Neutral citation [2023] CAT 76

Case No: 1593/6/12/23

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

22 December 2023

Before:

BRIDGET LUCAS KC
(Chair)
TIM FRAZER
ROBERT HERGA

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) AIRWAVE SOLUTIONS LIMITED
(2) MOTOROLA SOLUTIONS UK LIMITED
(3) MOTOROLA SOLUTIONS, INC.

Applicants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Intervener

Heard at Salisbury Square House on 2-3 August 2023

JUDGMENT

APPEARANCES

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

Sarah Abram KC, Naina Patel and Ben Lewy (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

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

Note: Excisions in this Judgment (marked "[✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

CONTENTS

A. INTRODUCTION

1. This is an application to the Tribunal in the exercise of its judicial review jurisdiction under section 179 of the Enterprise Act 2002 ("the Act") by (1) Airwave Solutions Limited ("ASL"); (2) Motorola Solutions UK Limited; and (3) Motorola Solutions, Inc., (together "Motorola"). Motorola applies for judicial review of the decision set out in the CMA's Final Report on *"Mobile radio network services"* dated 5 April 2023 ("the Decision").

2. The Decision concerns the supply of communications network services for emergency personnel by ASL, a subsidiary of Motorola Solutions, Inc., via what is commonly referred to as the "Airwave Network". The Decision concludes that there are features of the relevant market which cause an "adverse effect on competition" ("AEC") within the meaning of section 134 of the Act and imposes a charge control remedy that will reduce the price payable by the Government for the services significantly below the contractually agreed price. The financial impact of the Decision is substantial: the Decision determined that the prices charged by Motorola are inflated by the equivalent of around £200m per year.

3. The Airwave Network is a critical national service which is used by all police, fire and rescue, and ambulance services in Great Britain, and a number of central Government Departments (including the Home Office, Department of Health, Department of Transport, DEFRA, DWP and Ministry of Defence), and other "sharer organisations" such as local councils, coastguard, mountain rescue and charitable organisations. It enables more than 300,000 emergency personnel to communicate securely and is important for national security.

4. The Airwave Network was commissioned by the Home Office[1] under a Private Finance Initiative framework arrangement ("PFI Agreement") in 2000. The contract was won by British Telecommunications plc ("BT") which set up ASL to design, build, finance, own and operate the network. In 2007 ASL was

[1] The PFI Agreement was concluded with the Police Information Technology Organisation but the term "Home Office" was used for convenience during the hearing, and we adopt the same approach in this Ruling.

acquired by Macquarie Communications Infrastructure Group ("Macquarie").[2] It was originally anticipated that the Airwave Network would be provided until around 2019/2020.

5. Between April 2014 and September 2015, the Home Office ran a procurement process for the establishment of the Emergency Services Network ("ESN") to replace the Airwave Network. ESN was intended to facilitate greater data transfer and to use a commercial mobile network for most communications (unlike the Airwave Network which is a dedicated network). On 8 December 2015, the mobile network operator EE was awarded the main contract to establish the network infrastructure, and Motorola was awarded a contract for the provision of "User Services" (although the latter contract was terminated in 2022). The Home Office hoped that ESN would replace the Airwave Network by 2020.

6. Also, during 2015, Motorola negotiated with Macquarie to purchase ASL. A sale and purchase agreement was concluded on 3 December 2015. Pursuant to the PFI Agreement, the Home Office had a right of termination in respect of the transaction on grounds of change of control. The proposed transaction was reviewed and cleared by the CMA under the Act, having taken into account the views of the Home Office. As part of the acquisition, Motorola and the Home Office entered into a number of agreements executed on 17 February 2016, which included an agreement that the Airwave Network would continue to be provided at a fixed price under the PFI Agreement until such time as the Home Office served notice to terminate.

7. Many aspects of ESN have fallen behind the Home Office's desired timetable. On 20 December 2021, the Home Office exercised its right under the PFI Agreement to specify the National Shut Down Target Date of the Airwave Network as 31 December 2026, with the effect that the service would be provided until that date at the prevailing contractually agreed prices.

[2] The route by which Macquarie acquired ASL (which itself has undergone several name changes) is set out in the Decision at §2.11 but is not relevant to this application.

8. On 14 April 2021, the Home Office, at the request of the Cabinet Office, wrote to the CMA expressing concerns about the profits achieved by Motorola from the Airwave Network (the Home Office being, in substance, Motorola's contractual counterparty in respect of the Airwave Network).

9. On 25 October 2021, the CMA initiated a market investigation reference ("MIR") under section 131 of the Act. By the Decision, the CMA determined that:

(1) The relevant market is the supply of communications network services for public safety and ancillary services in Great Britain. This encompasses the Airwave Network and ESN.

(2) Competitive constraints on suppliers in this market typically arise through "competition for the market". In a well-functioning market, the CMA would expect one set of competitive arrangements to be replaced by another when long-term contracts come to an end, for example through a tendering (or re-tendering) process. However, the terms on which the Airwave Network has been provided from 2020 onwards are the result of bilateral negotiations between ASL and the Home Office in which the CMA considers that the Home Office had no credible alternative option for its choice of supplier. Key reasons include that ESN is taking considerably longer to implement than was contemplated.

(3) Against that background, there are features of the relevant market which cause an AEC within the meaning of section 134 of the Act. The first such feature is the importance of the Airwave Network. The second is that it must be provided by a monopolist pursuant to a long-term contract. The third is that the Home Office has not exercised its right under the PFI Agreement to take over the Airwave Network's assets and "their retendering is not a credible option". The fourth is that ESN "is taking much longer than anticipated to deliver". The fifth and sixth are that the Home Office is "locked-in" with Motorola and "has very weak bargaining power". The seventh is that "[t]here is asymmetry of information between the parties". The eighth is the "lack of effective

constraints provided by the terms of the PFI Agreement on the price of the provision of the network after 2019".

(4) Those features are (in the CMA's view) enabling Motorola to make supernormal profits in respect of the Airwave Network. The CMA thought it was appropriate to impose a charge control remedy in respect of the Airwave Network until 2029. This will reduce prices significantly below the contractually agreed prices. In addition, the CMA recommended to the Home Office that it should develop a plan to ensure that, by no later than 2029, the supply of services in the relevant market is subject to competitive pricing arrangements.

10. Motorola objects to the Decision, which it maintains rewrites one aspect of the existing contract - the price - whilst leaving the remainder of ASL's obligations under the contract intact until potentially 2029. On this application for judicial review, Motorola challenges the lawfulness of the Decision on two grounds. Whilst these evolved to a degree over time, and we will come to that, as argued in the submissions before us, these were:

(1) **Ground 1:** The CMA erred in its approach when finding that there was an AEC ("the Competitive Assessment"). Motorola maintains that there has been competition for the market in respect of the entirety of the period considered in the market investigation: first, by virtue of the public tender process in 2000 that resulted in the PFI Agreement, and secondly, as a result of the public tender in 2014 and 2015 for ESN. This was consistent with the CMA's expectations as to what constitutes a "well-functioning market".

(2) **Ground 2:** The CMA relies on a "profitability analysis" ("the Profitability Analysis") in reaching its conclusions on both the existence of an AEC and its proposed remedy. That profitability analysis is unlawful because the CMA's valuation of the assets employed by the Airwave Network: (1) is not consistent with the economic methodology that the Decision purported to prefer; (2) fails to take account of a

material consideration; and/or (3) is internally inconsistent with other fundamental reasoning in the Decision.

11. By way of relief, Motorola seeks an Order that the Decision is quashed and remitted to the CMA, and for payment of its costs.

12. On 31 July 2023, the CMA published its final order pursuant to section 161(1) of the Act ("the Order") imposing a charge control limiting the charges that can be made for services within the scope of the Order. The Order took effect on 1 August 2023, and will reduce the price payable by the Government below the contractually agreed price.

13. The Home Office, being a person with sufficient interest in the outcome for the purposes of Rule 16 of the CAT Rules, was granted permission to intervene in the current proceedings at a case management conference held on 29 June 2023, the reasons for which were given in a Ruling delivered on 7 July 2023 ([2023] CAT 45). The Home Office was granted permission on the basis that its submissions would not be duplicative of submissions made by the CMA, and we are grateful to the Home Office and its legal team for its adherence to that stricture. The Home Office submitted a short helpful note which addressed certain assertions made on the part of Motorola but made limited oral submissions, and was content to adopt those made by the CMA.

B. THE LEGAL FRAMEWORK

(1) The Act

14. Section 131 of the Act provides that the CMA may make a market investigation reference:

> "(1) … if the CMA has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom."

15. For these purposes:

> "(2) …any reference to a feature of a market in the United Kingdom for goods or services shall be construed as a reference to—
>
> (a) the structure of the market concerned or any aspect of that structure;
>
> (b) any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned; or
>
> (c) any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services.
>
> …
>
> (3) In subsection (2) 'conduct' includes any failure to act (whether or not intentional) and any other unintentional conduct."

16. Section 134(1) of the Act provides that:

> "(1) The CMA shall, on an ordinary reference, decide whether any feature, or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom. […]."

17. Section 134(2) provides that: "there is an adverse effect on competition if any feature, or combination of features, of a relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom".

18. Section 134(4) provides that if the CMA decides that there is an adverse effect on competition, it must also decide whether, and if so what, action should be taken for the purpose of "remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers".

19. Section 134(5) provides that:

> "(5) For the purposes of this Part, in relation to a market investigation reference, there is a detrimental effect on customers if there is a detrimental effect on customers or future customers in the form of—
>
> (a) higher prices, lower quality or less choice of goods or services in any market in the United Kingdom (whether or not the market or markets to which the feature or features concerned relate); or
>
> (b) less innovation in relation to such goods or services."

20. Section 136(2) of the Act provides for the preparation and publication of a report relating to the market investigation which must contain, in particular:

> "(a) the decisions of the CMA on the questions which it is required to answer by virtue of section 134;
>
> (b) its reasons for its decisions; and
>
> (c) such information as the CMA considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions."

21. Where a report has been prepared and published and contains the decision that there is one or more than one adverse effect on competition, section 138 provides:

> "(2) The CMA shall, within the period permitted by section 138A, in relation to each adverse effect on competition, take such action under section 159 or 161 as it considers to be reasonable and practicable—
>
> (a) to remedy, mitigate or prevent the adverse effect on competition concerned; and
>
> (b) to remedy, mitigate or prevent any detrimental effects on customers so far as they have resulted from, or may be expected to result from, the adverse effect on competition.
>
> (3) The decisions of the CMA under subsection (2) shall be consistent with its decisions as included in its report by virtue of section 134(4) unless there has been a material change of circumstances since the preparation of the report or the CMA otherwise has a special reason for deciding differently."

22. Sections 159 and 161 of the Act provide the CMA with the powers, respectively, to accept final undertakings and to make final orders for the purpose of remedying the AEC. A final order made under section 161 may contain anything permitted in Schedule 8 to the Act. This covers a range of actions including regulating the prices to be charged for any goods or service (paragraph 8), or requiring a person to do anything which the CMA considers appropriate to facilitate the provision of goods or services (paragraph 10).

23. Under section 179 of the Act:

> "(1) Any person aggrieved by a decision of the CMA… in connection with a reference or possible reference under this Part may apply to the Competition Appeal Tribunal for a review of that decision.
>
> ...

(4) In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.

(5) The Competition Appeal Tribunal may—

(a) dismiss the application or quash the whole or part of the decision to which it relates; and

(b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal."

(2) Common law grounds of review

24. Motorola submits that, if the Decision is illogical or incomplete or inconsistent in a material way, we should quash the Decision.

25. Since the Tribunal is to apply judicial review principles to the application pursuant to section 179(4) of the Act, the Tribunal is concerned "not with the correctness or otherwise of the [CMA's] findings and decision, but with the lawfulness of the decision making process which it adopted": *Barclays Bank v Competition Commission* [2009] CAT 27 at §22.

26. We were referred by both parties to *Tesco v Competition Commission* [2009] CAT 6, a case brought for judicial review under section 179 of the Act, and in particular the following paragraphs:

> "77. The grounds of judicial review are well-established. They frequently overlap with each other. It is not uncommon for a particular flaw in a decision or a decision-making process to fall within more than one ground. Failure of a decision-maker properly to take account of a relevant consideration in reaching its decision is among the grounds most frequently relied upon in judicial review. It is sometimes considered under the broad label of irrationality, but is also (and perhaps more appropriately in the present case) treated in its own right as a ground of challenge to the validity of a decision. This ground, and its converse ground of taking account of an irrelevant consideration, clearly reflect the fact that judicial review is in general about legality and the decision-making process rather than the merits of a decision.
>
> 78. Nor will a court necessarily quash every decision in respect of which it is established that a relevant consideration was left out of account: the reviewing court will normally consider whether the factor could have been material to the challenged decision. If the factor, though strictly speaking relevant, is too insignificant to have affected the decision, then its validity may be unaffected."

27. In addition to rationality - failing to take into account a relevant consideration, and taking into account an irrelevant consideration - a regulatory decision may be quashed where a mistake of fact plays a material part in the regulator's reasoning, but only if the alleged mistake of fact is uncontentious and objectively verifiable: See *E v SSHD* [2004] EWCA Civ 49 at §66 and *Rainbow Insurance Company Limited v FSC* [2015] UKPC 15 at §39. An allegation that a decision maker "fundamentally misunderstood" technical arrangements or analyses is not an allegation concerning a matter of objectively verifiable fact. Rather, it is an allegation concerning matters of opinion and evaluation and does not amount to a valid ground of review at all: See *R (Institute for Chartered Accountants in England and Wales) v Lord Chancellor* [2019] EWHC 461 (Admin) at §78-79. In *R (British Gas) v Gas and Electricity Authority* [2019] EWHC 3048 (Admin), Andrews J held:

> "87. [Counsel for British Gas] Mr Fordham also relied on E v Secretary of State for the Home Department [2004] EWCA Civ 49 [2004] QB 1044 as authority for the proposition that if there is a mistake of fact (for which the objecting party was not responsible) that is uncontentious and objectively verifiable, and the mistake played a material (but not necessarily decisive) part in the decision maker's reasoning, the decision may be susceptible to judicial review. He submitted that the principle was also engaged if the decision maker formed a mistaken impression which played a material part in its reasoning, or acted upon a wrong assumption, or if the decision was taken on facts unsupported by evidence. Again, there was no issue between counsel about these principles."

28. The modern approach to a rationality challenge was summarised by Saini J in *R (Wells) v Parole Board* [2019] EWHC 2710 (Admin) at [31]-[34]:

> "31. A modern approach to the Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 K.B. 223 (CA) test is not to simply ask the crude and unhelpful question: was the decision irrational?
>
> 32. A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the Panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied.
>
> 33. I emphasise that this approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury (at 230: 'no reasonable body could have come to [the decision]') but it is preferable in my view to approach the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion?

> 34. This may in certain respects also be seen as an aspect of the duty to give reasons which engage with the evidence before the decision-maker. An unreasonable decision is also often a decision which fails to provide reasons justifying the conclusion."

29. In his submissions, Mr Hoskins KC for Motorola referred us to a summary of the applicable legal principles in the textbook written by Mr Justice Fordham, *Judicial Review Handbook,* set out in Chapter "Principle 57: Unreasonableness", and in particular:

(1) "57.1 The unreasonableness principle. Unreasonableness – often still described as "irrationality" – is the public law description of a public authority acting in a way which, on appropriate scrutiny, was not reasonably open to it. The unreasonableness principle has governed judicial interference with those questions of substance as to which the public authority is primary decision-maker and has a built-in latitude. That includes the overall outcome (evaluating the merits), but also the decision-making approach and all matter of judgment, discretion or policy. Retaining its supervisory jurisdiction, and avoiding the forbidden substitutionary method, the Court asks whether the public authority's response was beyond the range of reasonable responses. This is a flexible and contextual test."

(2) "57.2 Unreasonableness as a high threshold. Many colourful phrases have traditionally been used in public law to explain that only in a strong case will Courts intervene on grounds of unreasonableness. Linguistic epithets have tended to be either general reminders of built in latitude warning against the forbidden substitutionary method or observations linked to features of a particular context seen to call for particular restraint. They have increasingly come to be discarded. There are dangers in appearing to set the bar too high. Reasonableness is a meaningful standard of substantive review."

(3) "57.3 Distinct species of unreasonableness. There have been advantages in the invocation of a flexible overarching reasonableness doctrine, as a generally applicable legal criterion for substantive grounds of judicial review at common law. The originating concept of reasonableness can serve as a necessary reminder of the all-important public authority "primary decision-maker" function, with the "built-in latitude", and of the forbidden substitutionary method. Having said that, a number of distinct, nuanced species of substantive public law wrong can provide a specific, principled basis for judicial intervention. They can raise the focused question at the heart of the case. They may have developed in a Wednesbury incubator, but whether they all now need to march under a Wednesbury banner is debatable…".

(4) "57.3.3 Unreasonableness: flaw in logic/not 'stacking up': … What the not very apposite term "irrationality" generally means in this branch of

> the law is a decision which does not add up – in which, in other words, there is an error of reasoning which robs the decision of logic."

30. Mr Hoskins highlighted from these passages the dangers in appearing to set the bar too high, and emphasised that reasonableness is still a meaningful standard of review. He submitted that he was not inviting the Tribunal to quash the Decision because it would have come to a different conclusion: that is something the Tribunal cannot do – and is the forbidden "substitutionary method". But if the Tribunal was satisfied that the reasoning in the Decision is illogical or incomplete, or inconsistent in a material way, then the Decision should be quashed.

31. The CMA stressed that "reasonableness" is a "flexible and contextual test", and that the context in this case is the technical and expert context that requires a margin of appreciation to be accorded to the decision-maker. To underline the importance of focusing on "unreasonableness", the CMA referred us to De Smith's *Judicial Review* (9th Ed) at §6-014:

> "… Judges should not lightly interfere with official decisions on this ground. In exercising their powers of review, judges ought not to imagine themselves as being in the position of the competent authority when the decision was taken and then test the reasonableness of the decision against the decision they would have taken. To do that would involve the courts in a review of the merits of the decision, as if they were themselves the recipients of the power. For that reason, Lord Greene in Wednesbury thought that an unreasonable decision under this definition "would require something overwhelming" (such as a teacher being dismissed on the ground of her red hair). More recently, the epithets devised by judges to describe unreasonable behaviour have included decisions which are "perverse", or "absurd" – implying that the decision-maker has "taken leave of his senses"."

32. We were referred by both parties to the Tribunal's judgment in *BAA Limited v Competition Commission* [2012] CAT 3, a case concerning a challenge under section 179 of the Act to the lawfulness of a report containing the Competition Commission's decision to require BAA to divest itself of Stansted airport. The Tribunal summarised the principles to be applied by the Tribunal to such applications at [20], as follows:

> "(3) The CC, as decision-maker, must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it … The CC "must do what is necessary to put itself into a position properly to decide the statutory questions": Tesco plc v Competition

Commission [2009] CAT 6 at [139]. The extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the CC, as to which it has a wide margin of appreciation as it does in relation to other assessments to be made by it: compare, e.g., Tesco plc v Competition Commission at [138]-[139]. In the present context, we accept Mr Beard's primary submission that the standard to be applied in judging the steps taken by the CC in carrying forward its investigations to put itself into a position properly to decide the statutory questions is a rationality test: see R (Khatun) v Newham London Borough Council [2004] EWCA Civ 55; [2005] QB 37 at [34]-[35] and the following statement by Neill LJ in R v Royal Borough of Kensington and Chelsea, ex p. Bayani (1990) 22 HLR 406, 415, quoted with approval in Khatun:

> "The court should not intervene merely because it considers that further inquiries would have been desirable or sensible. It should intervene only if no reasonable [relevant public authority – in that case, it was a housing authority] could have been satisfied on the basis of the inquiries made."

(4) Similarly, it is a rationality test which is properly to be applied in judging whether the CC had a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did. There must be evidence available to the CC of some probative value on the basis of which the CC could rationally reach the conclusion it did: see e.g. Ashbridge Investments Ltd v Minister of Housing and Local Government [1965] 1 WLR 1320, 1325; Mahon v Air New Zealand [1984] AC 808; Office of Fair Trading v IBA Health Ltd [2004] EWCA Civ 142; [2004] ICR 1364 at [93]; Stagecoach v Competition Commission [2010] CAT 14 at [42]-[45];

(5) In some contexts where Convention rights are in issue and the obligation on a public authority is to act in a manner which does not involve disproportionate interference with such rights, the requirements of investigation and regarding the evidential basis for action by the public authority may be more demanding. Review by the court may not be limited to ascertaining whether the public authority exercised its discretion "reasonably, carefully and in good faith", but will include examination "whether the reasons adduced by the national authorities to justify [the interference] are 'relevant and sufficient'" (see, e.g., Vogt v Germany (1996) 21 EHRR 205 at para. 52(iii); also Smith and Grady v United Kingdom (1999) 29 EHRR 493, paras. 135-138). However, exactly what standard of evidence is required so that the reasons adduced qualify as "relevant and sufficient" depends on the particular context: compare R (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532 at [26]-[28] per Lord Steyn. … Where, as here, a divestment order is made so as to further the public interest in securing effective competition in a relevant market, a judgment turning on the evaluative assessments by an expert body of the character of the CC whether a relevant AEC exists and regarding the measures required to provide an effective remedy, it is the "manifestly without reasonable foundation" standard which applies. One may compare, in this regard, the similar standard of review of assessments of expert bodies in proportionality analysis under EU law, where a court will only check to see that an act taken by such a body "is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion": Case C-120/97 Upjohn Ltd v Licensing Authority [1999] ECR I-223; [1999] 1 WLR 927, paras. 33-37. Accordingly, in the present context, the standard of review appropriate under Article 1P1 and section 6(1) of the HRA is essentially equivalent to that given by the ordinary domestic standard of rationality. However, we also accept Mr Beard's

submission that even if the standards required of the CC by application of Article 1P1 regarding its investigations and the evidential basis for its decisions were more stringent than under the usual test of rationality, the CC would plainly have met those more stringent standards as well;

(6) It is well-established that, despite the specialist composition of the Tribunal, it must act in accordance with the ordinary principles of judicial review: see IBA Health v Office of Fair Trading [2004] EWCA Civ. 142 per Carnwarth LJ at [88]–[101]; British Sky Broadcasting Group plc v Competition Commission [2008] CAT 25, [56]; Barclays Bank plc v Competition Commission [2009] CAT 27, [27]. Accordingly, the Tribunal, like any court exercising judicial review functions, should show particular restraint in "second guessing" the educated predictions for the future that have been made by an expert and experienced decision-maker such as the CC: compare R v Director General of Telecommunications, ex p. Cellcom Ltd [1999] ECC 314; [1999] COD 105, at [26]. … This is of particular significance in the present case where the CC had to assess the extent and impact of the AEC constituted by BAA's common ownership of Heathrow, Gatwick and Stansted (and latterly, in its judgment, Heathrow and Stansted) and the benefits likely to accrue to the public from requiring BAA to end that common ownership. The absence of a clearly operating and effective competitive market for airport services around London so long as those situations of common ownership persisted meant that the CC had to base its judgments to a considerable degree on its expertise in economic theory and its practical experience of airport services markets and other markets and derived from other contexts;

(7) In applying both the ordinary domestic rationality test and the relevant proportionality test under Article 1P1, where the CC has taken such a seriously intrusive step as to order a company to divest itself of a major business asset like Stansted airport, the Tribunal will naturally expect the CC to have exercised particular care in its analysis of the problem affecting the public interest and of the remedy it assesses is required. The ordinary rationality test is flexible and falls to be adjusted to a degree to take account of this factor (cf R v Ministry of Defence, ex p. Smith [1996] QB 517, 537-538), as does the proportionality test (see Tesco plc v Competition Commission at [139]). But the adjustment required is not as far-reaching as suggested by Mr Green at some points in his submissions. It is a factor which is to be taken into account alongside and weighed against other very powerful factors referred to above which underwrite the width of the margin of appreciation or degree of evaluative discretion to be accorded to the CC, and which modifies such width to some limited extent. It is not a factor which wholly transforms the proper approach to review of the CC's decision which the Tribunal should adopt;

(8) Where the CC gives reasons for its decisions, it will be required to do so in accordance with the familiar standards set out by Lord Brown in South Buckinghamshire District Council v Porter (No. 2) [2004] UKHL 33; [2004] 1 WLR 1953 (a case concerned with planning decisions) at [36]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other

> important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."
>
> In applying these standards, it is not the function of the Tribunal to trawl through the long and detailed reports of the CC with a fine-tooth comb to identify arguable errors. Such reports are to be read in a generous, not a restrictive way: see R v Monopolies and Mergers Commission, ex p. National House Building Council [1993] ECC 388; (1994) 6 Admin LR 161 at [23]. Something seriously awry with the expression of the reasoning set out by the CC must be shown before a report would be quashed on the grounds of the inadequacy of the reasons given in it."

33. In relation to the margin of appreciation to be afforded to the CMA, we were also referred to the decision of *R v Secretary of State for Transport* [2020] EWHC 226 (Admin), a planning case relating to a proposed development in relation to Stansted airport. Dove J conducted a review of the relevant case law (*R (Mott) v Environment Agency* [2016] 1 WLR 4338; *R (Downs) v Secretary of State for the Environment, Food and Rural Affairs* [2010] Env LR 7); *R (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2008] EWCA Civ 417; *R (Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 (Admin)), and concluded:

> "77. In the light of these authorities, in my view the position in relation to Wednesbury based challenges to the legality of decisions which have been informed or influenced by scientific or technical material is well settled. The approach is based upon the fundamental principle that the court is not re-taking the decision: it is not equipped procedurally or substantively to do so. Whilst the court will not abandon all curiosity as to how the decision has been reached, and can (as was emphasised in Mott) expect that the decision-taker will provide a full and accurate explanation of the facts and scientific analysis relevant to the decision, nevertheless it is not the role of the court to embark on its own technical appraisal of the issues. The court must recognise and respect the expertise which has been brought to bear in reaching the decision and appreciate that there may be more than one scientific view of an issue, as well as more than one way of modelling or forecasting an impact or effect. A decision-taker is entitled to give particular weight to a suitably scientifically qualified consultee and rely upon their advice in reaching a conclusion. All of these factors, and no doubt others, comprise the margin of appreciation to which the authorities refer. As Sullivan LJ observed in the case of Downs, this

> does not mean that the decisions are immune from judicial review, but that the hurdle for a claimant to surmount is formidable."

34. Finally, we were also referred to the following extract from *Tesco plc v Competition Commission* [2009] CAT 6, which stresses the importance of reviewing the Decision as a whole:

> "79. It is also common ground that when considering Tesco's challenge the Report should be read as a whole and should not be analysed as if it were a statute. In its Defence the Commission referred to R v MMC ex parte National House Building Council [1993] E.C.C. 388 in which Auld J (as he then was) (upheld on appeal: [1995] E.C.C. 89) after confirming the fact that reports prepared by the former Monopolies and Mergers Commission are susceptible of judicial review, held:
>
> > "…the Court in the exercise of this jurisdiction, as in its exercise in other contexts, must take care not to subject the [Commission's] Report to fine textual or legal analysis as if it were a statute or other legal document. I respectfully adopt the words of Hodgson J about this in R v MMC ex parte Visa International Service [1991] ECC 291 … "…the Report must not be read as if it were a statute or a judgment … It should be read in a generous not restrictive way and the Court should be slow to disable the MMC from recommending action considered to be in the public interest or to prevent the [Secretary of State] from acting thereon unless perceived errors of law are both material and substantial" (at p.398)."

35. These legal principles inform the approach that we have taken.

C. BACKGROUND

36. We set out, by way of introduction, a summary of the background facts in Section A. However, in order to decide Motorola's challenge, it is necessary to refer to the background in further detail. Our attention was also specifically drawn by the parties to various aspects of the PFI Agreement and the subsequent contractual negotiations that took place in 2014 to 2016, 2017, 2018 and 2021.

(1) The PFI Agreement

37. The PFI Agreement was tendered via the Official Journal of the European Communities ("OJEC") in January 1996 (Decision, §2.40). Although three consortia formed to bid for the PFI Agreement, the consortium led by BT was the only one that ultimately bid (Decision, §2.41).

38. The Airwave Network is a bespoke integrated network dedicated to emergency services' communications. It covers the whole of Great Britain. No alternative network providing similar services exists.

39. The contractual arrangements relating to the Airwave Network are lengthy and complex. The Decision addresses this in Section 2. The PFI Agreement was an overall agreement governing the terms that would be set out in individual contracts which were entered into with relevant police forces in England, Wales and Scotland with varying start dates. The roll out to police services started in September 2001. The last police services to join those using the Airwave Network were the Northern Constabulary, which executed a services contract in June 2001 and achieved 'Ready for Service' status in May 2005, and the British Transport Police which contracted in March 2006 (although the deemed commencement date was August 2002) (Decision, §2.43). Subsequently, separate service agreements were entered into by the Department of Health for ambulance services in England and Wales ("the Ambulance Main Agreement"), the Scottish Ambulance Service Board for ambulance services in Scotland, and the Home Office for all qualifying fire authorities ("the Firelink Project Agreement"). Each had varying start dates and durations.

40. Motorola drew our attention to the following features of the original PFI Agreement concluded with BT in 2000:

    (1) The PFI Agreement was not a construction contract: it was a contract for the provision of network services which included a requirement for ASL to build and maintain a bespoke network infrastructure in order to enable it to provide those services.

    (2) The PFI Agreement set out the structure of charges, comprising a core service charge (payable for access to the Airwave Network) and a menu of service charges that users can elect to purchase. Provision was made for annual adjustment in line with inflation by reference to set formulae. The PFI Agreement also specified availability requirements with discounts provided if they were not met.

(3) There were benchmarking provisions for certain charges within the initial six year period, and at least every five years after that.

(4) The contract did not specify a fixed end date: Clause 2 provided that it would continue in force until the date of expiry or termination of the last of the "Services Contracts" (being the contracts with the various "blue light" customers). However, the Home Office could terminate the contract on 12 months' notice.

(5) On termination, the Home Office had the right to require ASL to transfer the "Transferable Assets" to either the Home Office or an "Alternative Service Provider". The recipient of the assets was required to pay "the agreed fair market value of such assets and contracts". An asset transfer would also involve the transfer of employees under TUPE arrangements. Any dispute as to the scope of the "transferable assets" or their fair market value was to be resolved by arbitration.

41. As regards the end date to the original PFI Agreement, we note that the CMA concluded (Decision, §2.51) that it was initially envisaged as an overall framework contract for an estimated period of up to 19 years. That period is based on (i) the 15-year service contracts under which services were to be provided; (ii) the time required to build the network and then decommission it; and (iii) the network being fully operational from 2003. The CMA also concluded that the applicable procurement regulations had the effect of setting an expectation, by the OJEC notice, that the contract would not be extended. The OJEC notice specifically provided that the service would end after the 15-year period after 2003. The PFI Agreement itself did not originally include terms contemplating an extension.

42. Motorola pointed to the fact that this was an exclusive and long-term agreement, which reflected the nature of the market. Suppliers could not take the risk of building a bespoke network absent a long-term contract. The PFI Agreement contained agreed terms for pricing and service terms set at the beginning of the contract, thereby removing the risk of opportunism later in the contract. The

prices when they were originally set were competitive because they were fixed prior to the contract being entered into.

(2) ESN Procurement

43. The Home Office ran a competitive procurement exercise which ran from April 2014 to September 2015 for ESN. ESN was intended to replace the Airwave Network. The Decision found that the understanding that the PFI Agreement could not be extended after 2020 was one of the drivers for pursuing ESN. Key contracts relating to ESN were signed by EE and Motorola (for the "Lot 2" contract for the provision of user services)[3] on 8 December 2015. The timetable agreed by the winning bidders provided for the transition from the Airwave Network to ESN to start in September 2017 and to be completed by the end of 2019.

(3) Motorola's acquisition of ASL

44. On 3 December 2015, Motorola signed a contract for the acquisition of ASL from Macquarie. Pursuant to the PFI Agreement, the Home Office was entitled to terminate on grounds of change of control. On 7 December 2015, Motorola executed a deed with the Home Office acknowledging it would seek the approval of the Home Office as a condition precedent to the completion of the transaction.

(4) The 2016 Negotiations

45. In December 2015/January 2016 various discussions took place between Motorola and the Home Office as to the terms on which the Airwave Network would continue to be provided until ESN was ready, and the Airwave Network was no longer required ("the 2016 Negotiations"). A number of agreements were entered into, including Heads of Terms, dated 17 February 2016. Under these agreements:

[3] The Lot 1, Lot 2, and Lot 3 contracts are described at §2.78 of the Decision.

(1) The contract end dates of the various underlying emergency services contracts with ASL were aligned. The Home Office also obtained a unilateral right to extend the contracts at the prevailing price, and to specify the date on which the Airwave Network would be shut down. In particular, the Home Office had the right to issue a "National Shut Down Notice" which would specify the "National Shut Down Target Date" as being either 31 December 2019 or such later date as they might specify. The Home Office was also entitled to specify a different National Shut Down Target Date in respect of any ESN "Delayed Transition Group" i.e. a user group which was delayed in completing its transition to ESN. In other words, the Home Office could require Motorola to continue to provide the Airwave Network to a small number of users that were slow to transfer.

(2) The Home Office obtained a discount on certain prices otherwise payable by emergency service users under the existing contracts for the remaining duration of the Airwave Network services.

(3) Motorola entered into a Deed of Recovery that enabled the Home Office to impose financial penalties on Motorola through discounts to the Airwave Network charges, in the event that Motorola caused a delay to the introduction of ESN (Motorola also being a contracting party in relation to ESN and in a position to delay its implementation).

(4) Motorola settled litigation with the Home Office on terms which meant it would pay [✂] over three years in relation to price benchmarking, amongst other things.

(5) Motorola agreed to withdraw the procurement challenge brought by ASL in relation to the award of the "Lot 3" ESN contract to EE.

46. Motorola stressed the following points in relation to the 2016 Negotiations:

(1) The contractual arrangements in 2016 provided the price payable for the remaining life of the Airwave Network. This, Motorola submits, removed the scope for future opportunism by either party.

(2) The price negotiated in 2016 was itself a discount on the pricing structure that had been agreed under the original PFI Agreement. Further, Motorola assumed the cost and risk associated with providing the Airwave Network services, including in terms of any necessary upgrades or technology investment required to keep the Airwave Network operational, until such time as the Home Office exercised the right to shut it down.

(3) The contractual arrangements reached in 2016 expressly catered for the possibility of delay to the roll out of ESN beyond the end of 2019 because the Home Office acquired the right to determine when it wished to terminate the Airwave Network, so as to accommodate the progress of the roll out of ESN and the transition of users to ESN.

(5) The 2017 Negotiations

47. In early 2017, the Home Office and Motorola entered into further negotiations in relation to a planned delay to the transition to ESN of three months, and a consequent anticipated extension of the Airwave Network by a few months. This led to a one-off discount of [✂] to apply in 2020.

(6) The 2018 Negotiations

48. Between April and September 2018 further negotiations took place which resulted in an extension of the period of operation of the Airwave Network to 31 December 2022 and varied certain of the terms set out in the Heads of Terms. These terms included a [✂] discount on core service charges, and the continuation of the discount agreed in 2016 (amounting to [✂]). Heads of Terms were agreed on 21 September 2018, and implemented through a Change Advisory Note dated 14 May 2019, which included a revised date for the "mobilisation complete" of ESN of 30 November 2020.

(7) The 2021 Negotiations

49. The 2021 negotiations related to the potential extension of the Airwave Network (and the relevant contracts) beyond 31 December 2022: by that time it was not anticipated that users would complete the transition to ESN before the end of 2026. Negotiations stalled following the launch of the MIR on 25 October 2021.

(8) National Shut Down Notice

50. In December 2021 the Home Office served the National Shut Down Notice, the practical effect of which was to extend the provision of the network unilaterally to 31 December 2026 at the prevailing current prices, as modified in earlier negotiations.

(9) The Market Investigation

51. On 25 October 2021, the CMA made a reference for a market investigation in the supply of Land Mobile Radio ("LMR") network services for public safety (including ancillary services) in Great Britain under sections 131 and 133 of the Act. This followed a consultation that began on 8 July 2021. On 22 December 2021 Motorola challenged the CMA's decision to make the MIR: a challenge that the Tribunal rejected (see [2022] CAT 4).

D. THE DECISION

52. The Decision is a substantial document extending to over 600 pages including its appendices. Section 1 sets out at length the way in which the investigation was conducted, including (1) the way in which evidence was gathered, (2) the specialist advice and evidence sought, (3) consultations on the emerging analysis (including the preparation of the proposed profitability methodology approach), (4) the engagement with stakeholders, (5) the engagement with Motorola and the Home Office specifically, (6) consultation on the Provisional Decision Report ("PDR") published on 19 October 2022, and (7) subsequent hearings held with both Motorola and the Home Office.

53. The CMA identified the relevant market as "the supply of communications network services for public safety and ancillary services in Great Britain". The Decision summarised what would be expected in a well-functioning market as follows:

> "10. We have considered how competition can occur in that market. Building a bespoke integrated network of the kind required meant that a single supplier would be best placed to meet the emergency services' needs under long-term contracts. Under such contracts, the supplier could recoup the large upfront investment required to build the network, and have the chance to earn an estimated rate of return, over the life of the contracts.
>
> 11. Competitive constraints on suppliers in this market, therefore, typically arise through 'competition for the market'. It can occur when long-term contracts are first tendered and when they expire (or, more specifically, in anticipation of their expiry when a replacement network or a retendering of the existing network is competed for).
>
> 12. In a well-functioning market, we would expect one set of competitive arrangements to be replaced by another when such long-term contracts come to an end. That could, for example, be the replacement of the existing arrangements by:
>
> (a) a competitively priced continuation of the operation of the existing network infrastructure (secured, for example, under a retendering process facilitated by the transfer of the assets to the Home Office, or by the threat of such a process); or
>
> (b) a competitively priced new network (for example, one tendered under a new process), that could use new technology and offer enhanced functionality."

54. The CMA summarised its findings at §§14 to 26. In particular:

(1) The CMA concluded that the terms of the PFI Agreement resulted from "the type of process – tendering – that we might expect to provide competition for the market".

(2) The PFI Agreement that resulted was for a fixed term ending in 2019, (once the contractual dates were aligned):

> "It provided for a contract price designed to recoup the supplier's upfront investment in building the network and offer it the possibility of earning an estimated rate of return over that period, but not beyond. It contained provisions which sought to deal with the end of the contract and the transfer of assets to the Home Office (or a third party). It did not contain terms relating to or contemplating its extension. The relevant provisions were therefore generally the type of terms we might expect to find in a well-

functioning market up to 2019 (albeit that they were not all necessarily fully effective in achieving their objectives)."

(3) The CMA found that the position after the original period of the PFI Agreement had ended was "materially different". The CMA's assessment was that:

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

(4) The prices after the original period had ended are:

> "established … in bilateral negotiations between [ASL] (the monopoly supplier) and its owner, Motorola and the Home Office relating to the extension of the PFI Agreement. In those negotiations the Home Office has no credible alternative option in terms of its choice of supply or supplier."

(5) The CMA found that:

> "The terms on which the network is supplied, particularly the price, have not materially changed as we would expect in a competitive market to reflect that, now the original period of the PFI Agreement has ended:
>
> (a) The costs of providing the Airwave Network will have fallen significantly compared with the previous period where the supplier had to incur the substantial set-up costs of building the network; and
>
> (b) the risk borne by the supplier is much reduced after 2019 because the network is built and is operating as a reliable income stream."

(6) The CMA concluded that:

> "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. This is reflected in the generation of supernormal profits after the original period of the contract."

(7) Three key reasons were provided. First, the network is critical national infrastructure, and access must be maintained; secondly, the asset transfer provisions had not been effective ("acquiring them is not an option the Home Office could credibly pursue or threaten"); and thirdly, ESN is taking considerably longer to implement than was contemplated either when it was procured, or in 2016 when the parties negotiated terms relating to an extension of the Airwave Network after 2019.

(8) The CMA concluded that the Home Office is effectively "'locked in' to a monopoly provider … and will be in that position until at least 2026, likely until 2029 and possibly longer". The CMA considered there is a lack of constraint on pricing that would result in it being set at a competitive level, and that the Home Office is in a "particularly weak bargaining position". The CMA concluded that "Motorola can set and maintain a price substantially above the level we would expect in a well-functioning market".

(9) The CMA identified four further factors that reinforced Motorola's market power, and the Home Office's weak bargaining position:

> "(a) The fact that, in any negotiations, they are negotiating against the default option of the price agreed in 2016, which is very advantageous to Airwave Solutions and Motorola and correspondingly disadvantageous to the Home Office;
>
> (b) the Airwave Network's dependence on Motorola for equipment and upgrades for its ongoing operation;
>
> (c) the asymmetry of information between the parties; and
>
> (d) the likely ineffectiveness of the original contractual provisions relating to price benchmarking (and the lack of reliable comparators that make any benchmarking exercise practically very difficult (if possible at all))".

(10) The CMA also noted that competition was further distorted because of the need for the Airwave Network and ESN to be linked in the period of transition, as users switch networks at different times.

55. The CMA concluded that features of the relevant market resulted in an AEC in that market. Those features were summarised at §28 (and Decision, §7.29) as follows:

> "(a) The Airwave Network is a critical piece of infrastructure on which the emergency services in Great Britain, and ultimately lives, depend.
>
> (b) The Airwave Network is the only network of its kind in Great Britain and is provided by a monopolist. No other such networks exist nor are they likely to be constructed and ready for use before ESN (or an alternative network) is able to replace it.
>
> (c) The Airwave Network assets have not transferred to the Home Office under the terms of the PFI Agreement, Airwave Solutions still owns them

(and the related business) and the transfer of those assets is not a credible option that the Home Office could either pursue or threaten to pursue.

(d) The Home Office has tendered and contracted for a replacement network – ESN – but it is taking much longer than anticipated to deliver and replace the Airwave Network. ESN will not be ready until at least 2026, likely 2029 and possibly later.

(e) The Home Office and the emergency services in Great Britain are locked in with the incumbent supplier of communications network services – Airwave Solutions (and Motorola) – beyond the period over which prices were, or should have been, constrained by the terms of the PFI Agreement (and Airwave Solutions should have recouped its investment and had a chance to earn a reasonable return).

(f) The Home Office has very weak bargaining power.

(g) There is asymmetry of information between the parties.

(h) There is a lack of effective constraints provided by the terms of the PFI Agreement on the price of the provision of the network after 2019, including the benchmarking provisions which are likely to be ineffective."

56. The CMA identified the need for "interworking" in the transition between the Airwave Network and ESN as strengthening, and potentially prolonging Motorola's market power, which Motorola is "able and incentivised to delay, hamper and/or make more costly".

57. The CMA estimated that the AEC means that Motorola can be expected to make total supernormal profits from the operation of the Airwave Network of around £1.27 billion between 1 January 2020 and 31 December 2029; equivalent to charging almost £200 million per year more than the CMA would expect to see in a well-functioning market. The CMA noted that ASL contributes around 21% of Motorola's global pre-tax profits while accounting for only around 7% of its global revenues. The CMA concluded (at Decision §32) that:

> "The supernormal profits are, in our view, a reasonable measure of the transfer of welfare from the emergency services, and the taxpayers who fund them, to Motorola shareholders that results from the AEC we have identified. They indicate that a significant detrimental effect on customers results from that AEC".

E. GROUND 1: COMPETITIVE ASSESSMENT

(1) Motorola's position

58. In its Notice of Application ("NOA"), Motorola's challenge to the Competitive Assessment was originally stated to be as follows:

> "11. The CMA's finding that there are features of the market that cause an AEC is based on a fundamental error of approach.
>
> 11.1 In the market as defined by the CMA, there has been "competition for the market". In the first place, there was a public tender in 2000 resulting in the PFI Framework. In the second place, there was a public tender in 2014 to 2015 for the ESN network which is intended to replace the Airwave network. There has therefore been competition for the market in respect of the entirety of the period considered by the market investigation. This is entirely consistent with the CMA's expectations as to what constitutes a "well-functioning market".
>
> 11.2 The issue identified and addressed in the Decision arises because the Home Office underestimated the time needed to deliver ESN. It is not the result of any market failure or failure of competition. It is solely the result of what has turned out to be a misjudgement made by the Home Office in the context of what the CMA accepts was an undistorted competitive process in 2014 to 2015.
>
> 11.3 As the issue identified in the Decision is not a failure of competition, but rather a misjudgement by the Home Office, it follows that competition has not been distorted within the meaning of section 134(1). Sections 131 and 134 exist to allow the CMA to intervene where features in a market prevent, restrict or distort competition. They do not allow the CMA to intervene simply to re-open something that turns out to be a bad bargain."

59. In its Defence, the CMA stated that this ground did not clearly articulate a basis for judicial review and, in particular, did not clarify whether Motorola contends that the AEC finding was based on a material error of fact, was wrong in law, or was an irrational exercise of the CMA's discretion.

60. In its skeleton argument, Motorola referred only to §11.1 as being the basis of its challenge under Ground 1. The case on §11.2 and §11.3 were not argued before us. Motorola's argument on §11.1 was that, having found for the purposes of market definition that the Airwave Network and ESN were in the same market and that ESN exerted competitive constraint on the Airwave Network even whilst it was under development, the CMA then failed to take that into account when conducting its competitive assessment.

61. Pursuant to section 134(1) of the Act, the fundamental question for the CMA to address on a market investigation reference is "whether any feature, or combination of features, of each relevant market, prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom".

62. In this case, it is common ground that competition manifests itself through periodic competition *for* the relevant market. The key findings relevant to Ground 1 are summarised in the Decision as follows:

(1) §§14-15: The terms of the PFI Agreement under which the Airwave Network operates resulted from the type of process – tendering – that might be expected to provide competition for the market. The PFI Agreement was for a fixed term ending in 2019.

(2) §16: The terms on which the Airwave Network was provided after 2019 reflected a "virtually unconstrained" monopoly position on the supplier's part rather than the results of a competitive process.

(3) §17: Instead of being set through a competitive process, prices are established (or maintained without significant variation from previous levels) in bilateral negotiations between Airwave Solutions (the monopoly supplier) and its owner, Motorola, and the Home Office relating to the extension of the PFI Agreement. In those negotiations, the Home Office has no credible alternative option in terms of its choice of supply or supplier.

63. Motorola submits that the finding that the prices currently being paid for the Airwave Network reflect a virtually unconstrained monopoly position on the supplier's part rather than the result of a competitive process is tainted by a public law error. This is because the prices currently being paid have been subject at all material times to the constraint of competition *for* the market. That competitive constraint is a relevant consideration which the CMA has failed to take into account.

64. The steps in Motorola's argument are as follows:

(1) The Decision recognises that the PFI Agreement resulted from the type of tender process that might be expected to provide competition *for* the market.

(2) The ESN procurement exercise is also consistent with what the CMA expects in a well-functioning market. The Decision records that:

> "4.2 … in a well-functioning market, we would expect arrangements to be in place at, or close to the end of the original period of the PFI Agreement either to replace the Airwave Network with a competitively priced new and enhanced service, or to secure a competitively priced continuation of the operation of the existing network."

Consistent with that expectation, arrangements were put in place to replace the Airwave Network with a competitively priced new and enhanced service.

(3) In Section 3 of the Decision, the CMA considered "Scope for Competition and Market Definition". The CMA concluded that the Airwave Network and ESN fall within the same product market, and that they compete with each other. In particular:

> "3.75 … Our view is that there is potential for competitive interactions between ESN and the Airwave Network. In particular, although ESN is still in development and therefore is not available in the short term, a central incentive for ESN's suppliers to develop ESN in a timely manner comes from winning new customers from the Airwave Network. We also note that the prospect of ESN being developed as a replacement for the Airwave Network could, in principle at least, affect the incentives of Airwave Solutions to maintain or improve aspects of its offering with a view to delaying customers transferring to ESN.
>
> …
>
> 3.77 Substitutability in the short run may be different from substitutability in the longer term. In the short run firms compete using the products in their existing portfolios. In the longer term, firms may compete by improving their product portfolios. In this case, … competition in the supply of LMR network services for public safety takes place over the longer term.
>
> 3.78 Dynamic competition between the Airwave Network and ESN falls within this category of longer-term competition, because it involves the efforts and investments made by ESN's suppliers to develop a new offering which would serve as a replacement for LMR network services and

> therefore 'steal' Airwave Solutions' customers in a timely manner (ie induce demand-side substitution). It can also include efforts by Airwave Solutions to retain customers and prevent or delay them switching to ESN.
>
> …
>
> 3.79(b) …. from the perspective of Airwave Solutions, ESN represents the only significant long-term competitive threat that could reduce its customer base and Airwave Solutions will lose 100% of its customer base to ESN in due course.
>
> …
>
> 3.80 … Because Airwave Solutions' only demand side competition is dynamic competition from ESN's key suppliers developing a new solution, and the only demand side alternative from which ESN can attract customers is the Airwave network, our view is that the market includes both the existing TETRA Airwave service and the LTE network services for public services (ie ESN).
>
> 3.81 In assessing the demand-side substitutability between the Airwave Network and ESN, we have thus far focused on longer-term substitutability. We note that in the short run, and in particular prior to the development of ESN, there is no scope for demand-side substitution between the Airwave network and ESN: a customer that is negotiating with Airwave Solutions cannot realistically seek to get a better deal by threatening to walk away from negotiations and switch to ESN, because ESN is unavailable now as an option. Accordingly, while market definition would often take account of short run competition, in this case our focus on longer-term substitutability is appropriate. We take the lack of short-run substitutability into account in our competitive assessment where it is relevant (see section 4 of this report)."

(4) For the purposes of market definition, therefore, the CMA made express findings that ESN competed with the Airwave Network from a long-term perspective – even whilst ESN was still in development and before it was operational.

(5) However, when it comes to Section 4 of the Decision which sets out the CMA's competitive assessment, the Decision does not take the longer term competitive effects into account. That longer term competition is said to affect the Airwave Network because it is going to be replaced by ESN, and is therefore under competitive pressure to improve its offering and to try and delay the transfer of customers to ESN.

65. Motorola's submission is that the prices fixed in the bilateral negotiations were also subject to those same competitive constraints. That is because they have an

effect (as the CMA has found for the purposes of market definition) even whilst ESN is under development and before it is operational (and therefore at the time that the bilateral negotiations took place).

(1) Turning first to the 2016 Negotiations, these followed swiftly on from the ESN procurement, and in circumstances where the Home Office anticipated that ESN would replace the Airwave Network at the end of 2019 or in 2020. As regards the 2016 Negotiations it was anticipated that pursuant to that tender, ESN would replace the Airwave Network by the end of 2019. Motorola submitted that the 2016 Negotiations were concerned with matters of price, and referred us to Decision §4.113(b) which identified the Home Office as having secured a significant concession in terms of a unilateral option to extend the Airwave Network services for a period beyond 2019 at agreed pricing, and §4.113(d) which referred to the settlement of litigation relating to benchmarking and variation of price equating to payments to be made to the Home Office of [✂] over a three year period. At this time, consistent with the CMA's findings on market definition, there would be competition between the Airwave Network and ESN. ASL therefore had an incentive to maintain or improve aspects of its offering with a view to delaying customers transferring to ESN. When considering the parties' respective bargaining power at the time of the 2016 Negotiations, the CMA failed to have regard to the fact that there was competition between the Airwave Network and ESN, and therefore that the ESN procurement process provided a competitive constraint on ASL in terms of its prices at the time of the 2016 Negotiations.

(2) The 2017 Negotiations took place in the context of a three month further delay to ESN and the need for a "few months" extension to the Airwave Network. Motorola referred to §2.100 of the Decision which refers to the fact that these negotiations provided for a one-off discount of [✂] to apply in 2020. Again, and for the same reasons, these negotiations must have taken place at a time when there was competition between the Airwave Network and ESN.

(3) As regards the 2018 Negotiations, by this stage it was envisaged that ESN would complete mobilisation by 30 November 2020. The 2018 Negotiations resulted in an extension of the period of operation of the Airwave Network to 31 December 2022, and also involved a [✂] discount to core service charges and continuation of the discount given in 2016 (amounting to [✂]). Again, Motorola points to the fact that, for the purposes of market definition, the CMA found that there was sufficient competition between ESN and the Airwave Network for them to be in the same market, and therefore Motorola was subject to the same incentives to maintain or improve its offering when the negotiations took place. Motorola submits that this aspect of competition is also not addressed or taken into account in the Decision.

(4) The 2021 Negotiations did not result in any agreement. The result is that the prices set in the PFI Agreement, as modified in the 2016, 2017 and 2018 Negotiations, continue to apply. At the time each of those negotiations took place, Motorola was constrained in its pricing by the competition for the market that existed by virtue of the 2014/2015 ESN tender.

66. Each of these discussions, Motorola says, took place in the context where it was thought ESN would soon be implemented, and in circumstances where, according to the Decision, the Airwave Network would be incentivised to maintain or improve aspects of its offering so as to delay customers moving. It was in that competitive context that the current prevailing prices were negotiated. The analysis in the Decision wholly fails to recognise the competitive constraints imposed on the prevailing current price which were (when fixed) constrained by the competitive effects of 2014/2015 tender process, being a process that the CMA considered to be consistent with a well-functioning market.

67. In summary, therefore, Motorola's case is that, for the purpose of market definition, the CMA found that, following the 2014/2015 tender, there was competition between ESN and the Airwave Network, and that competition existed even whilst ESN was only in development. It is therefore not the case

that competition only arose after ESN was deployed and available. However, when it comes to the CMA's competitive assessment, the Decision failed to have regard to this material and important aspect of competition. Instead, the Decision finds that ASL enjoyed a virtually unconstrained monopoly position. This, it is said, amounts to a failure to take into account a material fact, and gives rise to an inconsistency between the CMA's competitive assessment and the CMA's findings in relation to market definition. Further, the failure to take into account that competitive constraint cannot be said to be *de minimis* because it underpins the CMA's market definition.

(2) The CMA's position

68. The CMA submitted that Motorola's challenge based on the competitive assessment should be dismissed for two essentially procedural reasons and because it is, as a matter of substance, flawed:

(1) First, the CMA says that the NOA did not disclose a valid basis for challenge.

(2) Secondly, Motorola's case as advanced in its skeleton argument (i.e. that the CMA failed to take into account competition between the Airwave Network and ESN) should be dismissed because it is a new argument which (a) is not pleaded in the NOA; and (b) is contrary to Motorola's prior insistence in the course of the market investigation that there was no competition between the Airwave Network and ESN; and

(3) Thirdly, in any event the CMA carefully evaluated and took proper account of the competitive effect identified by Motorola.

69. The first point is dependent on the resolution of the second. If the argument now pursued is not "new", and Motorola is not prevented from pursuing it then the NOA did give rise to a valid basis for challenge. For reasons which will appear in Section F below, we have determined that (1) the basis for Motorola's Ground 1 challenge, as developed in submissions before us, was sufficiently pleaded in its NOA, and (2) the fact that Motorola took the contrary position as

regards whether or not ESN was in competition with the Airwave Network does not prevent it from pursuing its argument now. It follows that the NOA did disclose a valid basis for the judicial review challenge, and the CMA's argument that it did not is dismissed.

70. We turn first to the substance of the CMA's response to Motorola's challenge on Ground 1, and deal first with market definition and the significance attached by Motorola to the finding that the Airwave Network and ESN were in the same market. The CMA referred to the Competition Commission's *Guidelines for Market Investigations: Their role, procedures, assessment and remedies* (April 2013) at §§132 to 133. There is no suggestion that these guidelines do not apply. These paragraphs stress that market definition is a useful tool, but not an end in itself: "The boundaries of the market do not determine the outcome of the CC's competitive assessment of a market in any mechanistic way. The Competitive Assessment will take into account any relevant constraints from outside the market, segmentation within it, or other ways in which some constraints are more important than others". The *CMA's Merger Assessment Guidelines* (18 March 2021) at §9.4 are to similar effect, albeit in a different context. The CMA submitted that an assessment is required of all of the competitive constraints, and it is not right to suggest that because something is in the same market as something else the market participants will always, to the same extent, act as competitive constraints to each other.

71. The CMA also submitted that Motorola's challenge to the Decision is based on a fine, textual analysis of the Decision of the kind that this Tribunal has considered to be impermissible, and requires an isolated reading of selected sentences, divorced from their proper context (see the *Tesco* decision, referred to in paragraph 34 above). In particular, Motorola's approach does not view the bilateral negotiations in their proper context, or take into account whether there was any scope for ESN to act as a competitive constraint to the Airwave Network, given that ESN was not an available alternative as it was not ready.

72. The CMA relied upon a number of the same passages in the Decision as Motorola, but placed a different emphasis on them. The CMA also drew our

attention to other passages in the Decision on which it relied which add further detail and context to the CMA's approach. In particular:

(1) As regards the original tender resulting in the PFI Agreement, the CMA submitted that this served at most to constrain prices for the period it was intended to cover: that is to say up until 2019. The CMA drew our attention to the finding summarised at §14 of the Decision (paragraph 54(1) above) that the *process* for the procurement of the PFI Agreement (i.e. tendering) was of the type "that we might expect to provide competition for the market". We were also referred to the finding summarised at §15 of the Decision (paragraph 54(2) above) which stated that "the relevant provisions were therefore generally the type of terms we might expect to find in a well-functioning market up to 2019" but not beyond.

(2) The Decision refers to the fact that, by 1997, BT was the sole bidder, and to other findings in the Decision which noted a review conducted by the National Audit Office which reported "the procurement process was subject only to limited competition" (Decision, §3.34).

(3) For the purposes of assessing the *current* state of competition, the CMA considered that in any event: "competition in the tender for the original PFI Agreement" was of "limited relevance", in circumstances where the PFI Agreement was only set to apply – and could therefore only constrain prices - for a fixed period that has now ended (Decision, §3.36).

(4) The CMA also concluded that, while "the original tender process is relevant context", current competitive conditions are determined "to a larger degree by the relative bargaining power of the negotiating parties" in bilateral negotiations on how to proceed following the PFI Agreement's expiry (Decision, §3.41).

73. As regards ESN, and the CMA's findings in relation to market definition:

(1) the CMA submitted that while §3.75 of the Decision (set out at paragraph 64(3) above) found that there was the potential for competitive interactions between the Airwave Network and ESN, there was no finding in the Decision that ESN does in fact operate as a competitive constraint in any particular circumstance. We were also referred to §3.76 in which the CMA considered the distinction drawn between static (short term) and dynamic (longer term) competition, the CMA's consideration of demand-side substitutability and its finding that competition between the Airwave Network and ESN fell into the longer term (§§3.77 to 3.80); and

(2) the CMA emphasised the finding in §3.81 that:

> "In assessing the demand-side substitutability between the Airwave Network and ESN, we have thus far focused on longer-term substitutability. We note that in the short run, and in particular prior to the development of ESN, there is no scope for demand-side substitution between the Airwave Network and ESN: a customer that is negotiating with Airwave Solutions cannot realistically seek to get a better deal by threatening to walk away from negotiations and switch to ESN because ESN is unavailable now as an option. Accordingly, while market definition would often take account of short run competition, in this case our focus on longer-term substitutability is appropriate. We take the lack of short-run substitutability into account in our competitive assessment where it is relevant".

74. When it comes to the competitive assessment, the CMA submitted that there is no requirement for the Decision to refer to long-term substitutability in relation to each analysis of the subsequent bilateral negotiations. A Competitive Assessment looks at what the competitive constraints are in a particular situation. The CMA argues that looking at longer term competitive constraints really means whether ESN exerts a relevant constraint, and that is what the Competitive Assessment actually does.

75. The CMA submits that it is necessary to consider each set of negotiations in context: what the negotiations were about, and whether ESN did operate as a competitive constraint in respect of price in those particular negotiations. As to this:

(1) As regards the 2016 Negotiations:

(i) the CMA argues that they related to the approval of the acquisition of the Airwave Network from Macquarie, and were not about price. The only aspect of those discussions which was "financial" related to the settlement of ongoing litigation which equated to payments to the Home Office of [✂] over three years. There is no proper basis for criticising any failure on the CMA's part to consider the way in which ESN was a competitive constraint on price, because the 2016 Negotiations were not about price.

(ii) In any event, the CMA maintains that the CMA did look at whether ESN was a competitive constraint in those negotiations. The CMA relies upon §4.117 of the Decision which records the finding that: "the Home Office: (i) had no viable options in the 2016 negotiations other than to consent to Motorola's acquisition of Airwave Solutions; and (ii) had limited bargaining power." The Decision (at §4.118 to 4.126) provides five reasons why the 2016 Negotiations were not reflective of a competitive market. The first is that the Home Office was not able to walk away from the Airwave Network because it was a critical service and was needed until ESN was ready.

(2) As regards the 2017 Negotiations, they resulted in a short extension and a "very small" discount in price, and were incidental to the bigger picture. They did not form part of the findings of AEC and are not referred to in Section 4 of the Decision. It is not suggested that these negotiations establish that there could be no AEC, and nor, given that it was only a small extension, could it be.

(3) As regards the 2018 and 2021 Negotiations, these were about price. The conclusion that the CMA reached as regards these negotiations was that:

> "4.140 … in the 2018 and 2021 negotiations the Home Office lacked the options we might expect it to have in a well-functioning market and did not have countervailing buyer power. Airwave Solutions / Motorola had market power that enabled the setting of a price that generates profits at a supernormal level. This is because the Home Office requires the provision

of the Airwave Network for critical emergency services communications until ESN (or another replacement network) is ready to replace it. Airwave Solutions / Motorola continues to own the Airwave Network and there is no alternative available to the Home Office. The transfer of the Airwave Network assets to the Home Office was not a credible option. The price that applied in the original period of the PFI Agreement between 2000 and 2019 might have been constrained by competition (at least in principle), but that is not the case after that period."

(4) The CMA submits that this reflects an assessment of whether or not, at the time of those negotiations, ESN acted as a competitive constraint, and the Decision reaches the conclusion that it did not. We were also referred to the paragraphs in the Decision that underpin that conclusion, and in particular the following:

"4.150 We have assessed the contemporaneous and related evidence about the negotiations in 2018 and 2021. Our assessment is that it shows that the Home Office lacked outside options and buyer power and that market power lay with Airwave Solutions / Motorola. We note that, as we describe below, this is a position Motorola itself recognised in its internal business documents, commenting in particular that:

... There is no alternative technology currently available to Airwave's UK customers and Airwave has no direct competitors ...

[and]

Pricing [….] will be subject to further negotiation. However, this is not expected to materially affect the profitability of the Airwave contract beyond 2022. Airwave customers do not currently have an alternative option."

…

"4.175 In the 2018 and 2021 negotiations, the Home Office, in our assessment, lacked credible alternative options and did not have countervailing buyer power, notwithstanding Motorola's submissions to that effect. Rather, Airwave Solutions / Motorola had market power. There are several relevant factors. The first set demonstrate that the Home Office had (and has) a continued reliance on the Airwave Network and Airwave Solutions / Motorola. The second set demonstrate that there was (and is) is a lack of constraint or pressure on the price that would result in it being set at the competitive level (and enabling it to be maintained substantially above that level)."

…

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

(5) We were also referred to the two following factors recorded in the Decision as demonstrating a lack of competitive constraint on price:

> "4.181 The first of those factors derives from the fact the Home Office had (and still has) to negotiate with the incumbent monopolist which operates critical infrastructure on whose provision it is dependent.
>
> 4.182 The second factor derives from the critical nature of the services which meant (and means) the Home Office cannot risk (and is inhibited from the risk of) disruption or degradation to their continuous supply."

(6) As regards the 2021 Negotiations, these again were about price, but there was no agreement on a price reduction, and the service effectively rolled over at the existing price. Again, the Decision records that this is consistent with the Home Office lacking alternative options and buyer power.

76. In relation to all of the bilateral negotiations relied upon, the CMA submits that the Decision did, therefore, consider whether or not ESN operates as a competitive constraint on price, and concluded that it did not. The CMA submits that, once the negotiations and the Decision's findings in relation to them, are seen in their proper context, it can be seen that a proper substantive assessment of competitive constraints was undertaken, and Motorola's challenge is excessively formalistic.

(3) Analysis

77. We should reiterate at the outset the points made in paragraph 52 above: the Decision is a substantial piece of work supported by almost 400 pages of appendices. In relation to each finding, the Decision sets out or identifies the evidence that underpins its conclusions. In our view, Motorola's challenge is flawed. We agree with the CMA that it requires a detailed analysis of isolated parts of the Decision, without paying sufficient regard to the Decision as a whole.

78. It also requires the CMA's findings - both in relation to the PFI Agreement and the ESN procurement process - to carry more weight than they can properly bear, once seen in their true and full context.

(1) As regards the submission that the Decision finds that the PFI Agreement is consistent with a well-functioning market, it is important to note the limitations to that finding. First, §14 makes clear that it is the tender *process* which might be expected to provide competition for the market. Secondly, the relevant provisions are generally, but not in all respects, consistent with the type of terms that might be expected from a competitive tender process. Thirdly, the provisions were not all necessarily effective. One obvious example of where the Decision finds they were not effective is the asset transfer provisions at the end of the term. Fourthly, the provisions were the type of terms that might be expected in a well-functioning market only for a fixed term (in this case to 2019) during which the supplier might expect to recoup its investment. The findings are therefore far more limited in scope and effect than Motorola suggests.

(2) As regards the 2014/2015 ESN procurement exercise, the Decision finds only that there was "potential" for competitive interactions between ESN and the Airwave Network, and that the prospect of ESN being developed as a replacement was "in principle capable of" affecting the incentives of Motorola to maintain or improve aspects of its offering. This is not a finding that ESN did in fact act as a competitive constraint whilst under development, or that it currently does so.

79. The Decision is clear that in Section 3 it is considering market definition. For that purpose, it is the longer-term dynamic that is relevant on the facts of this case. In this regard, §3.79 refers to the fact that ESN is being developed to meet the same fundamental demand-side need, and that the Airwave Network and ESN are the only two solutions that exist or are in development to meet that need. It also refers to the fact that ESN is ultimately to replace the Airwave Network when it is developed, and that in this respect ESN represents the only significant long-term competitive threat and the Airwave Network will ultimately lose 100% of its customer base. It is in this context that the Decision finds that "any efforts and investments made by ESN's key suppliers to develop ESN can be interpreted as efforts towards attracting customers away from Airwave Solutions and replacing it as a solution for Airwave Solutions'

customers". The Decision makes clear that, for the purposes of market definition, the focus is on long-term substitutability. This is precisely because there is no prospect of short-term substitutability before ESN is ready and operational. §3.81 makes clear that the position in the short run (and whilst ESN is under development) is that "there is no scope for demand-side substitution between the Airwave Network and ESN … because ESN is unavailable now as an option".

80. It seems to us that the assumption that underpins Motorola's submission is that because the Decision found that competitive constraints can, in principle, operate whilst ESN is under development and before it is operational, there is a finding in the context of the consideration of market definition that they did, in fact, do so and (it follows) that Motorola was in fact incentivised to improve its offering in particular in terms of price. We do not accept that there is any finding to that effect. We agree with the CMA that the question of whether or not ESN did, in fact, act as a competitive constraint in the negotiations between the Home Office and Motorola is what is then considered in Section 4: the competitive assessment.

81. As regards the 2016 Negotiations, the Decision considered the concessions that Motorola submitted to us were secured by the Home Office in the course of the 2016 Negotiations as regards price (§4.113) and assessed the parties' respective bargaining positions in those negotiations (§4.115). The CMA correctly identified the issue as being "whether the Home Office had the options, and the competitive constraints applied, that we would expect in a well-functioning market" (§4.115, emphasis added) and concluded that they did not. That finding was made on the basis of a detailed review of documents provided by both Motorola and the Home Office relating to the 2016 Negotiations (§4.116 and Appendix E, Part 3). §4.117 to 4.126 set out the CMA's conclusion that – at that time – the Home Office had no viable option other than to consent to Motorola's acquisition of ASL; that the Home Office had limited bargaining power and that the outcome was not one that was reflective of a competitive market. One reason for this was the fact that the Home Office was unable to walk away from the Airwave Network because it was a critical service and ESN was not ready. Whether or not the existence of ESN in fact provided any competitive constraint

in terms of incentivising the Airwave Network in terms of its pricing and offering at the time of the 2016 Negotiations is the question that was being considered by the CMA, and the CMA concluded that it did not.

82. We accept the CMA's submission that the 2017 Negotiations were incidental to the bigger picture and do not understand it to be suggested that these affect the conclusions we would otherwise draw based on the 2016, 2018 and 2021 Negotiations.

83. As regards the 2018 and 2021 Negotiations, these occurred in circumstances when it was known that ESN was not ready to replace the Airwave Network. The Decision makes certain observations about key outcomes from these negotiations, one of which is that "whilst there were some modifications, the resulting terms (or those that apply in default of agreement) are substantially based on the existing terms of the PFI Agreement that were set to cover the period between 2000 and 2019) – i.e. a price that reflected the cost of setting up an entirely new network" (§4.142). The Decision finds that the Home Office lacked, in the 2018 Negotiations, the options it might be expected to have in a well-functioning market. Again, the reason given is that the Home Office requires the provision of the service until ESN is ready to replace it. Further, Motorola continues to own the network, and the transfer of the assets to the Home Office (so that it could, for example, retender the provision of the service) is not a credible option, principally because the Home Office wants to replace the Airwave network with ESN. In reaching that conclusion, the CMA conducted a detailed review of the contemporaneous evidence relating to those negotiations (§4.150). In particular, we note the CMA's reference to Motorola's comment that, in the absence of any other alternative (i.e. ESN), the profitability of the Airwave Network would not be affected. Again, the CMA considered, in its competitive assessment, the issue of whether or not the existence of ESN in fact provided any competitive constraint in terms of incentivising the Airwave Network to improve its pricing and offering at the time of the 2018 Negotiations. The CMA concluded that it did not.

84. Motorola's challenge is therefore in our view, fundamentally flawed and proceeds on the basis of a premise as to the findings made in the context of

market definition which, in our view, is not supported by a full and proper reading of the Decision. There has, therefore, been no failure on the part of the CMA to take into account a relevant consideration, and nor is there any inconsistency as between the findings made by the CMA in relation to market definition, and those made in its competitive assessment.

85. We also note that the CMA is entitled to reach its Decision on the evidence before it. In that regard, we note that it was not suggested by Motorola that there was any evidence to the effect that Motorola was in fact influenced in its pricing by ESN, and (it follows) it was not submitted that the CMA had failed to take into account any relevant evidence or submissions from Motorola on the point. As Mr Hoskins made clear in submissions, the argument arises solely on the basis of the CMA's finding in relation to market definition. For the reasons we have explained, we consider Motorola's approach to that finding to be misconceived.

F. GROUND 1: PROCEDURAL POINTS

86. The CMA raised two procedural points:

(1) First, that the argument now made on Ground 1 - that ESN acted as a competitive constraint on the 2016 (and subsequent) Negotiations which was a relative consideration which was ignored, and inconsistent with the finding on market definition – was not raised in the NOA.

(2) Secondly, that the argument now made on Ground 1 is based on the assertion that ESN was in competition with the Airwave Network, which is a proposition that is inconsistent with the stance taken by Motorola in the course of the market investigation, and therefore Motorola is not entitled to take the point.

87. As to the first, we note that §11(1) of the NOA specifically asserts that in the market as defined by the CMA there has been competition for the market, and relies upon both the 2000 tender process and the ESN procurement exercise. Motorola then asserts that "[t]here has therefore been competition for the market

in respect of the entirety of the period considered by the market investigation", consistent with the CMA's expectations of a well-functioning market. The CMA submitted that this must be seen in the context of the substance of Motorola's case. That is summarised at §§73 and 74 of the NOA in the following terms:

> "73. The question for the CMA was whether competition in the market for the supply of communications network services for public safety and ancillary services network services was prevented, restricted or distorted. The CMA decided to treat the Home Office's limited bargaining power after 2016 as determinative of that question, while giving little or no weight to what the Home Office had freely decided and agreed to in 2000 and 2014-2016 under circumstances where there was no prevention, restriction, or distortion of competition.
>
> 74. In fact, there has been competition for the market in respect of the entirety of the period considered by the market investigation. This is entirely consistent with the CMA's expectations as to what constitutes a "well-functioning market". The limited bargaining power of both parties after 2016 arose necessarily from the fact that the Home Office had already made its choices in a competitive process for ESN procurement in 2014-2015."

88. The CMA submits that Motorola's case was really that there was limited bargaining power on both sides from 2016 onwards, but that did not matter: what matters is that there was competition for the market in 2014 to 2015. Now, however, the case is based on the (new) proposition that there was bargaining power in 2016 and in the later negotiations. Under CAT Rule 9(4)(d) Motorola was obliged to state the grounds for contesting the Decision in its NOA. Since it is not mentioned in the NOA it cannot permissibly form part of Motorola's case. The CMA accepted that it had not suffered any prejudice from the fact that the argument had been put differently, because it had been sufficiently clear from Motorola's skeleton.

89. Motorola's position is that the argument, as put before us, supports the existing argument pleaded in §11.1. It has also been developed in response to the CMA's argument raised in its Defence that the 2014/2015 procurement exercise only constrains prices once the ESN becomes operational.

90. In our view, the argument made by Mr Hoskins is adequately adverted to in §11.1, and in §§73 and 74. We also note that at §66 of the NOA, Motorola made the argument that "the options available to the Home Office in 2014-2016

involved no restriction or distortion of competition. The Home Office's choices were made in the context of a competitive process (the procurement of ESN) in relation to which the CMA raises no concerns". At §72, Motorola asserts that "since the ESN procurement process in 2014-2015 was competitive and the current circumstances were foreseeable and foreseen by the parties in negotiating the 2016 PFI Framework amendments, the current position flows from a previous competitive process and unimpeachable contractual bargain".

91. It may be that what was meant by the general assertion that there has been competition for the market over the entire period was not entirely clear, and the point was not developed in the NOA (or, it is fair to say, in Motorola's Reply) by reference to the CMA's finding on market definition in quite the same way that it has been before us. However, the CMA identified that the issue as to whether or not the 2014/2015 procurement exercise could act as a constraint was in play, and it addressed the point in its Defence. Motorola has now explained in its skeleton argument and submissions how it is said the competitive constraint had effect even before ESN was operational, and why it says that conclusion must follow from the CMA's finding on market definition. Even if we were wrong to conclude the point appeared – if only in general terms - in the NOA, in light of the CMA's acceptance that it has not suffered prejudice, we would have been minded to grant permission to Motorola to amend its NOA.

92. As to the second procedural point, the CMA's argument (at §11 of its skeleton argument) is as follows:

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

93. The CMA referred us to §§3.102 to 3.103 of the PDR where the CMA rejected Motorola's argument that ESN was not in competition with the Airwave Network. The CMA submitted that this reflects the ultimate conclusion made in the Decision, and that it was open to Motorola to raise the argument that the Competitive Assessment was inconsistent with the market definition finding at

that stage: after receipt of the PDR. Motorola could, and should, have done so and it is not open to Motorola to raise it now.

94. We were referred to *R (Criminal Injuries Compensation Appeals Panel) v Shields* [2001] ELR 164, a case concerning a claim for judicial review of a decision refusing compensation for criminal injury. Compensation was refused because the level of *mens rea* in relation to the infliction of the injury was not established. An additional ground of argument to justify an award of compensation was raised on the application for judicial review, but had not been raised before the decision-maker. That was rejected at §26 on the basis that "[t]his was not a ground ever relied upon and it is not therefore open to the Applicant to rely upon it now". The CMA relies upon this to suggest that if Motorola had any issue about consistency between market definition and competitive assessment, it is a point that should have been made earlier.

95. We disagree. The CMA's argument would require Motorola either to anticipate that the CMA would make exactly the same finding in its Decision (notwithstanding any submissions that may be made in between those times), or to anticipate the possible permutations of findings that the CMA might ultimately make in its Decision and the possible ramifications of such findings (should they be made) and point these out to the CMA. It would also require Motorola to have spotted every possible inconsistency and draw them to the attention of the CMA before the Decision was even made. Further, the logical conclusion of the CMA's argument is that Motorola is bound by both (i) what the CMA did find, and (ii) the diametrically opposed position which the CMA rejected in its final Decision. We have no hesitation in rejecting the CMA's submission on this point.

96. Motorola is perfectly entitled to submit that, in light of the CMA's finding that ESN did act as a competitive constraint on the Airwave Network (a finding contrary to Motorola's submissions in the course of the market investigation) a failure by the CMA to take its own finding into account means that the Decision ought to be quashed.

G. GROUND 2: THE PROFITABILITY ANALYSIS

(1) The Decision

97. The CMA relies on a Profitability Analysis in reaching its conclusions on both the existence of an AEC and on its proposed remedy. The Profitability Analysis is set out in Section 6 of the Decision and is supported by four appendices (G to J) amounting to approximately 130 pages of complex modelling. In summary:

(1) The CMA undertook a Profitability Analysis to understand whether the levels of profitability in the market were consistent with the levels the CMA might expect in a competitive market and if not, the extent of potential consumer harm. The purpose of the assessment was to determine whether Motorola was generating supernormal profits: i.e. profits exceeding a market-based return on investment, and, if so, to quantify them. The market-based return was calculated as the Net Present Value ("NPV") of profits when the internal rate of return ("IRR") was set equal to the weighted average cost of capital ("WACC").

(2) The Decision identified four key conceptual issues that had been considered in undertaking the economic profitability assessment. Those included (1) the relevant time period for the analysis; and (2) the appropriate approach to valuing the assets employed by the business.

(3) In reaching a view on those issues the Decision records that:

> "6.15 …we have taken into account the specific characteristics of the Airwave Network and the context in which the network was originally procured. In particular:
>
> (a) As set out in detail in Section 2, the Airwave Network was originally procured under a fixed-term PFI Agreement, which was due to end in late 2019/early 2020. That agreement set revenues in real terms for the provision of the network over the whole of the approximately twenty-year fixed term. These revenues were indexed against RPI inflation and gave Airwave Solutions the opportunity to not only recover its expected investment in the network but also to make a projected (nominal, pre-tax) return of [✂] [15% to 20%], ie significantly above a standard cost of capital.

(b) Consistent with the fixed-term nature of the agreement, the PFI Agreement provided Airwave Solutions with significant protections in the case of early termination by the Home Office. Specifically, were the Home Office to exercise its right to terminate the contract, in addition to paying compensation for the direct costs arising as a consequence of early termination, the Home Office would need to pay a further cash amount, calculated with reference to the projected expenditure and projected revenues as set out in the financial model such that it would restore Airwave Solutions' IRR to the figure set out in that model, ie the [✂] [15% to 20%] referred to above. In addition, Airwave Solutions was to be compensated for any loss of 'Sharer' income resulting from early termination by the Home Office. We note that these provisions appear to have provided protection to Airwave Solutions against all loss of value associated with early termination of the contract except insofar as Airwave Solutions' costs had been above the expected level prior to termination.

(c) The risk that Airwave Solutions assumed under the PFI Agreement in return for this significant security was to manage the costs of building and operating the network to the agreed standards. If Airwave Solutions had managed to build and operate the network at a lower cost, it would have made higher returns than the [✂] [15% to 20%] set in the PFI Model, while higher costs would have resulted in lower returns for Airwave Solutions. As noted above, however, this [✂] [15% to 20%] was materially above a standard cost of capital for a business of this sort. We consider that this provided further downside protection to Airwave Solutions in that there was scope for its costs to be (materially) higher than expected and for it still, ex post, to make a return in line with its cost of capital.

(d) Following Motorola's acquisition of Airwave Solutions, Motorola and the Home Office came to an agreement to extend the life of the Airwave Network beyond the original fixed-term period, initially for what was contemplated could be a short period in case the delivery of the replacement ESN network was briefly delayed, then until 2022 and then subsequently until 2026 (and we now understand that the Airwave Network is likely to be required until 2029 and possibly longer).

6.16 These factors lead us to conclude that an economically meaningful assessment of the profitability of the Airwave Network should:

(a) be split around 2020, with a separate assessment of profitability for the period from 2001 to 2019 (PFI period), and for the period from 2020 onwards (post-PFI period). In our view, the PFI Agreement represented an economic 'bargain' between the Home Office and Airwave Solutions, wherein the latter was provided with significant, long-term certainty over revenues and downside protections in return for it assuming the costs (both capital and operating) and risks associated with building and operating the network for the period covered by the PFI Agreement; and

(b) reflect the balance of risks and rewards in each period. In this case, we consider that the economic logic of the PFI Agreement was that in the PFI period Airwave Solutions was provided with a reasonable opportunity to recoup the initial investments in the Airwave Network, with the various protections provided to Airwave Solutions as set out

above. Therefore, in any extension to that initial fixed-term period, it follows that those investments should not be remunerated again since such an outcome would result in customers paying twice for the same assets. In our view, that would not represent a reasonable benchmark for a well-functioning market. We consider in detail both the potential approaches to valuation of the assets and the evidence of their likely value under those approaches below and in Appendix I."

(4) Motorola made submissions at the PDR stage to the effect that it was artificial to split the time period. The Decision (at §6.54) records that the CMA had considered those submissions and found it appropriate to split the period in particular because:

"(a) … the PFI Agreement was for a fixed period, without provision for extension, and contained terms which sought to facilitate the transfer of network assets to the Home Office at the end of that period. In other words, the original procurement exercise and resulting PFI Agreement sought to put in place arrangements to cover the period from 2001 to 2019/20, where the price for that period was constrained by the competitive tendering process that led to those arrangements. In our assessment, that is distinct from the period from 2020 in which those arrangements were not set to apply and in which period we would, in a well-functioning market, expect the arrangements to be replaced with a competitively priced alternative.

(b) There are good reasons to conclude that conditions of competition are likely to have been different when the extension was negotiated than when the original PFI Agreement was negotiated due to, inter alia, the incumbency of the Airwave Network, that an asset transfer was not a credible option for the Home Office and the limited expected further time requirement for use of the Airwave Network given the development of ESN.

…

(d) the fact that Airwave Solutions made lower returns over the 2001 to 2019 period than it expected when it signed the PFI Agreement i) was primarily the result of it incurring higher costs in building and operating the network than it expected, which was the risk that Airwave Solutions assumed under the original PFI Agreement …, ii) does not mean that it is inappropriate to treat Airwave Solutions as having had a reasonable opportunity to recoup its initial investments in that period, and iii) does not provide a reason to assess the profitability of the network over the full 2001 to 2026/9 period, which would, in effect, set a profitability benchmark that allowed Airwave Solutions to make super-normal returns in the post-PFI period in order to compensate it for the lower returns that it made during the PFI period when it was already compensated for that risk via the terms (pricing and other) agreed for the PFI period."

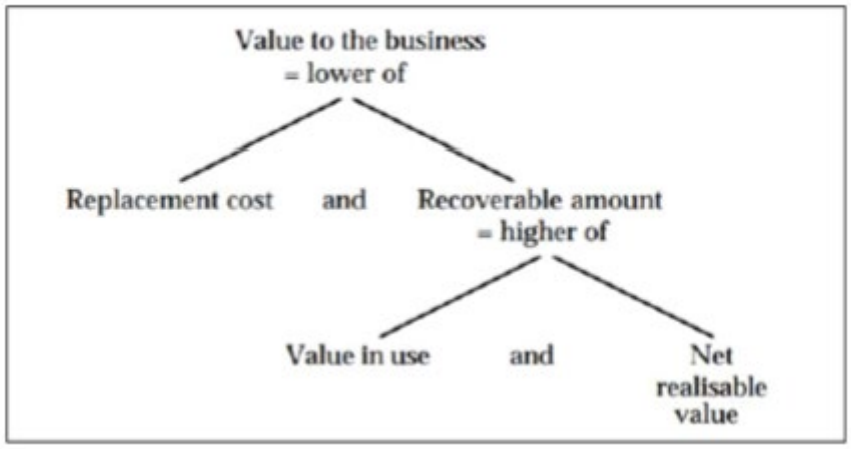
(5) The Decision also states that the CMA was "primarily interested in recent and current competitive conditions in the market, rather than

those which may have been present more than twenty years ago", and considered (Decision, §6.60) that:

> "a backward-looking profitability analysis … is very unlikely … to provide a good indicator of potential market power and the ability to extract supernormal profits at the time that the extension was agreed. Similarly, the profitability of the business over the whole 2001 to 2026/9 period would mix the picture from across the PFI and post-PFI periods and would risk masking the degree of profitability and market power enjoyed post-extension".

(6) In order to calculate the IRR of the Airwave Network for the period from 2020 to 2029, the CMA decided that it was necessary to arrive at a valuation of the Airwave Network assets in 2020. It decided that the assets should be recognised at their value-to-the-business ("VTB") at the start and end of the assessment periods. The CMA used a framework for establishing the VTB set out in Figure 6.1:

Figure 6.1: Establishing which valuation basis for an asset gives its value to the business



(7) On the CMA's approach, the VTB is equal to the lower of (1) the replacement cost and (2) the recoverable amount for the assets, where the recoverable amount was the higher of (a) the value in use, and (b) the net realisable value ("NRV"). The reason for adopting this approach (Decision, §6.66) is "based on [the CMA's] assessment that the sunk costs of the network, which had already been paid for by customers, should not influence pricing during an extension period that was not planned for. Put another way, 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".

98. As set out in Decision §§6.99-6.101, the CMA found that:

(1) The most reliable estimate of the replacement cost of the Airwave Network was likely to be reflected in a report prepared by Deloitte in 2016 ("the Deloitte Report"), rolled forward to reflect further investment between 2016 and 2019. This suggested an asset value of around [✂] million.

(2) Motorola estimated the NRV of ASL's assets to be around [✂] million.

(3) The value-in-use of ASL's assets in the extension period was zero for assets required to operate the Airwave Network during the original PFI period, but allowance should be made for investments made specifically in order to operate the network beyond the end of 2019. The value assigned to those further investments led to a value-in-use estimate of ASL's assets of between £50 and £80 million.

(4) Applying the approach identified in Decision Figure 6.1, the CMA's Profitability Analysis was based on the £80 million upper end of the CMA's estimate of the value-in-use of ASL's assets. This comprised (a) the depreciated replacement cost of investments made specifically to operate the Airwave Network beyond 2019; and (b) the residual alternative use value of ASL's assets.

99. During the investigation, Motorola's position was that the VTB should be calculated using the replacement value of the Airwave Network assets on a Modern Equivalent Asset ("MEA") basis: specifically the cost of a replacement TETRA network. Motorola commissioned a report by Analysys Mason, which calculated the MEA to be [✂]: a figure many times greater than that found by the CMA. The CMA rejected that approach.

100. Motorola submits that the Profitability Analysis is unlawful because it (i) is not consistent with the economic methodology that the Decision purported to prefer; (ii) fails to take account of a material consideration, namely what the price for public safety communications network services would be in a competitive market, and/or (iii) is internally inconsistent with other fundamental reasoning in the Decision.

(2) Alleged failure to apply the CMA's preferred methodology: the Byatt Report

(a) Motorola's position

101. The Decision refers to two economics reports concerning Profitability Analysis: (1) a report prepared for the Office of Fair Trading by Oxera in July 2003, entitled "Assessing profitability in competition policy analysis" ("the Oxera Report"), and (2) a 1986 report to HM Treasury by an Advisory Group, chaired by Dr Byatt, entitled "Accounting for Economic Costs and Changing Prices" ("the Byatt Report").

102. The Decision refers to Motorola's submissions on the Oxera Report, and on the Byatt Report at §§6.95-6.96:

> "6.95 In this context, we do not agree with Motorola's submissions on either the Oxera paper or the Byatt Report.[574] We recognise that we are departing from the recommendations of the former. As we explained in the PDR, the Oxera report constitutes general guidance which we agree is appropriate in most cases. However, we do not believe that it is appropriate in this case due to the very particular circumstances under which the Airwave Network was procured and remunerated during the PFI period, as set out above. In this case, the use of an MEAV/(new) replacement cost would create a benchmark that allowed a supplier to charge a captive customer again for assets which the supplier had already been given the opportunity to recoup (and which it did, in fact, recoup).
>
> 6.96 The key insight, it appears to us, from the quoted section of the Byatt Report is that assets should be valued at the level at which they would be traded in the absence of the existence of market power for any party which controls those assets. We note that this would be best approximated by the fair market value of the assets employed by the Airwave Network in their state as of the end of 2019 in the absence of the on-going contract with the Home Office, i.e. their value in an alternative use. The use of (an undepreciated) MEA as the benchmark in this case would seem to us to allow Motorola to capitalise on its incumbent position as owner of Airwave Solutions to realise a windfall gain

> on the value of its assets (the windfall being the difference between the alternative use value of the assets which it would have recovered in the absence of the contract extension and their replacement value). As set out above, we regard the approach set out in the Byatt Report as more appropriate given the circumstances of this case." (emphasis added)

103. The Oxera Report, at §1.15, suggests that for the assessment of excessively high profits, assets should be valued on an MEA basis. §4.12 explains that the MEA involves determining "the lowest cost of purchasing assets today that can deliver the same set of goods and services as the existing assets." The CMA acknowledged that they were departing from the recommendations made by Oxera and gave reasons for this. The CMA's approach in relation to Oxera is not a matter of complaint in this application for judicial review, and – subject to one point dealt with in paragraphs 123 to 135 below - is not a matter for this Tribunal.

104. The quoted sections of the Byatt Report which appear in "Section IV: Economic Costs and Current Costs" are those set out at fn 574 of the Decision, and are as follows:

> "51. In measuring the continuing costs of supply the relevant prices are those that would be paid for resources purchased now in the normal course of business in competitive markets. Such competitive market conditions may result from the actual existence of competing producers or, more generally, from the threat of competition from potential producers entering the market. Even where competitive markets do not exist, it is necessary to estimate the effects that competition would have in order to measure the value of the resources used.
>
> 52. …The assumption of free entry into a market defines the level of profit required to cover the cost of capital, since no-one will enter unless they expect to recover this cost.
>
> 53. The assumption of free entry also defines the value of existing assets to a business as equal to the amount a competitor would be prepared to pay for them in a competitive market…"

105. Motorola's argument on this point is, in short, that having identified that the approach set out in the Byatt Report was "more appropriate", the CMA then failed to apply it. In support of its submissions, Motorola referred us to various other paragraphs of the Byatt Report:

(1) Motorola referred to various passages from the summary and conclusions (Section 1) which emphasised that, whilst the terms of reference for the Byatt Report were specifically to consider accounting policies that might be developed to apply to nationalised industries, "the accounting principles advocated would also be applicable in the private sector or elsewhere in the public sector" (§1). These included paragraphs that referred to the fact that: nationalised industries tend to be capital intensive, and have much longer asset lives than those in the private sector (§2); that in many public utilities there is no competitive market in the product (§3); that "[p]rice makers need rules for fixing prices if they are not to exploit their monopoly or act as a drain on public resources" and should "set prices to cover the continuing costs of supply" or "economic costs" (§4); that "[e]conomic or continuing costs are the costs of resources used at the price they would be traded at in a highly competitive market, where entry to and exit from the market was easy. …In effect nationalised industries are required to behave as if they operated in markets where competitive pressures bring returns on capital into line with those in the private sector" (§5); and "…The overall principle is that assets should be included in the balance sheet at their value to the business. …" (§10).

(2) In particular, Motorola relied on §11 that states that: "The value of assets to a business means what potential competitors would find it worth paying for them, even if the competition is hypothetical. This will be the net replacement cost of a Modern Equivalent Asset if the asset would be worth replacing, or the recoverable amount if it would not." Motorola maintains that the emergency network is not only "worth replacing", it is essential that it is replaced.

(3) Motorola also referred to Section II: Objectives and General Approach of the Byatt Report (§§30; 31 and 36). In particular, we note that §31 stresses the importance that accounts should show the cost of carrying out the business, and the returns made on capital employed, and that the former are revealed not only by recording what was paid for inputs but by showing the current value of the resources used. §36 highlights that

the interest of the public in nationalised industries is twofold: first as an investor in ensuring an adequate return on capital resources is achieved; and secondly as consumers in ensuring that the return on capital is not excessive, in particular in the case of natural monopolies.

(4) Motorola referred to the following passages from Section V: Asset Valuation in Current Cost Accounting:

(i) "In principle, the CCA valuation of the tangible assets to a business is based on what a competitor would be prepared to pay for them in a fully competitive market, ie the cost of an asset of equivalent productive capability – a Modern Equivalent Asset (MEA) – if the asset would be worth replacing or the recoverable amount if it would not be." (Byatt Report, §5)

(ii) In relation to assets worth replacing: "The gross Modern Equivalent Asset value is what it would cost to replace an old asset with a technically up to date new one with the same service capability, allowing for any differences both in the quality of output and in operating costs. The net MEA value is the depreciated value taking into account the remaining service potential of an old asset compared with the new one. For replacement cost valuation cost to be appropriate it is not necessary to expect that the asset will actually be replaced …." (Byatt Report, §58)

106. Motorola submits that:

(1) the Byatt Report set out a methodology designed to value assets owned by companies, including monopolies, so that they could not obtain an excessive return on those assets;

(2) the MEA methodology set out in the Byatt Report is based on what a competitor would be prepared to pay for the assets in a fully competitive market;

(3) the nature of the relevant competitive market as found by the CMA is the market for the supply of public safety communications network services;

(4) to be consistent with the Byatt Report, the CMA should have assessed the VTB of the assets employed by the Airwave Network as of the end of 2019 by reference to the amount that a competitor would be prepared to pay for them in a competitive market for the supply of public safety communications network services;

(5) that is what the CMA expressly did not do. The CMA failed to apply that approach because it considered (at §6.96) it was appropriate to assess "the fair market value of the assets employed by the Airwave Network in their state as of the end of 2019 in the absence of the on-going contract with the Home Office, i.e. their value in an alternative use". (Motorola emphasis added). In other words, the CMA assessed the VTB on the basis that the assets were used "other than for the supply of public safety communications network services";

(6) on this basis the CMA concluded that the value to be assigned to ASL's assets in relation to the period of extension was "zero".

107. Motorola submits that the CMA therefore failed to apply the methodology which it considered to be appropriate, i.e. the Byatt Report methodology. The nub of Motorola's complaint is that the Byatt Report set out a methodology based on an MEA approach, but that the CMA failed to apply it when calculating the opening value of the Airwave Network assets for the purposes of the Profitability Analysis from 2020 to 2029. Motorola accepts that the CMA was not obliged to follow the Byatt Report, but submits that, having found that it was the appropriate approach and having chosen to follow it, the CMA was obliged to do so. The CMA's failure to do so amounts to an error of law.

(b) The CMA's position

108. The CMA's position is that the reference to the Byatt Report must be seen in context. The Decision considers what a well-functioning market might be:

> "4.29 … a well-functioning market might be one where:
>
> (a) at the end of the original period of the PFI Agreement, the Home Office would be able to (re)tender, or credibly threaten to (re)tender, for the

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

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

109. In neither scenario would competitors be required to build a replacement TETRA network for the extension period, so as to justify modelling on the basis of a willing purchaser of the existing Airwave Network at a value calculated on an MEA basis rather than the recoverable amount, being the approach adopted by the CMA.

110. Motorola had, in the course of the PDR stage, made submissions in response to the CMA's approach to valuing assets. The Decision at §§6.84-6.96 summarises those submissions, and sets out the CMA's explanation as to why it took the approach that it did. The CMA set the context for the paragraphs relied upon by Motorola in relation to the Oxera and Byatt Reports. In particular:

(1) "6.84 … In effect, Motorola submits that: (a) The 'competitive price' (as the benchmark against which we should assess the profitability of the Airwave Network from 2020 onwards) is that which would be sufficient to incentivise a new entrant with a new network into the market to provide these services for the limited remaining period over which the Home Office requires them."

(2) "6.85 … For the reasons set out in our PDR and considered further below, we do not agree that such a price (ie that referred to in 6.84(a)) represents the outcome of a well-functioning market in the particular circumstances of the Airwave Network since it implies that customers should have both guaranteed revenues to cover the original risks associated with investing in the network, including a 'hurdle rate' over and above a reasonable cost of capital, and then pay again (effectively twice) for the use of the LMR assets employed by Airwave Solutions

simply because the life of the network was extended beyond that originally envisaged."

(3) "6.87 The characteristics of LMR networks – in particular, the large, sunk costs associated with the development of such networks – are such that there is likely to be a single supplier and one or a small number of purchasers (who may group together). We would not expect to see LMR networks being developed speculatively but rather the main purchaser(s) effectively commissioning a supplier to develop and operate a network."

(4) "6.88 In return, the purchaser would provide a high level of security to the supplier in terms of demand/remuneration for the services provided. …"

(5) "6.89 For a market with these characteristics to work well, we would expect to see periodic tendering, ie competition for the market, for fixed periods, with the purchaser able to effectively re-tender at the end of one fixed period for provision in the next fixed period. For such re-tendering to be effective, the purchaser should not face material barriers to switching supplier, such as risks or uncertainty about the continuity of supply and/or the need to incur high switching costs. As set out in section 4, we consider that Airwave Solutions' continued ownership of the network assets and the uncertainty associated with the asset transfer provisions contribute to such barriers to switching."

The CMA submits that this is important, because in a well-functioning market the features that contribute to the AEC are taken out, and the assumption is that there are no barriers to switching.

(6) "6.90 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."

(7) "6.91 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, its (efficient) operating expenses, and a reasonable return on its capital, taking into account the (much reduced) risks assumed by the supplier over the extension period. This result could be achieved via different mechanisms, including, for example the 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."

(8) §§6.92 and 6.93 note that the well-functioning market posited by the CMA is not a fictitious scenario, but a plausible one in light of the contractual provisions and expectations (including those of Motorola) at the time of the original PFI Agreement, and the original PFI model.

(9) §6.94 then sets out the basis on which it is reasonable to assume that Motorola should not recover any further value for the original assets after the end of the PFI period.

111. As regards the key passages at §§6.95 and 6.96 which then follow and are relied upon by Motorola, the CMA submitted that the Decision does not prefer a methodology: it alighted on a "key insight" in the Byatt Report, and that the approach taken in the Decision was consistent with that "key insight".

112. The previous paragraphs (summarised above) set the "context" for what followed in §§6.95 and 6.96. In particular, as regards the CMA's reference to the Byatt Report, we were told that Motorola had made submissions following the CMA's publication of its "profitability working paper" in response to the CMA's reliance on the paragraphs from the Byatt Report that are quoted in fn

574. Those submissions were to the effect that the amount a competitor would be prepared to pay in a free entry scenario is equivalent to the investment a competitor would make in an alternative, new network (Decision, §6.73). It was this submission, said by Motorola to be based on the Byatt Report, that the CMA disagreed with, and this is what is reflected in §6.95 and 6.96 of the Decision.

113. The CMA identified what it considered to be the key insight from the Byatt Report, which is the need to value assets at the level they would be traded in the absence of the existence of market power. That is what the CMA takes from the Byatt Report: nothing more, and nothing less. The CMA submits that that is what the Decision seeks to do – by valuing the assets in the absence of the ongoing contract with the Home Office. The Decision records its view that the (undepreciated) MEA used by Motorola is inappropriate. The value of the assets would rationally be zero in the absence of the ongoing PFI Agreement because, for example, the assets would (or ought to have been) transferred to the Home Office at the end of the contract.

114. The CMA submits that the only passages in the Byatt Report referred to in the Decision are those identified in fn 574. Motorola has, however, gone further and referred to other passages it suggests are relevant on the basis that as the CMA thought it was appropriate to follow the Byatt Report, the CMA ought to have done so. That, Motorola suggests, would entail applying the net MEA replacement cost because not only is the Airwave Network worth replacing, it is essential that it is replaced.

115. The CMA submits, relying on *Plantagenet Alliance Ltd v Secretary of State for Justice* [2014] EWHC 1662 (Admin) at [117], that a public body is not required to follow non-statutory guidance it has not promised it would follow or represented itself as following, let alone parts of a report that are not referred to or endorsed in a decision.

116. The CMA says that even if it could be said that it ought to have followed the Byatt Report, contrary to what Motorola suggests, it does not mandate a net MEA value. That is because §11 of the Byatt Report provides that the VTB is "the net replacement cost of the [MEA] if the asset would be worth replacing or

the recoverable amount if it would not" (emphasis added). The CMA's position is that in a well-functioning market the asset would not be replaced with a new network at the start of an extension period to the original agreement. In a well-functioning market, for example, the assets would transfer to the Home Office at the end of the original period and it would be able to re-tender the provision of the service for the extension period, or because the contract would provide for a reduction in price for the extension period, or because ESN would have been available and would have replaced the Airwave Network.

117. The correct approach to the valuation of the assets depends on the circumstances of the particular case (§40, Byatt Report). The Byatt Report was not concerned with PFI agreements, and it is that difference that was taken into account by the CMA in its assessment of the well-functioning market. The approach the CMA adopted in the Decision is to use a measure of the recoverable amount; such an approach is not inconsistent with the Byatt Report.

118. In other words, it is possible to follow the Byatt Report whilst adapting it to the specific context of PFI agreements, which is what the CMA has done by identifying the key insight and then applying it in the context where a PFI agreement is in place. The CMA did not endorse the entire methodology in the Byatt Report. It endorsed the key insight identified and the CMA's approach was consistent with that key insight. But even viewing the Byatt Report as a whole, there is no irrational inconsistency between its methodology and the approach taken by the CMA, bearing in mind the particular circumstances of the PFI Agreement.

(c) Analysis

119. In our view the CMA's Profitability Analysis is exactly the sort of exercise that attracts a margin of appreciation, and in relation to which we should show particular restraint in "second-guessing" the decisions made by an expert and experienced decision maker. It is the CMA that has been given the task of carrying out the statutory functions under sections 134 and 138 of the Act: not us. We accept the CMA's submission that it is not required to follow non-

statutory guidance where it has not promised or represented it will do so, let alone parts of a report that are not referred to or endorsed in a decision.

120. In our view, reading the Decision as a whole, the CMA did not promise or represent that it would follow the Byatt Report. As §6.95 makes clear, the CMA did not consider the use of an MEA (new) replacement cost to be appropriate. If and to the extent that the Byatt Report suggested that such an approach was appropriate then the Decision makes clear that the CMA did not intend to take that route and would not follow it. We agree with the CMA that the point that is taken from the Byatt Report is limited to the key insight that is highlighted: in other words, that assets should be valued at the level at which they would be traded in the absence of the existence of market power enjoyed by any party who controls the assets. The CMA then explains what, in its view, that entails: a fair market valuation of the assets in the absence of the on-going contract with the Home Office. It is that point that the CMA takes from the Byatt Report.

121. It follows that we do not accept that the paragraphs in issue suggested that the CMA would follow every aspect of the Byatt Report. Even if they did, we do not understand how it can be said that an adherence to the Byatt Report would necessarily entail an MEA approach being applied. We agree with the CMA that §11 of the Byatt Report makes clear that it is not necessarily the MEA that would apply; that the correct approach depends on the circumstances of the case; and that the Byatt Report was not concerned with PFI agreements.

122. In our view, the CMA did not endorse the Byatt Report, or commit to apply its MEA approach. There is nothing inconsistent, therefore, in the CMA adopting the approach that it did. In substance, Motorola's complaint appears to be that the CMA's approach to valuing the assets was wrong, and that the CMA ought to have applied the Byatt Report's MEA valuation. That is an argument on the merits, and cannot ground a valid challenge for the purposes of judicial review. The CMA has made clear why it considered such a valuation to be inappropriate.

(3) Alleged inconsistency in the CMA's preferred methodology: the "paying twice" justification/ the "well-functioning market"

(a) Motorola's position

123. Motorola makes a further point relating to the methodology the CMA applied. Motorola submits that not only is the methodology inconsistent with the Byatt Report, but that it lacks logic and "does not stack up".

124. The CMA, at §6.66 of the Decision, states that its approach was:

> "based on our assessment that the sunk costs of the network which had already been paid for by customers, should not influence pricing during an extension period that was not planned for. Put another way, 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. We noted that the (new) replacement cost approach, which Motorola put forward as the appropriate benchmark, would result in such an outcome".

125. Motorola submits that the assertion that the sunk costs of the Airwave Network have been paid for is not supported by the facts. This is said to be for two reasons. First, the PFI Agreement did not provide for the transfer of assets at no cost at the end of the PFI Agreement: it was not a purchase agreement, but an agreement for the provision of services. Secondly, insofar as it did provide an option for the purchase of assets, the PFI Agreement (which was the result of a competitive tender process) provided for the purchase to be at "fair market value", which is inconsistent with the assumption that the assets would have been paid for by the end of the original period. Relying on the express terms of the PFI Agreement, therefore, Motorola submits that the CMA cannot credibly suggest that in a well-functioning market Motorola would be required to transfer the assets required to operate the Airwave Network at zero cost.

126. The CMA's conclusion that customers would not pay twice for the assets depends on its findings in relation to a "well-functioning market". Those findings are said by Motorola to be inconsistent with other findings in the Decision. The CMA's findings in this regard were as follows:

(1) First, in a well-functioning market pricing during an extension period would be constrained at a level at which the supplier was only able to recover the incremental investment in the network required to extend its life, its (efficient) operating expenses, and a reasonable return on its capital taking into account the reduced risks assumed by the supplier over the extension period (Decision, §6.91) but not any further value for the assets invested (and recouped) during the original period of the PFI Agreement (Decision, §6.94).

(2) Secondly, this constraint might be provided by different mechanisms, for example:

(i) competition amongst potential LMR network suppliers who had already incurred the sunk costs of constructing a network;

(ii) the contractual transfer of network assets at the end of the original contract period (at a zero price) to enable the re-tendering of the provision of services using the already built-and-paid-for network; or

(iii) a contractual requirement that the original supplier reduces prices during an extension period reflecting network assets having been 'paid' for over the original contract term (Decision, §6.91, fn 571-572).

127. Motorola submits that the three mechanisms identified by the CMA as providing a competitive constraint are contradicted by other findings in the Decision:

(1) As to the first, the Decision finds that the Airwave Network was a bespoke network, and that a single supplier would be best placed to meet the emergency services needs under long-term contracts. Motorola relies on these findings to argue that competition in this market would not take place by a number of competitors building LMR networks, and then seeking users for them.

(2) As to the second, Motorola points to the fact that the CMA has found that the terms of the PFI Agreement in this case resulted from the type of process, tendering, that might be expected to provide competition for the market, and that agreement (reached as part of a competitive process) did not provide for an automatic transfer of the assets at no cost at the end of the specified period, but provided for assets to be transferred at a "fair market value".

(3) As to the third point, this suffers from the same problem as the second: the PFI Agreement was the product of a competitive tender process, and did not include such terms.

128. Motorola submits that the CMA's counterfactuals are therefore simply unrealistic, and are self-serving in order to justify the conclusion that the CMA has reached. Even if you take the CMA's approach on its own terms (and leaving the failure to follow the Byatt Report to one side) it rests on the notion of a well-functioning market that is contradicted by its own findings elsewhere in the Decision as to what constitutes a well-functioning market.

(b) The CMA's position

129. The CMA submits that it does not follow from the fact that the PFI Agreement does not provide for the transfer of assets at no cost, or that there was an option for the transfer of assets at "fair market value" that the assets have not already been paid for. The Decision found that there is no credible option for the transfer of the assets to the Home Office and that this was a feature giving rise to an AEC. For all of the reasons considered in relation to Ground 1, it is not accepted by the CMA that there was any finding that the terms of the PFI Agreement are consistent with what might be expected in a well-functioning market. In particular, as regards the transfer of assets, the Decision finds that this is not a credible option precisely because the PFI Agreement only provides that "transferable" assets may be transferred at "fair market value" (without specifying how that was to be calculated) (Decision, §4.79), which gives rise to uncertainty (Decision, §4.77). It also records (Decision, §4.77) that under the

applicable PFI guidance[4] assets that have no practical alternative use (being only of value to the private sector) would normally be expected to transfer automatically to the contracting public authority.

130. When constructing the well-functioning market it is necessary to do so without the features contributing to the AEC. In relation to the three mechanisms that may provide competitive constraints in the well-functioning market:

(1) As regards the first mechanism, the CMA accepts that the market is not in fact one where there are multiple suppliers who have already incurred sunk costs into constructing a network. This point therefore falls away.

(2) As regards the second mechanism – the transfer of assets at the end of the original contract period – the CMA relies upon the points made in paragraph 129 above. In light of those matters, it is entirely plausible to consider that there would be a requirement to transfer the network assets at the end of the original contract period (at a zero price) to enable the re-tendering of the provision of services.

(3) In relation to the third mechanism, the position is really the same as in relation to the second. The fact that the existing agreement does not include such a term is not determinative, because what is important is what would be expected in the well-functioning market, not what the existing contract does (or does not) provide for.

131. The CMA also relies on the fact that it is difficult for Motorola to deny that the taxpayer has already paid for the sunk costs (and Motorola has not done so). The CMA also relies upon the findings in the Decision as to what a well-functioning market might entail (set out at paragraph 108 above), and that it does not entail the construction of a new network.

[4] Treasury Taskforce Guidance: Standardisation of PFI Contracts (1999).

(c) Analysis

132. The problem with Motorola's approach is that its foundation is built on an assumption that we have already decided is not valid in our decision on Ground 1 (see paragraphs 77 to 85 above).

133. Further, Motorola's argument assumes that the existing position reflects what might be expected in the well-functioning market in 2019 and thereafter, in circumstances where the CMA has considered the terms of the PFI Agreement and found that it does not. To put the point another way, Motorola's argument contends that the terms of the PFI Agreement awarded in 2000 evidence what a well-functioning market in 2019 and post-extension would entail. This is not borne out by the hypothetical exercise that the CMA is required to undertake as described below.

134. The hypothetical scenarios are put forward by the CMA because there has been an extension of the PFI Agreement beyond the date originally envisaged as being the contract period, and the CMA is then required to envisage in relation to that extension period, what the competitive constraints might be, regardless of what the position might be now, and under the contract under scrutiny. This point was addressed in §4.34 of the Decision:

> "In our view, Motorola's submission [that the Decision's approach to the well-functioning market is unrealistic and irrational] conflates what actually happened in the circumstances we are investigating with the test of what might have happened if the market was working well. It is inherent to any market investigation that, where there is a possibility of an AEC finding, there may be features that prevent the market working well. This is what we are seeking to test. If, in defining a well-functioning market, we were required to only take into account what actually happened (as opposed to what might have happened in the absence of any features that might distort competition) this would remove the purpose of a well-functioning market benchmark".

135. We accept that those scenarios must not be unrealistic, but at least as regards the second and third mechanisms, we do not accept Motorola's submission that the CMA's reasoning or conclusions do not "stack up" or are illogical because they are inconsistent with the existing contractual position. Further, the CMA is entitled to a wide margin of appreciation in how it constructs the well-

functioning market as long as it is plausible, and we do not consider that its approach is implausible.

(4) Alleged inconsistency in the CMA's preferred methodology: profitability in a competitive market

(a) Motorola's position

136. A related argument raised by Motorola is that the CMA, having identified the need to assess the price levels that would apply in a competitive market, failed to apply that approach because it posited a scenario in which the assets were valued on the basis that they are put to "an alternative use": i.e. a use other than to provide public safety communications network services. This is said to be a "further fatal inconsistency/failure to take account of a material consideration".[5] Motorola submits that there is only one use for the assets, which is fulfilling the PFI Agreement. This is a bespoke integrated network dedicated to emergency services communications. If it is necessary to look at a use other than the provision of that network then that would be a situation in which assets which can be sold off (buildings, land and certain equipment) are sold off for alternative uses. That approach, Motorola says, is contrary to economic theory but importantly for the present application, is contrary to the approach that the Decision itself finds is more appropriate in this case. That last point is a reference to the approach set out in the Byatt Report.

(b) The CMA's position

137. The CMA's position is that this simply means a use other than their existing use i.e. in the absence of the on-going contract with the Home Office. The reason that the CMA approach is appropriate is because it is necessary to value them at the level they would be traded in the absence of market power (that being the key insight derived from the Byatt Report). That saw the assets valued in such a way that the supplier was only able to recover the incremental investment in the network to extend its life (§6.91 of the Decision, referred to in paragraph

[5] Motorola Skeleton, §60.

110(7) above). We note that paragraph refers back to §6.90 (referred to in paragraph 110(6) above) which states that this reflects the logic of a PFI agreement. The value is, therefore, rationally zero.

(c) ***Analysis***

138. The answer to this argument follows on from the arguments made in relation to the Byatt Report at paragraphs 119 to 122 above. We have already decided that the basis for adopting this approach is explained in the Decision, and is not irrational. We have also found that the approach of the CMA to the "well-functioning market" is not irrational. It follows that we do not accept Motorola's argument that that the CMA failed to take account of the prices for the provision of public safety communications in a competitive market.

(5) Alleged inconsistency in the CMA's preferred methodology: the time period

139. For the purposes of its Profitability Analysis, the CMA divided the period into two separate time periods: 2001 to 2019, and 2020 to 2029. The CMA focused on 2020 onwards, and did not analyse the profitability of the business over the whole 2001 to 2029 period. The reason for this is explained in §6.60:

> "We are primarily interested in recent and current competitive conditions in the market, rather than those which may have been present more than twenty years ago. A backward-looking profitability analysis for the original 2001-2019 time period is very unlikely, in our view, to provide a good indicator of potential market power and the ability to extract supernormal profits at the time that the extension was agreed. Similarly, the profitability of the business over the whole 2001 to 2026/9 period would mix the picture from across the PFI and post-PFI periods and would risk masking the degree of profitability and market power enjoyed post-extension. That, it appears to us, would not provide insight into conditions of competition either during the original PFI period or during the extension post-PFI period. Therefore, we have not analysed Airwave's financial performance on that basis."

(a) Motorola's position

140. Motorola submits that, having decided that the Profitability Analysis should be conducted for the extension period of 2020 to 2029 (and that it would be wrong to take into account the prior period), when conducting the analysis over that

period, the CMA then relies on the prior period when carrying out the asset valuation at the end of 2019. Motorola's complaint is that the CMA ignores the pre-2020 position for one purpose, but relies on it heavily for another related purpose in the conduct of the same Profitability Analysis.

141. Whilst Motorola says that it is not incumbent on it to suggest how the inconsistency could be addressed, it suggests that the CMA could have conducted a Profitability Analysis over the whole period 2001 to 2029 as a "sensitivity analysis" in order to confirm its findings in relation to the later period from 2020. If that analysis for the whole period confirmed supernormal profits, that would support the CMA's analysis: if it did not, the CMA's approach would be "fatally" undermined.

(b) The CMA's position

142. The CMA submits that §6.60 explains that assessing profitability for the prior period does not help in the task the CMA is trying to do, which is to provide insight into the conditions of competition during the extension period. In short, the CMA's submission is that there is nothing inconsistent in reaching that view and then assessing profitability in the latter period on the assumption that the sunk costs of the Airwave Network have already been paid for in the prior period (and valuing the assets accordingly).

143. On the contrary, it is entirely consistent for the CMA to look at what happened in the original period in order to consider the opening value that should be used for the assessment of the latter period. If anything, the CMA could have conducted a Profitability Analysis over the original period in order to test its assumption that the sunk costs had been paid for. As to that, we were taken to various passages in the Decision which suggest that Motorola had indeed recovered its investment and a reasonable rate of return by the end of 2019.

144. The CMA's position is that for all of the reasons explained in the Decision (set out at §139 above), the approach adopted in the Decision to the split in time period was entirely rational.

(c) Analysis

145. We accept the submissions of the CMA. The CMA is entitled to a degree of latitude in how it approaches its Profitability Assessment, and in any event we can see no inconsistency in the approach taken by the CMA.

H. THE *SIMPLEX* POINT

146. The CMA submitted, on the basis of *Simplex GE (Holdings) v Secretary of State for the Environment* (1989) 57 P&CR 306, and *Barclays Bank Plc v Competition Commission* [2009] CAT 27, that if we were satisfied that the CMA's decision was tainted by a public law error we should exercise our discretion and refuse to quash the decision on the basis that the CMA would inevitably have reached the same conclusion as it did. That is because the CMA conducted a "sensitivity analysis" which used the "depreciated replacement cost", namely the higher value of [✂] based on the Deloitte Report referred to in paragraph 98(1) above. If such a value was used then the Decision stated that ASL could be expected to make supernormal profits with an NPV of £1.168m (as opposed to £1.272m).

147. The CMA accepts that the "depreciated replacement cost" is not an MEA, but submits that it is an entirely rational approach to estimating replacement cost to the Airwave Network assets at the start of the extension period. By reference to §58 of the Byatt Report (referred to in paragraph 105(4)(ii) above), the CMA argues that the depreciated replacement cost is in fact equivalent to a net MEA value. The CMA suggest that the figure reflects "a measure of MEA adjusted appropriately for the circumstances of this case".

148. Motorola pointed to the fact that there was no finding in the Decision that the depreciated replacement cost was a net MEA value. In circumstances where Motorola submitted that an MEA was the appropriate approach, and the CMA disagreed (Decision, §6.145), if the CMA considered that it was in fact adopting a form of MEA approach that would need to have been expressly stated in the Decision.

149. In any event, Motorola submitted that it is simply not right to suggest that the depreciated replacement cost is equivalent to a net MEA. That is because §58 of the Byatt Report states that the net MEA is the depreciated value of a technically up-to-date new asset, taking into account the remaining service potential of an old asset compared with the new one.

150. Motorola also referred us to §12-026; 12-027; 12-028 and 12-032 of *Judicial Remedies in Public Law* (6th Ed), by Lord Justice Lewis. In summary, the position at common law (which applies here) is that the Courts determine whether the decision has been lawfully reached and, if not, will quash it and leave it to the decision-maker to reconsider the matter. That remedy will not be refused if there is any doubt as to whether or not the decision would have been the same had the error not been made. It is insufficient if the decision would probably have been the same. The test is whether the decision would necessarily or inevitably have been the same: whether there is any realistic prospect of the decision being different but for the error. A public body may have more than one reason for taking a decision. The decision will be quashed unless the error played no material or significant part in the decision-making process. There is also a point of public interest in ensuring that public bodies do observe relevant public law principles in exercising their discretionary power, and that may necessitate decisions being quashed to ensure that public bodies take care to ensure that they are acting lawfully.

151. Motorola submits that it cannot be suggested that the result would inevitably have been the same, absent the CMA's approach to its Profitability Analysis. It is not possible to say that, if it erred in that analysis, the decision would nevertheless have been the same, based on the sensitivity analysis. The sensitivity was only a cross-check and did not purport to be a freestanding justification for its decision. In any event, the Decision makes clear that the CMA did not consider the depreciated replacement cost calculated by reference to the Deloitte Report to be appropriate.

152. It is fair to say that this point appeared to be something of a make-weight on the part of the CMA. In light of our decision, we do not need to decide it. Had we been required to do so, we would have accepted Motorola's submissions and

declined to exercise our discretion in favour of the CMA. What the CMA is really asking us to do is to assume that the CMA would have adopted an approach that they expressly found to be "inappropriate" and wrong. That seems to us to be poles apart from the sort of scenario envisaged in the *Simplex* case.

I. CONCLUSION

153. For the reasons we have given, Motorola's application for review of the Decision is unanimously dismissed.

Bridget Lucas KC
Chair

Tim Frazer

Robert Herga

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 22 December 2023