

**COMPLETED ACQUISITION BY NEC SOFTWARE SOLUTIONS UK LIMITED OF CAPITA (SSS)
LIMITED AND CAPITA SOFTWARE (US) LLC**

**CONFIDENTIAL ANNEX TO SSS PUBLIC SAFETY LIMITED'S RESPONSE TO THE
PROVISIONAL FINDINGS**

SUBMISSION REGARDING THE COUNTERFACTUAL, ICCS AND DUTIES

A. COUNTERFACTUAL

1. Introduction

1.1 We submit that the preliminary view set out in the Provisional Findings (**Provisional Findings** or **PFs**) that, regardless of ownership, the appropriate counterfactual is the pre-Merger conditions of competition where SSS Public Safety Limited (**SSS**) maintains competitive strength in the relevant markets, exerting a constraint on NEC Software Solutions UK Limited (**NECSWS**), is not supported by the available evidence.

1.2 In particular:

1.2.1 the evidence overwhelmingly and consistently establishes that Capita plc (**Capita**) [§] – Capita's direct evidence provided to the CMA confirms that: [§]"¹;

1.2.2 given this evidence, it is not plausible or "*credible*" for the Provisional Findings to conclude that Capita would have so fundamentally changed its investment strategy and invested sufficiently to maintain SSS as an effective competitor, where this appears to be based on the CMA's interpretation of [§] one internal Capita document, in circumstances Capita [§];

1.2.3 there is no evidence that an alternative purchaser "*would have*" purchased SSS absent the Merger, nor that, even if such an alternative purchaser "*would have*" existed it "*would have*" invested sufficiently to maintain SSS as an effective competitor – rather the Provisional Findings make a number of leaps of faith based only on evidence that "*alternative interest in purchasing SSS existed*"²; and

1.2.4 the Provisional Findings do not identify "*the most likely conditions of competition as its counterfactual against which to assess the merger*"³, and neither counterfactual proposed by the Provisional Findings meets the requisite standard that it "*would have happened*"⁴, nor that it would have been a "*credible*" alternative option⁵.

1.3 Rather, the evidence supports a finding that the most likely counterfactual is one where SSS would have continued to suffer from underinvestment and been a significantly weaker competitor.

1.4 The reasons for this are set out below.

¹ PFs paragraph 4.28, which refers to Capita response to the Counterfactual WP, 4 August 2022, paragraph 5.5.

² PFs paragraph 4.46.

³ Merger Assessment Guidelines (**MAG**) CMA 129, paragraph 3.13.

⁴ As required, and set out in the MAG, paragraph 3.4.

⁵ See PFs paragraph 4.21 – "*we consider the credibility of the alternative options available in order to inform which is the most likely counterfactual scenario*".

2. **The Provisional Findings do not identify the most likely counterfactual**
- 2.1 During Phase 1, the CMA has a duty to assess whether a merger creates a "*realistic prospect*" of an SLC. In order to make this assessment, the CMA will compare the merger to "*the most competitive counterfactual*", provided that such counterfactual is realistic.⁶
- 2.2 At Phase 2, to help make the overall SLC assessment: "*the CMA will select **the most likely conditions of competition** as its counterfactual against which to assess the merger*"⁷. As a result of the difference in the tests at Phase 1 and Phase 2 (where a balance of probabilities is applied to select the most likely scenario), a different counterfactual may be (and should be) adopted in Phase 2 than in Phase 1, where supported by the evidence.
- 2.3 At Phase 2, when identifying the most likely counterfactual, the CMA must incorporate into its assessment of the counterfactual only "*events that **would have happened** in the absence of the merger*"⁸. The Provisional Findings must therefore disregard views based only on assumption and speculation.
- 2.4 Furthermore, the Provisional Findings provide that "*our analysis of the counterfactual does not require us to specify the exact route Capita and SSS would have taken absent the merger. Rather, we consider **the credibility of alternative options** available in order to inform which is the most likely counterfactual scenario*"⁹.
- 2.5 This means that any view on a possible counterfactual expressed in the Provisional Findings must be both "credible" and supported sufficiently by evidence to show that the events concerned "would have happened".
- 2.6 The proposed counterfactuals in the Provisional Findings do not meet either standard: the Provisional Findings conclude that it is "*likely that, under the ownership of either Capita or another owner, SSS would have remained a going concern that continued to compete and have its products invested in*"¹⁰ yet the evidence in the Provisional Findings clearly recognises that:
 - 2.6.1 material levels of investment were needed – "*approximately [redacted]*"¹¹;
 - 2.6.2 Capita's strategy, [redacted];
 - 2.6.3 "*When Capita restructured its business... [redacted]*"¹²;
 - 2.6.4 "[redacted]"¹³; and
 - 2.6.5 two additional potential purchasers "*may have been interested*"¹⁴ and that this is evidence "*that alternative interest in purchasing SSS existed*"¹⁵, but do not produce any evidence and therefore certainty that an alternative purchaser "*would have*" acquired SSS, and no assessment of whether any such purchaser (even assuming one existed) "*would have*" invested in SSS sufficiently to the material sums required.

⁶ MAG paragraph 3.12.

⁷ MAG paragraph 3.13.

⁸ MAG paragraph 3.4.

⁹ PFs paragraph 4.21.

¹⁰ PFs paragraph 4.48.

¹¹ PFs paragraph 4.32.

¹² PFs paragraph 4.31.

¹³ PFs paragraph 4.31.

¹⁴ PFs paragraph 4.45.

¹⁵ PFs paragraph 4.46.

- 2.7 Based on the consistent and clear evidence, the only credible counterfactual is that absent the Merger, SSS would have been a [X]:
- 2.7.1 under Capita ownership SSS would have continued to have been underinvested; and
 - 2.7.2 there is no evidence of an alternative purchaser and even if one had existed, there is no evidence that it would have invested to the [X].
- 2.8 The Provisional Findings have not therefore identified the most likely counterfactual against which to assess the Merger.
3. **The Provisional Findings' reliance on two alternative counterfactuals is not justified**
- 3.1 As a further point, SSS notes that the CMA's guidance confirms that it must identify **the** most likely conditions of competition, unless two counterfactual scenarios lead to "*broadly the same conditions of competition*" (in which case the CMA need not choose between them)¹⁶. The Provisional Findings conclude that this principle applies in this case but no explanation or any evidence is provided to explain why.
- 3.2 In a market where customers highly value security, stability, market presence and track record, and where SSS' competitive position is vulnerable to the amount, nature and timing of investment made, there is no apparent justification for applying this principle in the absence of any appropriate assessment or evidence. For example, no consideration has been given to factors such as the following:
- 3.2.1 whether any investment, had it been made available by either Capita or an alternative purchaser, would have been made available within the same or a similar time frame and how the timing may have impacted SSS' competitive position;
 - 3.2.2 whether Capita or a new owner would have had the staff with skills to use the investment to develop on SSS' ICCS and Duties products, and how quickly they could do so;
 - 3.2.3 whether any investment by either Capita or a new owner would have been targeted at ICCS, Duties or other products;
 - 3.2.4 in the case of a new owner, the impact of the identity of a new purchaser on SSS' customers and its customer relationships given the importance customers place on track record and stability (as seen in the evidence provided to the CMA by the [X])¹⁷ including the risk that certain customers may choose to go out to tender in the face of a new owner for SSS; or
 - 3.2.5 in the case of SSS remaining with Capita, the potential impact on SSS of remaining part of the Capita Group given its serious financial difficulties.
- 3.3 In failing to give proper consideration to the above, the Provisional Findings have not properly assessed whether the two proposed counterfactuals would in fact lead to broadly the same conditions of competition. A difference in approach to any one or more of the factors above could materially have changed SSS' competitive position. The Provisional Findings should not therefore, in the absence of such consideration, apply a principle, which cannot, on the facts of the case, merely be assumed to apply. This approach is not therefore justified and the Provisional Findings should identify the most likely conditions of competition against which to assess the Merger.

¹⁶ MAG paragraph 3.9.

¹⁷ PFs, footnote 118.

4. **No evidence that SSS would have maintained its competitive position under Capita ownership**

4.1 The evidence in the Provisional Findings points to the conclusion that had SSS continued under Capita ownership, it would not have received the levels of funding needed to maintain it as an effective competitor.

(a) Capita had [REDACTED]

4.2 The evidence shows that pre-Merger Capita had [REDACTED]:

4.2.1 In 2018 SSS had put in place plans to invest in its products as part of its "Public Safety Platform" programme – this was costed at [REDACTED] (which only covered some of SSS' portfolio of products) and was considered the key contribution to maintaining SSS' competitive position;

4.2.2 in the face of its deteriorating financial position, Capita implemented a programme of restructuring with a plan to reduce debt through disposal of the Portfolio division and had "[REDACTED]" with a target to raise £700 million;

4.2.3 When Capita restructured its business "[REDACTED]"; and

4.2.4 "[REDACTED]".

4.3 [REDACTED].

(b) [REDACTED]

4.4 Capita [REDACTED] in the absence of the Merger. [REDACTED], and:

"[REDACTED]"¹⁸.

4.5 This is a [REDACTED] that SSS would have fundamentally revised its strategy [REDACTED] instead had "*an optimal investment strategy*" (see further comments below).

(c) Capita had no rationale for investment

4.6 Even leaving aside Capita's [REDACTED], objectively there would have been no rationale for further investment by Capita. In particular:

4.6.1 investment plans made by SSS in 2018 are outdated and fail to reflect Capita's financial deterioration or changes to market factors including the economic crisis and an increase in interest rates such that they cannot be relied on as evidence of a rationale for investment that would still stand;

4.6.2 by 2019, Capita had identified SSS "*as a [REDACTED]*"¹⁹;

4.6.3 further, Capita had "[REDACTED]" "*with a target to raise £700 million in order to meet significant additional cash commitments in 2021 relating to deferred VAT, restructuring and pension deficit payments, and debt maturities*"²⁰;

4.6.4 Capita [REDACTED]"²¹;

¹⁸ PFs paragraph 4.28, which refers to Capita response to the Counterfactual WP, 4 August 2022, paragraph 5.5.

¹⁹ PFs paragraph 4.28.

²⁰ PFs paragraph 4.25, which refers to Capita response to the CMA's RFI 2, 13 June 2022, question 37.

²¹ PFs paragraph 4.3.1.

- 4.6.5 the level of investment required for SSS to [X] for its ICCS and Duties product [X], as evidenced by the costs under the “Public Safety Platform” of [X] which only covered some of SSS’ portfolio of products; and
- 4.6.6 the costs of investment more widely to explore candidate growth opportunities were substantially greater, [X].
- 4.7 The combination of factors set out above contradict a finding that “*there appears to have been a rationale for further investment in SSS*”²². Rather, the evidence points clearly to the conclusion that Capita had no such plans, it would not have been rational for Capita to invest further to the levels needed and that it would have had neither the ability nor the incentive to do so.
- (d) A finding that there would “not” have been “no investment” is not the same as sufficient investment to maintain SSS as an effective competitor**
- 4.8 The Provisional Findings state:
- “It is our provisional view that neither of these options would have entailed SSS receiving no further investment or ceasing to actively compete for contracts”*²³.
- 4.9 In making this finding, the Provisional Findings appear to leap from concluding that SSS would not have received no investment to a view that SSS would have received the very significant investment required to maintain its competitive position. No evidence is provided to bridge this gap.
- 4.10 This is particularly stark in light of the fact that the evidence recognises that: (i) the level of investment required was very significant, approximately [X], and (ii) overwhelmingly supports a conclusion that Capita [X].
- 4.11 A finding of there being some investment is therefore not the same as sufficient investment, and it is evidence only of the latter that would provide a basis on which to conclude that SSS would have continued as an effective competitor. No such evidence has been produced.
- (e) A single Capita internal document is neither credible nor sufficient evidence that Capita would have so fundamentally changed its strategy [X]**
- 4.12 Against the weight of the evidence referred to above, the Provisional Findings choose to rely wholly on the interpretation of one internal Capita document, concluding on this basis alone, that Capita would have fundamentally revised its strategy [X] in spite of Capita’s own evidence to the CMA to the contrary.
- 4.13 With regard to the single Capita document we note the Provisional Findings:
- 4.13.1 understand the reference to ‘[X]’ to mean [X] and that the [X]²⁴; and
- 4.13.2 consider [X] to mean that the existing strategy of [X] would be “revised” and mean that “*instead an optimal investment strategy would be developed for it*”²⁵.
- 4.14 The subjective interpretation given to the document in the Provisional Findings is not consistent with the evidence, in particular:

²² PFs paragraph 4.48.

²³ PFs paragraph 4.46.

²⁴ PFs paragraph 4.34.

²⁵ PFs paragraph 4.35.

- 4.14.1 the evidence clearly points against an inference [X] – there is no other evidence to support such an inference and all the evidence clearly points to the contrary;
- 4.14.2 one document is insufficient to rebut the [X] and does not provide a credible basis on which to assume that Capita would have so fundamentally changed its otherwise [X];
- 4.14.3 even if it were credible that the SSS business [X] that Capita would have invested in the business.
- 4.15 SSS also understands that [X] anticipated by the Provisional Findings to have been afforded to SSS in the counterfactual.
- 4.16 In this context, the evidence clearly shows that in the absence of the Merger the most likely counterfactual is that Capita would have continued with its strategy of underinvestment and that SSS would have become a [X]. The reliance on the interpretation of one document does not meet the CMA’s evidential threshold of establishing the “*most likely conditions of competition*” that “*would have*” happened. Reliance on a single document does not amount to consideration of a credible alternative option.
- 4.17 Even if the Provisional Findings are right to interpret Capita’s one document to mean that absent the sale, Capita would have invested in SSS, they fail to consider, as set out above, whether Capita would have had the ability or incentive to invest the requisite amounts to maintain SSS as an effective competitor, particularly in the context of its ongoing financial difficulties.
- 4.18 The statement in the Provisional Findings that this one document be relied on “*in the absence of evidence to the contrary*”²⁶ is flawed - there is strong and compelling evidence to the contrary, all of which points to a view that there would not have been a rationale for further investment, [X].
5. **There is no evidence that SSS would have been acquired by an alternative purchaser or that the alternative purchaser would have invested sufficiently in SSS**
- (a) Lack of evidence that [X] “*would have*” acquired SSS**
- 5.1 It is clear from the evidence in the Provisional Findings that Capita ran an extensive sales process, proactively contacting parties [X]. Indeed, Capita [X]. Further, as noted in the Provisional Findings, Capita made public statements surrounding the sale of SSS (indeed [X] became aware of the sale through Capita’s March 2021 announcement of its FY2020 results).
- 5.2 It is significant that, despite this broad search, only one other indicative bid was submitted. Submission of an indicative bid is not evidence that [X] would have gone through with the sale following further due diligence. It is noted that [X].
- 5.3 Further, as the CMA is aware, most of SSS’s customer contracts [X], which either required [X]. In practice, this placed tight restrictions on who was considered a suitable potential purchaser²⁷. Indeed, the evidence in the Provisional Findings from the [X] is that “*customers would want a purchasing entity to be acceptable from a UK security perspective, and to have experience in the emergency services or software technology industries*”²⁸. It is not at all clear that [X] would have been able to garner the requisite consents from customers. There is no evidence to support this.

²⁶ PFs paragraph 4.36.

²⁷ Indeed, the fundamental importance customers place on this was [X], which required [X] before the Transaction could be closed.

²⁸ PFs footnote 117.

- 5.4 The evidence in the Provisional Findings does not therefore meet the evidential test that absent the Merger, [X] would have been a potential alternative owner or (as discussed below) that it would have invested sufficiently to maintain SSS as an effective competitor.

(b) Lack of evidence of an acquisition by alternative purchasers or a plan by an alternative purchaser to invest to the significant levels required

- 5.5 The Provisional Findings also note that the CMA identified two additional potential purchasers who told the CMA they had not been aware of the opportunity to purchase SSS, but “*may have been interested in that opportunity if it had arisen*”²⁹.
- 5.6 From this, the Provisional Findings conclude that the evidence “*indicates that alternative interest in purchasing SSS existed*”.
- 5.7 Evidence of “*alternative interest*” is not evidence of other purchasers who “*would have*” engaged in a sales process, undertaken due diligence and a financial assessment of the benefits of an acquisition and have acquired SSS. Nor is it evidence of whether either party would have been interested in acquiring all or only part of the SSS business.
- 5.8 Further, we note that an acquisition by either party (and in particular, [X] is likely to have raised [X] of their own account. As noted by the CMA’s MAG “*the CMA (at Phase 1 or Phase 2) will not have as its counterfactual a sale of the target firm to a purchaser that is likely to result in a referral for an in-depth investigation, given the uncertainty over whether such an acquisition would, ultimately, be cleared or subject to remedial action*”³⁰.
- 5.9 Finally, we note the reference to the Capita internal document in the Provisional Findings which notes [X]³¹. To the extent the Provisional Findings place evidential weight on this one document, it should take into consideration the clear statement that confirms that by Capita’s own assessment, [X].
- 5.10 The evidence also shows that to the extent there were other bidders in the process, they all fell away.
- 5.11 We note in respect of the alternative purchaser counterfactual, as for continued ownership by Capita, that the Provisional Findings state:
- “*It is our provisional view that neither of these options would have entailed SSS receiving no further investment or ceasing to actively compete for contracts*”³².
- 5.12 The Provisional Findings do not contain any assessment of, or evidence for, a finding that where an alternative buyer acquires SSS it would have invested the significant amounts required to maintain SSS’ competitive position. Expressing an interest, and having a real intent to invest materially are a long way apart and the Provisional Findings make another leap in this respect.
- 5.13 As regards [X] and [X] there is no consideration of whether either party would have made the necessary and material investments in SSS’ ICCS and Duties products required to maintain its competitive position.
- 5.14 The CMA’s findings that SSS would not have received no investment is very different from a finding based on evidence that SSS would have received the very significant investment required to maintain its competitive position. There is no discussion or analysis in the Provisional Findings to bridge this gap.

²⁹ PFs paragraph 4.45.

³⁰ MAG paragraph 3.11.

³¹ PFs paragraph 4.34.

³² PFs paragraph 4.36.

6. **CMA fails to provide sufficient clarity on the relevant time horizon for assessment of the counterfactual**

6.1 The Provisional Findings provide that the time horizon that the CMA considers when describing the counterfactual will be consistent with the time horizon used in the CMA's competitive assessment. The CMA's assessment of the nature of competition confirms "the next few years" as the relevant period over which to conduct its competitive assessment on the basis that this period encompasses a timeframe over which identified forthcoming opportunities will occur and over which investment in product development can be realised. This proposed time frame would therefore apply as the appropriate time horizon in the CMA's counterfactual assessment.

6.2 The Competition Appeals Tribunal (**CAT**) in its recent judgement stated 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"*³³.

6.3 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. This is highly relevant given the dynamic state of competition, the opportunities identified as coming out to tender in the next two years, the time frames SSS has indicated it would need to develop cloud offerings for its ICCS and Duties products, the impact of this delay on its ability to compete and the ongoing development and the gaining of ground by those competitors who are already able to offer cloud solutions for both products.

6.4 The CMA has therefore failed in its 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.

7. **The CMA states that it relies on pre-Merger conditions of competition, without factoring in the significant evidence of underinvestment which was present even before a sale was considered**

7.1 The Provisional Findings note at paragraph 4.18:

"Prior to the Merger, Capita had identified SSS as a target for divestment, begun a sales process, and [X]. The CMA considers that competitive conditions during that time period do not accurately represent pre-merger conditions of competition. The CMA considers instead that pre-merger conditions of competition are those broad conditions which prevailed when Capita was operating SSS as a going concern with sufficient investment for the business to continue as a competitive constraint".

7.2 This is an artificial approach, which fails to take into account the significant evidence of SSS' [X] (including in the pre-Merger period).

7.3 If the Provisional Findings do not take into account a counterfactual involving SSS representing a significantly [X] and anticipated dynamic changes must be taken into account consistently throughout the competitive assessment in the ICCS and Duties sections of the Provisional Findings.

7.4 However, as noted below, sufficient recognition of SSS' [X], vis-à-vis its competitors and in the context of a move to cloud, is missing from the CMA's analysis throughout the Provisional Findings.

7.5 In particular, the Provisional Findings do not adequately recognise:

7.5.1 the [X], as detailed further in sections B and C;

7.5.2 the current advantage that [X] competitors such as Frequentis, Motorola and SAAB, already enjoy, evidenced by the fact they have already [X];

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

- 7.5.3 the fact that these competitors are continuing to develop their products at pace, driving customer demand, and therefore have the ability to win upcoming tenders at the expense of SSS which only serves to capitalise on the gap;
 - 7.5.4 that the ever decreasing pool of tenders which the Provisional Findings expect to request as on-premise [X]; and
 - 7.5.5 that these dynamic changes in the nature of the market mean that SSS will [X], thus only serving [X], who will consolidate their position, building scale and track record (which as the Provisional Findings have noted, is of significant importance to customers in this industry).
- 7.6 Further commentary on the above is included throughout the rest of this response.
8. **Conclusion on the counterfactual**
- 8.1 For the reasons set out above, it is clear that the evidence strongly undermines the conclusion 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.
 - 8.2 Rather, all of the evidence considered in the round would lead to a finding regardless of SSS' ownership that SSS was [X], that it would have continued as a going concern but that the most likely counterfactual is that SSS would have been a significantly [X].

B. ICCS

9. Introduction

9.1 We disagree with the Provisional Finding that the Merger has resulted, or may be expected to result, in an SLC in the supply of ICCS to emergency services and transport customers in the UK.

9.2 In provisionally finding an SLC in relation to the supply of ICCS, the Provisional Findings rely on CMA guidance which provides that where “*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*”³⁴. This makes clear that this is a presumption and that any such presumption would not apply in the face of evidence to the contrary.

9.3 In this case it is clear as described below that competition does not take place between a few firms and in any event the weight of evidence set out in the Provisional Findings means that this presumption does not apply. In particular, it cannot be presumed that there is an SLC in ICCS when the evidence in the Provisional Findings shows that:

9.3.1 SSS is already a [X] constraint in the supply of ICCS [X];

9.3.2 the Parties are not materially close competitors;

9.3.3 other competitors apply greater, equal or similar constraint on the Parties as the Parties impose on each other; and

9.3.4 SSS will be a substantially [X].

9.4 The central concern set out in the Provisional Findings appears to be that there may not be “*sufficient remaining good alternatives [in the supply of ICCS] to constrain the merged entity post-merger*”³⁵. On this point, the evidence in the Provisional Findings overwhelmingly shows that this concern is unfounded. In particular, the Provisional Findings show that:

9.4.1 the Parties face competition from a substantial number of strong competitors in Motorola (recognised in the Provisional Findings as a particularly “*strong constraint*”³⁶), Frequentis and Saab, with Systel providing a constraint in relation to fire and rescue customers, and so five significant suppliers would continue to compete in ICCS post-Merger;

9.4.2 typically, only a small number of competitors (two on average) submit an official bid for a given opportunity³⁷, and so it can be expected that, going forward, on any one opportunity there will remain sufficient competition from the other ICCS suppliers; and

9.4.3 given the way that public sector tenders are run, it must be assumed that in the context of any bid, as the bidders do not know who else is bidding (directly or via a sub-contracting arrangement), all competitors would impose a competitive constraint, even when they choose not to bid.

9.5 In addition, customer views, which should be of paramount importance to the CMA’s analysis, have not been sufficiently taken into account in the Provisional Findings. The Provisional Findings show that ICCS customers, in the vast majority of cases (38 out of 40

³⁴ PFs paragraph 6.201.

³⁵ PFs paragraph 6.34.

³⁶ PFs paragraph 6.118.

³⁷ PFs paragraph 6.98.

customers who responded to the CMA's survey³⁸), have a positive or neutral view of the Merger, or have no particular views, and the data the CMA has collected from customers clearly demonstrates that overwhelmingly they do not view the Merger as giving rise to an SLC; a position reinforced by the apparent lack of any customer or competitor complaints in relation to the Merger.

- 9.6 The CMA must therefore have a high degree of confidence that other evidence it is relying on in coming to its SLC findings outweighs the views of customers.

10. **SSS is already a [X]**

(a) Opportunities data shows that SSS is already a [X] in ICCS

- 10.1 The Provisional Findings acknowledge that the Parties already [X] than competitors³⁹ and that SSS specifically "[X]"⁴⁰. These findings nonetheless overestimate the level of success SSS has had in relation to tenders, as explained below.

(i) SSS' only tender wins [X]

- 10.2 The CMA's opportunities data shows that SSS has only been successful in [X] out of [X] ([X]) tenders since 2017⁴¹ all of which, as set out in previous submissions, were won [X] – a fact which appears to have been taken acknowledged in the Provisional Findings but not taken account of.

- 10.3 The CMA's opportunities data further shows that, in the same period, competitors have been more successful in winning tenders [X]:

10.3.1 Motorola has [X];

10.3.2 Saab and Systel [X]; and

10.3.3 Frequentis [X].⁴²

- 10.4 [X] also shows that the Provisional Findings [X] that SSS is "better placed to win" opportunities for [X] solutions⁴³. [X].

(ii) Direct awards and extensions are not indicators of current or future competitive strength

- 10.5 The Provisional Findings fail to distinguish between the competitive dynamics involved in new tenders on the one hand and direct awards and extensions on the other.

- 10.6 Direct awards and extensions are a reflection of historic competition at the time that the framework or contract underpinning the award or extension was awarded; they are not indicators of current or future competitiveness.

- 10.7 The Provisional Findings however cite the Parties' historic performance in relation to direct awards and extensions as an indicator of future competitive strength and the current viability of their products⁴⁴. These findings are flawed.

³⁸ CMA Customer Evidence Working Paper, Figure 5.

³⁹ PFs paragraph 6.103.

⁴⁰ PFs paragraph 6.209.

⁴¹ PFs Table 6-3.

⁴² PFs paragraph 6.108.

⁴³ PFs paragraph 6.180.

⁴⁴ PFs paragraph 6.101-6.102.

- 10.8 In any case, future competitive strength cannot be projected based on historic extensions and direct award wins because of the changing market dynamic and increasing move to cloud. In circumstances where, as the Provisional Findings recognise, the vast majority of customers view cloud as being important or very important⁴⁵, and are increasingly adopting cloud-solutions, the number of potential on-premise direct awards or extensions which SSS could compete for [REDACTED].
- 10.9 Further, the changing market dynamic means that the number of SSS' historic direct award and extension wins is irrelevant to the assessment SSS' current or future competitive strength: a customer which currently has an on-premise solution and wishes to move to a cloud-solution cannot be expected to take up an extension or make a direct award to SSS when SSS is unable to offer a cloud solution and meet the customer's requirements.
- 10.10 It is therefore inconsistent for the Provisional Findings to, on the one hand, acknowledge that cloud is increasingly important to / being adopted by customers (the Provisional Findings identify a "*trend towards procuring cloud-based solutions*"⁴⁶) and on the other hand assume that customers will continue to direct award or extend contracts for non-cloud solutions in the same way / with the same frequency they might have done previously.

(iii) Other suppliers view SSS as a [REDACTED]

- 10.11 The Provisional Findings also show that SSS' already [REDACTED] is being recognised by other suppliers:
- 10.11.1 [REDACTED]⁴⁷;
- 10.11.2 Frequentis ranked SSS as a middling competitor and highlighted its lack of development as a weakness⁴⁸; and
- 10.11.3 NECSWS internal documents describe SSS' ICCS product as a "[REDACTED]" and "considers SSS's competitive threat to have weaknesses, in particular that SSS's current [REDACTED]"⁴⁹.

(b) The Parties are not materially close competitors

- 10.12 It is submitted that in reaching its provisional conclusion that there is, or is likely to be, an SLC in the supply of ICCS, the Provisional Findings rely on the presumption of closeness of competition (as outlined in paragraph 9.2 above) and a static snapshot of market shares, instead of systematically reviewing opportunities data and SSS internal documents which provide evidence that the Parties are not materially close competitors, and taking into account customer views that undermine such a presumption.
- 10.13 Evidence from the Provisional Findings clearly shows that the Parties are not materially close competitors.

(i) Provisional Findings opportunities data shows that the Parties compete more closely with other suppliers

- 10.14 CMA opportunity analysis shows that the Parties have "*historically*" competed but "*[r]ecently ... have only directly competed with each other a few times*"⁵⁰ and that they compete more closely with other suppliers. For example, the opportunities data shows that:

⁴⁵ PFs Figure 5-1: ICCS customers – importance of cloud.

⁴⁶ PFs paragraph 6.146.

⁴⁷ PFs paragraph 6.130(a).

⁴⁸ PFs paragraph 6.130(c).

⁴⁹ PFs paragraph 6.49-6.50.

⁵⁰ PFs paragraph 6.133.

- 10.14.1 the Parties have only officially bid on the same tender [X] out of [X] times since 2017, making the extent of their “historic” competition limited in relation to tenders⁵¹;
- 10.14.2 since 2017, the Parties only [X] and SSS [X] which, considering the CMA’s finding that [X];⁵²
- 10.14.3 the Parties have competed more frequently, as frequently or only slightly less frequently against other suppliers as they have against each other. For example:
 - 10.14.3.1 [X]
 - 10.14.3.2 [X];
 - 10.14.3.3 [X];
 - 10.14.3.4 [X]; and
 - 10.14.3.5 [X]

(ii) Internal documents and customer feedback show that the Parties are part of a wider competitor set

- 10.15 While the Provisional Findings note that the Parties “refer to each other [in] internal documents”⁵³ this appears to be in the context of a wider competitor set and does not indicate that the Parties are materially close competitors or that they monitor each other more closely than other competitors. For example, the Provisional Findings note that:
 - 10.15.1 “NECSWS frequently mentions the ICCS competitor set as being Motorola, Frequentis and Saab in addition to the Parties”⁵⁴; and
 - 10.15.2 “SSS frequently mentions the ICCS competitor set as being Motorola, Frequentis and Saab in addition to the Parties” and also mentions Systel⁵⁵.
- 10.16 Similarly, 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”⁵⁶, with Motorola and Frequentis being identified as “providers that [customers] believe could meet their software requirements” 17 and 16 times respectively (only one and two fewer than NECSWS) and Saab and Systel also receiving a number of mentions⁵⁷. This indicates that the Parties are viewed by customers as part of a wider competitor set in ICCS.

(c) Other competitors apply a greater or similar constraint as the Parties and sufficient substantial competitors would provide a constraint post-Merger

- 10.17 The evidence from the Provisional Findings shows that, in this case, a reduction from six to five substantial suppliers should not be seen to constitute an SLC. On this point the CMA’s

⁵¹ PFs Table 6-3.

⁵² PFs paragraph 6.116.

⁵³ PFs paragraph 6.133.

⁵⁴ PFs paragraph 6.51.

⁵⁵ PFs paragraph 6.69.

⁵⁶ PFs paragraph 6.123.

⁵⁷ PFs paragraph 6.124 and Table 6-5.

own guidance identifies mergers which reduce the number of competitors from four to three (not six to five) as more likely to be problematic⁵⁸.

- 10.18 In circumstances where the CMA's guidance does not consider a "six to five" merger to be problematic, based on the evidence set out in the Provisional Findings, it is not reasonable to conclude that the market is concentrated and to find an SLC in relation to ICCS. The evidence rather confirms that other competitors do, and would continue to, apply a sufficient competitive constraint on the merged entity post-Merger. This is the case in particular in the light of SSS' [X].

(i) Opportunities data shows that competitors are bidding for more or as many opportunities as the Parties

- 10.19 The Provisional Findings show that:

10.19.1 Motorola has been involved in [X] tenders since 2017, [X] SSS and more than the [X] which NECSWS has been involved in;

10.19.2 Frequentis has officially bid in [X] tenders, [X] each of the Parties; and

10.19.3 Saab and Systel have each bid for [X] tenders, [X] than each of the Parties⁵⁹.

- 10.20 The opportunities data therefore illustrates that other suppliers have been applying a greater or substantially similar constraint historically as the Parties. In addition, the Provisional Findings show that other suppliers will continue to apply a significant constraint going forward.

- 10.21 On this point, the central concern set out in the Provisional Findings, despite overwhelming evidence as to the strength of the Parties' competitors (as described further below), appears to be that certain competitors will be restricted in their ability to compete with the merged-entity for some opportunities, and that they will bid strategically⁶⁰. For example, the Provisional Findings state that "*Frequentis and Saab also provide a constraint and have been successful in the tenders that they have participated in. However, Frequentis and Saab have only participated in a [X] of tenders and the evidence suggests that the Parties' expectations of their participation in future would be similar*".⁶¹ These concerns are unfounded.

- 10.22 In relation to the specific finding regarding Frequentis and Saab, the internal documents referenced in the Provisional Findings do not indicate any expectation on behalf of the Parties that those suppliers would participate in a [X] of tenders going forward. At most, the internal documents cited seem to suggest that Frequentis and Saab may not be expected to [X] which is consistent with the Provisional Findings which state that, typically, two suppliers on average bid for a given opportunity⁶².

- 10.23 Similarly, where the Provisional Findings note that going forward "*suppliers such as Motorola that only have a cloud solution may not bid if the requirement is for an on-premise solution with a roadmap to cloud*"⁶³:

⁵⁸ MAG paragraph 2.18(a).

⁵⁹ PFs Table 6.3 and 6.4.

⁶⁰ PFs paragraph 6.208.

⁶¹ PFs paragraph 6.118.

⁶² PFs paragraph 6.98.

⁶³ PFs paragraph 6.180.

- 10.23.1 the opportunities data shows that this has not stopped Motorola from being involved in [REDACTED], even at a time when the market's move to cloud was not as advanced⁶⁴; and
- 10.23.2 [REDACTED].
- 10.24 In relation to the concerns regarding strategic bidding more generally, as noted above, the Provisional Findings' opportunities analysis shows that typically only a small number of competitors (two on average) submit an official bid for a given ICCS opportunity⁶⁵. This means that:
- 10.24.1 it can be expected that, going forward, on any one opportunity there will remain sufficient competition from other ICCS suppliers to sufficiently constrain the merged entity; and
- 10.24.2 strategic bidding (to the extent competitors would engage in this) is a pre-existing function of the market (whereby, as a matter of course, not all suppliers bid for all opportunities) and not a practice which is caused by or affected by the Merger.

(ii) The Parties are constrained by substantial competitors

- 10.25 The evidence set out in the Provisional Findings overwhelmingly shows that Motorola, Frequentis, Saab and Systel (in relation to fire and rescue customers) are all strong competitors and provide a substantial constraint on the Parties. This is reflected in evidence from internal documents, opportunities data and customer feedback.

Motorola

- 10.26 In relation to Motorola, the Provisional Findings have found that it is "*well positioned in the market and will remain a strong constraint in the market in the future*"⁶⁶ including on opportunities which the Parties do not ultimately bid for⁶⁷, "*has a strong offering and in the recent past has frequently participated in and won tenders*"⁶⁸.
- 10.27 The Provisional Findings further recognise that Motorola:
- 10.27.1 is "*mentioned in [REDACTED] NECSWS's competitor analyses and is often depicted as a strong competitive threat. Motorola is also referred to as having [REDACTED]*"⁶⁹;
- 10.27.2 in SSS' internal documents it "*appears to be viewed as a [REDACTED] with evidence of an increase in Motorola's [REDACTED] in recent years and a recognition of its [REDACTED]*";⁷⁰
- 10.27.3 has been involved in tenders [REDACTED];⁷¹
- 10.27.4 along with Saab "*appear to have become stronger competitors in recent years following their recent wins in 2021 and 2022*"⁷²;

⁶⁴ PFs paragraph 6.180 and Tables 6-3 and 6-4.

⁶⁵ PFs paragraph 6.98.

⁶⁶ PFs paragraph 6.208.

⁶⁷ PFs paragraph 6.110.

⁶⁸ PFs paragraph 6.135.

⁶⁹ PFs paragraph 6.65(a).

⁷⁰ PFs paragraph 6.86(a).

⁷¹ PFs paragraph 6.108 and Tables 6.3 and 6.4.

⁷² PFs paragraph 6.109.

- 10.27.5 *"exerts a high level of direct competitive pressure on the Parties"⁷³, "particularly in recent years"⁷⁴;*
- 10.27.6 *along with Frequentis, has "a head-start on the Parties given that both of them already have a cloud-based product"⁷⁵;*
- 10.27.7 *[REDACTED]⁷⁶;*
- 10.27.8 *[REDACTED]⁷⁷;*
- 10.27.9 *[REDACTED]⁷⁸ and*
- 10.27.10 *was very frequently mentioned by customers as having a proven product that could meet the customer's requirements⁷⁹, with only one fewer mention than NECSWS.*

Frequentis

- 10.28 As with Motorola, the Provisional Findings have identified that Frequentis is also *"well positioned [to provide a constraint] in terms of its product offering"⁸⁰* and, alongside Motorola, has a head-start on the Parties by virtue of its existing cloud-based product. In particular, the Provisional Findings have identified that Frequentis:
- 10.28.1 *is "frequently mentioned in NECSWS' documents" and is "generally recognised (...) as having a good product and good track record in the UK"⁸¹ and is recognised as a [REDACTED] with "significant market presence"⁸², with a "[REDACTED]"⁸³;*
- 10.28.2 *in SSS' internal documents "appears to be viewed as [REDACTED] with a [REDACTED]"⁸⁴ and is recognised as being '[REDACTED]' and having a "[REDACTED] reputation and a '[REDACTED]' solution"⁸⁵;*
- 10.28.3 *is in a "good position to win upcoming opportunities that have cloud requirements"⁸⁶;*
- 10.28.4 *is recognised by [REDACTED] as having "strong ICCS capability"⁸⁷;*
- 10.28.5 *[REDACTED]⁸⁸;*

⁷³ PFs paragraph 6.110.

⁷⁴ PFs paragraph 6.118.

⁷⁵ PFs paragraph 6.199.

⁷⁶ PFs paragraph 6.199.

⁷⁷ PFs paragraph 6.190.

⁷⁸ PFs paragraph 6.181(a).

⁷⁹ PFs paragraph 6.128 and Table 6-5 Number of mentions of ICCS competitors.

⁸⁰ PFs paragraph 6.208.

⁸¹ PFs paragraph 6.65(b).

⁸² PFs paragraph 6.55.

⁸³ PFs paragraph 6.59.

⁸⁴ PFs paragraph 6.86(b).

⁸⁵ PFs paragraph 6.74.

⁸⁶ PFs paragraph 6.191.

⁸⁷ PFs paragraph 6.130(a).

⁸⁸ PFs paragraph 6.181(d).

10.28.6 *"has been present in the market for more than a decade and it has grown its market share over this time"*⁸⁹and

10.28.7 is frequently mentioned by customers as having a proven product that could meet the customer's requirements, with only one fewer mention than Motorola.⁹⁰

Saab

10.29 In relation to Saab, the Provisional Findings have found that it will *"provide a constraint given that it has been successful in recent tenders"*⁹¹ and, in particular, that it will be "[X]"⁹². This is reflected in evidence from the Provisional Findings that Saab:

10.29.1 is "[X]" by NECSWS and often mentioned in NECSWS documents and *"recognised for having a [X]"*⁹³;

10.29.2 is also regularly mentioned in SSS internal documents⁹⁴ and is seen to have a "[X]", "[X]" and "[X]" than SSS on a specific opportunity⁹⁵;

10.29.3 is recognised by [X] as having a *"strong platform"*; ⁹⁶

10.29.4 as noted above, is recognised by the CMA (alongside Motorola) to have become a stronger competitor in recent years⁹⁷ and as *"beginning to target other customer segments, including the other UK emergency services"*⁹⁸;

10.29.5 [X]⁹⁹; and

10.29.6 is also frequently mentioned by customers as having a proven product that could meet the customer's requirements¹⁰⁰.

Systel

10.30 In addition to the above, the Provisional Findings have also found that Systel adds a further specific constraint in relation to fire and rescue customers¹⁰¹ and recognise Systel's private cloud capability¹⁰² in the context of future competition. The constraint Systel provides is reflected in evidence from the Provisional Findings that:

10.30.1 it is [X]¹⁰³;

⁸⁹ PFs paragraph 9.51.

⁹⁰ PFs paragraph 6.128 and Table 6-5 Number of mentions of ICCS competitors.

⁹¹ PFs paragraph 6.208.

⁹² PFs paragraph 6.192.

⁹³ PFs paragraph 6.60 - 6.61.

⁹⁴ PFs paragraph 6.86(c).

⁹⁵ PFs paragraph 6.78(a)-(c).

⁹⁶ PFs paragraph 6.130(a).

⁹⁷ PFs paragraph 6.109.

⁹⁸ PFs paragraph 6.20.

⁹⁹ PFs paragraph 6.181(b) and (c).

¹⁰⁰ PFs paragraph 6.128 and Table 6-5 Number of mentions of ICCS competitors.

¹⁰¹ PFs paragraph 6.208.

¹⁰² PFs paragraph 6.193.

¹⁰³ PFs paragraph 6.87.

10.30.2 it is identified by customers as having a proven product that could meet their requirements¹⁰⁴; and

10.30.3 it is recognised by Motorola for having broken into the ICCS market “likely due to its price offering”¹⁰⁵.

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

(i) The Provisional Findings recognise that SSS will not be able to [X] going forward

10.31 The Provisional Findings identify that “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” and that “the Parties are not well placed to win opportunities in the next few years which require an [X]”¹⁰⁶. The Provisional Findings therefore recognise that SSS will not be able to [X] of ICCS opportunities going forward.

10.32 The evidence also undermines the provisional conclusion that SSS is likely to be a more effective competitor in the future, or that it will be able to effectively compete for “hybrid” or [X] opportunities in the meantime¹⁰⁷.

(ii) The Provisional Findings show [X] the [X] will affect SSS’ competitive position going forward

10.33 SSS has already [X] and the CMA has received evidence that customers already see SSS’ product [X]¹⁰⁸. SSS’ ability to compete would [X] in the time it would take it to develop a cloud product and the Provisional Findings appear not to have considered how SSS could [X] or the impact on SSS of competitors’ successes and their ability to build on that going forward.

10.34 The Provisional Findings identify that “there is likely to be a small and possibly [X] 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”.¹⁰⁹ [X].

10.35 The Provisional Findings do not estimate what the number of such opportunities might be, but they have (i) identified [X] total upcoming ICCS opportunities per year in 2023 and 2024¹¹⁰; and (ii) noted that 5 customers who expressed reservations about cloud were “likely to consider an ICCS procurement process in the next few years”¹¹¹. In the absence of other estimates provided in the Provisional Findings and taking those figures as a proxy, the CMA’s analysis suggests that SSS would be well-placed to compete for as few as [X]/[X] tenders ([X]) in the next two years.

10.36 The Provisional Findings also state that the CMA has “seen evidence that suggests that there are still some customers whose stated preference is an on-premise solution and/or who have reservations about moving to a public-cloud solution” based partly on “customer evidence as set out in paragraph 6.145 [of the Provisional Findings]”.¹¹² However, the customer evidence the Provisional Findings refer to seemingly gives no indication that

¹⁰⁴ PFs paragraph 6.128 and Table 6-5 Number of mentions of ICCS competitors.

¹⁰⁵ PFs paragraph 6.130(a).

¹⁰⁶ PFs paragraph 6.194 and 6.195.

¹⁰⁷ PFs paragraph 6.197.

¹⁰⁸ PFs paragraph 6.133.

¹⁰⁹ PFs paragraph 6.180.

¹¹⁰ PFs paragraph 6.151.

¹¹¹ PFs paragraph 6.146.

¹¹² PFs paragraph 6.175(a).

customers have a “*stated preference*” for an on-premise solution. The relevant passage states instead that “*15 customers had reservations about and/or no preference for cloud-based solutions*” and even then, some of the responses cited by the CMA appear at worst neutral towards a cloud-requirement, for example, of the 15 customers:

10.36.1 “*Four respondents said they would consider all options and had no strong preference for cloud or on-premise solutions*”; and

10.36.2 “*two respondents said that cloud was not a main or determinative factor in deciding who to appoint as a supplier.*”¹¹³

10.37 In any case, even if there were some preference for on-premise solutions, [X] given the number of competitors on the market and the fact that its ICCS product is already perceived as being technically [X]. This is supported by the finding in the Provisional Findings that, as noted above, the Parties already have a [X] than competitors¹¹⁴ and that SSS specifically “[X]”¹¹⁵.

(iii) There is no evidence that in the counterfactual SSS would have received investment to develop its [X] cloud offering

10.38 As set out in paragraphs 5.1 onwards, there is no evidence that, in either counterfactual proposed in the Provisional Findings, SSS would have received the investment required to develop its public cloud offering.

(iv) Even if it had received investment, [X] SSS cannot [X] and there is no evidence that it would be able to do so in the short to medium term

10.39 Although the Provisional Findings suggest that some customers may accept a roadmap to cloud, instead of a public-cloud product, this proposition does not appear to have been tested with customers. The customer survey results show that the overwhelming majority of ICCS customers consider cloud to be either important or very important.¹¹⁶ In these circumstances, [X] against bidders with an actual cloud offer – Motorola and Frequentis. [X].

10.40 In addition, as the Provisional Findings note, although Saab does not currently offer a public-cloud solution, it is “/[X]” and, as the CMA is aware, it [X]¹¹⁷.

10.41 SSS’ [X] is evidence of both (i) the [X]. As the CMA is aware, SSS’ bid for this opportunity [X]¹¹⁸.

10.42 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 allow the Parties to use any development as a credible basis for competing in tenders through offering a roadmap to a [X]-cloud solution*”¹¹⁹.

10.43 However, the outcome of this tender shows that is clearly not the case. [X], [X]; this suggests that the [X] were not seen as credible by the customer, disproving the argument that “any development” towards a cloud-solution would constitute a credible roadmap. Even

¹¹³ PFs paragraph 6.145.

¹¹⁴ PFs paragraph 6.103.

¹¹⁵ PFs paragraph 6.209.

¹¹⁶ PFs Figure 5.1: ICCS customers – importance of cloud.

¹¹⁷ PFs paragraph 6.177(a) - 6.192.

¹¹⁸ SSS’ response to s109 dated 13 July 2022.

¹¹⁹ PFs paragraph 6.179.

if it is accepted that a “credible roadmap to cloud may be acceptable (...) to the customer”¹²⁰ [X].

(v) [X] in relation to on-premise opportunities

- 10.44 The East Coast and Kent and Essex opportunities, [X], provide evidence that SSS’ ICCS product is [X], even where customers are in principle willing to consider non public-cloud solutions.
- 10.45 In the Kent and Essex tender, [X], it still lost. These bids are not, as the Provisional Findings suggest, evidence that “SSS appears to have both the ability and incentive to continue to compete for customers while it develops its [X]-cloud offering.”¹²¹
- 10.46 The Provisional Findings also appear to suggest that the fact that SSS [X].
- 10.47 It is also inconsistent for the Provisional Findings to assert that SSS has an incentive to compete in ICCS because it is “[X]” while acknowledging that “it is likely to be possible to compete in some tenders with [X]-cloud or flexible cloud requirements [X], although this may not always lead to attractive financial terms for the supplier”¹²², which implicitly accepts that competing in this way [X].

(vi) Competitors will [X]

- 10.48 As noted above, the Provisional Findings are incorrect to assume that SSS will be [X], before launching its cloud product in the longer term; this fails to take into account how that shorter term period will [X].
- 10.49 The Provisional Findings note that “there is some uncertainty around how long it would take SSS to transition its ICCS product to have [X]-cloud functionality” and that SSS has indicated that it could develop a [X]-cloud product sooner than expected¹²³. We submit that this interpretation of SSS’ submissions is incorrect. The Provisional Findings suggest that SSS stated in one submission that it would take [X] and in another that this “[X]”¹²⁴. We consider that SSS’ submissions make clear that the [X]. In any case, we note that even a period of [X] is a significant amount of development time during which SSS’ would [X].
- 10.50 Even if, as the Provisional Findings suggest, some competitors engage in strategic bidding¹²⁵ SSS considers that in the time period it would take for it to develop a cloud solution, providers with an existing cloud offering will consolidate their position, building scale and track record.
- 10.51 Given the importance of track record and concerns about security in this market, this opportunity will be very valuable to Motorola, Frequentis and Systel, and undermine the potential gains for SSS when it is able to launch a cloud product. Competitors cannot be expected to hold back from capitalising on the gap left by SSS and NECSWS while the Parties complete their cloud investment plans.
- 10.52 The Provisional Findings appear to equate SSS having the incentive to protect its customer base with an ability to successfully do so and to compete. In particular, the Provisional Findings note that:

¹²⁰ PFs paragraph 6.180.
¹²¹ PFs paragraph 6.160.
¹²² PFs paragraph 6.173.
¹²³ PFs paragraph 6.167.
¹²⁴ PFs paragraph 6.167.
¹²⁵ PFs paragraph 6.208.

10.52.1 “[X], the opportunity to retain its substantial customer base, and the possibility of winning new customers suggest that its current ICCS product is likely to provide a good starting base for an investment case to develop a cloud-capable solution. SSS is currently investigating and taking steps to further develop its strategy for potential [X]-cloud enablement. This indicates that SSS is likely to be a more effective competitor in the future”¹²⁶; and

10.52.2 “SSS’s current large customer base provides a strong starting position for it to have an incentive to invest in its product to ensure that it is meeting customer’s future needs and putting itself in the best position to retain the customers it already has”¹²⁷.

10.53 It is submitted that the above conclusions fail to recognise that even if there were an investment case, SSS has been [X] them and that in the period of time taken for any such investment to be made and for SSS to bring to market a credible cloud-based ICCS solution, competitors will continue to forge ahead [X].

(e) In the round, evidence from the Provisional Findings shows that it is not reasonable to find an SLC in ICCS

10.54 The evidence in the Provisional Findings, taken in the round, clearly establishes that this is not a case in which the CMA can rely on the presumption that where there is evidence that competition mainly takes place among few firms “any two would normally be sufficiently close competitors that the elimination of competition between them would raise competition concerns”. The evidence clearly proves the contrary.

¹²⁶ PFs paragraph 6.196.

¹²⁷ PFs paragraph 6.172.

C. DUTIES

11. Introduction

11.1 We disagree with the provisional conclusion in the Provisional Findings that the Merger has resulted, or may be expected to result, in an SLC in the market for Duties in the UK. A finding of an SLC is not justified because:

11.1.1 the evidence in the Provisional Findings shows that the Parties are not in fact close competitors, and that no competition would be lost as a result of the Merger:

11.1.1.1 the CMA relies on a presumption of closeness of competition which should be rebutted in light of the available evidence, in particular the fact that [§] ¹²⁸;

11.1.1.2 SSS' internal documents do not support a finding that SSS and NECSWS are materially close competitors;

11.1.2 the Provisional Findings incorrectly conclude that the Parties impose an indirect constraint on each other;

11.1.3 competition in the Duties market is driven by Crown, and more recently Totalmobile, both of whom provide a sufficient competitive constraint post-Merger;

11.1.4 the Provisional Findings do not sufficiently take into account the competitive advantage that Crown and Totalmobile currently enjoy by virtue of having cloud-enabled products; and

11.1.5 further, the Provisional Findings underestimate:

11.1.5.1 the [§] the move to cloud will have on SSS' [§] in the next few years, and

11.1.5.2 the fact that the [§] between SSS' offering and that of its cloud-enabled competitors [§] during this period.

12. There is insufficient evidence for the CMA to conclude that the Parties are close competitors in Duties

(a) The Provisional Findings rely on a presumption of closeness of competition

12.1 As in the case of ICCS, the CMA has relied too heavily on the presumption of closeness of competition¹²⁹, based on there being a small number of suppliers, rather than systematically reviewing the evidence which clearly shows that SSS and NECSWS are not in fact close competitors. See reasons set out below.

(b) The opportunities data shows that the Parties do not compete

12.2 For the following reasons, there is insufficient evidence for the Provisional Findings to conclude that the Parties compete, and that competition would be lost as a result of the Merger:

¹²⁸ PFs paragraph 7.156.

¹²⁹ For example, PFs paragraph 7.155.

- 12.2.1 the Provisional Findings acknowledge that “[t]here is relatively limited evidence of SSS and NECSWS placing a constraint on each other for opportunities”¹³⁰ in Duties; and
- 12.2.2 the opportunities data collected by the CMA shows that there is no competition between the Parties in Duties, specifically the CMA’s opportunities data analysis has shown that [§]¹³¹. This is not sufficiently acknowledged in the Provisional Findings.¹³²
- 12.3 In light of the above, there is no loss of competition as a result of the Merger.
- (c) Internal documents do not support a conclusion that SSS and NECSWS are materially close competitors**
- 12.4 The Provisional Findings have identified few relevant internal documents and those documents which have been referenced do not show that there is any competitive dynamic between the Parties. Instead, SSS’ internal documents show that Crown is the most successful supplier in the market and SSS’ closest competitor. As noted in the Provisional Findings, SSS regularly mentions Crown in its internal documents¹³³.
- 12.5 As submitted previously to the CMA, SSS’ position is that the fact that Totalmobile is not often referred to in SSS’ internal documents does not mean that SSS does not, in practice, view TotalMobile as a strong competitor¹³⁴. In response to that submission, the Provisional Findings note that “we have seen no evidence to substantiate SSS’ claims and note that they do not align the other evidence we have reviewed in this chapter”¹³⁵.
- 12.6 The CMA should however note that: (i) TotalMobile was mentioned by customers the same number of times as NECSWS¹³⁶ as being a provider who they believed could meet their software requirements; (ii) [§]¹³⁷; (iii) TotalMobile [§] noted that it has recently developed a cloud-based version of this product using Microsoft Azure¹³⁸.
- 12.7 Objectively, there is significant amount of evidence in the Provisional Findings which shows that TotalMobile is an effective competitor in Duties, and this is reflected in SSS’ previous submissions that it does in fact view TotalMobile as a competitor. As such, there would appear to be no evidential basis in the Provisional Findings on which to conclude that the CMA has “seen no evidence to substantiate SSS’ claims and note that they do not align the other evidence we have reviewed in this chapter”.
- 12.8 In summary, in light of the above factors, and in particular the opportunities data, the presumption of closeness of competition should not be relied on simply due to there being a small number of competitors.

¹³⁰ PFs paragraph 7.80.

¹³¹ PFs paragraph 7.156.

¹³² PFs paragraph 7.156.

¹³³ PFs paragraph 7.65.

¹³⁴ PFs paragraph 7.59.

¹³⁵ PFs paragraph 7.62.

¹³⁶ PFs Table 7.4 paragraph 7.82.

¹³⁷ PFs paragraph 7.91.

¹³⁸ PFs paragraph 7.145.

13. **The Provisional Findings incorrectly infer that the Parties impose an indirect constraint on each other simply by virtue of being in the market**

13.1 Given that it is clear from the opportunities data that there is no direct competition as between SSS and NECSWS, the Provisional Findings have sought to infer indirect competition between the Parties.

13.2 However, it is incorrect for the Provisional Findings to conclude that simply by virtue of being active in Duties, the Parties place an indirect constraint on each other at the point of award of direct awards or extensions or that they will do so going forward¹³⁹.

13.3 This is because:

13.3.1 competition for direct awards and extensions is not forward-looking. Rather, direct awards and extensions are reflective of historic competition at the time the original framework or contract was entered into;

13.3.2 extensions are often simply a 'stop-gap' until a customer is ready to go out to full tender; and

13.3.3 in any case, the Parties' ability to secure direct awards and wins will reduce as customers' requirements increasingly include [X] solutions, which the Parties currently [X].

14. **Competition in Duties is driven by Crown and, increasingly, by Totalmobile and both would constitute a strong competition constraint post-Merger**

14.1 The customer feedback gathered by the CMA indicates that it is Crown that currently drives competition in Duties; it is mentioned the most by far in customer survey responses (with seven of eight respondents identifying it as a supplier that could meet their needs)¹⁴⁰. Crown's strength is also [X], which identify it as [X]¹⁴¹.

14.2 For the reasons set out above, it is clear that Totalmobile is also a significant competitor with the potential for further growth.

14.3 As described further below, both entities are already public-cloud enabled, which will only serve to cement their current competitive advantage.

15. **[X] is [X] and will continue to do so in future**

(a) Duties customers increasingly require a public cloud solution and Crown and Totalmobile are increasingly well-positioned to compete as the market moves to public-cloud

15.1 The CMA's customer survey responses overwhelmingly show that cloud capability is very important to Duties customers, with only 2 out of 21 customers rating it as less important than 3 on a scale of 1-5, and the Provisional Findings acknowledge that customers increasingly require a public-cloud solution to meet their needs.¹⁴²

15.2 SSS considers that this will necessarily place competitors which, [X], already have a public-cloud solution at an even greater competitive advantage. The analysis in the Provisional Findings has underestimated the impact this 'head-start' will have on [X].

15.3 In particular:

¹³⁹ PFs paragraphs 7.75 and 7.162.

¹⁴⁰ PFs paragraphs 7.84 and Table 7-4.

¹⁴¹ For example, PFs paragraph 7.25.

¹⁴² PFs paragraph 7.153 and Figure 7.1.

- 15.3.1 As mentioned above, customer feedback indicates that it is Crown that already drives competition in Duties. Crown's offering is already cloud-based using the Microsoft Azure platform, and it has submitted to the CMA that incremental and sometimes major product improvements occur every [X]¹⁴³. With this pace of improvement, it is expected that the 'head-start' provided by its cloud products will only serve to increase Crown's competitive advantage in the future. This is reflected in the Provisional Findings which confirm that *"Crown is well positioned to remain a strong constraint in the market in future"*¹⁴⁴.
- 15.3.2 As also identified in the Provisional Findings, Totalmobile has recently developed a cloud-based version of its product using Microsoft Azure, and it is building additional functionalities into the product that will not be available on-premise¹⁴⁵. Again, Totalmobile has a clear 'head-start' over SSS. The Provisional Findings state: *"Totalmobile will also provide a constraint, particularly given its recent developed cloud-based solution"*¹⁴⁶.
- 15.4 The Provisional Findings acknowledge that Crown and Totalmobile's cloud-based products *"may mean they are well-placed to compete for opportunities in the next few years"*¹⁴⁷. This significantly understates the position and the Provisional Findings have underestimated the extent to which Crown and Totalmobile will be able to leverage their existing public-cloud offering in upcoming tenders.
- (b) There is insufficient evidence to conclude that SSS will be able to [X] as the market moves further toward a public-cloud requirement**
- 15.5 Converse to the above, the move to cloud, and specifically public-cloud, [X].
- 15.6 The Provisional Findings state that SSS will be able to compete going forward since *"it has been able to provide a 'deployed in the cloud' solution to some customers, [X]"*¹⁴⁸ and SSS therefore *"has a form of cloud capability"*¹⁴⁹.
- 15.7 The Provisional Findings cannot draw this conclusion when:
- 15.7.1 they recognise that: *"[X]"*¹⁵⁰ (i.e. it is not a cloud solution). It [X]. This is an important distinction. As previously submitted, [X] and [X] cloud capabilities in and of itself, and is only capable of being deployed, or transferred, by a customer into their cloud structure - as in the case of [X] and [X]¹⁵¹;
- 15.7.2 the Provisional Findings accept that customers will increasingly require public-cloud based solutions, but then 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)"*¹⁵². As explained above, this is not correct as the shift to cloud patently does materially affect competition in Duties, and so should receive more weight in the Provisional Findings' assessment;
- 15.7.3 the Provisional Findings acknowledge that *"it is unclear from customer responses [...] what form of cloud solution (public or privately hosted) customers may*

¹⁴³ PFs paragraph 7.144.

¹⁴⁴ PFs paragraph 7.161.

¹⁴⁵ PFs paragraph 7.145.

¹⁴⁶ PFs paragraph 7.161.

¹⁴⁷ PFs paragraph 7.149.

¹⁴⁸ PFs paragraph 7.142(b).

¹⁴⁹ PFs paragraph 7.153.

¹⁵⁰ PFs paragraph 7.4(b).

¹⁵¹ PFs paragraph 7.153.

¹⁵² PFs paragraph 7.153.

prefer”¹⁵³ and the CMA has not obtained evidence on this point from customers. In the absence of customer feedback on the preferred nature of cloud solution, feedback from competitors shows that on-premise solutions will not be viable within 12-18 months, at most ([§]); and

15.7.4 [§]¹⁵⁴, [§]. This makes it challenging [§], contrary to what the Provisional Findings suggest.

15.8 In summary, in relation to Duties, as with ICCS, the Provisional Findings do not sufficiently take into account SSS’ [§] and have not given sufficient acknowledgement or weight to the [§] that already exists between SSS and its [§] competitors, which will [§] in the next few years.

¹⁵³ PFs paragraph 7.107.

¹⁵⁴ PFs paragraph 7.142.