

Investigation into conduct of Education Software Solutions Limited

Decision to accept binding commitments

Annex

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ANNEX 1 – THE COMMITMENTS

Education Software Solutions Limited / ParentPay (Holdings) Limited

Case 51140 Commitments

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 10 January 2023 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;

“**Applicant**” means the counterparty to the contract whose Quotation Number is listed in the Application to the Adjudicator;

“**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), as set out in Appendix 2 of these 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;

“**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;

“**ESS General Submission**” means the General Submission provided by ESS to the Adjudicator as referred to in paragraph 3.5(b) below, and as set out in Appendix 4 of these Commitments;

“**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;

“**Instructions**” means the instructions provided to Customers to assist them with completing the Application Form to be published after the Effective Date, as set out in Appendix 3A 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 10 January 2023;

“**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;

“**Quotation Number**” means the reference of the form “QUO-xxxxxx-xxxxxx” included in the email ESS sent to the Applicant to confirm that their annual entitlement contract was in place;

“**Restricted Information**” has the meaning set out in Annex 1 of the Briefing;

“**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 validly 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 validly 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 Applicants;
 - (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 Customer complying with the terms and conditions set out at subparagraphs 27(f) and (g) of the Instructions;
 - (c) ESS undertakes, for any Customer granted a New Break-Clause, to honour the right for the Customer to terminate their New Contract by validly 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 10 January 2023, by publishing it on the Website, and directly emailing all Customers with the Instructions and the 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 10 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 the Application where the Adjudicator determines at its discretion, and on the balance of probabilities 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 Applicant's Application including that:
 - (i) the Adjudicator shall acknowledge the Applications emailed to apply.ess@evelyn.com by means of automatic message sent on receipt, and in any event as soon as is reasonably practicable following receipt, and may provide the Applicant 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 and Personal Data (where the Adjudicator is required to do so under the Applicable Data Protection Legislation) redacted in accordance with the procedure set out in the Briefing (as outlined in paragraph 3.3(c) below);

- (iii) 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, communicate to the Adjudicator that it agrees to the grant of a New Break-Clause without the Adjudicator considering further the Applicant'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 up to two requests to the Applicant to provide further information, subject to the conditions set out in the Briefing. Where such a request is made, the Applicant 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 as soon as reasonably practicable after receipt of any submission made by ESS in respect of the Application, notice from ESS that it will not be making submissions in respect of the Application, or if no submissions or notice is received, the elapse of the period set out in paragraph 3.3(b)(iv) above, and in any case no later than 31 March 2023 (unless extended pursuant to paragraph 3.3(b)(viii) of these Commitments) ;
 - (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 Applicant 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 Annex 1 of the Briefing; and
 - (ii) before providing an appropriately redacted version of the Application to ESS, the Adjudicator shall review the Application and redact any Restricted Information and Personal Data (where the Adjudicator is required to do so under the Applicable Data Protection Legislation) 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 Applicant to redact any part(s) of the Application from disclosure to ESS).

- (d) instructions in relation to the form and content of the Application to the Adjudicator (the “**Instructions**”), including:
- (i) how Customers should make Applications to the Adjudicator;
 - (ii) the deadline for Applications;
 - (iii) a list of matters that Customers should include in its explanation of how it concluded that it was not possible to switch to an alternative MIS supplier in the time available, and a list of matters that the Customer may wish to include in its explanation 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 of the Application Form. If not, then the Applicant should tick the relevant box in Section 3 of the Application Form, and where applicable provide a short explanation of 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 ESS 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 “**ESS 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;
- (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 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 31 May 2023, and a final report on the number of New Break-Clauses exercised by Customers by 31 May 2024³;
 - (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.

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.

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:

Name:

Title:

Date:

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

Signature:

Name:

Title:

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.

Company

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MyConcern (/products-and-services/myconcern)

OFSM (/products-and-services/online-free-school-meals) Redstor

Back up Pro (/products-services/redstor-backup-pro) SIMS Parent

App (/products-and-services/sims-parent-app)

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GOLD

BRITISH EDUCATIONAL
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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 – BRIEFING TO ADJUDICATOR¹

Education Software Solutions Limited / ParentPay (Holdings) Limited

Case 51140

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 have offered Commitments to the CMA under section 31A of the Act which have been accepted by the CMA.
- 1.3 Pursuant to the Commitments, ESS have agreed to appoint an Adjudicator to determine Applications made by Applicants as provided for in this Briefing. The purpose of this Briefing is to govern the adjudication of the Applications by the Adjudicator. Further detail relating to the terms of the Adjudicator's appointment is provided in the Mandate and Adjudicator Terms and Conditions.²
- 1.4 This Briefing is effective from the Effective Date.
- 1.5 The Adjudication Process should proceed in particular with the Adjudicator having regard to the following key objectives:
 - (a) that Applications are determined fairly and in accordance with this Briefing (the “**Fairness Objective**”); and
 - (b) the Adjudication Process is conducted with all reasonable efficiency and speed (the “**Efficiency Objective**”).

2. DEFINITIONS

- 2.1 For the purposes of this Briefing the following definitions apply:

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

“**Adjudication Process**” means the process adopted by the Adjudicator for determining Applications as provided for in this Briefing;

“**Adjudicator**” means the independent decision-maker appointed by ESS on 10 January 2023 following the approval of the CMA, in accordance with the Mandate;

“**Adjudicator Review Period**” means the period for the Adjudicator to make its Determination as referred to in paragraph 7.12 below;

¹ For the purposes of this Briefing the definitions set out in Section 2 apply.

² **Hierarchy of documents.** In the case of any inconsistency or conflict between the provisions of either or both of the Mandate and this Briefing and the Commitments, the provisions of the Commitments shall prevail. In the case of any inconsistency or conflict between the provisions of the Mandate and this Briefing, in principle, the provisions of the Mandate will prevail (subject, in each instance to the CMA's prior agreement).

“**Adjudicator Terms and Conditions**” means the terms and conditions of the Adjudicator dated June 2022;

“**Annual Entitlement**” means the supply of periodic SIMS software updates and software support services as referred to in paragraph 3.4 below;

“**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;

“**Applicant**” means the counterparty to the contract whose Quotation Number is listed in the Application to the Adjudicator;

“**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 the Commitments;

“**Application Requirements**” means the requirements for Applications as referred to in paragraph 7.5 below;

“**Briefing**” means this briefing to the Adjudicator agreed between the CMA and ESS, which implements the 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), as set out in Appendix 2 of these Commitments;

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

“**Commencement**” means 9.00am (UK time) on 10 January 2023;

“**Commitments**” means the 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 the Commitments, such that section 31B of the Act applies;

“**Competition Act 1998 Rules**” means the rules set out in the Schedule to The Competition Act 1998 (Competition and Markets Authority’s Rules) Order 2014;

“**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;

“**Determination**” means the determination of an Application by the Adjudicator, including rejections;

“**DfE**” means the Department for Education;

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

“**Efficiency Objective**” means the objective that the Adjudication Process is conducted with all reasonable efficiency and speed;

“**ESS**” means Education Software Solutions Limited³ and its parent company, ParentPay (Holdings) Limited⁴;

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

“**ESS Review Period**” means the period for ESS to review a Redacted Application as referred to in paragraph 7.8 below;

“**ESS Submission**” means the brief submission provided by ESS to the Adjudicator on an Application as referred to in paragraph 7.8(b) below;

“**Fairness Objective**” means the objective that Applications are determined fairly and in accordance with this Briefing;

“**Final Report**” means the report referred to in paragraph 8.5 below;

“**ESS General Submission**” means the General Submission provided by ESS to the Adjudicator as referred to in paragraph 4.3 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 the 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 the 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 the Commitments;

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

“**LA**” means a local authority;

“**Mandate**” means the mandate for the Adjudicator dated 10 January 2023;

³ Company number 12595779, with registered office at 11 Kingsley Lodge, 13 New Cavendish Street, London, England, W1G 9UG.

⁴ Company number 08212986, with registered office at 11 Kingsley Lodge, 13 New Cavendish Street, London, England, W1G 9UG.

“**MAT**” means Multi-Academy Trust;

“**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, as explained in section 5 below;

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

“**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 as explained in paragraph 3.7(b) below;

“**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 as explained in paragraph 3.7 below;

“**PCR**” means the Public Contract Regulations 2015;

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

“**POR**” means pupils on roll for the school(s) covered by an Application, or where the school(s) is part of a MAT or federation, the POR for the MAT or federation;

“**Quotation Number**” means the reference of the form “QUO-xxxxxx-xxxxxx” included in the email ESS sent to the Applicant to confirm that their Annual Entitlement contract was in place;

“**Redacted Application**” means the version of the Application redacted in accordance with paragraph 7.6(c) below;

“**Restricted Information**” has the meaning set out in Annex 1 of this Briefing;

“**SIMS**” means the School Information Management System (MIS) supplied by ESS;

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

“**Term of Appointment**” means the term of appointment of the Adjudicator as referred to in paragraph 4.4 below;

“**Type A Application**” and “**Type B Application**” means an application, as defined in paragraph 6.2 of this Briefing, made in the form set out Appendix 3B of the Commitments (which can be downloaded from the Website);

“**Update Report**” means the report referred to in paragraph 8.1 below;

“**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 the Commitments);

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

3. BACKGROUND

Management information system software

- 3.1 ESS (amongst other things) supplies MIS software to schools in the United Kingdom branded as “SIMS”. A MIS is used by a school to collect and maintain a database of student information (e.g. attendance records or assessment results) and staff information. A MIS has two main functions:
- (a) it makes the running and administration of a school more efficient, for instance by supporting registration, management of pupil attendance, assessments, admissions, special educational needs, timetabling, parental messaging etc⁵; and
 - (b) it supports school data collections and data transfers. All state-funded schools in England and Wales are required to send information to their LA and/or DfE or the Welsh Government (as appropriate), in particular periodic school censuses and attendance data. The data required and the form in which it is to be provided frequently change.

Customers switching MIS providers

- 3.2 ESS operates in a market where there are rival companies also offering MIS software and customers can from time to time opt to move between suppliers. The decision by a customer as to which MIS provider to use is based on a range of different factors, including ease of use and the ease of integrating its preferred complementary software.
- 3.3 There are broadly four stages involved in the MIS switching process: (1) deciding and planning to procure; (2) preparation to procure; (3) procurement; and (4) implementation. Further detail in relation to these four stages is provided in paragraph 4.2 of the Commitments Decision and section 6 of the ESS General Submission.

SIMS

- 3.4 Historically, SIMS software has been licensed by ESS to LAs or directly to schools on a perpetual basis. That is, customers in return for an initial purchase price benefit from an indefinite licence to use the software, subject to certain conditions. ESS customers also procure (and in many cases are required to procure) an additional contract (known as an “**Annual Entitlement**” contract) for the supply of periodic software updates (including feature upgrades and bug fixes) and software support services.
- 3.5 Customers contract for Annual Entitlement to ensure that they receive regular feature upgrades and bug fixes and so that they can obtain assistance in the event of a problem. The updates provided pursuant to the Annual Entitlement also allow customers to supply the census data and other forms of statutory returns in the correct up-to-date format as required by their supervising education authority and/or national governmental education department. As such, the supply of Annual Entitlement is essential to the use of SIMS software by schools and in effect formed the basis for

⁵ Data stored in a MIS is used in a wide range of complementary software. Complementary software ‘reads’ the data held in the MIS software in order to perform additional tasks the MIS cannot do. For example, pupil admission, 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.

the annual payment and annual subscription to SIMS. ESS Annual Entitlement contracts range from 12 months to 10 years and may include a variety of renewal options. Please note that it is only ESS' customers who historically had Annual Entitlement contracts on a 12-month rolling basis, renewing on 1 April each year (and that satisfy the conditions set out in paragraph 6.2 and 6.3 below) that are within the scope of the Commitments.

- 3.6 In early November 2021, ESS indicated that henceforth when Annual Entitlement contracts came up for renewal, from 1 April 2022 onwards it would no longer offer Annual Entitlement contracts for SIMS on a 12-month rolling basis and that in future its minimum Annual Entitlement contract term would be three years. ESS also announced that it would cease to contract for Annual Entitlement with LAs, instead offering three-year direct contracts to all schools previously covered by LA Annual Entitlement contracts who wished to continue using SIMS. Under these new contracts, customers as before would be able to receive software updates, certain software support services and core SIMS Next Generation services, but the contracts would be for three years rather than one year. In early December 2021, ESS emailed LAs and schools with which it had direct contracts to clarify that its quotations for new Annual Entitlement contract (and the option to sign up to these contracts) could be accepted at any time up to 31 March 2022 (or indeed at any later time if the customer was unable or unwilling to contract by 31 March 2022).

The Original Break-Clause Offer

- 3.7 In January 2022, ESS made an offer (the “**Original Break-Clause Offer**”) to its SIMS customers considering whether to enter into a New Contract in the following terms:
- (a) customers had to agree to enter into a New Contract and send an email request for the Original Break-Clause Offer to ESS, both on or by 20 February 2022;
 - (b) customers would then have the option (but not the obligation) to terminate their New Contract after six months (i.e. on 30 September 2022) by providing notice to ESS on or by 31 August 2022 (the “**Original Break-Clause**”); and
 - (c) there was no direct financial cost or any detriment to the customer in opting to take up the Original Break-Clause. However, considering whether or not to opt to take up the Original Break-Clause (and, if applicable, actually opting to take up the Original Break-Clause) would have involved customers committing some staff time and resources.

The July Offers

- 3.8 In July 2022, ESS made a set of further offers (the “**July Offers**”) to SIMS customers. These offers were made to three distinct groups of customers, with each group receiving a specific offer applicable to that group.
- (a) Group 1 Offer: This consisted of three extension offers of up to 6 months. This offer was made to SIMS customers that validly opted to take up the Original Break-Clause Offer and had provided notice to exercise the 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. This offer was 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 opt to take up the Original Break-Clause Offer because they reasonably concluded before 20 February 2022 (the Original Break-Clause application deadline) 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. This offer was made to SIMS customers who accepted the New Contract on or before 31 March 2022 and applied for the Original Break-Clause but whose application was deemed by ESS to be invalid because they either:
 - (i) failed to submit their application by 20 February 2022 (the Original Break-Clause application deadline); or
 - (ii) failed to accept their three-year New Contract by the same deadline.

3.9 The details of the July Offers to each group were set out on the Website on 26 July 2022 with the Group 1 and Group 3 Offers emailed to all affected customers both in July and again in September. These details are set out in Appendix 1 to the Commitments.

The Adjudicator

3.10 Notwithstanding the Original Break-Clause Offer and the July Offers, the CMA has expressed to ESS competition concerns in relation to the change to its Annual Entitlement contracts detailed above. The CMA's concerns were in part based on responses to the CMA by some customers that they had not opted for the Original Break-Clause because they did not consider a switch to an alternative supplier was feasible by 30 September 2022.

3.11 In addition, the CMA has expressed its view that the Group 2 Offer did not:

- (a) allow for independent adjudication of customer applications;
- (b) sufficiently address the CMA's concerns since the conditions which had to be satisfied for a successful application excluded certain schools from the Group 2 Offer. This included those schools who entered into the New Contract and who did validly opt to take up the Original Break-Clause Offer, but did not subsequently exercise the Original Break-Clause because they concluded that they would not be able to move to an alternative supplier on or by 30 September 2022 or take advantage of the Group 1 Offer. In addition, in the CMA's view, the conditions limited the number of schools that could benefit from the offer and made it burdensome for customers to apply.

3.12 While ESS does not share the CMA's concerns, it has decided to offer the Commitments and to appoint the Adjudicator in order to bring the CMA's investigation to an end.

4. THE APPOINTMENT OF THE ADJUDICATOR

4.1 ESS has appointed, at its own cost, the Adjudicator to carry out an impartial determination of Applications made by Applicants. The Adjudicator is an independent person with the requisite competence and expertise to determine the Applications and has been approved by the CMA. At all times in respect of the Adjudication Process, the Adjudicator must have full regard to the Fairness Objective and the Efficiency Objective but, subject to complying with the requirements

of this Briefing, the Adjudicator has full discretion to operate the Adjudication Process as it considers appropriate.

- 4.2 Following its appointment, the Adjudicator has been provided by ESS with this Briefing, as approved by the CMA, which sets out the terms of its appointment, the conditions that each Application must satisfy and the procedure that the Adjudicator will adopt in making its Determinations.
- 4.3 Separately to the briefing pack, ESS will provide a General Submission (the “**ESS General Submission**”) to the Adjudicator.
- 4.4 The Adjudicator’s term of appointment (the “**Term of Appointment**”) shall start on the Commencement and, unless terminated in accordance with the relevant provisions of the Mandate, last until the latest of:
 - (a) the Determination of the last Application made by the Application Deadline and communication of the outcome to the CMA, ESS and the Applicant;
 - (b) the provision of all Update Reports and the Final Report set out in the Mandate and the Briefing; and
 - (c) answering any clarificatory questions from the CMA or ESS regarding the Final Report.

5. THE NEW BREAK-CLAUSE

- 5.1 The New Break-Clause allows a Customer with a New Contract to terminate the New Contract, to take effect on the New Break-Clause Effective Date.
- 5.2 The termination of the New Contract on the New Break-Clause Effective Date pursuant to the New Break-Clause is conditional on:
 - (a) the Customer providing written notice to ESS of exercising the New Break-Clause on or between 1 January 2024 and 29 February 2024 by email to: break@sims-mis.com; and
 - (b) save in respect of any *bona fide* dispute, the Customer paying all outstanding fees in respect of the contract to which the New Break-Clause applies to ESS prior to the New Break-Clause Effective Date. In this regard, on receipt of the notice referred to above, ESS will within 10 Working Days provide to the Customer an account of outstanding fees.
- 5.3 On serving notice pursuant to paragraph 5.2(a) above, the Customer will be taken to have agreed with ESS to terminate any perpetual licence in respect of any SIMS software covered by the New Contract from the New Break-Clause Effective Date.

6. APPLICATIONS TO THE ADJUDICATOR

- 6.1 A Customer may make an Application to the Adjudicator for a New Break-Clause in its New Contract.
- 6.2 The Adjudicator shall accept the Application where the Adjudicator determines at its discretion, and on the balance of probabilities 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 up the Original Break-Clause Offer (a “**Type A Application**”); 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 (a “**Type B Application**”).

6.3 In respect of a Type A Application and a Type B Application, a Customer is to be held to have “reasonably concluded” that switching to an alternative supplier was not possible by 30 September 2022 only where the Adjudicator is satisfied that the Customer has shown that it undertook a reasonable degree of diligence in coming to that view.

6.4 The Adjudicator will 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. This includes, when considering any Application from a Customer who concluded that switching to any alternative MIS supplier was not possible (in whole or in part) on the basis of the time expected to be taken by that supplier, the Adjudicator being satisfied that the Customer has shown a reasonable basis for that view. It would not be sufficient in itself to state in the Application that the reason it was not possible to switch was because there was not an alternative supplier available at the time.

6.5 The Adjudicator may take into account (among other things) the various steps in the process of switching MIS supplier, general considerations relating to the time required to switch MIS supplier and the specific circumstances of the Customer in assessing whether the Customer had ‘reasonably concluded’, after ‘genuine consideration’ that switching to an alternative supplier was not possible. For the avoidance of doubt, a Customer is not to be held to have failed to have undertaken the requisite degree of diligence because it did not, or may not have, complied with, followed or fulfilled its own - or any relevant - procedures, policies or duties at the time and the Adjudicator should not determine as part of its assessment whether the Customer had correctly followed or complied with any applicable procedures or policies or fulfilled its duties at the time.

7. THE ADJUDICATION PROCESS

Window for Applications

7.1 The window for Applications will open on Commencement.

7.2 Applications must be made by the Application Deadline.

7.3 Applications made after the Application Deadline shall be rejected.

Form and Content of Applications

7.4 Type A and Type B Applications must be made by submitting the Application Form. The instructions that will be provided to Customers to assist them with completing the Application Form and a copy of the Application Form is provided at Appendix 3 of the Commitments.

7.5 The Application to be completed:

- (a) comprises Section 1 (Customer Details), Section 2 (Applicant Contact Details); Section 3 (Your Eligibility for the New Break Clause); Section 4 (Optional Request for Redaction(s)); and Section 5 (Statement of Truth).
- (b) should include copies of contemporaneous documentation, where such documentation is reasonably available, corroborating the matters set out in Section 3 of the Application Form. If not, then the Applicant should tick the relevant box in Section 3 of the Application Form, and where applicable provide a short explanation of why no such documentation can reasonably be provided. Contemporaneous documentation 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; and
- (c) must in all cases be verified by a statement of truth (within Section 5) signed by the person submitting the Application, who must have the requisite authority on behalf of the Applicant to sign such a statement in the following terms:

“Statement of truth

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, and have read and accepted the **“Terms and Conditions”** set out at paragraph 27 of the **“Instructions: How to Apply for a New Break-Clause”**.”

(together the **“Application Requirements”**)

7.6 On receipt, the Adjudicator must as soon as reasonably practicable:

- (a) acknowledge the Application emailed to apply.ess@evelyn.com by means of automatic message sent on receipt, and in any event as soon as is reasonably practicable following receipt, and may provide the Applicant with a claim reference code for the Application; and
- (b) verify the Application and determine whether it considers that it complies with the Application Requirements. The Adjudicator may then either:
 - (i) reject the Application on the basis that it fails to comply with the Application Requirements; or
 - (ii) make one request to the Applicant to provide further information (whether to remedy any obvious omission, error or failure to comply with the Application Requirements, including in relation to the Quotation Number). When determining whether to make such a request, the Adjudicator must have particular regard to the Efficiency Objective. Where such a request is made, the Applicant must respond within three Working Days (or such reasonable time as the Adjudicator may determine in exceptional circumstances or taking into account any half term holidays indicated on the Application Form), failing which the Adjudicator must

either, where the Application still fails to meet the Application Requirements, reject the Application pursuant to paragraph 7.6(b)(i), or proceed with the Determination absent any response.

- (c) Unless already rejected pursuant to paragraph 7.6(b)(i) or 7.6(b)(ii), review the Application and produce a version of the Application (the “**Redacted Application**”) in which:
 - (i) all information which the Adjudicator determines to be Restricted Information is redacted; and
 - (ii) all Personal Data are redacted where the Adjudicator is required to do so under Applicable Data Protection Legislation.

7.7 The Adjudicator must then as soon as reasonably practicable (and, in principle, within ten Working Days of receipt of the Application) provide a copy of the Redacted Application to ESS, save for any Application which has already been rejected by the Adjudicator pursuant to paragraph 7.6(b)(i) or 7.6(b)(ii).

7.8 On receiving the Redacted Application, ESS may, within 10 Working Days (or such extended time period, as agreed with the CMA acting reasonably), choose to or not to agree to the grant of a New Break-Clause without the Adjudicator considering further the Application (the “**ESS Review Period**”).

- (a) In the event that ESS chooses to agree to the grant of a New Break-Clause in relation to the Application, it shall provide notice to the Adjudicator and the Adjudicator will automatically accept the Application.
- (b) In the event that ESS chooses not to agree to the grant of a New Break-Clause in relation to the Application, it may prepare a brief submission (the “**ESS Submission**”) explaining the reasons and provide the ESS Submission to the Adjudicator within the ESS Review Period. The ESS 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 ESS 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.

7.9 On receipt of any ESS Submission, the Adjudicator:

- (a) must disregard any matter contained within an ESS Submission that the Adjudicator reasonably considers is not within the scope of 7.8(b) or which is solely for the Adjudicator, as the independent decision maker, to determine in relation to the test above; and

- (b) may at its discretion make one and only one request to the Applicant for further information provided that it is in relation to a matter which (i) is specifically raised in the ESS Submission (and does not substantially repeat in whole or in part a prior request issued to the Applicant under paragraph 7.6(b)(ii) above) and (ii) the Adjudicator regards as potentially having a material bearing on its Determination. When deciding whether to make such a request, the Adjudicator must have particular regard to the Efficiency Objective and in relation to the timing of such a request, take into account any half term holidays indicated on the Application Form. Where such a request is made, the Applicant must respond within three Working Days, failing which the Adjudicator must proceed with the Determination absent any response.

7.10 For the duration of the Commitments, ESS must:

- (a) not make any copy of any Redacted Application or use any information provided in any Redacted Application for any purpose, other than for the purpose of facilitating the determination by the Adjudicator of the Application;
- (b) ensure that the Redacted 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 the Commitments;
- (c) keep a list of ESS employees and external advisers to whom any Redacted Application has been disclosed; and
- (d) in the event that ESS becomes aware that Restricted Information within any Redacted 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 Redacted Application retained by ESS; and
 - (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 Redacted 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.

7.11 As soon as reasonably practicable once the deadline has passed for ESS to make ESS Submissions to the Adjudicator, ESS will delete or destroy all copies of Redacted Applications (and all copies of any information provided in any Redacted Application) held by ESS or its employees, except:

- (a) to the extent that copies are contained in automated electronic backup systems and cannot be easily deleted;
- (b) one copy (including any automatic electronic backups of that copy) of the Redacted Applications may be held by ESS for a period of no more than five years from the Application Deadline (i.e., 10 February 2028). Such copies shall only be accessible by Mr Neubauer (or any successor(s) to his role within ESS) and only be accessible where necessary for one of the following purposes:

- (i) in respect of a specific Redacted Application and ESS Submission, where reasonably necessary in relation to engagement with the Applicant who made the respective Application in matters consequential to the Determination on the Application;
- (ii) where reasonably necessary in relation to any future regulatory – or similar – investigation; and
- (iii) where express permission has been granted by the CMA on request by ESS, such permission not to be unreasonably refused.

The Determination

7.12 The Adjudicator shall use reasonable endeavours to make its Determination of the Application as soon as reasonably practicable after:

- (a) any ESS Submission is received in respect of the Application from ESS;
- (b) notice from ESS is received that it will not be making submissions in respect of the Application; or
- (c) absent the Adjudicator having received from ESS any ESS Submission in respect of the Application, or any notice received that ESS will not be making submissions in respect of the Application, the expiry of the ESS Review Period,

and (unless extended pursuant to paragraph 7.16 and 3.3(b)(viii) of the Commitments) in any case no later than 31 March 2023 (the “**Adjudicator Review Period**”). For the avoidance of doubt, the Adjudicator shall not take into account submissions received from any person after the deadlines set out herein.

7.13 In arriving at the Determination, the Adjudicator must have regard (but may decide freely what weight to give) to:

- (a) the Application including, in particular, factors relating to the Applicant including the type, size (including the number of POR in the Applicant’s MAT or federation, or if it is not part of a MAT or federation, the Applicant’s POR number)⁶ and needs of the relevant school(s) as well as available resource (e.g. staff and budget) and experience (to the extent this information is set out in the Application);
- (b) the relevant time periods during which the Customer may have applied considerations, or taken actions, which are relevant to the Determination, being in respect of a:
 - (i) Type A Application, the Customer’s considerations and actions in the time period between when it was informed of the option to take up the Original Break-Clause and the applicable deadline. For the purposes of paragraphs 7.13(b)(i) and 7.13(b)(ii), a Customer was informed where it was informed by means of an email sent to a valid Customer email address in January 2022; and

⁶ For example, all other things being equal, an Applicant with a lower POR number than the average Customer might reasonably be expected to have simpler requirements than the average Customer and therefore need to undertake less diligence and require less time to complete the later stages of implementing a switch to an alternative MIS supplier. However, a Customer with a lower POR (in particular one which is not in a group) may also have less resources and experience available to undertake the investigative phases of considering (and to facilitate) switching to an alternative MIS supplier.

- (ii) a Type B Application, the Customer’s considerations and actions in the time period between when it was informed of the option to take up the Original Break-Clause and the deadline for exercising the Original Break-Clause (however, the Adjudicator shall pay due regard to any submissions by a Customer that it did not take steps, or took only limited steps, in the period from 12 January to 30 March 2022, being the period before the Customer received the explanatory email from ESS regarding how to exercise the Original Break-Clause).
 - (c) any ESS Submission in respect of the Application;
 - (d) the ESS General Submission; and
 - (e) the CMA’s Commitments Decision.
- 7.14 As soon as reasonably practicable after the Application Deadline (but not before), the Adjudicator must notify the Applicant, the CMA and ESS of the Determination and by 31 March 2023 at the latest (subject to any extension agreed in paragraph 3.3(b)(viii) of the Commitments), and provide brief reasons for any Determination rejecting an Application.
- 7.15 The Determinations of the Adjudicator are final and are not subject to appeal or legal challenge.

Changes to the Adjudicator Review Period and ESS Review Period

- 7.16 In the event that the number of Applications is such that, in the view of the Adjudicator, the time periods provided above are unfeasible, the Adjudicator may agree to an extension of the ESS Review Period or the Adjudicator Review Period with the CMA and ESS. Any variation of the ESS Review Period, Adjudicator Review Period or any other time period referred to in this Briefing must be agreed with the CMA and ESS. Any such requests should be kept limited to circumstances in which they are strictly necessary (including, but not limited to, much larger volume of applications than initially anticipated).

Publication

- 7.17 This Briefing and any ESS General Submission shall be made publicly available by ESS with reasonable prominence on the Website, by no later than Commencement.⁷
- 7.18 Individual Applications by Applicants and any ESS Submission in respect of any Application shall not be published and will not be disclosed to any person other than the Adjudicator, ESS and the CMA, to the extent provided for in the Commitments, the Briefing and the Mandate.
- 7.19 The Adjudicator acknowledges that any information received by it in the context of this process referred to in the Commitments, this Briefing and the Mandate is strictly confidential and should not be disclosed further to any third party (except to the CMA and to ESS, to the extent provided for in the Commitments, the Briefing and the Mandate). The Adjudicator also undertakes that it will not use any information received from Applicants for any purpose other than determination of the Applications under the Commitments, as set out in the Commitments, the Mandate and this Briefing.

⁷ The CMA will also publish this Briefing on the CMA’s website.

8. OVERSIGHT OF ADJUDICATION PROCESS

8.1 Each week (or alternative frequency to be agreed between the CMA, ESS and the Adjudicator) during the Adjudication Process, the Adjudicator will provide a report (the “**Update Report**”) to the CMA and ESS setting out:

- (a) the number of Applications received by the Adjudicator since it compiled the last Update Report;
- (b) the number of Applications acknowledged by the Adjudicator since it compiled the last Update Report;
- (c) the number of Applications accepted by the Adjudicator since it compiled the last Update Report (whether or not the Determinations have been communicated to the Applicant and ESS) disaggregated into:
 - (i) those Applications in respect of which ESS agreed to the grant of a New Break-Clause without the Adjudicator considering further the Application; and
 - (ii) other Applications where the Adjudicator has made a Determination in favour of the Applicant;
- (d) the number of Applications where the Adjudicator has made a Determination not in favour of the Applicant since it compiled the last Update Report (whether or not the Determinations have been communicated to the Applicant and ESS);
- (e) the number of Applications rejected by the Adjudicator since it compiled the last Update Report (whether or not the Determinations have been communicated to the Applicant and ESS) on the basis that it considered that they did not comply with the Application Requirements;
- (f) the number of Determinations made by the Adjudicator since it compiled the last Update Report (whether or not the Determinations have been communicated to the Applicant and ESS), and how many of those:
 - (i) were made within 10 Working Days of receipt of any submission made by ESS within the period set out in paragraph 3.3(b)(iv) of the Commitments in respect of the Application, or the elapse of that period if no such submission was made by ESS; and
 - (ii) have been communicated to the Applicant and ESS;
- (g) the Adjudicator’s views on its capacity to deal in accordance with this Briefing with the number of Applications received;
- (h) to the extent that Adjudicator considers that it may not have capacity to deal in accordance with this Briefing with the number of Applications received, any proposals it considers appropriate for addressing this; and
- (i) any concerns on the part of the Adjudicator as to the compliance on the part of ESS with the Commitments, any relevant provisions of the Mandate and/or with the provisions of

paragraph 7.8(b) above in respect of the contents of ESS Submissions on Applications and any proposals which the Adjudicator considers appropriate for addressing this.

- 8.2 If in the Update Report, the Adjudicator considers that it may not have capacity to deal in accordance with this Briefing with the number of Applications received, the Adjudicator, the CMA and ESS will convene a call as soon as reasonably possible to discuss in good faith:
- (a) any proposals provided by the Adjudicator; and
 - (b) any other proposals for addressing the issue.
- 8.3 If during such a call, the Adjudicator, the CMA and ESS agree proposals for addressing the capacity issue, this Briefing is to be considered amended in accordance with such agreement. In the absence of such an agreement, the Adjudicator should implement such proposals as it considers appropriate and this Briefing is to be considered amended accordingly.
- 8.4 Any amendment to this Briefing should be made public on the same basis as the Briefing itself.
- 8.5 At the conclusion of the Adjudication Process (which shall be deemed to have concluded once all Applications have been Determined and the Determinations have been communicated to Applicants, the CMA and ESS), the Adjudicator will provide a final report (the “**Final Report**”) to the CMA and ESS setting out:
- (a) the number of Applications received by the Adjudicator;
 - (b) the number of Applications acknowledged by the Adjudicator;
 - (c) the number of Applications accepted by the Adjudicator, disaggregated into:
 - (i) those Applications in respect of which ESS agreed to the grant of a New Break-Clause without the Adjudicator considering further the Application; and
 - (ii) other Applications where the Adjudicator has made a Determination in favour of the Applicant;
 - (d) the number of Applications where the Adjudicator has made a Determination not in favour of the Applicant;
 - (e) the number of Applications rejected by the Adjudicator on the basis that it considered that they did not comply with the Application Requirements;
 - (f) the number of Determinations made by the Adjudicator; and
 - (g) any concerns on the part of the Adjudicator as to the compliance on the part of ESS with the Commitments, any relevant provisions of the Mandate and/or with the provisions of paragraph 7.8(b) above in respect of the contents of ESS Submissions on Applications and any proposals which the Adjudicator considers appropriate for addressing this.
- 8.6 On receipt of any Update Report or the Final Report, the CMA or ESS may (as is reasonable) request that the Adjudicator clarify any matter in the report. The CMA and ESS may also (as is reasonable) request that the Adjudicator clarify any other matter (i.e. not a matter contained in any

report) in relation to the Adjudication Process.⁸ The Adjudicator will respond promptly. Any such response will be provided to the CMA and ESS.

⁸ This may include, at the CMA's discretion, the CMA requesting the Adjudicator to provide to the CMA a sample of ESS Submissions received by the Adjudicator.

ANNEX 1

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 Rules⁹ – 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.
 - (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.¹⁰
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 3 of the Application Form (i.e. documentation containing details of any communications between a customer and other MIS suppliers); and

⁹ The Competition Act 1998 (Competition and Markets Authority’s Rules) Order 2014, Schedule (‘**Competition Act 1998 Rules**’), Rule 1(1).

¹⁰ 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.

- (b) any details provided within, or documentation provided in support of, Section 3 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 Annex 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. In addition, for other named or identifiable persons, in order to avoid disclosing the identity of any individual concerned, the following terms shall be used by the Adjudicator in substitution when redacting Applications:
 - (a) in relation to a staff member of the customer, (i) with a POR number below 150, “Member of Staff”, or (ii) with a POR number of 150 and above, “Member of Staff” or “Senior Member of Staff” (as appropriate);
 - (b) in relation to a member of the governing board, “Member of Governing Body”;
 - (c) in relation to a staff member of the Local Authority, “Member of Local Authority”; and
 - (d) in relation to a third party supplier, “Supplier Representative”.

APPENDIX 3A – INSTRUCTIONS: HOW TO APPLY FOR A NEW BREAK- CLAUSE

Introduction

1. The following information will assist you in completing your application form. Please read it carefully before starting your application.
2. ESS has agreed to offer a new 12-month break-clause to certain customers who entered into a standard three-year contract with ESS for Core SIMS Annual Entitlement ('AE') services beginning on 1 April 2022.
3. This new 12-month break-clause will give certain customers the option to end their three-year contract with ESS early on 31 March 2024, by giving written notice to ESS between 1 January 2024 and 29 February 2024 ('New Break-Clause').
4. The key dates relevant to the application process for a New Break-Clause are as follows:

Key stages	Relevant dates
Window for applications to the Adjudicator for a New Break-Clause	between 10 January 2023 to 5pm on 10 February 2023
The Adjudicator to communicate the outcome of the application to the Applicants	between 10 February 2023 and 31 March 2023 (if no extensions)
Customers who have been granted a New Break-Clause to explore whether to switch MIS supplier (and if so, to make the necessary arrangements)	between the date of grant of New Break-Clause and 31 March 2024
Customers who have been granted a New Break-Clause to give notice to ESS if they want to end the contract early under the New Break Clause (if they decide they want to switch MIS supplier)	between 1 January 2024 and 5pm on 29 February 2024
End date for AE contract with ESS if New Break-Clause is exercised	31 March 2024

5. All applications for a New Break-Clause will be considered by an independent adjudicator ('Adjudicator') against the criteria set out below. The Adjudicator's decision over whether to accept or reject any applications will be final. Applications and the adjudication will be free of charge to the Applicants.
 - If the Adjudicator considers that the application criteria have been met, the application will be accepted. The date that an Applicant is informed by the Adjudicator that its application has been accepted will be the date of grant of the New Break-Clause.
 - If a successful Applicant wants to end the contract to which the New Break-Clause relates on 31 March 2024, it needs to tell ESS between 1 January 2024 and 5pm on 29 February 2024.

Once ESS is notified it will honour the New Break-Clause (subject to the Applicant's compliance with the Terms and Conditions set out below).

- If the Adjudicator considers that the application criteria have not been met, the application will be rejected. If the application is rejected, ESS will not grant the Applicant a New Break-Clause.
6. Please note that if the Adjudicator accepts your application and you are granted a New Break-Clause, your contract with ESS will not automatically come to an end. You will, however, be able to end this contract on 31 March 2024, one year before the end of its term, by giving ESS notice between 1 January 2024 and 5pm on 29 February 2024 (subject to your complying with the Terms and Conditions of this New Break-Clause set out below). Please note that the grant of a New Break-Clause does not change the terms and conditions of your contract with ESS, which will continue to apply until that contract comes to the end.
 7. The New Break-Clause gives you a period in which to consider whether or not to switch to another MIS supplier and, if you decide to switch, to implement that change. However, if you conclude that you would rather continue your contract with ESS and you do not give notice between 1 January and 29 February 2024, you will not need to take any further steps and the terms and conditions of your contract will remain the same for its remaining duration.
 8. Your decision to apply to the Adjudicator for a New Break-Clause will not affect the service levels you receive from ESS or prevent you from taking up any other offers ESS may make during the remaining contract term.

Background

9. In January 2022, ESS informed its customers whose Core SIMS AE contracts were due for renewal on 1 April 2022 of a six-month break-clause offer ('Original Break-Clause') which would allow those customers who took up ESS' offer of a new three-year AE contract commencing on 1 April 2022 to terminate their contracts after six months (i.e. on 30 September 2022), by giving notice to ESS by 31 August 2022. To benefit from this offer, customers needed to request the Original Break-Clause by email and accept ESS' quotation by 20 February 2022.
10. ESS made a number of further break-clause offers in July 2022 ("ESS' July Offers").¹

Eligibility Conditions for the New Break-Clause

11. Eligible customers can now apply to the Adjudicator for the New Break Clause to apply to any three-year Core SIMS AE contract with ESS that began on 1 April 2022. The application criteria are set out in paragraphs (a) and (b) below, depending on customers' circumstances.

- (a) **Customers who did not opt to take up the Original Break-Clause offered by ESS in January 2022 and have not successfully taken up one of ESS' July Offers²**

For customers who did not opt to take up the Original Break-Clause offer, ESS has agreed to offer a New 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

¹ Please see Appendix 1 of the Commitments for details on ESS' July Offers: <https://www.ess-sims.co.uk/breakoffers>.

² For a description of the relevant offer (referred to as "Group 2 Offer"), see Appendix 1 of the Commitments.

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 Break-Clause but who never exercised it and have not successfully taken up one of ESS' July Offers³

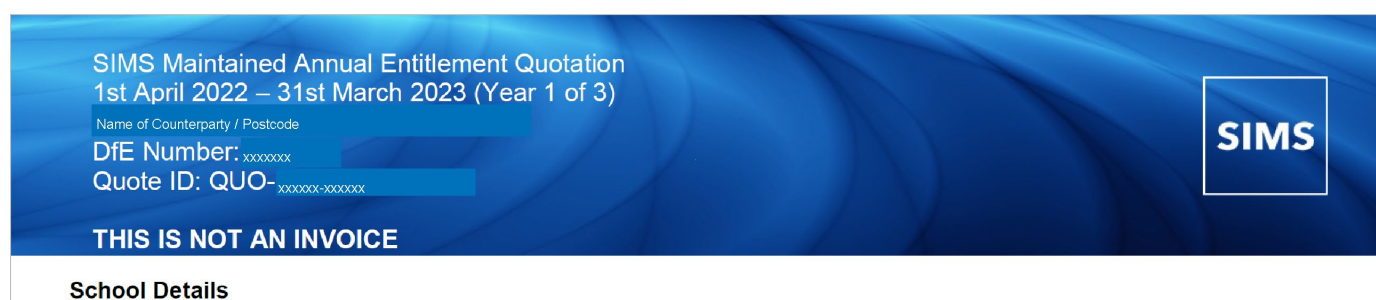
For customers who did opt to take the Original Break-Clause but never exercised it (i.e. did not terminate their contract by 30 September 2022), ESS has agreed to offer a New Break-Clause **to any customer that, after genuine consideration, reasonably concluded in a timely manner** that switching to an alternative supplier was not possible by 30 September 2022 and for this reason did not exercise the Original Break-Clause.

Application Requirements

12. The application form consists of five sections: Section 1 (Customer Details), Section 2 (Applicant Contact Details), Section 3 (Your Eligibility for the New Break Clause, including your explanation of your conclusions as to why it was not possible to switch in the time available), Section 4 (Optional Request for Redaction(s)) and Section 5 (Statement of Truth).
13. Applications should only cover a single contract, which should be identified by its ESS quotation number. Contracts can include all or some of the schools in a Multi-Academy Trust or federation, where such schools contracted as a group with ESS under the terms of a single contract.
14. **Applications should be made by 5.00pm on Friday 10 February 2023 by emailing the application form and any supporting documents to the Adjudicator at apply.ess@evelyn.com.**

How to find your Quotation Number

15. The quotation number, referred to as a 'Quote ID', takes the form "QUO-xxxxxx-xxxxxx" and is shown at the head of your quotation:



16. Your quotation number was also set out in the email confirming your new SIMS Annual Entitlement agreement, an example of which is set out below:

³ For a description of the relevant offers (referred to as "Group 1 Offer" or "Group 3 Offer"), see Appendix 1 of the Commitments.

Dear {Name}

Thank you for completing your quotation online via the ESS Portal.
Please find attached a final PDF summary of your Quotation.
Your confirmation reference is {QuoteNumber}.
Your payment will be processed according to the invoicing options you selected when processing your quotation.

Kind regards,



Education Software Solutions Ltd.
Registered in England and Wales | Registration no. 12595779
Registered office: 11 Kingsley Lodge | 13 New Cavendish Street | London | W1G 9UG
www.educationsoftwaresolutions.co.uk

Your explanation of your conclusions as to why it was not possible to switch in the time available

17. To enable the Adjudicator to make its decision, you will need to provide some information in Section 3 - Your Eligibility for the New Break Clause. This should be in the form of an explanation (to the best of your ability and recollection and on the basis of your belief and the information you had at the time) as to how you concluded that it was not possible to switch to an alternative MIS supplier in the timeframes available to you. By way of guidance, we would not expect a typical application to exceed 600 words (excluding any attachments).
18. This explanation should include:
 - an outline of what steps you thought you might need to take to switch to an alternative supplier and broadly when you started thinking about it;
 - approximately how long you thought the switching process would take in total and the basis for that time estimate;
 - if relevant to your view that you had insufficient time, a description of any research you carried out and/or discussions you had with alternative suppliers (either verbally or in writing), and how that may have impacted on your conclusions;
 - if relevant, why you decided not to opt for the Original Break Clause; or
 - if you opted for the Original Break-Clause, approximately when you made your decision that it was not possible to switch to an alternative supplier in the timeframe available to you.
19. Your explanation could also include any other information relevant to your specific circumstances at the time, for example:
 - the type, size and needs of the school(s) covered by your application and/or available resource and experience to consider and complete a switch to an alternative supplier;
 - any details and approximate timings that you can recall as to whether you discussed this internally within your school/Multi-Academy Trust (either formally or informally) and any procurement processes you thought you might be required to follow;

- any details and approximate timings that you can recall about any external discussions you held (either verbally or in writing) with other schools, your local authority, your federation or Multi-Academy Trust or ESS, and if so, how that impacted on your conclusions; and/or
 - you may also include any details of whether you considered if you were eligible for the Original Break-Clause extension offers published by ESS in July 2022.
20. If you do not have access to records of the relevant discussions/decisions because they were taken informally or verbally, you could include your recollection of these discussions as part of your explanation.
 21. Similarly, if your conclusion on whether or not to switch MIS supplier was impacted by discussions or guidance given by your local authority, you could include in your explanation your recollection of any such discussions or guidance.
 22. If your conclusion that it was not possible to switch to an alternative MIS supplier in the timeframes available to you was based on the time that it would take that alternative MIS supplier to carry out the switch, please include details of any inquiries you made to form that view.
 23. Please note that it would not be sufficient in itself to state in the Application that the reason it was not possible to switch was because there was not an alternative supplier available at the time.

Supporting documents and evidence

24. Supporting documentation is not required for your application to be considered and accepted by the Adjudicator. **However, you should include copies of documents from the relevant time period which would support your narrative in Section 3 of the application form, if such documents are reasonably available.**
25. This could for example include any of these documents; internal or external emails; text or WhatsApp messages; electronic diary notes recording a call or meeting; and/or typed or handwritten notes.
26. It is possible that supporting documentation may not be reasonably available to you, for example, because it does not exist or is held by someone external to the school or Trust or if it can only be located by undertaking extensive searches. If this applies to you, please tick the relevant boxes in Section 3 of the application form or if another reason applies, please provide a short explanation of why no supporting documentation is reasonably available.

Statement of Truth and Terms and Conditions

27. Applications in all cases must be verified by a statement of truth (within Section 5) signed by the person submitting the Application, who must have sufficient authority to sign such a statement, and must have read and agreed to the terms and conditions set out below:

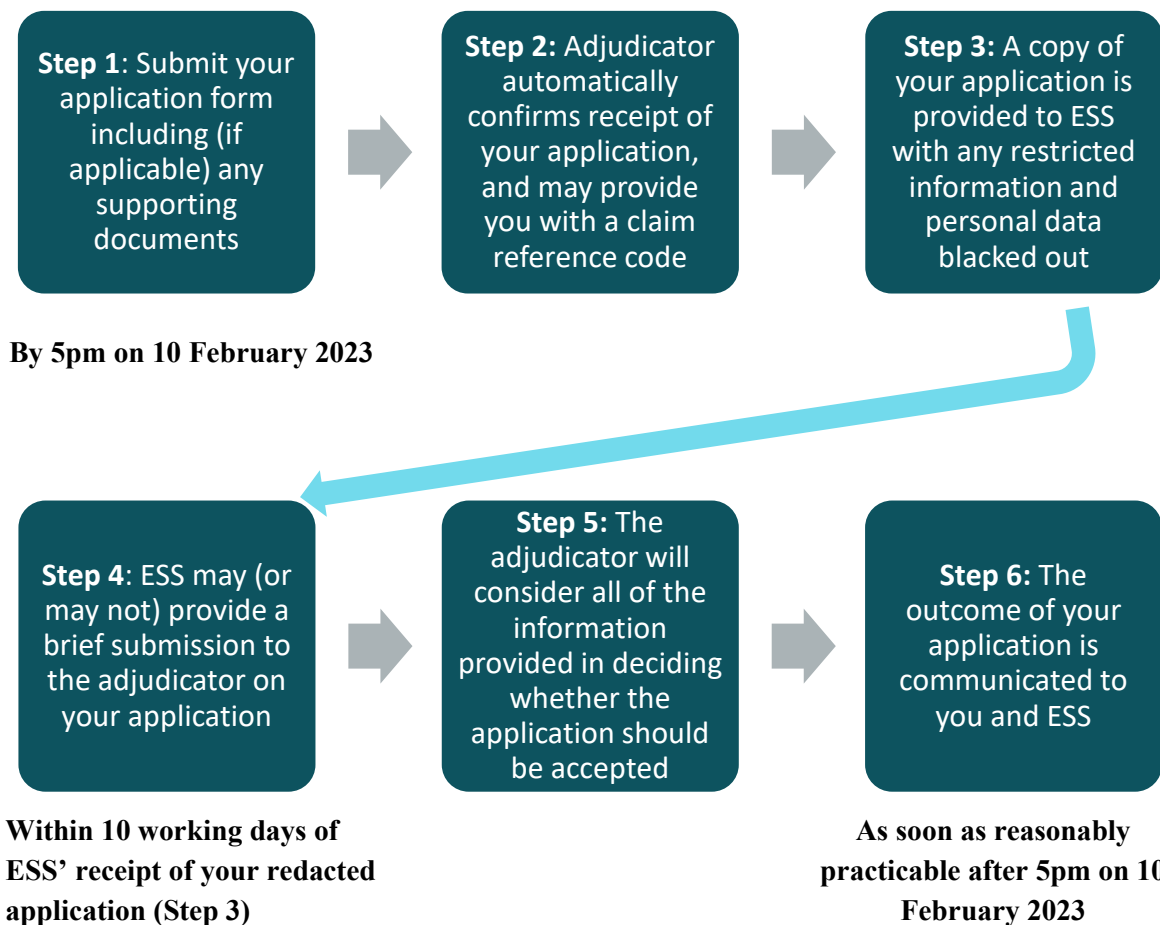
By submitting this application, the Applicant understands and accepts that the following terms apply and agrees to these terms in all respects:

- (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 the adjudication process.

- (c) The Applicant will not share the contents of this application form or any other correspondence from the Adjudicator with another MIS supplier. For the avoidance of doubt the Applicant can, however, engage with others (eg federation or Multi-Academy Trust, local authority or another MIS supplier) to check if they have any relevant facts or supporting documentation relevant to this application.
- (d) The Adjudicator:
- shall reject applications submitted after the deadline specified;
 - may extend 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 (available at: <https://www.ess-sims.co.uk/breakoffers>); 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) a request for any further information from the Applicant.
- (e) Nothing in this application, 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 the Applicant is a SIMS perpetual licence holder, the New Break-Clause right will be conditional upon the Applicant agreeing to terminate all SIMS perpetual licences that relate to the AE contract covered by this application from the New Break-Clause effective date (31 March 2024).
- (g) A New Break-Clause in respect of a given ESS AE 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).

Adjudication Process

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



29. Please ensure that all relevant information is included in your application. The Adjudicator may at its discretion, request further information from you, for example, if something is clearly missing from your application or in light of any 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 decision absent your response.
30. 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 follow the Briefing and may also take into account any general points made in ESS' General Submission and the CMA's Decision to accept the commitments. These documents are available at <https://www.ess-sims.co.uk/breakoffers>.
31. The Adjudicator intends to communicate the outcome of your application to you as soon as possible after 5pm on 10 February 2023 and in any event, by 31 March 2023. Where an application is rejected, the Adjudicator will provide a brief summary of its reasons.
32. Please note that the timings provided above are indicative and although the Adjudicator does not intend to depart from this timetable, it may do so subject to the agreement of the CMA and ESS.

Redaction of restricted information from your application

33. In Section 4 of the application form you have the opportunity to (but do not have to) indicate if there is any information/documents included in the application you do not wish ESS to see because they are confidential. The Adjudicator will then review the application and prepare a version of the application with confidential information blacked out (or redacted) before sharing it with ESS.
34. The Adjudicator will review your application (irrespective of whether you have filled in Section 4) to check if it contains any confidential information relating to you or anyone else (including other MIS suppliers or your local authority) before sharing it with ESS. If the Adjudicator identifies any confidential information, it will be redacted from the version of the application provided by the Adjudicator to ESS.
35. The Adjudicator will anonymise/redact contact details of individual members of staff except the names of any individual employed by you who, it is clear from your application, had direct communications with ESS. In order to avoid disclosing the identity of any individual concerned, where appropriate, the Adjudicator will anonymise the individual's name by replacing it with a general description of the role they fulfilled. For example, Member of Governing Body, Member of Local Authority, Member of Staff (if your POR number is below 150), or Member of Staff or Senior Member of Staff (if your POR number is 150 and above).
36. Any information which the Adjudicator decides to redact from the application form, will not be shared with ESS, and will only be accessible to the Adjudicator for the purposes of deciding the applications. The Adjudicator will treat it in the strictest confidence.
37. The contents of your redacted application form will only be shared with ESS and the CMA and not made public.
38. For avoidance of doubt, you are not required to provide information relating to individual students, their educational needs or progress, safeguarding or any information which you are not allowed to share with the Adjudicator because of the relevant legal/regulatory provisions.

Categories of confidential information

39. The categories of confidential information, which the Adjudicator will redact from the version of the application are included below (alongside some examples):
 - (i) commercial information whose disclosure might significantly harm the legitimate business interests of the organisation to which it relates. This would include commercially sensitive information relating to other MIS suppliers including any supporting documents such as notes of discussions or emails with those suppliers;
 - (ii) information relating to the private affairs of an individual whose disclosure might significantly harm the individual's interests. Examples of such information could include details of serious or long-term illness, private addresses, email addresses, telephone numbers or other contact details, names and personal details of family members;
 - (iii) information whose disclosure is contrary to the public interest.

Data protection legislation

40. In addition to reviewing the Application for, and redacting, any confidential information, the Adjudicator will also review the application for, and redact any, special category personal data as defined in the UK General Data Protection Regulation (GDPR).⁴
41. The Adjudicator will also redact any personal data where it is required to do so under UK data protection and privacy legislation.⁵
42. The Adjudicator's privacy policies can be found here: <https://www.evelyn.com/legal-compliance-regulatory/privacy-notices/>.

⁴ 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>).

⁵ Including the Data Protection Act 2018, the UK General Data Protection Regulation and the Privacy and Electronic Communications (EC Directive) Regulations 2003.

APPENDIX 3B - APPLICATION FORM FOR A NEW BREAK-CLAUSE

Please submit this application form for the new 12-month break-clause (“New Break-Clause”) by **5.00pm (UK time) on Friday 10 February 2023** by emailing it (along with any reasonably available supporting documents if relevant) to the independent adjudicator (“Adjudicator”) at apply.ess@evelyn.com.

For information on how to complete this application form and the process to be followed by the Adjudicator, please read the “Instructions: How to Apply for a New Break-Clause” available at <https://www.ess-sims.co.uk/breakoffers>.

This application form contains the following sections:

- **Section 1: Customer Details (mandatory to complete)**
- **Section 2: Applicant Contact Details (mandatory to complete)**
- **Section 3: Your Eligibility for the New Break Clause (mandatory to complete)**
- **Section 4: Optional Request for Redaction(s) (optional to complete)**
- **Section 5: Statement of Truth (mandatory to complete)**

Section 1: Customer Details

Customer name:	
(If different, name of school(s) covered by this application):	
Name(s) and address(es) including 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(s) covered by this application, or where you are part of a Multi-Academy Trust (“MAT”) or federation, the POR for your MAT or federation:	
Quotation number* of the relevant ESS Annual Entitlement contract to which this application shall apply (with the counterparty to this contract being the “Applicant”):	

* The quotation number, referred to as a ‘Quote ID’, takes the form “QUO-xxxxxx-xxxxxx” and is shown at the head of your quotation. It was also set out in the email confirming your new SIMS Annual Entitlement agreement. Please see the visual representations at paragraphs 15 to 16 of the “Instructions: How to Apply for a New Break-Clause” available at <https://www.ess-sims.co.uk/breakoffers>.

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 to request further information from you, if needed); and
- ESS if your application is successful.

Full name of the contact person for this application (“Contact”):	
Organisation and position:	
Email address:	
Phone number:	

Please indicate below the dates of the Contact’s February half-term holiday, as the Adjudicator will try not to contact you during this period:

Monday 13 February to Friday 17 February 2023

Monday 20 February to Friday 27 February 2023

Other (please specify):

Section 3: Your Eligibility for the New Break-Clause

Please read and comply with paragraph 11 of the “Instructions: How to Apply for a New Break-Clause” (available at <https://www.ess-sims.co.uk/breakoffers>) for details on the criteria to show your eligibility for the New Break-Clause. To demonstrate your eligibility, please provide the information and, if applicable, any documents requested in the three sub-sections below:

1. Type of customer

Please tick one of the following two boxes to indicate whether you either:

- did not opt to take up the Original Break-Clause offered by ESS (between January 2022 and 20 February 2022) as, after genuine consideration, you reasonably concluded on or before 20 February 2022 that switching to an alternative supplier was not possible by 30 September 2022; or
- did opt to take up the Original Break-Clause offered by ESS (between January 2022 and 20 February 2022) but did not exercise it on or by 31 August 2022 as, after genuine consideration, you reasonably concluded in a timely manner that switching to an alternative supplier was not possible by 30 September 2022.

2. Explanation as to why you concluded that switching to an alternative supplier was not possible in the timeframes available to you

Please read and comply with paragraphs 17 to 23 of the “**Instructions: How to Apply for a New Break-Clause**” (available at <https://www.ess-sims.co.uk/breakoffers>).

Please explain (to the best of your ability and recollection and on the basis of the belief and knowledge you had at the time) how you concluded either by:

- (i) 20 February 2022 (if you did not opt to take up the Original Break-Clause); or
- (ii) 30 September 2022 (if you opted to take up the Original Break-Clause);

that it was not possible to switch to an alternative MIS supplier in the timeframes available to you.

By way of guidance, we would not expect a typical application to exceed 600 words (excluding any attachments)

3. Supporting documents

Please read and comply with paragraphs 24 to 26 of the “**Instructions: How to Apply for a New Break-Clause**” (available at <https://www.ess-sims.co.uk/breakoffers>).

Please tick whichever box below applies:

- I have attached supporting documentation
- No supporting documentation is attached because none exists
- No supporting documentation is reasonably available because such documentation as exists is either held by someone external to my school or MAT and/or can only be located by undertaking extensive searches
- Other - please provide a short explanation of why no documentation is available below:

By way of guidance, we would not expect a typical explanation to exceed 100 words

Section 4: Optional request for redaction(s)

The Adjudicator will review this application and redact any Restricted Information and personal data before disclosing a version of it to ESS. The Adjudicator will also in principle withhold from disclosure to ESS:

- (a) copies of any documentation provided in support of Section 3 of this form which contains communications with other MIS suppliers; and
- (b) any details provided within, or documentation provided in support of, Section 4 of this form (i.e. any optional requests for redaction from disclosure).

Please read paragraphs 33 to 42 of the “**Instructions: How to Apply for a New Break-Clause**” for further information about the redaction of Restricted Information and personal data.

In addition, if there are any further 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 what information should be redacted (and why) in the box below.

Section 5: Statement of Truth

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, and have read and accept the “**Terms and Conditions**” set out at paragraph 27 of the “**Instructions: How to Apply for a New Break-Clause**” (available at <https://www.ess-sims.co.uk/breakoffers>).

Name: [*Contact*]

On behalf of: [*Customer Name*]

Signature:

Date:

APPENDIX 4 - ESS' GENERAL SUBMISSION

1. INTRODUCTION

- 1.1 The Adjudicator has been provided with the Briefing, which provides, among other things, guidance as to the Commitments offer to customers for a New Break-Clause, the requirements for each Application, and the role and procedure of the Adjudicator in determining Applications.
- 1.2 The purpose of this document is to provide the Adjudicator with ESS' general observations on a number of issues which ESS considers to be relevant to the Adjudicator's determination. As these submissions are likely to be of relevance to a large number of Applications, rather than repeat these points in response to individual Applications, ESS has prepared this submission ("**ESS' General Submission**") to assist the Adjudicator.
- 1.3 This General Submission is primarily factual but also includes ESS' own views and insights informed by those facts. ESS acknowledges that its views may differ from those of customers or third parties but where that is the case it is for the Adjudicator to determine whether there is factual support for these alternative views. ESS acknowledges that it is for the Adjudicator to weigh up the relevant evidence and considerations put forward by ESS with the views and evidence advanced by customers and make its own independent determination.
- 1.4 This document includes the following sections:
- **Section 2:** Relevant Regulations and Guidance
 - **Section 3:** About ESS and SIMS
 - **Section 4:** SIMS Contracting Arrangements
 - **Section 5:** Procurements Processes
 - **Section 6:** Switching Process
 - **Section 7:** Third party guidance on switching timeframes
 - **Section 8:** SIMS customer switching data
 - **Section 9:** The July 2022 offers by ESS
 - **Section 10:** Other relevant considerations
- 1.5 Terms defined in the Commitments and Briefing shall have the same meaning in this General Submission, unless otherwise stated.

2. RELEVANT REGULATIONS AND GUIDANCE

Relevant Legislation

- 2.1 The Education Act 1944 of England and Wales (the "**1944 Act**") established a national system of primary and secondary education and set out how the system would be administered by Local Education Authorities ("**LEAs**"), based on the then counties and county borough councils. The 1944 Act set out the LEAs' responsibilities for allocating resources to schools, including staff, buildings, equipment and materials. The essential features of the 1944 Act were reproduced in the Education Act of 1945 in Scotland and the Education Act of 1947 in Northern Ireland.
- 2.2 A significant change to this system of local authority control came about in the form of the Education Reform Act 1988 which granted schools in England and Wales a far greater degree of autonomy, including the introduction of grant-maintained schools which were independent of LEA control and funded directly from central government. LEA-maintained schools became responsible for managing their own budgets and the system became known as the 'Local

Management of Schools' (LMS). Similar changes were brought about in Northern Ireland and Scotland in 1989 and 1993 respectively.

- 2.3 With delegated budgets came responsibility for matters such as finance, the management of premises and the choice of where to purchase goods, equipment, support and services. Whilst LEA-maintained school funding was still allocated to schools via the local authority, to a large extent schools were responsible for spending this funding, including having a choice as to which services, if any, they purchased back from the local authority.
- 2.4 The 1993 Education Act at section 238 established school governing bodies as corporate bodies distinct from their LEA. This recognised the separation of schools from local authorities and allowed schools to directly contract for goods and services on their own account for the first time.
- 2.5 The School Standards and Framework Act 1998 (England and Wales), which abolished grant-maintained schools and enabled the formation of foundation schools, introduced further significant change. Schools which successfully applied for foundation status generally became the owners of their land and premises and the employer of staff, rather than the local authority. However, the local authority continued to fund the school on the same basis as all other local authority maintained / controlled schools.
- 2.6 The introduction of the Children Act 2004 saw the functions of education and children's services combined under designated Directors of Children's Services, and the term LEA became obsolete. By 2020 there were 207 bodies within the UK that had the strategic lead for the education of children and young people with funding responsibilities for maintained schools within their administrative areas. Of these:
- 27 were English county councils
 - 55 were English unitary authorities (plus the Isles of Scilly)
 - 36 were English metropolitan borough/district local councils
 - 32 were London boroughs (plus the City of London Corporation)
 - 32 were Scottish unitary authorities
 - 22 were Welsh unitary authorities
 - 1 was the Northern Ireland authority
- 2.7 The final significant change came with the Academies Act 2010 which made it possible for all Local Authority ("LA") maintained schools in England to become academies. Academies are directly funded by central government via the Education Skills and Funding Agency (ESFA) and are independent of LA control and responsibility.

The Role of Local Authorities

- 2.8 As a result of these changes, the relationship between LAs and schools, in England particularly, has changed significantly, and with it the marketplace for the provision of non-statutory or so called 'discretionary services' (which includes the supply of MIS and MIS support services) to schools.
- 2.9 The role of LAs in running schools is now minimal, and many have seen a significant reduction in the demand for discretionary services from schools, as governors and head teachers exercise their freedom to choose which services they require and from whom they purchase them. LAs are now essentially the commissioners of educational outcomes rather than the de facto provider

of education services, although they continue to provide statutory services such as the distribution of funding, school place planning and admissions.

- 2.10 While the majority of LAs with education responsibilities continue to supply at least some discretionary services to schools on a traded basis, there is no obligation for schools to take any of these services from their LA.
- 2.11 Funding arrangements require all LAs to delegate funding to maintained schools, with a general presumption of maximum delegation. However, where relevant school representatives on a Schools Forum¹ agree that the whole budget for their phase, for example primary or secondary, should be returned to the LA for central management, this is allowed, but only in respect of certain services. This recognises that in some circumstances a centralised approach can be more efficient and cost effective, while at the same time allowing schools to pool risk.
- 2.12 The Department for Education (“DfE”) term this centralised approach ‘de-delegation’ and it applies only to maintained primary and secondary schools. Academy schools are responsible for procuring these services and therefore receive their share of potentially ‘de-delegated’ budgets directly from the Education and Skills Funding Agency (“ESFA”). Academies can, however, choose to use these funds to purchase services from LAs. ‘De-delegation’ is not relevant to special schools or pupil referral units as these institutions are funded from separate High Needs budgets where the DfE requires different arrangements to apply.
- 2.13 Funds earmarked for the purchase of MIS and MIS support services are fully delegated to schools, with these products and services deemed discretionary services. Schools and trusts are responsible for procuring these discretionary services, and a LA only has a role in their procurement if in the case of LA maintained schools, the schools have chosen to de-delegate funds to the LA for this purpose, or in the case of trusts, if a trust chooses to procure these products and/or services from the LA. De-delegation is a procurement decision in and of itself and is subject to the normal requirements for school procurement (e.g. obtaining value for money).

Governance Arrangements

- 2.14 In the case of a single school the governing board is the school’s legally accountable body. It is accountable for the individual school to the LA and, if relevant, the diocese or relevant religious body. It has a strategic oversight role.
- 2.15 In the case of a ‘federation’ of schools,² the federation board is the legally accountable body for a group of schools who have formed a federation. It is accountable to the LA and, if relevant, the diocese or relevant religious body. It has a strategic oversight role of the schools in the federation.
- 2.16 Academies, whether single academy trust or multi-academy trusts (“MATs”) are governed by trust boards. MATs are single legal entities controlled by a charitable company limited by guarantee with a trust board that is accountable for all of the academies within the trust.
- 2.17 In England the roles and responsibilities of governance boards and trust boards are set out in the DfE’s Governance Handbook³. In Wales similar guidance is given in the ‘School Governors’

¹ School Forums contain representatives from schools and academies and act as a consultative body on some issues and a decision-making body on others. The forum decides, for example, how much funding can be retained by the LA within the dedicated schools grant and deals with any proposals to de-delegate funding from maintained schools - see: <https://www.gov.uk/guidance/schools-forum-a-guide-for-schools-and-academies>.

² Maintained schools and schools within a federation have a single governing board.

³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/925104/Governance_Handbook_FINAL.pdf

guide to the law’⁴. Further guidance is set out in ‘The School Governance (Roles, Procedures and Allowances) (England) Regulations 2013’ (“**SGR**”), which elaborates on the role and responsibilities of governing bodies.

- 2.18 This guidance and the SGR make clear that school boards should not get involved in the day-to-day running of the school, this being the responsibility of the Headteacher or Chief Executive Officer (“**CEO**”) and senior leadership team of the trust. In particular, governance and trust boards should play a strategic role and avoid routine involvement in operational matters, instead focusing on holding their Headteacher or CEO to account.
- 2.19 Governance boards, which normally consist of a minimum of 7 governors made up of the Headteacher, one staff governor, one LA governor and at least 3 parent governors, are required to hold at least three meetings in each school year. At least seven days clear notice should be given of each meeting, unless urgent matters need to be considered, in which case a shorter notice period can apply if the chair of the board so directs. Any 3 governors can call a meeting.
- 2.20 For academies, the DfE sets very few requirements relating to the constitution of trust boards. Except where an academy is designated with a religious character, the department’s model articles of association give academy trusts almost complete flexibility to design the constitution of their board of trustees as they see fit. Trust boards must, however:
- contain at least two elected parent trustees, or alternatively in MATs that there should be at least two elected parent trustees on each local governing body (“**LGB**”) – a LGB being a committee of a MAT board that oversees an individual academy within the MAT;
 - ensure that no more than a third of board seats are taken by trust employees; and
 - ensure that no more than 19.9% of board seats are given to LA representatives or associates.
- 2.21 Regulation 6 of the SGR requires that all boards act with integrity, objectivity and honesty and in the best interests of the school and should avoid conflicts of interest. Boards are ultimately responsible for the general control and management of the administration of the school with headteachers operating within the autonomy, powers and functions delegated to them by the board. Boards can delegate matters to sub-committees of the board, and in certain circumstances to the Headteacher or CEO, but remain accountable and responsible for all decisions made by these delegates.
- 2.22 LA appointed school governors and trust representatives are required to govern in the interests of the school and not represent or advocate for the interests of the LA. LA appointed school governors and trust representatives are potentially conflicted when considering the procurement of products or services offered by the traded services arm of an LA, since LA’s generally rely on their traded services arm to make a positive contribution to LA finances and depend on schools to use their traded services to achieve this aim.

Other Procurement Regulations and Guidance

- 2.23 Schools and trusts as public bodies are ‘contracting authorities’ subject to the Public Contract Regulations (2015) (“**PCR**”) ⁵. The PCR require that public bodies acquiring services whose value exceeds certain limits (the World Trade Organisation plurilateral Agreement on Government Procurement limits or “**WTO GPA**” limits) undertake procurement in a PCR compliant manner.

⁴ <https://gov.wales/school-governors-guide-law>

⁵ <https://www.legislation.gov.uk/ukxi/2015/102/contents/made>

This can be achieved by way of a competitive tendering process, which involves issuing of a Prior Information Notice and the preparation of formal tender documentation, or by using a PCR compliant purchasing framework such as the Crown Commercial Service (CCS) G Cloud framework or the Kent County Council framework (KCS), which materially simplifies the process.

- 2.24 In most cases the PCR will not apply to the procurement of MIS and MIS support services since these are low value services that typically only cost a few thousand pounds and take up between 0.1% and 0.2% of a school or trust's annual budget (see paragraph 4.17 for the basis of these calculations).
- 2.25 Procurement of MIS and MIS support services are operational matters with procurement occurring in the normal course. As such they are the responsibility of the Headteacher in LA maintained schools or the senior management team in a trust. Procurement of MIS and MIS support services are not ESFA regulated activities and as such do not require ESFA approval or need to be disclosed⁶.
- 2.26 The DfE publishes guidance advice for schools and trusts engaged in procurement.⁷ This guidance recommends that for low value (<£10,000) or medium value (£10,000 to £40,000) purchases, schools should obtain quotes from at least 3 suppliers and choose the supplier that offers the best value for money. The Academy Trust Handbook refers to this guidance as do many LA procurement guidance handbooks and websites. The DfE and DfES guidance is not, however, a statutory requirement and schools are not legally required to follow the advice given.
- 2.27 The Education Acts and related regulations give schools and trusts the responsibility for procurement for a wide range of discretionary services including MIS and MIS support services. With that responsibility comes the requirement to adequately resource the procurement function of the school or trust. The National Procurement Policy Statement makes clear that contracting authorities, which includes schools and trusts, should have: "processes and governance in place to determine and manage their most important contracts"; and "the right organisational capability and capacity with regard to the procurement skills and resources required to deliver value for money". Each year schools are required to review all service contracts to check which are due for renewal and to ensure prior to renewal that they offer value for money.⁸
- 2.28 While typically over 70% of school and trust budgets are taken up by employment costs,⁹ the remaining 30% is spread across a wide range of suppliers, with ICT learning resources, which includes MIS, accounting for between 1% and 5% of all expenditure. Amongst ICT learning resources alone, on average schools have approximately [50-100] different suppliers.¹⁰ To manage this supplier base and fulfil their value for money duty, schools have a duty to adequately resource their procurement function and ensure that they allow sufficient time prior to contract renewals to consider and, if judged necessary, move to alternate suppliers.

⁶ As set out in the Academy Trust Handbook

⁷ See for example https://www.gov.uk/guidance/get-help-buying-for-schools?utm_medium=email&utm_campaign=govuk-notifications-topic&utm_source=d15d82f7-c08b-48bf-8a3d-2957ebf77722&utm_content=daily and

⁸ See, for example, <https://www.gov.uk/guidance/school-resource-management-top-10-planning-checks-for-governors#:~:text=1.-,Staff%20pay%20as%20percentage%20of%20total%20expenditure,represents%20over%2070%25%20of%20expenditure.>

⁹ *Ibid.*

¹⁰ Source: GDPR in Schools ("GDPRiS"). GDPRiS provides, inter alia, data maps for schools showing how data they capture is used by their suppliers. These data maps allow schools to respond to statement access requests. GDPRiS provides this service to a representative sample of c. [2,000-3,000] primary and secondary schools in the UK. The data shows that on average schools have [50-100] different software suppliers who use school data captured by their MIS.

3. ABOUT ESS AND SIMS

Education Software Solutions and ParentPay Group

- 3.1 Education Software Solutions Limited (“ESS”) is a subsidiary of ParentPay (Holdings) Limited and is part of the ParentPay Group (“PPG”). The ESS business was, until February 2021, owned and operated by Capita plc. From February to August 2021, it was owned and operated by Montagu Private Equity LLP (“MEP”). PPG acquired ESS from MEP on 6th August 2021, the CMA having unconditionally cleared the transaction following a Phase 1 merger enquiry¹¹.
- 3.2 ESS specialises in the supply of management information and library management systems. Its core school software product is SIMS, a Management Information System (“MIS”) for schools. SIMS was first developed in the early 1980’s, by a teacher working at Lea Manor High School in Bedfordshire and then by Bedfordshire County Council. SIMS first began being used by schools other than Lea Manor in 1984. In 1988 a commercial company SIMS Ltd. was founded to further develop SIMS. SIMS Limited was acquired by Capita Group in 1994.
- 3.3 PPG was founded in 2022 and supplies a range of software and services to schools, further and higher education colleges and contract caterers working in the education sector in the UK, the Netherlands and Germany. Prior to the acquisition of ESS, software and services supplied by PPG included payment, parental engagement, messaging, meal ordering, meal management and catering management systems.
- 3.4 Together PPG and ESS have considerable experience of selling software and services to UK schools, supplying one or more of the group’s services and/or software products to over 20,000 schools. The group has dealt with all but a handful of UK LAs, and has an in depth knowledge of school procurement processes and regulations.

SIMS

- 3.5 SIMS is used by schools to collect, maintain and administer a database of pupil information and manage a range of school operations. SIMS records pupil attendance and attainment, monitors behaviour, tracks safeguarding arrangements, provides school leaders with reporting and analysis, allows schools to prepare and file a range of statutory returns, helps school manage their workforce and budgets, creates and manages timetables, and together with FMS, ESS’ financial management system, provides a complete ERP solution for schools.
- 3.6 The current version of SIMS (SIMS 7) is a Microsoft Windows program that is in the majority of cases installed on Windows laptops and tablets that link to a Microsoft SQL Server database licenced by the customer, installed on a customer-owned server and located in the customer’s premises. Installations of this kind are referred to as “on-premise” SIMS instances.
- 3.7 As with any Windows program, SIMS 7 can also be hosted in the cloud and accessed via a range of browsers or through a Virtual Private Network (“VPN”). This is termed a “cloud hosted” SIMS instance. Over 6,000 schools, close to 40% of the SIMS customer base, use SIMS in cloud hosted instances, with the cloud hosting provided by ESS and others. There are substantially more instances of SIMS hosted in the cloud than of any other MIS available in the UK.
- 3.8 ESS supports two different cloud hosted instances of SIMS: “Hosted SIMS”; and “SIMS Connected”. Hosted SIMS uses a VPN for access, whereas SIMS Connected is a cloud hosted instance of SIMS that can be accessed on an ‘anytime, anywhere’ basis using a range of browsers.

¹¹ <https://www.gov.uk/cma-cases/montagu-slash-parentpay-merger-inquiry>

ESS is currently gradually migrating Hosted SIMS customers to SIMS Connected, which is ESS' favoured hosted SIMS solution.

- 3.9 ESS is investing substantial sums into developing SIMS and its SIMS Connected proposition, including developing a range of “cloud-native” functionality that will inter-operate with and supplement the functionality currently available in SIMS 7. The project to develop this new “cloud-native” functionality and the functionality so developed is known as “**SIMS Next Generation**” or “**SNG**”.

SIMS Statutory Reporting

- 3.10 The Commitments are only relevant to schools in England and Wales.¹² All of these schools are required to regularly submit statutory reports to either the DfE, if they are located in England, or the Department for Education and Skills (“**DfES**”), if they are located in Wales. The content of these reports varies from year to year and from term to term. These reports are typically prepared and generated using a MIS, which has to be updated regularly to accommodate the changing requirements of the DfE and DfES. To reduce the cost of the reporting process, nearly all primary and secondary schools in England and Wales use a MIS solution.
- 3.11 In November 2021, in Wales there were only two MIS able to produce DfES statutory reports, SIMS 7 and Teacher Centre, and that remains the case today. Two former suppliers, Advanced Learning and RM, ceased to have a presence in Welsh schools in 2016 and 2017 respectively. According to Welsh government census data, Teacher Centre, which is supplied by Ceredigion County Council, is only used in primary schools in Wales.

MIS features and integrations

- 3.12 The data stored in or by a customer's MIS is also of use to other software programs and service providers. Most MIS software permits a portion of the data they capture to be shared with third party suppliers of software products used by schools to perform non-core MIS functions, for example, collecting parental payments, preparing financial reports, paying the school's workforce, managing school catering, and engaging with parents.
- 3.13 In this regard, the Adjudicator should be aware that the UK has a large number of specialist educational software application providers, many more than any other country in Europe, with schools on average subscribing to [50-100] different software products and/or services¹³. Most of these application providers read data from, and in a minority of cases write data to, school MIS. Moreover, to minimise development time and provide access to a broad range of MIS, most educational software application providers obtain their MIS data through intermediaries, known as ‘Aggregators’, such as Wonde and GroupCall.
- 3.14 Aggregators integrate with a wide range of MIS, all with different interfaces, and provide application developers with a single ‘MIS agnostic’ application programming interface (“API”), which developers can use to read or write data from and to any MIS supported by the Aggregator. An Aggregator's ‘MIS agnostic’ API hides the differences between MIS from application developers and theoretically saves time and money by ensuring developers only have to program for a single API.

¹² There is a separate procurement process relating to schools in Scotland and Northern Ireland which is not relevant to the cohort of schools covered by the Commitments.

¹³ Source: GDPR in Schools (“GDPRiS”). GDPRiS provides, inter alia, data maps for schools showing how data they capture is used by their suppliers. These data maps allow schools to respond to statement access requests. GDPRiS provides this service to a representative sample of [2,000-3,000] primary and secondary schools in the UK. The data shows that on average schools have [50-100] different software suppliers who use school data captured by their MIS.

- 3.15 Some education related software services, for example ParentPay payments, do not use Aggregators, on grounds of cost and quality, and instead have in-house integrations (or “Proprietary Integration”) with all the established MIS. Other third party products and services which similarly use Proprietary Integrations may only support a limited number of MIS.
- 3.16 Where schools rely on applications that integrate with both SIMS and their new chosen MIS provider (either via Aggregators or the supplier’s own MIS integrations), switching MIS should be a near-invisible process which has little or no impact on either their own or the school’s operations, and which can be implemented within a short space of time. Therefore, the need to integrate a customer’s MIS with existing third-party software products used by that customers should not delay the overall switching process.
- 3.17 While in most cases the use of Aggregators, or in-house support for a range of MIS, means that moving from one MIS is a seamless process for schools using third party application providers, where schools rely on Proprietary Integrations, their choice of MIS may be more limited (to the MIS which supports those specific applications).
- 3.18 Different MIS have different features and one of SIMS’ key differentiators are its Proprietary Integrations with third party systems that are unique to SIMS. Where a customer has to have one or more of the features and/or Proprietary Integrations that are unique to SIMS, in ESS’ view that customer could not have realistically considered switching to an alternative MIS that lacked these features or Proprietary Integrations at that time.

4. SIMS CONTRACTING ARRANGEMENTS

SIMS software licensing

- 4.1 Historically, the ESS business has licenced SIMS to customers under one-off perpetual licences. In the early years, prior to the 1993 Education Act, SIMS perpetual licenses were granted to LEAs and covered all of the LEA’s maintained schools. There was no need for sub-licensing arrangements since the LEA and its schools were part of the same body.
- 4.2 Following the 1993 Education Act, with the establishment of schools as corporate bodies distinct from their LEA, a number of LEA bulk SIMS software licences are understood to have been amended in order to permit the LEA, and subsequently, following the demise of LEAs, the LA, to sub-licence SIMS to its LA maintained schools in its catchment area.
- 4.3 With the introduction of grant-maintained schools, and subsequently academies, the SIMS licensing model was modified to include the direct licensing of SIMS software to schools no longer under the control of a LA (for example, foundation schools, free schools and academy trusts). These “**Direct Schools**” contracted directly with the ESS business (formerly Capita) and were required to purchase a new perpetual SIMS licence when they ceased to be LA maintained schools covered by a LA bulk SIMS licence.
- 4.4 As a result of the delegation of purchasing powers to schools, a number of LA maintained schools have chosen to contract directly with ESS for SIMS and/or SIMS ‘add-on’ and third-party modules (“**Add-ons**”). These LA maintained schools contracted directly with ESS either because:
- 4.4.1 they only require a subset of the functionality licensed by their LA, and it is therefore cheaper to purchase this from ESS directly even taking into account the bulk purchase discounts enjoyed by the LA;

- 4.4.2 they require functionality that their LA doesn't licence from ESS, and to obtain access to this functionality they contract directly with ESS while remaining a sub-licensee of the SIMS functionality ESS licenses to the LA; and/or
- 4.4.3 it is a condition of the LA's sub-licensing of SIMS that the school use certain of the LA's traded services, for example the LA's SIMS first- and second-line support services, and the school does not want to contract for these additional LA traded services so contracts directly with ESS for SIMS.
- 4.5 LA maintained schools contracting directly with ESS for SIMS or SIMS Add-ons are also termed "Direct Schools" in respect of these and only these contracts.
- 4.6 LAs generally bought SIMS using what are termed "2 system area" (2 Tier) or "3 system area" (3 Tier) licences. A 2 Tier licence includes a defined set of "Core" and "Curriculum" software modules, with a 3 Tier licence including these same Core and Curriculum modules along with an additional "Resources" module.¹⁴
- 4.7 Direct Schools generally purchase perpetual module licences individually, on an 'a la carte' basis, rather than buying the Core, Curriculum and Resources packages. Including Add-ons there are around 50 modules currently available as part of SIMS.
- 4.8 To avoid having to build a large-scale support operation, SIMS Limited encouraged LEAs to establish their own SIMS Support Unit ("SSU") that would provide first- and second-line support to LA maintained schools under the LEA's control. Consequently, a large number of SSUs were established, many of whom remain LA owned today, in many cases forming part of their LA's traded services arm.

Annual Entitlement agreements

- 4.9 In addition to holding a perpetual licence for the SIMS software, LA and Direct School customers entered into periodic Annual Entitlement ("AE") agreements, which entitled customers to receive software updates for their licenced software and ESS technical support services. It is important for the Adjudicator to note that it is these AE agreements to which the New Break-Clause Offer relates.
- 4.10 ESS understands that it was a condition of many perpetual licences that the licence holder was party to a current AE agreement. As such, many of ESS' 'perpetual licences' were not in fact perpetual, since they lapsed if no AE agreement was in place.
- 4.11 Schools in England and Wales require the latest AE software update from ESS in order to submit statutory returns to the DfE and DfES. Different statutory returns are required by each of the nations of the UK, who each have their own statutory returns timetable. ESS supplies software updates necessary for the statutory returns in England, Wales and Northern Ireland three times a year in April, July and October.¹⁵
- 4.12 ESS' AE agreements also provided schools with access to ESS technical support services for their licensed SIMS software. For LA maintained schools AE agreements only included third-line

¹⁴ Core includes the following modules: (a) STAR (b) Reporting (c) System Manager (d) PLASC and School Census (e) Attendance (f) Personnel (g) Special Educational Needs and (h) Exams Organiser (Secondary only). Curriculum includes the following modules: (a) Nova T6 (timetable) (b) Cover management (c) Nova P5 (appointment schedule) (d) Options (exam options) (e) Assessment Manager (f) Performance Analysis and (g) Profiles. Resources includes the following modules: (a) Financial Management System ("FMS") including Equipment (b) Register & Accounts Receivable and (c) Fees Billing 7.

¹⁵ The April update covers changes in statutory returns that fall due between mid-May and end-September, the July update covers changes in statutory return that fall due between October and mid-January of the following year, and the October update covers changes in statutory return that fall due between mid-January and mid-May of the following calendar year.

technical support services, but for Direct Schools they also included a basic (email and web) first- and second-line support service.

- 4.13 Around [500-1,000] Direct Schools use ESS' basic first- and second-line support service with the majority of Direct Schools choosing to contract for an enhanced level of support service either provided by an SSU or directly by ESS. Where ESS provides such first- and second-line support services these are known as 'SIMS Enhanced Support' services.
- 4.14 The majority of LAs own and operate an SSU and historically where they sub-licensed SIMS to LA maintained schools it was generally a condition of the sub-licence that these schools used the LA's own SSU for first- and second-line support.
- 4.15 Since nearly all schools use SSUs or ESS' Enhanced Support service to provide first- and second-line support, with ESS' third line support service provided directly to these first- and second-line support providers, the primary benefit that schools derive from their AE agreement is the supply of periodic software updates referred to above.
- 4.16 AE agreement terms range from 1 to 10 years. A sizeable minority (known to be above [25%] and thought to be below [50%] of all ESS customers¹⁶) have historically contracted for Annual Entitlement on longer terms, typically of between 3 and 10 years. Longer-term AE agreements with a duration over 12-months are, however, not relevant to the New Break-Clause Offer, which solely concerns customers that were previously on a rolling 12-months AE agreement due to expire on 31 March 2022. As explained above contracts relating to customers in Northern Ireland, which are multi-year agreements, are therefore not relevant to the adjudication process. ESS has no MIS contracts in Scotland.
- 4.17 AE agreement prices are typically linked to the number of pupils on the roll at the relevant educational establishment. Expenditure on AE services generally represents a relatively small proportion of the school's budget. ESS estimates that this would be in the region of **0.1%** for a LA maintained primary school (based on an average SIMS MIS Annual Entitlement expenditure of around [**£0.5k to £1.5k**] per annum compared to an average primary school budget of £1.16 million per annum)¹⁷ or around 0.3% if excluding average staff costs;¹⁸ and similarly in the region of **0.1%** for a LA maintained secondary school (based on average SIMS MIS Annual Entitlement expenditure of around [**£2.5k to £7.5k**] per annum and an average school budget of £4.91 million) or around 0.3% if excluding average staff costs.¹⁹ For academies, these figures are around [**£1.5k to £3.0k**] or **0.2%** for SIMS primary schools and [**£5.0k to 7.5k**] or **0.1%** for secondary schools, or around 0.7% and 0.3%, respectively, if excluded average staff costs. For completeness, these percentages would not be materially affected by the inclusion of SIMS add-on products, which typically are of relatively low value compared to SIMS AE.

The historic AE agreement renewal process

- 4.18 Since at least 2019, ESS has renewed Direct School AE agreements through an online web portal, known as the "**Portal**". The Portal provides the customer with one or more quotations, one for each AE contract currently held by the customer, with each quotation made up of one or more

¹⁶ The exact figure is not known because the ESS CRM prior to November 2021 did not record whether a customer was in a multi-year agreement. Any customer known to be renewing on 31 March 2023 or later was evidently in a multi-year agreement (and these customers accounted for approximately [25% to 50%] of the total customer base) but customers whose multi-year agreements came up for renewal prior to that could not be easily identified.

¹⁷ Based on school budgetary information available at www.besa.org.uk/key-uk-education-statistics/ and ESS data.

¹⁸ This is on the basis that, as explained in paragraph 2.27, typically over 70% of school and trust budgets are taken up by employment costs, the remaining 30% is spread across a wide range of suppliers.

¹⁹ *Ibid.*

line items corresponding to the various ESS software modules, or packages of modules (e.g. Core, Curriculum or Resources) covered by the contract.

- 4.19 Prior to ESS' acquisition by PPG, the Portal opened each year on or around the end of October and dealt with the renewal of Direct School AE contracts due to expire on 31 March of the following year, regardless of whether these contracts were 12-month rolling or multi-year AE agreements ("MYA"). The Portal also dealt with price and quotation changes within MYA that were not due to expire on 31 March of the following year.
- 4.20 12-month rolling AE agreements automatically renewed unless terminated by either party in writing at least 90 days before the end of the current term. MYA generally terminated [X] of their stated term. The terms of AE agreements could not be modified without the mutual written agreement of both parties, and where ESS sought to make price changes on renewal of 12-month AE agreements it was required to inform the customer at least 120 days before the end of the current term.
- 4.21 With many customers having multiple contracts, not all of which included SIMS, and some schools being both Direct Schools and covered by LA AE agreements, the Portal had to deal with a wide variety of contracting arrangements and groups, each with a unique contractual situation. Using a single website for such a wide variety of contractual arrangements was not ideal and required that communications linked to the Portal catered for the nuances of each group.
- 4.22 Customers eligible to use the Portal and who were on rolling 12-month AE agreements due to renew on 1 April of the following calendar year were invited in late October or early November to accept, partially accept, modify or cancel their quotations via the Portal, and where they failed to cancel a quotation, or a line item within a quotation, by 31 December, the quotation would be deemed accepted and would automatically renew on 1 April of the following year for a further 12-month term. Customers also had until 1 February of the following year to confirm certain parameters, such as the number of pupils on roll ("POR") within their establishment, which determined the amount that would be invoiced in advance of the upcoming renewal.
- 4.23 The Portal was not used by LA maintained schools who sub-licenced their ESS software modules from a LA and who received AE services under the terms of an umbrella LA AE agreement between ESS and their LA. These schools only used the Portal if they separately licenced Add-ons directly from ESS and then only in respect of these Add-ons.
- 4.24 LAs with umbrella AE agreements were, however, subject to similar renewal timeframes to Direct Schools. LAs with AE agreements due to renew on 1 April of the following calendar year, were expected to provide a full list of the LA maintained schools to be covered by their forthcoming renewal by 31 December of the current calendar year and to provide certain contract parameters, such as school POR numbers and purchase order numbers, by the 1 February deadline. The notice periods and termination arrangements for LA AE agreements were broadly the same as those used in Direct School AE agreements and changes to agreement terms generally required the mutual written agreement of both parties.
- 4.25 LAs with umbrella AE agreements were able to contract for these services on behalf of schools because these schools had de-delegated (as described in section 2 above) their MIS support services budget to the LA. These de-delegation arrangements generally lasted for a year and had to be renewed prior to each agreement anniversary. Even where the LA had entered into a MYA the number of schools covered by the agreement could often be varied each year since schools only de-delegated funding a year at a time. Accordingly, each year, on or around 1 November, ESS asked LAs to confirm the number of schools that they wished to be covered under their

umbrella AE agreement for the forthcoming 12-month period from 1 April of the following year to 31 March of the year after that. This allowed LA approximately two months to establish which schools would choose to de-delegate their MIS support services funding to the LA for the coming 12-month period.

4.26 Since LA maintained schools are responsible for their MIS and MIS support services procurement, de-delegation is in itself a procurement decision, requiring a school to establish whether purchasing these discretionary services through the LA offers VFM. LA maintained schools, while not generally contracting directly with ESS for AE prior to 1 April 2022, were in practice used to an annual cycle of MIS support services procurement in the form of renewal of their LA de-delegation arrangements. For all the reasons given in earlier sections, in ESS' view, renewal of these de-delegation arrangements should have involved exactly the same scrutiny and diligence as would have been required had the school chosen to procure these services directly from ESS or any other MIS provider.

4.27 It is noteworthy that prior to ESS' acquisition by PPG at least [25% to 50%] of schools were covered by MYA. As noted in paragraph 4.16, this could have been as high as [50%]. Schools chose to use MYA because:

4.27.1 they reduced procurement costs by avoiding the need for annual procurement;

4.27.2 they gave schools certainty of terms, and greater certainty over pricing, for multiple years making it easier to budget and forecast their MIS costs over the medium term;

4.27.3 MYA were not subject to rolling renewal and could not be terminated [⌘]; and

4.27.4 for schools who required more than 12 months to consider a change in their MIS, or who would be unable to switch MIS providers in the 90-day termination period that applied to 12-month rolling AE agreements, MYA provided schools with a longer period in which to consider alternatives and plan for a move to an alternative MIS supplier.

4.28 ESS also notes that at the time PPG acquired ESS nearly all Direct School AE agreements were with individual schools, with only [⌘] of ESS' 12-month rolling AE agreements being with school groups where the collective value of the agreement if extended to 3-years would exceed the then WTO GPA limit (and thereby be subject to the PCR).

The new three-year direct AE agreements

4.29 On 8 November 2021, ESS notified Direct Schools and LAs whose AE agreements were due for renewal on 1 April 2022 that it would not in future offer 12-month AE agreements, and would only offer 3-year AE agreements on 3-year rolling terms. ESS also notified LAs that in future it would not offer LAs umbrella AE agreements, opting instead to contract directly with LA maintained schools previously covered by such agreements.

4.30 Since AE agreement terms could not be modified without the written agreement of both parties, ESS had no choice but to terminate existing AE agreements by giving 90 days written notice in accordance with the terms and offering customers new contracts on the revised terms. It would not have been practical to modify nearly [10,000 -15,000] contracts by mutual written agreements.

4.31 ESS motivation in making these changes was as follows:

4.31.1 ESS proposed to make a £40 million 3-year investment in SNG and required certainty of revenues to support this investment;

- 4.31.2 SNG required ESS to copy school data to the cloud, which meant that ESS had to contract directly with the data controller, namely the school rather than the LA;
- 4.31.3 ESS' principal competitors' used agreements with 3, 4 or 5 year terms²⁰; and
- 4.31.4 PPG, in common with many education software suppliers, used 3-year terms for all of its contracts and had done so for at least the last 15 years.
- 4.32 In response to ESS' notice of 8 November, one of ESS' competitors sent a series of misleading communications to ESS' customers claiming that ESS would automatically enrol customers into new 3-year agreements unless they terminated their existing agreements before 31 December 2021. This was false but is believed to have created significant confusion in the market.²¹
- 4.33 Accordingly, on 7 December 2021, ESS issued a set of clarificatory communications to Direct Schools and LAs (an example of such a communication is provide in **Appendix 1**). These communications clarified that schools were able to enter into a new AE agreement at any time (that is, up to or after 31 March 2022), but that if schools wanted to ensure continuity of service they were recommended to enter into a new agreement before 31 March 2022. This was sent to customers in the event that the November communications were unclear as to whether a customer was required to agree to a New Contract by a date earlier than 31 March 2022.
- 4.34 The New Contracts offered were substantively similar to previous AE agreements, with some changes:
- 4.34.1 they were for a three-year term and include a term software licence for the relevant SIMS software modules;
- 4.34.2 they included access to core SNG cloud software and support services for a cost of [X] per annum for the term of the agreement;
- 4.34.3 They contained new provisions requiring that customers contracted with an approved SSU or ESS for the provision of first- and second-line SIMS technical support services; and
- 4.34.4 by virtue of contracting directly with all schools, they permitted ESS to copy and store SIMS data to and in the cloud, which was a necessary pre-cursor to the delivery of new SNG functionality.
- 4.35 As the existing AE standard terms did not permit amendment of the existing AE terms other than by written agreement, in order to ensure that the proposed changes to the AE agreements took effect, ESS was required to terminate its existing agreements and offer a new AE agreement to customers. To effect that termination, ESS in late December 2021 notified all customers²² with 12-month rolling AE agreements and LA umbrella agreements due for renewal on 1 April 2022 these agreements would terminate on 31 March 2022. By giving more than 90 days' advance notice of termination, ESS complied with the terms of these existing agreements.
- 4.36 On 8 November 2021, in addition to sending the communications referred to in paragraph 4.29 ESS opened the Portal to Direct Schools so as to allow them to agree to the New Contracts commencing on 1 April 2022. Customers could accept the New Contract on the Portal at any

²⁰ One of ESS' principal competitors offered contracts with a 1-year initial terms followed by 5 year rolling renewals, but since no school would deliberately change MIS for a single year this was effectively an initial term of 6 years followed by 5 year renewals.

²¹ ESS had no right to automatically enrol customers into new 3-year AE agreements, as was evident from a cursory examination of the existing AE agreement terms. The competitor eventually withdrew this claim but by then the damage had been done.

²² If the customer had already notified ESS that it was terminating its contract prior to ESS issuing these notices, no notice was issued to that customer.

time up to 31 March 2022 or indeed after that. However, if a customer signed up to the New Contract after 31 March 2022, the contract was backdated to 1 April 2022 to ensure that the customer received, and was entitled to receive, all software updates issued since the termination of its previous AE agreement.

- 4.37 In the version of the Portal ESS opened on 8 November 2021 the contracting process and terms were updated to make the contracting process clearer and more efficient. This included the introduction of an electronic acceptance of terms using a scroll wrap contracting process which drew specific attention to the changes included in the New Contracts.

LA Facilitation Agreements

- 4.38 Separately, in order to communicate the transition to direct contracting with LA maintained schools, ESS engaged with LAs in late October and early November 2021 to outline the rationale for moving to direct contracting and to 3-year terms for AE agreements. This rationale is set out in paragraph 4.31. The aim of this engagement was to provide time for LAs to communicate and liaise with LA maintained schools covered by their umbrella AE agreement with ESS and prepare for the move away from the de-delegation of contracting for AE.
- 4.39 LAs with AE agreements due for renewal on 1 April 2022 were given the choice of whether or not to terminate their SIMS 2-Tier or 3-Tier perpetual licences at the same time as terminating their umbrella AE agreement. Those LAs who agreed to termination did so under a Facilitation Agreement (“FA”), under which, in consideration for the LA agreeing to terminate its perpetual licences, ESS agreed to offer LA maintained schools formerly covered by the LA’s AE agreement, new 3-year AE agreements at the same prices as ESS charged the FA under the umbrella agreement, plus indexation.
- 4.40 Where LAs signed Facilitation agreements de-delegation arrangements ceased from 1 April 2022 and schools were free to procure directly from ESS or another MIS provider from that point forward.
- 4.41 With the move to direct contracting for all LA maintained schools, LAs were no longer in a position to require schools who were their SIMS sub-licensees to use the services of their SSU. Instead LA maintained schools are now able to obtain SIMS 7 support from any approved SSU or ESS. This potentially creates conflicts of interest for LAs, who have a duty to ensure that schools use the support provider who represents the best value for money, but who also need to ensure that their SSU continues to make a positive contribution to the LA’s finances.

The Gateway

- 4.42 In order to contract directly with LA maintained schools who had previously obtained their AE services under the terms of umbrella LA AE services agreements, ESS developed an online web portal (the “**Gateway**”), which adopted the same scroll wrap contracting process introduced in the Portal. The Gateway was opened to LA maintained schools in early January 2022. LA maintained school customers could accept the New Contract on the Gateway at any time but to benefit from continuity of service were recommended to contract on or before 31 March 2022.
- 4.43 As a result of the move to direct contracting with individual LA maintained schools, from a contractual perspective, ESS effectively had direct contracting arrangements with the following customer groups:
- Individual schools (which includes LA maintained schools) and single academy trusts;

- Individually invoiced academies or schools which form part of multi-academy trusts (“MATs”) and school trusts; and
- Centrally invoiced MATs.

The Original Break-Clause Offer

- 4.44 In January 2022, ESS made the Original Break-Clause Offer to those of its customers that had entered into or were considering whether to enter into a New Contract commencing on 1 April 2022.
- 4.45 Under the terms of the Original Break-Clause Offer, customers who agreed to a New Contract were given an option to request on or by 20 February 2022, at no cost to the customer, a 6-month break clause in their New Contract. The only material condition to the Original Break-Clause Offer was that a customer entered into a New Contract (which was necessary for the Original Break-Clause to operate) and sent their break clause request by email to a specified ESS mailbox on or before 20 February 2022. Customers who did so received an immediate automated response informing them they had been successful, provided that their email contained the basic customer information requested (being the school name, postcode, contract quote number and DfE number) and they signed up to their new three-year AE agreement by 20 February 2022.
- 4.46 The Original Break-Clause provided customers with the option to terminate their New Contract on **30 September 2022** by providing notice to ESS on or by 31 August 2022. In practice, ESS offered schools an additional week grace period following 30 September 2022 to migrate to their new MIS. There are no cases of which ESS senior management are aware where customers had their requests for the Original Break-Clause accepted and then subsequently rescinded or revoked.
- 4.47 The Original Break-Clause Offer was communicated to all eligible Direct Schools with core SIMS on Wednesday 12 January and to LA maintained schools between Friday 14 January and Wednesday 19 January. Copies of these communications are provided in **Appendix 2**. The Original Break-Clause Offer to LA maintained schools was made in conjunction with the opening of the Gateway (described above). As a formality, on 25 March 2022, ESS confirmed in writing the inclusion of the Break-Clause in the New Contracts to those schools which had applied for the Break Clause Offer and signed their new 3-year AE agreement by the 20 February deadline along with details of how to exercise their break clause right.
- 4.48 For completeness, on 25 July 2022, ESS communicated a series of extended break clause offers to customers. These offers and their significance to Applications is described further in Section 8 below.
- 4.49 A summary of the key milestones/communications with customers from 8 November to 30 September is provided below.

Table 1: Summary of key milestones/communications with customers

Milestone/communication	Date Sent
Engagement with LAs on proposed move to direct contracting with LA maintained schools	Last week of October and first week of November 2021
Original communications sent to LAs and customers using the Portal to contract for AE services	8 November 2021

Milestone/communication	Date Sent
Clarification emails sent to Portal customers and LA maintained schools	7 December 2021
Communications sent to customers who assented to 3-year AE agreements before clarification emails of 7 December	14 December 2021
6-month break-clause offer sent to customers using the Portal	12 January 2022
Original communication to customers using the Gateway to contract for AE services	14 - 19 January 2022
6-month break-clause offer sent to customers using the Gateway	14 – 19 January 2022
New Contract commencement date	1 April 2022
July Offers made to customers	25 July 2022
Deadline for exercising Original Break-Clause	31 August 2022
Date when Original Break-Clause takes effect	30 September 2022

Summary

- 4.50 Taking stock of the above, ESS summarises its view as follows.
- 4.51 It is evident that all schools who contracted for AE services, either directly on 12-month rolling terms or under the terms of an LA umbrella agreement, were used to a regular annual procurement cycle. Whether choosing to continue de-delegating MIS support service funding to an LA or to rollover their existing AE agreement for another year, schools who were abiding by the regulations and available procurement guidance were required each year to consider whether: re-procuring from ESS delivered value for money; and, if so, whether the contractual terms and contracting periods being used were appropriate. If these tests were not satisfied (and no customer could guarantee in advance of a renewal that they would be) then schools in the normal course were required to be in a position to procure from an alternative supplier who satisfied these criteria within the notice period available.
- 4.52 As such it is reasonable to expect that customers who had not already contemplated switching MIS prior to the 8 November 2021 announcement but who, on the basis of that announcement, decided to consider switching to an alternate MIS supplier, would have been geared up to take initial exploratory procurement planning steps in the days and weeks following the announcement, since this was something they would have expected to do in the normal course at this time of year.
- 4.53 Even for those customers who were confused by ESS’ 8 November announcement or the misleading statements made by ESS’ competitors in the wake of the announcement, would from **7 December 2021**, the date these communications were further clarified, have been clear about

what was proposed and would have had no reason not to explore moves to alternate suppliers if they were unhappy with ESS' new terms.

- 4.54 The date range **8 November to 7 December** therefore represents the **earliest** starting point for customers to have begun considering switching away from SIMS in response to the offer of the New Contracts.
- 4.55 It is evident from communications published by a competitor during this time that SIMS customers were being actively targeted to switch to competitor MIS from around mid-November 2021. With all of ESS' principal competitors actively seeking to use ESS' announcement of 8 November to win new business, SIMS customers were able to obtain quotations, receive demonstrations and obtain a wide range of information from competitors at short notice, reducing the time required to undertake a competitive procurement process (see Section 6 for further details).
- 4.56 While ESS considers that any customer who genuinely wished to consider switching MIS in response to ESS' announcement of 8 November would have at least begun their research into alternative providers by the end of November 2021, given the timescales set out in section 6, ESS would only expect a minority of these customers to have contracted with an alternate MIS supplier by the beginning of the 2022 Spring Term .
- 4.57 From 12 to 19 January 2022 (being the period over which the Original Break Clause Offer was communicated to the relevant customer groups) customers were made aware that if they requested a break-clause (which was available at no cost or condition, save for making the request²³ and accepting the New Contract on or by 20 February 2022), they would have until 30 September to effect any switch and could plan with confidence on that basis. As such, 12 – 19 January represents a conservative starting point for measuring the overall switching period afforded to customers with an Original Break-Clause. Given that this is the period in which customers would be giving consideration as to whether to request a break-clause, it may also be the period in which contemporaneous records are most likely to exist, which document considerations as to the timeliness for any switch to an alternative MIS.
- 4.58 On the basis of the above, ESS calculates that customers had, at the most, **a period of nearly 11 months** (46 weeks 5 days, being the period from 8 November 2021 to 30 September 2022), and, from the period the Original Break Clause was offered, **a period of approximately 8.5 months** (36 weeks and 3 days, being the period from 19 January to 30 September 2022), to consider, plan and implement the steps necessary to switch MIS.

5. PROCUREMENT PROCESSES

- 5.1 As a general observation, ESS considers that schools can face, at any time, the need to change a key supplier (for example, due to supplier failure/exit from the market or changes in the supplier's prices or terms). Schools procure goods and services from a wide range of suppliers and in most

²³ Schools were asked to follow a basic process to request the Original Break-Clause. This entailed sending an email requesting the break clause and noting the school name, postcode, quotation number and DfE number. Provided this was sent on or before 20 February 2022, an immediate automated email response was sent back to the school confirming that, provided the customer's request included the basic details requested, and the school signed their new 3-year Annual Entitlement agreement on or before 20 February, their request had been successful.

cases do so directly without the use of LA umbrella arrangements. This is particularly true of IT procurement where schools on average have around [50-100] different direct suppliers²⁴.

- 5.2 Given this large number of suppliers, average contract lengths of between one and three years and no standardisation of contract start and end dates, schools, as a matter of course, procure IT services on a regular basis and do so throughout the year. Schools have a statutory duty to procure discretionary services, such as their MIS, and to obtain value for money in so doing. As noted in paragraph 2.27, schools are required to have “processes and governance in place to determine and manage their most important contracts” of which MIS is one.
- 5.3 ESS also notes that in circumstances where an LA seeks to procure on behalf of a school, the school still has ultimate responsibility for the procurement and should only de-delegate purchasing responsibility to the LA if that is deemed to be consistent with the school’s internal guidelines and the law.²⁵
- 5.4 The procurement process adopted by customers purchasing AE services (or another MIS solution) will vary depending on the type and size of the customer, whether the customer is a group, and the customer’s circumstances at the time the procurement occurs.
- 5.5 Since one of the reasons for establishing MATs and federations was to allow groups of schools to benefit from more efficient and cost-effective procurement, these groups can reasonably be expected to be ready and equipped to undertake procurement at all times. This is borne out by the speed with which some of ESS’ largest MAT customers conducted procurement processes following ESS’ announcement on 8 November.
- 5.6 For individual schools the general rule of thumb is that smaller primary phase schools have simpler requirements than larger secondary phase schools. This is reflected in the relatively straightforward nature of primary phase procurement, which does not, for example, need to consider timetabling or options or exams.
- 5.7 The simpler requirements of primary schools are generally counterbalanced by the limited resources available to primary schools, which on average have less than a third of the workforce of secondary schools.
- 5.8 The procurement process adopted by customers will reflect these considerations, the value of the procurement as a proportion of the school’s budget and the regulatory regime applying to the customer, which will be set out in the customer’s individual procedures and policies. The main types of procurement process that a customer may adopt are:
- 5.8.1 **Informal procurement leading to a direct award.** Given the low value of MIS procurement, informal procurement followed by a direct award to a chosen supplier is the standard method by which MIS and MIS support services are procured.
- 5.8.2 Schools and school groups procuring services whose total value is below the WTO GPA limit of £213,477 inclusive of VAT may adopt their own informal procurement processes. The sophistication of the process used is often influenced by the contract value. The DfE (in its published guidance) recommends £40,000 as the threshold above which a more formal tendering process should be carried out. As noted in Section 3,

²⁴ Source: GDPR in Schools (“GDPRiS”). GDPRiS provides, inter alia, data maps for schools showing how data they capture is used by their suppliers. These data maps allow schools to respond to statement access requests. GDPRiS provides this service to a representative sample of [2,000-3,000] primary and secondary schools in the UK. The data shows that on average schools have [50-100] different software suppliers who use school data captured by their MIS.

²⁵ Where LAs procure MIS software on behalf of school(s) they may be required to go out to tender if the value of the contract they are seeking to award exceeds certain limits or if the contract cannot be awarded through a PCR compliant framework.

the average AE agreement contract value is considerably below this threshold and the same would generally be true for contracts from competitor MIS. For contracts whose total value is below £40,000 the DfE recommends, but does not require, that schools obtain at least three quotes.

- 5.8.3 A customer undertaking an informal procurement process will typically undertake a standard set of steps as part of that process including: the preparation of a requirements statement for circulation to potential suppliers; the issue of an invitation to quote or tender to these suppliers; an evaluation of proposals and quotations received; and the award of the contract to the chosen supplier. ESS would expect that in a small number of cases, the requirements statement and/or relevant tender documents would be prepared by consultants, but in most cases these documents are prepared in-house.
- 5.8.4 In ESS' experience, larger MATs or LAs looking to centrally procure an MIS on behalf of LA maintained schools will tend to use a more formal tender process. Since most LA procurements are likely to exceed WTO GPA limits these procurements are generally undertaken as formal PCR compliant processes (see below).
- 5.8.5 ESS notes that all of the LAs whose AE umbrella agreements were due for renewal on 1 April 2022 voluntarily signed a FA with ESS. In all of these LAs schools previously covered by the LA's umbrella AE agreement with ESS were free to contract directly with ESS and many did so. Schools were able to contract directly with ESS because the de-delegation arrangements required for LA umbrella contracting came to an end on 31 March 2022 and were not renewed. The lack of such de-delegation arrangements from 1 April 2022 meant that LAs were not in a position to continue procuring MIS on behalf of LA maintained schools in their catchment area from 1 April 2022, and would not have been in a position to do so without renewing their de-delegation arrangements with schools.
- 5.8.6 **Direct award through a framework.**²⁶ Procurement frameworks enable customers, including those subject to the PCR, to purchase education software products and services from a set of qualified providers on terms and at prices that have been pre-negotiated as part of a framework tender process. Schools have access to a number of procurement frameworks such as the Crown Commercial Service (CCS) G Cloud framework or the Kent County Council framework (KCS). Schools using these frameworks do not need to run a separate tender process of their own if they purchase products and services using these frameworks. Instead they can directly award a contract to an approved supplier under the framework, or run a mini-competition within the framework (which would involve inviting final quotes from all, or a subset of, framework approved providers, followed by an evaluation and an award stage). Given the relatively low contract value of a typical AE agreement, this sort of procurement approach accounts for a minority of MIS contract awards.
- 5.8.7 **Formal procurement under the Public Contract Regulations ("PCRs").** A formal procurement process in compliance with the PCRs is required where the contract value exceeds the relevant WTO GPA threshold.²⁷ Procurement of this type can be resource-intensive and time-consuming but is rarely used for MIS procurement, not least because

²⁶ Even where a formal PCR procurement process is required, this can be undertaken through PCR compliant frameworks such as the Crown Commercial Service (CCS) G Cloud framework or the Kent County Council framework (KCS), avoiding the need for a Prior Information Notice (PIN) or the preparation of formal tender documentation.

²⁷ The applicable thresholds as at 31 March 2022 was £213,477 including VAT.

PCR compliant procurement can nowadays be undertaken through frameworks and is considerably cheaper, less onerous and quicker if a framework is used.

- 5.8.8 When ESS made its announcement that it was moving to 3-year terms there were only [redacted] AE customers whose contracts, if renewed on a 3-year basis, would exceed the relevant WTO GPA contract value limit. This was the case because prior to 1 November 2021 nearly all schools who were members of federations or MATs contracted individually with ESS for SIMS.
- 5.8.9 When it became known that ESS was offering to provide shorter term contracts to customers whose contracts, if extended for a 3-year period, would exceed the relevant WTO GPA limit, ESS received several requests to combine previously individual contracts into group contracts, increasing the overall contract value. These requests were designed to increase the contract value so that it would exceed the WTO GPA limit and allow the federation or group to reduce the 3-year contract term.
- 5.8.10 Consequently, by December 2021 the number of customers who after taking into account discounts qualified for AE agreements with terms of less than 3 years rose from [redacted] to [redacted]. Despite this change the vast majority of new 3-year AE contracts remained with individual schools and are of relatively low value.

5.9 The expected timing for each of the above modes of procurement is described in further detail in Section 6 below.

5.10 ESS is aware that a small number of LAs intervened in the procurement decision-making process being undertaken by schools following the offer of the New Contracts and subsequent Original Break-Clause Offer. ESS understands that these interventions, whilst potentially irrelevant (as the LA had no formal role in the purchasing decision), may have halted or delayed decision-making by some schools for a period. Where these interventions are considered to have reduced the overall period available for switching, in ESS' view it would be relevant to understand the nature of the intervention, the length of the delay caused, and the effect it had on the school's decision-making process, including on the customer's decision not to take up the Original Break Clause Offer, given that this was a 'no cost' option.

6. SWITCHING PROCESS

6.1 Based on its experience, ESS considers that the process of switching MIS software can be subdivided into four main steps:

- deciding to procure;
- preparing to procure;
- procurement; and,
- implementation.

6.2 The background on applicable procurement processes in Section 5 above is relevant in this section.

Step 1 - Deciding to procure

6.3 If a school proposes to renew a contract with an existing supplier on materially the same terms and the value of that contract is below certain limits then this can generally be undertaken without the need for a procurement process provided that the school is satisfied that the contract continues to represent value for money. However, where a supplier materially alters their existing terms (as was the case here, where ESS terminated its existing AE agreements and offered schools the New

Contracts) and requires the school to enter into a new agreement schools would generally be expected (albeit not required) to undertake some form of procurement process.

- 6.4 In ESS' view, taking into account the relevant DfE and DfES guidance, the move to the New Contract would have *itself* required schools to undertake some form of procurement process, rendering the need for a decision to procure redundant. As such, from 8 November 2021, ESS considers that customers were necessarily faced with the need to procure (either a New Contract from ESS or a new MIS from an alternative MIS provider).
- 6.5 Since the procurement of an MIS is the responsibility of schools and not LAs and is classified under the governance regulations as an operational matter that in the normal course is to be handled by the school's Headteacher or the trust's CEO or senior leadership team, deciding to consider switching MIS should not have required input from either the school's LA or board of governors / trust board.
- 6.6 Notwithstanding the above, to the extent that any final decision to procure required the approval of the school's governance board, trust board or LA, ESS considers that, as it had served a notice of termination in relation to its existing contracts and offered New Contracts, such senior management or other group could have been convened within a reasonable short time to approve such decision. The governance regulations confirm this point.
- 6.7 As the contracting process for schools renewing on 1 April 2022 involved direct contracting arrangements with maintained schools, ESS would not have expected a decision to procure SIMS to have been made by an LA. ESS also understands that the third-party MIS suppliers generally contract directly with schools too (rather than with the LA), save for a small minority of cases involving an express de-delegation arrangement between the LA and school. Therefore, in the ordinary course, an LA would not be involved in the taking of such a decision.

Step 2 - Preparing to procure

- 6.8 In all cases, where procurement is required, the method selected is largely determined by the law and the schools' adopted procurement guidance.
- 6.9 The preparing to procure stage will usually entail deciding upon the procurement method to be used (the different forms of procurement that schools can use are set out in section 5.8), determining the school's requirements and identifying potential alternative MIS systems.
- 6.10 ESS considers that most schools and academies, have a good understanding of their MIS needs (since they use these systems in their daily work) and would readily be able to identify and, if necessary, document their requirements. Schools wishing to document their requirements are able to use publicly available MIS requirements lists available from the framework providers obviating the need to write their own requirements specification.
- 6.11 Identifying alternative MIS suppliers is a straightforward task given the plethora of material available via the Internet. MIS suppliers are keen to win new business and provide a range of materials and webinars for customers looking to switch away from SIMS.
- 6.12 ESS considers that schools undertaking the above steps would generally not have required more than **2 to 3 weeks** to do so unless an informal tender process was envisaged.
- 6.13 In ESS' experience very few schools or trusts use informal tender processes to procure their MIS. In the two years 2020 and 2021 when MIS switching rates rose as a result of the pandemic, ESS, which in the normal course would expect to see virtually all tender activity, only recorded 32 tenders suggesting that these are rarely used. In cases where schools chose to adopt an informal

tender process, ESS would expect the typical preparation for procurement to take no longer than **4 weeks** to complete.

Step 3 – Procurement

- 6.14 Schools in England and Wales (excluding the Channel Islands and the Isle of Man) have a duty under the Education Acts and associated school regulations to undertake some form of procurement process if they are considering switching MIS. Therefore, after identifying their requirements and potential alternative MIS suppliers, a school would be expected to carry out a procurement process in line with legal requirements and/or a school's own internal processes/guidelines.
- 6.15 The procurement process can be sub-divided into three broad stages: publication; evaluation; and award.
- 6.15.1 The first stage, publication, involves notifying suppliers of the existence of the customer's requirement and inviting bids.
- 6.15.2 The evaluation stage of the procurement process involves scrutinising the bids / quotes received, arranging for demonstrations, conducting supplier interviews and scrutinising terms. Some supplier evaluation may also occur before publication, with the published requirements statement or tender document informed by the responses received during the evaluation phase. In such cases the procurement stage tends to focus on contract terms and prices rather than functional evaluation.
- 6.15.3 The award stage mainly involves negotiation of contracts and terms. However, where frameworks are used, terms are largely prescribed, with the level of discount applied to the quoted framework price being the only major variable.
- 6.16 The different forms of procurement that schools can use are set out in section 5.8. Below we give estimates (based on ESS' views and experience) for the time required to undertake these different types of procurement process.
- 6.16.1 Informal procurement leading to a direct award:
- (a) Where the procurement involves a low- to medium-value contract (generally considered to be a contract whose value is less than £40,000), the applicable guidance for most schools is that at least three competing quotes should be obtained, which can be achieved in a relatively short period of time (normally no more than 1 to 2 weeks). This can then be followed by a direct award on standard terms (normally no more than 1 week).
 - (b) Where the procurement involves an informal tender process (for example, with a larger MAT), it is often the case that the customer will have access to professional expertise to manage such a process. ESS has evaluated available tender data from 2020/2021, covering 896 schools (**Appendix 3**).²⁸ This data shows that, on average, where a tender process is adopted, it takes:

²⁸ This analysis covers [25-50] tender processes covering circa [500-1,000] schools, including one large framework opportunity in Hertfordshire for over 350 schools. ESS believes the tenders listed in the file are likely to cover most of the total tender activity in the two year period in question (and in any case a statistically significant sample of such activity). This belief is based on the fact that during the two year period in question fewer than 2,000 schools changed their MIS, by no means all of which changes involved a tender process and that the tenders listed are representative in terms of MIS mix in that [50% - 75%] of schools covered by them

- 27.2 days on average from publication to the date set for supplier submissions; and
- 53.6 days (**7.7 weeks**) on average from publication to the planned award date.

Based on this data ESS estimates that a typical informal tender process would be completed within **8 weeks**.

6.16.2 Direct award through a framework:

Schools are well versed in using procurement frameworks to procure goods and services. In the case of a MIS, there are several frameworks schools can use including the G Cloud and KCS frameworks, which provide schools with feature-by-feature comparisons of MIS system functionality and comprehensive documentation on the various competitor offerings. The framework provider conducts the necessary due diligence on behalf of schools, considerably reducing any due diligence time.²⁹ In the case of a direct contract award, ESS expects that nearly all of its customers would be able to contract using frameworks and direct awards and that this would take **no more than 3 weeks**.

6.16.3 Formal PCR tender:

In ESS' experience, customers rarely need to engage in a formal PCR compliant procurement process, as the value of the procurement will generally fall well below the relevant regulatory threshold. Even where a formal procurement process is required, this can be undertaken through PCR compliant frameworks, avoiding the need for the preparation of formal tender documentation.

In this case no customer was required to undertake PCR compliant procurement since ESS offered all customers whose contract value would have exceeded the WTO GPA limit the option of a shorter contract whose value fell below that limit. ESS has therefore not estimated the time required for PCR compliant procurement but note that in the one case of PCR compliant procurement in the 2020/2021 period, undertaken by means of a formal tender rather than through a PCR compliant framework (the worst-case scenario), the time taken between publication and contract award was 14 weeks.

6.17 In ESS' own experience, it is very rarely the case that customers formally test MIS software before buying.³⁰ Given the low value of the procurement and the 'off-the-shelf' nature of the systems being procured, suppliers do not generally offer customers the opportunity to formally test their systems and are not geared up to undertake such testing. While customers may have an opportunity to use demonstration versions of the software prior to purchase, this is very different

had SIMS as their MIS, which is roughly the national average for England where the bulk of the schools covered by these tenders are based.

The data covers:

- all of the MIS and Financial system tenders that we understand to have been recorded by the Capita Bid team in 2020, when ESS was owned by Capita;
- all of the opportunities recorded by the ESS sales team for H2 2021, whether or not ESS participated in the tender process; and
- a number of tenders for H1 2021 when the business was owned by Montagu Private Equity and the recording process was interrupted.

It should be noted that so far as statutory public procurement rules tenders is concerned, ESS is only aware of one such tender in the two year period covered in the tender data.

²⁹ <https://arbor-education.com/blog-the-importance-of-frameworks-in-the-changing-mis-market/>

³⁰ A formal acceptance testing process would involve using a dummy data set to perform a series of defined acceptance tests against an agreed functional specification.

from formal user acceptance testing and, as far as ESS' senior management are aware, school MIS in the UK are very rarely sold to schools subject to a formal user acceptance testing process.

Step 4 - Implementation

- 6.18 Implementation and migration to a new MIS is an organised and standardised process. It is likely to entail the following steps: the migration of the customers' existing MIS data to the new MIS, post go-live training of the customers' staff in the use of the new MIS and, where necessary, and integrating the new MIS with other systems used by the customer, for example, third party payment or parental engagement systems (see sections 3.12 to 3.18). Some of these steps can and do occur in parallel.
- 6.19 As set out in further detail in Section 7, competing MIS suppliers are well versed in assisting customers through each step in the process. ESS' principal competitors publicised in December 2021 that they could migrate primary schools from SIMS to their MIS in **3 to 4 weeks**, with the process taking **4 to 11 weeks** for secondary schools³¹. Given that substantial numbers of customers did in fact switch from SIMS (see Section 7), indicating that such suppliers were able to meet these timeframes, these upper and lower timeframes are adopted for the purposes of ESS' analysis below.

ESS' time estimate for completing the overall switching process

- 6.20 Table 2 below summarises the time estimates given above. Adding these up, ESS view of the typical time taken to consider and switch would be: for smaller primary schools, between **7 – 10 weeks**; for secondary schools, between **10 – 17 weeks**; and for a larger MAT, within **23 weeks**.
- 6.21 The Table 2 estimates are in the main derived from publicly available data, with the implementation timings coming from competitor websites, and the procurement timings from data available from frameworks and from actual tender processes, which tend to be the most complex and thus the lengthiest form of procurement. Despite this ESS notes that its estimates of switching times set out in Table 2 are significantly lower than the time periods set out in paragraph 4.58 (these being the actual time periods schools had in which to consider, plan and implement a switch from SIMS to an alternate MIS).
- 6.22 ESS has provided data on the actual number of customers that terminated their contract for the supply of SIMS AE services, either by the original timeframe of 31 March 2022 or by the end of the Original Break-Clause period of 30 September 2022, in Section 8 below. This data shows that a significant number of customers were able to switch in the time available and that the customers that switched were of all types and sizes. In ESS' view this data is supportive of the time estimates set out in Table 2.

³¹ Arbor subsequently extended this estimate for secondary schools wishing to migrate to Arbor by 30 September 2022 to under 17 weeks.

Table 2: Summary of ESS' lower and upper range time estimates for switching - by customer type

	Primary		Secondary		Large MAT
% customers	>80% of all customers		<20% customers		<2% of customers
Time range estimate	Lower	Upper	Lower	Upper	
Step 1	-	-	-	-	-
Step 2	2	3	3	3	4
Step 3	2	3	3	3	8
Step 4	3	4	4	11	11
Total	7	10	10	17	23

7. THIRD PARTY GUIDANCE ON SWITCHING TIMEFRAMES

7.1 ESS faces significant competition from a range of competitors across Great Britain.³² ESS notes that Arbor and Bromcom account for nearly all switching away from SIMS, whereas SIMS gains customers from a wide range of MIS. Arbor and Bromcom have each published guidance for prospective customers as to the period of time required to implement a switch to their MIS solution.

Bromcom

7.2 Bromcom informed customers that it is able to migrate and onboard primary schools in **3 weeks** and secondary schools in **4 weeks**, that is, the period from the beginning of the onboarding process to the go-live date. These dates are expressly calibrated around customer switching from SIMS,³³ and were advertised by Bromcom on its website at the time.

7.3 According to these posts the Bromcom migration process is made up of:

- an initial discovery process undertaken in the first week;
- a subsequent go-live training period of one week for primary schools and 2 weeks for secondary schools, in which school administration staff each receive between 1 and 1.5 days training and teachers each receive 30 minutes of training; and
- a final week in which the Bromcom system goes live, data having been copied across from a backup of the school's SIMS database over a period of between 3 and 5 days whilst the go-live training is given.

7.4 The guidance notes that the data migration is comprehensive, involves no downtime for schools and allows teachers to continue taking registers as normal during the migration. Following the

³² For reference, the full list of competitors is Arbor, ScholarPack (Arbor and ScholarPack are owned by the same group, the Key), Bromcom, Pupil Asset, Advanced Progresso, iSAMS, WCBS and SEEMIS. SEEMIS are active in Scotland only.

³³ This is based on the video commentary accompanying the guidance, which refers expressly to customers switching from SIMS.

go-live date after week 3, Bromcom offers 7 weeks of additional post-migration support and training for primary schools and 8 weeks for secondary schools.

7.5 The Bromcom onboarding timelines are copied below in Figures 1 and 2.

Figure 1: Bromcom onboarding timeline screenshot - Primary schools

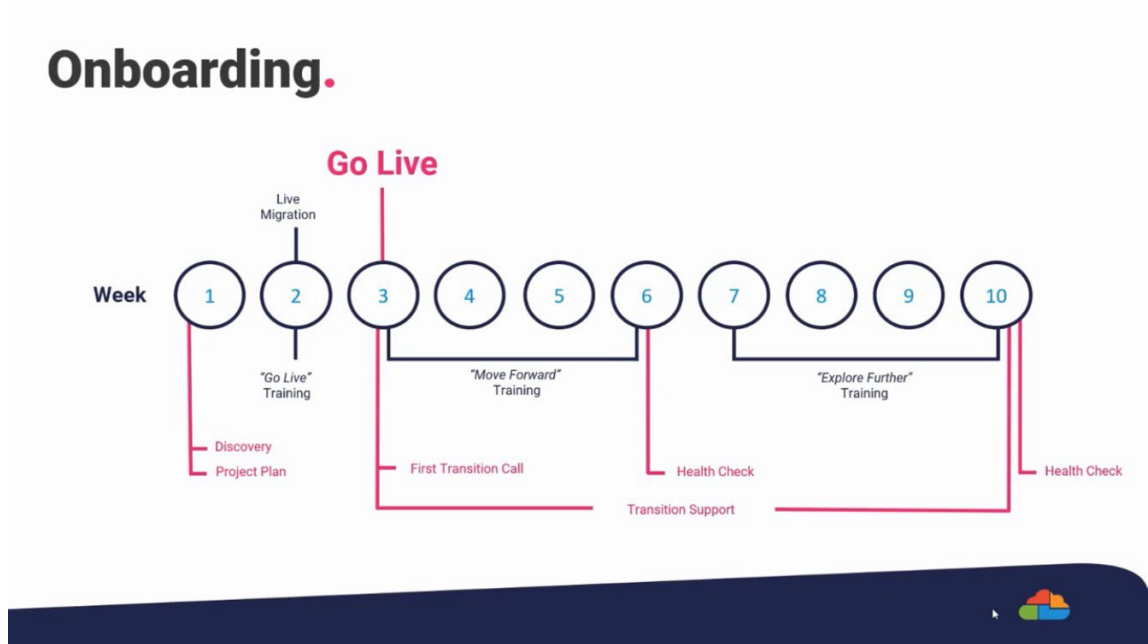
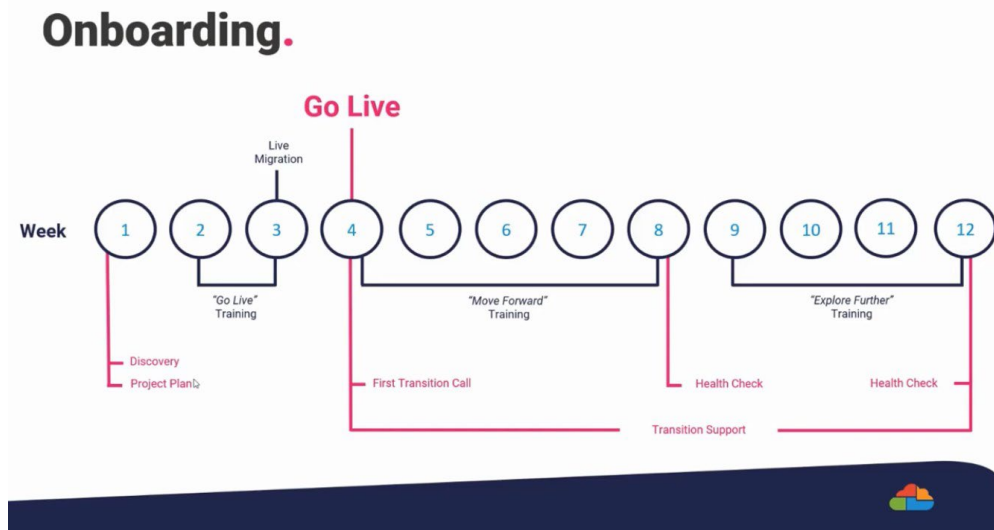


Figure 2: Bromcom Onboarding guidance timeline screenshot - Secondary schools



Arbor

7.6 In Arbor’s guidance document, “Switching Made Simple” (published in Q2, 2021) (**Appendix 4**, pages 16 and 17), Arbor noted that it could carry out a **4-week** process for migrating a primary school to Arbor, followed by a **3-week** bedding-in phase following the go-live date.

7.7 Following ESS’ announcement that it was changing its standard AE agreement term to 3 years, on 16 November 2021 Arbor posted an offer on its website headed “Switch now, pay later”. This offer was targeted at SIMS customers due to expire on 31 March 2022. The offer was for a 40

month contract term running from 1 December 2021 to 31 March 2025 and required schools to sign up by 31 December 2021.

- 7.8 Under this offer, Arbor was assuring customers that the migration process would be completed before the school’s SIMS AE contract expired on 31 March 2022, with an onboarding process commencing as early as 1 December 2021 (itself revealing of Arbor’s own estimated timeframes for completing the prior procurement steps). In parallel, Arbor developed a Fast Track Programme for primary schools, whereby primary schools could be migrated by Easter 2022 provided a contract was signed with Arbor by 1 February 2022.
- 7.9 Around this time, Arbor communicated that it was confident of managing a large-scale onboarding of schools by 31 March 2022. On 19 November 2021 [38], a member of Arbor’s partner team wrote to Arbor partners, including many SIMS Support Units, saying, inter alia, that Arbor were “preparing for a large volume of new Arbor schools”. She went on to say that “*We’ve heard from hundreds of schools and MATs this week who’ve already handed their notice in to SIMS. We’re confident we’re ready to take them on*”. The email is attached as **Appendix 5**.
- 7.10 On 13 December 2021, Arbor wrote to its support partners announcing that it was extending the deadlines by which schools could sign up for Arbor and be confident of being migrated by 31 March 2022 (see **Appendix 6** for a copy of this email). The extended deadlines were set as 14 January 2022 for secondary schools (giving a period of **under 11 weeks** between sign up and go-live) and 28 February 2022 for primary and special schools (giving a period of **under 5 weeks** between sign up and go-live). These periods have been used as part of the estimated timeframes in Section 5 above.

Arbor Fast Track Programme	Published	Sign up deadline for 1 Sep 2022 go-live	Time frame from sign up to go-live
Arbor Summer Fast Track Programme for primaries ³⁴	Q4 2021	28 February 2022	Sign-up to go-live in under 5 weeks
Arbor Summer Fast Track Programme for secondaries ³⁵	Q4 2021	14 January 2022	Sign-up to go-live in under 11 weeks.

After the Original Break-Clause Offer

- 7.11 Following the Original Break-Clause Offer, in February 2022 Arbor published updated details of its **Summer 2022 Fast Track Programme (Appendices 7 - 9)**. Under the terms of this offer, primary schools would be onboarded by Arbor by 1 September 2022 within a timeframe of under 11 weeks for primary schools and under 17 weeks for secondary schools. It is notable that, even as late as 2 February 2022, Arbor remained confident that a primary school could complete the steps necessary to switch to its MIS by 1 April 2022.

³⁴ <https://arbor-education-8475353.hs-sites.com/fast-track-primary-schools>

³⁵ <https://arbor-education-8475353.hs-sites.com/fast-track-secondary-schools>

Arbor Summer Fast Track Programme	Published	Sign up deadline for 1 Sep 2022 go-live	Time frame from sign up to go-live
Arbor Summer Fast Track Programme for primaries ³⁶	Q1 2022	17 June 2022	Sign-up to go-live in under 11 weeks
Arbor Summer Fast Track Programme for secondaries ³⁷	Q1 2022	9 May 2022	Sign-up to go-live in under 17 weeks

7.12 Arbor and Bromcom also hosted various webinars in the period, e.g. ‘Discover Arbor’ over three days in December and live webinars in January and February,³⁸ and published material on the ease and speed of switching to their MIS services, for example, ‘Debunking the myths around changing MIS’ (**Appendix 10**).³⁹

Other third party evidence

7.13 Herts for Learning (“**HfL**”), Hertfordshire’s education support unit, in 2021 set up a MIS framework from which Hertfordshire LA maintained schools could procure their MIS⁴⁰. On 29 September 2021 HfL published a question-and-answer briefing document (“**Q&A**”) that aimed to inform schools as to what would be involved in switching their MIS⁴¹ (see **Appendix 11**).

7.14 This Q&A contains several answers relating to the migration capabilities of MIS suppliers on the HfL framework. For example, on page 8 in answer to a question regarding migration timescales the Q&A states that “On average, the whole process takes around 4 - 6weeks – the actual data migration itself (when the switch over happens) can usually be managed over just a day or two, often a weekend”.

7.15 It is also relevant that ESS supplied the bulk of LA maintained schools in Hertfordshire. It follows that in the vast majority of cases schools were switching away from SIMS, and that the estimated timings given by HfL reflect the specific experience of the time taken to switch from SIMS to a third party MIS.

8. SIMS CUSTOMER SWITCHING DATA

8.1 This section deals with customers switching away from SIMS and ignores customers switching to SIMS from other MIS. It is therefore not reflective of net switching activity.

8.2 ESS has evaluated the available data and identified that, between 7 October 2021 and 30 September 2022,⁴² the number of schools in England and Wales that ceased using SIMS was [2,000-3,000] schools. This figure includes around [500-1,000] schools which took up and exercised their Original Break-Clause right, [25-75] of whom took advantage of the Group 1 Offer to extend their agreement for a limited period after 30 September 2020 (see below for details of the Group 1 Offer).

8.3 The [2,000-3,000] schools referred to in paragraph 8.2 were part of a cohort of [10,000-15,000] schools whose AE cover was due for renewal on 1 April 2022. Thus nearly [15%-25%] of schools using SIMS as their MIS and who were offered new three-year Annual Entitlement contracts

³⁶ <https://arbor-education-8475353.hs-sites.com/fast-track-primary-schools>

³⁷ <https://arbor-education-8475353.hs-sites.com/fast-track-secondary-schools>

³⁸ Source: Twitter. See **Appendix 12** for screenshots.

³⁹ <https://bromcom.medium.com/debunking-the-myths-around-changing-mis-828a1cf8dffd>

⁴⁰ <https://www.hertsforlearning.co.uk/mis-framework>

⁴¹ https://www.hertsforlearning.co.uk/sites/default/files/documents/dms_portal/mis-licenses/hfl-mis-framework-arbor-q%26a-v2.pdf

⁴² The data is measured as from 7 October 2021 due to the availability of data from the Department for Education.

commencing on 1 April 2022 switched to alternative suppliers on or before 30 September 2022, with close to 70% of these switches occurring before 1 April 2022.

- 8.4 This compares to an average SIMS customer annual loss rate of 733 schools per annum for the previous three years, which is a loss against the entire SIMS customer base rather than the subset of the base due for renewal on 1 April 2022. This loss of 2,199⁴³ schools over the 3 years to October 2021 accounted for 11.1% of the SIMS customer base at the start of the period, showing that the loss rate occasioned by the move to 3-year contracts was on a monthly basis over six times the rate experienced in the previous 3-years (the rate in the 11 months to 30 September 2022 being [0.5% to 2.5%] per month, and the rate in the previous 36 months being 0.29% per month).
- 8.5 This increase in the mean rate at which schools switched away from SIMS is statistically significant (at a 95% confidence level) and supports the hypothesis that many more schools switched away from SIMS in the 11 months from 8 November 2021 to 30 September 2022 than might otherwise have been expected to do so in the 3-year period from 1 April 2022 to 31 March 2025, absent of the introduction of 3-year agreements and the CMA's interventions.
- 8.6 ESS notes that of the [7,500-12,500] or so schools who could have applied for ESS' July 2022 Group 2 Offer (which provided a 12-month break clause to any school that emailed ESS by 30 September with objective evidence that it did not take up the Original Break Clause Offer because it reasonably concluded that a switch to an alternate MIS was not possible in the time available), only 9 schools applied.
- 8.7 ESS' analysis of the underlying DfE data shows that the schools which ceased using SIMS covered the full spectrum of school types, including LA maintained schools, single academies, MATs, special schools and pupil referral units. There was also a wide range of school sizes, with pupil numbers ranging from [10-20] to [2,000-2,500].
- 8.8 In addition, ESS notes that many of the schools who originally claimed that it would require more time to switch to an alternative MIS than ESS had originally made available, subsequently managed to switch within the time provided. A number of the 400 or so schools represented by Stone King solicitors (see Annex 1) provide an example of this.
- 8.9 Notwithstanding the above, ESS understands that some customers may have been affected by circumstances which severely impeded their ability to operate to the same timescales as achieved by the large number of other customers that were able to switch MIS.

9. THE JULY OFFERS

- 9.1 ESS announced a series of additional offers to customers on 25 July 2022 (the July Offers, as defined in the Commitments).
- 9.2 The July Offers were targeted towards three groups of customers:
- Group 1: SIMS customers that exercised their Original Break-Clause right (or intended to do so by 31 August 2022), having contracted to switch to an alternative supplier on or before 30 September, but required more time to complete their switch. This group of customers requiring additional time were able to extend their AE services for a period of up to 6 months (i.e. to 31 March 2023) in order to complete their switch to a third party MIS.

⁴³ The 2,199 figure is calculated by multiplying the average annual loss of 733 schools over three years by three.

- Group 2: SIMS customers that had a clear intention to switch to an alternative MIS when the Original Break-Clause Offer was made, but who are able to demonstrate they did not apply for the Original Break-Clause because they reasonably concluded that they would be unable to switch to an alternative MIS in the time available. This group was offered a new 12-month break clause where they met the relevant criteria
- Group 3: SIMS customers that did apply for the Original Break-Clause but whose application were rejected because they did so after the deadline (being 20 February 2022) (or accepted their 3-year contract after the same deadline set for this purpose). This group was offered a 9-month break-clause.

9.3 ESS considers that the availability of the Group 1 Offer is of particular significance to Type B applicants for the New Break-Clause. That is, customers who had a Break-Clause in their AE contract but evidently decided not to avail themselves if any of the extensions included in the July Offers.

9.4 For any customer who had considered switching, decided to switch and/or prepared to do so, but who had missed the deadline set by their chosen supplier to switch away from SIMS by 30 September, the Group 1 Offer gave these customers up to 6 further months in which to contract for and complete the switch, significantly longer than any of ESS' principal competitors quoted for undertaking such a move (see section 7).

9.5 In connection with the above, ESS notes that there are some SIMS customers representing groups of schools (such as MATs) who were in the process of switching, and did in fact switch, some (but not all) of the schools in their group in the time available under the Break-Clause. Where this occurred the Group 1 Offer allowed these groups to apply for an extension of up to 6 months in which to switch their remaining schools to their chosen alternate supplier.

10. OTHER RELEVANT CONSIDERATIONS

Size of customer

10.1 Whilst smaller schools, such as single primary schools, may have less internal resources and expertise to oversee a change in the school's MIS, ESS also notes that it takes considerably less time for smaller schools to migrate to a new MIS supplier (as clearly evidenced by the timeframes offered by competitors to such schools), thereby providing additional time to consider and prepare for procurement and migration.

10.2 In ESS' view, the prospect of switching within a shorter timeframe would sufficiently countervail any disadvantage faced by smaller customers when researching and procuring alternative MIS. Conversely, larger schools or groups of schools will understandably require greater time to undertake a switch to a new MIS but are more likely to have greater resources and access to year-round expertise to drive forward such a change.

10.3 Regardless of size schools have a statutory duty to procure discretionary services, such as MIS services, and to ensure that they meet the value for money procurement objective. To do so they are required to resource their procurement function appropriately, and to have "processes and governance in place to determine and manage their most important contracts" of which MIS is one (see paragraph 5.2).

10.4 In judging a school's size relative to its peers, it is relevant to note that across the UK the average primary school has 280 pupils on roll and the average secondary school has 950 pupils on roll.

Time of year

- 10.5 DfE data for England, shows that switching occurs throughout the year. This is confirmed by ESS' Annual Entitlement licence online check that allows ESS to monitor when customers cease using SIMS.
- 10.6 While the DfE data shows that, generally, more schools move MIS between January and May than between May and October or October and January (January, May and October being the three census months in England), ESS considers that this is a reflection of the fact that ESS, the largest MIS supplier in England, bills the majority of its customers annually on 1 April, and schools switching MIS, in a desire to minimise costs, therefore tend to move MIS so as to coincide with the ESS billing year.
- 10.7 In order to allow for data migration, switching MIS tends to occur over holiday periods or long weekends. Since the school year runs from September to August, moving MIS to coincide with the beginning of the academic year may be regarded as a pragmatic option, and the relevant data indicates that a significant number of schools chose this period, and did in fact migrate to a new MIS by 30 September 2022.

Welsh Schools

- 10.8 The choice in Wales is very limited. In November 2021, there were only two MIS being used by schools in Wales: SIMS 7; and Teacher Centre, and that remains the case today. Two former suppliers, Advanced Learning and RM, ceased to have a presence in Welsh schools in 2016 and 2017 respectively. According to Welsh government census data, Teacher Centre, which is supplied by Ceredigion County Council, is only used in primary schools.

Negotiated AE contract

- 10.9 The Adjudicator ought to be aware that ESS had entered into a small number of negotiated agreement with customers. These included, by way of example, where a customer had a series of AE agreements involving different schools (which were set to terminate on different dates in the future) and had asked ESS to amalgamate its different agreements into a single agreement, thereby reducing the overall contract duration in the process (leading to a loss of contracted revenue for ESS as contract end dates were brought forward). These negotiated arrangements involved the relevant customer agreeing, in return for this benefit, to not taking or exercising the Original Break-Clause. As such these negotiated agreements, to the extent they arise during the Commitments process, do not satisfy the criteria for obtaining a further break clause and are outside of the Commitments offer.

Risk of gaming or manipulation

- 10.10 On the basis of past competitor behaviour ESS is legitimately concerned about the risk of competitors using the New Break-Clause Offer to systematically target and encourage customers to apply in circumstances where that customer was not eligible, as they do not meet the criteria. This may include, but not be limited to, competitors providing scripted answers or template completed Applications. This issue was discussed with the CMA prior to agreeing the Commitments offer and it was agreed that the Adjudicator should be alerted to this issue, and take whatever steps it thought appropriate to avoid any such abuse.

Impact of COVID on ability to switch

- 10.11 PPG, through its payment platforms and MIS monitoring activities obtains real time data on school activity from a substantial proportion of UK schools. PPG believes this data gives it a unique insight into the operations of UK schools. This data shows that from September 2021

schools rapidly recovered from the effects of the pandemic and by January 2022 were undertaking a full range of school activities at a level similar to those seen in January 2020. As such PPG does not consider COVID to have had a material effect on schools' ability to undertake MIS procurement or respond to its Original Break Clause Offer.

Annex 1

Stone King Schools

1. ESS believes that a significant number of the complaints received by the CMA came from the 400 or so schools represented by the solicitors Stone King (the “Stone King Schools”), not all of whom were SIMS users.⁴⁴ ESS’ belief is based on the statements made to it by Stone King and Stone King’s clients. It is relevant background to note what happened to these schools.
2. The Stone King Schools through their solicitors claimed that they required 12 months or more to switch from SIMS to an alternative MIS. In Annex 1 of ESS’ letter to the CMA of 10 March 2022, ESS provided data on the outcomes for the Stone King Schools. The data provided by ESS showed that [75%-85%] of these schools had in fact completed a procurement process by the end of February 2022, less than four months after ESS announced its change in AE contract terms.
3. The Annex provided data on [300-350] of the [350-375] schools represented by Stone King who actually used SIMS and who were believed by ESS to still be using core SIMS software on 7 March 2022. The table below updates the position to reflect ESS’ current understanding of the outcome for these schools, [300-350] of whom were still using SIMS as their primary MIS on 19 May 2022, a figure that had dropped to [250-300] by 30 November 2022.
4. All [350-400] of the Stone King Schools engaged in a procurement process, with the vast majority undertaking a competitive procurement process. Of these, [10-20] moved to alternate MIS suppliers before 1 April 2022, [75-100] opted to take AE agreements without the Original Break Clause, [100-125] entered into bespoke AE agreements available to customers whose AE agreement value exceeded the relevant WTO GPA threshold, and [125-150] opted for AE agreements with an Original Break Clause, of which [50-100] exercised their Original Break Clause right to terminate their AE agreement on 30 September 2022.
5. From the table it is evident that all of the Stone King Schools using SIMS completed a procurement process within the 5-month notice period (8 November 2021 to 31 March 2022) and either decided to stay with SIMS, moved to alternative providers from 1 April 2022 or took the Original Break Clause Offer with a view to considering moving to an alternative provider by 1 October 2022, with most of these schools making these decisions by the end of February 2022.
6. ESS believes that this demonstrates that even schools who claimed to be unable to move in less than 18 months were in fact able to undertake and complete a procurement process in the 5 months from 8 November 2021 to 31 March 2022, and where, as a result of that process, they decided to switch away from SIMS they were able to do so by 30 September 2022.
7. The example of the Stone King Schools shows that a significant number of these schools (who originally claimed that it would take 12 months or more to switch) were able to undertake a competitive procurement process and where they decided to move to an alternative supplier, were able to switch by 1 October 2022.

⁴⁴ ESS cannot be certain that all of the Stone King Schools complained since it has not received any data from the CMA as to how many schools, or from which schools, complaints were received.

Category	Grouping	7 March 2022	29 July 2022	30 November
	Schools claiming to be represented by, or said by Stone King to be represented by, Stone King	[375-425]	[375-425]	[375-425]
	Schools amongst the above group using core SIMS at the last census date before the date shown in the column heading	[350-375]	[325- 350]	[250-300]
a.	Schools that went through a procurement process leading to their accepting a new 3-year ESS core SIMS AE agreement on or before the date shown in the column heading without a 6-month break clause	[15-25]	[75-100]	[75-100]
b.	Schools that were on 7 March 2022 still completing their procurement process and had indicated that they intended to contract with ESS for a 3-year AE agreement by 31 March 2022	[25-50]	-	-
c.	Schools that as at 7 March 2022 were known to be in a MAT where the total contract value for a 3-year AE agreement covering all of the schools in the MAT would be over the WTO GPA limit, and who were therefore eligible for a shorter AE agreement term that allowed the total value of their contract to fall below the WTO limit, which contracts they have accepted after undertaking a procurement process	[75-125]	[100-150]	[100-150]
d.	Schools that as at the date shown in the column heading were known to have gone to other suppliers after a procurement process, and who were expected to cease or ceased being ESS customers from 1 April 2022 or 1 October 2022	[20-30]	[75-100]	[75-100]
e.	Schools that accepted a 3-year ESS AE agreement with a 6-month break clause made up of:	[100-125]	[125-150]	[125-150]
i.	<i>Schools that have informed ESS that they will be moving to an alternate supplier on or before 1 October 2022</i>	[25- 50]	[50-75]	-
ii.	<i>Schools that have not formally confirmed their future plans to ESS but were as at 7 March 2022 expected to exercise the break clause when this option became available with a view to ceasing to use SIMS on or before 1 October 2022</i>	[50-75]	-	-
iii.	<i>Schools whose break clause intentions are unknown</i>	-	[50-75-]	-

iv.	<i>Schools who exercised the break clause</i>	-	-	<i>[70-80]</i>
v.	<i>Schools choosing to remain with ESS for core SIMS</i>		-	<i>[50-75]</i>
f.	Schools that were negotiating with ESS as at 7 March 2022, but had not taken up the option of a break clause, and were expected to either move to another supplier or contract with ESS by 1 April 2022.	[20-30]	-	-
Total		[300-350]	[350-400]	[350-400]