



**MOTOROLA SOLUTIONS**

**Mobile Radio Network Services Market Investigation**

*Motorola Response to Dual Role Working Paper*

11 May 2022

## 1. INTRODUCTION

- (1) Motorola welcomes the opportunity to provide some initial comments on the CMA's Dual Role Working Paper (the "Working Paper"). As evidenced through the many examples of Motorola's working practices given during the 6 May 2022 Hearing the CMA has failed to understand - or has simply ignored - the extraordinary contribution made by Motorola to the ESMCP. Instead, the CMA appears intent on joining forces with the Home Office and seeking to rely on false or misleading grounds (including taking evidence out of context, drawing patently false conclusions from evidence, and attributing negligence to Motorola's best efforts to resolve challenges) to build a 'delay' case against Motorola. A careful review of the evidence (being compiled further in response to comments made by the CMA in the 6 May 2022 Hearing) clearly indicates that Motorola has not delayed the delivery of Lot 2 to date and has no ability to delay Lot 2 in the future.<sup>1</sup>
- (2) If the CMA's analysis were to be believed, Motorola is exclusively to blame for ESMCP delay, in stark contrast to the independent investigations of the very same subject by the National Audit Office.<sup>2</sup>
- (3) The CMA appears to place great emphasis on representations made by the Home Office, EE and others. However, certain key representations made by the Home Office, which the CMA appears to have taken at face value, are false. The CMA could easily have verified this with Motorola before taking a position in the Working Paper. While certain CMA staff appeared visibly agitated in the 6 May 2022 Hearing when confronted with facts and evidence from those directly involved in the ESMCP that did not fit the narrative of the Working Paper, the Group is respectfully invited to carefully consider whether the evidence presented by the CMA really does support a conclusion that Motorola is to blame for ESN delay.
- (4) The Working Paper betrays a woeful (or, less charitably, deliberate) failure to appreciate the complexities of delivering, over a period of years, Motorola's contribution to a first-of-a-kind emergency services network over a commercial LTE network to the requirements set by the Home Office *anywhere in the world*. The CMA imputes to Motorola incentives/ability to delay ESN when instead Motorola was simply overcoming these extraordinary new challenges, at the same time as trying to support an extremely difficult customer, including, in 2017/2018, providing it with the strategic thought leadership required to give the Home Office a chance of delivering its programme with the essential user buy in that any mission critical communications technology transformation must have at its heart. This was evident also in the 6 May 2022 Hearing, with Motorola's descriptions of its extra-contractual assistance to try to gain customer acceptance challenged as evidence that Motorola "should have told the Home Office earlier" or that Motorola "should have known that the requirements were not fit for purpose". This is, and was, patently unfair to Motorola: Motorola submitted its bid (including over 1000 pages of Method Statements accepted by the Home Office in its contracted Supplier Solution which addressed Motorola's capability to comply or to not comply with the Lot 2 services specification provided by the Home Office. Motorola subsequently tried to improve the Home Office's chances of delivery, which is now, unfairly, being used against Motorola. The CMA's stance is

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<sup>1</sup> Motorola has accepted throughout that there have been delays due to various issues, but these have not delayed the delivery of Lot 2.

<sup>2</sup> The CMA is referred to prior National Audit Office reports as well as the PAC reviews.

the antithesis of laudable business practice and provides the ultimate disincentive for businesses to go beyond their bid specifications and offer enhanced customer support.

- (5) This submission explains:
- (i) the flaws in the CMA’s methodology; and
  - (ii) how the CMA should have approached this issue;
- (6) Subsequent submissions will address matters raised in the 6 May 2022 Hearing, including the correct interpretation of certain evidence.

## 2. THE CMA’S METHODOLOGY

### 2.1 Summary of CMA approach

- (7) The CMA’s Working Paper purports to examine how Motorola’s dual role may “be a feature that prevents, restricts or distorts competition in the supply of LMR network services” (emphasis added). The CMA does not however assess whether there is a distortion of competition in the supply of LMR network services. None of the CMA’s observations would, even if well found, point to any distortion of competition in the supply of LMR network services: the CMA fails to explore the relevant counterfactual (Motorola’s absence of a dual role) to its required conclusion: what would be the expected outcome *in the supply of LMR network services* but for Motorola’s dual role? No evidence is offered to suggest any restriction of competition in that relevant market<sup>3</sup>. Absent such analysis the Working Paper fails to advance the CMA’s theory of harm.
- (8) As it is, the CMA starts by looking at incentives, covering both direct financial incentives (essentially looking at the impact that a speedier roll-out of ESN would have on Motorola’s profits from both ESN Lot 2 and Airwave) and wider financial incentives, linked to the impact on Motorola’s reputation and the consequent impact on profits. Here, the CMA presents a story that Motorola might benefit overall from ESN being delayed and that any reputational damage would be limited. The CMA ignores, however, that, even if Motorola had been deficient in its delivery of the Lot 2 agreement – which is strongly denied – LMR network services would still have been required since other suppliers had failed to deliver their respective components of the ESN (e.g. [X]).
- (9) The CMA then looks at ability to delay the ESN roll-out and finds that Motorola would be able to cause delay as a consequence of supplying key components to ESN, including its MCPTT software Kodiak. The CMA fails to acknowledge, however, that in a project of this nature any supplier of key components may cause a delay to the delivery of the overall project.
- (10) Finally, the CMA considers outcomes, finding evidence to suggest that Motorola does not appear to have been pushing ESN development. This is based on the identification of alleged shortcomings in the way in which Motorola has been engaging with the challenges of ESN.

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<sup>3</sup> Simply pointing to an allegation of excess profitability in the supply of Airwave is insufficient to establish a restriction on competition; the provisions of section 134 Enterprise Act 2002 do not assist the CMA since pricing is to be assessed only once an AEC has been found.

## 2.2 What the CMA should have done

- (11) The CMA's approach does not consider the extent to which any other provider of the Lot 2 services (or, Motorola in the absence of its ownership of Airwave) would have performed better than Motorola in delivering the Lot 2 inputs into ESN. That is the necessary counterfactual for the analysis, which is not served to the requisite standard through a piecemeal assembly of evidence of Lot 2 challenges arising in the delivery of the ground breaking ESMCP. Such a compilation of evidence must be examined in light of the reality of the Lot 2 challenges and according to the correct standard. Otherwise, the Working Paper amounts to nothing more than a manifestly unfair pre-determined outcome with a thin veneer of evidence.
- (12) Therefore, in order to check whether Motorola's dual role has in fact had an impact on outcomes, the CMA would have to look at whether the alleged shortcomings in relation to Motorola's ESN engagement are:
- (i) obviously different from what one would expect from an alternative, conscientious, supplier of the Lot 2 deliverables, taking account of the fact that such an alternative supplier would also work in an environment where (for example) effective systems integration and project management from the prime contractor (the Home Office) are absent, the Home Office continually changes both its requirements and the criteria for success, communication between key suppliers to the programme is restricted, and the supplier is prevented from any meaningful engagement with end users; and/or whether they are
  - (ii) materially different from the shortcomings of other suppliers of ESN, i.e. whether Motorola is behaving in any way worse than the other contributors to the project.
- (13) There is no evidence that the CMA has undertaken either of the above assessments. Put differently, the CMA could have examined:
- (i) if Motorola's Lot 2 deliverables were in delay; and if so
  - (ii) who was responsible for such delays (e.g. Motorola, the Home Office, EE, KBR, Chelton, Samsung, Deloitte etc.)
  - (iii) if Motorola is responsible, is it reasonable to conclude that such delay would not have happened absent Motorola's ownership of Airwave.
- (14) Accordingly, the Working Paper methodology fails to meet the required standard of a reasonable inquiry.

## 3. **MOTOROLA'S INCENTIVES TO DELIVER LOT 2 ON A TIMELY BASIS**

### 3.1 Airwave's higher profitability

- (15) It is trite to note that Airwave profitability is higher than that of ESN. Indeed, the evidence offered by EE in this regard (para 33(b)) is pointedly trite yet specifically relied upon by the CMA. All that EE states, according to the cited evidence, is that EE has read an NAO report and Airwave's published accounts and observes that Airwave has higher profitability than ESN. Not only does EE's contribution add literally nothing to the factual or evidential matrix, EE is clearly

incentivised to point the finger at Motorola since [REDACTED] has failed to deliver the [REDACTED] on which the ESN users depend. Absent [REDACTED] delivering, Motorola never stands a chance to succeed yet the CMA simply ignores this.

- (16) It is also concerning that the CMA considers EE's (non) contribution worth specifically citing, which gives the appearance of bias against Motorola in the investigation of whether the market is working well. This is especially concerning given that the [REDACTED] and [REDACTED] together appear to be arranging the future of the emergency services mobile market after 2024 without regard to the fundamental principles of competitive tendering. The market investigation will be incomplete if the CMA does not investigate this proposed arrangement since it goes to the very heart of future opportunities for the future supply of LMR network services: a competitively tendered emergency services solution after 2024 should allow Airwave together with a mobile operator to bid. As matters stand, Airwave looks set to be excluded by virtue of these arrangements.
- (17) The CMA's emerging view is that Airwave's higher profitability (relative to ESN) may dull Motorola's incentives to deliver Lot 2 effectively and efficiently. The CMA claims that this was implicitly acknowledged by Motorola itself in a meeting with the Home Office (para 33(a), Working Paper). This is incorrect. The fact that Motorola would need to be compensated at an appropriate level has absolutely no bearing on its incentives to deliver ESN: Motorola strongly objects to such mischaracterisation of the evidence.

### 3.2 A fair assessment of Motorola's incentives is needed

- (18) The CMA notes the existence of interworking and states simply that "we have not focused on the delivery of the interworking solution in this working paper" (para 72). This is highly regrettable since the interworking facts point to a completely different story than one posited by the incentive theory. If Motorola had been incentivised to delay ESN this presumably would have been realised in Motorola's delivery of interworking. This is especially the case since any transitional process from Airwave to ESN is extraordinarily difficult without interworking (the existence of which was only made possible by Motorola's acquisition of Airwave and its offer to provide it), and based on the CMA's theory one might reasonably expect delays in the delivery of this solution. As it is, this was one area of the ESMCP<sup>4</sup> where Motorola was able to proceed without the effects of Home Office inertia, changing demands, etc which have caused such significant delay in other areas.
- (19) At the 30 November 2021 site visit Motorola demonstrated that the interworking is fully functional. The CMA ignores this, and in doing so fails to make the necessary distinction between (i) elements of Motorola's delivery that Motorola controlled and (ii) those elements of Motorola's delivery that required Home Office cooperation and stability. This is unfair and unreasonable, since an examination of the facts shows that Motorola has delivered where able to do so. This directly contradicts the incentives theory.

## 4. **MOTOROLA'S ABILITY TO DELAY ESN**

- (20) The CMA appears to misunderstand how to assess whether Motorola has the ability to have a material effect on the overall delivery of ESN, through its delivery so far of Lot 2. The CMA's current position is that:

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<sup>4</sup> Note that interworking is provided by Airwave outside of the Lot 2 agreement.

“... our emerging view is that Motorola has the ability to have a material effect on the overall delivery of ESN, through its delivery of Lot 2. The fact that the Kodiak MCPTT application is on the critical path for ESMCP and that this gives Motorola the ability to delay ESN was acknowledged by Motorola at the hearing with the CMA.” (Para 81)

- (21) Motorola has repeatedly made the point that a hypothetical ability to delay should not be confused with a real ability to delay. As such, in considering historical evidence, the analytical framework is not to pretend that all other aspects of the ESMCP had been delivered, as is implicit in the CMA’s analysis. It makes no sense to theorise whether for a period of time Motorola can be regarded as having an ability (i.e. the possibility of influencing an outcome) when that literally was not possible: Motorola could not physically have had a material effect on the success of ESN: whatever Motorola did or did not do during the ESMCP would have made no difference to the question of whether ESN transition would have started. To ignore that fact is to ground the analysis in pure fantasy. *As a matter of fact*, other suppliers had failed to deliver their respective parts of the ESMCP. *As a matter of fact*, therefore, Motorola never had any real ability to have a material effect on the overall delivery of ESN.
- (22) **For the avoidance of any doubt, none of this is to imply that Motorola has caused delay to any aspect of Lot 2. Motorola has not delayed its Lot 2 delivery.**
- (23) The CMA notes, at Para 77, that “The Home Office and third parties told us that the effects of delays in delivering the Kodiak application to the roll out of ESN were significant; first, because of its impact on the Airwave National Shutdown date; and second, because of its impact on the ESN critical path.”
- (24) The CMA relies on the following:
- “(a) In relation to the first, the Home Office told us that:
- [REDACTED]
- (25) The claims made in this Home Office submission are both false and misleading, and the CMA is invited to remind the Home Office of its obligations under the Enterprise Act 2002.
- (26) *First*, Kodiak has been and is being delivered on time and to contract and it is false to claim, as [REDACTED]. It also makes no sense to refer to a [REDACTED], in the context of software that is updated annually for all customers. As agreed at the 6 May 2022 hearing a detailed overview of the Kodiak timelines, contracted and additional features is being provided separately.
- (27) *Second*, Home Office evidence to the CMA implies that the contractual arrangements provide for flexibility in relation to the National Shutdown date. This is not the case, save with respect to certain [REDACTED] provisions. While Motorola will of course entertain discussions if the Home Office is still not ready with ESN by 31 December 2026, the contractual position is clear: by its own terms, [REDACTED], the Framework Agreement expires on 31 December 2026; the Home Office is not entitled to reimagine the Airwave contracts because ESN is not ready.
- (28) Of course, far from delaying the transition to ESN, Motorola’s interworking solution is ready. This point is entirely ignored by the CMA.

- (29) *Third*, other aspects of the ESMCP are not ready: EE does not [~~appear to~~] have a ready network, and the other delayed aspects of the ESMCP are well documented. It is therefore hopeless to claim, as the Home Office does, that it is due to delays in the delivery of Lot 2 that the Home Office is [~~is~~]. The Home Office must make plans for National Shutdown, since that is the date on which Motorola is contractually obliged to turn off the network and the date on which Airwave's [~~contract~~] expires.
- (30) *Fourth*, if Motorola is the sole cause of delay to commencing transition then the Home Office has a claim under the Deed of Recovery. Moreover, contrary to the CMA's assessment, it is not required that [~~is~~]. The CMA is respectfully invited to carefully reconsider the credibility of the Home Office's assertions.
- (31) *Fifth*, it is false to claim that [~~is~~] issues are in part the reason for potential [~~is~~]. Following the request made in the 6 May Hearing, a separate submission on this subject is being prepared.