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SUBMISSION ON TARGETED REVIEW OF THE COMMERCE ACT 1986

Introduction

1 Worldline New Zealand (formerly known as Paymark) was established in 1984 to provide low-cost Eftpos transaction processing as a way of enabling banks and merchants to move from cash to electronic payments. We are New Zealand's leading payments innovator. We design, build and deliver payment solutions that help Kiwis succeed and we have a strong drive to see New Zealand at the forefront of global payments innovation once again. Worldline New Zealand has been a part of Worldline SA, our parent company (a French corporation), since 2020. We are a New Zealand registered business, employing circa 200 people in Auckland. We process Eftpos transactions and transactions that are routed out to the international card schemes, we provide payment gateway solutions to ecommerce platforms and directly to ecommerce merchants. We have an API-based payment platform, and an in-market open banking payment product called 'Online Eftpos'. We're also working on a modern replacement on Eftpos and have a proof-of-concept successfully running that uses government issued digital identity credentials at the time of a payment.

2 Worldline supports initiatives that enhance industry competition and recognise the crucial role of regulators and government agencies. We appreciate the opportunity to comment on the Ministry of Business, Innovation and Enterprise's (**MBIE**) targeted review of the Commerce Act 1986 (the **Review**).

3 Our initial views on specific matters addressed by MBIE in the Review document are as follows. In summary:

3.1 we support reviewing New Zealand's merger regime, but the focus should be on addressing inefficiencies in the current clearance process;

3.2 we agree that more can be done to facilitate beneficial collaboration. Our experience has been that market participants are so wary of the risk of breaching competition law that they are reluctant to even engage in discussions about possible collaborations. The existing authorisation process is also too slow and resource-intensive and stifles or delays innovation. We support proposals to empower the Commission to grant class exemptions and/or implement a statutory notice regime, provided those processes can be made streamlined and efficient for business; and

3.3 we have reservations about increasing reliance on industry code or rules, as poorly designed codes tend to inhibit innovation and stifle competition.

4 We expand on these key issues below, and address them further in response to MBIE's questions in the Annex to this letter.

Time and cost associated with merger control processes

5 We support reviewing New Zealand's merger control regime, but we think the emphasise should be on refining the current clearance process so that it is more streamlined and efficient.

6 The existing process under the merger regime imposes significant time and financial burden on the parties involved. Measures to streamline and improve the current framework would be highly advantageous.

7 The Commerce Act 1986 (the **Act**) stipulates that the Commerce Commission (**Commission**) is obligated to either give a clearance or decline to give clearance within 40 working days after the clearance is registered, unless the Commission and the applicant agree an extension. The 40 working day deadline was implemented in 2017, in recognition of the fact that the existing 10 working day period was unrealistic. This suggests that the Commission should be capable of clearing most mergers within the statutory timeframe of 40 working days.

8 In practice however, the Commission more often than not fails to achieve this statutory timeframe. Over the past two years, the Commission has on average taken approximately 107 working days to make a decision. The Commission has cleared a merger within the 40 working day timeframe only six times. This indicates that the Commission's processes are substantially more prolonged than Parliament intended.

9 We consider this considerable delay highlights inefficiencies within the system. A prolonged process significantly deters merger activity in New Zealand, subjecting potential transactions to extended uncertainty, which can adversely impact business operations and employee retention/productivity. Additionally, the high costs associated with participating in this process (including filing fees and other expenses), make participation even more burdensome. This financial strain, combined with the uncertainty can ripple through businesses, causing them to delay critical decisions and strategic initiatives while the clearance process unfolds. Such delays can hinder growth opportunities and create instability, affecting employee confidence and potentially jeopardising the transaction's overall success.

10 While we acknowledge the Commission's responsibility to thoroughly assess the market and its participants, these issues underscore the pressing need for adjustments to current practices to better meet the practical demands of merger evaluations.

11 In our view, the central problem is that the threshold for declining a clearance application is low, which obliges the Commission to pursue theories of harm that have a correspondingly low probability. This means a substantial amount of time and effort goes into ruling out allegedly anticompetitive outcomes that are not likely to occur in practice. Our experience being acquired by Ingenico in 2018 illustrates the problem.

Case study 1: Ingenico Group SA & Paymark Limited Clearance

In 2018, Ingenico Group SA applied for clearance to acquire 100% of the shares of Paymark Limited, aiming to create a merged entity offering switching services, terminals and digital payment services.

The Commission primarily focused on whether the acquisition would enable Ingenico to inhibit rival terminal suppliers by foreclosing their access to switching services. The Commission dedicated considerable time to assessing this question, despite ample

evidence from the outset that Paymark had neither the ability nor the incentive to foreclose competing terminal suppliers.

Although the Commission eventually cleared the merger, determining the constraints on the merged entity would likely prevent anti-competitive conduct, the process took approximately 141 working days (about 6.5 months) from registration to clearance. This prolonged delay resulted in significant costs for all parties involved, including the bank owners, Ingenico, and Paymark. Ultimately, it still remains unclear to the parties involved why the process was so protracted for a theory of harm that, as subsequent events have shown, did not reflect Paymark's strategic interests.

Collaboration

12 Worldline supports reviewing the options available to facilitate beneficial collaboration under the Act. While the Act allows competitors to collaborate with other businesses under specific legislated conditions, we believe businesses should find it easier to engage in pro-competitive initiatives. Such initiatives can lead to improved outcomes for both consumers and businesses and enhance overall market dynamics.

13 The payments sector is an interconnected system that fundamentally relies on collaboration among its participants, including competitors, to function effectively and serve the best interests of consumers. Such collaboration is essential for activities like establishing industry standards and ensuring seamless transactions. Participants generally acknowledge the critical importance of competition regulations and support their enforcement to uphold fair and equitable market practices.

14 However, our current framework of cartel provisions is intentionally broad, presenting two significant challenges that warrant careful consideration in this Review. First, activities that are clearly competitive and efficient may inadvertently fall under these provisions, discouraging collaborations that could enhance market efficiency and expand consumer choice. Second, a strong compliance culture among participants prompts them to adopt an overly cautious approach. This often results in a reluctance to engage in discussions, even when proposed activities are well within legal boundaries, due to apprehensions about the Commission's enforcement stance and the broadly defined cartel provisions.

15 Theoretically, mechanisms such as exemptions, clearances, or authorisations address the issue of overly broad provisions. However, these processes are frequently prolonged, complex, and costly, deterring businesses from pursuing them. Furthermore, these procedures concentrate significant decision-making authority in the hands of the Commission, positioning it as the ultimate arbiter of permissible collaboration. This concentration of power can have profound implications for market design and innovation, potentially stifling collaborative efforts that could drive significant advancements and efficiencies in the market.

16 The following case study illustrates the critical need for collaboration among stakeholders to align objectives, engage regulators, efficiently invest resources, and coordinate efforts to achieve standardisation and streamline processes in enhancing New Zealand's payment systems.

Case study 2: Payments NZ Authorisation

In 2024, Payments NZ requested authorisation from the Commission for a collaboration to enhance the compatibility and efficiency of New Zealand's payment systems by standardising how third parties access banking data and services.

Payments NZ aimed to collaborate with open banking stakeholders to simplify partnerships for banks and third parties. The authorisation for a new partnering framework included an API Centre accreditation scheme and default standard terms

and conditions for banks and third parties. Their goal was to streamline access to banking data and services, facilitating easier connections for third parties with multiple major banks through standardised APIs.

The Commission approved the development with several conditions addressing concerns that the expected public benefits might not materialise without them. This caution arose from the risk of a conflict of interest in the decision-making process, which could undermine the potential benefits. The Commission indicated that if specific conditions were imposed, the benefits would likely surpass the detriments.

Although the Commission eventually granted the authorisation, the process took approximately 150 working days, from application submission to approval. As in the previous scenario, securing the authorisation required considerable resources, especially given the initiative's aim was to reduce barriers to access for payments through open banking. The Commission also imposed compliance conditions that will continue to impose costs on participants and potentially stifle innovation.

Given participants in a payments system (or any system) must agree basic rules and standards in order for the market to function, it is difficult to understand why the law should presumptively forbid such collaboration in the absence of Commission approval. No reasonable person would, we think, look at the proposed collaboration and conclude it could have a competition-lessening effect.

Currently, the industry is engaged in initiatives that coincide with MBIE's work on the Customer and Product Data Bill. It appears an opportunity was missed to advance the industry's work earlier, which could have allowed for better alignment and influence on the legislation, rather than having both processes occur in parallel.

17 With this in mind, initiatives that streamline and reassure market participants about their compliance obligations, or allow for quicker approvals, would be beneficial. The Review raises several preliminary options for consideration. We conditionally support:

17.1 empowering the Commission to grant class exemptions or specify safe harbours; and/or

17.2 introducing a statutory notification regime.

18 These options would offer businesses enhanced regulatory clarity and well-defined rules. Clear guidelines on permissible collaborations would reduce uncertainty, streamline the approval process and allow businesses to engage in beneficial collaborations more efficiently, for the benefit of consumers. However, it is important that:

18.1 safe harbours/class exemptions aren't interpreted as the implied limit of what is permitted (i.e. that which is not permitted by the safe harbour/exemption is presumptively unlawful) as this would further constrain rather than encourage collaboration; and

18.2 that any statutory notification regime genuinely lowers the barriers to collaboration rather than creating additional delay and costs.

19 It would also be helpful if:

19.1 the scope of the cartel provisions were narrowed to more clearly reflect genuinely harmful conduct, as opposed to drawing a very wide net and then relying on exemptions;

19.2 the Commission adopted a more practical, and less conservative, approach to assessing the merits of collaboration proposals. Our experience has been that the Commission is very conservative, which means the benefits of collaboration are lost; and

19.3 processes to approve collaboration proposals operate quickly and are more streamlined.

Industry codes

20 Establishing industry codes or rule making could effectively address gaps within the existing competition regulation framework. However, while the goal is to enhance competition, in practice, it might inadvertently hinder progress in certain industries.

21 While standardisation could theoretically bring about efficiencies and interoperability, it could also present challenges if an industry code is overly rigid. As noted by MBIE, Australia employs varying levels of codes, including both prescribed mandatory codes and non-prescribed codes. Mandatory codes, in particular, could lead to rigidity, stifling innovation by forcing businesses to adhere to specific practices or technologies and limiting their ability to explore alternative solutions or develop unique offerings that differentiate them in the market. We are wary of unnecessarily delegating commercial decision-making, particularly in competitive markets, to regulators or policy makers.

22 We believe striking a balance between standardisation and innovation is crucial to fostering a vibrant and competitive market environment.

23 Additionally, the lack of flexibility in industry codes may hinder a business's ability to adapt to changing market conditions. In today's rapidly changing corporate environment, businesses must be agile to adapt to new technologies, consumer preferences, and competitive pressures. Industry codes that do not allow for adaptation can stifle competition and innovation by preventing businesses from responding to any new opportunities or challenges.

24 Any industry code should be targeted and proportionate and informed by a clearly defined and well-evidenced problem definition in order to promote fair competition while not stifling innovation. This can be achieved by setting clear standards that ensure a level playing field for all industry participants while safeguarding consumer interests. It is crucial for industry codes to incorporate flexibility to remain relevant and effectively supportive a competitive market landscape. The effectiveness of industry codes in fostering a competitive market will largely depend on how the Commission or the Minister develops, implements, and enforces them. Ultimately, the strength of an efficient and competitive market is as robust as the regulations that support it.

Thank you for the opportunity to make a submission on the Review. If you require any further information, please do not hesitate to contact Julia Nicol, Head of Public Affairs, Regulatory & Corporate Communications on Privacy of natural persons

ANNEX - RESPONSES TO QUESTIONS

Mergers	
Issue 1 – the substantial lessening of competition test	
1.	What are your views on the effectiveness of the current merger regime in the Commerce Act? Please provide reasons.
	Our primary concerns are that: (i) the current SLC threshold is very conservative, which prompts the Commission to focus on low-probability theories of harm, and (ii) consequently the clearance process is increasingly resource-intensive and prolonged, which undermines efficient transaction activity.
2.	What is the likely impact of the Commission blocking a merger (either historically, or if the test is strengthened) on consumers in New Zealand? Please provide examples or reasons.
	If the test is strengthened and a procompetitive merger is blocked, the likely impact on consumers is that choice is limited, innovation could be stifled, market efficiency may be hindered, and the combined company could be prevented from achieving positive outcomes like cost reductions or improved product quality. Blocking a beneficial merger can inadvertently harm competition by preventing potential positive effects on the market.
3.	Has the 'substantial lessening of competition' test been effective in practice in preventing mergers that harm competition? Please provide examples of where it has, or has not, been effective.
	In our view yes and, in fact, the Commission's process is overly conservative, resulting in significant delays for transactions that have positive consumer impacts, please refer to the case studies in our submission for examples.
4.	Should the 'substantial lessening of competition' test be amended or clarified, including for: a. Creeping acquisitions? If so, should a three-year period be applied to assessing the cumulative effect of a series of acquisitions for the same goods or services? b. Entrenchment of market power (eg including acquisitions relating to small or nascent competitors)? c. In relation to just the merger provisions or wherever the test applies in the Commerce Act? If so, how? Please provide reasons.
	We do not believe these amendments are necessary. The SLC threshold is flexible and already sets a low bar for declining clearance. Greater focus is needed on ensuring the process for approving pro-competitive mergers does not operate as a deterrent for efficient transactions.

5.	How important is it for the 'substantial lessening of competition' test in the Commerce Act to be aligned with the merger test in Australian competition law, for example, to provide certainty for businesses operating across the Tasman and promote a Single Economic Market? Please provide reasons and examples.
	In our view it is more important to get the law and process right for New Zealand conditions than it is to align with Australian law.
6.	How effective do you consider the current merger regime is in balancing the risk of not enough versus too much intervention in markets?
	It currently errs on the side of too much intervention. We don't measure that in terms of the number of declined clearance applications, but rather the cost and delay of obtaining clearance for pro-competitive mergers.
Issue 2 – Substantial degree of influence	
7.	Do you consider that the current test of 'substantial degree of influence' captures all the circumstances in which a firm may influence the activities of another? If not, please provide examples.
	No comment.
8.	Should the Commerce Act be amended to provide relevant criteria or further clarify how to assess effective control? If so, how should it be amended? Please provide reasons.
	No comment.
Issue 3 – Assets of a business	
9.	Do you consider the term "assets of a business" in section 47 of the Commerce Act is unclear or unduly narrows the application of the merger review provisions in the Act?
	No comment.
10.	If you consider there is a problem, how should the phrase be amended? For example, by: a. referring simply to "assets"? or b. should the definition of "assets" in the Commerce Act be further refined?
	No comment.
Issue 4 – Mergers outside the clearance process	
11.	What are your views on how effectively New Zealand's voluntary merger regime is working?

	We support the retention of a voluntary merger regime. The focus of these reforms should be on ensuring that the merger clearance process delivers timely decisions and does not unduly err on the side of caution.
12.	Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.
	We are not aware of transactions having proceeded that ought to have been blocked. In our experience, the business community in New Zealand engages responsibly with the Commerce Commission, both formally and informally, on transactions that potentially raise competition issues.
13.	What are your views on amending the Act to confer additional powers on the Commission to strengthen its ability to investigate and stop potentially anti-competitive mergers? In responding, please consider the merits of each of the options: a. A stay and/or hold separate power b. A call-in power c. A mandatory notification power for designated companies.
	We don't support changes that would put additional process steps in the way of implementing procompetitive mergers, or strengthening the Commission's powers to intervene. The existing threshold for intervention is low and the voluntary clearance regime is an important part of New Zealand's merger control regime.
Issue 5 – Behavioural undertakings	
14.	Should the Commerce Commission be able to accept behavioural undertakings to address concerns with proposed mergers? If so, in what circumstances?
	Yes, where behavioural undertakings would address competition concerns, are specific, targeted and time-bound, and can be readily monitored and enforced.
Anticompetitive conduct	
Issue 6 – Facilitating beneficial collaboration	
15.	Has uncertainty regarding the application of the Commerce Act deterred arrangements that you consider to be beneficial? Please provide examples.
	Yes. In our experience as a participant in the New Zealand payments sector, market participants are deterred from engaging even in demonstrably pro-consumer collaboration discussions as a result of the broad scope of New Zealand's competition prohibitions.
16.	What are your views on whether further clarity could be provided in the Commerce Act to allow for classes of beneficial collaboration without risking breaching the Commerce Act?

	We support narrowing the cartel provisions so that they are limited to conduct that is more recognisably cartel behaviour, as opposed to a broader prohibition that is then tempered by exemptions. We also support the implementation of class exemptions and/or safe harbours, provided: (i) they are not interpreted as meaning anything not within the safe harbour/exemption is prohibited, and (ii) they don't place additional process barriers in the way of efficient collaboration.
17.	What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?
	As above.
18.	If relevant, what do you consider should be the key design features of your preferred option to facilitate beneficial collaboration?
	As above.
Issue 7 – Anti-competitive concerted practices	
19.	What are your views on whether the Commerce Act adequately deters forms of 'tacit collusion' between firms that is designed to lessen competition between them?
	No comment.
20.	Should 'concerted practices' (eg, when firms coordinate with each other for the purpose or effect of harming competition) be explicitly prohibited? What would be the best way to do this?
	Our view is that the concerted practices prohibition is highly uncertain and is difficult to delineate from conscious parallelism.
Code or rule-making powers and other matters	
Issue 8 – Industry Codes or Rules	
21.	Do you consider that industry codes or rules could either: a. Fill a gap in the competition regulation regime or b. Prove a more efficient and appropriate response to addressing sector-specified competition issues rather than developing primary legislation? Please provide reasons.
	We do not object to industry codes in practice, provided they are targeted and proportionate and informed by a clearly defined and well-evidenced problem definition in order to promote fair competition while not stifling innovation. In practice, our experience has been that regulator-led rule making is often overly

	restrictive, based on an imperfect understanding of the sector, and stifles innovation.
22.	If you think that industry codes or rules could fill a gap, what class of matters or rules could be included in an industry code or rules?
	N/A
23.	If the Commerce Act is amended to provide for the making of industry codes or rules, what matters would be important to consider in the design of the empowering provisions in the Act?
	Industry codes should be targeted and proportionate and informed by a clearly defined and well-evidenced problem definition in order to promote fair competition while not stifling innovation.
Issue 9 – Modernising court injunction powers	
24.	Should the injunctions powers in the Commerce Act be updated to allow the court to set performance requirements? Please provide reasons
	N/A
Issue 10 – Protecting confidential information	
25.	Do you consider that the Commission effectively maintains the balance between protecting commercially sensitive information and meeting its legal obligations, including the principle of public availability? Please provide reasons or examples.
	No comment.
26.	What additional regulatory changes may be desirable relating to commercially sensitive information? Please provide reasons.
	No comment.
27.	What are your views on strengthening the confidentiality order provisions in s 100 of the Act?
	No comment.
Issue 11 – Minor and technical amendments to the Commerce Act	

28.	What are your views on these proposed technical amendments to the Commerce Act?
	No comment.
29.	Are there any other minor or technical changes you consider could be made to improve the functioning of New Zealand's competition law?
	No comment.
Any other issues	
30.	Are there any other issues that you would like to raise?
	No comment.
General Comments:	
Please refer to our submission attached.	