

Education Software Solutions Limited / ParentPay (Holdings) Limited

Case 51140

Briefing to Adjudicator ¹

1. INTRODUCTION

- 1.1 On 26 April 2022, the CMA commenced an investigation under section 25 of the Competition Act 1998, Case 51140, in relation to the supply of management information system software for schools.
- 1.2 ESS and the ESS Group have offered Commitments to the CMA under section 31A of the Act which have been accepted by the CMA.
- 1.3 Pursuant to the Commitments, ESS have agreed to appoint an Adjudicator to determine Applications made by Applicants as provided for in this Briefing. The purpose of this Briefing is to govern the adjudication of the Applications by the Adjudicator. Further detail relating to the terms of the Adjudicator's appointment is provided in the Mandate and Adjudicator Terms and Conditions.²
- 1.4 This Briefing is effective from the Effective Date.
- 1.5 The Adjudication Process should proceed in particular with the Adjudicator having regard to the following key objectives:
 - (a) that Applications are determined fairly and in accordance with this Briefing (the "**Fairness Objective**"); and
 - (b) the Adjudication Process is conducted with all reasonable efficiency and speed (the "**Efficiency Objective**").

2. DEFINITIONS

- 2.1 For the purposes of this Briefing the following definitions apply:

"**Act**" means the Competition Act 1998;

"**Adjudication Process**" means the process adopted by the Adjudicator for determining Applications as provided for in this Briefing;

"**Adjudicator**" means the independent decision-maker appointed by ESS on 10 January 2023 following the approval of the CMA, in accordance with the Mandate;

"**Adjudicator Review Period**" means the period for the Adjudicator to make its Determination as referred to in paragraph 7.12 below;

¹ For the purposes of this Briefing the definitions set out in Section 2 apply.

² **Hierarchy of documents.** In the case of any inconsistency or conflict between the provisions of either or both of the Mandate and this Briefing and the Commitments, the provisions of the Commitments shall prevail. In the case of any inconsistency or conflict between the provisions of the Mandate and this Briefing, in principle, the provisions of the Mandate will prevail (subject, in each instance to the CMA's prior agreement).

“**Adjudicator Terms and Conditions**” means the terms and conditions of the Adjudicator dated June 2022;

“**Annual Entitlement**” means the supply of periodic SIMS software updates and software support services as referred to in paragraph 3.4 below;

“**Applicable Data Protection Legislation**” means all applicable data protection and privacy legislation in force in the UK including the Data Protection Act 2018, the UK General Data Protection Regulation and the Privacy and Electronic Communications (EC Directive) Regulations 2003;

“**Applicant**” means the counterparty to the contract whose Quotation Number is listed in the Application to the Adjudicator;

“**Application**” means an application made by a customer to the Adjudicator for a New Break-Clause in respect of their New Contract on or before the Application Deadline;

“**Application Deadline**” means 5.00pm (UK time) on 10 February 2023;

“**Application Form**” means the form for making an Application to be published after the Effective Date, as set out in Appendix 3B of the Commitments;

“**Application Requirements**” means the requirements for Applications as referred to in paragraph 7.5 below;

“**Briefing**” means this briefing to the Adjudicator agreed between the CMA and ESS, which implements the Commitments (as may be amended from time to time by ESS with the agreement of the CMA, to facilitate the effective operation of the Commitments), as set out in Appendix 2 of these Commitments;

“**CMA**” means the Competition and Markets Authority;

“**Commencement**” means 9.00am (UK time) on 10 January 2023;

“**Commitments**” means the commitments, given by ESS to the CMA pursuant to section 31A of the Act;

“**Commitments Decision**” means a formal decision by the CMA under section 31A of the Act to accept the Commitments, such that section 31B of the Act applies;

“**Competition Act 1998 Rules**” means the rules set out in the Schedule to The Competition Act 1998 (Competition and Markets Authority’s Rules) Order 2014;

“**Core SIMS**” means those ESS’ SIMS MIS modules belonging to the Core SIMS product;

“**Customer**” means an ESS customer with a New Contract who has not successfully taken up a Group 1 Offer, a Group 2 Offer or a Group 3 Offer;

“**Determination**” means the determination of an Application by the Adjudicator, including rejections;

“**DfE**” means the Department for Education;

“**Effective Date**” means the date on which ESS receives formal notification of a Commitments Decision;

“**Efficiency Objective**” means the objective that the Adjudication Process is conducted with all reasonable efficiency and speed;

“**ESS**” means Education Software Solutions Limited³ and its parent company, ParentPay (Holdings) Limited⁴;

“**ESS Group**” means ESS and all direct or indirect subsidiaries of ESS as defined by section 1159 of the Companies Act 2006;

“**ESS Review Period**” means the period for ESS to review a Redacted Application as referred to in paragraph 7.8 below;

“**ESS Submission**” means the brief submission provided by ESS to the Adjudicator on an Application as referred to in paragraph 7.8(b) below;

“**Fairness Objective**” means the objective that Applications are determined fairly and in accordance with this Briefing;

“**Final Report**” means the report referred to in paragraph 8.5 below;

“**ESS General Submission**” means the General Submission provided by ESS to the Adjudicator as referred to in paragraph 4.3 below

“**Group 1 Offer**” means the three extension offers of up to six months to any customer who had validly exercised the Original Break-Clause and contracted with an alternative supplier, but was unable to switch to their chosen supplier by 30 September 2022. The full Group 1 Offer is set out in Appendix 1 of the Commitments;

“**Group 2 Offer**” means the twelve-month break clause offer to any customer who did not opt to take up the Original Break-Clause Offer, where the customer fulfilled certain eligibility conditions. The full Group 2 Offer is set out in Appendix 1 of the Commitments;

“**Group 3 Offer**” means the nine-month break clause offer to any customer who had accepted ESS’ Annual Entitlement quotation on or before 31 March 2022 and had applied for an Original Break-Clause by that date, but whose application was deemed by ESS to be invalid, due to the customer not having met the deadline of 20 February 2022 to request the Original Break-Clause and/or accept the quotation. The full Group 3 Offer is set out in Appendix 1 of the Commitments;

“**July Offers**” means the offers published by ESS on the Website in July 2022 (the text of which is set out in Appendix 1 to the Commitments), comprising the Group 1 Offer, the Group 2 Offer and the Group 3 Offer;

“**LA**” means a local authority;

“**Mandate**” means the mandate for the Adjudicator dated 10 January 2023;

³ Company number 12595779, with registered office at 11 Kingsley Lodge, 13 New Cavendish Street, London, England, W1G 9UG.

⁴ Company number 08212986, with registered office at 11 Kingsley Lodge, 13 New Cavendish Street, London, England, W1G 9UG.

“**MAT**” means Multi-Academy Trust;

“**MIS**” means management information system;

“**New Break-Clause**” means an option on the part of the Customer to terminate the New Contract on the New Break-Clause Effective Date, by providing notice to ESS on or between 1 January 2024 and 29 February 2024, as explained in section 5 below;

“**New Break-Clause Effective Date**” means 31 March 2024;

“**New Contract**” means a three-year Annual Entitlement contract that includes Core SIMS commencing on 1 April 2022;

“**Original Break-Clause**” means the option to terminate the New Contract after six months (i.e. on 30 September 2022) by providing notice to ESS on or by 31 August 2022 as explained in paragraph 3.7(b) below;

“**Original Break-Clause Offer**” means the original offer made by ESS to customers in January 2022 for an Original Break-Clause to be included in New Contracts as explained in paragraph 3.7 below;

“**PCR**” means the Public Contract Regulations 2015;

“**Personal Data**” means personal information as defined in the Applicable Data Protection Legislation;

“**POR**” means pupils on roll for the school(s) covered by an Application, or where the school(s) is part of a MAT or federation, the POR for the MAT or federation;

“**Quotation Number**” means the reference of the form “QUO-xxxxxx-xxxxxx” included in the email ESS sent to the Applicant to confirm that their Annual Entitlement contract was in place;

“**Redacted Application**” means the version of the Application redacted in accordance with paragraph 7.6(c) below;

“**Restricted Information**” has the meaning set out in Annex 1 of this Briefing;

“**SIMS**” means the School Information Management System (MIS) supplied by ESS;

“**Special Category Personal Data**” means personal information as identified in Article 9(1) of the UK General Data Protection Regulation;

“**Term of Appointment**” means the term of appointment of the Adjudicator as referred to in paragraph 4.4 below;

“**Type A Application**” and “**Type B Application**” means an application, as defined in paragraph 6.2 of this Briefing, made in the form set out Appendix 3B of the Commitments (which can be downloaded from the Website);

“**Update Report**” means the report referred to in paragraph 8.1 below;

“**Website**” means the website of ESS at <https://www.ess-sims.co.uk/> (at which ESS will publish the text set out in Appendix 3 of the Commitments);

“**Working Day**” means any day other than a Saturday, Sunday or any other day that is a public holiday in England.

3. BACKGROUND

Management information system software

- 3.1 ESS (amongst other things) supplies MIS software to schools in the United Kingdom branded as “SIMS”. A MIS is used by a school to collect and maintain a database of student information (e.g. attendance records or assessment results) and staff information. A MIS has two main functions:
- (a) it makes the running and administration of a school more efficient, for instance by supporting registration, management of pupil attendance, assessments, admissions, special educational needs, timetabling, parental messaging etc⁵; and
 - (b) it supports school data collections and data transfers. All state-funded schools in England and Wales are required to send information to their LA and/or DfE or the Welsh Government (as appropriate), in particular periodic school censuses and attendance data. The data required and the form in which it is to be provided frequently change.

Customers switching MIS providers

- 3.2 ESS operates in a market where there are rival companies also offering MIS software and customers can from time to time opt to move between suppliers. The decision by a customer as to which MIS provider to use is based on a range of different factors, including ease of use and the ease of integrating its preferred complementary software.
- 3.3 There are broadly four stages involved in the MIS switching process: (1) deciding and planning to procure; (2) preparation to procure; (3) procurement; and (4) implementation. Further detail in relation to these four stages is provided in paragraph 4.2 of the Commitments Decision and section 6 of the ESS General Submission.

SIMS

- 3.4 Historically, SIMS software has been licensed by ESS to LAs or directly to schools on a perpetual basis. That is, customers in return for an initial purchase price benefit from an indefinite licence to use the software, subject to certain conditions. ESS customers also procure (and in many cases are required to procure) an additional contract (known as an “**Annual Entitlement**” contract) for the supply of periodic software updates (including feature upgrades and bug fixes) and software support services.
- 3.5 Customers contract for Annual Entitlement to ensure that they receive regular feature upgrades and bug fixes and so that they can obtain assistance in the event of a problem. The updates provided pursuant to the Annual Entitlement also allow customers to supply the census data and other forms of statutory returns in the correct up-to-date format as required by their supervising education authority and/or national governmental education department. As such, the supply of Annual Entitlement is essential to the use of SIMS software by schools and in effect formed the basis for

⁵ Data stored in a MIS is used in a wide range of complementary software. Complementary software ‘reads’ the data held in the MIS software in order to perform additional tasks the MIS cannot do. For example, pupil admission, attendance and assessment data, combined with parent contact details stored in a MIS may be used by a messaging service provider to send messages to parents about the performance of their child at school. The complementary software may also ‘write’ back data into the MIS, for example email responses from parents. See CMA’s decision dated 12 July 2021 in the *Montagu/ParentPay merger*, paragraph 54.

the annual payment and annual subscription to SIMS. ESS Annual Entitlement contracts range from 12 months to 10 years and may include a variety of renewal options. Please note that it is only ESS' customers who historically had Annual Entitlement contracts on a 12-month rolling basis, renewing on 1 April each year (and that satisfy the conditions set out in paragraph 6.2 and 6.3 below) that are within the scope of the Commitments.

- 3.6 In early November 2021, ESS indicated that henceforth when Annual Entitlement contracts came up for renewal, from 1 April 2022 onwards it would no longer offer Annual Entitlement contracts for SIMS on a 12-month rolling basis and that in future its minimum Annual Entitlement contract term would be three years. ESS also announced that it would cease to contract for Annual Entitlement with LAs, instead offering three-year direct contracts to all schools previously covered by LA Annual Entitlement contracts who wished to continue using SIMS. Under these new contracts, customers as before would be able to receive software updates, certain software support services and core SIMS Next Generation services, but the contracts would be for three years rather than one year. In early December 2021, ESS emailed LAs and schools with which it had direct contracts to clarify that its quotations for new Annual Entitlement contract (and the option to sign up to these contracts) could be accepted at any time up to 31 March 2022 (or indeed at any later time if the customer was unable or unwilling to contract by 31 March 2022).

The Original Break-Clause Offer

- 3.7 In January 2022, ESS made an offer (the “**Original Break-Clause Offer**”) to its SIMS customers considering whether to enter into a New Contract in the following terms:
- (a) customers had to agree to enter into a New Contract and send an email request for the Original Break-Clause Offer to ESS, both on or by 20 February 2022;
 - (b) customers would then have the option (but not the obligation) to terminate their New Contract after six months (i.e. on 30 September 2022) by providing notice to ESS on or by 31 August 2022 (the “**Original Break-Clause**”); and
 - (c) there was no direct financial cost or any detriment to the customer in opting to take up the Original Break-Clause. However, considering whether or not to opt to take up the Original Break-Clause (and, if applicable, actually opting to take up the Original Break-Clause) would have involved customers committing some staff time and resources.

The July Offers

- 3.8 In July 2022, ESS made a set of further offers (the “**July Offers**”) to SIMS customers. These offers were made to three distinct groups of customers, with each group receiving a specific offer applicable to that group.
- (a) Group 1 Offer: This consisted of three extension offers of up to 6 months. This offer was made to SIMS customers that validly opted to take up the Original Break-Clause Offer and had provided notice to exercise the Original Break-Clause (or, at the time they accepted the Group 1 Offer, intended to do so by 31 August 2022), having contracted to switch to an alternative supplier on or before 30 September 2022, but who for reasons outside of their control required more time to complete their switch.
 - (b) Group 2 Offer: This consisted of a 12-month break-clause offer. This offer was made to SIMS customers that could provide objective evidence that they had a clear intention to

switch to an alternative MIS when the Original Break-Clause Offer was made, but who were able to demonstrate they did not opt to take up the Original Break-Clause Offer because they reasonably concluded before 20 February 2022 (the Original Break-Clause application deadline) that they would be unable to switch to an alternative MIS by 30 September 2022 for reasons outside of their control.

- (c) Group 3 Offer: This consisted of a 9-month break-clause offer. This offer was made to SIMS customers who accepted the New Contract on or before 31 March 2022 and applied for the Original Break-Clause but whose application was deemed by ESS to be invalid because they either:
 - (i) failed to submit their application by 20 February 2022 (the Original Break-Clause application deadline); or
 - (ii) failed to accept their three-year New Contract by the same deadline.

3.9 The details of the July Offers to each group were set out on the Website on 26 July 2022 with the Group 1 and Group 3 Offers emailed to all affected customers both in July and again in September. These details are set out in Appendix 1 to the Commitments.

The Adjudicator

3.10 Notwithstanding the Original Break-Clause Offer and the July Offers, the CMA has expressed to ESS competition concerns in relation to the change to its Annual Entitlement contracts detailed above. The CMA's concerns were in part based on responses to the CMA by some customers that they had not opted for the Original Break-Clause because they did not consider a switch to an alternative supplier was feasible by 30 September 2022.

3.11 In addition, the CMA has expressed its view that the Group 2 Offer did not:

- (a) allow for independent adjudication of customer applications;
- (b) sufficiently address the CMA's concerns since the conditions which had to be satisfied for a successful application excluded certain schools from the Group 2 Offer. This included those schools who entered into the New Contract and who did validly opt to take up the Original Break-Clause Offer, but did not subsequently exercise the Original Break-Clause because they concluded that they would not be able to move to an alternative supplier on or by 30 September 2022 or take advantage of the Group 1 Offer. In addition, in the CMA's view, the conditions limited the number of schools that could benefit from the offer and made it burdensome for customers to apply.

3.12 While ESS does not share the CMA's concerns, it has decided to offer the Commitments and to appoint the Adjudicator in order to bring the CMA's investigation to an end.

4. THE APPOINTMENT OF THE ADJUDICATOR

4.1 ESS has appointed, at its own cost, the Adjudicator to carry out an impartial determination of Applications made by Applicants. The Adjudicator is an independent person with the requisite competence and expertise to determine the Applications and has been approved by the CMA. At all times in respect of the Adjudication Process, the Adjudicator must have full regard to the Fairness Objective and the Efficiency Objective but, subject to complying with the requirements

of this Briefing, the Adjudicator has full discretion to operate the Adjudication Process as it considers appropriate.

- 4.2 Following its appointment, the Adjudicator has been provided by ESS with this Briefing, as approved by the CMA, which sets out the terms of its appointment, the conditions that each Application must satisfy and the procedure that the Adjudicator will adopt in making its Determinations.
- 4.3 Separately to the briefing pack, ESS will provide a General Submission (the “**ESS General Submission**”) to the Adjudicator.
- 4.4 The Adjudicator’s term of appointment (the “**Term of Appointment**”) shall start on the Commencement and, unless terminated in accordance with the relevant provisions of the Mandate, last until the latest of:
 - (a) the Determination of the last Application made by the Application Deadline and communication of the outcome to the CMA, ESS and the Applicant;
 - (b) the provision of all Update Reports and the Final Report set out in the Mandate and the Briefing; and
 - (c) answering any clarificatory questions from the CMA or ESS regarding the Final Report.

5. THE NEW BREAK-CLAUSE

- 5.1 The New Break-Clause allows a Customer with a New Contract to terminate the New Contract, to take effect on the New Break-Clause Effective Date.
- 5.2 The termination of the New Contract on the New Break-Clause Effective Date pursuant to the New Break-Clause is conditional on:
 - (a) the Customer providing written notice to ESS of exercising the New Break-Clause on or between 1 January 2024 and 29 February 2024 by email to: break@sims-mis.com; and
 - (b) save in respect of any *bona fide* dispute, the Customer paying all outstanding fees in respect of the contract to which the New Break-Clause applies to ESS prior to the New Break-Clause Effective Date. In this regard, on receipt of the notice referred to above, ESS will within 10 Working Days provide to the Customer an account of outstanding fees.
- 5.3 On serving notice pursuant to paragraph 5.2(a) above, the Customer will be taken to have agreed with ESS to terminate any perpetual licence in respect of any SIMS software covered by the New Contract from the New Break-Clause Effective Date.

6. APPLICATIONS TO THE ADJUDICATOR

- 6.1 A Customer may make an Application to the Adjudicator for a New Break-Clause in its New Contract.
- 6.2 The Adjudicator shall accept the Application where the Adjudicator determines at its discretion, and on the balance of probabilities that:
 - (a) in respect of a Customer who did not opt to take up the Original Break-Clause Offer, that the Customer, after genuine consideration, reasonably concluded on or before 20 February

2022 that switching to an alternative supplier was not possible by 30 September 2022 and this was the reason why the Customer did not opt to take up the Original Break-Clause Offer (a “**Type A Application**”); or

- (b) in respect of a Customer whose New Contract included an Original Break-Clause but who did not then exercise the Original Break-Clause, that the Customer, after genuine consideration, reasonably concluded in a timely manner that switching to an alternative supplier was not possible by 30 September 2022 and this was the reason why the Customer did not exercise the Original Break-Clause (a “**Type B Application**”).

6.3 In respect of a Type A Application and a Type B Application, a Customer is to be held to have “reasonably concluded” that switching to an alternative supplier was not possible by 30 September 2022 only where the Adjudicator is satisfied that the Customer has shown that it undertook a reasonable degree of diligence in coming to that view.

6.4 The Adjudicator will make a case-by-case assessment of whether the Customer undertook a reasonable degree of diligence, on the basis of the belief and information the Customer had at the time. This includes, when considering any Application from a Customer who concluded that switching to any alternative MIS supplier was not possible (in whole or in part) on the basis of the time expected to be taken by that supplier, the Adjudicator being satisfied that the Customer has shown a reasonable basis for that view. It would not be sufficient in itself to state in the Application that the reason it was not possible to switch was because there was not an alternative supplier available at the time.

6.5 The Adjudicator may take into account (among other things) the various steps in the process of switching MIS supplier, general considerations relating to the time required to switch MIS supplier and the specific circumstances of the Customer in assessing whether the Customer had ‘reasonably concluded’, after ‘genuine consideration’ that switching to an alternative supplier was not possible. For the avoidance of doubt, a Customer is not to be held to have failed to have undertaken the requisite degree of diligence because it did not, or may not have, complied with, followed or fulfilled its own - or any relevant - procedures, policies or duties at the time and the Adjudicator should not determine as part of its assessment whether the Customer had correctly followed or complied with any applicable procedures or policies or fulfilled its duties at the time.

7. THE ADJUDICATION PROCESS

Window for Applications

- 7.1 The window for Applications will open on Commencement.
- 7.2 Applications must be made by the Application Deadline.
- 7.3 Applications made after the Application Deadline shall be rejected.

Form and Content of Applications

- 7.4 Type A and Type B Applications must be made by submitting the Application Form. The instructions that will be provided to Customers to assist them with completing the Application Form and a copy of the Application Form is provided at Appendix 3 of the Commitments.
- 7.5 The Application to be completed:

- (a) comprises Section 1 (Customer Details), Section 2 (Applicant Contact Details); Section 3 (Your Eligibility for the New Break Clause); Section 4 (Optional Request for Redaction(s)); and Section 5 (Statement of Truth).
- (b) should include copies of contemporaneous documentation, where such documentation is reasonably available, corroborating the matters set out in Section 3 of the Application Form. If not, then the Applicant should tick the relevant box in Section 3 of the Application Form, and where applicable provide a short explanation of why no such documentation can reasonably be provided. Contemporaneous documentation could include any of the following, for example: documents; internal or external emails; text or WhatsApp messages; electronic diary notes recording a call or meeting; and/or typed or handwritten notes; and
- (c) must in all cases be verified by a statement of truth (within Section 5) signed by the person submitting the Application, who must have the requisite authority on behalf of the Applicant to sign such a statement in the following terms:

“Statement of truth

I have reviewed the contents of this application and can confirm on behalf of the Applicant that they are correct and give an accurate (and not misleading) account of the contemporaneous consideration that led the Applicant to conclude that switching to an alternative MIS supplier was not possible by 30 September 2022.

I also confirm that I have the authority on behalf of the Applicant to sign this Statement of Truth, and have read and accepted the **“Terms and Conditions”** set out at paragraph 27 of the **“Instructions: How to Apply for a New Break-Clause”**.”

(together the **“Application Requirements”**)

7.6 On receipt, the Adjudicator must as soon as reasonably practicable:

- (a) acknowledge the Application emailed to apply.ess@evelyn.com by means of automatic message sent on receipt, and in any event as soon as is reasonably practicable following receipt, and may provide the Applicant with a claim reference code for the Application; and
- (b) verify the Application and determine whether it considers that it complies with the Application Requirements. The Adjudicator may then either:
 - (i) reject the Application on the basis that it fails to comply with the Application Requirements; or
 - (ii) make one request to the Applicant to provide further information (whether to remedy any obvious omission, error or failure to comply with the Application Requirements, including in relation to the Quotation Number). When determining whether to make such a request, the Adjudicator must have particular regard to the Efficiency Objective. Where such a request is made, the Applicant must respond within three Working Days (or such reasonable time as the Adjudicator may determine in exceptional circumstances or taking into account any half term holidays indicated on the Application Form), failing which the Adjudicator must

either, where the Application still fails to meet the Application Requirements, reject the Application pursuant to paragraph 7.6(b)(i), or proceed with the Determination absent any response.

- (c) Unless already rejected pursuant to paragraph 7.6(b)(i) or 7.6(b)(ii), review the Application and produce a version of the Application (the “**Redacted Application**”) in which:
 - (i) all information which the Adjudicator determines to be Restricted Information is redacted; and
 - (ii) all Personal Data are redacted where the Adjudicator is required to do so under Applicable Data Protection Legislation.

7.7 The Adjudicator must then as soon as reasonably practicable (and, in principle, within ten Working Days of receipt of the Application) provide a copy of the Redacted Application to ESS, save for any Application which has already been rejected by the Adjudicator pursuant to paragraph 7.6(b)(i) or 7.6(b)(ii).

7.8 On receiving the Redacted Application, ESS may, within 10 Working Days (or such extended time period, as agreed with the CMA acting reasonably), choose to or not to agree to the grant of a New Break-Clause without the Adjudicator considering further the Application (the “**ESS Review Period**”).

- (a) In the event that ESS chooses to agree to the grant of a New Break-Clause in relation to the Application, it shall provide notice to the Adjudicator and the Adjudicator will automatically accept the Application.
- (b) In the event that ESS chooses not to agree to the grant of a New Break-Clause in relation to the Application, it may prepare a brief submission (the “**ESS Submission**”) explaining the reasons and provide the ESS Submission to the Adjudicator within the ESS Review Period. The ESS Submission shall be limited to matters which are likely materially to assist the Adjudicator (and in principle should be focused on matters which relate to the education market, education procurement, the law relating to education, ESS, or ESS’ relationship with customers), in respect of:
 - (i) briefly referring the Adjudicator to material in the ESS General Submission (by way of cross reference) of relevance to the Application;
 - (ii) correcting matters in the Application which ESS considers to be materially factually inaccurate;
 - (iii) addressing matters in the Application which ESS considers to be substantially misleading; and/or
 - (iv) addressing matters which ESS considers to constitute material omissions of relevant matters in the Application.

7.9 On receipt of any ESS Submission, the Adjudicator:

- (a) must disregard any matter contained within an ESS Submission that the Adjudicator reasonably considers is not within the scope of 7.8(b) or which is solely for the Adjudicator, as the independent decision maker, to determine in relation to the test above; and

- (b) may at its discretion make one and only one request to the Applicant for further information provided that it is in relation to a matter which (i) is specifically raised in the ESS Submission (and does not substantially repeat in whole or in part a prior request issued to the Applicant under paragraph 7.6(b)(ii) above) and (ii) the Adjudicator regards as potentially having a material bearing on its Determination. When deciding whether to make such a request, the Adjudicator must have particular regard to the Efficiency Objective and in relation to the timing of such a request, take into account any half term holidays indicated on the Application Form. Where such a request is made, the Applicant must respond within three Working Days, failing which the Adjudicator must proceed with the Determination absent any response.

7.10 For the duration of the Commitments, ESS must:

- (a) not make any copy of any Redacted Application or use any information provided in any Redacted Application for any purpose, other than for the purpose of facilitating the determination by the Adjudicator of the Application;
- (b) ensure that the Redacted Application disclosed to ESS is disclosed only to ESS employees and external advisers that ESS considers necessary to its review of Applications and who have been made aware of their obligations under the Commitments;
- (c) keep a list of ESS employees and external advisers to whom any Redacted Application has been disclosed; and
- (d) in the event that ESS becomes aware that Restricted Information within any Redacted Application has been inadvertently disclosed to ESS under the Commitments use all reasonable endeavours to:
 - (i) ensure that ESS immediately redacts that Restricted Information from all copies of the Redacted Application retained by ESS; and
 - (ii) delete or destroy (and not retain) that Restricted Information as soon as possible, and in any event by no later than completion of the overall determination process in relation to the Redacted Application except to the extent that the Restricted Information is contained in automated electronic backup systems and cannot be easily deleted in which case ESS shall be bound by a duty of confidentiality to not use or disclose this information for any purpose unless required to disclose this information by a relevant authority legally empowered to require such disclosure.

7.11 As soon as reasonably practicable once the deadline has passed for ESS to make ESS Submissions to the Adjudicator, ESS will delete or destroy all copies of Redacted Applications (and all copies of any information provided in any Redacted Application) held by ESS or its employees, except:

- (a) to the extent that copies are contained in automated electronic backup systems and cannot be easily deleted;
- (b) one copy (including any automatic electronic backups of that copy) of the Redacted Applications may be held by ESS for a period of no more than five years from the Application Deadline (i.e., 10 February 2028). Such copies shall only be accessible by Mr Neubauer (or any successor(s) to his role within ESS) and only be accessible where necessary for one of the following purposes:

- (i) in respect of a specific Redacted Application and ESS Submission, where reasonably necessary in relation to engagement with the Applicant who made the respective Application in matters consequential to the Determination on the Application;
- (ii) where reasonably necessary in relation to any future regulatory – or similar – investigation; and
- (iii) where express permission has been granted by the CMA on request by ESS, such permission not to be unreasonably refused.

The Determination

7.12 The Adjudicator shall use reasonable endeavours to make its Determination of the Application as soon as reasonably practicable after:

- (a) any ESS Submission is received in respect of the Application from ESS;
- (b) notice from ESS is received that it will not be making submissions in respect of the Application; or
- (c) absent the Adjudicator having received from ESS any ESS Submission in respect of the Application, or any notice received that ESS will not be making submissions in respect of the Application, the expiry of the ESS Review Period,

and (unless extended pursuant to paragraph 7.16 and 3.3(b)(viii) of the Commitments) in any case no later than 31 March 2023 (the “**Adjudicator Review Period**”). For the avoidance of doubt, the Adjudicator shall not take into account submissions received from any person after the deadlines set out herein.

7.13 In arriving at the Determination, the Adjudicator must have regard (but may decide freely what weight to give) to:

- (a) the Application including, in particular, factors relating to the Applicant including the type, size (including the number of POR in the Applicant’s MAT or federation, or if it is not part of a MAT or federation, the Applicant’s POR number)⁶ and needs of the relevant school(s) as well as available resource (e.g. staff and budget) and experience (to the extent this information is set out in the Application);
- (b) the relevant time periods during which the Customer may have applied considerations, or taken actions, which are relevant to the Determination, being in respect of a:
 - (i) Type A Application, the Customer’s considerations and actions in the time period between when it was informed of the option to take up the Original Break-Clause and the applicable deadline. For the purposes of paragraphs 7.13(b)(i) and 7.13(b)(ii), a Customer was informed where it was informed by means of an email sent to a valid Customer email address in January 2022; and

⁶ For example, all other things being equal, an Applicant with a lower POR number than the average Customer might reasonably be expected to have simpler requirements than the average Customer and therefore need to undertake less diligence and require less time to complete the later stages of implementing a switch to an alternative MIS supplier. However, a Customer with a lower POR (in particular one which is not in a group) may also have less resources and experience available to undertake the investigative phases of considering (and to facilitate) switching to an alternative MIS supplier.

- (ii) a Type B Application, the Customer’s considerations and actions in the time period between when it was informed of the option to take up the Original Break-Clause and the deadline for exercising the Original Break-Clause (however, the Adjudicator shall pay due regard to any submissions by a Customer that it did not take steps, or took only limited steps, in the period from 12 January to 30 March 2022, being the period before the Customer received the explanatory email from ESS regarding how to exercise the Original Break-Clause).
 - (c) any ESS Submission in respect of the Application;
 - (d) the ESS General Submission; and
 - (e) the CMA’s Commitments Decision.
- 7.14 As soon as reasonably practicable after the Application Deadline (but not before), the Adjudicator must notify the Applicant, the CMA and ESS of the Determination and by 31 March 2023 at the latest (subject to any extension agreed in paragraph 3.3(b)(viii) of the Commitments), and provide brief reasons for any Determination rejecting an Application.
- 7.15 The Determinations of the Adjudicator are final and are not subject to appeal or legal challenge.

Changes to the Adjudicator Review Period and ESS Review Period

- 7.16 In the event that the number of Applications is such that, in the view of the Adjudicator, the time periods provided above are unfeasible, the Adjudicator may agree to an extension of the ESS Review Period or the Adjudicator Review Period with the CMA and ESS. Any variation of the ESS Review Period, Adjudicator Review Period or any other time period referred to in this Briefing must be agreed with the CMA and ESS. Any such requests should be kept limited to circumstances in which they are strictly necessary (including, but not limited to, much larger volume of applications than initially anticipated).

Publication

- 7.17 This Briefing and any ESS General Submission shall be made publicly available by ESS with reasonable prominence on the Website, by no later than Commencement.⁷
- 7.18 Individual Applications by Applicants and any ESS Submission in respect of any Application shall not be published and will not be disclosed to any person other than the Adjudicator, ESS and the CMA, to the extent provided for in the Commitments, the Briefing and the Mandate.
- 7.19 The Adjudicator acknowledges that any information received by it in the context of this process referred to in the Commitments, this Briefing and the Mandate is strictly confidential and should not be disclosed further to any third party (except to the CMA and to ESS, to the extent provided for in the Commitments, the Briefing and the Mandate). The Adjudicator also undertakes that it will not use any information received from Applicants for any purpose other than determination of the Applications under the Commitments, as set out in the Commitments, the Mandate and this Briefing.

⁷ The CMA will also publish this Briefing on the CMA’s website.

8. OVERSIGHT OF ADJUDICATION PROCESS

- 8.1 Each week (or alternative frequency to be agreed between the CMA, ESS and the Adjudicator) during the Adjudication Process, the Adjudicator will provide a report (the “**Update Report**”) to the CMA and ESS setting out:
- (a) the number of Applications received by the Adjudicator since it compiled the last Update Report;
 - (b) the number of Applications acknowledged by the Adjudicator since it compiled the last Update Report;
 - (c) the number of Applications accepted by the Adjudicator since it compiled the last Update Report (whether or not the Determinations have been communicated to the Applicant and ESS) disaggregated into:
 - (i) those Applications in respect of which ESS agreed to the grant of a New Break-Clause without the Adjudicator considering further the Application; and
 - (ii) other Applications where the Adjudicator has made a Determination in favour of the Applicant;
 - (d) the number of Applications where the Adjudicator has made a Determination not in favour of the Applicant since it compiled the last Update Report (whether or not the Determinations have been communicated to the Applicant and ESS);
 - (e) the number of Applications rejected by the Adjudicator since it compiled the last Update Report (whether or not the Determinations have been communicated to the Applicant and ESS) on the basis that it considered that they did not comply with the Application Requirements;
 - (f) the number of Determinations made by the Adjudicator since it compiled the last Update Report (whether or not the Determinations have been communicated to the Applicant and ESS), and how many of those:
 - (i) were made within 10 Working Days of receipt of any submission made by ESS within the period set out in paragraph 3.3(b)(iv) of the Commitments in respect of the Application, or the elapse of that period if no such submission was made by ESS; and
 - (ii) have been communicated to the Applicant and ESS;
 - (g) the Adjudicator’s views on its capacity to deal in accordance with this Briefing with the number of Applications received;
 - (h) to the extent that Adjudicator considers that it may not have capacity to deal in accordance with this Briefing with the number of Applications received, any proposals it considers appropriate for addressing this; and
 - (i) any concerns on the part of the Adjudicator as to the compliance on the part of ESS with the Commitments, any relevant provisions of the Mandate and/or with the provisions of

paragraph 7.8(b) above in respect of the contents of ESS Submissions on Applications and any proposals which the Adjudicator considers appropriate for addressing this.

- 8.2 If in the Update Report, the Adjudicator considers that it may not have capacity to deal in accordance with this Briefing with the number of Applications received, the Adjudicator, the CMA and ESS will convene a call as soon as reasonably possible to discuss in good faith:
- (a) any proposals provided by the Adjudicator; and
 - (b) any other proposals for addressing the issue.
- 8.3 If during such a call, the Adjudicator, the CMA and ESS agree proposals for addressing the capacity issue, this Briefing is to be considered amended in accordance with such agreement. In the absence of such an agreement, the Adjudicator should implement such proposals as it considers appropriate and this Briefing is to be considered amended accordingly.
- 8.4 Any amendment to this Briefing should be made public on the same basis as the Briefing itself.
- 8.5 At the conclusion of the Adjudication Process (which shall be deemed to have concluded once all Applications have been Determined and the Determinations have been communicated to Applicants, the CMA and ESS), the Adjudicator will provide a final report (the “**Final Report**”) to the CMA and ESS setting out:
- (a) the number of Applications received by the Adjudicator;
 - (b) the number of Applications acknowledged by the Adjudicator;
 - (c) the number of Applications accepted by the Adjudicator, disaggregated into:
 - (i) those Applications in respect of which ESS agreed to the grant of a New Break-Clause without the Adjudicator considering further the Application; and
 - (ii) other Applications where the Adjudicator has made a Determination in favour of the Applicant;
 - (d) the number of Applications where the Adjudicator has made a Determination not in favour of the Applicant;
 - (e) the number of Applications rejected by the Adjudicator on the basis that it considered that they did not comply with the Application Requirements;
 - (f) the number of Determinations made by the Adjudicator; and
 - (g) any concerns on the part of the Adjudicator as to the compliance on the part of ESS with the Commitments, any relevant provisions of the Mandate and/or with the provisions of paragraph 7.8(b) above in respect of the contents of ESS Submissions on Applications and any proposals which the Adjudicator considers appropriate for addressing this.
- 8.6 On receipt of any Update Report or the Final Report, the CMA or ESS may (as is reasonable) request that the Adjudicator clarify any matter in the report. The CMA and ESS may also (as is reasonable) request that the Adjudicator clarify any other matter (i.e. not a matter contained in any

report) in relation to the Adjudication Process.⁸ The Adjudicator will respond promptly. Any such response will be provided to the CMA and ESS.

⁸ This may include, at the CMA's discretion, the CMA requesting the Adjudicator to provide to the CMA a sample of ESS Submissions received by the Adjudicator.

ANNEX 1

RESTRICTED INFORMATION

1. The Adjudicator shall redact information considered to be “Restricted Information”.
2. Information is considered to be “Restricted Information” if the Adjudicator considers that it constitutes:
 - (a) “confidential information” within the meaning of the Competition Act 1998 Rules⁹ – albeit as applied by the Adjudicator –i.e.:
 - (i) commercial information whose disclosure might significantly harm the legitimate business interests of the undertaking to which it relates; or
 - (ii) information relating to the private affairs of an individual whose disclosure might significantly harm the individual’s interests; or
 - (iii) information whose disclosure is contrary to the public interest; or
 - (b) Special Category Personal Data relating to any person.
3. In the context of the Adjudication Process, information may constitute “confidential information” within the meaning of the Competition Act 1998 Rules if it is not in the public domain and constitutes competitively sensitive information – and, in particular, comprises any of the following:
 - (a) Information detailing a competitor’s pricing for its MIS products or related products (e.g. for core functionality and add-on features; setup fees; support fees and discounts) including details of any customer-specific terms including discounts or ‘free’ periods.
 - (b) Details/features of the specific product(s) offered/supplied by a competitor to a given customer (e.g. the combination of core functionality and add-on modules, third party products and support services) including: details on non-standard features (eg trial/pilot functionality); and information indicating that a customer has been offered/supplied by a competitor with a bespoke product (or indicating the features of that bespoke product).
 - (c) Specific terms and conditions of a given customer’s contract with a competitor including contract duration (and end date).
 - (d) Information relating to how a competitor’s MIS software interoperates with third party systems.
 - (e) Names(s) of competitor(s) which the customer contacted (or considered contacting) when considering switching MIS supplier, as described in the Application directly or indirectly.¹⁰
4. In the light of paragraphs 2 and 3 above, the Adjudicator shall in principle withhold from disclosure to ESS:
 - (a) copies of any contemporaneous documentation provided in support of Section 3 of the Application Form (i.e. documentation containing details of any communications between a customer and other MIS suppliers); and

⁹ The Competition Act 1998 (Competition and Markets Authority’s Rules) Order 2014, Schedule (‘**Competition Act 1998 Rules**’), Rule 1(1).

¹⁰ A competitor’s name may be referred to indirectly through, for example, the name(s) or contact details of any individual working at a competitor which the Customer contacted (or considered contacting) when considering switching MIS supplier.

- (b) any details provided within, or documentation provided in support of, Section 3 of the Application Form (i.e. optional requests for redaction from disclosure).
- 5. If the Adjudicator is unsure about how to address any Applicant’s request to not disclose certain information to ESS, or whether any particular information within an Application may constitute “confidential information” within the meaning of the Competition Act 1998 Rules, the Adjudicator could raise this with the CMA (and the CMA may advise the Adjudicator on the possible approach that the Adjudicator may wish to take).
- 6. The Adjudicator will be subject to obligations under the Applicable Data Protection Legislation, and shall redact Personal Data where the Adjudicator is required to do so under the Applicable Data Protection Legislation.
- 7. For the avoidance of doubt, nothing in this Annex nor the Briefing requires the Adjudicator to redact – or anonymise (e.g. replace with the individual’s position, if known to the Adjudicator) – the name of any individual within the customer who it is clear from the Application was in direct communication with ESS. In addition, for other named or identifiable persons, in order to avoid disclosing the identity of any individual concerned, the following terms shall be used by the Adjudicator in substitution when redacting Applications:
 - (a) in relation to a staff member of the customer, (i) with a POR number below 150, “Member of Staff”, or (ii) with a POR number of 150 and above, “Member of Staff” or “Senior Member of Staff” (as appropriate);
 - (b) in relation to a member of the governing board, “Member of Governing Body”;
 - (c) in relation to a staff member of the Local Authority, “Member of Local Authority”; and
 - (d) in relation to a third party supplier, “Supplier Representative”.