



Neutral citation [2024] CAT 7

Case No: 1593/6/12/23

**IN THE COMPETITION**

**APPEAL TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

30 January 2024

Before:

BRIDGET LUCAS KC  
(Chair)  
TIM FRAZER  
ROBERT HERGA

Sitting as a Tribunal in England and Wales

BETWEEN:

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

Applicants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Intervener

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**RULING (PERMISSION TO APPEAL)**

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1. The applicants, Motorola, seek permission to appeal the judgment of the Tribunal dated 22 December 2023 ([2023] CAT 76) (“the Judgment”) in which we rejected an application for judicial review of the decision set out in the CMA’s Final Report on “*Mobile radio network services*” dated 5 April 2023 (“the Decision”). The same abbreviations and definitions are used in this Ruling as are adopted in the Judgment.
2. Motorola has applied for permission to appeal to the Court of Appeal (“PTA”) on three grounds. The CMA and the Home Office (which was given permission to intervene in the judicial review application) resist the PTA application. The parties have provided written submissions, and were content for the CAT to determine the PTA application on the papers. We make this Ruling without a hearing, and based on the written submissions we have received.
3. Motorola seeks PTA on the following bases:
  - 3.1. The Tribunal made errors in respect of the competitive assessment (which consideration was the subject of Ground 1 of Motorola’s application for judicial review);
  - 3.2. The Tribunal made errors in respect of the profitability analysis (considered as Ground 2 of the application for judicial review); and
  - 3.3. In any event, there is a compelling reason for the appeal to be heard.
4. For the reasons set out below, we refuse PTA on all three bases.

**A. THE TEST FOR PTA**

5. An appeal lies from the Tribunal to the Court of Appeal on a point of law arising from a decision on appeal or review under the 2002 Act (Section 179(6)-(8)). In considering whether to grant permission to appeal, the Tribunal applies the test in Civil Procedure Rules Rule 52.6. Permission may only be granted where: (a) the Tribunal considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason why the appeal should be heard.

6. We note that, as regards Grounds 1 and 2, it is suggested that we made errors of law, in essence, in failing to agree with Motorola's argument that the CMA had failed to take into account material considerations, had acted irrationally and/or acted inconsistently. If our findings on the matters the subject of Grounds 1 and 2 were wrong, and we ought to have concluded that the CMA's decision was vitiated by error, then we would have erred in our application of the principles relating to judicial review. For the purposes of this application for PTA, therefore, it is necessary to consider whether there is a real prospect that Motorola would succeed in establishing that our conclusions were wrong.

**B. PERMISSION TO APPEAL GROUND 1: ERRORS IN RESPECT OF THE COMPETITIVE ASSESSMENT**

7. The first proposed basis for appeal is that the Tribunal erred in law because it should have found (consistent with Motorola's case) that the CMA failed to take any account of long-term competition in the competitive assessment in Chapter 4 of the Decision, and that this constituted a failure to take account of a material consideration. In other words, the Tribunal failed correctly to apply judicial review principles.
8. To put this proposed ground of appeal for PTA in context, it is necessary briefly to summarise Motorola's case on Ground 1 of its judicial review application. This is set out at [58] to [67] of the Judgment. Motorola's case was that the CMA found for the purpose of market definition (Chapter 3 of the Decision) that there was competition between ESN and the Airwave Network following the 2014/215 tender, even whilst ESN was only in development. However, when it came to the competitive assessment (Chapter 4), the Decision failed to have regard to that aspect of competition and instead found that Motorola enjoyed a virtually unconstrained monopoly. This, it was said, amounted to a failure to take into account a material fact (i.e. the longer-term competitive constraint provided by ESN whilst under development and even before it was ready to be deployed), and gave rise to an inconsistency between the CMA's competitive assessment and its findings in relation to market definition. The failure could not be said to be immaterial because it underpinned the CMA's market definition.
9. In support of its application for PTA, Motorola refers to part [80] of the Judgment where we said:

“It seems to us that the assumption that underpins Motorola’s submission is that because the Decision found that competitive constraints can, in principle, operate whilst ESN is under development and before it is operational, there is a finding in the context of the consideration of market definition that they did, in fact, do so and (it follows) that Motorola was in fact incentivised to improve its offering in particular in terms of price. We do not accept that there is any finding to that effect”.

10. At [8] and [9] of its application for PTA, Motorola submits that this passage represents the fundamental basis for the Tribunal’s conclusion that there was no failure on the CMA’s part to take account of the long term competition presented by ESN, even whilst under development. This reasoning, it is said, fails to recognise the nature of dynamic, long term competition, and treats the competition presented by ESN (as found for the purposes of market definition) as only a hypothetical possibility. Motorola says that the dynamic effect on competition was sufficiently real and material to justify a finding that the Airwave Network and ESN competed in the same market and that it follows from this that “even before ESN actually comes online, the fact that it will do so at some point is capable of exercising a competitive constraint on the Airwave Network”. Motorola argues that market definition and the assessment of competition are overlapping, not distinct analyses; that longer term competition is relevant in this market; and that the findings on market definition are based solely on the existence of longer-term competition, and yet there is no consideration of longer-term competition at all in the competitive assessment. Motorola submits that the Tribunal should have found that this was a failure on the part of the CMA to take account of a material factor.
11. None of the parties suggested before us that the CMA’s conclusion relating to market definition in Chapter 3 was made in error. As such (and to use Motorola’s words at [8] of the application for PTA) the finding of the CMA that the prospect of ESN ultimately coming online “is capable of exercising a competitive constraint on the Airwave Network” was not in dispute. However, it appeared to us that Motorola’s argument that Chapter 4 was inconsistent with Chapter 3 assumed that the finding in Chapter 3 equated to a finding that ESN did, in fact, exercise a significant competitive constraint in the specific price negotiations under consideration. We did not accept that that was right, or that there was therefore necessarily any inconsistency in the CMA’s approach, such as was alleged by Motorola.

12. The Judgment at [80] went on to say: “We agree with the CMA that the question of whether or not ESN did, in fact, act as a competitive constraint in the negotiations between the Home Office is what is then considered in Section 4: the competitive assessment”. In other words, dynamic competition was not treated as a mere hypothetical possibility. Accepting that ESN (again, to use Motorola’s words) “is capable” of exerting a competitive constraint (including in the period of development), Chapter 4 considered whether or not the existence of ESN in fact provided a significant competitive constraint in the specific pricing negotiations considered by the CMA in the Decision. The Judgment at [81] to [83] addresses the detailed, reasoned findings in the Decision on that question. The conclusion reached in the Decision was that ESN did not. We concluded that the CMA did not fail to take into account a relevant consideration, therefore, and found that there was no inconsistency between the findings made by the CMA in Chapters 3 and 4.
13. Motorola also refers to [85] and our observation that Motorola did not suggest to us that there was any evidence to the effect that Motorola was in fact influenced in its pricing by ESN. It is not entirely clear what argument Motorola wishes to make on [85] on any appeal. At [85] we record the limited scope of the argument that was being put to us. Motorola was not suggesting to us that the CMA had failed to take into account any relevant evidence or submissions. Rather, its argument was of limited scope and confined to the point based on the CMA’s findings in relation to market definition. We were not making a point about Motorola’s subjective perception of competition. We should also make clear that, as regards Motorola’s reference to objective evidence, contrary to the implication in [10] of Motorola’s PTA submissions, we made no finding as to the materiality of any price discounts offered by Motorola.
14. We do not consider that Motorola has any real prospect of success on the first basis on which it seeks PTA.

**C. PERMISSION TO APPEAL GROUND 2: ERRORS IN RESPECT OF THE PROFITABILITY ANALYSIS**

15. Motorola’s argument is that the Tribunal erred in law because it did not find that the CMA’s profitability analysis was irrational, and/ or failed to take account of a material

consideration, and/ or was internally inconsistent with other fundamental reasoning in the Decision.

16. Again, it is necessary to put this proposed ground of appeal in context. Motorola's argument is essentially the same as was made to the Tribunal in the course of the hearing. As explained in the Judgment at [97(2)], the appropriate approach to valuing the assets employed by the business was a "key conceptual issue" in the Decision. The Decision assigned a value-in-use of zero in the extension period for assets required to operate the Airwave Network during the original PFI period (with an additional allowance made for investments made specifically in order to operate the network beyond the end of 2019) - at [98(3)]. The CMA's approach was based on its view that, in a well-functioning market customers would not, in effect, pay twice for the same assets if the life of the network were extended beyond the term originally envisaged. This is essentially a counterfactual exercise. The CMA is comparing the prices actually agreed by the Home Office after 2019 with the prices that the CMA assesses would be paid in a "well-functioning market" ([124]).
17. The CMA's counterfactuals were (amongst other things) that in a well-functioning market: (a) the contract might have provided effectively for the transfer (at a zero price) of the network assets at the end of the contract period, allowing for the re-tendering of the provision of services using that already built and paid-for network; and alternatively, (b) the contract might have required that the original supplier reduce prices during any extension period to reflect the fact that the network assets had already been "paid" for over the original contract term: ([126(1); (2)]).
18. At [132-135] we found that the CMA was entitled to rely on these counterfactuals and rejected Motorola's argument that the terms of the PFI Agreement were evidence of what a well-functioning market would look like. Motorola says that finding is tainted by an error of law. The basis upon which we are said to have erred is as follows:
  - 18.1. The CMA accepted that both of the well-functioning market counterfactuals that it relied upon related to hypothetical alternative PFI contracts that might have been made in 2000, in place of the actual PFI Agreement.

- 18.2. As recorded in the Judgment: “The PFI Agreement was not a construction contract: it was a contract for the provision of network services which included a requirement for ASL to build and maintain a bespoke network infrastructure in order to enable it to provide those services.” [40(1)]; and “On termination, the Home Office had the right to require ASL to transfer the “Transferrable Assets” to either the Home Office or an “Alternative Service Provider”. The recipient of the assets was required to pay the “the agreed fair market value of such assets and contracts”.” [40(5)].
- 18.3. The Judgment recorded the findings in the Decision that the terms of the actual PFI Agreement resulted from “the type of process – tendering – that the CMA might expect to provide competition for the market” [54(1)]; and that the relevant provisions, including those dealing with the transfer of assets to the Home Office (or a third party), were “generally the type of terms the CMA might expect to find in a well-functioning market up to 2019 (albeit that they were not all necessarily effective in achieving their objectives)” [54(2)].
19. Motorola argues that it is therefore clear from the actual PFI Agreement itself what a well-functioning market looks like in terms of the treatment of the assets at the end of the term of the original PFI Agreement: the possibility for the Home Office to require the relevant assets to be transferred to it (or a third party) at a fair market value. Motorola relies on the fact that, whilst the Decision’s finding that the PFI Agreement is consistent with a well-functioning market is subject to certain limitations, there is no finding in the Decision that the asset transfer provisions in the PFI Agreement actually constituted an AEC. Further, whilst the Decision at paragraph 28(c) found that the fact that the Airwave Network assets have not transferred to the Home Office under the terms of the PFI Agreement constitutes an AEC again, there is no finding that the asset transfer provisions in the PFI Agreement themselves constituted an AEC.
20. Motorola argues that the counterfactuals that the CMA relied upon were therefore inconsistent with the direct evidence of what had occurred in a well-functioning market, which was to be found in the terms of the PFI Agreement itself. Motorola submits that “the Tribunal should have found that the CMA’s valuation of the Airwave Network assets was irrational (as it is based on hypotheticals that are inconsistent with the real life experience of how these contracts are structured), and/or failed to take account of a

material consideration, and/or was internally inconsistent with other fundamental reasoning in the Decision”.

21. We stated in our Judgment that Motorola’s argument is based on a selective reading of the Decision, and underestimates the significance of the limitations to the Decision’s findings both in relation to the PFI Agreement and procurement process ([54]; [78]). Motorola’s PTA application ([14.5]) seeks to gloss over this, but the limitations are significant. They are summarised at [78(1)] of the Judgment: (a) that it is the tender process that might be expected to provide competition for the market; (b) that the relevant provisions are generally, but not in all respects, consistent with the type of terms that might be expected from a competitive tender process; (c) that the provisions were not all necessarily effective; and (d) that the provisions were the type of terms that might be expected in a well-functioning market only for the fixed-term of the original PFI Agreement (in this case to 2019) during which the supplier might expect to recoup its investment.
22. The Judgment at [53] also refers to paragraph 12 of the Decision which states that “in a well-functioning market, we would expect one set of competitive arrangements to be replaced by another when such long-term contracts come to an end”. We were required to consider the nature of the exercise being conducted by the CMA when it considers the hypothetical scenarios. The counterfactuals are required because there has been an extension of the PFI Agreement beyond the date originally envisaged as being the contract period. The CMA is required to envisage, in relation to that extension period, what the competitive constraints might be regardless of what the position might be now, under the contract under scrutiny [134].
23. Whilst there is no express finding in the Decision that the asset transfer provisions in the PFI Agreement in and of themselves constitute an AEC, the Decision, read as a whole, clearly finds that the effect of those provisions is that there has been no transfer, and it is not a credible option. That is found to be an AEC. We do not, therefore, consider there is any merit in Motorola’s argument that, notwithstanding these findings, the asset transfer terms in the PFI Agreement nevertheless reflect the well-functioning market after the original contract period had come to an end in 2019.



24. We considered, and rejected the argument that there was any finding in the Decision to the effect that the existing asset transfer or payment terms in the PFI Agreement are consistent with what can reasonably be expected in the well-functioning market after 2019. It follows that the fact that the CMA's counterfactuals do not reflect the *existing* contractual position is not irrational, and nor can it be said that the CMA has failed to take account of a material consideration or gives rise to any inconsistency. The CMA is entitled to a margin of appreciation in the approach it adopts.
25. For these reasons, we do not consider that Motorola has any real prospect of success on the second basis on which it seeks PTA.

**D. COMPELLING REASONS**

26. Motorola argues that there are compelling reasons for an appeal to be heard. This is on the basis that:

“So far as Motorola is aware this is the first time that the competition regulator has intervened to rewrite a long-term contract with the Government for the provision of services of national significance. It is rare for the CMA to impose a charge control order given it is one of the most intrusive remedies available to the CMA. This intervention is particularly unusual in a market shaped by two open procurement processes (i.e. Airwave in 2000 and ESN in 2015). As a result of the Decision, the CMA has left all of the existing contractual obligations on Motorola in place whilst slashing the prices that Motorola is permitted to charge under the contract.”

27. The imposition of a charge control order is provided for by statute. The commercial impact on Motorola may be significant, and the use of such an order may be rare and unusual. However, it is inherent in the imposition of that remedy that the supplier's pricing freedom, whether under existing or future contracts, is limited. The reasons put forward by Motorola do not, therefore, provide a compelling reason why permission to appeal the Tribunal's decision on Motorola's application for judicial review should be granted.
28. We refuse permission to appeal on this basis.

**E. CONCLUSION**

29. Permission to appeal is refused on all bases on which it is sought. This decision is unanimous.

Bridget Lucas KC  
Chair

Tim Frazer

Robert Herga

Charles Dhanowa O.B.E., K.C. (*Hon*)  
Registrar

Date: 30 January 2024