IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1428/6/12/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 1 February 2022

Before:
The Honourable Mr Justice Marcus Smith
Jane Burgess
Eamonn Doran
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Airwave Solutions Limited & Others

Applicant

-v-

Competition and Markets Authority

Respondent

A P P E A R AN C E S

Brian Kennelly QC and Paul Luckhurst, (On behalf of Airwave Solutions Limited & Others)
Josh Holmes QC and Ms Naina Patel and Mr Ben Lewy (Competition and Markets Authority)

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Tuesday 1 February 2022

(9.36 am)

THE PRESIDENT: Mr Kennelly, good morning.

Before you begin, there are two matters of housekeeping.

First of all, these proceedings are being live streamed, as you can see, and those who are joining us by way of the platform are most welcome, but I should add to that welcome a warning that these proceedings are in open court and those attending remotely are subject to the same rules regarding in-person hearings.

An official recording is being made of today's process, but it is strictly prohibited for anyone else to either make a recording, audio or visual, of proceedings or to transmit or photograph what is going on here. I know that won't happen, but it is nevertheless something I should make clear.

More helpfully, Mr Kennelly, we have read the pleadings, as I suppose I should call them, we have read the decision and we are therefore well up on I think what you've got to say, and with that I will hand over to you to open your client's case.

MR KENNELLY: I am very grateful.

May it please the tribunal I do appear for the applicants' with Mr Luckhurst, my Learned Friends Mr Holmes QC, Ms Patel and Mr Lewy appear for the CMA.

By way of housekeeping, just to make sure, you should have, as I said, a pleadings bundle, an application bundle with three annexes, a defence bundle, two bundles of confidentiality documents which overlaps -- we will come back to that -- a correspondence bundle and a bundle of authorities.

THE PRESIDENT: Thank you, Mr Kennelly. Just so that you know what we are

looking at, we have the documents electronically and we have the bundles in horizontal tabs across the top of our screen so we can jump to those fairly quickly and then within the documents we have obviously the bundle electronically. The process is usually a little bit slower electronically than it is with paper bundles and can I simply enjoin all, including the tribunal, that when we are looking at confidential material that we read rather than talk.

Mr Holmes, I do apologise, I can't really see very much of your team because of that screen, but I will try and look round it when I try to see you. That is a problem which I'm not sure what solution I have.

Mr Kennelly.

Submissions by MR KENNELLY

MR KENNELLY: I have liaised with Mr Holmes and I had at least allotted to myself and we have agreed that I will take up to noon, I will try and go more quickly, it depends on the tribunal's court interventions, that gives me two and a half hours and Mr Holmes will then have two and a half hours, which takes him to about 3.30pm. I will reply, again we have said half an hour, hopefully less and that will allow time then for the tribunal to retire and deliver judgment if that still remains your intention.

First I will summarise our case, then I'll deal briefly with the law, which is common ground, and then I will develop my submissions for each ground.

The tribunal has seen that the CMA says that the Airwave contracts between the Home Office and Motorola currently have features which the CMA has reasonable grounds to suspect are, and I paraphrase, distorting competition. These features are under two broad headings.

The first concerns the Airwave contracts themselves.

The second is Motorola's alleged incentive and ability to delay the replacement for Airwave, the emergency services network or ESN.

As to the first, the CMA says that the Airwave contracts are the market, so the question is therefore one of competition for the market because once an exclusive long-term contract is made there's no longer any real scope for competition for the services it covers, so that is common ground.

The CMA has to ask: when there was competition for this market? The CMA says that was in 2000, when the PFI framework agreement was made, and currently. The CMA says that there was a competition problem because the original contracts were one sided and the Home Office is currently in a weaker position than Motorola in negotiating new contractual terms.

As to whether they are one sided, the CMA's decision, we say, disregards highly relevant consideration, namely the benchmarking provisions which allow the Home Office to ensure that the contracts continue to be competitive.

It also fails to engage properly the fact that the government will achieve a substantially more favourable investment rate of return over the lifetime of the contract than it considered to be reasonable in 2000 when, acting with the benefit of advice, the Airwave services were procured by it.

As the CMA's focus is on the current competitive balance between Motorola and the Home Office, that is based on the CMA's most fundamental error in this case. The decision, the MIR decision, is based on the finding that a new agreement was necessary for the contracts to continue to 2026.

That is not just bad drafting, as the CMA may now be suggesting, it is the very reason why the CMA focuses on the parties' bargaining power now.

In fact, the last time there was competition for the market was in 2016. That was the time when the Home Office had a choice, they had a choice between forcing

the former owners of Airwave to continue to honour the contract and provide services or to consent to Motorola taking over the Airwave contracts. That was a choice the Home Office had in 2016 and the Home Office had a veto power over Motorola's acquisition of Airwave in the first place. Because they had that veto power, the Home Office could insist on changes to the contracts as the price for allowing Motorola to take over Airwave.

The Home Office had substantial market power in those circumstances in 2016 and they exercised it. The Home Office secured price reductions from the agreed rates in the contracts and the Home Office secured very substantial payments from Motorola in respect of benchmarking, to which I will return in other claims.

Most importantly of all, the Home Office negotiated, in 2016, a unilateral right to continue the Airwave contracts in whole or in part for as long as it likes. As it told parliament, that may indeed have adverse financial consequences for Motorola.

There was no question, no question at all, of any contractual changes being necessary to extend the contracts to 2026. The Home Office negotiated that power to exercise unilaterally, in 2016.

The CMA focuses on the Home Office's ability to secure all the further concessions that the Home Office had sought since 2018. And the Home Office has struggled to secure all of those changes that it has sought, but that we say is hardly surprising after all of the relevant terms had been so recently agreed by the Home Office and at the Home Office’s advantage.

The real question is: whether there was a lack of competitive pressure in 2016, whether there was a problem with the balance of negotiating power, in 2016, but that is a question which the CMA refused to ask in the market

investigation.

Turning to the second broad feature which has triggered the market investigation, the concern that Motorola has the incentive and ability to delay the ESN arrangements which will replace the contracts. Again in 2016, in its position of extremely strong bargaining power, the Home Office imposed terms on Motorola to deal with this very issue.

The Home Office contemplated, in 2016, that ESN might well be delayed and it agreed a deed of recovery which was designed to penalise Motorola if it, was the cause of delays. The CMA now says that the deed of recovery may be ineffective, which is denied, but in any event the CMA is ignoring the statutory question: what is the adverse effect on competition if the deed of recovery turns out not to be effective?

That can't be addressed unless the CMA examines the bargaining power of the Home Office when it agreed to the deed of recovery.

My other grounds flow from these points save for the challenge to the administrative timetable which I will address at the end.

Before I turn to the law, I will address the question, if I may, as to why the tribunal should intervene now and not simply wait until the market investigation is over.

My short point is that even if all that the CMA has to show at this stage is a reasonable suspicion of an adverse effect on competition, if that suspicion is based on material errors of fact or irrelevant considerations, the decision should be set aside and the questions remitted to the CMA.

Because even if, having reconsidered the issue, the CMA decides to proceed with the market investigation, at least it would proceed on a correct basis and the CMA's approach will not be shaped by fundamental errors.

That, members of the tribunal, is even more clear -- the need for it to be quashed or remitted, is even more clear now that we have seen the CMA's defence in these proceedings.

They are not saying in their defence that our points may have merit or they are better ventilated in the market investigation. The CMA is saying to you in clear terms that the 2016 negotiations are not important and it is sufficient to examine the post-2018 discussions.

The CMA regards the benchmarking provisions in the contract as:

"Mere boilerplate and inapplicable in large part to the contracts for Airwave specifically."

These provisions are extremely important but the CMA submits, that they are irrelevant considerations.

I turn then to the law and the points I will make are, as you have seen, largely common ground. To show they are common ground I will go in fact to the CMA's defence, rather than the authorities bundle. If you could go to that defence and when I go to the defence in the course of the proceeding's I will, as the CMA has suggested, use the confidential version which is in the confidentiality documents bundle at page -- my bundles are not numbered, so I think it's 7?... Mr Luckhurst will assist me. Bundle 4, forgive me, in the confidential version of the defence page 72.

It's section 131(1)(1) of the Enterprise Act, and just to repeat its well known terms, this is the test for making the reference:

"The CMA may make a reference to its chair ... where it 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 supply or acquisition of any goods or services

in the United Kingdom."

I rely in particular on the need to show a prevention, restriction or distortion of competition. This is not a general power to get something out of a bad bargain or a contract with which they are no longer happy, there needs to be a problem with competition.

There are four public law grounds of challenge which are relevant.

THE PRESIDENT: Just pausing there though, I just want to be clear that it is also common ground that the reasonable grounds for suspicion are as it were, common ground in terms of what one is looking at?

We did a little bit of delving on what the law in this area is and really one can get a great deal of assistance from cases in the criminal law where reasonable grounds for suspecting have long been controls for, for instance: power of arrest. And so, for example, in Hussein v Chang Fook Kam 1970, Lord Devlin came to find the test:

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking, 'I suspect but I cannot prove'."

It seems to us important to articulate at the outset that suspicion is a very low hurdle. Of course, it's qualified by the reasonable element, it has to be objectively founded, but at the end of the day, we are not talking about proof, we are talking about something far less than proof.

If that is a wrong approach on our part, and reading the 1970 authority, if that's a wrong approach, I think we would welcome pushback from you and correction by Mr Holmes, but I think the pushback will be coming from you more than Mr Holmes.

MR KENNELLY: Sir, that's helpful. Unless, Mr Luckhurst, corrects me that is common ground. I of course accept that reasonable suspicion is a much

lower threshold than proof -- proof is not required. Our concern is not to say they lack proof, the concern, as you have seen from my opening, is they have gone down the wrong road. The basis for their reasonable suspicion, the questions they are asking themselves are the wrong questions and they have made fundamentally erroneous assumptions in order to launch this market investigation. The concern is that it's not simply sufficient to correct them in the course of the market investigation, their decision to launch, it is based on a material error of fact.

THE PRESIDENT: Well, I completely appreciate, Mr Kennelly, and I am very grateful for your articulating your line of attack so clearly, but I think to be clear how we see this, given that the test is reasonable suspicion, that it seems to us shapes not merely the factors that go into whether there should be an enquiry or not, but also the shape of the enquiry, in the sense that if you take a view that you have a reasonable suspicion on the facts of A, B and C, you may decide to the same low standard that the direction of the enquiry ought to be that way, rather than this way, and of course that may be completely wrong and you may be vindicated during the course of the enquiry, that's a given.

But that isn't the issue for today.

We understand the direction you are taking, that essentially the CMA is asking itself the wrong questions, but we think that right or wrong questions are similarly not to be finally decided but are to be viewed through the similar provision in the statute of reasonable grounds of suspicion or reasonable suspicion.

MR KENNELLY: Indeed, sir. If that is what the CMA has in fact done, and that's why it's important to look at their decision, because if they're saying, "We have reasonable suspicion of A, B and C and we take the view on the basis of

reasonable suspicion that D, E and F are not the way to go", that would be one thing. But they have staked their claim on a very clear basis and they have closed their minds, they have said that these other factors we are treating as unimportant and even for the purposes of reasonable suspicion they still must have a rational basis and they cannot base their reasonable suspicion on material errors of fact.

I appreciate that it's easier for them to show, a reasonable suspicion so I have to show very serious of errors of fact, in order to say, that can't even grant a reasonable suspicion, I mean that's the test I have to face. I have to say to you that these mistakes they have made couldn't even ground a reasonable suspicion, of an adverse effect on competition, perhaps that is the way to put it. That's a higher threshold for me, I certainly accept, than it would be in a challenge to a final report, but they still have to have a reasonable suspicion grounded on relevant considerations without material errors of fact.

On those grounds, those public law grounds, I just go -- and the CMA didn't accept these are the public law grounds that it has to satisfy, that the standard submission is tested, and we see that in their defence.

First at paragraph 22, this is on page 76 of the confidential documents bundle:

"The decision may require to be set aside insofar as it's based on a mistake as to an uncontentious and objectively verifiable existing fact the applicant was not responsible for the mistake; and the mistake [this is important] played a material but not necessarily decisive part in the decision maker's reasoning"

That's the first one.

The next is on irrationality. You see that at paragraph 17, that's very well established. Previous page, page 75 of the confidential documents bundle.

Then over the page, back again, page 76 the requirement to take into account only

relevant considerations and not take into account irrelevant considerations. The reviewing court would normally consider whether the factor could have been material, but materiality is required, as the tribunal held in Tesco PLC v Competition Commission.

This question -- I am just going to read this from my notice of application, it is not necessary to go back to it again, it's so well established. This question of failure to take into account relevant considerations, or taking into account irrelevant considerations, these really are, although it's under the label of irrationality, is treated by the tribunal as a separate basis for challenge in its own right.

Finally, in the defence, reasonable enquiries, back to page 75 "it is for the CMA to decide upon the manner and intensity of inquiry to be undertaken in any matter relevant to its decision and you will intervene only insofar as their approach to deciding what investigation or analysis to undertake was so unreasonable that no reasonable decision-maker could have adopted it"

Those are the legal grounds.

I will turn then if I may to my first ground of challenge, the errors of fact or failure to take into account relevant considerations in relation to the Airwave contracts.

The first error is that the decision completely disregarded the benchmarking provisions in the Airwave contracts. This is highly material when you look at particular features, which are the reasons for the decision to make the market investigation reference. Could you go, please, to the actual CMA MIR decision. Again in the confidential documents bundle, page 6. I am looking at paragraph 6, page 6. This is the key reasoning, for the decision to make the reference.

I am focusing first if I may on (b). The CMA states as one of the features "the

asymmetry of information between Motorola and the Home Office in relation to key drivers of pricing, for example the level of capital expenditure needed to keep their network operational"

Then (c), next concern that their "position as the owner of Airwave Solutions and a key supplier of ESN" may be resulting and I rely on this, "in the preservation of weak competitive constraints on Motorola in supply of" the current service under the Airwave contract, so again concern there are currently weak competitive constraints which might be preserved.

Then the next is (e) "the absence of competitive tension in the award of the original contract, with only one supplier taking part in the bidding process."

Then at 7, below that, skipping right down to the last sentence, there's a reference to harm in the market, potential "harm in the market and the burden of any excess profits made by Motorola and that falls ultimately on the British taxpayer." So the concern is that there's a lack of competitive pressure on the original contract, continuing weak competitive constraints resulting in excess profits. That's the concern.

I take you to that because it's so important for benchmarking.

Then we will stay in the decision if we may, and go to 1.25 on page 14, where you see this concern repeated. Halfway down paragraph 1.25 on page 14.

Because there was "only one bidder in 2000, the tender process was therefore not a competitive one and although the Home Office took a number of actions to mitigate the situation, such actions did not address the fundamental lack of competition for the contract there is currently no reason to believe that in the absence of any outside option the Home Office is able to negotiate a price that was at the competitive level"

Then, finally from the decision, at page 36, this is the very first sentence of the

paragraph at the top of page 36. It begins:

"By 2010 it became evident that the Airwave network was a costly solution and ..the Home Office had limited bargaining power within the terms of the existing arrangement."

This decision sets out that theory of harm, but does not refer to the -- pays no regard to the benchmarking provisions. We will see how the CMA disregards them and explains why they should be disregarded. But before we turn to what the CMA says, let's look at those provisions.

These provisions are in the framework agreement, they were there from the beginning, and that's in the second annex to the notice of application. I have it in annex-bundle 2B and it begins at page 27. You should have the PFI framework agreement, for the parties are on the first page, page 27.

The Police Information Technology Organisation is represented by the Home Office for these purposes and then BT was the original counterparty, ultimately its interest in the network was transferred to 02 none of this is material, it was transferred then to Macquarie and then sold to Motorola in 2016.

If you look at this PFI agreement on page 31, just to draw your attention, clause 2 to the duration of the framework agreement, that was amended significantly in 2016, I will come back to that.

I wish to take you to the change of control provisions to demonstrate the Home Office's veto power over any change of control in Airwave. You get that from page 56, clause 43, first, rights of termination. You see it was clause 43.1:

"The authority [that's the Home Office here] may at any time in writing terminate the framework arrangement on the occurrence of a change in control of contractor."

Change of control gives right to a power in the authority to terminate.

If you go to page 61, we see clause 51 51.1. “Each party shall inform the other party immediately in writing of any proposal or negotiations which have resulted or are likely to result in I paraphrase- change of control.”

The effect is, that the Home Office's consent is needed for any change of control.

If you go up, please, to page 81, we move on to benchmarking. I show you this contract for two purposes

One, is to show the Home Office veto on control change.

Now we are looking at benchmarking.

Before we get into the detail of what the benchmarking provisions provide, I need to make a correction to the notice of application. If you keep this open please, we will come back to it, just very briefly, it's in the pleadings bundle, the notice of application, it's footnote 22, on page 17 of the pleadings bundle. This goes in part to one of the claims the CMA makes and I will have to come back to it when I finish going through the contract.

In footnote 22, hopefully you will see the confidential part marked in yellow and if you read that, please.

I can say the word "waiver" out loud and you will see those dates. The latest date in that last sentence applies to the police only. The suggestion in this currently drafted footnote is that it applies to all of the counterparties to the Airwave contracts and the tribunal knows that's the police and ambulance services in England and ambulance services in Scotland. That latest date, applies to the police only.

The tribunal will understand the significance of that to the continuation benchmarking and the role of benchmarking from 2020 -- from 1 January 2021.

Coming back then to page 81, of annex 2B and the benchmarking provisions themselves. You will see in paragraph 2.1, on schedule 24, a reference to the

benchmarker. The tribunal can read -- I am afraid you will have to read all of this to yourself, I'll direct you to important bits but otherwise I will have to rely on you to read it, I can't read it out loud and I am trying to avoid asking the tribunal to sit in private if at all possible.

THE PRESIDENT: No, we are very grateful.

MR KENNELLY: Then 2.3, this can be read with some care because it's very important. One sees a reference -- perhaps it's best for the tribunal simply to read 2.3 and I will take you to the bits that are of particular materiality.

(Pause)

First of all, one sees there, the definition of value for money and the reference to quality and levels by reference to those available on the open market, And then the test, and one sees the test that's applied, to:

The matters that are “appropriate for market conditions current at the time of the benchmarking exercise."

The benchmarking ensures that the terms, not just pricing, remain competitive, by reference to open market conditions comparable services and prices on a continuing basis.

If you go to 2.4, you see that “following receipt of the results of that exercise” there's a reference to the contents of the framework agreement.

Then the factors that are taken into account for benchmarking are set out in 2.5, a broad range of factors.

Again, if the tribunal could read those to yourselves.

(Pause)

The tribunal has seen that one of the criticisms, the CMA makes of this benchmarking system is that it's not bespoke, it's boilerplate, not sufficiently linked to the Airwave contracts themselves. They also make the point that it's

not easy to find an exact comparator in order for this to work, but one can see that it isn't necessary for there to be an exact comparator, the benchmarking exercises allows for adjustments to be made in order for the benchmarker to do the best that he or she can in finding comparable services and not limited to those in the UK, but abroad also and I will come back to the relevance of that.

If you look at the decision very briefly, keep that open, please, and go back to the decision in the confidential bundle, page 16, it's paragraph 1.30B. The CMA has based its own decisions, it's very decision is based on a comparison between what they say are the much higher costs of the Airwave network in this country compared with similar public safety systems in Europe and price trends for public available mobile telephony, so they themselves are drawing comparisons and we say those are the kind of comparisons that the benchmarking exercise contemplates since 2000.

If you turn over the page, please, in the contract, we are going back to the annex, back to annex 2B, we see the frequency for these benchmarking exercises. You need to read 3 and 4 to see the standard degree of frequency and then the possibility, or the right, to greater frequency in paragraph 4.

(Pause)

At 5, the results of benchmarking, one can see then that, subject to the result of the benchmarking exercise, the consequences flow. We see that in 5.2, 5.3 and 5.4.

(Pause)

The CMA says these provisions are toothless, but you will see that they were relied upon by the Home Office and used to procure very substantial payments in 2016, we will come to that. Materially similar benchmarking clauses appear in

the ambulance contracts for England and Scotland. The significance of that is even greater because of the timing issue that I showed you earlier in footnote 22, of the notice of application.

We see that in the same annex, 2B, the ambulance contract for England, is at page 85. We see that agreement over the page at 86, between the Secretary of State for Health and Airwave for ambulance trusts in England, and the benchmarking provisions, are set out from page 182.

(Pause)

One sees, from paragraph 22.1, again very similar language. Three lines down, in clause 22.1, a reference to schedule 1.4. So this needs to be read with schedule 1.4, which I will come back to.

(Pause)

THE PRESIDENT: Mr Kennelly, you said a moment ago that the CMA's position is that these provisions are toothless and your position is that actually these provisions are not toothless, but they are capable of ensuring a proper and competitive price for the services being provided.

MR KENNELLY: Yes.

THE PRESIDENT: How can we reach a view as to that being right or wrong? Isn't that in itself a matter where unless you had a provision that was so clear cut that actually Motorola was providing services unequivocally uneconomic and uncompetitive, isn't this something which is precisely for investigation?

MR KENNELLY: Sir, perhaps I should be clear. You don't need to decide whether I'm right or wrong. The public law error is that these were not taken into account in the decision. That's the problem.

If they had said in their decision, "We have looked at these benchmarking provisions, we are not persuaded but we will have a look and it's up for discussion, but

we see it's a potentially relevant consideration", that would be one thing, I would have a much harder task. But they have disregarded them, that's the -- in their defence they say they're toothless, in their defence they say: "Don't worry, tribunal, there's nothing to see here it's all useless anyway". But the focus is not the defence, the focus is the decision. In the decision they disregarded them, that's the problem. They're treated as irrelevant, that's what has to be corrected. So they go back and say, "Okay, we've been told by the tribunal they are at least relevant and so we need to examine the problem".

THE PRESIDENT: The trouble with that is, and I articulate this because we haven't had an answer on this, what we are talking about here as well as being a distortion of competition and what the CMA are really doing is looking at the outcome of the process as we stand now and for instance one sees the point in paragraph 1.30, that is referred to in the decision, where they are referring to the significantly higher cost of the Airwave network compared to TOMMS(?), you took us to that.

Isn't it open to the CMA to say:

"Look, we frankly don't need to look at the contractual background, what we need to look at is the position as things stand at the moment? The contract may or may not be something that we need to look at when we are investigating. But provided we have a suspicion that the price is out of line, we don't need to investigate where the benchmarking issues are or are not toothful or toothless. What we are investigating is the position as we stand at the moment, on which the contractual matter may or may not be material, but we will come to that when we investigate."

MR KENNELLY: In my respectful submission, if that was their approach that would

be unlawful. Because it's not open to them to say now, that the contractual position may be irrelevant. The contractual position is relevant, in all circumstances. If they are saying now that they are treating the contractual provisions as even potentially irrelevant, that is an erroneous starting point.

These are relevant considerations and they need to be recognised at this stage and if they have proceeded on the basis they are irrelevant, then that's an error.

The reason for that, sir, is because this is not some background to the market. The contract is the market. They have said that it's competition for the market. This is it. So to say the terms are even potentially irrelevant is a material misdirection.

THE PRESIDENT: Well, it's at what stage you are applying irrelevant -- your client was presented with an investigation which concluded that there was a distortion of competition and the report said:

"Well, frankly, we have looked only at the prices as they stand now, we really think those prices are too high we didn't think it was necessary to look at the contractual provisions to work out why prices are there, so we have not considered the service being available, we have not considered the benchmarking, we have just looked at the price and applied a finger-in-the-air test".

Well, I absolutely take your point, but we are not eight months or however long down the line, we are at a stage where we are saying, well we want to investigate matters and in that context, isn't it enough to say that we have a suspicion that the prices are too high. Yes, of course, those prices will be informed by the contract, but why does the CMA need to go further than that?

MR KENNELLY: The problem is if the CMA says they have a reason, they must give a reason for their reasonable suspicion, and they have not done that in

those features that you see listed, and it's supported by the decision. They must, in taking that decision, have regard to relevant considerations and not have regard to irrelevant considerations. The test is not a tough one for the CMA, they don't need to go into any detail or make any conclusive findings, but these benchmarking provisions are highly material and the CMA has given them no credence at all. In fact, Mr Holmes will try and show you scraps of the decision and he will say, "Here, this is the hook for benchmarking" and, we will be interested to see what they say, but they have disregarded the decision and that's the problem and it's why I said to you at the beginning, which I hope is clear, if they're saying now these are irrelevant, then they are proceeding on an erroneous basis and the tribunal should quash it and set it aside and remit it to them so they recognise that these are relevant considerations that require investigation.

That's in everyone's interests, because then the market investigation, if it proceeds, will proceed on a lawful basis.

MR DORAN: Mr Kennelly, you say, if they are deciding now, paragraph 6 that you took us to starts, "Our current view ..." Doesn't that provide the flexibility for them which you say they are denying themselves? As I understand your argument?

MR KENNELLY: Indeed.

Sir, that reference to "current view" is why -- it's really the very same as reasonable suspicion and what that demonstrates is that the threshold for them is low, proof is not required. But as a matter of law, even their current view must be grounded on relevant situations and avoid material errors of fact. The Tribunal will be more indulgent to them in that regard, because all that is sought, all that is necessary, is a current view, but even a current view cannot

lawfully be based on irrelevant considerations.

The point is it's a current view that you must read in the context of the rest of the decision. If they were saying, "Our current view is based on these considerations and we recognise that these other things may be up in the air and we will come back to them", that would be one thing. But they appear to have disregarded, to treat as irrelevant, really important issues for the purposes of their own market investigation and that's why we ask the tribunal to intervene now to put them right. Otherwise, this investigation will proceed on an erroneous basis.

MR DORAN: Sorry, I do not want to put words in your mouth, so your concern is that the current view, as expressed in 6, excludes anything that isn't identified in 6 as a basis for not only precipitating the investigation but actually what the investigation would consider?

MR KENNELLY: Indeed, and obviously 6 must be read with the entirety of the decision and not read as a statute, it must be read with some generosity but, yes, it's 6 read with the decision. That is the framework for the investigation, those are the matters they are proposing to investigate, and the matters they are proposing to treat as irrelevant. And if there's any doubt about that, we see it in their defence where they, if I may use the expression, double down on what they say in the decision.

MR DORAN: One final point, I do not want to take up too much of your time. Do you think then that the independent panel within the CMA, who then pick this up and run with it, have then the job of only looking at the matters which are raised by 6 read in the context of the entirety of the decision, but not without that?

MR KENNELLY: The group, obviously, will do its own work and presumably the

group -- if matters come up which the group is troubled by the lawfulness of the initial decision, I am sure the group can ask the CMA in relation to that. But one shouldn't have to rely on that happening.

The Enterprise Act establishes the structure in stages, but there are legal requirements to be satisfied at each stage and the reasonable suspicion, or the current view the CMA must express, must itself be based on relevant considerations and avoid highly material errors of fact.

It may not be a high threshold for them, but there is a threshold and if they say in their decision, "These are the factors we consider relevant" and appear to give no weight at all to other very important factors, that is something that calls for the tribunal's intervention. It shouldn't be necessary for us to go to them in the market investigation and say, "You have made an error of law and if you continue with this we will have to challenge you at the end". There is a legal threshold for them to satisfy here and that is still a standard that must be met by them.

MR DORAN: Thank you.

THE PRESIDENT: I'm so sorry, Mr Kennelly, these questions come in one after the other.

MR KENNELLY: Not at all, I hope you will be understanding if I don't finish ...

THE PRESIDENT: Sticking to paragraph 6 in the decision, which we have been looking at, "Our current view is that the market for the supply of (inaudible) network services is not working well", that is their suspicion, if you like.

I think you accept that the market for the supply of these services is informed by the contractual provisions, including particularly the benchmarking for the prices of the services provided.

MR KENNELLY: Yes.

THE PRESIDENT: Isn't this actually a reference to the contractual machinery and isn't it actually just a broadbrush articulation for saying: we can't get into the detail because it's not for us now, but the benchmarking provisions are not, because of these outcomes listed in subparagraph 6(a) through (e), they are not consistent with the market working, which means the benchmarking can't be working, which means they may or may not be toothless.

I mean, isn't that just a statement of what is going to have to be looked at, because you are going to have to say, when you are investigating, first of all, are these outcomes more than suspicions, are they grounded in fact? That's something which will come to later, and that will inevitably snuck into consideration the operation of the market, whether it's working well or not. That will in itself, because the market is defined in this case by the contracts bring in the benchmarking. Aren't you ineluctably driven to having to consider the benchmarking and wouldn't it be wrong actually for the CMA to go further and say, "Well, we are now reaching a suspicion about how the benchmarking works".

In other words, what I am saying is: isn't the point in the reply about toothlessness no more than a filling out of what is already necessarily implicit in the decision?

MR KENNELLY: Sir, your articulation of what reference to the market means in paragraph 6 is not in the decision. Although these documents need to be read with some generosity, with respect that is too generous that is not there. There's no statement in the decision that can be read in that way. Had that been the articulation, I would have to make a different submission, maybe a similar submission, but that is not there. There is a limit to how much generosity the tribunal should show decisions like this, which involve ultimately very serious consequences for the subject of the investigation,

potentially the divestiture of the Airwave network itself.

The second point is that it's not in the CMA's defence that when they refer to market there, they are including of course the potential relevance of benchmarking provisions. Their defence, that's why it's important to see that too, is that these don't move matters forward at all.

I will come back to that. You can take no comfort from the defence that they are making the articulation, sir, that you have just outlined to us.

That's why the decision is important. That reference to market does not -- there's nothing in the decision to suggest that includes or will include proper consideration of those benchmarking provisions.

THE PRESIDENT: May I take it that "market" is not further defined in the decision?

MR KENNELLY: There's a discussion of the market being the contracts and the features of the market including ESN but, no. The crucial point that -- isn't in the decision, it's not the CMA's case. It's not their current case.

May I go back then to the benchmarking itself. We are in annex 2B, this is the ambulance contract for England. I have shown you that these benchmarking provisions are there. I am now on page 182, where you see the frequency provisions. At paragraph 22.2 you see that, again, the frequency of these may change in respect of what are called commodity components.

The tribunal may or may not be interested, I think in the time I will move on, but those are defined with great specificity in the document and one can see in respect of those they are more frequent benchmarking than is permitted.

That demonstrates, I will come back to it in reply, if it's a point Mr Holmes, wants to take up, just how bespoke these benchmarking provisions are to these contracts'. There's nothing boilerplate about them.

Then 22.3 refers to the selection of benchmarker.

22.4 on page 183 deals with disputes and one can see there, the tribunal reads 22.4, you see the consequences of the benchmarking report.

(Pause)

At 22.5, you see the very limited basis for the contractor for Motorola to dispute the benchmarking report. One sees a test in the middle of 22.5 that ought to be familiar to the tribunal.

(Pause)

Then we go to schedule 1.4, which we are told to read with clause 22. That's at page 278 of the same annex. There's a reference 1.1 has to be read with clause 22 of the agreement.

1.2.2 refers to the selection of benchmarked services.

1.2.3 identifies the benchmarker.

1.2.5, over the page, equivalent services. One sees a reference there to comparators and one sees the comparators are not geographically confined -- you see that about four lines down. That leads directly to the comparison the CMA itself makes in its decision, so it's just wrong to say you can't find comparators.

Then, 1.2.6, a very precise approach to questions of good value.

Over the page, 280, paragraph 3, I'll skip more quickly here, the appointment of the benchmarker.

3.4, you see how the costs are addressed, costs of the exercise, the exercise being necessarily a relatively complex one.

Then 281, over the page, there's a benchmarking process itself which, again, you don't need to read it in great detail, but one sees right away what a prescriptive and rigorous process this is, 4.1 and 4.2.

If you go over to 5.2, page 283, again, there's a reference to the approach one has to

take if the benchmark services are not good value.

Then, interestingly, at 5.4 one sees that the changes that arise from the benchmarking process go all one way.

The Scottish ambulance Contract is materially identical, there's no need to go through that. I'll show you where it is. It's at page 525 in the same bundle.

Its clause 22 is on page 616.

Put that to one side now. My submission here, and I have made it to you in the course of my discussion to the tribunal, is that benchmarking is a vital tool in the hands of the Home Office to ensure that prices and services are consistent with current market standards, which is a proxy for a competitive price for service levels and avoids excess profits. It goes right to the issue that the CMA says trigger the market investigation. Again, to the extent that they are concerned about asymmetry of information, again you saw it in paragraph 6, the benchmarker has wider powers to get whatever information it needs.

None of this is mentioned in the decision at all, that's why I say it's been disregarded, it's just a question of me disagreeing with how they have dealt with it, it's just not there. It's treated as an irrelevant consideration. If there's any doubt about that, I think you see it in the CMA's defence and this is where we see how they put their case, which is not, sir, how you put it to me a moment ago, because they could have put it that way and they didn't.

We see that, again best to see their defence in the confidential bundle. Bundle 4, go, please, to page 80, paragraph 34(2).

It's the first point they make. You see a reference there to suspension. You have, the point I made about how that's been done and the services which may continue to rely on benchmarking since 2020.

Then if you go, please, to page 82, 45(1), Motorola accepts these provisions were waived until 1 January 2021 as part of the settlement agreement in 2016. You see the confidential passage, subject to the correction I have made, but I accept the waiver to the extent that you have seen in the amended footnote 22.

I will pause there, because the CMA's point is that because they were waived as part of the commercial deal in 2016, they are irrelevant. But they're not irrelevant, in a competition assessment, or any assessment of relative bargaining power.

You see that from, again because it's confidential it's best to go to the reply in the pleadings bundle at page 68 to see this point.

It's paragraph 15.2(b), the confidential passage in 15.2(b).

(Pause)

What that shows, members of the tribunal, is that the parties acknowledged the ability of the Home Office to invoke these provisions and the fact that they had genuine economic value. If the Home Office wants to trade the benchmarking provisions, that's a matter for it, but that's an assessment, that's a factor that goes to assessing the bargaining power. And that has to be taken into account.

Then the CMA says, these provisions do not affect the pricing concerns that it has in any event, so again not the formulation, sir, that you raised with me. You get that from their defence in the next paragraph, 45(2), and they make three points there. If you go back to their defence, please, paragraph 45(2) on page 83 of bundle 4:

"The presence of the benchmarking provisions in no way undermines the pricing concerns."

In "no way undermines the pricing concerns", it's not, "It's a matter for discussion, we

are not persuaded but we will take a view", it just doesn't undermine them, it just doesn't affect them. Because, first, they say, the contractual provisions identified by me, the ones I have taken you to, are:

"A highly selective and potentially misleading summary of the true contractual position."

We don't understand that, because they don't explain how it is misleading or selective and there's no suggestion as to which provisions we have left out and I would be interested to see which other provisions Mr Holmes takes you to, we think those are the provisions.

The next one:

"Much of their text consists of boilerplate language, there is no obvious application to the Airwave network."

That's just simply wrong, the provisions are highly bespoke and I could take more time tracking the definitions through the contracts, where you see how closely they adhere to the specificities of these contracts.

Then they say:

"Moreover, the benchmarking provisions generally require further negotiation with Motorola before any price cut takes effect."

Again, that's not true. You saw provision for automatic price reductions following from the benchmarking report. Even where the process requires cooperation, that's not surprising for a detailed process requiring the identification of comparable current market prices or service levels and an independent third party.

Again, this isn't drafted as some kind of provisional view. They're telling you what they think.

MR HOLMES: I hesitate to interrupt I only do so in order to ensure there is no

misunderstanding on my Learned Friend's part. This obviously doesn't express the view of the Inquiry group. It expresses a view as to whether the benchmarking provisions in any way undermine the decision which is the subject of review in these proceedings.

To be clear, the Inquiry group will approach the case and consider all relevant matters.

THE PRESIDENT: I don't think I need to be under any illusions that we understand that we have the decision at first instance that we must examine on the grounds that it ought to be set aside. The prism through which we examine whether it ought to be set aside is your notice of application and the documents that follow are responsive to that. I don't think there's any --

MR KENNELLY: Indeed, sir, but because you, put to me how the decision could be read, it is very important to see how the drafter of the decision views it, but that's the point. The Inquiry group needs to start off on the correct path. This is the path that's been at least drawn for them and that's why we ask the tribunal to intervene.

THE PRESIDENT: I can see that there's likely to be an issue about what after-the-event documents say about that decision, and I see the point you make in that.

MR KENNELLY: Thank you, sir.

In any event, all of these definitive statements by the CMA about the uselessness of the benchmarking provisions they were successfully invoked as you will see -- we will come to that -- in 2016.

Sticking to the chronology, the tribunal has seen that in 2015 it's common ground that the ESN was tendered and contracts awarded to several contractors, principally EE, to build the physical infrastructure and Motorola the information

technology. Samsung contracted the following year to provide the handsets. Motorola's contract is called the Lot 2 contract, there are terms on that, to explain what the reference means.

It's common ground subsequently Motorola sought to purchase Airwave and the Home Office's consent was necessary for the sale and CMA merger approval.

In 2016, we come now to a key point of our submission, the Home Office extracted contractual amendments as a condition for its consent.

We get that first if we go back to annex 2B, in the heads of terms, annex 2B at page 725.

Just to show you the parties, this is Motorola and all of the counterparties'. You see that at page 725.

Then 726, the recitals. Recital B summarises what Airwave does.

We can skip ahead to the next page, 727. Recital C, Airwave will continue to provide services under what, as you see, are called the blue light contracts.

Then D, in 2015 Motorola entered into the contract to provide its bid for ESN.

Then E, they had different expiry dates and they want in these contracts to harmonise the expiry dates.

Then F, that's the point about the harmonised approach to the shutdown, national shutdown date, consistent with the transition.

Page 729, please, clause 2.1, "the parties agree to vary the blue light contracts in accordance with the terms of these" heads of terms.

I want to skip over the provisions on termination, because I will look at those in the contracts themselves.

If you go to page 731, at the very bottom, clause 4, benchmarking and settlements:

"Home Office and Motorola shall enter into a settlement agreement and agree terms agreeing to settle certain disputes between them and the basis on which any

future benchmarking may occur under the Home Office contracts."

4.2 there's a reference to the Home Office acknowledging that, “the future price changes under the contracts from a benchmarking exercise shall take into account the capital investment made” . You can see the rest of that Sentence.

Then, please, go to page 740, schedule 1, which deals with the changes to the agreed charges. This was one of the concessions, one of the conditions, which the Home Office managed to extract on the basis of its bargaining power.

740, there's no need to review this line by line, the extent of the reduction, and again there is no need to turn it up, for your note, it is in footnote 15 of the notice of application. It's not disputed there was a reduction, because -- a reduction to the default pricing agreed then as a permanent discount and negotiated by the Home Office then.

Then back to page 742 in this annex, paragraph 6. Here we see payments in respect of benchmarking and VOP. VOP was a different dispute between Airwave and the Home Office which has been settled in these provisions.

What you see here is the Home Office had triggered benchmarking and here Motorola's agreement to make payments in respect -- these are confidential so I cannot read them but the tribunal will see the amounts which Motorola has agreed to pay in respect of the benchmarking concerns raised under the existing agreement by the Home Office and the amount of those payments.

In addition, below that, you see in (B):

"In respect of any periods of service under the Home Office contracts after 2019 ..."

So if the contract overruns, it was due to finish in 2019, it was due to be shut down then, that was the original aspiration, but if it doesn't, “then Motorola shall cause Airwave to make it provide a payment or credit”, and you see the

amount there, on an ongoing basis, for so long as the contract goes beyond the original planned termination date.

Then, the main amendments to the contracts, we see in annex 2B, page 803. I will come back to what the CMA says about this, I have well in mind, sir, the point you are saying, this is all very interesting but how does it show the unlawfulness of the decision to make the reference, I will come back to that point, I need to show you the contractual framework first to show its importance and then I will show you what the CMA said about it.

Now we come to termination and we see that most clearly in the amendments themselves.

If we go to page 803 of the same annex, (inaudible) Contracts, umbrella CCN (?), this is the termination provisions that covers all of the contracts.

Then go to page 859, this is the amendment, this is the new clause 2 and 2A that will be inserted into the framework agreement that will cover all of the contracts. You see the requested change halfway down the page, this is the new clause, duration of this framework agreement to clause 2:

"The framework agreement shall commence on the effective date and, unless terminated before expiry in accordance with the provisions of the framework agreement, shall continue in force until the occurrence of national shutdown, save to the extent that the authority notifies the contractor that the authority requires continued services in respect of any delay transition ... in which case the framework agreement will expire on cessation of that requirement."

As we will see, it's the authority that determines when there should be national shutdown and it determines that not just nationally but also it can determine it for some but not all of certain transition groups. Who they are we see if we skip forward to page 863, under the heading Transition Group, this is where

the transition groups are defined. You see that there are various regions which are user organisations that use these services. What clause 2 is saying is, that the Home Office may decide certain regions are ready to transition and others aren't. The Home Office can require Motorola to continue to provide Airwave for any number of these groups.

There's a financial consequence for that though, that I will come to.

If we come back then, please, to page 859 and clause 2A.1:

"In order to achieve National Shutdown, the Authority shall issue a National Shutdown Notice to the Contractor."

That notice shall state various things.

Over the page, 860, we look at 2A.4. If a national shutdown note is issued in accordance with 2A1, the authorities need subsequently to defer that date for the nation or for any delayed transition group then the authority shall issue a deferred national shutdown notice to the contractor.

Again, if there's a delay, if the authority wants to defer, it unilaterally decides that and issues the relevant notice to Motorola.

Then over the page, 861, clause 2A.8, we see that the charges vary, depending on whether it's the whole country or delayed transition groups, obviously, Motorola, gets less if it's providing services for individual smaller number of groups.

Over the page at 863, as I say, those are the transition groups which may receive their own individual bespoke Airwave service, which means, the network has to be kept going even for one of them, if that's what the Home Office decides. The significance of that was recognised by the Home Office. For that, please go to annex 3, page 236.

Annex 3/236 is an extract from the House of Commons Committee of Public

Accounts where the Home Office representative is being asked questions by the Committee and the Committee is raising concerns about this contract. You see that Q100, a Mr Elphicke says: that the programme is going to end up falling behind there's a risk of an extension to their contract which will cost a lot of money and he says:

"..When I asked Motorola about it they said the Home Office takes the risk ..."

His concern is that the delivery seems partly in their control:

"To what extent do Motorola have skin in the game to deliver this project?"

The Home Office says:

"Fair question, I think they do ..."

This was in 2017:

"... as to an extension period, this could potentially be quite painful for them as well. As Mr Mill's described, they may need to do some capital investment; they may need to keep some people on. The actual income they 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. I think they have a strong incentive for the orderly wind-down of their network."

That is a correct reading, in my respectful submission, of the contract I have just shown you.

What do these provisions do? What is their relevance for the purposes of my challenge? They demonstrate two fundamental errors in the decision, really fundamental errors.

The first is the CMA's error in finding that the extension of these contracts needed to be agreed between the Home Office and Motorola in 2021. That's absolutely fundamental.

Second, the CMA's failure to take into account the bargaining power of the parties in

2016 and the significance of the changes negotiated in 2016. Because it's clear from the decision that the CMA believed that the extension of the contracts to 2026 had to be negotiated in 2021. As we have seen, that is totally wrong.

If you look, please, at the decision in the confidential bundle, page 5. We can skip most of that paragraph, I am looking at the penultimate sentence, they talk about the concerns that we have already discussed. Then they say, penultimate sentence in paragraph 4:

“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."

That can't be dismissed as infelicitous drafting or bad drafting, because it underpins the whole decision. We see that again in paragraph 1.52, if you go to page 22. Here, the CMA says:

"Following the end of the original PFI agreement period [that is 2019] the price had been set through negotiations between Motorola and the Home Office, as set out in Motorola's economic advisers' report, it's a bilateral monopoly because they are on either side of the contract. The outside options [this is important, halfway down] open to the two negotiating parties [these are the outside options after 2019 would] have a significant impact on their relative bargaining powers. We note in this respect that while walking away from the negotiations, the only outside option Motorola and the Home Office have, would mean giving up large profits for Motorola, for the Home Office it would result in the loss of critical communication capabilities for the police, fire services and emergency services in the field."

Here is the CMA finding -- there is no question here of this being up for discussion. This is a finding that Motorola, could walk away from the Airwave contracts,

and that is totally wrong. Motorola is not able to walk away from the contract with the consequence of merely giving up profits. If the Home Office exercised its unilateral option to require Motorola to continue to provide them, as in fact it did, in December 2021, that's happened. Motorola cannot walk away under any circumstances.

It's under a binding legal obligation to continue to provide the service. If it walked away, it would be in breach of contract and potentially liable for huge damages or even an order for specific performance.

In any event, although this isn't material to the point I am making, it would be unthinkable that Motorola would walk away from its core business, this would be extremely damaging for its global reputation. That's by the by, the contract prohibits them from doing, the very thing that CMA, here contemplates.

Which is why, and you have seen this in my submission, we ask ourselves has the CMA read the contract? We will hear what Mr Holmes says about that.

Then, page 31, again the same decision, 1.74:

"We do not agree with Motorola's assertion that the correct analysis of profitability of the Airwave network should combine profits and losses made during the lifetime of the PFI agreement with those in the post-PFI extension period."

Then this:

"The 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 a product of the competitive situation at the time of the negotiation".

That is the post-2019 negotiation.

The extension of the contract, that was automatic once the Home Office elected to exercise its unilateral rights. The negotiations were for further price

reductions, which the Home Office sought, but they weren't necessary for the extension at all.

What does the CMA now say about this? We see that in their defence, page 79 of the confidential bundle. We put this to them, this was put to them fairly in the notice of application and 79 of the core bundle, paragraph 29. They say:

"Motorola's allegation of error is understood to turn on a single phrase (“needing to be agreed by the end of 2021”) in the summary section of the decision."

You have my point that it's far more than just one extract from a summary:

"Those words simply reflect the CMA's understanding of the contractual parties' intended timeframe for the renegotiation in which they were engaged, and which Motorola reflected in its consultation response."

It's not clear, members of the tribunal, if the CMA maintains its position that it was necessary to agree the extension to 2026. The CMA nowhere in its defence admits that the extension was entirely the gift of the Home Office and required no agreement from Motorola. The CMA seems to be suggesting that when it referred to the extension needing to be agreed, it meant the discussion of the further pricing demands raised by the Home Office to vary the existing terms.

You have my point, that a potential variation of existing terms is very different from the need to agree an extension of the contract so as to provide for the continuation of the Airwave services.

We see again in the defence at paragraph 28 -- go back to page 78 of the same bundle -- I will only read the non-indented parts in 28, at the beginning and the end, they say: First: Motorola is wrong to allege that the CMA's appraisal of the contractual provisions was in error. CMA understood the contracts were the subject of renegotiation in 2016, they were then subject of another renegotiation in 2018, and the parties were engaged in a further renegotiation

during the period of the consultation.

Then at the end of that paragraph:

"The decision therefore correctly records the factual position as explained by Motorola the contracts have been successfully renegotiated as the date for the transition has been pushed back"

The CMA, here is avoiding engaging with what it actually said in the MIR decisions, which is, that the extension had to be agreed and that error, CMA's error that it believed that the extension had to be agreed in 2021, that obviously had a major impact on how the CMA regards the bargaining power of the parties. That is the second major error which the contractual provisions disclose in the CMA's decision.

Because you saw that very clearly from paragraph 1.52 of the decision, the CMA thinks that after 2019 Motorola can walk away from the Airwave contracts' and leave the Home Office, leave the country, without critical communications capabilities. Obviously if that were the case, it would have a drastic effect on their bargaining power and every negotiation to extend would be for the market, so it would be appropriate to focus on those later periods. But, as I have shown the tribunal, that view that CMA took, that finding it made, was totally wrong. Manifest and critical error of fact. Because of that error, and of course you see because of that error that's why the CMA treats negotiations in 2018 and 2020 as being equivalent to negotiations, it may be more important than negotiations in 2016 but of course in 2016 the Home Office was wielding the power of veto over Motorola's ownership of Airwave. The terms of the contractual changes, in 2016, show the bargaining power which the Home Office, then had, and that's obvious when one understands the contract, because in 2016 the Home Office had a choice, they could either

require the then provider of the Airwave services, to continue to honour the contract or switch to Motorola, consent to its acquisition of Airwave. That choice gave the Home Office power, bargaining power, and that is completely disregarded in the decision.

Again, this isn't a question of weight, it's just disregarded. In the defence, we see how the CMA deals with that. Again, I am looking at page 82 of the confidentiality bundle, paragraphs 43 and 44.

"Motorola contends the CMA's assessment of the parties' respective bargaining power is flawed by reason of its failure to consider the strength of the Home Office's position in 2016 or the effect of the changes in 2016." They say this:

"The allegation of error is unwarranted. The focus is on *the potential of the current market realities to give rise to adverse effects of competition.* The 2016 renegotiation was followed by subsequent renegotiation, the CMA was reasonably entitled to consider the negotiations and their outcomes overall in assessing whether there were reasonable grounds to suspect the competition was being restricted."

That, again, is ex postfacto reasoning. Because one looks in vain for an overall consideration, even in summary form, in the decision itself. The decision does not consider the respective bargaining power of the Home Office and Motorola in 2016 at all. There is no overall consideration.

The CMA contends that it must focus on the Home Office's ability to negotiate for further price reductions in 2018, but it ignored the highly material or relevant considerations from the 2016 contractual changes.

The negotiation in 2018, the negotiation that they do focus on, we can see was the Home Office seeking to bargain for a discount from the prices it had agreed in 2016.

An assessment of the bargaining power of the Home Office had then, if that is the focus, would shed no light at all on the bargaining power the parties had when the contract was up for grabs in 2016.

That's what I mean about them going off on completely the wrong foot, this isn't an immaterial error, their starting point is seriously flawed.

Those, members of the tribunal, are my submissions on the contracts themselves. Remember I said that the decision has two main features, two broad headings, that's the contract themselves.

The next is the alleged incentive Motorola has to delay the ESN in order to continue to obtain excessive profits from the Airwave contracts. That's the allegation.

To understand that we need to look at a deed of recovery.

Unsurprisingly, in this position of very strong bargaining power in 2016, the Home Office contemplated this problem arising and negotiated a deed of recovery to deal with it.

We see that in annex 2B again, page 790. Page 790, deed of recovery and please go to 792. Recital C, please. We see that in 2015 Motorola entered into a deed of undertaking with the Home Office to acknowledge it needed the approval of the Home Office before it could complete the Airwave transaction.

D refers to the ESN agreement 2015.

Then F:

“As part of its usual risk review process prior to the award of the Lot 2 Agreement, the ESN agreement, the Home Office identified a risk in Motorola's common control and ownership of Airwave and the ESN company, the ESN unit, such that Motorola could manipulate delivery under the Lot 2 Agreement in order to financially benefit under the (inaudible) contracts.” The very theory of harm which the CMA says ought to trigger the market investigation.

"The purpose of this Deed is to specify the approaches to remediation and the financial remedy that might apply in the event of either a Mobilisation delay" that is the building of the ESN network both in terms of the technology and the kit, and a transition delay, that is when both networks are ready for transition.

"The Authority agreed to provide its consent to the Airwave Transaction on certain conditions, including (among.. other things)… this Deed is entered into," all demonstrating the Home Office's bargaining power at the time.

Then the definitions on the same page, 793, you see a reference to key milestones in the Lot 2 agreement, that's the agreement as I said, that is the ESN agreement for Motorola.

And recovery charge adjustments, the penalty, the financial consequences of Motorola causing delay.

2.1 "under this deed is agreed if pursuant to the Lot 2 Agreement Motorola causes a delay in excess of ninety (90) days that isn't recovered during implementation in accordance with the clause below," that demonstrates I will just say for these purposes, a mobilisation delay.

We see in 2.2 that if there's a mobilisation delay -"both parties use reasonable efforts to try and make adjustments to seek to avoid any overall delay." So the effect of this is to allow a chance for Motorola to catch up to undo the delay which it's caused.

Then 3.1, mobilisation delay or decision to delay notification, the authority serves a mobilisation delay notice on Motorola and we see at 3.2 what that must include, the date when the delays have occurred, the reasons for it, the value of the delay payments and then that the mobile network has been provided by the MS supplier, that's EE.

The way this works is that for these penalties to be applied, the delay has to be

caused by Motorola and Motorola cannot be the cause of the delay if, for example, EE has already caused a delay. If the network isn't ready then Motorola hasn't caused a delay to the completion of the network.

One looks at these terms and one has to remember from a competition assessing point of view these were the terms that the Home Office negotiated when it was in a position of very strong bargaining power in 2016.

Then, at paragraph 4, we see the financial remedies 4(b), where there's been a period of "Mobilisation Delay that occurs after the National Shutdown Target Date." So everything is ready but Motorola has caused a delay, then 90 days are allowed. Then the financial penalties accrue.

We see that at 801, charge adjustments. 801 if Motorola causes a delay to the national shut down, we see the penalty that applies. And the percentage figure there -- I assume it's confidential for present purposes.

THE PRESIDENT: Yes, I am going on that basis for these documents --

MR KENNELLY: As am I, sir, yes. But you see the figure.

THE PRESIDENT: Yes.

MR KENNELLY: There are worked examples over the page at 802. But you have my broad point that in a position of very strong bargaining power, the Home Office, insisted on this structure to deal with the contemplated delays to the delivery of the ESN.

There were variations to the deed of recovery in 2017, I will show you those briefly, annex 2B, same annex, page 991. It's a Letter to the Secretary of State. 1.1, again, recalls that: "The Authority agreed to provide its consent to the Airwave transaction on certain conditions, including that they entered into the Deed of Recovery."

Then you see a further deal they struck in 2018 at 998. This is a point that's taken

by the CMA against me. One sees 998, there's a table, "Key terms". One sees a reference to a discount -- I am looking at the third column. There's a reference to a discount at paragraph 1 and then one sees a reference to a waiver in paragraph 4.

As I have explained, that date you see at paragraph 4 applies only to the police and not to the ambulance services of England and Scotland.

That is what the Home Office negotiated, as I said, it's position was strong bargaining power, what does the decision say about it? That's in 1.42 in the core bundle behind page 20.

Here at least, unlike benchmarking, the deed of recovery is mentioned: “The Home Office, told the CMA that despite the delayed date, the deed of recovery mechanism has never been applied” never been applied for a number of reasons.

Do you see (a):

"The deed of recovery is only applicable once ..."

And you have my points about that.

The short answer is -- and again the short answer which doesn't find any sign anywhere in this decision -- is that regardless when it can be invoked, it's a powerful financial incentive to avoid delay, delay is the concern.

Then (b):

"The principle underlying the deed of recovery was the recovery charge would ..."

There's a reference to changes “the priority of it was to motivate delivery, rather than to punish Motorola- as evidenced by reductions.”

Again, that's precisely the point. The financial incentives are designed to ensure compliance on timing compliance, not to punish delay. Delay is the concern and that demonstrates that the deed of recovery works to avoid delay.

If milestones are met, the penalty of the charge reduces.

(c) There's a reference to the amount would not be sufficient deterrent to Motorola, hence the reference to the comparison that may be conducted by reference to matters known only to Motorola. But for that benchmarking is relevant. But, again, no reference to that in the decision. That's exactly what you would expect to see here, even just to recognise its relevance, but there's no reference to it.

Most importantly of all, what is not in this decision, what is completely absent, is a recognition that when one looks at a deed of recovery, from a competition perspective one has to ask what was the bargaining power of the parties when they made this contract?

It was just a bad bargain that was entered into by a party exercising very strong market power, there's no question (inaudible) at all. That is completely absent from this decision and there's not even a recognition that that is a potential line of enquiry, that the enquiry group should undertake.

Critically, this is not just a question for the Home Office. In 2016, when the CMA approved this merger, the takeover of Motorola of Airwave, they were fully aware of the risk of delay and they had all of the contract rational in the tribunal. You see that in a submission that Motorola made to the CMA and that's in annex 3, annex 3 to the notice of application, page 276, paragraph 16. These are submissions that Motorola has made to the CMA. The point you see here, and it's really a question of fact, I am looking halfway down the paragraph, the sentence:

"In addition, as disclosed to the CMA at the time, at the time of the acquisition ..."

I am again assuming this is confidential, so I will not read the rest of it, there's reference to what Motorola's financial advisers modelled. If you will read to

the end of that paragraph, please.

(Pause)

My final point on this really is whether in fact Motorola has caused any delays to the ESN, there isn't a single piece of evidence that shows that Motorola has actually caused a delay to the overall project. Whatever problems Motorola have they have not caused the project to be delayed. If that were the case we would have seen the Home Office putting Motorola at least on notice that the deed of recovery provisions were going to be invoked.

There's no sign of that.

Those are my submissions on ground 1.

Now we move on to ground 2 and the profitability assessment.

I have three grounds to make on the profitability assessment.

The first on the relevant period, and that is determined by the purpose of the profitability assessment. For that, we need to go back to the decision, the decision is in the, as I said, you have it, now I am looking at paragraph 1.72 on page 31 of the confidential bundle.

The purpose is set out here. It says:

"The extent to which the results of profitability analysis indicate limitations in the competitive process may depend on both the size of the gap between the level of profitability and the cost of capital and the length of the period over which the gap persists."

The main reason for profitability assessment was to identify whether there was a gap between profitability and the cost of capital which might indicate limitations in the competitive process.

Motorola argued that the competitive process began with the competition for the contracts and so you have to look at the whole of the period from 2000 to

assess profitability over the whole of the period.

You see 1.73, Motorola also referred to the economic model that the Home Office agreed at the outset of the Airwave project, which anticipated a pre-tax nominal investment rate of return for at least the period from 2000 to 2019 to be that figure.

But the CMA disagrees and you see what they say at 1.74:

"We don't agree with Motorola's assertion that the correct analysis of profitability should combine the profits and losses made during the lifetime of the PFI agreement with those in the post-PFI or extension period ..."

They are saying for not for the whole of the period:

"The extension to the original PFI period was not an automatic one and involved negotiations spanning several months. The extension of 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 negotiation of the original PFI agreement."

They are saying we need to focus on 2018/2019.

But you have my submission. That if their reason for using 2020 to 2026 is because the extension needed to be agreed after 2019, that is plainly wrong and that is the reason why they are focusing on bargaining power in 2018/2019, because they think the whole contract had to be -- the extension had to be negotiated.

That's what's led to the focus on bargaining power in 2018 and has caused them to fall into error, because the true time when the extension was locked down, when the power to make the extension was locked down was 2016, and that's when the bargaining power was relevant.

THE PRESIDENT: Sorry to interrupt, I should have probably raised this after your

ground 1, but we have transcribers here, don't we?

MR KENNELLY: I'm sorry?

THE PRESIDENT: Not at all, I've been reminded myself.

MR KENNELLY: I apologise to the transcribers and I will stop.

THE PRESIDENT: Shall we rise for five minutes. I have interrupted you rather indelicately mid-flow. Let's resume at 11.35. Thank you very much. We will rise.

(11.27 am)

(A short break)

(11.44 am)

THE PRESIDENT: Yes, Mr Kennelly.

MR KENNELLY: Thank you, sir.

I was in ground 2, I said I had three points in ground 2.

The first was this question of when the Airwave contracts, should be truncated for the purposes of the profitability assessment.

The CMA contends, we have seen this in their defence, that this is a technical question where a substantial marginal appreciation is due. In our submission, that's wrong. The date on which the Airwave contract should be truncated for this profitability assessment is a point of principle based on the facts. The CMA's decision on when to truncate the Airwave contracts for its assessment, we have seen, is based on its misunderstanding of the contractual changes in 2016.

Finally, on the purpose of the profitability assessment, there's a suggestion that the CMA may be changing its case in its defence. I will just take you to it very briefly, at page 81 of the confidentiality bundle, paragraph 40. The CMA says there that it's:

"... using its profitability assessment to understand Motorola's recent and ongoing incentives to delay and/or shape ESN delivery in ways which prolong the lifetime of the network."

That's a reason they give for the forward-looking assessment.

We have seen in the decision that the purpose is not that, the purpose is broader. They are looking at limitations in the competitive process. Which is the prior question and it's not limited to this question of incentives to delay ESN.

Then the second point, as I said on this ground, is the CMA's use of net book value to calculate the investment rate of return. At first glance, members of the tribunal, that may well seem to be a technical expert issue, but really is a simple fundamental error and it's in part admitted by the CMA if one looks at it ... because we see in their defence, this is again in the confidentiality bundle, paragraph 49, page 84, they accept that the purpose of their choice of net book value is a rough-and-ready estimate for the replacement value of the assets. What they are looking for is a way of measuring the replacement value of the assets, that's the test they are using net book value for that.

They say it's a rough-and-ready measure. If you read at the end of 51, they say the reason for going for it as a rough-and-ready measure, going for net book value in particular, is that anything more would have required a full investigation. You see that in the second half of 51, “Motorola avers that the Airwave network is “*highly differentiated*” and “*bespoke*” and we don't suggest how the replacement cost or other economic valuation could have been proportionately arrived at by the CMA prior to a full investigation.”

No one is suggesting that a full investigation of anything was necessary. Insofar as the CMA wanted to rely on the investment rate of return in the decision, they could have suggested in their pre-decision consultation, for example,

an appropriate measure of economic value and they could have considered the responses, without any exhaustive analysis or conclusions.

What's clear is that once the CMA decided to rely on an investment rate of return, an IRR analysis, in the MIR decision, they then had to suggest a means for calculating that. And net book value was and is manifestly inappropriate.

That is a pure accounting measure, it's a very simple point. Long-lived assets, such as are in issue here, can have zero net book value after years of depreciation or amortisation, they can still cost a huge amount of money to replace. We see that from the OFT report, prepared obviously by the OFT, and relied upon by the CMA in its defence. Can I just take you to that briefly, I need to show you the degree of error. That's in annex 3 to the notice of application, page 5.

That's just the first page so you see what it is. Page 17, the IRR methodology and forgive me, if this is going over old ground for the tribunal

"Economic activities typically have a pattern of an initial investment… followed by a stream of revenues… A profitability assessment refers to the measurement of the rate of return made on investments in …the line of business….., and compare… it against an appropriate benchmark. If the…. returns are higher than the benchmark.." It can said to be profitable; If lower: unprofitable.

Then at 1.13 "from an economic point of view the profitability of an activity can be defined in terms of net increases in value resulting from that activity and realised over time. The IRR and the net present value are the conceptually correct methods for measuring this profitability because they take into account inflows and outflows over time and reflect the economic preference of time preference of money."

Then 1.15, about three lines down:

"The literature shows that it is possible to estimate from accounting data the IRR

over a segment of an activity's lifespan. You can truncate it, the theoretical framework for estimating this truncated IRR is of direct relevance to the question of policy analysis, it needs data about cash flows in the activity over the relevant time period and the asset values [this is really important] at the start and end of the period."

"Asset values should be based on either the cost of replacing the asset, specifically on a 'modern equivalent asset', or MEA basis, or the present value of future earnings, or the value derived from selling it, (its net realisable value, NRV)."

Over the page, the "valuation principle is known as the value-to-the-owner principle. For an assessment of excessively high profits, which is what concerned the CMA here assets should be value on an MEA basis, modern equivalent asset.

Then at page 55, one sees the value to the owner principle is broken down from paragraph 4.12. First bullet, "*the modern equivalent asset…*- theoretically, this is the lowest cost of purchasing assets today that can deliver the same set of goods and services. Present value is expected future cash flows discounted at the cost of capital." NRV extension of the price of the asset would fetch if it were sold or disposed of today.

Then please go to 79. Approaches to asset valuation, 5.3:

"Following the discussion in Chapters 3 and 4, the appropriate valuation for profitability assessments and competition analyses is the MEA basis most readily available estimates of asset values from audited accounts. However, these normally provide asset values based on historical costs, which may bear no resemblance to the MEA value."

Which is an echo of the point I made to you earlier.

Over the page at 5.6, page 80. Again, asset valuation can be based on various approaches. The approach commonly used in accounts is the historical cost

approach, which values assets based on original purchase cost less depreciation, net book value. Alternatively, assets could be valued according to their replacement cost approach, which asked the question which you have already seen in the earlier passages.

There's a cost of replacing the assets and the MEA valuation and we have been told, that the appropriate course, is the MEA valuation, because that's how you get to the replacement value not simply net book value which could well be zero, based on historical cost and depreciation.

5.9, “The question arises as to how MEA estimations could be obtained, whether rapid technological changes or high-level of intangibles or, as here, long-lived assets, the historical-cost values used in accounts may bear little resemblance to the MEA value on such basis, adjustments can be made or estimates may be obtained.”

Then 5.10: “In practice, audited accounts should be taken as a starting point- the main advantage of using them up to date is their account status is objective and audited, and under certain circumstances the historical costs might not be too different from the concept of MEA value and they would be close to MEA value”, where: there is no great technological change no significant deflation or inflation and no significant intangible assets.

It may be said against me in reply that that, provides a hook for starting with using net book values as a starting point, but you will see in the decision there is no suggestion at all that net book value provides a reasonable proxy for economic value for the reasons suggested at 5.10.

If this is what they are going to rely on, I anticipate the points, it would at least require them to say they were using net book value, as a starting point in order to get to the economic value and give a steer as to how that economic

value is ...

Because if replacement value is the test, it is irrational simply to use the net book value. There's no suggestion, as I say, that they are using this as a starting point to get to NPV or MEA. It's a very simple straightforward point, on how they approached asset valuation, even to ground a reasonable submission.

The third of my three points on this ground is how the CMA treats the investment rate of return which the Home Office actually negotiated and positively endorsed for the period 2000 to 2019. You have seen that figure, I am assuming the tribunal recalls it from the confidential documents.

THE PRESIDENT: Yes.

MR KENNELLY: If you go to annex 3, page 4, the same bundle, back to page 4 in annex 3, this is again a document from the House of Commons Committee of Public Accounts in relation to Airwave, 2002.

Actually this isn't a confidential figure, because it's in the public document. The question is asked at paragraph 7, page 4, first column, halfway down, where the chairman asks, again, the Home Office representative Mr Webb, about this 17 percent return, which is calculated as being what would be the right sort of return, how is that figure arrived at, why is it deemed to be reasonable?

The Home Office said:

"It's arrived at by 02 the counterparty, we took advice from both our technical and our financial advisers in reviewing that, considering the level of risk we were transferring to them and the fact that there was no precedent for such a large system in previous procurements, new technology, several stakeholders, there were issues relating to site acquisition, we considered 17 percent was fair endorsed at the time by both ourselves and the Home Office and we felt we had actively taken independent advice and the return was fair."

And we made the point that in grounding its reasonable suspicion CMA did not ask -- there was no suggestion the Home Office revisited its premise that 17 percent was a reasonable rate of return. Now, the CMA's response is, that the Home Office had limited bargaining power within the terms of the existing arrangement, but that's not an answer to the point. At the very least by way of reasonable enquiries, on the very question of what is the appropriate IRR, the CMA had to ask if the Home Office's view had changed and if so, why?

Relevant consideration was ignored and there was an unreasonable failure to make the most basic and straightforward Inquiry.

That is the end of my third point on ground 2.

THE PRESIDENT: I am very grateful.

MR KENNELLY: Ground 3 is a point on the definition of the market. Again you have seen it in my notice of application, it's a short point which I have largely teed up.

THE PRESIDENT: Yes, I was going to say: there's something of a nexus between your ground 1 and your ground 3.

MR KENNELLY: Indeed, and that's why I can take it quickly.

It's common ground that a full market definition is not required at this stage, but some market has to be identified under the statutory test. We saw that in the test under the Enterprise Act, there needs to be some market defined to trigger a market investigation reference and there are, again, fundamental errors in what CMA has done.

We see that in their decision at page 13, paragraph 1.20. Here they explain their concern, their approach to the market and they say:

"Once the original Airwave contract is in place, competitive constraints within the contract would be expected to be minimal until the prospect of it being

replaced by a new contract new supplier comes into play [that's ESN]. Where the transition from one long-term contract to a replacement one takes a period of time there can be some competitive constraints during the transition period on the incumbent supplier from the impending loss of new customers to the new suppliers, particularly if there is scope to retain some customers for longer, for example by offering attractive prices to encourage customers to delay their transition to the new provider."

Just pausing there, that is a reference to competition between Airwave and ESN, where you have the two networks, you want to encourage the provider under the old contract to offer better terms to encourage customers to stay and delay switching.

We see that repeated in the defence. That again isn't just a slip of the tongue from the CMA, they say it again in their defence. Please go to that, again in the confidential documents bundle, page 51. Sorry, it's paragraph 66(4), page 88.

Again they say here, echoing what we just read:

"It is not irrational for the CMA to consider the availability of ESN will affect the bargaining power of the parties by changing the outside options open to them where the Home Office can realistically cease to use LMR as a way of procuring better terms."

Again, I am not trying to argue round the margins, once ESN is operational, it's not going to be used by the Home Office as a way of procuring better terms for the service of the Airwave services. It's common ground that ESN will replace the Airwave services. They will not compete with the Airwave services. The emergency services aren't mobile phone customers who have a consumer choice, they can switch from one network to another, they can upgrade from 4G to 5G. These are public services and the policy of the government, it is

common ground, is that they will transfer the services from Airwave to ESN once ESN is operational and then the AW network the Airwave network will be shut down.

The availability of ESN can't affect the bargaining power as the decision suggests. The bargaining power is determined by the terms of the contract which you have seen, and the bargaining that takes place is the trade off between the parties under those terms, they could trade -- the benefit of one term against the benefit of another.

But whether ESN is ready tomorrow or in 2026 does not alter that. In any event, members of the tribunal, there is a separate point about Motorola's, involvement in ESN, the timing of that. That's, again, confidential, so for that I need to take you to the notice of application and ask you to read it. In the pleadings bundle, page 24.

This goes to the reality of what the CMA is (inaudible) in terms of Motorola's involvement with ESN. If you look at page 24 of the pleading bundle, page 59.5, you will see, the confidential passage and the non-confidential sentence that follows it.

(Pause)

It's common ground that ESN will not be ready until 2026. From what you are reading here Motorola's delivery of the ESN Lot 2 contract cannot be a feature of the Airwave (inaudible). The fact that this can even happen, the fact that, what you have read here takes place, illustrates it's wrong for the CMA to treat the separate question of Motorola's delivery of ESN as a feature of the market for the provision of Airwave services. The market for provision of Airwave services is governed by contracts.

You see how the defence deals with this, in the confidentiality bundle, 66(v),

page 88. There the CMA say the fact that Motorola has done what you have read it's done “has no bearing on whether it was rationally open to the CMA to treat that involvement as a *feature* throughout the *market* the purpose of assessing whether there were reasonable grounds for suspecting distortion of features of the market can obviously change,” and then we have that confidential passage.

Again, we say that's seriously wrong because the CMA's decision identified Motorola's involvement in ESN delivery as concerning a feature of the Airwave market, the Airwave network market, because Motorola had the incentive and the ability to delay. It was their ability to delay delivery of ESN. You have now seen when Motorola's involvement in ESN delivery will cease. That means, they don't have even a theoretical ability to delay the provision of ESN. It's common ground that the ESN network cannot be delivered before 2026 in any event, so this feature, this alleged feature, can't exist.

The fact that they may be involved in current price negotiations for the remaining period is irrelevant. Motorola would get whatever it gets under the contracts between now and the date you see, but the pace of ESN makes no difference to that, that can't be ready before 2026.

That really is my short point on their error on the market. I appreciate, again, I have to show a serious and material error to get home on that, and that's why it really is as clear as that.

My final ground is the challenge to the administrative timetable.

This is a fundamental question of fair procedures. This is the most rapid market investigation ever. Already, the hasty manner in which it has been conducted has caused material unfairness and errors on the part of CMA.

I will begin if I may with the CMA's own guidance, the supplemental guidance of

2017. That is in the authorities bundle, page 954.

You see at page 28 of that typical timetable -- we appreciation this is simply a description of a typical timetable, to give you an idea of the stages which are included in it. I am looking at page 28 of the internal numbering of the document itself. The statutory deadline is 18 months -- sorry, it's page 985. Paragraph 31 -- sorry, you see there are various stages that should be addressed in that timetable, which gives you an idea of why these investigations do often take up to two years.

Then at 3.31, information for provision of disclosure and the various stages are described.

If you go, please, to page 31 of the internal numbering, and paragraph 3.39. It says:

"In addition to drafting the formal terms of reference for the market investigation the CMA board may append an advisory steer to the reference decision setting out its expectations regarding ..."

I read this with some care, because it's again our concern about the steer that the Inquiry Group was getting. The CMA board says:

"They set out expectations regarding the scope of the market investigation and the issues that could be the focus of the investigation."

Then we see the timetable that's actually ordered. We see that in the application Bundle, page 76.

You may have it in various other places, it appears in a number of different documents.

It's also in annex 1 behind the notice of application, page 76.

The tribunal sees there the period within which the whole investigation is planned to be covered. From October 2021 to June 2022. April 2023 is the statutory deadline, that gives you an idea of how much scope there is for a more

generous timetable if the CMA were minded to order it and that's not the approach they have taken and we have real concerns about their reasons for such haste.

We have those concerns by reference most recently to the communications which were disclosed to us after these proceedings commenced. I will take you to those now. They are in the defence bundle. defence Bundle, page 1. You see at first this is a letter from the CMA to the Home Office, describing the decision to make a reference.

If you go to page 5, paragraph 16, you see that: “A draft timetable setting out the key stages of the market is contained in annex B”, So, they are consulting the Home Office on the timetable and they invite the Home Office, to make representations and they say: "Once it's finalised it will be published".

Then we see what the Home Office said in reply. If you go to 27 October, it's page 13. The letter begins on page 12, but the administrative timetable, is addressed on page 13.

Motorola wasn't given an opportunity to respond to these representations, we weren't even informed of their existence until after the decision had been taken and that has caused real prejudice and we see it straight away from this statement. So look what the Home Office told the CMA, second sentence, “having agreed with the CMA Board its Advisory Steer Motorola has a significant level of market power and so forth, that market power provides Motorola with the means to drive significant excess profits, a burden of which falls on taxpayers.”

There are two points here I want to draw from this paragraph.

The first is this:

"The value of these excess profits is such that it is vital the market investigation is

resolved as quickly as possible, for every day the Airwave contract sustains, the Taxpayer pays an excess [of that figure]."

Just pausing there, that figure you see is the value of the -- that's the entire Airwave network charge, that's the whole thing.

That is in effect saying that the potential result of the market investigation, or the result they are urging, is that the CMA will impose remedies that result in the Airwave network being provided for free.

Then we look at the second reason:

"Additionally, the longer the delay the greater the impact on British citizens of their Blue Light radio services not benefiting from valuable improvements in functionality and coverage deriving from a replacement service."

That improvement, the replacement service, is of course the ESN network. It's common ground the ESN network is likely -- the earliest it's likely to be operational is 2026. The timing for the market investigation proposed even by Motorola was December -- the conclusion of it was December 2022. On no view, on no possible rational view, could the timing of the market investigation impact when ESN comes on line. There's no question about that having any effect at all.

Then, we could have pointed that out to the CMA had we seen this, the CMA ought to have seen it themselves, it's obviously a false premise for what the Home Office are telling the CMA. Then this was put -- these inaccurate statements were put to the Inquiry Group, we see that, put to them without correction and taken into account, by the Inquiry Group's meeting decision.

We see that in the same bundle, page 15, an email of 28 October, I will start -- I will go from 15 to 16, but the email begins about one-third of the way down the page on page 15, 28 October 13:28. Email to the members, they are referring

to representations on the timetables, there's a reference to Motorola's representations.

Over the page, there's a reference to the Home Office representations and it says this:

"The Home Office on the other hand asks the group to consider whether the timetable can be further accelerated, pointing to the high cost to the taxpayer [that is that figure] and this delays to the benefits of innovation of any delay."

The false statement that the timing of the market investigation could delay ESN is put to the group without correction.

Then we see the discussion.

First of all -- sorry, one last point on this letter before I switch over. At the bottom of page 16, the Inquiry group is also told, if you see the very end of the last bullet at the bottom of page 16, the penultimate sentence, the Inquiry was told that "the proposed administrative timetable was therefore consistent with the BA Airports' timeframe."

That market investigation took two years. Had the Inquiry group dug deeper they would have realised that themselves, but the impression they are getting from the CMA is that there's consistency in timing between the eight months we are given and the two years that took place in BA.

Then we see how that went down. Back to page 15.

The first response from a member of the group, a member of the panel. That member of the panel says in the last sentence:

"Will each party have seen the other's response on this? It might be helpful if they did?"

Well indeed, but we were never shown what the Home Office said, the false statement was never corrected.

Then we see at page 14, halfway through -- before I move onto the next point, that point I made is not just a point in passing, that's a critical question on procedural fairness, that a decision maker shouldn't rely on potentially influential material that's withheld from the affected individual. We have our authorities on that in the first footnote in our reply, I will not take you through them but it's a question of natural justice. It's such an important question as this accelerated timetable.

Then we come back to the discussion with the Inquiry group, 28 October still, 5.27pm. You have seen the bit about seeing the other party's response, I have taken you to that, but I also want to show you the very first sentence in that email:

"That one party thinks it's too long and the other thinks it's too short suggests it's probably about right."

Again, that's not appropriate. It's fundamentally inappropriate as an approach to a timetable, in a market investigation. We are, the subject of the market investigation, the burden is on us to generate responses to engage. Our rights are the ones at stake, it's not like adversarial litigation where one has to often find a middle way between a defendant and a claimant. That's an inappropriate approach to a timetable in a market investigation.

Then, going backwards, we see on page 14, a suggestion, you see the email 29 October, 09:35am, that it might be necessary “to send a message to Motorola that they cannot just play for time.” There's really no question of us playing for time. This is the most rapid market investigation timetable ever suggested and the one we were asking them to adopt would still have been the most rapid ever.

MR HOLMES: Can you read on to the end of the paragraph, please?

MR KENNELLY: "However, there is nothing persuasive in the letter from the Home Office so I think we have to stick with the proposed timetable."

But the damage had been done. I mean we don't know what impression it took from the Home Office material, which bits of it were unpersuasive, one can only guess. It's cold comfort to Motorola to read that last sentence and that email from one of the panel members, we have no idea how it resonated with the others, In the face of a manifestly false statement, from the Home Office that was passed to them without correction by the CMA. That's not how particular frameworks (?) ought to work, we shouldn't be just hoping that false statements will not resonate in the minds of the decision makers.

This is in the circumstances where one of the remedies that has been recommended is divestiture of the Airwave network, the commercial interest for Motorola could not be greater. We are not suggesting that the members of the Inquiry group did anything other than seek in good faith to reach the right decision, but they were not well served by the communications received, from the staff team. And that's the basis of our concern that we express to you today.

THE PRESIDENT: Mr Kennelly, the substance of your point is that the CMA engaged in one round of consultation not two, in that they send out the, amongst other things, intended administrative timetable and ask the Home Office and Motorola to come back. They both do and there is then no further ability to respond in that no one asks the Home Office what they think about Motorola's submissions and no one asks Motorola what Motorola thinks about the Home Office's submissions? That's the essence of the problem, isn't it?

MR KENNELLY: It's one manifestation of the problem. A function of the excessively rapid approach of the market investigation. That's the most recent manifestation of it and I rely on everything else we say in our notice

application, this is just far too rapid to be fair. And that's our concern. It's very hard to say to you now how it will turn out to be unfair but we are entitled to say to you in advance it's just not conceivable to have a fair process with such an accelerated timetable and we are concerned that the reasons for accelerating it were based on false information, which should have been corrected.

THE PRESIDENT: Just to – actually, two points I make.

First, just to be clear about Motorola's interest in being consulted on the timetable. Would you say that Motorola has a legitimate interest in the speed of the Inquiry, of the investigation? I beg its pardon, or is Motorola's interest confined to having a fair process of Inquiry such that it can put its case?

MR KENNELLY: Obviously it's the fair process that's important, but that is -- that requires it to go at a reasonable pace and that's why – plainly the legal standard to which the CMA's subject, is fair procedure. Our concern is -- you have seen it, it's that this timetable, is so rapid, as to be procedurally unfair and we already see errors arising from the haste with which it's being pursued. And there's no reason for this excessive haste. If it were extended only as far as December 2022, it would still be the most rapid market investigation ever. We made very modest suggestions to the CMA and all we ask for, is a fair process.

THE PRESIDENT: My second question is really one on prematurity. I mean let us suppose that the timetable is overaggressive or overambitious, call it what you like, wouldn't the better time to test that be two or three months down the line when Motorola are told you had better respond to this point in six hours, because that's all that the timetable will accommodate? I have picked a deliberately extreme example to make clear the ability to challenge the

conduct of the enquiry and its course, which we are doing here. I am really suggesting that the ability to extend is one which I am putting to you, ought to colour how we see the timeframe.

So isn't the better time to challenge the process, to say:

"Well, look, they have gone for this accelerated timeframe, we have misgivings and expressed it to them, we are now being faced with a deadline which is just unreasonable and they are refusing to extend the timetable to make it fair."

Because one of the advantages, of course, of an eight-month investigation process is that you have quite a lot of flexibility to extend up to the 18 months.

MR KENNELLY: Indeed, and we saw an example of that approach in Asda, where the parties came to the tribunal over a particular deadline over the Christmas period and in circumstances that did not work, but the question is prejudice.

If prejudice arises because of a particular deadline or particular act of unreasonable behaviour, by the CMA, then they can come to the Tribunal in the middle of the process and no one can say it's premature.

The question for us now is we have to persuade you that we are currently prejudiced and that the prejudice is that because this whole timetable is so accelerated, at every stage we are subject to unnecessary and unreasonable burdens in terms of evidence gathering and allocation of resources.

The problem with prejudice like this is that it's very hard to show a concrete problem, but it's insidious. If a team is under unreasonable or unnecessary time pressure mistakes can be made, things can be missed, the prejudice infects the whole process. Now that's a price, that is sometimes necessary to pay when a matter is genuinely -- as we saw over the financial crisis, when perhaps certain decisions had to be taken very quickly. But it calls out for compelling justification when it's as rapid as this and it just isn't there. That's

the problem.

The timetable causes prejudice at every stage. It's very hard to identify it, because of its insidious nature. The question then is: why is it so rapid? And there's no justification for this extraordinarily rapid timetable. Except, potentially, what the Home Office, said to the Inquiry group which as we have shown you is just wrong and should never have been allowed before them.

I might have gone I am afraid rather over my time and I apologise both to the tribunal and to Mr Holmes, but I have nothing further, unless I can be of any assistance to you?

THE PRESIDENT: Thank you very much, Mr Kennelly, and no problem with the timing, we asked you quite a lot of questions and took you out of your way. Thank you very much for your submissions.

Thank you very much.

Mr Holmes?

Submissions by MR HOLMES

MR HOLMES: Could I move the microphone so I can see you all? I am sure the transcriber will shout if there's an issue.

You have obviously seen our written submissions and I am grateful to the tribunal for the indication that you have read the materials carefully. I don't want to belabour points which are in those submissions, so I shall move relatively briskly but obviously if there are points of concern do stop me.

I propose to deal with matters in this way I will begin with some brief submissions on the applicable statutory test.

I will then consider the CMA's reasoning in their decision.

In conclusion, I'll briefly address you on the four grounds of review.

Firstly, in relation to the statutory test, Mr Kennelly took you there but if I could just briefly re-open it. It's in the authorities bundle at page 4. As the tribunal has seen, Section 131 confers power on the CMA to make market investigation references. The test is in (1) and for a reference to be made "The CMA must have reasonable grounds for suspecting that any feature, or combination of features, of a market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services."

There are three short and basic points which bear emphasis.

The first is that the threshold for a reference is a low one. The CMA is only required to have reasonable grounds for suspicion. The CMA is not required to have formed a concluded view as to whether competition is being restricted. That reflects the preliminary nature of the reference stage. This is a decision to launch an investigation and not an investigation in its open right.

The decision as to whether a restriction of competition in fact arises is made subsequently, following a full market investigation. The relevant provision, which isn't in the bundle, is Section 134.

Mr Kennelly -- he was moving fast at the time and I think this wasn't his intended submission -- did suggest that a restriction of competition must itself be shown. That's obviously incorrect. As he accepted, the requirement is only for a suspicion and that's not a requirement to prove the existence of restriction.

In this connection, we do say that the authority of Hussein, which the tribunal canvassed with Mr Kennelly, is relevant as to the meaning of suspicion, meaning a state of conjecture or surmise where proof is lacking.

Section 131 serves as a filtering stage prior to detailed investigation and it reflects reasonable grounds for suspicion, not proof of a restriction.

The second point is that the focus is upon the situation currently prevailing in the market in question.

Unlike a Competition Act investigation, this is not a retrospective Inquiry to determine the position at any particular point in the past. The question for the CMA is whether there are reasonable grounds to suspect that a market feature or combination of features prevents, restricts or distorts competition in the present.

The third point to note is that a market feature is very broadly defined in (2). It may be a reference to “the structure of the market concerned or any aspect of the structure”, or, a reference to “any conduct whether or not in the market concerned in relation of one or more than one person who supplies or acquires goods or services in the market concerned; or any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services.”

So an encompassing term which captures both structural and behavioural dimensions.

Of course, in assessing whether the CMA's application of that test betrays any error, the tribunal has well in mind that this is not a forum to consider the merits or the correctness of the decision. It's obvious that Motorola disagrees, and disagrees vehemently, with a number of aspects of the reasoning in the decision. But, in order to succeed, Mr Kennelly must show one or more of the categories of public law error in relation to the decision, which, to paraphrase, involves showing irrationality, as a number of the grounds have alleged, that is to say that the decision was so unreasonable that no reasonable authority could have reached it or that a relevant consideration was omitted or that an irrelevant consideration was taken into account or that there was some

material error of fact, that is to say some undisputed and uncontroversial fact which was misstated and which materially affected the reasoning in the decision.

But this is not an occasion to decide whether the CMA was right or wrong in the approach which it took in the decision.

THE PRESIDENT: Well, more than that though, let's take the test of relevant or irrelevant considerations let's suppose we're fast-forwarding 8 or 18 months, I don't mind which, to the outcome of the investigation, and the investigation just fails -- I am sure it wouldn't -- to take account of a fact I think we can probably all agree is relevant, the contractual relationships over time between Motorola and the Home Office and their predecessors in time, and that simply is just not taken into account.

Chances are the entirety of the decision would fall, for that reason, because a factor going into the decision has fallen away. Here, the decision is whether to, investigate at all. One might have, and one sees it in the definition in Section 131(1), one might have "suspecting that any feature, or combination of features," so you can look at multiple features. Let's suppose, hypothetically speaking, the CMA identify six features which they suspect distorts competition. Let us suppose that five of those features can be shown to be just irrational, wrong. That's not enough, to set aside the decision, is it? Because the sixth feature still stands?

MR HOLMES: Yes.

THE PRESIDENT: What one has to do, I think -- I am articulating this really so Mr Kennelly can pushback in reply -- is see whether the decision to investigate can be attacked?

It may be that you can take the approach of knocking on the head each and every

factor that informs that decision, but that, given the suspicion test, seems to me quite a high hurdle to pass.

Doesn't the question of both irrationality or irrelevant considerations operate in -- well, take this example: suppose whoever decided to investigate said well I don't care what the facts are, today is Tuesday so we'll investigate. That would be something where you are going off to the races. But what one mustn't do, I'm suggesting, is get sucked into precisely the subject matter that is there for investigation. For two reasons

First of all, one cannot investigate it in this forum.

Secondly, isn't there a danger that one, by debating these matters in this level of granularity, is actually sending the wrong signal to the persons actually conducting the investigation, who, as you have indicated in Section 134, are given their own marching orders by statute?

MR HOLMES: Sir, I respectfully agree with the points that you were putting to me. It anticipates a submission that I intended myself to make, but I think that view is the correct one.

THE PRESIDENT: I am grateful. I have articulating it so Mr Kennelly, can tell us how far we are wrong, but I thank you.

MR HOLMES: I am grateful, Sir.

The preliminary nature of the exercise is reflected in long-established guidance, governing market investigation references. The CMA's predecessor, the Office of Fair Trading, issued a guidance in relation to the reference stage, and that's subsequently been adopted by the CMA.

If we could briefly consider that. It is in the authorities bundle, beginning at page 887. You see from the cover that this is “Guidance about the making of references”, so it's specifically addressed to the Section 131 test and the

author was the Office of Fair Trading. This has subsequently been adopted by the successor organisation, the CMA.

If we could turn within it to page 905, you see that section 3 concerns powers and procedures. Over the page, at page 906, there is a sub-section on consultation and publicity.

Paragraph 3.6 explains that "where the OFT now the CMA is proposing to make a reference it must first consult affected persons".

3.7 notes that the consultation will contain a statement of reasons, normally covering a description of the goods and services, the main parties, a view of the possible definition of the market and a summary of evidence that has led to the OFT's, or now CMA's, suspicion that competition has been restricted or distorted, including the possible market features.

Then over the page at 3.8, you see that "the OFT will not attempt to make more than a preliminary analysis of these points in its statement of reasons. It will be for the CC to produce a definitive analysis if a reference is made." The CC is a reference to the Competition Commission, which, prior to the establishment of the CMA, conducted the investigation, following a reference from the OFT. But the key point is, which remains in my submission valid, that what is required at the present stage is only a preliminary analysis, because the definitive analysis will follow.

Turning on to page 910, you see from the headings that the guidance considers the application of the reference test, in Part II. Under that rubric it first considers the prevention, restriction or distortion of competition aspect of the test.

Over the page, on 911, at the foot of the page, there is a relevant summary of the approach that will be taken when deciding whether to make a reference. "In short, in any competition assessment, the OFT will usually wish to consider

a combination of features and their interrelationships and will look at various types of information and sources of evidence. However, it is not required to reach firm conclusions before making a reference and it would be inappropriate for it to engage in extensive research. Provided it has reasonable grounds for suspecting that there are market features that adversely affect competition, the test has been met and further investigation can be left to the" market investigation stage, then conducted by the CC.

We commend that approach as the correct one. That the reference stage is a preliminary screening test, which will be followed by a detailed and thorough ongoing Inquiry into the relevant issues.

As we noted in our defence, it's a striking fact that since the introduction of the market investigation regime in 2002, there has never before been a judicial review brought against a decision, to make a market investigation reference. That no doubt reflects the preliminary nature of the reference stage. The detailed disagreements with the substance of the CMA's decision are matters for the investigation which is now underway. They are not appropriate material for a judicial review.

Can I now turn to the decision, and consider the reasons for which the CMA considered that there were reasonable grounds for suspecting a restriction.

Mr Kennelly showed you certain portions of the decision, but there was much that he did not show you, and it's relevant precisely to the point that you put to me sir, one needs to consider the totality of the decision in order to determine whether there is any error which makes the reference inappropriate.

I will take it, as Mr Kennelly did from the confidential version, which is, in the confidential bundle, bundle 4. If I could pick it up, as Mr Kennelly did, on page 6 of the bundle, page 5, of the internal numbering, at paragraph 6, which

sets out a pithy overview of the CMA's concerns.

The CMA there explains that its “current view, based on the available information, is that the market for the supply of LMR network services for public safety in Great Britain is not working well for the following reasons (operating alone or in any combination).”

Three points there.

Firstly, I think it was suggested by Mr Kennelly at one point that the market in this case, was the contract. That is not right, with respect. The provisional view of the market, arrived at by the CMA is a “market for the supply of LMR network services for public safety.” The reason why that distinction is important is because the contractual framework was always intended to expire at the end of 2019, the original PFI contract, and in the run up to that expiry it has been the subject of several renegotiations. There is therefore a need to consider, to stand back and to consider how the contracts have evolved and what light they shed on market conditions more generally, rather than looking at any one specific contract. I'll develop that point subsequently.

The second point is that it is obviously an assessment of the position now: the market is not working well.

The third point is that the CMA regards the reasons listed as sufficient to support a reference, whether taken alone or in any combination.

In my submission, to succeed in this review, Motorola must show that its criticisms undermine the totality of this reasoning to justify quashing the decision.

The reasons are then given.

The first is, I think, uncontentious, the market is extremely concentrated, with Motorola as the only supplier and the public sector, under the Home Office umbrella, as the only purchaser. Market concentration is a classic aspect of

market structure. I think it was suggested in the notice of application that there was some error in treating it as such. But that wasn't developed, by Mr Kennelly orally today and I say that it is incorrect.

The second point, at (b) --

THE PRESIDENT: Just to be clear, Mr Holmes, and to put you on the spot slightly, if we treated the summary as, as it were, the definitive statement of the list of suspicions that the CMA had, and deleted (b) through (e), do you say that the decision to refer could be justified, on 6(a) alone?

MR HOLMES: It's a good question, sir, and I am obviously not the author of the --

THE PRESIDENT: I appreciate that.

MR HOLMES: You can see what the decision says, which is that it regards that structural feature as in itself an indication that competition is not working well.

But I don't think for the purposes of my submission I need to go that far.

THE PRESIDENT: Fair enough, I mean I am just testing the words that immediately precedes that "... operating alone or in any combination", and it may be that one has to be a little bit more picky about which factors operate alone and, which don't.

MR HOLMES: I think that's a fair point, sir. I also think that -- well, in my submission, there is a sequential or dynamic aspect to some of the reasons. You see that, I think, from the second point (b) which really follows on from the first.

In a situation where there's one seller and one buyer, an obvious question is whether and to what extent, the buyer could realistically constrain the seller. In this connection, the CMA identifies another feature, which it suspects the market to possess, namely that there is an “asymmetry of information between Motorola and the Home Office in relation to key drivers of pricing, for example

the level of capital expenditure needed to keep the Airwave network operational."

If the Home Office, lacks insight into the key drivers of pricing one readily sees that that will limit its ability to exert any countervailing constraint on Motorola's price.

This point, sir, is one on which Motorola's case in the judicial review says very little, although it's an important aspect of the CMA's reasoning. In my submission, nothing that is said in the notice of application about it brings the point into any serious question.

I propose to run through the other points in paragraph 6, but if I could briefly refresh the tribunal's memory of the CMA's subsequent analysis of the information asymmetry point. The relevant part of the decision begins at page 23 of the bundle, towards the foot of the page. Paragraph 1.54 explains that the CMA: "obtained a large number of internal documents from Motorola, pertaining to negotiations about price that took place in 2018" and also negotiations in 2021, which were ongoing, at the time of the decision.

Two dimensions of the negotiations are then identified the duration of the extension the capital expenditure which Motorola expected to incur over the course of the extension.

Paragraph 1.50 explains the 2018 negotiations in more detail, which I will come back to. But for present purposes, if we turn on to page 24, you see the CMA's assessment of the evidence as to the negotiations.

At paragraph 1.56, the CMA acknowledges "that the Home Office has some level of bargaining power with regard to the duration of the extension." As Mr Kennelly has explained, under the contract it can defer the switch off date for the Airwave network under provisions negotiated in 2016.

But the 2018 negotiations were about price as well as extension and at 1.57 you see the important provisional finding “that there is a significant information asymmetry with regard to Motorola's proposed capital expenditure programme.” That is stated to be first “in terms of the amount of information provided to the Home Office about future expenditure” and, secondly, “a lack of transparency on actual past expenditure.”

The CMA notes that “in the period from 2018 to 2020, capital expenditure was significantly lower than had been forecast in the 2018 negotiations, this information had not been shared with the Home Office prior to the launch of the CMA's consultation.”

Then you see at (a) that: Motorola's commitment relating to capital expenditure was a key element of the 2018 extension negotiations.

Turning on to point (e), you see that prior to July 2021 and the CMA's consultation, Motorola had been arguing for a significant price rise, linked to a large capital expenditure in the period from 2023 to 2026.

Then casting your eye down to footnote 42, you see the note “that following the launch of the CMA's consultation, Motorola changed its stance. But when considering whether there may be an adverse effect on competition in a relevant market, CMA's interest is in understanding how the relevant market operates in the absence of any CMA intervention.”

Pausing there, the CMA consultation sheds some light on Motorola's capital expenditure and that led Motorola to change its approach to the negotiations.

Without such intervention, the Home Office would, in the CMA's provisional view, have lacked the means to assess the claims being made by Motorola as to future capital expenditure when conducting the 2018 and 2021 renegotiations.

That is the assessment of asymmetry of information and that point really is scarcely

touched upon in these proceedings.

Going back to paragraph 6 in this decision summary, on page 6 of this bundle, we do say that those two first considerations would in themselves provide a rational basis for the CMA's decision to make a reference.

The third reason underlying the CMA's decision is at (c). It relates to “Motorola's position as owner of Airwave Solutions and key supplier in the design and roll-out of ESN,” the intended replacement of Airwave's LMR network.

The CMA explains that this “may be resulting in the preservation of weak competitive constraints on Motorola in supplying LMR” and that is because first, Motorola has “the ability to shape or otherwise delay the design and roll-out of ESN so as to hamper the emergence of” any competitive constraint from ESN.

Secondly, Motorola has “the incentive to do so given the significant profits derived from Airwaves’ network.”

The second point is one that Mr Kennelly seemed to take exception to. You have seen our submission that one way in which the profitability analysis connects with the CMA's reasoning is to do with the incentive that it may give Motorola to delay the design and rollout of ESN.

Mr Kennelly emphasised another way in which the profitability assessment may be relevant, but it clearly is relevant in part to the incentive of Motorola.

Just to develop those points by reference to the subsequent reasoning, beginning with ability, Motorola's ability to hamper ESN is discussed on page 25, of the bundle, paragraph 1.61. The CMA explains there that “A critical aspect of the ESN roll-out is the transition from Airwave. That's made possible by upgrades and…through …the use of mission critical push to talk software (MCPTT) on the ESN side that is provided by Motorola's… in-house technology originally..(WAVE 7000), and later… Kodiak, a technology” which Motorola

bought in August 2017.

At paragraph 1.64, at the foot of the page, the CMA summarised its review of the evidence about MCPTT.

First, (a), it's "crucial …in the delivery of ESN."

Secondly, over the page at (b), "at the time of the 2018…. negotiations, Motorola proposed to… switch to Kodiak,…. but at that time the… software did not yet have some key mission critical functionality."

In the final sentence, the tribunal sees Motorola's internal assessment of the new technology, part of which is confidential, but if the tribunal reviews that, it will see what Motorola believed the Kodiak switch, left the door open for.

(Pause)

At point (c) you see the CMA received representations from the Home Office that the change from one technology to the other led to delays, and at the end of the subparagraph the Home Office told the CMA that Motorola imposed the switch to Kodiak, by informing the Home Office, that it would be ceasing to release updates of WAVE 7000.

At (d) you see what the Home Office said about Motorola's rollout of Kodiak.

In the final sentence on the page, the CMA's own assessment of the documentary evidence.

Turning over a page to point (e), you see that a consultant assessed Motorola's approach to the development of Kodiak and reference is made to the treatment of Kodiak as a black box and the consequences of that. At the end of the subparagraph, the consultant's assessment of Motorola's approach, which is confidential but the tribunal can see what is said.

(Pause)

At point (f) you see the reference to the *elongated commercial product roadmap*, and

to: documents seen by the CMA which suggest that the timing of some assets of delivery may be subject to Motorola's planned product releases rather than the needs of ESN.

Then, at paragraph 1.65, the CMA's assessment:

"Motorola disagrees with many aspects of the above account… However, in order to assess properly these comments and reach a firm view on the above matters, extensive gathering and assessment of technical evidence would be required. At this stage, based on the above evidence, it appears to us that Motorola's approach to the development of its MCPTT software may have been (and may continue to be) a material factor in delays to the ESN programme, because of the alleged inadequacies of the solution it had put forward as part of its original bid….; the need to develop mission-critical capability into the replacement technology…; and the lengthy and apparently inflexible product roadmap that Motorola has adopted in order to do so. In addition, the evidence suggests that Motorola largely controls the speed at which the various features required for ESN are delivered as part of its product release schedule. Thus, through Kodiak and its crucial role in supporting communication between Airwave network users and ESN network users, Motorola appears to have the ability to impede the timely transition of public safety organisations from the Airwave network to ESN."

The concern here of course is not only about the delays which have already taken place and which are baked into the 2026 date, but the risk that there might be further delays still.

The other limb of the CMA's analysis concerns Motorola's incentives to delay, and that turns on the CMA's profitability assessment. If you could turn, please, to page 33, you see the heading above paragraph 1.77, "Forward-looking

assessment". Paragraph 1.77 then explains that the CMA has “sought to analyse ..profits made by Motorola from the operation of the Airwave network in the period from 2020 to 2026.” That is to say from the beginning of the contract extension. PFI agreement having run until end 2019, to the time when it is currently expected that the Airwave network will be switched off.

Motorola does challenge this forward-looking assessment, and I will come to that, but for present purposes, where one is considering Motorola's recent and current incentives to delay ESN, it makes obvious good sense, and it's certainly not irrational, for the CMA to focus on the profits that Motorola is currently making and can expect to make in the run up to the switch from Airwave to ESN.

The output of the CMA's assessment is described in paragraph 1.85 on page 34 of the bundle. You see there that “Even on.. the more conservative.. Model” put forward by Motorola it will be expected to make and I am reading from the middle of the paragraph:

"... considerable levels of excess profits from its operation of the Airwave network in the period 2020 to 2026."

Just to complete the picture in relation to incentives, if you could turn to page 20 of the bundle, paragraph 1.43, the CMA there compares the revenues and profits available to Motorola, under the ESN and finds that they are in “sharp contrast with the scale of excess profits that the CMA ..estimates Motorola stands to make….” between 2020 and 2026. That's the third reason for the reference. Motorola's ability and incentive to delay ESN, prolonging the current market situation. And the ability isn't under challenge in these proceedings. Motorola recognises that that's a matter for the investigation stage.

The incentive to delay ESN is under challenge but on a basis, in my submission, that is unsustainable in view of the reasoning which the profitability analysis is being used to test.

So that is the third reason.

Turning back to the summary on page 6 of the bundle, you have my point that these first three considerations market concentration, asymmetry of information, ability and incentive to delay ESN, provide a sufficient and rational basis for the reference.

The fourth point at (d) is that the ESN, has in fact been the subject of multiple delays, thereby, "preserving weak competitive constraints on Motorola."

In other words, the Home Office, lacks an outside option which it could use to extract price reductions, or, to leave Airwave, altogether. Again, the fact of delay is not in issue. In my submission, its relevance as a feature of the market, cannot seriously be contested.

The fifth point, at (e), is: "the absence of competitive tension in the award of the original contract."

If I could show you the reasoning in the decision, which shows why this remains relevant two decades later, the lack of competition at the time of the original contract is explained on page 14, in paragraphs 1.23 to 1.25, and you see at paragraph 1.24 that whilst "70 companies expressed initial interest,…. by the time of the actual tender process… only one consortium, led by BT, remained in the running."

At paragraph 1.25, with only one bidder, "the tender process was therefore not a competitive one (as documented by the NAO at the time)."

The continuing relevance of that lack of initial competitive constraint, can be seen from page 23 of the decision at paragraph 1.55. It contains some confidential

material, so could I ask the tribunal just to refresh your memories of it by reading it to yourself.

(Pause)

It's slightly condensed, but what this paragraph is describing is the fact that there have been two concluded renegotiations as to price so far. One in 2016; that's the reference to the time of acquisition at the bottom of the page. You will see from footnote 39, that the CMA was aware of the discount -- although this is flagged as confidential, the pleadings are replete with non-confidential references to the fact of discounts in 2016. So there were discounts in 2016. Then again, that was then the starting point for a further renegotiation, in 2018, which led to further discounts.

But, for present purposes, the key point is that the starting point for each successive renegotiation was the original PFI Agreement pricing structure, either in its original form or as adjusted. And while price adjustments have been achieved in each round of renegotiation, they are still by reference to the original price.

At point (b), you see the point that this focus has been maintained despite the important fact described there, as to why there was no reason in principle to use the original pricing given the difference in circumstance so far into the operation of the Airwave network, which is recorded in the confidential text.

That point of course connects with the asymmetry of information on capital expenditure, which we've already considered.

So those, really, are the key considerations, a lack of competitiveness at the outset, with pricing still set by reference to the original rate, concluding the list in paragraph 6.

Just for completeness -- and I will break after that, if it's convenient to the tribunal -- to return to page 6, you see at paragraph 7, that the CMA also relied on its

profitability analysis in support of the conclusion that the current features identified “may result in significant customer detriment” by reason of the “high returns Motorola achieves from its operation of the Airwave network.” So a second, an additional, way in which the profitability analysis was of relevance.

You have my submission that these reasons are robust, notwithstanding Motorola's criticisms.

I will turn, after the short adjournment, to consider the grounds. If that were a convenient moment?

THE PRESIDENT: Yes, thank you very much, Mr Holmes. We will rise and return at 2 o'clock.

(1.10 pm)

(The luncheon adjournment)

(2.00 pm)

(Proceedings delayed)

(2.04 pm)

THE PRESIDENT: Mr Holmes.

MR HOLMES: If I could begin with ground 1, the core allegation in the notice of application is that the CMA's decision contains a material error of fact. The error alleged by Motorola is said to be apparent from paragraph 4 in the summary section of the decision. Just to refresh our memories of that if we could turn it up, please. It's in the decision, working from the confidential version again, although it's not a confidential passage, it's in the confidential bundle at page 5, paragraph 4, in the summary section. The objection is to the penultimate sentence:

"It is now expected that the Airwave network will continue until the end of 2026"

That part, I think, is not suggested to be an error.

It then states that “the terms of the extension need.. to be agreed by the end of 2021” and the final sentence explains that “negotiations… are on-going.”

Mr Kennelly, accepted, I think, that negotiations were in fact taking place in the run up to the CMA's decision, but exception is taken to the words "needing to be agreed". Motorola points out that the Home Office was entitled to extend the shutdown date under existing contractual arrangements, agreed in 2016, with the consequence that there was no need to agree an extension in 2021.

With respect, Motorola's complaint reads too much into paragraph 4. Motorola and the Home Office had each explained to the CMA that negotiations were on-going at the time of the decision, with a perceived commercial need to amend the terms of dealing. We can see what they each said about this.

Motorola's consultation response is in bundle 2C at page 270. If we turn within it, to page 272, you see in the penultimate bullet “Motorola notes that the consultation coincides exactly with the period during which the Home Office is negotiating with Motorola an extension to the Airwave service. The proposed MIR ignores the question of whether this is an appropriate use of central government power and influence…” and so on.

As regards the Home Office, if you turn to bundle 6, the disclosure bundle, page 3, you see that there's a note of a meeting between the Home Office and CMA on 1st September 2021. The relevant points are 8 and 9:

"Home Office… advised CMA that they are talking with MSUK and it appears to be business as usual. MSUK are discussing the way forward by way of an Airwave extension….[Home Office]… advised that it must put MSUK on notice of an Airwave extension by December 2021. However queries remain over the price and duration of any extension."

We have also explained in our defence what the Home Office and Motorola were each seeking at the outset of the negotiations. It's in the confidentiality bundle at page 79. You see from footnote 8 that each side began the negotiations from the position that pricing amendments were needed from a commercial perspective.

You see what Motorola was seeking and you see what the Home Office was seeking.

That is all that was intended by the drafting in paragraph 4 of the summary section. It wasn't intended as a statement of the contractual position, but a statement of practical reality that each side have perceived a commercial need to renegotiate the contract terms, and intended for the negotiations to run during the latter half of 2021.

The CMA therefore does not agree that there was any factual error on the face of the decision. It's notable that the phrase in question appeared in the CMA's proposal from July 2021 for a market investigation reference and there was nothing in Motorola's consultation response which takes issue with the terminology used in paragraph 4 as a fundamental error of approach.

Laying aside the allegation of factual error, ground 1 is in reality an allegation that the decision erred by not attaching greater relevance or significance to the 2016 renegotiation in its analysis of the competitive position.

There are five ways in which that is said to be the case.

First, it's said that the CMA failed to assess the respective bargaining power of the parties at the moment in 2016 when the default contractual pricing was agreed and erroneously focused on market dynamics thereafter.

That it was not appropriate or necessary to conduct a snapshot assessment of bargaining power in 2016. The CMA's focus was on the Home Office's ability

to constrain Motorola's pricing. We've seen, in a passage that I showed you earlier, that the CMA accepted that the Home Office had some bargaining power as regards the duration of the Airwave network.

The question was whether the Home Office, in the negotiations that were conducted in 2016 and again in 2018, was able to constrain Motorola's pricing?

What matters is the upshot of those negotiations. Do they show that the Home Office was able to exercise effective countervailing buyer power as regards price? The CMA's analysis suggests that they do not. Both price reductions achieved in the two sets of negotiations are factored into the CMA's forward-looking assessment of profitability and that assessment found that, taking those reductions into account, Motorola could expect to make high excess profits for the remainder of the contract period.

In that connection, the CMA also assessed, how far the Home Office had the information needed to constrain Motorola's pricing and found, based on the documentary evidence, that it didn't. Because it lacked visibility as to the key drivers of pricing. In particular, it could not accurately assess the capital expenditure which Motorola claimed to require to undertake.

In my submission, the core reasoning in the decision, is really unaffected by any snapshot in bargaining strength in 2016.

Motorola's second point is to say that the discounts agreed in 2018 reflect extraordinary buyer power as they depart from the contractual default set in 2016.

As to this, the 2018 renegotiation achieved amendments for the benefit of each side, as one would expect. That is explained in paragraph 1.50, of the decision. If we could open that up, please, in the confidential bundle. It's on page 22. You see that a price decrease to the core charges is referred to at (a) and,

a reprofiling of payments and a commitment by Motorola in relation to capital expenditure then, the waiving by the Home Office of its rights under the contracts to exercise certain contractual entitlements, until 2023.

Also, a reduction in an amount in the deed of recovery, by a specified percentage to another specified percentage once certain ESN delivery milestones were achieved. So it was a bargain, there was give and there was take.

The question for the CMA was whether this price negotiation, which took place in 2018, amounted to a meaningful constraint on Motorola's pricing. That is the subject of the profitability assessment, which reflects both the 2016 and the 2018 negotiations and the changes to pricing which they achieved.

We say there is no support for the notion of extraordinary buyer power in respect of price, as a result of the 2018 negotiations.

Thirdly, Motorola suggests that the CMA has overlooked the significance of contractual benchmarking provisions in the contract. This loomed particularly large in Mr Kennelly's submissions this morning.

As to this, the CMA was fully aware of those provisions. If you look again at paragraph 1.50 (d) of the decision, I hope you have it open in front of you, you will see that they are referred to there in the confidential text. The tribunal can see what is said about when those provisions will next be available.

In that connection, Mr Kennelly identified today an apparent error in what is said at footnote 22 of the notice of application. He said that the suspension of the benchmarking provisions applied only to the police service and not to the ambulance service.

That error, if error it is, also recurs, for your note, in footnote 38 in the notice of application and also in paragraph 15.2 (b) of the reply. The first time that it was said to be erroneous was, during the course of Mr Kennelly's

submissions today.

It should also be noted that Motorola was asked, during the consultation process, about the correctness of paragraph 1.50(d) and what is said there about the benchmarking provisions. You can see that from the documents in bundle 2C, picking it up, first, on page 293.

You see an email sent by an official from the Competition and Markets Authority, whose name is at the foot of the page, to an individual on the Motorola team. You will see that there are draft extracts from the final report and decision, which are attached in a table. That's in the second block of text. The CMA indicates that it would be grateful if by the date specified, you can -- the first bullet states:

"Confirm that the material is accurate…"

Then, secondly:

"Identify any …confidentiality" claims.

If you turn to page 308, you see the table.

A version of the table, returned by Motorola, and you can see that Motorola has inserted comments in the column headed "Comments on factual accuracy". Does the tribunal have that?

Then turning within that document to page 312, 1.50 is set out and you see at (d), the point we have just been discussing. Then if you look at the factual comments on that, you see that Motorola makes a point in relation to the price discount, that's 150 (a) but it doesn't suggest any error in 1.50(d). In my submission, the CMA was entitled to proceed on the basis that, the benchmarking provisions would apply on the basis described in 1.50(d), which now features in the final decision.

In the time available we haven't been able to bottom out, whether we agree that

there was any factual error in that statement. Our initial enquiries suggest that the relevant provisions appear not only in the police settlement, but also in the ambulance settlement, so it's not accepted what Mr Kennelly says -- it may be correct, we simply don't know. The point for today's purposes is that it cannot be said that there was any material error of fact in the Decision in 1.50 (d) which would allow the decision to be set aside. I refer you to the case law in relation to material error of fact, which notes that an error will not reflect any unfairness insofar as responsibility for it is attributable to the applicant.

We say that the CMA was entitled to proceed on the basis, it did in 1.50(d) and that provides a reason why the benchmarking provisions did not affect the CMA's conclusions for a period going forward.

The extent to which the benchmarking provisions may eventually provide a credible basis for constraining Motorola's pricing once they resume their operation, will of course be a matter for consideration in the investigation. For the avoidance of doubt, nothing in the defence in any way reflects the view of the Inquiry group about those provisions, or qualifies the exercise that the Inquiry group is undertaking.

In my submission, the existence of those provisions is not sufficient to displace the reasonable grounds for suspecting a competition problem summarised in paragraph 6 of the decision.

Motorola's fourth point alleges an error in the CMA's assessment of asymmetry of information. Motorola says that this is irrelevant because the price is fixed under the contractual framework.

But that misses the point entirely. In recent years, there have been several renegotiations of the price fixed under the framework and the price has changed. The CMA rightly considered how effective those negotiations have

been in constraining Motorola's pricing. It looked at whether the Home Office knew enough to negotiate effectively on price, and the CMA's assessment, based on evidence from the negotiations, is that it did not.

The fifth and final point in the notice of application was a contention that the CMA erred in considering the period from 2020 to 2026 separately when assessing profitability.

In my submission, that was a rational approach to take in circumstances where the CMA was assessing Motorola's present incentives to delay ESN. It was equally rational when considering the ongoing profitability of the contract, following renegotiations to the price, for the extension period.

Mr Kennelly suggested that there was no extension period, no extension contract. With respect, that's obviously incorrect. The PFI agreement was always intended to run until 2020 and not beyond it, so there was an extension contract. The extension contract begins in 2020. And it was reasonable, certainly not irrational, to consider profitability in the period from 2020 to 2026, in assessing whether the most recent renegotiations of price in 2016 and 2018 demonstrate any effective constraint on the pricing of Motorola.

In the reply, Motorola shifts ground and advances an additional complaint headed "Apparent failure to review the Airwave contracts". This is, with respect, an untenable complaint. It's clear from the decision that the CMA was familiar with the main lines of the contractual arrangements. It's true that the descriptions are kept at a relatively high level, but that was partly with a view to avoiding excessive redactions to the text. You can see this from correspondence relating to confidentiality. If we could go back to the table I showed you before in bundle 2C and turn to page 296, this is the table as originally put.

At 297, if you look at the final row in relation to paragraph 1.50, so that was the paragraph we were looking at before:

"The CMA considers that as this is a high-level account of the agreement, rather than a detailed description of commercial terms and conditions, publication of the text would not harm Motorola's legitimate business interest...It's.. also necessary for a reader's understanding of the CMA's reasoning. Please note, we are also seeking the Home Office's views. ”

So Motorola's criticism of the limited reference in the decision to underlying contractual provisions is misplaced. The CMA was trying to produce a public document and it was obviously sensible in doing that, to avoid including large swathes of confidential material from the contract.

But more fundamentally, where does this go as a ground of judicial review challenge?

The tribunal is considering whether the CMA's decision is flawed because of some error of fact or failure to take account of a relevant consideration or because it is irrational. If the CMA had refused to investigate something material, it would be relevant for the tribunal to consider whether that was itself a rational or an irrational choice, but there is nothing here which the CMA has refused to look at. There's no line of enquiry which is considered but rejected in the decision. And the tribunal's task, as the notice of application rightly phrase it, is to see whether the decision stacks up.

You have my submission that the essential reasoning is unimpeachable and unaffected by the features of the 2016 renegotiation on which Motorola now relies.

Ground 2 concerns the CMA's internal rate of return analysis and two criticisms are made

The first is that it was irrational, allegedly, to rely on the net book value of Airwave's assets as a measure of the upfront investment required over the 2020 to 2026 period. It's said the CMA should have instead relied upon the replacement cost, using a modern equivalent asset valuation or some other economic valuation instead of an accounting measure.

You have seen in the defence that CMA's position is that net book value provided a suitable, rough-and-ready assessment and that was more than sufficient at the reference stage.

The CMA is only required to consider whether there are reasonable grounds for suspecting a competition problem. The report on which Motorola relies emphasises the challenges of estimating a modern equivalent asset value and the audited accounts serve as a valid starting point and we have set out the passages in our defence.

The difficulty of arriving at any other measure of asset value is underlined by Motorola's own representations to the CMA during the ongoing investigation. We have set those out in the defence. They're confidential, so I'll take it from the page. It's in the confidentiality ring bundle, page 86.

If I could ask the tribunal, please, to review paragraph 56, and in particular the passage which is highlighted as confidential to the applicant.

(Pause)

You see the points made there by Motorola itself about the challenges involved in undertaking an MEA evaluation. The suggestion that the CMA should have undertaken such an analysis at the preliminary reference stage is really not tenable. And it's certainly not so unreasonable that no reasonable regulator could have proceeded otherwise.

The second criticism advanced is the 2020 to 2026 truncation, and you have my

points about that.

The profitability analysis assessed Motorola's present incentives and a forward-looking assessment was right for that.

Secondly, it assessed Motorola's profitability for the period following the most recent price renegotiation, and there was nothing irrational in that selection.

Ground 3 concerns the relevant market and it's advanced as a pure rationality challenge. Motorola contends that the CMA was irrational in various ways.

First, it says that it is irrational to consider competition during the course of a long-term contract. But the contract has exceeded its original term and the question is how the market is functioning now, following successive renegotiations? That's not an irrational matter for the CMA to have investigated.

It was a challenge in the notice of application to the identification of market concentration as a feature of the market. I don't think I need to address you about that. It wasn't developed today. But clearly market concentration is a paradigm example of a structural feature of a market, affecting competitive conditions.

Thirdly, it's said to be irrational for the CMA to have regard to the delivery of the ESN network as a feature of the market. But again, in my submission, that was a reasonable and rational thing to consider. The ESN is the only potentially available outside option for the Home Office. If it were imminently to be available, the Home Office would have a choice whether to continue using Airwave's network or to press to change the terms on which Airwave is supplied.

There's a transition period which will inevitably arise in the switchover from one network to the other, and during that time there is a potential to rely upon the

availability of the ESN in negotiating terms.

The fact that Motorola has the ability and incentive to delay the ESN is therefore a highly relevant feature of the market when assessing how competition works.

Motorola also relies on the fact that since the decision, it has given notice -- there's a conflict in the confidentiality markings, relevant to this point. I shall tread a little carefully, because the reply is more fulsome in explaining what Motorola will be doing than the defence, but the point is that -- let me just take it from the notice of application so you can see what I'm referring to ... yes, it's on page 24 of the pleadings bundle at paragraph 59.5. If you see what is said there about Motorola's involvement in ESN.

The consequences of that supervening development will be a matter to consider, insofar as they're relevant, in the market investigation. But, as I showed you in the decision, Motorola's technology is baked into the ESN and it's not clear how this development will affect that. In my submission, the supervening development, therefore, does not affect the rationality of the decision.

Fourthly, it's said in the notice of application that Motorola's role in delivery of ESN was understood by the Home Office and has been addressed in the contractual arrangements. That is a reference to the deed of recovery. But that is also expressly addressed in the decision, and Mr Kennelly took issue with what is said there, but, with great respect, this is an example of a disagreement with the reasoning, rather than the identification of any public law error.

Mr Kennelly's client, may well disagree with what is said, for example in paragraph 1.42 of the decision, about the deed of recovery, but that isn't a matter on which the tribunal can or should form a view.

The fifth and final point is connected, it's the point that the Home Office has never sought to activate the financial penalties under the deed of recovery, but that really is also really canvassed in 1.42 and any disagreement that Mr Kennelly's client may have with that analysis can be aired and explored in the investigation.

That brings me to the administrative timetable ground.

Motorola no longer pursues a challenge based on lack of reasons, and this therefore now boils down to a complaint that Motorola should have been given an opportunity to comment on or respond to the Home Office's representations.

In my submission, that is incorrect. Under the CMA's approach to the administrative timetable, which we have set out in the defence -- for your note at paragraphs 13 and 14 -- the requirement is for the group to put the administrative timetable to each party and to have regard to any views which the main parties to the reference have submitted to it. That's what the CMA group did in this case. Each of the parties commented, the Home Office contended for a shorter timetable, Motorola contended for a longer one. The CMA considered their comments and decided to maintain its original proposal. In my submission, there's nothing unfair about that. There's no requirement under the rules for the CMA to put each party's submissions on the administrative timetable to the other party and obtain their comments. Nor is this required as a general aspect of fairness. For decisions of this kind, it's enough for each party to have their say, and we have cited case law in paragraph 22 of the decision, which is authority for the proposition that a public authority doesn't need to put to parties what other parties have said. That's a recipe, for a never-ending process, and that comes in, particular

where you are dealing with a decision about an administrative timetable, which is open to amendment and review over the course of the investigation.

In the event, the CMA did not accept either party's proposed amendments to its draft timetable which it retained in unamended form. This was therefore not a case of splitting the difference, as Mr Kennelly suggests in the reply, the CMA was not persuaded by either party's representations and therefore maintained the timetable as proposed.

As for the suggestion the timetable itself is in some way unfair, that is unsustainable. There is no evidence before the tribunal, witness evidence, to suggest that this imposes insuperable burdens or obstacles for Motorola.

In any event, the timetable can if needed be flexed in due course. It's only a provisional timetable, which is always open to being revised if a party puts forward good reasons why a revision is needed.

We say that the final ground of challenge is without merit and should also be rejected. There's nothing procedurally unfair in the approach the CMA took or in the timetable which it fixed.

Subject to any questions, those are the CMA's submissions.

THE PRESIDENT: Thank you, Mr Holmes.

Just one on this last point. Suppose, having seen both the submissions of the Home Office and those of Motorola, the CMA decided to not maintain its stated position but vary it -- now, that variation could have been either to extend or not extend, but let's suppose, because Motorola is here, it was to further contract the proposed timeframe, to, let us say hypothetically, five months. Would you say that that is something that ought to have been run past Motorola to invite further submissions? Or do you say that the CMA had all of the material it needed to reach a decision, even if that was different to what

had been articulated to the parties?

MR HOLMES: Yes, so if the CMA had relied upon some contentious factual proposition which had been put to it by the Home Office, it is possible, in those circumstances, that the context would require in fairness that Motorola should be consulted and their views taken into account. So we can't be categorical in saying that a situation would never arise in which a further round of consultation would be required. But that's not the case here. There's no material factor from the Home Office's representations which was relied upon by the CMA in order to support a change of position from the original proposal.

In those circumstances, we say that there was no requirement for a further round of consultation before the administrative timetable was fixed. In relation to fairness, context is all and the context of this decision, which is always open to being revisited, doesn't show any unfairness in the round.

THE PRESIDENT: Yes, I understand the, in the context, sensitive point. In a sense, the primary concern of Motorola, certainly, is a fair process, as Mr Kennelly has articulated very clearly. Even if, given the point that was made by Motorola in its first and only round of response that, actually, eight months was not doable and one could do it quickly but not that quickly, would you say that even if there had not been anything from the Home Office to cause the CMA to change its mind, but there had been, nevertheless, a change of mind not to extend but to contract further, that in those situations -- I appreciate context is everything -- taking those facts, would you think that it would be appropriate to explain to Motorola that there was this minded change and did they have anything further to say in contrast to what they had said previously, in relation to the eight-month timetable?

MR HOLMES: Indeed, so this -- if I understand correctly, the hypothesis is a situation in which the CMA proposed a timetable but then, not as a result of anything that was said to it, but because its own internal reflections, it decided that another short timetable would be more appropriate. In those circumstances, it does seem reasonable to think that one might need to consult on the fresh position that the CMA proposed to adopt, probably to consult both parties.

I am grateful to my Learned Friend. The position in the case law and we can find authority for this if it would be helpful, is that if the proposal is fundamentally different, then a re-consultation would be required. But, of course, you have my submission that in this case that's not what happened. The CMA stuck to its guns.

THE PRESIDENT: Yes, but I mean, if you take for example -- suppose CMA's proposal had been we'll do it in 12 months and Motorola's response had been, "Frankly, we can do it in 10, we can do it in 14, we actually don't care". If the CMA had then gone back saying well okay actually we see the parties saying it's possible to do it shorter, we'll not do it in 12 we will do it in 10, that wouldn't be a fundamentally different change to require re-consultation? It's the fact that this was a very tight timetable, to which Motorola was taking objection --

MR HOLMES: Yes, indeed.

THE PRESIDENT: -- that really matters here?

MR HOLMES: Yes, yes. To be clear, however, it's not accepted that this timetable is unfairly tight and there's no material before the tribunal --

THE PRESIDENT: No, I have that point, but I'm exploring the nuances or the implications of Mr Kennelly's position, and I think it is fair to say that, the response of Motorola to the proposed timetable was that it was tight --

MR HOLMES: Yes.

THE PRESIDENT: -- and they had concerns about that, to put it neutrally?

MR HOLMES: Yes, that's correct, but of course if they had wished to challenge the fairness of the decision that the CMA took, the correct course would have been to provide carefully instantiated and evidenced material to show why the time limits under the administrative timetable are simply unmanageable.

Even in that case, in my submission it would be a tall order to suggest that the exercise of procedural discretion was in any way unfair in circumstances where this is only a working timetable, which can be revised at any point once such evidence is brought forward.

If you like, it's a kind of prematurity point, the challenge hasn't crystallised yet because there's nothing here today available to the tribunal to suggest that this timetable is unmanageably short.

THE PRESIDENT: Yes, thank you.

MR HOLMES: I am grateful.

THE PRESIDENT: Thank you very much, Mr Holmes. We are grateful.

Yes, Mr Kennelly.

Reply submissions by MR KENNELLY

MR KENNELLY: If I may, I will begin with the fundamental starting point, which is the function of the reasonable suspicion test and the requirements of public law, the point raised by the President at the beginning of my submissions and indeed at the beginning of Mr Holmes's.

The function of the reasonable suspicion test goes to the proof and the degree of certainty the CMA needs to have that its concerns are correct.

It doesn't need to prove that its concerns are correct at this stage, it is sufficient for

them to show a suspicion, or reasonable suspicion. But even that must be based on relevant considerations and not material errors of fact.

This really is fundamental and it goes to a point that the President raised. The reasonable suspicion test, low though it is, does not mean the CMA can say that even if our concerns are based on irrelevant considerations or material errors of fact, which can be identified at this stage, because that's my case, it doesn't matter. Because all we have to show is, a reasonable suspicion.

That's not correct. The correct position, as a matter of public law, is that even in satisfying the relatively low threshold of reasonable suspicion, they still must demonstrate that they have relied on relevant considerations only and have made no material errors of fact.

That's critically important in a decision like this, which is a relatively detailed decision. They have gone to some length to show their reasoning. Therefore, the tribunal is entitled to examine whether they have genuinely addressed relevant considerations and have avoided material errors of fact.

That goes to an important point, sir, you raised at the very beginning about whether it's necessary for me to knock out each of the propositions listed in paragraph 6.

The short answer is that is not the appropriate approach and it is not the CMA's case, although -- and I make no criticism of Mr Holmes, to take the pass that was sent to him, he accepted it gratefully, but that's not the CMA's pleaded case and it's not appropriate either.

In a reasoned decision like this, it is not appropriate simply to say it's sufficient if some of it stands up. The law is that if there is a material error of fact, even if it isn't decisive, but it's material, that provides a basis for setting aside the decision, depending on the degree of materiality.

We see that in the defence. We see that in the defence itself. I will go back to it, because that is the CMA's pleaded case. It's in the confidentiality documents bundle, and I will take you to it if I may, it's paragraph 22, page 76. Their pleaded case is:

"A decision may be shown to be unfair and require to be set aside insofar as it is based on a mistake as to an uncontentious and objectively verifiable existing fact; ... [a] …mistake played a material (but not necessarily a decisive) [one].. in the decision-maker's reasoning..."

They accept that even if there's a material fact that isn't decisive but material, that depending on the degree of materiality, requires the decision to be set aside.

That's the appropriate approach, because as a matter of public law, if a decision taker has based his decision on a number of reasons and a number of those then are at risk or set aside by the tribunal, it is open to a decision taker to say, "Even if this or that basis for my decision falls away I would have taken the same decision anyway, for these reasons!" That's not the CMA's case in their defence.

I see what they say in the decision of one or any of these grounds provides a basis for the reference, but they have not said to you that in the event of this error or that error the same decision would have been taken. That's a matter for them to advance to you to satisfy yourself that if, there is a material error of fact the same decision would have been taken anyway, and that's the appropriate approach and that's not what they have said in their defence.

THE PRESIDENT: No, I mean, the reason we kicked off with the law regarding reasonable suspicion and the suspicion being something that you can hold without proof, was precisely because we were concerned that what we have, and we will take, for the sake of argument, the relevant judicial review

proposals as expounded in the CMA's defence, we were concerned that there is a failure to recognise that these are criteria which apply where a decision-making body is either finding facts or exercising judgment in a determinative way.

The reason I took the rather extreme ball(?) to Mr Holmes was not because I thought he would disagree, I would fairly confident he would agree, it was because I wanted precisely this conversation with you.

The concern I have with the correctness of your submission is this: the reason one sets aside a decision where there's a material error of fact is because one cannot be confident, there being an error of fact, whether the decision would have occurred in the same way had that error not been made, or had the relevant consideration not been taken into account, take whichever test you like, I think the point is the same.

The reason one does that is because whatever view the reviewing tribunal might have about the importance of the error, because it's judicial review and because it is the process that is under review and not the correctness of the outcome, one says, well, the decisionmaker -- not the reviewing body but the administrative body making the decision -- has misinformed itself and so we cannot allow the decision to stand, it must be remitted to be remade.

The points that I am making, a little bit too long windedly, is that when one is talking about a suspicion, the points about it being wrong or the points about it being ultimately irrelevant are built into the nature of what a suspicion is. It's something that you think without evidence.

It does seem to me that there's a problem in reading across the ordinary JR tests, to a decision which is predicated upon there being not a finding of fact at all, indeed a finding of fact in this instance would be rather improper, but a mere

finding that there is a suspicion, albeit subject to the control of reasonableness, which of course we have to bear in mind.

That's why I gave the example of the CMA deciding that they would review the matter because today is Tuesday. That is something which is so far irrelevant, because it's not even relatable to the existence of a suspicion. That would be quite clearly an error, but it's divorced from the uncertainty that is built into, as I say, the concept of suspicion here. That's what I think is troubling me about the line taken in the defence. I think there's a translation of perfectly standard JR principles into a context where they don't sit very easily.

MR KENNELLY: I understand, sir.

May I explain why I endorse the approach the CMA is taking in applying those traditional JR principles even to the test of reasonable suspicion.

That is because there is a judgment, a determinative judgment, taken by the CMA to this extent, they have to decide to make the market investigation reference.

The test they have to satisfy for that, the trigger, is a relatively easy one to achieve, in the sense that nothing needs to be proven, a suspicion is enough. But they still -- I'm sorry to repeat myself -- need to base that on relevant considerations and avoid material errors of fact.

Once they have relied on, even for their suspicion, relevant considerations, and avoided material errors of fact, it's very, very difficult to impugn what they have done. What is a relevant consideration for a suspicion will be viewed differently from a relevant consideration for a final determination. What is a sufficient base of relevant considerations for reasonable suspicion will be different from the collection of relevant considerations for a final determination, but they still have to be relevant considerations and no material

errors of fact.

I fully accept that's a low threshold, but it's still the proper public law threshold. What they cannot do, is, even to ground a reasonable suspicion, base it on highly material errors of fact and irrelevant considerations.

This is why it's classic judicial review and we are not treading on the decision making prerogative of the CMA, it's only if I can show you a fundamental error of fact, it may not be decisive, it has to be really serious, which has infected their reasoning, which has led them to ask themselves the wrong question in reaching this decision to make the market reference. Then and only then do I succeed.

The misunderstanding in relation to the contract, on the termination of the contract, which Mr Holmes very gracefully glided around, but didn't quite address directly, is critical to that. Because my Submission to you, and if you are not with me on this then I don't get very far at all, they have misunderstood the fact that the contract could be extended by the Home Office unilaterally. They believed in the decision that that question of extension had to be negotiated and agreed. If that were true, that would radically alter the balance of negotiating power and would explain why they are focusing on 2018. That error has led them to ask themselves the wrong question, that's really fundamental. My point is it's not appropriate for that to be fixed by the Inquiry group, that has to be addressed now so we can proceed on a proper basis. As a matter of public law we are entitled to have a decision like that, which contains such a fundamental error, set aside and the matter remitted.

The suspicion ultimately is an inference to be investigated, but you have to draw that inference from non-erroneous facts, to, again, draw parallels from commercial law actually, not just criminal law. The suspicion is just an inference, they

don't have to prove anything, but the inference has to be drawn from non-false material facts and relevant considerations.

That's really the public law framework for how you have to approach this question.

THE PRESIDENT: Can I just test that in ... I think maybe in reference to the paragraph 6 list of factors in the summary of the decision itself.

MR KENNELLY: Indeed.

May I just say that's my primary submission. My second submission is that I can also knock out each of those factors in paragraph 6. We don't resile from that either, if you are against me on my first point, I maintain that I can actually knock out each of those.

THE PRESIDENT: I understand, that's helpful, but I'm at the anterior stage of implications of a partial success on -- we'll take point 6(a) to (e) as an example. I mean, Mr Holmes very fairly accepted that they might not all be self-standing grounds, and I think he was reticent in saying that 6(a) was a self-standing ground that could justify the decision on its own.

Let's pretend that each one of these factors, (a) through (e), is a self-standing suspicion, itself on reasonable grounds. You, though, contrary to the CMA's view that these are self-standing grounds, that suspicion is justified on reasonable grounds, show that actually (b) through (e), are just not even suspicions, they are not an inference justified by reference to unfound facts, they are simply mistakes or misconceptions, or call them what you will, they just don't count. But (a) somehow manages to survive.

I think you were saying earlier that your position was that the fact that (b) through (e) have fallen and that therefore the decision is in part premised on things which are not reasonable suspicions means that the matter needs to go back to the CMA to revisit.

MR KENNELLY: Yes. However they had phrased 6(a), the fact they are saying any or all of these, they had accepted -- and it's correct that they have accepted -- that if there is a sufficiently material error here, even if not decisive, so (b) or (c) or one of these falls away, the appropriate course is not simply to speculate that the decision would be the same anyway, because that would be pure speculation on the part of the Tribunal. There's nothing from CMA to explain how this would look --

MR HOLMES: I hesitate to interrupt, just to be clear we haven't accepted that it's not necessary to show a material error. I would refer to paragraph 30 of our defence, which really makes the point less elegantly that you put to me, sir, that the reason that they would need to show that these reasons individually were not sufficient. So our pleading position is not as Mr Kennelly describes it.

MR KENNELLY: I am very grateful for that, because what Mr Holmes identifies is a statement, in paragraph 30 of the defence. Again, ex post facto, where it says the CMA has identified multiple reasons why, taking individually or any combination, the reasonable suspicion of the competition in the market is not working well.

What they have not done is explained how, if one or other of their features falls away, the same decision would have been taken.

I mean, this is an ex post-facto sentence but they need to -- if they are going to say that the decision would have been exactly the same even if one or other element is knocked out, they need to plead and evidence that and to explain how the decision would proceed as it is, even if one or other element were kicked out of it.

It's quite inappropriate if the tribunal is minded to say this bit falls away, but another

bit survives then to speculate that the decision in its entirety would remain the same and the market investigation would proceed in the same way. That's an inappropriate speculation on the part of the tribunal, the safe thing to do is to remit and allow them to reconsider on a proper basis.

I will move on then if I may to the features themselves then.

6(a), "the… concentrated nature of the… market." Well, Mr Holmes didn't want to accept straight away that that was neither here nor there. Every long-term exclusive contract is going to lead to a concentration, that's a feature of every one of these cases. That can't possibly be of itself anything, it may be a framework for the concerns that follows, but on itself it means nothing.

Then we come to asymmetry of information. The point Mr Holmes made for the CMA was there's asymmetry of information between Motorola and the Home Office in relation to Motorola's capex, that's the basis for this concern, as it's expressed.

The first point here is: is this feature grounded on the relevant considerations or is it grounded on any irrelevant considerations? The irrelevant considerations -- sorry, the failure to take account of a relevant consideration here is the failure in this decision to take account of the bargaining power that the Home Office had in 2016 and the role of benchmarking, because if the concern is asymmetry of information, they need at least to take into account the fact that in 2016 the Home Office was in a very strong position to set up structures to obtain such information as it felt it needed to monitor pricing or indeed to determine the pricing in that contract. And that's highly relevant and it's completely disregarded in the decision, there's no hope for it.

Also, the benchmarking provisions address the ability, they cover the ability, to get information so as to check that the pricing is competitive. That is not reflected

in the decision at all. The reference to benchmarking Mr Holmes took you to is extremely cursory and refers only to the fact that it's been waived, it's not taken into account, it's treated as a purely irrelevant consideration.

That feature may well have such legitimate bases, we don't know, but unfortunately it is also based on a failure to take into account highly relevant situations, the appropriate course is for it to be remitted for them to consider whether the impact of the bargaining power in 2016 and the benchmarking provisions would make a difference even to that reasonable suspicion.

The reason why it's so important, and I will come to this, is that this suspicion is grounded, it's plain, from their error in believing that the contracts were up for grabs in 2018/2019, the extension had not been locked down. That is not just a passing comment on paragraph 4, I will come to where we see that.

We see it in the same decision, in paragraph 1.52, on page 23. Mr Holmes, in relation to the contracts, took you to paragraph 4 on page 5, and the reference to the contract needing to be agreed, but he did not address what the CMA meant in paragraph 1.52. I placed a lot of reliance on this. I took you back to it twice in the course of my submissions. It demonstrates that the CMA did make an error when it looked at the contracts, if it looked at them in detail at all.

Because here we see, most clearly their belief that Motorola could walk away from the contract, so the Home Office wasn't sure that it could lock Motorola in up until 2026. The second half of the paragraph says, when it discusses the outside options available to the parties, after 2019:

"The outside options available to the two negotiating parties will have a significant impact on their relative bargaining powers [true]… we note in this respect that while walking away from negotiations (the only outside option Motorola and

the Home Office have) would.... be giving up large profits from.. Motorola, ...the Home Office would have... the loss of critical communication... abilities from... police, fire services and emergency services in the field."

Mr Holmes, did not address you on this paragraph, and this is the paragraph where the CMA is saying they think that in 2019/2020 Motorola is free to walk away, although it would give up the profits under the contract. That's just completely wrong.

You have seen in the contract that the Home Office can elect and did elect to require Motorola to continue to provide the services until 2026.

I was waiting to see what Mr Holmes had to say about the extent to which the CMA has actually reviewed the contracts in this case. He did not say that they had reviewed the contracts, he chose his words very carefully. He said that the CMA in making this decision was familiar with the main lines of the contracts. He sought to downplay the significance of their error. The error in their decision that they believed that the extension had to be agreed in 2020.

The tribunal should be left with the same concern. The CMA here has made a serious mistake, and even now they are seeking to downplay it. That's fundamental to how they have approached the rest of the decision, because of course it explains why they believe the 2016 negotiation is just one of many and 2018/2019 is the focus.

We turn then to why they disregard the bargaining power of the parties in 2016. That's the same point. It's irrelevant in the eyes of the CMA, because in their decision they believe that after 2016 the question of extension still had to be agreed between the Home Office and Motorola.

Mr Holmes said the bargaining power in 2016 makes no difference, it's appropriate to focus on the situation now. But the bargaining power in 2016 explains the

competitive position of the parties after 2016. You're asking what is the adverse effect on competition, how to understand the position of the parties in 2018 or 2019 without knowing what has happened in 2016? And there is nothing in the decision to suggest that that has been taken into account by the CMA.

Then we come to benchmarking and the reference to it in paragraphs 1.50D of the decision. That's simply a reference to the fact that they've been waived. There's no reference to the role or function of benchmarking. This again isn't our attempt to argue the merits of the case, it's a public law point. Because the decision has failed to take any account of the economic significance of the benchmarking, even to the extent it's been waived. The CMA says if it's waived, it's irrelevant. It's plainly relevant, you have seen the way it operates in the contracts. If it has been traded away in return for price discounts, it demonstrates its economic significance and that has to be included in any consideration of bargaining power in the competitive assessment. They say No. They say It's not relevant.

That clear decision is what we challenge. That's a public law relevancy issue, not just a question of --

THE PRESIDENT: I see that. It's slightly a rerun of the debate we had earlier, but I will run it past you nonetheless.

Sometimes, a matter is left out of account which, if taken into account, shows that another conclusion, here a suspicion, a reasonable suspicion, is simply not a suspicion at all. I have your point on that. At this point, I think you're using relevance in the -- as you just said -- public law sense, that a decision that is reaching a conclusion on a question of fact or policy needs to take into account all material relevant factors.

If you fail to take into account a material, relevant factor, even if what you have said stands, and it's right, there is a failure, which will likely result in the decision being set aside. Is that the way you are using relevance at this point in your argument?

MR KENNELLY: Yes, to this extent, because it's true, again, as a matter of public law, that even if a decision-taker has relied on irrelevant consideration or has failed to take into account a relevant consideration, as a matter of relief, for example, it's still open for them to say, to the court "The same decision would have been taken". But the court is slow to go down that road, because, once you've committed a public law error of the type I have described, the better course is always to leave the decision-taker to fix it, not for the court to put itself in the shoes of the decision-taker and say, "Absent that error, the decision would have been the same". The important course is to let the decision-taker decide what to do once the error is corrected. So that is how I put it.

The reason why we put it forcefully, sir, is that the error here is so central. This question of whether the extension had to be negotiated after 2018 is the core of the CMA's theory of harm here. It is grounded on a fundamentally erroneous basis, which Mr Holmes has not changed, he didn't come to you and say no, in fact, the contract didn't -- sorry, the extension did have to be agreed. He sought to downplay its significance, but you see how significant it is, because it informs the focus of their bargaining power analysis and the way they look at the 2018 pricing. That's my point and I am repeating what I said earlier.

The benchmarking error is also significant, because the CMA here is saying, as I said, that if it's waived, then it can be taken out of account. But you have

seen its function, its function in a competitive assessment has a role in ensuring competitive pricing and if that's traded away, its value is still to be recognised by the CMA and they have said positively no, that's not the decision, that is not the approach we have taken in making this reference.

The points about the correction to footnote 22, the point about what was said by whom when is just a distraction. We are not saying, that if we led the CMA into error, that's a basis for you to set aside their decision. The fundamental point is they treat benchmarking as irrelevant, and that is the public law error they have made.

That's because it leads them to the regard of bargain power through a totally wrong prism.

And, this is my final point on this issue, it also leads them to make a mistake on how they view profitability. The reason why they say we look at profitability for 2020 is because they thought that the contract had to be renegotiated in terms of the extension from 2020. They say that at paragraph 1.73 and 1.77 of the decision.

Moving on then to the investment rate of return, the net book value. The reference to the defence, and it's telling that Mr Holmes went to the defence first, not the decision. The defence acknowledges that really what needs to be used is the replacement value for the assets. It's not in the decision, the decision simply says net book value. The decision doesn't say that's just a starting point, that's their test.

As the CMA implicitly now acknowledges, that cannot be the test. At most the CMA, now says it's a starting point but it does not say in the decision, it's a starting point. It's a distraction for Mr Holmes to say well we could never have done the full analysis that Motorola requires, I made this very clear, we never said

full analysis of anything is required, we only ask them to identify the right test and that's what they failed to do. There's no way they can say net book value is equivalent or proxy for MEA or present value, and they don't attempt to.

I move on then to ground 3 and relevant market. Again, market concentration here is not the issue. The question is whether the delivery of the ESN by Motorola is a feature of this market?

The first reason Mr Holmes gives for that is: well there's a transition period where there will be competitive pressure between ESN and the Airwave system. You have my submission, that that just isn't correct. Again, the CMA based its decision, its market definition, on that, and that's plainly wrong. One replaces the other. There's no competitive relationship between them at all.

The next point is that Motorola's delivery of ESN and the timings surrounding that and the nature of that delivery has changed, and you have seen that fact.

You have my submission that that delivery of ESN cannot be -- in relation to that change, it means that Motorola's delivery of ESN cannot be the future of the Airwave market. Because it's the delivery by Motorola of ESN that they say is, the feature of the Airwave market.

Then we have the deed of recovery.

True it is, the deed of recovery is mentioned in the decision. My Learned Friend says: well, my criticisms of the deed of recovery just show that I'm arguing the merits of the case. But again, not so. My concern isn't that they have made mistakes in how they read the deed of recovery, the public law error is, that they, failed to appreciate the relevance of the deed of recovery to the bargaining power of the parties in 2016.

If they had been asking themselves the right question, which was "Looking at the bargaining power of the parties in 2016, can we have a reasonable suspicion

of a competition problem?", they would have viewed the deed of recovery very differently.

The deed of recovery is another manifestation of the bargaining power that the Home Office had in 2016. But, that relationship between the deed of recovery and the bargaining power at the time that it was entered into is just completely ignored in the decision.

I am moving on then to the administrative timetable and ground 4.

THE PRESIDENT: Yes, thank you.

MR KENNELLY: Mr Holmes said there that this ground of challenge, is now just concerned with the lack of an opportunity to comment on the Home Office's representations.

I must repeat what I said today. That was not my case. I said I focused on that as a manifestation of the problem, we identify with the notice of application. I said in terms that, although I was referring you to that error that had arisen, I stood by the basic complaint that we raise in the notice of application, that the timetable itself was fundamentally unfair.

THE PRESIDENT: Yes. I actually wanted to check whether you were not pursuing your no reasons ?--

MR KENNELLY: Yes, the reason challenge has gone, because you got the reasons.

But we have an in-principle complaint about the timetable itself. As I said, the story I told you in opening is simply a manifestation, which demonstrates how an overhasty and unfair timetable leads to problems like that.

The split-the-difference approach which was taken by the panel, ultimately, is wrong in principle. By "split the difference", I don't mean they went halfway between two points, the point is --

THE PRESIDENT: No, they sought two points either side of their -- [over-speaking] -- and stuck with the decision for that reason.

MR KENNELLY: -- that's wrong in principle, in a market investigation like this. They said that this timetable is fair, and we have not given any particular example as to why it produces unfairness to us. The difficulty there is that it's impossible to provide specific examples of unfairness at this stage.

I made my submissions as to how an excessively rapid timetable produces unfairness in ways -- it's guaranteed to produce unfairness in ways that are difficult to anticipate in advance. But the tribunal knows its own judgment -- and this is something where you are well-placed to Judge; procedural fairness is something where you are more willing to step in, rather than second-guessing economic assessments -- in a process which Parliament has said should last -- can last up to two years, and what every other market investigation, has lasted for significantly longer than this one even when dealing with a single undertaking. One can ask oneself: why, why, is this the fastest ever? What's the justification? On its face, it suggests that unfairness will arise, errors will take place; we have already seen that. There just isn't the justification for it.

We are concerned that the reason why it's been fast-tracked is based, even in part, that is not decisive but material, the false statements made by the Home Office were passed uncorrected to the panel. It needs to be rapid because otherwise there will be delay to the ESN network.

(Inaudible) areas(?) are significant because, for such a rapid timetable, one likely (inaudible) unfairness, we ask ourselves why, why is it so rushed.

The last point I want to make, comes back to a point that Mr Holmes made about never-ending process of consultation. Our concern about that communication

I took you to wasn't that we wanted a never-ending process, we wanted one opportunity to comment on the submissions that were being made about the timetable. Even Mr Holmes had to accept, for the CMA, that if the CMA was relying on a contentious factual proposition, although subject to context, the law would require it to be put to Motorola before being relied upon by the decision taker, and that is exactly what happened here.

What the Home Office said was highly contentious, extremely prejudicial and we were given no opportunity to comment upon it.

Unless I can ... I am very grateful for the time.

THE PRESIDENT: Thank you very much, Mr Kennelly. What we are going to do is we are going to rise now and we will resume at ten to four.

What I hope we will be able to do, but the reason for our rising is to see whether we can, is to give you a statement of the result, because we are very conscious that, because of the aggressive nature of the timetable that you have described, Mr Kennelly, the parties need to have clarity sooner rather than later.

So we would hope to be able to give an outcome this evening, with our decisions to follow, in very short order. We would hope to get those out to you, again if we are in agreement as to where we're going, in the course of tomorrow or the day after.

But in order to see whether we can in fact do that, we will rise, as I say, until ten to four, and we will resume then. So thank you very much for your efforts. Until then.

(3.25 pm)

(A short break)

(3.51 pm)

Judgment on the Application

(For the Judgment, see [2022] CAT 4)

We will say no more than that, save to reiterate what I started off with, which is our gratitude to both teams for the outstanding way in which matters have been presented.

So, thank you very much. Unless there's anything more, we will rise now. But if there are consequential matters, we will deal with them in due course, I think in an order.

Thank you all very much. Good evening.

(3.58 pm)

(The hearing concluded)