

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

Issues statement

14 November 2019

The reference

1. On 21 October 2019, the Competition and Markets Authority (**CMA**), in exercise of its duty under section 22(1) of the Enterprise Act 2002 (**the Act**), referred the completed acquisition by Bottomline Technologies (de), Inc. (**Bottomline**) of Experian Limited's Experian Payments Gateway business and related assets (**EPG**) (**the Merger**) for further investigation and report by a group of CMA panel members (**the Group**).
2. In exercise of its duty under section 35(1) of the Act, the CMA must decide:
 - a) whether a relevant merger situation has been created; and
 - b) if so, whether the creation of that situation has resulted, or may be expected to result,¹ in a substantial lessening of competition (**SLC**) within any market or markets in the United Kingdom for goods or services.
3. In this statement, we set out the main issues we are likely to consider in reaching a decision on the SLC question (paragraph 2(b) above), having had regard to the evidence available to us, including the evidence referred to in the CMA's phase 1 decision (**the Phase 1 Decision**).² This does not preclude

¹ In answering this question, the CMA will apply a 'balance of probabilities' threshold. That is, the CMA will decide whether it is more likely than not that an SLC will result from the Merger. See [Merger Assessment Guidelines](#) (CC2 (Revised)/OFT1254), September 2010, paragraph, paragraph 2.12 and *OFT v IBA Health Ltd* [2004] EWCA Civ 142, paragraph 46.

² *Completed acquisition by Bottomline Technologies (DE), Inc. of certain assets of Experian Limited*, decision on relevant merger situation and substantial lessening of competition, 7 October 2019 (published on 8 November 2019).

us from considering any other issues which may be identified during the course of the phase 2 inquiry.

4. We are publishing this issues statement in order to assist any parties submitting evidence to the inquiry. The issues statement sets out the issues we currently envisage will be relevant to the inquiry. We invite parties to let us know if there are any additional issues which they believe we should consider.
5. Throughout this document, where appropriate, Bottomline and EPG are referred to as 'the Parties' and together as 'the Merged Entity'.

Background

The transaction

6. The Merger completed on 6 March 2019 and relates to the purchase by Bottomline of the trade and certain assets comprising the EPG business.³ Related to the asset acquisition, Bottomline and Experian also entered into commercial agreements related to payment verification software and a transitional service agreement related to EPG.

The Parties

7. Bottomline, through its subsidiary Bottomline Technologies Limited, supplies, *inter alia*, software that allows users to make submissions to the Bacs and FPS payments systems. Bottomline's flagship payments software in the UK is its hosted (that is, cloud-based) 'PT-X' solution.
8. Prior to the Merger, EPG was under the ownership of Experian Limited (**Experian**). Similar to Bottomline, EPG also is active in the supply of software that enables organisations to make submissions to the Bacs and FPS payments systems.

³ The assets comprising the EPG business are: software products (Experian Payments Gateway (EPG) Software; EPG Licence Key Generator Tool; EPGv2 (payments submission software); and EPG Data Manager Application) and intellectual property; freehold property; commercial contracts; goodwill; know how; employees (comprising technical, operational and administrative staff) and customer lists.

Payments submission software

9. The Parties overlap in the supply of payments software for (i) Bacs submissions via Bacstel-IP in the UK; and (ii) Faster Payments Service (**FPS**) Direct Corporate Access (**DCA**) submissions via Secure-IP in the UK. Bacstel-IP and Secure-IP are secure access channels that allow users to make direct submissions to the Bacs and FPS payment systems, respectively. The primary function of this software is to enable users to submit bulk submissions to the Bacs or FPS payment systems.⁴ Software providers must be approved by Bacs or FPS.
10. Organisations seeking to make submissions for Bacs or FPS payments can do so by:
 - a) directly submitting to Bacs or FPS using Bacs- or FPS-approved software (such as that provided by the Parties, so-called 'direct submissions');
 - b) using a payments bureau (so-called 'indirect submissions'); or
 - c) using a bank to make submissions on their behalf.
11. Payments bureaux use payments software to submit payments on behalf of other organisations, and may also provide a broader range of services than payment submissions. For example, some bureaux also provide additional services such as payroll, accounting, or tax services.
12. Submissions through banks can be made either using a bank's own online banking platforms or 'white-label' software (that is, under the bank's own brand rather than external software providers' submission software). We understand that 'white-label' software largely mirrors the functionality of an external software provider.
13. Bottomline supplies software directly to end-customers, to banks on a 'white-label' basis, and to payments bureaux. Bottomline also operates its own payments bureau. Bottomline supplies both deployed (that is, on-premises) and hosted payments software.
14. EPG's software is supplied directly to end-customers and to payments bureaux, but not on a 'white-label' basis via a bank. In contrast to Bottomline,

⁴ There are no differences in the process for organisations seeking to make direct submissions to the Bacs and FPS payment systems. However, with respect to FPS: (i) only HSBC and Barclays grant SUNs to their business banking customers to allow them to directly submit payments to FPS; and (ii) there are fewer providers of direct-submitting FPS software. Only six of the eighteen Bacs-approved software suppliers offer FPS functionality with their software.

EPG does not operate its own payments bureau. EPG's software is deployed and the company does not offer hosted solutions to customers.

The UK payments landscape and regulatory developments

15. Organisations in the UK currently have a number of options when choosing to make payments. The payment systems most utilised by organisations in the UK include Bacs, FPS, CHAPS and SWIFT (for international payments). The costs and processing times of each payment type differ and their use largely depends on individual customer requirements. We understand that a significant proportion of payments made by businesses in the UK are made using Bacs and, to a lesser extent, FPS (although we understand that FPS DCA submissions comprise only a small portion of all FPS transactions).
16. The UK payments sector is currently subject to a number of regulatory and technological developments which may result in changes to the Bacs and FPS systems. These include the EU's Second Payment Services Directive, Open Banking,⁵ and the New Payments Architecture (**NPA**). These developments may lead to entry/expansion of new and existing software providers, and increased competition.
17. The CMA considered developments affecting the UK payments sector in its Phase 1 decision but did not receive compelling evidence that their impact or timing of implementation would materially change its competitive assessment of the Merger. We intend to collect further evidence of the impact of these developments as part of the Phase 2 inquiry.

Frame of reference

18. Market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the CMA's analysis of the competitive effects of a merger in any mechanistic way. In assessing whether a merger may give rise to an SLC, the CMA may take into account constraints

⁵ Open Banking is a set of requirements imposed on 9 of the UK's largest banks by the CMA, but adopted voluntarily by virtually all of the smaller ones, arising from the CMA's market investigation into retail banking. Open Banking has specified security and communication software standards and industry guidelines that enable customers and small and medium-sized businesses to share their current account information securely with accredited third party providers. The NPA is intended to introduce new features to UK payments. These include, *inter alia*, faster payment cycles, new file formats for payment processing, and the introduction of a new accredited role for third party service providers into the payments landscape.

from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others.⁶

Approach in phase 1

19. In the Phase 1 Decision, the CMA considered the impact of the Merger in the following frames of reference:
 - a) the supply of payments software for Bacs submissions via Bacstel-IP in the UK; and
 - b) the supply of payments software for FPS DCA submissions via Secure-IP in the UK.

Bacs submissions via Bacstel-IP

20. During the Phase 1 inquiry, Bottomline submitted that a frame of reference incorporating only direct submission software is overly narrow, and that the relevant frame of reference should be expanded to include the competitive constraint from: (i) bureaux; (ii) online banking; and (iii) new competitors arising from regulatory changes to the payments landscape. In the Phase 1 Decision, the CMA considered whether the frame of reference should include each of these possible channels for submitting payments.
21. As regards bureaux, in the Phase 1 Decision the CMA defined a single frame of reference including the supply of software for Bacs submissions to both end-users and bureaux, as the available evidence indicated that both customer groups have broadly the same types of demand and had similar competitive options. The Phase 1 Decision also found that bureaux exercise only a limited constraint on direct submission software because bureaux ultimately are customers of software providers and offer end-customers different functionality to direct submission software.
22. In relation to 'white-label' software, in the Phase 1 Decision the CMA considered there to be no material differences between white-label software and direct submission software, and that white-label reflects another channel through which software providers are able to distribute their software to customers. The CMA therefore did not consider it appropriate to define a separate frame of reference for white-label software for the purposes of the Phase 1 Decision.

⁶ [Merger Assessment Guidelines](#) (CC2 (Revised)/OFT1254), September 2010, paragraph 5.2.2.

23. In respect of online banking platforms, the Phase 1 Decision notes that these provide a competitive option for smaller customers with less complex requirements. However, the differences in functionality between direct submission software and online banking platforms, as also noted by third-parties, resulted in the latter being excluded from the relevant frame of reference.
24. The Phase 1 Decision also considered that there was insufficient evidence to warrant expanding the relevant frame of reference to include new payment types and alternatives to direct debit/credit payments that may result from emerging industry and regulatory developments.

FPS submissions via Secure-IP

25. The Phase 1 Decision identified a distinct frame for reference for the supply of payments software for FPS submissions via Secure-IP. Bottomline disagreed with this approach, on the basis that: (i) online banking solutions are a significant competitive constraint on FPS DCA software, as reflected in the fact that FPS DCA submissions account only for 1% of submissions to FPS; (ii) in practice, only Barclays customers use FPS DCA; and (iii) the requirement to submit bulk FPS transactions using software is very niche and therefore users have migrated to other platforms.
26. The CMA did not receive compelling evidence indicating that software used for FPS DCA transactions submitted via Secure-IP and other forms of FPS transactions are economic substitutes such that the different transaction types merit being included in the same frame of reference. In addition, for the same reasons set out above in relation to Bacs software, the CMA in the Phase 1 Decision did not consider it appropriate to determine separate frames of reference for direct submission customers and bureaux with respect to FPS DCA.

Approach in Phase 2

27. Whilst we will use the frames of reference used in the Phase 1 Decision as a starting point for the Phase 2 investigation, we will investigate in more detail:
 - a) *The extent of demand-side substitutability between different types of payment solutions.* These include but are not limited to deployed, hosted, bureaux and online banking. In particular, we will consider the extent to which the Parties' customers either have switched, or would, in the future, switch to these other channels.

- b) *The extent of supply-side substitutability between different types of payment solutions.* These include but are not limited to deployed, hosted, bureaux and online banking.
- c) *The characteristics of demand and supply for Bacstel-IP software and FPS DCA software.* Based on this, we will determine whether they are in the same or different relevant markets.
- d) *Whether there are systematic differences in the requirements and/or preferences of different types of customers,* such that we should consider segmenting the relevant market by customer type. In particular, we will consider whether there should be any segmentation by customer size and/or industry.

Assessment of the competitive effects of the Merger

Counterfactual

- 28. The application of the SLC test involves a comparison of the prospects for competition with the Merger against the competitive situation without the Merger. The latter is called the ‘counterfactual’. We therefore will assess the possible effects of the Merger on competition compared with the competitive conditions in the counterfactual situation (that is, the competitive situation absent the Merger).⁷
- 29. At Phase 1, the CMA considered that there was a realistic prospect of a more competitive counterfactual than the pre-merger conditions of competition. In particular, the CMA received evidence that there was a realistic prospect that EPG would have been sold to an alternative purchaser who would have made the EPG business more competitive than under Experian’s previous ownership, and would result in a more competitive situation than the sale to Bottomline.
- 30. For the purposes of the Phase 2 inquiry, we will assess the merger against a counterfactual which, based on the facts available and reasonably foreseeable future developments, is determined to be the most likely scenario in the absence of the Merger.⁸

⁷ [Merger Assessment Guidelines](#) (CC2 (Revised)/OFT1254), September 2010, paragraph 4.3.1.

⁸ [Merger Assessment Guidelines](#) (CC2 (Revised)/OFT1254), September 2010, paragraphs 4.2.1 and 4.2.5.

31. In determining the most likely counterfactual against which to assess the effects of the Merger, we will consider:
 - a) *The ownership of EPG absent the Merger.* In particular, whether Experian would have retained ownership of EPG or would have sold EPG to an alternative purchaser.
 - b) *The competitive strategy of EPG absent the Merger.* In particular, whether EPG would have continued with its pre-Merger strategy, or would have pursued a more expansionary approach, or conversely contracted or ceased its operations.
32. Depending on our findings, this may result in a counterfactual that is equivalent in competitive strength to the pre-Merger conditions of competition, or an alternative scenario that is more, or less, competitive.⁹

Theories of harm

33. Theories of harm describe the possible ways in which an SLC could arise as a result of a merger and provide the framework for our analysis of the competitive effects of the merger.¹⁰
34. Set out below are the theories of harm which we intend to investigate in the Phase 2 inquiry. However, we may revise these theories of harm as our inquiry progresses. The identification of a theory of harm in this paper does not preclude an SLC being identified on another basis, following further work in the course of this inquiry, or the receipt of additional evidence. We welcome views on the theories of harm set out below.
35. At this stage, we are assessing two horizontal unilateral effects theories of harm relating respectively to the effect of the Merger on actual and potential competition in the UK. The concern under a horizontal unilateral effects theory of harm is that the removal of one business as a competitor could allow the remaining suppliers, including the Merged Entity, to increase prices, lower quality, reduce the volume or range of their services and/or reduce innovation, all relative to the counterfactual.
36. Our evaluation of these two theories of harm will take into account our own assessment of the counterfactual.

⁹ [Merger Assessment Guidelines](#) (CC2 (Revised)/OFT1254), September 2010, paragraph 4.3.4.

¹⁰ [Merger Assessment Guidelines](#) (CC2 (Revised)/OFT1254), September 2010, paragraph 4.2.1 and 4.2.6

Theory of harm 1: horizontal unilateral effects in the supply of Bacstel-IP software and/or FPS DCA software

37. Under this theory of harm, we will explore whether the effect of the Merger is to reduce the competitive constraints on Bottomline post-Merger in the supply of Bacstel-IP software and/or FPS DCA software.
38. In investigating this theory of harm, we will consider (among other matters):
 - a) The current nature of competition in the market. This will include investigating how firms contract with each other and how they go about setting and negotiating prices. We will also seek to ascertain what factors are important to customers when choosing between suppliers, how often customers shop around and switch providers, and whether new customers are entering the market.
 - b) The closeness of competition between Bottomline and EPG. In instances where customers view two firms as good alternatives to one another, they can exert an important competitive constraint on each other even if there are other players in the market. We will seek to use data on episodes of past switching, as well as other sources of evidence such as internal documents and information from third parties to determine how closely the Parties compete.
 - c) The competitive constraint imposed on the Parties by alternative suppliers of Bacstel-IP and/or FPS DCA software, *as well as from other sources*. Where there is evidence that customers view other providers of the same, or of different, payment solutions as close alternatives to the Parties, the Parties are likely to be constrained by these alternatives. We will seek to determine the extent to which any such alternatives exist and provide a competitive constraint on the Parties.
 - d) The strength of EPG under any alternative purchaser. In the event that we find that EPG would in the counterfactual be purchased by an alternative firm, we will seek to determine whether and if so how strong a competitor this would have made EPG's Bacstel-IP software and/or FPS DCA software.
 - e) The impact of future regulatory developments on this sector.

Theory of harm 2: loss of potential competition in the provision of a wider range of payment software and solutions

39. As explained in the Merger Assessment Guidelines, unilateral effects may arise from the elimination of potential competition where a potential entrant

could have increased competition. In assessing whether a merger leads to unilateral effects from a loss of potential competition, we will consider whether:

- a) the potential entrant would be likely to enter in the absence of the merger; and
 - b) such entry would lead to greater competition.¹¹
40. This theory of harm is based on the possibility that EPG, under the ownership of an alternative purchaser, would become a more significant competitor to Bottomline in the provision of a wider range of payment software and solutions, offering wider functionality beyond the ability to make Bacs and FPS DCA payment submissions.
41. We envisage that this could happen if the alternative purchaser of EPG either already owns, or develops, a wider range of payment software and solutions, in circumstances where EPG would not have developed such products as a standalone business (that is, absent any acquisition of EPG). The key differentiating factor between the two theories of harm is that, under theory of harm 2, the EPG business is developed in a way that goes beyond an organic development of EPG's product offer (such as an organic shift to offering EPG's current software functionality but on a hosted platform).
42. Under this theory of harm we will therefore explore whether the effect of the Merger might be the loss of potential future competition between the Parties for the supply of a wider suite of payment software.
43. In order to investigate this theory of harm, we will consider (among other matters):
- a) The nature of current payments software and solutions offered by Bottomline. Linked to this, we will seek to determine whether there is a wider market for the supply of a wider range of payment software and solutions and, if so, its scope.
 - b) Who are the main competitors in any market identified in (a), and how the Parties fit into that landscape.
 - c) Whether the addition of EPG's existing customer base (which is predominantly of large customers and bureaux) may enable the purchaser

¹¹ [Merger Assessment Guidelines](#), see paragraph 5.4.13 – 5.4.15.

of EPG to develop a better product offering than would have otherwise been the case, which may have resulted in EPG becoming a more significant competitor to Bottomline in the future.

- d) The likely competitive strength of EPG in the hands of an alternative purchaser. In particular, we will explore whether reputation and/or any economies of scale gained from integrating the EPG business and customer base with that of the alternative purchaser are important factors.
- e) The impact of future regulatory developments on this sector.

Countervailing factors

44. We will consider whether there are countervailing factors which are likely to prevent or mitigate any SLC that we may find. In particular, we intend to consider whether entry and/or expansion by alternative suppliers might act as an effective competitive constraint on the Merged Entity. We are currently not aware of any other possible countervailing factors.

Entry and expansion

- 45. In order to offset any SLC, entry and/or expansion would need to be timely, likely and sufficient.¹²
- 46. To investigate this issue, we intend to look at (among other matters):
 - a) the history of entry, expansion and exit;
 - b) the impact of technological changes in the payments sector to entry, expansion and exit;
 - c) the extent of the potential constraint from entry/expansion for each theory of harm and for different categories of customer;
 - d) the incentives that apply to different types of potential entrants;
 - e) potential barriers to entry and expansion including:
 - i. developing technology;
 - ii. meeting any regulatory requirements;

¹² [Merger Assessment Guidelines](#) (CC2 (Revised)/OFT1254), September 2010, paragraphs 5.8.1 to 5.8.15.

- iii. challenges in marketing and attracting customers and whether an absence of a base of existing customers to whom to cross-sell is a barrier;
- iv. whether a barrier arises because of network effects or reputational effects from not being an early supplier to establish a significant presence; and
- v. economies of scale or scope.

Efficiencies

47. We will examine any submissions that may be made in relation to efficiencies arising from the Merger. In particular, we will examine whether any potential efficiencies are rivalry-enhancing. In order to form a view, we will consider whether (a) the efficiencies are timely, likely and sufficient to prevent an SLC from arising (having regard to the effect on rivalry that would otherwise result from the Merger) and (b) the efficiencies are merger-specific (that is, a direct consequence of the Merger, judged relative to what would happen without it).¹³

Possible remedies and relevant customer benefits

48. Should we decide that the Merger has resulted, or may be expected to result, in an SLC in any market(s), we will consider whether, and if so what, remedies might be appropriate, and will issue a further statement.
49. In any consideration of possible remedies, we may have regard to their effect on any relevant customer benefits in relation to the Merger and, if so, what these benefits are likely to be, and which customers would benefit.¹⁴

¹³ [Merger Assessment Guidelines](#), paragraph 5.7.4.

¹⁴ See sections 30 and 35(5) of the Act and [Merger Assessment Guidelines](#), paragraphs 5.7.3 and 6.3.5.

Responses to the issues statement

50. Any party wishing to respond to this issues statement should do so in writing, by no later than **5pm on 29 November 2019**. Please email joseph.cruden@cma.gov.uk or write to:

Joseph Cruden
Project Manager
Bottomline/EPG merger inquiry
Competition and Markets Authority
The Cabot
25 Cabot Square
LONDON
E14 4QZ