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By email

Ms Lyn Camilleri
Director
Adjudication
Australian Competition and Consumer Commission
Email: lyn.camilleri@accg.gov.au

Copy to:

Dear Ms Camilleri

Bendigo and Adelaide Bank and others applications for authorisation (A91546 & A91547) — Clarification of collective negotiation scope

Thank you for meeting with us on 25 October 2016 to discuss and address your questions regarding the scope of the collective negotiations. As discussed in the meeting, we have set out in writing below responses to each of the five questions you raised with us in turn. For completeness, we also attach an updated version of the Collective Negotiation Framework document that formed Annexure A to the applicants' 30 September 2016 confidential response to interested party submissions.

Responses to your questions

1 Is the application limited to negotiations with Apple?

We confirm that the target of the collective negotiation and boycott is limited to Apple.

2 What are the applicants seeking to collectively negotiate in relation to fees?

We confirm that the scope of the collective negotiation in relation to fees is limited to negotiating for the right of each issuer to decide whether to pass through to end customers some or all of the issuer's costs associated with participating in Apple Pay. In other words, the collective negotiation is limited to negotiating to remove any "no pass-through" restriction Apple imposes on issuers.

To be clear, the level of fees to be charged by Apple to an issuer in respect of the availability of Apple Pay will be determined by individual negotiation between each issuer and Apple. If authorisation is granted, the decision of whether to pass through some or all of the issuer's costs of participating in Apple Pay to end customers, and if so, how much of that cost to pass through, will be a decision of each individual issuer.

3 Are the applicants still seeking to address the ability of Apple to "otherwise impede or prevent" the provision of competing mobile wallets?

We confirm that the applicants seek to collectively negotiate access to the NFC function as well as the ability to provide competing mobile wallets without Apple unreasonably impeding or preventing this, for example through mechanisms such as unreasonably prohibiting access to the App Store, providing access to the App store on unreasonable terms, or unreasonably delaying the approval of the app and its availability in the App store.

4 Who will be entitled to participate in the collective negotiation?

Participation in the collective negotiations will be limited to entities offering credit and/or debit cards. This would include the applicants and other financial institutions and may also include retailers who have their own or co-branded credit cards.

5 Are security standards “off the table”?

The applicants wanted to be able to collectively negotiate in relation to the following:

- ID&V methods for the provisioning of cards in Apple Pay should have the same level of security that applies to ID&V methods for the applicants’ own cards (including when those cards are provisioned on the applicant’s own mobile wallets);
- CVM for transactions on Apple Pay should have the same level of security the applicants’ apply to transactions made using the applicants’ proprietary wallets and EMV cards;
- tokenisation services in Apple Pay should comply with existing obligations the applicants have agreed to with the card schemes;
- applicants should have the ability to request cardholder information in relation to transactions made using Apple Pay if the following conditions are met: (a) the information is reasonably required for the purposes of dispute resolution, fraud and customer complaints; (b) the cardholder has consented to the request and sharing of such information (for the limited purpose of resolving a dispute or conducting a fraud investigation); and (c) Apple already holds the information requested.

We can confirm that based on the changes Apple has made since its launch in the US, including following industry pressure in Canada, the applicants do not consider that collective negotiation is necessary in relation to these issues. In other words, security standards will be left to individual negotiation and are “off the table” for the purposes of the application.

Yours sincerely



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Annexure A

Collective Negotiation Framework

1 Collective negotiations with Apple in relation to Apple Pay

For the duration of the authorisation, the collective negotiation and boycott is limited to negotiations with Apple in respect of Apple Pay.

2 Areas subject to collective negotiation

The scope of matters to be collectively negotiated with Apple is limited to the areas listed below.

2.1 Exclusivity

In addition to offering Apple Pay, the applicants want to have the ability for their customers to load their own integrated NFC capable mobile wallets that can communicate with the iPhone's NFC functionality in order to make NFC payments.

The collective negotiation seeks access to the iPhone's NFC functionality as well as the ability to provide competing mobile wallets without Apple unreasonably impeding or preventing this through other mechanisms such as unreasonably prohibiting access to the App Store, providing access to the App store on unreasonable terms, or unreasonably delaying the approval of the app and its availability in the App store.

2.2 Fees

We confirm that the scope of the collective negotiation in relation to fees is limited to negotiating for the right of each issuer to decide whether to pass through to end customers some or all of the issuer's costs associated with participating in Apple Pay. In other words, the collective negotiation is limited to negotiating to remove any "no pass-through" restriction Apple imposes on issuers.

To be clear, the level of fees to be charged by Apple to an issuer in respect of the availability of Apple Pay will be determined by individual negotiation between each issuer and Apple. If authorisation is granted, the decision on whether to pass through some or all of the issuer's costs of participating in Apple Pay to end customers, and if so, how much of that cost to pass through, will be a decision of each individual issuer.

3 Process

3.1 Who can participate?

Participation in the collective negotiations will be limited to entities offering credit and/or debit cards. This would include the applicants and other financial institutions and may also include retailers who have their own or co-branded credit cards.

To be entitled to participate, the card issuer would also have to have agreed to collectively negotiate with a view to achieving the outcomes set out above and the decision-making protocol.

3.2 Commencing negotiations

As soon as possible (but no later than a month after authorisation is granted).

3.3 Conduct of negotiations

Protocols and procedures will be put in place to make sure that the scope of the matters that can be discussed as part of the collective negotiation are appropriate and in compliance with the terms of the authorisation.

3.4 Individual negotiations

Participants are free to negotiate individually with Apple on all issues apart from the three issues set out in the section 2 at any time including during the period while collective negotiations are underway.

3.5 Collective boycott

Participants in the collective negotiation are expected not to conclude any individual negotiation with Apple until the collective negotiation has been concluded.

3.6 Joining and withdrawing from the collective negotiation

Additional parties may elect to participate in the collective negotiation after it has commenced, on the understanding that any decisions made prior to a party joining will not be open to reconsideration solely because a new party has joined the negotiation process.

Parties are expected to notify the group if they wish to withdraw from the collective negotiation process. No penalties will apply for withdrawal.

3.7 Concluding the negotiations

If the collective negotiation is concluded without Apple and the issuers reaching an agreement on the matters the subject of this document, each issuer can revert to one-to-one negotiations with Apple.