

ME/6830/19

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

COMMENTS ON CMA'S ISSUES STATEMENT

6 DECEMBER 2019

NON-CONFIDENTIAL VERSION

Introduction and Executive summary

1. Bottomline welcomes the opportunity to comment on the topics covered by the Issues Statement dated 14 November 2019.¹
2. Bottomline has already addressed a number of these topics in its Response to the CMA's Phase 1 Decision dated 11 November (the "Decision") and at the Site Visit held on 21 November 2019. Bottomline does not propose to repeat its submissions here save to note that it has provided substantial evidence to support a conclusion that:
 - (a) Bottomline and EPG face significant competitive constraints posed by other software suppliers as well as Bacs approved bureaux, FM DD providers, e-banking solutions, host-to-host bank channels and EMIs;²
 - (b) Bottomline and EPG are not close competitors;³ and
 - (c) the most likely scenario absent the Transaction is that [REDACTED], regardless of whether it would have been retained by Experian or sold to an alternative purchaser – as such, the counterfactual against which the competitive effects of the Transaction must be assessed is the *status quo ante* [REDACTED].⁴
3. Bottomline therefore limits its comments on the Issues Statement to points it has not already addressed.

Frame of reference

4. Bottomline agrees with the CMA's proposed approach at Phase 2 to investigate in more detail the extent of demand-side and supply-side substitutability between different types of

¹ Bottomline notes that the Issues Statement does not address topics relevant to whether a relevant merger situation has been created albeit it states that "*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*" (Issues Statement, §2(a)). In relation to this, Bottomline refers the CMA to Bottomline's Response to the CMA's Decision, §§72-74.

² See e.g. Bottomline's Response to the CMA's Decision, §§25-59; and Site Visit Presentation, slides 10-30.

³ See e.g. Bottomline's Response to the CMA's Decision, §§59-63.

⁴ See e.g. Bottomline's Response to the CMA's Decision, §§13-24; and the evidence from EPG at the Site Visit.

payment solutions, the characteristics of demand and supply for Bacstel-IP and Secure-IP⁵ software, and the requirements of different types of customers.

5. In doing so, it will be important for the CMA to assess all providers of Bacstel-IP software and Secure-IP software, Bacs approved bureaux, FM DD providers, e-banking, host-to-host bank channels and EMIs. In particular, it will be important for the CMA to assess how different channels can be suitable for different customers; while there might not be a single alternative solution that would meet the needs of all of the Parties' customers, the wide range of alternatives means that all current customers have one or more alternative solutions that would meet their requirements.
6. In relation to this, Bottomline draws to the CMA's attention §§25-59 of Bottomline's Response to the Decision and the evidence from the 'demonstration of the products' and 'frame of reference' sessions at the Site Visit.
7. Bottomline also submits that it will be important for the CMA to assess how existing players in the market are preparing for open banking, overlay services and the New Payments Architecture, and the extent to which some of the current market trends (most notably, the move to cloud) have been triggered or reinforced by this change. It is also important for the CMA to assess the extent to which Third Party Providers and EMIs are planning to provide alternative banking services to businesses, which would include the ability to make and receive payments.⁶
8. Bottomline is confident that such an assessment will result in the Inquiry Group concluding that Bottomline and EPG face, and will continue to face, strong competitive constraints posed by a range of competitors and that the Transaction has neither resulted, nor may be expected to result, in a SLC.

Counterfactual

9. Bottomline has already made detailed submissions on why the counterfactual adopted by the CMA at Phase 1 was unrealistic, and is certainly not the most likely alternative scenario to the Transaction – see especially §§13-24 of Bottomline's Response to the CMA's Decision and the evidence from the 'PT-X' and 'EPG' sessions at the Site Visit.⁷
10. In relation to §31(b) of the Issues Statement, it is important that the CMA considers not only the competitive strategy that EPG would have adopted absent the Transaction (whether in the hands of Experian or an alternative purchaser) but also whether it is likely to have succeeded in any such strategy. In particular, it will be important for the CMA to consider the evidence provided by Bottomline [REDACTED]. The CMA should therefore consider how EPG in the hands of Experian or a new owner would have managed this process, and the expected churn of the existing EPG customer base that would have taken place, had the alternative purchaser developed a hosted solution in a realistic timeframe.
11. It is very clear from the evidence adduced [REDACTED].

⁵ In relation to Secure-IP software, Bottomline welcomes the recognition in the Issues Statement that FPS DCA submissions comprise only a small portion of all FPS transactions (Issues Statement, §15).

⁶ For example, see the recent partnership between Modulr and Sage to "*bring millions of UK SMEs from 'bank hours only' payment s processing to the digital age*" – <https://www.internationalfinance.com/magazine/modulr-is-moving-millions-of-uk-smes-from-bank-hours-only-payments-processing-to-the-digital-age/>

⁷ In particular, in order to identify a counterfactual based on a sale to the specific party that the CMA had in mind in the Decision, it would be necessary to go further than to identify it as "*a potential alternative purchaser involved in the sales process*". It would be necessary to show, on the balance of probabilities, that Experian would have sold EPG to that alternative purchaser if Bottomline were excluded.

Theories of harm

12. As noted in Bottomline's Response to the Decision, the assessment of possible theories of harm in the Decision was limited to a single paragraph which stated: "*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*".⁸ Nowhere in the Decision did the CMA explain the basis on which it considered any of these possible theories of harm to be realistic. With the benefit of a detailed assessment which is afforded in Phase 2, Bottomline is confident that the Inquiry Group will conclude that there is no realistic theory of harm resulting from the Transaction.

Theory of harm 1

13. In relation to theory of harm 1, Bottomline notes in particular:
- (a) The CMA proposes to consider "*how often customers shop around and switch providers, and whether new customers are entering the market*".⁹ Bottomline would emphasise that any theory of harm investigated must be merger specific.
 - (b) Bottomline addressed the lack of closeness of competition between Bottomline and EPG at §§59-63 of its Response to the Decision.
 - (c) Bottomline addressed the competitive constraint posed by other software suppliers and by alternative channels at §§25-59 of its Response to the Decision and at slides 10-30 of the Site Visit Presentation.
 - (d) Assessing "*the strength of EPG under any alternative purchaser*"¹⁰ (emphasis added) is not the correct approach. It is its strength under its most likely ownership absent the Transaction (whether that is Experian or someone else) that would be relevant. In any event, as explained in Bottomline's Response to the Decision, it is not realistic to conclude that a purchaser, especially one with limited or no Bacs and/or FPS DCA software experience, would have had the ability [X] by simultaneously servicing the existing EPG customer base, transferring the contracts from Experian, developing a multi-tenant hosted solution from the single tenant architecture of the EPG product and competing for new business from day one [X].¹¹
14. Moreover, in so far as theory of harm 1 involves the sale of EPG to an alternative purchaser, Bottomline notes:
- (a) EPG might not have been sold to an alternative purchaser. This would have depended on the price offered, the credentials of the alternative purchaser, and whether a deal could have been struck that was acceptable to both sides.
 - (b) Even if Experian had sold EPG to an alternative purchaser, it might not have done so in a timely manner. If the sale was delayed this would have reduced the scale of any potential impact by comparison with the Bottomline acquisition.
 - (c) The alternative purchaser might not have made EPG into a substantially more competitive force in the market. This would have depended in part on the strategy of the purchaser but, even with the best intentions, there will always be very

⁸ Decision, §114.

⁹ Issues Statement, §38(a).

¹⁰ Issues Statement, §38(d).

¹¹ See e.g. Response to the CMA's Decision, §20(b) and evidence from EPG at the Site Visit.

significant uncertainty about whether a particular commercial strategy will ultimately be successful.

- (d) Moreover, even if it would have done so, it might not have done so in a timely manner. There are a number of reasons why this might not have occurred, including delays in bringing a new hosted solution to market, and the challenges in getting large numbers of customers to switch from other providers in a short space of time.

- 15. In light of the above, Bottomline is confident that the Inquiry Group will conclude on the balance of probabilities that the Transaction has not resulted, and may not be expected to result, in a SLC on the basis of theory of harm 1, not least because of the inherent uncertainty in each of the points above, which is compounded when they are assessed together.

Theory of harm 2

- 16. As Bottomline understands it, theory of harm 2 is premised on the following:

- (a) Bottomline provides "*a range of payment software and solutions*"¹² – for illustrative purposes, these are products A, B, C and D;
- (b) EPG supplies only part of that range¹³ – for illustrative purposes, product D;
- (c) the alternative purchaser in the counterfactual either supplies only part of that range (products A, B and C) or its offering of the full range (products A, B, C and D) is weakened by its position in product D; and
- (d) the difference in competition is substantial between the two hypothetical scenarios, namely (i) the merged Bottomline plus EPG competing in the supply of the product range A, B, C and D with the disappointed alternative purchaser, and (ii) Bottomline competing with the merged alternative purchaser plus EPG in the supply of the product range A, B, C and D.

- 17. In respect of this, Bottomline notes in particular:

- (a) Fundamental to this theory of harm is the concept that EPG would have provided something that is missing from the alternative purchaser's offering. The Issues Statement refers to "*the addition of EPG's existing customer base*" and "*reputation and/or economies of scale*" as this 'missing piece of the jigsaw'.¹⁴
 - (i) Bottomline notes that it is not suggested in the Issues Statement that the 'missing piece of the jigsaw' is the EPG source code. [REDACTED].
 - (ii) In relation to "*Whether the addition of EPG's existing customer base ... may enable the purchaser of EPG to develop a better product*": Strictly these two issues are distinct – the quality of the software that is developed depends on the skills of the software engineers that develop it, not the size of the customer base. To the extent there might be some commercial connection between the two, it would not be relevant to theory of harm 2 because the alternative purchaser is by definition already active in some or all of the products that comprise the "*range of payments software*" and

¹² Issues Statement, §43(a).

¹³ Issues Statement, §40.

¹⁴ Issues Statement, §§43(c) and (d).

therefore already has a customer base it can sell to. Also, given that the software is not insurmountably difficult to write (as evidenced by the number of suppliers), a supplier active in products A, B and C (or A, B, C and D) who wanted to add product D to its portfolio or improve the quality of its offering of product D and had enough cash to purchase EPG would presumably have a business case for organic investment in writing product D (or it could approach the numerous other suppliers of product D to explore the potential for a purchase). In summary, the purchase of EPG does not appear to be a necessary condition for the alternative purchaser competing against Bottomline across a range of products.

- (iii) In relation to "*reputation ... gained from integrating the EPG business and customer base*": As to whether EPG's reputation might strengthen the alternative purchaser's competitive position if they merged, Bottomline notes that [§]. Moreover, the alternative purchaser – already active in the supply of products A, B and C, or A, B, C and D – will have its own reputation for the supply of "*a range of payment software*". Given the need to transition to a hosted solution, the alternative purchaser's reputation will be at least as important as EPG's in determining customers' willingness to purchase products A, B, C and D from the hypothetical merged alternative purchaser plus EPG. As to whether the alternative purchaser's reputation might strengthen EPG's competitive position if they merged, it is difficult to see that the alternative purchaser would add much, if anything, to EPG's reputation, given that EPG had been operating as part of Experian, a FTSE-100 company.
- (iv) In relation to "*economies of scale gained from integrating the EPG business and customer base*": Bottomline notes that [§].
- (b) There is a paradox in theory of harm 2. If the addition of EPG to the alternative purchaser would have made the market for the supply of products A, B, C and D substantially more competitive, this would tend to suggest that EPG would be more valuable to the alternative purchaser than to Bottomline. Indeed, if the alternative purchaser has invested in developing products A, B and C (and potentially also a version of product D), then it would be expected to have a very high willingness to pay for EPG if EPG were truly the 'missing piece of the jigsaw' (assuming that the jigsaw could not be completed through organic software development or a purchase of a different company) as the costs of buying EPG would be recouped through increased sales of products A, B and C as well as product D. The fact that the alternative purchaser was not selected as the winning bidder (in circumstances where Bottomline was not aware of the existence of any competing bidders, let alone their identities) undermines the theory of harm.¹⁵
- (c) The CMA will need to identify the range of products in question and how they are sold – e.g. are they bundled and, if so, in what form (are they available for purchase only as a single package, or are they available separately but also available for purchase together but at a discount)? If the products are available separately and customers are willing to mix and match (to develop what they perceive to be 'best of breed' solutions), it is difficult to see what significance there is in adding product D to a supplier of A, B and C or strengthening product D on the part of a supplier providing products A, B, C and D.

¹⁵ Bottomline notes that, according to the CMA, "*headline price*" was a key factor used by Experian to select the winning bidder – see Decision, §54.

(d) In any event, in order for this theory of harm to have any merit there would need to be something about EPG that would make it a vital component to the package of payment software and solutions. [REDACTED].

(i) In relation to the EPG software product:

- As has been explained to the CMA, all Bacstel-IP and Secure-IP software must meet the technical specifications laid down by Bacs/FPS.¹⁶ In this regard, EPG is one of eighteen current suppliers of Bacstel-IP software and one of six current suppliers of Secure-IP software. It is not especially complex for software engineers to write code *de novo* for Bacstel-IP or Secure-IP software, as evidenced by the number of suppliers and recent new entry.
- Moreover, [REDACTED].¹⁷ [REDACTED].

(ii) In relation to the EPG customer base:

- The Issues Statement queries whether "*EPG's existing customer base (which is predominantly of large customers and bureaux) may enable the purchaser of EPG to develop a better product offering than would have otherwise been the case*".¹⁸ [REDACTED].¹⁹ [REDACTED].²⁰ [REDACTED].²¹ [REDACTED].²²
- As has been explained to the CMA, there are approximately 600 Bacs approved bureaux [REDACTED].²³
- Furthermore, as mentioned above, under the counterfactual that the "*alternative purchaser of EPG either already owns, or develops, a wider range of payment software and solutions*"²⁴ the alternative purchaser would already have a customer base that it could approach. There is nothing unique about the EPG customer base that an alternative purchaser could not obtain by leveraging its current customers or acquiring other players in the market.

18. In light of the above, Bottomline encourages the CMA to discard theory of harm 2 as not sufficiently credible to warrant further investigation.

Entry and expansion

19. In assessing whether entry and/or expansion would be timely, likely and sufficient, Bottomline would emphasise the importance of 'look up' moments and the likely impact of the forthcoming regulatory changes, including the adoption of the New Payments Architecture given that one of the stated aims of the new Payments Architecture is the introduction of new competitors into the payments landscape.

¹⁶ See e.g. Response to the CMA's Decision, §§62(a)(ii) and 65; and Site Visit Presentation, slide 5.

¹⁷ [REDACTED].

¹⁸ Issues Statement, §43(c).

¹⁹ See e.g. Response to the CMA's Decision, §§39(e) and 62(a)(ii).

²⁰ Evidence from Bottomline at the Site Visit.

²¹ Issues Meeting Presentation, slide 8.

²² Issues Statement, §40.

²³ Issues Meeting Presentation, slide 46.

²⁴ Issues Statement, §41.