"heavily weighted in favour of the MNOs and protect against any worsening of the terms of*

²¹⁰ Phoenix October Written Submission, page 3, paragraph 4.

²¹¹ Phoenix October Written Submission, page 3, paragraph 4.

²¹² Phoenix October Written Submission, page 7, paragraph 12.

²¹³ Phoenix October Written Submission, pages 7-8, paragraph 12.

²¹⁴ Phoenix October Written Submission, page 3, paragraph 4.

access to passive infrastructure.”²¹⁵ Phoenix noted that, based upon [REDACTED]

[REDACTED]²¹⁶ Phoenix stated that it is uncertain whether, by [REDACTED], “MNOs will require the same level of access to macro passive network infrastructure [...] as is required today, while WIPs will continue to be reliant on MNOs.”;²¹⁷

- (d) the regulatory environment, in particular the “clear and unambiguous provisions” of the GIA which requires WIPs to “meet all reasonable access requests for physical infrastructure on fair and reasonable terms and conditions”,²¹⁸ means that the Parties could not legally impose unreasonable access terms on any customer.²¹⁹ Phoenix also referenced European Commission decisions in *Proximus/Nexus Infrastructure/JV*²²⁰ and *Eurofiber/Proximus/JV*,²²¹ stating that the “decisive factor for the European Commission in these cases was that the ex ante regulation ensured that there was an ongoing obligation to provide access to the relevant infrastructure on a non-discriminatory and transparent basis. The same obligations will be imposed on the parties and other WIPs as a result of the GIA.”;²²²
- (e) this preliminary concern “appears to proceed on the premise that the MNOs currently operating in Ireland, or a putative MNO entrant, would only have two options” in the Relevant Market (i.e., the merged entity or Vantage)²²³ and does not take account of “strong independent third-party passive infrastructure operators, including WIPs such as Towercom,

²¹⁵ Phoenix October Written Submission, page 3, paragraph 4.

²¹⁶ Phoenix October Written Submission, page 3, paragraph 4.

²¹⁷ Phoenix October Written Submission, page 3, paragraph 4.

²¹⁸ Phoenix October Written Submission, page 3, paragraph 4.

²¹⁹ Phoenix October Written Submission, page 3, paragraph 4.

²²⁰ Case No M.10087 *Proximus/Nexus Infrastructure/JV*.

²²¹ Case No M.10070 *Eurofiber/Proximus/JV*.

²²² Phoenix October Written Submission, page 21, paragraph 60.

²²³ Phoenix October Written Submission, page 3, paragraph 4.

Shared Access, 2rn and others".²²⁴ Phoenix reiterated that WIPs' incentives to fill sites are strong because there are low marginal costs for co-location, meaning that the opportunity costs for having spare capacity on macro sites are high.²²⁵ Phoenix added that *"each of the MNOs has experience in operating passive infrastructure assets and have the option of self-supplying macro passive network infrastructure."*²²⁶

(f) as identified by RBB, there are *"several key factors from an economics perspective"* that explain why there is no prospect of an SLC arising *"at the point of renewal following the expiry of existing agreements between the parties and their MNO customers"*,²²⁷ including:

- (i) site-level overlaps between the Parties are [REDACTED] reduced further when the Proposals are taken into account.²²⁸ In fact, site-level overlaps show that [REDACTED] is a closer competitor to each of the Parties than they are to each other.²²⁹
- (ii) the Parties are *"constrained to a very substantial degree by independent rival WIPs"*, which have *"both ability and incentive to constrain the parties"*.²³⁰ Phoenix noted that this is a point of difference with the CMA's review of *Cellnex/CK Hutchison UK towers*, as the largest rival WIP in the UK at the time was a joint venture between MNOs that was *"not expected to be independent enough in the near term to compete vigorously for hosting services"*

²²⁴ Phoenix October Written Submission, page 4, paragraph 4.

²²⁵ Phoenix October Written Submission, page 4, paragraph 4.

²²⁶ Phoenix October Written Submission, page 4, paragraph 4.

²²⁷ Phoenix October Written Submission, page 4, paragraph 4.

²²⁸ As set out in paragraphs 1.45 to 1.47 above, Phoenix submitted proposals to the Commission pursuant to section 20(3) of the Act aimed at ameliorating any effects of the Proposed Transaction on competition in markets for goods or services in the State

²²⁹ Phoenix October Written Submission, page 4, paragraph 4.

²³⁰ Phoenix October Written Submission, page 4, paragraph 4.

*on new sites” and the other rival WIPs were “much smaller in size compared to those in Ireland”;*²³¹

- (iii) *“...rival WIPs in Ireland have significant scope to expand into new areas, placing further constraint on the parties. It is relatively easy to obtain suitable locations for a competing macro site in much of Ireland, in contrast to other countries with denser population and greater restrictions on land usage (such as the UK).”*²³² Phoenix reiterated that demand for macro sites is increasing in Ireland with 5G densification – at a faster rate than the UK – and noted that this creates strong incentives for entry and expansion;²³³ and
- (iv) *“...the share of MNO self-supply is low in Ireland creating more contestable demand in Ireland relative to the UK (where some operators still self-supply the majority of their requirements) and, through that, stronger incentives for entry and expansion”.*²³⁴

- (g) Additional economic factors identified by RBB prevent an SLC in relation to the (hypothetical) entry of a new MNO. Firstly, a new MNO entrant would have considerable choice over where it locates its active infrastructure, and competition between WIPs would occur as a result.²³⁵ Secondly, a new MNO entrant *“can use (or threaten to use) virtualised network options as a substitute for macro sites. The risk of losing this potential new demand to an alternative technology will confer strong incentives on WIPs to offer favourable terms”.*²³⁶
- (h) While the CMA considered whether the *Cellnex/CK Hutchison UK towers* transaction could give rise to an SLC upon renewal or expiry of MNOs’

²³¹ Phoenix October Written Submission, page 4, paragraph 4.

²³² Phoenix October Written Submission, page 4, paragraph 4.

²³³ Phoenix October Written Submission, page 4, paragraph 4.

²³⁴ Phoenix October Written Submission, page 4, paragraph 4.

²³⁵ Phoenix October Written Submission, page 5, paragraph 4.

²³⁶ Phoenix October Written Submission, page 5, paragraph 4.

any relevant market in Ireland.”²⁴² In addition, the Parties submitted that a “number of preliminary findings in the Assessment [were] not supported by sufficient – or indeed any – relevant corroborative evidence sufficient to justify a finding of an SLC on the balance of probabilities.”²⁴³

- 5.17 The Parties’ Written Response reiterated the importance of the long-term MSAs in providing “security on service levels and pricing for the MNOs until at least the early [REDACTED]”, and “the further protections on access, price and service levels now enshrined in directly applicable EU legislation” (i.e., the GIA).²⁴⁴

Views of the Commission on the Parties’ submissions on SLC

- 5.18 The Commission has considered all of the Parties’ submissions in detail in its analysis below. In summary, the Parties’ key points as set out above are addressed as follows:

There is a limited degree of geographical overlap between the Parties’ portfolios

- 5.19 The Commission has set out its views in relation to the Geographic Market in Section 3 of this Determination. The Commission’s analysis of geographical overlap is set out in detail in paragraphs 5.87 to 5.120 below.

Alternative providers exercise a competitive constraint

- 5.20 The Commission has considered the other firms present in the Relevant Market from paragraphs 5.164 to 5.215 below.
- 5.21 The Commission has examined the barriers to entry and barriers to expansion from paragraphs 5.216 to 5.304 below.

Neither of the Parties would be able to increase prices or reduce service levels due to the significant protections contained in their MSAs with the MNOs

²⁴² Parties’ Written Response, page 4.

²⁴³ Parties’ Written Response, page 8.

²⁴⁴ Parties’ Written Response, page 9.

5.22 The Commission considers this argument at various points in the analysis below, including paragraphs 5.59 to 5.67.

Customers are large, highly sophisticated and have a range of options

5.23 The Commission has considered this point in the context of countervailing buyer power in paragraphs 5.326 to 5.348

MNOs as primary customers with long-term contracts which will not be affected by the Proposed Transaction

5.24 The Commission has considered the effects of the Parties' long-term contracts throughout its analysis.

WIPs have strong incentives to encourage access to passive infrastructure

5.25 The Commission has considered incentives to provide access to macro passive infrastructure sites throughout its analysis.

Regulation provides certainty of access to passive infrastructure on FRAND terms

5.26 The Commission has considered the effects of regulation as an out of market constraint from paragraphs 5.308 to 5.324.

(B) Views of third parties on whether the Proposed Transaction is likely to lead to an SLC

5.27 As set out in Section 1, the Commission received a number of third-party submissions in relation to the Proposed Transaction. Furthermore, the Commission engaged with a number of third parties in relation to their views of the competitive effects of the Proposed Transaction, which are summarised in this section.

Competitors

5.28 In a submission made to the Commission on 8 April 2024, London Economics, on behalf of Hibernian Towers, submitted the following view in relation to the competitive effects of the Proposed Transaction.

“The merger of [Phoenix] and Cellnex causes a significant increase in market concentration, in a market where the level of concentration is already high and on a noticeably increasing trend. Higher levels of market concentration tend to make anti-competitive outcomes increasingly likely in this market.

The merged entity would have circa 40-50% market share and combine two entities that were before suppliers of alternative sets of infrastructure to two different MNOs.

[...]

The impacts of the proposed transaction must also be assessed against a market background involving significant commitments for future site development which will further increase market concentration and can be expected to significantly reduce competition for MNO tenancy contracts for the foreseeable the [sic] future. The significant coverage of MNO customers by such long-term contractual commitments is likely to amount to customer foreclosure and lead to dynamic inefficiency and ultimately higher prices for consumers.

An additional consideration is that the assessment of Cellnex’s market position, even if its ownership is transferred to [Phoenix], should also take into account its significantly stronger competitive position resulting from its portfolio of ground leases, as ground landlords, in this market, can exert significant control on tenancy arrangements.

Finally, we consider that it is particularly important to protect competition in infrastructure markets because loss of competition at this level of the supply chain has the potential to negatively impact competition in

downstream markets and ultimately cause inefficiency and detriment to consumers.”²⁴⁵

5.29 As mentioned in paragraph 1.23 above, a stakeholder of the Relevant Market, referred to as Third Party 1, made a submission to the Commission on 8 April 2024. Third Party 1 had the following views in relation to the Proposed Transaction:

“The Transaction raises substantive competition concerns in respect of the supply of access to passive infrastructure sites in rural areas and urban areas, as the combination of [Phoenix] and Cellnex’s wireless infrastructure business in the State (the “Combined Entity”) will have:

(a) significant scale and incumbency advantage (both current and expected);

(b) an effective monopoly over many infrastructure sites, particularly in urban areas; and

(c) even greater bargaining power to the detriment of its customers.

These factors will likely result in:

(i) a lack of development of, and investment in, critical 5G passive infrastructure in the State by third parties; and

(ii) the Combined Entity increasing prices and/or decreasing the quality and therefore the performance of the infrastructure provided to operators to cut costs. This will affect both the Combined Entity’s existing customers and other operators who will increasingly over time be forced to enter into long-term contracts with the Combined Entity given the lack of investment in 5G infrastructure by third parties. These risks are exacerbated in urban areas, where the Combined Entity will have an effective monopoly position

²⁴⁵ London Economics, *Note on Competition Concerns in the Irish Telecom Towers Market*, on behalf of Hibernian Towers, page 13 and 14.

in respect of many rooftop sites, where critical and largely non-replicable network infrastructure is located.”²⁴⁶

- 5.30 During a call with the Commission on 15 May 2024, when asked for its views on the Proposed Transaction, Vantage stated that:

“it is neutral – it is not opposed to the merger nor is it in favour of it”.²⁴⁷

- 5.31 During a call with the Commission on 28 May 2024, when asked for its views on the Proposed Transaction, Towercom provided the following response:

“the Proposed Transaction will create a large entity which covers a lot of sites in Ireland. It added that it is very difficult for Towercom to build any new sites required by the operators due to the commitments between operators and certain TowerCos.”²⁴⁸

- 5.32 During a call on 23 May 2024, ESB Telecoms explained to the Commission that:

“it supports enterprise and the advancement of infrastructure deployment. It noted that because its owner’s purpose is to supply service to Ireland, anybody that advances the telecoms market in Ireland is good for Ireland. However, ESB Telecoms noted that whoever has significant market power will have everything that comes with that. It added that it has not done the maths to estimate who has how much market power in the industry.”²⁴⁹

- 5.33 In a submission made to the Commission by Shared Access dated 6 August 2024, Shared Access stated the following:

“We believe the acquisition of Cellnex’s Irish operations by Phoenix will significantly concentrate telecom infrastructure ownership under a single

²⁴⁶Third Party 1 submission to the Commission dated 8 April 2024, page 1.

²⁴⁷ Vantage Call Note 15.05.2024, page 5.

²⁴⁸ Towercom Call Note 28.05.2024, page 4.

²⁴⁹ ESB Telecoms Call Note 23.05.2024, page 5.

entity, given that recently Phoenix acquired over 500 sites from eir, primarily rooftops. This deal included a build program that abruptly ended opportunities for companies like Shared Access, who had been successfully collaborating with eir for many years, to develop new sites. If Phoenix were to add Cellnex's assets to their portfolio, their dominance would be unprecedented, effectively creating a monopoly in the passive telecoms market in Ireland.

The proposed acquisition would mean that Phoenix control a substantial portion of the market which would greatly increase barriers to entry and limit market opportunities for both new entrants and existing but smaller companies such as Shared Access.

We believe one company's monopoly-like dominance would lead to a lack of competitive pressure, would increase costs for the Mobile Network Operators, and would significantly hinder technological advancements like the rollout of 5G and other future technologies such as 6G. If one company is responsible for the entire rollout, its market dominance may also reduce the ability to deliver the necessary number of sites within the country.”²⁵⁰

MNO Customers

5.34 During a call with the Commission on 17 May 2024, when asked whether it had any concerns regarding the Proposed Transaction, eir explained that:

“Ireland requires additional infrastructure and Ireland needs a Telecoms and TowerCo market that will continually invest in infrastructure throughout Ireland. eir continued that there is a continual requirement for significant and sustained capital investment into telecommunications and Ireland's [sic] needs Tower companies that are well resourced and committed to these investments. eir concluded [Phoenix] has continued to demonstrate a very strong commitment to Ireland, to continued

²⁵⁰ Shared Access submission to the Commission dated 6 August 2024.

investment in Ireland and this transaction will assist to ensure that the existing Cellnex site estate be owned by a partner with long term capability to upgrade, enhance and improve an aging tower estate currently owned by Cellnex.”²⁵¹

- 5.35 During a call with the Commission on 23 May 2024, when asked about its views of the Proposed Transaction, Three responded that:

“as long as Phoenix continues to invest and develop new sites, it is happy”²⁵²

- 5.36 During a call with the Commission on 23 April 2024, in response to whether it had any concerns regarding the Proposed Transaction, Vodafone explained that:

“it is not overly concerned about the merger, because Vantage is its main supplier, and the macro passive infrastructure sites provided to Vodafone by Cellnex and Phoenix only represent a small proportion of Vodafone’s portfolio. Vodafone added that some of its sites are owned by small landlords but it noted that post-merger there will be two main TowerCos remaining.”²⁵³

- 5.37 During a call with the Commission on 15 May 2024, when asked for its views on the Proposed Transaction, Imagine stated that:

“from Phoenix’s point of view, Imagine is not a big customer. Imagine explained that it has only ■ sites with Phoenix, ■ sites with Cellnex, and ■ sites with Towercom. Imagine included that it has a good relationship with both Phoenix and Cellnex.”²⁵⁴

²⁵¹ Commission’s written record of a remote meeting with eir on 17 May 2024 (“eir Call Note 17.05.2024”), page 1.

²⁵² Three Call Note 23.05.2024, page 4.

²⁵³ Vodafone Call Note 23.04.2024, page 3.

²⁵⁴ Imagine Call Note 15.05.2024, page 5.

(C) Factors the Commission considers relevant to whether the Proposed Transaction will likely result in an SLC

5.38 As set out above, the Commission has assessed the factors it considers relevant to whether the Proposed Transaction will likely result in an SLC. Its assessment is set out by reference to the following factors in particular:

- (i) impact of the Proposed Transaction on market structure and concentration;
- (ii) the nature of competition in the Relevant Market;
- (iii) closeness of competition between the Parties;
- (iv) whether other competitors could replace the competitive constraint provided by Cellnex;
- (v) barriers to entry and expansion in the Relevant Market;
- (vi) regulation as a potential out of market constraint; and
- (vii) whether countervailing buyer power is sufficient to negate an SLC.

(C)(i) Impact of the Proposed Transaction on market structure and concentration

5.39 Paragraph 3.1 of the Commission's Merger Guidelines states that "[a] central element in assessing the competitive impacts of a merger is identifying its effect on market structure." Market structure can be characterised by the number, size, and distribution of firms in a market. A merger or acquisition will have an impact on market structure as the merging parties, which were two firms pre-acquisition, become one firm post-acquisition. In the case of the Proposed Transaction, the impact on the market structure is the acquisition of the largest player in the Relevant Market by the third-largest player in the Relevant Market.

5.40 The Commission has assessed the market structure and market concentration in relation to the provision of hosting services on macro passive network infrastructure sites in the State.

Market structure

5.41 The Commission considers that the total number of macro passive network infrastructure sites operated by each WIP represents an appropriate measurement through which the structure of the market can be captured. As discussed in section 2, these WIPs include: Phoenix, Cellnex, Vantage, Towercom, ESB Telecoms, CIÉ, the OPW, Shared Access, 2rn, WIG, and Hibernian Towers. The Commission has estimated shares based on information provided to the Commission by the Parties and by third parties active in the Relevant Market. Their market shares, estimated according to the total number of existing sites operated by each WIP in 2024 is set out in Table 4 below.

Table 4: Estimated market shares of macro passive network infrastructure sites in the State, 2024.

Provider	Estimated Number of Total Sites	Estimated Market Share
Phoenix		[15-20]%
Cellnex		[30-35]%
Combined Market Share		[45-50]%
Vantage		[20-25]%
Towercom		[5-10]%
ESB Telecoms		[5-10]%
CIÉ		[0-5]%
OPW		[0-5]%
Shared Access		[0-5]%
2rn		[0-5]%
WIG		[0-5]%

Hibernian Towers		[0-5]%
Total		100%

Source: the Commission, based on information provided by the Parties and third parties.

5.42 As can be seen in Table 4, following implementation of the Proposed Transaction, Phoenix would have an estimated share of approximately 45-50% of the Relevant Market.

5.43 Furthermore, following implementation of the Proposed Transaction, Vantage would be the only other competitor with a market share in excess of 20%, while each remaining competitor would have a market share of less than 10%. Implementation of the Proposed Transaction would result in over 70% of the total sites in the Relevant Market being operated by two entities (i.e., the merged entity and Vantage).

5.44 Furthermore, the impact of the Proposed Transaction would be to reduce the number of competitors with national capabilities in terms of numbers and geographic coverage of sites from three (Cellnex, Vantage and Phoenix) to two (the merged entity and Vantage).

5.45 In this regard, the Commission notes that the EC Horizontal Merger Guidelines explains the following concerning the relationship between high market shares and market power:

“[t]he larger the market share, the more likely a firm is to possess market power. And the larger the addition of market share, the more likely it is that a merger will lead to a significant increase in market power. The larger the increase in the sales base on which to enjoy higher margins after a price increase, the more likely it is that the merging firms will find such a price increase profitable despite the accompanying reduction in output. Although market shares and additions of market shares only provide first

*indications of market power and increases in market power, they are normally important factors in the assessment”.*²⁵⁵

Market Concentration

5.46 Market concentration refers to the degree to which production or supply in a particular market is concentrated in the hands of a few large firms. The Commission’s Merger Guidelines state that:²⁵⁶

“Market concentration provides a snapshot of market structure and is often a useful indicator of the likely competitive impact of a merger. It is of particular relevance to the assessment of horizontal mergers. A horizontal merger that has little impact on the level of concentration in the market under consideration is unlikely to lead to an SLC.

Market concentration, however, is not determinative in itself. A high level of market concentration post-merger is not sufficient, in and of itself, to conclude that a merger is likely to lead to an SLC. Other relevant factors (such as, for example, the closeness of competition between the merging parties, market dynamics, barriers to entry and expansion, etc.) will be examined by the Commission before any conclusion is reached concerning the likely competitive impact of a merger. Market shares are important when measuring concentration. The market shares of firms in the market can give an indication of the extent of a firm’s market power. The combined market share of the merging parties, when compared with their respective market shares pre-merger, can provide an indication of the change in market power resulting from the merger. Competition concerns are more likely to arise when the merger creates a merged entity with a large market share.”

²⁵⁵ EC Horizontal Merger Guidelines, paragraph 27.

²⁵⁶ The Commission’s Merger Guidelines, paragraphs 3.2-3.4

5.47 Paragraphs 3.9 and 3.10 of the Commission’s Merger Guidelines set out that the Commission uses the Herfindahl-Hirschman Index (“HHI”) as a measure of market concentration. The Commission’s Merger Guidelines state that the Commission will have regard to the following HHI thresholds:

“A post-merger HHI below 1,000 is unlikely to cause concern.

Any market with a post-merger HHI greater than 1,000 may be regarded as concentrated and highly concentrated if greater than 2,000.

Except as noted below, in a concentrated market a delta of less than 250 is unlikely to cause concern and in a highly concentrated market a delta of less than 150 is unlikely to cause concern.”

5.48 The Commission’s Merger Guidelines explain, at paragraph 3.11, that:

“the purpose of the HHI thresholds is not to provide a rigid screen in order to determine whether or not a merger is likely to result in an SLC. Rather, the HHI is a screening device for deciding whether the Commission should intensify its analysis of the competitive impact of a merger.”

5.49 The Commission’s calculation of HHIs and HHI deltas with respect to the Proposed Transaction, based on the market share estimates, are set out in Table 5 below.

Table 5: HHI in the Relevant Market based on total number of macro sites, 2024.

	Based on total number of macro sites, 2024
HHI prior to implementation of the Proposed Transaction	1,918
HHI following implementation of the Proposed Transaction	2,956
HHI Delta	1,038

Source: the Commission, based on information provided by the Parties and third parties.

- 5.50 Based on the HHI calculations outlined in Table 5 above, and consistent with the Commission's Merger Guidelines, the Commission's view is that the Relevant Market is highly concentrated. The HHI delta (1,038) is significantly higher than the threshold of 150, below which the Commission might be able to consider, on the basis of market concentration, that the Proposed Transaction is unlikely to cause competition concerns.
- 5.51 In light of the above, the Commission's view set out in its Assessment was that, in line with the Commission's Merger Guidelines,²⁵⁷ the high level of concentration indicates that the Commission should intensify its analysis of the competitive effects of the Proposed Transaction in the provision of hosting services on macro passive network infrastructure sites in the State.

(C)(ii) The nature of competition in the Relevant Market

- 5.52 Having considered market structure, the next factor the Commission considers relevant to determining whether the Proposed Transaction would likely give rise to an SLC is the nature of competition in the Relevant Market. The key characteristics and historical developments of the Relevant Market were set out in Section 2. To assess the potential impact of the Proposed Transaction on the Relevant Market, it is useful to consider the competitive dynamics between WIPs competing to meet the needs of their key MNO customers.
- 5.53 The most important focus of competition in the Relevant Market is for large long-term framework agreements with MNO customers (MSAs). These agreements are a legacy of when each of the MNOs divested their passive infrastructure sites to a WIP. The MSAs are generally for a nationwide portfolio of passive infrastructure sites, for initial periods of between 8 and 20 years, covering the MNO's existing requirements as well as a significant part of its future requirements. The nature of these agreements plays a key role in the competitive dynamic of providing access to passive infrastructure. In particular, these agreements and their reach over

²⁵⁷ The Commission's Merger Guidelines, paragraphs 3.9-3.12.

MNOs' future requirements for passive infrastructure sites would appear to severely limit the contestable market and to impact the ability of those WIPs who are not party to an MSA to contest new or incremental demand from MNOs.

- 5.54 All three MNOs in the State have sold the entirety of their passive network infrastructure to a WIP and entered into long-term contracts with that WIP. While this has provided short term benefits for the MNOs associated with the release of capital, it may increase the operational expenditure of MNOs in the longer term. As noted in a recent study, MNOs' divestment of passive infrastructure assets:

*"could create dependencies by telcos on infrastructure companies for key coverage and (to a lesser extent) quality requirements, as well as exposing them to the risk of higher access prices (resulting in higher Opex) once the current contracts with infrastructure companies expire. At the same time, while the core concept of towercos (the ability to save on cost and improve efficiencies by consolidating infrastructure) should in theory improve the economics of deployment (including 5G network densification), such infrastructure sharing could also limit the incentives for MNOs to compete on quality and coverage."*²⁵⁸

- 5.55 As noted above, the passive infrastructure requirements of MNOs following the legacy divestment of their tower assets were met through long-term contracts, i.e., the MSAs, between each of the MNOs and the respective WIP. Where previously an MNO was vertically integrated, owning and operating its own passive infrastructure as well as owning and operating the active infrastructure which allows the MNO to offer retail mobile services, the divestment of towers has led to a vertical separation between the ownership and operation of passive infrastructure and that of the active mobile network.

MNO customer requirements for passive infrastructure

²⁵⁸ WIK Consult Report, submitted in Phoenix Phase 1 RFI Response, Annex 32.1, page 103.

5.56 As noted in Section 2, MNOs are by far the largest customers for hosting services on passive infrastructure, with other customers such as FWA operators and radio and broadcast customers accounting for less than █% of Cellnex's revenue in 2023,²⁵⁹ and less than █% of Phoenix's revenue in 2023.²⁶⁰ While non-MNO operators are included in the Relevant Market, and their needs are taken into account in the analysis of competitive effects, the discussion of competitive dynamics focuses on MNOs as customers because they make up such a high proportion of the demand for hosting services on passive infrastructure.

5.57 In assessing the impact of the Proposed Transaction, given the difference in relevant factors affecting each, the Commission gives specific consideration to the nature of competition between WIPs in terms of:

- (i) Competition for national contracts; and
- (ii) Competition for incremental business, which includes existing sites and new sites.

5.58 The Commission also considers interdependencies between national and incremental competition.

Competition for MNO requirements for national contracts

5.59 In order to provide retail mobile services, MNOs need access to passive infrastructure across the State on which to locate their active network equipment, and so need access to a large number of sites across different locations. As discussed in Section 2, all MNOs in the State have a framework agreement with at least one WIP for a large proportion of their sites.²⁶¹ This means that the MNO does not have to conclude multiple bespoke agreements for individual sites. Further, pricing is generally standardised within the MSA, so the MNO has pricing

²⁵⁹ Cellnex Phase 1 RFI Response, page 27, Table 5.

²⁶⁰ Phoenix Phase 1 RFI Response, page 27, Table 20.1.

²⁶¹ As discussed in Section 2, Cellnex has █ with █ MNOs, Phoenix has █, and Vantage has █ with █ Vodafone. Thus, the majority of MNO total site requirements are covered by █.

certainty for as long as the agreement is in place. It is expected that any potential new MNO market entrant would likely require a framework contract offering national coverage of passive infrastructure sites.

- 5.60 MNO network planning and development is carried out over a long timeframe. The legacy portfolios that were initially divested were designed by MNOs to meet their network requirements on a forward-looking basis. The long-term nature of the MSA with its national coverage therefore aligns with the long-term perspective of the MNO's mobile network planning. Network decisions by MNOs drive demand for passive infrastructure, both in terms of its volume and its location. In this sense, WIPs respond to this demand and are generally not pro-active in building new sites.
- 5.61 In theory, the entirety of an MNO's demand for sites is open to competition at two points: (i) at the beginning of a long-term contract; and (ii) when an existing long-term agreement expires²⁶² and a new agreement or an extension needs to be negotiated.
- 5.62 At the time of divesting their tower assets, each of the MNOs already had a mature network of passive infrastructure covering most of the territory of the State. A consequence of the initial divestment process is that each of the three largest WIPs in the State (Phoenix, Cellnex and Vantage) has a large and entrenched customer base derived from their respective original acquisition of MNO tower assets.
- 5.63 MNOs in Ireland are all still within the initial term of their original long-term contracts with WIPs. As there is no precedent for renegotiation of these contracts, it is difficult to ascertain the extent to which WIPs would compete for this business at the end of the contracts. Because passive infrastructure divestment is a relatively recent phenomenon across Europe, there is some evidence of contract renegotiation in other jurisdictions (for example, in the UK, the CMA cites

²⁶² The Commission understands that, [REDACTED]

renegotiation including tendering of the MBNL contract with Arqiva – now owned by Cellnex.)²⁶³

5.64 Given the high degree of historical concentration in the Relevant Market, the absence of recent renewals of contracts, and the relatively recent divestment of MNO passive infrastructure portfolios, it is not surprising that there is little evidence of the effect of competition between large WIPs with extensive portfolios of sites, or of MNOs threatening to use alternative WIPs as a negotiation strategy when renewing large contracts. The Commission considers that the absence of such evidence does not in and of itself signify anything about the likely impact of the Proposed Transaction and its assessment is based on the evidence that is available to it.

5.65 In the Parties' Written Response, the Parties disagreed with the Commission's analysis of competition at a national level which was set out in the Assessment:

*"The Assessment's national theory of harm is thus incorrect to argue that there are currently only three WIPs able to exert a competitive constraint, and that the merger represents a "three-to-two" within this set of suppliers. The economic evidence, based upon the economic realities of network infrastructure provision in the State, demonstrates that the merged entity will remain subject to effective competitive constraint following the completion of the Proposed Transaction."*²⁶⁴

5.66 The Commission does not agree with the Parties' view. For the reasons outlined above, MNOs require national coverage. At the point of expiry of the MSAs, they are likely to prefer to deal with a single WIP capable of offering a substantial proportion of suitable sites in the locations they require, owing to, in particular, the reduced contractual complexity of having a long-term agreement that covers the majority of the MNO's sites. At present, three WIPs in the State, including both Phoenix and Cellnex, offer this coverage. The Proposed Transaction would reduce

²⁶³ Appendix G of the CMA's Final Report, available at: [CMA Final Report appendix G](#).

²⁶⁴ Parties' Written Response, paragraph 4.29.

the number of WIPs able to offer such coverage to two, the merged entity and Vantage. Unlike Phoenix and Cellnex, Vantage cannot, in the Commission's view, be seen as an entirely independent tower company. As set out in paragraph 2.5 above, Vodafone retains a significant and controlling shareholding in Vantage. Consequently, Vantage may not represent an attractive alternative WIP for MNOs which compete with Vodafone in providing retail mobile services.

- 5.67 Further, the Commission understands that the cost and disruption associated with moving equipment from one site to another is substantial. Switching is discussed in detail in paragraph 5.121 to paragraph 5.146 below. This switching cost provides a strong incumbency advantage to the incumbent WIP at the point of renewal of an MSA. For an MNO to make a credible threat of switching to an alternative WIP, there would need to be alternative WIPs with viable national coverage. Currently, Cellnex and Vantage provide the only credible threat on a national basis to Phoenix. The threat from Cellnex would be completely removed following the Proposed Transaction and Vantage may not be a credible alternative to an MNO in competition with Vodafone for retail mobile services.

Competition for incremental business

- 5.68 MNO networks are not static, but evolve over time. An MNO may need to extend its network to provide additional capacity or upgrade to new technology, or may need to make its network more dense. In order to do this, the MNO will require incremental sites. Broadly speaking, incremental sites can be of two types:

- (i) **Existing sites.** These are sites which currently exist and which house active infrastructure belonging to at least one of the MNO's competitors, but which have capacity to provide the required services; and
- (ii) **New sites.** These are sites which do not currently exist, and which an MNO will request and agree with a WIP in order to deliver.

5.69 Table 6 sets out the numbers of incremental sites since 1 January 2022 for eir and Three, divided into those which are existing sites and those which are new sites.²⁶⁵

Table 6: Incremental sites for eir and Three since 1 January 2022.

	eir	Three
Number of incremental sites that are located on existing sites	██████████	██████████
Number of incremental sites that are new sites	██████████	██████████
Total	██████████	██████████

Source: Commission analysis of information provided by eir and Three.

5.70 As Table 6 shows, the majority of both eir’s and Three’s incremental sites are new sites—that is, newly constructed macro passive infrastructure sites.

Existing sites

5.71 In respect of existing sites, the identification of instances where only Cellnex and Phoenix overlap and could compete for incremental business can delineate those areas that would be most affected by the Proposed Transaction in terms of the competitive dynamics in relation to such incremental business, as this existing competition would be eliminated by the Proposed Transaction.

5.72 Where one or more other WIPs have sites in sufficient proximity, MNOs will have a choice of WIP, albeit potentially amongst a reduced number of providers post-Proposed Transaction. As site costs are largely fixed, the incentive for a WIP to seek to win another tenant for a site should be strong.

²⁶⁵ While the Commission requested similar information from Vodafone, Vodafone was not in a position to provide the relevant information within the required timeframe.

- 5.73 This very localised competitive interaction is captured in the Parties' overlap analysis, which assesses catchment radii which have been selected for different morphologies. This is discussed in detail in paragraphs 5.94 to 5.111 below. Generally, where no other WIP can offer a suitable site within a respective circle of coverage, the only competition is between the Parties, and the Proposed Transaction would eliminate this.
- 5.74 Approximately █% of sites do not have any competitor site (or indeed any other site) within their circle of coverage. MNOs seeking additional sites in these circles of coverage would be limited to a single WIP both pre- and post-Proposed Transaction.

New sites

- 5.75 The other way in which MNOs can secure incremental sites is via the development of new sites in collaboration with a WIP — as noted above, WIPs tend to be reactive to demand rather than acting unilaterally in developing new sites.²⁶⁶ WIPs need to be certain of demand post-site development and therefore will work with an MNO to identify and develop a site, based on relevant criteria such as the search ring within which the MNO needs a new site, and the availability of suitable land within the search ring.²⁶⁷
- 5.76 Competition for new sites is currently limited to a significant extent by provisions in contracts committing the MNO to seek additional sites from the WIP with which it has an MSA. The MSAs include provision for incremental sites in the form of BTS,

²⁶⁶ It is worth noting that, in theory, the BTF provisions of a contract between an MNO and a WIP may entail the WIP being proactive and identifying potential site locations for the MNO. However, in paragraph 9.1 of the Phoenix Phase 2 RFI Response and paragraph 17.2 of the Cellnex Phase 2 RFI Response, both Parties stated that neither of them has built any BTF sites to date. Therefore, the Commission considers that the construction of BTF sites (as opposed to BTS sites) is uncommon in practice. See paragraphs 2.51 to 2.57 above for an explanation as to the difference between BTF and BTS sites.

²⁶⁷ On page 2 of the Towercom Call Note 28.05.2024, Towercom "noted that given the time and cost of building a new site, it will only build one on the basis of a commitment to the site from an operator." On page 7 of the Shared Access Meeting Note 06.09.2024, Shared Access stated that there are two types of site locations, built sites and unbuilt sites. Shared Access stated that "if it builds a site, it will market the slots on the tower which are available to MNOs". Shared Access added that, when marketing unbuilt sites, it takes a list of where potential sites could be built and it takes this list "to MNOs to show them all the potential sites where Shared Access could build".

and may also include right of first refusal,²⁶⁸ whereby an MNO must first go to the WIP with which it has an MSA when it wishes to secure incremental sites.

5.77 Although the MNO may in principle be able to seek hosting services from other providers, it has contractual incentives to stay with the WIP with which it has an MSA.²⁶⁹ The Commission's analysis of information provided by eir and Three shows that, in 2023, [REDACTED] of eir's new sites and [REDACTED] of Three's new sites were provided under an MSA with a WIP.²⁷⁰ This is a clear indication of the way in which incremental demand from MNOs is brought within the scope of the long-term contract and limits the contestable market for the provision of passive infrastructure.

5.78 The effect of the inclusion of new incremental sites within long-term contracts was described by one competitor as follows:

*"The form of long-term contract adopted by the largest TowerCos, by committing the largest customers in the market to new supply as it is developed, and as this is agreed many years into the future, has an effect of customer foreclosure. By foreclosing access to a sufficient customer base to its actual or potential rivals in the upstream market (the tower hospitality services market) these contracts reduce the rivals' ability or incentive to compete. Smaller TowerCo players face increasing cost to access downstream customers or are simply restricted from accessing a significant customer base."*²⁷¹

5.79 The Parties' Written Response submitted that the Assessment took no account of likely changes in future conditions of competition. In particular, the Parties referenced changes in technology, including the following:

²⁶⁸ For example, [REDACTED]; and [REDACTED]

²⁶⁹ See paragraphs 3.51 to 3.57 above.

²⁷⁰ As the Parties do not have [REDACTED] this discussion is limited to eir and Three. Vodafone has a BTS agreement with Vantage, so the principle of incremental demand remaining with the host WIP remains valid.

²⁷¹ London Economics, 'Note on Competition Concerns in the Irish Telecom Towers Market', on behalf of Hibernian Towers, page 11.

- a) reduction in MNO reliance on mobile technology due to edge computing and private networks;
- b) increased use of virtualised cloud-based networks at the expense of physical networks;
- c) use of satellite technology; and
- d) use of mmWave spectrum as a means of densification.²⁷²

5.80 The Commission recognises that the communications sector is driven by fast-moving technology, and that developments may decrease reliance on mobile technology over the coming decades. However, there are also developments that may actually increase reliance on mobile technology and thereby lead to increased demand for passive infrastructure. The most obvious example of this is the ongoing roll-out of 5G, which requires further densification of mobile networks.

5.81 The potential for increased demand for passive infrastructure has been recognised by the Parties. For instance, in paragraphs 38.18(b) and (c) of the Phoenix Phase 1 RFI Response, Phoenix stated the following:

“Regulatory coverage obligations: as set out in response to Question 13 above, the coverage obligations attaching to the recent allocation of spectrum for the deployment of 5G wireless networks will act as a catalyst for further expansion and deployment of macro passive network infrastructure in the State;

5G densification: as set out in response to Question 16 above, requirements for 5G densification are anticipated to lead to increased demand for additional macro passive network infrastructure in Ireland”;

²⁷² Parties’ Written Response, paragraphs 3.10-3.13.

- 5.82 The Commission has therefore taken a balanced approach to the impact that technological developments may have on the Relevant Market, and does not rely on any one prediction when considering future conditions of competition.

(C)(iii) Closeness of competition between the Parties

- 5.83 Having considered the nature of competition in the Relevant Market, the next factor the Commission considers relevant to determining whether the Proposed Transaction would likely give rise to an SLC is the closeness of competition between the Parties. Close competitors are likely to exert greater competitive constraints on one another. Therefore, a merger between close competitors is more likely to raise competition concerns than a merger between suppliers who do not compete closely. In some cases, mergers between suppliers with high combined market shares may not raise competition concerns if they are not close competitors. Conversely, mergers between suppliers with relatively low combined market shares may raise competition concerns if they are close competitors and exert strong competitive constraints on one another.

- 5.84 Often, companies compete more or less closely in terms of how similar or different their product or service offerings are. The EC Horizontal Merger Guidelines note that:

“[t]he higher the degree of substitutability between the merging firms' products, the more likely it is that the merging firms will raise prices significantly. For example, a merger between two producers offering products which a substantial number of customers regard as their first and second choices could generate a significant price increase. Thus, the fact that rivalry between the parties has been an important source of competition on the market may be a central factor in the analysis.”²⁷³

- 5.85 The EC Horizontal Merger Guidelines also note that:

²⁷³ EC Horizontal Commission's Merger Guidelines, paragraph 28.

“[t]he merging firms’ incentive to raise prices is more likely to be constrained when rival firms produce close substitutes to the products of the merging firms than when they offer less close substitutes.”²⁷⁴

5.86 The services offered by Phoenix and Cellnex are close substitutes, and the products are largely homogenous. Therefore, the Commission’s analysis of the closeness of competition between the Parties, and between the Parties and third parties, has focused on the following parameters:

- (a) overlaps between the Parties’ macro passive infrastructure sites; and
- (b) switching between the Parties’ sites, and between the Parties’ sites and competitor sites.

Having considered the closeness of competition between the Parties by reference to the above parameters, the Commission then considered the effect that implementation of the Proposed Transaction would have on closeness of competition in respect of each identified area of competition, namely:

- (i) Competition for national contracts;
- (ii) Competition for incremental existing sites; and
- (iii) Competition for incremental new sites.

(a) Overlaps between the Parties’ passive infrastructure sites

5.87 The Commission has assessed the extent to which overlaps between the Parties’ sites are an indication of closeness of competition.

Views of the Parties

5.88 In the Merger Notification Form, when considering closeness of competition, the Parties submitted that:

²⁷⁴ EC Horizontal Commission’s Merger Guidelines, paragraph 28.

“The infrastructure networks of [the Parties] have different geographic focus areas. While both networks are dispersed nationally, [Phoenix]’s site portfolio is focused largely on [REDACTED] [REDACTED] while [Cellnex]’s sites are distributed more broadly across the country, with a significant number of sites located in [REDACTED] areas.”²⁷⁵

5.89 Page 21 of the RBB Report stated that the *“Parties are not particularly close competitors when compared to rivals.”*²⁷⁶ Cellnex site data was provided on the same page which showed that:

- (a) [REDACTED] of Cellnex’s sites ([REDACTED]%) overlapped with Phoenix sites only;²⁷⁷
- (b) [REDACTED] of Cellnex’s sites ([REDACTED]%) overlapped with Phoenix sites and sites of *“third-party rival WIPs”*;²⁷⁸ and
- (c) [REDACTED] of Cellnex’s sites ([REDACTED]%) overlapped with sites of *“third-party rival WIPs”* only.²⁷⁹

5.90 Phoenix site data was provided on page 22 of the RBB Report which showed that:

- (a) [REDACTED] of Phoenix’s sites ([REDACTED]%) overlapped with Cellnex sites only;²⁸⁰
- (b) [REDACTED] of Phoenix’s sites ([REDACTED]%) overlapped with Cellnex sites and sites of *“third-party rival WIPs”*;²⁸¹ and

²⁷⁵ Merger Notification Form, page 30, paragraph 94.

²⁷⁶ RBB Report, page 21.

²⁷⁷ RBB Report, page 15.

²⁷⁸ RBB Report, page 20.

²⁷⁹ Commission calculations based on footnote 74 of RBB Report, page 21.

²⁸⁰ RBB Report, page 15.

²⁸¹ RBB Report, page 21.

- (c) [REDACTED] of Phoenix's sites ([REDACTED]%) overlapped with sites of "third-party rival WIPs" only.²⁸²

5.91 RBB stated that there were only [REDACTED] sites where the Parties overlapped with each other and no third-party WIP. RBB stated that "[t]hese [REDACTED] sites equate to [REDACTED] distinct groups of overlapping sites where rivals are not present."²⁸³ RBB explained that it had to consider distinct groups of towers because not every overlapping area consisted of a single Phoenix site overlapping with a single Cellnex site.²⁸⁴ RBB stated that "[f]or example, if a [Phoenix] site overlaps with two Cellnex sites (which do not overlap with any other site), then these three sites will be classified as a single group."²⁸⁵

5.92 Furthermore, as discussed in paragraph 5.14(f)(i) above, in the Phoenix October Written Submission, Phoenix stated that site-level overlaps between the Parties are relatively limited and reduced further when the Proposals are taken into account. In fact, site-level overlaps show that Vantage is a closer competitor to each of the Parties than they are to each other.

EY-Parthenon's geographic overlap analysis

5.93 EY-Parthenon, on behalf of Phoenix, carried out an analysis of the overlaps between the Parties' sites (the "EY-P Geographic Overlap Analysis").²⁸⁶ EY-Parthenon concluded, on the basis of its analysis, that there was limited overlap between the Parties' sites, and there were constraints from overlapping alternative WIPs.

5.94 The EY-P Geographic Overlap Analysis can be summarised as follows:

²⁸² Commission calculations based on footnote 75 of RBB report, page 21.

²⁸³ RBB Report, page 21.

²⁸⁴ For example, it was possible for one Phoenix site to overlap with multiple Cellnex sites, or for one Cellnex site to overlap with multiple Phoenix sites, or for multiple Cellnex sites to overlap with multiple Phoenix sites.

²⁸⁵ RBB Report, page 15.

²⁸⁶ This EY-P Geographic Overlap Analysis is distinct and separate from the EY-P European Industry Report defined in footnote 57. It was prepared as part of the draft proposals developed by Phoenix and submitted to the Commission on 18 September 2024.

- (a) EY-Parthenon identified the "morphology" of each site. According to RBB, the "*morphology*" is [REDACTED] [REDACTED] [REDACTED] As such, EY-Parthenon identified five morphologies in the State:
- (i) dense urban - more than [REDACTED] people per square kilometre;
 - (ii) urban – between [REDACTED] and [REDACTED] people per square kilometre;
 - (iii) suburban – between [REDACTED] and [REDACTED] people per square kilometre;
 - (iv) rural – between [REDACTED] and [REDACTED] people per square kilometre; and
 - (v) sparse - less than [REDACTED] people per square kilometre.
- (b) As EY-Parthenon did not have access to the locations of third-party WIP sites, it approximated these using ComReg data which outlines the MNOs' points of presence ("PoPs"):²⁸⁸
- (i) First, EY-Parthenon identified the tenant(s) on each Phoenix and Cellnex site, and matched the PoP associated with tenant(s) of their sites to a corresponding PoP in the ComReg dataset. This, in theory, removes all PoPs hosted by the Parties and leaves only PoPs hosted by competitor WIPs. For example, EY-Parthenon stated "[REDACTED]" [REDACTED]²⁸⁹,
 - (ii) Second, using the remaining PoPs from the ComReg dataset which were not matched to PoPs hosted on the Parties' sites, EY-Parthenon combined PoPs that were within a certain distance of

²⁸⁷ RBB Report, page 18.

²⁸⁸ A PoP is the point on a network where active infrastructure is hosted on a passive infrastructure asset.

²⁸⁹ Phoenix Phase 1 RFI Response, Annex 7.1.2, page 1.

each other to create competitors' hypothetical sites. The underlying assumption used was that PoPs within a certain distance of each other imply the existence of a macro passive infrastructure site. The assumed distances are based on the morphology under which the PoPs are categorised and are outlined in Table below.

Table 7: Assumed maximum distance between PoPs that imply the existence of a passive infrastructure site, by morphology.

Morphology	Assumed maximum distance between PoPs that imply the existence of a passive infrastructure site
Dense Urban	100 metres
Urban	100 metres
Suburban	100 metres
Rural	100 metres
Sparse	100 metres

Source: Phoenix Phase 1 RFI Response, Annex 7.1.2, page 1.

- (c) Once EY-Parthenon had identified competitors' hypothetical sites, it approximated the circle of coverage provided by each site by assuming that:
- (i) a site in a dense urban or an urban area can provide a circle of coverage of up to 100 metres around a site;
 - (ii) a site in a suburban area can provide a circle of coverage of up to 100 metres around a site;
 - (iii) a site in a rural area can provide a circle of coverage of up to 100 metres around a site; and

- (iv) a site in a sparse area can provide a circle of coverage of up to [REDACTED] metres around a site.

EY-Parthenon compared these coverage assumptions with those implied by the locations of PoPs in the ComReg database, noting that the assumed circles of coverage are conservative as they are larger than half the distance between the closest PoPs of individual MNOs, which would tend to increase the competitive intensity around a tower.

- (d) EY-Parthenon's analysis then considered the number of other hypothetical sites within the circle of coverage of each of the Parties' sites by identifying the seven closest sites, identifying instances where there is:
 - (i) an overlap between the Parties' sites and no hypothetical competitor site;
 - (ii) an overlap between the Parties' sites and at least one hypothetical competitor site; and
 - (iii) no overlap between the Parties' sites or any hypothetical competitor site.
- (e) To further examine the validity of the results, RBB conducted a sensitivity analysis.²⁹⁰ The RBB analysis reiterated the results of the EY-P Geographic Overlap Analysis and also incorporated a sensitivity analysis whereby radii of the circles of coverage were both increased and decreased by 20% in order to observe whether the number of overlapping sites might change as a result of adjusting the assumptions made about coverage distances, as outlined in paragraph (c) above.

Views of the Commission on the EY-P Geographic Overlap Analysis

²⁹⁰ RBB Report, pages 20-24.

5.95 The Commission sets out below its observations in respect of the EY-P Geographic Overlap Analysis.

Selection of closest sites

5.96 As illustrated in Table 8 below, within the circle of coverage of the Parties' sites, over half had fewer than two overlapping sites, and about one in six had eight or more.

Table 8: Number of competing sites within circle of coverage of a site belonging to the Parties.

Number of other sites in circle of coverage	Proportion of Parties' sites
None	█%
1	█%
2	█%
3	█%
4	█%
5	█%
6	█%
7	█%
8	█%

Source: The Commission's observations from EY-P Geographic Overlap Analysis.

5.97 The Commission considered that these results were potentially problematic because they relied on assumptions about the relationship between sites and PoPs, such that the estimation of site overlaps was fairly speculative.

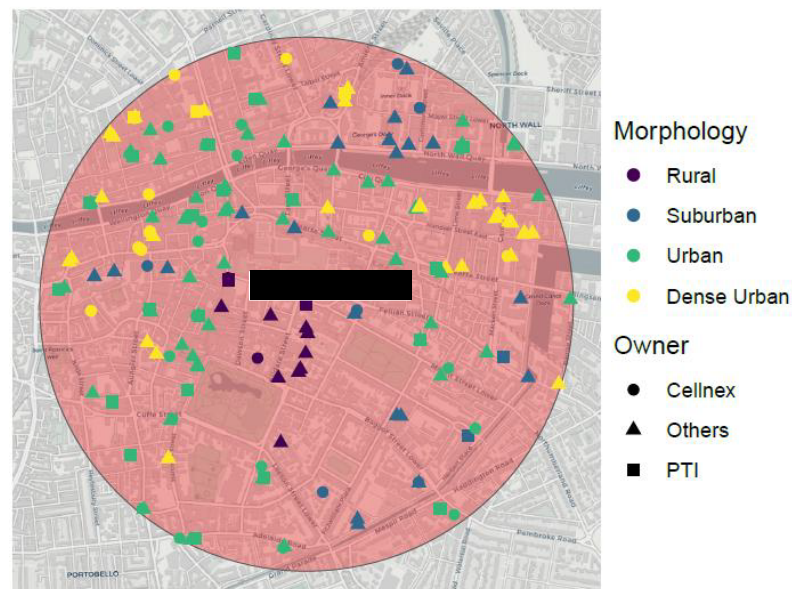
Morphology definitions

5.98 In relation to the morphology defined by the Parties and set out in paragraph 5.94, it was not clear how good a proxy population density calculated on this basis was for site density and distance, as it did not take into account, for example, the impact of business activity on the architectural environment. It also resulted in

identification of single “rural” morphologies within a group of urban and dense urban morphologies, which could have distorted the overlap analysis.

- 5.99 For example, a Phoenix site with ID [REDACTED] had [REDACTED] other sites within its circle of coverage. The site is located in the centre of Dublin but classified as “rural”. As the following diagram shows, the majority of sites within the circle of coverage are labelled “urban” or “dense urban”, whilst some other sites are also classified as “rural” or “suburban.”

Figure 4: Circle of coverage for Phoenix site [REDACTED]



Source: The Commission’s observations from the EY-P Geographic Overlap Analysis.

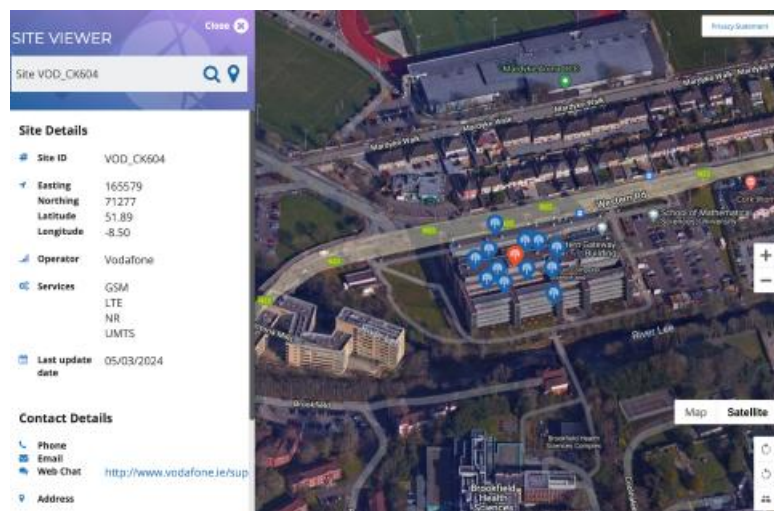
- 5.100 The Commission considered that, in some instances, sites in almost identical locations were labelled with different morphologies, seemingly because they fell on either side of a boundary between two small areas with different population densities. Although the example of Phoenix site [REDACTED] was admittedly an extreme case, this example suggests that the definition of morphologies, which then determined the radii of the circles of coverage, was questionable and that an alternative approach might be needed. The Commission was of the view that the sensitivity analysis undertaken by RBB (i.e., reducing or increasing radii of circles

of coverage), could not overcome the problem of a potential misclassification of morphologies.

Identification of competitors' sites.

5.101 The Commission considered that there were limitations in using the data contained in the ComReg database, because this data relates to PoPs, not sites. This would not be an issue if all PoPs on a particular site had the same location, but this is not necessarily the case. Where sites are shared by operators, but the specific location of their equipment differs, there are multiple entries in the ComReg database. This is common for rooftop sites where the equipment of operators tends to be in different positions. The ComReg database also includes small cells covering public venues, resulting in a large number of PoPs in close proximity, as shown in Figure 5 below:

Figure 5: Evidence of multiple PoP entries for same building.



Source: the Commission.

5.102 In order to address this problem, EY-Parthenon used the methodology described in paragraph 5.94(b) above. However, EY-Parthenon did not appear to apply a distance threshold when matching PoPs to the Parties' sites. This means that PoPs actually located on competitor sites could incorrectly be matched to Phoenix or Cellnex sites and thus removed from the analysis. EY-Parthenon noted that "[t]his

methodology is conservative for the competitive assessment because it results in less [sic] rival sites being identified.”²⁹¹

- 5.103 The Commission noted that not all Cellnex/Phoenix PoPs could be matched. EY-Parthenon stated that the standardised list of PoPs and towers included *“only PoPs that can be matched to ComReg data”*.²⁹² Therefore, PoPs that could not be matched were excluded, thereby reducing the number of sites considered in the analysis relative to the total number of sites that, according to the Parties’ site data, had at least one tenant on them.
- 5.104 Overall, this approach demonstrated some inconsistencies between the tenant information in the ComReg database and the Parties’ site databases. This suggested that some caution was needed when matching PoPs to the Parties’ sites based on tenant information.
- 5.105 As shown in Table above, for morphologies with lower population densities, EY-Parthenon increased the distances between PoPs that implied the existence of a competitor’s macro site. In explaining this, EY-Parthenon stated that, in areas with lower population densities *“(1) buildings are likelier to be larger, implying two locations marked at the same address can have different coordinates and be marked as further than they really are, and (2) sites are likelier to be further apart, since more rural areas need fewer towers to cover them than urban areas”*.²⁹³
- 5.106 The Commission noted that there did not appear to be any justification for how EY-Parthenon decided upon the specific distances used for each morphology, nor that the reasons provided in the above extract were valid. For example, one would expect to have larger buildings in urban areas (including dense urban and urban

²⁹¹ Phoenix Phase 1 RFI Response, annex 7.1.2.

²⁹² Phoenix Phase 1 RFI Response, annex 7.1.1.

²⁹³ Phoenix Phase 1 RFI Response, annex 7.1.2, page 4.

areas) accommodating multiple PoPs. Where PoP data refers to small cells, it is also quite possible that a single site includes multiple PoPs of the same operator.²⁹⁴

5.107 In light of the possible shortcomings of EY-Parthenon's analysis, the Commission developed the analysis in two main ways:

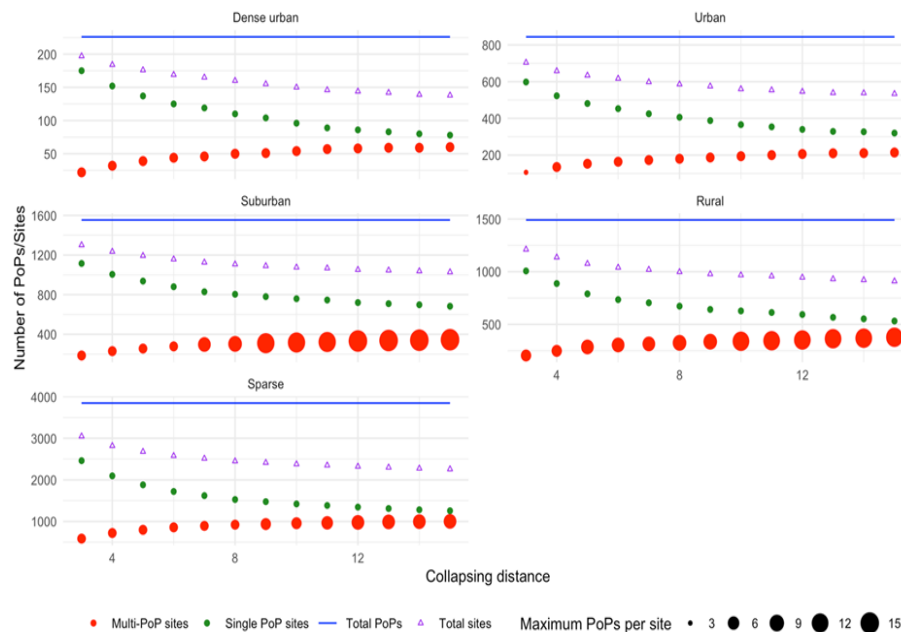
- (i) conducting a sensitivity analysis of the radii assumed by the Parties; and
- (ii) using data about alternative WIP sites provided to the Commission by the WIPs.

(i) Sensitivity analysis

5.108 In order to examine the robustness of the methodology used by EY-Parthenon in its geographic overlap analysis, the Commission examined the effect that adjusting the distances outlined in Table above would have in implying the existence of a site. Figure 6 below shows how the number of sites that comprise a single PoP and the number of sites that are identified as comprising multiple PoPs change as the distance between PoPs (that imply the existence of a site) increases. It also indicates the maximum number of PoPs that are combined into a single site.

²⁹⁴ In creating its list of hypothetical competitor sites, EY-Parthenon created additional sites where the ComReg database showed PoPs of the same operator in close proximity, noting that where there were two PoPs belonging to the same MNO, these were not tagged to the same site, "to reflect real-world scenarios, where an MNO only needs one PoP per site". It was not obvious how many additional sites were created as a consequence of this approach, and it was not clear whether multiple PoPs per site might in practice result from specific equipment configurations used by MNOs.

Figure 6: Sites and PoPs per site using different collapsing distances.



Source: The Commission

5.109 The Commission noted that, in Figure 6 above, as the distances that imply the existence of a site increased, there was a sharp increase in the maximum number of PoPs that might be collapsed into a single site in suburban and rural morphologies.

5.110 As expressed above, the Commission considered that EY-Parthenon's analysis may have overestimated the number of competitor WIP sites by a substantial margin, as the distances between PoPs implying the existence of a site were relatively short. If the EY-P Geographic Overlap Analysis had overestimated the number of competitor WIP sites, it was possible that the analysis had underestimated the number of problematic overlaps between the Parties - including situations giving rise to 2-to-1s or 3-to-2s, as described in paragraphs 5.89 and 5.90 above.

(ii) Analysis using data about alternative WIP sites provided to the Commission by these alternative WIPs.

5.111 The Commission noted the limitations of the Parties' analysis caused by their inability to secure information about the location of competitor sites. This meant the Parties had to make assumptions about where these sites may be. To address

this limitation, the Commission requested data from each alternative WIP in the State on the geolocation of their passive infrastructure sites. The Commission carried out an analysis of overlaps based on actual data on competitor sites.

5.112 The Commission requested information from nine third-party WIPs active in the Relevant Market. The Commission combined the data obtained from the third-party WIPs with the data provided by the Parties in response to the Phase 1 RFIs. This resulted in a market with approximately 500 fewer sites than that generated in the EY-P Geographic Overlap Analysis.

5.113 To check the robustness of the EY-P Geographic Overlap Analysis morphology definitions, and in an attempt to remove some of the anomalous results described in paragraphs 5.96 and 5.106 above, the Commission considered two different ways to define morphologies:

- (a) the same approach as set out in the EY-P Geographic Overlap Analysis – using census data at the small area level, and population density categories, for the identification of the five morphologies described in paragraph 5.94 above; and
- (b) using information collected by the Copernicus Land Monitoring service, which defines 44 different types of land use and land cover, of which 35 are relevant for the State.²⁹⁵ The Commission labelled each of these 35 categories as either: (i) an urban; (ii) a suburban; or (iii) a rural, morphology. This approach attempted to reduce the number of mislabelled sites by increasing the parameters of the urban morphology to also include dense urban areas, and the parameters of the rural morphology to also include sparse areas.

²⁹⁵ CORINE Land Cover, available at: <https://land.copernicus.eu/en/products/corine-land-cover>.

- 5.114 The Commission used the same assumptions as those used in the EY-P Geographic Overlap Analysis, and set out in paragraph 5.94(c) above, regarding the effect of morphology on the size of a site's circle of coverage.
- 5.115 Using the morphology definition described in paragraph 5.113(a) above, the Commission's analysis found that [REDACTED] Cellnex sites and [REDACTED] Phoenix sites – forming [REDACTED] tower groups²⁹⁶ – were located in areas where implementation of the Proposed Transaction would lead to a reduction in the number of competitors from 2 to 1. This result showed that the EY-P Geographic Overlap Analysis had overestimated the number of such sites, i.e., [REDACTED] Cellnex sites and [REDACTED] Phoenix sites, constituting [REDACTED] tower groups, as set out in paragraphs 5.89 to 5.91 above.
- 5.116 In addition, using the same morphology definition, the Commission's analysis found that [REDACTED] Cellnex sites and [REDACTED] Phoenix sites – forming [REDACTED] tower groups – were located in areas where the Proposed Transaction would lead to a reduction in the number of competitors from 3 to 2. The EY-P Geographic Analysis could not identify any such areas, as EY-Parthenon had insufficient site-level information to assign a hypothetical competitor site to any particular third-party WIP.
- 5.117 Using the morphology definition described in paragraph 5.113(b) above, the Commission's analysis found that [REDACTED] Cellnex sites and [REDACTED] Phoenix sites – forming [REDACTED] tower groups – were located in areas where the Proposed Transaction would lead to a reduction in the number of competitors from 2 to 1. This result showed that the EY-P Geographic Overlap Analysis had slightly underestimated the number of such sites.
- 5.118 Furthermore, using the same morphology definition, the Commission's analysis found that [REDACTED] Cellnex sites and [REDACTED] Phoenix sites – forming [REDACTED] tower groups – were located in areas where implementation of the Proposed Transaction would lead to a reduction in the number of competitors from 3 to 2.

²⁹⁶ As discussed in paragraph 5.91 above, distinct groups of towers were considered because some of the overlapping areas comprised more than two sites (i.e., it was not merely a single Phoenix site overlapping with a single Cellnex site). For example, it was possible for one Phoenix site to overlap with multiple Cellnex sites, or for one Cellnex site to overlap with multiple Phoenix sites, or for multiple Cellnex sites to overlap with multiple Phoenix sites.

5.119 Having examined the results of both morphology definitions, the Commission considered that the difference between the number of sites identified by each approach was negligible and, as such, there was no need to depart from the morphology definitions adopted in the EY-P Geographic Overlap Analysis.

5.120 In conclusion, the Commission undertook a rigorous test of the methodology used in the EY-P Geographic Overlap Analysis and noted the limitations of the EY-P Geographic Overlap Analysis caused by an inability to secure information about the locations of competitor sites. The Commission then further developed the EY-P Geographic Overlap Analysis by requesting geolocation data pertaining to these competitor sites from the competitors. The Commission's approach in this regard was designed to overcome the limitations associated with the assumptions on which the EY-P Geographic Overlap Analysis had to be based. The Commission considers that its development of the EY-P Geographic Overlap Analysis has resulted in an accurate depiction of overlaps between all macro passive network infrastructure sites in the State and, therefore, has enabled the Commission to identify areas of overlap where implementation of the Proposed Transaction would result in the reduction in the number of competitors from 3 to 2, or from 2 to 1. The Commission considers that these areas of overlap represent areas where the Parties compete particularly closely.

(b) Switching between the Parties' sites, and between the Parties' sites and competitor sites

5.121 As set out in paragraph 5.86, in assessing the closeness of competition between the Parties, the Commission considered overlaps between the Parties' macro passive infrastructure sites and switching between the Parties' sites, and between the Parties' sites and competitor sites. The Commission's assessment of the overlaps between the Parties' macro passive infrastructure sites is set out in the subsection above. This subsection now sets out the Commission analysis of switching between the Parties' sites, and between the Parties' sites and competitor sites.

Views of the Parties

5.122 According to the Parties,

“for most of their existing site portfolio, MNOs are expected to continue contracting with the same WIPs and are unlikely to switch to different WIPs. Switching a material number of sites between WIPs would be complex and costly (e.g., as they could require significant reconfiguration of the MNO’s network) and thus highly unlikely to occur in practice.”²⁹⁷

5.123 Switching data supports the Parties' view. According to Phoenix, in the period from 1 January 2020 to the date of the Phoenix Phase 1 RFI:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] "298

5.124 Further, during the same period, Three has switched away from a total of [REDACTED] Phoenix sites on which it had co-located. [REDACTED]

[REDACTED]

[REDACTED] 299

5.125 Cellnex stated that:

“Cellnex does not possess any documentation relating to or containing any analysis of the switching of each of: (i) MNOs; (ii) FWA operators, to and from any of Cellnex’s macro passive network infrastructure sites and those of another tower company. This information is not something the Cellnex Ireland business has tracked or monitored to date or something it can provide to the CCPC.”³⁰⁰

²⁹⁷ RBB Report, page 4.

²⁹⁸ Phoenix Response to Phase 1 RFI, question 31.

²⁹⁹ Phoenix Response to Phase 1 RFI, question 31 and Annex 31.1.

³⁰⁰ Phoenix Response to Phase 1 RFI, page 40, question 31.

5.126 The Parties explained that the MSA contracts generally limit the number of sites that can be switched away from in any one year:

“MNOs’ long-term agreements with WIPs also generally limit the number of sites they can switch away from. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

”³⁰¹

5.127 Phoenix submitted that MNOs were unlikely to switch their overall national contracts:

“Given the protections offered by these agreements, MNOs are, in practice, unlikely to switch a large portfolio of their existing sites between WIPs, even if there is the possibility to do so. Moreover, the current networks of the largest WIPs reflect MNOs’ historical infrastructure deployment and network configuration, which makes it unnecessary for MNOs to switch from most of their sites. This is consistent with the observed data provided in the RFI response, which do not show significant volumes of site switching between WIPs.”³⁰²

5.128 The Parties provided estimates of the cost of switching between passive infrastructure sites:

“(a) Removal and transfer of the active elements deployed on a macro passive network infrastructure site. [Phoenix] estimates that, typically, this may cost between €[REDACTED]-€[REDACTED] for MNOs or €[REDACTED]-€[REDACTED] for

³⁰¹ RBB Report, page 7.

³⁰² RBB Report, page 6.

FWA and other similar operators, depending on the volume of equipment to be transferred; and

(b) Modifications to the new macro passive network infrastructure site. Switching to a new macro passive infrastructure site may require updates or modifications to the new site. [Phoenix] estimates that the costs associated with these modifications may range from €[REDACTED] to in excess of €[REDACTED], depending on the nature and specification of the modifications required.”³⁰³

5.129 In the Parties’ Written Response, the Parties argued that no attempt was made in the Assessment to “*calculate the minimum critical scale at which a WIP may be capable of constraining the parties, nor has any analysis been conducted by the [Commission] to determine the level of switching that would be required by an MNO to render a unilateral price increase (even if possible) unprofitable.*”³⁰⁴ The Parties then referred to the RBB Annex, which suggested that “*WIPs only need to offer sufficient sites for MNOs to be able to threaten to switch to prevent WIPs such as [Phoenix], Cellnex and Vantage from raising prices.*”

5.130 The Parties stated that “*RBB’s analysis shows that a 5% national price increase would be rendered unprofitable by MNOs switching at most [REDACTED] sites away from the merged entity*”³⁰⁵ and, therefore, this number represents the actual level of scale necessary for a competitor WIP to exert a national pricing constraint on the merged entity.³⁰⁶ The Parties argued that there are currently eight WIPs – excluding Vantage – capable of providing such a constraint on the merged entity. The Parties maintained that it was, therefore, incorrect to assert that, prior to implementation of the Proposed Transaction, there would only be three WIPs capable of competing for national contracts at the expiry of existing MSAs, or to

³⁰³ Phoenix Phase 1 RFI Response, page 40, question 32.

³⁰⁴ Parties’ Written Response, page 23.

³⁰⁵ On page 25 of the Parties’ Written Response, the Parties explained that, as rival WIPs could accommodate switching by multiple MNOs to each of their towers, [REDACTED] is the “upper bound for the level of switching a rival WIP would need to accommodate to represent an effective competitive constraint.”

³⁰⁶ Parties’ Written Response, page 23.

characterise the Proposed Transaction as a three-to-two merger on a national basis.³⁰⁷

5.131 The Parties' Written Response explained that as critical volume loss is a function of the cost structure, *"the greater the extent to which costs are variable, the more attractive a price increase will be, all else constant. This is because the loss of revenue accompanying a loss of volume will be offset to a larger extent by cost savings."*³⁰⁸ The Parties stated that, owing to the very high ratio of fixed costs to variable costs in the Relevant Market, WIPs have a *"strong incentive to maximise usage of capacity on this infrastructure and means that lost volumes have a particularly adverse impact as revenue losses are offset by only very limited cost savings."*³⁰⁹

5.132 In the RBB Annex, the results of the analysis stated that *"if post-merger volumes are lower than █% of pre-merger volumes, the price increase will be unprofitable. Equivalently, a volume reduction of █% or more will result in a █% price increase being unprofitable."*³¹⁰ The Parties argued that this analysis showed that rival WIPs do not need to be able to accommodate the entirety of an MNO's national requirements to provide a competitive constraint on the merged entity.

5.133 In addition, the Parties argued that *"competitors do not even need to provide coverage across the entirety of the State: in order to constrain the merged entity, a competitor WIP only needs to be able to provide MNOs with, at most, █ sites somewhere in the State. Even if all of these sites were in the same general geographic location (e.g., the same county), given the overall effect on profitability, the possibility of switching these sites from the merged entity would be enough to constrain it from imposing a national price increase on MNOs."*³¹¹

³⁰⁷ Parties' Written Response, page 23.

³⁰⁸ Parties' Written Response, page 24.

³⁰⁹ Parties' Written Response, page 24.

³¹⁰ RBB Annex, page 2.

³¹¹ Parties' Written Response, page 25.

Views of third parties on switching

5.134 The three MNOs provided examples of costs associated with them moving to a different infrastructure site and/or switching to a different WIP.

5.135 Vodafone stated that switching to a different WIP is not common and would generally only occur at the end of a lease, either at the end of their lease with a WIP or when a lease with a landlord expires.³¹² Vodafone provided an example of costs associated with a particular site move, where Vodafone's costs amounted to [REDACTED].³¹³

5.136 Three stated that the cost of moving between one passive infrastructure site to another is as follows:

*"New tower provider [REDACTED]
[REDACTED]"*

*Three is responsible for [REDACTED]
[REDACTED]"*

*However it should be noted that the cost of upgrading legacy equipment to 5G [REDACTED]
[REDACTED]
[REDACTED] 314*

5.137 eir stated that the estimated cost to decommission a complete active site and move to a new location is around [REDACTED] per site. The assumptions underpinning the estimated cost included the [REDACTED]
[REDACTED] eir noted that [REDACTED]
[REDACTED] eir's estimates excluded [REDACTED]

³¹² Vodafone Call Note 23.04.2024, page 1.

[REDACTED] Email from Vodafone to the Commission dated 30 October 2024.

³¹⁴ Email from Three to the Commission dated 23 October 2024.

Each site requires [REDACTED] In addition to its overall estimate, eir provided two examples of decommissioning of eir active equipment and reinstatement at a new location, and noted that costs are subject to change based on [REDACTED]. One of eir's example relocation sites cost [REDACTED] and the other cost [REDACTED].³¹⁵

- 5.138 During a call with the Commission, ESB Telecoms noted that switching does not happen very often stating that *"moving off a site can be very expensive for customers from a practical point-of-view they need to re-point their antennas and dishes, and if they do it mid contracts it can come with additional costs. Customers may switch to a rival tower or rooftop, if ESB Telecoms' tower has limited height, there are issues with transmissions, or they are not getting the coverage that they need."*³¹⁶
- 5.139 In a call with the Commission, Towercom noted that *"it is rare that an MNO will exit a site for commercial reasons, as it will disrupt the coverage for its customers and create churn. Operators tend to add coverage."*³¹⁷
- 5.140 When asked about the prevalence of switching between WIPs, Hibernian Towers stated *"in its experience switching does not really occur, it is brought up in negotiations, but it is very costly for customers to move. It continued that it is not easy to move as it is not easy to switch suppliers, especially due to a high amount of investment that is put into a site, as the customer will need to move all its equipment. However, [Hibernian Towers] stated that it does happen, and this negatively affects TowerCos. [Hibernian Towers] noted that most contracts will allow for a customer to move off their site, as long as it is given a six to eight month notice in advance."*³¹⁸

³¹⁵ Email from eir to the Commission dated 24 October 2024.

³¹⁶ ESB Telecoms Call Note 23.05.2024, page 4.

³¹⁷ Towercom Call Note 28.05.2024, page 4.

³¹⁸ Hibernian Towers Call Note 11.06.2024, page 3.

Views of the Commission on switching

5.141 The Commission considers that there is very limited switching between WIPs for a number of reasons:

- (i) First, all three MNOs in the State are still within the terms of their long-term agreements contracted at the time of the original divestment of MNO passive infrastructure sites. There is therefore no evidence of previous MNO or WIP behaviour at the point where the long-term contracts are open for renegotiation. However, in principle, either party to the contract would have the ability to renegotiate its terms at this point. In terms of closeness of competition for national contracts, each of the Parties and Vantage are close competitors. The immediate effect of the Proposed Transaction would be to reduce the number of national alternatives that an MNO could switch to from 3 to 2.
- (ii) Second, for existing sites, the MSA agreements between MNOs and WIPs strictly limit the number of sites that an MNO can exit in a year. While this varies, the maximum number cited was 1%.³¹⁹ This means that there is a contractual limit on the number of sites that a WIP could switch away from and immediately limits the possible volume of switching. In theory, this limitation would not necessarily apply to MNO demand outside of the MSA contracts, but in practice there is no evidence of widespread switching between WIPs even absent a contractual obligation.
- (iii) Third, in addition to a contractual obligation not to switch, there is evidence of a significant cost associated with switching. Information submitted by MNOs and set out above provides examples of actual switching costs.

³¹⁹ See information on churn in each MSA in Table 1 and Table 2.

- (iv) Fourth, MNOs have also explained that switching would be potentially disruptive to their networks as it would involve the physical relocation of their active infrastructure as well as switching to alternative sources of power, connectivity and so on.

5.142 The Commission has considered the Parties' submission on their calculation of a minimum critical scale at which a WIP may be capable of constraining the merged entity.

5.143 The analysis carried out in the Parties' Written Response proposed that a 5% price increase would be rendered unprofitable *"by MNOs switching at most 83 sites away from the merged entity"*.³²⁰ The Commission notes that the Parties' analysis is limited to the level of switching which would be needed to render a 5% price increase unprofitable. This is not sufficient to demonstrate that a 5% price increase would be unprofitable because it is possible that a 5% price increase would result in fewer than 83 sites being vacated. Therefore, in order to demonstrate that a 5% increase would be unprofitable, the Commission needs to understand whether customer response is likely to be at the level to render the price increase unprofitable.

5.144 First, as noted in Section (C)(ii), switching in the Relevant Market is uncommon, as it is costly and disruptive. Furthermore, in order for a customer to be able to switch a significant number of sites, there would need to exist that number of available, and suitable, sites in the short term to switch to. The Commission sets out in Section (C)(v) that, to the extent that entry is possible, entry at that scale is unlikely to be timely. And it would also potentially require a significant amount of coordination and planning between the customer and the prospective new entrant to induce the new entrant to make the necessary investments with sufficient certainty that it will recoup that investment. There are, of course,

³²⁰ On page 25 of the Parties' Written Response, the Parties explained that, as rival WIPs could accommodate switching by multiple MNOs to each of their towers, ■ is the "upper bound for the level of switching a rival WIP would need to accommodate to represent an effective competitive constraint."

existing competitors, but none which would compete as closely with the merged entity, in as many local areas, as Phoenix and Cellnex do.

5.145 Second, the Parties' analysis would seem to assume a uniform price increase across its network. If price increases were focused on local areas in which Phoenix and Cellnex were the only operators, for example, switching in those areas would not be possible. According to the Commission's analysis, there are ■ tower groups where this would be the case. More generally, the impact of the Proposed Transaction in local areas is not uniform, with some areas significantly more affected (in terms of loss of competition) than others. To the extent that the merged entity is able to focus price increases on these areas, it will be more difficult, post-Proposed Transaction, for customers to respond so as to make those price increases unprofitable.

5.146 The Commission considers that the Parties' analysis in the RBB Annex, referenced in paragraph 5.129, does not demonstrate that the merged entity will not have market power post-Proposed Transaction, and, as such, that it will be unable to increase prices post-Proposed Transaction.

Overall views of the Commission on closeness of competition

5.147 The services offered by Phoenix and Cellnex are close substitutes, and the products are largely homogeneous. Furthermore, based on its analysis of the overlaps between the Parties' macro passive infrastructure sites (see paragraphs 5.87 to 5.120) the Commission's view is that Phoenix and Cellnex are close competitors.

5.148 While the Commission has found that there is very limited switching between WIPs in general and, by extension, between the Parties, there are points where an MNO may choose to switch or to develop new business with a WIP other than the one with which it has an MSA.

5.149 Having considered the closeness of competition between the Parties by analysing the overlaps between their macro passive network infrastructure sites, and given the evidence that customers switching away from sites occurs very rarely, the Commission has considered the effect that implementation of the Proposed

Transaction may have on closeness of competition in respect of each area of competition as identified in paragraph 5.8 above, namely:

- (i) Competition for national contracts;
- (ii) Competition for incremental existing sites; and
- (iii) Competition for incremental new sites.

(i) Closeness of competition for national contracts

5.150 The Parties' view that Phoenix and Cellnex each has a different geographic focus and therefore do not closely compete is not supported by the evidence seen by the Commission. Both Parties offer national coverage to MNOs and this is a key requirement for MNOs, not least due to the conditions in MNO spectrum awards, which require MNOs to provide national (population) coverage. Therefore, the infrastructure required by MNOs must support a national service. While there may, as shown in the overlap analysis, be some geographical variation between the density of each of Phoenix and Cellnex's coverage, the underlying coverage of both is national.

5.151 The only competitor WIP which also has national coverage is Vantage, which has an equivalent legacy divestment of Vodafone's passive infrastructure portfolio. In the Commission's view, this means that Vantage is the only close competitor to the parties that can meet an MNO's requirement for national coverage. This requirement for national coverage applies at market entry, and also at the point of renegotiation of long-term contracts.

5.152 The Commission recognises that barriers to switching currently exist in the market and would likely persist post-merger, and that these barriers limit the potential for an MNO to switch away from its existing main provider of passive infrastructure, irrespective of the merger. However, the effect of the merger would be to exacerbate the existing barriers to switching by reducing the alternatives that an MNO could switch to. This is discussed further 5.341 below.

(ii) Closeness of competition for incremental existing sites

- 5.153 All MNO customers have an on-going need for additional or upgraded sites to cope with network coverage and densification. However, even when an MNO has the opportunity to use the existing sites of another WIP in respect of such demand, in practice and as discussed above, there is very limited switching from an MNO's main WIP, either between the Parties, or indeed between any providers of passive network infrastructure sites. As set out above, all of the MNOs noted the technical difficulties and costs associated with switching. An additional key inhibitor to switching is the provisions in long-term agreements (i.e., MSAs) between an MNO and a WIP.
- 5.154 The Parties have argued that there are a number of significant competing passive infrastructure providers in the State which offer MNOs an effective alternative and constitute an important competitive constraint. The Commission notes that all of the MNOs use passive infrastructure provided by a number of different WIPs, not just the WIP that originally acquired their respective passive infrastructure and with which they have an MSA. However, none of the WIPs other than the three large national WIPs have a market share in excess of 10%, nor have any shown significant growth in the last few years. The Commission's view is that those WIPs compete on an opportunistic basis which tends to be location specific. Contrary to the Parties' views, the Commission has not seen evidence to suggest that non-national WIPs could be considered as "significant" competitors.
- 5.155 More specifically, closeness of competition in this regard is highly context-specific. Where an MNO requires a site within a specific geographic area, the relevant competitors are those WIPs which already have sites, with available capacity, within those areas. Phoenix and Cellnex, as the third and first largest WIPs respectively, each with national and dense coverage, compete closely in this regard because they have a greater number of sites in a greater number of locations than do the non-national WIPs.
- 5.156 In evaluating the closeness of competition between the Parties in respect of competition for MNOs' incremental business, and as described in paragraphs

5.111 to 5.119 above, the Commission has developed the data and methodology utilised in the EY-P Geographic Overlap Analysis.

5.157 As discussed in paragraph 5.89 above, [REDACTED] of Cellnex's sites ([REDACTED]%) overlap with Phoenix sites.³²¹

(a) Of these [REDACTED] sites, [REDACTED] sites overlap with Phoenix sites only.³²² Implementation of the Proposed Transaction would lead to a reduction in the number of WIPs active in these areas from 2 to 1.

(b) Of these [REDACTED] sites, [REDACTED] sites overlap with Phoenix and one other competitor only.³²³ Implementation of the Proposed Transaction would lead to a reduction in the number of WIPs active in these areas from 3 to 2.

5.158 As discussed in paragraph 5.90 above, [REDACTED] of Phoenix's sites ([REDACTED]%) overlap with Cellnex sites.³²⁴

(a) Of these [REDACTED] sites, [REDACTED] sites overlap with Cellnex sites only.³²⁵ Implementation of the Proposed Transaction would lead to a reduction in the number of WIPs active in these areas from 2 to 1.

(b) Of these [REDACTED] sites, [REDACTED] sites overlap with Cellnex and one other competitor only. Implementation of the Proposed Transaction would lead to a reduction in the number of WIPs active in these areas from 3 to 2.

5.159 Overall, based on the Commission's analysis, as a result of the Proposed Transaction, for [REDACTED] sites of the Parties' combined portfolio of [REDACTED] sites, there

³²¹ RBB report, page 21.

³²² RBB report, page 15.

³²³ Commission calculations based on the RBB report, page 21, and the Commission's analysis of site geolocation data provided by the Parties and third parties.

³²⁴ Commission calculations based on the RBB report, page 21, and the Commission's analysis of site geolocation data provided by the Parties and third parties.

³²⁵ Commission calculations based on the RBB report, page 21, and the Commission's analysis of site geolocation data provided by the Parties and third parties.

would be a reduction of at least one local competitor.³²⁶ It is clear, therefore, that a considerable amount of local competition is likely to be lost as a result of the Proposed Transaction.

(iii) Closeness of competition for incremental new sites

5.160 To assess closeness of competition for new sites, the Commission has examined the extent to which WIPs compete for new MNO business. Table 9 below sets out the number of new sites for each MNO from 1 January 2022, broken down by the WIP which operates and develops the site.

Table 9: New sites for eir, Three and Vodafone since 1 January 2022³²⁷

	eir	Three	Vodafone
Phoenix	█ (█%)	█ (█%)	█ (█%)
Cellnex	█ (█%)	█ (█%)	█ (█%)
Combined	█ (█%)	█ (█%)	█ (█%)
Vantage	█ (█%)	█ (█%)	█ (█%)
Other WIP	█ (█%)	█ (█%)	█ (█%)
Total	█ (100%)	█ (100%)	█ (100%)

Source: Commission analysis of information provided by eir, Three and Vodafone.

5.161 As Table 9 shows, the majority of each MNO's new sites are developed by WIPs with which they have long-term agreements (█)

³²⁶ Commission calculations based on the RBB report, page 21 and 22, and the Commission's analysis of site geolocation data provided by the Parties and third parties.

³²⁷ Each MNO was asked "For the period Jan 2022 to the date of this email, what proportion of new [MNO] macro passive infrastructure sites—that is, sites which [MNO] has not previously has [sic] equipment hosted on—could be characterised as the following: (i) existing site; (ii) new site". For each of (i) or (ii) the MNO was asked to give the number of sites broken down by Phoenix, Cellnex, Vantage or "other WIP". It is possible that each MNO's interpretation of "new site" differs somewhat from each other, therefore the Commission has not added the three MNOs together—however, the responses are informative in terms of WIPs' shares on an individual MNO basis.

_____)). This demonstrates the importance of these long-term agreements to WIPs in terms of growing their respective site portfolios and, conversely, the extent to which they may act as a barrier to other WIPs competing effectively to provide new sites for MNOs.

5.162 The Commission notes that the Proposed Transaction will lead to the loss of potential competition between two of the largest WIPs. Since January 2022, Phoenix has developed 281 [REDACTED] and Cellnex has developed 233 [REDACTED]. Excluding Vantage, the other WIPs developed [REDACTED] sites for [REDACTED]. While the long-term agreements include BTS commitments that to some extent explain why, historically, Phoenix and Cellnex have developed sites at greater scale, the Proposed Transaction will remove any potential competition between the only two providers to have demonstrated an ability to deliver sites for [REDACTED] at a large scale.

5.163 The Commission acknowledges that existing BTS agreements will expire within a shorter timeframe than the overall long-term contracts. This means that the competitive dynamics of the market are likely to be different following the expiry of those agreements. Unlike existing site portfolios, the Commission is not aware that there are any significant costs for an MNO to switch to an alternative WIP with respect to BTS contracts. Indeed, the Commission notes that both Phoenix and Cellnex currently have BTS agreements with [REDACTED]. However, as a result of the Proposed Transaction, following the removal of a significant alternative provider, an MNO's ability to switch its business for new sites to an alternative WIP on the conclusion of its current BTS agreement would be significantly reduced.

(C)(iv) Examination of the extent to which other competitors are likely to replace the competitive constraint provided by Cellnex

5.164 Having considered the closeness of competition between the Parties, the next factor the Commission considers relevant to determining whether the Proposed Transaction would likely give rise to an SLC is the extent to which other competitors are likely to replace the competitive constraint provided by Cellnex. In this section, the Commission now sets out its assessment of:

- (i) whether other competitors could replace the competitive constraint provided by Cellnex; and
- (ii) the extent to which Phoenix considers other competitors as a competitive constraint, as evidenced by reference to its internal documents.

Whether other competitors could replace the competitive constraint provided by Cellnex.

5.165 As discussed in paragraph 5.41 above, in considering the concentration of the Relevant Market, the Commission has taken the total number of macro passive network infrastructure sites operated by each WIP as of November 2024.

5.166 The Commission notes that, according to the site numbers as of November 2024, the three national WIPs collectively had [REDACTED] sites, which amounted to more than 70% of the total number of WIP sites.³²⁸ The remaining sites in the State are divided amongst 8 WIPs, each with a relatively small market share. Additionally, Cellnex alone with [REDACTED] sites had more sites than the 8 non-national WIPs combined. This clearly illustrates the level of competitive constraint provided by Cellnex that would need to be replaced post-Proposed Transaction.

Views of the Parties

5.167 In the Merger Notification Form, the Parties stated the following:

“There are a number of significant competing passive infrastructure providers active in the State. These providers are, and will remain, an important and effective alternative for operators, who also have the possibility for self-supply by building and maintaining their own infrastructure, as they have done previously. These alternative infrastructure providers therefore constitute an important competitive constraint on the combined [Phoenix/Cellnex]. MNOs and other customers of passive infrastructure services will therefore continue to be able to

³²⁸ Calculated by the Commission using information received from the Parties and third parties.

choose from a range of large international and domestic infrastructure providers, including Vantage Towers (“Vantage”), ESB, Towercom, Shared Access and 2rn, as well as having the outside option to self-supply.”³²⁹

5.168 As discussed in paragraph 5.14(e) above, this view was echoed in the Phoenix Written Response.

Views of third parties

Vantage

5.169 On 5 November 2024, the date on which it furnished the Commission with the geolocation data related to its portfolio, Vantage operated [REDACTED] macro sites in the State, meaning that the size of its portfolio had increased by [REDACTED] macro passive network infrastructure sites since 31 December 2023.³³⁰ During a call with the Commission, Vantage stated that, in its view, *“the market in Ireland has reached market saturation and [Vantage] noted that there are synergies for mergers with smaller companies.”*³³¹ Vantage explained that it sees a lot of potential for developing *“legacy infrastructure”* portfolios, such as those operated by 2rn or the OPW, which are *“linked to state assets.”*³³²

5.170 Vantage also explained that it sees opportunities for organic growth (i.e., the roll-out of new macro sites) *“within rural Ireland”*³³³. However, Vantage noted that growth in the Relevant Market is becoming more difficult and added that this will be exacerbated by the Proposed Transaction, as *“two MNOs would be tied to one entity”* and this would *“make it even harder to pick up customers”*.³³⁴ Vantage identified Cellnex as the WIP with which it competes most closely and stated that Phoenix will become Vantage’s main competitor following the Proposed Transaction.

³²⁹ Merger Notification Form, page 3, paragraph 12.

³³⁰ Vantage provided the size of its portfolio as of 31 December 2023 in an email to the Commission dated 4 July 2024.

³³¹ Vantage Call Note 15.05.2024, page 3.

³³² Vantage Call Note 15.05.2024, page 3.

³³³ Vantage Call Note 15.05.2024, page 3.

³³⁴ Vantage Call Note 15.05.2024, page 3.

5.171 When considering its commitment to build macro sites for Vodafone, Vantage stated that “*new builds are typically for anchor tenants of tower companies*”.³³⁵ Vantage also explained that developing sites is very capital intensive and both WIPs and MNOs “*need to invest a significant amount to upgrade the existing infrastructure and develop new sites with minimal returns on investment.*”³³⁶

5.172 The Commission notes that Vantage offers preferential treatment to Vodafone as its anchor tenant. According to Vantage Towers AG's Annual report:

*"If a new MNO tenancy is added to a site, Vodafone as the anchor tenant may receive an additional tenant discount to its base service charge unless the tenant was already co-locating on the site at the effective date of the Vodafone MSA and is installing more active equipment or renewing its site agreement.....the additional tenant discount can be up to 15% of the original anchor tenant fee."*³³⁷

5.173 Vantage confirmed that this discount applies in Ireland:

[illegible]

ESB Telecoms

5.174 On 29 October 2024, the date on which it furnished the Commission with the geolocation data related to its portfolio, ESB Telecoms operated [REDACTED] macro sites in

³³⁵ Vantage Call Note 15.05.2024, page 4.

³³⁶ Vantage Call Note 15.05.2024, page 3.

³³⁷ Vantage Towers AG, Annual Report 2022/2023, page 27, available at: [Vantage Annual financial statement](#).

³³⁸ Email from Vantage to the Commission dated 5 November 2024.

the State, meaning that the size of its portfolio had decreased by [REDACTED] macro passive network infrastructure site since 31 December 2023.³³⁹ During a call with the Commission, ESB Telecoms stated that most of these macro sites are tower sites and noted that 75-80% of its revenue comes from the three MNOs.³⁴⁰ ESB Telecoms stated that MNOs “*use a variety of different tower companies*” and, for example, one MNO may have its active infrastructure located on sites operated by ESB Telecoms, Phoenix, Cellnex, and Towercom.³⁴¹ ESB Telecoms expressed the view that “*location is key*” and MNOs pick sites “*by location not vendor*.”³⁴²

- 5.175 ESB Telecoms also stated that it aims to build between [REDACTED] and [REDACTED] new macro sites per year, although it sometimes might not reach this target due to difficulties obtaining planning permissions or accessing suitable land.³⁴³ It added that it has a combination of sites built for commercial customers and internally for communications purposes; and that its towers are located on sub-stations which it owns. Further, owning the land that it builds on “*eliminates all costly operational overheads of having to manage third parties, like landlords*.”³⁴⁴
- 5.176 ESB Telecoms noted that making a return on a new tower can be challenging because “*building a new tower involves a big capital outlay (landowner fee and infrastructure fee) and the tower will not produce a return on investments immediately*.”³⁴⁵ It added that MNOs want to increase their footprint on the towers, but this is expensive in light of high energy costs and costs associated with installing 5G equipment.³⁴⁶
- 5.177 ESB Telecoms suggested that BTS agreements dictate which WIPs the MNOs will approach when looking for a new site. It stated that “*Vantage is Vodafone’s*

³³⁹ ESB Telecoms provided the size of its portfolio as of 31 December 2023 in an email to the Commission dated 8 July 2024.

³⁴⁰ ESB Telecoms Call Note 23.05.2024, page 1.

³⁴¹ ESB Telecoms Call Note 23.05.2024, page 1.

³⁴² ESB Telecoms Call Note 23.05.2024, page 2.

³⁴³ ESB Telecoms Call Note 23.05.2024, page 3.

³⁴⁴ ESB Telecoms Call Note 23.05.2024, page 3.

³⁴⁵ ESB Telecoms Call Note 23.05.2024, page 3.

³⁴⁶ ESB Telecoms Call Note 23.05.2024, page 3.

partner, therefore if Vodafone comes to ESB [Telecoms] if [sic] has gone to Vantage first.”³⁴⁷ ESB Telecoms went on to say that it believes “the same dynamic exists with Three and Cellnex.”³⁴⁸

- 5.178 ESB Telecoms stated that it views all other WIPs as its close competitors and noted that, following the Proposed Transaction, its biggest competitor will be the merged entity. ESB Telecoms expressed the view that “*Phoenix will have the market power to change prices up or down for MNOs and it will have a significant amount of infrastructure to exert its power in the market.*”³⁴⁹

Towercom

- 5.179 On 25 October 2024, the date on which it furnished the Commission with the geolocation data related to its portfolio, Towercom operated [REDACTED] macro sites in the State, meaning that the size of its portfolio of macro passive network infrastructure sites had not increased since 31 December 2023.³⁵⁰ During a call with the Commission, Towercom stated that it operates a mature portfolio and that it is mainly active in upgrading sites to be able to facilitate new technology required by the MNOs. Its sites are spread across multiple counties but, due to the fact that most of its macro sites are towers and not rooftop sites, it does not have many urban sites.³⁵¹

- 5.180 Towercom stated that MNOs are the main users of macro sites and, as a result, they are also the main sources of revenue for WIPs. It noted that, given the time and cost involved, it will only develop a new site if it has secured a commitment for tenancy from an MNO, and that it would ideally get more than one tenant on a site to make a return on investment. Towercom concluded that it is easier to expand an existing site than to build a new one, especially as it is very difficult to

³⁴⁷ ESB Telecoms Call Note 23.05.2024, page 3.

³⁴⁸ ESB Telecoms Call Note 23.05.2024, page 3.

³⁴⁹ ESB Telecoms Call Note 23.05.2024, page 4.

³⁵⁰ Towercom provided the size of its portfolio as of 31 December 2023 in an email to the Commission dated 19 June 2024.

³⁵¹ Towercom Call Note 28.05.2024, page 1.

build any new sites required by MNOs due to BTS commitments between MNOs and certain WIPs.³⁵²

- 5.181 Towercom explained that its competitors are Phoenix, Vantage, Cellnex, ESB Telecoms and the OPW. Towercom stated that, of these competitors, ESB Telecoms is closest in size. Towercom also noted that WIPs compete at the local level.³⁵³

OPW

- 5.182 As of 22 January 2025, the date on which it furnished the Commission with the geolocation data related to its portfolio, the OPW operated [REDACTED] sites in the State, primarily at Garda stations. During a call with the Commission, the OPW stated that it *“maintains its existing portfolio of sites with passive infrastructure, and expansion of its portfolio is not in its remit.”*³⁵⁴ The OPW noted that its sites are managed by a third-party service provider and, although the *“service provider’s contract includes the possibility of adding new sites”* to the OPW’s portfolio, this has not materialised.³⁵⁵ The OPW explained to the Commission that it does not consider itself as operating within a wider market for passive infrastructure and does not have knowledge about the other WIPs in the Relevant Market.³⁵⁶

Shared Access

- 5.183 On 24 October 2024, the date on which it furnished the Commission with the geolocation data related to its portfolio, Shared Access operated [REDACTED] macro sites in the State, meaning that the size of its portfolio had not increased since 31 December 2023. During a meeting with the Commission, Shared Access stated that BTS agreements between the MNOs and certain WIPs essentially prevent competition between WIPs to build sites for the MNOs. It stated that eir’s long-term BTS agreement with Phoenix has resulted in the end of eir’s engagement with Shared Access in respect of building new towers. It explained that an MNO that

³⁵² Towercom Call Note 28.05.2024, page 4.

³⁵³ Towercom Call Note 28.05.2024, page 4.

³⁵⁴ OPW Call Note 15.05.2024, page 1.

³⁵⁵ OPW Call Note 15.05.2024, page 2.

³⁵⁶ OPW Call Note 15.05.2024, page 2.

has a BTS agreement with a particular WIP will generally locate on sites supplied by that WIP. In its view, the MNOs are less and less likely to go to smaller operators.³⁵⁷

5.184 Shared Access stated that, from a neutral host WIP's point of view, to be financially viable, there must be more than one tenant on a site. However, this can be difficult to achieve as MNOs are locked into BTS agreements with certain WIPs and may not be able to commit to a site operated by a rival WIP.³⁵⁸

5.185 Shared Access also stated that obtaining planning permission is the most critical barrier to the speed of deployment of a new site and estimated that it takes between 12 and 18 months to develop a new site.³⁵⁹

Hibernian Towers

5.186 On 31 October 2024, the date on which it furnished the Commission with the geolocation data related to its portfolio, Hibernian Towers operated [REDACTED] macro sites in the State, meaning that the size of its portfolio had decreased by [REDACTED] macro passive network infrastructure sites since 31 December 2023. During a call with the Commission, Hibernian Towers stated that it aims to build about [REDACTED] to [REDACTED] new sites per year, but it would like to build more. It explained that, as it has grown its business organically, it has licence agreements with MNOs on a site-by-site basis.³⁶⁰

5.187 Hibernian Towers expressed the view that market power in the Relevant Market is dictated by how many sites a WIP operates. A WIP that can commit to delivering 100 sites for a customer has a strong position in the market; and it is easier for a customer to move from ten sites than it is to move from 300 sites. Therefore, according to Hibernian Towers, if the majority of a customer's tenancies are on

³⁵⁷ Shared Access Meeting Note 06.09.2024, page 5.

³⁵⁸ Shared Access Meeting Note 06.09.2024, page 4.

³⁵⁹ Shared Access Meeting Note 06.09.2024, page 3.

³⁶⁰ Hibernian Towers Call Note 11.06.2024, page 1.

sites operated by a certain WIP, that WIP is relatively more powerful than other WIPs in the Relevant Market.³⁶¹

5.188 Hibernian Towers added that it believes that there has been insufficient consideration of the implications of the long-term BTS agreements between certain WIPs and the MNOs, noting that it is harder for WIPs like Hibernian Towers to engage with MNOs due to these commitments. Hibernian Towers stated that, when it approaches eir about moving onto a Hibernian Towers site, eir's response is that all of its investment will be put into its BTS agreement with Phoenix.³⁶²

Views of the Commission

5.189 The Commission considers that other competitors are unlikely to be able to replace the competitive constraint currently provided by Cellnex. In considering the constraint imposed by Cellnex in competition for national contracts, the Commission notes that Cellnex has more sites than all of the non-national WIPs combined, and has a ubiquitous and dense network of sites across the State. MNOs already have very limited choice of WIP which can meet their requirements for high quality national coverage, and the Proposed Transaction would further reduce this choice and remove Cellnex as a competitive constraint.

5.190 As discussed in paragraph 5.153 to 5.163 above, until the expiration of the MNO long term national contracts, competition in the Relevant Market is for an MNO's incremental business and is limited to MNOs seeking additional sites for densification or extension of their networks. This could be where the MNO seeks to co-locate on an existing site, or where the MNO requires a new site.

5.191 Where an MNO seeks to co-locate on an existing site, Cellnex currently imposes a competitive constraint on all WIPs as it has a large number of sites across the State, giving it an incumbency advantage as it is more likely to have an existing site in a

³⁶¹ Hibernian Towers Call Note 11.06.2024, page 3.

³⁶² Hibernian Towers Call Note 11.06.2024, page 4.

location that meets the MNO's needs. The removal of Cellnex from the market would remove this competitive constraint.

- 5.192 Where an MNO seeks a new site, Cellnex currently exercises a constraint through the BTS element of its contracts with MNOs. These contracts effectively lock down the largest part of MNO investment in new sites for the duration of the BTS agreement. Cellnex has BTS agreements with both Three and eir.
- 5.193 As discussed from paragraph 5.169 to paragraph 5.188 above, it is clear that none of the third party WIPs expanded their portfolios in any significant way between 31 December 2023 and late 2024/early 2025. The Commission is of the view that there is no evidence to suggest that this trend will change following the Proposed Transaction. This is discussed further in the context of barriers to entry and expansion below.
- 5.194 In assessing the extent to which other competitors, post-merger, may be able to replace the competitive constraint that was provided by Cellnex, the Commission considers it relevant to examine the extent to which Phoenix considers other competitors as a competitive constraint, as evidenced by reference to its internal documents.

The extent to which other providers of hosting services on macro passive network infrastructure sites are considered by Phoenix in its internal documents.

- 5.195 In assessing the extent to which WIPs act as a competitive constraint to each other in the Relevant Market, the Commission considers the views of the Parties to be relevant, in particular where those views have been expressed independently of the Proposed Transaction.
- 5.196 A document submitted as part of the Phoenix Phase 1 RFI Response showed Phoenix employees discussing [REDACTED]
[REDACTED].³⁶³ The discussion demonstrated that the Phoenix employees [REDACTED]

³⁶³ Phoenix Phase 1 RFI Response, document bearing production name 'PROD_0002625.pdf', dated 2023.

[REDACTED]
[REDACTED]

5.200 In another email thread, a Phoenix employee noted that Phoenix [REDACTED]
[REDACTED]
[REDACTED]
Further, it was noted that Phoenix [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁶⁸ Later in the chain, the Phoenix employee expressed
[REDACTED]
[REDACTED] However, the employee
pointed out that [REDACTED]
[REDACTED]
[REDACTED] At the end of the
conversation, the Phoenix employee stated that [REDACTED]
[REDACTED]
[REDACTED]³⁶⁹

5.201 In another email thread, Phoenix employees discussed [REDACTED]
[REDACTED]
[REDACTED]³⁷⁰ [REDACTED]
and Phoenix employees expressed concerns [REDACTED]
[REDACTED] The Phoenix employees also
expressed [REDACTED]
[REDACTED]

5.202 Another email thread discussed [REDACTED]
[REDACTED]

³⁶⁸ Phoenix Phase 2 RFI Response, document bearing production name 'PROD_RFI2_0000589.MSG', dated 2024.

³⁶⁹ Phoenix Phase 2 RFI Response, document bearing production name 'PROD_RFI2_0000589.MSG', dated 2024.

³⁷⁰ Phoenix Phase 2 RFI Response, document bearing production name 'PROD_RFI2_0000077.MSG', dated 2021.

[REDACTED]³⁷¹ In the thread, a Phoenix employee also summarised [REDACTED]

[REDACTED] According to the Phoenix employee's email, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

5.203 In another email thread, [REDACTED]

[REDACTED]³⁷² An analysis was conducted to ascertain whether [REDACTED]

[REDACTED]

5.204 In two other email threads, Phoenix employees discussed [REDACTED]

[REDACTED]

[REDACTED]. The Phoenix employees noted that [REDACTED]

[REDACTED]

[REDACTED]. In one of the threads, a Phoenix employee stated that Phoenix had "[REDACTED]"

[REDACTED]

[REDACTED]³⁷³ According to the second email thread, Phoenix [REDACTED]

[REDACTED] In the thread, a Phoenix employee stated the following: [REDACTED]

[REDACTED]³⁷⁴

5.205 In three separate email threads Phoenix employees discussed [REDACTED]

[REDACTED]

[REDACTED] One of these threads noted that [REDACTED]

³⁷¹ Phoenix Phase 2 RFI Response, document bearing production name 'PROD_RFI2_0000031.MSG', dated 2021.

³⁷² Phoenix Phase 2 RFI Response, document bearing production name 'PROD_RFI2_0000059.pdf', dated 2021.

³⁷³ Phoenix Phase 1 RFI Response, document bearing production name 'PROD_0002772.MSG', dated 2023.

³⁷⁴ Phoenix Phase 1 RFI Response, document bearing production name 'PROD_0002793.MSG', dated 2023.

[REDACTED]

[REDACTED] One of the Phoenix employees stated the following:

[REDACTED]

[REDACTED]³⁷⁵

5.206 In a subsequent email thread, a Phoenix employee noted that [REDACTED]

[REDACTED]

[REDACTED]³⁷⁶ In another email thread, [REDACTED]

[REDACTED]³⁷⁷

5.207 In another email thread, Phoenix employees discussed [REDACTED]

[REDACTED] In discussing this [REDACTED]

[REDACTED]

[REDACTED] and wondered whether Phoenix

[REDACTED]

[REDACTED] One Phoenix employee suggested [REDACTED]

[REDACTED]

They added that the Phoenix CEO [REDACTED] and noted

³⁷⁵ Phoenix Phase 1 RFI Response, document bearing production name 'PROD_0002624.pdf', dated 2023.

³⁷⁶ Phoenix Phase 1 RFI Response, document bearing production name 'PROD_0003025.MSG', dated 2023.

³⁷⁷ Phoenix Phase 2 RFI Response, document bearing production name 'PROD_RFI2_0000350.pdf', dated 2023.

by either: (i) applying for planning permission to expand/upgrade an existing site; or (ii) objecting to planning applications. The primary driver of the Parties competing in this way is to prevent churn by tenants of its existing sites.³⁸⁴

- 5.213 The Commission notes that an MNO corroborated such practices and stated that it considered that WIPs compete by objecting to each other's planning applications.³⁸⁵

The Commission's conclusions on whether other competitors could replace the competitive constraint provided by Cellnex.

- 5.214 The Commission's conclusion is that other competitors in the Relevant Market could not replace the competitive constraint currently provided by Cellnex. This is primarily due to the structure of the market, such that the Parties and Vantage (i.e., the national WIPs) account for a high proportion of the market. For the reasons explained above, the Commission's view is that Vantage, as the only alternative national WIP post-merger, would not be sufficient to replace the competitive constraint provided by Cellnex. The remaining WIPs individually and collectively account for a small market share only, which does not appear to have grown significantly over the last few years. These WIPs would not, therefore, in the Commission's view, be in a position to replace the competitive constraint provided by Cellnex.

- 5.215 [REDACTED]. Following the Proposed Transaction, the merged entity would have potentially strengthened or more extensive MSAs with all the MNOs. For example, [REDACTED], [REDACTED], and [REDACTED]. It is difficult to see how an alternative WIP, faced with the merged entity's entrenched position in respect of each of the MNOs, could replace the competitive constraint currently provided by Cellnex. These points are developed further in the discussion of barriers to entry and expansion below.

³⁸⁴ As detailed in Table 1, [REDACTED]

³⁸⁵ Three Call Note 23.05.2024, page 3.

(C)(v) Barriers to entry and expansion in the Relevant Market

5.216 Having considered the extent to which other competitors are likely to replace the competitive constraint provided by Cellnex, the next factor the Commission considers relevant to determining whether the Proposed Transaction would likely give rise to an SLC is the importance of barriers to entry and expansion in the Relevant Market.

5.217 The Commission assesses the extent to which market power may be constrained by the occurrence or threat of new entry, or by the ability of existing rivals to profitably expand supply. In both cases, any entry and/or expansion must meet the following three conditions.

(a) **Likelihood.** The Commission's Merger Guidelines set out that "[t]he Commission will assess whether a new entrant would be likely to make a commercial return on its investment at or above current premerger market prices taking into account the entry costs involved (including sunk costs that would not be recovered if the new entrant later exited) and the likely responses of incumbent firms",³⁸⁶ and that "other factors that would affect the likelihood of entry include the level of demand at existing prices, whether demand is growing, the output level the entrant is likely to obtain, the likely impact of entry on prices post-merger, and the scale at which the entrant would operate".³⁸⁷

(b) **Timeliness.** The Commission's Merger Guidelines note that "the longer it takes for potential entrants to become effective competitors, the less likely it is that market participants will be deterred from causing harm to competition" and that "[w]hile entry that is effective within two years is normally considered timely, the appropriate timeframe for effective new

³⁸⁶ The Commission's Merger Guidelines, paragraph 6.6.

³⁸⁷ The Commission's Merger Guidelines, paragraph 6.7.

entry will depend on the characteristics and dynamics of the market under consideration.”³⁸⁸

- (c) **Sufficiency.** The Commission’s Merger Guidelines set out that “[f]or entry to be sufficient, it must be likely that incumbents would lose significant sales to new entrants” and that “[e]ntry that is small-scale, localised, or targeted at niche segments is unlikely to be an effective constraint post-merger”.³⁸⁹

5.218 The Commission considers potential entry and potential expansion by reference to each of these headings and the information obtained from the Parties and third parties. This information covers a range of relevant topics, including, but not limited to: (i) BTS agreements between certain WIPs – including the Parties – and the MNOs; (ii) the impact of obtaining planning permission on the development of macro passive network infrastructure sites in the State; and (iii) the costs associated with developing and deploying macro passive network infrastructure sites in the State.

5.219 In this section, the Commission sets out its assessment in respect of potential entry and expansion as follows:

- (a) Likelihood of entry / expansion
- (i) Parties’ views;
 - (ii) Third parties’ views; and
 - (iii) The views of the Commission:
 - Competition for incremental new sites;
 - Competition for national contracts;

³⁸⁸ The Commission’s Merger Guidelines, paragraph 6.5.

³⁸⁹ The Commission’s Merger Guidelines, paragraph 6.8.

- Competition for incremental existing sites.
- (b) Timeliness of entry / expansion
 - (i) Parties' views;
 - (ii) Third parties' views; and
 - (iii) The views of the Commission:
 - Competition for incremental new sites;
 - Competition for national contracts;
 - Competition for incremental existing sites.
- (c) Sufficiency of entry / expansion
 - (i) Parties' views;
 - (ii) Third parties' views; and
 - (iii) The views of the Commission:
 - Competition for incremental new sites;
 - Competition for national contracts;
 - Competition for incremental existing sites.
- (d) The Commission's conclusion on potential entry by a *de novo* provider, or expansion of an existing smaller provider, of hosting services on a macro passive network infrastructure site.

(a) Likelihood of entry / expansion

5.220 In assessing whether it is likely that a *de novo* provider, or a smaller existing WIP³⁹⁰ seeking to expand its provision of hosting services on macro passive network infrastructure sites is likely to enter the Relevant Market, the Commission has considered a number of factors required to induce successful entry or expansion into the market. These factors include the following:

- Is there demand which could be met by a new entrant, or providers seeking to expand?
- Would a new entrant, or a smaller existing provider be capable of developing the capacity to compete effectively?
- What is the history of entry / expansion in the Relevant Market?

5.221 The Commission notes that much of the analysis and factors considered in respect of potential entry by a *de novo* provider are equally relevant when considering potential expansion by existing providers.

(a)(i) Parties' views on likelihood of entry and expansion

5.222 In the Phoenix Phase 1 RFI Response, Phoenix stated that there are several underlying factors that “will drive demand for growth in macro passive network infrastructure”, and “may entice new entry” into the Relevant Market:³⁹¹ (i) the room for further expansion of the MNOs’ networks to optimise mobile coverage for end-users, which is underpinned by strong macroeconomic factors such as demographics and GDP growth; (ii) the coverage obligations attached to the recent allocation of spectrum for the deployment of 5G wireless networks acting as a catalyst for further expansion; (iii) requirements for 5G densification; and (iv)

³⁹⁰ When considering the likelihood of expansion, the Commission contemplated whether an expansion of Vantage’s macro passive network infrastructure site portfolio would be likely to ameliorate any loss of competition resulting from the Proposed Transaction. However, as explained in paragraph 5.66 above, unlike Phoenix and Cellnex, Vantage cannot, in the Commission’s view, be seen as an entirely independent tower company because Vodafone retains a significant and controlling shareholding in Vantage. Consequently, Vantage may not represent an attractive alternative WIP for MNOs which compete with Vodafone in providing retail mobile services. Therefore, the Commission does not consider that the expansion of Vantage is likely to ameliorate any loss of competition resulting from the Proposed Transaction and is, for the purposes of this section, specifically considering the prospect of expansion by other existing competitors (i.e., excluding Vantage).

³⁹¹ Phoenix Phase 1 RFI Response, paragraph 38.18.

forecasted growth in data consumption, reflected by the abovementioned factors and, in particular, the increased availability of 5G coverage across the country.

- 5.223 In the Cellnex Phase 1 RFI Response, Cellnex stated that, although it is *“not aware of any particular new WIP likely to enter the market in the State, it does consider market demand evolution, particularly to satisfy network densification needs, will lead to opportunities for entrance of new players.”*³⁹²
- 5.224 In the Phoenix Phase 1 RFI Response, Phoenix stated that it *“estimates that there is a lead time of 4-36 months (depending on a number of factors) associated with developing and constructing new sites for the purposes of hosting macro passive network infrastructure, as there are no legal or regulatory barriers to becoming a WIP and no material advantages arising from economies of scale”*. Phoenix further expressed the view that *“WIPs seeking to expand or new entrants would benefit from a well-defined planning process and could quickly establish new rooftop sites, which typically take just four months to construct from start to finish.”*³⁹³
- 5.225 Phoenix also stated that it *“does not consider that there are any significant barriers to entry or expansion in relation to the supply of hosting services on macro passive network infrastructure services in Ireland”* and added that *“[o]ther than the costs of the acquisition of the Emerald portfolio, [Phoenix]’s costs of establishing its human, technical and operational resources in Ireland have been modest.”*³⁹⁴
- 5.226 In the Cellnex Phase 1 RFI Response, Cellnex stated that there *“are two options to enter the market, by acquiring existing sites and portfolio and / or building new sites.”* Cellnex also stated that *“[b]uilding a new site can be estimated to take between 12 and 18 months, whereas acquiring will depend on the specific factors of the transaction (seller, value, etc.). Additionally smaller WIPs and land*

³⁹² Cellnex Phase 1 RFI Response, page 44.

³⁹³ Phoenix Phase 1 RFI Response, paragraph 38.9.

³⁹⁴ Phoenix Phase 1 RFI Response, paragraph 38.1.

*aggregators can and do effectively compete against larger providers (and can scale up quickly with relative [sic]).*³⁹⁵

5.227 In the Phoenix Phase 1 RFI Response, Phoenix stated that it is “*not aware of any WIPs having publicly indicated an intention to enter the Irish sector imminently*”. However, it noted that there are a large number of international WIPs that are readily capable of doing so and also that land aggregators, such as AP Wireless, which is already present, will be more active in the State in the future. Phoenix reiterated the view that “*barriers to entry and expansion in Ireland are low and market conditions in the State are attractive for new entry*”.³⁹⁶

5.228 Furthermore, Phoenix provided four examples of recent developments in the Relevant Market, which it submitted show the absence of barriers to entry and expansion: (i) Cellnex’s acquisition of the CK Hutchison assets in 2021; (ii) Vodafone divesting its site portfolio to Vantage; (iii) KKR’s acquisition of Towercom, via John Laing Group Limited; and (iv) Hibernian Towers recently becoming the “*sole and exclusive agent responsible for marketing Virgin Media’s transmission sites in the Republic of Ireland*.”³⁹⁷

(a)(ii) Third parties’ views

5.229 During a call with the Commission, when asked whether it expected any new WIPs to enter the sector, Vantage stated that it believes “*new market entry is unlikely*” and that “*it is a very difficult industry, especially due to the sale and lease back agreements, as these provide commitments to certain tower companies for future growth and business*.”³⁹⁸ Vantage stated that it is difficult even for existing WIPs and explained that it “*would not expect to see any new entrant that would need to start from scratch but could see a company coming in to purchase existing tower companies*.”³⁹⁹ It expressed the view that the sector “*has reached market*

³⁹⁵ Cellnex Phase 1 RFI Response, page 43.

³⁹⁶ Phoenix Phase 1 RFI Response, paragraph 40.1

³⁹⁷ Phoenix Phase 1 RFI Response, paragraphs 38.13-38.14.

³⁹⁸ Vantage Call Note 15.05.2024, page 2.

³⁹⁹ Vantage Call Note 15.05.2024, page 3.

saturation and noted that there are synergies for mergers with smaller companies.”⁴⁰⁰ On this basis, Vantage suggested that entry by “a new tower company would be unlikely unless there was a new MNO which required the roll-out of passive infrastructure.”⁴⁰¹ Vantage also noted that “it is more difficult for smaller TowerCos to gain additional business due to the position of MNO commitments to other TowerCos.”⁴⁰²

5.230 During a call with the Commission, ESB Telecoms noted that it anticipates increased demand in the Relevant Market, as the roll-out of 5G requires smaller cell sizes and more transmitting sites with smaller cell radii. ESB Telecoms stated that it believes this demand can be met by building infrastructure on bus stops and streetlamps (i.e., micro sites), therefore in its view increased demand does not necessarily mean new macro passive network infrastructure sites will need to be built.⁴⁰³

5.231 When asked to consider the likelihood of entry into the market by new WIPs within the next two years, ESB Telecoms stated that there is huge interest in the tower market from asset management and investment funds that are looking to invest in towers internationally.⁴⁰⁴ However, it noted that it does not expect there to be any new entrants in the near future, as there are not many potential targets that could be acquired by these funds.⁴⁰⁵ As noted in paragraph 5.177 above, ESB Telecoms also stated that Vantage is Vodafone’s partner, therefore if Vodafone comes to ESB Telecoms to request delivery of a site, it has already gone to Vantage first. ESB Telecoms stated that it believed the same dynamic exists with Three and Cellnex.⁴⁰⁶

⁴⁰⁰ Vantage Call Note 15.05.2024, page 3.

⁴⁰¹ Vantage Call Note 15.05.2024, page 3.

⁴⁰² Vantage Call Note 15.05.2024, page 3.

⁴⁰³ ESB Telecoms Call Note 23.05.2024, page 4.

⁴⁰⁴ ESB Telecoms Call Note 23.05.2024, page 2.

⁴⁰⁵ ESB Telecoms Call Note 23.05.2024, page 3.

⁴⁰⁶ ESB Telecoms Call Note 23.05.2024, page 3.

- 5.232 During a call with the Commission, ESB Telecoms noted that building new macro passive network infrastructure sites is a very expensive investment, involving a big capital outlay (including landowner fee and infrastructure fee) which will not produce a return on investment immediately.⁴⁰⁷
- 5.233 ESB Telecoms noted also that “*there is less objection to planning permission when all is consolidated to one location*”⁴⁰⁸ (i.e., in an area where there is an existing site, it is more likely that a WIP will obtain planning permission to upgrade a site to enable co-location than it is that a WIP will obtain planning permission to build a new site).
- 5.234 In Hibernian Towers’ submission to the Commission, it noted that, following the Proposed Transaction, Phoenix would own the vast majority of the original MNO sites and be the preferred counterparty for Three and eir.⁴⁰⁹ Hibernian Towers stated that the long-term contracts between the three largest WIPs and the MNOs, which have essentially tied up future demand in the market, reduce the ability of smaller WIPs to compete.⁴¹⁰
- 5.235 During its meeting with the Commission, Shared Access noted that the rollout of new technologies means that more sites are needed and/or existing sites need to be upgraded.⁴¹¹
- 5.236 Shared Access also outlined the cost of entering the Relevant Market as a barrier to entry that a *de novo* entrant must consider. It gave an example of when it decided not to enter the Australian tower market because the cost of investment and the necessity to undercut rents to attract customers would have rendered such an expansion financially unviable. Shared Access stated that the Proposed

⁴⁰⁷ ESB Telecoms Call Note 23.05.2024, page 3.

⁴⁰⁸ ESB Telecoms Call Note 23.05.2024, page 3.

⁴⁰⁹ London Economics, ‘Note on Competition Concerns in the Irish Telecom Towers Market’, on behalf of Hibernian Towers, page 11.

⁴¹⁰ London Economics, ‘Note on Competition Concerns in the Irish Telecom Towers Market’, on behalf of Hibernian Towers, page 11.

⁴¹¹ Shared Access Meeting Note 06.09.2024, page 1.

Transaction would “*significantly increase barriers to entry*”.⁴¹² When asked to explain this view, Shared Access referred to WIPs’ need to have access to a lot of capital in order to construct sites.⁴¹³ It also stated that, from the point of view of a WIP that views itself as a neutral host, to be financially viable, there must be more than one tenant on a site.⁴¹⁴ On this basis, in order to become a financially viable WIP, a *de novo* entrant would have to attract multiple customers to a site. Attempting to do this without any existing macro passive network infrastructure sites, and/or customer agreements, is likely to be very challenging.

5.237 Shared Access stated that local planning authorities are unlikely to allow sites to be developed in close proximity to each other.⁴¹⁵ Shared Access stated that, when attempting to deliver sites, it must first check what sites already exist and where they are located. If there is an existing tower, then the planning authorities’ preference is for the WIP to redevelop or rebuild that tower and enable MNOs to co-locate.⁴¹⁶

5.238 During a call with the Commission, Towercom noted that, as building a new site is very capital and time intensive, it will only build on the basis of a commitment from at least one MNO,⁴¹⁷ and to ensure a return on its investment it would aim to co-locate more than one MNO on the site.⁴¹⁸ Furthermore, Towercom explained that market entry is difficult as the only way to feasibly gain a foothold is by acquiring a base portfolio. The need for planning permissions and the capital-intensive nature of constructing macro passive network infrastructure sites make it very difficult for a new entrant to grow organically.⁴¹⁹

⁴¹² Shared Access Meeting Note 06.09.2024, page 6

⁴¹³ Shared Access Meeting Note 06.09.2024, page 6

⁴¹⁴ Shared Access Meeting Note 06.09.2024, page 6.

⁴¹⁵ Shared Access Meeting Note 06.09.2024, page 2.

⁴¹⁶ Shared Access Meeting Note 06.09.2024, page 3.

⁴¹⁷ Towercom Call Note 28.05.2024, page 2.

⁴¹⁸ Towercom Call Note 28.05.2024, page 3.

⁴¹⁹ Towercom Call Note 28.05.2024, page 4.

- 5.239 Towercom also noted that, if there is an existing site at a location, then it is easier to upgrade a site to enable co-location of multiple tenants than to build a brand-new site in the area, as planning authorities generally prefer MNOs co-locating on one WIP's site rather than having another WIP building a new site.⁴²⁰
- 5.240 During its call with the Commission, eir stated that 5G roll-out will increase the demand for space on macro passive network infrastructure sites.⁴²¹
- 5.241 During its call with the Commission, Three stated that the demand for new towers will continue. Three explained that there is a constant densification of towers, as more towers are needed, and more equipment will be needed on these towers.⁴²²
- 5.242 During a call with the Commission, Third Party 1 stated that there has been an increase in demand, noting that as the MNOs deploy 5G, additional capacity is required in an MNO network.⁴²³
- 5.243 Third Party 1 noted that it is not viable for a WIP to build new sites on a speculative basis, without an insight into MNOs' demands.⁴²⁴ Third Party 1 noted that the development of a green field site is an expensive exercise with costs ranging from between €120,000 to €150,000 per site in addition to costs associated with landlords and legal fees.⁴²⁵

(a)(iii) The views of the Commission

Competition for incremental new sites

- 5.244 In terms of demand for new infrastructure, the Commission considers that it is possible for a new entrant, or an existing smaller WIP seeking to expand, to compete for this demand, but that it will face a number of barriers relative to an

⁴²⁰ Towercom Call Note 28.05.2024, page 3.

⁴²¹ eir Call Note 17.05.2024, page 3.

⁴²² Three Call Note 23.05.2024, page 2.

⁴²³ Third Party 1 Call Note 09.09.2024, page 2.

⁴²⁴ Third Party 1 Call Note 09.09.2024, page 3.

⁴²⁵ Third Party 1 Call Note 09.09.2024, page 2.

established incumbent, particularly an established incumbent with national coverage and an MSA with an MNO.

- 5.245 Based on the evidence gathered during the investigation, demand in the Relevant Market is growing. This is demonstrated by the number of new sites which have been developed in recent years, and is likely driven to an extent by the roll-out of new technologies such as 5G infrastructure. The Commission notes that some of the stakeholders involved in the Relevant Market are of the view that this increased demand will result in an increase in the number of micro passive network infrastructure sites, as opposed to macro passive network infrastructure sites. Notwithstanding this point, the Commission is of the view that demand in the Relevant Market is growing, and this may make entry by a *de novo* provider, or an existing smaller WIP seeking to expand its provision of hosting services on macro passive network infrastructure sites in the State more likely than if the market were stagnant or contracting.
- 5.246 A new entrant or smaller existing WIP would, however, be at a competitive disadvantage relative to incumbent providers. It would have to identify the location(s) which require a site and apply for planning permission in an area where: (i) there are not enough existing macro passive network sites to accommodate demand; and (ii) at least one MNO requires construction of a site. As discussed above, WIPs struggle to identify locations for sites without the input of MNO customers. A *de novo* entrant, in particular, may be expected to have difficulties obtaining such input, as an MNO is likely to seek to utilise its BTS agreement with an existing incumbent WIP to construct a new site.
- 5.247 The Commission has considered the costs involved for a new entrant, or smaller WIP seeking to expand. As discussed in paragraph 3.42, third parties have informed the Commission that the construction of macro passive network infrastructure sites is a highly capital-intensive process. The Commission further considers that there are some relevant scale economies. These relate to the ability to spread fixed costs (including administrative costs, overheads and network monitoring systems) across a larger portfolio of towers; and the ability to centralise

operations or benefit from lower costs for service contracts with the ability to offer higher volume, longer term contracts.

5.248 The Commission considers that these barriers to entry are likely to be somewhat lower for established competitors with portfolios of macro sites compared to new entrants. All else equal, a bigger competitor, in terms of number of existing sites, will face smaller competitive disadvantages in terms of economies of scale.

5.249 However, the difference in total site numbers between the merged entity (██████████ sites post-Proposed Transaction) and any of the other existing smaller WIPs – excluding Vantage - is substantial (Towercom is the next largest with ██████ sites).⁴²⁶ The Commission considers that incumbency advantages (such as the potential for owners of existing sites to object to planning permission for new sites) for the merged entity and Vantage will be a barrier to expansion for other competitors.

5.250 The Commission has also considered the likely responses of incumbent firms to a new entrant or a smaller WIP seeking to expand. As detailed above from paragraphs 5.195 to 5.208, the Commission has seen evidence of the Parties monitoring, and in some cases, objecting to, competitors' planning applications.

5.251 There is also evidence of planning authorities' reluctance to approve a planning application for construction of a site in an area that already has a macro passive network infrastructure site. As discussed above, this would mean that a *de novo* provider, or a smaller WIP seeking to expand its provision of macro passive network infrastructure sites, would likely have to enter the Relevant Market by constructing a site in an area where there are currently few, or no, sites. In this regard, the Commission reiterates the difficulties that they would face in obtaining the necessary input of MNOs; and that an MNO that requires a site in a certain area is more likely to request construction by its WIP partner through an existing

⁴²⁶ As set out in footnote 390 above, despite Vantage's scale, the Commission does not consider that the expansion of Vantage is likely to ameliorate any loss of competition resulting from the Proposed Transaction and is, for the purposes of this section, specifically considering the prospect of expansion by other existing competitors (i.e., excluding Vantage).

BTS agreement, rather than engage with a *de novo* entrant, or existing smaller WIPs.

Competition for national contracts

5.252 The Commission discussed the likelihood of competing for incremental new sites above. Those barriers also exist for the ability to compete for national contracts, but are of a larger order of magnitude, as the new entrant would need to have hundreds of operational sites, with a coverage spanning a large percentage of the State.

5.253 In terms of competing for national contracts, scale is an absolute necessity. To be able to provide an MNO's passive infrastructure requirements nationally, the new entrant must be able to offer national coverage. The smallest of the three providers with MSA agreements, Phoenix, has [REDACTED] sites. The Commission considers it is extremely unlikely a new entrant could reach anything like this kind of scale without acquiring a large portfolio of sites. The Commission estimates that the total number of new sites developed since January 2022 to have been [REDACTED]. On this basis, the Commission considers that it is not realistic for a new entrant to be able to reach that kind of scale entirely via development of new sites. And, as already discussed, the Commission does not view entry or expansion by large-scale acquisition to be very likely and, were it to happen, it would to some extent—quite possibly a very large extent—merely be replacing an existing competitive force rather than creating a new one.

5.254 In respect of the likelihood of a smaller WIP expanding to compete for national contracts, the Commission acknowledges that the 'scale deficit' between it and the merged entity and Vantage (the other incumbent), would be smaller than for a new entrant. Notwithstanding, a significant difference remains. For example, the number of sites operated by Vantage ([REDACTED] sites) and the next largest competitor (Towercom, [REDACTED] sites) amounts to a difference of more than 900 sites.

5.255 Furthermore, although there is a history of expansion in the Relevant Market, substantial expansion has not occurred since the MNOs divested their site

portfolios. Those divestments cannot be replicated in future. Indeed, during its call with the Commission, ESB Telecoms noted that *“most of the transactions have already been done”* and *“all the big groups of towers are gone”*.⁴²⁷ During its call with the Commission, Towercom expressed the view that it is mainly focused on upgrading existing sites as opposed to building new sites.⁴²⁸

5.256 The Commission considers that an existing smaller WIP will be at a similarly significant disadvantage to the incumbent providers as a new entrant in terms of the offering it can make to an MNO seeking to partner with a WIP that can meet its national coverage needs. Therefore, the Commission considers that it is highly unlikely to be feasible for an existing smaller WIP, in any reasonable period of time, to be able to develop a large number of sites to be able to compete on an equal footing with the incumbent providers, either through development of new sites or acquisition of portfolio(s).

5.257 In addition, in terms of existing demand which could switch from an incumbent to a new entrant or an existing smaller WIP, as noted in paragraphs 5.338 to 5.341, there is very limited switching (or, indeed, potential for switching) in this market for a number of reasons, including: the limitations in MSA agreements on the number of sites an MNO can exit; the significant financial costs associated with switching; and the disruption to MNOs’ networks which can result from the physical relocation of active infrastructure.

Competition for incremental existing sites

5.258 In the Commission’s view, the simplest indicator of a WIP’s ability to compete for incremental existing sites is the number of sites already in its portfolio. This means that a *de novo* entrant will be unable to compete for incremental existing sites by virtue of having no site portfolio to begin with. The Commission notes that, while the actual level of competitive constraint in each local area is determined by a

⁴²⁷ ESB Telecoms Call Note 23.05.2024, page 3.

⁴²⁸ Towercom Call Note 28.05.2024, page 2.

number of factors, including type of site, number of competitors in the local area, and proximity between sites, number of sites operated is a useful proxy.

5.259 The Commission has set out previously that [REDACTED] ([REDACTED]%) of Cellnex's existing sites overlap with Phoenix sites, and [REDACTED] ([REDACTED]%) of Phoenix's existing sites overlap with Cellnex sites. This is an indication of the scale of the competitive overlap between the Parties and their competitors—also relevant, of course, are cases where both Parties overlap with third party competitors.

5.260 No existing competitor is of a comparable scale to either of the Parties. The largest of them, Towercom, has [REDACTED] sites,⁴²⁹ while Phoenix currently has [REDACTED] sites and Cellnex currently has [REDACTED] sites. The Commission has set out previously why it does not consider it likely that any competitor could increase the number of sites in its portfolio by that order of magnitude. On that basis, the Commission therefore considers it unlikely that an existing competitor could replace the competitive constraint lost, in relation to existing sites, as a result of the Proposed Transaction, in a reasonable period of time.

(b) Timeliness of entry / expansion

5.261 In assessing whether it is likely that a *de novo* provider, or an existing smaller provider of hosting services on a macro passive network infrastructure site, would be able to enter, or expand its existing services, in the Relevant Market, the Commission has considered a two year timeframe as the relevant period of reference in terms of timeliness to become an effective competitor such that there would be a competitive constraint on the merged entity following the Proposed Transaction.

(b)(i) Parties' views

5.262 In the Phoenix Phase 1 RFI Response, Phoenix stated that it "*does not consider there to be any specific time required to become an effective competitor to existing WIPs in the State.*" Phoenix added that, while it "*estimates that there is a lead time*

⁴²⁹ Email from Towercom to the Commission dated 28 May 2024

of 4-36 months (depending on a number of factors) associated with developing and constructing new sites for the purposes of hosting macro passive network infrastructure, as there are no legal or regulatory barriers to becoming a WIP and no material advantages arising from economies of scale, [Phoenix] considers that a new entrant or WIP looking to scale up their presence significantly (such as Shared Access, Wireless Infrastructure Group or one of the other international WIPs currently operating outside Ireland) could quickly establish itself as an effective competitor to existing WIPs in the State.” Finally, Phoenix expressed the view that “WIPs seeking to expand or new entrants would benefit from a well-defined planning process and could quickly establish new rooftop sites, which typically take just four months to construct from start to finish.”⁴³⁰

5.263 In the Cellnex Phase 1 RFI Response, when considering the time required to achieve sufficient scale to become an effective competitor in the State, Cellnex stated that there *“are two options to enter the market, by acquiring existing sites and portfolio and / or building new sites.”* As mentioned in paragraph 5.226 above, Cellnex stated that *“[b]uilding a new site can be estimated to take between 12 and 18 months, whereas acquiring will depend on the specific factors of the transaction (seller, value, etc.). Additionally smaller WIPs and land aggregators can and do effectively compete against larger providers (and can scale up quickly with relative [sic]).”⁴³¹*

(b)(ii) Third parties’ views

5.264 The information obtained from third parties during the course of the Commission’s review suggests that the construction of BTS sites has a significant effect on competition within the sector and would affect entry and expansion:

- (a) During a meeting with the Commission, Shared Access noted that WIPs that do not have BTS agreements with MNOs are essentially unable to compete with the WIPs that do until such agreements expire.⁴³² Shared

⁴³⁰ Phoenix Phase 1 RFI Response, paragraph 38.9.

⁴³¹ Cellnex Phase 1 RFI Response, page 43.

⁴³² Shared Access Meeting Note 06.09.2024, page 2.

Access also noted that delivering sites is largely a planning issue. Before it can apply for planning permission, it must first check what sites already exist and where they are located. If it has an existing site in an area, the planning authorities' preference is for that site to be upgraded to enable co-location by multiple MNOs.⁴³³ In its experience, obtaining planning permission can be a long process, especially due to a lack of adequate resourcing in planning authorities. Shared Access added that it must assume that almost all applications will be appealed and noted that it only takes one objection to halt progress on the development of a site. Applications typically win on appeal, but it can add another year onto the process. When asked to estimate the timeline for the development of a site, Shared Access gave an estimated average in the range of 12 to 18 months.⁴³⁴ It stated that, at a site level, the main barriers are obtaining planning permission and obtaining a connection to the power supply. Obtaining planning permission is the most critical barrier to the speed of deployment;⁴³⁵

- (b) In its submission to the Commission, Hibernian Towers stated that eir's BTS agreement with Phoenix and Three's BTS agreement with Cellnex meant the MNOs *"would stop engaging with all other tower companies regarding the requirement for new sites."*⁴³⁶ Hibernian Towers noted that this *"is having a massive impact on the market and this impact can only further accentuate in the near future. While long-term contracts are indeed commonly used in the supply of hospitality services on passive network infrastructure macro sites, it is important to distinguish between a long-term licence, where an operator licences the use of tower space, from the overarching 8–10-year commitment contracts that commit an operator to go on X number of new build sites per year provided by that*

⁴³³ Shared Access Meeting Note 06.09.2024, page 2.

⁴³⁴ Shared Access Meeting Note 06.09.2024, page 3.

⁴³⁵ Shared Access Meeting Note 06.09.2024, page 6.

⁴³⁶ London Economics, *Note on Competition Concerns in the Irish Telecom Towers Market*, on behalf of Hibernian Towers, page 11.

*tower co. This sort of commitment can lead to effective downstream “customer foreclosure” with the potential for significant anti-competitive effects at the upstream level of tower hospitality services”;*⁴³⁷

- (c) In its submission to the Commission, Third Party 1 stated that Phoenix’s and Cellnex’s BTS agreements would result in the Parties having a *“combined total of c. 1000-1,200 additional sites to be developed over the next 7-10 years, with additional commitments expected due to the long term structure of these BTS agreements (for c. 20 years)”*.⁴³⁸ Third Party 1 submitted that, as a result, following implementation of the Proposed Transaction, *“c. 60-80% of total anticipated passive infrastructure growth in the State over this period”* would be owned and operated by Phoenix.⁴³⁹ Third Party 1 stated that *“MNO demand is the primary driver of growth in the market for passive infrastructure in the State. These BTS commitments, which apply on a lease-back basis, have effectively locked in the majority of this growth to the Combined Entity for the foreseeable future”*;⁴⁴⁰
- (d) During its call with the Commission, Towercom stated that competing to build new sites required by MNOs is very difficult due to the BTS commitments between the MNOs and rival WIPs;⁴⁴¹
- (e) ESB Telecoms noted that, although it aims to build ■■■ to ■■■ sites annually, it may not be possible to build this many due to difficulties in obtaining planning permissions or accessing suitable land on which it could construct a site;⁴⁴²
- (f) During its call with the Commission, eir noted that, for WIPs, building alternative sites is challenging and it can take many years to achieve a

⁴³⁷ London Economics, *Note on Competition Concerns in the Irish Telecom Towers Market*, on behalf of Hibernian Towers, page 11.

⁴³⁸ Third Party 1 submission to the Commission dated 8 April 2024, page 3.

⁴³⁹ Third Party 1 submission dated 8 April 2024, page 3.

⁴⁴⁰ Third Party 1 submission dated 8 April 2024, page 4.

⁴⁴¹ Towercom Call Note 28.05.2024, page 4.

⁴⁴² ESB Telecoms Call Note 23.05.2024, page 3.

successful outcome. eir stated that these challenges include obtaining planning permission.⁴⁴³ eir stated that the planning permission system is hugely problematic and there are long delays, especially with a growing trend of judicial reviews of new telecom infrastructure. eir stated that once an appropriate agreement is concluded with the site land-owner, the WIP progresses with site design and the planning application to the local authority as required. In the event the planning application is refused, the WIP must then restart the entire process. eir stated that, if the planning application is approved, the development could be delayed further if a judicial review is pursued by an objector, community or any third party;⁴⁴⁴ and

- (g) During its call with the Commission, Vodafone noted that the longest part of the process of constructing a new site is obtaining planning permission and noted that it can take two years for a new site to become operational.⁴⁴⁵

(b)(iii) The views of the Commission

Competition for incremental new sites

5.265 As outlined above, the Commission's investigation has shown the issues that a new entrant would face in developing new sites. It would need to identify MNOs with requirements for new sites, identify and obtain planning permission for suitable locations, and construct those sites. In total, for a given new site, this can be expected to take a number of years to complete. However, the Commission acknowledges that completing this process is not necessarily required to successfully compete for the MNOs' business - reaching an agreement with an MNO to undertake this process is the point at which competition occurs.

⁴⁴³ eir Call Note 17.05.2024, page 2.

⁴⁴⁴ eir Call Note 17.05.2024, page 4.

⁴⁴⁵ Vodafone Call Note 23.04.2024, page 2.

- 5.266 However, again as set out above, a new entrant faces considerable obstacles in competing for and winning the MNOs' business. In particular, a new entrant will not necessarily have a proven track record in developing macro passive network infrastructure sites. It will definitely have no proven track record in the State. It is reasonable to expect a new entrant to take considerable time to develop its capacity to deliver new sites at scale, and to establish a track record such that it might be in a position to win large numbers of contracts from MNOs.
- 5.267 Furthermore, and most importantly, even if a new entrant has the capacity and proven track record outside the State and arguably is able to compete effectively from the outset, the Commission considers that there are incumbency advantages for the providers which have long-term agreements that include BTS agreements. These agreements confer a significant competitive advantage in terms of developing new sites, at least for the timeframe of the current BTS agreements. They are a major barrier for existing competitors without such agreements and even more so for new entrants. In paragraphs 5.153 to 5.163 above, the Commission set out that a substantial majority of new sites are built by WIPs for MNOs with whom they have a BTS agreement.

Competition for national contracts

- 5.268 As noted previously, to provide an MNO's passive infrastructure requirements nationally, the new entrant must be able to offer national coverage. Without acquiring a portfolio of sites with national coverage, the Commission considers that it is not feasible that a new entrant could achieve this kind of scale in any reasonable period of time, if at all. Based on the Commission's investigation, a new entrant could not conceivably identify and develop hundreds of required sites, including hosting agreements with MNOs, in any reasonable period of time. Even if the new entrant's portfolio were to be developed via acquisition of existing sites from existing WIPs, the Commission considers that this would require multiple

acquisitions in order to gain the kind of scale necessary.⁴⁴⁶ The Commission does not consider that this could be achieved within a reasonable period of time.

Competition for incremental existing sites

5.269 As explained above, this parameter of competition is based on meeting demand from MNOs to replace existing sites. The Commission does not consider this further here, as to be able to compete for incremental existing sites, a new entrant must first have existing sites. The Commission's views on the timeliness of entry and expansion with respect to competing for existing sites were discussed above.

(c) Sufficiency of entry / expansion

5.270 In assessing whether entry by a *de novo* provider, or expansion by an existing smaller provider, of hosting services on a macro passive network infrastructure site would be sufficient, the Commission has broadly considered the following questions:

- is it likely that a new entrant could operate at a scale sufficient to compete effectively?; and
- is it likely that a new entrant would be able to replace the competition lost as a result of the merger?

5.271 In assessing whether a new entrant could operate at a sufficient scale, the Commission has considered whether there are competitive advantages for larger competitors, or more generally for incumbent competitors, potentially including scale economies. It has also considered, if there are competitive advantages related to scale or incumbency, whether it is likely that a new entrant could be expected to overcome those advantages to compete effectively.

(c)(i) Parties' views

⁴⁴⁶ As stated before, an acquisition of one of the merged entity's sites or Vantage's sites does not increase the number of national competitors back to the pre-Proposed Transaction level.

- 5.272 In the Phoenix Phase 1 RFI Response, Phoenix submitted that it does not consider economies of scale or scope to be important factors in the Relevant Market. This view was reiterated in the Parties' Written Response. Phoenix stated that, as demand for new sites is based on filling gaps in MNOs' networks, and the portfolios of each of the three largest WIPs reflect the historical deployment of sites by MNOs, it is unlikely that even the largest WIPs will have existing sites in the areas where future sites will be required by the MNOs. In addition, Phoenix submitted that the size of a WIP's portfolio is *"unlikely to be [sic] relevant consideration for a customer seeking hosting services as it would not be feasible for a customer to switch away entirely from incumbent suppliers due to the cost and disruption involved in migrating active equipment from deployed sites to alternative locations"*.⁴⁴⁷ This, according to Phoenix, suggests that a WIP is not necessarily more likely to attract new customers if it has a large portfolio of sites. Finally, Phoenix stated that adding more sites to a portfolio will *"allow spreading of fixed costs, but will not affect the incremental costs of a given new site. This means there is no incumbency advantage for existing WIPs in establishing new sites."*⁴⁴⁸
- 5.273 In the Phoenix Phase 1 RFI Response, Phoenix stated that, given the terms of the MSAs are highly preferential in the MNOs' favour, *"certain MNOs may be more reluctant to redeploy active equipment already deployed on existing sites."* Notwithstanding this, Phoenix stated that it does not *"consider there to be any incumbency advantage in respect of competition for the provision of new sites."*⁴⁴⁹
- 5.274 In the Cellnex Phase 1 RFI Response, Cellnex stated that *"[i]n a more general sense, having multiple customers occupying a macro passive network infrastructure site provides a number of comprehensive benefits including lower industry costs, increased network coverage, and reduced economic and environmental costs from avoided network duplication."*⁴⁵⁰

⁴⁴⁷ Phoenix Phase 1 RFI Response, paragraph 38.7.

⁴⁴⁸ Phoenix Phase 1 RFI Response, paragraph 38.7.

⁴⁴⁹ Phoenix Phase 1 RFI Response, paragraph 38.11.

⁴⁵⁰ Cellnex Phase 1 RFI Response, page 24.

5.275 Cellnex also expressed the view that scale *“is not particularly important to the ability of WIPs to compete effective [sic] for the supply of site access on either existing or new sites.”* It noted that *“the cost of upgrading an existing developed site may not be substantially different from the cost of building a new structure altogether.”* Furthermore, there *“are also limited economies of scale in building new sites”* as *“the cost of building a site is largely independent of the number of sites built.”* To this end, Cellnex stated that there *“is no significant incumbency advantage or economy of scale for an established player with a large existing site portfolio in a given geographical area in building a new site compared to a smaller player. There are the usual normal course of business efficiencies which can be achieved in any market but these are not prohibitive to new entrants entering the market.”*⁴⁵¹

5.276 When considering the importance of incumbency advantages in the Relevant Market, Cellnex stated that *“[a]lthough there are benefits in having positive reputation, experience, and loyalty (all of which can be achieved by new entrants with international experience or smaller providers), the key factor in performance of a WIP is the location of the infrastructure that aligns with customer’s needs and market demands.”*⁴⁵²

(c)(ii) Third parties’ views

5.277 During a call with the Commission, Hibernian Towers stated that, if a WIP can commit to delivering 100 sites for a customer, then it has a strong position in the market. However, it also noted that it is more feasible for a customer to move off ten sites than it is to move off 300 sites.⁴⁵³ Hibernian Towers also noted the impact of BTS commitments between MNOs and Phoenix, Cellnex and Vantage, which make it more difficult for other WIPs to engage with MNOs.⁴⁵⁴

⁴⁵¹ Cellnex Phase 1 RFI Response, page 43.

⁴⁵² Cellnex Phase 1 RFI Response, page 43.

⁴⁵³ Hibernian Towers Call Note 11.06.2024, page 3.

⁴⁵⁴ Hibernian Towers Call Note 11.06.2024, page 4.

- 5.278 During a meeting with the Commission, Shared Access stated that, in its experience, the WIP with the most available sites is the first one that MNOs tend to go to before the MNOs approach smaller WIPs.⁴⁵⁵ It noted that WIPs that do not have BTS agreements with MNOs are essentially unable to compete with those that have, until such agreements expire. Shared Access stated that, once Phoenix and eir entered into their MSA and long-term BTS agreement, eir's new tower build business with Shared Access stopped completely.⁴⁵⁶ Further, Shared Access stated that it considers new entry unlikely, especially if the Proposed Transaction were to be implemented. MNOs are less and less likely to go to smaller operators, and thus this dynamic does not incentivise new entrants. Given the MSAs and BTS agreements currently in place, Shared Access stated that it was difficult to see how, or from where, new entrants would attract business.⁴⁵⁷
- 5.279 During a call with the Commission, Towercom stated that it finds it very difficult to compete to build any new sites required by the MNOs due to commitments between the MNOs and certain WIPs.⁴⁵⁸
- 5.280 During a call with the Commission, Three stated that, ultimately, once an MNO is on a site, it will usually not leave this site for an extended period of time.⁴⁵⁹
- 5.281 Third Party 1 also noted that it considers BTS agreements between certain WIPs and MNOs to be a barrier to entry and expansion, as these agreements make it difficult for WIPs that don't have BTS agreements to predict the future network requirements of the MNOs.⁴⁶⁰ Third Party 1 stated that, previously, MNOs had been more open in communicating their future needs and that WIPs would then compete with one another to find and secure a site that satisfied this need. However, the development of BTS agreements between MNOs and certain WIPs

⁴⁵⁵ Shared Access Meeting Note 06.09.2024, page 1.

⁴⁵⁶ Shared Access Meeting Note 06.09.2024, page 2.

⁴⁵⁷ Shared Access Meeting Note 06.09.2024, page 6.

⁴⁵⁸ Towercom Call Note 28.05.2024, page 4.

⁴⁵⁹ Three Call Note 23.05.2024, page 3.

⁴⁶⁰ Third Party 1 Call Note 09.09.2024, page 3.

has limited this opportunity for competition, as MNOs will, typically, only provide information on the areas in which they require a new site to their partner WIP.⁴⁶¹

5.282 Third Party 1 expressed a concern that, following implementation of the Proposed Transaction, one firm would hold approximately two thirds of all future BTS commitments. It noted that, in rural areas, if the merged entity was operating with BTS commitments with two MNOs, instead of having to build two sites it could consolidate these commitments into one site. In terms of opportunities for future builds outside of the BTS commitments, Third Party 1 stated that while there were certain situations in which an MNO would be required to approach a WIP with which it does not have a BTS agreement, the MNO would generally approach its BTS partner in the first instance. It understands that the MNO budgets for a number of sites and base stations which can be developed in a certain year; so, until the MNO reaches its threshold of BTS commitments, it tends to not look elsewhere.⁴⁶²

5.283 Furthermore, in its submission to the Commission, Hibernian Towers noted that *“any countervailing effects attributable to potential market entry”* are *“practically non-existent”*.⁴⁶³

(c)(iii) The views of the Commission

Competition for incremental new sites

5.284 In considering the scale at which a new entrant would have to be able to compete, assuming that entry could occur in a timely fashion,⁴⁶⁴ the Commission has considered the experience of the existing competitors in the market. As previously set out in Table 10, the Commission has assessed each new site built for each MNO, broken down according to which WIP provided it. For eir, Three and Vodafone, WIPs other than Phoenix, Cellnex and Vantage (i.e., those that do not

⁴⁶¹ Third Party 1 Call Note 09.09.2024, page 3.

⁴⁶² Third Party 1 Call Note 09.09.2024, page 3.

⁴⁶³ London Economics, *‘Note on Competition Concerns in the Irish Telecom Towers Market’*, on behalf of Hibernian Towers, page 13.

⁴⁶⁴ For the avoidance of doubt, as set out in the analysis in the section above, the Commission does not consider timely entry to the Relevant Market to be likely.

have long-term or BTS agreements) accounted for around █%, █% and █% of new sites, respectively.⁴⁶⁵

5.285 For the reasons explained in paragraph 5.267 above, the Commission considers that a new entrant would not have a long-term (including BTS) agreement with an MNO. Therefore, the Commission focused on the WIPs currently active in the State other than Phoenix, Cellnex and Vantage as more accurate indicators of relative competition for new sites. Table 10 sets out the net change in site numbers for each of those WIPs, in each of 2022 and 2023.

Table 10: Net change in site numbers, by WIP, excluding Phoenix, Cellnex and Vantage, 2022 and 2023.

	2022	2023
Towercom ⁴⁶⁶	█	█
Hibernian Towers ⁴⁶⁷	█	█
Shared Access ⁴⁶⁸	█	█
ESB ⁴⁶⁹	█	█
OPW ⁴⁷⁰	█	█

Source: Commission analysis of information provided by each WIP cited in the table.

5.286 Each of the third parties in Table 10Table 10 have grown their site portfolios, on a net basis, by small numbers, with Shared Access having the largest growth with █ sites over the two years.⁴⁷¹

⁴⁶⁵Email from eir to the Commission dated 30 October 2024; email from Three to the Commission dated 30 October 2024; and email from Vodafone to the Commission dated 29 October 2024.

⁴⁶⁶Towercom response to the Commission's follow up questions dated 19 June 2024.

⁴⁶⁷ Email from Hibernian to the Commission dated 2 July 2024.

⁴⁶⁸ Shared Access response to the Commission's follow up questions dated 20 September 2024.

⁴⁶⁹ Email from ESB Telecoms to the Commission dated 23 May 2024.

⁴⁷⁰ Email from the OPW to the Commission dated 25 July 2024.

⁴⁷¹ Shared Access response to the Commission's follow up questions dated 20 September 2024.

5.287 Based on information provided in the Assessment, the Parties' Written Response stated that *"WIPs that do not have BTS arrangements with MNOs accounted for a total of [REDACTED] - [REDACTED] sites, while [the Parties] combined accounted for just [REDACTED] sites for MNOs outside of the MNOs with which they have BTS arrangements."*⁴⁷² The Parties argued that this shows that MNOs do not engage with WIPs on an exclusive basis in relation to incremental new sites.

5.288 While the Commission notes the point that MNOs can, and sometimes do, engage with other WIPs in respect of their new site needs, the Commission reiterates that [REDACTED] % of eir's new sites and [REDACTED] % of Three's new sites were provided by the Parties in 2023.⁴⁷³ The Commission also notes that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].⁴⁷⁴ This means that the sites built for the MNOs by rival WIPs were likely to have been first offered to the Parties.

5.289 In addition to the third-party views on BTS set out above, which were provided during the Commission's investigation, third parties provided further views on BTS when they were consulted in respect of the Proposals, i.e. during the Commission's market testing calls:

- (a) Hibernian Towers stated that *"BTS is very important to towercos, as the nationwide 5G rollout period is being completed in the near future."*⁴⁷⁵ Hibernian Towers considered that, if the BTS element of the Proposals were not included, *"the merged entity would have a dominant relationship with Three and Eir, in addition to the relationship that exists between Vantage and Vodafone."*⁴⁷⁶ As such, Hibernian Towers stated that *"it is very*

⁴⁷² Parties' Written Response, page 32.

⁴⁷³ See paragraph 5.77 above.

⁴⁷⁴ See paragraph 5.76 above.

⁴⁷⁵ Commission's written record of a remote meeting with Hibernian Towers on 13 January 2025, page 4.

⁴⁷⁶ Commission's written record of a remote meeting with Hibernian Towers on 13 January 2025, page 4.

*important that the divestiture includes a BTS allocation to avoid future demand being tied up by the merged entity and Vantage”;*⁴⁷⁷

- (b) Shared Access stated that *“future demand in the market for wireless infrastructure is largely locked in through BTS commitments”* and questioned the extent to which the purchaser of the proposed divestment package *“would be capable of incrementally winning new sites.”*⁴⁷⁸ Shared Access expressed its view that *“a fair portion of BTS commitments should be included in the proposed divestment package, as otherwise the purchaser may be locked out of the market for construction of new sites”;*⁴⁷⁹
- (c) Asterion Industrial Partners SGEIC SA (“Asterion”) identified BTS commitments as one of its main areas of focus in assessing the overall proportionality of the proposed divestment package because *“the possibility of capturing future demand is important in terms of quality, proportionality and in terms of scale.”*⁴⁸⁰ Asterion also expressed the view that *“there should be some form of cap or limit on the merged entity that would prevent the remedy taker from being squeezed from the market”* and noted that *“the inclusion of BTS would be a very important aspect of the divestment package.”*⁴⁸¹

5.290 Based on its investigation and, in particular, taking into account that MNO’s BTS commitments tie up a significant proportion of future demand, the Commission considers that it is very unlikely that a new entrant, or a smaller existing WIP, could enter or expand in the Relevant Market in the relevant timeframe to the necessary scale to be able to act as a competitive constraint on the merged entity.

Competition for national contracts

⁴⁷⁷ Commission’s written record of a remote meeting with Hibernian Towers on 13 January 2025, page 4.

⁴⁷⁸ Commission’s written record of a remote meeting with Shared Access on 14 January 2025, page 2.

⁴⁷⁹ Commission’s written record of a remote meeting with Shared Access on 14 January 2025, page 2.

⁴⁸⁰ Commission’s written record of a remote meeting with Asterion on 9 January 2025, page 3.

⁴⁸¹ Commission’s written record of a remote meeting with Asterion on 9 January 2025, page 3.

5.291 The Commission, in its consideration of barriers to entry for competition for national contracts, under likelihood and timeliness, considered the prospect of a new entrant reaching scale of a similar order of magnitude to the smallest existing national competitor, which is Phoenix. Were a new entrant to achieve this scale, the Commission is of the view that this would be sufficient to replace lost competition for national contracts. However, based on the Commission's investigation and for the reasons set out above, the Commission does not view this to be a likely scenario.

Competition for incremental existing sites

5.292 In paragraphs 5.157 and 5.158 above, the Commission set out, according to its analysis of site geolocation data provided by the Parties and third parties, the numbers of sites that would have fewer local competitor sites post-Proposed Transaction. When including those locations which would go from 2 to 1 and those locations which would go from 3 to 2 in terms of number of local competitors pre- and post-implementation of the Proposed Transaction, there would be a reduction in number of competitors on a total of [REDACTED] sites. (The Commission acknowledges that some of these sites may be within the same local area, so the total number of locations is likely to be less). Based on its investigation and for the reasons set out in its analysis above, the Commission is of the view that any such entry is not likely to be sufficient to replace the competition lost as a result of the Proposed Transaction.

(d) The Commission's conclusion on potential entry by a *de novo* provider, or expansion of an existing smaller provider, of hosting services on a macro passive network infrastructure site

5.293 In considering barriers to entry and barriers to expansion in the Relevant Market, the Commission has assessed the extent to which the exercise of any market power post-merger may be constrained by the threat or occurrence of new entry by new competitors and/or by the ability of rivals in the Relevant Market to profitably expand their service offering.

5.294 Based on its investigation and weighing up all the relevant factors and evidence provided by the Parties and third parties, as outlined above, the Commission now

sets out its conclusion in respect of competition for each of: incremental new sites; national contracts; and incremental existing sites. In summary, the Commission has reached the conclusion that the evidence does not support the view that entry or expansion by rivals would be timely, likely and sufficient to constrain any exercise of market power by the merged entity following the Proposed Transaction.

Competition for incremental new sites

5.295 On the basis of its analysis as set out above, the Commission has concluded that entry by a *de novo* provider, or expansion of a smaller existing provider, of hosting services on a macro passive network infrastructure site into the Relevant Market, is not likely to replace the competition lost as a result of the Proposed Transaction, in terms of competition for incremental new sites.

5.296 The Commission has reached this view based on:

- (i) new entrants are likely to face high capital costs with less ability to benefit from scale economies and the ability to spread costs over existing sites than incumbents;
- (ii) long-term agreements (including BTS commitments) between certain WIPs and MNOs to the development of new sites ensure that Phoenix (for eir), Cellnex (for Three and eir) and Vantage (for Vodafone) have a significant competitive advantage over all other potential competitors for the development of new sites;
- (iii) in the absence of MSAs, including BTS commitments, and the consequent engagement with MNOs, new entrants and smaller WIPs seeking to expand face significant difficulties in identifying a partner MNO and suitable locations for developing new sites;
- (iv) the planning application process in developing new sites takes a significant amount of time, in particular as incumbent WIPs

appear to monitor and object to planning applications by rivals;
and

- (v) the evidence suggests that planning authorities favour upgrading existing sites over developing new ones, which benefits incumbents over new entrants and existing smaller WIPs seeking to expand.

5.297 Therefore, in the Commission's view, it is unlikely that a new entrant, or an existing smaller WIP seeking to expand, could develop scale and a competitive presence in respect of competing for incremental new sites in a reasonable period of time.

Competition for national contracts

5.298 On the basis of its analysis as set out above, the Commission has concluded that entry by a *de novo* provider, or expansion of a smaller existing provider, of hosting services on a macro passive network infrastructure site into the Relevant Market, is not likely to replace the competition lost as a result of the Proposed Transaction, in terms of competition for national contracts.

5.299 The Commission has reached this view because:

- (i) to be able to compete for national contracts with MNOs, WIPs need significant scale and coverage across the State;
- (ii) building such scale and coverage across the State is not, in the Commission's view, realistic, for a new entrant, or an existing smaller provider, either via the development of new sites or via acquisition; and
- (iii) this is compounded by the fact that there is very limited switching (or, indeed, potential for switching) in this market for a number of reasons, including: the limitations in MSA agreements on the number of sites an MNO can exit; the significant financial costs associated with switching; and the

disruption to MNOs' networks which can result from the physical relocation of active infrastructure.

- 5.300 Therefore, in the Commission's view, it is unlikely that a new entrant, or an existing smaller WIP seeking to expand, could develop scale and a competitive presence in respect of competing for national contracts in a reasonable period of time.

Competition for incremental existing contracts

- 5.301 On the basis of its analysis as set out above, the Commission has concluded that entry by a *de novo* provider, or expansion of a smaller existing provider, of hosting services on a macro passive network infrastructure site into the Relevant Market is not likely to replace the competition lost as a result of the Proposed Transaction, in terms of competition for incremental existing sites.

- 5.302 The Commission has based this view on the fact that, for a new entrant to compete for demand via its existing sites, it will first have to compete effectively for new sites. Based on its investigation and for the reasons set out in detail above, the Commission considers that it is unlikely that a new entrant, or an existing smaller WIP seeking to expand, could develop scale and a competitive presence in respect of competing for incremental new sites in a reasonable period of time. It follows, therefore, that a new entrant, or an existing smaller WIP seeking to expand, could not develop scale and a competitive presence in respect of competing for incremental existing sites in a reasonable period of time.

The conclusion of the Commission on barriers to entry and expansion in the Relevant Market.

- 5.303 In considering barriers to entry and barriers to expansion in the Relevant Market, the Commission has assessed the extent to which the exercise of any market power post-merger may be constrained by the threat or occurrence of new entry by new competitors and/or by the ability of rivals in the Relevant Market to profitably expand their service offering.
- 5.304 Weighing up all the factors and the evidence provided by the Parties and third parties, the Commission's conclusion is that the evidence does not support the

view that entry or expansion by rivals would be timely, likely and sufficient to constrain any exercise of market power following implementation of the Proposed Transaction.

(C)(vi) Regulation as a potential out of market constraint

5.305 Having considered the extent to which barriers to entry and expansion are likely to replace the competitive constraint provided by Cellnex, the next factor the Commission considers relevant to determining whether the Proposed Transaction would likely give rise to an SLC is the importance of out of market constraints in the Relevant Market.

5.306 As stated in paragraph 3.8 above, market definition should not restrict the range of competitive effects to be assessed by the Commission in its merger review. The Commission does not identify the cohort of products and firms that may fall within the identified product and geographic markets and ignore all other factors. The Commission must also consider factors outside the relevant market which may impose competitive constraints on firms in the relevant market.

Parties' views

5.307 In the Merger Notification Form, the Parties proposed that telecommunications regulation would act as an out of market constraint in the Relevant Market.

5.308 The Parties noted that:

“While the ownership of passive wireless infrastructure for use by mobile operators is not specifically subject to ex ante SMP regulation by ComReg in Ireland, a number of provisions in the Irish telecoms regulatory framework encourage or seek to facilitate infrastructure sharing such that access to infrastructure sharing must generally be done in an open and transparent manner.”⁴⁸²

⁴⁸² Merger Notification Form, page 17, paragraph 51.

5.309 The Parties listed a number of provisions in the Irish telecommunications regulatory framework, including from the Communications Regulation Act 2002 and the European Union (Electronic Communications Code) Regulations 2022 that they believe apply to WIPs.⁴⁸³

5.310 In particular, the Parties proposed that, under the forthcoming GIA:⁴⁸⁴

“all of the [P]arties’ customers (including MNOs and other wireless network operators), will be able to rely on this regulatory backstop to ensure continuity of access to the combined [Phoenix/Cellnex] infrastructure on a prospective basis on reasonable terms. Consequently, as a result of the changes being introduced via the GIA, the combined [Phoenix/Cellnex] would not have the ability or incentive to raise prices and/or degrade quality of access for customers following implementation of the Proposed Transaction.”⁴⁸⁵

5.311 The Parties reiterated in the Phoenix October Written Submission that:

“The GIA is a directly effective EU regulation that imposes an obligation on providers of passive infrastructure, such as [the Parties], to meet all reasonable requests by operators for access to its physical infrastructure under fair and reasonable terms and conditions, including price, with a view to deploying elements of very high capacity networks or associated facilities.”⁴⁸⁶

5.312 The Parties further proposed that:

“Moreover, the GIA act has gone further in providing clarifications regarding the term “fair and reasonable” pricing for access requests. The GIA requires that pricing must “reflect market conditions” and provides

⁴⁸³ Merger Notification Form, page 17, paragraph 51.

⁴⁸⁴ The GIA is the EU Gigabit Infrastructure Act, as defined in paragraph 2.67 above.

⁴⁸⁵ Merger Notification Form, page 34, paragraph 110.

⁴⁸⁶ Phoenix October Written Submission, page 32, paragraph 111(a).

specific clarifications and criteria to be considered that require balancing a “fair return on investment” while “avoiding excessive prices”.”⁴⁸⁷

5.313 In relation to the GIA, the Parties’ Written Response (to the Assessment) stated that the Commission’s Theory of Harm was fundamentally undermined by the purpose of the GIA, which is *“to remove the possibility for network operators and providers of ancillary services to unfairly increase prices or reduce service quality”*.⁴⁸⁸ Additionally, the Parties submitted that *“the concerns regarding implementation imply that the [P]arties will not comply with their regulatory obligations. There is plainly no evidential basis for this, nor is there any reasonable basis (on the balance of probabilities or otherwise) to assume that the [P]arties would look to evade their regulatory obligations”*.⁴⁸⁹

The view of the Commission

5.314 The Commission has considered the extent to which telecommunications regulation would act as an out of market constraint in the Relevant Market.

5.315 The Commission notes that there are currently very few aspects of telecommunications regulations which apply to WIPs. WIPs are not network operators, and they are not authorised undertakings, and therefore the provisions of the Communications Regulation Act 2002 and the European Union (Electronic Communications Code) Regulations 2022 generally do not apply to them. While the national transposition of the BCRD⁴⁹⁰ has extended beyond the minimum requirements of EU legislation in some Member States,⁴⁹¹ the provisions of the BCRD do not apply to WIPs in Ireland.

⁴⁸⁷ Phoenix October Written Submission, page 33, paragraph 111(c).

⁴⁸⁸ Parties’ Written Response, page 18.

⁴⁸⁹ Parties’ Written Response, page 18.

⁴⁹⁰ The BCRD is the Broadband Cost Reduction Directive, as defined in paragraph 2.66 above.

⁴⁹¹ For example, the BCRD provisions apply to WIPs in Italy and Denmark.

5.316 The GIA is the latest in a series of EU measures aiming to accelerate progress towards its ‘Gigabit Society’ connectivity objectives,⁴⁹² which aim to ensure all European households have access to gigabit broadband by 2030, and that all populated areas are covered by a 5G network. The GIA is designed to make the deployment of new physical infrastructure easier, and to promote the joint use of existing assets. The aim is to extend the reach and lower the cost of Very High Capacity Networks (VHCNs) which are required to deliver gigabit broadband. As an EU Regulation, the GIA is set to come into force 18 months after its publication in the Official Journal in May 2024. The GIA follows a ‘minimum harmonisation’ approach, whereby Member States have the flexibility to introduce additional provisions that are stricter or more detailed than the minimum requirements set out in the GIA itself.

5.317 The GIA sets out that:

“In particular, taking into account the fast development of undertakings that primarily provide associated facilities such as ‘tower companies’, and their increasingly significant role as providers of access to physical infrastructure suitable to install elements of wireless electronic communications networks, such as 5G, the definition of ‘network operator’ should be extended beyond undertakings providing, or authorised to provide, electronic communications networks and operators of other types of networks, such as transport, gas or electricity, to include undertakings providing associated facilities, which should thus become subject to all the obligations and benefits set out in this Regulation, except the provisions regarding in-building physical infrastructure and access.”⁴⁹³ (emphasis added)

⁴⁹² European Commission, ‘*Connectivity for a European Gigabit Society – Brochure*’. Available at: <https://digital-strategy.ec.europa.eu/en/library/connectivity-european-gigabit-society-brochure>.

⁴⁹³ Regulation (EU) 2024/1309 of the European Parliament and of the Council of 29 April 2024 on measures to reduce the cost of deploying gigabit electronic communications networks, amending Regulation (EU) 2015/2120 and repealing Directive 2014/61/EU (Gigabit Infrastructure Act) (Text with EEA relevance), paragraph 15, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401309.

5.318 The scope of the GIA is therefore broader than that of the BCRD:

“The proposed GIA regulation updated the scope of the current directive, [BCRD] moving from the deployment of high-speed broadband network (30Mbps) to the deployment of VHCNs (e.g. FTTH and 5G – article 1). The definitions of network operator and physical infrastructure in article 2 were extended to include providers of associated facilities (e.g. tower companies – ‘TowerCos’) and ‘any other assets, including street furniture’, such as street lights, street signs, traffic lights, billboards, bus and tram stops, and metro stations (e.g. supporting small cells deployment for 5G).”⁴⁹⁴

5.319 The GIA will therefore impose conditions on WIPs that do not exist at present. WIPs will be obliged to provide access to network operators seeking to locate network equipment on their passive infrastructure, and there will be a series of supporting obligations dealing with how that is to be facilitated.

5.320 The GIA states that access providers must meet access requests under “*fair and reasonable terms and conditions, including price*”, while ensuring “*non-discriminatory terms and conditions*.”⁴⁹⁵ The Commission notes that Member States have been encouraged to provide further guidance on the terms and conditions of access, including the price and the approach to setting a price.

5.321 The Commission notes that, as the Parties have pointed out, WIPs have an incentive to grant access to MNOs as their business model incentivises having maximum occupancy on a tower. While the GIA will ensure that a WIP’s customer has the right to request access to a WIP’s passive infrastructure, this measure does align with the WIP’s interests – access requests are not likely to be a problem.

5.322 The Parties noted in the Parties’ Written Response that a Gigabit Infrastructure Act Steering Group has been established under the auspices of the Department of the

⁴⁹⁴ [Gigabit Infrastructure Act](#), European Parliament briefing, June 2024.

⁴⁹⁵ Article 3 of the GIA.

Environment, Climate and Communications with a view to engaging key stakeholders prior to implementation of the GIA. However, at the time of this Determination, no further guidance on the implementation of the GIA has been specified at a national level.

- 5.323 Experience in applying FRAND principles in a similar context (for example, under ex ante regulation in the fixed telecoms markets) suggests that implementation of FRAND principles is rarely straightforward. Disputes on the detail of access requests such as access pricing or quality of service are not uncommon, and their resolution can be protracted. Further, the Commission notes that some of the current practices in the market may not be immediately amenable to FRAND principles. For example, the designation of an anchor tenant implies a form of discrimination. While such issues are not likely to be insurmountable, they do add a layer of complexity to implementation of the GIA.

Conclusion

- 5.324 The Commission's view is that there are currently very few regulatory obligations that apply to WIPs. The GIA will apply to WIPs, and will set out a framework of obligations regarding access to passive infrastructure, and the terms and conditions under which access is to be provided. However, there remains uncertainty over how the GIA will be implemented in practice, particularly as very limited regulation has applied to WIPs until now.
- 5.325 The Commission therefore recognises that the GIA will impose conditions on WIPs that do not exist at present, but its view is that uncertainty over implementation means that the Commission cannot rely on the GIA regulation as being sufficient, of itself, to prevent an SLC.

(C)(vii) Countervailing Buyer Power

- 5.326 Having considered the extent to which out of market constraints are likely to replace the competitive constraint provided by Cellnex, the next factor the Commission considers relevant to determining whether the Proposed Transaction

would likely give rise to an SLC is the importance of countervailing buyer power in the Relevant Market.

5.327 The Commission's Merger Guidelines explain the potential effects of countervailing buyer power ("CBP") as follows:

*"[CBP] refers to the ability of a customer or customers, because of their position in the market, successfully to resist supplier price increases. In some circumstances, a customer may possess sufficient negotiating strength to enable it to constrain the ability of a supplier or suppliers to harm competition. The source of this negotiating strength may come from a customer's size; its commercial significance to the supplier; its ability to credibly threaten to switch, within a reasonable time frame, to alternative suppliers; its ability to sponsor a new entrant; and/or its ability to engage in self-supply (i.e., vertically integrate backwards and become a supplier itself). Where customers have countervailing buyer power post-merger, even after any reduction in buyer power caused by the merger, this may be sufficient to prevent competitive harm."*⁴⁹⁶

5.328 The Commission's Merger Guidelines note that for CBP to prevent an SLC, it is not sufficient that it exists pre-merger; "[t]here must be evidence that a customer, whatever its size, has the ability and incentive to prevent harm to competition – and that this ability and incentive will not be significantly diminished by the merger."⁴⁹⁷

5.329 Further, the Commission's Merger Guidelines state that:

"Even if the merging parties demonstrate that one or more customers will have significant countervailing buyer power post-merger, it does not necessarily follow that this will prevent an SLC. In a market where some but not all buyers possess significant [CBP], a merger may still result in

⁴⁹⁶ The Commission's Merger Guidelines, paragraph 7.1

⁴⁹⁷ The Commission's Merger Guidelines, paragraph 7.2

increased prices (or other competitive harm) for those customers with little or no [CBP].”⁴⁹⁸

5.330 The Commission’s Merger Guidelines note that the onus is on the merging parties to provide reliable evidence to the Commission to demonstrate that CBP will prevent harm to competition post-merger. The Commission’s Merger Guidelines indicate the types of information that would be considered in an assessment as to whether CBP is likely to prevent an SLC post-merger. The types of information include, but are not limited to, the following:

“(a) Examples of switching by customers between the merging parties pre-merger.

(b) Examples of switching by customers to alternative suppliers (other than the merging parties) pre-merger.

(c) Documentation indicating that customers have regularly and successfully resisted attempts by a supplier(s) to raise prices or otherwise harm competition pre-merger, coupled with evidence that the merger would not change this.

(d) Examples where customers have previously sponsored entry or vertically integrated.

(e) Documentation indicating that customers have considered vertical integration or sponsoring new entry and that such a strategy is commercially viable.”⁴⁹⁹

Views of the Parties

5.331 In the Merger Notification Form, the Parties stated that:

⁴⁹⁸ The Commission’s Merger Guidelines paragraph 7.4

⁴⁹⁹ The Commission’s Merger Guidelines, paragraph 7.10.

“Given the extent to which infrastructure providers such as [the Parties] (among others) are reliant on the MNOs to fill capacity on their sites, the MNOs have exceptionally strong [CBP] in negotiations with providers of hosting services passive infrastructure. This strength is reinforced by the fact that MNOs do not engage with passive infrastructure providers on an exclusive basis and, in practice, multi-source and use a variety of infrastructure providers on which to deploy their active networks, depending on the requirements of their network configurations (and reflecting the MNOs ability to ‘shop around’). While availing of the baseline provided by their anchor tenancy arrangements, MNOs and other wireless network operators will continue to have a range of options from which to choose in the [sic] relation to the deployment of their networks, including through increasingly prevalent competitive processes run by MNOs and wireless network operators for new or additional sites....Finally, MNOs also have the option in many cases of developing and further supplementing their own passive infrastructure portfolios if required.”⁵⁰⁰

5.332 In the Phoenix Written Submission, Phoenix added that:

“each of the MNOs active in Ireland has very significant experience in operating and managing macro passive network infrastructure assets, which provides them with good knowledge of WIPs’ costs and which further improves their bargaining power in negotiations with WIPs.”⁵⁰¹

Views of third parties

5.333 One third party suggested that bargaining power lies with the WIP and not with the MNO:

“the cost to MNOs of moving their active equipment from one site to another is enormous, and we would argue nearly prohibitive. This is nearly never actually observed to occur. The only occasions where this could occur

⁵⁰⁰ Merger Notification Form, page 32, paragraph 102.

⁵⁰¹ Phoenix Written Submission, page 32, paragraph 110.

is when an operator is fully replacing their active equipment (so they have the cost anyway). This nearly never happens. So the tower company has a strong negotiating position vis-à-vis the MNOs. The MNOs can, to a large extent, be considered captive customers over long periods of time, with only occasional instances of real renegotiation.”⁵⁰²

5.334 Further views of third parties in relation to an MNO’s ability to switch, which is directly related to bargaining power, have been set in paragraphs 5.134 to 5.140 above.

Views of the Commission

5.335 In considering the nature of competition in the Relevant Market, the Commission identified above in paragraphs 5.52 to 5.78 that competition for WIP contracts can potentially take place at two key points:

- (a) Competition for long-term national contracts, that is, the entirety (or a large proportion) of an MNO contract, which would be at the beginning of the contract or at the point of contract renewal; and
- (b) Competition for incremental business within a contract period.

5.336 In the Commission’s view, it is very unlikely that any customer except for an MNO could possibly exercise CBP because non-MNO customers represent a very small proportion of WIPs’ overall revenue base.⁵⁰³

5.337 As discussed in paragraphs 2.2 to 2.6 above, the legacy divestment by MNOs of their passive infrastructure portfolios meant that the three MNOs in the State each divested their portfolio to a single WIP and contracted with that WIP for hosting services on the passive infrastructure they had previously owned.

⁵⁰² London Economics, ‘Note on Competition Concerns in the Irish Telecom Towers Market’, on behalf of Hibernian Towers, page 12.

⁵⁰³ As noted in paragraph 5.56 above, non-MNO customers accounted for less than █% of Cellnex’s revenue in 2023, and less than █% of Phoenix’s revenue in 2023.

- 5.338 An MNO customer could potentially exercise CBP at the time of contract renewal. To be in a position to do so, the MNO would need to have a credible threat of switching at least a good portion of its portfolio to an alternative WIP, and be able to use this threat to negotiate on terms and conditions, including pricing. The availability of options to switch to an alternate provider is likely to be further limited by geographic variations in the availability of passive infrastructure. For example, there are fewer towers in rural areas (and they are often less economically attractive for WIPs), and planning restrictions and lack of available sites may limit available options in urban areas.
- 5.339 For an alternative provider to be a credible switching destination for an MNO's entire portfolio, it would need to have a ubiquitous network of passive infrastructure to which the MNO could switch its active infrastructure, with geographical scope and density across the State. Given the lead times discussed in paragraphs 5.262 to 5.264 above, it would not be credible for an MNO to consider switching its portfolio to a WIP that could not already offer national coverage.
- 5.340 The reasons why switching is very limited both between the customers of the Parties and between WIPs generally have been discussed in detail in paragraphs 5.121 to 5.146 above. The Commission notes that at the point of contract renewal, the contractual inhibitor on switching is removed – that is, during the contract, the MNO customer is not permitted to switch except within a small churn limit without significant penalties. Therefore, at the point of contract renewal, the customer is not contractually prevented from switching supply. However, the technical and cost barriers associated with switching would remain.
- 5.341 The Commission recognises that technical and cost barriers to switching are not merger-specific and that they are present both pre- and post-Proposed Transaction. However, the merger does impact on the MNO's choice of credible alternatives to which it could switch. Post-merger there would be one remaining competing national WIP in the State, Vantage. As discussed above, Vantage is part-owned by Vodafone, a retail competitor of Three and eir, and does not, in the Commission's view, represent a neutral alternative WIP for MNOs.

switch to, and as such, the MNO's already limited bargaining position would be further reduced.

- 5.348 Based on the evidence it has seen, the Commission's view is that the customers of the Parties can be seen as captive in long-term contracts, with limited opportunities to negotiate improved terms. While MNOs are undoubtedly of significance to WIPs, the Commission has not seen evidence that they would be in a position to constrain the ability of the merged entity to exercise market power.

The Commission's overall conclusion on horizontal unilateral effects

- 5.349 In light of the evidence and analysis set out in this section, the Commission has concluded that, absent proposals that would ameliorate its concerns, the Proposed Transaction would likely result in an SLC in the Relevant Market.

6. THE PROPOSALS

- 6.1 The Commission's concerns that the Proposed Transaction would, on the balance of probabilities, result in an SLC in the Relevant Market, were communicated to the Parties on a preliminary basis in advance of issuing the Assessment, and set out in full in the Assessment.
- 6.2 As outlined in paragraph 1.46, on 18 September 2024, the Parties submitted proposals to the Commission pursuant to section 20(3) of the Act which the Parties stated would ameliorate any effects of the merger on competition in the Relevant Market. These proposals were modified to reflect preliminary feedback from the Commission (the "Initial Proposals") such that the Commission could engage in market testing.⁵⁰⁸

Overview of the Initial Proposals

- 6.3 The Initial Proposals identified all sites where the Parties' macro passive network infrastructure sites overlap, and where the effect of the Proposed Transaction would be to reduce the number of WIPs active in an overlap area from 3 to 2 or from 2 to 1 (the "Overlap Areas"). This amounted to a total of [REDACTED] sites to be divested to a purchaser approved as suitable by the Commission. In addition, the Initial Proposals provided for the divestment package to include all new BTS sites required by MNOs within the identified Overlap Areas for the duration of the existing MSA/BTS agreements currently in place between MNOs and the Parties.

Market testing the Initial Proposals

- 6.4 During the period from 6 January 2025 to 14 January 2025 the Commission market tested the Initial Proposals as part of its assessment as to whether they would be appropriate, proportionate and effective in ameliorating the SLC concerns in the Relevant Market.

⁵⁰⁸ See paragraphs 1.45 to 1.47.

- 6.5 The Commission conducted phone interviews with the three MNOs in the State, and with seven potential purchasers of the proposed divestment package. The MNOs and the potential purchasers were provided with a non-confidential version of the Initial Proposals and a presentation with a brief overview of the proposed divestment package. Feedback from the market testing has been considered below in the Commission's evaluation of the Proposals.

The Commission's evaluation of the Proposals

- 6.6 In assessing proposals submitted to the Commission pursuant to section 20(3) of the Act, the Commission has regard to the Act, and to the Merger Guidelines. The Commission also takes into account the analytical framework set out in the European Commission's Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 ("EC Remedies Notice").⁵⁰⁹ As part of this evaluation and having regard to the analytical framework set out in the EC Remedies Notice, the Commission considers three key criteria when assessing proposals:

- (a) Are the proposals comprehensive and effective?;
- (b) Are the proposals capable of being implemented effectively within a short period of time?; and
- (c) Do the proposals eliminate the competition concerns entirely?

Are the proposals comprehensive and effective?

- 6.7 The Commission set out its concerns in Section 5 above that the Proposed Transaction would result in the removal of Cellnex from the Relevant Market, resulting in higher prices and reduced quality of service for customers, and ultimately consumers.
- 6.8 As noted above, the Initial Proposals provided for the divestment of a number of sites in the Overlap Areas, i.e. where the effect of the Proposed Transaction would

⁵⁰⁹ Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1022\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1022(01)).

be to reduce the number of WIPs active within an overlap area from 2 to 1 or from 3 to 2. Divestment of sites within the Overlap Areas would allow the entry or expansion of a competitor in these areas and so replace the competitive constraint that would be lost by the removal of Cellnex from the market. The replacement of Cellnex as a competitive constraint within the most concentrated areas is an effective remedy with respect to the Commission's competition concerns in specific Overlap Areas.

- 6.9 The Commission discussed above its concern that, in addition to competition concerns in specific Overlap Areas, Cellnex exerted significant competitive pressure at a national level, as one of three national WIPs that could offer MNOs the geographic coverage and level of density required to offer mobile services to their retail customers. Any potential remedy would therefore need to be of sufficient scale to address the Commission's concerns at a national level.
- 6.10 Market testing of the Initial Proposals indicated that the scale of the divestment package was unlikely to be attractive for a market entrant who did not already provide telecom infrastructure in the State, though this possibility should not be ruled out. Most respondents to the market testing who already have a presence in the State believed that, provided the quality and price were appropriate, the scale of the divestment package would allow them to compete effectively. Notwithstanding, some respondents noted that, post-transaction, the merged entity would be the biggest WIP in the State by a significant margin, and 30% larger than Cellnex is today.
- 6.11 The Commission recognises that, post-Transaction, any remedy-taker would be smaller than both the merged entity and Vantage. However, the divestment package would allow dense national coverage and so would allow the remedy-taker to offer MNOs a comprehensive portfolio of sites across the State. Further, the divestment package includes a proportion of BTS sites which would facilitate the remedy-taker sharing in a proportion of future demand for sites within the Overlap Areas, facilitating the expansion of its portfolio.

- 6.12 Several respondents to the market testing commented negatively on the quality of the divestment package. Specific concerns were raised about the composition of the divestment package in terms of a number of criteria including: the mix of structure type; the age of the sites; tenancy ratios; and the possible condition of the sites.
- 6.13 The selection criteria for the sites included in the divestment package was driven by: (i) the Overlap Areas; and (ii) ease of implementability, in particular in respect of minimising the need for third party consents.
- 6.14 The market testing feedback raised the possibility that an unintended consequence of the selection criteria used was that the divestment package was composed of an inferior set of sites, in particular compared to the portfolio of the merged entity, with implications for the remedy-taker's ability to compete effectively. To address these concerns, the Commission requested further analysis from Phoenix comparing the divestment package with the portfolio to be retained by the merged entity in the Overlap Areas, focusing on the metrics that were suggested during the market testing.⁵¹⁰
- 6.15 The result of this analysis showed that, in respect of structure, the divestment package contains more towers and streetwork sites than the retained portfolio and fewer rooftop sites. On average, the age of sites in the divestment package is around [REDACTED] than sites in the retained portfolio. The difference in average tenancy ratio is [REDACTED]%, and in average spare capacity, the difference is [REDACTED] %.
- 6.16 The Commission also requested data on revenue for the sites in the divestment package compared with sites in the retained portfolio. Overall, the revenue from the divestment package [REDACTED] [REDACTED]. However, the Commission notes that this may be accounted for (at least in part) by [REDACTED], as these make up a

⁵¹⁰ In particular, this analysis focused on: structure types; the age of the sites; tenancy ratios and revenues generated.

higher proportion of sites [REDACTED]

- 6.17 The Commission's conclusion on the comparative quality analysis is that the selection of sites based primarily on location within an Overlap Area and secondly by ease of divestment has not resulted in a significant reduction of the quality of the divestment package compared with the retained portfolio. While there are differences, some of these are likely to be addressed in due diligence and in the valuation of the divestment package and do not affect its viability.

Are the proposals capable of being implemented effectively within a short period of time?

- 6.18 The Commission recognises the complexity associated with implementing a divestment which involves a carve-out from larger contracts, in that post-transaction a proportion of Cellnex assets would be owned and operated by Phoenix and a proportion would be divested to a suitable purchaser. Consequently, the issue of third party (landlords and/or customers) consents arises.
- 6.19 During the market testing of the Initial Proposals, MNOs indicated that if their consent were required to effect the divestment, their key concern would be the identity of the purchaser of the divestment package. All MNOs noted that they were currently served by professional WIPs and that they would expect that any purchaser of a divestment package would have demonstrable experience of developing, owning and operating wireless passive infrastructure.
- 6.20 Most prospective purchasers responding to the market testing had experience of acquiring a portfolio of sites, and were able to share examples of issues that had arisen to delay implementation of previous acquisitions, in particular the time it can take to secure third party consents. The Commission was able to take this into account when evaluating whether the Initial Proposals were capable of being implemented effectively within a short period of time.
- 6.21 Market testing indicated that, absent the potential for delay due to the need for MNO and/or landlord consent, MNO customers and most prospective purchasers considered the timescales that were set out in the Initial Proposals as realistic.

Do the proposals eliminate the competition concerns entirely?

- 6.22 The Commission considers that divesting a site in all of the areas of overlap between the Parties where the merger would result in the number of WIPs active in these areas reducing from 3 to 2 or 2 to 1 is effective in removing its concern about competition at a local level. Competition in the Overlap Areas would therefore be restored when Cellnex is no longer active in the Relevant Market.
- 6.23 The Commission considers that the scale of the divestment package would allow a prospective purchaser to establish or significantly increase its presence at a national level, and to become a competitive force in the national market.

The Commission's overall assessment of the Initial Proposals

- 6.24 It was clear from the market testing of the Initial Proposals that the identity of a suitable purchaser of the divestment package was of key importance, in particular that it would have demonstrable experience of developing, owning and operating wireless passive infrastructure.
- 6.25 In addition, the market testing highlighted the potential for delay of the implementation of the sale of the divestment package due to the need to secure the consent of eir, as a key customer of the Parties, and in particular Phoenix.
- 6.26 As outlined in paragraph 1.46, following market testing and ongoing engagement between the Commission and Phoenix, on 5 February 2025 Phoenix submitted the Proposals, pursuant to section 20(3) of the Act, which addressed these issues and which the Commission accepted would ameliorate any effects of the merger on competition in the Relevant Market.
- 6.27 In particular, MNO concerns regarding the expertise and experience of the prospective purchaser are fully addressed by the suitable purchaser criteria set out in the Proposals.
- 6.28 Further, to address the concern regarding third party consent and the potential for delayed implementation, a legally binding letter from eir to Phoenix was submitted to the Commission stating that, subject to certain appropriate safeguards, it would

not withhold its consent where required for the divestment of sites included in the Proposals.

- 6.29 The Commission notes that extensive engagement with the Parties was required to ensure that its concerns with the Initial Proposals were addressed during the merger review process. This entailed considerable input from the Commission, and had implications for the time it took to come to the final version of the Proposals.
- 6.30 From the market testing, the Commission is satisfied that there are a number of prospective purchasers that would meet the suitable purchase criteria referred to above.
- 6.31 Further, the Commission considers that the Proposals reduce risks associated with potential delays to implementation through setting out clear timelines and addressing, insofar as is possible, customer consent.
- 6.32 The Commission is satisfied that the Proposals are comprehensive, effective and capable of being implemented within a short period of time.

Conclusion

- 6.33 Talking all of these factors into account, the Commission considers that the Proposals address its concerns in the Relevant Market entirely.

7. COMPETITIVE ASSESSMENT COORDINATED EFFECTS

7.1 Coordinated effects can occur where a proposed transaction changes the nature of competition in the relevant market by making it more likely that the merged entity and some, or all, of its competitors will coordinate their behaviour by, for example, raising prices and/or decreasing output. Thus, the key question⁵¹¹ is whether the Proposed Transaction would materially increase the likelihood that firms in the Relevant Market would successfully coordinate their behaviour or would strengthen existing coordination between firms in this relevant market.

7.2 Firstly, during its review of the Proposed Transaction, the Commission observed that there may already be a degree of coordination between WIPs,⁵¹² in particular in respect of planning the location of new passive infrastructure sites. In this regard, the Commission notes that obtaining approval on a planning application for a new site can take a long time (as set out in paragraph 5.264 above) and, as such, there are situations in which collaboration between WIPs might be necessary depending on which MNOs are co-locating on which sites.

7.3 For example, in the Phoenix Phase 2 RFI Response, Phoenix stated that it [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. *The purpose of this proposal was to allow for MNO equipment to be deployed on existing infrastructure in an efficient and speedy manner and in a limited number of cases where a need arose.*⁵¹³ This explanation is further buttressed by the evidence obtained by the

⁵¹¹ The Commission's Merger Guidelines, paragraph 4.23.

⁵¹² For example, in the internal Phoenix documents cited in paragraph 5.205, one of which [REDACTED] contained the following extract: [REDACTED]

[REDACTED] In the internal Phoenix documents cited in paragraph 5.208, one of which [REDACTED] contained the following extract: [REDACTED]

⁵¹³ Phoenix Phase 2 RFI Response, paragraph 13.5.

Commission during the course of its review of the Proposed Transaction, which suggests that co-location is oftentimes the local planning authorities' preferred method of MNO network densification.⁵¹⁴

- 7.4 Secondly, the Commission notes that implementation of the Proposed Transaction would result in over 70% of the total sites in the Relevant Market being operated by two entities (i.e., the merged entity and Vantage) and it is easier to coordinate behaviour when there is a smaller rather than a larger number of competitors.⁵¹⁵ To this end, the Commission reiterates that Vantage cannot be seen as an entirely independent tower company because Vodafone retains a significant and controlling shareholding in Vantage. In paragraph 4.26(d) of the Commission's Merger Guidelines, it is stated that *"firms with similar characteristics (e.g., market shares, cost structures, levels of vertical integration) will be more likely to have similar, and hence sustainable, incentives to coordinate than dissimilar firms"* (emphasis added).
- 7.5 The fact that Vodafone retains a shareholding in Vantage means that Vantage's level of vertical integration is different to that of the merged entity. Furthermore, the theoretical incentive for Vantage and the merged entity to engage in coordinated behaviour would be to strengthen their positions vis-à-vis their customers (i.e., the MNOs) and extract higher profits. The Commission considers that engaging in coordinated behaviour would be especially counterintuitive from Vantage's perspective as it is still partially owned by its main MNO customer.
- 7.6 In light of the above, the Commission's view is that the Proposed Transaction will not materially increase the likelihood of coordination among competitors in the market post-merger. The Commission has reached this view based on all of the information provided to it over the course of its review.

⁵¹⁴ Towercom Call Note 28.05.2024, page 3.

⁵¹⁵ The Commission's Merger Guidelines, paragraph 4.26(a).

- 7.7 Therefore, on this basis, the Commission considers that the Proposed Transaction does not raise any coordinated effects concerns in the State and no further discussion of coordinated effects is carried out for the purposes of assessing the likely effects of the Proposed Transaction in the Relevant Market.

8. VERTICAL RELATIONSHIP

8.1 The Commission has identified the following vertical relationship between the Parties:

- (i) The provision of land/real estate: Phoenix rents a number of land/real estate sites from Cellnex (i.e. as a landowner/customer relationship).

8.2 Vertical effects can occur where a proposed transaction changes the ability and incentives of the parties involved in the transaction, making it more likely that the merged entity will engage in either customer foreclosure or input foreclosure. Thus, the key question for the Commission to consider is whether a proposed transaction would materially increase the likelihood of customer foreclosure or input foreclosure due to the merger's effects on the merged entity's ability and incentive to foreclose its upstream and/or downstream competitors.⁵¹⁶

8.3 The Commission has reached the view that the vertical relationship identified in 8.1(i) above would not, of itself, give rise to any concerns following implementation of the Proposed Transaction.

8.4 In addition to the vertical relationship between the Parties, Cellnex is the lessor of a number of sites to third party WIPs. The Commission understands that these leases pertain to land only, and not to the passive wireless infrastructure. Phoenix does not lease any sites to other WIPs. As a result, the Proposed Transaction itself does not lead to any increase in market power in relation to the upstream supply of land/real estate to WIPs—therefore, the Commission does not consider that the Proposed Transaction gives rise to input foreclosure concerns relating to the provision of land/real estate.

8.5 For completeness, the Parties both also lease small numbers of sites from third-party WIPs. The Commission does not consider that the Proposed Transaction

⁵¹⁶ The Commission's Merger Guidelines, paragraphs 5.7–5.17.

could give rise to any customer foreclosure effects in the provision of land/real estate, as the Parties comprise a *de minimis* proportion of the potential lessees of non-specialised real estate.

- 8.6 Therefore, on this basis, the Commission considers that the Proposed Transaction does not raise any vertical competition concerns in the State.

9. EFFICIENCIES

9.1 Paragraphs 8.1 and 8.2 of the Commission's Merger Guidelines state that:

"A merger may generate various efficiencies for the merged entity. The Commission's analysis of efficiencies goes beyond the impact of efficiencies on the merged entity and focuses on whether verifiable efficiencies mitigate adverse competitive effects and prevent an SLC".

"The onus rests on the parties to show that claimed efficiencies are (i) merger-specific, (ii) verifiable and (iii) benefit consumers sufficiently to prevent an SLC".

9.2 The Commission has not received any submission from the Parties on efficiencies which meets the criteria set out in paragraph 8.2 of the Commission's Merger Guidelines.

10. CONCLUSION

- 10.1 In light of the Proposals submitted by Phoenix, the evidence available to it, and in light of its analysis as set out in this Determination, the Commission has formed the view that the Proposed Transaction will not substantially lessen competition in any market for goods or services in the State
- 10.2 Before making a determination in this matter, the Commission, in accordance with section 22(8) of the Act, has had regard to any relevant international obligations of the State, and concluded that there were none.

11. ANCILLARY RESTRAINTS

- 11.1 In the Merger Notification Form, the Parties stated that they were not notifying any such restrictions to the Commission.

12. DETERMINATION

Pursuant to section 20(3) of the Competition Act 2002, as amended (the “Act”), Phoenix Tower International Holdco, LLC (“Phoenix”) has submitted to the Competition and Consumer Protection Commission (the “Commission”) the proposals set out below regarding measures to be taken to ameliorate any effects of the proposed acquisition on competition in any market for goods or services in the State, with a view to the said proposals becoming binding on Phoenix.

The Commission has taken the proposals into account and, in light of the said proposals (which form part of the basis of its determination), has determined, in accordance with section 22(3)(a) of the Act, that the result of the proposed acquisition whereby Phoenix, through an indirectly wholly owned subsidiary, would acquire the entire issued share capital, and thus sole control, of Cellnex Ireland Limited and Signal Infrastructure Limited will not be to substantially lessen competition in any market for goods or services in the State, and, accordingly, that the acquisition may be put into effect.

Before making a determination in this matter, the Commission, in accordance with section 22(8) of the Act, had regard to any relevant international obligations of the State, and concluded that there were none.

For the Competition and Consumer Protection Commission

Brian McHugh

Chairperson

Competition and Consumer Protection Commission

APPENDIX A: PROPOSALS

Case M/24/018 – Phoenix Tower International/Cellnex

Proposals by Phoenix Tower International Holdco, LLC to the Competition and Consumer Protection Commission relating to the proposed acquisition of Cellnex Ireland Limited and Cignal Infrastructure Limited

Submitted on 5 February 2025

1. RECITALS

- 1.1 On 21 March 2024, the Competition and Consumer Protection Commission (the “CCPC”)⁵¹⁷ received a notification of the proposed acquisition by Phoenix Tower International Holdco, LLC (“PTI”) of sole control of Cellnex Ireland Limited (“CIL”) and Cignal Infrastructure Limited (“Cignal”), together (“Cellnex Ireland”), which comprise the wireless infrastructure business in Ireland of Cellnex Telecom S.A. (“Cellnex”) (the “Proposed Transaction”).
- 1.2 In its preliminary assessment of Case M/24/018 Phoenix Tower/Cellnex, dated 8 November 2024, the CCPC indicated that it had preliminary competition concerns in relation to the Proposed Transaction.
- 1.3 Pursuant to Section 20(3) of the Competition Act 2002 (as amended), PTI has submitted the following proposals to the CCPC for the purpose of ameliorating any effects of the Proposed Transaction on competition in the market for the provision of hosting services on macro passive network infrastructure sites in the State (the “Proposals”) and with a view to the Proposals becoming binding on PTI if the CCPC takes the Proposals into account and states in writing that the Proposals form the basis or part of the basis of a Determination.

2. DEFINITIONS

⁵¹⁷ For completeness, the definition of CCPC means the Competition and Consumer Protection Commission and its successors.

2.1 For the purpose of these Proposals, the following terms shall have the following meaning:

“Approved Purchaser” means a Suitable Purchaser approved by the CCPC and that has entered into the Share Purchase Agreement to acquire the Divestiture Package in accordance with clause 3.2 of the Proposals;

“Act” means the Competition Act 2002 (as amended);

“Business Day” means a day other than a Saturday or Sunday or public holiday in Ireland on which clearing banks are open for business in Ireland;

“CCPC Trustee” has the meaning ascribed to it in clause 6.4 of the Proposals;

“Determination” means the Determination of the CCPC pursuant to Section 22(3)(a) of the Act that the Proposed Transaction may be put into effect, taking into account the Proposals, which form the basis or part of the basis of the Determination;

“Divestiture Assets” means the following for each Divestment Site divested pursuant to these Proposals:

- (a) all on-site infrastructure assets (including steel constructions, fences, towers, masts, poles, basements and cabinets, as well as any other ancillary infrastructure asset) owned or operated by PTI, including related permits;
- (b) the benefit and obligations of any property licence or other agreement concluded with the lessor/landlord in relation to the Divestment Site;
- (c) all rights under contracts, including customer contacts relating to the Divestment Site; and
- (d) all applicable know-how, goodwill and business records relating to the Divestment Site;

“Divestiture Package” means

- (a) all of the Divestiture Assets in respect of each of the Divestment Sites listed at Appendix 1, including for the avoidance of doubt, PTI’s property rights (being the benefits and obligations of the property licence or other agreements concluded with the lessor/landlord in relation to each Divestment Site), and
- (b) the commitment by PTI to divest to the Approved Purchaser any New BTS Site that the Approved Purchaser agrees to acquire or develop pursuant to clause 3.4;

“Divestiture Period” means the period ending nine (9) months from the date of the Determination;

“Divestment Sites” means the macro passive network infrastructure sites whose identification numbers are listed at Appendix 1 and any New BTS Sites that will be acquired or developed by the Approved Purchaser pursuant to clause 3.4;

“DotEcon Analysis” means the analysis of overlaps between the Parties in respect of macro passive network infrastructure sites in the State, as set out in the report “Overlap analysis using competitor site data” dated 22 November 2024 prepared by DotEcon on behalf of the CCPC;

“Hold Separate Manager” has the meaning ascribed to it in clause 8.4;

“Mandate” means the mandate agreement to be entered into between PTI and the Trustee in accordance with clause 7.1 of the Proposals, the terms of which shall have been agreed with the CCPC;

“Material Change” means a change whereby a purchaser no longer fulfils the requirements of a “Suitable Purchaser”, as defined below;

“MNO” means a mobile network operator;

“MSA” means any Master Services Agreement pursuant to which PTI has contractual obligations to an MNO with respect to New BTS Sites;

“New BTS Sites” means incremental new build-to-suit sites that are identified and/or developed after the date of the Determination pursuant to existing programmes set out in an MSA in effect as at the date of these Proposals and that meet the New BTS Site Divestment Criteria. For the avoidance of doubt, the construction or development of new passive infrastructure at or near an existing site onto which MNO equipment is then moved (referred to as “drop and swap” sites) shall not constitute New BTS Sites;

“New BTS Site Build Divestiture Period” means the period of six (6) months following the completion of a New BTS Site and its delivery to PTI;

“New BTS Site Development Divestiture Period” means the period of twenty (20) Business Days from the date on which PTI is notified by the relevant MNO of its requirement for PTI to develop a New BTS Site, provided that this twenty (20) Business Days period shall be suspended until the date on which PTI secures the consent of the MNO if such consent is required under the relevant MSA, subject to the provisions of clause 3.4(a)(ii) and clause 3.4(b)(ii);

“New BTS Site Divestment Criteria” means where any New BTS Site(s) are, or would be, located within the geographic areas of the 314 tower groups identified as ‘3- to-2’ or ‘2-to-1’ in the DotEcon Analysis, or would give rise to a ‘3-to-2’ or ‘2-to-1’ tower group on the basis of the methodology set out in the DotEcon Analysis;

“Newco” means the company incorporated in Ireland by PTI for the purposes of giving effect to the Share Sale and which shall, where relevant and appropriate, be bound by the terms of these Proposals;

“Newco Business Transfer Agreement” means the binding agreement to be entered into between PTI and Newco for the transfer of PTI’s interests in the Divestiture Package to Newco for the purposes of the Share Sale;

“New Proposed Trustee” has the meaning ascribed to it in clause 6.2 of the Proposals;

“Parties” means PTI and Cellnex Ireland;

“Proposed Trustee” has the meaning ascribed to it in clause 6.1;

“Share Purchase Agreement” means the agreement between PTI and a Suitable Purchaser for the sale and purchase of 100% of the shares in Newco;

“Share Sale” has the meaning ascribed to it in clause 3.3;

“Suitable Purchaser” means a single purchaser that, in the CCPC’s view, meets all of the following criteria:

- (a) the acquisition by the purchaser of the Divestiture Package would not be likely to create prima facie competition concerns;
- (b) the purchaser has an existing track record of developing, owning and operating passive infrastructure assets, either in the State or elsewhere, and can demonstrate that it has the necessary capability to compete, and has access to appropriate financial resources, expertise (including managerial, operational and technical capability (including understanding of the legal and regulatory regime)) and assets to enable the Divestiture Assets comprising the Divestiture Package to be used to effectively compete in the Irish market as part of a viable and active business;
- (c) the purchaser is capable of obtaining in advance of the completion of the sale of the Divestiture Package all necessary approvals, licences and consents from any regulatory or other authority required to permit completion of the sale of the Divestiture Package to occur;
- (d) the purchaser is unconnected to, and independent of, both PTI (and its ultimate controlling shareholders, i.e. Blackstone, Inc. and Grain

Management LLC), Cellnex and Vodafone Ireland Limited (or any related or connected company, in particular Vantage Towers Limited);

- (e) the purchaser is able to continue to operate the Divestment Sites on a financially viable basis; and
- (f) the purchaser is committed to operating the Divestment Sites as an active competitive force and competing on a national basis;

“The State” means the Republic of Ireland; and

“Trustee” means the trustee approved, or deemed to have been approved, by the CCPC with whom PTI shall enter into the Mandate in accordance with clause 7.1 of the Proposals.

3. DIVESTITURE PROPOSAL

- 3.1 Pursuant to Section 20(3) of the Act, PTI submits to the CCPC the following Proposals for the purpose of ameliorating any potential effects of the Proposed Transaction on competition in the market for the provision of hosting services on macro passive network infrastructure in the State, with a view to the Proposals becoming binding on PTI on the date of the CCPC’s Determination.
- 3.2 PTI undertakes, subject to the provisions set out herein, to enter into a binding agreement in respect of the sale of the Divestiture Package to the Approved Purchaser within a period of four (4) months from the date of the Determination. PTI further undertakes to use best endeavours to ensure completion of the sale of the Divestiture Package to the Approved Purchaser as soon as possible thereafter and, in any event, within the Divestiture Period (or such longer period as may be allowed by the CCPC, acting reasonably).
- 3.3 The sale of the Divestiture Package will be executed by way of a share sale (the **“Share Sale”**). However, New BTS Sites may be acquired by the Approved Purchaser by way of a share sale or an asset sale.

3.4 PTI undertakes that, where any New BTS Site meets the New BTS Divestment Criteria, PTI will:

- (a) in the case of a New BTS Site that will be developed by the MNO under the relevant MSA, divest the entirety of the Divestiture Assets in respect of the relevant New BTS Site to the Approved Purchaser within the New BTS Site Build Divestiture Period and on terms that are comparable to the relevant provisions of the relevant MSA, unless (i) the Approved Purchaser informs PTI, pursuant to clause 3.5, that it does not wish to acquire the New BTS Site, or (ii) in the event the relevant MNO's consent is required for the divestment of the Divestiture Assets in respect of the relevant New BTS Site to the Approved Purchaser, and [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], the MNO withholds its consent; and

- (b) in the case of a New BTS Site that would otherwise be developed by PTI pursuant to the terms of the relevant MSA, divest the entirety of PTI's interests in the development and ownership of the relevant New BTS Site to the Approved Purchaser within the New BTS Site Development Divestiture Period and on terms that are comparable to the relevant provisions of the relevant MSA, unless (i) the Approved Purchaser informs PTI, pursuant to clause 3.5, that it does not wish to develop the New BTS Site, or (ii) in the event the relevant MNO's consent is required for the divestment of PTI's interests in the development and ownership of the relevant New BTS Site to the Approved Purchaser, and [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] the MNO withholds its consent.

- 3.5 If the Approved Purchaser (i) notifies PTI in writing that it does not wish to acquire or develop the New BTS Site; or (ii) otherwise does not respond to PTI within ten (10) Business Days of being informed in writing by PTI that a New BTS Site meets the New BTS Divestment Criteria, PTI shall not be required to divest the Divestiture Assets, or its interests in the development and ownership, in respect of the relevant New BTS Site.
- 3.6 If the Approved Purchaser agrees to develop or acquire a New BTS Site pursuant to clause 3.4, and PTI has secured the consent of the MNO if such consent is required under the relevant MSA, PTI may include a condition in the business transfer agreement in the event of an asset sale, or a share purchase agreement in the event of a share sale, in respect of the relevant New BTS Site that if, within four (4) months of being informed in writing by PTI that a New BTS Site meets the New BTS Divestment Criteria, the Approved Purchaser does not accept any condition(s) required by an MNO for entering into lease agreements with the MNO in respect of the New BTS Site, the rights and interests in the development and ownership in respect of the relevant New BTS Site shall revert to PTI. The four (4) month period referred to in this clause 3.6 shall be suspended until the date on which PTI secures the consent of the MNO if such consent is required under the relevant MSA, subject to the provisions of clause 3.4(a)(ii) and clause 3.4(b)(ii).
- 3.7 Where PTI takes ownership of a New BTS Site, or agrees to develop a New BTS Site on behalf of an MNO, that meets the New BTS Site Divestment Criteria after the date of the Determination but prior to completion of the sale of the Divestment Sites listed in Appendix 1 to the Approved Purchaser, that New BTS Site will be added to the Divestment Sites listed in Appendix 1.
- 3.8 PTI undertakes:
- (a) [REDACTED]
- [REDACTED]
- [REDACTED]

(b) if the transfer of a New BTS Site to the Approved Purchaser cannot be effected within the New BTS Site Build Divestiture Period, PTI will – until the transfer can be implemented, where necessary and for the shortest period of time practicable – enter into alternative contractual arrangements substantially in the form of a management agreement of the type typical in the industry, agreed between PTI and the Approved Purchaser and appended to the Share Purchase Agreement, that will transfer to the Approved Purchaser the beneficial interest in, or economic benefit of, such property rights, assets and contracts so that the Approved Purchaser will be able to commercialise, operate and manage the New BTS Sites in all material respects to the same extent as PTI is able to do; and

(c) [REDACTED]

3.9 PTI shall promptly inform the Trustee and the CCPC in writing if (i) the Approved Purchaser proposes to acquire a New BTS Site pursuant to clause 3.4(a) or to develop a New BTS Site pursuant to clause 3.4(b), or (ii) if the Approved Purchaser has indicated in writing that it does not wish to acquire, or develop, the relevant site, or (iii) if the relevant MNO has withheld its consent to the divestment of the relevant New BTS Site [REDACTED]

3.10 Where PTI has signed a binding business transfer agreement in the event of an asset sale, or a share purchase agreement in the event of a share sale, in respect of a New BTS Site that will be divested pursuant to clause 3.4 of the Proposals, it shall provide a copy of the binding contract and all supporting documentation (including a copy of any heads of agreement or draft contracts prepared by PTI or the Approved Purchaser) to the Trustee and the CCPC within three (3) Business Days of PTI's signing of the binding agreement.

- 3.11 PTI recognises that the sale of the Divestiture Package shall be upon such conditions as detailed in these Proposals and that the acquisition of the Divestiture Package by a prospective purchaser must not be likely to create, in light of information available to the CCPC, *prima facie* competition concerns in the CCPC's view.
- 3.12 PTI recognises that for a prospective purchaser to meet the CCPC's approval as a Suitable Purchaser, such purchaser shall be unconnected to and independent of PTI (and its ultimate controlling shareholders, i.e. Blackstone, Inc. and Grain Management LLC) and Cellnex (or any related or connected company). PTI further recognises that Vodafone Ireland Limited (or any related or connected company, in particular Vantage Towers Limited) shall not be considered a Suitable Purchaser.
- 3.13 PTI further recognises that for a prospective purchaser to meet the CCPC's approval, that purchaser must be deemed likely to obtain all necessary authorisations, licences and consents necessary for the sale of the Divestiture Package to the prospective purchaser.
- 3.14 PTI undertakes to ensure that it effects the sale of the Divestiture Package within the Divestiture Period, provided that this undertaking shall not apply to PTI if the Parties jointly notify the CCPC in writing and providing sufficient supporting evidence that the Proposed Transaction has been irrevocably abandoned.
- 3.15 PTI undertakes not to [REDACTED]
[REDACTED] for a period of [REDACTED]
following the date of completion of the Share Sale to the Approved Purchaser pursuant to the Proposals. PTI undertakes not to [REDACTED]
[REDACTED]
for a period of [REDACTED] following the date of completion of the acquisition of each New BTS Site acquired by the Approved Purchaser pursuant to clause 3.4(a) of the Proposals, or the date of divestment of PTI's interests in the development and ownership of the relevant New BTS Site pursuant to clause 3.4(b) of the Proposals.

- 3.16 If PTI enters into a binding agreement to acquire any interest in the Divestment Sites or Newco after the expiry of [REDACTED] referred to in clause 3.15, PTI shall [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- 3.17 PTI shall be deemed to have satisfied the terms of the Proposals immediately following the completion of the sale of the Divestiture Package, including completion of the sale to the Approved Purchaser of the entirety of PTI's interests in all relevant New BTS Sites meeting the New BTS Site Divestment Criteria that are acquired by the Approved Purchaser pursuant to clause 3.4, and all obligations under the Proposals shall cease at that time with the exception of the obligations set out in clauses 3.15 and 3.16 above, which will continue to have effect for the period specified therein. For the avoidance of doubt, any subsequent programmes agreed between PTI and any MNO for the delivery of new or build-to-suit sites following the expiry of the programmes in effect under the MSAs as at the date of these Proposals shall not be the subject of the New BTS Site requirements set out herein.
- 3.18 The CCPC and PTI shall act at all times in a reasonable manner with a view to achieving the effective and efficient implementation of the Proposals.

4. IMPLEMENTATION OF THE DIVESTITURE

- 4.1 PTI undertakes to divest the entirety of the Divestiture Assets in the Divestment Sites, which comprise the entirety of PTI's interests in the Divestment Sites. The sale of the Divestiture Package shall be executed by way of a Share Sale. For the avoidance of doubt, any New BTS Sites acquired by the Approved Purchaser pursuant to clause 3.4 may be acquired by way of a share sale or an asset sale.
- 4.2 PTI will:

- (a) transfer to Newco PTI's property rights (i.e. the benefit and obligations of the property licence or other agreements concluded with the lessor/landlord) in relation to the Divestment Sites and the Divestiture Assets in relation to the Divestment Sites pursuant to the terms of the Newco Business Transfer Agreement; and
- (b) as soon as practicable following the completion of the transfers to Newco and in any event within the Divestiture Period, complete the sale of all of the shares in Newco pursuant to the terms of the Share Purchase Agreement to the Approved Purchaser.

4.3 PTI undertakes:

- (a) not to carry out any act upon its own authority which may reasonably be expected to have a significant adverse impact on the economic value, the management, or the competitiveness of the Divestiture Package until the date of the completion of the Share Purchase Agreement;
- (b)
- (c) to put in place a transitional services agreement in respect of the provision of certain services (including but not limited to IT support, HR, finance and facilities management) to the extent and for such period as may reasonably be required by the Approved Purchaser; and
- (d) if the transfer of any Divestment Site(s) listed at Appendix 1 to the Approved Purchaser cannot be immediately effected on the date of completion of the Share Purchase Agreement due to a delay in the migration of customer contract(s), to put in place contractual arrangements substantially in the form of a management agreement of the type typical in the industry agreed between PTI and the Approved Purchaser and appended to the Share Purchase Agreement; such

contractual arrangements will apply as and from the date of completion of the Share Purchase Agreement, where necessary and for the shortest period of time practicable, in order for the Approved Purchaser to obtain effective management and control and to allow the economic benefit of the relevant customer contract to be transferred to the Approved Purchaser and ensure that the Approved Purchaser will be able to commercialise, operate and manage the relevant Divestment Site(s) in all material respects to the same extent as PTI is able to do immediately prior to the Share Purchase Agreement being completed.

- 4.4 PTI shall provide a copy of the signed Newco Business Transfer Agreement and all supporting documentation to the Trustee and the CCPC as soon as possible and in any event within three (3) Business Days of entering into the Newco Business Transfer Agreement.

5. APPROVAL OF A SUITABLE PURCHASER

5.1 PTI shall:

- (a) promptly inform the Trustee and the CCPC in writing, with a fully documented and reasoned proposal (together with all supporting documentation, including a copy of any heads of agreement or draft contracts prepared by PTI or the prospective purchaser), of any prospective purchaser who indicates a genuine interest/serious desire to purchase the Divestiture Package pursuant to a Share Sale and to whom PTI is considering the sale of the Divestiture Package, enabling the Trustee and the CCPC to verify the suitability of the prospective purchaser; and
- (b) when it has agreed in all material respects the provisions of a Share Purchase Agreement with a Suitable Purchaser in respect of the Divestiture Package, it shall provide a copy of this agreement and any relevant supporting documentation (including a copy of any heads of agreement), as a fully documented and reasoned submission (including any relevant updates regarding the Approved Purchaser) to the Trustee

and the CCPC, for the CCPC's approval, at least ten (10) Business Days in advance of PTI signing the Share Purchase Agreement enabling the Trustee and the CCPC to verify that the conditions and obligations laid down in the Proposals are fulfilled and that there has been no Material Change not reasonably foreseeable at the time the CCPC assessed the purchaser's suitability under clause 5.1(a), subject to the CCPC agreeing to keep confidential all such information received.

- 5.2 The CCPC shall communicate to PTI in writing whether a Suitable Purchaser proposed in accordance with clause 5.1(a) is approved within ten (10) Business Days of receipt of a fully documented and reasoned proposal (together with all supporting documentation, including a copy of any heads of agreement or draft contracts prepared by PTI or a prospective purchaser). If the CCPC does not communicate its approval or non-approval within ten (10) Business Days of receipt of a fully documented and reasoned proposal identifying such a purchaser in accordance with clause 5.1(a), such approval shall be deemed to have been given unconditionally. In the case of multiple offers from prospective purchasers each of which the CCPC considers suitable, PTI shall be free to accept the offer of any one of these prospective purchasers of its choosing.
- 5.3 Separately, within ten (10) Business Days of receipt of the substantially agreed Share Purchase Agreement and all supporting documentation and the fully documented and reasoned submission in accordance with clause 5.1(b), the CCPC shall communicate in writing: (i) whether it approves the terms of the substantially agreed Share Purchase Agreement, (ii) its view as to whether the conditions laid down in the Proposals have been fulfilled, and (iii) whether it considers there has been any Material Change in the status of the purchaser as provided for in clause 5.1(b). If the CCPC does not communicate its approval or non-approval within ten (10) Business Days, such approval shall be deemed to have been given unconditionally.

- 5.4 PTI shall provide a copy of the signed Share Purchase Agreement to the Trustee and the CCPC as soon as possible and in any event within three (3) Business Days of entering into the Share Purchase Agreement.
- 5.5 PTI recognises that, if at any time prior to the completion of the sale of the Divestiture Package to a Suitable Purchaser, the CCPC reasonably considers on the basis of the information available to it that there has been a Material Change, the CCPC may withdraw its approval of a Suitable Purchaser of the Divestiture Package.

6. APPOINTMENT OF A TRUSTEE

- 6.1 Within ten (10) Business Days of the date of the Determination, PTI will submit to the CCPC a reasoned proposal for one or more trustee, which is independent of both PTI and Cellnex (the “Proposed Trustee”). The appointment of the Proposed Trustee is subject to the approval of the CCPC. If the CCPC does not reject the Proposed Trustee by notice in writing within five (5) Business Days of the date of submission of the reasoned proposal, the Proposed Trustee shall be deemed to have been approved.
- 6.2 If the Proposed Trustee is rejected, PTI will submit to the CCPC a reasoned proposal for a new trustee (the “New Proposed Trustee”) within ten (10) Business Days of being informed of the rejection. If the CCPC does not reject the New Proposed Trustee by notice in writing to PTI within five (5) Business Days of the new proposal, the New Proposed Trustee shall be deemed to have been approved.
- 6.3 At the time of proposing the Proposed Trustee or the New Proposed Trustee to the CCPC, PTI shall furnish to the CCPC sufficient information to enable the CCPC to assess the suitability of the person so proposed, including (without limitation) a curriculum vitae.
- 6.4 If the New Proposed Trustee, proposed under clause 6.2, is rejected by the CCPC, the CCPC shall, acting reasonably, nominate a suitable trustee (the “CCPC Trustee”) which PTI will appoint or cause to be appointed.

7. TRUSTEE’S MANDATE

- 7.1 Within ten (10) Business Days of the date on which the CCPC has approved or is deemed to have approved either the Proposed Trustee, the New Proposed Trustee or the CCPC Trustee (“Trustee”), PTI shall enter into a mandate agreement (the “Mandate”) with the Trustee the terms of which have been agreed with the CCPC, which confers on the Trustee all the rights and powers necessary to permit the Trustee to monitor PTI’s compliance with the terms of the Proposals.
- 7.2 Within five (5) Business Days of the date on which the CCPC has approved or is deemed to have approved the Trustee, PTI shall submit to the CCPC a draft mandate agreement for approval by the CCPC, which approval shall not be unreasonably withheld. The terms of the draft mandate agreement shall be consistent with the terms of the Proposals. If the CCPC rejects the terms of the draft mandate agreement by notice in writing, the CCPC shall within five (5) Business Days thereof, propose an amended version of the draft mandate agreement, which shall be accepted by PTI.
- 7.3 The Trustee shall be independent of PTI and Cellnex, possess the necessary qualifications and experience to carry out its mandate (including the monitoring of divestment remedies of the type contemplated by these Proposals), and shall neither have nor become exposed to a conflict of interest. The Mandate shall provide for a mechanism to resolve any conflicts of interest that may arise during the term of the Mandate (including, if necessary, the replacement of the Trustee).
- 7.4 Throughout the duration of the Trustee’s appointment, the Trustee shall:
- (a) provide written reports (“Trustee Reports”) to the CCPC on the progress of the discharge of its duties under the Mandate, identifying any respects in which the Trustee has been unable to discharge such duties. The Trustee Reports shall be provided at monthly intervals, commencing one month after the date of the appointment of the Trustee, or at such other times or time periods as the CCPC may specify and are notified in writing to PTI. PTI shall receive a non- confidential copy of such Trustee Reports;

- (b) monitor and advise the CCPC as to the development of the procedure for selecting a Suitable Purchaser and as to the conduct of the negotiations with potential purchasers;
- (c) monitor and advise the CCPC as to whether the prospective purchaser(s) with whom PTI intends to negotiate are likely to satisfy the CCPC's requirements as to suitability including providing a written report to the CCPC within five (5) Business Days of receipt of a fully documented and reasoned proposal from PTI, pursuant to clause 5.1(a) of these Proposals, verifying the suitability of a prospective purchaser or purchasers;
- (d) provide a written report to the CCPC within five (5) Business Days of receipt of a fully documented and reasoned submission from PTI, pursuant to clause 5.1(b) of these Proposals, verifying whether the requirements set out in these Proposals have been fulfilled and that there has been no Material Change;
- (e) monitor the maintenance of the viability and marketability of the Divestiture Package and ensure that it is managed in the ordinary course of business, pursuant to good business practice;
- (f) provide such other ad hoc updates to the CCPC as the Trustee considers necessary;
- (g) monitor compliance by PTI, and any successors in title, with its obligations under the Proposals;
- (h) monitor the overall divestiture process, including in respect of the provisions set out in clauses 3.4-3.10 above regarding New BTS Sites for the duration of the build-to-suit programmes in operation at the time of the Proposals;
- (i) be kept fully informed about the processes relating to the migration of customer contracts, including:

- (I) the obtaining of customer consents (to the extent necessary); and
 - (II) the process and arrangements to be put in place where the transfer of a customer contract cannot be immediately implemented, pursuant to clauses 3.8(b) and 4.3(d), so as to allow the economic benefit of customer contracts to be transferred to the Approved Purchaser and which ensure that the Approved Purchaser will be able to commercialise, operate and manage any relevant Divestment Site in all material respects to the same extent as PTI immediately prior to putting into effect the aforementioned contractual arrangements;
 - (j) monitor the operation and compliance with these Proposals of any contractual arrangements put in place pursuant to clauses 3.8(b) and 4.3(d) and referred to in paragraph (i)(II) above;
 - (k) be kept fully informed about the processes relating to the migration of agreements with landlords.
- 7.5 The Trustee Report shall assess the compliance or otherwise of PTI with the Proposals during the period since the date of the previous Trustee Report (or, in the case of the first Trustee Report, since the date of the Determination).
- 7.6 The Trustee's duties and functions as set out above shall not be extended or varied in any way by PTI, save with the express consent of the CCPC. Any instruction or request to the Trustee from PTI which conflicts with the terms of the Mandate, and the duties and functions as set out above, will be considered null and void.
- 7.7 The CCPC may, on its own initiative or at the request of the Trustee, give any orders or instructions to the Trustee that are required in order to ensure compliance with the conditions and obligations attached to the Determination so long as PTI is first given an opportunity to comment on any such orders or instructions in advance.
- 7.8 PTI acknowledges that the Trustee shall act on behalf of the CCPC and be under an obligation to the CCPC to carry out its functions to the best of its abilities and PTI

undertakes to comply with any written requests made by the CCPC for the purpose of ensuring the full and effective compliance by PTI with the Proposals.

- 7.9 PTI undertakes that it shall cooperate fully with the Trustee, and PTI shall ensure that the terms and conditions of appointment of the Trustee reflect and give effect to the duties and functions of the Trustee and the obligations of PTI set out in the Proposals.
- 7.10 PTI undertakes that it and each of its affiliates and its employees, officers, directors, advisers and consultants shall cooperate fully with the Trustee, in particular by providing the Trustee with all cooperation, assistance and information as the Trustee may reasonably require in order to discharge its functions, including but not limited to:
- (a) the provision of full and complete access to all personnel, books, records, documents, facilities and information of PTI's business as the Trustee may reasonably require; and
 - (b) the provision of such office and supporting facilities as the Trustee may reasonably require.
- 7.11 After nine (9) months have elapsed from the date of the Determination (or such longer period as may be allowed by the CCPC, acting reasonably), without PTI having entered into a binding contract for the disposal of the Divestiture Package to a Suitable Purchaser, the Trustee shall be given an irrevocable mandate to negotiate (in good faith) and conclude arrangements for the sale of the Divestiture Package and upon such terms and conditions and for such consideration as the Trustee, in its sole discretion, considers appropriate for an expedient sale, to a viable and independent third party (subject to both the CCPC having approved the purchaser as a Suitable Purchaser and, following entry into a binding contract for the sale of the Divestiture Package, the CCPC having verified that there has been no Material Change in the status of the purchaser, in accordance with clauses 5.1, 5.2, 5.3 and 5.5 above). For the avoidance of doubt, PTI shall not be obliged to remunerate the relevant purchaser in order to ensure the sale of the Divestiture

Package. In this context, all references in clauses 5.1, 5.2, 5.3 and 5.5 to “PTI” shall be substituted with “the Trustee”. The Trustee shall, however, have regard to the legitimate financial interests of PTI in respect of any such sale, subject to PTI’s unconditional obligation to divest the Divestiture Package at no minimum price.

- 7.12 Where the Trustee has signed a binding contract for the sale of the Divestiture Package, it shall provide a copy of the binding contract and all supporting documentation (including a copy of any heads of agreement or draft contracts prepared by PTI or the prospective purchaser) to the CCPC within three (3) Business Days of PTI’s signing of the binding contract.
- 7.13 The CCPC and PTI shall endeavour to ensure that the Trustee shall act reasonably and responsibly.

8. INTERIM POSITION OF THE DIVESTMENT SITES

- 8.1 Following the Determination and pending the sale of the Divestiture Package to a Suitable Purchaser, PTI undertakes to ringfence the Divestiture Package and to preserve the economic viability, marketability, and competitiveness of the Divestiture Package until the date of completion of the Share Sale in accordance with good commercial practice.
- 8.2 PTI shall implement verifiable measures to ensure that it does not obtain any competitively sensitive information relating to each of the Divestment Sites during the period from the date of the Determination until the date of completion of the sale of the Divestiture Package save, by agreement with the Trustee under the terms of the Mandate, where such information is required:
- (a) to ensure the efficient transfer of the Divestiture Package to Newco;
 - (b) for the operation of the Divestment Sites in accordance with good commercial practice and any transitional services agreement in place in relation to the Divestment Sites;

- (c) to enable compliance with legal or regulatory obligations by PTI in respect of the Divestment Sites; and
- (d) for the purpose of assisting the divestiture by PTI of the Divestiture Package to a prospective purchaser.

In this regard, it is recognised that engagement will be required by the Trustee with PTI on operational issues that are specific, limited and not competitively sensitive in order to preserve the economic value of the Divestiture Package.

- 8.3 Following the Determination and pending completion of the sale of the Divestiture Package, PTI undertakes not to carry out any act upon its own authority which may reasonably be expected to have a significant adverse impact on the economic value, the management, or the competitiveness of any of the Divestment Sites until the date of the completion of the sale of the Divestiture Package. Furthermore, PTI undertakes not to carry out upon its own authority any act which may be of such a nature as to alter the nature or the scope of activity, or the industrial or commercial strategy, or the investment policy of any of the Divestment Sites.
- 8.4 PTI further undertakes to appoint a manager for each or all or any combination of the Divestment Sites who shall be designated with responsibility for ensuring the Divestment Sites are operated in accordance with the Proposals (the “Hold Separate Manager”).
- 8.5 The Hold Separate Manager shall be responsible for ensuring that the Divestment Sites are operated in a manner that ensures their continued economic viability, marketability, and competitiveness. Further, subject to the terms herein, the Hold Separate Manager shall be responsible for ensuring that no competitively sensitive information relating to the Divestment Sites and their operation is provided to PTI during the period from the date of the Determination until the date of completion of the sale of the Divestiture Package, save with the agreement of the Trustee under the terms of the Mandate and where one of the reasons set out in clause 8.2(a)-(d) above is satisfied.

9. MISCELLANEOUS

- 9.1 PTI will provide the Trustee with all reasonable assistance and will procure (so far as it is able) that all relevant third parties provide such assistance required to ensure compliance with the Proposals. PTI will provide or cause to be provided to the Trustee all such assistance and information, including copies of all relevant documents accessible to PTI as the Trustee may require in carrying out the Mandate, and will pay reasonable remuneration for the Trustee's services.
- 9.2 In addition, at the expense of PTI, the Trustee may appoint advisors (in particular for corporate finance and/or legal advice). The appointment by the Trustees of advisors is subject to PTI's approval, such approval not to be unreasonably withheld or delayed, if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should PTI refuse to approve the advisors proposed by the Trustee, the CCPC may approve the appointment of such advisors instead, after first having received PTI's views in writing. Only the Trustee shall be entitled to issue instructions to the advisors.
- 9.3 Notwithstanding the Trustee's overall responsibility to discharge its functions and, in particular, notwithstanding the Trustee's position as an independent unrelated third party, the Trustee (who shall undertake in the Mandate to do so) shall have, to the extent possible given the nature of its tasks, due regard to the commercial interests of PTI. The Trustee shall have access on an unrestricted, working basis to the Hold Separate Manager in order to ensure compliance by PTI with the (i) Proposals and (ii) its obligations to maintain the financial and competitive viability of the Divestment Sites.
- 9.4 The Mandate shall be deemed to be discharged and the Trustee's appointment shall be deemed to be terminated if PTI and Cellnex announce that the Proposed Transaction has been irrevocably abandoned and pursuant to clause 3.14 have provided sufficient supporting evidence to the CCPC that this is the case.

10. REVIEW CLAUSE

- 10.1 The CCPC may at its sole discretion, acting reasonably, extend any of the time periods provided for in the Proposals in response to a reasoned request from PTI or the Trustee or, in appropriate cases, on its own initiative.
- 10.2 The CCPC may further, at its sole discretion waive, modify or substitute any provision in the Proposals in response to a reasoned request from PTI or the Trustee showing good cause or in appropriate cases and following consultation with PTI, on its own initiative acting reasonably (albeit that the CCPC cannot shorten the Divestiture Period).

Dated 5 February 2025

Signed for and on behalf of **Phoenix Tower International Holdco, LLC**

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TIM CULVER, Executive Chairman

APPENDIX 1

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Competition and
Consumer Protection
Commission

