



**The Home Office (HO) – CMA Consultation Response relating to Motorola’s relationship with Airwave and The Emergency Services Network programme**

**Mobile radio network for the police and emergency services: Consultation response on the CMA’s proposal to make a market investigation reference**

The Competition and Markets Authority (**CMA**) has invited representations from interested parties on its proposal to make a Market Investigation Reference (**MIR**) in respect of the secure private mobile radio communications network for organisations involved in public safety in Great Britain (**the Airwave network**).

The HO has a clear interest in the CMA’s proposal. This is because many authorities, agencies and organisations providing these critically important services - and which rely on the Airwave network to do so - come within its remit. The HO is, to all intents and purposes, the main and primary customer of the Airwave network.

The purpose of this response is to reiterate the HO’s support for a MIR and, alongside other interested parties, to provide relevant information to the CMA to assist the CMA in deciding to make the MIR.

**The reference test**

The CMA’s provisional view is that the reference test is met; in other words, that there are reasonable grounds for suspecting that one or more features, alone or in combination, prevent, restrict or distort competition in a market or markets (in this case, the supply of the Airwave network and ancillary services) in Great Britain.<sup>1</sup>

The market described by the CMA in the consultation is an important one, both in terms of the distinct and essential nature of the services being provided, which are vital to public safety functions, as well as their cost, which is substantial (as explained clearly in the CMA’s consultation document). In other words, the HO would agree that the importance of the market and scale of the potential problems appear significant. Moreover, the nature of the relevant problems may be such that they can be remedied effectively, if alternative solutions cannot be found, through the application by the CMA of its market investigation powers.

More generally, unless an alternative solution can be found promptly to mitigate the potential burden on the British taxpayer and ensure a swift and predictable transition to the improved ESN solution - and the HO remains willing to cooperate in this respect - a MIR is an appropriate step. In such circumstances, the HO considers that the reference test would be met.

With the above considerations in mind, the CMA has invited responses to the following six questions. The HO’s response is set out under each question below.

**Do you consider that the CMA’s analysis is correct with respect to the suspected features of concern in the supply of the Airwave network (and ancillary services) in Great Britain?**

The HO considers that the CMA’s analysis with respect to the suspected features of concern is correct although there may be other features that the CMA may wish to consider further and/or incorporate. Such features include, but are not limited to:

- [redacted]; and

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<sup>1</sup> The HO notes that the CMA is not obliged to provide a precise definition of the market or markets to which any proposed MIR relates.



- the proprietary interworking arrangements that Motorola have put in place to enable communication between the Airwave network and the new ESN.

It is possible that these other features, while not expressly mentioned in the consultation, fall under the suspected features of concern already highlighted and it is also possible that the remedies identified by the CMA would ameliorate risk relating to these features too. However, the HO considers it appropriate to raise them at this stage for completeness to ensure the CMA has as comprehensive a picture as possible for the purposes of any preliminary evaluation.

**Do you consider that the CMA's analysis is correct with respect to the reference test being met in relation to the supply of the Airwave network (and ancillary services) in Great Britain?**

The HO agrees that, as matters stand, the CMA's analysis is correct with respect to the reference test being met in relation to the supply of the Airwave network (and ancillary services) in Great Britain.

The HO also agrees that adverse effects on competition resulting from the features that the CMA has identified in its proposal, would, if not remedied, persist and lead to significant customer harm, particularly in the context of a further extension to 2026, or beyond.

Indeed, as indicated already, at the time of Motorola's acquisition of Airwave Solutions, it was expected that the Airwave network would shut down (following customer transition to ESN) in 2019. This has not occurred and, without remedy, the Airwave network is likely to continue in operation, delaying the transition to a better solution, ESN, until at least 2026.

While the HO would never dismiss the prospect of Motorola proposing a solution pre-emptively to alleviate the need for a MIR, the present contract has already had to be extended by several years. In view of its remit, the HO considers that the CMA is well-placed to evaluate the relevant features of the market, and that – as already explained in the consultation document – the MIR mechanism is an appropriate and proportionate means of identifying and remedying the potential anomaly or incentive for Motorola to maintain the present contract in situ and correcting the features giving rise to potential adverse effects on competition.

The HO also agrees that the broad remit the CMA has under its market investigation powers make it better placed than a sectoral regulator (i.e. Ofcom) to assess not just Airwave Solutions' current conduct within the market in which it operates, but also the potential significance of Motorola's interest in the ESN – which the HO considers merits closer scrutiny. To the extent that the CMA may require additional expertise, of the type held by sectoral regulators such as Ofcom, we note that secondments can be provided.

**Do you agree with the CMA's proposal to exercise its discretion to make a reference in relation to the supply of the Airwave network (and ancillary services) in Great Britain?**

The HO agrees that the CMA is well placed to evaluate the features of the relevant market independently and to exercise its discretion to make a reference on the matter. The unique position of, and information available to, the CMA allows the best possible judgement on the relevant market conditions and the impact for customers. The constraints of the HO contract with Motorola / Airwave Solutions, and their refusal to provide information, currently denies the HO the necessary transparency to evaluate and challenge properly the harm that the HO considers has arisen from the unexpected prolongation of the contract. The CMA's position and powers on the other hand, and the enhanced visibility that this offers the CMA in respect of Airwave Solutions and Motorola's financial position, should allow the CMA to consider and address any distortive features within the scope of any reference.

As far as the scale of the suspected problems are concerned, the HO notes both the importance of the market and the proportion of the market likely to be affected by the features in question. Both are substantial, which should justify the effort required for the reference activity in question.

The HO considers that the data reported in the consultation paper is accurate and relevant to the decision, and that this would suggest that both of the above considerations are met, not least as



Motorola occupies a monopoly situation and, without remedy, the harm that is likely to arise from this situation may persist even beyond 2026.

**Do you consider the proposed scope of the reference, as set out in the draft terms of the reference in Appendix C would be sufficient to enable any adverse effect on competition (or any resulting or likely detrimental effects on customers) caused by the features referred to in paragraph 2.13 to be effectively and comprehensively remedied?**

The HO agrees that the draft terms of reference should, in principle, provide appropriate scope to consider and potentially remedy the adverse effect on competition if the CMA were to pursue the MIR.

As the CMA explains in the consultation document, it is important to stress that at the time of Motorola's acquisition of Airwave, the CMA's review anticipated the shutting down of the Airwave network by 2019, as did the HO. The timetable and its effects are now quite different, although the importance of the network and its distinct features appear largely unchanged. Moreover, the extended timeline has made necessary a significant investment in the network, in part driven by past under investment, which could have been avoided if ESN kept its original expected delivery profile.

The HO considers the inclusion of ancillary services appropriate, indeed, the scope of the proposed MIR should be framed in such a way so as to give the CMA an opportunity to consider holistically all features and services that are potentially relevant to an adverse effect on competition. It follows that the terms of reference for any MIR should, in principle and proposed by the CMA, include all relevant Airwave network ancillary services. This also reflects considerations raised by the CMA as part of its evaluation of the Motorola/Airwave merger, albeit reconciled by the CMA at that time.<sup>2</sup>

The other possible and significant considerations are whether the CMA should expand the scope of the reference to include: (a) an examination of Motorola's ability and incentive to deliver its ESN-related solution in a timely, efficient and cost-effective manner in light of the identification and implementation of potential remedies affecting the Airwave network, and / or (b) Motorola's inputs to and services provided in respect of the interworking of the Airwave network and the ESN; however, the HO does not have a firm view on these issues at this stage and it is possible that the remedies identified and other potential remedies would ameliorate risk in this respect.

**Do you consider that the adverse effect on competition (or any resulting or likely detrimental effects on customers) caused by the features referred to in paragraph 2.13 are capable of being effectively and comprehensively remedied by undertakings in lieu of a MIR?**

Effective undertaking in lieu (UIL) of an MIR, to correct the detrimental effects on the market the CMA has correctly identified, would, without doubt, benefit those whom the HO serves. This is not simply about saving the taxpayer money, the right UIL would potentially enable the right ESN solutions, ensuring that emergency services are better equipped sooner to respond to the needs of the public. UIL would potentially offer a faster resolution, accelerating the delivery of ESN, as the most critical part of the Motorola contribution to the ESN is over the next two years.

However, the HO is concerned that, for example, the large gap between WACC and ROCE<sup>3</sup> would suggest a low likelihood of reasonable and effective UIL proposals being achieved in the short term. Further, the HO has been working actively with Motorola to try to resolve concerns, but progress to date has been uncertain and slow. The significant challenges that this presents and their potential consequences are reflected in the consultation document, which also demonstrates the importance of a MIR, although the HO would never dismiss the prospect of a UIL solution that would avoid the need for CMA intervention.

The HO would be very much interested in supporting and commenting on the evaluation of any UIL proposed by Motorola directly to the CMA, if Motorola were minded to do so. The HO would

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<sup>2</sup> ME/6601/16, Completed acquisition by Motorola Solutions Inc. (Motorola) of Airwave Solutions Limited (Airwave), para. 88 (for example)

<sup>3</sup> [REDACTED]



appreciate further discussions regarding any potential UIL and, in particular, regarding transparency and the future monitoring of the efficacy of any such undertakings, as circumstances in the market can quickly change and it is important to make sure any undertakings remain appropriate to address the adverse effects on competition for which they were proposed.

**Do you have any views on our current thinking on the types of remedies that a MIR could consider (see paragraph 2.26 above)? Are there other measures we should consider?**

The consultation document explains clearly why the CMA has reached the conclusion that it has, at this stage, in respect of potential remedies. The two remedies potentially address different issues (in terms of supporting a more efficient and predictable transition to an improved solution and in potentially ameliorating any intervening harm) and have different implications for the HO.

If the CMA decides to make a MIR, the HO confirms its commitment to work with the CMA and other stakeholders to understand, in more detail, the potential shape and implications of these remedies, and to provide further perspectives on their likely effectiveness.

### *Divestiture*

Divestiture is clearly an important potential remedy in certain respects as it is likely to remove Motorola's conflicted objectives between the current and any new and improved service, and should have the effect of encouraging Motorola to focus on ESN. Such a remedy would, of course, need very careful consideration, particularly in terms of the identity/type of potential purchaser that may come forward as part of any remedy involving a divestiture of the Airwave Network, as well as any implications for that party and / or the HO, including those from an operational perspective, for example where Motorola necessarily retains network elements that require interworking.

The HO would want to ensure that any divestiture did not create other challenges in terms of any transition to the ESN, or the operation of the Airwave network in the interim.<sup>4</sup> It would also be necessary to address the risk of simply transferring the monopoly to another supplier who, without the implementation of other remedies (see below), might continue to make excess profits pending any transition.

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### *Price Control*

In terms of the other potential remedy that the CMA has outlined in the consultation document ie a form of rate of return regulation typically employed by regulators setting price caps for natural monopoly networks, the HO assumes that this would be on the lines of those established for fixed line networks, but other than the HO's brief observations in the following two paragraphs, again the HO would need to better understand the detail of and the scope of the regulation proposed to comment further.

While the HO agrees with the CMA that a rate of return type price control is available and may be a likely appropriate remedy, the HO considers that other forms of available price control should not be discounted, for example, revenue cap regulation or price cap regulation. The particular form of control imposed, should be structured in such a way to carefully balance the need to ensure the services are provided efficiently, maintaining appropriate quality of service, at a fair price, with any necessary cost or asset base adjustments, while enabling a fair return for the provider, including for any future investment that may be required.

Although, the HO agrees with the CMA that a MIR is more appropriate than, for example, Ofcom's sectoral powers under Communications Act 2003, the HO would encourage the CMA to draw on the

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<sup>4</sup> Any divestiture would be a non-trivial technical and delivery exercise, which would need to be managed carefully to ensure the continuity of the current Airwave network service (for the time being) and the ESN programme as the parties try to manage transition in parallel.



sectoral regulators' experience, including that of Ofcom, of implementing price controls imposed on SMP network operators and service providers in network industries with similar characteristics to those found here.

### *Other remedies*

In support of a price control remedy, the HO would encourage the CMA to keep under review and consider the benefit of other potential remedies, including, whether further obligations to support transparency such as, but not limited to, cost accounting and (to the extent that Airwave is not separate) accounting separation obligations, including information being made available to the HO, and the requirement for a new reference offer that, for example, amalgamates and corrects the current contracts.

### **Conclusion**

In light of the above considerations and absent any effective alternative solution being volunteered/proposed and agreed in the short term, which currently seems unlikely, the HO would agree that the reference test is met and that a MIR is an appropriate step. The relevant market is one of significant importance, as is the scale of the potential harm associated with the features identified by the CMA. The CMA is well placed to evaluate these features independently and, if appropriate, structure remedies that appear likely to be able to address the harm in question.