



Mobile Radio Network Services Market Investigation

Motorola's Response to the CMA's Working Paper on Potential Remedies

30 May 2022

- (1) Motorola welcomes the opportunity to comment on the CMA's Working Paper on "LMR Network Services Market Investigation: Potential Remedies". Motorola is extremely concerned that the CMA's intervention along the lines envisaged in the Potential Remedies Working Paper would turn out to have been the most profound mistake a competition authority could possibly make.
- (2) Based on the Potential Remedies Working Paper, the CMA's choice is essentially between the known outcome of the present Airwave contract, which continues to deliver an impeccable service at excellent value for money, and the potentially disastrous outcome of amending the final years of the contract with a charge control regime. The latter choice would hardly affect the lifetime IRR to Airwave but would dramatically alter the operation of the service for its final years.
- (3) Before the CMA concludes that it knows better than the parties what the "right" level of prices should have been, the CMA is urged to examine with the utmost care whether it is willing to embrace the expected consequences for the Airwave service of an ESN-style economic structure. It is clear that whatever might appear to have been appropriate on paper clearly did not work in the case of ESN. At the same time, the CMA has found no fault with the Airwave service, and indeed Airwave continues to be the "failsafe" network for the emergency services, used on a 24/7/365 basis, for genuinely life-saving purposes.
- (4) If the CMA were to intervene in the manner envisaged in the Remedies Working Paper, the greatest mistake would be to assume that the most significant challenge of a charge control regime is one of technical implementation. Those practical issues are of course real and it is, respectfully, perfectly obvious that it would be grossly disproportionate to design, implement, and enforce a regulatory charge control regime on a single contract for the remaining 3 years of its 26 year life. The real problem, however, is that the imposition of such a regime will put at risk service quality and ultimately lives.
- (5) As proposed, the Airwave service would be provided under fundamentally different conditions, which may leave the users in a worse position than if the contract had been left in place. For example, it would be highly regrettable if Motorola were unable to concentrate on making necessary mission-critical network changes no matter the cost, and to have to engage in a pre-approval process with the Home Office. Motorola's experience from ESN is such that Motorola could not undertake critical investments "on risk" in the hope that the Home Office might at some point agree to cover the costs. In that scenario, which is eminently foreseeable, the CMA's intervention could literally cost lives by taking key operational decisions out of the hands of Airwave and putting them in the hands of the Home Office. It should be emphasised that this risk is very real: Motorola has already supplied evidence of the Home Office requiring additional work to be done without commercial cover and refusing to make payments.
- (6) It bears repeating that Airwave continues to operate only because of the *delay of ESN, which the CMA entirely ignores in its market investigation except for looking at one aspect at the request of the Home Office, namely Motorola's dual role*, which is alleged to be one feature of the market that might prevent it from working well. The CMA has steadfastly refused to investigate ESN properly, maintaining a focus solely on Motorola despite:
 - (i) the CMA having indicated at the end of its market investigation process, that it intends to define the relevant market to include ESN;
 - (ii) Motorola having repeatedly requested that ESN be investigated properly; and

- (iii) the National Audit Office having undertaken extensive analysis of ESN and finding that the Home Office (as well as other companies) and not Motorola were responsible for ESN delays.
- (7) As a matter of fact, the CMA refused until very late in the market investigation process even to hear Motorola on the subject of ESN delay, and continues to express no interest in getting to the bottom of the reason why Airwave is still needed. Even more, the CMA appears to adopt, without any comment, the Home Office's view that Airwave – and thus a potential remedy – might be needed beyond 2026 and take at face value the Home Office's position that it would be entitled simply to require further extensions beyond those applying to Delayed Transition Groups. The CMA, inexplicably, continues to refuse to investigate why the delivery of ESN does not appear to be working well.
- (8) Motorola strongly believes that, to the extent that any of the potential remedies appear in the provisional decision, this will simply be confirmation that:
 - (i) the CMA has not conducted a fair and complete market investigation;
 - (ii) the CMA continues to rely on unsound economic analysis;
 - (iii) the CMA continues to ignore the actual operation of the market and decisions made by the Home Office, preferring instead to air vacuous theories about how competition within a contract might have worked; and
 - (iv) the market investigation has been aimed squarely at retrospectively re-writing the agreed terms of the Airwave contract for the benefit of the UK government.
- (9) Motorola notes that the potential remedies are overwhelmingly aimed at reducing the price that the Home Office would pay for the final few years of the Airwave service, and Motorola has focused its comments accordingly. The CMA should make no inference from Motorola's failure to address any points in the CMA's Potential Remedies Working Paper, the premise for which Motorola rejects in its entirety.
- (10) To place Motorola's comments on the Potential Remedies Working Paper in their correct context, the CMA has provided no remotely robust or reliable evidence that could justify the imposition of a charge control. Specifically, the CMA has not demonstrated to the requisite standard that Airwave is making excessive profits, particularly against the overwhelming evidence to the contrary supplied by Motorola, both over the entire Airwave contract period as well as over the CMA's so-called 'extension period' which Motorola continues to reject as absurd since this was never a period that was contracted for.
- (11) As demonstrated by Motorola, the CMA has made selective and distorted use of evidence to try to support a theory of excess profitability. This will not bear independent review. Specifically, the CMA has fabricated numbers suggestive of excess profitability by:
 - (v) arbitrarily splitting the contract into a PFI period and a so-called extension period, which was a period that was never bargained for by the parties;
 - (vi) adopting an unsustainable approach to valuing Airwave's assets at the beginning of the so-called extension period that makes no economic sense;
 - (vii) unjustified adjustment of costs.

For this reason, the mooted charge control would be *per se* disproportionate.

- (12) Even so, the CMA has acknowledged many practical problems that would be encountered in the implementation of any hypothetical charge control – problems that had been raised by Motorola early on – which further support the view that a charge control is disproportionate. Specifically, the CMA has acknowledged two key risks whose existence it ignores, if not denies in its other working papers, namely uncertainty over the investments required to keep the Airwave network operational and uncertainty over the duration for which the Airwave service would be required (which in Motorola’s view no longer exists, but which was a key risk at the point at which the Home Office obtained the unilateral right to require extensions to the service). Inexplicably, however, the CMA’s only concern with regard to these risks is a fear that a potential charge cap might be set at too high a level, completely ignoring the possibility that the cap might be set too tight, which would put at risk the necessary investments in the network. This is further evidence, if any more were needed, of the biased and analytically fundamentally inconsistent nature of this investigation whose sole purpose appears to be to support the Home Office’s unilateral request for lower prices, overriding contractual terms that have been agreed between the parties.
- (13) By way of example, [§]. The risk associated with this type of eventuality is already allocated in the Airwave contract, to the effect that Motorola simply has to “get it done” no matter the cost. The imposition of a charge control will fundamentally change this allocation of risk which has worked extremely well in the past and would continue to work well for the remainder of the contract period absent intervention.
- (14) Despite the protestations of the CMA, Motorola (and likely other prospective contractors) would regard the imposition of a charge control as a blatant attempt by the UK government to draw in regulatory powers to rewrite the terms of a contract to which it has agreed. This is deeply objectionable and – no matter what the CMA claims – will in fact severely undermine trust in the UK government as a contracting partner.
- (15) Motorola’s history of negotiations with the Home Office shows clearly that Motorola has consistently tried to accommodate reasonable requests from the Home Office. For example, when in 2018 the Home Office requested a long-term Airwave proposal with [§] opportunities, Motorola obliged. As a matter of fact, if the Home Office had chosen that option, it would have saved approximately GBP [§] million, leaving aside indexation. Yet the CMA has consistently refused to acknowledge even the existence of this 2018 offer with the opportunity for the Home Office to [§]. No pricing remedy can ever be proportionate when the underlying assessment giving rise to the remedy ignores contractual choices that were *in fact* made and which, *if made differently*, would have led to a better outcome for the customer.
- (16) Motorola is always willing to discuss improvements to terms for its customers, including the Home Office, but it is hopeless to suppose that such discussions could successfully take place against the spectre of a price control remedy or even divestiture, no matter how unlikely that threat may appear when exposed to rational assessment. It is for this reason that a ‘backstop’ remedy of a charge control would fail: Motorola could not be reasonably be expected to invest faithfully in the possibility of accomplishing a successful re-negotiation of terms when the other party is (a) the UK government in the guise of the Home Office which has consistently shown itself to be extremely difficult to deal with; and (b) the UK government has the competition authority hovering in the background with the threat of an entirely draconian remedy at its disposal.
- (17) Recognising that 31 December 2026 represents the contractually determined end of the Airwave service, Motorola has already indicated that a proportionate remedy, if one were to

be required, would be a backstop that applies after 2026 if the Home Office wanted to continue with Airwave and the parties could not reach agreement. There are simple reasons for this suggestion, which meets all the requirements of proportionality: first, the parties already have binding contractual arrangements until the end of 2026; second, the parties are free to negotiate whatever arrangement best suits them after 2026; and third, if they cannot agree terms they are happy with, a suitable charge control mechanism or other mechanism for agreeing a price provides a potential solution.

- (18) In truth, the assessment of single company pricing is not a suitable subject for a market investigation, as the CMA's own guidance recognises. This is especially the case for services provided under a long-term contract, since the market investigation while supposedly forwardly looking must – in the context of an ongoing contract – essentially amount to an *ex post* analysis. This market investigation should never have happened for reasons clearly set out by Motorola in its response to the consultation. Unfortunately, the CMA has ignored these observations, perhaps because this relates to a Government contract as the occasional reference to harm suffered by the taxpayer suggests (no other explanation has been offered and there is no precedent to offer any insights). Of course, the correct competition law intervention for single company excessive pricing is a Chapter II Competition Act 1998 investigation. There is however no reasonable basis for such an investigation, just as there is really no market failure justifying the imposition of any remedy prior to the expiry of the contract in December 2026.
- (19) Ultimately, Motorola strongly believes that the Home Office should be celebrating, and the CMA should be endorsing, the successful procurement of Airwave that has delivered a reliable service on time and consistently throughout, at a cost that has conclusively been shown to have been extremely good value for the British taxpayer over its lifetime. The CMA will interfere with this contract at its peril.