IN THE COMPETITION APPEAL TRIBUNAL

CaseNo: 1593/6/12/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 3rd 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

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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Thursday, 3 August 2023

(10.30 am)

Housekeeping

THE CHAIR: Yes, Ms Abram.

MS ABRAM: Good morning. Before we move back to the main action --

THE CHAIR: Yes.

MS ABRAM: -- with Ms Patel, can I just say a word on the suspension of the Tribunal's Order.

THE CHAIR: I think as a matter of logic -- and I am not sure if other Chairs do this -- I think I have to do that warning again about the livestream --

MS ABRAM: I am so sorry.

THE CHAIR: -- on the basis that someone might be joining us today for the first time, so I will just do that quickly.

Some of you are joining us livestream on our website. 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.

Thank you, Ms Abram.

MS ABRAM: Thank you, Madam.

Can we just start on the suspension of the remedies in the Final Order?

THE CHAIR: Yes.

MS ABRAM: The Tribunal might have seen some correspondence on this overnight.

THE CHAIR: Yes.

MS ABRAM: As Mr Hoskins kindly explained yesterday, the parties have been working hard between themselves to work out whether there is a basis on which appropriately the terms of the remedy in the Final Order can be suspended pending the Tribunal's judgment but giving suitable protection to the Home Office.

THE CHAIR: Yes.

MS ABRAM: So that if Motorola's challenge fails the Home Office is put back in the position that it should be in under the terms of the Final Order. I am happy to say that Motorola and the CMA have agreed some terms of a draft Order.

THE CHAIR: Yes.

MS ABRAM: Which I am very happy to hand up if that would be helpful.

THE CHAIR: If it is the same copy as came in yesterday, we have it.

MS ABRAM: I am very grateful. So as of yesterday evening, the position was that we were not sure what the Home Office's stance on it was. The Home Office has helpfully confirmed this morning and again the Tribunal may have seen the letter from the Home Office saying that they do not oppose the making of the draft Order.

So unless the Tribunal would like me to, I am not proposing to take you through its terms and I ask the Tribunal to make that Order.

THE CHAIR: I do not want to spoil the party, but we do have some issues with it. We have had a look. I think the Order you are asking us to make is under Rule 24 and 106. 106 is consent orders. But 24 very specifically deals with suspending the effect of a decision.

If it is an application to us under Rule 24 there are various formalities that need to be complied with which do not appear to have been complied with.

Also, I think it is 24(3), we actually have to exercise our power taking into account all

sorts of information which we do not currently have because that is the information that would be provided under sub-rule (5).

So at the moment we do not consider ourselves to be in a position to make an Order under 24.

Now, in light of the fact that three of you have agreed, and there's one wrinkle to that because the Home Office at the moment does not oppose, is there jurisdiction for us to make the Order under 106?

MS ABRAM: The CMA's view is that there is jurisdiction to make the Order as a consent order and in fact there was a proposal from the CMA that it should just be made under Rule 106. I am not sure which party it was that suggested it should be under Rule 24 as well but perhaps either Mr West or Ms Howard will be able to illuminate that.

THE CHAIR: The way I read it, given that the suspension or effect of an Order is specifically provided under Rule 24, I can see why that was thought necessary. Whether it is or not is a different matter, so I can see that.

We did wonder whether a practical solution, but it would take time, might be for Rule 24 to be complied with and us to have the statement with a statement of truth setting out the factors that we need to have regard to and then for the Home Office to indicate whether it consents or not to that, even in a short term so that you could have an Order in the short term to hold the ring until -- I mean, I think you are thinking about until about October 2023. It seemed to us that might be a practical way around it but at the moment we are slightly concerned about making an Order under Rule 24 without the formalities having been complied with.

MS ABRAM: I hear what the Tribunal says, Madam. In fact, that is why we had proposed that it should be an Order under Rule 106 on the basis it would be

a consent order effectively. We do not think that there's any limit on the Tribunal's jurisdiction to make such an Order, we're not aware of any authority to that effect.

Of course it is always in the Tribunal's jurisdiction to decide whether it is prepared to make a consent order. It may be that one of the points you are making is that you think that an Order of this nature should not be made simply by consent of the parties without the Tribunal considering whether the requirements in Rule 24 are met.

THE CHAIR: We also wondered whether it was a possibility for you to actually reach an agreement between yourselves as to suspending the effect of the Order and whether the Tribunal needs to be involved in that process at all. But I do not know if any thought has been given to that.

MS ABRAM: So my understanding is that the force of having an Order of the Tribunal and an Order of the Court is of course then it is based on an undertaking given by Motorola to the Court which has particular enforcement powers in consequence. So an agreement does not have the same enforcement capability.

THE CHAIR: I just wondered what the extra enforcement element was. We only had this recently but is it thought there might be some form of contempt provision if it is done that way? Because we are not sure -- is that necessarily right in the Tribunal, do we have powers?

MS ABRAM: So there is no penal order in the schedule to this draft Order. But the CMA has enforcement powers under, for example, under paragraph (e) of the schedule to the draft Order the undertakings.

So in the event that whichever applicant fails to fulfil its obligations under the undertakings, the CMA may enforce the charge control order, including for

breach of it, without prejudice to whether it is able to bring contempt proceedings. So what that envisages is that the CMA should have a direct enforcement right under the undertaking, fortified by Order of the Court, in a way that under an agreement you would have to sue for breach of the agreement and then seek enforcement.

Now, we are not expecting that we get into that world because it is all been done by consent between Motorola and the CMA and the Home Office has indicated that it does not oppose that so this all a long way down the track but that is the thinking.

THE CHAIR: So the other wrinkle, and there are lots of thoughts we're throwing out but, is that I think the Home Office, if you wanted to do a consent order route, and as I say we have not reached a final view as to whether that is appropriate or not, the Home Office would need to consent because as an intervener I think you are technically a party.

MS ABRAM: It might be better to hear from Ms Howard on that then before I carry on.

MS HOWARD: Thank you. I think the Tribunal's comments have foreshadowed some of the difficulties that we have had this week because the Home Office belatedly learnt about the Order -- I mean, things have happened very quickly obviously because the remedies order was only issued on Monday and so the parties have had to work at great speed and we understand that expedition. But the Home Office was concerned that it was not being involved in the consultation process and the negotiation of the terms of the undertaking and it is prepared to hold the ring for the period of these proceedings up until the judgment is given by the Tribunal. It is concerned that should there be a subsequent appeal, which could go on for years, that these terms are not

adequate to protect not just the users of the Home Office, but also other users and the wider general public interest.

It had prepared a witness statement that it was going to submit to the Tribunal setting out those concerns but it was difficult to do that without seeing the alleged harm that Motorola would be suffering first, so it's held back on that witness statement, but it would be willing to give it to you should you require it.

The position of the Home Office is that it is content to accept this Order. It would rather prefer to not oppose it than accept it, because it does not want it to form the template for any subsequent Order that might be used at the appeal stage, particularly if the harm and the -- Basically it is the lack of the use of these public funds for an extended period of time which may go on for a year or longer and the Tribunal will be aware of the quantum of the money that we are talking about, which is significant.

THE CHAIR: Yes.

MS HOWARD: And the lack of use of that money and/or lack of appropriate interest provisions are significant when you are looking at budgets for the Police, for the Ambulance service, for the Fire service. And that is where the Home Office's concerns have arisen and the use of this procedure as a sort of bypass for Rule 24 and the careful analysis and balancing of the competing interests that the Tribunal would normally undertake.

So that is why it's taken its position of [not] opposing. It is happy to hold the ring for the next sort of six weeks but we would be very concerned if these provisions continued because we do not think they are adequate for the longer-term harm that would arise.

THE CHAIR: Yes. That then calls into question if we did have to go under 24(3) our assessment of the effect on competition.

MS HOWARD: We do have a statement on the countervailing harm that would happen to the Home Office, the users, and the public interest that was ready to go because we were going to file that over the weekend, but obviously we'd want to respond to any evidence that Motorola might want to submit as to its harm. But we are keen, and we've been actively working with the CMA and Motorola, to try and get this Order into a position to hold the ring for these proceedings.

THE CHAIR: Yes. Can I get a handle on what the urgency is to the application because presumably there is the charge control procedure mechanism that's been put in place. Will that take some time to work through? I appreciate it is effective as of straightaway but does it take time to work through in terms of accounting or calculations or ...

MS ABRAM: Motorola's position, and Mr West will be able to speak further to that, is that practicalities will take a while to implement but under the terms of the Final Order, unless they are suspended, they take effect. They took effect as of Tuesday and so Motorola have an obligation now to make sure that they are not overcharging the Home Office.

So to the extent that there is non-practical urgency, to the extent that it is financial, there is an obligation on Motorola that will continue to accrue day by day unless the Order is suspended.

Now, look, the CMA is not parti-pris on this in the sense that it has no particular agenda of its own. But the harm that is alleged on either side is likely to be presumably financial, principally financial in the sense that it is X million pounds a week one way or another. And the question is whether the ring, who pays that X million pounds a week, should be held pending the Tribunal's judgment in the meantime.

So in those circumstances, given that Motorola are prepared to promise that they will make the Home Office good if the challenge fails, it seemed to us it was an appropriate, super pragmatic arrangement to make in the short term just to make sure that the Home Office get what they are absolutely entitled to under the terms of the Decision if, we say when, Motorola's challenge fails, but to avoid Motorola having to put those systems in place in the very short term, in the immediate term.

We are concerned by the prospect of a further interim relief round of these proceedings, including for costs reasons. I just put a marker down as to that in respect of costs because if there were to be an issue between Motorola and the Home Office as to whether or not there should be interim relief and the CMA were to incur costs as the decision-making body in that process, we would want it to be open to us to argue that the Home Office had stepped outside its role as an intervener and was causing us to incur costs which we should be entitled to recover from the Home Office.

THE CHAIR: Right. So it sounds like the practical monetary consequences are directly affecting the Home Office and your client, Mr Hoskins, and the CMA is actually trying to take a pragmatic view to make sure that nobody loses out. So I should probably hear from, is it, Mr West?

MR WEST: Yes, (several inaudible words).

Can I just briefly address you on the points that have arisen. From Motorola's perspective, this is not an application under Rule 24, although the Order says having regard to Rule 24, it is a consent order application and the question arises under Rule 106 whether the Home Office is technically a party. Now, there isn't any provision of the rules which specifies whether an intervener becomes a party for these purposes and our position is that the Home Office

is not a party and the point about costs which has just been made is perhaps instructive because of course the usual position is that an intervener is not liable for costs and cannot recover its own costs. That of course makes sense if an intervener is not in a position to cause other people to incur costs, which would be the position if the Home Office, by refusing its consent, was able to deprive the Tribunal of jurisdiction to make a consent order.

So, in my submission, the better analysis is that the consent which is required for a consent order is the consent of the parties, the CMA and the applicants, and not of the intervener.

So far as concerns the concerns which the Home Office has actually expressed about this Order, as I understood what my friend said, those concerns were really about a potential further suspension following judgment in this case and not so much about a suspension of a matter of weeks, one hopes, until judgment is handed down.

That concern is expressly addressed in the terms of the Order, in particular paragraph 2, which says that:

"If the report is upheld in whole or part such that the Decision to introduce a charge control stands, any additional suspension pending further appeal will require a separate application as part of any application for permission to appeal."

So there can be no question that this Order would fall away in those circumstances and a further application would be required. If that is the only concern which the Home Office has, in my submission, it is addressed and is not a reason why the Home Office shouldn't simply consent to this if its consent is required.

As concerns what obligations would arise now, if the Order were to be effective now, the principal one, as Ms Abram mentioned, is pricing: the obligation on my clients would be to adjust their prices so that those prices were set at a level

as to meet the maximum revenue requirement, including in respect of 2023.

My understanding and instructions are that that would require the pricing to be amended before judgment is handed down because it would not be possible to do so by means of amendments made only thereafter and still comply with the cap in relation to 2023.

There is of course an issue as regards the ability of Motorola to recover the difference in prices in the event that this application were to be upheld. Motorola's position would be that it is entitled to recover that difference under its contract with the Home Office if the appeal were to be successful but we anticipate that the Home Office would dispute that and they certainly have not to date undertaken that they would not take any such point.

By contrast, if there is a suspension, my clients have undertaken that they will make the Home Office good and that includes by providing for the payment of interest, which the undertaking does, so as to ensure that they are made 100 per cent whole.

The other obligation which would immediately arise is that of monitoring and reporting, which would effectively require an additional function to be created, financial reporting function to be created within Motorola immediately in order to comply with the monitoring and reporting requirements of the Final Order. And again it makes no sense for that to be recruited and developed, and for money to be spent on that, potentially for individuals to be employed, only for that to be reversed again in a matter of weeks should this application succeed.

These matters are not news to the Home Office because we explained them in a letter which was sent, I am sorry to say, on Sunday, which may not have made its way to the Tribunal. But I can try and get you copies of that letter but

we did set out in detail the prejudice that my clients would suffer. I have copies of that if it would be useful. Because that is in effect the evidence which we would supply if the Tribunal asked us to do so albeit with a statement of truth rather than simply yours sincerely and a signature. Would that be of use for the Tribunal to see that?

THE CHAIR: I am slightly concerned that we are getting down into quite a lot of detail on something that was presented this morning as something that was relatively uncontroversial and I appreciate that we've raised the spectre of Rule 24, we've raised the spectre of Rule 106. It seems now that the principal dispute, and in practical terms I suspect this might be right, is between the Home Office and Motorola in terms of ensuring that there is proper ways of addressing the balance whichever result follows.

The Home Office have not agreed this form of Order and at the moment they have a witness statement on the stocks, and you have a letter written on Sunday. Neither of which we've seen. If we had gone through the 24 process we would have seen it or we'd be presented with a consent order which the Home Office was happy with. So I think we are in a little bit of a difficulty in reaching a decision on this. Is the better course not for Motorola and the Home Office to see if they can agree something? And for us to then, if it is not agreed -- we could decide --

MR WEST: When you say agree something, you mean agree the Order?

THE CHAIR: At the moment, as I understood it, and Ms Howard said that she was not that familiar with the basis for the alleged harm that would be suffered by Motorola --

MR WEST: This letter was copied to the Home Office on Sunday.

THE CHAIR: Ms Howard informed the Tribunal she hadn't seen it.

MS HOWARD: We have seen the letter but the details in the letter were extremely brief and we have not had anything like the level of detail that has just been exposed. And we have been chasing an explanation of the harm that Motorola claims to be suffering and why it is not compensatable in damages for over a week and we have not been given the level of detail. This is the first chance that we've had to respond to it and obviously I need to take instructions on that.

I would also add that over the weekend -- we were not involved in any of the discussions last week that went on between CMA and Motorola, and everything has been kind of coordinated through the prism of the CMA, that is not allocating blame, I think the CMA has been in a very difficult position trying to mediate between the competing interests. But we were concerned. We do resist any insinuation that we are acting outside our part of an intervener or that we are causing unnecessary costs because we have been concerned throughout that due process should be followed. Whilst we can see the attractiveness of a pragmatic quick solution to hold the ring and allow the proceedings to continue, and we are under considerable pressure to try and facilitate that, we did manage to engage over the weekend. So, for instance, clause 2 that my learned friend took you to, holding the ring during the determination of these proceedings and requiring this application, that was the Home Office's drafting which it managed to put in over the weekend which was accepted and agreed to by the parties.

Our concerns in relation to the undertakings, again those have moved on over the weekend as a result of the Home Office's mark-ups and comments and the parties have worked very hard to move closer together. But the concerns are in the main that we wanted to actually specify the level of interest that is in

clause (c). We wanted to have the Bank of England base rate plus 1 or 2 per cent because that is the normal level that is accepted in damages actions and would be compounded over the period of the suspension in the normal course. That's been rejected.

We also have concerns about the best endeavours obligation at the start of (c). We just wanted a straight "will ensure", rather than it being watered down through best endeavours, which as the members of the Panel will be aware is always difficult as to exactly what that means and we think will just result in further debate.

THE CHAIR: Yes.

MS HOWARD: So it may be that we can take these concerns off-line and have a discussion with Motorola in the break to see if we can reach an accommodation between ourselves on those points and we can revert to you. I think at the moment there is an informal suspension in place at the moment. Then it may be that we can --

MR WEST: That is right, there was an informal suspension until yesterday. That is to be superseded by this Order unless there's a further extension of the informal suspension. The only additional suspension is the additional time for my client to actually supply the signed undertakings which was to be done in the course of today. So as at now, if the Tribunal does not make the Order, the parties would be left with having to agree a further extension, as I understand it.

If I can just address briefly my friend's points. I think she's accepting that the Home Office has had input into this Order. The only objection she raised was to do with the level of interest but we're dealing here with a suspension of a matter of weeks. One hopes that the Tribunal's judgment would be handed

down, given the expedited nature of this matter, as I say, within a matter or weeks. Are the Home Office really taking a point about compound interest given that it will only be compounded, one assumes, perhaps quarterly or semi-annually, it is not going to make any difference. Likewise, if it is base rate or base rate plus 2 per cent, it is going to make very little difference and one bears in mind as well that the Home Office is a governmental entity, they do not ordinarily borrow money at commercial rates in the first place.

I also do not accept that the explanation we've provided is not a full explanation. This letter, had I handed it up, is I think six or seven pages, six pages long.

THE CHAIR: That still leaves us with the problem that there seems to be a degree of discord between the Home Office and Motorola on this and so I am not sure that we are in a position to move forward and make the Order simply -- it is not a consent order, basically, as I see it, unless I am advised otherwise.

MS HOWARD: Why don't we try and have perhaps a brief adjournment and we'll see whether there's any room for discussion, understanding the concerns, and then we can revert and I suggest that we continue.

MS ABRAM: If I may suggest that this was intended to be, expected to be a brief interlude, perhaps not as entertaining as half-time at the Super Bowl but nonetheless a little bit of an interlude from the main action and so I think the CMA would resist the idea that the main course should be adjourned while this sideshow, with respect, is addressed.

May I just make sure that I, for the CMA, have understood where the Tribunal is. There are two issues here that I think perhaps might usefully be disentangled.

THE CHAIR: Yes.

MS ABRAM: There's the Tribunal's jurisdiction to make the Order under Rule 106 or Rule 24 and there's the Tribunal's willingness, view as to whether it is

appropriate to make the Order under Rule 106. I think I have understood the Tribunal correctly to say that, if the parties are all agreed on the terms of the Order such that there is actual consent from the Home Office, you consider that that is an Order that can be made by consent under Rule 106. Otherwise you would see this as a case where Motorola would need to make an application for interim relief under Rule 24.

THE CHAIR: I think that is broadly speaking right. I have reassuring nods from both sides. That is broadly speaking right. We've actually only looked at this relatively recently too, but yes.

MS ABRAM: I am really grateful. I think that gives us what we need to be able to go away and consider what can be done. I am very grateful. Thank you.

MR WEST: Motorola's position is also that we'd prefer to get on with the balance of the hearing and deal with this issue of interim relief, if necessary, afterwards.

THE CHAIR: Yes.

Ms Patel, I think that's you.

Submissions by MS PATEL (continued)

MS PATEL: Good morning. So we left off yesterday having gone through the three sub-grounds and we were about to move on to sensitivity.

THE CHAIR: Yes.

MS PATEL: Which is the last point in Motorola's skeleton argument. Motorola says that the CMA's sensitivity analysis, this is paragraph 74 of their skeleton at Bundle A, page 154, using the estimate of depreciated replacement cost at Decision 6.99(a), is not an MEA valuation so it does not cure the flaws identified by Motorola.

The first point to make is that this point was raised in the CMA's Defence at

paragraphs 99 to 100 as a response to the first sub-ground on the Byatt report. The reason it was raised there was because that sub-ground effectively says that the CMA should have followed Byatt, and Byatt, if you read it correctly, on Motorola's case, says that you should use MEA value, net MEA in fact if we look at it.

So the CMA said in response to that, that if it was required to follow Byatt, if Motorola's construction of Byatt was correct, and if therefore it was necessary to use the net MEA value, then if you looked at the estimate of depreciated replacement cost in the Decision, it was effectively equivalent.

Now, can I just take you through why that point is good. The estimate of depreciated replacement cost is at 6.199(a), which is Decision Bundle 217. We see there the references to:

"The most reliable estimate of the replacement cost of the Airwave network is likely to be given by the 2016 Deloitte report which was prepared independently of our investigation and rolled forward to reflect further investment in the network between 2016 and 2019."

So that is a figure from a valuation taken in 2016 which is rolled forward then to 2019 so that it reflects the correct period. It's also a figure which is depreciated, and you can see that on the facing page at 6.102:

"We have also carried out a sensitivity analysis using the estimate of depreciated replacement costs."

So two things happened to the Deloitte figure.

If I could ask you to then turn to Appendix I, which starts at page 556. This deals with the identification of valuation of fixed assets. You can see at paragraph 3 Motorola told us, effectively, that asset values should be established on the basis of a proper modern equivalent asset use. Then on the facing page,

paragraph 6, it talks about the report by Analysys Mason which was put forward by Motorola to develop a modern equivalent asset MEA assessment of the Airwave network.

There is a description of what the Analysys Mason report did. What this Appendix does it effectively looks at the Analysys Mason figure and it looks at the Deloitte figure and it compares them.

If you could then turn forward to page 560, paragraph 11 then sets out various concerns about the Analysys Mason report because it contains a number of assumptions which appear to us to be questionable. Those include the assumption about the replacement technology, the equipment cost estimates and OPEX costs.

Then it turns to the Deloitte report. Paragraph 13:

"Deloitte produced estimates of the replacement cost new and the fair value of the base stations and switch sites of the Airwave network."

So it was taking the new replacement cost as the basis for its estimates. If you turn on to the facing page, replacement costs new RCN is defined at the third bullet:

"RCN is defined as the current cost of a similar, new property having the nearest equivalent utility as the property being appraised."

Now, if you remember, the definition of the MEA from the Byatt report, it is a modern equivalent asset.

Now, the CMA then takes the Deloitte figure and the Analysys Mason figure and it looks at them together. So if you turn to page 565, paragraph 21, it talks about how it set out the provisional view in the PDR:

"To the extent the replacement cost approach rather than the recoverable value approach was appropriate we should place most weight on the Deloitte

report."

Then it says:

"We note that this report was prepared for Motorola in the normal course of business."

Then it sets out what the report estimated the fair value of that asset base in mid-2016 to be, and then it sets out the adjustment to roll it forward to 2019.

Then it depreciates the overall asset base assuming a ten-year economic useful life and that gives you the figure that is then used in 6.99(a).

Now, over the page from paragraph 25 there is a reference to Motorola's submissions on the accuracy of the Deloitte report. Then there are various observations about how the Deloitte report states in several places that its replacement cost figure assumptions were either prepared by or approved by management, which they took to be the Airwave or Motorola management. Second, and this is key:

"We observe that the two reports prepared by Analysys Mason and by Deloitte provide broadly similar estimates of the new replacement cost of Airwave Solutions' assets assuming that Tetra is the most appropriate MEA."

Then there's a figure.

Then at 26 it sets out that:

"On the basis of management provided or approved assumptions Deloitte estimates that the obsolescence of the assets reduces their fair value."

Then there's a further figure. Then there's reference to:

"The Deloitte report being prepared independently outside the context of our market investigation, less likely to be influenced by Motorola's interests".

Then at 27:

"The government guidance that was referred to at paragraph 21 appears entirely

consistent with the approach that Deloitte has taken – estimating DRC in the case of a specialist asset … considering the MEA cost and then applying an adjustment for obsolescence."

So paragraph 30, over the page:

The CMA therefore concludes: " that the most reliable approach in terms of identifying a replacement cost is to value the Airwave network assets in their existing state, drawing on the Deloitte report" and adjusted in the way that we've described.

The asset value is set out again that that produces at the end of that paragraph.

Then, at the end of paragraph 31:

"We note the approach of using Airwave Solutions' NPV as of 2016, charging depreciation then adding on CAPEX, produces a very similar figure."

So what you see is that the new replacement cost values of these two figures are very similar and all that happens to that new replacement cost is that it's then adjusted for depreciation. If you remember what paragraph 58 of the Byatt report said, it referred to the depreciated value of the gross modern equivalent asset value taking account of the remaining service potential of an old asset compared with a new one.

So we say that's why this figure is equivalent to a net MEA because it looks at the new replacement cost and it then rolls that forward to 2019 and it then depreciates it. So if it were required by public law in this case to follow the body of the Byatt report that Motorola has referred to, which the CMA did not refer to, and if that required adopting a net MEA value per paragraph 58, then in fact one can treat this figure that's used in 6.199(a) as the basis for the sensitivity analysis as the equivalent to a net MEA value.

Now, turning to Simplex, which you were taken to yesterday, the headnote that you

were taken to says that:

"Where a factual error has been taken into account in reaching a decision and that decision would be a lawful, that decision will be unlawful unless the court is satisfied that the same decision would have been reached on the basis of other valid reasons."

What the CMA are saying here is that if you were to agree with Motorola that the brief reference to the key insight from the Byatt report, that in fact the CMA was obliged to follow body of Byatt report, it was obliged to use net MEA, then if in fact you look at the sensitivity analysis that's conducted using this figure that we have identified from the Deloitte report at 6.199(a) and you see what happens, the result that is set out in paragraphs 6.145 to 6.147 does show you that it would have reached the same decision. If we could just turn to 6.147 on page 228.

6.147, you see the figure which was arrived at using the recoverable cost estimate, the supranormal profits of £1.27 billion for the extension period, then you see from the table the comparable figure that's arrived at using the -- so down on page 6.145 you see the figure, which is adjusted from the Deloitte report, the second figure that is highlighted.

THE CHAIR: Yes.

MS PATEL: That figure then plugs into the calculation in paragraph 6.148, which is effectively describing the middle column of the table at 6.3. You can see that the NPV there of 1.168 is only slightly below the NPV of 1.272 using the recoverable cost.

So if one is then looking at the conclusions in this section, 6.149, the conclusions are:

"Based on the above analysis, we conclude that Motorola is likely to derive

supranormal profits in relation to the supply of these LMR network services following the end of the original fixed period and we note that the supranormal profits are significant in size, scale and in excess of £100 million per year, almost one-third of the annual revenue earned by Airwave and likely to persist. The ability to earn such high returns for a period of a decade suggests a significant failure in the competitive process."

Now, those conclusions, and then 6.151, over the page:

"In summary, our assessment of market outcomes suggests a material failure in the competitive process."

We do say that those conclusions would stand if you used the figure in the middle column 1.168.

THE CHAIR: I understand the argument, Ms Patel, but what do you say about the last sentence of paragraph 6.145? You are inviting us to assume that the CMA would have done something, but the last sentence of 6.145, they specifically are saying -- sorry, the second-to-last sentence, they are saying they would not consider it to be appropriate.

MS PATEL: Yes. Well, we do not, but this argument is raised in response to the argument that Mr Hoskins put to us. And this is not the figure that the CMA adopted, it was a sensitivity analysis. The CMA's view is the correct approach is to use the measure of recoverable cost, the figure that is set out at 6.99(c).

THE CHAIR: But is it right that we have to logically then assume they would have done something they've specifically said would be inappropriate.

MS PATEL: I think that is the logic of the argument. What is said is: you have to hypothesise that we've made an error, so you have to hypothesise that we were not right to use recoverable cost, that in fact we ought to have followed Byatt and that in fact what Byatt says is that you should use net MEA and that

the equivalent figure for net MEA is the one set out.

So you are effectively having to assume that the sentence you have identified is wrong. That is part of the error that you are having to effectively say: well, you've made a mistake here, let's put that error to one side and let's see whether, notwithstanding that error, there is a valid unerroneous basis on which you would have come to the same decision.

THE CHAIR: But isn't that normally not the other side of the coin? So here you are asking for us to assume that they would have done the exact opposite of what they would otherwise -- what they actually did, the basis for the decision would be the exact opposite. So they would not have made what would be an error and that they would have done the opposite, whereas often these cases involve another factor in the decision-making process that of itself would justify the same decision being reached.

So not: you have to assume they would just have done the opposite, but there is something else in the decision-making process that says even if that bit is wrong, this bit is right.

MS PATEL: I think it is right that that is sometimes how the cases go. But if you were to find against us on the first sub-ground, you would be saying that in fact it would have been correct to use the other approach. So the consequence of your decision against us on sub-ground 1 is that effectively you are saying that the other basis for the valuation is a valid basis.

What the Decision shows is what would have happened if that basis had been used. We have said that we do not consider that to be the appropriate basis but you would be saying to us that that is a wrong judgment to have made and the fact is that table 6.3 shows you what the decision would have been had we adopted the approach that you would be saying we should have adopted. So

you can see that had we adopted what you would be saying we should have done, the result would have been the same.

THE CHAIR: Yes, I see. Thank you.

MS PATEL: You were taken to a chapter from Lord Justice Lewis's book and you were taken to I think the sentence 'you have to show that it has to be inevitably the same'. These cases often involve things which are much less black and white than statistics, actually. In my submission, looking at the table here, because we are concerned with numbers and because of the way the conclusions are expressed, concerned with supranormal profits in excess of £100 million, you can in fact see that had you adopted that figure those conclusions would stand.

Now, we do not say that this sensitivity analysis is the answer to sub-ground 3 and the issue as to time periods. I cannot say that. It was only raised as an answer to the point about Byatt. So I quite accept that it's not possible to excise other paragraphs of the Decision that deal with other sub-grounds and say that the decision would inevitably have been the same. But that's not how this sensitivity analysis was relied on.

So for those reasons we say that on that first sub-ground, even if you were against us, you ought not to grant any relief on that basis because the error you would be identifying and the course that you would be saying we should have taken would not in practice have yielded any difference to the ultimate decision because the result of supranormal profits would have been the same.

If I can then just pray on your patience, just to draw the strands together. You heard very attractive submissions from Mr Hoskins yesterday and I have, and Ms Abram has, in fact stayed off the jury points so far but if I can just pull it all together. You are, if you accept the profitability analysis, concerned here with

a context of supranormal profits of £4 million a week on the CMA's assessment and that is a very significant cost to the taxpayer and you've heard the Home Office's concerns about that.

You've got a Decision that runs to nearly 700 pages following an extensive market investigation in which Motorola participated vigorously and many of the points that you've heard have been raised at various points along the way in that investigation.

I do return to what I said at the outset, which is that Motorola's objections are effectively based on its position throughout the investigation that the opening asset valuation at the start of the extension should have been on an MEA basis, i.e. you should assume that a replacement network is built for the extension.

Now, Mr Hoskins says because he has to, that he's not saying the CMA should have done something else. He is in fact just pointing to flaws in the logic of the Decision. But, in my submission, what is at the heart of this challenge is the Motorola's view that we should have done something else and that is particularly why they point to Byatt and Byatt's endorsement of the MEA.

Mr Hoskins then seeks to pick apart the Decision by alighting on various paragraphs in isolation to suggest that there are public law errors that would clear the ground for that conclusion to be reached.

You've heard and seen in the Tesco case that a decision is not to be read like a statute, it is to be read as a whole and it is clear, in my submission, that in a well-functioning market in an extension period, competitors would not be building a new network. That is at the heart of the approach the CMA took.

When you feed that through the three sub-grounds, it is clear that there are no public law errors. Those errors have to be addressed through the wide margin of

appreciation. What does that wide margin of appreciation mean here? It means stand back and consider what the CMA is doing. It is hypothesising a well-functioning market. That is not a straightforward task because it requires constructing a hypothetical, so not a situation which is on all fours with what we've got because otherwise it would not be a benchmark of any kind, and yet it has to be a hypothetical which is plausible, which is a word I used yesterday.

Now, in my submission, the CMA has a wide margin of appreciation in how it constructs that well-functioning market hypothetical provided that it is plausible. The CMA also has a wide margin of appreciation in terms of the approach it takes to literature, on how valuation exercises should be conducted, which are not apposite necessarily for this context, and it has a wide margin for appreciation as to how it models a particular scenario, on which there is no precise, clear guidance as to how to do it in this case.

If I then just recap quickly the three sub-grounds. The first sub-ground, the CMA stated that the approach set out in Byatt is more appropriate given the circumstances of the case. Now, in my submission, applying the wide margin of appreciation means that you should construe the word "approach" in that sentence restrictively such that the approach is a reference to the key insight, which is the only bit of that report which is referred to expressly in the Decision.

The CMA applied that key insight that it had taken from Byatt to the circumstances of an extension period after a PFI Agreement, something that Byatt did not do at all. Mr Hoskins suggested that the approach we took was contrary to both Oxera and Byatt, but that is not a public law error. We are not required to follow either of those provided we can show that there are good reasons for

the approach that we have taken and we say that the approach we have taken to modelling profitability in the circumstances of this case is a rational one. It was said that it stands or falls on its own merits, of course it is not about the merits. We say it stands on its own rationality.

The second sub-ground, it's said that our approach rests on an assumption that in a well-functioning market, customers would not pay twice but that the statement as to what would occur in a well-functioning market in the extension period, which is what paragraph 6.91 that you were taken to yesterday is looking at, it's looking at the extension period, is contradicted by what is described as a well-functioning market in the PFI period, which is what paragraph 14 and 15 of the Summary that you were taken to yesterday are talking about.

Now, we say here the wide margin of appreciation means that you have to show the CMA significant latitude on modelling this hypothetical well-functioning market, provided it's plausible. Motorola has picked out various hypothetical scenarios as to what would occur with a hypothetical original PFI contract in a well-functioning market in the extension period. That's what 6.91 is doing. These are scenarios which, by definition, have not happened.

The actual PFI contract in this case clearly cannot constrain the range of scenarios in a well-functioning market in the extension period otherwise it would not be a useful benchmark. If I could just give you for your note paragraph 4.34 of the Decision where the CMA deals with exactly this issue, the importance of not confusing what has actually happened with what the benchmark should look like.

Then where we get to is that when we look at the actual PFI Agreement in this case, that cannot define what the well-functioning hypothetical looks like. Indeed,

when you look at the Decision, there is no finding that all the terms of the current PFI Agreement are consistent with a well-functioning market to 2019, which is what you'd require for Mr Hoskins' grounds to be good.

The scenario of 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 services using that already built and paid-for network, which is the one that appears in the text of paragraph 6.91, to be contradicted you would need to have something in the Decision which says that in a well-functioning market asset transfer provisions would always provide for transfer at more than no cost. You do not find that anywhere.

What you in fact find, as you saw yesterday, is that you would expect them to provide for transfer at no cost given Government Guidance, that was 4.77, that they do not actually provide for transfer at no cost, that was 4.79, despite being put in place following a process in which the bidder expected to set the price to recoup costs, and if for your note you could also take Decision 4.61, which makes clear that the Decision records the aim was to facilitate transfer and if effective they would have been consistent with the Guidance and the notion of recoupment.

You went to Decision 14, the Summary at 14 yesterday. It also contains an important footnote, footnote 5, which talks about the concerns around competition that had been raised by the NAO and others. You were taken to Decision 3.34. If could you also take a note of 3.31 and Appendix B 39. And 15, that we went to yesterday, says only that the relevant provisions were generally the type of terms we might expect to find in a well-functioning market up to 2019 albeit they were not all necessarily fully effective in achieving their objectives. That's because although they sought to deal with

the end of the contract and transfer of assets, as the feature in the AEC findings, I think I took you to section 7 yesterday, it's also in Decision 28(c) in the Summary, as that makes clear, the assets did not transfer and transfer was not a credible option.

So that is not a finding that the precise asset transfer provisions in the PFI Agreement were themselves the type we would expect to find in a well-functioning market. You cannot get that out of it. It is very clearly caveated. In fact, you have to hypothesise a market without paragraph 28(c) where the assets did transfer and/or transfer was a credible threat because that is the hypothetical original contract in a well-functioning market that's being posited.

So we say there isn't any inconsistency between those two scenarios and it would not make sense to hold the well-functioning market range of scenarios to the precise terms that we had in this contract with which concerns are identified as part of the AEC.

The contract could also require that the original supplier reduced prices during the extension period to reflect the fact that the network assets were already paid for. That was footnote 572. Again, nowhere does the Decision say that in a well-functioning market PFI Agreement would always cover the extension and at the same price. That is the sort of clear inconsistency that Mr Hoskins is seeking to identify. But in fact, obviously this PFI Agreement did not contain terms relating to or contemplating an extension at all.

Again, Decision 15 says only that the relevant provisions were generally the types of terms that we might expect to find and in a well-functioning market up to 2019, so it's not making any pronouncement as to the terms that a well-functioning market would have after 2019.

So again, you cannot get a finding that in a well-functioning market you would expect to always find a PFI Agreement containing extension terms relating to a reduced price.

On the contrary, if you look at paragraph 19 of the Decision, what it's in fact saying is that in other words after 2019 the terms of the extended PFI Agreement do not result in a price or a level of profitability that would be expected in a well-functioning market.

So the finding there is actually to the contrary. Again, what you have to do when you are hypothesising your counterfactual is hypothesise without the features giving rise to the AEC. If you look at 28(h) on page 15, there is a lack of effective constraint provided by the terms of the PFI Agreement on the price of the provision of the network after 2019. So you have to hypothesise that that's not there.

So we say that when you look at paragraph 6.91 and footnote 571 and you appreciate what it's doing, it's hypothesising original contracts in the PFI period, not this contract in the original PFI period because it has to exclude features that contribute to the AEC. Those hypotheticals are entirely rational. They are also plausible for the reasons that I gave yesterday so when you then check them against what has in fact happened, they are plausible as well.

I will sum up those points at the end.

Then finally sub-ground 3, the inconsistency as to time periods, which we dealt with at the end of yesterday, it's said that the profitability analysis for a later period should take place without taking any account of the prior period. Decision 6.60 does not say that. It actually says a profitability analysis that looks at the extent of profits for the earlier period alone or for the whole period will not give

you a good indicator of market power in the later period.

Now, it's not inconsistent with that to treat Airwave as having been paid for in the prior period in your well-functioning market benchmark. What you are trying to do is examine the competitive conditions of the later period, and treating Airwave as having been paid for in the prior period allows you to isolate the competitive conditions in the later period. In any event, when you look that modelling that was done in relation to the earlier period, you can see that that treatment of the assets being paid off in the early period is not irrational.

Sensitivity we've discussed this morning so I will be very brief but the depreciated replacement cost, it's said it's not a net MEA value. I hope I have shown you why we say it's perfectly rational to take the view that it's equivalent to one. It's said that we cannot say the Decision would be inevitably the same using that figure and I hope I've shown you that insofar as the value in use figure that we in fact used is said to be wrong, if it's because of Byatt we are said to be wrong, then that does not go anywhere because you can see what an equivalent figure to Byatt would have produced.

So bringing it all together, it would be very odd -- I mean, it is right that we have assumed that consumers shouldn't pay twice for this network and that that forms part of the profitability approach -- it would be very odd to arrive at a result where the profitability analysis that has made that assumption that consumers should not pay a second time for network assets in an extension period is found to be irrational notwithstanding three things. The model for the original agreement, which was based on the original pricing being sufficient to compensate for the investment, and indeed the terms of that agreement not being inconsistent with that. Secondly, various statements by Motorola that you were taken to yesterday, which relate to both the terms of the modelling

and their statements as to what in fact has turned out to happen in practice. Then, thirdly, the CMA's own modelling of the PFI period, which you were taken to yesterday, which indicates that it is reasonable to take the view that investment was recouped and a reasonable profit was earned in that early period.

So, taking all that together, we say that the analysis is sound. It is a valiant attempt to pick holes in it but when you read it in the round its assumptions and its methodology are entirely within the range of what was reasonable for the approach for the CMA to take and the vast supranormal profits that it identifies as the result should not continue.

Unless there are any questions for me, those are my submissions on ground 2.

THE CHAIR: Thank you.

Ms Abram, I have one more question for you actually arising out of your submissions yesterday, so I am sorry it is going to take you back a bit and everybody back a bit. It was the point you made obviously on ground 1 and Motorola's argument is that its inconsistent to include ESN in the market definition because of long-term competitive constraints and then also then not to also include it in the competitive assessment and so this is the Shields point.

You took us to the Provisional Decision Report and you said this argument was open to them when they received that. So I wanted to get to the bottom of whether it is the CMA's case that when you've had the PDR, if a point arises on the PDR that you say Motorola could have spotted, they are then precluded from pursuing it when the Final Decision is published by way of judicial review.

MS ABRAM: So if and to the extent it is the same point, yes. So the approach on this in the PDR was the same as the approach in the Final Decision. I was really responding to Mr Hoskins' argument to me. So I said, well, they are not

allowed to take that point now because they could have taken it earlier, Mr Hoskins said oh no, that authority is only about points you could have taken earlier and we couldn't have taken this point earlier because the inconsistency only arises in the Final Decision, and I say no, that is not right, it also arose in the PDR. So in a sense it is responsive to Mr Hoskins' response to me but I do say they are not allowed to take the point, yes.

THE CHAIR: But the situation is very different from the Shields case that you referred to because there, if I remember rightly, it was a criminal compensation case and there was -- I cannot even remember the statute but they said they were entitled to recover compensation under I think it was 8(c), no, they were not entitled, and then at the judicial review stage they said: ah well, whatever the position is on 8(c), we could have recovered under 8(g). So it was an argument that was open to them to make in their claim for compensation and it just seems to me, I need to be persuaded about this, that to say that Motorola should have spotted every inconsistency in the Decision that has provisionally been reached, that is an obligation that is on them at that stage and if they do not spot it at that point they are not entitled to raise it when the Final Decision is published.

MS ABRAM: It is not just that they did not spot it, is it? It is that they actually made a precisely contrary case in response to the Provisional Decision. So I showed you how until the skeleton argument ten days ago the case was that there wasn't competition between ESN and Airwave network and you will remember the context in which this arose was Motorola's argument: you cannot expect us to raise every possible basis of alternative argument. So we say there's no competition but if there is competition then you have to do X, Y and Z and Mr Hoskins said that is just too heavy a burden to put on the

subject of a public body's decision. Of course the case law shows that what you cannot do is raise a completely contrary point.

THE CHAIR: Yes.

MS ABRAM: That's the case law referred to in the skeleton. So Motorola did not just fail to identify all of the possible arguments they might make but they actually made exactly the opposite argument.

THE CHAIR: My point is slightly different. So they've raised that and I can understand if you say if black is black and then say ah, there was an error because they actually should have found black is black -- anyway, you know where I am going with that analogy, which did not quite work. But it is not quite the same thing because here they have made their argument, they've said what they think the position is. There's then a Provisional Decision Report which says we are inclined to be against you. And then are you saying, if that finding finds its way into the Final Report, they cannot challenge it on judicial review because they should have made their arguments earlier?

MS ABRAM: I am saying they should have made their arguments earlier and what they certainly cannot do is do a complete about-face. If I may say so, Madam, I think the chronology might be slightly different from the way that you've got in mind there.

THE CHAIR: Right.

MS ABRAM: The point that there was no competition between Airwave and ESN was not just made by Motorola prior to the original Provisional Decision Report, it's been made consistently throughout this whole process, including in response to the Provisional Decision. I have put some references to that in my skeleton. I do not know if you really want to turn them up now but at least let me give you the skeleton references so you can have a look at them later

on.

So it's in the skeleton argument, so bundle A, tab 9, my skeleton, paragraph 13 and the references to the Response to the Provisional Decision are at footnotes 13 and 14 on page 5. So you see there in point (b) I have summarised that Motorola also submitted that the opportunity for competition arose only in 2000 and therefore told the CMA that it makes no sense to think of negotiations between a customer and supplier under a long-term contract as competitive and the negotiations in 2016 were irrelevant to a competition assessment.

That's after the Provisional Decision. So they are deliberately renouncing and making the argument that they are now making at the stage of the Response to the Provisional Decision.

THE CHAIR: Aren't they just persisting in their original argument rather than renouncing an argument?

MS ABRAM: Yes. They are persisting in their original argument but it's directly of the opposite of the argument they are now making and that's the rub.

THE CHAIR: Right. Thank you.

MS ABRAM: I am grateful.

THE CHAIR: I wonder if that might be an appropriate point for a break actually. Shall we take a 10-minute break?

(11.42 am)

(A short break)

(11.55 am)

THE CHAIR: Yes, Ms Howard.

Submissions by MS HOWARD

MS HOWARD: Thank you. Over the short recess I have managed to take instructions and I can confirm that the Home Office is prepared to consent to the Order for the purpose of these proceedings and without prejudice to its position should there be an appeal and a new application under Rule 24 at a later stage. So I think we are drawing up the terms of the Order. I think it's envisaged that we will prepare the Order under Rule 106.

THE CHAIR: I was going to say, if you leave the reference to Rule 24 in there, that might present us with the problems from this morning.

MS HOWARD: We will present you with a signed version.

THE CHAIR: Thank you. Thank you very much.

MS HOWARD: In terms of submissions, the Home Office adopts and supports the CMA in its position. I was not going to make developed detailed submissions unless there are any particular points that the members of the Tribunal want to ask the Home Office for clarification on, or if I can assist you on any points but otherwise I think we just fully adopt what the CMA has said.

THE CHAIR: Thank you very much. That is very helpful, as was your intervention statement and your supplementary comments, so thank you very much.

MS HOWARD: I am grateful.

Reply submissions by MR HOSKINS

MR HOSKINS: You will be, I hope, pleased to hear I am not going to try and respond to every point that has been made against us but the usual caveat that does not mean that we accept -- I am not going to tilt at every windmill I possibly can. You have had our written submissions.

THE CHAIR: Yes.

MR HOSKINS: You have had my opening submissions. I am not going to try and cover everything, I am going to try and not repeat myself. So what am I going

to do?

THE CHAIR: Is that a promise, Mr Hoskins?

MR HOSKINS: I am going to try not to, that's a promise. I promise to try not to. I am going to focus on the main points --

THE CHAIR: Yes.

MR HOSKINS: -- that have come out of the way the argument has developed, which is what you would want and expect.

Let's start with ground 1. The CMA did not contest in its submissions to you that the findings on market definition in section 3 of the Decision focused on the finding that there was competition between ESN and Airwave over the longer term. That's the way I put it and Ms Abram made her submissions. They did not push back on that and say: no, no, no, that is not right. So that seems to be established.

The CMA also did not contest the proposition I put that this vector of competition, i.e. competition over the longer term, arising from the 2014/15 tender exercises existed from the time when ESN was in development**.**

So the CMA didn't in its oral submissions seek to make good the assertion in its skeleton argument that the 2014/15 procurement exercise would only constrain prices once ESN had become operational. You remember that crucial distinction.

So again I think it is now established that this long-term vector of competition applied immediately from the 2014/15 tender process.

What the CMA did put before you is essentially two defences to our ground 1. First of all, the CMA submitted that the negotiations which led to the current price for services under the Airwave network were not about price, save for the 2018 negotiations. So that was the first argument. The second argument

was, standing back, the CMA says: well, the Decision did take account of competition between Airwave and ESN. So those are the two points I am going to address you on.

The suggestion that the negotiations did not concern price, save for the 2018 negotiations, is simply not correct and that appears from the face of the Decision. The 2016, 2017 and 2018 negotiations all included negotiations about price.

Can I ask you to take up the Decision and turn first of all to page 120.

THE CHAIR: Yes.

MR HOSKINS: You were taken to paragraph 4.113(d) but before we get there I'd like to look at (b). So this is all in the context of the 2016 negotiations:

"Motorola had also previously told us that the Home Office's right of veto enabled it to secure the following significant concessions:

"(b) the unilateral option to extend the Airwave network services for any period beyond 2019 at agreed pricing."

So there was a discussion about price. It is important to understand a discussion about price is broader than an agreement to cut price or an agreement to have a discount. What we are talking about, what we are focusing on are negotiations about price. So there's one example in 2016.

Then over the page, this is the one you were taken to, settlement of ongoing litigation between the Home Office and Airwave Solutions relating to benchmarking and variation of price equating to payments to the Home Office of X million over 3 years. It's said, well, that's not about price. But it is about price. It's perfectly common in commercial disputes for a settlement to be reached at on a commercial basis where one party says: you drop the claims against us and we will do you a commercial deal on price over the following X

years. But that's a negotiation on price, it does not matter that it's a negotiation on price where a quid pro quo is given, in this case settlement of litigation. It's a discussion about price. It's a discussion about what level of price would be acceptable in order to settle the litigation.

So that is what you were shown to say that there were no negotiations about price in 2016. You were shown (d). (d) on its face is about price. I have also shown you (b). But there's more. If you go to page 54 of the Decision, paragraph 2.100:

"In addition to these negotiations [so that's 2018 and 2021], the Home Office and Motorola carried out negotiations in early 2017 as part of a replanning of the ESMCP [that was to do with refashioning the ESN provision] that was expected to lead to extensions of the period of operation of the Airwave network spanning a few months. These negotiations resulted in an X million one-off discount to apply in 2020."

So 2017, a discussion/negotiation about price.

Then paragraph 2.101:

"The 2018 negotiations resulted in an extension of the period of operation of the network to 31 December 2022 and had the effect of varying certain of the matters set out in the 2016 heads of terms. In commercial terms, this involved an additional X per cent discount to core service charges [so there's discussion about price in 2018] and the continuation of the discounts/credits given in 2016 [again confirming negotiations on price in 2016]."

So the 2016, 2017 and 2018 negotiations all included negotiations about price.

So let's imagine, let's take ourselves back, we are in 2016. In 2016, as we said in our skeleton and I submitted to you in opening, not contradicted, it was anticipated that ESN would replace the Airwave network by the end of 2019.

So you are negotiating in 2016. You think the ESN is going to be implemented in 2019.

According to the findings in section 3 of the Decision, at this stage Airwave and ESN were in the same market and as a result of longer-term competition Airwave had an incentive to maintain or improve aspects of its offering with a view to delaying customers transferring to ESN in 2019.

There is the competitive vector. 2017. In 2017, as we explained in our skeleton argument, it was also anticipated that ESN would replace Airwave by December 2019. Nothing had changed at that stage. The reference we gave in our skeleton, I will just give it to you now so you have it, Decision paragraph 2.98, table 2.2, at page 54.

So again we are in 2017. We think ESN is going to replace Airwave network in 2019. It's exactly the same dynamic. According to the findings in section 3 of the Decision, at this stage Airwave and ESN were in the same market and as a result of longer-term competition Airwave had an incentive to maintain or improve aspects of its offering with a view to delaying customers transferring to ESN.

2018. In 2018 it was anticipated that ESN would replace Airwave by 30 November 2020. In our skeleton, in our openings, if you want the reference, it is Decision paragraphs 2.94 to 2.95, page 53.

It's the same exercise. According to the findings in section 3 of the Decision, at that stage Airwave and ESN are in the same market, as a result of longer-term competition Airwave had an incentive to maintain or improve aspects of its offering with a view to delaying customers transferring to ESN.

So what is quite clear is that longer-term competition between Airwave and ESN was a relevant factor at the time of each of the negotiations concerning price in

2016, 2017 and 2018, and those were the negotiations which produced the current price being paid to Airwave.

So that's the first point that the CMA raised, there were no negotiations on price. Not correct.

The second point is they say: well, if you stand back, we did take account of competition between Airwave and ESN, and you were referred to a number of paragraphs which essentially made the point that the Home Office had to negotiate with the incumbent monopolist which operates critical infrastructure on whose position it is dependent and, secondly, at the time of the negotiations the Airwave network was the only such network available. It was therefore not open to the Home Office to walk away from negotiations. Remember those points. You saw them again, for example, Decision paragraph 4.175, 4.178 and 4.181. That's page 139 of the Decision.

But of course, the CMA considered competition between Airwave and ESN in chapter 4 because that's what chapter 4 was about. It's not enough to say: we thought about the question of competition between Airwave and ESN. As we have seen, there were different vectors of competition between ESN and Airwave at the time of the relevant negotiations. You saw the reference to dynamic competition, to long-term competition, to static competition. Competition is not, to use a terrible word that is in vogue, a blob, it is a basket of different considerations some of which will pull against each other but it is a multifactorial assessment. You have to consider all the different relevant vectors of competition.

In order to come to a decision which was lawful on public law grounds, the CMA was under an obligation to take account of all relevant vectors of competition, including the long-term competition identified in section 3 of the Decision.

Now, it's absolutely right Ms Abram referred you to the Guidance saying, well, just because you make a finding in relation to market definition it does not necessarily determine the result when you come to do the competition assessment. So you might give different weight to different vectors for different purposes. But what you cannot do, having identified a material vector of competition, is simply to ignore it when you come to the other exercise.

That is the simple public law point. The CMA has not been able to identify a single paragraph in section 4 of its Decision in which that particular vector of competition was taken into account. That is the point.

In relation to the procedural issues, I can deal with it very briefly --

THE CHAIR: Can I just ask you some questions about that?

MR HOSKINS: Please do.

THE CHAIR: So the CMA say there is longer-term competitive effects and they take that into account for the purpose of the market definition. But when they go on to consider the competitive analysis they are looking at short-term substitutability as that being the critical point about which there can then be -- that's what they are looking at – is there any competitive constraint at that point? And the competitive constraints can vary over time, can't they?

MR HOSKINS: Yes, but the longer-term competition, remember the definition of it was: what is the competition between ESN and Airwave leading up to the replacement of Airwave by ESN? That is what longer-term competition means as opposed to just look at it as a snapshot today. That is why when I took you through, and I keep repeating the same phrase, the 2016, 2017, 2018 negotiations, that is why I told you when the ESN network was anticipated to be coming into effect in each of those negotiations because

what that means is in 2016 ESN is thought to be coming into force in 2019, then one of the relevant vectors of competition in 2016 is Airwave looking ahead and thinking: how do we delay the switch of customers to ESN? With a network that's well established such as Airwave, what's an obvious way in which you do that? You give them a decent price.

So absolutely there are different vectors, but longer-term competition means the effect of competition between the time you are negotiating looking ahead to the time at which ESN will replace Airwave network.

THE CHAIR: You say the longstop date was not 2029 when those prices were agreed?

MR HOSKINS: Absolutely it was not and that is not in dispute. We made that point in our skeleton argument. It is not in dispute. The dates I am giving you are all from the Decision.

THE CHAIR: Yes, yes.

MR HOSKINS: That's one of the mistakes that the CMA has made. It's just assumed, it's thought about the delay to 2029, it's not done the exercise of saying: well, what was the position in 2016? That's what it has failed to do.

THE CHAIR: Thank you.

MR HERGA: Can I ask: was there any evidence put before the CMA that the pricing negotiations you have referred to and the pricing concession given were actually on Motorola's part an attempt to delay the take-up of ESN? Was there any evidence produced to that effect?

MR HOSKINS: Excuse me one second. Sorry, will you just let me follow up the yellow sticky I have been given. **(Pause)**.

I do not know. But my answer is it does not matter because the CMA has found that that is how competition operated, that Airwave/Motorola would have an

incentive to seek to delay the transfer of customers.

Now, it does not matter, as a businessperson when in commerce you do not tend to take a business decision by sitting down and saying what are the vectors of competition, how do I respond to them? As a businessperson what you are doing is you are having a negotiation, you are aware that ESN is coming on tap in two years' time, whatever it is, and you are thinking: how do we best preserve the position of the company? So the fact that it's not done expressly does not mean it's not relevant.

But I cannot answer your question in terms of is there evidence that someone in Motorola sat down and wrote down or had that specific thought.

MR HERGA: Okay. Thanks.

MR HOSKINS: So on the procedural issues, I will deal with it very quickly because it was subject to an exchange, Madam, between you and Ms Abram yesterday and again this morning and you have the point, which is Ms Abram relied on the Provisional Decision and said: well, you could have taken this point then. But, Madam, as you pointed out to Ms Abram, at that stage our argument was that ESN and Airwave were not in the same market. So what Ms Abram is forced to argue is that whilst we are putting forward one argument, we were under a duty, an obligation, to think of all possible ramifications, all possible other arguments that might arise so that we would not be precluded from raising them when the Final Decision came out.

You have my answer to that. If that were a principle of law, public administration would grind to a halt. You have seen the size of the Report in this case. Imagine if we'd had to anticipate every possible argument, times it by three. It would be impossible and it would be impractical. To be perfectly honest, this argument would be given very short shrift in the Administrative Court and

I would encourage you to give it similarly short shrift. It's a nonsense, it really is, for anyone with experience of public law issues.

Ground 2. The legality of the CMA's profitability analysis now rests on a very narrow point and that is its definition of what constitutes a "well-functioning market". As we've seen, the justification for the CMA's approach to valuation, you see it in particular at paragraph 6.66 of the Decision, and it is a phrase you will be well familiar with now:

"We were not minded to consider that in a well-functioning market 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."

Now, Ms Patel this morning very fairly accepted that the CMA's hypothetical must be plausible. So let's see if the hypothetical, the justification that you've been provided with, is plausible. There are a number of ways it was put. The first one was what I will call the three possibilities. These three possibilities appear in the skeleton argument. They are summarised there. It's a good way just to list them out and identify them. The CMA's skeleton, Bundle A, tab 9, page 179.

I showed you this yesterday so I can take it quickly. So it's paragraph (c)(ii):

"In a well-functioning market you might find competition amongst potential LMR network suppliers who had already incurred a sunk cost of constructing a network."

Now, that one has been abandoned, that was abandoned in the oral submissions. It was accepted that that is not relied upon for this purpose, so we can strike through that possibility. So that leaves us with the second and third possibilities in (ii) which both suggest that particular contractual provisions

would have been concluded in a well-functioning market. The transfer at expiry for zero cost or an agreement to reduce prices in the event of an extension.

The crucial passage here in the Decision is at 6.90 to 6.91. That's page 214. So paragraph 6.90. So this is expressly in the Decision considering the well-functioning market:

"Our assessment is that in a well-functioning market in the situation where a supplier is provided with a guaranteed level of revenues to give it the opportunity to recoup the significant outlay required to develop a network we would expect customers to enjoy material protection with respect to the pricing of LMR services in the event of requiring an extension of services beyond the period originally envisaged. We do not agree with Motorola that this assessment reflects supposition but rather we consider that it reflects the economic logic of a PFI agreement such as the one between Airwave Solutions and the Home Office."

So we are bang in the middle of the CMA's discussion and reasoning on well-functioning market. 6.91, the crucial paragraph:

"Specifically we would expect pricing during such an extension period to be constrained at a level at which the supplier was, broadly, only able to recover the incremental investment in the network required to extend its life it's (efficient) operating expenses, and a reasonable return on capital taking into account the (much reduced) risks assumed by the supplier over the extension period."

So that's what the CMA says, that's what it wants in a way the position to be. But how do you get there? How would that happen in practice? Well, that's explained by this:

"This result could be achieved via different mechanisms, including, for example, the contract [and that's the original contract] providing effectively for the transfer of the network assets at the end of the contract period. This would allow for the re-tendering of the provision of services using that already built and paid-for network."

Then 5.72, the second possibility:

"A different alternative could be for the contract [again the original contract] to require that the original supplier reduce prices during any extension period to reflect the fact that the network assets had already been 'paid' for over the original contract term."

So it's clear that what is being envisaged by the CMA is that in a well-functioning market one or other of these provisions would have appeared in the original contract. This is not some later contract extension or amendment. These are provisions one would expect in the original contract in a well-functioning market.

I understood Ms Patel, effectively, to accept that point this morning when she said, and I scribbled it down as accurately as possible:

"Paragraph 6.91 is contemplating original contracts in the PFI period but not this PFI Agreement."

I agree with her. That's what it's contemplating.

But we know that both those possibilities are not necessary facets of a well-functioning market because of paragraphs 14 and 15 of the Decision. So back to page 11. You've seen these multiple times. The real kicker for the CMA's argument is the final sentence of 15:

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

It's not for us to say the Decision distinguishes between some terms and others, it's for the CMA; if it wants to distinguish, you would have to do it in the Decision. But this sentence is absolutely in general terms: the terms in the PFI Agreement are what we'd expect in a well-functioning market.

THE CHAIR: The wording, we keep coming back to this sentence, it does say generally the type of terms, it does not necessarily mean all of them or in all circumstances, does it?

MR HOSKINS: No, but nor does it specify ones that not in the well-functioning market or those which are. I mean ... The word "generally", I think it would have to carry an awful lot of weight if what was being said was: well, all the terms were fine, except for the one that we are focusing on. You'd have to have that expressed in the reasoning.

THE CHAIR: But do we come back to you need to read the Decision as a whole?

MR HOSKINS: Absolutely, but that is what I am doing, it is the CMA who is trying to take the word generally and say take that word and put this very specific meaning on it. I am the one who is standing back, I am the one who is not trying to, you know, fine cut this. I am just reading paragraphs 14 and 15, take it at face value.

MR FRAZER: How does paragraph 19, in your view, affect that?

MR HOSKINS: 19 is irrelevant to this point because we've established, I think the CMA accepts, that here we are looking at what the original contract would have said in a well-functioning market.

MR FRAZER: For the period prior to 2019?

MR HOSKINS: What it would have provided. Because both the possibilities, as we just saw in paragraph 6.91 of the Decision, the CMA's analysis is that in a well-functioning market the original contract would have provided for

transfer at zero cost at expiry or would have provided for reduced prices on an extension. That is what they are saying would have been in the original contract.

MR FRAZER: But the sentence you quoted from at paragraph 15 does specifically refer to the period prior to the end of 2019.

MR HOSKINS: It does, and what the CMA says is there's an original PFI Agreement and it was for a fixed period of up to 2019 and the terms in that are what we'd expect, and that contract was one that was produced by a tender process in a well-functioning market. So the CMA is having to persuade you that despite what happened in reality in the original PFI Agreement, something different would have happened in a well-functioning market, which are the two possibilities it suggests.

THE CHAIR: So what the CMA seem to be saying is -- and I am just raising this so that you can let me have your comment -- is they are the type of terms you would expect, so you would expect something to be there, for example, for the transfer of assets and it says -- that works up to 2019. But if --

MR HOSKINS: Madam -- sorry to interrupt.

THE CHAIR: No, no. But then if it's going to continue after 2019, then --

MR HOSKINS: There was a provision in the PFI Agreement --

THE CHAIR: Yes, exactly.

MR HOSKINS: -- for the transfer of assets. There was an option for the Home Office to require the transferable assets to come to it at fair market value.

THE CHAIR: Yes.

MR HOSKINS: That's if we are talking about if one would have expected in a contract of this type in the original contract to have something relating to

what would happen to the assets at the end of the fixed period, it was there.

THE CHAIR: Yes, that is really my point. The CMA's point is that works up to 2019 during the period of the PFI Agreement, the original PFI term.

MR HOSKINS: (Several inaudible words due to overspeaking) because it was for the transfer -- it was at expiry the Home Office could require the assets to be transferred to it at fair market value to deal with what would happen after 2019. So the product of a tender in a well-functioning market gives rise to the original PFI Agreement. The original PFI Agreement, according to the CMA, is for a period of 19 years. What happens thereafter? The original agreement provides for that. The Home Office can if it chooses say: transfer us the assets at fair market value. So absolutely the possibility of an extension is catered for in the original agreement that we have.

THE CHAIR: Yes.

MR HOSKINS: The product of a tender process.

THE CHAIR: So what do we make of the fact the CMA say but that doesn't in practice work, which comes out of the Report, in practice --

MR HOSKINS: I am going to come to that particular point. I am trying to --

THE CHAIR: Yes.

MR HOSKINS: There are a number of ways in which they've tried to justify this approach and that particular point comes up in another heading and I going to deal directly with it. Here I am just dealing with the three possibilities.

THE CHAIR: Yes.

MR HOSKINS: So you have our submission on this. We are saying in relation to these possibilities: first one abandoned, and in relation to two and three the CMA cannot say that in a well-functioning market the original contract would have contained its second or third possibility because we know what

a well-functioning market produced and it wasn't either of those possibilities.

The second argument that was relied upon for the CMA's approach to well-functioning market is Decision paragraph 4.29, which is at page 98:

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

Now, that is exactly the same as the second possibility we've just looked at and I've dealt with that so that's dealt with. (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 4.29(b) is that in a well-functioning market the Home Office would have tendered for a new and enhanced replacement network which was ready without delay. But under that scenario the Home Office would have had to pay a price which reflected the sunk costs of building a new and enhanced network. So that does not assist in assessing Airwave's prices in a scenario where there has been a delay to the introduction of ESN. Unless of course one adopts an MEA approach because that is looking at the price of a new technology. But that's not what the CMA did, it's not what it wants to do. So (b) does not help them. In a well-functioning market there would be a sparkling new network, new technology, but that would have had to be paid for, that does not come

for free, so that does not help them.

The third way in which the CMA try to justify its approach to well-functioning market was by relying on the Competition Commission's Market Investigation Guidance. We see that in Authorities, tab 48, at page 2253, paragraph 30, page 2253, tab 48:

"The Act does not specify a theoretical benchmark against which to measure an AEC. In its market investigation reports the CC 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."

Stopping there, that is absolutely right. It would not be appropriate to try and come up with an idealised perfectly competitive market. To put it the way Ms Patel put it, the hypothetical must be plausible or, the way the case law sometimes puts it, it must be realistic. But under this approach then what one has to do is come up with a hypothetical without the features causing the AEC. But the CMA didn't actually follow these Guidelines in its Decision. That's not the approach it adopted.

The features that the CMA found to have caused the AEC are summarised in a number of places but one sees them, for example, at Decision paragraph 4.4 at page 88:

"We have found the following features of the market gave Airwave Solutions/Motorola market power and distort competition."

Then you have eight factors. But the first factor is:

"The Airwave network is a critical piece of infrastructure on which the emergency services in Great Britain and ultimately lives depend."

But the CMA's well-functioning market does not exclude that feature, it includes that

feature. The CMA has not attempted anywhere in the Decision to say: let's imagine a market without any of these eight features. That's not actually the approach its adopted. What it has done instead is to try and create a bespoke well-functioning market of its own. So the Guidance is very interesting but it's not Guidance that was followed by the CMA in this case.

Let's assume you could just cherry-pick bits of the features and you put some of them in your counterfactual and exclude others, you can have this mix and match approach even though that's not what the Guidance says. Let's look at (c), which is the feature which Ms Patel took you to and relied upon to say you cannot have (c), you cannot have the feature in (c) in the hypothetical.

But let's look at what (c) actually says. It says:

"The Airwave network assets have not transferred to the Home Office under the terms of the PFI agreement. Airwave Solutions still owns them and the related business and the transfer of those assets to the Home Office and their retendering is not a credible option that the Home Office could either pursue or threaten to pursue."

Now, let's assume you remove that feature from the counterfactual. What do you get? Well, what you get is, look that wording, the Airwave network assets have transferred to the Home Office under the terms of the PFI Agreement. If that had occurred, Airwave Solutions would not still own them and the Home Office could re-tender them.

That's what happens if you actually take out the specific feature in (c). So what are the terms, if the counterfactual is take out this feature, what do you get instead? The Airwave network assets have transferred to the Home Office under the terms of the PFI Agreement. Well, as we've just discussed, under the terms of the PFI Agreement, the Home Office had an option to require

transfer of the network at an agreed fair market value, not at zero cost. That's not in contention but if you want a reference for that, it's Decision Annex C, paragraph 60 to 62, at page 340.

So even if you could cherry pick features to include or exclude from your hypothetical, the CMA's approach to a well-functioning market does not actually properly exclude (c).

In any event, what the Guidelines certainly do not allow you to do, whether you are following them in whole or in part, is to read in to a contract any clauses that you think appropriate. That's not a principled approach. That's not what the Guidelines say you can do. But that's, in effect, what has happened.

Let me say a word about poor old Byatt, Professor Byatt. Where is he left? He has taken a beating over the last couple of days. Decision at paragraph 6.96, on page 216. Ms Patel said to you that what 6.96 means is not what it appears to say in the final sentence when the CMA said:

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

She said: well, that's not actually what it's meant to say, that's not what it means. We didn't follow the Byatt report. What she says is they were actually saying: if you look at the first sentence, we were picking on a key insight that we thought existed in the Byatt report and we built out from that.

So the truth of the matter is, if that is indeed the correct reading of the Decision, what the Decision is effectively saying is: we read the Oxera report and we saw the recommendation to use MEA; we didn't do that. We read the Byatt report and we saw the advice to use the MEA; we didn't do that. What that does of course is it leaves, as I said in my opening submission, the whole weight of the CMA's argument or its justification on its own approach that it created and

on the meaning of the well-functioning market.

For reasons I have described, the reliance on well-functioning market is a cold and lonely and fragile place to be. But they have no support from any economic theory to justify this as a rational, a plausible, a prudent approach. They've pushed it all to one side.

Let me deal with the inconsistent time period point. I made the submission that the Decision states that the period from 2001 to 2019, i.e. the earlier period, should not form part of the profitability analysis, but the Decision then relies on what happened in the prior period as the bedrock of its profitability analysis for the later period.

I made the point that there is nothing in the Decision by way of a sensitivity analysis to square that circle. So all one is left with is the bare inconsistency on the face of the Decision, without any attempt by the CMA to square that circle.

Now in oral submissions yesterday the CMA did try and square the circle. That was my understanding of what the submission was trying to do. They told you that they had calculated the IRR for the period 2001 to 2019. That is at Decision paragraph 6.148, on page 228.

THE CHAIR: Yes.

MR HOSKINS: You see a figure given there for that IRR.

You were also referred to table G12, at page 510. I should say, because we are getting into the weeds of the Decision at this stage, that table at G12 appears in Appendix G, which is entitled "Profitability". The title page is at page 470. The CMA also told you that it had calculated various WACCs for the period 2000 to 2019, and that's at page 600. That appears in Appendix J, which is called "Cost of capital". You see the title page for that at 575.

Now it's very interesting that dotted about the Report you have findings of IRR and

there appeared some findings on WACC, but what has not been explained, and what is not explained in the Decision, more importantly, is how that provides some sort of palliative to the inconsistency of approach in the main profitability analysis in terms of time periods. Showing some calculations relating to the earlier period, tucked away in different annexes, does not explain how the circle is to be squared. You simply cannot find that in the Decision.

You were also referred to Decision paragraph 6.102, at page 218, in this context. Paragraph 6.102:

"We note the analysis carried out in Appendix I", et cetera, et cetera.

But the final sentence is:

"We have not placed material weight on this analysis."

So that cannot square the circle either. So all you are left with is an apparent inconsistency, on the face of the Decision, and nowhere in the Decision an explanation of how that circle can be squared.

I would like to go out with a great bluster but I am going to go out with a whimper because I have to do some really terrible delving through some contracts. So I apologise. I will use some hyperbole at the end when I sit down, but bear with me for the next 10 minutes.

There were arguments raised by the CMA in its skeleton argument about the construction of the agreements. You remember the section on what the PFI Agreement says, what the Police contract said, what the Fire said, what the Ambulance said. It is worth looking at what they say because, just like the PFI Agreement, the three, sort of, if I can call them parasitic agreements, were all agreements produced in the context of a well-functioning market. There's no suggestion that there was a problem with any of them. So there

you have the main Agreement and three parasitic examples. So they are worth looking at to test the well-functioning market point.

Let's remind ourselves of Decision paragraphs 4.77 and 4.79, at page 112. A reference in 4.77 to the mystery schedule of the PFI Agreement provides for transferable assets to be transferred at the end of the Agreement for fair market value.

Then the acceptance in 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."

Understandably, that was not pushed back on yesterday by Ms Patel, very fairly. It's clearly recorded in the Decision.

So let's go to the CMA's skeleton on this point, Bundle A, tab 9, page 181. Let's pick it up at 35(a), which is dealing with the PFI Agreement. Well, you will see that, as we've just seen, the PFI Agreement did provide for asset transfer at expiry of the term.

If you go five lines down:

"... because it contained the provision of an option to purchase the Transferable Assets in schedule [blah] at agreed market value."

So you have our arguments on that: that that was produced by a well-functioning market by tender.

Then 35(b)(i) is the Police services contract. You'll see that it refers to Schedule blah of the PFI Agreement and its asset transfer provisions. So the Police contract just referred back to what was happening in the PFI Agreement and, similarly, the provision was for an option to have transferable assets at fair market value.

Then (b)(ii) has the Fire and Services rescue contract. Again, it had an option to transfer transferable assets for a sum equal to fair market value. So those three are consistent, insofar as they are dealing with their own assets.

Then we come to the Ambulance services contract. It's said in the skeleton argument, and was said to you yesterday orally, that this provides an option to acquire the transferable assets at no cost if the transferable assets are transferred to the Authority on expiry. It was submitted to you yesterday that somehow this contract could alter the interpretation of the other contracts.

But, Madam, I think you made the point far more elegantly than I am about to, that would really be the tail wagging the dog. But let's actually look at what the Ambulance contract actually said because, as I will show you in the very boring bit I am about to do, the Transferable Assets, capital T, capital A, do not cover the whole of the Airwave network lock, stock and barrel. The Transferable Assets, the term "Transferable Assets", only covers assets specific to the Ambulance services contract.

THE CHAIR: I was about to ask you that. It seemed pretty clear that it would not be the same definition.

MR HOSKINS: Exactly. So it's things like terminals and control room systems, et cetera, the bits and pieces that are specific to the Ambulance services contract. But that is apparent from a closer inspection of the terms.

So, with a deep breath, let's dive into the Ambulance services contract. You will find it in Bundle B1, at tab 7. If I could ask you to turn to page 704. You'll see the title page. It's between the Secretary of State for Health and Airwave O2 Limited, dated 19 July 2005. Then at page 710 you'll see:

"This Agreement … between …" and the Secretary of State for Health is referred to in this agreement as 'the Authority'.

Madam, as you just alluded to, as a matter of context, it would be very surprising if the Health Secretary could require the whole of the Airwave's network to be handed over to them on expiry, when the network was also being used by the Police and Fire services, which obviously the Health Secretary does not have anything to do with.

Can we go, please, to page 850, clause 41.6. This is the one referred to in the CMA's skeleton argument, "Transfer to Authority of assets and contracts on termination or expiry":

"Upon Termination or Expiry" -- then 41.6.2:

"The Authority (or its nominee) or the Replacement Supplier shall be entitled to acquire, at its option [so it is not an automatic transfer, it's an option] and the Contractor shall, if so requested by the Authority, transfer to the Authority (or its nominee) or the Replacement Supplier any one or more of the Transferable Assets [and I will come on to what those are]; and any such transfer shall [41.6.2(ii)] be made at no cost to the Authority in those circumstances."

But the whole point is what are the Transferable Assets?

Can we go to page 932, schedule 11, paragraph 1.8, "Transferable Assets". Page 932.

THE CHAIR: Thank you.

MR HOSKINS: "'Transferable Assets' means those of the Sole Use Assets and the Authority Initiated Assets which are capable of legal transfer to the Authority."

"Sole use assets" are defined at page 734. I'm afraid we are going to have to leap about because you find the definitions in different places. 734, bottom of the page:

"'Sole Use Assets' means those Assets which are only used by the Contractor to

provide the services to the Authority and not for any other party or purposes listed in schedule 1.11."

So that's Sole Use Assets, as the name suggests.

Back to page 932, and you have a definition of "Authority Initiated Assets". You will see that provides that Authority Initiated Assets are those which fall within the definition and, as you'll see right at the end:

"... and as such Assets are agreed between the parties and listed in a Register in accordance with this Schedule."

Now the CMA did not put forward the Register to support this argument, and we have not been able to find it readily, but we can find out more about the Register if you go to page 934, paragraph 4.1.1:

"During the Term, the Contractor will maintain a Register of all Assets, detailing the ownership status as either Sole Use Assets or Authority Initiated Assets, (separately identifying Transferable Assets) or Non-Exclusive Assets."

So the Register would distinguish between Sole Use Assets, Authority Initiated Assets and Non-Exclusive Assets. That shows you already that Non-Exclusive Assets are not Transferable Assets because you'll see the contradistinction between the Transferable Assets in parenthesis and Non-Exclusive Assets.

The definition of Non-Exclusive Assets is at page 932, 1.4:

"'Non-Exclusive Assets' means those Assets which are owned or leased and used by the Contractor or Sub-Contractor or in connection with the provision of services but which are also employed by the Contractor or Sub-Contractor for other purposes; and the Assets comprising the Shared Network Infrastructure shall be deemed to be Non-Exclusive Assets."

So that's where you see that common infrastructure are Non-Exclusive Assets.

If you go to page 734, we've just seen the term "Shared Network Infrastructure". However, 734, you'll see the definition of Shared Network Infrastructure, about two-thirds of the way down the page. It means:

"Those elements of the Airwave Network Infrastructure shared by the Authority and other users of the Airwave Network."

So, in our submission, it is quite clear from a proper construction and analysis of this contract that the parts of the network used to provide Services to other users are not Transferable Assets, and that is no surprise. It would be astonishing if it were otherwise.

But that's confirmed, if you go back to paragraph 934, so this is back to obligations during the term:

"During the Term, the Contractor will ..."

Then at 4.1.3:

"... ensure that all Sole Use Assets and Authority Initiated Assets are clearly marked to identify that they are exclusively used for the provision of Services under this Agreement", et cetera.

So, again, the distinction between the Transferable Assets, the Sole Use Assets and the Authority Initiated Assets and the non-Transferable Assets, which includes the Network.

I am sorry but if we are going to make this point, if we are going to do it properly, you have to do it properly.

THE CHAIR: Yes.

MR HOSKINS: So, insofar as there were specific provisions in the Ambulance services contract for an option of transfer at no cost upon expiry, that was limited to assets specific to that contract, no such provisions in any of the other agreements.

But what one does have in all four agreements -- sorry, in at least the PFI Agreement and the Police and the Fire contracts, are an option for transfer of assets on expiry at fair market value. Those are all examples of contracts in a well-functioning market.

I should say the Police and the Fire --

THE CHAIR: Is that actually right? Because the market -- isn't the market the same for the subcontracts, if I can put it that way, the service contracts, is the market the same as for the PFI Agreement relating to the construction of the network as a whole?

MR HOSKINS: The PFI Agreement is subject to a tender and then the services could decide whether to sign up to --

THE CHAIR: Yes.

MR HOSKINS: -- the parasitic contracts. So, yes, the well-functioning market comes through the PFI Agreement, it's dependent upon that. But, equally, services then come forward and decide whether to conclude on those terms or not.

I am not putting too much weight on that point.

THE CHAIR: I am just wondering how instructive the terms in these --

MR HOSKINS: Well, that's the other way of putting it. That's the other way of putting it. I mean, the weight of argument here is on the original PFI Agreement, absolutely.

It is 12.55 and the flourish can be brief. Those are our submissions, unless you have any further questions. That's why we say the Decision can and should be quashed.

MR HERGA: I just have one point. The transfer provisions in a well-functioning market would have been effective. That's an assumption I assume. But here

they were not effective, were they, because of the difficulties?

MR HOSKINS: If they were, if they had been effective, there would have been the option of a transfer at fair market value. But that's not what the CMA's well-functioning market envisages because it envisages the transfer of all the assets used to provide the network up to 2019 at zero cost.

MR HERGA: Thank you.

MR HOSKINS: Thank you.

Further submissions by MS ABRAM

MS ABRAM: I would just like, if I may, to respond to one point that was first raised in reply. You will remember that yesterday I noted that Mr Hoskins didn't engage with the 2017 negotiations in his opening submissions.

THE CHAIR: Yes.

MS ABRAM: I said, perhaps cheekily, definitely he was making too much of a presumption that I assumed they were satisfied with what we had said on that in writing. They were raised in reply. So could I just address the point that I would have made yesterday?

THE CHAIR: Yes.

MS ABRAM: So, just to put it in context, Mr Hoskins has taken you to Decision 2.100. So that's Decision Bundle, tab 1, page 54. I think actually Mr Hoskins said this morning that I had said yesterday that the 2017 negotiations were not about price. Of course I didn't. I said I was not going to speak about the 2017 negotiations.

So this paragraph says:

"In addition to the main negotiations in 2016, 2018, 2021, the Home Office and Motorola had carried out negotiations in early 2017 as part of a re-planning of

ESMCP and that led to extensions of the period of operation of the Airwave network spanning a few months [it was actually three months]. These negotiations resulted in an X million one-off discount to apply in 2020."

I say two things about that. The reference in our skeleton is 17(b), paragraph 17(b) of our skeleton. The first thing is that these negotiations, 2017, they were just a small incident in a bigger overall picture. They are not part of the basis for the finding of adverse effect on competition because they are just a minor extension, with a very small discount on the price. So they are not picked up in paragraph 4, in section 4 of the Decision, and it's never been suggested that these are the negotiations that somehow show that there wasn't an adverse effect on competition, neither could it be because they were just about a few months extension of the Airwave contract. You can see the figure discount. Of course that's not going to demonstrate that there wasn't an adverse effect on competition.

That's all I wanted to say.

THE CHAIR: Thank you.

Further submissions by MS PATEL

MS PATEL: I apologise, I also have three points which were first made in reply and a bullet point on each one, and also one correction, if I may, which I noticed Mr Hoskins went to paragraph 6.148. I think I submitted to you earlier that paragraph 6.148 was where the sensitivity analysis plugged in. Obviously that's not correct.

For the sensitivity analysis, for our last point, it's paragraph 6.145 that you need to look at, together with the table. I think I spoke correctly when I went to that yesterday but then incorrectly this morning.

THE CHAIR: Yes.

MS PATEL: The three new points then. Mr Hoskins took you to paragraph 4.29(a) and (b). You have my submissions on 4.29(a).

THE CHAIR: Yes.

MS PATEL: I made them yesterday and in the skeleton.

On 4.29(b), we simply say this is not talking about an extension here. This is talking about a new replacement, enhanced replacement network coming online, whereas when you look at 6.91, the paragraph Mr Hoskins places weight on, it's looking at what happens in an extension period. So, by definition, the replacement has not come online and one is looking at what to do in an extension period to the original PFI.

The second point Mr Hoskins took you to the CC3 Guidance.

THE CHAIR: Yes.

MS PATEL: If I could -- and he said that you need to exclude the features causing the AEC, it does not need to be a perfectly competitive market, but we have not followed the guidance.

If I could just ask you to turn up Decision 4.26, page 98.

THE CHAIR: Yes.

MS PATEL: This is the section in the Decision on the well-functioning market where the Decision talks about the Guidance. It says, paragraph 4.25:

"Guidelines provide broad principles."

4.26:

"Quotes from the guidelines" -- essentially the paragraph that Mr Hoskins took you to.

Then it says, the last sentence:

"The benchmark will generally be the market envisioned without the features causing

the AEC."

If I could ask you to look at the footnote, 279:

"There can also be reasons to depart from that general concept, for example if features are intrinsic to the market but nevertheless have anti-competitive effects, as in the case of a natural monopoly, or if the nature of competition in the market is defined by arrangements put in place by government."

So that point about generally the market envisioned without the features causing the AEC is not to be followed slavishly. So when Mr Hoskins goes to 4.4(a), for example, the nature of the network and its monopoly characteristics, the CMA is entitled to retain that as a feature of the market because you have to adopt a flexible approach when you are trying to encapsulate relevant features of the market but taking out those features that would effectively mean you weren't creating a meaningful benchmark against which to assess anti-competitive effects.

This point in the footnote is made good in the Guidance itself. If I could just complete the point by asking you to take up the Guidance, which was in Bundle 3 of the authorities, tab 48, page 2310. I am trying to do better, Mr Frazer, with my page numbers today.

MR FRAZER: Thank you.

MS PATEL: You will see paragraph 320, the last sentence:

"The benchmark will generally be the market envisioned without the features but there may sometimes be reasons to depart from that general concept."

The same point. An example given, "e.g. as in Rolling Stock Leasing", so that's where the footnote comes from.

The third point. So what happens here if you exclude the cause of the assets not being transferred? What happens if you exclude -- I think it was 4.4(c)

Mr Hoskins took you to.

THE CHAIR: Yes.

MS PATEL: So the feature is:

"The Airwave network assets have not transferred to the Home Office, Airwave still owns them. The transfer of those assets to the Home Office and their retendering is not a credible option that the Home Office could either pursue or threaten to pursue."

So if you exclude that, you have a situation where the assets have transferred.

Now we say that if you are excluding that, the assets have transferred, everything about the transfer of the assets is taken out, so the uncertainty around the terms, the uncertainty around the price, the uncertainty over which assets were supposed to be transferred, you take it out of the equation, you then get to the situation in paragraph 6.91 where the network assets -- the contract provides effectively for the transfer of the network assets at the end of the contract. This allows for the retendering of the provision of the services using that already built and paid for network. So the assets are transferred and the Home Office is then in ownership of them and it's able to tender for the service using the built and already paid for network. So in that scenario you are not in MEA territory because the Home Office owns the network and they are simply tendering for the service.

The last -- so the reference which is germane to that, in terms of the effectiveness of the provisions and what they were meant to do, I think I gave it to you -- I gave one of the references to you when I was finishing, but in light of how the reply has been put if I could just give you 4.61 in the Decision, which is page 107, and 4.62.

THE CHAIR: Yes.

MS PATEL: You will see there a discussion of the issues around the asset transfer provisions. The second sentence:

"Their aim, it appears to us, was to facilitate an effective transfer."

The last sentence:

"The Home Office would then have had the option either to re-tender the operation of the network or to operate the network itself or it would have been able to credibly threaten to do so in price negotiations."

4.62:

"If effective, those clauses and such an outcome would be consistent with the nature of PFI agreements, the government guidance on the operation of such agreements in place at the relevant time, the nature of the network services, the original fixed period of the PFI agreement and the notion that the Home Office would have paid for the network investment costs over that period. However, the terms themselves appear to give rise to uncertainties and the interpretation that Airwave placed on them seems to have differed from the position indicated in relevant government guidance."

So you see there it's a difference of view as to what these provisions mean.

THE CHAIR: Yes.

MS PATEL: And if you read that, those two paragraphs together, effectively what the Home Office is saying is that you would expect them to provide an effective transfer in a well-functioning market. That's what you would expect. But that's not what has happened here.

So when you are looking at the terms of the PFI Agreement being those that are generally consistent with the PFI Agreement, but there have been issues round effectiveness, carve out, clearly when you read the Decision as a whole it's catering for this situation where these terms did not do what they were

expected to do.

Those are the new points in reply. I have already addressed you on the contractual provisions. You have the point. We say the clause in the PFI Agreement is expiry and early termination. I do not have anything further to say on that.

THE CHAIR: Thank you.

Further submissions by MS HOWARD

MS HOWARD: If I may just add one note, following on from Ms Patel's submissions on the effectiveness of the transfer provisions, just a note for your pen, to follow on from the provisions she took you to at 4.61 and 4.62, those should be read equally with 4.94 and 4.95 of the Decision, which is at page 115 of the Bundle.

In particular, 4.95 refers to the lock-in effect of the uncertainties that arose between the parties as to the construction of these provisions, as to which assets were transferable and what their valuation should be; and that, in essence, because of those uncertainties the Home Office was locked in and was not able to credibly pursue or threaten to pursue the transfer of the assets in practice.

That was just one point I wanted to add. Thank you.

THE CHAIR: Thank you very much for your very helpful submissions. I may surprise you all and say we will reserve our judgment and we'll let you have a ruling in due course. We understand that this has been an expedited hearing and so obviously we will get on to it as soon as we can.

Where are we up to on the Order? Shall we await a form of Order from you on the undertakings?

MS ABRAM: Yes, I think the proposal was that it should be made as a consent order and so I think that the words 24 --

THE CHAIR: Yes, they were going to come out, weren't they?

MS ABRAM: (Several inaudible words due to overspeaking) which is in progress.

THE CHAIR: Okay. So if you can get that to us we'll be able to deal with that quickly.

Other than that, thank you very much for your submissions and you will hear from us shortly.

(1.08 pm)

(The hearing concluded)