

**Notice of intention to accept
binding commitments in
relation to the supply of
service, maintenance and
repair platforms by epyx
Limited**

and

Invitation to comment

10 March 2014

OFT1528

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Annexe 1 – Proposed Commitments

Annexe 2 – Demand-side: Example Variation Agreement

Annexe 3 – Supply-side: Example Variation Agreement

1 EXECUTIVE SUMMARY

- 1.1. In June 2011, the Office of Fair Trading ('the OFT') opened an investigation into epyx Limited ('Epyx'), for an alleged abuse of a dominant position in relation to the provision of its 1link Service Network platform in the UK, which is a platform facilitating the procurement of service, maintenance and repair ('SMR') services.
- 1.2. The abuse of a dominant position is prohibited by Chapter II of the Competition Act 1998 and Article 102 of the Treaty on the Functioning of the European Union.
- 1.3. During the course of the investigation, the OFT undertook a number of investigative steps to obtain evidence from Epyx, a broad range of its customers, trade associations, potential entrants and businesses providing services to the automotive sector. This evidence forms the basis of the OFT's preliminary views and competition concerns.
- 1.4. The OFT's preliminary view is that Epyx is likely to have a dominant position in the market for the supply of SMR platforms in the UK. The OFT is concerned that certain provisions in Epyx's contracts with its customers that lead to exclusivity and restrict or prevent the evaluation, development and marketing of alternative systems, may amount to an abuse of market power. In particular, the OFT is concerned that Epyx's conduct may be capable of exclusionary effects which operate to increase barriers to entry and therefore foreclose potential competition in the market:
 - **Epyx's contractual provisions may have the effect of increasing barriers to switching** by restricting customers from engaging effectively with new entrants (for example, in respect of live testing and evaluation of alternative systems) and from being able to use an alternative system alongside the 1link Service Network platform, even on a transitional basis.
 - **Epyx's contractual provisions may have the potential to prevent the emergence of alternative systems.** Potential new entrants are unable to gain access to a sufficient proportion of the market, and are restricted from engaging with customers in order to develop their service and facilitate customer switching. In parallel,

customers are restricted from independently sponsoring and developing alternative systems.

- 1.5 Epyx, and its ultimate parent company, FleetCor Technologies, Inc., have offered commitments aimed at addressing the OFT's competition concerns in this investigation.
- 1.6 The OFT provisionally considers that the commitments offered address its competition concerns by reducing the potential harm of the contractual provisions to a level that is not likely to foreclose market entry by an as-efficient competitor.
- 1.7 The proposed commitments:
 - **Remove barriers to switching** by removing or significantly relaxing any contractual restrictions preventing activities required to support sequential switching to alternative systems by demand-side customers (buyers of SMR services). For example, demand-side customers will be able to engage with providers of alternative systems, thoroughly test their services and transition in an effective manner. Supply-side customers (suppliers of SMR services) will be able to transact with their demand-side clients for these purposes.
 - **Remove barriers to product development** by permitting demand-side customers to develop alternative systems, whether with a new entrant (to help ensure that its offering is fit for purpose), with another company on the demand or supply-side, or by themselves.
 - **Remove barriers to network building and scale** by significantly shortening the duration provisions in new demand-side contracts in order to increase the frequency of future opportunities for customers to switch and for new entrants to compete for their business; and by removing restrictions on marketing and sponsorship.
- 1.8 The OFT considers that the changes proposed will inject pro-competitive features into the market by giving Epyx's customers, where desired, the opportunity to work with and switch to new entrants, and will increase

the likelihood of a viable and as-efficient new entrant successfully entering the market.

- 1.9 The commitments exempt a range of activities (live testing, the transitional use of alternative systems and intra-group transactions) from demand-side exclusivity, as well as potentially exempting other activities (the processing of tyre and glass transactions), but do not remove this exclusivity entirely. On the basis of evidence that demand-side customers tend to prefer the permanent use of only one SMR platform, the OFT provisionally considers that the retention of a diminished degree of exclusivity is not likely to have the effect of foreclosing the market so long as there is effective competition at the point when the customer can terminate an exclusive contract. The OFT provisionally considers that the commitments offered address this concern, by permitting activities that enable switching upon contract termination and by reducing other barriers to successful entry, as outlined above.
- 1.10 The OFT now invites interested third parties to make representations on the proposed commitments, which it will take into account before making its final decision whether to accept the commitments. The closing date for comment is 4 April 2014.

2 INTRODUCTION

- 2.1 In June 2011, the Office of Fair Trading ('the OFT') opened an investigation into epyx Limited ('Epyx'), for an alleged abuse of a dominant position in relation to the provision of its 1link Service Network platform ('SN platform') in the UK ('case CE/9496-11').¹
- 2.2 In October 2013, Epyx was acquired by FleetCor Technologies, Inc. ('FleetCor').² Following this acquisition, Epyx and FleetCor (the 'Parties') have offered commitments aimed at addressing the OFT's competition concerns in this investigation.
- 2.3 The OFT hereby gives notice³ that it proposes to accept these commitments and invites representations from interested third parties on this proposed course of action. Formal acceptance of the commitments by the OFT would result in the termination of the investigation, with no decision made as to whether or not the Competition Act 1998 ('the Act') or the Treaty on the Functioning of the European Union ('TFEU') has been infringed.
- 2.4 The commitments offered are set out at Annexe 1 to this document. Example demand-side and supply-side variation agreements, which do not form part of the commitments but are intended to illustrate how Epyx proposes to comply with the commitments, are set out at Annexe 2 and Annexe 3 respectively.
- 2.5 The OFT invites interested third parties to make representations on the proposed commitments, which it will take into account before making its final decision whether to accept the commitments. In order to assist third parties in responding to this consultation, this notice provides information on the OFT's investigation and the market context, with the aim of

¹ The OFT's case page can be found at www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/electronic-platform-services

² See FleetCor's press release at <http://investor.fleetcor.com/phoenix.zhtml?c=236217&p=irol-newsArticle&id=1870368> dated 30 October 2013.

³ Pursuant to paragraph 2 of Schedule 6A of the Competition Act 1998.

articulating the OFT's competition concerns and why the OFT provisionally considers that the proposed commitments address them.

2.6 As part of this consultation, the OFT is also inviting views on the example variation agreements by which Epyx proposes to ensure compliance with the proposed commitments. For the avoidance of doubt, these example variation agreements are not part of the proposed commitments.⁴ Customers are therefore not obliged to enter into new contracts or vary their existing contracts so as to match the terms in the example agreements, but can negotiate variants with Epyx as they see fit. Notwithstanding that Epyx will retain discretion over the final contractual documents it enters into, it will be obliged to act in compliance with the proposed commitments at all times.

2.7 Details of how to respond to the consultation are provided at the end of this document. The closing date for comment is 4 April 2014.

⁴ Namely, they will not form part of the commitments formally accepted by the OFT pursuant to section 31A of the Act.

3 THE OFT'S INVESTIGATION

- 3.1 In April 2011, the OFT received a complaint alleging that Epyx had abused a dominant position in relation to the provision of its SN platform in the UK, by imposing anti-competitive restrictions in its contracts with customers. The complaint raised the concern that Epyx's contracts created considerable barriers to entry with the effect of foreclosing the market to new entrants.
- 3.2 On 17 June 2011, the OFT launched a formal investigation under section 25 of the Act, on the basis that there were reasonable grounds to suspect that Epyx had infringed Chapter II of the Act and Article 102 of the TFEU and having determined that a formal investigation would be consistent with the OFT's Prioritisation Principles.⁵
- 3.3 During the course of its investigation, the OFT has undertaken a number of investigative steps to gather evidence from Epyx and other third parties. These steps included the sending of formal notices requiring documents and information under section 26 of the Act, and obtaining information through meetings, telephone conferences and other correspondence.
- 3.4 In particular, the OFT obtained information from a broad range of Epyx's demand and supply-side customers subscribed to the SN platform. This included demand-side customers accounting for more than 80 per cent of Epyx's demand-side revenues and a cross-section of Epyx's supply-side customers (with a focus on, but not limited to, the larger customers on each side). Additionally, the OFT obtained information from trade associations, potential entrants and businesses providing other services to demand-side customers who the OFT considered well placed to provide insights regarding customer needs.
- 3.5 Shortly after FleetCor's acquisition of Epyx in October 2013, Epyx and FleetCor approached the OFT to discuss a possible commitments offer.

⁵ 'OFT Prioritisation Principles' (OFT953), October 2008, www.of.gov.uk/shared_of/about_of/oft953.pdf

Accordingly, further to paragraph 4.18 of *Enforcement*⁶ (the 'Enforcement Guidance') and paragraph 10.19 of *A guide to the OFT's investigation procedures in competition cases*⁷ (the 'Procedural Guidance'), the OFT proceeded to discuss further with the Parties the scope of any commitments which it considered would be necessary to address the competition concerns it had identified.

- 3.6 By way of background, the OFT notes section 31A of the Act provides that, for the purposes of addressing the competition concerns it has identified, the OFT may accept, from such person or persons concerned as it considers appropriate, commitments to take such action (or refrain from such action) as it considers appropriate. The Enforcement Guidance describes the circumstances in which it may be appropriate to accept binding commitments, and the process by which parties to an investigation may offer commitments to the OFT.
- 3.7 In accordance with paragraph 4.16 of the Enforcement Guidance and paragraph 10.18 of the Procedural Guidance, a business under investigation can offer commitments at any time during the course of that investigation until a decision on infringement is made. In this case, no decision on infringement has been made.
- 3.8 The Parties offered formal commitments to the OFT as set out in Annexe 1 on 25 February 2014. The offering of the commitments does not constitute an admission of infringement of Chapter II of the Act or Article 102 of the TFEU.
- 3.9 Having considered the formal commitments offer, the OFT is currently of the view that the commitments offered address its competition concerns, for the reasons set out in this notice and that, as a result, it is appropriate for the OFT to exercise its discretion to terminate its investigation by way of a formal decision accepting binding commitments. Formal acceptance of commitments would result in the

⁶ '*Enforcement*' (OFT407), December 2004, www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft407.pdf

⁷ '*A guide to the OFT's investigation procedures in competition cases*' (OFT1263rev), October 2012, www.oft.gov.uk/shared_oft/policy/OFT1263rev

OFT terminating its investigation, without proceeding to a decision on whether or not Chapter II of the Act or Article 102 of the TFEU have been infringed.

- 3.10 The OFT invites representations from interested third parties on this proposed course of action.

The relevant parties to the investigation

- 3.11 Epyx is a private limited company incorporated in England and Wales in October 2000. Its reported revenue for the year ended 31 December 2012 was £20.8 million.

- 3.12 Epyx provides technology solutions to the UK automotive sector through a portfolio of online business-to-business trading platforms marketed under the 1link brand. These platforms are marketed by Epyx as connecting everyone in the supply chain – the fleet, the driver and the supplier – and designed to cover the main elements of a motor vehicle's life cycle, from initial acquisition through to service and maintenance, daily rental, relicensing and vehicle disposal. Customers can subscribe to each platform in the 1link portfolio individually or in combination with other 1link platforms.

- 3.13 The OFT's investigation to date has concerned only the supply of the aforementioned service and maintenance platform in the UK (the SN platform), as the complaint related to this platform only, which is also Epyx's main platform in terms of revenues and market position. The SN platform is described in more detail in the following chapter.

- 3.14 Epyx is currently indirectly wholly owned by FleetCor, its ultimate parent company. FleetCor is a global provider of fleet, fuelling and specialised payment solutions for businesses, and is publicly quoted on the New York Stock Exchange. FleetCor operates in 43 countries in North America, Europe, Africa and Asia, with reported revenue for the year ending 31 December 2012 of US\$707.5 million. FleetCor acquired⁸ 100 per cent of the shareholding of Quadrum Investments Group Limited, of

⁸ The acquisition was effected via FleetCor's wholly owned UK subsidiary, FleetCor UK Acquisitions Limited.

which Epyx is a wholly owned subsidiary, from the private equity firm HgCapital LLP and Epyx management in October 2013.

4 INDUSTRY BACKGROUND

- 4.1 The SN platform is a business to business service intended to assist companies requiring the service, maintenance and repair ('SMR') of corporate vehicle fleets to procure such services from suppliers. It is a two-sided service, designed to facilitate the interaction of one side of the market (buyers or demand-side customers) with the other (suppliers or supply-side customers).
- 4.2 This chapter sets out the OFT's preliminary view of key characteristics of the market in which the SN platform operates, in order to provide context for the OFT's subsequent discussion of its competition concerns. The chapter first describes the buyers and suppliers of the SMR services processed through SMR platforms, before describing the SN platform and the dynamics of the SMR platform market in more detail.

Fleets and the SMR market

- 4.3 Buyers of SMR platform services are companies that manage, on their own or others' behalf, the procurement of SMR work for corporate vehicle fleets (hereafter referred to as 'fleet companies'). The main categories of corporate vehicles are passenger cars, light commercial vehicles ('LCVs') and heavy goods vehicles ('HGVs').
- 4.4 Fleet companies include leasing companies, rental companies, companies which operate corporate vehicle fleets (fleet operators), companies which provide fleet management services to these fleet operators, and companies which offer corporate vehicle warranty and service plans. Among these, leasing companies are the largest segment:⁹
- Leasing companies lease vehicles for use by fleet operators and, depending on the nature of the lease, have responsibilities for maintaining these vehicles during and/or after the lease period.
 - Within the segment, outside a subset of relatively large companies, there is a high degree of fragmentation. For example, the top 50

⁹ Information provided by Epyx.

leasing fleets vary in size from over 270,000 vehicles to just over 1,000 vehicles. Only 29 fleets exceed 5,000 vehicles.¹⁰

- 4.5 Fleet companies obtain SMR work from a diverse network of suppliers.¹¹ Prominent among these suppliers are dealers who distribute vehicles but also provide associated services including SMR work. Other providers of SMR work include service centres, fast-fit outlets, repair shops and garages. Some of these suppliers operate as national or regional chains; some are owned by or affiliated (through franchises) with manufacturers; others function independently. The range of services offered will also differ across suppliers.
- 4.6 Fleet companies can also opt to carry out their SMR work in-house and thereby retain greater control over costs. Evidence presented to the OFT during the course of its investigation suggests that the larger fleet operators often take this approach.
- 4.7 The buyers and suppliers of SMR work make use of a range of methods to transact with one another, including:
- **SMR platforms** – these are online platforms commercially available under licence that use electronic technology to facilitate the communication, processing and management of SMR transactions for corporate vehicles. These platforms are available for multi-party use on both the demand and supply-side and offer a one-stop shop for a wide range of functionality covering a wide range of transaction types. The SN platform is an example of such a platform.
 - **Manual processing** – this comprises methods of processing SMR transactions that enable communication but do not offer any additional automated functionality. Manual processing includes the processing of SMR work via telephone calls, letters, emails and/or faxes between a buyer and supplier.

¹⁰ Research by Fleet News: www.fleetnews.co.uk/fleet-leasing/fn50-data/.

¹¹ There are many thousands of SMR suppliers in the UK (approximately 4,700 franchised dealers alone – see the website of the National Franchised Dealers Association at www.rmif.co.uk – and many more independent garages).

- **In-house systems** – these can be characterised as IT systems or software owned or developed by a buyer or supplier, which might be used as an alternative to an SMR platform for processing SMR transactions, but are only used for that company's business purposes. Such systems are therefore bespoke to the specific characteristics and needs of the commissioning company and are not commercially available on demand. Some suppliers have in-house systems and offer their fleet clients the use of these systems. Some manufacturers also operate in-house systems within their dealer groups, for example for the processing of warranty claims.

4.8 The above methods are capable of being used separately or in combination. For example, some fleet companies, while subscribed to the SN platform, may:

- use different processing solutions for different types of transactions, for example for transactions relating to tyres, glass and HGVs where the supplier base is more specialised.
- manually process a small number of transactions with suppliers who, due for instance to their size, location or specialist services, are used by exception and do not otherwise process sufficient fleet business to benefit from subscription to an SMR platform.

4.9 Fleet companies who are not subscribed to the SN platform typically appear to have simpler SMR requirements requiring a more limited degree of liaison with suppliers. For example, they may work with in-house garages which are part of the same corporate group, only use a limited number of marques, or only require a limited volume of SMR work.

1link Service Network Platform

4.10 Epyx launched the SN platform in 2003 and licenses its use on a national basis to its customers in the UK.

4.11 The SN platform is an electronic SMR platform. It enables the online exchange of information between a fleet company and a supplier at key points in an SMR transaction (administration, authorisation and invoice processing). Epyx describes the SN platform as a service that:

'facilitates the electronic trading between vehicle fleets and their supplier networks, covering work booking, SMR authorisation requests and on-line invoice submission processes. Inbuilt authorisation rules engines are designed to validate incoming requests reducing the need for manual authorisation of routine work requests. Electronic invoicing from the supplier allows authorised transactions to be loaded directly into a purchase ledger.'¹²

4.12 The SN platform also offers a range of additional optional services such as: the analysis and reporting of SMR activity and data across multiple fleet operator sites; the option for suppliers to incorporate manufacturer fleet pricing; and the collection of commissions and customer satisfaction feedback.

4.13 The SN platform meets the needs of fleet companies by offering a 'one-stop' online platform with substantial flexibility. It offers:

- access to a large network of SMR suppliers across the UK (and correspondingly it offers these supply-side customers ready access to most of their largest fleet customers). This is important as many fleet companies operate across the UK and drivers value the ability to use an SMR supplier in their vicinity.
- the ability to process a range of SMR transactions. This is important as fleets (in particular fleets from the key leasing segment, except where owned by a manufacturer who will favour vehicles from their own brand portfolio) may comprise different marques and different vehicle types; and may need to process different types of SMR transactions, including routine or general SMR work, tyre and windscreen replacement, and accident repair. Information provided to the OFT indicates that customers tend to use the platform primarily for the processing of general SMR work for multiple car marques, as cars represent the majority of corporate vehicles in the UK and customers may have alternative

¹² Example Schedule of Services provided by Epyx.

options¹³ for certain more specialist types of SMR work, such as tyre, windscreen or HGV work.

- 4.14 SMR platforms such as the SN platform are two-sided: an SMR platform's appeal will lie in its ability to offer fleet companies (demand-side customers) access to an attractive network of SMR suppliers (supply-side customers), and vice versa. This is in addition to the cost efficiencies, convenience and improved, centralised control of SMR activities an electronic platform provides.
- 4.15 The SN platform has become the industry standard SMR platform, achieving rapid industry acceptance with a supplier network of approximately 9,000 repair garages processing two and a half million vehicles each year. It is used by the UK's leading fleet companies.¹⁴

SMR platforms – choice, switching and entry

- 4.16 This section considers the decision making process for selecting an SMR platform, the key activities when switching, and potential barriers to market entry.

Demand-side led choice

- 4.17 While a range of SMR procurement solutions are available as described in paragraph 4.7, the industry dynamic where many suppliers compete for fleet clients means that suppliers have strong incentives to accommodate fleet companies' operational preferences in order to secure their business. The fleet companies therefore tend to drive the choice of processing method, with leasing companies – particularly the very large leasing companies – especially influential given the volume of SMR business they conduct.

¹³ For example, insurance products are offered that cover tyre work on a fixed-cost basis.

¹⁴ See information on the 1link Service Network published on Epyx's website: www.epyx.co.uk

Platform use: Single or Multi-Homing

- 4.18 In considering the likely competitive dynamic in this market, the OFT has therefore focused on the preferences of demand-side customers when using SMR platforms.
- 4.19 Information provided to the OFT indicates that the majority of demand-side customers prefer to use a single platform only ('single-home') to transact their SMR work, as using more than one platform ('multi-homing') brings increased complexity and operational costs of running multiple systems in parallel.
- 4.20 However, a small number of demand-side customers informed the OFT that they wished to multi-home with different SMR platforms for commercial reasons or security of supply. The principal advantages of multi-homing that customers identified were the introduction of competition in the market, cost reductions, mitigation of continuity risk, and improvements in product development.
- 4.21 Demand-side customers also identified a limited number of areas where there is some need for multi-homing with alternative systems (not necessarily SMR platforms) in relation to:
- specialist transactions such as tyre, glass and HGV work
 - intra-group transactions
 - manual processing where a supply-side customer does not use the SN platform
 - customers who manage fleets on behalf of third party demand-side companies.
- 4.22 Where one side of the market single-homes, competition will tend towards a winner-take-all outcome unless the other side is prepared to multi-home and therefore enable several platforms to co-exist. As previously explained, supply-side customers will seek to accommodate the requirements of their demand-side clients in order to attract, compete for and/or retain SMR business. For these commercial reasons, supply-side customers are generally willing to use more than one SMR platform where required by demand-side customers.

4.23 The OFT therefore considers that, in the absence of any restrictions, the outcome under free competition could be that most demand-side customers choose their preferred platform and supply-side customers facilitate this choice by providing services across multiple platforms; with a small proportion of demand-side customers also multi-homing.

Switching to Alternative Systems

4.24 Customers have indicated to the OFT that the use of an SMR platform like the SN platform is commercially beneficial to them and is an important tool in their day-to-day operations. In light of this expressed value for SMR platforms and general preference to single-home, the OFT considers that demand-side customers are likely to take a considered approach when determining whether to switch between SMR platforms.

4.25 Demand-side customers have explained to the OFT that any process of switching is likely to involve engagement in a range of activities in order to properly evaluate available alternatives and, if applicable, efficiently switch to the selected alternative system.

4.26 The extent of such activities will vary considerably depending on the customer's preferences and policies, as well as the quality and track record of the alternative system. However, it has generally been submitted to the OFT that the necessary activities will involve engagement with the provider of the alternative system, including:

- **Exploratory discussions:** this may include demonstrations of the alternative system, customer requests and feedback, informing the provider when the customer's contract with Epyx expires, and so on. Such discussions offer the provider the opportunity to market to and build relationships with target customers, obtain feedback to guide its product development, and plan future testing stages.
- **Testing:** this may include dummy testing or more formal pilot or live testing. Live testing involves demand-side customers processing live transactions with suppliers (transactions that lead to actual SMR work and cause taxable payments).

- **Transitional multi-homing** in the lead up to switching to the alternative system.¹⁵ Demand-side customers have informed the OFT that transitional multi-homing would typically involve switching their SMR transactions gradually over a transitional period. This is viewed by demand-side customers as a way to manage the risk associated with changing a business critical provider, in particular when adopting the services of a new entrant, or managing the logistics of migrating a large supplier base to an alternative system.

Network effects and market entry

- 4.27 In this two-sided market, network effects raise barriers to entry for potential entrants. Demand-side customers will not see much value in an alternative system unless a sufficient number of its suppliers are subscribed to it. Supply-side customers will only be inclined to use an alternative system which offers them access to demand-side customers with SMR work.
- 4.28 The barriers to entry for competitors to the SN platform will therefore not only include sunk costs¹⁶ and lead times relating to the need to develop the service, but also the need to build a network on both sides of the platform, while competing against an incumbent with a strong market position and an already well established network.
- 4.29 Customers, potential new entrants and companies working in the automotive sector have identified certain features that a new entrant is likely to need to be able to successfully and efficiently enter the market. These are:
- The cooperation and feedback of customers in designing a service fit for purpose and in preparing for a switch, including any testing and transition activities necessary.

¹⁵ A small number of customers may also wish to develop their own system (self-supply) with the view to leaving the SN platform or to multi-home with respect to specialist transactions.

¹⁶ In this context, a sunk cost is a cost incurred on entering a market that is not recoverable on exiting that market. These may, for example, include investments in advertising, distribution and technology development that could not be used for other applications.

- Customer promotion and sponsorship of the alternative system to other customers on both the demand and supply-side.
- The cooperation of Epyx in preparing for and ultimately effecting a switch during any transitional period.

4.30 The OFT considers that the features identified above will assist any potential entrant in overcoming the challenges presented by the two-sided nature of the market, by making it feasible for them to develop an attractive network of both demand and supply-side customers. To overcome this coordination issue, it is important that any new entrant is able to market widely and quickly secure a viable network. Timely access to a critical mass of demand-side customers, particularly larger customers who may be able to sponsor entry, is therefore likely to be vital to the success of a new entrant.

5 THE SN PLATFORM CONTRACTS

5.1 This chapter describes the contractual arrangements between Epyx and its SN platform customers and identifies the provisions relevant to the OFT's investigation.

Overview of Epyx's contractual arrangements

5.2 Epyx applies different contractual structures with its demand-side and supply-side customers.

5.3 On the demand-side:

- Customers currently¹⁷ enter into a 1link Master Agreement governing any and all 1link services they subscribe to, including the SN platform. Additional terms and conditions for each individual 1link platform service subscribed to are set out in a supplementary Schedule of Services for that service. The OFT refers to the 1link Master Agreement and Schedule of Services for the SN platform collectively as Epyx's 'demand-side contracts'.
- While based on standard templates, these demand-side contracts are typically subject to individual negotiation. Terms and conditions applicable to the SN platform, while often broadly similar, may therefore vary in terms of specific detail and over time (in line with variations in the content of the templates).

5.4 On the supply-side, Epyx's contracts relating to the SN platform are generally of a standard form. Customers typically enter into an Order and Registration Form, which is subject to Supplier Terms and Conditions published on Epyx's website and unilaterally varied by Epyx from time to time. The OFT refers to the Order and Registration Form, Supplier Terms and Conditions, and any other ancillary forms¹⁸ applicable to supply-side customers, collectively as Epyx's 'supply-side contracts'.

¹⁷ Prior to the introduction of this contractual structure in 2009, contracts took the form of Scheme Operator Contracts, some of which are still in force as at the date of this consultation.

¹⁸ For example, forms where supply-side customers subscribe to different directories or for a view of activities across a group of sites.

The relevant provisions

- 5.5 The OFT's investigation has focused on certain provisions in Epyx's contracts with both demand-side and supply-side customers that may restrict or prevent Epyx's customers from evaluating, developing, marketing and/or using alternatives to the SN platform. For similar reasons, the OFT has also been concerned by the historical use of such provisions even if no longer in continuance.
- 5.6 These provisions are summarised in Table 5.1.

Table 5.1: The relevant provisions

Demand-side contracts	Supply-side contracts
Use and/or development restrictions	Use restrictions
Minimum annual fee provisions	Development restrictions
Duration provisions	

- 5.7 The OFT refers to these provisions collectively as the 'relevant provisions'. The relevant provisions are discussed in more detail below.

Use and/or development restrictions in demand-side contracts

- 5.8 Epyx's demand-side contracts typically contain a requirement for demand-side customers 'to process all service and maintenance transactions through [the SN platform]'.
- 5.9 Many demand-side contracts also require customers not to 'develop, use, market or support the sale' of any alternative systems. The OFT understands from Epyx that demand-side customers who entered into new contracts with Epyx from May 2011 onwards are typically bound by a revised provision which removes the reference to 'develop, market or support the sale' and contains a reference to 'use' only.

5.10 The OFT refers to the various provisions set out in paragraphs 5.8 and 5.9, and substantially similar variants¹⁹ thereof within demand-side contracts, collectively, as the 'use and/or development restrictions'. A high proportion²⁰ of Epyx's demand-side contracts are subject to use and/or development restrictions.

Minimum annual fee provisions in demand-side contracts

5.11 In addition to the use and/or development restrictions, the vast majority of Epyx's contracts with its demand-side customers contain provisions which require them to pay a minimum annual fee, even if the fees attributable to the volume of transactions processed through the SN platform in any given contract year would be lower. The OFT refers to this requirement as a 'MAF'. The level of the MAF varies with each demand-side customer and is also subject to individual negotiation. The MAF is payable for each operating year that the contract is in force.

5.12 At any given level of transaction fee, the MAF is effectively a quantity commitment as it implies a certain corresponding volume of transactions.

5.13 Where a MAF is provided for, a shortfall fee may be charged, which represents any difference between the transaction fees incurred and the MAF in a given year.

Duration of demand-side contracts

5.14 Epyx's demand-side contracts also typically contain minimum periods of three to five years, with effective notice periods of between three and 36 months depending on when the notice is given. The OFT refers to these provisions collectively as 'duration provisions'.

Use and development restrictions in supply-side contracts

5.15 Epyx's contracts require its supply-side customers to process all of their SMR transactions with Epyx's demand-side customers through the SN platform. The OFT refers to this provision as the 'supply-side use

¹⁹ For example, sometimes excluding 'use' and sometimes excluding 'develop' and/or 'market'.

²⁰ Accounting for more than 70 per cent of Epyx's demand-side revenues.

restriction'. The supply-side use restriction prevents Epyx's supply-side customers from using alternative systems to process SMR transactions in respect of Epyx's demand-side customers' vehicles.

- 5.16 Supply-side customers were also previously subject to provisions which restricted them from developing, marketing or supporting the sale of alternative systems, including a restriction on 'development' for five years following the termination of their subscription to the SN platform. The OFT refers to these provisions as the 'supply-side development restrictions'. Epyx has informed the OFT that these restrictions were removed in a series of unilateral changes to its supply-side contracts in April 2012 and November 2011 respectively.
- 5.17 When in force, these restrictions applied to virtually all of Epyx's supply-side customers given the standardised nature of the supply-side contracts.

6 THE OFT'S COMPETITION CONCERNS

- 6.1 The OFT's preliminary view, for the reasons outlined in this chapter, is that Epyx is likely to have a dominant position in the market for the supply of SMR platforms in the UK. As such, its use of contractual provisions of an exclusionary nature may possibly amount to an abuse of market power.
- 6.2 To assess whether Epyx's conduct may be capable of an exclusionary effect, the OFT has considered whether the relevant provisions outlined in chapter 5, both taken separately and in combination, may operate to increase barriers to entry and thereby are capable of foreclosing potential competition.
- 6.3 This chapter explains the OFT's preliminary view of Epyx's market position and of the effects the relevant provisions have on the market.

Epyx's market position

- 6.4 The OFT has reached a preliminary view that the supply of SMR platforms in the UK is likely to constitute a separate relevant market.²¹ The preliminary view of the OFT is that, while alternative processing methods (such as manual processing) exist as described in paragraph 4.7, these are not deemed readily substitutable for the SN platform by the demand-side customers who drive the SMR platform market in the UK. In the OFT's preliminary view, customers of SMR platforms, who benefit from the unique and specific functionality they provide to process and manage high volume, geographically dispersed and complex SMR transactions more efficiently, consider alternative processing methods to be inferior alternatives that complement, rather than substitute for, SMR platforms.
- 6.5 As noted in paragraph 4.15, the SN platform is the industry standard SMR platform in the UK. At the present time, information from

²¹ The OFT's approach to market definition is set out in '*Market Definition*', (OFT403), December 2004, www.of.gov.uk/shared_of/business_leaflers/ca98_guidelines/of403.pdf

customers indicates there are no alternative platforms which offer the same functionality or access to such an extensive network of customers as the SN platform.

- 6.6 Moreover, the OFT takes the preliminary view that barriers to entry (as described in paragraphs 4.27 to 4.30) exist, such that Epyx currently faces a limited degree of potential competition. New entrants will have to invest both in developing a functional service and in establishing a network of sufficient scale on both sides of a market where a significant proportion of the existing customer base is bound by the relevant provisions.
- 6.7 Therefore, in the OFT's preliminary view, Epyx is likely to have a dominant position in the market for the supply of SMR platforms in the UK. The OFT is concerned that the restrictions in Epyx's contracts may raise barriers to entry to a level capable of foreclosing the market to potential competition, thereby potentially entrenching Epyx's market position.

Effect of the Relevant Provisions

- 6.8 In light of the apparent strength of Epyx's position in this market, the OFT takes the preliminary view that the use of the relevant provisions outlined in chapter 5 could amount to an exclusionary abuse as they may be capable of foreclosing the market to new entrants and thereby restricting the degree of competition on the market.
- 6.9 These types of provisions are capable of creating exclusivity or de facto exclusivity, preventing the development of alternative systems, and otherwise softening competition:
- **Exclusivity:** The demand-side use and/or development restrictions have similar effects to exclusivity provisions, and are mirrored within this two sided market by the supply-side use restriction which requires that supply-side customers observe such exclusivity when dealing with Epyx clients. Exclusive agreements may be capable of anti-competitive effects as they prevent new entrants from competing for customers who are within their contract term: it follows that an exclusive agreement of longer duration is likely to have a greater potential effect on competition. Exclusivity also

prevents even the limited use of more than one system while under contract, for example for the purposes of live testing or on a transitional basis while migrating to another platform.

- **De facto exclusivity:** Certain commercial arrangements within contracts may also have an anti-competitive effect, by offering financial incentives for loyalty to the provider and thereby softening competition. Such commercial arrangements could lead to de facto exclusivity even if no other exclusivity provision is in effect. The MAF is an example of a commercial arrangement that, depending on its use and customer impact, could have such anti-competitive effects.²² The MAF is capable of incentivising loyalty as any additional transactions up to the volume implicit within a given MAF are at zero incremental cost. Furthermore, a customer may be unwilling to risk missing its MAF and incurring a potentially substantial shortfall fee by diverting some of its transaction volume to another SMR platform. Such effects are likely to increase with the level of MAF set.
- **Other restrictions that may further soften competition:** Restrictions on the development, marketing and support of the sale of alternative systems are also potentially capable of inducing exclusivity and softening competition by preventing the emergence of alternative systems and preventing sponsorship. Further, information obtained by the OFT indicated that the prohibition of an activity defined as broadly as 'development' could have restricted customers from engaging with potential competitors to assist in the development of their proposed service.

6.10 The potential for such provisions to have adverse effects on competition is likely to increase with the degree of market power exercised by an incumbent and their prevalence.²³

²² Based on a preliminary analysis of data provided by Epyx, the OFT estimates that the total sum of the MAFs of all customers was equivalent to over 60 per cent of the demand-side revenues of the SN platform in 2012. While many customers meet their MAF and do not incur a shortfall fee, around a third of Epyx's customers incurred a shortfall fee in 2012.

²³ The relevant provisions affect demand-side customers accounting for more than 70 per cent of Epyx's demand-side revenues.

6.11 When assessing the potential for such provisions to have significant anti-competitive effects in the present case, the OFT has considered the specific context of the market at hand. Exclusivity of short duration, for example, is not likely to have negative effects where there is limited desire for multi-homing and competitors are able to compete effectively at the point of termination of a contract.

6.12 As set out in paragraphs 4.18 to 4.23, the OFT has considered the nature of demand in this market and takes the preliminary view that the desire to permanently multi-home is limited. While exclusivity necessarily precludes such multi-homing, the OFT therefore provisionally considers that this effect alone is unlikely to be sufficient to foreclose an as-efficient competitor from the market.

6.13 On this basis, the OFT's concerns centred on the ability of competitors to compete effectively and with sufficient frequency for single-homing customers. The OFT's preliminary view is that the relevant provisions identified were, and where still in force are, potentially capable of:

- **creating barriers to switching** that restrict competition on the merits at the limited points in time when the contracts can be terminated
- **preventing the development** of a viable alternative and hence depriving customers of choice when switching opportunities arise, and
- **preventing sufficient scale** for entry.

6.14 **In respect of barriers to switching:** where dealing with an operationally critical service (as SMR platforms have been described by customers to the OFT) customers, in order to switch, will need to be confident of the quality of a new entrant and the feasibility of a smooth transition. Where customers are prevented, under the terms of their contracts, from taking steps to obtain such reassurance, the effectiveness of competition, even at the points in time when they are able to terminate their contracts, is likely to be impaired. In the OFT's preliminary view, the relevant provisions may have an anti-competitive effect as they:

- restrict customers from undertaking the activities necessary to engage with and evaluate alternative systems, including by live testing where customers require it
- prevent customers from being able to use an alternative system alongside the SN platform, on a transitional basis when migrating to a new platform.

6.15 **In respect of development:** in the OFT's preliminary view, the relevant provisions may have an anti-competitive effect as:

- customers are restricted from assisting new entrants to develop their alternative systems to an attractive level
- customers are prevented from developing their own alternative systems, which may be able to complement SMR platforms or evolve into a competitor in their own right.

6.16 **In respect of scale:** in the OFT's preliminary view, the relevant provisions may have an anti-competitive effect as:

- the duration of exclusive demand-side contracts, which are typically three to five years in length and are entered into on a staggered basis, limits the proportion of customers available to new entrants at any given time. In the context of a two-sided market where network size and growth will impact the attractiveness of a new platform, this may represent a significant barrier to entry.
- the restrictions on customers developing, marketing or supporting the sale of alternatives may likewise inhibit new entrants' ability to work with customers and generate scale, including by the promotion of a new platform by a demand-side customer to its suppliers. In the context of a two-sided market where demand-side influence on supply-side behaviour is likely to be substantial, this may represent a significant barrier to entry.

6.17 In summary, therefore, for the reasons set out above the OFT is concerned that:

- **the relevant provisions may have the effect of increasing barriers to switching** by restricting customers from engaging effectively with new entrants (for example, in respect of live testing and evaluation of alternative systems) and from being able to use an alternative system alongside the SN platform, even on a transitional basis.
- **the relevant provisions may have the potential to prevent the emergence of alternative systems.** Potential new entrants are unable to gain access to a sufficient proportion of the market, and are restricted from engaging with customers in order to develop their service and facilitate customer switching. In parallel, customers are restricted from independently sponsoring and developing alternative systems.

6.18 Because of the two-sided nature of this market and the need to contemporaneously build a network of both demand and supply-side customers, a potential entrant already faces a significant coordination challenge to be able to offer a viable alternative to Epyx's platform. However, in the OFT's preliminary view, the relevant provisions have the effect of raising entry barriers even further in numerous ways as detailed above such that an anti-competitive effect is likely to arise.

6.19 In addition, given the importance of demand-side customers in determining the SMR processing method used, the OFT's preliminary view is that the prevalence of these provisions within Epyx's demand-side contracts, together with the duration of these contracts, are likely to restrict a new entrant's ability to gain timely access to a sufficient proportion of customers to successfully enter the market and thereby add to the coordination challenge faced by potential entrants.

7 THE COMMITMENTS

- 7.1 In order to address the OFT's competition concerns (as described in chapter 6), the Parties have offered formal commitments to the OFT (in the form set out in Annexe 1) which would remove or relax restrictions on its SN platform customers' evaluation, development, marketing and use of alternative systems. The commitments offered are analysed in detail below.
- 7.2 Epyx has also submitted example variation agreements for existing contracts to demonstrate how it proposes to effect the changes to its contracts. These documents are set out at Annexe 2 (for demand-side customers) and Annexe 3 (for supply-side customers). These documents do not form part of the commitments. They are provided to assist respondents to this consultation to evaluate the proposed outcomes of the commitments.
- 7.3 Following engagement with the parties, the OFT has reached the provisional view that its competition concerns are addressed by the commitments offered. Formal acceptance of commitments would result in the OFT terminating its investigation, and not proceeding to a decision on whether the Act or TFEU has been infringed. Accordingly, a decision by the OFT accepting binding commitments will not include any statement as to whether or not the conduct of the Parties has infringed Chapter II of the Act or Article 102 of the TFEU either prior to acceptance of the commitments or once the commitments are in place.

Appropriate case for commitments

The OFT Guidance

- 7.4 The Enforcement Guidance and the Procedural Guidance state that the OFT 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.²⁴

- 7.5 The OFT will not accept commitments where compliance with such commitments and their effectiveness would be difficult to discern, and/or where the OFT considers that not to complete its investigation and make a decision would undermine deterrence.²⁵

OFT assessment of the appropriateness of this case for commitments

- 7.6 The OFT considers that this is an appropriate case for commitments for the following reasons:

- **The competition concerns are readily identifiable:** The OFT's competition concerns relate to certain provisions in Epyx's contracts that may restrict or prevent its customers from evaluating, developing, marketing and using alternative systems, resulting in increased barriers to entry which, in the OFT's preliminary view, are capable of foreclosing, and likely to foreclose, competition in the market. The OFT's competition concerns are set out in chapter 6 above.
- **The OFT has reached the provisional view that the commitments offered by the Parties address the OFT's competition concerns:** The commitments offered by the Parties address the OFT's competition concerns by reducing the potential harm of the relevant provisions to a level that facilitates market entry by new entrants. To the extent that there are any residual restrictions post-commitments, the OFT provisionally considers they are not likely to foreclose the market as a whole by preventing an as-efficient competitor from entering the market.
- **The commitments offered are capable of being implemented effectively and, if necessary, within a short period of time:** Epyx has undertaken to act in accordance with the commitments as of the date the OFT publishes a decision accepting the commitments. Epyx will comply with its commitments with existing customers by

²⁴ Paragraph 4.3 of the Enforcement Guidance and paragraph 10.16 of the Procedural Guidance.

²⁵ Paragraph 4.5 of the Enforcement Guidance.

sending them variation agreements within two weeks of the date in which the OFT publishes a decision accepting the commitments.

- 7.7 Finally, the OFT does not consider that accepting commitments in this case would undermine deterrence. Rather, it considers that the proposed decision is proportionate, reasonable and appropriate when seeking to resolve competition concerns in a small market where the party concerned is itself small and has faced risks to enter the market and provide an innovative service to customers. Indeed, the proposed commitments, in some respects, go further than removing the contractual restrictions identified by including new obligations that will facilitate switching, for example the provision of reasonable technical support during the switching process.
- 7.8 The OFT also considers that a commitments decision will promote the importance of competition law in small markets and achieve its key objectives, when opening the case, of producing positive market outcomes in relation to high innovation markets and business models.²⁶
- 7.9 Accordingly, the OFT considers that this is an appropriate investigation in which to accept binding commitments from the Parties.

The proposed commitments

- 7.10 Epyx has undertaken to act in compliance with the proposed commitments (outlined below and set out in Annexe 1), including by:
- seeking to amend its existing contracts²⁷ with its demand and supply-side customers to comply
 - ensuring that all new contracts with existing²⁸ and future²⁹ demand and supply-side customers comply.

²⁶ As set out in the OFT's Annual Plan (available at www.of.gov.uk/shared_of/about_of/ap12/oft1294.pdf) when the investigation was opened.

²⁷ A contract in force at the date on which the OFT publishes a decision accepting commitments. Amendment of such contracts may be subject to agreement of the counterparty concerned.

All customers

7.11 The proposed commitments will ensure Epyx's existing and future customers³⁰ may engage freely with potential competitors, including by:

- meeting with competitors and third parties to discuss alternative systems, including attending demonstrations
- evaluating alternative systems, including conducting unlimited dummy tests through an alternative system
- disclosing to competitors when their contracts with Epyx will expire or be up for renewal
- promoting the use of alternative systems to any third party, including other Epyx customers.

7.12 Epyx's existing and future customers will also be able to develop their own alternative systems, including by collaborating with any third party (for example, other Epyx customers). To enable this, Epyx will remove or not enforce any development restrictions contained in existing demand-side contracts (refer to paragraph 5.9 above).

Demand-side customers

7.13 The proposed commitments are designed to reduce the potential effect of exclusivity provisions in demand-side customer contracts by:

- reducing the minimum contract length and notice period, hence increasing the opportunities for customer switching.
- in some circumstances, permitting customers to use alternative systems alongside the SN platform prior to expiration of the customer's contract with Epyx. Such carve-outs from exclusivity

²⁸ This means a party which is a customer at the date on which the OFT publishes a decision accepting commitments.

²⁹ That is, customers other than those which are already party to an existing contract with Epyx at the date on which the OFT publishes a decision accepting commitments.

³⁰ Irrespective of whether it is a demand or supply-side customer.

will apply for live testing and migration purposes, and in other limited circumstances as described further below.

Reduction of contract duration

7.14 While existing **minimum periods** will continue unchanged for contractual certainty, the proposed commitments will ensure that new contracts with Epyx's demand-side customers are shorter. Minimum periods will be limited to:

- 18 months for new contracts with **future** demand-side customers.
- 12 months for new contracts with **existing** demand-side customers.

7.15 For all contracts, **notice provisions** will have the following effect:

- where notice is served **during the minimum term**, termination will take effect at the end of the minimum term;
- where notice is served **after the end of the minimum term**, termination will take effect at the end of the contract year in which notice is served;

provided, in each case, that notice is served at least three months beforehand.

Live testing of alternative systems

7.16 Epyx will also permit demand-side customers to process live SMR transactions through an alternative system for the purposes of testing and evaluating that system, up to a maximum of five per cent of the demand-side customer's previous year's transaction volumes on the SN platform.³¹ The demand-side customer will not be required to notify Epyx of the occurrence or volume of these transactions.

³¹ Measured with reference to Invoice Record or Work Record transactions, whichever is defined in the customer's contract. For new customers in the first operating year of their contract, the maximum cap for live testing will be six per cent (by number) of the total number of SMR transactions which would be required to be processed on the SN platform in that operating year in order to meet any MAF.

7.17 To the extent that any MAF is contained in demand-side contracts, Epyx has committed that it will not be set at a level or enforced in such a way so as to inhibit live testing of the maximum permitted volume of transactions.

Transitioning to an alternative system

7.18 The proposed commitments will also permit demand-side customers to **transitional multi-home**. This means that demand-side customers will have the option to continue their use of the SN platform while starting to migrate to an alternative system.

7.19 Epyx will enable its demand-side customers to engage in a transitional period of up to **six months** after notice of termination takes effect. During the transitional period:

- there will be no restrictions on the use of alternative systems and **no MAF will apply**. **Registration fees** will be charged on a pro-rata basis.
- all other terms and conditions, including the pre-agreed transaction fees, will continue in force during the **first three months** of the transitional period.
- all other terms and conditions will continue in force during the **second three months** of the transitional period, except that (unless otherwise agreed between the demand-side customer and Epyx) the demand-side customer will be charged transaction fees at Epyx's volume-based list prices to be published for this purpose.

7.20 From the time notice of termination is served, until the end of the transitional period, Epyx has also committed to provide reasonable technical support and transfer information³² to its demand-side customers to facilitate the switch from the SN platform to the alternative system.

³² This includes the provision of the customer's own information to the customer or, at the customer's request, to the provider of the alternative system, in a format chosen by Epyx and normally used by commercial persons for data interchange between computer systems (such as delimited text files).

Other exceptions to the scope of exclusivity

7.21 Epyx has committed to permit demand-side customers to use alternative systems in parallel with the SN platform to process:

- **Tyre and glass** transactions, under existing contracts on request from the start of the next contract year, and under all new contracts.
- **Intra-group**³³ transactions under existing and new contracts.

7.22 Within existing contracts:

- The carve-out of tyre and glass transactions will be subject to renegotiation of any MAF and associated transaction fees, with amended fees effective from the next contract year.
- Any MAF will continue to apply regardless of whether intra-group transactions are processed.

7.23 Within new contracts, either or both of these carve-outs may be planned for from the outset and taken into account in fee negotiations.

7.24 Further, Epyx has also committed to permit its demand-side customers to process any other types of transactions on alternative systems where it is agreed with Epyx. Such exceptions will be subject to individual negotiation between Epyx and its demand-side customers.

Supply-side customers

7.25 Further to paragraphs 7.16 to 7.24 above, Epyx has committed to permit supply-side customers to use alternative systems where a demand-side customer either expressly makes such request or initiates a transaction using an alternative system.

7.26 This additional freedom will enable supply-side customers to cater for their demand-side clients' wishes to process transactions through an

³³ Transactions where the demand-side customer and supply-side customer are part of the same corporate group.

alternative system for the purposes of live testing and migrating systems in the transitional period, or where the demand-side customer is processing a transaction that is carved out from the exclusivity in its contract.

- 7.27 In these circumstances, the supply-side customer is not required to check that their demand-side client is acting in compliance with its contract with Epyx.
- 7.28 Supply-side customers will continue to be able to use alternative systems to process any transactions with any third party which is not a subscriber to the SN platform.

Reporting requirements

- 7.29 The Parties will provide information and documents as reasonably required by the OFT for the purposes of monitoring compliance with the commitments.
- 7.30 The Parties will also maintain any records reasonably required by the OFT for the above purpose.

Duration of the proposed commitments

- 7.31 The Parties have offered the commitments for a period of five years.

The OFT's assessment of the Commitments

- 7.32 The OFT provisionally considers that the proposed commitments offered by the Parties address its competition concerns as outlined in chapter 6 and, as a consequence, reduce the potential harm of the relevant provisions to a level that is not likely to foreclose market entry by an as-efficient competitor.

Barriers to switching are removed

- 7.33 Epyx will remove or significantly relax any contractual barriers to permit the activities required to support sequential switching to alternative systems by demand-side customers.
- 7.34 Demand-side customers will be able to engage with suppliers of alternative systems and thoroughly test their services, including by way

of a capped amount of live testing where desired, in order to properly evaluate and develop an alternative system that is fit for purpose. The OFT considers that testing by its nature is likely to be a transient activity involving limited volumes: hence the imposition of a reasonable cap is not likely to hinder customers from adequate scrutiny of the alternative system's performance. Within the capped amount, there will be no restriction on the category or type of SMR transaction to be tested.

- 7.35 Epyx will not operate MAFs in a manner that hinders the ability of customers to conduct live testing. The OFT provisionally considers that the existence of a MAF is generally unlikely to impede limited volumes of live testing unless initially set at a very high level or unless transaction volumes fall significantly from the time the MAF was negotiated. The OFT also provisionally considers that it would not be appropriate to constrain customers' commercial flexibility to negotiate MAFs and transaction fees. The OFT is therefore of the provisional view that the offered commitment in relation to MAFs is sufficient for the purposes of accommodating live testing.
- 7.36 The proposed commitments will provide for an environment whereby demand-side customers can efficiently and successfully switch over a period of time to an alternative system. This switching will be catered for in a transitional period where multi-homing is permitted, any MAF is removed, and technical support and customer information are provided by Epyx to its customers to the extent reasonably necessary to facilitate a successful switch to an alternative system. The demand-side customer can specify the exact length of transitional period required up to a maximum of six months, which will allow for flexibility on a case by case basis depending on the specific needs of the customer. Rates will be unchanged for the first half of the transitional period and will be transparent and non-discriminatory (based on a published price list) thereafter.
- 7.37 The proposed amendments to supply-side contracts will enable supply-side customers to assist and support their demand-side clients in live testing or while migrating to an alternative system.

Barriers to product development are removed

- 7.38 All of Epyx's demand-side customers³⁴ will be permitted to develop alternative systems, whether with a new entrant to help ensure that its offering is fit for purpose, with another company on the demand or supply-side, or by themselves (this would include circumstances where a customer commissions a bespoke in-house system from a third party).

Barriers to network building and scale are removed

- 7.39 The commitments will have the effect of significantly shortening the duration provisions in new demand-side contracts compared to existing contracts: 18 months where companies are not currently SN platform customers, and 12 months for existing SN platform customers.
- 7.40 The OFT considers this commitment to be beneficial and also provisionally considers that it is rational to allow a longer minimum period for completely new customers as (i) there is likely to be a greater level of investment required from Epyx in initiating such customers on to the platform and (ii) such new customers are themselves likely to have made a significant recent investment in transferring to the SN platform and are therefore less likely to have an immediate desire to switch.
- 7.41 Customers will be able to terminate at the end of the minimum period or any anniversary thereof, upon at least three months' prior notice. This is an improvement on and brings clarity to the present situation, where some customers may be or may consider themselves potentially bound beyond the minimum period.
- 7.42 The OFT provisionally considers that these commitments will significantly increase the frequency of future opportunities for demand-side customers to switch and for new entrants to compete for their business.
- 7.43 While minimum terms in existing demand-side contracts will be unchanged, the staggered nature of such contracts means that a reasonable proportion of the market will become available in the near

³⁴ Barriers to product development on the supply-side have been removed since April 2012.

future and will from then, under the commitments, be regularly available to competitors every 12 months.

7.44 Figure 7.1 provides a profile of Epyx's demand-side customers, showing the earliest dates at which their contracts can be terminated and the volume of transactions processed on the SN platform that these contracts relate to.³⁵

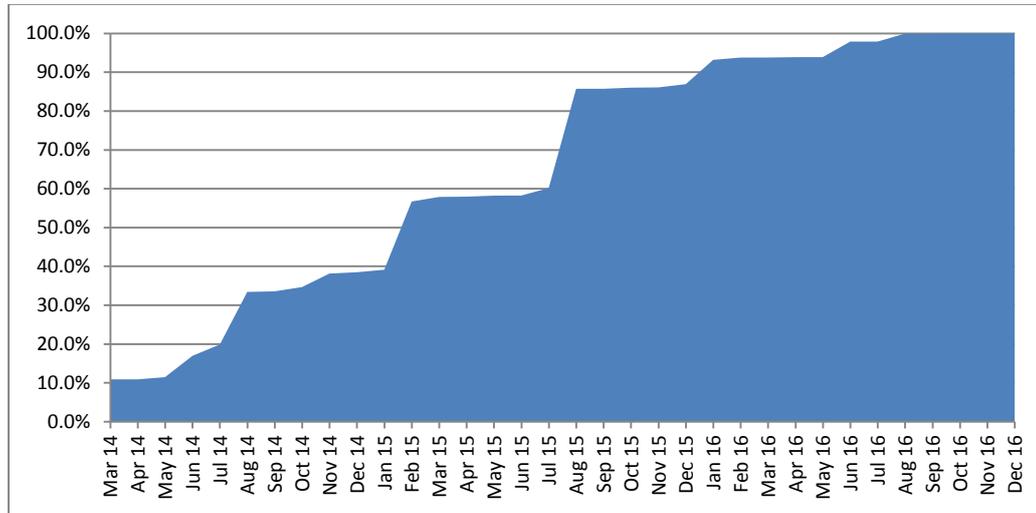
7.45 On the basis of this profile, as a result of the improved duration provisions to which Epyx has committed:

- New entrants would have the potential to initially compete for a significant proportion (up to 86 per cent) of the SMR transaction volumes that are currently processed on the Epyx platform within 18 months.³⁶
- By October 2016, all of Epyx's existing demand-side customers would have had at least one opportunity to switch to an alternative platform provider.

³⁵ With reference to invoice transaction volumes.

³⁶ As demand-side customers are required and will still be required to give three months' notice of termination, it is possible that those contracts which could be terminated during the first half of 2014 are extended by 12 months, as customers may not be in a position to benefit from the commitments and complete any necessary preparations for switching in time to give the required notice. Even if this is the case, a new entrant would still have the potential to compete for these customers within the 18-month timeframe.

Figure 7.1: Cumulative possible demand-side terminations by month, with reference to transaction volumes



Source: Data provided to the OFT by Epyx in February 2014

- 7.46 Epyx's customers will be permitted to engage in activities related to the sponsorship of alternative systems either by working with new entrants, and/or by promoting the alternative system to the parties with whom they transact on the SN platform.
- 7.47 New entrants can therefore freely approach, collaborate with and seek sponsorship from Epyx's customers as necessary, on both the demand and/or supply-side.
- 7.48 Epyx's commitment to allow customers to share information with competitors regarding the expiration or renewal dates of their contracts with Epyx will further assist new entrants to target customers and efficiently focus their marketing activity.

Overall effect of the proposed commitments

- 7.49 The OFT considers that the changes proposed will inject pro-competitive features into the market by giving Epyx's customers, where desired, the opportunity to work with and switch to new entrants, and will increase the likelihood of a viable and as-efficient new entrant successfully entering the market.
- 7.50 Epyx's relaxation, and in some cases removal, of the contractual restrictions imposed on customers that prevent the evaluation,

switching, development and marketing of alternative systems, in conjunction with a reduction in contract duration on the demand-side, will facilitate new entrants in:

- designing an efficient and fit for purpose service
- accessing a sufficient portion of Epyx's demand-side (and therefore also supply-side³⁷) customers on a timely and regular basis, and
- competing effectively for these customers to build a network on both sides of the market

in order to successfully enter the market.

7.51 The proposed amendments to supply-side contracts will enable supply-side customers to cooperate with their demand-side customers as they undertake evaluation and development activities and make preparations to switch to a new platform.

7.52 While the proposed commitments offered by the Parties retain a level of exclusivity on the demand-side, this is significantly reduced from its present level (as discussed above at paragraphs 7.16 to 7.24):

- The key areas where demand-side customers have expressed a desire to multi-home, for example specialist transactions such as tyre and glass and intra-group transactions, are expressly carved out of this exclusivity. For existing contracts, these carve-outs are subject either to fee amendments that reflect anticipated lower transaction volumes through the SN platform, or to the continuation of existing MAFs even where this may then be out of line with anticipated transaction volumes once the carve-outs are applied. Epyx has represented to the OFT that these features are necessary to respect the volume assumptions on which fees were originally agreed. However, the OFT notes that where these features are of concern to customers, they may negotiate new contracts that take full account of such carve-outs within their fees.

³⁷ The demand-side will drive supply-side use of the platform as explained in paragraph 4.17.

- Potential requirements³⁸ to transact other, more limited, volumes of transactions off-platform are addressed by paragraph 11.b of the commitments set out in Annexe 1, which allows for customers to seek to negotiate further exemptions with Epyx on a case by case basis. However, such additional exemptions are subject to Epyx's discretion.
- The proposed amendments to supply-side contracts will enable supply-side customers to cooperate where the demand-side customer wishes to take advantage of any of the exemptions from exclusivity set out above.

7.53 The OFT provisionally considers that exclusivity in the diminished form described above is of limited competition concern. The majority of demand-side customers have expressed a preference to 'single home' by processing all their SMR transactions through one SMR platform. A degree of exclusivity in and of itself is therefore not likely to foreclose the market so long as there is effective competition at the point when the customer can terminate an exclusive contract; and it would not therefore be proportionate or necessary to require its removal.

7.54 More critically, the key concerns of the OFT as set out in paragraph 6.13, in relation to switching barriers that prevent effective competition at the point of contract termination, and other restrictions that combine with this to increase barriers to entry, have in its provisional view been addressed.

7.55 The OFT provisionally considers that five years is a reasonable length of time sufficient to enable a competitor to enter the market.

7.56 The OFT will be able to obtain information and documents from the Parties to monitor their compliance with the commitments as necessary.

7.57 The OFT therefore provisionally considers, for the reasons set out above, that the offered commitments address its competition concerns.

³⁸ For example, as outlined in paragraph 4.21.

7.58 The OFT notes that should competition concerns arise which are not addressed by commitments accepted by it, it will not be prevented from taking any action in relation to these unaddressed concerns.

7.59 Acceptance of commitments also does not prevent the OFT from continuing its investigation, making a decision or giving a direction where it has reasonable grounds for:

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

8 THE OFT'S INTENTIONS AND INVITATION TO COMMENT

- 8.1 In light of the above, the OFT provisionally considers that the commitments offered by the Parties as set out in Annexe 1 of this document are sufficient to address its competition concerns. Therefore, the OFT intends to accept the commitments by means of a formal commitments decision.
- 8.2 As required by paragraph 2(2)(d) of Schedule 6A of the Act, the OFT now invites interested third parties to make representations on the proposed commitments and will take such representations into account before making its final decision whether to accept the commitments.
- 8.3 The OFT is particularly interested to hear from existing and potential customers of the SN platform, Epyx's competitors, and trade bodies. As noted above, the OFT has not reached a final view and invites all interested parties to submit observations and evidence in order to assist the OFT in its final assessment of the commitments offered by the Parties.
- 8.4 The OFT also welcomes any views on the example variation agreements for existing contracts submitted by Epyx. These are set out in Annexe 2 and Annexe 3 for demand-side customers and supply-side customers respectively.
- 8.5 The OFT will inform the European Commission, once it has considered representations from third parties, and no later than 30 days before the adoption of a decision accepting commitments.³⁹

Invitation to comment

- 8.6 Any person wishing to comment on the commitments should submit written representations to the postal or e-mail addresses given below by

³⁹ In accordance with the requirement under Article 11(4) of Regulation 1/2003 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [now 101] and 82 [now 102] of the Treaty [now TFEU] (OJ L1, 4.1.03, p1) to inform the European Commission no later than 30 days before the adoption of a decision accepting commitments in all cases which affect trade between Member States, to enable it to submit any comments.

5 pm on 4 April 2014. Please quote the case reference CE/9496-11 in all correspondence related to this matter.

SMR Platforms Team
Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX

Email: smrplatforms@oft.gsi.gov.uk

- 8.7 The OFT closes on 31 March 2014, after which this consultation and any decision in the investigation becomes the responsibility of the Competition and Markets Authority ('CMA').⁴⁰ Correspondence sent to the addresses above will be forwarded to the CMA.

Confidentiality

- 8.8 The OFT does not intend to publish the responses to the consultation with any commitments decision or notice to provisionally accept modified commitments. However, the information contained in the responses may be used or summarised on an anonymous basis in these documents.
- 8.9 In the event that the commitments are not accepted and the OFT is considering disclosing the information (such as in or with a statement of objections), it will revert to the provider of that information to obtain representations on confidentiality. The OFT will then consider those representations before deciding whether the information should be disclosed under Part 9 of the Enterprise Act 2002.

⁴⁰ The CMA will bring together the Competition Commission and the competition and certain consumer functions of the OFT in a single body. The CMA was established under the Enterprise and Regulatory Reform Act 2013 and came into being in shadow form in October 2013. It takes on its full powers and responsibilities, such as competition law enforcement, market studies and investigations, and merger control, on 1 April 2014. Visit the [CMA's pages on GOV UK](#) for more information.