



**MOTOROLA SOLUTIONS**

**Mobile Radio Network Services Market Investigation**

*Why a Charge Control is not the Answer*

## 1. INTRODUCTION

- (1) To further assist the CMA, this submission explains why and how the next step in the evolution of the relevant market is a technology neutral open tender.
- (2) If the CMA finds that the relevant market is not working well, the cause should be addressed so that an appropriate solution can be considered. The ‘problem’ the CMA would need to address is not that the Home Office is paying a fixed price it agreed to pay until it no longer needed Airwave. Instead, the problem would be that the Home Office needed Airwave for longer than it had hoped, only because of a failed procurement process. There is no need for a charge control to solve any such problem and by addressing the cause of the prolonged requirement for Airwave, any case for a charge control evaporates.
- (3) There is no doubt that, as history demonstrates in the case of Airwave, a suitably implemented tender process can work for the relevant market, while a proposed charge control would be disproportionate for at least six reasons:
  - (i) it would enshrine, for many years to come, the very market structure that the CMA would be claiming is not working well, while not addressing the underlying cause;
  - (ii) it would continue to impose GBP billions of avoidable costs on the British taxpayer at a time when this is least affordable;
  - (iii) it would subject Airwave to the operation of a wholly unnecessary regulatory apparatus that is being put together in extreme haste<sup>1</sup> and is already evidencing an alarming lack of industry knowledge that would be required to make sensible decisions;
  - (iv) it would permit the Home Office, in reprocurring ESN services, to limit the development of the relevant market by excluding Airwave’s tried and tested service together with current and future technology, despite Airwave having successfully delivered for over 20 years;
  - (v) it would deprive Airwave of a fair, open, and non-discriminatory tender process to seek to serve the relevant market after December 2026, when the current contract expires; and
  - (vi) it would amount to expropriation by overriding, for the benefit of the UK Government, the long-since agreed terms of a fixed price contract that will soon expire.
- (4) A charge control is a remedy of the absolute last resort and, for the further reasons given in this submission, wholly unnecessary in the present circumstances. Motorola believes the facts point overwhelmingly towards a clear and vastly more proportionate outcome – an open and competitive tender – than the potentially catastrophic one contemplated by the Provisional Decision.

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<sup>1</sup> Motorola notes that the CMA appears, post-Provisional Decision, to be fettering its discretion by sending statutory requests for information requiring the production of highly detailed information that could only be relevant to a charge control remedy implementation. The proposed interventions in relation to capex already points towards a lack of industry knowledge that would be critical for sensible decisions.

- (5) Equality of opportunity to serve customers requires that the Home Office engage in a fair, open and transparent procurement process, allowing all suppliers who believe they have a technology solution to meet the emergency service users' requirements at a competitive price to compete for the relevant market. Preserving such equality of competitive opportunity lies at the very heart of the statutory functions of the CMA, and it ought to be obvious to the CMA that Airwave must be allowed at least to compete to provide such service. The very fact that the CMA and indeed the Home Office<sup>2</sup> envisage that Airwave might be needed beyond its contractual end point (2026) and even beyond 2029, showing that Airwave can generate economic value well into the future, must be taken into account in any future tender process.
- (6) Given the [✂] failure of the ESN procurement process, it would be contrary to all competition principles as well as sound public authority decision-making to permit the Home Office to re-tender the expiring ESN contracts on a mandated yet unproven technology basis which would at best be no more cost effective than the other available technologies, while preventing the functioning network from competing. A procurement of communication network services for public safety under conditions of full competition would:
- (a) respect the fundamental principle of full and fair competition for the market;
  - (b) offer customers and users the required assurance that the market has been properly competed for, and that safety of life issues and user concerns have been dealt with appropriately in the tender process;
  - (c) confirm that the UK Government stands by the long-term contracts it freely enters into;
  - (d) avoid the *ex post* creation of a wholly unnecessary charge control regime that would rewrite a major ongoing asset-specific UK Government contract;
  - (e) eliminate or as a minimum substantially reduce the risk to the UK taxpayer of the Home Office manufacturing a scenario in which taxpayers must continue to pay for two networks over an extended period of time;
  - (f) resolve any perceived issue associated with the level of Airwave pricing if Airwave is to be needed for longer than 2026; and
  - (g) eliminate any putative need for a grossly inappropriate and dangerous bespoke charge control beyond 2026.

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<sup>2</sup> At the 2022 "BAPCO" conference the Home Office was publicly making references to Airwave continuing beyond 2026.

## 2. THE CENTRAL IMPORTANCE OF ESN FAILURE

- (7) The present market investigation exists only because ESN has failed and Airwave continues to operate as the back-up for much longer than intended.<sup>3</sup> If the CMA were to impose a charge control on Airwave, this would be a profound error because:
- (i) the failure of ESN to replace Airwave is not a failure of competition to set appropriate terms for the supply of Airwave but a very serious procurement and programme management failure by the Home Office; and
  - (ii) a new tender is all that is required.
- (8) Once this is properly recognised, it becomes obvious that the solution must be to require appropriate competition for the market. In fact, unless the CMA requires competition for the market, the CMA will support the perpetuation of this procurement failure and impose wholly avoidable costs on the British taxpayer.

### *The ESN Procurement* [✂]

- (9) The evidence that ESN amounts to a [✂] procurement failure is overwhelming. When the Home Office set out on its ESN project, the lifetime cost of ESN was expected to be around GBP 5.2 *billion* from 2015 to 2032, with a further GBP 1.1 *billion* coming from the emergency services in the form of contributions to the mobile services contract and expenditure in their areas of responsibility, i.e. a total of GBP 6.3 billion. Services were expected to be available in 2017 and migration completed by the end of 2019. The switch to ESN was expected to generate benefits of GBP 3.6 billion over the period to 2032.<sup>4</sup>
- (10) Even around the time of the ESN contract award, the Financial Times described the ESN contract award process under the following heading: “Emergency services’ £1bn contract tender in disarray”<sup>5</sup>. It was noted that the tender was being conducted with unnecessary haste given that other countries had concluded that the technology was not yet ready. The withdrawal of O2 Telefónica from the Lot 3 bid process before the BAFO stage meant that there was, ultimately, no competition to EE for the provision of the replacement national network infrastructure. At the time, the Home Office expressed its disappointment that there were no competing bidders for such replacement infrastructure (though claiming that “*the process to establish a more effective, flexible and affordable network for the UK’s police, fire and ambulance services will continue. Procurement remains extremely competitive and will deliver value for money to the taxpayer irrespective of O2 Telefónica’s decision to withdraw*”). In the event, the infrastructure

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<sup>3</sup> Indeed, this validates the Home Office’s decision to require Airwave on a permanent back-up basis at a fixed price, as part of the approval it gave to Motorola’s acquisition of Airwave in 2016.

<sup>4</sup> Comptroller and Auditor General, Upgrading emergency services communications: the Emergency Services Network, Session 2016-17, HC 627, National Audit Office, September 2016. According to the NAO, of the £5.2 billion cost paid by the Home Office, “£1,445 million (28%) is on running down the Airwave contract. ESN is expected to cost £3,762 million over 17 years, of which £1,182 million will be spent on building and transitioning to ESN in the five years to March 2020.” It is difficult to understand these figures as the Airwave service would have run to the end of 2019 in any case, and therefore it cannot properly be regarded as a cost of ESN if ESN had been available as a fully working replacement from 2020 onwards.

<sup>5</sup> Financial Times, 8 June 2015.

was not delivered on time and – to the best of Motorola’s information – is still not ready some 5 years later. Obviously, there can be no service without infrastructure, and inexplicably the CMA has failed to investigate why the infrastructure is not ready.

- (11) The Public Accounts Committee had the most extreme concerns about the 2018 reset of the ESN Programme, with PAC chair Meg Hillier quoted as saying:

“The endless delay in delivering a new system for our emergency services to communicate and share data is creating a crisis of confidence as police, fire and ambulance no longer have trust in the new system being delivered.

Neither the emergency services, nor the PAC, are convinced that the Home Office has a credible plan to deliver a reliable and effective service anytime soon. In the meantime services are having to find work arounds and buy new equipment to prop up the old Airwave system.

The Home Office’s reset of the Emergency Services Network programme has failed to deliver any more certainty. The financial benefits originally predicted for this programme are rapidly evaporating and it will not now realise cost savings, on the most optimistic forecasts, for at least a decade.

The key technology behind the ESN is not yet fully proven and we were not convinced that the Home Office has the capability and plans to deliver a coherent single system that provides the functionality and dependability the emergency services demand.<sup>6</sup> (Emphasis added.)

- (12) The procurement failure has been clearly documented over the years. By ignoring such objective assessment of the state of affairs (which have subsequently deteriorated) the CMA would be allowing this failure to perpetuate while putting the existing network at risk.

*The current and expected future costs of ESN failure*

- (13) When the NAO undertook its review in 2019, it was clear that the initial estimates of the whole life cost of ESN were hopelessly flawed. Lifetime costs had increased by almost 50% (£3.1 billion) to £9.3 billion, but the:

“Home Office still expects that ESN will be cheaper than Airwave in the long term. The Home Office calculates that ESN will cost up to £9.3 billion, less than its estimate of £12 billion for continuing to use Airwave. Its forecast break-even point, at which total financial benefits are expected to outweigh the costs that would have been incurred without ESN, is now in July 2029. This is seven years later than forecast in the 2015

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<sup>6</sup> “MPs add to criticisms of Emergency Services Network”, UKAuthority, 17 July 2019, (<https://www.ukauthority.com/articles/mps-add-to-criticisms-of-emergency-services-network/>)

business case and is based on the programme remaining on track from this point.”<sup>7</sup>  
(Emphasis added.)

(14) At that time, Airwave was expected to be switched off at the end of 2022, and the overall benefits had shrunk to GBP 1.5 billion even though the life of ESN had been extended by five years to 2037. Accordingly, the benefits per annum of expected ESN operation had fallen from GBP 300 million to GBP 100 million.

(15) Of course, the ESN programme has gone from [✂] to worse and estimates of the whole life cost of ESN have continued to escalate dramatically. According to the figures presented in the Accounting Officer Memorandum from October 2021 (last revised on 6 September 2022)<sup>8</sup>, the programme is now

“anticipated to have a Whole Life Cost of £11.3bn over the period of the FBC (FY2015/6 - FY36/7). This includes sunk costs of £3.4bn, further Programme Delivery costs of £1.0bn, Ongoing Costs of £4.1bn (net of income) and legacy costs (inc. Airwave) of £2.7bn. 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 c£0.3bn.”

(16) It is worth noting that the figure of £11.3 billion itself 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<sup>9</sup> – the same as the cost of continuing to use Airwave<sup>10</sup>. This difference is sufficient to wipe out the ‘significant positive Net Present Value’ that weighs in favour of continuing with the ESN programme in its current guise.

(17) Even this latest estimate is subject to further upward revision. Supposedly a “Quantified Schedule and Cost Risk Analysis has been undertaken, in place of a generic Optimism Bias”. This analysis assumed a 50% likelihood of Airwave retirement by February 2024, which was wildly optimistic then and is clearly entirely unrealistic now.

(18) The true costs of ESN’s failure are difficult to establish based on publicly available information, and the Home Office has not indicated clearly what ESN has cost so far, how much it will cost to bring it to a state of readiness, and how long this might take. However, even the Home

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<sup>7</sup> Comptroller and Auditor General, Progress delivering the Emergency Services Network, Session 2017-19, HC 2140, National Audit Office, May 2019; emphasis added.

<sup>8</sup> <https://www.gov.uk/government/publications/home-office-major-programmes-accounting-officer-assessments/accounting-officer-memorandum-emergency-services-mobile-communications-programme-esmcp>; accessed on 3 January 2023.

<sup>9</sup> The narrative around this increase states: “Compared to 2021-Q4, the projects Baseline Whole Life Cost increased from 11198.84 (£m) to 12026.34 (£m). This is primarily due to the following factors: These figures reconcile to the source data from the current Finance model, the main difference is in the Capital DEL recurring costs, which is an error carried over from a previous Financial Model version before it was refreshed and this has now been rectified in this report.”

<sup>10</sup> Much emphasis is placed on the contribution of the ‘legacy cost’ – the cost of the continued reliance on Airwave – to the ‘lifetime cost’ of ESN. However, these so-called ‘legacy costs’ are paying for enabling the emergency services to fulfil their mission by providing them with mission critical communications capability whilst the money spent on ESN is generating no benefit at all.

Office's own numbers show a business case that is becoming more and more marginal at best – and these numbers are based on an overly optimistic view of when ESN might eventually become operational.

- (19) It will be obvious to any reasonable observer that any putative benefit of replacing Airwave with ESN has been eroded (and at a substantial cost). The question now is not whether ESN might be a better deal overall for the taxpayer than Airwave. The question is how should the CMA ensure that competition for the market be best organised post-2026, to ensure that the needs of the emergency services are met beyond 2026 without incurring vast unnecessary costs. By putting the right process in place, competition for the market will determine the best outcome for the taxpayer.
- (20) Simply allowing ESN to continue on its current course, particularly by removing any incentive on the Home Office to finally deliver ESN cost effectively, would not address any of the underlying problems which the programme shares with many other [REDACTED] UK Government public procurement failures. Many of the reasons identified by the NAO for the failure of major procurement programmes<sup>11</sup> are present in the case of ESN, such as the split of responsibilities across different parties without any clear assignment and co-ordination. It is astounding that no substantive treatment can be found in the entire 650 pages of the CMA's provisional decision of the disappearance of the initially contracted ESN delivery partner (KBR, winner of the Lot 1 Delivery Partner contract) whose crucial role was then taken over by the Home Office, or the fact that owing to a lack of co-ordination EE and Motorola were working to different technical standards – fundamental issues that are well known to have plagued the programme in the past<sup>12</sup> and do not bode well for its future.
- (21) As recently as 2020 the Home Office conducted an in-depth review into whether to [REDACTED]. Motorola does not have details of that review, and the CMA essentially ignores its existence, but that review confirms that (i) during 2020 [REDACTED], and (ii) the [REDACTED] – indeed, [REDACTED]. The CMA's failure to take all this into account is especially concerning given how the CMA defines the market, i.e. including both ESN and Airwave: it is irrational for the CMA to purport to review the operation of the market while ignoring why the replacement for Airwave has failed to materialise and what, if anything, to do about it. It is furthermore patently unfair on Airwave to face remedies for any problems the CMA identifies and which Airwave has not caused.
- (22) It would be a policy failure (in fact irrational) to assume that the Home Office's historic procurement choices will somehow remedy themselves in future, and simply to look at potentially regulating Airwave "until ESN is ready". With the benefit of hindsight and

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<sup>11</sup> Lessons learned from Major Programmes, Report by the Comptroller and Auditor General, Session 2019–2021, 20 November 2020 HC 960.

<sup>12</sup> "Many of the delays and cost overruns have been attributed to a failure by government officials to identify that EE and Motorola, two of the main contractors, were working to different – and conflicting – technical standards, meaning the systems they were developing were not interoperable. Oversight also appears to have been minimal, as the exchange below between a PAC member and civil servants Sir Philip Rutnam and Stephen Webb captures. Sir Philip Rutnam was also scathing about the performance of contractor KBR, the former Halliburton subsidiary, telling MPs: 'The resource supplied directly by KBR proved to be less experienced and less valuable than we needed, and that is one of the reasons why we have, in practice, replaced some of the resource they provided with our own staff. It has not been a very happy episode...'" (TechMonitor, Gov't Hands EE Further £220 Million for ESN, Threatens "Payment Abatements" for Non-Delivery, 23 July 2019).

experience, given the vast costs at stake, unless there are very sound reasons to conclude otherwise, ESN must not be regarded as the inevitable replacement; rather, the CMA should view ESN as the problem and not the solution.

- (23) It is disproportionate for the CMA, in an entire absence of analysis and appropriate consultation yet in the presence of substantial network duplication costs, to allow the Home Office simply to carry on with whatever plans for ESN it may have and, in the meantime, for the CMA to require Airwave to provide mission-critical communications services for public safety in the UK using infrastructure which requires ongoing investment and to continue to perform to the required standards on terms on which no business could justify. Turning a blind eye to the real problems in the delivery of mission-critical communications capability to the emergency services creates a serious risk of further billions of pounds of wasted costs to the taxpayer that the CMA will have endorsed but could easily have avoided (see below).



### 3. A NEW TENDER IS THE PROPORTIONATE 'REMEDY'

- (24) ESN is the reason for the market investigation and should be considered the problem, not the potential solution. There is no reason for the CMA to avoid allowing competition to function effectively by way of a retender for the market, avoiding the mistakes that were made in respect of ESN. To assist the CMA, in Motorola's view, the difficulties encountered in relation to ESN are rooted in the decision to:
- (i) specify a specific technological solution that had not been adopted anywhere in the world (and to date is not deployed anywhere) instead of tendering for an outcome based on clearly defined user requirements which the market could compete to meet cost effectively by using any technology or combination of technologies available to it;
  - (ii) split the contract across a number of suppliers without putting in place effective and proper responsibilities for programme delivery<sup>13</sup> or clearly understood accountability (with certain crucial functionalities that would be required from a replacement solution being left out and tendered subsequently, resulting in a further fragmentation of responsibilities);
  - (iii) limit collaboration / communication between bidders in the later stages of the procurement that would have been crucial for technical alignment without providing the necessary co-ordinating function that would have been needed in the absence of direct communication.
- (25) These shortcomings can easily be addressed in any future tender for the provision of services after 2026. Under ordinary circumstances the CMA ought to be able to leave it to the Home Office to learn from its mistakes, carry out a new tender, and then sign a new contract. However, the Home Office appears intent on [✂] if the CMA provides it with an unfettered ability to do so.

#### *The case for a new tender process is overwhelming*

- (26) Over the duration of the current tender process (2000 – 2026) Airwave will have earned significantly less than the target return agreed by the parties at the outset, even though the target return was less than the Government is prepared to pay for far less risky projects. Prices have followed the agreed path, leading naturally to cumulative losses for Airwave for the first 14 years of the contract, and naturally to cumulative profits thereafter, at an overall IRR of just 11-12% by 31 December 2026 when the PFI Framework Agreement expires. **The economic evidence demonstrates beyond question that the Airwave tender process has worked exceptionally well for the 26 year period for which the Home Office contracted Airwave.**
- (27) The economic evidence, together with the actual conduct of the parties, therefore entirely undermine the very premise of the Provisional Decision and weigh overwhelmingly in favour of simply: (i) allowing the PFI Framework Agreement to continue on the agreed terms, and (ii) arranging a new tender process that avoids the mistakes of ESN.

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<sup>13</sup> Motorola is of course aware of the Lot 1 contract which was supposed to create a delivery partner taking on this responsibility. However, the selected supplier failed to deliver, which then resulted in the Home Office having to terminate the agreement.

- (28) The CMA's theory of excessive profits, by contrast, depends entirely on a profitability theory that speculates how the parties might have contracted differently if only the Home Office hadn't contracted ESN. Motorola is genuinely puzzled as to how the CMA believes this position is sustainable – it assumes away the one critical factor that is the cause of the present market investigation. The fact however is that ESN had been contracted, and this is exactly what drove the contractual requests made by the Home Office in the 2016 negotiations, in particular (a) the unlimited duration of the Airwave arrangements and an agreed price; and (b) the Deed of Recovery.
- (29) Put simply, no 'remedy' is required other than a fair procurement process for the relevant market. A further corollary is that the CMA must not interfere with the remaining term of the PFI Framework Agreement to December 2026 prior to the outcome of the new tender process, when such agreement has clearly worked extraordinarily well. To do so would create serious and, in light of the economic evidence, wholly unjustifiable risk of destroying the credibility of any proposed future tender process by the UK Government after December 2026.
- (30) In light of such strong empirical evidence showing the overwhelmingly positive outcome that has followed a successful tender process in the relevant market defined by the CMA for the duration of the service required by the customer, the Home Office (or an appropriate Contracting Authority) should run a new tender process for the period after 2026, having regard to fair procurement principles and avoiding the expensive mistakes of the past. If the Home Office chooses not to run such a tender, this will not be a competition failure that might require a remedy but a contractual choice. It would be pure fiction to claim that such a tender cannot be organised on an open, transparent, technology-neutral and non-discriminatory way in good time before the PFI Framework Agreement expires in December 2026; particularly because ESN is now ready for re-procurement across all its components.

*Competing for the relevant market*

- (31) To put Motorola's observations into an immediately recognisable competition framework, the CMA has now defined the relevant market as covering:

“the supply of communications network services for public safety and ancillary services in Great Britain. We consider that both the existing Tetra Airwave service and the LTE network services for public services (i.e. ESN) should be within the market as well as ancillary services.”

- (32) Both the Home Office and Motorola agree with the CMA that the relevant market includes both Airwave and ESN. There is no doubt that competition in the relevant market defined by the CMA has been, and will remain for the foreseeable future, competition *for* the market. Given the specific requirements of the emergency service users, significant investment in specific assets is required even when the service in part relies on commercial network deployments.<sup>14</sup> The substantive amount that had (and still has) to be spent by EE (and others) on improving network

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<sup>14</sup> Indeed, the fact that ESN utilises 4G network infrastructure is no different in principle from Airwave using commercial fibre networks where available. Any service provider will face many make-or-buy decisions, which affect the cost of service delivery.

coverage (including coverage on London Underground or air-to-ground communications) and the investment in customised software and devices to provide communications services that meet the need of the emergency services are ample evidence of this. Until it is economically and technologically feasible for suppliers to offer the emergency services very lightly customised commercial off the shelf software and hardware products, competition will to a large extent be competition for the market rather than competition in the market where blue light customers can easily switch between alternative suppliers.

- (33) Given that the ESN contracts expire, at the latest in 2024, the starting point for assessing whether to impose *any* remedy in the relevant market defined by the CMA must be to examine why a re-procurement of communications network services for public safety from 2024 onwards may not be expected to address any perceived AEC. The underlying principle should be that, wherever possible, competition for the market takes place and regulation is left to those areas that are truly necessary. As the CMA puts it:

“Remedial action may also be required to address customer detriment directly, for example where effective remedies aimed at introducing competition by addressing the AEC are unavailable or will not bear fruit in the short term [*reference omitted*]. Price controls are the most obvious example. However, such measures to control outcomes are not likely, by their nature, to provide a solution to the underlying problem and may also give rise to distortion risks, if retained over a long period. For these reasons [*referenced omitted*], remedial action to control outcomes will not generally be preferred as a long-term solution.”<sup>15</sup>

- (34) The only significant question is how to ensure that the tender process works well, which is addressed in the next section.

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<sup>15</sup> CMA, CC3 Revised.

#### 4. ENSURING THAT THE TENDER PROCESS WORKS WELL

(35) Motorola submits that a fair and non-discriminatory tender should be structured as follows:

- **Technology neutral procurement:** the tender will have to be for the provision of services specified in terms of the user requirements that they must meet rather than the technology used to provide them. That means the procuring authority should **not** be allowed to mandate that it requires outcomes derived from existing TETRA technology to be delivered by not using TETRA technology but by using LTE / broadband technology. It should not matter what technological solution the supplier deploys provided that it can provide the services to meet the specified requirements to the specified standards for the specified duration. Users should be very closely involved in drawing up the specification of requirements to ensure that their needs are being met but the tender itself must be run on a technology-neutral basis.
- **Unrestricted participation to ensure competition:** subject to meeting the standard pre-qualification criteria that ensure the credibility and suitability of prospective suppliers, the tender should be open to all bidders, including Airwave and the current ESN Lot 3 supplier EE (with appropriate partners as might be needed to meet the service requirements), and consortium bids that can take advantage of evolving technology e.g. 5G.
- **Clear responsibilities and incentives:** there must be clear responsibilities set out to which successful bidders can be held. This includes the specification of penalties for those who fail to meet requirements (both for delays in availability and in relation to failure to deliver to agreed service standards). Every effort should be made to minimise the scope for disagreement about what the supplier is required to deliver. Clear and effective dispute resolution mechanisms need to be put in place. In this regard, a critical view should be taken of the relative merits of splitting the contract into several lots let to different bidders versus having a single contractor who may rely on subcontractors or delivery partners but who assumes overall responsibility (and liability) for service delivery towards the customers and users.

(36) There can be no objection as a matter of principle to Airwave winning a tender to provide services to the relevant market: if given the opportunity, Airwave would compete vigorously to demonstrate that it offers the best value proposition for the duration of the next tender period, including with integrated solutions and a technology migration path as appropriate. Motorola would inevitably seek to take advantage of a combination with a data provider, as Motorola had proposed in 2020. This should not be looked on with scorn and scepticism by the Contracting Authority but should be encouraged as representing a global market leader's carefully considered assessment gained through many years of painful and costly experience of the optimum solution to deliver its core customers' requirements based on the appropriate technology standards. If current (and potential future) suppliers of ESN cannot offer a viable competitive solution based on user requirements within a reasonable time period, it would be irrational to permit a technology-driven future solution to be tendered for and simultaneously regulate Airwave as a utility. There is no justification for making further investments into a network technology that cannot compete effectively to provide services while at the same time paying for (and regulating) a successfully functioning service.

## **5. ROLE OF THE ASSET TRANSFER PROVISIONS**

(37) The CMA has provisionally taken the view that

“The Airwave Network assets have not transferred to the Home Office under the terms of the PFI Agreement, Airwave Solutions still owns them (and the related business) and the Home Office cannot retender or realistically threaten to retender their provision.”

(38) Motorola has previously explained that this position is a fiction. There is nothing to stop the Home Office from retendering the Airwave service (or, more accurately, inviting competition for the relevant market). In this competition, the Home Office can leverage its option to acquire the assets needed to run the Airwave business; the asset transfer provisions must not be used as a pretext to allow the Home Office to pursue ESN and not allow competition to operate in the relevant market.

(39) Motorola remains ready to explain how the asset transfer provisions would not inhibit a tender process that might lead to a transfer of ownership. Moreover, should Airwave ownership transfer, Motorola would simply revert to the role it has played since the inception of Airwave (and one which it plays in countries all over the world), namely to be a key supplier of components and equipment to the LMR network.

(40) The second obstacle the CMA identifies is the supposed ambiguity surrounding asset valuation. To the extent there was any disagreement over the asset valuation in any ownership transfer, this would simply be resolved in the same manner as any other commercial dispute in the United Kingdom or elsewhere, i.e. according to the relevant dispute resolution provisions. It is hopeless to suppose that the proportionate solution to any such putative issue is not to allow a competitive tender at all.

## **6. CONCLUSION**

- (41) The future operation of the relevant market should be determined by an open, technology neutral, competitive tender according to ordinary and well-established competition principles and in line with UK Government best practice procurement principles. A well-managed process inviting bids for the provision of the emergency services for the coming 10 years or more would resolve any competition concerns as well as confer immediate competitive discipline and incentives on the part of current and future potential suppliers.
- (42) By contrast, the proposed charge control remedy seeks only to minimise the cost to the taxpayer of the Home Office's failed ESN procurement by imposing an extreme and dangerous squeeze on Airwave's revenues, with scant regard for (or understanding of) the risks this poses to the continued availability of mission-critical communications services.
- (43) There are of course challenges with any complex tender process, but such challenges are routinely successfully addressed around the world. Fundamentally, however, any concern about the level of Airwave charges under the current contract is not a competition problem and cannot be recast as such and then remedied proportionately as a competition problem.