

## **ANNEX B**

### **Summary of responses to the consultation**

#### **Introduction**

1. This annex summarises some of the other issues, which are not expressly set out in this notice, raised in the responses to the consultation, together with the CMA's response. This annex is not intended to be a comprehensive record of all views expressed by respondents.
2. Twenty-five responses were submitted to the consultation. The issues raised broadly fall into the following categories:
  - duration of customers' contracts
  - duration of the initial commitments
  - market structure
  - concerns not related to the initial commitments.
3. The issues raised under these headings are summarised in paragraphs 4 to 20 of this annex on a high level anonymised/aggregated basis.

#### **Duration of customers' contracts**

##### ***The responses***

4. Multiple respondents generally welcomed the reduction of the minimum period to 12 months for existing demand-side contracts.
5. There were, however, concerns expressed by some respondents to the consultation that:
  - The reduction was unnecessary if the exclusivity provisions were removed from demand-side contracts in their entirety.
  - The continued existence of longer term demand-side contracts means that certain customers (including those customers who recently signed new contracts) are withheld from competition which therefore constrains the emergence of alternative systems. It was therefore

suggested by one respondent that these existing demand-side contracts should be shortened to a maximum of 18 months, where the current minimum period expires at a date after 31 December 2014.<sup>1</sup>

- Shorter minimum periods might increase opportunities for Epyx to raise prices more frequently, particularly if there is no competitive pressure being exerted on Epyx at the time of contract renewals. It was suggested by one respondent that the CMA should require mandatory reporting from Epyx in relation to pricing at the time of contract renewals.
- Some respondents acknowledged the need for notice of termination to be served during the minimum period or subsequent anniversary, but suggested the terms around the service of the notice were onerous and unjustified (for example, notice that is served one day short of three months before the end of the minimum period or subsequent anniversary could result in the notice not taking effect until the end of the following contract year).

### ***CMA's response***

6. The CMA has set out its provisional views on exclusivity and exclusions at paragraphs 7.9 to 7.12 of this notice.
7. The CMA provisionally considers that, based on evidence submitted by Epyx in February 2014, the shortened duration provisions in demand-side contracts under the initial commitments (as outlined in paragraph 7.14 of the March notice) are proportionate and appropriate on the basis that it will give new entrants access to (i) of up to 86% of the SMR transaction volumes that are currently processed on the SN platform by August 2015, and (ii) all of Epyx's existing demand-side customers by October 2016. This means that all of Epyx's existing demand-side customers would have at least one opportunity to switch to an alternative system (and every year thereafter) by October 2016. On this basis, the CMA provisionally considers that the existing duration provisions (along with the remaining relevant provisions) are relaxed or removed to an extent that is not likely to foreclose market entry by an as-efficient competitor.
8. The CMA does not consider it appropriate or proportionate, as suggested by one respondent, to review or monitor individual contractual negotiations

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<sup>1</sup> It was also noted that some supply-side customers are also bound to longer term contracts and, in line with the initial commitments offered on the demand side, should be similarly protected against unduly long minimum periods or afforded a break clause.

relating to price and other similar commercial factors. The CMA notes that the overarching purpose of provisionally accepting the modified commitments is to reduce barriers to entry to an extent that is not likely to foreclose market entry by an as-efficient competitor. Where competition thrives in a market, the CMA would expect that it would act as a constraint on market participants which will positively impact on prices, service, functionality, innovation and other factors and thus reduce the potential for exploitative behaviour.

9. Further, the CMA does not consider the notice provisions under the modified commitments to create anti-competitive foreclosure effects. The CMA notes that transitioning to an alternative system is likely to require months or years of detailed planning and various stages of evaluation and development. The CMA therefore considers that demand-side customers should be able to operate within the notice provisions allowed for by the modified commitments and also notes that customers and Epyx are free to negotiate shorter notice provisions (three months is the maximum that Epyx can contract to).

## **Duration of the initial commitments**

### ***The responses***

10. Multiple respondents expressed the view that the five-year duration of the initial commitments was not sufficient and it should be extended. These respondents were generally of the view that the initial commitments were too short for a competitor to establish itself in the market and the development of a competitive market to be achieved.
11. Key reasons given for these views were that the length of the initial commitments would dissuade potential new entrants from making the necessary investment and that an adequate number of customers were unlikely to switch in this timeframe because of contractual constraints and the preference to switch in tranches in a staggered manner over a significant period of time.
12. The responses proposed alternative duration periods ranging from ten years to indefinite continuation subject to periodic review (for example, every five years) by the CMA or the achievement of a specified competition metric (for example, successful market entry by a competitor or a reduction of Epyx's market share to a level where it was no longer dominant).

## ***CMA's response***

13. The CMA provisionally considers that the five-year duration of the modified commitments is appropriate and proportionate in the context of the market. In particular the basis for its provisional view is that:
- Five years of effective commitments is sufficient for an as-efficient competitor to establish a presence in the market, particularly given the widened scope of the modified commitments.
  - An indefinite period of commitments, or those linked to a review period or competition metric, lack legal certainty and would be overly onerous on the parties in the circumstances.
  - Five years is a significant period of time in the context of an innovative technology market.
  - The purpose of commitments is not to penalise the parties, or ensure successful entry, but to ensure the CMA's competition concerns are addressed (ie the artificial barriers to entry imposed by Epyx's conduct are sufficiently reduced so as to not anti-competitively foreclose the market).
14. The CMA notes that it is able to open a new investigation should it have reasonable grounds to suspect that the parties are abusing their dominant position after the modified commitments have expired.

## **Market Structure**

### ***The responses***

15. Concerns were raised in the consultation that the natural structure of the existing market (even absent any potentially abusive conduct) does not readily allow for entry. One respondent stated that although it was comfortable that certain contractual restrictions will be relaxed by the initial commitments, it considers that development and acceptance of a new alternative system in the market is limited, if not impossible.
16. Another respondent submitted that given the nature of the market the only model that could deliver true competition would be regulatory intervention in a similar manner as the electricity, gas and telephony markets. In this respect, it was considered that a new entrant should be allowed to use the technology and infrastructure that Epyx has established between itself and the demand and supply-sides of the market.

### ***CMA's response***

17. Regulatory intervention in the market of the type suggested is not a remedy available to the CMA in relation to this investigation. Access to Epyx's infrastructure is not considered necessary in order to address the CMA's competition concerns.

### **Concerns not related to the initial commitments**

#### ***The responses***

18. Multiple respondents made representations that suggest Epyx may be engaging in unfair and exploitative practices in its dealings with customers. These representations broadly ranged from dissatisfaction expressed on quality of service and functionality, transparency of contractual terms and level of prices and fee structure designed to tie in demand-side customers and/or favour demand-side customers over supply-side customers. These respondents broadly submitted that Epyx was using its dominant position in the market to exploit customers and distort competition to its own commercial advantage.

### ***CMA's response***

19. Whilst representations regarding allegedly exploitative behaviour are noted, the CMA is of the view that these allegations do not directly relate to the initial commitments that had been offered by the parties and which were the subject of the consultation. The commitments process is intended to address the CMA's competition concerns, which in this matter relate to exclusionary behaviour; namely, foreclosure of the market. For the avoidance of doubt, the CMA has not tested the veracity of these allegations and they do not relate to matters within the current scope of the investigation.
20. The CMA notes that the overarching purpose of provisionally accepting the modified commitments is to reduce barriers to entry to an extent that is not likely to foreclose market entry by an as-efficient competitor. Where competition thrives in a market, the CMA would expect that it would act as a constraint on market participants which will positively impact on prices, service, functionality, innovation and other factors and thus reduce the potential for exploitative behaviour.