



MOTOROLA SOLUTIONS

Mobile radio network for the police and emergency services

Proposal to make a market investigation reference

18 August 2021

Motorola's Response

1. INTRODUCTION AND SUMMARY

- (1) The CMA's proposal to make a market investigation reference in relation to the mobile radio network for the police and emergency services¹ (the "Proposed MIR") is unprecedented, unreasonable, disproportionate, and contrary to the CMA's own stated policies.
- (2) Motorola² has studied, and agrees with, the independent report commissioned by Motorola from DotEcon. Section 131(1) of the Enterprise Act 2002 (the "EA2002"), in essence, permits (but does not require) the CMA to make a reference where the CMA has 'reasonable grounds' for suspecting that any 'feature' of a 'market' in the United Kingdom for goods or services restricts competition in connection with the supply or acquisition of any goods or services in the United Kingdom. For the reasons explained, the Proposed MIR fails to meet the requisite standard under section 131(1) of the EA2002.
- (3) The following are some of the salient features of the consultation process and the Proposed MIR:
 - The CMA's guidance provides that *"the [CMA] expects to have discussed the issues thoroughly with the parties concerned, where they have been identified, before the start of the formal consultation period."*³
 - The CMA has had many months of secret discussions with the UK Home Office⁴ (and presumably the Cabinet Office), but made no attempt to contact Motorola, resulting in the Proposed MIR being uninformed, one sided, and biased.
 - The CMA put Motorola on 12 hours' notice that the CMA would be making an announcement (the contents of which were not revealed) concerning Motorola at approximately 10am BST the following morning. The CMA provided Motorola with a copy of the CMA's press release at approximately 9am BST, i.e. 3am in Chicago, Motorola's location, one hour before the issue of the press release.
 - The CMA's first substantive contact with Motorola was to send a statutory demand for the production of documents running to thousands of pages, with a five working day deadline, against the background of an accusation of excessive pricing and threat of divestiture.
 - Despite being formulated under the pretence of a market investigation, the CMA's proposed investigation does not relate to a market.

¹ Competition & Markets Authority, 'Mobile radio network for the police and emergency services: Proposal to make a market investigation reference' (July 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1000278/Final_Version_Airwave_MIR_Proposal_.pdf>.

² "Motorola" is used in this Response to refer collectively to the entities involved in the delivery of the Airwave service together with their relevant affiliates.

³ Office of Fair Trading, 'Market Investigation References' (March 2006) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284399/oft511.pdf> ("OFT511"). OFT511 was adopted by the CMA Board, and remains applicable after 1 April 2014, subject to the changes set out in the Enterprise and Regulatory Reform Act 2013.

⁴ Herein referred to as the "Home Office".

- The Proposed MIR is to investigate Motorola’s long-term pricing under a small number of contracts procured and entered into consistent with all applicable legislation. This is not a ‘market’ and is therefore outside the scope of section 131 of the EA2002. It is nonsensical to claim that competition is restricted within the framework of a single long term contract.
- The principal long term contract contains detailed provisions regarding the precise financial model to be employed by the parties, the pricing, and agreement on the economic return that the project company (Airwave) is entitled to earn to ensure a fair return. The CMA ignores this, yet the analysis shows that Airwave is not making excessive returns.
- The CMA also ignores the fact that in addition to carefully drafted provisions on pricing, the contract with the Home Office contains an independent third party referral process (the “Benchmarking Process”) to ensure that prices are fair, which has already been used by the parties⁵. The Home Office is an important and highly valued partner of Motorola, and Motorola expects to resolve any disagreements regarding pricing with regard to the contractual provisions it has in place with the Home Office.
- Furthermore, the CMA makes no acknowledgement of the fact that the Home Office preferred [REDACTED] the Benchmarking Process in order to [REDACTED] in the extension negotiations of 2016 and 2018. The Home Office was satisfied by both the price discounts and overall contractual arrangements, including additional capital investments executed in those agreements. [REDACTED]
- The CMA reviewed all aspects within the scope of the Proposed MIR when it reviewed, and unconditionally approved, Motorola’s acquisition of Airwave (the “Airwave Acquisition”). It would be an abuse of the CMA’s powers for the CMA to make a market investigation reference.
- There has been discriminatory treatment by the CMA of Motorola as the sole private sector supplier under the Airwave contracts and the Home Office as the sole government sector customer under that contract. Among others, Motorola is accused of having unilateral market power, whereas no consideration at all is given to the bargaining power held by the Home Office.
- Motorola notes that the consultation coincides exactly with the period during which the Home Office is negotiating with Motorola an extension to the Airwave service. The Proposed MIR ignores the question of whether this is an appropriate use of central Government power and influence to threaten interference with a commercial negotiation arrangement.
- If Airwave is extended on current terms until 2026, the service will have been provided on terms that are vastly more favourable to the Home Office than initially envisaged and agreed by the parties.
- The CMA has identified forced divestiture of Motorola’s Airwave network as a potential remedy for the alleged adverse incentives arising from Motorola’s dual role. It is not clear why the CMA has ignored the alternative, [REDACTED], remedy [REDACTED].

⁵ Airwave was described by the third party as “exceptionally cooperative” in the most recent Benchmarking Process.

- If the CMA makes the Proposed MIR, the CMA would set the most dangerous precedent, destroying legal certainty and confidence in contracting with the UK Government. The legal and investment community would essentially stamp all long-term Government projects with a private, not Government, health warning and the net cost to the British taxpayer would inevitably rise.
- There is a strong insinuation in the Proposed MIR that Motorola is to blame for the delay to the development of ESN, which is wholly unsupported by the evidence and which Motorola rejects in the strongest possible terms. In addition, the Home Office and Motorola agreed in the Deed of Recovery (signed in 2016 and reviewed by the CMA at the time of the Airwave Acquisition) strong contractual protections to the effect that if [X]. The fact is that Motorola has not caused the delay to the introduction of ESN; it had absolutely no incentive to do so given the [X] financial implications that would follow [X].
- Motorola has spent the past month – at considerable cost – dealing with substantial and wide ranging demands for vast numbers of documents before a market investigation has even commenced. These demands are completely inconsistent with the notion of a fair, reasonable, and balanced consultation process that is supposed to be inquisitorial and not accusatorial.
- Despite the Proposed MIR being targeted solely at Motorola, it is extraordinary that during the consultation process the CMA has made no attempt at all to invite Motorola to discuss any aspect of the substantive merits of the Proposed MIR.
- The comments in this Response are by necessity limited and preliminary, given the resource demands placed on Motorola by the CMA.

(4) The remainder of this Response expands on some of these points.

2. AIRWAVE'S PRICING IS NOT EXCESSIVE

- (5) The central plank of the Proposed MIR is a concern that Motorola is generating excessive returns from the Airwave service. Regrettably, the CMA made no attempt to contact Motorola prior to the launch of the consultation process, although this matter essentially only concerns Motorola's pricing of the Airwave service. The Proposed MIR does not explain why the CMA did not contact Motorola, yet had many discussions with the Home Office.
- (6) As far as assessing the economics of the Airwave service is concerned, the CMA states (see paragraph 1.49 of the Proposed MIR):

“As we do not have cash flow information for the early years, i.e. we could not calculate the IRR, we have calculated the Airwave Solutions ROCE”

- (7) It is extraordinary that the CMA did not contact Motorola for this information prior to publication of the Proposed MIR, or even to attempt to derive cashflows from publicly available balance sheets. By failing to request this information, the CMA has deprived itself of the very information that the CMA claims would be most useful, and has produced instead a financial estimate of the Airwave service that is wholly divorced both from reality and from the

contractual benchmark agreed by the parties, and is seemingly designed to engineer a narrative that justifies the basis of the CMA's Proposed MIR.

- (8) Motorola agrees that an IRR analysis over the appropriate time horizon is the correct analytical tool, as was agreed between the parties, and had the CMA requested such IRR information relating to Airwave from Motorola this would have been provided. The actual IRR data entirely contradicts the misleading financial estimates generated by the CMA for the purposes of justifying the Proposed MIR. The actual IRRs from the supply of Airwave leave no objective basis for any form of action by the CMA:
- (i) the Home Office is in possession of the economic model that the Home Office agreed at the outset of the Airwave project, which anticipated a pre-tax nominal IRR for the initial duration of the Airwave contract (2000-2019) to be around [REDACTED];
 - (ii) the actual investment required in the network by far exceeded the anticipated investment so that despite additional revenue streams obtained from sharers the actual project IRR fell far short of the anticipated level; and
 - (iii) even if the Airwave service is provided until 2026 on the current contractual terms the average IRR for the period 2000-2026 will be less than [REDACTED].
- (9) Based on the actual versus budgeted returns under the agreed infrastructure contract it would be a misuse of its powers for the CMA to intervene years later, take an inappropriate economic snapshot, and rewrite the terms of the contract for services.

3. ASSESSMENT OF THE CMA'S REASONING

- (10) The CMA identifies a market for the supply of Airwave, and four main reasons why this 'market' is not working.

There is no 'market' for the supply of Airwave

- (11) The Airwave service was contracted in 2000 and has been supplied under that contract until 2018, when it was extended following extensive negotiations between Motorola and the Home Office and the Department of Health and Social Care which concluded in December 2018 and led to some significant concessions by Airwave including discounts [REDACTED].⁶ The supply of the Airwave service pursuant to a long-term contract does not amount to a 'market': there is a sole purchaser (the Home Office), and a sole supplier (Motorola) who provides a bespoke service as required by the purchaser, pursuant to highly detailed contractual requirements that have been negotiated over a period of many months. There is no scope for switching by either party (neither currently has any available substitutes) and therefore no 'market'.
- (12) According to the CMA, the Airwave 'market' is not 'working well' for the following reasons (see paragraph 5 of the Proposed MIR):

⁶ [REDACTED]

- “a. the highly differentiated and bespoke nature of the Airwave network, requiring it to be designed, built and operated under a long-term exclusive contract,*
- b. the dual role of Motorola, as owner of Airwave Solutions and key supplier in the roll-out of ESN since 2016, with the incentives such a position creates,*
- c. the absence of competitive tension in the award of the original contract, with only one supplier taking part in the bidding process and the resulting likely uncompetitive pricing structure, and*
- d. delays in the roll-out of ESN that have necessitated the extension of the Airwave network by three years to 2022 and now require a further extension until the end of 2026, thereby prolonging the likely uncompetitive pricing structure well beyond the original term of the PFI Agreement.”*

Airwave was bespoke and built and operated under a long-term exclusive contract

- (13) The CMA has failed to draw the correct conclusion from the fact that the Airwave network must be provided under a long-term exclusive contract, namely that there cannot be a ‘market’ for the provision of the Airwave network. Instead, the CMA claims, but does not establish, that this ‘feature’ restricts competition. Airwave is supplied pursuant to a valid procurement process, and many thousands of hours have been spent working on the contract, together with significant time spent by the parties agreeing an extension to the contract on terms satisfactory to both parties.
- (14) It is obvious that the Airwave service would not have been delivered otherwise than under a long-term exclusive contract, so it is illogical to conclude that the very feature that allowed the provision of the service is regarded as a feature that restricts competition. The same circular reasoning would apply to any long-term project commissioned by the Government.

The dual role of Motorola and the incentives such a position creates

- (15) The CMA states that it cleared the Airwave Acquisition, *“in part because of the expectation (and assurances of both Motorola and the Home Office) that the Airwave network would be shut down by 2019”* (paragraph 3 of the Proposed MIR).
- (16) The CMA had full visibility over all aspects of the Airwave Acquisition when the CMA reviewed and approved the transaction. Specifically, at the time of the CMA’s review of the Airwave Acquisition it was entirely within the range of foreseeable outcomes that Motorola would operate Airwave much longer than 2019. In fact, the possible extension of the Airwave network as necessitated by delays in the delivery of ESN was evidently contemplated by the CMA in the course of its review of the Airwave Acquisition, as questions relating to this topic were raised with Motorola by the CMA during its review.⁷ In addition, as disclosed to the CMA at that time, at the time of the acquisition, Motorola’s financial advisers had modelled five contract extension scenarios: 2019, 2020, 2022, 2025 and 2028, assuming that revenues would grow from 2020 in line with inflation. Motorola supplied the probabilities of such extension to the

⁷ See question 18 of the CMA’s email to Motorola dated 6 April 2016, question 3 of the CMA’s email to Motorola dated 18 April 2016 and question 5 of the CMA’s email to Motorola dated 27 May 2016.

CMA, which included a [X] probability that Airwave would be extended until 2022 and a [X] probability that Airwave would be extended until 2025.⁸

- (17) As the CMA itself recognises, the ‘dual role’ of Motorola now identified by the CMA as a ‘feature’ existed at the time of the CMA’s assessment of the Airwave Acquisition, and accordingly it was open to the CMA to impose any ‘incentives’ remedies it saw fit, as part of its assessment. However, after a thorough analysis, the CMA concluded that Motorola’s acquisition of Airwave did not “give rise to competition concerns on any basis.”⁹ The CMA is not now entitled to reopen by means of a market investigation reference the unconditional clearance the CMA gave to the Airwave Acquisition¹⁰ based on the same facts.
- (18) In any event, section 131(1) of the EA2002 does not permit the CMA to establish a ‘reasonable suspicion’ that Motorola’s incentives to deliver ESN amount to a ‘feature’ for the purposes of section 131(1) and thus restrict competition unless there is a reasonable basis to suspect that:
- (i) Motorola has such incentives; *and*
 - (ii) Motorola has successfully been able to act upon such incentives; *or*
 - (iii) Motorola will have the ability to act upon those incentives in the future, whether or not it has done so in the past.
- (19) Absent ability, any incentive remains at best speculation, which is insufficient to satisfy the requirements of section 131(1) of the EA2002.
- (20) Motorola does not have access to the confidential version of the Proposed MIR so it is impossible for Motorola to form a view on whether the CMA might have acted reasonably in its assessment of the contractual arrangements (i.e. the Deed of Recovery) between Motorola and the Home Office that were specifically and extensively negotiated to eliminate the prospect of any such incentives materialising. Nonetheless, Motorola strongly believes that Motorola cannot reasonably be considered to have had any incentive to delay the development of ESN which, as the following makes clear, Motorola could not in any event have acted upon to influence the development of ESN. Moreover, such a theory ignores the clear benefit to the Home Office of Motorola’s dual role, including the delivery of a bespoke ‘interworking’ solution to assist with the transition to ESN.
- (21) The Proposed MIR offers no preliminary assessment of whether Motorola has demonstrated any ability to act in accordance with the alleged incentives to cause a delay to ESN, despite the lapse of some 5 years since Motorola’s purchase of Airwave and participation in the development of ESN. The CMA notes at paragraph 1.42 of the Proposed MIR that:

“[w]hile the CMA has not to date reached a view on Motorola’s part in the delays to the ESN roll-out, it considers that this merits further investigation, given the incentives created by Motorola’s dual role in the roll-out of ESN and operation of the Airwave network.”

⁸ Annex G of Motorola’s submission to the CMA dated 12 April 2016.

⁹ Paragraph 121 of the CMA’s Decision on Relevant Merger Situation and Substantial Lessening of Competition dated 1 July 2016.

¹⁰ By proposing a divestiture remedy, it is clear that this is in substance what the CMA is seeking to do.

- (22) Given that the CMA has not reached a view on Motorola’s ‘part’ in the delays to the ESN roll-out, the CMA must instead identify a reasonable basis to suspect that Motorola is able to delay ESN in the future. This too is absent from the Proposed MIR. There is therefore no reasonable ground to suspect that Motorola’s dual role and concomitant incentives amount to a ‘feature’ within the meaning of section 131(1) of the EA2002.
- (23) Even if the CMA did have reasonable grounds to suspect that Motorola’s dual role amounted to a ‘feature’ for the purposes of section 131(1) of the EA2002, and despite indicating that this ‘merits further investigation’, the CMA makes no proposal in the draft Terms of Reference to investigate any aspect of ESN. Since the Home Office has apparently informed the CMA that “delays by Motorola in its delivery of ESN is resulting in significant additional cost to the Government”,¹¹ it is both irrational and procedurally unfair for the draft Terms of Reference to ignore the development of ESN. The alleged ‘feature’ (Motorola’s dual role) clearly cannot be fairly assessed by looking at just one of Motorola’s roles.
- (24) Moreover, the assertion that Motorola is directly or indirectly causing delay is wholly unsupported by the facts. [X]. The latest National Audit Report (“NAO”)¹² lays the blame for delays to the development of ESN squarely at the feet of the Home Office, as instructed by the Cabinet Office:

“Our report on the Emergency Services Network (Figure 7 on page 21) found that despite the high inherent risks, the Home Office set an over-ambitious timeline for delivery, with no contingency, and fell significantly behind schedule. We found this problem is widespread, as international public sector digital programmes also often overrun and exceed their budget.”¹³

- (25) No blame was attributed to the private sector, much less to Motorola specifically. As the NAO Report put it (page 21):

“[ESN] sought to be at the cutting edge of technology despite the high inherent risks and was unable to manage the delivery effectively.

Objective: *The Cabinet Office instructed the Home Office to decommission the dedicated radio network used by the police, fire and ambulance services and replace it with a novel solution based on an existing public 4G mobile network.*

What happened: *The public 4G mobile network approach involved significant technical challenges, including:*

- *working with the network provider to increase the coverage and resilience of its 4G network [not Motorola’s responsibility];*
- *developing new handheld and vehicle-mounted devices as no current devices were compatible with the Emergency Services Network [not Motorola’s responsibility];*

¹¹ See paragraph 1.40 of the Proposed MIR.

¹² National Audit Office, ‘The challenges in implementing the digital change’ (21 July 2021) <<https://www.nao.org.uk/wp-content/uploads/2021/07/The-challenges-in-implementing-digital-change.pdf>> (the “NAO Report”).

¹³ Paragraph 2.7 of the NAO Report.

- *successfully integrating all the components* [not Motorola's responsibility]; and
- *meeting the needs of the emergency services in situations such as in the air or underground* [not Motorola's responsibility].

As the programme progressed, the Home Office faced significant technical difficulties in scenarios including aircraft transmission [not Motorola's responsibility] and the availability of devices able to communicate directly with each other without a network signal [not Motorola's responsibility]."

- (26) None of the factors listed by the NAO fall within Motorola's responsibility.
- (27) The mere fact that Motorola is one of the suppliers in the delayed ESN programme is insufficient to form a reasonable basis to suspect that Motorola will be able, in the future, unilaterally to cause the delay of ESN. It is also directly contradicted by the fact that [REDACTED].
- (28) Motorola notes that the CMA has identified divestiture of the Airwave network as a potential remedy. Motorola strongly believes that [REDACTED].
- (29) [REDACTED].
- (30) In sum, the CMA has not demonstrated that Motorola has any incentive, much less any ability, to delay ESN, and yet despite the Home Office having welcomed Motorola's participation in ESN, that participation appears to have thrown Motorola's future ownership of Airwave in serious jeopardy. In this regard, from Motorola's standpoint [REDACTED].

Absence of competitive tension in the award of the original contract

- (31) The public procurement process prior to the award of the Airwave contract was a valid, highly competitive, process with over 50 potential bidders expressing interest; the fact that only one bidder remained at the end of that process was simply a function of the competitive process, the extremely high risk profile of the project and the vast capital outlay (which turned out to be substantially higher than anticipated) required by the successful bidder. Much like other governments, the Home Office could have chosen to carry out the project itself. Instead, the Home Office chose to outsource this on terms that the Home Office, and the supplier, were prepared to agree and did agree after substantial negotiation.
- (32) Motorola has a legitimate expectation that the contract it signed, together with any extensions, following a valid procurement process and substantial negotiations, will be honoured by the Home Office.

Delays in the roll-out of ESN have necessitated the extension of the Airwave network ... thereby prolonging the likely uncompetitive pricing structure well beyond the original term of the PFI Agreement

- (33) The observations made above in respect of the alleged 'likely uncompetitive pricing structure' apply, *mutatis mutandis*, to this alleged feature.

- (34) A delay to the development of ESN cannot logically be a ‘feature’ of the Airwave ‘market’ since ESN is not included within the description of that ‘market’, and certainly not where the CMA proposes to exclude entirely from the Terms of Reference for the Proposed MIR any consideration of ESN.
- (35) The Proposed MIR makes no reference to the fact that in 2016, by leveraging its veto right over the Airwave Acquisition, the Home Office secured important variations to its current arrangements, and in doing so was able to exercise a competitive choice between Motorola’s offer and remaining with the status quo. There is no reason to suppose that Motorola’s offer was not competitive: the negotiation of these concessions, including agreeing on the contractual mechanism for any future extensions of the Airwave service that may be required due to ESN prolongation, took many weeks. Further, the ESN / Airwave ‘incentive’ risk that the CMA identifies in the Proposed MIR was extensively examined, negotiated and agreed in the ‘Deed of Recovery’. As part of the contractual extension mechanisms agreed with the Home Office at the time of the Airwave Acquisition, Motorola provided significant flexibility by offering to mitigate the risk of any further Airwave extensions that were necessary [X].
- (36) It is therefore incorrect to insinuate that Motorola was in any position to (nor did it) exercise any competitive advantage in these circumstances. On the contrary, the concessions secured by the Home Office enabling it to manage the risk of transition from Airwave to ESN were significantly advantageous, especially when compared to the Home Office’s position in remaining with the status quo. The contractual deal reached was fair and balanced.

4. A MARKET INVESTIGATION IS NOT APPROPRIATE

- (37) Based on the foregoing, the CMA does not have reasonable grounds to make a market investigation reference. If the CMA, in light of this new information, nonetheless believes that it has sufficient grounds to meet the requirements of section 131(1) of the EA2002, Motorola respectfully submits that the CMA should not exercise its discretion to make a market investigation reference for the following reasons.
- (38) The present context in no way approximates the purpose for which section 131 of the EA2002 was drafted; it would be an abuse of the CMA’s power to exercise its discretion and make a market investigation reference. The economic position under review is that of a long term contract with a monopsonist government purchaser with dedicated and experienced resources, not a weakened group of customers or consumers.
- (39) As a matter of good administrative practice, the CMA should also not depart from its own guidance unless there is clear justification for doing so. In addition to the extracts included at paragraph 3 above, paragraph 2.7 of OFT511¹⁴ makes clear:

“It is not the present intention of the [CMA] to make market references based on the conduct of a single firm, whether dominant or not, where there are no other features of a market that adversely affect competition.”

- (40) The ‘features’ identified in the Proposed MIR all relate to Motorola’s alleged conduct, and the proposed remedies involve action in respect only of Motorola’s business.

¹⁴ (n 3).

- (41) A market investigation would also be inconsistent with the CMA’s own findings. At paragraph 1.29 of the Proposed MIR, the CMA states:

“it appears to us from the above developments that since 2010, Airwave Solutions has behaved in a way that is consistent with the exercise of unilateral market power”.

- (42) Therefore according to the CMA’s own guidance and findings there is no basis for a market investigation reference. The CMA states (at paragraph 2.32 of the Proposed MIR) that it proposes to make a market investigation reference rather than to seek redress for past conduct under the Competition Act 1998. Motorola cannot find any such explanation in the Proposed MIR, and there is in any event no basis for any such action.

- (43) Furthermore, to put the Airwave project IRR figures into an ordinary commercial context by reference to just one example of a Government project, in July 2014 HM Treasury published a pitchbook “Investing in UK Infrastructure”¹⁵ which included the following project opportunity:

Investing in UK Infrastructure

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Port of Ardersier

Port of Ardersier (PoA) is a 340 acre site situated in North East Scotland, 14 miles from Inverness. It operated as an oil fabrication yard for 20 years and has been remediated by existing owners. Through Aventa Capital Partners it is being developed as a large dedicated port focused on UK offshore energy.

PoA is considered to be the only available site in Scotland capable of developing as an Offshore Renewable Energy Hub benefiting from its natural harbour facilities, existing infrastructure, size of site and strategic location to the upcoming Moray Firth (1,500MW) and Beatrice (1,000MW) offshore wind farms.

The site:

- Is a natural sheltered harbour protected by a 1.2km quay wall, ensuring a safe and stable harbour for the loading of hi-tech wind generation equipment for shipping offshore.
- Already has industrial level mains, electricity, gas, water and sewerage utilities.

The development will accommodate offshore wind manufacturing, installation staging, operations and maintenance in a coordinated hub.

PoA has all the necessary planning permissions and marine consents to be used as an Offshore Renewable Energy Hub.

The region qualifies for grant funding as it is in the lowest 5% of GDP per capita in the UK.



Investment Opportunity

To partner Aventa Capital Partners to acquire, finance and operate a manufacturing and operating PoA. A phased development of infrastructure, industrial real estate and commercial developments. Initial funding of £100m required to:

- Acquire the majority equity of the Port from existing developers;
- Restructure the existing external debt facilities and improve the capital structure of the company;
- Fund capital investment for core infrastructure relating to dredging and quay wall expansion;
- Expand the operational and management capabilities.

Investment returns are targeted at 15-18% IRR with a cash yield above 6%.

- (44) Such a project does not begin to approach the complexity of designing, building and operating a 24/7 Great Britain coverage emergency services radiocommunications network. Nonetheless, the UK Government anticipated that investment returns for the above project were in the range of 15-18% IRR, for a project that does not carry remotely the same risk that the Airwave service did at the time of its inception.

¹⁵ HM Treasury, ‘Investing in UK Infrastructure’ (July 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/357135/infrastructure_pitchbook_28072014.pdf>.

- (45) Accordingly, given that the returns earned by Airwave over its lifetime (projected to 2026 based on the current contract) compare favourably to the Home Office’s expectations, and in view of the Government’s expectations on far less risky long term projects, it would be unreasonable to intervene based on a contract extension of that project on commercial terms consistent with its historic operation.
- (46) The CMA’s own guidance¹⁶, at paragraph 18, notes that its:

“market investigation regime sits within the broad spectrum of competition law, operating alongside other regulatory mechanisms, including prohibitions ... by allowing the competition authorities the opportunity to assess whether competition in a market is working effectively, where it is desirable to focus on the functioning of the market as a whole rather than on a single aspect of it or the conduct of particular firms within it. A market investigation may examine any competition problem and identify the feature causing the problem. It aims only to see if competition within the particular market under review is working well or can be improved and is not seeking to establish general rules and obligations for firms.” (Emphasis added.)

- (47) It is clear from this extract that the CMA recognises that the correct perspective would be to analyse competition for the market, which would require an analysis of the bidding process that took place over 20 years ago. Again, for the reasons explained above, a market investigation into the supply of Airwave under a long term contract cannot reasonably be regarded as an investigation into how goods and services are traded, i.e. a ‘market’ within the meaning of the EA2002.
- (48) Motorola is concerned that any market investigation reference would have the [✂].

5. CONCLUSION

- (49) These are Motorola’s preliminary comments in the time available to date and given the resource constraints placed upon it by the CMA. Motorola strongly believes that the Proposed MIR is entirely unwarranted, would be an abuse of the CMA’s powers, and that an objective consideration of all the relevant facts and circumstances will yield no other conclusion.

Motorola
August 2021

¹⁶ The Competition Commission, ‘Guidelines for market investigations: Their role, procedures, assessment and remedies’ (April 2013) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf> (“CC3 (Revised)”). CC3 (Revised) was adopted by the CMA Board, and remains applicable after 1 April 2014, subject to the changes set out in the Enterprise and Regulatory Reform Act 2013.