

FNZ / GBST

GBST Response to the CMA's Notice of Possible Remedies

1 Executive summary

A full divestiture of GBST represents the only comprehensive and effective remedy to all aspects of the SLC and the resulting adverse effects, that the CMA has provisionally found. Neither a partial divestiture nor behavioural remedies would be capable of remedying the SLC, so a full divestiture is both proportionate and necessary.

A partial divestiture of GBST is neither feasible nor desirable from the perspective of potential purchasers. A partial divestiture would give rise to significant asset and composition risks because of how GBST operates. In particular, GBST's underlying core products in each operating segment are developed, maintained and sold to clients on a global basis. Moreover, the level of integration between different parts of the GBST business and the level of interdependence between different jurisdictions and operating segments would present significant challenges in carving-out the UK or Wealth Management operating segment of GBST. A partial divestiture is, therefore, both unlikely to attract a suitable purchaser or enable a purchaser to operate as an effective competitor in the Relevant Market.

[X], GBST is strongly of the view that the CMA should appoint a divestiture trustee from the outset of the divestiture period in order to ensure the divestiture process is completed as soon as possible without further degradation of the GBST business.

A behavioural remedy would not be an effective remedy to the SLC and resulting adverse effects and would not be appropriate in this case.

1.1 This submission is made by GBST Holdings Limited ("**GBST**") in response to the CMA's Notice of Possible Remedies ("**NPR**") of 5 August 2020 in relation to the completed acquisition of GBST by FNZ (Australia) Bidco Pty Ltd ("**FNZ**") (the "**Transaction**").

1.2 In the NPR, the CMA identified the following potential structural remedies to the substantial lessening of competition ("**SLC**") in the market for Retail Platform Solutions excluding in-house software in the UK (the "**Relevant Market**") provisionally identified in the CMA's Provisional Findings dated 5 August 2020:¹

- (i) a full divestiture of GBST; and
- (ii) a partial divestiture of GBST, potentially split on the basis of operating segment, geography, or both:
 - (a) a divestiture of GBST's global Wealth Management business (the "**Global Wealth Management Business**");
 - (b) a divestiture of all of GBST's UK operations (the "**UK Business**"); or
 - (c) a divestiture of GBST's UK Wealth Management business (the "**UK Wealth Management Business**").

1.3 The CMA's view is that a full divestiture of GBST would "*represent a comprehensive and effective remedy*",² while noting its "*reservations with regards to the effectiveness of a partial*

¹ NPR, para. 22.

² NPR, para. 12.

divestiture".³ The CMA has also noted that "*a behavioural remedy is very unlikely to be an effective remedy to the SLC or any resulting adverse effects that it has provisionally identified*".⁴

1.4 In summary:

1.4.1 GBST agrees with the CMA's preliminary view that a full divestiture of GBST would represent a comprehensive and effective remedy to all aspects of the SLC and resulting adverse effects that the CMA has provisionally found.⁵ In fact, a full divestiture of GBST is the only appropriate remedy, as this represents the smallest viable, standalone business that can compete effectively on an ongoing basis with FNZ.

1.4.2 GBST also shares the CMA's reservations with regards to the effectiveness of a partial divestiture. Specifically:

- (i) **A partial divestiture is not practically feasible.** It is highly unlikely that any carve-out of the Wealth or UK Wealth businesses could be appropriately configured to allow a purchaser to operate the divested business as an effective competitor in the Relevant Market due to the [X] embedded in both the Wealth and Capital Markets operating segments and across the jurisdictions in which GBST operates (Australia, Hong Kong, Singapore, the UK and the US). Given the challenges and time necessary to achieve separation, these shared assets and services would need to be divested in their entirety in order for any divestiture package to be feasible [X]. GBST considers this a relevant consideration going to the costs and effectiveness of partial divestiture.
- (ii) **There are significant risks with a partial divestiture.** A partial divestiture would have an unacceptable risk profile and weaken the competitive capability of the divested and retained businesses. Namely:
 - (a) A partial divestiture by operating segment would give rise to significant and unnecessary asset and composition risks. This would weaken the competitive capability of the GBST business in the UK and potentially significantly limit its attractiveness to a suitable purchaser.
 - (b) A partial divestiture on a geographic basis (with or without further division by operating segment) is not possible because GBST's underlying core products sold by both operating segments (Composer for Wealth, Syn~ for Capital Markets) are developed, maintained and sold to clients on a global basis. A sub-licence to a divestment purchaser for the UK would not enable the divestment business to compete effectively as an ongoing independent competitor from FNZ as it would give FNZ control over Composer, GBST's core product in the Relevant Market (including investment in its future product

³ NPR, para. 15.

⁴ NPR, para. 17.

⁵ NPR, para. 12.

development which as the CMA notes in its Provisional Findings is a “*key competitive factor in this market*”).⁶

- (c) A partial divestiture would impose material costs and risks on GBST’s customers [redacted], risk undermining GBST’s reputation and track record with clients and thereby its brand (which is key to its competitive strength) and weaken the ability of the divested entity to continue to [redacted] to remain competitive against its competitors, including FNZ in the Relevant Market.

1.4.3 To prevent the further degradation of the GBST business due to a prolonged divestiture process being run by FNZ, a divestiture trustee (“**DT**”) should be appointed from the outset of the divestiture period. Although this is an unusual step, it is clearly necessary and justified given the exceptional circumstances of this case, including [redacted]. Allowing FNZ to run the divestiture process would give rise to significant and unnecessary asset and purchaser risks and prolong the divestiture process.

1.4.4 GBST understands that the purchaser suitability criteria must be applied in order to ensure that the purchaser has the necessary capability and is committed to ensuring that GBST continues to compete in the Relevant Market, including against FNZ.⁷ However, provided such criteria are met, GBST considers that no class of potential purchasers (such as private equity funds or financial sponsors) should be excluded from acquiring GBST.

1.4.5 GBST agrees with the CMA’s view that a behavioural remedy is very unlikely to be an effective remedy to the SLC and resulting adverse effects that the CMA has provisionally identified given that the markets in which GBST operates involve both competition for the market (via long-term contracts and infrequent tenders) and competition in the market (via periodic re-negotiation and service provision) and lack an appropriate regulator for monitoring or enforcement purposes.

1.5 Both the nature of any possible remedy and the effectiveness of the remedy process will be critical for ensuring the future viability of the GBST business, [redacted].

1.6 In this context, [redacted].

2 Overview of how GBST operates

2.1 GBST has set out below an overview of how the GBST business is structured and operated in order to assist the CMA’s understanding of the level of integration between different parts of the GBST business, the level of inter-dependence between different jurisdictions and operating segments, and the challenges of separation that would undermine the effectiveness of any partial divestiture and its attractiveness to a divestment buyer.

2.2 GBST operating segments are effectively split into the Wealth Management Division (active in Australia and the UK) and the Capital Markets Division (active in Australia, Asia, the UK and the USA).

⁶ For example, paragraph 56, Provisional Findings.

⁷ CMA guidance on merger remedies (13 December 2018, CMA 8) (the “**Remedies Guidance**”), paras. 5.20 – 5.27.

2.3 GBST's underlying core products in each operating segment are developed, maintained and sold to clients on a global basis.

2.4 GBST has a [X]:

2.5 [X].

2.6 [X]:

(i) [X]

(ii) [X]

(iii) [X]

(iv) [X]

(v) [X]

(vi) [X]

(vii) [X]

(viii) [X]

2.7 [X] As discussed in further detail at paragraph 4.8.2 below:

(i) [X]

(ii) [X]

(iii) [X]. Ties in relation to products and services of such an essential nature would significantly impact on GBST's ability to effectively compete on an ongoing basis with FNZ.

2.8 From a geographic perspective, [X].

3 Scope of the divestiture package: full divestiture

3.1 In the NPR, the CMA identified full divestiture and partial divestiture (via three possible alternatives) of GBST as possible remedies to the SLC which it identified in its Provisional Findings.

3.2 GBST agrees that a structural remedy is necessary in order to restore the loss of competition between the parties at source and ensure the structure of the market itself continues to drive rivalry between the parties in the medium / long term.⁸ The only structural remedy that GBST considers would be effective to remedy the CMA's competition concerns, restore the competitive structure of the market, be attractive to purchasers and enable GBST to operate as a viable business is a full divestiture of GBST.

4 Scope of the divestiture package: partial divestiture

4.1 Any form of partial divestiture would be insufficient to "*achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it*" and would present material asset and purchaser risk.⁹ In particular:

⁸ Remedies Guidance, paras. 3.37 – 3.38.

⁹ Remedies Guidance, para. 3.3; NPR para. 6.

- (i) GBST's underlying core products for both operating segments (Composer for Wealth, Syn~ for Capital Markets) are developed, maintained and sold to clients on a global basis. If FNZ sub-licensed Composer for the UK, it would retain an unacceptable level of control over GBST's core product in the Relevant Market. This would not only compromise the independence and competitive capability of the divestiture package, but is unlikely to be commercially attractive to a suitable purchaser.
- (ii) Any partial divestiture (by operating segment and/or geographically) would require a complex and disruptive separation [§<].

4.2 As is explained below, any form of partial divestment would likely leave the purchaser without all the support it requires to operate effectively and independently (and, if a divestiture takes place on a geographic basis, leave FNZ with a degree of control over GBST's core product in the Relevant Market).¹⁰ As the CMA recognises in the NPR, this would be unacceptable as it would prevent a purchaser from operating as an effective competitor in the Relevant Market, and risks making the divestiture package unattractive to suitable purchasers.

4.3 Further, each of the potential forms of carve-out would cause significant composition and asset risks that would give the remedy an unacceptable risk profile and weaken the competitive capability of both the carved-out business and the remaining GBST business. The Remedies Guidance clearly explains that such risks are likely to limit the effectiveness of the remedy.¹¹

4.4 As is explored in detail below, a carve-out of any part of the GBST business would lead to substantial risks of:

- 4.4.1** significant costs and risks being imposed on customers, particularly because existing and new customers would be [§<] when re-platforming to GBST;
- 4.4.2** disruption to current GBST partnerships that could adversely affect its competitiveness in the UK;
- 4.4.3** [§<] across both operating businesses;
- 4.4.4** the divested entity and the remaining entity having a weakened ability to [§<] remain competitive in the medium term [§<].¹²;
- 4.4.5** a loss of trust by customers (both existing and potential) that GBST can handle their requirements due to the likely disruption, particularly during tenders and re-platforming to GBST when *"customers must have a high degree of confidence that a potential supplier can operate, is committed to developing their Retail Platform Solution and will enable the Retail Platform to remain competitive and compliant with*

¹⁰ Remedies Guidance, para. 5.14. As reflected in the Remedies Guidance, carving out a partial divestiture is *"far more difficult"* than a full divestiture, and *"the CMA may have less assurance that the purchaser will be supplied with all it requires to operate competitively"*.

¹¹ Remedies Guidance, para. 5.3(a); NPR para. 14. In the case of composition risks *"the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market"*. Moreover, in relation to asset risks, *"the competitive capability of a divestiture package will deteriorate before completion of the divestiture, for example, through the loss of customers or key members of staff"*.

¹² Annex GBST RFI2.12.2_ [§<])

necessary regulation".¹³ This is a particularly significant risk if GBST loses control of either the underlying Composer product [REDACTED] following a partial divestiture; and

- 4.4.6 constraints upon GBST's ability to operate at sufficient scale (and with sufficient financial strength) to service its existing customers and win new customers. As noted above, GBST's core products for both operating are developed, maintained and sold to clients on a global basis. The importance of scale as both a competitive strength and a barrier to entry is referenced by the CMA in the Provisional Findings.¹⁴

- 4.5 Given that the CMA identified in its Provisional Findings that GBST competes with FNZ through its partnerships to offer a PaaS solution,¹⁵ that the Parties' rivalry drives new product development and innovation,¹⁶ and that GBST's competitive strengths include "*scale, proven experience and a strong reputation*",¹⁷ the above risks mean that any form of partial divestiture would likely not be effective in remedying or mitigating the SLC and the resulting adverse effects on customers.

A partial divestiture of the Global Wealth Management Business (i.e. split by operating segment) would not compete as effectively with FNZ as it did pre-Transaction

- 4.6 GBST considers that a partial divestiture comprising the Global Wealth Management Business (i.e. split by operating segment, with FNZ retaining the Capital Markets Business) would not be an appropriate or effective remedy to the SLC due [REDACTED].
- 4.7 Given the extent to which the segments are interconnected, a carve-out of the Global Wealth Management Business from the remaining GBST business would not be practically possible without damaging the viability of the carved-out business.¹⁸ It would also give rise to significant levels of composition and asset risk which would ultimately mean that the divestment business' competitive position would be damaged, and the SLC provisionally identified would not be addressed. Attempting to carve out the Global Wealth Management Business in this way would also make the divestiture package significantly less attractive to potential purchasers.
- 4.8 This is expanded on below:

- 4.8.1 ***Scope of the business and assets to be divested:*** a divestiture package for the Global Wealth Management Business would need to include, as a minimum.

[REDACTED].

- 4.8.2 ***It is not practically feasible to carve out the Global Wealth Management Business:*** [REDACTED].

(i) [REDACTED]

(a) [REDACTED].

¹³ Provisional Findings, para. 7.11.

¹⁴ "Some third parties mentioned scale as a barrier: SECCL told us that customers select on the basis of capital strength; Hubwise mentioned that the supplier's balance sheet would be taken into account; and Avaloq mentioned scale a factor" (Provisional Findings, para. 8.15).

¹⁵ For example, "Qualitative evidence from customers who ran these tenders showed that they considered the Parties as suitable alternatives, including the GBST/Equiniti partnership as an alternative to FNZ" (Provisional Findings, para. 7.64).

¹⁶ Provisional Findings, paras. 7.202 – 7.205.

¹⁷ Provisional Findings, para/ 7.41.

¹⁸ Remedies Guidance, para. 5.14. Carving out a partial divestiture is "*far more difficult*" than a full divestiture, and "*the CMA may have less assurance that the purchaser will be supplied with all it requires to operate competitively*".

- (b) [REDACTED].
- (c) [REDACTED].
- (d) [REDACTED].
- (e) [REDACTED].
- (f) [REDACTED].
- (ii) [REDACTED]
 - (a) [REDACTED].
 - (b) [REDACTED].

4.8.3 Scope of the divestiture package would be too constrained to attract a suitable purchaser who can compete effectively and a carve out of this business would give rise to significant composition, asset and purchaser risks: The Global Wealth Management Business cannot be carved out from GBST's Capital Markets business without damaging the competitive position of the Global Wealth Management Business in the UK.

- (i) **Composition risks:** The Global Wealth Management Business is highly integrated with the Capital Markets business [REDACTED].¹⁹ Attempting to carve out the Global Wealth Management Business would not only handicap it operationally and as a competitor, but also serve to make the divestiture package less attractive to potential purchasers.
- (ii) **Asset risks:** The extra time that would be taken, the significant disruption and the fundamental change to the nature of the GBST business as a whole if a carve out takes place would bear a significant risk of [REDACTED], with the consequence that the competitive capability of the Global Wealth Management Business would deteriorate even before completion of the divestiture.
- (iii) **Purchaser risks:** A carved out Global Wealth Management Business may not be able to attract a suitable purchaser given the dependency on FNZ during any transition period for shared services and the large risks attached to splitting a highly integrated business.

A partial divestiture of the UK Business (i.e. split by geography) would not allow the UK business to compete as effectively with FNZ as pre-Transaction.

4.9 GBST considers that a partial divestiture of the UK Business (i.e. split by geography) would not be an appropriate or effective remedy to the SLC due to: (i) GBST's underlying core products for both operating segments (Composer for Wealth, Syn~ for Capital Markets) being developed, maintained and sold to clients on a global basis. If FNZ sub-licenced Composer for the UK, it would retain an unacceptable level of control over GBST's core product in the Relevant Market; and (ii) the material amount of integration of GBST's Australian/ROW operations with the UK Business.

4.10 This is expanded on below:

¹⁹ GBST previously explained these points to the CMA in November 2019 during discussions on the scope of the Initial Enforcement Order.

- 4.10.1 Scope of the business and assets to be divested:** Divestiture of the UK Business, i.e. on a geographic basis, would not be feasible, primarily because GBST's underlying core products for both operating segments (Composer for Wealth, Syn~ for Capital Markets) are developed, maintained and sold to clients on a global basis [X]. FNZ would retain ownership of the Composer/Syn~ product [X] for use in Australia and sub-licence it to the divested business for use in the UK. The key issues with this are explained in paragraph 4.10.3 below.
- 4.10.2 It is not practically feasible to carve out the UK Business:** GBST considers that a partial divestiture of the GBST business by geography (or indeed both operating segment and geography) would not be practically possible as a remedy to the SLC. In short: Composer and Syn~ are developed, maintained and sold to clients on a global basis and cannot be divested via a sub-licence in the UK without FNZ retaining control over the underlying product. Moreover, GBST's Australian/RoW operations are heavily integrated with, and key to the effectiveness of, the UK Business.
- 4.10.3** GBST's underlying core products for both operating segments (Composer for Wealth, Syn~ for Capital Markets) are developed, maintained and sold to clients on a global basis [X]. A partial divestiture by geography would effectively require two competitors to use exactly the same software product. FNZ would retain ownership of the Composer/Syn~ product (and its common IP) for use in Australia and sub-licence it to the divested business for use in the UK. This would mean that:
- (i) FNZ would have a version of the software that would be used by a proposed competitor in the Relevant Market.
 - (ii) FNZ would retain control over investment and new product development of the underlying Composer/Syn~ products used by GBST in the UK, not only providing it with full visibility over GBST's current and future technical capabilities but also with the ability to influence (and restrict) them.
 - (iii) Even an irrevocable, long-term sub-licence would not be sufficient to protect the divested business and ensure its independence from FNZ given that it would relate to GBST's core product in the Relevant Market (rather than, for example, use of a supporting service or a brand licence). GBST is not aware of any such sub-licences in any of the markets in which it operates.
 - (iv) Given that the underlying software products are not being divested in this divestiture option, it cannot be considered as purely structural in form - the CMA recognises that *"a licence that requires a licensee to rely on the licensor for updates of the technology or continuing access to specialist inputs or know-how will be regarded as a behavioural commitment, which is subject to significant risks of not being an effective remedy"*.²⁰
 - (v) A sub-licence of this type would not be likely to be commercially attractive to a suitable purchaser and it is difficult to see how a sale could be achieved (i.e. the composition risks would be very high).
 - (vi) Additionally, a partial divestiture of the UK Business would have the same impact on the remaining Capital Markets business, [X]. This represents a

²⁰ Remedies Guidance, para. 6.2.

cost able to be taken account of in the CMA's proportionality assessment of remedies.

4.10.4 In addition, a partial divestiture on a geographic basis would also be unfeasible because [§].

4.10.5 ***Scope of the divestiture package is too constrained to attract a suitable purchaser who can compete effectively and would give rise to significant levels of risk:*** In addition to the above, a partial divestment of the UK business would give rise to significant risk:

(i) ***Composition / asset risk:*** [§].

(ii) ***Purchaser risk:*** a carved-out divestiture package for the UK Business would face a range of significant issues (as set out above) that mean attracting a suitable purchaser would be very challenging.

A partial divestiture of the UK Wealth Management Business (i.e. split by geography and operating segment) would not compete as effectively with FNZ as it did pre-Transaction

4.11 Divesting GBST's UK Wealth Management Business (i.e. split by geography and operating segment) is not feasible or desirable for the reasons outlined above at paras. 4.6 to 4.11 above. Namely, such a partial divestment would not be feasible and would give rise to significant levels or risk which harm the divestment business' competitive position and not address the SLC provisionally identified. Specifically:

4.11.1 ***Scope of the business and assets to be divested:*** A partial divestiture of the UK Wealth Management Business will encounter the same issue with respect to the underlying core products detailed above (i.e. FNZ would retain control of the Composer product and sub-licence it to GBST for use in the UK) as well as the issues with access to the [§]. GBST does not believe a sale of the UK Wealth Management Business to be possible, nor palatable to any suitable purchaser.

4.11.2 ***It is not practically feasible to carve out a UK Wealth Management Business:*** The extensive difficulties with separating the UK Business on a geographic basis and the challenges in relation to [§] are set out above. As noted above, the Australian/ROW and Capital Markets business are heavily integrated, and key to the effectiveness of, the UK Business.

4.11.3 ***Scope of the divestiture package is too constrained to attract a suitable purchaser who can compete effectively and would give rise to significant risk:*** For the reasons set out above, the UK Wealth Management Business cannot be carved out from GBST's remaining operations [§]. A carved-out divestiture package for the UK Business would face a range of significant issues (as set out above) that mean attracting a suitable purchaser would be very challenging.

5 Identification and availability of a potential buyer

5.1 GBST has a number of observations on the application of the criteria applied by the CMA when assessing the availability and suitability of potential purchasers²¹:

²¹ Remedies Guidance, para. 5.21; NPR para. 24.

- 5.1.1 Independence:** GBST notes that the purchaser should have no significant connection to FNZ that may compromise the purchaser's incentive to compete with FNZ (such as an equity interest, common significant shareholders, reciprocal trading relationships, or continuing financial assistance).
- 5.1.2 Capability:** The purchaser must have access to appropriate financial resources, expertise (although it would have access to the experienced GBST management team), and assets to support GBST as necessary and ensure it can be an effective competitor in the marketplace. [3<].²² However, it is critical that the purchaser has both the ability and incentive to compete vigorously in the future with all market participants, including FNZ.²³
- 5.1.3 Commitment:** The purchaser should be able to provide an appropriate business plan and objectives for competing in the market, and a clear demonstrable intention and incentive to maintain and operate GBST as a viable and competitive business – including in competition with FNZ.²⁴
- 5.1.4 Absence of competitive or regulatory concerns:** As GBST has explained in previous submissions, and as identified in the Provisional Findings, FNZ and Bravura are the only significant competitors to GBST in the UK.²⁵
- 5.2** GBST does not consider that (provided they fulfil the criteria set out in the Remedies Guidance and paragraph 24 of the NPR) there are any specific types of purchasers that should be ruled out as potentially suitable purchasers of a divestiture business. Aside from existing players in the platforms software space (including non-retail platform solutions providers), a number of financial buyers, such as private equity firms, have experience investing in this sector.²⁶
- 5.3** In past cases where private equity buyers and new entrants have been potential purchasers, the CMA has reviewed their suitability on a case-by-case basis, considering whether the proposed purchaser will satisfy the requirements of the Remedies Guidance,²⁷ and thus be able to operate the divestiture business so as to resolve the SLC concern and maintain competition.²⁸ The CMA should focus on whether a suitable purchaser has the resources and management expertise to run the divested business.²⁹
- 5.4** GBST does not consider that a UK presence and understanding of the Relevant Market is essential, as the purchaser would have access to GBST's existing management team with a detailed knowledge of the Relevant Market with which to assist a purchaser.
- 5.5** The Remedies Guidance also highlights the importance of avoiding purchaser risks, i.e. *"risks that a suitable purchaser is not available or that the merger parties will dispose to a*

²² Remedies Guidance, para. 5.21(c); NPR para. 24(b).

²³ Remedies Guidance, para. 5.26.

²⁴ Remedies Guidance, para. 5.21(d); NPR para. 24(c).

²⁵ *"We have provisionally found that, alongside the constraint they impose on each other, Bravura is the only close competitor to the Parties in the supply of Retail Platform Solutions in the UK"*, Provisional Findings, para. 7.129.

²⁶ NPR para. 25(b).

²⁷ Remedies Guidance, para. 5.21.

²⁸ See, for example, *Acadia Healthcare Company/Priority Group* (2016), where two private equity firms were considered suitable purchasers of the divested business, Notice of Consultation dated 7 October 2016, paragraph 23 et seq.

²⁹ See, for example, the views of third parties in *Cygnat Heath Care/Cambian Adult Services*, Final Report, 16 October 2017, paragraph 14.92.

weak or otherwise inappropriate purchaser".³⁰ In terms of the first element, provided the divestiture process is conducted in an efficient and impartial way and the competitive integrity of the GBST business is not undermined by a carve-out, GBST does not consider it likely that there is a material risk of a suitable purchaser not being available. GBST has [X]. However, as discussed below, [X], would give the remedy an unacceptable risk profile and be less likely to effectively and comprehensively remedy the SLC (at the expense of GBST and FNZ's customers).³¹

6 Divestiture Process

- 6.1 [X], this case involves exceptional circumstances which require the early appointment of a DT [X].

The divestiture period must be as short as reasonably possible to reduce asset risks

- 6.2 GBST considers that the duration of the divestiture period should be minimised to the extent possible – primarily by appointing a DT immediately at the outset of the divestiture process, rather than only after the initial divestiture period has concluded. This will considerably shorten the period of uncertainty in which GBST must operate and [X]. Moreover, unlike in many fast-moving markets where there are many opportunities to quickly 'bounce back' from a period of weakness, the nature of competition in the Relevant Market (with long-term contracts and infrequent tenders) means [X].
- 6.3 [X]. Furthermore, shortening the divestiture period to deal with the specific circumstances of the GBST business and what is necessary in order to ensure the remedy is effective is consistent with the Remedies Guidance which notes that "*the length of this period will depend on the circumstances of the merger*".³²

[X]

- 6.4 GBST considers that [X].³³
- 6.5 First, the significance and closeness of competition between the parties [X].³⁴
- 6.6 Second, [X]:

(i) [X]

- 6.6.1 [X]³⁵

(ii) [X]

- 6.6.2 [X].³⁶ [X].³⁷

³⁰ Remedies Guidance, para. 5.3(b).

³¹ The Remedies Guidance notes that the CMA will seek remedies that have a high degree of certainty of achieving their intended effect, and that customers or suppliers of the merger parties should not bear significant risks that remedies will not have the requisite impact on the SLC or its adverse effects (Remedies Guidance, para. 3.5(d); NPR paras. 7 and 19).

³² Remedies Guidance, para. 5.41.

³³ [X].

³⁴ Final Report dated 28 August 2013 on the acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc, Appendix K, para. 39.

³⁵ [X]

³⁶ [X].

³⁷ [X].

(iii) [REDACTED]

6.6.3 [REDACTED].

(iv) [REDACTED]

6.6.4 [REDACTED].³⁸

(v) [REDACTED]

6.6.5 [REDACTED].³⁹

Risks that the divestiture package will deteriorate before completion of the divestiture

6.7 [REDACTED].

[REDACTED]

6.8 Generally, the merger parties are responsible for securing a prospective buyer and demonstrating that it satisfies the suitability criteria, except in circumstances where a divestiture trustee is in place.⁴⁰ [REDACTED].⁴¹ [REDACTED]; or (iii) [REDACTED]. For this reason, a DT should be appointed at the outset of the divestiture period in this case.⁴²

6.9 [REDACTED].⁴³

Appointment of a DT

6.10 As set out in paragraph 29 of the NPR, the CMA has the power to direct the appointment of an independent DT to dispose of the divestiture package if: (i) FNZ fails to procure divestiture to a suitable purchaser within the initial divestiture period; or (ii) the CMA has reason to expect that the Parties will not procure divestiture to a suitable purchaser within the initial divestiture period. However, the CMA may also require “*in unusual circumstances*” that a DT is appointed at the outset of the divestiture process.⁴⁴

6.11 GBST considers that, in light of the particular and “unusual” circumstances of this case, it would be both appropriate and necessary for the CMA to appoint a DT at the outset of the divestiture process. If a DT is not appointed at that initial stage, there would be a material risk that the GBST business in the UK [REDACTED].

6.12 The CC previously appointed a DT at the outset of the divestiture process in two cases: (i) *Tesco plc / Co-operative Group Ltd store at Uxbridge Road, Slough*,⁴⁵ and (ii) *Ryanair / Aer Lingus*. In both cases, the CC noted the unusual circumstances but made its decision based, in particular, on the following factors:

6.12.1 [REDACTED])

³⁸ [REDACTED]

³⁹ [REDACTED])

⁴⁰ Remedies Guidance, para. 5.22

⁴¹ NPR para. 23(e)(i).

⁴² The Remedies Guidance is clear that the appointment of a DT is one way to overcome the divestiture risks caused by the merger parties incentives (other protective measures, such as a monitoring trustee would not be sufficient in this case) (para. 5.5).

⁴³ Ryanair / Aer Lingus Final Report, paras. 7.137 – 7.148

⁴⁴ Remedies Guidance, para. 5.44; NPR paras. 29 and 30.

⁴⁵ Final Report dated 28 November 2007 on the completed acquisition by Tesco plc of a former Co-operative Group Limited store on Uxbridge Road, Slough.

- 6.12.2 [X];
- 6.12.3 no particular knowledge or understanding of the divested business being necessary by the seller; and
- 6.12.4 the appointment of the DT having no disproportionately detrimental effects on the seller (relative to the risks of the remedy not being effective).
- 6.13 GBST considers that, having regard to each of these factors as well as the need for the CMA process to be resolved as swiftly as possible, it is critical that the CMA appoints a DT at the outset of the divestiture process.
- 6.14 As FNZ would need to hire a financial adviser/investment bank to run the process due to the lack of information it can access, appointing a DT would not involve significant additional costs for FNZ. Moreover, on balance, the appointment of a DT from the outset is necessary, reasonable and proportionate, considering the significant risk the remedy will not be effective otherwise.
- 6.15 As explained above, [X].
- 6.16 In addition to the factors cited in its decisions to appoint a DT, in both Ryanair/Aer Lingus and Tesco/Coop, the CC noted certain conduct by the acquirers towards the target businesses. [X].
- 6.17 In Ryanair / Aer Lingus:
- 6.17.1 Ryanair had sought to use its position as shareholder to continually challenge Aer Lingus' management and distract them from the effective running of the business. Ryanair's activities generated a significant constraint on Aer Lingus management's time.⁴⁶ [X],⁴⁷.
- 6.17.2 Ryanair was willing to use its position as a shareholder to make public comments denigrating Aer Lingus, even though this would damage Aer Lingus' competitive position (e.g. by appearing unattractive to investors or potential partners) and, therefore, the value of Ryanair's stake. For example, Ryanair told the CC that Aer Lingus had no future as an independent airline because of its small scale, its peripheral location and its repeated failure to expand outside of Ireland,⁴⁸ and that Aer Lingus was an inherently unattractive partner.⁴⁹ [X].
- 6.18 In *Tesco / Coop*, Tesco's concerns about the financial impact of a competitor influenced Tesco's decisions as to how much to bid for, and ultimately its acquisition of, the Coop store.⁵⁰ [X]. Similar to *Tesco / Coop*, [X].

The need for a swift resolution to the CMA process

- 6.19 [X]. It is therefore essential that a DT is in place immediately from the outset of the divestiture process in order that the divestiture process is completed as swiftly as possible.

Additional procedural safeguards may be necessary

⁴⁶ Ryanair / Aer Lingus Final Report, paras. 4.39 – 4.41.

⁴⁷ [X]

⁴⁸ Ryanair / Aer Lingus Final Report, para. 7.43.

⁴⁹ Ibid, para. 7.82.

⁵⁰ Tesco / Coop Final Report, para. 3.11.

- 6.20** Additional procedural safeguards may be required to minimise the risks associated with this divestiture, and limiting FNZ's access to confidential information about GBST (particularly through the use of NDAs and the involvement of a Monitoring Trustee in the relationship between FNZ and any financial advisers it appoints).⁵¹

The appointment of a Monitoring Trustee should continue but is not sufficient for an effective remedy process

- 6.21** As set out above, [3<]. This is both due to the prolonged duration of the CMA process (even prior to the remedies process extending this further) and [3<]. It will be necessary that a Monitoring Trustee continues to be in place to ensure that the operations and assets of GBST are maintained and properly supported during the course of the process. However, the capabilities and position of the Monitoring Trustee would not be sufficient to oversee the complexities of the divestiture process more generally and this should be done by a DT that can manage the process as a whole.⁵²

7 A behavioural remedy is not appropriate or sufficient to remedy the SLC

- 7.1** GBST considers that a behavioural remedy is not appropriate to remedy the SLC on any of the three grounds noted in the Remedies Guidance because:

7.1.1 *Structural remedies are feasible.* As discussed above, a structural remedy in the form of a full divestiture is possible and will address the concerns raised by the CMA in the Provisional Findings.

7.1.2 *The SLC is not expected to have a short duration.* The CMA expects the Transaction to result in a SLC as a result of horizontal unilateral effects in the Relevant Market.⁵³ There is no indication in the Provisional Findings that the SLC identified would be of short duration. Rather, the CMA provisionally concluded that barriers to entry are high,⁵⁴ that entry and expansion would not be timely, likely and sufficient to outweigh the SLC,⁵⁵ that contracts are for a long duration and that switching costs are significant, that future product development would be subject to reduced incentives to innovate by the Transaction,⁵⁶ and no factors were foreseen by the CMA in the Provisional Findings as indicating that the SLC would be of short duration.

7.1.3 *A structural measure would not remove substantial RCBs.* The CMA has not identified any substantial RCBs which would arise from the Transaction and has noted that the two benefits identified by FNZ did not amount to potential rivalry-enhancing efficiencies and that any benefits would not be passed on to consumers.⁵⁷ There are therefore no RCBs arising from the Transaction, and so no RCBs that could be removed by a structural measure, such as full divestiture.

- 7.2** In addition to the above factors, any behaviour remedy is unlikely to be effective in reducing the SLC identified by the CMA in the Provisional Findings because:

⁵¹ NPR para. 27.

⁵² NPR para. 28.

⁵³ Provisional Findings, para. 68.

⁵⁴ Provisional Findings, chapter 8.

⁵⁵ Provisional Findings para. 8.52.

⁵⁶ Provisional Findings para. 7.202.

⁵⁷ Provisional Findings para. 8.78.

- 7.2.1 A behavioural remedy would likely create a significant costly distortion in market outcomes.**⁵⁸ One risk of behavioural remedies is that they can create market distortions that reduce the effectiveness of the remedy measures and/or increase their effective costs.⁵⁹ In the present case, [X].
- 7.2.2 A behavioural remedy would not be practical.** A remedy should be capable of effective implementation, monitoring and enforcement.⁶⁰ Whilst GBST and FNZ do, to some extent, operate in a regulated environment, those regulators are not well positioned to monitor compliance by FNZ with any behavioural requirements, limiting the practicality of enforcing them.⁶¹

8 Cost of remedies and proportionality

- 8.1** A full divestiture of GBST is the minimum required to remedy the SLC provisionally identified by the CMA – it would therefore be the least costly and restrictive option available. Neither a partial divestiture nor a behavioural remedy would be sufficient or effective in remedying the SLC and the resulting adverse effects and costs would instead be borne by customers. [X] are included in order to make a divestiture package for the Global Wealth Management Business effective [X]. They are not, therefore, more proportionate remedies.
- 8.2** To the extent that costs are incurred by FNZ in carrying out a full divestiture rather than a partial divestiture, the Remedies Guidance is clear that *“the CMA will not normally take account of costs or losses that will be incurred by the merger parties as a result of a divestiture remedy, as it is open to the merger parties to make merger proposals conditional on the approval of the relevant competition authorities”*.⁶²
- 8.3** Moreover, in this case, it was open to FNZ to make its merger conditional on approval by the relevant competition authorities. However, FNZ took a commercial risk, and the cost of that should not be borne by third parties. The CMA Guidance is clear that *“as the merger parties have the choice of whether or not to proceed with the merger, the CMA will generally attribute less significance to the costs of a remedy that will be incurred by the merger parties than the costs that will be imposed by a remedy on third parties, the CMA and other monitoring agencies”*.⁶³

⁵⁸ Remedies Guidance, para. 3.46; NPR para. 9

⁵⁹ Remedies Guidance, para. 7.4(c).

⁶⁰ Remedies Guidance, para. 3.5(c).

⁶¹ Remedies Guidance, para. 3.48.

⁶² Remedies Guidance, paras. 3.9; NPR para. 31.

⁶³ Remedies Guidance, para. 3.8.