



Neutral citation [2023] CAT 45

Case No: 1593/6/12/23

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

7 July 2023

Before:

Bridget Lucas KC
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

- (1) AIRWAVE SOLUTIONS LIMITED**
(2) MOTOROLA SOLUTIONS UK LIMITED
(3) MOTOROLA SOLUTIONS, INC.

Applicants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Applicant to Intervene

Heard at Salisbury Square House on 29 June 2023

RULING

APPEARANCES

Mark Hoskins KC (instructed by Winston & Strawn London LLP) appeared on behalf of the Applicants.

Josh Holmes KC (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

Anneli Howard KC and Jack Williams (instructed by TLT LLP) appeared on behalf of the Applicant to Intervene.

A. BACKGROUND

1. On 25 October 2021, the Competition and Markets Authority (“CMA”), exercising its powers under sections 131 and 133 of the Enterprise Act 2002 (the “2002 Act”), made a reference for a market investigation into the supply of communications network services for emergency personnel through what is known as the “Airwave network”. The Airwave network is provided by Airwave Solutions Limited (“ASL”), a subsidiary of Motorola Solutions, Inc (“Motorola Inc”). On 5 April 2023, the CMA published its final report (the “Decision”). In very brief summary, the Decision determined that there are features of the relevant market which cause an “adverse effect on competition” (“AEC”) within the meaning of section 134 of the 2002 Act, and that there is a detrimental effect in that Motorola is able to make supernormal profits in respect of the charges it makes for the Airwave network and services provided. The CMA’s Decision imposes a charge control remedy that will reduce the price payable by the Home Office, and recommends that the Home Office 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.
2. On 5 June 2023, ASL, Motorola Solutions UK Limited, and Motorola Inc (together, “Motorola”) issued an application under section 179 of the 2002 Act for a review of the Decision by the Tribunal on two grounds. First, Motorola maintains that the CMA’s finding that there are features of the market that cause an AEC was based on a fundamental error of approach, and secondly, Motorola challenges the profitability analysis on which the CMA’s conclusions both as to the existence of an AEC and as to its proposed remedy were based.
3. The parties were unanimously of the view that the hearing of the application ought to be expedited. The case management conference (“CMC”) was listed for 29 June 2023. Notice of the CMC was provided to the Home Office, given that it had been identified as a potential applicant for permission to intervene. The Home Office is the main contracting party with Motorola and the primary customer for the supply of the Airwave network.

B. APPLICATION FOR PERMISSION TO INTERVENE

4. On 23 June 2023, the Home Office provided notice of its application for permission to intervene which set out the grounds relied upon. The application was accompanied by a witness statement of Mr Simon Parr, the Senior Responsible Owner, employed by the Home Office. Pursuant to Competition Appeal Tribunal Rules 2015 (“CAT Rules”) Rule 14(2), a summary of the application was published on the Tribunal’s website on 28 June 2023 and that contains the usual statement indicating that any person with sufficient interest may apply to intervene in the proceedings within three weeks of publication of the summary. The Home Office’s application was helpfully prepared at short notice with a view to it being determined at the CMC on 29 June 2023 if at all possible. Any other notice of intervention will be due by 19 July 2023 and, given that the hearing of the Motorola’s application has been listed for two days on 2 and 3 August 2023, will be dealt with promptly so as not to disrupt that timetable.
5. At the CMC, I granted the Home Office’s application to intervene, on the basis that its submissions (written and oral) should be non-duplicative of those made by the CMA. I indicated that I would provide my reasons after the hearing. This Ruling sets out my reasoning.

C. GOVERNING PRINCIPLES

6. Rule 16(1) of the CAT Rules provides that “any person with sufficient interest in the outcome may make a request to the Tribunal for permission to intervene in the proceedings”. Rule 16(6) provides that if the Tribunal is satisfied, having taken into account the observations of the parties, that the intervening party has a sufficient interest, it may permit the intervention on such terms and conditions as it thinks fit. As the Competition Appeal Tribunal Guide to Proceedings 2015 makes clear, there is a two-stage test: first, the applicant must show “a sufficient interest” in the outcome of the proceedings; and secondly, if such an interest is shown, the Tribunal has a discretion as to whether to permit an intervention and if so, on what terms. In exercising its discretion, the Tribunal will have regard to the “Governing Principles” in rule 4 of the CAT Rules, principally with a

view to dealing with the case justly, expeditiously and fairly and at proportionate cost.

7. As regards the first stage, I am reminded by Ms Howard KC for the Home Office that (1) a party is likely to have sufficient interest where it has participated in the administrative procedure (see *Albion Water v DGWS* [2004] CAT 19 at [67]); and (2) sufficient interest may also be presumed if the applicant for judicial review has served its application on the prospective intervener (see *BT v DGT* [2003] CAT 20 at [5] to [6]).
8. As regards the second stage, Ms Howard also drew my attention to the authorities which, in summary, provide that interventions will be permitted where the Tribunal is satisfied that the proposed intervener would provide material “added value” to the issues in the case (see *B&M European Value Retail v CMA* [2019] CAT 8; *Sabre Corp v CMA* [2020] CAT 16), and that the Tribunal will be mindful of the need to keep the scope of the proceedings and costs within reasonable bounds and to avoid complexity or expense (See *Flynn Pharma Ltd and Pfizer Inc v CMA* [2019] CAT 2 at [15]; *Gutmann (Trains)* [2023] CAT 23 at [7]).

D. DECISION

9. On 16 May 2023, Slaughter and May on behalf of Motorola wrote to the Tribunal noting its intention to make an application for review under s. 179 of the Act. That letter was copied to the Home Office, with Slaughter and May noting at paragraph 5 that Motorola was “aware that the Home Office... may be interested in the proceedings”; and Motorola provided the Notice of Application to the Home Office on 7 June 2023. Before me, the parties agreed that the first limb was satisfied, and that the Home Office has a sufficient interest in the outcome of Motorola’s application. That must be right. In summary:
 - (1) The Home Office is the main contracting party with Motorola and the primary customer for the Airwave network for emergency services, and it has a significant direct (and indirect) financial interest in the outcome of the proceedings, and in any delay to the implementation of the charge

control, which seeks to address the potential overcharge of £200 million found by the CMA.

- (2) The Home Office made the initial complaint that led to the CMA's investigation and, ultimately, the Decision. It was also the main active third party in the CMA's investigation. It was involved significantly in those investigations, providing significant factual and economic input.
- (3) The Home Office has an ongoing role in overseeing the effective rollout of the ESN and in ensuring the smooth transition of users from the Airwave network to the ESN. I am told that any uncertainties regarding the imposition of the charge control or the CMA's intended review in 2026 and/or delays caused by these proceedings (and any appeals), whether brought by Motorola or the CMA, could prolong use of the Airwave network at higher rates for longer and delay the technological benefits and cost savings to users (and the public) of the ESN. I am also told that it could affect the ability of the Home Office to ensure the ESN is competitively procured on an ongoing basis after 2029.

10. In the circumstances, it seems to me that the first limb is plainly satisfied. The Home Office made two further points in relation to the first limb which I consider are more properly considered as part of the second limb, and the exercise of my discretion:

- (1) First, I am told that the Home Office is uniquely placed to efficiently communicate with the other "Shared Users" (of which there are over 1,800, including, for example, various central Government Departments, including the Department of Health, and Ministry of Defence, blue light police, ambulance and fire services, local councils, coastguard and mountain rescue services) who were not active parties in the CMA's market investigation and are unlikely to be represented before the Tribunal even though they will be impacted by the outcome of the proceedings.

- (2) Secondly, the Home Office considers that Motorola's challenge calls the CMA's factual findings and inferences into question and, in doing so, casts aspersions about the Home Office's conduct and understanding in relation to its procurement of both the Airwave network and the ESN. The Home Office suggests that it is uniquely well-placed to assist the Tribunal on the specific matters directly concerning it, its past conduct, and its beliefs/understandings.
11. Motorola, in its response, raised concerns in relation to the latter point, and the possibility of opening up factual disputes between Motorola and the Home Office that would be inappropriate in the context of judicial review proceedings. Motorola also submitted that the Home Office had not identified any other points on which the CMA would not be well placed to defend its own Decision.
12. In its submissions, and specifically in Ms Howard's oral submissions, the Home Office emphasised that it is mindful that, as judicial review proceedings, the Tribunal's consideration of the Decision will be limited to the evidence available to the CMA at the time it was made. Ms Howard confirmed that it was only if Motorola were to adduce new evidence not canvassed before the CMA at that time, and which implicated the Home Office, that there might be any need for the Home Office to respond. Its present intention is to proceed on the basis of the Decision, and the CMA's assessment of the arguments made to it.
13. A further issue raised by Motorola was the issue of costs. As to that, Ms Howard informed me that the Home Office's assumption was that the ordinary rules would apply: that is to say that as an intervener, the Home Office would bear its own costs.
14. Having heard the Home Office's submissions on Motorola's two points of principle, its Counsel, Mr Hoskins KC, confirmed that the Home Office's application to intervene was not opposed.
15. Ms Howard also confirmed that the intention was for the Home Office to liaise with the CMA so as to avoid duplication in written and oral submissions, and any complexity that might otherwise arise from its involvement. All parties

agree that the original two day time estimate remains appropriate, even if permission was granted for the Home Office's intervention.

16. I am therefore satisfied that I should exercise my discretion and grant the Home Office's application on the basis that it will liaise with the CMA, and that its written and oral submissions will be non-duplicative of those made by the CMA. With that in mind, at the CMC I directed that the Statement of Intervention should be served after the CMA's Defence: again, so as to avoid any unnecessary duplication.

Bridget Lucas KC
Chair

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 7 July 2023