

Becta Report

September 2010

School management information systems and value for money 2010

A report with recommendations addressing issues relating to legal compliance, cost reductions and bureaucratic burdens.



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1 Executive summary and recommendations

Summary of recommendations from the 2010 market study

- 1.1 The primary focus of this report is an analysis of the operation of the marketplace for school MIS *products and services, and specifically on the procurement practices in place. However, the school Management Information Systems (MIS) marketplace is impacted by a wider set of issues such as statutory returns, interoperability approaches and the arrangements for the provision of local authority support. Consequently the Market Study commissioned by Becta and carried out by Atkins Ltd considered the impact of these wider issues.*
- 1.2 On receipt of the findings of the Market Study Becta considered the evidence, commissioned the necessary legal analysis and developed this report and recommendations. They address:
 - Compliance with Procurement Law
 - Reductions in Costs
 - Reductions in Bureaucratic Burdens.
- 1.3 In summary, it is clear from the evidence and findings emanating from the Market Study that the school MIS marketplace is:
 - Still uncompetitive as a result of a virtual absence of Open Journal of the European Union (OJEU) compliant procurement activity
 - Still dominated by a single supplier
 - Still distorted due to the impact of the statutory returns process which increases costs to schools, increases the burdens on local authorities and mitigates in particular against smaller providers
 - Still characterised by a lack of understanding of the relevant EU and UK procurement regulations at the local authority level, and concerns round the cost of change
 - Still impeded by a lack of a mandated interoperability standard
 - Still supported by specialist teams, almost always operating at the individual local authority level, and consequently unable to take advantage of economies of scale.
- 1.4 The relevance of such findings take on significant importance given that over the 5 year lifetime of this parliament the costs to schools of MIS licensing, maintenance and support is likely to exceed £550 million at 2009/10 prices.
- 1.5 Therefore, the recommendations below are designed to drive greater efficiencies by improving competitiveness, reducing both the cost of MIS provision and bureaucratic burdens.

Recommendations on legal compliance

- 1.6 **Recommendation 1** – Each local authority should urgently conduct a review to determine if the specific arrangements they have put in place for the supply and on-going maintenance of school MIS systems are in accordance with the law. This recognises that the Market Study identified a significant number of MIS procurement activities which are potentially non-compliant with EU and UK procurement law (Paragraphs 1.14 to 1.21).
- 1.7 **Recommendation 2** – Where local authorities are unable to demonstrate compliance with EU and UK procurement law they should limit the scope of un-competed MIS contract renewals they intend to make to that which is permissible under the only supplier exemption (Paragraphs 1.22 to 1.26).
- 1.8 **Recommendation 3** – Local authorities should examine the opportunity to protect themselves and their schools from some of the potentially significant consequences of a court ruling that their MIS supply and maintenance arrangements are in breach of EU and UK procurement law, by the use of an OJEU Voluntary Ex Anti Transparency (VEAT) notice (Paragraphs 1.27 to 1.33).

Recommendations on reducing costs

- 1.9 **Recommendation 4** – The Department should consider the very significant savings which would flow from the establishment of a cost effective national or central MIS procurement mechanism, with associated advice and guidance, which local authorities and schools would then have the freedom to use. This recognises the likely significant increase in the number of MIS related EU compliant procurements. It is estimated that the difference between the cost of the recommended approach and the cost of procurements at the individual school level would be some £138 million over five years (Paragraphs 1.34 to 1.39).
- 1.10 **Recommendation 5** – Local authorities should urgently revisit their options for reducing the cost of MIS licensing and the cost of delivering MIS support to schools. This is in the light of the considerable financial pressures facing the entire education sector (Paragraphs 1.40 to 1.42).
- 1.11 **Recommendation 6** – The Department should consider introducing arrangements to remove the potential for double charging. Currently when a school changes its legal status, for example by becoming an Academy, it can be required by its MIS provider to pay again to licence its existing MIS system in circumstances where its MIS supplier prohibits licence transfer (Paragraphs 1.43 to 1.44).
- 1.12 **Recommendation 7** – The Department considers mandating an interoperability standard in the MIS and Learning Platform (LP) marketplace and that such a mandated standard should be in place within the next 12 months. This would assist schools in exercising choice, increase competition and reduce interoperability costs (Paragraphs 1.45 to 1.48).

Recommendations on reducing bureaucracy

- 1.13 **Recommendation 8** – The Department considers the benefits of an immediate freeze in respect of further changes in the specification for data returns. This would support their commitment to urgently ensure all schools are freed of bureaucracy and to reduce the burden of data collection on schools (Paragraphs 1.49 to 1.52).

Legal compliance concerns

- 1.14 The core legal concern relates to the fact that £38 million to £44 million of public funds is expended annually on the renewal of MIS software maintenance contracts, almost universally without a call for competition and potentially in a manner which goes beyond the exemptions available under EU and UK procurement law.
- 1.15 Legal advice indicates that the annual renewal of MIS software maintenance contracts effectively comprises the award of a new contract. Such awards will therefore be subject to the full procedural requirements associated with EU and UK procurement law unless they fall under the scope of one of the two exemptions available.
- 1.16 One such exemption – the additional services exemption, permits under certain circumstances the purchase of services beyond those originally contracted for. However the total value of such additional services is limited to 50% of the value of the original contract. This exemption is considered therefore not to be relevant to the circumstances under which the vast majority of annual MIS contract renewals take place (Paragraphs 6.5 to 6.7).
- 1.17 The remaining exemption (the only supplier exemption) relates to circumstances when there are technical reasons which mean that there is only one company with the expertise or the exclusive rights to provide the services. This exemption will be available for school MIS contract renewals, but only to the extent that the renewal is limited in scope to basic software maintenance such as bug fixes and changes necessary to facilitate alterations in government reporting requirements.
- 1.18 However, the only supplier exemption would not include anything that could be acquired from other software vendors such as new software modules or additional functionality. It also wouldn't permit incremental changes to a product which were shown over time to have resulted in the supplier developing new areas of functionality or indeed a completely new product. Generational changes in the nature of the products, for example, the upgrade from a DOS-based product to a Windows-based product, or from a local area network (LAN) based product to a "cloud" based product, would if challenged be likely to be regarded as sufficiently material to require the change to be competitively procured by the contracting authority (Paragraphs 6.8 to 6.12).

- 1.19 Recognising the limitations which apply to the only supplier exemption, the Market Study analysed the procurement practises reported and noted that just over 20% of the practice fell into the categories that were considered likely to be compliant with procurement law. Over 16% of the cases reported were categorised as unlikely to be compliant. In over 63% of the cases the responses indicated the local authority could not identify the basis on which the product had originally been procured, and thus may well have difficulty in defending a procurement law challenge.
- 1.20 In summary, a large number of annual MIS contract renewals are taking place in the absence of competition. These renewals are considered to fall within the scope of the procurement regulations and its requirements for an OJEU based call for competition. Additionally, a significant number of local authorities have acquired new functionality over the past few years which would also typically fall under the scope of the procurement regulations. However, over the last 5 years only 18 MIS related OJEU procurements have been identified.
- 1.21 The introduction into UK law of the Remedies Directive in December 2009 makes it much easier for suppliers to challenge contract awards and makes the implications of successful challenges more wide ranging. In the light of this, we consider it essential that local authorities should urgently conduct a review to determine if the specific arrangements they have put in place for the supply and on-going maintenance of school MIS systems are in accordance with the law.

De minimis scope in contract renewals

- 1.22 The Market Study found that many of the MIS systems currently in use in schools were originally procured many years ago and had been continually updated and enhanced via the mechanism of annual maintenance. More recently the majority of local authorities have acquired new functionality to meet the needs of relatively recent government initiatives in respect of 14 to 19 provisions and in respect of web based access for teachers and parents.
- 1.23 The continual updating and enhancement of functionality or the acquisition of new functionality is considered to go beyond what is permitted under the only supplier exemption to the EU and UK procurement laws.
- 1.24 If contracting entities wish to rely on the only supplier exemption to award an MIS contract in the absence of competition, they **must** ensure that the scope of the services provided under that renewed contract are strictly limited to basic software support such as bug fixes and changes necessary to support statutory returns. The services must **not** include new or enhanced functionality nor must they result in the migration of the product from one technical "generation" to another. The key test will be for the local authority in question to demonstrate that the changes delivered under the exemption do not expand the scope of the software or the support services delivered under the original contract.
- 1.25 The MIS supplier is the organisation best placed to verify that the scope of changes to its software under a support contract will not exceed what is permissible under the exemption. Contracting entities should therefore consider seeking written confirmation from their MIS supplier that the services provided under a support contract awarded without a call for competition do not exceed what is permissible under the exemption.
- 1.26 The de minimis approach will not necessarily protect the contracting authority from a proposed award being challenged by a supplier under the Remedies Directive. If a legal challenge is actually commenced the contracting authority must suspend the award procedure. However, the use of the de minimis approach should assist the contracting authority in justifying the proposed award to the court.

Risk reduction strategy

- 1.27 Following the introduction of the Remedies Directive in December 2009 additional remedies are now available to aggrieved suppliers including a requirement on a contracting authority to **automatically** suspend the contract-making when a legal challenge to the contract award decision is **launched**. The need for the aggrieved supplier to successfully apply to the High Court for an injunction is removed. In addition, post the award of contract the High Court can now, for a period of time after contract award, make a declaration of **ineffectiveness** i.e. the cancellation of the contract, where certain serious rule breaches have occurred. In the context of the MIS marketplace

- the most likely grounds justifying a finding of ineffectiveness are a failure to advertise a contract in the OJEU, or combined breaches of the procurement regulations.
- 1.28 According to the Office of Government Commerce (OGC) guidance on the new remedies rules, a finding of ineffectiveness means that:
- “any obligations under the contract that have yet to be performed will be cancelled, and should not in fact be performed” but that “any obligations that have already been performed will not necessarily be affected by the cancellation”.*
- 1.29 The OGC guidance does not deal specifically with renewals of contracts. It is possible that where an order of ineffectiveness is made for a contract extension the effect of the order would be to render the whole agreement ineffective and not just the element that has been extended. This could mean that for an MIS support renewal the whole agreement would be regarded as ineffective and this could mean that the licence to use is also terminated if the support is not separable from the licence terms.
- 1.30 A finding of ineffectiveness can also have serious ramifications for the apparently successful supplier(s), who could find themselves deprived of a contract that they thought they had won fairly, with the breakage costs and losses of profit associated with that contract deprivation.
- 1.31 If the High Court finds a contract ineffective, it is **required** to impose a civil financial penalty on the contracting authority. The level of the civil financial penalty will be decided on a case-by-case basis by the court, taking into account all relevant factors, and ensuring that the penalty is effective, proportionate and dissuasive. Additionally, the High Court can provide for alternative penalties instead of ineffectiveness, in certain situations where ineffectiveness is inappropriate.
- 1.32 In essence the rationale for the severe nature of these consequences is a wish to deter contracting authorities from the most severe breach of the procurement rules – a direct award of a contract without an OJEU advertisement. This behaviour deprives potential suppliers of the opportunity to tender for the works or services and also of the opportunity to object prior to an award. Recognising the intentionally serious consequences which can flow from a declaration of ineffectiveness the Remedies Directive provides a mechanism by which such declarations can be avoided.
- 1.33 A contracting authority may decide it is justified in awarding a contract without an OJEU advertisement announcing a call for competition, because for example it considers the nature or scope of the contract does not fall within the regulations. In this case the authority now has the opportunity to publish a new form of OJEU advertisement - a Voluntary Ex Ante Transparency (VEAT) notice. This notice provides a public announcement that an award is proposed without a call for competition, giving suppliers an opportunity to challenge. The notice includes a mandatory justification for the decision not to carry out a competitive procurement. If no challenges are brought during the ten day standstill period commencing the day after the publication of the VEAT notice and the award of the contract then the contract can be awarded with the ineffectiveness remedy disengaged.

Cost savings

- 1.34 We considered carefully whether in the light of the wide range of procurement issues identified via the Market Study the most appropriate way forward would be to recommend that local authorities end their role in the procurement of school MIS solutions and leave the matter to individual schools. We rejected that approach for the follow reasons:
- 1.35 It would place considerable additional bureaucratic burdens on thousands of individual schools at a time when the Department's policy focus is on increasing educational standards and on reducing bureaucratic burdens. We estimate the additional market sounding costs of a school based approach to be in the region of £88 million over the lifetime of a five year parliament. Additionally, about £31 million of further costs would arise as a result of the loss of aggregation which would flow from moving to individual institution purchasing. Thus the total five year costs of this approach would be in the order of £119 million.
- 1.36 We also considered if recommending procurements by each individual local authority might be the best way forward. From a cost perspective we estimated that the cost of each local authority establishing arrangements (via an OJEU compliant process) on behalf of its individual schools would be in the region of £20 million over the lifetime of a five year parliament. However, an OJEU compliant process would allow local authorities to enter multi-year contracts. The Market Study

- found that the one authority that had taken such an approach had generated savings of about 12%. Replicating this across the system indicates that it would save about £25 million over 5 years. Thus the net impact of individual procurements at the local authority level would be savings of £5 million over five years.
- 1.37 The opportunity for significantly greater savings will flow from the establishment of a specific collaborative procurement arrangement (a framework) which takes account of the particular features of the MIS marketplace. Such collaborative arrangements provide the freedom for schools and local authorities to use them but place no obligation on them to do so. We estimate that the initial cost of establishing such a framework would be between £400,000 and £500,000, and the cost of a call-off by all of the 152 local authorities to be about £5.2 million in total. Thus the 5 year costs of establishing the arrangement would be about £6 million.
- 1.38 The ability of local authorities to establish multi-year contracts is estimated to generate savings in the order of £25 million. The net cost of this option is therefore a saving of about £19 million (£25 million – £6 million) over 5 years, a significantly greater saving than that generated by procuring at the individual local authority level and £138 million less expensive than the cost of procuring at the individual school level. In summary the five year position is:
- The implication of procuring at the individual school level is that it will cost an estimated £119 million.
 - The implication of procuring at the individual local authority level is that the aggregation savings should exceed the cost of the procurements yielding a savings of £5 million.
 - The implication of establishing a common framework and associated support and guidance is that the aggregation savings should exceed the cost of the procurement by £19 million.
- 1.39 The difference between the most expensive option and the least expensive option is £138 million. It should be noted that this £138 million sum takes no account of any savings that may be derived as a result of the competitive pressures generated by establishing the framework. An earlier framework in respect of the provision of Learning Services is estimated to have reduced unit costs to schools by more than 60%. The establishment of a national MIS framework arrangement is reflected in our recommendations.
- 1.40 The annual costs for MIS licensing have grown from an estimated £31 million in 2005 to an estimated £38 million to £44 million in 2010. The costs are rising at a historical average of 6% annually. Unchallenged over the lifetime of a five year parliament they will have cost between £227 million and £262 million. Local authorities can take steps to reduce these costs by ensuring that:
- Price reductions flow from any reductions in the nature, frequency and scope of statutory returns (Paragraph 10.48).
 - A very rigorous approach is taken to product enhancements, ensuring they are, in the current financial climate, absolutely essential enhancements and that there is full visibility regarding their current and future financial implications (Paragraph 10.44).
 - Where functionality enhancements are not being procured, as a result of a decision to adopt the de minimis approach to software maintenance, this reduction in scope is reflected in reduced supplier pricing (Paragraph 10.11).
 - Open competition via an OJEU procurement process is used to drive out year on year discounts as a result of a longer than one year commitment to a given supplier (Paragraph 10.40).
 - Local authorities should demonstrate the advantages of aggregated procurement and longer term agreements to their schools, and gain agreement from their schools to commit to longer term contracts.
 - Local authorities explore whether greater economies of scale in the procurement of MIS systems (for example by local authorities in a region combining their requirements) might generate greater savings than those possible by individual local authority purchasing.
 - The Systems Interoperability Framework (SIF) is mandated in the statement of requirement to ensure that contracting authorities are not in the future locked into their current supplier and that there is effective interoperability between MIS systems and Learning Platforms.
 - An assessment is made of the whole life infrastructure and support savings which could flow from a hosted or cloud based approach to MIS functionality. These savings would have to be adjusted for any increased bandwidth costs (Paragraph 10.42 to 10.43).

- 1.41 It is estimated that the cost of MIS support provided by local authorities to their schools is in the region of £65 million annually at 2010 prices or £325 million over the 5 year lifetime of a parliament. The fact that this support is usually funded directly by schools is a measure of the value they attach to it. However, it is likely that the costs of the provision will come under increased scrutiny in the context of the financial pressures faced by schools and local authorities.
- 1.42 Additionally, the support is often provided by relatively small and disparate teams operating within the confines of a single authority and seeking to provide expert support across a very wide range of functional areas. This model of support also limits the ability to support more than one product, particularly in the smaller authorities. We believe the time is right for local authorities to move to a shared service model for this support (Paragraphs 10.60 to 10.64).
- 1.43 When a school changes its legal status by for example becoming an Academy, it is often the case that its MIS supplier takes the view that the MIS licence is not transferable to the new legal entity. Thus the school finds that it has to expend funds repurchasing a license to use an MIS system that it may have been using for very many years. Both the original licence purchased when the school was a local authority school, and the licence purchased when the school changed legal status are likely to have been paid for from the public purse.
- 1.44 In the light of the pressures on the public finances, we consider the ending of this double charging to be an opportunity to deliver savings and we recommend that the Department considers introducing arrangements to bring it to an end. Such an arrangement could be via a property transfer scheme as envisaged by Schedule 8 of the Academies Act 2010, or an alternative statutory mechanism.
- 1.45 The lack of a mandated interoperability standard can also add costs in a variety of ways:
- It can limit the ability of customers to select an aspect of functionality from a provider other than their current MIS provider thus leading to supplier lock-in
 - It can limit the ability of new providers to enter the marketplace and their ability to leverage existing data sources as they develop their offering
 - It can lead to inefficient business processes, data duplication, re-entering of data in multiple systems, reduction in data quality and increased reporting costs
 - It can lead to increased product development costs as each supplier seeks to develop their own approach to interoperability.
- 1.46 Since the publication of the 2005 report there has been significant progress regarding the use of SIF as an interoperability standard. The Market Study reported that all of the main suppliers considered that a mandated interoperability standard would soon be essential, but there was increasing supplier concern regarding the time it was taking to achieve widespread adoption (Paragraphs 9.10 to 9.11).
- 1.47 Local authorities also supported the introduction of a mandatory standard and the Specialist Schools and Academy Trust (SSAT) saw interoperability as increasingly important (Paragraph 9.12).
- 1.48 Therefore, we recommend that to assist schools in exercising choice, to increase competition and to reduce interoperability costs, the Department considers mandating an interoperability standard in the MIS and Learning Platform (LP) marketplace and that such a mandated standard should be in place within the next 12 months.

Reductions in bureaucratic burdens

- 1.49 A recurring theme during the Market Study was the continued impact that the data returns process (statutory and non statutory) places on suppliers, local authority support teams and schools. These burdens flow from the electronic data requirements of the Department and a range of other agencies. In 2005 there were 28 such mandatory returns and in 2010 there were 41. This represents virtually a 50% increase over the period.
- 1.50 In addition to the new returns required there are on-going changes to existing returns involving the omission of existing information or adding new information requirements. Finally there are currently 86 "optional" returns which schools may choose to submit. However every MIS provider has to provide functionality to meet the "optional" returns. The financial cost of this extensive work falls to schools, suppliers and local authority support teams, not to those making the data demands.

- 1.51 For small suppliers in the MIS marketplace it is estimated that the effort to address the statutory requirements represents about 30% of their MIS turnover, whereas for the dominant supplier the effort is estimated to be less 3% of their MIS related turnover. Local authorities are also concerned about the impact of the statutory returns process arguing that it stifles innovation, limits new entrants into the marketplace and impacts on solution quality.
- 1.52 We believe that in the light of the commitment of the Coalition Government to reducing the data burden on schools the time is right to consider a five year freeze on any changes to the specifications of statutory returns, with that freeze only being lifted when arrangements are in place to ensure that the data requirements of the centre do not result in additional costs to schools and disadvantage suppliers including SME's (Paragraphs 10.47 to 10.50).

Key strategic risk

- 1.53 We consider that there is a significant risk that local authorities will face a legal challenge to the procedures they are currently using to renew, on a year by year basis, their MIS support arrangements. This is based on the procurement practices reported during the Market Study, the allegations of improper procurement practices made by some suppliers before and during the Market Study, and the relative ease with which remedies can now be pursued under the Remedies Directive.
- 1.54 Where such challenges are duly issued local authorities are required by law to place the relevant contract renewal on hold. Where the challenges are successful, local authorities run the risk of having contracts rendered ineffective (cancelled), and being subject to a civil financial penalty. Additionally, there is a risk that an ineffectiveness ruling would impact any on-going "right to use" in respect of current software products.
- 1.55 Our various recommendations are designed to help individual local authorities identify any risks relating to their specific MIS procurement arrangements, minimise the potential for challenge and address risks round a potential finding of ineffectiveness. We also highlight the nature of the savings that will flow from the establishment of a common national framework for procuring MIS solutions which schools and local authorities would have the freedom to use. Recognising that local authorities will be considering the renewal of the MIS support contracts in December 2010 we believe urgent action on our procurement related recommendations is essential.
- 1.56 We also set out other opportunities for cost reductions at the local authority and school level and actions which the Department may wish to consider regarding potential double charging, statutory returns, interoperability and the establishment of a framework agreement to facilitate procurements in a cost effective way.

2 Introduction and background

The 2005 Review

- 2.1 In 2005 Becta published its 'School Management Information Systems and Value for Money' report. This identified concerns regarding the effective operation of the school Management Information Systems marketplace. The concerns included the considerable impediments to the exercise of effective choice by schools, the substantial increases in licensing costs of products from the dominant supplier as well as issues covering the timeliness and quality of Management Information Systems software.
- 2.2 The report identified the need for improvement in a number of crucial areas including the procurement and effective use of Management Information Systems. To address the identified concerns the report made nine recommendations under the subject areas of Commercial, Interoperability, Delivering Effective Support and Statutory Returns.

Update on 2005 recommendations

- 2.3 When we set out our nine recommendations in 2005 we were clear that they were interdependent and consequently needed to be implemented as a cohesive whole. Whilst considerable progress has been made in a number of areas, it will nevertheless be necessary to go significantly further in three crucial respects if the **systemic** changes envisaged in the 2005 report are to be delivered.
- 2.4 Firstly, our recommendation on the establishment of a Framework Agreement to ensure local authorities were in compliance with their UK and EU procurement requirements was not implemented. This was due to the fact that local authorities indicated that they did not have an appetite for such a Framework Agreement. We set out elsewhere in our report why addressing this issue is now for them an urgent inescapable necessity.
- 2.5 Secondly, whilst we have seen very considerable progress on interoperability including wide stakeholder commitment to the adoption of the Systems Interoperability Framework (SIF) as a national standard, the mandating of that standard is still to be confirmed. We set out elsewhere in our report why we feel the time for mandating a standard has now arrived.
- 2.6 Finally, a key 2005 recommendation envisaged a Memorandum of Understanding (MOU) between the Department and the main suppliers of MIS products. This was successfully negotiated and signed in October 2006 and was seen as an important step forward as it committed the Department to ensuring that the changes in the requirements for statutory returns were kept to a minimum and communicated to suppliers in a consistent and timely way. Suppliers committed to delivering quality software to schools on time, and to work to improved interoperability and technical standards.
- 2.7 The MOU envisaged that the Department would establish separate arrangements through which it contracts directly with suppliers in relation to statutory returns imposing quality and timeliness thresholds on providers. Therefore, the costs of meeting the Department's needs via the statutory returns process would no longer fall to schools. In the event the establishment of the arrangements to facilitate direct contracting were not successfully concluded and the charges associated with statutory returns continue to fall, ultimately, to schools. In the absence of revised arrangements suppliers have declined to continue with a formal MOU.

Supplier and local authority concerns regarding MIS procurement

- 2.8 During 2008 and 2009 Becta received a number of representations from suppliers to the effect that the procurement arrangements adopted by local authorities in respect of MIS provision and support had not progressed, and that in their view the practices were in breach of EU and UK procurement law.
- 2.9 Additionally, concerns have been raised by local authorities regarding the need for clarity in respect of their procurement obligations in the complex area of school MIS solutions. Local authorities also raised concerns pertaining to a lack of effective interoperability between Learning Platforms and School MIS Systems.

3 Strategic context

Coalition Government policy

- 3.1 There has been an early emphasis by the Coalition Government on bringing forward measures designed to deliver a paradigm shift in relation to the quality of education provision in England. The aim is to improve educational opportunity for all pupils with a particular focus on improvements for those most disadvantaged. There is also a growing consensus that such a shift is required if we are to successfully meet the present and future economic social and political needs of the nation, within the context of increasing global competition.
- 3.2 Immediate emphasis has been placed by Government on the need to:
- Provide greater autonomy for schools
 - Create a new generation of independently run state schools
 - Raise the status of the teaching profession
 - Make the most effective use of the resources available and reduce the deficit
 - Increase the adoption of open standards to support interoperability
 - Provide systems based on open interoperability.
- 3.3 Along with the further empowering of the front line, the need for what the Department has described as “sharper, more intelligent accountability” has been identified as a policy priority. Effective Information and Communications Technology (ICT) products and services have the ability to significantly contribute to this empowerment and the related accountability.

Empowering practitioners – facilitating accountability

- 3.4 Central to delivering the paradigm shift will be the necessity to empower practitioners through the successful application of ICT. This will provide those delivering at the front line with the systems and tools that they need to effectively deliver the policy challenges in the context of increased autonomy and overall accountability.
- 3.5 School leaders are increasingly looking to the role of ICT to support improvements in student learning, to reduce administrative overheads and to facilitate improvements in the effectiveness and efficiency of their schools. Such transformation in working practices, efficiency savings and creative developments have been, and continue to, take place in the private sector through the application of emerging technologies. Educators can and should continue to build on those achievements.
- 3.6 The challenges associated with both the new flexibilities and the sharper accountability will drive forward the need for relevant, reliable and timely tools, data and information at all levels of the education system. This is needed at the front line to support devolved management, administration, monitoring and evaluation of educational effectiveness, and in the classroom to help monitor student performance and facilitate assessment whilst ensuring teacher time is not spent on manual laborious record keeping and administration. The necessary tools and capabilities are at the heart of an effective school Management Information System (MIS).
- 3.7 It is of strategic importance to schools and policy makers alike that the marketplace for school MIS systems operates effectively, driven by the principles of open competition, choice and demonstrable value for money. This will ensure that MIS systems better meet the needs of schools and support the front line.

Driving competition and choice

- 3.8 The intention underpinning the recommendations in this report is to ensure that within the increasingly complex world of technology implementation, diverse education opportunities and financial constraints, those delivering at the front line are effectively supported by their MIS systems. This will require policy developments to ensure the marketplace for MIS systems operates much more effectively than it has done in the past. Specifically, there is a need for measures to ensure:

- The arrangements local authorities and schools have in place for the provision of MIS systems comply with EU and UK procurement law
- Reductions in the burdens and costs associated with the statutory returns process
- More effective interoperability within and between MIS products and the wider ICT ecosystem
- More cost effective MIS support arrangements which can focus on helping schools deliver the maximum value for money from the considerable sums that they have been delegated.

Reducing the deficit

- 3.9 It is fully expected that the effective implementation of all our recommendations will ensure progress in meeting the Coalition Government's educational objectives whilst also reducing the cost to schools of their MIS systems and support. This will free up valuable resources for the front line and ultimately this will ensure that more effective use is made of data, information and tools to support evidence based decision making which in the hands of empowered professionals will help them drive up standards and reduce costs.

4 MIS market review - methodology

Structure of the review

- 4.1 Becta's review of the MIS Marketplace consisted of four stages, the first two of which were conducted independently of Becta. The four stages encompassed:
- Commissioning independent field work, primarily via a range of face to face interviews and an online survey, to determine procurement practices on the ground and the views of local authorities and MIS suppliers.
 - Reviewing the findings emanating from the fieldwork and the production of a report and analysis for consideration by Becta and its legal advisors.
 - A review by Becta's legal advisors which took account of the nature and extent of procurement practices identified and an independent analysis of the findings.
 - The production and release of a Report and Recommendations which took account of the Market Study, the legal advice and Becta's analysis of the most effective way forward.
- 4.2 In mid February 2010 Atkins was appointed to conduct the independent study (the "Market Study") which comprised stages 1 and 2 as outlined above. The key elements of the Market Study were:
- An online survey available to all 152 local authorities
 - Face to face interviews with 20 local authorities. When selecting the local authorities Atkins was required to take account of size, type and geographical locality. Atkins noted that the level of MIS procurement activities in the local authorities they selected was higher than was typical of local authorities in England generally.
 - Meetings with MIS suppliers. Atkins met with all seven of the Information Management Partnership for Schools (IMPS) suppliers along with a selection of other suppliers who provided MIS products or services to schools or Local Authorities in England. Six of the IMPS suppliers, representing more than 99% of the schools MIS marketplace, also agreed to provide additional detailed information in support of the Market Survey.
 - Engagement with a range of other individuals including representatives of the National Association of Head Teachers (NAHT) and the Specialist Schools and Academies Trust (SSAT).
- 4.3 Following completion of the Market Study, Atkins submitted its report, which was reviewed by Becta and its legal advisors. Following that review Becta developed its Report and Recommendations.

Approach to the market study

- 4.4 Atkins was responsible for choosing those individuals to be interviewed via face to face meetings and for the design and delivery of the online survey. In order to ensure an appropriate level of confidentiality and impartiality, Becta identified in its contractual arrangements with Atkins that it did not wish to know or receive any information about the identity of the participants in the Market Study. Atkins was given full discretion to determine which local authorities it approached and which individuals it interviewed.
- 4.5 Individuals who had participated in the online survey or taken part in the face to face interviews were told by Atkins that in recognition of the fact that much of the data it was seeking would be of a particularly sensitive nature, their answers would be anonymous and treated in the strictest confidence. Becta agreed with this approach as it considered that Atkins was likely to get fuller disclosure if undertakings of anonymity and confidentiality were given to participants by Atkins.
- 4.6 Becta provided assistance to Atkins in relation to the content of the online questionnaire and in the development of Topic Guides which were to be used to structure the interviews with local authorities and suppliers.

Local authority consultation

- 4.7 In early December 2009 Becta wrote to all Directors of Children's Services (DCSs) to advise them of our intention to commission an independent review into the operation of the marketplace for

school Management Information Systems and supplier provided support. We indicated in that letter a number of grounds for undertaking the Market Study including the fact that:

“Recently a number of suppliers have contacted us expressing significant concerns in regard to how the MIS marketplace is working from a procurement perspective. There appears to be some uncertainty regarding the most appropriate approach to procuring MIS solutions in a manner compliant with EU obligations. It is a complex area”.

- 4.8 In February 2010 we wrote again to DCSs to advise them that Atkins had been appointed to conduct the Market Study and that they would be in touch with all local authorities as a matter of urgency. Atkins subsequently wrote to all local authorities indicating:
- “As part of the review Atkins would be conducting an online survey with all local authorities in England and all responses would be analysed by Atkins and be reported anonymously to Becta to ensure that an individual authority could not be identified.”*
- 4.9 The survey was designed to collectively understand what MIS products and services are used, who supplies them and how they were procured.
- 4.10 To ensure that participants in the online survey were in a position to consult within the local authority where necessary, the survey was designed to allow respondents to log in on any number of occasions to update and complete the survey. Additionally, a PDF version of the survey was made available so that respondents could easily discuss any areas with relevant colleagues.
- 4.11 In the event 75 local authorities completed the introductory parts of the survey and of that number 54 provided information regarding the procurement arrangements in place. Face to face interviews were held with 20 local authorities.

Policy developments

- 4.12 On 24th May 2010 there was an announcement by the new Coalition Government of the closure of Becta. Regarding the MIS Market Review, Becta took the decision, given the policy and strategic significance of the issues being identified at that time, to complete the relevant work as promptly as possible and move to release its findings, recommendations and advice. In the light of the closure announcement it is expected that Becta will discuss with the Department for Education (DfE) the means by which the recommendations can be taken forward.

5 Nature of the MIS marketplace in England

Defining MIS systems

- 5.1 In seeking to better understand the nature of the MIS Marketplace in England we need to be able to accurately define it. The definition will have an impact on how we measure market share, how we assess market size and growth, how we identify target customers and how we assess the nature and extent of competition. For the purpose of the Market Review we agreed that MIS systems are:
- “..the products services and tools that are used to support a school’s management and administration, enabling the educational institution to move towards evidence based decision making and more effective teaching and learning.”*
- 5.2 Therefore, the marketplace is the value of those products services and tools. However, there are some of those MIS related services which are not typically provided via a market. One such example is the local authority MIS support teams which provide technical, functional and business support to schools. Given that our intention was to keep the focus of the review deliberately narrow we were not primarily concerned in the report with the supply of those local authority provided services, but rather with the products, services and tools that were provided via private sector companies and the extent to which their provision was in accordance with EU and UK procurement obligations.
- 5.3 It is also the case that when one looks at the range of products, services and tools which contribute to “more effective teaching and learning”, it could arguably be considered to include virtually all the ICT resources within the school, certainly encompassing what is usually described as Learning Platforms (LPs), and curriculum software.
- 5.4 Therefore, it was necessary for Becta to agree as part of the Market Study a definition of MIS systems which needed to be broad enough to recognise the sophisticated nature of the market offerings whilst remaining manageable and avoiding straying into the provision of products such as Learning Platforms. Commenting on the scope of the MIS definition used the Market Study indicates:
- “the [...] list is not exhaustive, we believe that it represents the most common elements of an MIS and provides an appropriate and manageable definition for the survey. It should be noted that each supplier and LA will also have their own definition of an MIS.”*
- 5.5 The list of functionality which fell within the agreed definition is set out in Annex 1.

Structure of the marketplace

- 5.6 The Market Study used two measures to determine the structure of the MIS marketplace. One measure (the Census measure) focused on the data held by the DfE in respect of the MIS systems used to make Statutory Returns. A second measure (the Usage measure) is based on data provided by the respondents to the online survey.

The Census Measure

- 5.7 The Census data held by the DfE identifies on a school by school basis the MIS system used to provide the electronic data return. The position in 2005 and 2010 is summarized below:

Market Share Movement 2005 to 2010				
Supplier	No. of schools in 2010	Market share 2010	Market share 2005	Change over 5 years
Bromcom	5	<1%	<1%	0%
Capita	17,789	80%	81%	-1%
Pearson Phoenix	651	3%	5%	-2%
RM	2,063	9%	9%	0%
Serco	1,408	6%	3%	3%
Wauton Samuel	198	1%	1%	0%
Other	38	<1%	<1%	0%
	22,152	100%	100%	

Figure 1: Market share movement 2005 to 2010

- 5.8 As the above table indicates, and based on approximately 22,000 returns, this measure of market share confirms that there has been virtually no movement in relative market share over the last 5 years.
- 5.9 In 2005, no supplier other than the dominant supplier had a market share of 10% or greater and that remains the position in 2010. In 2005, four providers had a market share of less than 5%, and that remains the position in 2010. In 2005, three providers had a market share of 1% or less and that remains the position in 2010.
- 5.10 By any reasonable measure the schools MIS marketplace has remained stagnant.

The Usage Measure

- 5.11 The Market Study sought information from local authorities as to which supplier provided the software for each of the areas of functionality set out in Annex 1. With that data it was able to produce an uptake map of the market share for each provider's solution for each functional area. The findings are summarised below:

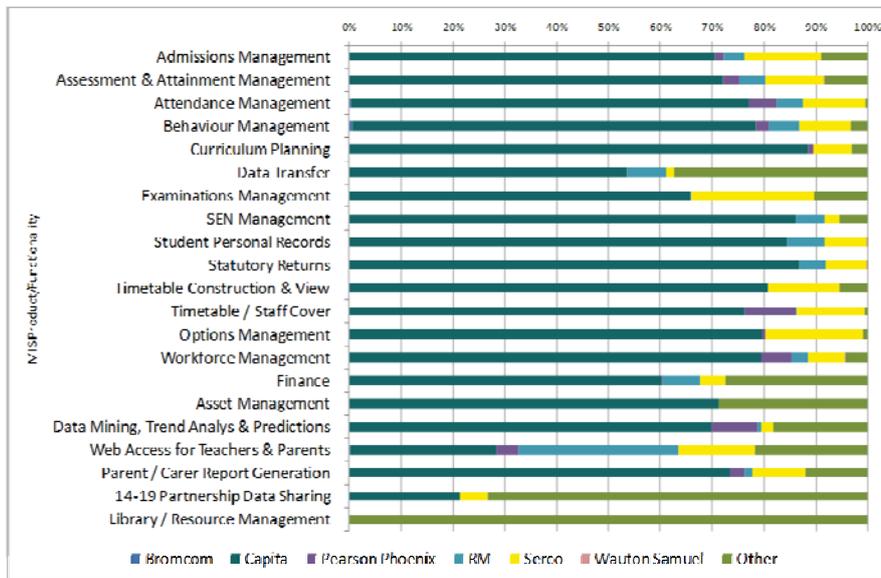


Figure 2: Market share per functional area

- 5.12 Commenting on this analysis the Market Study indicated:
"... that a number of products including Data Transfer, Finance, Web Access for Teachers and Parents, 14-19 Partnership Data Sharing and Library/Resource Management are supplied by other suppliers i.e. not the main suppliers."
- 5.13 When we aggregate the functional areas we get a feel for the degree to which, based on deployment, a given supplier dominates or otherwise the overall provision of MIS solutions. This analysis, which is based on 51 survey respondents, is set out in Figure 3 below.

Supplier	% Share of overall provision
Bromcom	0.1%
Capita	67.3%
Pearson Phoenix	4.50%
RM	5.1%
Serco	7.6%
Wauton Samuel	0.1%
Other	15.4%

Figure 3: Aggregated market share per supplier

- 5.14 This analysis, which is more broadly based than the census measure, confirms the dominant position of Capita and suggests that about 33% of the market place is held by smaller players. Commenting on this data the Market Study indicates:

“It should be noted that above figures have been calculated using the average of a range of schools using each product (as the survey did not ask for absolute numbers). For this reason particular caution needs to be used when drawing conclusions from this data. We do however feel that this analysis provides a useful comparison from an actual product usage point and that it broadly supports the market share derived from the 2010 Census data”.

Value of the marketplace

- 5.15 The assessment of market value for 2005 and 2010 is summarised below:

Area	Estimated value 2005 £ml	Estimated value 2010 £ ml	Variance from 2005 £ml
Cost of MIS software and supplier provided maintenance and support	31	38 – 44	+8 to +14
Cost of local authority provided MIS support	55	65	+ 10
Cost of MIS systems in schools	149	See Note 1	N/A
Cost of MIS servers in schools	See Note 2	19	N/A
Total	235	122-128	N/A

Figure 4: Assessed market value 2005 and 2010

- 5.16 The 2005 report estimated the value of the sums expended on MIS software to be about £31 million annually. Evidence from the Market Study indicates that this sum has risen by about 6% year on year since 2005 and currently stands between £38 million to £44 million annually. That would indicate that since the 2005 report the total increase stands between 23% and 42%.
- 5.17 Had the cost of MIS software remained at its 2005 level the 5 year cost would have been expected to be £155 million (5 years at £31 million per year). Allowing for the actual 6% year on year increase brings the 5 year cost to £185 million, £30 million greater that might otherwise have been expected.
- 5.18 Over the period that additional £30 million cost can be attributed to a range of factors including:
- Additional functionality required by policy developments
 - Additional functionality required to meet statutory returns
 - Additional functionality required to meet the needs of schools
 - Additional enhancements to the technical platform.
- 5.19 In the light of the pressures on the public purse and the expressed policy intention to divert resources to the front line, we believe that each of the underlying factors contributing to year on year increases in costs should be rigorously addressed.
- 5.20 We have set out elsewhere in the report our recommendations regarding statutory returns and how cost reductions might be achieved. We also believe that there is a case for “functional stability” in relation to MIS systems except in circumstances of pressing need. This would also facilitate a significant reduction in the sums being charged to schools for annual maintenance / annual entitlement.

¹ By 2010 schools were for the most part operating integrated networks and the cost of workstations to access MIS systems was no longer considered a relevant measure.

² In 2005 the cost of MIS servers was not separately identified.

- 5.21 This functional stability would also allow MIS support teams to focus on enabling schools to make the most of the extensive functionality already available in many MIS systems, particularly those tools aimed at ensuring schools make the most effective use of the considerable resources under their delegated authority. This would drive forward improvements in teaching and learning.
- 5.22 The Market Study is also clear that collaborative procurements and competition in the marketplace will yield savings. The issues flowing from the fact that the evidence indicated that little of the £185 million 5 year spend was ever market tested is dealt with elsewhere in this report.
- 5.23 It also remains the case that significantly more is spent supporting MIS systems than in acquiring them. Over the five year lifetime of a parliament the cost of MIS licencing/maintenance (at about £45 million annually) and MIS support (at about £65 million annually) is likely to exceed £550 million. We set out elsewhere in this report our recommendations in respect of reducing both licencing and support costs.

Approaches to funding product acquisitions

- 5.24 We were able within the Market Study to identify how MIS products were being funded.

Local authority approach to funding MIS products	%
Local Authority purchases and schools paying local authority for bundled services that include local authority support.	39%
Local authority has negotiated local terms and pricing with one or more suppliers that the schools can choose to purchase directly from suppliers.	7%
Local authority purchases and schools pay local authority for single MIS product with bundled support from the supplier	8%
Other	46%

Figure 5: Approach to funding MIS products and services

- 5.25 The evidence emerging from this analysis, including the textual responses classified as “Other”, is that local authorities continue to play a central role in the arrangements underpinning payments to MIS suppliers in all but a minority of cases. This will have implications for the extent to which local authorities are able to argue that MIS purchases by schools are “disaggregated” and thus not subject to EU procurement thresholds. This issue is explored in more detail later in our report.

LA role in product acquisitions

- 5.26 Evidence from the Market Review indicated that 86% of local authorities recommend specific MIS products to their schools. It is clear that such advice has been taken seriously by schools and played a major part in their decision making around MIS provision.
- 5.27 There are clearly advantages in local authorities aggregating the demand for MIS software, and playing a central coordinating role in the provision of cost effective and responsive support. However, in recommending a specific product local authorities will need to ensure that arrangements for the acquisition of that product do not distort competition in the marketplace and are in compliance with EU and UK procurement obligations. How EU and UK procurement law interrelates with the acquisition of MIS products and their on-going maintenance is set out in the following section of our report.

6 Legal obligations on contracting authorities

Scope of this section

- 6.1 We set out in this section of the report our understanding of the legal obligations which surround the acquisition of MIS software and related services and the renewal of annual maintenance agreements. This information is provided as general guidance only. It does **not** constitute specific legal advice. Whilst we believe that this section sets out a useful framework for analysing the interplay between EU and UK procurement law and the complexities associated with acquiring and updating school MIS solutions, the extent to which any behaviour conforms with or breaches the law will depend on the facts of a particular case including the wording of any associated OJEU notice. Ultimately such decisions are a matter for the courts and legal advice should be sought in specific circumstances. The responsibility for ensuring that procurements are conducted in accordance with the law rests with individual contracting entities.

Relevant EU and UK legislation

- 6.2 The purchase of packaged software by procuring entities has been subject to the EU procurement regulations since 1977. The purchase of maintenance and support services was brought within the scope of the EU procurement regulations in 1994. Current EU regulations are given the force of law in England and Wales through the Public Contracts Regulations 2006. Whilst the procurement rules are complex, the underlying principles are straightforward. They require the procurement of goods and services to be conducted in a manner which is fair, open and transparent.
- 6.3 The EU procurement regulations set out different obligations depending on the category of the services being procured. The services are known as Type A or Type B services. In general terms the obligations which relate to the provision of Type B services are less onerous than those which relate to Type A. Type B services include services such as education and vocational health. However, the provision of MIS software does not involve the actual provision of “education and vocational health services”, it is simply the provision of goods and services. The goods and services being supplied are actually computer and related services - a Type A service.
- 6.4 Thus the provision of MIS software and services is considered to be subject to the full procedural requirements of the EU procurement rules associated with Type A services. However, there are two possible exemptions to the full ambit of the EU procurement rules which may be applicable and these are examined below in the context of the MIS marketplace.

Additional services exemption

- 6.5 This exemption relates to the provision of additional services which were not included in the original contract but which through unforeseen circumstances have become necessary, and where the services cannot for technical or economic reasons be carried out or provided separately from those under the original contract without major inconvenience to the contracting authority.
- 6.6 As the onus is on the local authority to demonstrate that the exemption applies, it will clearly be harder for a local authority to rely on it where the original contract was not correctly procured (procurements categorised as “Red” in the survey analysis, as per Annex 2) or where local authorities are unable to identify the basis on which products were originally procured (procurements categorised as “Grey” in the survey analysis, again as per Annex 2).
- 6.7 Also, even where the use of the exemption is justified, it is limited in total to 50% of the amounts paid under the original contract. In general terms, after examining a number of possibilities, we think that it is unlikely that there will be many situations where procuring entities are entitled to rely on this exemption in relation to the provision of MIS software and associated support.

Only supplier exemption

- 6.8 This exemption applies where a procuring authority is able to argue that “for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services can only be provided by a particular person”. In these circumstances the procuring authority is entitled to use the “negotiated procedure without prior publication of contract notice” i.e. to carry out a single tender procurement process.

- 6.9 This could apply where there are technical reasons which mean that there is only one company with the expertise to provide the services under the support agreement or one company has the exclusive right to provide such services. In respect of basic support for an MIS product (such as bug fixes or patches to maintain the product), where the MIS provider is the owner of the Intellectual Property Rights (IPR) in the product and the MIS provider has not granted licences to third parties to amend and enhance the MIS product (such as in an open source arrangement) then the MIS provider will be the only person with the necessary rights to maintain the product. Consequently we consider that this exemption will in these circumstances apply to the provision of such basic support services.
- 6.10 Additionally, where changes are required to update the software in respect of changing reporting requirements, (for example to the DfE), then such legislative updates would also most likely fall under the “only supplier” exemption. The key test will be for the local authority in question to demonstrate that the changes do not expand the scope of the software or the support services delivered under the original contract. The development of new functionality is not restricted by IPR constraints or any unique technical expertise and so this exemption is not available for the development of new functionality.
- 6.11 EU case law indicates that, in considering the scope of exemptions, they are to be construed narrowly. As such, procuring entities would not be permitted under the exemption to acquire anything that could be acquired from other software vendors such as new software modules or additional functionality. This would also be the case where incremental changes to a product were shown over time to have resulted in the supplier developing new areas of functionality or indeed a completely new product.
- 6.12 For example, the upgrade from a DOS-based product to a Windows-based product, or from a LAN based product to a “cloud” based product is likely to be regarded by the court as being a change which would not be permitted under the only-supplier exemption. This change is likely to be regarded by the courts as sufficient material to require the change to be competitively procured by the contracting authority. As a result, regard should be had by the contracting authority when the only supplier exemption is claimed to the generation of a particular MIS product to which the originally procured product relates. Once the originally procured product has run its life, the contracting authority should seriously consider whether it is still possible to utilise the only supplier exemption in respect of on-going support or whether it is then the appropriate time for the contracting authority to test the market by way of a formal OJEU based procurement.

Aggregation rules

- 6.13 Where no exemptions apply, the financial threshold at which goods and services become subject to the full rigour of the Regulations is (at the time of writing) where the contract has a financial value in excess of £156,442 (excluding VAT). For an arrangement of an indefinite duration, such as a perpetual MIS licence, the regulations provide that the financial value of the contract will be calculated on the original license charge and 48 months of support.
- 6.14 Therefore procuring entities need to aggregate the provision of MIS supply and services contracts over a 48 month period. This indicates that an annual contract value of about £40,000 would mean the full Regulations would apply. We have set out below the rules which apply when a local authority seeks to consider the acquisition of MIS products as “disaggregated”.

Advising or recommending a solution and disaggregation

- 6.15 Where individual procuring schools are separate legal entities (such as Academies) and the value of the goods and services being procured fall below the relevant financial threshold then the full scope of the procurement rules will not apply.
- 6.16 However, under such circumstances an Interpretative Communication from the European Commission suggests that contracting authorities (i.e. those individual schools) will need to comply with the general principles of transparency and competitive procurement. Therefore, some sort of simplified competitive procurement process would be required.
- 6.17 Whilst it should be recognised that currently most state schools are not in fact independent legal entities in their own right and will generally form part of their local authority, there are circumstances when they could demonstrate that they are “discrete operational units” and thus independent for the purposes of the aggregation rules. The general tests which will apply would be that the school:
- can show that it is buying for its own use;

- has a degree of budgetary independence in the area of contracting;
 - has the ability to independently make the choice of candidates and tenderers and does actually exercise such independent choice;
 - was not using the market power and influence of the local authority at any stage during the tendering process up to contract award.
- 6.18 Where there are factors each of which demonstrate reliance by the school on the local authority in relation to its MIS purchases, this would mitigate against a local authority being able to successfully argue that such purchases are independent and should be dis-aggregated. We have set out below two case studies which demonstrate a number of the factors that will be relevant to such a determination:

Case Study 1

- 6.19 The local authority has issued a recommendation to its schools that a particular product or service should be used. This is because the local authority in question has had talks with the supplier and has secured a preferential deal which will reduce the cost for the schools. In turn the local authority assists with negotiating the basis on which the product or service is supplied. In this instance, the school will not be regarded as being a “discrete operational unit” and the purchases of all of the schools within a local authority in this situation will need to be aggregated.

Case Study 2

- 6.20 The local authority informs its schools that it can only provide support for a single product and in addition has technical interfacing requirements that can only be met by that product. As this is the case, the local authority makes it clear that it will only pay for that product, and that the cost of procuring any alternatives will have to be met out of each school’s budget. Again, in this instance the school will not be regarded as being a “discrete operational unit” and the purchases of all of the schools within a local authority in this situation will need to be aggregated.

Procurement implications of contract renewals

- 6.21 The majority of MIS support arrangements are renewed on an annual basis and many local authorities have been agreeing such annual renewals for many years. **Becta has been advised that such year on year renewals effectively comprise the award of a new contract.** This is because the local authority is in effect exercising its discretion as to whether or not to renew or terminate its MIS contract.
- 6.22 The general rule is that the scope of the original advertised contract cannot be extended. As a result, where local authorities are unable to identify the basis on which products were originally procured (procurements categorised as “Grey” in the survey analysis) they need to exercise great care in relation to what they procure under the guise of software maintenance. However, where a contract is renewed after its minimum term and that option to extend was provided for in the original OJEU advertisement, the extension will not need to be competed.
- 6.23 An extension that was not provided for in the original OJEU notice will be subject to the requirements of the procurement regulations unless it falls under one of the relevant exemptions. EU procurement case law indicates that when considering the application of exemptions to the procurement rules, the exemptions are to be construed narrowly.
- 6.24 Of particular relevance in the context of renewals is the exemption which relates to the “only supplier” route via the negotiated procedure, the scope and limitations of which are discussed elsewhere in this report. Local authorities are not entitled to procure under a software maintenance agreement solutions not covered by an OJEU compliant process and which could be supplied by another vendor. The test of whether another vendor could supply the product will usually be a call for competition.
- 6.25 As set out above, significant functional upgrades not covered by an original OJEU compliant procurement process are unlikely to be considered acceptable. These include: (i) a generational step change at the end of a product’s life, (ii) upgrades which migrate a product from one technical platform to another, or (iii) arrangements whereby on-going software maintenance results in new or significantly enhanced functionality.

The Remedies Directive

- 6.26 The Public Contracts (Amendment) Regulations 2009 which implemented the EU Remedies Directive came into force across the UK on 20 December 2009. In general terms the Remedies Directive introduced enhanced post-tender notice requirements, stronger 'standstill' provisions, and tougher remedies for entering into contracts which were awarded in breach of the law and what the Office of Government Commerce (OGC) describes as "illegal direct awards".
- 6.27 The remedies for such behaviour are intentionally severe and now include the ability for a court to render the contract "ineffective" i.e. cancel it. As indicated previously the supply of MIS products and services are considered to be Part A services and therefore subject to the scope of the Remedies Directive. Therefore any MIS procurement (including any support contract renewal) commencing on or after the 20th December 2009 will be subject to the enhanced remedies regime.

Implications of acting outside the regulations

- 6.28 As set out earlier, the extent to which any procurement behaviour conforms with or breaches the law will depend on the facts of a particular case including the wording of any associated OJEU notice, and ultimately such decisions are a matter for the courts. Notwithstanding this, it is important for contracting authorities to take note of the recent significant changes in the regime that will apply in circumstances where a supplier considers that a contract was awarded in breach of EU and UK procurement law. The key changes are summarised below.

The original regime

- 6.29 Prior to the introduction of the Remedies Directive the remedies available to an aggrieved supplier were actions against a contracting authority in the High Court, or actions by the European Commission against a Member State in the European Court of Justice. Prior to the award of a contract the High Court's powers included the power to suspend an incomplete contract award procedure (an injunction), or the setting aside of a decision by a contracting authority. Post the award of the contract, the only remedy available to the High Court was to award damages.

The new regime

- 6.30 Nothing in the old regime has been taken away. However, additional remedies are now available under the Remedies Directive including a requirement on a contracting authority to **automatically** suspend the contract-making when a legal challenge to the contract award decision is **launched**. Thus the need for an aggrieved supplier to successfully apply to the High Court for an injunction is removed. In addition, after the award of contract, the High Court can now make a declaration of **ineffectiveness** of a contract where certain serious rule breaches have occurred and must award a civil penalty where an ineffectiveness order is made.

Contracts declared ineffective

- 6.31 There are three grounds on which it is possible that a ruling of ineffectiveness in respect of a contract may be made. Those grounds are:
- failure to advertise the contract in the OJEU;
 - combined breaches of the procurement procedural rules and the new review procedural rules; and
 - call-off procedural breach.
- 6.32 If only one of these grounds is met, then a declaration of ineffectiveness could be available to an aggrieved operator.
- 6.33 The consequence of such a declaration is the prospective ineffectiveness of the contract. According to the OGC guidance on the new remedies rules, this means that:
- "any obligations under the contract that have yet to be performed will be cancelled, and should not in fact be performed" but that "any obligations that have already been performed will not necessarily be affected by the cancellation".*
- 6.34 The new Remedies Directive does not deal specifically with renewals of contracts. It is possible that where an order of ineffectiveness is made for a support contract extension the effect of the order would be to render the whole agreement ineffective including the on-going software licence.

- 6.35 If the High Court finds a contract ineffective, it must also impose a civil financial penalty on the contracting authority. The level of the civil financial penalty is to be decided on a case-by-case basis by the court, taking into account all relevant factors, and ensuring that the penalty is effective, proportionate and dissuasive. Additionally, the High Court can provide for alternative penalties (either contract shortening, fines, or both) instead of ineffectiveness, in certain situations where ineffectiveness is inappropriate.
- 6.36 Ineffectiveness may be inappropriate where there are 'overriding reasons relating to a general interest that require the effects of the contract to be maintained', or where there has only been an infringement of the standstill rules or the automatic suspension requirement, but no corresponding breach of the procurement rules.
- 6.37 The High Court will also have the power to rule on any consequential matters. For example, to provide for restitution of money already paid, or property transferred, under the contract, or for compensation to the economic operator who originally won the contract in good faith but was then deprived of it following the ineffectiveness ruling.
- 6.38 A finding of ineffectiveness can also have serious ramifications for the apparently successful supplier(s), who could find themselves deprived of a contract that they thought they had won fairly, with the breakage costs and losses of profit associated with that contract deprivation.
- 6.39 The contracting authority may be able to mitigate or avoid a decision of ineffectiveness by the publication of a Voluntary Ex Ante Transparency (VEAT) notice when it has awarded a contract without competitive tendering. The VEAT notice provides the opportunity for aggrieved suppliers to challenge the decision to award without competition.
- 6.40 The period during which proceedings seeking a declaration of ineffectiveness must be started is dependent on the extent to which the contracting authority has complied with obligations relating to advertising the contract award and its use of a standstill period. In the absence of such measures the period under which the contract award may be challenged is six months from contract award.

Conclusions regarding remedies

- 6.41 Our conclusions are based on the procurement practices reported by the Market Study, the allegations of improper practices made to Becta by some suppliers leading up to the Market Study and during it, and the relative ease with which remedies can now be pursued. We believe that there is a significant risk that local authorities could face a legal challenge to the procedures they are currently using to renew, on a year by year basis and in the absence of OJEU based competition, their MIS support arrangements. Where such challenges are successful, local authorities run the risk of having contracts rendered ineffective and being subject to a civil financial penalty.

7 MIS procurement practices

Level of understanding at LA level

- 7.1 Commenting on the level of understanding in relation to procurement obligations, the Market Study commented:
- “In collecting evidence of current practice, we have found a clear lack of understanding from an LA perspective as to what they should be doing with regards to testing the market.”*
- 7.2 The Market Study also indicated:
- “We were highly concerned about the low level of formal market testing and procurement practice that is conducted by LAs in relation to MIS products and services.”*

Formal market testing 2005 to 2010

- 7.3 Becta’s 2005 report identified the clear need for local authorities to review their existing MIS contracts to ensure that they complied with wider UK and EU procurement law obligations. The report anticipated the establishment of a national Framework Agreement to facilitate, in a cost effective way, adherence by schools and local authorities to their EU and UK procurement law obligations.
- 7.4 Feedback from local authorities subsequent to the publication of that report indicated that there was not an appetite within the local authority community for such a Framework Agreement, and consequently Becta did not proceed with it.
- 7.5 Since the publication of Becta’s 2005 report there have been new requirements placed on schools which impacted their MIS systems. Two of the most notable new areas related to web based access for parents and teachers, and in respect of 14-19 data sharing. The Market Study indicated that 67.5% of respondents confirmed that they had a solution in place in relation to the new requirement for web based access and that 42% of respondents had purchased a solution in relation to 14-19 functionality.
- 7.6 It was therefore surprising to note that the Market Study established that in the period between 2005 and 2010, during which these new requirements arose, the total number of formal competitions for MIS products and services was only 18. Of these, 12 were formal MIS related OJEU procurements, 5 related to BSF OJEU’s which made specific reference to MIS. The remaining “competition” related to a call-off from an OGC Buying Solutions Framework Agreement on which the only supplier indicated as capable of supplying an MIS solution was Capita (Paragraphs 10.29 to 10.30).

Informal market testing

- 7.7 The Market Study indicated that 60% of local authorities had conducted some form of informal market testing and that the nature and extent of this informal activity took various forms. Such activity is not of course a substitute for the procurement requirements of EU and UK law.
- 7.8 Notwithstanding the clear recommendation in the 2005 report, the 2010 Market Study reported that:
- “It is clear that many LAs do not fully understand their legal obligation to conduct EU compliant procurements for the provision of MIS, or how frequently such an exercise should be undertaken. We estimate that, depending on the outcome of legal advice being sought by Becta, between 60% and 80% of local authorities could be in breach of EU procurement requirements with regards to how they acquire MIS”.*

When / how were current products acquired?

- 7.9 The online survey contained a number of questions relating to the mechanism used by local authorities to procure their MIS systems and 9 possible responses to such questions. Becta subsequently categorised these 9 possible responses as Green (possibly EU compliant), Grey (procurement basis unknown), Red (considered unlikely to be judged compliant). Further details of the categorisation are set out in Annex 2.

7.10 There were 75 local authority responses to the online survey element of the Market Study, and for each of the 21 areas of functionality it allowed respondents to identify up to 3 suppliers.

7.11 Of course no local authority has arrangements in place with 3 suppliers for every area of MIS functionality and in fact the number of procurement related responses received across all responding local authorities was 947. These responses were further analysed from the perspectives of:

- The Nature of the Overall Procurement Activity
- The Number of local authorities who had procurement activity of a particular type.

7.12 **Nature of the Overall Procurement Activity** - The 947 procurement related responses have categorised as follows:

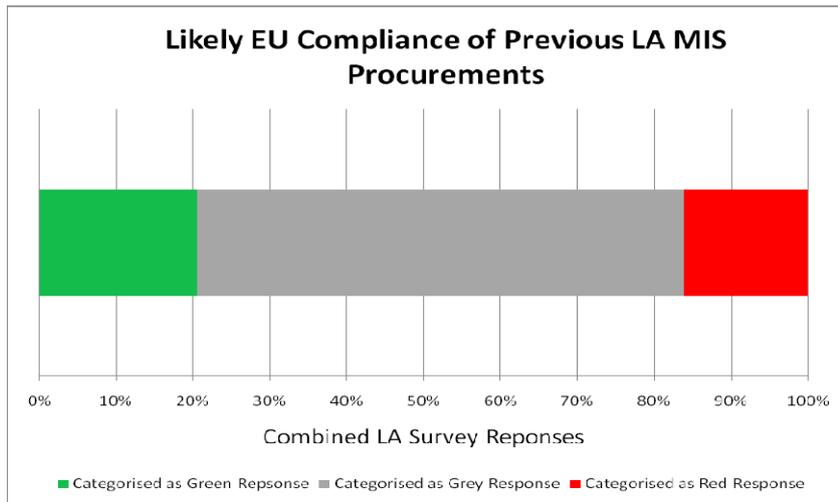


Figure 6: Likely overall EU procurement compliance based on online survey analysis

7.13 This data shows that after analysing the 947 procurement responses to the online survey just over 20% fell into the categories that Becta considered “Green”. Over 16 % of the cases reported were categorised as Red, and in over 63% of the cases the responses indicated the local authority could not identify the basis on which the product had originally been procured.

7.14 The following summary indicates how the 947 procurement responses relates to each of the 21 functional areas from the online survey element of the Market Study:

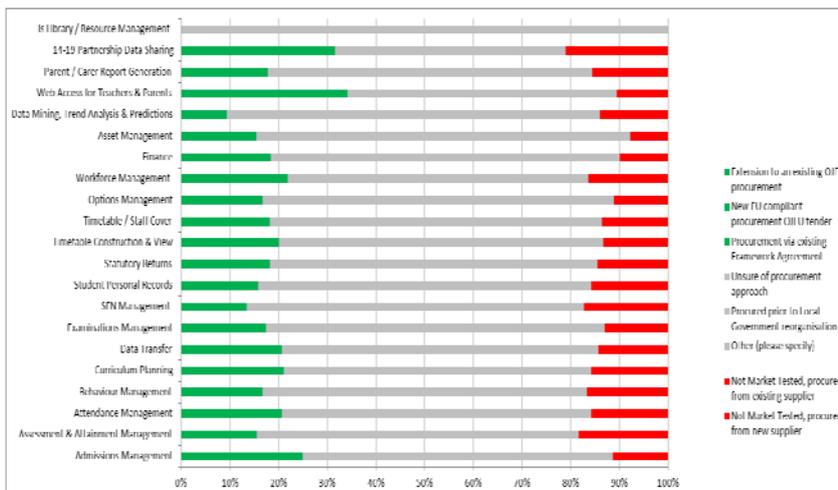


Figure 7: Likely EU procurement compliance per MIS functional area

7.15 It is worth observing that whilst in the most recently procured functional areas (Web Access and 14-19 data sharing) the level of “Green” procurement activity is higher than in other areas, it remains

(at between 30% and 40%) very far short of being the norm. Indeed the 14-19 area represents not only one of the most recent functional areas but the one with the highest declared level of procurement activity which can presently be considered as Red.

- 7.16 In broad brush terms this analysis indicates that about 20% of the functionality in any given area was procured via procedures assessed as Green, and about 15% via procedures assessed as Red. In about 65% of the cases the basis through which the functionality was procured was unknown i.e. Grey.

The number of Local Authorities who had procurement activity of a particular type

- 7.17 Of the 75 local authorities responding to the online survey 54 (72%) provided some data regarding how school MIS functionality had been procured. This analysis looked at each of the 54 responding local authorities to determine how much of its procurement activity fell into each of the Green/Grey/Red categories. Graphically the position is as set out below:

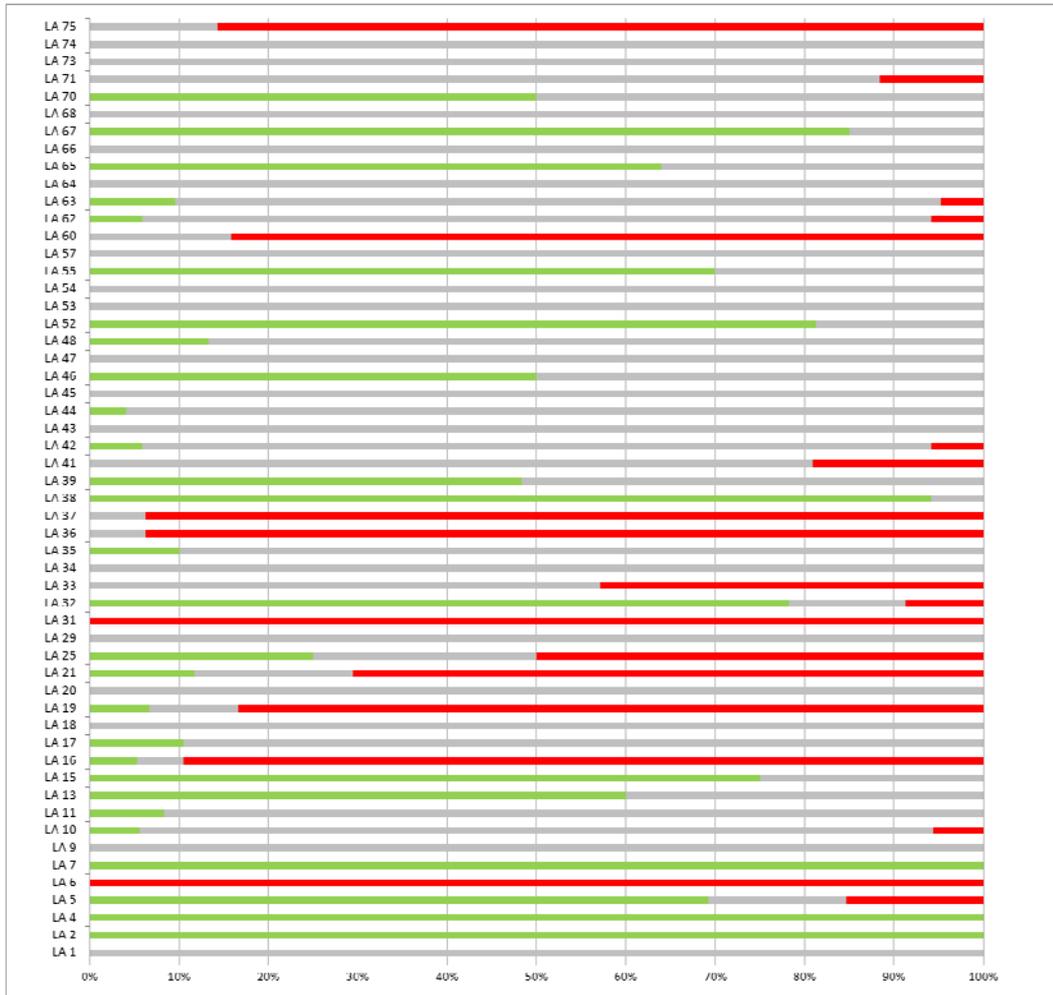


Figure 8: Likely EU procurement compliance per responding local authority

- 7.18 In summary the position in relation to the degree of assessed procurement compliance of those local authorities providing procurement level data was as follows:
- 7.19 **Green – Possibly EU compliant.** The number of respondents who indicated they were using an approach categorised as “Green” for all of the MIS procurement areas that they actually provided a response for was 3 (6% of the 54 responding local authorities). A further 25 local authorities indicated at least some procurement activities that were categorised as Green bringing the total of such responses to 28 (52%). The responses from 26 local authorities (48% of respondents) indicated not a single area of MIS procurement activity which was categorised as “Green”.

- 7.20 **Red – Unlikely to be EU compliant.** The number of respondents who indicated they were using an approach categorised as “Red” for all of the MIS procurement areas that they actually provided a response for was 2 (4%). A further 17 local authorities indicated at least some procurement activities that were categorised as Red bringing the total of such responses to 19 (35%). The responses from 35 local authorities (65% of respondents) indicated not a single area of MIS procurement activity which was categorised as “Red”.
- 7.21 **Grey – Status of Procurement Unknown.** The number of respondents who indicated that they were using an approach categorised as “Grey” for all of the MIS procurement areas that they actually provided a response for was 17 (31%). A further 32 local authorities indicated at least some procurement activities that were categorised as Grey bringing the total of such responses to 49 (91%). The responses from 5 local authorities (9% of respondents) indicated not a single area of MIS procurement activity which was categorised as “Grey”.

Level of confidence regarding legal compliance

- 7.22 A key recommendation contained within the 2005 Report noted that local authorities should review their MIS supply arrangements to ensure they complied with EU and UK procurement law.
- 7.23 Based on the detailed data provided via the Market Study, Becta’s level of confidence that the procurement practices operated by local authorities in this area are compliant with EU and UK procurement obligations is extremely low.
- 7.24 In summary, this analysis paints a seriously worrying picture regarding the level of MIS procurement activity which the Market Study considers as potentially compliant with EU and UK procurement law. Local authorities with a significant level of Red/Grey activity could find it very difficult to successfully defend a challenge to their MIS procurement approach when they next seek to renew their MIS contractual arrangements.

Suspending standing orders

- 7.25 In addition to their obligations under EU and UK procurement law there is a legal requirement on local authorities to maintain internal contracting processes and ensure competition by the establishment of relevant standing orders. However, a local authority can exempt any contract from such standing orders when it is satisfied that the exemption is justified by special circumstances.
- 7.26 One in five of the local authorities interviewed as part of the Market Study indicated that they had, in relation to purchasing annual MIS support, sought and been granted, approval by the local authority to suspend the relevant standing orders.
- 7.27 It should be noted that such standing orders do not in any way take precedence over UK and EU procurement laws. Thus where the negotiation of a contract renewal by a local authority without competition would be contrary to procurement law, any waiver of standing orders would not prevent a breach of procurement law by the local authority.

Contract renewal – future local authority intentions

- 7.28 We asked the Market Study to identify when the contractual arrangements local authorities had in place for the various aspects of MIS functionality were due for renewal.
- 7.29 The Market Study had 1101 responses in this area of which 463 indicated that the date for contract renewal was unknown. Of the 618 remaining responses 503 (81%) indicated an intention to renew their contracts within the next 12 months.

Development of the MIS marketplace over time

- 7.30 We asked the Market Study to determine when the MIS products were first deployed. An analysis of the responses received is summarised below:

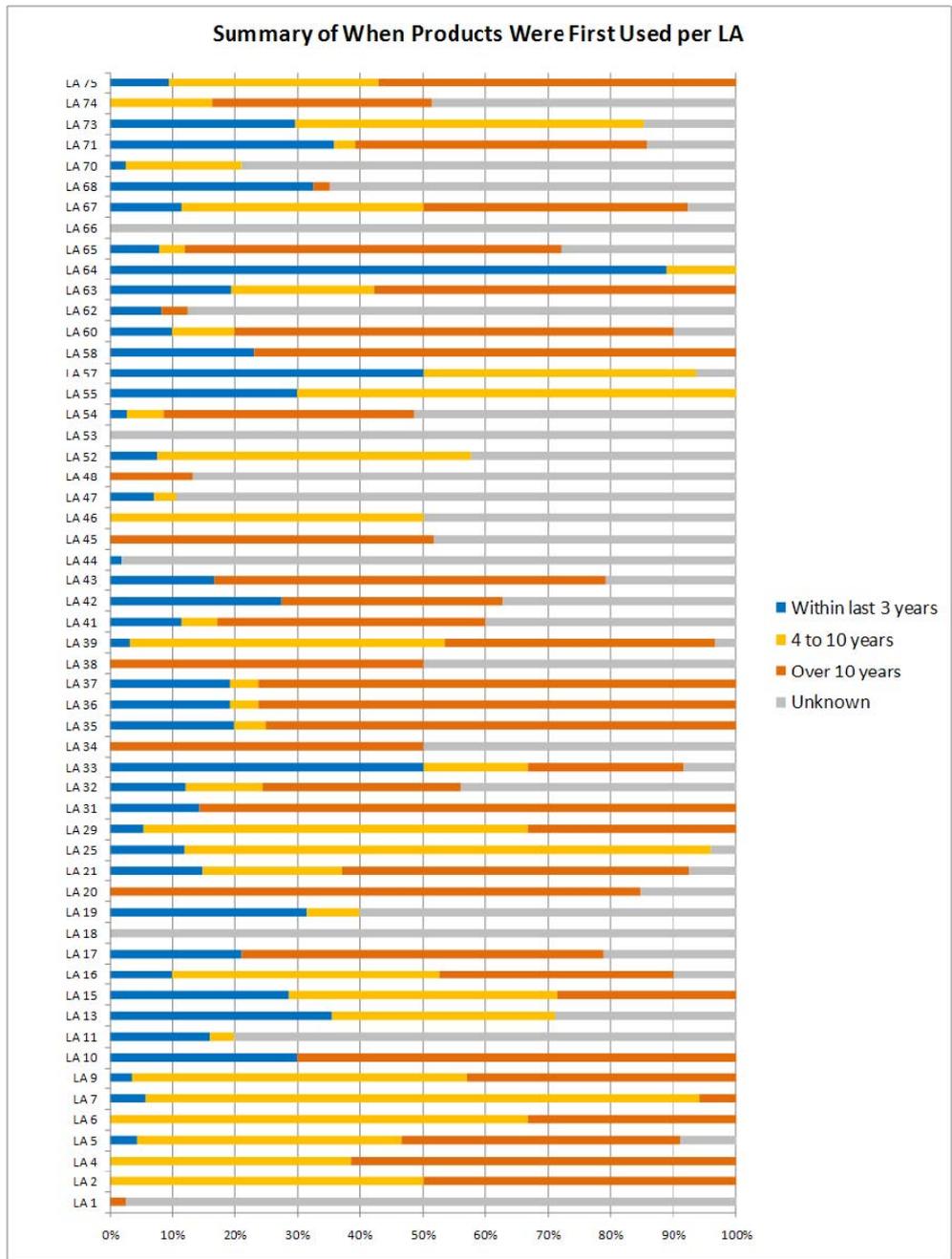


Figure 9: Likely date of initial deployment of MIS functionality

- 7.31 If a local authority indicated when a single product was first deployed that would count as one response, a local authority indicating when all 21 functional areas were first deployed would count as 21 responses. There were a total of 1,373 responses to questions as to when products were first deployed and 473 of those responses indicated the date was unknown. So the Market Study has a total of 900 responses regarding when individual areas of functionality were deployed.
- 7.32 In broad brush terms the above analysis shows on a local authority by local authority basis a fairly consistent pattern of deployments over the last 3 years, notwithstanding that these deployments took place in a context of very few OJEU procurements.
- 7.33 Looking cumulatively at the 900 responses and plotting them against the year of deployment yields the following:

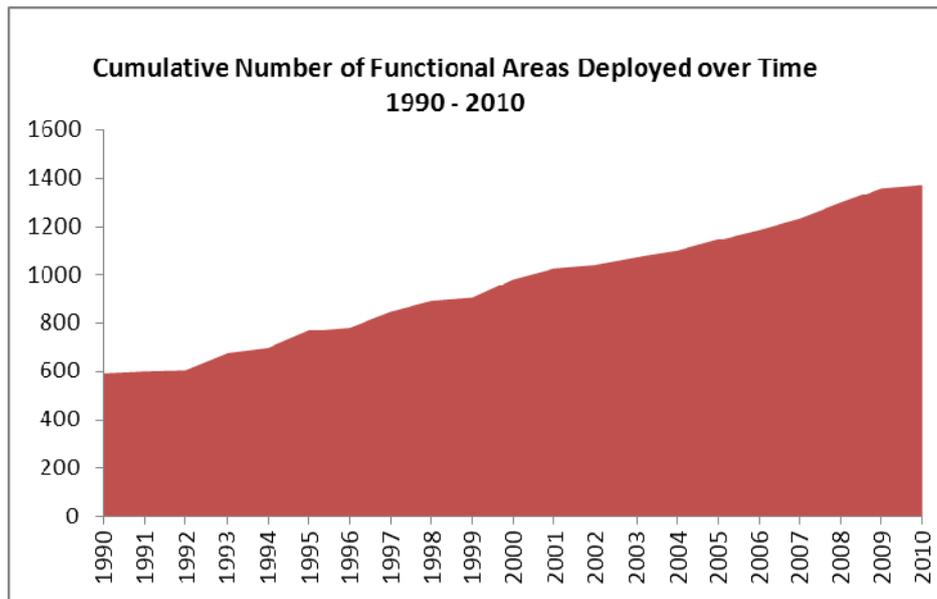


Figure 10: Cumulative number of functional areas deployed 1990 - 2010

- 7.34 The analysis of this data in relation to procurement practices needs to be treated with some caution. Firstly, it relates to when functionality was deployed not when it was procured. Secondly, whilst the Market Review has MIS OJEU procurement history data for the period from 2005 to 2010 we have no data on the nature or extent of MIS OJEU related procurements prior to 2005. However, the data does suggest a fairly consistent year on year pattern of an increasing number of functional deployments.
- 7.35 Additionally, in the context of 75 local authorities responding to the online survey and with 21 functional areas and (theoretically) up to 3 supplier options per functional area, the maximum number of deployment options would be 4,725. Had each of the 75 local authorities had a single supplier for each functional area the maximum number of deployment options would be 1,575. So an analysis based on 900 actual deployments needs to be treated with some caution.
- 7.36 However, in 2005 the cumulative number of functional deployments was approximately 1000. In 2010 the number had increased to about 1250. This increase took place in the context of a very low number of OJEU procurements over the same period. Likewise there is a picture of steady year on year increases in the number of functional deployments since about 1992 but relatively limited history of an equivalent steady flow of local authority OJEU procurements over that period.
- 7.37 Commenting on the way that new functionality was brought to the marketplace the Market Study noted:

“Atkins found no evidence to suggest that brand new modules are included within suppliers’ annual maintenance charge (for example 14-19 solutions and parental reporting are being purchased in addition to previous contractual agreements). It is however clear from speaking to some LAs who use SIMS that this practice was used historically by Capita but that this has now ceased (these specific LAs believed this to be due to “competition requirements”). 30% of LAs interviewed noted that they would actually prefer new modules to be included in the annual maintenance again

Whilst brand new functionality is no longer included in the annual support charge, it should be noted that all suppliers include new enhancements to existing modules as part of their ongoing agreement with their customers. This, in some cases, can lead to significantly enhanced, updated and even rebranded modules being developed and freely made available within the existing MIS agreements.”

Procurement by individual schools

- 7.38 In addition to the 947 local authority procurements reported as part of the online survey element of the Market Study, respondents indicated on 407 occasions that the relevant functionality was “Purchased direct from supplier by school”.

- 7.39 On the face of it procurement decisions made freely by individual schools fall outside the scope of the Market Study – it was concerned with procurement practices at the local authority level. However, as indicated in our earlier analyses of the legal framework, there are activities that a local authority typically undertakes which will make it more difficult for them to argue that the MIS purchases made by individual schools fall outside their EU and UK procurement responsibility as they are disaggregated.
- 7.40 One of the important factors to be considered will be what role if any the local authority played in advising the school and to what extent it was involved in providing support for the solution chosen by the school.
- 7.41 In that respect it is worth noting that the Market Study stated:
- “86% of LAs surveyed recommend specific MIS products to their schools. This recommendation is often based around the fact that the LA has negotiated a discount with the supplier for aggregated procurement at LA level and/or the LA has a school MIS Support team that specialises in a certain product. This is the case in the majority of LAs who use Capita SIMS as their preferred product.*
- Of the 14% surveyed who do not recommend specific products, the LAs will usually still engage with schools regarding MIS choice by helping them to informally assess available products and providing support regarding evidence based decision making, but they do not have a preferred supplier.”*
- 7.42 A further indicator of the ability to argue that such purchases are disaggregated will relate to the extent to which the local authority provides support. The Market Study stated:
- “Where LAs offer support for a specific product set or sets, they generally prefer the schools to use their supported solution but LAs stress that the decision to do so rests firmly with the schools.*
- 75% of LAs interviewed provide support and maintenance to schools that use their preferred MIS products. This is mainly support for Capita’s MIS however one LA also supports Serco and another supports RM.”*
- 7.43 We have set out our view on how most effectively to address the urgent and wide ranging procurement issues facing local authorities in Section 10 of our report.

8 Statutory returns

The 2005 position

- 8.1 Becta's 2005 report noted the progress that had been made in relation to statutory returns but identified the need for fundamental improvements in this area and recommended;
- "a revised commercial framework for the collection of statutory returns data to reduce "the considerable financial and bureaucratic burden the process currently places on schools, LEAs and MIS suppliers."*
- 8.2 It further recommended that the revised commercial framework would require that the Department enter into a formal memorandum of understanding (MOU) with each of the providers of school-wide MIS systems and that the timescales for release or changes to statutory returns agreed via the MOU should recognise the considerable practical challenges associated with the steps necessary to upgrade software on individual school systems.
- 8.3 It went on to recommend that once established, the MOU should be developed and enhanced to provide a comprehensive framework for the technical specification of returns, taking full account of emerging cross-government standards. The recommendation in this area was that:
- "on the establishment of that comprehensive framework, the Department should then establish separate contractual arrangements for statutory returns through which it contracts directly with suppliers, imposing quality and timeliness thresholds on providers. The costs of meeting the Department's needs via the statutory returns process should therefore no longer fall to schools."*

Progress to date

- 8.4 The Market Study indicated that local authorities had confirmed that considerable improvements to the timeliness and quality of new software releases was achieved since the 2005 report, although they indicate that there is still some way to go. We believe these noted improvements to be attributable to the signing of the MOU.
- 8.5 As part of the agreement to establish the MOU, a Central Data Returns Funding Project was set up and led by the Department in August 2008 to test the concept of funding software suppliers towards the costs of changes to their software systems resulting from the Department's data requirements. The aim was that the Department would contract directly with suppliers, imposing quality and timeliness thresholds. The costs of meeting the Department's data needs would therefore no longer fall to schools and local authorities.
- 8.6 The Department instigated the Gateway process in August 2008 and the Gateway 1 review took place in October 2008. This validated the need for the project, though it led to a significant revision of its methodology. No Gateway 2 review took place, as this was deemed by the Gateway review team to be unnecessary. The Gateway 3 review in March 2009, however, took the line that the project had no compelling business case, a return on the investment could not be demonstrated and there were several potential negative outcomes. As a result, the project was closed in April 2009. Therefore there was no funding available for suppliers to deliver Department required changes to software.
- 8.7 At the time the project was closed, work was underway to agree a renewed MOU. However, since the closure of the funding project suppliers have declined to enter into a new MOU and thus there is no longer an agreed MOU between the suppliers and the Department.

Current view of suppliers

- 8.8 During the Market Study 6 IMPS suppliers all expressed a level of concern around the annual development costs incurred in order to support the Department's and other agency statutory return requirements. This was of particular concern to suppliers with a low market share, whose investment in meeting these requirements represents a substantial cost in comparison to their returns from MIS sales. Smaller suppliers in particular considered the demands of statutory returns to be a barrier to improved innovation and competition within the MIS market.
- 8.9 Suppliers cited this development cost as a major contributor to their annual support and maintenance charges. They also expressed discontent that the recommendation in the 2005 report, regarding the costs of changes to statutory returns being met by the authority requesting the return

was never followed through to a satisfactory conclusion due to the closure of the Central Data Returns Funding Project.

- 8.10 As part of the Market Study the main suppliers were asked to estimate the cost to them of meeting the statutory return requirements. Four suppliers responded and the data generated average annual costs of £370k. When these figures are compared against the market share for each supplier, the proportional cost is significantly higher for those with a smaller market share.
- 8.11 The review report estimated that the software development costs of statutory returns equates to over 30% of the estimated MIS related turnover for two suppliers. Whereas for the dominant supplier the estimate was that the software development cost of statutory returns equates to less than 3% of their MIS related turnover. Assuming four providers with an average software development cost in relation to statutory returns of £370K, yields an annual cost for all 6 suppliers of £2.2 million or £11.0 million over the 5 year lifetime of the parliament. It should be noted that that £11.0 million is the assessed cost to suppliers not the charges they might make to schools. The figure takes no account of the actual cost to suppliers and local authorities of providing support to schools during the statutory returns process, or the costs in time and effort for each school to make the online returns.

Current view of Local Authorities

- 8.12 Local authorities interviewed during the Market Study also expressed concern about the increasing demands that the changing requirements of statutory and non-statutory returns are placing on both their own resources, schools and their MIS suppliers. They considered the impact to include stifling innovation and limiting the potential for new entrants to the market and impacting quality. Whilst they indicated that the MOU has resulted in considerable improvements they still feel there is some way to go and indicated concern that the cost of making changes to meet central Government requirements continues to be passed onto schools.

Becta's assessment

- 8.13 Management Information Systems suppliers are part of the delivery chain and relationships and engagement between them and the Department need to be managed effectively.
- 8.14 In continuing discussions around the Memorandum of Understanding (MoU) between the Department and suppliers, it was clear that suppliers expected the central funding proposal to be enacted, ideally via full-cost recovery approach but this was considered by the Department to exceed the likely budget available.
- 8.15 Scoping "statutory data requirements" was a further difficulty not least because of the tension between suppliers wanting a broad definition and funding limitations. Establishing an independent and fair funding mechanism that would be accepted by a range of suppliers with widely differing market shares and business models was also a further difficulty in agreeing an acceptable way forward.
- 8.16 We have set out Becta's view of the way ahead on the issue of statutory returns in Section 10 of our Report.

9 Interoperability

The 2005 position

- 9.1 The 2005 report recommended that Becta should establish supplier-independent and open interoperability architecture to create the opportunity for improved interoperability at the school level and at the LA or Regional Broadband Consortium (RBC) level. The System Interoperability Framework (SIF) was seen as being “at the heart” of the interoperability drive.

Progress to date

- 9.2 Since the publication of the 2005 report, Becta has led on education related interoperability developments and SIF has been confirmed as the preferred solution. SIF is developed by the SIF Association, a non-profit membership organisation whose members include 2200+ software suppliers ranging from small specialist companies to multi nationals, schools, local authorities and government organisations active in primary and secondary education markets in the US, Europe, Australia and the UK.
- 9.3 These organisations came together to create a set of rules and definitions which enable software programs from different companies to share information. The SIF Specification makes it possible for programs within a school or local authority to share data with other establishments without any additional programming and without requiring each supplier to learn and support the intricacies of other suppliers’ applications.
- 9.4 The goal of the SIF Association is to make it possible for the educational community to have access to the most current and accurate data available. Becta co-chairs the SIFA UK Board and also represents the UK on the US SIFA Board. It has been instrumental in driving forward the standard in the UK. Becta is clear that SIF has proven potential to deliver a wide range of benefits at the front line and at local and national levels.
- 9.5 In July 2008, Becta, DCSF and DIUS published a ‘Statement of Intent’ regarding interoperability which stated that SIF was the direction of travel and a decision would be made by 2010. Following the release of the Statement of Intent there has been significant progress in the development and use of SIF as a vendor neutral architecture.
- 9.6 The move to implement SIF in some local authority areas has seen an increase in demand for MIS suppliers to produce SIF agents for their software. Whilst some of these suppliers are involved in developing SIF agents for their own products, others rely on a third party to develop SIF agents for their product. The demand from local authorities for interoperable solutions has also seen some local authorities starting to look for alternative MIS solutions for their schools where there is no roadmap for SIF from their existing supplier.
- 9.7 The dominant MIS supplier was initially unconvinced at a strategic level that SIF was the best available solution (citing security concerns). However, continued effort by that supplier and other SIF members resulted in July 2010 in agreement on changes to the specification which will address the concerns that had been raised.
- 9.8 The SIFA UK Community is growing and now is well established with an elected Board. It has an agreed governance structure and working Groups have been formed to continue development of the standard. The SIFA UK website is live and quarterly meetings have been well supported by the community. It is an excellent collaborative vehicle for stakeholders working together to develop SIF in the UK. Attendance at each event and membership are increasing year on year having risen from about 5 in 2006 to 60 in 2010.
- 9.9 A business case for the adoption of SIF in the education sector was released in January 2009 and the UK data model has been continuously developed with annual releases of upgrades. There are implementations in Birmingham, Northern Ireland, London Grid for Learning (LGfL), South West Grid for Learning (SWGfL), Norfolk, East of England Broadband Network (E2BN), East Midlands Broadband Consortium (EMBC), Dudley, Sunderland, Cynnal, Cheshire East, Leeds and Warwickshire.

Current view of suppliers

- 9.10 All of the main MIS suppliers agree that a single standard for systems interoperability will soon become essential within the MIS market. However, views on SIF were found to vary across the

main suppliers. Many of the suppliers involved in the market review queried the time it is taking to implement. Around 50% of suppliers interviewed expressed concern regarding a lack of adoption of a common interoperability standard across the MIS market. They argued that lack of adoption acts as a barrier to local authorities and schools changing MIS suppliers or selecting a combination of MIS products from different suppliers to deliver their overall solution, and believe that either SIF or a similar standard should be mandated.

- 9.11 The Department has recently conducted a review of interoperability across the education sector, the findings of which are not yet in the public domain and some suppliers raised this as a concern creating further uncertainty in the market.

Current view of Local Authorities

- 9.12 Local authorities agreed that a single standard for systems interoperability would be of benefit although there was some confusion over what this would mean in practice and lack of understanding of the benefits and the ability of SIF to deliver them. Nevertheless, it was felt that the issue of interoperability would become more important and would be driven by the new government's policy on additional academies and free schools. During the review an interviewee from SSAT commented that in their view systems interoperability would help federations of academies in the transfer of data between their academies and the local authorities in which they are situated.
- 9.13 It was also felt that communication should be improved regarding the status of interoperability, in order to allay any concerns and communicate the benefits.

Becta's assessment

- 9.14 We have set out Becta's view of the way ahead on the issue of interoperability in Section 10 of our Report.

10 Addressing the challenges ahead

The range of challenges ahead

- 10.1 We have highlighted in our Report a range of challenges impacting on the marketplace for school MIS systems and support which has been estimated to be in the region of £550 million over a five year lifetime of this Parliament. We set out below our recommended way forward in respect of:
- Procurement Concerns
 - Rising Costs
 - Statutory Returns
 - Interoperability
 - Open Source
 - Effective Support

Procurement concerns

- 10.2 The legal review indicated the limited nature of the activities which were likely to be considered acceptable for procurements being categorised as software maintenance and seeking to use the “only supplier” exemption from a call for competition. The key issue is likely to be that what is procured under the only supplier exemption cannot expand the scope of the software or the support services delivered under the original contract.
- 10.3 In summary, our analysis of procurement practices has shown that many of the MIS systems in use were originally procured many years ago and have been continually updated since that date via the mechanism of annual maintenance. Indeed about 50% of the local authorities who purchased support and maintenance from the dominant supplier purchased the original licence over 10 years ago. It is worth noting that many of those local authorities commented regarding the improvements in the quality of the software and services they currently received as compared to the position which pertained at the time of Becta’s 2005 report.
- 10.4 However, the upgrades received since the original procurement are likely to have included new functionality and transitions to new technology platforms both of which our legal advice indicate are likely to fall outside the scope of available EU and UK procurement regime exemptions and thus should have been subject to the rigor of the full EU and UK procurement regulations.
- 10.5 Whilst dissatisfaction with a supplier’s performance can be a reason to go to the market earlier than otherwise might be the case, sustained high levels of satisfaction do not remove the limitations as to what can be procured under available exemptions or alter the principles underpinning EU and UK competition law.
- 10.6 The Market Study indicates that even more recent additional functional enhancements such as 14-19 data and Web Based Access for teachers and parents have only been market tested in a manner consistent with EU and UK procurement obligations in a minority of occasions. Indeed since Becta’s 2005 report there have only been 18 OJEU procurements for the provision of MIS products and services (including 5 where MIS was an element of a wider BSF procurement).
- 10.7 Where a local authority can identify an EU compliant current contract the scope of its OJEU notice will be a key factor in determining what is acceptable. Where an original recent OJEU contract cannot be identified (circumstances categorised Grey in the Market Study) or where the processes used are recognised as being unlikely to be EU compliant (categorised as Red in the Market Study) local authorities are at risk from challenge under the recently introduced Remedies Directive. Overall about 80% of local authorities fall into one or other of these categories.
- 10.8 It is considered crucial that in the light of the findings of this Report, all local authorities review their MIS procurement arrangements in advance of their next contract renewal to determine the status of their arrangements under EU and UK procurement law. This urgent need is reflected in our recommendations.
- 10.9 The legal advice is that the annual renewal of an MIS support contract is effectively the award of a new contract. We believe that local authorities can reduce the 6 month time period during which a challenge to such a contract can be made under the Remedies Directive, and remove the possibility of a finding of ineffectiveness, by the use of a VEAT notice. Consideration of the use of VEAT notices is therefore reflected in our recommendations.

- 10.10 Local authorities will want to note that current OGC guidance does not extend to the implications of a finding of ineffectiveness on contract renewals and thus there is uncertainty regarding what impact it might have on the on-going right to use the software by schools.
- 10.11 We also recommend that where local authorities intend to renew an MIS software maintenance agreement in the absence of confirmation that it is covered by EU compliant procurement procedures they should seek to reduce the risk of challenge by limiting their un-competed contract to the basic support permitted under the “only supplier” exemption. An MIS supplier will be the entity best placed to verify that the scope of changes to its software under a support contract will not exceed what is permissible under the exemption. Contracting entities should therefore consider seeking written confirmation from their MIS supplier that the services provided under a support contract awarded without a call for competition do not exceed what is permissible under the exemption. Clearly, where local authorities are acquiring such a limited support service it should cost less than a service which included product enhancements across a wide range of functional areas. Local authorities should therefore review the difference between these two services and negotiate cost reductions accordingly.

Strategies for procuring MIS solutions

- 10.12 It is clear that if an individual school or a local authority has a requirement for the provision of an MIS system on the basis that it wishes to receive, during the duration of its contract, functional enhancements and technology upgrades, and pay for them via an annual payment, then that is an entirely proper requirement. Indeed many schools, local authorities and suppliers will see the benefit of such a holistic and strategic approach and will be able to justify entering into multi-year contracts for the provision of such a requirement.
- 10.13 The issue is that such a requirement (including the requirement for annual enhancements) must have been competed for in a fair open and transparent manner in line with EU and UK procurement law and that the services being provided must remain within the scope and time span covered by the relevant OJEU advertisement. Problems regarding what enhancements can be delivered occur when the services fall outside the scope of the OJEU and the contracting authority then seeks to depend on the “only supplier” exemption to justify on-going contract renewals.
- 10.14 The options by which schools and local authorities can move from operating in a non-compliant environment to a fully compliant environment are considered below.
- 10.15 Additionally, it is the case that many schools will want to procure a collection of integrated modules from a single supplier, and there can be advantages in that approach. The key is to require that the supplier offering the bundle of interrelated products is fully committed to an interoperability approach which will ensure that the contracting authority is not locked into that supplier for other areas of functionality in the longer term. However the competition law issues that relate to “bundling products” in the situation where there is a dominant supplier in a marketplace are complex and fall outside the scope of this report.

Options to regularise the procurement position

- 10.16 We have considered whether the procurement arrangements necessary to address the issues identified in the Market Study are best progressed at the level of:
- Individual Schools
 - Individual Local Authorities
 - Collaboration on behalf of the wider School System.
- 10.17 For each possible arrangement we assess its practicalities, costs and the extent to which the solution might be likely to provide legal certainty to schools and local authorities.

Procuring at the level of individual schools

- 10.18 We considered carefully whether in the light of the wide range of procurement issues identified via the Market Study the most appropriate way forward would be to recommend that local authorities end their role in the procurement of school MIS solutions and leave the matter to individual schools. We rejected that approach for the following reasons:

- 10.19 It would place considerable additional bureaucratic burdens on thousands of individual schools and would potentially result in many thousands of individual procurement exercises which would swamp the MIS marketplace.
- 10.20 It would result in additional year on year costs for thousands of individual schools, as in many cases the cost of solutions procured at the individual school level would significantly exceed the cost of agreements negotiated by the local authority. Indeed the Market Study indicated that it expects such individual procurement cost to be “considerably higher”. This is contrary to the Government’s policy focus on reducing costs and would be particularly unhelpful in the context of MIS systems where the Market Study indicates that costs are currently escalating at 6% year on year, even under the aggregated purchases currently in place at the local authority level.
- 10.21 Assuming that the average primary/special/pupil referral unit would only need a limited market sounding exercise to identify its needs and appoint its MIS supplier, we estimate that the costs per primary school would be in the region of £3,600. This is based on a nominal 11 days effort at an average cost of £325 per day. With 18,477 such schools the cost of this local procurement approach would be just under £67 million.
- 10.22 Post primary schools would typically have more complex MIS requirements than other schools and we estimate their market testing costs per school to be £6,300 (based on 19 days effort at £325 per day). With 3,333 secondary schools this approach to procurement yields a total cost just under £21 million. The cost for an individual procurement approach across the primary, secondary and special sectors would therefore be £88 million.
- 10.23 Additionally, the loss of aggregation in the individual school procurement model means that annual cost of MIS software would be likely to rise by about 20% generating further annual costs. However, individual schools may attract a modest discount for entering multi-year contracts. Overall, we estimate the software costs impact of local procurements to be approximately £31 million over a 5 year lifetime of this parliament. The full cost of such a disaggregated approach would therefore be £119 million over 5 years (£88 million + £31 million).
- 10.24 The legal advice is that there are many factors that would mitigate against successfully arguing that school MIS purchases can be “disaggregated” in the context of the EU thresholds and thus considered to be individual purchases. Those factors include issues such as a local authority recommending products, supporting only certain products, identifying interfacing needs met only by a particular product, assisting in contractual or pricing negotiations in respect of a particular product. Thus the “disaggregated” approach lacks legal certainty unless local authorities desist from all these mitigating activities. To do so would of course cause very severe inconvenience and disruption to many thousands of schools.
- 10.25 Finally, we recognised that whilst there is benefit to be derived by allowing individual schools choice in relation to the MIS system they use, **it does not follow that to exercise such choice individual schools have to establish the contracting framework through which the choice is exercised.** In summary, such multiple contracting vehicles would be hugely bureaucratic and unaffordable for the majority of schools.

Procuring at the individual local authority level

- 10.26 We also considered if recommending individual procurements by each single local authority might be the best way forward. This was based on an assumption that the establishment of such a single local authority wide OJEU procurement would consume just over 200 days of effort at a cost of £650 per day indicating a per authority cost in excess of £130,000. Replicated across all local authorities in England this would yield costs in the region of £20 million.
- 10.27 However, an OJEU compliant process would allow local authorities to enter multi-year contracts. The Market Study found that the one authority that had taken such a multi-year approach had generated savings of about 12%. Replicating this across the system indicates that it could save about £25 million over 5 years. Thus the net impact of individual procurements at the local authority level would be savings of £5 million over 5 years (costs of £20 million minus savings of £25 million).
- 10.28 Also whilst the number of individual procurements under this model would be considerably less than under the individual school approach, it would still be likely to overwhelm the MIS marketplace and be extremely expensive.
- 10.29 The question also arose as to whether any existing collaborative procurement agreements might be used to meet the needs of this marketplace. Indeed during the Market Study a number of respondents queried if it were possible to use the existing OGC’s Buying Solution Software

Applications Solutions – Bespoke Applications framework to meet their MIS needs. The Market Study further noted that one local authority had in fact used this OGC framework.

- 10.30 However, it transpires that the only MIS supplier on this framework was the dominant supplier, and so in Becta's view this would not represent a mechanism for testing competition in this marketplace. Indeed the Public Contracts Regulations 2006 specifically forbid a contracting authority from using a framework agreement improperly or in such a way as to prevent, restrict or distort competition.

Procuring via a collaborative arrangement

- 10.31 Under this model the Department would commission the establishment of national procurement arrangements which could be used by those local authorities and individual schools who did not wish to incur the costs and inconvenience of establishing their own separate procurement arrangements.
- 10.32 However, final decisions regarding use of the arrangements (or otherwise) would remain at the discretion of individual local procurement entities. It would be important taking account of the policy focus on Academies and Free schools that whatever cost effective procurement arrangements were established such schools should have the freedom to use them if they so wished.
- 10.33 The opportunity for significantly greater savings than those available by establishing procurements at the individual local authority level will flow from the establishment of a specific collaborative procurement arrangement (a framework) which takes account of the particular features of the MIS marketplace.
- 10.34 Such collaborative arrangements (frameworks) provide the freedom for schools and local authorities to use them but place no obligation on them to do so. We estimate that the initial cost of establishing such a framework would be between £400,000 and £500,000, and the cost of a call-off by all of the 152 local authorities to be about £5.5 million in total. Thus the 5 year costs of establishing the arrangement would be about £6 million.
- 10.35 Again the ability of local authorities to establish multi-year contracts is estimated to generate 5 year savings in the order of £25 million. **The net cost of this option is therefore a saving of about £19 million over 5 years, a significantly greater saving than that generated by procuring at the individual local authority level and some £138 million less expensive than the £119 million cost of procuring at the individual school level. The establishment of specific framework arrangements is reflected in our Recommendations.**
- 10.36 It should be noted that this £138 million takes no account of any savings that may be derived as a result of the competitive pressures generated by establishing the framework. An earlier framework in respect of the provision of Learning Services is estimated to have reduced unit costs to schools by more than 60%.
- 10.37 Recognising the particular features of the schools' MIS Marketplace, we recommend that such a national framework adopts a range of characteristics which have been updated from our 2005 report and set out in detail in Annex 3. In summary the principles which should underpin the contractual terms and conditions of the Framework Agreement should reflect the principles of effective choice, improved pricing visibility, minimum service levels regarding the quality and timeliness of software updates and support, and conformance to open technical and data standards including adherence to SIF.
- 10.38 Were such a framework to also encompass options to allow for the purchase of a Learning Platform or a combined solution then further procurement economies of scale would be derived.

Rising costs

- 10.39 We noted that the Market Study indicated the year on year base cost to schools in England of acquiring maintaining and supporting their MIS systems was now in the region of £38 million to £44 million and was increasing at the rate of 6% annually. In the light of the current financial pressures facing schools and the nation generally we consider that the base cost and its current rate of increase will both be considered unacceptable.
- 10.40 We also noted the view of the Market Study that significant cost reductions could be achieved from effective negotiation. One local authority was cited as having saved £80,000 over three years (12% of the relevant spend). The Market study commented that:
- "this ability to offer large discounts could be an indication that average market prices are high, which in turn could be a symptom of a lack of opportunity for competition in the market".*

- 10.41 We expect our recommended collaborative procurement approach (framework agreement) and the associated level of increased competition will drive forward and deliver significant cost reductions.
- 10.42 The Market Study also found that there is a growing recognition from local authorities regarding the potential whole life savings that can be achieved from adopting a web enabled, supplier hosted MIS. Such offerings are likely to emerge with an open and competitive market environment driven by the recommended collaborative procurement approach.
- 10.43 Whilst it noted that there are concerns around data security and issues in some areas with connectivity, the Market Study identified that appropriate guidance and improved competition will allay these concerns and that web based solutions will deliver real savings and operational efficiencies in the future. We believe any move to web based solutions would go beyond what would be acceptable under the only supplier exemption and should therefore be market tested in a manner compliant with EU and UK procurement law.
- 10.44 In the current financial climate schools and local authorities should take a very robust view regarding the necessity for further functional improvements in the MIS systems now available. Whilst we recognise that there may, in limited circumstances, be a need for future functional enhancements, we believe that in current financial climate savings in this area could be found. Therefore, we recommend a very rigorous approach in this area focusing on reducing demand, and therefore costs, and clear visibility on pricing of future enhancements.
- 10.45 Where local authorities have adopted our recommendation regarding a de minimis approach to software maintenance in the absence of an OJEU compliant contract we would expect the prices they pay to be consequently reduced to reflect this more basic service provision.
- 10.46 Finally, it is also clear that a failure to address the issues identified under statutory returns will seriously impact the ability of schools, local authorities and suppliers to effectively address the cost reduction challenges.

Statutory returns

- 10.47 At the time of the 2005 report the number of mandatory statutory returns was 28 and since that time the number has risen to 41, an approximately 50% increase. There are also now some 86 “optional” returns for which suppliers need to provide functionality.
- 10.48 We recommend that the Department considers the advantages of immediately freezing the specification for Statutory Returns and instructing all its NDPBs to do likewise. This is in the light of the level of costs associated with the Statutory Returns process, the current failure to find a solution regarding removing the consequential financial burden from schools, the need to reduce bureaucratic burdens on schools, and the need to find significant reductions in public expenditure. This freeze should ideally last for 5 years and should remove the need for MIS suppliers to invest further resources into this area resulting in a significant reduction in the annual charges suppliers make to schools, thus reducing the bureaucratic burden on schools and freeing up resources for the front line.
- 10.49 We further recommend that the Department permits the freeze on Statutory Returns to be lifted only when the requesting party has mechanisms in place to allow those bodies applying to make changes (and not schools) to pay for the necessary costs of modifying the MIS system and collecting the data. The custom and practice whereby resources are deflected from the front line to meet the data requirements of the “centre” should end.
- 10.50 To help inform the development of these mechanisms, suppliers should immediately be asked to provide more transparency regarding the cost to them of statutory returns and how this cost is passed on to their customers. Making this cost clear on customer invoices in the interim could also help to reaffirm the true cost of statutory returns and demonstrate to the front line the reduction over the period of the freeze.

Interoperability

- 10.51 One of the most significant areas of concern in the 2005 review focused on interoperability between MIS products. The continuing importance of this issue is well illustrated by the fact that the Market Study found that 25% of local authorities interviewed and 50% of MIS suppliers felt that it was important to have an interoperability standard **mandated**.
- 10.52 The Market Study states that SIF is a mature international standard used widely in US and Australia. Additionally, SIF has of course been driven forward in the last five years by Becta and its

- partners via the SIF Association, and its uptake facilitated by the Department's 2008 "statement of intent". Whilst there are implementations in Birmingham, Northern Ireland, London Grid for Learning, South West Grid for Learning, Norfolk, E2BN, EMBC, Dudley, Sunderland, Cynnal Cheshire East, Leeds and Warwickshire, strategically its uptake has been very slow.
- 10.53 Indeed it remains the case that SIF is still not universally applied within the UK market for MIS and LP functionality and there is additional concern that in the absence of a mandated requirement for SIF further fragmentation round approaches to interoperability could take place.
- 10.54 We have made the point previously that it is likely that the challenges associated with both the new flexibilities and the sharper accountability envisaged by the Government will drive forward the need for relevant, reliable and timely tools, data and information at all levels of the education system. Therefore, we believe that there will be more reliance on interoperability, as learning platforms and other school based systems will increasingly need to seamlessly integrate with the school MIS systems and deliver data sharing with other establishments.
- 10.55 We recommend that to assist schools in the effective use of ICT to deliver improved learning, to exercise choice and to reduce costs that the Department **mandates** an interoperability standard in the MIS and LP marketplace and that such a mandatory requirement should be in place within the next 12 months. This timeframe is broadly in line with the messages the Department communicated to the marketplace in 2008.
- 10.56 We also recommend that communication to the MIS industry sector, local authorities, Regional Broadband Authorities and schools should be improved regarding the status of interoperability, in order to allay any concerns, communicate the benefits and drive forward uptake.

The role of Open Source in MIS

- 10.57 We required that the Market Study include within its scope a consideration of the extent to which Open Source solutions were playing or could play a role in the provision of MIS products and services to schools. The Market Study reported:
- "It should also be noted that we investigated the possibility of open source MIS products in the market. We spoke to one supplier who has developed such a solution, however this is only currently in use in one school in England, it is not currently freely available and the supplier is currently trying to find backing for its further development. We therefore conclude that open source is not a currently viable option within the MIS market."*
- 10.58 We believe that in the medium to long term Open Source solutions can play a role in the MIS marketplace. It is clearly the case that a fully functional institution-wide MIS solution would take many years to develop. However, where interoperability was a mandatory requirement in the MIS and LP marketplace we consider that Open Source solutions could be developed which would supplement the functionality available via existing proprietary MIS solutions and provide a further avenue of competition and choice in relation to new areas of functionality. However, such an opportunity is dependent on the increased interoperability we have recommended along with the adoption our recommendations on Statutory Returns.

The role of Learning Platforms in delivering MIS functionality

- 10.59 Over the last few years there has been increasing convergence between aspects of the functionality found in a "traditional" MIS product, and the functionality emerging in some Learning Platforms (LP) products. Ultimately this trend has the possibility to provide enhanced competition in the MIS market space (and vice versa), but this competition would be dependent on the improved interoperability which would flow from the mandating of SIF, and the resulting framework agreement taking account of the MIS and LP synergy. These preconditions are reflected in our recommendations.

The provision of support for MIS systems

- 10.60 The arrangements for the provision of MIS support were not a detailed focus of the Market Study and did not fall within the scope of the online survey. However, the 20 local authority interviews did explore the nature of the MIS support arrangement in place and the overwhelming model (in 75% of those interviewed) was that the support was provided via a local authority support team. In many cases such support was "recharged" to schools.

- 10.61 Our 2005 report recommended a move to a more aggregated model of support, but the 2010 interviews found that in only two cases the support arrangements spanned more than one authority. The current Market Study estimated the cost of MIS support to be about £65 million annually.
- 10.62 It is clear that MIS support teams provide valuable expert services to schools across a range of areas which depending on the size and nature of the team would encompass technical support, business systems support and importantly, advice on the strategic use of MIS software to improve institutional management and teaching and learning. However, in many cases the teams are small in size and face considerable challenges in providing support across the entire range of functional areas that comprise a modern MIS system.
- 10.63 It is likely that MIS support provision will come under additional cost pressures in the light of the financial pressures being faced by schools and local authorities. We believe the best way to ensure the on-going provision of such important support is by encouraging local authority support teams to come together and form a shared service arrangement.
- 10.64 Such an approach will yield economies of scale and provide via larger teams a wider and deeper range of functional expertise than would be available if support is replicated across every individual local authority in what is typically relatively small teams. There will of course be organisational and managerial issues to be resolved in such an approach, but we consider the benefits to be considerable and thus such a shared service approach is reflected in our recommendations.

Annex 1 – Modular definition of an MIS

Atkins was asked to arrive at a modular definition for an MIS in order for them to conduct research around the functionality available from MIS suppliers and what local authorities are actually buying. For this purpose Atkins used the following functional elements:

- Admissions Management
- Assessment & Attainment Management
- Attendance Management
- Behaviour Management
- Curriculum Planning
- Data Transfer
- Examinations Management
- SEN Management
- Student Personal Records
- Statutory Returns
- Timetable Construction &View
- Timetable / Academic Staff cover
- Options Management (end of Key Stage 3)
- Workforce Management
- Finance
- Asset Management
- Data Mining, Trend Analysis & Predictions
- Web Access to appropriate data for Teachers, Governors & Parents
- Student progress Report Generation
- 14-19 Partnership Data Sharing
- Library / Resource Management

Annex 2 – Categorising procurement behaviour

The online survey identified a number of possible responses to questions relating to how a product was procured. Those responses were:

1. Extension to an existing OJEU procurement
2. New EU complaint procurement OJEU tender
3. Procurement via existing Framework Agreement
4. Unsure of procurement approach
5. Procured prior to Local Government reorganisation
6. Not Market Tested, procured from existing supplier
7. Not Market Tested, procured from new supplier
8. Other (please specify) [Usually re-categorised by ATKINS based on textual response]
9. Procured Directly by Schools.

In order to simplify the findings emanating from the survey we categorised these responses as follows:

Green – Responses 1, 2 and 3. We suggest that such approaches are more likely to be compliant with EU and UK legislation than others, although of course the extent to which they are actually compliant will depend on the facts of the particular case including the wording of the associated OJEU notice.

Grey – Responses 4 and 5. These categories allow for situations where the LA is unable to indicate the basis on which the relevant functional area was procured. Recognising that in some cases that may have been as a result of local government reorganisation a specific category (category 5) for that occurrence was provided.

Red – Responses 6 and 7. We suggest that such approaches, whereby a requirement was not market tested are most unlikely to be judged as compliant with EU and UK legislation.

We omitted from our calculations responses using category 9. We adopted this approach because it in essence indicated that the particular area of functionality was procured directly by schools. As our survey was primarily concerned with the procurement practices of LAs, we considered this approach appropriate. We recognised that in some cases the basis of the agreement used by individual schools to procure their software may in fact have flowed from actions of the LA, but we consider the simplification to be acceptable.

Annex 3 – MIS framework agreement - characteristics

On Licensing, Interoperability and Data Access

Ensure that a change to the legal status of a school (for example to Academy Status) does not require an otherwise licenced school to have to re-licence its existing MIS software **thus creating a double charge to the public purse.**

Ensure products must conform to the System Interoperability Framework (SIF) Interoperability Architecture

Ensure that regardless of how the MIS infrastructure is managed, owned, or provided ownership of data rests with the schools and not the MIS supplier. The framework should not permit the charging for access to data for other software products purchased by the school.

On Service Levels

Ensure contract management arrangements are such as to allow schools and local authorities to hold their suppliers to account for issues such as the cost, quality and timeliness of the software. It is recognised that such issues are significantly impacted by the statutory returns process which would need to be resolved before suppliers could give such assurances to their customers. In the absence of such resolution no prudent supplier could of course give such contractual assurances.

Ensure suppliers must offer a choice of service levels to customers, including service levels which incorporate a service credit regime.

On Pricing

Ensure suppliers must establish a mechanism by which customers have clear visibility of the forward price of the software. A minimum of two years' rolling visibility will be required, increasing to three years once the recommended freeze on statutory returns is implemented.

Ensure that suppliers must establish proportionate pricing whereby customers who opt to have an element of their MIS provision via an alternative provider will see costs from their incumbent supplier reduce proportionately.

Ensure that discounted prices are available for longer term contracts.

Ensure that suppliers must ensure that customers are advised regarding the basis on which any annual charge is based and varied, and the proportion of that charge which relates to the various services which it encompasses.

On Choice

Ensure supplier responsibilities to assist when schools or local authorities wish to migrate from one MIS supplier to another for all or part of the MIS provision.

On Statutory Returns

Ensure that the framework is established in such a manner as to allow for the possibility that the Department (or any of its NDPB's) may wish to commission changes necessary to allow MIS products used in schools to meet changed requirements in respect of statutory returns and for the cost of those changes to be met by the body commissioning the changes.

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