Completed acquisition by Open Text Corporation of GXS Group Inc

ME/6392-14

The CMA's decision on reference under section 22(1) given on 26 August 2014. Full text of the decision published on 16 September 2014.

Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

Summary

1. Open Text Corporation (OpenText) is a global provider of a suite of software products that assist organisations in finding, utilising, and sharing business information. OpenText is active in the supply of cloud-based electronic messaging and business integration services through its subsidiary Easylink. GXS Group Inc (GXS) is a global provider of business-to-business (B2B) e-commerce services and software solutions. On 16 January 2014 OpenText acquired 100% of the shares of GXS (the Merger). OpenText and GXS are together referred to as 'the Parties'.

2. For the reasons set out in more detail below, the Competition and Markets Authority (CMA) considers that a relevant merger situation has been created.

3. The Parties overlap in the provision of Electronic Data Interchange (EDI) messaging services, which involves the electronic exchange between trading partners of business documents such as purchase orders in a standardised format. The CMA analysed the horizontal effects of the Merger in the provision of EDI VAN infrastructure to non-integrated suppliers (i.e. those without EDI VAN infrastructure) of EDI messaging services (resellers); horizontal effects in the provision of EDI messaging services to end-customers; foreclosure effects relating to access to EDI VAN infrastructure for resellers; foreclosure of standalone EDI software providers; and around interconnection between different EDI VAN infrastructure providers.

4. With respect to horizontal effects in the UK, the CMA found that the Parties were not close competitors and the incremental gain in market share as a result of the Merger is small. Further, the CMA received few customer concerns related to the effects of the Merger.

5. With respect to any potential foreclosure of: (i) resellers active in the UK from access to EDI VAN infrastructure; or (ii) standalone EDI software providers active in the UK, the CMA found that the Merger has not materially changed the incentives of the merged entity.

6. With respect to any potential foreclosure of other EDI VAN infrastructure providers, the CMA found that the merged entity has no material incentive to terminate its existing interconnection agreements with other EDI VAN infrastructure providers active in the UK.

7. Therefore, and on the basis of the evidence available overall, the CMA does not consider that the Merger has resulted, or may be expected to result, in a substantial lessening of competition.

8. This Merger will therefore **not be referred** under section 22(1) of the Enterprise Act 2002 (the Act).

Parties

9. OpenText is a publicly listed company in Canada active in providing a suite of software products that assist organisations in finding, utilising, and sharing business information. OpenText is active in the supply of cloud-based electronic messaging and business integration services through its subsidiary Easylink.

10. GXS is a global provider of business-to-business (B2B) e-commerce services and software solutions, which enable business documents, such as purchase orders, delivery information and invoices, to be processed and exchanged electronically between parties.

11. GXS's UK turnover for the year ended 2013 was [✂].

Transaction

12. OpenText, through a wholly owned US subsidiary, Ocelot Merger Sub, Inc., acquired 100% of the shares in GXS. Following the Merger GXS continues to operate as a wholly owned subsidiary of OpenText. The Merger completed on 16 January 2014 and was made public by way of a press release on the same day. The CMA was not notified of the Merger and initiated a formal investigation on its own initiative through its mergers intelligence functions.

Jurisdiction

13. As a result of the Merger, the enterprises of OpenText and GXS have ceased to be distinct. The Parties overlap in the supply of EDI messaging services in

the UK, and estimate that their combined share of supply, based on 2012 revenue in the UK, is between [20%–30%] with an increment of [0%–10%].[1] The CMA therefore considers that the share of supply test in section 23 of the Act is met in this case.

14. The statutory four-month period, as extended under section 25(2) of the Act, within which the CMA may make a reference under section 24 of the Act expires on 26 September 2014.

15. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created.

16. The deadline for the CMA's decision under section 34ZA(1) of the Act is 26 August 2014.

Product frame of reference

Background

17. The Parties are active in the supply of enterprise information management (EIM) and other business-to-business services. They overlap in the supply of EDI messaging services and (to a limited extent) in fax management solutions. EDI messaging services are the computer-to-computer exchange of business documents, such as purchase orders, invoices or shipping information, in a standard electronic format between trading partners. EDI messaging services were previously considered by the Competition Commission (CC) in *Francisco Partners/G International* (2005) and by the Office of Fair Trading (OFT) in *GXS/Inovis* (2010) and *Francisco Partners/Kewill* (2013).[2]

18. The provision of EDI messaging services requires EDI infrastructure and EDI software. EDI providers frequently also assist businesses in operating their EDI systems.

19. GXS and OpenText own proprietary EDI infrastructure, also referred to as a value-added network or VAN, which they use for their own EDI messaging services. There are several VAN providers and whenever a VAN has an interconnection agreement with another VAN, EDI messages can be sent from mailboxes belonging to one VAN provider to mailboxes belonging to the other VAN provider.

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[1] The Parties submitted that they did not have full visibility over the size of the market and therefore gave ranges.
[2] *Acquisition by Francisco Partners LP of G International, Inc*, CC report of September 2005 (*Francisco Partners/G International)*, and OFT decision: *Completed acquisition by GXS of Inovis (2010)* (GXS/Inovis) and OFT decision: *Completed Acquisition by Francisco Partners of Kewill plc (2013) (Francisco Partners/Kewill).*

20. Both Parties also offer newer, internet-based connection options for exchanging EDI messages, such as web EDI (where messages are exchanged via a website) and point-to-point internet EDI (where messages are exchanged directly between trading partners using, for example, the AS2 protocol).

21. End-customers requiring both EDI infrastructure access and EDI software can source these in a number of alternative ways. Similarly, suppliers are active in, and focus on, providing different aspects of this overall service.

22. Most suppliers of services involving EDI offer EDI software. In some cases they will offer this on a standalone basis without including access to EDI infrastructure. In such instances, end-customers contract separately with an EDI infrastructure provider and put together the full EDI package themselves. Some EDI software providers focus on providing EDI software on a standalone basis. The CMA refers to providers with this focus as ‘standalone EDI software providers’.

23. Some EDI software providers operate their own EDI infrastructure, combining it with EDI software to offer the full EDI package themselves. These types of suppliers are referred to as ‘integrated suppliers’. Both OpenText and GXS are integrated suppliers offering the full EDI package themselves.

24. Where suppliers do not have EDI infrastructure themselves (or where their own EDI infrastructure is limited), they may provide the full EDI package through combining EDI software with agreed access to the EDI infrastructure of another company. These types of suppliers act as so-called ‘resellers’ of EDI infrastructure access and in many instances offer EDI software with differing or more advanced functionality, rather than just reselling access. Some UK resellers adopt a broker-like business model and multi-source VAN access for different customers. GXS and OpenText offer access to their VANs to resellers.

25. Once an end-customer has sourced both EDI infrastructure access and EDI software, through any of the alternative options outlined above, it can then choose to either operate the messaging service in-house (‘in-house EDI services’) or outsource the operation of the messaging service to their supplier (‘managed EDI services’). Both Parties offer each of these types of EDI service.

26. ‘Fax Management’ solutions, where there is also a limited overlap between the Parties, comprises products for the automation and integration of sending and receiving fax documents.

Product scope

27. In *GXS/Inovis* and in *Francisco Partners/Kewill,* the OFT identified the relevant product markets as follows:[3]

    a. EDI infrastructure (supply of both VAN infrastructure and internet-based connection options including, for example, supply of VAN infrastructure to resellers);

    b. EDI software, without concluding on the exact scope as regards specific software categories; and

    c. EDI messaging services (supply of a bundle of EDI infrastructure and EDI software to end users), without concluding on whether managed EDI services are in the same market as in-house solutions.

28. The CMA has used this as its starting point for the analysis in this case and considers each of these in turn.

Provision of EDI VAN infrastructure access

29. The CMA received evidence that some customers have switched away from VANs to alternative technologies (eg internet EDI using the AS2 protocol). However, the CMA has not received evidence that a general shift from VANs to these alternative technologies has happened or would be imminent. This was corroborated by third parties, who noted that to switch away from VANs would involve multiple trading partners making the same switch. This makes it difficult for many trading partners to switch away from VANs completely, for example suppliers to large retailers that are not in position to determine the technology used. The CMA therefore considers, on a cautious basis, the supply of EDI infrastructure based on VAN technology only ('EDI VAN infrastructure').

Provision of EDI VAN infrastructure to resellers and end-customers

30. In the present case, the evidence available shows that competition for access to EDI VAN infrastructure differs between supply to resellers and supply to end-customers (for those that buy access to VANs on a standalone basis).

31. First, there is scope for price discrimination between these groups with the Parties offering resellers discounts off list prices. Second, some EDI VAN Infrastructure providers, such as GXS, OpenText and Liaison, offer specific partner programmes to support resellers, whereas others [✂] do not. Third,

[3] Paragraphs 22–40 of *GXS/Inovis*.

resellers noted that they would not be able to switch away from VANs following a small but significant and non-transitory increase in price in VAN access because of their limited ability to persuade customers to use alternative technologies. There is scope for end-customers, however, to switch to other alternatives such as in-house EDI messaging services (buying EDI software and EDI VAN infrastructure as part of a single service).

32. The CMA has therefore assessed the supply of EDI VAN infrastructure access to resellers separately from the supply of EDI VAN infrastructure to end-customers.

Provision of EDI software

33. In GXS/Inovis[4] the OFT did not conclude on the precise scope of an EDI software market, but considered that it may form a separate market at the intermediate level of the supply chain. In the present case, the Parties' overlap in EDI software is less of a concern as there are several other suppliers of EDI software in this market. As such the CMA does not need to conclude on the precise scope of the EDI software market, and, because of the lack of horizontal concerns, the CMA does not consider the EDI software market further, except within the broader context of EDI messaging services.

Provision of EDI messaging services to end-customers

34. Many customers purchasing EDI messaging services through a package combining EDI VAN infrastructure and EDI software noted that they would not switch away from such a package in the event of a 5% price increase. The CMA therefore considers EDI messaging services supplied as a package separately from its individual components noted above (in addition to considering EDI VAN infrastructure separately).

35. The CMA observes that not all EDI messaging solutions are technically feasible and economically viable for some end-users. That is, for instance, web EDI may not be a viable solution for businesses transferring large volumes of data and AS2 solutions may not be economically feasible for smaller businesses, due to high set-up costs. The in-house IT capabilities of businesses may also determine the choice of EDI solution. The CMA notes that competitors have indicated that for larger businesses and their trading partners, EDI messaging services using VANs is a standard solution. Therefore, the CMA has focused on EDI messaging services using VANs in its competitive assessment, although it has not needed to conclude on the precise scope of the product

[4] *GXS/Inovis*, paragraph 39.

market. The CMA has not here examined in more detail the Parties' overlaps in other types of EDI messaging service due to the wider range of suppliers and lack of concern in relation to these services.

36. Regarding switching between in-house and managed EDI message services, some end-customers noted that they would not switch in response to a 5% price increase limited to one of these services. The CMA has therefore considered, on a cautious basis, and in line with previous decisions, in-house and managed EDI messaging services separately where necessary.

Fax Management solutions

37. The Parties could not exclude that their operations may overlap to a minimal extent in fax management solutions in the UK, but submitted that were there to be such an overlap, the Parties' revenues and market shares were minimal on both a UK and global basis. The Parties estimate their combined market share to be around [0%–10%]. The CMA received no third party concerns in this area and has therefore not assessed fax management solutions in more detail for the purposes of this decision.

Geographic frame of reference

38. The Parties submit that the relevant geographic market for all products is worldwide, given that the majority of providers operate on a worldwide basis and there are no significant barriers to trade on a worldwide basis. The following points relate to all services involving EDI.

39. In 2005 the CC noted[5] that there were few providers in common between geographic areas, and that other than GXS very few of the other US companies were present at all in the UK at that time. More recently, the OFT has considered the impact of transactions in this sector using a UK geographic scope, although for EDI VAN infrastructure the OFT considered that the geographic scope may be wider than the UK given that EDI VAN infrastructure does not need to be (and often is not) located in the UK in order to serve UK customers.[6]

40. In the present case a number of third parties indicated that they consider that local presence of suppliers in the UK has some bearing on their choice of provider. Many customers noted that the service would need to let them exchange messages with their other UK trading partners. For example, a VAN which has no UK trading partners or that does not interconnect with a VAN

[5] *Francisco Partners/G International*, paragraph 4.31.
[6] *GXS/Inovis*, paragraphs 41–43.

which has them, could not be used to exchange messages among UK customers. Consistent with this, UK resellers indicated that they would only consider EDI VAN infrastructure providers which are widely interconnected and have a certain global, or at least a UK coverage. Some noted that they were not familiar with certain EDI VAN infrastructure providers who have no presence in the UK but do have market share on a global basis.

41. The CMA therefore considers on a cautious basis the supply of the products discussed above to customers in the UK. In relation to the supply of EDI VAN infrastructure, the CMA only considers VANs which have a significant UK customer base and are interconnected with other such VANs.

Conclusion on frame of reference

42. On the basis of the above, the CMA has assessed the Merger on the basis of the provision of EDI VAN infrastructure, EDI software, and EDI messaging services, all on a UK basis.

43. Within EDI VAN infrastructure, the CMA distinguishes between supply to re-sellers and supply to end-customers. Within EDI messaging services, the CMA focuses on services that use VANs and distinguishes between in-house and managed EDI services where necessary.

44. Since no competition concerns arise on any plausible basis, the CMA has not found it necessary to conclude on the precise market definition in this case.

Counterfactual

45. The CMA assess a merger's impact relative to the situation that would prevail absent the merger (that is, the counterfactual). In practice, in completed mergers, the CMA generally adopts the pre-merger conditions of competition as the counterfactual against which to assess the impact of the merger. In this case, there is no evidence supporting a different counterfactual, and the Parties have not put forward arguments in this respect. Therefore, the CMA considers the pre-merger conditions of competition to be the relevant counterfactual.

Competitive assessment

46. The CMA has examined the Merger on the basis of the following potential competition concerns:

    - horizontal unilateral effects in the provision of EDI VAN infrastructure to resellers, and to end-customers

- horizontal unilateral effects in the provision of EDI messaging services to end-customers
- foreclosure of resellers from EDI VAN infrastructure
- foreclosure of standalone EDI software providers
- foreclosure of other EDI VAN infrastructure providers

Horizontal unilateral effects

47. Horizontal unilateral effects can arise where a firm merges with a competitor that previously provided a competitive constraint, and are more likely where the merger firms' products competed closely.[7]

Horizontal unilateral effects in EDI VAN infrastructure to resellers

48. The CMA considered whether the reduction in the number of EDI VAN infrastructure providers may lead to price increases, in particular for resellers, who rely on access to an interconnected VAN that transmits EDI messages between UK trading partners.

Market shares and competitors

49. The Parties submitted that they were not aware of any independent market data that provide shares of supply for the UK and did not estimate their shares in the supply of VAN access to resellers. Using EDI VAN infrastructure provider revenues from resellers, the CMA estimates that the Parties' combined UK market share is [60%–70%] with an increment of [0%–10%] from OpenText.

50. Competitor responses broadly corroborated these share estimates. They identified GXS as the EDI VAN infrastructure provider with the largest share in the UK, with market share estimates ranging from between 60% to 95%, and noted that OpenText was significantly smaller than GXS.

51. Based on third party responses, it appears that the Merger results in a reduction of interconnected VANs currently with a UK nexus from four to three. In addition to the Parties, Liaison and IBM were noted as providers of VANs to resellers.

[7] *Merger Assessment Guidelines*, paragraphs 5.4.2 and 5.4.6.

Third party views

52. Competitors of the Parties who operate their own interconnected VANs did not raise concerns.

53. The CMA contacted several resellers and standalone EDI software providers, including all UK resellers who specifically contracted with GXS and OpenText. Most did not respond, and only one raised concerns specific to the Merger. This concern was from a [✂]. It had concerns due to the increased market share of the merged entity. However, upon further enquiry by the CMA, the concerned third party also stated that it would not have considered OpenText a viable alternative to GXS in any event prior the Merger, as OpenText was too small.

54. The majority of third party concerns raised by resellers related to the provision of access to the major interconnected EDI VAN infrastructure providers. However, most of these were not related to the potential competitive effects of the Merger, but instead focused on the alleged behaviour of the target in the market prior to the Merger. Most resellers considered OpenText to be too small to be a credible alternative EDI VAN infrastructure provider to GXS in the UK with not enough UK trading partners using its VAN, suggesting that their product offerings were not substitutable for the majority of resellers wishing to compete for end-customers in the UK.

55. The evidence received by the CMA also suggests that resellers can switch away from the merged Parties to avoid a price increase, in particular by switching to Liaison. Indeed, the CMA was informed of several occasions where this happened recently. In addition, although [✂] does not have a reseller partner programme, some resellers consider it an alternative to the Parties.

56. Further, resellers who responded to the CMA's market test did not raise concerns about switching costs between interconnected VANs. Indeed, as mentioned above, the CMA has received submissions from UK resellers who adopt a broker-like business model and multi-source EDI VAN infrastructure access for different customers.

CMA view

57. Although the number of viable EDI VAN infrastructure providers is relatively small in the UK, the available evidence suggests that GXS and OpenText were not viewed as close competitors in the UK by third parties, who did not raise substantiated concerns in relation to this point. The CMA also notes that the increment in market share attributable to OpenText is low and that the evidence

supports the view that Liaison, GXS's main competitor, will continue to exert a significant constraint on the merged entity.

58. The CMA therefore does not consider that the Merger has resulted, or may be expected to result, in a substantial lessening of competition in the provision of EDI VAN infrastructure to resellers in the UK.

Horizontal unilateral effects in EDI VAN infrastructure to end-customers

59. As the CMA has noted above in its discussion of product scope, end-customers have a wider choice of services and providers available to them than resellers in relation to EDI VAN infrastructure. Given this and the CMA's finding above of no competition concerns in the provision of EDI VAN infrastructure to resellers, the CMA considers that there is no realistic prospect of a substantial lessening of competition in the supply of EDI VAN infrastructure to end-customers on a standalone basis. The CMA further notes the lack of end-customer concern specific to this area. However, below the CMA has considered the supply of this infrastructure as part of a combined EDI messaging service.

Horizontal effects in EDI messaging services to end-customers

60. The Parties submitted that the combined shares are moderate and the increment from the Merger is small. They estimated that GXS's market share in EDI messaging services was [20%–30%] based on 2012 revenues from EDI messaging services, and OpenText's market share was around [0%–10%]. While GXS is a larger player in EDI messaging services (with 2012 revenues of [✂] in the UK), OpenText's activities are small (with 2012 revenues of [✂] in the UK). In addition, OpenText's activities in managed EDI services are considerably smaller than that of GXS. The Parties submitted that both Parties' sales are [✂] the market is growing.

61. The Parties also submitted that the merged entity would continue to be constrained by a substantial number of strong competitors, and that the Parties themselves were not close competitors. The Parties did not identify who their main competitors in the limited field of EDI messaging services were but did list several of their competitors on a wider basis, and at a global level.[8]

62. Further, the Parties submitted that customers can easily switch suppliers, and do not hesitate to do so, in particular as price is a big determinant in purchasing negotiations. They also submitted that switching is particularly easy, because it is intrinsic in EIM products that they are compatible with the many different

[8] GXS considered [✂] to be its closest competitors. Likewise, on a global level, OpenText considered [✂] to be its closest competitors.

systems that different customers may have, so customers are not locked into one particular VAN. However, this was not supported by third parties, as discussed below.

Third party views

63. Internal documents provided by the Parties show that the Parties tend to consider competitors [✂]. The CMA has therefore placed more weight on third party comments insofar as they describe competition in the UK.

64. The CMA contacted several customers of the Parties. Most did not respond, but of those who did, the majority had no concerns, and a few raised some form of concern, but these were either unsubstantiated, did not relate to the potential effects of the Merger. For instance, concerns were not merger-specific as the concerned customers did not consider OpenText and GXS to be competing against each other in the UK prior to the Merger.

65. Overall, many end-customers did not appear to be well informed about the market. Some reported resellers to be direct competitors of EDI VAN infrastructure providers, which supports the Parties' assertion that, at least for some end-customers, the offerings of resellers (when they can connect to the major VANs) are [✂].

66. However, end-customer responses did not support the Parties' statement on switching, with the majority who responded stating that switching EDI messaging service providers involves expending considerable time, costs and risks. Nevertheless, the majority of end-customers stated that the cost of EDI messaging is relatively low compared to other IT expenditures.

CMA view

67. Third party revenue figures suggest that the Parties' combined market share in EDI messaging services in the UK is no more than [60%–70%] with OpenText's share no more than [0%–10%].

68. The Parties also provided the CMA with a list of customer contracts they had each won and lost. GXS provided data between the fourth quarter of 2012 and the beginning of 2014, which comprised of [✂] UK 'opportunities'; and OpenText provided data for 2012 to 2013, which comprised of [✂] UK 'opportunities'.[9] Based on this, GXS's main competitors in the UK appear to be [✂] (which it refers to [✂] times), [✂] (which it refers to [✂] times), and [✂]

[9] The data did not always distinguish where an 'opportunity' relates to the provision of EDI messaging services or other services but in most cases they relate to EDI messaging services.

(which it refers to [✂] times). The most frequently referred to 'competitor' was [✂]. OpenText is not mentioned in the data, and the Parties informed the CMA separately that GXS had lost only [✂] to OpenText between the fourth quarter of 2012 and the beginning of 2014. On the OpenText side, [✂] were the most referred to competitor, with GXS being referred to [✂] times, and [✂] times. The results of these data suggest that GXS and OpenText were not close competitors prior the Merger.

69. Further, the market for the provision of EDI messaging services to end-customers appears to be more fragmented than the market for EDI VAN infrastructure due to the presence of resellers and standalone EDI software providers. One competing EDI VAN infrastructure provider noted that there were more than 400 suppliers of EDI solutions operating in Europe, while one reseller considered there to be at least ten significant suppliers of EDI messaging solutions in the UK.

70. Further, third parties identified a number of suppliers that offered a wide range of EDI services including EDI software, in-house EDI messaging and managed EDI services. The suppliers noted included IBM, Kewill, Atlas, WeSupply, OmPrompt, and FirstB2B. The CMA considers that the large number of competitors to the Parties points towards limited horizontal concerns within specific EDI messaging solutions, including in-house and managed services, as well as EDI software.

71. The CMA does not consider that the Merger has resulted, or may be expected to result, in a substantial lessening of competition as a result of horizontal unilateral effects in relation to the supply of EDI messaging services to end-customers in the UK. This is due to the lack of third party concerns, the small increment, the limited competition between GXS and OpenText and the constraint from a significant number of other competitors including IBM, Kewill, Atlas, WeSupply, OmPrompt and FirstB2B.

Foreclosure effects

Foreclosure of resellers from EDI VAN infrastructure

72. The merged entity is a provider of EDI VAN infrastructure to a number of resellers, who themselves combine this with EDI software to supply EDI messaging services to end-customers. The CMA therefore considered whether the merged entity may have the ability and the incentive to foreclose these resellers from access to the Parties' EDI VAN infrastructure, as they may compete with the merged entity to supply end-customers.

73. The CMA received a number of concerns from resellers about the provision of access to the major interconnected EDI VAN infrastructure providers. However, as noted at paragraphs 53 and 54 these related to GXS's behaviour on the market prior to the merger as opposed to any merger-specific effect.

Ability

74. The Parties submitted the merged entity would have no ability to foreclose as resellers could turn to a number of other EDI VAN infrastructure providers. They submitted that EDI VAN infrastructure is commoditised, has no meaningful capacity constraints and is not limited geographically. Further the Parties submitted that many resellers currently supplied by the Parties have multi-year contracts, which would prevent any short-term foreclosure.

75. Given the Parties' combined market share in the supply of EDI VAN infrastructure to UK resellers could be [60%–70%], the CMA notes that the Parties may have an ability to partially foreclose resellers in the UK by increasing prices for VAN access, other service fees or a degradation of service. However, it has not been necessary to conclude on this in this case given the CMA's conclusions on incentives below.

Incentive

76. The Parties submitted that the merged entity would have no incentive to foreclose resellers. They submitted that this was because a foreclosure strategy would require forgoing the significant revenue associated with its sales of EDI VAN infrastructure to resellers. Further, resellers would be able to switch suppliers of EDI VAN infrastructure, meaning that the merged entity would not expect to recoup the forgone revenue associated with such a strategy.

77. The Parties further submitted that both Parties have invested in establishing partner programmes, which actively encourage resellers to develop value-added products, using their respective EDI VAN infrastructures. Moreover, the Parties submitted that the incentives leading to the creation of these partner programmes would not be altered by the Merger.

78. The CMA notes the Parties' points on why they have an incentive to supply resellers and considers this will not materially change following the merger. Given the small increment of OpenText, the merger does not materially increase the likelihood of taking sales from resellers' end-customer business nor the likelihood of retaining existing sales with the Parties' end-customers. This means any increase in incentives to foreclose resellers would be insignificant. End-customers could switch to a number of other competitors such as IBM, Liaison, and Atlas.

79. The CMA further notes that foreclosure incentives would be limited by resellers switching to other EDI VAN infrastructure providers such as Liaison and the resulting loss of EDI VAN infrastructure revenues the Parties would earn. Resellers generally noted that they would switch suppliers in the event of a price increase by the merged entity, with Liaison being the most frequently named alternative supplier, followed by IBM.

80. The CMA therefore does not consider that the Merger has resulted, or may be expected to result, in a substantial lessening of competition as a result of vertical foreclosure of resellers from access to EDI VAN infrastructure.

Foreclosure of standalone EDI software providers

81. This theory of harm is similar to the one relating to the foreclosure of resellers. The CMA considered whether the merged entity may have the ability and the incentive to foreclose standalone EDI software providers (albeit these do not resell EDI VAN infrastructure) as they may compete with the merged entity to supply end-customers.

82. Some of these standalone EDI software providers' end-customers will use their EDI software in conjunction with the Parties' EDI VAN infrastructure. If the Parties increased the price of access to their EDI VAN infrastructure for these end-customers or made their EDI VAN infrastructure incompatible with the EDI software of the standalone EDI software provider, it could make using the offerings of competing standalone EDI software providers relatively less attractive to buying a combined EDI messaging service. The Parties may have an incentive to do this if it significantly increased their sales of EDI messaging services. Some standalone EDI software providers pointed to possible concerns over this behaviour, albeit they were about GXS's behaviour prior to the merger and were not merger-specific.

83. The CMA considers that the incentive to engage in this behaviour has not materially changed following the merger for similar reasons as in the case of foreclosure of resellers. First, the increment in market share attributable to OpenText in the UK is small. The merger therefore does not increase materially the likelihood of taking sales from standalone EDI software providers' end-customers. Second, there are a number of other EDI messaging services other than the Parties that end-customers could switch to, as set out in the reseller foreclosure assessment above.

84. The CMA therefore considers that there is no realistic prospect of a substantial lessening of competition as a result of conglomerate effects in the UK.

Foreclosure of other EDI VAN infrastructure providers

85. The CMA considered whether the merged entity may have the ability and the incentive to foreclose other EDI VAN infrastructure providers by terminating, or increasing the price of, existing interconnection agreements, as other EDI VAN infrastructure providers may compete with the merged entity to supply end-customers.

86. To enable data interchange with trading partners on other EDI VAN infrastructure providers' network, an EDI VAN infrastructure provider requires an interconnection agreement with other EDI VAN infrastructure providers. Interconnection may be on reciprocal terms with the major EDI VAN infrastructure providers, or at a cost. A number of third parties had voiced concerns about a previous decision made by GXS in 2013 to terminate its relationship with Loren Data and to refuse an interconnection agreement.[10] The CMA therefore considered whether the merged entity might have the ability and incentive to foreclose competing EDI VAN infrastructure providers.

87. The Parties submitted, supported by internal documents, that they would have neither the ability nor the incentive to foreclose an EDI VAN infrastructure provider. In particular, OpenText considered, after the Merger, [✂]. Second, it considered [✂]. Finally, it considered [✂].

88. The CMA considers that the merged entity will not have the incentive to end interconnection with EDI VAN infrastructure providers with a significant UK customer base. This is because of the interdependency between large VANs, who send and receive data from each other and therefore increase the utility to their customers. None of the EDI VAN infrastructure providers who have interconnection agreements with the Parties and who have material activities in the UK, as noted above, had concerns about a termination of these agreements. In particular, IBM and Liaison noted that they do not consider that the Merger would bring about any change in the agreements they have with the Parties. The size of their EDI business and the data volume exchanged also suggests that there is no incentive to foreclose these providers.

89. In addition, most third parties [✂] told the CMA that OpenText had a better reputation in the market than GXS. They also confirmed that following the Merger, there have been no signs of such conflicts between the Parties and smaller EDI VAN infrastructure providers.

[10] The CMA understands that since acquiring GXS, OpenText has reversed GXS's decision to terminate its contractual relationship with Loren Data.

90. On the basis of the evidence available overall, the CMA therefore considers that there is no material incentive to foreclose the existing interconnections with other EDI VAN infrastructure providers in the UK, such as to find a realistic prospect of a substantial lessening of competition.

Countervailing buyer power

91. In some circumstances, an individual customer may be able to use its negotiating strength to limit the ability of a merged firm to raise prices. The CMA refers to this as countervailing buyer power.[11]

92. The CMA received mixed evidence on countervailing buyer power. Some third parties stated that having a strong brand as a customer would convey a degree of buyer power. Other customers noted that due to high switching costs, they did not consider themselves able to obtain lower prices, even though they considered themselves to be customers with attractive brands. There were also a number of third parties who considered that they could switch away from VAN-based EDI messaging, for instance to AS2 EDI messaging. If the switching of these customers would lead their other trading partners to switch to AS2, this could give them a degree countervailing buyer power over the Parties. However, the CMA does not have sufficient evidence on the degree of this constraint and the number of customers for which this would be the case.

93. In any event, the CMA considers that even if some customers have buyer power, their buyer power may not be to the advantage of other customers as prices are commonly individually negotiated. However, the CMA has not needed to conclude on this point, given that it has not found that the Merger gives rise to a realistic prospect of a substantial lessening of competition on any grounds, even in the absence of countervailing factors.

Barriers to entry and expansion

94. Entry, or expansion of existing firms, can mitigate the initial effect of the acquisition on competition, and in some cases may mean that there is no substantial lessening of competition. In assessing whether entry or expansion might prevent a substantial lessening of competition, the CMA considers whether such entry or expansion would be timely, likely and sufficient. In terms of timeliness, the CMA's guidelines indicates that the CMA will look for entry to occur within two years.[12]

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[11] *Merger Assessment Guidelines*, paragraph 5.9.1.
[12] *Merger Assessment Guidelines*, paragraph 5.8.1.

95. In the present case, the Parties submitted that barriers to entry are low, as the business requires no major investments. Programming staff and computers are all that is needed. Moreover, high supply-side substitutability in the IT sector allows competitors to expand their product portfolio without major efforts.

96. The evidence available to the CMA does not necessarily support this view. For example, the CMA has received no evidence of recent entry of EDI VAN infrastructure providers in the UK, although there have been changes in ownership of different VANs (eg the exit of IBM and subsequent re-entry by IBM through the acquisition of Sterling). Whilst the set-up costs for EDI VAN infrastructure appear not to be insurmountable, most third parties who responded to the CMA's market test noted that VAN technology and resulting significant network effects in the provision of such services constitute barriers to entry, in that it may be difficult to reach a sufficiently large customer base to operate a VAN profitably and to be able to persuade other EDI VAN infrastructure providers' to interconnect with it.

97. However, the CMA has not needed to conclude on the sufficiency of entry or expansion given the conclusions set out above.

Third party views

98. The CMA contacted several of the Parties' customers, potential customers and competitors. Most did not respond, but of those that did, the majority raised no concerns about the merger, and where concerns were raised, they were generally not related to the competitive effects of the Merger.

99. Third party comments have been taken into account where appropriate in the competitive assessment above.

Decision

100. Consequently, the CMA does not believe that it is or may be the case that the Merger has resulted or may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

101. This Merger will therefore **not be referred** under section 22(1) of the Act.

Nelson Jung
Director of Mergers
Competition and Markets Authority
26 August 2014