MOTOROLA SOLUTIONS

Mobile Radio Network Services Market Investigation

Motorola's Response to the CMA's Provisional Decision Report

21 November 2022

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1. SUMMARY OBSERVATIONS ON THE PROVISIONAL DECISION

1.1 Motorola welcomes the opportunity to respond to the CMA's Provisional Decision in its mobile network radio services market investigation.

1.2 For the reasons explained in this Response, it is regrettable that the CMA has to date not taken the opportunity to explain to the Cabinet Office and the Home Office that:

(a) the Home Office needs to comply with the long-term contracts that were freely entered into;

(b) there is no reasonable basis to intervene under the Enterprise Act 2002, even if politically there may be pressure for such intervention;

(c) far from being contrary to public policy, the Airwave network represents extraordinary value to the British taxpayer, and that it would be contrary to public policy, if not dangerous, to intervene in relation to these contracts.

1.3 The CMA's proposed justifications for intervention – other than this being sought by the Home Office and Cabinet Office[1] – as well as the calculation of alleged excessive profits have lurched from one explanation to another, including taking diametrically opposed positions over time.

1.4 Motorola strongly believes that the CMA should follow its own articulated policy and apply well-tested competition principles instead of searching for grounds on which to intervene to change contractually agreed pricing; the CMA should also stand behind its prior analysis of the Airwave network and ESN undertaken in 2016 – the facts have not changed – and refuse to make a policy intervention that would present clear risks to public safety as well as enshrine the effects of poor procurement choices by other parts of the Government.

1.5 As explained below, the CMA's latest effort to try to justify its ability to intervene depends on a newly invented theory of how 'competitive interactions' between a supplier and a customer are supposed to shape the terms of long-term contracts. This new theory was not articulated at any point during the Consultation period, during the market investigation, or shared with Motorola prior to the Provisional Decision. This new theory is entirely absent from decades of economic literature on the functioning of markets and competitive behaviour. It is also inconsistent with the CMA's own specification of what would happen in a well-functioning market, which correctly identifies that competition in relation to the services under consideration takes place *for the market*. Finally, it is noticeable that in the 19 years of operation of the current market investigation regime, none of the Office of Fair Trading, Competition Commission, or the CMA has ever sought to review a long-term fixed price commercial contract between two parties. It is scarcely conceivable that the CMA would do so if faced with such a request from two well-advised private sector organisations. The CMA is not entitled to create a new category of Government protected customers alongside consumers. As this Response and all of Motorola's prior submissions make clear, the matter at hand is in substance not a market issue, but a contract issue, and the CMA's 693 pages of Provisional Decision and Appendices do not change this.[2]

[1] Final Report and Decision on a Market Investigation Reference, paragraph 1.6.

[2] Motorola requested sufficient additional time to respond to this vast Provisional Decision, but the CMA was only prepared to allow a limited extension even though the Response Hearing is not scheduled until 7 weeks after the deadline set for Motorola's Response. Motorola has however attempted to address the main points in the time given to it.

1.6 Motorola believes that the Provisional Decision:

(a) misstates and misapplies the facts;

(b) contemplates a remedy that is grossly disproportionate;

(c) is flawed legally and economically; and

(d) is fundamentally anticompetitive.

1.7 Notwithstanding the fact that the CMA has no reasonable basis to rewrite the PFI Framework Agreement (the "PFI Agreement"), even if it had, the charge control remedy proposed by the CMA is *itself* anticompetitive, since it is set at such a punitively low level that the Home Office would never be incentivised to invite competitive tenders and allow competition for the market to work. This is completely inconsistent with how the market has operated prior to the CMA's intervention, with the initial tender for Airwave and the subsequent tender for its replacement, ESN. The effect of the CMA's proposed remedy is to turn a market that can be successfully competed for (*per* the CMA, in the case of Airwave) into an 'unnatural' monopoly by regulating prices down to a level that grossly undervalues the economic value of the assets deployed and is wholly inconsistent with the project risk profile.

1.8 The CMA's price control proposal would eliminate any future competition for the market (even assuming the Home Office would have any incentive at all to contemplate running a tender) and create a self-fulfilling prophecy.[3] Indeed, the CMA has recognised exactly this point in previous market investigation Decisions where it has decided against imposing a charge control as it "may generate distortion risks over time by discouraging innovation" and "would also discourage new entry" into the market.[4] Motorola notes that in spite of having only last year served the Airwave National Shutdown Notice, which sets the contractual end date, the Home Office is already making public statements (e.g. at the recent BAPCO conference) about the use of the Airwave network beyond 2026. Applying ordinary competition principles, this ought to be deeply concerning to the CMA. To impose a charge control would be irrational and grossly disproportionate, quite aside from the difficulty of reconciling such a proposed remedy with the requirements of public procurement law and principles.

1.9 Perhaps to avoid the consequences referenced in the previous paragraph, Motorola knows of no other country in the world in which, shortly before a 25+ year successful[5] procurement contract comes to an end, a competition authority:

(a) ignores the contracting authority's termination notice;

(b) rewrites the contractual terms that apply both prior to and *beyond* the termination date;

[3] Motorola notes that the CMA effectively encourages such an outcome, by contemplating that Airwave might be regulated even after 2029.

[4] Private Health Market Investigation Remittal, Final Report, paragraph 12.219(d) and (e).

[5] Contrary to its initial position which considered that the initial PFI procurement process did not work well from a market standpoint, the CMA now takes the opposite position, i.e. this was a successful procurement. Based on the CMA's own analysis it is only by artificially dividing the contract temporally that one can conjure up an illusion of excess profit.

(c) decides that the service cannot be re-procured at the point of termination (including through whatever remedies might be applied to support such re-procurement) even though the service was originally procured competitively and the termination date is 4 years away;

(d) fundamentally rewrites the agreed economic bargain to create a vast regulatory apparatus that was never contemplated and is not needed; and

(e) imposes a price reduction applicable immediately and at a level that will substantially reduce, if not remove, the Authority's incentive to reprocure at all, replacing competition for the market with a regulated monopoly.

1.10 It would follow from the CMA's economic logic (mandating an unnatural monopoly) that all other network plans should be shelved, to eliminate inefficient duplication. The level of the price control creates the strongest possible incentive for the Home Office to extend the Airwave network while it can carry on wasting vast sums of taxpayers' money on a replacement that may never materialise.

1.11 Given that the Home Office has set the Airwave network's termination date as 31 December 2026, there is no fundamental reason why the Home Office should not now be expected to reprocure a mobile communications network service for after 2026, whether based on the ESN technology model or on a technology neutral basis allowing the market to bid solutions designed to meet the emergency service and other users' priorities rather than be forced by the contracting authority to bid solutions based on a particular technology. There was successful competition for the market in 2000[6] and the CMA has not explained why this success cannot be replicated. Such an explanation is especially required given that, at the level at which the CMA proposes to set the charge control, there may never be competition for the market. In substance, the CMA seems to be ignoring the fact that the Home Office has given notice to terminate the Airwave service, whereas the CMA should see this as the next opportunity for competition for the market rather than an arbitrary date that is rendered meaningless if the CMA's proposed remedy were implemented.

1.12 The CMA appears intent on enshrining an absence of competition up to and beyond 2029, through a recommendation to the Home Office that allows for the Home Office to put "in place a regulatory function to safeguard against the risk of anticompetitive outcomes resulting from a continuing monopoly position in the provision of all or part of the Airwave Network beyond 2029."[7] It is difficult to imagine how the CMA could be more disproportionate in relation to a market that can be competed for, has been competed for, and is being competed for in every other developed European jurisdiction than to make a recommendation – against the background of an ongoing anticompetitive charge control – that includes the prospect of indefinitely replacing competition with an artificially created monopoly regulation.[8]

1.13 Motorola is extremely concerned that in spite of presenting it as being provisional, the CMA is treating the proposed charge control remedy as a *fait accompli*. Even before Motorola had the opportunity to respond to the CMA's Provisional Decision, Airwave received an RFI from the CMA requesting certain information that would go towards the CMA's assessment of how a charge control will work. Furthermore, the CMA is now expected to publish its Final Decision

[6] As recognised by the CMA in paragraphs 7.10 to 7.12 of the Provisional Decision.
[7] Provisional Decision, paragraph 46.
[8] Such monopoly regulation also limits innovation which would otherwise occur on (re)procurement.

in February 2023[9]. This gives the CMA approximately 2 months (not taking into account staff absences during the Christmas period) from the date of Motorola's Response and perhaps less than one month (depending on when the Final Decision is published) from the date of Motorola's Response Hearing[10] in which to (i) consider whether a charge control is a proportionate remedy, and (ii) decide the appropriate level of charge control.

1.14 The CMA also seems to be hurtling towards a pre-determined desire to apply a draconian price control even though this completely changes the economic bargain between the parties and is grossly unfair to Motorola. To put the CMA's efforts into context, Ofgem's price control on electricity distribution in Britain (RIIO-ED1) was timetabled to take over 2 years to implement from the date of its Strategy Decision to the commencement of the price control[11]. The Airwave contract has just four years to run. In the Private Healthcare Market Investigation, the CMA decided against a form of price control on the very basis that "the CMA would not have the resources available to do this work and would need to set up an independent body to do so."[12] In that Decision, the CMA came to the conclusion that "given the significant risks of distortions associated with this approach, combined with the time and resources that would be required" to set up the price control, it "would not be an effective or proportionate way of mitigating" the AEC it identified[13]. The CMA cannot credibly claim that the position would be less complex in relation to Airwave, create fewer distortions and risks, or require fewer resources.

1.15 The risks of the CMA trying to set the charge control as low as possible are already apparent. Despite devoting nearly 100 pages to the details of a charge control remedy, the CMA makes the most elementary mistake in relation to asset valuation that renders its entire proposed price control remedy absurd. In its base case for the analysis of Airwave's profitability in the period from 2020 to 2026, the CMA has given Airwave's assets a negative opening value of £[✂]million[14]. This implies that the "pre-2020 Airwave" (which is itself a fiction since the PFI Agreement was never split or, in any event, split that way[15]) would have had to pay £[✂] million to the "post-2020" Airwave to take on the burden of running a business going forward which then supposedly managed to create excess profits of more than £1 billion. This makes no sense and distorts reality to artificially manufacture excess profitability over the last years of the PFI Agreement. The same asset valuation that underpins this calculation, which puts the value of Airwave's assets in 2019 at their scrap value, is then used by the CMA in its calculations when determining the level of charge control that it would impose on Airwave.

1.16 In substance, the CMA's proposed remedy is not only grossly disproportionate, it would also amount to a forced expropriation in breach of Article 1 of the First Protocol of the European Convention on Human Rights, as incorporated into English law by way of the Human Rights Act 1998 ("A1P1"). Motorola is entitled to enjoy peaceful enjoyment of the contract – one which was agreed by the parties in 2016 after substantial negotiations, and whose details (which apply today) were provided to the CMA when the CMA cleared Motorola's acquisition of Airwave in 2016 (the "Airwave Acquisition"). In all the circumstances, Motorola has a

[9] CMA Revised administrative timetable published on 15 November 2022.
[10] Timetabled for 10 January 2023.
[11] Ofgem Factsheet 117 'Price Controls Explained', March 2013, <https://www.ofgem.gov.uk/sites/default/files/docs/2013/03/price_control_explained_march13_web.pdf>.
[12] Private Healthcare Market Investigation Remittal, Final Report, paragraph 12.238.
[13] Ibid., paragraph 12.239. See also paragraph 12.260.
[14] Provisional Decision, Appendix G, paragraph 97.
[15] The PFI Agreement's terms were amended by mutual consent in 2016 and those terms have applied from 2016, not 2020.

legitimate expectation that Motorola would not be deprived of the benefit of the Airwave contract until termination in accordance with its terms.

1.17 The CMA's Provisional Decision to extinguish Airwave's rights under its contract with the Home Office is unjustified and disproportionate in circumstances where (a) Motorola has not engaged in any wrongful conduct or any conduct constituting abuse of any putative dominant position; (b) the price of the contract was freely agreed and the contract extended in 2016 (and furnished to the CMA); (c) the Airwave network remains an exceptionally well-run service that continues to meet and exceed the demands of its users[16]; (d) the IRR remains within (and in fact well below) the level agreed in 2000; (e) Airwave is effectively tied to the contract and would be forced to provide a service for a fraction of the freely-agreed price indefinitely; and (f) the perverse effect is to incentivise the Home Office to continue the relationship rather than engage in a competitive tender process.

1.18 The CMA fails properly and fairly to engage with the Home Office's own conduct. The Home Office never pursued a discount in 2016, at the point of maximum leverage when it could have threatened to withhold consent to the Airwave Acquisition. In fact, the Home Office specifically welcomed the Airwave Acquisition, which the CMA accepts as a finding[17] but from which it does not draw the proper conclusion. The proper conclusion is simply that the Home Office freely agreed terms for Airwave that would apply until Airwave was no longer needed, which is now 2026, as determined by the Home Office serving the National Shutdown Notice.

1.19 Not only does the CMA ignore the consequences of what was agreed in 2016, the CMA also does not take proper account, in considering what a well-functioning market would deliver, of the Airwave pricing offer made to the Home Office in 2018. The Home Office was offered better charges in 2018 which, had they been accepted, would now, *i.e. during the period that the CMA claims there are excessive profits*, be yielding approximately £[✂] million in savings to the Home Office.

1.20 It is not proportionate for the CMA to impose *any* price reduction on Airwave in circumstances where:

(a) the Home Office did not pursue discounts in 2016, whose terms apply today;

(b) the Home Office refused a £[✂] million discount in 2018 that would apply today; and

(c) the Home Office [✂] a ([✂]) £[✂] million [✂] in 2022 (before the Provisional Decision) that would [✂] from [✂].

1.21 By ignoring the fact that the Home Office has previously decided not to accept price reductions, the CMA is essentially saying that the Home Office requires protection from itself.

1.22 The Home Office has now set the termination date of the PFI Agreement, which has been in place since 2000, as 31 December 2026. The CMA cannot legitimately interfere with the Home Office's freely given contractual choices, including its decision not to accept discounts offered,

[16] In an email dated 20 September 2022, the Home Office acknowledged the critical ('behind the scenes') role that Airwave played in the flawless execution of 'Operation London Bridge' following the death of Her Royal Highness, Queen Elizabeth II on Thursday 8 September 2022. Furthermore, for the month of September the Airwave service received its first-ever 9 out of 9 score for customer satisfaction.

[17] Provisional Decision, Appendix D, paragraphs 43 to 49.

that apply until the National Shut Down Date. It is also for the Home Office to decide how to contract for the period after December 2026, not for the CMA.

2. FACTUAL PREMISE OF THE MARKET INVESTIGATION

2.1 While the CMA's arguments justifying intervention have varied enormously throughout the market investigation, the facts have remained the same. Serious factual errors infect the entire Provisional Decision, including the CMA's latest theory about how competition should have functioned differently.

The CMA's failure to understand the PFI Agreement and its evolution and operation

2.2 The CMA still fails to understand how the PFI Agreement operates as a contractual matter, even though this Agreement lies at the heart of the market investigation and is the factual basis on which all its competition analysis ought to rest.

2.3 The CMA wrongly treats the PFI Agreement as having a fixed term that is capable of extension at the Home Office's discretion. For example,

> "In 2021, negotiations having been unsuccessful, the contracts were extended by the Home Office's exercise of its contractual right to set and issue notice of the NSD Target Date."[18]

2.4 In fact, in 2021, by serving the National Shut Down Notice, the Home Office in substance converted the PFI Agreement back from an open-ended contract to one with a fixed end date that now terminates on 31 December 2026. The Home Office did nothing that had the effect of 'extending' the contract. To understand this, consider what would have happened if the Home Office had done nothing in December 2021. The answer is that the PFI Agreement would simply have continued to run until such time as a formal National Shut Down Notice was issued by the Home Office; to be no later than 12 months prior to the date that the Home Office required National Shut Down – i.e. cessation – of the Airwave service. The CMA appears to have misunderstood the effect of the prior National Shut Down Target dates which did nothing more than set a date before which the Home Office would not be able to terminate the PFI Agreement.[19] By contrast, the effect of the National Shut Down Notice is, contractually, to start the National Shut Down Procedure which culminates on the date specified in that Notice with the cessation of the Airwave service.[20]

2.5 The chronology of the parties' contractual position is very simple:

2000 Home Office agrees PFI Agreement with an expiry date of the last to expire of any Services Contracts to be entered into in the future.

2016 Home Office amends PFI Agreement to have no expiry date until a National Shutdown Notice is issued.

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[18] Provisional Decision, paragraph 2.100.

[19] See e.g. Provisional Decision, paragraph 2.89, which also refers, incorrectly, to a right to extend. The CMA states at paragraph 2.102 that the "2018 negotiations resulted in an extension of the period of operation of the Airwave Network to 2022", which is not correct. There was nothing agreed in 2018, but for which Airwave would have shut down. See also paragraph 2.103 which refers to the Home Office exercising a right to "extend the contract unilaterally". Finally, see also paragraph 3.31 which misinterprets Winston & Strawn's letter (on behalf of Motorola) to the CMA dated 16 June 2022.

[20] Motorola has previously explained that while the parties used the term "extension", this has no contractual meaning – it simply referred to continuation of the contract.

2021 Home Office serves a National Shutdown Notice for the PFI Agreement to terminate in 2026.

2.6 At all times, in relation to the PFI Agreement:

(a) the price was fixed;

(b) neither party had the right unilaterally to change the price;

(c) the Home Office was in sole control over the duration through the right to serve a National Shutdown Notice. Airwave, by contrast, had no right to terminate the contract except for non-payment; and

(d) the target IRR remained the same.

2.7 When tested against the facts, the notion that Airwave nonetheless has market power after 2016 (generally defined as the ability to raise prices without loss of demand)[21] during the term of the contract (i.e. at all times) is simply hopeless.

2.8 Against these simple and basic facts, the CMA puts up the fiction of an agreement that would have required regular negotiations about extensions and the terms that would apply for the next period before further negotiations were needed, where all these negotiations are construed as competitive interactions between the parties against the background of outside options that were becoming progressively worse for the Home Office.

2.9 The CMA thus claims that the Airwave contracts amount to more than simply a contract between two willing parties, and that the scope for a competition assessment is not displaced by the existence of contractual rights.[22] However, the obvious point is that – as regards the contracts under review – the opportunity for competition (i.e. for the market to function) *in fact* only exists at the point at which the contract is entered into and at the point at which it is renewed or a change of the end date is agreed. Approaching this on any other basis is a material error. The CMA's provisional finding that the Home Office did not expect a long-term extension of Airwave when agreeing prices is irrelevant given that the Home Office signed a contract providing for prices that would apply indefinitely. There is no basis for the CMA to intervene on competition grounds, and the CMA's proposal to ignore the price that the parties set is egregious. Whatever the CMA might think the parties might have hoped for or even expected might happen in the future (or even wish they had done differently) cannot possibly disapply what they in fact agreed, on which there is no uncertainty at all.

2.10 In support of its view that the contract would be subject to regular re-negotiation, the CMA quotes a recital that says:

[21] The CMA states at paragraph 3.72 that "contractual terms may be the subject of further negotiation as the market, and parties' market power, evolves". This makes no sense in a long-term contract with fixed prices and in any event is entirely contradicted in this case by the evidence. In 2021, Motorola tried to pass on higher expected future capex costs to the Home Office. The Home Office simply refused, confirming the absence in reality of any theoretical market power "in" the Airwave contracts, even at a point in time when the Home Office was supposed to be in a "particularly weak bargaining position" (paragraph 23). This also extinguishes any basis for the CMA to rely on perceptions that there might be further negotiations (paragraph 3.76) and where those negotiations might lead. If the Home Office had wanted to limit the time period over which those fixed prices would apply (and it did not, since it wanted the opposite), the Home Office would have done so (or there would at least be evidence that it had attempted to do so).

[22] Provisional Decision, paragraph 3.33.

> "Both parties acknowledge that the Services will need to be flexible and dynamic according to the requirements of the Authority and the Customers, and therefore may be subject to change"[23]

2.11 All this recital says, however, is that the **Authority** and the **Customers** *may* change their requirements. There is no claim by anyone that the requirements have changed, much less that Airwave has priced its services unfairly in response to any changed requirements. On the contrary, the CMA has found that the Airwave service has been consistent and the service levels extraordinarily high. As a matter of fact, despite the PFI Agreement being so "complex and the original term of the Airwave PFI Agreement was long"[24] (where, in fact, it was at the lower end of the duration of most PFI agreements concluded at the time, which typically ranged from 15 to 30 years), the only issue the CMA has found is that the long-since agreed price appears unfairly high when looked at through the lens of the final few years.

2.12 Throughout the contract, the parties have continued to see whether there may be mutually beneficial adjustments to the terms (such as Airwave's 2018 offer of substantial discounts in exchange for a longer term, with break options, which the Home Office at the time rejected, instead preferring to carry on with the default terms). This is simply ordinary and expected commercial behaviour in a long-term contract and the CMA's attempt to transform it into an excuse to try to intervene as if *competition* was taking place is unreasonable. The view that any attempt by parties to a contract to identify the scope for mutually beneficial changes to the terms amounts to evidence of competition to be investigated is simply absurd. The theory created by the CMA to try to circumvent the facts is dealt with separately below.

2.13 The CMA gives eight reasons to support its approach of setting aside the contractual terms, claiming that "even where a supplier's responsibilities are set out in contracts, in practice its performance will often be influenced by its incentives and the competitive conditions in the market".[25] However, rather than being in any way clear about which of these reasons provides a potential basis for intervention, the CMA simply says that "[m]any of the above points are applicable in this case"[26]. It is clearly not enough to point to hypothetical reasons and leave Motorola (or anyone else) to guess which might be the ones that the CMA has in mind.

2.14 Upon closer examination the only reason that is remotely linked to competitive pressure is that a supplier may wish to exceed its contractual requirements if this increases its chances to win future business or reduces the risk of the customer taking away business at the point at which the contract expires. Competitive conditions at the point at which the contract expires or can be terminated may indeed affect performance of the contracting parties prior to that point. A supplier might be willing to reduce the price to stave off the threat of the customer re-tendering, which carries the risk of losing the entire business. In this case, however, there was no 'risk' of the customer taking away the entire business that could be reduced by offering better prices. With the Home Office's decision to procure a replacement network the complete loss of Airwave's business had become a ***certainty***. The only uncertain element was the point at which this would happen, and it is nonsensical to argue that Airwave could have delayed the timing of its demise by offering better terms. Transition to ESN was going to start

[23] Provisional Decision, paragraph 3.27.
[24] Provisional Decision, paragraph 3.27.
[25] Provisional Decision, paragraph 3.26.
[26] Provisional Decision, paragraph 3.27.

as soon as the new network was ready, as is clearly evident from the priority that the Home Office gave to retaining flexibility.[27]

2.15 In any case, even if (which is not accepted) there were aspects of the contract that were not fully specified, this does not at all apply to the terms that are at the heart of the CMA's concerns: the pricing that would apply going forward was fully specified. Unless the parties, by mutual consent, agreed to change prices, the prevailing prices (subject to indexation) would apply. Thus, the CMA's attempts to rely on uncertainty to support an 'incomplete contracts' analysis are without any merit.

2.16 The CMA's interpretation of the PFI Agreement is therefore fundamentally flawed, which entirely undermines the CMA's competition analysis.

Benchmarking Provisions

2.17 The CMA has provisionally concluded that the benchmarking provisions under the contracts are likely to be largely ineffective in constraining the price of the Airwave network in the period from 2020. The CMA has misunderstood the importance of these provisions in assessing the bargain struck by the parties and the power of the Home Office to constrain pricing within the contractual framework. Motorola has addressed these provisions in previous submissions but emphasises, in particular, that: (a) the benchmarking mechanisms provide for a neutral evaluation of certain charges payable under the contractual framework; (b) the Home Office successfully invoked the benchmarking mechanisms to challenge the value of the contractual charges – in the sense that Motorola agreed to settle that dispute with payments that amounted, in substance, to a discount on the charges payable under the contract; (c) the parties to the contract plainly do attribute value and significance to the benchmarking provisions because on two occasions bargains have been struck in which the Home Office has agreed to suspend use of the benchmarking provisions in return for concessions from Motorola, including a reduction on the contractual fees otherwise payable.

The Economic Performance of Airwave

2.18 The CMA has ignored the facts that drive the competition analysis, in particular the actual IRR data from the PFI Agreement, which it now recognises as the outcome in which "the Home Office had the opportunity to run an open competition for a supplier and, as a result, to agree terms that constrained the price of the provision of the network. In such a competition, the winning supplier would reasonably have been expected to set the price at a level that would enable it to cover its expected costs and earn a reasonable return for the period of the contract."[28]

2.19 By artificially splitting the PFI Agreement into 2000 to 2019, and 2020 to 2026, the CMA deprives itself of the opportunity to assess the PFI Agreement in the correct manner and

[27] Moreover, it is obvious that no supplier would have been interested in tendering for a replacement network if the migration to such a network could be delayed (and perhaps even prevented completely) by the incumbent lowering its price (or improving its service, as the CMA appears to be claiming in its extensive and entirely speculative discussion of the negotiations between the Home Office and Airwave as 'competitive interactions') (see Provisional Decision, paragraph 3.65 and following).

[28] Provisional Decision, paragraph 7.11. This is the direct opposite of the Consultation Document and the Final Report and Decision to make a Market Investigation Reference, where the bidding process for the PFI contract was found to have lacked competitive tension, likely to have resulted in an uncompetitive pricing structure, which was one of the reasons considered by the CMA to be contributing to the market not working well.

creates entirely meaningless financial performance metrics that distort the true picture. This is especially the case as the CMA rests its truncated analysis on assumptions that defy economic logic in relation to the value of Airwave's assets: in its base case for the analysis of Airwave's profitability in the period from 2020 to 2026, the CMA assumes a negative opening value for Airwave's assets. This means that, rather than receiving compensation for assets with significant economic value (since the assets were used beyond 2020), Airwave would have had to pay £[✂] million to its post-PFI incarnation to take on the 'burden' of running the business going forward.[29] This is absurd, and only serves to create the illusion of an enormous level of excess profitability over the last years of the PFI contract.

2.20 There is moreover no rational basis to create such an artificial split since:

(a) in substance[30], the PFI Agreement has operated as a single contract, with a start date of 2000 and an end date now of 2026;

(b) the PFI Agreement never had a fixed end date of December 2019[31];

(c) in 2016 the PFI Agreement was specifically amended to *avoid* any possibility of that agreement ending in 2019 unless the Home Office decided otherwise;

(d) the CMA seems to take the view that the pricing that resulted from the 2016 negotiations would be fine until 2019 but not thereafter, even though the parties agreed something different, which makes no sense;

(e) the only relevance of 2019 is that ESN was supposed to be ready. It has no relevance for the Airwave contract, given what the parties agreed; and

(f) according to the economic data that the CMA does not challenge, the Home Office has had a substantially better bargain than the one agreed to in 2000 over the entire period from 2000 to 2026 (the actual project IRR fell far short of the anticipated level, which the Home Office had been willing to agree in 2000).[32]

2.21 It is therefore entirely unreasonable for the CMA to try to intervene to find supernormal profits over arbitrarily defined "last years" of a contract that never came to an end. As Motorola has repeatedly shown, the PFI Agreement has performed extraordinarily well for the customer and has yielded returns for the supplier well below those that the customer has accepted at the outset. There is no rational basis for the CMA to claim that costs have been recouped over a certain sub-period of an ongoing contract and finding excessive charges over another sub-period of the contract (so even the very idea of paying twice for the same assets makes no sense). Such intervention would be an abuse of the CMA's market investigation powers, not least because the actual investment undertaken by Airwave has exceeded the

[29] The CMA identifies a negative opening asset value for the 2020 to 2026 period, i.e. a cash inflow (a payment from the pre-2020 Airwave to the post-2020 Airwave), as a result of subtracting net current liabilities from the residual asset value; Appendix G, paragraph 97.

[30] Of course, the PFI Agreement has Service Contracts sitting 'beneath' it, but in substance these agreements are to be read together.

[31] The PFI Agreement was to terminate on the expiry of the last Service Contract, the date of which was not known when the PFI Agreement was signed.

[32] Despite additional revenue streams obtained from sharers.

expected investment in the original financial model by a substantial margin whereas the actual revenues have not.

The CMA's 2016 Merger Control Clearance

2.22 There should be no greater assurance offered to a company than that afforded by merger control clearance. This is especially the case when the combined business in question is characterised by the existence of, in substance, just two long-term contracts (Airwave and Lot 2 of ESN), both with the Government, and which were in place[33] when the CMA approved the Airwave Acquisition. It is extremely concerning to Motorola that the CMA has ignored entirely its reasoning and acceptance of the amended Airwave contracts in 2016. The CMA now prefers to adopt a completely different assessment of the competitive relationship between Airwave and ESN, as well as impose a remedy on Airwave that was never even contemplated in 2016, much less imposed on Motorola. Such a radically different assessment requires more than a passing justification. The CMA's merger control clearance provided the most robust assurance that no competition issues arise from Motorola's ownership of Airwave or from the contracts that were reviewed by the CMA, including the 2016 amendments to the PFI Agreement. Remarkably, nowhere does the CMA resolve, or even address, this critical inconsistency or the unfairness in now holding Airwave's pricing and Motorola's 'dual role' against it.

2.23 In 2016, having won the procurement competition to supply Lot 2 of ESN, Motorola sought Home Office approval of the Airwave Acquisition. Following extended negotiations designed to recognise and accommodate the inter-relationship between ESN (the Home Office's mandated technology replacement) and the existing Airwave service, the Home Office consented to the Airwave Acquisition and agreed binding terms that would apply to the supply of the Airwave network after 2016 and for as long as the Home Office required the Airwave service.[34] This consent was not only necessary for Motorola to be able to close the Airwave transaction, agreeing terms with the Home Office was necessary to secure Motorola Board approval of the acquisition. The CMA attaches no proper weight to the fact that the Home Office was keen to have Motorola acquire Airwave, given Motorola's experience, and the fact that the freely agreed terms reflected the Home Office's interests.

2.24 In addition to Home Office consent, the CMA undertook a merger control investigation and unconditionally approved the Airwave Acquisition. At the time of the CMA's merger review, *both* of the theories of harm that the market investigation focuses on existed *in their current form*, i.e. the so-called 'dual role' of Airwave and Motorola, as well as the contractual terms that apply as between Airwave and the Home Office. Specifically, the terms that apply in the post-2020 period now chosen by the CMA as the appropriate place to focus its investigation, were already in place when the CMA reviewed and unconditionally approved the Airwave Acquisition.

2.25 When the CMA reviewed the Airwave Acquisition in 2016, the CMA found **no competitive relationship between ESN and Airwave**, which is inconsistent with the harm now said to arise from Motorola's 'dual role'. This was not an oversight: the CMA specifically took account of the prospect that ESN would not be ready by 2019, including reviewing Motorola's internal

[33] As the CMA is aware, the terms of the current Airwave pricing were provided to the CMA as part of the CMA's assessment of the Airwave Acquisition.

[34] Motorola notes that the CMA's temporal assessment starts from 2020 which makes no sense since the terms on which the Airwave network was provided in 2020 were agreed in 2016. This is discussed further below.

assessments that ESN would be subject to delay. The CMA also received third party submissions which stated that there would be delays to the ESN timetable and it was unlikely that the Airwave network would be switched off in the planned timescales, if ever.[35] The Provisional Decision fails to explain how the same facts have now led the CMA to the opposite conclusion. The CMA's position in 2016, which was driven by a proper purpose and not by a Cabinet Office/Home Office demand that the CMA intervene in the Home Office's long term Airwave contract, was the correct approach.

2.26 So far as Motorola is able to ascertain, the only facts pertinent to the market investigation that have changed since both the Home Office and the CMA approved the Airwave Acquisition in 2016 are that:

(a) the Home Office now wishes it had signed a different contract (despite not asking for anything different at the time and having since rejected various offers that would have offered it savings)[36]; and that

(b) prompted by the Cabinet Office and the Home Office, the CMA has provisionally (i) changed its competitive assessment based on the same facts, and (ii) supported the Home Office by proposing to rewrite the contract, seemingly without question.

2.27 Based on the above considerations, the CMA has devised a price control remedy that, in substance, pretends Motorola (or any other prospective buyer) would have agreed to acquire Airwave and run it as if it were a utility, with no consideration of the business risks.

2.28 Motorola would never have contemplated buying Airwave on terms that the CMA has now provisionally decided should be the fundamental terms of the long-term Airwave contract that Motorola has stepped into. No amount of *ex post* hypothesising[37] about what might have been on offer in a well-functioning market can change the fact that when Motorola made its acquisition, it did so on the basis of a legitimate expectation following clear Home Office representations (and subsequent agreement) as to the terms on which the Airwave network was to be provided. If the CMA rewrites the Airwave contract and creates a regulatory regime, this will be a clear breach of Motorola's legitimate expectations created when both bodies (the Home Office and the CMA) gave their unconditional consent to the Airwave Acquisition. In this regard, the proposed remedy would be particularly egregious since Airwave is not entitled to terminate the contract other than on very limited grounds.

2.29 While purporting to consider the relevant contractual terms, the CMA attaches no weight to the fact that those terms agreed by and between Motorola and the Home Office relating to the supply of the Airwave service lay at the very heart of Motorola's decision to proceed with the Airwave Acquisition, as welcomed by the Home Office. Those terms provided contractual certainty as to the terms on which the Airwave network must be provided, and were provided to the CMA in 2016 (see below). While Motorola was still exposed to the uncertainty over how long the service would be needed and the investment that might be required to maintain service at the required levels in the face of rapidly changing technology, it was the agreed terms that gave clarity as to the financial consequences if Motorola were to cause ESN to be delayed. Failure to give appropriate weight to these contractual arrangements is a material

[35] See the CMA's Decision on Motorola's acquisition of Airwave dated 1 July 2016, paragraph 35.
[36] This is not a criticism of the Home Office: with the benefit of hindsight, the Home Office may have changed its mind about the kind of contract it would like Airwave to operate under, but that is not a competition problem.
[37] For the reasons explained below, the counterfactual presented by the CMA is in any event hopeless.

omission that the CMA has not weighed properly, or at all. It is obvious that these terms carry vast commercial exposure to Airwave and the price cannot simply be rewritten on the pretext of a well-functioning market issue. The fact is that the parties agreed to the terms, the Home Office approved the Airwave Acquisition on those terms, the CMA approved the Airwave Acquisition, the terms are critical to the successful operation of the Airwave network, and the CMA cannot now simply isolate the price, rewrite that, and require Airwave to continue to operate the network to the same level merely because the Government has demanded this.

2.30 Pointing out, as the CMA does, that the terms that have been agreed could be changed through future negotiations and that the parties might have expected such negotiations to take place misses the point entirely. Contracting parties can change any of the terms they have agreed by mutual consent. They will only agree on such changes if this creates benefits that can be shared between them (and they can agree on how the gains are to be split). This means that any mutually agreed beneficial variation of terms cannot leave one party worse off than under the default terms. A reduction in price is not a change of terms that falls into this category, and it would be naïve in the extreme to agree default prices in the expectation that these would simply be lowered in the future without some quid pro quo.

2.31 Whilst *all* terms of any contract are subject to further negotiation if the parties view it in their mutual interest to have such discussions and reach agreement, failure of one party to obtain more favourable terms than agreed to at the outset does not provide an entry point for a competition assessment. The price agreed at the outset – together with other key commercial terms – forms the very heart of the commercial agreement reached between the parties. In fact, other than the service levels, there is arguably nothing more fundamentally important to the parties. Indeed, one reason the Home Office was so very keen in 2016 to agree a fixed price of unlimited duration was to avoid it facing higher prices in the future, as allegedly threatened by Airwave's previous owners. The CMA's idea that the parties regard this simply as an "option" is an irrational treatment not only of the binding nature of the Airwave contract, but of how the parties themselves understood the contract would operate and the central importance attached to reaching agreement on fixed pricing.

2.32 Even if the CMA could make out a basis for intervention that goes beyond the Home Office wanting to pay less (even though the Home Office rejected a discount offered in 2018 [✂]), it places no weight at all on the central importance of the agreed pricing when deciding whether it is proportionate to intervene at all. Critically, the Home Office has terminated the Airwave service by issuing a National Shutdown Notice. The fact is the parties had freely – and after significant negotiations – entered into a long-term fixed price contract to supply the UK's mission-critical emergency services which is now ending, and which the CMA takes no account of when formulating its proposed intervention. If the Final Decision reflects the contents of the Provisional Decision, this will be a clear breach of A1P1.

The CMA's Market Investigation Reference Policy

2.33 The CMA is also acting in direct contravention of its own policy:

> "It is not the present intention of the [CMA] to make market references based on the conduct of a single firm, whether dominant or not, where there are no other features of a market that adversely affect competition."[38]

2.34 It is clear from the CMA's provisional determination, that the CMA has departed from its own policy. Its extremely narrow approach to assessment of the operation of the relevant market, amounting in most parts of its Provisional Decision to the PFI Agreement alone, together with its proposal to impose highly specific rules and obligations for Airwave—a price control regime to regulate the agreed prices of a single project company – clearly represents a reference based on the conduct of a single firm. The importance of the CMA maintaining adherence to its policies whilst they remain in effect is particularly strong in this context given the extremely broad and ill-defined nature of the CMA's powers under its market reference jurisdiction. As the CMA has also stated,

> "A market investigation may examine any competition problem and identify the feature causing the problem. It aims only to see if competition within the particular market under review is working well or can be improved and is not seeking to establish general rules and obligations for firms."[39]

2.35 The CMA does not even investigate the cause of the present market investigation, namely the delay of ESN, but simply takes this as a 'feature of the market'. The CMA recognises that competition takes the form of competition for the market (even if one were to accept the CMA's fiction that this is the most important form of competition, but not the only one). The ESN procurement is the most recent instance of competition for the market. Accordingly, the failure of the ESN procurement to deliver a working solution in time or with reasonably short delay should be at the heart of the CMA's investigation. Such assessment is vital not only for the understanding as to whether Airwave is a 'market' capable of being investigated, but also lies at the very heart of any remedy decision. See further below.

[38] Office of Fair Trading, 'Market Investigation References' (March 2006) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284399/oft511.pdf> ("**OFT511**"). OFT511 was adopted by the CMA Board, and remains applicable after 1 April 2014, subject to the changes set out in the Enterprise and Regulatory Reform Act 2013.

[39] CC3, paragraph 18.

3. THE WELL-FUNCTIONING MARKET: COMPETITION FOR THE MARKET

The CMA's Market Investigation

3.1 The CMA now[40] provisionally identifies the relevant market as "the supply of communications network services for public safety and ancillary services in Great Britain". This is the relevant market, characterised by competition-for-the-market, which the CMA purports to be investigating to see whether it is working well.

3.2 Within that relevant market one can currently make two salient observations:

(a) The ongoing ESN procurement failure to replace Airwave. Consistently delayed since 2017 and with no end in sight to that delay, ESN has so far cost the taxpayer hundreds of millions of Pounds (with exact numbers being difficult to ascertain) and will have a lifetime cost that is higher than the cost of continuing to use Airwave over the same period, even if the ESN service becomes available (which is far from certain).

The failed ESN procurement continues to be one of the UK Government's most expensive failures. It is a textbook example of procurement that has failed to work.

(b) The ongoing successful supply of the Airwave service, contracted since 2000, and since 2016 contracted as a backup while taxpayers and the emergency services as well as other users wait for ESN to emerge.

The supply of the Airwave service is a textbook example of the outcome of a well-functioning market. Airwave was procured through a tender process, like ESN, but runs extraordinarily successfully and will by the end of 2026, on the contracts in place since 2000, have generated an IRR to Airwave of less than 11-12%, which compares very favourably to even much less risky, let alone mission-critical, Government projects.

The CMA's Approach in the Consultation

3.3 In the Consultation, the CMA correctly stated (at paragraph 1.19) the form that competition would take in the relevant market:

> "As is apparent from the above, the Airwave network is a highly differentiated and bespoke offering that was purposefully designed to meet the very specific needs of one customer group. Under such circumstances, one would expect competition to be 'for the market', i.e. to involve a process through which a long-term contract is awarded to one of a few suppliers and the main competitive interaction occurs when contracts are awarded and/or extended. Once the contract is in place, competitive constraints within the contract would be expected to be minimal at best." (Emphasis added.)

[40] In its Consultation Document, the CMA defined the relevant market as "the supply of the Airwave network (including all relevant ancillary services in Great Britain). In the Final Report and Decision on a Market Investigation Reference, the CMA defined the relevant market as "the supply of LMR network services for public safety in Great Britain." The current market definition was first identified in the CMA's Scope for Competition and Market Definition, in which the CMA defined the relevant market as "the supply of communications network services for public safety and ancillary services in Great Britain."

3.4 Paragraph 1.19 of the Consultation Document then goes on to state that "[a]lthough there may be some scope for customers to exercise some level of bargaining power at the point of negotiating contract extensions, in the absence of 'outside options', this would be expected to have a limited impact on the conduct of the incumbent supplier." (Emphasis added.) The obvious outside option – and the only one that is consistent with the nature of the services supplied – is the option to re-tender at the point at which the initial contractual commitment ends.

3.5 So at the Consultation stage, at no point did the CMA suggest that competition occurs within the contract. This is correct because such an idea (a) makes no sense; (b) finds no support in economic literature; (c) does not reflect how a bidding market works; and (d) is the opposite of the CMA's own stated analysis of the scope for competition in relation to bidding markets:

> "In markets characterized by bidding and tendering processes firms bid on the basis of the service they can offer to supply customers with bespoke products. The competitive constraint on firms in these markets comes from a customer's willingness to award a contract to a rival rather than to switch to a different bespoke product."[41] (Emphasis added.)

3.6 In other words, the Consultation Document and the CMA's prior policy both correctly recognise the absence of competition once competition for the market has occurred.

3.7 The CMA now however provisionally says something very different. The CMA's position in the Provisional Decision is that competition for the market is "an important source of competitive constraints"[42], "[b]ut not the only one"[43]. The CMA even claims that Motorola agrees with this position, but that is simply not true. In an effort to avoid having to accept that there is no scope for in-contract competition (and so no basis for CMA intervention), the CMA now has identified 'competitive interactions' that can supposedly remain during the contract. Moreover, these competitive interactions would, in a well-functioning market, reflect an outside option (re-tendering Airwave on the basis of existing assets) that has in fact become irrelevant because the other outside option (the decision to procure a replacement network, ESN) had been exercised. The CMA's assessment is irrational and is addressed further below. The simple points are (a) there is no option for a tender because the parties are within a contract; and (b) there is nothing anticompetitive for a contracting party who has agreed a contract with the Government to rely on its terms.

The CMA's description of a well-functioning market

3.8 The CMA discusses how a hypothetical well-functioning market might operate: a succession of long-term contracts, punctuated by decisions to tender for a replacement, re-tender or renew a contract against the option of re-tendering. This is understandable given that the nature of the services under consideration is such that competition must take the form of competition for the market.

3.9 Specifically, the CMA states:

[41] CC3 (Revised), footnote 76.
[42] Provisional Decision, paragraph 12.
[43] Provisional Decision, footnote 3.

> "[i]n 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. That could, for example, be the replacement of the existing arrangements by:
>
> (a) a competitively priced continuation of the operation of the existing network infrastructure (for example, under a retendering process facilitated by the transfer of the assets to the Home Office, or the threat of such a process); or
>
> (b) a competitively priced new network (for example, one tendered under a new process), that could use new technology and offer enhanced functionality."[44] (Emphasis added.)

3.10 The CMA further observes:

> "In these cases, the process of competition would be expected to lead to the Home Office paying competitive prices for the network and services in the period after the original fixed period of the PFI Agreement. We observe that they are plausible possibilities in a market like the one under consideration. The terms of the PFI Agreement were in principle broadly consistent with the first. The second is broadly reflected in what the Home Office sought to achieve in its procurement of ESN in 2014/15. Accordingly, while they are hypothetical, they are illustrations of a theoretical benchmark which we keep in mind to help us in our competition assessment."[45] (Emphasis added.)

3.11 Both options identify tendering as the source of competition. When competition takes place for-the-market, it is a tautology to observe that conditions of competition must be examined at the point in time when such competition (tendering) takes place, until the next such competition next takes place. This is the very point of competition *for-the-market*, and the correct way to examine competition is of course to examine what actually happened and why it happened.

3.12 Of course, contrary to what the CMA claims, the options are not 'hypothetical'. The Home Office chose the second option and decided to have competition for the market to replace the Airwave network. Moreover, the Home Office specified the replacement in such terms (including a very specific technology mix for which there was no precedent, which was generally seen to be high-risk and of which there still is no working version) that Airwave was unable to compete to supply its own customers using its own assets and services[46]. As a result, Airwave was then simply left in the position where it would be required until the chosen replacement network was ready.

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[44] Provisional Decision, paragraph 13; similarly, paragraph 4.9 which refers to a well-functioning market as one where:
"(a) At the end of the original fixed period of the PFI Agreement, the Home Office would be able to (re)tender for the provision of LMR network services for public safety using the infrastructure that had already been built and paid for and where sufficient effective competitors would participate in such a tender to produce a competitive outcome; or alternatively, (b) the Home Office successfully tendered amongst competing bidders for the delivery of a new and enhanced replacement network which was in position to replace the existing network when the fixed-period of the PFI Agreement ended, and the process to choose that network involved sufficient competing alternatives and resulted in competitive prices for that new network."

[45] Provisional Decision, paragraph 4.10.

[46] This itself was a major and unnecessary restriction on the ESN procurement competition. The fact that the CMA identifies the possibility of the Airwave network being required on a long-term basis sheds light on the irrationality of that decision, yet the CMA has so far failed to investigate ESN procurement.

3.13 It should be obvious that choosing one option instead of the other means that the alternative option – the path not chosen – is no longer relevant for any *competition* assessment of how the future turns out. The CMA nonetheless proceeds on the basis that having made the choice to replace Airwave the outcome that might have resulted from the Home Office retendering Airwave should still provide the benchmark against which the operation of Airwave as a backup solution should be judged. This is irrational and unfair to Motorola.

The decision to procure a new network

3.14 The Home Office went through a highly detailed, multi-year process of tendering for the delivery of a competitively priced new network, with all users to be migrated by the end of December 2019. Presumably the CMA thought that the market was well-functioning when it investigated the Airwave Acquisition, otherwise the CMA would have done something about it.

3.15 Of course, things did not turn out as the Home Office expected. The ESMCP programme has not remained on track and the whole life cost of ESN has continued to be revised upwards, incurring substantial (and with hindsight fully avoidable) network duplication costs. According to the last estimate presented in the Accounting Officer Memorandum, "ESMCP is anticipated to have a Whole Life Cost of £11.3bn over the period of the FBC (FY2015/6 – FY36/7) …. Compared to the baseline 'Do Minimum' option, the preferred option, ESN, is better value for money with a significant positive Net Present Social Value (NPSV) of £0.8bn. This remains the case following robust sensitivity analysis showing a 90% likelihood that the NPSV will be £0.3bn."[47]

3.16 Noting that the figure of £11.3 billion does not reconcile with the data reported in the Government Major Project Portfolio dataset, where the whole life cost of ESN is reported to be £12 billion, this shows that the currently expected lifetime cost of ESN is the same as the cost of continuing to use the Airwave service before the discounts that Airwave has historically and recently offered. Factoring in these discounts leaves the Airwave service cheaper than ESN, especially considering that differences in the range of services offered could be addressed by adding ESN-like services to Airwave at a relatively small incremental cost. However, even ignoring the discounts offered by Airwave, the break-even point is pushed out to the date at which ESN is expected to cease operation. Given such outcomes from the competitive procurement process for ESN, it is unreasonable to purportedly identify a competition failure in respect of the cheaper fixed price contract for Airwave.

3.17 In fact, on the basis of information available to Motorola it is far from clear that ESN will ever pay its way. Not surprisingly, although this attracts no analysis by the CMA, the Home Office has repeatedly considered abandoning the project and this may be a decision that will ultimately need to be taken. In any case, a delay of 10 years (as currently envisaged) or more cannot be acceptable in relation to the reasonable duration of a long-term contract considering speed of technological change. This is a profound failure of procurement by the Home Office (but, crucially, one which is wholly separate to the question of whether the Airwave terms were arrived at pursuant to an adequate competitive process).

3.18 The failure of ESN is not an inconvenient factor that contributes to a fictitious market (the market for the supply of the Airwave network on the basis of having been re-tendered by the

[47] Accounting Officer Memorandum: Emergency Services Mobile Communications Programme, last updated 6 September 2022.

Home Office) that never existed (since the procurement choice was specifically made in favour of ESN) not working well. The ESN failure is not the cause of the supply of the Airwave network not working well, it is simply the manifestation of a failure of procurement for the market that actually existed.

3.19 In a well-functioning bidding market, once the customer chooses not to continue with the incumbent supplier's service from the point the existing contract expires, the customer's only requirement from the incumbent at that stage is to ensure the current contract operates effectively until the service is replaced by the new supplier. Of course, should the incumbent supplier impose an excessive price for such service (on the ground that the customer has no alternative until the new network is ready and despite the existence of fixed prices), such attempt would be caught by the prohibition on abusive pricing.

3.20 A market investigation case is also hopeless, since in substance the matter under investigation is just a long-term, heavily negotiated and precisely formulated fixed price contract between two well-advised parties. There was and is no Airwave competition to be assessed, only a long-standing agreement between the parties which was simply amended in 2016 to ensure safe and secure supply of the existing emergency service until the new service arrived. Yet despite the fact that a re-tendered Airwave service is the procurement choice that was not made, the CMA devotes almost all of its Provisional Decision and Appendices to pretending that a well-functioning market would have delivered the Airwave service on different terms. This makes no sense.

3.21 As the Home Office sought and agreed the continuation of the Airwave contract beyond 2019 without a tender process on terms that are clear and unambiguous it would be a gross misapplication of the Enterprise Act 2002 to subject – some 7 years later – the Airwave contract amendments to a competition assessment as if competition for that market had taken place. This is especially the case given that competition for the Airwave network's replacement had in fact just taken place. It makes no sense for the CMA to pretend that the decision to pursue a new replacement network had not been taken and try to look at what might have been the Airwave price if the Home Office had not made that choice but instead sought to re-tender the Airwave network on the basis of its existing assets.

3.22 Put simply, in 2014/15 the Home Office was at a fork in the road, with a choice between (a) using the existing network and (b) going with a new network. These are the options the CMA identifies, cited above at paragraph 3.9. Once the path forward had been chosen (ESN), all that remained was to contract a secure back up in the form of the Airwave network until the replacement was ready. The premise of all of the CMA's Provisional Decision is therefore a choice that was not in fact made in 2015/2016, when the current arrangements were settled. There was never any intention or any attempt by the Home Office to re-tender for LMR services based on continued use of the infrastructure that had already been built and paid for.[48] Moreover, for the reasons explained in the following section, it is factually incorrect for the CMA to assert that the Home Office would (or let alone could) have made a different choice if only the asset transfer provisions had been drafted better.

The path not taken and the role of the asset transfer provisions

3.23 The CMA claims that:

[48] (with the possible exception of utilising some of Airwave's assets to provide the required covered by ESN).

> "one way an effective competitive process could have operated in a well-functioning market might have been for the contract for the provision of services using the existing infrastructure to be contestable from time to time as long as it remained economic to do so (for example, at the end of the PFI Agreement in 2020). The terms of the PFI Agreement relating to the transfer of network assets to the Home Office at that point were consistent with that possibility. This is not however how the market has developed.
>
> We have therefore considered the factors and circumstances that led the market to evolve in a different way. Those include the factors and circumstances that led the Home Office to decide to commence a procurement process for entirely new infrastructure relatively shortly after the Airwave Network had been fully rolled out. In particular, we have considered the operation of the exit and asset transfer clauses in the PFI Agreement and concerns about Airwave Solutions' high levels of debt."[49]

3.24 The CMA then finds that the asset transfer clauses:

> "have not been effective in securing the transfer of the network assets to the Home Office and [that] these assets are still owned by Airwave Solutions. That has played an important part in reducing the Home Office's options and distorting competition because it means the Home Office could not, for example, retender the provision of the network and services using the existing infrastructure. It is reliant on Airwave Solutions for their continued provisions."[50]

3.25 The CMA suggests that if the asset transfer provisions had been drafted differently, the Home Office would have been able to take possession of the network. This is wrong, for the simple reason that the Home Office was not interested in taking possession of the Airwave network in 2016 since it was completely focused on ESN. The asset transfer provisions played no role in the decision to procure ESN or the negotiation of a unilateral right to continue to draw on the Airwave network at the agreed price and it is irrational and unfair on Motorola for the CMA to pretend otherwise.

3.26 The CMA portrays the alleged lack of effectiveness of the asset transfer provisions in the PFI Agreement as a major factor forcing the Home Office to choose the second option (procuring a replacement network for the Airwave network) rather than the first (retendering on the basis of existing assets). There is no evidence to support this assertion and furthermore it is in direct contradiction to the CMA's own description of the ESN procurement, which refers to the Home Office's 2013 Outline Business Case for pursuing ESN setting out the following strategic objectives:

> "(a) The expected expiry of the Airwave contracts in the period from 2016 to 2020 as well as the OJEC notice, which led to a common understanding that the PFI Agreement would be effective until 2020 and could not be extended.
>
> (b) The significantly higher cost (estimated to be at least 200%) of the Airwave Network and services when compared with similar public safety systems in Europe and price trends for publicly available mobile telephony. The increasing user requirements for

[49] Provisional Decision, paragraphs 4.30 and 4.31.
[50] Provisional Decision, paragraph 4.35.

mobile broadband data to support operational transformation that could not be fully met by the existing system."[51] (Footnote omitted.)

3.27 Further:

"One strategic objective of procuring the design and roll-out of ESN was that ESN would 'be based on a commercial mobile communications network that can be re-competed more regularly to exploit market forces and take advantage of technological evolution'. Four requirements were set for the new system, relating to functionality, security, availability and coverage. It was noted that TETRA technology could not meet all these requirements, without the use of additional broadband technology. While there were various options for combining TETRA technology with broadband, the chosen technology, 4G Long Term Evolution (LTE) could meet all the stated requirements. … The chosen technological option was to make use of commercial 4G LTE services enhanced with extended coverage and public safety service platform and as noted above, one key aim was to avoid the risk of 'lock-in' with a provider (recognised as a key issue in the way in which LMR technology had been implemented) in order to:

(a) Encourage competition in the commercial mobile services market segment and benefit from commercial rates (even with a premium for emergency services airtime)

(b) Target best of breed providers in this specialist ESN functionality market segment

(c) Maintain the ability to compete this separately in the future and as a contingency should there be a delay to open standards."[52]

3.28 The CMA therefore has no basis to assert that if only the PFI asset transfer provisions had been more effective, the ESMCP would never have existed, and the ESN procurement would never have taken place. The asset transfer provisions are, quite simply, an irrelevant consideration and the CMA has not properly demonstrated otherwise. The reference to what could hypothetically have happened in 2020 also makes no sense since the parties had already agreed in 2016 what would happen in 2020 (and beyond). The only way for 2020 terms to change under the CMA's asset transfer hypothesis would be to pretend that the 2016 terms had not been settled and that the Home Office instead of requiring a continuation of Airwave services for as long as they were required on agreed prices had tendered for, or threatened to do so, the operation of Airwave from 2020 onwards.

3.29 The CMA does not address this at all, including how and why it supposes Motorola in fact would have agreed to acquire Airwave on whatever terms might have been agreed if only things had been different. This would involve addressing the obvious question of how such hypothetical amendment in 2016 would leave Motorola's own internal forecasts on whether to acquire Airwave on the new hypothetical terms, especially in light of the probability weighted IRRs of acquiring Airwave, which the CMA has ignored in the factual, let alone counter factual.

3.30 It is obvious that the current supply of the Airwave service must be seen in the context of the choice made by the Home Office to procure a replacement network, which meant that the Airwave network would only be required after the end of the initial PFI period as a backup

[51] Provisional Decision, paragraph 2.74.
[52] Provisional Decision, paragraphs 2.75 and 2.76.

solution that covered the needs of the emergency service until ESN was ready. If the ESN procurement had been successful, this might still be the case for a limited period, but not for the ten or more years that currently seem to be envisaged.

3.31 To provide for the case where ESN would be delayed, the Home Office negotiated the flexibility to switch off the Airwave network at the earliest opportunity. It is indeed apparent from the discussion of the Home Office's objectives during negotiations with Airwave that can be found in the Provisional Decision that the Home Office was unwilling to commit to any particular Airwave termination date, and was only later concerned about price as the ESN delays were mounting.

3.32 Accordingly, the Home Office and Airwave agreed various changes to the PFI Agreement at the point at which Motorola acquired Airwave. The key provisions were the unilateral right of the Home Office to require the provision of the Airwave services at the price already specified in the Blue Light Contracts, unless the parties agreed on a different pricing. This does not seem to be disputed and is acknowledged by the CMA, describing (in relevant part) the agreement in the following terms:

> "The HoTs also record Motorola's and the Home Office's agreement that the pricing that would apply until the National Shut Down was the price already specified in the Blue Light Contracts subject to certain amendments agreed in the HoTs and to any further amendments resulting from any subsequent negotiations."[53]

3.33 It is against the fact that, having tendered for a replacement network, the Home Office and Airwave agreed a change to the PFI Agreement that any subsequent bilateral discussions that took place between Motorola and the Home Office after 2016 must be assessed.

3.34 The CMA claims that:

> "[i]n 2016, when the parties agreed the HoTs and DoR, the Home Office expected that it would only require access to the Airwave Network until ESN was ready to replace it – which it anticipated would be in or around 2020. Its options were limited by its concerns about Macquarie's continued ownership of Airwave Solutions, its ongoing dependence on the Airwave Network which remained in Airwave Solutions' ownership, and the possible unlawfulness of longer term extensions of the PFI Agreement. These factors affected the Home Office's ability to negotiate HoTs (or a DoR) that secured competitive outcomes."[54]

3.35 It is entirely unclear what the CMA considers to have been competitive outcomes in relation to the 2016 negotiations. The Home Office had just procured a ***replacement*** network, obliterating any concerns about the ongoing dependence on the Airwave network and rendering questions about who owned the Airwave assets irrelevant. Because of this, it is nonsense to suppose that the Home Office would realistically have re-tendered for the continued provision of Airwave-like LMR services on the basis of Airwave's existing assets. Moreover, this failure to retender is not attributable to the malfunctioning of any market: the Home Office clearly had no interest in committing to any longer term extension regardless of a 'possible unlawfulness' of such a choice as it wanted to be in a position to switch off the Airwave network as soon as possible. Given that it very clearly was the procurement option

[53] Provisional Decision, Annex C, paragraphs 147 and 148.
[54] Provisional Decision, paragraph 4.16(c).

that was not chosen, the continued provision of the Airwave network on terms that might have emerged from a re-procurement cannot be taken as a reasonable benchmark.

3.36 Regardless of the Home Office's hopes, the possibility that ESN might be delayed for a longer period and that the Airwave network might operate for longer was moreover entirely clear and transparent at that point, including to the CMA when it approved the Airwave Acquisition. The false hopes of the Home Office cannot be allowed to drive the suggestion of whether any putative 'Airwave extension market' was working well. The scenarios considered by Motorola at the time of the Airwave Acquisition covered cases where the Airwave network would be needed for much longer. Motorola's own assessments at the time were that it was ***more likely than not*** that Airwave would be needed beyond 2020.[55] These scenarios were shared with the CMA and were clearly known to the Home Office and the CMA when the Airwave Acquisition was approved. Even if one believes that the Home Office might have made a different choice if it had not had expectations that, in hindsight, turn out to have been wrong, this is not a failure of competition and it cannot form the basis of an intervention on competition grounds especially when the CMA had already undertaken the relevant competition analysis at the time.

3.37 The CMA of course acknowledges that Motorola considered that the Airwave network might be needed for longer if ESN was delayed. However, such treatment is unfair to Motorola since the CMA only uses this as evidence against Airwave when discussing Motorola's 'dual role', suggesting that Motorola's strategy at the outset might have been to behave in a way that would hamper the development of ESN rather than do whatever would be in its powers, almost irrespective of what it was contractually committed to do, to ensure that ESN would be ready by the end of the PFI period. None of this was a concern to the CMA in 2016 despite the same evidence being before the CMA, and the CMA has not explained why it has now provisionally arrived at a different conclusion.

3.38 The Airwave service is provided today on the same contractual basis as had just been signed when the CMA approved the Airwave Acquisition. The CMA was fully aware of the contractual position that provided for continued supply of the Airwave network at the prevailing prices and the likelihood that ESN might be delayed for more than a few months as well as Motorola's 'dual role' when it approved the acquisition. The CMA cannot legitimately make a finding in a Provisional (or Final) Decision that rests on a notion that the operation of the Airwave network would not extend much beyond the end of the PFI period.

3.39 Motorola notes that the CMA no longer claims that Motorola gave "assurances"[56] regarding the expected operation of the Airwave network. The CMA is now respectfully invited to abandon the remaining pretence that whatever might have been the Home Office's expectation can fairly be shoehorned into a competition analysis.

3.40 In any event, the supposed ambiguities or problems associated with the asset transfer provisions do not exist. The asset transfer provisions, as originally drafted, were intended to provide for the eventuality that Airwave might need to run the Airwave business after the Home Office had terminated its contract, i.e. continue to provide services to any other organisations that it would manage to sign up as customers (the Fire and Rescue Services, the Ambulance Services and sharers). The projected returns from the Police contracts were

[55] In other words, the CMA's assertions (e.g. at paragraph 4.147) are false.
[56] Consultation Document, paragraph 1.31; CMA's Final Report and Decision on a Market Investment Reference, paragraph 1.35.

insufficient for Airwave, and so Airwave intended to develop the business in a number of different ways. In the event, other than the expansion of service to both the fire and ambulance services, as well as the "sharer" services, the plans that Airwave had to use the network to attract a range of uses were ultimately unsuccessful. Once it became clear that such commercial opportunities would not be realised, any ambiguities regarding transferable assets were resolved since there would be no "residual" users that needed to be serviced. In short, there is no uncertainty today that would prevent the Home Office from exercising its option to acquire the Transferable Assets (for example) on expiry of the contract in December 2026. The entire factual basis of the CMA's assessment of the role that the asset transfer provisions could have played if they had been drafted differently is wrong.

3.41 Finally, the asset transfer provisions are part of the contractual bargain between the parties. The relevant issue is whether there was adequate competition when the contract was agreed – and not whether the Home Office might be advantaged by amendments to the existing contractual terms.

4. THE COMPETITIVE INTERACTIONS FICTION

4.1 As noted above, the CMA has identified that competition in a well-functioning market in the present case takes the form of competition for the market.

4.2 However, as also noted above, the terms agreed between Airwave and the Home Office come from negotiations in 2016 when the Home Office had just procured a replacement network and required the Airwave network only as a backup, such that they cannot be the result of failed competition for the market. The terms may have been agreed on the basis of expectations about the duration for which the Airwave network would be needed as a backup that turned out to be longer than the Home Office hoped, but failure correctly to anticipate the future is not a failure of competition.

4.3 Being left without a proper basis for intervention, the CMA since the initial Consultation Document has contended that competition for the market is 'an important source of competition' – but not the only one. For example the CMA places reliance on an unspecific and unsustainable form of long term dynamic competition, with its latest attempt being the concept of "competitive interactions" within a contract, to try to intervene in the Airwave contract. Indeed, the CMA's case rests upon this since without a market there is no market to investigate, and without a market characterised by the two parties interacting competitively, there is no market in this case since the market had been competed for.

4.4 The CMA's effort fails because it bears no reflection on how bidding markets work and contains a profound misunderstanding of the correct way to regard bilateral negotiations within a long-term contract. For the reasons previously explained, it makes no sense to think of negotiations between a customer and a supplier under a long term contract as "competitive".

4.5 The CMA's starting point to explain the relevance of "competitive interactions" is the assumption that:

> "in a well-functioning market, from around 2020 there would be effective competitive interactions between the Home Office and a supplier of communications network services for public safety. These competitive interactions would give the Home Office alternative options and allow it to choose (or threaten to choose) a different supplier and effectively discipline any supplier that did not offer competitive prices or terms. Such a market would generate prices, profits and quality of service that were at competitive levels."[57]

4.6 The well-functioning market in 2020 posited by the CMA assumes that there would be scope for re-tendering the Airwave network (or tender for another service) after around 2020, i.e. rely on competition for the market, ignoring that:

(a) competition for the market had already taken place; and that

(b) the terms for the supply of the Airwave service had been agreed in 2016, explicitly by affording the Home Office the unilateral right to call on Airwave for as long as it required rather than relying on some hypothetical different supplier in return for

[57] Provisional Decision, paragraph 4.8.

> Motorola's legitimate expectation of both fixed pricing and it bearing the technology refresh risk for that unspecified duration of service.

4.7 The Home Office clearly had no desire to re-tender at this juncture or any later juncture. It is entirely fictional to consider that there could have been a tender at this time when it was not in the Home Office's interests to invite competition for the market. The CMA is simply trying to give the Home Office the benefit of a putative tender process together with the benefits of not having to tender.

4.8 Specifically, in 2018 ESN had been 'reset' with a then expected arrival date of 2022/2023, yet apparently this should be assumed away for a 2020 analysis. Similarly, in 2016 the price for the Airwave network beyond 2020 had already been agreed, and this too should be assumed away, to allow for "effective competitive interactions". This makes no sense at all, and the CMA does not explain who, in 2020, is supposed to own Airwave (and on what terms), be providing the Airwave service and on what terms, subject to what notice period, and at what price, under the CMA's well-functioning market hypothesis.

4.9 Analysis of a hypothetical well-functioning market cannot be based on an assumption about the operation of that market in 2020 that is so obviously untenable since it directly contradicts what had happened previously and how the parties had already agreed to commit to each other. By 2020 there would, and could, be no "alternative options" since by 2020 the Home Office had already made its choice. For such an assumption to be made, one would need to pretend that no agreements had been reached in 2015, 2016 or 2018 and that no lead time would be required to implement whatever competitive choice the Home Office made. In other words, the CMA's description of the well-functioning market in 2020 is pure fantasy, and one which does not satisfy the obvious requirement that the counter factual should be a realistic one.

4.10 In the CMA's view, "over time as the market has developed, the Home Office's options and factors that in a well-functioning market would have acted as competitive constraints on the price of provision of the Airwave Network or secured its replacement by a competitively procured alternative have diminished (or did not materialise)" so that "[i]n the period from 2020, after the original fixed- period of the PFI Agreement, the Home Office neither has the options that we might expect in a well-functioning market nor are there other constraints on prices and profits that we might expect to apply"[58].

4.11 Having dismissed the Home Office's decision to procure a replacement network as a choice that has been made because of the alleged inefficiency of the asset transfer provisions in Airwave's contracts and for which there is no evidence, and having re-cast the heavily negotiated arrangements struck between Airwave and the Home Office in 2016 when the CMA cleared the acquisition as having been forced upon the Home Office (yet the Home Office neither asked the CMA to review the Airwave Acquisition at the time nor complained about the Airwave terms once the CMA decided to investigate), the CMA then proceeds to observe:

> "[i]n the negotiations in 2018 and 2021, the Home Office was negotiating against the outside or default option agreed in 2016 of extending the operation of the Airwave Network at previously contracted prices and on previously agreed terms, where, amongst other things, the asset transfer provisions in the PFI Agreement had not resulted in the transfer of network assets and Airwave Solutions still owned them,

[58] Provisional Decision, paragraph 4.15.

ESN had not been delivered, and the Home Office's dependence on the Airwave Network meant it was locked in to Airwave Solutions."[59]

4.12 Even ignoring the irrationality of choosing the procurement option not taken as the relevant comparator and the CMA's factual misunderstanding as to how the PFI Agreement operates (see above), these observations do not justify intervention on competition grounds. The very point of a contract is of course to "lock" the parties in by setting out terms that will apply for the duration of the contract. A reference to the fact that there were previously contracted prices and terms is nothing more than a statement of the obvious and does not justify a competition intervention. The asset transfer provisions were irrelevant and the Home Office's "dependence"[60] on the Airwave network would only be relevant if Airwave was in a position to leverage any power, which it wasn't since pricing had already been definitively agreed. Bilateral discussions between two parties after they are "locked in" (i.e. after competition for the market has, or could have, taken place) have absolutely nothing to do with competition or market assessments. The parties are of course free to change these terms by mutual agreement and will typically do so when changes in circumstances provide scope for obtaining benefits that can be shared. However, absent such a mutual agreement, the terms that were agreed initially apply. This is the point of a contract.

4.13 It therefore makes no sense to point out that "the HoTs explicitly refer to the possibility of the Blue Light Contract prices being further amended by mutually agreement through Change Control Notes"[61] and to conclude from this that the Home Office should have been expecting (or would have been entitled to) lower prices in the future by reference of some outcome that could have been obtained if the Home Office had re-tendered the Airwave network. The Home Office not only understood, but insisted upon, the terms to which it agreed applied until any different terms were negotiated by mutual agreement. Indeed, as noted above, there have been instances, for example in 2018 [✂], where Motorola offered lower prices *in exchange* for a longer-term commitment by the Home Office, which would provide greater certainty and also allow for better investment planning. The Home Office has rejected such offers.

4.14 The simple point, which Motorola has made since the outset of the CMA's intervention, is that once the parties have signed up to a contract, their interaction does not constitute a 'market', well-functioning or otherwise.

4.15 The CMA, by contrast, claims that "even where a supplier's responsibilities are set out in contracts, in practice its performance will often be influenced by its incentives and the competitive conditions in the market."[62] The reasons it provides for this view are, however, entirely spurious:

4.16 The first reason given is that contracts may be incomplete and may not fully specify all obligations, creating a certain degree of flexibility and allowing a supplier to exceed requirements if sufficiently incentivised, e.g. by the impact its performance has on winning future business.[63] It is, of course, true that the risk that the customer takes away the business

[59] Provisional Decision, paragraph 4.16(d).
[60] Provisional Decision, paragraph 4.16(d).
[61] Provisional Decision, Appendix C, paragraph 148. This is a misinterpretation of the relevant provisions – pricing only changes where the underlying service changes. There is no ambiguity as to the prices agreed.
[62] Provisional Decision, paragraph 3.26.
[63] Ibid., subparagraph (a).

in its entirety once the contract has expired may prompt the supplier into offering better terms than the default to which it is contractually entitled. This was not the case here.

4.17 The second reason given is that contract terms can be varied or waived, with the degree of competitive pressure affecting whether the supplier is able to renegotiate terms in its favour.[64] This reason seems to be no different from the first and is related to the threat of losing business, which obviously is affected by the extent to which the customer is bound by contractual commitments, which are there for the very reason of preventing one party from acting opportunistically by reneging on commitments given when external circumstances change.

4.18 The third, fourth and fifth reasons relate to the cost and willingness of parties to enforce contractual commitments, which may result in disputes being sorted through negotiation rather than litigation.[65] The fact that there may be ambiguity in contractual terms and that the parties may, in their mutual interest, decide to try to come to an agreement rather than seeking external enforcement does nothing to change the fact that the terms agreed determine the default position for both parties – the only difference is that the relevant terms are defined by the interpretation of an outside party. Moreover, there is no ambiguity as to the terms, since aside from the dual-role theory, the CMA is only interested in the price that was agreed.

4.19 The sixth reason states that contracts reflect competitive conditions at the point at which the contract is agreed and that they do not "necessarily provide the same level of protection for parties as that afforded by *effective competition in a market over time*" and that "[w]hen analysing markets, the CMA's focus is on underlying economic realities as they may develop over time, including the way in which relevant parties approach transactions and commercial relationships more generally."[66] This makes no sense since it ignores the fact that the contract emerged from competition for the market, and where therefore by definition there is no competition in the market over time.

4.20 The seventh reason is that there is "a distinction to be made between what a party is entitled to contractually and the incentives that drive the behaviour of companies, including within commercial negotiations (before or after a contract is agreed). It is the combination of both that defines how a market operates."[67] Again, this makes no sense: how parties might choose to behave towards each other as part of their ongoing commercial relationship has nothing to do with market forces.

4.21 The eighth and last reason is that, at the end of the contract, the decision whether to extend it beyond the specified period and whether to do so on the same terms reflects the competitive situation at the time the extension is agreed.[68] This is nothing other than a claim that any extension or procurement of an alternative depends on the extent to which competition for the market can expected to be effective. This is moot since the Home Office decided simply to amend the terms of the Airwave contract in terms satisfactory to it. If anything, the eighth reason lends support to the fact that, by its own assessment, the CMA

[64] Ibid., subparagraph (b).
[65] Ibid, subparagraphs (c), (d) and (e).
[66] Ibid., subparagraph (f); emphasis added.
[67] Ibid., subparagraph (g).
[68] Ibid., subparagraph (h).

should focus on competitive conditions for ESN procurement, which ultimately were determined by how the Home Office decided to run the procurement process.

4.22 This leaves nothing other than the point that a supplier might be prepared to offer better terms without being obliged to do so in exchange for the customer not re-tendering at the end of the contract. However, with the Home Office's decision to procure a replacement network, Airwave's future opportunities were decided: the Airwave network was to be supplied as a backup for as long as needed, without Airwave having the right to terminate (other than in very limited circumstances) and it was to be exposed to the full technology risk of keeping the network operational. Airwave's pricing would have no impact on the timing of ESN becoming operational or the fact that it would be turned off once migration was complete.

4.23 While accepting that competition is (mainly, subject to some fictious competitive interactions) for the market, the CMA therefore prefers to investigate the agreement reached between the Home Office and Airwave on the terms which were to apply after 2019, with reference to a world in which the Home Office would have had the option, after 2019, to seek, or threaten to seek, an alternative supplier of the services on the basis of Airwave's existing assets at every point which it could then leverage in negotiations with Airwave about a variation of the contractual terms agreed. This fiction of what should be considered to be a well-functioning market further defies economic logic for two reasons:

4.24 First, there cannot be any actual competing supply to which the Home Office could have switched. This is because where competition is for the market owing to the nature of the services supplied, there is no alternative supply unless and until this alternative is explicitly tendered for. In such a case the new supplier would replace the old supplier, and both supplies would only be active for as long as is required to achieve transition. This scenario does not allow for any competition in respect of the terms on which the services are offered because these terms would have been determined by the new tender and the previous tender. Of course, it is always possible to use the threat of a tender for a replacement, i.e. the potential for having competition for the market, in negotiations, but only at the point at which the existing contractual commitments permit and of course would not apply in the present situation.

4.25 Second, notwithstanding the extraordinary effort spent by the CMA in trying to justify in eight ways the notion of competitive interactions that would arise ***in*** a well-functioning market once the market has been competed for, there is no escape from the facts that:

(a) the terms that have been contractually agreed determine what the parties are entitled to;

(b) terms can be changed by mutual agreement (or otherwise as set out in the contract), but <u>not</u> just because one party later believes it would prefer a different arrangement;

(c) a customer and a supplier, in a long-term contract, simply do not engage in 'competitive interactions';

(d) the Home Office was happy with the contract price until it (or the Cabinet Office) was no longer happy. These are not 'competitive interactions'; and

(e) whether or not the contract between the Home Office and Airwave has turned out better or worse than expected is not a competition issue.

5. REMEDIES

5.1 As set out above, in Motorola's view the current arrangement under which the Airwave service is provided is the result of an agreement between the parties made in 2016 when competition for the market had just taken place, with the Home Office having decided to replace the Airwave network with ESN. To protect against possible delays in ESN becoming available, the Home Office sought to retain Airwave's services on terms that provided it with maximum flexibility at the prevailing price. This agreement was the basis on which Motorola decided to acquire Airwave and on which the CMA cleared the acquisition. It is not the result of the market not functioning well.

5.2 With the benefit of hindsight, it is now clear that ESN has been delayed for much longer than the Home Office expected, and will be delayed further, and the Home Office may well wish to have negotiated a different agreement or tendered for a backup service at the time. However, this is no failure of competition. It is simply regret over a decision that has turned out perhaps not to have been the best one. However, this cannot be the basis for an intervention by the CMA to change the contractually agreed terms for the benefit of one party, in particular as that party had been offered and has rejected terms that better reflected the commercial reality in the meantime (the 2018 offer). For this reason alone, the imposition of any remedy is disproportionate, as there is nothing that needs to be remedied.

5.3 Competition is clearly capable of delivering successful outcomes for the relevant market since it has done so for over 20 years. It is therefore wildly disproportionate for the CMA to assume that there are no prospects for competition to deliver a workable and efficient solution in the near future and instead to punish Airwave with a draconian charge control for the next 7 years. Indeed, the CMA has not adequately explained why it may be expected that the market will not be working well going forward. There is scope for competition for the market in 2024 when the current ESN contracts expire and the Home Office can decide whether it wishes to re-tender these contracts or potentially procure a different solution. One would expect the Home Office to choose the option that maximises the chances of having a working solution available by the time the current contract ends at the end of 2026, but it is ultimately the Home Office's choice. Should the Home Office decide to proceed along a path that requires the ongoing availability of the Airwave network beyond 2026, it can re-tender for this service or negotiate a new contract with Airwave for the period after 2026, with the outside option of re-tendering should it not be happy with the outcome of that negotiation, which clearly exists at this point.

5.4 If the CMA wishes to ensure that such future competition for the market succeeds in creating a competitively priced and working replacement network, it should examine the reasons why the 2015 ESN procurement has failed to do so (although, as stated above, this appears to have been essentially a procurement failure by the Government). As the CMA (and others, who have looked at ESN) has found, the reasons for this delay are complex, but "it is likely to be a reasonable conclusion that the Government's own approach to the programme played a major part in the issues that have been experienced in its delivery since its inception."[69]

5.5 In Motorola's view, this finding should not be surprising given that competition for the market is typically shaped by the decisions of the customer setting the parameters on which prospective suppliers are invited to tender. Trying to understand how the observed failures are linked to the procurement decisions taken would therefore seem to be the proper scope

[69] Provisional Decision, paragraph 5.89.

of a market investigation which would allow the CMA to identify the causes of any failure of the market to work well and to recommend changes that address these causes. In Motorola's view, which has been clearly stated throughout, an investigation into 'the supply of communications network services for public safety and ancillary services in Great Britain' should aim to identify the causes of the ESN procurement failure. A proportionate remedy coming out of such a market investigation would then be to maintain the current contractual arrangements in place and develop a set of recommendations aimed at avoiding a repeat of the procurement failure in the future. This exercise has been undertaken many times before in relation to failed Government ICT programmes including the catastrophic National Programme for IT (or "NPfiT"), the key lessons from which may be well observed here.

5.6 Overall, this means that there is no justification for the CMA to re-write the terms of a contract in run-off. The terms of the current Airwave contract should remain intact until the fixed end date of 31 December 2026 (which has been set as a result of the Home Office having served a National Shutdown Notice), save for any changes the parties might agree. Should the Home Office require Airwave services beyond 2026, it would be free to negotiate the terms of a follow-on contract taking into consideration the outside options it will have at the point at which the contract expires.

5.7 If, despite lacking any proper justification for doing so, and proceeding simply on the basis that it considers Airwave's prices to be higher than, in its view, they ought to be, the CMA were unilaterally to change the terms on which the parties agreed, it would need to do so with a view of what the parties might have agreed. In this, the CMA should take account of offers that have been made and should, with the benefit of hindsight, have been accepted. The utterly inappropriate and draconian charge control proposed by the CMA, which turns mission-critical communications infrastructure for the emergency services into a regulated utility whose assets can be sweated with scant regard for the risks and uncertainties associated with the need to maintain a robust and reliable network, clearly falls far outside this scope. Such is the draconian extent of the CMA's remedy that the revenue impact substantially exceeds the penalties the parties agreed would apply under the heavily negotiated Deed of Recovery, and falls substantially below even the price reduction request made by the Home Office in 2021.

6. INTERWORKING

6.1 Further to Motorola's Response to the CMA's Questions on the Lot 2 expiry dated 14 June 2022 which provided clarifications as to the impact of Motorola's ESN decision, for example, in relation to the delivery of interworking (the "June 2022 Submission"), Motorola and the Home Office have agreed that Motorola will provide its DIMETRA Dispatch Communications Server ("DCS") which enables effective real-time communication. DCS provides the ability to develop specialised control room solutions through the MCC 7500 Application Program Interface ("API"). This standard interface enables the Home Office to procure its new interworking solution with an alternative ESN MCPTT supplier. For ease of reference the agreed upon technical solution was described as 'Option 1' in the June 2022 Submission and is provided in more developed form as the Confidential Interworking Offer Annex to this Response.

6.2 Motorola has offered to provide a service that meets the Home Office's requirement for [✂] interworking talkgroups (with an option for a further [✂] on request) with complete flexibility for the Home Office to order for delivery as required.

6.3 Motorola and the Home Office are currently engaged in detailed commercial negotiations regarding a contractual agreement under which Motorola would provide the necessary DCS technology to enable the Home Office to procure a new interworking solution with a replacement ESN MCPTT provider. [✂]. Motorola will update the CMA as this matter progresses, but notes in the meantime that the CMA appears to have misunderstood what is required for successful interworking, judging by the remedy that the CMA proposes to impose.

6.4 Interworking is the technical capability of connecting together two systems of different technologies to enable communications between them. Within interworking architectures, each system presents an interface towards an interworking function. The interworking function itself may be included as part of the interface presented by one of the systems or, as is typical where a viable standards based solution does not yet exist, it is provided by a gateway product that provides for the translation of each of the native interfaces of the interworked systems.

6.5 Interworking is deployed across LTE and LMR networks all over the world, and it follows the same simple steps. The incumbent network (typically LMR) makes available a connection interface (the specification for which is agreed between the customer and the network provider), based upon the existing standard capabilities of the legacy (LMR) system to which the new (typically LTE) network connects.

6.6 It is entirely for the new network provider (in this case a replacement ESN MCPTT supplier) to ensure that its solution operates with the incumbent's network, and, provided the incumbent has provided access to a standard interface specification and to the relevant connection interface (in this case DCS), the incumbent has no further responsibility as that is the limit of its technical involvement in such a solution.

6.7 This industry standard approach is exactly how TETRA solutions were introduced to displace the preceding analogue technologies; the onus and requirements were placed upon the incoming TETRA solutions to provide the capabilities and services to interwork with the established legacy analogue systems. Motorola products called "Basic Interface Modules" (BIM) were originally deployed to provide interworking to the many existing legacy systems

that preceded Airwave; extensively so in the case of British Transport Police to deliver interworking on a nationwide basis.

6.8 For this reason, the CMA's proposed remedy would be entirely disproportionate since it anticipates Airwave having "a requirement to provide the services involved in the development and use of the alternative interworking solution on a cost-plus basis."[70] There are no services involved in the provision of interworking once the relevant interface has been agreed. A suitable analogy would be expecting the electrician who provided the plug sockets in a house to be responsible for the operation of the dishwasher.

6.9 This solution is no different than how Motorola would have to interface their MCPPT solution into a competitive LMR network for interworking. It does so all over the world.

6.10 The Home Office has told Motorola [✂].

[70] Provisional Decision, paragraph 8.69(b).

7. FAIRNESS AND IMPARTIALITY

7.1 Motorola wishes to respectfully register its concerns as to whether the process and outcome contemplated by the CMA is fair and impartial. As Motorola has previously noted, the investigation appears to have been driven by ESN procurement failings which has led to Airwave being required for longer than some[71] thought. This has led to a highly unusual situation in which the CMA has been invited by the Government to intervene in the contractually agreed pricing under a long-term bilateral contract.

7.2 Particular concerns about the investigation and provisional findings include: (a) a significant change of position by the CMA between its 2016 merger clearance decision and the present investigation, which has not been adequately explained (see paragraphs 2.24 to 2.26 above); (b) an approach which departs from the CMA's market reference policy (see paragraphs 2.32 and 2.33 above) and defies accepted principles of competition analysis; and (c) that the CMA appears to have systematically preferred the Home Office's version of events (see immediately below). In the circumstances Motorola reserves its position on whether the process and outcome give rise to apparent bias.

7.3 The CMA claims in the Provisional Decision that it has not favoured the views of one party over another[72]. That claim does not, however, seem to be supported by the facts. Inevitably, there are differences of opinion between the Home Office and Motorola. So far as Motorola is able to ascertain, in each and every case the Home Office's version of events is preferred[73]. Accordingly, the statistics do not support the CMA's claim to have not favoured the views of one party over another. Motorola cannot find one instance in which Motorola's account is preferred over the Home Office's, which is especially concerning given that the CMA supports the Home Office even without any contemporaneous evidence[74].

7.4 Although Motorola and Airwave have provided the overwhelming majority of substantive assistance to the CMA's market investigation, Motorola is alleged to have provided minimal or no engagement with certain facts and the CMA's understanding of them[75] whereas there is no such equivalent allegation levelled at the Home Office. To date, Motorola has provided approximately 1,000,000 pages of material to assist the CMA's investigation, typically under the most extreme time demands. Motorola has been refused access to the CMA's file[76] so is limited in its ability to comment but notes from the case page and the references in the Provisional Decision that the Home Office has made very submissions. Motorola has made 32 submissions to further assist the CMA's market investigation, amounting to over 450 pages. Last, Motorola is unaware of the extent to which the CMA has documents in its possession which do not support the positions that the CMA takes in the Provisional Decision.

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[71] But not Motorola, as disclosed to the CMA in 2016.

[72] Provisional Decision, paragraph 1.29.

[73] The CMA often notes the Home Office's view without questioning the account or engaging further with the analysis. See for example paragraphs 3.66, 3.67, 3.68, 3.114, 4.41, 4.51, 4.54, 4.55, 4.122, 4.171, 5.38, 5.54, 5.118, 5.119, 5.120, 5.121, 5.122, 5.123, and 8.93. In contrast, the CMA is often "not minded to agree" with Motorola's views and conducts extensive analysis as to why Motorola's submissions are not consistent with the CMA's findings. See for example paragraphs 4.123, 4.124, 4.125, 4.126, 4.127, 4.189, 4.190, 4.191, 4.192, 4.193, 4.194, 4.195, 4.212, 5.92, 6.48, 6.74, 6.80, 6.81, and 6.82.

[74] Motorola has been unable to review the evidence that the CMA purportedly relies upon, since the CMA has refused to make this evidence available, by an email dated 1 November 2022.

[75] Provisional Decision, paragraph 1.27.

[76] This refusal is contained in the CMA's comments on the Appendix K putback text dated 28 September 2022.

7.5 By necessity, Motorola has indicated in its many submissions and responses to RFIs that it is only commenting on the matters presented in the submissions and responses. In fact, many of Motorola's submissions have simply been ignored. By way of illustration, Motorola's Delay Paper, Second Supplementary Submission, Third Supplementary Submission, Fourth Supplementary Submission, Supplementary Submission on US Cost Accounting Standards, Response to the CMA's Working Paper on the Role of the 2016 Change of Control Negotiations, and Post-ESN Hearing Submission were all submissions prepared by Motorola to assist the CMA's investigation and are not even referenced in the Provisional Decision. On 31 August 2022, in a letter to the CMA Motorola noted that certain important points made by Motorola during the course of the market investigation were not available to key stakeholders and requested that, in the interests of transparency, 3 of its submissions were published on the CMA's case page. This request was acceded to on 4 November 2022, after publication of the Provisional Decision.

7.6 Last, the CMA implies that Motorola has not engaged with the CMA on the subject of benchmarking, which is unfair to Motorola. The CMA itself quotes extensively from Motorola's submissions on benchmarking, in particular its 15 November 2021 response to the CMA's Final Report and Decision on a Market Investigation Reference and its 10 January 2022 response to the CMA's Issues Statement. As a matter of fact, the CMA's position on benchmarking is wholly unsupported. The CMA claims "we find it difficult to reconcile the facts that we have been able to establish through our review of contemporaneous documents with Motorola's characterisation of events…"[77]. On this point, the CMA offers no reference to any contemporaneous documents, much less any access thereto, or to any other contemporaneous documents that the CMA claims to have relied on. Indeed, Motorola has also made submissions on benchmarking in its Second Supplementary Submission to the CMA's Oral Hearing on 10 February 2022 which the CMA does not reference in its Provisional Decision.

[77] Provisional Decision, paragraph 4.212.