SLAUGHTER AND MAY

FNZ RESPONSE TO PROVISIONAL FINDINGS ('PFs') 25 AUGUST 2020

Case No. ME/6866/19

COMPLETED ACQUISITION OF GBST HOLDINGS LIMITED ("GBST") BY FNZ (AUSTRALIA) BIDCO PTY LTD ("FNZ")

SLAUGHTER AND MAY

[×]

25 August 2020

900746393

Table of Contents

| 1. | Introduction and executive summary | 2 |
|----|---|-----------|
| 2. | Preliminary issues | 5 |
| 3. | The CMA's approach to market definition remains vague, artificial and overly narrow | 6 |
| 4. | Even within a narrow 'Retail' market, FNZ and GBST are not close competitors and there many other strong, credible competitors | are 13 |
| 5. | To the extent the Transaction results in any lessening of competition (which FNZ refutes), loss would be much more limited than the PFs suggest | the 18 |

List of Annexes

| [%] | [×] |
|-----|-----|
| [%] | [×] |
| [%] | [%] |

1. Executive summary

- 1.1 FNZ strongly disagrees with the CMA's provisional finding that the completed acquisition of GBST by FNZ (the '**Transaction**') gives rise to a substantial lessening of competition ('**SLC**'). This finding is not supported by the evidence.
 - (i) The CMA's proposed Retail product market is artificially narrow.
 - (a) The CMA has not followed an orthodox market definition analysis. It has not correctly analysed or tested demand- or supply-side constraints: its analysis focuses on downstream customer (platform) differentiation and supplier 'focus' rather than customer requirements and supplier capabilities/ responses.
 - (b) The data makes clear that a wider market definition is appropriate.
 - (c) The CMA has not provided sufficient detail of third-party questionnaires or responses, upon which it places significant reliance. There are grave concerns about this exercise. In particular, the use of the confusing term 'Retail Platform Solutions' gives rise to real doubt as to the reliability of the material and the accuracy of the CMA's conclusions. In addition, the lack of disclosure means that FNZ is unable to comment on the extent to which respondents may: (i) lack recent market experience, having not recently tendered; and/or (ii) have other relevant motivations for any response.¹
 - (d) Those concerns, and the flaws in the CMA's approach, are strongly reinforced by the clear inconsistencies that arise from the CMA's approach to classifications.
 - (ii) Even within the CMA's market definition, focussing on the so-called Retail segment, FNZ/JHC and GBST are not close competitors. [≫].² [≫]. Even when software-only solutions are considered, GBST and JHC are plainly not close competitors GBST is focused on pensions, while JHC does not have this functionality and several important software-only providers exist. Moreover, having adopted a (wrong) narrow market definition in this case, there is inadequate recognition of out-of-market constraints. In fact, the data shows that there are a number of credible, actual and potential, alternative suppliers. [≫].
 - (iii) To the extent the Transaction results in any lessening of competition (which FNZ refutes), the loss would be much smaller than the PFs suggest. In particular, the CMA has not shown that GBST exerts any meaningful constraint on FNZ. [≫].³ Any lost competition would therefore be limited to the (small) constraint exercised

_

¹ It is also not apparent from the disclosed materials that the questions attempted to adequately test orthodox market definition assessment criteria.

² PFs, para 22.

³ See Annex 1.

by FNZ on GBST – i.e. the impact on a handful of GBST customers that could arise if these customers wanted to switch to a PaaS model. However, such customers in fact stand to benefit from the Transaction, including as a result of FNZ's substantial planned R&D investments.

- 1.2 [≫]. The resultant doubts over the accuracy of the points made is a matter on which FNZ and its representatives have been unable to comment adequately due to the lack of disclosure. Where third parties have vested interests and/or views differ, the best way to decide between them is by looking at the hard data see Annexes 1 and 2 in particular.
- 1.3 For convenience, in this response FNZ uses terms defined by the CMA in the PFs. This should not be taken as endorsement of the definitions and underlying concepts. In fact, as noted above FNZ strongly disagrees with the CMA's definitions of Retail and Non-Retail Platform Solutions.

2. Preliminary issues

- 2.1 In this response, FNZ is not proposing to restate its position on every issue covered by the PFs, to resubmit evidence that has been submitted (and in many cases overlooked) before, or to address each flaw in the PFs. Instead FNZ urges the CMA to review the detailed submissions and evidence it has provided to the CMA throughout the Phase 1 and Phase 2 investigations, in particular material submitted in response to the Annotated Issues Statement ('AIS'), Working Papers ('WPs'), the Issues Statement, and in its Phase 2 Initial Submission. The sections that follow focus on explaining why the CMA's core conclusions on market definition, competitive constraints and the degree of any lessening of competition are not supported by the evidence. However, FNZ does wish to draw the CMA's attention to the following over-arching points:
 - (i) First, the CMA has changed its own position on a number of key points such as the asymmetric constraint between FNZ and GBST, the position of SS&C and SEI, as well as the degree of competition between GBST and JHC - between the AIS/Working Papers and PFs. While the CMA is of course free to change its views during the course of its investigation, this fundamental shift appears to have taken place without any additional evidence or reasonable justification.
 - (ii) Second, FNZ is (and has been) limited in its ability to meaningfully respond to certain issues raised by the CMA, as it has lacked access to key information. For example, FNZ has not had access to the CMA's third-party questionnaires or responses (despite numerous requests⁵). As a result, FNZ has been unable to fully assess how the CMA has interpreted and summarised evidence received from third parties, which has been given material weight in the CMA's assessment of both market definition and closeness of competition. FNZ was only granted

Response to Annotated Issues Statement and individual Working Papers submitted on 6 July 2020; Response to Issues Statement dated 7 May 2020; Phase 2 Initial Submission submitted dated 29 April 2020. This is not an exhaustive list.

⁵ See email from Slaughter and May to CMA dated 12:28 25/06/2020; letter from Slaughter and May to CMA dated 30/06/2020; email from Slaughter and May to CMA dated 12:16 14/07/2020 and email from Slaughter and May to CMA dated 16:47 19/08/2020.

access to the CMA's platform classifications (which underpin the CMA's analysis of the share of supply and tender data) at a late stage, and is therefore only now in a position to point out inherent contradictions.

- (iii) Third, the CMA has placed significant weight on submissions $[\times]$.
 - (a) [≫] third parties are [≫] interested in acquiring (part of) the GBST business as a remedy taker. 6
 - (b) A significant proportion of customers have not run a tender since at least the start of 2016 and admit to not having up-to-date knowledge of the market. FNZ is not able to verify which statements in the CMA's PFs report should be accompanied by this important caveat.⁷
- (iv) Finally, the counterfactual selected by the CMA (pre-merger conditions of competition) on which the SLC finding is predicated does not follow from the CMA's own findings of fact. The CMA recognises that, absent the Transaction, 'SS&C would have sought to conclude the acquisition of GBST, that 'SS&C was well advanced in the purchase process' and that 'ASX announcements noted that the GBST board was going to recommend SS&C proposal unanimously to its shareholders, in absence of a superior offer.' Any 'residual uncertainty' around the completion of the acquisition should not be sufficient to displace the most likely counterfactual. Moreover, the CMA's conclusion that GBST would (or could) have remained viable as an independent competitor [★]. The selection of the wrong counterfactual means that the basis for any finding of an SLC is entirely invalid. In any case, as demonstrated below, even on the basis of premerger conditions, any theoretical loss of competition is very limited.)

3. The CMA's approach to market definition remains vague, artificial and overly narrow

3.1 The approach to market definition is central to the CMA's analysis in this case. Taking the wrong approach – as FNZ submits has happened here – fundamentally undermines the value that can be attributed to the CMA's core competitive assessment, including the

⁶ Indeed, since Phase 1, FNZ has received enquiries from a number of institutions that expressed interest in an acquisition of (part of) GBST, including from [≫]. [≫].

⁷ The CMA found that 40% of customers confirmed that they had not run a tender since the start of 2016 and 23% confirmed that they did not have detailed, up-to-date information regarding Platform Solutions providers. See FNZ's response to the Competitive Assessment – Third Party Evidence WP, page 3.

⁸ PFs, para 5.31.

⁹ PFs, para 32.

¹⁰ GBST had also engaged numerous advisors – including Allens, Norton Rose, Deutsche Bank and Marlin & Associates (see for example: https://www.afr.com/technology/gbst-hires-fresh-set-of-lawyers-mid-bidding-war-20190702-p523iq). GBST's intentions to sell were not in doubt.

¹¹ See also FNZ's Phase 1 submissions regarding the appropriate counterfactual including the Merger Notice and FNZ's response to the Phase 1 Issues Letter.

analysis of the tender data, shares of supply and closeness of competition (all of which are predicated on the existence of a separate 'Retail' market).

The CMA's approach to market definition is imprecise and inconsistent

- 3.2 The CMA has provisionally found that 'the relevant product market is the supply of Retail Platform Solutions,' 12 which supply '[Investment Platforms] that typically serve high volumes of customers and are primarily focused in the mass affluent part of the market.' 13 The CMA contrasts such 'Retail' Platforms with stockbroker platforms, private client investment manager ('PCIM') platforms, and platforms operated by private banks, which 'tend to deal with more bespoke wealth planning' 14, and which the CMA defines collectively as 'Non-Retail Platforms'. 15
- 3.3 As previously emphasised by FNZ, ¹⁶ the CMA has not clearly explained or delineated the concepts on which it has based this distinction. Indeed, the CMA itself appears to accept that the perimeters of this putative market are unclear, and that the term 'Retail' is not used consistently in the industry: 'These Investment Platform types are not formally defined and there is some variation in the terminology used by market participants to describe them. In addition, we have not found there to be a clear line of delineation between Retail and Non-Retail Platforms and we therefore consider that there is a degree of overlap between the two, where some Investment Platforms do not neatly fit into only one category.'¹⁷
- 3.4 As FNZ has explained in detail, ¹⁸ the distinctions based on wealth management platform ('WMP') characteristics, such as a focus on particular end-customer groups (e.g. 'mass affluent consumers'), or historical differences between WMPs (e.g. financial planning firms; PCIMs; stockbrokers) which the CMA appears to have relied on to varying degrees throughout its investigation are not supported by the data and are not meaningful or clear-cut.
- 3.5 The CMA's list of 'Retail' and 'Non-Retail' Platforms (which FNZ has only recently received, despite requesting access since Phase 1), clearly reveals the inconsistent and

13 PFs, para 23.

¹² PFs, para 26.

¹⁴ PFs, para 23.

¹⁵ PFs, para 6.31.

¹⁶ See, for example, para 2.1 et seq. of FNZ's response to the AIS and WPs.

¹⁷ PFs, para 6.32. Indeed, the CMA uses the word 'retail' in describing 'stockbroking' platforms and notes that these allow financial instruments to be traded 'on behalf of consumers (through advisors) or allow the consumer the ability to 'Dolt-Yourself', making it even more unclear how the CMA considers that these platforms materially differ from 'Retail' Platforms – see PFs, para 6.33(c).

¹⁸ See sections 3 and 4 of FNZ's Phase 2 Initial Submission and section 2 and Annex 1 of FNZ's response to the AIS and WPs.

artificial nature of the CMA's approach. It simply does not stand up to scrutiny. By way of non-exhaustive example (further examples are set out in Annex 1):19

- (i) Platforms categorised by the CMA as 'Retail' have important 'Non-Retail' features/clients, served by a single platform proposition clearly showing that the CMA's classification is arbitrary. For example:
 - (a) Platforms with strong stockbroking heritage and offerings (such as Hargreaves Lansdown and the two AJ Bell platforms) have been classified as 'Retail' this is inconsistent with the CMA's view that 'stockbroking' platforms are a separate category.²⁰
 - (b) Platforms categorised as 'Retail' provide discretionary investment management services. As recognised by the CMA, this is conceptually equivalent to PCIM²¹ which the CMA classes as 'Non-Retail'. Two of the largest discretionary investment services providers in the UK are Standard Life Wrap (designated 'Retail') and Quilter (designated 'Retail'). Standard Life Wrap provides platform functionality for funds managed on a discretionary basis by Brewin Dolphin, Charles Stanley, Cazenove Capital, Canaccord, Tilney, LGT Vestra and others (specifically categorised by the CMA as 'Non-Retail'). ²² Standard Life also provides platform services to numerous discretionary investment management businesses [%]. This is inconsistent with the CMA's view that the Platform Solution requirements of Non-Retail firms are somehow different from those of Retail firms.
- (ii) The CMA has 'not identified any UK Retail Platform clients served by Pershing' despite Pershing itself having told the CMA that it is an existing provider of Retail Platform Solutions. Pershing's own submissions are consistent with FNZ's view that customers like Raymond James (c.£11bn AUA), Seven IM (c.£8bn AUA) and Sanlam (c.£7bn AUA) should be considered 'Retail' even on the CMA's approach. See Annex 1 for further details on the comprehensive 'Retail' functionalities offered by Raymond James, Seven IM and Sanlam.

¹⁹ See also Annex 2 for further details on the similarity of solution requirements across 'Retail' and 'Non-Retail' Platforms.

²⁰ Indeed Hargreaves Lansdown considers itself 'the UK's No1 broker' and states that 'more shares [are] dealt through HL for investors than any other UK broker'. See https://www.hl.co.uk/shares/share-dealing. See also Annex 2 which demonstrates that 'Retail' Platforms offer a wide range of assets including stocks and shares.

²¹ PFs, para 6.33(b) and footnote 145.

²² https://www.adviserzone.com/adviser/public/adviserzone/wrap/wrapinvestments/dims-on-wrap/managedportfolios.

²³ PFs, para 8.26.

²⁴ Although redacted, para 7.88 of the PFs seems to suggest that even GBST agrees that Pershing has Retail capabilities.

- (iii) Several platforms that compete head-to-head (i.e. targeting precisely the same end consumers, and as a consequence having very similar requirements of their Platform Solutions providers) have been classified differently. For example:
 - (a) Interactive Investor ('Non-Retail') is a close competitor of Hargreaves Lansdown ('Retail'), providing a very similar range of tax wrappers (including SIPPs) and asset product classes.²⁵ AJ Bell YouInvest also considers Interactive Investor to be a competitor.²⁶ [※].²⁷
 - (b) Seven IM ('Non-Retail') is a direct competitor of Standard Life Wrap ('Retail') and Novia ('Retail') – as evidenced by direct comparisons on consumer websites. ²⁸ All three have IFA and wealth manager customers, provide discretionary investment functionality, and provide pension and retirement income solutions.
 - (c) St James Place ('Retail') is a direct competitor of the Lloyds Schroders JV (Schroders Personal Wealth) ('Non-Retail'), Tilney (Smith & Williamson) ('Non-Retail') and Rathbones ('Non-Retail'). There is no meaningful basis on which to distinguish them. Indeed, FT Adviser even recently covered the 'price war' taking place between St James Place and Lloyds Schroders JV (Schroders Personal Wealth).²⁹
- These are just some of the more obvious examples of material errors. We refer the CMA to FNZ's detailed, comprehensive data- and fact- based analysis of products, services and client propositions supplied in both Phase 1 and Phase 2 (see further in paragraphs below and in Annex 2).
 - The hard data supports FNZ's view that the relevant product market is the supply of all Platform Solutions for WMPs, and the alternative ad-hoc classification used by the CMA is materially in error.
- 3.7 FNZ has provided extensive evidence (including objective, quantitative data³⁰) to support its view that there has been significant convergence and that the relevant product market is the supply of all platform solutions for WMPs with the possible exception of a handful of private banks catering to ultra-high-net-worth individuals. These detailed submissions,

²⁵ See, for example, Interactive Investor's webpage, comparing its offering to Hargreaves Lansdown: https://www.ii.co.uk/service-plans/investor/comparison. See also: https://www.ii.co.uk/ii-accounts, https://www.ii.co.uk/investing-with-ii and https://www.hl.co.uk/investment-services.

²⁶ https://www.youinvest.co.uk/sites/default/files/20181127_AJB_Prospectus.pdf.

²⁷ PFs, Appendix F.

²⁸ See, for example, https://www.defaqto.com/advisers/ratings/star-ratings/investments/platform/.

²⁹ https://www.ftadviser.com/investments/2019/09/18/advisers-brand-sip-and-schroders-price-war-irrelevant/

³⁰ See, in particular, section 2 and Annex 1 to FNZ's response to the AIS and WPs. An updated version of that Annex, aligned with the CMA's (recently disclosed) classifications is provided as Annex 2. See also section 3 of FNZ's Initial Phase 2 Submission.

which exhaustively consider both demand- and supply-side substitution, have been ignored, or given insufficient weight, in the PFs.

Demand-side substitution

- 3.8 On the demand side, as the CMA recognises, the key consideration is whether a solution meets customer requirements ³¹ (as opposed to minor variations in platform characteristics).
- 3.9 The CMA claims that 'customers generally do not consider suppliers of Non-Retail-focused Solutions to be strong alternatives to those which focus on Retail Platform Solutions.'32 However, the data gathered by FNZ clearly shows that there is no consistent basis on which to distinguish the products and services offered by Retail and Non-Retail Platforms (and, as a consequence, their solution requirements).
- 3.10 The data submitted by FNZ shows that Retail and Non-Retail Platforms (including stockbrokers and PCIMs) both: (i) serve mass affluent customers as a core part of their customer base; (ii) provide the same or similar mainstream assets; (iii) cater for high-volume, commoditised demand with scalable solutions (via model portfolio services ('MPS')); (iv) offer a wide range of tax wrappers (including pension wrappers);³³ and (v) cannot be distinguished according to whether they offer 'open' or 'closed' architecture.³⁴ As a consequence, the solution requirements of Retail and Non-Retail Platforms are the same or very similar.³⁵ This remains true if the data previously submitted is updated to reflect the CMA's (recently disclosed) classifications see Annex 2.
- 3.11 The CMA claims that there is a 'cluster' of solutions providers for Retail Platforms that is distinct from, and rarely overlaps with, solution providers for Non-Retail Platforms.³⁶ [※]. [※].
- 3.12 $[\times]$. See Annex 1 for further details.
- 3.13 In fact, the main demand-side consideration facing a WMP is whether to choose a PaaS or software-only solution. As explained in detail in prior submissions, these delivery

³¹ PFs, para 6.35.

³² PFs, para 6.45.

³³ Notably, on-platform pensions (characterised as an important distinguishing feature of Retail Platforms by the CMA in the PFs – see para 6.33) are not in fact a feature of all Retail Platforms, and are offered by a number of Non-Retail Platforms. See further, paras 4.14 to 4.28 of FNZ's Initial Phase 2 Submission which explains the ease with which platforms can integrate off-platform pension wrappers, as well as third-party supplied on-platform pension wrappers, with an IAS solution.

³⁴ FNZ response to the AIS and WPs, para 2.17.

³⁵ See also paras 2.8- 2.11 of FNZ's response to the AIS and WPs for a discussion explaining that software solution requirements do not differ materially across Retail and Non-Retail Platforms.

³⁶ PFs, para 6.44.

- models have very different characteristics and, as a result, cater to WMPs with distinct preferences. 37 [>]. See Annex 1 for further details.
- 3.14 Differentiation between delivery models far exceeds any (modest) differences between WMP requirements cited by the CMA in justification of its Retail/Non-Retail distinction. It is fundamentally inconsistent to define separate product markets on the basis of the latter, whilst not taking account of the former. [X]. See Annex 3.

Supply-side substitution

- 3.15 The CMA correctly recognises that supply-side responses are an important consideration in cases (such as this) which involve bidding and tendering, and customers with bespoke requirements.³⁸
- 3.16 Supply-side substitution by Non-Retail providers is eminently feasible given the similarity of 'Retail' and 'Non-Retail' customer requirements (see paras 3.8 3.14 above and Annex 2). As a consequence, it is highly likely that Non-Retail suppliers would enter or expand in the Retail segment if prices rose by 5-10%, drawing on their existing capabilities. This is the relevant test not whether providers currently focus on Retail/Non-Retail tenders. While the CMA claims to have considered 'whether there are grounds for aggregating narrower markets into a single broader market based on the likely response of suppliers to changes in prices', this is not substantiated in its analysis.³⁹
- 3.17 A number of major providers that have not been (adequately) recognised by the CMA are particularly well placed to enter and/or expand in the Retail segment if prices were to rise. For example:
 - (i) [≫] See Annex 1 for further details.
 - (ii) Providers such as Avaloq, Pershing and Temenos operate at scale and already have a proven track record of supplying competitive Platform Solutions both in the UK and internationally.⁴⁰
 - (iii) Pershing itself considers that it is already able to serve Retail Platforms.⁴¹ This is consistent with FNZ's views that Pershing customers such as Raymond James, Seven IM and Sanlam should be characterised as 'Retail' even on the CMA's narrow approach.⁴²

³⁷ See also, paragraphs 2.6 – 2.7 of FNZ's response to the AIS and WPs and paras 2.4 – 2.7 of FNZ's response to the Phase 2 Issues Statement.

³⁸ PFs, para 6.7.

³⁹ PFs, para 6.7.

⁴⁰ For further detail, see FNZ's response to the AIS and WPs, paras 2.19 – 2.23; 3.25 et seq.

⁴¹ PFs, para 6.55(a).

⁴² See also Table 3.1 of the FNZ's response to the AIS and WPs.

- (iv) The third-party evidence indicates that a wide range of suppliers are considered alternatives to FNZ and GBST.⁴³
- 3.18 The CMA claims that Non-Retail focused suppliers lack the relevant brand, reputation and track record to win tenders for Retail Platforms⁴⁴ and usually do not compete with Retail focused suppliers.⁴⁵ This is a backward-looking approach; the CMA has not assessed the following crucial issues:
 - (i) Whether a 5-10% increase in prices by Retail suppliers would induce Non-Retail suppliers to make the necessary investments (to the extent any were needed) to compete for Retail tenders (and customers to invite Non-Retail suppliers to participate in Retail tenders, and ultimately switch to them);⁴⁶ and
 - (ii) Whether a customer that wanted a PaaS solution would be more willing to consider a PaaS supplier with limited Retail segment experience than a software-only supplier with greater Retail experience.
- 3.19 Further, market dynamics support increased supply-side constraints going forward. Convergence of Retail and Non-Retail offers almost universally acknowledged by third parties ⁴⁷ and evidenced in Annex 2 implies that supply-side constraints can only increase in the future. New opportunities will also continue to emerge due to the growing trend toward outsourcing, as also recognised by the CMA. ⁴⁸
- 3.20 Even if a narrow Retail market definition were accepted (which it is not), for the reasons set out in the paragraphs 3.2 to 3.6 above, the implication is that barriers to entry and expansion are low and therefore the 'out-of-market' constraint exerted by Non-Retail providers would therefore be almost as powerful as if they were 'in' the market. The CMA has not adequately tested how 'Non-Retail' Platform suppliers (or customers) would react in the event that prices for Retail Platform Solutions increased and/or quality was degraded post-Transaction.

<u>The CMA's reliance on third-party evidence is misplaced – the focus should be on the hard data</u>

⁴³ For example, third parties indicated that there were 17 alternative suppliers to the Parties, with six being listed with a high degree of frequency (Avaloq, Bravura, Pershing, SEI, SS&C, Temenos) – PFs, Appendix D, Figures 1 and 2.

⁴⁴ PFs, para 6.37.

⁴⁵ PFs, para 6.69.

⁴⁶ Indeed, track record and reputation serving Non-Retail customers (with the same or very similar Platform Solution requirements) in the UK as well as experience servicing Retail and Non-Retail customers internationally will be relevant to this assessment.

⁴⁷ As noted in para 6.50 of the PFs, 'of the 25 third parties that gave a view, almost all believed that there had been some convergence.' See also section 3 of FNZ's Phase 2 Initial Submission for more details on convergence.

⁴⁸ PFs, para 6.62. FNZ notes that proprietary solutions account for more than 25% of AUA held on WMPs – see FNZ's response to the AIS and WPs, para 3.36(ii).

- 3.21 Whilst the CMA has failed to give sufficient weight to the hard data, it appears to have placed significant weight on the views of third parties.⁴⁹ [%]⁵⁰ this evidence is likely to be tainted by flaws in the design of the CMA's information-gathering processes:
 - (i) The CMA appears to have framed its third-party questionnaires (as it did in its Financial and Market Questionnaires issued to FNZ) by reference to 'Retail Platform Solutions.' FNZ has previously voiced its concerns to the CMA 52 that doing so would result in the predominant collection of evidence within an artificially narrow frame of reference and exclusion of important evidence across other segments which demonstrates that this is the case. While the CMA has stated that it 'did not place any restrictions on what customers could tell us so that we could take into account all constraints, including from alternatives that may sit outside our market definition,'53 this does not in practice mitigate the significant risk of inconsistencies in the respondents' answers, and the assumptions inherent in the framing of the questions, which are likely to materially affect the reliability of the results.
 - (ii) As a result of the CMA's failure to use clear, consistent, accurate terminology in defining the putative Retail and Non-Retail segments (coupled with the varying uses of this terminology in the industry), third parties are likely to have responded to the same question on different bases, such that the evidence is likely to be internally inconsistent and insufficiently robust. The CMA has stated that 'we set out and defined any terms used in questions which might cause confusion or have different meanings to different respondents'. ⁵⁴ However, as explained above, it is difficult to reconcile the CMA's (changing) definition of 'Retail' with its classification of platforms, and any such vague definition is unlikely to have resolved this issue. ⁵⁵
- 4. Even within a narrow 'Retail' market, FNZ and GBST are not close competitors and there are many other strong, credible competitors

⁴⁹ The CMA also cites FNZ's internal documents in support of its approach to market definition – see, for example, PFs, paras 6.46 – 6.47 and 6.59. FNZ has explained that these documents, read in context, do not provide good evidence – particularly when set against the hard economic data referred to above – to support the CMA's assessment. See paragraphs 2.26 – 2.27 of FNZ's response to the AIS and WPs, and section 4 below.

⁵⁰ See para 2.3 et seq. of FNZ's response to the AIS and WPs; and the executive summary of its comments on the Competitive Assessment – Third Party Evidence WP.

⁵¹ See, for example, PFs, para 7.89 and footnote 347.

⁵² See also the Slaughter and May email addressed to the CMA, dated 13:31 23/04/2020; and FNZ's response to the Financial and Market Questionnaires.

⁵³ PFs, Appendix C, para 42.

⁵⁴ PFs, Appendix C, para 41.

⁵⁵ The CMA itself acknowledges, at paras 41 – 42 of Appendix C to the PFs: 'there can be challenges in communicating with third parties in this industry due to inconsistencies and differences in how participants use terminology...In particular, we recognize that all respondents may not consistently apply the distinction between Retail Platforms and Non-Retail Platforms in their answers.'

FNZ and GBST are not close competitors

4.1 Regardless of the approach to market definition adopted by the CMA, there is no basis for the CMA's provisional conclusion that FNZ and GBST 'compete closely with each other.' This is borne out clearly by the economic evidence, set out in detail in FNZ's previous Phase 2 submissions, and summarised briefly below. [➢] — see Annex 1.

The Parties' primary delivery models (PaaS and software only) do not compete closely:

- 4.3 [≫]: (i) the fundamentally different customer outsourcing models served by PaaS and software-only solutions, respectively; and (ii) the consequent difficulties and costs of comparing software-only and PaaS proposals. For example, in addition to functionality, a request for proposals ('RFP') for a PaaS model would focus on operational risk management, service standards, KPIs, regulatory compliance and governance. In contrast, an RFP for a software-only model would focus on functionality and technology. 63

The GBST/Equiniti partnership is $[\times]$ FNZ's integrated PaaS solution:

⁵⁶ PFs, para 7.84.

⁵⁷ See FNZ's response to the Phase 2 Issues Statement, paras 2.3 – 2.18. See also section 2 of FNZ's Phase 2 Initial Submission.

⁵⁸ PFs, para 6.22.

⁵⁹ PFs, para 22.

⁶⁰ See Annex 1 for further detail.

⁶¹ PFs, Appendix E, paras 26 – 28. The CMA also recognises at para 6.35 that 'In bidding markets, the products which customers select towards the final commercial negotiation stage also provides evidence on the products seen as closely competing'.

⁶² For further detail on the (absence of) closeness of competition between different delivery models, see paras 3.8 et seq. of FNZ's response to the AIS and WPs; and section 2 of FNZ's response to the Phase 2 Issues Statement.

⁶³ See also section 2 of FNZ's response to the Issues Statement.

4.4 FNZ has previously explained ⁶⁴ that GBST's partnership with Equiniti is [\times] FNZ's integrated PaaS model. The CMA itself notes that 'at the time of the Merger, [\times], '⁶⁵ [\times]. [\times] the inherent challenges associated with partnerships, and the lack of success of this model in the market – rather than the implication of the Transaction. ⁶⁶ Indeed, the CMA's own enquiries have shown that a large majority of third parties expressing a view (notably including Bravura, which itself was in a partnership with Genpact) did not indicate that a partnership represents a credible alternative to an integrated PaaS supplier. ⁶⁷ [\times].

Competition between GBST and JHC is limited

- Although JHC and GBST both supply software-only solutions, GBST provides a largely complementary offering to JHC Composer does not offer a number of key features provided by JHC.⁶⁸ Since 2016, JHC has recorded only one loss to GBST in its bidding data [\gg]. In the same period, JHC has recorded losses to numerous other software suppliers (that will continue to constrain the combined entity post transaction), including [\gg 1⁶⁹
- 4.6 Further observations based on the CMA's tender data are provided at Annex 1.

There are many other competitors in the market

- 4.7 As also set out in previous FNZ submissions, the available evidence clearly shows that the market for WMP solutions (as well as the narrower, Retail segment) is and will remain competitive post-Transaction.
- 4.8 The CMA's own third-party evidence indicates that FNZ and GBST compete against at least six other major suppliers (Bravura, Avaloq, SEI, Pershing, SS&C and Temenos),⁷⁰ as well as a long tail of smaller challengers (whose presence is understated because the CMA did not prompt respondents to think of them).⁷¹ This is consistent with the broad

⁶⁴ For further detail, see FNZ's response to the Phase 2 Issues Statement, paras 2.23 – 2.25 and FNZ's response to the Market Definition WP, pages 6, 8 and 9.

⁶⁵ PFs, para 2.12.

⁶⁶ [≫]

⁶⁷ PFs, paras 7.51 – 7.52; and Competitive Assessment – Third Party Evidence WP, para 42 and footnote 57. See FNZ's response to the Competitive Assessment – Third Party Evidence WP, pages 22 – 23, which explain that the CMA's interpretation that more third parties than not considered the GBST and Equiniti partnership be a [≫] to FNZ [≫] given that a majority of customers and consultants who responded did not provide a view and less than 25% of customers who responded indicated that the GBST and Equiniti partnership would be [≫] integrated PaaS suppliers.

⁶⁸ See FNZ's response to the Phase 2 Issues Statement, paras 2.26 – 2.30. See also FNZ's Phase 2 Initial Submission, para. 2.7.

⁶⁹ For further detail, see FNZ's response to the Phase 2 Issues Statement, paras 2.26 – 2.30.

⁷⁰ PFs, paras 7.46 – 7.48.

⁷¹ PFs, Appendix D, Figures 1 and 2.

range of competitor losses and tender overlaps recorded in the FNZ/JHC tender data . $[\times]^{72}$. See also Annex 1.

- 4.9 SS&C and SEI were recognised in the CMA's WPs as material constraints to FNZ, ⁷³ which is supported by their own statements to the CMA⁷⁴ [※]. Their apparent relegation in the PFs to 'limited' constraints is not adequately explained. SS&C serves the single largest Retail Platform in the UK (St James's Place Wealth Management), and the successful migration of this customer on to SS&C's Bluedoor platform is likely to have addressed any residual concerns from third parties regarding the migration of customers. ⁷⁵ While SEI may currently have a more limited UK presence amongst Retail customers compared to Non-Retail customers, it has a very strong international presence and [※].
- 4.10 As explained in section 3 above, Retail and Non-Retail Platforms have very similar solutions requirements. To the extent Non-Retail Platforms have broader requirements (e.g. in terms of supported asset classes), the ability to serve such platforms encompasses the ability to serve a Retail Platform. On a narrow market for the supply of Platform Solutions to Retail Platforms which the CMA acknowledges has no clear delimitations the 'out-of-market constraint' exerted by Non-Retail providers would be almost as powerful as if they were 'in' the market. This out-of-market constraint does not have sufficient prominence in the CMA's analysis. Moreover, the out-of-market constraint needed to offset the potential for post-merger harm depends on the extent to which the merging parties compete in the first place. This is limited see section 5 below.

The CMA's own evidence does not support its conclusions

4.11 The CMA has relied on three primary sources of evidence in support of its provisional conclusions that 'FNZ and GBST compete closely against each other in the supply of Retail Platform Solutions in the UK'⁷⁷ and that 'Bravura is the only close competitor to the Parties'.⁷⁸ However, for the reasons set out below, this evidence does not actually support the CMA's conclusions – it certainly does not 'consistently [point] in the same direction – that FNZ and GBST are two of the leading suppliers within this market and compete closely against each other.'⁷⁹

Tender data

⁷² See section 2 of FNZ's response to the Phase 2 Issues Statement.

⁷³ See the CMA's annotation of para 41 of the AIS; and the Competitive Assessment – Third Party Evidence WP.

⁷⁴ See section 2 above, and PFs, para 7.91.

⁷⁵ FNZ's Phase 2 Initial Submission, para 5.7(ii).

⁷⁶ See also Annex 2.

⁷⁷ PFs, para 7.84.

⁷⁸ PFs, para 7.129.

⁷⁹ CMA press release: https://www.gov.uk/government/news/competition-concerns-in-retail-investment-software-merger.

- 4.12 As explained in further detail in Annex 1:
 - (i) As the CMA recognises, most customers have made a decision on delivery model pre-tender ([≫]). This is fundamentally inconsistent with a finding that GBST and Bravura exert the strongest constraint on FNZ and that PaaS suppliers (like SS&C, Pershing, etc.) are less important.
 - (ii) [**※**]
 - (iii) [**≫**].

Third-party evidence

- 4.13 Leaving aside [%] the inherent flaws in the CMA's survey design mentioned above (see paragraph 3.21), the third-party evidence presented by the CMA ([%]), to the extent disclosed in the WPs and PFs, broadly corroborates FNZ's submissions. For example:
 - (i) The CMA notes that all third parties that gave a view indicated that 'the delivery model offered by a supplier was important,' 80 and that 'third parties often indicated that Bravura is a closer competitor to GBST than FNZ for this reason'. 81 Further, the customer feedback cited by the CMA indicates that a large majority of customers expressing a view indicated a preference for either conducting asset servicing in-house (to preserve the personal nature of the offering or due to having sufficient scale) or outsourcing to an external provider. In other words, they have a clear preference either for a software-only or for a combined software and servicing solution, but not both, illustrating the absence of effective competition between delivery models. 82
 - (ii) The CMA's market testing indicates that GBST and FNZ are not closer competitors to each other than each of the six other large suppliers. ⁸³ For example, Bravura, Pershing and Avaloq were actually mentioned by third parties as GBST's competitors more often (ten mentions each) than FNZ. And SEI, SS&C and Temenos were mentioned as GBST competitors as often as FNZ (nine times each). This is particularly important, as it clearly undermines the CMA's view that: (i) there is a distinct Retail Platform Solutions product market (excluding)

⁸⁰ PFs, para 6.19. It is also notable that Figure 1 (in Section 7) of the PFs identifies no material difference in 'closeness' to FNZ between GBST, Bravura, SEI, SS&C and Pershing.

⁸¹ Competitive Assessment – Third Party Evidence WP, para 33.

⁸² PFs, paras 6.63 - 6.64.

⁸³ See PFs, para 7.45 and Appendix D, Figures 1 and 2. As explained by FNZ in para 26 of its response to the Competitive Assessment – Third Party Evidence WP, although the CMA places great weight on the 'closeness scores' set out in Figure 1 of the PFs, the instructive value of these results is in fact highly questionable, given the difficulty in interpreting (and determining the differences between) the various options available to respondents.

Avaloq, Pershing and Temenos); and (ii) FNZ and Bravura are the only other material constraints in this market.⁸⁴

4.14 This also raises a broader issue regarding the CMA's interpretation of survey results (which FNZ cannot verify without access to the underlying information).

FNZ internal documents

- 4.15 As explained in FNZ's previous submissions, ⁸⁵ [≫], and the documents cited by the CMA in support of its PFs represent a very small subset of the more than 16,000 documents that were submitted to the CMA. As such, they also make up a very small percentage of the totality of the evidence the CMA must consider, and cannot be allocated significant (and certainly not determinative) weight in the CMA's conclusions especially in light of the economic evidence, cited above.
- 4.16 Further, some of the documents cited by the CMA were [≫]. Although the CMA states in its WPs that it 'took FNZ's submissions in relation to the third party reports into consideration', this is not reflected in the CMA's assessment which still treats these documents as [≫].[≫]. It is not clear why FNZ would have [≫]. It is unreasonable for the CMA to have set such a high bar for this evidence to be given appropriate weight.⁸⁶
- 4.17 The CMA also notes that 'many FNZ internal documents consider the wider Platform Solutions sector in which FNZ operates, not just the Retail Platform Solutions in the UK market', and that 'the Parties do not routinely segment customers in their internal documents' but this is not reflected in its finding that the documents 'characterise FNZ and GBST as two of a limited number of significant suppliers of Retail Platform Solutions in the UK'.88
- 4.18 Finally, even in the subset of FNZ's own internal documents cited by the CMA, there are many references to: (i) the fact that PaaS is fundamentally different to software-only; and (ii) a broader competitor set: [≫].
- 5. To the extent the Transaction results in any lessening of competition (which FNZ refutes), the loss would be much more limited than the PFs suggest

The asymmetric nature of the constraint between the Parties

⁸⁴ Similarly, Pershing and Avaloq were mentioned more frequently by third parties as a competitor of FNZ than GBST was (ten times each compared to nine), despite the CMA's dismissal of these competitors. Temenos, SEI and SS&C were mentioned as frequently as GBST, but again this is not adequately reflected in the CMA's competitive assessment. See PFs, Appendix D, Figure 1.

⁸⁵ For a more detailed discussion of FNZ's internal documents, see FNZ's response to the Competitive Assessment – Internal Documents WP; and FNZ's response to the AIS and WPs, paras 2.26 – 2.27 and 3.2.

⁸⁶ Competitive Assessment – Internal Documents WP, para 26.

⁸⁷ PFs, paras 7.124 and 6.46.

⁸⁸ PFs, para 7.82(c).

- 5.1 GBST does not exercise any material constraint on FNZ. Although FNZ is firmly of the view that the Transaction will not result in a substantial lessening of competition, to the extent that there were any (theoretical) lost competition as a result of the Transaction, this would be limited to a (small) constraint exercised by FNZ on GBST for those GBST customers that might consider switching from a software-only model to a PaaS model. The asymmetric nature of the constraint between the Parties was previously acknowledged by the CMA in its AIS and WPs, but is noticeably absent from the PFs, without any apparent justification. In fact, the evidence is clear:
 - (i) FNZ does not lose to GBST: As discussed above, it is only in a minority of cases that customers have not made a pre-tender delivery model selection, and [≫]. Even in the [≫] occasions where FNZ (as distinct from JHC) and GBST conceivably compete, in practice FNZ does not lose to GBST. The FNZ tender data records only one (low-value) loss to GBST in the last 10 years. As explained above, JHC and GBST do not materially compete and the GBST/Equiniti partnership is [≫] FNZ's PaaS model.⁸⁹
 - (ii) Market shares are not a reliable indicator of GBST's market position: FNZ's views on the flaws inherent in market shares in this sector have been set out in detail in prior submissions. 90 Nonetheless, the CMA considers that shares of supply provide 'a useful indicator of the relative size of each Party and other suppliers in the market'. 91 While FNZ acknowledges that GBST may have a material share of supply in the Retail Platform sub-segment as measured by AUA, the CMA incorrectly interprets this as an indication of [%]. The reality is that it is merely a reflection of [%] that are [%]. 92 Further, GBST's market share reflects the CMA's entire 'Retail' segment, including tenders exclusively for software-only solutions, rather than the much narrower sub-segment of cases where FNZ's PaaS solution conceivably competes with GBST's software solution (i.e. Retail Platforms open to considering both software and PaaS models). 93 [%] See Annex 3.
 - (iii) [≫]⁹⁴

⁸⁹ For a more detailed discussion, see section 2 of FNZ's response to the Phase 2 Issues Statement; and Annex 1.

⁹⁰ See section 14 of FNZ's response to the Phase 1 Issues Letter. See also Merger Notice, paras 14.25 – 14.28.

⁹¹ PFs, para 37.

⁹² See FNZ's response to the AIS and WPs, para 3.19. See also FNZ's response the Competitive Assessment – Shares of Supply WP, pages 2 and 7.

⁹³ See also FNZ's response to the Shares of Supply WP.

 $^{^{94}}$ See also FNZ's response to the AIS and WPs, paras 3.19 - 3.24.

- (iv) $[\times]^{95} [\times]^{.96} [\times]^{.97} [\times]^{.98}$
- (v) GBST does not (and would not, absent the transaction) drive innovation by FNZ. [%]. A majority of third-party respondents cited by the CMA confirmed that FNZ is a leading innovative supplier in the market. 99 FNZ's incentive to innovate is driven by the imperative to remain competitive with other PaaS suppliers, and customer (and, in turn, end-consumer) demands (as [%]). 100 Indeed, the CMA acknowledges that it found 'no evidence that FNZ responded to GBST's Project Evolve. 101
- Any constraint exerted by FNZ on GBST is tempered by the extremely limited competition between PaaS and software-only suppliers generally, the weakness of partnership models ([%), the complementary nature of GBST's and JHC's software-only offerings and the number of competing software-only providers see section 4 above. Moreover, any residual (very small) impact on GBST customers will be entirely mitigated and customers will, in fact, benefit from the Transaction (see below).
- 5.3 [**⋈**].¹⁰² [**⋈**].

Any theoretical loss of constraint FNZ imposes on GBST will not lead to customer harm; the Transaction in fact generates significant benefits

- There is no credible evidence to suggest that GBST customers will be harmed by the Transaction (e.g. through higher prices, lower service levels or reduced innovation). On the contrary, the Transaction will generate significant benefits for customers in the UK and in Australia. On the contrary, the Transaction will generate significant Relevant Customer Benefits (RCBs) for customers in the UK as set out in FNZ's Response to the Notice of Possible Remedies. These include:
 - (i) improved quality of GBST products (including from enhanced FNZ product functionality that is not currently available with GBST) and increased innovation;

⁹⁵ For a detailed discussion, see FNZ's response to the Product Development WP.

⁹⁶ PFs, Appendix K, para 22.

⁹⁷ PFs, para 5.27.

⁹⁸ See also section 3 of FNZ's Response to the Annotates Issues Statement

⁹⁹ Product Development WP, para 38.

¹⁰⁰ FNZ's incentives to innovate are not determined in a narrow, UK Retail Platform Solutions market. They are determined by international competition. [≫]. See Annex 5 of FNZ's response to the CMA's Market Questionnaire for further details on recent innovations.

¹⁰¹ PFs, para 7.192.

^{102 [※]}

- (ii) reduced ongoing operational and regulatory costs and risks following migration to SaaS or PaaS; and
- (iii) lower cost to GBST customers of migration to SaaS or PaaS (if they wish to migrate), owing to FNZ's existing data-centre infrastructure (and accompanying support functions).
- In particular, there is no basis for the CMA's assertion that [>] would be consistent with a reduced incentive to innovate being brought about as a result of the Merger.' FNZ has explained in previous submissions 104 that it would not be rational for it to degrade or withhold GBST's Composer software from current or prospective GBST customers. Doing so would:
 - (i) cut across written assurances to key GBST (and FNZ) customers; 105
 - (ii) result in [≫] GBST customer losses and AUA outflows to a range of credible software-only players, including in Australia, where GBST has a more substantial customer base [≫] and software-only solutions are more prominent (as Australia is some years behind the UK in its transition to PaaS). This would in turn devalue GBST as an asset; and
 - (iii) cause serious damage to FNZ's reputation and relationships with customers and regulators.
- 5.6 Therefore, FNZ is highly incentivised to continue to invest in GBST's software on a standalone basis. [※], ¹⁰⁶ [※]. ¹⁰⁷
- 5.7 As explained before, FNZ's R&D programme will [X]), but also, in addition will: 108
 - (i) enable GBST to offer a [≫] SaaS offering and significantly lower the cost of migrating to this for customers that wish to transition. [≫]. As a result of the Transaction, FNZ will be able to leverage its existing infrastructure and support services, as well as considerable experience and expertise providing cloud-based solutions, to offer a SaaS offering to GBST customers without GBST having to develop this capability on a standalone basis; and

¹⁰³ PFs, para 7.205.

¹⁰⁴ For further detail, see FNZ's response to the AIS and WPs, paras 4.1 et seq; and FNZ's response to the Product Development WP.

¹⁰⁵[≫].

¹⁰⁶ PFs, para 7.201.

¹⁰⁷ FNZ estimates that a single customer represents [※], which equates [※]. When considered in this context, FNZ's investment plans make clear commercial sense.

¹⁰⁸ See FNZ's response to the Notice of Possible Remedies for further details of customer benefits arising from the Transaction.

- (ii) integrate GBST's Composer software with existing FNZ products and services, which would enable GBST customers to access enhanced functionality quickly, including multilingual capabilities, income capital protection, and retail insurance (in addition to the wholesale insurance that GBST currently offers its customers), as well as products from FNZ such as [※].
- 5.8 To the extent that some advancements have already been implemented, [≫], this would be positive for both customers and FNZ it would merely mean that less time and investment would be required to [≫] Composer.¹⁰⁹
- 5.9 A clear majority of customers (almost two-thirds of those that were contacted) also did not express any concerns regarding the transaction, and a number expected it to generate real benefits. 110
- 5.10 In addition, the Transaction will result in considerable benefits to customers outside the UK. These are set out fully in FNZ's Response to the Notice of Possible Remedies but include: benefits to Australian wealth management customers in the form of operational cost savings from benefits equivalent to the RCBs for UK customers; and benefits to capital markets business customers in terms of lower costs due to synergies in third party clearing costs.

¹⁰⁹ [≫].

 $^{^{110}}$ PFs, Appendix L, paras 1 – 6.