

Supply of Service, Maintenance and Repair Platforms

Notice of intention to accept modified commitments offered by epyx Limited and FleetCor Technologies, Inc. and invitation to comment

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1. Executive summary

- 1.1 On 10 March 2014, the Office of Fair Trading ('the OFT') gave notice ('March notice') that it proposed to accept commitments ('initial commitments') offered by Epyx Limited ('Epyx') and FleetCor Technologies, Inc. ('FleetCor') (together, 'the parties') in relation to the OFT's investigation into whether Epyx had abused a dominant position with respect to its provision of its 1Link Service Network platform in the UK ('the SN platform'). The SN platform facilitates 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 ('the Act') and Article 102 of the Treaty on the Functioning of the European Union ('TFEU').
- 1.3 The March notice set out the OFT's competition concerns, namely, that certain provisions in Epyx's contracts with its customers which operate to restrict or prevent the evaluation, development and marketing of alternative systems may be capable of anti-competitive exclusionary effects on the market by artificially raising barriers to entry, and, may amount to an abuse of market power.
- 1.4 The March notice outlined the OFT's provisional view that the initial commitments addressed those concerns; and, that they should therefore be accepted. Pursuant to Schedule 6A of the Act, through publication of the March notice the OFT conducted a public consultation seeking representations from interested third parties on the initial commitments.
- 1.5 Responsibility for the investigation passed to the Competition and Markets Authority ('the CMA') on 1 April 2014.¹
- 1.6 The consultation ran for 20 working days during which period both the OFT and the CMA respectively received representations from a wide range of respondents in the automotive sector. The CMA has carefully considered those representations.
- 1.7 A significant number of respondents to the consultation were broadly supportive of the provisional decision to accept the initial commitments. However, the CMA's view, in light of the representations as a whole, is that the initial commitments did not relax certain restrictions imposed in Epyx's

¹ From 1 April 2014, the CMA brought 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.

contracts to a level that would address its competition concerns. Specifically, the remaining restrictions were still likely to foreclose the market to entry by an as-efficient competitor.

1.8 The CMA's competition concerns remain unchanged from those expressed in the March notice.

1.9 Following further discussions with the parties, modifications to the initial commitments were offered to the CMA ('modified commitments'). The proposed modifications to the initial commitments are as follows:

- an additional exclusion to the exclusivity provisions in Epyx's contracts, allowing customers to carve-out categories of transactions on a 'marque-by-marque' basis
- fleet managers being permitted to rely on the exclusions to different extents on a customer by customer basis
- an extension to the annual cap on live testing, from 5% of the previous year's transactions, to 10% for existing contracts; and, from 6% to 12% in the first year of a new contract
- an extension to the transitional period, during which demand-side customers can switch to an alternative provider whilst still being able to use the SN platform
- clarification that the modified commitments apply to vehicle manufacturers.

1.10 The CMA provisionally considers that the modified commitments offered by the parties address its competition concerns by sufficiently reducing the potential anti-competitive exclusionary effects of certain restrictive provisions in Epyx's contracts with its customers, to an extent that is not likely to foreclose market entry by an as-efficient competitor. In particular the CMA provisionally considers that the modified commitments, in addition to the benefits conferred by the initial commitments:

- enable forms of multi-homing which may facilitate entry into the market by an as-efficient competitor and thus improve competitive conditions in the market

- further diminish the barriers to switching for demand-side customers by offering increased live testing capacity and significantly longer transition periods.

1.11 As such, the CMA is provisionally minded to accept the modified commitments by means of a formal commitments decision.

1.12 The CMA now invites representations from interested third parties on the modified commitments. Representations will be carefully considered before the CMA makes its final decision on whether to accept the modified commitments. The closing date for comment is 18 June 2014.

2. Introduction

- 2.1 In March 2014, the OFT gave notice² that it proposed to accept commitments offered by the parties in case CE/9496-11 and invited representations from interested third parties on that proposed course of action.³
- 2.2 The initial commitments were offered by the parties in relation to the OFT's investigation into whether Chapter II of the Act and/or Article 102 of the TFEU had been infringed. Responsibility for the investigation passed to the CMA on 1 April 2014.⁴
- 2.3 The OFT's competition concerns were set out in the March notice.⁵ The OFT conducted a public consultation pursuant to Schedule 6A of the Act to seek representations on the initial commitments ('consultation'). The consultation took the form of publication of the March notice and an invitation to comment issued on the OFT's website⁶ on 10 March 2014. The consultation ran for 20 working days and closed on 4 April 2014.
- 2.4 Twenty-five responses to the consultation were received. The CMA has carefully considered the responses and engaged in further discussions with certain respondents to clarify concerns where it was considered appropriate to do so. The CMA has discussed the concerns raised by respondents with the parties.
- 2.5 Following this process, the parties have proposed to make certain modifications ('proposed modifications') to the initial commitments. The proposed modifications combined with the initial commitments are hereafter referred to as the 'modified commitments'. Having considered the proposed modifications, the CMA is provisionally of the view that acceptance of the modified commitments will address its competition concerns.
- 2.6 Therefore, the CMA hereby gives notice pursuant to paragraph 3(1)(a) of Schedule 6A of the Act that it proposes to accept the modified commitments in accordance with section 31A(2) of the Act.
- 2.7 Formal acceptance of the modified commitments by the CMA would result in the termination of its investigation, with no decision made on whether the

² In accordance with paragraph 2(1)(a) of Schedule 6A of the Act.

³ '*Notice of intention to accept binding commitments in relation to the supply of service, maintenance and repair platforms by epyx Limited*', OFT1528, 10 March 2014.

⁴ See footnote 1 above.

⁵ OFT1528 (footnote 3 above), Chapter 6.

⁶ <http://oft.gov.uk/OFTwork/oft-current-cases/competition-case-list-2011/electronic-platform-services#.U2yatOIZrcs>

conduct which was the subject of the investigation constitutes an infringement of the Act or the TFEU.

2.8 Acceptance of the modified commitments would not prevent the CMA from taking any action in relation to competition concerns which are not addressed by the modified commitments. Moreover, acceptance of the modified commitments would not prevent the CMA from re-opening the investigation, making an infringement decision, or giving a direction in circumstances where the CMA had reasonable grounds for:

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

2.9 The remainder of this document is structured as follows:

- Chapter 3 summarises the competition concerns
- Chapter 4 sets out the initial commitments and why the OFT previously provisionally considered that they addressed its competition concerns
- Chapter 5 summarises the outcome of the consultation
- Chapter 6 summarises proposed modifications to the initial commitments
- Chapter 7 explains the CMA's provisional assessment of the modified commitments
- Chapter 8 explains the CMA's intentions and invites representations on the modified commitments
- Annex A sets out the modified commitments
- Annex B sets out a summary of the responses to the consultation

- Annex C illustrates the operation of the evaluation and switching process for demand-side customers under the modified commitments.

2.10 The CMA invites interested third parties to make representations on the modified commitments which are set out in Annex A. The CMA will take representations into account before a final decision is made on whether to accept the modified commitments. Details of how to comment are provided in Chapter 8 of this document. The closing date for representations is 18 June 2014.⁷

⁷ 10 working days.

3. Competition concerns

3.1 The March notice set out the OFT's preliminary views that:

- Epyx is likely to have a dominant position in the market for the supply of SMR platforms in the UK.
- Certain provisions in Epyx's contracts with its customers ('relevant provisions') are exclusionary in nature and may amount to an abuse of market power, namely:

Demand-side contracts	Supply-side contracts
Use and/or development restrictions	Use restrictions
Minimum Annual Fee provisions	Development restrictions
Duration	

3.2 The CMA's current competition concerns are as follows:

- **The relevant provisions may have the effect of increasing barriers to switching** by restricting customers from engaging effectively with potential/actual new entrants (eg, 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 effect of preventing the emergence of alternative systems.** Potential as-efficient 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.

3.3 The CMA's competition concerns as set out by the OFT are contained in the March notice.⁸

⁸ OFT1528 (footnote 3 above), Chapter 6.

4. The initial commitments

4.1 The parties offered the initial commitments on 25 February 2014.

4.2 The OFT provisionally considered that the initial commitments addressed its competition concerns by reducing the potential exclusionary effects of the relevant provisions to a level that was not likely to foreclose market entry by an as-efficient competitor. The initial commitments:

- **Removed barriers to switching** by removing or relaxing contractual restrictions preventing activities required to support sequential switching to alternative systems by demand-side customers. For example, demand-side customers would be able to engage with providers of alternative systems, test their services and transition in an effective manner. Supply-side customers would be able to transact with their demand-side clients for these purposes.
- **Removed barriers to product development** by permitting demand-side customers to develop alternative systems, whether: with a new entrant (to help ensure that its service is fit for purpose); with another company on the demand or supply-side; or, by themselves.
- **Removed 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.

4.3 The OFT provisionally considered that the changes proposed by the initial commitments would sufficiently improve the competitive conditions on the market by giving Epyx's customers, where desired, the opportunity to work with and switch to new entrants, and increase the likelihood of a viable as-efficient new entrant successfully entering the market.

4.4 The initial commitments and the OFT's provisional assessment of these are set out in the March notice.⁹

⁹ OFT1528 (footnote 3 above), Chapter 7.

5. The consultation outcome

- 5.1 The consultation took the form of publication of the March notice and an invitation to comment issued on the OFT's website¹⁰ on 10 March 2014. The consultation ran for 20 working days and closed on 4 April 2014.
- 5.2 The OFT and the CMA (from the point at which responsibility for the investigation passed to the CMA on 1 April 2014) collectively received 25 responses to the consultation. These responses were received from a wide range of respondents in the automotive sector (the majority comprising Epyx's demand-side and supply-side customers), such as leasing and fleet management companies, fleet managers and consultancy companies and garage and vehicle repair shops, fast-fitters, vehicle manufacturers and dealers. Trade associations and companies that operate in neighbouring (geographical and/or product) markets also submitted responses to the consultation. The CMA followed up with a number of these respondents where clarification was required in relation to certain issues raised.
- 5.3 A significant number of respondents to the consultation were broadly supportive of the provisional decision to accept the initial commitments and generally welcomed the increased contractual flexibility around customer development, evaluation and switching to and/or use of alternative systems. Some of these respondents submitted that the increased customer freedom would reduce barriers to entry in the market.
- 5.4 The CMA notes that a majority of respondents on the supply-side were supportive of the initial commitments. However, multiple respondents, in particular on the demand-side, expressed views that the initial commitments were not sufficient to address the identified competition concerns. The CMA attaches particular weight to the views expressed on the demand-side on the basis that the initial commitments largely impact on demand-side contracts and in light of the provisional view that it is demand-side customers that drive choice of SMR platforms.¹¹
- 5.5 The CMA considers that, while a wide variety of issues were raised by these respondents, there were certain key themes contained in the responses that were directly relevant to whether the initial commitments addressed the competition concerns identified in the March notice. These key themes are set out below.

¹⁰ <http://oft.gov.uk/OFTwork/oft-current-cases/competition-case-list-2011/electronic-platform-services#.U2yatOIZrcs>

¹¹ The industry dynamic that suppliers compete for demand-side clients means that suppliers have strong incentives to accommodate demand-side operational preference in order to secure business. The demand-side therefore tends to drive the choice of processing method.

Retention of exclusivity

5.6 Multiple respondents disagreed with the provisional view that the majority of demand-side customers would prefer to use a single platform only, considering instead that multi-homing (that is, using two or more SMR platforms in parallel), is desirable, feasible and/or business critical. These respondents were generally of the view that demand-side companies were prepared to multi-home for operational and/or commercial reasons and, in particular, might need to multi-home for a significant period of time before making the decision on whether to switch to an alternative system on a permanent single-homing basis.

5.7 Whilst respondents generally welcomed the exclusions of tyre and glass and intra-group transactions from exclusivity, it was suggested that these exclusions did not go far enough and demand-side customers wanted flexibility to multi-home in other ways. For example, respondents suggested exclusions for:

- **Different supplier groups, marques or transactions types:** as different SMR platforms may offer a range of functionality/features with some being superior or inferior in relation to, for instance, particular marques or types of transactions than other platforms without necessarily offering superior functionality in relation to SMR transactions as a whole. Therefore, it was submitted that there may be a desire from demand-side customers to use different SMR platforms with different supplier groups, marques or transaction types.

It was submitted to the CMA that in order to sponsor entry, demand-side customers might 'start small' and therefore the most practical approach may be to switch a specific marque, or particular marques, away from the SN platform.

- **In-house systems (for own brand, intra-group or externally):** it was suggested that demand-side customers may benefit from using their in-house systems to transact with external supply-side customers as well as using these systems internally within their own corporate group.
- **Manual processing:** one respondent noted that it already observed demand-side customers using manual processing alongside the SN platform and therefore considered exclusivity to be contrary to market needs.
- **Supplier systems:** it was submitted that dealers providing SMR services may require demand-side customers to use different platforms,

or, as submitted by a supply-side customer, manual processing as referred to above.

- **Fleet managers:** who may need to use different SMR platforms for different clients.

5.8 The CMA received representations suggesting that the ability for demand-side customers to multi-home was directly relevant to the analysis of market entry and the retention of exclusivity may prevent it occurring. Several respondents referred to another geographic market in Europe where competition was present and multi-homing between two or more SMR platforms was successfully occurring (for example, with different platforms being used for franchised dealers and for independent dealers, glass and tyres and also examples of fleets using their in-house systems alongside externally provided SMR platforms).

5.9 Therefore, it was broadly submitted, for the reasons outlined, that the retention of exclusivity in Epyx's contracts would likely prevent demand-side customers from switching to alternative systems and/or engaging in multi-homing, to a level that would prevent successful entry and foreclose the market.

Annual live testing cap

5.10 Multiple respondents welcomed the freedom to engage in live testing as permitted by the initial commitments; however, some expressed the view that the annual live testing cap was unduly restrictive and not sufficient to facilitate demand-side customers conducting a proper evaluation of an alternative system through a thorough and meaningful programme of testing, before making a decision on whether to switch to the alternative system on a single or multi-homing basis.

Transitional period

5.11 Multiple respondents welcomed the transitional period (for example, it would lower risk and avoid disruption to customers switching to an alternative system); however, some considered that the transitional period was too short when taking into account integration issues and the desire of demand-side customers to sequentially migrate different tranches of transactions over a longer period of time. Accordingly, some respondents stated that the transitional period was not sufficient to facilitate switching to an alternative system on a single or multi-homing basis.

5.12 One respondent stated that it was unclear whether or not the level and scope of the technical support provided by Epyx during the transitional period would be adequate and that customers would not have sufficient clarity regarding the costs of switching unless Epyx's default price list was known and fixed for the duration of the commitments. Furthermore, this respondent expressed scepticism regarding the need or justification for the use of a default list price.¹²

Clarifications

5.13 A number of respondents sought clarification on the application of the initial commitments to certain segments in the automotive sector, for example fleet managers and vehicle manufacturers and how the initial commitments generally affected the demand-side customers' existing contractual arrangements with Epyx.

Other issues

5.14 Annex B sets out in more detail some of the other issues raised in the responses to the consultation, together with detail of the CMA's consideration and response in relation to each issue.

¹² The CMA notes the annual price list will be published to demand-side customers in advance so that demand-side customers will be aware of the transaction costs applicable for that year. Further, should Epyx and the demand-side customer wish, they may negotiate their own transaction rates for the final nine months of the transitional period (if needed) and therefore will not be subject to the annual price list.

6. The proposed modifications to the initial commitments

- 6.1 In light of the concerns raised in the responses to the consultation, and subsequent discussions on these issues with the parties, the parties offered modified commitments on 1 May 2014.
- 6.2 Table 1 summarises the proposed modifications to the initial commitments. Further detail is set out below and Annex C provides an illustration of the possible operation of the modified commitments for demand-side customers who wish to evaluate alternative systems and switch away from Epyx.

Table 1 – Comparison of commitments

	Initial commitments (February 2014)	Modified commitments (May 2014)
Exclusions to exclusivity (in addition to live testing and a transitional period as below)	Exclusions for - <ul style="list-style-type: none"> • tyres and glass • intra-group transactions • any other types of transactions agreed with Epyx. 	Exclusions for - <ul style="list-style-type: none"> • tyres and glass • intra-group transactions • any other types of transactions agreed with Epyx • specified marque(s). <p><i>Fleet Managers will be permitted to apply the above exclusions to different extents on a customer-by-customer basis.</i></p>
Annual live testing cap	<ul style="list-style-type: none"> • 5% of prior year transactions; or • in the first year of a new contract: 6% of transactions implied by any Minimum Annual Fee. 	<ul style="list-style-type: none"> • 10% of prior year transactions; or • in the first year of a new contract: 12% of transactions implied by any Minimum Annual Fee.
Transitional period	<ul style="list-style-type: none"> • 6 months, during which day-to-day support will be provided. 	<ul style="list-style-type: none"> • 12 months, during which routine support will be provided.

- 6.3 The CMA recognises that not all of Epyx’s demand-side customers are subject to provisions in their contracts that lead to exclusivity and/or restrict or prevent the evaluation, development and marketing of alternative systems. Demand-side customers are not under any obligation to accept the contractual variations, where applicable, proposed by Epyx pursuant to the modified commitments. If demand-side customers do not formally accept such variations, Epyx will conduct its business with that customer as though it had accepted the variation and in accordance with the principles of the modified commitments, to the maximum extent compatible with that customer’s existing

contract. For the avoidance of doubt, demand-side customers who are not currently subject to exclusivity provisions will **not** have such provisions imposed on them in their existing contracts by virtue of the implementation of the modified commitments.

Exclusions to exclusivity

Initial commitment

6.4 Epyx originally committed to carve out certain categories of transactions from the scope of exclusivity provisions contained in many of its demand-side contracts. Specifically, the initial commitments permitted its demand-side customers to use alternative systems in parallel with the SN platform to process:

- **Tyre and glass** transactions, under existing contracts, on request, and under all new contracts
- **Intra-group**¹³ transactions under existing and new contracts
- **Other types** of transactions where agreed¹⁴ with Epyx under existing and new contracts.

6.5 With regards to new contracts, these exclusions may be planned from the outset and taken into account in fee negotiations.

Proposed modification

6.6 Epyx has proposed modifications to broaden the scope of such exclusions by permitting demand-side customers to use alternative systems in parallel with the SN platform to process transactions in respect of particular marque(s) identified to Epyx in advance. Demand-side customers will be able to carve out such transactions from existing contracts; however, any Minimum Annual Fee ('MAF') will continue to apply.¹⁵ In new contracts, any such carve-outs can be agreed at the outset and taken into account in fee negotiations.

6.7 Epyx has also proposed modifications to the exclusions set out in paragraph 6.4, which clarifies that demand-side customers must notify Epyx in advance

¹³ Transactions where the demand-side customer and supply-side customer are part of the same group (defined on the basis of company law principles).

¹⁴ Such exclusions will be subject to individual negotiation between Epyx and its demand-side customers.

¹⁵ This exclusion (and others for intra-group and other types of transactions agreed with Epyx), however, differs from the exclusion for tyre and glass whereby Epyx will offer the variation to the existing contract with, if appropriate, such variations being subject to a reduction in the MAF and corresponding increase in other fees reflecting the reduction in anticipated transaction volumes.

of deciding to process these categories of transactions outside of the SN platform.

6.8 These proposed modifications can be found at paragraph 11 of the modified commitments contained in Annex A.

Annual live testing cap

Initial commitment

6.9 Epyx originally committed to permit demand-side customers to process live SMR transactions through alternative systems for the purposes of testing and evaluating, up to an annual maximum¹⁶ of:

- **Existing contracts:**¹⁷ 5% of the demand-side customer's previous operating year's transaction volumes on the SN platform.
- **New contracts:**¹⁸ 6% of the total number of transactions which would be required to be processed on the SN platform in the first operating year of their contract in order to meet any MAF. The second and subsequent years of the new contract will be subject to the 5% live testing cap described above.

Proposed modification

6.10 Epyx has proposed modifications to the initial commitments which will increase the annual live testing cap to **10%** for existing contracts and **12%** for the first operating year of new contracts. All other aspects of the commitments relating to live testing remain unchanged.

6.11 These proposed modifications can be found at paragraphs 4(a) and 4(b) of the modified commitments contained in Annex A.

Transitional period

Initial commitment

6.12 Epyx originally committed to permitting demand-side customers to transitional multi-home, meaning that demand-side customers have the option to continue

¹⁶ Measured with reference to Invoice Record or Work Record transactions, whichever is defined in the customer's contract.

¹⁷ Existing contract means a demand-side contract in force at the date on which the CMA publishes a decision accepting commitments (including an existing contract which is subsequently amended).

¹⁸ New contract means a demand-side contract which is not in force at the date on which the CMA publishes a decision accepting the commitments, including new contracts that replace a terminated existing contract.

their use of the SN platform while starting to migrate to an alternative system, for a period of up to six months.

Proposed modification

- 6.13 Epyx has proposed modifications to the initial commitments which increase the transitional period to **12 months**. During the transitional period:
- (a) 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.
 - (b) 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 remainder 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 which will be published annually to its customers for this purpose.
 - (c) Epyx will continue to provide routine technical support, including the relevant program upgrades and other improvements made available to other subscribers where required for continued use of the SN platform.
 - (d) From the time notice is given until the end of the first six months of the transitional period (nine months in total under the three-month notice period standard in Epyx's demand-side contracts), Epyx will provide such support as is reasonably necessary to facilitate the transfer of the demand-side customer to any alternative system.
- 6.14 These details remain unchanged in the modified commitments, except that Epyx has revised the description of technical support from 'day to day' to 'routine'. For an explanation of this proposed modification, refer to paragraph 7.31.
- 6.15 These proposed modifications can be found at paragraphs 13(a) and 13(b) of the modified commitments contained in Annex A.

Clarifications

Fleet managers

- 6.16 Epyx has clarified in the modified commitments that fleet managers (who manage fleets on behalf of fleet owners) can negotiate any of the specific exclusions for their fleet customers on a customer-by-customer basis, subject to having separate contractual arrangements for each customer.

6.17 These proposed modifications can be found at paragraph 12 of the modified commitments contained in Annex A.

Manufacturers

6.18 Epyx has also clarified that the modified commitments apply to manufacturers in the following ways:

(a) As a demand-side customer, where the manufacturer owns a leasing fleet, has a demand-side contract, and uses the SN platform for the purposes of procuring or processing SMR transactions.

(b) As a supply-side customer, where the manufacturer owns a supplier, has a supply-side contract, and uses the SN platform for the purposes of providing or processing SMR transactions.

(c) In a non-trading capacity, where the manufacturer has a contractual relationship for other services related to the SN platform such as reports.

6.19 In cases (a) and (b), the manufacturer is, directly or indirectly, affected by paragraphs 4 to 14 and 15 of the modified commitments respectively. In all cases, namely (a) to (c), the manufacturer is still a customer and paragraphs 1 to 3 of the modified commitments apply.

6.20 These proposed modifications can be found in the definitions section of the modified commitments contained in Annex A.

Impact on contractual rights

6.21 Epyx has proposed modifications clarifying that the modified commitments do not impact on demand-side customers' contractual rights. Specifically, demand-side customers are not under any obligation to accept variations proposed by Epyx in accordance with the modified commitments. For the avoidance of doubt, if demand-side customers do not formally accept such variations, Epyx will conduct its business with that customer as though it had accepted the variation and in accordance with the principles of the modified commitments, to the maximum extent compatible with that customer's existing contract.

6.22 These proposed modifications can be found at footnote 1 of the modified commitments contained in Annex A.

7. The CMA's provisional assessment of the modified commitments

Provisional assessment

- 7.1 The CMA's preliminary view is that the relevant market is driven by the demand-side customers who have a need for SMR services and therefore generate SMR transactions. These demand-side customers fall broadly into two groups.¹⁹ One group has a preference for multi-homing, the other for single-homing. There may be overlap between the groups in terms of actual outcomes, as preferences do not always manifest directly in choices made for a range of reasons – whether reflecting practical or commercial considerations, information gaps or factors outside demand-side customers' control.
- 7.2 The provisional conclusions in the March notice were based on a preliminary view that the desire to permanently multi-home was limited. As such, any residual restriction following implementation of the initial commitments (ie continued inability to freely multi-home) arising solely from the remaining exclusivity provisions was provisionally considered unlikely to have a significant impact in terms of artificially foreclosing the market.
- 7.3 The concerns described in the March notice focused on the ability of competitors to compete effectively and with sufficient frequency for single-homing demand-side customers. In particular, the March notice was concerned with the potential for the relevant provisions to increase barriers to single-homing demand-side customers switching, thereby preventing the emergence of alternative systems. The initial commitments addressed this by facilitating evaluation (through live testing), transition (through a transitional period) and development, sponsorship and the ability to build scale (through the removal of clauses restricting such activities and the shortening of minimum contract periods).
- 7.4 The CMA's competition concerns remain unchanged from the March notice. However, upon consideration of the responses to the consultation, the CMA is no longer of the view that the initial commitments were sufficient to reduce the potential exclusionary effects of the relevant provisions to a level that is not likely to anti-competitively foreclose the market and, therefore, address its competition concerns.

¹⁹ For simplicity, we do not consider those who may be generally ambivalent between the two approaches as they could presumably adapt to commitments that facilitated either.

7.5 In particular, the CMA considers that the responses indicate:

- (a) The desire to permanently multi-home appears to be more significant than was anticipated in the March notice. Although the CMA does not consider the evidence received to be conclusive on the extent that retention of exclusivity in demand-side contracts constitutes an insuperable barrier to entry, it recognises the likely importance of some degree of multi-homing within the market entry dynamic. The CMA notes that multiple respondents expressed interest in particular potential approaches to multi-homing (for example, the most likely approach identified was a carve-out of transactions by marque) that were not catered for by the exclusions from exclusivity within the Initial Commitments.
- (b) Notwithstanding whether a demand-side customer prefers to single or multi-home, a likely reaction to increased choice (at least in the short to medium term until the market has reached a more advanced competitive state) may involve partial rather than total switching to alternative systems.
 - (i) This appears plausible in the context of a market where the CMA takes the preliminary view that Epyx holds a dominant position with the SN platform being a must-have service. Any competitor may not be a full substitute initially and the risk associated with switching completely from the SN platform may be perceived as unacceptably high. From the customer's perspective, limited multi-homing would mitigate the risks around this position by allowing for progressive transition. Transitioning one or more vehicle marques to begin with was identified as one of the most likely multi-homing/switching options from a practical point of view.
 - (ii) Competition encourages innovation and choice. A competing new entrant's service could vary by functionality, scope (the range of services offered) or price. Competitors will need to choose their optimal entry strategy, which may involve launching a more focussed service and widening their capability from there, rather than launching a fully comprehensive service from the outset. Demand-side customers may be readily incentivised to switch particular categories of transactions where it can benefit from a focussed superior service in relation to such transactions. If both Epyx's market position and the possibility of specialised entry strategies incline towards partial switching (effectively a form of multi-homing) while competition is developing, such partial switching may be critical to allow a competitor to obtain a sufficient scale in the market to enter successfully.

(c) A wide range of different switching approaches and needs exist that may therefore require more flexibility in the switching and transition process. Live testing approaches may vary (for example testing a full cross-section of transaction types across all marques as opposed to testing a cross-section of transaction types across one marque; or, where integration needs are particularly complex depending on how the business and its IT are set up), requiring varying amounts of time or transaction volumes. Similarly, different transition strategies may require different transitional periods.

7.6 In light of these factors, the CMA concluded from the responses that the initial commitments may not give a sufficient number of demand-side customers sufficient scope to switch. The CMA further concluded that any further commitments offer would require more flexibility to allow for a wider range of outcomes and market development under which entry could occur.

7.7 The parties subsequently responded by offering the proposed modifications. The CMA provisionally considers that they do offer increased flexibility to a level that will cater for and accommodate the most likely demand-side customer approaches to evaluation and switching, as described to the CMA. The CMA notes, in assessing the modified commitments, its concern is not to enable all possible approaches but to determine whether the modified commitments are likely to facilitate a sufficient proportion of demand-side customers to evaluate and switch, where desired, so that an as-efficient competitor is not likely to be foreclosed from the market.

7.8 Having assessed the available information in the round; and, having considered the parties' proposed modifications, the CMA therefore provisionally considers that the modified commitments address its competition concerns.

7.9 The paragraphs below expand further on the CMA's provisional assessment for each of the proposed modifications.

Exclusions to exclusivity

7.10 Notwithstanding the representations referred to in paragraphs 5.6 to 5.9, in the absence of evidence of switching between SMR platforms in the UK, and noting the acknowledged one-stop-shop benefits of using a single SMR platform, the CMA does not provisionally consider that an appetite for multi-homing in the longer term is likely for a significant proportion of the market. The CMA nonetheless notes and provisionally considers multi-homing in the short/medium term (for instance during the duration of any period of

commitments), may nonetheless be a practical way of facilitating entry into a currently foreclosed market.

7.11 The CMA provisionally considers that under effective competitive conditions many customers would not choose to multi-home. Any resultant residual exclusivity would, in such conditions, have limited impact on effective competition. The CMA notes in this regard that some demand-side customers are not currently subject to exclusivity in any event, and that the modified commitments would not operate to impose such a restriction upon them. However, the CMA notes representations, suggesting that:

- (a) The ability of demand-side customers to multi-home in relation to particular categories of transactions,²⁰ for longer than the envisaged transitional period, may be important to new entrants who initially may not have the same advantages of scope and scale as the incumbent.
- (b) Demand-side customers are constrained by the SMR platforms available in the market. If new entrants choose to focus on a particular niche in which they can be most efficient and successful in the short term, demand-side multi-homing may be the only outcome that can readily accommodate market entry and thus competition, at least in the short term.

7.12 Therefore, the CMA provisionally considers that the freedom to multi-home in ways that are most likely to be practical entry strategies by potential new entrants is critical in ensuring barriers to entry are sufficiently lowered to facilitate competition.

7.13 The CMA provisionally considers that the proposed modifications, which further relax exclusivity, address its competition concerns by allowing for the most likely forms of multi-homing identified to it throughout the consultation (notably marque-by-marque), including those that may be the most likely entry strategy of a new entrant. The impact of any residual exclusivity should therefore be limited to a level that will not result in anti-competitive foreclosure effects.

Annual live testing cap

7.14 Live testing is the processing of a live transaction. A live transaction, as envisaged by the modified commitments, is a fulfilled transaction – that is, a transaction that results in SMR work being carried out on a vehicle and payment being made to the supplier for that work. Such a transaction would

²⁰ For example, by marque or manual processing.

incur charges to Epyx where processed on the SN platform and its diversion to an alternative system will reduce the total transaction fees payable to Epyx.

- 7.15 As set out in paragraphs 6.9 to 6.11, under the modified commitments, the parties have offered to increase the volume of live testing permitted annually, to 10% of the prior operating year's volumes.²¹
- 7.16 As shown in Annex C, live testing is only intended to be one part of the evaluation and switching process. For example:
- (a) Prior to deciding whether to switch, demand-side customers can, given the removal of development restrictions, carry out **unlimited dummy testing** (non-live transactions) on an alternative system in order to evaluate its suitability. Such dummy testing could include integration, resilience and user acceptance testing of all types of transactions so long as they are not actually fulfilled.
 - (b) Prior to deciding whether to switch, the CMA provisionally considers, on the basis of available information, that some demand-side customers will require the additional reassurance of confirming the performance of the live system. The live testing provisions of the modified commitments are aimed at providing this reassurance, enabling customers to fully validate the usability of an alternative system by undertaking sufficient transactions through that system.
 - (c) Once a demand-side customer has decided to fully switch, and has given notice to Epyx to this effect, it will be permitted to continue to use the SN platform for a period of time after the termination would normally have taken effect (the transitional period – discussed in paragraphs 6.12 to 6.15) for the purpose of facilitating a successful transition to the alternative system. During this transitional period **there is no restriction on any form of multi-homing** (including no MAF). This means that there is no restriction on any form of live processing on the alternative system during the transitional period.
- 7.17 Within this switching cycle, the CMA therefore expects the live testing provisions in the modified commitments to bridge the gap between dummy testing in the run-up to a switching decision, and live use of the alternative system when transitioning to it. Live testing provides customers with the

²¹ Or for a new contract, 12% of the total number of transactions which would be required to be processed on the SN platform in the first operating year of their contract in order to meet any MAF. The second and subsequent years of the new contract will be subject to the 10% live testing cap described above.

option of additional reassurance, if required, before taking the decision to switch.

- 7.18 The live testing provision is thus primarily intended to allow sufficient comfort in the alternative system's capabilities for the demand-side customer to decide whether to switch, rather than to resolve all pre-launch issues, as this more intensive level of live work or larger scale pilot may be completed within the 12 month transitional period. The CMA therefore anticipates that live testing/live system validation should be at a limited level, not least because businesses have indicated that there is a significant degree of business disruption involved in running two systems on a live basis. The CMA does not therefore expect that a business would usually transfer significant live transactions to an alternative system (knowing that – unless relating to one of the exclusions – it was generally bound by exclusivity and could not follow through with permanent use) until it was serious about switching and could therefore give notice to Epyx.
- 7.19 The CMA provisionally considers that an average demand-side customer should be able to evaluate the feasibility of switching if it had completed an appropriate testing programme (including observing a reasonable amount of live transactions alongside dummy testing).
- 7.20 However, the CMA acknowledges that multiple respondents indicated that the 5% annual live testing cap is too low. The CMA notes that a number of responses called for the cap to be lifted entirely as this would maximise flexibility. The CMA provisionally considers this unworkable: it provides very limited clarity on what is permissible under a contract which (albeit with exclusions) is fundamentally intended to be of an exclusive nature.
- 7.21 The CMA also provisionally considers that any use of an alternative system beyond a certain level for a significant period of time (which an uncapped live testing provision would effectively permit) starts to be incompatible with the concept of **testing for evaluation purposes**²² as intended by the initial commitments and starts to encroach upon the concept of a **transitional period** in anticipation of a firm commitment or intention to switch, which is intended to be dealt with by separate provisions relating to the transitional period.
- 7.22 The CMA provisionally considers that 10% of annual volumes is a sufficient amount of transactions to evaluate the feasibility of switching. Demand-side customers have flexibility in terms of how they choose to distribute the test volume during this annual period: for instance the actual proportion of

²² Which as set out in paragraph 7.34 of the March notice (OFT1528, footnote 3 above) the CMA considers a transient or semi-permanent activity involving limited volumes.

transactions tested could, over a shorter period, be significantly higher than 10%. For example, assuming that transactions occur evenly through the year:

- 10% of annual volumes tested over a six-month period is equivalent to 20% of volumes during a six-month test period
- 40% of volumes during a three-month test period
- the demand-side customer could switch completely to the alternative system for a month's live trial, with 1.7% of the prior operating year's transaction volumes still available for live testing at other points during that year.

7.23 The CMA provisionally considers that this allows for considerable flexibility in the switching process: shorter-term high volume testing (for live stress testing); longer-term lower volume testing (where greater familiarity over time is desired, or a longer period of time is required to capture a broad range of transaction types - some of which may rarely occur on a live basis - or where different iterations of development are being tested over time); and a sufficient total live volume processed to validate performance. The CMA provisionally considers that this flexibility should also allow for a reasonable degree of live testing prior to the use of any exclusions from exclusivity (where the demand-side customer does not switch away from Epyx entirely).

7.24 In provisionally considering that the proposed modifications address its competition concerns, the CMA notes a response suggesting a cap of 20%, which, as set out above in paragraph 7.22 is readily feasible for shorter periods, under the modified commitments.

7.25 The CMA notes that one respondent expressed a concern that it was not clear in practice how Epyx would set or enforce any MAF in a way that does not inhibit live testing. The CMA recognises that it is not possible or feasible to comprehensively predetermine all implementation details, however expects that Epyx will conduct itself in a manner that is consistent with the principle that demand-side customers are permitted to live test. Accordingly, the CMA would expect that Epyx does not act in a manner that deters or prevents demand-side customers from live testing (for example by seeking or threatening to seek a shortfall fee where a MAF is not met because of live testing within the annual live testing cap).

Transitional period

7.26 Demand-side customers will be required to give notice to terminate their contract with Epyx prior to switching. Once demand-side customers have

decided to switch, they have the opportunity to do so in a now-extended period of 12 months (as set out in paragraphs 6.12 to 6.15). Demand-side customers will receive (i) routine support from Epyx while they continue to use the SN platform for the 12 month transitional period and (ii) transitional support from the time notice to terminate is given until the middle of the 12 month transitional period (ie six months post termination of contract).

- 7.27 The CMA notes concerns raised by respondents (as set out in paragraphs 5.11 to 5.12) that the six month transitional period in the initial commitments may not have been sufficient to successfully switch to an alternative system. The CMA also notes that a transitional exercise of this nature has not occurred on any significant scale for an SMR platform in the UK. In this context, the CMA considers it reasonable and important that sufficient flexibility is allowed for and is of the provisional view that the proposed modifications to the transitional period provide this.
- 7.28 The CMA notes representations suggesting that a 12 to 18 month transitional period is necessary, and provisionally considers that 12 months is sufficient to facilitate transition because:
- (a) The modified commitments prevent Epyx from entering into new contracts with demand-side customers with a minimum period beyond one year; and either Epyx or the demand-side customer is entitled to terminate the contract at one-year intervals thereafter. As such it would be disproportionate to require Epyx to continue to supply the SN platform beyond 12 months post termination.
 - (b) The CMA would expect that where a demand-side customer intends to switch away fully from the SN platform, it would aim to do this as expeditiously as possible. A 12 month transition should allow for switching, particularly given that significant evaluation and testing (including live testing) could have occurred prior to the transitional period.
 - (c) The most likely tranche-by-tranche transition identified to the CMA related to marque-by-marque transfer allowing a staged, manageable transition by demand-side customers on a marque-by-marque basis. This is now separately allowed for by the proposed modifications offered by the parties (refer to paragraph 6.6).

Transitional support remains unchanged and has not been extended

- 7.29 The duration of the **transitional** support to be provided in the transitional period is unchanged and will be provided for a maximum of nine months (the

three-month notice period and the first six months of any transitional period, but not the additional six months of the modified transitional period).

- 7.30 The CMA provisionally considers that nine months is already a significant post-contractual obligation and that customers should be able to plan adequately within this timeframe.
- (a) Epyx has submitted to the CMA that it expects the majority of transitional support requirements to occur at the outset of transitioning to another platform, so that the impact of a shorter obligation in this regard should be limited.
- (b) It should also be noted that Epyx will continue to provide **routine technical** support for standard SN platform use for the full length of any transitional period even if the maximum 12 months is applied. Only exceptional support relating to transition requirements (described above as transitional support) will not continue through the final six months of the now-extended transitional period.
- 7.31 The CMA notes that the proposed modifications change the description of technical support from 'day-to-day' to 'routine'. The purpose of this change is to clarify that technical support will not necessarily be on a daily basis, but provided where the demand-side customer requires it for continued use of the SN platform, for example, the relevant platform upgrades and other improvements made available to other subscribers. The CMA provisionally considers that this modification does not affect the extent to which the commitments address its competition concerns.

Clarifications

Fleet managers

- 7.32 The CMA recognises the special circumstances of fleet managers, in that they are answerable to numerous customers whose individual SMR needs in deciding the best platform may vary. The CMA is of the view that customers should not be denied the benefits of the exclusions afforded to others just because they operate through an intermediary.
- 7.33 The CMA notes that the proposed modifications clarify that fleet managers are covered by the modified commitments (for more detail, see paragraphs 6.16 to 6.17).

Manufacturers

- 7.34 The CMA notes that a respondent sought clarification of the applicability of the initial commitments to vehicle manufacturers and suggested that they should apply to manufacturers, including where they are non-transactional customers of the SN platform.
- 7.35 The CMA considers that manufacturers are capable of exerting an important influence on supply-side dynamics and may therefore be important sponsors for new entrants. The CMA was therefore concerned that a respondent was unclear whether manufacturers were covered by the initial commitments. Accordingly, the CMA requested, and the parties agreed to offer, clarification within the modified commitments that they apply to manufacturers.
- 7.36 The CMA provisionally considers that the proposed modifications (refer to paragraphs 6.18 to 6.20) satisfactorily address this point and reflect the CMA's expectation of the operation of the modified commitments.

Conclusion

- 7.37 The CMA provisionally considers that the modified commitments will sufficiently lower the artificial barriers to entry caused by the relevant provisions to a level that an as-efficient competitor is not likely to be foreclosed from entering the market. In particular:
- (a) While the modified commitments do not allow for unrestricted multi-homing, they enable the forms of multi-homing which are most likely to facilitate entry and thus improve competitive conditions on the market.
 - (b) The modified commitments further diminish the barriers to switching for demand-side customers by offering significantly increased live testing capability and significantly longer transitional periods.
 - (c) The proposed modifications clarify how manufacturers (who like other customer groups may be able to sponsor entry to the market) and fleet managers are covered by the modified commitments.
- 7.38 Accordingly, in light of the considerations set out above, based on an assessment of the evidence available to it, the CMA provisionally considers that the modified commitments address its competition concerns. The CMA is provisionally satisfied that the modified commitments are sufficient and appropriate to address its competition concerns in the context of the market and as such is provisionally minded to accept the modified commitments.

8. The CMA's intentions and invitation to comment

The CMA's intentions

- 8.1 In light of the above, the CMA provisionally considers that the modified commitments offered by the parties as set out in Annex A are sufficient to address its competition concerns in this case. Therefore, the CMA proposes to accept the modified commitments by means of a formal commitments decision.
- 8.2 As required by paragraph 3 of Schedule 6A of the Act, the CMA now invites interested third parties to make representations on the modified commitments. The CMA will take representations into account before making a final decision on whether to accept the modified commitments.
- 8.3 The CMA is particularly interested to hear from existing and potential customers of the SN platform, Epyx's competitors, and trade bodies. As noted above, the CMA has not reached a final view and invites all interested parties to submit observations and evidence in order to assist the CMA in its final assessment of the modified commitments offered by the parties.
- 8.4 The CMA will also inform the European Commission, no later than 30 days before the adoption of any decision accepting commitments, to enable it to submit any comments on the CMA's provisional decision.²³

Invitation to comment

- 8.5 Any person wishing to comment on the modified commitments should submit written representations to the CMA, at the postal or email address given below, by 5pm on 18 June 2014. Please quote the case reference CE/9496-11 in all correspondence related to this matter.

SMR Platforms Team
Competition and Markets Authority
Victoria House
37 Southampton Row
London WC1B 4AD

Email: smrplatforms@cma.gsi.gov.uk

²³ 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 and 82 of the Treaty (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.

Confidentiality

- 8.6 The CMA 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.
- 8.7 In the event that the modified commitments are not accepted and the CMA 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 CMA will then consider those representations before deciding whether the information should be disclosed under Part 9 of the Enterprise Act 2002.