

**FNZ'S RESPONSE TO 'SUMMARY OF THE CMA'S  
UPDATED ANALYSIS AND INITIAL THINKING' PAPER  
RECEIVED 24 FEBRUARY 2021**

**dated**

**9 March 2021**

---

**Case No. ME/6866/19**

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

---

**SLAUGHTER AND MAY**

**WJT/JFH/HXW/RXZW**

**Annexes**

Annex 1	Confidential RBB Annex on Tender Analysis.
Annex 2	Source data to support FNZ's market wide functionality evidence presented at oral representations.

**Table of Contents**

<b>1.</b>	<b>Introduction and executive summary</b>	<b>4</b>
<b>2.</b>	<b>Counterfactual</b>	<b>4</b>
<b>3.</b>	<b>Market definition</b>	<b>8</b>
<b>4.</b>	<b>Disclosed questionnaires do not discharge CMA's duty to consult</b>	<b>19</b>
<b>5.</b>	<b>Shares of supply</b>	<b>21</b>
<b>6.</b>	<b>Tender analysis</b>	<b>21</b>

## 1. Introduction and executive summary

- 1.1 FNZ welcomes the opportunity to comment on the CMA's emerging thinking at this point in the remittal process, including in the light of the (relatively limited) material disclosed on 24 February 2021. The CMA is – quite rightly – (re)considering a number of key aspects of its competition analysis, following the quashing of the Final Report of 5 November 2020 (the **FR**). At this stage, however, the indications are that the CMA is intent on reaching the same conclusion by a different route, and that in a number of significant respects its approach may not stand up to scrutiny.
- 1.2 On the counterfactual, the CMA appears minded to continue to assess the impact of FNZ's acquisition of GBST (the **Transaction**) against pre-merger conditions of competition, notwithstanding that an SS&C/GBST merger is the more likely alternative scenario. The basis for doing so – that an SS&C/GBST merger would be irrelevant if SS&C was a weak constraint, inappropriate if SS&C was a strong constraint, and too difficult to deal with if SS&C was something in between – is unreasonable and irrational. While an SS&C/GBST merger could not substantially lessen competition (**SLC**), it would materially change the market structure – and therefore the basis on which the CMA must conduct its competitive analysis in this case.
- 1.3 On market definition, the CMA appears to be considering tinkering with the categorisation of certain 'Borderline' and 'Retail' platforms, rather than revisiting what is a fundamentally artificial distinction. FNZ has submitted a very large body of robust evidence demonstrating that there is no credible basis on which to identify a distinct market for the supply of 'Retail Platform Solutions'. The data disclosed by the CMA provides [redacted] for this view. It is concerning that the CMA appears to continue to overlook this objective evidence in favour of qualitative responses to its questionnaires. FNZ requires access to these responses to comment properly, but the disclosed questionnaires reveal significant fault-lines and omissions in the evidence gathering process. The extent to which the CMA is collecting new information to address the weaknesses and gaps in its evidentiary base – which would be vital to reach a robust decision on remittal – is unclear. It is also concerning that, at this stage in the process – almost 16 months after launching its investigation – the CMA appears to continue to confuse market definition at the platform and the platform solutions levels.
- 1.4 More generally, the picture that emerges from the CMA's corrected and updated share of supply and tender datasets is [redacted] with the views set out in FNZ's initial remittal submission (the **Initial Remittal Submission**) and previous submissions. It is a picture of [redacted] missing entirely – in the market as presented in the FR. The material that has been disclosed, weighed appropriately alongside the evidence that FNZ has put in, provides no reasonable basis on which to conclude that [redacted] – or, ultimately, that the Transaction gives rise to an SLC.

## 2. Counterfactual

### ***The CMA's proposed approach to the counterfactual is unreasonable and irrational***

- 2.1 The '*Summary of the CMA's updated analysis and emerging thinking paper*' (the **Summary**) – broadly in line with the FR – states that '*it seems possible that GBST could*

*have been acquired by an alternative purchaser, SS&C, or could have remained under independent ownership absent the Merger* (para. 8).

- 2.2 The evidence – including as summarised in the FR and other CMA-produced documents<sup>1</sup> – shows that the first of these scenarios is much more likely. SS&C was a willing buyer (and disappointed not to have succeeded in its bid, [3<]); GBST was a willing target (which engaged two investment banks to advise on the sale and find suitable purchasers; and the board subsequently publicly announced its unanimous intention to recommend SS&C's proposal). In these circumstances, there is no reasonable basis on which to conclude that, on the balance of probabilities, GBST would have remained independent.<sup>2</sup>
- 2.3 The FR (erroneously) selected the pre-merger conditions of competition as the counterfactual, on the basis that '*neither scenario would produce a meaningfully different competitive result*' since, in either case, '*GBST would have remained as an active competitor*' (para. 5.24).
- 2.4 The CMA is now, quite rightly, (re)considering '*whether the choice between either of the possible outcomes [...] would make a material difference to our competitive assessment*' (para. 9). However, the Summary suggests that the CMA is minded to continue to assess the impact of the Transaction against pre-merger conditions of competition, this time on the basis that an SS&C/GBST counterfactual could only be:
- (i) irrelevant – if SS&C was a weak constraint (para. 10);
  - (ii) inappropriate – if SS&C was a strong constraint, such that an SS&C/GBST merger would itself have been likely to be referred to Phase 2 (para. 11);<sup>3</sup> or
  - (iii) impossible to predict with the requisite degree of accuracy, and therefore also inappropriate – if the constraint from SS&C fell somewhere in between (para. 13).
- 2.5 We challenge the rationality of this approach. On this logic, the CMA would never have cause to consider an alternative counterfactual involving competing bids, since each would necessarily fall into one of buckets (i)-(iii) above. But it is well-established that a

<sup>1</sup> See, e.g., FR, paras. 5.22-5.23, CMA's Provisional Findings Report, para. 5.31, CMA's Counterfactual Working Paper, para. 49.

<sup>2</sup> The CMA must carry out its assessment of the counterfactual using a '*balance of probabilities*' test (MAGs, para. 2.12).

<sup>3</sup> The CMA says its '*established practice*' is not to consider counterfactuals that are likely to result in a Phase 2 reference. This approach is not reflected in the Enterprise Act 2002 or the MAGs, which say only that the CMA will not adopt a counterfactual that involves violations of competition law (e.g. a cartel). It is not clear that a counterfactual should be discounted purely on the basis it was likely to have been referred (as opposed to being prohibited). In any case, there is no basis to exclude an SS&C/GBST merger as the CMA's own assessment makes clear that the SS&C/GBST merger would not have resulted in a blocking decision. Such a decision as regards the counterfactual would not be substitutable for a full merger inquiry were the counterfactual transaction ever to arise, such that the CMA would not be fettering its discretion for any future inquiry.

competing bid scenario is one of *'the most notable examples'* of when the CMA may use a counterfactual other than the prevailing conditions of competition (MAGs, para. 4.3.7).<sup>4</sup>

- 2.6 As regards the Transaction, and contrary to the FR, SS&C does not provide only a *'weak constraint'* (FR, para. 8.175). For reasons explained at para. 5.11 of the Initial Remittal Submission, and as amply evidenced by developments post-dating the FR, SS&C is a material player, competing in particular against FNZ and other PaaS suppliers (such as Avaloq, Pershing, SEI and TCS BaNCS). It would be irrational to conclude that SS&C's constraint on GBST is so insignificant that it makes no difference to the competitive conditions but that an FNZ/GBST merger is liable to give rise to an SLC.
- 2.7 It also cannot be said that SS&C provides such a strong constraint – specifically on GBST, which is the relevant issue in this context – that an SS&C/GBST merger is an inappropriate counterfactual. Leaving aside whether the practice of ruling out counterfactuals on the basis of a potential Phase 2 referral is well-founded (see footnote 3 above), the CMA has sufficient information to determine that there could be no *'realistic prospect'* of an SLC in this case.<sup>5</sup> It does not make sense to ignore this information and then attempt to second guess whether or not the CMA might have referred SS&C/GBST to Phase 2.
- 2.8 Recently disclosed materials (i.e. the CMA's updated shares of supply and tender analyses) provide [redacted] for this position:
- (i) The combined shares of supply for SS&C/GBST would be [redacted] when Borderline platforms (but not other Non-Retail platforms) are taken into account.
  - (ii) SS&C and GBST are not close competitors. While SS&C does offer software-only, [redacted].
  - (iii) SS&C/GBST would face competition from a wide range of strong players, including [redacted]. Even in the overly narrow Retail segment, SS&C/GBST would have [redacted] combined share of [redacted], and would not give rise to a [redacted].
- 2.9 Stepping back, it would be extraordinary for the CMA to shift from the view espoused in the FR, that SS&C provides such a weak constraint that it does not qualify as a material competitor, to a view on remittal that SS&C in fact provides such a strong constraint that it would have been prevented from acquiring GBST on competition grounds.
- 2.10 As for bucket (iii) above, the CMA cites the MAGs in support of the view that it cannot be expected to assess this 'middle ground', as this would require it *'to predict the likely impact of two different transactions in a way that would be spuriously accurate and therefore would not be an appropriate counterfactual scenario'* (para. 13). However, read in context, the MAGs provide no support for this position. In particular, the reference to

<sup>4</sup> There are also numerous cases where the CMA has considered whether an alternative acquirer is the most likely counterfactual. See, e.g., *Bottomline/Experian*; *Reckitt Benckiser/K-Y Brand*; *Euro Car Parts/Andrew Page*.

<sup>5</sup> The Summary is wrong to imply (at para. 11) that FNZ's Notice of Application suggested an SS&C/GBST merger would result in a lessening of competition that would be likely give rise to a Phase 2 reference. On the contrary, FNZ's position is that neither SS&C/GBST nor FNZ/GBST gives rise to an SLC.

'spurious' accuracy relates to what should be incorporated into the counterfactual – not how the Transaction should be assessed against that counterfactual:

*However, the CC will typically incorporate into the counterfactual only those aspects of scenarios that appear likely on the basis of the facts available to it and the extent of its ability to foresee future developments; it seeks to avoid importing into its assessment any spurious claims to accurate prediction or foresight.* [emphasis added] (4.3.6).

- 2.11 No 'spurious claims to accurate prediction or foresight' are required to establish that it is most likely that SS&C would have acquired GBST if FNZ had not.
- 2.12 The CMA also suggests that assessing the Transaction against an SS&C/GBST counterfactual would not be 'consistent with the CMA's established approach to the counterfactual (as set out in the CMA's guidance), which [...] is typically not based on a detailed analysis that is comparable in detail to the analysis of the competitive effects of a merger' (para. 14).
- 2.13 The CMA's suggestion is wrong, for two key reasons.
- (i) First, the MAGs make clear that there may well be cases where the counterfactual analysis does need to be comparable in detail to the competitive effects analysis. In particular, where – as here – the choice between two or more scenarios could make a 'material difference' to the assessment, the CMA 'will' carry out 'additional detailed investigation before reaching a conclusion on the appropriate counterfactual' (para 4.3.6). The CMA has proven itself willing in a number of recent Phase 2 cases to carry out just such an assessment.<sup>6</sup>
  - (ii) Second, it is important to distinguish: (i) any analysis that is required to conclude what the most likely counterfactual is on the balance of probabilities; and (ii) the SLC analysis that must then be carried out against that counterfactual. For example, in *Amazon/Deliveroo* the CMA conducted a very detailed assessment to determine that the most likely counterfactual involved Amazon's re-entry into the relevant market;<sup>7</sup> that point having been established, the whole of the SLC analysis flowed from it. In this case, it is relatively straightforward to establish that an SS&C/GBST merger is the most likely counterfactual. What is currently missing is any consideration of the competitive effects of the Transaction against that counterfactual.

***The Transaction cannot result in an SLC compared to the correct counterfactual***

- 2.14 As the Initial Remittal Submission explained, an SS&C/GBST merger would produce a materially different market structure to the pre-merger conditions of competition. This is evident from the fact that there would be one fewer competitor bidding for tenders. One

---

<sup>6</sup> See, e.g., *Amazon/Deliveroo*, *JD Sports/Footasylum*, *Bottomline/Experian*, and *Tobii/Smartbox*.

<sup>7</sup> More than 50 pages of the *Amazon/Deliveroo* Final Report were devoted to detailed analysis of the counterfactual.

consequence is that, measured against the correct counterfactual, the Transaction would not reduce the number of competitors.

- 2.15 As part of the remittal process, it is incumbent upon the CMA to analyse the incremental competitive impact of the Transaction relative to the correct counterfactual: an SS&C/GBST merger. For the reasons set out at paras 5.14-5.15 of the Initial Remittal Submission, no SLC can arise on this basis.

### 3. Market definition

- 3.1 The Summary states that the CMA is ‘*considering whether differences exist between the requirements of Retail Platforms and Non-Retail Platforms and, if so, whether those differences mean that some suppliers of Platform Solutions are better suited to serve one group of customers than another (and so should be considered to be close substitutes)*’ (para. 26). It is also ‘*considering how easy it would be for suppliers to Non-Retail Platforms to adapt their Platform Solutions to enable them to compete for Retail Platforms*’ (para. 22).

- 3.2 The detailed evidence provided by FNZ shows that there is no basis to define a separate market for the supply of Retail Platform Solutions. In the FR, the CMA appeared to privilege qualitative responses to its questionnaires over this hard data. FNZ has not been granted access to these responses, but the questionnaires that have been disclosed indicate several important omissions or distortions in the evidence gathering process. As a result, the questionnaire evidence is unlikely to provide a sound basis for the assessment of market definition or closeness of competition.

- 3.3 As this section explains in detail:

- (i) The CMA’s questionnaires are subject to fundamental design flaws, including (i) a definition of Retail platforms that differs significantly from that used in the FR, (ii) leading questions, which were liable to distort answers in favour of finding differentiation between platform types, and (iii) a failure to gather requisite information on how platforms and suppliers would respond to a SSNIP.
- (ii) In contrast, FNZ has provided robust evidence proving that Retail, Borderline and Non-Retail platforms have the same functionalities, and thus require the same capabilities from their solutions providers. The disclosed shares of supply and tender datasets [§<]. On this basis, FNZ disagrees fundamentally with the CMA’s segmentation of Retail, Borderline and Non-Retail platforms. Not only is the case for the inclusion of Borderline platforms compelling, adding these platforms (but excluding Non-Retail platforms) is conservative.
- (iii) Even if – hypothetically – different platforms targeted different investor types and were not regarded as substitutes by those investors (or their advisers), which as shown below is not in fact the case, the solutions that these different platforms use are, nevertheless, substitutes because they deliver the same functionality.

#### ***The CMA’s questionnaires are subject to fundamental design flaws***



*The definition of a Retail platform differs substantially from that used in the FR*

- 3.4 The disclosed ‘pre-PF’<sup>8</sup> questionnaires are framed by reference to a specific definition of Retail platforms, which is prominently set out at the beginning of the questionnaire. According to that definition, Retail platforms are:

*investment platforms which are particularly focused on:*

- (I) *the processing of a high volume of mainstream investments and information for a large number of customers, at low cost with limited manual intervention; and*
- (II) *the provision of a wide range of tax wrappers integrated into the platform (on-platform tax wrappers), often for pension administration (On-Platform Pension Wrappers).*

*Traditionally Retail Platforms may have been known as “financial planning firms” focused on the provision of services to end-investors through IFAs. However, the CMA considers that Retail Platforms may also include D2C and workplace platforms with the above characteristics. Examples of Retail Platforms in the UK include: Aviva, Vitality and AJ Bell.<sup>9</sup>*

- 3.5 However, the FR states:

*Retail Platforms offer more commoditised products, with the provision of tax wrappers such as pensions being a more important element of their offer. Retail Platforms have a larger number of investors than Non-Retail Platforms. Consequently, it is more important for Retail Platforms to be highly automated and have efficient systems for managing customer accounts.<sup>10</sup>*

- 3.6 The FR’s characterisation of a Retail platform is materially different to that adopted in the ‘pre-PF’ questionnaires. Most notably, the provision of integrated, on-platform tax wrappers has been dropped entirely from the FR’s definition.

- 3.7 The change in the definition of ‘Retail platform’ is problematic if responses to the ‘pre-PF’ questionnaires have been used to support the Retail market definition adopted in the FR (as FNZ suspects). For example, certain platforms may have been identified in ‘pre-PF’ responses as not qualifying as Retail because they do not offer on-platform tax wrappers, when this feature was ultimately not part of the Retail platform definition used in the FR. This matters because respondents may have: (i) identified fewer platforms as Retail than

<sup>8</sup> The CMA has disclosed 12 questionnaires: seven customer questionnaires, three competitor questionnaires, and two consultant questionnaire. Several are essentially variants of the same questionnaire. The CMA’s index splits them into: Annex 3 - Phase 2 Questionnaire (May-June 2020); Annex 4 - Phase 2 Questions Remedies (August 2020); and Annex 5 - Phase 2 Questionnaires (September, 2020). However, some questionnaires in Annex 3 have deadlines for responses after the Provisional Findings (PFs), published on 6 August 2020. Rather than use the CMA definitions, any questionnaire with a response date before the PFs is defined as ‘pre-PFs’; the remaining questionnaires are ‘post-PFs’.

<sup>9</sup> See e.g., para. 2 on page 2 of ‘3.3 Consultant questionnaire’ and ‘3.6 Customer questionnaire’.

<sup>10</sup> FR, para. 6.79. See also para. 6.16(a) of the FR, which is a slightly modified version of para. 6.33(a) of the PFs.

they otherwise would; and/or (ii) understood that on-platform pension functionality is required to supply a Retail platform when, in fact, such functionality is not required.

- 3.8 The CMA issued a (second) set of customer questionnaires with a deadline for responses of 21 August 2020, i.e. after the PFs were published.<sup>11</sup> It is unclear when these questionnaires were issued, although it was presumably close to the date of the PFs (6 August 2020). Puzzlingly these ‘post-PF’ questionnaires retained the ‘pre-PF’ definition of Retail platforms, even though the definition used in the PFs was different.<sup>12</sup> In responding to the August post-PF questionnaires, customers may have become aware of the different characterisation of Retail platforms adopted in the PFs and in the questionnaire, and therefore have become (even more) confused. In turn, this is likely to have contaminated their responses.

*The questionnaires contained leading questions, liable to distort answers in favour of finding differentiation between platform types*

- 3.9 The framing of a number of the questions in the questionnaires pre-supposes that a particular segmentation of the market exists. For example, the CMA says that it *‘understands there is differentiation across Investment Platforms and that the market could be segmented into Retail Platforms and non-Retail Platforms as per definition 2 above [i.e. the pre-PF Retail platform definition]’* [emphasis added].<sup>13</sup>

- 3.10 Question 18 of the customer questionnaire then goes on to ask respondents:

- (i) *‘which segment(s) of the market [they] consider [their] platform(s) to operate in (Retail Platform segment or non-Retail Platform segment) [emphasis added]; and*
- (ii) *‘what capabilities and functionality [they] require from [their] Platform Solution supplier(s), and why these are necessary’, with specific capabilities being highlighted.*

- 3.11 This sequencing is problematic. At the beginning of the questionnaire the CMA defined a Retail platform as having certain characteristics that distinguish it from a Non-Retail platform. The question then asks respondents to adopt that definition and to compare and contrast Retail and Non-Retail platforms (as defined by the CMA). This discourages a platform from self-identifying as Retail unless it exhibits the specific characteristics called out by the CMA. The CMA has effectively steered respondents towards a particular answer, i.e. that these platform types are *different* whether or not that distinction exists or

<sup>11</sup> See ‘3.4 Customer questionnaire – [Bespoke].docx’ and ‘3.5 Customer questionnaire – short.docx’.

<sup>12</sup> See para. 6.33(a) of the PFs. The definition set out in the PFs was adopted for the last phase of questionnaires disclosed by the CMA (e.g. ‘5.6 Customer questionnaire – version 2.docx’), with a deadline for responses of 8 September 2020.

<sup>13</sup> See question 18 of ‘3.6 Customer questionnaire.docx’, question 13 of ‘3.3 Consultant questionnaire.docx’, and question 16 of ‘3.1 Competitor questionnaire.docx’.

is meaningful in practice. This has led to platforms who view each other as direct competitors, being inconsistently classified between Retail, Borderline and Non-Retail.

*The questionnaires failed to gather critical evidence on how customers or suppliers would react to a SSNIP or an equivalent change in quality*

- 3.12 The Summary recognises that the Hypothetical Monopolist Test (**HMT**) provides the framework for rigorous market definition in competition cases (para. 19). However, it suggests that in applying the HMT there are alternatives to the ‘SSNIP’ question (para. 19).
- 3.13 Critically, the HMT requires consideration of likely responses to a hypothetical change in competitive conditions (conventionally characterised in terms of a SSNIP, or an equivalent change in quality) by customers (demand-side substitution) and potential suppliers (supply-side substitution). The MAGs sets out this approach, which establish that in defining the relevant product market ‘*the Authorities will assess whether the hypothetical monopolist could profitably raise the price of at least one of the products in the candidate market by at least a small but significant amount over a non-transitory period of time (ie by a ‘SSNIP’...)*’ (para. 5.2.11).
- 3.14 To perform the HMT test, evidence must therefore provide the basis for an assessment of how customers and potential suppliers would be likely to respond to a change in competitive conditions, i.e. to a SSNIP (or its equivalent). The CMA’s questionnaires do not provide such a basis.
- 3.15 Notably, the customer questionnaires do not assess the willingness of platforms to forgo certain aspects of functionality (e.g. tax wrappers delivered on-platform) and to choose an alternative without that functionality (e.g. off-platform provision of the same wrapper) in response to an increase in the price of such functionality.
- 3.16 Similarly, while questionnaire ‘3.1 Competitor questionnaire.docx’ does ask Non-Retail platform solution providers to ‘*explain how easy it would be for [them] to adapt [their] Platform Solutions to enable [them] to compete for Retail Platform customers*’, it does not frame this in terms of a response to a SSNIP. Instead, it focuses on current market conditions and whether suppliers have existing plans to do so. But even a small increase in price may profoundly change incentives to adapt a solution in order to serve Retail platforms. The CMA questionnaires do not provide a basis for satisfying the HMT.
- 3.17 The CMA has not particularised what extra functionality is required to serve Retail platforms that is not offered by Borderline or Non-Retail platforms. Neither has it tested whether the absence of that functionality is material when considered in the light of a SSNIP. This is a major omission in the CMA’s analysis.

***In contrast, FNZ has provided robust evidence proving that there is no basis to define a separate market for Retail Platform Solutions***

- 3.18 The Summary suggests the CMA is reconsidering the Retail and Non-Retail distinction based on demand- and supply-side considerations, which FNZ welcomes (para 20). However, the Summary later more narrowly suggests that it is only considering which

Borderline platforms might form part of the Retail market (para 26). [REDACTED]. This suggests that the CMA may have pre-determined market definition, and is not re-considering whether the Retail and Non-Retail distinction remains valid. That is irrational in light of the evidence submitted in FNZ's Initial Remittal Submission and Annex (and further explained at the 2 March 2020 oral representations).

- 3.19 The Summary also says that it has not found evidence in the Parties' internal documents to suggest that *'they consider Non-Retail Platform Solutions could be a material competitive constraint'* (para 22). That is not true. FNZ's internal documents submitted to the CMA, even amongst the select number of screenshots in the FR appendices, show numerous mentions of 'Non-Retail Platform Solution' suppliers.<sup>14</sup>

*Borderline and Non-Retail platforms require Retail functionality*

- 3.20 During the oral representations, FNZ provided detailed evidence (gathered on a platform-by-platform basis) showing that Retail, Borderline and Non-Retail platforms do not possess the distinguishing features that the CMA claims.<sup>15</sup> In particular, the data shows that Retail, Borderline and Non-Retail platforms: (i) offer a homogeneous range of mainstream assets, (ii) offer a wide range of tax wrappers (including pension wrappers), and (iii) require scalability and automation from their solutions providers.

- 3.21 FNZ explained that the fact that all platforms have to offer the same functionality is unsurprising. It follows from the fact that all investors (regardless of wealth) need access to mainstream assets in a tax efficient way in order to manage risk and returns on their investments.<sup>16</sup>

*Many solutions providers compete for at least Retail and Borderline platforms*

- 3.22 The CMA's disclosed shares of supply and tender datasets [REDACTED].<sup>17</sup> Figure 3.1 below identifies suppliers that have reached the commercial negotiations (i.e. late) stage of a Retail/Borderline tender and/or supply a Retail/Borderline platform in the shares of supply dataset [REDACTED].<sup>18</sup>
- 3.23 The figure shows [REDACTED]. These suppliers include [REDACTED]. Indeed, [REDACTED]. This means that the FR's finding that *'suppliers of Platforms Solutions tend[...] to specialise in serving one or the other type of platform'* is erroneous (FR, para. 6.81).

<sup>14</sup> See FR, Appendix D, para. 1 and Appendix L, paras. 1, 5, 7 and 15.

<sup>15</sup> See Annex 1 of the Initial Remittal Submission and Slides 12-22 of the FNZ oral representations presentation. For completeness, the charts on Slides 14 and 17 of the oral representations presentation contain minor updates to the charts presented in Annex 1 of the Initial Remittal Submission. The source data for platforms supplied by competitors in the charts on Slides 14 and 17 of the FNZ oral representation presentation are contained in Annex 2 to this response.

<sup>16</sup> Slides 5-6 of the FNZ oral representations presentation.

<sup>17</sup> [REDACTED] and [REDACTED], both disclosed on 24 February 2021.

<sup>18</sup> [REDACTED]

**[FIGURE 3.1 REDACTED]**

- 3.24 The Summary notes that the CMA intends to take account of the role played by factors such as brand, reputation, user experience and track record (para. 24). But, as explained in the Initial Remittal Submission, if a solutions provider to Borderline and Non-Retail platforms has been able, in undertaking such supply, demonstrably to fulfil all the requirements of Retail platforms (e.g. because the functionalities required by Borderline and Non-Retail platforms encompass those required by Retail platforms), then this solutions provider must have a suitable brand, reputation, user-experience and track-record to supply Retail platforms (paras. 4.19-4.20). Borderline platforms by definition offer Retail components (FR, Appendix G, para. 16). It is unreasonable, therefore, to suggest that a reputation gained by supplying Borderline platforms would fail to assist a supplier in winning Retail contracts.

*Illustrative example*

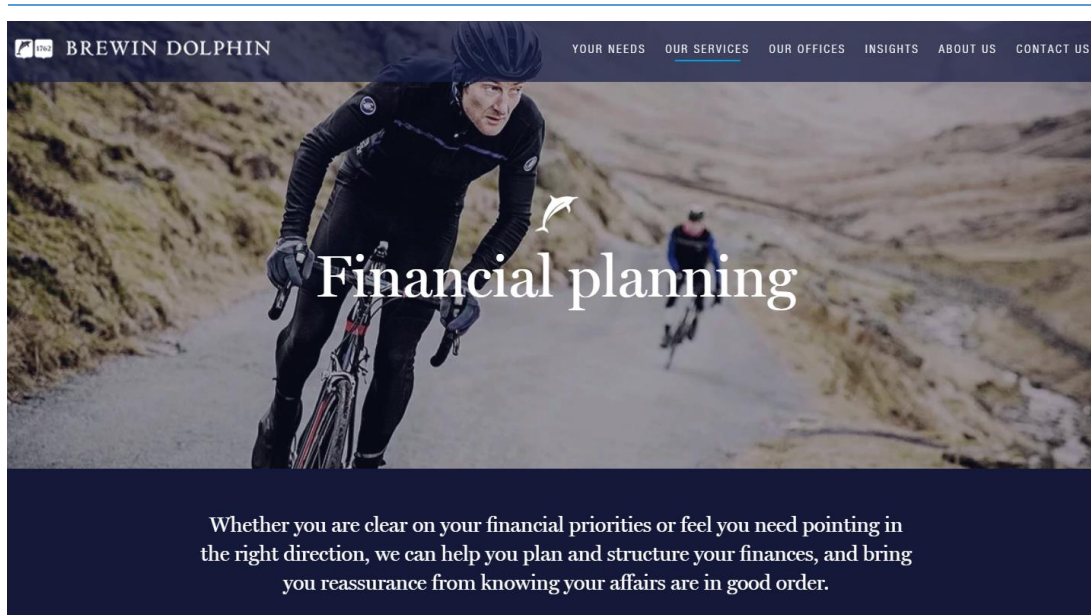
- 3.25 The preceding points are neatly illustrated by Brewin Dolphin, a Borderline platform which uses Avaloq for its investment accounting software. Brewin Dolphin advertises itself as offering a financial planning service that targets mass-affluent customers. For example, Brewin Dolphin's 2019 Annual Report and Accounts stated (page 17):

*At our heart we are an advice-led business. We have made significant progress in growing our financial planning business over the past five years.*

*We know that good advice can help people achieve their financial objectives and outcomes. There is an increased onus on individuals to provide for their own retirement and partly as a result there is an increased demand for financial advice across a broad range of society – from mass market to mass affluent and high net worth. However, many people in the UK who have financial needs currently choose not to, or are unwilling to, take advice. We see this as a strategic opportunity and the basis for a widening service offer that means we can meet the specific needs of an increasingly broad spectrum of clients.*

- 3.26 Its website gives prominence to this offer. Figure 3.2 below presents a screenshot for individual investors (top graphic), which states that one of the services offered to individual investors is financial planning and shows that there is a minimum investment amount of just £500.

**Figure 3.2**  
**Brewin Dolphin's webpage on financial planning and minimum investment amount**



## Invest now

Start investing from £500 with Brewin Portfolio Service. Sign up online. Simple, accessible and cost efficient. Capital at risk.

Please note that the application website will not launch in Internet Explorer (IE).

[GET STARTED](#)

[Existing clients](#)

Source: <https://www.brewin.co.uk/individuals/our-services/wealth-management/financial-planning> and <https://www.brewin.co.uk/individuals/our-services/online-investments>, accessed on 4 March 2021.

- 3.27 Brewin Dolphin also makes clear that it requires scalability and that reputation and track record need not be limited to the UK but can be based on international experience.<sup>19</sup>

*In April 2019, we announced that we had appointed Avaloq to replace our core custody and settlement system. Avaloq is a pre-eminent provider of core software and digital technology to banks and wealth managers. Its robust and scalable*

<sup>19</sup> Brewin Dolphin, Annual Report and Accounts, 2019, Page 19, emphasis added.

*software is used by over 150 wealth managers and banks globally. We expect the system to go live towards the end of 2020.*

- 3.28 It would therefore be irrational for the CMA to exclude Avaloq entirely from the relevant competitor set (as the FR did). As noted during the oral representation, [§<].

***Any differences in investor groups targeted by platforms are overstated and, in any event, do not imply differences in functionality required***

- 3.29 The Summary asserts that '*platforms with similar functionalities may not always be substitutes*' (para. 21). This appears to suggest that some platforms may be better suited than others to serving certain investor types. FNZ understands Professor Thanassoulis raised a similar issue during the oral representations, querying whether intermediaries might channel different types of investor to different platforms.<sup>20</sup>
- 3.30 Such channelling does not generally occur in practice. However – and critically – this line of enquiry is not germane to the key point. It is the functionality offered that is the relevant consideration when defining a market for platform solutions. That functionality does not differ across platforms.
- 3.31 The CMA's position prompts concerns that an important distinction between market definition at the platform level and at the platform solutions level has not been fully recognised. Even if different platforms targeted different investor types and were not regarded as substitutes by those investors (or their advisers) – which, as shown from paragraph 3.39 below, is generally not the case as there is no clear distinction in the investor types served by Retail and Borderline platforms – the solutions that these platforms use are, nevertheless, substitutes because they deliver the same functionality.

*Intermediaries typically use a single platform*

- 3.32 In FNZ's experience, it would not be commonplace for an intermediary to direct different customers to different platforms. That is because:
- (i) Vertically-integrated financial advisers or discretionary investment managers would typically refer clients to their own platform.
  - (ii) Non-vertically integrated financial intermediaries (i.e. financial advisers or discretionary investment managers that are not employed directly by a platform) typically want to use a single platform to cater for their entire end-investor base, as this is the most efficient and cost effective way of operating.

*Instances where financial intermediaries use more than one platform are unrelated to platform functionality*

---

<sup>20</sup> See transcript at sent to FNZ on 8 March 2021, pages 42-44.

- 3.33 While FNZ acknowledges that there may be instances where financial intermediaries use more than one platform, importantly this would be for reasons that are unrelated to the functionalities offered by the platforms. For example:
- (i) Historically there may have been some intermediaries that used more than one platform in order to negotiate better rebates using their client book. Post-RDR (Retail Distribution Review) and the banning of rebates in 2012, this has fallen away. Some legacy arrangements may have been kept in place because a transfer could not be justified from a client 'suitability'<sup>21</sup> perspective, given the regulatory requirement for advisers to evidence suitability of any advice and management of a client's holdings.<sup>22</sup>
  - (ii) Most platforms charge fees on a tiered basis (i.e. different rates for different end-client account sizes) and the platform that offers the best value may differ depending on an investor's assets. Moreover, some financial intermediaries may be able to negotiate better fees with certain platforms (e.g. lower rates for a book of end-clients of a certain account size). As such, end-clients may be allocated to different platforms for cost reasons unrelated to the platform's functionalities.
  - (iii) Financial intermediary firms that have merged may historically have used different platforms. Again as a result of the 'suitability' requirement, these firms may need to retain the use of multiple platforms as they are unable to simply move the assets of end-clients to a single platform without evidencing that a transfer would be better for the end-client (as opposed to remaining in the existing platform). [§<].

*Platforms offer the same functionality*

- 3.34 Even where financial advisers and discretionary managers do use more than one platform, the platforms in question will nonetheless require the same type of 'Retail' functionality in terms of mainstream assets, tax wrappers, automation and scalability.
- 3.35 To substantiate the point that different platform types offer the same functionality to (i) financial advisers on the one hand (which the CMA seems to associate with 'Retail' platforms<sup>23</sup>), and (ii) discretionary investment managers on the other (which the CMA seems to associate with Non-Retail platforms (e.g., FR, paras. 6.16(c), 6.80)), FNZ has conducted a detailed assessment of functionalities offered by a Retail and a Borderline platform supplied by FNZ and by a Retail and a Borderline platform supplied by FNZ's competitors. Table 3.1 below shows the activities undertaken by financial advisers and discretionary fund managers using on-platform functionality for each [§<].

---

<sup>21</sup> FCA rules around 'suitability' were strengthened around the same time as the implementation of RDR in 2012. See also: <https://www.fca.org.uk/firms/assessing-suitability>

<sup>22</sup> See FNZ's Response to the New Frame of Reference dated 20 March 2020.

<sup>23</sup> E.g. '3.3 Consultant questionnaire' states 'Traditionally Retail Platforms may have been known as "financial planning firms" focused on the provision of services to end-investors through IFAs.'



- 3.36 It is also notable that [REDACTED].<sup>24</sup>
- 3.37 What is clear is that the on-platform functionalities which financial advisers and discretionary investment managers use are identical.
- 3.38 To the extent differences exist between the activities carried out by the financial intermediaries, these relate to activities which do not require on-platform functionality. In other words, financial advisers and discretionary investment managers, which the CMA considers cater for different investor types, require the same on-platform functionality. As such, all types of platforms require the same functionality from their solutions providers.

---

<sup>24</sup> [REDACTED].

**Table 3.1**  
**Activities undertaken by financial advisers and discretionary fund managers**

Activities undertaken by financial intermediaries	[REDACTED]		[REDACTED]		[REDACTED]		[REDACTED]	
	Employed & 3 <sup>rd</sup> Party Financial Advisers	3 <sup>rd</sup> Party Discretionary Fund Managers	Employed & 3 <sup>rd</sup> Party Financial Advisers	3 <sup>rd</sup> Party Discretionary Fund Managers	Employed Financial Advisers	Employed Discretionary Fund Managers	Employed Financial Advisers	Employed Discretionary Fund Managers
Onboard and collect client personal details	✓	✓	✓	✓	✓	✓	✓	✓
Manage client relationships via CRM solution	✗	✗	✗	✗	✗	✗	✗	✗
Plan client financial and estate arrangements	✗		✗		✗		✗	
Assess client risk profile and assign to suitable asset class model portfolio	✓	✓	✓	✓	✓	✓	✓	✓
Macroeconomic market research		✗		✗		✗		✗
Investment research	✓	✓	✓	✓	✓	✓	✓	✓
Advise client on levels and types of investment	✗		✗		✗		✗	
Invest client monies in various asset classes and tax wrappers	✓	✓	✓	✓	✓	✓	✓	✓
Portfolio reporting, monitoring and rebalancing	✓	✓	✓	✓	✓	✓	✓	✓
Collect initial and ongoing fees from client	✓	✓	✓	✓	✓	✓	✓	✓

Notes: "✓" indicates an activity that is undertaken using the platform's functionality. "✗" indicates an activity that is undertaken off-platform. Where a cell is left empty, the activity is not undertaken by the financial intermediary in question. [REDACTED].

Source: A selection of vertically integrated and third-party financial intermediaries that use the [REDACTED] platform: [REDACTED]  
A selection of vertically integrated and third-party financial intermediaries that use the [REDACTED]

*There is no clear distinction in the investor types served by Retail and Borderline platforms*

3.39 Finally, data for a sample of FNZ/JHC platforms show that mass-affluent investors are a key customer group for both Retail and Borderline platforms (Initial Remittal Submission, Annex 1, section 5).

3.40 Although there may be some differences in the overall percentage of mass-affluent investors across different platforms, differences in the precise proportions of mass-affluent customers matter much less than whether or not a platform requires a solution that caters for mass-affluent customers or other customers with similar requirements. Because Borderline and Non-Retail platforms require functionality that enables them to serve a large number of mass-affluent customers (and/or other investors requiring access

to the same assets), their requirements encompass the same functionality as Retail platforms.

- 3.41 This is illustrated in Table 3.2 below which shows the number of customer accounts by different customer bands for a selection of FNZ/JHC platforms. Both Retail and Borderline platforms have a large number of mass affluent customers (as well as customers with assets of less than £100,000).<sup>25</sup> This means that they need to offer the functionalities required by these customers.
- 3.42 FNZ is unable to populate a similar table for platforms supplied by its competitors because such data are not available from public sources. However, FNZ highlights that the [redacted] demonstrates the very substantial overlap in functionality required by different platform types. This example is representative of the wider market.

**[TABLE 3.2 REDACTED]**

**4. Disclosed questionnaires do not discharge CMA's duty to consult**

- 4.1 The CMA claims that its disclosure of questionnaires issued during the Phase 2 investigation should:
- (i) address FNZ's concern that it was unable to understand the context in which un-redacted third-party evidence quoted in the FR was provided to the CMA; and
  - (ii) enable FNZ to make informed and meaningful representations on the extent to which aspects of these questionnaires could affect the weight attached to third-party responses to these questionnaires.
- 4.2 FNZ disagrees. FNZ remains unable to adequately understand the basis for, respond to, challenge and correct certain key conclusions in the FR which rely heavily on third-party evidence from competitors and customers.
- 4.3 By way of example, the FR concludes that Non-Retail suppliers would find it *'difficult and unattractive'* to adapt their platform solution to enable them to compete for Retail platforms (FR, para. 6.52, Summary, para. 22). As a result, *'based on third-party evidence and lack of evidence from the parties'*, the FR concluded that it was unlikely that the suppliers of Non-Retail Platforms Solutions would be *'willing and able'* to adapt their products *'to compete with Retail Platforms in the event that prices of Retail Platform Solutions increased by a small but significant extent'* (FR, para 6.54).
- 4.4 FNZ has reviewed the questionnaires carefully. However, without the competitor, customer and consultant evidence (whether in response to the questionnaires or otherwise) regarding the alleged inability or incentive to adapt, FNZ's ability to respond, challenge or correct is severely impaired. Based on what can be gleaned from the disclosed questionnaires and the limited evidence left un-redacted in the FR, the CMA does not have a reasonable evidence base for the proposition that Borderline or Non-Retail platforms would find it *'difficult or unattractive'* to adapt their offering to compete for

<sup>25</sup> The dataset used for the analysis does not include Non-Retail platforms, which is why they are not shown in the table.

Retail platforms in response to a relevant market signal (i.e. a small but significant increase in prices for Retail platform solutions).

- (i) The questionnaires – to which the CMA accords such significant evidentiary value – do not mention Borderline platforms at all; they cover only Retail and Non-Retail platforms.
- (ii) Whilst the questionnaires did ask how easy it would be for Non-Retail platform solution providers to adapt their solutions to enable them to compete for Retail platforms, they did not ask whether Non-Retail platform solution providers would adapt in the event of a price signal.
- (iii) The vague and changing definitions of ‘Retail’ used at various stages in its inquiry are likely to have resulted in questions being answered on different bases at different times. For example, as explained above, when platform solution providers were asked how easy it would be to compete for Retail platforms (in a questionnaire in May 2020) they were told that Retail platforms *‘are particularly focused on [...] the provision of a wide range of tax wrappers integrated into the platform (on-platform tax wrappers), often for pension administration (On-Platform Pension Wrappers).’* However, whether tax wrappers are available on- or off-platform is not mentioned as a relevant distinction in the FR.

This change in definition makes it necessary for the CMA to disclose the underlying evidence as to why competitors consider they may find it *‘difficult and unattractive’* to supply Retail platforms in order for FNZ to understand the case against it as regards supply-side substitutability. By way of example, FNZ considers that suppliers such as Avaloq and Temenos are capable of competing for and winning Retail tenders and believes that Temenos supplies [REDACTED] (a Retail platform). The CMA appears to have received inconsistent evidence on this point: *‘Another consultant said that Avaloq and Temenos were good examples of firms that are likely to increase their focus and presence in Retail Platforms. However, Avaloq and Temenos told us that [REDACTED]’* (FR, para. 6.50(b)). This discrepancy suggests that consultants and competitors may not share a common understanding of what functionalities are required by Retail Platforms. Again, [REDACTED].

- 4.5 FNZ has submitted extensive evidence which shows that Borderline and Non-Retail platforms have the same functionality as Retail platforms, and that their solutions providers must therefore be able to supply Retail platforms. By way of example, see section 3 above as regards Brewin Dolphin, a Borderline platform which includes Retail functionality. Brewin Dolphin is supplied by Avaloq. The key pillars of the CMA’s ‘Retail’ definition all exist in Brewin Dolphin’s offering, evidencing Avaloq’s ability to supply such solutions. This includes supplying ‘mass-affluent’ investors, offering a financial planning service, and the necessary scalability.<sup>26</sup> This evidence is [REDACTED] by the CMA datasets that have been disclosed. For example, the CMA’s updated tender analysis shows that the parties have faced [REDACTED] rivals at the RFI stage in Retail and Borderline tenders. Given

<sup>26</sup> See further page 16 of Annex 1 to the Initial Remittal Submission which sets out key requirements from Brewin Dolphin’s tender documents [REDACTED] which state that: [REDACTED].

this [redacted] of suppliers, it seems highly likely that at least a proportion of these suppliers have the ability and incentive to adapt their capabilities (to extent they do not already have such capabilities), to respond to a small but significant change in price.

- 4.6 FNZ and its advisers are not currently in a position to understand how such robust evidence can be disregarded in favour of apparently inconsistent responses to flawed questionnaires – and therefore what more could be provided to support its position.

## 5. Shares of supply

- 5.1 The FR suggests that the Transaction is a ‘3-to-2’.<sup>27</sup> Even leaving aside the correct counterfactual (against which there is no reduction in competitors at all), this view is [redacted] by the CMA’s own share of supply data, which show that post-merger [redacted] in the (artificially narrow) Retail segment.<sup>28</sup>

### ***CMA datasets substantiate that the Transaction [redacted]***

- 5.2 In contrast to the shares of supply presented in the FR (Table 8.1), Table 1 in the updated Appendix I<sup>29</sup> (which is based on the CMA’s disclosed share of supply data) clearly shows that there are [redacted]. This suggests that post-Transaction there will remain at least [redacted] in the narrow Retail segment. Put simply, the Transaction cannot be characterised as giving rise to a ‘3-to-2’ merger.<sup>30</sup>
- 5.3 In addition, as demonstrated in Section 3 above, a wealth of hard evidence shows that Borderline and Non-Retail platform solutions providers can credibly supply Retail platforms. Therefore, on a conservative basis, the competitive assessment must include, at the very least, Borderline platforms.
- 5.4 When the shares of supply analysis includes both Retail and Borderline platforms, [redacted] are added to the mix. Table 2 in the updated Appendix I shows that, in addition to parties that appear in the shares of supply for Retail platforms, [redacted].

## 6. Tender analysis

### ***No basis for finding that FNZ/JHC and GBST are close competitors***

- 6.1 The CMA’s updated tender dataset [redacted] any finding of close competition between FNZ/JHC and GBST (see Annex 1 for more details).

<sup>27</sup> Para. 8.186 of the FR states that ‘FNZ and GBST compete closely with each other, alongside close competition from one other competitor, Bravura’.

<sup>28</sup> [redacted], disclosed on 24 February 2021.

<sup>29</sup> [redacted], disclosed on 24 February 2021.

<sup>30</sup> As noted below, there is strong differentiation between PaaS and SO delivery models. Once shares of supply properly reflect the distinction between delivery models, it is evident that there is [redacted] in respect of the supply of PaaS solutions to Retail platforms, and [redacted] in the supply of SO solutions to Retail platforms. See Slide 5 of the FNZ oral representation closed door presentation.

- (i) The Parties [§<]. As the tender dataset has been expanded to cover the period to February 2021, this means that the Parties [§<].
  - (ii) PaaS and software-only (**SO**) delivery models are highly differentiated. The Summary does not discuss whether PaaS and SO delivery models compete closely against each other. This is an omission. The updated tender dataset shows that in over [§<]% of Retail (as well as Retail and Borderline) tenders, platforms specify whether they want a PaaS or SO delivery model at the outset. This suggests that FNZ (whose primary delivery model is PaaS) and GBST (a SO provider) [§<].
  - (iii) Whilst the RFI stage is not relevant for the purposes of assessing whether the Parties are close competitors, any assessment of the RFI stage must take into account [§<].
- 6.2 It is striking that, despite the existence of this hard data, the FR places significant weight on customer (and competitor and consultant) responses to a question asking whether they regarded various competitor solution providers as close alternatives to FNZ and GBST. The basis for this approach is Question 10 of the initial customer questionnaire (a similar question was posed to competitors and consultants). Here, customers were asked to assign a closeness score – between 1 and 5 – to each of eight named competitors as well as being invited to add additional names. The meaning of these scores is as follows: 1 = not at all a close alternative, 2 = a somewhat close alternative, 3 = a moderately close alternative, 4 = a close alternative, and 5 = a very close alternative.
- 6.3 Such subjective rankings, which are disconnected from a standard measure of competitive interaction (such as a tender), and do not take into account how rankings would change in the event that one or more solutions providers increased the price (or reduced the quality of) their offer, can function as a very blunt instrument at best. It would be irrational to accord them more weight than the tender data, which shows clearly that the Parties are not close competitors.

***The Parties operate in a highly crowded, competitive environment***

- 6.4 A combined analysis of the shares of supply and tender data demonstrates that a [§<] number of suppliers can credibly supply Retail platforms. This is shown in Figure 3.1 above, where a total of around [§<] competitors (excluding the Parties and in-house) have reached the late stage of a Retail or Borderline tender and/or supply a Retail or Borderline platform. Notably, in addition to the suppliers already identified in the CMA's shares of supply data, namely [§<], other providers which can credibly supply Retail platforms include [§<].

6.5 The Parties faced [redacted] rivals at the RFI stage in Retail and Borderline tenders, [redacted]. Even if [redacted] rivals made it through to the late stages of a Retail or Borderline contract, that would [redacted].<sup>31</sup>

---

<sup>31</sup> The Parties faced a total of [redacted] rivals at the RFI stage of a Retail or Borderline tender in the CMA's tender dataset. [redacted] of these currently credibly supply Retail platforms and are shown in Figure 3.1 above. Of the [redacted] rivals which have not yet been found to credibly supply Retail platforms, [redacted].