
Decision addressed to Motorola, Motorola USA and Sepura by the Office of Communications Section 2 of the Competition Act 1998

Anti-competitive conduct in the supply of terrestrial trunked radio (TETRA) devices, accessories and related services for use on the Airwave network in Great Britain

NON-CONFIDENTIAL VERSION

Redactions are indicated by [X]

CW/01241/05/19

Infringement decision

Issue date: 16 December 2022

Publication date: 27 February 2023

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A. OVERVIEW

(1) Executive Summary

1. This Decision of the Office of Communications (“**Ofcom**”) is addressed to:
 - (1) Motorola Solutions UK Limited (“**Motorola**”);
 - (2) Motorola’s ultimate parent company, Motorola Solutions Inc. (“**Motorola USA**”);
and
 - (3) Sepura Limited (“**Sepura**”).
2. We refer to Motorola, Motorola USA and Sepura collectively as the “**Addressees**” and refer to Motorola and Sepura interchangeably as a “**Party**” and collectively as the “**Parties**”.
3. In this Decision, Ofcom concludes that the Parties have infringed the prohibition imposed by section 2(1) (the “**Chapter I prohibition**”) of the Competition Act 1998 (the “**Act**”). This Decision is issued under section 31 of the Act and rules 5 and 6 of The Competition Act 1998 (Competition and Markets Authority’s Rules) Order 2014 (the “**CMA Rules**”).¹
4. This Decision relates to a text message exchange of competitively sensitive information between senior employees of Motorola and Sepura on 5 September 2018. This exchange was in connection with a procurement exercise run by what was known at the time as the Police ICT Company (“**PICT**”) but is now known as the Police Digital Service.
5. Ofcom has found that as a result of this exchange of messages on 5 September 2018, the Parties infringed the Chapter I prohibition by participating in a concerted practice that had the object of restricting or distorting competition in the supply of TETRA devices, accessories and related services for use on the Airwave network in Great Britain, and affected trade within the UK (the “**Infringement**”).
6. Our view is that it is appropriate to impose a financial penalty on Sepura under section 36 of the Act in respect of the Infringement.
7. Motorola USA applied for leniency in this case and provided Motorola USA continues to comply with the conditions of the Competition and Markets Authority’s (the “**CMA**”) leniency policy (including the requirement to maintain continuous and complete cooperation),² Motorola USA will satisfy the conditions for immunity and neither Motorola USA nor Motorola will be subject to a financial penalty.
8. In accordance with the CMA Rules, this Decision sets out the facts upon which we rely, the conduct which we consider amounts to an infringement of the Chapter I prohibition, the financial penalty we are imposing and our reasons for that penalty.³

(2) Structure of this Decision

9. The remainder of this Decision is set out as follows:

¹ SI 2014/458, available at: <https://www.legislation.gov.uk/uksi/2014/458/made>.

² CMA, 2013, [Applications for leniency and no-action in cartel cases](#).

³ CMA Rules, rule 6(1).

- (1) **Section B** describes the investigation phase;
 - (2) **Section C** provides a factual background relating to the Addressees and the participants in the text message exchange which is the subject of this Decision along with screenshots of those messages. It also provides a brief overview of the industry and products affected by the Infringement;
 - (3) **Section D** provides our view on market definition;
 - (4) **Section E** provides our assessment of the relevant economic context;
 - (5) **Section F** explains the background to and structure of the PICT Tender, including our factual assessment of the role of pricing in the context of the PICT Tender;
 - (6) **Sections G and H** identifies the Parties' respective conduct relating to the PICT Tender and our factual assessment of that conduct;
 - (7) **Section I** sets out the exchange of messages between [X] (of Sepura) and [X] (of Motorola) on 5 September 2018 and our factual assessment of those messages;
 - (8) **Section J** is an outline of the legal framework;
 - (9) **Section K** sets out the relevant legal principles applicable to concerted practices which have as their object the restriction, distortion or prevention of competition;
 - (10) **Section L** is our legal assessment of the exchange of messages on 5 September 2018 in light of the legal and economic context. It concludes that the Parties infringed the Chapter I prohibition by participating in a concerted practice that had the object of restricting or distorting competition;
 - (11) **Section M** deals with other aspects relevant to an assessment under Chapter I of the Act;
 - (12) **Section N** sets out our actions, including our decision to impose a financial penalty on Sepura and not to impose directions on the Parties; and
 - (13) **Section O** sets out the process we have followed for determining the level of a financial penalty.
10. Further information is included within the following annexes, which form part of this Decision:
- (1) **Annex 1** sets out the glossary and defined terms;
 - (2) **Annex 2** sets out our view on market definition in further detail;
 - (3) **Annex 3** sets out the exchange of messages on 5 September 2018 alongside time stamps; and
 - (4) **Annex 4** identifies the names and roles of employees of Motorola and Sepura referred to in this Decision.

B. THE INVESTIGATION

11. This section sets out the origin of the investigation and provides an overview of the investigatory steps taken.

(1) Commencement

12. On 14 September 2018, Motorola USA approached the CMA for leniency under the CMA's leniency policy⁴ and on 18 September 2018, the CMA issued a provisional Type A leniency marker to Motorola USA.
13. The CMA and Ofcom have concurrent competition powers in relation to activities connected to electronic communications, broadcasting and postal services matters.
14. The CMA subsequently confirmed that agreement had been reached that Ofcom was the competent person who should exercise Part 1 functions under the Act in relation to this matter. Ofcom was therefore allocated the case in accordance with the Competition Act 1998 (Concurrency) Regulations 2014.⁵
15. On 14 May 2019, Ofcom confirmed Motorola USA's Type A leniency marker and the conditions for its immunity.⁶
16. Ofcom subsequently determined there were reasonable grounds to suspect that the Parties had engaged in conduct that may infringe Chapter I of the Act, as required under section 25 of the Act and on 7 June 2019 Ofcom confirmed it had opened its formal investigation under the Act.⁷

(2) Initial evidence gathering

17. During the investigation:

⁴ CMA, 2013, [Applications for leniency and no-action in cartel cases](#).

⁵ [Competition Act 1998 \(Concurrency\) Regulations 2014](#).

⁶ Under the CMA's leniency policy, the CMA will grant total immunity from financial penalties to a participant who is the first to come forward before the CMA has commenced an investigation and who satisfies the conditions of leniency; such an applicant is known as the Type A applicant. See Applications for leniency and no-action in cartel cases (OFT1495 dated July 2013, adopted by the CMA) and the OFT's Guidance as to the appropriate amount of a penalty (OFT423 September 2012, adopted by the CMA), paragraphs 3.4 and 3.13 to 3.14, which has since been replaced by the CMA's Guidance as to the appropriate amount of a penalty (CMA73), paragraphs 3.4 and 3.13 to 3.14.

⁷ [Ofcom's publication of case opening](#), available at <https://www.ofcom.org.uk>.

- (1) Ofcom requested documents and information from Sepura under section 26 of the Act on 6 June 2019,⁸ 8 November 2019,⁹ 20 December 2019,¹⁰ 24 January 2020,¹¹ 14 February 2020,¹² 28 February 2020¹³ and 23 June 2020.¹⁴
- (2) Ofcom conducted interviews under section 26A of the Act with members of Sepura's senior management team ([Sepura Executive Team Member A], [Sepura Executive Team Member D], [Sepura Executive Team Member C], [Sepura Executive Team Member B]) as well as [the Sepura Regional Sales Director] on 5 December 2019.
- (3) Ofcom issued a notice under section 27 of the Act to Sepura on 5 December 2019 and obtained documents relevant to the investigation from [the Sepura Regional Sales Director]'s personal mobile phone.¹⁵
- (4) Ofcom requested information from [the Sepura Regional Sales Director] under section 26 of the Act on 7 April 2020.¹⁶
- (5) Ofcom requested documents and information from Motorola on a voluntary basis (in accordance with the CMA's leniency policy) on 6 June 2019,¹⁷ 4 October 2019,¹⁸ 22 November 2019,¹⁹ 20 December 2019,²⁰ 24 January 2020,²¹ 14 February 2020²² and 24 June 2020.²³

⁸ Ofcom's first request for information issued to Sepura under section 26 of the Act and dated 6 June 2019 (ATF 6062).

⁹ Ofcom's second request for information issued to Sepura under section 26 of the Act and dated 8 November 2019 (ATF 4704).

¹⁰ Ofcom's third request for information issued to Sepura under section 26 of the Act and dated 20 December 2019 (ATF 4763).

¹¹ Ofcom's fourth request for information issued to Sepura under section 26 of the Act and dated 24 January 2020 (ATF 4797).

¹² Ofcom's fifth request for information issued to Sepura under section 26 of the Act and dated 14 February 2020 (ATF 4818).

¹³ Ofcom's sixth request for information issued to Sepura under section 26 of the Act and dated 28 February 2020 (ATF 4828).

¹⁴ Ofcom's seventh request for information issued to Sepura under section 26 of the Act and dated 23 June 2020 (ATF 4887).

¹⁵ Ofcom's request for documents under section 27 of the Act and dated 5 December 2019 (ATF 6071).

¹⁶ Ofcom's request for information issued to [the Sepura Regional Sales Director] under section 26 of the Act and dated 7 April 2020 (ATF 5047).

¹⁷ Ofcom's first request for information issued to Motorola and dated 6 June 2019 (ATF 5111).

¹⁸ Ofcom's second request for information issued to Motorola and dated 4 October 2019 (ATF 5123).

¹⁹ Ofcom's third request for information issued to Motorola and dated 22 November 2019 (ATF 5147).

²⁰ Ofcom's fourth request for information issued to Motorola and dated 20 December 2019 (ATF 5174).

²¹ Ofcom's fifth request for information issued to Motorola and dated 24 January 2020 (ATF 5190).

²² Ofcom's sixth request for information issued to Motorola and dated 14 February 2020 (ATF 5202).

²³ Ofcom's seventh request for information issued to Motorola and dated 24 June 2020 (ATF 5261).

- (6) Ofcom requested documents and information from PICT on both a voluntary basis and under section 26 of the Act on 24 October 2019,²⁴ 16 January 2020,²⁵ 14 February 2020²⁶ and 25 February 2020.²⁷
- (7) Ofcom requested information from PSNI on a voluntary basis on 19 February 2020.²⁸

(3) The Statement of Objections

- 18. Ofcom issued a Statement of Objections to the Addressees on 23 October 2020, setting out Ofcom’s provisional finding that the Parties infringed the Chapter I prohibition by participating in a concerted practice that had the object of preventing, restricting or distorting competition in the supply of TETRA devices, accessories and related services for use on the Airwave network in Great Britain and may have affected trade within the UK.²⁹
- 19. Following the issue of the Statement of Objections, a Case Decision Group was appointed within Ofcom to act as the decision-maker on:
 - (1) Whether or not the legal test for establishing an infringement had been met; and
 - (2) The appropriate amount of any penalty.
- 20. On 4 February 2021, Sepura submitted written representations on the Statement of Objections (“**Sepura SO Representations**”).³⁰

(4) Draft Penalty Statement and First Letter of Facts

- 21. On 24 September 2021, Ofcom issued a Draft Penalty Statement³¹ and a Letter of Facts to Sepura³² (“**First Letter of Facts**”). Ofcom also issued a letter of clarification to Motorola.³³
- 22. Sepura provided written representations on the matters set out in the Draft Penalty Statement (“**Sepura Penalty Representations**”) and the First Letter of Facts (“**Sepura’s First Letter of Facts Representations**”) on 22 October 2021.³⁴

²⁴ Ofcom’s first informal request for information issued to PICT and dated 24 October 2019 (ATF 5861).

²⁵ Ofcom’s first request for information issued to PICT under section 26 of the Act and dated 16 January 2020 (ATF 5894).

²⁶ Ofcom’s second request for information issued to PICT under section 26 of the Act and dated 14 February 2020 (ATF 5912).

²⁷ Ofcom’s second informal request for information issued to PICT and dated 25 February 2020 (ATF 5914).

²⁸ Ofcom’s first informal request for information issued to PSNI and dated 19 February 2020 (ATF 6003).

²⁹ Ofcom issued a version of the Statement of Objections to Sepura Limited containing Sepura’s confidential information (ATF 6124) and a version of the Statement of Objections to Motorola Limited and Motorola USA containing Motorola’s confidential information (ATF 6117).

³⁰ Sepura’s written representations dated 4 February 2021 (ATF 6278). Motorola also made one submission in response to the SO on 18 December 2020 (ATF 6242).

³¹ Ofcom’s Draft Penalty Statement issued to Sepura Limited, dated 24 September 2021 (ATF 6347).

³² Ofcom’s Letter of Facts issued to Sepura, dated 24 September 2021 (ATF 6344).

³³ Ofcom’s letter of clarification to Motorola, dated 24 September 2021 (ATF 6349).

³⁴ Sepura’s written representations in response to Ofcom’s Draft Penalty Statement (ATF 6374), and Sepura’s written representations in response to Ofcom’s First Letter of Facts (ATF 6375), both dated 22 October 2021.

(5) Oral Hearing

23. On 5 November 2021, Sepura made oral representations on the matters referred to in Sepura’s SO Representations, Penalty Representations and First Letter of Facts Representations. We refer to the written record of these oral representations as the **“Sepura Oral Transcript”**.

(6) Further evidence gathering

24. Ofcom requested further documents and information from Sepura under section 26 of the Act on 13 August 2021,³⁵ 19 November 2021³⁶ (following their oral representations) and 15 July 2022.³⁷
25. Ofcom requested further documents and information from Motorola on a voluntary basis (in accordance with the CMA’s leniency policy) on 15 July 2022³⁸ and 10 August 2022.³⁹
26. Ofcom requested further documents and information from PICT under section 26 of the Act on 21 March 2022⁴⁰ and 14 November 2022.⁴¹

(7) Second Letter of Facts

27. On 11 July 2022, Ofcom issued a further letter of facts to Sepura (**“Second Letter of Facts”**)⁴² and a letter of facts to Motorola.⁴³ Sepura replied to the Second Letter of Facts on 29 July 2022.⁴⁴ In response, Ofcom provided a revised version of the Second Letter of Facts to Sepura on 16 August 2022 (**“Revised Second Letter of Facts”**).⁴⁵ Sepura responded to the Revised Second Letter of Facts on 2 September 2022, including its response (**“Sepura Second Letter of Facts Representations”**)⁴⁶ provided alongside Sepura’s commentary on the specific ways in which Ofcom indicated it may rely on a document or reference in any final decision

³⁵ Ofcom’s eighth request for information issued to Sepura and dated 13 August 2021 (ATF 6297).

³⁶ Ofcom’s ninth request for information issued to Sepura and dated 19 November 2021 (ATF 6414).

³⁷ Ofcom’s tenth request for information issued to Sepura and dated 15 July 2022 (ATF 6498).

³⁸ Ofcom’s eighth request for information issued to Motorola and dated 15 July 2022 (ATF 6500).

³⁹ Ofcom’s ninth request for information issued to Motorola and dated 10 August 2022 (ATF 6530).

⁴⁰ Ofcom’s third request for information issued to PICT and dated 21 March 2022 (ATF 6473).

⁴¹ Ofcom’s fourth request for information issued to PICT and dated 14 November 2022 (ATF 6665).

⁴² Ofcom’s second letter of facts issued to Sepura and dated 11 July 2022 (ATF 6485) provided alongside Annex A which indicated specific ways in which Ofcom may rely on a document or reference in any final decision (ATF 6486).

⁴³ Ofcom’s letter of facts issued to Motorola and dated 11 July 2022 (ATF 6489) provided alongside Annex A which indicated specific ways in which Ofcom may rely on a document or reference in any final decision (ATF 6490). We also sent a version of the First Letter of Facts to Motorola (ATF 6491).

⁴⁴ Sepura’s response dated 29 July 2022 (ATF 6517) to Ofcom’s Second Letter of Facts provided alongside Sepura’s commentary on the specific ways in which Ofcom indicated it may rely on a document or reference in any final decision (ATF 6517).

⁴⁵ Ofcom’s response dated 16 August 2022 (ATF 6543) to Sepura’s letter of 29 July 2022, provided alongside a revised Annex A which indicated specific ways in which Ofcom may rely on a document or reference in any final decision (ATF 6544).

⁴⁶ Sepura’s representations dated 2 September 2022 (ATF 6571) in response to Ofcom’s Revised Second Letter of Facts.

(**“Sepura Second Letter of Facts Representations (Revised Annex A)”**).⁴⁷ Motorola provided no representations in response to Ofcom’s letter of facts.

28. Unless otherwise noted, we refer to Sepura’s written and oral representations, as well as its responses to Ofcom’s letters of facts, collectively as **“Sepura’s representations”**.

⁴⁷ Sepura’s commentary (ATF 6572) on the specific ways in which Ofcom indicated it may rely on a document or reference in any final decision provided with Sepura’s Second Letter of Facts Representations.

C. FACTUAL BACKGROUND

29. In this section, we set out relevant background information on the Addressees' business activities and the industry affected by the Infringement. We also identify the participants in the text message exchange which is the subject of this Decision along with screenshots of those messages.

(1) The Addressees

(a) Motorola

30. Motorola is a private limited company (company number 00912182) registered in the UK.⁴⁸ Motorola describes itself as a *"leading provider of mission-critical communication infrastructure, devices, accessories, software and services"*⁴⁹ to UK government and commercial organisations. Its UK activities primarily involve the supply of TETRA⁵⁰ devices, accessories and related services for use on a private telecommunications network dedicated to emergency services users in Great Britain (known as the Airwave network and ultimately owned by Motorola USA). Motorola also designs, plans and installs TETRA networks and systems⁵¹ and supplies TETRA infrastructure (including switching platforms and base stations) for such networks.⁵² As user requirements have evolved from reliance on voice to reliance on data applications, Motorola has more recently developed 4G LTE devices and related software for use by the emergency services in Great Britain.⁵³

(b) Motorola USA

31. Motorola USA is a US company incorporated in Delaware (I.R.S Employer Identification No. 36-1115800) and listed on the New York Stock Exchange. Motorola USA describes itself as *"a global leader in public safety and enterprise security"* providing technologies including in *"Land Mobile Radio Communications"* to *"more than 100,000 public safety and commercial customers in over 100 countries"*.⁵⁴ Motorola is indirectly wholly owned by Motorola USA.

⁴⁸ Registered at Companies House under company number 00912182 at the registered address of Nova South, 160 Victoria Street, London, United Kingdom, SW1E 5LB, [Motorola company information](https://find-and-update.company-information.service.gov.uk/) available at <https://find-and-update.company-information.service.gov.uk/> [accessed on 30 August 2022].

⁴⁹ Motorola Solutions UK Limited, Annual Report for the year ending 31 December 2020 (page 2) in [Filing History](https://find-and-update.company-information.service.gov.uk/), Companies House, available at <https://find-and-update.company-information.service.gov.uk/>.

⁵⁰ Terrestrial Trunked Radio (TETRA) is a set of standards that describes a common mobile radio communications infrastructure.

⁵¹ [Tetra Planning and Intergration Services](https://www.motorolasolutions.com), available at <https://www.motorolasolutions.com> [accessed 22 August 2022]

⁵² Motorola First Response, Question 1; Motorola Sixth Response (Q. 5), paragraph 3; Motorola Seventh Response, Question 4. See also [Motorola's website](#) and [CMA decision on Motorola acquisition of Airwave](#), August 2016, page 2 [accessed on 30 August 2022].

⁵³ Motorola First Response, Question 1, paragraph 4.

⁵⁴ [Motorola Solutions Inc. Annual Report \(2021\)](#), page 3, available at <https://www.annualreports.co.uk> [accessed on 30 August 2022].

(c) Sepura

32. Sepura is a private limited company (company number 04353801) registered in the UK.⁵⁵ Sepura describes itself as a supplier of digital radio solutions including devices, complementary accessories, software and support tools to mission-critical users in public safety organisations as well as business-critical users in commercial organisations in over 100 countries.⁵⁶ Sepura’s UK activities also primarily involve the supply of TETRA devices, accessories and related services for use on the Airwave network in Great Britain.⁵⁷ It also supplies TETRA infrastructure (including base stations and the associated “backbone” of a radio network).⁵⁸
33. Prior to 17 April 2017, Sepura was a listed company (Sepura plc). It subsequently delisted and in May 2017, Sepura was acquired by a wholly owned subsidiary of Hytera Communications Corporation Limited (“Hytera”),⁵⁹ a Chinese-based global manufacturer and supplier of professional mobile radio communications systems and solutions to public sector and commercial customers.⁶⁰ On 15 July 2022, Sepura was acquired by Epiris LLP, a private equity fund.⁶¹

(2) The participants in the exchange of messages on 5 September 2018

(a) [Sepura Regional Sales Director] and [Motorola VP for Sales]: their backgrounds

34. This Decision relates to an exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018. At the time of the exchange, they were employed by Sepura and Motorola respectively.

⁵⁵ Registered at Companies House under company number 04353801 at the registered address of 9000 Cambridge Research Park, Beach Drive, Waterbeach, Cambridge, CB25 9TL, [Sepura company information](https://find-and-update.company-information.service.gov.uk/) available at <https://find-and-update.company-information.service.gov.uk/> [accessed on 30 August 2022].

⁵⁶ <https://www.sepura.com/company-overview> [accessed on 22 August 2022].

⁵⁷ Sepura First Response, Question 1. Also see [Sepura’s website](#).

⁵⁸ Sepura First Response, Question 1, paragraph 1.21; Sepura Third Response – Part 1, Question 21, paragraph 21.3.2.

⁵⁹ <https://hytera.co.uk/news/hytera-communications-completes-acquisition-of-seapura>. For the purposes of this Decision, Ofcom has exercised its discretion not to attribute liability to Hytera.

⁶⁰ Competition & Markets Authority, ‘[Hytera-Sepura: A report to the Secretary of State for BEIS on the anticipated acquisition by Hytera Communications Corporation Limited of Sepura PLC](#)’, May 2017, paragraph 18. As a condition of Hytera’s acquisition, Hytera and Sepura were required to give Undertakings to the Secretary of State for Business Energy and Industrial Strategy “provide assurance that sensitive information and technology are protected and ensure the continued supply of a repair service for secure communications devices used by the emergency services”. See: <https://www.gov.uk/government/consultations/proposed-acquisition-of-seapura-plc-by-hytera-communications-corporation-ltd-draft-undertakings>. These undertakings were revised around December 2021. See: [Description of consultation on revised national security undertakings relating to Hytera’s acquisition of Sepura](#).

⁶¹ <https://www.epiris.co.uk/media/epiris-news/epiris-announces-the-acquisition-of-seapura/> [accessed 28 September 2022]. The undertakings given to the Secretary of State for Business Energy and Industrial Strategy by Hytera and Sepura were also released: <https://www.gov.uk/government/publications/acquisition-of-seapura-ltd-by-epiris-llp-notice-of-final-order>.

35. [The Motorola VP for Sales] joined Motorola Solutions in May 2011 as the Sales Director for [X].⁶² He went on to become the [Motorola VP for Sales], a post he held at the time of the exchange.⁶³
36. [The Sepura Regional Sales Director] joined Sepura in March 2014. He joined initially in the role of Regional Director for [X], but over time this grew to include [X].⁶⁴
37. Prior to joining Sepura, [the Sepura Regional Sales Director] was employed by Motorola (from 1999 to June 2013⁶⁵) as a Sales Account Manager and was a direct report of [the Motorola VP for Sales] throughout his employment at Motorola.⁶⁶ Motorola has confirmed that “[a]s his direct manager there would have been regular interaction [between [the Sepura Regional Sales Director] and [the Motorola VP for Sales]] in the normal execution of their duties”.⁶⁷ [The Sepura Regional Sales Director] commented during his interview with Ofcom that [the Motorola VP for Sales] “was the guy that sacked” him from Motorola.⁶⁸ [The Sepura Regional Sales Director] added: “When I left Motorola I was really quite angry ... I’ve got no like for Motorola at all.”⁶⁹
38. [The Sepura Regional Sales Director] and [the Motorola VP for Sales] knew each other, at least in a professional capacity, prior to [the Motorola VP for Sales] joining Motorola.⁷⁰ [The Sepura Regional Sales Director] and [the Motorola VP for Sales] also remained in contact after [the Sepura Regional Sales Director] left Motorola. For instance, the evidence indicates that:
 - (1) The contact details of [the Motorola VP for Sales] were added to [the Sepura Regional Sales Director]’s personal mobile phone on 4 June 2016;⁷¹
 - (2) Between January and June 2017, [the Sepura Regional Sales Director] and [the Motorola VP for Sales] exchanged a number of messages regarding a potential job offer for [the Sepura Regional Sales Director] from Motorola.⁷² This included an email from [the Sepura Regional Sales Director] to [the Motorola VP for Sales] on 14 January 2017 that provided details of [the Sepura Regional Sales Director]’s

⁶² Motorola Eighth Response, Question 5.

⁶³ Motorola Seventh Response, Question 3.

⁶⁴ [Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 30; [Sepura Regional Sales Director] First Response, Question 1.

⁶⁵ [Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 36.

⁶⁶ Motorola Eighth Response, Question 5.

⁶⁷ Motorola Eighth Response, Question 5.

⁶⁸ [Sepura Regional Sales Director] Interview Transcript (CD2), paragraph 67.

⁶⁹ [Sepura Regional Sales Director] Interview Transcript (CD2), paragraph 73.

⁷⁰ [Sepura Regional Sales Director] Interview Transcript (CD2), paragraph 71.

⁷¹ [Sepura Regional Sales Director] Mobile Phone Documents, Document 27 (ATF 5075).

⁷² Motorola Sixth Response, Document 465, pages 1-4 (ATF 5766) and Documents 466 (ATF 5767) – 470 (ATF 5771).

remuneration package at Sepura,⁷³ and another from [the Sepura Regional Sales Director] to [the Motorola VP for Sales] on 27 January 2017 that included a copy of [the Sepura Regional Sales Director]’s employment contract with Sepura.⁷⁴ The evidence indicates that [the Sepura Regional Sales Director] and [the Motorola VP for Sales] also met up on 26 January 2017.⁷⁵

- (3) On 10 February 2017, [the Sepura Regional Sales Director] and [the Motorola VP for Sales] discussed the status of Sepura’s acquisition by Hytera, including details around Hytera’s efforts to obtain governmental approvals for the acquisition in the UK and Germany.⁷⁶
- (4) [The Sepura Regional Sales Director] and [the Motorola VP for Sales] met at an annual regional conference organised by BAPCO⁷⁷ at the end of March 2017.⁷⁸
- (5) In May 2018, [the Sepura Regional Sales Director] and [the Motorola VP for Sales] exchanged several further messages about [the Sepura Regional Sales Director] potentially re-joining Motorola.⁷⁹ The evidence indicates that [the Sepura Regional Sales Director] and [the Motorola VP for Sales] met up in mid-May 2018.⁸⁰

(b) *[Sepura Regional Sales Director]’s contact with other ex-Motorola colleagues*

- 39. In the months following the end of his employment by Motorola, but prior to joining Sepura, [the Sepura Regional Sales Director] appears to have taken steps to remain in touch with a number of his former colleagues by saving their contact details on his personal mobile phone.⁸¹
- 40. While at Sepura, [the Sepura Regional Sales Director] continued to have contact with a number of his former Motorola colleagues. For instance, the evidence indicates that:

⁷³ Motorola Sixth Response, Document 466 (ATF 5767).

⁷⁴ Motorola Sixth Response, Documents 467 (ATF 5768) and 468 (ATF 5769).

⁷⁵ Motorola Sixth Response, Document 465, pages 1-3 (ATF 5766) and 467 (ATF 5768).

⁷⁶ Motorola Sixth Response, Document 465, page 3, (ATF 5766).

⁷⁷ BAPCO is the “British Association of Public Safety Communications Officials” and “... attended by representatives from many UK and international public safety agencies” including potential customers as well as the Parties’ competitors (Sepura Third Response - Part 2, Question 18(a)).

⁷⁸ Motorola Sixth Response, Document 465, pages 3-4, (ATF 5766).

⁷⁹ Motorola Sixth Response, Document 465, pages 5-6 (ATF 5766); [Sepura Regional Sales Director] Mobile Phone Documents, Document 147 (ATF 5078).

⁸⁰ Motorola Sixth Response, Document 465, page 5 (ATF 5766).

⁸¹ For instance, the contact details of [the Motorola Airwave VP MD] and [the Motorola Marketing Consultant] (both of whom worked for Motorola at the time) were added to [the Sepura Regional Sales Director]’s personal mobile phone on 14 August 2013 and 19 September 2013 respectively. See [Sepura Regional Sales Director] Mobile Phone Documents, Documents 6 (ATF 5070) and 13 (ATF 5072). [The Motorola Airwave VP MD] was also identified as a contact on [the Sepura Regional Sales Director]’s phone for WhatsApp ([Sepura Regional Sales Director] Mobile Phone Documents, Document 534 ATF 5083) and [the Motorola Marketing Consultant] was also identified as a contact on [the Sepura Regional Sales Director]’s phone for WhatsApp and Facebook Messenger ([Sepura Regional Sales Director] Mobile Phone Documents, Documents 529 (ATF 5082) and 543 (ATF 5085)).

- (1) The contact details of [the Motorola Senior VP], who was at the time employed by Motorola as [Motorola Senior VP],⁸² was added to [the Sepura Regional Sales Director]'s personal mobile phone on 4 June 2016.⁸³
- (2) On 18 July 2018, [the Sepura Regional Sales Director] contacted [the Motorola Marketing Consultant] (who was at the time employed by Motorola as a [Marketing Consultant] but left Motorola on 8 December 2018)⁸⁴ to let him know that he had moved back to the North of England. [The Motorola Marketing Consultant] replied to thank [the Sepura Regional Sales Director] for this update.⁸⁵
- (3) On 24 July 2018, [the Sepura Regional Sales Director] contacted [the Motorola Airwave VP MD] (who was at the time employed by Motorola as [Airwave VP MD])⁸⁶ and suggested they meet up on 25 July 2018, although it appears that [the Motorola Airwave VP MD] was not available to meet.⁸⁷

(3) The messages exchanged on 5 September 2018

41. On 5 September 2018, [the Sepura Regional Sales Director] contacted [the Motorola VP for Sales] and said "*Hi How is it going?*" After exchanging a few pleasantries, [the Motorola VP for Sales] restarted the conversation approximately 90 minutes later raising the topic of the PICT Tender.⁸⁸ [The Sepura Regional Sales Director] and [the Motorola VP for Sales] went on to discuss a range of matters relevant to the PICT Tender over the course of over two hours including:
 - (1) their perceptions of PICT's approach to and objectives for the PICT Tender;
 - (2) recent pricing in Europe;
 - (3) other potential competitors;
 - (4) potential volumes;
 - (5) distribution channels; and
 - (6) Sepura's pricing strategy and likely pricing levels.

⁸² Motorola Seventh Response, Question 3.

⁸³ [Sepura Regional Sales Director] Mobile Phone Documents, Document 26 (ATF 5074). The evidence also indicates [the Motorola Senior VP] was added as a WhatsApp contact on [the Sepura Regional Sales Director]'s phone on 23 March 2018 [Sepura Regional Sales Director] Mobile Phone Documents, Document 46 (ATF 5076)) and was also identified as a contact on Facebook Messenger ([the Sepura Regional Sales Director] Mobile Phone Documents, Document 528 (ATF 5081)).

⁸⁴ Motorola Sixth Response (Qs. 3, 4 and 23), Question 3, paragraph 7 (ATF 5781).

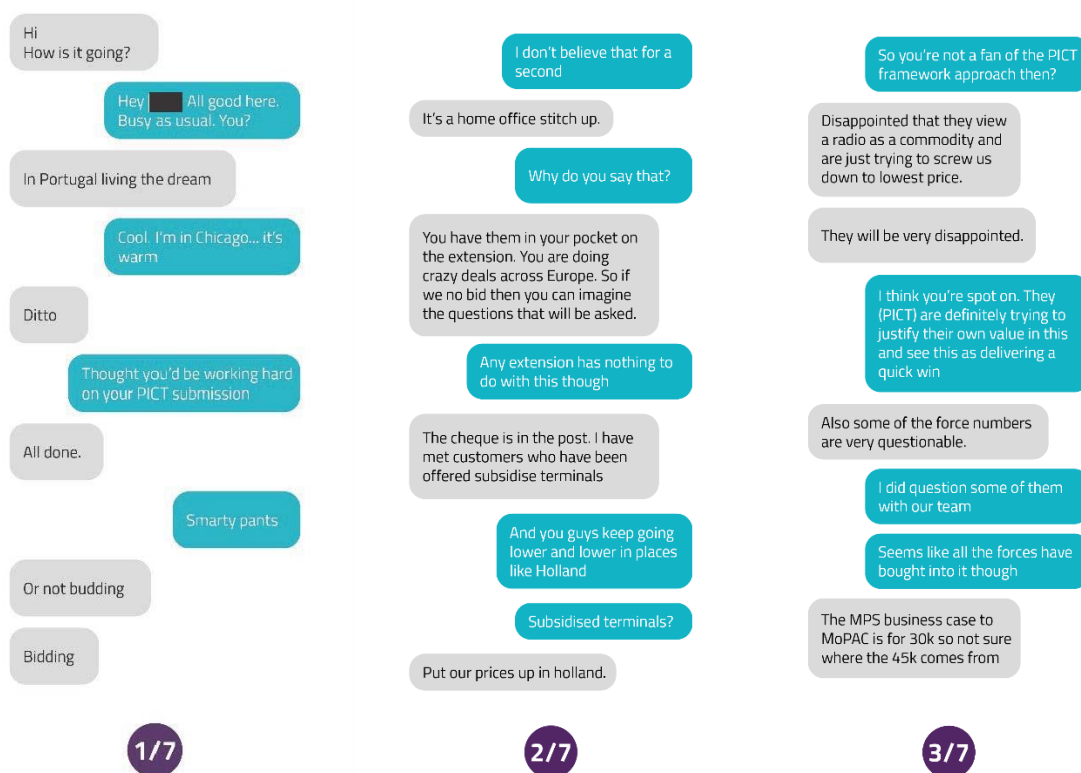
⁸⁵ [Sepura Regional Sales Director] Mobile Phone Documents, Document 65 (ATF 5077); [Sepura Regional Sales Director] First Response, Question 8(a), page 7.

⁸⁶ Motorola Seventh Response, Question 3.

⁸⁷ [Sepura Regional Sales Director] Mobile Phone Documents, Document 694 (ATF 5087); Motorola Sixth Response (Qs. 3, 4 and 23), Question 3, Document 492 (ATF 5799). These messages do not identify the reason why [the Sepura Regional Sales Director] wanted to meet up with [the Motorola Airwave VP MD].

⁸⁸ We provide a high level overview of the PICT Tender in **Section C(6)** below and more detail in **Section F**.

42. Set out below are screenshots of this exchange of messages. The messages sent by [the Sepura Regional Sales Director] of Sepura have a grey background and the messages sent by [the Motorola VP for Sales] of Motorola have a blue/turquoise background.
43. Sepura accepts that this exchange of messages was “foolish”, “flirting with regulatory risk”, “stupid” and “wrong”.⁸⁹ We discuss these messages in detail in **Section I** below and in **Section L** below explain why we consider the exchange to infringe the Chapter I prohibition.



⁸⁹ Sepura Oral Transcript, paragraph 131.

Will be interesting to see how forces approach it. Fleet refresh v piecemeal approach

I think they all like the value of NARPF replacement and PICT have sold this view that everyone will get MPS pricing

Until the ESN date is confirmed then all forces will do piecemeal but some DIY repairs

Buts = buys

There's nothing stopping any force going out to tender though

It's not mandatory

Need to stop Capita screwing around our business

Who do you think will bid Lot 1 Apart from us 2?

4/7

This is why PICT is a good option. Just the way they are trying to screw us over

The whole bit on no mini tenders for 12 months is to get us to give best prices day one. No chance!

Lol. You'll be keen... I'm sure of that

No based on the number of opportunities and the likelihood of switching then keep prices as they are

That means really low Sepura speak then

If it was winner takes all then game on. But to drive no incremental revenues then why give away margin.

My recommendation tomorrow is to keep prices as is. If management say no I will let you know.

6/7

Possibly Leonardo or Airbus

Have they got Airwave approved devices?

I see Leonardo has got new leader for this part of their business. Uk bloke

No but there was someone asking stupid questions so makes Leonardo the obvious choice

Hahahahahaha

You let Capita still supply your devices in WMP and GMP though right?

Ex supura

No they buy through SCC

Oh. My mistake.

5/7

My view is to let the dust settle see what happens with ESN then we can have some fun and games but for now let's wait

I get paid on GM not level of discount.

Changing the subject. How's life back in the North East?

[Redacted]

[Redacted]

[Redacted]

[Redacted]

7/7

(4) TETRA and the Airwave network: an overview

44. Organisations involved in public safety in Great Britain - including the police, fire and ambulance services - use a private mobile radio network called Airwave to securely communicate in the field.⁹⁰ The Airwave network uses digital terrestrial trunked radio (TETRA) technology and is a “critical piece of national infrastructure”.⁹¹ There is currently “no alternative method for the police, fire and emergency services staff to communicate securely with each other when in the field”.⁹²
45. In the following paragraphs, we explain what TETRA is and provide further background and information on the Airwave network and its users. We also explain the future of the Airwave network.

(a) TETRA

46. Terrestrial Trunked Radio or TETRA is a digital two-way radio standard. It was developed to take advantage of the benefits of digital technology over analogue systems and provide “secure, reliable and instant voice and data communications in mission critical, operations critical and business critical environments”.⁹³ TETRA is based on a set of open, interoperable standards that were developed by the European Telecommunications Standardisation Institute (“ETSI”) and is now used around the world by professional mobile radio users including for public safety, transportation, utilities, Government, military and oil and gas.⁹⁴
47. There are a number of commercial TETRA networks in the UK that operate on separate frequencies.⁹⁵ Within Great Britain, the main TETRA network is the Airwave network.

(b) The Airwave network

48. In 2000, Airwave was established by the British Telecommunications Group and was contracted to build and operate the Airwave network. The network became operational in 2002 and is one of the oldest private public safety networks in the world.⁹⁶
49. In 2007, Airwave was sold to Macquarie Communications Infrastructure Group⁹⁷ and in February 2016, Airwave was acquired by the Motorola group. The Airwave network is

⁹⁰ [CMA’s market investigation reference decision](#) into the Airwave network dated 25 October 2021 (“**CMA Market Reference Decision**”), paragraphs 1 and 1.1.

⁹¹ Motorola [Notice of Application](#) to the Competition Appeal Tribunal (“**CAT**”) dated 22 December 2021 (“**Motorola Notice of Application**”) relating to the CMA Market Reference Decision, paragraph 1.

⁹² CMA Market Reference Decision, paragraph 1.

⁹³ [What is Tetra](#), available at <https://www.motorolasolutions.com> [accessed on 22 August 2022]

⁹⁴ <https://www.etsi.org/technologies/tetra> [accessed on 22 August 2022]

⁹⁵ Motorola First Response, Question 1, paragraph 6.

⁹⁶ [Airwave](#); Sepura First Response, Question 1, paragraph 1.6.

⁹⁷ Timeline of events in Appendix A of the [Appendices](#) to the CMA Market Reference Decision.

currently owned by Airwave Solutions Limited (“**Airwave**”)⁹⁸ and its ultimate parent company is Motorola USA.⁹⁹

50. The Airwave network is based on TETRA standards and allows secure two-way radio communications between public safety users and commercial organisations. The Airwave network is only available in Great Britain¹⁰⁰ and covers approximately 99% of the land mass.¹⁰¹
51. Airwave provides its network to the British emergency services and other organisations, who contract with Airwave for the right to use the Airwave network for a defined period. Airwave effectively sells users of its network airtime in the same way that a mobile phone operator sells its customers a bundle of minutes, texts and data for use on its network.
52. Motorola supplies Airwave with TETRA infrastructure and technology for its network and both Motorola and Sepura provide TETRA devices, accessories and related services to users of the Airwave network.¹⁰²
53. Airwave, through its ‘Airwave Direct’ operation, also supplies a managed service to users whereby it will source and supply TETRA devices and accessories for use on its network, in addition to providing related services and the right to use its network.¹⁰³

(c) Users of the Airwave network

54. Airwave holds various licences issued by Ofcom under the Wireless Telegraphy Act 2006. These licences authorise Airwave to provide electronic communications services over its network using radio frequencies that have been allocated for emergency services applications and assigned to Airwave by Ofcom. Airwave also has a contractual relationship with the Home Office to provide services on its network to over 400 organisations identified

⁹⁸ [Corporate information](https://www.airwavesolutions.co.uk), available at <https://www.airwavesolutions.co.uk> [accessed on 22 August 2022]. Airwave’s company number is 3985643.

⁹⁹ Motorola First Response, page 2, paragraph 2. See also: [Corporate information](https://www.airwavesolutions.co.uk), available at <https://www.airwavesolutions.co.uk> [accessed on 22 August 2022]

¹⁰⁰ In Northern Ireland, there is a separate TETRA network owned and operated by the Police Service of Northern Ireland (PSNI) and known as the Barracuda network.

¹⁰¹ [Airwave](#).

¹⁰² Motorola First Response, Question 1(c), paragraph 3; Motorola Sixth Response (Q. 5), paragraph 11; Sepura First Response, Question 1.

¹⁰³ [Airwave Direct](#) is a fully managed mobile communication service that runs over the Airwave network. It offers a choice of radio terminal options with a range of contract length options. The package of managed services offered by Airwave includes a range of services including device management, device programming, upgrades, training and maintenance, 24/7 access to Airwave Direct’s dedicated helpdesk as well as a bundled package of radio terminal and airtime, available at <https://web.archive.org/web/20200106141026/https://www.airwavesolutions.co.uk/products/products-and-services/airwave-direct/>. Also see [CMA Decision](#) in relation to the Completed acquisition by Motorola Solutions Inc. (Motorola) of Airwave Solutions Limited (Airwave) dated 1 July 2016 (“**Motorola USA/Airwave Merger Decision**”), footnotes 2 and 3.

in a “*sharers list*” (including police, fire and ambulance services and other named organisations).¹⁰⁴

55. The purpose of the sharers list is to limit the availability of the Airwave network to organisations involved in public safety related activities that have a need to communicate with the British police, fire and ambulance services in emergency situations.¹⁰⁵ The police, fire and ambulance services are the main users of the Airwave network and account for approximately 96% of the Airwave user base.¹⁰⁶
56. If another organisation wants to join the Airwave sharers list, they need to be approved by Ofcom and obtain the necessary security accreditation from Airwave.¹⁰⁷

(d) Future of the Airwave network

57. In 2012, the Home Office wrote to all Airwave users to confirm its intention to switch off the Airwave network.¹⁰⁸ The Home Office subsequently launched a tender to replace the Airwave network with the Emergency Service Network (“**ESN**”), a new 4G commercial mobile LTE network.¹⁰⁹ This tender was won by EE in 2015.¹¹⁰ The current Airwave network, based on TETRA standards, is most suited to voice applications and as user requirements and technology continue to evolve to a greater reliance on data applications, it was decided that a 4G LTE network would be more appropriate for the needs of the emergency services in the future. As the ESN will use EE’s pre-existing commercial mobile network, it is also intended to save costs in the long term compared to using a private TETRA network which is fully dedicated to its users. As the ESN will not be based on the TETRA standard, when all users of the Airwave network have been migrated to the new ESN, there will no longer be any demand for TETRA devices and accessories for use on the Airwave network.
58. Motorola was awarded a contract under the ESN “*to provide software and systems that ensure ESN meets the needs of emergency services*”.¹¹¹ We understand Sepura supplies products and repair services for the new ESN.¹¹²

¹⁰⁴ National Audit Office Report, [Progress delivering the Emergency Services Network](#), dated 10 May 2019 (“**NAO Report**”), paragraph 1 and Motorola First Response, Question 1(c), paragraph 5. See also “[List of Sharer Organisations](#)”.

¹⁰⁵ Ofcom [Process for joining the Airwave sharers list](#), page 1.

¹⁰⁶ Motorola First Response, Question 1(c), paragraph 5.

¹⁰⁷ Ofcom [Process for joining the Airwave sharers list](#), including section relating to ‘TEA2 Sub-Licence (TETRA Encryption Algorithm 2)’ for information on the security accreditation required from Airwave.

¹⁰⁸ Motorola Fourth Response, Question 6, paragraph 41.

¹⁰⁹ [Home Office Overview of Emergency Services Network](#).

¹¹⁰ NAO Report, paragraph 3.

¹¹¹ NAO Report, paragraph 3. Further information on Motorola’s role under the ESN is available in the CMA Market Reference Decision.

¹¹² [Description of consultation on revised national security undertakings relating to Hytera’s acquisition of Sepura](#).

59. The original plan was for the ESN to be complete by December 2019, at which point the Airwave network could be switched off.¹¹³ It was envisaged that users of the Airwave network would commence transitioning onto the ESN in September 2017.¹¹⁴ However, completion of the ESN has been delayed.
60. In September 2018, the Home Office announced a reset of the ESN programme. The date by which the ESN network would replace the Airwave network was extended to December 2022 and the plan became to launch the new ESN in several stages rather than all at once.¹¹⁵ In May 2019, the National Audit Office (“NAO”) reported on the risk of further delays relating to the introduction of the ESN,¹¹⁶ as did a further report by the House of Commons Committee of Public Accounts in July 2019.¹¹⁷ In response to this report, the Government in October 2019 confirmed that *“December 2022 is the earliest date at which Airwave is expected to be replaced by ESN. It is not a target date.”*¹¹⁸
61. In June 2019, Motorola’s contract relating to solutions it will be providing under the ESN was extended to December 2024. This contract extension arose due to delays to the ESN network and was considered necessary *“in order to fully rollout the solution to the users and to avoid the risk of impacting on the benefits of the service to the users”*.¹¹⁹
62. On 10 September 2020, the Home Office noted that *“the absolute latest that we could turn Airwave off is 2025, and what we are seeking to do is to accelerate that date so that we can turn it off by the beginning of 2024”*.¹²⁰
63. In June 2021, a Home Office official told the UK Parliament’s Public Accounts Committee that the transition from the Airwave network to the new ESN would *“go on until the end of 2026”*.¹²¹ The roll-out of the new ESN could however be subject to further delays.

(5) Airwave-TETRA Products

(a) TETRA devices, accessories and related services

64. TETRA products, including those used on the Airwave network, can be divided into three broad categories:

¹¹³ Public Accounts Committee, [Introduction to ESN Further Progress Review](#), dated 17 July 2019 and [NAO Background to the NAO Report](#) on webpage accompanying NAO Report.

¹¹⁴ [NAO Background to the NAO Report](#) on webpage accompanying NAO Report.

¹¹⁵ See Public Accounts Committee, [2018 ‘Reset’ of the ESN Programme](#), dated 17 July 2019.

¹¹⁶ [NAO Press Release](#) dated 10 May 2019 accompanying NAO Report.

¹¹⁷ Public Accounts Committee, One Hundred and Eighth Report of Session 2017–19, [Emergency Services Network: further progress review](#), dated 17 July 2019.

¹¹⁸ [Treasury Minutes](#) of Government response to the Committee of Public Accounts on the Ninety-Fifth and on the Ninety-Ninth to the One Hundred and Eleventh reports from Session 2017–19, pages 42–43, paragraph 1.2.

¹¹⁹ [Contract Award Notice](#), 2019/S 114-280398, Section II.2.4.

¹²⁰ Public Accounts Committee, [Oral evidence: Home Office Recall](#), HC 678, dated 10 September 2020, Question 64.

¹²¹ CMA Market Reference Decision, paragraph 1.2. Further information on the timeline events relating to the delays to the roll-out of the new ESN is available in Appendix A of the [Appendices](#) to the CMA Market Reference Decision.

- (1) TETRA devices, i.e. the radio terminals themselves (including associated software);¹²²
- (2) peripheral equipment and accessories (which we collectively refer to in this Decision as “**accessories**”);¹²³ and
- (3) related services.

We refer to these devices, accessories and related services as “**TETRA products**” or, when we refer to their use on the Airwave network, “**Airwave-TETRA products**”.

65. There are three main types of TETRA device:¹²⁴

- (1) hand-held portable devices (referred to as overt devices);
- (2) covert devices that can be concealed about the body; and
- (3) mobile devices which can be installed in control rooms as well as vehicles, motorcycles, trains, boats and aircraft.

We refer to these devices as “**TETRA devices**” or, when we refer to their use on the Airwave network, “**Airwave-TETRA devices**”.

66. We understand that there are over 300,000 individual users of Airwave-TETRA devices.¹²⁵

67. TETRA devices for use on the Airwave network must be TETRA devices that comply with the ETSI Standards and suppliers must also obtain accreditation from Airwave and the National Cyber Security Centre (“**NCSC**”) prior to their devices and associated software being used on the live Airwave network.¹²⁶

68. Accessories (including batteries, chargers, cables, antennae, earpieces, eartubes, bespoke cases, clips, speaker microphones, microphone kits) are required to make a device functional for use in specific environments or for operational requirements.¹²⁷ While many accessories will be purchased at the same time as the device in order for it to function, some may be

¹²² Airwave-TETRA devices are primarily software-controlled and require appropriate software to be installed devices in order for them to function.

¹²³ The Parties do not distinguish between peripheral equipment and accessories. See Sepura Fifth Response, Question 2, paragraph 2.2; Motorola Sixth Response (Q. 5), paragraph 4.

¹²⁴ Sepura First Response, paragraph 1.21 and Question 5, Document 3803.1 “*PICT Tender Response - Pricing Strategy*” presentation (version 4) circulated on 5 September 2018 but dated and presented on 6 September 2018 and containing [the Sepura Regional Sales Director]’s revised pricing recommendations in response to the PICT Tender (“**Sapura’s 6 September 2018 Presentation**”) (ATF 903); Motorola First Response, Annex 3, “*UK Devices Market*” presentation dated 30 August 2018 relating to Motorola’s response to the PICT Tender (“**Motorola’s 30 August 2018 Presentation**”) (ATF 5280); Motorola First Response, Annex 4, “*Executive Bid & Contract Review Process*” presentation dated 11 September 2018 relating to Motorola’s response to the PICT Tender (“**Motorola’s 11 September 2018 Presentation**”) (ATF 5281).

¹²⁵ Motorola [Notice of Application](#), paragraph 1. See also Sepura First Response, paragraph 1.6; Motorola First Response, Question 1(c), paragraph 6; and PICT First Response, A2, paragraph 7 (ATF 5987) which indicates the number of Airwave-TETRA devices in operation is lower than the number of users of such devices.

¹²⁶ In Northern Ireland, PSNI use TETRA devices that are separately approved by PSNI and NCSC for use on the separate TETRA network used in Northern Ireland (PSNI Response, Questions 2 and 5).

¹²⁷ Sepura First Response, Question 1, paragraph 1.21.1.5; Sepura Third Response – Part 1, Question 26, paragraph 26.4; Motorola Sixth Response, Question 19, paragraph 58(b); PICT First Informal Response – Part A, A9.

purchased at a later date, and some accessories may work across different devices (including those provided by different suppliers).¹²⁸

69. Services related to the supply of Airwave-TETRA devices generally include after sales warranty, maintenance, repairs and training (although various other services may also be provided including system configuration and programming, device refurbishment, device disposal and financing options).¹²⁹

(b) Suppliers of Airwave-TETRA products

70. The evidence indicates that the supply of Airwave-TETRA devices is highly concentrated, with Motorola and Sepura together accounting for the vast majority (if not all) of sales.¹³⁰ While a small number of other suppliers manufacture Airwave-TETRA devices (namely Airbus, Thales and Cleartone),¹³¹ the evidence indicates that these other suppliers play a highly limited role. We discuss this further in Section **E(3)(a)** below.
71. The evidence suggests there may be a wider set of suppliers of accessories.¹³²
72. There are also some other suppliers of related services.¹³³

¹²⁸ While there is some evidence that some accessories may be compatible between different device manufacturers, the evidence is mixed on this point. Motorola has commented that “*very few peripherals/accessories are compatible as between device manufacturers*” (Motorola Sixth Response, Question 19, paragraph 58(b)). We also note that customers may prefer to purchase accessories from the same supplier that provided their Airwave-TETRA device so there is “*complete ownership for technical issues should they occur*” (PSNI Response, Question 6). However, Sepura has commented that “[m]any accessories which can be used with TETRA devices are not TETRA-specific” and that “*it is possible to buy accessories which are compatible with Sepura (and other) TETRA devices on Amazon and ebay*” (Sepura Third Response – Part 1, Question 26, paragraph 26.6 and Question 27, paragraph 27.3). Sepura has also explained that “[m]any accessories are interchangeable and/or substitutable between accessory manufacturers and brands, even including, for example, batteries (Sepura Third Response – Part 1, Question 26, paragraph 26.5).

¹²⁹ Sepura First Response, Question 1, paragraph 1.21. Also see PICT First Informal Response – Part A, Document 15 (“**PICT Procurement Plan**”), paragraphs 2.6 and 2.7 (ATF 5955); PICT First Informal Response – Part A, Document 20 (Volume 1, Appendix B: Pricing) (“**PICT Pricing Document**”), pages 7 - 13 (ATF 5959).

¹³⁰ PICT First Informal Response – Part A, A2 and PICT Procurement Plan, Section 4; Motorola Fourth Response, Question 6, paragraph 43, footnote 10 and paragraph 50; Sepura First Response, paragraph 6.5.

¹³¹ Motorola Sixth Response, Question 18, paragraph 57; Sepura Third Response – Part 1, Question 26; Sepura Third Response – Part 2, paragraph 23.7; PICT Procurement Plan, paragraph 4.4.

¹³² There is some evidence that the competitive conditions for the supply of some accessories may be different to those applicable to the supply of Airwave-TETRA devices whether provided as a standalone devices as part of a bundle. In particular, we note that accessories (unlike devices) do not need to be accredited for use on the Airwave network (Motorola Sixth Response, Question 17, paragraph 55; Sepura Fifth Response, Question 11, paragraph 11.16). Whilst accessories can be – and likely are – purchased separately from a device in some circumstances, this may be more likely to be the case when accessories need to be replaced or accessory stocks generally need to be refreshed. We do not have sufficient evidence to suggest such purchases of accessories are systematically made via third parties who are not Motorola or Sepura.

¹³³ See paragraph 76 below.

(c) Sales of Airwave-TETRA products

73. The turnover for Motorola and Sepura in relation to the sale of Airwave-TETRA products in the UK between 2015 and 2021 is set out in Table 1 below.¹³⁴ Combined figures prior to 2019 were significantly lower, reflecting the fact that the migration off the Airwave network had originally been scheduled to commence in September 2017 and, by December 2019, all Airwave users had expected to have migrated from the Airwave network to the ESN. As a result, there was “very low levels of business” in 2017 and 2018 prior to the reset of the ESN programme in Autumn 2018.¹³⁵

Table 1: Parties’ estimated turnover of Airwave-TETRA products (£m): 2015-2021¹³⁶

	2015	2016	2017	2018	2019	2020	2021
Motorola	3.9	2.5	3.5	5.7	4.7	[X]	[X]
Sepura	8.9	6.7	5.8	6.8	20.9	[X]	[X]

(d) Distribution of Airwave-TETRA products to end-users

74. Users of Airwave-TETRA products can either buy them directly from a supplier (i.e. Motorola or Sepura) or through a third party.
75. Customers that purchase Airwave-TETRA products directly from suppliers often do so under a “Framework Agreement”, which is the result of centrally run procurement (such as the tender issued by PICT) and entitles customers to make purchases at pre-agreed prices from the successful bidders of the procurement. Some customers (for example, larger customers with their own sophisticated procurement function) may decide to run their own procurement exercises. In any event, most users of the Airwave network are public bodies and they will need to comply with the relevant procurement rules in the Public Contracts Regulations 2015 when purchasing TETRA products.
76. Purchases through a third party can take different forms, including:
- (1) Managed services: third parties supply Airwave-TETRA products alongside other products or services. For example:

¹³⁴ Summed turnover of Motorola’s and Sepura’s sales of Airwave-TETRA products from: Motorola Sixth Response (Q. 5), Annex 1 (ATF 5795); Sepura Third Response – Part 1, Annex 4, Table 1 (ATF 4955); and Sepura Eighth Response, Question 1(a). We note that Sepura reports its revenue in Euros and we have used the [Office for National Statistics](#) (“ONS”) GBP to EUR exchange rates.

¹³⁵ Macfarlanes’ (acting on behalf of Sepura) letter to Ofcom dated 21 February 2020, paragraph 8 (ATF 6066). See also, Motorola First Response, Question 1(c), paragraphs 7-9; Motorola Fourth Response, Question 6, paragraph 41.

¹³⁶ For Motorola, see Motorola Eighth Response, Question 1. For Sepura, see Sepura Tenth Response, Question 1, Annex 1. We note that Sepura reports its revenue in Euros and have used the [ONS](#) GBP to EUR exchange rate for each relevant year. Note that exchange rates fluctuated significantly between 2015 and 2021. Figures have been rounded to the nearest £0.1m. No adjustment has been made for inflation.

- (i) Airwave Direct provides a managed service consisting of a combined package of devices (purchased from Motorola or Sepura) plus airtime on the Airwave network.¹³⁷
 - (ii) Capita Secure Information Solutions Limited (“**Capita**”) provides end-users that have outsourced the procurement of their Airwave-TETRA devices to Capita with various services such as inventory management, device configuration, device replacement, repair/service management, logistical support and a 24/7 helpdesk.¹³⁸
- (2) Resellers and distributors: both Parties have a small amount of turnover associated with sales of TETRA products to resellers and distributors, some of which are ultimately sold to Airwave users.¹³⁹ For example, we understand Motorola operates what it refers to as an “*indirect sales and supply*” model whereby it contracts with – and supplies TETRA products to – so called “*channel partners*” who then sell those TETRA products to their customers.¹⁴⁰
77. In the Motorola USA/Airwave Merger Decision, the CMA found that different customer types had a strong preference for a particular distribution channel, with the evidence indicating that large organisations would typically purchase direct from a supplier (such as Motorola or Sepura), while mostly smaller customers (such as local councils) would purchase Airwave-TETRA devices as part of a managed service (e.g. from Airwave Direct).¹⁴¹
78. The Parties have confirmed that they do not consider managed service providers to be competitors.¹⁴² As it is Motorola and Sepura that hold the accreditations to supply Airwave-TETRA devices, managed service providers purchase Airwave-TETRA products from Sepura or Motorola and then supply such products to their own customers as part of a managed service.
79. Figure 1 below illustrates our understanding of the key distribution channels for Airwave-TETRA products to end-users.¹⁴³

¹³⁷ [Airwave Direct brochure](#) [accessed on 22 August 2022]. See also Motorola Fourth Response, Question 14, paragraph 66; Motorola Sixth Response, Questions 21 and 22; Motorola Sixth Response (Qs. 3, 4 and 23), Question 23; Motorola Seventh Response, Question 2; Sepura First Response, Question 1, paragraph 1.8.3; Sepura Third Response – Part 1, paragraph 25.8; PICT First Informal Response – Part A, A7.

¹³⁸ <http://www.capitacontrolsolutions.co.uk/device-managed-services/>. Also see Sepura First Response, Question 1, paragraph 1.8.2; Sepura Second Response – Part 1, Question 14, paragraph 14.1; Sepura Fifth Response, Question 13; Motorola Fourth Response, Question 7, paragraph 53; Motorola Sixth Response, Question 24, paragraph 67.

¹³⁹ Sepura Third Response – Part 1, Question 27, paragraph 27.4 and Question 29, paragraphs 29.2 – 29.3.

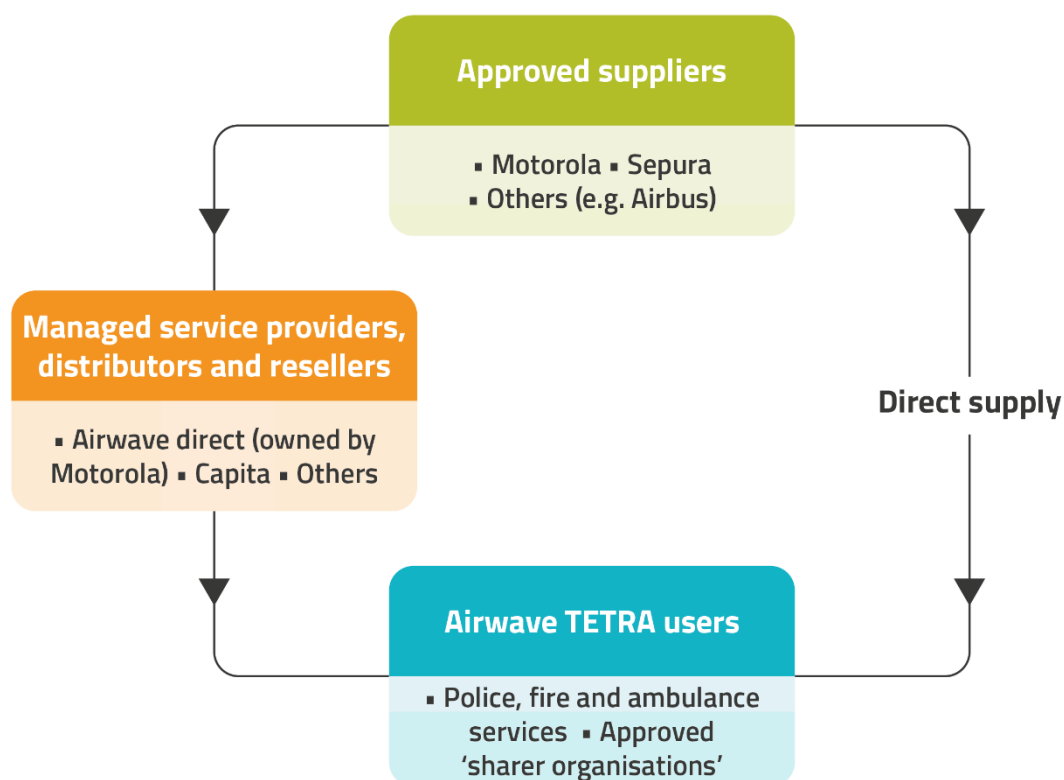
¹⁴⁰ Motorola Fourth Response, Question 7, paragraph 51 and Question 9, paragraph 56. A list of Motorola’s partners can be found here: https://www.motorolasolutions.com/en_xu/partner-finder.html

¹⁴¹ Motorola/USA Airwave Merger Decision, page 3, paragraph 9. See also Motorola Seventh Response, Table 3; Sepura Third Response – Part 2, Question 33, paragraph 33.1.2.

¹⁴² The Parties have confirmed that they do not consider managed service providers to be competitors (Sepura Fifth Response, Question 13; Motorola Fourth Response, Question 7; Motorola Sixth Response, Question 24).

¹⁴³ As explained in paragraph 71 above, we note that the evidence suggests there may be a wider set of suppliers of accessories.

Figure 1: Key distribution channels for Airwave-TETRA products



(6) The PICT Tender: an overview

80. As explained above, many customers purchase Airwave-TETRA products directly from suppliers under a Framework Agreement, which is the result of a centrally run procurement exercise. In 2018, PICT issued an invitation to tender¹⁴⁴ and ran a procurement exercise – acting as a central purchasing body on behalf of Airwave users – in order to address the forecasted shortfall in Airwave-TETRA products arising from the delay to the introduction of the ESN (the “**PICT Tender**”).
81. The PICT Tender was split into Lot 1 and Lot 2. The Parties only bid for Lot 1¹⁴⁵ and the facts and findings in this Decision therefore relate only to Lot 1. Lot 1 required bidders to submit a price for eight separate bundles of Airwave-TETRA products, each of which consisted of an Airwave-TETRA device, accessories and related services.¹⁴⁶ We refer to the Airwave-TETRA products included in these bundles as the “**Lot 1 Products**” and provide further information

¹⁴⁴ [Contract Notice](#) 2018/S 157-359676.

¹⁴⁵ PICT First Informal Response – Part B, Document 21, Airwave Terminal Procurement Decision Paper, 15 October 2018 (“**PICT Decision Paper**”), Section 2.2 (ATF 5960). Although Motorola did not bid for Lot 2, Airwave did submit a bid (PICT Decision Paper, Section 2.2).

¹⁴⁶ PICT Pricing Document, pages 3 – 7. (ATF 5959)

on Lot 1 in **Section F** below. Successful bidders entered into a “**Framework Agreement**” with PICT.

82. The conduct that forms the Infringement occurred in the context of the PICT Tender.

D. MARKET DEFINITION

83. While Ofcom is not obliged to carry out a formal assessment and define the relevant market in all cases,¹⁴⁷ we have formed a view of the relevant market in order to calculate Sepura's "relevant turnover" in the market affected by the Infringement, as this is required for the purposes of establishing the level of the financial penalty that Ofcom considers is appropriate to impose on Sepura.
84. For the reasons set out in **Annex 2**, which forms an integral part of this Decision, Ofcom has found that the relevant market is the supply of TETRA devices, accessories and related services for use on the Airwave network in Great Britain (the "**Relevant Market**").

E. ECONOMIC CONTEXT

85. Our assessment of the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018, and in particular whether it infringes the Chapter I prohibition, requires close consideration of the economic context at and around the time the exchange occurred.¹⁴⁸
86. In this section, we have therefore set out our assessment of the evidence in relation to the economic context in which the exchange of messages on 5 September 2018 occurred, namely:
- (1) The nature of the relevant products
 - (2) The role of Airwave-TETRA devices in driving purchasing decisions
 - (3) The market context for the supply of Airwave-TETRA devices including:
 - (i) Market concentration
 - (ii) Barriers to entry
 - (iii) Barriers to customer switching
 - (iv) Pricing transparency
 - (4) Ofcom's overall findings on the economic context
87. We draw on our findings in this section along with our findings in **Sections E - H** to determine (i) the meaning of the messages exchanged on 5 September 2018 (see **Section I** below); and (ii) whether that exchange of messages constitutes a concerted practice which had as its object the restriction or distortion of competition (see **Section L** below).

(1) Nature of the relevant products

88. The relevant products are Airwave-TETRA products. They are used by the emergency services and other organisations that need to contact the emergency services.
89. Whilst there is no single product with a uniform price, we have found Airwave-TETRA products are sufficiently commoditised for pricing information to be valuable to

¹⁴⁷ Annex 2 – **Market Definition** Sections A-B(1).

¹⁴⁸ *Lexon v CMA* [2021] CAT 5 at [64] and the cases discussed in greater detail in **Section L** below.

competitors. While Airwave-TETRA devices can be designed to incorporate specific customer requirements and may not be interoperable between different suppliers,¹⁴⁹ the evidence indicates that Airwave-TETRA devices are categorised depending on their primary use and key features and that Motorola and Sepura offer equivalent products and packages that fulfil the same purpose.¹⁵⁰

90. Indeed, PICT required the bidders to submit prices for pre-defined bundles of Airwave-TETRA products determined by PICT, each of which included an Airwave-TETRA device with specific functionality.¹⁵¹ Both Motorola and Sepura were also able to identify the equivalent product offered by their competitor.¹⁵²

(2) The role of Airwave-TETRA devices in driving purchasing decisions

91. The main focus in terms of customer requirements and what drives their purchasing decision is the Airwave-TETRA device itself. The device they choose will depend on a variety of factors and in particular, the intended use environment and operational requirements. For example, a customer may require a hand-held portable Airwave-TETRA device, a covert Airwave-TETRA device or an Airwave-TETRA device designed to be fitted in a particular vehicle. Customers will then require accessories and related services so their chosen device can function in specific environments and so that they can maximise its performance. The equipment, accessories and related services a customer needs will ultimately be determined by the Airwave-TETRA device they are using.
92. This focus on an Airwave-TETRA device was reflected in the structure of the PICT Tender itself. For example:
- (1) The bundles included in Lot 1 were all focused around Airwave-TETRA devices.
 - (2) While each bundle in Lot 1 included a pre-defined mix of devices and accessories, Sepura has explained that “[t]he aggregation of the most commonly used accessories into a bundle simplifies the procurement process for many customers and users” and ensures “customers order all of the essential components required for a working device”.¹⁵³
 - (3) PICT (and Sepura) have confirmed that accessories were only included in the PICT bundles so that PICT could evaluate each bid on a consistent basis, rather than bidders offering alternatives which were not directly comparable.¹⁵⁴

¹⁴⁹ PICT Procurement Plan, paragraph 4.2.

¹⁵⁰ See, for example, Motorola’s 11 September 2018 Presentation, pages 7, 9, 10-12 which identify Sepura’s comparable products and packages and Sepura’s 6 September 2018 Presentation, pages 7, 12-13 which identify Motorola’s comparable products and packages.

¹⁵¹ See PICT Pricing Document.

¹⁵² See, for example, Motorola’s 11 September 2018 Presentation, pages 7, 9, 10-12; Sepura’s 6 September 2018 Presentation, pages 7, 12 and 13.

¹⁵³ Sepura Third Response – Part 2, Question 15(a), paragraphs 15.1 and 15.2.

¹⁵⁴ PICT First Informal Response – Part A, A36; Sepura Third Response – Part 2, Question 15(a), paragraph 15.3 and Question 16(b); Sepura SO Representations, paragraph 2.4.7.

- (4) The PICT Tender rules indicated that PICT was mainly interested in bidders involved in the manufacture and supply of all Lot 1 Products, i.e. suppliers of Airwave-TETRA devices that were capable of providing a full product solution rather than suppliers that, for example, could only supply accessories. For example, the PICT Tender rules explained that PICT *“may reject a tender if any bidder does not tender for the provision of the full Lot 1 requirement”* and any bidder that wanted to submit a bid for only part of Lot 1 required *“an express invitation or prior permission”* from PICT.¹⁵⁵ Sepura has also explained that PICT informed it that it would prefer direct bids from manufacturers that could supply all Lot 1 Products.¹⁵⁶
93. For the reasons set out above, only bidders involved in the manufacture and supply of all Lot 1 Products acted as a competitive constraint on the Parties. As explained below, this meant Sepura was highly likely to be Motorola’s strongest competitor and vice versa.
94. Taking into account the key role of Airwave-TETRA devices in driving purchasing decisions, and to facilitate our assessment of the evidence and application of the relevant legal framework, we have considered below the relevant market context for the supply of TETRA devices for use on the Airwave network.

(3) Market context

(a) Market concentration

95. As explained above, the evidence indicates that Motorola and Sepura together account for the vast majority (if not all) of sales.¹⁵⁷
96. While a small number of other suppliers may manufacture TETRA devices that are accredited for use on the Airwave network (including Airbus, Thales and Cleartone),¹⁵⁸ the evidence indicates that these other manufacturers play a limited role (if any) and do not act as a competitive constraint on the Parties.¹⁵⁹ For example, the evidence demonstrates that when

¹⁵⁵ PICT First Informal Response – Part B, page 3, paragraph A17.

¹⁵⁶ Sepura Second Response – Part 1, paragraph 14.3 and Sepura Third Response – Part 2, paragraph 19.2.

¹⁵⁷ PICT First Informal Response – Part A, A2 and PICT Procurement Plan, Section 4; Motorola Fourth Response, Question 6, paragraph 43, footnote 10 and paragraph 50; Sepura First Response, paragraph 6.5.

¹⁵⁸ Motorola Sixth Response, Question 18, paragraph 57; Sepura Third Response – Part 1, Question 26; Sepura Third Response – Part 2, paragraph 23.7; PICT Procurement Plan, paragraph 4.4. We understand that these manufacturers were accredited at the time of the exchange of messages on 5 September 2018 and remain accredited today (Motorola Tenth Response, Question 6). [Airwave Network Connection Certificates](https://www.airwavesolutions.co.uk/community/community/) are available for all these manufacturers on Airwave’s website, available at <https://www.airwavesolutions.co.uk/community/community/> [accessed on 22 September 2022]. Note that Airbus incorporates what was [previously known](#) as the Cassidian brand. See also [Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 48.

¹⁵⁹ We note that when interviewed by Ofcom, [Sepura Executive Team Member A] commented: *“We probably had about 55% of installed base in the UK police forces”*. In terms of how much of the remaining 45% was Motorola he said *“All of it / So, sorry, that’s probably like 44%. So there’s a tiny amount of specialist equipment that was still out in the field, very, very old, over 10 years old, perhaps 15 years old, from the two other companies, Thales and Cleartone. ... But fundamentally there was only two companies ...”* ([Sepura Executive Team Member A]’s Interview Transcript, paragraphs 117 – 121).

obtaining and analysing competitive intelligence for the PICT Tender, Sepura was only focused on Motorola's potential pricing and vice versa.¹⁶⁰

97. Indeed, Sepura has explained that it "*anticipates that Motorola is the only other supplier of TETRA devices for use on the Airwave network during the period 2017- 2019*"¹⁶¹ and Motorola has explained that "*Sepura is its strongest competitor*" for the supply of Airwave-TETRA devices.¹⁶²
98. Moreover, internal documents provided by the Parties indicate that every police force in Great Britain sources its Airwave-TETRA devices from either Motorola or Sepura.¹⁶³
99. We find that Motorola and Sepura are the strongest – if not effectively the only two – competitors in the market for Airwave-TETRA devices. This was also the case at and around the date of the exchange of messages on 5 September 2018. This market concentration may be explained by the high barriers to entry and material barriers to customer switching, both explained in more detail below. It is also supported by the fact PICT only received bids from the Parties for Lot 1.¹⁶⁴

(b) Barriers to entry

100. As explained in **Section C(4)(d)** above, the Airwave network is currently scheduled to be switched off by the end of 2026 after all users have migrated to the ESN. As the number of users of the Airwave network declines as users migrate to the new ESN, so too will the demand for Airwave-TETRA products that are not suitable for use on the ESN.¹⁶⁵ This meant that at and around the date of the exchange of messages on 5 September 2018, the opportunity for a new entrant to make significant sales of Airwave-TETRA products was limited and in January 2020 PICT confirmed that it "*[does not anticipate] ... that any alternative provider to either Motorola or Sepura will now enter the market.*"¹⁶⁶
101. While this factor alone indicates there were, and remain, high barriers to entry, other factors are likely to have exacerbated these barriers. For example, potential new entrants may not have had recent experience in the UK market or Airwave-TETRA products, or existing

¹⁶⁰ Sepura First Response, Question 6, paragraph 6.14 and Sepura's 6 September 2018 Presentation; Motorola's 30 August 2018 Presentation and Motorola's 11 September 2018 Presentation.

¹⁶¹ Sepura Fifth Response, Question 2, paragraph 2.4. See also Sepura Third Response – Part 1, Question 26, paragraph 26.2.1 where Sepura recognises that Motorola is "*its main competition in relation to TETRA devices in the UK*"; Sepura First Response, Question 6, paragraph 6.14. Further, [Sepura Executive Team Member C] commented as follows during his interview with Ofcom: "*there's basically only two competitors in our market worldwide, Motorola and us*" and "*there's only one competitor we have really and that's Motorola. Worldwide. There are other vendors of TETRA terminals but in the last few years they've all fallen away and stopped investing basically.*" ([Sepura Executive Team Member C]'s Interview Transcript, paragraphs 55 and 52 respectively).

¹⁶² Motorola Fourth Response, Question 7, paragraph 50.

¹⁶³ Motorola's 30 August 2018 Presentation, page 3; Sepura's 6 September 2018 Presentation, pages 5 – 6.

¹⁶⁴ PICT Decision Paper, Section 2.2.

¹⁶⁵ Motorola has explained that "*[t]he UK Government had been recommending users not to make any major handset purchases, given the development of the [ESN]*" (Motorola Third Response – Part 2, Question 37, paragraph 48).

¹⁶⁶ PICT First Response, A3 (ATF 5987). See also Sepura Third Response – Part 1, Question 27, paragraph 27.5.

relationships with potential customers.¹⁶⁷ In this context, incentivising customers to overcome any lack of reputation and customer service for critical products used for public safety and consider a new third provider would have required a significant change to the market dynamics at the time.

102. The “*rigorous*”¹⁶⁸ technical and regulatory accreditation process required for TETRA devices to be supplied for use on the Airwave network are also likely to have acted as a further barrier to entry.
103. In terms of the accreditation process, all TETRA devices must comply with the mandatory operational and functional requirements as defined in the TETRA ETSI standards.¹⁶⁹ All TETRA devices for use on the Airwave network must also obtain:
- (1) Accreditation by Airwave to confirm the device’s interoperability with the Airwave network and to ensure any associated hardware and software achieves minimum levels of performance and specified functionality that will not compromise the operation of the network.¹⁷⁰ Airwave maintains a reference system (designed to replicate its live operational network) to test all devices that may be used to connect to its network and as at March 2021 charged a fee of up to around £[£3K] to carry out this testing.¹⁷¹
 - (2) Accreditation by the NCSC [is required].^{172 173}
104. PICT has confirmed that these accreditations are “*made on each model and software version to ensure that the necessary technical capabilities and appropriate security protocols and confidentiality are maintained.*”¹⁷⁴ In summary, any company that wants to supply Airwave-TETRA devices will be subject to regulatory hurdles that are likely to incur significant time and cost and therefore act as a barrier to entry.¹⁷⁵
105. Sepura has explained that “[o]nly Motorola and Sepura have ever had accredited devices which met and meet the PICT Tender criteria.”¹⁷⁶

¹⁶⁷ PICT Procurement Plan, paragraph 4.5.

¹⁶⁸ Sepura Third Response – Part 1, Question 26, paragraph 26.2.

¹⁶⁹ PICT First Informal Response – Part A, A5; Motorola Sixth Response, Question 17, paragraph 43 - Motorola has confirmed that “*TETRA compliance is managed by the TETRA and Critical Communications Association (“TCCA”)*”.

¹⁷⁰ Sepura Fifth Response, Question 11; Motorola Sixth Response, Question 17, PICT First Informal Response – Part A, A5; PICT Second Response, Question 1.

¹⁷¹ Motorola Sixth Response, Question 17 and Document 479 (ATF 5780).

¹⁷² Sepura Fifth Response, Question 11; PICT First Informal Response – Part A, A5; PICT Second Response; Question 1. Further information on the NCSC accreditation process is available at <https://www.ncsc.gov.uk/information/information-about-caps>.

¹⁷³ Sepura Fifth Response, Question 11.

¹⁷⁴ PICT First Informal Response – Part A, A5.

¹⁷⁵ Also see [Sepura Executive Team Member C]’s Interview Transcript, paragraph 59.

¹⁷⁶ Sepura SO Representations, paragraph 2.4.5.

106. Taking into account all the evidence, we find that at and around the date of the exchange of messages on 5 September 2018 there were high barriers to entry for the supply of Airwave-TETRA devices in what was expected to be a rapidly declining market when the ESN is switched on. While there have been ongoing delays to the roll-out of the ESN, we find that the uncertainty around these delays has done little, if anything, to reduce these barriers to entry. The Parties would have been aware of these factors relating to barriers to entry at the time of the PICT Tender.

(c) Barriers to customer switching

107. The evidence indicates that customers are typically loyal to their current supplier and switching is limited. Sepura has explained that some police forces have been using Motorola for up to 15 years.¹⁷⁷ This is largely due to the significant costs involved in switching suppliers.¹⁷⁸ While customers will at times need to refresh their stocks, there are significant administrative costs involved in switching suppliers, including those associated with re-procuring equipment, training on the use of new devices, implementing new programming tools, implementing new operational policies and procedures, and potentially having to engage with more than one manufacturer in relation to the management of devices. More generally, switching suppliers will incur the cost of purchasing new devices and new accessories (such as batteries, chargers, earpieces, antennas and microphones)¹⁷⁹ as well as the cost of de-installing and replacing equipment embedded in buildings and vehicles.¹⁸⁰ Customers will need to overcome all of these costs to incentivise switching. The attention to detail required when addressing all of these points (and mitigating the risk of service interruptions) is particularly important given Airwave-TETRA devices are mostly used by the emergency services.
108. It is also likely to be difficult for some customers to justify incurring any associated costs and time when Airwave-TETRA products have a limited market duration (as explained in paragraph 100 above). Those barriers to switching increase as the market duration of Airwave-TETRA products reduces the closer to the date on which the Airwave network is switched off. Consistent with this view, in January 2020, PICT confirmed that “*given the pending replacement of the Airwave network, ... it does not expect [... customers] to switch equipment provider between Motorola and Sepura*”.¹⁸¹ We do however recognise that any increase in barriers to customers switching may be more limited with further delays to the

¹⁷⁷ Sepura Third Response – Part 2, Question 13(d), paragraphs 13.5.8 and 13.5.10.

¹⁷⁸ Sepura Third Response – Part 2, Question 4(a), paragraph 4.4.2; [Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 123 and [Sepura Regional Sales Director] Interview Transcript (CD2), paragraphs 10, 204 and 209.

¹⁷⁹ As explained in **Section E(2)** above, customers tend to purchase an Airwave-TETRA device as a bundle alongside accessories and related services for their chosen device and “*very few peripherals/accessories are compatible between different device manufacturers*” (Motorola Sixth Response, Question 19, paragraph 58(b)).

¹⁸⁰ Motorola Sixth Response, Question 19; Sepura Fifth Response, Question 9; [Sepura Executive Team Member A]’s Interview Transcript, paragraph 131; PICT Second Response, Question 11. Sepura has explained that the costs associated with buying additional accessories and the burden and cost of retraining officers was a key reason why Police Scotland chose to refresh its Airwave-TETRA devices with its existing supplier, Motorola (Sepura Third Response – Part 2, Question 13(d), paragraph 13.5.9; Sepura Fifth Response, Question 9, paragraph 9.6).

¹⁸¹ PICT First Response, A3.

roll-out of the ESN and that customers may be more incentivised to switch if they will require Airwave-TETRA devices for longer than anticipated.

109. Notwithstanding the barriers to switching, the Parties were aware that switching can, and does, occur as a result of any revised pricing submitted as part of a procurement exercise. This is demonstrated by the Parties' contemporaneous evidence set out in **Sections G and H** below, which identifies the risks and potential gains to the Parties from customers switching as a result of the prices submitted to PICT.¹⁸²
110. The evidence also indicates that switching is most likely to occur if a customer needs to replace a significant proportion of its Airwave-TETRA products and a material level of discount is offered. For example, the Metropolitan Police Service ("**MPS**") switched from Motorola to Sepura following a price drop Sepura offered under the terms of the Framework Agreement in December 2018.¹⁸³ The evidence therefore suggests that materially discounted pricing, relative to prevailing pricing, is likely to be required to overcome the barriers identified above and trigger switching.
111. Where customers do decide to switch suppliers, price is therefore a key driver of their decision to switch and a key parameter on which the Parties compete.¹⁸⁴
112. Taking into account all the evidence, we find that:
 - (1) at and around the date of the exchange of messages on 5 September 2018, there were material barriers to switching;
 - (2) barriers to switching are higher the closer the date on which the Airwave network is switched off (although any increase in those barriers may be more limited with further delays to the roll-out of the ESN);
 - (3) some customers do still switch suppliers - switching can, and does, occur as a result of any revised pricing submitted as part of a procurement exercise and when customers do switch, price is the key driver of their decision; and

¹⁸² See, for example, Sepura's 6 September 2018 Presentation, pages 5, 6 and 11; Motorola's 11 September 2018 Presentation, pages 4 and 6.

¹⁸³ Sepura Fifth Response, Question 9, paragraph 9.7. The price drop Sepura offered for its key product bundles i.e. those including an overt [X] and [X] device (which Sepura has described as "*the primary models put forward in Sepura's Bid*" - Sepura Fourth Response (Qs. 2-4), Question 2, paragraph 2.7) was between approximately [X]% and [X]% (see, for example, Sepura First Response, Question 5, Documents 867.1 (ATF 3774), 704.1 (ATF 3937) and 828.1 (ATF 3813)) although additional discounts were subsequently made available where certain accessories were not included in a bundle and/or where a certain volume of Airwave-TETRA bundles were purchased (see, for example, Sepura First Response, Question 5, Document 774.1 (ATF 3867), attaching Document 2102.1 (ATF 2539)). For example, significant discounts of up to £[X] or [X]% were available for purchases of a PICT motorcycle mobile radio bundle on the basis at least [X] of such devices were purchased under the terms of the price drop (see, page 11 of Document 2102.1). We note that [the Sepura Regional Sales Director] described Sepura's price drop as "*significant*" and "*colossal*" during interview ([Sepura Regional Sales Director] Interview Transcript (CD2), paragraphs 213 and 221). We understand that four police forces have switched from Motorola to Sepura following the award of the Framework Agreement (Sepura SO Representations, paragraph 7.10).

¹⁸⁴ See, for example, Sepura Second Response – Part 1, Question 8(a), paragraph 8.1.5 in which Sepura explained that its price drop strategy in December 2019 took into account that a "*substantial discount would be required to secure ... [the MPS] business.*" See also Sepura Oral Transcript, paragraphs 52 and 147.

- (4) material levels of discount from a competitor's pricing are likely to be required to incentivise switching, given the barriers we have identified.

(d) Pricing transparency

113. The more pricing transparency there is on what prices have previously been offered or adopted by competitors, the better informed the Parties will likely be in terms of making strategic pricing decisions in the future, including in response to procurements such as the PICT Tender. In the following paragraphs, we assess the evidence relating to pricing transparency at and around the date of the exchange of messages on 5 September 2018.
114. As noted above, Motorola and Sepura have many years of experience supplying TETRA devices. They have participated in numerous procurement processes and have procurement and intelligence gathering functions that enable them to regularly and effectively compete against each other in a highly concentrated market.¹⁸⁵
115. Additionally, their customers are generally public bodies subject to a public procurement regime and *“there is usually a requirement to provide certain information about the winner and winning bid”*.¹⁸⁶ In other words, these procurements can reveal a certain degree of information about other bidders and the prices at which they bid. Accordingly, previous procurement exercises and their own market knowledge mean that the Parties have various competitive intelligence available to them (including in relation to pricing) when participating in procurements. As discussed below, this is particularly true for the PICT Tender that had a wide scope covering all users of the Airwave network in Great Britain, which is *“one of the oldest national public safety networks in the world”*.¹⁸⁷

(i) Some UK customers publish prices paid for Airwave-TETRA devices or publish pricing information which allows the price of a winning bid to be reverse engineered

116. At the time of the exchange of messages on 5 September 2018, both Parties had been supplying Airwave-TETRA products to UK customers for around 20 years.
117. Motorola and Sepura have confirmed that the Home Office published the prices paid for Airwave devices by various UK police forces.¹⁸⁸ Motorola confirmed that this information included *“[a] force by force breakdown of prices, number of items and purchase date (sometimes with additional information)”* for both hand-held Airwave radios and vehicle

¹⁸⁵ For example, [the Sepura Regional Sales Director] circulated *“Weekly Reports”* relating to the sales area for which he was responsible which identified competitive intelligence relating to recent and upcoming tenders and projects as well as Motorola pricing, and included section titled *“Competitive Update”*. See, for example, Sepura Sixth Response, Document 5181.1 (ATF 332) and Sepura Sixth Response, Document 5209.1 (ATF 304).

¹⁸⁶ Motorola Sixth Response, Question 7, paragraph 20. For example, in the same paragraph, Motorola explains that Regulation 86 of the Public Contracts Regulations 2015 requires public bodies to disclose *“the name of the tenderer to be awarded the contract and the reasons for the decision, the characteristics and relative advantages of the successful tender, the score obtained by the winner and the score obtained by the tenderer which is to receive the notice”*.

¹⁸⁷ Sepura First Response, Question 1, paragraph 1.6.

¹⁸⁸ Sepura First Response, Question 6, paragraph 6.14.1; [Sepura Executive Team Member A]’s Interview Transcript, paragraph 54; [Sepura Executive Team Member C]’s Interview Transcript, paragraph 57; [Sepura Executive Team Member B]’s Interview Transcript, paragraph 50; Motorola Sixth Response, Question 9.

mounted Airwave radios.¹⁸⁹ This information was available to the Parties prior to the deadline for the submission of bids for the PICT Tender.

118. Sometimes the prices of winning bids can also be reverse engineered from the published scores of other bidders or ascertained from feedback received following a tender. This is demonstrated by the fact Sepura was able to reverse engineer Motorola's average price for the bundle PICT evaluated when scoring the bids for the PICT Tender.¹⁹⁰

(ii) Some UK customers disclose Motorola pricing information to Sepura

119. Sepura has confirmed that market intelligence on competitor pricing can come from *"information obtained from customers, for example ... negotiations with customers in which they use competitors' pricing as a negotiating tool in order to obtain lower prices from Sepura"*.¹⁹¹
120. Contemporaneous evidence demonstrates that some UK customers directly provide suppliers with information on competitors' prices. For example, separate weekly reports circulated by [the Sepura Regional Sales Director] stated *"Motorola pricing received is that a new KMF will cost £[X]"*¹⁹² and *"good competitive data on Motorola pricing received"* based on information disclosed by potential Sepura customers.¹⁹³
121. Sepura has confirmed that pricing information disclosed by customers allowed [the Sepura Regional Sales Director] *"to piece together his own view of where Motorola's pricing levels were likely to be"* in its response to the PICT Tender.¹⁹⁴

¹⁸⁹ Motorola Sixth Response, Question 9. See also paragraph 57 of [Sepura Executive Team Member C]'s Interview Transcript.

¹⁹⁰ See, for example, Sepura First Response, Question 5, Documents 24.1 (ATF 4612), 376.1 (ATF 4265) and 1786.1 (ATF 2855) and Sepura Fifth Response, Question 5(d)); [Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 106. See also Motorola Second Response – Part 2, Question 18(b), paragraph 100.

¹⁹¹ Sepura First Response, Question 6, paragraph 6.14.3. See also [Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 123 in which he said: *"Now our risk for PICT was that Police Scotland pricing may get out into the marketplace. It could be that that could get out from a Police Scotland person telling Motorola, 'cause that's sometimes what happens, often happens, where you get customers who are a little bit ..."*

¹⁹² Sepura Sixth Response, Document 5181.1, page 2 (ATF 332) and Sepura Seventh Response, Question 5(a), paragraph 5.1. Sepura has confirmed that "KMF" means "Key Management Facility" which *"is a piece of equipment used to provision radios with the encryption keys required to provide "end-to-end" encryption, which is a more secure form of encryption than the "air interface" encryption which is normally applied to TETRA communications"* (Sepura Seventh Response, Question 5(b), paragraph 5.2).

¹⁹³ Sepura Sixth Response, Document 5209.1, page 2 (ATF 304). See also email dated 19 December 2018 in which [the Sepura Regional Sales Director] explained in the following comment to [the Sepura Business Development Director] and [the Sepura Business Development Manager] that a particular police force had indicated to him that Motorola were considering a price drop: *"From our meeting with [police force] today, the competition have been touting a price drop but I do not know what it was ..."* (Sepura First Response, Question 5, Document 1250.1 (ATF 3391)).

¹⁹⁴ Sepura Seventh Response, Question 6(a), paragraph 6.1.

(iii) Some European customers publish the price of winning bids or publish pricing information allowing the price of a winning bid to be reverse engineered

122. Motorola and Sepura have indicated that they use multiple sources to inform their pricing decisions. One of these sources is previous competitive interactions between them, such as tenders in Europe. Evidence showing a degree of pricing transparency in relation to pricing for previous tenders in Europe can therefore be used to help inform the Parties about each other's approach to pricing and the Parties can take that information into account when determining their own future pricing decisions, such as those they were required to take in response to the PICT Tender.¹⁹⁵ For example:

- (1) In the exchange of messages on 5 September 2018, [the Sepura Regional Sales Director] suggested to [the Motorola VP for Sales] that Motorola was "*doing crazy deals across Europe*" and [the Motorola VP for Sales] referred to Sepura's pricing in Holland.
- (2) [The Sepura Regional Sales Director] and [Sepura Executive Team Member C] discussed recent "*horribly low pricing from Moto in Romania*" in the context of whether Sepura should submit a lower bid in response to the PICT Tender.¹⁹⁶
- (3) [The Sepura Regional Sales Director] has explained that Sepura had observed Motorola pricing below Sepura's cost price in Norway and suspected Motorola may have been cross-subsidising. [The Sepura Regional Sales Director] explained that Sepura was mindful that Motorola could do something similar in the UK by using its Airwave business to cross-subsidise its bid for the PICT Tender and that Sepura was "*trying to assess those dynamics*".¹⁹⁷

123. In this context, the pricing of winning bids throughout Europe is sometimes made public, disclosed to suppliers including Motorola and Sepura or can be reverse engineered from the information that is disclosed.¹⁹⁸ For example:

- (1) Sepura was provided with a copy of the pricing submitted by the winning bidder for a tender carried out by the Stockholm Metro in Sweden.¹⁹⁹
- (2) [The Sepura Regional Sales Director] explained that in Holland, there was "*a tender for mobiles ... three tenders for portables and ... a tender for Atex radios*" and for

¹⁹⁵ Sepura First Response, Question 6, paragraph 6.14.3. For Motorola, see Motorola Sixth Response, Question 13.

¹⁹⁶ See paragraph 271 below.

¹⁹⁷ [Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 123.

¹⁹⁸ [The Sepura Regional Sales Director] explained during interview: "*So one of the great things about some of our international markets ... is that they publish the results of the winners and the losers, and some markets are not necessarily discreet about how they may ...*" (see [Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 106. See also PICT Second Formal Response, Question 2(d); paragraph 50 of [Sepura Executive Team Member A]'s Interview Transcript; paragraph 55 of [Sepura Executive Team Member C]'s Interview Transcript; and Motorola Sixth Response, Question 6, paragraph 18.

¹⁹⁹ Sepura Fifth Response, Question 5(a) and (b); [Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 106.

each tender the “*losing bidders were told exactly what the winning bidder won with*”.²⁰⁰

- (3) In relation to public safety tenders in Romania that are conducted through an e-auction process, Sepura has confirmed it is provided with the value of the final bids and the identities of other bidders.²⁰¹
- (4) Motorola has confirmed that in Poland, information on the gross offer price of the winning bidder has been made public via the Police Headquarters’ public procurement website.²⁰²
- (5) In Belgium, Motorola has confirmed that the winning bidders and the price at which they bid were published following the conclusion of a framework agreement in 2018,²⁰³ and Sepura received competitive data on Motorola’s pricing that enabled it to carry out a “*like for like match*” comparing Motorola’s pricing for car kit accessories with its own.²⁰⁴

124. The contemporaneous evidence also demonstrates that the prices of winning bids around Europe – including in Sweden and the Czech Republic – can be reverse engineered from the published scores of other bidders or ascertained from feedback received following a tender. For example, Sepura was able to reverse engineer Motorola’s average price for the bundle PICT evaluated when scoring the bids for the PICT Tender.²⁰⁵

(iv) Some resellers publish Motorola/Sepura pricing

125. Some resellers (including dealers, partners and distributors) publish price books which Sepura has confirmed “*are then freely available on the internet*”.²⁰⁶

²⁰⁰ [Sepura Regional Sales Director] Interview Transcript (CD2), paragraph 121. [The Sepura Regional Sales Director] also reported to Sepura that “*Feedback from Holland (ARC II tender) is that Motorola has offered its partners 65% off list pricing*” (Sepura Sixth Response, Document 5214.1, page 2 (ATF 299)).

²⁰¹ Sepura Fifth Response, Question 5(c). [Sepura Executive Team Member B] also commented during interview that Romanian procurement processes are “*very open and transparent*” and that they always publish the prices offered by the winning bidder (paragraph 62 of [Sepura Executive Team Member B]’s Interview Transcript.) See also Sepura First Response, Question 5, Document 3288.1 (ATF 1418) in which [the Sepura Regional Sales Director] and [Sepura Executive Team Member C] discuss “*horribly low pricing from Moto in Romania*” in the context of Sepura’s pricing strategy for the PICT Tender, and Document 3162.1 (ATF 1544) in which [Sepura Executive Team Member B] says to [the Sepura Regional Sales Director] “[*w]e have just seen in Romania that Moto bid 233 Euro for a radio bundle*”.

²⁰² Motorola Sixth Response, Question 7, paragraph 24.

²⁰³ Motorola Sixth Response, Question 7, paragraph 25.

²⁰⁴ Sepura First Response, Question 5, Documents 1763.1 (ATF 2878) and 2575.1 (ATF 2066).

²⁰⁵ Sepura Fifth Response, Question 5, Document 2578.1 (ATF 2063) which indicates Sepura was able to reverse engineer Motorola’s pricing for its 6650 and 3550 products that were part of its bid to the Swedish Police; and in relation to a tender run by the Prague Municipal Police in the Czech Republic, [the Sepura Regional Sales Director] confirmed that Sepura had calculated another bidder’s tender price as “*list price – 70% discount*” and noted that “[*t]he other Motorola offers are almost double the price*” (Sepura Sixth Response, Document 5305.1, page 4, (ATF 217)).

²⁰⁶ Sepura Third Response – Part 2, Question 12, paragraph 12.3. See also [Sepura Executive Team Member A]’s Interview Transcript, paragraph 54 and [Sepura Executive Team Member C]’s Interview Transcript, paragraph 55.

126. For example, Sepura obtained Motorola's detailed 27-page price book for the MTP3000 series product from a European reseller.²⁰⁷ Sepura also had access to Motorola's detailed 27-page price book for its MTP6000 series products,²⁰⁸ and there is evidence that Sepura had obtained other information on Motorola pricing from a reseller in Germany.²⁰⁹ Further, in Norway, [the Sepura Regional Sales Director] explained that Sepura was working with one of its partners that received and analysed Motorola's pricing and enabled Sepura to determine that its own pricing was uncompetitive.²¹⁰
127. Motorola has also confirmed that it obtained information about Sepura's pricing from one of Sepura's resellers.²¹¹
128. The price books we are aware of being available online relate to European, rather than UK, pricing and may not reflect pricing at the time of the PICT Tender. For example, Motorola's price books for its MTP3000 and MTP6000 series products that were available to Sepura were dated June 2017 and September 2016 respectively. These price books may also not reflect any discounts applied to published prices.
129. However, [the Sepura Regional Sales Director] requested copies of these price books in November 2018, indicating they were still of useful and practical value to Sepura.²¹² Sepura has also confirmed that [the Sepura Regional Sales Director] used Motorola's MTP6000 price book as the baseline pricing from which to estimate Motorola's likely pricing for the PICT Tender.²¹³

(v) Some third parties publish market reports containing high level pricing information

130. Third parties, such as IHS Markit, publish market reports that contain high level information on average selling prices. In a highly concentrated market these can provide meaningful information in relation to competitor pricing.²¹⁴

²⁰⁷ Sepura Third Response – Part 2, Question 12, paragraph 12.3, footnote 6; the price book is available at Sepura First Response, Question 5, Document 1960.1 (ATF 2681). See also Sepura First Response, Question 6, paragraph 6.14.2 and Sepura Fifth Response, Question 4(b) indicating that pricing for other Motorola TETRA products is available online. See also Sepura Fourth Response – Part 2, Question 3(b).

²⁰⁸ Sepura First Response, Question 5, Document 1961.1 (ATF 2680)

²⁰⁹ Sepura First Response, Question 5, Documents 3103.1 (ATF 1603), 3810.1 (ATF 896) and 3811.1 (ATF 895).

²¹⁰ Sepura First Response, Question 5, Documents 2578.1 (ATF 2063) and 2583.1 (ATF 2058) and [Sepura Regional Sales Director] Interview Transcript (CD2), paragraph 119.

²¹¹ Motorola Sixth Response, Question 8.

²¹² Sepura First Response, Question 5, Document 208.1 (ATF 4431)

²¹³ Sepura Ninth Response, Question 10(b), paragraph 10.4.2.

²¹⁴ Motorola Sixth Response, Question 11; Motorola Sixth Response, Question 6, paragraph 18.

(vi) Sepura's representations on pricing transparency

131. In the paragraphs below, we set out Sepura's representations relating to pricing transparency followed by our assessment of what pricing information was likely to have been available to the Parties at the time of the PICT Tender.
132. Sepura does not dispute the availability of the historical and publicly available information identified above. Rather, Sepura contends that:
- (1) There was limited pricing information available in relation to the pricing of Airwave-TETRA products in Great Britain, which were the focus of the PICT Tender. Sepura contends that much of the pricing information available relates to European bids, or pricing where sales are made via partners rather than direct by a manufacturer (meaning the actual pricing of manufacturers is less transparent).²¹⁵ Sepura also notes PICT's comment that PICT held limited pricing information relating to previous tenders.²¹⁶
 - (2) Any pricing information that may have been available to the Parties would have been "*difficult to interpret*"²¹⁷ and "*would not say anything about what the prices would be for the PICT tender*"²¹⁸ because:
 - (i) Historical offers are always bespoke as they depend on specific requirements for a bid and variable inputs such as the specific bundle of TETRA-products requested, customer's technical requirements, and expected volumes.²¹⁹ As a result, there was no "*prevailing price*".
 - (ii) The PICT bundles were also unique and specifically created for the purpose of the Framework Agreement.²²⁰ These "*PICT bundles*" each contained a mix of products chosen by PICT but Sepura also submitted a separate "*Sepura bundle*" containing a mix of products which it considered its customers generally purchase.²²¹
133. Sepura also rejected the notion that there was some form of prevailing or market price for Airwave-TETRA products. In particular, it rejects the argument that its own pricing for

²¹⁵ Sepura SO Representations, paragraph 4.35; Sepura's First Letter of Facts Representations, paragraph 3.2.1. Sepura has submitted that "*customers typically expect significant discounts from published ... prices*" (Sepura Third Response – Part 2, Question 12, paragraph 12.3).

²¹⁶ Sepura SO Representations, paragraphs 2.4.9, 4.36 – 4.37; Sepura Oral Transcript, paragraph 69. Also see PICT First Informal Response – Part A, A32 and PICT Second Formal Response, Question 2 in which PICT confirmed that the standard best practice is for the "*[w]inners – but not the pricing offered in the winning bids*" to be made public and shared with industry participants.

²¹⁷ Sepura SO Representations, paragraph 4.24.

²¹⁸ Sepura Oral Transcript, paragraph 65.

²¹⁹ See, for example, Sepura SO Representations, paragraphs 4.24, 4.27 and 4.31; Sepura Oral Transcript, paragraphs 65 – 68.

²²⁰ Sepura SO Representations, paragraph 2.4.7; Sepura Oral Transcript, paragraphs 67 and 70.

²²¹ Sepura SO Representations, paragraph 4.38.

different bids over the previous 12 months would have been of practical value in identifying Sepura's current pricing.²²²

(vii) Ofcom's assessment in relation to pricing transparency

134. Taking into account all the evidence, we find that pricing information on both Airwave-TETRA products and TETRA products more generally was readily available via a variety of sources at and around the date of the exchange of messages on 5 September 2018. The evidence demonstrates that the Parties had access to prices paid for Airwave-TETRA products, price lists and pricing information for TETRA products based on who won and lost bids in the UK (and also a variety of European countries) and were generally aware of pricing levels "*all round Europe*".²²³
135. The levels of pricing transparency available enabled both Parties to gain a general understanding of the other Party's current market pricing, and use that information when determining their strategy for the PICT Tender. For example, both Parties estimated each other's likely range of pricing in contemporaneous presentations relating to their proposed pricing strategy.²²⁴ While interpreting pricing information might not always be entirely straightforward, Sepura has also confirmed that [the Sepura Regional Sales Director] was able "*to piece together his own view of where Motorola's pricing levels were likely to be*" in its response to the PICT Tender.²²⁵
136. We recognise that there are certain factors indicating that there may not always be pricing transparency in relation to the price a competitor has offered for a particular TETRA product or bid, including in relation to winning bids in the UK.²²⁶ We do not however consider it necessary for there to be complete and up-to-date pricing information available for every opportunity in order to find there are material levels of pricing transparency in the market.
137. We also recognise that all bids are likely to be tailored to the specific requirements of a particular opportunity (which will often be based on a bundle of products) and may not be directly applicable to other opportunities in the future. This does not however mean that previous pricing does not provide a valuable insight into future pricing. The Parties will be aware of the specific requirements for each opportunity (for example, what accessories are included in the bid and whether volume discounts may be permitted) and any relevant

²²² Sepura SO Representations, paragraphs 4.33 – 4.35.

²²³ See paragraph 50 of [Sepura Executive Team Member A]'s Interview Transcript. See also paragraph 55 of [Sepura Executive Team Member C]'s Interview Transcript in which he commented: "*We have market intelligence from... because there's basically only two competitors in our market worldwide, Motorola and us. We have market intelligence for won and lost bids on a variety of geographies. There are price lists that are published in various regions, including the UK, so we can have a reasonably accurate guesstimate of what the market pricing will be. It will be the same for Motorola for us.*"

²²⁴ In relation to Sepura, see, for example, Sepura's 6 September 2018 Presentation, pages 7 and 13 and Sepura First Response, Question 5, Document 3223.1 (ATF 1483). In relation to Motorola, see Motorola's 30 August 2018 Presentation, pages 14 - 18, 22 and 23 (ATF 5280); Motorola's 11 September 2018 Presentation, pages 7 – 12 and 17 – 19; Motorola Second Response – Part 2, Question 18(h). This evidence is explained in more detail in **Sections G and H** below.

²²⁵ Sepura Seventh Response, Question 6(a), paragraph 6.1. See also Sepura Ninth Response, Question 10.

²²⁶ See, for example, Sepura First Response, Question 5, Documents 86.1 (ATF 4550) 74.1 (ATF 4562) and 1755.1 (ATF 2886).

context, and can take that information into account when assessing their own general current market pricing²²⁷ as well as part of their market intelligence on each other's pricing. For example, a "*Competitive Pricing Overview*" prepared by Motorola plotted recent bids it had won and lost in Britain and Europe on a graph which identified the unit price on one axis and the volumes available on the other (as well as "*Sepura intel*" on two bids).²²⁸

138. Taking into account all the evidence, we find that at and around the date of the exchange of messages on 5 September 2018:
- (1) there was a material degree of pricing transparency in relation to the pricing of TETRA products including those used on the Airwave network; and
 - (2) both Parties would have had a general understanding of the other Party's current pricing for TETRA products including those used on the Airwave network.
139. These findings are consistent with the evidence on the Parties' pricing strategies and respective understanding of the competitive landscape which we discuss in detail in **Sections G - H** below.

(4) Ofcom's overall findings on the economic context

140. A major driver for customers' purchasing decisions in this market is the Airwave-TETRA device itself and the way it will be deployed (e.g. overt handheld, covert, or vehicle-mounted).
141. Motorola and Sepura offer substantially equivalent devices that fulfil the same purpose, but in practice customers need to purchase a package or bundle of the Airwave-TETRA device and its peripherals or accessories. This ensures they have a working device, but can make it more challenging for a force to compare like-with-like between providers.
142. The PICT Tender sought to support comparison by providing a set of comparable bundles. As noted in **Section G(2)** below, Sepura also included prices for alternative bundles of Airwave-TETRA products that it considered better reflected what its customers typically purchase.
143. Accordingly, competition for the supply of Airwave-TETRA products typically takes place over a bundle of Airwave-TETRA products, albeit with the Airwave-TETRA device as the focal point of the bundle.
144. At and around the date of the exchange of messages on 5 September 2018, Motorola and Sepura together accounted for the vast majority (if not all) of sales of Airwave-TETRA devices. There were also high barriers to entry for the supply of Airwave-TETRA devices in what was expected to be a rapidly declining market when the ESN is switched on. We

²²⁷ See, for example, Sepura First Response, Question 5, Document 1928.1 (ATF 2713) which is a document identifying the pricing for Airwave-TETRA products Sepura had recently offered to customers; the date of the offer; the name of the customer; the opportunity in terms of the volume of Airwave-TETRA devices within the scope of the offer; the type of Airwave-TETRA device offered; the accessories and related services within the scope of the offer; and the headline price and discount offered. See also Sepura's 6 September 2018 Presentation (pages 8 – 10 and 13) which provides line graphs identifying Sepura's pricing for various bids over the previous 12 months.

²²⁸ Motorola's 30 August 2018 Presentation, page 14 (ATF 5280). See also page 18 on recent market points which identifies volumes and Airwave-TETRA products included in different bundles.

consider that at the time of the PICT Tender, the Parties were (and were likely to remain) each other's strongest competitor for the supply of Airwave-TETRA devices, and it was unlikely that a new market entrant would emerge to disrupt the existing competitive conditions between the Parties.

145. Combined with material barriers to switching, as evidenced by the loyalty demonstrated by customers to their current supplier, we find that competition and switching in this market is limited. However, there is evidence that materially discounted pricing for a bundle of Airwave-TETRA products desired by a force, relative to prevailing pricing, may trigger switching.
146. Where there are opportunities of this kind for aggressive competition on price within a market where competition and switching is generally limited, we consider a supplier needs to weigh up the likelihood and benefits of capturing additional volumes against potentially lower profitability as a result of the discount. Conversely, a supplier looking to maintain higher pricing must assess the risk of a competitor offering materially discounted pricing and inducing the supplier's customers to switch.
147. In this context, an important element in a company choosing its pricing strategy is to anticipate their competitor's strategy. This will be informed by knowledge of what a competitor has done previously, and any other market intelligence. The more uncertainty there is about a competitor's likely pricing strategy, then the greater may be the risks of not pricing aggressively. On the other hand, greater transparency around previous pricing should make forecasting a competitor's actions easier.
148. We consider that the ability to anticipate a competitor's pricing is likely to be more pronounced when there is a material degree of pricing transparency; where the market is highly concentrated; where there are high barriers to entry and material barriers to customer switching; and there is regular competitive interaction between competitors (as opposed to a market with numerous competitors, where interaction between competitors is rare, and previous pricing is opaque). We find that these are the characteristics of the market for the supply of Airwave-TETRA devices. These characteristics do not eliminate the value of additional information that can be obtained on a competitor's pricing strategy. Rather, we consider that additional information on a competitor's pricing is likely to be particularly valuable in the context of a market with such characteristics. The uncertainties about a competitor's strategy are already likely to be attenuated by the characteristics of the market and, so, any further insight into a competitor's strategy is likely to impact on the competition that remains.
149. In terms of what insight into each Party's pricing may have been available to the other Party at the time of the PICT Tender, we find that there was material pricing transparency in advance of the PICT Tender, with information on previous pricing available to the Parties from a range of sources. This gave each of the Parties a general understanding of the other Party's current pricing levels.
150. This general pricing transparency allowed each of the Parties to draw some imperfect inferences about the prices which the other might offer in the PICT Tender. It did not, however, give the Parties knowledge of each other's bidding strategy, including in the light

of the particular bundles of Airwave-TETRA products PICT required bidders to submit pricing for.

151. Ofcom recognises that information about general pricing strategy may be less valuable in circumstances where there are not material barriers to switching, or where a purchasing decision is based on comparing prices for a single product. However, Ofcom considers that, in the context of an exercise like the PICT Tender, where there were material barriers to switching and competition was based on a bundle of products, it would be valuable for the Parties to have a general understanding of each other's pricing strategy. This would enable them to understand whether a pricing level or level of discount may be sufficient to incentivise switching. For example, knowledge of whether Sepura was likely to price aggressively and at a level which may trigger a switching decision would be particularly valuable information to Motorola, and vice versa. This would enable a Party to anticipate whether the other Party's bid for the PICT Tender was likely to be aggressive or particularly competitive on price, and to shape their own strategy accordingly.

F. THE PICT TENDER

(1) Introduction

152. Taking into account all the evidence and Sepura’s representations, in this section we set out our findings in relation to:

- (1) the background to the PICT Tender;
- (2) its key features and structure; and
- (3) the role of pricing in the PICT Tender.

(2) The PICT Tender

(a) Background

153. PICT (now known as the Police Digital Service (“PDS”))²²⁹ was set up in 2012 and is a private company limited by guarantee established, owned and funded by its members²³⁰ to support policing. Prior to becoming the PDS, its key goals were to make the public safer through better information communication technology and to “*make better use of public money*” by “*negotiating and managing contracts to achieve efficiencies and value for money*”.²³¹

154. One consequence of the various delays to the launch of the new ESN network is that users of the Airwave network have needed Airwave-TETRA products for a significantly longer period than they had anticipated.²³²

155. Accordingly, in July 2018, PICT was tasked with leading and coordinating a procurement plan to address this forecasted shortfall in Airwave-TETRA products.²³³

156. PICT’s core goals were focused on reducing prices for the customers it was acting on behalf of.²³⁴ These included:

²²⁹ PICT changed its name to the Police Digital Service in early 2021 – see Certificate of Incorporation of Change of Name at [Companies House](#) dated 18 February 2021. For the purposes of this Decision, we refer to PICT, which was the name of the company at the time of the conduct that is the subject of this Decision.

²³⁰ At the time of the conduct that is the subject of this Decision, PICT’s members included “*all but one of the police forces in England and Wales, the British Transport Police Authority, the Police Service of Northern Ireland and the National Crime Agency*” (<https://web.archive.org/web/20200919064919/https://ict.police.uk/our-members/>). PDS’ members now include all police forces in England and Wales as well as other policing law enforcement agencies identified on its [website](#) [accessed on 1 April 2022].

²³¹ PICT First Informal Response – Part B, A10 and Document 22 (ATF 5961). Information about the key goals of PDS is available on its [website](#) [accessed on 28 June 2022].

²³² See, for example, PICT First Information Response – Part A, A31; Sepura SO Representations, paragraph 2.4.

²³³ PICT First Informal Response – Part B, A10. See also Section 2 of PICT Procurement Plan and paragraph 115 of [Sepura Executive Team Member A]’s Interview Transcript.

²³⁴ PICT Procurement Plan, paragraph 2.1; PICT First Informal Response – Part A, A31 and A33; PICT First Informal Response – Part B, A10 and A26; PICT Decision Paper, paragraph 1.1.

- (1) providing a cost-effective route to market that was compliant with the Public Contracts Regulations 2015 and avoided the need for each organisation to undertake a separate procurement exercise;²³⁵
 - (2) negotiating on behalf of all forces and “drive increased value over and above that which any one police force could obtain individually”;²³⁶ and
 - (3) allowing police forces to obtain direct pricing from suppliers rather than transacting “*though the more expensive intermediary model*”.²³⁷
157. PICT identified various procurement options to achieve its goals before deciding that running a procurement exercise – acting as a central purchasing body on behalf of the police, fire, ambulance and other organisations – under an open tender competition was its preferred option.²³⁸
158. PICT recognised that the degree of competition for the supply of Airwave-TETRA products was limited²³⁹ and that “*in the absence of new entrants ... [was] largely dependent, amongst other things, on the timing of the expected switch off of the re-phased Airwave [network] and policing ability to co-ordinate and forecast demand requirements to the marketplace under an open tender competition.*”²⁴⁰
159. PICT’s Procurement Plan also explained how PICT thought its proposed procurement would encourage bidders to submit their best pricing. PICT noted:
- “Sepura and Motorola stock of TETRA devices for use on UK Airwave is significant according to industry intelligence. Both vendors are forecasting a higher than planned demand for new stock as policing and emergency services adjusts to a new ESN roll-out timeline and accelerate a refresh of the estimated 300K units left in service. However it is unlikely that either supplier has planned for a single buyer sector competition, assuming forces would continue to transact at the local procurement level. Both supplier sales teams will be heavily incentivised to ensure they meet revenue growth forecasts and are expected to offer volume discounts in return for aggregated purchasing commitments.”²⁴¹
160. PICT’s Procurement Plan also stated:
- “It is estimated that cost avoidance savings of at least [X]% of forecasted spend can be achieved through a single aggregated competition. This approach helps create an element of risk (i.e. uncertainty) that a supplier’s bid could be unsuccessful, as opposed to force

²³⁵ PICT First Informal Response – Part B, A10 and A26.

²³⁶ PICT First Informal Response – Part A, A33.

²³⁷ PICT First Informal Response – Part B, A26; PICT Decision Paper, paragraph 1.1. See also Sepura SO Representations, paragraph 2.4.3.

²³⁸ PICT Procurement Plan, Section 5.

²³⁹ PICT Procurement Plan, Section 4.

²⁴⁰ PICT Procurement Plan, paragraph 4.7.

²⁴¹ PICT Procurement Plan, paragraph 4.8.

managing individual procurements on an ad hoc decentralised basis, thereby encouraging suppliers to submit their lowest sustainable price offer to policing.”²⁴²

161. PICT’s Procurement Plan explained the new Framework Agreement would cover the four-year period until mid-November 2022²⁴³ and PICT initially estimated the value of orders under the Framework Agreement to be up to £180 million.²⁴⁴

(b) Publication

162. The evidence indicates that the Parties became aware of the possibility of PICT being involved in a new national procurement in June 2018.²⁴⁵
163. PICT has explained that on 31 July 2018, it published a Prior Information Notice (“PIN”), which briefly described the PICT Tender²⁴⁶ and shared a document setting out the proposed scope and timeline of the PICT Tender.²⁴⁷
164. On 16 August 2018, PICT held an “All Bidder Briefing” event with potential bidders. PICT invited 15 potential bidders to the event, although only Sepura, Motorola and Capita attended.²⁴⁸ At this event, PICT presented slides that explained PICT’s focus on obtaining “*best value* to policing and other Airwave emergency service users*”.²⁴⁹ PICT also indicated that the scoring of the bids would focus on the pricing submitted for the purpose of awarding a Framework Agreement at those prices.²⁵⁰
165. On 17 August 2018, PICT published an Invitation to Tender (“ITT”) in the Official Journal of the EU.²⁵¹

²⁴² PICT Procurement Plan, paragraph 10.3.

²⁴³ PICT Procurement Plan, paragraph 9.1. See also PICT First Informal Response - Part B, Document 23 (Part 1) (PICT ITT, Volume 1 of 4 Instructions to Bidders) (“**PICT Instructions to Bidders**”) paragraph 2.2.1 (ATF 5962). As explained in **Section C(4)(d)** above, around the time of the PICT Tender, it was expected that the Airwave network would need to remain operational until 31 December 2022 due to delays in rolling out the new ESN and the procurement was intended to cover a similar timeframe (to 15 November 2022).

²⁴⁴ PICT Procurement Plan, paragraph 10.1; PICT Instructions to Bidders, paragraph 2.2.2. This forecast was subsequently reduced by approximately £10 million - see PICT First Informal Response – Part A, A34 and PICT First Response, A2, paragraph 6 and Document 7 (“**PICT Framework Information Sheet**”) (ATF 5971).

²⁴⁵ PICT has explained that it “understands that [X], may have ... briefed Sepura, Motorola and/or the wider industry about the possibility of a national TETRA tender ... possibly **May-June 2018** ... during a [sic] vendor site visits or engagements.” (PICT Second Informal Response). Sepura has confirmed that this meeting took place on 21 June 2018 during which the OCiP confirmed the possible involvement of PICT in the procurement (Sepura Tenth Response, Question 5, paragraph 5.4).

²⁴⁶ PICT Second Informal Response including Document 1 (ATF 6061). The [PIN](#) was also published in the Official Journal of the EU (the “**OJEU**”) on 7 August 2018. The [OJEU](#) is the publication in which all tenders from the public sector which are valued above a certain financial threshold according to EU legislation, must be published.

²⁴⁷ PICT Second Informal Response including Document 2 (ATF 5998).

²⁴⁸ PICT Second Informal Response including Document 4 (ATF 5999); Sepura SO Representations, paragraph 2.4.6.

²⁴⁹ PICT Second Informal Response including Document 3, page 4 (ATF 6000).

²⁵⁰ PICT Second Informal Response, Document 3, page 6 (ATF 6000).

²⁵¹ See [Contract Notice](#) 2018/S 157-359676.

(c) *Key features and structure*

(i) Scope and key requirements of the submission

166. The PICT Tender was split into two lots.²⁵²
- (1) Lot 1 - Radio Terminals, Peripheral Equipment and Accessories. This was described in the ITT as the “purchase, hire, buyback, lease, asset refresh, disposal, Device as a Service or DaaS, warranty and maintenance and extended warranty of Terrestrial Trunked Radio (TETRA) terminals, accessories and peripheral equipment and systems for use on the UK Airwave system” and is referred to in this Decision as the “**Lot 1 Products**”. Lot 1 consisted of the eight bundles of Airwave-TETRA products. Each bundle consisted of an Airwave-TETRA device, accessories and related services for the following uses: overt handhelds, desktop radios, mobiles (vehicles), mobiles (motorcycles), covert handhelds, firearms, mobiles (aircraft) and mobiles (boats).²⁵³
 - (2) Lot 2 – Managed Radio Services. This was described in the ITT as “technology agnostic managed radio solution bundles (such as radio service support, user support services and project management, etc.) for use on the UK Airwave system”. Lot 2 required the successful bidder to “have a dual role; firstly they will act as the first point of contact when users are experiencing service incidents or have a service related query, and secondly they will act as their [customers’] agent when dealing with [Airwave] and other regulatory authorities when incident management situations are escalated”.²⁵⁴
167. The Parties only submitted bids in relation to Lot 1.²⁵⁵ Neither Sepura²⁵⁶ nor Motorola²⁵⁷ offer the type of managed services covered by Lot 2 of the PICT Tender and did not therefore bid for Lot 2.²⁵⁸ The facts and findings in this Decision therefore only relate to Lot 1.
168. Bidders were required to submit various documents to PICT. In particular, bidders were required to submit (i) a pricing document containing the pricing for each of the eight bundles in Lot 1; and (ii) a “*Standard Catalogue*” containing individual pricing for “*additional*

²⁵² PICT Instructions to Bidders, paragraph 2.3; PICT Pricing Document, pages 3 – 20. See also Sepura SO Representations, paragraph 2.4.7.

²⁵³ PICT Pricing Document pages 3 – 7. The Lot 1 Products comprise all the Airwave-TETRA products supplied by Motorola in Great Britain (Motorola Fourth Response, Question 1(b)) and the vast majority of Sepura’s (Sepura Third Response – Part 1, Question 24, paragraph 24.2).

²⁵⁴ PICT ITT, Volume 2 of 4: Specification (Lot 2), paragraph 2.1, provided to the CMA as CMA-7 (ATF 5822).

²⁵⁵ PICT Decision Paper, Section 2.2.

²⁵⁶ Although Sepura does not supply managed services in the UK, it does work with managed service providers (including Capita and Airwave Direct) to help determine the device requirements for the customers of managed service providers; managed service providers then purchase Airwave-TETRA products from Sepura on behalf of their customers (Sepura First Response, Question 1, paragraphs 1.8 and 1.18).

²⁵⁷ Note that Airwave Direct (part of the same corporate group as Motorola) does supply managed services.

²⁵⁸ Although Motorola did not bid for Lot 2, Airwave did submit a bid (PICT Decision Paper, Section 2.2).

standard equipment items".²⁵⁹ Bidders were not permitted to offer volume discounts to individual forces as PICT sought to secure volume discounts across all forces through a *"single aggregated competition"*.²⁶⁰ Bidders were also required to confirm if their Lot 1 Products complied with various technical requirements.²⁶¹

169. The PICT Tender was intended to produce bids that had been prepared wholly independently and carefully constructed to comply with the various requirements in the ITT. Indeed, the Parties were required to sign and provide, together with their bid documents, a *"Collusive Tendering Declaration"* to confirm they did not *"[c]ommunicate to a party other than The Police ICT Company the amount or approximate amount of [their] proposed Tender"*.²⁶² The PICT Tender also explained that a bidder would be disqualified if it:

- (1) fixed or adjusted its "pricing by or in accordance with any agreement or arrangement with any other Bidder";²⁶³
- (2) communicated "to any person other than the Commissioner the amount or approximate amount of its Tender".²⁶⁴

170. As explained in **Section E(2)** above, the ITT indicated that PICT was mainly interested in bidders involved in the manufacture and supply of all Lot 1 Products, i.e., suppliers of Airwave-TETRA devices that were capable of providing a full product solution rather than suppliers that, for example, could only supply accessories. Accordingly, the PICT Tender rules explained that PICT *"may reject a tender if any bidder does not tender for the provision of the full Lot 1 requirement"* and any bidder that wanted to submit a bid for only part of Lot 1 required *"an express invitation or prior permission"* from PICT.²⁶⁵

(ii) Scoring

171. PICT explained that the bidders who submitted the three highest scoring tenders for Lot 1 would be successful.²⁶⁶ As the Parties supplied the vast majority (if not all) of the Lot 1 Products for use on the Airwave network at the relevant time, it was highly likely they would win a place on the Framework Agreement regardless of their scores. PICT nonetheless hoped

²⁵⁹ PICT Pricing Document, page 7.

²⁶⁰ PICT Procurement Plan, paragraph 10.3; PICT Pricing Document, page 3.

²⁶¹ PICT First Informal Response, Document 23 (Part 4) (PICT ITT, Volume 2 of 4: Specification Lot 1) (ATF 5965)

²⁶² PICT First Informal Response, Document 23 (Part 8) (PICT ITT, Volume 4: Additional Response Forms, Form 2), page 3 (ATF 5969).

²⁶³ PICT Instructions to Bidders, paragraph 14.2.1.

²⁶⁴ PICT Instructions to Bidders, paragraph 14.2.2.

²⁶⁵ PICT First Informal Response – Part B, page 3, paragraph A17.

²⁶⁶ PICT Instructions to Bidders, paragraph 2.1.3. See also Sepura SO Representations, paragraph 2.4.6.

another supplier would be interested²⁶⁷ and indicated that any bidder without the required accreditation would have been given time in which to secure the same.²⁶⁸

172. PICT also explained that 80% of the total score for Lot 1 would be awarded based on pricing²⁶⁹ and reinforced the importance of “*keeping costs to a minimum*” and “*deliver[ing] better value for money*”.²⁷⁰ The focus on pricing was also reflected elsewhere in the tender documentation, where PICT explained there was a maximum of 100 points available for bids for Lot 1, comprising a price score (out of 80 points) and a technical evaluation score (out of 20 points).²⁷¹ PICT explained that the lowest priced bid would score the maximum 80 points and that the score awarded to other bidders was “*dependent on how far they deviate from the lowest price*”.²⁷²

(iii) Award and Implementation

173. The deadline for the submission of bids was 14 September 2018.²⁷³
174. PICT explained that the successful bidders would enter into a Framework Agreement for the supply of Lot 1 Products²⁷⁴ to the police, fire, ambulance and other organisations that use Airwave-TETRA products. These users of the Airwave network were referred to in the tender documentation as “*Other Contracting Bodies*” but which for simplicity we refer to in this Decision as customers.²⁷⁵ PICT explained that the Framework Agreement would remain in place for up to four years, although any contracts customers entered into with successful bidders under the terms of the Framework Agreement could be in place for up to 10 years.²⁷⁶
175. The tender documentation explained that customers would be entitled to “*call-off*” the Framework Agreement in one of two ways.²⁷⁷

²⁶⁷ See, for example, PICT Procurement Plan, Section 4 (ATF 5955).

²⁶⁸ PICT First Informal Response – Part A, Document 18, Question 80 (ATF 5958). Also see Sepura First Response, Question 5, Document 1774.1 (ATF 2867).

²⁶⁹ PICT Instructions to Bidders, Schedule 3, paragraph 1.2.

²⁷⁰ PICT Instructions to Bidders, paragraph 2.1.5.

²⁷¹ PICT Instructions to Bidders, paragraph 9.2.

²⁷² PICT Instructions to Bidders, Schedule 3, paragraph 2.1.

²⁷³ [Contract Notice](https://ted.europa.eu) 2018/S 157-359676, available at <https://ted.europa.eu> [accessed on 22 August 2022]

²⁷⁴ PICT Instructions to Bidders, paragraph 2.1.3.

²⁷⁵ PICT Instructions to Bidders, Schedule 5. The Framework Agreement can be used by the police forces (identified [here](#)), other UK emergency services and Airwave generic and sharer partner organisations (identified [here](#)) (PICT First Informal Response – Part B, A21.) Customers that are not police services are required to pay an access fee to use the Framework Agreement (PICT First Informal Response – Part B, A22; PICT Framework Information Sheet, paragraph 1.2.5).

²⁷⁶ PICT Instructions to Bidders, paragraph 2.2.1. See also Sepura SO Representations, paragraph 2.4.11.

²⁷⁷ PICT First Informal Response – Part B, A23; PICT Framework Information Sheet, Section 3; PICT Instructions to Bidders, paragraph 2.2.3.

176. The **first** was by way of a direct award, i.e., a customer can request Lot 1 Products at the prices and on the terms applicable at the time under the Framework Agreement.²⁷⁸ These prices would be either:
- (1) the prices bidders submitted in their response to the PICT Tender on 14 September 2018 (“**bid pricing**”); or
 - (2) the prices successful bidders may offer as part of any price drop during a so-called “Pricing Incentive Window” in accordance with the terms of the Framework Agreement (“**price drop pricing**”).²⁷⁹ This price drop mechanism operated as follows:
 - (i) The first Pricing Incentive Window would be available from 11 December 2018 to 14 February 2019²⁸⁰ and thereafter for each three-month period from 1 April to 30 June (inclusive) and 1 October to 31 December (inclusive) i.e., in the 2nd and 4th quarters of each year.²⁸¹ There were therefore 6 months of the year (the 1st and 3rd quarters) when successful bidders were not permitted to offer price drop pricing.
 - (ii) Price drop pricing could apply to all or some of successful bidders’ Airwave-TETRA products²⁸² and be in place for up to 60 consecutive days.²⁸³
 - (iii) Successful bidders could replace all or part of their bid pricing with their pricing drop pricing before the expiry of their price drop pricing during a Pricing Incentive Window.²⁸⁴
 - (iv) Successful bidders could apply price drop pricing to alternative bundles of Airwave-TETRA products that they considered reflected customer requirements. In other words, successful bidders were not restricted to only

²⁷⁸ Clause 2, Schedule 5 of the Framework Agreement (Sepura First Response, Annex 9, ATF 4931).

²⁷⁹ The Pricing Incentive Window was not originally part of the PICT Tender. Sepura has submitted that it asked PICT to add this option to the PICT Tender. The evidence indicates that PICT had agreed to add the Pricing Incentive Window to the PICT Tender as early as 24 August 2018 and that PICT had confirmed its inclusion by 4 September 2018. See Sepura First Response, Question 5, Document 1983.1 (Question 5 and 14) (ATF 2658), attached to Document 297.1 (ATF 4343) and Documents 66.1 (ATF (4570), 1755.1 (ATF 2886) and 3781.1 (ATF 925). See also Sepura SO Representations, paragraphs 2.4.2, 2.4.10, 2.4.12 and 2.4.13; Sepura Oral Transcript, paragraphs 52 and 147; [Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 64.

²⁸⁰ Clause 13.3, Clause 6.1 of Schedule 2 and definition of “Incentive Pricing Window” in the Framework Agreement (Sepura First Response, Annex 9, ATF 4931); Sepura Third Response – Part 1, Question 20; Sepura First Response, Question 5, Document 2108.1(ATF 2533); Sepura Ninth Response, Question 2, paragraph 2.2.

²⁸¹ PICT First Informal Response – Part A, A35; PICT First Informal Response – Part A, Document 18, Question 14.

²⁸² Sepura Ninth Response, Question 1, paragraph 1.1.

²⁸³ Definition of “Incentive Pricing Concession Period”, Framework Agreement (Sepura First Response, Annex 9, ATF 4931). See also Sepura First Response, Question 5, Documents 286.1 (ATF 4354) and 1186.1 (ATF 3455).

²⁸⁴ Clause 13.5 and Clause 6.3 of Schedule 2, Framework Agreement (Sepura First Response, Annex 9, ATF 4931); Sepura First Response, Question 5, Document 1983.1 (Question 14) (ATF 2658). See also PICT First Informal Response – Part A, Question 35.

applying price drop pricing to the eight bundles of Airwave-TETRA products in Lot 1.²⁸⁵

- (v) Successful bidders could also offer volume discounts applicable to all customers as part of its price drop pricing (but which could be driven by or directed at certain forces).²⁸⁶

177. The **second** was by way of a further “*mini competition*” (or “*mini tender*”) in accordance with the “*Further Competition Procedure*” permitted under the Framework Agreement, whereby customers with bespoke business and technical requirements could ask successful bidders to submit competitive bids to meet a customer’s specific requirements.²⁸⁷ PICT explained to bidders that no mini competitions were permitted for the first 12 months of the Framework Agreement (i.e., until 15 November 2019).²⁸⁸
178. While customers were entitled to call-off the Framework Agreement, they were under no obligation to do so and were free to purchase any Lot 1 Products outside of the Framework Agreement, i.e., on prices and/or on terms that are different to those available under the Framework Agreement.²⁸⁹
179. Bidders were not therefore guaranteed any sales under the Framework Agreement.²⁹⁰ They could nonetheless have expected significant volumes given the potential cost savings and efficiencies associated with customers purchasing Lot 1 Products off the Framework Agreement and the expected need for customers to refresh their stock of Airwave-TETRA products considering the delays in the launch of the ESN. In fact, PICT estimated the total value of the Framework Agreement relating to the Lot 1 Products as £100 million²⁹¹ (although it later revised its forecast to £91 million).²⁹²

²⁸⁵ Sepura SO Representations, paragraph 2.4.13. See also Sepura First Response, Question 5, Document 774.1 (ATF 3867), attaching Document 2102.1, pages 5 and 7 (ATF 2539), Document 770.1 (ATF 3871) and Document 1983.1 (Question 13) (ATF 2658).

²⁸⁶ See, for example, Sepura First Response, Question 5, Document 774.1 (ATF 3867), attaching Document 2102.1, pages 6 and 8 - 12 (ATF 2539), and Document 770.1 (ATF 3871).

²⁸⁷ Clause 3, Schedule 5 of the Framework Agreement (see, for example, Sepura First Response, Annex 9, ATF 4931).

²⁸⁸ PICT First Informal Response – Part B, A23; PICT First Informal Response – Part A, Document 18, Question 14. See also Sepura SO Representations, paragraph 2.4.10.

²⁸⁹ PICT Instructions to Bidders, paragraph 2.2.5. See also Sepura SO Representations, paragraph 2.4.4. For example, a customer may: (i) prefer to purchase a managed service (e.g. from Airwave Direct or Capita) which can only be purchased outside of the Framework Agreement, or via a reseller or distributor (Motorola Fourth Response, Question 14, paragraph 66 and Question 15, paragraph 68); (ii) be a large organisation with a sophisticated procurement function and/or want to make a large purchase and hope to achieve a volume discount which they can only negotiate outside of the Framework Agreement (Sepura Third Response – Part 2, Questions 33, 35 and 36; Motorola’s 30 August 2018 Presentation, page 20; PICT First Informal Response – Part B, A26); or (iii) otherwise find some of the contractual terms under the Framework Agreement commercially unattractive or be put off by the access fee that is applicable to non-police customers (Sepura Third Response – Part 2, Question 35).

²⁹⁰ See, for example, Sepura SO Representations, paragraph 4.2.2.

²⁹¹ PICT First Informal Response – Part A, A34.

²⁹² PICT First Response, A2, paragraph 6 and PICT Framework Information Sheet (ATF 5971).

(d) PICT's assessment of bids

180. Despite there being three places available on the Framework Agreement for successful Lot 1 bidders, only the Parties submitted bids.²⁹³ The Parties submitted their bids on 14 September 2018.
181. PICT then engaged with the Parties to obtain clarification on a number of points and gave the Parties an opportunity to give a presentation to PICT.²⁹⁴ In particular, PICT raised questions over Sepura's pricing and expressed concern to Sepura that it was "*not as aggressive as they had hoped*".²⁹⁵ PICT also requested details of the pricing Sepura had recently offered to some police forces.²⁹⁶
182. PICT awarded Motorola the maximum 80 marks for the pricing of its bid. Sepura scored 63 marks for the pricing of its bid.²⁹⁷ In its Decision Paper following the scoring of the bids, PICT commented as follows:²⁹⁸

"[§]."

(e) Notification of successful bids

183. On or around 17 October 2018,²⁹⁹ the Parties were informed that their bids for Lot 1 of the PICT Tender had been successful and were informed of their scores.³⁰⁰
184. Based on PICT's scoring methodology and the fact Motorola had been the only other successful bidder, Sepura was able to reverse engineer Motorola's average price for the bundle PICT evaluated for scoring purposes and establish that Motorola's average price was significantly cheaper than that of Sepura.³⁰¹
185. Following notification of their successful bids, Motorola and Sepura separately entered into the Framework Agreement with PICT,³⁰² which was intended to remain in place for up to four years i.e., until 15 November 2022.³⁰³

²⁹³ PICT Decision Paper, Section 2.2.

²⁹⁴ Sepura Second Response – Part 1, Question 16.

²⁹⁵ Sepura First Response, Question 5, Document 1762.1, page 2 (ATF 2879).

²⁹⁶ See, for example, Sepura First Response, Question 5, Documents 40.1 (ATF 4596), 108.1 (ATF 4528) and 1762.1 (ATF 2879); Sepura Second Response – Part 1, Question 16.

²⁹⁷ PICT Decision Paper, Section 2.2.

²⁹⁸ PICT Decision Paper, Section 4.2.

²⁹⁹ Sepura First Response, Question 6, paragraph 6.19; Motorola Third Response – Part 1, Question 13, page 15, paragraph 41.

³⁰⁰ See, for example, Sepura First Response, Question 5, Document 2094.1 (ATF 2547).

³⁰¹ Sepura First Response, Question 6, paragraph 6.19. See also Sepura First Response, Question 5, Documents 24.1 (ATF 4612), 376.1 (ATF 4265) and 1786.1 (ATF 2855) and Sepura Fifth Response, Question 5(d).

³⁰² Sepura First Response, Annexes 9 (ATF 4931) and 10 (ATF 4932); Motorola First Response, Annex 5 (ATF 5282).

³⁰³ Clause 3, Framework Agreement (see, for example Sepura First Response, Annex 9, ATF 4931). PDS published a [Tender for a replacement framework](https://www.find-tender.service.gov.uk) on 6 June 2022, (available at <https://www.find-tender.service.gov.uk>) [accessed on 14

186. The Framework Agreement, and therefore the bid pricing, became effective from 15 November 2018.³⁰⁴ On the same day, PICT publicly announced that the Parties' bids had been successful and issued a press release that contained quotes from [the Sepura Regional Sales Director] on behalf of Sepura and [Motorola Sales Employee A] on behalf of Motorola³⁰⁵ (although an earlier draft seen by Sepura contained a quote from [the Motorola VP for Sales]).³⁰⁶ PICT also:

- (1) wrote to all Chief Constables informing them of the award. PICT explained that the Framework Agreement offers "*some clear and immediate benefits, including [s]ignificant efficiencies and discounts ... and lowest cost across the policing supply chain*".³⁰⁷
- (2) prepared a presentation for BAPCO explaining the benefits of the Framework Agreement as including "*full price transparency and lowest cost across the supply chain*" and describing it as a "*new national framework that delivers significant efficiencies and discounts*".³⁰⁸

187. The Contract Award Notice was published by the OJEU on 29 November 2018.³⁰⁹ This named both Parties as "*contractors*" in relation to Lot 1 but did not include any further information about their bids.

(f) Subsequent pricing and sales of Lot 1 Products

188. Sepura was concerned that Motorola had submitted a significantly lower priced bid and less than one month after the Framework Agreement had become effective, decided to offer a price drop under the terms of the Framework Agreement (effective from 11 December 2018).³¹⁰ Sepura has issued subsequent price drops between 15 May and 30 June 2019; 20 November and 31 December 2019; 15 May and 30 June 2020; 25 September and 24 December 2020; 18 May and 30 June 2021; 1 October and 31 December 2021; and 1 April and 30 June 2022.³¹¹

November 2022], which was anticipated to commence in mid-September 2022. To lower the impact of an unplanned price increase, PDS elected to defer the start date of the new framework agreement to 14 November 2022. An extension to the Framework Agreement beyond that date was requested by PDS and agreed by the bidders as a variation, extending the Framework Agreement Term to 31 December 2022. The variation pricing was set by the winning bids as part of their Invitation to Tender Response. The new framework is scheduled to commence on 1 January 2023 and is for an initial period of 48 months with an option for PDS to extend for a period of up to an additional 12 months (PICT Fourth Response).

³⁰⁴ PICT First Informal Response – Part B, A1. See also PICT Framework Information Sheet.

³⁰⁵ British APCO, 21 November 2018. [Sepura, Motorola awarded national Airwave terminal contract](https://www.bapco.org.uk), available at <https://www.bapco.org.uk> [accessed on 16 March 2021].

³⁰⁶ Sepura First Response, Question 5, Document 4071.1 (ATF 635).

³⁰⁷ PICT First Informal Response – Part A, A3 and Document 16 (ATF 5956).

³⁰⁸ Sepura First Response, Question 5, Document 4070.1 (ATF 636).

³⁰⁹ [Contract Award Notice](https://ted.europa.eu/) 2018/S 230-525537, available at <https://ted.europa.eu/>.

³¹⁰ Sepura Second Response – Part 1, Question 8, paragraph 8.1.1; Sepura Ninth Response, Question 2, paragraph 2.2.

³¹¹ Sepura Seventh Response, Question 3(b); Sepura Eighth Response, Question 5; Sepura Tenth Response, Question 4. Sepura amended the detail of at least some of its price drops during a Pricing Incentive Window.

189. As at late July 2022, Sepura had made approximately £[X] million³¹² and Motorola had made approximately £[X] million³¹³ in sales under the terms of the Framework Agreement.
190. While approximately [X]% of Sepura's sales under the terms of the Framework Agreement have been made at its price drop pricing, Sepura had still made almost £[X] million in sales at its bid pricing by late July 2022.³¹⁴
191. In contrast, Motorola did not issue any price drops until [X] and the vast majority (approximately [X]%) of its sales have been made at its bid pricing (approximately £[X] million).³¹⁵
192. We understand no mini competitions have taken place under the terms of the Framework Agreement.³¹⁶

(3) The role of pricing in the context of the PICT Tender

193. The PICT Tender represented an important phase of competition for the supply of Airwave-TETRA products and the Parties would have expected it to be the last opportunity for their respective businesses to set framework pricing for such products.³¹⁷
194. The key features of the PICT Tender are explained in **Section F(2)(c)** above. In particular:
- (1) There were three places available on the Framework Agreement, although only the Parties ultimately submitted bids.
 - (2) PICT's core goals were focused on reducing prices for the customers it was acting on behalf of.
 - (3) 80% of the scoring was based on price and 20% was based on technical specifications. PICT explained that the lowest priced bid would score the maximum 80 points and that the score awarded to other bidders was "*dependent on how far they deviate from the lowest price*".³¹⁸
195. As the top three scoring bidders would win a place on the Framework Agreement, the PICT Tender was different than under a more conventional tender process such as a "*winner takes all*" tender and pricing played a different role.³¹⁹ For example, and as explained in **Section F(2)(c)** above, the terms of the Framework Agreement:

³¹² Sepura Tenth Response, Question 2, Annex 2. We note that Sepura reports its revenue in Euros and have used the [ONS](#) GBP to EUR exchange rate of 1.1633 for the year ending 31 December 2021.

³¹³ Motorola Eighth Response, Question 2.

³¹⁴ Sepura Tenth Response, Question 2, Annex 2.

³¹⁵ Motorola Eighth Response, Question 2 and Motorola Ninth Response, Question 2.

³¹⁶ PICT Third Formal Response, Response 2.

³¹⁷ At the time of the PICT Tender, the Parties would have understood the Airwave network was to be switched off no later than the end of 2022.

³¹⁸ PICT Instructions to Bidders, Schedule 3, paragraph 2.1.

³¹⁹ See, for example, Sepura SO Representations, paragraph 2.3.

- (1) Required bidders to set a price for pre-defined bundles of Airwave-TETRA products as well as individual Airwave-TETRA products that would remain the default pricing throughout the duration of the Framework Agreement.³²⁰ In this context:
 - (i) The Framework Agreement covered the whole of Great Britain.
 - (ii) The Framework Agreement would remain in place for up to four years, although any contracts entered into by customers with successful bidders under the terms of the Framework Agreement could be in place for up to 10 years.
- (2) Explained that customers were under no obligation to purchase Airwave-TETRA products and were free to purchase products outside the Framework Agreement. In other words, winning a place on the Framework Agreement did not guarantee successful bidders any sales.
- (3) Did not allow bidders to offer volume discounts to individual forces (although during a Pricing Incentive Window, successful bidders could offer volume discounts which were effectively directed at certain forces).
- (4) Allowed successful bidders to offer discounted pricing during certain time periods and for mini-competitions to occur after the first 12 months. Unlike some other tender opportunities, these terms meant that the prices submitted to PICT on 14 September 2018 would not necessarily be applicable to customers or to all products throughout the duration of the Framework Agreement.

(a) Sepura's representations

196. In the following paragraphs we summarise Sepura's representations in relation to the role of pricing in the context of the PICT Tender and our factual assessment of the evidence.
197. Sepura has submitted that the PICT Tender was not "*a typical procurement process*" and that "*the pricing submitted in the actual bids is of limited relevance*".³²¹ It has submitted that the "*structure and certain details regarding the PICT Tender are of critical importance to understanding and contextualising*" the exchange of messages on 5 September 2018.³²²
198. Sepura has explained that the structure of the PICT Tender – in particular, the fact that the Parties were required to submit a price that would be applicable to all customers regardless of their size or volume ordered, and the availability of the price drop mechanism – meant the Parties were not incentivised to submit their lowest price to PICT on 14 September 2018.³²³

³²⁰ Subject to the possibility that bidders could revise their bid pricing following the end of a price drop although we note neither Party has amended their bid pricing in this way. PDS has also explained that "*pricing revisions were subject to an exception for additions or deletions to standard Catalogue items and subject to a formal review and variation process, as managed by PDS*" (email from TLT Solicitors, acting on behalf of PDS, to Ofcom dated 22 September 2022 (ATF 6582)).

³²¹ Sepura SO Representations, paragraph 2.3, and Section 2 more generally.

³²² Sepura SO Representations, paragraph 2.3.

³²³ See, for example, Sepura Third Response – Part 2, Questions 15(c) and (d); Sepura SO Representations, paragraph 2.4.2, 2.4.11. 2.8 and 2.9; Sepura Oral Transcript, paragraphs 140 and 146.

199. Taking into account the structure of the PICT Tender, Sepura has explained that its “*strategy was effectively to drive sales and price competition through the ... [price drop mechanism], which is when the real offers of prices would be made because there were real offers and real volumes*”.³²⁴ Sepura has also suggested that the PICT Tender “*was understood by the parties ... effectively as a qualification exercise*” and was “*on some analysis, an exercise somewhat empty of purpose*”.³²⁵ Sepura has gone as far as saying: “*The prices submitted for the bids would be irrelevant and of no interest to either party because the ... [Framework Agreement] is structured so that the pricing competition actually takes place after the ... [Framework Agreement] has been awarded*”.³²⁶
200. Sepura has also submitted that the structure of the PICT Tender meant “*that all the usual risks of competition (for example, what prices customers would pay, who the customers would be, whether there would be other bidders and who would actually win or keep any customers) remain constant even after the places on the ... [Framework Agreement] were allocated*”.³²⁷

(b) Ofcom’s findings

201. The evidence – and in particular the contemporaneous evidence relating to the role and importance of bid pricing set out in **Sections G and H** below³²⁸ – supports a finding that bid pricing and overall pricing strategy played a key role in the context of the PICT Tender.
202. While both Parties were – subject to complying with PICT’s various technical requirements – highly likely to be awarded a place on the Framework Agreement, bid pricing remained a key consideration in being awarded that place. The structure of the PICT Tender meant there were different ways in which the Parties could respond. It also meant that bid pricing would play an immediate, ongoing and significant role following the award of the Framework Agreement in both the prices customers would pay as well as the incentives for customers to switch from one Party to the other.
203. This finding is supported by the evidence set out in detail in **Sections G and H** below which demonstrates that:
- (1) The Parties’ respective strategies were focused on winning a place on the Framework Agreement at the right price.
 - (2) Both Parties were aware that the bid pricing they were required to submit was a key parameter on which they were competing for customers.

³²⁴ Sepura Oral Transcript, paragraph 143. See also paragraphs 147 and 165 of the Sepura Oral Transcript and Sepura SO Representations, Annex 1, rows 50 – 53.

³²⁵ Sepura Oral Transcript, paragraphs 143 and 167.

³²⁶ Sepura SO Representations, Annex 1, rows 50 – 53. See also Sepura Oral Transcript, paragraphs 142 – 149 and 165 – 169.

³²⁷ Sepura SO Representations, paragraph 4.2.

³²⁸ See, in particular, our findings drawn from the contemporaneous evidence set out in **Sections G(5) and H(5)**.

- (3) Both Parties were concerned that if they did not submit sufficiently competitive prices, by reference to the bid prices submitted by the other, then they may lose customers as a result.
204. Accordingly, and contrary to Sepura's representations that the bid prices "*would be irrelevant and of no interest to either party*" the evidence demonstrates that understanding the pricing strategy adopted by the other Party for the PICT Tender was particularly important. In the following paragraphs, we set out our assessment of:
- (1) the role of bid pricing under the Framework Agreement including:
 - (i) the role of bid pricing in the award of the Framework Agreement; and
 - (ii) the immediate and ongoing role of bid pricing following the award of the Framework Agreement; and
 - (2) the role of bid pricing in the Parties' pricing strategies.
- (i) Role of bid pricing under the Framework Agreement
205. We recognise that the structure of the PICT Tender meant pricing played a different role than in other tender opportunities such as a "*winner takes all*" tender. For example:
- (1) The fact there were three places available on the Framework Agreement and the Parties supply the vast majority of (if not all) Airwave TETRA products (and were ultimately the only bidders for the PICT Tender), meant both Parties were highly likely to be awarded a place on the Framework Agreement notwithstanding whether or not their bid pricing was considered aggressive or competitive.
 - (2) Certain features of the PICT Tender – in particular, the price drop mechanism and potential for mini-competitions after 12 months – meant the Parties would have an opportunity to revisit their bid pricing if it was not considered sufficiently competitive.
206. This does not however mean that the Parties were unconstrained in their bid pricing or that their bid pricing did not matter.
207. Bid pricing mattered both in the context of the award of the PICT Tender and in the role it played in the prices customers would pay following the award of the Framework Agreement.

Role of bid pricing in the award of the Framework Agreement

208. First, PICT's core goals were focused on reducing prices for customers and the scoring and scope of the PICT Tender meant pricing played a greater role than in other tenders. Notably, pricing was 80% of the scoring whereas in previous tender opportunities pricing played a less important role in the scoring. For example, for the Police Scotland tender, pricing had a much lower weighting of 40% of the scoring.³²⁹
209. Secondly, PICT's Procurement Plan indicates PICT wanted to "*create an element of risk (i.e. uncertainty) that a supplier's bid could be unsuccessful*" and that PICT did not consider it a

³²⁹ Sepura First Response, Question 5, Document 2021.1, page 2 (ATF 2620).

foregone conclusion that both Parties would be awarded a place on the Framework Agreement.³³⁰ PICT could also request an explanation of any pricing it did not consider to be consistent with recent market pricing and there was a potential risk of disqualification if a bidder could not provide a satisfactory response.³³¹

210. Thirdly, there was a reputational risk if a Party submitted bid pricing not considered competitive including by reference to the other Party's pricing.³³²

Immediate and ongoing role of bid pricing following the award of the Framework Agreement

211. Bid pricing also played an immediate, ongoing and significant role following the award of the Framework Agreement.
212. While the structure of the PICT Tender meant the bid pricing was not fixed for the duration of the Framework Agreement – by allowing the Parties to offer price drops, subsequently replace their bid pricing with their price drop pricing, and engage in mini-competitions – both Parties were free to decide whether or not to take advantage of any of these pricing scenarios. Bid pricing was therefore potentially the only pricing available to customers seeking to purchase Airwave-TETRA products under the terms of the Framework Agreement.
213. Even if a Party decided to offer price drops, they were only allowed to do so during certain time periods meaning there could still be significant periods of time – at least 6 months per year – when bid pricing would be applicable to any customers needing or choosing to purchase under the terms of the Framework Agreement. Mini-competitions were also prohibited for the first 12 months.
214. The following market context also meant bid pricing took on an important role after the Framework Agreement was awarded:
- (1) The PICT Tender was a national framework from which all customers of Airwave-TETRA products could make purchases (in comparison to other tenders which generally concerned individual customers such as a specific police force).
 - (2) The Framework Agreement would remain in place for up to four years (and any contracts customers entered into with successful bidders under the terms of the Framework Agreement could be in place for up to 10 years).

³³⁰ PICT Procurement Plan, paragraph 10.3.

³³¹ PICT Instructions to Bidders, paragraph 1.4.2. [The Sepura Regional Sales Director] recognised this possibility in his pricing recommendations and identified a way to mitigate this risk was to “[e]nsure pricing consistent with current pricing” (see, for example, Sepura’s 6 September 2018 Presentation, page 11). [The Sepura Regional Sales Director] similarly commented during interview: “... you’ll have seen my previous prices that we sold, so we wanted to be within that tolerance so that PICT couldn’t turn around and say well Sepura were more expensive than the market price because that could allow them to disqualify us. Whereas if we were showing a discount then therefore the price shouldn’t have become something that they could disqualify us for. So that was the basis of how we positioned our pricing” ([Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 93). See also [Sepura Regional Sales Director] Interview Transcript (CD1), paragraphs 62 ad 68.

³³² For example, there were concerns within Sepura that Motorola may submit a low price to PICT which could “discredit/embarass” Sepura (Sepura First Response, Question 5, Document 3178.1 (ATF 1528)).

- (3) The Parties could use the pricing submitted to PICT as their baseline market pricing for Airwave-TETRA products – to this end, higher bid pricing means a higher pricing level can then be used as baseline from which to offer discounts under the terms of the Framework Agreement³³³ (or potentially offer pricing outside the terms of the Framework Agreement). The effect of this would likely be amplified if both Parties submitted higher pricing, as opposed to if only one Party submitted higher pricing and the other Party submitted lower pricing.
215. In this way, the bid pricing could impact the prices ultimately paid by customers purchasing Airwave-TETRA products for a significant period.
216. PICT designed its tender to meet the needs of all forces and for bundles of products which it expected these forces to require. The bid pricing offered might have been the only pricing available to customers for all products, or for a subset of products, if other forms of pricing (including price drop pricing) were not adopted, not extended to all products or were not on offer when the customer wished to purchase products. In addition, to the extent that other forms of pricing (such as price drop pricing) were available, any discounts offered would have been in relation to the bid pricing as a reference point. We consider that it is reasonable to assume that the level of bid pricing could influence customer perceptions around the value of discounts offered by providing a point of comparison.

(ii) The Parties' pricing strategies

217. The contemporaneous evidence set out in **Sections G and H** below is clear that bid pricing played a key role in the context of the PICT Tender. In particular, both Parties were concerned that if they did not submit sufficiently competitive bid pricing, by reference to the pricing submitted by the other, then they may lose customers as a result.
218. Taking into account the structure of the PICT Tender and the risk of losing customers if their pricing was not considered sufficiently competitive, the Parties had two key pricing decisions to make, namely:
- (1) their overall pricing strategy; and
 - (2) where to pitch their bid pricing within that overall strategy,
219. The Parties were afforded significant flexibility over both decisions and the evidence indicates they did in fact adopt different strategies.
220. One pricing strategy could have been to submit competitive or aggressive bid pricing and rarely, if at all, utilise the price-drop mechanism. The evidence indicates Motorola adopted this pricing strategy by rarely, or at least not initially, utilising the price drop mechanism (see, in particular **Section H(5)** below).
221. Another strategy would have been to submit less aggressive bid pricing. If the other Party also proposed relatively high bid prices, this might have allowed for only relatively limited discounts thereafter. A strategy based on higher bid pricing would also, however, allow a

³³³ For example, Sepura offered price drops based on a discount from its bid pricing. See, for example, Sepura First Response, Question 5, Documents 867.1 (ATF 3774), 704.1 (ATF 3937) and 2102.1 (ATF 2539).

Party to subsequently utilise the price-drop mechanism or revise its bid pricing if its bid pricing was not considered competitive (i.e. not close enough to the other Party's bid pricing to deter switching). The evidence indicates Sepura's pricing strategy included submitting higher bid pricing and utilising the price-drop mechanism as considered necessary (see, in particular **Section G(5)** below).

222. The following factors are also likely to have been relevant to the Parties' pricing strategies and contributed to the complexity of the pricing decisions they had to make:
- (1) The type of Airwave-TETRA device to include in their bid, including its functionality, technology and age. Sepura has submitted that PICT's technical specification for the bid was poor compared to the technology available³³⁴ meaning it was possible for bidders to submit a wide range of Airwave-TETRA devices with varying levels of functionality that still satisfied PICT's technical requirements.³³⁵
 - (2) The relatively high levels of gross margins generally made on Airwave-TETRA products³³⁶ which would have afforded the Parties significant flexibility over where to price their bid within their overall pricing strategy.
 - (3) PICT provided the bidders with estimated forecasts of customer demand and the Parties had put together their own forecasts. The Parties would therefore have had a reasonably good idea of expected volumes to help inform the pricing they submitted to PICT on 14 September 2018.³³⁷
 - (4) The Parties were aware that the market for Airwave-TETRA products had a limited duration and would have expected the PICT Tender to be the last opportunity to set framework pricing for such products.
223. In short, there were various ways in which the Parties could have responded to the PICT Tender and the significant difference between the prices each of the Parties ultimately submitted to PICT on 14 September 2018 demonstrates the flexibility in pricing strategy they were afforded.
224. The complexity of Sepura's strategy is demonstrated by [the Sepura Regional Sales Director]'s pricing recommendations presented to Sepura's senior management in which he set out his proposed strategy for overt portables for 0-6 months, 6-12 months and 12+ months.³³⁸
225. [The Sepura Regional Sales Director]'s proposed strategy was to respond to competitive conditions via price drops, revised bid pricing and/or mini-competitions. The evidence

³³⁴ Sepura SO Representations, Annex 1, rows 19-22.

³³⁵ See also Sepura SO Representations, paragraph 2.4.8 and Sepura First Response, Question 6, paragraph 6.16 in which Sepura acknowledges its portfolio consists of different models of Airwave-TETRA devices with different specifications and price points. PICT's Decision document explains that Sepura scored higher than Motorola in relation to its technical specification (PICT Decision Paper, Section 4.2).

³³⁶ See, for example, Sepura First Response, Question 5, Documents 2019.1 (ATF 2622) and 2038.1 (ATF 2603).

³³⁷ See evidence referenced in **Section I(7)** below.

³³⁸ Sepura's 6 September 2018 Presentation, page 12, discussed in more detail in paragraphs 269 - 273 below.

demonstrates, however, that Sepura recognised the ongoing relevance of bid pricing (or ‘list pricing’ in the terms used in [the Sepura Regional Sales Director]’s recommendations) in determining whether and what level of discounts might be required. In particular, his recommendations were to:

- (1) set the list price at 0-6 months and use price drops “to drive 4Q revenues”;
- (2) “Review and asses [sic] if “list Price” is competitive” at 6-12 months and either use price drops “for 2Q revenues or revise list pricing”;
- (3) and at 12+ months “Use mini tender route to avoid list price discounts”.

226. This evidence is set out in more detail in **Section G** below and demonstrates both Sepura’s understanding that bid pricing may need to be revised based on its relative competitiveness as against Motorola’s pricing, and also its preference to avoid discounts against bid pricing if possible.
227. We consider this strategy was not without risk. Customers may have decided to switch suppliers rather than wait for a potential price drop offered by their current supplier, or may have decided they would prefer a supplier with more competitive pricing available all year round, rather than competitive pricing which may only be available during certain defined periods.
228. While we recognise the way in which Sepura pursued its pricing strategy after the PICT Tender meant its bid pricing ultimately took on a less direct role in its sales of Airwave-TETRA products under the Framework Agreement, its bid pricing has been applicable to approximately [X]% of its sales, worth almost £[X] million. Further, Motorola’s bid pricing remained the only pricing Motorola offered under the terms of the Framework Agreement until [X] and has therefore played an even greater role than for Sepura.
229. In any event, the role of bid pricing in the PICT Tender should not only be considered in hindsight. Based on the evidence, we find that Sepura intended to react based on the relative competitiveness of its bid pricing as against Motorola’s. Accordingly, we consider it likely that if Motorola had also submitted higher bid pricing in response to the PICT Tender, Sepura would have had a weaker incentive to discount as deeply and frequently using the price drop mechanism.
230. Finally, as set out above in **Section E(4)** we consider that understanding the pricing strategy the other Party intended to adopt was particularly valuable information, and prior to the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018, there would have been uncertainty over the pricing strategy each Party intended to adopt.
231. Taking into account all the evidence, and in particular the contemporaneous evidence set out in **Sections G and H** below, we find that pricing strategy and bid pricing played a key role in the context of the PICT Tender.

G. SEPURA'S CONDUCT RELATING TO THE PICT TENDER

(1) Key individuals at Sepura

232. Various individuals at Sepura were involved in preparing Sepura's bid in response to the PICT Tender, including:³³⁹

- (1) [REDACTED] ([Sepura Regional Sales Director]);
- (2) [REDACTED] ([Sepura Business Development Director]) and [REDACTED] ([Sepura Business Development Manager]), both [the Sepura Regional Sales Director]'s direct reports;
- (3) [REDACTED] ([Sepura Executive Team Member B] and [the Sepura Regional Sales Director]'s manager);
- (4) [REDACTED] ([Sepura Senior Bids Employee]);
- (5) [REDACTED] ([Sepura Executive Team Member C]);
- (6) [REDACTED] ([Sepura Executive Team Member D]);
- (7) [REDACTED] ([Sepura Bids Employee A]);
- (8) [REDACTED] ([Sepura Bids Employee B]); and
- (9) [REDACTED] ([Sepura Executive Team Member A]).

233. [The Sepura Regional Sales Director], [Sepura Executive Team Member B], [Sepura Executive Team Member C], [Sepura Executive Team Member D] and [Sepura Executive Team Member A] were directly involved in Sepura's decisions relating to the pricing of its bid;³⁴⁰ in particular [the Sepura Regional Sales Director], who was the commercial lead for Sepura's bid and the "[p]rincipal point of contact with end-users and PICT, negotiating terms including pricing", was tasked with preparing Sepura's initial response.³⁴¹

(2) Overview of Sepura's approach to the PICT bundles

234. As explained in Section F(2)(c)(i) above, the PICT Tender required bidders to submit a bid containing prices for pre-defined bundles of Airwave-TETRA products, including an Airwave-TETRA device, accessories and related services. We refer to these product bundles as "**PICT bundles**".

235. PICT has explained that the PICT bundles included what it considered to be the most commonly used accessories and enabled PICT to evaluate different bids on a consistent basis.³⁴²

236. In its bid, as well as providing prices for the PICT bundles, Sepura also included prices for alternative bundles of Airwave-TETRA products that it considered better reflected what its

³³⁹ Sepura First Response, Question 3(c), Annex 5 (ATF 4927). The roles identified are the roles of the individuals at the relevant time.

³⁴⁰ Sepura First Response, Question 3(c), Annex 5 (ATF 4927).

³⁴¹ Sepura First Response, Question 4, Annex 4 (ATF 4926).

³⁴² PICT First Informal Response – Part A, A36; Sepura Third Response – Part 2, Question 16(b); Sepura SO Representations, paragraph 2.4.7.

customers typically purchase by excluding some of the accessories included in the PICT bundles.³⁴³ We refer to these alternative product bundles as “**Sepura bundles**”. We note that the scoring of Sepura’s bid, and ultimately its inclusion on the Framework Agreement, was based solely on its pricing for the PICT bundles.

(3) Chronology of Sepura’s conduct

237. In the following sub-sections we set out the relevant evidence in relation to the conduct of Sepura and its employees, from before the exchange of messages with [the Motorola VP for Sales] on 5 September 2018 until after the submission of bids on 14 September 2018. This includes the evidence relating to its strategy and approach to pricing in response to the PICT Tender.

238. After setting out the contemporaneous evidence in form of a chronology, we set out other relevant evidence in our possession, before explaining our factual findings from this evidence. Where Sepura disagrees with our interpretation of its internal documents, we have, where appropriate, reflected our consideration of its representations in footnotes. All times are given in British Summer Time (BST).³⁴⁴

(a) Before the exchange of messages on 5 September 2018

239. In early 2018 (and at least by May 2018), it was clear to Sepura that a new national procurement for Airwave-TETRA products was required. Sepura has explained that “[a]t that time, there was increasing demand from users for new Airwave devices (as evidenced by, for example the Metropolitan Police’s request for a quotation in the spring of 2018); and there was no readily available procurement vehicle for them to do so”.³⁴⁵

240. In May 2018, [the Sepura Regional Sales Director] and [the Motorola VP for Sales] exchanged further messages about [the Sepura Regional Sales Director] potentially re-joining Motorola.³⁴⁶ The evidence indicates that [the Sepura Regional Sales Director] and [the Motorola VP for Sales] met up in mid-May 2018.³⁴⁷

³⁴³ Sepura Third Response – Part 2, Question 15(a). Sepura has explained that the Sepura bundle did not include the following items which were included in the PICT bundle: (i) spare battery; (ii) ear piece with lead; (iii) “personal rapid charging” unit; and (iv) plug adaptor for battery charging unit (paragraph 15.7). See also Sepura SO Representations, paragraph 4.38.

³⁴⁴ We understand the times in the documents provided with Sepura First Response, Question 5 are in UTC. We have therefore added one hour to those times to identify times in BST.

³⁴⁵ Sepura Tenth Response, Question 5, paragraph 5.1 (ATF 6522).

³⁴⁶ Motorola Sixth Response, Document 465, pages 5-6 (ATF 5766); [Sepura Regional Sales Director] Mobile Phone Documents, Document 147 (ATF 5078). See **Section C(2)** above for details for earlier contact between [the Sepura Regional Sales Director] and [the Motorola VP for Sales].

³⁴⁷ Motorola Sixth Response, Document 465, page 5 (ATF 5766).

241. On 21 June 2018, Sepura has explained that it first became aware of the possible involvement of PICT in running a new national procurement during a meeting with the Home Office Operational Communications in Policing (OCiP).³⁴⁸
242. On 23 June 2018, and following on from the meeting on 21 June 2018, [the Sepura Regional Sales Director] circulated a weekly report to colleagues in which he identified PICT as a possible national procurement route and suggested that Sepura should engage with PICT.³⁴⁹
243. On 29 June 2018, a representative of the Metropolitan Police Service emailed [the Sepura Regional Sales Director] and stated: *"It is likely that PICT will contact you re procurement on a national level."*³⁵⁰
244. On 18 July 2018, [the Sepura Regional Sales Director] contacted [the Motorola Marketing Consultant] (who was at the time employed by Motorola as a [Marketing Consultant] but left Motorola on 8 December 2018)³⁵¹ to let him know that he had moved back to the North of England. [The Motorola Marketing Consultant] replied to thank [the Sepura Regional Sales Director] for this update.³⁵²
245. On 20 July 2018, [the Sepura Regional Sales Director] circulated a weekly report in which he stated that *"[t]he goal of the procurement is to ensure best value for money for the tax payer"*.³⁵³ He added that *"[i]t will be a competitive tender"* and that *"[c]ontracts will be awarded to multiple suppliers"*.
246. On 24 July 2018, [the Sepura Regional Sales Director] contacted [the Motorola Airwave VP MD] (who was at the time employed by Motorola as [Motorola Airwave VP MD])³⁵⁴ and suggested they meet up on 25 July 2018, although it appears that [the Motorola Airwave VP MD] was not available to meet.³⁵⁵

³⁴⁸ Sepura Tenth Response, Question 5, paragraph 5.4. The OCiP manage the Airwave network on behalf of its users and Sepura has explained that OCiP referred to the potential involvement of PICT at a visit to Sepura's offices on 21 June 2018 (ATF 6522). See also PICT Second Informal Response.

³⁴⁹ Sepura Sixth Response, Document 5334.1, page 1 (ATF 188)

³⁵⁰ Sepura Tenth Response, Question 5, paragraph 5.5 and Annex 4 (ATF 6522)

³⁵¹ Motorola Sixth Response (Qs. 3, 4 and 23), Question 3, paragraph 7.

³⁵² [Sepura Regional Sales Director] Mobile Phone Documents, Document 65 (ATF 5077); [Sepura Regional Sales Director] First Response, Question 8(a), page 7 (ATF 5089). We are not aware of any earlier communications between [the Sepura Regional Sales Director] and [the Motorola Marketing Consultant] before 18 July 2018 which indicates that they may not have been in regular contact before Sepura became aware of the possibility of the PICT Tender.

³⁵³ Sepura Sixth Response, Document 5278.1, page 1 (ATF 241)

³⁵⁴ Motorola Seventh Response, Question 3.

³⁵⁵ [Sepura Regional Sales Director] Mobile Phone Documents, Document 694 (ATF 5087); Motorola Sixth Response (Qs. 3, 4 and 23), Question 3, Document 492 (ATF 5799). These messages do not identify the reason why [the Sepura Regional Sales Director] wanted to meet up with [the Motorola Airwave VP MD]. We are not aware of any earlier communications between [the Sepura Regional Sales Director] and [the Motorola Airwave VP MD] before 24 July 2018 which indicates that they may not have been in regular contact before Sepura became aware of the possibility of the PICT Tender.

247. On 31 July 2018, PICT published a PIN that briefly described the PICT Tender³⁵⁶ and shared a document setting out the proposed scope and timeline of the PICT Tender.³⁵⁷
248. On 10 August 2018 (10:51am), [the Sepura Regional Sales Director] sent an email to [the Sepura Business Development Director] listing a series of actions discussed during a call about the upcoming PICT Tender. In it, [the Sepura Regional Sales Director] identified two of the actions that had been agreed Sepura needs to get underway as “[v]iew on price delta that would force them to the completion [sic]” and “[c]ompetitive view on Motorola and bidding intent”.³⁵⁸
249. Later the same day, a weekly report from [the Sepura Regional Sales Director] stated: “As this is not a winner takes all contract then our current focus is centred on our pricing strategy and we are building a list of forces that will struggle to consider the competition along with the price delta that would compel the force to purchase a competitor product”.³⁵⁹
250. On 13 August 2018, PICT sent the Contract Notice for the PICT Tender to Sepura.³⁶⁰
251. On 16 August 2018, PICT held an “All Bidder Briefing” event with potential bidders.³⁶¹ [The Sepura Regional Sales Director] stated during interview that he did not attend this meeting.³⁶² However, the evidence indicates that [the Sepura Regional Sales Director] did attend the meeting.³⁶³
252. On 16 August 2018 (6:56pm), and following the PICT bidder event, [the Sepura Regional Sales Director] emailed [the Sepura Business Development Director] and [Sepura Bids Employee A] expressing concerns around PICT’s approach to the tender and querying why the tender is 80% based on price.³⁶⁴
253. On 17 August 2018, PICT published the Contract Notice for the PICT Tender in the Official Journal of the EU (the “OJEU”).³⁶⁵

³⁵⁶ PICT Second Informal Response, including Document 1 (ATF 6061). The PIN was published in the Official Journal of the EU (the “OJEU”) on 7 August 2018. The OJEU is the publication in which all tenders from the public sector which are valued above a certain financial threshold according to EU legislation, must be published.

³⁵⁷ PICT Second Informal Response, including Document 2 (ATF 5998).

³⁵⁸ Sepura First Response, Question 5, Document 190.1 (ATF 4447). We believe [the Sepura Regional Sales Director] meant to refer to the “price delta that would force them to the competition”, in particular given his comment later the same day in paragraph 249 below.

³⁵⁹ Sepura First Response, Question 5, Document 3669.1, page 2 (ATF 1037).

³⁶⁰ PICT Second Informal Response, Document 2, page 2 (ATF 5998).

³⁶¹ PICT Second Informal Response including Document 4 (ATF 5999).

³⁶² [Sepura Regional Sales Director] Interview Transcript (CD1), paragraphs 55-58 and 139-144 and [Sepura Regional Sales Director] Interview Transcript (CD2), paragraph 12.

³⁶³ When asked by Ofcom during interview whether [the Sepura Regional Sales Director] may have dialled in to this meeting from Portugal he said he did not “believe there was a facility to dial in”. In fact, the contemporaneous evidence shows that [the Sepura Regional Sales Director] confirmed to PICT that he would be dialling into this meeting and did attend the meeting (Sepura First Response, Question 5, Document 714.1 (ATF 3927) and Document 848.1 (ATF 3793)).

³⁶⁴ Sepura First Response, Question 5, Document 143.1 (ATF 4494).

³⁶⁵ [Contract Notice](https://ted.europa.eu/) 2018/S 157-359676, available at <https://ted.europa.eu/>.

254. On 18 August 2018 (11:32am), [the Sepura Regional Sales Director] circulated a weekly report in which he: (i) noted 80% of the scoring was based on price; (ii) noted there were three places available on the Framework Agreement which “*should ensure that both Motorola and Sepura are included*”; and (iii) identified the following week’s priorities in relation to the PICT Tender as “[d]evelop pricing modelling tool” and “*competitive pricing*”.³⁶⁶
255. On 19 August 2018 (6:49pm), [Sepura Executive Team Member B] sent an email to [the Sepura Regional Sales Director] stating: “*If we have the ability to have mini tenders etc then surely price is almost irrelevant. As long as we are within an acceptable % of Moto*”.³⁶⁷
256. On 22 August 2018 (9:49am), [the Sepura Regional Sales Director] sent an email to [the Sepura Business Development Director] asking him to complete a document identifying the pricing for Airwave-TETRA products Sepura had recently offered to customers.³⁶⁸ The document identified the date of the offer; the name of the customer; the opportunity in terms of the volume of Airwave-TETRA devices within the scope of the offer; the type of Airwave-TETRA device offered; the accessories and related services within the scope of the offer; and the headline price and discount offered.
257. On 24 August 2018 (9:23pm), [the Sepura Regional Sales Director] circulated a weekly report which stated: “*Although not confirmed it is believed Motorola will submit the following terminal types ... If this is verified ... Further enquiries to be made to seek further details on the potential Motorola offer*”.³⁶⁹
258. On 27 August 2018 (6:33pm), [the Sepura Business Development Director] sent an email to [the Sepura Regional Sales Director] attaching the completed document identifying the pricing for Airwave-TETRA products Sepura had recently offered to customers.³⁷⁰ [The Sepura Regional Sales Director] responded later that day (7:13pm) and commented “*if the competition have this information they will struggle to make head nor tail of our pricing strategy*”.³⁷¹
259. On 29 August 2018 (10:24am), [Sepura Executive Team Member C] sent an email to [the Sepura Business Development Director] suggesting that if Sepura does “*not trash the price on the overall bundle offering*” then they may still want to offer a discount to existing customers when they trade in an old working terminal to encourage them to stay with Sepura.³⁷²

³⁶⁶ Sepura First Response, Question 5, Document 1774.1 (ATF 2867).

³⁶⁷ Sepura First Response, Question 5, Document 1756.1 (ATF 2885). As explained in **Section F(2)(c)(iii)** above, mini-competition (or mini-tenders) were not permitted in the first 12 months under the Framework Agreement.

³⁶⁸ Sepura First Response, Question 5, Document 270.1 (ATF 4370).

³⁶⁹ Sepura First Response, Question 5, Document 1758.1 (ATF 2883). Sepura has explained that “[the Sepura Regional Sales Director] does not recall there being any specific intention of verifying this information” and that his “comment relates to general gathering of market information” (Sepura Third Response, Part 2, Question 6, paragraph 6.2).

³⁷⁰ Sepura First Response, Question 5, Document 86.1 (ATF 4450), attaching Document 1928.1 (ATF 2713)

³⁷¹ Sepura First Response, Question 5, Document 74.1 (ATF 4562).

³⁷² Sepura First Response, Question 5, Document 84.1 (ATF 4552).

260. On 31 August 2018 (5:52pm), [the Sepura Regional Sales Director] circulated a weekly report in which he commented that it had been *“impossible to find any recent information on Motorola pricing with any information more than 6 months old”*.³⁷³ In the same report, he suggested PICT’s inclusion of the price drop mechanism in the Framework Agreement was a *“positive”* development as Sepura *“do not have to make aggressive up front pricing and [can] use the half yearly special as incentive to close the trading periods”*.³⁷⁴
261. On 1 September 2018 (8.51pm), [the Sepura Regional Sales Director] sent an email to [Sepura Executive Team Member B] stating:
- “The challenge here for both Sepura and Motorola is Forces are not going to refresh their whole fleets so they will have a mixed fleet to manage and what price makes this a compelling decision to swap away from their current band. Indications from Forces is that a discount of [X]-[X]% may drive that decision. I think Motorola will avoid a price war here. In addition whilst forces may be considering alternative brands they are showing little appetite to switch. Our challenge is do we want to discount our radio price for no incremental sales? ... We have been attempting to get competitive intel on Motorola and there is nothing being shared”.³⁷⁵
262. On 3 September 2018 (7:27am), [the Sepura Regional Sales Director] sent to [the Sepura Business Development Director] the first version (v1) of a presentation entitled *“PICT Tender Response – Pricing Strategy presentation”*.³⁷⁶ This presentation contained his pricing recommendations for the PICT Tender (*“Sepura’s 3 September 2018 Presentation”*)³⁷⁷ and also:
- (1) Recognised that the purpose of the PICT Tender was *“to demonstrate value for money”* and *“create a competitive environment to drive lowest pricing”*.³⁷⁸
 - (2) Identified pricing for Airwave-TETRA products Sepura had recently offered to certain police forces for three of Sepura’s overt products over the last 12 months.³⁷⁹

³⁷³ Sepura First Response, Question 5, Document 1755.1, page 2 (ATF 2886)

³⁷⁴ Sepura has submitted that it asked PICT to add this option to the PICT Tender. The evidence indicates that PICT had agreed to add the Pricing Incentive Window to the PICT Tender as early as 24 August 2018 and that PICT had confirmed its inclusion by 4 September 2018. See Sepura First Response, Question 5, Document 1983.1 (Question 5 and 14) (ATF 2658), attached to Document 297.1 (ATF 4343) and Documents 66.1 (ATF 4570), 1755.1 (ATF 2886) and 3781.1 (ATF 925). See also Sepura SO Representations, paragraphs 2.4.2, 2.4.10, 2.4.12 and 2.4.13; Sepura Oral Transcript, paragraphs 52 and 147; [Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 64.

³⁷⁵ Sepura First Response, Question 5, Document 2926.1 (ATF 1780). Sepura has explained that [the Sepura Regional Sales Director] thought Motorola would avoid a price war because the PICT Tender was not a *“typical”* procurement process for example, due to the fact there were three places available on the Framework Agreement which simply afforded successful bidders the opportunity to sell their products rather than guaranteeing any sales. Sepura has explained that the comment relating to *“nothing being shared”* was a reference to the *“general lack of market intelligence available, in particular from customers”*. (Sepura Third Response – Part 2, Question 4, paragraph 4.9).

³⁷⁶ Sepura First Response, Question 5, Document 3240.1 (ATF 1466).

³⁷⁷ Sepura First Response, Question 5, Document 3862.1 (ATF 844)

³⁷⁸ Sepura’s 3 September 2018 Presentation, page 3 (ATF 844).

³⁷⁹ Sepura’s 3 September 2018 Presentation, pages 8 – 10 and 12.

- (3) Estimated Motorola's low, medium and high bid prices, based on the bundle or Airwave-TETRA products Sepura considered Motorola would submit to PICT in accordance with the bundles identified in Lot 1 of the PICT Tender.³⁸⁰
- (4) Stated that Motorola are "[a]ggressively pursuing Sepura forces with MTP6650".³⁸¹
- (5) Identified five police forces that were at the time supplied by Sepura as a "medium" risk of switching to Motorola and five police forces that were at the time supplied by Motorola as a "medium" opportunity of switching to Sepura.³⁸²
- (6) Identified a possible outcome of the PICT Tender as being Sepura's market share remaining unchanged, with an associated risk of "margin erosion" and that a potential way to mitigate that risk being to "[e]nsure pricing consistent with current offers".³⁸³
- (7) Identified a possible outcome of the PICT Tender as being a loss of market share and that a potential way to mitigate that risk would be to "[e]nsure [Sepura] are within xx% of Motorola pricing".³⁸⁴
- (8) Set-out [the Sepura Regional Sales Director]'s initial thoughts on his pricing recommendations in relation to Sepura bundles containing one of Sepura's Airwave-TETRA devices which were the focus of Lot 1 of the PICT Tender:³⁸⁵
 - (i) Handheld portable overt devices:³⁸⁶
 1. "Use current force pricing" and submit the following "bid price", which Sepura has explained were based on the price for its Sepura bundle (which it considered customers typically purchase) rather than a PICT bundle:³⁸⁷
 - a. Sepura STP9 bundle: £[REDACTED]
 - b. Sepura SC20 bundle: £[REDACTED]
 - c. Sepura SC21 bundle: £[REDACTED]
 2. "Offer 4Q order and delivery incentive of £[REDACTED]".

³⁸⁰ Sepura's 3 September 2018 Presentation, page 7; and Sepura Ninth Response, Question 10, paragraph 10.1.

³⁸¹ Sepura's 3 September 2018 Presentation, page 7.

³⁸² Sepura's 3 September 2018 Presentation, pages 5 – 6.

³⁸³ Sepura's 3 September 2018 Presentation, page 11.

³⁸⁴ Sepura's 3 September 2018 Presentation, page 11.

³⁸⁵ 8 out of the 9 bundles in Lot 1 of the PICT Tender included a handheld portable overt device or a mobile device (PICT Pricing Document, pages 3 – 7). Also see Sepura First Response, Question 1, paragraph 1.21.1 and Sepura's 6 September 2018 Presentation, pages 12 – 14. Sepura's overt devices include the SC20 and SC21 models which Sepura has described as "the primary models put forward in Sepura's Bid" (Sepura Fourth Response (Qs. 2-4), Question 2, paragraph 2.7).

³⁸⁶ Sepura's 3 September 2018 Presentation, page 12.

³⁸⁷ Sepura Third Response – Part 2, Question 15.

(ii) Mobile devices: ³⁸⁸

1. *“Use current force pricing with [X]% discount to show PICT value add”.*

263. Later that morning on 3 September 2018 (10:15am) [the Sepura Regional Sales Director] sent Sepura’s 3 September 2018 Presentation to his manager, [Sepura Executive Team Member B]. He noted it was still a work in progress but would welcome any thoughts or input [Sepura Executive Team Member B] may have.³⁸⁹ Later that day (2:48pm), [the Sepura Regional Sales Director] circulated an updated version (v2) of Sepura’s 3 September 2018 Presentation to [the Sepura Senior Bids Employee] and [Sepura Executive Team Member C] indicating that this version took into account feedback from [Sepura Executive Team Member B].³⁹⁰
264. [The Sepura Senior Bids Employee] replied on 3 September 2018 (2:52pm) saying the presentation *“feels good and will really help inform the tough commercial part of [the] submission”*.³⁹¹
265. [The Sepura Regional Sales Director] replied on 3 September 2018 (2:58pm) saying that it was not a typical response but that his presentation would hopefully help with some of the background. He said his next task was to look at the Bill of Materials (BoM)³⁹² to help develop some of the margins, although he queried how he could report in any meaningful way given the potential spread of sales volumes.³⁹³
266. Later, on 3 September 2018 (3:23pm), [Sepura Executive Team Member C] sent an email to [the Sepura Regional Sales Director] in which he said: *“You need somewhere to explore the threat – or explain why you think it is low – that Moto will go in with a low price (maybe subsidised by Airwave profit), to try and discredit/embarass us as being poor value to weaken our position/pinch some Customers.”*³⁹⁴ He also suggested potentially allowing

³⁸⁸ Sepura’s 3 September 2018 Presentation, page 14. This page was noted as *“Under Construction”*.

³⁸⁹ See Sepura First Response, Question 5, Document 2926.1 (ATF 1780), attaching Document 3110.1 (ATF 1596).

³⁹⁰ Sepura First Response, Question 5, Document 3289.1 (ATF 1417), attaching Document 3874.1 (ATF 832). We note that this version included an additional point on page 15 in relation to Sepura’s strategy relating to covert products which states *“Illustrate depth of portfolio with complete price list”*.

³⁹¹ Sepura First Response, Question 5, Document 3255.1 (ATF 1451).

³⁹² The email from [the Sepura Regional Sales Director] includes only the acronym ‘BoM’, which we understand to mean the Bill of Materials or in other words, the costs.

³⁹³ Sepura First Response, Question 5, Document 2962.1 (ATF 1744).

³⁹⁴ Sepura First Response, Question 5, Document 3178.1 (ATF 1528). During interview, [Sepura Executive Team Member C] explained that he was alluding to the risk that Motorola may submit a low price by bundling airtime on the Airwave network with Airwave-TETRA devices. In terms of what [Sepura Executive Team Member C] expected [the Sepura Regional Sales Director] to do in response to his comment, [Sepura Executive Team Member C] explained during interview: *“I didn’t expect him to do anything particularly. Just expecting him to have a commercial view of the pricing we need to be competitive. That’s his job.”* ([Sepura Executive Team Member C]’s Interview Transcript, paragraphs 80 – 89). Sepura subsequently submitted that [Sepura Executive Team Member C]’s concern was *“that Motorola may use its ownership of the Airwave network and Airwave Direct to subsidise the prices of its TETRA devices”* (Sepura Third Response – Part 2, Question 5(a), paragraph 5.2). See also [Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 115 and [Sepura Regional Sales Director] Interview Transcript (CD2), paragraph 110.

Sepura's SC21 product to be introduced at a discounted price during the Pricing Incentive Window.

267. [The Sepura Regional Sales Director] replied late on 3 September 2018 (4:20pm) to say [Sepura Executive Team Member C]'s comments on SC21 pricing were valid and that he would look at this.³⁹⁵ He also attached a revised version of his presentation (still labelled v2) which he said incorporated other feedback he had received.³⁹⁶ This version included a new pricing scenario which referred to the risk that Motorola may be able to offer subsidised Airwave-TETRA devices as a result of its ownership of the Airwave network (by offering a bundle of TETRA-devices alongside airtime for use of the Airwave network).³⁹⁷ This version also included an additional point relating to Sepura's strategy for overt portables that queried whether Sepura can justify a £[X].³⁹⁸ [The Sepura Regional Sales Director] sent this same version of his presentation to [Sepura Executive Team Member B] on 3 September 2018 (10:21pm), noting it was an updated version reflecting internal discussions.³⁹⁹
268. On 4 September 2018 (5:26pm), [the Sepura Business Development Director] emailed [the Sepura Senior Bids Employee] (copying in [the Sepura Regional Sales Director]) asking him to go through where gross margins had dropped off due to currency changes.⁴⁰⁰ Later that day (6:15pm), [the Sepura Business Development Director] suggested going for a minimum of [X]% margin on accessories for simplicity.⁴⁰¹
269. Early on 5 September 2018 (7:51am), [the Sepura Regional Sales Director] circulated a revised version of his presentation (v3) to [Sepura Executive Team Member B], copying in [Sepura Executive Team Member C], [the Sepura Senior Bids Employee] and [the Sepura Business Development Director].⁴⁰² Whilst circulated on 5 September 2018, this version was dated 6 September 2018 as there was a meeting scheduled for [the Sepura Regional Sales Director] to present his pricing recommendation to colleagues, including members of Sepura's senior management on 6 September 2018 (excluding the [Sepura Executive Team Member D] and [Sepura Executive Team Member A]). [The Sepura Regional Sales Director] subsequently updated slides 5 and 6 of his presentation on PICT forecasts (see paragraph

³⁹⁵ Sepura First Response, Question 5, Document 3251.1 (ATF 1455).

³⁹⁶ Sepura First Response, Question 5, Document 3863.1 (ATF 843).

³⁹⁷ Scenarios A and E, page 11. Sepura has explained that [the Sepura Regional Sales Director] added this new pricing scenario in response to [Sepura Executive Team Member C]'s comment on the risk of Motorola going in with a low price – see Sepura Third Response – Part 2, Question 5(b) and Sepura First Response, Question 5, Documents 3251.1 (ATF 1455) and 3863.1 (ATF 843). We note that this explanation was not presented by either [the Sepura Regional Sales Director] or [Sepura Executive Team Member C] during interview (see [Sepura Regional Sales Director] Interview Transcript (CD1), paragraphs 125 – 132 and [Sepura Executive Team Member C]'s Interview Transcript, paragraphs 86 – 89).

³⁹⁸ Sepura First Response, Question 5, Document 3863.1 (ATF 843), page 12.

³⁹⁹ Sepura First Response, Question 5, Document 3162.1 (ATF 1544), attaching Document 3839.1 (ATF 867).

⁴⁰⁰ Sepura First Response, Question 5, Document 3330.1 (ATF 1376).

⁴⁰¹ Sepura First Response, Question 5, Document 3340.1 (ATF 1366). Sepura has explained that the suggestion to increase margins for accessories to at least [X]% resulted from a reassessment of margins from those under the previous framework agreement, known as NARPF (Sepura Third Response – Part 2, Question 14(a)). Also see [Sepura Regional Sales Director] Interview Transcript (CD3), paragraph 13.

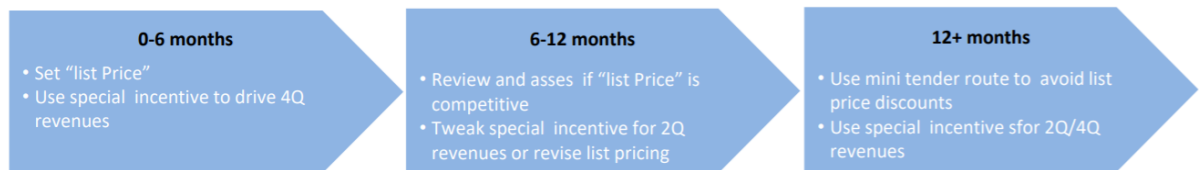
⁴⁰² Sepura First Response, Question 5, Document 3307.1 (ATF 1399), attaching Document 3883.1 (ATF 823).

273 below) and in doing so created version 4 (v4) which we refer to as “Sepura’s 6 September 2018 Presentation”.

270. [The Sepura Regional Sales Director] explained that further to various meetings/reviews, Sepura’s 6 September 2018 Presentation outlined the recommended pricing approach for the PICT Tender.⁴⁰³ [The Sepura Regional Sales Director]’s proposed pricing strategy was now much more developed and the key high-level pricing recommendations in Sepura’s 6 September 2018 Presentation were as follows:

(1) Handheld portable overt devices:⁴⁰⁴

(i) Adopt the following pricing strategy:



(ii) “Use current force pricing” and submit the following “bid price” which Sepura has explained were based on the price for its “Sepura bundle” bundle:

1. Sepura STP9 bundle: £[X] (the same price as in Sepura’s 3 September 2018 Presentation)
2. Sepura SC20 bundle: £[X] (£[X] lower than in Sepura’s 3 September 2018 Presentation)
3. Sepura SC21 bundle: £[X] (£[X] lower than in Sepura’s 3 September 2018 Presentation)

(iii) “Offer 4Q order and delivery incentive of £[X]”.

(2) Mobile devices:⁴⁰⁵

(i) “Use current force pricing” (i.e. [the Sepura Regional Sales Director] no longer recommends a “[X]% discount to show PICT value add”)

(ii) “Offer special £[X] discount for Q4 orders”

271. Later on 5 September (8:39am), [Sepura Executive Team Member C] sent an email to [the Sepura Regional Sales Director] in which he said:

“I hate to say it but my gut is feeling that we should consider going cheaper We have just seen horribly low pricing from Moto in Romania (admittedly for MTP3550 which is not offered here, and which we believe is a cheaper platform than their other Tetra portables – although they could try to get Airwave approval on this?) Perhaps a reaction to losing ARC? – politically they need to win some European business. I know UK is a much different dynamic and we have considerable Customer protection. Maybe we leave

⁴⁰³ Sepura First Response, Question 5, Document 3307.1 (ATF 1399).

⁴⁰⁴ Sepura’s 6 September 2018 Presentation, page 12.

⁴⁰⁵ Sepura’s 6 September 2018 Presentation, page 14.

the going cheaper debate until we are all together with [[Sepura Executive Team Member A]]?”⁴⁰⁶

272. [The Sepura Regional Sales Director] replied later on 5 September 2018 (9:06am) as follows:

“[X]”⁴⁰⁷

273. Later on 5 September 2018 (9:49am), [the Sepura Regional Sales Director] circulated version 4 of this presentation to [Sepura Executive Team Member B], copying [Sepura Executive Team Member C], [the Sepura Senior Bids Employee] and [the Sepura Business Development Director]. [The Sepura Regional Sales Director] explained that this version included updated slides 5 and 6 with updated forecasts for force demand provided by PICT.⁴⁰⁸

274. Later on 5 September 2018, [the Sepura Regional Sales Director] and [Sepura Executive Team Member C] discussed PICT’s requirement for the PICT bundle to include quick start support and collection and return of repairs and how they may impact on Sepura’s pricing. At 5:15pm, [the Sepura Regional Sales Director] replied to [Sepura Executive Team Member C] stating: *“I do not think we can increase the sales price so we will have to absorb it?”*⁴⁰⁹

(b) The exchange of messages on 5 September 2018

275. The exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018 is reproduced in **Section C(3)** above (as well as Annex 3) and our factual assessment of the exchange is set out in **Section I** below.

(c) After the exchange of messages on 5 September 2018

276. On 6 or 7 September 2018, [the Sepura Regional Sales Director] recalls deleting the exchange of messages which took place on 5 September 2018 from his personal mobile phone.⁴¹⁰

⁴⁰⁶ Sepura First Response, Question 5, Document 2953.1 (ATF 1753).

⁴⁰⁷ Sepura First Response, Question 5, Document 3268.1 (ATF 1438). Sepura has explained that this debate took place between [the Sepura Regional Sales Director], [Sepura Executive Team Member C] and [Sepura Executive Team Member A] after 5 September 2018 (primarily at the meeting on 10 September 2018) where [Sepura Executive Team Member A] approved Sepura’s bid (Sepura Third Response – Part 2, Question 17(b)).

⁴⁰⁸ Sepura First Response, Question 5, Document 3086.1 (ATF 1620), attaching Document 3803.1 (ATF 903).

⁴⁰⁹ Sepura First Response, Question 5, Document 3120.1 (ATF 1586).

⁴¹⁰ There is digital forensic evidence that [the Sepura Regional Sales Director] deleted his exchange of messages with [the Motorola VP for Sales] on 5 September 2018 from his personal mobile phone, as well as various other messages sent and received during a period of approximately 19 hours on 5 and 6 September 2018 (CMA Digital Forensics Report, 7 May 2020, page 3 (ATF 4883); CMA Digital Forensics Report, 27 February 2020, page 6 (ATF 4881)). [The Sepura Regional Sales Director] has also confirmed that he deleted his exchange of messages with [the Motorola VP for Sales] on 5 September 2018 from his personal mobile phone ([Sepura Regional Sales Director] First Response, Question 4(a)). We cannot establish precisely when these messages were deleted, although [the Sepura Regional Sales Director] recalls it may have been on 6 or 7 September, one or two days after his exchange of messages with [the Motorola VP for Sales] ([Sepura Regional Sales Director] First Response, Question 4(b)).

277. On 6 September 2018 (6:33am), [the Sepura Regional Sales Director] emailed colleagues asking if it was possible to do a simple comparison of PICT v NARPF⁴¹¹ pricing to see if there were any “uncomfortable” price changes that may “cause [Sepura] problems or need justification”.⁴¹² He also asked [the Sepura Business Development Director] to identify the “big ticket items” (which he identified as batteries and chargers) so they “can compare them against the competition”.⁴¹³
278. Later on 6 September 2018, [the Sepura Regional Sales Director] presented the revised pricing recommendations as set out in version 4 of his slides to Sepura’s bid team and senior management (excluding the [Sepura Executive Team Member D] and [Sepura Executive Team Member A]).⁴¹⁴
279. On 7 September 2018 (7:51am), [Sepura Bids Employee B] emailed [the Sepura Business Development Director], copying in [the Sepura Regional Sales Director] and explained he had started to populate the pricing document bidders were required to complete and send to PICT as part of their bid submission (“**Sepura’s PICT Pricing Document**”).⁴¹⁵ He explained that he had put proposed pricing for Sepura bundles “in the Additional Bundles Section from Page 12 onwards, and started on the other bundles.”⁴¹⁶ [Sepura Bids Employee B] also asked [the Sepura Business Development Director] to “create quotations in AX for the Bundle 1 response according to the required configuration in the Pricing document” as agreed in the meeting the previous day (which we understand from [Sepura Bids Employee B]’s response, identified below, was a request to include proposed pricing for the PICT bundles).⁴¹⁷

⁴¹¹ Sepura has explained that “NARPF” is a reference to The National Airwave Radio Procurement Framework, the previous framework agreement awarded to Sepura which came into effect on 18 September 2011 and “through which early adopters of TETRA could “refresh” their fleets of TETRA devices” (Sepura Second Response – Part 1, Questions 12(a) and (b)).

⁴¹² See Sepura First Response, Question 5, Document 3223.1 (ATF 1483). Sepura has explained that “pricing under NARPF had been unchanged for a number of years and Sepura was concerned that customers would not react favourably if there were a sudden increase in accessory prices compared to those that they had paid previously” Sepura Third Response – Part 2, Question 14(e)). See also [the Sepura Regional Sales Director]’s later email at 6:45am in which he commented that Sepura needed to ensure they wouldn’t “upset anyone with significant price increases” (Sepura First Response, Question 5, Document 2916.1 (ATF 1790)).

⁴¹³ Sepura has explained that “[the Sepura Regional Sales Director] intended to compare the proposed Sepura pricing with public information available on similar information for Sepura’s competitors” although Sepura has also confirmed that no such comparison was ultimately required or undertaken (Sepura Third Response – Part 2, Question 14(f) and (g)). We note the timing of [the Sepura Regional Sales Director] intending to carry out this comparison which occurred the morning after [the Sepura Regional Sales Director]’s exchange of messages with [the Motorola VP for Sales] in which [the Sepura Regional Sales Director] had informed [the Motorola VP for Sales] of Sepura’s proposing pricing strategy not to price aggressively or lower its prices – see **Section I** below.

⁴¹⁴ Sepura Third Response – Part 2, Question 13(a) and Sepura Fifth Response, Question 1.

⁴¹⁵ Sepura First Response, Question 5, Document 3057.1 (ATF 1649), attaching Document 3787.1 (ATF 919). This document is a partly completed version of the template provided by PICT for respondents to the PICT Tender to submit the pricing of their bids.

⁴¹⁶ The pricing for the Sepura bundles containing an STP9, SC20 and SC21 product matches the pricing included in Sepura’s 6 September 2018 Presentation presented by [the Sepura Regional Sales Director] on the previous day.

⁴¹⁷ Sepura has explained that AX is the name of its system which contains costs and suggested pricing for Sepura’s Airwave-TETRA products. Sepura has explained that “[i]t is the AX pricing which Sepura uses, internally, as a starting point for

280. Later on 7 September 2018 (7:16pm), [Sepura Bids Employee B] emailed [the Sepura Business Development Director] and [the Sepura Regional Sales Director], copying in others, explaining that he had ‘*created provisional P&L’s with rough estimate pricing for the Bundle 1 response adhering to PICT definition in pricing table*’⁴¹⁸ i.e., pricing for the PICT bundles. He attached a revised version of Sepura’s PICT Pricing Document which contained the following proposed pricing for PICT bundles up-front (in addition to the pricing for the Sepura bundles from page 12 which he had included in the version he had circulated earlier that day):⁴¹⁹
- (1) PICT STP9 bundle: £[REDACTED]
 - (2) PICT SC20 bundle: £[REDACTED]
 - (3) PICT SC21 bundle: £[REDACTED]
281. [Sepura Bids Employee B] also attached a spreadsheet with proposed pricing for PICT and Sepura bundles at both “full” and “discounted” sales prices.⁴²⁰
282. On 8 September 2018 (9:20am) [the Sepura Business Development Director] responded to [Sepura Bids Employee B], copying [the Sepura Regional Sales Director] and others, with his feedback.⁴²¹ In particular, he (i) suggested including the pricing for the Sepura bundles before the pricing for the PICT bundle containing the same Airwave-TETRA device; and (ii) noted that the quotations added for the additional accessories included in the PICT bundles “*equates to £[REDACTED] per bundle*”.⁴²²
283. On 9 September 2018 (5:00pm), [the Sepura Regional Sales Director] circulated a revised version (v5) of his pricing recommendations - now titled “*PICT Tender Response – Executive Bid Strategy Sign Off*” and dated 10 September 2018 - to [Sepura Bids Employee B] and [the Sepura Business Development Director], copying in [Sepura Executive Team Member C], [Sepura Executive Team Member B], [the Sepura Senior Bids Employee] and other colleagues (“**Sepura’s 10 September 2018 Presentation**”).⁴²³ We note the following in relation to Sepura’s 10 September 2018 Presentation:
- (1) Whilst circulated on 9 September 2018, this version was dated 10 September 2018 as there was a meeting scheduled for [the Sepura Regional Sales Director] to present his pricing recommendations to colleagues, including members of Sepura’s senior

preparing its responses to direct sales enquiries such as invitations to tender or requests from one of Sepura’s partners for pricing for a particular opportunity” (Sepura Fourth Response – Part 2, Question 2, paragraphs 2.3 – 2.4.)

⁴¹⁸ Sepura First Response, Question 5, Document 3203.1 (ATF 1503).

⁴¹⁹ Sepura First Response, Question 5, Document 3849.1, pages 4 - 6 (ATF 857). The pricing in this document reflects the pricing in a spreadsheet also attached to [Sepura Bids Employee B]’s email (Sepura First Response, Question 5, Document 3850.1 (ATF 856)).

⁴²⁰ Sepura First Response, Question 5, Document 3850.1 (ATF 856). The “full sales” pricing in this document reflects the pricing in Sepura First Response, Question 5, Document 3849.1, (ATF 857).

⁴²¹ Sepura First Response, Question 5, Document 12.1 (ATF 4624).

⁴²² Sepura has explained that the PICT bundles included the following additional accessories: (i) spare battery; (ii) ear piece with lead; (iii) “personal rapid charging” unit; and (iv) plug adaptor for battery charging unit (Sepura Third Response – Part 2, Question 15, paragraph 15.7).

⁴²³ Sepura First Response, Question 5, Document 3308.1 (ATF 1398), attaching Document 3884.1 (ATF 822).

management (including the [Sepura Executive Team Member A] and [Sepura Executive Team Member D]) on 10 September 2018.

- (2) [The Sepura Regional Sales Director] explained in his covering email attaching Sepura's 10 September 2018 Presentation that he had included new slides on terms and conditions in the Framework Agreement and how Sepura would drive sales.⁴²⁴ He said they could discuss further during the meeting scheduled for 12 noon the next day, 10 September 2018.
- (3) Sepura's 10 September 2018 Presentation included the same pricing strategy for both overt portables and mobiles as that in Sepura's 6 September 2018 Presentation - i.e., "[u]se current force pricing" and offer a £[X] discount for Q4 orders.⁴²⁵
- (4) The recommended "*bid price*" for Sepura's key product bundles in Sepura's 10 September 2018 Presentation was £[X] higher than the recommended "*bid price*" in Sepura's 6 September 2018 Presentation.⁴²⁶
- (5) Sepura's 10 September 2018 Presentation identified the following pricing which was £[X] higher than the pricing for Sepura bundles contained in Sepura's 6 September 2018 Presentation but which matches the proposed pricing for PICT bundles in Sepura's PICT Pricing Document circulated by [Sepura Bids Employee B] on 7 September 2018:⁴²⁷
 - (i) STP9 bundle: £[X]
 - (ii) SC20 bundle: £[X]
 - (iii) SC21 bundle: £[X]

284. Later on 9 September 2018 (10:27pm), [Sepura Bids Employee B] responded to [the Sepura Business Development Director]'s feedback from 8 September 2018,⁴²⁸ copying [the Sepura Regional Sales Director] and others, and attached a revised version of Sepura's PICT Pricing Document.⁴²⁹ To address [the Sepura Business Development Director]'s comments, [Sepura Bids Employee B] explained that he had included the pricing for the Sepura bundles before the pricing for the corresponding PICT bundle and "*corrected*" pricing for the PICT bundles. In this version, the pricing for the PICT bundles had all been reduced by £[X] from the version circulated on 7 September 2018. These lower prices for the PICT bundles were the prices that Sepura ultimately included in its bid for the PICT bundles.

⁴²⁴ Sepura First Response, Question 5, Document 3308.1 (ATF 1398) and pages 5 and 17 of Document 3884.1 (ATF 822).

⁴²⁵ Compare Sepura's 10 September 2018 Presentation, pages 13 and 15 with Sepura's 6 September 2018 Presentation, pages 12 and 14.

⁴²⁶ Compare Sepura's 10 September 2018 Presentation, page 14 with Sepura's 6 September 2018 Presentation, page 13.

⁴²⁷ Compare Sepura's 10 September 2018 Presentation, page 14 with Sepura's 6 September 2018 Presentation, page 13 with Sepura First Response, Question 5, Document 3849.1, pages 4 - 6 (ATF 857).

⁴²⁸ Sepura First Response, Question 5, Document 2980.1 (ATF 1726).

⁴²⁹ Sepura First Response, Question 5, Document 3747.1 (ATF 959).

285. Later on 9 September (10:45pm), [Sepura Bids Employee B] responded to [the Sepura Regional Sales Director]’s email of 5:00pm earlier that day⁴³⁰ and attached a revised spreadsheet with the proposed pricing for PICT and Sepura bundles at both “full” and “discounted” sales prices, having “*slightly modified the SRG margins [...] to include Professional Services costs*”.⁴³¹ The pricing for the PICT bundles remained unchanged from his earlier email to [the Sepura Business Development Director] at 10:27pm.
286. On 10 September 2018 (10:39am), [Sepura Bids Employee B] requested that the agenda for a “*Police/CT Tender Response Review Meeting*” be circulated. Item 1a on the Agenda states “*Pricing for bundles 1-8, additional Bundle Pack and spares ([Sepura Regional Sales Director]/[Sepura Business Development Director])*”.⁴³² This call appears to have been a pre-sign off call with [Sepura Bids Employee A], [the Sepura Senior Bids Employee], [the Sepura Regional Sales Director], [the Sepura Business Development Director], [Sepura Bids Employee B] and [Sepura Executive Team Member C].⁴³³
287. Later on 10 September (12:39pm), [Sepura Executive Team Member B] emailed [the Sepura Regional Sales Director] to say he had just had lunch with [Sepura Executive Team Member A]. He explained that in the sign-off call later in the day [Sepura Executive Team Member A] would be looking closely at pricing, the key being to ensure the pricing works if Sepura has to absorb import tariffs as a result of a no-deal Brexit. [Sepura Executive Team Member B] indicated that he thought they were generally covered on pricing.⁴³⁴
288. Later on 10 September (12:52pm), [the Sepura Regional Sales Director] circulated Sepura’s 10 September 2018 Presentation that he planned to use on the 2pm call with Sepura’s senior management team.⁴³⁵
289. Later on 10 September (2:00pm), [the Sepura Regional Sales Director] presented his revised pricing recommendations contained in Sepura’s 10 September 2018 Presentation.⁴³⁶ Sepura has advised that [Sepura Executive Team Member A] gave his approval for the pricing of Sepura’s bid verbally at this meeting on 10 September 2018.⁴³⁷ Subsequent evidence, identified below, indicates this approval was for (i) the pricing of Sepura bundles that was proposed in Sepura’s 6 September 2018 Presentation; and (ii) the pricing of PICT bundles that was proposed in a revised version of Sepura’s PICT Pricing Document circulated by [Sepura Bids Employee B] at 10:27pm on 9 September 2018, and not approval of any of the pricing in Sepura’s 10 September 2018 Presentation.

⁴³⁰ Sepura First Response, Question 5, Document 3298.1 (ATF 1408).

⁴³¹ Sepura First Response, Question 5, Document 3881.1 (ATF 825).

⁴³² Sepura First Response, Question 5, Document 3109.1 (ATF 1597), attaching Document 3812.1 (ATF 894).

⁴³³ Sepura First Response, Question 5, Document 2955.1 (ATF 1751), attaching Document 3417.1 (ATF 1289).

⁴³⁴ Sepura First Response, Question 5, Document 2964.1 (ATF 1742).

⁴³⁵ Sepura First Response, Question 5, Document 3232.1 (ATF 1474), attaching Document 3861.1 (ATF 845).

⁴³⁶ Sepura First Response, Question 5, Document 2989.1 (ATF 1717).

⁴³⁷ Sepura Third Response – Part 2, Question 17(b).

290. On 11 September 2018 (11:09am), [Sepura Bids Employee B] circulated Sepura's draft response to the PICT Tender containing its proposed pricing.⁴³⁸ The proposed pricing for the Sepura bundles was consistent with the bid prices in Sepura's 6 September 2018 Presentation and the proposed pricing for the PICT bundles was consistent with the pricing of PICT bundles in a revised version of Sepura's PICT Pricing Document circulated by [Sepura Bids Employee B] at 10:27pm on 9 September 2018.⁴³⁹
291. On 13 September 2018 (7:42am), [Sepura Bids Employee B] circulated proposed new prices for items previously below a [X] % margin.⁴⁴⁰
292. Later on 13 September 2018 (8:32am), [the Sepura Business Development Director] emailed [Sepura Bids Employee B], [the Sepura Senior Bids Employee], [Sepura Executive Team Member C] and other colleagues expressing a concern that Sepura was increasing some of its "*big ticket*" items by over [X] % and that this would not land well with PICT or Sepura's UK customer base.⁴⁴¹
293. Later on 13 September 2018 (10:24am), [Sepura Bids Employee B] sent [Sepura Executive Team Member A] the profit and loss account for all the various bundles Sepura intended to submit to PICT for his review and approval.⁴⁴² [Sepura Bids Employee B] said the PICT Price Catalogue was being finalised but would be with [Sepura Executive Team Member A] shortly.⁴⁴³
294. Later on 13 September 2018 (12:20pm), [the Sepura Regional Sales Director] emailed [the Sepura Senior Bids Employee] and [the Sepura Business Development Director] requesting to see the Price Catalogue as it formed the basis of 80% of the scoring of Sepura's bid.⁴⁴⁴
295. On 14 September 2018 (9:10am), [the Sepura Senior Bids Employee] emailed [the Sepura Regional Sales Director], [Sepura Executive Team Member C] and [the Sepura Business Development Director] attaching Sepura's pricing for the PICT and Sepura bundles as well as the PICT Price Catalogue and asked if they could review pricing one last time and confirm they are happy.⁴⁴⁵

⁴³⁸ Sepura First Response, Question 5, Document 3208.1 (ATF 1498), attaching Document 3851.1 (ATF 855).

⁴³⁹ We note that Sepura has submitted that any changes in its pricing between Sepura's 10 September 2018 Presentation and the final pricing it submitted to PICT on 14 September 2018 "*reflect changes in the accessories included in the relevant bundles, rather than a change in approach to pricing*" (Sepura Second Response – Part 1, Question 15, paragraph 15.3).

⁴⁴⁰ Sepura First Response, Question 5, Document 485.1 (ATF 4156), attaching Document 2045.1 (ATF 2596).

⁴⁴¹ Sepura First Response, Question 5, Document 5.1 (ATF 4631).

⁴⁴² Sepura First Response, Question 5, Document 336.1 (ATF 4305).

⁴⁴³ The "*PICT Price Catalogue*" is what PICT referred to as the "*Standard Catalogue*" containing individual pricing for "*additional standard equipment items*". It is unclear whether the PICT Price Catalogue was subsequently emailed to [Sepura Executive Team Member A] or whether [Sepura Executive Team Member A] provided any written approval in response to [Sepura Bids Employee B]'s email.

⁴⁴⁴ Sepura First Response, Question 5, Document 347.1 (ATF 4294).

⁴⁴⁵ Sepura First Response, Question 5, Document 310.1 (ATF 4330), attaching Documents 1995.1 (ATF 2646) and 1996.1 (ATF 2645). There does not appear to be any written confirmation in subsequent emails in response to [the Sepura Senior Bids Employee]'s email.

296. Later on 14 September 2018 (11:33am), [the Sepura Senior Bids Employee] received confirmation from PICT that Sepura's bid had been successfully submitted.⁴⁴⁶ Its bid contained prices for all the of PICT bundles as well as prices for the Sepura bundles.⁴⁴⁷
297. The prices Sepura submitted for its Sepura bundles reflected the bid prices recommended in Sepura's 6 September 2018 Presentation.
298. The prices Sepura submitted for the PICT bundles were higher than the prices Sepura submitted for the Sepura bundles, reflecting the additional accessories included in the PICT bundles. These prices were consistent with the prices in a revised version of Sepura's PICT Pricing Document circulated by [Sepura Bids Employee B] at 10:27pm on 9 September 2018. They were also:
- (1) between [X] and [X]% above Sepura's high estimate of Motorola's likely pricing (which was within the [X]-[X]% delta identified by [the Sepura Regional Sales Director]);⁴⁴⁸ and
 - (2) higher than what Sepura had recently quoted some police forces for the same products.⁴⁴⁹
299. Sepura's bid submission also explained that it would offer a £[X] discount on the purchase of a new Airwave-TETRA device from Sepura if a customer traded in an old working Sepura Airwave-TETRA device⁴⁵⁰ i.e., Sepura's buyback scheme was focused on existing Sepura customers rather than existing Motorola customers.
- (d) After the submission of bids**
300. On 17 September 2018 (5:57pm), [Sepura Bids Employee B] responded to a request from [the Sepura Senior Bids Employee] for feedback on the PICT submission, attaching his "Post Bid Review".⁴⁵¹ [Sepura Bids Employee B] commented that "[X] [[Sepura Regional Sales

⁴⁴⁶ Sepura First Response, Question 5, Document 57.1 (ATF 4579). Sepura has explained that it later made some minor changes to its bid that were unrelated to pricing and that it resubmitted its bid on 27 September 2018 (Sepura First Response, Question 2 and Sepura Second Response – Part 1, Question 16).

⁴⁴⁷ Sepura First Response, Question 2, Annex 2, Volume 1, Appendix B (ATF 6334).

⁴⁴⁸ See, for example, Sepura's estimates of Motorola's pricing on page 7 of Sepura's 6 September 2018 Presentation compared to the final pricing in Sepura's PICT Pricing Document that Sepura submitted to PICT (Sepura First Response, Question 2, Annex 2 (ATF 6334)). See also Sepura First Response, Question 5, Document 2926.1 (ATF 1780). These prices were also between [X] and [X]% above Sepura's medium estimate of Motorola's likely pricing.

⁴⁴⁹ See, for example, Sepura First Response, Question 5, Documents 40.1 (ATF 4596), 108.1 (ATF 4528) and 2033.1 (ATF 2608). Sepura has explained that its recent quote to the MPS was based on a "high volume" purchase by the largest police force in the UK and is not therefore an appropriate benchmark by which to compare the pricing it submitting in response to the PICT Tender which is applicable to all police forces, regardless of their size and volume ordered (see, for example, Sepura Third Response – Part 2, Question 15(d); Sepura SO Representations, paragraphs 2.4.9, 2.7, 2.10.4, 4.37 and 7.8; Sepura Oral Transcript, paragraphs 69, 70, 146, 147).

⁴⁵⁰ Sepura's PICT Pricing Document, page 29 (Sepura First Response, Question 2, Annex 2 (ATF 6334)).

⁴⁵¹ Sepura First Response, Question 5, Document 535.1 (ATF 4106), attaching Document 2066.1 (ATF 2575).

Director]] provided an excellent presentation/justification for setting the pricing levels agreed.” He also noted: “Personally, I felt we set the level marginally too high”.⁴⁵²

301. On or around 20 September 2019, PICT raised questions over Sepura’s pricing and expressed concern to Sepura that it was “*not as aggressive as they had hoped*”.⁴⁵³ PICT also requested details of the pricing Sepura had recently offered to some police forces.⁴⁵⁴
302. On 24 September 2018 (11:59), [the Sepura Senior Bids Employee] agreed to [the Sepura Regional Sales Director]’s suggestion to offer a time-limited price drop unless “*you get wind that Moto have lower pricing and in that case you could lower permanently*.”⁴⁵⁵
303. On 27 September 2018, Sepura made some minor changes to its bid that were unrelated to pricing and resubmitted its bid on the same day.⁴⁵⁶
304. On 16 October 2018 (5:04pm), [the Sepura Senior Bids Employee] sent an email to colleagues working on the bid to inform them that Sepura had been awarded a place on the Framework Agreement.⁴⁵⁷ Sepura was also informed of its score.⁴⁵⁸
305. On 17 October 2018 (11:28am), [the Sepura Regional Sales Director] emailed [the Sepura Senior Bids Employee] detailing PICT’s basket price calculation and relative differences between the Parties’ pricing which [the Sepura Regional Sales Director] was able to work out based on PICT’s scoring methodology and the fact Motorola had been the only other successful bidder.⁴⁵⁹
306. On 21 October 2018 (9:40am), [the Sepura Regional Sales Director] included reference to the comparative pricing of the Parties’ respective bids in his internal weekly report.⁴⁶⁰ [The Sepura Regional Sales Director] noted that “*PICT calculated our average price at £[redacted] for the evaluation bundle, whereas Motorola has been calculated to be £[redacted]*”. [The Sepura Regional Sales Director] also commented that Sepura needed to “*quickly access [sic] if this £[redacted] delta will push forces that were committed to buy Sepura radios to purchase radios from Motorola*” and noted that Sepura had “*an opportunity for a “Price Drop” in November and December to address any short-term gaps.*”
307. [The Sepura Regional Sales Director] has stated that in November 2018, approximately two months after the exchange of messages on 5 September 2018, he lost the mobile phone

⁴⁵² Sepura First Response, Question 5, Document 2066.1 (ATF 2575), page 2.

⁴⁵³ Sepura First Response, Question 5, Document 1762.1, page 2 (ATF 2879).

⁴⁵⁴ See, for example, Sepura First Response, Question 5, Documents 40.1 (ATF 4596), 108.1 (ATF 4528) and 1762.1 (ATF 2879); Sepura Second Response – Part 1, Question 16.

⁴⁵⁵ Sepura First Response, Question 5, Documents 141.1 (ATF 4496) and 1162.1 (ATF 3479).

⁴⁵⁶ Sepura First Response, Question 2 and Sepura Second Response – Part 1, Question 16.

⁴⁵⁷ Sepura First Response, Question 5, Document 505.1 (ATF 4136).

⁴⁵⁸ See, for example, Sepura First Response, Question 5, Document 2094.1 (ATF 2547).

⁴⁵⁹ Sepura First Response, Question 5, Document 376.1 (ATF 4265). See also Sepura First Response, Question 6, paragraph 6.19 and Sepura Fifth Response, Question 5(d).

⁴⁶⁰ Sepura First Response, Question 5, Document 1786.1 (ATF 2855).

(including the SIM card) he used for the exchange of messages with [the Motorola VP for Sales], at a train station in Cologne in Germany.⁴⁶¹ [The Sepura Regional Sales Director] also submitted that the mobile phone he used for the exchange was not backed up in any way and that he had lost all of the data on it, including text messages.⁴⁶² There is, however, digital forensic evidence of various messages on [the Sepura Regional Sales Director]'s current personal mobile phone device (which is associated with the same phone number used for the exchange of messages on 5 September 2018)⁴⁶³ that go back as far as December 2017.⁴⁶⁴ This date is significantly earlier than the date on which [the Sepura Regional Sales Director] has said he lost his mobile phone and SIM card that was not backed up.

308. On 6 December 2018, Sepura met with PICT to discuss a potential price drop.⁴⁶⁵
309. On 11 December 2018 (3:42pm), [the Sepura Senior Bids Employee] emailed PICT, copying [the Sepura Regional Sales Director], to confirm Sepura's price drop of a £[X] discount on all PICT and Sepura bundles that included an [X] or [X] Airwave-TETRA device.⁴⁶⁶ [The Sepura Senior Bids Employee] also confirmed that Sepura had extended its buyback scheme to offer a £[X] discount on the purchase of a new Airwave-TETRA device from Sepura if a customer traded in an old Motorola Airwave-TETRA device (or an Airwave-TETRA device that was not working) i.e., Sepura amended its buyback scheme to also target existing Motorola customers.⁴⁶⁷
310. On 24 December 2018 (9:53am), [the Sepura Regional Sales Director] emailed PICT attaching updated price drop pricing which included additional discounts where certain accessories were not included in a bundle included in the price drop and/or where a certain volume of

⁴⁶¹ [Sepura Regional Sales Director] Interview Transcript (CD3), paragraphs 65 to 69.

⁴⁶² [Sepura Regional Sales Director] Interview Transcript (CD3), paragraphs 86 to 87; Sepura Third Response – Part 1, Question 3(c), paragraph 3.15; and [Sepura Regional Sales Director] First Response, Question 3(b).

⁴⁶³ [The Sepura Regional Sales Director] has explained that he retained the same mobile phone number after he lost his phone (see [Sepura Regional Sales Director] Interview Transcript (CD3), paragraphs 70 and 71).

⁴⁶⁴ Digital forensic evidence suggests that the iCloud backup feature was switched on and activated on [the Sepura Regional Sales Director]'s personal mobile phone, indicating that text messages and other data sent or created before the date on which [the Sepura Regional Sales Director] says he lost his phone were: (i) backed up; and (ii) likely to be accessible to him on his replacement handset without specialist software, for example, by looking for a contact such as [the Motorola VP for Sales] and scrolling through all the messages in that conversation stream (see CMA Digital Forensics Report, 27 February 2020, page 7, Observation 3 (ATF 4881) and CMA Digital Forensics Report, 7 May 2020, pages 3 and 4 (ATF 4883)). Accordingly, our view is that [the Sepura Regional Sales Director]'s account that he lost his phone and SIM card, including all of the data on it, approximately two months after the exchange of messages with [the Motorola VP for Sales] on 5 September 2018, is not credible.

⁴⁶⁵ Sepura First Response, Question 5, Document 867.1 (ATF 3774).

⁴⁶⁶ The discount for Sepura's key product bundles was between approximately [X]% and [X]% (Sepura First Response, Question 5, Documents 867.1 (ATF 3774), 704.1 (ATF 3937) and 828.1 (ATF 3813)). See also Sepura Second Response – Part 1, Question 8, paragraph 8.1.1; Sepura Fifth Response, Question 9, paragraph 9.7; Sepura Ninth Response, Question 2, paragraph 2.2.

⁴⁶⁷ Sepura First Response, Question 5, Documents 704.1 (ATF 3937) and 828.1 (ATF 3813).

Airwave-TETRA bundles were purchased.⁴⁶⁸ [The Sepura Regional Sales Director] sent a revised version to PICT on 27 December 2018 “to reflect some minor corrections”.⁴⁶⁹ This offer remained available until 14 February 2019.⁴⁷⁰

311. Since this first price drop period, Sepura has retained its bid pricing⁴⁷¹ and utilised the pricing incentive mechanism at every available opportunity by offering price drops from its bid pricing.⁴⁷²
312. Approximately [X]% of Sepura’s sales under the terms of the Framework Agreement have been made at its price drop pricing, although by late July 2022, Sepura had still made almost £[X] million in sales at its bid pricing.⁴⁷³ Sepura has also only ever sold some Airwave-TETRA products (typically accessories and services) at its bid pricing i.e., it has never offered any price drop pricing for some Airwave-TETRA products.⁴⁷⁴

(4) Other evidence on Sepura’s approach to pricing for the PICT Tender

313. During the course of our investigation, Sepura and [the Sepura Regional Sales Director] have also provided the following explanations to Ofcom in relation to Sepura’s pricing strategy for the PICT Tender.
- (1) **The structure of the PICT Tender did not incentivise Sepura to submit its lowest or best price to PICT.** Sepura has submitted that the structure of the PICT Tender – in particular the fact the Parties were required to submit a price that would be applicable to all customers regardless of their size or volume ordered and which

⁴⁶⁸ Sepura First Response, Question 5, Document 774.1 (ATF 3867), attaching Document 2102.1 (ATF 2539). Page 11 of Document 2102.1 also indicates that significant discounts of up to £[X] or approximately [X]% were available for purchases of a PICT motorcycle mobile radio bundle on the basis at least [X] of such devices were purchased during a Pricing Incentive Window. See also footnote 183 above.

⁴⁶⁹ Sepura First Response, Question 5, Document 823.1 (ATF 3818), attaching Document 2108.1 (ATF 2533); Sepura Third Response – Part 1, Question 20.

⁴⁷⁰ Sepura First Response Question 5, Document 2108.1, page 1 (ATF 2533).

⁴⁷¹ Sepura Ninth Response, Question 2, paragraph 2.1. The Parties could replace all or part of their bid pricing with their price drop pricing at the end of a Pricing Incentive Window. See Clause 13.5 and Clause 6.3 of Schedule 2 of the Framework Agreement (Sepura First Response, Annex 9 (ATF 4931)). See also PICT First Informal Response – Part A, Question 35.

⁴⁷² Sepura has issued subsequent price drops between 15 May and 30 June 2019; 20 November and 31 December 2019; 15 May and 30 June 2020; 25 September and 24 December 2020; 18 May and 30 June 2021; 1 October and 31 December 2021; and 1 April and 30 June 2022. See Sepura Seventh Response, Question 3(b); Sepura Eighth Response, Question 5; Sepura Tenth Response, Question 4. Sepura amended the detail of at least some of its price drops on one or more occasions during each Pricing Incentive Window. See also [Sepura Regional Sales Director] Interview Transcript (CD2), paragraph 221.

⁴⁷³ Sepura Tenth Response, Question 2, Annex 2. We note that approximately [X]% ([X] out of [X]) of customers that have purchased Airwave-TETRA products from Sepura under the terms of the Framework Agreement have purchased at least some of those products at its bid pricing. One customer ([X]) has only purchased products at Sepura’s bid pricing and other customers (including [X]) have made the majority of their purchases at its bid pricing. While other customers have made more purchases at Sepura’s price drop pricing, a significant amount of purchases have still been made at its bid pricing (Sepura Tenth Response, Question 2, Annex 2). Sepura has explained that some customers may not have been able to take advantage of price drop pricing due to “budget governance” (see, for example, Sepura Sixth Response, Document 5179.1, page 2, ATF 334).

⁴⁷⁴ Sepura Ninth Response, Question 1.

would be applicable for the duration of the Framework Agreement – meant it was not incentivised to submit its lowest or best price to PICT on 14 September 2018.⁴⁷⁵

- (2) **It was nonetheless clear to Sepura that it needed to offer competitive pricing that was within a certain tolerance of Motorola's pricing.** Sepura has explained that it was clear that it *"would need to offer very competitive pricing in order to be included on the [Framework Agreement]"*⁴⁷⁶ and that in order *"[t]o win business under the [Framework Agreement], Sepura's pricing ... [had] to anticipate the likely pricing from Motorola"* and accordingly Sepura went about *"compil[ing] an estimate of Motorola's likely pricing"*.⁴⁷⁷

During interview, [the Sepura Regional Sales Director] explained that *"there was a lot of uncertainty and nervousness within [Sepura]"* that if Motorola priced significantly below Sepura – for example, if it used its Airwave business to cross-subsidise its bid for the PICT Tender – Sepura *"could be overlooked"*. [The Sepura Regional Sales Director] also explained that the business was challenging him over whether Sepura was being aggressive enough with its pricing and querying why they should bid at the amount being proposed.⁴⁷⁸

- (3) **Sepura was also focused on ensuring its pricing was within a certain tolerance of its recent pricing.** [The Sepura Regional Sales Director] explained during interview that Sepura needed to ensure its pricing reflected where the marketplace expected its pricing to be based on the pricing it had offered to customers it had recently won or supplied over the previous 12 months.⁴⁷⁹

⁴⁷⁵ See, for example, Sepura Third Response – Part 2, Questions 15(c) and (d); Sepura SO Representations, paragraphs 2.4.2, 2.4.11, 2.8 and 2.9; Sepura Oral Transcript, paragraphs 140 and 146. See also paragraph 136 of [Sepura Executive Team Member B]'s Interview Transcript in which he said *"to the best of my recollection, I felt that the pricing probably didn't change much over the period, mainly because this was to get onto a frame contract and was not probably what anyone was going to really purchase at. Our sole objective, as I said at the beginning, was to get onto the... for us to win any business we would have to get onto the contract, rate contract as well, so we had to be mindful that we had to be within a framework to get there, but the real battle would come when we could do some pricing drops and things like that. Price drops, game over. That's how I viewed it. So that's how I remember the discussions."*

⁴⁷⁶ Sepura First Response, Question 6, paragraph 6.5. See also paragraph 156 of [Sepura Executive Team Member C]'s Interview Transcript in which he said: *"We always knew we were going to have to be very competitive in this bid, so the evolution was how competitive we need to be"*. We note that Sepura's position appears to have shifted during the course of the investigation (see, for example, the subsequent evidence cited from Sepura's SO Representations and the Oral Transcript referred to in Section H(3)(a) above).

⁴⁷⁷ Sepura First Response, Question 6, paragraphs 6.13 - 6.15. See also [Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 68 and Sepura Ninth Response, Question 10.

⁴⁷⁸ [Sepura Regional Sales Director] Interview Transcript (CD2), paragraph 110 and [Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 115.

⁴⁷⁹ The Parties could potentially have been disqualified if they could not justify their pricing to PICT (PICT Instructions to Bidders, paragraph 1.4.2). [The Sepura Regional Sales Director] recognised this possibility in his pricing recommendations and identified a way to mitigate this risk was to *"[e]nsure pricing consistent with current pricing"* (see, for example, Sepura's 6 September 2018 Presentation, page 11). [The Sepura Regional Sales Director] similarly commented during interview: *"... you'll have seen my previous prices that we sold, so we wanted to be within that tolerance so that PICT couldn't turn around and say well Sepura were more expensive than the market price because that could allow them to disqualify us. Whereas if we were showing a discount then therefore the price shouldn't have become something that they could disqualify us for. So that was the basis of how we positioned our pricing"*. He went on to explain that Sepura *"took the*

- (4) **Sepura intended to use the price drop mechanism to drive sales or in the event its pricing was not sufficiently competitive.** Sepura has explained that it “was concerned that Motorola’s prices may have been significantly lower than its own, and the first price drop was always envisaged as an opportunity to respond if it appeared that Motorola’s prices were significantly lower than Sepura’s prices.”⁴⁸⁰ It has also submitted that its strategy was “effectively to drive sales and price competition through the IPC, which is when the real offers of prices would be made because there were real offers and real volumes”.⁴⁸¹

314. In determining its overall pricing strategy, Sepura has confirmed that it took various factors into account including:⁴⁸²

“the relative weighting of price in the tender scoring;
historical pricing levels in the UK;
the cost of manufacture, including future development requirements and providing extended warranty cover;
competitor pricing and behaviour;
expected customer budgets; and
the possibility for future price drops”.

315. In relation to how Sepura’s proposed pricing levels developed, Sepura explained that it was:

“not possible to provide a linear description of the development of [its] proposed pricing as various possible alternative bundle components and prices were discussed (sometimes concurrently) in face-to-face meetings. Such meetings were not minuted and, due to the lapse in time, it is not possible for the individuals involved to explain the evolution of the different potential options that were under consideration between 1 and 14 September 2018.”⁴⁸³

316. Sepura did nonetheless create a description of how its pricing evolved for the purposes of Ofcom’s investigation and submitted that the net impact of Sepura’s internal discussion on

view that [they] wanted to be within a [\leq] % tolerance of” its pricing over the last 12 months ([Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 93). See also [Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 62 and 68. Consistent with this risk and element of Sepura’s pricing strategy, see Sepura First Response, Question 5, Document 1928.1 (ATF 2713) identifying the pricing for Airwave-TETRA products Sepura had recently offered to customers and Sepura’s 3, 6 and 10 September 2018 Presentations which all identified prices paid by certain police forces for three of Sepura’s overt products over the last 12 months (see, for example, Sepura’s 6 September 2018 Presentation, pages 8 – 10 and 13).

⁴⁸⁰ Sepura Second Response – Part 1, Question 8, paragraph 8.1.1. See also Sepura First Response, Question 6, paragraph 6.18.

⁴⁸¹ Sepura Oral Transcript, paragraph 143. See also paragraphs 52, 147 and 165 of the Sepura Oral Transcript and Sepura SO Representations, Annex 1, rows 50 – 53.

⁴⁸² Sepura First Response, Question 6, paragraph 6.2.

⁴⁸³ Sepura Second Response – Part 1, Question 15, paragraph 15.1.1.

pricing between 3 and 14 September 2018 was an overall reduction in the prices of the Sepura bundles it submitted to PICT.⁴⁸⁴

317. The majority of Sepura's sales under the terms of the Framework Agreement have been made at its price drop pricing.⁴⁸⁵ A significant number of customers (at least [§<] customers) have however still paid Sepura's bid pricing for Airwave-TETRA products; by late July 2022, Sepura had made approximately £[§<] million in sales under the Framework Agreement (almost £[§<] million of which was at its bid pricing).⁴⁸⁶
318. Sepura has also submitted that it has competed "*aggressively*" under the Framework Agreement which is demonstrated by the fact the Metropolitan Police Service ("**MPS**"), the largest potential customer, switched from Motorola to Sepura following Sepura's price drop offered in December 2018.⁴⁸⁷

(5) Ofcom's findings in relation to Sepura's approach to pricing for the PICT Tender

319. Taking into account all of the evidence relating to Sepura's pricing strategy for the PICT Tender and its conduct in response to the PICT Tender, we have summarised below the key evidence and findings on which we rely on in this Decision.
320. Sepura would have expected the PICT Tender to be the last opportunity to set framework pricing⁴⁸⁸ for Airwave-TETRA products⁴⁸⁹ and that its bid pricing was a key parameter on which it was competing for customers. For example, Sepura recognised that the purpose of the PICT Tender was "*to demonstrate value for money*" and "*create a competitive environment to drive lowest pricing*",⁴⁹⁰ and [the Sepura Regional Sales Director] emphasised the importance of pricing in light of the fact it attracted 80% of the score.⁴⁹¹

⁴⁸⁴ Sepura Second Response – Part 1, Question 15, paragraph 15.3. We also note that none of Sepura's senior management identified any significant changes in Sepura's approach to the pricing of its bid or in [the Sepura Regional Sales Director]'s attitude or approach to pricing around 6 September 2018. See paragraphs 153 – 158 of [Sepura Executive Team Member C]'s Interview Transcript, paragraphs 145 – 148 of [Sepura Executive Team Member A]'s Interview Transcript, paragraphs 113 – 116 of [Sepura Executive Team Member D]'s Interview Transcript and paragraphs 131 – 136 of [Sepura Executive Team Member B]'s Interview Transcript.

⁴⁸⁵ Sepura Tenth Response, Question 2, Annex 2. See also Sepura SO Representations, paragraph 2.4.7; Sepura Oral Transcript, paragraph 52.

⁴⁸⁶ Sepura Tenth Response, Question 2, Annex 2 and footnote 473 above. See also Sepura Ninth Response, Question 1.

⁴⁸⁷ Sepura Fifth Response, Question 9, paragraph 9.7. See also Sepura SO Representations, paragraphs 2.4.12, 2.10.6; Oral Transcript, paragraphs 147, 187, 197 - 199.

⁴⁸⁸ We discuss the importance of this framework or bid pricing in **Section F(3)(b)(i)**.

⁴⁸⁹ As explained in **Section F(2)(a)**, the PICT Tender was intended to address shortfall in Airwave-TETRA products resulting from an extension of the date by which all Airwave-TETRA users would have migrated to the ESN network. As explained in **Section C(4)(d)**, the extension was to 31 December 2022 and the Framework Agreement was intended to remain in place until a similar date, 15 November 2022 (see **Section F(2)(e)**). [The Sepura Regional Sales Director] and Sepura would have been aware of this. See also [Sepura Regional Sales Director] Interview Transcript (CD1), paragraphs 84 – 89.

⁴⁹⁰ See, for example, Sepura's 6 September 2018 Presentation, page 3. See also, Sepura Sixth Response, Document 5278.1, page 1, (ATF 241) in which [the Sepura Regional Sales Director] states "[t]he goal of the procurement is to ensure best value for money for the tax payer" and [Sepura Regional Sales Director] Interview Transcript (CD2), paragraph 152.

⁴⁹¹ See, for example, Sepura First Response, Question 5, Documents 347.1 (ATF 4294) and 1774.1 (ATF 2867).

321. Sepura was also aware of the aggressive competition that can occur between the Parties,⁴⁹² as well the flexibility afforded to it in terms of its pricing strategy, and the importance of getting its strategy right.⁴⁹³
322. Sepura's strategy for the PICT Tender was, in broad terms, to ensure that it got on the Framework Agreement at the right price. It was concerned that if its pricing was not competitive then customers might switch to Motorola and that Sepura would therefore lose market share as a result.⁴⁹⁴ It was also concerned that it could potentially be disqualified if it could not explain its pricing by reference to its recent market pricing.⁴⁹⁵
323. Specifically, taking into account the structure of the PICT Tender, Sepura's strategy was to:
- (1) Submit a relatively high price – in the sense that it did not represent Sepura's lowest or best pricing⁴⁹⁶ – whilst ensuring its pricing was (1) sufficiently competitive by being within a certain tolerance – identified by [the Sepura Regional Sales Director] as within [\mathcal{X}]-[\mathcal{X}]% – of Motorola's pricing;⁴⁹⁷ and (2) within a certain tolerance of its recent pricing;⁴⁹⁸ and
 - (2) Utilise the price drop mechanism to drive sales, particularly if its bid pricing was not considered competitive when compared with Motorola's pricing.⁴⁹⁹
324. Taking into account Sepura's strategy for the PICT Tender, we find that [the Sepura Regional Sales Director] would have had an interest in there being less downward pressure on bid pricing. For example, Sepura would have been less incentivised to utilise the price drop mechanism, or potentially revise its bid pricing, if its bid pricing was considered sufficiently

⁴⁹² See, for example, the discussion between [the Sepura Regional Sales Director] and [Sepura Executive Team Member C] relating to "*horribly low pricing*" in Romania in Sepura First Response, Question 5, Document 2953.1 (ATF 1753) and [the Sepura Regional Sales Director]'s comment that Motorola had "*offered its partners 65% off list pricing*" in Holland (Sepura Sixth Response, Document 5214.1, page 2, (ATF 299). See also paragraphs 4.3, 4.5, 4.10 and 4.12 of Sepura SO Representations.

⁴⁹³ For example, [the Sepura Regional Sales Director] commented that "*[a]s this is not a winner takes all contract then our current focus is centred on our pricing strategy*" (Sepura First Response, Question 5, Document 3669.1 (ATF 1037)). See also [Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 66 and [Sepura Regional Sales Director] Interview Transcript (CD2), paragraph 17.

⁴⁹⁴ See, for example, Sepura First Response, Question 5, Documents 190.1 (ATF 4447), 3669.1 (ATF 1037), 1774.1 (ATF 2867), 3178.1 (ATF 1528), 2953.1 (ATF 1753), Sepura's 6 September 2018 Presentation, pages 5, 6 and 11.

⁴⁹⁵ See, for example, Sepura's 6 September 2018 Presentation, page 12 and [Sepura Regional Sales Director] Interview Transcript (CD1), paragraphs 62 and 93.

⁴⁹⁶ See, for example, Sepura First Response, Question 5, Documents 108.1 (ATF 4528) and 1755.1, page 2 (ATF 2886); Sepura Third Response – Part 2, Question 15(d), paragraph 15.15.

⁴⁹⁷ See, for example, Sepura First Response, Question 5, Documents 190.1 (ATF 4447), 3669.1 (ATF 1037), 1756.1 (ATF 2885), 2926.1 (ATF 1780) and Question 6, paragraph 6.5 and 6.13 – 6.15; [Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 68.

⁴⁹⁸ See, for example, [Sepura Regional Sales Director] Interview Transcript (CD1), paragraphs 62, 68 and 93; Sepura SO Representations, paragraph 2.4.6; Sepura First Response, Question 5, Document 1928.1 (ATF 2713) and Sepura's 6 September 2018 Presentation, pages 8 – 10 and 13.

⁴⁹⁹ See, for example, Sepura's 6 September 2018 Presentation, page 12; Sepura Second Response – Part 1, Question 8, paragraph 8.1.1; Sepura First Response, Question 6, paragraph 6.18; Sepura Oral Transcript, paragraphs 52, 143, 147 and 165; and Sepura SO Representations, Annex 1, rows 50 – 53.

competitive compared to Motorola's pricing, for example, because both Parties submitted a relatively high bid price.

325. Sepura had a general understanding of Motorola's current market pricing and used that information to help devise and fulfil its strategy. For example, Sepura estimated Motorola's low, medium and high pricing in Sepura's 3, 6 and 10 September 2018 Presentations.⁵⁰⁰
326. As noted above, Sepura was however concerned about the risk of Motorola undercutting the pricing of its bid in response to the PICT Tender, to an extent that might encourage some of Sepura's customers to switch to Motorola and reduce Sepura's market share. Sepura's contemporaneous documents demonstrate that Sepura sought to address this risk by seeking to (i) obtain competitive intelligence on Motorola's bidding intent including its likely approach to pricing;⁵⁰¹ and (ii) ensure its pricing was within a certain delta of Motorola's likely pricing.⁵⁰²
327. [The Sepura Regional Sales Director] was also tasked with obtaining competitive intelligence on Motorola's likely bidding intent and approach to pricing.⁵⁰³ On 1 September 2018, days before the exchange of messages on 5 September 2018, he explained that Sepura had *"been attempting to get competitive intel on Motorola and there is nothing being shared"*. [The Sepura Regional Sales Director] also expressed the view that he thought *"Motorola will avoid a price war"*.⁵⁰⁴
328. On 3 September 2018, [Sepura Executive Team Member C] sent an email to [the Sepura Regional Sales Director] in which he expressed concern that Sepura's proposed pricing may be too high and that Motorola could significantly undercut Sepura. He said:
- "You need somewhere to explore the threat – or explain why you think it is low – that Moto will go in with a low price (maybe subsidised by Airwave profit), to try and discredit/embarrass us as being poor value to weaken our position/pinch some Customers."⁵⁰⁵
329. On 5 September 2018, and prior to his exchange of messages with [the Motorola VP for Sales] later that day, [the Sepura Regional Sales Director] reduced the recommended bid price for the SC20 and SC21 Sepura bundles by £[X] and £[X] respectively.⁵⁰⁶ He also revised his pricing recommendation for mobiles by removing the proposed [X]% discount

⁵⁰⁰ See also Sepura Ninth Response, Question 10; [Sepura Executive Team Member A]'s Interview Transcript, paragraph 50; [Sepura Executive Team Member C]'s Interview Transcript, paragraph 55; and Sepura First Response, Question 5, Document 3223.1 (ATF 1483) in which [the Sepura Regional Sales Director] suggested Sepura should compare its proposed prices for batteries and charges against the competition.

⁵⁰¹ See, for example, Sepura First Response, Question 5, Document 190.1 (ATF 4447), 1758.1 (ATF 2883), 1755.1 (ATF 2886), 2926.1 (ATF 1780), 3178.1 (ATF 1528).

⁵⁰² See, for example, Sepura First Response, Question 5, Documents 190.1 (ATF 4447), 3669.1 (ATF 1037), 1756.1 (ATF 2885), 2926.1 (ATF 1780).

⁵⁰³ Sepura First Response, Question 5, Document 190.1 (ATF 4447).

⁵⁰⁴ Sepura First Response, Question 5, Document 2926.1 (ATF 1780). See also footnote 375 above.

⁵⁰⁵ Sepura First Response, Question 5, Document 3178.1 (ATF 1528). See also footnote 394 above.

⁵⁰⁶ Sepura's 6 September 2018 Presentation, page 12.

which had featured in Sepura's 3 September 2018 Presentation. He recommended to "[u]se current force pricing" for both overt portables and mobile products and offer a special £[><] discount for Q4 orders.⁵⁰⁷

330. Taking into account Sepura's strategy on ensuring its pricing was within a certain tolerance of its recent pricing to customers and the fact [the Sepura Regional Sales Director] identified proposed or actual prices paid by certain police forces for three of Sepura's overt products over the last 12 months,⁵⁰⁸ we find that there would have been an understanding within Sepura as to the meaning of "current force pricing". We note that [the Sepura Regional Sales Director]'s use of the phrase "[u]se current force pricing" would have been surprising if it was only understood by [the Sepura Regional Sales Director] himself. The more likely explanation is that [the Sepura Regional Sales Director] made key pricing recommendations which both he and other individuals within Sepura would have understood.
331. In response to the revised version of [the Sepura Regional Sales Director]'s pricing recommendations circulated on 5 September 2018, [Sepura Executive Team Member C] told [the Sepura Regional Sales Director] that he was concerned that Motorola may price lower and thought Sepura "should consider going cheaper".⁵⁰⁹
332. The exchange of messages with [the Motorola VP for Sales] occurred later on 5 September 2018.
333. On the day after this exchange of messages with [the Motorola VP for Sales] – and in the knowledge that he had informed Motorola that Sepura would not be submitting an aggressive price to PICT – [the Sepura Regional Sales Director] presented his pricing recommendations to Sepura's senior management.⁵¹⁰
334. As Sepura's pricing lead, [the Sepura Regional Sales Director] continued to be involved in discussions around the pricing of Sepura's bid until it was submitted.⁵¹¹
335. Sepura's pricing of PICT bundles and Sepura bundles was not finalised prior to the exchange of messages with [the Motorola VP for Sales] on 5 September 2018 and there was significant scope for Sepura's pricing strategy and bid pricing to be amended after this exchange. In particular:
- (1) We are not aware of any contemporaneous evidence indicating that Sepura had proposed any pricing for PICT bundles prior to the exchange of messages with [the Motorola VP for Sales] on 5 September 2018. The evidence indicates PICT bundle

⁵⁰⁷ Sepura's 6 September 2018 Presentation, page 14.

⁵⁰⁸ See, for example, Sepura First Response, Question 5, Document 86.1 (ATF 4450), attaching Document 1928.1 (ATF 2713) and pages 8 – 10 and 13 of Sepura's 6 September 2018 Presentation which identify the pricing for Airwave-TETRA products Sepura had recently offered to certain police forces for three of Sepura's overt products over the last 12 months.

⁵⁰⁹ Sepura First Response, Question 5, Document 2953.1 (ATF 1753).

⁵¹⁰ Sepura First Response, Question 5, Document 3232.1 (ATF 1474), attaching Document 3861.1 (ATF 845). See also Document 3244.1 (ATF 1462).

⁵¹¹ The evidence indicates that Sepura was still amending some of its pricing for individual items up until at least 13 September 2018. See Sepura First Response, Question 5, Document 485.1 (ATF 4156), attaching Document 2045.1 (ATF 2596).

pricing may have been discussed at the meeting on 6 September 2018, one day after the exchange with [the Motorola VP for Sales].⁵¹² Initial pricing for PICT bundles was then circulated on 7 September 2018.⁵¹³

- (2) On 6 September 2018, one day after the exchange of messages with [the Motorola VP for Sales], [the Sepura Regional Sales Director] presented to colleagues the pricing recommendations relating to Sepura bundles he had circulated on 5 September 2018.⁵¹⁴
- (3) Sepura's pricing of PICT bundles and Sepura bundles was not approved until 10 September 2018.⁵¹⁵
- (4) Sepura's pricing of individual Airwave-TETRA products continued to be reviewed and revised at least until 13 September 2018.⁵¹⁶

336. As noted above, Sepura wanted to ensure its pricing was sufficiently competitive by being within a certain tolerance – identified by [the Sepura Regional Sales Director] as within [X]-[X]% – of Motorola's pricing. The prices Sepura submitted for the PICT bundles were between [X]% and [X]% above Sepura's medium estimate of Motorola's likely pricing and between [X]% and [X]% above Sepura's high estimate of Motorola's likely pricing.⁵¹⁷ The evidence therefore indicates that Sepura's bid pricing was set in the expectation of Motorola setting relatively high prices and for Sepura's prices to be within the identified tolerance of those high prices. [The Sepura Regional Sales Director] subsequently identified a £[X] delta between Motorola's average price and Sepura's average price based on PICT's "*evaluation bundle*".⁵¹⁸

337. As explained above, Sepura's 10 September 2018 Presentation contained higher pricing than the pricing contained in Sepura's 6 September 2018 Presentation.⁵¹⁹ However, the pricing in Sepura's 10 September 2018 Presentation reflects the pricing for PICT bundles that was circulated by [Sepura Bids Employee B] on 7 September 2018 and does not therefore appear to be directly comparable to the pricing in Sepura's 6 September 2018 Presentation (which contained pricing for Sepura bundles). The evidence therefore suggests that the higher pricing in Sepura's 10 September 2018 Presentation reflected PICT bundle pricing (and the

⁵¹² Sepura First Response, Question 5, Document 3057.1 (ATF 1649) in which [Sepura Bids Employee B] refers to creating quotations "*agreed in yesterday's meeting*".

⁵¹³ Sepura First Response, Question 5, Document 3203.1 (ATF 1503), attaching Document 3849.1 (ATF 857).

⁵¹⁴ Sepura Third Response – Part 2, Question 13(a) and Sepura Fifth Response, Question 1.

⁵¹⁵ Sepura Third Response – Part 2, Question 17(b).

⁵¹⁶ See, for example, Sepura First Response, Question 5, Documents 485.1 (ATF 4156), 5.1 (ATF 4631), 336.1 (ATF 4305), 347.1 (ATF 4294) and 310.1 (ATF 4330).

⁵¹⁷ See, for example, Sepura's estimates of Motorola's pricing on page 7 of Sepura's 6 September 2018 Presentation compared to the final pricing in Sepura's PICT Pricing Document that Sepura submitted to PICT (Sepura First Response, Question 2, Annex 2 (ATF 6334)).

⁵¹⁸ See, for example, Sepura First Response, Question 5, Document 1786.1 (ATF 2855).

⁵¹⁹ For example, compare proposed pricing on page 12 of Sepura's 6 September 2018 Presentation with the proposed pricing on page 14 of Sepura's 10 September 2018 Presentation.

additional accessories contained in a PICT bundle).⁵²⁰ This evidence reinforces our finding that Sepura's pricing of PICT bundles was not finalised until after the exchange of messages with [the Motorola VP for Sales] on 5 September 2018.

338. We note that Sepura's initial explanation for the pricing in Sepura's 10 September 2018 Presentation is not entirely consistent with its subsequent explanation and Sepura's version of events has changed during Ofcom's investigation. In this regard, Sepura submitted in response to a statutory information request that the pricing in Sepura's 10 September 2018 Presentation represented pricing for Sepura bundles containing additional accessories (which Sepura referred to as "Alternative Bundles") but which were not PICT bundles.⁵²¹ For the following reasons, we did not consider Sepura's initial explanation of the higher pricing in Sepura's 10 September 2018 Presentation to be credible:

- (1) There is no reference in Sepura's 10 September 2018 Presentation or in [the Sepura Regional Sales Director]'s covering email attaching the slides that the prices were not directly comparable with those in previous slide packs due to changes in the accessories included in the bundles.⁵²² This is despite Sepura's 10 September 2018 Presentation being circulated to those that had been sent earlier versions, including [the Sepura Business Development Director], [Sepura Executive Team Member C], [Sepura Executive Team Member B] and [the Sepura Senior Bids Employee].
- (2) In response to a statutory information request, Sepura submitted that the pricing in Sepura's 10 September 2018 Presentation included a "*second battery*".⁵²³ However, the cost of second battery does not appear to fully account for the increase to the recommended bid prices.⁵²⁴
- (3) The contemporaneous evidence does not suggest that a second battery or any other accessories were being considered to be added to the Sepura bundle. In fact, earlier on 9 September 2018 (9:02am) and before he had circulated his revised pricing

⁵²⁰ Compare proposed pricing on page 14 of Sepura's 10 September 2018 Presentation with the pricing in Sepura First Response, Question 5, Document 3849.1, pages 4 - 6 (ATF 857), attached to Document 3203.1 (ATF 1503).

⁵²¹ Sepura Second Response – Part 1, Question 15 (including Table 2, footnote 2). Ofcom subsequently asked Sepura to confirm in response to a statutory information request what the proposed pricing on page 14 of Sepura's 10 September 2018 Presentation represented, noting Sepura's previous explanation that the right-hand column represented pricing for its "Alternative Bundles". Sepura's response of 6 December 2021 failed to explain that the pricing in Sepura's 10 September 2018 Presentation actually represented PICT bundle pricing and not some alternative bundle of Airwave-TETRA products that was not a Sepura bundle or a PICT Bundle (Sepura Ninth Response, Question 11). Taking Sepura's initial explanation of the higher pricing in Sepura's 10 September 2018 Presentation at face value, [the Sepura Regional Sales Director]'s recommendations in Sepura's 10 September 2018 Presentation would have increased the prices customers paid for these bundles irrespective of whether the bundles contained additional accessories.

⁵²² Sepura First Response, Question 5, Document 3308.1 (ATF 1398), attaching Document 3884.1 (ATF 822).

⁵²³ Sepura Third Response – Part 2, Question 15, paragraph 15.10.

⁵²⁴ We understand the bid price of an additional high capacity battery was £30, while the unit cost of a high capacity battery was £11.29 (see Sepura First Response, Annex 2, Document 1.3.7, PICT Price Catalogue, page 27 (ATF 6336)).

recommendations, [the Sepura Regional Sales Director] had confirmed that the “*Sepura bundles*” (i.e., without an additional battery) looked “*very good*”.⁵²⁵

- (4) As noted above, the pricing in Sepura’s 10 September 2018 Presentation reflects the initial pricing for PICT bundles circulated by [Sepura Bids Employee B] on 7 September 2018. Indeed, when Sepura was given a further opportunity to explain the pricing in Sepura’s 10 September 2018 Presentation in Ofcom’s Revised Second Letter of Facts, Sepura accepted that Sepura’s 10 September 2018 Presentation did in fact reflect PICT bundle pricing.⁵²⁶
339. After Sepura became aware that Motorola had submitted significantly lower pricing to PICT, Sepura decided to offer a price drop at the first available opportunity.⁵²⁷ Sepura also amended its buyback scheme from being focused on existing Sepura customers to also targeting existing Motorola customers.⁵²⁸
340. Ofcom considers that it is clear from the evidence set out above that the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018 occurred before Sepura’s pricing strategy and pricing had been finalised. As explained further below, that exchange was highly relevant to the strategic pricing decisions that Sepura needed to make in response to the PICT Tender, and there was therefore significant scope for the exchange to affect those strategic pricing decisions.

⁵²⁵ Sepura First Response, Question 5, Document 3327.1 (ATF 1379) in response to Document 3424.1 (ATF 1282), attaching Document 3973.1 (ATF 733).

⁵²⁶ Sepura’s Second Letter of Facts Representations (Revised Annex A), rows 30-32.

⁵²⁷ Sepura First Response, Question 5, Documents 1786.1 (ATF 2855), 867.1 (ATF 3774), 704.1 (ATF 3937) and 828.1 (ATF 3813). See also Sepura Second Response – Part 1, Question 8, paragraph 8.1.1; Sepura Ninth Response, Question 2, paragraph 2.2.

⁵²⁸ Sepura’s PICT Pricing Document, page 29 (Sepura First Response, Question 2, Annex 2 (ATF 6334)) and subsequently Sepura First Response, Question 5, Documents 704.1 (ATF 3937) and 828.1 (ATF 3813).

H. MOTOROLA'S CONDUCT RELATING TO THE PICT TENDER

(1) Key individuals at Motorola

341. Various individuals at Motorola were involved in preparing Motorola's bid in response to the PICT Tender, including.⁵²⁹

- (1) [REDACTED] ([Motorola VP for Sales]);
- (2) [REDACTED] ([Motorola Airwave VP MD]);
- (3) [REDACTED] ([Motorola Senior VP]);
- (4) [REDACTED] ([Motorola Finance Lead]);
- (5) [REDACTED] ([Motorola Sales Employee A]);
- (6) [REDACTED] ([Motorola Senior Finance Director]);
- (7) [REDACTED] ([Motorola Financial Consultant]);
- (8) [REDACTED] ([Motorola Senior Sales Employee]);
- (9) [REDACTED] ([Motorola Bids Employee A]);
- (10) [REDACTED] ([Motorola Sales Employee B]);
- (11) [REDACTED] ([Motorola Bids Employee B]); and
- (12) [REDACTED] ([Motorola Sales Employee C]).

342. All of these individuals were involved in the pricing of Motorola's bid to varying degrees and at various times.⁵³⁰ For example, in response to requests for information, Motorola has stated that:

- (1) [The Motorola VP for Sales] was the commercial lead for Motorola's bid and whose *"role was to make ultimate pricing decision, with the input of [the Motorola Senior VP] and [the Motorola Finance Lead]"*.⁵³¹
- (2) [The Motorola Senior VP]'s *"role was one of internal high level supervisory review"*. It has been submitted that *"[the Motorola Senior VP] did not attend meetings to discuss the proposed bid and paperwork"* although prior to his recusal he *"was involved in high level strategic discussions ... which included discussions on pricing"*.⁵³² Motorola has also submitted that [the Motorola Senior VP] was expected to attend the second level sign-off call on 11 September 2018 and was responsible for approving Motorola's final bid.⁵³³

⁵²⁹ Motorola First Response, Question 4(a), Tables 1 and 2 and Motorola Second Response – Part 1, Questions 4 and 9(b), Table 1. The roles identified are the roles of the individuals at the relevant time.

⁵³⁰ Motorola First Response, Question 4(a), Tables 1 and 2 and Motorola Second Response – Part 1, Questions 5(a) and 9(b), Table 1.

⁵³¹ Motorola First Response, Question 4(a), Table 1.

⁵³² Motorola Second Response – Part 2, Question 13(c).

⁵³³ Motorola First Response, Question 4(a), Table 1; Motorola Second Response – Part 2, Question 13(c); Motorola Third Response, Part 1 – Question 5(a)(iii).

- (3) [The Motorola Airwave VP MD] played a “*peripheral*” role in Motorola’s bid although “[h]is precise involvement in Motorola’s Bid and whether or not he commented on early drafts of the Bid is now not recalled”.⁵³⁴ Motorola has however confirmed that prior to his recusal [the Motorola Airwave VP MD] had some involvement in its pricing and was “*responsible for signing bid documents*”.⁵³⁵
- (4) [The Motorola Finance Lead] had an important role which was focused on the pricing of Motorola’s bid and balancing competing demands from Motorola’s sales and finance functions within Motorola.⁵³⁶ Motorola has submitted that his role was to review Motorola’s pricing “*from an overall finance perspective*”⁵³⁷ and “*ensure that price margins remained sustainable from a business perspective*”.⁵³⁸

(2) Chronology of Motorola’s conduct

343. In the sub-sections that follow we set out the evidence in relation to Motorola’s conduct from before the exchange of messages with [the Sepura Regional Sales Director] on 5 September 2018 until after the submission of bids on 14 September 2018. This includes the evidence relating to its pricing strategy and approach to pricing in response to the PICT Tender as well as the key steps taken by Motorola, [the Motorola VP for Sales], [the Motorola Airwave VP MD] and [the Motorola Senior VP] to try and mitigate the impact of the exchange of messages on its bid.
344. After setting out the contemporaneous evidence in form of a chronology, we set out other relevant evidence in our possession, before explaining our factual findings from this evidence. All times are given in British Summer Time (BST).⁵³⁹

(a) Before the exchange of messages on 5 September 2018

345. The evidence indicates that Motorola may have become aware of the possibility of PICT being involved in a new national procurement for Airwave-TETRA products in June 2018⁵⁴⁰ and in July 2018, Motorola discussed different potential procurement frameworks with PICT.⁵⁴¹

⁵³⁴ Motorola Second Response – Part 2, Question 12(c).

⁵³⁵ Motorola First Response, Question 4(a), Table 1.

⁵³⁶ Motorola Third Response – Part 2, Question 27(a), paragraph 34 and (b).

⁵³⁷ Motorola Second Response – Part 2, Question 16, paragraph 82.

⁵³⁸ Motorola Third Response – Part 2, Question 29(b).

⁵³⁹ Motorola has confirmed that the times in email correspondence are in UTC. It has also confirmed that where an instant messaging conversation has been provided to Ofcom as a system generated email, the time of the first message in the conversation is denoted by the time at the top of the system-generated email and not the times of the first message within the actual conversation (Motorola Ninth Response, Question 3). We have added one hour to the relevant times to identify times in BST.

⁵⁴⁰ PICT Second Informal Response and Sepura Tenth Response, Question 5.

⁵⁴¹ Motorola Eighth Response, Question 7.

346. Prior to mid-August, Motorola’s bid team reviewed the market and discussed various approaches in anticipation of the PICT Tender being issued.⁵⁴²
347. On 30 August 2018, and following the issue of the PICT Tender, all individuals identified in paragraph 341 above (except [Motorola Bids Employee B] and [Motorola Sales Employee C]) met to discuss “*broad pricing parameters*” and a “*rough price*” for Lot 1.⁵⁴³ Motorola has explained that “[t]he objective of the meeting ... was to take [the Motorola Finance Lead] through the team’s proposed sales strategy as it stood at the time, to consider the pricing strategy and to get buy-in for the proposed approach.”⁵⁴⁴ Motorola has also confirmed that “[n]o consensus on pricing was reached at that meeting”⁵⁴⁵ although [Motorola Sales Employee A] and [the Motorola Senior Sales Employee] gave a presentation titled “*UK Devices Market*” and its “*content was very closely followed for the design of the bid*”.⁵⁴⁶ The presentation included the following:
- (1) Motorola’s Sales Strategy identified its key objectives as being to win its current customers and “[f]lip target Sepura forces”.⁵⁴⁷
 - (2) Motorola’s Sales Strategy also explained: “*Limited technical and operational differentiation. Price is biggest factor*”.⁵⁴⁸
 - (3) In relation to potentially “*flipping*” a particular police force, Motorola explained that “[p]rice on the framework will be the key factor”.⁵⁴⁹
 - (4) A “*Competitive Pricing Overview*” relating to Motorola’s MTP6650 product in scatter graph format identifying pricing from recent bids in Britain and Europe that Motorola had won and lost and “*Sepura intel*” on two of those recent bids.⁵⁵⁰
 - (5) Pricing scenarios for Motorola’s handheld, mobile and covert products which identified the equivalent Sepura product, estimated a Sepura price point and calculating potential revenues and margins based around those estimated price points and “*flipping*” a certain proportion of Sepura’s customers.⁵⁵¹

⁵⁴² Motorola First Response, Question 9, paragraph 33.

⁵⁴³ Motorola First Response, Question 2 and paragraphs 34 and 36 of Question 9. See also Motorola Second Response – Part 2, Questions 6, 15 (Table 2) and 16.

⁵⁴⁴ Motorola Second Response – Part 2, Question 16, paragraph 71.

⁵⁴⁵ Motorola Second Response – Part 2, Question 16, paragraph 71.

⁵⁴⁶ Motorola First Response, Question 9, paragraph 35.

⁵⁴⁷ Motorola’s 30 August 2018 Presentation, page 8.

⁵⁴⁸ Motorola’s 30 August 2018 Presentation, page 8.

⁵⁴⁹ Motorola’s 30 August 2018 Presentation, page 9.

⁵⁵⁰ Motorola’s 30 August 2018 Presentation, page 14.

⁵⁵¹ Motorola’s 30 August 2018 Presentation, page 15 – 17. See also Motorola Second Response – Part 2, Question 16, paragraph 81 in which Motorola explains that the purpose of setting out the various possible price points in relation to its MTP6650 product as “*to ‘wargame’ different scenarios and consider the impact on Motorola*”.

- (6) A list of “[r]ecent market price points” in Britain and Europe based on bids Motorola had won and lost.⁵⁵²
 - (7) A pricing overview in bar graph format showing Motorola’s proposed pricing against estimated low and high Sepura pricing.⁵⁵³
 - (8) A slide on its potential pricing strategy by reference to the role of mini-competitions in the Framework Agreement which also estimated Sepura’s likely pricing and how Sepura’s pricing would impact on Motorola’s pricing strategy.⁵⁵⁴
348. On 3 September 2018, a call took place to review Motorola’s progress on its bid including its pricing for the various bundles.⁵⁵⁵
349. On 4 September 2018, a meeting took place to review the Airwave-TETRA products Motorola intended to include within each PICT bundle as well as the pricing of its bid. Motorola has explained “[f]ollowing this meeting prices which had been agreed were sent for a profit and loss analysis.”⁵⁵⁶
350. On 5 September 2018 (10:01am), [Motorola Sales Employee A] sent an email to [the Motorola VP for Sales] to explain that he had been going through all the pricing for the bundle and sub-bundles and was pulling together the profit and loss figures for each. He also noted the price Motorola was aiming for in relation to its ST7500 product and commented: “we reckon this is on par with Sepura”.⁵⁵⁷
351. On 5 September 2018 (2:30pm) and prior to the exchange of messages with [the Sepura Regional Sales Director] on 5 September 2018, there was a meeting to discuss the associated services that could be offered in Lot 1.⁵⁵⁸
- (b) The exchange of messages on 5 September 2018**
352. The exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018 is reproduced in **Section C(3)** above (as well as Annex 3) and our factual assessment of the exchange is set out in **Section I** below.

⁵⁵² Motorola’s 30 August 2018 Presentation, page 18.

⁵⁵³ Motorola’s 30 August 2018 Presentation, page 22.

⁵⁵⁴ Motorola’s 30 August 2018 Presentation, page 23.

⁵⁵⁵ Motorola Second Response – Part 2, Questions 6, 15 (Table 2) and 16.

⁵⁵⁶ Motorola Second Response – Part 2, Questions 6, 15 (Table 2) and 16 (paragraphs 73 and 80).

⁵⁵⁷ Motorola Second Response – Part 2, Document 62 (ATF 5351).

⁵⁵⁸ Motorola Second Response – Part 2, Questions 6 and 15 (Table 2) and Documents 23 (ATF 5312) and 24 (ATF 5313). Motorola has submitted that [the Motorola VP for Sales] does not believe he attended this meeting and neither [the Motorola Airwave VP MD] nor [the Motorola Senior VP] attended this meeting (Motorola Third Response – Part 1, Question 11(i)).

(c) After the exchange of messages on 5 September 2018

353. On 6 September 2018 (around 1:00am), [the Motorola VP for Sales] boarded a flight back to the UK. He landed back in the UK around 8:50am.⁵⁵⁹
354. Later on 6 September 2018 (starting around 9:15am), a Monthly Airwave/UK service leadership team meeting took place.⁵⁶⁰ This meeting was led by [the Motorola Airwave VP MD] in his role as [Motorola Airwave VP MD]. The meeting covered a range of topics including the PICT Tender. Pages 13 – 19 of the slides presented at the meeting relating to the PICT Tender;⁵⁶¹ Motorola has explained that “*high level overview information*” was provided and that “[the Motorola Senior Sales Employee] did not speak about pricing and does not recall any such discussions taking place at that meeting”.⁵⁶² Whilst [the Motorola VP for Sales] was invited to his meeting, Motorola has submitted that he did not attend.⁵⁶³ The evidence indicates this meeting continued until around 3:00pm and finished before [the Motorola VP for Sales] reported the exchange of messages he had with [the Sepura Regional Sales Director] the previous day.⁵⁶⁴
355. Later on 6 September 2018 (11:18am), [the Motorola VP for Sales] messaged [the Motorola Senior VP] to say he was back in the UK and ask if he had time for a catch-up that day. [The Motorola Senior VP] replied to say the following afternoon would be better and at 1:11pm, [the Motorola VP for Sales] said he would call him then.⁵⁶⁵
356. Later on 6 September 2018 (3:24pm), [the Motorola VP for Sales] exchanged messages with [the Motorola Senior Sales Employee]. In this conversation, [the Motorola VP for Sales] asked [the Motorola Senior Sales Employee] how the preparations for the PICT Tender were going.⁵⁶⁶ [The Motorola Senior Sales Employee] replied to say they were “*getting there*” and asked if [the Motorola VP for Sales] wanted to catch up before the call scheduled for 7 September 2018 but [the Motorola VP for Sales] said he was “*happy to cover it tomorrow*”. [The Motorola Senior Sales Employee] noted that Motorola’s pricing was “*nearly there*” and flagged that there were “*a few bits on aircrafts etc*”. He also said that he needed to catch up with [X] ([Motorola Bids Employee B]) relating to the profit and loss. A few minutes later in

⁵⁵⁹ Motorola Sixth Response, Question 1 and Document 464 (messages 78 and 79) (ATF 5765).

⁵⁶⁰ Motorola Second Response – Part 2, Document 65 (ATF 5354).

⁵⁶¹ Motorola Second Response – Part 2, Document 27 (ATF 5316).

⁵⁶² Motorola Third Response – Part 2, Question 16, paragraph 9.

⁵⁶³ Motorola Third Response – Part 2, Question 16, paragraph 4. We note that following this meeting [Motorola Sales Employee A] emailed [the Motorola VP for Sales] the slides presented at the meeting. He identified “*2 major take-aways*” unrelated to the PICT Tender said he would give [the Motorola VP for Sales] a call the following day to discuss it in more detail (Motorola Second Response – Part 2, Document 28 (ATF 5317)).

⁵⁶⁴ Motorola Second Response – Part 2, Documents 1 (ATF 5290) and 65 (ATF 5354).

⁵⁶⁵ Motorola Third Response – Part 1, Document 291 (ATF 5581).

⁵⁶⁶ Motorola Second Response – Part 2, Document 26 (ATF 5315).

the conversation [the Motorola VP for Sales] said “... *I need to talk to you about something / actually – we can probably do it over the phone in a minute*”.⁵⁶⁷

357. Later on 6 September 2018 (4:32pm), [the Motorola VP for Sales] messaged his manager, [the Motorola Airwave VP MD] asking if he had “*10 mins for a chat*”.⁵⁶⁸ The evidence indicates [the Motorola VP for Sales] informed [the Motorola Airwave VP MD] about his exchange of messages with [the Sepura Regional Sales Director] at this time.⁵⁶⁹ Motorola has confirmed that [the Motorola VP for Sales] read or described parts of this exchange of messages to [the Motorola Airwave VP MD] and [the Motorola Airwave VP MD]’s recollection of his conversation with [the Motorola VP for Sales] about this exchange was that “*the gist of the conversation was that on the Sepura side, the pricing was too low*”.⁵⁷⁰
358. By 4:58pm on 6 September 2018, the evidence indicates [the Motorola VP for Sales] had spoken to [the Motorola Senior VP] and informed him about his exchange of messages with [the Sepura Regional Sales Director].⁵⁷¹ Motorola has confirmed that [the Motorola VP for Sales] read or described parts of this exchange of messages to [the Motorola Senior VP] and [the Motorola Senior VP]’s recollection of his conversation with [the Motorola VP for Sales] about this exchange of messages was that “*there were comments about trying to keep pricing high, but, other than that, he does not recall specifics in terms of what the price would be or the level at which Sepura would be pricing*”.⁵⁷² [The Motorola VP for Sales] subsequently messaged [the Motorola Airwave VP MD] to say [the Motorola Senior VP] had told him to contact Motorola’s [Lead Counsel] “*but not to worry about it*”.⁵⁷³
359. Around 5pm on 6 September 2018, [the Motorola VP for Sales] messaged Motorola’s [Lead Counsel] and sent screenshots of his exchange of messages with [the Sepura Regional Sales Director].⁵⁷⁴

⁵⁶⁷ Motorola has explained that [the Motorola VP for Sales] wanted to discuss a potential new role for [the Motorola Senior Sales Employee] (which followed on from a discussion he had had with HR the previous day) and that there was no discussion of the PICT Tender on this call. (Motorola Third Response – Part 1, Question 15). We note that there does not appear to be a record of this call and we have not been provided with any explanation for its absence (Motorola Third Response – Part 2, Question 26(a), paragraph 27 and Document 319 (ATF 5611)).

⁵⁶⁸ Motorola Second Response – Part 2, Question 12, paragraph 29 and Document 1 (ATF 5290). We understand the relevant time of this message and other message conversations in the same format is the time at the top of the email and not the times within the actual conversation (Motorola Second Response – Part 2, Question 12, paragraph 29; Motorola Ninth Response, Question 3).

⁵⁶⁹ Motorola First Response, Question 3; Motorola Second Response – Part 2, Question 12(a).

⁵⁷⁰ Motorola Sixth Response, Question 2, paragraph 6.

⁵⁷¹ Motorola First Response, Question 3; Motorola Second Response – Part 2, Question 13(a), paragraph 50 and Document 1 (ATF 5290).

⁵⁷² Motorola Sixth Response, Question 2, paragraph 7.

⁵⁷³ Motorola Second Response – Part 2, Document 1 (ATF 5290).

⁵⁷⁴ Motorola Second Response – Part 2, Document 3 – 14 (ATF 5292 to ATF 5303). See also Motorola Third Response – Part 1, Document 291, page 2 (ATF 5581). Other individuals at Motorola were also informed about the exchange of messages on 5 September 2018 due to their roles in the legal or ethics departments in the business although they were not involved in the PICT Tender (Motorola First Response, Question 3).

360. At 6:13pm on 6 September 2018, [the Motorola VP for Sales] received a missed call from [the Motorola Senior VP].⁵⁷⁵
361. On 7 September 2018 (8:08am) [the Motorola VP for Sales] messaged [the Motorola Airwave VP MD] to say Motorola's [Lead Counsel] had "*asked [him] not to work on any UK device stuff until [he] hear[s] from either her or the US guys*" and that he would not be joining the "*Area Call*" later that day.⁵⁷⁶ Motorola has submitted to Ofcom that [the Motorola VP for Sales] ceased his involvement in the PICT Tender on 7 September 2018.⁵⁷⁷
362. Later on 7 September 2018 (12:11pm), [the Motorola Senior Finance Director] messaged [the Motorola VP for Sales] to ask if he was free for a chat on "*re UK subs*" (which Motorola has explained was a reference to UK subscribers).⁵⁷⁸ [The Motorola VP for Sales] replied to say he could not speak at the moment but indicated he would let him know when he was free.⁵⁷⁹ Motorola has submitted that [the Motorola VP for Sales] "*assumed that [the Motorola Senior Finance Director] wanted to discuss pricing regarding the PICT Tender*" and that neither [the Motorola VP for Sales] nor [the Motorola Senior Finance Director] recall this call taking place.⁵⁸⁰ We note that there is a gap in [the Motorola VP for Sales]'s phone logs between 7 and 14 September 2018 and we have not been provided with a definitive explanation for their absence.⁵⁸¹
363. Later on 7 September 2018 (2:08pm), [Motorola Sales Employee C] sent an email containing "*recommended selling prices for Bundle 7 (aircraft solutions)*" to [Motorola Sales Employee A] and [the Motorola Senior Sales Employee], copying [the Motorola Senior Finance Director] and [the Motorola VP for Sales].⁵⁸²
364. Later on 7 September 2018 (2:30pm), and in advance of the "*Area Call*" identified below, [Motorola Bids Employee B] circulated some profit and loss figures to various colleagues including [the Motorola VP for Sales] for some of the PICT bundles but noted that some were not complete yet.⁵⁸³

⁵⁷⁵ Motorola Third Response – Part 2, Question 26(a), paragraph 27 and Document 319 (ATF 5611).

⁵⁷⁶ Motorola Third Response – Part 1, Document 291, page 3 (ATF 5581). See also Motorola Third Response – Part 1, Question 5(a)(i) and (b) and Document 292 (ATF 5582).

⁵⁷⁷ Motorola Second Response – Part 2, Question 6 and 11(a). We note that [the Motorola VP for Sales] does appear to have remained involved in working on other UK matters (see Motorola Second Response – Part 2, Schedule 2).

⁵⁷⁸ Motorola Second Response – Part 2, Document 84 (ATF 5373). Motorola Third Response – Part 2, Question 17, paragraph 12. We also note that later that same day [the Motorola Senior Finance Director] messaged [the Motorola Finance Lead] to say "*we are still working on our UK subs framework response*" and his reference to "*UK subs*" also indicates [the Motorola Senior Finance Director] had wanted to discuss Motorola's bid for the PICT Tender with [the Motorola VP for Sales] (Motorola Third Response – Part 2, Document 322 (ATF 5614)).

⁵⁷⁹ Motorola Second Response – Part 2, Document 84 (ATF 5373).

⁵⁸⁰ Motorola Third Response – Part 2, Question 17, paragraph 13.

⁵⁸¹ Motorola Third Response – Part 2, Question 26(a), paragraph 28. See also footnote 648 below.

⁵⁸² Motorola Second Response – Part 2, Questions 6 and 16, and Document 30 (ATF 5319). See also Motorola Third Response – Part 1, Question 5(c).

⁵⁸³ Motorola Second Response – Part 2, Documents 34 (ATF 5323) and 35 (ATF 5324). See also Motorola Third Response – Part 1, Question 5(c).

365. Later on 7 September 2018 (2:30pm) an “Area Call” took place for the purpose of “*first level internal sign-off of Motorola’s Bid*”.⁵⁸⁴ The pricing of Motorola’s bid was clarified at this meeting and profit and loss figures and margins for the various bundles were discussed although they were not all complete at this stage.⁵⁸⁵
366. Later on 7 September 2018 (3:46pm), [the Motorola Senior Finance Director] emailed [the Motorola Finance Lead] to explain that Motorola was still working on its response to the PICT Tender. He explained that “[t]he equipment piece (Lot 1)” was almost complete but that the sales team wanted to discuss the pricing for Lot 1 at the “wrap call” on 11 September 2018.⁵⁸⁶
367. Later on 7 September 2018 (4:50pm), [Motorola Sales Employee A] left a voicemail for [the Motorola VP for Sales]. Motorola has submitted that [Motorola Sales Employee A] was calling to catch up, discuss forecasts and update [the Motorola VP for Sales] on the “Area call” that took place earlier that day.⁵⁸⁷ [Motorola Sales Employee A]’s voicemail said: “*we’re all good on the bundles, the only one that’s looking very low on the P&L is the 7500 and that’s mainly because there’s quite specific costs coming in from product line that because it’s not signed off yet they’re putting very high costs in so we’re scrubbing that one ahead of Monday*”. [Motorola Sales Employee A] also asked for a call back if [the Motorola VP for Sales] had “*got five minutes*”. Motorola has submitted that neither [the Motorola VP for Sales] nor [Motorola Sales Employee A] recall [the Motorola VP for Sales] calling [Motorola Sales Employee A] back. We again note that there is a gap in [the Motorola VP for Sales]’s phone logs between 7 and 14 September 2018 and we have not been provided a definitive explanation for their absence.⁵⁸⁸
368. On 9 September 2018 (9:56am), [Motorola Sales Employee B] emailed [the Motorola VP for Sales] and requested he sign a number of forms relating to Motorola’s bid.⁵⁸⁹ [Motorola Sales Employee B] and [Motorola Sales Employee A] chased [the Motorola VP for Sales] for his signature on 12 September 2018 although the evidence indicates [the Motorola VP for Sales] did not sign these documents.⁵⁹⁰
369. On 10 and 11 September 2018, [the Motorola Senior VP] held a multi-day meeting that Motorola has submitted he usually holds every few months. We are not aware of any

⁵⁸⁴ Motorola Second Response – Part 2, Question 6 and Document 32 (ATF 5321).

⁵⁸⁵ Motorola Second Response – Part 2, Questions 15 (Table 2) and 16 and Documents 32 (ATF 5321) and 33 (ATF 5322) 34 (ATF 5323) and 35 (ATF 5324). Motorola has submitted that none of [the Motorola VP for Sales], [the Motorola Airwave VP MD] and [the Motorola Senior VP] attended this call (Motorola Third Response – Part 1, Question 11(ii)). See also Motorola Third Response – Part 1, Question 11(iii) and Question 19.

⁵⁸⁶ Motorola Third Response – Part 2, Document 322 (ATF 5614).

⁵⁸⁷ Motorola Third Response – Part 2, Document 307 (ATF 5598) and paragraphs 54 and 55.

⁵⁸⁸ Motorola Third Response – Part 2, Question 26(a), paragraph 28. See also footnote 648 below.

⁵⁸⁹ Motorola Second Response – Part 2, Documents 36 (ATF 5325) and 37 (ATF 5326). See also Motorola Third Response – Part 1, Question 5(c).

⁵⁹⁰ Motorola Second Response – Part 2, Documents 52 (ATF 5341), 53 (ATF 5342) and 54 (ATF 5343); Motorola Third Response – Part 1, Question 5(b), paragraph 15, Question 6, and Documents 342 (ATF 5634), 343 (ATF 5635) and 358 (ATF 5650).

evidence that the PICT Tender was discussed at this meeting but note Motorola's confirmation that [the Motorola VP for Sales], [the Motorola Airwave VP MD] and [the Motorola Finance Lead] all attended [the Motorola Senior VP]'s meeting⁵⁹¹ (but that [the Motorola Finance Lead] only attended on 10 September 2018).⁵⁹² On both 10 and 11 September 2018, a dinner was arranged. Motorola has confirmed that [the Motorola VP for Sales], [the Motorola Senior VP] and [the Motorola Airwave VP MD] all attended the dinner on 10 September (although [the Motorola Airwave VP MD] "*arrived late and left relatively early*") and that it was likely [the Motorola Finance Lead] also attended this dinner on 10 September.⁵⁹³ Motorola has confirmed that [the Motorola VP for Sales] and [the Motorola Senior VP] attended the dinner on 11 September 2018. Whilst invited, it has submitted that [the Motorola Airwave VP MD] and [the Motorola Finance Lead] did not attend the dinner on 11 September.⁵⁹⁴

370. On 10 or 11 September 2018, Motorola has submitted that [the Motorola Finance Lead] was informed that [the Motorola VP for Sales], [the Motorola Airwave VP MD] and [the Motorola Senior VP] "*were no longer involved in Motorola's Bid. No reason was given to [the Motorola Finance Lead] for their non-involvement*".⁵⁹⁵
371. On 10 September 2018, a "*red ink*" review of Motorola's bid was carried out to review how its pricing and other information was represented in line with the requirements of the PICT Tender. Motorola has submitted that the actual pricing of its bid was not discussed at this meeting.⁵⁹⁶
372. On 10 September 2018 (4:00pm), there was a monthly review of Airwave performance which was attended by [the Motorola Airwave VP MD] and [the Motorola Finance Lead] as well as others outside the team preparing Motorola's bid in response to the PICT Tender. Motorola has explained that the PICT Tender may have been referenced in terms of its

⁵⁹¹ Motorola Third Response – Part 1, Question 21, paragraph 69 in which Motorola confirmed that [the Motorola VP for Sales] and [the Motorola Senior VP] attended "*the duration of the meeting*" and [the Motorola Airwave VP MD] attended "*some of the meeting*". See also Motorola Third Response – Part 2, paragraph 51 and Motorola Third Response – Part 1, Document 297 (the agenda for the meeting) (ATF 5587).

⁵⁹² Motorola Third Response – Part 1 Document 298 (ATF 5588). The minutes identify one of the actions as "*2019 [Motorola VP for Sales] - forecasting discussion with [Motorola Airwave VP MD]/[Motorola Finance Lead]*" (page 4). See also Motorola Third Response – Part 2, paragraph 51.

⁵⁹³ Motorola Second Response – Part 2, Documents 105 (ATF 5394), 106 (ATF 5395); Motorola Third Response – Part 1, Question 22; Motorola Third Response – Part 2, paragraph 52. Motorola has submitted that "*[n]one of [the Motorola VP for Sales], [the Motorola Airwave VP MD] and [the Motorola Senior VP] discussed or recall others having discussions of the PICT Tender.*"

⁵⁹⁴ Motorola Second Response – Part 2, Document 122 (ATF 5411); Motorola Third Response – Part 1, Question 23. Motorola has submitted that "*[n]either [the Motorola VP for Sales] nor [the Motorola Senior VP] discussed or recall others discussing the PICT Tender.*"

⁵⁹⁵ Motorola Third Response – Part 2, Questions 5(c) and (d), paragraph 49.

⁵⁹⁶ Motorola Second Response – Part 2, Questions 6, 15 (Table 2) and 16. Motorola has submitted that none of [the Motorola VP for Sales], [the Motorola Airwave VP MD] and [the Motorola Senior VP] attended this call (Motorola Third Response – Part 1, Question 11(iv)).

status as a bid that was ongoing although the focus of discussion was on overall financial and non-financial performance and margin improvement.⁵⁹⁷

373. Later on 10 September 2018 (5:44pm), [Motorola Bids Employee B] sent [the Motorola Finance Lead] the profit and loss figures relating to Lot 1 and said she would separately circulate the individual margins.⁵⁹⁸
374. Later on 10 September 2018 (6:00pm), the evidence indicates [the Motorola Senior Finance Director] and [the Motorola Finance Lead] had a call to discuss Motorola's bid.⁵⁹⁹
375. On 10 September 2018 (6:12pm), [Motorola Bids Employee B] emailed [the Motorola Finance Lead] and attached "[u]nit margins per model". She also noted that the margins were "undergoing one final review from the team".⁶⁰⁰
376. Later on 10 September 2018 (7:17pm), [the Motorola Senior Finance Director] shared detailed pricing and profit and loss data with [the Motorola Finance Lead] relating to its response to the PICT Tender, including information on Motorola's costs and margins for its MTP6650 product at different price points.⁶⁰¹
377. Motorola has submitted that on 10 September 2018, [the Motorola VP for Sales], [the Motorola Airwave VP MD] and [the Motorola Senior VP] were formally removed from further participation in the PICT Tender when changes were made to its internal approval process.⁶⁰² We note that there is no contemporaneous evidence to support this formal change in the approvals process occurring on 10 September 2018; there is however evidence of responsibility for approving the PICT Tender being reassigned from [the Motorola VP for Sales] and [the Motorola Senior VP] to [the Motorola Finance Lead] on 12 September 2018.⁶⁰³
378. On 11 September 2018 (8:00am), there was the second level sign-off or "wrap up" call involving a "review of the pricing strategy and pricing proposals ... with [the Motorola Finance Lead]... [who had] final sign off on the prices".⁶⁰⁴ Motorola has explained that

⁵⁹⁷ Motorola Third Response – Part 1, Question 20 and Documents 195 (ATF 5484) and 296 (ATF 5586).

⁵⁹⁸ Motorola Third Response – Part 2, Documents 327 (ATF 5619) and 328 (ATF 5620).

⁵⁹⁹ Motorola Third Response – Part 2, Documents 329 (ATF 5621) and 330 (ATF 5622).

⁶⁰⁰ Motorola Third Response – Part 2, Documents 331 (ATF 5623) and 332 (ATF 5624).

⁶⁰¹ Motorola Third Response – Part 2, Documents 333, (ATF 5625) and 334 (ATF 5626) and 335 (ATF 5627).

⁶⁰² Motorola Second Response – Part 2, Questions 11(a), 12(b) and 13(b). See also Motorola Third Response – Part 1, Question 7.

⁶⁰³ Motorola Third Response – Part 2, Documents 347 (ATF 5639) and 348 (ATF 5640). See also Motorola Second Response – Part 2, Document 248 (ATF 5537).

⁶⁰⁴ Motorola Second Response – Part 2, Questions 6, and 16 (paragraph 78) and 17(c) (paragraph 97) and Documents 38 (ATF 5327) and 43 (ATF 5332). See also Motorola First Response, Questions 2, 9 and 10. [The Motorola VP for Sales] was invited to this call although Motorola has submitted that none of [the Motorola VP for Sales], [the Motorola Airwave VP MD] and [the Motorola Senior VP] attended this call (Motorola Second Response – Part 2, Document 38 (ATF 5327); Motorola First Response, Question 9, paragraph 38; Motorola Third Response – Part 1, Question 5(c) and 11(ii)).

margins and final bid prices were discussed at this meeting.⁶⁰⁵ A presentation titled “Executive bid & Contract Review Process” was also presented which included the following:

- (1) A “Top Risk” was identified as: “settle on wrong price and lose business”.⁶⁰⁶
- (2) Under Pricing Strategy, it was noted: “80% pricing so need price competitively price [sic] to minimise risk of churning existing subscribers and incentivise early refresh rather than wait for offer window or mini-comp. Increase likelihood of flipping target Sepura customers. Price point is mapped against known recent price points for Sepura.”⁶⁰⁷
- (3) Pricing proposals for the various PICT bundles including estimates of Sepura’s likely pricing and in relation to Bundle 1a, pricing from recent bids in Britain and Europe that Motorola had won and lost.⁶⁰⁸
- (4) As in Motorola’s 30 August 2018 Presentation, this presentation included (i) a “Competitive Pricing Overview” relating to Motorola’s MTP6650 product in scatter graph format identifying pricing from recent bids in Britain and Europe that Motorola had won and lost and “Sepura intel” on two of those recent bids;⁶⁰⁹ (ii) a list of “[r]ecent market price points” in Britain and Europe based on bids Motorola had won and lost;⁶¹⁰ and (iii) a pricing overview in bar graph format showing Motorola’s proposed pricing against estimated low and high Sepura pricing.⁶¹¹

379. Motorola has explained that on 11 September 2018 there was a discussion over whether to stick with the proposed price of £[X] for its [X] product or whether to increase it.⁶¹² Motorola has explained that [the Motorola Finance Lead] decided to increase the price by £[X] which also had the knock-on effect of also increasing the pricing of Motorola’s bid in relation to a number of bundles of Lot 1 of the PICT Tender.⁶¹³ Motorola has explained that [the Motorola Finance Lead] had wanted to increase the price for the device by £[X] to

⁶⁰⁵ Motorola First Response, Question 9, paragraph 38.

⁶⁰⁶ Motorola’s 11 September 2018 Presentation, page 4.

⁶⁰⁷ Motorola’s 11 September 2018 Presentation, page 5.

⁶⁰⁸ Motorola’s 11 September 2018 Presentation, pages 7-12.

⁶⁰⁹ Motorola’s 11 September 2018 Presentation, page 16.

⁶¹⁰ Motorola’s 11 September 2018 Presentation, page 17.

⁶¹¹ Motorola’s 11 September 2018 Presentation, page 18.

⁶¹² Motorola Third Response – Part 2, Question 29(a).

⁶¹³ Motorola Second Request – Part 2, Question 16, paragraphs 82, 83, 86 and 92. Motorola has explained that as at late July 2022, this price increase had resulted in approximately £[X] of additional revenue (Motorola Eighth Response, Question 4).

*“around the mean in terms of deals”*⁶¹⁴ although Motorola’s sales team had wanted to price the device at a lower amount and a £[3<] price increase was agreed as a compromise.⁶¹⁵

380. On 11 September 2018 (6:25pm), [the Motorola VP for Sales] messaged [the Motorola Senior Finance Director] to say he had been in [the Motorola Senior VP]’s staff meeting. He added: *“Can’t talk to you about PICT devices. [The Motorola Finance Lead] should take the lead”*.⁶¹⁶
381. On 12 September 2018 (5:59am), [the Motorola Senior Finance Director] messaged [the Motorola VP for Sales] to say *“Ok. [The Motorola Finance Lead] told me”*.⁶¹⁷ [The Motorola VP for Sales] asked [the Motorola Senior Finance Director] to speak to [Motorola Sales Employee B] and [Motorola Sales Employee A] in relation to the documents he had been asked to sign. [The Motorola Senior Finance Director] replied to say he had spoken to [Motorola Sales Employee A] and would *“figure out who will sign and let him know”*.
382. On 12 September 2018, Motorola has explained that an *“Executive status review call”* may have taken place to discuss the process for submitting Motorola’s bid to PICT but it is *“unclear whether or not this meeting took place”*.⁶¹⁸
383. On 12 September 2018 (3:20pm), [the Motorola Senior VP] sent an email confirming he had delegated his approval for Motorola’s bid to [the Motorola Finance Lead].⁶¹⁹
384. On 12 September 2018 (around 3:45pm), the evidence indicates that responsibility for approving the PICT Tender was formally reassigned from [the Motorola VP for Sales] and [the Motorola Senior VP] to [the Motorola Finance Lead].⁶²⁰
385. On 13 September 2018 (10:32am), [Motorola Bids Employee B] emailed [the Motorola Finance Lead] and [the Motorola Senior Finance Director] for their confirmation that they

⁶¹⁴ Motorola Third Response – Part 2, Question 29(b).

⁶¹⁵ Motorola has explained that [the Motorola Finance Lead] was reviewing the pricing *“from an overall finance perspective”* and his *“role was to ensure that price margins remained sustainable from a business perspective”* (Motorola Third Response – Part 2, Question 29).

⁶¹⁶ Motorola Second Response – Part 2, Document 49 (ATF 5338). Motorola has explained that *“[the Motorola Senior Finance Director]’s clear recollection is that [the Motorola VP for Sales] could not be involved in the PICT Tender or any further discussions concerning the opportunity, but that he did not receive any explanation for this refusal”* (Motorola Third Response – Part 2, Question 8 and paragraph 50).

⁶¹⁷ Motorola Second Response – Part 2, Document 50 (ATF 5339). Motorola has explained that *“[the Motorola Senior Finance Director] was referring to the fact that [the Motorola Finance Lead] told him that [the Motorola VP for Sales] could not be involved in the PICT Bid”* (Motorola Third Response – Part 2, Question 9).

⁶¹⁸ Motorola Second Response – Part 2, Questions 6 and 15 (Table 2). [The Motorola VP for Sales] was invited to this call although Motorola has explained that it *“was a weekly calendar invitation which was set to recur over a set period (and which therefore would have been sent out relatively far in advance)”*. Motorola has also submitted that none of [the Motorola VP for Sales], [the Motorola Airwave VP MD] and [the Motorola Senior VP] attended this call in the event it did take place (Motorola Second Response – Part 2, Question 15 (Table 2) and Document 19 (ATF 5308); Motorola Third Response – Part 1, Question 11(vi)).

⁶¹⁹ Motorola Second Response – Part 2, Document 248 (ATF 5537).

⁶²⁰ Motorola Third Response – Part 2, Documents 346 (ATF 5638), 347 (ATF 5639) and 348 (ATF 5640). See also Motorola Second Response – Part 2, Document 248 (ATF 5537) and Motorola Third Response – Part 1, Question 7. We note that [the Motorola VP for Sales] also received an approval request on 12 September 2018 which indicates his approval was not formally reassigned any earlier than 12 September 2018 (Motorola Second Response – Part 2, Document 57 (ATF 5346)).

approved of Motorola's pricing for Lot 1.⁶²¹ [The Motorola Finance Lead] subsequently emailed [the Motorola Senior Finance Director] (10:37am) to ask if the pricing identified in [Motorola Bids Employee B]'s email was consistent with their discussions including in relation to *"device price assumptions"*.⁶²² [The Motorola Senior Finance Director] responded to [the Motorola Finance Lead] (10:53am)⁶²³ and both [the Motorola Finance Lead] and [the Motorola Senior Finance Director] subsequently confirmed their approval (10:56am and 10:59am respectively).⁶²⁴ On 13 and 14 September 2018, Motorola has submitted that its bid was formally signed-off by various individuals in accordance with its formal approvals process.⁶²⁵

386. On 13 September 2018 (11:48am), [the Motorola Senior Sales Employee] sent [the Motorola VP for Sales] and [Motorola Sales Employee A] a tweet from PICT's CEO.⁶²⁶ [The Motorola VP for Sales] replied *"lol"* and then said *"please do not discuss the devices bid on this hangout"*. [Motorola Sales Employee A] acknowledged [the Motorola VP for Sales]'s comment and [the Motorola VP for Sales] subsequently left the conversation.⁶²⁷
387. On 14 September 2018 (10:22am), Motorola's final bid for the PICT Tender was submitted.⁶²⁸ Motorola's bid only contained pricing for the PICT bundles.⁶²⁹
388. On 14 September 2018 (2:43pm), and after Motorola had submitted its bid in response to the PICT Tender, Motorola's legal representatives contacted the CMA to enquire about the availability of Type A immunity.⁶³⁰
389. On 18 September 2018, the CMA granted provisional Type A immunity marker to Motorola Solutions Inc.,⁶³¹ which was subsequently confirmed by Ofcom on 14 May 2019.
390. As at late July 2022, the vast majority (approximately [X]%) of Motorola's sales under the terms of the Framework Agreement have been at its bid pricing (approximately £[X] million of sales). Motorola did not offer any price drops until [X] when it offered its first price drop

⁶²¹ Motorola Third Response – Part 2, Documents 350 (ATF 5642) and 351 (ATF 5643).

⁶²² Motorola Third Response – Part 2, Document 352 (ATF 5644).

⁶²³ Motorola Third Response – Part 2, Document 353 (ATF 5645).

⁶²⁴ Motorola Second Response – Part 2, Document 21 (ATF 5310); Motorola Third Response – Part 2, Document 355 (ATF 5647) and 357 (ATF 5649). See also, Motorola Third Response – Part 2, Document 294 (ATF 5584).

⁶²⁵ Motorola Second Response – Part 2, Question 16 (paragraph 79). See, for example, Motorola Third Response – Part 2, Document 356 (ATF 5648).

⁶²⁶ Motorola Second Response – Part 2, Document 58 (ATF 5347).

⁶²⁷ Motorola has submitted that [the Motorola VP for Sales] *"wanted to make it clear that he did not want any discussions to take place regarding the PICT Tender while he was present"*. It has also submitted that [Motorola Sales Employee A] believes [the Motorola Senior Finance Director] had previously informed him that [the Motorola VP for Sales] could not discuss the PICT Tender and that he *"did not inquire as to the reason"* (Motorola Third Response – Part 1, Question 10).

⁶²⁸ Motorola Second Response – Part 1, Question 1, paragraph 1.

⁶²⁹ Motorola's PICT Pricing Document, provided to the CMA as CMA-18 (ATF 5813)

⁶³⁰ [X].

⁶³¹ [X].

until [§<]. It subsequently offered another price drop between [§<]. Motorola made approximately £[§<] million in sales to [§<] customers at the price drop pricing it offered in [§<].⁶³²

(3) Other evidence on Motorola's approach to pricing for the PICT Tender

391. Motorola has confirmed that its objectives for the PICT Tender *"were to retain their current subscribers and try and win some of the police forces who were customers of Sepura"*.⁶³³ It has *"recalled that the focus of the discussion was ... on how to price at an appropriate level that would be attractive to the Metropolitan Police (who would purchase large volumes of devices) whilst balancing this with the fact that there was no minimum order volume and therefore the prices in the PICT Framework would be those that were available to all of those entities entitled to purchase from the Framework"*.⁶³⁴

392. Motorola has confirmed that it took various factors into account when determining its overall pricing strategy for Lot 1 of the PICT Tender, including:⁶³⁵

"Pricing of recent bids for similar devices and level of success;

Competitive intelligence provided by the strategy team;

Publicly available information;

Customer requirements;

Pricing information from one of its suppliers ...;

Feedback from previous bids (winning bid details are often published once a contract has been awarded);

Any products or services that Motorola were unable to deliver at the outset and for which solutions would need to be found; and

The potential for very high volume demands at the outset".

393. Motorola has also recalled that information relating to comparable Sepura products *"was not used as a basis for an in-depth discussion regarding the price that Motorola should submit. Other factors were much more the focus of discussion, such as where to price to make the deal both attractive and financially viable in respect of smaller volume consumers in light of upcoming opportunities for device replacements."*⁶³⁶ Motorola has also submitted that it does not recall a *"specific discussion regarding the Sepura price points"*.⁶³⁷

⁶³² Motorola Eighth Response, Question 2 and Motorola Ninth Response, Question 2.

⁶³³ Motorola Second Response – Part 2, Question 20, paragraph 111.

⁶³⁴ Motorola Third Response – Part 1, Question 31(a), paragraph 92.

⁶³⁵ Motorola First Response, Question 8, paragraph 32.

⁶³⁶ Motorola Third Response – Part 1, Question 31(b), paragraph 95.

⁶³⁷ Motorola Third Response – Part 1, Question 31(c), paragraph 96.

(4) Other evidence on steps taken after the exchange of messages on 5 September 2018

394. Motorola has made the following submissions in relation to the steps Motorola, [the Motorola VP for Sales], [the Motorola Airwave VP MD] and [the Motorola Senior VP] took after the exchange of messages with [the Sepura Regional Sales Director] on 5 September 2018:
- (1) [The Motorola VP for Sales], [the Motorola Airwave VP MD] and [the Motorola Senior VP] did not discuss the exchange of messages with [the Sepura Regional Sales Director] on 5 September 2018 with anyone other than for the purpose of reporting it internally and deciding on next steps.⁶³⁸
 - (2) [The Motorola VP for Sales] did not attend any internal meetings or calls relating to the PICT Tender after the exchange of messages with [the Sepura Regional Sales Director] on 5 September 2018, and (save for discussions relating to reporting that exchange) had no discussions with anyone inside or outside Motorola regarding the PICT Tender after that exchange.⁶³⁹
 - (3) [The Motorola VP for Sales] did not read any emails he received which related to the PICT Tender and set up a separate inbox for any such emails he did receive.⁶⁴⁰
 - (4) Whilst there is no contemporaneous evidence of [the Motorola Airwave VP MD] or [the Motorola Senior VP] being asked to cease their involvement in Motorola's bid, Motorola has submitted that [the Motorola Senior VP] and [the Motorola Airwave VP MD] did not attend any internal meetings or calls directly related to the PICT Tender after the exchange of messages with [the Sepura Regional Sales Director] on 5 September 2018, and had no discussions with anyone inside or outside Motorola regarding the PICT Tender bid following their recusal on 10 September 2018.⁶⁴¹ Motorola has submitted that [the Motorola Airwave VP MD] and [the Motorola Senior VP] were "*very senior employees*" and that "*they knew that the matter was very serious and that they should not talk to anyone about the matter*".⁶⁴²
 - (5) As part of their roles, [the Motorola VP for Sales], [the Motorola Airwave VP MD] and [the Motorola Senior VP] had cause to be, and were, in frequent contact with a number of individuals who were involved in the preparation, pricing and finalisation of Motorola's bid up until the point it was submitted on 14 September 2018.⁶⁴³ Such

⁶³⁸ Motorola Third Response – Part 1, Question 3. Motorola has confirmed that [the Motorola VP for Sales], [the Motorola Airwave VP MD] and [the Motorola Senior VP] discussed the exchange with individuals identified in its response to Motorola First Response, Question 3 for the purpose of reporting it internally.

⁶³⁹ Motorola First Response, Questions 4(a) (Table 1), 6 and 7; Motorola Second Response – Part 1, Question 14; Motorola Third Response – Part 1, Questions 5(a)(i), (b) and (c) and 12; Motorola Third Response – Part 2, Question 26(b).

⁶⁴⁰ Motorola Third Response – Part 1, Questions 5(a)(i) and (c) and 13 and Documents 293 (ATF 5583) and 295 (ATF 5585).

⁶⁴¹ Motorola First Response, Questions 2 and 4(a), Table 1; Motorola Second Response – Part 2, Questions 6, 12 and 13; Motorola Third Response – Part 1, Questions 5(a)(ii) and (iii), 5(b) and 12; Motorola Third Response – Part 2, Question 26(b).

⁶⁴² Motorola Third Response – Part 1, Question 5(b), paragraph 16.

⁶⁴³ Motorola letter to Ofcom dated 11 February 2020 (ATF 5200).

contact involved email, phone and face-to-face contact on ongoing matters not related to the PICT Tender, as well as contact on social occasions.⁶⁴⁴

395. In this context, we note that other members of Motorola's bid team were only informed about [the Motorola VP for Sales], [the Motorola Airwave VP MD] and [the Motorola Senior VP] being recused from further involvement in Motorola's bid to the extent considered necessary and Motorola did not inform anyone in the PICT bidding team about the reasons for the recusals.⁶⁴⁵

396. We also note the following points:

- (1) Motorola has provided a record of one missed call from [the Motorola Senior VP] on [the Motorola VP for Sales]'s phone from 6 September 2018⁶⁴⁶ and [the Motorola VP for Sales]'s phone logs indicate that *"there were no calls recorded as either incoming, outgoing or missed between 7 September 2018 and 24 September 2018"*.⁶⁴⁷ We have not been provided with a definitive explanation for their absence.⁶⁴⁸
- (2) Motorola has provided Ofcom with a record of one call from [the Motorola Senior VP] to [the Motorola Finance Lead] on 5 September 2018 prior to the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] later that day but no record of any other calls made to or from [the Motorola Senior VP]'s phone between 5 and 14 September 2018.⁶⁴⁹
- (3) It was not possible for Ofcom to review any documents on [the Motorola Airwave VP MD]'s mobile phone between 5 September 2018 (the date of the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales]) and 14 September 2018 because Motorola submitted that *"the phone he was using during the relevant period was lost"*.⁶⁵⁰

⁶⁴⁴ Motorola Second Response – Part 2, Questions 11(b), 12(e) and (f) and 13(e) and (f) and, for example, Documents 105 (ATF 5394), 106 (ATF 5395) and 122 (ATF 5411); Motorola Third Response – Part 2, Questions 26 and 27(d); Motorola Third Response – Q. 26(c).

⁶⁴⁵ Motorola Third Response – Part 1, Question 5(c). See also Question 10(b) and Motorola Third Response – Part 2, Question 8 and paragraphs 49-50.

⁶⁴⁶ Motorola Third Response – Part 2, Question 26(a), Document 319 (ATF 5611)

⁶⁴⁷ Motorola Third Response – Part 2, Question 26(a), paragraph 28.

⁶⁴⁸ Motorola has explained: *"Possible explanations ... for this absence of data include: that the call logs might have been deleted, calls may have been forwarded to another number during the date range in question, the phone was switched off or out of signal range or the phone may have been restored from a back-up that did not contain the call logs in question. [The Motorola VP for Sales] has however confirmed that none of these circumstances were the case. A signed affidavit to that effect can be obtained, if necessary"* (Motorola Third Response – Part 2, Question 26(a), paragraph 28).

⁶⁴⁹ Motorola Third Response – Part 2, Question 26(a), paragraph 27 and Document 320 (ATF 5612)

⁶⁵⁰ Motorola Second Response – Part 2, paragraph 1.

(5) Ofcom’s findings in relation to Motorola’s pricing strategy for the PICT Tender and steps taken after the exchange of messages on 5 September 2018

397. Taking into account all the evidence relating to **Motorola’s pricing strategy for the PICT Tender**, we summarise the key evidence and findings on which we rely in this Decision below:

- (1) Motorola was aware that its bid pricing was a key parameter on which it was competing for customers. For example, Motorola’s Sales Strategy explained: *“Limited technical and operational differentiation. Price is biggest factor”*⁶⁵¹ and *“[p]rice on the framework will be the key factor”*.⁶⁵²
- (2) Motorola’s strategy was, in broad terms, to ensure that it got on the Framework Agreement at the right price. It focused on both customers it may be able to “flip” from Sepura as well as trying to get existing customers to refresh their Airwave-TETRA products early and before any possible price drop Sepura might offer or mini-competition.⁶⁵³
- (3) Motorola’s pricing strategy therefore required it to submit a sufficiently competitive price by reference to Sepura’s pricing, which meant *“competitive intelligence”* was one the factors Motorola took into account to inform its overall pricing strategy.⁶⁵⁴
- (4) Motorola had a general understanding of Sepura’s current market pricing and estimated Sepura’s likely pricing throughout Motorola’s 30 August and 11 September 2018 Presentations. In particular:
 - (i) Motorola identified recent market price points and *“Sepura intel”* from Britain and European markets based on recent bids that Motorola had won and lost, including five tenders identified by [the Sepura Regional Sales Director] in his pricing recommendations in order to demonstrate Sepura’s pricing over the past 12 months.⁶⁵⁵

⁶⁵¹ Motorola’s 30 August 2018 Presentation, page 8.

⁶⁵² Motorola’s 30 August 2018 Presentation, page 9.

⁶⁵³ See, for example, Motorola’s 30 August 2018 Presentation, pages 8 – 9 and 15 – 17 and Motorola’s 11 September 2018 Presentation, pages 4 and 6.

⁶⁵⁴ Motorola First Response, Question 8, paragraph 32.

⁶⁵⁵ Motorola’s 30 August 2018 Presentation, pages 14, 18 and 23 and Motorola’s 11 September 2018 Presentation, pages 7, 17 and 18 in relation to the [X] bid; Motorola’s 30 August 2018 Presentation, page 14 and Motorola’s 11 September 2018 Presentation, page 17 in relation to the [X] bid; Motorola’s 30 August 2018 Presentation, page 18 and Motorola’s 11 September 2018 Presentation, page 18 in relation to the [X] bid; Motorola’s 30 August 2018 Presentation, page 18 and Motorola’s 11 September 2018 Presentation, page 18 in relation to the [X] bid; and Motorola’s 30 August 2018 Presentation, page 18 and Motorola’s 11 September 2018 Presentation, page 18 in relation to the [X] bid. See also, for example, Sepura’s 6 September 2018 Presentation, pages 8 – 10 and 13.

- (ii) Motorola “*had a basis upon which it could estimate price ranges for Sepura-comparable products*”⁶⁵⁶ and estimated Sepura’s likely low and high pricing based on what Motorola considered to be its equivalent products.⁶⁵⁷
 - (iii) Motorola identified different pricing scenarios taking into account its estimates of Sepura’s pricing and the possibility of winning customers from Sepura.⁶⁵⁸
- (5) Motorola’s pricing was not finalised on 4 September 2018. In fact, some prices had not even been proposed by 4 September 2018. At the time of the exchange of messages with [the Sepura Regional Sales Director] on 5 September 2018, there was scope for Motorola’s pricing strategy and pricing to be amended and some pricing was in fact amended. In this context, we note the following points:
- (i) Profit and loss figures for some of Motorola’s product bundles were not circulated until 7 September 2018; even then, they were not all complete by 7 September 2018⁶⁵⁹ and profit and loss figures and margins continued to be reviewed until 13 September 2018.⁶⁶⁰
 - (ii) Recommended selling prices for Bundle 7 (aircraft solutions) were not circulated until 7 September 2018.⁶⁶¹
 - (iii) On 10 September 2018, at least [the Motorola Finance Lead] was still considering Motorola’s bid pricing, in particular Motorola’s costs and margins for its MTP6650 product at different price points.⁶⁶²
 - (iv) Motorola’s 11 September 2018 Presentation identified Motorola’s pricing for each Lot 1 bundle as a “*Pricing proposal*”⁶⁶³ and [the Motorola Finance Lead] increased the pricing of Motorola’s MTP6650 product by £[X] on 11 September 2018. This change had a knock-on effect of on a number of other bundles which included the same Airwave-TETRA device.⁶⁶⁴

⁶⁵⁶ Motorola Second Response – Part 2, Question 18(h).

⁶⁵⁷ Motorola’s 30 August 2018 Presentation, page 22 and Motorola’s 11 September 2018 Presentation, page 19.

⁶⁵⁸ Motorola’s 30 August 2018 Presentation, page 15 – 17; Motorola Second Response – Part 2, Question 16, paragraph 81 and Motorola’s 11 September 2018 Presentation, pages 7 – 12.

⁶⁵⁹ Motorola Second Response – Part 2, Documents 32 (ATF 5321), 33 (ATF 5322), 34 (ATF 5323) and 35 (ATF 5324). See also Motorola Second Response – Part 2, Questions 15 (Table 2) and 16; Motorola Third Response – Part 2, Document 322 (ATF 5614). See also [the Motorola Senior Sales Employee]’s comment to [the Motorola VP for Sales] on 6 September 2018 in which he said: “*[p]ricing is nearly there (got a few bits on aircrafts etc). I need to catch up with [Motorola Bids Employee B] later re the p and l*” (Motorola Second Response – Part 2, Document 26 (ATF 5315)).

⁶⁶⁰ See, for example, Motorola Third Response – Part 2, Documents 352 (ATF 5644) and 353 (ATF 5645).

⁶⁶¹ Motorola Second Response – Part 2, Questions 6 and 16, and Document 30 (ATF 5319).

⁶⁶² Motorola Third Response – Part 2, Documents 333, (ATF 5625) and 334 (ATF 5626) and 335 (ATF 5627).

⁶⁶³ Motorola’s 11 September 2018 Presentation, pages 7 – 12.

⁶⁶⁴ Motorola Second Response – Part 2, Question 16, paragraphs 82, 83, 86 and 92.

- (v) Motorola's pricing was not formally approved until 13 September 2018.⁶⁶⁵
- (6) [The Motorola Finance Lead] played a key role in determining and approving the final pricing Motorola submitted in relation to its bid for Lot 1. On the basis that at least some of [the Motorola Finance Lead]'s responsibilities were reassigned from [the Motorola Senior VP] following the exchange of messages on 5 September 2018,⁶⁶⁶ [the Motorola Senior VP] also had a key role in determining the pricing for Motorola's bid prior to his recusal. Motorola has also confirmed that [the Motorola Senior VP] would have provided input into the "*ultimate pricing decision*".⁶⁶⁷
398. Taking into account all the evidence relating to **the steps Motorola, [the Motorola VP for Sales], [the Motorola Airwave VP MD] and [the Motorola Senior VP] took after the exchange of messages with [the Sepura Regional Sales Director] on 5 September 2018**, we summarise below the key evidence and findings on which we rely on in this Decision.
- (1) The exchange of messages ended shortly before [the Motorola VP for Sales] got on a plane to travel back to the UK on 5 September 2018. He arrived back in the UK at around 8:50am on 6 September 2018⁶⁶⁸ and was working again by no later than 11:18am on that day.⁶⁶⁹ However, he did not report this exchange of messages until 4:32pm, when he spoke to his manager, [the Motorola Airwave VP MD].⁶⁷⁰ The evidence of his earlier exchange of messages with [the Motorola Senior VP] at 11:18am about a 'catch up' show no hint of urgency or appreciation of the seriousness of the situation.⁶⁷¹
- (2) There is no evidence that anyone instructed [the Motorola VP for Sales] to cease his involvement in the PICT Tender until around 8:00am on 7 September 2018⁶⁷² and Motorola has confirmed this is the case.⁶⁷³ We have therefore found that:
- (i) [The Motorola VP for Sales] remained a member of Motorola's PICT bid team for at least the majority of 6 September 2018 and potentially until the morning of 7 September 2018.

⁶⁶⁵ Motorola Second Response – Part 2, Document 21 (ATF 5310); Motorola Third Response – Part 2, Document 355 (ATF 5647) and 357 (ATF 5649). See also, Motorola Third Response – Part 2, Document 294 (ATF 5584).

⁶⁶⁶ Motorola Third Response – Part 2, Documents 346 (ATF 5638) and 348 (ATF 5640) and Motorola Second Response – Part 2, Document 248 (ATF 5537)

⁶⁶⁷ Motorola First Response, Question 4(a), Table 1.

⁶⁶⁸ Motorola Sixth Response, Question 1 (ATF 5213) and Document 464 (messages 78 and 79) (ATF 5765).

⁶⁶⁹ Motorola Third Response – Part 1, Document 291 (ATF 5581).

⁶⁷⁰ Motorola Second Response – Part 2, Question 12(a) and Document 1 (ATF 5290) and Motorola First Response, Question 3.

⁶⁷¹ Motorola Third Response – Part 1, Document 291 (ATF 5581).

⁶⁷² Motorola Third Response – Part 1, Document 291, page 3 (ATF 5581). See also Motorola Third Response – Part 1, Question 5(a)(i) and (b) and Document 292 (ATF 5582).

⁶⁷³ Motorola Second Response – Part 2, Question 6 and 11(a).

- (ii) At least for the majority of 6 September 2018, [the Motorola VP for Sales] had not been informed not to discuss the PICT Tender with any other members of the bid team.
- (3) [The Motorola VP for Sales] did in fact discuss the PICT Tender with at least one other individual on 6 September 2018, asking [the Motorola Senior Sales Employee] how preparations were going.⁶⁷⁴ [The Motorola Senior Sales Employee] responded to ask if [the Motorola VP for Sales] was happy to “cover it” at a meeting the following day and noted that Motorola’s “[p]ricing ... [was] nearly there”. [The Motorola VP for Sales] responded to say “happy to cover it tomorrow” and towards the end of their exchange of messages, [the Motorola VP for Sales] said “... I need to talk to you about something / actually – we can probably do it over the phone in a minute”. Whilst Motorola has submitted that this subsequent conversation was unrelated to the PICT Tender,⁶⁷⁵ we note that (i) at this stage [the Motorola VP for Sales] had not been instructed not to discuss the PICT Tender with any other members of the bid team; (ii) [the Motorola VP for Sales]’s earlier messages in this exchange indicates he was prepared to discuss the PICT Tender.
- (4) After [the Motorola VP for Sales] had been instructed to cease his involvement in the PICT Tender, [the Motorola Senior Finance Director] messaged [the Motorola VP for Sales] and asked to speak about UK subscribers,⁶⁷⁶ which [the Motorola VP for Sales] understood to relate to the pricing for the PICT Tender.⁶⁷⁷ [The Motorola VP for Sales] and [the Motorola Senior Finance Director] do not recall this call taking place and we note [the Motorola VP for Sales]’s submission that he did not discuss the PICT Tender with anyone after his exchange of messages with [the Sepura Regional Sales Director] on 5 September 2018.⁶⁷⁸ However, [the Motorola VP for Sales]’s response to [the Motorola Senior Finance Director] that he would let him know when he was free⁶⁷⁹ indicates that he may have been prepared to speak with [the Motorola Senior Finance Director] despite his instruction to cease further involvement in Motorola’s bid.
- (5) Motorola has provided a record of one missed call from [the Motorola Senior VP] on [the Motorola VP for Sales]’s phone from 6 September 2018 and there is a gap in

⁶⁷⁴ Motorola Second Response – Part 2, Document 26 (ATF 5315).

⁶⁷⁵ Motorola Third Response – Part 1, Question 15. See also Sepura’s Second Letter of Facts Representations (Revised Annex A), rows 72 – 73.

⁶⁷⁶ Motorola Second Response – Part 2, Document 84 (ATF 5373). Motorola Third Response – Part 2, Question 17, paragraph 12. We also note that later that same day [the Motorola Senior Finance Director] messaged [the Motorola Finance Lead] to say “we are still working on our UK subs framework response” which also indicates [the Motorola Senior Finance Director] wanted to discuss Motorola’s bid for the PICT Tender with [the Motorola VP for Sales] (Motorola Third Response – Part 2, Document 322 (ATF 5614)).

⁶⁷⁷ Motorola Third Response – Part 2, Question 17, paragraph 13.

⁶⁷⁸ Motorola Third Response – Part 1, Question 3. See also Sepura’s Second Letter of Facts Representations, paragraph 14.3 and Sepura’s Second Letter of Facts Representations (Revised Annex A), rows 74 – 77.

⁶⁷⁹ Motorola Second Response – Part 2, Document 84 (ATF 5373).

[the Motorola VP for Sales]’s phone logs between 7 and 14 September 2018.⁶⁸⁰ The evidence indicates that [the Motorola VP for Sales] had a number of calls on 6 September 2018 (including with [the Motorola Senior Sales Employee], [the Motorola Airwave VP MD], [the Motorola Senior VP] and Motorola’s [Lead Counsel]) as well as other calls between 7 and 14 September 2018.⁶⁸¹ We have not been provided a definitive explanation for the absence of these call records and note that one possible explanation is that they were deleted.⁶⁸²

- (6) Motorola has provided a record of one call from [the Motorola Senior VP] to [the Motorola Finance Lead] on 5 September 2018 prior to the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] later that day but no record of any other calls made to or from [the Motorola Senior VP]’s phone between 5 and 14 September 2018⁶⁸³ including on 6 September 2018 when the evidence indicates [the Motorola VP for Sales] called [the Motorola Senior VP] to inform him about the exchange⁶⁸⁴ and subsequently received a missed call from [the Motorola Senior VP].⁶⁸⁵
- (7) We have not been able to review any documents on [the Motorola Airwave VP MD]’s phone between the exchange of messages on 5 September 2018 and 14 September 2018 because Motorola submitted that *“the phone he was using during the relevant period was lost”*.⁶⁸⁶
- (8) In this context, we note that Motorola did not advise its PICT bid team as a whole of the recusals of [the Motorola VP for Sales], [the Motorola Airwave VP MD] or [the Motorola Senior VP].⁶⁸⁷ There was therefore nothing to mitigate the risk that remaining members of Motorola’s PICT bid team from calling or otherwise contacting [the Motorola VP for Sales], [the Motorola Airwave VP MD] or [the Motorola Senior VP] to discuss the PICT Tender.

⁶⁸⁰ Motorola Third Response – Part 2, Question 26(a), paragraphs 27 and 28 and Document 319 (ATF 5611)

⁶⁸¹ See evidence identified in Section H(2)(c) above.

⁶⁸² Motorola Third Response – Part 2, Question 26(a), paragraphs 27 and 28 and Document 319 (ATF 5611). Motorola has also confirmed that the primary phone contact for individuals is their mobile phone number identified in their email signatures and it is unaware of [the Motorola VP for Sales] using any other device for work purposes (Motorola Third Response – Part 2, Question 26(a), paragraph 30).

⁶⁸³ Motorola Third Response – Part 2, Question 26(a), paragraph 27 and Document 320 (ATF 5612). Motorola has also confirmed that the primary phone contact for individuals is their mobile phone number identified in their email signatures and that [the Motorola Senior VP] was not a frequent user of Dialpad, a business VoIP provider he had access to (Motorola Third Response – Part 2, Question 26(a), paragraph 30).

⁶⁸⁴ Motorola Third Response – Part 1, Document 291 (ATF 5581); Motorola First Response, Question 3; Motorola Second Response – Part 2, Question 13(a) and Document 1 (ATF 5290).

⁶⁸⁵ Motorola Third Response – Part 2, Question 26(a), paragraph 27 and Document 319 (ATF 5611). See also Sepura’s Second Letter of Facts Representations (Revised Annex A), rows 78 – 83.

⁶⁸⁶ Motorola Second Response – Part 2, paragraph 1.

⁶⁸⁷ Motorola Third Response – Part 1, Question 5(c). See also Question 10(b) and Motorola Third Response – Part 2, Question 8 and paragraphs 49-50; Sepura’s Second Letter of Facts Representations (Revised Annex A), rows 84 – 85.

- (9) Motorola could have taken additional steps to mitigate the risk that the exchange of messages on 5 September 2018 influenced its bid. For example:
- (i) [The Motorola VP for Sales], [the Motorola Airwave VP MD] and [the Motorola Senior VP] all continued to work with and had frequent contact with colleagues working on Motorola's bid for the PICT Tender.⁶⁸⁸
 - (ii) Whilst Motorola has submitted that pricing was not discussed, the PICT Tender was nonetheless discussed at an Airwave meeting on 10 September 2018 at which both [the Motorola Airwave VP MD] and [the Motorola Finance Lead] were present.⁶⁸⁹
 - (iii) [The Motorola VP for Sales], [the Motorola Airwave VP MD], [the Motorola Senior VP] and [the Motorola Finance Lead] all attended an all-day meeting on 10 September 2018⁶⁹⁰ which was followed in the evening by a social dinner.⁶⁹¹
399. On 11 September 2018 – one day after the all-day meeting attended by [the Motorola VP for Sales], [the Motorola Airwave VP MD], [the Motorola Senior VP] and [the Motorola Finance Lead] followed by dinner in the evening – [the Motorola Finance Lead] increased the price of one of Motorola's key Airwave-TETRA devices (the MTP6650) by £[<].⁶⁹²
400. Motorola did not inform PICT of the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018.
401. Neither [the Motorola VP for Sales] nor Motorola made Sepura aware of the exchange or messages on 5 September 2018 or informed [the Sepura Regional Sales Director] or Sepura that [the Motorola VP for Sales] and Motorola had taken steps to seek to mitigate the impact of the exchange on its bid.
402. At no point prior to Motorola finalising and submitting its bid in response to the PICT Tender did Motorola inform any regulatory authority of the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018. Motorola notified the CMA on 14 September 2018, after it had submitted its bid to PICT.

⁶⁸⁸ Motorola letter to Ofcom dated 11 February 2020 (ATF 5200)..

⁶⁸⁹ Motorola Third Response – Part 1, Question 20 and Documents 195 (ATF 5484) and 296 (ATF 5586).

⁶⁹⁰ Motorola Third Response – Part 1, Question 21, paragraph 69 and Motorola Third Response – Part 2, paragraph 51.

⁶⁹¹ Motorola Second Response – Part 2, Documents 105 (ATF 5394), 106 (ATF 5395); Motorola Third Response – Part 1, Question 22; Sepura Third Response – Part 2, paragraph 52.

⁶⁹² Motorola Second Response – Part 2, Question 16, paragraphs 82, 83, 86 and 92. Motorola has explained that as at late July 2022, this price increase had resulted in approximately £[<] of additional revenue (Motorola Eighth Response, Question 4).

I. THE EXCHANGE OF MESSAGES ON 5 SEPTEMBER 2018⁶⁹³

(1) Introduction

403. At 6:44pm BST on 5 September 2018, [the Sepura Regional Sales Director] contacted [the Motorola VP for Sales] via text message (specifically iMessage) on his mobile phone. Close to an hour passed before [the Motorola VP for Sales] replied at 7:38pm. What followed was the exchange of a few pleasantries (five messages between 7:38pm and 7:52pm) before a lull in the conversation. [The Motorola VP for Sales] restarted the conversation nearly an hour and a half later at 9:20pm by sending the following message: “*Thought you’d be working hard on your PICT submission 😊*”.
404. For over two hours, from 9:20pm to 11:23pm, [the Motorola VP for Sales] and [the Sepura Regional Sales Director] then proceeded to exchange 48 messages on a range of matters relevant to the PICT Tender including:
- (1) their perceptions of PICT’s approach to and objectives for the PICT Tender;
 - (2) recent pricing in Europe;
 - (3) other potential competitors;
 - (4) potential volumes;
 - (5) distribution channels; and
 - (6) Sepura’s pricing strategy and likely pricing levels.
405. This discussion of the PICT Tender comprised 26 messages sent by [the Sepura Regional Sales Director] and 22 sent by [the Motorola VP for Sales]. It is these messages that are the focus of this Decision.
406. After this exchange of messages relating to the PICT Tender, [the Motorola VP for Sales] changed the subject and they ended the conversation with a further 16 messages discussing other personal matters from 11:26pm onwards. In total, [the Motorola VP for Sales] and [the Sepura Regional Sales Director] exchanged 69 messages on 5 September 2018.
407. In this section we set out the messages [the Sepura Regional Sales Director] and [the Motorola VP for Sales] exchanged with each other. We describe the explanations of the messages provided to us and then set out our assessment of the messages taking into account the relevant context, in particular as set out in **Sections E-H** above.
408. We consider it important to view the messages exchanged on 5 September 2018 as a totality and not to take each message solely in isolation.
409. Where considered appropriate, we have grouped messages together for the purposes of our assessment.⁶⁹⁴ In each case, we first set out the content of the messages, before

⁶⁹³ The messages quoted in this section are based on Motorola Sixth Response, Document 464 (ATF 5765). See also Motorola’s explanation of the timing of the messages in Motorola Sixth Response, Question 1 and other copies of the messages in Motorola’s submission to the CMA (ATF 5817) and Motorola Sixth Response, Document 465 (ATF 5766).

⁶⁹⁴ We have generally grouped the messages in a similar way to how they are grouped for commentary in Sepura SO Representations, Annex 1.

summarising and assessing the arguments and evidence presented by the Parties in connection with them. We then give our overall assessment of the messages exchanged in **Section I(21)**.

(2) Messages 1 – 5

410. Messages 1 – 5 consist of the following messages:

- (1) Message 1 (6:44pm), [Sepura Regional Sales Director]: *“Hi How is it going?”*
- (2) Message 2 (7:38pm), [Motorola VP for Sales]: *“Hey [✂]. All good here. Busy as usual. You?”*
- (3) Message 3 (7:39pm), [Sepura Regional Sales Director]: *“In Portugal living the dream.”*
- (4) Message 4 (7:51pm), [Motorola VP for Sales]: *“Cool. I’m in Chicago...it’s warm”*
- (5) Message 5 (7:52pm), [Sepura Regional Sales Director]: *“Ditto”*

(a) Views of the Parties

- 411. Motorola has not commented on these messages other than to confirm that [the Motorola VP for Sales] was in Chicago at the time⁶⁹⁵ and that the exchange of messages on 5 September 2018 started with the Parties exchanging a few pleasantries.⁶⁹⁶
- 412. Sepura and [the Sepura Regional Sales Director] have confirmed that [the Sepura Regional Sales Director] was on holiday at his house in Portugal at the time. Both Sepura and [the Sepura Regional Sales Director] have also commented that the exchange occurred quite late at night for [the Sepura Regional Sales Director] and suggested that [the Sepura Regional Sales Director] may have had a few drinks.⁶⁹⁷
- 413. When Ofcom interviewed [the Sepura Regional Sales Director] on 6 December 2019, [the Sepura Regional Sales Director] said he did not know what prompted him to message [the Motorola VP for Sales] on 5 September 2018.⁶⁹⁸ He later stated that he did not message [the Motorola VP for Sales] with the intention of discussing the PICT Tender.⁶⁹⁹
- 414. Sepura has subsequently provided [the Sepura Regional Sales Director]’s further explanation that he had meant to text his friend, Mr Phil Jones (a former neighbour who has previously

⁶⁹⁵ Motorola Sixth Response, Question 1.

⁶⁹⁶ [✂], page 7, lines 23 – 25.

⁶⁹⁷ Sepura Oral Transcript, paragraphs 39 and 131 and [Sepura Regional Sales Director] Interview Transcript (CD1), paragraphs 99 – 102. In his response to Question 4(b)(ii) of [Sepura Regional Sales Director] First Request, he also explained that at the time of his exchange of messages with [the Motorola VP for Sales] on 5 September 2018: *“I was on holiday in Portugal, I was tired, and I had been drinking”*.

⁶⁹⁸ [Sepura Regional Sales Director] Interview Transcript (CD1), paragraphs 99 – 102.

⁶⁹⁹ [Sepura Regional Sales Director] Interview Transcript (CD1), paragraphs 103 – 104.

stayed in his property in Portugal and who [the Sepura Regional Sales Director] often messages when he is in Portugal), and not [the Motorola VP for Sales].⁷⁰⁰

415. Sepura's SO Representations also set out [the Sepura Regional Sales Director]'s explanation that [the Motorola VP for Sales]'s reference to Chicago made [the Sepura Regional Sales Director] realise that he was not texting his friend, Mr Jones. Sepura notes that after [the Sepura Regional Sales Director]'s reply of "*Ditto*" in relation to the weather, the exchange stopped for approximately 90 minutes until [the Motorola VP for Sales] sent the first message relating to the PICT Tender.⁷⁰¹

(b) Ofcom's factual assessment

416. As explained in **Section F(2)(b)** above, the context to the exchange of messages on 5 September 2018 is that around May/June, the Parties became aware of the possibility of the PICT Tender. [The Sepura Regional Sales Director] and [the Motorola VP for Sales] exchanged messages about [the Sepura Regional Sales Director] potentially re-joining Motorola in May 2018 and the evidence indicates they met up in mid-May 2018. In July 2018, [the Sepura Regional Sales Director] contacted other ex-Motorola colleagues including [the Motorola Marketing Consultant]⁷⁰² and [the Motorola Airwave VP MD].⁷⁰³
417. There were concerns within Sepura that Motorola may submit a low price to PICT which could "*discredit*" Sepura or result in it losing customers and market share. [The Sepura Regional Sales Director] was tasked with obtaining competitive intelligence⁷⁰⁴ on Motorola's bidding intent and approach to pricing and was asked to "*explore the threat*"⁷⁰⁵ that Motorola may submit a low price to PICT. On the same day as – but before – the exchange of

⁷⁰⁰ Sepura SO Representations, Annex 1, rows 1 – 3 which explain that Mr Jones has stayed in [the Sepura Regional Sales Director]'s property in Portugal previously and that [the Sepura Regional Sales Director] often messages Mr Jones at some point when he is in Portugal.

⁷⁰¹ Sepura SO Representations, Annex 1, rows 4 – 5.

⁷⁰² On 18 July 2018, [the Sepura Regional Sales Director] contacted [the Motorola Marketing Consultant] (who was at the time employed by Motorola as a [Motorola Marketing Consultant] but left Motorola on 8 December 2018) to let him know that he had moved back to the North of England. [The Motorola Marketing Consultant] replied to thank [the Sepura Regional Sales Director] for this update. See [Sepura Regional Sales Director] Mobile Phone Documents, Document 65 (ATF 5077); [Sepura Regional Sales Director] First Response, Question 8(a), page 7. We are not aware of any earlier communications between [the Sepura Regional Sales Director] and [the Motorola Marketing Consultant] before 18 July 2018 which indicates that they may not have been in regular contact before Sepura became aware of the possibility of the PICT Tender.

⁷⁰³ On 24 July 2018, [the Sepura Regional Sales Director] contacted [the Motorola Airwave VP MD] (who was at the time employed by Motorola as [Airwave VP MD]) and suggested they meet up on 25 July 2018, although it appears that [the Motorola Airwave VP MD] was not available to meet. See [Sepura Regional Sales Director] Mobile Phone Documents, Document 694 (ATF 5087) and Motorola Sixth Response (Qs. 3, 4 and 23), Question 3, Document 492 (ATF 5799). We are not aware of any earlier communications between [the Sepura Regional Sales Director] and [the Motorola Airwave VP MD] before 24 July 2018 which indicates that they may not have been in regular contact before Sepura became aware of the possibility of the PICT Tender.

⁷⁰⁴ Sepura First Response, Question 5, Document 190.1 (ATF 4447).

⁷⁰⁵ Sepura First Response, Question 5, Document 3178.1 (ATF 1528). See also footnote 394 above.

messages on 5 September 2018, it was suggested to [the Sepura Regional Sales Director] that Sepura “*should consider going cheaper*”.⁷⁰⁶

418. It is against this background that [the Sepura Regional Sales Director] contacted [the Motorola VP for Sales] on 5 September 2018.
419. [The Sepura Regional Sales Director]’s claim that he meant to text his former neighbour was first presented to Ofcom by Sepura on 4 February 2021. This claim does not feature in any of [the Sepura Regional Sales Director]’s witness evidence prior to that date. Ofcom first showed [the Sepura Regional Sales Director] the exchange of messages on 5 September 2018 on 5 December 2019 and at no point during the next 14-month period did [the Sepura Regional Sales Director] suggest to Ofcom that he had meant to text his former neighbour instead of [the Motorola VP for Sales].⁷⁰⁷ We do not therefore consider [the Sepura Regional Sales Director]’s submission that he meant to text his former neighbour and not [the Motorola VP for Sales] to be credible.
420. Even if [the Sepura Regional Sales Director] had meant to text his former neighbour and had no intention of discussing the PICT Tender, both [the Motorola VP for Sales] and [the Sepura Regional Sales Director] went onto discuss the PICT Tender for over two hours. At any point during the conversation, [the Sepura Regional Sales Director] could have said to [the Motorola VP for Sales] that it was not appropriate to discuss the PICT Tender and ended the conversation, but he did not do so.

(3) Messages 6-11

421. Messages 6 - 11 consist of the following messages:

- (1) Message 6 (9:20pm), [Motorola VP for Sales]: “*Thought you’d be working hard on your PICT submission 😊*”
- (2) Message 7 (9:20pm), [Sepura Regional Sales Director]: “*All done.*”
- (3) Message 8 (9:33pm), [Motorola VP for Sales]: “*Smarty pants*”
- (4) Message 9 (9:35pm), [Sepura Regional Sales Director]: “*Or not budding*”
- (5) Message 10 (9:35pm), [Sepura Regional Sales Director]: “*Bidding*”
- (6) Message 11(9:36pm),[Motorola VP for Sales]: “*I don’t believe that for a second*”

(a) Views of the Parties

422. Motorola has submitted that [the Motorola VP for Sales]’s comments in this part of the exchange were intended “*to tease*” [the Sepura Regional Sales Director]⁷⁰⁸ or “*as a witty and sarcastic response*”.⁷⁰⁹

⁷⁰⁶ Sepura First Response, Question 5, Document 2953.1 (ATF 1753).

⁷⁰⁷ Ofcom’s view is that no credible explanation has been provided for this change in position.

⁷⁰⁸ [X], page 8, lines 6 – 10.

⁷⁰⁹ [X], page 8, lines 11 – 14.

423. [The Motorola VP for Sales] has submitted *“that it is not always easy to determine whether [the Sepura Regional Sales Director] is being serious”* and that [the Sepura Regional Sales Director]’s contradictory statements *“reflected his demeanor”*.⁷¹⁰ Contemporaneous evidence indicates that Motorola’s [Lead Counsel]’s initial reaction was that it could be a *“deliberate trap”* and that [the Motorola VP for Sales] and [the Motorola Airwave VP MD] thought [the Sepura Regional Sales Director]’s comments may have been *“[the Sepura Regional Sales Director] letting off steam”*.⁷¹¹
424. Sepura contends that [the Sepura Regional Sales Director]’s comments in this exchange of messages reflect *“[the Sepura Regional Sales Director] winding-up ... [the Motorola VP for Sales]”*⁷¹² and that [the Sepura Regional Sales Director]’s *“primary intention was to be non-committal and leave [the Motorola VP for Sales] guessing”*.⁷¹³ Sepura has submitted that *“[the Sepura Regional Sales Director] considers that at no point would [the Motorola VP for Sales] take him seriously”* and that [the Sepura Regional Sales Director]’s responses were to *“have a “bit of fun””*.⁷¹⁴
425. Sepura has submitted that evidence Ofcom has obtained from Motorola is consistent with its own submissions.

(b) Ofcom’s factual assessment

426. Considering Messages 6 – 11 in the context of the messages that followed, we find that [the Sepura Regional Sales Director] and [the Motorola VP for Sales] were tentatively establishing a willingness to discuss the PICT Tender.
427. We find that [the Sepura Regional Sales Director] did not expect his suggestion that Sepura might not have bid to be taken seriously by [the Motorola VP for Sales], and [the Motorola VP for Sales] obviously did not take it seriously. While we have taken this light-hearted start to the conversation into account when we have considered the remainder of the messages, it does not change our view that the content of the following messages was intended to be, and was likely to have been, taken seriously by both Parties. As set out below, by the time [the Sepura Regional Sales Director] disclosed information relating to Sepura’s pricing strategy for the PICT Tender, [the Motorola VP for Sales] and [the Sepura Regional Sales Director] had exchanged information about the PICT Tender which both knew to be true.

(4) Messages 12 - 16

428. Messages 12 -16 consist of the following messages:

- (1) Message 12 (9:40pm), [Sepura Regional Sales Director]: *“It’s a home office stitch up.”*

⁷¹⁰ [3<], page 8, lines 17-20; Sepura SO Representations, Annex 1, rows 6 – 10.

⁷¹¹ Motorola Third Response – Part 1, Document 292, page 56 (ATF 5582) and Sepura SO Representations, Annex 1, rows 6 – 10.

⁷¹² Sepura Oral Transcript, paragraphs 40 and 63.

⁷¹³ Sepura SO Representations, Annex 1, rows 6 – 10.

⁷¹⁴ Sepura SO Representations, Annex 1, rows 6 – 10.

- (2) Message 13 (9:49pm), [Motorola VP for Sales]: *"Why do you say that?"*
- (3) Message 14 (9:51pm), [Sepura Regional Sales Director]: *"You have them in your pocket on the extension. You are doing crazy deals across Europe. So if we no [sic] bid then can you imagine the questions that will be asked."*
- (4) Message 15 (9:55pm), [Motorola VP for Sales]: *"Any extension has nothing to do with this though"*
- (5) Message 16 (9:57pm), [Sepura Regional Sales Director]: *"The cheque is in the post. I have met customers who have been offered subsidise [sic] terminals."*

(a) Views of the Parties

- 429. Sepura has submitted that Messages 12 and 15 are further examples of "[the Sepura Regional Sales Director] winding-up ... [the Motorola VP for Sales]".⁷¹⁵ It has submitted that Messages 12 – 15 relate to Sepura's concerns that Motorola's contract with the Home Office to provide the Airwave network (which had been extended) and role in the ESN mean that *"the Home Office is dependent upon Motorola"* and Motorola has a *"competitive advantage"* over Sepura.⁷¹⁶ Sepura has submitted that it is was particularly concerned that Motorola's ownership of Airwave *"would enable it to cross-subsidise"* its sales of Airwave-TETRA devices and [the Sepura Regional Sales Director]'s comment in Message 15 *"is a direct reference to this concern"*.⁷¹⁷
- 430. Motorola has submitted that [the Motorola VP for Sales] did not understand what [the Sepura Regional Sales Director] meant by his comment *"It's a home office stitch up"*.⁷¹⁸ It has submitted that [the Motorola VP for Sales] understood [the Sepura Regional Sales Director]'s reference to *"the extension"* as the extension to the Airwave network but queried how that extension was related to the PICT Tender.⁷¹⁹
- 431. Motorola has also submitted that [the Motorola VP for Sales] understood [the Sepura Regional Sales Director]'s comments about *"doing crazy deals across Europe"* to *"be a statement that the parties had been competing aggressively elsewhere in Europe"* and understood that if Sepura (as one of only two bidders) did not submit a bid for the PICT Tender then *"this would be considered unusual by the industry"*.⁷²⁰
- 432. Motorola has submitted that [the Motorola VP for Sales] did not understand [the Sepura Regional Sales Director]'s message about a cheque being in the post.⁷²¹

⁷¹⁵ Sepura Oral Transcript, paragraphs 40 and 63.

⁷¹⁶ Sepura SO Representations, Annex 1, rows 11 – 14.

⁷¹⁷ Sepura SO Representations, Annex 1, rows 11 – 14.

⁷¹⁸ [X], page 8, lines 22 – 24.

⁷¹⁹ [X], page 9, lines 4 – 9.

⁷²⁰ [X], page 9, lines 9 – 18.

⁷²¹ [X], page 9, lines 18 – 19.

(b) Ofcom's factual assessment

433. We find that after establishing a willingness to discuss the PICT Tender in Messages 6 – 11, [the Sepura Regional Sales Director] and [the Motorola VP for Sales] moved on to discuss matters relating to the PICT Tender in Messages 12 – 16.
434. We note however that [the Sepura Regional Sales Director]'s comment that Motorola was *"doing crazy deals across Europe"* and [the Motorola VP for Sales]'s understanding that [the Sepura Regional Sales Director] was stating that the Parties *"had been competing aggressively elsewhere in Europe"* are consistent with Sepura's internal discussions relating to the competitive landscape in the context of its pricing strategy for the PICT Tender.⁷²²

(5) Messages 17 – 19

435. Messages 17 – 19 consist of the following messages:

- (1) Message 17 (9:57pm), [Motorola VP for Sales]: *"And you guys keep going lower and lower in places like Holland"*
- (2) Message 18 (9:58pm), [Motorola VP for Sales]: *"Subsidised terminals?"*
- (3) Message 19 (10:01pm), [Sepura Regional Sales Director]: *"Put our prices up in holland [sic]."*

(a) Views of the Parties

436. Motorola has submitted that [the Motorola VP for Sales]'s comment in Message 17 was in response to [the Sepura Regional Sales Director]'s comment in Message 14 about Motorola *"doing crazy deals across Europe"* and reflected [the Motorola VP for Sales]'s understanding that Sepura was driving the prices of TETRA-terminals lower in Holland.⁷²³
437. Sepura has submitted that it was unclear to [the Sepura Regional Sales Director] why [the Motorola VP for Sales] made the comment about lower prices in Holland. It has submitted that there was a recent tender in Holland, but bids were made through third-party distributors who add on their own margin and included *"a significant element of non Sepura accessories and local services"*. Sepura has submitted that the relevant authority would have informed the losing bidders of the details of the winning bid submitted by a third-party distributor.⁷²⁴
438. Sepura has submitted that [the Sepura Regional Sales Director]'s comment that Sepura put its prices up in Holland was *"a contradictory statement intended to confuse and irritate [the Motorola VP for Sales]"*.⁷²⁵
439. Motorola has submitted that [the Motorola VP for Sales] understood [the Sepura Regional Sales Director]'s comment in Message 19 to be suggesting that Sepura put their prices up in

⁷²² See, for example, the discussion between [the Sepura Regional Sales Director] and [Sepura Executive Team Member C] relating to Motorola's *"horribly low"* pricing in Romania (Sepura First Response, Question 5, Document 2953.1 (ATF 1753)).

⁷²³ [X], page 9, lines 20 – 27.

⁷²⁴ Sepura SO Representations, Annex 1, row 16. See also paragraph 123(2) above.

⁷²⁵ Sepura SO Representations, Annex 1, row 18.

Holland “*but [the Motorola VP for Sales] understood that the opposite was in fact the case*”.⁷²⁶

440. Sepura has submitted that [the Motorola VP for Sales]’s comment in Message 17 suggesting that Sepura’s pricing was lower in Holland “*reveal[s] that [the Motorola VP for Sales] has little idea of what Sepura’s prevailing prices were or wrongly thought that they were low.*”⁷²⁷

441. Motorola has submitted that [the Motorola VP for Sales]’s comment in Message 18 was in response to [the Sepura Regional Sales Director]’s comment in Message 16 about a customer having been offered subsidised terminals and reflected [the Motorola VP for Sales]’s confusion over what [the Sepura Regional Sales Director] was referring to. Motorola has submitted that “*[the Motorola VP for Sales] is not aware that any customer has ever requested or discussed the idea of a subsidised terminal*”.⁷²⁸

(b) Ofcom’s factual assessment

442. We find that [the Motorola VP for Sales]’s comment about Sepura “*going lower and lower in places like Holland*” is again consistent with contemporaneous evidence indicating the Parties had been competing aggressively in Holland.⁷²⁹ We therefore find that [the Motorola VP for Sales] was sharing his true belief about the position in Holland and reject Sepura’s submission that [the Motorola VP for Sales] had “*little idea of what Sepura’s prevailing prices were or wrongly thought that they were low.*”

443. Taking into account the contemporaneous evidence, we also find that these messages are indicative of an environment in which, prior to the exchange of messages on 5 September 2018, aggressive competition could occur between the Parties. Sepura has not provided any evidence to the contrary in this regard.

444. In relation to [the Sepura Regional Sales Director]’s comment, “*Put our prices up in holland*”, we find that [the Sepura Regional Sales Director] was either being sarcastic (perhaps, and consistent with the messages that follow, because he wanted to give the impression that Sepura’s pricing strategy was to submit a high bid price or not to undercut Motorola’s pricing) or had misunderstood the position.

445. Either way, and even if [the Sepura Regional Sales Director] was being sarcastic, it does not follow that the remainder of the exchange did not convey competitively sensitive information relating to Sepura’s pricing strategy for the PICT Tender. We note that the information [the Sepura Regional Sales Director] went on to disclose was also consistent with Sepura’s actual pricing strategy.

⁷²⁶ [X], page 10, lines 8 – 11.

⁷²⁷ Sepura Oral Transcript, paragraph 79.

⁷²⁸ [X], page 10, lines 1 – 6.

⁷²⁹ For example, in internal discussions relating to the competitive landscape in the context of Sepura’s pricing strategy for the PICT Tender, [the Sepura Regional Sales Director] commented “*that Motorola ... offered its partners 65% off list pricing*” in relation to a recent tender in Holland (Sepura Sixth Response, Document 5214.1, page 2 (ATF 299)).

(6) Messages 20 – 23

446. Messages 20 - 23 consist of the following messages:

- (1) Message 20 (10:44pm), [Motorola VP for Sales]: *“So you’re not a fan of the PICT framework approach then?”*
- (2) Message 21 (10:51pm), [Sepura Regional Sales Director]: *“Disappointed that they view a radio as a commodity and are just trying to screw us down to lowest price.”*
- (3) Message 22 (10:51), [Sepura Regional Sales Director]: *“They will be very disappointed.”*
- (4) Message 23 (10:54pm), [Motorola VP for Sales]: *“I think you’re spot on. They (PICT) are definitely trying to justify heir [sic] own value in this and see this as delivering a quick win”*

(a) Views of the Parties

447. We have explained in **Section F** above that the purpose of the PICT Tender was to obtain “best value” bids and “drive increased value” for police forces. Recognising PICT’s stated purpose, Motorola has explained that the whole point of the PICT Tender was for PICT to obtain the lowest price per unit regardless of volume and that this was a well-known fact.⁷³⁰
448. During his interview with Ofcom, [the Sepura Regional Sales Director] explained that he was disappointed that the PICT Tender did not allow for volume discounts and that PICT was trying to commoditise Sepura’s products without appreciating their value.⁷³¹ When queried on whether [the Sepura Regional Sales Director]’s reference to “They” in Message 22 was a reference to PICT, he replied: *“Yeah, ‘cause the fact that I think their expectation was the fact that we were going to lower our prices to ridiculously stupid numbers. But how you interpret that I think is to you. I mean it’s... I don’t know what it was really...”*⁷³²
449. Sepura has subsequently explained that the scoring structure for the PICT Tender – being 80% for price and 20% for technical – coupled with PICT’s technical specification for the bid being poor compared to the technology available, meant *“there was an incentive for bidders to include entry-level modules in their bids which would have less functionality and poorer technology”*.⁷³³ Sepura contends that [the Sepura Regional Sales Director]’s comments in Messages 21 and 22 were *“simply a factual observation regarding the structure of the Tender”*.⁷³⁴

(b) Ofcom’s factual assessment

450. We find that in Messages 20-23, the Parties discussed PICT’s approach to and objectives for the PICT Tender. We acknowledge that both Parties would have been aware of PICT’s

⁷³⁰ [3<], page 11, lines 1 – 3.

⁷³¹ [Sepura Regional Sales Director] Interview Transcript (CD1), paragraphs 130 – 131.

⁷³² [Sepura Regional Sales Director] Interview Transcript (CD1), paragraphs 132 – 133.

⁷³³ Sepura SO Representations, Annex 1, rows 19-22.

⁷³⁴ Sepura SO Representations, Annex 1, rows 19-22.

objectives and the terms of the Framework Agreement. However, Messages 20-23 contained competitive intelligence in the form of the Parties' views on PICT's approach to the PICT Tender that at the very least were not publicly available and which: (i) served to confirm or deny each Party's own view; and/or (ii) allowed each Party to become aware more simply, rapidly and directly of how the other Party may view the PICT Tender than under normal market conditions.

451. [The Motorola VP for Sales]'s agreement with [the Sepura Regional Sales Director]'s views also demonstrates that the conversation had clearly moved on from any initial messages in which [the Sepura Regional Sales Director] may have been "*winding-up*" [the Motorola VP for Sales] and that they were sharing their views on the PICT Tender which the other agreed with.
452. Taking into account all the evidence, and when read together with [the Sepura Regional Sales Director]'s subsequent and more explicit messages that Sepura would not be lowering its prices or pricing aggressively, we find that in Messages 21 and 22, [the Sepura Regional Sales Director] was informing [the Motorola VP for Sales] that Sepura would not be submitting its lowest price to PICT.

(7) Messages 24-27

453. Messages 24 - 27 consist of the following messages:

- (1) Message 24 (10:55pm), [Sepura Regional Sales Director]: "*Also some of the force numbers are very questionable.*"
- (2) Message 25 (10:55pm), [Motorola VP for Sales]: "*I did question some of them with our team*"
- (3) Message 26 (10:56pm), [Motorola VP for Sales]: "*Seems like all the forces have bought into it though*"
- (4) Message 27 (10:59pm), [Sepura Regional Sales Director]: "*The MPS business case to MoPAC is for 30k so not sure where the 45k comes from*"

(a) Views of the Parties

454. Sepura has submitted that these messages "*are simply observations on facts known to both [the Sepura Regional Sales Director] and [the Motorola VP for Sales]*".⁷³⁵
455. Motorola has explained that PICT had provided bidders with a forecasted estimate of orders it expected police forces to call off the Framework Agreement, but that [the Motorola VP for Sales] did not consider PICT's forecasts "*tallied up with the numbers out there*" based on conversations [the Motorola VP for Sales] had been having with police forces.⁷³⁶
456. Motorola has explained that [the Sepura Regional Sales Director]'s references in Message 27 to MPS and MoPAC are references to the Metropolitan Police Service and the Mayor's Office

⁷³⁵ Sepura SO Representations, Annex 1, rows 23 – 32.

⁷³⁶ [X], page 11, lines 10 – 17.

for Policing and Crime respectively.⁷³⁷ It has submitted that PICT had forecasted 45,000 potential orders from the MPS, but that both [the Sepura Regional Sales Director] and [the Motorola VP for Sales] were aware that the MPS only had approximately 30,000 Airwave-TETRA devices and that [the Sepura Regional Sales Director] was questioning where the 45,000 figure had come from.⁷³⁸ While Motorola has submitted that it was aware of the 30,000 figure, it has also submitted that “[the Motorola VP for Sales] was unsure this was information that was publicly available”.⁷³⁹

(b) Ofcom’s factual assessment

457. As explained in **Sections G(4) and H(3)** above, both Parties have submitted that potential volumes of orders was one factor they took into account when determining the pricing of their bid for the PICT Tender.
458. We acknowledge that both [the Sepura Regional Sales Director] and [the Motorola VP for Sales] may have been aware that the MPS had approximately 30,000 users of Airwave-TETRA devices and therefore also had some doubt over PICT’s estimated order forecast for the MPS.
459. We do not consider that Messages 24 - 27 would have been significant in isolation. However, in context, they are part of, consistent with, and corroborating a continuous exchange of messages in which the Parties discussed competitive intelligence. In this instance, the exchange consisted of the Parties’ perceptions of PICT’s estimated forecasts, and these perceptions were not publicly available. The exchange also: (i) served to confirm or deny each Party’s own view on a factor relevant to the pricing of their bid; and/or (ii) allowed each Party to become aware more simply, rapidly and directly of the other Party’s view on a factor relevant to the pricing of their bid than under normal market conditions.
460. This exchange of messages is again indicative of [the Sepura Regional Sales Director] and [the Motorola VP for Sales] sharing accurate information with each other, indicating a degree of cooperation between them and value in what the other is saying.

(8) Messages 28 – 33

461. Messages 28 - 33 consist of the following messages:
- (1) Message 28 (11:02pm), [Motorola VP for Sales]: *“Will be interesting to see how forces approach it. Fleet refresh v piecemeal approach”*
 - (2) Message 29 (11:06pm), [Sepura Regional Sales Director]: *“I think they all like the value of NARPF replacement and PICT have sold this view that everyone will get the MPS pricing”*
 - (3) Message 30 (11:07pm), [Sepura Regional Sales Director]: *“Until the ESN date is confirmed then all forces will do piecemeal but our [sic] some DIY repairs.”*

⁷³⁷ [redacted], page 11, lines 23 – 27.

⁷³⁸ [redacted], page 11, lines 27 – 28 and page 12, lines 1 – 2. See also Motorola First Response, Question 14.

⁷³⁹ [redacted], page 12, lines 2 – 3.

- (4) Message 31 (11:08pm), [Sepura Regional Sales Director]: *“Buts = buys”*
- (5) Message 32 (11:08pm), [Motorola VP for Sales]: *“There’s nothing stopping any force going out to tender though”*
- (6) Message 33 (11:08pm), [Motorola VP for Sales]: *“It’s not mandatory”*

(a) Views of the Parties

- 462. Sepura has submitted that these messages *“are simply observations on facts known to both [the Sepura Regional Sales Director] and [the Motorola VP for Sales]”*.⁷⁴⁰
- 463. Motorola has submitted that [the Motorola VP for Sales]’s comment in Message 28 relates to the fact the Parties were required to submit a price to PICT that would be applicable to all customers regardless of the volume of Airwave-TETRA products they ordered. It has submitted that [the Motorola VP for Sales] made this comment as he found it *“genuinely interesting”* in terms of whether customers may decide to refresh their entire fleet of Airwave-TETRA products or adopt a piecemeal approach given there was no difference in the price they would pay per unit.⁷⁴¹
- 464. Sepura has similarly submitted that [the Sepura Regional Sales Director]’s comments in Messages 29 and 30 relate to the fact the PICT Tender did not allow bidders to offer volume discounts to individual forces.⁷⁴² Sepura has also submitted that because the Airwave network is being replaced with the ESN, its expectation (which was also based on an instruction from the Home Office) was that police forces would *“sweat”* their Airwave-TETRA products until the Airwave network was switched off by focusing on *“ad-hoc purchases and repairs”* rather than refreshing an entire fleet of Airwave-TETRA products.⁷⁴³
- 465. Motorola has submitted that in Message 29, *“[the Motorola VP for Sales] understood [the Sepura Regional Sales Director] to be claiming that the PICT have convinced the forces that through the framework agreement all the forces will get Metropolitan Police pricing on their devices, at least until the implementation date of ESN is confirmed”*.⁷⁴⁴
- 466. Motorola has also submitted that in Messages 32 and 33, [the Motorola VP for Sales] was noting that there was no requirement for any police force to purchase Airwave-TETRA

⁷⁴⁰ Sepura SO Representations, Annex 1, rows 23 – 32.

⁷⁴¹ [redacted], page 12, lines 4 – 19.

⁷⁴² Sepura SO Representations, Annex 1, rows 23 – 32. Sepura has also explained that *“NARPF”* is a reference to The National Airwave Radio Procurement Framework, the previous framework agreement awarded to Sepura and which came into effect on 18 September 2011. Sepura has explained that under the terms of the NARPF, there were no pre-determined bundles of products and no price drop mechanism, although it was permitted to offer volume discounts (Sepura Second Response – Part 1, Questions 12(a) and (b)).

⁷⁴³ Sepura SO Representations, Annex 1, rows 23 – 32.

⁷⁴⁴ [redacted], page 13, lines 1 – 5. PICT has explained that in relation to an enquiry relating to Lot 2 of the PICT Tender, it explained *“that the single price band fee model was required to avoid a scenario whereby a smaller force (e.g. Cumbria) is expected to pay a premium price for the same service due to their comparator size with a larger force (e.g. MPS)”* (PICT First Informal Response - Part A, A33 and Document 18, Question 62 (ATF 5958))

products under the terms of the Framework Agreement and that forces could still run their own procurement exercise.⁷⁴⁵

(b) Ofcom's factual assessment

467. We find that in Messages 28 - 33, the Parties were discussing PICT's approach to the PICT Tender and how customers may behave in light of some of the terms of the Framework Agreement. For example, in Message 30 [the Sepura Regional Sales Director] suggests that all forces would generally purchase "*piecemeal*" rather than look to refresh their whole fleet.
468. While we recognise that the Parties would have been aware of the terms of the Framework Agreement, we note that the messages are significant in three respects. First, [the Sepura Regional Sales Director] and [the Motorola VP for Sales] confirm to each other their respective understanding of how the Framework Agreement operates, indicating a degree of cooperation between them and value in what the other is saying. Second, the Parties are likely to have been less incentivised to offer aggressive bid pricing if customers were likely to purchase "*piecemeal*" rather than placing more significant orders. Third, the messages are consistent with the tenor of the whole conversation between [the Sepura Regional Sales Director] and [the Motorola VP for Sales], which displays a willingness freely to share their views when discussing matters relating to an ongoing competitive tender process.

(9) Message 34

469. Message 34 (11:08pm), from [the Sepura Regional Sales Director], consists of the following message: "*Need to stop capita screwing around our business.*"

(a) Views of the Parties

470. Sepura has submitted that "[the Sepura Regional Sales Director]'s comment relates to a concern that he has that Capita have offered second hand equipment to the market which Capita advertises to be refurbished despite not, in Sepura's view, having the technical capability to undertake such refurbishment."⁷⁴⁶
471. Motorola has submitted that [the Motorola VP for Sales] did not understand [the Sepura Regional Sales Director]'s comment in Message 34.⁷⁴⁷
472. As explained in paragraph 76 above, Capita is a managed service provider that: (i) purchases Airwave-TETRA products from Motorola or Sepura on behalf of its customers; and (ii) provides those products to its customers alongside various services such as inventory management, device configuration, device replacement, repair/service management, logistical support and a 24/7 helpdesk.

⁷⁴⁵ [S], page 13, lines 5 – 9.

⁷⁴⁶ Sepura SO Representations, Annex 1, row 33.

⁷⁴⁷ [S], page 13, lines 9 – 11 and 17 – 19.

473. Motorola has submitted that “[the Motorola VP for Sales] explained that from Motorola’s standpoint, the outcome of the PICT bid will not change Motorola’s relationship with Capita.”⁷⁴⁸

(b) Ofcom’s factual assessment

474. Message 34 appears to be an observation unrelated to the PICT Tender. It is however again consistent with the general tone of their conversation and which displays a willingness freely to discuss matters relating to the competitive landscape.

(10) Messages 35 – 40

475. Messages 35 - 40 consist of the following messages:

- (1) Message 35 (11:09pm), [Motorola VP for Sales]: “Who do you think will bid Lot 1 Apart from us 2?”
- (2) Message 36 (11:09pm), [Sepura Regional Sales Director]: “Possibly Leonardo or airbus [sic]”
- (3) Message 37 (11:10pm), [Motorola VP for Sales]: “Have hey [sic] got Airwave approved devices?”
- (4) Message 38 (11:11pm), [Motorola VP for Sales]: “I see Leonardo has got a new leader for this part of their business. Uk [sic] bloke”
- (5) Message 39 (11:11pm), [Sepura Regional Sales Director]: “No but there was someone asking stupid questions so makes Leonardo the obvious choice”
- (6) Message 40 (11:11pm), [Motorola VP for Sales]: “Hahahahaha”

(a) Views of the Parties

476. Sepura has submitted that [the Sepura Regional Sales Director]’s comment that Leonardo and Airbus may possibly also bid for Lot 1 “was merely him listing the only other theoretical bidders” and “a matter of fact”.⁷⁴⁹ Taking into account the highly concentrated nature of the market and high barriers to entry, Sepura has submitted that Messages 35 - 40 would “if anything, would serve to increase uncertainty as to who was bidding”, in particular as neither Leonardo nor Airbus attended PICT’s All-Bidder conference on 16 August 2018.⁷⁵⁰
477. In relation to [the Sepura Regional Sales Director]’s reply in Message 39 suggesting that Leonardo and Airwave did not have TETRA devices that were approved for use on the Airwave network, Sepura has submitted that this information is not competitively sensitive because: (i) accreditation is granted by Motorola (as the owner of the Airwave network); and (ii) the names of accredited suppliers is available on Motorola’s website.⁷⁵¹ Sepura has also noted [the Sepura Regional Sales Director]’s comments during interview that, taking into

⁷⁴⁸ [S&C], page 13, lines 12 – 13.

⁷⁴⁹ Sepura SO Representations, Annex 1, paragraph 4.40.5 and rows 34 – 36. See also Oral Transcript, paragraph 85.

⁷⁵⁰ Sepura SO Representations, Annex 1, paragraph 4.40.3 and rows 34 – 36. See also Sepura Oral Transcript, paragraph 87.

⁷⁵¹ Sepura SO Representations, Annex 1, paragraph 4.40.1 and rows 34 – 36. See also Sepura Oral Transcript, paragraph 86.

account Motorola's ownership of the Airwave network, Motorola and [the Motorola VP for Sales] "... would have a better understanding of whether or not ... [Leonardo or Airbus] were viable" bidders for the PICT Tender.⁷⁵²

478. Sepura has also submitted that [the Sepura Regional Sales Director]'s comment suggesting Leonardo was the "obvious choice" because "there was someone asking stupid questions" reflects "[the Sepura Regional Sales Director]'s sense of humour or "demeanour""⁷⁵³ and looks "rather like an in-joke between participants in the industry".⁷⁵⁴

479. Motorola has not provided any additional information in relation to these messages.⁷⁵⁵

(b) Ofcom's factual assessment

480. By this point in the conversation, the evidence indicates that [the Motorola VP for Sales] valued the information [the Sepura Regional Sales Director] was providing and decided to seek his views on who may submit a bid in addition to Motorola and Sepura. We also find that Message 36 is a clear statement by [the Sepura Regional Sales Director] that he thought Leonardo or Airbus could possibly submit a bid.

481. We acknowledge that the highly concentrated nature of the market and high barriers to entry would have reduced the likelihood of another competitor submitting a bid. However, it remains the case that there were three places available on the Framework Agreement and PICT hoped to attract a third bidder. The evidence also demonstrates that the Parties were uncertain as to whether there may be a third bidder and who that bidder may be.⁷⁵⁶

482. We also acknowledge that [the Motorola VP for Sales] and Motorola may have had access to information on whether Leonardo or Airbus had TETRA devices that were approved for use on the Airwave network. However, the fact [the Motorola VP for Sales] asked [the Sepura Regional Sales Director] in Message 37 whether Leonardo or Airbus had Airwave-approved devices indicates that he was not aware of this at the time of the exchange of messages on 5

⁷⁵² Sepura SO Representations, Annex 1, paragraph 4.40.2 and rows 34 – 36. See also Sepura Oral Transcript, paragraph 86.

⁷⁵³ Sepura SO Representations, Annex 1, rows 38 – 39. See also Sepura Oral Transcript, paragraph 84.

⁷⁵⁴ Sepura Oral Transcript, paragraph 63. See also paragraph 84.

⁷⁵⁵ [S], page 13, lines 20 – 27 and page 14, lines 1 – 10.

⁷⁵⁶ For example, paragraph 52 of the transcript of [Sepura Executive Team Member B]'s interview states: "I questioned a lot whether other companies like Leonardo, which is Selex brand, would be bidding, whether they would want to do an interest [sic]. And I also thought that Airbus would probably bid, mainly because they have a small device and thought well if they don't bid now they'll never bid. So I would've assumed that they would've been competitive. I would've thought that the three lots, there would have been three parties onto this bid. That was my assumption, even though I may have been told by others there's probably, you know, the barrier to entry to the market just because of, you know, understanding what the police forces use today might be a bit difficult for a new entrant. But I sort of thought that there would be a very big competitive number of parties that would have all three spots on the PICT tender field." [Sepura Executive Team Member A] also commented that [the Sepura Business Development Director] thought Andromeda could be a third bidder although they needed approval from NCSC and Airwave (Sepura First Response, Question 5, Document 157.1 (ATF 4480)). Even after Sepura had submitted its initial bid, Sepura did not know if there had in fact been any other bidders for Lot 1 (Sepura First Request, Question 5, Document 3664.1, page 2 (ATF 1042)). We note that PICT had indicated that any bidder without approvals from Airwave and NCSC would have been given time in which to secure these approvals (PICT First Informal Response – Part A, Document 18, Question 80 (ATF 5958)). Also see Sepura First Response, Question 5, Document 1774.1 (ATF 2867)).

September 2018. Indeed, Motorola has confirmed that knowledge of whether Leonardo and Airbus had Airwave-approved devices was not commonly held within its commercial team.⁷⁵⁷

483. Taking into account all the evidence, we find that the Parties exchanged competitive intelligence in the form of their views on other potential bidders that were not publicly available and that: (i) served to confirm or deny each Party's own view; and/or (ii) allowed each Party to become aware more simply, rapidly and directly of the other Party's views.
484. Like all of the messages and the information disclosed within them, Messages 35 - 40 have to be read in the context within which they are sent. They are corroborative of an exchange of information between the Parties which is not consistent with that of independent competitors separately determining their commercial behaviour in the context of the PICT Tender.
485. These messages also have to be seen in their economic context. As explained in **Section E** above, any new entrant would have to price aggressively to overcome barriers to switching. The Parties' knowledge of what each other thought about the likelihood of a third bidder would therefore have been valuable information relevant to the pricing of their bid. The Parties concluded that a credible third bidder was unlikely.

(11) Messages 41 – 44

486. Messages 41 - 44 consist of the following messages:

- (1) Message 41 (11:12pm), [Motorola VP for Sales]: *"You let Capita still supply your devices in WMP and GMP though right?"*
- (2) Message 42 (11:13pm), [Sepura Regional Sales Director]: *"Ex sepura"*
- (3) Message 43 (11:13pm), [Sepura Regional Sales Director]: *"No they buy through SCC"*
- (4) Message 44 (11:14pm), [Motorola VP for Sales]: *"Oh. My mistake."*

(a) Views of the Parties

487. The Parties have confirmed that the references to *"WMP"* and *"GMP"* in Message 41 are references to West Midlands Police and Greater Manchester Police.⁷⁵⁸ The Parties have also confirmed that SCC (referred to in Message 43) is a distributor used by some police forces to procure their Airwave-TETRA devices.⁷⁵⁹
488. Sepura has submitted that [the Sepura Regional Sales Director]'s response in Message 43 confirming to [the Motorola VP for Sales] that WMP and GMP purchase Airwave-TETRA devices through SCC and not Capita was not competitively sensitive or capable of reducing uncertainty in relation to the PICT Tender because: (i) the role of SCC as a distributor of Airwave-TETRA devices is known to both Motorola and Sepura and they both supply police forces via SCC; (ii) SCC's website confirms it supplies WMP; (iii) [the Motorola VP for Sales]

⁷⁵⁷ Motorola First Response, Question 15.

⁷⁵⁸ Sepura SO Representations, paragraph 4.41 and Annex 1, row 40; Sepura Oral Transcript, paragraph 89; [redacted], page 14, lines 11 – 14.

⁷⁵⁹ Sepura SO Representations, Annex 1, rows 42 - 43; [redacted], page 14, line 15.

was already aware that WMP and GMP were supplied by a distributor; and (iv) WMP and GMP are the second and third largest police forces in the UK and regardless of whether they currently procure their devices through a distributor, it was clear that they were potential customers under the Framework Agreement.⁷⁶⁰

489. Motorola has not provided any additional information in relation to Messages 41, 43 and 44.⁷⁶¹

490. Motorola has submitted that [the Sepura Regional Sales Director]’s comment in Message 42 supplemented his comment in Message 39 and indicated that the Leonardo individual [the Sepura Regional Sales Director] was referring to in Message 39 used to work at Sepura.⁷⁶²

(b) Ofcom’s factual assessment

491. Consistent with our finding that by this point in the conversation, [the Motorola VP for Sales] valued the information being provided by [the Sepura Regional Sales Director], [the Motorola VP for Sales] went on to request and obtain further information from [the Sepura Regional Sales Director]. We find that Message 41 is a clear question from [the Motorola VP for Sales] asking whether WMP and GMP procure their Airwave-TETRA devices from Sepura via Capita. We also find that Message 42 is a clear statement by [the Sepura Regional Sales Director] confirming that WMP and GMP procure their Airwave-TETRA devices from Sepura via SCC and not Capita.

492. Motorola has confirmed that at the time of the exchange of messages on 5 September 2018, this information was not known by [the Motorola VP for Sales] and may not have been more widely known within Motorola at the time of the exchange of messages on 5 September 2018.⁷⁶³

493. While Motorola has submitted that knowledge of WMP’s and GMP’s use of SCC as a distributor was “*not relevant to the submission*”⁷⁶⁴ and that Motorola may have been able to obtain this information from other sources, this exchange of messages indicates a degree of cooperation between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] which was of value of them. It is also again consistent with the general tone of the conversation which displays a willingness freely to discuss matters relating to the competitive landscape and supply of Airwave-TETRA products in the context of an ongoing competitive tender process.

(12) Message 45

494. Message 45 (11:15pm), [Sepura Regional Sales Director]: “*That is why PICT is a good option. Just they [sic] way they are trying to screw us over*”

⁷⁶⁰ Sepura SO Representations, paragraph 4.42 and Annex 1, rows 42 – 43; Sepura Oral Transcript, paragraphs 90 – 92.

⁷⁶¹ [redacted], page 14, lines 11 – 18.

⁷⁶² [redacted], page 14, lines 8 – 10.

⁷⁶³ Motorola First Response, Question 16.

⁷⁶⁴ Motorola First Response, Question 16.

(a) Views of the Parties

495. Sepura has explained that [the Sepura Regional Sales Director]’s comment in relation to PICT being “*a good option*” reflected the fact distributors such as SCC – which typically add on a margin – were prohibited from submitting bids for Lot 1 of the Framework Agreement.⁷⁶⁵ In other words, only manufacturers were allowed to submit bids for Lot 1 which meant customers should obtain better value pricing direct from the manufacturer rather than through a distributor.
496. Neither Party has commented on [the Sepura Regional Sales Director]’s comment referring to PICT “*trying to screw us over*” save Motorola has submitted that “[*the Motorola VP for Sales*] *did not pay any particular attention to this comment at the time*”.⁷⁶⁶

(b) Ofcom’s factual assessment

497. We note that Message 45 follows on from Message 21 in which [the Sepura Regional Sales Director] comments that PICT “*are just trying to screw us down to lowest price*”. We find that [the Sepura Regional Sales Director]’s comment in Message 45 referring to PICT “*trying to screw us over*” is a further example of [the Sepura Regional Sales Director] expressing his view or perceptions relating to PICT’s approach to the PICT Tender, most likely in relation to pricing.
498. We attach no great significance to this message in isolation. In context however, we see it as part of, consistent with, and corroborating a continuous exchange of messages in which the Parties discussed competitive intelligence.

(13) Message 46

499. Message 46 (11:16pm), [Sepura Regional Sales Director]: “*The whole bit on no mini tenders for 12 months is to get us to give best prices day one. No chance!*”.

(a) Views of the Parties

500. We have explained in **Section F(2)(c)(iii)** above that the Framework Agreement did not allow any mini tenders during the first 12 months and Motorola has explained that Message 46 is a reference to [the Sepura Regional Sales Director]’s understanding that this prohibition was to gain price certainty. Motorola has also confirmed that in Message 46, “[*the Sepura Regional Sales Director*] *is indicating that Sepura will not submit best prices from the outset of the framework agreement.*”⁷⁶⁷
501. Sepura has explained that this comment was based on the original structure of the PICT Tender (before PICT agreed to include the price drop mechanism) and “*is an example of [the Sepura Regional Sales Director] ‘letting off steam’*”. Sepura contends that Message 46 does

⁷⁶⁵ Sepura SO Representations, Annex 1, row 44.

⁷⁶⁶ [redacted], page 14, lines 23 – 24.

⁷⁶⁷ [redacted], page 15, lines 1 – 5.

not therefore relate to the actual tender for which the Parties ultimately submitted bids and is therefore “*entirely meaningless*”.⁷⁶⁸

(b) Ofcom’s factual assessment

502. We note that in Message 46, [the Sepura Regional Sales Director] refers to mini-tenders and not the price drop mechanism referred to in Sepura’s SO Representations.
503. In that context, we find that in Message 46, [the Sepura Regional Sales Director] is (i) citing the example of PICT’s approach to mini-tenders as evidence that PICT wanted bidders to offer their lowest pricing on day one; and (ii) confirming that there was “*no chance*” Sepura would be offering PICT its best or aggressive pricing from day one. As indicated above, Motorola has explained this was also [the Motorola VP for Sales]’s understanding of this message and reflects Sepura’s pricing strategy before the exchange of messages on 5 September 2018, as well as the pricing it ultimately submitted to PICT.⁷⁶⁹
504. We find Message 46 to be part of a series of messages in which [the Sepura Regional Sales Director] disclosed Sepura’s pricing strategy to [the Motorola VP for Sales] and sought to reinforce his earlier messages (Messages 21/22) that Sepura would not be submitting aggressive bid pricing to PICT.

(14) Messages 47 and 48

505. Messages 47 and 48 consist of the following messages:
- (1) Message 47 (11:17pm), [Motorola VP for Sales]: “*Lol. You’ll be keen...I’m sure of that*”.
 - (2) Message 48 (11:18pm), [Sepura Regional Sales Director]: “*No based on the number of opportunities and the likelihood of switching then keep prices as they are.*”

(a) Views of the Parties

506. Motorola’s view is that in Message 47 [the Motorola VP for Sales] was indicating his scepticism over [the Sepura Regional Sales Director]’s comment in Message 46 that Sepura would not submit aggressive pricing to PICT on 14 September 2018.⁷⁷⁰
507. Sepura similarly suggests that [the Motorola VP for Sales] was not taking [the Sepura Regional Sales Director]’s comment seriously and indicated to [the Sepura Regional Sales Director] that he thought Sepura would offer “*sharp or competitive prices*”.⁷⁷¹ Sepura suggests that [the Motorola VP for Sales]’s response in Message 47 is “*illustrative of the mistrust and rivalry between [the Sepura Regional Sales Director] and [the Motorola VP for Sales]*”.⁷⁷²

⁷⁶⁸ Sepura SO Representations, Annex 1, row 45. See also paragraph 2.4.10.

⁷⁶⁹ See **Section G** above.

⁷⁷⁰ [X], page 15, lines 6 – 8 and 14 – 15.

⁷⁷¹ Sepura Oral Transcript, paragraph 123.

⁷⁷² Sepura SO Representations, Annex 1, rows 46 – 48.

508. Motorola has not commented on Message 48.
509. Sepura contends that there was no reference point or benchmark price to give meaning to [the Sepura Regional Sales Director]’s comment to “*keep prices as they are*”. It also contends that any interpretation of this message to mean Sepura was going to bid high is inconsistent with [the Motorola VP for Sales]’s messages indicating that he thought Sepura’s prices were “*really low*” (see Message 17 above and Message 49 below).⁷⁷³

(b) Ofcom’s factual assessment

510. First, we find nothing in [the Motorola VP for Sales]’s response in Message 47 that demonstrates that [the Motorola VP for Sales] objected to [the Sepura Regional Sales Director]’s disclosures relating to Sepura’s pricing strategy in Message 46.
511. One interpretation of Message 47 is, as submitted by the Parties, that [the Motorola VP for Sales] was sceptical of [the Sepura Regional Sales Director]’s comment in Message 46 that Sepura would not be submitting its best prices to PICT on 14 September 2018.
512. [The Motorola VP for Sales]’s response may also have been intended to encourage [the Sepura Regional Sales Director] to tell him more about Sepura’s pricing or provide even further validation to support his disclosures (which [the Sepura Regional Sales Director] did in fact go on to provide).⁷⁷⁴
513. Whatever [the Motorola VP for Sales] intended by Message 47, we find that [the Sepura Regional Sales Director] understood that [the Motorola VP for Sales] was at least sceptical about what he had said about Sepura not submitting its best pricing to PICT on 14 September 2018, and so provided further information in Message 48 in an attempt to persuade him that he was serious.
514. We find that Message 48 is a clear statement by [the Sepura Regional Sales Director] that Sepura’s pricing strategy was to “*keep prices as they are*” and retain the status quo. In other words, Sepura would not be lowering its existing pricing or submit the type of aggressive pricing it had submitted in the past (and that was alluded to in some of the earlier messages in the exchange).⁷⁷⁵
515. Message 48 is consistent with, and corroborative of, the information [the Sepura Regional Sales Director] disclosed in Messages 21/22 and 46, namely that Sepura would not be submitting its “*lowest*” or “*best*” pricing to PICT. [The Sepura Regional Sales Director] subsequently disclosed in Message 48 that Sepura intends to “*keep prices as they are*”. In doing so, he:
- (1) reinforced the general message that Sepura did not intend to submit low or aggressive bid pricing to PICT, in particular by seeking to validate Sepura’s pricing

⁷⁷³ Sepura SO Representations, Annex 1, rows 46 – 48.

⁷⁷⁴ We note [Sepura Executive Team Member B]’s comment during interview that he felt “*there is a bit of fishing from the Motorola guy to [the Sepura Regional Sales Director] as well, reading the whole document*” ([Sepura Executive Team Member B]’s Interview Transcript, paragraph 124).

⁷⁷⁵ For example, see our assessment of Message 17 – 19 above.

strategy by reference to “the number of opportunities and the likelihood of switching”; and

- (2) disclosed additional detail on what [the Sepura Regional Sales Director] meant by his earlier comments that Sepura would not be submitting its “lowest” or “best” pricing, namely that it would retain the status quo and “keep prices as they are”.

516. Regardless of what [the Motorola VP for Sales] meant by Message 47, [the Sepura Regional Sales Director]’s reply rejected any suggestion that Sepura would in fact submit low or aggressive bid pricing to PICT.

517. We disagree that this finding is inconsistent with [the Motorola VP for Sales]’s comments in Messages 17 and 49. We have explained our findings in relation to Message 49 below and further note that Message 17 related to pricing in Holland.

(15) Messages 49 and 50

518. Messages 49 and 50 consist of the following messages:

- (1) Message 49 (11:19pm), [Motorola VP for Sales]: “That means really low in Sepura speak then 😏😏”.
- (2) Message 50 (11:21pm), [Sepura Regional Sales Director]: “If it was winner takes all then game on. But to drive no incremental revenues then why give away margin.”

(a) Views of the Parties

519. Motorola’s view is that in Message 49 [the Motorola VP for Sales] was again indicating his scepticism over [the Sepura Regional Sales Director]’s intention for Sepura not to price aggressively.⁷⁷⁶

520. Sepura has submitted that there may be different readings of [the Motorola VP for Sales]’s response in Message 49.⁷⁷⁷ On the one hand, it has submitted that Message 49 indicates that [the Motorola VP for Sales] thought Sepura’s prices were “really low”.⁷⁷⁸ On the other, it has submitted that [the Motorola VP for Sales]’s response may have been intended as a joke and demonstrates that he was not taking [the Sepura Regional Sales Director]’s comment to “keep prices as they are” seriously, which is again “illustrative of the mistrust and rivalry between [the Sepura Regional Sales Director] and [the Motorola VP for Sales]”.⁷⁷⁹

521. Motorola has explained that [the Motorola VP for Sales] understood [the Sepura Regional Sales Director]’s comments in Message 50 to be questioning why a supplier would give up their margin when they may not necessarily achieve significant revenues as a result of winning a place on the Framework Agreement.⁷⁸⁰

⁷⁷⁶ [S&L], page 15, lines 14 – 15.

⁷⁷⁷ Sepura Oral Transcript, paragraph 136.

⁷⁷⁸ Sepura Oral Transcript, paragraphs 136 – 138 and Sepura SO Representations, Annex 1, rows 46 – 48. See also Sepura SO Representations, paragraph 4.29.

⁷⁷⁹ Sepura Oral Transcript, paragraph 123 and 136 – 138; Sepura SO Representations, Annex 1, rows 46 – 48.

⁷⁸⁰ [S&L], page 15, lines 22 – 25.

522. Sepura has submitted that Message 50 is the first of four consecutive messages from [the Sepura Regional Sales Director] in which he “*is more explicit*” and represents a “*gear shift*” in the conversation.⁷⁸¹
523. Sepura contends that Message 50 is a further example of [the Sepura Regional Sales Director] “*letting off steam*” as a result of his frustration over the structure of the PICT Tender. [The Sepura Regional Sales Director] has said his message is “*a statement of the obvious*”, reflecting the fact the PICT Tender did not guarantee any sales or give any visibility over actual customer requirements.

(b) Ofcom’s factual assessment

524. First, we find nothing in [the Motorola VP for Sales]’s response in Message 49 that demonstrates that [the Motorola VP for Sales] objected to [the Sepura Regional Sales Director]’s disclosures relating to Sepura’s pricing strategy in Message 48.
525. It is unclear exactly what [the Motorola VP for Sales] meant by his comment in Message 49 and we do not therefore agree that it should be interpreted as [the Motorola VP for Sales] indicating his view that Sepura’s existing prices were “*really low*.”
526. As explained in our assessment of Messages 47 and 48 above, [the Motorola VP for Sales] may have been indicating his scepticism in response to [the Sepura Regional Sales Director]’s disclosure that Sepura would “*keep prices as they are*” or seeking further information or validation from [the Sepura Regional Sales Director].
527. Whatever [the Motorola VP for Sales] intended by Message 49, we find that [the Sepura Regional Sales Director] understood that [the Motorola VP for Sales] did not believe what he had said about Sepura’s intention to “*keep prices as they are*”, and so provided further information in Message 50 in an attempt to persuade him that he was serious, in this instance by seeking to validate Sepura’s pricing strategy by reference to the structure of the PICT Tender.
528. In fact, Message 50 is the first of four consecutive messages from [the Sepura Regional Sales Director] over an 89-second period in which he further reinforced his comments about Sepura’s pricing strategy.
529. We find that in Message 50, [the Sepura Regional Sales Director] was commenting on the structure of the PICT Tender and questioning why bidders should give away any margin when they are not competing for the entirety of the market and are not guaranteed any sales.
530. Considered in isolation, this may appear as a relatively obvious comment to make based on the structure of the PICT Tender. However, Message 50 is consistent with, and corroborative of, Messages 21/22, 46 and 48 in which we found [the Sepura Regional Sales Director] disclosed to [the Motorola VP for Sales] that Sepura would not be submitting its “*lowest*” or “*best*” pricing to PICT and suggested that the Parties should “*keep prices as they are*”.

⁷⁸¹ Sepura Oral Transcript, paragraph 125.

531. Regardless of what [the Motorola VP for Sales] meant by Message 49 above, [the Sepura Regional Sales Director]’s reply again rejected any suggestion Sepura would in fact submit low or aggressive bid pricing to PICT.
532. We also find that [the Sepura Regional Sales Director]’s comment in Message 50 that the Framework Agreement would “*drive no incremental revenues*” indicated to [the Motorola VP for Sales] that Sepura was not intending to submit bid pricing aggressive enough to encourage Motorola customers to switch to Sepura (which could have driven incremental revenue). [The Sepura Regional Sales Director] may also have been indicating that he did not expect either Party to submit bid pricing that was aggressive enough to encourage any customers to switch.
533. While we have found there to be material barriers to switching (see **Section E(3)(c)** above), the Parties’ contemporaneous documents clearly demonstrate that the Parties were concerned about customers switching and were also focused on winning customers from each other.⁷⁸² In this context, [the Sepura Regional Sales Director]’s view on whether Sepura expected any switching to occur, whether as a result of the structure of the PICT Tender or its own pricing strategy, would have been valuable information to [the Motorola VP for Sales].
534. Taking into account all the evidence, we find that [the Sepura Regional Sales Director]’s disclosure relating to the Framework Agreement “*driv[ing] no incremental revenues*” was competitive intelligence in the form of [the Sepura Regional Sales Director]’s view that was not publicly available and that: (i) served to confirm or deny [the Motorola VP for Sales]’s own view; and/or (ii) allowed [the Motorola VP for Sales] to become aware more simply, rapidly and directly of [the Sepura Regional Sales Director]’s views.

(16) Message 51

535. Message 51 (11:21pm), [Sepura Regional Sales Director]: “*My recommendation tomorrow is to keep prices as is. If management say no I will let you know*”.

(a) Views of the Parties

536. Motorola has not commented on this message from [the Sepura Regional Sales Director] save to confirm that [the Motorola VP for Sales] did not hear back from [the Sepura Regional Sales Director] after the exchange of messages on 5 September 2018.⁷⁸³
537. Sepura contends that [the Sepura Regional Sales Director]’s comment to “*keep prices as is*” was “*meaningless*” to both Motorola and Sepura as there was no reference point.⁷⁸⁴ [The Sepura Regional Sales Director] has also commented that his reference to pricing was “*entirely abstract*” because the pricing submitted to PICT on 14 September 2018 was

⁷⁸² See **Sections G and H**.

⁷⁸³ [X], page 16, lines 3 – 4.

⁷⁸⁴ Sepura SO Representations, Annex 1, rows 50 – 53. Sepura’s representations on what [the Motorola VP for Sales] may have understood from the comment “*keep prices as is*” are summarised in more detail in Section L(1)(a) below.

“irrelevant” and that pricing competition only took place after the Framework Agreement became effective.⁷⁸⁵

538. [The Sepura Regional Sales Director] has explained that his comment *“If management say no I will let you know”* was a *“stupid and, insofar as it concerns the allegations, meaningless, comment intended to make [him] sound important and that he is a “big deal” at Sepura.”*⁷⁸⁶

(b) Ofcom’s factual assessment

539. As discussed in **Sections E-H** above, bid pricing was a key parameter on which the Parties were competing and understanding the likely pricing strategy of the other Party was particularly valuable information.
540. Taking into account all the evidence, we find that Message 51 is a clear statement by [the Sepura Regional Sales Director] relating to Sepura’s pricing strategy for the PICT Tender, namely that [the Sepura Regional Sales Director] would be recommending to Sepura’s senior management to *“keep prices as is”* and that he would let [the Motorola VP for Sales] know if Sepura’s senior management did not accept his recommendation.
541. Message 51 follows on from Messages 21/22, 46, 48 and 50 in which we have found [the Sepura Regional Sales Director] disclosed to [the Motorola VP for Sales] that Sepura would not be submitting its *“lowest”* or *“best”* pricing to PICT, suggested that the Parties should *“keep prices as they are”* and questioned why the Parties should *“give away margin”*. [The Sepura Regional Sales Director]’s subsequent disclosure that he would be recommending that Sepura *“keep prices as is”* in the context of the whole exchange:
- (1) reinforced his previous messages that Sepura did not intend to submit low or aggressive bid pricing to PICT, in particular by seeking to validate Sepura’s pricing strategy by informing [the Motorola VP for Sales] that he would let him know if Sepura’s senior management did not accept his recommendation; and
 - (2) again, disclosed additional detail on what [the Sepura Regional Sales Director] meant by his earlier comments that Sepura would not be submitting its *“lowest”* or *“best”* pricing, namely that Sepura would retain the status quo and *“keep prices as is”*.
542. We also note that [the Sepura Regional Sales Director]’s comments in Message 51 were accurate in that they reflected Sepura’s actual governance process and actual pricing strategy. In particular:
- (1) consistent with [the Sepura Regional Sales Director]’s comment to [the Motorola VP for Sales] that he would be making a recommendation to Sepura’s senior management *“tomorrow”*, a meeting was scheduled to, and did in fact, take place with Sepura’s senior management on 6 September, the day after the exchange on 5 September 2018.⁷⁸⁷

⁷⁸⁵ Sepura SO Representations, Annex 1, rows 50 – 53.

⁷⁸⁶ Sepura SO Representations, Annex 1, rows 50 – 53.

⁷⁸⁷ See paragraph 278 above.

- (2) consistent with [the Sepura Regional Sales Director]’s comment that he would be recommending to “*keep prices as is*”, [the Sepura Regional Sales Director]’s recommendations to Sepura’s senior management (contained in Sepura’s 6 September 2018 Presentation) included a recommendation to “[*u*]se current force pricing” in relation to both overt portables and mobile products.⁷⁸⁸ In the same presentation, [the Sepura Regional Sales Director] had identified a risk to Sepura’s market share and described mitigating this risk by “[*e*]nsur[ing] pricing consistent with current offers”.⁷⁸⁹
543. Message 51 is a clear statement by [the Sepura Regional Sales Director] relating to Sepura’s actual pricing strategy for the PICT Tender and we reject Sepura’s submission that [the Sepura Regional Sales Director]’s comment to “*keep prices as is*” was “*meaningless*”. As explained in **Section H(5)** above, we have found Motorola would have had a general understanding of Sepura’s current pricing for TETRA products including those used on the Airwave network. Further, [the Sepura Regional Sales Director] followed his comment “*My recommendation tomorrow is to keep prices as is*” by remarking to [the Motorola VP for Sales] that “*If management say no I will let you know*”. There is a clear inference from these two statements that [the Sepura Regional Sales Director] considered his disclosure relating to Sepura’s pricing strategy to be useful and of practical value to [the Motorola VP for Sales], and that [the Sepura Regional Sales Director] was eager to ensure that [the Motorola VP for Sales] would act on it, hence the promise in the second statement to provide an update if necessary (i.e. if the first disclosure required supplementary information to remain useful).
544. In any event, Motorola did not need to know Sepura’s actual recent pricing for [the Sepura Regional Sales Director]’s disclosures to have been of meaningful and practical value to [the Motorola VP for Sales]. The significance of [the Sepura Regional Sales Director]’s disclosures was to indicate to [the Motorola VP for Sales] that Sepura was not intending to push prices down or win customers from Motorola. These disclosures would have been particularly valuable to Motorola in circumstances where it was actively seeking competitive intelligence on Sepura’s likely pricing.
545. We also reject [the Sepura Regional Sales Director]’s submission that he only informed [the Motorola VP for Sales] that he would let him know if Sepura’s senior management did not accept his recommendation to make himself “*sound important*” and a “*big deal*”. Taking into account all the evidence – in particular [the Sepura Regional Sales Director]’s disclosures in Messages 21/22, 46, 48 and 50 – we find that the more likely explanation for [the Sepura Regional Sales Director]’s comment in Message 51 is that he knew he would be making pricing recommendations to Sepura’s senior management on 6 September 2018 and was eager to ensure that [the Motorola VP for Sales] would act on his disclosures relating to Sepura’s pricing strategy. In particular, it sought to indicate to [the Motorola VP for Sales] that he could trust [the Sepura Regional Sales Director] and rely on the competitively sensitive information [the Sepura Regional Sales Director] had shared with him.

⁷⁸⁸ Sepura’s 6 September 2018 Presentation, pages 12 and 14.

⁷⁸⁹ Sepura’s 6 September 2018 Presentation, page 11.

(17) Message 52

546. Message 52 (11:22pm), [Sepura Regional Sales Director]: *“My view is to let the dust settle see what happens with ESN then we can have some fun and games but for now let’s wait”*.

(a) Views of the Parties

547. Motorola has explained that Message 52 *“continues a further elaboration on [the Sepura Regional Sales Director]’s thinking in respect of keeping prices as they were”*. [The Motorola VP for Sales] has explained that he understood [the Sepura Regional Sales Director]’s comment to be suggesting that the Parties can compete against each other in the future but should not compete against each other *“for now”*.⁷⁹⁰

548. Sepura has not commented on this message.

(b) Ofcom’s factual assessment

549. We find that in Message 52, [the Sepura Regional Sales Director] was most likely to be suggesting that the Parties should not compete with each other or price at a level which may result in any customers switching until they knew what was happening with the ESN.

550. As explained in **Section E(3)(b)** above, the market for Airwave-TETRA products has a limited duration. This is because when the ESN is complete and all users of the Airwave network have been migrated to the ESN, there will no longer be any demand for Airwave-TETRA products. Noting that the migration to the ESN *“was on the horizon”*, [the Sepura Regional Sales Director] explained during interview that *“[a]ll the indications from all the forces is that they were going to continue to sweat their assets”* and that the opportunity to win customers was *“quite small”*.⁷⁹¹ As explained in **Section C(4)(d)** above, the ESN has however been subject to significant delays. Longer delays to the ESN means more forces may need to refresh or purchase new Airwave-TETRA products, creating more opportunities to win customers before the Airwave network is finally switched off. These delays may also mean that customers are more incentivised to switch on the basis they will require Airwave-TETRA devices for longer than anticipated.

551. [The Sepura Regional Sales Director] would have been aware of this economic context relating to the migration to the ESN. As explained in **Section G(5)**, the evidence also indicates he would have been aware:

- (1) that the PICT Tender was likely to be the last opportunity to set framework pricing for Airwave-TETRA products;
- (2) that while the economic and market context created an incentive not to compete aggressively, aggressive competition can occur between the Parties;
- (3) of the risk that Sepura’s customers could switch to Motorola if its pricing was not within a certain delta of Motorola’s; and

⁷⁹⁰ [X], page 16, lines 5 – 14.

⁷⁹¹ [Sepura Regional Sales Director] Interview Transcript (CD2), paragraph 211.

- (4) that Sepura would have been less incentivised to utilise the price drop mechanism if its bid pricing was considered sufficiently competitive compared to Motorola's pricing, for example, because both Parties submitted a high bid price.
552. Taking into account all of the evidence, including [the Sepura Regional Sales Director]'s disclosures in Messages 21/22, 46, 48, 50 and 51 above, we find that the most likely explanation of Message 52 is that [the Sepura Regional Sales Director] was suggesting to [the Motorola VP for Sales] that the Parties should not submit competitive or aggressive bid pricing in response to the PICT Tender. [The Sepura Regional Sales Director]'s reference to the ESN may have been to suggest the value of winning an ESN-related contract in the future is expected to be higher and, therefore, more likely to induce stronger competition between the Parties. Or he might have been suggesting that the Parties may want to compete for customers for Airwave-TETRA products again if there are any further delays in the roll out of the ESN on the basis customers would require Airwave-TETRA products for longer and may be more incentivised to switch. Either way, [the Sepura Regional Sales Director] was suggesting to [the Motorola VP for Sales] that the Parties should not compete for each other's customers for now and should instead retain the status quo.
553. As noted above, Message 52 also follows on from Messages 21/22, 46, 48, 50 and 51 in which we have found that [the Sepura Regional Sales Director] disclosed to [the Motorola VP for Sales] that Sepura would not be submitting its "*lowest*" or "*best*" pricing to PICT; suggested that the Parties should "*keep prices as they are*"; questioned why the Parties should "*give away margin*"; and informed [the Motorola VP for Sales] that he would be recommending to Sepura's senior management to "*keep prices as is*". Taking into account the exchange of messages on 5 September 2018 as a whole, we have also found that [the Sepura Regional Sales Director]'s subsequent disclosure that the Parties should wait until they can have some "*fun and games*" reinforced – or in Motorola's words, provided further elaboration on – his previous messages that Sepura did not intend to submit lower or aggressive bid pricing to PICT, in particular by seeking to validate Sepura's pricing strategy by reference to the timing of the rollout of the ESN.

(18) Message 53

554. Message 53 (11:23pm), [Sepura Regional Sales Director]: "*I get paid on GM not level of discount.*".

(a) Views of the Parties

555. Motorola has confirmed its understanding that the reference to "*GM*" is a reference to "*gross margin*". It has also explained that Message 53 again provides context for [the Sepura Regional Sales Director]'s previous disclosures that the Parties "*should wait and keep prices as they are*".⁷⁹²
556. Sepura has not commented on this message.

⁷⁹² [X], page 16, lines 16 – 18.

(b) Ofcom's factual assessment

557. Message 53 is the last of four consecutive and uninterrupted messages from [the Sepura Regional Sales Director] without reply from [the Motorola VP for Sales].
558. We understand [the Sepura Regional Sales Director]'s reference in Message 53 to "GM" to be a reference to "gross margin"⁷⁹³ and find that [the Sepura Regional Sales Director] was explaining to [the Motorola VP for Sales] that the level of any discount offered by Sepura to PICT was not directly relevant to how he is compensated. In other words, [the Sepura Regional Sales Director] was informing [the Motorola VP for Sales] that he had a clear financial incentive to keep Sepura's gross margin as high as possible and not to offer PICT any discount, i.e., he personally would likely be in a worse financial position if Sepura lowered its prices.
559. Message 53 is consistent with the pricing information disclosed in Messages 21/22, 46, 48, 50, 51 and 52. In particular, [the Sepura Regional Sales Director] confirmed and sought to corroborate Sepura's pricing strategy by reference to how he is compensated.
560. We also note that [the Sepura Regional Sales Director]'s comments in Message 53 concerning his personal motivation might explain why, prior to the exchange of messages on 5 September 2018, he removed from his pricing recommendations a proposed [X]% discount for mobiles. In that regard, [the Sepura Regional Sales Director]'s comment in Message 53 reflected his revised recommended pricing strategy for mobiles.

(19) Message 54

561. Message 54 (11:26pm), [Motorola VP for Sales]: *"Changing the subject. How's life back in the North East?"*.

(a) Views of the Parties

562. Motorola has not commented on this message other than to acknowledge [the Motorola VP for Sales] changed the subject.⁷⁹⁴
563. Sepura has described [the Motorola VP for Sales]'s changing of the subject as *"abrupt", "prompt", "immediate" and "brusque"*.⁷⁹⁵
564. Sepura has also explained that [the Motorola VP for Sales]'s changing of the subject *"seems more like what one might call a tumbleweed moment in the conversation where someone makes an off-colour joke, for instance, that prompt[s] a frosty reaction."*⁷⁹⁶

⁷⁹³ We note that [the Sepura Regional Sales Director] used the abbreviation "GM" in his slides containing his pricing recommendations for the PICT Tender and Sepura has confirmed these references were to "gross margin". See Sepura Penalty Representations, paragraph 2.22 (ATF 6374).

⁷⁹⁴ [X], page 16, lines 18 – 19.

⁷⁹⁵ Sepura SO Representations, paragraphs 4.17, 4.19, 5.24 and 5.30 and Sepura Oral Transcript, paragraphs 45, 96 and 122.

⁷⁹⁶ Sepura Oral Transcript, paragraph 127.

(b) Ofcom's factual assessment

565. On the broad subject of the PICT Tender, the Parties had exchanged 48 messages over more than two hours before [the Motorola VP for Sales] changed the subject. On the specific subject of pricing strategy for the PICT Tender, we have found that the Parties first exchanged information relating to pricing strategy in Messages 21/22 and continued the conversation for a further 35 minutes. Even taking a narrow focus on just [the Sepura Regional Sales Director]'s final four messages, which in Sepura's words were "*more explicit*" and represented a "*gear shift*" in the conversation, [the Motorola VP for Sales] still took three and a half minutes to change the subject.
566. Regardless of the reason for [the Motorola VP for Sales] deciding to change the subject, we find that [the Motorola VP for Sales]'s comments in Message 54 contained no objection to, or reservation about, the information [the Sepura Regional Sales Director] had disclosed.

(20) Messages 55 – 69

567. These are personal messages in which [the Motorola VP for Sales] and [the Sepura Regional Sales Director] discuss family matters and a potential catch up at a future industry event.⁷⁹⁷
568. The nature and content of these messages indicates that [the Motorola VP for Sales] and [the Sepura Regional Sales Director] had some form of personal relationship outside of work involving a degree of mutual trust.

(21) Ofcom's overall factual assessment of the exchange of messages on 5 September 2018

569. We have examined in detail the content of the messages exchanged on 5 September 2018 between [the Sepura Regional Sales Director] of Sepura and [the Motorola VP for Sales] of Motorola, which we note occurred days before the Parties had planned to, and did in fact, submit bids in response to the PICT Tender.
570. In summary, their content shows that [the Sepura Regional Sales Director] and [the Motorola VP for Sales] engaged in an exchange of competitively sensitive commercial information over a period of more than two hours without any legitimate commercial justification for doing so. The behaviour of both individuals was not consistent with that of independent competitors separately determining their commercial behaviour in the market. The messages that they exchanged covered a broad range of competitively sensitive views and information relating to the PICT Tender, thereby reducing the inherent uncertainty in the competitive process that the PICT Tender sought to engender.
571. Irrespective of whether the first message sent by [the Sepura Regional Sales Director] was accidental or not, [the Sepura Regional Sales Director] and [the Motorola VP for Sales] then proceeded - as individuals who are employed by competitors - to have an exchange of messages for over two hours that went well beyond a discussion of general conditions related to the PICT Tender or historical and public information. In particular, we find that [the Sepura Regional Sales Director] disclosed information relating to: (i) Sepura's pricing strategy for the PICT Tender; and (ii) the overall level of Sepura's proposed pricing in the

⁷⁹⁷ We understand that [the Motorola VP for Sales] did not ultimately attend this industry event (Motorola Third Response – Part 1, Question 4).

context of its overall strategy. In this respect, we note in particular Messages 21/22, 46, 48, 50, 51, 52 and 53.

572. While the tone of some of the earlier messages may have been more jocular, [the Sepura Regional Sales Director] and [the Motorola VP for Sales] went on to exchange views, and requested and obtained information, relating to the PICT Tender and the competitive landscape more generally, some of which they agreed with. The content of the messages demonstrates that they exchanged information which they both understood to be true, and which was of value to them. It is also clear that the tone of subsequent messages - in particular Messages 21/22, 46, 48, 50, 51, 52 and 53 relating to Sepura's pricing strategy - was serious, and that their content was accurate in that it reflected Sepura's actual pricing strategy. We find that all of these messages informed [the Motorola VP for Sales] that Sepura would not be submitting low, competitive or aggressive bid pricing to PICT. In particular, we find that:
- (1) Messages 21/22 and 46 informed [the Motorola VP for Sales] that Sepura would not be submitting its "*lowest*" or "*best*" pricing.
 - (2) Messages 48 and 51 informed [the Motorola VP for Sales] that Sepura would "*keep prices as they are*" or "*keep prices as is*", i.e., not lower its current pricing.
 - (3) Message 52 informed [the Motorola VP for Sales] that Sepura intended to retain the status quo and not price at a level which may result in any of Motorola's existing customers switching to Sepura.
573. Messages 50, 52 and 53 (as well as Messages 46, 48 and 51) reinforced and sought to validate or persuade [the Motorola VP for Sales] of the accuracy of [the Sepura Regional Sales Director]'s earlier disclosures relating to Sepura's pricing strategy for the PICT Tender.
574. We find that each time [the Motorola VP for Sales] expressed a degree of scepticism, [the Sepura Regional Sales Director] responded reiterating his position by reference to additional information, and sought to leave [the Motorola VP for Sales] in no doubt as to Sepura's pricing strategy for the PICT Tender.
575. We also find that [the Motorola VP for Sales] expressed no reservations or objections to any of the information [the Sepura Regional Sales Director] disclosed.
576. In **Section L** below, we set out our legal assessment of the exchange of messages on 5 September 2018. That legal assessment is informed by our factual findings in this section as well as **Sections E-H** and the legal principles set out in **Section K**.

J. LEGAL FRAMEWORK

(1) Introduction

577. This section sets out the legal framework which Ofcom has applied in this Decision.

(2) The Chapter I prohibition

578. The Chapter I prohibition is set out in section 2 of the Act and provides in particular at section 2(1) that:

“agreements between undertakings, decisions by associations of undertakings or concerted practices which—

(a) may affect trade within the United Kingdom, and

(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited unless they are exempt in accordance with the provisions of this Part.”

579. Section 2(2) explains that section 2(1) applies in particular to agreements, decisions or practices which:

“(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

580. Ofcom has therefore considered:

(1) whether the conduct is an agreement or concerted practice; and

(2) whether the agreement or concerted practice had as its object or effect the prevention, restriction or distortion of competition within the United Kingdom.

581. If these two aspects are established, the conduct in question is anti-competitive unless it is exempt under the exemption provisions provided for.⁷⁹⁸

⁷⁹⁸ See **Section M(4)** below.

(3) The relevance of Decisions by the European Commission and judgments of the EU courts

582. Under the European Union (Withdrawal Agreement) Act 2020, section 2(1) of the European Communities Act 1972 (under which EU law had effect in the UK's national law) was applicable until the end of the transition period (31 December 2020).⁷⁹⁹
583. While the transition period has now ended, under section 60A of the Act, Ofcom continues to be required to act with a view to securing that there is no inconsistency between:
- (1) the principles that it applies, and the decisions it reaches, in determining a question arising under the domestic prohibitions; and
 - (2) the principles laid down by the Treaty of the Functioning of the European Union ("TFEU") and the Court of Justice of the EU (the "**Court of Justice**") before the end of the transition period, and any relevant decision made by that Court before the end of the transition period, so far as applicable immediately before the end of the transition period in determining any corresponding question arising in EU law.⁸⁰⁰
584. We must also continue to have regard to any relevant Decision or Statement of the European Commission made before the end of the transition period.⁸⁰¹
585. This means that decisions of the European Commission and the case-law of the EU courts are of direct relevance to our findings in this Decision. Section 60A(7) of the Act does however allow Ofcom and the courts to depart from such principles and case-law where considered 'appropriate' to do so, in light of one of a number of prescribed factors. We have not considered it appropriate to depart from such principles in this Decision.

(4) Burden and Standard of Proof

586. The burden of proving an infringement of the Chapter I prohibition falls on Ofcom.⁸⁰²
587. Ofcom is required to establish the infringement to the civil standard of proof i.e. on the balance of probabilities.⁸⁰³
588. A presumption of innocence is enshrined in Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms. This means that any doubt as to whether an

⁷⁹⁹ Section 1A, European Union (Withdrawal) Act 2018, as introduced by section 1, European Union (Withdrawal Agreement) Act 2020.

⁸⁰⁰ Section 60A(2) of the Act.

⁸⁰¹ Section 60A(3) of the Act.

⁸⁰² *Napp Pharmaceutical Holdings Ltd and Subsidiaries v Director General of Fair Trading* [2002] CAT 1 at [95] and [100]. See also *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17 at [164] and [928]–[931]; *AH Willis and Sons Limited v OFT* [2011] CAT 13 at [45]; and *Tesco Stores Limited and Others v Office of Fair Trading* [2012] CAT 31 at [88].

⁸⁰³ *Napp Pharmaceutical Holdings Ltd and Subsidiaries v Director General of Fair Trading* [2002] CAT 1 at [95] and [100]. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, [164] and [928]–[931]; and *Tesco Stores Limited and Others v Office of Fair Trading* [2012] CAT 31, paragraph 88. See also, more recently, in the context of a Chapter II prohibition, *Royal Mail v Ofcom* [2019] CAT 27 at [171].

infringement is established on the balance of probabilities must operate to the advantage of the undertaking alleged to have infringed the competition rules.⁸⁰⁴

⁸⁰⁴ See also *Tesco Stores Limited and others v OFT* [2012] CAT 31, paragraph 88. See more recently, *Balmoral Tanks Limited v CMA* [2017] CAT 23 at [36] and the judgment of Green LJ in *Flynn Pharma Limited and Pfizer Inc. v CMA* [2020] EWCA Civ 339 at [114]-[116].

K. LEGAL PRINCIPLES

589. As explained at paragraphs 578-581 above, exchanges of information can only be caught by the Chapter I prohibition if the exchange establishes or is part of an agreement, decision or concerted practice. This is a necessary first step. The focus of the present decision is the third of those categories, concerted practices.
590. The existence of a concerted practice does not prejudice whether the concerted practice gives rise to a restriction of competition with the meaning of the Chapter I prohibition (i.e. whether it has as its object or effect the prevention, restriction or distortion of competition within the United Kingdom). That is a subsequent step in the analysis.
591. What follows in this section are the well-established legal principles relevant to both steps of the analysis. **Section L** then applies those principles to the exchange of information on 5 September 2018.

(1) The law applicable to concerted practices

592. As the Court of Appeal explained in *Balmoral Tanks v CMA* [2019] EWCA Civ 162 ("**Balmoral CoA**") at [16],⁸⁰⁵ a concerted practice is:

“a form of co-ordination between undertakings which, without going so far as to amount to an agreement properly so called, knowingly substitutes a practical co-operation between them for the risks of competition”

593. The Court of Appeal then proceeded at [17] to elaborate on the meaning of a concerted practice. Referring to the Court of Justice in *Suiker Unie and Others v Commission*, Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, EU:C:1975:174 ("**Suiker Unie**") at [173]-[174] it said this:

“[173] The criteria of co-ordination and co-operation laid down by the case law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the Common Market, including the choice of the persons and undertakings to which he makes offers or sells.

[174] Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.”

Accordingly, “the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the

⁸⁰⁵ Referring to paragraph 64 of the judgment of the Court of Justice in *ICI v Commission*, C-48/69, EU:C:1972:70. See also in this regard the more recent judgment of the Court of Justice in *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343 ("**T-Mobile**") at [26] and the cases cited.

operation of the market in question, with the result that competition between undertakings is restricted" ([*T-Mobile*], at paragraph 35 of the judgment)."

594. At [18], the Court of Appeal citing [59]-[61] of *T-Mobile* repeated the well-established legal proposition that a single meeting can potentially give rise to a concerted practice:

"59 [...] Depending on the structure of the market, the possibility cannot be ruled out that a meeting on a single occasion between competitors [...] may, in principle, constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical cooperation between them for competition and the risks that that entails.

60 [...] [T]he number, frequency, and form of meetings between competitors needed to concert their market conduct depend on both the subject-matter of that concerted action and the particular market conditions. If the undertakings concerned establish a cartel with a complex system of concerted actions in relation to a multiplicity of aspects of their market conduct, regular meetings over a long period may be necessary. If, on the other hand, as in the main proceedings, the objective of the exercise is only to concert action on a selective basis in relation to a one-off alteration in market conduct with reference simply to one parameter of competition, a single meeting between competitors may constitute a sufficient basis on which to implement the anti-competitive object which the participating undertakings aim to achieve.

61 In those circumstances, what matters is not so much the number of meetings held between the participating undertakings as whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question and knowingly substitute practical cooperation between them for the risks of competition. Where it can be established that such undertakings successfully concerted with one another and remained active on the market, they may justifiably be called upon to adduce evidence that that concerted action did not have any effect on their conduct on the market in question."

595. In *T-Mobile*, the Court of Justice also explained at [51] that:

"As regards the presumption of a causal connection formulated by the Court in connection with the interpretation of Article [101(1) TFEU], it should be pointed out, first, that the Court has held that **the concept of a concerted practice, as it derives from the actual terms of that provision, implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two**. However, the Court went on to consider that, subject to proof to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market. That is all the more the case where the undertakings concert together on a regular basis over a long period. Lastly, the Court concluded that such a concerted practice is caught by Article [101(1) TFEU], even in the absence of anti-competitive effects on the market (see *Hüls*, paragraphs 161 to 163)."

[Emphasis added]

596. The passage from *T-Mobile* quoted directly above along with those cited by the Court of Appeal chime with the summary of Advocate General (Kokott) at [74]-[75] of her Opinion:

“74. The concept of a concerted practice [...] implies, first, concertation between the undertakings concerned, second, conduct on the market following such concertation and, third, a relationship of cause and effect between concertation and market conduct, ⁽⁵⁰⁾ without any requirement, however, that this market conduct as such should result in a specific restriction on competition. ⁽⁵¹⁾”⁸⁰⁶

“75. According to the Court’s case-law, the rebuttable presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market; it is for the undertakings concerned to prove the contrary. ⁽⁵²⁾”

597. We also note what the Advocate General (Kokott) said in relation to the ‘Exchange of information between competitors in the light of the requirement of independence for the purposes of competition’:

“52. Regard must be had to the fact that independence of economic participants constitutes one of the basic requirements for competition to function. Accordingly, the provisions of the Treaty relating to competition are based on the concept that each economic operator must determine independently the policy which he intends to adopt on the common market. That requirement of independence precludes any direct or indirect contact between economic operators by which an undertaking influences the conduct on the market of its competitors or discloses to them its decisions or deliberations concerning its own conduct on the market, if as a result conditions of competition may apply which do not correspond to the normal conditions of the market in question. ⁽³⁹⁾

[...]

54. It is irrelevant in that connection whether only one undertaking unilaterally informs its competitors of its intended market behaviour or whether all participating undertakings inform each other of their respective deliberations and intentions. Simply when one undertaking alone breaks cover and reveals to its competitors confidential information concerning its future commercial policy, that reduces for all participants uncertainty as to the future operation of the market and introduces the risk of a diminution in competition and of collusive behaviour between them.”

598. Drawing on relevant case-law it is clear that the elements of a concerted practice are therefore:

- (1) **A reduction or removal of strategic uncertainty:** Does the conduct reduce or remove a degree of uncertainty as to the operation of the market in question?
- (2) **Knowing substitution:** Did the undertakings “*knowingly substitute practical cooperation between them for the risks of competition*”? This can be determined from the economic context and the content of the undertakings’ conduct and will occur where:

⁸⁰⁶ The authorities cited at footnotes 50-53 are: (50) *Commission v Anic Partecipazioni* (“*Anic*”), C-49/92 P, EU:C:1999:356, paragraph 118, and *Hüls v Commission* (“*Hüls*”), C-199/92 P, EU:C:1999:358, paragraph 161; (51) *Anic*, paragraph 124; *Hüls*, paragraph 165; *Montecatini v Commission*, C-235/92 P, EU:C:1999:362, paragraph 125; and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, C-105/04 P, EU:C:2006:592, paragraph 139; and (52) *Anic*, paragraphs 121 and 126, and *Hüls*, paragraphs 162 and 167.

- (i) Disclosure is deliberate (rather than inadvertent).
- (ii) The discloser should have the knowledge and awareness that disclosure might affect the competitive conduct of the recipient (even if they do not have an anti-competitive intention).
- (iii) The recipient requests or accepts competitively sensitive information.⁸⁰⁷ A recipient accepts competitively sensitive information unless they publicly distance themselves from the information. It is clear from the case-law that *“the notion of public distancing as a means of excluding liability must be interpreted narrowly”*.⁸⁰⁸ In terms of how a party can publicly distance itself, the undertaking concerned must clearly oppose the anti-competitive conduct⁸⁰⁹ and indicate to other undertakings concerned that it participated in conduct in a spirit that was different from theirs.⁸¹⁰ Silence or passive participation during an exchange of information will not therefore constitute public distancing.⁸¹¹ What matters is whether the undertaking concerned has expressed its opposition to anti-competitive conduct by distancing itself *“openly and unequivocally”*⁸¹² in a manner which is perceived as such by other undertakings concerned.⁸¹³

It is not necessary for both parties to a concerted practice to disclose information that reduces strategic uncertainty to the other; the disclosure of such information by one party and receipt of it by the other is sufficient.⁸¹⁴

- (3) **Causal connection:** a relationship of cause and effect between concertation and subsequent market conduct. In this regard the starting point is that there is a rebuttable presumption of a causal connection.

⁸⁰⁷ *Cimenteries CBR and Others v Commission*, T-25/95 etc, EU:T:2000:77, paragraphs 1849 and 1852. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraphs 206(vii) and 206(viii) (followed in *Makers UK Limited v Office of Fair Trading* [2007] CAT 11, paragraphs 103(vii) and 103(viii)); *Argos Ltd & Anor v Office of Fair Trading* [2006] EWCA Civ 1318 paragraph 21(v).

⁸⁰⁸ *Westfalen Gassen Nederland v Commission*, Case T-303/02, EU:T:2006:374, paragraph 103. See also, *Denki Kagaku Kogyo v Commission*, T-83/08, EU:T:2012:48, paragraph 53.

⁸⁰⁹ *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717, paragraph 31.

⁸¹⁰ See, for example, *Total Marketing Services v Commission*, C-634/13 P, EU:C:2015:614, paragraphs 20-21 and the case-law cited. See also *YKK and Others v Commission*, T-448/07, EU:T:2012:322, paragraph 113.

⁸¹¹ See, for example, *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717, paragraph 31 and the case-law cited. See also *YKK Corp v Commission*, T-448/07, EU:T:2012:322, paragraph 116.

⁸¹² *Westfälische Drahtindustrie v Commission*, T-393/10, EU:T:2015:515, paragraph 194. See also, for example, *Sumitomo Electric Industries and J-Power Systems v Commission*, T-450/14, EU:T:2018:455, paragraph 101.

⁸¹³ *LS Cable & System v Commission*, C-596/18 P, EU:C:2019:1025, paragraph 21 and the case-law cited.

⁸¹⁴ *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17 paragraph 658. See *Tate & Lyle and Others v Commission*, T-202/98, EU:T:2001:185, paragraph 58 (citing *Rhône-Poulenc v Commission*, T-1/89, EU:T:1991:56, paragraphs 122 to 123). See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraph 200; *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17, paragraph 159 and *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, paragraph 155.

- (i) Subject to proof to the contrary, which it is for the economic operators concerned to adduce, there is a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market.
- (ii) The typical situations identified in the case-law in which the presumption can be rebutted involve public distancing and reporting anti-competitive conduct to the relevant authorities. There may be other ways of rebutting the presumption depending on the specific facts of a case.⁸¹⁵

599. We also note that these well-established legal principles are equally applicable in the context of a tendering process: see *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4 at [195]-[207]-[214] and the analysis at [247]-[253].

600. When we address each of these three elements in our application of these legal principles in **Section L(1)** below, we also make reference to specific passages of the relevant case-law where appropriate.

(2) The law on object infringements

(a) The law on object infringements: general principles

601. The Competition Appeal Tribunal (“**CAT**”) recently set out the principles relating to infringements by object in *Lexon (UK) Limited v CMA* [2021] CAT 5 (“**Lexon**”). In that judgment the CAT carefully considered a number of authorities⁸¹⁶ regarding object infringements and set out at [178]-[185] the principles to be drawn from those authorities.

602. In particular, at [178], the CAT referred to the key (and well-established) principles regarding infringements by object. The CAT cited [112]-[118] of judgment of the Court of Justice in *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184 (“**Dole**”):

“112 [...] it must be recalled that, to come within the prohibition laid down in Article [101]1(1) [TFEU], an agreement, a decision by an association of undertakings or a concerted practice must have ‘as [its] object or effect’ the prevention, restriction or distortion of competition in the internal market.

113 In that regard, it is apparent from the Court’s case-law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects.

114 That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.

⁸¹⁵ *Eturas and Others* (“**Eturas**”), C-74/14, EU:C:2016:42, paragraphs 46 – 49.

⁸¹⁶ Including the judgments of the Court of Justice: *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, [112]-[118]; *Groupement des cartes bancaires (CB) v Commission*, C-67/13 P, EU:C:2014:2204, [49]-[54] and [35]-[57] of the (then) AG Wahl Opinion; *Gazdasági Versenyhivatal v Budapest Bank Nyrt.*, C-228/18, EU:C:2020:265, [33]-[40], [51], [54], [76] and [86] and 42, 44, 48-49 of the AG Bobek Opinion; the judgment of the Court of Appeal in *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13 at [36]-[38].

- 115 Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article [101]1(1) [TFEU], to prove that they have actual effects on the market. Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.
- 116 Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for the purpose of determining whether such conduct is covered by that defined in Article [101]1(1) [TFEU], it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent.
- 117 According to the case-law of the Court, in order to determine whether a type of coordination between undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition ‘by object’ within the meaning of Article [101]1(1) [TFEU], regard must be had, inter alia, to its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.
- 118 In addition, although the parties’ intention is not a necessary factor in determining whether a type of coordination between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account.”

(b) The law on object infringements: exchanges of information

603. In *Lexon*, the CAT went on to set out the well-established legal principles relevant to an assessment of whether there is an infringement by object specifically in the context of a concerted practice involving the exchange of information: see *Lexon* at [186].⁸¹⁷ The CAT set out (at [187]) the following eight legal principles⁸¹⁸ drawn from the leading authorities:⁸¹⁹
- (1) Each economic operator must determine independently the policy which it intends to adopt including the choice of the persons and undertakings to which it makes offers or sells.⁸²⁰
 - (2) This requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors. It does however strictly preclude any direct or indirect contact

⁸¹⁷ They included *Dole*, *Balmoral CAT*, *T-Mobile*, *Koninklijke Philips NV v Commission*, T-762/14, EU:T:2016:738 (*Smart Chips*) (“*Philips GC*”) and *Balmoral CoA*.

⁸¹⁸ Some of these principles overlap with legal principles set out at **Section K(1)** above in relation to establishing a concerted practice. They are however set out in full here for clarity and ease of reference.

⁸¹⁹ We also note the specific paragraphs of the authorities cited by the CAT when setting out the eight legal principles.

⁸²⁰ *T-Mobile*, paragraph 32; *Dole*, paragraph 119; *Philips GC*, paragraph 60; *Balmoral CAT*, paragraph 38; and *Balmoral CoA*, paragraph 17.

between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of competition in the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market.⁸²¹

- (3) The exchange of information between competitors is incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted.⁸²²
- (4) An exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anticompetitive object.⁸²³
- (5) The competition rules are designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such (and therefore, in order to find that a concerted practice has an anticompetitive object, there does not need to be a direct link between that practice and consumer prices).⁸²⁴
- (6) The concept of a concerted practice implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two. Subject to proof to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market. Such a concerted practice is caught by Article 101(1) TFEU, without the need to establish the existence of anticompetitive effects on the market.⁸²⁵
- (7) The fact that information exchanged with competitors could be gathered in the market does not prevent it from giving rise to an infringement. That information

⁸²¹ *T-Mobile*, paragraph 33; *Dole*, paragraph 120; *Philips GC*, paragraph 61; *Balmoral CAT*, paragraph 38; and *Balmoral CoA*, paragraph 17.

⁸²² *T-Mobile*, paragraph 35; *Dole*, paragraph 121; *Balmoral CAT*, paragraphs 39, 82 and 119; and *Balmoral CoA*, paragraph 17.

⁸²³ *T-Mobile*, paragraph 41; *Dole*, paragraph 122; *Philips GC*, paragraph 62; and *Balmoral CAT*, paragraph 50.

⁸²⁴ *T-Mobile*, paragraphs 38 and 39; and *Dole*, paragraph 125.

⁸²⁵ *T-Mobile*, paragraph 51; *Dole*, paragraphs 126-127; *Philips GC*, paragraphs 64-65; and *Balmoral CAT*, paragraphs, 40, 44, 46 and 119.

could enable participants to be aware of the relevant information more simply, rapidly and directly than they would from participating in the market.⁸²⁶

- (8) An exchange of information on a single occasion can potentially give rise to a concerted practice.⁸²⁷

604. These principles apply with equal force where the information exchanged is inaccurate or misleading:

“91 [...]the fact remains that the very disclosure of that type of information on future prices, whether correct or inaccurate, is capable of influencing the conduct of undertakings on the market. In that regard, it has been held that, even on the assumption that it is proved that certain participants in the cartel succeeded in misleading other participants by sending incorrect information and in using the cartel to their advantage, by not complying with it, the infringement committed is not eliminated by that simple fact.”⁸²⁸

(c) The law on object infringements in the context of exchanges of information: experience

605. In *Lexon*, the CAT also had to consider the issue of experience. This arose in the context of an argument raised by the appellant that the information exchange in that case was novel and without any precedent and therefore could not be held to be an infringement by object. Rejecting that proposition the CAT found (at [225]-[227]) that:

“225. For an infringement by object, it is necessary that the anticompetitive capacity that is the source of concern must be within experience and not be entirely novel or theoretical. However, we are not persuaded that an infringement by object based on an information exchange can only be found to exist where the precise nature of the exchanges, and the information contained, fall exactly within the terms of a prior legal authority. That would be an excessive constraint to impose on the doctrine. We consider that the jurisprudence shows that it is sufficient if the exchanges at issue fall within categories that are already sufficiently established by case law or by clear economic theory and agency decisional practice.

226. For example, the Opinion of Advocate General Kokott in *Lundbeck v Commission*, C-591/16 P, EU:C:2020:428 explains at paragraph 156:

“it is not necessary, in order to classify an agreement as a restriction of competition by object, that the same type of agreement has been found unlawful in the past. The role of experience and, therefore, foreseeability in that regard do not [...] concern the specific category of agreement in a particular sector, but the fact that it is established that certain forms of collusion [...] are in general and in the view of the experience gained, so likely to have negative effects on competition that it is not necessary to

⁸²⁶ *Balmoral CAT*, paragraphs 43 and 122.

⁸²⁷ *T-Mobile*, paragraph 59; *Balmoral CAT*, paragraph 46; and *Balmoral CoA*, paragraph 18.

⁸²⁸ *Philips GC*, paragraph 91. This paragraph was cited with approval in *Balmoral CAT*, see paragraphs 94-95.

demonstrate that they have had such effects in the particular case in hand.”

227. However, in this case, it is not necessary to explore the outer reaches of this boundary. The facts we have found above fall classically within the areas which established legal authority, economic theory and competition authority decisional practice have consistently determined as infringing. This is so on the basis that the conduct had the capacity to affect competition in the marketplace and that it undermined the fabric of competition, not least by reducing the uncertainty inherent in, and essential to, the competitive process. As the Tribunal in *Balmoral CAT* explained at paragraph 41:

“The strictness of the law in this regard reflects the fact that it is hard to think of any legitimate reason why competitors should sit together and discuss prices at all.”

606. This understanding of the case-law is clear when considering the broad range of information exchanges that have all been found to constitute a restriction of competition by object. They include for example:

- (1) Exchanges of information on factors relevant for setting future prices,⁸²⁹ price trends and indications of quotation prices.⁸³⁰
- (2) An exchange of information which pursued a collaborative strategy of higher pricing.⁸³¹
- (3) Exchanges of information relating to future pricing which allowed parties to “*create a climate of mutual certainty as to their future pricing policies*”.⁸³²
- (4) An exchange of information on an intention not to offer a customer a price they had previously requested or to price below a certain price point.⁸³³
- (5) An exchange of information on future pricing strategy in general.⁸³⁴
- (6) An exchange of statistical pricing information.⁸³⁵

⁸²⁹ *Dole*, paragraph 134.

⁸³⁰ *Dole and Fresh Del Monte Produce v Commission and Commission v Fresh Del Monte Produce*, C-293/13 P, EU:C:2015:416. In addition, the European Commission Notice: Guidelines on the applicability of Article 101 of the Treaty of the Functioning of the European Union to horizontal co-operation agreements, OJ C 11/1, 14 January 2011 (the ‘Horizontal Guidelines’) notes that “*private exchanges between competitors of their individualised intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities*”, paragraph 74.

⁸³¹ *Tate & Lyle and Others v Commission*, Case T-202/98, EU:T:2001:185.

⁸³² *Tate & Lyle and Others v Commission*, Case T-202/98, EU:T:2001:185, paragraphs 58 and 60. See *Rhone Poulenc v European Commission*, EU:T:1991:56, paragraphs 122 to 124.

⁸³³ *Philips GC*, paragraph 84 (upheld on appeal to the Court of Justice in C-98/17 P *Koninklijke Philips NV v Commission*, EU:C:2018:774).

⁸³⁴ *Philips GC*, paragraph 84 (upheld on appeal to the Court of Justice in C-98/17 P *Koninklijke Philips NV v Commission*, EU:C:2018:774).

⁸³⁵ *Aalborg Portland and Others v Commission*, Joined Cases C-204/00 P etc., EU:C:2004:6, paragraphs 279-297.

- (7) An exchange of information at a single meeting between competitors in relation to one parameter of competition.⁸³⁶
 - (8) An exchange of information where one party does not respect the agreed price increases.⁸³⁷
607. We note that all of these authorities referred to in this section (**Section K**) are settled case-law.⁸³⁸
608. In the section that follows, we apply these legal principles to the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018.

⁸³⁶ See, for example, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343. See also *Balmoral CA*.

⁸³⁷ *Cascades v Commission*, T-308/94, EU:T:1998:90, paragraph 230; see also, *Comap v Commission*, T-377/06, EU:T:2011:108, paragraph 99; *Fresh Del Monte v Commission*, T-587/08, EU:T:2013:219, paragraph 459.

⁸³⁸ For a very recent application of the principles set out in this section see, for example, the judgment of the EU General Court in *Scania and Others v Commission*, T-799/17, EU:T:2022:48 at [266]-[270] (regarding the legal principles relevant to a finding of a concerted practice), [271]-[290] (regarding the application of those principles to the facts of the case) and [298]-[299] (in relation to exchanges of information as infringements by object).

L. APPLICATION OF THE LEGAL PRINCIPLES TO THE EXCHANGE OF MESSAGES ON 5 SEPTEMBER 2018

609. This section draws on all of the evidence and sets out Ofcom’s legal assessment of the exchange of messages on 5 September 2018 set out in **Section I**, taking into account the:

- (1) economic context set out in **Section E**;
- (2) PICT Tender explained in **Section F**;
- (3) Parties’ conduct including their respective pricing strategies and approach to pricing set out in **Sections G and H**;
- (4) content of, and our factual findings in relation to, the exchange of messages on 5 September 2018 set out in **Section I**;
- (5) legal framework as described in **Section J**; and
- (6) applicable legal principles set out in **Section K**.

610. We then draw on our findings in **Sections E-I** and assess the evidence as to whether the exchange of messages on 5 September 2018 constitutes a concerted practice which had as its object the restriction or distortion of competition within the meaning of the Chapter I prohibition and relevant case-law by reference to:

- (1) Concerted practice:
 - (i) did the exchange of messages on 5 September 2018 reduce a degree of uncertainty as to the operation of the PICT Tender?;
 - (ii) did the Parties knowingly substitute practical cooperation between them for the risks of competition, which led to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the Airwave-TETRA products, the importance and number of the undertakings as well as the size and nature of the market?; and
 - (iii) was there a relationship of cause and effect between the exchange of messages on 5 September 2018 and the Parties’ subsequent conduct?
- (2) By object infringement:
 - (i) the legal and economic context;
 - (ii) the content of the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018; and
 - (iii) its objectives.

(1) Was the exchange of messages on 5 September 2018 a concerted practice?

611. This section considers the three elements set out in paragraph 610 above.

(a) *Sepura’s representations in relation to whether the exchange of messages on 5 September 2018 reduced uncertainty*

612. Sepura contends that “*none of the statements made in the ... [exchange of messages on 5 September 2018] were confidential or capable of reducing uncertainty between the*

parties”,⁸³⁹ even “*to a minor degree, still less a substantial one*”.⁸⁴⁰ Sepura has submitted that the information disclosed “*if believable, was either self-evident, vague, contradictory, or incapable of meaningful use*”.⁸⁴¹ Sepura has also described [the Sepura Regional Sales Director]’s disclosures as “*very high level*”, “*abstract*”, “*unclear*”, “*ambiguous*”, “*benign statements of fact*” and “*liminal*”.⁸⁴² In support of these descriptions of [the Sepura Regional Sales Director]’s disclosures, Sepura has submitted that the evidence demonstrates that:

- (1) It was self-evident that the structure of the PICT Tender did not incentivise the Parties to submit their best or aggressive bid pricing.⁸⁴³
- (2) The pricing it submitted to PICT on 14 September 2018 was effectively “*irrelevant*” as it was always understood that the price drop mechanism would be used to drive revenue and sales and that any pricing competition was likely to take place after the Framework Agreement became effective.⁸⁴⁴
- (3) [The Motorola VP for Sales] did not understand or have “*a tolerably clear idea of what [the Sepura Regional Sales Director] meant*” by his comments to “*keep prices as they are*” and “*keep prices as is*”.⁸⁴⁵ For example, Sepura has submitted that some messages in the exchange on 5 September 2018 (including Messages 17 - 19) demonstrate that [the Motorola VP for Sales] “*wrongly thought*” that Sepura’s recent pricing had been low or at least did not “*have an accurate understanding of Sepura’s pricing*”.⁸⁴⁶
- (4) [The Sepura Regional Sales Director]’s comments were of no meaningful use because there was no material degree of pricing transparency in the market and [the Motorola VP for Sales] did not “*actually know, with a tolerable degree of certainty, what Sepura’s supposed current pricing was or would be*”.⁸⁴⁷ Sepura has also submitted that “*Motorola would have had to do some very considerable work to unpack its potential significance, if it could do so at all, and there would, even if*

⁸³⁹ Sepura Oral Transcript, paragraph 93. See also Sepura SO Representations, paragraphs 1.6.2 and 4.1.3.

⁸⁴⁰ Sepura Oral Transcript, paragraph 59. See also Sepura Oral Transcript, paragraphs 82 and 93 and Sepura SO Representations, paragraph 4.38; Sepura’s Second Letter of Facts Representations, paragraphs 7, 9, 12 and 18.

⁸⁴¹ Sepura Oral Transcript, paragraph 50. See also Sepura SO Representations, paragraph 3.12; Sepura’s Second Letter of Facts Representations, paragraphs 5.2 and 8.1 and Sepura’s Second Letter of Facts Representations (Revised Annex A), rows 12 – 19.

⁸⁴² Sepura SO Representations, paragraphs 1.6.2, 2.10.2, 2.10.3; Sepura Oral Transcript, paragraph 102.

⁸⁴³ Sepura Oral Transcript, paragraph 140. See also Sepura SO Representations, paragraph 2.4.2.

⁸⁴⁴ Sepura SO Representations, Annex 1, rows 50 – 53. See also Sepura Oral Transcript, paragraphs 142 – 149 and 165 – 169.

⁸⁴⁵ Sepura Oral Transcript, paragraph 62.

⁸⁴⁶ Sepura Oral Transcript, paragraph 79. See also Sepura Oral Transcript, paragraphs 71, 78 and 81; Sepura SO Representations, paragraph 4.29.

⁸⁴⁷ Sepura Oral Transcript, paragraphs 62 and 64. See also Sepura SO Representations, paragraphs 1.6.2, 4.24, 4.26 – 4.39; Sepura Oral Transcript, paragraphs 76 and 82; Sepura’s Second Letter of Facts Representations (Revised Annex A), rows 86 – 97.

*they'd tried to do that, have been very considerable residual ambiguity".*⁸⁴⁸ Sepura's representations on pricing transparency have been summarised in more detail in **Section E(3)(d)** above.

(b) Ofcom's assessment of whether the information reduced uncertainty

613. In the following paragraphs, we set out our assessment of the evidence – including the economic context in which the exchange of messages on 5 September 2018 occurred and its content – and find that the exchange of messages on 5 September 2018 significantly reduced uncertainty between the Parties.

614. Our assessment is structured as follows:

- (1) The PICT Tender required the Parties to make strategic pricing decisions.
- (2) Each Party understood its strategic pricing decisions were constrained by the other Party's pricing.
- (3) Both Parties sought information to address ongoing strategic uncertainty about the other Party's pricing.
- (4) The exchange of messages on 5 September 2018 significantly reduced that strategic uncertainty.
- (5) Reduction of uncertainty relating to Sepura's subsequent conduct.
- (6) Reduction of uncertainty relating to Motorola's subsequent conduct.

(i) The PICT Tender required the Parties to take strategic pricing decisions

615. All tenders require bidders to take strategic decisions relating to (i) whether to respond to the tender at all; and (ii) the value at which to submit a tender response. Those strategic decisions require consideration of factors such as: the likelihood of a bid being successful; the likely value of orders under the resulting contract (taking into account volumes from existing customers and potential new customers); other potential bidders; and the level at which other potential bidders will submit their pricing. The PICT Tender was no different in that it also required potential bidders to take strategic decisions.

616. As explained in **Section F(3)(b)** above, the structure of the PICT Tender meant the bid pricing played a role in relation to the award of the PICT Tender and was also a key parameter on which the Parties were competing for customers on an ongoing basis.

617. The structure of the PICT Tender also required the Parties to take strategic decisions relating to (i) their overall pricing strategy including the extent to which they intended to rely on bid pricing or price drop pricing; and (ii) where to pitch their pricing within that overall strategy, and the Parties were afforded significant flexibility over both these decisions. The different ways in which the Parties could respond also meant the strategic pricing decisions they were required to take played a more important and more complex role than would be the case in relation to a more conventional tender process.

⁸⁴⁸ Sepura Oral Transcript, paragraph 102.

(ii) Each Party understood its strategic pricing decisions were constrained by the other Party's pricing

618. As explained in **Section F(3)** above, we recognise that some of the features of the PICT Tender may have meant the Parties were not as incentivised to submit as aggressive bid pricing as they may have submitted for other tender opportunities.⁸⁴⁹
619. It does not however follow that the bid pricing was “*irrelevant*” or that each Party understood that the other Party would not be submitting an aggressive bid. It does also not mean that the Parties were (or believed they were) unconstrained in their bid pricing.
620. On the contrary, the contemporaneous evidence set out in **Sections G and H** is clear that the Parties’ respective strategic pricing decisions were influenced and constrained by various factors, including the other Party’s pricing.⁸⁵⁰ In particular, that evidence demonstrates that both Parties were aware of the importance of ensuring their bid pricing was competitive, in the sense of ensuring it was within a certain tolerance of the other Party’s pricing. This is because they were concerned they could lose customers if the other Party undercut their pricing by a significant amount.
621. As a result, the Parties’ respective strategic pricing decisions were not taken in isolation, but needed to be calibrated by reference to what the Party knew (or could estimate) about the other Party’s likely pricing decisions. In other words, Motorola’s pricing decisions could be affected by knowledge of what Sepura intended to do on price and vice versa.
622. What was valuable to the Parties was not just the specific pricing the other intended to submit to PICT; it would also be valuable to know the other Party’s likely pricing strategy and overall level of pricing. For example, Sepura did not necessarily need to price below Motorola, or within only a small margin above Motorola, because it knew (i) it was highly likely to win a place on the Framework Agreement anyway; and (ii) provided its pricing was not so high above Motorola’s that it may trigger switching, it could subsequently reduce its pricing as considered necessary, for example during a Pricing Incentive Window.⁸⁵¹
623. If, however, Sepura knew that Motorola did not intend to, or was less likely to, submit aggressive bid pricing, then Sepura could respond to that knowledge by similarly not submitting aggressive bid pricing without any real risk that it would lose any customers (or any need to subsequently reduce its bid pricing).
624. As explained in **Section E(4)** above, additional insight on a competitor’s pricing strategy may be particularly valuable in the context of the market for the supply of Airwave-TETRA devices (which is a highly concentrated market, where there are high barriers to entry and material

⁸⁴⁹ For example, the Parties were highly likely to be awarded a place on the Framework Agreement because they were the strongest – if not effectively the only two – competitors in the market and the top three scoring bidders would win a place on the Framework Agreement. The PICT Tender also afforded the Parties the opportunity to offer price drops for up to 6 months a year and subsequently replace their bid pricing with their price drop pricing, and there was also the possibility of mini-competitions after 12 months.

⁸⁵⁰ See, in particular, the evidence referred to in **Sections G(5) and H(5)** above.

⁸⁵¹ See **Section F(2)(c)(iii)**.

barriers to customer switching, and where there is regular competitive interaction between competitors and a material degree of pricing transparency).

625. As a result, both Parties sought information to address this ongoing strategic uncertainty about the other Party's pricing.

(iii) Both Parties sought information to address ongoing strategic uncertainty about the other Party's pricing

626. To inform their strategic pricing decisions, the evidence demonstrates the Parties considered a range of factors including recent pricing levels, feedback from previous bids, competitive intelligence on the pricing and behaviour of other potential bidders, customer requirements and budgets, potential volumes, current and future costs, the duration of the Framework Agreement and exchange rate fluctuations.⁸⁵²
627. While various pricing information and competitive intelligence available to the Parties enabled them to have a general understanding of the other Party's current market pricing,⁸⁵³ and to estimate the other Party's likely pricing,⁸⁵⁴ there remained strategic uncertainty over the other Party's bid pricing.⁸⁵⁵ Moreover, it is clear that prior to the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018, neither Party knew what pricing strategy the other Party intended to adopt or where they may pitch their pricing within that overall strategy.
628. Taking into account this strategic uncertainty over the other Party's bid pricing, there is a significant amount of contemporaneous evidence detailing the extensive internal discussions that both Parties had in relation to their pricing strategy and exact price positioning, as well as seeking to estimate the other Party's likely pricing.
629. The structure and flexibility afforded by the PICT Tender, as well as the market context, also contributed to the uncertainty in relation to how each Party would approach its bid pricing. For example:

⁸⁵² For example, see Sepura First Response, Question 6, paragraph 6.2 and Sepura's 3, 6 and 10 September 2018 Presentations. Sepura Third Response – Part 2, Question 15(c) and (d); Motorola First Response, Question 8, paragraph 32 and Motorola's 11 September 2018 Presentation.

⁸⁵³ For example, [the Sepura Regional Sales Director] was able to "*to piece together his own view of where Motorola's pricing levels were likely to be*" (Sepura Seventh Response, Question 6(a), paragraph 6.1). See also, the evidence set out in **Section E(3)(d)**.

⁸⁵⁴ In relation to Sepura, see Sepura First Response, Question 6, paragraphs 6.13 - 6.15; Sepura's 6 September 2018 Presentation, pages 7 and 13; and [Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 68. In relation to Motorola, see Motorola's 30 August 2018 Presentation, pages 14, 18 and 23 (ATF 5280) and Motorola's 11 September 2018 Presentation, pages 7, 17 and 18.

⁸⁵⁵ For example, on 31 August 2018 [the Sepura Regional Sales Director] said that he considered it "*impossible to find any recent information on Motorola pricing with any information more than 6 months old*". See, Sepura First Response, Question 5, Document 1755.1 (ATF 2886). See also, Sepura First Response, Question 5, Document 74.1 (ATF 4562) (in response to Document 86.1 (ATF 4550), attaching Document 1928.1 (ATF 2713)).

- (1) Sepura was particularly concerned that Motorola's ownership of Airwave may enable it to submit a low price which could "*discredit/embarrass*" Sepura and result in it losing customers.⁸⁵⁶
 - (2) [The Sepura Regional Sales Director] commented during interview that "*[t]here was talk that in return for special Airwave pricing that Motorola would be given a device contract on the back of it. So there was a lot of uncertainty and nervousness within our business that we could be overlooked in this marketplace.*"⁸⁵⁷
 - (3) Sepura estimated Motorola's low, medium and high pricing.⁸⁵⁸
 - (4) Motorola estimated Sepura's low and high pricing.⁸⁵⁹
630. All tender processes are intended to attract wholly independent bids and take advantage of the climate of uncertainty under normal conditions of competition. The PICT Tender was no different, as evidenced by the inclusion of a Collusive Tendering Clause in the PICT Tender documentation.⁸⁶⁰
631. In this regard, we find that while the Parties had access to a range of information to inform their bid pricing for the PICT Tender, the evidence demonstrates there was ongoing uncertainty around (i) each Party's overall pricing strategy; and (ii) where each Party would pitch its pricing within that overall strategy.
- (iv) The exchange of messages on 5 September 2018 significantly reduced that strategic uncertainty
632. As explained above:
- (1) The PICT Tender required the Parties to take strategic pricing decisions which to some extent depended on their belief as to the other Party's pricing; and
 - (2) Both Parties were uncertain where the other Party may pitch its pricing.
633. It is in this context that the exchange of messages on 5 September 2018 took place. In this exchange, the Parties discussed a range of matters relevant to the PICT Tender including:
- (1) their perceptions of PICT's approach to and objectives for the PICT Tender, in particular, [the Sepura Regional Sales Director]'s general aversion to PICT's approach to the PICT Tender;

⁸⁵⁶ Sepura First Response, Question 5, Document 3178.1 (ATF 1528). Sepura has explained that [Sepura Executive Team Member C]'s concern was "*that Motorola may use its ownership of the Airwave network and Airwave Direct to subsidise the prices of its TETRA devices*" (Sepura Third Response – Part 2, Question 5(a), paragraph 5.2).

⁸⁵⁷ [Sepura Regional Sales Director] Interview Transcript (CD2), paragraph 110.

⁸⁵⁸ Sepura estimated Motorola's pricing for its [X] product as between £[X] and £[X]; its [X] product as between £[X] and £[X]; and its [X] product as between £[X]-£[X] (see Sepura's 6 September 2018 Presentation, pages 7 and 13).

⁸⁵⁹ See, for example, Motorola's 30 August 2018 Presentation, page 22 (ATF 5280) and Motorola's 11 September 2018 Presentation, page 19 and Motorola Second Response – Part 2, Question 18.

⁸⁶⁰ See Section F(2)(c)(i) above.

- (2) recent pricing in Europe;
 - (3) other potential competitors;
 - (4) potential volumes;
 - (5) distribution channels; and
 - (6) Sepura's pricing strategy and likely pricing levels.
634. In this exchange, the Parties shared market intelligence which provided them with an opportunity to confirm their understanding of various aspects of the PICT Tender and the wider market context directly from their competitor. It also enabled them to reduce uncertainty as to how their competitor might behave in the future.
635. Our assessment of the content of the messages is set out in **Section I** above.
636. When the messages are read as a whole, we found that [the Sepura Regional Sales Director] made a number of disclosures relating to (i) Sepura's pricing strategy for the PICT Tender; and (ii) the overall level of Sepura's proposed pricing in the context of its overall strategy.
637. None of [the Sepura Regional Sales Director]'s disclosures could have been legally obtained by Motorola from another source and they were clearly capable of influencing the Parties' decisions as to the pricing to submit in response to the PICT Tender. This is particularly the case where:
- (1) the exchange involved the two strongest competitors and ultimately the only two bidders for the PICT Tender; and
 - (2) the bid pricing played a role in relation to the award of the PICT Tender and was also a key parameter on which they were competing for customers on an ongoing basis.
638. Whether strategic uncertainty is reduced is not a question of hindsight. It requires a consideration of the conduct in question, taking into account the context in which it occurred.
639. Given the features of this market set out in **Sections E and F** above, the disclosure of competitively sensitive information between the two strongest competitors – that accounted for the vast majority (if not all) of sales of Airwave-TETRA devices – was particularly liable to further reduce uncertainty and impair undistorted competition.
640. In the following paragraphs, we set out our assessment of how the exchange of messages on 5 September 2018 reduced uncertainty between the Parties.

(v) Reduction in uncertainty relating to Sepura's subsequent conduct

641. Taking into account the evidence and our findings in **Sections E-I** above, we find that [the Sepura Regional Sales Director]'s disclosures to [the Motorola VP for Sales] significantly reduced uncertainty relating to (i) Sepura's pricing strategy for the PICT Tender; and (ii) the overall level of Sepura's proposed pricing in the context of its overall strategy.
642. As explained in **Section F(3)(b)**, the PICT Tender afforded the Parties significant flexibility over their pricing strategy. As indicated in that section, one strategy could have been to submit less competitive or aggressive bid pricing with the intention of maintaining this

pricing or utilising the price drop mechanism to drive sales, retain or win customers, if considered necessary in response to competitor pricing. This is the strategy that Sepura ultimately adopted. Another commercially rational strategy could have been to submit more competitive or aggressive bid pricing (and, in doing so, potentially undercut the other Party's pricing by an amount that may trigger switching).

643. If one Party selected the first strategy and the other selected the second strategy, this may have resulted in customers switching to the cheaper Party, potentially before the other Party had the opportunity to offer a price drop or engage in any mini-competition. Both Parties were alive to the risk that customers may switch suppliers if they did not get their pricing right and Sepura was particularly concerned that Motorola may significantly undercut Sepura's pricing.⁸⁶¹ Conversely, if both Parties selected the first strategy, there may have been no need to subsequently use the price drop mechanism to drive sales, retain or win customers, and competition following the award of the PICT Tender may have been conducted on the basis of higher bid pricing offered by both Parties.
644. We have found that (i) [the Sepura Regional Sales Director]'s disclosures relating to Sepura's pricing strategy were market intelligence and were accurate in that they reflected Sepura's actual pricing strategy;⁸⁶² and (ii) by the end of the conversation [the Sepura Regional Sales Director] had significantly reduced uncertainty in relation to the bid pricing that Sepura intended to adopt.
645. In particular, we have found that [the Sepura Regional Sales Director]'s disclosures informed [the Motorola VP for Sales] that Sepura did not intend to submit aggressive bid pricing – or pricing at a level which may change the status quo and result in customers switching to Sepura – and in doing so significantly reduced uncertainty in relation to the pricing that Sepura intended to adopt.
646. We have also found that [the Sepura Regional Sales Director] reiterated and strengthened his position in response to apparent uncertainty by [the Motorola VP for Sales]. For example:
- (1) [The Sepura Regional Sales Director] sent several messages in which he disclosed information on Sepura's pricing strategy.⁸⁶³
 - (2) Each time [the Motorola VP for Sales] expressed a degree of scepticism, [the Sepura Regional Sales Director] responded reiterating his position by reference to additional information relating to the structure of the PICT Tender, the timing of the ESN roll-out and his financial incentives.⁸⁶⁴
 - (3) [The Sepura Regional Sales Director] informed [the Motorola VP for Sales] that he would let him know if Sepura's senior management decided to adopt a different strategy. [The Sepura Regional Sales Director] did not update [the Motorola VP for

⁸⁶¹ See in particular **Sections G(5) and H(5)**.

⁸⁶² See **Section I(21)**.

⁸⁶³ See **Section I(21)**.

⁸⁶⁴ See **Section I(21)**.

Sales] on any change in pricing strategy.⁸⁶⁵ Our view is that [the Motorola VP for Sales] and Motorola would therefore have come away from the exchange of messages knowing that [the Sepura Regional Sales Director] was likely to recommend to his senior management to “*keep prices as is*” (i.e. not lower its current pricing) and that, in the absence of further communication to the contrary from [the Sepura Regional Sales Director], Sepura’s bid would be made on that basis. In other words, the fact [the Sepura Regional Sales Director] did not subsequently update [the Motorola VP for Sales], would have informed [the Motorola VP for Sales] that what [the Sepura Regional Sales Director] had told him about Sepura’s pricing strategy had been confirmed by Sepura’s senior management.

647. At the very least, we have found that [the Sepura Regional Sales Director]’s disclosures allowed [the Motorola VP for Sales] (and Motorola) to “*become aware of ... [the] information more simply, rapidly and directly*”⁸⁶⁶ than he would otherwise have done, which accordingly significantly reduced strategic uncertainty between the Parties.
648. Motorola did not need to know Sepura’s actual recent pricing for [the Sepura Regional Sales Director]’s disclosures to have been of meaningful and practical value to [the Motorola VP for Sales]. The significance of [the Sepura Regional Sales Director]’s disclosures was to indicate to [the Motorola VP for Sales] that Sepura was not intending to push prices down or win customers from Motorola as a result of its bid pricing. These disclosures would have been particularly valuable to Motorola in circumstances where it was actively seeking competitive intelligence on Sepura’s likely pricing. In this context, we note that:
- (1) Motorola was concerned that customers could switch to Sepura if it did not get its pricing right. [The Sepura Regional Sales Director]’s disclosures that the Parties should “*keep prices as they are*” and not compete for each other’s customers (at least in the short term), informed Motorola that the status quo (in terms of each other’s customer base) was appropriate and that Motorola did not need to lower its current pricing levels in response to the PICT Tender.
 - (2) Motorola estimated Sepura’s likely pricing through contemporaneous presentations prepared on Motorola’s pricing strategy, including a pricing overview in bar graph format showing Motorola’s proposed pricing against estimated low and high Sepura pricing.
 - (3) As Motorola already had a general understanding of Sepura’s current market pricing, even a relatively limited or high level disclosure would be valuable and provide meaningful information about Sepura’s pricing strategy, in particular as Motorola knew or would have expected Sepura to be its strongest competitor for the bid.
 - (4) A clear indication from Sepura that it would not be pricing aggressively would also indicate to Motorola that Sepura would be more likely to price towards the higher

⁸⁶⁵ [X], page 16, lines 3 – 4.

⁸⁶⁶ *Tate & Lyle and Others v Commission*, Joined Cases T-202/98, T-204/98 and T-207/9, EU:T:2001:185, paragraph 60.

end of Motorola's estimate of Sepura's likely pricing and that Motorola could therefore attach greater weight to that higher estimate when considering its pricing strategy for the PICT Tender.

649. In summary, we find that [the Sepura Regional Sales Director]'s disclosures significantly reduced uncertainty in relation to Sepura's subsequent conduct relating to the PICT Tender. This information was of strategic value to Motorola and at least capable of influencing its own pricing decisions in response to the PICT Tender.

(vi) Reduction in uncertainty relating to Motorola's subsequent conduct

650. The evidence set out in **Section I** above demonstrates that [the Motorola VP for Sales] was an active participant in the exchange of messages on 5 September 2018. He initiated the conversation about the PICT Tender and sent a total of 22 messages to [the Sepura Regional Sales Director] on matters relevant to the PICT Tender, including asking [the Sepura Regional Sales Director] questions relating to the PICT Tender.
651. As explained in **Section I(21)**, we have also found that there is nothing in [the Motorola VP for Sales]'s messages which demonstrates that he expressed any reservations or objected to [the Sepura Regional Sales Director]'s disclosures.
652. We have found that [the Motorola VP for Sales]'s conduct, including his failure to express any reservations or object to [the Sepura Regional Sales Director]'s disclosures would have given [the Sepura Regional Sales Director] confidence, comfort or assurance that Motorola:
- (1) was aware of Sepura's pricing intentions and would take that information into account in determining its own pricing strategy; and
 - (2) would have at least had a reduced incentive to submit a low or aggressive bid as it could be less concerned about Sepura submitting a low or aggressive bid which could result in Motorola losing customers (and Motorola was therefore less likely to submit an aggressive bid or pricing at a level which may change the status quo and result in customers switching to Motorola).
653. We have therefore found that [the Sepura Regional Sales Director]'s disclosures coupled with [the Motorola VP for Sales]'s failure to express any reservations or objections, reduced uncertainty relating to Motorola's pricing in response to the PICT Tender.
654. Sepura was actively seeking competitive intelligence and [the Motorola VP for Sales]'s acceptance of [the Sepura Regional Sales Director]'s disclosures would have been of strategic value to [the Sepura Regional Sales Director] and at least capable of affecting Sepura's pricing decisions in response to the PICT Tender. In particular:
- (1) Sepura had estimated Motorola's low, medium and high pricing. By disclosing to [the Motorola VP for Sales] that Sepura did not intend to price aggressively, and [the Motorola VP for Sales] accepting that information, [the Sepura Regional Sales Director] is likely to have felt more confident that Motorola would price towards the higher end of that range than would have been the case absent the disclosures. Sepura could therefore attach greater weight to that higher estimate when considering its pricing for the PICT Tender.

- (2) A key part of Sepura’s strategy was to ensure its pricing was within a certain tolerance of Motorola’s pricing and there were concerns within Sepura that Motorola may go in with a low bid price and significantly undercut Sepura. [The Motorola VP for Sales]’s acceptance of [the Sepura Regional Sales Director]’s disclosures are likely to have given [the Sepura Regional Sales Director] reassurance that his pricing recommendations to Sepura’s management did not give rise to a material risk of customers switching or Sepura losing market share as a result.

(vii) Conclusion on reduction in uncertainty

655. We find that the exchange of messages on 5 September 2018 significantly reduced uncertainty in relation to a key parameter on which the Parties were competing for customers and undermined a significant phase of competition between the Parties.
656. Pricing is the key driver of competition between the Parties and each Party understood its strategic pricing decisions in response to the PICT Tender were constrained by the other Party’s pricing. While various pricing information and competitive intelligence was available to the Parties, there remained strategic uncertainty as to where each Party may pitch their pricing in the context of the PICT Tender.
657. In particular, the PICT Tender afforded the Parties significant flexibility over (i) their overall pricing strategy; and (ii) where to pitch their pricing within that overall strategy. In this context, there was uncertainty as to where each Party may pitch its pricing.
658. We find that the exchange of messages on 5 September significantly reduced that strategic uncertainty taking into account the economic and market context in which it occurred. In particular:
- (1) [The Sepura Regional Sales Director]’s repeated disclosures that Sepura would not be lowering its pricing or pricing aggressively – which [the Sepura Regional Sales Director] reinforced and sought to validate by references to the structure of the PICT Tender, the timing of the ESN roll-out and his financial incentives – significantly reduced uncertainty relating to the pricing strategy that Sepura intended to adopt;
- (2) [The Sepura Regional Sales Director]’s disclosures to “*keep prices as they are*” and “*keep prices as is*” significantly reduced uncertainty around the likely pricing levels Sepura would adopt within its overall strategy; and
- (3) [The Motorola VP for Sales]’s conduct and failure to express any reservation or object to [the Sepura Regional Sales Director]’s disclosures, reduced uncertainty relating to the pricing strategy that Motorola was likely to adopt.
659. Moreover, the exchange of a series of messages indicating the pricing strategy one competitor intended to adopt in response to the PICT Tender, could affect the bid from the only other competitor for the bid, and the price set by the outcome of the PICT Tender for a significant number of years. This is supported by the case-law (set out above at **Section K**) as

well as the context specific to these messages set out in **Sections E-I** above.⁸⁶⁷ We note in particular the:

- (1) Parties are the two strongest competitors;
- (2) high barriers to entry and material barriers to customer switching;
- (3) nature of the information disclosed;
- (4) key role and influence of [the Motorola VP for Sales] and [the Sepura Regional Sales Director];
- (5) timing of the exchange of messages on 5 September 2018, prior to the deadline for submission of bids and prior to the Parties finalising their respective strategic pricing decisions; and
- (6) duration and scope of the Framework Agreement.

660. The content of the messages exchanged on 5 September 2018 is in stark contrast to the principle that economic operators should determine their market conduct independently and should not directly or indirectly influence the conduct on the market of a competitor or disclose its future conduct.

(c) Sepura's representations regarding Knowing Substitution

661. Sepura does not dispute the fact the exchange of messages on 5 September 2018 took place. Sepura also accepts that this exchange of messages was “foolish”, “flirting with regulatory risk”, “stupid” and “wrong”.⁸⁶⁸ However, Sepura rejects Ofcom’s case that there is sufficient contemporaneous evidence and relevant context to prove the exchange of messages on 5 September 2018 satisfies the requirements of reciprocity.

662. Sepura puts forward an alternative explanation for the exchange of messages on 5 September 2018 which it contends demonstrates there was no reciprocity or “*knowing substitution*”. Sepura’s version of events is that [the Sepura Regional Sales Director] had meant to text his former neighbour instead of [the Motorola VP for Sales]. Sepura has submitted that the exchange of messages on 5 September 2018 that followed occurred quite late at night for [the Sepura Regional Sales Director] and after he had had a few drinks.⁸⁶⁹ Sepura contends that “*good portions of the thread of messages plainly consist in [the Sepura Regional Sales Director] winding-up, or in modern parlance “trolling”, [the Motorola VP for Sales]”*⁸⁷⁰ and that [the Sepura Regional Sales Director]’s “*primary intention was to be non-committal and leave [the Motorola VP for Sales] guessing*”.⁸⁷¹ Sepura further

⁸⁶⁷ See for example, *Balmoral v CMA* [2017] CAT 23, paragraph 103.

⁸⁶⁸ Sepura Oral Transcript, paragraph 131

⁸⁶⁹ Sepura Oral Transcript, paragraph 39

⁸⁷⁰ Sepura Oral Transcript, paragraphs 40 and 63.

⁸⁷¹ Sepura SO Representations, Annex 1, rows 6 – 10.

contends that [the Motorola VP for Sales] was not taking [the Sepura Regional Sales Director] seriously and at times responded in a jocular manner.⁸⁷²

663. In support of its alternative explanation Sepura relies on:

- (1) [The Sepura Regional Sales Director]’s after-the-event account of what he meant by his messages in the exchange with [the Motorola VP for Sales] on 5 September 2018.⁸⁷³ For example, [the Sepura Regional Sales Director] has described his conduct in this exchange of messages as mischievous.⁸⁷⁴
- (2) [S&L], and in particular [the Motorola VP for Sales]’s after-the-event account of what he understood [the Sepura Regional Sales Director] to have meant by his messages in their exchange on 5 September 2018. For example, Sepura relies on the fact that “[the Motorola VP for Sales] explained that it is not always easy to determine whether [the Sepura Regional Sales Director] is being serious” and that [the Sepura Regional Sales Director]’s contradictory statements in their exchange of messages on 5 September 2018 reflected his demeanour.⁸⁷⁵
- (3) Sepura’s assessment of the relevant market context and its view that the bitter rivalry that exists between both Motorola and Sepura,⁸⁷⁶ and between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on a personal level, undermines any suggestion that there was an intention to restrict competition.⁸⁷⁷
- (4) Sepura’s interpretation of the exchange of messages on 5 September 2018 and its view that [the Motorola VP for Sales] did not request or accept any competitively sensitive information. In particular, Sepura contends that:
 - (i) [The Motorola VP for Sales] “immediately” and “deliberately” changed the subject which demonstrates “he was plainly uncomfortable with the direction the conversation had taken”.⁸⁷⁸
 - (ii) It is unrealistic to suggest [the Motorola VP for Sales] probed or encouraged [the Sepura Regional Sales Director] to provide him with competitively sensitive information; rather, [the Motorola VP for Sales] questioned the

⁸⁷² Sepura Oral Transcript, paragraphs 123, 124 and 135 – 138.

⁸⁷³ Sepura SO Representations, section 4 and Annex 1.

⁸⁷⁴ [Sepura Regional Sales Director] Interview Transcript (CD2), paragraphs 108, 129 and 215. See also Sepura SO Representations, paragraph 1.4.1.

⁸⁷⁵ [S&L], page 8, lines 17-20; Sepura SO Representations, paragraph 4.14 and Annex 1, row 10.

⁸⁷⁶ Sepura SO Representations, paragraphs 4.3 and 4.6 – 4.10 and 4.16. See also Sepura’s Second Letter of Facts Representations (Revised Annex A), rows 1 – 3.

⁸⁷⁷ Sepura has submitted that [the Sepura Regional Sales Director] “does not like” or “trust” [the Motorola VP for Sales] (Sepura SO Representations, paragraphs 4.3 and 4.11 to 4.16). [The Sepura Regional Sales Director] also indicated on various occasions during interview that he did not trust [the Motorola VP for Sales] and that his relationship with him was “non-existent”, and certainly not a personal relationship (see [Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 51 and [Sepura Regional Sales Director] Interview Transcript (CD2), paragraphs 68, 69, 78, 79, 87 and 192).

⁸⁷⁸ Sepura Oral Transcript, paragraphs 96 and 126 and Sepura SO Representations, paragraphs 1.4.4, 4.17 and 4.19. See also Sepura Oral Transcript, paragraphs 45 and 122.

veracity of [the Sepura Regional Sales Director]’s disclosures and changed the subject.⁸⁷⁹

- (iii) The exchange of messages on 5 September 2018 “*is clearly distinguishable to a meeting*” and there was nothing in [the Motorola VP for Sales]’s reaction to [the Sepura Regional Sales Director]’s disclosures relating to Sepura’s pricing strategy to indicate such disclosures had been received, understood and accepted by [the Motorola VP for Sales] or reduced uncertainty around [the Motorola VP for Sales]’s or Motorola’s subsequent behaviour.⁸⁸⁰
- (iv) [The Motorola VP for Sales] “*immediately*” reported the exchange of messages on 5 September 2018 to Motorola’s lawyers⁸⁸¹ and Motorola then “*immediately*” put in place ring-fencing measures⁸⁸² which demonstrate that neither [the Motorola VP for Sales] nor Motorola intended to accept [the Sepura Regional Sales Director]’s disclosures relating to Sepura’s pricing strategy.⁸⁸³
- (v) [The Motorola VP for Sales] had no intention to request or accept competitively sensitive information from [the Sepura Regional Sales Director]; he thought [the Sepura Regional Sales Director] was just “*letting off steam*”.⁸⁸⁴

664. Sepura has made representations that the context in which the exchange of messages on 5 September 2018 occurred therefore demonstrates that the Parties did not knowingly substitute practical cooperation between them for the risks of competition.⁸⁸⁵

665. Sepura also contends that there can be no reciprocity in this case because the exchange of messages on 5 September 2018 did not eliminate or substantially reduce uncertainty.⁸⁸⁶

⁸⁷⁹ Sepura SO Representations, paragraph 4.17 and 4.18;

⁸⁸⁰ Sepura SO Representations, paragraphs 3.11, 4.19 and 4.21. Sepura also contends that [the Sepura Regional Sales Director] did not consider his disclosures relating to Sepura’s pricing strategy to be competitively sensitive.

⁸⁸¹ Sepura SO Representations, paragraphs 4.15, 4.5, 5.8, 5.24 and 5.25; Sepura Oral Transcript, paragraph 46. We note that Sepura also describes [the Motorola VP for Sales] as “*promptly*” reporting his exchange of messages with [the Sepura Regional Sales Director] on 5 September 2018 (see Sepura SO Representations, paragraph 1.4.5).

⁸⁸² Sepura SO Representations, paragraphs 1.4.6 and 8.3; Sepura Oral Transcript, paragraphs 47 and 107. We note that Sepura also describes Motorola as “*taking rapid steps to ensure that there was no risk of any information that may have been received affecting its bid*” (see Sepura SO Representations, paragraph 4.20). See also Sepura’s Second Letter of Facts Representations, paragraphs 5.2, 11, 12 and 18 and Sepura’s Second Letter of Facts Representations (Revised Annex A), rows 65 – 71.

⁸⁸³ Sepura SO Representations, paragraph 4.20.

⁸⁸⁴ Sepura SO Representations, paragraph 4.20.

⁸⁸⁵ Sepura SO Representations, paragraphs 4.1.1 and 4.2 – 4.16.

⁸⁸⁶ Sepura SO Representations, paragraph 3.11.

(d) Ofcom's assessment of Knowing Substitution

666. Our factual assessment of the messages is set out in **Section I** above. It is clear from that assessment and a plain reading of the messages that the Parties "*knowingly substitute[d] practical cooperation between them for the risks of competition*". For ease of reference we repeat some of that analysis below. In particular, it is clear that:

- (1) [The Sepura Regional Sales Director]'s disclosures were deliberate (rather than inadvertent);
- (2) [The Sepura Regional Sales Director] had the knowledge and awareness that his disclosures might affect the conditions of competition irrespective of whether he had an anti-competitive intention; and
- (3) [The Motorola VP for Sales] accepted competitively sensitive information.⁸⁸⁷

667. It is not necessary for both parties to a concerted practice to disclose information that reduces strategic uncertainty to the other; the disclosure of such information by one party and receipt of it by the other is sufficient.⁸⁸⁸

668. We set out below our assessment of [the Sepura Regional Sales Director]'s and [the Motorola VP for Sales]'s conduct by reference to the points above. We then assess Sepura's alternative explanation of the exchange of messages on 5 September 2018.

(i) [Sepura Regional Sales Director]

669. As explained in **Section I(21)**, [the Sepura Regional Sales Director] made repeated disclosures in the exchange of messages on 5 September 2018 relating to Sepura's pricing strategy that Sepura would not be lowering its prices or pricing aggressively. These cannot credibly be described as inadvertent disclosures. Rather, we find that [the Sepura Regional Sales Director]'s disclosures were deliberate.

670. For the following reasons we also find that [the Sepura Regional Sales Director] knew or should have known that his disclosures might have affected Motorola's conduct relating to the PICT Tender.

- (1) One of the factors Sepura took into account when determining its overall pricing strategy was competitor pricing and behaviour and [the Sepura Regional Sales Director] was tasked with obtaining competitive intelligence on Motorola's bidding intent and likely approach to pricing.⁸⁸⁹ [The Sepura Regional Sales Director] was

⁸⁸⁷ *Cimenteries CBR and Others v Commission, T-25/95 etc*, EU:T:2000:77, paragraphs 1849 and 1852. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraphs 206(vii) and 206(viii) (followed in *Makers UK Limited v Office of Fair Trading* [2007] CAT 11, paragraphs 103(vii) and 103(viii)); *Argos Ltd & Anor v Office of Fair Trading* [2006] EWCA Civ 1318 paragraph 21(v).

⁸⁸⁸ *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17 paragraph 658. See *Tate & Lyle and Others v Commission, T-202/98*, EU:T:2001:185, paragraph 58 (citing *Rhône-Poulenc v Commission, T-1/89*, EU:T:1991:56, paragraphs 122 to 123). See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraph 200; *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17, paragraph 159 and *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, paragraph 155.

⁸⁸⁹ See evidence identified in Section G(5).

therefore aware that competitive intelligence on Motorola's pricing strategy would help inform Sepura's pricing and therefore affect Sepura's conduct in relation to the PICT Tender. It follows that [the Sepura Regional Sales Director] knew or should have known that disclosing information on Sepura's pricing strategy to Motorola might affect Motorola's approach to pricing and reduce price competition for the PICT Tender. This is particularly the case in circumstances where (i) Sepura had identified price as the key factor on which the Parties were competing;⁸⁹⁰ and (ii) [the Sepura Regional Sales Director] exchanged information about Sepura's pricing strategy with its strongest competitor for the PICT Tender.

- (2) [The Sepura Regional Sales Director] did exactly as he told [the Motorola VP for Sales] he would do in that he recommended to Sepura's senior management to "[u]se current force pricing" i.e. keep prices as is.⁸⁹¹ This undermines any suggestion [the Sepura Regional Sales Director] was just being mischievous; rather, it indicates [the Sepura Regional Sales Director] intended to share Sepura's actual pricing strategy.
- (3) In any event, even if [the Sepura Regional Sales Director]'s disclosures were intended to be inaccurate, misleading or mischievous, he should have known they were still capable of influencing Motorola's conduct in relation to the PICT Tender.⁸⁹²
- (4) Disclosing competitively sensitive information relating to pricing – including on pricing strategy for an ongoing tender exercise – with a competitor is a well-established competition law infringement. [The Sepura Regional Sales Director]'s comments during interview also demonstrate he knew the exchange of messages with [the Motorola VP for Sales] on 5 September 2018 should not have taken place:
 - (i) [The Sepura Regional Sales Director] confirmed to Ofcom that he would "*not engage and give the competition any sort of insight*" and that he appreciated the importance of keeping Sepura's pricing strategy to a small circle of people even within Sepura.⁸⁹³
 - (ii) [The Sepura Regional Sales Director] deleted the exchange of messages with [the Motorola VP for Sales] on 5 September 2018 from his personal mobile

⁸⁹⁰ See evidence identified in Section G(5).

⁸⁹¹ In his presentations to Sepura's senior management, [the Sepura Regional Sales Director] had identified a risk to Sepura's market share and described mitigating this risk by "[e]nsur[ing] pricing consistent with current offers" (see, for example, Sepura's 6 September 2018 Presentation, page 11). This suggested mitigation is also consistent with [the Sepura Regional Sales Director]'s comments in his exchange of messages with [the Motorola VP for Sales] on 5 September 2018 that he would be recommending to Sepura's senior management to "*keep prices as is*" and that he did not see why Sepura should give away margin. [The Sepura Regional Sales Director]'s comment to [the Motorola VP for Sales], "*I get paid on GM not level of discount*" also confirmed to [the Motorola VP for Sales] that [the Sepura Regional Sales Director]'s remuneration would not be affected by not offering PICT a discount. This is consistent with [the Sepura Regional Sales Director] removing from Sepura's 6 September 2018 Presentation the proposed [X]% discount for mobiles which had featured in Sepura's 3 September 2018 Presentation (compare page 14 of Sepura's 3 September 2018 Presentation with page 14 of Sepura's 6 September 2018 Presentation).

⁸⁹² *Philips GC*, paragraph 91 and the case-law cited. See also *Balmoral CAT*, paragraphs 94-95.

⁸⁹³ See [Sepura Regional Sales Director] Interview Transcript (CD1), paragraphs 54 and 95 to 99 and [Sepura Regional Sales Director] Interview Transcript (CD2), paragraphs 88 – 89.

phone and, according to his recollection, he did so just one or two days after the exchange occurred.

(ii) [Motorola VP for Sales]

671. Taking into account the legal and economic context and content of the exchange of messages on 5 September 2018, we find that [the Motorola VP for Sales] at the very least accepted [the Sepura Regional Sales Director]’s disclosures relating to Sepura’s pricing strategy.

[The Motorola VP for Sales] accepted [the Sepura Regional Sales Director]’s disclosures

672. First, we reject the argument that the exchange of messages on 5 September 2018 is clearly distinguishable from a meeting. The exchange of messages on 5 September 2018 involved an ongoing discussion between two competitors involving a series of text messages on mobile phones and both individuals clearly knew the identity of the other. In such circumstances, the series of messages is akin to the interaction that occurs at a meeting.

673. We have assessed the content of the exchange of messages on 5 September 2018 in **Section I** and found no evidence that [the Motorola VP for Sales] expressed any reservations or objections in response to [the Sepura Regional Sales Director]’s messages. In particular:

- (1) Changing the subject does not constitute “*openly and unequivocally*” objecting to information and does not therefore constitute evidence [the Sepura Regional Sales Director]’s disclosures were not accepted. This is particularly true in circumstances where (i) [the Motorola VP for Sales] only decided to change the subject after receiving repeated messages from [the Sepura Regional Sales Director] relating to Sepura’s pricing strategy; and (ii) [the Motorola VP for Sales] went on to discuss personal matters with [the Sepura Regional Sales Director].
- (2) [The Motorola VP for Sales]’s subsequent conduct in reporting the exchange of messages on 5 September 2018 internally within Motorola did not amount to an objection to [the Sepura Regional Sales Director]’s disclosures.

674. The evidence demonstrates that far from being a passive participant, it was [the Motorola VP for Sales] that turned the conversation to the PICT Tender and subsequently probed [the Sepura Regional Sales Director] by asking him questions relating to the PICT Tender including:

- (1) Asking [the Sepura Regional Sales Director] why he thought the PICT Tender was “*a home office stitch up*”.
- (2) Querying what [the Sepura Regional Sales Director] meant by his comment that he had “*met customers who have been offered subsidise [sic] terminals*”.
- (3) Suggesting to [the Sepura Regional Sales Director] that [the Sepura Regional Sales Director] was “*not a fan of the PICT framework approach*”.
- (4) Asking [the Sepura Regional Sales Director] who else may submit bids for Lot 1 of the PICT Tender.

- (5) Asking [the Sepura Regional Sales Director] whether Leonardo or Airbus had Airwave approved devices.
 - (6) Asking [the Sepura Regional Sales Director] whether Capita still supplied Sepura's Airwave-TETRA devices to West Midlands Police (WMP) and Greater Manchester Police (GMP).
675. Irrespective of [the Motorola VP for Sales]'s rationale for engaging in the exchange, it is clear that his responses encouraged [the Sepura Regional Sales Director] to disclose further information in relation to Sepura's pricing strategy and likely pricing levels. For example:
- (1) In response to [the Sepura Regional Sales Director]'s comment that there was "*no chance*" Sepura would be submitting its best prices from day one, [the Motorola VP for Sales] replied "*Lol. You'll be keen...I'm sure of that*". [The Sepura Regional Sales Director]'s reply sought to validate his previous comment by reference to the structure of the PICT Tender and market context when he replied "*No based on the number of opportunities and the likelihood of switching then keep prices as they are.*"⁸⁹⁴
 - (2) In response to this comment from [the Sepura Regional Sales Director] to "*keep prices as they are*", [the Motorola VP for Sales] replied by saying "*That means really low in Sepura speak then* 🤔🤔".⁸⁹⁵ [The Sepura Regional Sales Director] replied with four further messages seeking to reinforce his comments that Sepura would not be submitting aggressive bid pricing to PICT, by reference to the structure of the PICT Tender, timing of the ESN and the fact he is not paid based on the level of discount offered to PICT. He also informed [the Motorola VP for Sales] that he would let him know if Sepura's senior management did not accept his pricing recommendation.⁸⁹⁶
676. We further find that [the Motorola VP for Sales] did understand, or ought to have understood, that the information provided to him by [the Sepura Regional Sales Director] was competitively sensitive:
- (1) [The Motorola VP for Sales] was responsible for the pricing of Motorola's bid⁸⁹⁷ and would have been aware that bid pricing was a key parameter on which it was competing for customers. [The Motorola VP for Sales] would have also been aware that Motorola's key objectives were to retain existing customers and win customers from Sepura and that to help fulfil those objectives, Motorola had sought competitive intelligence on recent market price points and Sepura's likely pricing.⁸⁹⁸

⁸⁹⁴ Messages 46 – 48, **Section I**.

⁸⁹⁵ Messages 48 – 49, **Section I**.

⁸⁹⁶ Messages 50 – 53, **Section I**.

⁸⁹⁷ Paragraph 342 above.

⁸⁹⁸ See, in particular, the evidence set out in **Section H(5)** above.

- (2) Taking into account the evidence and our assessment in **Sections E-I** above, we find that [the Motorola VP for Sales] should have been aware that [the Sepura Regional Sales Director]’s disclosures relating to Sepura’s pricing strategy provided him with an insight into Sepura’s pricing strategy that was not publicly available and was competitively sensitive, even if he did not appreciate the anti-competitive nature of the disclosures.
- (3) Notwithstanding this, the fact he reported the exchange of messages with [the Sepura Regional Sales Director] on 5 September 2018 indicates that he recognised that the exchange could be anti-competitive in nature.

(iii) Sepura’s alternative explanation

677. We have considered Sepura’s alternative explanation in light of all the evidence and our factual findings in **Sections E-I**. We have addressed Sepura’s submissions in support of its alternative explanation in **Section I(21)** above.
678. In particular, while the tone of some of the earlier messages in the exchange may not have been serious, [the Sepura Regional Sales Director] and [the Motorola VP for Sales] went on to exchange views and requested and obtained information relating to the PICT Tender and the competitive landscape more generally, some of which they agreed with. The content of the messages indicates that they exchanged information which they both understood to be true, and which was of value to them. It is also clear that the tone of subsequent messages, and in particular Messages 21/22, 46, 48, 50, 51, 52 and 53 relating to Sepura’s pricing strategy, was serious.
679. Consistent with that, [the Motorola VP for Sales]’s decision to report the exchange internally the following day suggests that [the Motorola VP for Sales] did not dismiss the exchange as [the Sepura Regional Sales Director] joking around or “*letting off steam*”.
680. We further note that:
 - (1) [The Sepura Regional Sales Director]’s evidence has changed over the course of the investigation and is not always consistent with other evidence. For example, on 5 December 2019 Ofcom first showed [the Sepura Regional Sales Director] his exchange of messages with [the Motorola VP for Sales] on 5 September 2018. [The Sepura Regional Sales Director] did not however suggest to Ofcom that he meant to text his former neighbour instead of [the Motorola VP for Sales] until 4 February 2021, some 14 months later.⁸⁹⁹
 - (2) In any event, it is irrelevant whether [the Sepura Regional Sales Director] meant to text his former neighbour given the uncontested fact that [the Sepura Regional Sales Director] continued the conversation for over two hours in the knowledge that he was communicating with [the Motorola VP for Sales].
 - (3) A conversation lasting over two hours, consisting of a total of 69 messages which included pleasantries and a discussion of personal matters does not indicate a

⁸⁹⁹ See also the evidence referenced in **Section I(2)** of this Decision.

frosty, antagonistic or unpleasant exchange. On the contrary, [the Sepura Regional Sales Director]’s comment that he would let [the Motorola VP for Sales] know if Sepura’s senior management did not accept his pricing proposals is indicative of seeking to develop a relationship based on trust.

- (4) Sepura’s submissions that [the Sepura Regional Sales Director] “*does not like*” or “*trust*” [the Motorola VP for Sales] are also inconsistent with evidence which demonstrates:
- (i) [The Motorola VP for Sales] and [the Sepura Regional Sales Director] had a relationship outside of work; they discussed personal matters⁹⁰⁰ and meeting up socially on more than one occasion.⁹⁰¹
 - (ii) Between January and June 2017, [the Sepura Regional Sales Director] and [the Motorola VP for Sales] exchanged a number of messages regarding a potential job offer for [the Sepura Regional Sales Director] from Motorola.⁹⁰² In one of these messages, [the Sepura Regional Sales Director] said to [the Motorola VP for Sales]: “*I found our discussions really interesting and showed we have a great deal in common and mutual respect to ensure we can make this work*”.⁹⁰³
 - (iii) In May 2018 (just a few months prior to the exchange of messages on 5 September 2018), [the Sepura Regional Sales Director] and [the Motorola VP for Sales] exchanged messages relating to [the Sepura Regional Sales Director] potentially re-joining Motorola and [the Sepura Regional Sales Director] sent [the Motorola VP for Sales] a copy of his employment contract at Sepura. The evidence suggests they met up in mid-May 2018.⁹⁰⁴
 - (iv) [The Sepura Regional Sales Director] sent [the Motorola VP for Sales] a funny video on 17 February 2019 and had previously sent him a video on 29 January 2019.⁹⁰⁵
 - (v) [The Sepura Regional Sales Director] congratulated [the Motorola VP for Sales] on LinkedIn when he got a new job.⁹⁰⁶

⁹⁰⁰ See, for example, Motorola Sixth Response, Document 464, messages 63 – 75 (ATF 5765).

⁹⁰¹ See, for example, Motorola Sixth Response, Documents 465 (ATF 5766), 472 (ATF 5773) and 473 (ATF 5774) which indicate [the Motorola VP for Sales] and [the Sepura Regional Sales Director] met up for beers around January, March and June 2017. We note that this is inconsistent with [the Sepura Regional Sales Director]’s evidence during interview in which he stated “... *when I was going through the transition out of Motorola I might have met guys for beers and what have you but that’s very much in the past ... The last time I think I probably had a beer with the Motorola guy would be at least four, five years ago*” ([Sepura Regional Sales Director] Interview Transcript (CD1), paragraph 52).

⁹⁰² See evidence referred to in paragraph 38(2) of this Decision.

⁹⁰³ Motorola Sixth Response, Document 467 (ATF 5768)

⁹⁰⁴ See evidence referred to in paragraph 38(5) of this Decision.

⁹⁰⁵ [Sepura Regional Sales Director] First Response, Question 6.

⁹⁰⁶ Motorola Sixth Response, Document 471 (ATF 5772) and [Sepura Regional Sales Director] Interview Transcript (CD3), paragraph 26.

- (5) In any event, whether or not [the Sepura Regional Sales Director] liked or trusted [the Motorola VP for Sales] does not preclude [the Sepura Regional Sales Director] disclosing competitively sensitive information to [the Motorola VP for Sales].
681. Taking into account all the evidence and our findings in **Sections G and H**,⁹⁰⁷ we find that the Parties were focused on winning a place on the Framework Agreement at a price which did not result in customers switching suppliers; while the economic and market context created an incentive not to compete aggressively, they were aware of the aggressive competition that can occur between them; they were both uncertain and concerned at where the other Party may pitch its pricing in the specific context of the PICT Tender and sought competitive intelligence on the other Party's pricing; and they would have expected the PICT Tender to be last opportunity to set framework pricing for Airwave-TETRA products.⁹⁰⁸
682. In this context, we find there was an incentive for the Parties to ensure there was less downward pressure on prices than would have been expected under normal competition.
683. It is in this context that the exchange of messages on 5 September 2018 took place. It is clear from a plain reading of the content of the messages that they were anti-competitive and we set out our findings in relation to those messages in **Section I**.
684. Taking into account all the evidence and our factual findings in **Sections E-I**, we do not consider Sepura's alternative explanation of the messages of 5 September 2018 to be credible. In our judgment, given the legal and economic context and the nature of the information disclosed for over a two-hour period, we find that the Parties knowingly substituted practical cooperation between them for the risks of competition.
685. Moreover, we note that Motorola has admitted that it participated in a concerted practice in breach of the Chapter I prohibition.

(e) Conclusion on knowing substitution

686. For the reasons set out above, the evidence demonstrates that the Parties "*knowingly substitute[d] practical cooperation between them for the risks of competition*".⁹⁰⁹ It is also clear that there was no obvious or legitimate explanation for why the Parties did so, much less why they did so for over two hours.

(f) Sepura's representations in relation to the causal connection between the concerted practice and conduct on the market

687. Sepura has rejected the view that there was a causal connection in this case. In summary, Sepura has made the following representations.
688. In relation to the burden and standard of proof:

⁹⁰⁷ See in particular, **Sections G(5) and H(5)**.

⁹⁰⁸ We discuss the importance of this framework or bid pricing in **Section F(3)(b)**.

⁹⁰⁹ *ICI v Commission*, C-48/69, EU:C:1972:70 paragraph 64. Recently recalled in *Balmoral Tanks Limited v CMA* [2019] EWCA Civ 162 paragraph 37.

- (1) Sepura has submitted that “*context will determine the strength of the presumption and the evidence burden on the alleged infringer*”.⁹¹⁰ Sepura contends that because the presumption can be more compelling in certain cases – such as cases involving undertakings that concert together on a regular basis over a long period⁹¹¹ – it follows that (i) the presumption can be weaker in other cases; and (ii) that in the specific circumstances of this case – involving a one-off unilateral disclosure of “(at most) *ambiguous and limited information*” – the presumption is “*attenuated*” and “*weak*.”⁹¹²
- (2) Sepura seeks to distinguish:
 - (i) *British Sugar*, on the basis that exchange involved “*a unilateral disclosure by a dominant entity on the market*” (which Sepura is not) and Motorola did not ask for any competitively sensitive information or have any agenda.⁹¹³
 - (ii) *Balmoral*, on the basis that exchange involved “*very specific pricing information and very specific pricing assurance by Balmoral, and that had to be seen in the context of a long-running and well-organised cartel*”.⁹¹⁴ Sepura contends that [the Sepura Regional Sales Director]’s disclosures were “*at most, vague unclear and very high level*”;⁹¹⁵ they were therefore “*the polar opposite*” of the disclosures in *Balmoral* which involved “*clear, immediately useful, concrete pricing information*”.⁹¹⁶
- (3) Sepura also contends that Ofcom’s approach to the evidence required to rebut the presumption is unduly strict and relies on the case of *Eturas* as authority for the proposition that Ofcom cannot require the Parties to take excessive or unrealistic steps in order to rebut the presumption.⁹¹⁷ Sepura has submitted that in order to rebut the presumption, Sepura only needs to demonstrate that on the balance of probabilities the exchange of messages on 5 September 2018 did not inform or affect the Parties’ subsequent conduct.

689. As regards the role of public distancing:

⁹¹⁰ Sepura Oral Transcript, paragraph 98.

⁹¹¹ Sepura SO Representations, paragraphs 3.16 and 5.5; Sepura Oral Transcript, paragraph 100.

⁹¹² Sepura SO Representations, paragraphs 1.6.1, 3.16, 5.2.1, 5.6 and 5.27. See also Sepura’s Second Letter of Facts Representations (Revised Annex A), rows 65 – 71.

⁹¹³ Sepura Oral Transcript, paragraph 101.

⁹¹⁴ Sepura Oral Transcript, paragraph 100.

⁹¹⁵ Sepura Oral Transcript, paragraph 102.

⁹¹⁶ Sepura Oral Transcript, paragraphs 102 and 103.

⁹¹⁷ Sepura SO Representations, paragraph 5.22. See also Sepura’s Second Letter of Facts Representations (Revised Annex A), rows 65 – 71.

- (1) Sepura contends that Ofcom has “*placed irrational or excessive reliance on the absence of evidence of public distancing*” in this case.⁹¹⁸
- (2) Sepura recognises that public distancing requires a party to “*openly and unequivocally*” oppose anti-competitive conduct. However, Sepura relies on the case of *Eturas* to contend that public distancing is either not required or should be accepted in a watered-down form in the specific circumstances of this case. Sepura contends that the exchange of messages on 5 September 2018 (like *Eturas*) is “*clearly distinguishable*” to a case involving a meeting (or a long running series of exchanges) in which “*the considerations are different*”.⁹¹⁹

690. In relation to Motorola’s subsequent actions:

- (1) First, Sepura has submitted that [the Motorola Senior VP] and [the Motorola Airwave VP MD] “*had no role in the PICT pricing*” and “*had not previously been involved in the tender*” prior to their recusal.⁹²⁰ It has also submitted that, based on Motorola’s evidence, Sepura’s pricing “*was not a particularly important factor*” in informing Motorola’s bid.⁹²¹
- (2) Second, Sepura relies on the various steps Motorola took after the exchange of messages on 5 September 2018 to contend the presumption has been rebutted in this case including:
 - (i) Motorola’s “*immediate*”, “*comprehensive*” and “*effective*” ring-fencing measures taken after the exchange of messages on 5 September 2018 including the removal of [the Motorola VP for Sales], [the Motorola Senior VP] and [the Motorola Airwave VP MD] from any further involvement in the PICT Tender.⁹²² For example, Sepura has submitted that [the Motorola VP for Sales] “*immediately*” reported the exchange of messages to Motorola’s lawyers who “*then immediately insulated the information and withdrew the relevant personnel*”.⁹²³ Sepura submits that the steps Motorola took after the exchange of messages on 5 September 2018 meant “*in the space of two days, all potential for ... [[the Sepura Regional Sales Director]’s disclosures] to travel and to affect the PICT Tender was effectively shut down.*”⁹²⁴

⁹¹⁸ Sepura SO Representations, paragraph 5.22.

⁹¹⁹ Sepura SO Representations, paragraph 5.24.

⁹²⁰ Sepura Oral Transcript, paragraphs 80 and 106.

⁹²¹ Sepura Oral Transcript, paragraph 117.

⁹²² Sepura SO Representations, paragraphs 1.6.1, 5.2.2; Sepura Oral Transcript, paragraphs 51 and 106. See also Sepura’s Second Letter of Facts Representations, paragraphs 5.2, 11, 12 and 18 and Sepura’s Second Letter of Facts Representations (Revised Annex A), rows 65 – 71.

⁹²³ Sepura Oral Transcript, paragraphs 46, 47 and 107. Sepura SO Representations, paragraphs 1.4.6, 4.15, 5.8, 5.24, 5.25 and 8.3.

⁹²⁴ Sepura SO Representations, paragraph 5.9

- (ii) Evidence that Motorola’s pricing strategy was determined independently of the exchange of messages on 5 September 2018 and “*largely locked its prices*” or “*in all but minor respects*” before the exchange.⁹²⁵ Sepura submits that Motorola only increased prices “*after the ... [exchange of messages on 5 September 2018] because of independent concerns expressed by [the Motorola Finance Lead] from their finance department*”.⁹²⁶
- (iii) Motorola’s reporting of the exchange of messages on 5 September 2018 to the CMA “*promptly*” and “*as soon as it sensibly could*”.⁹²⁷ Sepura has submitted that Motorola’s leniency application should be treated as “*an integral part of the ring-fencing steps taken by Motorola to ensure its bid was incapable of being contaminated by the ... [exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018]*”.⁹²⁸
- (3) Sepura has described Motorola’s evidence as “*unequivocal*”⁹²⁹ and submitted that “*[i]t’s hard to imagine what more Motorola could have done in practical steps to ensure its bids weren’t influenced by the message exchange*”.⁹³⁰ Sepura has submitted that to suggest the presumption has not been rebutted is “*all speculation*” which “*is self-evidently wrong in the face of all the actual evidence*” and “*is to tacitly but necessarily suggest that Motorola’s evidence, and indeed the steps it took to which that evidence is directed, is given in bad faith*”.⁹³¹

691. In relation to its own subsequent actions:

- (1) Sepura has submitted that it could not have altered its conduct to take account of the exchange of messages on 5 September 2018 for the following reasons:
 - (i) First, Sepura did not receive any competitively sensitive information.⁹³²

⁹²⁵ Sepura Oral Transcript, paragraphs 75 and 106. See also Sepura Oral Transcript, paragraph 116; Sepura SO Representations, paragraphs 5.2.4, 5.15 – 5.16 and 5.19; Sepura’s Second Letter of Facts Representations (Revised Annex A), rows 65 – 71.

⁹²⁶ Sepura Oral Transcript, paragraph 75. See also Sepura Oral Transcript paragraph 115 and Sepura SO Representations, paragraph 5.17.

⁹²⁷ Sepura Oral Transcript, paragraphs 48 and 106. See also Sepura Oral Transcript, paragraph 119 and Sepura SO Representations, paragraph 5.25. Sepura has submitted that it was “*a reasonable and sensible course*” for Motorola not to report the exchange of messages on 5 September 2018 until after it had submitted its bid and that “*drawing more attention to the issue would have created a tip-off risk*” (Sepura Oral Transcript, paragraph 120. See also Sepura SO Representations, paragraphs 5.26 - 5.27).

⁹²⁸ Sepura SO Representations, paragraph 5.28.

⁹²⁹ Sepura Oral Transcript, paragraph 112.

⁹³⁰ Sepura Oral Transcript, paragraph 109.

⁹³¹ Sepura Oral Transcript, paragraph 112. See also Sepura Oral Transcript, paragraph 118 and Sepura SO Representations, paragraph 5.13.

⁹³² Sepura SO Representations, paragraphs 1.6.1 and 5.29; Sepura Oral Transcript, paragraph 122.

- (ii) Second, in the circumstances of this case, [the Sepura Regional Sales Director] would have had little or no confidence [the Motorola VP for Sales] would act on the exchange of messages on 5 September 2018. Sepura relies on [the Motorola VP for Sales]’s “*abrupt*” changing the subject in a manner which it contends gave a clear indication to [the Sepura Regional Sales Director] that [the Motorola VP for Sales] was “*uncomfortable with the potential direction of the conversation*”.⁹³³ Sepura submits that “[n]o reasonable business person could possibly interpret ... [the Motorola VP for Sales]’s response”⁹³⁴ as one indicating Motorola would adjust its conduct to take into account the exchange of messages on 5 September 2018, and that if [the Sepura Regional Sales Director] had relied on the exchange of messages in that way “*he would have been irrational and ... highly irresponsible*”.⁹³⁵ Sepura also seeks to rely on [the Sepura Regional Sales Director]’s subjective interpretation of the exchange of messages on 5 September 2018.⁹³⁶
- (iii) Third, Sepura’s pricing was “*fully locked in*” before the exchange of messages on 5 September 2018.⁹³⁷
- (2) Sepura has also submitted that some of the pricing Sepura submitted to PICT was higher than some of its previous pricing for reasons unconnected to the exchange of messages on 5 September 2018. For example:
 - (i) Sepura has submitted that its costs had significantly increased from the date of its pricing under the previous framework.⁹³⁸
 - (ii) Its recent quote to the MPS was based on a “*high volume*” purchase by the largest police force in the UK and is not therefore an appropriate benchmark by which to compare the pricing it submitted in response to the PICT Tender which is applicable to all police forces, regardless of their size and volume ordered.⁹³⁹ Sepura has noted that PICT explicitly identified the structure of the PICT Tender – and the fact it did not allow bidders to offer volume discounts to individual forces – as a potential reason why it considered Sepura’s bid to be “*significantly overpriced*” compared to its recent quote to the MPS.⁹⁴⁰

⁹³³ Sepura SO Representations, paragraph 5.22; Sepura Oral Transcript, paragraphs 122 and 126.

⁹³⁴ Sepura SO Representations, paragraph 5.30.

⁹³⁵ Sepura Oral Transcript, paragraph 128.

⁹³⁶ Sepura SO Representations, paragraph 5.30.

⁹³⁷ Sepura Oral Transcript, paragraph 74. See also paragraph 129.

⁹³⁸ Sepura SO Representations, paragraph 7.5

⁹³⁹ Sepura SO Representations, paragraphs 2.4.9, 2.7, 2.10.4, 4.37 and 7.8; Sepura Oral Transcript, paragraphs 69, 70, 146, 147.

⁹⁴⁰ Sepura SO Representations, paragraphs 7.7 – 7.8.

(g) *Ofcom's assessment of the causal connection between the concerted practice and conduct on the market*

692. In the following paragraphs, we assess the evidence in relation to whether there was a causal link. For completeness, we do this both in relation to Motorola's subsequent conduct and Sepura's subsequent conduct.

(i) Parties' activity on the market

693. The Parties remained active on the market following the exchange of messages on 5 September 2018. Indeed, they both submitted bids for the PICT Tender and remain active in the supply of Airwave-TETRA products today. We have therefore found that the Parties continued to conduct themselves on the market after the exchange of messages on 5 September 2018.

(ii) Presumption of a causal connection

694. It is open to Ofcom to rely on the presumption that there was a causal link between the exchange of messages on 5 September 2018 and the Parties' subsequent conduct on the market, and draw the conclusion that the Parties took account of the information exchanged when determining their conduct on the market.

695. As to Sepura's submission that the presumption can in certain circumstances be weak, we recognise that the presumption may be harder to rebut in some cases than others: this is a fact-specific exercise.⁹⁴¹ There is, however, a legal presumption of a causal connection between an exchange of competitively sensitive information between undertakings and their subsequent conduct on the market in all cases; the same presumption applies to both one-off⁹⁴² and unilateral exchanges.⁹⁴³ The question is therefore whether the presumption is rebutted on the facts in this case.

696. In order to rebut the presumption Sepura is required to prove that the exchange of messages did not have any influence on its conduct such as to rule out any link between the exchange of messages on 5 September 2018 and Sepura's subsequent conduct on the market.⁹⁴⁴ That evidence needs to be concrete and objective.⁹⁴⁵ We explain the type of evidence that can rebut the presumption in paragraph 598(3) above and there is a significant body of case-law acknowledging the strictness of the law in this regard.⁹⁴⁶ As

⁹⁴¹ *Hüls v Commission*, C-199/92 P, EU:C:1999:358, paragraph 162; *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 59.

⁹⁴² *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 59 – 61, cited in *Balmoral Tanks Limited v CMA* [2017] CAT 23, paragraphs 45-46.

⁹⁴³ *JJB Sports v Office of Fair Trading* [2004] CAT 17, paragraph 873, citing *Tate & Lyle and Others v Commission*, T-202/98, T-204/98 and T-207/98, EU:T:2001:185 at paragraphs 56 to 58.

⁹⁴⁴ *Solvay v Commission*, C-455/11 P, EU:C:2013:769 paragraph 43, and the cases cited therein.

⁹⁴⁵ *Westfalen Gassen Nederland v Commission*, Case T-303/02, EU:T:2006:374, paragraph 95. See also, *Denki Kagaku Kogyo v Commission*, T-83/08, EU:T:2012:48, paragraphs 215-216.

⁹⁴⁶ For example see, *Solvay v Commission*, C-455/11 P, EU:C:2013:796, paragraph 43: "it is for the undertaking concerned to prove that the concerted action did not have any influence whatsoever on its own conduct on the market. [...] The proof to

explained by the Tribunal⁹⁴⁷ in *Balmoral CAT* at [41] (and subsequently endorsed by a different formation of the Tribunal⁹⁴⁸ in *Lexon* at [227]):

“The strictness of the law in this regard reflects the fact that it is hard to think of any legitimate reason why competitors should sit together and discuss prices at all.”

697. Sepura also relies on the case of *Eturas* as authority for the proposition that Ofcom cannot require the Parties to take excessive or unrealistic steps in order to rebut the presumption.⁹⁴⁹ We address *Eturas* in this context in **Section L(1)(g)(vi)** below.
698. In any event, we reject the argument that we are requiring the Parties to take excessive or unrealistic steps in order to rebut the presumption of a causal connection. For example, it was open to [the Sepura Regional Sales Director], [the Motorola VP for Sales] or Motorola to publicly distance themselves from the exchange of messages on 5 September 2018 in accordance with the requirements in the case-law, but they chose not to.
699. We have carefully considered whether there is any evidence indicating that the presumption may have been rebutted on the facts of this case.

(iii) Public distancing

700. We find that neither [the Motorola VP for Sales] nor Motorola took any steps to publicly distance themselves from the exchange of messages on 5 September 2018.
701. There is a significant body of case-law in which the Courts explain the requirements of public distancing, namely that the undertaking concerned has expressed its opposition to anti-competitive conduct by distancing itself “*openly and unequivocally*”⁹⁵⁰ in a manner which is perceived as such by other undertakings concerned.⁹⁵¹
702. In contrast to the requirements of the case-law relating to public distancing, at no point did [the Motorola VP for Sales] express any reservations or objections to [the Sepura Regional Sales Director] in relation to the information [the Sepura Regional Sales Director] disclosed to [the Motorola VP for Sales] on 5 September 2018.
703. [The Motorola VP for Sales] eventually decided to change the subject. However, changing the subject does not amount to open and unequivocal opposition and does not therefore constitute effective public distancing in accordance with the requirements of the case-law.⁹⁵² In any event, we note that [the Motorola VP for Sales] decided to change the subject after repeated messages from [the Sepura Regional Sales Director] indicating that Sepura

the contrary must therefore be such as to rule out any link between the concerted action and the determination, by that undertaking, of its conduct on the market”. See also, *Cimenteries*, T-25/95, EU:T:2000:77, paragraph 1912.

⁹⁴⁷ Rose J, as she then was, Dr Catherine Bell and Ms Margot Daly.

⁹⁴⁸ Peter Freeman CBE KC (Hon), Paul Lomas and Derek Ridyard.

⁹⁴⁹ *Eturas UAB and others*, C-74/14, EU:C:2016:42, paragraph 41.

⁹⁵⁰ *Westfälische Drahtindustrie v Commission*, T-393/10, EU:T:2015:515, paragraph 194. See also, e.g., *Sumitomo Electric Industries and J-Power Systems v Commission*, T-450/14, EU:T:2018:455, paragraph 101.

⁹⁵¹ *LS Cable & System v Commission*, C-596/18 P, EU:C:2019:1025, paragraph 21 and the case-law cited.

⁹⁵² See in particular paragraph 598(3) above and the case-law cited.

would not be pricing aggressively.⁹⁵³ [The Sepura Regional Sales Director] also informed [the Motorola VP for Sales] that he would let him know if Sepura's senior management did not agree to his recommended pricing strategy. In our view, these repeated messages demonstrate that [the Sepura Regional Sales Director] was eager to ensure that [the Motorola VP for Sales] would act on his pricing disclosures and sought to ensure [the Motorola VP for Sales] was left in no doubt as to Sepura's pricing strategy.

704. We have similarly found that at no point did Motorola express any reservations or objections to Sepura in relation to the information [the Sepura Regional Sales Director] disclosed to [the Motorola VP for Sales] on 5 September 2018.
705. As a result, we find that the content of messages exchanged on 5 September 2018 and Motorola's lack of public distancing would have given [the Sepura Regional Sales Director] the confidence, comfort or assurance that Motorola would take [the Sepura Regional Sales Director]'s disclosures into account when determining its own pricing for the bid.
706. The evidence set out in **Section I** above also demonstrates that [the Motorola VP for Sales] was not a mere passive recipient of information; he actively probed [the Sepura Regional Sales Director] for further information relating to the PICT Tender indicating that [the Motorola VP for Sales] was interested in obtaining competitively sensitive information on Sepura's strategy for the PICT Tender.
707. Sepura's representations related to *Eturas* in this context are addressed in **Section L(1)(g)(vi)** below.
708. We have also found that [the Sepura Regional Sales Director] and Sepura did not publicly distance themselves from the exchange of messages on 5 September 2018.⁹⁵⁴

(iv) Reporting to the relevant authorities

709. Sepura was not aware of Motorola's leniency application until October 2020 when Ofcom published its Statement of Objections. We therefore find that Motorola's leniency application has not rebutted the presumption of a causal connection between the exchange of messages on 5 September 2018 and Sepura's subsequent conduct.
710. We also note that Motorola has admitted that it participated in a concerted practice in breach of the Chapter I prohibition.
711. As regards Sepura's representations related to Motorola's reporting to the relevant authorities, we note that Motorola reported the exchange of messages on 5 September 2018 to the relevant regulatory authorities in the form of a leniency application to the

⁹⁵³ See **Section I(21)** of this Decision.

⁹⁵⁴ PICT's announcement that Motorola and Sepura were the successful bidders included a quote from [the Sepura Regional Sales Director] and an earlier draft seen by Sepura contained a quote from [the Motorola VP for Sales] which supports our view that neither Party publicly distanced themselves from the exchange of messages on 5 September 2018; both Parties continued to hold [the Sepura Regional Sales Director] and [the Motorola VP for Sales] out to be the key leads for their respective bids for the PICT Tender (at least until the date PICT announced the successful bidders) (Sepura First Response, Question 5, Document 4071.1 (ATF 635)).

European Commission and the CMA; however, it did not do so until after it submitted its bid in response to the PICT Tender.⁹⁵⁵

712. Motorola did not therefore report the exchange of messages on 5 September 2018 at a point in time which could have precluded that exchange from affecting its subsequent conduct relating to the PICT Tender. In other words, Motorola reported the exchange to the relevant authorities after the causal connection between the exchange on 5 September 2018 and its subsequent conduct had an opportunity to crystallise.
713. We therefore find that Motorola’s reporting of the exchange of messages on 5 September 2018 is not sufficient evidence to rebut the presumption of a causal connection in relation to the exchange and its subsequent conduct; rather, it is relevant to the subsequent granting of leniency.
714. More generally, we note that Motorola did not report the exchange to PICT, the contracting authority. In this context, we note that the European Commission has published Guidance on fighting collusion in public procurement.⁹⁵⁶ The Guidance stresses the importance of reporting any anti-competitive conduct to the contracting authority so that the authority can then decide if it considers the relevant parties have taken appropriate “*self-cleansing measures*” to ensure their bid is not tainted and remains reliable or whether to exclude either party from the tender process.⁹⁵⁷

(v) Other evidence regarding the *Anic* presumption

715. Case-law provides the following examples of scenarios where, taking into account the specific facts of a case, the *Anic* presumption was rebutted based on other evidence (i.e., not public distancing or reporting to the relevant authorities):
- (1) Competitively sensitive information is sent via a computerised system (for example, where the information is sent via a third party online platform provider that requires the recipient to log in and read the message) and the recipient is unaware of who the other addressees of the message are.⁹⁵⁸
 - (2) Collusive meetings have taken place over a long period of time and have taken place after the representatives from the relevant undertaking have stopped participating.⁹⁵⁹

⁹⁵⁵ Motorola Second Response – Part 1, Question 1; Motorola’s leniency enquiry to the CMA dated 14 September 2018 (ATF 6032).

⁹⁵⁶ Official Journal of the European Union, March 2021. [European Commission Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground](#) (2021/C 91/01)

⁹⁵⁷ See section 5.7.

⁹⁵⁸ *Eturas UAB and others*, C-74/14, EU:C:2016:42, paragraphs 46 – 49.

⁹⁵⁹ *Total Marketing Services v Commission*, C-634/13 P, EU:C:2015:614, paragraphs 23, 24 and 28, referred to in *Eturas UAB and others*, C-74/14, EU:C:2016:42, paragraph 46.

- (3) An undertaking exits the market immediately after receiving competitively sensitive information.⁹⁶⁰
 - (4) The information exchanged becomes publicly available before the knowledge and awareness obtained from the information exchange could have been put to use.⁹⁶¹
716. The facts of the exchange of messages on 5 September 2018 are not similar to any of the factual scenarios identified above. We have, however, carefully considered whether there is any other evidence indicating that the presumption may have been rebutted on the facts of this case. We have considered whether either Motorola's or Sepura's conduct after the exchange of messages on 5 September 2018 may have rebutted the presumption.
717. In relation to Motorola's conduct after the exchange of messages on 5 September 2018:
- (1) We note that Motorola has admitted that it participated in a concerted practice in breach of the Chapter I prohibition. We have nonetheless considered Sepura's assertions that the steps Motorola took after the exchange of messages on 5 September 2018 rebuts the *Anic* presumption.
 - (2) Taking into account all the evidence and our findings in **Section H(5)** above, we find that the steps Motorola took after the exchange of messages on 5 September 2018 were insufficient to rebut the presumption in relation to its own subsequent conduct. We are not satisfied that the evidence demonstrates that it follows from the steps taken by Motorola after the exchange of messages on 5 September 2018 that the exchange did not have any influence whatsoever on Motorola's subsequent conduct on the market.
 - (3) Regardless of whether Motorola had taken sufficient steps to rebut the presumption in relation to its own subsequent conduct, Sepura was not aware of any of the steps taken by Motorola after the exchange of messages on 5 September 2018. We have therefore also found that Motorola's conduct after the exchange of messages on 5 September 2018 has not rebutted the presumption of a causal connection between the exchange and Sepura's subsequent conduct.
 - (4) It is therefore clear, from the evidence, that Sepura cannot rely on Motorola's internal compliance mechanisms to rebut the *Anic* presumption in this case.
718. As for Sepura's conduct after the exchange of messages on 5 September 2018:
- (1) We have also considered whether the steps Sepura took after the exchange of messages on 5 September 2018 rebut the *Anic* presumption.
 - (2) We have set out the key events in relation to Sepura's conduct after the exchange of messages on 5 September 2018 in **Section G** above. We have also explained in

⁹⁶⁰ *Tesco Store Limited and others v OFT* [2012] CAT 31, paragraph 277.

⁹⁶¹ *Tesco Store Limited and others v OFT* [2012] CAT 31, paragraph 277-278. On this basis the CAT found that: "By the time that information had been [publicly] disclosed ... it was not capable of being used by Tesco in any meaningful way to distort competition."

Section L(1)(b)(iv) above our finding that [the Sepura Regional Sales Director] gained confidence, comfort or assurance that:

- (i) Motorola was aware of Sepura's pricing intentions and would take them into account in determining its own pricing strategy.
 - (ii) Taking into account [the Sepura Regional Sales Director]'s disclosures, Motorola would have at least had a reduced incentive to submit a low or aggressive bid as it could be less concerned about Sepura submitting a low or aggressive bid which could result in Motorola losing customers (and Motorola was therefore less likely to submit an aggressive bid or pricing at a level which may change the status quo and result in customers switching to Motorola).
 - (iii) An aggressively-priced bid was unnecessary and [the Sepura Regional Sales Director] could therefore sustain his recommended pricing strategy, still win a place on the Framework Agreement and not risk losing customers or market share.⁹⁶²
 - (iv) In determining Sepura's pricing levels within its overall strategy, [the Sepura Regional Sales Director] could (a) attach greater weight to Sepura's estimate of the upper range of Motorola's likely pricing; and (b) ensure Sepura's pricing for a PICT bundle was within a 20% tolerance of that upper estimate.⁹⁶³ In doing so, [the Sepura Regional Sales Director] could maintain higher gross margins and, according to his comment to [the Motorola VP for Sales] in the exchange, be compensated on this basis.
- (3) Neither [the Sepura Regional Sales Director] nor Sepura took any steps to ring-fence [the Sepura Regional Sales Director] from Sepura's bid team or otherwise mitigate the risk that the confidence, comfort or assurance [the Sepura Regional Sales Director] obtained from the exchange of messages on 5 September 2018 influenced Sepura's subsequent conduct on the market. There is therefore no evidence that Sepura took any steps to ensure the exchange of messages on 5 September 2018 did not have any influence on its response to the PICT Tender.

⁹⁶² This risk did in fact crystallise and was identified by [the Sepura Regional Sales Director] in mid-November 2018 after Sepura realised Motorola had submitted pricing significantly below its own and decided to offer a price drop. In slides prepared by [the Sepura Regional Sales Director] in relation to an opportunity for the MPS, he included the following comments:

"Current Risks:

Sepura PICT pricing is higher than Motorola

Customers will buy Motorola as will see short term gap"

(see, for example Motorola First Response, Question 5, Document 2205.1, page 5 (ATF 2436)).

⁹⁶³ The prices Sepura submitted for the PICT bundles were between [\geq] and [\leq] % above Sepura's high estimate of Motorola's likely pricing. See, for example, Sepura's estimates of Motorola's pricing on page 7 of Sepura's 6 September 2018 Presentation compared to the final pricing in Sepura's PICT Pricing Document that Sepura submitted to PICT (Sepura First Response, Question 2, Annex 2 (ATF 6334)).

- (4) We have also found no concrete and objective contemporaneous evidence indicating that Sepura did not take into account the information [the Sepura Regional Sales Director] obtained from the exchange of messages on 5 September 2018 when determining its pricing strategy and/or its pricing of individual products for the PICT Tender.
- (5) This is reinforced by the evidence and our findings set out in **Section G** above.
- (6) Moreover, regardless of whether Sepura's pricing strategy and/or individual prices increased, decreased or did not change as a result of the exchange of messages on 5 September 2018, the case-law is clear that such evidence cannot on its own rebut the *Anic* presumption. For example:
 - (i) In *JJB*, the CAT rejected JJB's argument that a meeting during which sensitive information was exchanged "*made no difference to what it was going to do anyway*": the CAT considered that the information exchanged would have reduced uncertainty; it would have been "*highly material to JJB in formulating its own policy*".⁹⁶⁴
 - (ii) In *Solvay*, the Court of Justice explained: "*it must be stated that probative data illustrating the competitive nature of the market and, in particular, the decrease of prices during the period concerned cannot suffice, of itself, to rebut that presumption. That data does not of itself make it possible to prove that that undertaking did not take account of the information exchanged with its competitors in determining its conduct on the market.*"⁹⁶⁵
- (7) [The Sepura Regional Sales Director] was in a position to take into account the exchange of messages on 5 September 2018, including the increased confidence, comfort or assurance obtained in relation to Motorola's likely pricing strategy.
- (8) In these circumstances, we find that [the Sepura Regional Sales Director] cannot have failed, whether directly or indirectly, to take the exchange of messages on 5 September 2018 into account and that no reasonable interpretation of the evidence can rule out any link between that exchange of messages and Sepura's subsequent conduct in relation to its response to the PICT Tender. Sepura was therefore not relying only on its "*own perceptions, predictions and experience of the market*"⁹⁶⁶ in its response to the PICT Tender.
- (9) We have therefore found that the presumption of a causal connection has not been rebutted on the facts of this case.

⁹⁶⁴ [878] of *JJB*.

⁹⁶⁵ [44] of *Solvay*. See also *Cimenteries CBR v Commission*, T-25/95, EU:T:2000:77, paragraphs 1389 and 1912.

⁹⁶⁶ *Tesco Stores Limited and others v OFT* [2012] CAT 31, paragraph 51.

(vi) Sepura's reliance on the *Eturas* judgment

719. In its submissions, Sepura places considerable reliance on the judgment of the Court of Justice in *Eturas and Others* (C-74/14, EU:C:2016:42). Sepura relies in particular on [41] and [46]-[49] of that judgment.⁹⁶⁷ We find that these passages do not alter our conclusions.⁹⁶⁸

720. *Eturas* was a reference to the Court of Justice from the Supreme Administrative Court of Lithuania. It arose in the context of national proceedings where an anti-competitive concerted practice was alleged. The issue in the case was whether certain evidence was sufficient proof of a fact which, if established, would trigger a presumption of liability under Article 101(1) TFEU. In essence, the Court of Justice was asked whether Article 101(1):

“must be interpreted as meaning that, where the administrator of an information system, intended to enable travel agencies to sell travel packages on their websites using a uniform booking method, sends to those economic operators, via a personal electronic mailbox, a message informing them that the discounts on products sold through that system will henceforth be capped and, following the dissemination of that message, the system in question undergoes the technical modification necessary to implement that measure, it may be presumed that those operators were aware or ought to have been aware of that message and, in the absence of any opposition on their part to such a practice, it may be considered that those operators participated in a concerted practice within the meaning of that provision.”⁹⁶⁹

721. In short, the Court of Justice was concerned with the specific question of whether the dispatch of a message through an electronic system may constitute sufficient evidence to establish that the operators that used the system were aware, or ought to have been aware, of the content of that message.

722. At [33]-[34], the Court of Justice explained that this question of awareness of the content of a message is concerned with the presumption of innocence which is separate to, and “*not intrinsically linked to*”, the presumption of a causal connection which arises under Article 101(1). The Court emphasised that Article 101(1) can only be engaged with respect to an undertaking if an assessment of the evidence, based on national rules on the standard of proof, establishes that undertaking was, or ought to have been, aware of the information which is the subject of alleged concertation. In terms of the assessment of evidence relevant to the question of awareness, the Court went on to explain:

“37 Consequently, the principle of effectiveness requires that an infringement of EU competition law may be proven not only by direct evidence, but also through indicia, provided that they are objective and consistent.

38 In so far as the referring court has doubts as to the possibility, in view of the presumption of innocence, of finding that the travel agencies were aware, or ought to have been aware, of the message at issue in the main proceedings, it must be recalled that the presumption of innocence constitutes a general principle of EU

⁹⁶⁷ Sepura SO Representations, paragraphs 3.17 and 5.22 - 5.24.

⁹⁶⁸ [26]-[50] of *Eturas*.

⁹⁶⁹ [26] of *Eturas*.

law, now enshrined in Article 48(1) of the Charter of Fundamental Rights of the European Union (see, to that effect, judgment in *E.ON Energie v Commission*, C-89/11 P, EU:C:2012:738, paragraph 72), which the Member States are required to observe when they implement EU competition law (see, to that effect, judgments in *VEBIC*, C-439/08, EU:C:2010:739, paragraph 63, and *N.*, C-604/12, EU:C:2014:302, paragraph 41).

39 The presumption of innocence precludes the referring court from inferring from the mere dispatch of the message at issue in the main proceedings that the travel agencies concerned ought to have been aware of the content of that message.

40 However, the presumption of innocence does not preclude the referring court from considering that the dispatch of the message at issue in the main proceedings may, in the light of other objective and consistent indicia, justify the presumption that the travel agencies concerned were aware of the content of that message as from the date of its dispatch, provided that those agencies still have the opportunity to rebut it.”

723. It was after this discussion of the presumption of innocence that the Court explained at [41] that *“the referring court cannot require that those agencies take excessive or unrealistic steps in order to rebut that presumption”*⁹⁷⁰. Rather, the travel agencies had to be given the opportunity to rebut the presumption that they were aware of the content of the message. Sepura quotes this italicised text out of context, wrongly suggesting that it relates to the presumption of a causal connection.⁹⁷¹

724. The Court went on to discuss at [42]-[45] the circumstances in which an undertaking can be presumed to be aware of information, and on which a finding of concertation can be based, taking into account the factual scenario arising in Eturas:

“42 In the second place, as regards the participation of the travel agencies concerned in a concerted practice within the meaning of Article 101(1) TFEU, it must be recalled, first, that under that provision, the concept of a concerted practice implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two (judgment in *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 126 and the case-law cited).

43 Secondly, it must be pointed out that the case at issue in the main proceedings, as presented by the referring court, is characterised by the fact that the administrator of the information system at issue sent a message concerning a common anticompetitive action to the travel agencies participating in that system, a message which could only be consulted in the ‘Notices’ section of the information system in question and to which those agencies did not expressly respond. Following the dispatch of that message, a technical restriction was implemented which limited the discounts that could be applied to bookings made via that system to 3%. Although that restriction did not prevent the travel agencies concerned from granting

⁹⁷⁰ See also [45].

⁹⁷¹ Sepura Written Representations, paragraph 5.22.

discounts greater than 3% to their customers, it nevertheless required them to take additional technical steps in order to do so.

44 Those circumstances are capable of justifying a finding of a concertation between the travel agencies which were aware of the content of the message at issue in the main proceedings, which could be regarded as having tacitly assented to a common anticompetitive practice, provided that the two other elements constituting a concerted practice, noted in paragraph 42 above, are also present. Depending on the referring court's assessment of the evidence, a travel agency may be presumed to have participated in that concertation if it was aware of the content of that message.

45 However, if it cannot be established that a travel agency was aware of that message, its participation in a concertation cannot be inferred from the mere existence of a technical restriction implemented in the system at issue in the main proceedings, unless it is established on the basis of other objective and consistent indicia that it tacitly assented to an anticompetitive action."

[Emphasis added]

725. Only after this discussion, did the Court proceed to develop the points relied on by Sepura (at [46]-[49]) which are relevant to the presumption of a causal connection under Article 101(1). What the Court does at [46]-[49] is address the *nature* of the evidence that would be sufficient to rebut the presumption, in particular "*in circumstances such as those at issue in ... [Eturas]*".⁹⁷²

726. It is clear from these passages of *Eturas* that it concerned a situation far removed from the conduct that is the subject of this Decision:

- (1) First, the exchange of messages on 5 September 2018 did not concern a single despatch by an administrator of an information system to which no one responded. [The Sepura Regional Sales Director] and [the Motorola VP for Sales] exchanged messages for over two hours (of which a total of 54 were related to the PICT Tender).
- (2) Secondly, as we have clearly established above, both [the Sepura Regional Sales Director] and [the Motorola VP for Sales] were aware of the messages. It is not a case of Ofcom inferring from the mere presence of a single message on either of those individuals' phones.

(h) Conclusion on causal connection

727. Taking into account all the evidence we find in summary:

- (1) The Parties remained active on the market following the exchange of messages on 5 September 2018.

⁹⁷² [49]. See also [46] in which the Court said "*in a case such as that at issue in the main proceedings*" and [49] in which the Court said "*in particular circumstances such as those at issue in the main proceedings*". This reading of *Eturas* is in line with the Supreme Court's analysis of *Eturas*, albeit in a different context, in *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2020] UKSC 24 at [112]-[117], in the context of Article 101(3) TFEU.

- (2) There is a legal presumption that there was a causal link between the exchange of messages on 5 September 2018 and the Parties' subsequent conduct on the market.
- (3) The steps Motorola took after the exchange of messages on 5 September 2018 were insufficient to rebut the presumption in relation to its own subsequent conduct.
- (4) As Sepura was not aware of any of these steps taken by Motorola, those steps taken by Motorola were also not capable of rebutting the presumption of a causal connection between the exchange and Sepura's subsequent conduct.
- (5) Sepura did not take any steps after the exchange of messages on 5 September 2018 which are capable of rebutting the presumption in relation to its own subsequent conduct.

728. As a result, the presumption has not been rebutted and we therefore conclude that there is a causal link between the exchange of messages on 5 September 2018 and the Parties' subsequent conduct on the market.

(2) Was the exchange of messages on 5 September 2018 a by object infringement?

729. We now consider whether that concerted practice had as its object the prevention, restriction or distortion of competition.

(a) *Sepura's representations in relation to whether there was a by object infringement*

730. Sepura has submitted that the category of by object infringements should be interpreted restrictively and reserved exclusively for concerted practices that inherently reveal a sufficient degree of harm to competition. Sepura contends that it is not sufficient to merely state that an information exchange may "*reduce strategic uncertainty*"; it states that in order to find the exchange of messages on 5 September 2018 restricted competition by object, Ofcom must also assess whether the exchange had an anti-competitive purpose.⁹⁷³

731. Sepura relies on the following three points to contend that the exchange of messages on 5 September 2018 did not reveal a sufficient degree of harm to competition to constitute a by object infringement.

- (1) Motorola did not receive any information on Sepura's actual pricing and therefore had no or little significance.⁹⁷⁴
- (2) The exchange of messages on 5 September 2018 did not inform Motorola's pricing.⁹⁷⁵
- (3) Sepura received no competitively sensitive information.⁹⁷⁶

⁹⁷³ Sepura SO Representations, paragraph 6.2

⁹⁷⁴ Sepura SO Representations, paragraph 6.3.1.

⁹⁷⁵ Sepura SO Representations, paragraph 6.3.2.

⁹⁷⁶ Sepura SO Representations, paragraph 6.3.3.

732. Sepura also submits that the structure of the PICT Tender and content of messages exchanged on 5 September 2018 means that it was incapable of impacting competition.⁹⁷⁷

(b) Ofcom's assessment in relation to whether there was a by object infringement

733. In the paragraphs set out below, we assess the following points taking into account Sepura's representations:

- (1) the legal and economic context in which the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018 occurred;
- (2) its content; and
- (3) its objectives.

(i) Legal and economic context

734. We have assessed the legal and economic context in which the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018 occurred taking into account its actual context, including the products and services affected and the conditions of the functioning and structure of the market.

735. The legal and economic context in which the exchange of messages on 5 September 2018 took place is set out in detail in **Sections E-I** above. In particular, we found that:

- (1) The products in question (Airwave-TETRA products) are used by the emergency services. Airwave-TETRA products are also sufficiently commoditised for pricing information to be valuable to competitors.
- (2) Pricing is the key driver of competition for the supply of Airwave-TETRA devices in a market which is highly concentrated; there are high barriers to entry; there are material barriers to customers switching supplier; and there is a material level of transparency as to what prices are charged to customers. This context means competition and switching is limited and that even a relatively limited or high level disclosure of competitively sensitive pricing information relating to one Party's bid for a particular tender could reveal a significant amount about their pricing strategy or likely pricing and be particularly valuable to the other Party.
- (3) There is also evidence that materially discounted pricing, relative to current pricing, may trigger switching. Anticipating a competitor's pricing strategy is therefore a key consideration for the Parties when determining their own pricing strategy for a particular opportunity.
- (4) PICT's core goals were focused on reducing prices for the customers it was acting on behalf of and obtaining the Parties' best pricing.
- (5) While both Parties were highly likely to be awarded a place on the Framework Agreement, the PICT Tender was an important phase of competition between the

⁹⁷⁷ Sepura SO Representations, paragraphs 2.4 and 4.39. See also Sepura's Second Letter of Facts Representations (Revised Annex A), row 27.

Parties, and bid pricing remained a key consideration in being awarded that place. The structure of the PICT Tender also meant there were different ways in which the Parties could respond. In particular, it afforded any bidder significant flexibility over (i) their overall pricing strategy; and (ii) where to pitch their pricing within that overall strategy.

- (6) Both Parties were aware that their bid pricing was a key parameter on which they were competing for customers and their respective strategies were focused on winning a place on the Framework Agreement at the right price. Both Parties were concerned that, if they did not submit sufficiently competitive prices, by reference to the prices submitted by the other, then they may lose customers as a result.
- (7) What was important in the context of an exercise like the PICT Tender was having a general understanding of the other Party's pricing strategy and in particular whether it was likely to be aggressive on price. This would enable one Party to anticipate whether the other Party's bid may incentivise switching, and to shape their own strategy accordingly.
- (8) As a result, both Parties sought competitive intelligence and took into account the other Party's anticipated pricing in order to inform their own bid.
- (9) The exchange took place between the two strongest – if not effectively the only two – competitors in the market for Airwave-TETRA devices, and between two individuals that were the pricing leads for their Party's respective bid.
- (10) The exchange took place at a time when both Parties were still discussing their pricing strategy and specific pricing levels, and before they had finalised their bid pricing.
- (11) Bid pricing would play an immediate, ongoing and significant role following the award of the Framework Agreement in both the prices customers would pay as well as the incentives for customers to switch from one Party to the other. As a result, it had the potential to affect the pricing of all Airwave-TETRA products, including products purchased at that bid pricing or price drop pricing as well as Airwave-TETRA products purchased outside the terms of the Framework Agreement.⁹⁷⁸
- (12) Bid pricing could be in place for up to four years and any contracts customers entered into with successful bidders under the terms of the Framework Agreement could be in place for up to 10 years.

(ii) Content

736. We have set out our assessment of content of the messages exchanged on 5 September 2018 in **Section I** above.

⁹⁷⁸ We discuss the role of bid pricing in detail in **Section F(3)(b)** above. We further note that both the Parties and purchasers of Airwave-TETRA products may take into account the pricing under the Framework Agreement when determining their pricing strategy in relation to other tenders (Sepura Fifth Response, Question 8(b), paragraph 8.7 and Motorola Sixth Response, Question 15). We also note that PSNI has confirmed that it will use the pricing of Airwave-TETRA pricing in Great Britain "*as a baseline on which to begin negotiation with potential suppliers*" (PSNI Response, Question 9).

737. In the exchange of messages on 5 September 2018, the Parties discussed a range of matters relevant to the PICT Tender including their perceptions of PICT’s approach to and objectives for the PICT Tender; recent pricing in Europe; other potential competitors; potential volumes, distribution channels; and Sepura’s pricing strategy and likely pricing levels.
738. As explained in **Section I** above, the evidence demonstrates that [the Sepura Regional Sales Director] made a number of clear statements relating to Sepura’s actual pricing strategy for the PICT Tender. These messages informed [the Motorola VP for Sales] and Motorola that Sepura would not be submitting aggressive bid pricing to PICT. In particular:
- (1) [The Sepura Regional Sales Director] indicated to [the Sepura Regional Sales Director] that Sepura would not be submitting its “lowest” or “best” pricing and would not be offering PICT any discount.
 - (2) [The Sepura Regional Sales Director] informed [the Motorola VP for Sales] that Sepura would “keep prices as they are” and “keep prices as is” i.e., not lower its current pricing.
 - (3) [The Sepura Regional Sales Director] informed [the Motorola VP for Sales] that Sepura intended to retain the status quo and not price at a level which may result in any of Motorola’s existing customers switching to Sepura.
 - (4) [The Sepura Regional Sales Director] reinforced and sought to validate or persuade [the Motorola VP for Sales] of the accuracy of [the Sepura Regional Sales Director]’s earlier disclosures relating to Sepura’s pricing strategy for the PICT Tender by references to the structure of the PICT Tender, the timing of the ESN roll-out and his financial incentives.
 - (5) Each time [the Motorola VP for Sales] expressed a degree of scepticism, [the Sepura Regional Sales Director] responded reiterating his position by reference to additional information and sought to leave [the Motorola VP for Sales] in no doubt as to Sepura’s pricing strategy for the PICT Tender.
739. We agree with Sepura that the by object category of infringements should be interpreted restrictively. We also note all of the legal principles set out in **Section K(2)**. In particular, as regards experience (in relation to infringements by object) we highlight the case-law referred to section **K(2)(c)**.
740. In this case, however, we are dealing with an exchange of information between the two largest competitors shortly before the submission of bids in a significant public tender process. As described in detail above, the evidence on the case file demonstrates that pricing was a key factor for each of the Parties in the preparation of their respective bids for the PICT Tender. Exchanges of information such as those that are the subject of this Decision are serious and inherently risk harming competition. This is clear from our analysis of the legal and economic context. Indeed, in the case-law of the EU and UK courts, and the decisional practice of competition authorities, there have been consistent findings that exchanges of information such as those that are the subject of this Decision amount to “by

object” infringements as they are by their nature harmful to the proper functioning of competition.⁹⁷⁹

741. The conduct that is the subject of this Decision (i.e. the exchange of information on 5 September 2018) was an exchange between direct competitors. The settled case-law shows that conduct of this kind falls under the classic example of a by object infringement.⁹⁸⁰ This is also clear from our assessment of the legal and economic context.
742. Such disclosures are particularly liable to harm competition by their very nature in circumstances such as the specific context in which the exchange of information of 5 September 2018 occurred (see in particular **Sections E and F** above).

Level of detail of pricing information disclosed

743. We find that [the Sepura Regional Sales Director]’s disclosures were by their very nature harmful to normal competition between the Parties in the PICT Tender for the following reasons.
744. First, the case-law confirms that it is not necessary for an information exchange to include specific or granular pricing in order to amount to a restriction of competition by object. As the CAT found in *Balmoral*:

“the significance of the price exchange information here was not simply in the numbers themselves but as an indication ... (whether or not it was true) that Balmoral was not intending to push prices down.”⁹⁸¹

745. Second, [the Sepura Regional Sales Director]’s disclosures related to Sepura’s individual intentions for the PICT Tender. Such an individualised perception of pricing strategy, whether genuine or not, reveals a pricing intention that is not available in a market based on principles of normal competition. As explained in the European Commission’s Horizontal Guidelines in the context of by object infringements:

“[e]xchanging information on companies’ individualised intentions concerning future conduct regarding prices ... is particularly likely to lead to a collusive outcome. Informing each other about such intentions may allow competitors to arrive at a common higher price level without incurring the risk of losing market share or triggering a price war during the period of adjustment to new prices ... private exchanges between competitors of their individualised intentions regarding future prices ... would normally be considered and fined as cartels because they generally have the object of fixing prices”⁹⁸²

⁹⁷⁹ See in particular **Sections K(2)(b)** (in relation to information exchanges as object infringements) and **K(2)(c)** (on the role of experience in such cases) above.

⁹⁸⁰ See, for example, *Lexon* at [225]-[227], *Balmoral CAT* at [37]-[50] (on appeal, *Balmoral* argued that the CAT had adopted an impermissibly strict approach to the test for “object” infringement in the context of information exchanges however this ground of appeal was categorically rejected by the Court of Appeal: see *Balmoral CoA* [33]-[34]).

⁹⁸¹ *Balmoral Tanks Limited v CMA* [2017] CAT 23, paragraph 104.

⁹⁸² Horizontal Guidelines, paragraphs 73 and 74.

746. Third, [the Sepura Regional Sales Director]’s repeated disclosures that Sepura would not be pricing aggressively would have been useful and of practical value to Motorola for at least the following reasons:
- (1) The structure of the PICT Tender meant the Parties were not only required to decide what bid pricing to submit but were also required to decide on their overall pricing strategy, and were afforded significant flexibility over both these strategic pricing decisions.
 - (2) In a highly concentrated market characterised by a material degree of pricing transparency, high barriers to entry and material barriers to customer switching, and where there is a high degree of regular competitive interaction between the Parties, information on Sepura’s generalised pricing strategy would have been particularly valuable to Motorola. In such a market, understanding the precise pricing of products or bundles of products is not the only information of potential value to a competitor. Rather, it will be valuable to understand whether one Party may intend to offer a sufficient level of discount to result in customer switching – in other words, whether a Party may intend to price aggressively or not.
 - (3) Motorola estimated Sepura’s likely low and high pricing for its equivalent Airwave-TETRA products throughout contemporaneous presentations prepared on Motorola’s pricing strategy. In this context, [the Sepura Regional Sales Director]’s disclosures relating to Sepura’s pricing would have indicated to Motorola that it could attribute more weight to Sepura’s likely high pricing and take that upper range into account when determining its own pricing strategy.
 - (4) In the context of the PICT Tender – which required the Parties to submit pricing for eight pre-defined bundles – a clear indication of Sepura’s general approach to its pricing (namely, that it would not be pricing aggressively) would have been particularly valuable information to Motorola.
747. It was also straightforward for Motorola to amend its pricing and put in a less aggressive bid. For example, Motorola could have, and did, simply increase the price of one key product that was included in various Lot 1 bundles.⁹⁸³
748. For the reasons set out above, we find that [the Sepura Regional Sales Director]’s disclosures were by their very nature harmful to competition between the Parties in the PICT Tender. The exchange of messages on 5 September 2018 ultimately deprived customers (primarily the emergency services funded by the taxpayer) of the opportunity to benefit from the competitive tendering process that would have existed but for the exchange of messages on 5 September 2018.

⁹⁸³ Indeed, Motorola has confirmed that it increased the price of one product by £[X] on 11 September 2018 which had the knock-on effect of also increasing the pricing of Motorola’s bid in relation to a number of bundles. Motorola has explained that this price increase was suggested by [the Motorola Finance Lead] who was reviewing the pricing “*from an overall finance perspective*” and whose “*role was to ensure that price margins remained sustainable from a business perspective*” (Motorola Second Response – Part 2, Question 16, paragraphs 82, 83, 86 and 92; Motorola Third Response – Part 2, Question 29).

Pricing of Motorola's bid

749. With regard to Sepura's representations that the exchange on 5 September 2018 did not inform Motorola's pricing, we repeat our findings made in **Section L(1)**, in particular paragraphs 650 -654 and 717 above.

Pricing of Sepura's bid

750. With regard to Sepura's representations that Sepura did not receive any competitively sensitive information, we repeat our findings made in **Section L(1)**, in particular paragraphs 641 - 649 and 718 above.
751. The case-law is clear that an exchange of information at a single meeting between competitors in relation to one parameter of competition⁹⁸⁴ is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.⁹⁸⁵
752. Moreover, any subsequent switching or price drops that may have occurred after the Framework Agreement became effective does not cure the conduct that occurred on 5 September 2018 of its anti-competitive object. Any competition that took place after the Framework Agreement was effectively distorted by the anti-competitive conduct that had influenced the bid pricing submitted to PICT.
753. We also note Sepura does not include all Airwave-TETRA products in its price drops and the terms of the Framework Agreement only allowed the Parties to offer price drops during certain time periods and for mini-competitions to occur after the first 12 months (and there was no guarantee either would occur). This meant that there could be significant periods of time – of at least 6 months per year – when the prices submitted by Sepura on 14 September 2018 would be applicable to any customers needing or choosing to purchase Airwave-TETRA products under the terms of the Framework Agreement.⁹⁸⁶
754. Indeed, between the date the Framework Agreement became effective and late July 2022, Sepura made almost £[3<] million in sales at its bid pricing.⁹⁸⁷ Sepura has also only ever sold some Airwave-TETRA products (typically accessories and services) at its bid pricing and not offered any price drop pricing for these products.⁹⁸⁸

(iii) Objectives and intention

755. We do not need to establish that [the Sepura Regional Sales Director] or [the Motorola VP for Sales] did in fact have a subjective anti-competitive intention. Nor do we need to

⁹⁸⁴ See, for example, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343. See also *Balmoral CAT* and *Balmoral CoA*.

⁹⁸⁵ *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 43; *Sony Cooperation and Others v Commission*, Case T-762/15, paragraph 59; *Dole Food Co. v Commission*, C-286/13 P, EU:C:2015:184, paragraph 122. See also *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 41; *HSBC Holdings and others v Commission*, Case T-105/17, paragraph 62; *ICAP and Others v Commission*, Case T-180/15, paragraph 52.

⁹⁸⁶ See also **Section F(2)(c)(iii)** and footnote 472 above.

⁹⁸⁷ Sepura Tenth Response, Question 2, Annex 2.

⁹⁸⁸ Sepura Ninth Response, Question 1.

establish that [the Sepura Regional Sales Director] and [the Motorola VP for Sales] actually reached a common understanding to submit bids at a certain level.

756. While the Parties' subjective intention is not a necessary ingredient in determining whether a concerted practice has an anti-competitive object, their subjective intentions can be taken into account by Ofcom insofar as they are relevant.⁹⁸⁹
757. We rely on our findings about the Parties conduct in **Sections G – I** above.
758. Our consideration of the evidence in those sections indicates that [the Sepura Regional Sales Director] would have been incentivised to (i) ensure there would be less downward pressure on prices than would otherwise have been expected absent the exchange of messages on 5 September 2018;⁹⁹⁰ and (ii) retain the status quo in terms of Sepura's margins and market share.⁹⁹¹ Moreover, Sepura may have decided it was not necessary to utilise the price drop mechanism if its bid pricing was considered competitive compared to Motorola's pricing, for example, because both Parties submitted a high bid price.
759. It is also clear that [the Motorola VP for Sales] was not a passive participant.
760. Moreover, whatever [the Sepura Regional Sales Director]'s or [the Motorola VP for Sales]'s objectives were when they started their conversation on 5 September 2018, we have considered their objectives in light of the content of the messages exchanged on 5 September 2018.⁹⁹² We find that [the Motorola VP for Sales]'s and [the Sepura Regional Sales Director]'s general desire to obtain competitively sensitive information from their main competitor in relation to a tender with an imminent submission deadline is indicative of an intention to reduce strategic uncertainty between them.
761. Assessing the objectives of the exchange of messages on 5 September 2018 in light of the relevant context and their content, we find that the purpose that had been arrived at by the end of the exchange of messages was anti-competitive. We have therefore found that the objectives of the exchange of messages on 5 September 2018 support a finding that the concerted practice was a restriction of competition by object.
762. This finding is consistent with the fact (i) [the Motorola VP for Sales] subsequently reported the exchange internally;⁹⁹³ and (ii) [the Sepura Regional Sales Director] subsequently deleted

⁹⁸⁹ *Dole* at [118] (as cited with approval in *Lexon*) quoted at paragraph 602 above.

⁹⁹⁰ In particular, [the Sepura Regional Sales Director] would have been aware that the PICT Tender was at the time likely to be last opportunity to set framework pricing for Airwave-TETRA products and that its structure meant Sepura did not have to submit its most aggressive pricing to PICT on 14 September 2018 (see in particular **Section G(5)**). [The Sepura Regional Sales Director] also had a clear financial incentive to keep Sepura's gross margin as high as possible and not to offer PICT any discount, i.e., he personally would likely be in a worse financial position if Sepura lowered its prices (see **Section I(18)**).

⁹⁹¹ For example, [the Sepura Regional Sales Director] identified a possible outcome of the PICT Tender as being Sepura's market share remaining unchanged, with an associated risk of "*margin erosion*" and that a potential way to mitigate that risk being to "*[e]nsure pricing consistent with current offers*" (see, for example, Sepura's 6 September 2018 Presentation, page 11). Consistent with this, Sepura's pricing strategy for overt portable and mobiles was to "*[u]se current force pricing*" (see, for example, Sepura's 6 September 2018 Presentation, pages 12 and 14). See also our assessment of Message 52 in **Section I(17)**.

⁹⁹² *Balmoral Tanks Limited v CMA* [2017] CAT 23, paragraph 82.

⁹⁹³ See evidence identified in **Section H(2)(c)** above.

the exchange from his mobile phone (which he has claimed he subsequently lost at a train station in Germany),⁹⁹⁴ both of which are indicative of the Parties having reached an anti-competitive objective by the end of the exchange.

763. We also recognise that Sepura has put forward an alternative explanation for the exchange of messages on 5 September 2018, namely that [the Sepura Regional Sales Director] meant to text his former neighbour instead of [the Motorola VP for Sales] and was subsequently just being mischievous to keep [the Motorola VP for Sales] guessing.⁹⁹⁵ We have explained in **Section L(1)(d)(iii)** above why we do not consider Sepura's alternative explanation to be credible taking into account the evidence and our factual findings in **Sections E - I**. We also note that Sepura's alternative explanation does not involve any pro-competitive or other legitimate objective. We do not therefore consider Sepura's alternative explanation negates our conclusion that the exchange of messages on 5 September 2018 restricted competition by object.

(c) Our conclusion on object of preventing, restricting or distorting competition

764. Taking into account all the evidence, Ofcom finds that the exchange of messages on 5 September 2018 had as its object the restriction or distortion of competition.
765. Standing back, it is clear from our assessment of the legal and economic context that the exchange of information that arose on 5 September 2018 falls squarely within the type of situation addressed in *Lexon* judgment (i.e. an infringement by object made in the context of a concerted practice involving the exchange of information): see *Lexon* at [186]. It is a classic example of the type of situation the case-law has consistently found restricts competition by object. As the CAT in *Balmoral* CAT remarked:

“The strictness of the law in this regard reflects the fact that it is hard to think of any legitimate reason why competitors should sit together and discuss prices at all.”

766. Moreover, we note that arguments advanced by Sepura⁹⁹⁶ are analogous to those rejected by both the CAT and the Court of Appeal in *Balmoral* and the CAT in *Lexon*.⁹⁹⁷

(3) Conclusion on the legal assessment of the exchange of messages on 5 September 2018

767. Taking into account our assessment of the evidence in **Sections E – I** above, we find that the exchange of messages identified in **Section I** constitutes a concerted practice that had as its object the restriction or distortion of competition.

⁹⁹⁴ Paragraphs 276 and 307 above.

⁹⁹⁵ Sepura SO Representations, Annex 1 and [Sepura Regional Sales Director] Interview Transcript (CD2), paragraphs 108, 129 and 215.

⁹⁹⁶ Sepura SO Representations, paragraphs 3.11, 4.39 and Section 6.

⁹⁹⁷ We note in particular [224]-[228] of *Lexon*. The cases referred to by Sepura, *T-Mobile* and *Cartes Bancaires* were carefully considered by the Court of Appeal (in respect of *T-Mobile*) and the CAT (in relation to both *Cartes Bancaires* and *T-Mobile*).

M. OTHER LEGAL ASPECTS OF THE CHAPTER I PROHIBITION

(1) Duration

768. Ofcom has found that the Infringement took place on 5 September 2018.

(2) Appreciable restriction of competition

(a) Key legal principles

769. An agreement will fall within the Chapter I prohibition only if it has as its object or effect an appreciable prevention, restriction or distortion of competition.⁹⁹⁸

770. An agreement that may affect trade within the UK or part of it, and that has an anti-competitive object, constitutes by its nature, and independently of any actual or potential effects, an appreciable restriction on competition.⁹⁹⁹

(b) Application to the facts

771. Ofcom has found that the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018 constituted a concerted practice that had the object of restricting or distorting competition (see **Section L(2)(c)** above) and that it may have affected trade within the UK (see paragraphs 774 - 775 below). Ofcom therefore also finds that the concerted practice constitutes by its very nature an appreciable restriction of competition for the purposes of the Chapter I prohibition.

(3) Effect on Trade within the UK

(a) Key legal principles

772. The Chapter I prohibition applies to agreements which may affect trade within the UK or part of it.¹⁰⁰⁰ The effect on trade does not necessarily need to be ‘appreciable’.¹⁰⁰¹

773. It is sufficient to establish that the agreement is capable of having such an effect; actual effects need not be shown.¹⁰⁰²

(b) Application to the facts

774. Ofcom finds that the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018 constituted a concerted practice that

⁹⁹⁸ An agreement between undertakings falls outside the prohibition in Article 101(1) TFEU if it has only an insignificant effect on the market: see *Expedia Inc. v Autorité de la concurrence and Others*, C-226/11, EU:C:2012:795, paragraph 16 and the case-law cited therein. See also Agreements and Concerted Practices (OFT401, December 2004), adopted by the CMA Board, paragraph 2.15.

⁹⁹⁹ *Expedia Inc. v Autorité de la concurrence and Others*, C-226/11, EU:C:2012:795, paragraph 37, which applies with the necessary changes in respect of the Chapter I prohibition in accordance with section 60(2) of the Act; Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union, OJ C 291, 30.8.2014, paragraphs 2 and 13: “For instance, as regards agreements between competitors, the Commission will not apply the principles set out in this Notice to, in particular, agreements containing restrictions which, directly or indirectly, have as their object...the allocation of markets or customers”.

¹⁰⁰⁰ Section 2(7) of the Act.

¹⁰⁰¹ *Aberdeen Journals v Director of Fair Trading* [2003] CAT 11, paragraphs 459–461.

¹⁰⁰² *Tate & Lyle plc and Others v Commission*, T-202/98, T-204/98 and T-207/98, EU:T:2001:185, paragraph 78.

may have affected trade within the UK. This concerted practice related to products and services within the Relevant Market, the scope of which we have found to extend to the whole of Great Britain (see **Section D and Annex 2(B)(3) and (4)**). It also involved the two principal suppliers of these products and services in Great Britain.

775. In addition, Ofcom has concluded in **Section L(2)(c)** above that this concerted practice had the object of restricting or distorting competition in relation to the PICT Tender which means that by its very nature, it was capable of affecting trade.

(4) Exclusion under section 3(1), individual exemption under section 9(1) and block exemption under section 10 of the Act

776. Section 3(1) of the Act provides that the Chapter I prohibition does not apply if excluded under Schedules 1 to 3 of the Act (which concern mergers and concentrations, competition scrutiny under other enactments and general exclusions).
777. Additionally, agreements which satisfy the four cumulative criteria in section 9 of the Act or fall with the retained block exemption provisions provided for by section 10 of the Act are exempt from the Chapter I prohibition.
778. The burden of establishing that an agreement falls within the block exemption or satisfies the conditions for individual exemption is on the party claiming the benefit (sections 9(2) and 10 of the Act).¹⁰⁰³
779. None of the Parties have sought to advance evidence as to why their conduct should be excluded from the Act in this respect. Moreover, and in light of the above, Ofcom has found that the concerted practice is not exempt from the application of the Chapter I prohibition under section 9 of the Act and none of the relevant exclusions and exemptions apply.

(5) Undertakings, conduct of employees and attribution of liability

780. For the purposes of the Chapter I prohibition, the term ‘undertaking’ covers every entity engaged in economic activity, regardless of its legal status and the way in which it is financed.¹⁰⁰⁴ An entity is engaged in ‘economic activity’ where it conducts any activity ‘... of an industrial or commercial nature by offering goods and services on the market ...’.¹⁰⁰⁵
781. The term ‘undertaking’ designates an economic unit, even if in law that unit consists of several natural or legal persons.¹⁰⁰⁶
782. It is well established that an undertaking does not correspond to the commonly understood notion of a legal entity, for example under English commercial or tax law, and that a single undertaking may comprise one or more legal or natural persons.¹⁰⁰⁷

¹⁰⁰³ See also *Generics (UK) Limited and others v CMA* [2018] CAT 4, paragraphs 365-366.

¹⁰⁰⁴ *Klaus Höfner and Fritz Elser v Macrotron GmbH*, C-41/90, EU:C:1991:161, paragraph 21.

¹⁰⁰⁵ *Commission v Italian Republic*, C-118/85, EU:C:1987:283, paragraph 7.

¹⁰⁰⁶ *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 55.

¹⁰⁰⁷ *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 55 and the case-law cited; *Sepia Logistics v OFT* [2007] CAT 13, paragraph 70; *Hydrotherm*, 170/93, EU:C:1984:271, paragraph 11.

783. The undertaking that committed the infringement can therefore be larger than the legal entity whose representatives actually took part in the infringing activities. When an undertaking infringes the competition rules, it is for that entity, according to the principle of personal responsibility, to answer for that infringement.¹⁰⁰⁸

(a) Conduct of employees

784. While competition law applies only to undertakings, such undertakings act through their employees. The Court of Justice has explained that:

“An employee performs his duties for and under the direction of the undertaking for which he works and, thus, is considered to be incorporated into the economic unit comprised by that undertaking. [...] For the purposes of a finding of infringement of EU competition law any anti-competitive conduct on the part of an employee is thus attributable to the undertaking to which he belongs and that undertaking is, as a matter of principle, held liable for that conduct.”¹⁰⁰⁹

785. It is not necessary for senior management (or indeed any employees other than those individuals directly involved in a concerted practice) in the undertakings concerned to have knowledge of unlawful conduct of its more junior employees for an undertaking to be held liable for a breach of competition law; action by a person who is authorised to act on behalf of the undertaking suffices.¹⁰¹⁰

(b) Attribution of liability

786. For each of the Parties which Ofcom finds has infringed the Chapter I prohibition, we have first identified the legal entity directly involved in the Infringement. We have then determined whether liability for the Infringement should be shared with another legal entity forming part of the same undertaking, in which case each legal entity’s liability will be joint and several.
787. A legal entity may be held liable for an infringement committed by its subsidiary – even without the parent’s knowledge or involvement¹⁰¹¹ – where, as a matter of economic reality,¹⁰¹² it can be said to have exercised ‘decisive influence’ over its subsidiary during its ownership period.¹⁰¹³
788. A parent company can be held jointly and severally liable for an infringement committed by a subsidiary company where:

¹⁰⁰⁸ *Akzo Nobel NV v Commission*, C-97/08 P, EU:C:2009:536, paragraph 56.

¹⁰⁰⁹ *VM Remonts and others v Konkurences padome*, C-542/14, EU:C:2016:578, paragraphs 23-24.

¹⁰¹⁰ *SA Musique Diffusion française and others v Commission*, C-100-103/80, EU:C:1983:158, paragraph 97.

¹⁰¹¹ *General Química SA v Commission*, C-90/09 P, EU:C:2011:21.

¹⁰¹² *Del Monte v Commission*, C-293/13 P, EU:C:2015:416.

¹⁰¹³ *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536; *Dow v Commission*, C-179/12 P, EU:C:2013:605.

- (1) the parent company is able to exercise ‘decisive influence’ over the conduct of the subsidiary;¹⁰¹⁴ and
- (2) the parent company does in fact exercise such decisive influence;¹⁰¹⁵
- (3) such that the two entities can be regarded as a single economic unit and thus jointly and severally liable.

789. If the subsidiary is wholly-owned by the parent company, the parent company is able to exercise decisive influence over the subsidiary and there is a rebuttable presumption in law that the parent did in fact exercise a decisive influence over the commercial policy of the subsidiary.¹⁰¹⁶ In such circumstances, the parent company and its subsidiary form a single economic unit and, are therefore, the same undertaking for the purpose of applying the Chapter I prohibition.¹⁰¹⁷

790. The burden of rebutting such a presumption – by adducing sufficient evidence that the subsidiary company acted independently on the market – lies with the parent company.¹⁰¹⁸ Ofcom is not required to demonstrate that the parent was involved in, or even aware of, the infringement by its subsidiary.¹⁰¹⁹

(c) Ofcom’s assessment

(i) Are the Parties undertakings for the purposes of competition law?

791. Ofcom finds that the Parties were, amongst other things, suppliers of TETRA products, and were therefore engaged in an economic activity and were therefore undertakings for the purposes of the Chapter I prohibition.¹⁰²⁰

(ii) Is the conduct of their respective employees attributable to Motorola and Sepura?

792. At the time of the exchange of messages on 5 September 2018, [the Motorola VP for Sales] was employed by Motorola and [the Sepura Regional Sales Director] was employed by Sepura. Consistent with the legal principles set out above, the Parties are liable for the conduct of their employees: the conduct of [the Motorola VP for Sales] is attributable to Motorola and the conduct of [the Sepura Regional Sales Director] is attributable to Sepura.

¹⁰¹⁴ *BMW Belgium and Others v European Commission*, 32/78, and 36/78 to 82/78, EU:C:1979:191.

¹⁰¹⁵ *AEG-Telefunken v Commission*, 102/82, EU:C:1983:293.

¹⁰¹⁶ *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraphs 60 and 61; *Alliance One & Others v European Commission*, T-24/05, EU:T:2010:453, paragraphs 126-130.

¹⁰¹⁷ *Alstom v Commission*, T-517/09, EU:T:2014:999, paragraph 55; *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 59.

¹⁰¹⁸ *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 61

¹⁰¹⁹ *General Química SA v Commission*, C-90/09 P, EU:C:2011:21, paragraph 102. See also *Akzo Nobel NV and Others v Commission*, C-97/08, EU:C:2009:536, paragraphs 59 and 77.

¹⁰²⁰ Sepura First Response, Question 1; Motorola First Response, Question 1.

Attribution of liability – Motorola

793. We find that Motorola was directly involved in, and is therefore liable for, the Infringement.
794. Motorola was indirectly wholly-owned by Motorola USA.¹⁰²¹ As a result, Motorola USA is presumed to have had decisive influence over Motorola for the purposes of the Infringement.
795. This Decision is addressed to Motorola and Motorola USA.¹⁰²²

Attribution of liability – Sepura

796. Ofcom concludes that Sepura was directly involved in, and is therefore liable for, the Infringement.
797. In May 2017, Sepura became a wholly-owned subsidiary of Hytera Communications Corporation Limited, incorporated in China.¹⁰²³ There may be other companies within the same corporate group as Sepura (see paragraph 33 above) which could have been held jointly and severally liable for the Infringement. However, for the purposes of this investigation, Ofcom has exercised its discretion to attribute liability within the relevant corporate group to Sepura only.
798. This Decision is therefore addressed to Sepura.

¹⁰²¹ Motorola First Response, Question 1(b).

¹⁰²² *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536.

¹⁰²³ Sepura First Response, Question 1(b).

N. OFCOM'S ACTION

(1) Ofcom's Decision

799. For the reasons stated above, Ofcom has decided that on 5 September 2018 the Parties infringed the Chapter I prohibition by participating in a concerted practice that had the object of restricting or distorting competition, and may have affected trade within the UK (defined earlier as the “**Infringement**”).

(2) Directions

800. Section 32(1) of the Act provides that if Ofcom has made a decision that an agreement infringes the Chapter I prohibition, it may give such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.

801. We consider that the Infringement is no longer continuing and in light of this, Ofcom considers that it is not necessary in the circumstances of this case to give directions to the Parties.

(3) Financial penalties

(a) Introduction

802. Section 36(1) of the Act provides that, on making a decision that conduct has infringed the Chapter I prohibition, Ofcom may in certain circumstances require the undertaking(s) concerned to pay a penalty in respect of the infringement. In accordance with section 38(8) of the Act, Ofcom must have regard to the CMA's published guidance on penalties in force at the time when setting the amount of any penalty.¹⁰²⁴

803. Having decided that the Parties have infringed competition law, Ofcom has decided that it is appropriate in the circumstances of this case to exercise its discretion under section 36(1) of the Act to impose a penalty for the Infringement, given the seriousness of the Infringement and in order to deter similar conduct in the future.

804. Motorola USA applied for leniency in this case and provided Motorola USA continues to comply with the conditions of the CMA's leniency policy (including the requirement to maintain continuous and complete cooperation),¹⁰²⁵ Motorola USA will satisfy the conditions for immunity and neither Motorola USA nor Motorola will be subject to a financial penalty.

805. The remainder of this section therefore sets out Ofcom's reasons for deciding that it is appropriate to impose a financial penalty on Sepura for the Infringement.

806. In accordance with Rules 11 and 6 of the CMA Rules, a Draft Penalty Statement was provided to Sepura on 24 September 2021. Sepura provided written representations on the Draft Penalty Statement on 22 October 2021 (the “**Sepura Penalty Representations**”) and made oral representations on 5 November 2021 (the “**Sepura Oral Transcript**”).

807. On 16 December 2021, the CMA published new guidance on setting the appropriate amount of a penalty. Paragraph 1.9 of that new guidance explains that where a draft penalty

¹⁰²⁴ CMA, December 2021. [CMA's guidance as to the appropriate amount of a penalty \(CMA73\)](#).

¹⁰²⁵ CMA, 2013, [Applications for leniency and no-action in cartel cases](#).

statement has been issued prior to the date of publication of the new guidance, the guidance in force at the time the draft Penalty Statement was issued applies. The penalties guidance referred to below is therefore the penalties guidance dated 18 April 2018 that was in force at the time we issued the Draft Penalty Statement to Sepura (“**Penalties Guidance**”).

1026

(b) Legal framework

(i) Statutory objectives and statutory maximum

808. Section 36(7A) of the Act sets out that, in fixing a penalty, Ofcom must have regard to:

“(a) the seriousness of the infringement concerned, and

(b) the desirability of deterring both the undertaking on whom the penalty is imposed and others from ... [infringing] the Chapter 1 prohibition ...”

809. Section 36(8) of the Act provides that no penalty may exceed ten per cent of an undertaking’s worldwide turnover in the last business year preceding the date on which the infringement decision is taken.¹⁰²⁷

(ii) Penalties Guidance

810. In accordance with section 38(8) of the Act, where Ofcom proposes to require an undertaking to pay a penalty, Ofcom must have regard to the CMA’s Penalties Guidance.

811. The Penalties Guidance reflects the statutory objectives relating to seriousness and deterrence in section 36(7A) of the Act.¹⁰²⁸ The Penalties Guidance also recognises that it is important to ensure that penalties imposed on individual undertakings are proportionate and not excessive.¹⁰²⁹

(iii) Ofcom’s margin of appreciation

812. Provided the penalty it imposes in a particular case falls within the range permitted by section 36(8) of the Act and the 2000 Order, and that Ofcom has, in determining the amount, had regard to the statutory objectives set out in section 36(7A) of the Act and the Penalties Guidance, Ofcom has a margin of appreciation when determining the appropriate amount of a penalty under the Act.¹⁰³⁰ While Ofcom needs to ensure broad consistency in the approach to penalty, Ofcom is not bound by its decisions in relation to the calculation of financial penalties in previous cases, nor is it bound by previous decisions taken by the CMA,

¹⁰²⁶ CMA, April 2018. *CMA’s guidance as to the appropriate amount of a penalty (CMA73)*.

¹⁰²⁷ Calculated in accordance with The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309), as amended by The Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259) (the “**2000 Order**”).

¹⁰²⁸ Penalties Guidance, paragraph 1.3.

¹⁰²⁹ Penalties Guidance, paragraph 1.5.

¹⁰³⁰ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at paragraph 168 and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, at paragraph 102.

in either a competition law or a regulatory context.¹⁰³¹ Rather, Ofcom makes its assessment on a case-by-case basis having regard to all relevant circumstances and the objectives of the Penalties Guidance.¹⁰³²

813. Sepura has also recognised that “[p]enalties involve more of the discretionary type of evaluation of the kind with which Ofcom is more generally familiar”.¹⁰³³
814. The Penalties Guidance sets out in detail the steps for determining the appropriate level of a penalty. **Sections N(3) and O** of this Decision sets out how we have had regard to the Penalties Guidance in determining the financial penalty. **Section O** also sets out the key facts and information we consider to be relevant, as well as our reasoning in determining the financial penalty.

(iv) Small agreements

815. Section 39(3) of the Act provides that a party to a ‘small agreement’ is immune from the effect of section 36(1) of the Act (that is, penalties) for infringements of the Chapter I prohibition. A ‘small agreement’ is an agreement between undertakings, the combined applicable turnover of which does not exceed £20 million for the business year ending in the calendar year preceding the one during which the infringement occurred; and which is not a price fixing agreement.¹⁰³⁴
816. Ofcom considers that the small agreements immunity does not apply in this case as the combined applicable turnover of the Addressees exceeds £20 million.¹⁰³⁵

(v) Intention/negligence

817. Under section 36(3) of the Act, Ofcom may impose a penalty if it is satisfied that an infringement has been committed intentionally or negligently by an undertaking. However, where Ofcom finds that the infringement was committed at least negligently, it is not

¹⁰³¹ See, for example, *Eden Brown and Others v OFT* [2011] CAT 8, at paragraph 78. See also more recently, *Roland v CMA* [2021] CAT 8 at [87].

¹⁰³² See, for example, *Kier Group and Others v OFT* [2011] CAT 3, at paragraph 116 where the CAT noted that ‘other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent’. See also *Eden Brown and Others v OFT* [2011] CAT 8, at paragraph 97 where the CAT observed that ‘Decisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case’.

¹⁰³³ Sepura Oral Transcript, paragraph 201.

¹⁰³⁴ Section 39(1) of the Act and the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262), Regulation 3. The term ‘applicable turnover’ means the turnover determined in accordance with the Schedule to the Regulations.

¹⁰³⁵ The turnover of Motorola for the year ended 31 December 2017, as recorded in the Annual Report and Financial Statements submitted to Companies House for that year, was £81 million, <https://beta.companieshouse.gov.uk/company/00912182/filing-history> [accessed 30 August 2022]; the turnover of Motorola USA for the year ended 31 December 2017, as recorded in its 2017 Annual Report to Stockholders at page 24, https://www.annualreports.com/HostedData/AnnualReportArchive/m/NYSE_MSI_2017.pdf [accessed 30 August 2022], was USD 6,380 million; the turnover of Sepura for the year ending 31 December 2017 was EUR 74.5 million (Sepura Eighth Response, Question 1, paragraph 1.1(b)).

obliged to specify whether it considers the infringement to be intentional or merely negligent.¹⁰³⁶

818. The CAT has explained the terms ‘intentionally’ and ‘negligently’ as follows:

“...an infringement is committed intentionally for the purposes of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition. The OFT is not, however, obliged to decide whether an infringement is committed intentionally or negligently...”¹⁰³⁷

819. The CAT has confirmed that intention or negligence does not require awareness by an undertaking of any specific legal characterisation of its conduct. The question is whether the undertaking could not have been unaware or ought to have been aware of the anti-competitive nature of its conduct, i.e., the intention or negligence relates to the facts not the law.¹⁰³⁸

820. The type of exchange of pricing information that is the subject of this Decision has the object of preventing, restricting or distorting competition and is a restriction of competition that can be regarded, by its very nature, as being harmful to the proper functioning of competition. This is clear from our analysis of the legal and economic context above. It follows that the Parties must have been aware, or could not have been unaware, that their conduct was anti-competitive. This is supported by the contemporaneous evidence which we have also taken into account in order to establish whether or not there was an intention or negligence in this case.

Conduct which has the object of restricting or distorting competition

821. For the reasons set out in **Section L(3)** above, Ofcom considers that the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018 reduced uncertainty between the Parties and was, by its very nature, harmful to the proper functioning of normal competition, such that it had as its object the restriction of competition.

822. On this basis, our view is that the Parties could not have been unaware (or, at least, ought to have known) that their conduct was capable of harming competition and anti-competitive in nature. Our view is that Sepura therefore committed the Infringement intentionally, or at the very least negligently.

¹⁰³⁶ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, at paragraphs 453–457; see also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at paragraph 221.

¹⁰³⁷ *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, at paragraph 221.

¹⁰³⁸ *Royal Mail plc v. Office of Communications* [2019] CAT 27, at paragraph 782; *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, at paragraph 124 and case-law cited.

The evidence

823. Notwithstanding our finding that the exchange of messages on 5 September 2018 had as its object the restriction of competition, Ofcom also considers that the contemporaneous evidence indicates that Sepura could not have been unaware (or at least ought to have known) that its conduct was anti-competitive in nature.

824. In paragraphs 825 - 828 below, we set out:

- (1) the fact [the Sepura Regional Sales Director]’s conduct is attributable to Sepura;
- (2) Sepura’s representations on intention/negligence; and
- (3) our assessment of the evidence.

(i) [the Sepura Regional Sales Director]’s conduct is attributable to Sepura

825. In the circumstances of this case, [the Sepura Regional Sales Director]’s conduct is attributable to Sepura as his employer.¹⁰³⁹ Accordingly, Sepura is liable for this conduct. If [the Sepura Regional Sales Director] could not have been unaware, or ought to have been aware, of the anti-competitive nature of his conduct, it follows that the Infringement was committed intentionally or at the very least negligently.

(ii) Sepura’s representations on intention/negligence

826. Sepura’s Penalty Representations did not contain any representations relating to intention/negligence. For completeness, we have however considered Sepura’s SO Representations relating to intention in the context of section 36(3) of the Act, in particular its representations summarised at **Section L(1)(c)** above.

(iii) Ofcom’s assessment of the evidence

827. Disclosing competitively sensitive information relating to pricing to a competitor – including on pricing strategy – is a well-established competition law infringement. Indeed, [the Sepura Regional Sales Director] confirmed to Ofcom that he would “*not engage and give the competition any sort of insight*” and that he appreciated the importance of keeping Sepura’s pricing strategy to a small circle of people even within Sepura.¹⁰⁴⁰ Our view is that Sepura cannot therefore have been unaware (or at least ought to have known) that its conduct was anti-competitive in nature, namely that the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018 would reduce price competition between the Parties. This is particularly the case in circumstances where:

- (i) Sepura had identified price as the key factor on which the Parties were competing;¹⁰⁴¹ and
- (ii) [the Sepura Regional Sales Director] exchanged information about Sepura’s pricing strategy with its strongest competitor for the PICT Tender.

¹⁰³⁹ See **Section M(5)** above.

¹⁰⁴⁰ [Sepura Regional Sales Director] Interview Transcript (CD1), paragraphs 54 and 95 to 99 and [Sepura Regional Sales Director] Interview Transcript (CD2), paragraphs 88 – 89.

¹⁰⁴¹ See, for example, **Sections F(3)(b) and G** above.

828. We have also found that the contemporaneous evidence supports our view that Sepura could not have been unaware (or at least ought to have known) that its conduct was capable of harming competition.¹⁰⁴² In particular:

- (1) Both Parties were focused on winning a place on the Framework Agreement at a price which did not result in customers switching to the other Party. To assess that risk, the Parties needed to understand whether the other Party intended to submit aggressive bid pricing at a level which may incentivise switching. Both Parties were however uncertain where the other Party might pitch their pricing in the specific context of the PICT Tender and sought competitive intelligence on that other Party's pricing.¹⁰⁴³ In this context, we find that Sepura cannot have been unaware that sharing any information on its pricing strategy with Motorola, its key competitor for the PICT Tender, was capable of harming competition.
- (2) [The Sepura Regional Sales Director] made various disclosures to [the Motorola VP for Sales] relating to Sepura's pricing strategy indicating the Parties should not price aggressively.¹⁰⁴⁴ These cannot credibly be described as inadvertent disclosures. Rather, the content of the messages suggests that the disclosures were deliberate and intended to reduce strategic uncertainty.
- (3) [The Sepura Regional Sales Director] did exactly as he told [the Motorola VP for Sales] he would do in that he recommended to Sepura's senior management to "[u]se current force pricing", i.e., keep prices as is.¹⁰⁴⁵ Our view is that this undermines the suggestion [the Sepura Regional Sales Director] was just being mischievous; rather, it supports our view that [the Sepura Regional Sales Director] intended to share Sepura's actual pricing strategy.¹⁰⁴⁶ In any event, [the Sepura Regional Sales Director] ought to have known that sharing any information about Sepura's pricing strategy with its key competitor – whether being mischievous or not – was capable of harming competition.
- (4) By [the Sepura Regional Sales Director]'s own account, he felt "*a bit foolish for having being drawn into a conversation [he] would not normally have*" the day after the exchange of messages with [the Motorola VP for Sales] on 5 September 2018 and decided "*it would be best to simply delete and forget about what had been said*".¹⁰⁴⁷ [The Sepura Regional Sales Director] appreciated the potential

¹⁰⁴² See, for example, the evidence and findings set out in **Sections G-I, L(1) and L(2)**.

¹⁰⁴³ See the evidence and findings set out in **Sections G-H**.

¹⁰⁴⁴ See in particular **Section I(21)**.

¹⁰⁴⁵ [The Sepura Regional Sales Director]'s comment to [the Motorola VP for Sales] in their exchange of messages on 5 September 2018, "*I get paid on GM not level of discount*" also confirmed to [the Motorola VP for Sales] that [the Sepura Regional Sales Director]'s remuneration would not be affected by not offering PICT a discount. This is consistent with [the Sepura Regional Sales Director] removing from Sepura's 6 September 2018 Presentation the proposed [\times] % discount for mobiles which had featured in Sepura's 3 September 2018 Presentation (compare page 14 of Sepura's 3 September 2018 Presentation with page 14 of Sepura's 6 September 2018 Presentation).

¹⁰⁴⁶ See also the evidence and findings in **Sections L(1) and L(2)**.

¹⁰⁴⁷ [Sepura Regional Sales Director] First Response, Question 4(b)(ii).

consequences of failing to keep Sepura's pricing strategy within a small circle¹⁰⁴⁸ and our view is that his decision to delete the exchange of messages with [the Motorola VP for Sales] from his personal mobile phone is indicative of deliberate concealment, which is strong evidence of an intentional infringement.

- (5) We also note that [the Motorola VP for Sales] was concerned about the exchange of messages with [the Sepura Regional Sales Director] and the part he played in it. He reported the exchange of messages on 5 September 2018 internally the following day,¹⁰⁴⁹ which suggests that [the Motorola VP for Sales], and therefore Motorola, could not have been unaware of the anti-competitive nature of the exchange.

Conclusion on intention/negligence

829. For the reasons set out in paragraphs 821 - 828 above, we are satisfied that Sepura committed the infringement intentionally or at least negligently. We consider that:

- (1) Sepura could not have been unaware of the anti-competitive nature of the exchange of messages on 5 September 2018 and therefore committed the Infringement intentionally; or
- (2) in the alternative, and for these same reasons, Sepura ought to have known that its conduct was anti-competitive in nature.

(4) Conclusion

830. Ofcom has concluded that:

- (1) Sepura has at least negligently infringed the Chapter I prohibition; and
- (2) In light of the seriousness of the Infringement and the desirability of deterring Sepura and others from engaging in conduct that infringes Chapter I prohibition in the future, it is appropriate to impose a financial penalty on Sepura.

¹⁰⁴⁸ [Sepura Regional Sales Director] Interview Transcript (CD1), paragraphs 54 and 95 to 99 and [Sepura Regional Sales Director] Interview Transcript (CD2), paragraphs 88 – 89.

¹⁰⁴⁹ See evidence identified in **Section H(2)(c)**.

O. CALCULATION OF FINANCIAL PENALTY

831. As explained in paragraph 1.10 of the Penalties Guidance, Ofcom must have regard to the Penalties Guidance in force at the time it sets the amount of a financial penalty.
832. The Penalties Guidance sets out a six-step process for determining the level of a financial penalty. These steps are:
- (1) **Step one:** calculation of the starting point having regard to the seriousness of the alleged infringement and the relevant turnover of the undertaking;
 - (2) **Step two:** adjustment for duration;
 - (3) **Step three:** adjustment for any aggravating or mitigating factors;
 - (4) **Step four:** adjustment for specific deterrence and proportionality;
 - (5) **Step five:** adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy; and
 - (6) **Step six:** application of reductions under the CMA's leniency programme, settlement and approval of voluntary redress schemes.

(1) Step one: starting point

833. The starting point for determining the level of financial penalty is calculated having regard to:
- (1) the seriousness of the infringement and the need for general deterrence; and
 - (2) the relevant turnover of the undertaking.¹⁰⁵⁰
834. The starting point (expressed as a percentage up to 30 per cent) applied to the relevant turnover – see **Section O(1)(c)** below – depends in particular upon the seriousness of the infringement: the more serious the infringement, the higher the starting point is likely to be.¹⁰⁵¹ The Penalties Guidance explains that the starting point should also reflect the need to deter the infringing undertaking(s) and other undertakings from engaging in that type of infringement in future.¹⁰⁵² This assessment is made on a case-by-case basis, taking into account all the circumstances of the case.¹⁰⁵³
835. Having regard to the Penalties Guidance, Ofcom's approach has been to consider:
- (1) how likely it is for the type of infringement at issue, by its nature, to harm competition. A starting point within a range of 21% to 30% will be used for the most serious infringements of competition law, including hardcore cartel activity. A

¹⁰⁵⁰ Penalties Guidance, paragraph 2.3.

¹⁰⁵¹ Penalties Guidance, paragraph 2.4.

¹⁰⁵² Penalties Guidance, paragraph 2.4.

¹⁰⁵³ Penalties Guidance, paragraph 2.8.

starting point between 10% and 20% is more likely to be appropriate for certain, less serious, object infringements.¹⁰⁵⁴

- (2) whether it is appropriate to adjust the starting point upwards or downwards by making an assessment of the extent and likelihood of harm to competition and ultimately consumers, taking into account all relevant factors in the specific circumstances of the case. These factors may include: the nature of the product or service, including the nature and extent of demand; the structure of the affected market, including the market shares(s) of the undertaking(s) involved in the infringement, market concentration and barriers to entry; the market coverage of the infringement; the actual or potential effect of the infringement on competitors and third parties; and the actual or potential harm caused to consumers (whether directly or indirectly).¹⁰⁵⁵
- (3) whether the starting point for a particular infringement is sufficient for the purpose of general deterrence. In particular, we have considered the need to deter other undertakings, whether in the same market or more broadly, from engaging in the same or similar conduct.¹⁰⁵⁶

(a) Seriousness

(i) Sepura's representations on Step 1

836. Sepura has submitted that a starting point of 12%, at the lower end of the 10 – 20% range, would be appropriate¹⁰⁵⁷ taking into account:

- (1) The facts of other cases in which starting points of between 18 and 20% were applied and which Sepura contends involved conduct which was “*significantly more serious*” and “*more likely to cause harm to competition*”:¹⁰⁵⁸

- (i) Sepura notes that in *Balmoral*, a starting point of 18% was applied by the CMA. While *Balmoral* also involved an exchange of information on a single occasion, Sepura submits that the circumstances were:

“significantly more serious in nature and likely to harm competition than in the present case”, namely because the exchange in *Balmoral*: “(i) was bilateral; (ii) included detailed discussions of specific pricing information; (iii) took place in circumstances in which all bar one of the market participants were already participating in a long-established cartel involving the fixing of prices and regular exchange of pricing information; and (iv) was immediately disseminated and drawn upon by other participants.”¹⁰⁵⁹

¹⁰⁵⁴ Penalties Guidance, paragraphs 2.5 and 2.6.

¹⁰⁵⁵ Penalties Guidance, paragraphs 2.5 and 2.8.

¹⁰⁵⁶ Penalties Guidance, paragraphs 2.5 and 2.9.

¹⁰⁵⁷ Sepura Penalty Representations, paragraph 2.11. See also Sepura Oral Transcript, paragraph 190.

¹⁰⁵⁸ Sepura Penalty Representations, paragraphs 2.6 and 2.8. See also Sepura Oral Transcript, paragraph 189.

¹⁰⁵⁹ Sepura Penalty Representations, paragraph 2.6. See also Sepura Oral Transcript, paragraph 190.

- (ii) Sepura notes that in *Lexon*, where a starting point of 20% was applied by the CMA, there were a number of exchanges of information that were “*far more significant, extensive and protracted and thus ... more likely to cause harm to competition*” than the exchange of messages on 5 September 2018.¹⁰⁶⁰
- (2) There was no real potential for harm resulting from a reduction of competition in relation to the PICT Tender.¹⁰⁶¹ In particular:
 - (i) Sepura did not receive any information that could have influenced its conduct.¹⁰⁶²
 - (ii) The price drop mechanism meant Sepura was still able to price aggressively under the terms of the Framework Agreement and the vast majority of its sales have in fact been made at its Price Drop Pricing.¹⁰⁶³ Despite the highly concentrated nature of the market and barriers to switching, Sepura’s Price Drop Pricing also incentivised the MPS (the largest police force in the UK) to switch to Sepura in 2019.¹⁰⁶⁴

(ii) Our assessment of the appropriate starting point

837. For the reasons set out in paragraphs 839 – 852 below, Ofcom considers that a starting point of **18%** should be applied in this case.
838. We note that the specific circumstances and context of every case is different. As explained in paragraph 812 above, while Ofcom needs to ensure broad consistency in the approach to penalty, Ofcom is not bound by its decisions in relation to the calculation of financial penalties in previous cases, nor is it bound by previous decisions taken by the CMA, in either a competition law or a regulatory context. We have considered starting points applied in previous cases, including in *Balmoral* and *Lexon*. We have also taken into account the specific circumstances of the conduct in this case and the context in which it occurred. We set out below our assessment of the starting point in this case.

The likelihood that the type of infringement at issue will, by its nature, cause harm to competition

839. As explained in **Section K(2)** above, the EU Courts, the European Commission, the CMA and the CAT have held on numerous occasions that agreements or concerted practices which involve the sharing among competitors of pricing or other information of commercial or strategic significance, reveal in themselves a sufficient degree of harm to competition such that they restrict competition by object.

¹⁰⁶⁰ Sepura Penalty Representations, paragraph 2.8.

¹⁰⁶¹ Sepura Penalty Representations, paragraph 2.11.

¹⁰⁶² Sepura Penalty Representations, paragraph 2.10.1.

¹⁰⁶³ Sepura Penalty Representations, paragraph 2.10.2. See also Sepura Oral Transcript, paragraphs 186 – 188.

¹⁰⁶⁴ Sepura Penalty Representations, paragraph 2.10.3.

840. As explained above, we have found that [the Sepura Regional Sales Director] disclosed competitively sensitive information to [the Motorola VP for Sales] relating to Sepura's pricing strategy and likely pricing levels for the PICT Tender.
841. Ofcom considers that an exchange of information about pricing strategy is generally among the object infringements most likely to cause significant harm to competition, including the normal conditions of competition as part of a competitive tendering process.
842. All tender processes are intended to attract wholly independent bids and take advantage of the climate of uncertainty under normal conditions of competition. Colluding with other potential bidders is also generally explicitly prohibited under the terms of a tender process. Any sharing of competitively sensitive information between competitors – in particular, pricing information – is therefore serious and inherently risks harming the competitive tendering process.
843. As explained in **Section L(2)** above, Ofcom has found that the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018 revealed a sufficient degree of harm to be considered a restriction of competition by object. We also found that the exchange deprived PICT of the opportunity to benefit from the competitive tendering process that would have existed under normal market conditions.

The extent and/or likelihood of harm to competition in the specific relevant circumstances in this case

844. The PICT Tender was an important phase of competition between the Parties and the evidence demonstrates there was significant uncertainty around: (i) the Parties' overall pricing strategy; and (ii) where the Parties would pitch their pricing within that overall strategy. The PICT Tender sought to take advantage of the climate of uncertainty and attract "best value" bids. It also required bidders to confirm that they did not "[c]ommunicate to a party other than The Police ICT Company the amount or approximate amount of [their] proposed Tender".¹⁰⁶⁵
845. As explained in **Section L(1)(b)** above, we have found that the exchange of messages on 5 September 2018 significantly reduced uncertainty in relation to a key parameter on which the Parties were competing and undermined a significant phase of competition between the Parties. The extent and likelihood of harm is particularly pronounced in this case because the exchange of messages occurred between the only two bidders for the PICT Tender.
846. As explained in **Sections I(21)** and **L(1)(b)(vi)** above, we have found that:
- (1) [The Sepura Regional Sales Director] disclosed competitively sensitive information to [the Motorola VP for Sales] relating to Sepura's pricing strategy and likely pricing levels for the PICT Tender.

¹⁰⁶⁵ PICT First Informal Response, Document 23 (Part 8), Form 2 (ATF 5969).

- (2) [The Sepura Regional Sales Director] gained confidence, comfort or assurance from knowing Motorola was aware of Sepura’s pricing intentions and would take that information into account in determining its own pricing strategy.
847. As explained in **Section E(3)**, we have also found the market for the supply of Airwave-TETRA devices to be highly concentrated with material barriers to switching. Whilst some customers do overcome these barriers, any customer that is not prepared to pay the bid pricing of its current supplier or wait for its current supplier to offer a price drop, has only one other supplier to consider and must then overcome the barriers to switching.
848. Moreover, the PICT Tender was a national procurement on behalf of the police, fire, ambulance and other organisations. Any potential harm resulting from a loss in the competitive tendering process would therefore have had the potential to increase the financial burden on public services over a significant period, which may ultimately fall on the taxpayer or be funded by removing resources from other important public services.
849. We discuss the role of pricing in the context of the PICT Tender in detail **Section F(3)(b)** above.
850. In assessing the extent and/or likelihood of this harm in this case, we have taken into account all the evidence, including factors that may increase and factors that may decrease the extent and/or likelihood of this harm.

Sufficiency of starting point for general deterrence and conclusion on the starting point

851. Consistent with section 36(7A) of the Act, a key objective of imposing a particular penalty is to deter other undertakings from engaging in anti-competitive activity in the future. In this regard, it is important that all undertakings understand that:
- (1) sharing commercially sensitive information with a competitor – in particular information relating to pricing – undermines the competitive process that would exist under normal market conditions and is one of the most serious types of conduct most likely to infringe Chapter I of the Act;
 - (2) sharing competitively sensitive information during a public procurement process undermines the ability of the public authority to run a fair, transparent and competitive process and can result in less efficient use of public resources over a significant period than would have otherwise occurred;¹⁰⁶⁶ and
 - (3) any undertaking found to have shared competitively sensitive information in breach of the Act is liable to receive a significant financial penalty.
852. Our view is that the need to deter other undertakings from engaging in similar conduct in the future is important in this case because:

¹⁰⁶⁶ See, for example: Official Journal of the European Union, March 2021. [European Commission Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground](#) (2021/C 91/01) section 1.1, page 3.

- (1) Collusion in public procurements can have a particularly damaging effect on the relevant market for a significant period by increasing the financial burden on public services and ultimately the taxpayer, and by undermining public confidence in public procurement processes.
- (2) The EU Courts, the European Commission, the CMA and the CAT have held on numerous occasions that agreements or concerted practices involving the sharing of competitively sensitive information among competitors – including the sharing of pricing information and the sharing of competitively sensitive information in the context of public procurements – infringe competition law and significant financial penalties have been imposed on undertakings found in breach of the law. However, none of these previous penalties appear to have had a sufficient deterrent effect on Sepura and there continues to be a need to deter other undertakings from engaging in anti-competitive conduct.¹⁰⁶⁷

(b) Conclusion on the starting point

853. Taking into account all of the factors identified in paragraphs 839 – 852 above in the round, we consider a starting point of **18%** of Sepura’s Relevant Turnover (see **Section O(1)(c)** below) to be appropriate. This is at the upper end of the 10 – 20% range, which we consider is the appropriate range for this type of infringement. Our view is that a starting point of **18%** is sufficient to reflect the seriousness of the Infringement and for the purpose of general deterrence, while also taking into account the specific circumstances of this case.

(c) Determination of relevant turnover and financial year for Step 1

854. The Penalties Guidance defines the relevant turnover for the purposes of Step 1 as the turnover of the undertaking in the relevant product and geographic markets affected by the infringement in the undertaking's last business year (which is the financial year preceding the date when the infringement ended).¹⁰⁶⁸ This is based on the relevant turnover as set out in an undertaking’s audited accounts. Using relevant turnover is typically intended to reflect the scale of a party’s activities in the relevant market under investigation and, accordingly, to act as a proxy to reflect the potential impact of an infringement on a given market.
855. Consistent with our statutory obligations to have regard to the Penalties Guidance, Ofcom has determined the relevant turnover in the manner specified above. The exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] occurred on 5 September 2018 and the appropriate financial year is therefore Sepura’s full financial year preceding that date, which is the financial year ending 31 December 2017.

¹⁰⁶⁷ For example, the European Commission has recently noted that “*Collusion is a recurring phenomenon in public procurement markets ... Cases of collusion are regularly identified, investigated and prosecuted*” (see [European Commission Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground](#) (2021/C 91/01) section 1.1, page 3). See also [CMA CA98 cases](#).

¹⁰⁶⁸ Penalties Guidance paragraph 2.11.

856. As explained above, Ofcom considers that the relevant product and geographic market is the supply of TETRA devices, accessories and related services for use on the Airwave network in Great Britain.¹⁰⁶⁹
857. Ofcom therefore considers that, for the purposes of calculating a penalty for the Infringement, Sepura's relevant turnover was £5.8 million (the "**Relevant Turnover**").¹⁰⁷⁰
858. We have, however, taken into account in Step 4 below (in **Section O(4)**) the fact Sepura's revenues from Airwave-TETRA products significantly increased in subsequent financial years following the award of the Framework Agreement, as a result of the delays to the roll-out of the ESN.

(d) Conclusion on Step 1

859. Applying a starting point of 18% to Sepura's Relevant Turnover of £5.8 million results in a penalty figure of **£1,044,000** at the end of Step 1.

(2) Step two: adjustment for duration

860. The Penalties Guidance sets out that the starting point at Step 1 may be increased or decreased to take into account the duration of an infringement.
861. In line with the Penalties Guidance, and where the total duration of an infringement is less than one year, Ofcom will usually treat the duration of the infringement as a full year for the purposes of calculating the number of years of the infringement.¹⁰⁷¹ There are exceptional circumstances where Ofcom may decrease the starting point, if the duration of the infringement is less than one year.¹⁰⁷²
862. The Infringement is based on an exchange of messages on 5 September 2018.

(a) Conclusion on Step 2

863. Ofcom has decided to apply a multiplier of 1 to the penalty figure at the end of Step 1. This means the penalty figure at the end of Step 2 is unchanged at **£1,044,000**.
864. Ofcom does not consider that the circumstances of the Infringement require a departure from the standard approach and warrant a multiplier of less than 1. The practice of rounding up for infringements lasting less than a year aims at ensuring sufficient deterrence for shorter infringements, recognising that even infringements of a very short duration (including those which take place at a single meeting) may have longer-lasting effects.¹⁰⁷³ In

¹⁰⁶⁹ See **Section D** and **Annex 2**.

¹⁰⁷⁰ Sepura Third Response – Part 1, Annex 4, Table 1 (ATF 4955). We note that Sepura reports its revenue in Euros and have used the [ONS](#) GBP to EUR exchange rate for each relevant year.

¹⁰⁷¹ Penalties Guidance, paragraph 2.16.

¹⁰⁷² Penalties Guidance, paragraph 2.16.

¹⁰⁷³ As recognised by the CAT in *Apex Asphalt and Paving Co Ltd v OFT* [2005] CAT 4, at paragraph 278: '*...the effect of the infringement is not restricted to the short period referred to above but has a potential continuing impact on future tendering processes by the same tenderees. Moreover, in relation to tenders we bear in mind the specific nature of a tender process: once a contract has been awarded following an anti-competitive tender, the anti-competitive effect is irreversible*

this context, we note that the Framework Agreement Sepura entered into with PICT remains in place for up to four years, and any contracts entered into under the terms of the Framework Agreement could be in place for up to 10 years.¹⁰⁷⁴

865. We have, however, taken into account the fact the Infringement is based on an exchange on one day (albeit of 54 messages sent over approximately four and a half hours) when assessing the seriousness of the Infringement in Step 1.

(3) Step three: adjustments for aggravating and mitigating factors

866. The Penalties Guidance sets out that the amount of the penalty at Step 2 may be increased where there are aggravating factors or decreased where there are mitigating factors. The Penalties Guidance contains a non-exhaustive list of factors that may warrant an adjustment to the penalty figure at the end of Step 2.¹⁰⁷⁵

867. Ofcom will consider whether any adjustments are appropriate based on the specific circumstances of the infringement. This necessarily involves an exercise of judgment within the scope of Ofcom's margin of appreciation.

(a) Aggravating factors

868. The Penalties Guidance identifies the involvement of directors or senior management in an infringement as a potential aggravating factor.¹⁰⁷⁶ Ofcom has discretion to determine whether it is appropriate to increase the penalty to reflect [the Sepura Regional Sales Director]'s role, taking into account the specific circumstances of this case.

(i) Sapura's representations on Step 3

869. Sepura has submitted that Ofcom can only uplift a penalty at this stage as a result of [the Sepura Regional Sales Director]'s role if [the Sepura Regional Sales Director] held a "senior management" position at Sepura. Sepura has submitted that Ofcom "has mischaracterised [the Sepura Regional Sales Director]'s role"; it contends that his role is not one of senior management but "that tier of middle management and sales that reported to senior management", "albeit at or near the apex of that particular rank".¹⁰⁷⁷ In support of its position, Sepura has made the following representations:

- (1) While [the Sepura Regional Sales Director]'s job title included the term "Director", he is not a Sepura company director; his title simply reflected industry practice of

in relation to that tender. The contract has been awarded; the contract works will in all likelihood have commenced. It is readily apparent that this is not a case where ongoing conduct may simply be rectified. We consider, therefore, that the OFT's decision not to make any adjustment for duration in the circumstances of this case was appropriate and reasonable'.

¹⁰⁷⁴ PICT Instructions to Bidders, paragraph 2.2.1. See also our findings on the ongoing role of pricing in the context of the PICT Tender in **Section F(3)(b)** above.

¹⁰⁷⁵ Penalties Guidance, paragraph 2.17.

¹⁰⁷⁶ Penalties Guidance, paragraph 2.18.

¹⁰⁷⁷ Sepura Penalty Representations, paragraph 2.14; Sepura Oral Transcript, paragraphs 184 and 191.

giving titles to senior salespeople to give them gravitas when negotiating externally.¹⁰⁷⁸

- (2) [The Sepura Regional Sales Director] was not part of Sepura's "Executive Team" and had no leadership or managerial responsibilities outside of his role as regional Sales Director for [X].¹⁰⁷⁹

870. Sepura has also made the following points in relation to [the Sepura Regional Sales Director]'s role in preparing Sepura's response to the PICT Tender:

- (1) Many individuals helped prepare Sepura's bid for the PICT Tender – while "[the Sepura Regional Sales Director] had important input into the PICT tender",¹⁰⁸⁰ his involvement and role as the key contact point for PICT was a result of his customer-facing sales role.¹⁰⁸¹
- (2) [The Sepura Regional Sales Director] was not responsible for final approval of Sepura's bid for the PICT Tender; this approval rested with Sepura's Executive Team.¹⁰⁸²

(ii) Ofcom's assessment

871. For the reasons set out below, we have decided to uplift the penalty figure at this stage by 5% to reflect [the Sepura Regional Sales Director]'s senior and highly influential role at Sepura, including in relation to Sepura's response to the PICT Tender.
872. We have assessed all the evidence relating to [the Sepura Regional Sales Director]'s role within Sepura, as well as his role in preparing Sepura's response to the PICT Tender. We have considered [the Sepura Regional Sales Director]'s actual role and influence rather than his title or inclusion in any team or board.
873. [The Sepura Regional Sales Director] is in a senior role that has a direct and significant impact on Sepura's business. [The Sepura Regional Sales Director] is a Sales Director and leads a team that is responsible for Sepura's [X] sales region ([X]), accounting for approximately [X]% of its total revenues on average between 2017 and 2020.¹⁰⁸³ In his role, [the Sepura Regional Sales Director] also makes public statements and announcements, and in doing so represents Sepura's voice to the outside world.¹⁰⁸⁴ We acknowledge that [the

¹⁰⁷⁸ Sepura Penalty Representations, paragraph 2.14.1; Sepura Oral Transcript, paragraph 192.

¹⁰⁷⁹ Sepura Penalty Representations, paragraph 2.14.1

¹⁰⁸⁰ Sepura Oral Transcript, paragraph 193.

¹⁰⁸¹ Sepura Penalty Representations, paragraphs 2.14.3 – 2.14.4.

¹⁰⁸² Sepura Penalty Representations, paragraph 2.14.4; Sepura Oral Transcript, paragraph 193.

¹⁰⁸³ Sepura Ninth Request, Question 4, paragraph 4.2.2.

¹⁰⁸⁴ See, for example, Sepura First Response, Question 5, Document 4071.1 (ATF 635) and the following public announcements: <https://www.sepura.com/articles/sepura-selected-by-the-police-ict-company-as-approved-vendor-for-uk-public-safety-users>; <https://www.policeprofessional.com/news/police-ict-company-awards-airwave-contract/>; <https://www.criticalcommunicationsreview.com/ccr/news/101335/uk-police-forces-continue-to-choose-sepura-s-sc20-radio>.

Sepura Regional Sales Director] is not part of Sepura's Executive Team and does not appear to play any wider leadership or managerial role than in his role as [Sepura Regional Sales Director].¹⁰⁸⁵

874. In his role as [Sepura Regional Sales Director], the PICT Tender fell within [the Sepura Regional Sales Director]'s remit. [The Sepura Regional Sales Director] was the key lead for the pricing of Sepura's bid for the PICT Tender and the evidence demonstrates he played a highly influential role in shaping Sepura's pricing strategy and its decision-making process.
875. While [the Sepura Regional Sales Director] was not part of Sepura's Executive Team and was not responsible for giving final approval for Sepura's bid, he was responsible for obtaining competitive intelligence, advising on and preparing Sepura's pricing strategy and presenting that strategy and pricing to Sepura's Executive Team.¹⁰⁸⁶ The evidence demonstrates that [the Sepura Regional Sales Director] played an active role from the start, was front and centre in discussions relating to Sepura's pricing strategy, and had a direct and significant impact on both shaping Sepura's pricing strategy and the pricing Sepura ultimately submitted to PICT;¹⁰⁸⁷ in contrast, some members of Sepura's Executive Team only played an active role in Sepura's bid at a late stage in the process.¹⁰⁸⁸ In many ways, [the Sepura Regional Sales Director] was the directing mind behind the pricing of Sepura's bid and therefore on prices paid by emergency service organisations purchasing Airwave-TETRA products across the whole of Great Britain for a significant period.
876. Individuals in senior and highly influential roles such as [the Sepura Regional Sales Director] are critical to ensuring a culture of compliance with competition law across an organisation and should lead by example in ensuring they do not engage in any anti-competitive conduct. This is particularly true for individuals in such roles where risks relating to competition law compliance are likely to be more pronounced including (i) roles in a company which regularly participates in public procurement exercises in a highly concentrated market; and (ii) senior customer-facing roles who may seek or be provided with competitive intelligence and have contact with competitors. If individuals in senior roles with heightened competition law risks

¹⁰⁸⁵ See, for example, Sepura Ninth Request, Questions 5 – 9.

¹⁰⁸⁶ See detailed chronology set out in **Section G**. Also see Sepura First Response, Question 4, Annex 4 (ATF 4926); [Sepura Executive Team Member B]'s Interview Transcript, paragraphs 42 and 46; [Sepura Executive Team Member A]'s Interview Transcript, paragraphs 42 – 44; [Sepura Executive Team Member C]'s Interview Transcript, paragraphs 50 – 51; [Sepura Executive Team Member D]'s Interview Transcript, paragraph 54.

¹⁰⁸⁷ We also note that one day before the submission of Sepura's bid, on 13 September 2018, [the Sepura Regional Sales Director] requested to see the Price Catalogue on the basis that has 80% of the scoring and on 14 September 2018 he was one of three individuals asked to review the pricing in the PICT Price Catalogue one last time and confirm he was happy (Sepura First Response, Question 5, Documents 347.1 (ATF 4294) and 310.1 (ATF 4330)).

¹⁰⁸⁸ For example, [Sepura Executive Team Member A] confirmed during interview that he does not generally get involved until *"the very end of the process"* when he will *"usually ask a few questions around either the pricing, the margin, the strategy, the terms"*. He confirmed that he *"wasn't involved at the earlier stages"* of Sepura's preparations in response to the PICT Tender ([Sepura Executive Team Member A]'s Interview Transcript, paragraphs 40 – 48). Similarly, [Sepura Executive Team Member D] confirmed [X] was not involved in the earlier stages but became involved later on in *"certain sign off meetings"* and after there was already a pricing structure in place ([Sepura Executive Team Member D]'s Interview Transcript, paragraphs 46 and 116). Sepura has also confirmed that [Sepura Executive Team Member D] and [Sepura Executive Team Member A] did not attend Sepura's 6 September 2018 Presentation but did attend Sepura's 10 September 2018 Presentation (Sepura Third Response – Part 2, Question 13(a) and Sepura Fifth Response, Question 1).

do not lead by example, a culture of non-compliance is more liable to spread across an organisation.

877. Taking into account the importance of individuals in senior and highly influential roles leading by example, as well as the nature and direct impact of [the Sepura Regional Sales Director]’s role in the pricing of Sepura’s bid, we consider an uplift for senior management involvement to be appropriate in this case.
878. Taking into account the specific circumstances of this case, we consider that an uplift of 5% is appropriate.
879. We have not identified any other aggravating factors that we consider are relevant in this case.

(b) Mitigating factors

880. Ofcom may decrease the penalty figure at Step 3 for cooperation that enables a more effective and/or speedy enforcement process. In line with the Penalties Guidance, to decrease the penalty figure for this reason, a degree of cooperation is needed over and above what is generally expected. For example, respecting the time limits agreed with Ofcom is necessary but not sufficient to warrant a reduction of the penalty figure at Step 3.¹⁰⁸⁹
881. Ofcom considers that Sepura has generally cooperated in our investigation, including by agreeing to a streamlined access to file process. The way in which Sepura has subsequently cooperated with this process led to some savings of time and resources for which we consider a 5% reduction for cooperation is appropriate.
882. We have not identified any other mitigating factors that we consider are relevant in this case.

(c) Conclusion on Step 3

883. As explained above, we consider it appropriate to apply a 5% uplift and a 5% reduction for aggravating and mitigating factors respectively. There is therefore no change to the penalty figure at this step, and it remains at **£1,044,000**.

(4) Step four: specific deterrence and proportionality

884. The Penalties Guidance sets out that, as a fourth step, an assessment should be made as to whether the overall penalty proposed is appropriate in the round.¹⁰⁹⁰ This assessment will be made on a case-by case basis¹⁰⁹¹ and necessarily involves an exercise of judgment within the scope of Ofcom’s margin of appreciation.
885. The figure reached after Step 3 may be increased at this step to achieve the objective of specific deterrence (i.e. ensuring that the penalty imposed on the undertaking in question

¹⁰⁸⁹ Penalties Guidance, footnote 35.

¹⁰⁹⁰ Penalties Guidance, paragraph 2.24.

¹⁰⁹¹ Penalties Guidance, paragraph 2.21.

will deter it from engaging in anti-competitive practices in the future),¹⁰⁹² provided that any uplift does not result in a penalty that is disproportionate or excessive having regard to the undertaking's size and financial position and the nature of the infringement.¹⁰⁹³

886. The Penalties Guidance gives the following examples of where it may be appropriate to increase the penalty figure to achieve the objective of specific deterrence:

- (1) where an undertaking has a significant proportion of its turnover outside the relevant market;¹⁰⁹⁴ and/or
- (2) where the relevant turnover does not accurately reflect the scale of an undertaking's involvement in the infringement or the likely harm to competition. The Penalties Guidance explains that this might be the case *"for example, in relation to bid-rigging cases or where an undertaking's turnover in the last business year before the infringement ended was unusually low"*.¹⁰⁹⁵

887. The penalty can also be decreased at this step to ensure it is not disproportionate or excessive, taking into account the specific circumstances of the infringement.¹⁰⁹⁶

888. In considering whether any adjustments should be made at this step for specific deterrence or proportionality, we may consider appropriate indicators of the undertaking's size and financial position, as well as any other relevant circumstances.¹⁰⁹⁷ We may take into account an undertaking's total worldwide turnover at the time the penalty is imposed and may take into account averages across recent years.¹⁰⁹⁸

889. This assessment ultimately requires Ofcom to take a step back and use its judgment to decide whether the proposed penalty at the end of Step 3 is appropriate in all the circumstances of the case.

(a) Sepura's representations on Step 4

890. Sepura has submitted that an uplift of 'almost 50%' at Step 4 is excessive, disproportionate *"and not appropriate in the context of the specific facts of the case"*, in particular taking into account *"the very limited infringement (a one-off and unilateral disclosure of unclear information)"*.¹⁰⁹⁹ Sepura contends no uplift or one that is a *"substantially lower"* would be more appropriate.¹¹⁰⁰

¹⁰⁹² Penalties Guidance, paragraph 2.21.

¹⁰⁹³ Penalties Guidance, paragraph 2.23.

¹⁰⁹⁴ Penalties Guidance, paragraph 2.21.

¹⁰⁹⁵ Penalties Guidance, paragraph 2.22.

¹⁰⁹⁶ Penalties Guidance, paragraph 2.24.

¹⁰⁹⁷ Penalties Guidance, paragraph 2.24.

¹⁰⁹⁸ Penalties Guidance, paragraph 2.20.

¹⁰⁹⁹ Sepura Penalty Representations, paragraphs 1.3 and 2.23.

¹¹⁰⁰ Sepura Penalty Representations, paragraph 2.23. See also Sepura Oral Transcript, paragraph 184.

891. Sepura has accepted that one reason an uplift can be applied at this stage is to “*address artificially disproportionality low turnover*” but contends that “*we’re not in that terrain at all*”.¹¹⁰¹ In this regard, Sepura has submitted that its turnover significantly increased in 2019 and 2020 for the following two reasons:

- (1) There was “*suppressed demand*” prior to the Framework Agreement being implemented; and
- (2) Sepura won a significant share of the “*suppressed orders*” that flowed from the implementation of the Framework Agreement, including winning significant numbers of customers from Motorola.¹¹⁰²

892. Sepura also submitted that most of its sales under the terms of the Framework Agreement were made at the discounted prices under the price drop mechanism.¹¹⁰³ Sepura contends that it should not be penalised for its ability to successfully compete by “*cutting its prices and providing competitive bundles*”.¹¹⁰⁴

893. Sepura has also asserted that the “*reputational and market consequences*” – in particular its “*future bidding eligibility*” – of a finding of finding of anti-competitive conduct “*far outweigh the significance of any potential fine*”.¹¹⁰⁵

(b) Ofcom’s assessment of Step 4

894. The penalty figure at the end of Step 3 is **£1,044,000**. Ofcom considers that a penalty of this size would not be sufficient to achieve the statutory objective of deterrence taking into account Sepura’s size and financial position. Specifically, Ofcom considers an increase to be appropriate given that:

- (1) the Relevant Turnover at the end of Step 1 is significantly lower than and does not accurately reflect Sepura’s turnover in the Relevant Market in subsequent years; and
- (2) Sepura generates a significant proportion of its revenues outside the Relevant Market.

895. In our judgment, we have decided that Sepura’s penalty should be increased to **£1,500,000** to ensure that the penalty is sufficient to ensure it achieves the statutory objective of deterrence. We do not consider a penalty of £1,500,000 to be disproportionate or excessive taking into account Sepura’s size and financial position and the specific circumstances of this case.

896. We explain our reasoning in more detail below by reference to the revenues identified in Table 2 immediately below.

¹¹⁰¹ Sepura Oral Transcript, paragraph 199.

¹¹⁰² Sepura Oral Transcript, paragraphs 197 – 198 and 204 – 207.

¹¹⁰³ Sepura Penalty Representations, paragraph 2.19; Sepura Oral Transcript, paragraph 198.

¹¹⁰⁴ Sepura Penalty Representations, paragraph 2.20. See also Sepura Oral Transcript, paragraphs 198 and 199.

¹¹⁰⁵ Sepura Oral Transcript, paragraph 132.

Table 2: Sepura's turnover 2015 – 2021 (£ million)¹¹⁰⁶ – the Relevant Turnover is shaded grey

Year ending 31 December	Sepura Airwave-TETRA product turnover	Sepura UK & Ireland turnover ¹¹⁰⁷	Sepura worldwide turnover ¹¹⁰⁸
2015	8.9 ¹¹⁰⁹	-	-
2016	6.7 ¹¹¹⁰	-	-
2017	5.8 ¹¹¹¹	7.9 ¹¹¹²	65.3 ¹¹¹³
2018	6.8 ¹¹¹⁴	10.4 ¹¹¹⁵	82.2 ¹¹¹⁶
2019	20.9 ¹¹¹⁷	24.3 ¹¹¹⁸	99.5 ¹¹¹⁹

¹¹⁰⁶ We note that Sepura reports its revenue in Euros. We have the [ONS](#) average GBP to EUR exchange rate for each relevant year as follows: 1.3782 for year ending 31 December 2015; 1.2233 for year ending 31 December 2016; 1.1413 for year ending 31 December 2017; 1.1305 for year ending 31 December 2018; 1.1405 for year ending 31 December 2019; 1.125 for year ending 31 December 2020; 1.1633 for year ending 31 December 2021. Note that exchanges rates fluctuated significantly between 2015 - 2021. Figures have been rounded. No adjustment has been made for inflation.

¹¹⁰⁷ These figures include revenues from TETRA products that are not used on the Airwave network.

¹¹⁰⁸ We understand Sepura has investments in various subsidiaries which are valued at around EUR 51 million and that these revenue figures exclude revenues from those subsidiaries (see [Sepura Limited, Annual Report and Accounts, Year Ended 31 December 2021](#) ("2021 Annual Report"), page 38.

¹¹⁰⁹ Sepura Tenth Response, Question 1, Annex 1. Sepura's revenues from Airwave-TETRA products for the year ending 31 December 2015 were EUR 12,333,000.

¹¹¹⁰ Sepura Tenth Response, Question 1, Annex 1. Sepura's revenues from Airwave-TETRA products for the year ending 31 December 2016 were EUR 8,171,000.

¹¹¹¹ Sepura Tenth Response, Question 1, Annex 1. Sepura's revenues from Airwave-TETRA products for the year ending 31 December 2017 were EUR 6,642,000.

¹¹¹² Sepura Eighth Response, Question 1(a). Sepura's revenues for the UK and Ireland for the year ending 31 December 2017 were EUR 9,000,000.

¹¹¹³ Sepura Eighth Response, Question 1(b). Sepura's worldwide revenues for the UK and Ireland for the year ending 31 December 2017 were EUR 74.5 million.

¹¹¹⁴ Sepura Tenth Response, Question 1, Annex 1. Sepura's revenues from Airwave-TETRA products for the year ending 31 December 2018 were EUR 7,711,000.

¹¹¹⁵ [Sepura Limited, Annual Report and Accounts, Year Ended 31 December 2018](#) ("2018 Annual Report"), page 22. Sepura's UK and Ireland revenues for the year ending 31 December 2018 were EUR 11,728,000.

¹¹¹⁶ Sepura's 2018 Annual Report, page 12. Sepura's worldwide revenues for the year ending 31 December 2018 were EUR 92,972,000.

¹¹¹⁷ Sepura Tenth Response, Question 1, Annex 1. Sepura's revenues from Airwave-TETRA products for the year ending 31 December 2019 were EUR 23,786,000.

¹¹¹⁸ [Sepura Limited, Annual Report and Accounts, Year Ended 31 December 2019](#) ("2019 Annual Report"), page 25. Sepura's UK and Ireland revenues for the year ending 31 December 2019 were EUR 27,700,000.

¹¹¹⁹ Sepura's 2019 Annual Report, page 12. Sepura's worldwide revenues for the year ending 31 December 2019 were EUR 113,487,000.

2020	[§<] ¹¹²⁰	28.8 ¹¹²¹	105.2 ¹¹²²
2021	[§<] ¹¹²³	17.1 ¹¹²⁴	88.0 ¹¹²⁵

(i) Significant increase in turnover from Airwave-TETRA products

897. We have found that the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2015 harmed the competitive tendering process underpinning the PICT Tender. We have also found that Sepura’s revenues flowing directly and indirectly from the award of the Framework Agreement (i.e., those in the years ending December 2018-2021) dwarf the Relevant Turnover used in Step 1 of this penalty calculation.
898. As explained at **Section O(1)(c)**, the Relevant Turnover is Sepura’s turnover in the Relevant Market (i.e., the supply of Airwave-TETRA products in Great Britain) in Sepura’s financial year ending before the date of the Infringement (i.e., year ending 31 December 2017). As can be seen in Table 2 above, this was £5.8 million, and the penalty figure at the end of Step 1 is a proportion of that figure.
899. As can also be seen from Table 2, Sepura’s Relevant Turnover was the lowest for all years ending 31 December 2015 to 2021. While Sepura’s revenues from Airwave-TETRA products for the years ending 31 December 2015, 2016 and 2018 were between approximately 16% and 53% higher than Sepura’s Relevant Turnover, Sepura’s revenues from Airwave-TETRA products for the years ending 31 December 2019, 2020 and 2021 were even higher (between approximately [100]% and [400]% higher).
900. Sepura has explained that there was “*suppressed demand*” prior to the implementation of the Framework Agreement in November 2018¹¹²⁶ and that its turnover from Airwave-TETRA products for 2017 and 2018 reflects “*very low levels of business*”.¹¹²⁷ This is because Airwave users had originally been expecting to start migrating off the Airwave network to the ESN by September 2017 and complete that migration by December 2019. Airwave users (and Sepura’s customers) had therefore planned, during 2017 and 2018, to manage with their

¹¹²⁰ Sepura Tenth Response, Question 1, Annex 1. Sepura’s revenues from Airwave-TETRA products for the year ending 31 December 2020 were EUR [§<].

¹¹²¹ [Sepura Limited, Annual Report and Accounts, Year Ended 31 December 2020](#) (“**2020 Annual Report**”), page 27. Sepura’s UK & Ireland revenues for the year ending 31 December 2020 were EUR 32,362,000.

¹¹²² Sepura’s 2020 Annual Report, page 14. Sepura’s worldwide revenues for the year ending 31 December 2020 were EUR 118,369,000.

¹¹²³ Sepura Tenth Response, Question 1, Annex 1. Sepura’s revenues from Airwave-TETRA products for the year ending 31 December 2021 were EUR [§<].

¹¹²⁴ Sepura’s 2021 Annual Report, page 30. Sepura’s UK & Ireland revenues for the year ending 31 December 2021 were EUR 19,891,000.

¹¹²⁵ Sepura’s 2021 Annual Report, page 16. Sepura’s worldwide revenues for the year ending 31 December 2021 were EUR 102,363,000.

¹¹²⁶ Sepura Oral Transcript, paragraphs 197 and 204 – 207.

¹¹²⁷ Macfarlanes’ letter to Ofcom dated 21 February 2020, paragraph 8 (ATF 6066). See also Motorola First Response, Question 1(c), paragraphs 7-9; Motorola Fourth Response, Question 6, paragraph 41.

current stock of Airwave-TETRA products until they were no longer required. However, as explained in **Section C(4)(d)** above, there have been significant delays to the roll-out of the ESN and Airwave users have therefore required Airwave-TETRA products for longer than anticipated. The PICT Tender was intended to address the forecasted shortfall in Airwave-TETRA products arising from these delays.

901. In the three months after being awarded a place on the Framework Agreement (around mid-November 2018 to mid-February 2019), Sepura received orders – both under the terms of the Framework Agreement and “*off-framework*” – for over 45,000 Airwave-TETRA devices “*including a contract in March 2019 to deliver 32,000 TETRA terminals to the Metropolitan Police*”.¹¹²⁸ In total for the year ending 31 December 2019, Sepura received orders for 85,000 Airwave-TETRA devices, which contributed to the significant increase in its revenues from Airwave-TETRA products to £20.9 million.¹¹²⁹ This represents an increase of 260% from its equivalent revenues for the year ending 31 December 2017.
902. Sepura’s revenues from Airwave-TETRA products continued to increase – at least in part driven by further delays to the roll-out of the ESN – rising to £[§<] million for the year ending 31 December 2020.¹¹³⁰ While they subsequently reduced for the year ending 31 December 2021, Sepura’s annual report explains that “[t]he ongoing Covid-19 pandemic has led to disruption and uncertainty in ... [Sepura’s] core markets” but that “demand for ... [Sepura’s] products remains robust” and at the end of December 2021 Sepura’s closing order book was higher than at the end of December 2020.¹¹³¹
903. Taking into account the evidence set out above, we do not consider that Sepura’s revenues for the year ending 31 December 2017 accurately reflect the level of revenues it has directly or indirectly made following the exchange of messages on 5 September 2018 and the subsequent award of a place on the Framework Agreement.
904. For completeness, and in response to Sepura’s representations, we recognise that the majority of Sepura’s sales after the Framework Agreement was implemented have been made at its price drop pricing and that it has won some customers from Motorola. The exact nature of Sepura’s sales is not however relevant to whether the Relevant Turnover accurately reflects the turnover Sepura has directly or indirectly made following the award of the Framework Agreement. In any event, we note that:
 - (1) Sepura accepts that its sales following the award of the Framework Agreement are not only the result of its price drop pricing but also the result of “*suppressed demand*”.

¹¹²⁸ Sepura’s 2018 Annual Report, page 1.

¹¹²⁹ Sepura’s 2019 Annual Report, page 1.

¹¹³⁰ Sepura’s 2020 Annual Report, page 1.

¹¹³¹ Sepura’s 2021 Annual Report, page 1.

- (2) Sepura offered price drops based on a discount from its bid pricing¹¹³² meaning its price drop pricing could still be impacted by its bid pricing.

905. We have taken the specific features of the PICT Tender, and how those features may have meant that the extent and/or likelihood of harm to competition may have been more limited in this case, into account when selecting a starting point of 18% at Step 1.

(ii) Significant revenues outside the Relevant Market

906. While Sepura's Relevant Turnover represents a large proportion of its revenues in the United Kingdom and Ireland for the year ending 31 December 2017, it represents a much smaller proportion of Sepura's worldwide revenues. This has continued to be the case.

907. In fact, Sepura generates significant revenues outside the Relevant Market (i.e., revenues not attributable to the sale of Airwave-TETRA products): its total worldwide revenues were approximately £99.5 million, £105.2 million and £88.0 million for the years ending 31 December 2019, 2020 and 2021 respectively (averaging approximately £97.6 million between 2019 and 2021).

908. Putting the penalty figure at the end of Step 3 into context, it represents less than 1.2% Sepura's worldwide turnover for the year ending 31 December 2021, the last full year for which its accounts are available (and less than 1.1% of its average worldwide turnover for the years ending 31 December 2019-2021).

(iii) Other financial metrics

909. We have also taken into account other financial metrics that are indicative of Sepura's size and the financial resources available to it to help inform our assessment of whether the penalty figure at the end of Step 3 is appropriate to ensure the penalty achieves deterrence. In this regard, we note that:

- (1) Sepura's operating profit was approximately £17.4 million for the year ending 31 December 2021¹¹³³ and the penalty figure at the end of Step 3 represents just 6% of this figure (and less than 6.1% of Sepura's average operating profit for the years 2019-2021).¹¹³⁴

- (2) Sepura's net assets were approximately £85.5 million for the year ending 31 December 2021¹¹³⁵ and the penalty figure at the end of Step 3 represents less than

¹¹³² For example, Sepura offered price drops based on a discount from its bid pricing. See, for example, Sepura First Response, Question 5, Documents 867.1 (ATF 3774), 704.1 (ATF 3937) and 2102.1 (ATF 2539).

¹¹³³ Sepura's 2021 Annual Report, page 16. Sepura's operating profit for the year ending 31 December 2021 was EUR 20,296,000 and we have used the [ONS](#) average GBP to EUR exchange rate for that year of 1.1633.

¹¹³⁴ Sepura's operating profit for the years ending 31 December 2019, 2020 and 2021 was EUR 14,943,000, EUR 23,611,000 and EUR 20,296,000 respectively (see page 14 of its 2020 Annual Report and page 16 of its 2021 Annual Report) and we have used the [ONS](#) average GBP to EUR exchange rates for those years of 1.1405, 1.125 and 1.1633 respectively.

¹¹³⁵ Sepura's 2021 Annual Report, page 19. Sepura's net assets for the year ending 31 December 2021 were EUR 99,460,000 and we have used the [ONS](#) average GBP to EUR exchange rate for that year of 1.1633.

1.3% of this figure (and less than 1.5% of Sepura's average net assets for the years 2019-2021).¹¹³⁶

- (3) Sepura's cash balances were approximately £39.5 million for the year ending 31 December 2021¹¹³⁷ and the penalty figure at the end of Step 3 represents less than 2.7% of this figure (and less than 2.9% of Sepura's average cash balances for the years 2019-2021).¹¹³⁸

(c) Conclusion on whether to adjust penalty at Step 4

910. Taking into account all of the factors identified in paragraphs 897- 909 above, our view is that it is appropriate to apply an uplift to the penalty figure at the end of Step 3 to more accurately reflect:
- (1) Sepura's current revenues relating to Airwave-TETRA products, which represent a significant increase from levels prior to the award of the Framework Agreement for the reasons outlined above; and
- (2) the fact Sepura generates a significant proportion of its revenues outside the Relevant Market.
911. Without the application of an uplift, our view is that the penalty would not reflect Sepura's size and financial resources and would not therefore have sufficient deterrent effect.
912. We note Sepura's submission that the "*reputational and market consequences*" of this Decision outweigh the significance of the financial penalty. However, we consider that a financial penalty that reflects both the revenues impacted by the conduct and Sepura's size and financial resources has an important and necessary deterrent effect. It is Sepura's responsibility to take appropriate measures to satisfy contracting authorities of their reliability when wishing to participate in future procurement exercises.¹¹³⁹ Moreover, such arguments cannot absolve it of liability for an appropriate financial penalty for competition law infringement.
913. We do not consider the penalty figure at the end of Step 3 is disproportionate or excessive taking into account Sepura's size and financial position and the specific circumstances of this case, and do not therefore consider it appropriate to decrease the penalty figure at the end of Step 3.

¹¹³⁶ Sepura's net assets for the years ending 31 December 2019, 2020 and 2021 were EUR 59,520,000, EUR 79,964,000 and EUR 99,460,000 respectively (see page 17 of its 2020 Annual Report and page 19 of its 2021 Annual Report) and we have used the [ONS](#) average GBP to EUR exchange rates for those years of 1.1405, 1.125 and 1.1633 respectively.

¹¹³⁷ Sepura's 2021 Annual Report, page 19. Sepura's cash balances for the year ending 31 December 2021 were EUR 45,921,000 and we have used the [ONS](#) average GBP to EUR exchange rate for that year of 1.1633.

¹¹³⁸ Sepura's cash balances for the years ending 2019, 2020 and 2021 were EUR 35,802,000, EUR 42,763,000 and EUR 45,921,000 respectively (see page 17 of its 2020 Annual Report and page 19 of its 2021 Annual Report) and we have used the [ONS](#) average GBP to EUR exchange rates for those years of 1.1405, 1.125 and 1.1633 respectively.

¹¹³⁹ See, for example, the self-cleaning provisions within Regulation 57(13)-(17) of [The Public Contracts Regulations 2015](#) and Article 57(6) of the [Directive 2014/24/EU of the European Parliament and the of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC](#).

(d) Conclusion on amount of uplift at Step 4

914. Taking into account the specific circumstances of this case and exercising our judgment, we have decided that it would be appropriate to uplift the penalty figure at the end of Step 3 to **£1,500,000** to ensure it has a sufficient deterrent effect.
915. We do not consider uplifting the penalty to £1,500,000 to be disproportionate or excessive, taking into account Sepura's size and financial position and the specific circumstances of this case. A penalty of £1,500,000 is approximately 1.7% of Sepura's total worldwide revenues for the year ending 31 December 2021 (and approximately 1.5% of its average worldwide revenues for the years 2019-2021). It is also:¹¹⁴⁰
- (1) Less than 8.7% of Sepura's operating profit for the year ending 31 December 2021 (and less than 8.8% of Sepura's average operating profit for the years 2019-2021).
 - (2) Less than 1.8% of Sepura's net assets for the year ending 31 December 2021 (and less than 2.2% of Sepura's average net assets for the years 2019-2021).
 - (3) Less than 3.8% of Sepura's cash balances for the year ending 31 December 2021 (and less than 4.2% of Sepura's cash balances for the years 2019-2021).
916. Moreover, a penalty of £1,500,000 is almost six times lower than the maximum penalty we could have imposed.
917. While Sepura submits that the infringement was "*very limited*" and "*a one-off*", we note that (i) the exchange consisted of 54 messages for over two hours; and (ii) the fact that it occurred on a single day does not diminish the seriousness of the conduct which we have found was sufficient to harm the competitive process relating to the PICT Tender. We also refer to our findings on the extent and/or likelihood of harm to competition in **Section O(1)(a)** above.

(5) Step five: adjustment to prevent maximum penalty being exceeded and to avoid double jeopardy

918. Section 36 of the Act provides that no penalty may exceed ten per cent of an undertaking's worldwide turnover in the last business year preceding the date on which the infringement decision is taken.¹¹⁴¹
919. Ofcom has assessed the penalty figure against Sepura's worldwide turnover and this assessment has not necessitated any reduction. Ofcom is not aware that any adjustment needs to be made to the level of the penalty to avoid double jeopardy.

(6) Step six: application of reductions under the CMA's leniency programme, settlement and approval of voluntary redress schemes

920. In line with the Penalties Guidance, at this stage reductions to the penalty figure would be applied in circumstances where an undertaking has a leniency agreement with the CMA¹¹⁴²

¹¹⁴⁰ See references to Sepura's annual reports referred to in **Section O(4)(b)(iii)** above.

¹¹⁴¹ Section 36(8) of the Act, the 2000 Order, and Penalties Guidance, paragraph 2.25.

¹¹⁴² Penalties Guidance, paragraph 2.29.

or makes a full and unequivocal admission of liability and agrees to a streamlined administrative procedure, including waiving rights to provide some or all written and oral representations.¹¹⁴³

921. Sepura did not apply to the CMA for leniency and this case has not been settled so, accordingly, no adjustment is appropriate.

922. There are no other reductions to apply in this case.

(7) Final penalty

923. Having had regard to the Penalties Guidance and in light of all of the circumstances of the case, Ofcom has determined that a financial penalty of **£1,500,000** is appropriate.

¹¹⁴³ Penalties Guidance, paragraph 2.30.

Table 3: Summary of financial penalty calculation

Step	Adjustment	Penalty
Step one		
Starting point	18%	
Applied to Relevant Turnover		£1,044,000
Step two		
Adjustment for duration	none	£1,044,000
Step three		
Adjustment for aggravating or mitigating factors		
<i>Director / senior manager involvement</i>	5%	
<i>Sepura's cooperation</i>	5%	£1,044,000
Step four		
Adjustment for specific deterrence and proportionality	44% ¹¹⁴⁴	
		£1,500,000
Step five		
Adjustment to ensure maximum penalty is not exceeded and to avoid double jeopardy	none	£1,500,000
Step six		
Adjustment for leniency, settlement and/or voluntary redress	none	£1,500,000

¹¹⁴⁴ The adjustment is 43.7% to one decimal place and has been rounded to the nearest percent.

ANNEX 1 - GLOSSARY

In this Decision:

“2000 Order” means The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309), as amended by The Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259);

“accessories” means peripheral equipment and accessories used with TETRA devices;

“Act” means the Competition Act 1998;

“Addressees” means Motorola, Motorola USA and Sepura;

“Airwave” means Airwave Solutions Limited (company number 3985643) and any of its employees, officers or contractors;

“Airwave Direct” means the fully managed mobile communication service provided by Airwave that runs over the Airwave network;

“Airwave-TETRA devices” means the following TETRA devices for use on the Airwave network: hand-held portable TETRA devices (or overt devices); covert TETRA devices that can be concealed about the body; and mobile TETRA devices which can be installed in control rooms as well as various vehicles;

“Airwave-TETRA products” means Airwave-TETRA devices, accessories and related services;

“bid pricing” means the prices the Parties submitted in their response to the PICT Tender on 14 September 2018 and which applies when price drop pricing does not apply;

“CAT” means the Competition Appeal Tribunal;

“Chapter I prohibition” means the prohibition set out in Section 2 of the Act, which prohibits agreements or concerted practices between undertakings which may affect trade within the whole or part of the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK, unless an exclusion applies or the agreements or concerted practices in question are exempt in accordance with the provisions of Part 1 of the Act;

“CMA” means the Competition and Markets Authority;

“CMA Rules” means The Competition Act 1998 (Competition and Markets Authority’s Rules) Order 2014, SI 2014/458;

“ESN” means the Emergency Services Network which is the new 4G commercial mobile LTE network intended to replace the Airwave network;

“ETSI” means the European Telecommunications Standardisation Institute;

“First Letter of Facts” means the first Letter of Facts sent to Sepura dated 24 September 2021 (ATF 6344);

“Framework Agreement” means the framework agreement the successful bidders for the PICT Tender entered into with PICT;

“GMP” means Greater Manchester Police;

“Hytera” means Hytera Communications Corporation Limited;

“Infringement” means Ofcom’s finding that the Parties have infringed the Chapter I prohibition by participating in the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018 that had as its object the restriction or distortion of competition;

“ITT” means the documentation relating to the invitation to tender for the PICT Tender;

“Lot 1 Products” means the Airwave-TETRA products identified in different bundles included in Lot 1 of the PICT Tender and identified in the PICT Pricing Document.

“Motorola” means Motorola Solutions UK Limited (company no. 00912182) and any of its employees, officers or contractors;

“Motorola’s 30 August 2018 Presentation” means Motorola’s internal presentation titled *“UK Devices Market”* and dated 30 August 2018, provided as Annex 3 with Motorola First Response (ATF 5280);

“Motorola’s 11 September 2018 Presentation” means Motorola’s internal presentation titled *“Executive Bid & Contract Review Process”* and dated 11 September 2018 relating to Motorola’s response to the PICT Tender, provided as Annex 4 with Motorola First Response (ATF 5281);

“Motorola Eighth Response” means Motorola’s response dated 29 July 2022 to Ofcom’s eighth request for information dated 15 July 2022 (ATF 6520);

“Motorola First Response” means Motorola’s response dated 18 July 2019 to Ofcom’s first request for information dated 6 June 2019 (ATF 5284);

“Motorola First Response – Annex 5” means Motorola’s response dated 22 July 2019 to Ofcom’s first request for information dated 6 June 2019 (ATF 5282);

“Motorola Fourth Response” means Motorola’s response dated 15 January 2020 to Ofcom’s fourth request for information dated 20 December 2019 (ATF 5181);

“Motorola Ninth Response” means Motorola’s response dated 17 August 2022 to Ofcom’s ninth request for information dated 10 August 2022 (ATF 6549);

“Motorola Second Response – Part 1” means Motorola’s first response dated 18 October 2019 to Ofcom’s second request for information dated 4 October 2019 (ATF 5288);

“Motorola Second Response – Part 2” means Motorola’s second response dated 25 October 2019 to Ofcom’s second request for information dated 4 October 2019 (as supplemented by email on 20 March 2020) (ATF 5289);

“Motorola Seventh Response” means Motorola’s response dated 8 July 2020 to Ofcom’s seventh request for information dated 24 June 2020 (ATF 5802);

“Motorola Sixth Response” means Motorola’s response dated 28 February 2020 to Ofcom’s sixth request for information dated 14 February 2020 (ATF 5213);

“Motorola Sixth Response (Qs. 3, 4 and 23)” means Motorola’s response dated 10 March 2020 to Ofcom’s sixth request for information dated 14 February 2020 (ATF 5781);

“Motorola Sixth Response (Q. 5)” means Motorola’s response dated 15 April 2020 to Ofcom’s sixth request for information dated 14 February 2020 (ATF 5796);

“Motorola Third Response – Part 1” means Motorola’s first response dated 6 December 2019 to Ofcom’s third request for information dated 22 November 2019 (ATF 5754);

“Motorola Third Response – Part 2” means Motorola’s second response dated 13 December 2019 to Ofcom’s third request for information dated 22 November 2019 (ATF 5755);

“Motorola Third Response – Q. 26(c)” means Motorola’s response dated 17 December 2019 to Ofcom’s third request for information dated 22 November 2019 (ATF 5756);

“Motorola USA” means Motorola Solutions Inc. (I.R.S Employer Identification No. 36-1115800) and any of its employees, officers or contractors;

“MPS” means Metropolitan Police Service;

“[Sepura Executive Team Member A]’s Interview Transcript” means the written record of the interview of [Sepura Executive Team Member A] carried out by Ofcom at Sepura’s offices on 5 December 2019 under section 26A of the Act (ATF 5001);

“[Sepura Executive Team Member C]’s Interview Transcript” means the written record of the interview of [Sepura Executive Team Member C] carried out by Ofcom at Sepura’s offices on 5 December 2019 under section 26A of the Act (ATF 5002);

“[Sepura Executive Team Member D]’s Interview Transcript” means the written record of the interview of [Sepura Executive Team Member D] carried out by Ofcom at Sepura’s offices on 5 December 2019 under section 26A of the Act (ATF 5003);

“[Sepura Executive Team Member B]’s Interview Transcript” means the written record of the interview of [Sepura Executive Team Member B] carried out by Ofcom at Sepura’s offices on 5 December 2019 under section 26A of the Act (ATF 5004);

“[Sepura Regional Sales Director] First Response” means [the Sepura Regional Sales Director]’s response dated 24 April 2020 to Ofcom’s first request for information dated 7 April 2020 under section 26 of the Act (ATF 5089);

“[Sepura Regional Sales Director] Interview Transcript” means the written record of the interview of [the Sepura Regional Sales Director] carried out by Ofcom at Sepura’s offices on 5 December 2019 under section 26A of the Act. This record is divided into three parts: CD1 (ATF 5067), CD2 (ATF 5068) and CD3 (ATF 5069);

“[Sepura Regional Sales Director] Mobile Phone Documents” means the documents from [the Sepura Regional Sales Director]’s personal iPhone or SIM card associated with the phone number 07909 536336 that were responsive to search terms provided to the CMA by Ofcom to identify documents potentially relevant to Ofcom’s investigation;

“NCSC” means the National Cyber Security Centre;

“Ofcom” means the Office of Communications;

“OJEU” means the Official Journal of the European Union;

“Parties” means Motorola and Sepura;

“Party” means Motorola or Sepura (as applicable);

“PDS” means the Police Digital Service, formerly known as PICT;

“Penalties Guidance” means the CMA’s Guidance as to the appropriate amount of a penalty (CMA73, 18 April 2018);

“PICT Decision Paper” means Document 21 (Airwave Terminal Procurement Decision Paper dated 15 October 2018) provided with PICT First Informal Response – Part B (ATF 5960);

“PICT First Informal Response – Part A” means PICT’s first response dated 15 November 2019 to Ofcom’s request for information dated 24 October 2019 (ATF 6016);

“PICT First Informal Response – Part B” means PICT’s second response dated 29 November 2019 to Ofcom’s request for information dated 24 October 2019 (ATF 5948);

“PICT First Response” means PICT’s response dated 31 January 2020 to Ofcom’s first request for information dated 16 January 2020 under section 26 of the Act (ATF 5987);

“PICT Framework Information Sheet” means Document 7 (Framework Information Sheet v4) issued following the award of the Framework Agreement and provided with PICT First Informal Response – Part A (ATF 5971);

“PICT Instructions to Bidders” means Document 23 (Part 1) (PICT ITT, Volume 1 of 4 Instructions to Bidders) provided with PICT First Informal Response - Part B (ATF 5962);

“PICT Pricing Document” means Document 20 (Volume 1, Appendix B: Pricing) provided with PICT First Informal Response – Part A and which PICT required bidders to complete and submit in response to the PICT Tender (ATF 5959);

“PICT Procurement Plan” means Document 15 (Procurement Plan – TETRA Airwave devices) provided with PICT First Informal Response – Part A (ATF 5955);

“PICT Second Informal Response” means PICT’s response dated 11 March 2020 to Ofcom’s request for information dated 25 February 2020 (ATF 5997);

“PICT Second Response” means PICT’s response dated 28 February 2020 to Ofcom’s second request for information dated 14 February 2020 under section 26 of the Act (ATF 6059);

“PICT Tender” means the procurement process run by the Police ICT Company for the Lot 1 Products for UK police forces and other organisations that use the Airwave network, as set out in the OJEU, number 2018/S 157-359676;

“PICT Third Response” means PICT’s response dated 4 April 2022 to Ofcom’s third request for information dated 21 March 2022 under section 26 of the Act (ATF 6478);

“PICT Fourth Response” means PICT’s response dated 25 November 2022 to Ofcom’s forth request for information dated 14 November 2022 under section 26 of the Act (ATF 6680);

“PIN” means the Prior Information Notice published by PICT on 31 July 2018;

“Police ICT Company” or **“PICT”** means The Police ICT Company whose registered company number is 08113293, and any of its employees, officers or contractors, now known as the Police Digital Service;

“price drop pricing” means discounted prices below the bid pricing that the Parties are permitted to offer during a Pricing Incentive Window in accordance with the terms of the Framework Agreement;

“Pricing Incentive Window” means a period during which Parties are permitted to offer price drop pricing in accordance with the terms of the Framework Agreement. The first Pricing Incentive Window was available from 11 December 2018 to 14 February 2019 and thereafter for each three-month period from 1 April to 30 June (inclusive) and 1 October to 31 December (inclusive);

“PSNI” means the Police Service of Northern Ireland;

“PSNI Response” means PSNI’s response dated 28 February 2020 to Ofcom’s request for information dated 19 February 2020 (ATF 6047);

“Relevant Market” means the market for the supply of TETRA devices, accessories and related services for use on the Airwave network in Great Britain;

“Relevant Turnover” means Sepura’s turnover in the Relevant Market in Sepura’s financial year ending before the date of the Infringement (i.e., year ending 31 December 2017), namely £5.8 million;

“Revised Second Letter of Facts” means Ofcom’s response dated 16 August 2022 (ATF 6543) to Sepura’s letter of 29 July 2022, provided alongside a revised Annex A which indicated specific ways in which Ofcom may rely on a document or reference in any final decision (ATF 6544);

“Second Letter of Facts” means Ofcom’s second letter of facts issued to Sepura and dated 11 July 2022 (ATF 6485) provided alongside Annex A which indicated specific ways in which Ofcom may rely on a document or reference in any final decision (ATF 6486);

“[X]” [X];

“Sepura” means Sepura Limited whose registered company number is 04353801, and any of its employees, officers or contractors. For the avoidance of doubt, for the period prior to 17 April 2019 this means Sepura plc whose registered company number was 04353801, and any of its employees, officers or contractors;

“Sepura’s 3 September 2018 Presentation” means version 1 of [the Sepura Regional Sales Director]’s internal presentation titled *“PICT Tender Response - Pricing Strategy”*, circulated on and dated 3 September 2018 and containing his initial pricing recommendations in response to the PICT Tender, provided as Document 3862.1 with Sepura First Response (ATF 844);

“Sepura’s 6 September 2018 Presentation” means version 4 of [the Sepura Regional Sales Director]’s internal presentation titled *“PICT Tender Response - Pricing Strategy”*, circulated on 5 September 2018 but dated and presented on 6 September 2018 and containing his revised pricing recommendations in response to the PICT Tender, provided as Document 3803.1 with Sepura First Response (ATF 903);

“Sepura’s 10 September 2018 Presentation” means version 5 of [the Sepura Regional Sales Director]’s internal presentation titled *“PICT Tender Response – Executive Bid Strategy Sign Off”*, circulated on 9 September 2018 but dated and presented on 10 September 2018 and containing his pricing recommendations in response to the PICT Tender, provided as Document 3884.1 with Sepura First Response (ATF 822);

“Sepura Second Letter of Facts Response” means Sepura’s representations dated 2 September 2022 in response to Ofcom’s Revised Second Letter of Facts (ATF 6571);

“Sepura Second Letter of Facts Response (Revised Annex A)” means Sepura’s commentary on the specific ways in which Ofcom indicated it may rely on a document or reference in any final decision provided with Sepura’s Second Letter of Facts Representations (ATF 6572);

“Sepura SO Representations” means Sepura’s response dated 4 February 2021 to Ofcom’s Statement of Objections dated 23 October 2020 (ATF 6278);

“Sepura Oral Transcript” means the written record of the oral hearing with Sepura that took place on 5 November 2021 (ATF 6444);

“Sepura Penalty Representations” means Sepura’s response dated 22 October 2022 to Ofcom’s Draft Penalty Statement dated 23 October 2020 (ATF 6374);

“Sepura First Letter of Facts Representations” means Sepura’s response dated 22 October 2022 in response to Ofcom’s First Letter of Facts (ATF 6375);

“Sepura First Response” means Sepura’s response dated 18 July 2019 to Ofcom’s first request for information dated 6 June 2019 under section 26 of the Act (ATF 4935);

“Sepura Second Response – Part 1” means Sepura’s first response dated 22 November 2019 to Ofcom’s second request for information dated 8 November 2019 under section 26 of the Act (ATF 4946);

“Sepura Second Response – Part 2” means Sepura’s second response dated 28 November 2019 to Ofcom’s second request for information dated 8 November 2019 under section 26 of the Act (ATF 4949);

“Sepura Third Response – Part 1” means Sepura’s first response dated 24 January 2020 to Ofcom’s third request for information dated 20 December 2019 under section 26 of the Act (ATF 4956);

“Sepura Third Response – Part 2” means Sepura’s second response dated 3 February 2020 to Ofcom’s third request for information dated 20 December 2019 under section 26 of the Act (ATF 4830);

“Sepura Fourth Response (Qs. 2-4)” means Sepura’s second response dated 10 February 2020 to Ofcom’s fourth request for information dated 24 January 2020 under section 26 of the Act (ATF 4967);

“Sepura Fifth Response” means Sepura’s response dated 28 February 2020 (excluding Question 8(e)) to Ofcom’s fifth request for information dated 14 February 2020 under section 26 of the Act (ATF 4992);

“Sepura Sixth Response” means Sepura’s response dated 5 March 2020 to Ofcom’s sixth request for information dated 28 February 2020 under section 26 of the Act (ATF 4835);

“Sepura Seventh Response” means Sepura’s response dated 8 July 2020 to Ofcom’s seventh request for information dated 23 June 2020 under section 26 of the Act (ATF 6480);

“Sepura Eighth Response” means Sepura’s response dated 27 August 2021 to Ofcom’s eighth request for information dated 13 August 2021 under section 26 of the Act (ATF 6307);

“Sepura Ninth Response” means Sepura’s response dated 6 December 2021 to Ofcom’s ninth request for information dated 19 November 2021 (ATF 6435);

“Sepura Tenth Response” means Sepura’s response dated 29 July 2022 to Ofcom’s tenth request for information dated 15 July 2022 (ATF 6522);

“TETRA” means Terrestrial Trunked Radio;

“TETRA devices” means hand-held portable TETRA devices (or overt devices); covert TETRA devices that can be concealed about the body; and mobile TETRA devices which can be installed in control rooms as well as various vehicles;

“TETRA products” means TETRA devices, accessories and related services;

“TFEU” means the Treaty on the Functioning of the European Union;

“WMP” means West Midlands Police.

ANNEX 2 – MARKET DEFINITION

A. INTRODUCTION

1. When applying the Chapter I prohibition, Ofcom is not obliged to define the relevant market, unless it is impossible, without such a definition, to determine whether the agreement or concerted practice under investigation has as its object or effect the appreciable prevention, restriction or distortion of competition.¹¹⁴⁵ The CAT has stated that, in Chapter I cases, the *‘determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement’*.¹¹⁴⁶
2. In the present case, we have formed a view of the relevant market in order to calculate Sepura’s ‘relevant turnover’ in the market affected by the Infringement, as this is required for the purposes of establishing the level of the financial penalty that Ofcom considers is appropriate to impose on Sepura.¹¹⁴⁷
3. To that effect, Ofcom must be *“satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement”*.¹¹⁴⁸ The Court of Appeal has made clear that the relevant market which is taken for the purposes of penalty assessments may properly be assessed on a broad view of the particular trade which has been affected by the proved infringement, rather than by a relatively exact application of principles that would be relevant for a formal analysis.¹¹⁴⁹
4. Ofcom’s view on the relevant market in this case should therefore be viewed in context, and in the light of its purposes as outlined above, and is not determinative for the purposes of any future cases.
5. For the reasons given below, Ofcom has found that the relevant market for the purposes of establishing an appropriate financial penalty to impose on Sepura for the Infringement is the **supply of TETRA devices, accessories and related services for use on the Airwave network in Great Britain.**

B. ASSESSMENT OF THE RELEVANT MARKET

(1) Introduction and framework

6. The analysis below sets out Ofcom's view on the relevant market(s) in this case: it considers what products and/or services are part of the relevant market (the relevant product market)

¹¹⁴⁵ *Volkswagen AG v Commission*, T-62/98, EU:T:2000:180, paragraphs 230-232; *SPO and Others v Commission*, T-29/92, EU:T:1995:34, paragraph 74.

¹¹⁴⁶ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph 176. See also: [Market definition \(OFT403, December 2004\)](#), adopted by the CMA Board, footnote 6: *‘[a]n exception is where agreements have as their object the prevention, restriction or distortion of competition. In these cases, market definition is not necessarily a prerequisite for finding an infringement: see Case T-62/98 Volkswagen AG v Commission [2000] ECR II 2707 at paragraphs 230 to 232’*.

¹¹⁴⁷ See Section 6 above, which discusses Ofcom’s proposed Decision.

¹¹⁴⁸ *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, paragraph 170.

¹¹⁴⁹ *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, paragraph 173.

and the geographic scope of the relevant market (the relevant geographic market). For the purposes of defining the relevant product market, Ofcom's starting point is the set of products which were the subject of the Infringement (the 'focal products'). Ofcom then assesses whether the relevant product market and/or geographic market should be broadened based on demand side and supply side substitutability.

7. Demand side substitution is the process by which customers of the focal products would switch some of their purchases from the focal product to other close substitute products.¹¹⁵⁰ Supply side substitution explores whether entry into the candidate relevant market (that is, the market which includes the focal products and any sufficiently close demand side substitutes) would be likely to arise at relatively short notice and without incurring substantial sunk costs.¹¹⁵¹
8. In this case, the focal products are the products included in Lot 1 of the PICT Tender. PICT identified Lot 1 as: *"Radio Terminals, Peripheral Equipment and Accessories: purchase, hire, buyback, lease, asset refresh, disposal, Device as a Service or DaaS, warranty and maintenance and extended warranty of Terrestrial Trunked Radio (TETRA) terminals, accessories and peripheral equipment and systems for use on the UK Airwave system."*¹¹⁵²
9. We refer to these products and services collectively as the **"Lot 1 Products"**. The Parties do not distinguish between peripheral equipment and accessories and we collectively refer to both as "accessories".¹¹⁵³
10. We now consider whether, on the basis of demand or supply-side substitution, we should broaden the relevant market beyond the Lot 1 Products within the scope of the Framework Agreement.

(2) The relevant product market

(a) Lot 1 Products outside of the Framework Agreement

11. Customers were under no obligation to use the Framework Agreement and were free to purchase any Lot 1 Products outside of the Framework Agreement i.e. on prices and/or on terms that are different to those available under the Framework Agreement. We have therefore considered whether the relevant product market should be widened to include the supply of TETRA products for use on the Airwave network but purchased outside of the Framework Agreement.
12. We note that, whether customers purchase within or outside the Framework Agreement, the Airwave-TETRA products that customers would buy will be exactly the same. In this regard, we note that the Lot 1 products include all, or the large majority, of the products

¹¹⁵⁰ See Market Definition, OFT403 (adopted by the Board of the Competition and Markets Authority).

¹¹⁵¹ If prices rise, undertakings that do not currently supply a product might be able to supply it at short notice and without incurring substantial sunk costs. This may prevent a hypothetical monopolist profitably sustaining prices 5 to 10 per cent above competitive levels. This form of substitution is carried out by suppliers and hence is known as supply side substitution.

¹¹⁵² PICT Instructions to Bidders, paragraph 2.3.

¹¹⁵³ Sepura Fifth Response, Question 2, paragraph 2.2; Motorola Sixth Response (Q. 5) paragraph 4.

which the Parties produce as products compatible with the Airwave-TETRA network.¹¹⁵⁴ Further, all of Motorola's¹¹⁵⁵ Airwave-TETRA products, and the vast majority of Sepura's Airwave-TETRA products,¹¹⁵⁶ are available both within and outside the Framework Agreement.

13. As such, we consider that the supply of Airwave-TETRA products made available for supply outside the Framework Agreement are sufficiently close demand-side substitutes to the supply of Airwave-TETRA products made available for supply within the Framework Agreement such that the former should be included in the relevant product market. This includes the supply of all Airwave-TETRA products outside the Framework Agreement, including sales to resellers, distributors and managed service providers (such as Airwave Direct and Capita) as well as to customers entitled to use the Framework Agreement.
14. We therefore conclude that the relevant product market should be broadened to include at least the supply of all Airwave-TETRA products, regardless of whether they are purchased within or outside the Framework Agreement.

(b) TETRA products for use on non-Airwave networks

15. We have also considered whether TETRA products for use on networks other than Airwave should be included in the relevant market for this case.
16. On the demand side, users of the Airwave network need to procure a TETRA device that has been designed for use on the Airwave network and that has the relevant accreditations from Airwave and the National Cyber Security Centre. Users cannot use any other TETRA device on the Airwave network. Customers also need to ensure that the accessories they purchase, and which they require to make the device functional, are compatible with their chosen Airwave-TETRA device. Therefore, we do not consider that TETRA products for use on other networks are sufficiently close demand-side substitutes to be included in the relevant product market.
17. On the supply side, any company that wants to supply TETRA devices for use on the Airwave network, and is not currently doing so, will be subject to various regulatory hurdles, which are likely to take significant time and cost to overcome and act as a significant barrier to entry and expansion (see **Section E(3)(b)** above). We note that there is a "rigorous"¹¹⁵⁷ technical and regulatory accreditation process required for TETRA devices to be supplied for use on the Airwave network. Therefore, we do not consider that TETRA devices for other networks are sufficiently close supply-side substitutes to be included in the relevant product market.

¹¹⁵⁴ Motorola Fourth Response, Question 1(b); Sepura Third Response – Part 1, Question 24, paragraph 24.2.

¹¹⁵⁵ Motorola Fourth Response, Question 1(b).

¹¹⁵⁶ Sepura Third Response – Part 1, Question 24, paragraph 24.2.

¹¹⁵⁷ Sepura Third Response – Part 1, Question 26, paragraph 26.2.

(c) Conclusion on the relevant product market

18. For the reasons set out above, and for the purposes of calculating Sepura's "relevant turnover", we conclude that the relevant product market is the **supply of TETRA devices, accessories, and related services for use on the Airwave network.**¹¹⁵⁸

(3) The relevant geographic market

19. We do not consider it likely that the relevant geographic is narrower than Great Britain because:
- (1) the Airwave network covers the whole of Great Britain; and
 - (2) the PICT Tender required suppliers to supply customers in any part of Great Britain.
20. In addition, we have seen no evidence to indicate that the relevant geographic market is any broader than Great Britain. Moreover, there may be features of the market for the supply of TETRA products on the Airwave network in Great Britain which are specific to Great Britain – for example, the regulatory hurdles mentioned above and the switching costs which customers may incur in changing supplier. These factors may make it costly and time-consuming for any supplier not currently supplying TETRA products for the Airwave network in Great Britain to begin doing so. Therefore, we consider the relevant geographic market to be Great Britain.

(4) Conclusions on the relevant product market and the relevant geographic market

21. For the reasons set out above, and for the purposes of calculating Sepura's "relevant turnover" in the market affected by the Infringement, we conclude that the relevant market is the **supply of TETRA devices, accessories and related services for use on the Airwave network in Great Britain.**

¹¹⁵⁸ This includes software associated with the Airwave-TETRA device and peripheral equipment. Related services include services included in Lot 1 but not managed services of the type procured under Lot 2 of the PICT Tender.

ANNEX 3 – THE EXCHANGE OF MESSAGES ON 5 SEPTEMBER 2018

The table below sets out the exchange of messages on 5 September 2018 between [the Sepura Regional Sales Director] of Sepura and [the Motorola VP for Sales] of Motorola.¹¹⁵⁹

	From	To	Timestamp (UTC+1)	Message
1.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 18:44:07	Hi How is it going?
2.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 19:38:23	Hey [👉]. All good here. Busy as usual. You?
3.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 19:39:02	In Portugal living the dream.
4.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 19:51:35	Cool. I'm in Chicago....it's warm
5.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 19:52:01	Ditto
6.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 21:20:21	Thought you'd be working hard on your PICT submission 😊
7.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 21:20:47	All done.
8.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 21:33:22	Smarty pants

¹¹⁵⁹ Based on Motorola Sixth Response, Document 464 (ATF 5765).

	From	To	Timestamp (UTC+1)	Message
9.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 21:35:53	Or not budding
10.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 21:35:59	Bidding
11.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 21:36:37	I don't believe that for a second
12.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 21:40:30	It's a home office stitch up.
13.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 21:49:38	Why do you say that?
14.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 21:51:40	You have them in your pocket on the extension. You are doing crazy deals across Europe. So if we no bid then can you imagine the questions that will be asked.
15.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 21:55:37	Any extension has nothing to do with this though
16.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 21:57:03	The cheque is in the post. I have met customers who have been offered subsidise terminals.

	From	To	Timestamp (UTC+1)	Message
17.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 21:57:05	And you guys keep going lower and lower in places like Holland
18.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 21:58:52	Subsidised terminals?
19.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 22:01:01	Put our prices up in holland.
20.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 22:44:14	So you're not a fan of the PICT framework approach then?
21.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 22:51:20	Disappointed that they view a radio as a commodity and are just trying to screw us down to lowest price.
22.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 22:51:45	They will be very disappointed.
23.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 22:54:07	I think you're spot on. They (PICT) are definitely trying to justify heir <i>[sic]</i> own value in this and see this as delivering a quick win
24.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 22:55:08	Also some of the force numbers are very questionable.
25.	[Motorola VP for Sales]	[Sepura Regional]	05/09/2018 22:55:40	I did question some of them with our team

	From	To	Timestamp (UTC+1)	Message
		Sales Director]		
26.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 22:56:22	Seems like all the forces have bought into it though
27.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 22:59:12	The MPS business case to MoPAC is for 30k so not sure where the 45k comes from
28.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 23:02:31	Will be interesting to see how forces approach it. Fleet refresh v piecemeal approach
29.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 23:06:10	I think they all like the value of NARPF replacement and PICT have sold this view that everyone will get the MPS pricing
30.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 23:07:21	Until the ESN date is confirmed then all forces will do piecemeal but some DIY repairs.
31.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 23:08:03	Buts = buys
32.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 23:08:14	There's nothing stopping any force going out to tender though
33.	[Motorola VP for Sales]	[Sepura Regional	05/09/2018 23:08:20	It's not mandatory

	From	To	Timestamp (UTC+1)	Message
		Sales Director]		
34.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 23:08:42	Need to stop capita screwing around our business.
35.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 23:09:03	Who do you think will bid Lot 1 Apart from us 2?
36.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 23:09:57	Possibly Leonardo or airbus
37.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 23:10:20	Have hey [<i>sic</i>] got Airwave approved devices?
38.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 23:11:15	I see Leonardo has got new leader for this part of their business. Uk bloke
39.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 23:11:29	No but there was someone asking stupid questions so makes Leonardo the obvious choice
40.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 23:11:37	Hahahahaha
41.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 23:12:06	You let Capita still supply your devices in WMP and GMP though right?

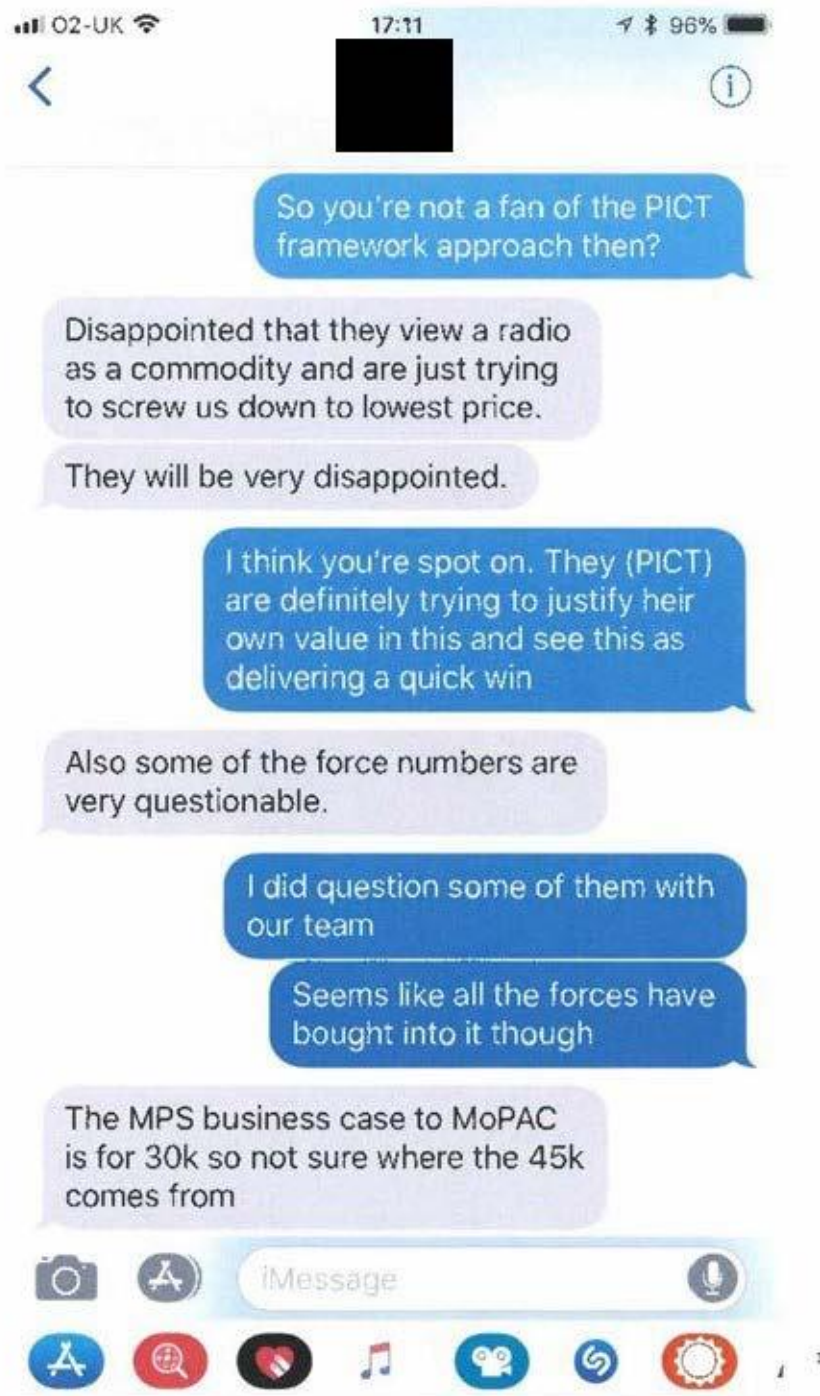
	From	To	Timestamp (UTC+1)	Message
42.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 23:13:10	Ex Sepura
43.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 23:13:10	No they buy through SCC
44.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 23:14:33	Oh. My mistake.
45.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 23:15:28	That is why PICT is a good option. Just they <i>[sic]</i> way they are trying to screw us over
46.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 23:16:26	The whole bit on no mini tenders for 12 months is to get us to give best prices day one. No chance!
47.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 23:17:00	Lol. You'll be keen...I'm sure of that
48.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 23:18:23	No based on the number of opportunities and the likelihood of switching then keep prices as they are.
49.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 23:19:53	That means really low in Sepura speak then 😞😞

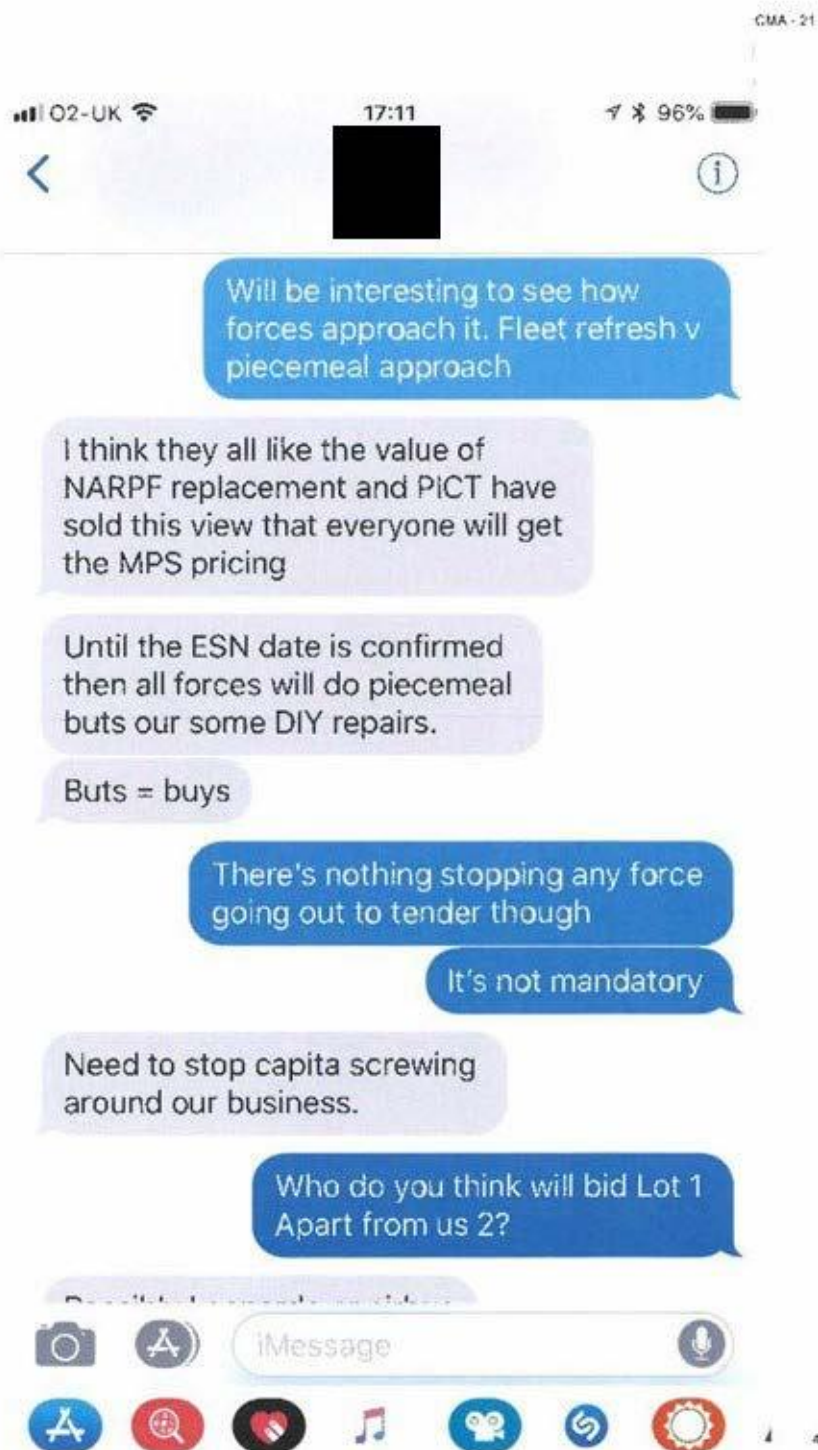
	From	To	Timestamp (UTC+1)	Message
50.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 23:21:45	If it was winner takes all then game on. But to drive no incremental revenues then why give away margin.
51.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 23:21:46	My recommendation tomorrow is to keep prices as is. If management say no I will let you know.
52.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 23:22:40	My view is to let the dust settle see what happens with ESN then we can have some fun and games but for now let's wait
53.	[Sepura Regional Sales Director]	[Motorola VP for Sales]	05/09/2018 23:23:14	I get paid on GM not level of discount.
54.	[Motorola VP for Sales]	[Sepura Regional Sales Director]	05/09/2018 23:26:41	Changing the subject. How's life back in the North East? ¹¹⁶⁰

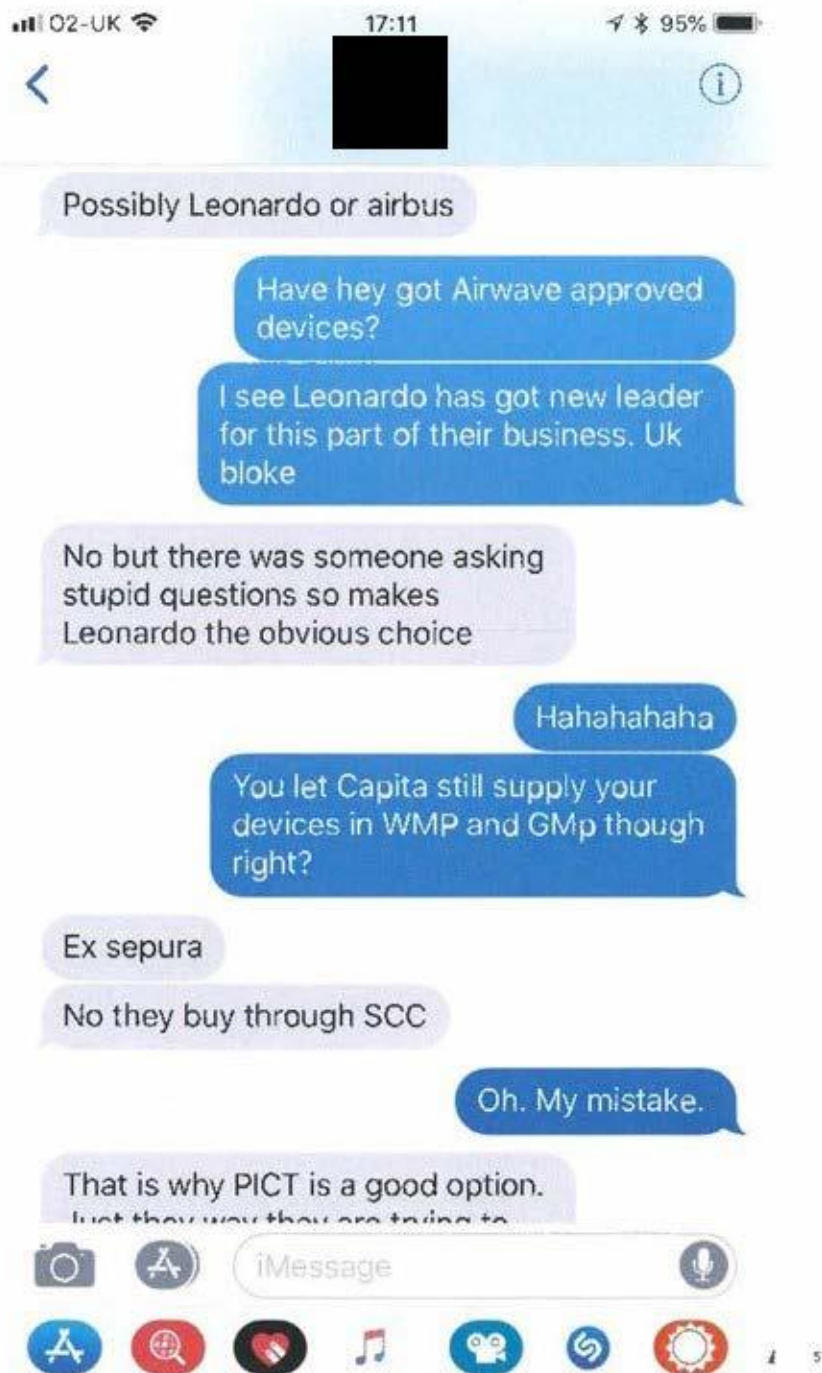
¹¹⁶⁰ Subsequent messages were exchanged between [the Motorola VP for Sales] and [the Sepura Regional Sales Director] between 05/09/2018 23:28 to 05/09/2018 23:34. Those text messages were of a personal nature and have been excluded.

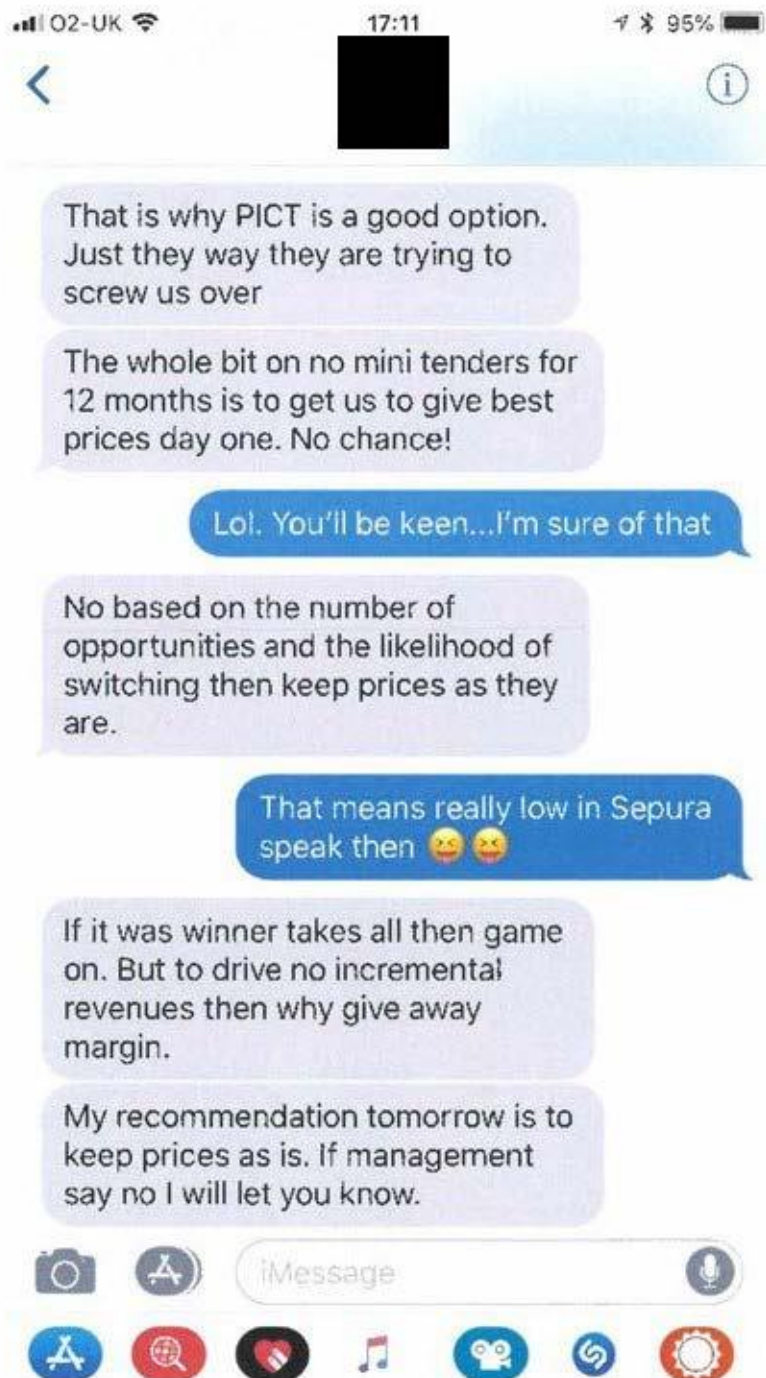












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17:11

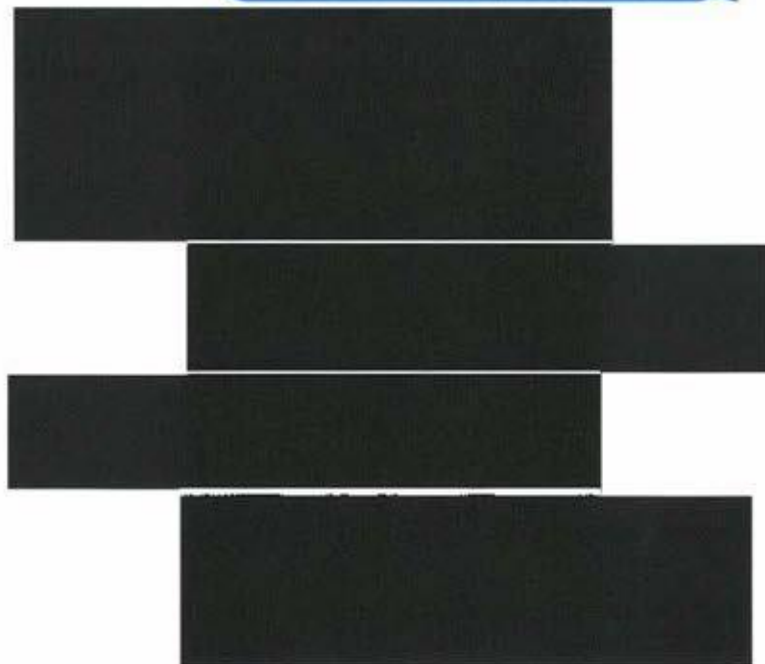
95%



My view is to let the dust settle see what happens with ESN then we can have some fun and games but for now let's wait

I get paid on GM not level of discount.

Changing the subject. How's life back in the North East?



ANNEX 4 – INDIVIDUALS

The tables below identifies the employees of Motorola and Sepura referred to in this Decision and their role at the time of the exchange of messages between [the Sepura Regional Sales Director] and [the Motorola VP for Sales] on 5 September 2018. The employees' names and roles are listed to facilitate an understanding of the evidence.

Table 4: Sepura employees

Name	Role
[REDACTED]	[Sepura Regional Sales Director]
[REDACTED]	[Sepura Executive Team Member A]
[REDACTED]	[Sepura Executive Team Member B]
[REDACTED]	[Sepura Executive Team Member C]
[REDACTED]	[Sepura Executive Team Member D]
[REDACTED]	[Sepura Senior Bids Employee]
[REDACTED]	[Sepura Bids Employee A]
[REDACTED]	[Sepura Bids Employee B]
[REDACTED]	[Sepura Business Development Director]
[REDACTED]	[Sepura Business Development Manager]

Table 5: Motorola employees

Name	Role
[REDACTED]	[Motorola VP for Sales]
[REDACTED]	[Motorola Airwave VP MD]
[REDACTED]	[Motorola Senior VP]
[REDACTED]	[Motorola Finance Lead]
[REDACTED]	[Motorola Senior Finance Director]
[REDACTED]	[Motorola Financial Consultant]

[X]	[Motorola Sales Employee A]
[X]	[Motorola Senior Sales Employee]
[X]	[Motorola Sales Employee B]
[X]	[Motorola Bids Employee A]
[X]	[Motorola Bids Employee B]
[X]	[Motorola Sales Employee C]
[X]	[Motorola Marketing Consultant] (left Motorola on 8 December 2018)