Completed acquisition by Francisco Partners of Kewill plc

ME/5594/12

The OFT's decision on reference under section 22(1) given on 6 March 2013. Full text of decision published 27 March 2013.

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

PARTIES

1. **Francisco Partners III (Cayman) L.P.** and **Francisco Parallel Fund III (Cayman) L.P.** are funds operated by the US private equity firm Francisco Partners (all funds operated under the Francisco Partners trademark are jointly referred to in this decision as '**Francisco Partners**'). Francisco Partners is focussed on investments in technology companies and currently has over US$7 billion (around £4.5 billion) in committed equity capital.

2. **Kewill plc** ('**Kewill**') provides supply chain management software to enable businesses and logistics providers to manage the movement of goods and information, including B2B e-commerce software and services. In the financial year ended 31 March 2012, Kewill's global revenues were around £59.3 million and its UK revenues were around £12.8 million.

3. **GXS** provides B2B e-commerce software and services and operates in the UK through GXS Limited (GXS Limited and its group companies are jointly referred to in this decision as '**GXS**'). Francisco Partners owns around 68 per cent of GXS, with the remainder owned mainly by other investment firms. In the financial year ended 31 December 2011, GXS's global revenues were around US$480 million (around £319 million) and its UK revenues were around US$52 million (around £34 million).

TRANSACTION

4. Kewill was listed on the London Stock Exchange and was acquired by Francisco Partners III (Cayman) L.P. and Francisco Parallel Fund III (Cayman) L.P. by means of a Court-sanctioned scheme of arrangement that became effective on 5 July 2012 (the 'Acquisition'). The Acquisition completed on 12 July 2012.

JURISDICTION

5. As a result of the Acquisition, Francisco Partners and Kewill ceased to be distinct. The parties submitted that the Acquisition is not a relevant merger situation under the Enterprise Act 2002 (the 'Act') because neither the share of supply test nor the turnover test in section 23 of the Act is met. However, as set out below (see paragraphs 26-27), the parties' own share estimates indicate that Francisco Partners, through its group company GXS, and Kewill overlap in the provision of in-house electronic data interchange ('EDI') messaging services with a combined share of supply exceeding 25 per cent.

6. Francisco Partners noted that GXS is (indirectly) owned for around 68 per cent by Francisco Partners, L.P., a different fund from the funds that acquired Kewill. Francisco Partners submitted that these funds constitute independent and distinct operations. It stated that [ ]. It noted that [ ].

7. Francisco Partners did not submit to the OFT that GXS and Kewill were not under common ownership or control such that it would be inappropriate for the OFT to take both GXS and Kewill into account for the purposes of the share of supply test. The OFT considers that Francisco Partners, L.P. exercises full control over GXS in view of its majority shareholding and its right to appoint seven out of the nine members of the board of directors of GXS Worldwide, Inc., GXS Limited's (indirect) parent company.[1] Further, the OFT has not been provided with sufficient evidence to conclude that, after the Acquisition, GXS and Kewill are not under common control given that the respective Francisco Partners funds that control GXS and Kewill appear to be under common management as entities within the private

[1] See the Form 10-K submitted by GXS Worldwide, Inc. with the US Securities and Exchange Commission, for example at page 18 (www.sec.gov/Archives/edgar/data/1490346/000095010312001369/dp29302_10k.htm).

equity firm Francisco Partners.[2] The OFT notes that [ ], based on the evidence obtained by the OFT, it is or may be the case that the Acquisition confers the ability on Francisco Partners to integrate GXS and Kewill or at least coordinate their conduct on the market.

8. The OFT therefore considers that the share of supply test is met and that it is or may be the case that the Acquisition has resulted in the creation of a relevant merger situation. The OFT therefore has jurisdiction to review the Acquisition under the Enterprise Act 2002.

9. The Acquisition was completed on 12 July 2012. Following extensions under section 25(2) of the Act, the statutory deadline is 17 April 2013. The administrative deadline is 7 March 2013.

MARKET DEFINITION

10. GXS and Kewill overlap in the provision of EDI messaging services. EDI is the computer-to-computer exchange of business documents, such as purchase orders, invoices or shipping information, in a standard electronic format between trading partners.[3] EDI messaging services were previously considered by the Competition Commission ('CC') in *Francisco Partners/G International* (2005) and by the OFT in *GXS/Inovis* (2010).[4]

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

12. GXS owns proprietary EDI infrastructure, referred to as a value-added network or VAN, which it uses for its own EDI messaging services and also provides to resellers of infrastructure who do not have their own infrastructure. Kewill does not have its own EDI VAN infrastructure and resells the VAN infrastructure of GXS and another infrastructure owner (Liaison) to its customers. Both parties also operate 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

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[2] The OFT notes, for example, that no distinction is made between different Francisco Partners funds on Francisco Partners' website (www.franciscopartners.com).
[3] Kewill derives most of its revenues from trade management and logistics software products, but the OFT has not considered these further as the Acquisition does not give rise to an overlap or vertical relationship between the parties for these products.
[4] *Acquisition by Francisco Partners LP of G International, Inc*, CC report of September 2005, and *Completed acquisition by GXS of Inovis*, OFT decision of 25 June 2010.

(where messages are exchanged directly between trading partners using, for example, the AS2 protocol).

13. Businesses can satisfy their EDI requirements by obtaining a bundle of EDI software and infrastructure access, operated by the business's in-house team, referred to as 'in-house EDI services', or by outsourcing their entire EDI operations to an external service provider, referred to as 'managed EDI services'. Both GXS and Kewill provide such in-house and managed EDI services.

14. GXS and Kewill also both provide EDI software on a stand-alone basis, for example for point-to-point internet EDI connections or for businesses buying in the infrastructure component of EDI separately.

Product scope

15. In *GXS/Inovis* the OFT identified the relevant product markets as follows:[5]

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

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

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

16. In *GXS/Inovis*, the OFT noted that managed EDI services was a growing segment of the market and identified several reasons why managed EDI services might be part of the same market as in-house EDI services, including the fact that they fulfilled the same basic function and that some customers switched from in-house to managed services. The OFT further noted that the same competitors (VAN owners, resellers, and B2B/e-commerce vendors) who provided in-house EDI services were also able to (and did) provide managed EDI services.

17. The parties suggested a different approach to market definition to the approach taken by the OFT in *GXS/Inovis*, for three reasons. The parties submitted that, first, it is not necessarily appropriate to consider an 'upstream' infrastructure segment separately from the 'downstream'

[5] Paragraphs 22 to 40 (see footnote 4 above).

service provision, as these are often bundled according to customers' needs.

18. Second, according to the parties, there has been a clear shift to the provision of managed (that is, outsourced) EDI services from in-house provision, driven by the ability to connect via the internet without the need for a VAN, by the increasing 'commodity' nature of EDI services that can be outsourced just as other business functions, and by the benefits of outsourcing the IT labour required for operating an EDI system. The parties noted that managed EDI services' share in their revenues had significantly increased in the past few years compared to the share of in-house EDI services (although the OFT notes that GXS's revenues from managed EDI services are [ ] its revenues from in-house EDI services).

19. The third reason given by the parties is that EDI messaging services are increasingly provided by a range of ERP (Enterprise Resource Planning) and e-commerce providers, as they cross-sell a messaging application as a 'bolt-on' to another (non-EDI) system programme used in the customer's business. The parties referred to these ERP/e-commerce providers as 'Tier 1' competitors, such as SAP, Oracle, IBM, HP and Microsoft, alongside 'Tier 2' competitors in the form of traditional EDI VAN providers, including GXS, and 'Tier 3' competitors in the form of software or managed services providers who may resell EDI VANs, including Kewill. The parties noted that the interest of 'Tier 1' competitors in EDI was indicated by acquisitions by these providers of EDI service providers, such as IBM's acquisition of Sterling in 2010 and SAP's acquisition of Crossgate in 2011.

20. Several third parties in the present case confirmed a trend towards managed EDI services, but some customers suggested that the additional expense involved in switching to a managed service had or would put them off doing so.

21. On a cautious basis, in the present case the OFT has used the same product scope as in its *GXS/Inovis* decision. This includes separate markets for EDI infrastructure and EDI software,[6] which are complementary to each other inasmuch as both are used to provide EDI messaging services, while some service providers, including Kewill, resell other providers' infrastructure. The OFT has also considered in-house and managed EDI

[6] The OFT did not receive any evidence to suggest that any segmentation into specific software categories was appropriate or would make a difference to its competitive assessment.

services separately. However, the OFT has not needed to reach a conclusion about the precise product scope of the relevant markets given that the Acquisition does not give rise to significant competition concerns on any basis. The OFT also notes that for differentiated products it may not be possible or desirable to seek to define strictly delineated relevant markets. Constraints operating between managed and in-house EDI services, and those which derive from the wider offers of broader-based ERP suppliers have been taken into consideration in the competitive assessment below.[7]

Geographic scope

22. The parties submit that relevant geographic market 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 parties, however, concentrated their submissions on the competitive impact of the Acquisition on the UK.

23. In 2005 the CC noted that there were few providers in common between geographic areas, and that other than GXS only a very few of the other US companies were present at all in the UK.[8] In *GXS/Inovis*, the OFT considered the impact of the transaction under a UK geographic scope, although for EDI infrastructure the OFT considered that the geographic scope may be wider than national given that EDI infrastructure does not need to be (and often is not) located in the UK in order to serve UK customers.[9]

24. Although Kewill is active worldwide, its EDI activities are concentrated in the UK. As in 2005, there appear to be EDI suppliers with a differing presence in the UK. The OFT has therefore used a UK geographic scope, but notes that in EDI infrastructure the geographic scope may be wider. There was no need for the OFT to reach a conclusion in this respect given the lack of significant competition concerns.

Conclusion

25. For the reasons set out above, the OFT has, on a cautious basis, considered the competitive impact of the Acquisition separately in the

[7] See *Merger Assessment Guidelines* (CC2 and OFT1254, September 2010), paragraph 5.2.2.
[8] *Francisco Partners/G International*, paragraph 4.31.
[9] *GXS/Inovis*, paragraphs 41-43.

provision of EDI infrastructure, EDI software, in-house EDI services and managed EDI services, all in the UK.

HORIZONTAL UNILATERAL ISSUES

Shares of supply

26. As set out at Table 1 below, the parties estimated that their combined share in the supply of in-house EDI services, consisting of bundled infrastructure and software provision by both infrastructure owners such as GXS and infrastructure resellers such as Kewill, is [35-45] per cent with an increment of [0-10] per cent. Since the parties do not overlap in the upstream provision of EDI infrastructure to re-sellers, the OFT does not consider this upstream infrastructure any further in its horizontal assessment (for the vertical assessment, see from paragraph 46 below). For managed EDI services, the parties estimated that their combined share of supply is [10-20] per cent with an increment of [0-10] per cent.

Table 1: Parties' sales and shares of supply in the UK in 2012 in the downstream supply of EDI messaging services to final customers

Product		GXS	Kewill	Combined	Market
In-house EDI services (a)[10]	sales	£[ ]	£[ ]	£[ ]	£[ ]
	share	[30-40]%	[0-10]%	**[35-45]%**	100%
Stand-alone EDI software (b)	sales	£[ ]	£[ ]	£[ ]	£[ ]
	share	[10-20]%	[0-10]%	**[10-20]%**	100%
All in-house EDI services (c = a + b)	sales	£[ ]	£[ ]	£[ ]	£[ ]
	share	[20-30]%	[0-10]%	**[25-35]%**	100%
Managed EDI services (d)	sales	£[ ]	£[ ]	£[ ]	£[ ]
	share	[5-15]%	[0-10]%	**[10-20]%**	100%
All EDI services (e = c + d)	sales	£[ ]	£[ ]	£[ ]	£[ ]
	share	[15-25]%	[0-10]%	**[20-30]%**	100%

Source: Parties and further OFT calculations.

27. However, the OFT considers that the shares as estimated by the parties may understate their actual position in the market. As the OFT also noted

[10] Consisting of bundled infrastructure and software provision by infrastructure owners and infrastructure resellers.

in *GXS/Inovis*,[11] there is a lack of publicly available data about the size of the market and the parties may have overestimated the actual size in their share calculations (for example, information from some third parties indicated that their UK revenues were significantly below estimates submitted by the parties). Further, both the parties and some third parties told the OFT that they did not have revenue data exactly following the OFT's market delineation, making it necessary to estimate their revenues. In *GXS/Inovis*, the OFT also considered significantly smaller market sizes than those provided by the parties[12] which, if again applied in the present case, would significantly increase the parties' shares of supply. The OFT received market share estimates from one third party, which stated that GXS has around [80-90] per cent and Kewill around [0-10] per cent (with a higher share in software), although other third-party information received by the OFT suggests these shares overestimate the parties' actual shares.

28. Given the difficulties in estimating the parties' shares of supply, the OFT has placed only limited weight on the parties' share estimates. The OFT has instead focussed on other evidence to assess the Acquisition's impact on competition. The OFT notes that, in particular in the case of differentiated products such as EDI messaging services, horizontal unilateral effects are more likely where the merger firms' products compete closely.[13] In these circumstances, evidence on customer purchasing options or switching, and an assessment of the number, strength and positioning of competitors is particularly informative. The consideration of switching data also has the benefit of gauging the current level of competition between the parties, while market shares may reflect the historic competitive strength of firms as opposed to the current competitive dynamic, in particular where switching is limited (as third parties suggested may be the case in EDI messaging services).

Competitors in the provision of EDI messaging services

29. The parties submitted that they face several competitors in all segments of the market, including ERP/e-commerce providers referred to by the parties as 'Tier 1' competitors (see paragraph 19 above). The parties submitted

[11] *GXS/Inovis*, paragraph 60.
[12] The OFT considered potential market sizes of £40 million and £50 million for in-house EDI services only or in-house and managed EDI services combined (*GXS/Inovis*, paragraphs 66-67). Third-party information in the present case suggests that the lower estimate may be too low, but it is not clear this also applies to the higher estimate.
[13] *Merger Assessment Guidelines*, paragraph 5.4.6.

that, as businesses spend only a very small proportion of their IT budgets on EDI, switching was ordinarily motivated by a larger strategic decision to upgrade the business's IT infrastructure. Internal documents and market reports submitted by the parties also identify several providers as competitors, although the OFT notes that it is not always clear to what extent these documents and reports specifically regard the UK or are focussed more on the US. GXS's cancellation data discussed below (paragraph 39) also support the presence of several competitors.

30. Third-party responses, relating specifically to the UK, supported the existence of several competitors to the parties. Third parties identified at least 13 competitors for in-house EDI services, 15 for managed EDI services and 11 for EDI software, including Atlas, Seeburger, IBM/Sterling, Hauste, Orbit, FirstB2B and NetEDI. However, most third parties did not name the 'Tier 1' providers identified by the parties as competitors, except to the extent that these providers had acquired specialised EDI providers (in particular IBM's acquisition of Sterling). Several third parties, in particular competitors, also noted that GXS was the dominant provider in the provision of EDI messaging services.

31. The OFT considers that the large number of competitors to the parties points towards limited horizontal competition concerns with the Acquisition. However, as also set out in the CC's report in *Francisco Partners/G International* and in the OFT's decision in *GXS/Inovis*, GXS is significantly larger than its competitors in the UK. The OFT has therefore assessed further evidence below on the relative strength of the parties and how closely they compete with each other.

Closeness of competition between the parties

Views from the parties and third parties

32. The parties submitted that Kewill does not impose any significant competitive constraint on GXS. They stated that [ ]. The parties submitted that this is illustrated by the fact that [ ]. The parties submitted that Kewill's B2B business is [ ], which was supported to some extent by internal documents. However, the OFT notes that in the UK [ ] of Kewill's revenues are in fact generated by its B2B business, including its EDI

business which on its own represents nearly [ ] of Kewill's UK revenues.[14] Further, although Kewill's (re)sales of traditional EDI VAN provision and software have been [ ], its sales of managed EDI services has been [ ]. The OFT has not, therefore, drawn any inferences from Kewill's worldwide focus on its non-B2B business for the OFT's assessment of Kewill's competitive constraint in EDI services.

33. None of the internal documents provided by the parties suggest that Kewill is a significant constraint on GXS or that the parties are close competitors. Kewill is only one of several EDI competitors monitored by GXS and [ ]. A 2009 internal Kewill document notes that [ ].[15]

34. The parties also provided market reports by [ ] and [ ], which also suggest that the parties were not close competitors, although the OFT notes that these reports do not focus specifically on the UK. For example, in [ ], Sterling (now part of IBM), Crossgate (now part of SAP) and Liaison were among competitors closer to GXS than Kewill.[16] A similar [ ] in a [ ] report did not even include Kewill.[17]

35. The parties' competitors generally stated that the parties competed against each other. Several competitors noted differences between the parties, in particular in respect of their size and the fact that Kewill does not have its own VAN infrastructure. However, some competitors also noted that GXS and Kewill both provide EDI services to large businesses that have trading links with a great many suppliers (such as large retailers or manufacturers). Several competitors expressed concerns about the Acquisition, partly because, according to these competitors, GXS already dominated the sector prior to the Acquisition and significant consolidation has taken place (including GXS's acquisitions of G International (from IBM) and Inovis (which has previously itself acquired Freeway), as well as BT's closure of its EDI services). Other concerns were vertical concerns, which are discussed further from paragraph 46 below.

36. Customer responses were mixed, with several customers indicating that they could not comment on whether the parties competed closely given

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[14] The parties stated that in the UK in 2010/11 (that is, the financial year ended 31 March 2011), Kewill's B2B business generated around £[ ] million, representing around [ ] per cent of its UK turnover. This includes around £[ ] million in EDI services, representing around [ ] per cent of Kewill's UK turnover.
[15] [ ].
[16] [ ], 20 November 2009. Also, [ ], 10 February 2011.
[17] [ ], 29 October 2009.

that they had worked with only one of them. Some customers identified differences between the parties in terms of size as well as type of customers, with Kewill being more suited for smaller customers. Customers were generally not concerned about the Acquisition, although the OFT cannot exclude the possibility that, at least to some extent, this may be the result of a relative lack of importance of EDI messaging services for customers in their overall IT budget (as suggested by the parties, see at paragraph 29 above).

37. The parties submitted that GXS and Kewill have a different industry focus for their EDI messaging services, with Kewill's main focus being on logistics and customs, consistent with its main business, and GXS's main focus being on automotive, retail and consumer goods, hi-tech and financial services. However, third-party comments did not bear out any significant difference in the parties' industry focus.

Customer switching evidence

38. Generally, the OFT considers that, if the products of merger firms are close substitutes, unilateral effects are more likely because the merged firm will recapture a significant share of the sales lost in response to a price increase, making this increase less costly. The diversion ratio from the product of one of the merger firms to the other is a useful indicator of the ability of the second product to constrain the prices of the first product.[18] The OFT has therefore assessed evidence on customer switching between GXS and Kewill.

39. GXS provided the OFT with data and analysis relating to all UK contract cancellations since 2010 for EDI messaging services and EDI software. There were [ ] instances of switching to Kewill in this data.[19] This amounted to [0-10] per cent of the instances where a customer had been recorded as moving to a competitor, and [5-15] per cent of the instances where the competitor was specifically identified in GXS's cancellation data. GXS's cancellation data recorded switching to [ ] other competitors. Three of these had taken more customers from GXS than Kewill – [ ] – and for [ ] competitors there were [ ]. The OFT further notes that none of the

[18] *Merger Assessment Guidelines*, paragraph 5.4.9(a).

[19] The parties suggested that even for those instances of switching to Kewill, it may be an existing Kewill customer switching its VAN requirements away from GXS (for example to Liaison, whose VAN is also resold by Kewill) rather than switching its entire EDI provision from GXS to Kewill. However, the OFT did not receive sufficient evidence to verify this.

cancellations that GXS recorded as switching to a competitor, related to the cancellation of GXS's managed EDI services, which suggests an absence of competition concerns as regards managed EDI services.

40. In *GXS/Inovis* the OFT assessed similar GXS cancellation data for the period between 2006 and 2009, which indicate that Kewill was less of a competitive constraint than Inovis. These data support the above findings on Kewill's limited constraint based on data from 2010 [ ].

41. Given that the GXS cancellation data are not comprehensive and no cancellation data were available for Kewill, each of the parties also provided the OFT with data that gives an indication of their total wins and losses as well as estimates of on how many of these might have been as result of switching between GXS and Kewill. These estimates are broadly consistent with the GXS cancellation data in that they indicate that there is very little switching between the parties relative to their total wins and losses in in-house EDI services, EDI software and managed EDI services. The OFT also notes that GXS's [ ] business plan, which was produced before the Acquisition, refers to [ ].[20]

42. The OFT considers that the switching evidence set out above indicates that there is only limited competition between the parties in all EDI services segments. The GXS cancellation data suggests that there are a large number of other competitors to GXS, at least three of which appear to compete at least as closely as Kewill (if not more so) with GXS's EDI messaging services.

Conclusion on horizontal unilateral effects

43. The evidence obtained by the OFT in the present case indicates that GXS is by far the largest provider of EDI messaging services, which was also found by the OFT in its 2010 *GXS/Inovis* decision and by the CC in its 2005 *Francisco Partners/G International* report. The acquisition of competitors since 2005 has helped GXS to maintain this market position (if not strengthen it). While in the present case GXS is not directly acquiring Kewill, the Acquisition has the potential to limit the competition between them. Such sequential acquisitions have the potential to lead to a substantial lessening of competition over a longer term horizon. In particular, there may come a point where there are insufficient competitive

[20] [ ].

constraints on the acquiring firm and a merger may raise significant concerns even if the increment to the firm's position is small.

44. In the present case, taking all of the evidence set out above into account, the OFT considers that there are still sufficient remaining constraints on the parties in all areas of overlap. [ ], [ ] and [ ] appear to be exerting an equal if not stronger constraint on GXS compared to Kewill in EDI messaging services and software. There are also other competitors to the parties in all areas of overlap, albeit that there is insufficient evidence to conclude on the competitive constraint that they individually exert. These other competitors include [ ], [ ], [ ], [ ] and [ ]. More generally, the lack of switching between the parties is consistent with the lack of customer concern, the parties' internal documents and market reports.

45. Taking all this evidence in the round, the OFT considers that the Acquisition does not give rise to a realistic prospect of a substantial lessening of competition in the provision of EDI messaging services in the UK.

NON-HORIZONTAL ISSUES

46. Some of the parties' competitors have raised non-horizontal concerns about the Acquisition. Although the competition effects of non-horizontal aspects of mergers are often benign, under certain conditions they may weaken rivalry between firms and harm the ability of the merged firm's rivals to provide a competitive constraint. The OFT has therefore assessed whether after the Acquisition:

    a. the parties would have the ability to harm rivals;

    b. the parties would have an incentive to do so; and

    c. the effect of the parties' actions would be sufficient to give rise to a realistic prospect of a substantial lessening of competition.[21]

Foreclosure by increasing interconnection costs and times

47. EDI services are used, among other things, to exchange information between companies with many suppliers such as large supermarket chains, which are referred to as 'hubs', and these companies' suppliers, referred to as 'spokes'. Some competitors stated that GXS provides EDI services to

[21] *Merger Assessment Guidelines*, paragraphs 5.6.1 to 5.6.6.

many hubs and that GXS makes it difficult for competitors who provide services to the spokes to connect to GXS's network, for example through high cross-network fees or long delays in making the initial connections. One of these competitors raised a specific concern that the Acquisition could strengthen GXS's position as EDI service provider to many hubs by adding Kewill's hub customers to its network (where Kewill does not already resell GXS's VAN network but uses Liaison's VAN network instead).

48. The OFT assessed the same concern in its *GXS/Inovis* decision.[22] In that case the OFT noted that, since the merged entity would be the monopoly provider of interconnection to the combined GXS/Inovis network, the ability of the merged firm to foreclose access to the GXS/Inovis network was not in dispute. However, the OFT concluded that the merged firm would lack incentives to foreclose, because (a) GXS's interconnection policy was in place before the GXS/Inovis merger, (b) that merger did not result in a change in incentives for GXS because of the small increment to GXS's pre-existing position, and (c) the rationale for GXS's fees did not appear to have been exclusionary.

49. In the present case this reasoning appears to apply as well. In particular, the increment from Kewill is also small, as set out above.[23] GXS also submitted that it currently has more than [ ] VAN interconnects and that there are recurring infrastructure costs involved to maintain interconnects. Further, it noted that it typically charges no cross-network fees where there is similarity between the networks in size and technical competence.

50. The parties submitted further that there is no incentive for Kewill to move its customers who are only on Liaison's network (representing the majority of Kewill's customers for both in-house and managed EDI services) across to GXS's network. Since, according to the parties, [ ], such a move would give rise to inconvenience for customers and to costs without generating additional revenues for Kewill. In addition, customers could instead switch directly to Liaison (or GXS) instead of using Kewill as reseller.[24] The parties

[22] *GXS/Inovis* (see footnote 4 above), paragraphs 114-122.
[23] The OFT also notes that Kewill could increase the number of GXS network customers by no more than around [ ] per cent if it moved all of its customers that are currently on Liaison's network onto GXS's network, given that Kewill resold Liaison's network to around [ ] customers in its 2011/12 financial year while GXS had around [ ] EDI messaging customers in 2012 (both in-house and managed EDI).
[24] [ ].

further submitted that customers of GXS and Kewill expect to be able to interconnect, so significant attempts by the parties to make interconnection more difficult will impact customers' business and therefore that of the parties, although a competitor noted that interconnection difficulties may in reality reflect badly on the provider of EDI services to the spokes rather than on GXS as provider to the hub.

51. In terms of effect, the evidence received by the OFT suggests that the cross-network fees currently charged by GXS are to some extent absorbed by its competitors rather than passed on to their customers, such that the impact on customers in relation to such fees is limited. Further, while these fees may reduce GXS's competitors' profitability, the OFT has not received evidence that indicates that any impact of the Acquisition in this respect would be sufficient to reduce competition in the provision of EDI services significantly. As any attempt by GXS to foreclose its competitors would appear to have little effect on competition, this could further weaken any incentives GXS has to engage in this behaviour as a result of the Acquisition.

52. Further, as regards the long delays in making initial connections into GXS's network that some competitors had raised concerns about, third-party comments received by the OFT suggest that such delays do not result in any significant customer switching to GXS away from competitors. The effect on competitors, and hence any weakening of competition, resulting from an increase in interconnection times is therefore likely to be limited. The OFT also notes that delays appear only to take place when the initial interconnections are made, limiting any harm to customers (and giving a possible explanation for the lack of resulting switching).

53. Therefore, taking into account the factors set out above, the OFT considers that the parties would have only limited, if any, incentives to increase GXS's cross-network fees or increase the time to set up the connections with its network as a result of the Acquisition. Further, any effect on competition may also be limited, although the OFT does not need to conclude on the extent of this effect given its conclusion on incentives.

Supply of VAN infrastructure to resellers

54. In its *GXS/Inovis* decision, the OFT also considered concerns about possible foreclosure by the merged parties of competing providers of EDI

services by restricting access to their VAN infrastructure to re-sellers.[25] The OFT concluded that the parties would not have the ability to engage in such foreclosure in view of the presence of sufficient alternative providers of VAN infrastructure. Similar concerns were not raised in the present case and, in contrast to the GXS/Inovis merger, the parties in the present case do not both have VAN infrastructure and therefore the Acquisition does not result in a reduction in the number of infrastructure providers. The OFT therefore considers that the Acquisition does not give rise to such foreclosure concerns.

THIRD-PARTY VIEWS

55. Several of the parties' competitors, active across the EDI messaging supply chain, raised concerns about the Acquisition, which have been addressed above. Customers generally did not express concerns about the Acquisition.

ASSESSMENT

56. As a result of the Acquisition, GXS and Kewill are both held by Francisco Partners funds. GXS and Kewill overlap in the provision of in-house and managed EDI messaging services as well as EDI software. Kewill does not have its own EDI VAN but is one of the re-sellers of GXS's VAN.

57. Based on the parties' share of supply estimates, their highest combined share is in the provision of in-house EDI services at [35-45] per cent with an increment of [0-10] per cent, with lower shares in EDI software and managed EDI services. However, there is significant uncertainty around the size of the market and third-party information suggests that the parties have underestimated their shares. The evidence suggests that GXS is by far the largest provider of EDI messaging services in the UK and several third parties referred to increasing consolidation in the sector. The OFT has therefore focussed its assessment on the remaining competitive constraint faced by the parties and on the closeness of competition between them.

58. Third parties supported the parties' submission that they still have several competitors for all elements of EDI provision. There is also evidence that Kewill is not GXS's closest competitor, including from customer switching data provided by the parties that suggested that three competitors placed

[25] *GXS/Inovis* (see footnote 4 above), paragraphs 107-113.

an equal if not stronger constraint on GXS than Kewill. The parties' internal documents also supported this conclusion. The OFT therefore considers that after the Acquisition the parties will continue to face sufficient remaining constraints in all areas of overlap.

59. The OFT has also assessed foreclosure concerns raised by some competitors, who submitted that GXS may make it difficult for other providers of EDI messaging services to connect to its network, which is used to serve the EDI needs of several large businesses, through raising interconnection costs into GXS's network or through long initial interconnection delays. The OFT considers that, as a result of the Acquisition, GXS would have only limited, if any, incentives to engage in such practices. Further, any effect on competition may be limited, although the OFT does not need to conclude on the extent of this effect given its conclusion on incentives.

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

DECISION

61. This merger will therefore **not be referred** to the Competition Commission under section 22(1) of the Act.