

20 July 2023



Draft Mobile Radio Network Services Market Investigation Order 2023

*Response to the CMA's Further Consultation on The Mobile Radio Network Services Market
Investigation Draft Order*

20 July 2023

1. INTRODUCTION AND SUMMARY

- (1) This is Airwave's and Motorola's response (the "**Response**") to the further consultation by the Competition and Market Authority (the "**CMA**") on the draft Mobile Radio Network Services Market Investigation Order 2023 as modified by the CMA on 11 July 2023 (the "**Modified Draft Order**"). References in the Response to the "**Final Order**" are intended to refer to the CMA's final order to be published by the CMA in due course.
- (2) As was similarly stated in Airwave's and Motorola's response to the CMA's consultation on the Mobile Radio Network Services Market Investigation Order 2023 dated 16 June 2023 (the "**First Response**"), the Response is without prejudice to Airwave's and Motorola's position that the CMA has not established that there is any adverse effect on competition within the meaning of section 134 of the Enterprise Act 2002 (the "**EA2002**").
- (3) Subsequent to the First Response, Airwave's and Motorola's application for review by the Competition Appeal Tribunal of the CMA's final decision dated 5 April 2023 (the "**CAT Application**") has been scheduled to be heard on Wednesday 2 August and Thursday 3 August 2023.
- (4) This Response does not restate the concerns raised by Airwave and Motorola in the First Response, suffice to note that Airwave and Motorola fully maintain the points raised therein. Motorola notes that the Modified Draft Order and the CMA's further consultation paper do not appear to have taken account of any of the concerns raised by Airwave and Motorola in the First Response. As a consequence, for the reasons previously explained, Motorola remains of the view that the Modified Draft Order remains unworkable as currently drafted.
- (5) The Response focuses primarily on the concerns raised with the CMA during the meeting that took place between the CMA, Airwave and Motorola on 19 July 2023 (the "**19 July Meeting**"), and which the CMA has stated it will consider in further detail. These points are covered in **Section 2** below.
- (6) The Response also comments on the proposed modifications made by the CMA within the Modified Draft Order in respect of Article 6.2(b), as set out in **Section 3** below.
- (7) Finally, the Response sets out a case study which exemplifies the unintended consequences that the Modified Draft Order gives rise to, and that Airwave is presently facing notwithstanding the fact that the Final Order is yet to be published. The Modified Draft Order should seek to address these unintended consequences. This case study is set out in **Section 4** below.

2. CONCERNS RAISED WITH THE CMA ON 19 JULY 2023

- (8) As set out in the agenda that was shared with the CMA prior to the 19 July Meeting (the "**Agenda**"), the ten concerns that Airwave and Motorola wanted to discuss with the CMA at the 19 July Meeting were as follows:

1. **Applicability of Article 7.1 of the Modified Draft Order.**

- Does Article 7.1 only apply after the first delivery of compliance information in the autumn of 2024?
- 2. Operation of Article 8 of the Modified Draft Order.**
 - Would requests made under Article 8 reflect the time that will be needed for Airwave to make changes to its internal systems and processes in Autumn 2023, before it could answer such requests?
 - 3. Does the CMA expect Airwave to make changes to its contracts to reflect the new pricing and service credit regime imposed by the Modified Draft Order?**
 - The service credit-related wording of the Modified Draft Order is particularly unclear.
 - 4. In light of the fact that: (i) changing Airwave's pricing will take time; and (ii) the remainder of 2023 is short in duration, has the CMA considered whether it would be more desirable from the perspective of end users for Airwave to spread the resulting price changes out in order to avoid sharp ups and downs in unit prices (while hitting RevMax across a longer period)?**
 - Changes to the drafting of Schedule 1.4 of the Modified Draft Order will be required if so.
 - 5. Does the CMA have a view on the definition of revenue in the period (e.g., based on accounting revenue recognition)?**
 - The definition needs to be clear, and would ideally be aligned with statutory accounting.
 - 6. Can the CMA provide clarity as to the required level of granularity of the reporting of opex, revenue and capex?**
 - Pro-forma templates would make this more efficient for Airwave to implement, and would ensure that Airwave is aligned with the CMA's expectations.
 - 7. In relation to the calculation of RevMax and associated changes in prices, would it be more efficient to have an explicit mechanism to deal with situations in which data is not available at the point at which new prices have to be finalised?**
 - For example, this data could include data from audited statutory accounts, from national statistics as regards CPI / RPI etc. and actual service credit levels. Much (if not all) of this data will not be available at the point when the new year's prices need to be set, although unaudited / draft / estimated values may be available.
 - As currently drafted, the Modified Draft Order presents particular difficulty in relation to service credits.

8. **What process does the CMA envisage for requested changes to the contracts that themselves require additional capex or opex? How quickly would it be possible to agree any required change to the Modified Draft Order?**

- For example, in relation to additional coverage or special events.

9. **Does the CMA have a view on an appropriate materiality threshold in relation to, for example, the calculation of RevMax or the correction of an error?**

10. **Overarching topics.**

- Length of / level of detail within the Modified Draft Order, and, in turn, concern with regards to the possibility of disputes regarding the Modified Draft Order.
- Operational and related concerns.

(9) In the first instance, Motorola welcomes the CMA's clarification at the 19 July Meeting, that:

- (i) In relation to Item 1, Article 7.1 shall only apply after the first delivery of compliance information in the autumn of 2024.
- (ii) In relation to Item 2, the CMA indicated that it would contact Airwave / Motorola in advance of a formal request for the provision of information in order to confirm what a "reasonable time" would be in relation to any information sought, and that this would inevitably depend on the complexity of the request in question.

(10) In relation to Items 3 to 10 of the agenda, the CMA agreed that it would be appropriate for it to consider these Items in further detail following the 19 July Meeting. To assist the CMA in such consideration, Airwave and Motorola have summarised below the key points that were discussed in relation to Items 3 to 10 of the Agenda:

- (i) **Item 3:** Airwave and Motorola are not clear as to whether the Modified Draft Order requires Airwave to make changes to its contracts to reflect the new pricing and service credit regime imposed by the same.

Airwave's and Motorola's concern in this regard is premised on the fact that Airwave's billing and service credit arrangements are extremely complex, including by virtue of the fact that: (a) the Home Office requires Airwave to issue invoices across multiple product lines so as to allow the Home Office and the English and Scottish health departments to manage their own internal accounting; (b) Airwave's billing systems are set up to bill customers in line with the pricing contained within the relevant contract; (c) some invoices are issued in arrears, whilst others are issued in advance; (d) Airwave is accustomed to predominantly fixed billing, as opposed to variable billing; (e) there are

various service credit regimes that are all calculated differently;¹ (f) reconciliations / adjustments often need to be made to allow for the timing differences that occur between billing cycles and revenue per the statutory accounts; and (g) there are multiple methodologies for applying discounts, amongst other nuances.

In order to assist the CMA's understanding of this issue, Airwave and Motorola are annexing to the Response: (a) a table which sets out the various services and billing profiles to which the CMA has assigned a single charge within the Modified Draft Order (see **Annex A**); and (b) a complete set of Airwave's invoices for one quarter (see **Annex B**). The invoices contained within Annex B serve to highlight both the various invoicing patterns, customers and level of granularity by which services are broken down, as was pointed out to the CMA during the 19 July Meeting.

The Modified Draft Order does not make clear whether Airwave should make changes to its contracts so as to reflect the new pricing and service credit regimes imposed by the Modified Draft Order. Nor does the Modified Draft Order make clear how the revised revenue under the charge control should be allocated across both customers and products / services. In the absence of contractual changes, Airwave and Motorola are concerned that there will very likely be disputes with customers as to pricing and the application of service credits. This is particularly so in circumstances whereby Airwave is already engaged in disputes with the Home Office regarding the payment of indexation. However, alongside this, Airwave and Motorola are cognisant that to amend the relevant contracts will place a significant administrative burden on both the legal and commercial teams. In either case, clarity as to the CMA's expectation is crucial to Airwave and Motorola.

- (ii) **Item 4:** Airwave and Motorola are concerned that the current provision for price changes within the Modified Draft Order mean that Airwave will need to drastically reduce its prices late in 2023, and will then need to increase its prices early in 2024. This issue is related to the question of whether the Modified Draft Order requires Airwave to make changes to its contracts to reflect the new pricing and service credit regime, as discussed at Item 3 above. Airwave and Motorola query whether the CMA has considered whether it would be more desirable to spread the resulting price changes out across 2024 by allowing prices to be set such that revenues would exceed RevMax in 2023 by a certain amount (which would then result in a reconciliation adjustment in 2024). This would allow prices to be set in a manner that would mean that there was not an increase in prices in 2024 relative to late 2023. Further support for this proposition can be found in the fact that: (i) changing Airwave's pricing will take time, and will involve the maintenance of current billing levels until any new arrangements (including relevant changes to contracts, as necessary) are implemented; (ii) the remaining duration of 2023 is short; (iii) NPV-wise, the effect should be neutral; and (iv) variable billing is not ideal for Airwave, nor its

¹ By way of further detail, Airwave currently pays service credits on the following contracts for which the Performance Measures and Service Level Targets differ. For example: (a) police is measured via the concept of Stage 1, Stage 2 and Stage 3 payments / credits; (b) fire performance is measured on a subset of the sites (known as the "Fire Required" sites); (c) the Department of Health has approximately [] Service Levels under the Department of Health contract; and (d) GBNR has a linear scale of service credits depending on network availability.

customers. Airwave also queries who will explain the future arrangements to all of Airwave's customers, since Airwave (despite having engaged highly experienced external advisers) does not understand how the charge control regime is supposed to operate, both across its customers and over time.

As an additional point in relation to Item 4, and as promised by Airwave and Motorola during the 19 July Meeting by way of follow up, Airwave and Motorola note that in the Modified Draft Order, the wording of paragraph 1 of Schedule 1 regarding the reconciliation adjustment in 2024 is currently as follows:

For the year $t = 2024$:

$$\text{Recon}(\text{CPM})_{t-1} = (1 + \text{ARet}_t) * [\text{RevMax}(\text{CPM})_{2023(\text{rem})} - \text{Rev}(\text{CPM})_{2023(\text{rem})}]$$

Where:

RevMax(CPM)_{2023(rem)} means the maximum amount of revenues Airwave Solutions and Motorola Solutions can receive from charges for Core Services and Police Menu Services in relation to the remaining part of 2023 starting with the Commencement Date, as determined in line with paragraph 2 of this Schedule.

Rev(CPM)_{2023(rem)} means the actual amount of revenues received by Airwave Solutions and Motorola Solutions from charges for Core Services and Police Menu Services in the remaining part of 2023 starting with the Commencement Date (after the application of Service Credits).

In the years beyond 2024, the term (i.e., $1 + \text{ARet}_t$) in the above formula corrects for the over / under revenue having been held for one year on average (i.e., ARet_t represents the "interest" on the (on average) one year "loan" of the over / under revenue). Airwave and Motorola understand that the intention is to place the parties in the same position in net present value terms as they would have been if revenue had been equal to RevMax, and there had been no need for a reconciliation adjustment.

However, because in 2023 the Modified Draft Order only applies for part of the year, the over / under revenue in this case will have been held for significantly less than a year. In turn, the formula for the reconciliation adjustment in 2024 given in paragraph 1 of Schedule 1 is not correct. The correct calculation needs the multiplier $(1 + \text{ARet}_t)$ to be raised to a different power, reflecting the fact that the over / under revenue will have been held for (on average) less than a year. The appropriate average duration for the correction factor is the time in years between:

- The mid-period date for the remainder of 2023 (which is halfway between the Commencement Date and 31 December 2023); and
- The mid-year date of 2024 (which is halfway between 1 January 2024 and 31 December 2024).

If the Commencement Date was 1 August 2023, then the time difference would be roughly 8.5 months (2.5 months in the remainder of 2023 and 6 months in 2024), and thus an approximation of the required figure in that case is (8.5/12).

In light of the above, suitable alternative wording to replace the t = 2024 wording referenced above would be:

For the year t = 2024:

$$\text{Recon(CPM)}_{t-1} = ((1 + \text{ARet}_t)^{\text{TD}}) * [\text{RevMax(CPM)}_{2023(\text{rem})} - \text{Rev(CPM)}_{2023(\text{rem})}]$$

Where:

“^” indicates raising to a power.

TD is the time interval in years between the mid-period date for the remainder of 2023 (halfway between the Commencement Date and 31 December 2023), and the mid-year date of 2024 (halfway between 1 January 2024 and 31 December 2024). This calculation may be undertaken in months for convenience. For example, if the commencement date is 1 August 2023 then TD has the value 0.708.

RevMax(CPM)_{2023(rem)} means the maximum amount of revenues Airwave Solutions and Motorola Solutions can receive from charges for Core Services and Police Menu Services in relation to the remaining part of 2023 starting with the Commencement Date, as determined in line with paragraph 2 of this Schedule.

Rev(CPM)_{2023(rem)} means the actual amount of revenues received by Airwave Solutions and Motorola Solutions from charges for Core Services and Police Menu Services in the remaining part of 2023 starting with the Commencement Date (after the application of Service Credits).

No adjustment is needed to the formula in other years.

- (iii) **Item 5:** The Modified Draft Order does not define revenue in the period. During the 19 July Meeting, Airwave and Motorola highlighted that there is a difference between revenue and charges, as there are certain nuances including: (a) the billing of certain customers in advance; (b) deferred revenue; and (c) billing adjustments to account for items such as service credits, and thus a definition would need to be provided. As a related concern, Airwave and Motorola noted that there was uncertainty as to how to treat items that straddle the period both before and after the Final Order. It would be preferable if the definition of revenue in the period were to follow the statutory accounting revenue recognition. Whilst the CMA indicated that the Modified Draft Order refers to statutory accounting as the principle that underlies its contents, further clarification is required.
- (iv) **Item 6:** Airwave and Motorola indicated to the CMA that it would be helpful to know the level of granularity required for the items to be reported pursuant to the Modified Draft Order (i.e., opex, revenue and capex). Airwave and Motorola suggested that the CMA may wish to provide pro-forma templates (or agree these with Airwave and Motorola in advance) so that compliant systems could be built for the purposes of reporting. The CMA

stated that it did not necessarily consider that pro-forma templates needed to be included within the Modified Draft Order, but recognised that this would be helpful for Airwave and Motorola, and thus it would consider this.

- (v) **Item 7:** The Modified Draft Order does not always make explicit provision for situations in which data is not available at the point at which new prices have to be finalised, and thus Airwave and Motorola highlighted that prices will need to be set on the basis of forecasts. For example, prices for 2024 will need to be set in late 2023 / early 2024 based on a forecast of RevMax 2024, but this depends on service credits in 2024, which will only be known accurately after 2024 has finished. Whilst the CMA indicated that it expects there to be a reconciliation after the event, Airwave and Motorola stated that it would not be practicable to get to October 2024, find that it was not in line to achieve RevMax, and then be obliged to change its prices again, as this would create the need for prices to be changed more than once per year. The CMA indicated that it would consider the mechanics of this issue in further detail.
- (vi) **Item 8:** The Modified Draft Order does not directly address the possibility for changes to the contracts that require additional capex or opex, as requested by the customers, nor the process to take into account such changes. Examples of such changes from customers include requests for additional coverage or special events for which bespoke arrangements are required. If additional capex were required, this would then imply significant changes to the Modified Draft Order with changes to the future RAB, depreciation allowance, etc.

In addition, Motorola and Airwave are concerned by the fact that the Modified Draft Order may have significant distortive effects in terms of competition in the market for equipment, insofar as there is no limit on the extent to which individual customers could demand additional equipment offered under the catalogue of each contract free of charge.²

The CMA indicated that it would consider these issues further.

- (vii) **Item 9:** The Modified Draft Order does not include a materiality threshold in relation *inter alia* to the calculation of RevMax or the correction of an error, which creates a high level of uncertainty. The CMA indicated that it would consider this issue further.
- (viii) **Item 10:** The CMA noted that there was some overlap between this Item and the discussion of the other Items, and that hearing Airwave's and Motorola's operational concerns was helpful information upon which it would further reflect.

3. MODIFICATION OF ARTICLE 6.2(b)

- (11) The Modified Draft Order includes modifications to Article 6.2, and in particular Article 6.2(b). Article 6.2(b) now includes references to specific documents that were submitted by Airwave during the course of the CMA's market investigation, and which were cited in the Mobile Radio

² See paragraph 40(i) of the First Response.

Network Services: Final Report (the “**Report**”). According to the explanatory note which accompanies the Modified Draft Order, the CMA implemented these modifications following a request from the Home Office for clarification about the relevant capex forecasts that are to be used as a baseline for the requirement to report deviations between actual capex, capex plans submitted, and allowed capex.³

- (12) In the First Response, Airwave and Motorola raised several concerns in relation to the suitability of the high-level capex forecasts that have been used by the CMA as a baseline for this reporting requirement, as well as in relation to capex forecasts, and actual capex spend more generally.⁴ These concerns do not appear to have been considered by the CMA in the Modified Draft Order, despite the fact that Airwave and Motorola also referred the CMA to various instances in which clarity as to how changes in scope (necessitating additional capex) are to be handled in future is evidently required.⁵ Airwave and Motorola therefore remain unclear as to how changes in scope should be handled in future.
- (13) Airwave and Motorola consider that the modifications to Article 6.2 within the Modified Draft Order are insufficient to address the concerns raised in the First Response. In particular, the clarification does not resolve the core issue that the figures in the Report that are being referenced are based on high level forecasts that have been adjusted by the CMA in various ways, cannot form an appropriate baseline for reporting requirements, or for the assessment of whether particular investments are justified.

4. UNINTENDED CONSEQUENCES OF THE MODIFIED DRAFT ORDER

- (14) Set out below is a case study to demonstrate, by way of example, the unintended consequences that the Modified Draft Order gives rise to, and that the Modified Draft Order should seek to accommodate.
- (15) The [redacted] that Airwave [redacted] from BT Group (“**BT**”) are critical to delivering the Airwave network. In essence, [redacted] are the “brains” of the Airwave network. Without them, the Airwave network cannot work.
- (16) Airwave has been in discussions with BT regarding the extension of [redacted] through to 31 December 2026 (which, as the CMA will be aware, is the National Shutdown Date for the Airwave network).
- (17) As previously communicated to the CMA, BT has sought to impose a price increase of over [redacted]% relative to the existing price paid by Airwave. In addition, BT is demanding that Airwave commits to a contract term lasting until [redacted], with no provision for [redacted] in the contract. This is in spite of

³ See paragraphs 18 and 19 of the Notice of Intention to Make an Order Under Section 165 of and Schedule 10 to the Enterprise Act 2002 and Public Consultation on Modifications to the Draft Order.

⁴ See paragraphs 46 to 51 of the First Response.

⁵ For example, Airwave and Motorola referred to changes of scope in the form of: (a) the expansion of coverage [redacted]; (b) the Queen Elizabeth II’s funeral; and (iii) the coronation of King Charles III. See paragraphs 37 and 38 of the First Response.

the fact that the National Shutdown Date is 31 December 2026 (i.e., Airwave only has a commitment from its customer that the Airwave network is required until 31 December 2026).

- (18) What will happen as of 31 December 2026 and beyond is presently unclear to Airwave, as: (a) the Home Office [redacted] (noting that the Home Office has limited rights to do so), nor made clear its intentions for [redacted]; and (b) under the charge control, Airwave cannot assume that it will be viable to run the Airwave network beyond the National Shutdown Date for financial planning purposes. In light of these uncertainties, Airwave has not been able to accede to BT's demand [redacted]. In turn, BT has taken the decision to [redacted], which means that Airwave must [redacted]. However, in light of the extreme complexity of the attendant live service transition arrangements, it is not viable for Airwave to [redacted]. In any case, the costs of [redacted] are not provided for by the Modified Draft Order.⁶
- (19) If the CMA had proposed a proportionate remedy in response to the adverse effect on competition pursuant to section 134 of the EA2002 alleged (which, as the CMA is aware, Airwave and Motorola do not agree exists), Airwave might have been in a position to [redacted]. However, in light of the provisions of the Modified Draft Order, Airwave is not in a position to make such a decision.
- (20) In light of the above, Airwave and Motorola hereby put the CMA on notice that [redacted], presents an immediate threat to the ongoing provision of the Airwave network. The same has been communicated to the Home Office. It shall be clear to the CMA that the Modified Draft Order needs to make provision for eventualities such as this.

5. CONCLUSION

- (21) As the above makes evident, there remain (in addition to those already highlighted within the First Response) very serious problems that need to be addressed by the CMA before the Final Order can properly be issued.
- (22) As ever, Motorola and Airwave welcome continued dialogue and engagement with the CMA with respect to the Modified Draft Order.

⁶ Airwave and Motorola also note that the termination arrangements within the Modified Draft Order do not cover a situation in which, as a result of providing for the running of the Airwave network to the National Shutdown Date, Airwave incurs operating cost commitments which run beyond the National Shutdown Date. This would appear to put Airwave at risk of being unable to obtain payment from the Home Office for such costs, as there will be an asymmetry between the capex and the opex in such an instance.