

ESS' GENERAL SUBMISSION

1. INTRODUCTION

- 1.1 The Adjudicator has been provided with the Briefing, which provides, among other things, guidance as to the Commitments offer to customers for a New Break-Clause, the requirements for each Application, and the role and procedure of the Adjudicator in determining Applications.
- 1.2 The purpose of this document is to provide the Adjudicator with ESS' general observations on a number of issues which ESS considers to be relevant to the Adjudicator's determination. As these submissions are likely to be of relevance to a large number of Applications, rather than repeat these points in response to individual Applications, ESS has prepared this submission ("**ESS' General Submission**") to assist the Adjudicator.
- 1.3 This General Submission is primarily factual but also includes ESS' own views and insights informed by those facts. ESS acknowledges that its views may differ from those of customers or third parties but where that is the case it is for the Adjudicator to determine whether there is factual support for these alternative views. ESS acknowledges that it is for the Adjudicator to weigh up the relevant evidence and considerations put forward by ESS with the views and evidence advanced by customers and make its own independent determination.
- 1.4 This document includes the following sections:
- **Section 2:** Relevant Regulations and Guidance
 - **Section 3:** About ESS and SIMS
 - **Section 4:** SIMS Contracting Arrangements
 - **Section 5:** Procurements Processes
 - **Section 6:** Switching Process
 - **Section 7:** Third party guidance on switching timeframes
 - **Section 8:** SIMS customer switching data
 - **Section 9:** The July 2022 offers by ESS
 - **Section 10:** Other relevant considerations
- 1.5 Terms defined in the Commitments and Briefing shall have the same meaning in this General Submission, unless otherwise stated.

2. RELEVANT REGULATIONS AND GUIDANCE

Relevant Legislation

- 2.1 The Education Act 1944 of England and Wales (the "**1944 Act**") established a national system of primary and secondary education and set out how the system would be administered by Local Education Authorities ("**LEAs**"), based on the then counties and county borough councils. The 1944 Act set out the LEAs' responsibilities for allocating resources to schools, including staff, buildings, equipment and materials. The essential features of the 1944 Act were reproduced in the Education Act of 1945 in Scotland and the Education Act of 1947 in Northern Ireland.
- 2.2 A significant change to this system of local authority control came about in the form of the Education Reform Act 1988 which granted schools in England and Wales a far greater degree of autonomy, including the introduction of grant-maintained schools which were independent of LEA control and funded directly from central government. LEA-maintained schools became responsible for managing their own budgets and the system became known as the 'Local

Management of Schools' (LMS). Similar changes were brought about in Northern Ireland and Scotland in 1989 and 1993 respectively.

- 2.3 With delegated budgets came responsibility for matters such as finance, the management of premises and the choice of where to purchase goods, equipment, support and services. Whilst LEA-maintained school funding was still allocated to schools via the local authority, to a large extent schools were responsible for spending this funding, including having a choice as to which services, if any, they purchased back from the local authority.
- 2.4 The 1993 Education Act at section 238 established school governing bodies as corporate bodies distinct from their LEA. This recognised the separation of schools from local authorities and allowed schools to directly contract for goods and services on their own account for the first time.
- 2.5 The School Standards and Framework Act 1998 (England and Wales), which abolished grant-maintained schools and enabled the formation of foundation schools, introduced further significant change. Schools which successfully applied for foundation status generally became the owners of their land and premises and the employer of staff, rather than the local authority. However, the local authority continued to fund the school on the same basis as all other local authority maintained / controlled schools.
- 2.6 The introduction of the Children Act 2004 saw the functions of education and children's services combined under designated Directors of Children's Services, and the term LEA became obsolete. By 2020 there were 207 bodies within the UK that had the strategic lead for the education of children and young people with funding responsibilities for maintained schools within their administrative areas. Of these:
- 27 were English county councils
 - 55 were English unitary authorities (plus the Isles of Scilly)
 - 36 were English metropolitan borough/district local councils
 - 32 were London boroughs (plus the City of London Corporation)
 - 32 were Scottish unitary authorities
 - 22 were Welsh unitary authorities
 - 1 was the Northern Ireland authority
- 2.7 The final significant change came with the Academies Act 2010 which made it possible for all Local Authority ("LA") maintained schools in England to become academies. Academies are directly funded by central government via the Education Skills and Funding Agency (ESFA) and are independent of LA control and responsibility.

The Role of Local Authorities

- 2.8 As a result of these changes, the relationship between LAs and schools, in England particularly, has changed significantly, and with it the marketplace for the provision of non-statutory or so called 'discretionary services' (which includes the supply of MIS and MIS support services) to schools.
- 2.9 The role of LAs in running schools is now minimal, and many have seen a significant reduction in the demand for discretionary services from schools, as governors and head teachers exercise their freedom to choose which services they require and from whom they purchase them. LAs are now essentially the commissioners of educational outcomes rather than the de facto provider

of education services, although they continue to provide statutory services such as the distribution of funding, school place planning and admissions.

- 2.10 While the majority of LAs with education responsibilities continue to supply at least some discretionary services to schools on a traded basis, there is no obligation for schools to take any of these services from their LA.
- 2.11 Funding arrangements require all LAs to delegate funding to maintained schools, with a general presumption of maximum delegation. However, where relevant school representatives on a Schools Forum¹ agree that the whole budget for their phase, for example primary or secondary, should be returned to the LA for central management, this is allowed, but only in respect of certain services. This recognises that in some circumstances a centralised approach can be more efficient and cost effective, while at the same time allowing schools to pool risk.
- 2.12 The Department for Education (“DfE”) term this centralised approach ‘de-delegation’ and it applies only to maintained primary and secondary schools. Academy schools are responsible for procuring these services and therefore receive their share of potentially ‘de-delegated’ budgets directly from the Education and Skills Funding Agency (“ESFA”). Academies can, however, choose to use these funds to purchase services from LAs. ‘De-delegation’ is not relevant to special schools or pupil referral units as these institutions are funded from separate High Needs budgets where the DfE requires different arrangements to apply.
- 2.13 Funds earmarked for the purchase of MIS and MIS support services are fully delegated to schools, with these products and services deemed discretionary services. Schools and trusts are responsible for procuring these discretionary services, and a LA only has a role in their procurement if in the case of LA maintained schools, the schools have chosen to de-delegate funds to the LA for this purpose, or in the case of trusts, if a trust chooses to procure these products and/or services from the LA. De-delegation is a procurement decision in and of itself and is subject to the normal requirements for school procurement (e.g. obtaining value for money).

Governance Arrangements

- 2.14 In the case of a single school the governing board is the school’s legally accountable body. It is accountable for the individual school to the LA and, if relevant, the diocese or relevant religious body. It has a strategic oversight role.
- 2.15 In the case of a ‘federation’ of schools,² the federation board is the legally accountable body for a group of schools who have formed a federation. It is accountable to the LA and, if relevant, the diocese or relevant religious body. It has a strategic oversight role of the schools in the federation.
- 2.16 Academies, whether single academy trust or multi-academy trusts (“MATs”) are governed by trust boards. MATs are single legal entities controlled by a charitable company limited by guarantee with a trust board that is accountable for all of the academies within the trust.
- 2.17 In England the roles and responsibilities of governance boards and trust boards are set out in the DfE’s Governance Handbook³. In Wales similar guidance is given in the ‘School Governors’

¹ School Forums contain representatives from schools and academies and act as a consultative body on some issues and a decision-making body on others. The forum decides, for example, how much funding can be retained by the LA within the dedicated schools grant and deals with any proposals to de-delegate funding from maintained schools - see: <https://www.gov.uk/guidance/schools-forum-a-guide-for-schools-and-academies>.

² Maintained schools and schools within a federation have a single governing board.

³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/925104/Governance_Handbook_FINAL.pdf

guide to the law'⁴. Further guidance is set out in 'The School Governance (Roles, Procedures and Allowances) (England) Regulations 2013' ("SGR"), which elaborates on the role and responsibilities of governing bodies.

- 2.18 This guidance and the SGR make clear that school boards should not get involved in the day-to-day running of the school, this being the responsibility of the Headteacher or Chief Executive Officer ("CEO") and senior leadership team of the trust. In particular, governance and trust boards should play a strategic role and avoid routine involvement in operational matters, instead focusing on holding their Headteacher or CEO to account.
- 2.19 Governance boards, which normally consist of a minimum of 7 governors made up of the Headteacher, one staff governor, one LA governor and at least 3 parent governors, are required to hold at least three meetings in each school year. At least seven days clear notice should be given of each meeting, unless urgent matters need to be considered, in which case a shorter notice period can apply if the chair of the board so directs. Any 3 governors can call a meeting.
- 2.20 For academies, the DfE sets very few requirements relating to the constitution of trust boards. Except where an academy is designated with a religious character, the department's model articles of association give academy trusts almost complete flexibility to design the constitution of their board of trustees as they see fit. Trust boards must, however:
- contain at least two elected parent trustees, or alternatively in MATs that there should be at least two elected parent trustees on each local governing body ("LGB") – a LGB being a committee of a MAT board that oversees an individual academy within the MAT;
 - ensure that no more than a third of board seats are taken by trust employees; and
 - ensure that no more than 19.9% of board seats are given to LA representatives or associates.
- 2.21 Regulation 6 of the SGR requires that all boards act with integrity, objectivity and honesty and in the best interests of the school and should avoid conflicts of interest. Boards are ultimately responsible for the general control and management of the administration of the school with headteachers operating within the autonomy, powers and functions delegated to them by the board. Boards can delegate matters to sub-committees of the board, and in certain circumstances to the Headteacher or CEO, but remain accountable and responsible for all decisions made by these delegates.
- 2.22 LA appointed school governors and trust representatives are required to govern in the interests of the school and not represent or advocate for the interests of the LA. LA appointed school governors and trust representatives are potentially conflicted when considering the procurement of products or services offered by the traded services arm of an LA, since LA's generally rely on their traded services arm to make a positive contribution to LA finances and depend on schools to use their traded services to achieve this aim.

Other Procurement Regulations and Guidance

- 2.23 Schools and trusts as public bodies are 'contracting authorities' subject to the Public Contract Regulations (2015) ("PCR")⁵. The PCR require that public bodies acquiring services whose value exceeds certain limits (the World Trade Organisation plurilateral Agreement on Government Procurement limits or "WTO GPA" limits) undertake procurement in a PCR compliant manner.

⁴ <https://gov.wales/school-governors-guide-law>

⁵ <https://www.legislation.gov.uk/ukxi/2015/102/contents/made>

This can be achieved by way of a competitive tendering process, which involves issuing of a Prior Information Notice and the preparation of formal tender documentation, or by using a PCR compliant purchasing framework such as the Crown Commercial Service (CCS) G Cloud framework or the Kent County Council framework (KCS), which materially simplifies the process.

- 2.24 In most cases the PCR will not apply to the procurement of MIS and MIS support services since these are low value services that typically only cost a few thousand pounds and take up between 0.1% and 0.2% of a school or trust's annual budget (see paragraph 4.17 for the basis of these calculations).
- 2.25 Procurement of MIS and MIS support services are operational matters with procurement occurring in the normal course. As such they are the responsibility of the Headteacher in LA maintained schools or the senior management team in a trust. Procurement of MIS and MIS support services are not ESFA regulated activities and as such do not require ESFA approval or need to be disclosed⁶.
- 2.26 The DfE publishes guidance advice for schools and trusts engaged in procurement.⁷ This guidance recommends that for low value (<£10,000) or medium value (£10,000 to £40,000) purchases, schools should obtain quotes from at least 3 suppliers and choose the supplier that offers the best value for money. The Academy Trust Handbook refers to this guidance as do many LA procurement guidance handbooks and websites. The DfE and DfES guidance is not, however, a statutory requirement and schools are not legally required to follow the advice given.
- 2.27 The Education Acts and related regulations give schools and trusts the responsibility for procurement for a wide range of discretionary services including MIS and MIS support services. With that responsibility comes the requirement to adequately resource the procurement function of the school or trust. The National Procurement Policy Statement makes clear that contracting authorities, which includes schools and trusts, should have: “processes and governance in place to determine and manage their most important contracts”; and “the right organisational capability and capacity with regard to the procurement skills and resources required to deliver value for money”. Each year schools are required to review all service contracts to check which are due for renewal and to ensure prior to renewal that they offer value for money.⁸
- 2.28 While typically over 70% of school and trust budgets are taken up by employment costs,⁹ the remaining 30% is spread across a wide range of suppliers, with ICT learning resources, which includes MIS, accounting for between 1% and 5% of all expenditure. Amongst ICT learning resources alone, on average schools have approximately [50-100] different suppliers.¹⁰ To manage this supplier base and fulfil their value for money duty, schools have a duty to adequately resource their procurement function and ensure that they allow sufficient time prior to contract renewals to consider and, if judged necessary, move to alternate suppliers.

⁶ As set out in the Academy Trust Handbook

⁷ See for example https://www.gov.uk/guidance/get-help-buying-for-schools?utm_medium=email&utm_campaign=govuk-notifications-topic&utm_source=d15d82f7-c08b-48bf-8a3d-2957ebf77722&utm_content=daily and

⁸ See, for example, <https://www.gov.uk/guidance/school-resource-management-top-10-planning-checks-for-governors#:~:text=1.-,Staff%20pay%20as%20percentage%20of%20total%20expenditure,represents%20over%2070%25%20of%20expenditure.>

⁹ *Ibid.*

¹⁰ Source: GDPR in Schools (“GDPRiS”). GDPRiS provides, inter alia, data maps for schools showing how data they capture is used by their suppliers. These data maps allow schools to respond to statement access requests. GDPRiS provides this service to a representative sample of c. [2,000-3,000] primary and secondary schools in the UK. The data shows that on average schools have [50-100] different software suppliers who use school data captured by their MIS.

3. ABOUT ESS AND SIMS

Education Software Solutions and ParentPay Group

- 3.1 Education Software Solutions Limited (“ESS”) is a subsidiary of ParentPay (Holdings) Limited and is part of the ParentPay Group (“PPG”). The ESS business was, until February 2021, owned and operated by Capita plc. From February to August 2021, it was owned and operated by Montagu Private Equity LLP (“MEP”). PPG acquired ESS from MEP on 6th August 2021, the CMA having unconditionally cleared the transaction following a Phase 1 merger enquiry¹¹.
- 3.2 ESS specialises in the supply of management information and library management systems. Its core school software product is SIMS, a Management Information System (“MIS”) for schools. SIMS was first developed in the early 1980’s, by a teacher working at Lea Manor High School in Bedfordshire and then by Bedfordshire County Council. SIMS first began being used by schools other than Lea Manor in 1984. In 1988 a commercial company SIMS Ltd. was founded to further develop SIMS. SIMS Limited was acquired by Capita Group in 1994.
- 3.3 PPG was founded in 2022 and supplies a range of software and services to schools, further and higher education colleges and contract caterers working in the education sector in the UK, the Netherlands and Germany. Prior to the acquisition of ESS, software and services supplied by PPG included payment, parental engagement, messaging, meal ordering, meal management and catering management systems.
- 3.4 Together PPG and ESS have considerable experience of selling software and services to UK schools, supplying one or more of the group’s services and/or software products to over 20,000 schools. The group has dealt with all but a handful of UK LAs, and has an in depth knowledge of school procurement processes and regulations.

SIMS

- 3.5 SIMS is used by schools to collect, maintain and administer a database of pupil information and manage a range of school operations. SIMS records pupil attendance and attainment, monitors behaviour, tracks safeguarding arrangements, provides school leaders with reporting and analysis, allows schools to prepare and file a range of statutory returns, helps school manage their workforce and budgets, creates and manages timetables, and together with FMS, ESS’ financial management system, provides a complete ERP solution for schools.
- 3.6 The current version of SIMS (SIMS 7) is a Microsoft Windows program that is in the majority of cases installed on Windows laptops and tablets that link to a Microsoft SQL Server database licenced by the customer, installed on a customer-owned server and located in the customer’s premises. Installations of this kind are referred to as “on-premise” SIMS instances.
- 3.7 As with any Windows program, SIMS 7 can also be hosted in the cloud and accessed via a range of browsers or through a Virtual Private Network (“VPN”). This is termed a “cloud hosted” SIMS instance. Over 6,000 schools, close to 40% of the SIMS customer base, use SIMS in cloud hosted instances, with the cloud hosting provided by ESS and others. There are substantially more instances of SIMS hosted in the cloud than of any other MIS available in the UK.
- 3.8 ESS supports two different cloud hosted instances of SIMS: “Hosted SIMS”; and “SIMS Connected”. Hosted SIMS uses a VPN for access, whereas SIMS Connected is a cloud hosted instance of SIMS that can be accessed on an ‘anytime, anywhere’ basis using a range of browsers.

¹¹ <https://www.gov.uk/cma-cases/montagu-slash-parentpay-merger-inquiry>

ESS is currently gradually migrating Hosted SIMS customers to SIMS Connected, which is ESS' favoured hosted SIMS solution.

- 3.9 ESS is investing substantial sums into developing SIMS and its SIMS Connected proposition, including developing a range of “cloud-native” functionality that will inter-operate with and supplement the functionality currently available in SIMS 7. The project to develop this new “cloud-native” functionality and the functionality so developed is known as “**SIMS Next Generation**” or “**SNG**”.

SIMS Statutory Reporting

- 3.10 The Commitments are only relevant to schools in England and Wales.¹² All of these schools are required to regularly submit statutory reports to either the DfE, if they are located in England, or the Department for Education and Skills (“**DfES**”), if they are located in Wales. The content of these reports varies from year to year and from term to term. These reports are typically prepared and generated using a MIS, which has to be updated regularly to accommodate the changing requirements of the DfE and DfES. To reduce the cost of the reporting process, nearly all primary and secondary schools in England and Wales use a MIS solution.
- 3.11 In November 2021, in Wales there were only two MIS able to produce DfES statutory reports, SIMS 7 and Teacher Centre, and that remains the case today. Two former suppliers, Advanced Learning and RM, ceased to have a presence in Welsh schools in 2016 and 2017 respectively. According to Welsh government census data, Teacher Centre, which is supplied by Ceredigion County Council, is only used in primary schools in Wales.

MIS features and integrations

- 3.12 The data stored in or by a customer's MIS is also of use to other software programs and service providers. Most MIS software permits a portion of the data they capture to be shared with third party suppliers of software products used by schools to perform non-core MIS functions, for example, collecting parental payments, preparing financial reports, paying the school's workforce, managing school catering, and engaging with parents.
- 3.13 In this regard, the Adjudicator should be aware that the UK has a large number of specialist educational software application providers, many more than any other country in Europe, with schools on average subscribing to [50-100] different software products and/or services¹³. Most of these application providers read data from, and in a minority of cases write data to, school MIS. Moreover, to minimise development time and provide access to a broad range of MIS, most educational software application providers obtain their MIS data through intermediaries, known as ‘Aggregators’, such as Wonde and GroupCall.
- 3.14 Aggregators integrate with a wide range of MIS, all with different interfaces, and provide application developers with a single ‘MIS agnostic’ application programming interface (“API”), which developers can use to read or write data from and to any MIS supported by the Aggregator. An Aggregator's ‘MIS agnostic’ API hides the differences between MIS from application developers and theoretically saves time and money by ensuring developers only have to program for a single API.

¹² There is a separate procurement process relating to schools in Scotland and Northern Ireland which is not relevant to the cohort of schools covered by the Commitments.

¹³ Source: GDPR in Schools (“GDPRiS”). GDPRiS provides, inter alia, data maps for schools showing how data they capture is used by their suppliers. These data maps allow schools to respond to statement access requests. GDPRiS provides this service to a representative sample of [2,000-3,000] primary and secondary schools in the UK. The data shows that on average schools have [50-100] different software suppliers who use school data captured by their MIS.

- 3.15 Some education related software services, for example ParentPay payments, do not use Aggregators, on grounds of cost and quality, and instead have in-house integrations (or “Proprietary Integration”) with all the established MIS. Other third party products and services which similarly use Proprietary Integrations may only support a limited number of MIS.
- 3.16 Where schools rely on applications that integrate with both SIMS and their new chosen MIS provider (either via Aggregators or the supplier’s own MIS integrations), switching MIS should be a near-invisible process which has little or no impact on either their own or the school’s operations, and which can be implemented within a short space of time. Therefore, the need to integrate a customer’s MIS with existing third-party software products used by that customers should not delay the overall switching process.
- 3.17 While in most cases the use of Aggregators, or in-house support for a range of MIS, means that moving from one MIS is a seamless process for schools using third party application providers, where schools rely on Proprietary Integrations, their choice of MIS may be more limited (to the MIS which supports those specific applications).
- 3.18 Different MIS have different features and one of SIMS’ key differentiators are its Proprietary Integrations with third party systems that are unique to SIMS. Where a customer has to have one or more of the features and/or Proprietary Integrations that are unique to SIMS, in ESS’ view that customer could not have realistically considered switching to an alternative MIS that lacked these features or Proprietary Integrations at that time.

4. SIMS CONTRACTING ARRANGEMENTS

SIMS software licensing

- 4.1 Historically, the ESS business has licenced SIMS to customers under one-off perpetual licences. In the early years, prior to the 1993 Education Act, SIMS perpetual licenses were granted to LEAs and covered all of the LEA’s maintained schools. There was no need for sub-licensing arrangements since the LEA and its schools were part of the same body.
- 4.2 Following the 1993 Education Act, with the establishment of schools as corporate bodies distinct from their LEA, a number of LEA bulk SIMS software licences are understood to have been amended in order to permit the LEA, and subsequently, following the demise of LEAs, the LA, to sub-licence SIMS to its LA maintained schools in its catchment area.
- 4.3 With the introduction of grant-maintained schools, and subsequently academies, the SIMS licensing model was modified to include the direct licensing of SIMS software to schools no longer under the control of a LA (for example, foundation schools, free schools and academy trusts). These “**Direct Schools**” contracted directly with the ESS business (formerly Capita) and were required to purchase a new perpetual SIMS licence when they ceased to be LA maintained schools covered by a LA bulk SIMS licence.
- 4.4 As a result of the delegation of purchasing powers to schools, a number of LA maintained schools have chosen to contract directly with ESS for SIMS and/or SIMS ‘add-on’ and third-party modules (“**Add-ons**”). These LA maintained schools contracted directly with ESS either because:
- 4.4.1 they only require a subset of the functionality licensed by their LA, and it is therefore cheaper to purchase this from ESS directly even taking into account the bulk purchase discounts enjoyed by the LA;

- 4.4.2 they require functionality that their LA doesn't licence from ESS, and to obtain access to this functionality they contract directly with ESS while remaining a sub-licensee of the SIMS functionality ESS licenses to the LA; and/or
- 4.4.3 it is a condition of the LA's sub-licensing of SIMS that the school use certain of the LA's traded services, for example the LA's SIMS first- and second-line support services, and the school does not want to contract for these additional LA traded services so contracts directly with ESS for SIMS.
- 4.5 LA maintained schools contracting directly with ESS for SIMS or SIMS Add-ons are also termed "Direct Schools" in respect of these and only these contracts.
- 4.6 LAs generally bought SIMS using what are termed "2 system area" (2 Tier) or "3 system area" (3 Tier) licences. A 2 Tier licence includes a defined set of "Core" and "Curriculum" software modules, with a 3 Tier licence including these same Core and Curriculum modules along with an additional "Resources" module.¹⁴
- 4.7 Direct Schools generally purchase perpetual module licences individually, on an 'a la carte' basis, rather than buying the Core, Curriculum and Resources packages. Including Add-ons there are around 50 modules currently available as part of SIMS.
- 4.8 To avoid having to build a large-scale support operation, SIMS Limited encouraged LEAs to establish their own SIMS Support Unit ("SSU") that would provide first- and second-line support to LA maintained schools under the LEA's control. Consequently, a large number of SSUs were established, many of whom remain LA owned today, in many cases forming part of their LA's traded services arm.

Annual Entitlement agreements

- 4.9 In addition to holding a perpetual licence for the SIMS software, LA and Direct School customers entered into periodic Annual Entitlement ("AE") agreements, which entitled customers to receive software updates for their licenced software and ESS technical support services. It is important for the Adjudicator to note that it is these AE agreements to which the New Break-Clause Offer relates.
- 4.10 ESS understands that it was a condition of many perpetual licences that the licence holder was party to a current AE agreement. As such, many of ESS' 'perpetual licences' were not in fact perpetual, since they lapsed if no AE agreement was in place.
- 4.11 Schools in England and Wales require the latest AE software update from ESS in order to submit statutory returns to the DfE and DfES. Different statutory returns are required by each of the nations of the UK, who each have their own statutory returns timetable. ESS supplies software updates necessary for the statutory returns in England, Wales and Northern Ireland three times a year in April, July and October.¹⁵
- 4.12 ESS' AE agreements also provided schools with access to ESS technical support services for their licensed SIMS software. For LA maintained schools AE agreements only included third-line

¹⁴ Core includes the following modules: (a) STAR (b) Reporting (c) System Manager (d) PLASC and School Census (e) Attendance (f) Personnel (g) Special Educational Needs and (h) Exams Organiser (Secondary only). Curriculum includes the following modules: (a) Nova T6 (timetable) (b) Cover management (c) Nova P5 (appointment schedule) (d) Options (exam options) (e) Assessment Manager (f) Performance Analysis and (g) Profiles. Resources includes the following modules: (a) Financial Management System ("FMS") including Equipment (b) Register & Accounts Receivable and (c) Fees Billing 7.

¹⁵ The April update covers changes in statutory returns that fall due between mid-May and end-September, the July update covers changes in statutory return that fall due between October and mid-January of the following year, and the October update covers changes in statutory return that fall due between mid-January and mid-May of the following calendar year.

technical support services, but for Direct Schools they also included a basic (email and web) first- and second-line support service.

- 4.13 Around [500-1,000] Direct Schools use ESS' basic first- and second-line support service with the majority of Direct Schools choosing to contract for an enhanced level of support service either provided by an SSU or directly by ESS. Where ESS provides such first- and second-line support services these are known as 'SIMS Enhanced Support' services.
- 4.14 The majority of LAs own and operate an SSU and historically where they sub-licensed SIMS to LA maintained schools it was generally a condition of the sub-licence that these schools used the LA's own SSU for first- and second-line support.
- 4.15 Since nearly all schools use SSUs or ESS' Enhanced Support service to provide first- and second-line support, with ESS' third line support service provided directly to these first- and second-line support providers, the primary benefit that schools derive from their AE agreement is the supply of periodic software updates referred to above.
- 4.16 AE agreement terms range from 1 to 10 years. A sizeable minority (known to be above [25%] and thought to be below [50%] of all ESS customers¹⁶) have historically contracted for Annual Entitlement on longer terms, typically of between 3 and 10 years. Longer-term AE agreements with a duration over 12-months are, however, not relevant to the New Break-Clause Offer, which solely concerns customers that were previously on a rolling 12-months AE agreement due to expire on 31 March 2022. As explained above contracts relating to customers in Northern Ireland, which are multi-year agreements, are therefore not relevant to the adjudication process. ESS has no MIS contracts in Scotland.
- 4.17 AE agreement prices are typically linked to the number of pupils on the roll at the relevant educational establishment. Expenditure on AE services generally represents a relatively small proportion of the school's budget. ESS estimates that this would be in the region of **0.1%** for a LA maintained primary school (based on an average SIMS MIS Annual Entitlement expenditure of around [**£0.5k to £1.5k**] per annum compared to an average primary school budget of £1.16 million per annum)¹⁷ or around 0.3% if excluding average staff costs;¹⁸ and similarly in the region of **0.1%** for a LA maintained secondary school (based on average SIMS MIS Annual Entitlement expenditure of around [**£2.5k to £7.5k**] per annum and an average school budget of £4.91 million) or around 0.3% if excluding average staff costs.¹⁹ For academies, these figures are around [**£1.5k to £3.0k**] or **0.2%** for SIMS primary schools and [**£5.0k to 7.5k**] or **0.1%** for secondary schools, or around 0.7% and 0.3%, respectively, if excluded average staff costs. For completeness, these percentages would not be materially affected by the inclusion of SIMS add-on products, which typically are of relatively low value compared to SIMS AE.

The historic AE agreement renewal process

- 4.18 Since at least 2019, ESS has renewed Direct School AE agreements through an online web portal, known as the "**Portal**". The Portal provides the customer with one or more quotations, one for each AE contract currently held by the customer, with each quotation made up of one or more

¹⁶ The exact figure is not known because the ESS CRM prior to November 2021 did not record whether a customer was in a multi-year agreement. Any customer known to be renewing on 31 March 2023 or later was evidently in a multi-year agreement (and these customers accounted for approximately [25% to 50%] of the total customer base) but customers whose multi-year agreements came up for renewal prior to that could not be easily identified.

¹⁷ Based on school budgetary information available at www.besa.org.uk/key-uk-education-statistics/ and ESS data.

¹⁸ This is on the basis that, as explained in paragraph 2.27, typically over 70% of school and trust budgets are taken up by employment costs, the remaining 30% is spread across a wide range of suppliers.

¹⁹ *Ibid.*

line items corresponding to the various ESS software modules, or packages of modules (e.g. Core, Curriculum or Resources) covered by the contract.

- 4.19 Prior to ESS' acquisition by PPG, the Portal opened each year on or around the end of October and dealt with the renewal of Direct School AE contracts due to expire on 31 March of the following year, regardless of whether these contracts were 12-month rolling or multi-year AE agreements ("MYA"). The Portal also dealt with price and quotation changes within MYA that were not due to expire on 31 March of the following year.
- 4.20 12-month rolling AE agreements automatically renewed unless terminated by either party in writing at least 90 days before the end of the current term. MYA generally terminated [X] of their stated term. The terms of AE agreements could not be modified without the mutual written agreement of both parties, and where ESS sought to make price changes on renewal of 12-month AE agreements it was required to inform the customer at least 120 days before the end of the current term.
- 4.21 With many customers having multiple contracts, not all of which included SIMS, and some schools being both Direct Schools and covered by LA AE agreements, the Portal had to deal with a wide variety of contracting arrangements and groups, each with a unique contractual situation. Using a single website for such a wide variety of contractual arrangements was not ideal and required that communications linked to the Portal catered for the nuances of each group.
- 4.22 Customers eligible to use the Portal and who were on rolling 12-month AE agreements due to renew on 1 April of the following calendar year were invited in late October or early November to accept, partially accept, modify or cancel their quotations via the Portal, and where they failed to cancel a quotation, or a line item within a quotation, by 31 December, the quotation would be deemed accepted and would automatically renew on 1 April of the following year for a further 12-month term. Customers also had until 1 February of the following year to confirm certain parameters, such as the number of pupils on roll ("POR") within their establishment, which determined the amount that would be invoiced in advance of the upcoming renewal.
- 4.23 The Portal was not used by LA maintained schools who sub-licenced their ESS software modules from a LA and who received AE services under the terms of an umbrella LA AE agreement between ESS and their LA. These schools only used the Portal if they separately licenced Add-ons directly from ESS and then only in respect of these Add-ons.
- 4.24 LAs with umbrella AE agreements were, however, subject to similar renewal timeframes to Direct Schools. LAs with AE agreements due to renew on 1 April of the following calendar year, were expected to provide a full list of the LA maintained schools to be covered by their forthcoming renewal by 31 December of the current calendar year and to provide certain contract parameters, such as school POR numbers and purchase order numbers, by the 1 February deadline. The notice periods and termination arrangements for LA AE agreements were broadly the same as those used in Direct School AE agreements and changes to agreement terms generally required the mutual written agreement of both parties.
- 4.25 LAs with umbrella AE agreements were able to contract for these services on behalf of schools because these schools had de-delegated (as described in section 2 above) their MIS support services budget to the LA. These de-delegation arrangements generally lasted for a year and had to be renewed prior to each agreement anniversary. Even where the LA had entered into a MYA the number of schools covered by the agreement could often be varied each year since schools only de-delegated funding a year at a time. Accordingly, each year, on or around 1 November, ESS asked LAs to confirm the number of schools that they wished to be covered under their

umbrella AE agreement for the forthcoming 12-month period from 1 April of the following year to 31 March of the year after that. This allowed LA approximately two months to establish which schools would choose to de-delegate their MIS support services funding to the LA for the coming 12-month period.

4.26 Since LA maintained schools are responsible for their MIS and MIS support services procurement, de-delegation is in itself a procurement decision, requiring a school to establish whether purchasing these discretionary services through the LA offers VFM. LA maintained schools, while not generally contracting directly with ESS for AE prior to 1 April 2022, were in practice used to an annual cycle of MIS support services procurement in the form of renewal of their LA de-delegation arrangements. For all the reasons given in earlier sections, in ESS' view, renewal of these de-delegation arrangements should have involved exactly the same scrutiny and diligence as would have been required had the school chosen to procure these services directly from ESS or any other MIS provider.

4.27 It is noteworthy that prior to ESS' acquisition by PPG at least [25% to 50%] of schools were covered by MYA. As noted in paragraph 4.16, this could have been as high as [50%]. Schools chose to use MYA because:

4.27.1 they reduced procurement costs by avoiding the need for annual procurement;

4.27.2 they gave schools certainty of terms, and greater certainty over pricing, for multiple years making it easier to budget and forecast their MIS costs over the medium term;

4.27.3 MYA were not subject to rolling renewal and could not be terminated [⌘]; and

4.27.4 for schools who required more than 12 months to consider a change in their MIS, or who would be unable to switch MIS providers in the 90-day termination period that applied to 12-month rolling AE agreements, MYA provided schools with a longer period in which to consider alternatives and plan for a move to an alternative MIS supplier.

4.28 ESS also notes that at the time PPG acquired ESS nearly all Direct School AE agreements were with individual schools, with only [⌘] of ESS' 12-month rolling AE agreements being with school groups where the collective value of the agreement if extended to 3-years would exceed the then WTO GPA limit (and thereby be subject to the PCR).

The new three-year direct AE agreements

4.29 On 8 November 2021, ESS notified Direct Schools and LAs whose AE agreements were due for renewal on 1 April 2022 that it would not in future offer 12-month AE agreements, and would only offer 3-year AE agreements on 3-year rolling terms. ESS also notified LAs that in future it would not offer LAs umbrella AE agreements, opting instead to contract directly with LA maintained schools previously covered by such agreements.

4.30 Since AE agreement terms could not be modified without the written agreement of both parties, ESS had no choice but to terminate existing AE agreements by giving 90 days written notice in accordance with the terms and offering customers new contracts on the revised terms. It would not have been practical to modify nearly [10,000 -15,000] contracts by mutual written agreements.

4.31 ESS motivation in making these changes was as follows:

4.31.1 ESS proposed to make a £40 million 3-year investment in SNG and required certainty of revenues to support this investment;

- 4.31.2 SNG required ESS to copy school data to the cloud, which meant that ESS had to contract directly with the data controller, namely the school rather than the LA;
- 4.31.3 ESS' principal competitors' used agreements with 3, 4 or 5 year terms²⁰; and
- 4.31.4 PPG, in common with many education software suppliers, used 3-year terms for all of its contracts and had done so for at least the last 15 years.
- 4.32 In response to ESS' notice of 8 November, one of ESS' competitors sent a series of misleading communications to ESS' customers claiming that ESS would automatically enrol customers into new 3-year agreements unless they terminated their existing agreements before 31 December 2021. This was false but is believed to have created significant confusion in the market.²¹
- 4.33 Accordingly, on 7 December 2021, ESS issued a set of clarificatory communications to Direct Schools and LAs (an example of such a communication is provide in **Appendix 1**). These communications clarified that schools were able to enter into a new AE agreement at any time (that is, up to or after 31 March 2022), but that if schools wanted to ensure continuity of service they were recommended to enter into a new agreement before 31 March 2022. This was sent to customers in the event that the November communications were unclear as to whether a customer was required to agree to a New Contract by a date earlier than 31 March 2022.
- 4.34 The New Contracts offered were substantively similar to previous AE agreements, with some changes:
- 4.34.1 they were for a three-year term and include a term software licence for the relevant SIMS software modules;
- 4.34.2 they included access to core SNG cloud software and support services for a cost of [X] per annum for the term of the agreement;
- 4.34.3 They contained new provisions requiring that customers contracted with an approved SSU or ESS for the provision of first- and second-line SIMS technical support services; and
- 4.34.4 by virtue of contracting directly with all schools, they permitted ESS to copy and store SIMS data to and in the cloud, which was a necessary pre-cursor to the delivery of new SNG functionality.
- 4.35 As the existing AE standard terms did not permit amendment of the existing AE terms other than by written agreement, in order to ensure that the proposed changes to the AE agreements took effect, ESS was required to terminate its existing agreements and offer a new AE agreement to customers. To effect that termination, ESS in late December 2021 notified all customers²² with 12-month rolling AE agreements and LA umbrella agreements due for renewal on 1 April 2022 these agreements would terminate on 31 March 2022. By giving more than 90 days' advance notice of termination, ESS complied with the terms of these existing agreements.
- 4.36 On 8 November 2021, in addition to sending the communications referred to in paragraph 4.29 ESS opened the Portal to Direct Schools so as to allow them to agree to the New Contracts commencing on 1 April 2022. Customers could accept the New Contract on the Portal at any

²⁰ One of ESS' principal competitors offered contracts with a 1-year initial terms followed by 5 year rolling renewals, but since no school would deliberately change MIS for a single year this was effectively an initial term of 6 years followed by 5 year renewals.

²¹ ESS had no right to automatically enrol customers into new 3-year AE agreements, as was evident from a cursory examination of the existing AE agreement terms. The competitor eventually withdrew this claim but by then the damage had been done.

²² If the customer had already notified ESS that it was terminating its contract prior to ESS issuing these notices, no notice was issued to that customer.

time up to 31 March 2022 or indeed after that. However, if a customer signed up to the New Contract after 31 March 2022, the contract was backdated to 1 April 2022 to ensure that the customer received, and was entitled to receive, all software updates issued since the termination of its previous AE agreement.

- 4.37 In the version of the Portal ESS opened on 8 November 2021 the contracting process and terms were updated to make the contracting process clearer and more efficient. This included the introduction of an electronic acceptance of terms using a scroll wrap contracting process which drew specific attention to the changes included in the New Contracts.

LA Facilitation Agreements

- 4.38 Separately, in order to communicate the transition to direct contracting with LA maintained schools, ESS engaged with LAs in late October and early November 2021 to outline the rationale for moving to direct contracting and to 3-year terms for AE agreements. This rationale is set out in paragraph 4.31. The aim of this engagement was to provide time for LAs to communicate and liaise with LA maintained schools covered by their umbrella AE agreement with ESS and prepare for the move away from the de-delegation of contracting for AE.
- 4.39 LAs with AE agreements due for renewal on 1 April 2022 were given the choice of whether or not to terminate their SIMS 2-Tier or 3-Tier perpetual licences at the same time as terminating their umbrella AE agreement. Those LAs who agreed to termination did so under a Facilitation Agreement (“FA”), under which, in consideration for the LA agreeing to terminate its perpetual licences, ESS agreed to offer LA maintained schools formerly covered by the LA’s AE agreement, new 3-year AE agreements at the same prices as ESS charged the FA under the umbrella agreement, plus indexation.
- 4.40 Where LAs signed Facilitation agreements de-delegation arrangements ceased from 1 April 2022 and schools were free to procure directly from ESS or another MIS provider from that point forward.
- 4.41 With the move to direct contracting for all LA maintained schools, LAs were no longer in a position to require schools who were their SIMS sub-licensees to use the services of their SSU. Instead LA maintained schools are now able to obtain SIMS 7 support from any approved SSU or ESS. This potentially creates conflicts of interest for LAs, who have a duty to ensure that schools use the support provider who represents the best value for money, but who also need to ensure that their SSU continues to make a positive contribution to the LA’s finances.

The Gateway

- 4.42 In order to contract directly with LA maintained schools who had previously obtained their AE services under the terms of umbrella LA AE services agreements, ESS developed an online web portal (the “**Gateway**”), which adopted the same scroll wrap contracting process introduced in the Portal. The Gateway was opened to LA maintained schools in early January 2022. LA maintained school customers could accept the New Contract on the Gateway at any time but to benefit from continuity of service were recommended to contract on or before 31 March 2022.
- 4.43 As a result of the move to direct contracting with individual LA maintained schools, from a contractual perspective, ESS effectively had direct contracting arrangements with the following customer groups:
- Individual schools (which includes LA maintained schools) and single academy trusts;

- Individually invoiced academies or schools which form part of multi-academy trusts (“MATs”) and school trusts; and
- Centrally invoiced MATs.

The Original Break-Clause Offer

- 4.44 In January 2022, ESS made the Original Break-Clause Offer to those of its customers that had entered into or were considering whether to enter into a New Contract commencing on 1 April 2022.
- 4.45 Under the terms of the Original Break-Clause Offer, customers who agreed to a New Contract were given an option to request on or by 20 February 2022, at no cost to the customer, a 6-month break clause in their New Contract. The only material condition to the Original Break-Clause Offer was that a customer entered into a New Contract (which was necessary for the Original Break-Clause to operate) and sent their break clause request by email to a specified ESS mailbox on or before 20 February 2022. Customers who did so received an immediate automated response informing them they had been successful, provided that their email contained the basic customer information requested (being the school name, postcode, contract quote number and DfE number) and they signed up to their new three-year AE agreement by 20 February 2022.
- 4.46 The Original Break-Clause provided customers with the option to terminate their New Contract on **30 September 2022** by providing notice to ESS on or by 31 August 2022. In practice, ESS offered schools an additional week grace period following 30 September 2022 to migrate to their new MIS. There are no cases of which ESS senior management are aware where customers had their requests for the Original Break-Clause accepted and then subsequently rescinded or revoked.
- 4.47 The Original Break-Clause Offer was communicated to all eligible Direct Schools with core SIMS on Wednesday 12 January and to LA maintained schools between Friday 14 January and Wednesday 19 January. Copies of these communications are provided in **Appendix 2**. The Original Break-Clause Offer to LA maintained schools was made in conjunction with the opening of the Gateway (described above). As a formality, on 25 March 2022, ESS confirmed in writing the inclusion of the Break-Clause in the New Contracts to those schools which had applied for the Break Clause Offer and signed their new 3-year AE agreement by the 20 February deadline along with details of how to exercise their break clause right.
- 4.48 For completeness, on 25 July 2022, ESS communicated a series of extended break clause offers to customers. These offers and their significance to Applications is described further in Section 8 below.
- 4.49 A summary of the key milestones/communications with customers from 8 November to 30 September is provided below.

Table 1: Summary of key milestones/communications with customers

Milestone/communication	Date Sent
Engagement with LAs on proposed move to direct contracting with LA maintained schools	Last week of October and first week of November 2021
Original communications sent to LAs and customers using the Portal to contract for AE services	8 November 2021

Milestone/communication	Date Sent
Clarification emails sent to Portal customers and LA maintained schools	7 December 2021
Communications sent to customers who assented to 3-year AE agreements before clarification emails of 7 December	14 December 2021
6-month break-clause offer sent to customers using the Portal	12 January 2022
Original communication to customers using the Gateway to contract for AE services	14 - 19 January 2022
6-month break-clause offer sent to customers using the Gateway	14 – 19 January 2022
New Contract commencement date	1 April 2022
July Offers made to customers	25 July 2022
Deadline for exercising Original Break-Clause	31 August 2022
Date when Original Break-Clause takes effect	30 September 2022

Summary

- 4.50 Taking stock of the above, ESS summarises its view as follows.
- 4.51 It is evident that all schools who contracted for AE services, either directly on 12-month rolling terms or under the terms of an LA umbrella agreement, were used to a regular annual procurement cycle. Whether choosing to continue de-delegating MIS support service funding to an LA or to rollover their existing AE agreement for another year, schools who were abiding by the regulations and available procurement guidance were required each year to consider whether: re-procuring from ESS delivered value for money; and, if so, whether the contractual terms and contracting periods being used were appropriate. If these tests were not satisfied (and no customer could guarantee in advance of a renewal that they would be) then schools in the normal course were required to be in a position to procure from an alternative supplier who satisfied these criteria within the notice period available.
- 4.52 As such it is reasonable to expect that customers who had not already contemplated switching MIS prior to the 8 November 2021 announcement but who, on the basis of that announcement, decided to consider switching to an alternate MIS supplier, would have been geared up to take initial exploratory procurement planning steps in the days and weeks following the announcement, since this was something they would have expected to do in the normal course at this time of year.
- 4.53 Even for those customers who were confused by ESS’ 8 November announcement or the misleading statements made by ESS’ competitors in the wake of the announcement, would from **7 December 2021**, the date these communications were further clarified, have been clear about

what was proposed and would have had no reason not to explore moves to alternate suppliers if they were unhappy with ESS' new terms.

- 4.54 The date range **8 November to 7 December** therefore represents the **earliest** starting point for customers to have begun considering switching away from SIMS in response to the offer of the New Contracts.
- 4.55 It is evident from communications published by a competitor during this time that SIMS customers were being actively targeted to switch to competitor MIS from around mid-November 2021. With all of ESS' principal competitors actively seeking to use ESS' announcement of 8 November to win new business, SIMS customers were able to obtain quotations, receive demonstrations and obtain a wide range of information from competitors at short notice, reducing the time required to undertake a competitive procurement process (see Section 6 for further details).
- 4.56 While ESS considers that any customer who genuinely wished to consider switching MIS in response to ESS' announcement of 8 November would have at least begun their research into alternative providers by the end of November 2021, given the timescales set out in section 6, ESS would only expect a minority of these customers to have contracted with an alternate MIS supplier by the beginning of the 2022 Spring Term .
- 4.57 From 12 to 19 January 2022 (being the period over which the Original Break Clause Offer was communicated to the relevant customer groups) customers were made aware that if they requested a break-clause (which was available at no cost or condition, save for making the request²³ and accepting the New Contract on or by 20 February 2022), they would have until 30 September to effect any switch and could plan with confidence on that basis. As such, 12 – 19 January represents a conservative starting point for measuring the overall switching period afforded to customers with an Original Break-Clause. Given that this is the period in which customers would be giving consideration as to whether to request a break-clause, it may also be the period in which contemporaneous records are most likely to exist, which document considerations as to the timeliness for any switch to an alternative MIS.
- 4.58 On the basis of the above, ESS calculates that customers had, at the most, **a period of nearly 11 months** (46 weeks 5 days, being the period from 8 November 2021 to 30 September 2022), and, from the period the Original Break Clause was offered, **a period of approximately 8.5 months** (36 weeks and 3 days, being the period from 19 January to 30 September 2022), to consider, plan and implement the steps necessary to switch MIS.

5. PROCUREMENT PROCESSES

- 5.1 As a general observation, ESS considers that schools can face, at any time, the need to change a key supplier (for example, due to supplier failure/exit from the market or changes in the supplier's prices or terms). Schools procure goods and services from a wide range of suppliers and in most

²³ Schools were asked to follow a basic process to request the Original Break-Clause. This entailed sending an email requesting the break clause and noting the school name, postcode, quotation number and DfE number. Provided this was sent on or before 20 February 2022, an immediate automated email response was sent back to the school confirming that, provided the customer's request included the basic details requested, and the school signed their new 3-year Annual Entitlement agreement on or before 20 February, their request had been successful.

cases do so directly without the use of LA umbrella arrangements. This is particularly true of IT procurement where schools on average have around [50-100] different direct suppliers²⁴.

- 5.2 Given this large number of suppliers, average contract lengths of between one and three years and no standardisation of contract start and end dates, schools, as a matter of course, procure IT services on a regular basis and do so throughout the year. Schools have a statutory duty to procure discretionary services, such as their MIS, and to obtain value for money in so doing. As noted in paragraph 2.27, schools are required to have “processes and governance in place to determine and manage their most important contracts” of which MIS is one.
- 5.3 ESS also notes that in circumstances where an LA seeks to procure on behalf of a school, the school still has ultimate responsibility for the procurement and should only de-delegate purchasing responsibility to the LA if that is deemed to be consistent with the school’s internal guidelines and the law.²⁵
- 5.4 The procurement process adopted by customers purchasing AE services (or another MIS solution) will vary depending on the type and size of the customer, whether the customer is a group, and the customer’s circumstances at the time the procurement occurs.
- 5.5 Since one of the reasons for establishing MATs and federations was to allow groups of schools to benefit from more efficient and cost-effective procurement, these groups can reasonably be expected to be ready and equipped to undertake procurement at all times. This is borne out by the speed with which some of ESS’ largest MAT customers conducted procurement processes following ESS’ announcement on 8 November.
- 5.6 For individual schools the general rule of thumb is that smaller primary phase schools have simpler requirements than larger secondary phase schools. This is reflected in the relatively straightforward nature of primary phase procurement, which does not, for example, need to consider timetabling or options or exams.
- 5.7 The simpler requirements of primary schools are generally counterbalanced by the limited resources available to primary schools, which on average have less than a third of the workforce of secondary schools.
- 5.8 The procurement process adopted by customers will reflect these considerations, the value of the procurement as a proportion of the school’s budget and the regulatory regime applying to the customer, which will be set out in the customer’s individual procedures and policies. The main types of procurement process that a customer may adopt are:
- 5.8.1 **Informal procurement leading to a direct award.** Given the low value of MIS procurement, informal procurement followed by a direct award to a chosen supplier is the standard method by which MIS and MIS support services are procured.
- 5.8.2 Schools and school groups procuring services whose total value is below the WTO GPA limit of £213,477 inclusive of VAT may adopt their own informal procurement processes. The sophistication of the process used is often influenced by the contract value. The DfE (in its published guidance) recommends £40,000 as the threshold above which a more formal tendering process should be carried out. As noted in Section 3,

²⁴ Source: GDPR in Schools (“GDPRiS”). GDPRiS provides, inter alia, data maps for schools showing how data they capture is used by their suppliers. These data maps allow schools to respond to statement access requests. GDPRiS provides this service to a representative sample of [2,000-3,000] primary and secondary schools in the UK. The data shows that on average schools have [50-100] different software suppliers who use school data captured by their MIS.

²⁵ Where LAs procure MIS software on behalf of school(s) they may be required to go out to tender if the value of the contract they are seeking to award exceeds certain limits or if the contract cannot be awarded through a PCR compliant framework.

the average AE agreement contract value is considerably below this threshold and the same would generally be true for contracts from competitor MIS. For contracts whose total value is below £40,000 the DfE recommends, but does not require, that schools obtain at least three quotes.

- 5.8.3 A customer undertaking an informal procurement process will typically undertake a standard set of steps as part of that process including: the preparation of a requirements statement for circulation to potential suppliers; the issue of an invitation to quote or tender to these suppliers; an evaluation of proposals and quotations received; and the award of the contract to the chosen supplier. ESS would expect that in a small number of cases, the requirements statement and/or relevant tender documents would be prepared by consultants, but in most cases these documents are prepared in-house.
- 5.8.4 In ESS' experience, larger MATs or LAs looking to centrally procure an MIS on behalf of LA maintained schools will tend to use a more formal tender process. Since most LA procurements are likely to exceed WTO GPA limits these procurements are generally undertaken as formal PCR compliant processes (see below).
- 5.8.5 ESS notes that all of the LAs whose AE umbrella agreements were due for renewal on 1 April 2022 voluntarily signed a FA with ESS. In all of these LAs schools previously covered by the LA's umbrella AE agreement with ESS were free to contract directly with ESS and many did so. Schools were able to contract directly with ESS because the de-delegation arrangements required for LA umbrella contracting came to an end on 31 March 2022 and were not renewed. The lack of such de-delegation arrangements from 1 April 2022 meant that LAs were not in a position to continue procuring MIS on behalf of LA maintained schools in their catchment area from 1 April 2022, and would not have been in a position to do so without renewing their de-delegation arrangements with schools.
- 5.8.6 **Direct award through a framework.**²⁶ Procurement frameworks enable customers, including those subject to the PCR, to purchase education software products and services from a set of qualified providers on terms and at prices that have been pre-negotiated as part of a framework tender process. Schools have access to a number of procurement frameworks such as the Crown Commercial Service (CCS) G Cloud framework or the Kent County Council framework (KCS). Schools using these frameworks do not need to run a separate tender process of their own if they purchase products and services using these frameworks. Instead they can directly award a contract to an approved supplier under the framework, or run a mini-competition within the framework (which would involve inviting final quotes from all, or a subset of, framework approved providers, followed by an evaluation and an award stage). Given the relatively low contract value of a typical AE agreement, this sort of procurement approach accounts for a minority of MIS contract awards.
- 5.8.7 **Formal procurement under the Public Contract Regulations ("PCRs").** A formal procurement process in compliance with the PCRs is required where the contract value exceeds the relevant WTO GPA threshold.²⁷ Procurement of this type can be resource-intensive and time-consuming but is rarely used for MIS procurement, not least because

²⁶ Even where a formal PCR procurement process is required, this can be undertaken through PCR compliant frameworks such as the Crown Commercial Service (CCS) G Cloud framework or the Kent County Council framework (KCS), avoiding the need for a Prior Information Notice (PIN) or the preparation of formal tender documentation.

²⁷ The applicable thresholds as at 31 March 2022 was £213,477 including VAT.

PCR compliant procurement can nowadays be undertaken through frameworks and is considerably cheaper, less onerous and quicker if a framework is used.

- 5.8.8 When ESS made its announcement that it was moving to 3-year terms there were only [x] AE customers whose contracts, if renewed on a 3-year basis, would exceed the relevant WTO GPA contract value limit. This was the case because prior to 1 November 2021 nearly all schools who were members of federations or MATs contracted individually with ESS for SIMS.
- 5.8.9 When it became known that ESS was offering to provide shorter term contracts to customers whose contracts, if extended for a 3-year period, would exceed the relevant WTO GPA limit, ESS received several requests to combine previously individual contracts into group contracts, increasing the overall contract value. These requests were designed to increase the contract value so that it would exceed the WTO GPA limit and allow the federation or group to reduce the 3-year contract term.
- 5.8.10 Consequently, by December 2021 the number of customers who after taking into account discounts qualified for AE agreements with terms of less than 3 years rose from [x] to [x]. Despite this change the vast majority of new 3-year AE contracts remained with individual schools and are of relatively low value.

5.9 The expected timing for each of the above modes of procurement is described in further detail in Section 6 below.

5.10 ESS is aware that a small number of LAs intervened in the procurement decision-making process being undertaken by schools following the offer of the New Contracts and subsequent Original Break-Clause Offer. ESS understands that these interventions, whilst potentially irrelevant (as the LA had no formal role in the purchasing decision), may have halted or delayed decision-making by some schools for a period. Where these interventions are considered to have reduced the overall period available for switching, in ESS' view it would be relevant to understand the nature of the intervention, the length of the delay caused, and the effect it had on the school's decision-making process, including on the customer's decision not to take up the Original Break Clause Offer, given that this was a 'no cost' option.

6. SWITCHING PROCESS

6.1 Based on its experience, ESS considers that the process of switching MIS software can be subdivided into four main steps:

- deciding to procure;
- preparing to procure;
- procurement; and,
- implementation.

6.2 The background on applicable procurement processes in Section 5 above is relevant in this section.

Step 1 - Deciding to procure

6.3 If a school proposes to renew a contract with an existing supplier on materially the same terms and the value of that contract is below certain limits then this can generally be undertaken without the need for a procurement process provided that the school is satisfied that the contract continues to represent value for money. However, where a supplier materially alters their existing terms (as was the case here, where ESS terminated its existing AE agreements and offered schools the New

Contracts) and requires the school to enter into a new agreement schools would generally be expected (albeit not required) to undertake some form of procurement process.

- 6.4 In ESS' view, taking into account the relevant DfE and DfES guidance, the move to the New Contract would have *itself* required schools to undertake some form of procurement process, rendering the need for a decision to procure redundant. As such, from 8 November 2021, ESS considers that customers were necessarily faced with the need to procure (either a New Contract from ESS or a new MIS from an alternative MIS provider).
- 6.5 Since the procurement of an MIS is the responsibility of schools and not LAs and is classified under the governance regulations as an operational matter that in the normal course is to be handled by the school's Headteacher or the trust's CEO or senior leadership team, deciding to consider switching MIS should not have required input from either the school's LA or board of governors / trust board.
- 6.6 Notwithstanding the above, to the extent that any final decision to procure required the approval of the school's governance board, trust board or LA, ESS considers that, as it had served a notice of termination in relation to its existing contracts and offered New Contracts, such senior management or other group could have been convened within a reasonable short time to approve such decision. The governance regulations confirm this point.
- 6.7 As the contracting process for schools renewing on 1 April 2022 involved direct contracting arrangements with maintained schools, ESS would not have expected a decision to procure SIMS to have been made by an LA. ESS also understands that the third-party MIS suppliers generally contract directly with schools too (rather than with the LA), save for a small minority of cases involving an express de-delegation arrangement between the LA and school. Therefore, in the ordinary course, an LA would not be involved in the taking of such a decision.

Step 2 - Preparing to procure

- 6.8 In all cases, where procurement is required, the method selected is largely determined by the law and the schools' adopted procurement guidance.
- 6.9 The preparing to procure stage will usually entail deciding upon the procurement method to be used (the different forms of procurement that schools can use are set out in section 5.8), determining the school's requirements and identifying potential alternative MIS systems.
- 6.10 ESS considers that most schools and academies, have a good understanding of their MIS needs (since they use these systems in their daily work) and would readily be able to identify and, if necessary, document their requirements. Schools wishing to document their requirements are able to use publicly available MIS requirements lists available from the framework providers obviating the need to write their own requirements specification.
- 6.11 Identifying alternative MIS suppliers is a straightforward task given the plethora of material available via the Internet. MIS suppliers are keen to win new business and provide a range of materials and webinars for customers looking to switch away from SIMS.
- 6.12 ESS considers that schools undertaking the above steps would generally not have required more than **2 to 3 weeks** to do so unless an informal tender process was envisaged.
- 6.13 In ESS' experience very few schools or trusts use informal tender processes to procure their MIS. In the two years 2020 and 2021 when MIS switching rates rose as a result of the pandemic, ESS, which in the normal course would expect to see virtually all tender activity, only recorded 32 tenders suggesting that these are rarely used. In cases where schools chose to adopt an informal

tender process, ESS would expect the typical preparation for procurement to take no longer than **4 weeks** to complete.

Step 3 – Procurement

- 6.14 Schools in England and Wales (excluding the Channel Islands and the Isle of Man) have a duty under the Education Acts and associated school regulations to undertake some form of procurement process if they are considering switching MIS. Therefore, after identifying their requirements and potential alternative MIS suppliers, a school would be expected to carry out a procurement process in line with legal requirements and/or a school's own internal processes/guidelines.
- 6.15 The procurement process can be sub-divided into three broad stages: publication; evaluation; and award.
- 6.15.1 The first stage, publication, involves notifying suppliers of the existence of the customer's requirement and inviting bids.
- 6.15.2 The evaluation stage of the procurement process involves scrutinising the bids / quotes received, arranging for demonstrations, conducting supplier interviews and scrutinising terms. Some supplier evaluation may also occur before publication, with the published requirements statement or tender document informed by the responses received during the evaluation phase. In such cases the procurement stage tends to focus on contract terms and prices rather than functional evaluation.
- 6.15.3 The award stage mainly involves negotiation of contracts and terms. However, where frameworks are used, terms are largely prescribed, with the level of discount applied to the quoted framework price being the only major variable.
- 6.16 The different forms of procurement that schools can use are set out in section 5.8. Below we give estimates (based on ESS' views and experience) for the time required to undertake these different types of procurement process.
- 6.16.1 Informal procurement leading to a direct award:
- (a) Where the procurement involves a low- to medium-value contract (generally considered to be a contract whose value is less than £40,000), the applicable guidance for most schools is that at least three competing quotes should be obtained, which can be achieved in a relatively short period of time (normally no more than 1 to 2 weeks). This can then be followed by a direct award on standard terms (normally no more than 1 week).
 - (b) Where the procurement involves an informal tender process (for example, with a larger MAT), it is often the case that the customer will have access to professional expertise to manage such a process. ESS has evaluated available tender data from 2020/2021, covering 896 schools (**Appendix 3**).²⁸ This data shows that, on average, where a tender process is adopted, it takes:

²⁸ This analysis covers [25-50] tender processes covering circa [500-1,000] schools, including one large framework opportunity in Hertfordshire for over 350 schools. ESS believes the tenders listed in the file are likely to cover most of the total tender activity in the two year period in question (and in any case a statistically significant sample of such activity). This belief is based on the fact that during the two year period in question fewer than 2,000 schools changed their MIS, by no means all of which changes involved a tender process and that the tenders listed are representative in terms of MIS mix in that [50% - 75%] of schools covered by them

- 27.2 days on average from publication to the date set for supplier submissions; and
- 53.6 days (**7.7 weeks**) on average from publication to the planned award date.

Based on this data ESS estimates that a typical informal tender process would be completed within **8 weeks**.

6.16.2 Direct award through a framework:

Schools are well versed in using procurement frameworks to procure goods and services. In the case of a MIS, there are several frameworks schools can use including the G Cloud and KCS frameworks, which provide schools with feature-by-feature comparisons of MIS system functionality and comprehensive documentation on the various competitor offerings. The framework provider conducts the necessary due diligence on behalf of schools, considerably reducing any due diligence time.²⁹ In the case of a direct contract award, ESS expects that nearly all of its customers would be able to contract using frameworks and direct awards and that this would take **no more than 3 weeks**.

6.16.3 Formal PCR tender:

In ESS' experience, customers rarely need to engage in a formal PCR compliant procurement process, as the value of the procurement will generally fall well below the relevant regulatory threshold. Even where a formal procurement process is required, this can be undertaken through PCR compliant frameworks, avoiding the need for the preparation of formal tender documentation.

In this case no customer was required to undertake PCR compliant procurement since ESS offered all customers whose contract value would have exceeded the WTO GPA limit the option of a shorter contract whose value fell below that limit. ESS has therefore not estimated the time required for PCR compliant procurement but note that in the one case of PCR compliant procurement in the 2020/2021 period, undertaken by means of a formal tender rather than through a PCR compliant framework (the worst-case scenario), the time taken between publication and contract award was 14 weeks.

6.17 In ESS' own experience, it is very rarely the case that customers formally test MIS software before buying.³⁰ Given the low value of the procurement and the 'off-the-shelf' nature of the systems being procured, suppliers do not generally offer customers the opportunity to formally test their systems and are not geared up to undertake such testing. While customers may have an opportunity to use demonstration versions of the software prior to purchase, this is very different

had SIMS as their MIS, which is roughly the national average for England where the bulk of the schools covered by these tenders are based.

The data covers:

- all of the MIS and Financial system tenders that we understand to have been recorded by the Capita Bid team in 2020, when ESS was owned by Capita;
- all of the opportunities recorded by the ESS sales team for H2 2021, whether or not ESS participated in the tender process; and
- a number of tenders for H1 2021 when the business was owned by Montagu Private Equity and the recording process was interrupted.

It should be noted that so far as statutory public procurement rules tenders is concerned, ESS is only aware of one such tender in the two year period covered in the tender data.

²⁹ <https://arbor-education.com/blog-the-importance-of-frameworks-in-the-changing-mis-market/>

³⁰ A formal acceptance testing process would involve using a dummy data set to perform a series of defined acceptance tests against an agreed functional specification.

from formal user acceptance testing and, as far as ESS' senior management are aware, school MIS in the UK are very rarely sold to schools subject to a formal user acceptance testing process.

Step 4 - Implementation

- 6.18 Implementation and migration to a new MIS is an organised and standardised process. It is likely to entail the following steps: the migration of the customers' existing MIS data to the new MIS, post go-live training of the customers' staff in the use of the new MIS and, where necessary, and integrating the new MIS with other systems used by the customer, for example, third party payment or parental engagement systems (see sections 3.12 to 3.18). Some of these steps can and do occur in parallel.
- 6.19 As set out in further detail in Section 7, competing MIS suppliers are well versed in assisting customers through each step in the process. ESS' principal competitors publicised in December 2021 that they could migrate primary schools from SIMS to their MIS in **3 to 4 weeks**, with the process taking **4 to 11 weeks** for secondary schools³¹. Given that substantial numbers of customers did in fact switch from SIMS (see Section 7), indicating that such suppliers were able to meet these timeframes, these upper and lower timeframes are adopted for the purposes of ESS' analysis below.

ESS' time estimate for completing the overall switching process

- 6.20 Table 2 below summarises the time estimates given above. Adding these up, ESS view of the typical time taken to consider and switch would be: for smaller primary schools, between **7 – 10 weeks**; for secondary schools, between **10 – 17 weeks**; and for a larger MAT, within **23 weeks**.
- 6.21 The Table 2 estimates are in the main derived from publicly available data, with the implementation timings coming from competitor websites, and the procurement timings from data available from frameworks and from actual tender processes, which tend to be the most complex and thus the lengthiest form of procurement. Despite this ESS notes that its estimates of switching times set out in Table 2 are significantly lower than the time periods set out in paragraph 4.58 (these being the actual time periods schools had in which to consider, plan and implement a switch from SIMS to an alternate MIS).
- 6.22 ESS has provided data on the actual number of customers that terminated their contract for the supply of SIMS AE services, either by the original timeframe of 31 March 2022 or by the end of the Original Break-Clause period of 30 September 2022, in Section 8 below. This data shows that a significant number of customers were able to switch in the time available and that the customers that switched were of all types and sizes. In ESS' view this data is supportive of the time estimates set out in Table 2.

³¹ Arbor subsequently extended this estimate for secondary schools wishing to migrate to Arbor by 30 September 2022 to under 17 weeks.

Table 2: Summary of ESS' lower and upper range time estimates for switching - by customer type

	Primary		Secondary		Large MAT
% customers	>80% of all customers		<20% customers		<2% of customers
Time range estimate	Lower	Upper	Lower	Upper	
Step 1	-	-	-	-	-
Step 2	2	3	3	3	4
Step 3	2	3	3	3	8
Step 4	3	4	4	11	11
Total	7	10	10	17	23

7. THIRD PARTY GUIDANCE ON SWITCHING TIMEFRAMES

7.1 ESS faces significant competition from a range of competitors across Great Britain.³² ESS notes that Arbor and Bromcom account for nearly all switching away from SIMS, whereas SIMS gains customers from a wide range of MIS. Arbor and Bromcom have each published guidance for prospective customers as to the period of time required to implement a switch to their MIS solution.

Bromcom

7.2 Bromcom informed customers that it is able to migrate and onboard primary schools in **3 weeks** and secondary schools in **4 weeks**, that is, the period from the beginning of the onboarding process to the go-live date. These dates are expressly calibrated around customer switching from SIMS,³³ and were advertised by Bromcom on its website at the time.

7.3 According to these posts the Bromcom migration process is made up of:

- an initial discovery process undertaken in the first week;
- a subsequent go-live training period of one week for primary schools and 2 weeks for secondary schools, in which school administration staff each receive between 1 and 1.5 days training and teachers each receive 30 minutes of training; and
- a final week in which the Bromcom system goes live, data having been copied across from a backup of the school's SIMS database over a period of between 3 and 5 days whilst the go-live training is given.

7.4 The guidance notes that the data migration is comprehensive, involves no downtime for schools and allows teachers to continue taking registers as normal during the migration. Following the

³² For reference, the full list of competitors is Arbor, ScholarPack (Arbor and ScholarPack are owned by the same group, the Key), Bromcom, Pupil Asset, Advanced Progresso, iSAMS, WCBS and SEEMIS. SEEMIS are active in Scotland only.

³³ This is based on the video commentary accompanying the guidance, which refers expressly to customers switching from SIMS.

go-live date after week 3, Bromcom offers 7 weeks of additional post-migration support and training for primary schools and 8 weeks for secondary schools.

7.5 The Bromcom onboarding timelines are copied below in Figures 1 and 2.

Figure 1: Bromcom onboarding timeline screenshot - Primary schools

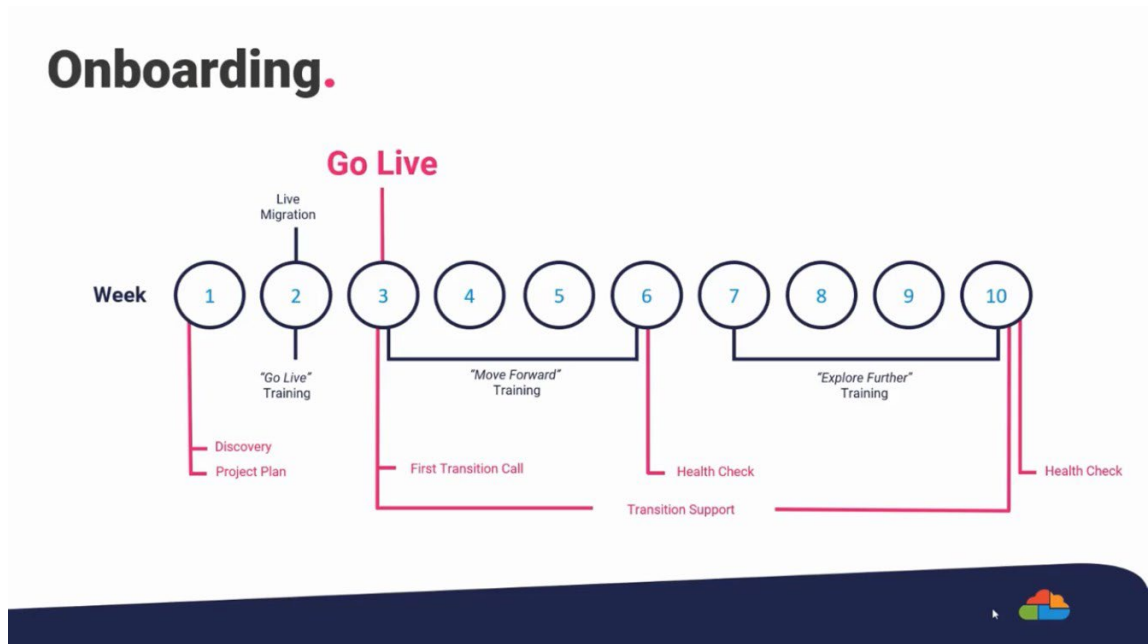
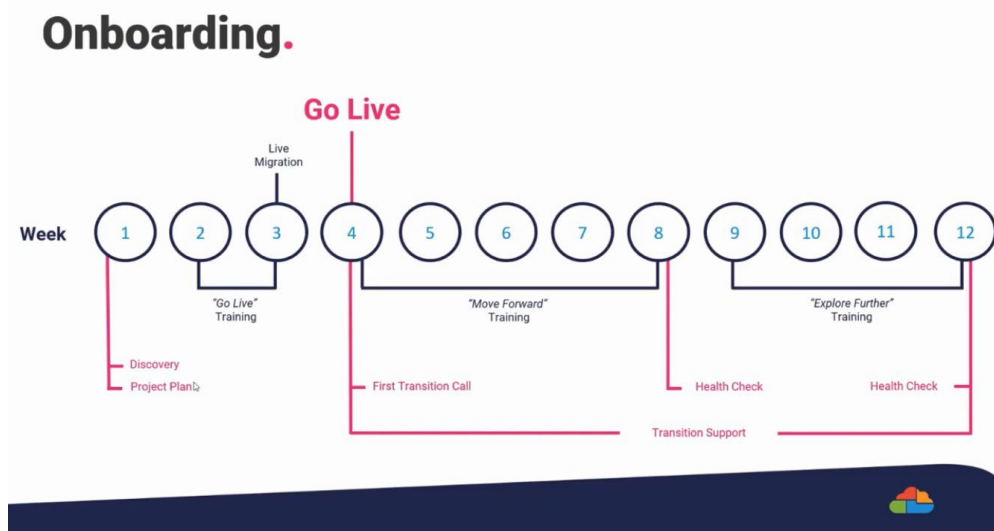


Figure 2: Bromcom Onboarding guidance timeline screenshot - Secondary schools



Arbor

7.6 In Arbor’s guidance document, “Switching Made Simple” (published in Q2, 2021) (Appendix 4, pages 16 and 17), Arbor noted that it could carry out a **4-week** process for migrating a primary school to Arbor, followed by a **3-week** bedding-in phase following the go-live date.

7.7 Following ESS’ announcement that it was changing its standard AE agreement term to 3 years, on 16 November 2021 Arbor posted an offer on its website headed “Switch now, pay later”. This offer was targeted at SIMS customers due to expire on 31 March 2022. The offer was for a 40

month contract term running from 1 December 2021 to 31 March 2025 and required schools to sign up by 31 December 2021.

- 7.8 Under this offer, Arbor was assuring customers that the migration process would be completed before the school’s SIMS AE contract expired on 31 March 2022, with an onboarding process commencing as early as 1 December 2021 (itself revealing of Arbor’s own estimated timeframes for completing the prior procurement steps). In parallel, Arbor developed a Fast Track Programme for primary schools, whereby primary schools could be migrated by Easter 2022 provided a contract was signed with Arbor by 1 February 2022.
- 7.9 Around this time, Arbor communicated that it was confident of managing a large-scale onboarding of schools by 31 March 2022. On 19 November 2021 [§], a member of Arbor’s partner team wrote to Arbor partners, including many SIMS Support Units, saying, inter alia, that Arbor were “preparing for a large volume of new Arbor schools”. She went on to say that “*We’ve heard from hundreds of schools and MATs this week who’ve already handed their notice in to SIMS. We’re confident we’re ready to take them on*”. The email is attached as **Appendix 5**.
- 7.10 On 13 December 2021, Arbor wrote to its support partners announcing that it was extending the deadlines by which schools could sign up for Arbor and be confident of being migrated by 31 March 2022 (see **Appendix 6** for a copy of this email). The extended deadlines were set as 14 January 2022 for secondary schools (giving a period of **under 11 weeks** between sign up and go-live) and 28 February 2022 for primary and special schools (giving a period of **under 5 weeks** between sign up and go-live). These periods have been used as part of the estimated timeframes in Section 5 above.

Arbor Fast Track Programme	Published	Sign up deadline for 1 Sep 2022 go-live	Time frame from sign up to go-live
Arbor Summer Fast Track Programme for primaries ³⁴	Q4 2021	28 February 2022	Sign-up to go-live in under 5 weeks
Arbor Summer Fast Track Programme for secondaries ³⁵	Q4 2021	14 January 2022	Sign-up to go-live in under 11 weeks.

After the Original Break-Clause Offer

- 7.11 Following the Original Break-Clause Offer, in February 2022 Arbor published updated details of its **Summer 2022 Fast Track Programme (Appendices 7 - 9)**. Under the terms of this offer, primary schools would be onboarded by Arbor by 1 September 2022 within a timeframe of under 11 weeks for primary schools and under 17 weeks for secondary schools. It is notable that, even as late as 2 February 2022, Arbor remained confident that a primary school could complete the steps necessary to switch to its MIS by 1 April 2022.

³⁴ <https://arbor-education-8475353.hs-sites.com/fast-track-primary-schools>

³⁵ <https://arbor-education-8475353.hs-sites.com/fast-track-secondary-schools>

Arbor Summer Fast Track Programme	Published	Sign up deadline for 1 Sep 2022 go-live	Time frame from sign up to go-live
Arbor Summer Fast Track Programme for primaries ³⁶	Q1 2022	17 June 2022	Sign-up to go-live in under 11 weeks
Arbor Summer Fast Track Programme for secondaries ³⁷	Q1 2022	9 May 2022	Sign-up to go-live in under 17 weeks

7.12 Arbor and Bromcom also hosted various webinars in the period, e.g. ‘Discover Arbor’ over three days in December and live webinars in January and February,³⁸ and published material on the ease and speed of switching to their MIS services, for example, ‘Debunking the myths around changing MIS’ (**Appendix 10**).³⁹

Other third party evidence

7.13 Herts for Learning (“**HfL**”), Hertfordshire’s education support unit, in 2021 set up a MIS framework from which Hertfordshire LA maintained schools could procure their MIS⁴⁰. On 29 September 2021 HfL published a question-and-answer briefing document (“**Q&A**”) that aimed to inform schools as to what would be involved in switching their MIS⁴¹ (see **Appendix 11**).

7.14 This Q&A contains several answers relating to the migration capabilities of MIS suppliers on the HfL framework. For example, on page 8 in answer to a question regarding migration timescales the Q&A states that “On average, the whole process takes around 4 - 6weeks – the actual data migration itself (when the switch over happens) can usually be managed over just a day or two, often a weekend”.

7.15 It is also relevant that ESS supplied the bulk of LA maintained schools in Hertfordshire. It follows that in the vast majority of cases schools were switching away from SIMS, and that the estimated timings given by HfL reflect the specific experience of the time taken to switch from SIMS to a third party MIS.

8. SIMS CUSTOMER SWITCHING DATA

8.1 This section deals with customers switching away from SIMS and ignores customers switching to SIMS from other MIS. It is therefore not reflective of net switching activity.

8.2 ESS has evaluated the available data and identified that, between 7 October 2021 and 30 September 2022,⁴² the number of schools in England and Wales that ceased using SIMS was [2,000-3,000] schools. This figure includes around [500-1,000] schools which took up and exercised their Original Break-Clause right, [25-75] of whom took advantage of the Group 1 Offer to extend their agreement for a limited period after 30 September 2020 (see below for details of the Group 1 Offer).

8.3 The [2,000-3,000] schools referred to in paragraph 8.2 were part of a cohort of [10,000-15,000] schools whose AE cover was due for renewal on 1 April 2022. Thus nearly [15%-25%] of schools using SIMS as their MIS and who were offered new three-year Annual Entitlement contracts

³⁶ <https://arbor-education-8475353.hs-sites.com/fast-track-primary-schools>

³⁷ <https://arbor-education-8475353.hs-sites.com/fast-track-secondary-schools>

³⁸ Source: Twitter. See **Appendix 12** for screenshots.

³⁹ <https://bromcom.medium.com/debunking-the-myths-around-changing-mis-828a1cf8dffd>

⁴⁰ <https://www.hertsforlearning.co.uk/mis-framework>

⁴¹ https://www.hertsforlearning.co.uk/sites/default/files/documents/dms_portal/mis-licenses/hfl-mis-framework-arbor-q%26a-v2.pdf

⁴² The data is measured as from 7 October 2021 due to the availability of data from the Department for Education.

commencing on 1 April 2022 switched to alternative suppliers on or before 30 September 2022, with close to 70% of these switches occurring before 1 April 2022.

- 8.4 This compares to an average SIMS customer annual loss rate of 733 schools per annum for the previous three years, which is a loss against the entire SIMS customer base rather than the subset of the base due for renewal on 1 April 2022. This loss of 2,199⁴³ schools over the 3 years to October 2021 accounted for 11.1% of the SIMS customer base at the start of the period, showing that the loss rate occasioned by the move to 3-year contracts was on a monthly basis over six times the rate experienced in the previous 3-years (the rate in the 11 months to 30 September 2022 being [0.5% to 2.5%] per month, and the rate in the previous 36 months being 0.29% per month).
- 8.5 This increase in the mean rate at which schools switched away from SIMS is statistically significant (at a 95% confidence level) and supports the hypothesis that many more schools switched away from SIMS in the 11 months from 8 November 2021 to 30 September 2022 than might otherwise have been expected to do so in the 3-year period from 1 April 2022 to 31 March 2025, absent of the introduction of 3-year agreements and the CMA's interventions.
- 8.6 ESS notes that of the [7,500-12,500] or so schools who could have applied for ESS' July 2022 Group 2 Offer (which provided a 12-month break clause to any school that emailed ESS by 30 September with objective evidence that it did not take up the Original Break Clause Offer because it reasonably concluded that a switch to an alternate MIS was not possible in the time available), only 9 schools applied.
- 8.7 ESS' analysis of the underlying DfE data shows that the schools which ceased using SIMS covered the full spectrum of school types, including LA maintained schools, single academies, MATs, special schools and pupil referral units. There was also a wide range of school sizes, with pupil numbers ranging from [10-20] to [2,000-2,500].
- 8.8 In addition, ESS notes that many of the schools who originally claimed that it would require more time to switch to an alternative MIS than ESS had originally made available, subsequently managed to switch within the time provided. A number of the 400 or so schools represented by Stone King solicitors (see Annex 1) provide an example of this.
- 8.9 Notwithstanding the above, ESS understands that some customers may have been affected by circumstances which severely impeded their ability to operate to the same timescales as achieved by the large number of other customers that were able to switch MIS.

9. THE JULY OFFERS

- 9.1 ESS announced a series of additional offers to customers on 25 July 2022 (the July Offers, as defined in the Commitments).
- 9.2 The July Offers were targeted towards three groups of customers:
- Group 1: SIMS customers that exercised their Original Break-Clause right (or intended to do so by 31 August 2022), having contracted to switch to an alternative supplier on or before 30 September, but required more time to complete their switch. This group of customers requiring additional time were able to extend their AE services for a period of up to 6 months (i.e. to 31 March 2023) in order to complete their switch to a third party MIS.

⁴³ The 2,199 figure is calculated by multiplying the average annual loss of 733 schools over three years by three.

- Group 2: SIMS customers that had a clear intention to switch to an alternative MIS when the Original Break-Clause Offer was made, but who are able to demonstrate they did not apply for the Original Break-Clause because they reasonably concluded that they would be unable to switch to an alternative MIS in the time available. This group was offered a new 12-month break clause where they met the relevant criteria
- Group 3: SIMS customers that did apply for the Original Break-Clause but whose application were rejected because they did so after the deadline (being 20 February 2022) (or accepted their 3-year contract after the same deadline set for this purpose). This group was offered a 9-month break-clause.

9.3 ESS considers that the availability of the Group 1 Offer is of particular significance to Type B applicants for the New Break-Clause. That is, customers who had a Break-Clause in their AE contract but evidently decided not to avail themselves if any of the extensions included in the July Offers.

9.4 For any customer who had considered switching, decided to switch and/or prepared to do so, but who had missed the deadline set by their chosen supplier to switch away from SIMS by 30 September, the Group 1 Offer gave these customers up to 6 further months in which to contract for and complete the switch, significantly longer than any of ESS' principal competitors quoted for undertaking such a move (see section 7).

9.5 In connection with the above, ESS notes that there are some SIMS customers representing groups of schools (such as MATs) who were in the process of switching, and did in fact switch, some (but not all) of the schools in their group in the time available under the Break-Clause. Where this occurred the Group 1 Offer allowed these groups to apply for an extension of up to 6 months in which to switch their remaining schools to their chosen alternate supplier.

10. OTHER RELEVANT CONSIDERATIONS

Size of customer

10.1 Whilst smaller schools, such as single primary schools, may have less internal resources and expertise to oversee a change in the school's MIS, ESS also notes that it takes considerably less time for smaller schools to migrate to a new MIS supplier (as clearly evidenced by the timeframes offered by competitors to such schools), thereby providing additional time to consider and prepare for procurement and migration.

10.2 In ESS' view, the prospect of switching within a shorter timeframe would sufficiently countervail any disadvantage faced by smaller customers when researching and procuring alternative MIS. Conversely, larger schools or groups of schools will understandably require greater time to undertake a switch to a new MIS but are more likely to have greater resources and access to year-round expertise to drive forward such a change.

10.3 Regardless of size schools have a statutory duty to procure discretionary services, such as MIS services, and to ensure that they meet the value for money procurement objective. To do so they are required to resource their procurement function appropriately, and to have "processes and governance in place to determine and manage their most important contracts" of which MIS is one (see paragraph 5.2).

10.4 In judging a school's size relative to its peers, it is relevant to note that across the UK the average primary school has 280 pupils on roll and the average secondary school has 950 pupils on roll.

Time of year

- 10.5 DfE data for England, shows that switching occurs throughout the year. This is confirmed by ESS' Annual Entitlement licence online check that allows ESS to monitor when customers cease using SIMS.
- 10.6 While the DfE data shows that, generally, more schools move MIS between January and May than between May and October or October and January (January, May and October being the three census months in England), ESS considers that this is a reflection of the fact that ESS, the largest MIS supplier in England, bills the majority of its customers annually on 1 April, and schools switching MIS, in a desire to minimise costs, therefore tend to move MIS so as to coincide with the ESS billing year.
- 10.7 In order to allow for data migration, switching MIS tends to occur over holiday periods or long weekends. Since the school year runs from September to August, moving MIS to coincide with the beginning of the academic year may be regarded as a pragmatic option, and the relevant data indicates that a significant number of schools chose this period, and did in fact migrate to a new MIS by 30 September 2022.

Welsh Schools

- 10.8 The choice in Wales is very limited. In November 2021, there were only two MIS being used by schools in Wales: SIMS 7; and Teacher Centre, and that remains the case today. Two former suppliers, Advanced Learning and RM, ceased to have a presence in Welsh schools in 2016 and 2017 respectively. According to Welsh government census data, Teacher Centre, which is supplied by Ceredigion County Council, is only used in primary schools.

Negotiated AE contract

- 10.9 The Adjudicator ought to be aware that ESS had entered into a small number of negotiated agreement with customers. These included, by way of example, where a customer had a series of AE agreements involving different schools (which were set to terminate on different dates in the future) and had asked ESS to amalgamate its different agreements into a single agreement, thereby reducing the overall contract duration in the process (leading to a loss of contracted revenue for ESS as contract end dates were brought forward). These negotiated arrangements involved the relevant customer agreeing, in return for this benefit, to not taking or exercising the Original Break-Clause. As such these negotiated agreements, to the extent they arise during the Commitments process, do not satisfy the criteria for obtaining a further break clause and are outside of the Commitments offer.

Risk of gaming or manipulation

- 10.10 On the basis of past competitor behaviour ESS is legitimately concerned about the risk of competitors using the New Break-Clause Offer to systematically target and encourage customers to apply in circumstances where that customer was not eligible, as they do not meet the criteria. This may include, but not be limited to, competitors providing scripted answers or template completed Applications. This issue was discussed with the CMA prior to agreeing the Commitments offer and it was agreed that the Adjudicator should be alerted to this issue, and take whatever steps it thought appropriate to avoid any such abuse.

Impact of COVID on ability to switch

- 10.11 PPG, through its payment platforms and MIS monitoring activities obtains real time data on school activity from a substantial proportion of UK schools. PPG believes this data gives it a unique insight into the operations of UK schools. This data shows that from September 2021

schools rapidly recovered from the effects of the pandemic and by January 2022 were undertaking a full range of school activities at a level similar to those seen in January 2020. As such PPG does not consider COVID to have had a material effect on schools' ability to undertake MIS procurement or respond to its Original Break Clause Offer.

Annex 1

Stone King Schools

1. ESS believes that a significant number of the complaints received by the CMA came from the 400 or so schools represented by the solicitors Stone King (the “Stone King Schools”), not all of whom were SIMS users.⁴⁴ ESS’ belief is based on the statements made to it by Stone King and Stone King’s clients. It is relevant background to note what happened to these schools.
2. The Stone King Schools through their solicitors claimed that they required 12 months or more to switch from SIMS to an alternative MIS. In Annex 1 of ESS’ letter to the CMA of 10 March 2022, ESS provided data on the outcomes for the Stone King Schools. The data provided by ESS showed that [75%-85%] of these schools had in fact completed a procurement process by the end of February 2022, less than four months after ESS announced its change in AE contract terms.
3. The Annex provided data on [300-350] of the [350-375] schools represented by Stone King who actually used SIMS and who were believed by ESS to still be using core SIMS software on 7 March 2022. The table below updates the position to reflect ESS’ current understanding of the outcome for these schools, [300-350] of whom were still using SIMS as their primary MIS on 19 May 2022, a figure that had dropped to [250-300] by 30 November 2022.
4. All [350-400] of the Stone King Schools engaged in a procurement process, with the vast majority undertaking a competitive procurement process. Of these, [10-20] moved to alternate MIS suppliers before 1 April 2022, [75-100] opted to take AE agreements without the Original Break Clause, [100-125] entered into bespoke AE agreements available to customers whose AE agreement value exceeded the relevant WTO GPA threshold, and [125-150] opted for AE agreements with an Original Break Clause, of which [50-100] exercised their Original Break Clause right to terminate their AE agreement on 30 September 2022.
5. From the table it is evident that all of the Stone King Schools using SIMS completed a procurement process within the 5-month notice period (8 November 2021 to 31 March 2022) and either decided to stay with SIMS, moved to alternative providers from 1 April 2022 or took the Original Break Clause Offer with a view to considering moving to an alternative provider by 1 October 2022, with most of these schools making these decisions by the end of February 2022.
6. ESS believes that this demonstrates that even schools who claimed to be unable to move in less than 18 months were in fact able to undertake and complete a procurement process in the 5 months from 8 November 2021 to 31 March 2022, and where, as a result of that process, they decided to switch away from SIMS they were able to do so by 30 September 2022.
7. The example of the Stone King Schools shows that a significant number of these schools (who originally claimed that it would take 12 months or more to switch) were able to undertake a competitive procurement process and where they decided to move to an alternative supplier, were able to switch by 1 October 2022.

⁴⁴ ESS cannot be certain that all of the Stone King Schools complained since it has not received any data from the CMA as to how many schools, or from which schools, complaints were received.

Category	Grouping	7 March 2022	29 July 2022	30 November
	Schools claiming to be represented by, or said by Stone King to be represented by, Stone King	[375-425]	[375-425]	[375-425]
	Schools amongst the above group using core SIMS at the last census date before the date shown in the column heading	[350-375]	[325- 350]	[250-300]
a.	Schools that went through a procurement process leading to their accepting a new 3-year ESS core SIMS AE agreement on or before the date shown in the column heading without a 6-month break clause	[15-25]	[75-100]	[75-100]
b.	Schools that were on 7 March 2022 still completing their procurement process and had indicated that they intended to contract with ESS for a 3-year AE agreement by 31 March 2022	[25-50]	-	-
c.	Schools that as at 7 March 2022 were known to be in a MAT where the total contract value for a 3-year AE agreement covering all of the schools in the MAT would be over the WTO GPA limit, and who were therefore eligible for a shorter AE agreement term that allowed the total value of their contract to fall below the WTO limit, which contracts they have accepted after undertaking a procurement process	[75-125]	[100-150]	[100-150]
d.	Schools that as at the date shown in the column heading were known to have gone to other suppliers after a procurement process, and who were expected to cease or ceased being ESS customers from 1 April 2022 or 1 October 2022	[20-30]	[75-100]	[75-100]
e.	Schools that accepted a 3-year ESS AE agreement with a 6-month break clause made up of:	[100-125]	[125-150]	[125-150]
i.	<i>Schools that have informed ESS that they will be moving to an alternate supplier on or before 1 October 2022</i>	[25- 50]	[50-75]	-
ii.	<i>Schools that have not formally confirmed their future plans to ESS but were as at 7 March 2022 expected to exercise the break clause when this option became available with a view to ceasing to use SIMS on or before 1 October 2022</i>	[50-75]	-	-
iii.	<i>Schools whose break clause intentions are unknown</i>	-	[50-75-]	-

iv.	<i>Schools who exercised the break clause</i>	-	-	<i>[70-80]</i>
v.	<i>Schools choosing to remain with ESS for core SIMS</i>		-	<i>[50-75]</i>
f.	Schools that were negotiating with ESS as at 7 March 2022, but had not taken up the option of a break clause, and were expected to either move to another supplier or contract with ESS by 1 April 2022.	[20-30]	-	-
Total		[300-350]	[350-400]	[350-400]