



Additional Submission: Home Office response to Motorola's "Why a Charge Control is not the Answer" Submission

Note: Confidential redacted information is shown [REDACTED].

Introduction

1. On 10 February 2023, the CMA provided the Home Office with a copy of Motorola's submission "Why a Charge Control is not the Answer", dated 4 January 2023 (the **Submission**). The Submission is the first time that Motorola has overtly and explicitly explained its position in respect of both: (i) the CMA's provisionally proposed charge control; and (ii) the 'alternative remedy' that Motorola suggests is required to address its view of the cause of the Adverse Effect on Competition (**AEC**), which the Home Office notes, Motorola now appears to accept exists.
2. The Home Office appreciates that this Submission is not invited; however, the Home Office believes that it is important to rebut Motorola's attempts to re-frame the causes and responsibilities for the AEC. In so doing, the Home Office believes that its responses to Motorola's latest objections can be answered based on evidence that has already been submitted in these proceedings and/or arguments that are already well-rehearsed. The purpose of this brief further submission is therefore to consolidate those arguments in one place and to provide an update on the Home Office's procurement strategy for the ESN project.
3. In this submission, the Home Office, first sets out its overall view of Motorola's Submission, and then turns to summarise the key considerations that underpin the choice between *ex-ante* regulation in the form of a charge control and the more market-led solutions such as a competitive procurement, before finally addressing Motorola's six reasons or points¹ why it says a proposed charge control would be unsuitable or disproportionate.

Response to the Submission

The charge control and tender are not a binary choice

4. It appears that Motorola is labouring under a misapprehension that the CMA needs to make a binary choice between: (a) a charge control now to curtail the potential for excess profits, until the outcome of the competitive process, i.e., the provision of the ESN, is complete and users have transitioned; or (b) a mechanism that seeks to replicate the ongoing competitive process for the future provision of the ESN.
5. However, the two remedies are complements not alternatives, as they each address different aspects of the harm generated by the AEC.² The CMA can (and in the Home Office's view should) favour a package of remedies that most comprehensively address the relevant AEC and/or their effects. A charge control is a necessary antidote to remedy the excess profits that the CMA has already provisionally found would be earned by Motorola in the coming years while it continues to provide the Airwave services on which the Home Office and the emergency services are reliant until its replacement can be installed. However, a charge control will not prevent a more competitive equilibrium in the future where the Home Office intends to open up procurement to other suppliers to allow for a transition to ESN and which does not repeat its reliance on Motorola for this critical next stage.

¹ See paragraph (3), Submission.

² See, paragraph 22, Summary, CMA Provisional Decision Report, December 2022

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Motorola's attempts to secure further delay

6. Motorola's proposal that the CMA require the Home Office to run a 'technology neutral' tender is self-serving, apparently designed to further its own commercial objectives. The tender would do nothing to address the AEC concerns with Airwave or to ensure the continuous provision of secure, resilient, voice and data services to Great Britain's emergency services on an ongoing and sustainable basis at a fair and reasonable price.
7. Motorola's proposal provides an insight into Motorola's commercial objectives, which are a repeat of its former commercial strategy. As part of the competition that led to the award of the ESN Lot 2 User Services contract to Motorola in early 2016, Motorola's then proposal was an MCX over LTE solution, i.e., a non-TETRA based solution, pushing its now withdrawn WAVE 7000 technology (WAVE 7000 having been replaced by Kodiak in 2018). Since then, Motorola's commercial strategy has publicly altered, Motorola preferring solutions that favour a 'dual' technology approach of TETRA / P25 for voice with an LTE overlay for data. Indeed, it was this combined technology approach, that Motorola proposed to the Home Office as an alternative to Kodiak, as recently as 2021, and which it is again proposing as part of the Submission. Motorola's commercial objective is clear, to sustain for as long as possible, use of the Airwave network.
8. The proposal (if adopted) would do no more than provide Motorola with a yet another opportunity to extend its monopoly position by re-bidding a legacy-based proposition, that has already been rejected as out-dated, sub-optimal and too costly. Motorola is simply looking for further opportunities for delay, including not just a route to challenge the CMA's Final Report but also to raise potential procurement challenges, creating yet further dependency on Airwave (at least until the market is subsequently re-competed). This delay would likely sustain the super-profits earned by Motorola which the CMA has estimated to amount to around £160m per year.
9. It is clearly for the Home Office, as the procuring Authority, to decide – within the confines of its powers and compliance with the Public Contracts Regulations 2015 – what services need to be procured, and to set the terms and conditions of any resulting competition. However, assuming, that it was hypothetically appropriate to run a re-procurement as Motorola suggests, there would be no benefit in terms of immediately resolving the AEC brought about by Motorola's conduct:
 - a. the Home Office would need to reassess the scope and terms of the competition, repeating work that has already been carried out, wasting further limited resources, and further delaying the implementation of Airwave's successor;
 - b. at the end of this procurement, Motorola's bid may succeed, or it may fail, and if the latter, it would seem plausible, in the context of preserving the use of Airwave, that Motorola would seek to challenge that procurement decision, to cause yet further delay³; and
 - c. it is equally plausible that altering the Home Office's approach, at this late stage, to allow a tender that utilises Airwave legacy technology, would result in prospective bidders withdrawing, either because they see Motorola as having an unfair incumbency benefit, or alternatively due to the perceived uncertainty that such a significant change of approach by the Home Office may cause.

Motorola's attempt to re-write history and shift blame

10. Motorola argues that the cause of the market failure is that, essentially, the Home Office did not carry out a 'technology neutral' tender in 2015, which resulted in the award of the ESN contracts, that Motorola then positions as a 'failure', leading to Airwave being required beyond its original expected life, i.e., circa end-2019 / start-2020. To suggest this, is no more than a self-serving

³ The Submission fails to consider the approach that Motorola took in 2015. In 2015, in addition to winning the ESN Lot 2 User Services contract, Motorola also acquired Airwave. To allow Motorola's acquisition of Airwave to proceed, Motorola agreed to instruct Airwave to withdraw Airwave's then ESN procurement challenge, a challenge which was made on the basis that it was wrong in 2015 to exclude Airwave from competing for ESN, and which involved similar arguments to those Motorola makes in the Submission. Having altered its strategic approach, and having abandoned ESN, Motorola is performing a *volte-face*.

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misrepresentation, excluding or ignoring facts unhelpful to Motorola, to provide an alternative misleading narrative.

11. In 2015, Motorola bid for and won the ESN Lot 2 User Services contract, having committed to deliver its obligations in time to enable Airwave to be switched-off around the turn of 2020. However, Motorola completely ignores its own failings and inability to deliver on these obligations under the ESN Lot 2 User Services contract. Indeed, amongst other failures:
 - a. Motorola failed to deliver its WAVE 7000 solution, requiring – not for the first time – a significant reset of the contract delivery timetable in 2018 and a move to Motorola’s Kodiak solution; and
 - b. despite the 2018 move to Kodiak and the resulting ESN reset, Motorola then failed to deliver a version of the Kodiak solution that was good enough to allow transition from Airwave to the ESN by the then revised date of 2022.
12. By 2021, due to Motorola’s broken ESN commitments and delivery failures, the relationship between Motorola and the Home Office was significantly damaged, with little or no trust. Further, there was no plan from Motorola as to when it would deliver its contractual obligations and therefore no clear view of by when ESN would be delivered, when users would be transitioned from Airwave to the ESN, or when Airwave would be switched-off.
13. In November 2021, faced with the risk of being required to divest Airwave, Motorola indicated that it would play no further role in ESN, post 2024 when its contract ended, unless that divestiture risk was removed. Subsequently, in March 2022, Motorola proposed that they walk-away from the ESN Lot 2 User Services agreement. This proposal ultimately led to the December 2022 Settlement and the termination of the Lot 2 User Services Agreement.
14. The Home Office can only speculate as to the reasons behind Motorola’s ESN failures. However, the outcome is undeniable, leading to Airwave remaining as the only available network for the provision of mobile radio communications services to Great Britain’s emergency services. Motorola’s failure to deliver its ESN Lot 2 User Services contractual obligations is that Airwave has now been used for some three years beyond its expected contract life and is likely to be required for several more years, possibly to 2029 or beyond. Motorola’s ESN Lot 2 User Services contract delivery failure has therefore enabled Airwave to earn significant and unfairly high returns on the capital employed in the network, for a much longer period than anticipated and agreed when the Airwave PFI contract was originally let. Additionally, in the absence – as Motorola suggest – of a charge control, Motorola would be able to continue to earn excessive and uncompetitive returns on investments that are already fully paid for, against an investment profile that is very considerably lower risk than when the PFI Framework Arrangement was agreed.
15. Although the Airwave Network National Shutdown Date is currently the 31 December 2026, this date will need to be extended. The Home Office is currently considering when it should extend this date and for how long. As the Home Office has explained, Airwave will likely be needed well into the second half of the current decade, potentially to 2029, or longer. It is therefore misleading of Motorola to suggest that the PFI Framework Arrangement will come to an end in 2026. The Home Office envisages that a charge control would need to be in place for at least 5 years, and this would continue to be the case even if the Home Office were to recompute the market in a way suggested by Motorola.
16. Finally, the Home Office does not agree with Motorola’s assessment of the cost of ESN set out in paragraphs (9), (14) and (16) of the Submission, nor does the Home Office agree the positioning or interpretation of the NAO’s findings or the Accounting Officer’s Memorandum, referenced in paragraphs (13) and (15) of the Submission.

The need for other remedies

17. The Submission also highlights the need for other remedies to protect the quality of service delivered by the Airwave network and relied on by Britain’s emergency service personnel. For example, Motorola comments,

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“[...] 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.”⁴

This, the Home Office suggests, is an implied threat from Motorola, that – notwithstanding the proposed charge control would enable Motorola to make a fair and reasonable return – that quality of service would be reduced. A quality-of-service remedy, of the type advocated by the Home Office, is therefore essential to protect against such a reaction by Motorola.

18. Even if the Home Office were to run a tender of the type proposed by Motorola, it is unclear what technology or solution and which bidder would prevail, and therefore the need for an interworking solution, and therefore an interworking remedy, remains.

Conclusion

19. Motorola’s Submission is clearly self-serving, seeking to rewrite the ‘narrative’, on a partial basis, for its own commercial purposes: to cause delay and / or preserve the use of the Airwave asset for as long into the future as possible. The Submission itself demonstrates the need for effective remedies to constrain Motorola’s behaviour, including its pricing behaviour through a charge control.

Necessity for and Proportionality of the Proposed Charge Control

Introduction

20. In this section, the Home Office summarises the key considerations that underpin the choice between *ex-ante* regulation in the form of a charge control and the more market-led solutions such as a competitive procurement.
21. While the points that the Home Office raises in this section are implicit in the CMA’s assessment to date and are far from novel, given Motorola’s Submission represents an analysis which is so diametrically opposed to the case where a charge control would be appropriate, the Home Office believes it would be helpful to articulate these issues more fully with reference to Airwave and the ESN.

Key Considerations for a Charge Control

22. In general, an *ex-ante* approach such as the imposition of a charge control will seek to impose restrictions on a business conduct before those adverse effects occur. This approach potentially provides clear guidance on acceptable conduct, so in principle has the advantage of providing legal certainty.
23. However, there are several considerations that complicate the assessment, and which have some resonance with Airwave and ESN and as alluded to by Motorola (whether expressly or by implication and with some duplication) across the Submission. These are:
 - the effects of conduct are often dependent upon the detailed market context in which they occur;
 - generic prohibitions can be expected to prevent conduct that is actually beneficial as opposed to harmful;
 - it may not be possible to legislate for all contingencies;

⁴ Paragraph (42), Submission

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- the benefits of apparent regulatory certainty can be lost in markets which are subject to significant change over time with the result that formal rules can become out of kilter with the market reality and lose their economic rationale and function over time; and
- detailed *ex-ante* rules can have an impact on the regulatory culture by creating a rules-based environment which detracts from rather than incentivises market-oriented and competitive outcomes.

Proportionality of and necessity for the proposed charge control

24. Bearing in mind the above factors, the following are the types of contexts in which a price control tends to be more appropriate with specific reference to Airwave:

- Narrow issues: when dealing with a narrowly defined issue so that the range of contingencies and variables can be reduced and managed. In the case of Airwave, the MIR provides an in-depth analysis of the specific and narrow market context, the vital provision of critical emergency communications services across Great Britain in the public sector. Indeed, the very narrowness of the scope of the reference has been highlighted by Motorola itself.
- Effects: where the effects of relevant conduct are similar across the great number of variables. In the case of Airwave, a system failure or challenges for sustainability would have similar or analogous effects of a potentially catastrophic nature for the provision of emergency services, putting lives at risk.
- Scope of conduct: where the conduct that *ex-ante* regulation is directed at, is simple to formulate so that the scope of acceptable behaviour can be tightly framed, understood and monitored. In the case of Airwave, the proposed charge control builds on regulatory precedents in other regulatory contexts, and the Home Office believes that the scope of conduct can be tightly defined even if in the past some elements have suffered from contractual incompleteness, especially given the maturity of the Airwave services.
- Harm: where the potential harms that are likely to occur are potentially large and irreversible. In the case of Airwave, the impact of the continued overcharge is significant both in terms of reach and potential impact:
 - the excess (super) profits already identified by the CMA are large in absolute terms and by any order of magnitude (circa £1.1 billion from 2020 to 2026); and
 - if the delivery of ESN takes longer than 2026, the CMA estimates that Motorola could make an additional £160 million in supra-normal profits each year after this;
 - the non-financial implications of a delayed transition to a sustainable solution potentially include threats to safety, loss of life and limb, security concerns and loss of confidence in the emergency services.
- Policy basis: where the *ex-ante* rules have a strong policy-based legitimacy that commands a wide level of consensus among the affected population while recognising that stakeholder interests will diverge. In the case of Airwave:
 - the CMA's remedies approach – with the charge control at its core – is what the CMA intends with its recommendation to the Home Office to, essentially, 'get on and sort out ESN and put it on a proper footing by 2029';
 - the proposed charge control is supported (or at least not objected to) by all stakeholders except Motorola; and
 - no other interested or third parties, be they investors or other suppliers to HM Government, including suppliers to the Home Office, have raised concerns about the

implications for future contracts of the CMA imposing a charge control in respect of Airwave's charges.

Motorola's [Dis] Proportionality Arguments

25. Motorola suggests that there are six reasons or points why the proposed charge control would be unsuitable or disproportionate.⁵ In this section, the Home Office responds to each of these points in turn below (while noting that some of the arguments and therefore the responses tend to elide):

"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"

26. The Home Office is proceeding with the ESMCP's plan to re-let the ESN Lot 2 User Service contract and to extend the ESN Lot 3 Network Services contract, as well as let such additional contracts as are necessary to deliver the ESN, for example, the provision of interworking gateway services for the transition period. The plan is in train, following Motorola's announcement of its intention to withdraw from the ESN project a Prior Information Notice (PIN) for the Lot 2 User Services has been published, and further to the settlement terms agreed between Motorola and the Home Office, information has been provided to and gathered from potential suppliers, and the Home Office is on track to publish a Contract Notice by [X] and an Invitation to Tender by [X], albeit this is subject to Home Office governance.
27. This tender process will enable the delivery of the ESN, transition of users, and the switch-off of Airwave by the end of the decade, hopefully before, and essentially deliver the competition for the market that was intended in 2015/16 to be delivered in 2020. Having delivered the ESN and therefore the competition for the market, split into two primary parts, i.e., the User Services and the Network Services, and having installed in the contractual framework a requirement for a non-proprietary standards approach, the Home Office plans will turn to the delivery of the next evolution of the ESN, with competition in the market for both User Services and Network Services.
28. While noting that the failure to deliver the ESN Lot 2 User Services, has delayed the ESN, rather than "*enshrining, for many years to come*" the competition problems, the Home Office considers that its approach provides a pathway for not just competition for the market, but competition in the market.
29. The Home Office further observes that the features of the market that the CMA has identified as giving rise to an AEC, are precisely those for which a charge control is warranted.
30. The Home Office further observes, that even if the ESMCP were to now run a tender as proposed by Motorola (which the Home Office does not consider necessary or appropriate), there would be a significant delay while the Home Office seeks information, designs and prepares for the competition, reissues a PIN, obtains feedback and provides information to prospective suppliers, issues an invitation to tender, considers responses, follows the chosen tender process, awards a contract, and the winner delivers the winning solution, including testing, interoperability checking, training and transition. All of which is likely to take time, with of course no certainty as to who would win the competition, meaning that Airwave may be required for much longer than under the Home Office's current plan. As such, there is a disconnect between Motorola's Submission's proposal and the need for a charge control. Given the critical nature of the communication services for the emergency services, there is no scope for a hiatus or break in service. Airwave will be needed to provide continuity of service in the interim and, as there is no opportunity to procure and deliver an alternative in that interim timescale, a charge control is required in both eventualities.
31. Finally, the Home Office would observe that, regardless of the cause of the relevant AEC, the CMA is not obligated to address each cause, and it may focus on resolving the effects of the AEC, where the CMA does not consider the cause can be resolved proportionately. For example, the CMA's market investigation guidelines comments,

⁵ Submission, paragraph (3)

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“However, the remedy that is ultimately selected need not directly address every feature identified, if for example, tackling a subset of features directly would be sufficient to generate effective competition and thereby remedy the AEC.”⁶

32. In the circumstances, it would seem incongruous if the CMA abandoned its proposed charge control now in preference for a future competition which carries the risk of perpetuating the very same problems the CMA has identified in its provisional decision, given:
- it would afford Motorola a windfall benefit before any new contract is put into effect to continue charging excess profits;
 - it would effectively expose UK taxpayers to the burden of having to pay excessive prices for a legacy system in the interregnum before a replacement is put in place in circumstances where there is no feasible option to sever all ties with Motorola before at the earliest the end of 2026; and
 - it would sacrifice the certainty of curtailing harm to the public interest now based on data and quantitative analysis against the uncertain prospects of a tender at a future date which if modelled on the approach put forward by Motorola shows every sign of perpetuating the *status quo*.

“II. It would continue to impose GBP billions of avoidable costs on the British taxpayer at a time when this is least affordable”

33. As the Home Office has explained in the response to Motorola’s first point, running a procurement of the type envisaged by Motorola would not necessarily reduce the period on which Great Britain’s emergency services remain dependent on Airwave (on its current delivery terms), and indeed would likely extend that period (not least for the reasons set out in paragraph 9c above).
34. In terms of affordability of Airwave, the Home Office and other users of Airwave have no alternative – a replacement for Airwave unlikely to be available for some years to come and likely not before 2027 (even if Motorola’s proposal was accepted (which the Home Office does not) and Motorola / Airwave’s bid were accepted and were to win (which is a hypothetical unknown) – meaning a charge control would remain necessary and proportionate, to ensure a fair price and value for money for the British taxpayer.
35. It is not clear what Motorola means by “avoidable costs”. Excess profits have already been found by the CMA and can be remedied by a familiar charge control remedy whose costs of implementation would be far outweighed by the charge savings made. This argument therefore appears to be labouring under the same misapprehension that there is a binary choice between a charge control and ‘something else’ which pervades the Submission, and which is not the case (see paragraphs 4 and 5 above). These costs of implementation are not avoided by a procurement because the two mechanisms (charge control and procurement) are designed to deliver different things.
36. Further, while freely criticising the cost of the ESN, as an expensive, ambitious project that is doomed to fail, Motorola ignores or disregards the £1.1 billion of avoidable costs that the Home Office will have paid since 2019 as a result of the AECs that the CMA has identified. Even if a procurement of the type that Motorola proposes were to commence in 2023/24 (which would not take into account the significant planning and information gathering that would be required), delivery would not happen until several years later. In the interim, absent a charge control, Motorola would continue to be unjustly enriched at British taxpayers’ expense.
37. Additionally, if the Home Office were, hypothetically, to adopt a hybrid solution of the type now advocated by Motorola, it is likely that at the next tender round there would be a move to an MCX over LTE solution. In this eventuality, Britain’s emergency services would incur additional costs,

⁶ CC3, para 332.

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in having to purchase devices designed to work on the hybrid solution, and then MCX over LTE devices, with additional training and other costs.

“III. It would subject Airwave to the operation of a wholly unnecessary regulatory apparatus that is being put together in extreme haste and is already evidencing an alarming lack of industry knowledge that would be required to make sensible decisions”

38. The CMA has sensibly already gathered data inputs for any charge control that might be imposed. Rather than being procedurally irregular, this is a rational and necessary part of the CMA’s work, to gather information, to inform options, test feasibility, and lay the groundwork for any remedy, including any charge control, that may be imposed.
39. If a charge control is imposed, the CMA has a relatively short period in which to impose a Final Order. This lead time of up to 6 months (which may exceptionally be extended) is common to other cases where a charge control is considered necessary. Further, in combination with the market investigation, the period is not dissimilar to the lead-time in price control determinations in regulatory contexts as part of ‘business as usual’ regulation, which to those parties, may be considered equally as controversial as Motorola argues a charge control would be in this investigation. Additionally, assuming the CMA decides that a charge control is a necessary and proportionate remedy and there are areas of the charge control that have not been designed yet, the CMA will consult further on the terms of that charge control, and Motorola (along with other interested parties) will be able to provide input into its design and methodology and the form of the Final Order, including the need for review clauses.
40. The Enterprise Act 2002 market investigation process allows for one of the most detailed information gathering exercises in a regulatory environment anywhere in the world. The CMA have spent over 15 months gathering information, considering submissions, engaging experts, to ensure it has a clear understanding of the relevant market. Further, on the basis of the CMA’s provisional decision report, it is clear that the CMA have understood the relevant market context in all material respects.

“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 have successfully delivered for over 20 years”

41. While the Home Office accepts that generally, the quality of service, for example, in terms of service availability has been good, the Home Office’s concern, in replacing the Airwave network, was to ensure that Great Britain’s emergency services have continued access to the mobile radio communications services that they need today and that represents value for money. Airwave is based on legacy technology, approaching end of life, with significant limitations in terms of data services, and a high cost to the taxpayer.
42. The decision to move to an MCX over LTE solution was made in the first half of the last decade. That move was supported by Motorola at that time; Motorola both bidding for and winning the ESN Lot 2 User Services contract with its WAVE 7000 MCX over LTE solution and, having acquired Airwave, withdrawing Airwave’s then procurement challenge to ESN. Further, for countries with geographies similar to the UK, there is an accelerating move to ESN type solutions.
43. Additionally, Motorola agreed as part of the settlement terms reached with the Home Office in December 2022 that it would not [REDACTED].⁷
44. This agreement that Motorola [REDACTED].
45. This was a key term of the settlement agreement for the Home Office and was, consequently, heavily negotiated. That Motorola is now seeking to [REDACTED], by asking the CMA to impose an alternative remedy requiring an ESN procurement that is technology neutral [REDACTED], further reflects Motorola’s self-serving commercial objective to preserve the use of Airwave for as long as

⁷ [REDACTED] of the Settlement Agreement dated 19 December 2022

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possible. Should Motorola wish, it is welcome to bid for ESN when it is retendered in the future, following the current round of procurement.

“V. It would deprive Airwave of a fair, open, and non-discriminatory tender process to seek to service the relevant market after December 2026, when the current contract expires”

46. As Motorola has pointed out, there is a likelihood that Airwave will be required until 2029, possibly longer, as such it is likely that Airwave will continue to service the relevant market for some years to come. The Home Office is currently considering when would be an optimal time to extend the Airwave National Shutdown Date and for how long.
47. As discussed in response to Motorola’s point IV, above, it will be open for Motorola to bid for ESN when there is a further competition in due course.

“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 soon expire”

48. The Home Office does not consider that a charge control would result in the unlawful interference, let alone expropriation, of any relevant rights or assets enjoyed by Motorola.
49. PITO and British Telecommunications Plc, the Home Office and Motorola’s contractual predecessors, agreed a PFI type contract, for the delivery of certain services, with a specific charging structure, that was intended to last until the end of 2019. The Home Office sought to implement a replacement for the services that would come into effect at the end of the original intended PFI period.
50. Motorola was a key supplier to that replacement service but failed to deliver its contractual obligations. Further, Motorola was then the owner of the provider of the incumbent services. As a result of Motorola’s failures, Motorola has been able to sustain the incumbent services, significantly beyond the intended contract end date, obtaining a huge financial benefit to the detriment of the UK Government and, ultimately, taxpayers.
51. It is illogical to suggest expropriation, where the contract should have ended, and is only continuing to run due to the failure of the owner of the assets, especially where the proposed charge control continues to allow a fair return.
52. To the extent that Motorola’s argument on this aspect resembles points it has made previously on its claimed A1P1 rights, the Home Office cannot understand how the analysis put forward in the Submission advances such claims. A mere expectation that charges for future services after the expiration of the relevant PFI contract would not be reduced by the law does not constitute a relevant property right. Therefore, a charge control as proposed by the CMA that was limited to changing the methodology for future charging years would not seem to come within A1P1. Even if it did, the question of the lawfulness of the measure as with the other qualified rights will turn on whether any interference can be justified in the public interest. Most A1PI cases turn on the test of proportionality since the right to enjoyment of property is subject to many provisos and exceptions “in the public interest”. There is likely to be a substantial overlap therefore with the matters briefly outlined in response to Motorola’s points (I) to (V) above.

16 February 2023