



**MOTOROLA SOLUTIONS**

**Mobile Radio Network Services Market Investigation**

*Motorola's Response to the CMA's Issues Statement*

10 January 2022

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## 1. Introduction and Summary

(1) Motorola<sup>1</sup> welcomes the opportunity to comment on the Issues Statement published by the CMA on 13 December 2021. Motorola notes that the Issues Statement is intended to act as a framework for the Group's market investigation and that there is no presumption that the Group will find any AECs.

(2) Motorola's summary comments on the Issues Statement are:

(a) To ensure a complete and balanced investigation of the reference market, the Group should investigate two further important theories of harm:

(i) *Unilateral Market Power of the Home Office* giving rise to issues such as [✂] (whether intentional or unintentional), [✂] across Airwave and ESN;

(ii) *Dual Role of the Home Office as sole customer in ESN and Airwave*, to determine whether Home Office conduct [✂].

These theories of harm, and key related evidence, are explained below. Motorola believes that an exploration of these issues will contribute to a clearer understanding of whether the reference market is working well and if not what the causes may be.

(b) Motorola welcomes the Group's focus on the contractual arrangements between Motorola and the Home Office. An independent assessment of these arrangements and the actions of the parties is a fundamental pre-requisite to the assessment of whether there may be any AECs in a properly identified relevant market.

(c) The Group has implicitly recognised that the correct approach is to look at competition *for* the market since the Group proposes to focus on contractual negotiations in 2015/16, and then in 2018 and 2021. Motorola agrees with this approach. However, since Airwave only came about because of the very contract being investigated, the contractual starting point in 2001 and economic outcome for the Home Office by the end of the contract in December 2026 need to be an integral part of the analysis.

(d) Motorola welcomes the Group's careful assessment of the credibility of the theory that Motorola's "dual role" may have affected the delivery of ESN and whether Motorola has the incentive and ability to affect the delivery of ESN in the future.

(e) Motorola welcomes an assessment of ESN but is concerned that the focus is presently only on Motorola's dual role. If Airwave profitability is the central concern (which the evidence points entirely against), the magnitude of any excess profits is set by the extent of any ESN delay. The Group should therefore not only focus on the role of the Home Office in causing ESN delay, but ensure that it has a balanced picture by taking

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<sup>1</sup> "Motorola" is used in this Response to refer collectively to the entities involved in the delivery of the Airwave service together with their relevant affiliates. This Response should be read together with Motorola's prior submissions to the CMA.

evidence from all stakeholders. As a minimum, Motorola suggests that evidence is taken from the following current and former stakeholders in the programme:

[✂]

- (f) In the assessment of *innovation*, the Group is strongly encouraged to assess the role of the Home Office in [✂] the reference market. Supporting grounds for such assessment are provided at paragraphs (96) to (98) below
  - (g) The Group is also encouraged to thoroughly examine the cost of ESN to the taxpayer. This topic is addressed at paragraph (58) below.
- (3) Motorola strongly believes that after careful consideration the Group will conclude either that there are no AECs, or that any AECs arise because of [✂]. The evidence available to the Group demonstrates overwhelmingly that Airwave is a project company that has consistently delivered to or beyond its requirements, and has done so at exceptional value for money while showing substantial flexibility. Motorola recognises that there are many issues for the Group to consider that require careful assessment, and Motorola remains at the Group's disposal to assist the market investigation.

## 2. Market Characteristics and Market Definition

### 2.1 Market Characteristics

- (4) The CMA appears to have misunderstood Motorola's view on what constitutes a relevant market and why the supply of the Airwave service should not be considered to be a market to be investigated. The Issues Statement presents Motorola's position as follows (at paragraph 22): "*Motorola Solutions, in its successive submissions, has argued that the supply of LMR network services in Great Britain does not constitute a relevant market. This is because, they argue, such services can only be provided through a long-term contract (the PFI Agreement) between two parties (Airwave Solutions and the Home Office) owing to the bespoke nature of the services, and there is limited scope for competition during the contract.*"
- (5) This is not Motorola's position. Rather, Motorola has explained that the supply of services *within* a contract should not be considered a relevant market. A failure to understand the difference between *markets* (in which prospective suppliers compete) and *contracts* (under which services are being supplied) has potentially disastrous consequences for the legal certainty that contracts are supposed to provide to the contracting parties.
- (6) This is why Motorola responded to the market investigation consultation, which postulated a market for the supply of the Airwave network (now amended by the CMA to be described as a market for the supply of LMR network services), by stating that:

*"[t]he **supply** of the Airwave service pursuant to a long-term contract does not amount to a 'market': there is a sole purchaser (the Home Office), and a sole supplier (Motorola) who provides a bespoke service as required by the purchaser, pursuant to highly detailed contractual requirements that have been negotiated over a period of many months"* (emphasis added).

- (7) The CMA's own guidance puts this point as follows:<sup>2</sup>

***"In some instances firms compete for a market, rather than in a market, for example, by competing to be the first to claim a patent in a key area, the first to achieve scale in a new market, or to win a public procurement contract or franchise to supply a public service."***

- (8) This is why there is currently no 'market' in any competition sense for the provision of Airwave: these services are currently supplied on terms agreed when the contract was tendered and subsequently amended by the parties and will be provided on agreed terms until 31 December 2026<sup>3</sup> and beyond, at the sole option of UKHO. Contracts for a replacement service have been tendered when ESN was procured. Any market investigation that does not take as its starting point negotiations at the point of contracting is a 'market investigation' in name only.
- (9) One clear way to illustrate the difference between a contract and a market in the present context is to examine the outside options available to the parties. Motorola's outside options are non-existent. Motorola is contractually required, at an agreed price, to provide the Airwave service until the Home Office specifies, now being until 31 December 2026. Walking away would mean Motorola breaking its contract which, quite aside from the ruinous financial consequences, is hardly a credible option given the damage this would cause to Motorola's reputation. As the Home Office has recognised in evidence given to the PAC<sup>4</sup> it is unrealistic to theorise that Motorola could afford to be seen to walk away from its core business.

## 2.2 Relationship between ESN and Airwave

- (10) Motorola notes that the CMA appears to have dispensed with the idea of competition between alternative networks during the transition period from Airwave to ESN. Instead, the CMA seems to consider that there is some competitive interaction between Airwave and ESN referred to as 'long run dynamic competition'. According to the CMA:

*"the development of ESN may affect Airwave Solutions' revenue and profitability by impacting upon, for example, the number of customers that use it, the length of time that customers use Airwave Solutions, the extent of customers' bargaining positions vis-à-vis Airwave Solutions and the level of investment required to keep the Airwave network in operation. The development of ESN can therefore be viewed as a form of long-run dynamic competition as it represents efforts that have the goal of winning customers that currently use the Airwave network."*

- (11) Motorola fully agrees with the notion that the development of ESN affects Airwave's revenues – after all, if ESN had been delivered by the Home Office's required date, Airwave would by now be shut down. However, this effect arises purely from the fact that the Airwave network is needed for longer than the Home Office initially expected. It does not amount to any

<sup>2</sup> *Guidelines for Market Investigations: Their role, procedures, assessment and remedies* (CC3 Revised), at paragraph 11.

<sup>3</sup> [REDACTED].

<sup>4</sup> Oral evidence: Emergency Services Communications (16 November 2016), Question 100 <<https://publications.parliament.uk/pa/cm201617/cmselect/cmpubacc/770/770.pdf>>.

competitive interaction, as the parameters for the transition from Airwave to ESN are entirely unaffected by Airwave's actions or decisions.

- (12) ESN also affects Airwave profitability, but not in ways suggested by the above passage. Airwave has to be provided to the exact date specified by the Home Office (now set at 31 December 2026) which given the lumpy nature of capital investment required to maintain the network at contracted levels, may lead to lower overall profitability depending on the particular year selected. Motorola is also subject to high levels of risk and uncertainty as a result of the Home Office's unilateral option to further defer the shutdown date beyond 31 December 2026 at a [redacted] notice either nationally or regionally (depending on progress of the Home Office's ESN Transition plan) with all of the attendant complications and costs of maintaining its supply chain to accommodate that option.
- (13) It bears emphasising here that the terms on which these customers would be served and the (expected) timing of the migration from Airwave to ESN were determined at the tender stage of the ESMCP in 2015. The transition from the old (Airwave) to the new (ESN) provider of mobile communications services for the emergency services does not depend, in any way, on the relative attractiveness of the commercial terms offered by the two networks. Those terms are already set – individual users (police, fire ambulance) are unable separately to choose whether they want Airwave or ESN for a particular period. It is therefore unclear what *competitive* interaction 'long-term dynamic competition' seeks to capture as the Home Office – acting as the sole customer – simply sets the time frame for the switch over from one network to the other.

### 2.3 Contractual and Commercial Relationships between Airwave and its customers

- (14) As Motorola has explained to the CMA on a number of occasions, to the extent that Airwave amounts to a market, it only exists as such because of the negotiation of contracts that gave rise to its existence. To date, the CMA has failed to demonstrate an accurate understanding of the contractual position, and Motorola welcomes the Group's sharp focus on this vital issue. Motorola believes that once the Group understands the contractual arrangements for the remaining life of Airwave (i.e., until December 2026) (and in light of the benchmarking provisions available to the Home Office – see paragraphs (94) to (95) below), the Group will find that there are no competition concerns in the supply of LMR network services.
- (15) The CMA states at paragraph 4 of the Summary of the MIR Decision that "*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***" (emphasis added; see also paragraph 1.51 of the MIR Decision).
- (16) The CMA's description of the contractual position is incorrect and misleading. Motorola's Response to the MIR Decision presents a factual overview of the contractual position. Briefly, the CMA is wrong to state that there is a "need" to "agree" an extension to the contract(s) in order for the Airwave service to be continued beyond 2022. It is similarly wrong to state that there is a "need" to "agree" the terms (including as to pricing) that will apply to the period beyond 2022. This has been demonstrated conclusively by the Home Office [redacted]. This continuation mechanism was put in place and agreed by Motorola and the Home Office in 2016 specifically to avoid the "need to agree" as the Home Office insisted upon the absolute right to continue the Airwave contracts as long as the Home Office needed the service.

- (17) Similarly, the CMA's scant treatment of the Deed of Recovery fails to recognise the central role played by that document, and the importance of the commercial principles agreed. According to Recital (H) of the Deed of Recovery: [REDACTED]. In other words, the Deed of Recovery was in large part the reason why the Home Office consented to Motorola's acquisition of Airwave.
- (18) In addition to setting out financial remedies (including the right to reduce Airwave payments by [REDACTED]% or approximately £[REDACTED]m) in the event of certain delays, the Deed of Recovery gives the absolute power to the Home Office to decide for how long the Airwave network would run. As Recital (E) makes clear: [REDACTED]<sup>5</sup> and this principle lay at the heart of the arrangements entered into between Motorola and the Home Office in 2016. At the time of the Deed of Recovery, the Home Office had not settled its transition plan and so insisted on a "notice" mechanism under which the Home Office would later inform Airwave when individual regions would be shut down.
- (19) Agreement of the Deed of Recovery was the Home Office's absolute priority in the suite of concessions obtained by the Home Office in 2016 and has played a central role in each negotiation with the Home Office since 2016.

#### 2.4 2015/16 Contractual Arrangements

- (20) Motorola welcomes the Group's focus on this period. This is the only point at which the parties had the option to walk away during the period of Motorola's ownership of Airwave. Motorola's walk-away option was not to proceed with the Airwave acquisition (although this was hardly attractive since Motorola would have had to pay a break fee of £[REDACTED]million). The Home Office's walk-away option was to refuse consent to the acquisition, causing the acquisition to fail (but the Airwave service would continue). As a result, the Home Office was able to 'bid down' and lock in the terms on which Motorola (instead of Macquarie) would be required to supply Airwave, in return for the Home Office consenting to the transaction.
- (21) On 9 December 2015, Motorola executed its Lot 2 Agreement, by virtue of which Motorola would be a supplier to ESN.
- (22) Shortly thereafter, Motorola's proposed acquisition of Airwave gave the Home Office an opportunity to secure significant concessions as a condition of providing its consent for the transaction to go ahead. That opportunity enabled the Home Office to secure the following:
- (a) A 'Deed of Recovery' providing financial remedies protecting the government from a delay to ESN caused solely by Motorola's ESN Lot 2 delivery and the consequential need to extend Airwave;
  - (b) A perpetual obligation for Airwave to continue to deliver the service at an agreed price (subject to indexation) and at Airwave's risk and cost until the final ESN Transition Group (whether delayed or on time) has transitioned to ESN and Airwave is switched off;

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<sup>5</sup> [REDACTED].

- (c) A unilateral option in favour of the Home Office to extend Airwave for any period beyond 31 December 2019<sup>6</sup> at agreed pricing (subject to indexation) and further flexibility (all aligned to possible ESN elongated Transition scenarios) to require delivery of the Airwave service only to such ESN Transition Groups that are delayed in transitioning to ESN and need the service for longer than those groups that have transitioned;
  - (d) Classification of the Airwave network into eight different regional areas which would align to the ESN Transition Group rollout strategy. Each Airwave regional area would have a separate notice period and end date;
  - (e) An essential and bespoke “interoperability” service under which the emergency services users would be able to communicate on an interoperable basis via the existing Airwave Tetra system and the new ESN PTT voice communication system during the transition phase from Airwave to ESN;
  - (f) Settlement of ongoing litigation between the Home Office and Airwave relating to Benchmarking and Variation of Price equating to payments to the Home Office of £[X]m over three years;
  - (g) A common end date for all core contracts – Police, Fire, and Health - removing the “ragged edge” expiry dates, which would have been problematic as regards the Home Office’s aspiration to complete ESN Transition across all the emergency services by December 2019;
  - (h) Access to [X] of Airwave’s sites located in rural areas in order to enable the Home Office to execute on its ESN extended area coverage requirements;
  - (i) Flexibility for Police Forces to extend their existing Menu Services provision at current pricing for a period of their choice through to National Shut Down; and
  - (j) Withdrawal of Airwave’s procurement challenge against the Home Office following Airwave’s exclusion from the ESMCP “Lot 3” competition.
- (23) It should be noted that the Home Office did not seek to secure any form of price reduction at this point, having secured the overall deal it wanted (see also Table 1 below, in which Motorola outlined the estimated £[X] million that Motorola’s acquisition would save the Home Office, compared with remaining with Airwave’s then owner), as well as interworking, which was essential to a timely launch of ESN.
- (24) In particular items (a), (d) and (e) above indicate that there was no doubt about the eventual replacement of Airwave by ESN as and when the latter became operational, with Airwave ensuring that the transition would be smooth, and that any potential conflict of interest that might arise from Motorola’s ‘dual role’ was considered and addressed.
- (25) In addition, the Home Office gained, in Motorola, a supplier of its critical Airwave service with public safety at the heart of its business and whose infrastructure and TETRA technology had been the backbone of the Airwave network. The change in ownership also led to approximately £2 billion of debt being removed from the Guardian Digital Communications Ltd (Airwave’s

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<sup>6</sup> The then “National Shutdown Target Date”.



immediate parent company) balance sheet, which was put in place as part of Macquarie’s acquisition of Airwave<sup>7</sup> (which would of course have incentivised Macquarie to seek to maximise their profit at every opportunity, not least in the scenario of ESMCP being delayed).

- (26) The evidence points overwhelmingly towards the conclusion that the overall agreement entered into with Motorola as acquirer of Airwave offered the Home Office better value for money even than the deal that the Home Office had secured with Airwave’s previous owners, which as the Airwave project IRR analysis unequivocally shows had already provided exceptional value for money. Motorola did not have any level of market power at the time of the acquisition of Airwave, or at any time thereafter since the contractual terms had been agreed. This was explained by *the Home Office* in April 2017 to the Public Accounts Committee as follows:

*“Q46 Philip Boswell: As a previous contracts manager for contractors, designed obsolescence is a convenient mechanism to squeeze money out of customers—mobile phone users will be completely familiar with that, and clients alike. The contractor having moved the goalposts by saying they are going to withdraw their support, what can you possibly do about this? Do you think it gives them a stronger position if you want to extend beyond? You are just figuring out what you need at the moment.*

*Mark Sedwill: Just one point of context: this was a severe risk when Macquarie were the owners of Airwave—and we spent quite some time on this at the previous hearing—because they had essentially been telling the market that they were going to be able to charge us pretty much any price they liked after the end of the PFI 2020.*

***With Motorola taking over and agreeing a much more reasonable set of price extensions**, we have already mitigated that financial risk very substantially. As Mr Webb says, it is Vodafone not Motorola who have issued the notification about the support for this particular part of the infrastructure. There is a question between them as well as between us and Motorola but, as Mr Webb says, **we have a price agreement with Motorola for those extensions that is firm. Is that fair?** (emphasis added)*

*Stephen Webb: indicated assent—”<sup>8</sup>*

## 2.5 The 2018 Airwave “extension”

- (27) It should be noted as a general matter that while the term “extension” has been used colloquially between the parties and publicly, in contractual terms everything that took place after 2016 was a continuation of the contract, not an extension. There was never a point in time after 2016 when, but for agreement between the parties, the Airwave contract would have ended.
- (28) Since in 2016 the contractual terms for the future provision of Airwave had already been settled, any amendments to those terms would ordinarily only occur where the parties could jointly

<sup>7</sup> Guardian Digital Communications Limited Annual Report and Consolidated Financial Statements Year ended 30 June 2015 <<https://find-and-update.company-information.service.gov.uk/company/06143540/filing-history/MzE0MjI4NjM0MWFkaXF6a2N4/document?format=pdf&download=0>>

<sup>8</sup> Public Accounts Committee, *Upgrading emergency service communications – recall* (21 April 2017) <<https://publications.parliament.uk/pa/cm201617/cmselect/cmpubacc/997/997.pdf>>.

conclude that it was in their mutual interests to amend the agreements. In reality, as the contractual evidence demonstrates however, every amendment after 2016 amounted to *improved* terms for the Home Office. This evidential picture directly contradicts any theory that Motorola had market power.

- (29) In April 2018, the Home Office approached Motorola with a request to quote for a ten-year continuation of the Airwave contract. This request appears to have been made in the context of the planned reset of the ESMCP, so that the Home Office could understand the cost of retaining Airwave as a long-term committed backup for mission critical PTT voice functionality. Motorola responded to the Home Office request with a first model to set out what the service charges might be and to advance the ‘framework’ of both Airwave and ESN.<sup>9</sup> Although the parties had already agreed the pricing that would apply irrespective of Airwave’s period of operation, in view of a potential 10-year commitment from the Home Office Motorola proposed an innovative discount structure of [redacted]% [redacted]% [redacted]% over time, with discounts staggered in line with network investments that would be required.
- (30) The Home Office subsequently requested a proposal for an extension based on a rolling 18-month contract structure. In response, Airwave explained that such an arrangement could not be accommodated without significant increases in the price of the Airwave service as Airwave would be unable to enter into long-term contracts with suppliers and would need to pass on higher charges for short-term contracts and potentially large write-offs of capital investments. As an alternative, Airwave offered the option of contract breaks at predefined points (after [redacted] years). This would allow Airwave to package network investments in a planned manner into discrete blocks. Decommissioning charges would be waived after the full contract term but would be payable in full or at [redacted]% if the Home Office exercised the break options and therefore the network would have to be shut down earlier. As Airwave pointed out, incorporating the flexibility offered through the break options created additional risks as investments might need to be brought forward if component failure rates exceeded forecasts without any certainty of being able to recoup these investments.
- (31) The proposal submitted to the Home Office in June 2018<sup>10</sup> retained the discount structure of the original 10-year proposal, and with some changes to the bundles included would guarantee blue light customers savings of £[redacted]m off a total baseline revenue of £[redacted]bn over 10 years, compared with savings of £[redacted]m off a total baseline revenue of £[redacted]bn under the initial proposal. This amounted to a similar saving of around 14% over the full ten-year period whilst providing a considerable amount of flexibility.
- (32) Some three months later, the Home Office sought and obtained continuation of the Airwave service for a further three years beyond 2019 at a [redacted]% discount to the existing service charge. In addition to discounting of Airwave Service Charges by [redacted]%, the Home Office required an amendment of the payment profile of the Blue Light Contracts which pushed payments out of 2020 and into 2021 and 2022 for budgetary reasons. As a result, Motorola had to take working capital funding at its own cost to accommodate this requirement of the Home Office. In addition to securing cashflow benefits, by agreeing with Motorola to amend the ‘target’ national shut down date from 31 December 2019 to 31 December 2022 the Home Office preserved its ability

<sup>9</sup> Airwave: 10 Year Extension Modelling, 17 April 2018.

<sup>10</sup> Airwave: 10 Year Extension Modelling, 6 June 2018.

to later exercise the Home Office's extension option, via issuance of a National Shutdown Notice, secured in 2016. This was therefore a highly favourable outcome for the Home Office.

- (33) It is however not clear to Motorola why the Home Office chose a three-year extension at a [%] discount in preference to the proposal made by Motorola in June 2018 which had an initial period of [%] years at a [%] discount (after which a break option could be exercised), unless some or all of the following applied: (a) the Home Office was very confident that it would have no further need for Airwave after 2022; or (b) politically, the Home Office could not be seen to enter into another 10 year agreement, even with two break clauses; or (c) the Home Office wanted to guarantee itself the ability to extend Airwave for ever.
- (34) These negotiations show that in 2018 the 'market' (if extra-contractual negotiations can ever be considered to constitute a market) was working extraordinarily well for the customer. The Home Office asked Airwave to provide quotes for different scenarios, and Airwave engaged with the Home Office constructively, exploring alternative ways of providing the Home Office with the requested flexibility that could be made to work with the requirement for long term commitments from Airwave to its suppliers and the nature of the investments needed to maintain the service at the agreed standard over a reasonably certain time horizon.
- (35) It is obvious that the Home Office was in the driving seat. The Home Office set its requirements and decided which of the options offered by Airwave it would eventually pursue. Airwave provided a range of options rather than simply pointing to the existing terms and (for example) threatening to stop providing the service altogether if the Home Office did not accept those terms. As the Home Office itself recognised when giving evidence,<sup>11</sup> it would not be a sensible strategy for Motorola not to engage constructively with respect to the provision of emergency services in the UK, since this is its core business.

## 2.6 2021 Negotiations

- (36) In March 2021 the Home Office sought to further improve the terms of its arrangements in relation to Airwave while planning the required continuation of Airwave beyond December 2022. Motorola had initially requested a price increase to take account of the vast capex programme that would be necessary to provide the Airwave service until 2026. This request was flatly rejected, and the [%] of the Home Office towards Motorola became [%], even though Airwave continued to operate at its customary high level. Many [%] were [%] placed on Motorola for detailed information, [%]. Furthermore, despite Motorola producing successive draft Heads of Terms and demonstrating in meetings to the Home Office that Airwave represented exceptional value for money according to the terms of the contract, the Home Office refused to specify its [%] only that Motorola's proposed terms were not acceptable to the Home Office.
- (37) Recognising that this is speculation on the part of Motorola, the Group is [%]. Once the market investigation was launched, Airwave was unable to continue discussions regarding the provision of further *ex gratia* discounts to the Home Office, given the highly uncertain environment into which the Airwave business had been plunged by the CMA's market investigation reference.

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<sup>11</sup> Oral evidence: Emergency Services Communications (16 November 2016), Question 100. <<https://publications.parliament.uk/pa/cm201617/cmselect/cmpubacc/770/770.pdf>>.

### 3. Theories of Harm

#### 3.1 General comments

- (38) Any market investigation where there is a sole supplier and a sole customer should examine separately whether bargaining power is skewed in favour of one side to an extent that would give this side unilateral market power. If there are no grounds to consider such an uneven distribution of negotiation power, this points strongly towards the conclusion that the market is working well. For the reasons explained below, Motorola believes there is overwhelming evidence to support a thorough investigation of the Home Office’s conduct and its impact on Airwave, yet this is absent from the Issues Statement.
- (39) The need to make a careful assessment of unilateral market power on both the demand and supply side assumes a central importance: the present market involves a monopolist and a monopsonist; and the Group’s second theory of harm (dual role) depends on the first (unilateral market power) being true and of course there would be no need for any inquiry as to profitability if the first theory did not hold true.
- (40) As presently conceived, the theory of harm regarding ESN delay (namely Motorola’s ‘dual role’) discriminates against Motorola; the theory has been unreasonably and unfairly narrowly drawn. ESN delay has caused Airwave to run longer than the Home Office’s originally envisaged shutdown dates of 31 December 2019 or 31 December 2022. By framing the theory of harm only in terms of Motorola’s “dual role”, the Group is unreasonably limiting its own ability to examine the true cause of ESN delay to ascertain whether this may this turn out to be a feature of the reference market and if so, what to do about it.
- (41) In its Response to the MIR Decision, Motorola explained the issue as follows:

*“... (i) critically, if ESN had been delivered on time, Airwave would have been switched off and this Market Investigation would not be happening; and (ii) the ESMCP provides a helpful insight into the conduct of the Home Office as a monopsonist customer and into the conduct of Motorola often going beyond its contractual obligations to support the ESMCP. On an objective reading it will be obvious that Motorola did not delay the ESMCP. Of course, given [✂] this is now moot, but nonetheless Motorola intends to ensure that the Group has the facts surrounding this topic. In fact, Motorola anticipates that, having considered the explanation for the delays in the ESMCP, the Group will want to consider whether the CMA should have considered the adverse incentives on the Home Office created by the Home Office’s achievement in 2016, at a time when the misalignment of two of its key ESMCP suppliers’ technical solutions had become apparent to the Home Office, of a unilateral fixed-price option to extend Airwave without limit in time. This option effectively provided a state-guaranteed insurance policy that Airwave would always be available regardless of the state of its ESMCP. The Group may also want to consider why the finger has been pointed at Motorola in respect of ESMCP delay, and whether the accusation is fair.”*

- (42) It is troubling to Motorola that, despite the many volumes of publicly available independent assessments pointing towards an [✂] by the Home Office to deliver ESMCP (and thereby

achieve Airwave shutdown on a timely basis), the Issues Statement indicates no efforts are necessary or appropriate to examine Home Office conduct in relation to ESN and its impact on Airwave. Motorola therefore respectfully invites the Group to review as separate theories of harm:

- (a) Unilateral market power of the Home Office; and
- (b) Dual role of the Home Office in relation to ESMCP and Airwave.

(43) Further evidence and reasoning is provided below.

### 3.2 Unilateral Market Power of the Home Office

(44) The Home Office is a monopsonist in respect of both ESN and Airwave, and the Group is urged to make a careful assessment of the extent to which the Home Office has caused adverse effects on competition in the reference market. Notwithstanding the fact that, across Airwave and ESN, it has made many [REDACTED], the Home Office has used its monopsony power in a number of ways over time including to: extract lower prices outside of contractually agreed terms; defer significant payments; [REDACTED] including in respect of ESN delay, all in full knowledge that Motorola has no “walk away” options.

(45) By way of example of this [REDACTED], despite the agreement in 2018/2019<sup>12</sup> to implement an incremental product-based delivery programme culminating in “ESN Prime” from which point the ESN Transition would start, the Home Office decided to change the basis for delivery - moving to a “ESN Beta” and ESN V1” deployment. Following this decision, the Home Office required Motorola to deliver significantly increased technical scope (through its Kodiak Software for ESN V1) compared to the scope that the Home Office had only 18 months previously agreed would be sufficient to commence its transition phase from ESN Prime (which was itself similar in scope to the ESN Beta). Not only was this new approach [REDACTED] by the Home Office, but the Home Office also then [REDACTED]affording Motorola the necessary commercial cover to undertake this new work. The Home Office also insisted that its dates for the achievement of “Beta” [REDACTED] and “ESN V1” be maintained regardless of continual significant increases in scope, which the Home Office attributed to the needs of its users. All of this was despite the parties having specifically agreed the contractual scope and price for that scope in the ESN Reset. Motorola believes that once the Group has assessed conduct such as this, the Group will conclude that remedies may be appropriate to resolve conduct issues and incentives on the purchasing side, not the supply side.

(46) In its very first Response to the Market Investigation Consultation, Motorola observed that:<sup>13</sup>

*“[t]here has been discriminatory treatment by the CMA of Motorola as the sole private sector supplier under the Airwave contracts and the Home Office as the sole government sector customer under that contract. Among others, Motorola is accused of having unilateral market power, whereas no consideration at all is given to the bargaining power held by the Home Office.”*

<sup>12</sup> ESN Heads of Terms and CAN500.

<sup>13</sup> Motorola’s 18 August 2021 submission, at page 3, sixth bullet point.

- (47) The CMA has so far continued this unequal treatment, and the Group's independent thorough assessment of the role of the Home Office will ensure a fair market investigation. This will be welcomed not just by Motorola but no doubt [REDACTED]; it is Home Office conduct which drives market outcomes.<sup>14</sup>
- (48) It is of course for the Group to determine how best to investigate and measure the Home Office's unilateral market power as a 'feature'. Motorola respectfully notes that this might include testing the implicit assumption that ESN is necessarily [REDACTED], examining the net costs to the taxpayer of creating the replacement network, and by examining [REDACTED] to procure a new ESN in the first place. A private sector customer contemplating such a vast first-of-a-kind project would need to have a keenly justified business plan, among other things, whereas publicly available data suggests that the economic case for ESN [REDACTED], especially given (i) the substantial duplicative network setup costs; (ii) the service performance of Airwave and excellent reputation among users; and (iii) that, in practice, users already have data services in addition to their Airwave contracts.
- (49) Inefficient purchasing choices. A powerful Government customer does not have the same budgetary constraints<sup>15</sup> as a private sector business that is accountable to its shareholders, especially in the context of critical national infrastructure. There are moreover many instances of Home Office purchasing inefficiencies and the Group is respectfully invited to seek evidence from stakeholders on this. As an isolated example, Airwave sought to assist the Home Office in relation to control room procurement by suggesting that ESN-ready control rooms procured by user organisations should also have DCS capability (DCS is a required Airwave protocol) in case ESN roll out was delayed. The Home Office [REDACTED] this suggestion with the result that user organisations have had to reprocure control rooms at substantial and unnecessary additional cost.
- (50) Similarly, the Group might also carefully examine how ESN currently looks set to operate from a user standpoint, to determine the extent to which the Home Office has developed an improved offering. Certain activities currently performed by Airwave as part of the contract with the Home Office will need to be performed by end user organisations. The ESN model is essentially of a "self-service" nature, requiring user organisations to dedicate their own local teams, presumably at their cost, to manage parts of the ESN service. It is unclear whether such costs have been factored into previous appraisals of ESN.
- (51) 2019 shut down date. The CMA has previously and mistakenly asserted that Motorola gave certain "assurances" that the Airwave network would be shut down in 2019. Motorola never gave any such assurance and in fact assigned a [REDACTED]% probability (as disclosed to the CMA at the time of Motorola's acquisition of Airwave) to the prospect of the Airwave network being extended beyond 2019. Moreover, Airwave voiced its concerns around the overly optimistic timetable. Subsequently the original 17-month ESMCP mobilisation timetable set by the Home Office in 2015 had to be extended by 4 months late in the pre-BAFO procurement stage. Motorola believes this was because the Home Office realised that bidder concerns on industry's

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<sup>14</sup> See for example, Motorola's Response to the MIR Decision, at paragraph (63), which explains how the Home Office kept Motorola and EE apart, with the result that ESN was unnecessarily delayed. See also the PAC's negative view of such Home Office conduct, summarised at paragraph (65).

<sup>15</sup> The Home Office did not budget for ESN delay contingency, despite relying on it, as it did not know its budgetary settlement beyond 2020. Motorola's Response to the MIR Decision, at paragraphs (44) to (46).

ability to build a first-of-a-kind solution of such complexity in such a short time period were well founded. Even then the Home Office did not extend the subsequent “transition phase” and the Airwave switch off date remained set at 31 December 2019. The ability to act independently of budget constraints and set targets that are roundly rejected by industry are symptomatic of market power.

- (52) Refusal to pay. A refusal to pay can be evidence of unilateral market power. The Group is respectfully invited to consider the Home Office’s refusal, at times, to make certain significant payments due under its contracts with Airwave. [REDACTED]. This behaviour has continued in the ESMCP with, by way of example, Motorola currently [REDACTED] undertaken.
- (53) Requiring work with no contractual certainty. Similarly, the Home Office has required work to be done but without committing to payment terms. During 2020 and 2021 Motorola was working on over £[REDACTED]m in change requests while prolonged negotiation on pricing for such requests took place. These negotiations did not conclude until December 2021.
- (54) Obstructive conduct. In the period after October 2020 the Home Office adopted a pattern of obstructive behaviour towards Motorola’s delivery efforts. This was in stark contrast to the progress of the mobilisation phase in the period between September 2018 and August 2020 in which Motorola secured 22 milestone achievement certificates. This included the critical on time delivery of Motorola’s Kodiak 9.0 software release which was important to the Home Office’s plans to deliver the then “ESN Prime” product to its users. Although the Motorola personnel and delivery methodology remained consistent through this period the Home Office approach from October 2020 became [REDACTED]. By way of example, having previously agreed a [REDACTED] plan for its ESN solution the Home Office changed personnel and then proceeded to use every opportunity [REDACTED].

### 3.3 Dual role of the Home Office

- (55) As explained above, the Group should consider whether the Home Office’s role as a monopsonist in relation to both ESN and Airwave may be a feature of the reference market that may prevent, restrict, or distort competition in the supply of LMR network services.
- (56) The Home Office’s dual role has a far greater ability to affect competition than Motorola’s hypothetical ability, and yet the CMA has so far ignored this entirely. Motorola strongly believes that any examination of dual roles of economic actors across both ESN and Airwave must include the Home Office. A failure to do so would render the market investigation incomplete and entirely one-sided. While there are multiple suppliers to ESN there is only one customer. Furthermore, since it is the only ESMCP participant with direct delivery contracts with every supplier, the Home Office has, by design, been the system integrator and so in complete control since day one.
- (57) Since the Home Office secured for itself in 2016 the right to require Airwave for as long as the Home Office needed and on terms that were fixed and subject only to indexation, the Home Office may not have had a strong incentive as a customer to make best efforts to introduce ESN promptly, and there is strong contemporaneous evidence to support a theory that the Home Office was too relaxed about its need to meet ESN deadlines.<sup>16</sup>

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<sup>16</sup> For example, see Motorola Response to MIR Decision, at paragraphs (39) to (48).

- (58) The Group is also invited to consider whether the conflict between the role of the Home Office as Airwave customer and as ESN customer has led to taxpayer money being wasted through a (so far) failed ESN procurement programme and an unnecessarily prolonged Airwave service. This ‘feature’ of Airwave has a respectable empirical basis. There is a vast amount of material in the public domain regarding the Home Office’s failings, including the Home Office’s own admissions. The Group may wish to consider whether a single powerful Government Ministry ought to be permitted to control, on behalf of the taxpayer, the purchasing of two networks, one of which is intended to replace the other, especially when the Home Office has publicly admitted to its procurement failings in respect of deliverability, scope and governance.<sup>17</sup> It was for the Home Office to set and ultimately accomplish ESN delivery, once it had decided that ESN was necessary.
- (59) The record clearly shows that the Home Office had, from 2016, treated what it called an “extension” of Airwave as a ready contingency, and had entered into binding contractual arrangements to lock down that contingency. Yet there was no detailed plan for how such a contingency would be triggered, how it would operate, and the Home Office never communicated to Motorola critical information such as whether and for how long it expected to require Airwave extensions and in which regions. Motorola was simply expected to comply with whatever demands the Home Office would place on Motorola. Indeed, notwithstanding that National Shut Down Notice has been served, Motorola still does not know what the Home Office is planning with respect to moving users from Airwave to ESN despite the complexity of such a transition programme.

#### 3.4 Unilateral market power of Airwave Solutions

- (60) As explained above, it is important to proceed on the correct contractual footing before examining the existence of any such theory of harm. Motorola notes, by way of example, that paragraph 32 of the Issues Statement states:

*“Delays in the roll-out ESN [sic.] beyond [the end of 2019], by preventing the emergence of ESN, have resulted in the continuation, for a sustained period of time, of a market situation in which prices and contract continuation are established through a series of bilateral negotiations.”*

- (61) This statement is misleading since it implies that but for the negotiations there would be no contract continuation and/or establishing of price, whereas neither is true. Since 2016, prices have been agreed and the Home Office has never needed to agree with Airwave an extension to the Airwave service.
- (62) The CMA proposes (at paragraph 29) to examine whether this market structure (Airwave as sole supplier of LMR network services for public safety in Great Britain) can be expected to grant Airwave unilateral market power. The CMA proposes to do this by considering “the balance of negotiating power of each relevant party in contract negotiations that have taken place since 2015” on 3 occasions:

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<sup>17</sup> Motorola Response to MIR Decision, at paragraph (37).



- The period around the award of the ESN contracts and acquisition of Airwave Solutions by Motorola;
  - The 2018 negotiations leading to the continuation of the contracts until the end of 2022; and
  - The 2021 negotiations relating to the potential extension of the contracts beyond 2022
- (63) Motorola agrees that these are useful points of focus for the Group's assessment, provided that the contractual position *since* 2015/2016 is fully understood, which is not apparent from the contents of the Issues Statement. It would be a material factual mistake for the Group to proceed on the basis that there was (or could have been) competition for the market in 2018 or in 2021.
- (64) Those time periods (2018 and 2021) are nonetheless useful since they illustrate how the parties conducted themselves and their ability (or otherwise) to secure improvements to the contractual arrangements that had been settled in 2016 *and which but for those improvements would continue to apply*. Post-2016 (i) Airwave never had an outside option; and (ii) the Home Office carried no risk in the event it failed to improve upon current terms.
- (65) In essence, the contemporaneous evidence for those periods clearly shows that Airwave (Motorola) never had (and so was unable to exercise) unilateral market power:
- The 2015/2016 negotiations yielded a very substantial improvement over the arrangements in place with the Airwave's prior owner and the Home Office leveraged its veto to achieve extraordinary flexibility to continue Airwave effectively as an open-ended insurance policy against ESN prolongation, as well as an interworking solution from Motorola that would achieve transition of users from Airwave to ESN (something that Airwave's then owners were not in a position to accomplish).
  - The 2018 negotiations show how the Home Office was able to secure improved terms despite the ongoing application of the 2016 agreements; and
  - The 2021 negotiations show how Airwave was *unable* to secure improvements to its commercial arrangements since the Home Office refused to accept such requests.
- (66) As noted above, competition for the Airwave market most recently took place in 2016 and Motorola made substantial efforts to improve the Home Office's position. Table 1 below is a table prepared by Motorola in 2016 and sent to the Home Office in order to convince the Home Office that it should consent to Motorola's acquisition. As will be apparent, **Motorola identified savings for the Home Office of £[REDACTED] million if it approved Motorola's acquisition, compared with exercising its veto**. The Group is encouraged to require evidence from the Home Office (including as between its then ESN programme director and his team) as to its reaction to this offer at the time.
- (67) By leveraging its veto right over the Airwave Acquisition, the Home Office therefore secured important variations to its current arrangements, and in doing so was able to exercise a

competitive choice between Motorola's offer and remaining with the status quo. There is no reason to suppose that Motorola's offer was not competitive: the negotiation of these concessions, including agreeing on the contractual mechanism for any future extensions of the Airwave service that may be required due to ESN prolongation, took many weeks.

**Table 1: Estimated Savings to Home Office of Motorola's Acquisition of Airwave**

[✂]

(68) At the site visit on 30 November 2021, one of the Group members expressed surprise at the fact that Motorola had agreed to provide such a complex and aging network for an indefinite period and at a fixed price subject only to indexation. The reason is simply that this was the commercial deal that had to be struck at the time and after substantial negotiation in which the walk-away cost to Motorola was significant. Ultimately, Motorola made a commercial decision that the risk reward ratio was appropriate. This included the fact that Motorola was particularly keen to ensure that the handover from Airwave to ESN was smooth, and Motorola believed that its corporate reputation would be enhanced accordingly. Now that the Home Office has confirmed it requires Airwave until [X], Motorola will have to incur approximately £[X] million in capital expenditure and take all additional necessary steps at its own cost to ensure that the network remains fit for purpose until it is switched off. This is part of the risk reward nature of a commercial decision.

### 3.5 Dual role of Motorola<sup>18</sup>

(69) Although Motorola's dual role in ESN and Airwave is expressed as a theory of harm, such a theory is contradicted by the evidence. In fact, Motorola's dual role has benefited both Airwave and ESN in important ways. At the outset, Motorola's acquisition of Airwave helped to avoid problems with ESN procurement by settling Airwave's claim against the Home Office for not being down-selected in relation to Lot 3 of ESN.

(70) Motorola's successful development of interworking, especially against the background of the complex real-world challenges, also needs to be carefully understood, to place a theory of Motorola delaying/shaping ESN in its factual context. Critically, if Motorola had not acquired Airwave, Motorola strongly believes that interworking may never have been delivered or, if it had been procured via Airwave under its previous ownership, would never have developed as quickly and at the pace required to accommodate the Home Office's transition timetable and complexity. When the Group explores the technical and practical realities involved in ensuring that the ESN Transition plan was achievable the Group will appreciate how fundamental Motorola's contribution was to delivering this critical Interworking technology for the Home Office. The interworking technology, as demonstrated, is already live due to Motorola's efforts. By owning Airwave, Motorola directed Airwave's activities towards ensuring that interworking was developed promptly, to facilitate the switch to ESN.

(71) While certain "lower tier" solutions (Radio-Radio and Control room based) could possibly have been carried out without Motorola, these solutions carry substantial disadvantages including being difficult to manage deploy and operate at the scale required, especially given the key communication principle of "floor control" that public safety users rely upon. There are extraordinary technical challenges associated with developing and implementing a higher-level interworking solution that is capable of safely transitioning large mission critical user organisations, especially simultaneously. Motorola's capabilities were essential to ensuring that a suitably resilient solution was found, in the form of an integrated wireline solution.

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<sup>18</sup> Motorola is just one (albeit main) supplier to LMR network services and related activities that is also active in ESN. There is no theoretical reason why control room suppliers and transmission suppliers, for example, would not also have the exact same hypothetical incentives identified by the CMA in relation to Motorola, yet the Issues Statement contains no consideration of such suppliers.

- (72) At the time when Motorola acquired Airwave, the Airwave network operated essentially on a “break/fix” support capability, using end of development life software and hardware. The network did not support the standardised ISI interface (the ETSI standardised interface for connecting between systems), and nor could such ISI interface be added because the system was too old. Adding ISI interfaces would need all switches to be refreshed, at significant time and cost. Motorola developed the latest TETRA product to communicate with the legacy Airwave system software so as to enable a partial refresh of Airwave such that the refreshed part of Airwave could run software that has support for Interworking. This was executed in 2017 according to schedule and without any milestone slip. Motorola also developed a proprietary solution for interworking based upon the non-standardised protocols used in internal interfaces within the heart of Airwave, to connect to the part that was refreshed. As part of the 2018/2019 ESN reset, Motorola then adapted its interworking solution so that it was compatible with the Kodiak PTT software which the Home Office had moved to.
- (73) Motorola was also the driving force behind the development of a dedicated user interface and support programme, the purpose of which was to facilitate a direct engagement between the user representatives, supported by the Home Office’s technical staff, with Motorola on all matters related to the use and operation of the Kodiak product in the ESN ecosystem. Dedicated Motorola personnel work within the project team to ensure that the Motorola teams understand the User’s perspective and expectations of the products and services that Motorola is supplying, with a particular focus on the drivers behind the Users needs and expectations. This proactive and essential effort, made outside of any contractual obligation, contradicts any theory that Motorola may have acted (or not acted) with a view to delaying ESN. Motorola’s efforts here included setting up and taking responsibility for a number of key working groups that met on a frequent (i.e., daily, weekly) basis to ensure that ESN users understood how Kodiak and related systems worked, all with a view to ensuring that the Home Office’s transition would be ready. These groups<sup>19</sup> consisted of Motorola and Home Office representatives, and representatives from the user organisations.
- (74) In any event, to frame this theory of harm, Motorola’s incentives to delay ESN will amount to a ‘feature’ of the reference market if:
- (i) it may be expected that Motorola has such incentives; *and*
  - (ii) Motorola has successfully been able to act upon such incentives; *or*
  - (iii) Motorola will have the ability to act upon those incentives in the future, whether or not it has done so in the past.

*Motorola has no incentive to delay ESN*

- (75) Any hypothetical incentive that Motorola may have had to delay ESN was extinguished at the insistence of the Home Office. First, as part of the contractual extension mechanisms agreed in 2016 at the time of the Airwave acquisition, Motorola offered to mitigate the risk of any further Airwave extensions that were necessary by shutting down Airwave on a regional basis

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<sup>19</sup> For example, UIUX (User Interface, User Experience), Application Interface, Application Experience (AIAX), Operational Configuration Working Group (OCWG).

depending on ESN availability. As previously explained, this could involve Motorola running Airwave at a significant loss.

- (76) As noted above, the suite of agreements entered into between the Home Office and Motorola in 2016 included a heavily negotiated Deed of Recovery with significant financial penalties for delay to ESN caused by Motorola, to which the CMA has paid scant regard. The Group is strongly encouraged to examine carefully the effect of this document, since the incentives to deliver under the Deed of Recovery have been key to Motorola, as Motorola delivered its components of ESN despite delay issues caused by the Home Office. Notably, the Home Office has never [✂].

*Motorola has no ability to delay ESN*

- (77) After a careful examination it will be evident that it is simply implausible to suppose that if Motorola had not owned Airwave, it could have sped up the delivery of ESN (not least since other parts of ESN are still not ready). Although EE and Motorola are currently the Home Office's main contractual partners until expiry of their ESN contracts in 2024, the Home Office has engaged a large number of third parties to carry out work on key aspects of the ESMCP. Table 2 below summarises the suppliers which it is understood feed into ESN (based on publicly available information and Motorola's understanding).

**Table 2: Suppliers to ESN**

	<b>Contract</b>	<b>Contractor</b>	<b>Description</b>
<b>1.</b>	<b>Programme advisory and delivery services</b>	Deloitte	Programme advisory and delivery services and transformation consultancy services
<b>2.</b>	<b>Mobile communication Services</b>	EE	Mobile phone network infrastructure including Air to Ground Network
<b>3.</b>	<b>User services</b>	Motorola	Various software and systems to make ESN work as a service
<b>4.</b>	<b>Delivery partner</b>	KBR <sup>20</sup>	Programme management
<b>5.</b>	<b>Handheld devices</b>	Samsung	Ruggedised handsets with device-to-device and push-to-talk capability for emergency services
<b>6.</b>	<b>Fixed vehicle devices</b>	Handsfree Group	Equipment for use in emergency service vehicles

<sup>20</sup>As stated above, KBR is no longer active as the Delivery Partner for the Programme.

	<b>Contract</b>	<b>Contractor</b>	<b>Description</b>
7.	<b>Vehicle installation</b>	TBC	Procure and coordinate installation of equipment in emergency service vehicles
8.	<b>Network resilience</b>	TBC	Capability to maintain an acceptable level of service following disruption to the network such as power/ equipment failure
9.	<b>Extended area services</b>	Various	292 sites in areas not covered by the EE network need to be built and connected to EE's network
10.	<b>Air-to-Ground Network Design Assurance</b>	Roke Manor Research	ESN coverage for emergency service aircraft
11.	<b>Aircraft communication system</b>	Chelton	Devices for emergency service aircraft
12.	<b>London underground coverage</b>	Transport for London and subcontractors	Provide ESN coverage across the London Underground network including tunnels and stations
13.	<b>ESN link</b>	Vodafone	Network connection between control room equipment and ESN
14.	<b>Control room upgrades</b>	Various	Upgrading control room software to work with ESN
15.	<b>Coverage assurance</b>	Telent	Services to test ESN coverage
16.	<b>Programme support</b>	Internal staff and contractors	Resource to support ESN

(78) In view of the sheer number of suppliers to ESN, it would take some considerable effort for Motorola to try to slow down all other participants' activities (who presumably would in any case refuse, not least given their contractual liabilities). The fact is that it is hopeless to suppose that Motorola could delay ESN. If (ignoring the provisions of the Deed of Recovery), theoretically, Motorola were to attempt to delay ESN, this would be immediately obvious and there is no evidence to suggest that Motorola has in fact made such efforts.

(79) The latest National Audit Report ("NAO")<sup>21</sup> blames the Home Office, not Motorola, for ESN delays:

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

*“Our report on the Emergency Services Network (Figure 7 on page 21) found that despite the high inherent risks, the Home Office set an over-ambitious timeline for delivery, with no contingency, and fell significantly behind schedule. We found this problem is widespread, as international public sector digital programmes also often overrun and exceed their budget.”<sup>22</sup>*

(80) As the NAO Report put it (at page 21):

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

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

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

- *working with the network provider to increase the coverage and resilience of its 4G network [not Motorola’s responsibility];*
- *developing new handheld and vehicle-mounted devices as no current devices were compatible with the Emergency Services Network [not Motorola’s responsibility];*
- *successfully integrating all the components [not Motorola’s responsibility]; and*
- *meeting the needs of the emergency services in situations such as in the air or underground [not Motorola’s responsibility].*

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

(81) None of the factors listed by the NAO fall within Motorola’s area of responsibility.

(82) As a matter of fact, notwithstanding the multitude of changes that were made in respect of the scope of the Programme overall, including those changes which affected Motorola’s obligations under the Lot 2 contract specifically, Motorola remained committed to fulfilling the Programme’s requirements. This was true even in instances where it was necessary for Motorola to input significant amounts of additional cost, time, and effort in order to achieve compliance with the Home Office’s evolving requirements, and in instances where such compliance required Motorola to undertake work without commercial cover.<sup>23</sup>

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<sup>22</sup> Paragraph 2.7 of the NAO Report.

<sup>23</sup> Motorola Response to MIR Decision, at paragraphs (56), (57) and (66).



#### 4. Outcomes

- (83) The Group will no doubt recognise at the outset that Airwave was delivered on time, on budget, and meets (and typically exceeds) the requirement of users and its contracted performance levels.
- (84) Certainly in terms of outcomes this contrasts extremely favourably with the ESMCP procurement, in which the Home Office apparently considers competition to have been intense (although one of the two remaining bidders in Lot 3 withdrew before the BAFO stage [redacted]), but where project delivery has been plagued by multiple problems. The National Audit Office report into the delivery of ESN exposes the many failures of the Home Office that are responsible for the delay that the CMA and Home Office appear to want to blame on Motorola. Reading that report side by side with the report into the Airwave procurement should make abundantly clear that the number of bidders in procurements of this nature is only one factor determining the quality of the outcome – and perhaps not the most important one.

##### 4.1 Profitability

- (85) Motorola has prepared a separate response to the Group's Working Paper on Profitability. This section makes some general comments, to ensure that the profitability assessment is framed appropriately.
- (86) As Motorola has repeatedly explained, Airwave is a project company arriving at the end of its service life, and its economic performance needs to be measured in that context for the Government to retain its credibility as a long-term contracting partner. When Airwave completes its service [redacted], the service will have been provided on terms that are vastly more favourable to the Home Office than initially envisaged and agreed by the parties.
- (87) Motorola very much welcomes the Group's thorough assessment of Airwave profitability. By the end of 2026 Airwave will have yielded a nominal post-tax IRR of approximately [redacted]%. The post-tax IRR agreed by the Home Office as being a fair target for Airwave was 17%. The economic and contractual evidence shows unequivocally that the British taxpayer has had both the security and safety afforded by a network with extraordinary service levels, and has enjoyed this service at a price that, with the benefit of hindsight, has turned out to be an economic bargain.
- (88) The UK Government first set out its wish to be a long-term contracting partner for a nation-wide Tetra network in 1996. The economic principles of the proposed procurement process were summarised in the 23 January 1996 Official Journal Notice:<sup>24</sup>

*“The [Airwave] service will be delivered in accordance with the principles of the UK Government's Private Finance Initiative (PFI). The PFI aims to improve both the quality and the efficiency of public services. It encourages the private sector to assume ownership and investment responsibility for the provision of assets and associated services, thus passing the risks and rewards of ownership to the private sector”*

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<sup>24</sup> OJ [1996] S 15/169, at paragraph 14.

- (89) From a private sector commercial standpoint, there was no precedent at the time for such a vast complex system as Airwave; Airwave represented new technology, and it was far from certain that there would ever be additional users of the Airwave network beyond the police forces. As with any sort of partnership, during the negotiations the parties had engaged in discussions around risk and rewards. Airwave was prepared to engage in discussions about sharing benefits, sharing the rewards, as long as the Home Office could bring new users to the table (which it turned out they could not) and if they were prepared to share in some of the risks, which they were unprepared to do.<sup>25</sup>
- (90) The parties were unable to come to an agreement which shared risks/rewards and therefore Airwave took on the risk (in return for reward) of the project. Questions were asked of PITO<sup>26</sup> about the level of return and their view was recorded in minutes of evidence taken before the Committee of Public Accounts on 22 April 2002.<sup>27</sup> Given the central importance of the agreed IRR to the very creation of Airwave, it is worth citing the relevant exchange in full:

*“7. May I ask Mr Webb about this 17% return which was calculated as being what would be the right sort of return? How was this figure arrived at? Why was it deemed to be reasonable?”*

*(Mr Webb<sup>28</sup>) It was arrived at by O2. We took advice from both our technical and our financial advisers in reviewing that. Considering the level of risk we were transferring to O2 and the fact that there was no precedent for such a large system in previous procurements, it was new technology, there were several stakeholders and in fact there were issues relating to site acquisition, we considered the 17% return was fair. This was endorsed at the time by both ourselves and the Home Office. We felt we had actually taken independent advice and the return was fair.”*

...

*“93. Looking over a 15-year period and looking at the rate of change and looking at the risk element in that, how are you able to come to the conclusion that the rate of return is 17%?”*

*(Mr Webb) In that 17% a fair degree of risk was built in. Bear in mind that it is the responsibility of O2 to deliver the technology upgrade, therefore recognising that was part of the risk they built into that assessment.”*

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<sup>25</sup> Committee of Public Accounts, *Public Private Partnerships: Airwave* (4 November 2002) Q205 <<https://publications.parliament.uk/pa/cm200102/cmselect/cmpubacc/783/783.pdf>>.

<sup>26</sup> PITO ceased to exist on 31 March 2007 and was replaced by the National Policing Improvement Agency with effect from 1 April 2007. The NPIA was wound down operationally in December 2012 and its function in respect of the emergency services network was transferred to the Home Office. Accordingly, references to PITO should be read as references to the Home Office.

<sup>27</sup> Committee of Public Accounts, *Public Private Partnerships: Airwave* (4 November 2002) <<https://publications.parliament.uk/pa/cm200102/cmselect/cmpubacc/783/783.pdf>>.

<sup>28</sup> Phillip Webb, Chief Executive, Police Information Technology Organisation (PITO).

*“121. Coming back for a moment to the question of whether the system can be sold elsewhere—we already know that it may be sold to the Ambulance and the Fire Services in future—the decision was taken that a 17% profit level was a reasonable one. To what extent was the fact that there might be a lot more profit in it for the company because of the possibility of selling on without having to pay back any of that to the original buyer included in that decision that that was a reasonable profit level?”*

*(Mr Webb) At the time we should have liked more people to have signed up but the only people we could deliver at the time were the Police Service. Any risk associated with selling on to any other authorities was down to O2 so it was a commercial decision as far as we were concerned.*

*122. But any profit was going to them as well.*

*(Mr Webb) Yes.*

*123. So in a sense there was no downside for them. All that could possibly happen was that the profit level would go up if they did manage to sell on either to foreign countries or to other emergency services in this country. It is only an upside.*

*(Mr Webb) Not necessarily. They did take a significant risk in the sense of the 17% return is assuming they actually get paid for it. At this moment, because there is a delay in the project and it is taking longer in some areas than necessary, they are not being paid, they are not earning revenue. There has been some retention of revenue as far as we are concerned, so they are not getting the full amount at this time.*

*124. The 17% was the profit they were expected to make if they concluded a successful system and sold it simply to the Police Service in this country. only once we have successfully delivered here in the UK.*

*(Mr Webb) Yes, that was what the plan was; 17%.*

*125. And 17% was considered to be reasonable. If that had been the end of it and they had sold to nobody else it would have been considered a reasonable profit to make.*

*(Mr Webb) That was the advice from our advisers at the time.*

*126. Yet we allowed them also to take on all the potential profit for selling to any other service within this country or indeed abroad without insisting on any sort of a clawback.*

*(Mr Webb) I am corrected here. An element of shares was an assumption which O2 made in terms of determining that profit was actually built into that 17%. They were taking the risk of assuming they would actually sell some shares to other people.*

*127. I am delighted to have that change of answer, if I may say so. If that had not been the new answer, I should have been seriously worried about the way that negotiation had been carried out. How much of the 17% is the risk, whatever risk, which has been transferred to the company from the public sector? This is a PFI deal after all.*

*(Mr Webb) It is a PFI deal so we have transferred the bulk of this to O2 in that they are responsible for providing the whole service, they are responsible for developing the service and a full capital investment is down to them.<sup>29</sup>*

*128. To date my understanding is that they have spent in excess of £100 million in putting in the infrastructure, they have received nothing like £100 million in terms of revenue. If they say in a year or two's time that they are very sorry but they cannot actually produce the system without getting a bit more money, do you say you are walking away and going back to your old system, picking up your hand-held mobile phones again?*

*(Mr Webb) We would not necessarily do that. The first thing we would do is endeavour to ensure that they do deliver. They have a contract with us. There are liabilities associated with that contract in terms of delivery. We would also automatically try to negotiate a situation where they did deliver."*

- (91) The Home Office also gave their views on the subject of the commercial terms in response to questions and their view was recorded in the same minutes of evidence:

*"78. If I have a lot of people who want to join O2 now, since you are the purchaser of this system in effect, you funded this development, you funded the setting up of this system, the taxpayer has funded it, how much does the taxpayer get back? What percentage does the taxpayer get back for every additional user of the system?*

*(Mr Gieve<sup>30</sup>) Under the contract we have at the moment we do not get anything back for extra users. The deal we have done with O2 is that they will take the risk from not getting extra users and they will take the gain from getting extra users. What those gains will be depends on the deals they do with other users. Those are also likely to be taxpayers, the Fire Service or whatever."*

...

*129. ...*

*(Mr Webb) ... Almost certainly if TETRA did fail we would have to procure an alternative system and that may have to be done on a local basis if we could not do another national procurement.*

*130. That might then become very expensive.*

*(Mr Webb) That could become expensive.*

*131. So not all the risk has been transferred.*

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<sup>29</sup> Committee of Public Accounts, *Public Private Partnerships: Airwave* (4 November 2002) <<https://publications.parliament.uk/pa/cm200102/cmselect/cmpubacc/783/783.pdf>>.

<sup>30</sup> John Gieve CB, Permanent Secretary, Home Office.

*(Mr Webb) You could not ever mitigate risk against companies failing to deliver and going bankrupt. Quite frankly we would be looking to get a significant return on any investment we had made as a result of that.*

*(Mr Gieve) What risks are O2 taking? One risk is that they cannot produce the required level of performance for the investment they had assumed at the outset. For example, they may need to put in more masts than they had planned in order to provide the coverage and quality of performance. That will cost them a lot of money and that will reduce the 17%. They only get the 17% if they deliver the service to their cost.*

*132. I understand that they only get 17% profit if they do that. What I am asking is if they do not manage to do that and come back to you and say sorry they need more money whether in practice you are then over a barrel and have to say you cannot afford to go back to the old system. It would cost you a huge amount to ask somebody else to set up a new TETRA system now for us and therefore effectively you would be in a position where you were going to have to pay a little bit more to Airwave to make sure they do remedy the problems they still have.*

*(Mr Gieve) I certainly would not accept that if Jeff comes back and says he needs to change the contract we would just do so because we are over a barrel. We would force them to deliver on their contract and if they did not, there would be dire consequences. You then ask what happens if they are actually driven out and you have to find someone new. In that sense there is always a residual risk because we have to provide the service or at least the police authorities have to supply the service. That is true whether it is a PFI or a normal contract. There will be severe consequences for O2 if they cannot deliver”*

- (92) Evidence from Airwave on the acceptability of the 17% return is that “[w]hat we made clear at the time and we still stand by, is that we would not have done this project in isolation for the police at [17%] return. We have taken this project on, on the basis that it would give us an opportunity to be able to market it to the Fire Service, the Ambulance Service and such like”.<sup>31</sup>
- (93) The statements made by all parties in response to questions concerning profitability illustrate that all parties to the negotiations recognised that the return to Airwave reflected commercial risk taken on by Airwave in circumstances in which the PITO had the opportunity to share in the risk and rewards but chose not to do so. The rate of return was considered and determined to be fair.

#### 4.2 Benchmarking provisions

- (94) The Issues Statement is silent on whether the Group intends to take account of the benchmarking provisions agreed between the parties, yet this may have a significant bearing on profitability [X]when the [X]to invoke these provisions. In addition to carefully drafted provisions on pricing, the contract with the Home Office contains an independent third-party referral process (the “Benchmarking Process”) to ensure that prices are fair, which has already

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<sup>31</sup> Committee of Public Accounts, *Public Private Partnerships: Airwave* (4 November 2002) Q199 <<https://publications.parliament.uk/pa/cm200102/cmselect/cmpubacc/783/783.pdf>>.

been used by the parties.<sup>32</sup> Indeed, the Home Office preferred to [REDACTED]. The Home Office was satisfied by both the price discounts and overall contractual arrangements, including additional capital investments executed in those agreements. The Benchmarking Process was used on two occasions to verify the fairness of pricing, and on both occasions the third party found no excessive pricing for the Airwave service.

- (95) The Group is therefore respectfully invited to give requisite weight to the method chosen by the well-advised parties to address questions of value for money within the contract. The benchmarking provisions are fully capable of addressing value for money. Otherwise, contractual certainty is destroyed, and that cannot be an appropriate or proportionate intervention.

#### 4.3 Innovation

- (96) The Group proposes to look at delays in the design and roll-out of ESN. Motorola strongly welcomes this and refers the Group to the detailed submissions made in Motorola's Response to the MIR Decision.<sup>33</sup> Motorola is deeply concerned with the CMA's apparent perception that Motorola has been able to shape ESN, and Motorola respectfully requests that the Group requires the production of an appropriate balance of evidence in this respect (including from those stakeholders mentioned above at paragraph 1(e).
- (97) Motorola notes that the Group does not indicate any intention to examine how the Home Office's conduct has affected the reference market in relation to innovation. This is a material omission given that the Home Office (albeit later indicating its regret in this regard) structured the ESMCP programme in such a way that delivery of ESMCP was solely in the hands of the Home Office. The Group is respectfully reminded (i) that EE and Motorola were prohibited from working together which led to delays;<sup>34</sup> (ii) that, having suggested to Motorola that it was interested in exploring it the Home Office then declined to discuss the possibility of a [REDACTED]; and (iii) that the Home Office is in the process of securing [REDACTED].
- (98) The Group is respectfully invited to consider whether the Home Office has in fact met the requirements of users and whether this may have dampened innovation. The Home Office obtained a set of requirements from end users known as Elaborated Requirements (ELABRs), which form the basis of user expectations regarding the operation of ESN. However, it should be emphasised that these requirements do not align with the requirements that Motorola agreed to satisfy as part of the Lot 2 Agreement.

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<sup>32</sup> Airwave was described by the third party as "exceptionally cooperative" in the most recent Benchmarking Process.

<sup>33</sup> Motorola Response to MIR Decision, at section 2.

<sup>34</sup> Motorola Response to MIR Decision, at paragraph (63).

**5. Conclusions**

(99) Motorola believes that after a careful investigation the Group will conclude there is no credible evidence to support the finding of an AEC in the reference market caused by Airwave or Motorola and that, as a result, no remedies will be required in that regard.

(100) Motorola looks forward to supporting the Group in its investigation.