IN THE COMPETITION APPEAL TRIBUNAL

CaseNo: 1593/6/12/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 2nd August 2023

Before:

Bridget Lucas KC
(Chair)
Tim Frazer
Robert Herga

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Airwave Solutions Limited & Others

Applicants

V

Competition and Markets Authority

Respondent

&

The Home Office

Intervener

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A P P E A R AN C E S

Mark Hoskins KC and Paul Luckhurst (Instructed by Winston & Strawn London LLP and Slaughter and May) on behalf of the Applicants

Sarah Abram KC, Naina Patel and Ben Lewy on behalf of the Respondent

Anneli Howard KC, Suzanne Rab and Jack Williams (Instructed by TLT LLP) on behalf of the Intervener

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Wednesday, 2 August 2023

(10.30 am)

Housekeeping

MR HOSKINS: Good morning.

THE CHAIR: Good morning, Mr Hoskins. I should start with the usual opening remarks.

MR HOSKINS: Yes, sorry.

THE CHAIR: Some of you are joining us livestream on our website so I must start therefore with the customary warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of these proceedings and breach of that provision is punishable as contempt of court.

Mr Hoskins, before you start, I had a couple of preliminary points of clarification which is probably best to raise straight off rather than let you get into your stride and interrupting.

There are two points and the first I think is principally aimed at you, Mr Hoskins, which is we wondered whether any point is being taken on this application that the market investigation related to the conduct of a single firm.

We don't read that from your Notice of Application but we --

MR HOSKINS: It's not.

THE CHAIR: It's not, thank you.

MR HOSKINS: There's no legal point I am taking.

THE CHAIR: Then the other point is probably aimed principally at you, Ms Abram, and that is we noted various references in the skeletons to new points which the CMA alleges Motorola isn't permitted to argue and we understand that to

be for two reasons. One is that some of the points were not raised in the course of the market investigation and the second is that they are not in the Notice of Application and obviously some of those factors could apply to both. We wanted to say that we will of course hear any submissions that the CMA wish to make on those points but we wanted to clarify whether it's suggested we should determine now whether Motorola should make those arguments effectively as a preliminary point or whether your position is that we can hear the arguments and then address -- because you have addressed them in your skeleton and then address them in a general ruling at the end.

MS ABRAM: I am very happy to continue de bene esse and to raise both the points going to whether they are permissible grounds and respond to the substance all at once.

THE CHAIR: Thank you. That was definitely our inclination but I did not want to shut you out from making a different point.

Thank you, Mr Hoskins.

Submissions by MR HOSKINS

MR HOSKINS: Thank you. Let me get the difficult bit out of the way, which is telling you everyone who is appearing. Hopefully I won't miss anyone. I am appearing with Mr West KC -- and I will explain why he's here in a second -- and Mr Luckhurst. For the CMA, you have Ms Abram KC, Ms Patel and Mr Lewy, who I am told is remote, whether he's in an exotic location has not been divulged. For the Home Office, you have Ms Howard KC and Ms Rab. Mr West is here more as a threat than a promise because the Final Order was adopted on Monday.

THE CHAIR: Right.

MR HOSKINS: Which of course raises the spectre of what happens if, God forbid, we were to win our appeal and there was an order in place effective from Monday, you will hopefully be pleased to hear we are trying to avoid burdening you with an interim relief application, which is the last thing we need in the next couple of days. Negotiations have feverishly been taking place and we are optimistic it can be dealt with by agreement. I think the hope is there will be a draft order produced to you for the Tribunal's approval which will hold the ring pending a judgment coming. But given that has not been -- that process has not been completed, that's why Mr West is here.

THE CHAIR: Thank you. Thank you for that.

MR HOSKINS: Hopefully we'll never hear from him again, in the nicest possible way.

THE CHAIR: A little harsh but ...

MR HOSKINS: It's for all our interests.

As we said in our skeleton argument, and I hope I am not indulging too much flattery, the basic facts are, if I may say, excellently summarised in the Tribunal's own notice that was published on 28 June and hopefully you've all seen that. The reference for it is Bundle G tab 10 page 295 but you have had two days pre-reading, I am not going to take up your time going through those facts. They are very well set out there.

Given you've had pre-reading time, I am going to just jump straight into the issues. But having said that, let me just clear the jury points out of the way. The CMA understandably repeatedly refers to its belief that Airwave is charging supernormal profits for the Airwave network. But of course whether that is correct depends on the validity of the CMA's reasoning in its Decision. The question for the Tribunal is not how do we save the taxpayer money, the only

relevant question for the Tribunal is, is the CMA Decision lawful, and I am sure you are well mindful of that. But let's just put that jury point to one side. It's not relevant for what's before us. The question for the Tribunal is one of law, not of policy.

But let me just counterbalance that jury point with our own one before I leave this issue, nothing to do with the legal issues, but I do want to make sure the Tribunal is in no doubt about the importance of this appeal for Motorola. The CMA's remedy rewrites one aspect of the existing contract, which is the price, whilst leaving the remainder of Airwave's contractual obligations intact until potentially 2029. Under the CMA's remedy, Airwave must continue to provide the Airwave Network services at prices which are significantly below the prices that were contractually agreed. So this matters for Motorola. It is commercially very important. But those are the two jury points. So what? Let's move to the law.

What are the judicial review principles to be applied in this case, and you've had a deluge of snippets from cases here and snippets from cases there but let's just try and focus on what principles really matter. In terms of what somebody has called irrationality or unreasonableness, people write articles about what the appropriate term is and what it means but let me just try and encapsulate what we say is the principle to be applied here. As in pretty much all judicial review cases, the public body, the CMA, relies heavily on its margin of appreciation, and why not? Because that's an important principle of public law. But margin of appreciation is not a get out of jail free card. That's made clear in the extract from Mr Justice Fordham's leading public law textbook and we set out some extracts from that at paragraph 41 of our skeleton argument and you have the text in the Authorities Bundle.

As Mr Justice Fordham makes clear and here I am quoting:

"There are dangers in appearing to set the bar too high. Reasonableness is a meaningful standard of substantive review."

So what is the margin of appreciation, how does it operate? I appreciate I am taking a plunge here. As I say, people write articles on this stuff but let me have my own little go at saying what we say it means. What the Tribunal cannot do and what we are not asking it to do is to quash the CMA's Decision because the Tribunal would have come to a different conclusion on the evidence before it.

That is the margin of appreciation or, as Mr Justice Fordham puts it, the forbidden substitutionary method.

THE CHAIR: Yes.

MR HOSKINS: However, if the Tribunal concludes that the reasoning in the Decision is illogical or is incomplete or is inconsistent in a material way, it can and should quash the Decision. That is what in practical terms we say is the test here and what the margin of appreciation cannot do is to shield materially defective reasoning.

A word on relevant considerations. It's common ground that a failure to take account of a material relevant consideration is a valid ground of challenge. So, for example, you see that in the CMA's defence at paragraph 30. But it's also important not to get too hung up on public law pigeonholes. If I can explain what I mean by that by showing you a decision of the Tribunal: Tesco v Competition Commission. If you could take out Authorities tab 17, page 550.

If I could ask you to read paragraph 77, but it's the first few sentences I really rely on in relation to the no need to pigeon hole.

THE CHAIR: Yes, thank you.

MR HOSKINS: So let me turn to our first ground of challenge and you can see that in our Notice of Application, Bundle A, tab 1, page 8. Paragraph 11 and particularly 11.1. Ground one:

"The CMA's finding that there are features of the market that can cause an AEC is based on a fundamental error of approach."

You've no doubt read this but I ask you to refresh your memory. In particular you'll see:

"In the second place, there was a public tender in 2014 to 2015 for the ESN network which is intended to replace the Airwave Network. There has therefore been competition for the market in respect of the entirety of the period considered by the market investigation."

So an important part of Motorola's case in ground one was and is that the public tender in 2014 to 2015 contributed to ensuring competition for the market in respect of the entirety of the period considered by the market investigation.

The CMA's response to that particular ground is in their defence at paragraph 18.1. This is Bundle A, tab 5, page 73. You'll see paragraph 18.1, ground one they say, if I can skip the first couple of sentences then they say:

"This ground is misdirected. As the CMA found in their report, neither of the exercises relied on by Motorola [so that's the original tender and the 14/15 tender] is effective to constrain prices in the present. The tendering of the 2000 PFI Agreement served at most to constrain prices for the period it was intended to cover (ending in 2019)."

Then importantly here:

"The 2014/2015 ESN procurement exercise will only constrain prices once the ESN becomes operational. In circumstances where ESN has been delayed and the parties are outside the original term of the PFI Agreement there is no

operative competitive constraint."

So in its defence the CMA expressly relied on the argument that the 2014/15 ESN procurement exercise will only constrain prices once the ESN becomes operational. Our response to that argument is that that is flatly contradicted by the findings on market definition in the Decision.

Now, if I can turn then to the Decision, which is obviously in the Decision Bundle. If I can ask you to turn to tab 1, page 60, and 60 is the Bundle numbering rather than the internal numbering --

THE CHAIR: Yes.

MR HOSKINS: -- of the document.

THE CHAIR: Yes.

MR HOSKINS: Section 3, "Scope for competition and market definition". If you read paragraphs 3.1 and 3.2, you'll see what this section deals with. In particular, it deals with market definition.

THE CHAIR: Yes.

MR HOSKINS: As you will have seen, the Decision finds that the Airwave Network and ESN falls in the same product market and compete with each other. That's the conclusion in this section.

Can we go to page 81, paragraph 3.75. There it's said:

"Motorola has submitted that there cannot be a competitive interaction between the two networks because ESN has been designed to replace the Airwave Network and the transition has been agreed within contracts and does not depend on the relative attractiveness of each network. Our view is that there is potential for competitive interactions between ESN and the Airwave Network."

So what you see there is Motorola put forward an argument about the market and

that was rejected by the CMA.

THE CHAIR: Yes.

MR HOSKINS: I will come back to this. I am going to address obviously the arguments that the CMA has raised about why we can't run this point, I will come back to that when I do that.

But for the moment what is important is that, as I will show you, the CMA made express findings that ESN competed with Airwave from a long-term perspective whilst ESN was still in development. You will immediately see the point there because, as you've seen from the CMA's defence, they say no competition from ESN until it is actually in place and operating, and we are submitting that, in this section of the Decision, there are findings that competition between ESN and Airwave existed whilst ESN was still in development. That's the hard point that I am going to demonstrate.

MR FRAZER: Mr Hoskins, will you be coming onto paragraph 3.81 which deals I think with this point?

MR HOSKINS: Absolutely, I am going to trudge painstakingly through all these paragraphs I'm afraid. So let's continue first of all with paragraph 3.75. So we've seen the CMA decision says:

"Our view is that there is potential for competitive interactions between ESN and the Airwave Network."

Then they say:

"In particular, although ESN is still in development and therefore is not available in the short term, a central incentive for ESN's suppliers to develop ESN in a timely manner comes from winning new customers from the Airwave Network. We also note that the prospect of ESN being developed as a replacement for the Airwave Network could, in principle at least, affect the incentives of

Airwave Solutions to maintain or improve aspects of its offering with a view to delaying customers transferring from ESN."

So immediately you'll see that in this section the CMA is identifying competitive effects which exist while ESN is still in development and those are competitive effects both on ESN and on Airwave.

At paragraph 3.77 you see the heading "Demand Side substitutability":

"Substitutability in the short run may be different from substitutability in the longer-term. In the short run firms compete using the products in their existing portfolios. In the longer term, firms may compete by improving their product portfolios. In this case, as discussed in paragraph 3.63, competition in the supply of LMR network services for public safety takes place over the longer-term."

3.78:

"Dynamic competition between the Airwave Network and ESN falls within this category of longer-term competition because it involves the efforts and investments made by ESN's suppliers to develop a new offering which would serve as replacement for LMR network services and therefore 'steal' Airwave Solutions' customers in a timely manner (i.e. induce demand side substitution). It can also include efforts by Airwave Solutions to retain customers and prevent or delay them switching to ESN."

So again competitive effects whilst ESN is in development.

3.79, over the page. 3.79(a) says:

"ESN is being developed to meet the same fundamental demand-side need that the Airwave Network has met, namely providing communications network services, including MCPTT functionality for Great Britain's blue light emergency services. The Airwave Network and ESN are the only two

solutions that exist or are in development that meet or have the potential to meet this demand side need."

I just pick up (b) in the final sentence:

"In this respect, from the perspective of Airwave Solutions, ESN represents the only significant long-term competitive threat that could reduce the customer base and Airwave Solutions will lose 100% of customer base to ESN in due course."

Paragraph 3.80:

"In light of the above, any effort and investments made by ESN's key suppliers to develop ESN can be interpreted as efforts towards attracting customers away from Airwave Solutions and replacing it as a solution for Airwave Solutions' customers. Because Airwave Solutions' only demand-side competition is dynamic competition from ESN's key suppliers developing a new solution and the only demand side alternative from which ESN can attract customers is the Airwave Network, our view is that the market includes both the existing TETRA Airwave service and the LTE network services for public services (i.e. ESN)."

i.e. Airwave and ESN are in the same product market.

Then 3.81:

"In assessing the demand side substitutability between the Airwave Network and ESN, we have thus far focused on longer-term substitutability. We note that in the short run, and in particular prior to the development of ESN, there is no scope for demand-side substitution between the Airwave Network and ESN: a customer that is negotiating with Airwave Solutions cannot realistically seek to get a better deal by threatening to walk away from negotiations and switch to ESN, because ESN is unavailable now as an option. Accordingly, while

market definition would often take account of short run competition, in this case our focus on longer-term substitutability is appropriate. We take the lack of short-run substitutability into account in our competitive assessment where it is relevant."

So for the purposes of reaching the conclusion on market definition, the focus is on longer-term competitive effects and then they say that the short-run substitutability is taken account in section 4 but they do not say that the longer-term effect is taken account on section 4 and we'll come to section 4 and see what it says about that.

Now, what's important to understand about what is being said here is this: the CMA is not saying that long-term competition is something that will not take place until the future, for example when ESN has entered service. What it is saying is that there will be competition between ESN and Airwave over the longer term starting now when ESN is still in development. That's clear from the CMA's own conclusions on market definition.

You see at 3.80 and you also see it at paragraph 3.94 that -- here I am quoting 3.94:

"Our view is therefore that the relevant market is the supply of communications network services for public safety and ancillary series in Great Britain."

i.e. the market now, today, includes both. Why does it include both? Because of the long-term competition between Airwave and ESN. How does that affect Airwave? Because it knows it's going to be replaced by ESN and therefore it is under competitive pressure to try and delay the transfer of customers to ESN. But that's an effect that's taking place now and that's what is relied on for the market definition which is said to apply now.

So in this section, the CMA did not find that ESN and the Airwave Network would be in the same market or would be in competition once ESN had become

operational, the CMA found that they were in the same market now. They are in competition now and that's whilst ESN is still being developed.

This isn't a minor point. This isn't me sort of finding a little footnote. The CMA's market definition depends on this long-term competition. I showed you the paragraph where it said that. For the purposes of market definition we are focusing on the long-term competition, not the short-run competition. It's therefore clearly a material consideration. It's the whole or the primary basis for the market definition finding.

So that's what's happening in the market definition section. But, as I will show you, the CMA failed to take any account of that type of competition when it conducted its competitive assessment in relation to the current prices being paid to Airwave for use of the Airwave Network. That take us to section 4. That's at page 88 of this Bundle.

So what one finds in section 4, you see heading "Competitive Assessment (1): market features and Airwave Network". In essence, this is the CMA's analysis of restriction of competition. You'll see that if you look at paragraph 4.1, there is a brief description of what this section covers.

Now, before I go into the detail of 4.1, the core findings in the Decision are clearly set out in the summary. So let's go back to that for a moment. That's at page 9 of this Bundle. You'll see at page 9 the heading "Summary". I am going to pick it up at paragraph 9. Paragraph 9 summarises the finding on the relevant market, which we've just looked at. Then if I can ask you to remind yourselves of paragraphs 10 to 11. The important point here is the finding that competition manifests itself through periodic competition for the relevant market. That's the first sentence of paragraph 11.

Then over the page, page 11, paragraph 14, "Our Findings":

"In our assessment, the terms of the PFI Agreement under which the Airwave Network operates resulted from the type of process - tendering - that we might expect to provide competition for the market. In relation to the original period of the PFI Agreement, the Home Office had opportunity to run an open competition for a supplier and, as a result, to agree terms that constrained the price of the provision of the network. In such a competition, the winning supplier would reasonably have been expected to set the price at a level that would enable it to cover its expected costs and give it the chance to earn a reasonable return for the period of the contract."

The point being, in the original PFI tender, the Home Office had the opportunity to run an open competition for a supplier and to agree terms that constrained the price of the provision of the network.

Paragraph 15, the first sentence, according to the CMA:

"The PFI Agreement that resulted from the original procurement exercise was for a fixed term ending in 2019."

Paragraph 16:

"The position now that the original period of the PFI Agreement has ended, however, is materially different."

This is very important:

"Our assessment is that the terms on which the Airwave Network is provided after 2019 are better characterised as reflecting a virtually unconstrained monopoly position on the supplier's part rather than the result of a competitive process."

So for the purposes of analysis of restriction of competition, the CMA says that Airwave is in a virtually unconstrained monopoly position, i.e. one in which, according to the CMA, Airwave faces no material competition.

Then paragraph 17:

"Instead of being set through a competitive process, prices are established (or maintained without significant variation from previous levels) in bilateral negotiations between Airwave Solutions (the monopoly supplier) and its owner Motorola and the Home Office relating to the extension of the PFI Agreement. In those negotiations the Home Office has no credible alternative option in terms of its choice of supply or supplier."

Now, bear in mind that the current prices being paid for use of the Airwave Network were set in the negotiations in 2016 and 2018. We make that point at paragraph 27 of our skeleton argument. It's not been contested. I believe it to be common ground because that's what also the Decision says. But I do not think that's controversial.

But let's look at those negotiations in turn, the 2016 negotiations, the 2018 negotiations. The 2016 first. Can you please go to page 52 of this Bundle. Can you read to yourselves paragraphs 2.87 and 2.88, just to remind you what the 2016 negotiations were about. **(Pause)**.

THE CHAIR: Yes.

MR HOSKINS: We have negotiations leading to an agreement in February 2016. Now, let's remind ourselves that a tender for the market had just taken place in 14/15, ending in 15, so these negotiations are following hard on the heels of that competitive process. Can you please go to page 123. Paragraph 4.121. "Fourth, at the time of these negotiations [and that's the 2016 negotiations you'll see from the next sentence] the Home Office anticipated that ESN would replace the Airwave Network in 2020. It had tendered, consulted and agreed with suppliers on that basis."

So at the time of the 2016 negotiations, it was anticipated that, pursuant to the 2015 tender, ESN would replace the Airwave Network by the end of 2019, in 2020.

THE CHAIR: Yes.

MR HOSKINS: Now, as we've just seen, according to section 3 of the Decision, there was sufficient competition between ESN and the Airwave Network for them to be in the same market at this stage. That means, according to the findings in section 3 of the Decision, that Airwave had an incentive to "maintain or improve aspects of its offering with a view to delaying customers transferring to ESN". That's not me saying that, that's me effectively quoting from section 3 of the Decision.

However, there is no mention of that important aspect/factor of competition in the CMA's consideration of restriction of competition in section 4. Now, I can't prove a negative. I can't show you what's not there. I can read you through every line and say: see not there, but that would not be entertaining for anyone. We've made the point it's for the CMA to demonstrate to you where it has taken account of that vector of competition.

It has attempted do so in its skeleton argument. So let's see where according to the CMA it has taken account of this factor of competition. The CMA's skeleton argument, you have it in Bundle A, tab 9. You want to keep the Decision open. Bundle A, tab 9, page 173.

THE CHAIR: Yes.

MR HOSKINS: So you'll see, if you go to the prior page 172, the heading "CMA took competition between ESN and the Airwave Network into account":

"Motorola is in any event wrong to contend that the CMA failed to take this point into account."

Then the next page, 173, paragraph 17:

"That careful consideration of the scope for ESN to operate as a competitive constraint on the Airwave Network formed part of a thorough assessment of

the extent of competitive pressure on the price of Airwave Network services. This permeates throughout the CMA's subsequent analysis of the negotiations between the HO and Motorola."

Now let's look at paragraph 17(a). You see 2016 and it refers to decision 4.118. So this is where the CMA says that the long-term vector of competition was considered in section 4. So let's go to decision 4.118. It's page 122 of the Decision Bundle. Paragraph 4.118 says:

"First, the Home Office was not able in 2016 to walk away from Airwave Solutions. There was a need for the critical services provided by the Airwave Network to continue until ESN was (is) ready."

That may or may not be right. There you have it. That's a point the CMA relies on. But there's no mention whatsoever of the competitive pressure on Airwave to compete with ESN in order to delay the transfer of customers from the Airwave Network to ESN. It's not in 4.118. It's not anywhere in section 4.

Let's move on to the 2018 negotiations. Can we go to page 52 of the Decision Bundle. You'll see the heading just above paragraph 290, "ESN delivery delays and re-plans". Now, we find what was happening in relation to ESN at this time in paragraphs 2.94 and 2.95. If I can ask you, please, to read 2.94 and 2.95. **(Pause)**.

THE CHAIR: Yes.

MR HOSKINS: Three points to note from those paragraphs. First of all, following negotiations held from May to August 2018, heads of terms were signed on 21 September 2018. Secondly, these heads of terms were implemented through a change advisory note called CAN500 which was signed on 14 May 2019. Thirdly, CAN500 included a revised date for mobilisation complete of ESN of 30 November 2020. So at the time of -- we'll come on to

it -- the Airwave negotiations in 2018, it was envisaged that ESN would have mobilisation complete by 30 November 2020.

Let's look at what was happening in relation to Airwave at that time. Those were negotiations dealing with ESN. Let's now switch to Airwave. You see the heading on page 54, "Negotiations relating to the Airwave Network".

THE CHAIR: Mm-hmm.

MR HOSKINS: And paragraph 2.99 explains that negotiations on the continued provision of Airwave took place between April to September 2018. You'll see that in the middle sentence.

The Decision at paragraph 2.101 tells us that the 2018 negotiations resulted in an extension of the period of operation of the Airwave Network to 31 December 2022. Note that that was actually beyond the mobilisation complete date of 30 November 2020 set by CAN500.

Then at paragraph 2.102, that's the last three lines, explain that in the December 2021 the Home Office served a national shutdown notice the practical effect of which was to extend the provision of the network unilaterally to 31 December 2026 at current prices. That was following an attempt to have another negotiation which did not lead to a further agreement.

THE CHAIR: Mm-hmm.

MR HOSKINS: Now, again, go back, according to section 3 of the Decision there was sufficient competition between ESN and Airwave Network that they were in the same market in 2018 and that means, again, according to section 3 of the Decision, that Airwave had an incentive to maintain or improve aspects of its offering with a view to delaying customers transferring to ESN.

But yet again there is no mention of that important material vector of competition in the CMA's consideration of restriction of competition in section 4 of its

Decision. Again let's go back to the CMA's skeleton and see where it says this point was considered.

So you'll want to keep the Decision open but let's go to the CMA's skeleton, Bundle A, tab 9, page 173, paragraph 17(c).

THE CHAIR: Mm-hmm.

MR HOSKINS: 2018 and 2021. You'll see four paragraphs referred to there of the Decision. Paragraph 4.175, 4.180, 4.181 and 4.140.

THE CHAIR: Yes.

MR HOSKINS: So let's look at those paragraphs. Back to the Decision, page 139, paragraph 4.175. So this is the first place that longer-term competition is supposed to be taken account of. I ask you simply to read paragraph 4.175 very closely and you'll find no mention of the point we are talking about.

In essence, paragraph 4.175 is no more than an introductory paragraph in any event.

The second paragraph relied upon by the CMA is paragraph 4.180, which again is simply an introductory paragraph. Again I invite you to read it. **(Pause)**.

The third paragraph that the CMA relies upon is paragraph 4.181. Again, if you read it, you'll see it simply does not address the point that we are concerned with.

The fourth and final paragraph relied upon is paragraph 4.140 at page 128, which is a general conclusory paragraph. Again, it does not address the point we are concerned with. If you could please read paragraph 4.140.

(Pause).

THE CHAIR: Yes.

MR HOSKINS: The short point therefore is this. This is our ground one. In its assessment of market definition, the CMA found that following the 2014/2015 tender there was competition between ESN and the Airwave Network and that competition began whilst ESN was in development. It is not the case,

according to section 3 of its own decision, that there was no competition until ESN was fully deployed.

However, in its assessment of restriction of competition, the CMA has failed to have any regard to that material and important aspect of competition. I have shown you that what they say is that Airwave enjoyed a virtually unconstrained monopoly position, i.e. one in which there was no material competition. We say whether you call it an inconsistency point or a failure to take account point, it does not really matter, but we say the failure to take any account at all of the competition between ESN and the Airwave Network as a result of the 2014/2015 tender is clearly a material and relevant consideration and is therefore a material and relevant public law error.

Our submission is that the CMA's failure to take account of that important factor means that the Decision must be quashed.

Now, that's the substantive ground one and I have addressed the CMA's substantive response to ground one, which leaves me with -- I guess one can call them procedural arguments. That may not be precisely right but you know the points --

THE CHAIR: May I just stop you there and ask you a question about the substance.

MR HOSKINS: Of course, of course.

THE CHAIR: It is difficult to avoid reading in the Decision a distinction that is frequently drawn between the short-term and long-term competition. What do you say we should make of that distinction? Because I understand your argument is that they have not taken into account what they say about the longer-term competition. What do you say we should make of the short-term competition that features highly?

MR HOSKINS: Well, the question you have to ask, there are different facets of

competition. Competition in the short term and competition in the long term. For the purposes of market definition, the CMA found that there was both short-term and long-term competition, though the focus for market definition was long-term competition.

The long-term competition is not de minimis because it was the hook upon which the market definition is based. It must be material important vector of competition. So therefore when one comes to the restriction of competition, again there are different forces at play. It's not there is one element which is the answer to everything. There are short-terms issues, there are long-term issues, they are all at play, it's all a mix.

But what the CMA cannot do is simply fail to bring a material element of competition into the mix when it makes its consideration. That's the problem. It is not that the CMA has said: for the purposes of market definition we focus on long-term competition and not so much on short-term competition. When they come to section 4 they say: we focus on short-term competition here for the following reason, but long-term competition is of limited relevance or does not matter or it does not tip the scale, whatever the weighing up is. But what the CMA cannot do is simply fail to take it into account and that is what has happened in section 4.

That is a classic public law error. My submission to you is not the CMA should have reached a particular conclusion. My submission to you is in order to lawfully reach the conclusion it did it would have to have taken account of this material factor and it did not.

THE CHAIR: Thank you.

MR HOSKINS: So let's go to the procedural arguments. The first is that this is a new case. It's said that we've raised a new case in our skeleton argument

that does not form part of our pleaded case. Now, I have shown you the main aspects of this but I will show you them again just so you have them in this context. Let's go back to our Notice of Application. Bundle A, tab 1, page 8.

Now, you've seen this already this morning and you will have seen that an important part of our ground one was that the public tender in 2014 to 2015 introduced competition for the market in respect of the entirety of the period considered by the market investigation. That was our case.

I have shown you what the CMA's response is, tab 5, page 73. They say you are wrong that the 2014/15 had any effect on competition in the relevant period. The reason they give for that, paragraph 18.1:

"The 2014/15 ESN procurement exercise will only constrain prices once the ESN becomes operational."

That's the point that the CMA sought to rely upon.

Now, as I have just submitted, on our case that particular argument that the CMA wishes to rely upon is flatly contradicted by its own findings on market definition in the Decision. Put quite simply, this is not a new ground. The argument I have just put to you this morning supports our existing ground, it's not a new ground. It's an argument which supports our existing ground, but it also responds to a specific argument that the CMA put forward in its defence.

So there's absolutely no merit whatsoever in this purported procedural defence. But in any event, even if there were something in it, that would not be enough, because the CMA does not claim any prejudice. But nor could it. The CMA had a week to respond to our skeleton argument. The argument is based entirely on the CMA's own decision. This is not a case where a new argument would require new evidence or disclosure. It's all in the CMA's own decision.

All relevant materials have been available at all times to the CMA and they are all

before the Tribunal. Therefore, we say there's nothing in this procedural argument. It is quite surprising, if I may say, to see this sort of argument given such weight in a public body's skeleton argument. One might expect a public body being challenged to say: we will come to court and we will explain, we will defend our decision on the merits. But what the CMA is asking you to do is to say: regardless of whether Motorola's argument has any merit or not, you should shut it out on a pleading point, and that's not a very attractive place for a public body to be.

Let us go to the second procedural argument. The CMA's skeleton argument at page 171. So we are still in tab 9 of Bundle A. Paragraph 11:

"Motorola is not entitled to complain that competition between the Airwave Network and ESN was a relevant consideration which the CMA failed to take into account, because Motorola previously made a directly contrary argument, telling the CMA that ESN is not a competitive constraint on the Airwave Network. As decision paragraph 3.75 records, 'Motorola has submitted that there cannot be a competitive interaction between the two networks'."

Now, you might want to keep the skeleton open but let's look at decision 3.75, which is at page 81 of the Bundle.

THE CHAIR: Yes.

MR HOSKINS: You saw this this morning:

"Motorola has submitted that there cannot be a competitive interaction between the two networks because ESN has been designed to replace the Airwave Network, and the transition has been agreed within contracts and does not depend on the relative attractiveness of each network."

Then, importantly:

"Our view is that there is potential for competitive interactions between ESN and the

Airwave Network."

The important point here is that the CMA rejected Motorola's submissions and came to the opposite conclusion.

Now, it's quite right, and understandably so, that an applicant cannot submit to a decision-making body that something is black and then when the Decision records that the thing is black suddenly lodge an appeal and say: aha actually it's white. Of course you can't do that. That's clear from the extract. If you go back to the CMA's skeleton argument at paragraph 12, so Bundle A tab 9, page 171.

THE CHAIR: Yes.

MR HOSKINS: In the words of Mr Justice Langstaff:

"It does no service to public administration for a party to seek to overturn decisions of a public body by arguing that the body was in error by adopting the very argument that party had advanced before it."

That's the point.

But that's not this case. Because the CMA rejected our argument.

THE CHAIR: Yes.

MR HOSKINS: Then they go on at paragraph 12 to say:

"This reflects the broader principle that a party is not entitled to challenge a decision on the basis of a ground not previously relied upon."

But that principle is not absolute or without limits. A party is not excluded from raising a point in a judicial review that was not open to it during the investigation. You can be criticised for not taking a point that was open to you but you cannot be criticised for failing to take a point that was not open to you.

Now, in this case, Motorola could not rely on the findings on market definition in section 3 of the Decision during the investigation because those findings did

not exist yet. We are caught in a circle we can't break into. The whole point of our challenge in ground one is that CMA has adopted a decision and that decision on its face is internally inconsistent. Of course, that's not a point we could raise in the investigation.

THE CHAIR: I suppose the point would have to be something like you were obliged to raise alternative arguments dependent on whether you lost a point in the market investigation.

MR HOSKINS: We'd have to anticipate every possible thing that might arise, not just if the CMA rejected our findings but in terms of what they might find. It's not simply having an alternative, it's having a crystal ball to try and imagine what the CMA might decide despite our submission and then trying to meet them. As a public law principle I think most public bodies would be aghast if the parties before them were required as a matter of law to try and tilt at every windmill possible. The wheels of public administration would quickly ground to a halt if that was an obligation.

MR FRAZER: Mr Hoskins, on your earlier point, what I understand the CMA to be saying is that during the period following 2019, the extension of the Airwave period, there was insufficient constraint on the prices from ESN. So that ESN was not in a sufficient state to constrain the prices that were being charged for Airwave. I understand that was the point that Motorola made during the investigation, that there wasn't sufficient constraint from ESN throughout the entire period and this is a point within that point. In other words, the CMA is saying, yes, there wasn't sufficient constraint on the prices in the period following 2019 irrespective of the fact that the market definition included both systems.

So to what extent then in your submission is this inconsistent for that period post

2019 with what Motorola had submitted concerning the market definition during the investigation?

MR HOSKINS: My submission, with respect, is that's not the relevant question because the ground only becomes available once the Decision is adopted and once you have the finding in section 3. So regardless of what we were submitting, what one has is because the CMA has chosen to rely on particular reasoning for section 3, long-term vector of competition, regardless of general arguments that were going before, that point only crystallises once the Decision was adopted. We cannot be shut out from running that point because if the Decision is inconsistent because of the findings made by the CMA on its own grounds, because we were not relying on the long-term vector of competition in section 3, it's entirely the CMA's own reasoning, own decisions, own conclusions that we are relying on, and therefore this point only crystallises once the Decision is adopted.

MR FRAZER: I see. Thank you. That's helpful.

MR HOSKINS: That completes what I want to say on ground one. Unless there are any further questions, I was going to move on to deal with ground two.

THE CHAIR: Okay.

MR HOSKINS: Thank you. So let's go back to our Notice of Application just to see what this ground is. So Bundle A, tab 1, page 9. Paragraph 12. You'll have seen this. I just ask you to refresh your memory of what is said there. **(Pause)**.

THE CHAIR: Yes.

MR HOSKINS: Then let's go back to the Decision. If we can pick it up at page 203, please. Paragraph 6.64 and figure 6.1. Again you may just want to refresh your memory on what is said there. **(Pause)**.

THE CHAIR: Yes.

MR HOSKINS: I must confess when I first read the Decision I looked at this 6.64 and the figure and thought this very impressive, I wonder where they got this methodology from. But of course what one must remind oneself is this is not taken from a textbook or an economic principle, this is just a description of the CMA's own methodology that they have made up. We'll come to look at that methodology. But the fact there is a diagram does not give it any import. This is just a description of their methodology. It's not lifted from a third-party source.

Can we go to paragraph 6.99 on page 217. Because this is where you see the application of the CMA's methodology. Again you may just want to refresh your memory by looking at paragraphs 6.99, 6.100 and 6.101. **(Pause)**.

THE CHAIR: Yes.

MR HOSKINS: Now, applying it to figure 6.1, what the CMA alighted upon and what it concluded is that the value in use was the appropriate assessment of Airwave Network's assets and you'll see that set out at 6.99(c). It really comprises of three elements. First of all, you'll see at (c) it's said:

"The value-in-use of the assets under an extension period in a well-functioning market would be zero, for those assets required to operate the network during the original PFI period."

So for all of the assets required to operate the network during original PFI period: zero.

Then the second element is at (c)(i) where a value is allowed for a depreciated replacement cost of investments made specifically to operate the Airwave Network beyond the end of 2019. So again put very crudely, assets required to operate after 2019 a value is given.

Then finally at (ii) a residual alternative use value of Airwave's assets is given. Those are the three elements.

THE CHAIR: Yes.

MR HOSKINS: Now, in our skeleton argument we explained that the residual alternative use of Airwave's assets meant their value in a use other than the provision of emergency communications network services.

THE CHAIR: Yes.

MR HOSKINS: In effect, in alternative use we might be able to sell off some of the sites that are currently part of the network and someone else might have a use for them, et cetera. The CMA takes quite a surprising stance in relation to this. If we can go to its skeleton argument, Bundle A, tab 9, page 176.

THE CHAIR: Mm-hmm.

MR HOSKINS: It begins on page 175, paragraph 24.

THE CHAIR: Yes.

MR HOSKINS: The CMA's conclusions in valuation of assets are set out in decision 6.9, which we've just read. Then after the quote at the top of page 176, CF Motorola's skeleton at 37(b), the CMA says:

"The residual (alternative) use did not necessarily mean 'their value in a use other than the provision of emergency communications network services'; it simply meant valuing them in a use other than their existing use, i.e. in the absence of the on-going contract with the Home Office."

Now, the reason I say that is surprising is there is only one use for the Airwave Network assets. This really at best is playing with semantics in the skeleton. Can we go to paragraph 6.96 of the Decision, which is on page 216.

THE CHAIR: Yes.

MR HOSKINS: If I could ask you to read that. It's a paragraph we'll come back to.

(Pause).

It's in particular the sentence that begins:

"We note that this would be best approximated by the fair market value of the assets employed by the Airwave Network in their state as of the end of 2019 in the absence of the ongoing contract with the Home Office, i.e. their value in an alternative use."

The point being if you do not have a contract with the Home Office, you have to use the assets for something else other than providing a communications network.

That's clear again from the Decision. If you go to page 9 of the Decision. If you read paragraphs 2 and 3. **(Pause)**.

THE CHAIR: Yes.

MR HOSKINS: So the relevant services are provided through a bespoke integrated network, and then paragraph 6:

"As a bespoke integrated network fully dedicated to emergency services communications covering the whole of Britain, the Airwave Network is operated by a single supplier. No alternative network providing similar services exists."

Then paragraph 10, which we saw earlier:

"We have considered how competition can occur in that market. Building a bespoke integrated network of the kind required meant that a single supplier would be best placed to meet the emergency services' needs under long-term contracts."

So let's be under no illusions, when we are talking about alternative use, that is a use other than the provision of the single emergency services communications network in the United Kingdom. If you do not have the Home Office contract, you do not get to provide those services and all you are left with is selling off

the bits of the network that can be sold off for other alternative uses, for example buildings, plots of land, bits of kit that might have another use.

So the value that's given under this part of the assessment, £18 million, is essentially the sum that could be made by breaking up and selling off assets of the network, let's be quite clear that's what's involved here.

Let's turn to the economic justification or basis for the approach adopted by the CMA to valuing Airwave Network's assets and remember it ascribes a value of zero to all the assets that were involved in providing the network prior to 2019.

Our submission is that the approach adopted by the CMA to valuing Airwave Network's assets runs counter to established economic principles but also more importantly for the purposes of the public law challenge it runs counter to the approach which the Decision itself described as more appropriate in the circumstances of this case.

Can we go to page 215 of the Decision.

THE CHAIR: Yes.

MR HOSKINS: Paragraph 6.95. In this paragraph, the CMA accepted that its approach departed from the recommendations in the Oxera paper and the recommendation was that an MEA basis should be used. I'll come on to look a bit more at what MEA means, but quite candid at paragraph 6.95: we are not following the Oxera guidance. Then, in relation to the Byatt Report, we have paragraph 6.96, which I asked you to read a moment ago, and also footnote 574. Footnote 574 cites from paragraphs 51 to 53 of the Byatt Report. You may again wish to remind yourself of what is said there. I will come back to it. **(Pause)**.

Please note the final sentence of paragraph 6.96:

"As set out above, we regard the approach set out in the Byatt Report as more

appropriate given the circumstances of this case."

Now, I was aware it was probably going to be quite a dull read but we've set out relevant extracts from the Byatt Report at paragraphs 46 to 51 of our skeleton argument and we also suggested that you look at particular sections of the Byatt Report in your pre-reading.

THE CHAIR: Yes.

MR HOSKINS: Actually it is not nearly as indigestible as one might have feared. So I am not going to trail you through all those passages again. But, in short, the Byatt Report provided advice to the treasury on the accounting principles to be applied to the valuation of assets of nationalised industries, including nationalised monopoly industries.

Secondly, one of the purposes of the advice was to ensure that the return on capital by nationalised industries was not excessive, notably in the case of natural monopolies. Thirdly, the Byatt Report stated that the guidance given would also be applicable in the private sector.

The fourth point, under the Byatt approach, nationalised industries are required to behave as if they operated in markets where competitive pressures bring returns on capital into line with those in the private sector. So even if a particular industry does not have competition, the Byatt Report says you have to imagine it has competition.

THE CHAIR: Mm-hmm.

MR HOSKINS: The fifth point, according to the Byatt recommendation, the overall principle is that assets should be included in the balance sheet at their value to the business. The sixth point, the value of assets to a business means what potential competitors would find it worth paying for them even if the competition is hypothetical. That's where you see that reference to free entry

in footnote 5. So that's what that's about. You have a nationalised industry but you imagine that there could be free entry into the industry and it's on that basis that the valuation is conducted and the appropriate way to conduct that valuation is through an MEA.

What that means is that the value to business are the net replacement costs of a modern equivalent asset, an MEA, if the asset would be worth replacing. However, you use the recoverable amount if the asset would not be worth replacing. But, as we have pointed out in our skeleton argument, the emergency communications network is not only worth replacing, it's essential that it is replaced. The Decision at the start explains how critical it is to the emergency services to have such a network. So it's not even a case where you might um and ah about whether to replace the network or not, it has to be replaced, it's essential that it is replaced.

Now, I only want to take you briefly to the Byatt Report given your pre-reading. You'll find it in Bundle C at tab 1. If I could pick it up at page 11. There are a number of definitions. At paragraph 11, value to business, it's explained:

"The value of assets to a business means what potential competitors would find it worth paying for them even if the competition is hypothetical. This will be the net replacement cost of a Modern Equivalent Asset if the asset would be worth replacing, or the recoverable amount if it would not."

Then if we go through to page 21.

THE CHAIR: Yes.

MR HOSKINS: Paragraphs 58 and 59. 58, "Assets worth replacing":

"The gross Modern Equivalent Asset value is what it would cost to replace an old asset with a technically up to date new one with the same service capability allowing for any differences both in quality of output and in operating costs.

The net MEA value is the depreciated value [and clearly that means the depreciated value of a technically up to date new asset] taking into account the remaining service potential of an old asset compared with the new one. For replacement cost valuation cost to be appropriate it is not necessary to expect that the asset will actually be replaced."

Then you have paragraph 59 which was on your reading list but you'll see what happens if something is not worth replacing but we say we are not in that world.

MR FRAZER: Mr Hoskins, you say you are not in that world but if we consider the period under review, that's to say 2019 to the end of the Airwave phase, is it to be your submission that the assets were worth replacing for that period or should we be looking at paragraph 59 instead? Sorry, is it right that paragraph 59 would be relevant rather than 58 for that period? You made the submission earlier that of course emergency contact infrastructure is worth replacing because it's necessary, as we all know. But if we are just looking at the period which the CMA was looking at in the Decision, is that still your submission?

MR HOSKINS: It absolutely is because one cannot countenance a situation in which between 2019 and, say, 2029 there was no emergency communications network in the UK.

MR FRAZER: That's not quite the point. The point is that would the assets need replacing during that period in order for them to be to operational?

MR HOSKINS: They would because, remember, what Byatt is saying is that you have let's call it a monopoly, in order to ascribe a value to the assets, what you have to do is to imagine that there's competition and what you have to imagine by way of competition, is that someone else is coming into the market

with up-to-date technology and the up-to-date technology is then the value that is placed, effectively, on the assets of the business. So that logic applies entirely to the period post 2019 because, yes, as we know, Airwave has carried on supplying it, but what the CMA is trying to do is put a value on the assets. If you are following the Byatt Report, as the CMA purported to do, then it is an asset that's worth replacing because you cannot imagine a world in which there is no emergency network for that period.

MR FRAZER: That's clear, thank you.

MR HOSKINS: Bear in mind that nowhere in the Decision will you find the CMA suggesting that this is an asset not worth replacing, part of Byatt. They do not say: we think Byatt is the most appropriate, and by the way it's paragraph 59 of Byatt, the only paragraphs they cite are 51 and 53, you remember footnote 574, and you see them on page 19 of the Bundle.

In a sense, that reiterates the point I just put to you as my answer to your question, if you just refresh your memory by reading 51 to 53, in particular the first sentence of 53. **(Pause)**.

Now, you will be delighted to hear that I am not asking you to conduct an evaluation of the Byatt Report, is it sound, is it not sound et cetera, all I am asking you to do is to note two things. First of all, as I showed you, decision paragraph 6.96 states that the CMA regarded, and I am quoting:

" ... the approach set out in the Byatt Report is more appropriate given the circumstances of this case."

Secondly, in spite of the recognition of the appropriateness of the Byatt Report, the CMA has patently not followed the advice in the Byatt Report. That is the simple point. That's the public law point. The CMA has failed to follow the approach which the Decision itself stated was more appropriate given the

circumstances of this case.

We can put Byatt away.

THE CHAIR: What do you say about the point that the CMA was not obliged to follow Byatt?

MR HOSKINS: It was not obliged to follow Byatt, absolutely. But where a public body does say: we intend to follow a particular course, if it then fails to adopt that course, that is a ground of challenge. But there is no prior obligation, of course, on it to follow Byatt. But if it chooses to follow Byatt, it has to do it correctly. What you cannot do is say: we are going to follow this particular path, and then when it's pointed out that you've done it wrongly say: ah well, it does not matter because we were not obliged to do it in the first place. That's not a get out of jail card in public law.

So let's -- a break?

THE CHAIR: Yes.

MR HOSKINS: I could do with a break as well, I have to say, so that's a good moment. Thank you.

(11.55 am)

(A short break)

(12.10 pm)

MR HOSKINS: We have just looked at the way in which the CMA having purported to favour the Byatt approach then failed to apply it. Let me now turn to the merits or, as we would say, lack of merit in the CMA's own approach.

Can we go to the Decision at page 203.

THE CHAIR: Yes.

MR HOSKINS: We looked at 6.64 and figure 6.1 earlier but I would like now to invite you to read paragraph 6.65 and 6.66, which is a description of the approach

adopted by the CMA in its provisional decision. **(Pause)**.

THE CHAIR: Yes.

MR HOSKINS: You'll see in 6.66 the absolute crux of the CMA's methodology:

"Put another way, we were not minded to consider that in a well-functioning market [I will return to what that means] customers would, in effect, pay twice for the same assets if the life of the network were extended beyond the term originally envisaged when the LMR network was commissioned."

Then if we go to page 212, 6.85.

THE CHAIR: Yes.

MR HOSKINS: 6.84 sets out Motorola's submission but if you could read 6.85 please. **(Pause)**. So we see it's in the final decision; the PDR reasons are, effectively, adopted.

So what that means is the validity of the CMA's approach rests on its assertion that in "a well-functioning market" a customer would not pay twice for the same assets if the life of the network were extended beyond the term originally envisaged.

But that of course raises the crucial question: well, what does the CMA mean by a well-functioning market? It's well summarised in the CMA's own skeleton, Bundle A, tab 9, page 179. You see (c):

"As explained in the CMA's defence, in a well-functioning market", then if I could invite you to read (i) to (iii) please. **(Pause)**.

THE CHAIR: Yes.

MR HOSKINS: You'll see there is a cross-reference to the Decision paragraph 6.91 at footnotes 571 and 572 but I am not going to take you there because we will be looking at the same thing again except in the Decision.

So you'll see from that that the CMA contends that a customer would not pay twice

for the same assets in a well-functioning market as a result of three different possibilities. So when it's trying to define what a well-functioning market would look like, it says: these are three possibilities that we rely upon to support our approach.

First of all, that there would be competition amongst potential LMR network suppliers who had already incurred the sunk costs of constructing a network. You'll see that in (ii).

Now, an LMR network, as you've seen, is the technology the Airwave Network uses. It's the older technology, if you like.

The second possibility, again in (ii), is the contractual transfer of network assets at the end of the original contract period to enable the retendering of the provision of services using already built and paid-for network. So it's a contractual argument. In a well-functioning market that's what the contract would provide for.

The third possibility: in a well-functioning market there would be a contractual requirement that the original supplier would reduce prices during an extension period reflecting network assets having been paid for over the original contract term.

So those are the three possibilities for a well-functioning market that the CMA relies upon. But none of them is sustainable in light of the findings in the Decision. So let me take them in turn.

The first suggestion is that, in a well-functioning market, there would be competition amongst potential LMR network suppliers who had already incurred sunk costs of constructing a network. Well, that suggestion is contradicted by the basic facts in the Decision. I already showed you this morning that the Airwave's network was a bespoke project built solely to provide

communication network services to the emergency services. Let's go back to what we looked at this morning. It's the Decision, tab 1, page 9. I showed you paragraphs 2 and 3. I showed you paragraph 6, it's a bespoke network. Then at 10, really important for this point:

"We have considered how competition can occur in [the relevant] market. Building a bespoke integrated network of the kind required meant that a single supplier would be best placed to meet the emergency services' needs under long-term contracts."

So these findings establish that in a well-functioning market there would be competition to build a single bespoke LMR network. Competition in this market, in a well-functioning market, would not take place by a number of competitors building their own LMR networks and then seeking users for them.

So the well-functioning market based on a number of competing LMR networks is contradicted by the Decision's own findings on competition in this market.

The second suggestion for a "well-functioning market" is that the original agreement would provide for the transfer of the network assets at the end of the original contract period to enable the retendering of the provision of services using an already built and paid-for network. So, i.e. under the contract, what would happen is at the end of the period, the network would be handed over to the contracting authority or its chosen third party for zero, for nothing, and then there would be a further competition for other people to compete to use that network but the network is there and paid for, so it doesn't cost.

The problem with that is that we know what a contract in a well-functioning market would look like. We know what terms it would contain. Because the original PFI Agreement was drafted and concluded in just such a market. I showed

you this already this morning, paragraph 14:

"In our assessment, the terms of the PFI Agreement under which the Airwave Network operates resulted from the type of process - tendering - that we might expect to provide competition for the market. In relation to the original period of the PFI Agreement, the Home Office had the opportunity to run an open competition for a supplier, and as a result, to agree terms that constrained the price of the provision of the network."

Indeed all other contractual terms.

Now, we also know that, in that well-functioning market, the PFI Agreement did not provide for an automatic transfer of the assets at no cost at the end of the specified period. Again that's not in dispute. Can we go to page 112 of the Decision.

THE CHAIR: Can I just take you back to paragraph 14.

MR HOSKINS: Of course.

THE CHAIR: Is the CMA there drawing a distinction between the PFI Agreement terms themselves and the type of process which is tendering? So tendering can be expected to provide competition for the market but the terms of the PFI Agreement, in this particular case, in certain respects I think they are highlighted in the Decision, it says they were not effective to act as proper constraint and one of their issues I think is the fact it does not provide for a transfer at the end.

So are we seeking to elide two concepts in that paragraph 14 in your argument?

MR HOSKINS: Certainly not in my argument. We'll see what the CMA says. But what you have is, in relation to the original PFI Agreement, it's the Home Office that decides to have a tender and it sets the terms of the tender and to coin a phrase from paragraph 14, it has the opportunity to run an open

competition and it has every opportunity it wants to set the terms of the agreement.

It conducted that competition and that gave rise to the PFI Agreement. The PFI Agreement was the result of a competitive process -- it was the result of a well-functioning market. What we know is that from that process in a well-functioning market it did not produce a contract with the term that the assets would be handed over for zero at the end of the period.

So my point is that you start with the CMA saying in a well-functioning market the contract would provide for the assets to be handed over for zero, and yet we know because we had a well-functioning market which led to the PFI Agreement and that well-functioning market did not lead to such a contractual provision.

So the suggestion that in a well-functioning market that is the paradigm term, the only term that could be arrived it at clearly does not stack up just because of what happened in this case.

MR FRAZER: Mr Hoskins, we can hear from the CMA later and I am sure we will, but are these scenarios here intended do you think to be hypothetical counter-alternative markets, alternative scenarios to deal with a situation which had not been envisaged originally, i.e. that there would not be a conclusion of the envisaged period but there would be an extension and therefore clearly there aren't alternative LMR suppliers. But if this is a hypothetical situation in which one is attempting to construct a correct approach, then these start to make a little bit more sense, do they not? So that there is in terms of the provision relating to the transfer of assets at the end of the period, this is not the end of the period, in effect, this is an extension. And in that extended period is it necessary to then envisage

mechanisms by which you can deal with what a competitive constraint would have been?

MR HOSKINS: It absolutely is, these are hypothetical counterfactuals, so they are not real. But it is well established that counterfactuals must be realistic. They are hypothetical but they must be realistic. What has actually happened here is that the CMA has picked counterfactuals to justify the result it wants. I do not wish to sound pejorative, they are self-serving but I do not mean that in the pejorative sense. I mean that the hypotheticals justify the conclusion and that's not allowed. If you are conducting a meaningful counterfactual analysis, you have to ask what is a realistic counterfactual and then say what would happen in that counterfactual.

What you can't do is simply say: these are counterfactuals, because it's hypothetical I can choose what I want or I choose this one and that one because it suits me. A counterfactual must be realistic. That's why I say if the counterfactual is there would have been a suite of LMR networks all competing against each other, that's not realistic because the Decision itself tells us what the well-functioning market would lead to.

If the counterfactual is the contract would have had this particular provision in it, we know that that is not realistic because there was a competition which did not lead to that necessary conclusion, it led to the conclusion we have.

So you are absolutely right that a counterfactual is hypothetical. It does not mean you can just pluck it out of the air, it still has to be justified, it still has to be realistic and it still has to be consistent with the other findings in the Decision. What you can't do is come up with a counterfactual and then you look elsewhere and say: well, that's just not realistic because look what you've found here. That's what we say has happened here.

So I am looking at the second possibility, that in a well-functioning market you would have this particular type of contractual provision. That's not what happened here and again that shouldn't be controversial. If you go to page 112 of the Decision, you'll see what the provisions actually were in relation to transfer. 4.77:

"Additional uncertainties were (and are) liable to arise as a result of the way [I am not quite sure why the schedule number is confidential but I won't read it out] of the PFI Agreement provides for transferable assets to be transferred at the end of the agreement for fair market value."

Then 4.79:

"The exit and asset transfer provisions did not, however, provide for the transfer of transferable Airwave Network assets to the Home Office at no cost at the end of the PFI Agreement. That is the case even though, as we referred to above, the terms of the contracts were put in place for a specified period following a tendering process in which the winning bidder would be expected to set the price so as to recoup its expected costs of building the network and give it the chance of earning a reasonable return over that period."

So despite these factors, what was decided by the Home Office, what was agreed by the Home Office as part of a competitive process was there would not be an automatic transfer at zero cost and that was a result that was the product of a well-functioning market, a tender process.

So therefore the way we put it as a public law issue, if you like, is that this possibility, this particular counterfactual, again is just not consistent with other findings in the Decision. It is not a realistic counterfactual for that reason.

The third suggestion is that in "a well-functioning market" the original agreement would include a requirement that the original supplier would reduce prices

during an extension period reflecting network assets having been paid for over the original contractual term. So when you are looking back, in the original contract you would have had a particular contract term dealing with extension and requiring a reductions in price. You'll see that suffers from exactly the same defect as the second suggestion because under the original contract, the PFI Agreement, which was the product of a tender process, there is no contractual provision for a reduction in prices during some specified extension period.

Therefore, our submission is that as well as having the flaw of failing to have followed Byatt, which it says it was following, even if you take the CMA's approach on its own terms, it rests on this notion of a well-functioning market and all three of the possibilities for a well-functioning market that the CMA puts forward as justification are contradicted by its own findings as to what constitutes a well-functioning market elsewhere in the Decision.

This is a classic public law error.

There is a third element to ground 2, another reason why there is a public law error in relation to the valuation of the assets and that is the internally inconsistent reliance on time periods in the Decision.

On the one hand, in order to justify the CMA's decision to assess pricing over the period from 2020 to 2029 entirely separately from the prior period of 2001 to 2019, the Decision asserts that the profitability analysis from the period from 2020 to 2029 should take place without taking any account of the prior period. So that's a bit of a mouthful. But let me show you the bit of the Decision I am referring to. Decision at page 201, paragraph 6.60.

If I could ask you to refresh your memory of what paragraph 6.60 says. **(Pause)**.

THE CHAIR: Yes.

MR HOSKINS: So what the CMA are saying is: we are going to conduct the profitability analysis for the period from 2020 to 2029 because would it be wrong to take into account the prior period. That's paraphrasing but that's what they say.

But on the other hand, when they are actually conducting the profitability analysis for that later period, 2020 to 2029, critically, they say it relies critically on the prior period to justify its approach to the valuation of the assets at the end of 2019. That's because the CMA's approach, as we've seen, fundamentally depends on its assertion that the sunk costs of the Airwave Network had already been paid for by customers in the prior period. So when they are conducting the profitability analysis for 2020 to 2029, it is based on what happened in the previous period. You see that, we've seen it already, at page 204, paragraph 6.66. It's becoming a well-trodden path.

So what you see in the Decision is that the CMA refuses to take account of the prior period for one purpose but then it relies heavily on the prior period for another related purpose. This is all in the context of its profitability analysis.

Now, how could that inconsistency be removed or addressed? Now, of course, that's a matter for the CMA. I do not need to do their job for them and they would not welcome me trying to do so. But we did suggest a possibility in our skeleton argument as to how they might have squared their own circle. What they might have done, not obliged to do, what they might have done is conducted a profitability analysis over the whole 2001 to 2019 period as a sensitivity analysis in order to confirm their findings in relation to the truncated period from 2020 to 2029. That's just a possibility. That's what they could have done.

If the analysis for the whole period confirmed supernormal profits, that would of

course support the CMA's analysis. If the analysis for the whole period did not indicate supernormal profits, that would undermine the CMA's truncated analysis and its assertion that someone should not pay twice for the same assets.

Now, I am not saying it must have done that and that's a flaw, I am simply pointing out that if you want to adopt this inconsistent approach, there might be ways to palliate it and to square that circle. But having failed to conduct any sort of palliative exercise, all that one is left with on the face of the Decision is that bare inconsistency. Again, as a matter of public law, what we say is the CMA's failure to conduct its profitability analysis on an internally consistent basis is another example of a fundamental error which means that the Decision must be quashed.

I am sorry, I apparently misspoke. My suggestion for the sensitivity analysis was for the whole period 2000 to 2029 not for 2000 to 2019. Sorry, apparently I misspoke.

So under our ground 2 those are the three principal reasons, we rely on the three principal public law errors we rely upon.

So let me come to the conclusion of this part of my submissions. The Decision itself tells us that the CMA's approach to asset valuation is a critical part of its Decision, and that's clearly right. However, we say that the approach to evaluation is fundamentally flawed for at least the following reasons. First of all, in its Decision, the CMA stated that it regarded, and I am quoting:

" ... the approach set out in the Byatt Report as more appropriate given the circumstances of the case".

However, as I have demonstrated, the CMA then patently failed to apply the recommendation and the advice in the Byatt Report.

The second point is this: the approach adopted by the CMA is contrary to the relevant guidance in both the Oxera paper and the Byatt Report. The CMA has not identified any support for its approach in any literature, reports or papers. Its methodology stands or falls on its own merits or lack thereof.

The third point: the CMA's approach rests solely on its assertion that in a "well-functioning market" customers would not pay twice for the same assets if the life of the network was extended beyond the term originally envisaged. However, again, as I have hopefully demonstrated, the CMA's suggestion of what would occur in a well-functioning market is contradicted by findings in its own decision, findings as to the operation of a well-functioning market.

Finally, the CMA's approach to relevant time periods for the purposes of conducting its profitability analysis is internally inconsistent. I want to make it quite clear this is not a case in which Motorola is asking the Tribunal to come to a different conclusion on the facts as found by the CMA. On the contrary, it's a case in which we say the CMA's approach to asset valuation is simply inconsistent with its own basic findings in its own decision. There is a nice turn of phrase in Mr Justice Fordham's book, he likes a nice turn of phrase, where he says, to coin his phrase, the CMA's approach simply does not stack up, a colloquial way of putting the principle that I outlined at the start. We say the Decision therefore can and should be quashed on this basis.

Now, there is a postscript to this because the CMA seeks to run a sort of get out of jail card even if it's lost on all the points to date. And that's by reliance on its sensitivity analysis. Let's look at that sensitivity analysis. If we can go to the Decision at page 218. Paragraph 6.103:

"We have also carried out a sensitivity analysis using the estimate of the depreciated replacement cost as set out in 6.99 above. The results of our sensitivity

analysis are set out in paragraphs 6.114 to 6.150 below."

So it cross-refers to 6.99 and you'll see that depreciated replacement cost. Previous page, 6.99(a):

"We find that the most reliable estimate of the replacement cost of the Airwave Network is likely to be given by the 2016 Deloitte report."

Now, it's important to note, we'll come back to this, this is a replacement cost of the Airwave Network, not of any other competing network or of any new technologically more advanced network, replacement cost of the Airwave Network.

Can we go to the CMA's skeleton, Bundle A, tab 9, page 187, paragraphs 52 and 53. There's two points here. First of all, paragraph 52, the CMA seeks to convince you that the depreciated replacement cost, i.e. the sensitivity analysis, is actually a net MEA value and consistent with the Byatt Report. We see that in the final sentence of paragraph 52.

Then they go on to suggest that if that is correct, if in fact they have unbeknownst to us all conducted an MEA analysis without us knowing it and without it being stated as such in the Decision. They say that because they conducted that sensitivity analysis, the Tribunal should therefore refuse to grant relief in respect of ground 2, not only because the Decision contains no public law errors, but also by application of the principle in Simplex.

Now, what they are submitting to you there is that even if you have found that the Decision was tainted by public law error, you should nonetheless exercise the discretion that you do have to refuse to quash the Decision. So even though public law error, we are not going to quash the Decision, and the reliance they have for that submission is Simplex. So let's look at Simplex, Authorities, tab six. We do not need to go into the facts of it. It was a planning case.

If you go to page 59, the headnote, point two in the headnote:

"Held, in relation to the second appeal, where a factual error has been taken into account in reaching a decision, that decision would be ultra vires unless either the error was an insignificant or insubstantial one [and here, this is the bit I understand the CMA to rely upon] or the court was satisfied that even though one reason for a decision was bad in law, the same decision would have been reached on the basis of other valid reasons."

That's the Simplex principle, as they call it, that they seek to invoke.

Now, this argument is flawed for two reasons. First of all, the suggestion that the depreciated replacement costs analysis was a net MEA value is incorrect. There is no such finding in the Decision. This is an ex-post attempt to drag something up. And on something as important as this, remember the issue between Motorola and the CMA on this was we were saying you must adopt an MEA approach and they said no, we do not have to. If they wanted to suggest that they were in fact adopting some form of MEA approach, that is something they would have had to have said in the Decision. That is not something that you can raise in your skeleton argument.

I do not shy away from the fact that as a public body the onus on them not to raise new grounds is much greater than the onus on us because we are challenging the Decision and they certainly cannot come up with this sort of argument in a skeleton argument when there is not a breath of it in the Decision.

But even if they were entitled to raise it, it's patently incorrect. Can we go back to the Decision at page 217. The sensitivity is at paragraph 6.99(a). The sensitivity is based on the replacement cost of the Airwave Network. Let's look at the MEA, what does an MEA approach require? Let's go to the Byatt Report,

Bundle C, tab 1, page 21.

We looked at this earlier, paragraph 58:

"The gross Modern Equivalent Asset value is what would it cost to replace an old asset with a technically up to date new one with the same service capability allowing for any differences both in the quality of output and in operating costs. The net MEA value is the depreciated value [and it's quite clear from the text that it's the depreciated value of a technically up-to-date new asset] taking into account the remaining service potential of an old asset compared with a new one."

So it's quite clear on the face of Byatt that the MEA value is the depreciated value of a technically up-to-date new asset, not the depreciated value of the old asset.

So the sensitivity relied upon by the CMA in the Decision is therefore quite clearly not an MEA valuation of any sort.

The second point is that even if we were wrong on that, so assume against me for the moment, the usual position at common law is that if the courts find that a decision has been unlawfully reached, they will quash that decision. That not surprisingly is the norm. They will not normally refuse to do so unless the Decision would necessarily or inevitably have been the same absent the error.

Now, there is now a statutory provision which applies in the High Court but it does not apply in tribunals. It's not been invoked by the CMA. So we are dealing with the common law with what they call the Simplex principle. The common law principles are discussed and summarised in Lord Justice Lewis' textbook, which I hope has been added right at the back of your Authorities Bundle, we are calling it tab 54. Hopefully you'll have it at the back of your Bundle.

THE CHAIR: Well, I have it, so there we are.

MR HOSKINS: Say, again sorry?

THE CHAIR: It's made its way into my Bundle.

MR HOSKINS: Brilliant. Thank you. So this is a leading textbook by a Court of Appeal judge who specialised in public law over his many years at the bar. If we can pick it up at paragraph 12-026. If I could ask you to read paragraph 12-026, 12-027 and 12-028, please. **(Pause)**.

I should say you'll note at footnote 91 the reference to Simplex.

THE CHAIR: Mm-hmm.

MR HOSKINS: So that's the world we are in. If I could ask you finally to read paragraph 12-032. **(Pause)**.

THE CHAIR: Yes.

MR HOSKINS: What has happened is the CMA have said that even if you find a public law error, you should not quash and they've simply referred you to Simplex. They have not referred you to any of these principles that underlie the discretion that the Tribunal has. I will say no more than that is surprising that you've not had that drawn to your attention by the body seeking to invoke the principle. Nor has the CMA even attempted to engage with the principle beyond citing it. You'll see from these passages that it is restrictively applied and that the case law indicates that there are particular considerations that have to be addressed and met. No attempt whatsoever by the CMA to make out a case on the basis of the relevant principles.

But, in any event, in the present case it cannot be suggested that the result would inevitably have been the same, absent the CMA's main profitability analysis. So what we are being asked to imagine is: take out all those paragraphs on the profitability analysis section, imagine they did not exist, the Decision would have been the same because of the sensitivity analysis. That's clearly untenable because the sensitivity analysis was just that, it was a cross-check

for the main analysis. It was not a freestanding justification for the Decision.

That's obvious, but let me just show you one paragraph to make that good. Page 227, paragraph 6.145, "Results":

"In Table 6.3, we set out the results for our base case asset value [so that's the main approach]. We have also considered a sensitivity profitability analysis … However, as explained above, we do not consider this depreciated replacement cost as the appropriate value on which to base our assessment."

There's absolutely no way that, if the main analysis did not appear in this Decision, the Decision would have been exactly the same. They do not get close to the Simplex discretion.

I would like to finish just by saying some very brief words, and I hope it's not presumptuous, if you were to find for Motorola. I think it's important to understand what the result of that would be. Now if you find for us on either of our grounds, then in our submission you should quash the Decision.

What that doesn't mean is that you are reaching a decision on the merits of whether the current Airwave prices are anti-competitive or not because that's not your function. By quashing the Decision, it would be open, if the CMA so wished, to ask you to remit the matter back to them for them to reconsider and to reconsider in light of the public law errors that you have identified.

What you would be saying to the CMA is: I am sorry, this Decision is not lawful. But what you are not, if you choose to remit it, preventing them from doing is doing a proper job, a lawful job. So you are not, in any way, shape or form, deciding the merits of this case.

Unless you have any further questions, those are the submissions I wish to make on behalf of Motorola.

THE CHAIR: I did have an issue that arose out of something that arose when we

were looking at the Byatt Report. I think we were looking at paragraph 58. Mr Frazer asked you a question and you said we are not looking at paragraph 59, no one says we are looking at paragraph 59, assets not worth replacing and the recoverable amount.

MR HOSKINS: Mm-hmm.

THE CHAIR: Then you referred us to paragraph 6.65 of the Decision. So that's page 203 of the Decision Bundle.

There, the CMA refer to the fact that in their provisional decision they were dealing with -- they formed the view that in a well-functioning market the value to the business of Airwave's assets would reflect their recoverable amount, the net realisable value, rather than new replacement cost. Then you said that's actually the result they ultimately came to.

MR HOSKINS: Sorry, the result they came to -- 6.66, the justification was carried across. The result they came to was to base their approach on value and use in the final decision.

THE CHAIR: Right. Okay. Yes. Perhaps I misunderstood your submission then.

MR HOSKINS: I think it may be my lack of clarity, yes. But 6.99 is quite clear that -- what I was trying to -- if I explain what I was trying to say.

THE CHAIR: Yes.

MR HOSKINS: The reason I showed you 6.65 and 6.66 is because later on, the Decision refers back to the PDR to justify the approach adopted in the Decision.

THE CHAIR: Right.

MR HOSKINS: My understanding is in particular what they are relying upon is the 'shouldn't have to pay twice' in 6.66.

THE CHAIR: Yes.

MR HOSKINS: Therefore, when they come back to that, in 6.85, they say:

"For the reasons set out in our PDR ... do not agree that such a price [that's an MEA price or an MEA valuation] represents the outcome of a well-functioning market."

So it's a narrower read back.

THE CHAIR: Right.

MR HOSKINS: But I do not think there will be any dispute that the CMA's approach is based on shouldn't have to pay twice, whether you take it from 6.66 or 6.85, or indeed other places in the Decision. But I was simply trying to show you that the not paying twice in the PDR is also relevant in the Decision.

THE CHAIR: Okay. Thank you.

MR HERGA: I had one question, Mr Hoskins. I just wonder whether -- I do not actually -- I have to confess to not having read the Byatt Report in full, or much at all, but, anyway, I wondered could you be following the approach of the Byatt Report? Because I assume the Byatt Report – because it was in 1986 – does not deal with PFI contracts, because I do not think they were kicking around then, so could you follow the approach of the Byatt Report but take into account that it does not apply to PFI contracts and therefore adjust your thinking but still be following the approach?

MR HOSKINS: In principle, yes. But do we see that in the Decision? Do we see where -- we have read the Byatt Report. We are going to follow the Byatt Report, but we are going to change it in the following ways. You do not see that sort of reasoning. You see them saying: we think it's appropriate to follow the Byatt Report. But you do not see them saying: it's appropriate to follow the Byatt Report with the following changes. They just actually adopt their own approach, which is not reflected in the Byatt Report at all.

But, yes, I mean the CMA was free to do whatever it wanted, but the first part of ground 2 is, having said, "We are going to follow the Byatt Report", they have to do it.

MR HERGA: The approach.

MR HOSKINS: The approach, absolutely, yes, the approach.

MR HERGA: Thank you.

THE CHAIR: I do not have any more questions for you, Mr Hoskins. It might be appropriate to break for lunch rather than make Ms Abram get up for 2 minutes, but we will still come back at 2 o'clock.

(12.58 pm)

(The luncheon adjournment)

(2.00 pm)

Submissions by MS ABRAM

THE CHAIR: Yes, Ms Abram.

MS ABRAM: I am grateful. Madam, I am going to address ground 1 and Ms Patel is going to deal with ground 2.

So I will start on ground 1. On that, I would like to do five things, please. Just to map out where I am going in advance, I am going to first show you that approach to be taken to challenges based on the text of a decision. Second, I am going to show you some sources on market definition exercises and how they interact with competitive assessments. Third, I am going to show you the Decision. Fourth, I am going to take you to the pleading, to the Notice of Application. Fifth, I am going to take you to the provisional decision report.

So starting with the first point then, which is the law. I am going to show you an authority that Mr Hoskins took you to but a different paragraph of it. It's the

Tesco v Competition Commission case in authority Bundle 1, tab 17, and like Mr Hoskins I am going to take you to page 550.

THE CHAIR: Yes.

MS ABRAM: So Mr Hoskins showed you paragraph 77 about the grounds of judicial review. I would just like to call your attention to paragraph 79, which is really relevant given the way that ground 1 has developed. So the Tribunal says:

"It is also common ground that when considering Tesco's challenge, the Report should be read as a whole and should not be analysed as if were a statute. In its Defence the Commission referred to [a case] in which Auld J ... after confirming the facts that reports prepared by the former Monopolies and Mergers Commission are susceptible of judicial review, held:

' ... the Court in the exercise of this jurisdiction, as in its exercise in other contexts, must take care not to subject the [Commission's] Report to fine textual or legal analysis as if it were a statute or other legal document. …'"

Then skipping on a couple of lines:

"' ... the Report must not be read as if it were a statute or a judgment ... It should be read in a generous not restrictive way and the Court should be slow to disable the MMC from recommending action considered to be in the public interest or to prevent the [Secretary of State] from acting thereon unless perceived errors of law are both material and substantial'."

So that's the frame of reference that we are working in.

So to go from there to another legal point about the purpose of a market definition exercise because ground 1 is really about the interaction between the market definition stage of the Decision and the competitive assessment stage of the Decision. So I just want to show you some guidance on how the two fit together.

Now, these are both CMA or CMA predecessor documents, so they are the CMA's own guidance, but it's not suggested that they are wrong. They were referred to in the skeletons so I do not think there's any issue about them. It's Authorities Bundle 3, tab 48 and you'll see from the front page of tab 48 that it's a Competition Commission's (as it then was) guidance document giving guidelines to the market investigations, and of course that's what we are doing here.

The relevant passage is on page 31 of the internal numbering, 2273 of the Bundle numbering.

THE CHAIR: Yes.

MS ABRAM: Could I ask the Tribunal to read paragraphs 132 and 133 at the top of the page, please. **(Pause)**.

THE CHAIR: Yes.

MS ABRAM: The bit I particularly call your attention to is the second half of 133:

"The boundaries of the market do not determine the outcome of the CC's competitive assessment of the market in any mechanistic way. The competitive assessment will take into account any relevant constraints from outside the market, segmentation within it, or other ways in which come constraints are more important than others."

To similar effect, in a slightly different context but just so you can see this isn't an outlier, I will show you another source making a similar point. So that is in tab 50 of the same Bundle, and it's a 2021 document from the CMA itself. It's merger assessment guidelines. The page I am interested in is page 78 of the internal numbering, page 2445 of the Bundle numbering.

THE CHAIR: Yes.

MS ABRAM: Can I ask you to have a look at paragraph 9.4. **(Pause)**.

THE CHAIR: Yes, thank you.

MS ABRAM: So again in the context of a merger investigation, it's the CMA saying: market definition, it's not an all or nothing affair, it's not black or white. Neither is it an end in itself. There might be some competitive constraints that are strong and others that are weak, some might come from outside the market and it's relevant to carry out that nuanced assessment of all of the competitive constraints rather than suggesting that because something is in the same market as something else therefore they are always to the same extent competitive constraints on one another. So that's the starting point for the analysis of the Decision.

I would like, if I may, then to turn to the Decision and take you through it. Now, before I do that, spoiler alert, let me just identify for you where I am going to with this. Now, in summary, what I say is that the interpretation of the Decision on which ground 1 relies is not just a question of the kind of impermissible textual reading of the Decision like a statute that Tesco v Competition Commission tells us that is not permissible. It really requires you, frankly, to stand on one head and shut one eye to get to the result that Motorola advocates for. It's only possible to get where Motorola suggests it's possible to get by reading sentences or phrases of the Decision without reading them in their proper context, without reading the rest of the sentence or the paragraph.

In particular, there are two things that this reading of the Decision has to ignore consistently. First of all, you have to look at the Decision without thinking about what the purpose of any of the negotiations analysed in the Decision was in order to follow Mr Hoskins' line of argument. So what Motorola's ground 1 does not take into account is whether each of the set of negotiations

addressed in ground 1 was actually a context in which there was any scope for ESN to operate as a competitive constraint on the Airwave Network and we'll go to what the Decision says about that.

The other thing that you have to ignore to read the Decision the way that Motorola says, is that references to alternative options and to the Home Office's ability to walk away from Airwave are references to whether there was another available alternative. The only potential available alternative was ESN and the Decision repeatedly consistently finds that wasn't an available alternative just because it was not ready and that's why it's not a competitive constraint in each of the set of negotiations.

So I am going to show you how I get there in the Decision. Now, Mr Hoskins took you to quite a few of the paragraphs that I was going to take you to, so I am not going to do the same at great length but what I will do is try and pick out the points that I want to draw your attention to and put them in what we say is the more complete context, respectfully, of the Decision.

Let's start at decision Bundle, tab 1, page 81. So we are going to start with the section on market definition and then look at the section on the negotiations. So 375 starting at the end of page 81, Mr Hoskins took you through this so I am not going to ask you to read it again but I'll just pick out the bits I am interested in. In the second line of page 82:

"Our view is that there is potential for competitive interactions between ESN and the Airwave Network. In particular, although ESN is still in development and therefore is not available in the short term, [there are] incentive[s] for ESN's suppliers in … winning clients from Airwave ..."

Then the final four lines:

"We also note that the prospect of ESN being developed as a replacement for the

Airwave Network could, in principle at least, affect the incentives of Airwave Solutions."

So this is an analysis of what potential competition is and what in principle could be a competitive constraint. It's not saying: ESN is operating as a competitive constraint on Airwave in any particular circumstance. That's really brought out by paragraph 3.76 of the Decision, which Mr Hoskins did not take you to and that's no criticism but you will see that in paragraph 3.76 there is a discussion of static and dynamic competition. So the CMA explain that, as we all know, as is trite, static competition is about competition now within about a year time frame and dynamic competition is about potential competition in the future, so in the longer term. Clearly in that context that's leading on from the identification of ESN as a potential competitive constraint but not one that's operating in the immediate term.

Then I just want to pick up at 3.79(a) over the page, the final three lines. This isn't in contention but the Decision finds:

"The Airwave Network and ESN are the only two solutions that exist or are in development that meet or have the potential to meet this demand-side need."

We all know of course the premise for this is that the Airwave Network is a critical national service. So what the CMA are saying is you've got a critical service, you've only got two ways of meeting it, so the only alternative is ESN and it's going to come on to say it's not an alternative because it's not ready.

Then paragraph 3.81 is really the key paragraph, the punchline on the market definition point here and again Mr Hoskins took you to that but the key bit is from the fifth line onwards:

"A customer that is negotiating with Airwave Solutions cannot realistically seek to get a better deal by threatening to walk away from negotiations and switch to ESN

because ESN is unavailable now as an option."

Then the final sentence:

"We take the lack of short-run substitutability into account in our competitive assessment where it is relevant."

Now, Mr Hoskins takes this and says: well, this is a finding that there is no short-run substitutability but there's also a finding that the two are in the same relevant market and so therefore you've got to deal in each analysis of the negotiations with short-run and long-run substitutability as if they are boxes to be ticked on a multiple choice questionnaire. But of course what the source, the guidance shows you on market definition is that what we are doing when we do a competitive assessment is looking at what the competitive constraints are in that particular situation and the CMA's nuanced understanding of market definition shows that that's a combination of short-run constraint, there may be long-run constraints as well, and they will look in each particular set of negotiations at whether the long-run constraints were relevant and that really means is ESN a relevant constraint. It's not some kind of rubric where there is a box to be ticked and you have to use the magical key words "long-run competitive constraints" every time you look at it, the question is what the substance of the analysis is.

So with that by way of framework of the Decision, let's look at the individual sets of negotiations. We'll start at 2016. Could we start at paragraph 4.114 of the Decision, which is on page 121 of the Bundle numbering. This goes back to my point about what the negotiations were about and whether the negotiations are capable of demonstrating that ESN operated as a competitive constraint on Airwave in respect of price in those particular negotiations.

Now, the critical point there is that the 2016 negotiations were not about the price of the Airwave Network. They were about whether or not Motorola should be allowed to acquire Airwave from Macquarie. Now, there was a bit of conversation about finance and I will show you the context of it, further up on that same page, point (d), so if you flip over to the previous page you'll see that paragraph 4.113 is introduced as a list of significant concessions that Motorola says that the Home Office managed to secure in those 2016 negotiations.

(d) says there was settlement of ongoing litigation for X pounds. That's not the same as a conversation about the price at which Airwave would be supplied.

So the starting point, in my submission, is that there is no proper basis to say that the CMA failed to consider the way that ESN was competitive constraint on the price charged by Airwave in the 2016 negotiations because the 2016 negotiations were not about price.

But the CMA did look to the extent relevant at whether ESN was a competitive constraint on Airwave in those negotiations in a more general sense. That's 4.117 and 4.118. So to start at 4.117:

"Based on our review of the documents it appears to us that the Home Office: (i) had no viable options in the 2016 negotiations other than to consent to Motorola's acquisition of Airwave … and, (ii), had limited bargaining power."

There are five key reasons why we do not regard the outcome as one in which the Home Office was able to use its position to secure concessions from Airwave's solution, Motorola, which were reflective of competitive market. The first there, 4.118, is the Home Office was not able in 2016 to walk away from Airwave Solutions. There was a need for the critical services provided by the Airwave Network to continue until ESN was/is ready.

Now, Mr Hoskins submitted to you that this is not the CMA considering whether ESN operated as a competitive constraint on Airwave Network. In my submission, it absolutely is that because it is the first reason given for which the Home Office lacked bargaining power in the 2016 negotiations and it is Home Office could not threaten to walk away, they need this critical service and they've got no alternative, so ESN is not a competitive constraint.

So it's squarely doing exactly what it's complained that the CMA did not do.

Now, the next point that was addressed in Motorola's skeleton argument was the 2017 negotiations and we said in our skeleton the 2017 negotiations were not actually part of the adverse effect on competition findings and that point was not pressed orally so I am not going to pursue that with the Tribunal unless that would be helpful, the point is addressed in our skeleton, I am assuming that it was addressed to Motorola's satisfaction.

So then let's move to the 2018 and the 2021 negotiations. Again, it's really important to start the discussion by looking at what was actually under negotiation and what was achieved in the 2018 and 2021 negotiations. Let's start with the description of that on page 129 of the Bundle numbering. That's paragraphs 4.147 and 8. Could I ask you to read those. **(Pause)**.

So I take three points from those two paragraphs. The first is that these are negotiations about the price of the Airwave Network, so unlike 2016. The second is that we see at the bottom of paragraph 148 on page 129 that the outcome is consistent with the Home Office lacking alternative options and buyer power in the negotiations. As we've said, alternative options could only be ESN because that's the only other network that's in contemplation.

The third point that I make about them is that you'll see that the outcome of the 2021 negotiations was that there was no agreement on price, no reduction at all to

the pre-existing price, as a result of which the service effectively rolled over on the previous price.

So the argument that's been put by Motorola this morning, unsurprisingly without great reliance on the 2021 negotiations, is that the negotiations since 2016 show that ESN was operating as a constraint on the Airwave negotiations and that Airwave was incentivised, in the words of chapter 3, to improve its offering by the threat from ESN. Well, the proof of the pudding there is in the eating in the 2021 negotiations. So far was ESN from imposing any kind of competitive constraint that Airwave did not agree to any reduction at all in the price, so the Home Office is kept captive carry on paying the previously pre-agreed price.

So the 2021 negotiations do not help Motorola.

But let's continue the review in respect of the 2018 negotiations in which you can see the percentage figure is confidential but there was a small reduction in the price agreed. We can start that consideration of the detail of the Decision at page 128, so back a page, this is paragraph 4.140. Again, Mr Hoskins took you to this paragraph. But just to pick out the key points, the conclusion that the CMA draws from its analysis is that in the 2018 and 2021 negotiations the Home Office lacked the options we might expect it to have in a well-functioning market. A couple of lines further below, this is because the Home Office requires the provision of the Airwave Network for critical emergency services communications until ESN or another replacement network is ready to replace it.

So, again, clear link. ESN is not ready. It was not a competitive constraint in the 2018 or a fortiori the 2021 negotiations, the finding of the CMA. Then the CMA goes through the evidence supporting that conclusion in great detail and

one paragraph I particularly want to bring to your attention because again it shows direct consideration of this issue is paragraph 4.150 on page 130:

"We have assessed the contemporaneous and related evidence about the negotiations in 2018 and 2021. Our assessment is that it shows that the Home Office lacked outside options [i.e. anything other than Airwave] and buyer power and that market power lay with Airwave Solutions / Motorola. We note that, as we describe below, this is a position Motorola itself recognised in its internal business documents, commenting in particular that: 'there is no alternative technology currently available to Airwave's UK customers and Airwave has no direct competitors.' Pricing will be subject to further negotiation. However, this is not expected to materially affect the profitability of the Airwave contract beyond 2022. Airwave customers do not currently have an alternative option."

Out of the mouths of Motorola, now what's said against me is, yes, but the CMA has an obligation to consider for itself whether there is a competitive constraint, but this is the CMA considering it and finding against Motorola on the basis of Motorola's evidence.

Then there's one final passage on this subject, just to pull that all together from the conclusion section on the 2018 and 2021 negotiations. That starts at page 139. Again Mr Hoskins took you to some of these bits so I am not going to go through them in huge detail but just to pull out where the conclusions come from the evidence. The first sentence of 4.175:

"In the 2018 and 2021 negotiations, the Home Office in our assessment, lacked credible alternative options and did not have countervailing buyer power."

Then they set out the factors leading to that conclusion and you'll see about four lines from the top of that paragraph:

"The first set [of factors] demonstrate that the Home Office had (and has) a continued reliance on the Airwave Network and Airwave Solutions / Motorola."

The reasons for that are then set out in paragraphs 4.176 and following but the key points addressing this issue, two lines up from the bottom of page 139:

"The Airwave Network was (and still is) the only such network available. No alternative network existed (nor exists) and no other provider was (nor is) likely to build and supply one in the uncertain period until the transition to ESN."

So this is exactly what it's said that the CMA did not do. This is the CMA saying: we are looking at the competitive constraints on Airwave in that negotiation, we think that the Home Office was reliant on Airwave and we are going to give you the reasons why it's reliant on Airwave and one of those is there wasn't an alternative network and ESN was not ready.

So, again, that's doing exactly what it said the Home Office did not do. Then just a couple more paragraphs to pick up in that passage. 4.181, we are talking here about lack of competitive constraint or pressure on the price, you see from the heading, so directly on point. 4.181:

"The first of those factors derives from the fact the Home Office had (and still has) to negotiate with the incumbent monopolist which operates critical infrastructure on whose provisions it is dependent" and "[the second factor] the critical nature of the services, which meant (and means) the Home Office cannot risk (and is inhibited from the risk of) disruption or degradation to their continuous supply."

So that brings together the point that I made at the start, which is not controversial, about the critical nature of the Airwave Network with the fact that the

Home Office could only go to the Airwave Network in order to acquire those services.

So, in my submission, kind of stepping back from those sections on the negotiations, I say that the 2016 negotiations were not about price. The 2017 negotiations are no longer relied on. They were minor incident relating to a very short extension of the Airwave Network not part of the AEC assessment. 2021 negotiations led to no agreement at all, Airwave were completely unincentivised by ESN in the 2021 negotiations, so they did not agree any price reduction, the Home Office kept paying the same amount of money.

2018 negotiations, there was a negotiation on price and there was a small reduction in the price but the CMA carefully considered the extent to which ESN operated as a competitive constraint on Airwave in those negotiations and said: actually it did not because ESN was not ready, so the Home Office couldn't walk away, couldn't threaten to walk away in those negotiations.

I want just in that context to go back to paragraph 16 and 17 of the Decision because Mr Hoskins did take you to those and they are at page 11 of the Bundle numbering. You'll see that what the CMA is concluding there is that the Home Office has no credible alternative option in terms of supplier. The prices are established or maintained in fact in bilateral negotiations but because there's nowhere else the Home Office can go, ESN isn't operating as a competitive constraint and that's why the CMA reached the conclusion that the terms that were agreed are characterised as reflecting a virtually unconstrained monopoly position because the Home Office has no other options.

So on the analysis of long-term competition in the Decision, I say it's really an understatement to describe that ground as excessively formalistic. It's not

even just excessively formalistic, it really requires a reading of the Decision that's like box-ticking exercise where the CMA is obliged to use particular formulas in order to consider questions on each occasion where there is a potential competitive interaction and what the CMA has done is a proper substantive assessment of the competitive constraints and it's a really coherent assessment as well.

That's what I wanted to say on the Decision and that's the substance of ground 1. I want to move on to the process points on ground 1 just to make sure I cover them off.

So to start with the pleaded position. So the argument that's made is that the CMA failed to take account of the fact that ESN acted as competitive constraint in the negotiations since 2016. That argument is not in the Notice of Application. I would like to show you that. You were shown this morning the summary section of the Notice of Application but I want to show you the guts of it, the real pleading of it. So I would like to show you paragraphs 73 and 74. So it's A, tab 1, page 29. If I could ask you to read those paragraphs. **(Pause)**.

THE CHAIR: Yes.

MS ABRAM: So I pick two points out of there. In the third line of paragraph 73:

"The CMA decided to treat the Home Office's limited bargaining power after 2016 as determinative of [the] question [of whether there was an AEC]."

Then, secondly, third line of paragraph 74:

"The limited bargaining power of both parties after 2016 arose necessarily from the fact that the Home Office had already made its choices … in the procurement in 2014-2015."

So the bit of the NOA you were shown earlier is a submission that there was competition for the market in 2014 and 2015. But what Motorola went on to

say is: it does not matter, according to its case in the NOA, that there wasn't bargaining power on the part of the Home Office after 2016 because what matters is that there was competition for the market in 2014 to 2015. They are now saying: hang on, there was bargaining power in 2016 and later. So there was competition for the market and that conferred bargaining power in 2016 and later. So the point that's now made is not within the original ground 1. It's not an additional ground. It's actually a handbrake turn from where they were in the NOA less than two months ago.

The point that's made against me on that is: well, it does not really befit a public authority to take pleading points. Really you should be interested in getting the argument out and making sure they are properly determined by the Tribunal. Of course, of course the CMA does want to make sure that there is a proper process and that involves expecting everyone to play by the rules and public authorities are entitled to expect commercial parties to play by the rules to just the same extent as commercial parties are entitled to expect the same of public authorities.

The other point I would make on that is that rule 9(4)(d) of the CAT rules, which is the rule that requires you to set out your grounds in your Notice of Application, of course involves, inherently is about what you've got to do in a Notice of Application in a challenge to a public authority.

So if it's not there for public authorities to expect to hold commercial parties to account, who is entitled to police the application of rule 9(4)(d)?

THE CHAIR: Is paragraph 74 really inconsistent with what Mr Hoskins was arguing? Because the first sentence does confirm there's been competition for the market in respect of the entirety of the period considered by the market investigation, which is what he's arguing today, and he does refer to the

bargaining power of both parties after 2016 and what he submitted earlier was that that relates to the market definition and the long-term competitive constraints. So is it really accurate to say that it isn't at least flagged up? It might not be exactly as you might have envisaged but is it not fair to say it was flagged up?

MS ABRAM: The keyword that in sentence is the limited bargaining power of both parties. So what Motorola are saying there is they are taking as a starting point, yes, okay, there was limited bargaining power, they say on both sides, from 2016 onwards, but that does not matter because the competition for the market in 2014 did everything that was necessary to produce a well-functioning market, and that is a model of competition in competition law and economics where there is no competition within a market during a stated period, during which a contract is awarded and you have periodic competition for the market and it does not matter in those kind of markets that competition is effectively reduced or absolutely wiped out during the period of existence of the contract, and Motorola are saying there that this is just one of those agreements, and that's an argument but it's really different from the argument that's been made today.

So that's the pleading. The final point that I wanted --

THE CHAIR: Just one other point. I think Mr Hoskins said have you suffered any prejudice from this?

MS ABRAM: We do not suggest that we've suffered any prejudice from it because in the week that we've had to serve our skeleton argument, that generous period, I am not criticising, but in that week we've sought to address it. But I do say that the ground is not there and say that I am entitled to point that out to the Tribunal.

So the final point, again, it goes to these process points about what arguments Motorola is entitled to make. Now, Mr Hoskins said earlier that all the authority about not being entitled to bring forward a ground of judicial review that you have not mentioned before in the administrative process before the proceedings relates to cases where it was open to the applicant to make that argument earlier and it did not do so and so it's not allowed to come to the court and say: here is a new argument that we could have made previously and we did not. He said that's what that case law is about.

Well, that may be right but I'm afraid to say that Motorola could have made exactly the point that's now the basis of ground 1 earlier based on the provisional decision. So I am going to show you the provisional decision. It's in Bundle C. It's tab 13. It's page 643 of the Bundle numbering, 88 of the document numbering.

Now, this document is all identified as confidential to Motorola so I am not going to read it out. Could you read 3.102 and 3.103, please.

(Pause).

THE CHAIR: Yes.

MS ABRAM: Now, this is precisely the same point that ended up in the final version of the Decision and it's precisely the point, it raises precisely the point the alleged inconsistency that Motorola say the CMA did not then take into account in their competitive assessments in section 4 of the Decision.

So if as Motorola submitted this morning the case law is you can't make an argument that was open to you to make earlier and you did not make, you could have made but did not, then I'm afraid Motorola falls squarely into that rubric. I would just like to show you one case very quickly just to make sure that I have shown you what the authority is on that. It's in Authorities 1, tab 8.

THE CHAIR: Yes.

MS ABRAM: Now, this is the Shields case. This is a case of a claim for judicial review challenging a refusal of criminal injury compensation by the criminal injuries compensation appeals panel. Now, the context is that the applicant had been injured and the reason for which compensation was refused was that it was said that the injury wasn't criminally inflicted because the requisite level of mens rea was not established.

The applicant challenged that in his claim for judicial review but you'll see that in addition to challenging that at page 105 of the Bundle numbering, paragraph 25 of the judgment:

"It was further argued by Mr Walker [so the applicant's counsel] that the panel should have had regard to paragraph 8(c) of the scheme in concluding that the injuries were directly attributable to the apprehension of an offender. It was up to the applicant to make his case before the panel. This was not ground ever relied upon and it is not therefore open to the applicant to rely upon it now."

So that was a case where one ground had been put before the panel, they'd rejected the case on that basis. He'd brought forward another ground in the claim for judicial review and Mr Justice Moses said: no, you could have made that point to the panel, you did not, it's too late now.

In just the same way, if Motorola had an issue about consistency between market definition and competitive assessment, for all of the reasons I've given, that is a point without merit, but it's a point that should have been made at an earlier stage and it's not open to them to make it in their skeleton argument ten days before this hearing.

That's all I wanted to say about ground 1 unless I can help any further.

THE CHAIR: No, thank you.

MS ABRAM: I am very grateful.

Submissions by MS PATEL

MS PATEL: I have four topics to address on ground 2. I would like to start with a summary of the CMA's response. Some brief comments on the legal prism through which ground 2 should be approached. Thirdly, to look at the key aspects of the profitability analysis in the Decision. Then, fourthly, and I hope succinctly having looked at the Decision, to just run through the grounds the sub grounds that have been put forward this morning.

THE CHAIR: Yes.

MS PATEL: So to start with the Summary. Motorola challenges the profitability analysis on three sub-grounds. The Byatt Report ground, the ground that's pleaded as a failure to take account of the material considerations, which has evolved this morning I think into an argument that the well-functioning market hypothesis contradicts the Decision, and the ground that the approach to time periods is internally inconsistent.

Now, the crux of the complaint is that the CMA should have used the replacement value of the network assets on an MEA basis, which is the cost of a replacement TETRA network, so not ESN, when calculating the opening value of the Airwave Network assets for an analysis which covered the extension period of 2020 to 2029, and it is said the CMA's failure to adopt that approach gives rise to the alleged public law errors that have been put forward.

As you've seen from the pleadings, the CMA's response is that none of the three grounds are made out, but the crux of the response is that using the

replacement value of the network assets on an MEA basis for this extension period profitability analysis would have been inconsistent with the assessment of a well-functioning market. That is because assuming the cost of a replacement TETRA network for the extension period would have implied that customers would effectively have paid twice for the assets, once during the PFI Agreement period and then again in the extension period.

Can I just at this point ask you to turn up the guidance which gives us the thinking behind the counterfactual of that well-functioning market. It's Authorities 3 and it's tab 48. This is CC 3, the Competition Commission guidelines for market investigations. It's paragraph 30 on page 2253.

"The Act does not specify a theoretical benchmark against which to measure an AEC. In its market investigation reports the Competition Commission uses the term a well-functioning market in the sense generally of a market without the features causing the AEC rather than to denote an idealised perfectly competitive market."

So that concept of a well-functioning market is the concept which is then picked up when one looks at the Decision on the profitability analysis. But before I leave the summary, can I just ask you to turn up decision paragraph 4.29, which is page 98 of the Decision Bundle.

MR FRAZER: I am sorry, which page?

MS PATEL: Page 98. This is the section of the Decision which talks about the well-functioning markets in section 4. You'll see at paragraph 4.29:

"For example, a well-functioning market might be one where ..."

So these are examples, non-exhaustive examples:

"(a) At the end of the original period of the PFI Agreement, the Home Office would be able to (re)tender or credibly threaten to (re)tender for the provision of LMR

network services for public safety using the infrastructure that had already been built and paid for and where sufficient effective competitors would participate in such a tender to produce a competitive outcome, or alternatively;

(b) the Home Office successfully tendered amongst competing bidders for the delivery of a new and enhanced replacement network which was ready to replace the existing network when the period of the PFI Agreement ended, and the process to choose that network involved sufficient competing alternatives and resulted in competitive prices for that network."

So in neither of these scenarios would competitors be required to build their own replacement TETRA network for an extension of the PFI period so as to justify modelling them being willing to purchase the Airwave Network at a value calculated on the MEA basis rather than the recoverable amount, specifically the value in use amount, which is the approach that the CMA adopted.

So that's the summary. If I could move on to part 2 of my submissions, the legal prism through which ground 2 should be approached. The principles are broadly common ground and are summarised in the defence, paragraphs 22 to 35, and there are only really three authorities that I would like to ask you to turn up to highlight some points of distinction in light of Mr Hoskins' submissions.

The first is the BAA case, which is Authorities 1, tab 23. This was a challenge to a market investigation report which decided on the divestment of Stansted Airport. It's paragraph 20, which starts on page 803, which sees an exposition of some of the principles as would be applied by a court on application for judicial review under section 179(4) of the Act. I just wanted to draw your attention to subparagraph 4, which sets out the rationality test

being the one that's properly applied in judging whether there is a sufficient basis for a finding in light of the evidence available.

Paragraph 20.5, which talks about the wide margin of appreciation, and indeed a standard of manifestly without reasonable foundation, by the first hole punch, where property is involved.

Paragraph 20.6, well established that despite the specialist composition of the Tribunal, it must act in accordance with the ordinary principles of judicial review. So the need to show restraint in second-guessing the educated predictions for the future by an expert and experienced decision-maker, such as the Competition Commission in that case, hold good, notwithstanding the specialist composition of a tribunal like the CAT.

Then 20.7, the suggestion that there is a need to flex the rationality test in certain contexts, for example where an intrusive step like an order for a company to divest itself of a major business asset is on the table:

" ... the adjustment required is not as far-reaching as suggested by Mr Green at some points in his submissions. It is a factor which is to be taken into account alongside and weighed against other very powerful factors referred to above which underwrite the width of the margin of appreciation or degree of evaluative discretion to be accorded to the [Competition Commission], and which modifies such width to some limited extent. It is not a factor which wholly transforms the proper approach to review of the [Competition Commission's] decision which the Tribunal should adopt."

So the margin of appreciation remains in the fore even in cases which involve the divestment of a company's assets and although there is some flexibility it is not the case that it allows applicants to rewrite, effectively, the rationality standard.

The second case is Barclays, which is in the same Bundle, tab 19, which was also a challenge to a market investigation report, this time on payment protection insurance. You see that at paragraph 2.

If we could start at paragraph 22. The second sentence:

"The Tribunal's concern is not with the correctness or otherwise of the Commission's findings … but with the lawfulness of the decision-making process."

23 and 25 deal with failure to take into account relevant considerations. Failures are amenable to judicial review but weight is not subject to rationality.

Paragraph 27, again the specialist composition of a Tribunal does not permit departure from the settled principles of judicial review.

Then 28 and 29 on materiality:

"The relevant failing must satisfy a materiality test. Generally speaking a relevant failing will require the finding or decision to be quashed unless the Tribunal is satisfied that a reasonable decision-maker in the position of the Commission would still have reached the same finding or decision."

Then in 29 you see citation of a passage from a judgment of Lord Justice May in the BBC ex parte Owen case and in fact that's same passage cited in the Simplex case at 326 and it talks about the need to look at the reasons that are given and:

" ... when one is satisfied that although a reason relied on by a statutory body may not properly be described as insubstantial nevertheless even without it the statutory body would have been bound to come to precisely the same conclusion then it would be wrong for this court to exercise its discretion to strike down the conclusion."

Then finally the Ross case, which is in the second Authorities Bundle.

THE CHAIR: On the previous authority, are you going to explain to us how we can

disentangle the bits that are challenged?

MS PATEL: I will when I come to the sensitivity analysis and what is said about it.

THE CHAIR: I am sorry, which Bundle are we in?

MS PATEL: It's Bundle 2, tab 34, Authorities Bundle 2, tab 34. So this was a challenge to a decision not to treat a planning application at Stansted Airport as development requiring planning consent in part because of passenger number calculations and it's really paragraph 66 onwards which talk about --

MR FRAZER: Where is that?

MS PATEL: Page 1374, which talk about the relevant principles in cases which concern technical complexity. You'll see at 66 there is a citation of the Spurrier case, that a challenge to an evaluative planning judgment is a particularly daunting case. At 69 there's discussion of the Mott case, which is also mentioned in the CMA's defence:

" ... in which several of the earlier authorities dealing with the question of the correct approach to resolving contentions that a decision was Wednesbury unreasonable when the decision involved the evaluation of technical or scientific evidence, were considered."

In that case, Mott concerned the percentage of salmon in the River Severn estuary. Common ground, at the end of that paragraph:

" ... the court should afford a decision-taker an enhanced margin of appreciation in cases involving scientific, technical and predictive assessments.

There is then if I can ask you to read at your leisure 70, 71, 72 which talk about the cases discussed in Mott, namely Downs and the British Union for the Abolition of Vivisection case. But if we could finish for present purposes at the end of 76, 77, on 1377. At the end of 76 we see again the discussion in Spurrier that:

" ... Mott is a helpful reminder of well-established good law: the court should accord an enhanced margin of appreciation to decisions involving or based upon 'scientific, technical and predictive assessments' by those with appropriate expertise. The degree of that margin will of course depend on the circumstances: but, where a decision is highly dependent upon the assessment of a wide variety of complex technical matters by those who are expert in such matters ... the margin of appreciation will be substantial."

Then 77, the second sentence:

"The approach is based on the fundamental principle that the court is not retaking the decision."

Half-way down:

"The court must recognise and respect the expertise which has been brought to bear in reaching the decision, and appreciate that there may be more than one scientific view of an issue, as well as more than one way of modelling or forecasting an impact or effect. A decision-taker is entitled to give particular weight to a suitably scientifically qualified consultee and rely upon their advice in reaching a conclusion. All of these factors, and no doubt others, comprise the margin of appreciation to which the authorities refer. As Sullivan LJ observed in the case of Downs, this does not mean that the decisions are immune from judicial review, but that the hurdle for a claimant to surmount is one which formidable."

So we do say that that is the territory that we are in, that you have a profitability analysis which is addressed at section 6 of the decision, but it's supplemented by several appendices, G, H, I and J, and in total this runs to 180 pages of complex modelling and so it's squarely the sort of area which demands an enhanced margin of appreciation.

With that, if I could move to my third set of submissions on the Decision. I am going to take this in three parts, to look at the context of the profitability analysis, then the approach to time periods and then the approach to valuing assets since it's both time periods and valuation which are taken issue with in the grounds.

The purpose of this profitability analysis was to understand whether levels of profitability in the market are consistent with the levels we might expect in the competitive market. You see that at 6.2 of the Decision.

6.7 sets out that the discount cash flow analysis was used over a given segment of an activity's life span and that required a value of assets at the beginning and the end of the relevant period. The modelling approach was set out at 6.8: supernormal profits were the net present value of profits -- sorry, this is 6.8 on page 182 -- when the internal rate of return was set equal to the WACC.

Now, the context is set out in a section headed "Key Conceptual Matters" on page 184. We see there, there are four points that the analysis is going to address, the second and third of which are respectively the time period and the approach to valuation of the assets.

But before that, the context that's noted is 6.15(a), that:

"the Airwave Network was originally procured under a fixed term PFI Agreement which was due to end late 2019 / early 2020. That agreement set revenues in real terms for the provision of the network over the whole of the fixed term. [The] revenues were indexed … and gave Airwave Solutions the opportunity not only to recover its expected investment in the network but also to make … a return … significantly above the standard cost of capital."

(b):

"Consistent with the fixed-term of the agreement, the PFI Agreement also provided

… significant protections in the case of early termination."

That paragraph sets out, effectively, how those provisions worked, that, effectively, in the case of early termination an amount would need to be paid to restore the IIR to the figure set out in the model in addition to other compensation.

(c) sets out that because the projected return was significantly above the standard cost of capital, it meant that Airwave could still make a return even in the event that its costs were materially higher than expected.

Then at (d) we see that the agreement to extend the life of the network beyond the original fixed term for what was contemplated was originally supposed to be very short and then it grew and grew.

So there are two takeaways set out then at 6.16 from this. The first is that the time period should be split around 2020 because the PFI Agreement represented an economic bargain or, if you see in 6.16(b), it had its own economic logic.

That logic was that ASL was provided with a reasonable opportunity to recoup the initial investment.

The same logic meant that in an extension to the initial fixed term the investments, this is 6.16(b), should not be remunerated again since such an outcome would result in customers paying twice for the same assets.

So what you see is that the structure of the original agreement and the expectations in relation to recoupment are in fact part of the context for both the approach to time periods and the approach to valuation.

Moving on to what the Decision found in relation to time periods, that begins at page 193.

THE CHAIR: Yes.

MS PATEL: We see the discussion of what was set out in the PDR. We see Motorola's submissions at 6.48 and then we see the assessment beginning at

6.54 on 198. It's essentially throughout Motorola said it was artificial to split the time period. The CMA concluded, as it had done in the PDR, that it was appropriate to split the time period. The reasons for that were that 6.54(a), the PFI Agreement was for a fixed period without provision for extension and contained terms which sought to facilitate the transfer of network assets at the end of that period.

So that procurement exercise and agreement sought to put in place arrangements to cover that period where the price for that period was constrained by the competitive tendering process that led to those arrangements.

"In our assessment, that is distinct from the period from 2020 in which those arrangements were not set to apply and in which period we would in a well-functioning market expect the arrangements to be replaced with a competitively priced alternative."

6.54(d), over the page, then refers back to 6.15 to 6.17 and the contextual features that we went to a moment ago and the statement that the PFI period had its own economic logic such that it was not inappropriate to treat ASL as having had a reasonable opportunity to recoup its initial investments in the initial PFI period and you see that again in that paragraph at (d)(ii).

So the result is that assessing profitability over the whole period, this is (iii) in 6.54(d):

" ... would, in effect, set a profitability benchmark that allowed [ASL] to make super-normal returns in the post-PFI period in order to compensate it for the lower returns that it made during the PFI period when it was already compensated for that risk via the terms (pricing and other) agreed for the PFI period."

The result, the conclusion that's then reached is at 6.62, that the CMA will proceed with split time periods but extending the later period so that it ran from 2020 to

2029 instead of 2026 as in the PDR.

That takes us on to valuation of assets, which begins at page 202.

THE CHAIR: What do you say about the argument that this is basically an exercise in self-fulfilling prophecy in the sense that because the CMA reached the view that the taxpayer shouldn't pay twice therefore they split the market this way?

MS PATEL: As you'll see in the Decision, various material is gone to, to suggest that that is a plausible assumption. There are statements from Motorola, amongst other things, against which the plausibility of that is tested and the conclusion that you draw from that is that it's a rational approach to have adopted. Well, it also is I think worth saying and I think we've said it both in the defence and in the skeleton that at no point has Motorola actually denied that it did recover the cost of the network during the original PFI period.

So valuation of assets. The figure 6.1 was disparaged this morning as essentially something that the CMA has made up. Can I pass up the source of figure 6.1. **(Handed)**.

THE CHAIR: Mr Hoskins have you seen this?

MR HOSKINS: I have not seen it.

MS PATEL: He has not, I am sorry, I was given it at lunch. But all it is is --

THE CHAIR: Are you happy for us to see it?

MR HOSKINS: Well, it is what it is. If it's going to be shown, it would be useful if it's also (inaudible) decision or whether this is literally something which has been -- it may well be this came up in the investigation. I was not involved in the investigation. But if it's literally something that has been pulled out now, I think that should be made clear.

MS PATEL: No, the only purpose of showing it up is because it was suggested that it does not come from somewhere and for clarity --

MR HOSKINS: Does that mean it's accepted that this is the first time that Motorola has been shown or made aware that this is where it comes from?

MS PATEL: I am being told behind me -- well, it's obviously not footnoted in the Decision and it's not clear that it was given to Motorola during the investigation.

MR HOSKINS: Beyond saying that figure 6.1 was pulled from this, I am not sure then it's appropriate to go through any detail in this, with all due respect. It's not in evidence. We are stuck with the Decision and what's in it and this is not in the Decision.

MS PATEL: All I was proposing to say was that it is -- and I do not need to go to that --

THE CHAIR: I think, Mr Hoskins, you did suggest that it was something the CMA had drawn up for themselves. I think if the point is limited to this document shows us where it came from --

MR HOSKINS: That's why I have accepted if that's the only use then that's fine. If we are going to delve into the details to justify an approach, the I would object to that.

THE CHAIR: Yes, I see.

MR HOSKINS: Absolutely I am happy to be corrected on that particular point.

MS PATEL: So the submission is limited to the fact that figure 6.1 comes from paragraph 6.8 of this document, which is a statement of principles for financial reporting from the Accounting Standards Board and it's a figure which indicates an approach to valuing value to the business.

THE CHAIR: Yes, I see.

MS PATEL: I understand it's a well-known approach. If you look up value to the business or deprival value as it's also called --

MR HOSKINS: We are now straying into --

THE CHAIR: Yes, we are now getting into -- yes, I am not sure we can take that point ...

MS PATEL: That is the approach that was adopted and looking at figure 6.1 Motorola says that a measure of replacement costs should have been used, specifically MEA, and what the Decision does is in part adopt a measure for recoverable costs, specifically value in use.

We see the assessment, having set out figure 6.1, the assessment of the approach to valuation begins on page 212. We see at 6.81 Motorola's submission the competitive price which we should assess -- the benchmark against which we should assess the profitability of the network is that which would be sufficient to incentivise a new entrant with a new network into the market to provide these services for the limited remaining period over which the Home Office requires them.

We see at 6.85:

"For the reasons set out in the PDR and considered further below, we do not agree."

Mr Hoskins took you to that paragraph. It explains the paying twice justification.

Then we see the description of the well-functioning market at 6.87:

"The characteristics of LMR networks - in particular, the large, sunk costs associated with the development of such networks - are such that there is likely to be a single supplier in one or a small number of purchasers [who …] would not expect to see LMR networks being developed speculatively, but rather the main purchaser(s) effectively commissioning a supplier to develop an operator network.

[6.88] In return, the purchaser would provide a high level of security … Indeed this was the case for the Airwave Network …"

Then reference to the long-term agreement and the revenues largely guaranteed and significant financial protection provided in the case of early termination.

"For a market with these characteristics to work well, we would expect to see periodic tendering, i.e. competition for the market, for fixed periods, with the purchaser able to effectively re-tender at the end of one fixed period for the provision in the next fixed period. For such retendering to be effective, the purchaser should not face material barriers to switching supplier, such as risks or uncertainty about the continuity of supply and/or the need to incur high switching costs. As set out in section 4, we consider that Airwave Solutions' continued operation of the network assets and the uncertainty associated with the asset transfer provisions contribute to such barriers to switching."

That's important because it's saying in a well-functioning market you take out the features that contribute to the AEC and you assume that there aren't barriers to switching and then in the same paragraph it says that in this scenario there are features of the market as identified in the features of the AEC which contribute to barriers to switching.

"Our assessment is that in a well-functioning market the situation where the supplier is provided with a guaranteed level of revenue we would expect customers to enjoy material protection with respect to pricing in the event of requiring an extension. We do not agree with Motorola that this assessment reflects supposition. We consider it reflects the economic logic of a PFI Agreement."

Then the detail, paragraph 6.91 and footnotes 571 to 572, that Mr Hoskins put his reformulated second ground on this morning. Then at 6.92 we note that rather than being fictitious, this is the treatment of plausibility, as Motorola has asserted:

" ... this well-functioning market benchmark is a plausible one in light of the contractual provisions and expectations at the time that the original PFI Agreement was signed, although we observe that some of these provisions have given rise to uncertainty and not been effective."

So that is doing two things. It's saying the well-functioning market benchmark is a plausible one but that does not mean that the provisions in the original PFI Agreement are identical with what you would expect to see in a PFI Agreement from a well-functioning market. For example, we note statements made by Motorola during our site visits. If I could just ask you to read what follows.

Then also 6.93, which refers to the PFI model. Again, given the marking, if I could ask you to read that.

THE CHAIR: Yes.

MS PATEL: So that is an example of the way in which that benchmark was then tested for plausibility in relation to the actual facts.

For your note, there's also a further -- well, in fact, let us go to it -- decision, 4.74 on page 111.

THE CHAIR: Yes.

MS PATEL: It's also picked up in our skeleton argument but that's the further statement that's relied on.

So, having then tested this approach for plausibility, 6.94 goes on to say why it would be reasonable to assume that Airwave would not be able to recover any further value for the original assets after the end of the PFI period.

Then we have the treatment of the Byatt Report, which I will come back to in a moment. If we could just move on to the conclusions on the valuation of assets and how the figures are used, at page 217. Mr Hoskins took you to

paragraph 6.99.

THE CHAIR: Yes.

MS PATEL: Which sets out, 6.99(a), the measure of the CMA's view of the most reliable estimate of that replacement costs, and that's the figure that's then used in the sensitivity analysis. A figure from Motorola for net realisable value. Then the CMA's conclusion on value in use, which had the three components that Mr Hoskins took you to this morning.

Then their application at 6.100, which provides a range. Then the upper end of that range being then adopted as a conservative estimate at 6.100. Then at 6.103 a sensitivity analysis being conducted.

That cross-references to 6.144, which begins on page 227. We see at 6.147 the conclusion using the value in use figure, the figure there as to supernormal profits.

Then you see from 6.148 the conclusion from the sensitivity analysis. You see the figure for supernormal profits in the table. It has not been carried across into the text, but you can see that the difference for NPV between the asset value base case and asset value sensitivity is small, given the size of the numbers we are talking about.

THE CHAIR: Yes. I wonder if that would be an appropriate moment for a break for the transcriber. Now, I said 5 minutes last time. We will say 10 because I got into trouble for it being too short.

(3.19 pm)

(A short break)

(3.34 pm)

THE CHAIR: Yes, Ms Patel.

MS PATEL: If I could move on to three sub-grounds. The first is that the CMA's

approach is purportedly inconsistent with its preferred methodology. The CMA did not prefer a methodology. It alighted on a key insight from a section of a report and the Decision was consistent with that key insight.

You've been taken to paragraph 6.95 of the Decision. Then if I could ask you to read again the first sentence of that paragraph: "In this context", that's page 215, "we do not agree with Motorola's submissions on either the Oxera paper or the Byatt Report" and that's a reference back to paragraph 6.73 on page 206, where in response to the profitability working paper the CMA produced, Motorola noted the CMA's reference to the Byatt Report and stated that it was important to consider how free entry in respect of providers would have played out and effectively said that the result would have been what is set out in the work produced by Analysys Mason, and you see in the previous paragraph, 6.72, that the Analysys Mason report commissioned by Motorola estimated a total replacement cost.

So that has been Motorola's position as to what the replacement value of the network assets on an MEA basis would look like.

THE CHAIR: Yes.

MS PATEL: It's clear from 6.95 that the CMA was not agreeing with that. The passage that they quoted in the Report is set out at footnote 574. The key insight that the CMA took from that is set out at 6.96 which you were taken to.

"The key insight it appears to us from the quoted section of the Byatt Report is that assets should be valued at the level at which they would be traded in the absence of the existence of market power for any party which controls those assets."

So that is what the CMA is taking from the Byatt Report but nothing more, nothing less. The same paragraph then goes on to say how that would be best

approximated. The sentence --

THE CHAIR: Can I just pause there. So do I understand you to say that the paragraphs identified were identified by Motorola; is that right? Or have I misunderstood that?

MS PATEL: No, those paragraphs were --

THE CHAIR: We highlighted.

MS PATEL: -- set out by the CMA in their profitability working paper and Motorola alights on those and sets out how it says those should be applied in paragraph 6.73.

THE CHAIR: Yes.

MS PATEL: Then the CMA sets out what it sees as the insight from those paragraphs, i.e. why it was referring to them and then says how that insight would be approximated here, the fair market value, this is 6.96, of the assets employed by the Airwave Network in their state at end of 2019 in the absence of the ongoing contract with the Home Office, i.e. their value in an alternative use.

So that's the value in an alternative use here, it's without the ongoing contract with the Home Office, which is the embodiment of the market power here.

Then the --

THE CHAIR: Is that a reference to the specific ongoing contract?

MS PATEL: The ongoing contract, yes.

Then there's reference to why the MEA would not be appropriate and the windfall gain. Then it says:

"We regard the approach set out in the Byatt Report as more appropriate given the circumstances of this case."

Now, Motorola sets out vast swathes of the Byatt Report in its skeleton argument in

support of its claim that the CMA failed to apply its approach. But public law does not demand that a public authority follow passages of non-statutory guidance which it has not endorsed or said it would follow. The authority for that mentioned is in our skeleton. I do not think there's any need to turn it up but it's the Plantagenet case, the Richard the Third case, and it's Authorities 2, tab 27, page 118 to 119 and it's paragraphs 112 and 117, not a controversial proposition.

Here the CMA's endorsement of the Byatt Report was limited to what it identified as the key insight from the quoted section.

That key insight was the need to value assets at the level they would be traded in the absence of market power for the party that controlled them and that is precisely the insight which the CMA applied in deciding to value the assets in the absence of their ongoing contract with the Home Office, i.e. their value in use in a well-functioning market.

This saw the assets valued in such a way that "the supplier was only able to recover the incremental investment in the network required to extend its life, its (efficient) operating expenses and a reasonable return on its capital taking into account the… (reduced) risks assumed over the extension period" but not any further value for the assets invested and recouped during the original period of the PFI Agreement.

That comes from decision 6.91.

That value was rationally zero.

THE CHAIR: Can I just read 6.91.

MS PATEL: Yes.

THE CHAIR: Right, thank you. Yes, thanks.

MS PATEL: So considering the scenarios that are set out in 6.91, so that value was

rationally zero in the absence of the ongoing contract with the Home Office, for example because those assets would have transferred to the Home Office under a contract providing for the transfer of the network assets at the end of the contract period.

THE CHAIR: What do you say about the fact that the underlying contract did not actually provide for that, the transfer of assets?

MS PATEL: So I am going to come on to that but the short point is that the well-functioning market requires you to construct it without the features contributing to the AEC and here the features of the AEC included the uncertainty arising from the asset transfer provisions. You'll also have seen from our skeleton argument that although it is right that the provisions did not provide expressly for transfer at no cost, one can read the suite of contracts, the whole suite of contracts in such a way that they are consistent with the PFI model such that it's not inconsistent to treat them as incompatible with a situation where the assets would have transferred at no cost at the end of the contract, despite the fact that they do not say that expressly.

But I'll come on to that in a more detail.

THE CHAIR: Yes, I did not want to take you out of course. That's okay.

MS PATEL: So the short point is that the Byatt methodology was not a preferred methodology, the CMA endorsed a specific insight and it applied that insight in the approach that it took to valuation.

In any event, there is no inconsistency with the parts of the Report that Motorola now also relies on. Motorola took you to paragraph 11 of the Byatt Report, which said that the value of assets to a business means what potential competitors would find it worth paying for them even if the competition is hypothetical.

"This will be the net replacement cost of the Modern Equivalent Asset if the asset

would be worth replacing or the recoverable amount if it would not."

Mr Hoskins also took you to paragraph 58 of the Byatt Report which then explains what the gross MEA value is and then explains what the net MEA value is. Gross is replacing an old asset with a technically up-to-date new one with the same service capability and net is then depreciating that over the remaining service potential.

Motorola says in the present case the emergency network is not only worth replacing, it is essential that it is replaced. But in a well-functioning market the asset would not be replaced for new at the start of an extension period. For example, because the assets would transfer to the Home Office at the end of the original PFI Agreement and it would be able to re-tender for the provision of network services because 6.91 refers to services using the already built and paid-for network or because of the provision, for example, in a contract requiring that original suppliers reduce prices or, for example, because ESN would have replaced Airwave so you would not have an extension at all, or ESN would be seen to replace Airwave such that again no competitor is going to then wish to pay the net replacement cost to the MEA value for an entirely new network because you are in an extension period.

So for those reasons the CMA took the view potential competitors would not find it worth paying the net replacement cost of an MEA for the Airwave Network for the extension period.

So it used a measure of recoverable amount valued to the business, which is what Byatt said you should do if the asset was not worth replacing, if there is a waning market for it.

THE CHAIR: Is that paragraph 59 of the Byatt Report?

MS PATEL: 59 does talk about recoverable amount, yes. Let's go to that. It's

Bundle C. It was page 21.

MR HOSKINS: I just draw your attention to the phrasing of it: none of the capacity in question, it's not the specific network.

THE CHAIR: Mm-hmm. Yes.

MS PATEL: Now, in the scenario where the assets transfer to the Home Office, the capacity does not need to be replaced because it's there and it's in the ownership of the Home Office.

THE CHAIR: Now, Mr Hoskins in his submissions said that there's no reference to paragraph 59 in the CMA's decision. Is that right?

MS PATEL: That is correct.

THE CHAIR: And is there reference to 58 actually?

MS PATEL: No, the only reference is the one that you've been taken to at footnote 574.

THE CHAIR: Right. Yes.

MS PATEL: So the only reason these points are being made is because it's said against us that we have not followed Byatt and we agree that the bit of Byatt that we've endorsed is the bit that's cited at footnote 574 but what I am seeking to do in this submission is set out that in fact if you read Byatt closely, it does not say it's only the MEA, it depends on the circumstances. In this circumstance the circumstances are more apt to recoverable amount, which is what the CMA did. But Byatt is not on point for this situation, which is the point that I will make next.

THE CHAIR: Yes.

MS PATEL: Before we leave Byatt, for completeness there's also a section in the Appendix on pages 92 and 93. So 5.13 and 5.14 talk about assets worth replacing, all the way up to 5.16. Then 5.17 to 5.20 talk about assets not

worth replacing.

THE CHAIR: I am not sure I know which document we are in?

MS PATEL: This is still Byatt. It has a second volume. So it's still Bundle C. It's pages 92 and 93 behind the second tab rather than the first.

THE CHAIR: Thank you. Yes.

MS PATEL: So page 92, from paragraph 5.13 down to page 93, paragraph 5.20. Just for completeness really. I don't ...

THE CHAIR: Yes.

MS PATEL: But the point is that the Byatt Report seeks to identify an appropriate methodology for industries which enjoy monopoly or significant market power but it also recognised its limits and set out clearly at paragraph 40 that application was a matter for the circumstances of individual cases.

So paragraph 40 is at page 15. The sentence about contextuality and the need to be careful in application is the last sentence in bold. Byatt was not a report which looked at PFI Agreements and the circumstances in this case include the circumstances of the PFI Agreement that was in place and it was that difference which the CMA took account of in its assessment of the well-functioning market the Byatt Report takes no account of. So when Mr Herga said this morning "is it possible to follow Byatt while adapting it to the context of the PFI Agreement?", it's certainly possible to apply the key insight that the CMA identified but then to say it needs to be applied according to the context and circumstances of this case and this is very different because there was a PFI Agreement, so even when you model the hypothetical you have to consider the PFI Agreement.

So for all those reasons we say there wasn't any failure to follow a preferred methodology. The CMA did not endorse the entire methodology in the Byatt

Report. It endorsed the used key insight. It was consistent with that. But even when you read the parts of the Byatt Report that Mr Hoskins relies on, there is no patently irrational inconsistency between the approach that the CMA adopted bearing in mind that it was looking at applying that key insight to a very different context.

The second ground is it began as an alleged failure to take account of a material consideration. Now, in the Notice of Appeal, which is in Bundle A at page 35, it was said that the relevant consideration that was not taken account of was what would the price of public safety communication network services be in a competitive market.

Now, in the skeleton, which begins at page 168 of the same Bundle, the ground shifts again and Motorola relied on certain express terms of the PFI Agreement and those are set out at paragraph 58, the point is made at paragraph 58 and 59. Motorola also made submissions in relation to the well-functioning market at 66 to 68. So there appeared to be two new material considerations that regard had not been had to: one was the terms of the agreement and the other was the construction of the well-functioning market.

Then today the way the argument is put is that the well-functioning market posits three possibilities and that none of those possibilities, which are set out in decision 6.91 and footnotes 571 and 572, are sustainable in light of the other parts of the Decision. So it appears now to be a challenge to the construction of the well-functioning market saying that it's irrational because it's inconsistent with the Decision.

Now, that is not an argument that appeared in the Notice of Appeal and rather than repeating, can I endorse the points that my learned friend Ms Abram made

about the fact that they are new.

But I will address the point as it was put this morning.

MR HOSKINS: I am really sorry to interrupt. The arguments I put this morning were responding to the CMA's skeleton argument, which I am fully entitled to do.

THE CHAIR: Yes, okay. You can address us on that in your reply.

MR HOSKINS: That's **(overspeaking)**.

THE CHAIR: Yes.

MS PATEL: So three scenarios were advanced. One a scenario where there is competition -- these are all from 6.91 of the Decision. 6.91 sets out effectively that the CMA's positing of a well-functioning market at the start of an extension period could be achieved by different mechanisms. Mr Hoskins went first to footnote 571, competition among several potential LMR network providers which were already operating in the market, i.e. who had already incurred the sunk costs of constructing a network. Two: for example, and this in the body of 6.91, the contract providing, effectively, for the transfer of network assets at the end of the contract period to allow for the retendering of the provision of the service using that already built and paid-for network. Three: footnote 572, the contract requiring that the original supplier reduce prices during any extension period to reflect that the fact the network assets had already been paid for over the original contract term.

Now, on the first point, the CMA agrees that the construction of this market is not a market in which you would have multiple suppliers sinking the costs of a network together. But the two mechanisms that are then referred to with the contractual transfer of assets or an original supplier constraining prices are entirely rational constructs of a well-functioning market.

The well-functioning market, as you have seen, is a market where you have to ignore

the features of an AEC and in this case the AEC, as you can see from 7.29(c) on page 235, includes failure of the assets to transfer to the Home Office under the terms of the PFI Agreement and the transfer of those assets not being a credible option that the Home Office can either pursue or threaten to pursue.

It was said this morning that the asset transfer provisions are what you would see in a well-functioning market. The actual asset transfer provisions that we have in the contract are what you would see in a well-functioning market. Now, that's not quite right. That's not the finding that the CMA made. What the CMA found and if you can look at decision 3.34 --

MR FRAZER: Page?

MS PATEL: That's on page 70.

MR FRAZER: Thank you.

MS PATEL: Is that:

"While the process was of the type that we might expect in a well-functioning market, its competitiveness in practice has been reviewed by the NAO. [The] NAO reported that, in its view, the procurement was subject only to limited competition."

Now, the CMA goes on to find at 3.36 competition in the tender had limited relevance in the assessment of competition now. So it's not taken any further. But the CMA does not find that the contractual provisions that emerge from the process of the first tender are in terms what you would expect to find in a well-functioning market.

Of course you have to ignore them if they are a feature of the AEC.

If you can turn to decision 4.77.

MR FRAZER: What page is that?

MS PATEL: On page 112, apologies. The reason why it's entirely rational to take the view that in a well-functioning market, at the end of the original PFI Agreement, customers would not pay again for the same assets is, I think, given some colour by the paragraphs that are set out here.

You'll see at decision 4.77 that there is reference to the uncertainties created by the actual clauses in the agreement and then there's a reference to PFI guidance, footnote 313, "The Treasury Taskforce Guidance: Standardisation of PFI Contracts", assets that have no practical alternative use, and then footnote 314:

" ... such as schools, hospitals, prisons only of value to the public sector procurer would normally be expected to transfer automatically to the contracting public authority at no cost. Other PFI guidance makes a similar point that on expiry of a standard PFI Agreement contract with rare exceptions the key assets needed to continue to deliver public services should revert to the public sector free of charge."

So that is why the modelling of the well-functioning market, which assumes reversion of the assets to the Home Office or the ability to credibly threaten that, is an entirely rational construct.

It's also a construct which is plausible and I have touched on this already when I went through the Decision but there are three points here. Motorola has never actually denied that the taxpayer has in fact already paid for the sunk costs of the network. This was not done in the skeleton. It was not done this morning. The point was clearly taken against it as early as the defence, paragraph 105. One would assume that if that was a challenge that Motorola wished to make it would have made it by now.

Secondly, it would be difficult for Motorola to deny that the taxpayer has in fact

already paid for the sunk costs of the network and that's because of three things. That's because of the terms of the PFI model and I took you to the Decision 6.93. That's because of statements made by Motorola on more than one occasion and I took you to those two paragraphs. Then it's also because of the terms of the provisions themselves and these are set out in the skeleton at paragraph 35, the CMA's skeleton at paragraph 35, which is on page 181 to 182 of the Bundle A. I do not propose to turn these up in detail in part because of the markings and in part because you have all the references. But what you can see is that the provisions in question provided for transfer both on expiry of the term and on early termination. So they were doing two things. Now, it is right that they did not in the PFI Agreement provide for transfer at no cost on termination. But there wasn't a clause that was only providing for that scenario. The clauses were all referring to transfer in two scenarios.

THE CHAIR: Mm-hmm.

MS PATEL: When you read the suite of contracts as a whole, you will see at 35(c) that there is separate treatment of those two scenarios of termination and early -- sorry, of termination expiry at term and early termination in the Ambulance services contract and you'll see that that contract provides for transfer at no cost on expiry but not in the event of termination. So there it is split out.

THE CHAIR: In one sense what are we to make of that? Because quite often you get faced with the argument, well, if it's expressly provided for in one contract then it obviously was not meant to have that meaning in the other?

MS PATEL: Yes, there is a clear finding which we stand by because it's correct that the provisions did not provide for transfer at no cost on expiry of the term in the PFI Agreement. The only point I am making here is that there wasn't

a clause that specifically provided only for that scenario. When one looks at the agreement it's rather more nuanced. So in fact the submission that the reasoning the CMA has endorsed in the Decision is inconsistent with that clause also does not get home. It's not inconsistent because that clause is doing multiple things.

I do not need to get there because in fact the well-functioning market does not require you to take account of provisions which have been found to contribute to the AEC. So it's merely a supplementary point that if it's said that there is a direct contradiction between the terms of the contracts and this well-functioning market such that the well-functioning market hypothesis is not plausible, then that's not right.

The logic of that reflects the model and you've seen from the model that when you look at how the model calculates things, the way the model treats termination, it's set out in the skeleton since where you are and we went to this passage earlier but it's set out at 33(a), the PFI model provided the basis on which the PFI Agreement contracted, right? It provided the modelling to which the PFI Agreement then referred and you see that in the PFI model there's very clear treatment of the position at the end of the fixed term and that's set out at 33(a), the text that is redacted. So there is no contradiction there.

Then, in relation to the third scenario, which Mr Hoskins said: well, in relation to the original supplier constraining prices, that's not what the PFI Agreement says. But of course again that's not the question. The question is in a well-functioning market what might you see?

Again, there's no problem there because you are not constrained by the terms of the agreements that have actually been entered into because in fact some of those features have been found wanting in terms of producing the competitive

outcome that was expected.

MR HERGA: But wasn't Mr Hoskins' point that the actual contract that was tendered actually is indicative of what -- because it was done in a competitive manner, the terms in it are indicative of what the terms would be in a competitive market?

MS PATEL: My understanding is that the agreement itself was the product of negotiation. I don't -- that was not my understanding of what Mr Hoskins said but I will be corrected if I am wrong.

MR HOSKINS: (inaudible words).

MS PATEL: I took you to the part of the Decision which says that the process was of the type that one would expect to see in a well-functioning market, and that is correct. But the Decision does not find that the terms were what you would expect to find in a well-functioning market and the terms themselves were the product of a negotiation, I am told. It's not the case --

MR HOSKINS: Sorry, it has to be a reference to the Decision. It can't be evidence from counsel. I am sorry to --

THE CHAIR: No, no, that's a good point, Mr Hoskins.

MS PATEL: I did not understand it being said this morning that a contract was put out to tender with terms in it which one party signed up to.

THE CHAIR: As I understand Mr Hoskins' point, it's that because the CMA found that the tender process itself, the original tender process, was what it would expect to find in a well-functioning market, therefore the terms of the agreement themselves are what you would find in a well-functioning market.

MS PATEL: Yes.

THE CHAIR: And I think your point is that the tender process might be what you would expect, but actually the CMA do not say that all of its terms reflect what

you would otherwise find in a well-functioning market.

MS PATEL: There is no finding in the Decision to that effect. In fact, the CMA found in the paragraphs that I took you to that in fact there was limited -- they refer to the NOA report, that there was in fact limited competition in the sense that at the end of the process there was only one final bidder there. So there isn't a finding that certainly these terms that we are discussing now represent the product -- represent a well-functioning market, are the terms that you would expect to see in a well-functioning market, which is what I understood Mr Hoskins to be saying. The Decision does not say that.

THE CHAIR: I think Mr Hoskins' point is it's slightly inconsistent to say that the contract that's a product of a process that is expected -- is exactly what the CMA would expect, it's inconsistent then to say -- cherry pick certain terms and say they are not.

MS PATEL: My submission is it's not because the Decision is quite carefully worded. It's although -- shall we go back to it? 3.34:

"The process was of the type we might expect in a well-functioning market --"

So the process is of the type:

"... its competitiveness in practice [so how that actually played out has been reviewed by the NOA], the NOA reported that, in its view, the procurement process was subject only to limited competition."

That's all about the process. So, although the process was of the type that you might expect in a well-functioning market, in practice concerns had been raised about its competitiveness.

Then that paragraph does not say anything about the product of the process, the terms.

THE CHAIR: I think Mr Hoskins' point goes a bit further, which is that the tender

process itself, I think at some point in the CMA decision, is considered to be a competitive process. I might be wrong about this. He may be able to find the references.

MR HOSKINS: It's paragraph 14 (inaudible words).

THE CHAIR: Thank you.

MR HOSKINS: Page 11.

THE CHAIR: Yes, thank you. So it's page 11 of the Bundle, yes.

MS PATEL: Yes. So, again, it says resulted from -- that the terms of the agreement resulted from the type of process that we might expect to provide competition, but it does not say that the terms of the PFI Agreement in fact reflected what we would expect to find in a well-functioning market. In fact, the terms of the agreement are then expressly referred to as giving rise to a feature of the market that is an AEC and that is expressly something that you have to discount when you are constructing your hypothetical.

MR HOSKINS: To be fair to my learned friend, I should point out the last sentence of paragraph 15 because -- rather than just coming to it in reply.

MR HERGA: I was about to say the same thing.

MR HOSKINS: It's only fair to give a warning of that now.

THE CHAIR: Do you see the last few lines of paragraph 15? To be fair, this is a point made to you on your feet and you may want to come back to it tomorrow, but I think Mr Hoskins' point is that there is a finding:

"The relevant provisions were generally the type of terms one might expect to find in a well-functioning market up to 2019."

MS PATEL: Sorry, which paragraph are you on?

THE CHAIR: Paragraph 15 on page 11 --

MS PATEL: 15, at the end of 15. I have it now.

THE CHAIR: -- of the Decision Bundle.

MS PATEL: Yes, "generally". It does say "generally". Then it says in brackets:

"… (albeit that they were not all necessarily fully effective in achieving their objectives)".

That reflects the paragraph of the features in the AEC that I took you to.

"Necessarily" was 7.29(c):

"The Airwave Network assets have not transferred to the Home Office under the terms of the PFI Agreement, Airwave Solutions still owns them … and the transfer of those assets is not a credible option that the Home Office could either pursue or threaten to pursue."

That runs directly counter to what the CMA has said it would expect in a well-functioning market. So it's clear that it's not saying that all of the terms are the type that we would expect to find in a well-functioning market because it is expressly saying they were not all necessarily fully effective. When you read the Decision as a whole, you can well see that one category of terms that wasn't necessarily fully effective in that way was these asset transfer provisions.

THE CHAIR: Thank you.

MS PATEL: If we come back to 4.29(a), where those two scenarios of a well-functioning market are set out as examples, you've got scenario (a):

"At the end of the original period of the PFI Agreement, the Home Office would be able to (re)tender, or credibly threaten to (re)tender, for the provision of … network services for public safety using the infrastructure that has already been built and paid for."

Now that does not necessarily involve competitors bidding to purchase the network. It can simply see them bidding to use it, for the reasons I've described. It

refers to the use of infrastructure that's already been built and paid for and responding to a tender for services.

That is consistent with what the CMA has constructed. They've looked at how PFI Agreements are normally structured. They've looked at what you expect to happen to the assets at the end of that. They've looked at what Motorola has told them about the recovery, about the situation here in terms of recoupment of investment. They've looked at the PFI model, which is the basis on which the parties contracted, and they've looked at the provisions in the contract with which they've identified problems.

The well-functioning market scenario is one where, at the end of the agreement which you have entered into, you would expect to be able to re-tender or credibly threaten to re-tender because you are able to transfer the assets back. In such a scenario, clearly the competitor is not going to be building their own replacement network for an extension period. So an MEA basis isn't appropriate.

As to the second scenario:

"The Home Office successfully tendered amongst competing bidders for the delivery of a new and enhanced replacement network which was ready to replace the existing network when the period of the PFI Agreement ended."

Now, there, you would not, if it's the well-functioning market, have an extension period because you would have ESN coming in to replace the PFI Agreement at the end of its term. But if you were to have a short extension, for example if you have a delay, it would not be the appropriate way to model it because you are supposed to remove the features that contribute to the AEC, which include the delay. But let's just hypothesise for a moment that that's what happens. Again, you would have a short extension period but with a new

network on the way, a new and different network on the way, the ESN network, which is not a TETRA network. So, again, the competitor would not be saying: I'll build my own new replacement TETRA network for the extension period.

So in neither of these example scenarios would competitors be required to build their own replacement network so as to justify modelling them, being willing to purchase the Airwave Network on an MEA value basis.

To the extent this is a challenge to a failure to take account of material considerations, if the material consideration is the price for public safety communication network services in a competitive market, the CMA did account of it, it just took a different view to Motorola as to what that price would be.

If it's certain express terms of the PFI Agreement, those were clearly considered in the Decision, and you've got the references to the Appendix in the skeleton argument. If it's the modelling of a well-functioning market, the CMA clearly, again, modelled a well-functioning market, it's just that Motorola disagrees.

So none of those factors are factors that were not taken account of, which is why I say, properly, it's a challenge which is slightly different, it is actually an attack on the well-functioning market itself. But for the reasons that I hope I have identified, the CMA's position is that its construction of the well-functioning market is a rational one. It is one which reflects the guidance, which says you must exclude features identified as giving rise to the AEC. It's one that reflects guidance on what one would expect to happen in PFI Agreements, and it's one which is plausible, based on the factual matters that have been looked at in relation to this particular set of circumstances.

If I can try and deal quickly with the internally inconsistent approach to time periods.

THE CHAIR: Yes.

MR FRAZER: Can I just ask you one point of clarification. There were three potential scenarios for a well-functioning market, the first of which was that there would be competition amongst LMR suppliers.

MS PATEL: Yes.

MR FRAZER: Did you dismiss that as not relevant or how -- I wasn't quite sure how we were meant to deal with that one potential scenario.

MS PATEL: Yes. So that's the one in footnote 571.

MR FRAZER: Yes.

MS PATEL: I mean, so that is not expressly referred to as one of the different mechanisms in 6.91. It does not sit in the last sentence of -- in the penultimate sentence of that paragraph and it does not sit in footnote 572. But we would accept that in a well-functioning market of this kind you would not have multiple suppliers.

MR FRAZER: Okay, thank you.

MS PATEL: We say it does not go anywhere because as long as we have modelled a well-functioning market, with various mechanisms, that would give rise to a scenario which is consistent with what we've modelled and it's a rational decision, and we say that the scenarios I have referred to are scenarios which are consistent with the modelling.

MR FRAZER: I thought that's what you said. I just wanted to check.

MS PATEL: On the internally inconsistent approach to time periods then, Motorola's case has shifted here too. I mean, for your note, in the judicial review of the market investigation reference that took place last year, Motorola challenged the split of time periods itself as artificial and unreasonable. You have that in Bundle H, tab 19. It's paragraphs 41 to 42, 26, referring back to 26 and 25.

During the investigation, Motorola also rejected the use of split time periods, and you see that at decision 6.13, on page 183, where it says they rejected the use of the truncated analysis.

But in the Notice of Appeal, Motorola did not challenge the use of split time periods as irrational or otherwise. There wasn't any head-on challenge. All it said was that the Decision was internally inconsistent because it said that profitability for the later period should take place without taking any account of the prior period but then relied critically on the prior period by assuming that the sunk costs had been recovered in that period.

But in the skeleton, and this is paragraph 73, Bundle A, page 154, not only is there now an alleged inconsistency of reasoning, it is said that the CMA should have conducted a profitability analysis over the whole period to confirm its findings.

We say that that is now tantamount to seeking to challenge the use of split time periods, and if it was a point that was going to be taken it should have been taken at a much earlier point.

THE CHAIR: I did not understand Mr Hoskins to be saying that the CMA should have done it. I think he was saying it was an exercise that could have been done.

MR HOSKINS: That's the way I certainly put it this morning, because of the inconsistency I simply said one of the ways it could be palliated is like this. But having chosen not to palliate it in that way, or any other way, you are left with the inconsistency.

MS PATEL: Okay, it's not how it's put in the skeleton but I am grateful for that clarification.

The first point is -- so having explained the approach to time periods, as you saw

from the parts of the Decision I took you to, the CMA concluded that it was it appropriate to split the time period because of the distinct economic logic of the PFI period, which, for example, gave Airwave an opportunity to recover its expected investment in the network and a return significantly above a standard cost of capital, that compared to the later period where those arrangements were not set to apply, and in a well-functioning market one would expect them to be replaced with a competitively priced alternative.

The paragraph that this ground relies on is paragraph 6.60, and that's at page 201 of the Decision, where Motorola says that:

"By reason of this paragraph, the decision asserts that the profitability analysis for the later period should take place without taking any account of the prior period."

That is not quite what it says. What it says is that:

"A backward-looking profitability analysis [second sentence] for the original … time period is very unlikely … to provide a good indicator of potential market power and the ability to extract supernormal profits at the time the extension was agreed. Similarly, [assessing] profitability of the business over the whole … period would mix the picture from across the PFI and post-PFI periods and would risk masking the degree of profitability in market power enjoyed post-extension."

So what the Decision is saying is that assessing profitability for the prior period does not help you to do what the CMA is trying to do, which is to provide insight into the conditions of competition during the original PFI period or during the extension period. It is also saying that assessing profitability across the whole period won't help you.

But there's no inconsistency between that position and assessing profitability in the

later period on the assumption that in a well-functioning market the sunk costs of the network have already been paid for in the prior period.

All that paragraph is doing is saying: it does not help us to look at -- to conduct a profitability analysis of the earlier period and it does not help us to conduct a profitability analysis over the whole period. But it's entirely consistent with those statements to say that we are going to look at the later period, and we are going to make an assumption as to how assets should be -- as to what happened in the prior period in order to arrive at our opening value for the later period.

The CMA was not required to conduct a profitability analysis over the whole period, and that does not even follow from the way this ground has been put. At best, what would follow is that the CMA should have conducted a profitability analysis over the prior period to confirm whether its assumption that in a well-functioning market the sunk costs of the network have already been paid for in the prior period was plausible here.

Actually, if you turn to decision 6.148.

MR FRAZER: What page is that?

MS PATEL: That's on page 228, apologies. You'll see it refers to, for completeness, calculating the profits achieved from operating the network in the earlier period and estimating that the IRR is around 11 per cent, and then noting that:

"This is slightly above the upper end of the WACC estimate for that period but below the … hurdle rate."

Now, for completeness, I will just give you the other references there. The underlying table is table G12, which is at page 510 of that Bundle. Table G12 shows the profitability model results for that earlier period in a base case and

a sensitivity case. There, you can see the IRR of 11 per cent.

Just for completeness, the WACC that's referred to, that it's referred to as being slightly above, is at page 604, paragraph 92.

So what that tells you -- well, it confirms that if you look at the early period it's not irrational to take the view that the upfront investments have been paid off and a reasonable profit has been made.

Just one further reference to Appendix I. Sorry, if we start with decision 6.102, page 218. This is a reference to an analysis that's carried out in Appendix I using the purchase price of Airwave in 2016 as a proxy for the value to the business of the business' assets as of that date. Again, the conclusion that's drawn from that is that it indicates that Motorola had recovered its investment in Airwave Solutions, plus a reasonable return, by the end of 2019.

The reference for that, to the actual workings in Appendix I, is page 574. It's paragraphs 42 -- sorry, 573 to 574 and it's paragraphs 42 to 45.

We say -- sorry.

THE CHAIR: No, keep going.

MS PATEL: This ground does not go anywhere. There's no inconsistency between the approach that's adopted to the profitability of the extension period. It makes an assumption as to what happened in the earlier period and when that assumption is cross-checked against two efforts to look at the earlier period the assumption is found to be plausible.

So there's no inconsistency. But even if one wanted to cross-check it, and the material to cross-check it is there, it's not an irrational basis on which to have approached the profitability modelling of the later period and to have split the time period in that way.

THE CHAIR: Thank you. I see the time. I think we are doing quite well on time

generally, aren't we?

MR HOSKINS: Unless Ms Howard has a nasty surprise for us. She made promises last time.

THE CHAIR: She did. I think, subject to how much more you have to cover, we have got tomorrow.

MS PATEL: I only have the sensitivity analysis to cover. That's my last point. But I am very happy to do it in the morning rather than now.

THE CHAIR: I think that might be helpful, especially with the transcriber, so if we could come back for 10.30 in the morning, that would be great.

(4.37 pm)

(The hearing adjourned until Thursday, 3 August 2023 at 10.30 am)