Neutral citation [2022] CAT 4

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1428/6/12/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

2 February 2022

Before:

SIR MARCUS SMITH
President
JANE BURGESS
EAMONN DORAN

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) AIRWAVE SOLUTIONS LIMITED
(2) MOTOROLA SOLUTIONS UK LIMITED
(3) MOTOROLA SOLUTIONS, INC.

Applicants

- and -

THE COMPETITION AND MARKETS AUTHORITY

Respondents

Heard on 1 February 2022

JUDGMENT

APPEARANCES

Mr Brian Kennelly, QC and Mr Paul Luckhurst (instructed by Winston & Strawn London LLP) appeared on behalf of the Applicants.

Mr Josh Holmes, QC, Ms Naina Patel and Ben Lewy (instructed by the Legal Department of the Competition and Markets Authority) appeared on behalf of the Competition and Markets Authority.

Note: Excisions in this Judgment (marked "[✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

A. INTRODUCTION

1. By a document entitled "Mobile radio network for the police and emergency services: final report and decision on a market investigation reference" dated 25 October 2021 (the **Decision**), the Competition and Markets Authority of the United Kingdom (the **CMA**) decided to make a market investigation reference under section 131 of the Enterprise Act 2002 (the **Reference**).

2. The subject matter of the Reference – and, for reasons we will set out, we consider that excessive specific description of the subject matter of the reference to be both inappropriate and ill-advised in this Judgment – concerns the supply of land mobile radio network services for public safety in Great Britain. This service – as the Applicants (we shall collectively refer to them as **Motorola**) describe it – "is used by all police, fire and ambulance services in the UK. It enables more than 300,000 emergency personnel to securely communicate".[1] We shall refer to it as the **Network**. Quite unsurprisingly, the cost of the Network is high. According to the CMA – we have no idea whether the figure is agreed, and it does not matter – in 2019 the First Applicant, which operates the Network, generated revenues of £434 million.[2]

3. In conjunction with the Reference, the CMA articulated an administrative timetable for the determination of the Reference. As is well-known, section 137 of the Enterprise Act 2002 provides for a maximum period for the conclusion of a reference of 18 months, although that time frame may be the subject of (limited) extension. In this case, the CMA (by its board) issued an "Advisory Steer" to the **Inquiry Group** appointed to determine the Reference that it was necessary that the Inquiry Group reach its conclusions "expeditiously", and that the "sense of urgency is acute in this case".

4. It will be necessary to consider the process by which the reference timetable was ultimately set. For the moment, it is sufficient to say that the Inquiry Group determined on a timetable culminating in a final report being issued in June 2022, about eight months from the date of the reference. Motorola had suggested a longer – but still fast – timetable culminating in a final report in December 2022. The Home Office – the Government department principally interested in the Network – had suggested an even shorter timeframe than that proposed by the Inquiry Group.

5. By this application (the **Application**), Motorola challenge:

   (1) The decision to make the Reference.

   (2) The timetable by which the Reference is to be determined.

6. The Application is made, as it must be, under section 179 of the Enterprise Act 2002. The Application is one for judicial review, for the case is to be decided by applying "the same principles as would be applied by a court on an application for judicial review": see section 179(4) of the Enterprise Act 2002.

7. We propose to consider, first, the challenge to the decision to make the Reference (Section B below). We then consider the challenge to the timetable by which the

[1] Paragraph 1 of the Notice of Application.

[2] Paragraph 3(6) of the Defence.

Reference is to be determined (assuming that the decision to make the Reference survives) (Section C below).

B. THE DECISION TO MAKE THE REFERENCE

(1) Introduction: "reasonable grounds for suspecting"

8. We should stress, at the outset of this section, that we see it as no part of our function to anticipate what may, or may not, be the "findings" of the Reference, assuming that a Reference is made. What we are concerned with is the anterior question: did, under section 131 of the Enterprise Act 2002, the CMA have "reasonable grounds for suspecting that any feature, or combination of features of a market,…prevents, restricts or distorts competition" in connection with the supply of goods or services in the United Kingdom.

9. The discretion in the CMA is therefore wide: all that is required, for the power to trigger a reference to be properly exercised, is that there are "…reasonable grounds for suspecting…". There are, clearly, two aspects to this test:

   (1) First, there must be a genuine "suspicion" on the part of the CMA. This, essentially, is a subjective test. Suspecting means that there is a possibility, which is more than fanciful, that the relevant facts exist capable of generating the suspicion. In *Hussien v. Chong Fook Kam*,[3] Lord Devlin said:

   > "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove." Suspicion arises at or near the starting-point of an investigation of which the obtaining of *prima facie* proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage..."

   (2) Secondly, there must be an objective basis for that suspicion: there must be "reasonable grounds" for it. Whether there are reasonable grounds for the suspicion formed by the CMA depends on the information held by the CMA at the time, viewed in light of all the circumstances. It may be based on information which later turns out to be wrong. All that matters is that a reasonable person in possession of the same facts and information would also have the suspicion.

10. Of course, these are the elements that will inform the decision of the CMA to investigate or not. It is that decision which is the subject of the judicial review under section 179(4) of the Enterprise Act 2002.

11. These three layers of consideration are neatly articulated in the (admittedly very different) case *of Anna Castorina v. The Chief Constable of Surrey*, where Woolf LJ stated:[4]

> "…I suggest that, in a case where it is alleged there has been an unlawful arrest, there are three questions to be answered:

[3] [1970] AC 942 at 948.

[4] (1988) 160 LG Rev 241.

1. Did the arresting officer suspect that the person who was arrested was guilty of the offence? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.

2. Assuming the officer had the necessary suspicion was there reasonable cause for that suspicion? This is a purely objective requirement to be determined by the Judge if necessary on the facts found by the jury.

3. If the answer to the two previous questions is in the affirmative, then the officer has a discretion which entitles him to make an arrest and in relation to that discretion the question arises as to whether the discretion has been exercised in accordance with the principles laid down by Lord Greene MR in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 K.B 223".

12. This test suggests that for the CMA to make any kind of finding in a decision to make a reference is a step too far. Findings are the province of market investigations, not references for market investigations. Although, of course, an investigation, if determined upon, is not constrained by the suspicions articulated in the decision to refer (see section 134 of the Enterprise Act 2002), the decision to refer needs to be cautious not to trespass into what is properly the province of the investigation.

(2) The Decision

13. Given the subject matter of the Decision – the making of a reference – the Decision is (at 49 pages, plus annexes) surprisingly long. It stoops to a high degree of specificity which may reflect, we concede, the complexity of the market investigation that the CMA proposes to undertake.

14. For the present purposes, we will content ourselves with setting out the CMA's summary of its Decision:

"1. The Airwave network is a secure private mobile radio communications network for organisations involved in public safety in Great Britain. Currently, there is no alternative method for the police, fire and emergency services staff to communicate securely with each other when in the field.

2. The Airwave network uses land mobile radio (LMR) technology and was commissioned by the Home Office in 2000 under a private finance initiative framework arrangement (the PFI Agreement) that was due to end in December 2019. The network was expected to be shut down at this point and a different secure communications solution using EE Limited (EE)'s commercial 4G mobile network was to become operational (referred to as the Emergency Services Network or ESN).

3. Motorola Solutions, Inc (Motorola) won one of the key contracts for the delivery of ESN in 2015 and purchased Airwave Solutions Limited (Airwave Solutions, the owner and operator of the Airwave network) in 2016. The merger was cleared by the CMA, 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.

4. In the last two years, there have been increasing concerns about the delays to the roll-out of ESN and costs to the British taxpayer of the continuing operation of the Airwave network. Government officials and other stakeholders (in particular the National Audit Office and the Public Accounts Committee) have expressed concerns regarding Motorola's position and incentives to deliver ESN, given the on-going high profitability of the Airwave network. It is now expected that the Airwave network will continue until

the end of 2026, with the terms of the extension needing to be agreed by the end of 2021. Negotiations between Motorola and the Home Office are on-going.

5. Because of its highly differentiated and bespoke nature, the Airwave network by necessity needed to be designed, built and operated under a long-term exclusive contract. Under these circumstances, the main competitive constraint on the supplier of LMR network services for public safety in Great Britain (Airwave Solutions) occurred when the contract was awarded. Once the contract was in place, competitive constraints within the contract were minimal at best until the prospect of the network being replaced by ESN came into play. This development had the potential to materially change competitive dynamics: during the transition period users would be faced with the decision either to stay on the old network (for as long as possible) or move to the new one (as soon as possible), based on how attractive each option was. Thus, in principle, absent any other market development (such as the involvement of Motorola in the delivery of ESN whilst also owning Airwave Solutions), any negotiations between Motorola and the Home Office regarding the extension of the PFI Agreement taking place after the award of the ESN contracts would have been impacted by the competitive constraints the impending arrival of ESN would place on Airwave Solutions.

6. Our current view, based on the available information, is that the market for the supply of LMR network services for public safety in Great Britain is not working well for the following reasons (operating alone or in any combination):

    a. the extremely concentrated nature of the current market, in which the price is established through negotiation between a monopoly provider (Motorola) and a monopsony buyer (the Home Office).

    b. the asymmetry of information between Motorola and the Home Office in relation to key drivers of pricing, for example the level of capital expenditure needed to keep the Airwave network operational;

    c. Motorola's position as owner of Airwave Solutions and key supplier in the design and roll-out of ESN, which may be resulting in the preservation of weak competitive constraints on Motorola in the supply of LMR network services for public safety, because of:

        i. the ability of Motorola to shape or otherwise delay the design and roll-out of ESN, and thus hamper the emergence of the significantly different competitive dynamics envisaged by the Home Office when it procured the design and roll-out of ESN; and

        ii. the incentive on Motorola to do so, arising from the significant profits it derives from operating the Airwave network.

    d. the delays in the roll-out of ESN (which may or may not have resulted from Motorola's conduct in relation to the design and roll-out of ESN since 2016), that are preserving weak competitive constraints on Motorola in the supply of LMR network services for public safety; and

    e. the absence of competitive tension in the award of the original contract, with only one supplier taking part in the bidding process.

7. This may result in significant detriment for customers, as evidenced by the high returns Motorola achieved from its operation of the Airwave network in 2020 and is expecting to achieve, under the scenarios we have considered, over the next 6 years. Any harm in

this market and the burden of any excess profits made by Motorola ultimately falls to the British taxpayer.

8. For the reasons set out in paragraphs 6 and 7 above, we have concluded that there are reasonable grounds to suspect that one or more features in the market for the supply of LMR network services in Great Britain are preventing, restricting or distorting competition. We have therefore decided to launch a market investigation reference (MIR) relating to the supply of LMR network services for public safety in Great Britain.

9. We have identified three potential remedies at this stage:

   a. A form of rate of return regulation typically employed by regulators setting price caps for natural monopoly networks. The price control would fall away as soon as the Airwave network is turned off and/or its operator ceases to have market power. This could address adverse effects resulting from the exercise of market power by Airwave Solutions.

   b. Open book accounting, including the mandatory reporting of capital expenditure. This could address adverse effects resulting from the feature identified in paragraph 6.b.

   c. Divestiture of the Airwave network. This could address adverse effects resulting from the feature identified in paragraph 6.c."

(3) Motorola's grounds of review in relation to the Reference

15. Motorola advance three grounds in support of the Application:

(1) ***Ground 1***. The CMA proceeded on the basis of a flawed understanding of the contractual position. It wrongly stated that there was a "need" to "agree" an extension to the contract in order for the Airwave service to be continued beyond 2022. It failed to understand that the contract, amongst other things: (1) grants the Home Office a unilateral right to vary the date at which the Airwave network will be shut down (and to require Motorola to provide the services until that date); (2) provides for the default prices payable for the remaining life of the Airwave network; and (3) contains benchmarking provisions which provide for a neutral evaluation of certain charges payable under the contractual framework.

(2) ***Ground 2***. The CMA's approach to the investment rate of return (the **IRR**) under the contract was irrational and contrary to established literature.

(3) ***Ground 3***. The CMA adopted an irrational approach to the Airwave network "market" and the ESN as an alleged "feature" of that market. Paragraph 11.8 of the Notice of Application states:

   "(a) The so-called "market" was created by an exclusive and long-term contract which sets prices. If the Home Office now considers that it has agreed to pay too much for the services (a point which Motorola does not accept), that would be a bad bargain and not a market investigation issue.

   (b) It does not make sense to justify intervention on the grounds that the market is "extremely concentrated" as this logic could apply to any bespoke service delivered under a long-term exclusive contract.

(c) It is unreasonable to treat delivery of the ESN network as a "feature" of the Airwave network "market". ESN is not a "competing" alternative to the Airwave network. Users will migrate from Airwave to ESN only when ESN becomes fully operational, at which point the Airwave network will be shut down and shall cease to exist.

(d) In any event, Motorola's role in the delivery of ESN was fully understood by the Home Office (and approved by the CMA) in 2016 and was addressed in the contractual arrangements, which enable the Home Office to impose financial penalties if Motorola causes delays to ESN delivery.

(e) Those penalties have never been activated because Motorola has not caused any such delays."

(4) Grounds of judicial review: the law and our approach

16. Motorola contend that the Decision should be quashed because (variously):

(1) The CMA proceeded on the basis of a mistake of fact that played a material part in its Decision;

(2) The CMA had regard to an irrelevant consideration and/or failed to have regard to a relevant consideration;

(3) The CMA failed to conduct the assessments necessary in order to produce a defensible decision;

(4) Acted irrationally and/or unreasonably.

17. These are all perfectly proper grounds for judicial review if we had before us a decision actually finding that Motorola's conduct in relation to the Network did prevent, restrict or distort competition. In short, if the CMA had conducted the investigation it has (as yet) only decided to refer, and if the CMA had reached this conclusion, then we would entirely understand the substance of the Notice of Application.

18. But that is precisely what the CMA has not done. Rather the CMA suspects that there is a prevention, restriction or distortion of competition and our role is to consider (on a judicial review and to those standards) whether that suspicion has reasonable grounds and the discretion to refer was properly exercised.

19. In our judgment it is simply not appropriate to seek to determine – even on a judicial review standard – what is going to be the substance of the CMA's investigation – assuming it continues. If we were to resolve, in the manner suggested by the Notice of Application, the various grounds of judicial review set out above, we would actually be second-guessing the direction and outcome of the investigation, before it has even concluded. That, to our minds, would be impermissible. What we would be doing is reviewing an outcome that has not yet been reached (namely the outcome of the Reference). What we should be doing is reviewing the Decision to make the Reference, which is an altogether different matter.

20. The point can be made by way of example, using Ground 1. In the first place, we consider that it would be altogether inappropriate to make findings about the correctness or otherwise of the true contractual provision unless the error of the CMA is: *(i)* so egregious that it would be evident, on short inspection, to an extremely busy person in

a hurry; and *(ii)* the point on which the CMA has erred is so fundamental to the Decision as to comprehensively undermine it.

21. Ground 1 meets neither test. The point of Ground 1 is that the nature of the contract pursuant to which the Network is provided is such as to preclude any risk of overpayment to or excessive profit on the part of Motorola. Motorola may well be right about that – we are even prepared to assume that (after investigation) Motorola succeeds in this contention. But to suggest that this is an open-and-shut proposition is, with all due respect to Motorola, not arguable. Or in other words, the fact that the CMA potentially proceeds to make a reference on the basis of a mistake as to a single piece of factual information does not negate the reasonable suspicion the CMA formed on the basis of all the evidence before it.

22. Secondly, even assuming (against ourselves) that the points made in relation to Ground 1 are so open-and-shut, one of the points informing the suspicion of the CMA that is potentially pernicious to competition is the continuation of an agreement for the Network that was expected to have a limited duration, which is now significantly being exceeded. It is obvious that a price agreed for a 5 year agreement (we are speaking hypothetically) may well be rendered excessive if, without more, that agreement is converted into a 10 year agreement. That – reading the Decision – is obviously one of the factors informing the CMA's Decision. Again, we express no view at all about the susceptibility of this conclusion to successful judicial review, because no such conclusion has been reached. Instead, as we say, this is a factor informing the suspicion of the CMA, and the question we must ask is whether a suspicion so formed (and having regard to the various other factors relied upon by the CMA in the Decision) is reasonable.

23. In the course of his very able submissions, Mr Kennelly, QC submitted that the failure on the part of the CMA to consider the contractual background and history to the Network represented a failure to consider highly material facts and matters which ought to have been considered, if only to be rejected. We disagree:

    (1) The suspicions informing the decision to refer are set out – in summary form – in paragraph 6 of the Decision, where the CMA states its "current view" that "the market" for the supply of the Network "is not working well".[5]

    (2) The market, in this case, is – at least in part – informed by the contractual background and history to the Network. It may very well be that when that contractual background and history is properly considered, Mr Kennelly's contentions will be borne out, and the CMA will conclude that (in light of the relevant contractual provisions) the market is – contrary to its present view – in fact working well.

    (3) But we fail to see how any kind of assessment of the "market" and/or the contractual background and history can serve to undermine the points articulated in paragraphs 6(a) to (e) of the Decision. These indicators of the market not working well may (we are quite prepared to accept) ultimately prove to be

[5] The summary is quoted in full in paragraph 14 above.

indicators of a fair and competitive contractual regime. But this is precisely the point for the Inquiry Team to consider.

(4) There were times, in the course of submissions, when it was suggested that the manner in which the Decision was framed might serve to limit the investigations of the Inquiry Team. We wish to stress that that cannot be so. The Inquiry Team will go where its investigations take it, untrammelled by the Decision.

24. Viewing each ground in this way, we conclude that none of them provide any basis for setting aside or quashing the Decision. Grounds 1 and 3 are intrinsically linked, and bad for the reasons we have given. Ground 2 – the approach to the IRR – is self-evidently precisely the sort of complex question of fact and economics that needs to be considered during the course of an investigation. We accept that the outcome of such an investigation is capable of being characterised as "irrational", but not when the IRR merely goes to inform a suspicion.

25. More to the point, we are satisfied that a "ground-by-ground" approach to the grounds for judicial review is unlikely to be profitable unless it can be said that the substance of that ground, in and of itself, is (see paragraph 20 above) so fundamental that (if successful) it would comprehensively undermine the Decision to make the reference, such that the Decision was objectively unjustifiably and/or irrational. That contention is, in this case, simply not tenable.

26. This last point can be put in two different ways:

(1) The Decision is, as we have said, a decision to make the Reference. The factors informing the CMA's suspicion are – as is clear from the summary, let alone the full document comprising the Decision – multiple. We do not consider – where the decision is one to refer – that an attack on one or more of these multiple factors is or can be particularly profitable, given the nature of the decision at issue. (As we say, if the decision constituted the outcome of an investigation, matters would be very different.) Rather, we consider that the correct approach, in this case, is to ask – standing back and viewing the Decision as a whole – whether the decision to refer (given that the touchstone is "reasonable suspicion") is itself unreasonable. We bear in mind in the context of judicial review, that a decision will only be set aside or quashed as unreasonable if it is so unreasonable that no reasonable decision maker, taking into account all (relevant) considerations, would have taken it: *Office of Fair Trading v. IBA Health Ltd*.[6]

(2) To put the same point another way, if it is shown that one of multiple strands of "reasonable suspicion" that goes to support a decision to refer is unfounded – whether because the "suspicion" is so slight so as not to amount even to a suspicion, or because it is not a reasonable suspicion – that does not mean that the decision to refer must be set aside. That would be an error. Rather, the question has got to be whether – in light of the reasonable suspicions that survive – the decision to refer is assailable on standard judicial review grounds.

[6] [2004] EWCA Civ 142 at [58].

27. We find that the Decision before us cannot be regarded as unreasonable according to this test (whichever formulation is adopted). We would only stress that – for the reasons we have given – there is (in the context of this Decision) a danger in the words "only relevant considerations". The *IBA Health* decision at [58] says this:

> "As is well-known, "Wednesbury unreasonableness" is shorthand for an act or decision which is so unreasonable as to be an act or decision which no person or tribunal properly instructed and taking account of all but only relevant considerations could do or make..."

The Decision in this case is one based on "reasonable suspicion", which involves – as we have said – considering something to be the case with little or no proof or evidence. It follows that it is perfectly possible – on investigation – for many, even all, of the factors informing the CMA's suspicion to be falsified on investigation. That potentiality in no way undermines the reasonableness or validity of the CMA's suspicion. We would not want this Judgment to be read as suggesting that if a single factor informing the CMA's suspicion can be shown to be wrong, that requires a quashing of the decision so that the CMA must decide again whether there is a "reasonable suspicion". The nature of the CMA's decision in this regard requires the Decision to be viewed in the round.

(5) Conclusion

28. We reject each of the grounds of judicial review advanced by Motorola, for the reasons we have given. More to the point, viewing the Decision as a whole – as we consider we should – we do not consider that any ground of judicial review, but in particular the "unreasonableness" ground, can serve to cause us to set aside or quash the Decision.

(6) Postscript

29. It is not for us to tell the CMA how to write its decisions. That, of course, is a matter absolutely for the CMA. However, it may assist the CMA to know that whilst we have considered with care the entirety of the Decision, we consider that the outcome of this judicial review in relation to this particular Decision would have been the same had the Decision only comprised the summary that we have set out in paragraph 14 above.

C. THE INVESTIGATION TIMETABLE

(1) Introduction

30. Our conclusion renders it necessary to consider Motorola's second challenge, which is in relation to the **Administrative Timetable Decision**. As regards this decision, Motorola contend that "the process by which the timetable was determined was unfair, the timetable is unfair, and the CMA's decision on the timetable was unreasoned".

31. It is necessary, first, to set out the relevant history.

(2) The relevant history

32. The Decision was published on 25 October 2021. At the same time, the CMA's Board issued an "Advisory Steer" to the Inquiry Group, in the following terms:

> "…we would expect that in setting its administrative timetable for the inquiry, the Group takes into account the necessity of reaching its conclusions expeditiously. The

> sense of urgency is acute in this case, and the issues that the CMA has identified in its preliminary work appear to be relatively contained. While the suspected detriment may come to an end when the Airwave network is replaced, the timing of that is uncertain and the likely detriment high in the meantime."

33. On the same day – 25 October 2021 – Motorola received a communication from the Inquiry Group enclosing a draft administrative timetable. This proposed that a final report would be issued in June 2022, within eight months of the reference being made.

34. The Inquiry Group invited comment from Motorola by 27 October 2021, and Motorola submitted detailed representations within that time frame. It is unnecessary to go into detail, but Motorola submitted that the draft timetable was unprecedented and too rapid to be fair.

35. The CMA also wrote to the Home Office, in similar terms and imposing a similar timetable. The CMA received a response from the Home Office within that time frame. It is appropriate that we set out the Home Office's response because this is relevant to Motorola's attack on the Administrative Timetable Decision:

> "We agree with the CMA Board's Advisory Steer (the Steer), in particular, that Motorola has a significant level of market power, amongst other things, derived from the features set out in paragraph 5 of the Steer. This provides Motorola with the means to derive significant excess profits, the burden of which falls on taxpayers. The value of these excess profits is such that it is vital the Market Investigation is resolved as quickly as possible. For every day the Airwave contract sustains, the taxpayer pays in excess £[✂]. Additionally, the longer the delay, the greater the impact on British citizens of their Blue Light radio services not benefiting from valuable improvements in functionality and coverage deriving from a replacement service. The Home Office would ask the MRG to consider whether the proposed timetable may be shortened. The MRG already has a very significant amount of information about the market, which hopefully should reduce the investigation period, especially as there are only two main parties, i.e. Motorola and the Home Office. As mentioned, the Home Office will do all it can to provide any requested information and to provide its submissions in a timely way."

36. The CMA put the parties' responses to the Inquiry Group in the following terms:

> "In setting its timetable, the Group needs to 'have regard' to the representations made, but in deciding how to set its timetable, the Group should mainly consider: whether it believes that such a timetable will enable it to understand and apply the correct facts, ask itself the right questions, consider the right evidence, give interested parties the chance to make representations at the right pre-decision stages and take proper account of them. The staff team considers that at this stage, taking into account the CMA's experience of running such processes and its ability to allocate more resources to the case if required, the proposed timetable is capable of achieving these objectives, for the following reasons:
>
> - The number of both main and third parties is particularly low in this case, which will significantly shorten any evidence gathering process and disclosure activity
>
> - In relation to the assessment of the AEC, other than profitability analysis, there appears to be little scope for extensive data analysis (obtaining and analysing large datasets from many parties is what typically takes considerable CMA time and resources in market investigations)

- Compared to many market investigations, there appear to be few potential remedy options

- Under the CMA's revised process (which we note did not apply in either [✂] or [✂]), the Group is expected to invite views on potential remedies from the outset of an investigation (i.e. as part of its Issues Statement). Our proposed administrative timetable is therefore consistent with the timeframe. ([✂] did not result in any remedies being imposed by the Competition Commission)."

37. Communications between the members of the Inquiry Group suggest that the members took the view that "splitting the difference" between the parties was a factor in their thinking. That, of course, meant sticking with the original timetable. On 1 November 2021, the CMA (by email) indicated to the parties that:

> "The [Inquiry] Group asked for views from Motorola and the Home Office on this matter. Having had regard to both parties' views, the Group has decided to retain its proposed timetable."

(3) The challenge to the Administrative Timetable Decision

38. Motorola challenges the Administrative Timetable Decision on a number of related grounds:

(1) ***Procedural unfairness.*** It is said that the failure to enable Motorola to comment on the Home Office's submissions on timetable was procedurally unfair. The Home Office's letter of 27 October 2021 should have been provided to Motorola, and Motorola afforded an opportunity to comment on it. Motorola contends that this procedural unfairness meant that it (Motorola) was unable to counter the (inaccurate) assertions of the Home Office.

(2) ***Absence of reasons.*** No reasons were given for the Administrative Timetable Decision.

(3) ***Substantive unfairness***. The timetable is insufficiently long to enable Motorola to exercise its rights of defence. The investigation is important to Motorola; there is an overriding requirement that Motorola be given sufficient time to defend itself; and past market investigations strongly suggest that a timetable of only eight months is simply not feasible.

39. The second of these challenges was not pursued before us, given the disclosure made by the CMA. but (given the written submissions we received) we say a few words nonetheless.

(4) Analysis

(a) Substantive unfairness

40. Market investigations are intended to be short and intense. By statute, the CMA must prepare and publish its report within the period of 18 months beginning with the date of the market investigation reference: section 137(1) of the Enterprise Act 2002. Although this period can be extended, we take this to be the maximum time that market investigations should ordinarily take. It would, therefore, be an error to presume that

section 137(1) is providing any kind of indicator as to the typical or desirable or normal length of such investigations. It does not.

41. We consider that it is incumbent upon the CMA to set an administrative timetable that is the shortest period that is reasonable. Without seeking to state all of the factors that go to the question of reasonableness, the following three are clearly relevant:

    (1) ***Rights of defence.*** The timetable must be sufficient to enable all interested persons properly to have their interests represented and taken into account. Whilst, of course, the views of interested persons will have some relevance, at the end of the day, this is the CMA's investigation, and it will know what is required. The CMA is in the best position to articulate the length of time that will be needed to conduct a proper investigation that respects the rights of defence. We bear in mind, also, that an administrative timetable can be extended if appropriate. That, we consider, ought to give the CMA more confidence to set aggressive, but reasonable, timetables. (We would not want to be taken to suggest that extensions ought to be a matter of course. The CMA should not be over-aggressive in its timetabling.)

    (2) ***CMA resource.*** We understand that the CMA has limited resources and that it is for the CMA (in the first instance, and subject to a broad discretion) to decide what resources to commit to any particular investigation. Inevitably, that decision will affect the anticipated length of the investigation.

    (3) ***Perceived urgency***. One of the factors that the CMA will bear in mind is how important it may or may not be to progress an investigation with greater than usual resource and urgency. As we have stated, market investigations are generally intended to be short and intense, but there may be circumstances which persuade the CMA to expedite an investigation (which will, generally, have CMA resource implications).

42. Motorola's contention of substantive unfairness obviously goes to the first of these three factors. We recognise that an eight-month period is shorter than the average, and that concluding the investigation by June 2022 might set a record. The CMA has clearly taken the view that there is a degree of urgency; and that it is willing to devote the necessary resources to achieving this outcome. These are matters for the CMA. The question for us, at this point, is whether the administrative timetable set is substantively unfair to Motorola, such that the Administrative Timetable Decision must be set aside.

43. We do not consider that to be the case here:

    (1) The CMA has a procedural discretion, giving it significant latitude. As we have indicated, it is the CMA that knows best the likely future demands of the investigation, and we should be slow to second guess. We see nothing on the face of it to suggest that eight months is unreasonably short or will prejudice Motorola's rights of defence. Although Mr Kennelly made the point that an unprecedentedly short investigation was likely to place pressures on Motorola that were unfair and also incapable of specific articulation at this stage, no evidence was adduced (even in general terms) in support of this proposition. We accept that the investigation is shorter than is normal; we accept also that this will place all parties – including Motorola, but also the Home Office and CMA – under pressure. But we do not accept that the CMA's decision – even placing

full weight on Motorola's rights of defence – can be characterised as substantively unfair.

(2) Indeed, there are a number of factors that suggest that a shorter than usual investigation will be possible because of the limited number of parties, the limited size of the market, and the fact that Motorola is clearly well-resourced and able to obtain expert representation and a large enough team to ensure that Motorola's interests are properly protected.

(3) We are deferring to the CMA's primary duty to conduct market investigations, and the CMA's consequent expertise. But we recognise that if the CMA has "got it wrong", the error can be rectified by extending the timetable. We also stress – as Motorola will be well-aware – that if any aspect of the investigation does become unfair, and the CMA fails to rectify this unfairness, a right of recourse lies to this Tribunal: *BMI Healthcare Ltd v. Competition Commission*, [2013] CAT 24.

(b) Procedural unfairness

44. We do not accept that there has been procedural unfairness in this case. The CMA – rightly – took the view that in an urgent investigation it was important and necessary to establish the administrative timetable quickly. This the CMA did within days of the Decision to make the Reference: the Decision was published on 25 October 2021, and the Administrative Timetable Decision notified on 1 November 2021.

45. Within this limited period, the CMA properly engaged in a single round of consultation with the interested parties. We consider that this was appropriate, and that it was not necessary (given the communications received from both the Home Office and Motorola) in this case to have a second round of consultation, so that the Home Office could respond to Motorola and *vice versa*. We consider that that was a reasonable approach in the circumstances of this case.

46. We are not suggesting that in all cases, a single round of consultation will be sufficient. There will be times when fairness requires a point made by one interested party to be put to another interested party before a decision is made. Motorola sought to suggest that this was such a case. We disagree. It is true that the Home Office's letter urged even greater expedition than the CMA was suggesting and that the grounds for this advanced by the Home Office (set out in paragraph 35 above) were likely to be contentious as between Motorola and the Home Office.

47. But the question of expedition is fundamentally a matter for the CMA. Subject to the need to respect the rights of defence, and to ensure a timetable consistent with these, we do not consider that Motorola had any particular right or interest in suggesting that the investigation was not urgent or in need of a more relaxed timetable.

48. Motorola's only real legitimate interest lies an investigation that respects its rights of defence. Had the CMA decided to accede to the Home Office's request, and abbreviate an eight-month proposed timetable into something materially shorter, then we consider the CMA would have had to engage with Motorola. As it was, the Inquiry Group took the view that a timetable both parties were equally unhappy with was a sign that the timetable is "probably about right". That was a view the Inquiry Group was entitled to take.

(c) Absence of reasons

49. We have no desire to engage on the question of whether the CMA was or was not obliged to give reasons for its timetabling decision. We would only observe that, generally speaking:

    (1) It is appropriate to give reasons; but

    (2) The manner in which those reasons are expressed and their form is acutely context sensitive.

50. In this case, the CMA's letter (in similar terms to both the Home Office and Motorola) stated in paragraph 16 that a draft administrative timetable was appended and that comments were invited. We consider that it is obvious that the parties were being consulted essentially on the workability of that timetable (hence the reference to "availability problems"). Motorola's response – rightly – focussed on this. The CMA's notification that it was maintaining the administrative timetable it had proposed did not need to contain express reasons: it is obvious that what was the CMA was doing was articulating what it considered to be an appropriate timetable. To require every line or step to be individually justified is disproportionate and not what we consider the law requires.

(5) Conclusion

51. For all these reasons, Motorola's challenge to the Administrative Timetable Decision is rejected.

52. This Judgment is unanimous.

Sir Marcus Smith
President

Jane Burgess

Eamonn Doran

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 2 February 2022