



Mobile Radio Network Services Market Investigation

Motorola's Response to the CMA's Working Paper on Scope for Competition and Market Definition

27 May 2022

1. Introduction and Summary

- (1) Motorola welcomes the opportunity to comment on the CMA's Working Paper on "Scope for Competition and Market Definition" published on 13 May 2022. It should be recalled at the outset that the CMA previously concluded that the acquisition by Motorola of Airwave did *"not give rise to a realistic prospect of an SLC as a result of horizontal unilateral or vertical effects in any market or markets"*, and ultimately that *"the scope for competition between Airwave and Motorola is limited"* (paragraph 83, Merger Clearance Decision). Airwave remains the same service as assessed by the CMA in 2016, and ESN remains the same replacement network for Airwave, yet the CMA has not explained or even attempted to explain how the facts underlying the competitive assessment are different today from when the CMA conducted its assessment in 2016, or for that matter in 2007, when Macquarie acquired Airwave.

Market Definition

- (2) Motorola notes that the market definition now put forward by the CMA – communication network services for public safety and ancillary services – differs from:
- the definition of the market used in the initial consultation (where it was market for the Airwave service);
 - the market defined in the reference decision (where it was the market for Land Mobile Radio Network services);
 - the market defined when the CMA assessed the acquisition by Motorola of Airwave (where the reference market for the horizontal assessment was the Airwave network); and finally
 - the market defined when the CMA assessed Macquarie's acquisition of Airwave (where the reference market was digital PMR services).
- (3) Motorola does not object to the latest market definition proposed by the Home Office and adopted by the CMA, but CMA references to submissions made by Motorola need to be put into the context of the CMA's prevailing view of the market at the time of any particular Motorola submission. For example, Motorola's view that it makes no sense to refer to a 'market' for the Airwave service does not imply that Motorola rejects the notion of a market for communication network services for public safety – it simply reflects Motorola's view, consistently expressed throughout the investigation, that the Airwave service is one specific instance of a communication network service, provided by Airwave under a long-term exclusive contract, and is not a market
- (4) Motorola has repeatedly requested that a fair market investigation be carried out, which must include the delivery of the ESN and the CMA now eventually defines the relevant market to include ESN, though without spending much effort to assess the failings of ESN beyond the allegation that Motorola's dual role may constitute a 'feature of the market' that is somehow responsible for 'the market not working well'. A refusal to investigate ESN properly (including as to why Airwave was, in 2015, excluded from the ESMCP tender process following the ITT stage) means that the market investigation is incomplete, its findings will inevitably fail to take due account of material considerations, and any remedies will almost inevitably be irrational or disproportionate.

Scope for Competition

- (5) The CMA's "emerging view is that we agree with Motorola that the original tender process ... was a relevant form of competition" (para 4). Motorola has however never described the original tender process as "a relevant" form of competition: it was *the only* competition that has taken place for this market (when it was defined as a market for the Airwave service or a LMR network services market). Motorola does not believe that any of its submissions leave room for doubt in this regard.
- (6) The CMA then identifies two other processes (forms of competition) which it believes affected the level of prices, quality and innovation: negotiations that have taken place between the Home Office and Motorola; and efforts made by Motorola as one of ESN's key suppliers.
- (7) For the reasons explained herein, the CMA's theory about scope for competition within a long-term contract is in substance nothing more than a thinly-veiled attempt to intervene to remedy contractual choices on behalf of the UK government that were made on a fully informed basis. It would be disproportionate for the CMA to intervene on behalf of the Home Office based on a proposition of "competition", as if the Home Office did not have power and vast resources at its disposal (including highly paid advisers deployed on almost every aspect of the commercial negotiation). The Home Office is not a consumer who might need protection from poor decisions (such as might for example be the case in relation to the purchase of funeral services). The Home Office is a **highly sophisticated government purchaser**. Its approach to negotiation of the ESMCP contracts is a good example of how the Home Office routinely sets the rules of the game, as a procuring entity. ESMCP bidders were told, at the outset in the Invitation to Tender, that the Home Office would only allow discussion on a very limited set of contractual provisions. Through the procurement phase the Home Office stuck rigidly to this mandate with the consequence that Motorola (and presumably EE) signed extremely onerous contracts. Of course, suppliers always have a choice as to whether to proceed in such a scenario. However, it seems unlikely in the extreme that the CMA would intervene to support suppliers against the Home Office when the latter enforces terms such as the obligation for a supplier to proceed with a requested change at its risk if the Home Office chooses not to agree the price and then, some 18 months later has still refused to agree that price. A full market investigation would require careful exploration of this point.
- (8) The CMA's vacuous theory about scope for competition in the Airwave contract leads it inevitably to a point where the CMA itself would not wish to arrive. The CMA states that to the extent:
- "that any elements of the original contract have continued (when in principle they could have been amended) this is likely more reflective of the bargaining power of each party over time and the extent of competitive constraints than the competitiveness of the tender in which they were first set."*¹
- (9) Since "in principle" anything can be amended, the CMA seems to be stating that anything unamended must be so by virtue of the bargaining power of the parties. In this view of the world there is no opportunity for the parties to be content with any particular provisions. The logical consequence of this position is that there is no scope for contracting as any party could, the following day, claim that the other possesses market power by pointing at terms that continue to apply and have not been amended to its satisfaction. Economic activity would be

¹ Paragraph 32.

reduced to what can be traded in spot markets for cash or bartered. This is clearly an absurd position to take, but it is the position that the CMA takes.

- (10) At the same time, the Remedies Working Paper indicates that, out of all of the vast number of unamended contractual provisions in the many thousands of pages that amount to the Airwave service, the only one that apparently suggests the market may not be working well – and despite the outcomes evidence directly to the contrary – is the price of the service. This would be remarkable ‘emerging thinking’ on its own but makes even less sense when judged against the standard set forth by the CMA at paragraph 32 of its Working Paper.
- (11) The CMA prefers – again without any explanation – not to look at the economic performance of the Airwave contract over its term. Instead, the CMA believes that:

“the current market outcomes are determined to a larger degree by the prevailing competitive constraints on the negotiating parties and therefore that there is likely greater value in considering these more recent competitive interactions with in the context of our forward-looking assessment of whether features of the market affect competition.”²

- (12) This point does not bear scrutiny and is inconsistent with the CMA’s own stated position, as explained below.

2. Actual competition

The initial tender yielded a competitive outcome

- (13) The CMA summarises its emerging thinking as *“the available evidence suggests that there was limited competition within the original tender”*.³ This is not true. The directly available evidence, i.e. the measurable outcome of the tender process, is that it was a highly competitive contract for the Home Office.
- (14) By the time of the expiry of the Airwave contract on 31 December 2026, Airwave will have generated an IRR of [§30] % over its lifetime. As Motorola has explained on many occasions elsewhere this IRR is well within the range of reasonable outcomes for projects of its kind, and the CMA has never disputed this. At the same time the CMA refuses to engage with any assessment of the lifetime IRR of the project (having nonetheless indicated that it would do so).
- (15) The observed outcome of the Airwave contract is therefore that it has yielded a highly competitive rate for the provision of a service that the CMA has not found to be substandard in any manner. Certainly, the CMA has not indicated that the IRR generated by Airwave over the lifetime of the contract will have been excessive by any measure. It therefore makes no sense at all for the CMA to ignore the single strongest piece of evidence as to whether the original tender was a competitive process, namely the outcome for the customer over a 25 year period.
- (16) Yet this is precisely what the CMA does, at the same time as constructing a vacuous theory of scope for competition, which is explored below in more detail. First, however, it is important to start with the single most important determinant of the scope for competition, namely decisions made by the Home Office. This factor is also ignored by the CMA.

² Paragraph 33.

³ Paragraph 30.

Role of the Home Office

- (17) The single most important feature of the market that affects competition in the provision of communication network services for public safety is the following: *how the UK government, through the Home Office, chooses to purchase those services*. As the Home Office rightfully accepts, but the CMA appears reluctant to, the Home Office should be bound by its informed contractual choices. In a similar vein, the Home Office expected Airwave to be bound by its choices, including during the *first 14 years* of the Airwave service when the service was unprofitable due to the massive amounts of investment that had to be undertaken.
- (18) A proper examination of the scope for competition within the market (if this can ever make any sense at all - see further below) requires an assessment of exactly how the market has been constructed. Otherwise any subsequent assessment is an exercise in futility. The scope for competition in relation to the provision of communication network services for public safety is in fact determined by the decisions of the buyer – the Home Office – about when and how to procure the service.
- (19) There are instances where competition could have taken place, but did not because of the decisions taken by the Home Office. These decisions set the parameters within which any assessment of whether the market is working well **must** be undertaken.
- (20) First, as Motorola has previously explained, the CMA has ignored the fact that it was the Home Office's choice not to run a competitive procurement exercise for "*communications network services for public safety and ancillary services*" for the period 2020 – 2026. That the Home Office did not do so is hardly surprising given that the Home Office had run such a procurement exercise only in 2015 through the tenders for ESN, with a view to having ESN ready for full operation by 2019. Had the Home Office's tendering strategy been successful, Airwave would have been switched off.
- (21) Second, the Home Office could have included Airwave in a technology neutral tender process, but the Home Office chose to exclude Airwave. This itself indicates how far away from reality the notion of 'long run dynamic competition' between Airwave and ESN is.
- (22) Third, the Home Office could have procured ESN as an alternative solution that would, as the new technology evolved, be available alongside Airwave, giving users the choice to pick one or the other, depending on price and quality of service, thereby creating incentives for the two networks to compete on these parameters. Instead, the Home Office decided to maintain a market structure in which there would be a single supplier of "*communications network services for public safety*", apart from the (anticipated short) time period necessary to complete migration of users from one network to the other.
- (23) Last, the Home Office could have chosen a [X] with the various [X] offered by Motorola in 2018, in return for very substantial discounts. For reasons best known to itself, the Home Office preferred not to take that option.
- (24) Finally, for the sake of completeness, the Home Office could have structured the original Airwave procurement process in a manner that would have sustained more bidders but decided not to do so in view of the additional costs that this might have caused. This is most certainly moot since the observed outcome is plain to see, as described above. It could but did not include terms in the Airwave contracts that would have allowed it to require an extension of service provision at reduced rates.
- (25) The CMA's assessment must navigate its way through these freely determined strategic and contractual choices made by the Home Office, if the CMA is to undertake a defensible

investigation of whether the 'market' was working well, let alone to find a basis for intervention.

- (26) In the remainder of this submission Motorola focuses on the CMA's assessment of the scope for competition, starting by outlining what a well-functioning market for the provision of "communications network services for public safety and ancillary services" would look like.

3. A well-functioning market for the provision of communications network services for public safety: competition for the market

- (27) At various points, the CMA has acknowledged that the provision of the services under consideration poses very specific challenges that mean that they need to be supplied under exclusive long-term contracts, acknowledging that competition should be regarded as 'competition for the market'. For example, at paragraph 1.19 of the Consultation document the CMA describes the Airwave network as:

*"a highly differentiated and bespoke offering that was purposefully designed to meet the very specific needs of one customer group. Under such circumstances, one would expect competition to be 'for the market', i.e. to involve a process through which a long-term contract is awarded to one of a few suppliers and the main competitive interaction occurs when contracts are awarded and/or extended. **Once the contract is in place, competitive constraints within the contract would be expected to be minimal at best. Although there may be some scope for customers to exercise some level of bargaining power at the point of negotiating contract extensions, in the absence of 'outside options', this would be expected to have a limited impact on the conduct of the incumbent supplier.**"* (Emphasis added)

- (28) According to the CMA's own analysis, therefore, a search for competitive constraints within the contract would seem largely pointless, since within the contract competitive constraints would be expected to be "minimal at best". Motorola agrees with the CMA and has pointed out at the outset that for this very reason it is absurd to undertake a market investigation of the Airwave contract. Motorola cannot understand why the CMA has nonetheless now sought to embark on this futile exercise.
- (29) The CMA is also correct when it refers to 'outside options' as having an impact on the incumbent supplier (Airwave). As a matter of fact, at the point of contract 'extension' (in 2016) **the Home Office had already exercised its outside option by choosing to procure ESN, with the express purpose to provide a complete replacement of Airwave, with the intention of this being achieved by the end of 2019.** All that was left was for the Home Office to ensure that Airwave would continue to provide a backstop until the Home Office no longer needed it, and the Home Office negotiated a deal that it was satisfied met the Home Office's needs. As necessary, Motorola will seek disclosure on this in due course.
- (30) The CMA has sought to claim that there might be some competitive interaction between one network and its successor, at least for the time it takes to transition from the 'old' to the 'new'

solution⁴ – a notion which later mutates into a new notion of ‘long-run dynamic competition’.⁵

- (31) In the Profitability Modelling and Results Working Paper, the CMA eventually makes the following observation when it attempts to define what it means by a well-functioning market:

*“We note that the features of LMR networks – in particular, the very 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). In this context, we would not expect to see LMR networks being developed speculatively but rather we would expect to see the main purchaser(s) effectively commissioning a supplier to develop and operate a network and, **in return, the purchaser would provide a high-level of security to the supplier in terms of demand / remuneration** for the services provided. Indeed, this was the case with the Airwave network where PITO signed a long-term agreement with Airwave for the provision of services, under which revenues were largely guaranteed.”⁶*

- (32) Here, the CMA clearly identifies the key issues that are relevant for competition: at any time (except for the period that may be required to complete migration from one supplier to another), there will typically be a single supplier who has been commissioned to provide the service and who receives a guaranteed revenue stream (through a commitment on price and demand) in exchange for making the required, largely sunk investments.

- (33) However, the CMA then jumps straight to the outcomes that it believes one would expect in a well-functioning market without any further analysis as to how these outcomes would come about or even drawing out the implications for how competition –described by the CMA as the “*process of rivalry as firms seek to win customers’ business*”⁷ – would work. These are as follows:

- First, in such a market competition works through repeated tendering for long-term exclusive contracts. The purchaser (the Home Office) will rationally want to limit the time when parallel networks exist to the minimum period that is required for users to migrate from the old to the new solution as this co-existence involves a duplication of fixed costs.
- Second, there is a link between the commitment offered by the purchaser and the terms offered by the supplier: the longer and the more wide-ranging the commitment, the better the terms suppliers will be prepared to offer.
- Third, where a transition from an ‘old’ to a ‘new’ solution is involved, the commitment that needed to be offered to the new supplier means that transition process will have to be pre-determined and cannot depend on the relative commercial attractiveness of the

⁴ Having repeated the point about competition for the market, the CMA in the final decision to open a market investigation then states that “[w]here the transition from one long-term contract to a replacement one takes a period of time, there can be some competitive constraint, during this transition period, on the incumbent supplier from the impending loss of customers to the new supplier(s), particularly if there is scope to retain some customers for longer, for example by offering attractive prices to encourage customers to delay their transition to the new provider. Similarly, once a new provider wins the competition to develop replacement technology, the incentive of that new provider to develop and implement that new technology will be driven by the prospect of taking revenues away from the incumbent provider.” (Paragraph 1.20 of the Final Decision to open a market investigation)

⁵ Paragraph 21 of the Issues Statement states that “ESN may affect Airwave Solutions’ revenue and profitability by impacting upon, for example, the number of customers that use it, the length of time that customers use Airwave Solutions, the extent of customers’ bargaining positions vis-à-vis Airwave Solutions and the level of investment required to keep the Airwave network in operation. The development of ESN can therefore be viewed as a form of long-run dynamic competition as it represents efforts that have the goal of winning customers that currently use the Airwave network.”

⁶ Paragraph A-37 of the Profitability Modelling and Results Working Paper; emphasis added.

⁷ Paragraph 12.

‘old’ and the ‘new’ solution. Any tender for a replacement will have to provide the winner the necessary security in terms of demand and remuneration – as the CMA quite rightly says, no one would develop a replacement ‘speculatively’ in the expectation that it might eventually be able to lure away customers for the incumbent provider. This is not a market where the transition from one technology to its replacement happens through the decentralised decisions of many customers (such as in the eventual replacement of video tapes by DVDs, DVDs by Blu-ray, and physical copies by downloading/streaming services, or the move from copper to fibre networks) which is driven by price and service characteristics. Pretending that competitive forces could work in a similar fashion during a transition period in this market is naïve in the extreme.

- (34) Whether these procurement tenders take place in a competitive or an uncompetitive market can be assessed in the same way as in any other market – if there is a single supplier capable of delivering the service who faces many buyers, there is a monopoly. If a single buyer has a choice of multiple suppliers, there is a monopsony, and there are single entities on both sides, there is a bilateral monopoly. Market outcomes then depend on the decisions made by the buyer on how to structure the procurement process. It is the buyer who specifies its needs and who sets the terms on which suppliers prepare their offers. It is the buyer who defines the ‘rules of the game’ and who decides how competition between prospective suppliers plays out.
- (35) As noted above – and as explained by Motorola previously – it is extremely short-sighted to claim that competition in the Airwave tender was limited because ultimately only one bidder remained. The process was long and drawn out and shaped by choices made by the Home Office. There were a number of prospective suppliers and the gradual narrowing down was the result of technological requirements and a reluctance to take on some of the considerable cost of understanding requirements and scoping out possible solutions. In fact, Airwave has been extraordinarily successful – judged on its own, and even more so by comparison with other public sector procurement projects, including ESN which the CMA refuses to investigate. Even at this point the CMA acknowledges that the terms agreed effectively ensure that services are provided to the requisite standard and that Airwave has the right incentives to invest and ensure that the network continues to support mission-critical communications for the emergency services.⁸
- (36) In the event, the Home Office tendered for a replacement of Airwave in 2015. Again being a first-of-its-kind solution at the very leading edge of technology, this replacement solution should leverage technological developments in mobile communications.
- (37) In this procurement process, any concerns there might have been about distortions of competition arising from asymmetry between the incumbent provider and new suppliers were wiped away as Airwave was excluded from bidding after the initial tender phase. Whilst Motorola continues to believe that a hybrid solution combining TETRA and LTE technology would provide a better technology path to the future (a position which Motorola has stated openly and publicly and which is borne out by the recent tendering decisions by other governments), the Home Office chose not to pursue such a path: there was no opportunity for different technological options compete on a level playing field. Rather, the Home Office was, following the refusal of Airwave’s previous owners Macquarie to slash its prices in 2012 upon request of the Cabinet Office with nothing offered in return, determined to move to LTE as quickly as possible and seemingly at all costs and this in turn dictated how competition played out.

⁸ CMA’s Potential Remedies Working Paper (16 May 2022).

- (38) None of this 'scope for competition' is examined by the CMA's Working Paper, which is a material omission. The CMA should simply recognise that the Home Office did not pursue the option of adopting a safer, more circumspect, and more realistic timetable and obtain an extension of Airwave, where the terms of the extension could have been negotiated in an environment where a longer extension could have been offered in exchange for better terms. This would be an example of competition in relation to the speed of transition imagined by the CMA, which could have happened but for the Home Office's decision to aim for an Airwave switch-off by the end of 2019.
- (39) It was only after the Home Office had executed its strategy on ESN that the Home Office sought to obtain insurance against delays and secure the right to continue to rely on Airwave for access to communications services for public safety for as long as it took to complete the transition to ESN. Neither the original PFI contract nor any of the other contracts that were agreed with the Fire and the Ambulance services included any provision for the continued supply of services beyond the agreed end date. Airwave was under no obligation to continue to provide the service, just as it is under no obligation to provide the service after 31 December 2026.
- (40) In terms of 'scope for competition', at this point the Home Office had two main options. It could have tendered for the required services or asked Airwave for a right to require the continued supply of services. In either case, it could have specified a notice period to Airwave or committed to a (potentially much) longer minimum or fixed period. The choice of whether to invite competitive offers or to agree a short (or long) term variation of the contract with Airwave was purely the Home Office's.
- (41) The Home Office chose the second option, presumably in the expectation that ESN would become available within a reasonable period. Note that the option of a bilaterally agreed longer term contract was not a hypothetical choice whose real existence one could question: the Home Office had this very choice in 2018, with a long-term discount [✂] proposed to it by Motorola. Instead, the Home Office obtained the unilateral right to require Airwave to continue to provide services for as long as needed. There was no commitment to a minimum period.
- (42) The service currently provided by Airwave is, therefore, not one that was specifically tendered for and was thus subject to the competitive constraints that affect such tenders in a well-functioning market. The service for which the Home Office invited tenders is ESN. What Airwave currently provides is simply insurance against further ESN delays, and the best way to measure whether that market is working well is over the life of the Airwave contract. Any other method makes no sense.
- (43) Against this background, the CMA's statements about what one should expect in a well-functioning market are mere speculation. The CMA's belief that there should "*material protection with respect to the pricing of LMR services in the event of requiring an extension of the period originally envisaged*" does not indicate anything about whether the market is functioning well. If one instead were to speculate what should be expected in a market in which Airwave enjoys unilateral market power vis-a-vis a customer whose demand is determined by the need to maintain public safety and therefore very, if not completely price-inelastic, the obvious conclusion would be that Airwave should have massively increased

prices. Of course, Airwave did not seek to do this and the evidence is clearly that the Home Office would in any event have flatly rejected any such approach⁹

- (44) One of the key omissions from the CMA's 'scope for competition' analysis is that the Home Office never wanted to extend Airwave beyond 2019 – it commissioned a replacement and the only reason why Airwave continues to operate is because this replacement is delayed. The Home Office never wanted to commit to a substantial extension period in exchange for which it could have obtained better terms. The very foundation of the CMA's analysis is therefore irrational.
- (45) It may well be the case that with hindsight the Home Office now wished any of (i) it had included a clause in the original contract governing the pricing of Airwave services beyond 2019; (ii) it had run a competitive tender for the provision of services over a seven-plus year extension period; or (iii) it had accepted Motorola's 2018 offer of a very significant discounts over time with [§<]. However, one contracting party wishing, with hindsight, to have made different decisions in the past is not and cannot be an indication of a market not working well.

4. The role of negotiations

- (46) The CMA is of course right to state that contracts – in particular long-term contracts agreed when competition for the market takes place – allow for re-negotiating or amending the terms. However, for any such negotiation the fallback position that defines the outside option is defined by the current terms (or the way in which incomplete terms would be construed in the context of a dispute resolution process). There may well be *“opportunities to renegotiate contracts that have been agreed as the result of a tendering process. Even once a long-term contract has been agreed and awarded, there can be opportunities to renegotiate aspects of it.”*¹⁰
- (47) However, a necessary condition for such negotiations is that there is scope for both parties to gain relative to the fallback position; there need to be gains from trade. The observation that one party could be better off if different terms applied is trite; it cannot form the basis for negotiations (and, as noted above, the fact that terms have not been changed in response to a unilateral request from one party says nothing about bargaining power, let alone market power).
- (48) Even if competitive conditions outside of the contract have changed, under any reasonable view of the nature of contracts, negotiations take place against the fall-back position of the terms that have been agreed.
- (49) By way of example, suppose that that ten years into the Airwave contract, spare parts availability issues mean that it becomes prohibitively expensive for Airwave to provide its service. This would amount to a change in competitive conditions from the time at which the original tender took place. It does not, however, imply that Airwave can suddenly insist on an increased price as it is bound by the contractual terms that were agreed. Airwave might be able to negotiate a release from its commitments (i.e. early termination), but this would involve compensation of the Home Office. To take a converse example, in which a new supplier emerged that could provide a service at a much cheaper price, the Home Office could not simply avoid the contract on that basis, but it might be able to obtain a lower price in exchange for offering to extend the term, i.e. committing not to change to the alternative supplier at the end of the initial contract period. In both these examples, however, there

⁹ Motorola did, in 2021, seek to recover its additional expected capex costs, but the Home Office refused. This refusal itself confirms that Motorola does not have unilateral market power.

¹⁰ Paragraph 26 (f).

would have to be a quid pro quo and it would make no sense to suppose that in a well-functioning market there could be a sudden improvement in the terms afforded only to either party regardless of the contractual provisions that have been agreed.

- (50) The CMA appears to have a rather peculiar understanding of the notion of ‘competitive negotiations’ that already appear in the original consultation where Airwave’s refusal to accede to a unilateral demands from the Home Office for a discount is taken as an indication of unilateral market power as *“between 2010 and 2014, negotiations with Airwave Solutions’ then owner, Macquarie, failed to deliver a satisfactory outcome and led to the Home Office deciding to commission a new communications solutions that would take time and significant cost to implement.”*¹¹
- (51) According to the CMA, *“whilst negotiations are not currently a competitive process, in that the Home Office has no competitive alternatives available to switch to, there could be scope for such competition to exist in the absence of features of the market, such as the lack of alternatives.”*¹² This statement is no more than a tautology: there could be competition if there were competition. The statement is also entirely inconsistent with the CMA’s position that competing LMR solutions would not be developed speculatively but only come about through a tender process in which the buyer commits to guarantee revenues in exchange for the necessary investments.
- (52) Of course, within a contractual relationship, it is not the gift of one party to define what constitutes a satisfactory outcome. However, the suggestion here seems to be that any Home Office demand that is not met is taken as evidence of restricted or distorted competition. This suggestion is preposterous unless one were to accept that contracts have no meaning in economic interactions.

5. Competition by investing in ESN

- (53) The CMA continues to maintain a theory that there is some form of competitive interaction between Airwave and ESN, variously described as long-term dynamic competition or competition between the two networks for retaining or attracting customers.
- (54) It is unclear how the CMA views the process by which ESN will eventually replace Airwave, but whatever indication of the CMA’s views can be distilled from the working paper suggests that the CMA’s view is entirely detached from reality. The CMA seems to believe that since the contracts were awarded to three key suppliers in 2015 each of these key suppliers *“had the opportunity to make efforts and investments to contribute towards developing a new platform that would replace the Airwave Network”*, driven by *“incentives for ESN’s suppliers, including Motorola, to develop this new product innovation in a timely manner [coming] from the ability to derive profit as soon as possible from winning new customers from the Airwave Network and selling ESN’s services to them.”*¹³ **The reality is however that there were clear intentions**

¹¹ Paragraph 1.29 of the Consultation Document.

¹² Paragraph 82.

¹³ Paragraphs 39 and 40. For the sake of completeness, it should also be pointed out that one of the key suppliers – KBR, which had won the contract for performing the crucial role of delivery partner with responsibility for programme management, overseeing testing across the full ESN service, managing the transition from Airwave to ESN and supporting training and vehicle installation design and assurance – never fulfilled this role. KBR’s performance was found to be unsatisfactory in 2016 and *“in 2017, an independent review of the ESN programme found that the Home Office had appointed less-experienced civil servants to take decisions, effectively downgrading KBR to a recruitment vehicle for project administrators and telecommunications experts. This meant responsibility for planning and collaboration across suppliers had effectively passed to the Home Office”* (National Audit Office ‘Progress delivering the Emergency Services Network’, Report.

by the Comptroller and Auditor General, HC 2140 Session 2017–2019 10 May 2019, paragraph 2.14)

to have ESN completed by the time the original Airwave contract was expected to come to an end, and the contracts were structured as such. Rather than relying on incentives to contribute to a completion of ESN as and when, there were contractual commitments that defined the position of the suppliers. As Motorola has repeatedly stated, this is the place that the CMA should be looking, to determine whether or not the market is working well.

- (55) Like Airwave, ESN would not be developed ‘speculatively’ – there needed to be some assurance about users migrating to ESN as soon as the replacement would become available. The Home Office took responsibility for managing the users ‘buy in’ to the Airwave to ESN transition process and this was set out in the original contracted ESN Transition Plan with each group of user agencies scheduled to transition at defined points in the schedule. Under the original ESN contract model Motorola (and, as Motorola understands, EE) were only able to [§] of building their respective ESN solutions until the entire ESN service was signed off as ready to go live and commence transition. At this point each supplier would start receiving a service charge which would serve to recoup [§], **irrespective of actual user adoption**, which remained under Home Office control. This provided the strong financial incentive (along with some joint EE & Motorola ‘cross-lot’ payments during mobilisation) to get transition started as soon as possible and there was no question of the users being able to ‘opt out’. With ESN having been commissioned with the clear intention that Airwave would be switched off as soon as ESN was ready there was nothing that Airwave could do to delay or reduce the extent of switching to ESN by improving aspects of its offering to the Home Office. Such an incentive would have existed as long as there was the *“prospect of ESN being developed as a replacement for Airwave”*¹⁴, i.e. prior to the ESN tender and the award of the ESN contracts, but not after the contracts had been awarded.
- (56) The CMA claims that *“Motorola has not explained why investments in a solution that would replace an incumbent solution, take its customers, leading to profits, would not amount to competition.”*¹⁵ Motorola has never stated that there could not have been competition between Airwave and its replacement at the point at which ESN tendered (though, as noted above, the Home Office eliminated any possibility of such competition by excluding Airwave). It is therefore entirely obvious that, and why, Airwave had identified ESN as a competitive threat, as the CMA notes.
- (57) Moreover, Motorola has maintained, and continues to maintain, that once a replacement has been commissioned, there is no further competition between the ‘old’ and the ‘new’ as it would be nonsensical to believe that the investment in the new solution would take speculatively in the expectation that ultimately customers will migrate, depending on the relative attractiveness of the terms offered.
- (58) As noted above, the reference to replacement of old products and services by newer alternatives is moot given that the nature of the service implies that there will be a sequence of exclusive long-term contracts with any period of overlap minimised to whatever is needed to complete migration from one network to the next. The CMA does not provide any support for its claim that Airwave could speed up or slow down (or potentially even prevent) the transition to ESN by offering lower prices. For this to happen, ESN would have had to be contracted on the basis of ‘build it and hope that you can attract customers’ – which is very clearly a nonsensical proposition.
- (59) Where there is an element of choice for individual users as to the timing of their transition, this is driven by their need to accept the new solution as a sufficiently reliable alternative that

¹⁴ Paragraph 40.

¹⁵ Paragraph 46 (a).

meets their requirements as effectively as the existing, tried-and-tested option. **It is simply wrong to even suggest that these migration decisions would be driven by price**, and there is no support in any of the references put forward by the CMA to suggest otherwise. It is for the Home Office to facilitate and support this process and as Motorola has noted, the Home Office is also failing in this regard: inhibiting interaction between the end users and the providers of the service is likely to hinder rather than help users feeling comfortable with the replacement.

- (60) The CMA's converse view – that there are insufficient incentives for Motorola to drive forward the development of ESN – is of course nothing other than a re-statement of the points the CMA makes about Motorola's dual role. Motorola has responded to these points in detail elsewhere.¹⁶ If the initial plans for ESN development were overly ambitious and unrealistic, this is in no way linked to Motorola's dual role or any attempt to restrict or distort competition between Airwave and its replacement.

6. Conclusions

- (61) As the CMA says, competition is a process of rivalry between suppliers trying to win the customer's business. In the market for the provision of communications network services for public safety, this rivalry takes place at certain points in time when the customer tenders for long-term exclusive contracts. Owing to the nature of the service and the requirements for large sunk investments, this is the only rational way in which such services can be provided and pretending that there is scope for competition within these contracts, which the CMA at the very outset has identified as being minimal, is fanciful.
- (62) In these tenders, it is the buyer who defines the rules of the game and who decides how competition plays out. In this case, it is the Home Office who, through its procurement decisions, has defined the scope for competition. With hindsight, it may well be the case that the Home Office would have liked to make different decisions than the ones it took, which made sense at the time, but that is not a competition issue.

¹⁶ Motorola's Response to Dual Role Working Paper (11 May 2022), paragraphs 15 – 19.