



COMPETITION APPEAL TRIBUNAL

**NOTICE OF AN APPLICATION UNDER
SECTION 179 OF THE ENTERPRISE ACT 2002**

CASE NO. 1593/6/12/23

Pursuant to rules 14 and 26 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (“the Rules”), the Registrar gives notice of the receipt on 5 June 2023 of an application for review under section 179 of the Enterprise Act 2002 (the “Act”) by (1) Airwave Solutions Limited (2) Motorola Solutions UK Limited, and (3) Motorola Solutions, Inc., (together “Motorola”). Motorola applies for review of the decision set out in the Competition and Markets Authority’s (“CMA”) Final Report on “Mobile radio network services” dated 5 April 2023 (“Decision”). Motorola is represented by Winston & Strawn London LLP, 1 Ropemaker Street, London, EC2Y 9AW (reference: Peter Crowther) and Slaughter and May, One Bunhill Row, London, EC1Y 1YY (reference: Claire Jeffs).

The Decision concerns the supply of communications network services for emergency personnel via the “Airwave network” by Airwave Solutions Limited (“ASL”), a subsidiary of Motorola Solutions, Inc. It determines that there are features of the relevant market which cause an “adverse effect on competition” (“AEC”) within the meaning of section 134 of the Act and imposes a charge control remedy that will reduce the price payable by the Government for the services significantly below the contractually agreed price.

According to the Notice of Application, the Airwave network is a critical national service, which is used by all police, fire, and ambulance services in the UK. It enables more than 300,000 emergency personnel to communicate securely and is important for national security.

The Airwave network was commissioned by the Home Office in 2000 under a Private Finance Initiative framework arrangement (“PFI Framework”). The contract was won by British Telecommunications plc (“BT”) which set up ASL to design, build, finance, own and operate the network. In 2007 ASL was sold as a standalone business to Macquarie Communications Infrastructure Group (“Macquarie”).

Between April 2014 and September 2015, the Home Office ran a procurement process for the establishment of the Emergency Services Network (“ESN”) to replace the Airwave network. ESN was intended to facilitate greater data transfer and to use a commercial mobile network for most communications (unlike Airwave which is a dedicated network). On 8 December 2015, the mobile network operator EE was awarded the main contract to establish the network infrastructure and Motorola was awarded a contract for “User Services” (although the latter contract was terminated in 2022). The Home Office hoped that ESN would replace the Airwave network by approximately 2020.

Also, during 2015, Motorola negotiated with Macquarie to purchase ASL. A sale and purchase agreement was concluded on 3 December 2015. Pursuant to the PFI Framework, the Home Office’s consent was required for the transaction. It was also reviewed and cleared by the CMA under the Act, having taken into account the views of the Home Office. As part of the acquisition, Motorola and the Home Office entered into a number of agreements executed on 17 February 2016, which included an agreement that the Airwave service would continue to be provided at a fixed price under the PFI Framework until such time as the Home Office served notice to terminate.

Many aspects of the ESN project have fallen behind the Home Office's desired timetable. On 20 December 2021, the Home Office exercised its right under the PFI Framework to specify the National Shut Down Target Date of the Airwave service as 31 December 2026, with the effect that the service would be provided until that date at the contractually agreed prices.

On 14 April 2021, the Home Office, at the request of the Cabinet Office, wrote to the CMA expressing concerns about the profits achieved by the Airwave network.

On 25 October 2021, the CMA initiated a market investigation reference under section 131 of the Act.

By the Decision the CMA determined that:

- (a) The relevant market is the supply of communications network services for public safety and ancillary services in Great Britain. This encompasses the Airwave network and ESN.
- (b) Competitive constraints on suppliers in this market typically arise through "competition for the market". In a well-functioning market, the CMA would expect one set of competitive arrangements to be replaced by another when long-term contracts come to an end, e.g. through a tendering (or re-tendering) process. However, the terms on which the Airwave network is provided from 2020 are set in bilateral negotiations between ASL and the Home Office in which the CMA considers that the Home Office has no credible alternative option for its choice of supplier. Key reasons include that ESN is taking considerably longer to implement than was contemplated.
- (c) Against that background, there are "features" of the relevant market which cause an AEC within the meaning of section 134 of the Act. The first "feature" refers to the importance of the Airwave network. The second is that it must be provided by a monopolist pursuant to a long-term contract. The third is that the Home Office has not exercised its right under the PFI Framework to take over the Airwave assets and "their retendering is not a credible option" (principally because the Home Office wants to replace the Airwave network with ESN). The fourth is that ESN "is taking much longer than anticipated to deliver". The fifth and sixth are that the Home Office is "locked-in" with Motorola and "has very weak bargaining power". The seventh is that "[t]here is asymmetry of information between the parties". The eighth is the "lack of effective constraints provided by the terms of the PFI Agreement on the price of the provision of the network after 2019".

Those features are (in the CMA's view) enabling Motorola to make supernormal profits in respect of the Airwave network. The CMA thought it was appropriate to impose a charge control remedy in respect of the Airwave network until 2029. This will reduce prices significantly below the contractually agreed prices. In addition, the CMA recommended to the Home Office that it should develop a plan to ensure that by no later than 2029 the supply of services in the relevant market is subject to competitive pricing arrangements.

Motorola challenges the Decision on the following two grounds.

Ground 1: The CMA's finding that there are features of the market that cause an AEC is based on a fundamental error of approach.

In the market as defined by the CMA, there has been "competition for the market". In the first place, there was a public tender in 2000 resulting in the PFI Framework. In the second place, there was a public tender in 2014 to 2015 for the ESN network which is intended to replace the Airwave network. There has therefore been competition for the market in respect of the entirety of the period considered

by the market investigation. This is entirely consistent with the CMA's expectations as to what constitutes a "well-functioning market".

The issue identified and addressed in the Decision arises because the Home Office underestimated the time needed to deliver ESN. It is not the result of any market failure or failure of competition. It is solely the result of what has turned out to be a misjudgement made by the Home Office in the context of what the CMA accepts was an undistorted competitive process in 2014 to 2015.

As the issue identified in the Decision is not a failure of competition, but rather a misjudgement by the Home Office, it follows that competition has not been distorted within the meaning of section 134(1). Sections 131 and 134 exist to allow the CMA to intervene where features in a market prevent, restrict or distort competition. They do not allow the CMA to intervene simply to re-open something that turns out to be a bad bargain.

Ground 2: The CMA relies on the profitability analysis in section 6 of the Decision in reaching its conclusions on both the existence of an AEC and on its proposed remedy. That profitability analysis is unlawful because the CMA's valuation of the assets employed by Airwave: is not consistent with the economic methodology that the Decision purported to prefer; fails to take account of a material consideration; and/or is internally inconsistent with other fundamental reasoning in the Decision.

As regards the relief sought, Motorola seeks:

1. An Order that the Decision is quashed and remitted to the CMA.
2. An Order that Motorola is entitled to payment of its costs.
3. Such other relief as the Tribunal may consider appropriate.

Any person who considers that they have sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings in accordance with rule 16 of the Rules.

Please note that: (i) a direction of the President is currently in place as to the electronic filing of documents (see paragraph 2 of the Practice Direction relating to Covid-19 published on 20 March 2020); and (ii) any request for permission to intervene should be sent to the Registrar electronically, by email to registry@catribunal.org.uk, so that it is received within three weeks of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at Salisbury Square House, 8 Salisbury Square, London EC4Y 8AP, or by telephone (020 7979 7979) or email (registry@catribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, KC (Hon)

Registrar

Published 28 June 2023