

Notice of intention to accept
commitments offered by
Education Software Services Ltd
in relation to the supply of management
information system software to schools

Case number 51140

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1. Introduction

- 1.1 On 26 April 2022, the Competition and Markets Authority (the '**CMA**') opened an investigation under the Competition Act 1998 (the '**Act**'), into whether Education Software Solutions Limited and its parent company ParentPay (Holdings) Limited ('**PPH**') (together '**ESS**') have infringed the prohibition in section 18 of the Act (the '**Chapter II prohibition**'), in relation to the supply of management information system ('**MIS**') software to schools (the '**Investigation**').
- 1.2 On 14 November 2022, ESS offered commitments to the CMA aimed at addressing the CMA's competition concerns arising from the conduct being investigated (the '**Proposed Commitments**'). Specifically, the Proposed Commitments offered by ESS seek to address the CMA's competition concerns in relation to ESS effectively moving schools in England and Wales from one-year to three-year contracts, with limited opportunity (in particular in the way in which these contract changes were implemented and the timeframes given) to avoid those contracts (the '**Conduct**').
- 1.3 In summary, the Proposed Commitments would give schools the opportunity to apply to an independent adjudicator for a further 12-month break clause, if they had considered switching MIS supplier at the time of the move to ESS' three-year contract but concluded that they would not be able to switch within the timescales set by ESS. The adjudicator would inform schools of the outcome of their application by 31 March 2023. This would give those schools the option to terminate their new three-year contract with ESS (and switch MIS supplier) on 31 March 2024, ie a year before the end of the new three-year contract. The Proposed Commitments are described in Section 5 below and the text of the Proposed Commitments is set out at Annex 1.
- 1.4 The CMA hereby gives notice¹ that it proposes to accept the Proposed Commitments. Formal acceptance of the commitments by the CMA would result in the termination of the Investigation, with no decision made as to whether or not the Act has been infringed by ESS. The offer of commitments does not constitute an admission of any infringement by ESS.
- 1.5 The CMA invites interested third parties to make representations on the Proposed Commitments, which it will consider before making a final decision on whether to accept the Proposed Commitments. The closing date for representations is **5.00pm on 8 December 2022**.

¹ Pursuant to paragraph 2 of Schedule 6A to the Act.

1.6 Acceptance of the Proposed Commitments would not prevent the CMA from taking any action in relation to competition concerns which are not addressed by the Proposed Commitments. Moreover, acceptance of the Proposed Commitments would not prevent the CMA from continuing the Investigation, making an infringement decision, or giving a direction in circumstances where the CMA had reasonable grounds for:

- believing that there had been a material change of circumstances since the commitments were accepted;
- suspecting that a person had failed to adhere to one or more of the terms of the commitments; or
- suspecting that information which led the CMA to accept the commitments was incomplete, false or misleading in a material particular.²

1.7 To assist third parties in responding to this consultation, this notice provides:

- information on the Investigation and ESS (Section 2);
- background, including the relevant market context and ESS' Conduct in the relevant market(s) (Section 3); and
- a summary of the CMA's competition concerns (Section 4).

1.8 The notice then summarises:

- the Proposed Commitments and why the CMA provisionally considers that they address the CMA's competition concerns (Section 5); and
- details of the CMA's intentions and how to provide comments in response to this notice (Section 6).

1.9 The notice attaches the text of the Proposed Commitments (Annex 1), which includes the following three appendices:

- the text of the offers made by ESS to some of its customers in July 2022 (Appendix 1);
- guidance regarding the handling of Restricted Information (Appendix 2);
- guidance on how to apply for a break clause under the Proposed Commitments (Appendix 3A); and

² Pursuant to section 31B of the Act.

- a draft form for customers to complete in order to apply for a break clause under the Proposed Commitments (Appendix 3B).

2. The CMA's investigation

The Investigation

- 2.1 The Investigation was instigated following concerns raised by a number of stakeholders including schools, local authorities ('**LAs**'), and competitors.
- 2.2 On 26 April 2022, the CMA opened a formal investigation under the Act, having determined that it had reasonable grounds for suspecting that:
- a. ESS holds a dominant position in relation to the supply of MIS software to schools in England and in Wales; and
 - b. ESS' Conduct constitutes an abuse of its dominant position contrary to the Chapter II prohibition, which may lead to anti-competitive foreclosure and/or the imposition of unfair terms and trading conditions.³
- 2.3 In the course of the Investigation, the CMA took steps to gather evidence from ESS and third parties. These steps included: issuing formal notices to ESS requiring documents and information under sections 26 and 27 of the Act; sending information requests to the Department for Education ('**DfE**'), the Welsh Government, the Welsh Local Government Association, and relevant contacts in Northern Ireland and Scotland, LAs, schools and competitors; as well as the use of CMA questionnaires to obtain information from schools in England and schools and LAs in Wales. The CMA also obtained further information from certain third parties through calls and voluntary written submissions.⁴
- 2.4 Prior to receiving an offer of commitments from ESS, the CMA had been considering whether to give interim measures directions to ESS under section 35 of the Act pending the outcome of the Investigation. If, following the current consultation, the CMA decides to accept commitments, the CMA will not make a decision on whether to give any interim measures directions in relation to the Conduct.⁵

³ The Investigation initially related also to ESS' pricing of its MIS software ('**SIMS**') and its Financial Management System software when sold together, in a way that makes the combined price considerably cheaper than if each is purchased separately. On 27 October 2022, the CMA closed this separate limb of the Investigation on administrative priority grounds.

⁴ This included submissions from competitors, schools and LAs.

⁵ Consistent with section 31B(2) of the Act.

The commitments offer

- 2.5 ESS indicated an intention to offer commitments, without prejudice to its position that it has not infringed the Act, to address the CMA's competition concerns. Accordingly, and in line with paragraph 10.22 of the CMA's *Guidance on its investigation procedures under the Act* (the '**Procedural Guidance**'),⁶ the CMA proceeded to discuss with ESS the scope of any commitments which the CMA considered would be necessary to address the concerns it had identified.
- 2.6 Section 31A of the Act provides that, for the purposes of addressing the competition concerns it has identified, the CMA may accept, from such person or persons concerned as it considers appropriate, commitments to take such action (or refrain from such action) as it considers appropriate. The Procedural Guidance describes the circumstances in which the CMA is likely to consider it appropriate to accept binding commitments and the process by which parties to an investigation may offer commitments to the CMA.⁷
- 2.7 In accordance with paragraph 10.21 of the Procedural Guidance, a business under investigation may offer commitments at any time during the course of an investigation until a decision on infringement is made. In this case, no such decision has been made.
- 2.8 The Proposed Commitments being offered to the CMA by ESS are set out in Annex 1 to this notice. The offering of commitments does not constitute an admission by ESS of an infringement of the Chapter II prohibition.
- 2.9 Having considered the Proposed Commitments, the CMA is of the provisional view that these address its competition concerns for the reasons set out in this notice, and that it is appropriate for the CMA to close the Investigation by way of a formal decision accepting the Proposed Commitments. Formal acceptance of Proposed Commitments would result in the CMA terminating the Investigation, and not proceeding to a decision on whether the Chapter II prohibition has been infringed.

The party and product under investigation

- 2.10 ESS is active in the supply of (amongst other things) education software solutions to schools in the UK, including a management information system (MIS) software product known as SIMS, which is the focus of the Investigation. MIS software is used by a school to collect and maintain a

⁶ [Guidance on the CMA's investigation procedures in Competition Act 1998 cases \(CMA8, December 2021\)](#).

⁷ [Procedural Guidance](#), paragraphs 10.15–10.25.

database of student information (eg attendance records or assessment results) and staff information. MIS software has two main functions.

- a. It makes the running and administration of a school more efficient, for instance by supporting registration and the management of pupil attendance, assessments, admissions, special educational needs, timetabling, parental messaging, etc.⁸
- b. It supports school data collection and transfer. All state-funded schools in England and Wales are required to provide information, periodic school censuses and attendance data to their LA and/or DfE or the Welsh Government (as appropriate). The data required and the form in which it is to be provided frequently change.

2.11 Education Software Solutions Limited is a subsidiary of PPH. Since August 2021, Montagu Private Equity LLP has owned an indirect minority interest in Education Software Solutions Limited through its shareholdings in PPH and ParentPay Newco Limited. Before 2021, ESS was owned by the Capita plc.

⁸ Data stored in a MIS is used in a wide range of complementary software. Complementary software 'reads' the data held in the MIS in order to perform additional tasks the MIS cannot do. For example, pupil attendance and assessment data, combined with parent contact details stored in a MIS may be used by a messaging service provider to send messages to parents about the performance of their child at school. The complementary software may also 'write' back data into the MIS, for example email responses from parents. See [CMA's decision dated 12 July 2021 in the Montagu/ParentPay merger](#), paragraph 54.

3. Background

3.1 This section sets out the CMA's preliminary view of:

- the definitions of the relevant market(s) for the supply of MIS software in the UK;
- ESS' position in the relevant market(s); and
- ESS' conduct in the relevant market(s).

3.2 The purpose of this section is to provide context for Section 4, which describes the CMA's competition concerns.

The relevant market(s)

3.3 The focal product is the supply of MIS software (see description at paragraph 2.10 above).

3.4 As part of the Investigation, the CMA has found that different arrangements for purchasing MIS software operate in each of the UK nations, leading to different demand and supply conditions in each of the UK nations.⁹

3.5 The CMA's preliminary view is that the relevant customer market may be restricted to all state-funded schools or it may also encompass independent schools. However, it has not been necessary to conclude on this point because the CMA has reasonable grounds to suspect dominance on either basis.

3.6 The Investigation has focused on the following candidate markets:

- a. the supply of MIS software to state-funded schools in England; and
- b. the supply of MIS software to state-funded schools in Wales.

ESS' position in the relevant market(s)

3.7 Whilst ESS' market share in England has declined slightly over the last three years, as of October 2021 (around the start of the Conduct), ESS had a market share of 68% for the supply of MIS software to state-funded schools in England.¹⁰ ESS' key competitors in England include Arbor (whose group also now includes ScholarPack), Bromcom and RM Integris. As of October 2021,

⁹ The CMA's preliminary view is that the Conduct does not impact schools in Northern Ireland and Scotland.

¹⁰ Based on DfE census data (Autumn 2021).

each of these suppliers had a share of less than approximately 10% for the supply of MIS software to state-funded schools in England, although Arbor and ScholarPack's combined market share was approximately 15%.¹¹ As of May 2022, ESS' market share had fallen to approximately 61%.¹²

- 3.8 As of February 2022, ESS has held a share of 82% for the supply of MIS software to state-funded schools in Wales.¹³ This share has been stable and extremely high over time. The only other supplier in Wales is Ceredigion Teacher Centre, which has been developed by Ceredigion's LA.
- 3.9 The CMA's preliminary view is that these shares of supply alone materially exceed the threshold under the case law such that there is a rebuttable presumption that ESS holds a dominant position in both England and Wales.¹⁴ The CMA is also of the preliminary view (based on submissions from customers, competing MIS suppliers as well as market reports) that there are material barriers to entry and expansion and that there is very limited, if any, potential for countervailing buyer power from schools.¹⁵

ESS' Conduct in the relevant market(s)

- 3.10 In early November 2021, ESS told its SIMS customers on one-year annual entitlement contracts of its decision to change the duration of these contracts to three years from 1 April 2022 ('**New Contracts**').¹⁶ Customers were reminded that they had until 31 December 2021 to inform ESS whether they wanted to cancel their contract, thus giving them about two months to decide whether to give notice to ESS (from the time ESS informed them of the New Contracts). On 7 December 2021, ESS emailed schools with which it had direct contracts asking schools to inform ESS if they wished not to renew by 31 December 2021, adding '*but you do not have to. You can renew at any point up to or including 31 March 2022 or indeed any point thereafter. It is up to you.*' From 7 December 2021, customers would have had around 4 months (until 31 March 2022) to decide whether to sign up to a New Contract with ESS or to switch to another MIS supplier, in order to have a MIS in place by 1 April 2022.

¹¹ Based on DfE census data (Autumn 2021). Based on DfE census data for May 2022, the market shares of RM Integris and Bromcom remained below 10%, and Arbor had a market share of over 13% (and Arbor and ScholarPack's combined market share was approximately 21%).

¹² Based on DfE census data (Summer 2022).

¹³ Based on provisional census data for Wales.

¹⁴ Judgment in *Akzo v Commission* C-62/86, EU:C:1991:286, paragraph 60.

¹⁵ In particular, the fact that the Conduct was implemented unilaterally (without margin for schools or LAs to negotiate) suggests that there is not sufficient countervailing buyer power to offset ESS' market power.

¹⁶ ESS sent communications to schools with which it had direct contracts and LAs (who were contracting on behalf of LA-maintained schools).

- 3.11 In January 2022, ESS notified schools and LAs of the opportunity to apply for a six-month break clause (the '**Original Break-Clause**').¹⁷ If they met the conditions for the Original Break-Clause,¹⁸ customers who had entered into a New Contract (with a three-year duration) with ESS could give notice (by 31 August 2022) to terminate that New Contract. If they gave notice, the New Contract would end on 30 September 2022.
- 3.12 One of the conditions to be granted an Original Break-Clause was to send an email to ESS by 20 February 2022 to apply for such a clause. Customers received an immediate automated response, which stated: '*subject to you providing the required information: a) school name, b) school postcode, c) quote number and d) DfE number to this inbox from the email address that our correspondence was sent to and signing your new three-year agreement via the ESS Gateway or Portal on or before 20th February 2022, then you will have the right to terminate your new agreement on 30th September 2022, by issuing notice of termination on or before 31st August 2022. Where you have validly requested a break clause, in early April 2022 we will contact you with details of how to invoke your right for your agreement to terminate on 30th September 2022.*' Customers did not receive a further email from ESS to confirm that they had complied with all the conditions and that they were successful in getting an Original Break-Clause.
- 3.13 On 30 March 2022, ESS contacted the schools that had complied with the application process for an Original Break-Clause to provide brief details on the process for exercising the Original Break-Clause. From the time they received the email with further details on the process for exercising the Original Break-Clause, customers wishing to switch MIS software supplier had approximately five months to give notice to ESS (from 30 March 2022 to 31 August 2022) and another month before the New Contract with ESS would end (by 30 September 2022). Customers that started the process for switching before receiving further details on how to exercise the Original Break-Clause would have had longer.

¹⁷ Several ESS-supplied schools in England and Wales (and LAs in Wales) that responded to the CMA's June 2022 and July 2022 questionnaires stated that they were not offered the six-month Original Break-Clause. This point is disputed by ESS.

¹⁸ The six-month Original Break-Clause would take effect (ie the New Contract with ESS would terminate) on 30 September 2022 if the following conditions were met. Schools had to: (i) accept the New Contract (of a three-year duration) on or by 20 February 2022; (ii) send an email request for the Original Break-Clause by 20 February 2022; and (iii) if customers were successful in applying for the Original Break-Clause, exercise the Original Break-Clause by providing notice to ESS on or by 31 August 2022.

- 3.14 In July 2022, ESS published additional offers on its website (**'July Offers'**).¹⁹ These offers were made to three distinct groups of customers, with each group receiving specific offer(s) applicable to that group.
- a. **'Group 1 Offer'**: This consisted of three extension offers of up to 6 months made to SIMS customers that validly applied for an Original Break-Clause and had exercised their Original Break-Clause (or, at the time they accepted the Group 1 Offer, intended to do so by 31 August 2022), having contracted to switch to an alternative supplier on or before 30 September 2022, but who for reasons outside of their control required more time to complete their switch.
 - b. **'Group 2 Offer'**: This consisted of a 12-month break clause offer made to SIMS customers that could provide objective evidence that they had a clear intention to switch to an alternative MIS when the Original Break-Clause offer was made, but who were able to demonstrate they did not apply for the Original Break-Clause offer because they reasonably concluded before 20 February 2022 (the deadline to apply for an Original Break-Clause) that they would be unable to switch to an alternative MIS by 30 September 2022 for reasons outside of their control.
 - c. **'Group 3 Offer'**: This consisted of a 9-month break clause offer made to SIMS customers who accepted a New Contract on or before 31 March 2022 and applied for the Original Break-Clause but whose application was refused by ESS because they either: (i) failed to submit their application by the Original Break-Clause application deadline (20 February 2022); or (ii) they failed to accept their 3-year New Contract by the same deadline.

¹⁹ See Appendix 1 to the Proposed Commitments (within Annex 1 to this notice).

4. The CMA's competition concerns regarding ESS' conduct on the relevant markets

- 4.1 This section summarises the CMA's competition concerns in relation to the Conduct.
- 4.2 The CMA first describes the customers' process for switching MIS software (by way of background), before summarising its preliminary view on anti-competitive foreclosure and the imposition of unfair terms and conditions.

Customers' process for switching MIS software

- 4.3 Based on its investigation to date, including submissions from ESS, other MIS suppliers, schools and LAs, the CMA understands there are broadly four stages in the MIS switching process: (1) deciding and planning to procure; (2) preparation to procure; (3) procurement; and (4) implementation. Schools may choose to carry out some of these steps at differing stages of the switching process depending on the circumstances and to allow robust, informed decisions to be made.
 - a. For the first stage, the decision whether to procure, and the planning for that, involves a school getting agreement to look at alternative providers from school staff (as this will involve cost and resource, including frontline teaching staff, to implement) as well as the school governing body. It also involves schools carrying out internal research on their requirements and a review of current systems, as well as considering schools and LA procurement policies and public contract regulations. It may also involve doing market research on providers.
 - b. For the second stage, preparation to procure, the CMA understands that this involves schools researching the available options, which could include contacting providers (potentially getting product demonstrations and initial quotes), visiting trade fairs and/or consulting with other schools to consider their options before switching. A further step at this stage may also include the time and resource to consider schools and LA procurement policies, as applicable, and prepare to carry out a formal procurement process in line with legal requirements or a school's own internal processes (and there are approved procurement frameworks which can be used for this). Schools may need to consider if they need specialist resource to facilitate or manage this process in addition to school resources. Where LAs procure MIS software on behalf of schools they may be required to go out for tender if the value of the contract they are seeking to award exceeds certain limits or if the contract cannot be

awarded through a procurement framework. For example, LAs told the CMA that they may be required to go out to tender for contracts over £25,000. In addition, individual academies may also have internal tender requirements for contracts over a certain amount.

- c. For the third stage, the procurement process can be sub-divided into publication, evaluation and award of the contract. A further element of the evaluation stage can involve product demonstrations and testing the MIS software. Schools would also need to obtain internal approval for the awarding of the contract from trustees or governors of the school.
- d. The fourth stage, implementation, involves the migration of the school's existing MIS data to the new MIS system, training staff in the use of the new software and going live.

4.4 Evidence received by the CMA suggests that the time required to switch varies between customers. This may depend on the type (e.g. primary/secondary) and size of the school(s) – for example, larger schools or those with more complex needs may require longer for the switching process – as well as available resource and experience of the staff in relation to this process and any budgetary constraints. For instance:

- a. Evidence the CMA received from schools and LAs indicated that the process of planned switching involves considerable research and planning, which can span the year, involving staff engagement and resource throughout. Customers also stated that, given the importance of MIS software for a school, this research and preparation was essential to ensure a properly functioning system that integrated with LA systems;
- b. testing the MIS software can take months depending on the number of schools involved as part of the same procurement process.
- c. the timing of internal approval for the various stages of the procurement process including awarding of the contract is dependent on the frequency of board of governors/trustees meetings;
- d. the time and resource needed to prepare to carry out a procurement process depend on whether a formal procurement process is necessary in line with legal requirements or a school's own internal processes and whether they need specialist resource to facilitate and/or manage this process; and
- e. the timing of the implementation and migration to the new MIS software is crucial and must be planned for so that it takes place at a time when staff resources are available and there is a minimal risk of disruption to

the operations of the schools in case any problems occur. Contingency planning is also important to mitigate this risk as well as time for staff training to ensure familiarity with the system changes.

Competition concerns identified by the CMA

- 4.5 The CMA refers to the Conduct described at paragraphs 3.10 to 3.14 above. The CMA is concerned that schools were effectively moved onto a New Contract that prevents switching for three years, when previously switching was possible annually, with ESS giving schools limited opportunity to avoid those New Contracts, for example by switching to alternative suppliers.
- 4.6 It is the CMA's preliminary view that the Conduct constituted the imposition of unfair terms and trading conditions and that the Conduct may restrict competition by foreclosing the market to competitors and new entrants on the market (including by limiting their ability and incentive to grow).
- 4.7 ESS did not consult schools on the changes to the New Contracts, which it made unilaterally. ESS gave schools limited advance notice of these changes and schools said they found ESS' initial communications inconsistent and confusing. The Conduct was also implemented alongside other material changes to the way in which ESS contracted with LA-maintained schools,²⁰ such that the burden on schools in terms of their decision-making process was increased (in particular taking account of the timeframes they had to decide, plan and implement any switch).
- 4.8 Schools may have found it particularly challenging to switch within the timescales set by ESS given that the schools affected by the Conduct were resource and time constrained, especially in the post-COVID-19 pandemic recovery period and the reintroduction of national school tests in the 2022 summer term.²¹
- 4.9 A significant proportion of ESS' customers in England and Wales that replied to the CMA's June 2022 and July 2022 questionnaires told the CMA that they were unable to switch MIS software supplier either before the start of the three-year New Contract with ESS (on 1 April 2022) or by acting upon ESS' six-month Original Break-Clause offer. Notably, a significant proportion of respondents stated that they required ten or more months to switch MIS

²⁰ In particular, using direct contracts where schools had previously contracted through LAs and use of a portal to communicate with schools.

²¹ Resourcing and experience limitations also likely put them at a disadvantage relative to ESS, especially for those schools that were contracting directly with ESS for the first time after having previously relied on their LA to procure SIMS for them.

software provider, which is longer than the timescales which schools were given by ESS in relation to the Conduct (see paragraph 3.10 above).

- 4.10 In addition to responses to the CMA's questionnaires, evidence received from schools and LAs indicated that some schools that had opted for the six-month Original Break-Clause did not on reflection consider a switch was feasible by 30 September 2022. This was due to a number of reasons, including (in isolation or in combination) September being one of the busiest times of year for schools, the lack of time for training and overall lack of resources to change MIS software provider, the demands placed on schools due to COVID-19 and post-COVID-19 recovery over that six-month period and the reintroduction of national school tests in the 2022 summer term.
- 4.11 The CMA notes that, according to figures from ESS, [2,000-3,000] schools did manage to switch from ESS to alternative MIS software suppliers between October 2021 and the end of September 2022.²² However, the CMA has not been able to estimate how many of these had planned to switch prior to ESS announcing changes in contract duration.²³ Whilst the CMA acknowledges the increase in switching which may be in response to the Conduct, it does not remove the possibility that there might be schools that wanted to switch, but that were not able to for reasons mentioned above.
- 4.12 ESS made further offers to customers in July 2022 (see paragraph 3.14 above). However, the 'Group 2 Offer' to customers excluded schools that were granted an Original Break-Clause but subsequently considered that they did not have sufficient time to switch. It also included conditions²⁴ which would limit the number of schools that could benefit from the offer, gave ultimate discretion to ESS which risked limiting schools' options in practice, and would have made it burdensome for customers to apply. Therefore, the CMA considered that these own-initiative steps (taken by ESS) did not adequately address the CMA's competition concerns, because many schools had no option but to remain on the New Contract (which is for three years) until 31 March 2025.

²² The CMA cannot independently verify ESS' switching figure of [2,000-3,000] for the period October 2021 to September 2022 as the Autumn 2022 DfE census data has not been published yet and equivalent data for Wales does not appear to exist for this timeframe. The latest publicly available census data (May 2022), shows that 1,686 schools had switched from ESS to alternative MIS software suppliers between October 2021 and May 2022 in England.

²³ In the three years prior to this, ESS' annual loss rate was 733 schools and [§].

²⁴ In particular, the customer was required to provide 'objective evidence that at the time ESS made its six-month Original Break-Clause Offer, it had a clear intention to switch to an alternate supplier; and did not apply for the Original Break-Clause because it reasonably concluded that it would be unable to switch to an alternative supplier in the time available for reasons outside its control.' The detail of the offer was set out at <https://www.ess-sims.co.uk/breakclauseoffer>; for the text of the offer, see Appendix 1 to the Proposed Commitments (within Annex 1 to this notice).

- 4.13 As a consequence of ESS' market power and the extent of the conduct relative to its customer-base, a significant portion of the market ([50-60]% of state-funded schools in England and [70-80]% of state-funded schools in Wales) is subject to the Conduct. Thus, a large proportion of the market is potentially affected by the foreclosure resulting from the Conduct.
- 4.14 Due to ESS' significant market share, competitors' main opportunities to win new business arise from customers switching away from ESS. The CMA is of the preliminary view that competitors have been deprived of the chance to win new customers (ie those that might have switched away from ESS had they been able to) for a meaningful period of time, as a result of the Conduct. Therefore, it is the CMA's preliminary view that ESS' main competitors may face reduced customer wins and as a result, it would weaken their ability to meaningfully grow their customer base and could reduce investment in the development of their MIS software over the next three years. The CMA is concerned that this may impede their ability to provide effective competition to ESS in 2025. In addition, new market entrants who could provide further competition in the MIS software market are likely to be disadvantaged by the lack of customers they are able to win from ESS until the three-year term ends. This is, in turn, likely to discourage new entrants to the market and reduce their ability to remain viable competitors in the market that could compete for schools in England and Wales in 2025.
- 4.15 ESS' New Contracts for SIMS generally have the same start date and renewal date for schools using ESS who were moved from one-year contracts on 31 March 2022. This 'lumpiness' of the portion of the market that is contestable at any given time may exacerbate the foreclosure effect.
- 4.16 As set out above, the evidence indicates that many schools considered they had no real choice. They felt compelled to accept ESS' New Contract as the only alternative was to have the contract terminated without an alternative MIS software supplier being in place. This suggests that some schools may have had to continue using software which no longer suited their requirements compared to competing software that they may have been considering switching to within the next three years.
- 4.17 The timing of the Conduct may have exacerbated the negative effects on both schools and competitors because it arises at a point where there may have been a greater degree of switching than previously. Following the COVID-19 pandemic more schools sought cloud-based MIS software. The CMA notes that while ESS has MIS software which it describes as cloud-based, ie 'SIMS Connected' and 'SIMS Hosted', ESS itself described the rationale for its three-year contracts as offering certainty over its customer and revenue base sufficient to allow ESS to invest substantially in developing 'cloud-native'

extensions to the SIMS product ('SIMS Next Generation'). Competitors that offered such alternatives had an opportunity to expand their market share to schools seeking this.

- 4.18 The CMA has not been persuaded of any commensurate benefit of the Conduct for schools based on the evidence reviewed to date.

Objective justification

- 4.19 The CMA's preliminary view is that there is no objective justification for the Conduct. ESS has stated that it sought to guarantee three years of revenues in order to facilitate investment in ESS' product offering. ESS has also asserted that this investment is necessary to compete and meet consumer demand, relative to schools' requirements. However, the CMA has not been persuaded by ESS' explanations as to why this investment required ESS to implement the changes to the New Contracts in the way it did, ie by giving customers a limited opportunity to avoid those changes.
- 4.20 The CMA does not consider that the Conduct was indispensable to ESS' stated goal, or that the claimed benefits outweigh the harm to schools.

5. The CMA's assessment of the Proposed Commitments

- 5.1 In order to address the CMA's competition concerns in relation to the Conduct (as described in Section 4 above), and without prejudice to ESS' position that it has not infringed the Chapter II prohibition, ESS has offered the Proposed Commitments. The Proposed Commitments are set out in Annex 1 of this notice and are summarised from paragraph 5.5 below.
- 5.2 The notice attaches the text of the Proposed Commitments (Annex 1), which includes three appendices:
- the text of the offers made by ESS to some of its customers in July 2022 (Appendix 1);
 - guidance regarding the handling of Restricted Information (Appendix 2);
 - guidance on how to apply for a break clause under the Proposed Commitments (Appendix 3A); and
 - a draft form for customers to complete in order to apply for a break clause under the Proposed Commitments (Appendix 3B).
- 5.3 For the reasons set out in paragraphs 5.5 to 5.41 below, the CMA provisionally considers that its competition concerns are addressed by the Proposed Commitments.
- 5.4 Formal acceptance of commitments would result in the CMA terminating the Investigation, and not proceeding to a decision on whether the Act has been infringed. Accordingly, a decision by the CMA accepting binding commitments will not include any statement as to whether or not the Conduct infringed the Act either prior to the acceptance of the commitments or once the commitments are in place.

The Proposed Commitments

- 5.5 The Proposed Commitments create a new gateway for schools that had previously not been able to exit the 3-year term of the New Contracts but had considered doing so at the time. These schools could be granted the option to terminate the New Contract with ESS on 31 March 2024, by applying to an independent adjudicator for a new 12-month break clause ('**New Break-Clause**'). It would be subject to these schools meeting a number of conditions to demonstrate their eligibility for the New Break-Clause. The New Break-Clause would give schools a further period of 12 months to research and either (i) stay with ESS or (ii) plan and implement a switch to another MIS

software supplier (see paragraphs 4.3 and 4.4 above). The adjudicator would inform schools of the outcome of their applications by 31 March 2023. If switching MIS supplier is a school's preferred option, the New Break-Clause would enable the school to terminate the New Contract on 31 March 2024 by giving ESS written notice between 1 January 2024 and 29 February 2024. It would allow eligible schools to terminate the New Contract a year earlier than the end of the 3-year term.

- 5.6 Appointment of an independent adjudicator: ESS has offered to appoint an independent adjudicator, approved by the CMA, who would decide whether the conditions are met such that the customer should be granted a 12-month New Break-Clause (the '**Adjudicator**'). The Adjudicator would be an individual who is part of (and supported by a team at) a professional services firm and has relevant experience including of CMA processes and handling commercially sensitive information.
- 5.7 Customers within the scope of ESS' offer: applications could be made to the Adjudicator by customers who entered into the New Contract and who consider they meet one of the two conditions set out in paragraph 5.8 below and:
- a. decided not to apply for the Original Break-Clause offer made by ESS to customers in January 2022 (the '**Original Break-Clause Offer**'); or
 - b. validly applied for the Original Break-Clause Offer, but did not subsequently exercise the Original Break-Clause.
- 5.8 Conditions and test to be applied by the Adjudicator: the Adjudicator would consider that the conditions are met where the Adjudicator determines that:
- a. in respect of a customer who did not opt to take up the Original Break-Clause Offer, that the customer, after genuine consideration, reasonably concluded on or before 20 February 2022 that switching to an alternative supplier was not possible by 30 September 2022 and this was the reason why the customer did not opt to take the Original Break-Clause Offer; or
 - b. in respect of a customer whose New Contract included an Original Break-Clause but who did not then exercise the Original Break-Clause, that the customer, after genuine consideration, reasonably concluded in a timely manner that switching to an alternative supplier was not possible by 30 September 2022 and this was the reason why the customer did not exercise the Original Break-Clause.
- 5.9 The Adjudicator would consider that a customer has 'after genuine consideration, reasonably concluded' that switching to an alternative supplier

was not possible by 30 September 2022 where the Adjudicator is satisfied that the customer has shown that it undertook a reasonable degree of diligence in coming to that view. The Adjudicator would make a case-by-case assessment of whether the customer undertook a reasonable degree of diligence, on the basis of the belief and information the customer had at the time. In making this assessment the Adjudicator would take into account (among other things) the various steps in the process of switching MIS supplier (see paragraph 4.3 above), any relevant considerations relating to the time required to switch MIS supplier and the specific circumstances of the customer. Further detail on what information the Adjudicator would take into account would be set out in a briefing agreed between the CMA and ESS for the Adjudicator to apply when considering applications under ESS' Proposed Commitments (**'Adjudicator Briefing'**).²⁵

5.10 The Adjudicator would inform customers of the outcome of their application by 31 March 2023.

5.11 Information to include in applications (overview): customers would submit an application form. A copy of the template form is provided at Appendix 3B to the Proposed Commitments (within Annex 1 to this notice). The application:

- a. would comprise a form which would include details on the customer, the applicant, the internal processes followed by the customer, any customer communications with MIS suppliers other than ESS, and the customer's conclusions as regards switching MIS;²⁶
- b. should include any contemporaneous documentation supporting the application which is reasonably available,²⁷ and if no such documentation is reasonably available may include an explanation of why no such documentation can reasonably be provided;
- c. must in all cases be verified by a statement of truth signed by the person submitting the application, who must have the requisite authority on behalf of the applicant to sign such a statement; and

²⁵ Once it has reviewed responses to the consultation based on this notice, if the CMA accepts the Proposed Commitments, the Adjudicator Briefing would be published by ESS (and possibly by the CMA) alongside ESS' final commitments offer.

²⁶ The application form is currently structured as follows: Section 1 (Customer Details); Section 2 (Applicant Contact Details); Section 3 (Your Internal Processes); Section 4 (Communication with other MIS Suppliers); Section 5 (Your Conclusions); Section 6 (Terms of Submission and Statement of Truth); and Section 7 (Any Optional Request(s) For Redaction).

²⁷ Such documentation could include, for example: internal or external emails; text or WhatsApp messages; electronic diary notes recording a call or meeting; and/or typed or handwritten notes.

- d. could include any optional request(s) for redaction from disclosure to ESS.
- 5.12 ESS to comment on applications: ESS would have the option to comment on appropriately redacted versions of applications made to the Adjudicator. ESS' comments shall be limited to matters which are likely materially to assist the Adjudicator (and in principle should be focused on matters which relate to the education market, education procurement, the law relating to education, ESS, or ESS' relationship with customers) in respect of: (i) briefly referring the Adjudicator to material in ESS' General Submission²⁸ (by way of simple cross-reference) of relevance to any application; (ii) correcting matters in an application which ESS considers to be materially factually inaccurate; (iii) addressing matters in an application which ESS considers to be substantially misleading; and (iv) addressing matters which ESS considers to constitute material omissions of relevant matters in an application.
- 5.13 The Adjudicator would disregard any matter contained within ESS' submission which is solely for the Adjudicator, as the independent decision maker, to determine in relation to the test set out at paragraph 5.8 above.
- 5.14 The Adjudicator would consider whether any commercially sensitive information and certain personal data (**'Restricted Information'**) should be redacted from the applications before disclosure to ESS. Guidance on the type of information that should be redacted and additional safeguards to prevent the disclosure of Restricted Information to ESS is provided at (see Appendix 2 to the Proposed Commitments within Annex 1 to this notice). The final version of the guidance would be set out as an appendix to the commitments offer and to the Adjudicator Briefing. This would include guidance that the Adjudicator would consider the redaction of:
- a. any commercially sensitive information, ie information that is not in the public domain which might significantly harm the legitimate business interests of the undertaking to which it relates, such as information related to ESS' competitors;
 - b. any information related to the private affairs of individuals that may cause harm if disclosed or information that would be against the public interest to disclose; and

²⁸ Separately to the Adjudicator Briefing, ESS would like to provide a general submission (the **'General Submission'**) to the Adjudicator (which would also be made publicly available).

- c. any Special Category Personal Data,²⁹ and any necessary Personal Data,³⁰ in line with the Adjudicator's duties under the Applicable Data Protection Legislation.³¹
- 5.15 Communicating the New Break-Clause offer to ESS' customers: ESS would communicate the New Break-Clause offer to its customers by publishing it on its websites and directly emailing its customers. Customers would be provided with guidance on the process for completing the application (see Appendix 3A to the Proposed Commitments, within Annex 1 to this notice), a template application form (see Appendix 3B to the Proposed Commitments, within Annex 1 to this notice), the text of the commitments offer (see the remainder of Annex 1 to this notice) and the Adjudicator Briefing. The text of the commitments offer (and the Adjudicator Briefing) would also be published on the CMA's website.
- 5.16 Support to the Adjudicator: to support the Adjudicator in considering applications, ESS would: provide the Adjudicator with required information; make itself available for scheduled meetings with the Adjudicator; maintain such resources as are reasonable to fulfil its obligations under the commitments; provide the Adjudicator with such co-operation as may be reasonably required for the performance of its tasks; and ensure payment of the Adjudicator's remuneration.
- 5.17 Honouring offers of July 2022: ESS would honour each successful application for one of the July Offers (see paragraph 3.14 above).³²
- 5.18 Reporting and compliance: The following would assist the CMA to effectively monitor ESS' compliance with the Proposed Commitments.
- a. ESS would: (i) report to the CMA on the number of New Break-Clauses granted to Customers and exercised by them; (ii) notify the CMA (within five working days of becoming aware) of any breaches of the commitments; (iii) take prompt actions to remedy a breach; and (iv) keep, maintain and produce to the CMA any information or document specified by the CMA relating to the operation of the Proposed Commitments.
- b. The Adjudicator would: (i) provide to the CMA (with copies to ESS) regular interim reports and a final consolidated report on the matters to

²⁹ Special Category Personal Data means personal information as identified in Article 9(1) of the UK General Data Protection Regulation.

³⁰ Personal Data has the meaning set out in the Applicable Data Protection Legislation set out under Footnote 31.

³¹ The Applicable Data Protection Legislation is all applicable data protection and privacy legislation in force in the UK, including the Data Protection Act 2018, the UK General Data Protection Regulation and the Privacy and Electronic Communications (EC Directive) Regulations 2003.

³² Details of the July Offers are set out at paragraph 3.14 above.

be set out in the Adjudicator Briefing;³³ (ii) report to the CMA (with a copy to ESS) if the Adjudicator considers that ESS is failing or has failed to comply with any of the Proposed Commitments; and (iii) produce a plan explaining how the Adjudicator would maintain the resources required to fulfil its obligations under the Proposed Commitments, the Mandate and the Adjudicator Briefing. The CMA and ESS may ask the Adjudicator any necessary clarificatory questions regarding its reports, to which the Adjudicator must respond promptly.

- c. Where the CMA has reason to believe that there is any failure by ESS to meet its obligations under the Proposed Commitments, such as concerns raised by the Adjudicator in its reports, the CMA may propose measures that the CMA considers necessary to ensure ESS' compliance.
- d. If ESS has concerns about the operation of the Adjudicator, ESS shall raise these with the CMA and must obtain the CMA's approval before dismissing and replacing the Adjudicator and it may only be for good cause. The CMA may also require ESS to dismiss and replace the Adjudicator if the CMA has reason to conclude that the Adjudicator is not meeting its obligations (for example exposure to a conflict of interest, inability to perform the agreed functions or other good cause). Any substitute Adjudicator nominated by ESS would also only be appointed after the CMA's approval.
- e. The Adjudicator Briefing may be amended by agreement between the CMA and ESS to facilitate the effective operation of the Proposed Commitments.

The CMA's assessment of the appropriateness of this case for commitments

The CMA's Guidance

5.19 Pursuant to section 31A of the Act, for the purposes of addressing the competition concerns it has identified, the CMA may accept from such person

³³ These would include: (i) the number of applications received/acknowledged; (ii) the number of applications accepted/rejected; (iii) updates on the Adjudicator's capacity to deal with applications; and (iv) any concerns on the part of the Adjudicator as to the compliance on the part of ESS. Under the terms of the Adjudicator Briefing, these reports will be weekly (or of an alternative frequency to be agreed between the CMA, ESS and the Adjudicator).

(or persons) as it considers appropriate, commitments to take such action (or refrain from taking such action) as it considers appropriate.

- 5.20 Paragraph 10.18 of the Procedural Guidance states that the CMA is likely to consider it appropriate to accept binding commitments only in cases where: (a) the competition concerns are readily identifiable; (b) the competition concerns are addressed by the commitments offered; and (c) the proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time.
- 5.21 Paragraph 10.20 of the Procedural Guidance states that the CMA will not accept commitments where compliance with such commitments and their effectiveness would be difficult to discern and/or where the CMA considers that not to complete its investigation and make a decision would undermine deterrence.

The CMA's assessment

- 5.22 The CMA has assessed the Proposed Commitments against the criteria referred to in the paragraphs immediately above and sets out its provisional conclusions below.

The competition concerns are readily identifiable

- 5.23 The CMA provisionally considers that the competition concerns with respect to the Conduct are readily identifiable. Those competition concerns are set out in Section 4 of this notice.

The CMA has reached the provisional view that the Proposed Commitments address the competition concerns

- 5.24 The CMA provisionally considers that the Proposed Commitments address the CMA's competition concerns relating to the imposition of unfair terms and conditions and foreclosure (as set out in Section 4 above).
- 5.25 The Proposed Commitments would give schools which, at the time of the move to a New Contract were genuinely considering switching MIS supplier but reasonably concluded that they would not be able to switch within the timescales set by ESS,³⁴ an opportunity to do so; thereby giving these schools an effective choice by enabling them to plan and implement a switch, releasing them from the New Contracts materially early and facilitating competition. Moreover, in giving schools a further period of 12 months to research, plan and implement a switch to another MIS software supplier, the

³⁴ Either by the start of the New Contract on 1 April 2022 or with the six-month Original Break-Clause.

Proposed Commitments are consistent with the evidence identified by the CMA in relation to the time these schools need to switch.

- 5.26 The CMA notes that a period of 12 months to research, plan and implement a switch to another MIS software supplier is longer than the timescales which schools were given by ESS in relation to the Conduct (see from paragraph 3.10 above) and would enable these schools to go through the steps set out at paragraph 4.3 above. Moreover, this additional 12 months would enable these schools (representing a contestable portion of the market) to terminate their contract on 31 March 2024, a year before the end of the three years under the New Contract.

The Proposed Commitments are capable of being implemented effectively and, if necessary, within a short period of time

- 5.27 The Proposed Commitments would be in force between the date on which ESS would receive formal notification of a decision by the CMA under section 31A of the Act to accept commitments (the ‘**Effective Date**’) and the ‘Termination Date’ set out in the Proposed Commitments (which the CMA envisages will be no earlier than 31 March 2024).
- 5.28 ESS has committed to implement the Proposed Commitments by communicating the offer of a 12-month New Break-Clause to customers on 9 January 2023.³⁵ Customers would have the opportunity to make an application to the Adjudicator for a New Break-Clause, giving them the option to terminate their New Contract, from 9 January 2023 until 10 February 2023.³⁶ Customers should be notified whether their application was accepted by no later than 31 March 2023.
- 5.29 In addition, applications will be determined by the independent Adjudicator. Possible candidates for the Adjudicator role have been identified as at the date of this notice. The draft Adjudicator Briefing will be finalised with the Adjudicator before any final decision by the CMA to accept commitments. The draft Mandate will be finalised, again with the Adjudicator, closer to the time of the Adjudicator’s appointment (and in any event, by no later than when adjudication process would start, which the CMA expects to be 9 January 2023).
- 5.30 Schools would be provided with guidance on how to apply for a break clause under the Proposed Commitments (see Appendix 3A to the Proposed

³⁵ 9 January 2023 is a provisional date which depends on the timing of any final CMA decision to accept the Proposed Commitments.

³⁶ These are provisional dates which depend on the timing of any final CMA decision to accept the Proposed Commitments.

Commitments, within Annex 1 to this notice), the template application form (see Appendix 3B to the Proposed Commitments, within Annex 1 to this notice), the text of the commitments and the Adjudicator Briefing (which provides further information about the test, the process and how to complete the application form) on 9 January 2023.

- 5.31 As such, the CMA provisionally considers that the Proposed Commitments are capable of being implemented effectively and within a short period of time.

Compliance with the Proposed Commitments and their effectiveness would not be difficult to discern

- 5.32 In this regard, the CMA considers that the appointment by ESS of an independent adjudicator (following the approval of the CMA) for determining the applications for a 12-month New Break-Clause set out in paragraph 5.6 above will ensure the impartiality and transparency of the process, thereby encouraging relevant customers to apply.
- 5.33 Moreover, the Adjudicator will be provided with a briefing agreed between ESS and the CMA which will set out the test and process to be applied by the Adjudicator when determining applications, and is as such designed to ensure the effectiveness of the Proposed Commitments (see paragraphs 5.8 to 5.16 above for the test and process envisaged).
- 5.34 In addition, ESS will be required to keep, maintain, and produce any information or document specified in writing by the CMA that relate to the operation of the Proposed Commitments which the CMA requires for the purpose of monitoring and reviewing the operation of the Proposed Commitments.
- 5.35 As noted above, the Adjudicator will also be required to: provide the CMA with interim reports and a final consolidated report on the matters to be set out in the Adjudicator Briefing;³⁷ reply promptly to any questions from the CMA or ESS as applicable; and report promptly to the CMA if the Adjudicator considers that ESS is failing or has failed to comply with any of the Proposed Commitments, any relevant provisions of the Mandate and/or with the provisions of the Adjudicator Briefing governing the scope of any ESS submission on any application as part of the process.
- 5.36 The CMA would also expect schools to raise concerns directly with the CMA if there were issues with the process.

³⁷ See footnote 33 above.

- 5.37 Finally, the Proposed Commitments contain specific provisions to ensure that their purpose cannot be frustrated by ESS.
- 5.38 For the reasons set out above, the CMA provisionally considers that ESS' compliance with the Proposed Commitments and their effectiveness will not be difficult to discern.

Acceptance of the Proposed Commitments would not undermine deterrence

- 5.39 The CMA considers that acceptance of the Proposed Commitments would give customers which had been unable to switch in the timescales set by ESS another 12 months to switch (and would thus be contestable). The Adjudicator would inform the customers of the outcome of their applications by 31 March 2023. If successful, these customers would be able to plan and implement a switch by 31 March 2024, at the end of year 2, and therefore a year before the end of their New Contracts.
- 5.40 By accepting the Proposed Commitments early on in the Investigation, the CMA would be able to resolve its competition concerns quickly, providing a better and more immediate outcome for customers and competitors than by pursuing the case to a decision at a later date, by which time it may no longer be possible to rectify any harm to competition arising from the Conduct.
- 5.41 The CMA therefore provisionally considers that acceptance of the Proposed Commitments would not undermine deterrence.
- 5.42 Acceptance of the Proposed Commitments would not preclude the CMA from taking further enforcement action in relation to other suspected breaches of competition law in the relevant markets and/or related markets which raise competition concerns and harm consumers.
- 5.43 Accordingly, the CMA considers that this is an appropriate investigation in which to accept binding commitments and provisionally considers that the Proposed Commitments fully address its competition concerns.

6. The CMA's intentions and invitation to comment

The CMA's intentions

- 6.1 For the reasons set out above, the CMA provisionally considers the Proposed Commitments set out at Annex 1 to this notice to be sufficient to address the competition concerns identified by the CMA. Therefore, the CMA proposes to accept the Proposed Commitments by means of a formal commitments decision.
- 6.2 Pursuant to paragraphs 2 and 8 of Schedule 6A of the Act, the CMA now invites interested third parties to make representations on the Proposed Commitments and will take such representations into account before making a final decision on whether to accept commitments.
- 6.3 The CMA welcomes comments on the Proposed Commitments, including on:
- (a) the eligibility criteria (for example, the test to be applied by the Adjudicator); and
 - (b) any matters that may affect effective implementation (for example, the application form set out at Appendix 3B to the Proposed Commitments, within Annex 1 to this notice).

Invitation to comment

- 6.4 The consultation period is 3 weeks from the date of this notice. Any person wishing to comment on the Proposed Commitments should submit written representations to Louise Banér and Clementine Messent at 51140-consultation@cma.gov.uk by **5.00pm on 8 December 2022**. Please quote the case reference 51140 in all related correspondence.

Confidentiality

- 6.5 The CMA does not intend to publish the responses to the consultation with any commitments decision or notice of its intention to accept any modified commitments. However, the information contained in the responses may be used or summarised on an anonymous basis, including in any commitments decision or notice of its intention to accept any modified commitments.
- 6.6 If the CMA decides not to accept the Proposed Commitments and is considering disclosing the information provided to it in response to this notice, the CMA will revert to the provider of that information to obtain representations on confidentiality. The CMA will then consider those

representations before deciding whether the information should be disclosed under Part 9 of the Enterprise Act 2002.

Annex 1

The Proposed Commitments

Education Software Solutions Limited / ParentPay (Holdings) Limited

Case 51140

Proposed Commitments

(14 November 2022)

1. INTRODUCTION

- 1.1 On 26 April 2022, the CMA commenced an investigation under section 25 of the Competition Act 1998, Case 51140, in relation to the supply of management information system software for schools.
- 1.2 ESS and the ESS Group hereby offer Commitments under section 31A of the Act.
- 1.3 Consistent with sections 31A and 31B of the Act, the Commitments are offered on the basis that if the CMA accepts the Commitments in accordance with section 31A(2) of the Act, it shall not continue the Investigation, make a decision within the meaning of section 31(2) of the Act, or give a direction under section 35 of the Act.
- 1.4 The offer of these Commitments by ESS and the ESS Group does not constitute an admission of any wrongdoing by ESS and nothing in these Commitments may be construed as implying that ESS agrees with any concerns identified by the CMA in its Investigation, including in the Commitments Decision. ESS has not been the subject of any infringement decision or statement of objections in respect of the Investigation.
- 1.5 These Commitments are without prejudice to ESS should any third party commence or conduct proceedings or other legal action against ESS.

2. DEFINITIONS

- 2.1 For the purposes of these Commitments the following definitions apply:

“**Act**” means the Competition Act 1998;

“**Adjudicator**” means the independent decision-maker appointed by ESS on [●] following the approval of the CMA, in accordance with the Mandate;

“**Applicable Data Protection Legislation**” means all applicable data protection and privacy legislation in force in the UK including the Data Protection Act 2018, the UK General Data Protection Regulation and the Privacy and Electronic Communications (EC Directive) Regulations 2003;

“**Application**” means an application made by a Customer to the Adjudicator for a New Break-Clause in respect of their New Contract on or before the Application Deadline;

“**Application Deadline**” means 5.00pm (UK time) on 10 February 2023;

“**Application Form**” means the form for making an Application to be published after the Effective Date, as set out in Appendix 3B of these Commitments;

“**Briefing**” means the briefing to the Adjudicator agreed between the CMA and ESS, which implements these Commitments (as may be amended from time to time by ESS with the agreement of the CMA, to facilitate the effective operation of the Commitments);

“**CMA**” means the Competition and Markets Authority;

“**Commitments**” means these commitments, given by ESS to the CMA pursuant to section 31A of the Act;

“**Commitments Decision**” means a formal decision by the CMA under section 31A of the Act to accept these Commitments, such that section 31B of the Act applies;

“**Core SIMS**” means those ESS’ SIMS MIS modules belonging to the Core SIMS product;

“**Customer**” means an ESS customer with a New Contract who has not successfully taken up a Group 1 Offer, a Group 2 Offer or a Group 3 Offer;

“**Effective Date**” means the date on which ESS receives formal notification of a Commitments Decision;

“**Engagement Letter**” means the letter from ESS to the Adjudicator setting out the terms for the appointment of the Adjudicator dated [●];

“**ESS**” means Education Software Solutions Limited¹ and its parent company, ParentPay (Holdings) Limited²;

“**ESS Group**” means ESS and all direct or indirect subsidiaries of ESS as defined by section 1159 of the Companies Act 2006;

“**General Submission**” means the General Submission provided by ESS to the Adjudicator as referred to in paragraph 3.5(b) below;

“**Group 1 Offer**” means the three extension offers of up to six months to any Customer who had validly exercised the Original Break-Clause and contracted with an alternative supplier, but was unable to switch to their chosen supplier by 30 September 2022. The full Group 1 Offer is set out in Appendix 1 of these Commitments;

“**Group 2 Offer**” means the twelve-month break-clause offer to any Customer who did not opt to take up the Original Break-Clause Offer, where the Customer fulfilled certain eligibility conditions. The full Group 2 Offer is set out in Appendix 1 of these Commitments;

“**Group 3 Offer**” means the nine-month break-clause offer to any Customer who had accepted ESS’ annual entitlement quotation on or before 31 March 2022 and had applied for an Original Break-Clause by that date, but whose application was deemed by ESS to be invalid, due to the Customer not having met the deadline of 20 February 2022 to request the Original Break-Clause and/or accept the quotation. The full Group 3 Offer is set out in Appendix 1 of these Commitments;

“**Investigation**” means the CMA’s investigation under section 25 of the Act, Case 51140, in relation to the supply of management information system software for schools;

¹ Company number 12595779, with registered office at 11 Kingsley Lodge, 13 New Cavendish Street, London, England, W1G 9UG.

² Company number 08212986, with registered office at 11 Kingsley Lodge, 13 New Cavendish Street, London, England, W1G 9UG.

“July Offers” means the offers published by ESS on the Website in July 2022 (the text of which is set out in Appendix 1 of these Commitments), comprising the Group 1 Offer, the Group 2 Offer and the Group 3 Offer;

“Mandate” means the mandate for the Adjudicator dated [●];

“MIS” means management information system;

“New Break-Clause” means an option on the part of the Customer to terminate the New Contract on the New Break-Clause Effective Date, by providing notice to ESS on or between 1 January 2024 and 29 February 2024;

“New Break-Clause Effective Date” means 31 March 2024;

“New Break-Clause Offer” means the offer made by ESS to Customers for Applications to be considered by the Adjudicator, and for a New Break-Clause to be granted by ESS to any Customer whose Application is accepted by the Adjudicator;

“New Contract” means a three-year annual entitlement contract that includes Core SIMS commencing on 1 April 2022;

“Original Break-Clause” means the option to terminate the New Contract after six months (i.e. on 30 September 2022) by providing notice to ESS on or by 31 August 2022;

“Original Break-Clause Offer” means the original offer made by ESS to Customers in January 2022 for an Original Break-Clause to be included in New Contracts;

“Personal Data” means personal information as defined in the Applicable Data Protection Legislation;

“Restricted Information” has the meaning set out in Appendix 2 of these Commitments;

“Special Category Personal Data” means personal information as identified in Article 9(1) of the UK General Data Protection Regulation;

“Termination Date” means 30 June 2024, unless released at an earlier date in accordance with section 31A(4) of the Act because the CMA agrees that the latter of the dates on which (i) all Applications have been determined by the Adjudicator and (ii) all New Break-Clauses have been granted, and either exercised (and ESS has fully discharged all associated actions required as a result of the New Break Clauses having been exercised) or the period for them to be exercised has expired;

“Website” means the website of ESS at <https://www.ess-sims.co.uk/> (at which ESS will publish the text set out in Appendix 3 of these Commitments); and

“Working Day” means any day other than a Saturday, Sunday or any other day that is a public holiday in England.

3. COMMITMENTS ON THE NEW BREAK-CLAUSE

3.1 For the period specified in Section 5 below:

- (a) ESS undertakes to appoint an Adjudicator to carry out the Adjudicator’s functions set out in the Mandate and the Briefing, including the determination of Applications made by Customers;
- (b) ESS undertakes to honour and give effect to a New Break-Clause to any Customer whose Application is accepted by the Adjudicator (including by confirming, within

twenty Working Days of receiving notice from the Adjudicator that a Customer's Application is accepted, the means by which ESS will grant the New Break-Clause), subject to the Applicant complying with the terms of submission set out at paragraphs (f) and (g) in Section 6 of the Application Form;

- (c) ESS undertakes, for any Customer granted a New Break-Clause, to honour the right for the Customer to terminate their New Contract by exercising the New Break-Clause; and
- (d) the ESS Group will not, in any way, circumvent, or otherwise frustrate the operation of, any of the Commitments.

3.2 ESS undertakes to communicate the New Break-Clause Offer to Customers on 9 January 2023, by publishing it on the Website, and directly emailing all Customers with both information on completing the Application and a template Application Form (as set out in Appendix 3 of these Commitments).

3.3 ESS undertakes that the Briefing provided to the Adjudicator will be effective from the date on which it is published on the Website on 9 January 2023, and shall include the following principal elements:

- (a) the test for the determination of Applications by the Adjudicator, which shall be in the following terms:

“The Adjudicator shall accept a Customer's Application where the Adjudicator determines that:

- (i) in respect of a Customer who did not opt to take up the Original Break-Clause Offer, that the Customer, after genuine consideration, reasonably concluded on or before 20 February 2022 that switching to an alternative supplier was not possible by 30 September 2022 and this was the reason why the Customer did not opt to take up the Original Break-Clause Offer; or
- (ii) in respect of a Customer whose New Contract included an Original Break-Clause but who did not then exercise the Original Break-Clause, that the Customer, after genuine consideration, reasonably concluded in a timely manner that switching to an alternative supplier was not possible by 30 September 2022 and this was the reason why the Customer did not exercise the Original Break-Clause.”

- (b) the procedure to be followed by the Adjudicator in assessing the Customer's Application including that:

- (i) the Adjudicator shall acknowledge the Applications emailed to [the relevant Adjudicator email address] by means of automatic message sent on receipt, and in any event as soon as is reasonably practicable following receipt, and may provide the Customer with a claim reference code for the Application;
- (ii) the Adjudicator must as soon as reasonably practicable (and, in principle, within ten Working Days of receipt) provide an appropriately redacted version of the Application to ESS, i.e. with any Restricted Information redacted in accordance with the procedure set out in the Briefing (as outlined in paragraph 3.3(c) below);
- (iii) ESS may at any time prior to the Adjudicator's determination communicate to the Adjudicator that it agrees to the grant of a New Break-Clause without

- the Adjudicator considering further the Customer's Application, in which case the Adjudicator shall automatically determine that the Application is accepted;
- (iv) ESS may, within ten Working Days (or such extended time period, as agreed with the CMA acting reasonably) of receipt of an appropriately redacted version of the Application from the Adjudicator, make a brief submission to the Adjudicator in respect of the Application, in accordance with the procedural provisions in the Briefing (as outlined in paragraph 3.4(a) below);
 - (v) the Adjudicator may make one request to the Customer to provide further information. Where such a request is made, the Customer must respond within three Working Days, failing which the Adjudicator must proceed with its determination absent any response;
 - (vi) the Adjudicator shall use reasonable endeavours to make its determination within ten Working Days of receipt of any submission made by ESS within the period set out in paragraph 3.3(b)(iv) above in respect of the Application, or the elapse of that period if no such submission is made;
 - (vii) the Adjudicator's determination shall be final, and shall be communicated (together with a brief summary of the reasons for any determination rejecting an Application) to the CMA, ESS and the Customer as soon as is reasonably practicable after the Application Deadline and by 31 March 2023 at the latest (subject to any extension agreed in paragraph 3.3(b)(viii) below); and
 - (viii) the Adjudicator may propose, and seek agreement from both the CMA and ESS for, an extension to any time limit applicable to any of the Adjudicator functions set out in the Mandate and the Briefing.
- (c) the procedure to be followed in relation to the redaction of Restricted Information including that:
- (i) the Adjudicator shall have regard to the definition of Restricted Information outlined in Appendix 2 of these Commitments; and
 - (ii) before providing an appropriately redacted version of the Application to ESS, the Adjudicator shall review the Application and redact any Restricted Information which includes removing certain specific sections or text and supporting documents in accordance with the Briefing (and after considering any request made within an Application by the Customer to redact any part(s) of the Application from disclosure to ESS).
- (d) guidance in relation to the form and content of the Application to the Adjudicator, including:
- (i) how the Customer should make the Application to the Adjudicator;
 - (ii) the deadline for the Application;
 - (iii) a list of matters that the Customer may wish to include in the Application to assist the Adjudicator;
 - (iv) that the Application should include copies of contemporaneous documentation, where such documentation is reasonably available, corroborating the matters set out in Sections 3, Section 4 and/or Section 5 of

the Application Form, and if not then the Application may include a statement explaining why no such documentation can reasonably be provided; and

- (v) that the Application must contain a statement of truth in a prescribed form signed by the person submitting the Application, who must have the requisite authority on behalf of the Applicant to sign such a statement.

3.4 In relation to any brief submission which ESS may make to the Adjudicator in respect of the Application under paragraph 3.3(b)(iv) above, ESS acknowledges that:

- (a) any such submission shall be limited to matters which are likely materially to assist the Adjudicator (and in principle should be focused on matters which relate to the education market, education procurement, the law relating to education, ESS, or ESS' relationship with customers), in respect of:
 - (i) briefly referring the Adjudicator to material in the General Submission (by way of cross reference) of relevance to the Application;
 - (ii) correcting matters in the Application which ESS considers to be materially factually inaccurate;
 - (iii) addressing matters in the Application which ESS considers to be substantially misleading; and/or
 - (iv) addressing matters which ESS considers to constitute material omissions of relevant matters in the Application; and
- (b) on receipt of any such submission, the Adjudicator will disregard any matter contained within the submission that the Adjudicator reasonably considers is not within the scope of paragraph 3.4(a) above or which is solely for the Adjudicator, as the independent decision maker, to determine in relation to the test.

3.5 To assist the Adjudicator in the performance of its functions as set out in the Mandate and the Briefing, ESS undertakes to:

- (a) provide to the Adjudicator any information stipulated in the Commitments, the Mandate and/or the Briefing;
- (b) provide to the Adjudicator its written observations which may apply generally to Applications (the "**General Submission**");
- (c) make itself, and its directors, employees, advisers, officers and consultants available at reasonable notice for any scheduled meetings to support the Adjudicator in the performance of its functions;
- (d) ensure payment of the remuneration of the Adjudicator, as stipulated in the Mandate [and Engagement Letter];
- (e) produce a plan explaining how ESS will maintain such resources as are reasonable to ensure the fulfilment of the obligations set out for ESS in these Commitments; and
- (f) provide and cause its directors, employees, officers, advisers and consultants to provide the Adjudicator with all such co-operation as the Adjudicator may reasonably require to perform its functions.

3.6 In particular, ESS undertakes to:

- (a) not to make any copy of any Application or use any information provided in any Application for any purpose, other than the purpose of facilitating the determination by the Adjudicator of the Application;
- (b) ensure that any appropriately redacted version of an Application disclosed to ESS is disclosed only to ESS employees and external advisers that ESS considers necessary to its review of Applications and who have been made aware of their obligations under these Commitments;
- (c) keep a list of ESS employees and external advisers to whom any appropriately redacted version of any Application has been disclosed; and
- (d) in the event that ESS becomes aware that Restricted Information within any Application has been inadvertently disclosed to ESS under the Commitments use all reasonable endeavours to:
 - (i) ensure that ESS immediately redacts that Restricted Information from all copies of the Application retained by ESS;
 - (ii) delete or destroy (and not retain) that Restricted Information as soon as possible, and in any event by no later than completion of the overall determination process in relation to the Application except to the extent that the Restricted Information is contained in automated electronic backup systems and cannot be easily deleted in which case ESS shall be bound by a duty of confidentiality to not use or disclose this information for any purpose unless required to disclose this information by a relevant authority legally empowered to require such disclosure.

4. COMMITMENTS ON THE JULY OFFERS

- 4.1 ESS undertakes to honour each successful application for one of the July Offers (i.e. the Group 1 Offer, the Group 2 Offer and the Group 3 Offer) by eligible Customers.

5. DURATION

- 5.1 The Commitments shall apply from the Effective Date to the Termination Date.

6. VARIATION, RELEASE AND SUPERSESSION

- 6.1 ESS may offer a variation or substitution of the Commitments as envisaged by section 31A(3) of the Act, including where ESS reasonably considers that there has been misconduct or gross negligence in the performance of the Adjudicator's functions.
- 6.2 ESS may request the release of the Commitments as envisaged by section 31A(4)(b) of the Act, including where ESS considers that there has been a material change to the reasons and/or facts on which the Commitments Decision is based.
- 6.3 The variation, substitution or release of these Commitments shall not affect the validity and enforceability of any rights or obligations that arose prior to such variation, release or supersession.

7. REPORTING AND COMPLIANCE

- 7.1 ESS:

- (a) will provide to the CMA any information and documents which the CMA reasonably requests for the purposes of enabling the CMA to monitor and review the operation of the Commitments or any provision of the Commitments;
- (b) will provide to the CMA a final report on the number of New Break-Clauses granted to Customers by [●], and a final report on the number of New Break-Clauses exercised by Customers by [●]³;
- (c) will promptly notify the CMA, as soon as practicable (and, at the latest within five Working Days of becoming aware of the breach) by email at RemediesMonitoringTeam@cma.gov.uk if it becomes aware of any breach of the Commitments, and will provide at the same time or as soon as practicable (and, at the latest within a further two Working Days) information concerning the nature and duration of the breach;
- (d) will promptly take all actions reasonably required, in consultation with the CMA, to remedy a breach; and
- (e) will keep, maintain and produce any information or document specified in writing by the CMA that relate to the operation of any provision of the Commitments.

7.2 The obligations at paragraph 7.1 above shall apply for the period that these Commitments are in force, as set out in Section 5 above.

7.3 ESS acknowledges that if the CMA reasonably believes that the Adjudicator is not meeting the requirements of its role, the CMA shall be able to require ESS to dismiss the Adjudicator and to replace the Adjudicator with another person selected by ESS and approved by the CMA.

8. EFFECT OF INVALIDITY

8.1 Should any provision of these Commitments be contrary to law or invalid for any reason, ESS and the ESS Group shall continue to observe the remaining provisions.

9. GOVERNING LAW

9.1 The Commitments shall be governed by and construed in all respects in accordance with English law.

9.2 Disputes arising concerning the Commitments shall be subject to the exclusive jurisdiction of the courts of England and Wales.

Signed for and on behalf of **Education Software Solutions Limited**

Signature:

Title:

Name:

Date:

³ These reports provided by ESS will complement the reports to be provided by the Adjudicator under the terms of the Mandate and the Briefing.

Signed for and on behalf of **ParentPay
(Holdings) Limited**

Signature:

Title:

Name:

Date:

Appendix 1

Text of the July Offers

Software and Support Extension Offers - (ESS001)

Published: 29 July 2022

We have been asked by a small number of customers who have contracted to move to a new MIS supplier on or before 30th September 2022 and who have decided to exercise, or have already exercised, their break clause right, to extend their existing Annual Entitlement (AE) agreement because, for reasons outside their control, they are unable to move to their new MIS supplier by 30th September 2022 when their existing ESS AE agreement expires. To accommodate these requests, we have decided to make available the following three new software and support extension offers.

Background

If you have a perpetual licence for your SIMS and/or FMS software, then you are entitled to install this software on servers in your premises and to use this software in perpetuity.

ESS provides updates to this software, including updates that allow you to perform statutory returns, at least three times annually, with updates for statutory returns being provided no later than the term before the statutory return is due.

Customers who are licensed to use SIMS and/or FMS, and who have a current AE agreement with ESS at the time a software update is released, are entitled to receive and use these updates while they remain licenced users. Accordingly, if you do not have a perpetual licence, and rely upon the software licence included in your AE agreement to licence your SIMS and/or FMS software, then on termination of your AE agreement you will no longer be entitled to continue using SIMS and/or FMS and you should delete all unlicensed copies of ESS software from your systems.

This means that if you are a customer without a perpetual licence who has a break clause in their new 3-year AE agreement and you validly exercise your break clause right to terminate your AE agreement on 30th September 2022, then you will not be able to produce statutory returns using SIMS and/or FMS from 1st October 2022 onwards.

The Offers

(i) 4-month software licence extension offer

If you are a customer without a perpetual software licence for core SIMS and/or FMS and have validly exercised a break clause right to terminate your AE agreement on 30th September 2022, having already contracted to move to a different management information and/or financial management system supplier, and for any reason your new supplier cannot migrate you to their system by 30th September 2022, ESS is offering a 4-month software licence extension that will allow you to use SIMS and/or FMS to produce statutory returns during the 2022 autumn term.

If you meet these conditions and would like to take up this offer, please contact us at break@educationsoftwaresolutions.co.uk (<mailto:break@educationsoftwaresolutions.co.uk>). In response we will provide you with a quotation and terms, which you should accept by 14th October 2022 if you wish to take up the offer.

Your email should include "ESS001 - 4-month software licence extension offer"; your school's name, postcode, DfE number and the quotation number of the AE agreement for which you wish to request the licence extension together with evidence that you have already contracted with an alternative supplier with services due to commence by 30th September 2022.

(ii) 4-month technical support extension offer

If you have validly exercised a break clause right to terminate your AE agreement on 30th September 2022 but continue to require technical support for your licensed SIMS and/or FMS software during the period 1st October 2022 to 31st January 2023, ESS is able to provide you with a 4-month 1st, 2nd and 3rd line technical support agreement, which will include the provision of any relevant software patches released by ESS during the term of the agreement.

Please note that if your SIMS and/or FMS software licence expires on 30th September 2022, to take up this offer you will need to also take up the software licence offer set out in (i) above.

If you meet these conditions and would like to take up this offer, please contact us at break@educationsoftwaresolutions.co.uk (<mailto:break@educationsoftwaresolutions.co.uk>). In response, we will provide you with a quotation and terms, which you should accept by 14th October 2022 if you wish to take up the offer.

Your email should include "ESS001 - 4-month technical support extension offer"; your school's name, postcode, DfE number and the quotation number of the AE agreement for which you wish to request the technical support extension.

(iii) A combined software licence, technical support and software update extension offer

If you have a new 3-year core SIMS and/or FMS AE agreement that includes a break clause allowing you to terminate this agreement on 30th September 2022, and you validly exercise this break clause right; and

a) you have contracted with an alternative supplier to switch away from SIMS and/or FMS by 30th September 2022 prior to exercising your break

clause right; but

b) far reasons outside of your control your alternative supplier fails to switch your school to their system before 30th September 2022 and is unable to reschedule the switch before the 2023 spring term:

then:

- far customers with perpetual core SIMS and/or FMS software licences, ESS will offer a 6-month agreement running from 1st October 2022 to 31st March 2023, which will include access to 1st, 2nd and 3rd line technical support and software updates and that will allow you to produce 2023 spring term statutory returns, subject to your agreeing to terminate your perpetual core SIMS and/or FMS software licences from 31st March 2023.
- far customers without perpetual core SIMS and/or FMS software licences, ESS will offer a 2-month agreement running from 1st February to 31st March 2023, which will include a software licence and access to 1st, 2nd and 3rd line technical support and software updates released in the period from 1st October 2022 to 31st March 2023, provided that the customer has taken up the 4-month software licence and technical support extension offers set out in (i) and (ii) above. This agreement will allow customers to produce 2023 spring term statutory returns and will ensure that customers without perpetual licences will be able to benefit from the same overall 6-month extension period as customers with perpetual licences.

If you meet these conditions and would like to take up this offer, please contact us at break@educationsoftwaresolutions.co.uk (mailto:break@educationsoftwaresolutions.co.uk). In response, we will provide you with a quotation and terms, which you should accept by 9th December 2022 if you wish to take up the offer.

Your email should include "ESS001 - A combined software licence, technical support and software update extension offer", your school's name, postcode, DfE number and the quotation number of the AE agreement for which you wish to request the extension together with evidence that you have already contracted with an alternative supplier with services due to commence by 30th September 2022 and that the supplier is now unable to switch you by that date.

Please note that:

- If your new 3-year AE agreement includes a break clause, to validly exercise your break clause rights you must first have paid your AE invoice and any other outstanding ESS invoices in full.
- Neither the 4-month technical support agreement nor the 4-month software licence extension includes access to software updates that will allow you to undertake 2023 spring term statutory returns.
- SIMS Support Units are contractually unable to provide support for SIMS and/or FMS users who do not have a current AE agreement with ESS, so if you require SIMS and/or FMS technical support after you have terminated your AE agreement this can only be obtained from ESS.
- If your new 3-year AE agreement includes a break clause, to validly exercise your break clause rights you must first have paid your AE invoice and any other outstanding ESS invoices in full.
- Any licence/ service provided under the Extension Offer arrangements will be provided on comparable commercial terms to those ESS uses to provide these licences/ services to schools who currently contract with ESS directly for the provision of equivalent licences / services.

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Customers who did not request the 6-month break clause - (ESS002)

Published 3 August 2022

ESS is making available a 12-month break clause offer to any customer who has already entered into a standard 3-year AE agreement with ESS for core SIMS and/or FMS AE services commencing on 1st April 2022 and that was not subject to a 6-month break clause right, provided that the customer:

- (i) can provide objective evidence that,
 - a. at the time ESS made its 6-month break clause offer (being from 12th January 2022 to 20th February 2022), it had a clear intention to switch to an alternate supplier; and
 - b. did not apply for the break clause because it reasonably concluded that it would be unable to switch to an alternative supplier in the time available for reasons outside its control; and
- (ii) consequently, did not request the 6-month break clause.

By way of illustration, objective evidence of, for example, a clear intention to switch would include an email to ESS sent during the break clause offer period stating such an intention.

If you qualify for this offer, to apply please email us at break@educationsoftwaresolutions.co.uk (mailto:break@educationsoftwaresolutions.co.uk) before 30th September 2022, sending your email from the email address which you used to accept your AE agreement.

Your email should include "*ESS002 - Conditional Break Clause Offer*", your school's name, postcode, DfE number and the quotation number of the **AE** agreement for which you wish to request the break clause right, together with the evidence that supports your application, which you should **include objective evidence of both your intent to switch and your inability to switch in the time available.**

If your evidence reasonably and objectively demonstrates that you meet the criteria set out above, ESS will offer you a 12-month break clause right from the date your application is finally determined. Any break clause right so offered will be conditional upon your having paid all your unpaid ESS invoices in full prior to the exercise of your break clause right.

For the avoidance of doubt, this offer is only open to schools who genuinely satisfied the above criteria at the time ESS made its break clause offer (being the dates above). If ESS, acting reasonably, has cause to suspect that a misrepresentation has been made in this regard ESS will not be able to accommodate your request.

The 12-month break clause will only be capable of being exercised between 30 and 90 days prior to the break clause date. You will only be offered the opportunity to terminate the entire AE agreement that is covered by the quotation number you supply. Partial termination will not be permitted.

If you terminate your AE agreement using the 12-month break clause right and subsequently request to recontract for some of the services provided under that agreement, ESS reserves the right to amend its charges to take account of the reduction in scope.

For perpetual licence holders the break clause right will be conditional upon your agreeing to terminate your SIMS and/or FMS perpetual licence from the break clause date (i.e., 12 months after the break clause is granted). Detailed break clause terms will be provided and will need to be accepted by customers for the break clause right to apply.

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Customers who did not meet deadline for the 6-month break clause (ESS003)

Published 29 July 2022

A small number of customers who were refused break clauses on the grounds that they failed to apply for the break clause offer and/or to accept their Annual Entitlement (AE) quotation, by the 20th February 2022 deadline appealed ESS' decision. The appeals process was rigorous and fair, and a third of appeals were accepted.

None-the-less, as a gesture of goodwill, ESS has decided to offer a new 9-month break clause offer to any customer who accepted an AE quotation on or before 31st March 2022 and who also applied for the 6-month break clause offer by this date but were refused a break clause because they failed to apply for the break clause offer, or they failed to accept their AE quotation, by the 20th February 2022 deadline.

If you qualify for this offer, to apply please email us at break@educationsoftwaresolutions.co.uk (<mailto:break@educationsoftwaresolutions.co.uk>) before 30th September 2022, sending your email from the email address which you used to accept your AE agreement.

Your email should include "ESS003 - Further Conditional Break Clause Offer" your school's name, postcode, DfE number and the quotation number of the AE agreements for which you wish to request the break clause right.

The 9-month break clause will only be capable of being exercised between 30 and 90 days prior to the break clause date. You will only be offered the opportunity to terminate the entire AE agreement that is *covered* by the quotation number you supply. Partial termination will not be permitted.

If you terminate your AE agreement using the 9-month break clause right and subsequently request to recontract for some of the services provided under that agreement, ESS reserves the right to amend its charges to take account of the reduction in scope.

For perpetual licence holders the break clause right will be conditional upon your agreeing to terminate your SIMS and/or FMS perpetual licence from the break clause date (i.e., 9 months after the break clause is granted). Detailed break clause terms will be provided and will need to be accepted by customers for the break clause right to apply.

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Appendix 2

Guidance on the handling of Restricted Information

1. The Adjudicator shall redact information considered to be “Restricted Information”.
2. Information is considered to be “Restricted Information” if the Adjudicator considers that it constitutes:
 - (a) “confidential information” within the meaning of the Competition Act 1998 Rules¹ – albeit as applied by the Adjudicator –i.e.:
 - (i) commercial information whose disclosure might significantly harm the legitimate business interests of the undertaking to which it relates; or
 - (ii) information relating to the private affairs of an individual whose disclosure might significantly harm the individual’s interests; or
 - (iii) information whose disclosure is contrary to the public interest; or
 - (b) Special Category Personal Data relating to any person.
3. In the context of the Adjudication Process, information may constitute “confidential information” within the meaning of the Competition Act 1998 Rules if it is not in the public domain and constitutes competitively sensitive information – and, in particular, comprises any of the following:
 - (a) Information detailing a competitor’s pricing for its MIS products or related products (e.g. for core functionality and add-on features; setup fees; support fees and discounts) including details of any customer-specific terms including discounts or ‘free’ periods.
 - (b) Details/features of the specific product(s) offered/supplied by a competitor to a given Customer (e.g. the combination of core functionality and add-on modules, third party products and support services) including: details on non-standard features (eg trial/pilot functionality); and information indicating that a Customer has been offered/supplied by a competitor with a bespoke product (or indicating the features of that bespoke product).
 - (c) Specific terms and conditions of a given Customer’s contract with a competitor including contract duration (and end date).
 - (d) Information relating to how a competitor’s MIS software interoperates with third party systems.

¹ The Competition Act 1998 (Competition and Markets Authority’s Rules) Order 2014, Schedule (‘Competition Act 1998 Rules’), Rule 1(1).

- (e) Names(s) of competitor(s) which the Customer contacted (or considered contacting) when considering switching MIS supplier, as described in the Application directly or indirectly.²
- 4. In the light of paragraphs 2 and 3 above, the Adjudicator shall in principle withhold from disclosure to ESS:
 - (a) copies of any contemporaneous documentation provided in support of Section 4 of the Application Form (i.e. documentation containing details of any communications between a Customer and other MIS suppliers); and
 - (b) any details provided within, or documentation provided in support of, Section 7 of the Application Form (i.e. optional requests for redaction from disclosure).
- 5. If the Adjudicator is unsure about how to address any Applicant's request to not disclose certain information to ESS, or whether any particular information within an Application may constitute "confidential information" within the meaning of the Competition Act 1998 Rules, the Adjudicator could raise this with the CMA (and the CMA may advise the Adjudicator on the possible approach that the Adjudicator may wish to take).
- 6. The Adjudicator will be subject to obligations under the Applicable Data Protection Legislation, and shall redact Personal Data where the Adjudicator is required to do so under the Applicable Data Protection Legislation.
- 7. For the avoidance of doubt, nothing in this Appendix nor the Briefing requires the Adjudicator to redact – or anonymise (e.g. replace with the individual's position, if known to the Adjudicator) – the name of any individual within the Customer who it is clear from the Application was in direct communication with ESS.

² A competitor's name may be referred to indirectly through, for example, the name(s) or contact details of any individual working at a competitor which the Customer contacted (or considered contacting) when considering switching MIS supplier.

Appendix 3A

Guidance for Applicants on how to apply

The following information is designed to assist you in completing your application form. Please read it carefully before starting your application.

ESS has agreed to offer a new 12-month break-clause to certain customers who prior to 31 March 2022 entered into a standard three-year annual entitlement (AE) contract with ESS for Core SIMS AE services commencing on 1 April 2022. This new 12-month break-clause will provide a customer with the option to terminate their three-year AE contract on 31 March 2024, by providing written notice to ESS between 1 January 2024 and 29 February 2024.

All applications for this new twelve-month break-clause offer will be considered by an independent Adjudicator against the eligibility conditions set out below. The Adjudicator's determination will be final.

- If the Adjudicator considers that the eligibility conditions have been met, the application will be accepted and ESS will honour and give effect to a new break-clause, subject to the applicant complying with the terms of submission set out at paragraphs (f) and (g) in Section 6 of the application form.
- If the Adjudicator considers that the eligibility conditions have not been met, the application will be rejected. If the application is rejected, the customer will not be entitled to a new 12-month break-clause.

Eligibility Conditions for the New Break-Clause

In January 2022, ESS notified those of its customers whose AE agreements were due for renewal on 1 April 2022 of a six-month break-clause offer which provided each customer with the option to terminate their new three-year AE contract after six months from the start date of the contract (i.e. on 30 September 2022), by providing notice to ESS on or by 31 August 2022. In order to benefit from this offer, customers needed to request the break-clause by email and accept their AE quotation, both on or by 20 February 2022.

(a) Customers who did not opt to take up the original six-month break-clause offered by ESS in January 2022

For customers who did not opt to take up the original six-month break-clause offer, ESS has agreed to offer a new twelve-month break-clause to any customer that, after genuine consideration, reasonably concluded on or before 20 February 2022 that switching to an alternative supplier was not possible by 30 September 2022 and for this reason did not opt to take up the original break-clause offer.

(b) Customers who did opt to take up the original six-month break-clause but who never exercised the break-clause and have not taken up ESS' Group 1 Offer or Group 3 Offer¹

For customers who did opt to take the original six-month break-clause but this break-clause was never exercised, ESS has agreed to offer a new twelve-month break-clause to any customer that, after genuine consideration, reasonably concluded in a timely manner that switching to an alternative supplier was not possible by 30 September 2022 and for this reason did not exercise the original break-clause.

Application Requirements

The application form is made up of seven sections: Section 1 (Customer Details), Section 2 (Applicant Contact Details), Section 3 (Your Internal Processes), Section 4 (Communication with other MIS Suppliers); Section 5 (Your Conclusions), Section 6 (Terms of Submission and Statement of Truth) and Section 7 (Any Optional Request(s) For Redaction).

The application should include copies of contemporaneous documentation, where such documentation is reasonably available, supporting the matters set out in Section 3, Section 4 and/or Section 5 of the application form. This could include any of the following, for example: documents; internal or external emails; text or WhatsApp messages; electronic diary notes recording a call or meeting; and/or typed or handwritten notes.

If no supporting documentation is reasonably available, please give an explanation of why that is the case. Supporting documentation is not required for your application to be considered, if it is not reasonably available.

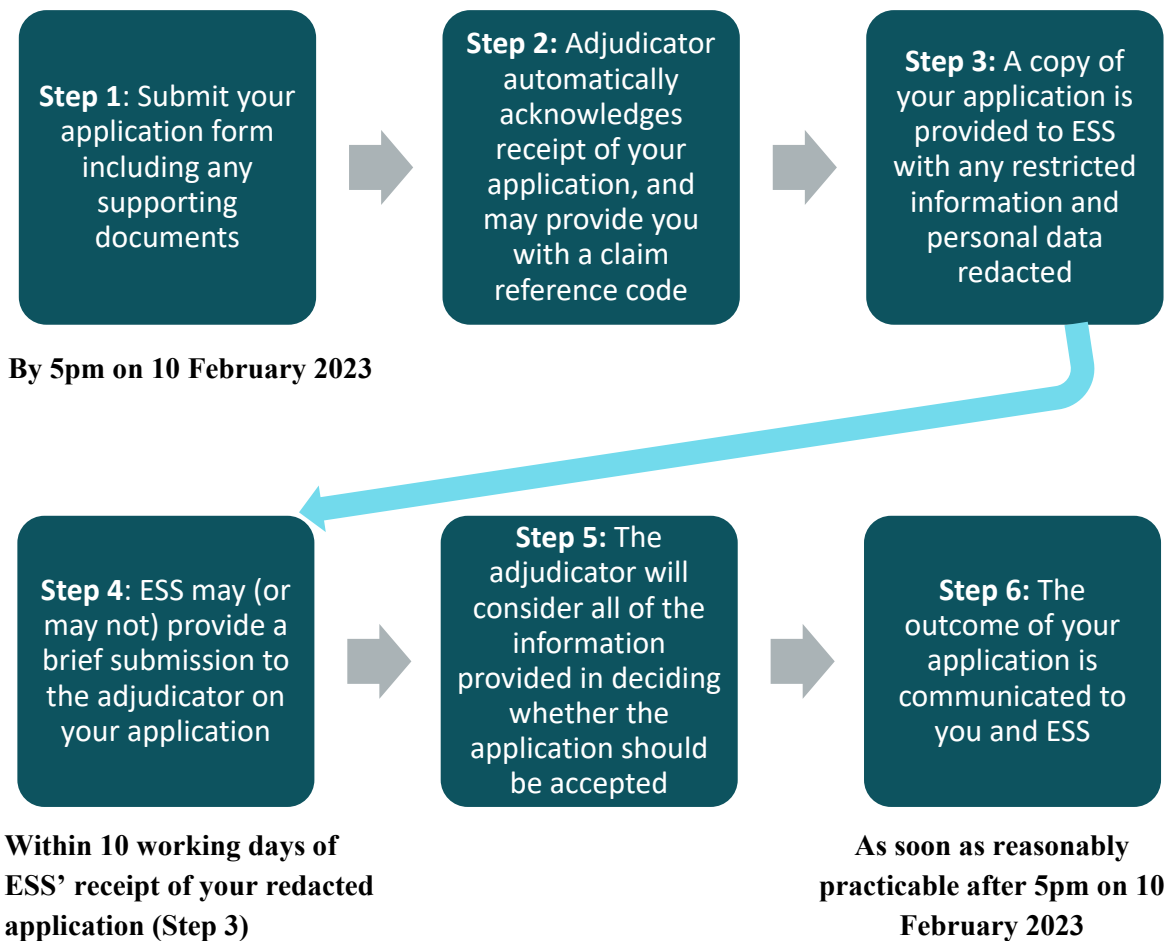
Applications in all cases must be verified by a statement of truth (within Section 6) signed by the person submitting the Application, who must have the requisite authority to sign such a statement.

Applications should be made by 5.00pm (UK time) on Friday 10 February 2023 by emailing the application form and any supporting documents to *[Placeholder for the relevant Adjudicator email address, after it is agreed with Adjudicator]*.

¹ Please see Appendix 1 of the Commitments.

Adjudication Process

An overview of the adjudication process is provided in the diagram below:



Please ensure that all relevant information is included in your application. The Adjudicator, may at its discretion, make one request for further information from you to remedy any failure to comply with the application requirements, or in light of the brief submission provided by ESS. Where such a request is made, you must respond within three working days. If you do not respond in that time period, the Adjudicator will proceed with its determination absent your response.

In making its determination, the Adjudicator will consider the information provided in your application (including any supporting documentation), any submission received from ESS and any response to a request for further information. The Adjudicator will also take into account the matters set out in its briefing and the General Submission received from ESS, which are available at *[Insert website links]*.

The Adjudicator intends to communicate the outcome of your application to you as soon as reasonably practicable after 5pm on 10 February 2023. Where an application is rejected, it will provide a brief summary of the reasons.

Please note that the timings provided above are indicative and whilst the Adjudicator does not intend to depart from this timetable, it reserves the right to do so at any time (subject to the agreement of the CMA and ESS).

Redaction of restricted information from your application

The Adjudicator will disclose to ESS an appropriately redacted version of your application. Before providing your application to ESS, the Adjudicator will:

- redact information which the Adjudicator considers constitutes “confidential information”. For these purposes, confidential information means:
 - (i) commercial information whose disclosure might significantly harm the legitimate business interests of the undertaking to which it relates; or
 - (ii) information relating to the private affairs of an individual whose disclosure might significantly harm the individual’s interests; or
 - (iii) information whose disclosure is contrary to the public interest.
- redact any information that the Adjudicator considers to be special category personal data under Article 9(1) of the UK General Data Protection Regulation (GDPR)²

The Adjudicator will also redact any personal data where it is required to do so under UK data protection and privacy legislation.³ Please note that the Adjudicator will not be required to redact or anonymise the name of any individual employed by you who, it is clear from your application, has had direct communications with ESS.

To the extent reasonably possible, please do not provide confidential information relating to other management information software (MIS) suppliers or their products, unless you consider it relevant to your application. Confidential information relating to other management information software (MIS) suppliers’ may include non-public information on their (i) pricing, (ii) product details or features, (iii) contract terms and conditions, and (iv) software interoperability with third-party systems. It may also include the names(s) of competitor(s) which you contacted (or considered contacting) when considering switching MIS supplier.

To the extent reasonably possible, please do not provide in your application (or in any document submitted in support of that application) any confidential information in the form of any matters which relate to your organisation but which do not relate to the procurement of MIS software.

You will have the opportunity in the application form to provide details of any information which you believe should not be disclosed to ESS by the Adjudicator (and to give the reasons why).

Please note that the information provided by you to the Adjudicator in your application:

- will only be further disclosed to ESS (in appropriately redacted form) and the Competition and Markets Authority (the CMA); and

² This reads “... *personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited.*” (<https://www.legislation.gov.uk/eur/2016/679>).

³ Including the Data Protection Act 2018, the UK General Data Protection Regulation and the Privacy and Electronic Communications (EC Directive) Regulations 2003.

- will not be made public.

[PLACEHOLDER FOR ADJUDICATOR TO INSERT A LINK TO, OR THE CONTENT OF, THE ADJUDICATOR'S APPLICABLE PRIVACY POLICY]

Appendix 3B
Template Application Form

Please submit this application form by 5.00pm (UK time) on Friday 10 February 2023 by emailing it (along with any supporting documents) to [Placeholder for the relevant Adjudicator email address, after it is agreed with Adjudicator].

Section 1: Customer Details

In January 2022, ESS notified its customers of a break-clause offer which provided each customer with the option to terminate their new three-year annual entitlement contract starting on 1 April 2022 after six months from the start date of the contract (i.e. on 30 September 2022), by providing notice to ESS on or by 31 August 2022. The break-clause offer had to be taken up by 20 February 2022.

PLEASE CLICK (OR OTHERWISE PUT A CROSS AGAINST) ONE OF THE FOLLOWING TWO BOXES TO INDICATE WHETHER YOU ARE A CUSTOMER WHO YOU CONSIDER TO BE ELIGIBLE FOR A NEW BREAK-CLAUSE AND EITHER:

DID NOT OPT TO TAKE UP THE SIX-MONTH BREAK-CLAUSE OFFERED BY ESS BETWEEN JANUARY 2022 AND 20 FEBRUARY 2022; OR

DID OPT TO TAKE UP THE SIX-MONTH BREAK-CLAUSE OFFERED BY ESS BETWEEN JANUARY 2022 AND 20 FEBRUARY 2022 BUT DID NOT EXERCISE IT ON OR BY 31 AUGUST 2022.

Customer name:	
(If different, name of school(s) covered by this application):	
Address(es) of school(s) covered by this application:	
Postcode(s) of school(s) covered by this application:	
DfE number(s) of school(s) covered by this application:	
Number of Pupils on Roll (POR) for the school covered by this application, or where you are part of a Multi-Academy Trust, the POR for your group:	
Quotation number of the relevant ESS annual entitlement contract to which this application shall apply:	
Commencement date of the relevant ESS annual entitlement contract:	

End date of the relevant ESS annual entitlement contract:	
--	--

Section 2: Applicant Contact Details

Please provide the contact details of an individual who can be contacted in relation to this application.

These contact details will be used by:

- the Adjudicator to communicate the outcome of your application to you (and if, at the Adjudicator's discretion, the Adjudicator wishes to request further information from you); and
- ESS only in the event that your application is successful.

Full name of individual making this application:	
Organisation and position:	
Email address:	
Phone number:	

Section 3: Your Internal Processes

(a) Please provide information about the consideration you carried out internally in relation to determining whether it would be possible to change MIS supplier by 30 September 2022. This may include any of the following, for example:

- your internal correspondence and discussions about not opting for or not exercising ESS' six-month break-clause offer;
- any correspondence or discussions your local authority may have had with you about not opting for or not exercising ESS' six-month break-clause offer (and if these had a bearing on your decisions, why);
- the consideration you carried out in relation to selecting an alternative MIS supplier, including when that commenced and the internal processes you followed;
- any correspondence or discussions your local authority may have had with you about selecting an alternative MIS supplier (and if these had a bearing on your decisions, why);
- the type of procurement process you considered you were required to follow to procure a new MIS;
- the internal steps you considered you were required to take (or which you took) in selecting an alternative MIS supplier;
- the time you estimated you needed to undertake these steps and select a preferred MIS supplier and the basis for that time estimate; and
- details of any specific circumstances which affected your ability to complete your procurement and switch to an alternative MIS by 30 September 2022.

Please also provide any additional details which you consider relevant to your consideration of switching MIS supplier (for example, any additional details regarding the type, size, and needs of the school(s) covered by this application and/or available resource and experience).

*If you are a customer who **did not opt** to take up ESS' six-month break-clause offer by 20 February 2022, your answer should refer only to the consideration you carried out internally up to 20 February 2022.*

*If you are a customer who **did opt** to take up ESS' six-month break-clause offer by 20 February 2022, but **did not** exercise the break-clause, your answer should also refer to the consideration you carried out internally after applying for the six-month break-clause to seek to transfer to an alternative supplier by 30 September 2022. As such, you may include any of the following, for example:*

- *internal planning you carried out around the process for switching to an alternative MIS supplier;*
- *internal steps you took towards switching to an alternative MIS supplier; or*
- *consideration of the break-clause extension offers published by ESS on 25 July 2022 at <https://www.ess-sims.co.uk/>.*

(b) Please attach to your application email any documents contemporaneous with and supporting the matters referred to above, which are reasonably available to you.

This could include any of the following: documents; internal or external emails; text or WhatsApp messages; electronic diary notes recording a call or meeting; and/or typed or handwritten notes.

If no supporting documentation is reasonably available, please provide an explanation of why that is the case. Supporting documentation is not required for your application to be considered, if it is not reasonably available.

Section 4: Communication with other MIS Suppliers

(a) Please provide details of your communications with other MIS suppliers. This may include any information provided by other MIS suppliers on any of the following, for example:

- when they were able to provide demonstrations of their systems;
- how long any data cleansing might take;
- how long it would take them to carry out data migration from SIMS to their system;
- how long the staff training and familiarisation would take if this was expected to occur before go-live; and
- the latest deadline by which you were required to contract with the alternative MIS supplier in order for you to transfer by 30 September 2022.

*If you are a customer who **did not opt** to take up ESS' six-month break-clause offer by 20 February 2022, your answer should refer only to communications with other MIS suppliers up to 20 February 2022.*

*If you are a customer who **did opt** to take up ESS' six-month break-clause offer by 20 February 2022, but **did not** exercise the break-clause, your answer should also refer to communications with other MIS suppliers after opting for the six-month break-clause.*

- (b) Please attach to your application email any documents contemporaneous with and supporting the matters referred to above, which are reasonably available to you.

This could include any of the following: documents; internal or external emails; text or WhatsApp messages; electronic diary notes recording a call or meeting; and/or typed or handwritten notes.

If no supporting documentation is reasonably available, please give an explanation of why that is the case. Supporting documentation is not required for your application to be considered, if it is not reasonably available.

Please note that the Adjudicator shall in principle withhold from disclosure to ESS copies of any contemporaneous documentation provided in support of this Section 4 (i.e. documentation containing details of your communications with other MIS suppliers).

Section 5: Your Conclusions

- (a) Please provide a narrative explanation of the basis on which you concluded that you would not be able to complete the transfer to an alternative MIS supplier on or by 30 September 2022. In providing your explanation, please indicate when you came to that conclusion.

- (b) Please attach to your application email any documents contemporaneous with and supporting the matters referred to above, which are reasonably available to you.

This could include any of the following: documents; internal or external emails; text or WhatsApp messages; electronic diary notes recording a call or meeting; and/or typed or handwritten notes.

If no supporting documentation is reasonably available, please give an explanation of why that is the case. Supporting documentation is not required for your application to be considered, if it is not reasonably available.

Section 6: Terms of Submission and Statement of Truth

By submitting this application, I understand and accept that the following terms apply and agree these terms in all respects:

- (a) The Adjudicator's determination will be final and is not subject to appeal or legal challenge.
- (b) The Adjudicator shall not be liable for any claim, loss or damage arising as a result of [*Placeholder for further 'hold-harmless' wording to be added, after it is agreed with the Adjudicator*].
- (c) This application, any information provided by me in connection with the application, and any communications received by me from the Adjudicator (including its final determination) must be treated as private and confidential. I must not disclose the contents of any information provided by me, or to me in connection with this adjudication process to any other person, company, firm or body outside of my organisation.
- (d) The Adjudicator:
 - shall reject applications submitted after the deadline specified;
 - may change the timetable for the adjudication process (after any change has been agreed with the CMA and ESS), in accordance with the relevant parts of the Adjudicator's Briefing; and
 - shall reject any application that fails to comply with these instructions (e.g. any application that is not accompanied by a completed statement of truth), unless such failure can be remedied by the Adjudicator making (at the Adjudicator's discretion) one request for any further information from me.
- (e) Nothing in this information, or in any other documentation provided as part of the adjudication process shall be regarded as a commitment or representation or constitute the basis of an express or implied contract.

- (f) If I am a SIMS or FMS perpetual licence holder, the new break-clause right will be conditional upon my agreeing to terminate any SIMS and/or FMS perpetual licence from the new break-clause grant date.
- (g) A new break-clause in respect of a given ESS annual entitlement contract can be exercised only following the payment in full of any outstanding invoices relating to this contract (save in respect of a *bona fide* dispute as to the amounts owed).

I have reviewed the contents of this Application and can confirm on behalf of the Applicant that they are correct and give an accurate (and not misleading) account of the contemporaneous consideration that led the Applicant to conclude that switching to an alternative MIS supplier was not possible by 30 September 2022.

I also confirm that I have the authority on behalf of the Applicant to sign this Statement of Truth.

Name:

On behalf of: [*Customer Name*]

Signature:

Date:

Section 7: Optional request(s) for redaction

The Adjudicator will review this application and redact any Restricted Information and personal data (which may include removing certain specific sections or text and supporting documents) before disclosing a version of it to ESS. Please see the ‘Information for Applicants’ document published at <https://www.ess-sims.co.uk> and <https://www.educationsoftwaresolutions.co.uk> for further information about the redaction of Restricted Information and personal data. In particular, please note that the Adjudicator shall in principle withhold from disclosure to ESS:

- (a) copies of any contemporaneous documentation provided in support of Section 4 of this form (i.e. documentation containing communications with other MIS suppliers); and
- (b) any details provided within, or documentation provided in support of, Section 7 of this form (i.e. any optional requests for redaction from disclosure).

In addition, if there any details provided in any section(s), or in any supporting document(s), which you believe should not be disclosed to ESS by the Adjudicator, please explain which details (and why) in the box below.