

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.

Annex

PFS SUBMISSIONS CONTAINING DISCLOSED MATERIAL

PFS REF.	RESPONSE ON BEHALF OF NECSWS
<b>2. THE COUNTERFACTUAL</b>	
4.18	<p><b>The CMA's provisional conclusion on the pre-merger conditions of competition is irrational</b></p> <ul style="list-style-type: none"><li>On the basis of the evidence available to it, the CMA cannot reasonably conclude that the pre-merger conditions of competition are <i>"those broad conditions that prevailed when Capita was operating SSS as a going concern [REDACTED] to provide a competitive constraint"</i>.<ul style="list-style-type: none"><li>It appears from paragraph 4.31 of the PFs that [REDACTED]. There is no reasonable basis for completely disregarding [REDACTED]; any other counterfactual is not representative of reality and cannot by any means be considered <i>"the most likely conditions of competition"</i>.</li><li>The appropriate counterfactual must be the conditions of competition which would have arisen absent the merger, and thus must include the impact of [REDACTED]. It is irrational for the CMA to adopt, as it has done in paragraphs 4.18 and 4.49 of the PFs, a hypothetical (and more competitive) benchmark of the pre-merger situation as the counterfactual without any sound evidential basis. The CMA's current approach in the PFs deviates from established practice in merger investigations and is inconsistent with settled case law (see <i>Stagecoach v. Competition Commission</i> [2010] CAT 14, paragraph 129).</li><li>The CMA's Merger Assessment Guidelines indicate that the CMA will consider whether the counterfactual should include entry or expansion by merging parties absent the merger. It would be unsound to take such plans into account but at the same time to ignore a merging party's competitive decline, particularly in a case such as this where there is clear and compelling evidence [REDACTED].</li></ul></li></ul>

4.33 - 4.35	<p><b>CMA's provisional conclusion that Capita would have developed an optimal investment strategy for SSS absent the Merger is entirely unfounded</b></p> <ul style="list-style-type: none"> <li>• The CMA's conclusion is illogical and contrary to the evidence that is set out in the PFs.</li> <li>• Capita's evidence set out at paragraph 4.28 of the PFs is [REDACTED]. In other words, [REDACTED]. The CMA's conclusion entirely ignores this evidence.</li> <li>• The CMA seems to base its conclusion on a single sentence from a Capita internal document quoted at paragraph 4.33 of the PFs, i.e. "[REDACTED]". The CMA makes a significant – and unwarranted - logical leap in paragraph 4.35 of the PFs that this reference refers to Capita revising its existing strategy of [REDACTED] and instead developing an optimal investment strategy for SSS. Although the extract provides some basis for a conclusion that Capita would have retained SSS if no buyer had been found on this occasion, it provides no support for the CMA's conclusion that Capita would have developed an "<i>optimal investment strategy</i>" for SSS. The extract quoted in paragraph 4.33 of the PFs refers only to [REDACTED], which does not suggest either explicitly or implicitly that this would involve provision of funding, [REDACTED].[REDACTED].</li> </ul>
<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>• Another example of the inconsistent application of the CMA's chosen timeframe can be found at paragraphs 7.143 to 7.148 of the PFs. In these paragraphs, the CMA appears to have only collected and considered information from third parties on [REDACTED]. Nonetheless, the CMA subsequently concludes at paragraph 7.152 of the PFs that it does "<i>not consider it likely that suppliers in adjacent markets will become competitors in the time period of our assessment, given their lack of existing plans to enter</i>" (emphasis added).</li> </ul>
<b>4. COMPETITIVE ASSESSMENT - ICCS</b>	
General	<p><b>Evidence in the PFs cannot support a finding of an SLC in the supply of ICCS</b></p> <ul style="list-style-type: none"> <li>• The following additional evidence in the PFs contradicts the provisional finding of an SLC in the supply of ICCS: <ul style="list-style-type: none"> <li>○ taken at face value, the CMA's opportunities data presented in Table 6-4 shows that competitors such as Motorola and Saab have become much more effective competitors in recent years and will constrain the Parties. In addition, Frequentis and Systel have [REDACTED]. Further, the CMA's opportunity data presented in Table 6-3 does not support a conclusion that NECSWS and SSS are key drivers of competition in ICCS given [REDACTED]; and</li> <li>○ the responses from competitors set out at paragraph 6.130 of the PFs also demonstrate that customers have a wide range of alternatives. Excluding the Parties, [REDACTED] noted that [REDACTED] were among its principal competitors, Saab noted that Frequentis [REDACTED] were among its competitors; and Frequentis noted that Systel and Motorola were among its competitors. Competitors</li> </ul> </li> </ul>

	have also recognised that SSS's ICCS product is outdated.
6.36 - 6.45	<b>Inappropriate preference for revenue-based market shares</b> <ul style="list-style-type: none"> <li>The CMA has presented estimated shares of supply by revenue for each affected market, and (although limitations are noted) this is considered the preferred measure. Without access to the underlying data used by the CMA, it is not clear how information on revenues were collected and whether these revenues have been prepared on a consistent basis across suppliers. Revenue can vary significantly during the lifetime of a contract with different suppliers adopting different approaches to reporting annual revenues. The CMA identifies shares by revenue and concludes that shares by revenue are similar to previous years. However, even by the CMA's own calculations, this does not appear to be true where NECSWS' share was [REDACTED] [5-10]% in 2019 compared to [REDACTED] [20-30]% in 2021. In addition, the CMA has also had to apply assumptions in the absence of receiving revenue data from other suppliers such as Saab and Systel (as per the notes to Tables 6-2 and 8-2) and, as such, it is not possible to comment on the reliability of these estimates. Therefore, it does not seem reliable to give greater weight to shares on a revenue basis as compared to shares on a volume basis.</li> </ul>
6.100 - 6.118	<b>Analysis of CMA's opportunities data</b> <ul style="list-style-type: none"> <li>Even according to the analysis presented in the PFs, NECSWS has won only [REDACTED] of the [REDACTED] tenders since 2017 and SSS has also only won [REDACTED] of these [REDACTED] tenders. More generally, the Parties officially bid in the same tender in only [REDACTED] out of the [REDACTED] tenders that have taken place since 2017. This is contrary to the CMA's provisional finding that the Parties are key drivers of competition in the market. The CMA itself recognises that the Parties "<i>have only directly competed with each other a few times</i>" (paragraph 6.133 PFs).</li> <li>In addition, the CMA's analysis clearly demonstrates how Motorola and Saab have [REDACTED]. Further, both Parties have [REDACTED] and SSS's recent performance [REDACTED]. The CMA has further acknowledged that even where a supplier does not bid, it may impose some constraint on the Parties. This again is consistent with there being multiple ICCS suppliers that will continue to constrain the Parties post-Merger.</li> </ul>
<b>5. COMPETITIVE ASSESSMENT – DUTIES</b>	
General	<b>CMA's conclusion that the Merger would result in an SLC in the supply of Duties to Police customers is unwarranted</b> <ul style="list-style-type: none"> <li>The CMA acknowledges that NECSWS/SSS [REDACTED] (paragraph 7.74 PFs). This is a further reason why the CMA's conclusion that the Merger would result in an SLC in the supply of Duties to Police customers is unwarranted.</li> </ul>
<b>6. COMPETITIVE ASSESSMENT – RMS</b>	
8.63 - 8.66	<b>CMA analyses the opportunity data inconsistently</b> <ul style="list-style-type: none"> <li>The CMA states that direct competition between the Parties is limited in RMS. In support of this conclusion, the CMA notes that the Parties were invited to bid in the same tender [REDACTED] times since 2017 and subsequently submitted bids against each other [REDACTED]. This</li> </ul>

	<p>is evidence that the Parties have "<i>directly competed against each other to only a limited extent since 2017</i>".</p> <ul style="list-style-type: none"> <li>• The CMA's interpretation of its opportunities data for RMS is inconsistent with its approach to ICCS and Duties. For example, in ICCS the Parties have only officially bid in [X] of the same opportunities since 2017. In Duties, the CMA notes that the Parties have not competed against each other since [X] based on its data. However, for both ICCS and Duties the CMA reaches the opposite conclusion to RMS. For ICCS, the CMA states the opportunities data "<i>demonstrates that the Parties are competitive constraints on each other</i>" (paragraph 6.104 PFs), and for Duties states that the Parties' mere presence in the market means "<i>they have placed some indirect constraint on each other</i>" despite having not bid against one another (paragraph 7.75 PFs).</li> <li>• It is incumbent on the CMA to consider all the evidence in a balanced and impartial way to arrive at evidence-based conclusions. It is not permissible for the CMA to adapt its interpretation of evidence based on its overall views on the statutory questions.</li> <li>• Contrary to the CMA's conclusions in ICCS and Duties, the opportunities data clearly confirm that the Parties are not close competitors in any of ICCS, Duties or RMS.</li> </ul>
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