

**COMPLETED ACQUISITION BY NEC SOFTWARE SOLUTIONS UK LIMITED OF CAPITA SECURE SOLUTIONS AND SERVICES**

**ME/6979/21**

**RESPONSE TO PROVISIONAL FINDINGS**

NECSWS's comments on the CMA's Provisional Findings ("PFs") are set out in the table below.

PFS REF.	NECSWS'S RESPONSE
<b>1. GENERAL ISSUES</b>	
--	<p><b>Concerns regarding the CMA's approach to standard of proof, theories of harm and findings of SLC</b></p> <ul style="list-style-type: none"> <li>• The CMA must satisfy itself, on the balance of probabilities, that the Merger may be expected to result in an SLC.</li> <li>• Throughout the PFs, the CMA has made unreasonable assumptions and leaps of logic which do not meet the standard of proof needed to provisionally find an SLC – including (but not limited to) the counterfactual, as detailed further in this response.</li> <li>• The CMA has also taken an inconsistent approach to the evidence available to it in several ways. In particular: <ul style="list-style-type: none"> <li>○ it has chosen to take certain statements in internal documents at face value without conducting further inquiry while at the same time either failing to take into account or attributing little weight to material evidence in other internal documents and other sources. This indicates an unreasonable approach taken by the CMA and a failure to take into account material considerations. For example, a statement in an SSS internal document that its ICCS system is "<i>rock solid</i>" is accepted without any evaluation of SSS's incentives for making such a statement (paragraph 6.183 PFs), while other internal documents and oral evidence (given in the context of s.117 Enterprise Act 2002) describing NECSWS's current strategy as regards its CARM Duties product are essentially disregarded in chapter 7 of the PFs;</li> <li>○ the CMA has not treated references to competitors in internal documents in an even-handed way which points to unreasonableness. For example, more recent negative references in NECSWS's internal documents to SSS and its competitive offering have been given much less weight (e.g. in paragraphs 6.48-6.50 PFs) than: (i) comparable references to third party competitors (e.g. as regards Frequentis in paragraphs 6.56-6.59 PFs), or (ii) references in older internal documents to SSS being a competitive constraint. This approach is difficult to reconcile with the fact that recent market trends (e.g. the growing importance of cloud services and the success of newer competitors) are acknowledged by the CMA in its PFs. As such, the CMA should place more weight on recent internal documents than older ones when analysing the likely future competitive dynamics; and</li> <li>○ the CMA recognises the competitive strength of certain of the Parties' competitors in its substantive assessment based on a</li> </ul> </li> </ul>

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	range of evidence, but does not seem to consider most of them as significant market participants in its findings on barriers to entry and expansion even though that would be a relevant consideration.
<b>2. THE COUNTERFACTUAL</b>	
4.18	<ul style="list-style-type: none"> <li>Please see separate Annex for submissions containing Disclosed Material.</li> </ul>
4.33 - 4.35	<ul style="list-style-type: none"> <li>Please see separate Annex for submissions containing Disclosed Material.</li> </ul>
4.45 - 4.46	<p><b>Pure speculation and unreasonable to assume that SSS would have been sold to an alternative purchaser, or that such a purchaser would have invested in SSS</b></p> <ul style="list-style-type: none"> <li>The fact that there were two third parties who say they would have been "interested" in purchasing SSS had they been aware of the opportunity does <u>not</u> mean that it is likely that SSS would have been sold to an alternative purchaser, or that such a purchaser would have invested in SSS. To assume otherwise, and without more evidence, is unreasonable.</li> <li>As set out at paragraph 2.7 of the Parties' Response to the Annotated Issues Statement, any potential purchaser would have had to, inter alia, (i) make a credible offer having reviewed the Information Memorandum and conducted due diligence, (ii) reach commercial agreement with Capita on the terms of an acquisition (which is unlikely to have been straightforward) and (iii) obtain the requisite level of customer consents to the transfer of their contracts (of which there could be no certainty or even likelihood). It is not known whether the interested parties would have had the requisite funding, and there is also no rational basis for assuming that such a purchaser would have made the necessary investments to maintain SSS's competitive position, or competed actively for contracts in the relevant markets - which would depend heavily on the identity of the purchaser and their commercial objectives.</li> <li>There is no evidence in the two paragraphs of the PFs dealing with this point that the CMA has taken these material considerations into account. Rather, the CMA merely asserts that "<i>alternative interest in purchasing SSS existed</i>" as its foundation for considering that an alternative entity is likely to have purchased SSS (paragraph 4.46 PFs).</li> <li>However, elsewhere in the PFs, CMA itself notes to the contrary that "<i>there is some uncertainty about the investability of the SSS business in its entirety</i>" and "<i>many potential buyers were not interested in purchasing SSS</i>".</li> <li>Consideration should also be given to the incentives behind the third parties' statements of hypothetical interest in acquiring SSS, noting that there is no downside to expressing such interest retrospectively - and potentially commercial upside in light of the potential impact on the CMA's investigation.</li> </ul>
4.48	<p><b>Conclusions on the counterfactual are therefore unreasonable and not based on the evidence and cannot stand</b></p> <ul style="list-style-type: none"> <li>For the reasons explained above, both of the CMA's alternative conclusions on the counterfactual are flawed, based on an</li> </ul>

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	unreasonable approach and a failure to take into account material considerations, and neither can stand. It therefore cannot be assumed that SSS would have received significant investment to be competitive in the counterfactual. Rather, the available evidence points in the opposite direction.
<b>3. NATURE OF COMPETITION</b>	
5.31 - 5.34	<p><b>Uncertainty and inconsistency in relation to the CMA's proposed timeframe for assessment</b></p> <ul style="list-style-type: none"> <li>• At paragraph 5.33 of the PFs, the CMA states that: "[i]n this case, and given the nature of these markets...the relevant period over which we should conduct our competitive assessment is in particular <i>the next few years</i>." (emphasis added). This timeframe is uncertain and the PFs provide no clear indication of what specifically the CMA means by "<i>the next few years</i>". The fact that such a key element of the CMA's assessment is not properly defined disadvantages NECSWS, and is unreasonable and inconsistent with the CMA's duty to take reasoned decisions. This uncertainty makes it difficult to fully understand, and therefore respond to, the CMA's PFs as it is unclear what time-horizon the CMA considers to be relevant for the purposes of its assessment. It is also noted that the CMA appears to have focused on a period of two years in its Market Developments Working Paper, but has provided no reasoning why it has adopted a different timeframe now.</li> <li>• Notwithstanding the above, the timeframe that the CMA adopts throughout the PFs has been applied inconsistently. The inconsistency in the reasoning is such that it is not clear what position the CMA is adopting and thus NEWCS is not being given a fair opportunity to respond to the CMA's position. In particular: <ul style="list-style-type: none"> <li>○ at paragraphs 6.190-6.193 of the PFs, the CMA appears to have only collected and considered information from NECSWS and SSS's competitors on their plans to bid for ICCS opportunities over a two-year period. However, despite having not sought or considered evidence from competitors over a longer period (which would be a material consideration that should be taken into account), the CMA nonetheless provisionally concludes at paragraph 6.199 that "[t]he Parties will face some constraint from other suppliers, and this may increase over <i>the next few years, but not materially so</i>" (emphasis added);</li> <li>○ at paragraph 6.147 of the PFs, the CMA appears to have only sought a competitor's views as regards to future market developments for cloud enabled ICCS solutions over a two-year period; and</li> <li>○ at paragraph 9.8 of the PFs, when setting out the CMA's framework for assessing entry and expansion, the CMA states that it "<i>will look for effective entry to occur within</i>" a two year-period. Again, the CMA appears to have only consulted with the Parties' competitors on entry and expansion over a shorter two-year period. For example, in relation to the supply of Duties, the CMA notes possible market entrants "<i>did not have any plans to enter the Duties market or provide direct supply of duties management services to any emergency services customer in the UK in the next two years</i>" (paragraph 9.83 PFs). It is inappropriate and unreasonable for the CMA to assess an SLC over a period of "<i>the next few years</i>" but, at the same time, discount the prospect of market entry and expansion over at least the same timeframe. This approach is also contrary to the CMA's own Guidance, which states that: "<i>the time horizon for considering the counterfactual will be consistent with the time</i></li> </ul> </li> </ul>

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	<p data-bbox="555 272 2011 424"><i>horizon used in the CMA's competitive assessment (for example, but not exhaustively, entry or expansion by third parties and whether a merger is expected to result in efficiencies)" (CMA 129, paragraph 3.15) and "what is considered to be timely in order to prevent or mitigate the adverse effects of a merger will depend on the industry and the characteristics and dynamics of the market, and the timeframe over which the CMA expects an SLC to result from a merger" (CMA 129 paragraph 8.33).</i></p> <ul data-bbox="414 443 2011 938" style="list-style-type: none"> <li>• Contrary to what is stated in footnote 158 of the PFs, the CMA unreasonably fails to take into account relevant information which falls outside its stated timeframe. For example, in relation to the increasing relevance of cloud-based solutions in the supply of ICCS, the CMA has (albeit inconsistently) focused on future opportunities over the next few years to assess whether the Parties will remain effective competitors ([X]). The CMA has relied on the finding that some customers who prefer on-premise solutions with a roadmap to cloud will procure ICCS over the next few years and that this will offer the Parties an opportunity to continue competing in this market (see paragraph 6.180 PFs). However, a focus on the market over "<i>the next few years</i>" alone is unreasonable as it will fail to have regard to competitive dynamics beyond that. The CMA itself acknowledges in paragraph 6.176 of the PFs that the number of any such opportunities "<i>may be small and further declining in the coming years</i>" in light of the PDS strategy and this trend should be properly accounted for.</li> <li>• The timeframe that the CMA adopts in its assessment (and the consistency of its application) is of crucial importance in this case. Technological change in the markets under review by the CMA has altered (and continues to alter) the competitive dynamics. This change has allowed innovative new entrants (i.e. cloud-based providers) to threaten and consistently win business from traditionally less agile incumbents. The CMA must therefore adopt an appropriate and clearly defined timeframe for its assessment and be consistent in its application.</li> <li>• Please see separate Annex for additional submissions containing Disclosed Material.</li> </ul>
<b>4. COMPETITIVE ASSESSMENT - ICCS</b>	
General	<p data-bbox="414 1029 1541 1058"><b>Evidence in the PFs cannot reasonably support a finding of an SLC in the supply of ICCS</b></p> <ul data-bbox="414 1077 2011 1364" style="list-style-type: none"> <li>• The evidence presented by the CMA in the PFs cannot rationally support a conclusion that the merger gives rise to an SLC in the supply of ICCS to emergency services and transport customers in the UK.</li> <li>• When viewed in the round and reasonably considered, the evidence in the PFs themselves contradicts any such finding. For example: <ul data-bbox="510 1197 2011 1364" style="list-style-type: none"> <li>○ NECSWS and SSS's internal documents contain many references to credible alternatives in the supply of ICCS in the UK, including Motorola, Frequentis, Saab and Systel;</li> <li>○ the evidence collected from customers demonstrates that they consider that they have many alternatives to the Parties. For example, in Table 6-5 each of Motorola, Frequentis, Saab and Systel received a significant number of mentions by customers as credible suppliers;</li> </ul> </li> </ul>

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	<ul style="list-style-type: none"> <li>○ the vast majority of customers were either positive or did not express any concerns about the transaction (paragraph 6.126 PFs); and</li> <li>○ each Party's ICCS solution is an on-premise solution and the CMA itself accepts that there is "<i>likely to be a small and possibly declining number of opportunities in the next few years that will either only require an on-premise solution or where an on-premise solution with a credible road map to cloud may be acceptable (or even desirable) to the customer</i>" (paragraph 6.180 PFs).</li> </ul> <ul style="list-style-type: none"> <li>● Consistent with the above, the Parties have also provided the CMA with strong evidence that each of Motorola, Frequentis, Saab and Systel are credible competitors in the supply of ICCS (see e.g. paragraphs 4.3 to 4.5 Annotated Issues Statement Response).</li> <li>● The evidence supports the conclusion that the transaction does not give rise to an SLC in the supply of ICCS to emergency services and transport customers in the UK. In particular, the ICCS market is highly competitive with six well-established suppliers. As such, the CMA's view that the ICCS market is "<i>concentrated with only six competitors operating it</i>" (emphasis added; paragraph 6.132 PFs) does not appear to be founded on a reasonable basis: many markets exhibit healthy competition with fewer active competitors.</li> <li>● Please see separate Annex for additional submissions containing Disclosed Material.</li> </ul>
6.36 - 6.45	<ul style="list-style-type: none"> <li>● Please see separate Annex for submissions containing Disclosed Material.</li> </ul>
6.45	<ul style="list-style-type: none"> <li>● The CMA does not provide any explanation why one should interpret Frequentis's market share by volume of calls differently simply because a large volume of calls is generated by one contract.</li> </ul>
6.47 - 6.50	<p><b>Unreasonable conclusions drawn from NECSWS's internal documents</b></p> <ul style="list-style-type: none"> <li>● The internal documents cited by the CMA do not support a finding that it considers SSS to be a close competitor in the supply of ICCS. Rather, NECSWS's internal documents (particularly recent documents) clearly identify that SSS's ICCS offering has weaknesses and that its current solution [X], as the CMA itself recognises at paragraphs 6.49 and 6.50 of the PFs.</li> </ul>
6.52 - 6.65	<p><b>CMA has failed to take into account relevant evidence from NECSWS's internal documents that alternative suppliers in ICCS pose a strong competitive constraint</b></p> <ul style="list-style-type: none"> <li>● The CMA has correctly identified that NECSWS's internal documents demonstrate that NECSWS considers that "<i>Motorola is a strong competitive threat</i>" (paragraph 6.54 PFs).</li> <li>● However, the CMA has failed to take into account the competitive constraint imposed by other competitors in the supply of ICCS evidenced in NECSWS's internal documents. In particular: <ul style="list-style-type: none"> <li>○ as regards Frequentis, the CMA cites passages from NECSWS's internal documents which evidence the strong and credible constraint posed by Frequentis (paragraphs 6.56 and 6.57 PFs). However, the CMA later concludes that "<i>this constraint is</i></li> </ul> </li> </ul>

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	<p><i>likely to have limitations</i>" in part due to its view that "Frequentis [redacted]". This is an inappropriate basis to discount the competitive threat imposed by Frequentis. Even assuming Frequentis was expected to bid less often than other competitors, NECSWS will be unaware of which bids Frequentis will participate in, meaning that it will still act as a competitive threat across all bids; and</p> <ul style="list-style-type: none"> <li>○ similarly, as regards Saab, the CMA incorrectly states that Saab is a "<i>more limited constraint</i>" on NECSWS despite having been provided with contemporaneous internal documents from NECSWS which show that Saab [redacted]. In particular, the CMA notes that NECSWS's internal documents recognise Saab [redacted] (paragraph 6.61 PFs).</li> <li>● Further, the CMA's assessment of the competitive constraint imposed by Frequentis and Saab is inconsistent with its assessment of SSS which points to an unreasonable approach. In particular, the CMA states that the competitive threat posed by Frequentis is "<i>weaker</i>" than that of SSS or Motorola, and that Saab provides a "<i>more limited constraint</i>" than other competitors, relying in part on statements in NECSWS's internal documents on their ability [redacted]. However, the CMA has itself noted statements in NECSWS's internal documents detailing SSS's "<i>weaknesses</i>", but makes no similar reservation about the competitive threat posed by SSS in its conclusions.</li> </ul>
6.100 - 6.118	<p><b>Analysis of CMA's opportunities data</b></p> <ul style="list-style-type: none"> <li>● In relation to the Parties' participation in ICCS and Duties opportunities since 2017, the CMA has clarified that it has considered all 'involved' suppliers in its analysis where the 'involved' supplier is one who was at least invited to the opportunity to bid (and may have submitted an informal or formal bid). Without access to the underlying data, it is not clear if this approach will overstate the Parties' participation in opportunities where a Party was invited but did not place a bid or qualify the PQQ stage. Fairness requires that NECSWS be supplied with the underlying data in order to be able to have a fair opportunity to respond to this issue.</li> <li>● Moreover, it is not clear how opportunities have been classified as Tenders, Direct Awards and Extensions in the CMA's analysis. For instance, as per footnote 486, opportunities that were classified as a direct award by a customer were treated as such even if these were considered to be Tenders by the appointed supplier.</li> <li>● Please see separate Annex for additional submissions containing Disclosed Material.</li> </ul>
6.119 - 6.128	<p><b>Customers do not think that the transaction will give rise to an SLC in the supply of ICCS</b></p> <ul style="list-style-type: none"> <li>● As per paragraph 6.126 of the PF, the CMA states that the "<i>vast majority</i>" of customers responded with a 'neutral' or 'don't know' response when asked about the impact that the proposed transaction would have on them as an ICCS customer. However, the CMA has explained that it only places a limited amount of weight on these responses due to the limited engagement from customers. This approach does not reasonably consider the potential reasons why there was limited engagement – in fact, the limited engagement to this question is further proof that ICCS customers are not concerned by the proposed transaction. If customers were concerned about the transaction their engagement with the CMA would likely have been significantly higher.</li> </ul>

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	<ul style="list-style-type: none"> <li>• More generally, it is not clear why customers' response to this question is given limited evidential weight whilst other responses are considered more reliable. For example, Table 6-5 examines examples of the number of times customers mentioned particular ICCS suppliers as meeting their software requirements ranking by suitability (the majority of which actually provided this feedback at Phase 1). This again points to an inconsistent approach to evidence and a failure to take into account material considerations.</li> </ul>
6.137 - 6.199	<p><b>CMA's provisional findings support a conclusion that cloud enabled ICCS solutions are, and will increasingly be, important to compete effectively</b></p> <ul style="list-style-type: none"> <li>• The CMA's own analysis supports the Parties' views that it is currently important, and will become increasingly important, for ICCS solutions to be deployed through public cloud. This is supported by the feedback from the PDS (paragraph 6.143 PFs) and by the fact that over half of customers consider that cloud deployment is very important to them (i.e. four or five out of five) (paragraph 6.144 PFs). The evidence that the CMA has collected is also consistent with the fact that all ICCS tenders in the last two years have either had a cloud requirement or have been won by a cloud-based supplier. For example, West Yorkshire Police framework for North East police and fire ICCS (won by Motorola); Dyfed Powys Police (won by Motorola); Hereford and Worcester FRS and Shropshire FRS (won by Motorola); Kent &amp; Essex Police (won by Motorola); the Met Police (won by Frequentis); South Wales and Gwent Police (won by Saab); and the ARP tender for ambulance ICCS (won by Frequentis).</li> <li>• Although the CMA has not provided the Parties with the feedback from customers, the fact that some reservations have been expressed about cloud-based solutions does not undermine the fact that most customers regard deployment of ICCS through public cloud as very important. It is therefore correct for the CMA to conclude that non-cloud-based tenders are likely to be "<i>small and declining in the coming years</i>" (paragraph 6.176 PFs).</li> <li>• It is clear against that background that, given SSS that has [redacted], it will be [redacted] in the supply of ICCS in the counterfactual.</li> </ul>
6.181 - 6.184	<p><b>Evidence on previous tenders supports the fact that SSS's ICCS solution is [redacted]</b></p> <ul style="list-style-type: none"> <li>• In paragraph 6.181(a) to (d) of the PFs, the CMA sets out clear evidence of SSS's ICCS product's [redacted]. This supports the Parties' views that SSS is currently [redacted].</li> <li>• However, at paragraph 6.183 of the PFs, the CMA relies on a single SSS internal document to suggest that SSS's ICCS product will be a competitive constraint in the counterfactual. This is an insufficient basis to support the CMA's conclusion at paragraph 6.184 of the PFs that SSS exerts a credible "<i>competitive constraint</i>" in the supply of ICCS.</li> </ul>
6.193	<p><b>Evidence supports Systel being a credible competitive threat</b></p> <ul style="list-style-type: none"> <li>• The CMA has been provided with evidence from Systel that it intends to bid for six opportunities over the next two years. Contrary to the CMA's conclusion, this demonstrates that Systel will be a credible competitive constraint on the Parties. In this regard, the CMA itself accepts at paragraph 6.184 of the PFs that "<i>a constraint exists even where [a bidder] does not ultimately win a tender but still</i></li> </ul>

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	<p><i>competes for it".</i></p> <ul style="list-style-type: none"> <li>• Further, the Parties do not know which opportunities Systel will bid for, and it will therefore act as a credible competitive constraint across all tenders.</li> <li>• Therefore, the CMA's reservations regarding the competitive constraint imposed by Systel are unwarranted.</li> </ul>
6.200 – 6.209	<p><b>Consideration of factors irrelevant to the CMA's statutory questions</b></p> <ul style="list-style-type: none"> <li>• Under 35(1) of the Enterprise Act 2002, the CMA is required to decide on the balance of probabilities whether a relevant merger situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the UK for goods or services.</li> <li>• The standard which the CMA is required to prove does not change based on the sector under consideration. However, in these paragraphs the CMA notes that the "<i>ICCS market is...extremely important for public safety</i>" and that the CMA has considered "<i>the importance of the product market</i>" when reaching its provisional findings. These considerations are wholly irrelevant to the statutory questions that the CMA must answer. The CMA is not permitted to change the legal standard (in particular by lowering its standard of proof) in circumstances where it regards the market or markets under consideration as being particularly important.</li> </ul>
<b>5. COMPETITIVE ASSESSMENT – DUTIES</b>	
General	<p><b>The CMA's conclusion that the Merger would result in an SLC in the supply of Duties to Police customers is not reasonable and not based on the evidence</b></p> <ul style="list-style-type: none"> <li>• The CMA acknowledges that NECSWS has not won any new customers [✂] (paragraphs 7.130 and 7.131 PFs). As explained in previous submissions, NECSWS also has a small customer base in Duties.</li> <li>• The CMA considers that NECSWS should be viewed as an indirect competitive constraint based on it winning direct awards and extensions. However, these instances are dwarfed by the number won by Crown and are more similar to Totalmobile. In addition, this is consistent with the number of mentions by customers (see Table 7-4) where Crown was the most frequently mentioned, followed by SSS; and NECSWS is mentioned the same number of times as Totalmobile and in similar numbers to SAP being mentioned. This is also consistent with NECSWS being very much a secondary player within Duties. The reality is that the transaction changes very little in Duties: this market is and continues to be characterised by Crown and SSS being the two predominant competitors.</li> <li>• Not a single customer that responded to the CMA's questionnaire indicated that the transaction would have a negative impact in the supply of Duties (paragraph 21, Appendix D of the PFs). In addition, as regards the single customer which the CMA considers as having provided a "<i>negative view</i>" about the transaction, this relates to switching products rather than to concerns stemming from a</li> </ul>



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	<p>reduction in competition or choice (paragraph 22, Appendix D of the PFs). Further, NECSWS notes that the vast majority of customers were either positive or responded with a 'neutral' or 'don't know' response when asked about the impact that the proposed transaction would have on them as a Duties customer (paragraph 20, Appendix D of the PFs). Therefore, customer feedback is not consistent with a finding of an SLC in the supply of Duties.</p> <ul style="list-style-type: none"> <li>• The success of CARM in terms of recent extensions, in particular in relation to that of NECSWS's largest customer, the Metropolitan Police, has been given more weight than is warranted. [REDACTED].</li> <li>• Please see separate Annex for additional submissions containing Disclosed Material.</li> </ul>
7.12 and 6.19	<p><b>Inconsistent approach to market definition</b></p> <ul style="list-style-type: none"> <li>• In the PFs the CMA concludes that the relevant product market is the supply of Duties solutions to police customers. To support that conclusion, the CMA states "<i>the fact that only one sizeable supplier of police forces is active across multiple emergency services segments is indicative that there may be significant differences in conditions of competition across these segments</i>".</li> <li>• The CMA's approach to the Duties market is inconsistent with its approach in ICCS. In particular, at paragraph 6.19 of PFs, the CMA states that "<i>not all competitors are active across all customer segments... [and t]here are also significant differences in suppliers' shares of supply across different segments</i>". Nonetheless, the CMA reaches the opposite conclusion for ICCS stating that "<i>it is not appropriate to segment the relevant market by customer type</i>", while maintaining for Duties that the market should be defined as the supply of Duties to police customers only.</li> </ul>
7.46 (footnote 457)	<p><b>Market share data need to be interpreted cautiously</b></p> <ul style="list-style-type: none"> <li>• The CMA concludes in paragraph 7.48 of the PFs that the Duties market is "<i>highly concentrated</i>", relying in part on revenue market shares for 2021. As the Parties previously explained, market share information needs to be interpreted cautiously for the purposes of a forward-looking merger assessment. This is particularly the case given the "lumpiness" of market shares in light of the nature of the markets being considered. The CMA itself recognises that there is significant variance in market shares by revenue, which in this example varies by up to nine percentage points between 2019 and 2021 (see footnote 457).</li> <li>• It is submitted that very little (if any) insight relevant to the CMA's investigation can be derived from the CMA's revenue-based market share analysis.</li> </ul>
7.57 and 7.68	<p><b>Internal documents do not reasonably support a conclusion that NECSWS and SSS are close competitors in Duties</b></p> <ul style="list-style-type: none"> <li>• The internal documents presented in the PFs clearly show that NECSWS and SSS do not regard each other as close competitors in the supply of Duties.</li> <li>• As regards NECSWS, the CMA itself states that NECSWS "<i>regularly mentions [REDACTED]</i>" in its internal documents. Similarly, SSS's internal documents demonstrate, as the CMA states, that "<i>SSS considers Crown to be its [REDACTED] competitor and [REDACTED] constraint on it</i></li> </ul>

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	<p><i>in the market</i>" (paragraph 7.68 PFs).</p> <ul style="list-style-type: none"> <li>The Parties' internal documents clearly evidence that NECSWS and SSS [REDACTED]. These documents cannot, therefore, reasonably support a finding that the parties are close competitors in the supply of Duties.</li> </ul>
7.135-7.140	<p><b>CMA's assessment of the future competitiveness of CARM ignores relevant evidence</b></p> <ul style="list-style-type: none"> <li>The CMA does not consider the documentary evidence submitted by NECSWS to be conclusive regarding [REDACTED], and disregards this evidence partly on the basis that the documents are from a period when the transaction was under consideration (paragraph 7.135 PFs). [REDACTED]. The CMA's conclusion ignores oral evidence (given in the context of s.117 Enterprise Act 2002) provided to the CMA at the NECSWS's Main Party Hearing that NECSWS [REDACTED]. The PFs do not appear to take any account of this evidence.</li> <li>The documents the CMA cites at paragraph 7.137 of the PFs to support the contention that NECSWS [REDACTED] are more than two years out of date (and since this time [REDACTED]).</li> </ul>
<b>6. COMPETITIVE ASSESSMENT – RMS</b>	
General	<ul style="list-style-type: none"> <li>While NECSWS may not agree with the entirety of the CMA's analysis on the RMS market as set out in the PFs, NECSWS nonetheless supports the CMA's overall conclusion that the Transaction has not, and may not be expected to result, in an SLC in the market for RMS in the UK. As such, the response in this section is limited to a small number of observations which are relevant to the CMA's assessment in ICCS and Duties.</li> </ul>
8.63 - 8.66	<ul style="list-style-type: none"> <li>Please see separate Annex for submissions containing Disclosed Material.</li> </ul>
8.145	<ul style="list-style-type: none"> <li>The CMA seems to accept that, in the counterfactual, SSS would not receive the significant investment it requires to develop a cloud-based RMS solution. However, the CMA reaches the opposite conclusion for ICCS, stating that there is an "<i>investment case to develop a cloud-capable solution</i>", despite there being no credible evidence to conclude that SSS's ICCS business would receive the requisite funding in the counterfactual (i.e. from Capita or an alternative buyer).</li> <li>Again, it is not permissible or reasonable for the CMA to adapt its interpretation of evidence based on its overall views on the statutory questions.</li> </ul>
<b>7. COUNTERVAILING FACTORS</b>	
9.21 - 9.31 and 9.68 - 9.72	<p><b>CMA's customer questionnaire cannot be used as a basis to state that barriers to entry are high</b></p> <ul style="list-style-type: none"> <li>The CMA's customer questionnaire cannot be used as a basis to find that barriers to entry are high. As noted in the Parties' response to the Customer Evidence Working Paper, the CMA asked customers about each factor in isolation rather than how each factor</li> </ul>

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	<p>should be traded off against each other. This introduces material bias in the responses, such that they must be treated with significant caution. Notwithstanding the bias, the responses do not reasonably support a conclusion of high barriers to entry for the reasons set out in NECSWS's response to the Customer Evidence Working Paper.</p> <ul style="list-style-type: none"> <li>It is inappropriate to discount entry by Motorola merely because this was achieved via an acquisition, particularly in circumstances where it has been an aggressive competitor since its entry. In any event, there has also been market entry by competitors who did not do so via an acquisition, such as Saab and Systel in ICCS and Mark43 in RMS.</li> </ul>
9.32 - 9.34, 9.38	<p><b>SSS internal documents evidence low barriers to entry in ICCS</b></p> <ul style="list-style-type: none"> <li>The CMA appears to have failed to properly take into account the clear and contemporary evidence in SSS's internal documents which describe the threat of entry in the supply of ICCS in the UK [X]. The CMA inappropriately discounts this evidence partly because [X]; as such, these developments are likely to occur within "<i>the next few years</i>".</li> <li>Further, it is incorrect to state that barriers to entry and expansion are high because of [X]: this does not (and has not) acted as a material barrier to market entry and expansion in the supply of ICCS. In general, CMA must consider not whether there are <i>no</i> barriers to entry or expansion, but whether any barriers to entry and expansion are so material to prevent effective market entry or expansion.</li> </ul>
9.39	<p><b>Clear history of market entry by international players</b></p> <ul style="list-style-type: none"> <li>The relevant markets show a clear history of market entry by international players. The CMA should not discount entirely the prospect of future entry simply because past entry occurred five or more years ago. Given the nature of competition in these markets, and the typical length of contracts, five years should be seen by the CMA as relatively recent entry, and indicative of the likelihood of future entry. In any event, NECSWS considers that the ESN transition is likely to encourage international entry in ICCS in the near future.</li> </ul>
9.51	<p><b>CMA inappropriately dismisses the impact of new entrants in ICCS</b></p> <ul style="list-style-type: none"> <li>As previously explained to the CMA, there has been credible market entry by Systel, Saab and Motorola. The CMA dismisses the impact of these competitors, relying in part on the fact that their shares of supply are less than 5%. However, the CMA itself recognises that market shares need to be treated with caution in these markets (including for ICCS). It is much more informative for the CMA to consider the results of recent tenders. Each of those show that Systel, Saab and Motorola are significant competitive constraints in the supply of ICCS. Further, the CMA recognises that these suppliers "<i>have achieved a high share of wins</i>" and, as regards Motorola, the CMA concludes elsewhere in the PFs that it "<i>is well positioned in the market and will remain a strong constraint...in future</i>" (paragraph 6.208 PFs). It is therefore unreasonable for the CMA to infer, based on these previous market developments, that barriers to entry are high for future entry or expansion going forward.</li> </ul>
9.66 and 9.67	<p><b>Evidence from competitors suggests low barriers to entry in Duties</b></p> <ul style="list-style-type: none"> <li>The evidence that the CMA has collected from competing suppliers of Duties solutions supports the Parties' position that there are</li> </ul>

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	no material barriers to entry to the UK market in the supply of Duties. The CMA cannot reasonably conclude that there " <i>are significant barriers to entry into the Duties market in the UK</i> " where the CMA has received evidence to the contrary from those actually present in the market. As noted above, the evidence that the CMA has collected from customers is biased and is insufficient as a rational basis for assessing barriers to entry.
<b>8. APPENDICES</b>	
<b>Appendix C</b>	
21 and 23	• [X]
22	• [X]
32-34	• [X]
38	• [X]
45	• [X]
52	• [X]
119	• [X]
156	• [X]
<b>Appendix D</b>	
General	<ul style="list-style-type: none"> <li>The CMA has not disclosed, even to the Parties' advisers, the responses it has received from customers. As a result, NECSWS is unable to assess whether the CMA's categorisation of responses in Appendix D (and elsewhere in the PFs) is appropriate. As such, NECSWS' responses are limited to the material that has been disclosed to it or its advisers. Fairness requires that NECSWS be supplied with these responses in order to be able to have a fair opportunity to respond to this issue.</li> </ul>
20	<ul style="list-style-type: none"> <li>The CMA has given limited evidential weight to the fact that the vast majority of customers responding to the questionnaire did not identify the impact of the proposed merger as negative. In particular, the CMA states that the response rate to this question was limited (paragraph 20, Appendix D, PFs) and therefore limited evidential weight can be given to such responses. However, this appears inconsistent with the greater weight and prominence given to the CMA's conclusions associated with the number of mentions</li> </ul>

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	<p>of ICCS and Duties competitors despite receiving far fewer responses to this question. The CMA received 39 responses (Table 1.1, Appendix D) to its question asking for views of the acquisition which represents 45% of ICCS customers identified by the CMA, but just 22 responses to its question identifying ICCS providers (Table 6-5, PFs) which represents just 26% of ICCS customers identified by the CMA. Nonetheless, the CMA appears to give greater evidential weight to customer responses to the latter question. Similarly for Duties, the CMA received 19 responses (Table 1.2, Appendix D) to its question asking for views of the acquisition which represents 49% of Duties customers identified by the CMA but just 8 responses to its question identifying Duties providers (Table 7-4, PFs) which represents 21% of Duties customers identified by the CMA.</p>