

Verifone New Zealand / Smartpay Holdings Limited
Submission by Smartpay Holdings Limited on the Statement of Issues
28 April 2020

INTRODUCTION

1. On 9 April 2020 the Commerce Commission ("**Commission**") published its Statement of Issues ("**SOI**") in relation to Verifone New Zealand's ("**Verifone**") potential acquisition of the assets used by Smartpay Holdings Limited (and its subsidiaries) to operate the Smartpay terminal business in New Zealand ("**Smartpay**") ("**Acquisition**").
2. The public version of the SOI sent to Smartpay by the Commission on 9 April contained a number of redactions. The Commission provided Smartpay with a less-redacted version of the SOI on 24 April 2020. Smartpay has endeavoured to respond to all issues that have been disclosed to it through the SOI, [CONFIDENTIAL].
3. As neither Smartpay, nor its external legal counsel, have been provided with a fully unredacted version, Smartpay does not respond to, and reserves its rights in respect of, the parts of the SOI that it has not received.
4. Smartpay is grateful for the opportunity to respond to the SOI, and is available to meet with the Commission to discuss this response further.

EXECUTIVE SUMMARY

5. Smartpay agrees with the Commission's views in the SOI that the Acquisition does not give rise to any potential concerns in respect of:
 - (a) unilateral effects at the importation level, wholesale level, and retail/resale level to enterprise and commercial merchants;
 - (b) coordinated effects at any level;
 - (c) vertical effects on resellers; and
 - (d) conglomerate effects.
6. This demonstrates that the Commission has satisfied, or is close to satisfying, itself that a number of aspects of the Acquisition, including in relation to a number of different customers, do not give rise to any competition concerns.
7. The only remaining aspects of the Acquisition that the Commission is continuing to test through the SOI process (as disclosed to Smartpay)¹ are:
 - (a) the potential for unilateral effects in the supply of terminals to small and medium-sized enterprises ("**SMEs**");
 - (b) [CONFIDENTIAL]
8. Smartpay is confident that no such concerns are likely to arise.

¹Smartpay notes that the SOI also says that the Commission is considering vertical effects of a nature not disclosed to Smartpay through the SOI process. Accordingly, Smartpay does not respond to this issue, but notes it is not in relation to effects on resellers.

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9. Specifically in relation to the supply of terminals to SMEs applying the orthodox principles of market definition, SME customers are simply a type of customer within the broader terminals market (consistent with the Commission's finding in *Ingenico/Paymark*), and even setting aside the issue of market definition:
- (a) there is a significant number of competitors in the supply of terminals to SME customers, including both other direct importers and resellers that are highly price competitive for SME customers. Examples include POS Mate, Eftpos Now, Eftpos Warehouse, Windcave/Payment Express, Kiwi Eftpos, Eftco Ltd, Business Applications Ltd, and Taxi Trans Track Ltd;
 - (b) there are no barriers to resellers becoming direct importers, or switching to purchase terminals from a supplier aside from Verifone (such as Skyzer, Perception Technologies, Castles Technology, etc);
 - (c) in the areas that Verifone and Smartpay focus on different customer industries, each faces close competition from third parties in those industries (e.g. Taxi Trans Track Ltd in taxis, and Windcave in hospitality), demonstrating that they are not uniquely placed as each other's closest competitor;
 - (d) Windcave is already a significant competitor for SME customers, including **[CONFIDENTIAL]**, and there are no barriers whatsoever to limit it from expanding that presence further; and
 - (e) Ingenico, with its multiple business platforms in New Zealand, is well placed to compete in the supply of payments solutions to SME and other customers in New Zealand.
10. Accordingly, Smartpay cannot see any way in which the Acquisition could be said to give rise to a substantial lessening of competition in the supply of terminals to SME customers in New Zealand.

11. [CONFIDENTIAL]

- (a) **[CONFIDENTIAL]**
- (b) **[CONFIDENTIAL]**
 - (i) **[CONFIDENTIAL]**
 - (ii) **[CONFIDENTIAL]**
 - (iii) **[CONFIDENTIAL]**

12. Accordingly, Smartpay is confident that the Acquisition does not give rise to any competition concerns in any market. Smartpay's reasoning for these views are set out in more detail as follows.

NO UNILATERAL EFFECTS IN THE SUPPLY OF TERMINALS SMEs

13. Smartpay is confident that the Acquisition will not give rise to any unilateral effects concerns in relation to the supply of terminals to SMEs for the following reasons.

No separate market for SME customers

14. As a starting comment, Smartpay notes that in focusing its concerns on a market for "the supply of terminals to SMEs", the SOI adopts a different, and narrower, market than the Commission used to analyse competition in *Ingenico / Paymark* (where it defined a market for the "retailing of terminals", i.e. a market encompassing all customer types). In positing that narrow market definition, the SOI refers to factors such as:
- (a) certain competitors predominantly targeting larger or smaller customers;
 - (b) larger customers being more likely to use tenders or negotiate bespoke agreements.
15. With respect, Smartpay does not consider that either the facts or law support such a narrow market definition. As the Commission will be aware, different customer focuses or different purchasing models is very common in almost all markets – and differentiation is not itself sufficient to justify separate markets. Indeed:
- (a) market definition is not decided by differentiation, but rather by substitution between goods / services "as a matter of fact and commercial common sense";²
 - (b) the Courts in New Zealand have outlined that supply-side substitutability is a key factor to consider in defining relevant markets;³
 - (c) the Commission has previously outlined that when considering whether to define separate markets it will look to see if there is a "chain of substitution between products and, so long as there is no break in the chain of close substitution possibilities such that each adjacent pair of products are close substitutes, all of these products might be included in the same market".⁴ As a result, the Commission has defined a single product market where there are low barriers to suppliers switching between the supply of different differentiated products; and
 - (d) for there to be a separate Commerce Act market based on demand-side dynamics, the Commission would need to show that:
 - (i) there is a particular type of customer that can only purchase terminals from the so-called SME terminal suppliers, and that this customer would not have the ability, in the event of a SSNIP by a hypothetical monopolist, to switch to the so-called enterprise/commercial suppliers;
 - (ii) suppliers to these SME customers are aware that those customers are in a weak bargaining position due to their particular ability to only purchase from so-called SME terminal suppliers and, therefore, can price discriminate to those customers on that basis; and
 - (iii) other so-called enterprise/commercial suppliers would not be able to expand their offering to offer their terminals to SME customers.
16. Smartpay's evidence is that:

² Commerce Act 1986, section 3(1A).

³ *Commerce Commission v Air New Zealand Limited* HC Auckland CIV-2008-404-8352 (24 August 2011).

⁴ Commerce Commission Decision No. 574 *Fonterra Co-Operative Group Limited Kapiti Fine Foods Limited and United Milk Limited* (23 February 2006) at [81].

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- (a) there are no barriers that prevent so-called enterprise/commercial suppliers supplying terminals and other payments solutions to SMEs (in fact, Windcave and Ingenico do so already);
 - (b) customers can switch between a range of terminal providers, with different functionality, depending on what they consider to offer the best price / quality mix for them;
 - (c) there are no customers that the merged entity could identify as being captive to only being able to purchase terminals or other payments solutions from Verifone or Smartpay (indeed, any SME customers could, and they often do, also purchase from Windcave, Ingenico, and other importers and resellers).
17. Accordingly, applying the orthodox principles of market definition, the relevant market is the market for the "retailing of terminals", as the Commission found in *Ingenico / Paymark*.
18. However, even setting aside issues of market definition, Smartpay is confident that there is no prospect of SMEs facing any material lessening of competitive options.

Resellers are highly price competitive

19. The SOI says that the Commission has been told by one reseller that it is "able to compete on price with Verifone" and the Commission has been provided examples where resellers have been competitive on price.
20. Despite that evidence, the SOI says that the Commission is still considering feedback from some (but not all) market participants "that resellers find it difficult to compete on price with Verifone and Smartpay in the SME market."
21. That feedback is incorrect, and does not reflect Smartpay's in-market experience.
22. As the Commission is aware, on 11 March 2020, Smartpay provided the Commission with sixteen recent examples of communications with SME customers who presented Smartpay with [CONFIDENTIAL], demonstrating the significant alternative choices that SME customers have. Those sixteen examples were not exhaustive, and simply intended to be illustrative of conversations that Smartpay has with SME customers frequently. As noted at the time those were provided to the Commission, there would be many more examples of alternative providers competing vigorously on price (amongst other factors such as service and contract duration) to SME customers. Just in that illustrative set, SME customers referred to alternative options from [CONFIDENTIAL].
23. Post-Acquisition there will remain a significant number of other competitors that vigorously compete for the terminal business of SME customers based on price (and other factors such as service and contract duration), including a significant number of other resellers.

No barriers to resellers becoming importers

24. The SOI, in considering whether resellers are price competitors, appears to draw a static delineation between "resellers" and competitors that import terminals.
25. Given the forward-looking nature of merger analysis, it is not enlightening to draw such a delineation given there are no barriers to terminal competitors importing their own terminals. Indeed, it would readily be open to terminal competitors that currently resell terminals to replicate Smartpay's business model of importing PAX terminals. As Smartpay submitted in

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its cross-submission on the Statement of Preliminary Issue ("**Cross-submission**"), the PAX terminals have already been certified for use by anyone on the Paymark switch⁵ (with that certification process based on the terminal hardware and not the supplier). Furthermore, it is in any event relatively inexpensive and quick to obtain Paymark certification for a terminal. There are already other independent providers in market who can supply a PAX application, including EFT Solutions and Aurium Limited, which have developed PAX applications including for the New Zealand market.

26. In addition to PAX, there are also very many other terminal manufacturers internationally that are not currently represented in New Zealand and would be viable alternative supply options for importers, including Bitel, Newland Payment, LIANDI, Xin Guo Du, New POS Technology, and many others.⁶
27. Therefore, to the extent any existing terminal competitors perceived a competitive benefit from moving to an import business model, they could readily do so. Smartpay's current business model could be readily replicated by the terminal competitors currently operating a "reseller" business model.
28. Accordingly, the Commission's forward-looking assessment should recognise that competitors currently operating a reseller model could readily switch, or threaten to switch, to an import business model.

No barriers to resellers switching supplier

29. In addition to resellers' ready ability to switch to an import model, there are numerous other existing wholesale suppliers that resellers could switch to – for example, Skyzer, Perception Technologies, Castles Technology, etc. Accordingly, there are no resellers that could credibly claim to be dependent on Verifone post-Acquisition. Resellers could readily explore numerous options (importing or other wholesale suppliers) in order remain vigorous competitors post-Acquisition.

The parties' focus on different customer types

30. At paragraph 45, the SOI indicates that the Commission is considering whether the fact that Verifone has developed a focus on hospitality customers, and Smartpay has developed a focus on taxi customers, indicates some form of "closeness of competition" as a result of each developing a respective focus on different types of customers.
31. That is not a correct inference to draw from Verifone and Smartpay focussing on different customers. To the contrary, the fact that each focuses on different customer types illustrates an absence of closeness of competition. Indeed, Smartpay faces competition from a number of terminal providers that specifically focus on supplying terminals to taxi customers. For example:
 - (a) Taxi Trans Track Ltd;⁷
 - (b) Eftpos Warehouse, with its offering "For Food Trucks, Tradies & Taxi";⁸

⁵ Cross-submission at [13(a)].

⁶ <https://www.marketwatch.com/press-release/global-pos-terminals-market-2020-ingenico-verifone-pax-newland-payment-liandi-xin-guo-du-new-pos-technology-bitel-cybernet-and-more-2020-01-30>

⁷ <http://taxitranstrack.co.nz/>

⁸ <https://eftposwarehouse.co.nz/eftpos/#moving-businesses>

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32. The offering that Smartpay has developed for taxi customers is a bespoke solution for the taxi industry that contains additional functionality to assist fleet management and reporting. This application would not be attractive for any merchant that is not a taxi driver. To the best of Smartpay's knowledge, Verifone does not have an equivalent taxi-focused application in New Zealand. Smartpay's offering will continue to face competition from other third-party competitors that focus on the taxi / mobile transport customer segment. Furthermore, as noted in the clearance application, Smartpay is seeing increasing competition from mPOS offerings in relation to mobile and SME businesses. BNZ markets its mPOS PayClip offering to taxi and other mobile/transport businesses ("*whether you're a tradesperson, a taxi driver, or a mobile hairdresser, PayClip® is the mobile payment solution that lets you get paid on the go*"),⁹ [CONFIDENTIAL]
33. Similarly, Verifone's hospitality focussed offering faces competition from a number of other competitors focussed on that segment. For example:
- (a) Windcave markets a POS solution that "is perfect for any fast paced hotelier, hospitality and retail environments" through a partnership with RMS, which is a "software company producing and supporting Online Booking, Channel Management and Front Office Systems to the world's hospitality industry".¹⁰
 - (b) Eftco Ltd markets payment terminal solutions specifically marketed at "cafes and restaurants"¹¹ and "tourism and events",¹² as well as including case studies of a number of its bespoke offerings provided to accommodation, tourism, and hospitality customers on its website;¹³
 - (c) Eftpos Now markets a "hospitality point of sale [offering] using smart technology specifically designed for restaurants, cafes, bars and more. Providing features such as stock control, customer loyalty, staff tracking systems and reporting";¹⁴
 - (d) BNZ's PayClip mPOS offering is marketed to specifically target hospitality customers by offering compatibility "with posBoss, a hospitality point-of-sale system which operates off an iPad."¹⁵
34. The fact that each of Verifone and Smartpay faces other competitors that focus on these areas demonstrates the significant competitive constraint that will remain post-Acquisition, and that there are numerous other competitors that compete to differentiate their product to appeal to different types of customers.

Windcave is already a significant competitor for SME customers

35. The SOI states that the Commission is still considering whether "Windcave could compete more directly for SME merchants" and in particular whether "there are any significant barriers that would prevent Windcave focussing more on SME merchants".¹⁶
36. There are no barriers whatsoever to Windcave competing for SME customers.

⁹ <https://help.posbosshq.com/en/articles/645757-eftpos-and-payment-options-new-zealand>

¹⁰ <https://www.windcave.com/Payment-Express-and-RMS-announce-POS-Integration-nz>

¹¹ <https://eftco.co.nz/industry-solutions/cafes-and-restaurants/>

¹² <https://eftco.co.nz/industry-solutions/tourism-and-events/>

¹³ <https://eftco.co.nz/case-studies/>

¹⁴ <https://www.eftposnow.co.nz/products/hospitality>

¹⁵ <https://www.bnz.co.nz/business-banking/payments/payclip>

¹⁶ SOI, at [54].

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37. First, SME customers' requirements are simpler than enterprise/commercial customers' requirements. Therefore, to the extent a supplier is able to offer solutions that fulfil enterprise/commercial customers, it would readily be able to offer a more simple solution to SME customers.

38. Second, it is not a matter of needing to consider whether Windcave *could* compete for SME customers, it already does. Windcave markets itself as a "high-growth, innovative, global leader in payment technology delivering a range of secure solutions to major corporate, banking and SME clients globally".¹⁷ Windcave is already a strong competitor for SME customers in New Zealand, and **[CONFIDENTIAL]**:

(a) **[CONFIDENTIAL]**.

(b) **[CONFIDENTIAL]**¹⁸

(c) **[CONFIDENTIAL]**

39. These recent examples demonstrate that Windcave is already a significant competitor for SME customers, and there is no credible basis to conclude that there are any barriers preventing Windcave from further expanding its presence in supplying SME customers.

Ingenico/Paymark will continue to constrain Verifone post-Acquisition

40. While Ingenico does not currently supply terminals directly to merchants:

(a) Smartpay agrees that "the threat of Ingenico's entry into the SME market" would "constrain the merged entity post-transaction".¹⁹ Ingenico/Paymark are the main switch and certifying body in New Zealand as well as the largest terminal supplier in the world. There are no conceivable barriers for them to enter or expand in any level of the payments supply chain, and Ingenico/Paymark are likely to take any steps they consider necessary to maximise revenues (including further expanding if they considered that Verifone was able to divert revenue streams away from their network); and

(b) even if Ingenico/Paymark chose to not supply terminals directly to merchants, as the Commission acknowledges,²⁰ it is especially well placed to increase support to terminal retailers and resellers to compete against Verifone so as to retain volumes over its own network.

41. In addition to the above as the SOI noted, Ingenico owns Bambora "a global payment solutions provider, [which] was launched in 2015 with the explicit ambition of simplifying payments for businesses in the SME segment." In New Zealand, Ingenico markets Bambora as offering "an end-to-end payment experience: one contract, one contact and one solution. We can meet all your payment acceptance needs, acting as a single point of entry to the payments network."²¹ In announcing the acquisition of Paymark in 2018, Ingenico said:²²

¹⁷ <https://www.windcave.com/careers>

¹⁸ **[CONFIDENTIAL]**

¹⁹ SOI, at [58].

²⁰ SOI, at [59].

²¹ <https://www.bambora.com/en/nz/online-payments/>

²² <https://www.ingenico.com/press-and-publications/press-releases/finance/2018/01/ingenico-group-reaches-an-agreement-to-acquire-paymark.html>

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By combining its historical terminals assets with Paymark and Bambora in the Pacific region, Ingenico will be well positioned to create great value for New Zealand retailers and financial institutions with a complete omnichannel offering including POS and terminal management, in-store and online processing capabilities and valued-added services such as analytics and loyalty.

Building on the recent acquisition of Bambora, Ingenico will now be able to expand its offering in New Zealand, delivering services and solutions in all areas of payments for **small and large businesses and financial institutions alike**" said Dominic White, VP Pacific Region for Ingenico Group. "I am looking forward to welcoming Paymark's team to Ingenico Group." [Emphasis added]

42. The above demonstrates that Ingenico, with its multiple business platforms in New Zealand, is well-placed to compete in the supply of payments solutions to SME and other customers in New Zealand.

43. [CONFIDENTIAL]

mPOS compete for SME customers

44. Smartpay also notes that the SOI did not reflect that Smartpay has seen a number of merchants switch traditional EFTPOS terminals for newer payments technologies, such as mPOS. [CONFIDENTIAL] BNZ's PayClip products has been described by independent analysts, such as Canstar, as "ideal for small businesses, particularly those who are mobile", noting that the "the product's lightweight structure enables ease-of-use for a huge section of the business community (particularly small to medium enterprises (SMEs))".²³ Market research finds that the uptake in mPOS is expected to continue grow at a compound annual growth rate ("CAGR") globally of 19% through to 2027 (described as "explosive growth").²⁴ Ingenico's Bambora describes this as the "mPOS revolution".²⁵

45. For these reasons, both the UK's Competition & Markets Authority ("CMA") and the European Commission ("EC") have treated traditional POS and mPOS as competing in the same relevant market – in particular noting, the strong competition from mPOS in relation to SME-type customers. For example:

(a) the EC cited the "strong competition in this space in particular from mPOS terminals suppliers (PayPal/iZettle, Square, SumUp) who are specifically targeting smaller merchants".²⁶

(b) the CMA found that providers of traditional POS and mPOS compete in the same relevant market, citing "very similar" functionality, lower pricing, diversion ratios of over 30% between mPOS and POS and the attractiveness of such options, in particular for smaller merchants.²⁷

46. Competition from these newer technologies is only going to increase, and it important that the Commission's forward-looking analysis appropriately reflects this – both in consideration of market definition, and then in assessment of competitive effects (as recognised by two of the world's most pre-eminent competition regulators).

²³ <https://www.canstar.co.nz/business-banking/innovation-excellence-bnz-payclip/>

²⁴ <https://imagine.next.ingrammicro.com/IngramMicroAdvisor/media/imlibrary/site/d/datacapturepos/docs/KD2019-9102d2-DCPOS-Infographic-April-v3.pdf>

²⁵ <https://www.bambora.com/articles/how-mobile-pos-is-reshaping-retail/>

²⁶ Case M.9357 – FIS / Worldpay (5 July 2019).

²⁷ https://assets.publishing.service.gov.uk/media/5cffa74440f0b609601d0ffc/PP_iZ_final_report.pdf

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47. **[CONFIDENTIAL]**

48. **[CONFIDENTIAL]**

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49. **[CONFIDENTIAL]**

50. **[CONFIDENTIAL]**²⁸

[CONFIDENTIAL]

51. **[CONFIDENTIAL]**

52. **[CONFIDENTIAL:]**

(a) **[CONFIDENTIAL:]**

(b) **[CONFIDENTIAL]**

[CONFIDENTIAL]

53. **[CONFIDENTIAL]**²⁹

54. **[CONFIDENTIAL]**

55. **[CONFIDENTIAL]**

56. **[CONFIDENTIAL]**

57. **[CONFIDENTIAL]**

58. **[CONFIDENTIAL]**

Concluding remarks

59. We trust the above provides sufficient further information to demonstrate why Smartpay is confident the Acquisition will not give rise to any competition issues, but please let us know if Smartpay can be of any further assistance.

60. Finally, as the Commission will appreciate, the contents of this submission contains highly confidential and commercially sensitive and Smartpay requests that it is treated as such. Confidential information is identified by yellow highlighting. Accordingly, it is requested that this information be held by the Commission in strictest confidence, and the information is provided on the basis that it may only be used for the purposes of the Commission considering Verifone's application for clearance to acquire Smartpay (and may not be disclosed to any other party including Verifone without Smartpay's written consent).

61. Confidentiality is sought for the purposes of section 9(2)(b) and (ba) of the Official Information Act 1982 on the grounds that:

²⁸ <http://nzx-prod-s7fsd7f98s.s3-website-ap-southeast-2.amazonaws.com/attachments/SPY/345113/312992.pdf>.

²⁹ **[CONFIDENTIAL]**

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- (a) the information is commercially sensitive and valuable information that is confidential to Smartpay; and
 - (b) disclosure would be likely to unreasonably prejudice the commercial position of Smartpay, and prejudice the supply of similar information to the Commission in the future.
62. Smartpay requests that it be notified of any request made to the Commission under the Official Information Act or otherwise for release of this information, and that the Commission seeks its views as to whether the information remains confidential and commercially sensitive at the time responses to such questions are being considered.