Submission to the Commerce Commission on:

Payments between bank accounts –

Request for views on payments made over the interbank payment network

Date: 9 October 2023

Kiwibank submission to the Commerce Commission on payments between bank accounts – request for views on payments made over the interbank payment network

Executive summary

1. Kiwibank welcomes the opportunity to provide feedback to the Commerce Commission (**Commission**) on its request for views on whether to designate the interbank payment network (**network**) under the Retail Payment System Act 2022 (**RPS Act, consultation**). We are also grateful to members of the Commission and MBIE for meeting with us to discuss the consultation.

2. In summary, Kiwibank's submission is that:

    a) The Commission has not made the case that designating the network would meet the purposes of the RPS Act – the Commission's objectives can be met without regulation, and the possibility of regulatory intervention at this stage may cause market inefficiencies, uncertainty, and delays.
    b) There is a significant risk of overlap with the Consumer and Product Data Bill (**CPD Bill**) which is likely to create an inefficient, complex open banking framework.
    c) The Commission's energy could be better directed at a first principles review of open banking in Aotearoa, including a cost-benefit analysis.
    d) The API Centre Minimum Open Banking Implementation Plan (**implementation plan**) is binding and creates public accountability for the delivery of agreed API Standards. The established timeframes for Kiwibank's delivery of the implementation plan are appropriate relative to its size and market share.

3. We agree that the delivery of open API standards will create a strong foundation for payments innovation and Kiwibank is committed to doing its part to enable that. However, in our view, the consultation does not adequately recognise the other factors which have to date slowed the sector's delivery of open API standards, in particular:

    a) The inability to negotiate common terms of access between banks and third party payment providers as a result of competition law. Minimum standards in relation to privacy, security, disputes, and the management of liability are fundamental and terms of access need to balance the efficiency of the partnering process with safety and security for customers.
    b) Uncertainty regarding the interaction between the API Centre's work and the development of the CPD Bill. There was a reasonable possibility that the legislative framework could partially or entirely overtake industry-led initiatives (including the standards required under the implementation plan). It was also expected that legislation would resolve issues around privacy, security and liability.
    c) Numerous 'once-in-a-generation' legislative changes in recent years have taken precedence over the delivery of other technology change. The impacts of these trade-offs are more acute for smaller, domestically owned banks like Kiwibank – as has been expanded on in the industry's response to the Commission's Market Study preliminary issues paper. Regulatory reforms compete for priority with industry-led initiatives and strategic objectives like growth and innovation.

4. Notwithstanding those delays, as noted below, there is no suggestion that the domestic systemically important banks (**D-SIBs**) will not deliver the first part of the implementation plan by 30 May 2024 – those historical impediments will not prevent progress.

5. Kiwibank has reviewed Payments NZ's submission on this consultation, which we support. We will not repeat the submissions made there, except to reinforce some key points:

a) Innovation, open API standards, and reasonable terms for partnering and access are important requirements for new payment solutions, however, these alone will not ensure success. Customer experience, fraud protection, dispute resolution services, consumer trust, scale and ubiquity are also essential. The presence of these is what makes the card schemes attractive to customers.
b) While innovation may create opportunities for new payment options using bank transfers, it is possible that this may ultimately come at a cost. Bank transfers are free at present, but innovation and new functionality require investment. It's unlikely that bank transfers could remain free for merchants and customers if supplemented with 'overlay services' like fraud protection, improved functionality, and security.
c) Payments NZ has identified a number of technical issues with the proposed designation, particularly, in respect of the definition of 'interbank payment network' and the scope of the designation. We also note Payments NZ's view that the proposed designation will not achieve the Commission's desired outcomes and that it would be likely to create legal and practical difficulties.

Insufficient evidential foundation for designation under the RPS Act and risk of a piecemeal regulatory framework

6. We understand that it is the Commission's current intention to advance the delivery of open banking by exercising its regulatory powers to define and designate the interbank payment network. However, as explained below, we are concerned that:

    a) The Commission has not established a reasonable evidential foundation to show that exercising its regulatory powers meets the purposes of the RPS Act.
    b) The proposed regulatory intervention will lead to a piecemeal and fragmented open banking framework, which is unlikely to deliver the best outcomes for Aotearoa.

7. The purpose of the RPS Act is to promote competition and efficiency in the retail payment system for the long-term benefit of merchants and consumers in New Zealand.[1] The functions and powers of the Commission and the Minister must be exercised for this purpose. A necessary pre-condition of exercising this power is, therefore, a reasonable evidential foundation that the recommendation meets the purposes of the RPS Act. Particularly, that regulation is likely to be efficient – in other words, that the benefits outweigh the costs.

8. In our view, that evidential foundation has not been established here – the costs of regulatory intervention far outweigh any perceived benefits:

    a) The Commission can achieve the desired outcome without exercising its regulatory powers. We understand that the Commission has identified three preconditions to payments innovation: (1) open API standards that respond to use cases, (2) banks have built APIs to those standards, and (3) standardised partnering agreements in place. The first and second of those preconditions already exist or are underway. The Commission does not need to designate the network to achieve the third. It could, for example, support this through the Commerce Act authorisation process or other guidance. In those circumstances, the exercise of the Commission's regulatory powers does not meet the purposes of the RPS Act.
    b) If the Commission's intent is for (2) to be delivered more quickly than what the industry has committed to in the implementation plan, we do not believe that is achievable. The first suite of open API standards is due to be delivered in eight months. We are not aware of any

[1] Section 4(1).

indication that the relevant banks won't meet that timeframe. In our view, designating the network may cause further delays (discussed below).

c) The Commission has broad powers under the RPS Act which can be exercised in many ways, some of which are outlined in table 5.1. The potential for regulation will introduce uncertainty at a critical time of banks' implementation programmes. Banks will be concerned about the potential that the Commission issues standards on access requirements or directions about network rules that are similar to, but not the same as the API Centre's standards and other governing documents. This uncertainty may drive banks to pause work pending the outcome of the consultation process to ensure that what's being developed and delivered aligns with any regulatory requirements (this would avoid the need for rework to the same systems within a short space of time which is both costly and an inefficient use of scarce resources).

d) Finally, and as discussed in more detail below, we do not believe the efficiency objective is met in light of other proposed legislative frameworks which are intended to achieve the same thing (ie, deliver open banking).

9. If the Commission proceeds to recommend that the network is designated, and the government also continues with the development of the CPD Bill, New Zealand's regulatory framework for open banking will be fragmented and piecemeal, and therefore unlikely to deliver the best outcomes for Aotearoa.

10. Although the Commission asserts that the exercise of its regulatory powers would complement the CPD Bill, we consider there is a real risk that these two regimes will overlap, resulting in inefficiency and unnecessary compliance burden (and therefore cost). In that regard, we note the recent statutory review of the Australian consumer data right (**CDR**) which recommended that limiting duplication and overlapping regulatory obligations would make it easier to navigate, reducing compliance burden and confusion for participants.[2]

11. We also note the Commission's comment that it will continue to engage with MBIE while these two regimes are developed, which may result in changes to the Commission's approach. While we welcome the Commission indicating that it will be responsive to changes in the broader legislative ecosystem, we reiterate that banks need certainty about their regulatory obligations (particularly to the extent those obligations are a trigger for technology change, which requires at least 12-18 months lead time). If the Commission does choose to proceed, we suggest that the more appropriate response would be for MBIE to consider whether the banking sector should be the first designated under the CPD Bill, or whether it is appropriate for the banking sector to be designated at all.

First principles review of open banking needed

12. Kiwibank supports a first principles review of open banking, including a cost-benefit analysis. This should consider which open banking use cases would deliver the greatest impact, the appropriate level of investment by industry, measures of success, the distribution of risk between participants, and the best legislative/regulatory vehicle for delivering it. A regulatory sandbox could also help to test the viability of novel use cases. Without this, we consider there is a real risk that Aotearoa's open banking framework is inappropriate for the relatively small size of the market, over capitalised, and underutilised. We note Kiwibank and NZBA's recent submissions to MBIE on the exposure draft of the CPD Bill, which highlight our concerns with the Bill as drafted.

[2] https://treasury.gov.au/sites/default/files/2022-09/p2022-314513-report.pdf.

13. The experiences of the United Kingdom and, more recently, Australia illustrate the risk of over capitalisation and underutilisation. A recent statutory review of the Australian CDR noted stakeholder feedback of very little awareness of CDR and consequent low uptake. Additionally, the review found that the size, complexity, and prescriptiveness of the regime prevented participants from focussing on developing new products and services, and created a barrier to participation in the regime by smaller businesses.

14. Similarly, a review of the UK's implementation of open banking estimates that it is used by only 7 million consumers and businesses, and that use cases are limited and are not regularly used.[3] UK Finance estimates that the cost incurred between 2016 and 2019 to establish the infrastructure for open banking was £1.5 billion.[4] Despite open banking having been implemented seven years ago, payment APIs have not been applied to the in-person payments use case in the UK.[5]

15. The consultation paper points to examples from India, Brazil and Thailand as evidence of the opportunities in the payments space, however, in our view, these are not good comparators with Aotearoa. The key difference being that those countries all have much larger populations than New Zealand with differing problem statements, for example, moving away from largely cash-based economies and significant financial inclusion challenges.

Payments NZ industry implementation plan gives certainty APIs will be delivered

16. In the consultation paper, the Commission expresses the view that the minimum delivery dates in the implementation plan are not ambitious enough, and that there is nothing to prevent these timeframes from being extended.

17. Kiwibank does not agree with that assessment for three reasons. First, this is the first time that Payments NZ participants have publicly committed to binding implementation timeframes for delivering API standards. With public commitment comes accountability. There will be commercial and reputational impacts for any member of the API Centre that does not meet the agreed dates in the implementation plan. Particularly if all other participants deliver the API standards on time. We acknowledge that there was a slow start to the industry's development of open APIs, however, that was in large part due to delivery being more complex than first thought. Payments NZ and its participants now have a deeper understanding of the open banking ecosystem and the technical requirements needed for current and future capabilities.

18. Secondly, the implementation plan was the subject of extensive consultation and has the buy-in of participants. Banks have been able to commit to the timeframes in the plan as they're proportionate and realistic, taking into account other work programmes and competing priorities (both legislative/regulatory and strategic). We note Kiwibank's minimum delivery dates are longer than those of the big four Australian banks (ie those banks classified by RBNZ as D-SIBs) – the context for that is discussed in more detail below.

[3] The (unmet) potential of Open Banking; Towards a system that provides incentives for all participants, 4 July 2023, pg 4: Open_Banking_Report_Final.pdf (ulsterbank.co.uk)
[4] The (unmet) potential of Open Banking; Towards a system that provides incentives for all participants, 4 July 2023, pg 16: Open_Banking_Report_Final.pdf (ulsterbank.co.uk)
[5] The (unmet) potential of Open Banking; Towards a system that provides incentives for all participants, 4 July 2023, pg 12: Open_Banking_Report_Final.pdf (ulsterbank.co.uk)

19. Thirdly, in response to the Commission's commentary that the implementation plan is not ambitious enough, we note that it would be very unlikely the proposed regulatory framework could be delivered more quickly than the implementation plan. The first tranche of API standards is due to be delivered by 30 May 2024, whereas the next stage in the regulatory development process is not due to be completed until Q1 2024. If anything, regulatory intervention will be more likely to cause delays by creating further uncertainty and distraction (as discussed above). In light of that, we query whether this comment is intended as a criticism of Kiwibank's longer implementation timeframe. Our response to that is as follows.

20. By staggering the minimum delivery dates for participants of different sizes/scales, Payments NZ has recognised that Kiwibank does not have the resources to build and deliver APIs within the same timeframes as the D-SIBs. Staggered implementation reflects the proportionate application of standards to industry participants. It is also consistent with overseas experience.[6]

21. We would strongly oppose any intervention by the Commission to bring forward Kiwibank's minimum delivery dates. It would create an unfair challenge for Kiwibank which does not have the capacity to deliver open API standards any sooner, particularly given the lead-time required for a project of this size and scale, and Kiwibank's existing pipeline of technology change. Additionally, given that the vast majority of payments are processed by the D-SIBs, their delivery of open APIs will give payment providers meaningful access to the payments network ([redacted])[7] – Kiwibank's payments processing is minor in comparison.

[6] In Australia where a CDR is mandatory, the major four banks (ANZ, NAB, Westpac and CBA), owners of the New Zealand D-SIBs, went first and the rest later (https://www.cdr.gov.au/rollout). In the UK, open banking was mandated for the nine largest banks and is voluntary for others.

[7] [redacted]