



Deacons

eBay International A.G.

Notification N93365

Reply to Further Submission

Dated: 10 June 2008

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1. Introduction

- 1.1 This further reply is made on behalf of eBay International A.G. (eBay) in response to the anonymous submission made to the Australian Competition and Consumer Commission (ACCC) dated 26 May 2008 (Submission).
- 1.2 eBay does not propose to provide the ACCC with a detailed critical analysis of the Submission. eBay has already provided the ACCC with the analysis conducted by NERA in respect of the Project and a comprehensive response to those submissions placed on the public register by 23 May 2008. The material in those documents adequately addresses the majority of points raised in the later submission and, in particular:
- (1) the analysis of eBay's relevant market; and
 - (2) the purpose and likely effect of the Conduct, when considered in light of the whole Project.
- 1.3 The Submission is, however, based on an analysis that contains a significant error in its consideration of PayPal's market. This error has led to an inappropriate and unduly narrow definition of the market in which PayPal competes. It is the intention of this reply merely to draw the ACCC's attention to this analytical error.

2. P2P online payment systems

- 2.1 The Submission's consideration of PayPal's market looks principally to technical distinctions in the way in which different payments services are provided. Such distinctions are not an appropriate approach to defining a market, unless it can be shown that they are relevant for the demand or supply side substitution of one payment system for another. No such analysis of why these features are relevant for either demand or supply side substitution is provided in the submission.
- 2.2 The submitting party simply asserts that only so called P2P online payment systems are substitutable for PayPal. It defines "P2P online payment systems" as those that:
- (1) provide payment infrastructure linking the online payer and payee;
 - (2) authorise transactions using that infrastructure, enabling a relationship of trust between the parties; and
 - (3) record transaction details, so that disputes can be resolved.

It further notes that P2P online payment systems facilitate direct payment communication between an online buyer (payer) and online seller (payee), without using traditional intermediaries such as banks and other financial institutions¹.

- 2.3 In distinguishing PayPal from other payment providers, the submitter notes the following:
- "In contrast, financial intermediaries in online debit card and credit card transactions facilitate payments using existing legal infrastructure (for example, clearing and settlement systems). Importantly, there is no direct communication (P2P communication) between the payer (online buyer) and payee (online seller) -*

¹ Paragraph 3.27

the payment transaction is instead conducted between the online buyer's financial institution and the online seller's financial institution.¹²

- 2.4 The submitter then notes³ that, from the perspective of an online seller, P2P online payment systems are unlikely to be closely substitutable for non-P2P online payment systems (including CC/DC, bank deposits and instant cash transfer services) because P2P online payment systems:
- (a) provide greater scalability - non-P2P online payment systems rely on financial institutions that are a potential central point of failure or bottleneck, which limits scalability; and
 - (b) are faster, easier and cheaper to establish and administer, particularly with respect to smaller, individual online sellers - non-P2P online payment systems require certain sunk costs in infrastructure (for example, merchant facilities) which are not required by P2P online payment systems.
- 2.5 On the basis of these points, it is apparent that the submitter is attempting to distinguish P2P online payment providers from non-P2P online payment providers by reference to:
- (1) the infrastructure used to process payments;
 - (2) the authorisation of payments;
 - (3) the existence or extent of direct communication between the payer and the payee; and
 - (4) the recording of transaction details for the purpose of resolving disputes.
- 2.6 However, it is difficult to see how any of these factors are, in fact, distinguishing features of PayPal when compared with the processing services offered by banks for debit and credit card payments or direct deposits. This is because:
- (1) PayPal payments can be funded via credit or debit card or by direct debit and, thus, PayPal payments necessarily rely on the payment infrastructure used by banks (and banks are necessarily involved in PayPal payments);
 - (2) banks also authorise payments using their own infrastructure and PayPal relies on such bank authorisation to facilitate payments between users;
 - (3) PayPal payments do not require any more communication between payer and payee than payments made by credit/debit cards or direct deposit. Indeed, they require less communication as no financial details are required to be provided for a payment to be made. The only communication is between PayPal and each of the sender and recipient; and
 - (4) banks and other financial institutions keep records of all credit/debit card and direct deposit payments and do, to some extent, become involved where payments or transactions are disputed.
- 2.7 Given the above, it is difficult to see the distinction between P2P and non-P2P online payment systems. Indeed, many of the distinctions drawn by the submitter would appear not to be matters that would be readily apparent to users, and buyers in particular. In

² Paragraph 3.28

³ at paragraph 3.29

regard to the substitutability of so called "P2P" and "non-P2P" systems, neither of the two reasons cited by the submitting party support the contention that these systems are not substitutable.

- 2.8 First, it is unclear what the submitting party means by the term 'scalability' and why this has any relevant connection with banks being a potential 'central point of failure' or 'bottleneck' – a curious submission itself.
- 2.9 Second, while for some recipients of funds, services such as PayPal are less costly than obtaining a merchant facility and accepting credit/debit card payments directly online (both in terms of the sunk cost of developing a payment mechanism and on-going merchant fees), they are not less costly than accepting payment by direct deposit.

3. Conclusion

- 3.1 Overall, the submitting party fails to recognise that there are three main ways in which a non-eBay seller can choose to receive online payments:

- (1) Direct deposit;
- (2) Obtaining a merchant facility and accepting credit/debit card payments through an online payment mechanism; and/or
- (3) Accepting the services of providers such as PayPal, Paymate or BPAY⁴.

- 3.2 Each of these three methods may differ in terms of the suite of services offered by the service provider(s), the underlying payment instruments that can be used, the extent of communication of financial information, the ease and convenience of use and so on. The services are also offered at different prices, since they are not precisely the same bundle of services as each other. Despite these differences, however, there is nothing to suggest that they are services provided in separate markets.

4. Factual Notes

- 4.1 In further response to the Submission, it is worth noting a number of recent events in the market that have some bearing on eBay's Notification. These are:

- (1) OZtion's reported 50% increase in sales, 65% increase in the value of merchandise traded and over 10% growth in memberships (of which 14% were sellers) since eBay announced the Project⁵;
- (2) The acquisition of Oztion by Jumbuck Entertainment a successful public company with operations throughout the world⁶;
- (3) The entry of Trading Post, a business operated by Telstra subsidiary, Sensis, into online auctions in direct competition with eBay and expressly in response to a perceived opportunity created by the proposed Conduct⁷; and
- (4) The reported 21% increase over the last 12 months in credit and charge card fraud, largely attributed to 'card-not-present' transactions, such as those conducted

⁴ or, should it enter the market in Australia, Google Checkout.

⁵ Announcement 3 June 2008 at <http://www.oztion.com.au/community/announcement.aspx>

⁶ ASX Announcement <http://www.asx.com.au/asx/statistics/showAnnouncementPDF.do?idsID=00847668>

⁷ http://www.about.sensis.com.au/news/media_releases/mediaRelease.php?id=20080527

over the internet. In this context, the comments of APCA's Chief Executive Officer, Chris Hamilton are apposite:

*"What the statistics are telling us is that even as today's technology makes it possible to buy anything from anywhere, it is also making it possible for fraudsters to operate globally. It's no surprise that Australian consumers and retailers need to take particular care when not dealing face-to-face."*⁸

4.2 The above events lend considerable support to the arguments that:

- (1) notwithstanding eBay's share of its relevant market, it is likely to be competitively constrained by existing and potential competitors with significant resources; and
- (2) regardless of submissions made to the contrary, the particular security issues faced by the eBay platform can be readily addressed by requiring users to adopt a payment system that is specifically suitable for transactions where consumers and retailers are not dealing face to face; that is, PayPal.

⁸ APCA Press Release
[http://www.apca.com.au/Public/apca01_live.nsf/ResourceLookup/Press_Release_Payments_Fraud_Statistics_4.pdf/\\$File/Press_Release_Payments_Fraud_Statistics_4.pdf](http://www.apca.com.au/Public/apca01_live.nsf/ResourceLookup/Press_Release_Payments_Fraud_Statistics_4.pdf/$File/Press_Release_Payments_Fraud_Statistics_4.pdf)