

**COMPLETED ACQUISITION BY NEC SOFTWARE SOLUTIONS UK LIMITED OF CAPITA (SSS)
LIMITED AND CAPITA SOFTWARE (US) LLC ME/6979/21****SSS PUBLIC SAFETY LIMITED****RESPONSE TO PROVISIONAL FINDINGS****1. INTRODUCTION**

- 1.1 This submission sets out SSS Public Safety Limited's (**SSS**) response to the CMA's Provisional Findings dated 15 September 2022 (the **Provisional Findings** or the **PFs**).
- 1.2 The Annex to this response sets out a separate submission which provides a detailed response to the CMA's Provisional Findings regarding the counterfactual, the supply of Integrated Communication and Control Services software (**ICCS**) and Duties Management Systems software (**Duties**) in the UK.
- 1.3 By way of summary, SSS welcomes the CMA's Provisional Findings in relation to the supply of Records Management Systems software (**RMS**). However, SSS respectfully submits that the Provisional Findings regarding the counterfactual, ICCS and Duties are fundamentally flawed in a number of key areas. In particular:
- 1.3.1 the CMA's legal framework set out in the Merger Assessment Guidelines (**MAG**) is incorrectly applied in the Provisional Findings in a number of key respects in relation to the counterfactual, ICCS and Duties; and
 - 1.3.2 the weight of evidence clearly shows that a substantial lessening of competition (**SLC**) does not arise in relation to either ICCS or Duties.

2. Provisional Findings do not place sufficient weight on customer views but are inconsistent in the weight that they attach to other sources of evidence**(a) Customer views are paramount and should be afforded greater reliance in the Provisional Findings**

- 2.1 The vast majority of customers providing feedback to the CMA did not identify a concern with the Merger. In fact 38 out of 40 customers provided positive or neutral feedback or had no particular views.
- 2.2 SSS' strong view is that the Provisional Findings must take this into account in making an SLC finding. In particular, this substantially differentiates this Merger from other CMA phase 2 investigations whereby For example, in *Tobii / Smartbox* the CMA found that "*The majority of the customers who responded to our questionnaire raised concerns about the impact of the Merger. Most of the concerns raised related to potential deteriorations in quality, service (including customer support) and/or the range of products available.*"¹

(b) The Provisional Findings overly-rely on other sources of evidence**(i) The Provisional Findings fail to differentiate between the competitive dynamics involved in new tenders as compared to direct awards and extensions**

- 2.3 For both ICCS and Duties, the Provisional Findings place significant weight on the fact that the Parties have won direct awards and extensions. However, direct awards and extensions are not indicators of current or future competitive strength but rather are a reflection of historic competition at the time that the framework or contract underpinning the award or extension was awarded.

¹ Completed acquisition by Tobii AB of Smartbox Assistive Technologies Limited and Sensory Software International Ltd Summary of Final Report Paragraph 27.

2.4 The Provisional Findings therefore err in relying on the Parties' historic performance in relation to direct awards and extensions as an indicator of future competitive strength and the current viability of their products². Future competitive strength cannot be projected based on historic awards which do not reflect the changing market dynamic and customer demand for cloud-based solutions. [§].

2.5 The Provisional Findings accept that the vast majority of customers view cloud as being very important or important: it follows therefore that even if SSS is able to successfully retain customers via direct awards or extensions now, such success must inevitably be time limited and cannot be taken as an indication of SSS' future competitive strength where customers want to move to cloud [§].

(ii) Provisional Findings rely on some internal documents but do not rely on others

2.6 The Provisional Findings place substantial reliance on certain internal documents, for example, in relation to the counterfactual. However, in other circumstances the CMA either disregards internal document or recognises such evidence but then attaches no or little weight to this when reaching a conclusion on an SLC. For example, the Provisional Findings acknowledges that in relation to ICCS SSS' internal documents recognise the constraint from competitors such as Motorola, Frequentis and Saab. However, in reaching its conclusions as to an SLC the CMA seemingly places no or limited reliance on this evidence.

2.7 This inconsistency in dealing with the same types of evidence is a fundamental flaw in the Provisional Findings that an SLC arises in relation to both ICCS and Duties.

3. Evidence in the Provisional Findings substantially and consistently demonstrates that SSS would have been a [§]

(a) Provisional Findings incorrectly apply the CMA's legal framework for assessing the counterfactual

3.1 When assessing the counterfactual at Phase 2 the CMA must:

3.1.1 *select **the most likely conditions of competition** as its counterfactual against which to assess the merger" unless two counterfactual scenarios lead to "broadly the same conditions of competition" (in which case the CMA need not choose between them);³*

3.1.2 *incorporate into its assessment only "events that **would have happened** in the absence of the merger". The Provisional Findings must therefore disregard views based only on assumption and speculation;*

3.1.3 *"consider **the credibility of alternative options** available in order to inform which is the most likely counterfactual scenario"; and*

3.1.4 *provide "... a clear understanding as to the time frame within which the impairment to dynamic competition would manifest itself".⁴*

3.2 The Provisional Findings' assessment of the counterfactual fails to apply each of these aspects of the legal framework for analysing the counterfactual. The Provisional Findings:

3.2.1 *do not identify the "most likely" counterfactual;*

3.2.2 *consider two counterfactual scenarios without providing an evidential basis for concluding that each of these scenarios would give rise to "broadly the same conditions of competition";*

² PFs paragraph 6.101-6.102.

³ MAG, paragraph 3.13.

⁴ CAT Case No: 1429/4/12/21 paragraph 104.

- 3.2.3 do not consider only events that “*would have*” happened but rather take into account possible events which “*may have*” happened;
- 3.2.4 make assumptions and leaps of logic which are contrary to the evidence set out in the Provisional Findings and result in counterfactuals which are not “*credible*”; and
- 3.2.5 fail to provide sufficient clarity on the relevant time horizon for assessment of the counterfactual.

(b) Provisional Findings do not consider the counterfactual proposed by the Parties

- 3.3 The Provisional Findings consider two alternative counterfactual scenarios:
 - 3.3.1 whether SSS would have been operated as a going concern with sufficient investment to remain a competitive constraint on NECSWS and as such maintain pre-merger conditions of competition; or
 - 3.3.2 whether SSS would have received no further investment and would have ceased to actively compete for contracts.
- 3.4 However, the Provisional Findings do not consider the counterfactual put forward by the Parties that the most likely counterfactual is one where SSS would have continued to suffer from underinvestment and been a significantly weakened competitor going forward.

(c) Provisional Findings clearly show that if Capita were to have retained SSS it would not have fundamentally “*revised*” its strategy to invest in SSS to maintain SSS as a competitive constraint going forward

- 3.5 Please see the Annex which sets out a separate submission containing Disclosed Material.

(d) Provisional Findings do not provide evidence that an alternative purchaser “*would have*” bought SSS

- 3.6 SSS considers that Capita ran an extensive sales process and made public statements surrounding the sale of SSS. Despite the broad nature of the process, only one other indicative bid was submitted. Evidence of an indicative bid however is not evidence that the bidder “*would have*” gone through with the purchase of SSS following a due diligence process. Please see the Annex which sets out a separate submission containing Disclosed Material.
- 3.7 The Provisional Findings note that the CMA identified two additional parties which informed the CMA that they “*may have been interested in that opportunity if it had arisen*”.⁵ The Provisional Findings conclude on this basis that the evidence “*indicates that alternative interest in purchasing SSS existed*”⁶.
- 3.8 Evidence that two parties “*may have been interested*” fails to meet the threshold required for the assessment of the counterfactual, namely evidence of what “*would have*” happened. Neither does this provide the basis for a “*credible alternative*”. No assessment appears to have been carried out to explore what interest the potential purchasers may have had, nor what view they would have formed had they undertaken due diligence and a financial assessment. In light of the fact that other potential bidders dropped out of the sales process by Capita, and in the absence of any other evidence, it is unclear on what basis the Provisional Findings can reasonably conclude a different outcome would arise in the counterfactual.

⁵ PFs paragraph 4.45.

⁶ PFs paragraph 4.46.

(e) The Provisional Findings do not provide evidence that even if there had been an alternative buyer, they would have invested sufficiently in SSS to maintain it as an effective competitor

- 3.9 Even if there was credible evidence that there would have been an alternative purchaser, the Provisional Findings fail to undertake any assessment of whether such a purchaser would have invested at all, let alone sufficiently, in SSS to maintain it as an effective competitor. There is a significant evidential gap between expressing an interest, acquiring SSS and investing in SSS to a very material level. The Provisionals Findings however make this leap with no evidence to bridge this gap.

(f) A finding that there would “not” have been “no investment” is not evidence that there would have been sufficient levels of investment to maintain SSS as an effective competitor

- 3.10 A finding that there would “not” have been “no investment” is far from a conclusion that any alternative purchaser would have invested sufficiently to enable SSS to develop cloud capabilities for its ICCS and Duties and other products and maintained its competitive position. Clearly no investment is not the same as sufficient investment. The Provisional Findings make no attempt to address this leap in logic.

(g) The Provisional Findings fail to provide sufficient clarity on the relevant time horizon for assessing the counterfactual

- 3.11 By defining the appropriate time horizon for the assessment of the counterfactual as “*the next few years*”, the Provisional Findings fails to meet the evidential standard set down by the Competition Appeals Tribunal (the **CAT**) in a recent judgement in which it provided that “*It is necessary for there to be a clear understanding as to the time frame within which the impairment to dynamic competition would manifest itself*”.⁷
- 3.12 A reference merely to “*a few years*” is vague and insufficiently clear to enable the Parties to understand the relevant time frame for the CMA’s assessment of dynamic competition. The Provisional Findings therefore fail in their analysis of the relevant time frame for both the counterfactual and the competitive assessment to meet the clarity threshold as set down by the CAT.

(h) The Provisional Findings rely on the pre-Merger conditions of competition without taking account of the impact of underinvestment in SSS present before the sale was considered

- 3.13 The Provisional Findings must take into account a counterfactual in which SSS is a [X] and in which anticipated dynamic changes in competition [X] it further. Without prejudice to SSS’ views regarding the counterfactual, this must be considered throughout the competitive assessment of ICCS and Duties.

(i) Conclusion on the most likely counterfactual

- 3.14 For the reasons set out above, it is clear that the evidence available to the CMA strongly contradicts the provisional view set out in the Provisional Findings that regardless of ownership, the appropriate counterfactual is pre-merger conditions of competition where SSS maintains competitive strength in the relevant markets, exerting a constraint on NECSWS.
- 3.15 Rather, the evidence considered in the round would lead to a finding regardless of SSS’ ownership that SSS was already a [X], that it would have continued as a going concern but that the most likely counterfactual is that SSS would have continued to suffer from under investment and [X].

⁷ CAT Case No: 1429/4/12/21 paragraph 104.

4. Evidence set out in the Provisional Findings clearly demonstrates that no SLC arises in relation to ICCS

(a) Parties are not close competitors

(i) The Provisional Findings reliance on a presumption that the Parties are close competitors is flawed and incorrect

4.1 In finding an SLC in relation to the supply of ICCS, the Provisional Findings rely on the following:

*"We are mindful that where the CMA finds evidence that competition mainly takes place among a few firms, any two would normally be sufficiently close competitors that the elimination of competition between them would raise competition concerns, subject to evidence to the contrary. We have therefore considered the evidence of a high degree of concentration alongside all of the other evidence we have collected."*⁸

4.2 This is taken from a paragraph of the MAG which considers that the concept of closeness of competition is a "relative concept".⁹

4.3 For this presumption of closeness of competition to apply in the context of ICCS the Provisional Findings must conclude that competition "takes place mainly between a few firms". Evidence in the Provisional Findings clearly shows that this is not the case and that competition takes place between six suppliers of ICCS.

4.4 The Provisional Findings conclude that:

4.4.1 *"we consider that Motorola is well positioned in the market and will remain a strong constraint in the market in the future";*

4.4.2 *"Frequentis is also well positioned in terms of its product offering";*

4.4.3 *"We consider that Saab will also provide a constraint given that it has been successful in recent tenders";*

4.4.4 *"... we consider that Systel adds a further specific, but limited, constraint on the Parties."*

4.5 While the Provisional Findings identify some perceived limitations with the number of tenders which Frequentis, Saab and Systel bid on they nevertheless implicitly accept that each of these will bid on tenders and are "well positioned" or a "constraint" when they do so.

4.6 For example, the Provisional Findings note that "[e]vidence from the Parties' customers supports the view that there are six providers of ICCS namely: NECSWS, SSS, Motorola, Frequentis, Saab and Systel".¹⁰

4.7 The evidence and conclusions in the Provisional Findings clearly show that it is not the case that competition for the supply of ICCS "takes place mainly between a few firms". Rather the opposite. As such, the presumption that the Parties are close competitors such that the elimination of competition between them would raise competition concerns, does not stand.

(ii) The evidence shows that the Parties are not materially close competitors for the supply of ICCS

4.8 In this context, it is necessary for the Provisional Findings to provide evidence that the Parties are close competitors of one another in ICCS. The Provisional Findings do not provide

⁸ PFs paragraphs 6.201 and 7.155.

⁹ MAGs paragraph 4.10.

¹⁰ PFs paragraphs 6.123.

such evidence. Rather, and to the contrary, the Provisional Findings highlight the limited competition between the Parties. Please see the Annex which sets out a separate submission containing Disclosed Material.

(b) Clear evidence that the Parties compete against substantial competitors which are close competitors to the Parties

- 4.9 The evidence in the Provisional Findings highlights that other suppliers compete closely with the Parties.
- 4.10 For example, the CMA recognises that SSS' internal documents consistently recognise Motorola, Frequentis and Saab as significant constraints and the Provisional Findings conclude that Systel is a constraint in relation to fire and rescue customers.
- 4.11 Similarly, in their feedback to the CMA, customers have identified that Motorola and Frequentis are "*providers that [customers] believe could meet their software requirements*" 17 and 16 times respectively (only 1 and 2 fewer than NECSWS) and Saab and Systel also receive a number of mentions¹¹.
- 4.12 Please see the Annex which sets out a separate submission containing Disclosed Material.

(c) Sufficient competitive constraints will remain post-Transaction in ICCS

- 4.13 The concerns in the Provisional Findings in relation to ICCS appears to be that certain competitors will bid strategically and limit the number of tenders they bid for going forward¹².
- 4.14 There is no basis for these concerns. This is because:
- 4.14.1 the CMA's opportunities analysis shows that typically, only a small number of competitors (two on average) submit an official bid for a given ICCS opportunity;
- 4.14.2 The Provisional Findings implicitly accept that Frequentis, Saab and Systel will each bid on some opportunities going forward and that where they do bid they will impose a constraint on the Parties.
- 4.15 In these circumstances, post-Transaction the merged NECSWS / SSS business will:
- 4.15.1 know that Motorola will or is very likely to bid for an opportunity;
- 4.15.2 know that Frequentis, Saab and Systel may bid for an opportunity (directly or through a sub-contracting arrangement e.g. with a prime contractor);
- 4.15.3 not know which opportunities Frequentis, Saab and Systel will or will not bid for; and
- 4.15.4 as such, as a matter of necessity, need to assume that these competitors will bid for an opportunity and take this into account when they bid (this is particularly because the public procurement process undertaken for opportunities in this market provide little transparency or insight as to which competitors have in fact bid for particular opportunities).
- 4.16 This means that even if one or more of Frequentis, Saab and Systel do not in practice bid for a particular opportunity the NECSWS / SSS merged business will not know that and will still be constrained by those rivals.

¹¹ PFs paragraph 6.124 and Table 6-5.

¹² PFs paragraph 6.208.

4.17 On this basis, SSS' respectfully submits that "sufficient competitive constraints" will remain post-Merger.¹³

(d) Absent the Merger SSS will be a [X] competitive constraint in ICCS in the future

(i) The Provisional Findings confirm that cloud capability will be important in a substantial number of tenders going forward

4.18 The Provisional Findings identify "a substantial proportion of ICCS opportunities forthcoming in the next few years are likely to consider suppliers' cloud capabilities [...] as one element of their requirements"¹⁴. The Provisional Findings therefore recognise that customers will increasingly want a cloud solution and that this change is taking place and will substantially impact competitive opportunities in the new few years.

(ii) Provisional Findings accept that the Parties are not well placed to win these opportunities

4.19 The Provisional Findings conclude that "The Parties are not well placed to win opportunities in the next few years which require an immediate public-cloud deployment"¹⁵.

(iii) Provisional Findings fail to assess and take into account the impact that this change will have on SSS' market position and competition going forward

4.20 The Provisional Findings however fail to analyse how the declining number of opportunities in this "few years" period will impact SSS' competition position. In particular, no consideration is afforded to:

4.20.1 the fact that SSS' ICCS solution is not public cloud-deployable and that in the counterfactual – even if were to have had the investment to deploy its ICCS solution into the cloud which SSS considers there is no evidence to support – there would have been a significant period of gap (likely at least two years if not more) before SSS would have been able to compete with a deployable public cloud solution and the extent to which this would have caused a decline in SSS' market position as a result of being unable to compete for those opportunities that the Provisional Findings consider will arise in the next "few years";

4.20.2 the extent to which SSS' competitors, which the Provisional Findings confirm have a "head-start" on SSS in terms of developing cloud, will further innovate and develop their offering and so increase the gap between SSS and its rivals;¹⁶ and

4.20.3 the finding in the Provisional Findings that the Parties already have a lower success rate in winning tenders than competitors¹⁷ and that SSS specifically "has had less recent tender success".¹⁸

(iv) Evidence shows that SSS is [X] for opportunities requiring a roadmap for cloud and is [X] for on-premise solutions

4.21 The Provisional Findings state that "both NECSWS and SSS are likely to continue to develop their [X]-cloud solutions. Given the tender example above [X] we consider that this may

¹³ MAG paragraph 4.8.

¹⁴ PFs paragraph 6.194 and 6.195.

¹⁵ PFs paragraphs 6.194 and 6.195.

¹⁶ PFs paragraph 6.199.

¹⁷ PFs paragraph 6.103.

¹⁸ PFs paragraph 6.209.

allow the Parties to use any development as a credible basis for competing in tenders through offering a roadmap to a [X]-cloud solution”¹⁹.

- 4.22 However, it is unclear on what basis the Provisional Findings can conclude that “any development” would be a credible basis for competing for tenders. The Provisional Findings provides no evidence or analysis for this. It may be that customers are open to receiving roadmaps but this does not mean that SSS either has or would in the counterfactual have a [X]. [X]. This is particularly where rivals already have deployable cloud solutions.
- 4.23 This tender also highlighted that SSS’ ICCS on-premise product [X]. This reflects, as above, that SSS’ success rate in winning tenders has declined including for [X].
- 4.24 This means that going forward even for customers who express a preference for an on-premise solution (to the extent this is relevant), [X].²⁰
- 4.25 Consequently, in the time it will take [X].

5. No SLC arises in relation to Duties

(a) Parties are not close competitors

(i) The Provisional Findings reliance on a presumption that the Parties are close competitors is flawed and incorrect

- 5.1 In assessing the extent to which the Parties compete with one another the Provisional Findings rely on the following paragraph from the MAG: “We are mindful that where the CMA finds evidence that competition mainly takes place among a few firms, any two would normally be sufficiently close competitors that the elimination of competition between them would raise competition concerns, subject to evidence to the contrary.”²¹
- 5.2 However, this is a presumption: it applies only “normally” and “subject to evidence to the contrary”. As such, it is a presumption which is rebuttable. In this case it is clear that the weight of evidence shows that this presumption must be rebutted.

(ii) The Parties are not materially close competitors

- 5.3 There is “clear evidence” that the Parties are not close competitors and in fact that the Parties do not compete with one another.
- 5.4 The Provisional Findings acknowledge that “[t]here is relatively limited evidence of SSS and NECSWS placing a constraint on each other for opportunities”²², and the Parties opportunities analysis shows that [X].
- 5.5 SSS’ internal documents provide further evidence that the Parties are not close competitors. Please see separate Annex for submission containing Disclosed Material.
- 5.6 For these reasons, the Provisional Findings should not rely on the presumption of closeness of competition, when the evidence shows that the Parties are not materially close competitors.

(b) The Provisional Findings’ conclusion that the Parties indirectly constrain one another simply by being present in the market is not supported by evidence

- 5.7 The Provisional Findings conclude that the mere fact that the Parties have “a presence in the [Duties] market means they have placed some indirect constraint on each other at the

¹⁹ PFs paragraph 6.179.

²⁰ PFs paragraph 6.103

²¹ PFs paragraphs 7.155.

²² PFs paragraph 7.80.

point of award” of direct awards and extensions. However, the Provisional Findings provide no evidence for coming to this view. Rather:

- 5.7.1 direct awards and extensions reflect competition at the time that the original framework or contract was entered into and are not forward-looking;
- 5.7.2 extensions are typically an interim measure employed by a customer before it is ready to go out to a full tender;
- 5.7.3 the Parties’ ability to secure awards and extensions will decrease as more [X].

(c) Crown and Totalmobile represent strong competitive constraints

- 5.8 The evidence in the Provisional Findings relating to customer feedback shows that Crown is the leading competitor, and this is supported by SSS’ internal documents. Crown is already offering a cloud-based product using the Microsoft Azure platform. The Provisional Findings accept that *“Crown is well positioned to remain a strong constraint in the market in future”*²³.
- 5.9 The Provisional Findings also state: *“Totalmobile will also provide a constraint, particularly given its recent developed cloud-based solution”*²⁴.
- 5.10 The fact that both Crown and Totalmobile are currently cloud-enabled means they have a significant head-start from SSS. The Provisional Findings notes that this means that they *“may mean they are well-placed to compete for opportunities in the next few years”*²⁵.
- 5.11 This understates the position, as there is already a significant gap in competitiveness as between SSS and these players.

(d) The Provisional Findings underestimate the extent to which SSS currently [X]

- 5.12 The Provisional Findings acknowledge that customers are increasingly moving to public-cloud solutions in Duties. However, it concludes that this fact does not materially affect the competitive assessment *“since we consider all main suppliers have a form of cloud capability (private or public cloud)”*²⁶. This is not correct.
- 5.13 The Provisional Findings overstate the cloud capability of the [X]²⁷. [X].
- 5.14 The Provisional Findings suggest that SSS can win contracts based on a roadmap. [X].
- 5.15 On this basis SSS considers that the evidence shows that no competition in Duties will be lost by the Merger neither now nor in the future.

6. Conclusion

- 6.1 SSS agrees with the CMA of the importance of the ICCS and Duties markets (particularly ICCS in relation to maintaining public safety). Given this SSS’ strong view is that it is crucial that any SLC finding is underpinned by the necessary evidence and analysis. SSS is concerned that the evidence in this case clearly reflects that no SLC arises in relation to ICCS or Duties and that if the CMA were to conclude differently this would have a substantial and harmful impact on customers which carry out a fundamental and key public service.

²³ PFs paragraph 7.161.

²⁴ PFs paragraph 7.161.

²⁵ PFs paragraph 7.149.

²⁶ PFs paragraph 7.153.

²⁷ PFs paragraph 7.153.