

ME/6830/19

**COMPLETED ACQUISITION BY
BOTTOMLINE TECHNOLOGIES LIMITED
OF CERTAIN ASSETS OF EXPERIAN LIMITED**

RESPONSE TO CMA'S DECISION

11 NOVEMBER 2019

NON-CONFIDENTIAL VERSION

Introduction and Executive Summary

1. On 6 March 2019, Bottomline Technologies Limited acquired certain assets¹ ("EPG") from Experian Limited (the "Transaction"). Bottomline Technologies Limited is a wholly owned subsidiary of Bottomline Technologies (de), Inc, a NASDAQ listed corporation registered in Delaware, USA.
2. In its decision dated 7 October 2019, the CMA stated that: (a) it believes that it is or may be the case that a relevant merger situation has been created; and (b) the merger gives rise to a realistic prospect of a substantial lessening of competition ("SLC") as a result of horizontal unilateral effects in: (i) the supply of payments software for Bacs submissions via Bacstel-IP in the UK; and (ii) the supply of payments software for FPS DCA submissions via Secure-IP in the UK (the "Decision").²
3. In the Phase 2 Opening Letter received from the CMA Panel Chair, Bottomline was invited to provide a written response to the Decision addressing the issues identified by the CMA's initial Phase 1 investigation. In taking up this invitation to respond, Bottomline has carefully considered the Decision.
4. Bottomline is disappointed by the lack of engagement by the CMA during a Phase 1 process which lasted nearly 5 months (including the period prior to the formal opening of the Phase 1 investigation). At various points, the Decision remarks on the CMA not having "*received sufficient evidence*"; or not having "*found any evidence*"; or that "*the CMA has not received any evidence in the current inquiry to indicate...*", etc.³ However, it is clear that, based on a proper assessment of the evidence available during the Phase 1 investigation – both that reported in the Decision and highly relevant evidence that was overlooked or mis-interpreted by the CMA – there can be no reasonable basis on which there could be said to be a realistic prospect that the Transaction has resulted, or may be expected to result, in a SLC, thereby meeting the Phase 1 threshold (even understanding that "*the realistic prospect threshold is intentionally a lower and more cautious threshold for an SLC finding than that applied by the [CMA] after more extensive investigation*").⁴

¹ These assets include the source code to the Experian Payments Gateway (EPG) payments software, a freehold property in Rugby, a customer list and the TUPE transfer of eight employees. [X].

² Decision, §§2 and 7.

³ See, for example, Decision, §§3, 6, 100, 106, 110, 188, 191, 194, 211, 221, 226.

⁴ CMA's *Merger Assessment Guidelines* (OFT1254/CC2), September 2010, §2.7.

5. On that basis, self-evidently the Transaction would not meet the higher standard of proof applicable in Phase 2 which requires the CMA to take "*a different approach since it has to make an overall judgement on whether or not an SLC has occurred or is likely to occur*".⁵ In doing so, the CMA applies a "balance of probabilities" threshold to its analysis at Phase 2. According to its guidance, the CMA "*addresses the question: is it more likely than not that an SLC will result? It must therefore form an expectation which has a higher level of probability than that required of the [CMA in Phase 1] calling for a more extensive investigation than that carried out at Phase 1*".⁶
6. Going forward, Bottomline would anticipate that the resources afforded to the CMA in the extended and in-depth Phase 2 investigation process would permit the CMA not only to seek sufficient evidence but to assess it properly. In that event, Bottomline is confident that the Inquiry Group will be able to conclude that the Transaction has neither resulted, nor may be expected to result, in a SLC.
7. It is important to view the Transaction in its proper context. It has been estimated by Bacs itself that approximately 100,000 businesses in the UK make payments through the Bacs and/or FPS networks. Between them they make approximately 6.5 billion Bacs transactions and 2.5 billion FPS transactions, per year, worth £5 trillion and £2 trillion respectively. They are able to do this using a variety of channels, most notably including by using software that enables them directly to submit the transaction files into the networks (Bacstel-IP and a tiny fractional amount of Faster Payments via Secure-IP software respectively), by using the services of a third party that submits the transaction files on their behalf (a Bacs approved bureau and/or a FM DD provider in the case of direct debit transactions – 60% of businesses choose this indirect route) or by using an e-banking solution or other bank channels. Prior to the Transaction there were 18 providers of Bacstel-IP software, 6 providers of Secure-IP software, approximately 600 Bacs approved bureaux and 50 FM DD providers and all major banks offer their business customers e-banking and channel solutions with Bacs and/or FPS payments functionality.
8. The Decision fails to recognise that, while there is no single alternative that would suit all customers, it is the case that all customers could switch to an alternative that is suitable for them. For example, smaller customers making mainly payments can easily switch to e-banking, customers who focus on direct debits can easily switch to FM DD providers or bureaux, and large customers with complex needs can switch to channel banking solutions such as SWIFT or Host-2-Host ("H2H"), in addition to other software providers.
9. This Transaction relates to the acquisition of a single software product that is used by a very small number of customers (approximately [X] customers). The annual revenue associated with the software is approximately £[0-5] million. [X].
10. During the Phase 1 process, the CMA failed to appreciate this context. Moreover, it failed to appreciate that the supply of payments software for Bacs submissions via Bacstel-IP and FPS DCA submissions via Secure-IP is highly competitive, characterised by strong competition from a wide array of players including numerous software providers, Bacs approved bureaux, FM DD providers and banks.

⁵ CMA's *Merger Assessment Guidelines*, §4.3.6.

⁶ CMA's *Merger Assessment Guidelines*, §2.12.

11. As explained further below, there are a number of themes that are pervasive throughout the Decision which can be drawn out as meriting close scrutiny in the Phase 2 investigation. These are:
- (a) The conclusions reached by the CMA in the Decision are unsustainable based on a proper assessment of the evidence available during the Phase 1 investigation;
 - (b) The reasoning in the Decision is internally inconsistent – for example, on the one hand the Decision is premised on an assertion that an alternate purchaser of the EPG assets would have been able to compete for new business and develop the EPG product yet, on the other hand, it concludes that barriers to entry and expansion are high and ignores that other software suppliers, such as AccessPay and CORVID, have been recently taken over and/or benefit from significant external investment;
 - (c) The Decision is premised on a fundamental misunderstanding of the market and competitive landscape – for example, the Decision either ignores or significantly understates the competitive constraints posed by other software providers, bureaux, FM DD providers and e-banking solutions; and
 - (d) The Decision is premised on a wholly unrealistic counterfactual leading to unrealistic (and non-evidenced) theories of harm.
12. Given the request for a relatively brief response, Bottomline will not address in detail in this document all the reasons why Bottomline considers that the Decision contains significant errors, mis-appreciations of fact and evidence and flawed reasoning. It will instead give a summary of some of its key areas of concern but refers the Inquiry Group to its prior responses and submissions (including the information and data previously provided) in the Phase 1 process. The issues which Bottomline respectfully asks the Inquiry Group to address include the following:
- (a) the counterfactual adopted in the Decision, which drives many of the incorrect conclusions reached, is not realistic nor is it the most likely alternative scenario to the Transaction;
 - (b) the competitive constraints posed by other providers of software including AccessPay, CORVID and Finastra, which are manifestly understated in the Decision;
 - (c) the erroneous exclusion of online banking and bureaux from the frames of reference, and the failure to assess the competitive constraint posed by FM DD providers who have grown very significantly in the last 5 years, by considering them solely as part of bureaux. And in any event the manifest understatement of the competitive constraints posed by these alternative channels;
 - (d) the limiting of the FPS submission market to FPS DCA alone thus excluding the vast majority of FPS transactions;
 - (e) the persistent failure of the CMA in the Phase 1 process to take account of the cancellations data (first shared with the CMA in June 2019) which shows:
 - (i) [✂] switching from Bottomline to other software providers and alternative channels; and
 - (ii) limited switching between Bottomline and EPG;

- (f) the lack of closeness of competition between Bottomline and EPG;
- (g) the lack of any substantiated theory of harm;
- (h) the inappropriate dismissal of the impact already seen in the market in anticipation of the changes within the payments landscape – all of which are intended to facilitate competition in payment services including by modernising payment platforms – and, in particular, the Payments Strategy Forum's plans to replace the existing payments infrastructure with the New Payments Architecture within the next 2 or more years; and
- (i) the mistaken conclusion that the reference was made within the statutory deadline and was therefore lawful.

(A) Counterfactual

The CMA must adopt the "most likely" alternative scenario as the counterfactual

- 13. The CMA generally adopts the pre-merger conditions of competition as the preferred default counterfactual for the reason that it does not need to speculate about what might have happened in the absence of the merger in question.
- 14. In contrast to this approach, the counterfactual adopted in the Decision assumes the occurrence of not one, but a number of highly speculative events. The CMA states in its Decision: "*The evidence available to the CMA during the course of its investigation indicates that there is a realistic prospect that, in the counterfactual situation, EPG would have been sold to an alternate purchaser that is not already active in Bacs or FPS software and that this purchaser would have invested in developing the EPG software and competed for new business.*"⁷
- 15. During Phase 1, the CMA has a duty to assess whether a merger creates a "realistic prospect" of a SLC. In order to make this assessment, the CMA will compare the merger to "*the most competitive counterfactual*" (emphasis added), provided that such counterfactual is realistic.⁸ For the reasons set out below, Bottomline considers that in the Decision the CMA adopted an unrealistic counterfactual.
- 16. By contrast, in the in-depth Phase 2 investigation, whilst the CMA may consider various possible counterfactuals, it must ultimately select (on the balance of probabilities⁹) "*only the most likely scenario*" (emphasis added).¹⁰ As a result, a different counterfactual may be adopted in Phase 2 than in Phase 1.¹¹
- 17. Even if the counterfactual adopted at Phase 1 were realistic – which Bottomline submits manifestly is not the case – it is certainly not the most likely alternative scenario to the Transaction and the CMA must therefore discard it.

⁷ Decision, §48.

⁸ *Merger Assessment Guidelines*, §4.3.5.

⁹ *Merger Assessment Guidelines*, §2.2

¹⁰ *Merger Assessment Guidelines*, §4.3.5.

¹¹ For example, see *Linery Limited and Ulster Farm By-Products Limited*, A report on the completed acquisition by Linery Limited of Ulster Farm By-Products Limited, 6 January 2016; and *Optimax Clinics Limited and Ultralase Limited*, A report on the completed acquisition by Optimax Clinics Limited of Ultralase limited, 20 November 2013.

The Phase 1 counterfactual is not realistic, let alone the most likely alternative scenario

18. In the Decision, the CMA stated that it considers that the most relevant counterfactual (at Phase 1) was *"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"*.¹² This position is repeated throughout the Decision.¹³ The CMA also states that the alternate purchaser is not already active in Bacs or FPS software. Moreover, the CMA even states that it has evidence indicating that *"under the ownership of an alternate purchaser, there is a realistic prospect that investment would have been undertaken to upgrade EPG's product suite to include hosted technology"*.¹⁴
19. The keystone of this counterfactual appears to be information the CMA states it received from a company that *"participated"* in Experian's sales process and that, according to the Decision, *"told the CMA that it does not have activities that overlap with EPG in relation to Bacs via Bacstel-IP or FPS via DCA submissions"*.¹⁵ According to the Decision this information indicates that (a) there would be an alternate purchaser who would not give rise to competition concerns and (b) that alternate purchaser would seek to compete for new customers and develop the EPG product going forward.¹⁶
20. In relation to this counterfactual:
 - (a) The sale of EPG to a purchaser with limited or no Bacs and/or FPS DCA software experience – such as the alternate purchaser relied upon in the Decision – is unrealistic as a result both of the characteristics of the EPG assets that Experian was selling and Experian's aims in carrying out the sales process. In particular:
 - (i) Experian's desire to protect its continuing customer relationships: Experian has a wider relationship with a number of EPG users who also use other Experian solutions. Therefore, Experian wanted to ensure that any sale of EPG would not negatively affect its relationship with these customers. Indeed, in the Decision, the CMA states that one of the reasons for Experian's selection of Bottomline was *"the fact that Bottomline employees had previous experience of working at EPG"* and that this gave it *"the knowledge and skills to offer a seamless service"*.¹⁷

¹² Decision, §60.

¹³ Decision, §5, §48, §56, §58, §59 at footnote 54, §129, §155, §214 and §230.

¹⁴ Decision, §134. Bottomline notes that, in the Issues Paper, the CMA identified the relevant counterfactual as *"the sale of EPG to an alternative purchaser that is not already active in Bacs or FPS software and that would have competed for new business"* (Issues Paper, §27). The CMA made similar statements about the relevant counterfactual throughout the Issues Paper (Issues Paper, §26, §59(d), §63 and §71(c)). None of these statements mentioned any evidence that such an alternate purchaser would have invested in EPG's product going forward. If the CMA had this evidence from a realistic alternative purchaser, it is surprising that it was not mentioned in the Issues Paper or at the Issues Meeting or at any time prior to the Decision. It goes without saying that this assertion would need to be supported by a full and detailed set of contemporaneous evidence from the time of the sale process that this was the position of the most likely alternate purchaser to have been selected by Experian. Belatedly, the version of the Decision published on the CMA's website on 8 November 2019 has disclosed previously redacted paragraphs giving further detail of the plans of a company said to have *"participated"* in Experian's sales process including an internal document which that company apparently provided to the CMA (although the Decision does not state when this evidence came to light) which is stated to have been prepared contemporaneously to the sales process confirming the company's plans to develop the EPG assets (Decision, §§57 and 58). Bottomline would strongly encourage the CMA to test this evidence. Otherwise it would risk accepting *post hoc* rationalisation which cannot support a requirement that the chosen counterfactual must be the "most likely" one in the eyes of Experian.

¹⁵ Decision, §57. This evidence post-dated the Issues Paper.

¹⁶ Decision, §56.

¹⁷ Decision, §54. Bottomline notes that the Decision also states that *"Experian subsequently submitted to the CMA that existing payments capability, such as Bacs and/or FPS, was a consideration when selecting bidders but was not a determining factor"* (Decision, §53). In relation to this: first, if Experian took the time to divide potential bidders into two groups, one for those with software equivalent to EPG and the other for those without software equivalent to EPG, as stated in the Decision, this suggests that even if not determinative it was an important factor; secondly, the

A non-Bacs/FPS DCA software provider would not have been able to provide a seamless service and Experian would have recognised this.

- (ii) The nature of the EPG assets and the lack of sufficient support under a transitional agreement: even if Experian would have been willing to sell EPG to a non-Bacs/FPS DCA software provider, it is unrealistic to expect that a non-Bacs/FPS DCA software provider would have been able successfully to take over EPG. The EPG assets do not comprise a standalone business. They included only six operational staff, of whom only one was a development engineer.¹⁸ In addition, the amount of support that Experian was willing to provide under any Transitional Service Agreement ("TSA") was very limited (both in terms of duration and scope).¹⁹ Therefore, a non-Bacs/FPS DCA software provider would not have had the necessary expertise or staff, nor the necessary support, to service successfully EPG's existing customer base (let alone win over new customers).
 - (iii) The requirements of existing EPG customers: it is unrealistic to suggest that a non-Bacs/FPS DCA software provider would have been acceptable to Experian's existing customers (even if it was acceptable to Experian), because such a purchaser would not have the necessary expertise, staff and resources to service these customers' contracts immediately following the close of the transaction particularly given the short duration of the TSA Experian was prepared to agree.²⁰
- (b) It is not realistic to conclude that a purchaser with limited or no Bacs and/or FPS DCA software experience would have had the ability [redacted] simultaneously servicing the existing EPG customer base, transferring the contracts from Experian, developing a hosted solution [redacted] and competing for new business from day one [redacted].²¹ In particular:
- (i) The EPG assets included [redacted]. The Decision does not provide any evidence that the alternate purchaser would have injected the necessary resources to simultaneously win additional market share and develop a hosted solution. It also has not provided any evidence of the likely timescales for either of these developments, or whether they are interrelated; i.e. whether the CMA had the evidence to conclude that the alternate purchaser could already win significant business using the deployed EPG software, or whether it would have had to wait until a hosted solution was ready.
 - (ii) Unlike a number of competing software vendors, Experian had not made the necessary investments to upgrade EPG's legacy product, including to create a cloud-based solution.

sentence relates to Experian's considerations when selecting *potential bidders* and not the winning bidder, and does not therefore support a hypothesis that Experian would have sold EPG to a non-Bacs/FPS DCA software provider if it had not sold EPG to Bottomline: the Decision's logic on this point is tenuous at best.

¹⁸

[redacted].

¹⁹

See Bottomline's Response to the Issues Paper, 16 September 2019, §25.

²⁰

[redacted] (see Bottomline's Response to the Issues Paper, 16 September 2019, §25).

²¹

In this regard, a purchaser of the EPG assets, especially a larger, more institutionally complex, software provider, with established processes and protocols, is in a 'worse' position than a *de novo* entrant with a greenfield proposal since the former would have to work within the confines of the acquired EPG assets including the legacy customer base and their individual demands.

- (iii) Experian had twice investigated developing a hosted "version" of EPG and twice abandoned those plans. The idea that another software provider, especially an inexperienced yet large and institutionally complex software provider with established processes and protocols, would succeed where as experienced a player as Experian had failed is fanciful.
 - (iv) Although the CMA argues that while it "*acknowledges that customers may be reluctant to switch to less-established providers [...] given an alternative purchaser would be acquiring a well-established provider of Bacs and FPS and given the evidence the CMA has reviewed regarding the alternate purchaser's plans to compete for new business and develop the EPG product going forward, the CMA considers that an alternate purchaser would not be in the same position as a de novo new entrant*"²², the CMA does not adequately explain why it believes that an alternate purchaser with no experience in the Bacs/FPS DCA software market would be in a stronger position than a *de novo* entrant.²³
 - (v) Moreover, this counterfactual is premised on an assumption that prospective customers would recognise the acquired EPG assets – which would have had to change name as Experian would not allow its trade names and marks to be used – as a "well-established" provider in circumstances where the CMA's Phase 1 market investigation had, apparently, suggested low levels of customer recognition of Bacs and FPS DCA software providers. In any event, if the alternate purchaser itself does not have a "*proven track record and associated reputation*", it seems unlikely that it would be able successfully to attract new customers merely by virtue of purchasing EPG, especially considering the sustained lack of active marketing by Experian²⁴ (which is reflected in third party views that EPG is not a strong competitor²⁵).
 - (vi) There can be no general assumption that any acquisition would result in the acquired set of assets becoming more competitive. For example, a purchaser's plans for the acquired assets could fail (which may result in the business becoming less rather than more competitive) or a purchaser may merely be interested in having a "*cash cow*".²⁶
- (c) Even if the alternate purchaser identified in the Decision would have sought to compete for new customers and develop the EPG product, the CMA must show that Experian would have sold EPG to *that* alternate purchaser if Experian had not sold it to Bottomline. If it is in fact more likely that EPG would have been sold to a different alternative purchaser, then any evidence provided by the alternate purchaser relied upon by the CMA in the Decision is irrelevant. The choice of purchaser resided with Experian at the time of sale and not, *post hoc*, with the CMA.

²² Decision, footnote 54.

²³ The CMA itself states in the Decision that entry and expansion "*may be inhibited by limited opportunities for less established rivals to contest new business and further, larger customers may be reluctant to switch to providers without a proven track record and associated reputation*" (Decision, §220). The CMA cannot have it both ways.

²⁴ Decision, §155; Bottomline's Response to the Issues Paper, 16 September 2019, §26.

²⁵ For example, see Decision, §140.

²⁶ Bottomline's Response to the Issues Paper, 16 September 2019, §26.

- (d) Even if it can be proven that Experian would have sold EPG to the alternate purchaser relied upon in the Decision, it would not be enough if the most likely alternative scenario is a sale to a purchaser with some hypothetical plans to invest in developing the EPG product; instead it would have to be shown that the most likely outcome would have been that the alternate purchaser would actually have invested and succeeded in competing in the market as a result.

The correct counterfactual

- 21. As explained in its submissions during Phase 1, Bottomline considered that, absent the Transaction, the most likely scenario was that Experian would have either:
 - (a) maintained EPG as a declining set of assets with a small number of staff and without investing in it further; or
 - (b) sold EPG to an alternative purchaser with existing Bacs and/or FPS DCA software expertise who, like Bottomline, would have sought to upsell to and service the EPG customer base.
- 22. However, the CMA stated in the Issues Paper that none of the alternative purchasers that made "serious" bids for EPG is currently active in the supply of Bacs or FPS DCA payments software.²⁷
- 23. As explained above, Bottomline considers it unrealistic that Experian would have sold EPG to a purchaser with no experience in Bacs and/or FPS DCA software. However, even if Experian would have been willing to sell EPG to a purchaser with limited or no experience in Bacs and/or FPS DCA software, the CMA would have to show that *that* purchaser would have been willing and able successfully to develop the EPG product going forward in order to have a future-proofed proposition to sell to customers. The CMA has not provided any evidence indicating that this would be the most likely scenario absent the Transaction, let alone compelling evidence. For the reasons set out above, Bottomline considers this scenario entirely unrealistic.
- 24. Bottomline submits that the most likely scenario is that EPG would have been a diminished competitor, regardless of whether it would have been retained by Experian or sold to an alternate purchaser. As such, the counterfactual against which the competitive effects of the Transaction must be assessed is the *status quo ante*, i.e. EPG operating as a declining set of assets with a small number of staff. This is the counterfactual that the CMA should adopt in Phase 2.

(B) The competitive constraints imposed by other software providers

- 25. Bottomline and EPG face, and will continue to face, strong competitive constraints from a range of competitors, including other software providers, Bacs approved bureaux, FM DD providers and e-banking solutions. During the Phase 1 process, the CMA consistently ignored or downplayed these constraints. The CMA appears to place more weight on shares of supply notwithstanding its acknowledgement that shares of supply for differentiated products are less meaningful.
- 26. There is ample evidence that other software providers pose significant competitive constraints. For example:
 - (a) Bottomline's cancellations data. The cancellations data, [redacted]²⁸ [redacted].

²⁷ Issues Paper, §25.

- (b) Internal documents. [redacted].²⁹ [redacted].³⁰ [redacted].
- (c) The survey of EPG customers commissioned by Bottomline as part of the due diligence process. [redacted].³¹ [redacted].
- (d) The competitive actions of the other software providers on the market. For example, [redacted].³² In addition, an advert for AccessPay appears at the top of the first page of results from a Google search for the term "*Bacs approved software*" or "*Bacs direct submission software*".³³
- (e) External recognition for the other software suppliers. For example, Deloitte named AccessPay as the fastest growing fintech company outside of London in 2017.³⁴
- (f) Recent investments in and by the other software providers. For example, CORVID was recently acquired by Jonas Software, who also own Constellation Payments and London & Zurich (a well-known FM DD provider). Jonas Software describe CORVID as "*a premium payment processing software provider*". The announcement of the acquisition refers to CORVID as having "*excellent technology ... [and] better growth prospects with an owner who has specific interests and capability in developing payments processing and software*". Similarly, AccessPay has recently raised £9 million from private equity investors – the press release announcing the investment stated that AccessPay would "*use this investment to expand its sales, marketing and engineering teams and further develop its software platform*".³⁵ In addition, AccessPay invested £1.4 million in research and development in 2018 having identified it as "*a priority*".³⁶
- (g) Other software providers' demonstrable ability to attract and service customers of all sizes and complexity of needs. For example, AccessPay has grown since its launch in 2012 to now have more than 500 customers – these include the AA [redacted], Argyll and Bute, Carl Zeiss, Clifford Thames, IATA, Helping, ITV, Primark, Stena Line, Sterling 2000 [redacted], Saga Healthcare [redacted], Wildfowl and Wetlands Trust, and Young Women's Trust.³⁷ CORVID's customers include Arts Council of Wales, Hinckley & Rugby Building Society, Johnston Carmichael (a bureau) and Veolia Energy. Finastra's customers include Fairpoint Group, London & South Eastern Railway and Maersk. Grange's customers include Arcadia Group and Rimmel International Ltd.

27. Despite this evidence, in the Decision the CMA wrongly concludes that alternative providers will provide only a limited competitive constraint.

(C) The competitive constraints imposed by other channels

28. Bottomline and EPG face, and will continue to face, strong competitive constraints from alternative channels, including Bacs approved bureaux, FM DD providers, e-banking solutions and other bank channels.

²⁸ Bottomline's Response to the Issues Paper, 16 September 2019, §10.

²⁹ Annex A.1.3 to Bottomline's response to the second s.109 notice.

³⁰ Annex 24.03 to Bottomline's response to the first s.109 notice.

³¹ Decision, §172.

³² Bottomline's presentation to the CMA at the Issues Meeting, slides 40-42.

³³ See Annex 3 to the Bottomline's Response to the Issues Paper for screenshots.

³⁴ <https://www.deloitte.co.uk/fast50/winners/previous-winners/index.html>.

³⁵ <https://www.beringea.com/beringea-announces-northern-expansion-with-landmark-investment-into-accesspay/>.

³⁶ Access Systems (UK) Limited, Annual report and financial statements, 30 April 2018.

³⁷ <https://www.accesspay.com/v4/>.

e-banking solutions

29. In the Decision, the CMA states that there are a number of factors that convinced it not to widen the relevant product frame of reference to include online banking. Of these, the main factor appears to be a misconceived belief as to a difference in functionality between e-banking solutions and direct submission software.³⁸
30. The CMA is wrong to exclude online banking from the relevant frame of reference. In fact, Bottomline has [X].³⁹ Bottomline estimates that, over the period 2014–2018, [X] of Bottomline customer losses where the competitor is known switched to an Internet banking solution, accounting for [X] of all of Bottomline's revenue lost in that time to known competitors.⁴⁰ [X].
31. As [X] of Bottomline and EPG's customer bases make fewer than 12,000 payments per year, their needs could very easily be met using e-banking solutions, which generally allow a maximum number of payments between 1,000-10,000 per file upload with no limit on the number of file uploads.⁴¹
32. In relation to the CMA's statement that online banking is only an option for smaller customers, Bottomline notes that [X].⁴² [X].⁴³
33. Finally, in relation to the CMA's comment that it has not received evidence that online banking replicates the functionality of direct submission software⁴⁴; this is surprising given that Bottomline provided evidence of this at the Issues Meeting.

Bureaux

34. The Decision states that that the CMA did not widen the relevant frame of reference to include bureaux because it considered that bureaux only provide a limited constraint on direct submission software. The Decision gives two reasons for this conclusion:
 - (a) bureaux are customers of direct submission software providers, making them an alternative route to market for software suppliers; and
 - (b) there are certain differences between the functionality of bureaux and direct submission software.⁴⁵
35. In addition, the Decision describes the level of switching from Bottomline's submission software to bureaux as low [X].⁴⁶
36. The CMA is wrong to exclude bureaux. Bureaux are important players in the market, as is clear from the evidence:
 - (a) Commercial bureaux submissions account for more than a quarter of total Bacs submissions; in terms of SUNs, approximately 60,000 SUNs (60%) submit their payments indirectly via a bureau.⁴⁷

³⁸ Decision, §100.

³⁹ See Bottomline's presentation to the CMA at the Issues Meeting, slide 30.

⁴⁰ See Bottomline's presentation to the CMA at the Issues Meeting, slide 48.

⁴¹ See Bottomline's presentation to the CMA at the Issues Meeting, slide 48.

⁴² See Bottomline's response to the first s.109 notice, §141.

⁴³ See Bottomline's response to the first s.109 notice, §142.

⁴⁴ Decision, §100.

⁴⁵ Decision, §91.

⁴⁶ Decision, §91-92.

⁴⁷ See Bottomline's presentation to the CMA at the Issues Meeting, slide 25.

- (b) [REDACTED].⁴⁸
- (c) [REDACTED].⁴⁹
37. With regard to the CMA's comment that bureaux are only an alternative route to market for software suppliers, Bottomline notes that the fact that one company supplies an input to a second company does not mean that the two companies do not compete downstream. In addition, Bottomline and EPG supply software to only [REDACTED] of the 605 Bacs approved bureaux (and only [REDACTED] of those are supplied by EPG); this means that [REDACTED] Bacs approved bureaux ([REDACTED]) must be supplied with software by other suppliers or use another channel.⁵⁰
38. The Decision also fails to understand properly the importance of FM DD providers. Unlike traditional bureaux, which simply submit Bacs credit and debits on behalf of their clients, FM DD providers manage the whole direct debit process for clients, reducing their administration costs. The introduction and growth of FM DD providers has been a relatively recent innovation in the payments market. Bottomline has lost [REDACTED] to FM DD providers in recent years.
39. Specifically in relation to one FM DD provider, GoCardless, Bottomline notes:
- (a) GoCardless recently secured a \$75 million investment from Google and Salesforce;
- (b) [REDACTED];
- (c) [REDACTED];⁵¹
- (d) an advert for GoCardless appears at the top of the first page of results from a Google search for "*alternatives to Experian payments gateway*";⁵²
- (e) its customers include Box, Docusign, Hive, The Financial Times, Mindbody, Nutmeg, Sage, The Guardian and Tripadvisor. These are national and multinational highly respected organisations likely submitting large volumes of transactions, clearly showing that the statement in the Decision that "*Such end-customers typically are smaller in size and accordingly submit lower volumes of transactions to Bacs*" is incorrect.⁵³
40. The Decision fails to recognise that, while there is no single alternative that would suit all customers, it is the case that all customers could switch to an alternative that is suitable for them. For example, smaller customers making mainly payments can easily switch to e-banking, customers who focus on direct debits can easily switch to FM DD providers or bureaux, and large customers with complex needs can switch to advanced banking solutions such as H2H, in addition to other software providers.

⁴⁸ See Bottomline's presentation to the CMA at the Issues Meeting, slides 33 and 46; and Bottomline's Response to the Issues Paper, 16 September 2019, §8-9.

⁴⁹ See Bottomline's presentation to the CMA at the Issues Meeting, slide 33. [REDACTED] (see Bottomline's presentation to the CMA at the Issues Meeting, slide 47).

⁵⁰ See Bottomline's presentation to the CMA at the Issues Meeting, slide 46.

⁵¹ See e.g. Annex 24.03 to Bottomline's response to the first s.109 notice.

⁵² See Annex 5 to the Bottomline's Response to the Issues Paper for screenshots.

⁵³ Decision, §71.

(D) By limiting the FPS submission market to FPS DCA alone the CMA excludes the vast majority of FPS transactions

41. The Decision states that the CMA "*has not received any 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*" and that the CMA "*therefore considers a single frame of reference for the supply of payments software for FPS DCA submissions via Secure-IP (analogous to that for Bacs)*".⁵⁴
42. This does not address why it would be correct to limit the frame of reference only to transactions using FPS DCA thus excluding the vast majority of FPS transactions, particularly in the light of the submissions made by Bottomline that point to the incorrectness of a single frame of reference for FPS DCA transactions excluding other FPS transactions.⁵⁵
43. As submitted by Bottomline during the Phase 1 process:
- (a) it is only customers of Barclays and, to a lesser extent, HSBC⁵⁶ who can use FPS DCA to send Faster Payments;
 - (b) customers of many other banks and, indeed, of Barclays and HSBC can use alternative methods of carrying out FPS transactions, such as e-banking solutions;
 - (c) as explained at the Issues Meeting, e-banking solutions do allow users to make batch uploads; and
 - (d) given the small number of businesses using FPS DCA, but the growing trend in Faster Payments usage for business highlighted in the UK Finance Business Payments survey,⁵⁷ it is clear that the wider business population must be using other channels to initiate Faster Payments.
44. In fact, the e-banking FPS submission for all other banks (and the majority of Barclays and HSBC customers who do not wish to use the FPS DCA software) is a significant driver of switches to e-banking, as this enables businesses to access all payment types in one place.

(E) The Decision failed to take account of Bottomline's cancellations data

45. The Phase 1 case team failed to engage with the cancellations data that was provided to the CMA in mid June until after the Issues Meeting on 12 September at the earliest, and even thereafter there are indications that the data was mis-understood.
46. This casts very serious doubt on the correctness of the Decision as it is the key available evidence on closeness of competition between Bottomline and EPG and, perhaps most importantly, on the strong role played by other channels (for example, banks and bureaux) in constraining Bottomline.

⁵⁴ Phase I Decision, §§106-107.

⁵⁵ See Bottomline's revised consolidated response to the CMA's section 109 notice dated 17 May 2019, submitted on 28 June 2019, §§110-121, and Bottomline's presentation to the CMA at the Issues Meeting, slides 9, 13, 91 and 99.

⁵⁶ HSBC services were not launched until 2016 and remain minor.

⁵⁷ See Bottomline's revised consolidated version of the response to the CMA's section 109 notice dated 17 May 2019, submitted on 28 June 2019, §115 and footnote 51.

47. Diversion ratios are an important measure of the closeness of competition between firms in a market, and can shed light on the competitive constraints faced by Bottomline, as well as on its closeness of competition with EPG. The best available evidence on diversion ratios comes from Bottomline's record of customer cancellations, which was provided to the CMA during the Phase 1 process. This includes a list of all customers cancelling their contract between 2014 and 2018 and includes information such as the reason for the cancellation, and the competitor that the customer has moved to (if applicable and known). Using the former, it is possible to identify and remove cancellations where the customer did not move to an alternative provider ('non-competitive losses'), for example due to insolvency, site closure, or the customer failing to obtain bank sponsorship.⁵⁸ The vast majority of the remaining cancellations will have switched to an alternative provider in respect of whom Bottomline may not know the identity if the customer was unwilling to divulge this information.
48. Using this evidence, [X] customers were identified as having been lost to EPG between 2014 and 2018.⁵⁹ It has also been possible to identify [X] additional switches to EPG (that were previously recorded as cancellations to unknown competitors) by matching the list of Bottomline customer cancellations with the list of EPG customers.⁶⁰ As such, there can be a high degree of confidence that all switching between Bottomline and EPG in this period has been captured.
49. Table 1 shows the number of customer losses to Bottomline's main competitors between 2014 and 2018, based on Bottomline's cancellation data. During this period, only [X] customers have been lost to EPG, compared to at least [X]. Moreover, it is evident that banks are the most common destination for customer cancellations⁶¹ and that [X] move to use a bureau.⁶²

Table 1 Customers switching from Bottomline to competitors

[X]

50. While the number of known losses (i.e. cancellations where a specific competitor is named) is only [X] of the total, this is a very conservative approach to counting the number of cancellations. Many non-competitive losses have already been identified and removed from the dataset, so it is not reasonable to assume that a significant proportion of the remaining losses will be non-competitive simply because Bottomline does not know where the customer switched to. In addition, instances where the customer has indicated that they have switched to a bank, but not named the specific bank, have not been counted as a known loss, yet these are evidently a competitive loss.

⁵⁸ Bank sponsorship is required to obtain a SUN, which is required to make submissions to Bacs.

⁵⁹ [X].

⁶⁰ In cases where it was ambiguous as to whether a switch had occurred or not, for example if the dates that the customer left Bottomline and joined EPG overlap or are a year or two apart, a conservative approach has been taken by including these as switches between Bottomline and EPG. [X].

⁶¹ Bottomline notes that customers moving to banks include both moves to e-banking and moves to white-label solutions, if the banks offer such an option. The data available made it possible to check whether a customer had switched to a white-label solution provided by Bottomline itself; only [X] during 2014–2018 switched to a white-label software supplied by Bottomline.

⁶² Note that this only includes cancellations where the customer named a specific bank; if the customer indicated that they switched to a bank but did not specify which one, this is counted as a loss to an unknown competitor. The same applies to losses to bureaux.

51. Therefore, the CMA should consider the overall number of cancellations when analysing the level of switching in the market, as this will be closer to the true number. This is in contrast to the Decision, where the CMA wrongly concluded that the cancellation data showed "*little switching between all providers*" based only on the number of cancellations where the competitor was known.⁶³
52. The Decision also asserts that the number of customers switching to banks is small relative to Bottomline's customer base,⁶⁴ but this does not acknowledge the losses to unspecified banks, as described above. Including these would add another [X] cancellations over the period 2014–2018 to the [X] already included in Table 1. Even then, it still does not include the losses to banks where the customer was not willing to divulge that it was switching to a bank.
53. Table 2 shows the diversion ratios to EPG and other competitors when only losses to known competitors are included. Given the confidence that all switches between Bottomline and EPG have been identified as a result of the customer matching process, and the cleaning of the data to remove non-competitive losses as far as possible, the diversion ratios from Bottomline to EPG in Table 2 are an upper estimate. If all losses are considered, the customer diversion ratio to EPG decreases to [X] (from [X]), and the revenue diversion ratio decreases to [X] (from [X]).

Table 2 Diversion from Bottomline to other competitors

[X]

54. As acknowledged in the Decision, this data confirms that EPG exerted a limited competitive constraint on Bottomline during this period. Furthermore, other rivals and channels appear to be much closer competitors to Bottomline (including banks and bureaux).
55. The Decision dismisses the relevant evidence on two main grounds:
- the cancellation data provided by Bottomline is consistent with evidence of the low switching in the market overall and of the presence of high barriers to switching;⁶⁵ and
 - the customers who cancelled during the period 2014-2018 only account for a small proportion of revenues.⁶⁶
56. On the first point, the Decision does not explain how, if switching in the market is so low as to discount the constraint from other Bacs software suppliers, the merger between Bottomline and EPG would result in a SLC by contrast to the counterfactual of a different owner for EPG. This is a critical failure of the Decision's posited counterfactual.
57. The Decision also does not explain whether the CMA's assessment of barriers to switching refers to deployed or cloud solutions; as already submitted to the CMA, cloud products like PT-X inherently reduce switching costs, by *de facto* eliminating most of the fixed costs of operating a deployed solution at the client's premises and making switching to different suppliers less costly.

⁶³ Decision, §148(a).

⁶⁴ Decision, §148(d).

⁶⁵ Decision, §148(a).

⁶⁶ Decision, §148(a).

58. Even if it is the case that the customers who cancelled only account for a small proportion of revenues, this cannot discount for the fact that switching has taken place and that there is competitive constraint resulting from the threat of switching.

(F) Bottomline and EPG are not close competitors

59. Bottomline and EPG are not close competitors. In this regard, Bottomline notes:

(a) Bottomline's payments software business is focused on its PT-X hosted solution (which is used by approximately [X] of its payments software customers) and additional value-added services. The EPG software, on the other hand, is legacy deployed software for Bacstel-IP and FPS DCA only.

(b) Diversion ratios between Bottomline and EPG are limited. Between 2014 and 2018, only [X] of the [X] losses where the customer told Bottomline to whom it was switching, and only [X] of the total [X] losses, were losses to EPG. Similarly, in that period only [X] of the [X] customers lost by EPG were lost to Bottomline.⁶⁷

(c) Bottomline's internal documents [X].⁶⁸ [X].⁶⁹

60. The Decision does, however, appear to be based on an implicit assertion that Bottomline and EPG are, or would become, close competitors. Implicit or otherwise, this assertion is not supported by evidence.

61. The Decision contends that, in assessing the closeness of competition between Bottomline and EPG, the CMA considered (a) differences in Bottomline's and EPG's product offerings, (b) third party views, (c) evidence from internal documents, and (d) evidence relating to customer switching.

62. Taking each of these in turn:

(a) In relation to the differences in Bottomline's and EPG's product offerings:

(i) According to the Decision, "*the CMA ... agrees that the Parties largely have a different product proposition*".⁷⁰ It is clear that Bottomline's focus is, and has been for many years, on its PT-X hosted solution. The EPG product, by contrast, is deployed legacy software.

⁶⁷ For reasons that are unclear, the Decision does not refer to the EPG switching data.

⁶⁸ Annex A.1.3 to Bottomline's response to the second s.109 notice.

⁶⁹ Annex 24.03 to Bottomline's response to the first s.109 notice. [X].

⁷⁰ Decision, §131. The Decision does, however, go on to make a series of *non sequiturs*. In particular, at §133 of the Decision, the CMA draws an inference that "*the hosted/deployed distinction is not a consideration for all customer groups*" supposedly on the basis of (i) Bottomline offering deployed software as well as a hosted solution, (ii) [X] and (iii) non-disclosed evidence that it is "*possible*" that an alternate purchaser of EPG might have retained the EPG product. If this evidence suggests anything, it is the polar opposite to the inference drawn in the Decision. Likewise, at §132 of the Decision, the CMA states that the difference in Bottomline's and EPG's offerings "*is of limited relevance to its competitive assessment*" despite the remainder of that paragraph citing evidence from customers that supports a distinction between deployed software and hosted solutions. Bottomline notes that, if the Decision had concluded that deployed software constituted a distinct market from hosted solutions, then that market would most likely have been *de minimis*.

- (ii) Although it is not stated explicitly, the Decision appears to be based on an incorrect assumption that Bottomline's and EPG's products are the only products that are suitable for businesses with complex needs or that make large volumes of transactions. As Bottomline explained to the CMA multiple times during the Phase 1 process, all Bacs approved software products must meet the same technical specifications as laid down by Bacs and FPS. This includes the ability to make large volumes of transactions. Moreover, Bottomline provided the CMA with numerous examples of customers of other software suppliers and other channels that deal with complex needs and/or large volumes of transactions.⁷¹
- (b) In relation to third party views the Decision accepts that the overwhelming majority of Bottomline's and EPG's customers did not indicate that there was close competition between Bottomline and EPG.⁷²
- (c) In relation to internal documents:
 - (i) The Decision acknowledges that [redacted].⁷³ [redacted].⁷⁴ [redacted].
 - (ii) The Decision cites a single Bottomline internal document. It then goes on to mischaracterise that document. Bottomline has already addressed the CMA's mischaracterisation of that document in its response to the CMA's Issues Paper.⁷⁵ What that document actually demonstrates is that [redacted].
 - (iii) The Decision also cites two, or possibly three, documents that the CMA states it obtained from Experian. However, in both the Issues Paper and the Decision, the paragraphs relating to these documents are redacted almost in their entirety which does not afford Bottomline an opportunity to meaningfully respond.
- (d) In relation to customer switching:
 - (i) The Decision states that the CMA accepts that the very small number of customers who switched from Bottomline to EPG over a five year period demonstrates that "*the constraint from EPG on Bottomline has been limited*".⁷⁶ In fact, it has been very limited.

⁷¹ See e.g. Bottomline's presentation to the CMA at the Issues Meeting, slides 40, 43, 44 and 47; and Bottomline's Response to the Issues Paper, §§28 and 37.

⁷² Decision, §136. The Decision does, however, go on to cite precisely four customers – one Bottomline customer and three EPG customers – which the CMA implies (but does not explicitly state) evidences that Bottomline and EPG are close competitors. First, it is instructive to note that (i) Bottomline provided the CMA with contact details for 60 customers, (ii) staff associated with the EPG product had been including a notice in their communications with EPG's customer base of approximately [redacted] customers informing them about the CMA's investigation and (iii) the CMA issued an invitation to comment. In that context, four customers is a very small number. Secondly, and in any event, given their ordinary meaning, the comments cited do not actually suggest that Bottomline and EPG are close competitors. The comment attributed to a Bottomline customer, cited at §136(a) makes no reference to EPG. The comment attributed to the first EPG customer – "*there is no known software product that has the flexibility and functionality that EPG has and that supports this customer's volume and complexity*" – suggests that EPG has no close competitor. As does the comment attributed to the second EPG customer – "*that EPG realistically is the only product that can really handle all of this customer's requirements and that it has no like-for-like alternative on its volumes*".

⁷³ Decision, §143.

⁷⁴ See further §26(b) above.

⁷⁵ Decision, §143. See Bottomline's presentation to the CMA at the Issues Meeting, slide 94.

⁷⁶ Decision, §148(b).

(ii) To put the switches from Bottomline to EPG in context, [REDACTED]⁷⁷ [REDACTED]⁷⁸ [REDACTED].

63. For the reasons set out above, it is clear that the evidence does not support a conclusion that Bottomline and EPG are, or would have become, close competitors. On the contrary, the evidence demonstrates that there was not, is not, and would not be, close competition between Bottomline and EPG.

(G) The Decision does not advance a substantiated theory of harm

64. The assessment of possible theories of harm in the Decision is, at best, cursory. It is limited to a single paragraph of four lines. That paragraph, §114, states: "*the removal of EPG as a competitor could allow Bottomline to increase licence fees, increase maintenance charges, reduce product availability and/or reduce investment in product development*". Nowhere in the Decision does the CMA explain the basis on which it considers any of these possible theories of harm to be realistic.

65. Moreover, in relation to each of these:

(a) Increased licence fees and maintenance charges: The CMA had access to the pricing tools used by Bottomline's and EPG's respective sales teams. [REDACTED] Moreover, the competitive constraint posed by other software providers and alternative channels means Bottomline could not raise prices above the competitive level.

(b) Reduction in product availability: Bottomline's internal documents generated in the ordinary course of business [REDACTED]. This is also reflected in Bottomline's communications with EPG customers following completion of the Transaction. Bottomline provided extensive evidence in this regard during the Phase 1 process.⁷⁹

(c) Reduced investment in product development: All Bacstel-IP and FPS-DCA software must comply with the same technical specification published by Bacs and FPS respectively. As a result, there is limited scope for innovation. That notwithstanding, a number of other software suppliers are publicly committed to innovation. For example, AccessPay invested £1.4 million in research and development in 2018 having identified it as "*a priority*"⁸⁰; Finastra claims it "*builds and deploys innovative, next-generation technology*"; Serrala states "*We constantly challenge ourselves to bring relevant innovation to market*"; V1 states "*Our proven technology is being constantly innovated to ensure our customers are fit for the digital era and keep ahead of the game*". Experian was not investing in development of the EPG products. There is no compelling evidence that this would have changed regardless of whether EPG had remained with Experian or been sold to someone else. [REDACTED].

66. Had the CMA assessed these possible theories of harm in more than a cursory manner, it would have realised that none of these alleged theories of harm is even remotely realistic.

⁷⁷ Decision, §148(c).

⁷⁸ Decision, §148(d).

⁷⁹ See e.g. Bottomline's response to the second s.109 notice; Bottomline's presentation to the CMA at the Issues Meeting; and Bottomline's Response to the Issues Paper.

⁸⁰ Access Systems (UK) Limited, Annual report and financial statements, 30 April 2018.

(H) Incorrect dismissal of impact of regulatory and market developments

67. In the Decision, the CMA failed adequately to consider the anticipated regulatory developments and consequent market changes occurring in the payments landscape; in particular, the Payments Strategy Forum's plans to replace the existing payments infrastructure with the NPA, Open Banking and the EU's Second Payment Services Directive. The assessment of these fundamental issues to the future shape of the payments landscape is limited to 13 short paragraphs of the Decision.
68. In the Decision, the CMA states that the competitive effect of these developments is "*uncertain and unlikely to be felt in the short-term*"⁸¹ and that "*the impact on competition from these regulatory developments is currently unknown*".⁸² However, contradictorily, the CMA also states that "*the Parties' internal documents and also the views of third parties*" both "*appear to acknowledge the need to adapt their [...] businesses in order to compete effectively in the new payments landscape*". This acknowledgement of the need to adapt has been further substantiated by commercial changes made by both Bottomline and its competitors already in preparation for the introduction of the NPA.
69. [X], which is better configured for the NPA. This is indicative of a wider industry trend in response to the anticipated changes. It is clear that firms are already prudently adapting their businesses in order to stay relevant once the NPA has been introduced. The Decision is therefore incorrect to proffer that the competitive effect of regulatory developments are unlikely to be felt in the short-term because they are evidently being felt – and being proactively responded to – at present.
70. Under the NPA, it is planned that current low value high volume interbank clearing (such as Bacs or FPS) will be replaced with a single, simplified clearing and settlement layer supporting a common credit message.⁸³ One outcome of this change (alongside the advent of Open Banking) is that Third Party Providers ("TPPs") will continue to grow in prominence. TPPs, as well as increasingly prevalent Electronic Money Institutions ("EMIs") such as Modulr FS and Revolut, will add to the competitive constraint faced by Bottomline and EPG, as they offer alternative banking services to businesses.
71. The CMA's erroneous conclusion that the impact of the NPA and these other regulatory developments is "*unknown, such that they are unlikely to mitigate the effects of any SLC*" is said to be based on its assessment of the evidence grouped under three headings: (a) timing, (b) uncertainty, and (c) position of existing suppliers. Taking each of these in turn:
- (a) In relation to "timing":
- (i) Central to the CMA's conclusion is a contention that the NPA is forecast for implementation after 2021 and therefore it will not have an effect within the two year period in which entry and/or expansion is typically be expected to mitigate the effects of a SLC.⁸⁴ This assumes that firms will delay any preparation for the NPA until such time as it comes into effect – that cannot be the stance of a prudent business.

⁸¹ Decision, §63.

⁸² Decision, §224.

⁸³ §33 of Bottomline's response to the first s. 109 notice.

⁸⁴ Decision, §225.

- (ii) The CMA states that it has "*not received any evidence that competition from TPP/PISPs, PSPs or EMIs/PSPs, currently provide a meaningful constraint on the parties*".⁸⁵ As indicated above, TSPs and EMIs are already beginning to gain traction.
- (iii) The CMA's own guidance states that it will take into account "*those aspects of scenarios that appear likely on the basis of the facts available to it and the extent of its ability to foresee future developments*".⁸⁶
- (b) In relation to the alleged "uncertainty", the CMA cites a single Experian document which (erroneously) suggests that the introduction of Request to Pay as part of the NPA will not lead to the replacement of Bacs Direct Debits. In what is, at best, a *non sequitur* the Decision states that this Experian document "*suggest[s] that the regulatory developments will not adversely affect Bottomline's payments software business*".⁸⁷ In any event the NPA is certain to come into being.
- (c) In relation to the position of existing suppliers the CMA contends that "*incumbent providers of Bacs and FPS payment software will be likely to have a competitive advantage in terms of supplying payments software for the NPA*".⁸⁸ As indicated above, the intended effect of the NPA is that current payment systems will be replaced with a single, simplified clearing and settlement layer supporting a common credit message. The CMA's consideration of the historical reputation of well-renowned suppliers such as Bottomline and EPG as a basis for their continued success is misguided. According to Pay.UK, the introduction of the NPA will "*[create] an historic opportunity to rebuild the core clearing and settlement infrastructure from the bottom up*".⁸⁹ The introduction of the NPA will thus level the playing field. All current market competitors, in addition to the TPPs, EMIs and others referred to above, will be required to demonstrate to prospective customers their ability to operate within the NPA.

(I) The Transaction is not a relevant merger situation

- 72. The Decision was taken on 7 October 2019, after the statutory deadline for a reference had passed. As a result, the reference was unlawful. The statutory deadline for a reference passed on 15 August 2019 at the latest.⁹⁰
- 73. The Transaction completed on 6 March 2019. Following completion:
 - (a) Announcements were prominently displayed on Bottomline's and Experian's websites from 7 March 2019. Both of those announcements made it clear that Bottomline had acquired the EPG software from Experian. These landing pages featured very prominently in the results of relevant searches conducted using Google and Bing.⁹¹ It is clear, therefore, that any individual searching for information about the EPG software would have been directed to a landing page that made it abundantly clear that Bottomline had acquired the EPG software.

⁸⁵ Decision, §226.

⁸⁶ Merger Assessment Guidelines §4.3.6.

⁸⁷ Decision, §227.

⁸⁸ Decision, §228.

⁸⁹ <https://www.wearepay.uk/new-payments-architecture-core/>

⁹⁰ The four month statutory period was suspended for one month between 3 June 2019 and 3 July 2019.

⁹¹ Bottomline's Response to CMA Questions of 17 September 2019, 18 September 2019, §§5-12.

- (b) The Bacs approved software suppliers page on Bacs website was updated on 14 March 2019. Again, this made it clear that Bottomline had acquired the EPG software from Experian. Again, this page featured very prominently in the results of relevant searches conducted using Google and Bing.⁹²
- (c) EPG customers were contacted by Experian and Bottomline and informed about the Transaction. Bottomline also contacted Bacs and VocaLink to inform them about the Transaction. These contacts all took place on 7 and 8 March 2019.
- (d) Bottomline filed a Form 8-K about the Transaction with the Securities and Exchange Commission on 8 March 2019.
- (e) The Transaction was reported by a number of newswires including MarketScreener.com, S&P Global Market Intelligence and Streetinsider.com between 8 March and 11 March 2019.

74. The various announcements, publicity and notices that set out material facts about the Transaction must be assessed in the round. When this is done it is clear that the material facts about the Transaction were made public by 15 March 2019 at the latest.⁹³ As Parr, Finbow and Hughes have commented "*the key point should be that interested third parties are aware of the transaction, and have sufficient opportunities to raise concerns about it with the CMA*".⁹⁴ There can be no doubt that was the case here.

⁹² Bottomline's Response to CMA Questions of 17 September 2019, 18 September 2019, §§13-14.

⁹³ In the Decision, the CMA asserts that it cannot reasonably be expected to monitor announcements filed with one of the world's major securities regulators by a company listed on one of the world's major stock exchanges (Decision, §37(d)), newswires "*aimed at a professional audience*" (Decision, §37(e)), "*pages within a business's website*" (Decision, §37(f)), or "*a specialist website*" (Decision, §37(g)). This is surprising given that the CMA draws on the research of a dedicated intelligence team which the CMA claims enables its Mergers Intelligence Committee to identify and consider more than 600 transactions per year. The CMA's assertion that an announcement filed with one of the world's major securities regulators by a company listed on one of the world's major stock exchanges is not something that "*could readily be ascertained by the CMA acting reasonably and diligently in accordance with its statutory functions*" (Decision, §25) is equally surprising given that the CMA has a statutory duty to "*seek to promote competition, both within and outside the United Kingdom*" (emphasis added) (Enterprise and Regulatory Reform Act 2013, section 25(3)).

⁹⁴ Parr, Finbow and Hughes, UK Merger Control: Law and Practice, 3rd edition, 2016, page 72. In the Decision, the CMA incorrectly asserts that the Explanatory Notes to the Enterprise Act state that "*whether material facts have been made public should be assessed from the perspective of the CMA*" (Decision, §37(a)). In actuality, the Explanatory Notes state "*the section defines the term 'made public' as having the meaning of 'generally known or readily ascertainable'*" and then goes on to state "*The intention is that [the CMA] would reasonably be expected to have known or found out about the merger if it has not been notified about it*" (Enterprise Act 2002 Explanatory Notes, §107.)