IN THE COMPETITION APPEAL TRIBUNAL

BETWEEN:

(1) AIRWAVE SOLUTIONS LIMITED

(2) MOTOROLA SOLUTIONS UK LIMITED

(3) MOTOROLA SOLUTIONS, INC.

Applicants

and

COMPETITION AND MARKETS AUTHORITY ("CMA")

Respondent

NOTICE OF APPLICATION UNDER SECTION 179 OF THE ENTERPRISE ACT 2002

Names and addresses of the Applicants:

Airwave Solutions Limited, Nova South, 160 Victoria Street, London, SW1E 5LB

Motorola Solutions UK Limited, Nova South, 160 Victoria Street, London, SW1E 5LB

Motorola Solutions, Inc., 500 W. Monroe Street, Chicago, Illinois, 60661, USA

(References to "Motorola" in this Notice are to the Applicants collectively, save where the context otherwise requires)

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Name and address of Respondent:

Attn: Jessica Radke and Vanessa Pye, Competition and Markets Authority, The Cabot, 25 Cabot Square, London, E14 4QZ (Emails: Jessica.Radke@cma.gov.uk; Vanessa.Pye@cma.gov.uk; Tel: +44 20 3738 6740)

Forum:

Motorola considers that the appropriate forum for these proceedings is England and Wales (see Rules 9(4)(c) and 18 of the Competition Appeal Tribunal Rules 2015).

Signed:

Winston & Strawn London LLP
as authorised representatives of the Applicants

Dated: 22 December 2021

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SCHEDULE OF ANNEXES

CONFIDENTIAL INFORMATION

Confidential business secrets of the Applicants in this Notice are highlighted in [yellow] (CAT Guide to Proceedings §7.46).

A. FACTUAL BACKGROUND AND SUMMARY OF APPLICATION

(i) The existing Airwave network and the planned Emergency Services Network

1. The Airwave network is a critical piece of national infrastructure, which is used by all police, fire, and ambulance services in the UK. It enables more than 300,000 emergency personnel to securely communicate.

2. The Airwave network was commissioned by the Home Office in 2000 under a Private Finance Initiative framework arrangement (the "**PFI Framework**"). The contract was won by British Telecommunications plc ("**BT**") which set up Airwave Solutions Limited to design, build, finance, and operate the network. Airwave Solutions Limited was sold as a standalone business to Macquarie Communications Infrastructure Group ("**Macquarie**").

3. In 2014, the Home Office ran a procurement process for the establishment of the Emergency Services Network ("**ESN**"). ESN was intended to facilitate greater data transfer and to use a commercial mobile network for most communications (unlike Airwave which is a dedicated network). It was intended that ESN would replace Airwave once ESN was fully operational.

4. In 2015, a range of parties were engaged by the Home Office to deliver elements of ESN. The largest contract was awarded to the mobile network operator EE and included establishing the network infrastructure. Motorola Solutions UK Limited won the "Lot 2 Contract", covering the customer and service support elements; the development of new specialist public safety applications; and provision of certain core network functions.

5. In 2016, Airwave Solutions Limited was acquired from Macquarie by Motorola Solutions, Inc.,[1] the transaction having been consented to by the Home Office and investigated and cleared by the CMA.

6. ESN is not yet operational. Multiple aspects of the project have fallen behind the Home Office's desired timetable.[2] The Airwave network therefore continues to provide the secure communications platform for the emergency services.

[1] Motorola Solutions Overseas Limited, a direct subsidiary of Motorola Solutions, Inc., acquired the shares in Guardian Digital Communications Limited, the parent company of Airwave Solutions Limited.
[2] Letter from the Home Office to Meg Hillier MP, Chair of the Public Accounts Committee (30 July 2021) <https://committees.parliament.uk/publications/7265/documents/76221/default/?__cf_chl_managed_tk__=EEid GU0ZT6wptzIXxZ7_NGTacLjpRVzv9ABq0nBil0Q-1640110034-0-gaNycGzNBtE> **[Annex III, pp.239-242]**.

(ii) The Home Office complaint and intervention by the CMA

7. On 14 April 2021, the Home Office, at the request of the Cabinet Office, wrote to the CMA expressing concerns about the profits achieved by the Airwave network.[3] It is important to appreciate that the Home Office is, in substance, Motorola's contractual counterparty in respect of the Airwave network. The Home Office had previously sought and obtained discounts on the prices that were payable for the Airwave network under the existing contractual arrangements and would continue to seek such discounts.

8. On 8 July 2021, the CMA announced its intention to consult on whether to launch a market investigation into the Airwave network. The consultation concluded on 2 September 2021.

9. On 25 October 2021, the CMA announced its decision to make a market investigation reference under section 131 of the Enterprise Act 2002 ("**2002 Act**"), for the reasons set out in a report entitled *"Mobile radio network for the police and emergency services: Final report and decision on a market investigation reference"* **[Annex I, pp.2-50]** ("**the MIR Decision**").

10. Also on 25 October 2021, the CMA wrote to Motorola enclosing (amongst other things) a draft administrative timetable for the market investigation and inviting Motorola's comments on that timetable. Motorola objected to the timetable and proposed an alternative timetable. On 1 November 2021, the CMA informed Motorola that it had decided to adopt its proposed timetable, after considering the views of both Motorola and the Home Office **[Annex I, pp.74-75]** ("**the Administrative Timetable Decision**").

(iii) Summary of grounds of review

11. Motorola challenges the MIR Decision under section 179 of the 2002 Act on the following principal grounds:

Ground 1:

11.1 The CMA proceeded on the basis of a flawed understanding of the contractual position. It wrongly stated that there was a "need" to "agree" an extension to the contract in order for the Airwave service to be continued beyond 2022. It failed to understand that the contract, amongst other things: (1) grants the Home Office a unilateral right to vary the date at which the Airwave network will be shut down (and to require Motorola to provide the services until that date); (2) provides for the default prices payable for the remaining life of the Airwave network; and (3) contains benchmarking provisions

[3] MIR Decision §1.6. Motorola has never seen a copy of the letter.

which provide for a neutral evaluation of certain charges payable under the contractual framework.

11.2 These contractual terms governing the remaining life of the Airwave network were negotiated by the parties in 2016 at a time when the Home Office had significant bargaining power, because Motorola Solutions, Inc. required the consent of the Home Office in order to acquire the Airwave network from Macquarie.

11.3 The CMA's failure to accurately and fully understand the contractual arrangements concluded in 2016 has a number of material consequences for the MIR Decision:

(a) The MIR Decision completely fails to assess the respective bargaining power of the parties at the moment in 2016 when the default contractual pricing was agreed. Instead it erroneously focuses on *"market dynamics"* during the period after 2016 when the Home Office has sought discounts to the default pricing agreed in 2016.

(b) The CMA's purported assessment of the parties' respective negotiating power in the period after 2016 is vitiated by a failure to acknowledge that the contractual arrangements, as concluded in 2016, do not provide for prices to be set by further bargaining as to terms.

(c) The CMA fails to have proper regard to the benchmarking provisions (on the erroneous basis that these provisions will not assist the Home Office when it seeks to negotiate an extension to maintain the Airwave network when the current contract comes to an end).

(d) The CMA wrongly relies on ongoing *"asymmetry of information… in relation to key drivers of pricing"* to justify a reference. This is irrelevant where the price was fixed in the 2016 negotiations.

(e) The CMA's misapprehension is the basis on which the CMA purports to split the contract into two main periods: the *"original contract"* until 2019 and the so-called *"extension contract"* from 2020 to 2026.

11.4 The MIR Decision should therefore be quashed because the CMA: (1) proceeded on the basis of a mistake of fact that played a material part in its decision; (2) had regard to an irrelevant consideration and/or failed to have regard to a relevant consideration; and/or (3) failed to conduct any assessment of the respective bargaining power of the

parties at the moment in 2016 when the current default pricing was agreed (which is a failure to have regard to a relevant consideration and/or irrational).

Ground 2:

11.5 The CMA's approach to the investment rate of return ("**IRR**") under the contract is irrational and/or fails to have regard to relevant considerations.

11.6 First, the CMA purports to analyse IRR in the period 2020 to 2026 (the so-called *"extension contract"*) on the basis of the Net Book Value ("**NBV**") of the relevant assets in 2020. This is irrational and contrary to established literature.

11.7 Second, the Government, on advice, took the view that an IRR of 17% was reasonable and the PFI Framework was negotiated in 2000 based on this target. If the Airwave network is continued until 2026 at the prices agreed in 2016, IRR over the lifetime of the contract will be approximately [figure excised] (i.e. the Government will have done better than its target). The MIR Decision makes no proper attempt to engage with the parties' informed contractual decisions on the allocation of risk and/or to consider whether the IRR over the lifetime of the contract is reasonable.

Ground 3:

11.8 The CMA adopts an irrational approach to the Airwave network *"market"* and ESN as an alleged *"feature"* of that market:

(a) The so-called *"market"* was created by an exclusive and long-term contract which sets prices. If the Home Office now considers that it has agreed to pay too much for the services (a point which Motorola does not accept), that would be a bad bargain and not a market investigation issue.

(b) It does not make sense to justify intervention on the grounds that the market is *"extremely concentrated"* as this logic could apply to any bespoke service delivered under a long-term exclusive contract.

(c) It is unreasonable to treat delivery of the ESN network as a *"feature"* of the Airwave network *"market"*. ESN is not a "competing" alternative to the Airwave network. Users will migrate from Airwave to ESN only when ESN becomes fully operational, at which point the Airwave network will be shut down and shall cease to exist.

(d) In any event, Motorola's role in the delivery of ESN was fully understood by the Home Office (and approved by the CMA) in 2016 and was addressed in the contractual arrangements, which enable the Home Office to impose financial penalties if Motorola causes delays to ESN delivery.

(e) Those penalties have never been activated because Motorola has not caused any such delays.

12. Given the standard of review applied by the Tribunal in an application under section 179 of the 2002 Act, the Grounds summarised above concern the clear and fatal flaws in the MIR Decision. Where this Application does not engage with particular points of detail, this should not be understood as an acceptance by Motorola that the CMA has adopted a correct approach to such matters.

13. In the alternative, Motorola challenges the Administrative Timetable Decision under section 179 of the 2002 Act on the grounds that the process by which the timetable was determined was unfair, the timetable is unfair, and the CMA's decision on the timetable was unreasoned.

B. LEGAL FRAMEWORK

(i) 2002 Act

14. Section 131 of the 2002 Act provides (emphasis added):

> *"(1) The CMA may… make a reference to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 if the CMA has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.*
>
> *(2) For the purposes of this Part any reference to a feature of a market in the United Kingdom for goods or services shall be construed as a reference to—*
>
> *(a) the structure of the market concerned or any aspect of that structure;*
>
> *(b) any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned; or*
>
> *(c) any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services.*
>
> *(3) In subsection (2) "conduct" includes any failure to act (whether or not intentional) and any other unintentional conduct."*

15. Under section 179 of the 2002 Act:

> *"(1) Any person aggrieved by a decision of the CMA… in connection with a reference or possible reference under this Part may apply to the Competition Appeal Tribunal for a review of that decision.*
>
> *[…]*
>
> *(4) In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.*
>
> *(5) The Competition Appeal Tribunal may—*
>
> > *(a) dismiss the application or quash the whole or part of the decision to which it relates; and*
> >
> > *(b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal."*

(ii) <u>CMA guidance</u>

16. Under the CMA guidance on 'Market investigation references' ("**the Guidance**"),[4] a reference will only be made in respect of adverse effects that are suspected to be significant:

> *"2.27 The [CMA] will only make a reference when it has reasonable grounds to suspect that the adverse effects on competition of features of a market are significant. In making this assessment it will consider whether these suspected adverse effects are likely to have a significant detrimental effect on customers through higher prices, lower quality, less choice or less innovation…"*

17. The Guidance also addresses the interaction between market investigation references and the power of the CMA to take action in respect of breach of the Chapter II prohibition (which could include, for example, abuse of dominance through excessive pricing):

> *"2.3 When dealing with a suspected competition problem it is the [CMA's] policy always to consider first whether it may involve an infringement of one or both of the CA98 prohibitions and to investigate accordingly…*
>
> *2.4 …Market investigation references are therefore likely to focus on competition problems arising from uncoordinated parallel conduct by several firms or industry-wide features of a market in cases where the OFT does not have reasonable grounds to suspect the existence of anti-competitive agreements or dominance…*
>
> *2.7 …Generally speaking single-firm conduct will, where necessary and possible, be dealt with under CA98 or appropriate sectoral legislation or rules. It is not the present intention of the OFT 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."*

[4] The guidance was originally issued by the Office of Fair Trading ("**OFT**"). References to the OFT and to the Competition Commission have been amended in the quotations below for ease of understanding.

(iii) Case law

18. In *BMI Healthcare Ltd v Competition Commission* [2013] CAT 24 the Competition Appeal Tribunal ("CAT") observed at §1 that *"The market investigation regime established by the Enterprise Act 2002… focuses on markets, rather than the behaviour of individual firms…"*.

19. In *Tesco Plc v Competition Commission* [2009] CAT 6, an application for review under section 179 of the 2002 Act, the CAT held at §77:

> *"The grounds of judicial review are well-established. They frequently overlap with each other. It is not uncommon for a particular flaw in a decision or a decision-making process to fall within more than one ground. Failure of a decision-maker properly to take account of a relevant consideration in reaching its decision is among the grounds most frequently relied upon in judicial review. It is sometimes considered under the broad label of irrationality, but is also (and perhaps more appropriately in the present case) treated in its own right as a ground of challenge to the validity of a decision. This ground, and its converse ground of taking account of an irrelevant consideration, clearly reflect the fact that judicial review is in general about legality and the decision-making process rather than the merits of a decision."*

20. The CAT further noted: at §79 that a report of the regulatory body should be read as a whole and not analysed as if it were a statute; and at §81 that the regulator should be afforded an appropriate margin of appreciation, such that the CAT will not intervene in its assessments or judgments without good reason.

21. In addition to rationality, failing to take into account a relevant consideration, and taking into account an irrelevant consideration (see *Tesco* (supra)), it is well established that the court or tribunal in an application for judicial review *"has jurisdiction to quash for a misunderstanding or ignorance of an established or relevant fact"* (see *R (Alconbury Developments Ltd) v SSETR* [2003] 2 AC 295 at §§53 and 169; see also *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430 at §7[5]).

22. A regulatory decision is therefore liable to be quashed where a mistake of fact (or a mistaken impression or wrong assumption) plays a material part in the regulator's reasoning. In *R (British Gas) v Gas and Markets Authority* [2019] EWHC 3048 (Admin), Andrews J held:

> *"87. [Counsel for British Gas] Mr Fordham also relied on E v Secretary of State for the Home Department [2004] EWCA Civ 49 [2004] QB 1044 as authority for the proposition that if there is a mistake of fact (for which the objecting party was not responsible) that is uncontentious and objectively verifiable, and the mistake played a material (but not necessarily decisive) part in the decision maker's reasoning, the decision may be susceptible to judicial review. He submitted that the principle was also*

[5] Cited in *James v Hertsmere Borough Council* [2020] 1 WLR 3606 (CA) at §20 and *Adesotu v Lewisham LBC* [2019] 1 WLR 5637 (CA) at §15.

> *engaged if the decision maker formed a mistaken impression which played a material part in its reasoning, or acted upon a wrong assumption, or if the decision was taken on facts unsupported by evidence. Again, there was no issue between counsel about these principles, but only as to their application to the facts of this case.*
>
> *88. I am satisfied on the evidence that these requirements are made out and that, irrespective of the fairness or otherwise of the consultation, British Gas would succeed on this ground also. The continuity assumption was factually incorrect, and so too was the reason given by GEMA for making it. The hedging strategy characterised as 'typical' had ceased to be so; suppliers did not largely maintain long-term hedging strategies. It was not a fair basis for the assessment that GEMA made."*

23. A decision by the CMA as to how to operate the procedure of a market investigation is amenable to review, including on grounds of breach of the rules of natural justice (see *BMI Healthcare* at §§74, 79).

C. GROUNDS OF REVIEW IN RESPECT OF THE MIR DECISION

(i) Ground 1: failure to understand and/or take into account the contractual agreement(s) and related failures to assess relevant matters

24. As stated above, the Airwave network was commissioned by the Home Office[6] under the PFI Framework, a contract concluded with BT in 2000.

25. Pursuant to the terms of the PFI Framework, the Home Office was able to withhold its consent for the purchase of Airwave Solutions Limited by Motorola Solutions Inc.,[7] which had been proposed in 2015. Accordingly, Motorola executed a deed with the Home Office on 7 December 2015 acknowledging that it would seek the approval of the Home Office (as a condition precedent) prior to the completion of the transaction.

26. The Home Office used its veto power over Motorola Solutions Inc.'s proposed acquisition of the Airwave network to secure numerous important amendments to the terms on which the Airwave service was provided and additional contractual undertakings from Motorola. As stated in one of the contractual documents concluded between Motorola and the Home Office in 2016: *"The Authority has agreed to provide its consent to the Airwave Transaction on certain conditions, including (amongst other things) that this Deed is entered into."*[8] The terms secured by the Home Office included, amongst other things:

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[6] The PFI Framework was concluded with the Police Information Technology Organisation but the term "Home Office" is used throughout this Notice for ease of understanding (in respect of the PFI Framework and all related contractual documentation, including agreements concerning emergency services other than the police).
[7] Clause 51 of the PFI Framework required Airwave to notify the Home Office of any change of control and clause 43.1 gave the Home Office the right to terminate the agreement in the event of a change of control **[Annex II, pp.61, 56]**.
[8] 2016 Deed of Recovery, recital H **[Annex II, p.793]**.

26.1 The Home Office obtained a unilateral right to specify the date the Airwave network would be shut down and to subsequently vary that date. Motorola was required to provide the Airwave service until the Home Office decided to shut it down. In particular:

(a) The Home Office had the right to issue a *"National Shut Down Notice"* which would specify the *"National Shut Down Target Date"* as being either the initially agreed National Shut Down Target Date of 31 December 2019 or any later date.[9, 10]

(b) Irrespective of the initial target, the Home Office had a right unilaterally to change the National Shut Down Target Date after it had issued the National Shut Down Notice by serving a *"Deferred National Shut Down Notice"*.[11]

(c) The Home Office had the right to specify different a Shut Down Target Date in respect of a *"Delayed Transition Group"* and to subsequently defer that date. The Home Office therefore acquired a unilateral right to transfer most service users to ESN but to require Motorola to continue to provide the Airwave service to a small number of users that were slow to transfer.[12] This means that Motorola bears the risk that it will be forced to maintain complex national infrastructure for a small number of users until their transition to ESN is complete. The Home Office explained to the Public Accounts Committee in 2016: *"The actual income [Motorola] get from the extension may be less than the cost of running the network if we ask for it only for a few regions for a certain period…"*.[13]

(d) The effect of the above provisions was to afford the Home Office the ability to tell Motorola to continue provision of the Airwave services, either nationally or on a regional basis only depending on the progress of the Home Office's ESN Transition Plan, such that if any emergency services users were delayed

[9] 2016 Heads of Terms, clause 2.5 **[Annex II, p.729]** (implemented in clause 2A.1 of the PFI Framework (as amended by Part 1 of Annex 3 to the Blue Light Contracts Umbrella CCN ("**UCCN1**") **[Annex II, p.859]**).
[10] The 2016 Heads of Terms explained that *"'National Shut Down Target Date' means 31 December 2019 or such later date as the Home Office may specify to Airwave in accordance with the procedures set out in Clause 2 below"* **[Annex II, p.728]** (emphasis added). This definition was inserted into Schedule 1 of the PFI Framework by UCCN1 **[Annex II, p.863]**.
[11] 2016 Heads of Terms, clauses 2.8 and 2.10 **[Annex II, pp.730, 731]** (implemented in clauses 2A.4 and 2A.6 of the PFI Framework (as amended by UCCN1) **[Annex II, p.860]**).
[12] See, e.g., 2016 Heads of Terms clauses 2.2, 2.5(c) and 2.12 **[Annex II, pp.729, 730, 731]** (implemented in clauses 2, 2A.1(c) and 2A.8 of the PFI Framework (as amended by UCCN1) **[Annex II, p.859, 861]**).
[13] Oral evidence: Emergency Services Communications (16 November 2016) <https://publications.parliament.uk/pa/cm201617/cmselect/cmpubacc/770/770.pdf> **[Annex III, p.236]**.

in transitioning from Airwave to ESN the Airwave service would remain available to them until they had transitioned.

26.2 The Home Office secured a discount on the prices that were otherwise payable by emergency service users under the existing contract(s).[14] That discount applied for the remaining duration of the Airwave service (i.e. until such time as the Home Office elected to cease using the service).[15]

26.3 Motorola was required to enter into a Deed of Recovery which enabled the Home Office to impose financial penalties on Motorola in the event that Motorola caused delays to the introduction of ESN (as noted above, Motorola had already been awarded the ESN Lot 2 Contract when it was negotiating with the Home Office regarding its proposed acquisition of the Airwave network).[16]

26.4 Motorola agreed to settle ongoing litigation between the Home Office and Airwave on terms which equated to payments to the Home Office of [value excised] over three years.[17] (This litigation related to, amongst other things, a price benchmarking mechanism under the PFI Framework and associated contracts, which the CMA has failed to have regard to: see further §§27.2 and 33 below.)

26.5 Motorola agreed to withdraw the procurement challenge brought by Airwave Solutions Limited in respect of its exclusion from the "Lot 3" ESN competition by the Home Office.

27. Four points bear emphasis:

27.1 First, these contractual arrangements between Motorola and the Home Office provided for the price payable for the services for the remaining life of the Airwave network. The negotiated price was itself a discount on a pricing structure originally agreed between the Home Office and BT when the Airwave network was commissioned.

[14] Whilst the prices payable by police users were governed by the PFI Framework, the prices payable by other emergency services (English and Scottish Ambulance services and Fire services) were governed by parallel contracts. The suite of contracts governing police, ambulance, and fire services are referred to as the "Blue Light Contracts" (see recital B to the 2016 Heads of Terms **[Annex II, p.726]**).

[15] The charging structure under the contractual framework means that there is no single figure stated for the overall discount negotiated on behalf of the service users. Motorola estimates that the approximate equivalent annual discount afforded through the agreed financial concessions to the Home Office was [figure excised] of core charges (with reference to core charges in the year ended 31 March 2015).

[16] The recitals to the 2016 Deed of Recovery include the following explanation: *"As part of its usual risk review process prior to the award of the Lot 2 Agreement, the Authority identified a risk in MSI's common control and ownership of Airwave and MSUKL, such that MSI could manipulate delivery under the Lot 2 Agreement in order to financially benefit under the Blue Light Contracts"* **[Annex II, p.793]**.

[17] See 2016 Heads of Terms, clause 4 **[Annex II, p.731]** and Schedule 1, Part A **[Annex II, p.740]**.

Motorola assumed all of the cost and risk associated with keeping the Airwave network operational until such time as the Home Office no longer required the service.

27.2 Second, the contractual framework contains benchmarking provisions which provide for a neutral evaluation of certain charges payable under the contractual framework. These are summarised in tabular form in Annex II(A) to this Notice.

27.3 Third, the *possibility* of a delay to the roll out of ESN was clearly contemplated because: (1) the Home Office secured for itself a unilateral ability to extend indefinitely the Airwave service at existing pricing (as may be required, depending on the progress of the roll out of ESN and the transition of users from Airwave); and (2) the Deed of Recovery deals with delays to ESN caused by Motorola. However, the Home Office was apparently satisfied that the Deed of Recovery included incentives that gave sufficient protection against Motorola causing delays to ESN.

27.4 Fourth, the CMA reviewed the acquisition of Airwave Solutions Limited by Motorola Solutions Inc. at the point when Motorola Solutions UK Limited had already won the ESN Lot 2 Contract and cleared the transaction.

28. In the MIR Decision, the CMA proceeds on the basis of a fundamentally flawed understanding of the contractual position. The CMA states in §4 of the Summary of the MIR Decision that "*it is now expected that the Airwave network will continue until the end of 2026, with the terms of the extension needing to be agreed by the end of 2021*" (emphasis added; see also §1.51 of the MIR Decision).

29. This is not a correct description of the contractual position (as set out at §§26-27 above):

29.1 The CMA appears to have been confused by: (a) the fact that the Home Office has since 2016 sought *discounts* from Motorola to the contractually agreed prices; and/or (b) the fact that Motorola agreed in 2018 to provide such a discount for the period 1 January 2020 to the "National Shut Down Target Date" (then agreed as 31 December 2022), in return for the Home Office confirming that the Airwave service would not be terminated before 31 December 2022.

29.2 However, it is wrong to state that there is a "need" to "agree" an extension to the contract(s) in order for the Airwave service to be continued beyond 2022. It is similarly wrong to state that there is a "need" to "agree" the terms (including as to pricing) that will apply to the period beyond 2022.

29.3 This would have been apparent to the CMA if it had taken reasonable steps to understand the contractual position.

30. The CMA's failure to accurately and fully understand the contractual arrangements concluded in 2016 has a number of material consequences for the MIR Decision.

31. First, the MIR Decision is vitiated by: (1) a complete failure to assess the respective bargaining power of the parties at the moment in 2016 when the default contractual pricing was agreed; and/or (2) the CMA's erroneous focus on *"market dynamics"* during the period after 2016 when the Home Office has sought discounts, notwithstanding that the long term contract governing the provision of the services until the cessation of the Airwave network is already agreed. In particular:

31.1 As stated above: (1) the Home Office was in an extremely strong bargaining position at the time of the 2016 negotiation; (2) the default contractual prices which will govern the provision of the Airwave service until it is terminated were agreed in 2016;[18] and (3) contractual mechanisms to address the risk of delays to the roll out of ESN caused by Motorola were also agreed in 2016.[19] An assessment of the bargaining power of Motorola and the Home Office in 2016 should, therefore, have been at the centre of the CMA's analysis.

31.2 However, such an assessment is absent from the MIR Decision. Instead, the Decision wrongly focuses on the period after the suite of 2016 contracts had been agreed. The heading above §1.48 refers to *"Market dynamics following the ESN procurement and Motorola's acquisition of Airwave Solutions"* (emphasis added). §§1.48 to 1.60 then discuss the parties' negotiations in the period 2018 to date in which the Home Office has sought to secure a discount on the prices agreed in 2016.

31.3 The CMA has therefore wrongly treated the period after 2016 as involving competition *"for the market"* because of its erroneous belief that extensions to the contract needed to be agreed during this period.[20] At the same time it has not assessed at all the competitive dynamics in 2016, which is the moment when the parties agreed

[18] The 2016 pricing is the default pricing regime that will govern the Airwave service until it is terminated, subject to: (a) the benchmarking provisions; and/or (b) Motorola agreeing to provide discounts in respect of certain periods of time or on an indefinite basis.
[19] I.e. the 2016 Deed of Recovery described at §26.3 above.
[20] The CMA states that *"one would expect competition to be 'for the market', ie 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"* (MIR Decision at §1.19).

contractual terms governing the provision of the relevant services until their cessation (at a time when the Home Office was in an extremely powerful bargaining position).

32. Second, the CMA's purported assessment of the parties' respective negotiating power in the period after ESN procurement and Motorola's acquisition of Airwave Solutions Limited (at §§1.48 to 1.60) is vitiated by the CMA's mistaken belief as to the factual position. The CMA states at §1.74 that *"[t]he extension to the original PFI Agreement was not an automatic one and involved negotiations spanning several months. The extension profitability therefore reflects the respective negotiating powers of the Home Office and Motorola, which are the product of the competitive situation at the time of the negotiation, rather than the competitive conditions at the time of the negotiation of the original PFI Agreement (see paragraphs 1.48 to 1.60 for a full discussion of these negotiations)."* The CMA thereby suggested that the Home Office was in a weak bargaining position in the period from around 2018 to date. The CMA failed to acknowledge, however, that the contractual arrangements, as concluded in 2016, do not provide for prices to be set by further bargaining as to terms. To state that *"the extension to the original PFI Agreement was not an automatic one and involved negotiations spanning several months"* is wholly detached from the contractual reality. All concessions secured by the Home Office (e.g. in 2018) were outside of the default contractual position and, in fact, represent extraordinary buyer power on the part of the Home Office. This mistaken belief therefore goes to the foundation of the CMA's view that this is evidence of a 'market' not working well.

33. Third, the CMA's misapprehension causes the CMA to fail to have proper regard to the benchmarking provisions under the contractual framework. In particular:

33.1 The benchmarking provisions are summarised in tabular form in Annex II(A) to this Notice. Taking the contractual arrangements for the ambulance service as an example:

(a) [contractual provisions excised]

(b) [contractual provisions excised]

(c) [contractual provisions excised]

33.2 Such provisions should have been at the centre of the CMA's analysis in the context of an inquiry where a central issue is the price payable under the contract(s) and the options that are available to the Home Office if it is concerned about pricing and value for money.

33.3 §2.46 of the MIR Decision appears to be a purported explanation of why these benchmarking provisions (which the CMA seems to call *"contractual dispute resolution"*) are unimportant. It refers to §1.59, which states that *"the set of circumstances discussed in paragraphs 1.57 and 1.58… are not capable of being resolved through arbitration or litigation."* §1.58 states that *"with the government owning neither the spectrum, nor the network… this set of circumstances is likely to put the Home Office in a weaker bargaining position in any negotiation following the end of the original PFI Agreement period"* (emphasis added).[21] The CMA has therefore wrongly treated the benchmarking provisions as irrelevant on the ground that these provisions will not assist the Home Office when it seeks to negotiate an extension to maintain the Airwave network when the current contract comes to an end. If the CMA had understood the contractual position properly, it would have appreciated that: (1) the contract provides for provision of the service until it is shut down on the instruction of the Home Office (i.e. this is not a situation in which further negotiations are necessary); (2) the benchmarking provisions provide a means for the Home Office to assess and achieve value for money under the contract.[22]

34. Fourth, the CMA's misapprehension leads it to rely wrongly on *"asymmetry of information… in relation to key drivers of pricing, for example the level of capital expenditure needed to keep the Airwave network operational"* to justify a reference (MIR Decision at §2.21(b)). The alleged information asymmetry is irrelevant in the context of a contract where the price is fixed (subject to independent benchmarking of certain charges and to annual agreed indexation) and where the supplier assumes all of the risk to deliver the network and related services at the agreed price. The parties did not agree a mechanism for pricing which tied prices to Motorola's costs (such as *"capital expenditure"*). Nor did they agree contractual obligations of information sharing (unsurprisingly since the contract does not provide for prices to be tied to costs or subject to periodic renegotiation).

35. Fifth, the CMA's misapprehension is the implicit basis on which the CMA purports to split the contract into two main periods – the *"original contract"* until 2019 and the so-called *"extension contract"* from 2020 to 2026 (see MIR Decision §§1.74-1.75). However: (1) the initially proposed National Shut Down Target Date of 31 December 2019 was aspirational and non-binding (see §26 above); and (2) there is no basis for treating the period from 2020 to 2026 as somehow part of a different contract, since it is covered by the continuation of existing terms

[21] §1.57 of the MIR Decision refers to information asymmetry (as to which, see §34 below).
[22] As a matter of fact, when Motorola Solutions, Inc. acquired Airwave Solutions Limited in 2016, it agreed to pay the Home Office [value excised] million to settle an ongoing benchmarking process and [summary of contractual arrangements excised].

(subject only to any further price reductions the Home Office is able to obtain pursuant to the benchmarking provisions and/or by bargaining for further discounts). This is a fundamental and critical error since the CMA's profitability analysis is based on the *"extension contract, i.e. for the period from 2020 to 2026"* (MIR Decision §1.75ff). The CMA's *"August Model"* based on this split (§1.81) purportedly shows a post-tax real IRR of [figure excised] for the *"extension contract"*. This therefore produced results which suggest that the IRR is vastly higher than it would be if the entire period of the contract were taken into account[23] (as it should be).

36. In light of the matters set out above the MIR Decision should be quashed because:

36.1 The CMA proceeded on the basis of a mistake of fact that played a material part in its decision.

36.2 Further or alternatively, the CMA had regard to an irrelevant consideration (namely its erroneous description of the contractual position) and/or failed to have regard to a relevant consideration (namely the full and accurate contractual position, as described at §§26-27 above).

36.3 Further and in any event, the absence of any assessment of the respective bargaining power of the parties at the moment in 2016 when Motorola Solutions, Inc. acquired Airwave Solutions Limited is a failure to have regard to a relevant consideration and/or irrational.

[23] Note that the CMA's split August Model shows a post-tax real IRR of [figure excised] for the period 2000-2019 (§1.81).

(ii) Ground 2: irrationality and/or failure to have regard to relevant considerations in the CMA's approach to the investment rate of return under the contract(s)

37. The Chapter II prohibition protects against excessive pricing by a monopoly provider and Motorola is not in breach of that provision. The CMA pursued an aggressive strategy of document requests from the moment it turned its attention to the Airwave service. Given that the CMA's policy is to consider first whether there has been an infringement of the Chapter II prohibition (see §17 above), it must be assumed that the CMA has found no evidence of excessive pricing.

38. This CMA inquiry flows instead from the fact that the Home Office is dissatisfied with the price that it is paying for infrastructure and associated services which it commissioned under a long term PFI agreement in 2000, as subsequently varied in 2016 (at a time when the Home Office had significant bargaining power: see §§25-27 above). In essence, the Home Office would like the CMA to intervene to reduce the prices that it has contracted to pay.

39. Against that background, the CMA's approach to the IRR under the contracts is irrational and/or fails to have regard to relevant considerations.

Irrational valuation of Airwave's business

40. To assist the CMA with its analysis, Motorola provided an IRR model (which the CMA refers to as the *"August Model"*) showing, among other things, Airwave's IRR and its pre-tax nominal IRR.

41. The CMA states that, in order to analyse forecast profitability over the so-called *"extension contract"*, it split the August Model into two periods: (i) 2002 to 2019 (which the CMA treats as the period covered by the original PFI Framework); and (ii) the forecast *"extension"* period (2020 to 2026).

42. Motorola's position is that this chronological division is artificial and unreasonable (see §§26 and 35 above)). However, even if it is assumed in the CMA's favour that such a division was reasonable in principle, the CMA's approach to the calculation was irrational.

43. In particular, to determine the asset values at the end of 2019, it is understood that the CMA relied on the NBV of the assets as a measure of the upfront investment that would be required to provide the services over the *"extension"* period, in order to calculate IRR over this period (§1.80, MIR Decision). This methodology is entirely inappropriate for a truncated analysis.

44. While a truncated analysis can, in theory, be deployed in limited circumstances, a report published in 2003 by Oxera, on behalf of the OFT (the predecessor body to the CMA), makes clear that truncated analysis:

> "[…] *requires data about the cash flows of the activity in question over the relevant time period, and the asset values at the start and end of that period. … [A]sset values should be based on either the cost of replacing the asset (specifically on a 'modern equivalent asset', or MEA, basis), the present value (PV) of future earnings, or the value derived from selling it (its net realisable value, or NRV). In particular, assets should be valued on the lower of the replacement cost or economic value, where its economic value is determined by the higher of its PV of its future earnings or its NRV. This valuation principle is also known as the value-to-the-owner principle. For the assessment of excessively high profits, assets should be valued on an MEA basis*."[24]

45. This means that instead of using the accounting concept of NBV to measure the asset value at the start of the *"extension"* period, the CMA should have relied upon the replacement cost or other economic valuation.

46. Indeed, the logic of the CMA's approach is that any landlord who has recovered the original cost of constructing a building would be required to slash rents and any manufacturer whose plant and machinery continues to be used in production, even though fully written off in the accounts, would have to lower prices to reflect its lower cost base. This makes no sense.

47. The CMA's methodology is so flawed that it can properly be characterised as irrational.

No reasonable attempt to assess IRR over the lifetime of the Airwave network and/or in light of the parties' informed contractual decisions on the allocation of risk

48. The evidence shows that when the PFI Framework was concluded in 2000 the Government, on advice, concluded that a reasonable target IRR over the lifetime of the Airwave network would be approximately 17%. Evidence given to the Public Accounts Committee by officials in 2002 explained:

> *"…We took advice from both our technical and our financial advisers... Considering the level of risk we were transferring to O2*[25] *and the fact that there was no precedent for such a large system in previous procurements, it was new technology, there were several stakeholders and in fact there were issues relating to site acquisition, we considered the 17% return was fair. This was endorsed at the time by both ourselves*

[24] Oxera, "*Assessing profitability in competition policy analysis"*, OFT Economic Discussion Paper No 6 (July 2003) §1.15 <https://www.oxera.com/wp-content/uploads/2018/03/OFT-Assessing-profitability-1.pdf> **[Annex III, pp.17-18]**.
[25] By this time the BT business responsible for delivering the Airwave network was known as "02".

and the Home Office. We felt we had actually taken independent advice and the return was fair." [26]

49. Motorola also drew the attention of the CMA to a more recent Government appeal to potential investors to acquire, finance, and operate a new manufacturing and port facility which stated: *"Investment returns are targeted at 15%-18% IRR"*.[27]

50. On the assumption that the Home Office exercises its right to extend the Airwave network until 2026 under the existing contractual terms, the Airwave network will have yielded a nominal post-tax IRR of approximately [figure excised].[28]

51. This demonstrates that, over the lifetime of the Airwave network, the Government has obtained better value than it was hoping to achieve at the time of the original procurement in 2000.

52. The MIR Decision contains a brief and superficial discussion of the respective bargaining power of the parties when the PFI Framework was originally concluded in 2000. The CMA notes that by the end of the lengthy tendering process BT was the only company that remained in the running and relies on this to conclude that *"there is currently no reason to believe that, in the absence of any outside option, PITO was able to negotiate a price that was at the competitive level"* (see §§1.23-1.26). However:

    52.1 the MIR Decision makes no proper attempt to engage with the fact that the Government, on advice, considered a target of 17% IRR to be fair when the PFI Agreement was concluded in 2000;

    52.2 the MIR Decision makes no attempt to engage with the comparator provided by Motorola (see §49 above) or, indeed, any other relevant comparator that might inform an assessment of whether the target IRR agreed by the parties was competitive. Indeed, the MIR Decision does not contend that 17% IRR was in any way an unreasonable target for the contracting parties; and/or

    52.3 the MIR Decision does not engage with the fact that the Home Office did not seek to revisit the premise that 17% IRR was a reasonable target when the contractual arrangements were revised in 2016, at a time when the Home Office had the power to veto Motorola's acquisition of the Airwave network.

[26] Committee of Public Accounts, Public Private Partnerships: Airwave (4 November 2002) <https://publications.parliament.uk/pa/cm200102/cmselect/cmpubacc/783/783.pdf> **[Annex III, p.4]**.
[27] Motorola submission dated 18 August 2021 at (43)-(44) **[Annex III, p.281]**.
[28] Motorola's submissions dated 18 August 2021 at (8)(iii) **[Annex III, p.274]**.

53. Indeed, the CMA states at §1.7 of the MIR Decision that *"the assessment has not been concerned with the effectiveness or otherwise of the historical policy and procurement decisions that resulted in the creation of the Airwave network"*. These are plainly relevant matters yet, as this sentence indicates, the CMA has either deliberately not taken them into account or has confined them to a peripheral and wholly superficial mention.

54. This is symptomatic of a striking failure on the part of the CMA to ask or answer the questions that obviously arise where the Home Office is demanding that the CMA use its market investigation powers to re-write the terms of the final years of a long-term contract where the parties took an informed decision on the allocation of risk. The need for such inquiries is all the greater where the Government has in fact achieved a better result than it was willing to accept when the contract was originally agreed in 2000.

(iii) Ground 3: irrational approach to the Airwave network *"market"* and ESN as an alleged *"feature"* of that market

55. In the MIR Decision, the CMA identifies the provision of the Airwave network as a *"market"*, characterises that *"market"* as *"concentrated"*, and places heavy reliance on its view that matters associated with the ESN network are a *"feature"* of that market. Three of the five *"features"* of the market that are said to *"restrict or distort competition"* are listed at §2.21 as follows:

> *"(a) the extremely concentrated nature of the current market, in which the price is established through negotiation between a monopoly provider (Motorola) and a monopsony buyer (the Home Office); …*
>
> *(c) Motorola's position as owner of Airwave Solutions and key supplier in the design and roll-out of ESN, which may be resulting in the preservation of weak competitive constraints on Motorola in the supply of LMR network services for public safety, because of:*
>
> *(i) the ability of Motorola to shape or otherwise delay the design and roll-out of ESN, and thus hamper the emergence of the significantly different competitive dynamics envisaged by the Home Office when it procured the design and roll-out of ESN; and*
>
> *(ii) the incentive on Motorola to do so, arising from the significant profits it derives from operating the Airwave network;*
>
> *(d) the delays in the roll-out of ESN (which may or may not have resulted from Motorola's conduct in relation to the design and roll-out of ESN from 2016), that are preserving weak competitive constraints on Motorola in the supply of LMR network services for public safety;"*

56. The CMA's approach is irrational, for the following reasons.

57. First, the Airwave network is a highly differentiated, bespoke piece of critical infrastructure which exists as a result of a Government procurement exercise. The so-called *"market"* was

therefore created by an exclusive and long-term contract between the Government and Airwave Solutions Limited. Prices have been set under those long-term contractual arrangements. It does not make sense to assess competition during the course of the contract. If the Home Office now considers that it has agreed to pay too much for the services (a point which Motorola does not accept), that would be a bad bargain and not a market investigation issue.

58. Second, it does not make sense to justify intervention on the grounds that the market is *"extremely concentrated"*. Following this logic, any bespoke service delivered under a long-term exclusive contract would constitute a market which would then be susceptible to becoming the subject of a market investigation: by definition, any such "market" would also be "*extremely concentrated"*.

59. Third, treating delivery of the ESN network as a *"feature"* of the Airwave network *"market"* is a fiction that has been employed by the Home Office (and apparently accepted by the CMA) to seek to justify CMA intervention. This is an unreasonable approach:

59.1 ESN is <u>not</u> a "competing" alternative to the Airwave network. Users will migrate from Airwave to ESN only when ESN becomes fully operational. Following completion of the transition the Airwave network will (subject to a decommissioning period) be shut down, along with the spectrum it uses, and shall cease to exist. This was clear from the outset of the ESN procurement: the OJEU Contract Notice stated that *"The ESN will replace those services delivered under current service contract(s)"*.[29] When the Government announced the award of the ESN contracts it explained that *"the new services will <u>replace</u> the existing system"*.[30] The National Audit Office has explained that *"The Home Office intended that ESN would: fully replace Airwave, matching it in all respects"*.[31] The decision to replace Airwave with ESN was made in 2014 at the inception of the ESN procurement and the UK's emergency service users, which are funded by central government, will be required to transition to the new service when it is ready.

59.2 The CMA is therefore wrong to rely in the MIR Decision on the hypothesis that "negotiations" about the extension of the Airwave contract could be subject to

[29] United Kingdom-London: Telecommunications services, 2014/S 077-133654, Contract notice (18 April 2014) <https://ted.europa.eu/udl?uri=TED:NOTICE:133654-2014:TEXT:EN:HTML> **[Annex III, p.220]**.
[30] 'Final contracts for new emergency services network are signed' (9 December 2015) (emphasis added) <https://www.gov.uk/government/news/final-contracts-for-new-emergency-services-network-are-signed> **[Annex III, p.232]**.
[31] National Audit Office, 'Progress delivering the Emergency Services Network' (HC2140, 10 May 2019) at §1.5 <https://www.nao.org.uk/wp-content/uploads/2019/05/Progress-delivering-the-Emergency-Services-Network.pdf> **[Annex III, p.238]**.

competition in the sense that Airwave would have an incentive to offer better terms to delay the migration of its users to ESN (MIR Decision §2.16(c); see also Summary §5). This supposed competitive constraint sits at the heart of the CMA's assessment of competitive conditions but it is fundamentally wrong.

59.3 If ownership of the Airwave network was transferred overnight to a different undertaking this would have no impact on *"competition"* in the Airwave network *"market"*. The new owner would still be a monopoly provider of the Airwave service and entitled to charge the contractually agreed fees (for both the core network service and for the additional "menu services" procured by individual police forces). Nor would the ESN service be delivered any faster.

59.4 In reality, the Home Office's complaint is about the prices it has contracted to pay for the Airwave network. What it wants is for the CMA to impose price controls for the final years of the Airwave network. Concerns about ESN delay are a convenient way to contend that there are *"features"* of the Airwave *"market"* that are problematic and which therefore justify a market investigation. This is illustrated by the Home Office response to the CMA's consultation, which stated that an order requiring Motorola to divest the Airwave network would not be sufficient: *"It would also be necessary to address the risk of simply transferring the monopoly to another supplier who, without the implementation of other remedies (see below), might continue to make excess profits pending any transition [to ESN]"* **[Annex III, p.368]**.

59.5 [commercially sensitive information excised]. This demonstrates that it was wrong for the CMA to treat Motorola's involvement in delivering the ESN Lot 2 Contract as a "feature" of the Airwave network *"market"*.

59.6 When the CMA approved Motorola's acquisition of Airwave Solutions Limited in 2016 it did not regard ESN and Airwave to be competitors. That economic reality has not changed. (Indeed, §2.33(c) of the MIR Decision tacitly accepts that Airwave and ESN are separate markets in which suppliers make commercial decisions based on separate motivations.)

60. Fourth, Motorola's role in delivery of ESN was fully understood by the Home Office and has been addressed in the contractual arrangements (with the previous approval of the CMA):

60.1 As explained at §§25-27 above, Motorola had been awarded the ESN Lot 2 Contract before it purchased the Airwave network but: (1) the Home Office was content for Motorola to purchase Airwave Solutions Limited; (2) Motorola was required to enter

into a heavily negotiated Deed of Recovery which enabled the Home Office to impose financial penalties on Motorola in the event that Motorola caused delays to the introduction of ESN and the Home Office was apparently satisfied that this gave sufficient protection against Motorola causing delays to ESN. This issue was therefore considered by the parties and addressed under the contractual framework.

60.2 Moreover, the CMA examined and cleared the acquisition of Airwave by Motorola. It is inaccurate for the MIR Decision to imply at §1.35 that this was on the basis of an assurance that ESN would be delivered by 2019 and that Airwave would cease to be operational at that date: (1) the CMA was in receipt of forecasts from the merging parties that modelled the Airwave service continuing beyond 2019; (2) the National Shut Down procedure agreed in 2016 specifically catered for prolongation of the Airwave service as needed in the context of the progress of the roll out of ESN; and (3) there were contractual provisions in the Deed of Recovery that expressly envisaged delay.

61. [Commercially sensitive information excised]. The simple reason for this is that Motorola has not caused any such delays. The causes of delay to ESN are well documented publicly and there is nothing Motorola could have done to bring about the delivery of ESN at an earlier date.

D. GROUNDS OF REVIEW IN RESPECT OF THE ADMINISTRATIVE TIMETABLE DECISION

62. At a meeting between Motorola and the Home Office on 19 October 2021, [commercially sensitive information excised].[32]

63. Motorola was notified on 21 October 2021 that the MIR Decision would be issued on 25 October 2021.

64. On 25 October 2021, at the same time as publishing the MIR Decision, the CMA Board issued an "Advisory Steer" to the Inquiry Group that had been appointed to determine the reference **[Annex III, pp.362-364]**. The Advisory Steer stated at §7 (emphasis added):

> *"…**we would expect that in setting its administrative timetable for the inquiry, the Group takes into account the necessity of reaching its conclusions expeditiously. The sense of urgency is acute in this case**, and the issues that the CMA has identified in its preliminary work appear to be relatively contained. While the suspected detriment may come to an end when the Airwave network is replaced, the timing of that is uncertain and the likely detriment high in the meantime."*

[32] [correspondence excised] **[Annex III, p.371]**.

65. This is the only paragraph of substance in the Advisory Steer which is not already contained in the MIR Decision.[33]

66. CMA guidance on the proper role and content of advisory steers does not envisage that the CMA Board will issue the appointed inquiry group with an expectation that an investigation be conducted with expedition and a sense of acute urgency. On the contrary, an advisory steer may set out *"expectations regarding the scope of the market investigation and the issues that could be the focus of the investigation"*.[34]

67. On the same day (i.e. 25 October 2021), Motorola received a letter from the Chair of the Inquiry Group which enclosed a draft administrative timetable **[Annex III, pp.341-358]**. It proposed that a final report would be issued in June 2022 (i.e. within eight months of the reference being made). This timetable was considerably shorter than any market investigation in history.

68. The CMA's letter invited any comments from Motorola on the draft administrative timetable by 27 October 2021 (see §23). Motorola submitted detailed representations within that timeframe, submitting that the draft timetable was unprecedented and too rapid to be fair **[Annex I, pp.70-73]**. Motorola proposed an alternative timetable in which the final report would be issued in December 2022. This would still have been the shortest market investigation in history and considerably shorter than the average time taken for recent investigations.

69. On 1 November 2021, the CMA stated its position on the administrative timetable by way of email, as follows **[Annex I, p.74]**:

> *"Many thanks for your comments on the Administrative Timetable.*
>
> *The Group asked for views from Motorola and the Home Office on this matter. Having had regard to both parties' views, the Group has decided to retain its proposed timetable."*

70. In the circumstances, Motorola challenges the Administrative Timetable Decision on the grounds that:

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[33] §§1 to 3 are a generic introduction. §4 states that the Board Advisory Steer forms part of the decision to refer and that this is separate from but should be read in conjunction with the Terms of Reference. §5 repeats verbatim the subsections of §6 of the MIR Decision Summary. §6 reiterates information in the MIR Decision and appears to largely be an amalgamation of §7 of the MIR Decision Summary (*"the burden of any excess profits made by Motorola ultimately falls to the British Taxpayer"*) and also §2.22 of the MIR Decision (*"[w]e have reasonable grounds for suspecting that the above features, alone or in combination, give risk to unilateral market power for Airwave Solutions and that, as a consequence, it may be able to make profits well in excess of its cost of capital…"*). §8 is no more than a common sense reminder of the Group's duties and an indication that the full range of remedies should be considered and the most suitable identified.

[34] 'Market studies and market investigations: Supplemental guidance to the CMA's approach' (CMA3, July 2017) at §3.39.

70.1 Other than noting that regard was had to *"both parties' views"*, no reasons were given as to why the CMA decided to retain its proposed timetable or to reject Motorola's alternative timetable or its submissions in support of its alternative timetable.

70.2 Motorola (the only undertaking which is the subject of the investigation) was not given any opportunity to respond to the views expressed by the Home Office before the CMA made its decision (despite the CMA treating these views as a material consideration).

70.3 The timetable is unfair:

(a) Whilst only a maximum time limit for a market investigation is set by statute,[35] there is an overriding requirement that Motorola be given sufficient time to exercise its rights of defence.

(b) Experience from recent market investigations points toward an average timetable of one year and nine months with the shortest investigation to date being 15 months.[36] Even in previous investigations addressing the activities of only one undertaking, the process has taken around two years.[37]

(c) One of the remedies recommended for consideration in the MIR Decision is divestiture of the Airwave network. The potential impact on Motorola's commercial interests of a forced deprivation of its property cannot be overstated. A careful investigation must be followed.

(d) The MIR Decision provides a telling example of the prejudice Motorola could suffer if the investigation is rushed. At §1.68, the CMA notes that *"Motorola disagreed with the above summary but the explanation it gave was high level and unsubstantiated. In the absence of evidence to the contrary, we consider our interpretation of this document and its context to be a reasonable one…"*. However, the summary in question was provided to Motorola on 5 October 2021 as part of the "putback" process and Motorola had only three days, until 8 October 2021, to provide its comments on the factual accuracy of that summary (along with comments on many other passages that it had seen for the first time). Motorola is concerned that similar issues may arise in the course

[35] 18 months, which can be extended by 6 months (see section 137 of the 2002 Act).
[36] For the past seven market investigations (funerals, investment consultations, retail banking, energy, private healthcare, payday lending and aggregates, cement and ready-mix concrete), the average time from reference to final report was around one year and nine months.
[37] Movies on pay TV was referred for a market investigation on 4 August 2010 and the final report was published on 2 August 2012. BAA airports was referred for a market investigation on 29 March 2007 and the final report was published on 19 March 2009.

of the investigation and that the timetable will not allow it sufficient time to put forward its case comprehensively and fairly.

(e) There is no good reason for the investigation to proceed with such urgency, in the face of Motorola's genuine concerns. As explained in section C above, there are long-standing contractual arrangements in place for the Airwave network until its cessation.[38]

70.4 The Advisory Steer from the CMA Board was outside the scope of the CMA's guidance.

71. Furthermore, Motorola is concerned that the Home Office appears to have anticipated that a rapid timetable would be set, despite the unprecedented nature of such a timetable. Pursuant to the duty of candour, Motorola requests the disclosure of correspondence or other records of discussions between the CMA and the Home Office and the Cabinet Office as regards the investigation process and procedure (and reserves the right to seek an order for disclosure if such material is not provided).

E. CONCLUSION AND REQUEST FOR RELIEF

72. Motorola does not invite the Tribunal to determine the merits of the present case. It respectfully submits that the MIR Decision is vitiated by clear public law errors. Motorola therefore seeks the remission of the MIR Decision so that it can be re-taken on a proper basis.

73. Motorola claims in this Notice the following relief:

73.1 an order that the MIR Decision is quashed and remitted to the CMA to take a new decision;

73.2 alternatively, an order that the Administrative Timetable Decision is quashed and remitted for reconsideration;

73.3 an order that Motorola is entitled to payment of its costs; and/or

73.4 such other relief as the Tribunal may consider appropriate.

74. Motorola reserves the right to bring any applications it considers appropriate in the context of these proceedings, including as to disclosure and/or interim relief.

[38] [summary of contractual arrangements excised]

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22 December 2021