Completed acquisition by Bottomline Technologies (de), Inc. of Experian Limited's Experian Payments Gateway Business and related assets

Decision to refer

ME/6830/19

Please note that [✂] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

Introduction

1. On 6 March 2019, Bottomline Technologies (de), Inc. (**Bottomline**) acquired Experian Limited's (**Experian**) Experian Payments Gateway business and related assets (**EPG**) (the **Merger**).

2. On 7 October 2019, the Competition and Markets Authority (**CMA**) decided under section 22(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger constitutes a relevant merger situation that has resulted or may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**).[1]

3. On the date of the SLC Decision, the CMA gave notice pursuant to section 34ZA(1)(b) of the Act to Bottomline of the SLC Decision. However, in order to allow Bottomline the opportunity to offer undertakings to the CMA for the purposes of section 73(2) of the Act, the CMA did not refer the Merger for a Phase 2 investigation pursuant to section 22(3)(b) on the date of the SLC Decision. On 7 October 2019 the CMA extended the statutory four-month period mentioned in section 24(1) of the Act by notice pursuant to section 25(4) of the Act.

4. Pursuant to section 73A(1) of the Act, if a party wishes to offer undertakings for the purposes of section 73(2) of the Act, it must do so before the end of the five working day period specified in section 73A(1)(a) of the Act. The SLC Decision stated that the CMA would refer the Merger for a Phase 2

[1] See https://www.gov.uk/cma-cases/bottomline-technologies-de-inc-experian-limited-merger-inquiry.

investigation pursuant to section 22(1), and in accordance with section 34ZA(2) of the Act, if no undertakings in lieu of reference (**UIL**) for the purposes of section 73(2) of the Act were offered to the CMA by the end of this period (ie by 14 October 2019); if Bottomline indicated before this deadline that it did not wish to offer such undertakings; or if the CMA decided by 21 October 2019 that there are no reasonable grounds for believing that it might accept the undertaking offered by Bottomline, or a modified version of it.

5. The CMA identified in the SLC Decision that the Merger has resulted or may be expected to result in a SLC as a result of horizontal unilateral effects in relation to the supply of: (i) payments software for Bacs submissions via Bacstel-IP in the UK; and (ii) payments software for Faster Payments Service Direct Corporate Access (**FPS DCA**) submissions via Secure-IP in the UK.

The Proposed Undertaking

6. On 14 October 2019, Bottomline offered the CMA the divestment of its [✂] as a UIL (the **Proposed Undertaking**). The divestment was to be affected through the disposal of all of the issued and to be issued shares in [✂] and included:

   (a) [✂];

   (b) [✂];

   (c) [✂];

   (d) [✂];

   (e) [✂]; and

   (f) [✂].

7. Bottomline also offered transitional back-office support (eg IT and systems support and accounting services) to any prospective purchaser for a period of six months from divestment (with the potential to further extend this support). Bottomline further offered to include an upfront buyer requirement in the Proposed Undertaking if required by the CMA.

8. Bottomline also indicated its willingness to include a behavioural commitment as part of the Proposed Undertaking to: [✂].

Assessment of the Proposed Undertaking

9. The CMA has an obligation under the Act when accepting UILs to have regard to the need to achieve as comprehensive a solution as is reasonable and

practicable to remedy, mitigate or prevent the SLCs the CMA has identified and any adverse effects resulting from it.[2]

10. In order to accept UILs the CMA must be confident that all of the potential competition concerns that have been identified at Phase 1 would be resolved by means of the UILs without the need for further investigation.[3] UILs therefore are considered appropriate only where the proposed remedy is clear-cut and capable of ready implementation.[4] The requirement for a remedy to be clear-cut has two dimensions. First, when addressing any substantive competition concerns identified there must be no material doubts about the overall effectiveness of the remedy.[5] Second, in practical terms, those UILs of such complexity that their implementation is not feasible within the constraints of the Phase 1 timetable are unlikely to be accepted.[6]

11. The CMA's starting point in deciding whether to accept a proposed UIL is to seek an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively remedying the SLC.[7] As a general rule, the CMA considers that at Phase 1 it is appropriate for it to seek to remedy or prevent competition concerns rather than merely mitigating them.[8] Further, in view of the possibility to refer the Merger for an in-depth investigation, following which the CMA may exercise significant remedy powers, the CMA is unlikely to accept a UIL offer at Phase 1 which does not comprehensively address the SLC unless it was abundantly clear that at Phase 2 it would be materially no better placed than it had been at Phase 1 to achieve a remedy that would restore the levels of competition that existed pre-merger.[9]

12. The CMA will take divestiture of all or part of the acquired business as its starting point in identifying a divestiture package. This is because restoration of the pre-merger situation in the markets subject to an SLC will generally represent a straightforward remedy. The CMA will consider a divestiture drawn from the acquiring business if this is not subject to greater risk in addressing the SLC.[10]

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[2] Section 73(3) of the Act.
[3] CMA Guidance, Merger Remedies of 13 December 2018 (**CMA87**), paragraph 3.27.
[4] *Ibid*.
[5] CMA87, paragraph 3.28(a).
[6] CMA87, paragraph 3.28(b).
[7] CMA87, paragraph 3.30. CMA87 notes that the objective is to ensure competition following the implementation of the remedy is as effective as pre-merger competition. The CMA considers that this objective must be viewed in the context of: (i) the starting point of seeking an outcome which restores competition absent the merger (ie, the counterfactual), thereby comprehensively remedying the SLC; and (ii) the statutory requirement in section 73(3) of the Act for the CMA in considering UILs to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and adverse effects arising from it.
[8] CMA87, paragraph 3.31.
[9] *Ibid*.
[10] *Ibid*, paragraph 5.6.

13. Bottomline submitted that the Proposed Undertaking will remedy the concerns identified by the CMA in the SLC Decision for the reasons discussed below.

(a) Bottomline submitted that the divestment of [✂] will allow any prospective purchaser to compete for new business and, if desired, further develop [✂]. Bottomline submitted that [✂] can be used by both businesses and bureaux to make both Bacs and FPS DCA submissions and that it is functionally equivalent to EPG. Bottomline submitted that [✂] is suited to serve larger organisations as necessary and therefore this remedies any concerns that the CMA has in relation to the effect of the Merger on larger customers and/or bureaux. Bottomline also submitted that [✂] is profitable and that such profits could be readily invested into customer acquisition or product development.

(b) Bottomline submitted that [✂] has a share of Service User Numbers (**SUNs**) that is greater than the share of the EPG business. Bottomline submitted that divestment of [✂] would mean that the Parties' combined share of supply based on SUNs would be lower post-Merger than Bottomline's share pre-Merger. Bottomline therefore submitted that the effect of the Merger and subsequent divestment is to reduce rather than increase market concentration.

(c) Bottomline submitted that [✂].

(d) Bottomline submitted that the acquisition of [✂] by a divestment purchaser would: (i) increase the competitive strength of an existing Bacs-approved software supplier – in particular where that supplier currently offers only a hosted-solution; or (ii) create a new market player with a successful and well-established product set and an attractive customer base which includes blue-chip companies. Bottomline therefore submitted that any new entrant would have an opportunity to compete for new business and develop an existing product with a solid customer base and brand-recognition.

(e) Bottomline submitted that by strengthening an existing Bacs-approved software supplier or creating a new player, the Proposed Undertaking would therefore comprehensively address the SLC.

(f) Bottomline also submitted that divesting the EPG business would not provide a more comprehensive remedy following a Phase 2 review [✂]. Bottomline therefore submitted that even if the SLC were not

comprehensively addressed by the Proposed Undertaking, the CMA should exercise its discretion to accept this remedy.[11]

14. The CMA has carefully considered whether the Proposed Undertaking would comprehensively remedy the SLCs identified in the SLC Decision. The CMA identified the relevant counterfactual situation to the Merger in the SLC Decision as the sale of EPG to an alternate purchaser that does not give rise to competition concerns and would compete for new business and develop the EPG product going forward. The CMA therefore has assessed the Proposed Undertaking in light of this counterfactual and, based on the evidence currently available, has material doubts as to whether [✂] under the ownership of any prospective purchaser would replicate the competitive constraint of EPG in the same situation, for the following reasons.

15. Table 1 below compares metrics of [✂] and EPG:

Table 1: Comparison of [✂] and EPG metrics

	SUNs	Customers	Revenue	Volume of Bacs transactions (2018)	Annual average revenue per customer
[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
EPG	[✂]	[✂]	[✂]	[✂]	[✂]

Source: Bottomline response to CMA Questions of 15 October 2019. The customer contracts and revenue figures for both businesses incorporate both Bacs and FPS combined; the transaction volumes relate to Bacs alone.

16. As noted above in paragraph 12, in identifying a divestiture package, the CMA will take, as its starting point, divestiture of all or part of the acquired business. The CMA will consider a divestiture drawn from the acquiring business if this is not subject to greater risk in addressing the SLC.

17. A comparison of the key metrics of [✂] and EPG highlights differences in their customer base, scale and the types of customers served.[12] Although [✂] has a greater number of SUNs and customer contracts than EPG, EPG generates far higher revenues, and processes significantly higher volumes of Bacs transactions, from its smaller customer base.

[11] In accordance with CMA87 paragraph 3.31, which states that the CMA is unlikely to accept a UIL offer at Phase 1 which does not comprehensively address the SLC unless it was abundantly clear that at Phase 2 it would be materially no better placed than it had been at Phase 1 to achieve a remedy that would restore the levels of competition that existed pre-merger.

[12] These differences also are reflected in the shares of supply for both businesses when measured using volumes of transactions and revenue. For example, EPG accounted for [30-40]% of all transactions processed in 2018, whereas [✂] accounted for only [5-10]%. Similarly, EPG's share of revenue in 2018 was approximately [10-20]%, compared to [✂] [0-5]% share.

18. Moreover, there appear to be significant differences in the average revenue per customer, with EPG generating an annual average revenue of [✂] per customer, compared to [✂] for [✂]. The CMA also notes that [✂] top customer would be only the [✂] largest EPG customer (by volumes), with [✂] second largest customer [✂].

19. These differences in scale and customer profiles of the two businesses mean that the CMA is not confident that [✂] is capable of effectively servicing large and bureaux customers to the same extent as EPG. These differences also indicate that the competitive constraint of EPG will not be fully restored through the Proposed Undertaking.

20. The CMA also has material doubts as to whether [✂] under new ownership would provide a significant competitive constraint on the combined entity such that it would restore the levels of competition that would exist absent the Merger.

21. In particular, the CMA notes that [✂] would be a relatively small software provider and that the combined entity will remain significantly larger, regardless of the measure of share. This is reflected in Table 2 below.[13]

[13] For the purposes of this Decision the CMA considers the combined entity to be the combination of Bottomline and EPG but excluding [✂].

Table 2: Combined entity and [✂] shares of supply post-divestment

	SUNs	Volume of Bacs transactions (2018)	Revenue (2018)*
Combined entity	[40-50]%	[70-80]%	[70-80]%
[✂]	[✂]%	[5-10]%	[0-5]%

Source: Volume of transactions shares estimated using Pay UK data. Revenue shares estimated using actual revenues from Parties and competitors responding to market testing.

*Revenue for [✂] taken from 30 September 2019 and includes both Bacs and FPS DCA submissions.

22. The CMA notes that the large increment to the combined entity's share when measured using volume of transactions or revenues results directly from the Merger and the scale of this increment is not addressed through the Proposed Undertaking.

23. The CMA also is not confident that the Proposed Undertaking will remedy its concerns relating to the increase in Bottomline's existing scale resulting from the Merger (as discussed in the SLC Decision). In particular, the CMA notes that pursuant to the Proposed Undertaking, Bottomline will retain EPG's customers (accounting for a significant volume of Bacs transactions and combined Bacs and FPS DCA revenues that are materially larger than [✂]), as well as significant capability in respect of both Bacs and FPS DCA submissions. In particular, Bottomline will retain a number of deployed software solutions [✂] accounting for [✂], generating approximately [✂] of revenue and approximately [✂]. The CMA therefore is not confident that [✂] will be able to compete effectively against a competitor of such scale.

24. In light of the above, the CMA has material doubts as to whether the potential competition concerns identified in the SLC Decision would be comprehensively remedied through the Proposed Undertaking. Given that the CMA has material doubts about the effectiveness of the remedy in resolving its SLC concerns, it does not consider it necessary to form a view on the implementation of the Proposed Undertaking (including the behavioural commitments which were offered as part of the Proposed Undertaking).

25. Finally, the CMA considers that it would not be appropriate to exercise its discretion to accept the Proposed Undertaking, even if it does not comprehensively address the SLCs identified in the SLC Decision. This is because the CMA does not consider that 'it is abundantly clear that at Phase 2, it would be materially no better placed than it had been at Phase 1 to achieve a remedy that would restore the levels of competition that existed pre-

merger.'[14] In particular, the CMA does not conclude from Bottomline's submissions that a divestment of EPG (or part thereof) would not be feasible.[15] Moreover, as discussed in paragraph 23, Bottomline offers a number of other software solutions [✂] in the markets where SLCs were identified which could form part of a remedy package imposed at Phase 2.[16]

Decision

26. For the reasons set out above, after examination of the Proposed Undertaking, the CMA does not believe that it would achieve as comprehensive a solution as is reasonable and practicable to the SLCs identified in the SLC Decision and the adverse effects resulting from those SLCs.

27. Accordingly, the CMA has decided not to exercise its discretion under section 73(2) of the Act to accept the Proposed Undertaking.

28. Therefore, pursuant to sections 22(1) and 34ZA(2) of the Act, the CMA has decided to refer the Merger to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 to conduct a phase 2 investigation.

Joel Bamford
Senior Director, Mergers
Competition and Markets Authority
21 October 2019

[14] CMA87, paragraph 3.31.
[15] In this respect, the CMA notes that it will not normally consider the cost of divestiture to the merger parties in selecting appropriate remedies in accordance with CMA87, paragraph 4.80.
[16] In this regard, the CMA notes that at Phase 2, it has significant remedy powers under Schedule 8 of the Act, including the ability to prohibit a merger, and that it has increased time available in the context of a Phase 2 merger investigation to consider more detailed remedies (CMA87, paragraph 3.31).