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Statement of Preliminary Issues

Ingenico / Paymark

23 April 2018

Introduction

1. On 20 April 2018, the Commerce Commission registered an application (the Application) from Ingenico Group SA (Ingenico) to acquire 100% of the shares in Paymark Limited (Paymark).[1]

2. The Commission will give clearance if it is satisfied that the proposed merger will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

3. This statement of preliminary issues sets out the issues we currently consider to be important in deciding whether or not to grant clearance.[2]

4. We invite interested parties to provide comments on the likely competitive effects of the proposed merger. We request that parties who wish to make a submission do so by **Friday 4 May 2018**.

5. At the end of this document there is a glossary of terms that we have used.

The parties[3]

6. Ingenico is a global payment services company offering point of sale (POS) payment terminals, electronic payment software and transaction services. In New Zealand, Ingenico is a wholesale supplier of its POS terminals to resellers and operates a digital payments gateway business called Bambora.

7. Paymark is an operator of a payment switch and is owned by four of New Zealand's five major trading banks: ANZ, BNZ, Westpac and ASB. Paymark's payment switch receives electronic requests for transfer of funds from merchants at the POS and routes them to the appropriate bank for transfer of those funds. In addition to its switching infrastructure, Paymark provides a range of services complementary to

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1 A Public version of the application will be available on our website at: http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/.

2 The issues set out in this statement are based on the information available when it was published and may change as our investigation progresses. The issues in this statement are not binding on us.

3 See the Application for more information on the parties.

payment switching (including data analytics and customised payment solutions for switching customers) and some eCommerce offerings including digital payment gateways.

Our framework

8. Our approach to analysing the competition effects of the proposed merger is based on the principles set out in our Mergers and Acquisitions Guidelines.[4] As required by the Commerce Act 1986, we assess mergers using the substantial lessening of competition test.

9. We define markets in the way that we consider best isolates the key competition issues that arise from the merger. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.[5]

10. We compare the extent of competition in each relevant market both with and without the merger. This allows us to assess the degree by which the proposed merger might lessen competition.[6] If the lessening of competition is likely to be substantial, we will not give clearance to the proposed merger. When making that assessment, we consider, among other matters:

    10.1 constraint from existing competitors – the extent to which current competitors compete and the degree they would expand their sales if prices increased;

    10.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and

    10.3 the countervailing market power of buyers – the potential constraint on a business from the purchaser's ability to exert substantial influence on negotiations.

Market definition

11. Ingenico submits that the New Zealand markets potentially affected by the transaction are:[7]

    11.1 the national market for the provision of payment switching and processing services for electronic transactions (the switching market);

    11.2 the national market for the wholesale supply of payment terminals and terminal connectivity to resellers (the wholesale terminal market);

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4 Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013. ("Merger guidelines") Available on our website at www.comcom.govt.nz

5 Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

6 *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

7 The Application at [56].

11.3 the various regional markets for the re-sale supply of payment terminals and terminal connectivity to merchants (the retail terminal markets);

11.4 the national market for the provision of digital payment services (the digital payment market), including:

11.4.1 eCommerce payments by credit and debit card; and

11.4.2 other online payment services.

12. Ingenico also acknowledges that there may be separate markets for the provision of payments-related services such as data analytics, POS terminal certification and payment authorisation services.

13. We will test whether these market definitions are appropriate.

Without the merger

14. We will consider what the parties would do if the merger did not go ahead. We will consider the evidence on whether the without-the-merger scenario is best characterised by the status quo, or whether the parties would seek alternative options, for example, finding a different buyer for the company.

Preliminary issues

15. The questions that we will be focusing on when assessing whether the proposed merger is likely to substantially lessen competition in the relevant markets are:

15.1 would the merger reduce competition through eliminating the constraint that the two entities impose upon one another?

15.2 would the merged entity be able to engage in behaviour that forecloses rivals and renders them less able to compete?

Would the merger reduce competition through eliminating the constraint that the two entities impose upon one another?

16. Where two suppliers compete in the same market, a merger would remove a competitor that would otherwise act as a competitive constraint, potentially allowing the merged entity to raise prices or lessen quality.[8] A merger could also reduce competition if one of the merging firms was a potential or emerging competitor. In such a case, the merger may preserve the market power of the incumbent firm.

17. The Application submits that the only existing overlap between Ingenico and Paymark services is in relation to digital gateway services. The Application submits that the merger would not result in any substantial lessening of competition in this

[8] For ease of reference, we only refer to the ability of the merged entity to “raise prices” from this point on. This should be taken to include the possibility that the merged entity could reduce quality or worsen an element of service, i.e. it could increase quality-adjusted prices.

market due to the small degree of aggregation and the presence of other competitors.[9]

18. We will assess the degree of constraint that Ingenico and Paymark currently impose upon one another for these services. To the extent that any constraint is material, we will assess whether the lost competition between the merging parties could be replaced by rival competitors.

Would the merged entity be able to foreclose rivals?

19. A merger between suppliers can result in a substantial lessening in competition due to vertical or conglomerate effects.

Vertical effects

20. We will consider whether the proposed merger raises vertical effects. A vertical merger is a merger between firms operating at different levels of a supply chain (for example, a wholesaler and a retailer). Vertical mergers can increase a merged entity's ability and/or incentive to foreclose its rivals, including by raising the costs of rivals or by changing the conditions of entry to make it harder to enter or expand.

21. The merger between Ingenico and Paymark would combine two firms that provide services at different levels of the supply chain. We will assess whether this might create the ability and incentive to foreclose rivals. We will consider, for example, whether the merged entity would seek to make it harder or more costly to gain access to Paymark's switch and/or related services in order to foreclose those firms that:

    21.1 supply terminals in competition with Ingenico; and/or

    21.2 provide digital gateway services in competition with Paymark and Bambora.

22. The strategy described above could result in a substantial lessening of competition if it raised the costs of rivals or changed the conditions to make entry and expansion harder, such that rivals were a weaker constraint on the merged entity. This may allow the merged entity to raise prices or reduce the quality of its service.

23. The Applicant submits that the proposed merger does not raise any vertical concerns.[10] The Applicant argues that rivals for the supply of terminals could use a rival switch, and that it would not be in the interests of the merged entity to engage in such conduct because any profits gained in the supply of terminals would not exceed the lost profits from reduced switch transactions.

24. As part of our assessment of the vertical effects of the merger, we will consider:[11]

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[9] The Application at [119].

[10] See for example, the Application at [126].

[11] Merger Guidelines at 46.

24.1 whether the merged entity would have the ability to foreclose, through having control over an important input;

24.2 whether the merged entity would have the incentive to foreclose, through earning additional profit from the strategy; and

24.3 whether the competition lost from any foreclosed competitors would be sufficient to have the likely effect of substantially lessening competition.

Conglomerate effects

25. A conglomerate merger is a merger between firms supplying goods or services that may be complementary. Such mergers may, in certain situations, increase a merged firm's ability and/or incentive to foreclose competitors by, for example, bundling together complementary products, or by refusing to sell those goods or services to customers unless they also buy a second service from it (tying).

26. Some of the services that Paymark and Ingenico offer could be viewed as complementary. For example, for a merchant to offer customers the ability to pay by debit or credit, the merchant requires both a terminal and access to a switch network that processes the payment. This creates the potential for the merger to cause conglomerate effects. This could result in a significant lessening of competition if it raised the costs of rivals or denied rivals from reaching sufficient scale to provide effective competition.

27. As part of our assessment of the conglomerate effects of the merger, we will consider:

27.1 whether the merged entity would have the ability to foreclose, through having market power for at least one complementary product;

27.2 whether the merged entity would have the incentive to foreclose, through earning additional profit from the strategy; and

27.3 whether the competition lost from the foreclosed competitors is sufficient to have the likely effect of substantially lessening competition.

Next steps in our investigation

28. The Commission is currently scheduled to make a decision on whether or not to give clearance to the merger by **19 June 2018.** However, this date may change as our investigation progresses.[12] In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.

29. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above.

[12] The Commission maintains a clearance register on our website at http://www.comcom.govt.nz/clearances-register/ where we update any changes to our deadlines and provide relevant documents.

Making a submission

30. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference "Ingenico Paymark" in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **Friday 4 May 2018**.

31. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission's website.

32. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA. For example, if disclosure would unreasonably prejudice the supplier or subject of the information. In assessing the confidentiality of information contained in submissions for the purposes of publication on our website, we intend to apply an approach that is consistent with the OIA.

Glossary

Term	Description
Digital payments gateway	Software that facilitates a payment by delivering transaction information (such as credit card details) securely over the internet. Payment gateways can be seen as a digital alternative to a physical payment terminal.
eCommerce	Commercial transactions executed online. eCommerce transactions are generally supported by a website or application that stores or inputs consumer payment details, enabling transactions with merchants to take place.
Payment terminals (terminals)	A device that interfaces with payment cards to make electronic funds transfers, also known as a point of sale terminal, a credit card terminal, or an EFTPOS terminal.
POS	The place at which a retail transaction is carried out.
Switch	Payments infrastructure that sends transaction information to the correct issuing or acquiring financial institution (depending on the type of transaction) so that the funds can be taken from the customer's account and delivered to the merchant.