



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPLICATION UNDER SECTION 179 OF THE ENTERPRISE ACT 2002

Case No: 1428/6/12/21

Pursuant to rules 14(2), 25 and 26 of the Competition Appeal Tribunal Rules 2015 (S.I. No. 1648 of 2015) (“the Rules”) the Registrar gives notice of the receipt on 22 December 2021 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 of the Competition and Markets Authority (“CMA”) to make a market investigation reference (“MIR”) under section 131 of the Act into the supply of land mobile radio (“LMR”) network services for public safety in Great Britain contained in a report published by the CMA on 25 October 2021 entitled *Mobile radio network for the police and emergency services: Final report and decision on a market investigation reference* (“the MIR Decision”). Motorola is represented by Winston & Strawn London LLP of CityPoint, One Ropemaker Street, London, EC2Y 9AW (reference: Peter Crowther).

Motorola is the owner and operator of the Airwave network which is a private mobile radio communications network currently used by all police, fire, and ambulance services in the UK to communicate securely. The Airwave network uses LMR technology and was commissioned by the Home Office in 2000 under a Private Finance Initiative framework arrangement (the “PFI Framework”).

As stated in the Notice of Application (“NoA”), the Home Office intends to replace the Airwave network with a new Emergency Services Network (“ESN”) which would use a commercial mobile network for most communications (unlike Airwave which is a dedicated network). In 2014, the Home Office ran a procurement process for the establishment of ESN and awarded the largest contract to mobile network provider EE in 2015. Motorola Solutions UK Limited also won a contract for the delivery of ESN. In 2016, Motorola Solutions, Inc. acquired Airwave Solutions Limited, a transaction which was investigated and cleared by the CMA.

According to the NoA, ESN is not yet operational having been the subject of delays. The Airwave network continues to provide the secure communications platform for emergency services communications. On 14 April 2021, the Home Office expressed concerns to the CMA about the profits achieved by the Airwave network (referred to at paragraph 1.6 of the MIR Decision). On 8 July 2021, the CMA announced its intention to consult on whether to launch a market investigation into the Airwave network. The CMA’s consultation concluded on 2 September 2021. Following the consultation, on 25 October 2021 the CMA published its MIR Decision. The CMA concluded, at paragraph 8 of the MIR Decision, that there are reasonable grounds to suspect that one or more features of the market for the supply of LMR network services in Great Britain are preventing, restricting or distorting competition. The CMA’s reasons for its conclusion are summarised at paragraphs 6 and 7 of the MIR Decision.

In summary, Motorola advances three grounds of review in respect of the MIR Decision, which are as follows:

1. Ground 1: The CMA has failed to understand and/or take into account the contractual agreement(s) and failed to assess relevant matters. In particular, Motorola contends that the CMA proceeded on the basis of a flawed understanding of the contractual position between Motorola and the Home Office, in that the CMA wrongly stated that there was a “need” to “agree” an extension to the contract in order for the Airwave service to be continued beyond 2022. Further, Motorola alleges that the CMA has failed to understand that the contract: (i) grants the Home Office a unilateral right to vary the date at which the Airwave network will be shut down (and to require Motorola to provide the services until that date); (ii) provides for the default prices payable for the remaining life of the Airwave network; and (iii) contains benchmarking provisions. Motorola further contends that the

CMA failed to assess the respective bargaining power of the parties in 2016 when the current default pricing was agreed.

2. Ground 2: The CMA's approach to the investment rate of return ("IRR") under the contract is irrational and/or fails to have regard to relevant considerations. In particular, Motorola contends that (i) the CMA purported to analyse IRR in the period 2020 to 2026 on the basis of the Net Book Value of the relevant assets in 2020. Motorola contends that this is irrational and contrary to established literature; and (ii) the MIR Decision makes no proper attempt to engage with the parties informed contractual decisions on the allocation of risk and/or to consider whether the IRR over the lifetime of the contract is reasonable.
3. Ground 3: Motorola contends that the CMA has adopted an irrational approach to the Airwave network "market" and ESN as an alleged "feature" of that market. The so-called "market" was created by an exclusive and long-term contract that sets prices. Furthermore, it does not make sense to justify intervention on the grounds that the market is "*extremely concentrated*" as this logic could apply to any bespoke service delivered on a long-term contract. It is unreasonable to treat delivery of the ESN network as a "*feature*" of the Airwave network "*market*". Motorola submits that ESN is not a competing alternative to the Airwave network. Users will migrate from Airwave to ESN only when ESN becomes fully operational, at which point the Airwave network will be shut down and shall cease to exist.

Motorola states that the grounds summarised above concern clear and fatal flaws in the MIR Decision.

In the alternative, Motorola challenges, by way of review under section 179 of the 2002 Act, the CMA's decision as to the timetable for the market investigation communicated to it on 1 November 2021 by the CMA ("the Administrative Timetable Decision"), on the grounds that the process by which the timetable was determined was unfair, the timetable is unfair, and the CMA's decision on the timetable was unreasoned.

As regards the relief sought, Motorola seeks:

- a) An order that the MIR Decision is quashed and remitted to the CMA to take a new decision;
- b) Alternatively, an order that the Administrative Timetable Decision is quashed and remitted to the CMA for reconsideration;
- c) Costs; and
- d) Such other relief as the Tribunal considers 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 telephone (020 7979 7979) or email (registry@catribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar

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