

Decision to accept binding
commitments under the
Competition Act 1998 from
Education Software Solutions Ltd
in relation to the supply of management
information system software to schools

Case number 51140

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Annex 1 - The Commitments offered by ESS

- Appendix 1 - Text of the July Offers
- Appendix 2 - Briefing to Adjudicator
- Appendix 3A - Instructions: How to apply for a New Break-Clause
- Appendix 3B - Application form for a New Break-Clause
- Appendix 4 – ESS' General Submission

1. Introduction and summary

- 1.1 In this decision made under section 31A of the Competition Act 1998 (the '**Act**'), the Competition and Markets Authority (the '**CMA**') accepts the commitments offered by Education Software Solutions Limited and its parent company ParentPay (Holdings) Limited ('**PPH**') (together '**ESS**') as set out in the Annex 1 to this decision (the '**Commitments**').
- 1.2 ESS offered the Commitments to the CMA in order to address the CMA's competition concerns, which focus on the way in which ESS effectively moved schools in England and Wales from one-year to three-year contracts for the supply of Management Information System ('**MIS**'), without providing sufficient opportunity to avoid those contracts (the '**Conduct**') (as set out in more detail in Section 4). The CMA is concerned about the way in which these contract changes were implemented and the limited timeframes given to schools to consider their options, make a decision on whether or not to switch MIS supplier, and plan and implement such a switch.
- 1.3 In summary, the Commitments will give schools the opportunity to apply to an independent adjudicator (the '**Adjudicator**') for a 12-month break clause, if they had genuinely considered switching MIS supplier at the time ESS moved schools from an annual to a three-year contract, but reasonably concluded that they would not be able to switch within the timescales set by ESS. The Adjudicator will inform schools of the outcome of their application by 31 March 2023.
- 1.4 This new break clause, which is subject to certain conditions,¹ gives those schools who successfully apply a 12-month period in which to consider whether or not to switch to another MIS supplier (the '**New Break-Clause**') and, if they decide to switch, to plan and implement that change.
 - (a) If they decide to switch, this New Break-Clause will enable those schools to end their three-year contract with ESS (and switch MIS supplier), a year early, on 31 March 2024.²
 - (b) However, if the schools conclude that they would rather continue their contract with ESS, schools will not need to take any further steps and the terms and conditions of their contract will remain the same for its remaining duration.
- 1.5 As a result of accepting the Commitments, the CMA has closed its investigation (the '**Investigation**') with no decision made as to whether or not ESS infringed the prohibition in section 18(1) of the Act (the '**Chapter II prohibition**').³ The offer of

¹ These terms and conditions are set out at subparagraphs 26(f) and (g) of Appendix 3A – Instructions: How to apply for a New Break-Clause.

² For more detail, see Section 5 which summarises the Commitments and Appendix 3A – Instructions: How to apply for a New Break-Clause.

³ Section 18(1) of the Act prohibits any conduct on the part of one or more undertakings which amounts to the abuse of

the Commitments by ESS does not constitute an admission of any infringement by ESS.

- 1.6 Acceptance of the Commitments does not prevent the CMA from taking any action in relation to competition concerns which are not addressed by the Commitments. Moreover, acceptance of the Commitments does not prevent the CMA from continuing its Investigation, making an infringement decision, or giving a direction in circumstances where the CMA has reasonable grounds for:
 - (a) believing that there has been a material change of circumstances since the Commitments were accepted;
 - (b) suspecting that a person had failed to adhere to one or more of the terms of the Commitments; or
 - (c) suspecting that information which led the CMA to accept the Commitments was incomplete, false or misleading in a material particular.⁴
- 1.7 If a person from whom the CMA has accepted commitments fails, without reasonable excuse, to adhere to the commitments, the CMA may apply to the court for an order requiring, among other matters, the default to be made good.⁵
- 1.8 The remainder of this decision is structured as follows:
 - (a) Section 2 provides information on the Investigation and ESS.
 - (b) Section 3 sets out the relevant background, including the relevant market context and the Conduct.
 - (c) Section 4 sets out the CMA's competition concerns.
 - (d) Section 5 summarises the Commitments.
 - (e) Section 6 sets out the CMA's assessment of the Commitments and of the responses to the consultation on the Commitments.
 - (f) Section 7 sets out the CMA's decision to accept the Commitments.
- 1.9 This decision attaches the text of the Commitments (Annex 1), which includes the following five appendices:
 - (a) the text of the offers made by ESS to some of its customers in July 2022 (Appendix 1);
 - (b) Briefing to Adjudicator (including guidance regarding the handling of Restricted Information) (Appendix 2);

a dominant position in a market if it may affect trade within the United Kingdom, or any part(s) of the United Kingdom, unless any of the excluded cases pursuant to section 19 of the Act apply. For these purposes, a dominant position means a dominant position within the United Kingdom or any part(s) of the United Kingdom.

⁴ Section 31B(4) of the Act.

⁵ Section 31E of the Act.

- (c) Instructions: How to apply for a New Break-Clause (Appendix 3A);
- (d) Application form for a New Break-Clause (Appendix 3B); and
- (e) ESS' General Submission (Appendix 4).

2. The CMA's investigation

The Investigation

- 2.1 The Investigation was instigated following concerns raised by a number of stakeholders including schools, local authorities ('**LAs**'), and competitors.
- 2.2 On 26 April 2022, the CMA opened the Investigation, having determined that it had reasonable grounds for suspecting that:
- (a) ESS holds a dominant position in relation to the supply of MIS software to schools in England and in Wales; and
 - (b) The Conduct constitutes an abuse of its dominant position contrary to the Chapter II prohibition, which may lead to anti-competitive foreclosure and/or the imposition of unfair terms and trading conditions.⁶
- 2.3 In the course of the Investigation, the CMA took steps to gather evidence from ESS and third parties. These steps included: issuing formal notices to ESS requiring documents and information under sections 26 and 27 of the Act; sending information requests to the Department for Education ('**DfE**'), the Welsh Government, the Welsh Local Government Association, and relevant contacts in Northern Ireland and Scotland, LAs, schools and competitors; as well as the use of CMA questionnaires to obtain information from schools in England and schools and LAs in Wales. The CMA also obtained further information from certain third parties through calls and voluntary written submissions.⁷
- 2.4 Prior to receiving an offer of commitments from ESS, the CMA had been considering whether to give interim measures directions to ESS under section 35 of the Act pending the outcome of the Investigation. As a result of accepting the Commitments and closing the Investigation, the CMA has not reached a view on whether the conditions of section 35 of the Act are met.⁸

The commitments offered and consultation process

- 2.5 Following confirmation from ESS that it was willing to offer commitments, on 23 September 2022 the CMA provided ESS with a summary of its competition concerns in relation to the Conduct.
- 2.6 On 14 November 2022, without prejudice to its position that it had not infringed the Chapter II prohibition of the Act, ESS submitted a formal offer of commitments to address the CMA's competition concerns under section 31A of the Act.

⁶ The Investigation initially related also to ESS' pricing of its MIS software ('**SIMS**') and its Financial Management System software when sold together, in a way that makes the combined price considerably cheaper than if each is purchased separately. On 27 October 2022, the CMA closed this separate limb of the Investigation on administrative priority grounds.

⁷ This included submissions from competitors, schools and LAs.

⁸ A consequence of accepting commitments under section 31A of the Act is that by virtue of section 31B(2) of the Act, the CMA is precluded from giving a direction under section 35 of the Act.

- 2.7 On 17 November 2022, the CMA issued a Notice of intention to accept commitments (the '**Notice**'), setting out the commitments offered, the reasons why the CMA proposed to accept them and inviting interested third parties to make representations (the '**Consultation**').
- 2.8 The Consultation closed on 8 December 2022 and representations were received from 20 interested parties. Responses to the Consultation and the CMA's consideration of them are summarised in Section 6 of this decision. The CMA has decided, following representations made to it in the course of the Consultation and its due consideration of them, that further simplification and clarification of the application process is appropriate and necessary to enable effective implementation of the Commitments. ESS offered to include (as part of the Commitments) a revised application form and instructions to applicants simplifying and clarifying the process.
- 2.9 The CMA has given full consideration to all the relevant material in its possession (including responses to the Consultation and the further revisions to the application form and instructions to applicants offered by ESS) and has concluded that, for the reasons set out in Sections 5 and 6 of this decision, the Commitments address its competition concerns in this case. The CMA has therefore decided to accept the Commitments. Accordingly, the CMA has closed its Investigation with no decision made on whether or not the Act has been infringed.

The party and product under investigation

- 2.10 ESS is active in the supply of (amongst other things) education software solutions to schools in the UK, including a MIS software product known as SIMS, which is the focus of the Investigation.
- 2.11 Schools use MIS software to collect and maintain a database of student information (eg attendance records or assessment results) and staff information for two main functions.
- (a) It makes the running and administration of a school more efficient, for instance by supporting registration and the management of pupil attendance, assessments, admissions, special educational needs, timetabling, parental messaging, etc.⁹
 - (b) It supports school data collection and transfer. All state-funded schools in England and Wales are required to provide information, periodic school censuses and attendance data to their LA and/or DfE or the Welsh Government (as appropriate). The data required and the form in which it is to

⁹ Data stored in a MIS is used in a wide range of complementary software. Complementary software 'reads' the data held in the MIS in order to perform additional tasks the MIS cannot do. For example, pupil attendance and assessment data, combined with parent contact details stored in a MIS may be used by a messaging service provider to send messages to parents about the performance of their child at school. See [CMA's decision dated 12 July 2021 in the Montagu/ParentPay merger](#), paragraph 54.

be provided frequently change.

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

3. Background

- 3.1 Given that the CMA has not conducted a full, in-depth investigation following the offer of commitments, this Section sets out the CMA's preliminary view of:
- (a) the definitions of the relevant markets;
 - (b) ESS' position in the relevant markets; and
 - (c) ESS' conduct in the relevant markets.
- 3.2 The purpose of this Section is to provide context for Section 4 of this decision, which sets out the CMA's competition concerns.

The relevant markets

- 3.3 The focal product is the supply of MIS software (see description at paragraph 2.10 above).
- 3.4 As part of the Investigation, the CMA has found that different arrangements for purchasing MIS software operate in each of the UK nations, leading to different demand and supply conditions in each of the UK nations.¹⁰
- 3.5 The CMA's view is that the relevant customer markets may be restricted to all state-funded schools or it may also encompass independent schools. However, it has not been necessary to conclude on this point because the CMA has reasonable grounds to suspect dominance on either basis.
- 3.6 The Investigation has focused on the following candidate markets:
- (a) the supply of MIS software to state-funded schools in England; and
 - (b) the supply of MIS software to state-funded schools in Wales.

ESS' position in the relevant markets

- 3.7 As of October 2021, ESS had a market share of 68% for the supply of MIS software to state-funded schools in England.^{11,12} ESS' market share in England had been falling in the three years up to October 2021 but has declined more significantly since then. As of October 2022, ESS' market share had fallen to approximately 56%.^{13,14}
- 3.8 ESS' key competitors in England include Arbor (which is part of The Key Group

¹⁰ The CMA's view is that the Conduct does not impact schools in Northern Ireland and Scotland as ESS does not supply state-funded schools in Scotland and its customers in Northern Ireland are supplied via a long-term tendered contract.

¹¹ Based on DfE census data (Autumn 2021).

¹² Market shares in this Section were calculated using the number of schools under contract by each MIS software supplier.

¹³ Based on DfE census data (Autumn 2022).

¹⁴ Based on DfE census data for May 2022, the first census after ESS' new contracts were implemented, ESS' market share had fallen to c. 61%.

together with ScholarPack), Bromcom and RM Integrus.¹⁵ As of October 2021, each of these suppliers had a share of less than 10% for the supply of MIS software to state-funded schools in England, although Arbor and ScholarPack's combined market share was approximately 15%.¹⁶ As of October 2022, the market shares of RM Integrus and Bromcom remained below 10%, and Arbor had a market share of over 16% (Arbor and ScholarPack's combined market share was approximately 24%).¹⁷

- 3.9 As of February 2022, ESS has held a share of c. 82% for the supply of MIS software to state-funded schools in Wales.¹⁸ This share has been stable and extremely high over time. The only other supplier in Wales is Ceredigion Teacher Centre, which has been developed by Ceredigion's LA.
- 3.10 The CMA's preliminary view is that these shares of supply alone materially exceed the threshold under the case law such that there is a rebuttable presumption that ESS holds a dominant position in both England and Wales.¹⁹ The CMA is also of the preliminary view (based on submissions from customers, competing MIS suppliers as well as market reports) that there are material barriers to entry and expansion and that there is very limited, if any, potential for countervailing buyer power from schools.²⁰

ESS' Conduct in the relevant market(s)

- 3.11 In early November 2021, ESS told its SIMS customers whose one-year annual entitlement contracts came up for renewal from 1 April 2022 of its decision to change the duration of these contracts to three years from 1 April 2022 ('**New Contracts**').²¹ The majority of ESS' customers with annual entitlement contracts had one-year rolling contracts. These customers were reminded that under the terms of these contracts they had until 31 December 2021 to inform ESS whether they wanted to cancel their existing contract from 31 March 2022, thus giving them about two months to decide whether to give notice to ESS (from the time ESS informed them of the New Contracts). On 7 December 2021, ESS emailed LAs and schools with which it had direct contracts clarifying that if they wished to sign up to the New Contracts they should do so by 31 March 2022, adding '*but you do not have to. You can renew at any point up to or including 31 March 2022 or indeed any point thereafter. It is up to you.*' From 7 December 2021, those schools would have had around four months (until 31 March 2022) to decide whether to sign up to a New Contract with ESS or to switch to another MIS supplier, in order to have a MIS in place by 1 April 2022.

¹⁵ [The Key have agreed to purchase RM Integrus.](#)

¹⁶ Based on DfE census data (Autumn 2021).

¹⁷ Based on DfE census data (Autumn 2022).

¹⁸ Based on the most recent census data for Wales (February 2022).

¹⁹ Judgment in *Akzo v Commission* C-62/86, EU:C:1991:286, paragraph 60.

²⁰ In particular, the fact that the Conduct was implemented unilaterally (without margin for schools or LAs to negotiate) suggests that there is not sufficient countervailing buyer power to offset ESS' market power.

²¹ ESS sent communications to schools with which it had direct contracts and LAs (who were contracting on behalf of LA-maintained schools).

On 12 January 2022, ESS contacted LA-maintained schools (who had previously contracted via their LAs) with login details that allowed them to review and sign up to the New Contract.

- 3.12 In January 2022, ESS notified all affected schools of the opportunity to apply for a six-month break clause (the '**Original Break-Clause**').²² If they met the conditions for the Original Break-Clause,²³ customers who had entered into a New Contract (with a three-year duration) with ESS could give notice (by 31 August 2022) to terminate that New Contract. If they gave notice, the New Contract would end on 30 September 2022.
- 3.13 One of the conditions to be granted an Original Break-Clause was to send an email containing the school's name, postcode, DfE number and ESS quotation number to ESS by 20 February 2022 to apply for such a clause. Customers received an immediate automated response, which stated: '*subject to you providing the required information: a) school name, b) school postcode, c) quote number and d) DfE number to this inbox from the email address that our correspondence was sent to **and** signing your new three-year agreement via the ESS Gateway or Portal on or before 20th February 2022, then you will have the right to terminate your new agreement on 30th September 2022, by issuing notice of termination on or before 31st August 2022. Where you have validly requested a break clause, in early April 2022 we will contact you with details of how to invoke your right for your agreement to terminate on 30th September 2022.*' Customers did not receive a further email from ESS to confirm that they had complied with all the conditions and that they were successful in getting an Original Break-Clause.
- 3.14 On 30 March 2022, ESS contacted the customers that had complied with the application process for an Original Break-Clause to provide details of the process for exercising the Original Break-Clause. From the time they received the email with details on the process for exercising the Original Break-Clause, customers wishing to switch MIS software supplier had approximately five months to give notice to ESS (from 30 March 2022 to 31 August 2022) and another month before the New Contract with ESS would end (by 30 September 2022). Customers that had started considering the process for switching before receiving details on how to exercise the Original Break-Clause would have had longer.
- 3.15 In July 2022, ESS published additional offers on its website ('**July Offers**').²⁴ These offers were made to three distinct groups of customers, with each group receiving

²² Several ESS-supplied schools in England and Wales (and LAs in Wales) that responded to the CMA's June 2022 and July 2022 questionnaires stated that they were not offered the six-month Original Break-Clause. This point is disputed by ESS.

²³ The six-month Original Break-Clause would take effect (ie the New Contract with ESS would terminate) on 30 September 2022 if the following conditions were met. Schools had to: (i) accept the New Contract (of a three-year duration) on or by 20 February 2022; (ii) send an email request for the Original Break-Clause by 20 February 2022; and (iii) if customers were successful in applying for the Original Break-Clause, exercise the Original Break-Clause by providing notice to ESS on or by 31 August 2022.

²⁴ See Appendix 1 to the Commitments (within Annex 1 to this decision).

specific offer(s) applicable to that group.

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

4. The CMA's competition concerns

- 4.1 In this Section the CMA first describes schools' process for switching MIS software (by way of background), before summarising its competition concerns in relation to the Conduct.

Customers' process for switching MIS software

- 4.2 Based on the Investigation to date, including submissions from ESS, other MIS suppliers, schools and LAs, the CMA understands there are broadly four stages in the MIS switching process: (i) deciding and planning to procure; (ii) preparation to procure; (iii) procurement; and (iv) implementation. Schools may choose to carry out some of these steps at differing stages of the switching process depending on the circumstances. Overall, schools will want to make robust and informed decisions when procuring their MIS given that it is key software for the effective running of a school and which it is mandatory to have.
- (a) For the first stage (deciding and planning to procure), a school will research and define its current and future needs. The school may consult with a range of stakeholders (including staff and the governing body) to secure their agreement and buy-in for the procurement, as well as the change management process and the implementation process required. This will involve cost, time and a resource commitment (including from frontline teaching staff). Schools may wish to consult with other similar schools in their locality for peer-to-peer insight into switching. Schools will also want to devote time to gain a sound understanding of a compliant procurement process and timescales for the switch. This may also include the school undertaking initial research into the MIS supplier market.
- (b) For the second stage (preparation to procure) the CMA understands that schools may undertake more detailed research into MIS suppliers. This may include product demonstrations, visiting trade fairs and again consulting with other similar schools and networks. Equally, once the decision to procure has been approved, schools typically need to refine their requirements and produce a detailed specification and all other documentation required for a compliant procurement exercise. Schools will need to determine the best 'route to market' whether through an appropriate procurement framework or through a bespoke procurement route (which would take more time). A further element at this stage may also include devoting the time and resource to secure specialist support to manage the procurement process if the school does not have in-house capability and/or capacity. For example, this might include dealing with all the procurement and legal aspects of formal procurement process to ensure compliance with the Public Contract Regulations 2015 ('PCRs') as well as with the school's own policies and protocols. Where LAs procure MIS software on behalf of schools, they may be required to go out for tender if the value of the contract they are seeking

to award exceeds certain limits, or if the contract cannot be awarded through a procurement framework. For example, some LAs told the CMA that they may be required to go out to tender for contracts over £25,000. In addition, individual academies may also have internal tender requirements for contracts over a certain amount.

- (c) For the third stage, the procurement process can be sub-divided into publication, evaluation and award of the contract. Schools will need to ensure that they follow the appropriate procurement processes set out above, whether procuring through a framework or through a bespoke tendering opportunity. Schools would generally secure at least three competitive quotes for evaluation. For a framework, schools would need to follow the defined process. For bespoke procurements subject to the PCRs, there are strict PCRs and timings which need to be adhered to throughout. Timescales around the procurement exercise should be sufficient to allow quality bids from suppliers (although they can be reduced for framework procurements). Evaluation of bids may need to include an appropriate stakeholder group attending product demonstrations and initial testing of the MIS software. Once selected, schools may need to follow defined regulatory processes in awarding the contract and will need to align with their policies and processes (which would include full internal approvals, including from the governing body).
- (d) The fourth stage, implementation and data migration, requires a systematic process for changing supplier. Timing of this implementation and testing needs to be carefully considered to mitigate risks to the running of the school and to enable smooth transition from the exiting MIS to the new MIS software. For example, schools may want to avoid certain key time periods such as during exams. Schools also need to carefully manage the out-going MIS supplier and system. Staff engagement and familiarity throughout is key and a full training programme will likely need to be completed prior to (or in some cases after) any system going live. The CMA understands that while a phased implementation may take longer, it may be more successful in implementation.

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

- (a) the process of planned switching likely involves considerable research and planning, which can span the year, involving staff engagement and resource throughout as well as staff training before the system goes live.

Customers also stated that, given the importance of MIS software for a school, this research and preparation was essential to ensure a properly functioning system that integrated with LA systems;

- (b) testing the MIS software can take months depending on the complexity and number of schools involved as part of the same procurement process;
- (c) schools will need to consider at the planning stage what time is required to get internal approval for the various stages of the procurement process including the final decision to award the contract. Schools will need to take into account all regulatory and internal policies, and may also have to factor in the frequency of board of governors/trustees meetings;
- (d) the time and resource needed to prepare to carry out a procurement process depend on the complexity of the schools' requirement, whether the school has appropriate resource in-house and the need to secure compliance with the PCRs (if relevant) and school policies and protocols; and
- (e) the timing of the implementation and migration to the new MIS software is important and must be planned for so that it takes place at a time when staff resources are available and there is a minimal risk of disruption to the operations of the schools in case any problems occur. A process for managing the change of supplier needs to be defined, considered and evaluated at the planning stage of the procurement. This would then need to be refined and agreed at the time of contract award.

Competition concerns identified by the CMA

- 4.4 The CMA refers to the Conduct described at paragraphs 3.11 to 3.15 above. The CMA is concerned that schools were effectively moved onto a New Contract that prevents switching for three years, when previously it was possible annually, with ESS giving schools limited opportunity to avoid those New Contracts, ie by switching to alternative suppliers. It is relevant that this is a contract for key software for schools that enables mandatory provision of information.
- 4.5 It is the CMA's preliminary view that the Conduct constituted the imposition of unfair terms and trading conditions and that it may restrict competition by foreclosing the market to competitors and new entrants on the market (including by limiting their ability and incentive to grow).
- 4.6 The focus of the CMA's concerns relates to the way in which ESS implemented the transition to the New Contract and the impact this had on the ability of schools to exercise choice in that context. ESS did not consult schools on the changes to the New Contracts, which it implemented unilaterally. ESS gave schools limited

advance notice of these changes and some schools said that they found ESS' initial communications inconsistent and confusing. The Conduct was also implemented alongside other material changes to the way in which ESS contracted with LA-maintained schools,²⁵ such that the burden on schools in terms of their decision-making process was increased (in particular taking account of the timeframes they had to decide, plan and implement any switch).

- 4.7 The CMA is concerned that schools may have found it particularly challenging to switch within the timescales set by ESS given that the schools affected by the Conduct were resource and time constrained, especially in the post-COVID-19 pandemic recovery period and due to the reintroduction of national school tests in the 2022 summer term.²⁶
- 4.8 A significant proportion of ESS' customers in England and Wales that replied to the CMA's June 2022 and July 2022 questionnaires told the CMA that they were unable to switch MIS software supplier either before the start of the three-year New Contract with ESS (on 1 April 2022) or by acting upon ESS' six-month Original Break-Clause offer.²⁷ Notably, a significant proportion of respondents stated that they required ten or more months to switch MIS software supplier (taking into account the end-to-end process), which is longer than the timescales which schools were given by ESS in relation to the Conduct (see paragraph 3.11 above).
- 4.9 In addition to responses to the CMA's questionnaires, evidence received from schools and LAs indicated that some schools that had opted for the six-month Original Break-Clause did not on reflection consider a switch was feasible by 30 September 2022. This was due to a number of reasons, including (in isolation or in combination) September being one of the busiest times of year for schools, the lack of time for training and overall lack of resources to change MIS software supplier, the demands placed on schools due to COVID-19 and the reintroduction of national school tests as set out in paragraph 4.7 above.
- 4.10 The CMA notes that, according to figures from ESS, [2,000-3,000] schools did manage to switch from ESS to alternative MIS software suppliers between October 2021 and the end of September 2022,²⁸ although some of these schools may have already planned to switch prior to ESS announcing changes in contract duration. Whilst the CMA acknowledges the increase in switching in this period compared to the previous three years,²⁹ which may be in response to the Conduct, it does not remove the possibility that there were schools that wanted to switch but were not

²⁵ In particular, using direct contracts where schools had previously contracted through the LAs and using a portal to communicate with schools.

²⁶ Resourcing and experience limitations also likely put them at a disadvantage relative to ESS, especially for those schools that were contracting directly with ESS for the first time after having previously relied on their LA to procure the SIMS software for them.

²⁷ The CMA wrote to 1,232 schools in England and Wales as well as 22 Local Authorities in Wales. The CMA received 134 unique responses in total of which 118 were ESS customers.

²⁸ Data based on the Summer and Autumn 2022 DfE censuses shows that 2,713 schools switched away from ESS to alternative MIS software suppliers over the period of October 2021 to October 2022. Equivalent data for Wales does not appear to exist for this timeframe.

²⁹ In the three years prior to this, ESS' annual loss rate was 733 schools.

able to for the reasons mentioned above.

- 4.11 ESS made further offers to customers in July 2022 (see paragraph 3.15 above). However, the ‘Group 2 Offer’ to customers excluded schools that were granted an Original Break-Clause but subsequently considered that they did not have sufficient time to switch. It was also subject to conditions³⁰ which limited the number of schools that could benefit from the offer, gave ultimate discretion to ESS which risked limiting schools’ options in practice, and made it burdensome for customers to apply. Therefore, the CMA considers that these own-initiative steps (taken by ESS) did not adequately address the CMA’s competition concerns, because a number of schools had no option but to remain on the New Contract (which is for three years) until 31 March 2025.
- 4.12 As a consequence of ESS’ market power and the extent of the conduct relative to its customer-base, a significant portion of the market is subject to the Conduct. Thus, a large proportion of the market is potentially affected by the foreclosure resulting from the Conduct.
- 4.13 Due to ESS’ significant market share, competitors’ main opportunities to win new business arise from customers switching away from ESS. The CMA is of the preliminary view that competitors may have been deprived of the chance to win new customers (ie those that might have switched away from ESS had they been able to) for a meaningful period of time, as a result of the Conduct.³¹ Therefore, it is the CMA’s preliminary view that ESS’ main competitors may face reduced customer wins and as a result, it would weaken their ability to meaningfully grow their customer base. In addition, new market entrants who could provide further competition in the MIS software market are likely to be disadvantaged by the lack of customers they are able to win from ESS until the three-year term ends. This is, in turn, likely to discourage new entrants to the market and reduce their ability to remain viable competitors in the market that could compete for schools in England and Wales in 2025.
- 4.14 ESS’ New Contracts for SIMS have the same start date and renewal date on 31 March 2022. This ‘lumpiness’ of the portion of the market that is contestable at any given time may exacerbate the foreclosure effect.
- 4.15 As set out above, the evidence indicates that a number of schools considered they had no real choice. The CMA is concerned, in particular, that they felt compelled to accept ESS’ New Contract as the only alternative was to have the contract terminated without an alternative MIS software supplier being in place. This

³⁰ In particular, the customer was required to provide ‘objective evidence that at the time ESS made its six-month Original Break-Clause Offer, it had a clear intention to switch to an alternate supplier; and did not apply for the Original Break-Clause because it reasonably concluded that it would be unable to switch to an alternative supplier in the time available for reasons outside its control.’ The detail of the offer was set out at <https://www.ess-sims.co.uk/breakclauseoffer>; for the text of the offer, see Appendix 1 to the Commitments (within Annex 1 to this decision).

³¹ As noted at paragraph 4.10 above, the CMA acknowledges the increase in switching in this period compared to the previous three years, which may be in response to the Conduct. It does not remove the possibility that competitors may have been deprived of the chance to win new customers.

suggests that some schools may have had to continue using software which no longer suited their requirements compared to competing software that they may have been considering switching to within the next three years.

- 4.16 The timing of the Conduct may have exacerbated the negative effects on both schools and competitors because it arose at a point where there may have been a greater degree of switching than previously. Following the COVID-19 pandemic more schools sought cloud-based MIS software. Competitors that offered cloud-based software had an opportunity to expand their market share to schools seeking this type of software. The CMA notes that while ESS has MIS software which is cloud-based, ie 'SIMS Connected' and 'SIMS Hosted', ESS itself described the rationale for its three-year contracts as offering sufficient certainty over its customer and revenue base to allow ESS to invest substantially in developing 'cloud-native' extensions to the SIMS product ('SIMS Next Generation').
- 4.17 The CMA has not been persuaded of any commensurate benefit of the Conduct for schools based on the evidence reviewed.

Objective justification

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

5. The Commitments

- 5.1 To address the CMA's competition concerns in relation to the Conduct (as described in Section 4 above), and without prejudice to ESS' position that it has not infringed the Chapter II prohibition, ESS has offered the Commitments. The Commitments are set out in Annex 1 of this decision and summarised below.
- 5.2 This decision attaches the text of the Commitments (Annex 1), which includes five appendices:
- (a) the text of the offers made by ESS to some of its customers in July 2022 (Appendix 1);
 - (b) Briefing to Adjudicator (including guidance regarding the handling of Restricted Information) (Appendix 2);
 - (c) Instructions: How to apply for a New Break-Clause (Appendix 3A);
 - (d) Application form for a New Break-Clause (Appendix 3B); and
 - (e) ESS' General Submission (Appendix 4).
- 5.3 The Commitments create a new gateway for schools that had previously genuinely considered not taking up, or exiting from, the three-year term of the New Contracts at the time it was offered, but had reasonably concluded they had insufficient time to switch.
- 5.4 These schools could be granted the option to terminate the New Contract with ESS a year early (on 31 March 2024), by applying to an independent adjudicator for a New Break-Clause provided that they meet certain conditions.
- 5.5 The New Break-Clause will give successful applicants a period of 12 months to consider whether or not to switch to another MIS supplier, and if they decide to switch, to activate the break clause.
- 5.6 The Adjudicator will assess if the application meets the criteria set out below. The Adjudicator will inform schools of the outcome of their applications by 31 March 2023. For successful applicants, if switching MIS supplier is a school's preferred option, subject to certain conditions³², the New Break-Clause will enable the school to terminate the New Contract on 31 March 2024 by the school giving ESS written notice to terminate between 1 January 2024 and 29 February 2024.
- 5.7 However, if a school concludes that it would rather continue its contract with ESS and it does not give notice to terminate, it will not need to take any further steps and the terms and conditions of its contract will remain the same for its remaining duration.

³²These terms and conditions are set out at subparagraphs 26(f) and (g) of Appendix 3A – Instructions: How to apply for a New Break-Clause.

- 5.8 Appointment of an independent adjudicator: ESS has appointed Evelyn Partners as the Adjudicator to decide whether a school's application meets the eligibility criteria. The Adjudicator has been approved by the CMA and has relevant experience for the role, including experience of working with the CMA and handling commercially sensitive information. The Adjudicator will be paid by ESS and the application process will be free of charge for the applicants.
- 5.9 Customers within the scope of ESS' offer: applications can be made to the Adjudicator by customers who entered into the New Contract and who consider that they meet one of the two conditions set out in paragraph 5.10 below³³ and either:
- (a) decided not to apply for the Original Break-Clause offer made by ESS to customers in January 2022 (the '**Original Break-Clause Offer**'); or
 - (b) validly applied for the Original Break-Clause Offer but did not subsequently exercise the Original Break-Clause.
- 5.10 Conditions to be determined by the Adjudicator: the application criteria for the New Break-Clause are set out in paragraphs (a) and (b) below, depending on schools' circumstances:
- (a) for Customers who did not take up the Original Break-Clause Offer, the New Break-Clause offer is made to any Customer who, after genuine consideration, reasonably concluded on or before 20 February 2022 that switching to an alternative supplier was not possible by 30 September 2022 and for this reason the customer did not opt to take up the Original Break-Clause Offer; or
 - (b) for Customers who did opt to take up the Original Break-Clause but who did not then exercise it, the New Break-Clause offer is made to any Customer who, after genuine consideration, reasonably concluded in a timely manner that switching to an alternative supplier was not possible by 30 September 2022 and this was the reason why the customer did not exercise the Original Break-Clause.
- 5.11 The Adjudicator will assess whether the Customer has shown that it undertook a reasonable degree of diligence in concluding it was not possible to switch to an alternative MIS supplier in the timeframes available. The Adjudicator will make a case-by-case assessment of whether the Customer undertook a reasonable degree of diligence, based on the beliefs and information the Customer had at the time. However, it would not be sufficient in itself to state in the application that the reason it was not possible to switch was because there wasn't an alternative supplier available at the time. In making this assessment the Adjudicator will take into account (among other things) the various steps in the process of switching MIS supplier (see paragraph 4.2 above), ESS' General Submission, this decision and any

³³ In addition, the customers should not have successfully taken up any of the July Offers and should not have validly terminated or given notice to terminate their New Contract ('**Customers**').

relevant considerations relating to the time required to switch MIS supplier and the specific circumstances of the Customer. However, the Adjudicator will not be assessing whether schools correctly complied with any applicable procurement procedures or policies; this will not impact on whether an application is successful.

- 5.12 Further detail is also set out in the briefing for the Adjudicator when considering applications under the Commitments (**'Briefing to Adjudicator'** available at Appendix 2 to Annex 1 of this decision).³⁴
- 5.13 Information to include in applications (overview): Customers will need to submit an application form, a copy of which is provided at Appendix 3B to Annex 1 of this decision. Customers should read the 'Instructions: How to apply for a New Break-Clause' which set out the information to be included in applications (these are available at Appendix 3A to Annex 1 of this decision).
- 5.14 The application:
- (a) includes details on the customer, the applicant, and an explanation as to how the applicant concluded that it was not possible to switch to an alternative MIS supplier in the timeframes available. This will enable the applicant to explain to the best of their ability and recollection their own particular set of circumstances for the Adjudicator to consider, based on their belief and the information they had at the time;³⁵
 - (b) should include, if reasonably available, any supporting documentation from the relevant time period which would support the applicant's narrative. If no such documentation is reasonably available, the applicant should tick the relevant box and where applicable include a short explanation of why no such documentation can reasonably be provided, to assist the Adjudicator's understanding;
 - (c) must in all cases be verified by a statement of truth signed by the person submitting the application, who must have the requisite authority on behalf of the applicant to sign such a statement; and
 - (d) could include any optional request for redaction(s) from disclosure to ESS.
- 5.15 ESS' ability to comment on applications: ESS will have the option to comment on appropriately redacted versions of applications made to the Adjudicator (see paragraph 5.17 below). ESS' comments will be limited to matters which are likely to materially assist the Adjudicator (and should be focused on matters which relate to the education market, education procurement, the law relating to education, ESS, or ESS' relationship with customers) by:

³⁴ The Briefing to Adjudicator is available at Appendix 2 to Annex 1 of this decision.

³⁵ The application form is structured as follows: 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); Section 5 - Statement of Truth.

- (a) briefly referring the Adjudicator to material in ESS' General Submission³⁶ (by way of simple cross-reference) of relevance to any application;
- (b) correcting matters in an application which ESS considers to be materially factually inaccurate;
- (c) addressing matters in an application which ESS considers to be substantially misleading; and/or
- (d) addressing matters which ESS considers to constitute material omissions of relevant matters in an application.

5.16 The Adjudicator can disregard any matter contained within ESS' submission which is solely for the Adjudicator, as the independent decision maker, to determine in relation to the test set out at paragraphs 5.10-5.11 above.

5.17 Confidentiality: The Adjudicator will consider whether any commercially sensitive information and certain personal data ('**Restricted Information**') should be redacted from the applications before disclosure to ESS. Guidance to the Adjudicator on the type of information that should be redacted and additional safeguards to prevent the disclosure of Restricted Information to ESS is provided within the Briefing to Adjudicator (available at Appendix 2 to Annex 1 of this decision). The guidance for the Adjudicator sets out that it is to redact:

- (a) any commercially sensitive information, ie information that is not in the public domain which might significantly harm the legitimate business interests of the undertaking to which it relates, such as information related to ESS' competitors;
- (b) any information related to the private affairs of individuals that may cause harm if disclosed or information that would be against the public interest to disclose; and
- (c) any Special Category Personal Data,³⁷ and any necessary Personal Data,³⁸ in line with the Adjudicator's duties under the Applicable Data Protection Legislation.³⁹

5.18 Communicating the New Break-Clause offer to ESS' customers: ESS will communicate the New Break-Clause offer to its customers by publishing details of it on its websites and directly emailing customers eligible to apply for the New Break-Clause. Customers are provided with instructions explaining the process for completing the application (see Appendix 3A to Annex 1 of this decision), an

³⁶ Separately to the Briefing to Adjudicator, ESS has provided a general submission ('**ESS' General Submission**') to the Adjudicator available at Appendix 4 to Annex 1 of this decision.

³⁷ Special Category Personal Data means personal information as identified in Article 9(1) of the UK General Data Protection Regulation.

³⁸ Personal Data has the meaning set out in the Applicable Data Protection Legislation (set out under footnote 38).

³⁹ The Applicable Data Protection Legislation is all applicable data protection and privacy legislation in force in the UK, including the Data Protection Act 2018, the UK General Data Protection Regulation and the Privacy and Electronic Communications (EC Directive) Regulations 2003.

application form (Appendix 3B to Annex 1 of this decision) as well as links to ESS' website containing the text of the commitments offer (see Annex 1 of this decision) and the Briefing to Adjudicator (see Appendix 2 to Annex 1 of this decision).

- 5.19 Support for the Adjudicator: to support the Adjudicator in considering applications, ESS will provide the Adjudicator with required information; make itself available for scheduled meetings with the Adjudicator; maintain such resources as are reasonable to fulfil its obligations under the Commitments; provide the Adjudicator with such co-operation as may be reasonably required for the performance of its tasks; and ensure payment of the Adjudicator's remuneration.
- 5.20 Honouring offers of July 2022: ESS will honour each successful application for the July Offers.⁴⁰
- 5.21 Reporting and compliance: The following will assist the CMA to effectively monitor ESS' compliance with the Commitments.
- (a) ESS will: (i) 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; (ii) report to the CMA on the number of New Break-Clauses granted to customers and exercised by them; (iii) notify the CMA (within five working days of becoming aware) of any breaches of the Commitments; (iv) take prompt actions to remedy a breach; and (v) keep, maintain and produce to the CMA any information or document specified by the CMA relating to the operation of the Commitments.
- (b) The Adjudicator will: (i) provide to the CMA (with copies to ESS) regular interim reports and a final consolidated report on the matters set out in the Briefing to Adjudicator;⁴¹ (ii) report to the CMA (with a copy to ESS) if the Adjudicator considers that ESS is failing or has failed to comply with any of the Commitments; and (iii) produce a plan explaining how the Adjudicator will maintain the resources required to fulfil its obligations under the Commitments, the Adjudicator Mandate (the '**Mandate**') and the Briefing to Adjudicator. The CMA and ESS may ask the Adjudicator any necessary clarificatory questions regarding its reports, to which the Adjudicator must respond promptly.
- (c) Where the CMA has reason to believe that there is any failure by ESS to meet its obligations under the Commitments, such as concerns raised by the Adjudicator in its reports, the CMA may propose measures that the CMA considers necessary to ensure ESS' compliance.
- (d) The Briefing to Adjudicator may be amended by agreement between the CMA

⁴⁰ Details of the July Offers are set out at paragraph 3.15 above.

⁴¹ These would include: (i) the number of applications received/acknowledged; (ii) the number of applications accepted/rejected; (iii) updates on the Adjudicator's capacity to deal with applications; and (iv) any concerns on the part of the Adjudicator as to the compliance on the part of ESS. Under the terms of the Briefing to Adjudicator, these reports will be weekly (or of an alternative frequency to be agreed between the CMA, ESS and the Adjudicator).

and ESS to facilitate the effective operation of the Commitments.

- 5.22 In addition, if the CMA reasonably believes that the Adjudicator is not meeting the requirements of its role, the CMA will 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. If ESS has concerns about the operation of the Adjudicator, ESS shall raise these with the CMA and must obtain the CMA's approval before dismissing and replacing the Adjudicator and it may only be for good cause.

6. The CMA's assessment of the Commitments and the Consultation responses

- 6.1 This Section sets out the CMA's assessment of the Commitments against the criteria set out in the CMA's Guidance on its investigation procedures under the Act (the '**Procedural Guidance**')⁴² and the reasons why, having taken careful account of the information available, including the submissions received in response to the Consultation, the CMA considers it appropriate to accept the Commitments.
- 6.2 The CMA received 20 individual written submissions from third parties in response to the Consultation. It also held calls with two third parties. In terms of respondents, the CMA received responses from ten schools or trusts,⁴³ two LAs,⁴⁴ four MIS suppliers⁴⁵ (one of which had also had interactions with schools),⁴⁶ and four other stakeholders.⁴⁷ The Consultation responses are summarised below in the relevant parts of this Section.

Assessment of the Commitments

The Procedural Guidance

- 6.3 Pursuant to section 31A of the Act, for the purposes of addressing the competition concerns it has identified, the CMA may accept from such person (or persons) as it considers appropriate, commitments to take such action (or refrain from taking such action) as it considers appropriate.
- 6.4 The Procedural Guidance states that the CMA is likely to consider it appropriate to accept binding commitments only in cases where (a) the competition concerns are readily identifiable; (b) the competition concerns are addressed by the commitments offered; and (c) the proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time.⁴⁸
- 6.5 The CMA will not accept commitments where compliance with such commitments and their effectiveness would be difficult to discern and/or where the CMA considers that not to complete its investigation and make a decision would undermine deterrence.⁴⁹

⁴² [Guidance on the CMA's investigation procedures in Competition Act 1998 cases \(CMA8, December 2021\)](#).

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED] – a [REDACTED] research [REDACTED] firm – [REDACTED], conducted qualitative interviews with 21 school business managers. Various factors reduce the amount of weight the CMA can put on these interviews. These include, but are not limited to, (i) how contacted schools were selected, (ii) [REDACTED] initiating the contact and (iii) the self-selection of schools that responded and ultimately participated in these interviews. Nevertheless, themes emerging from these interviews were consistent with those received from other schools and stakeholders who responded directly to the CMA's consultation, such as (i) the complexity of the application form and (ii) the difficulties schools would have in providing written evidence of decision making. Consequently, the CMA believes it can, in conjunction with other evidence, put some weight on the responses to the interviews conducted by [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ Paragraph 10.18 of the [Procedural Guidance](#).

⁴⁹ Paragraph 10.20 of the [Procedural Guidance](#).

- 6.6 Commitments are a means of resolving investigations more quickly and efficiently: in summary, the CMA accepts binding promises from one or more parties under investigation in relation to their future conduct so as to address the competition concerns identified by the CMA. The Competition Appeal Tribunal has noted that '[t]he CMA's power to accept binding commitments is intended to allow it to resolve cases more quickly and efficiently by avoiding the need for a full investigation, thereby enabling the CMA to use its limited resources for a broader range of enforcement purposes'.⁵⁰
- 6.7 The CMA cannot require parties to an investigation to offer commitments or particular commitments. It is solely for each party to an investigation to determine what, if any, commitments they are willing to offer the CMA. The CMA then assesses whether any commitments offered should or should not be accepted. In order to accept commitments, the CMA must consider that the commitments offered will address the competition concerns the CMA has identified and the CMA must consider, in the exercise of its discretion, that it is appropriate to accept commitments in the case in question.⁵¹
- 6.8 The CMA has a broad discretion in determining which cases are suitable for commitments and whether the commitments offered should be accepted.⁵² The Competition Appeal Tribunal has acknowledged that, in the exercise of the competition authority's judgement when accepting commitments, it is legitimate for the competition authority to 'strike a balance' in terms of the appropriate level of intervention in a case, provided that in doing so, it takes proper account of material points drawn to its attention and avoids obvious error.⁵³
- 6.9 In the CMA's view, commitments are appropriate for addressing specific competition concerns identified by the CMA as arising from the Conduct.

The CMA's assessment

- 6.10 In the present case, ESS has put forward the Commitments with a view to addressing the CMA's competition concerns arising from the Conduct. The CMA's competition concerns, which are set out in Section 4 above, were communicated to ESS.
- 6.11 In accordance with the CMA's Procedural Guidance, the CMA has assessed the Commitments against the criteria referred to in the paragraphs 6.3 to 6.5 above and sets out its conclusions below.

The competition concerns are readily identifiable

- 6.12 The CMA considers that the competition concerns with respect to the Conduct,

⁵⁰ *Skyscanner Limited v Competition and Markets Authority* [2014] CAT 16, at [21].

⁵¹ See paragraphs 10.15 to 10.20 of the [Procedural Guidance](#).

⁵² See paragraphs 10.17 to 10.21 of the [Procedural Guidance](#).

⁵³ *Skyscanner Limited v Competition and Markets Authority* [2014] CAT 16, at [130] and [132].

which are set out in Section 4 of this decision, are readily identifiable.

- 6.13 Respondents generally agreed with the CMA's assessment of the competition concerns arising from the Conduct.
- 6.14 A number of third party responses to the Notice (including seven schools/trusts, three MIS suppliers, two LAs, and three other stakeholders) have raised concerns in relation to the Conduct, which were similar to concerns previously received and taken into account by the CMA in its assessment of the Conduct (as set out in the Notice and at Section 4 above).⁵⁴ In addition, many respondents highlighted points they considered were important context to the Conduct. These included the challenges faced by schools at the time of the change to a three-year contract: for example, having to manage pupils' return after the lockdowns and related challenges raised by COVID-19 pandemic as well as budget squeezes.⁵⁵ Another respondent flagged particular concerns for LA-maintained schools as the move to three-year contracts happened at the same time as the move to direct contracts for schools who previously contracted through their LAs.⁵⁶
- 6.15 Having reviewed responses to the Consultation, the CMA remains of the view that the CMA's competition concerns are readily identifiable.
- 6.16 A number of respondents also raised concerns which the CMA considers are out of the scope of the Investigation as they do not relate to the Conduct:
- (a) One respondent commented on the CMA closing the FMS limb of the Investigation, stating that schools are forced to pay significantly more for their financial management software when opting to change their MIS.⁵⁷
 - (b) One respondent indicated that they entered into a three-year contract for FMS but would like to switch away from FMS.⁵⁸
 - (c) Two respondents (schools/trusts) told the CMA that ESS (and other MIS suppliers) should give schools which are about to convert to academy status either (i) a 12-month break clause when they become an academy;⁵⁹ or (ii) a short-term licence for the use of SIMS so they can align with the MAT when they join (if the wider Trust uses alternative MIS software).⁶⁰ The CMA notes that issues solely arising from changes to a school's status (for example as a result of converting to an academy) during the term of the New Contracts are out of scope of the Investigation.

⁵⁴ [REDACTED] and some school business managers who were interviewed as part of [REDACTED] submission.

⁵⁵ Submission from one MIS supplier and one other stakeholder.

⁵⁶ Submission from one MIS supplier. Another MIS supplier raised a different point that, as a result of ESS contracting directly with schools (rather than LAs, as was previously the case), it is significantly more difficult and costly for other MIS suppliers to target these multiple individual schools, and as the contract value for individual school sales is significantly lower than entire LA contracts, it is less attractive.

⁵⁷ Submission from one other stakeholder.

⁵⁸ Submission from one school/trust.

⁵⁹ [REDACTED].

⁶⁰ [REDACTED].

6.17 One respondent (school/trust) also asked whether (as a school entity (the original contracting authority) ceases to exist on joining a Multi Academy Trust) a Trust could apply for a break clause for a school on the basis that the Trust has considered another MIS, even though the original contract was with the (now non-existent) school entity.⁶¹ The CMA notes that the Adjudicator would assess whether the conditions of the offer are met by schools who were considering converting at the time of the Conduct or have since joined an academy.

The Commitments address the competition concerns

6.18 The CMA considers that the Commitments address its competition concerns relating to the imposition of unfair terms and conditions and related foreclosure. Specifically, they provide schools which, at the time of the move to a New Contract were genuinely considering switching MIS supplier but reasonably concluded that they would not be able to switch within the timescales set by ESS,⁶² an opportunity to do so. Accordingly, the Commitments provide these schools with an effective choice by enabling them to plan and implement a switch, releasing them from the New Contracts a year early and facilitating competition. Moreover, in giving schools a period of 12 months to research, decide whether to switch and if so plan and implement a switch to another MIS software supplier, the Commitments are consistent with the evidence identified by the CMA in relation to the time these schools need to switch.

6.19 A period of 12 months to research, decide whether to switch and if so to plan and implement a switch to another MIS software supplier is longer than the timescales which schools were given by ESS in relation to the Conduct (see from paragraph 3.11 above) and will enable these schools to go through the steps set out at paragraph 4.2 above. Moreover, this additional 12 months will enable these schools (representing a contestable portion of the market) to terminate their contract on 31 March 2024, a year before the end of the three years under the New Contract. The CMA considers that this makes a material difference by restoring competition in the market a year earlier than it would have been had the Commitments not been accepted.

6.20 The CMA sets out below its assessment of whether the Commitments address its competition concerns (as set out in Section 4 above), including taking into account representations received by the CMA in response to the Consultation.

6.21 Overall, half of the respondents and the majority of those who commented on the Commitments welcomed the option of early exit from the New Contract as provided for by the Commitments.⁶³ Most of these respondents nevertheless also commented that the proposed application process (to be granted a New Break-Clause) was long and difficult to understand and that schools may not actually have

⁶¹ [redacted].

⁶² Either by the start of the New Contract on 1 April 2022 or with the six-month Original Break-Clause.

⁶³ These include submissions from at least four schools/trusts, two MIS suppliers, one LA and three other stakeholders.

the required evidence, which could deter them from applying.⁶⁴ These comments and the CMA's assessment are set out in the following sub-section on the effectiveness of the implementation of the Commitments (see from paragraph 6.28 below).

6.22 Some of these respondents also commented on the scope of the Commitments:

- (a) Two respondents stated that the Commitments should grant all schools a 12-month break clause in order to have the option to exit the New Contract with ESS.⁶⁵
- (b) One of these respondents also stated that for schools who are in the process of procuring a new MIS software, the CMA should consider the provision of an option to exit before 2024, or a rebate of licence costs (partial or full).⁶⁶
- (c) Four respondents stated that the Commitments should include provisions for the future: ESS should either revert to one-year contracts going forward⁶⁷, should be required to give schools 12 months' notice of contractual terms before agreeing MIS contracts in future⁶⁸ or also commit to offer a choice in contract terms post any initial contract period, including a one-year contract option besides longer-term contracts.⁶⁹

6.23 Three respondents (including one LA, one school and one other MIS supplier) disagreed with the resolution of the CMA's investigation by way of commitments.⁷⁰ In particular, one respondent stated that some schools would need longer than 12 months to consider possible other MIS suppliers and allow a transition. They also stated that the Commitments make no redress for the operational and financial impacts incurred by the LA and the schools to date and until the end of the New Contract.⁷¹ Another of these respondents stated that the CMA should reach a finding on whether ESS had abused its dominant position and that ESS should return to the previous one-year contract.⁷²

6.24 In relation to the comments on the scope of the Commitments, as set out at paragraph 6.18 and in Section 4 above, the CMA's competition concerns relate to those schools which considered switching at the time but felt that they would not be able to switch within the timescales set by ESS. The CMA's concerns with the Conduct centre on the way in which the New Contract was implemented, and the time frames provided to schools to consider their options, make a decision whether or not to switch and then plan and implement that switch (rather than the duration of the New Contract in itself). Therefore, the CMA considers that the Commitments

⁶⁴ These include submissions from at least three schools/trusts, two MIS suppliers, one LA and three other stakeholders.

⁶⁵ Submissions from one school/trust and one MIS supplier.

⁶⁶ Submission from one school/trust.

⁶⁷ Submission from one MIS supplier and one school/trust.

⁶⁸ Submission from one MIS supplier.

⁶⁹ Submissions from a different MIS supplier and one other stakeholder.

⁷⁰ [redacted].

⁷¹ Submission from one LA.

⁷² Submission from one MIS supplier. They also commented on the effectiveness of the Commitments; their comments are taken into account in the relevant section below.

are capable of addressing the competition concerns identified in this case without going further by providing a break clause to any school who wishes to exit the New Contract before the expiry of the three-year term or requiring future contracts to be of shorter duration.

- 6.25 In relation to the comments on whether commitments should be accepted, the CMA considers that by accepting the Commitments the CMA would be able to resolve its competition concerns quickly, providing a better and more immediate outcome for customers and competitors than by pursuing the case to a decision at a later date, by which time it may no longer be possible to rectify the specific harms preliminarily identified in this case, which are time sensitive. The CMA understands from information obtained as part of the Investigation that schools' ability and time needed to switch differs depending on a variety of factors and considers that the Commitments strike an appropriate balance in taking account of those differing circumstances.
- 6.26 For the reasons set out above, the CMA considers that the Commitments address the CMA's competition concerns relating to the imposition of unfair terms and conditions and related foreclosure as set out in Section 4 above.

The Commitments are capable of being implemented effectively and within a short period of time

- 6.27 The CMA provisionally concluded in the Notice that the Commitments are capable of being implemented effectively and within a short period of time for the following reasons.
- (a) The Commitments will be in force between the date of this decision (ie date on which ESS has received formal notification of a decision by the CMA under section 31A of the Act to accept commitments) and the 'Termination Date' set out in the Commitments (which the CMA envisages will be no earlier than 31 March 2024).
 - (b) ESS will implement the Commitments by communicating the offer of a 12-month New Break-Clause to customers on the date of this decision. Customers will have the opportunity to make an application to the Adjudicator for a New Break-Clause giving them the option to terminate their New Contract, from the date of this decision until 10 February 2023. Customers will be notified by the Adjudicator as to whether their application was accepted by no later than 31 March 2023.
 - (c) In addition, applications will be determined by an independent Adjudicator appointed by ESS following the approval of the CMA, on the basis of the Mandate and the Briefing to Adjudicator agreed with the CMA.
 - (d) On the date of this decision schools will be provided with guidance on how to apply for a break clause under the Commitments (see 'Instructions: How to apply for a new Break-Clause' at Appendix 3A to Annex 1 of this decision),

the application form (see 'Application Form for a New Break-Clause' at Appendix 3B to Annex 1 of this decision) as well as links to ESS' website containing the text of the commitments (available at Annex 1 of this decision) and the Briefing to Adjudicator (which provides further information about the test and the process) (available at Appendix 2 to Annex 1 of this decision).

- 6.28 The majority of respondents who commented on the Commitments stated that the form was complicated and it was not clear what level of detail would be required for a school's application to be successful. They also commented that it may be difficult for schools to provide evidence in the application form due to a number of factors, in particular: (i) a lot of evidence would be based on recollection of verbal discussions, in particular given the short time granted when ESS announced the contract changes for SIMS; (ii) schools may not have documented or kept details of research, discussions or steps they took as they did not know at the time that they would need to provide evidence; (iii) it relates to events that will have occurred a year ago; (iv) schools would have a short amount of time within which to find the evidence (ie 10 January to 10 February 2023) which also coincides with census collection dates.⁷³ In addition, procurement decisions or discussions may have taken place at Trust or LA level (in particular in Wales), which means that schools may not have that evidence themselves.⁷⁴
- 6.29 Some respondents also stated that schools would need to be able to liaise within their MAT as well as with entities outside of the school (eg LA) as part of the application process, including to assist with the recollection of discussions and guidance.⁷⁵ One respondent also requested the possibility for a break clause to be applied for at Trust level for multiple schools (to save time).⁷⁶
- 6.30 Some respondents raised some concerns about the nature of the evidence to be provided alongside the application form, including that it may be in breach of school's privacy or data protection policy or that it meant disclosing confidential information.⁷⁷ Some respondents also raised concerns about having to redact information before submitting their application to the Adjudicator as some may not know what information to redact and/or it would be a lengthy process.⁷⁸ One respondent stated that they would expect the Adjudicator to redact confidential information from applications before they are shared with ESS.⁷⁹
- 6.31 A number of respondents added that if not addressed (eg by simplifying the form),

⁷³ These include submissions from at least two schools/trusts, one LA, two MIS suppliers and two other stakeholders. See also the report prepared by [redacted]: (i) just under half of respondents [redacted] did not have issues with the form itself but (ii) only [redacted] thought they could relatively easily find the evidence. Nearly all respondents thought it was unrealistic and unreasonable to expect schools to gather the required evidence, write a narrative, and submit it within the required application timescale. [redacted].

⁷⁴ Submissions by one MIS supplier and one LA.

⁷⁵ These include submissions by one MIS supplier, one other stakeholder and a school business manager interviewed by [redacted].

⁷⁶ Submission from one school/trust.

⁷⁷ Several schools interviewed by [redacted]; and submissions from two other stakeholders.

⁷⁸ Several schools interviewed by [redacted]; and submission from one other stakeholder.

⁷⁹ Submission from one MIS supplier.

the issues set out above could deter schools from applying, in particular as there is no appeal process for schools.⁸⁰

6.32 In light of the above, ESS offered to make certain amendments to the application form and the instructions⁸¹ in order to clarify and simplify the application process for a New Break-Clause as follows:

- (a) The application form⁸² has been shortened and the wording simplified. It now includes references to the relevant paragraphs in the instructions where information on how to fill in the application form is included.
- (b) The instructions⁸³ now include clarification on what information schools should provide as part of their application where applicable, as well as other information that schools may want to provide which is relevant to their specific circumstances. Therefore, they should be read before completing the application form.
- (c) The instructions now make it clearer that:
 - (i) Schools are not required to provide documentary evidence if it is not reasonably available and includes some examples of situations when schools may not have access to written evidence.
 - (ii) Schools are not required to redact or identify confidential information as this would be handled by the Adjudicator.
 - (iii) The break clause is an option to switch suppliers but that schools are not required to exit their contract with ESS and may continue to contract on the same terms and service levels if they wish to do so.
 - (iv) Schools can contact others (for example within their federation or MAT or their LA or another MIS supplier) where necessary to check facts or obtain documents to complete their application (provided that they do not share the contents of their application with these parties).
 - (v) The Adjudicator will treat all applications in strictest confidence and will redact personal data as required under data protection and privacy legislation before sharing any application with ESS.
 - (vi) In relation to Multi Academy Trusts or federations, while applications should only cover a single contract, 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.

⁸⁰ Submission from one other stakeholder.

⁸¹ These documents are provided at Appendices 3A and 3B to the Commitments, within Annex 1 of this decision.

⁸² See 'Application Form for a New Break-Clause' at Appendix 3B to Annex 1 of this decision.

⁸³ See 'Instructions: How to apply for a new Break-Clause' at Appendix 3A to Annex 1 of this decision.

- 6.33 Four of the respondents suggested that as an alternative to the evidence to be provided by applicants, it should be sufficient for heads of schools or trusts to self-certify that they meet the eligibility criteria (ie that they had genuinely considered switching but had reasonably concluded that it would not be possible for them to do so within the time available) without having to provide further narrative or evidence.⁸⁴ One of these respondents also submitted that the Adjudicator should assume the school made a genuine consideration to switch unless ESS can show otherwise.⁸⁵
- 6.34 Two respondents who welcomed the resolution of the Investigation by way of commitments, stated that there should be no adjudication process.⁸⁶ These respondents in particular stated that the process of the Proposed Commitments would be complex and impose a significant burden on schools.⁸⁷ One of these respondents commented that without the adjudication process, it would be reasonable for this break clause to have a deadline of 31 May 2023.⁸⁸
- 6.35 The CMA considered these submissions but has found that, on balance, given the simplification and clarification in the application form and instructions (as set out above) in line with respondents' feedback, it is appropriate to accept the Commitments. The CMA considers that, while a certification process (with no adjudicator and no burden of proof on applicants) would be simpler, it is a reasonable and proportionate expectation that schools complete the revised application form given the conditions attached to the New Break-Clause.
- 6.36 A number of respondents have asked for more information about who the independent adjudicator would be and how they would be appointed.⁸⁹ One of these respondents submitted that the Adjudicator should be a member of CIArb and a qualified ADR professional, with relevant UK schools experience. The CMA has provided further detail on the Adjudicator and the process followed in relation to their appointment in paragraph 5.8 of this decision. The CMA does not see the process for applying for a New Break-Clause under the Commitments as a dispute resolution procedure but rather a tailored solution requiring judgement in evaluating applications as well as experience of handling confidential information. As set out above, the CMA has approved the Adjudicator based on a series of criteria to ensure its suitability and in light of its experience of similar roles.
- 6.37 Considering these amendments to the application form and to the instructions, the

⁸⁴ Submissions from one MIS supplier, one LA and two other stakeholders. One of these respondents (other stakeholder) suggested that the application process be simplified so it does not depend on evidence being gathered or submitted but would be based on the leadership team certifying that it is their intention to test the market and they do not want to be tied into a three-year contract with ESS.

⁸⁵ Submission from one MIS supplier.

⁸⁶ Submission from another school/trust and one MIS supplier.

⁸⁷ Submission from one MIS supplier.

⁸⁸ [X]. According to this respondent, this would give schools time to complete a competitive tender process and where an alternative supplier is chosen, provide sufficient implementation time prior to the new academic year (September 2023).

⁸⁹ Submissions from some school business managers interviewed by [X], one MIS supplier, and one other stakeholder.

CMA is satisfied that the Commitments are capable of being implemented effectively and within a short period of time.

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

- 6.38 The CMA provisionally concluded that ESS' compliance with the Commitments and their effectiveness will not be difficult to discern for the reasons set out below.
- 6.39 The CMA considers that the appointment by ESS of an independent adjudicator (following the approval of the CMA) for determining the applications for a 12-month New Break-Clause set out in paragraph 5.8 above will ensure a robust and transparent process. As noted above, the Adjudicator will be required to: provide the CMA with interim reports and a final consolidated report on the matters to be set out in the Briefing to Adjudicator;⁹⁰ reply promptly to any questions from the CMA or ESS as applicable; and report promptly to the CMA if the Adjudicator considers that ESS is failing or has failed to comply with any of the Commitments, any relevant provisions of the Mandate and/or with the provisions of the Briefing to Adjudicator governing the scope of any ESS submission on any application as part of the process.
- 6.40 In addition, ESS will be required to keep, maintain, and produce any information or document specified in writing by the CMA that relates to the operation of the Commitments which the CMA requires for the purpose of monitoring and reviewing the operation of the Commitments. The Commitments also contain specific provisions to ensure that their purpose cannot be frustrated by ESS.
- 6.41 The CMA would also expect schools to raise concerns directly with the CMA if there were issues with either the Adjudicator or ESS' role in the process.
- 6.42 One respondent stated that it would be difficult for the CMA to discern the effectiveness of compliance with the Commitments.⁹¹ However, the points raised by this respondent actually related to the evidence to be provided by schools and the adjudication process and were therefore discussed above (at paragraphs 6.28 to 6.37).
- 6.43 The CMA considers that the Commitments process includes sufficient safeguards to ensure that it has sight of the effectiveness of the adjudication process throughout. This includes regular reporting requirements on the Adjudicator, who will provide updates to the CMA on the uptake and conclusion of applications and can also report any non-compliance on ESS' part. For the reasons above, the CMA is satisfied that ESS' compliance with the Commitments and their effectiveness will not be difficult to discern.

⁹⁰ See paragraph 5.21 above.

⁹¹ Submission from one MIS supplier.

Acceptance of the Commitments would not undermine deterrence

- 6.44 The CMA considers that acceptance of the Commitments will not undermine deterrence against infringements of the Act. The CMA considers that the Commitments will give customers which had been unable to switch in the timescales set by ESS another 12 months to switch (and would thus be contestable). The Adjudicator will inform the customers of the outcome of their applications by 31 March 2023. If successful, these customers will be able to plan and implement a switch by 31 March 2024, at the end of year two, and therefore a year before the end of their New Contracts.
- 6.45 By accepting the Commitments early in the Investigation, the CMA considers it would be able to resolve its competition concerns quickly, providing a better and more immediate outcome for customers and competitors than by pursuing the case to a decision at a later date, by which time it may no longer be possible to rectify the specific harms identified in this case, which are time sensitive.
- 6.46 None of the respondents to the Consultation made representations that acceptance of the Commitments would undermine deterrence. One respondent however stated that ESS should be stopped from repeating similar conduct in future.⁹² For the reasons set out above, including in particular in relation to scope at paragraph 6.24 above, the CMA considers that it is not necessary to include such provisions in the Commitments. Acceptance of the Commitments would not preclude the CMA from taking further enforcement action in relation to other suspected breaches of competition law in the relevant markets and/or related markets which raise competition concerns and harm consumers.

⁹² Submission from one MIS supplier.

7. The CMA's decision

7.1 For the reasons set out in this decision, the CMA has concluded that the Commitments as set out in Annex 1 of this decision address the competition concerns it has identified arising from the Conduct and that it is appropriate to accept the Commitments for the purposes of addressing those competition concerns. Accordingly:

- (a) The CMA has decided to accept the Commitments by means of this decision;
and
- (b) The CMA will discontinue the Investigation with effect from the date of this decision.

Signed:

Ann Pope

Senior Responsible Officer and Senior Director, Antitrust

For and on behalf of the Competition and Markets Authority

Date: 10 January 2023