

## Summary of responses to the consultations

### Introduction

1. This annex summarises the key issues raised by respondents to the first and second consultations, together with the CMA's response. This annex is not intended to be a comprehensive record of all views expressed by respondents.
2. The issues raised during the first and second consultations broadly fell within the following eight categories:
  - A. retention of exclusivity and exclusions
  - B. live testing
  - C. transitional period and support
  - D. duration of customers' contracts
  - E. fleet managers, manufacturers and implementation
  - F. duration of the commitments
  - G. market structure
  - H. concerns not related to the initial commitments
3. These issues are summarised below.

### ***First consultation***

4. The parties offered initial commitments in relation to which the OFT issued, on 10 March 2014, the March notice<sup>1</sup> and invited interested third parties to make representations to the first consultation.
5. Twenty-five responses were submitted in response to the first consultation on the initial commitments. These responses were received from a wide range of respondents in the automotive sector such as: leasing and fleet management

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<sup>1</sup> *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.

companies, fleet managers, consultancy companies, garage and vehicle repair shops, fast-fitters, vehicle manufacturers, dealers, trade associations and other companies providing IT services to the sector. The CMA followed up with a number of these respondents where clarification was required in relation to certain issues raised.

### ***Second consultation***

6. Following the first consultation, the parties proposed modified commitments that amended certain aspects of the initial commitments in light of the consultation responses.
7. On 5 June 2014, the CMA issued the June notice<sup>2</sup> and invited interested third parties to make representations to the second consultation.
8. The CMA received six responses to the second consultation. All of the respondents had previously made submissions during the first consultation and the majority represented demand-side views.<sup>3</sup> As with the first consultation, the CMA followed up with a number of respondents where clarification was required in relation to certain issues raised.
9. Each of the key issues raised during the second consultation fell within the categories of concerns identified during the first consultation and no further material issues were raised in relation to the other aspects of the modified commitments.

### **A. Retention of exclusivity and exclusions**

#### ***First consultation responses***

10. Multiple respondents disagreed with the preliminary view in the March notice that the majority of demand-side customers would prefer to use a single platform only, submitting instead that multi-homing (that is, using two or more SMR platforms in parallel) was 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

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<sup>2</sup> [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](#), 5 June 2014.

<sup>3</sup> No responses were received from supply-side customers during the second consultation, although this is consistent with the fact that the majority of the respondents on the supply side expressed supportive views during the first consultation.

making the decision on whether to switch to an alternative system on a permanent single-homing basis (for example, to reduce switching risk).

11. Whilst respondents generally welcomed the exclusions from exclusivity,<sup>4</sup> it was suggested that they did not go far enough and demand-side customers wanted flexibility to multi-home in other ways. Some respondents expressed a preference for exclusivity to be removed in its entirety and highlighted other areas in which demand-side customers may want to multi-home, including for fleet managers on behalf of their different clients, by marque (manufacturer brands), by type of transaction, by supplier group, and/or with in-house systems, manual processing and supplier systems.

### ***Modified commitments***

12. The modified commitments broadened the scope of the exclusions to exclusivity 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.
13. Further, the modified commitments clarified that demand-side customers must notify Epyx in advance of using any of the following permitted exclusions to exclusivity, ie in advance of processing any transactions in the following categories of transactions outside of the SN platform: transactions where the demand-side customer and supply-side customers are part of the same corporate group; transactions in respect of particular vehicle marque(s) identified to Epyx; and any other types of transactions agreed with Epyx.

### ***Second consultation responses***

14. The majority of the respondents to the second consultation remained primarily concerned that the modified commitments did not go far enough and should remove exclusivity in its entirety. Whilst noting the exclusions to exclusivity, including the additional marque-by-marque exclusion in the modified commitments, it was suggested that this would not be sufficient to facilitate entry by potential competitors. As during the first consultation, the respondents highlighted other areas in which demand-side customers may prefer to multi-home.

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<sup>4</sup> In the initial commitments the exclusions were for transactions relating to tyres and glass, intra-group and any other types of transactions where it is agreed with Epyx.

15. One respondent queried whether the exclusions could be applied on a partial basis, ie whether customers could transfer to an alternative system only some but not all of the transactions within the scope of each exclusion.
16. Another respondent disagreed with the requirement to notify Epyx in advance of using certain permitted exclusions to exclusivity. This respondent observed that the notification requirement was not present in the initial commitments and served no purpose other than to provide Epyx with intelligence about its customers' use of alternative systems. The respondent queried the rationale for requiring customers to give advance notice to Epyx.

### ***Final commitments***

17. Epyx has clarified that the exclusions may be applied in part or in full – ie a demand-side customer may elect to process either some or all of the transactions in each category of exclusions outside the SN platform. Accordingly, clarifications have been added to paragraphs 9 to 11 of the final commitments to confirm that exclusions may be applied on a partial basis should customers so choose.
18. The requirement for demand-side customers to notify Epyx in advance of using certain permitted exclusions to exclusivity (as described in paragraph 13 of this annex) has been removed from paragraph 11 of the final commitments.<sup>5</sup>

### ***The CMA's response***

19. The CMA's consideration of representations relating to exclusivity and the exclusions is set out in Chapter 4 of the decision.

## **B. Live testing**

### ***First consultation responses***

20. Multiple respondents to the first consultation 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 in the initial commitments (5% of the prior year's transaction volumes, or 6% of the volumes implied by any minimum annual fee when in the first year of a contract) was unduly restrictive and not sufficient to facilitate demand-side customers conducting a proper evaluation of an alternative system through a thorough and meaningful

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<sup>5</sup> It should be noted that the exclusion relating to any other types of transactions, which requires agreement with Epyx (paragraph 11(c) of the final commitments set out in Annex A), remains unchanged.

programme of testing, before making a decision on whether to switch to the alternative system on a single- or multi-homing basis.

21. One respondent expressed a concern that it was not clear in practice how Epyx would set or enforce any minimum annual fee in a way that did not inhibit live testing.

### ***Modified commitments***

22. The modified commitments increased the annual live testing cap from 5% to 10% of prior year volumes (from 6% to 12% of the volumes implied by any minimum annual fee in the first year of a contract). All other aspects of the commitments relating to live testing remained unchanged.

### ***Second consultation responses***

23. Multiple respondents to the second consultation welcomed the amendments relating to the annual live testing cap.

### ***Final commitments***

24. All aspects of the live testing provisions in the final commitments, including the annual live testing cap, remain unchanged from the modified commitments.

### ***The CMA's response***

25. The CMA considers that 10% of annual volumes (as approximated within the final commitments by reference to prior year volumes or the minimum annual fee depending on the stage of a customer's contract) is a sufficient amount of transactions to assess the feasibility of switching to an alternative system, when taken in conjunction with the wider programme of evaluation permitted under the final commitments, which includes unrestricted 'dummy' (that is, non-live) testing.
26. Demand-side customers will have flexibility in terms of how they choose to distribute the live test volume during an annual period: for instance, the actual proportion of transactions tested could, over a period shorter than 12 months, be significantly higher than 10%.
27. The CMA 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 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).

28. The CMA also notes that customers may carry out live testing subject to the annual cap through each year of the five-year commitments period.
29. On the practical point raised by one respondent to the first consultation (see paragraph 21), the CMA recognises that it is not possible comprehensively to predetermine all implementation details. However, it 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 expects that Epyx will not act in a manner that deters or prevents demand-side customers from live testing by seeking or threatening to seek payment of a minimum annual fee where the minimum annual fee is not met because of live testing within the annual live testing cap.<sup>6</sup>

## **C. Transitional period and support**

### ***First consultation responses***

30. 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 migrate different tranches of transactions in sequence 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 and suggested that a 12- to 18-month transitional period was necessary.
31. One respondent stated that it was unclear whether 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

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<sup>6</sup> Paragraph 5 of the final commitments in Annex A states that:  
Customers will not be required to notify Epyx of the occurrence of live testing or of the volume of transactions processed via live testing. Any Minimum Annual Fee will be set at a level intended not to inhibit live testing of the maximum permitted volume of transactions, and where a Minimum Annual Fee is already set in any Existing contract, it will not be enforced in such a way so as to inhibit live testing of the maximum permitted volume of transactions.

duration of the commitments. Further, this respondent expressed scepticism regarding the need or justification for the use of a default list price.

### ***Modified commitments***

32. The modified commitments increased the duration of the transitional period from a maximum of 6 to a maximum of 12 months.
33. All other aspects of the commitments relating to the transitional period remained unchanged, except that Epyx revised the description of technical support from 'day to day' to 'routine' (routine technical support). The purpose of this change was to clarify that the routine technical support would not necessarily be on a daily basis, but would be provided where the demand-side customer required it for continued use of the SN platform, for example the relevant platform upgrades and other improvements made available to other subscribers.

### ***Second consultation responses***

34. Multiple respondents to the second consultation welcomed the amendments relating to the transitional period.

### ***Final commitments***

35. All aspects of the transitional period and support in the final commitments remain unchanged from the modified commitments.

### ***The CMA's response***

36. The CMA considers that a transitional period of up to 12 months is proportionate and appropriate as:
  - (a) The final commitments prevent Epyx from entering into new contracts with existing demand-side customers for a minimum period that extends beyond 12 months;<sup>7</sup> and either Epyx or the demand-side customer is entitled to terminate the contract at one-year intervals thereafter. The transitional period is for up to 12 months as it would be disproportionate to require Epyx to continue to supply the SN platform beyond 12 months post-termination.
  - (b) The CMA expects that where a demand-side customer intends to switch away fully from the SN platform, it will aim to do this as expeditiously as

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<sup>7</sup> Excluding new contracts entered into with future customers.

possible. A transitional period of up to 12 months should allow for switching, particularly given that significant evaluation and testing (including live testing) can occur prior to the transitional period.

- (c) Exclusions to exclusivity (such as the additional marque-by-marque exclusion), while intended to cater for permanent multi-homing, can also be used effectively to extend transition beyond 12 months. For example, a customer can start its transition using one of these exclusions and give notice of termination to Epyx when it is confident that it will be able to complete the remaining transition within 12 months.
37. In relation to the concerns expressed about support in the transitional period (see paragraph 31), the CMA notes the duration of the *transitional support*<sup>8</sup> to be provided is for a maximum of nine months. This nine-month period consists of the three-month notice period and up to the first six months of the transitional period.
38. The CMA considers that this is a significant post-contractual obligation and that customers should be able to plan adequately within this time frame:
- (a) Epyx submitted to the CMA that it expected 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) Epyx will continue to provide *routine technical support*<sup>9</sup> for standard SN platform use for the full length of the transitional period (ie up to 12 months). Epyx is not obliged to provide transitional support (as described in paragraph 37) after the first six months of the transitional period.
39. Finally, the CMA notes that 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. The CMA considers that a default price list is an acceptable mechanism for use post-termination of a commercial arrangement by a customer. Further, should Epyx and the demand-side customer wish, they may negotiate their own transaction rates

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<sup>8</sup> Transitional support is support as is reasonably necessary to facilitate the transfer of the customer to any alternative system. Such support will include, at no charge, the provision of customer information to the customer or, at the customer's request, to the supplier 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). See paragraph 13(c) of the final commitments contained in Annex A.

<sup>9</sup> Routine technical support includes the relevant platform upgrades and other improvements made available to other subscribers where required for continued use of the SN platform. See paragraph 13(b) of the final commitments contained in Annex A.

for the final nine months of the transitional period (if needed) and in that case will not be subject to the annual price list.

## **D. Duration of customers' contracts**

### ***First consultation responses***

40. Multiple respondents generally welcomed the reduction of the minimum period to a maximum of 12 months for new contracts with existing demand-side customers. There were, however, concerns expressed by some respondents to the consultation that:

- The reduction was unnecessary if the exclusivity provisions were removed from demand-side contracts in their entirety.
- The continued existence of longer-term demand-side contracts (that is, existing contracts, for which the minimum period remained unchanged) would mean that certain customers were withheld from competition which therefore constrained the emergence of alternative systems. It was therefore suggested by one respondent that these existing demand-side contracts should be shortened to a maximum of 18 months, where the current minimum period expired at a date after 31 December 2014.<sup>10</sup>
- Shorter minimum periods might increase opportunities for Epyx to raise prices more frequently, particularly if there was no competitive pressure being exerted on Epyx at the time of contract renewals. It was suggested by one respondent that the CMA should require mandatory reporting from Epyx in relation to pricing at the time of contract renewals.
- Some respondents acknowledged the need for notice of termination to be served during the minimum period or subsequent anniversary, but suggested that the terms around the service of the notice were onerous and unjustified (for example, notice that was served one day short of three months before the end of the minimum period or subsequent anniversary could result in the notice not taking effect until the end of the following contract year).

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<sup>10</sup> It was also noted that some supply-side customers are also bound to longer-term contracts and, in line with the initial commitments offered on the demand side, should be similarly protected against unduly long minimum periods or afforded a break clause.

### ***Modified commitments***

41. In light of the CMA's preliminary view that the shortened duration provisions in demand-side contracts were proportionate and appropriate (see below), no amendments to the provisions were proposed in the modified commitments.

### ***Second consultation responses***

42. No submissions on the contract duration provisions were made during the second consultation.

### ***Final commitments***

43. Accordingly, all aspects of the provisions in the final commitments relating to the duration of demand-side customers' contracts remain unchanged from the initial and modified commitments.

### ***The CMA's response***

44. The CMA considers that the shortened duration provisions in demand-side contracts are proportionate and appropriate as they will increase the frequency of future opportunities for customers to switch and for new entrants to compete for their business. The shortened durations will allow new entrants access to approximately 80% of the SMR transaction volumes that are currently processed on the SN platform, within one year of the final commitments taking effect.<sup>11</sup>
45. The CMA does not consider it proportionate or appropriate, as suggested by one respondent, to review or monitor individual contractual negotiations relating to price and other similar commercial factors.
46. Further, the CMA does not consider the notice provisions under the commitments to be unduly restrictive. The CMA notes that transitioning to an alternative system is likely to require many months of detailed planning and various stages of evaluation and development. The CMA therefore considers that demand-side customers should be able to operate within the notice provisions allowed for by the commitments and also notes that customers and Epyx are free to negotiate shorter notice provisions.

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<sup>11</sup> This is based on updated information provided by Epyx to the CMA in August 2014, which notes that to the extent that Epyx has entered into new contracts with its existing customers since the March notice, such contracts have used one-year minimum periods and one-year rollovers for consistency with the anticipated commitments. Furthermore, the updated data shows that all of Epyx's existing demand-side customers would have at least one opportunity to switch to an alternative system by November 2016 (and would have further opportunities to switch every year after their first opportunity to do so).

## **E. Fleet managers, manufacturers and implementation**

### ***First consultation responses***

47. 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 on how the initial commitments generally affected demand-side customers' existing contractual arrangements with Epyx.

### ***Modified commitments***

#### *Fleet managers*

48. The modified commitments clarified that fleet managers<sup>12</sup> can negotiate any of the specific exclusions for their fleet customers on a customer-by-customer basis, subject to having separate contractual arrangements with Epyx for each customer.

#### *Manufacturers*

49. Further, Epyx 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; and
  - (c) in a non-trading capacity, where the manufacturer has a contractual relationship for other services related to the SN platform such as reports.
50. 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 would apply. The definition of 'customer' was amended in the modified commitments to further clarify this.

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<sup>12</sup> Fleet manager means an organisation which, in relation to the use of the SN platform, acts on behalf of other independent entities.

### *Implementation*

51. Epyx proposed modifications clarifying that the modified commitments did not impact on demand-side customers' contractual rights. Specifically, footnote 1 of the initial commitments was modified to clarify that demand-side customers would not be under any obligation to accept variations proposed by Epyx in accordance with the modified commitments.

### **Second consultation responses**

52. No further submissions were received on these issues during the second consultation.

### **Final commitments**

53. Accordingly, all aspects of the provisions in the final commitments relating to fleet managers, manufacturers and implementation remain unchanged from the modified commitments.

### **The CMA's response**

#### *Fleet managers*

54. The CMA recognises the special circumstances of fleet managers, in that they are answerable to numerous clients whose individual SMR needs in deciding the best platform may vary. The CMA considers that customers should not be denied the benefits of the exclusions afforded to others just because they operate through an intermediary.
55. The CMA considers that the final commitments clarify that the clients of fleet managers may also benefit from the permitted exclusions and reflect the CMA's expectation of the operation of the final commitments.

#### *Manufacturers*

56. As manufacturers are capable of exerting an important influence on supply-side dynamics and may therefore be important sponsors for new entrants, the CMA considers it important that the final commitments apply to them.
57. The CMA considers that the final commitments clarify that they apply to manufacturers and reflect the CMA's expectation of the operation of the final commitments.

## *Implementation*

58. The final commitments require Epyx to amend its current contracts with its demand- and supply-side customers by writing to its customers within 14 days of the date of publication of this decision. Epyx is also required to ensure that all new contracts and supply-side contracts are entered into on terms that are compliant with the final commitments.
59. The CMA recognises that not all of the existing contracts with Epyx's demand-side customers include the relevant provisions which are the subject of the CMA's competition concerns. Accordingly, demand-side customers are not under any obligation to accept the contractual variations offered as a result of the final commitments. If demand-side customers whose contracts include the relevant provisions do not formally accept such variations, Epyx is still obliged to conduct its business with those customers as though they had accepted the variation and in accordance with the principles of the final commitments, to the maximum extent compatible with each 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 final commitments.
60. The CMA considers that the final commitments clarify the position described above and reflect the CMA's expectation of the operation of the final commitments.

## **F. Duration of the commitments**

### ***First consultation responses***

61. Multiple respondents expressed the view that the five-year duration of the initial commitments was not sufficient and should be extended. These respondents were generally of the view that the initial commitments were too short for a competitor to establish itself in the market and for the development of a competitive market to be achieved.
62. Key reasons given for these views were that the length of the initial commitments would dissuade potential new entrants from making the necessary investment and that an adequate number of customers were unlikely to switch in this time frame because of contractual constraints and the preference to switch in tranches in a staggered manner over a significant period of time.
63. The responses proposed alternative duration periods ranging from ten years to indefinite continuation subject to periodic review (for example, every five years) by the CMA or the achievement of a specified competition metric (for

example, successful market entry by a competitor or a reduction of Epyx's market share to a level where it was no longer dominant).

### ***Modified commitments***

64. In light of the CMA's preliminary view that the five-year duration was proportionate and appropriate (see below), the duration of the initial commitments remained unchanged in the modified commitments.

### ***Second consultation responses***

65. Two respondents to the second consultation reiterated their view that a five-year duration for the commitments was insufficient for a potential competitor to establish itself in the market.

### ***Final commitments***

66. The duration of the final commitments remains unchanged from the initial and modified commitments.

### ***The CMA's response***

67. The CMA considers that the five-year duration of the final commitments is proportionate and appropriate in the context of this market. In particular, it considers that five years is a significant period of time in the context of an innovative technology market such as in the present case and will be sufficient for a credible competitor to establish a presence in this market, particularly given the widened scope of the final commitments. An indefinite period of commitments is not therefore proportionate.<sup>13</sup>
68. The CMA notes that it is able to open a new investigation should it have reasonable grounds to suspect that the parties are abusing a dominant position after the final commitments have expired.

## **G. Market structure**

### ***First consultation responses***

69. Concerns were raised in the first consultation that the natural structure of the existing market (even absent any potentially abusive conduct) did not readily allow for entry. One respondent stated that although it was comfortable that

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<sup>13</sup> See also paragraph 4.8 of [Enforcement \(OFT407\)](#), December 2004: 'Binding commitments will generally be adopted for a specified period of time.' This guidance was originally published by the OFT and has been adopted by the CMA.

certain contractual restrictions would be relaxed by the initial commitments, it considered that the likelihood of development and acceptance of a new alternative system in the market was limited, if not impossible.

70. Another respondent submitted that given the nature of the market, the only model that could deliver true competition would be regulatory intervention in a similar manner as the electricity, gas and telephony markets. In this respect, it was considered that a new entrant should be allowed to use the technology and infrastructure that Epyx had established between itself and the demand and supply sides of the market.

### ***Modified commitments***

71. In light of the CMA's preliminary view (see below), there were no amendments to the initial commitments in the modified commitments in respect of the representations expressed on market structure as outlined above.

### ***Second consultation responses***

72. One respondent to the second consultation reiterated its views regarding regulatory intervention (see paragraph 70).

### ***Final commitments***

73. The final commitments remain unchanged from the initial and modified commitments.

### ***The CMA's response***

74. The CMA considers that regulatory intervention in the market of the type suggested is not a remedy available to the CMA in relation to this investigation. Access to Epyx's infrastructure is not considered necessary in order to address the CMA's competition concerns.

## **H. Concerns not related to the initial commitments**

### ***First consultation responses***

75. Multiple respondents made representations that suggested Epyx may be engaging in unfair and exploitative practices in its dealings with customers. These representations broadly ranged from dissatisfaction expressed on quality of service and functionality, transparency of contractual terms and level of prices and fee structure designed to tie in demand-side customers and/or favour demand-side customers over supply-side customers. These

respondents broadly submitted that Epyx was using a dominant position in the market to exploit customers and distort competition to its own commercial advantage.

### ***Modified commitments***

76. In light of the CMA's preliminary view (see below), there were no amendments in the modified commitments in respect of these representations.

### ***Second consultation responses***

77. No further issues in this regard were raised during the second consultation.

### ***Final commitments***

78. The final commitments remain unchanged from the initial and modified commitments.

### ***The CMA's response***

79. Whilst representations regarding allegedly exploitative behaviour are noted, the CMA is of the view that these allegations do not directly relate to the final commitments offered by the parties which were the subject of the consultations. Moreover, the allegations do not relate to matters within the current scope of the investigation. Accordingly, the CMA has not tested the veracity of these allegations in this commitments process.