16 May 2016

ICE / TRAYPORT

INITIAL SUBMISSION TO CMA

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EXECUTIVE SUMMARY

The Parties

- ICE operates derivatives exchanges and clearing houses across a wide range of asset classes, including European utilities (European power and gas, coal and emissions).
- Trayport is an ISV providing software to market participants active in European utilities trading markets – i.e. traders, brokers and exchanges/clearing houses.
- Trayport's software products are:
    - Trading solutions for broker OTC trading venues (BTS) - matching engine software and direct front-end screen access for traders to the broker's trading venue (only)
    - An equivalent trading solution for exchanges (ETS)
    - A straight through processing (STP) clearing link to facilitate the routing of OTC trades executed on a BTS broker venue for clearing by a clearing house (STP Link)
    - Aggregated front-end screen access for traders to view and initiate trading on multiple trading venues (Joule/Trading Gateway)
    - An interface for non-ETS exchanges to have their venues displayed on, and accessible for trading via, Joule (GV Portal).

The Substantive Issue

- Trayport's customers include competitors to ICE – exchange groups (e.g. EEX Group and CME) and, to a lesser extent, brokers (e.g. GFI/BGC, ICAP, Tullett Prebon, TFS and Marex Spectron).
- Trayport's software relationships and connectivity with market participants make it an important ISV – and raise the question as to whether ICE might use Trayport strategically to undermine its competitors.

No Ability or Incentive to Foreclose

- EEX Group and CME would have to be foreclosed, and trading/clearing diverted from them, for any foreclosure theory of harm to be plausible.
    - Both exchange groups are major rivals with significant market positions in core markets in which Trayport is active.
    - EEX Group is the incumbent exchange and clearing house for many of the relevant asset classes – e.g. continental power, including German power in particular.
- Neither the European Energy Exchange (EEX) nor CME use ETS / Trayport matching engine or front end software technology – their only use of Trayport software is connectivity via GV Portal and/or clearing links including STP Link
    - Those software interfaces are contractually protected via existing Trayport licences
    - E.g. CME has contractual protection until [redacted]
- Trading on EEX Group exchanges can bypass the Trayport network and much does already. EEX has a multi-front end access policy. It is implausible that existing liquidity on EEX Group exchanges could be diverted given traders' links with EEX and the drivers of traders' choice of trading/clearing venue (i.e. the importance of liquidity and open interest).
- OTC trades can be and are routed for clearing to competitor clearing houses without using the Trayport STP Link - including for OTC trades executed on broker venues using BTS.
- Brokers are too important to ICE's business for ICE to attempt to divert OTC trading onto its exchange – nor would this be feasible in any event given alternative ways to trade OTC.
- The financial risks of upsetting market participants using Trayport are enormous (illustrated by how ICE lost the coal market to CME) and unambiguously eliminate any incentive for ICE to pursue the highly speculative and uncertain gains from trying to divert trading/clearing.
    - Revenues of over $[redacted] would be at risk which dwarf the theoretical gains even if ICE was successful ($[redacted]) – which in practice it never would be.

Confirmed by ICE's Internal Papers

- ICE's rationale for the acquisition and future plans for Trayport are entirely inconsistent with the theories of harm
    - Clear intention for Trayport to continue and grow as a distinct business within ICE Group – business as usual essentially.
- The fact that Trayport's former owner (the broker GFI/BGC) did not use Trayport strategically against other brokers is further evidence that vertical foreclosure concerns can be discounted.

SHEARMAN & STERLING LLP

ICE / TRAYPORT - INITIAL SUBMISSION TO CMA

1. INTRODUCTION

1.1 This submission explains why the acquisition of Trayport, Inc. and GFI TP Ltd ("Trayport") by Intercontinental Exchange, Inc. ("ICE") does not give rise to competition concerns.

1.2 The substantive issue raised by the acquisition is a vertical theory of harm as to whether ICE might use Trayport to foreclose its competitors for trading and clearing energy derivatives (that is, energy derivatives with European power and gas, coal and emissions underlyings).

1.3 ICE's rationale for the acquisition and future plans for Trayport are entirely inconsistent with this theory of harm. Further, it is possible to identify a number of core market features which of themselves suffice to rule out ICE having the ability and incentive to pursue a foreclosure strategy using Trayport.

1.4 The focus of this submission is to highlight and substantiate those key facts so that vertical concerns can be ruled out.

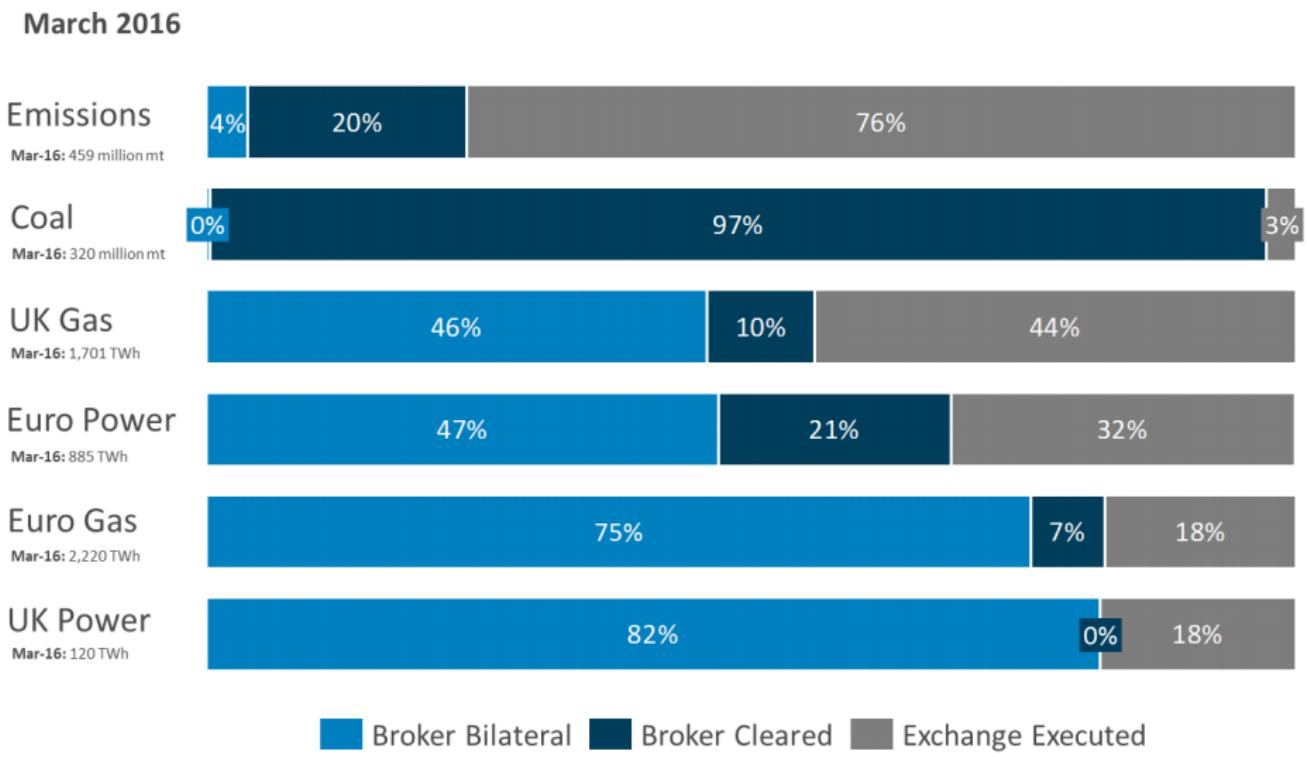
1.5 ICE notes that a hypothetical horizontal issue was raised in Phase 1. This is not sustainable as a plausible theory of harm - there is no horizontal competition between ICE and Trayport. This is explained for completeness in Annex 1.

2. WHY IS THERE A VERTICAL ISSUE TO ADDRESS?

2.1 Derivatives, including those with underlyings linked to the European utilities at issue in this case, can be traded on derivatives exchanges (in which case they are referred to as "exchange-traded derivatives" or "ETDs") or over-the-counter ("OTC") on broker trading venues. OTC trading can be voice brokered or electronic (i.e. screen based like an exchange) or a hybrid of the two (i.e. a trade can be agreed/matched orally and processed/executed electronically).

2.2 Trades can be cleared by a central counter-party ("CCP" or "clearing house") so that the clearing house assumes the risk of counterparty default on behalf of the trading parties. The alternative is that the exposure remains bilateral whereby each party is exposed to the other party's default risk. All trades executed on-exchange are cleared (by the clearing house nominated by the exchange). OTC trading is both bilateral and cleared. To clear an OTC trade of the relevant energy derivatives, the trade is registered with the exchange as a future and then routed for clearing as an ETD as if the trade had been executed on the exchange originally.

2.3 The following diagram shows the split for trading of European utilities derivatives between on exchange and OTC trading, and for OTC trading the split between uncleared OTC (i.e. broker bilateral) and OTC trading which is cleared (i.e. broker cleared).



Source: Trayport, 'Market dynamics report', March 2016

2.4 ICE operates derivatives exchanges and clearing houses, including in respect of derivatives with European gas and power, coal and emissions underlyings ("European utilities" for ease of reference). The relevant exchanges are ICE Clear Futures (located in London) and ICE Endex (located in Amsterdam). ICE Clear Europe is the relevant clearing house (located in London). European utilities represent only a small part of ICE's overall group activity -- the associated revenues are approximately $[redacted] compared to group revenues of more than $4.6 billion.

2.5 Trayport is an independent software vendor ("ISV") which provides software and connectivity used by market participants in European utilities derivatives markets. Specifically:

(a) Broker Trading System ("BTS") – software used by brokers to operate OTC trading venues. It essentially comprises (i) a matching engine to execute trades and (ii) direct front end screen access for traders to the broker's trading venue (only). The main brokers active in European utilities markets all use BTS.

(b) Exchange Trading System ("ETS") – equivalent software to BTS made available to exchanges. The main exchange groups active in trading/clearing for European utilities use proprietary technology or solutions sourced from third party ISVs other than Trayport (not ETS).

(c) Joule/Trading Gateway ("TGW") – software for traders providing aggregated, multi-venue front end screen access which enables traders to (i) view derivatives contracts and pricing etc available for trading on all connected trading venues and (ii) to initiate a trade on each of those venues -- i.e. send a message to a connected venue to match a trade. TGW does not allow trades to be matched across trading venues (even those operating BTS); trades can only be matched within the same trading venue.

(d) Global Vision Portal ("GV Portal") – a software interface which allows non-ETS exchanges to connect to TGW and have their markets/contracts displayed on and accessible for trading via TGW.

(e) A software interface (STP Link) which facilitates straight through processing of OTC trades executed on a BTS venue whereby the OTC trades are routed to an exchange/clearing house for clearing – from the broker OTC venue's 'back-end' system / BTS.

2.6 The vertical issue arises because the majority of European utilities trading is initiated by traders using a TGW screen that sends messages to the regulated execution venues to execute trades. This is not because there is anything unique about Trayport's software in terms of functionality etc. Equivalent software is available from a wide range of other ISVs (e.g. Exxeta, Trading Technologies and SunGard) and also exchange groups who (unlike ICE) supply their technology on a standalone 'ISV' basis (e.g. Nasdaq and CME).

2.7 Rather, Trayport has achieved this position because it instigated the development of hybrid / screen based OTC trading in European utilities markets around 15 years ago. It did so by initially providing its BTS trading solution to individual brokers (initially for Marex Spectron, then to other brokers), so that the brokers could provide hybrid / screen based trading as well as traditional voice-brokered trading. Then, in response to user demand, it developed the TGW screen to give traders aggregated front end access to the various broker trading venues. This aggregation has in time extended to exchanges as well, via GV Portal connectivity as well as use of ETS.

2.8 As a result, Trayport has established an important network of customer relationships and connectivity with market participants active in European utilities markets. This is why some Trayport customers who compete with ICE would no doubt prefer that Trayport is not owned by ICE.

2.9 From a merger review perspective, however, there is an established analytical framework to test whether or not ICE's control of Trayport is cause for concern: does ICE have the ability and incentive to pursue a (total or partial) foreclosure strategy; and would this lead to an SLC in any market?

2.10 For the reasons explained below, this is not the case. A key point to bear in mind from the outset is that the core of Trayport's business model is an aggregated view of, and access to, trading venues and implicit to this is being neutral between venues. Any impairment of this approach would undermine Trayport's business model and the utility of its TGW product on which its current (and future) market position is dependent.

3. ICE'S ACQUISITION RATIONALE AND PLANS FOR TRAYPORT ARE INCONSISTENT WITH A FORECLOSURE CONCERN

3.1 ICE's core trading and clearing businesses are transaction based. ICE has made a strategic decision to diversify into new and complementary business areas involving software and data, to offset the volatility of transaction based revenue streams with recurring license fee based revenues.

3.2 The acquisition of Trayport is part of this diversification strategy, along with for example the acquisitions of Interactive Data Corporation ("IDC") and SuperDerivatives. Trayport's network of screen access and connectivity with market participants in European utilities markets (i.e. 'screen real estate' on desks) is viewed by ICE as an attractive distribution channel for delivering and monetising the enhanced data services that ICE is developing both organically and by acquisition (e.g. IDC).

3.3 ICE is on record to this effect. For example, ICE's founder and CEO, Jeffrey Sprecher, made the following statement in response to a specific question about ICE's plans for Trayport during ICE's Q4 2015 earnings call:

"[O]*ur company is evolving, … we're providing services to others that go beyond just trading and clearing. And so, we're following the workflow of the industry and providing infrastructure. So, it's a natural evolution for us. Many of our competitors have provided software in the form of their trading platforms or access to their networks.* ***We had historically not been in that business.*** *But, as you see,* ***we're moving in that direction,*** *because we have an interesting footprint. And so, in that regard,* ***we want to support brokers, we want to support asset managers, investors, listed companies and others, with services that go way beyond just trading and clearing.***"[1]

3.4 This strategy for Trayport is based on having Trayport's screen access deployed and used as widely as possible, which is inconsistent with a foreclosure strategy.

3.5 Further, ICE's internal papers show a clear intent to continue operating Trayport as a distinct business within the ICE Group and to grow its business in line with Trayport's pre-acquisition strategy. See, for example, the following extract from ICE's 2016 Budget proposal:

[redacted]

3.6 The assumed [redacted]% growth is effectively ICE adopting Trayport's own pre-acquisition budget and business plan; i.e. an assumption of business as usual for Trayport. There is no suggestion in any of ICE's internal papers (including those submitted to its parent board of directors in order to obtain approval to purchase Trayport) that ICE might use Trayport strategically against third parties.

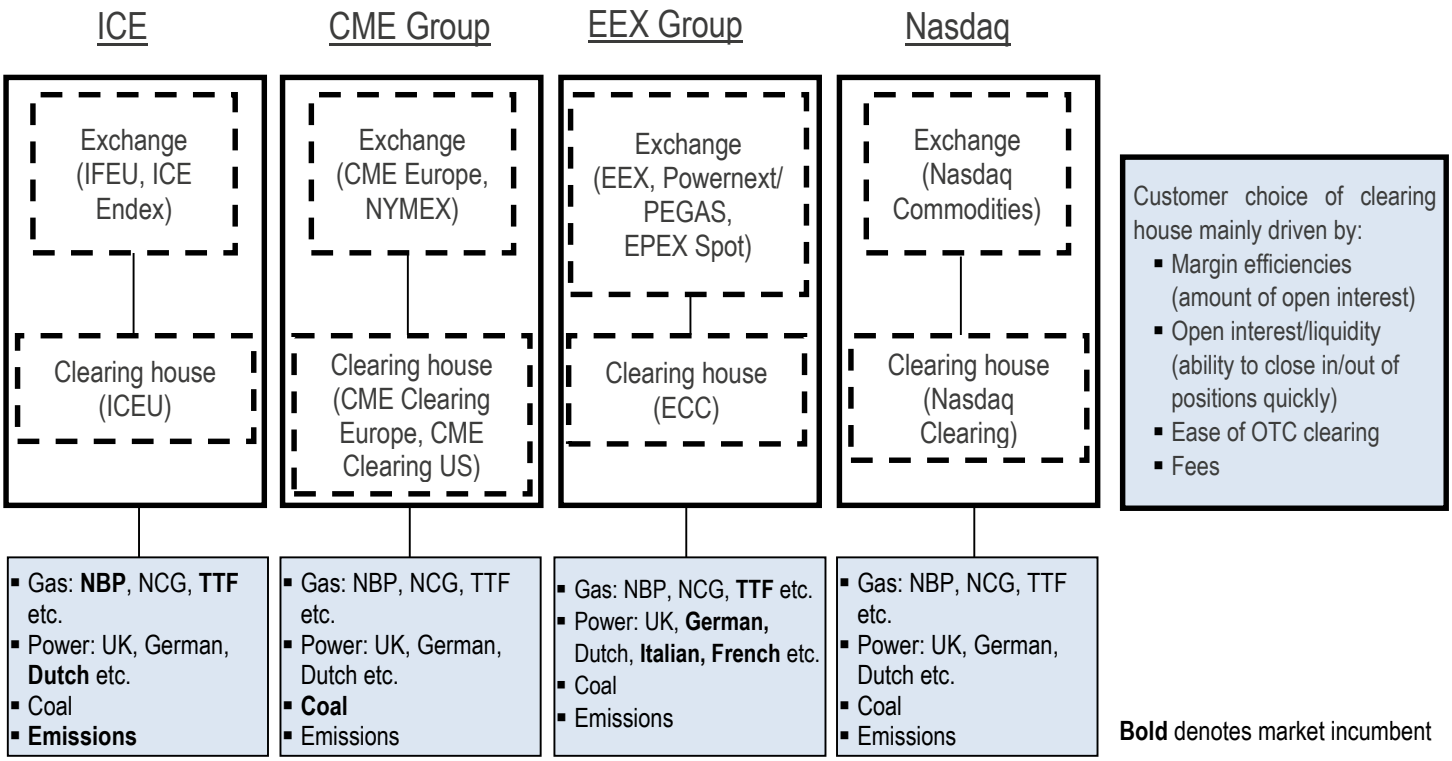
3.7 The fact that ICE's rationale for acquiring Trayport and its internal papers are inconsistent with a vertical foreclosure concern is a strong indicator that such concerns are unrealistic.

4. GFI'S PRIOR OWNERSHIP OF TRAYPORT IS COMPELLING EVIDENCE THAT ICE WILL ALSO NOT USE TRAYPORT STRATEGICALLY AGAINST COMPETITORS

4.1 Trayport was owned by GFI prior to its acquisition by ICE.

4.2 GFI is one of the major OTC brokers active in European utilities markets. Its closest rivals in these markets are the other major OTC brokers who all use Trayport's BTS trading solution to operate their OTC trading venues and its TGW network of screens to connect with traders, i.e. ICAP, Tullet Prebon, TFS and Marex Spectron, among others.

[1] http://ir.theice.com/~/media/Files/I/Ice-IR/quarterly-results-archive/2015/fourth-quarter-2015/ice-4q15-transcript.pdf



4.3 The fact that GFI and BGC (after it acquired GFI in February 2015) did not attempt to use Trayport strategically against the other brokers (and indeed exchanges) is compelling evidence that ICE likewise will not attempt to undermine its competitors using Trayport.

4.4 If anything, ICE has even less ability and incentive to do so than GFI/BGC.

(a) GFI's broker rivals use Trayport's BTS trading solution. By contrast, ICE's closest rivals (the exchange groups such as EEX,[2] Nasdaq and CME) use proprietary technology or solutions sourced from ISVs other than Trayport.

(b) ICE is a highly regulated, much larger and more diverse company than GFI/BGC. Its wider group activities give rise to inter-dependencies with market participants which

[2] EEX means EEX Group, including European Energy Exchange (EEX), Powernext and EPEX SPOT.

expose ICE to much greater downside risk from misuse of Trayport than was the case for GFI/BGC – both financial and reputational.

4.5 The fact that no foreclosure issue arose under GFI/BGC's ownership of Trayport effectively creates a presumption that the same will be true under ICE's ownership.

5. COMPETITIVE LANDSCAPE AND KEY MARKET DYNAMICS

Competitive landscape – strong and effective competitors

5.1 ICE faces strong competition in its European utilities trading and clearing activities from a number of integrated exchange/clearing house groups – most notably EEX, CME and Nasdaq.

5.2 EEX, CME and Nasdaq all list contracts on their exchanges to make trading and clearing (including for OTC trades) available across all the relevant asset classes within European utilities – including for ICE's core markets where it is the incumbent (e.g. NBP/UK Gas). This is illustrated by the diagram in 4.2 above. Where the product (e.g. NBP) is highlighted in bold and underlined under a particular exchange group, this means the exchange group is the incumbent venue for this product, i.e. the majority of trading/clearing has coalesced on this venue for the reasons discussed below (e.g. ICE in the case of NBP).

5.3 In overview, ICE has incumbency positions (in respect of on exchange trading / OTC clearing) in UK gas (NBP), emissions and in some continental European gas markets – Dutch gas (TTF) and Dutch power. Equally, other exchanges also have strong market positions in European utilities markets. EEX in particular has major positions in both European gas and power markets. It is the incumbent in a number of European power markets, including German power which is the most liquid (i.e. most widely traded) market and effectively serves as the pricing benchmark for overall European power. CME has established itself as the incumbent in OTC clearing of coal, displacing ICE. Nasdaq is a challenger across the board.

5.4 Another important competitive constraint that ICE faces in European utilities markets is OTC brokers. This is because, in some instances, ETD and OTC trading are substitutes for traders.

5.5 Equally, brokers are not only competitors to ICE; they are also the source of important OTC clearing revenues. Furthermore, brokers provide essential data inputs for a range of ICE group companies, for example ICE Benchmark Administration for its administration of benchmarks including ICE LIBOR, LBMA Gold Price and ICE Swap Rate.

5.6 This competitive landscape, and the inter-dependencies between ICE and the brokers, must be taken into account when assessing the likelihood of ICE having the ability or incentive to use Trayport to divert trading or OTC clearing to ICE.

Key market dynamics – importance of liquidity and open interest

5.7 The interaction between Trayport and ICE does not concern bilateral (i.e. uncleared) OTC trading; rather it concerns cleared trading – both OTC and ETD. It is important to take proper account of the drivers of where such trades are executed and cleared; and why. <u>This choice is dictated by the traders</u>.

5.8 Where a trader holds open interest (i.e. existing trading positions) is key to a trader's choice of venue. First, it can be easier for a trader to manage their risk in one place. Secondly, multiple positions on highly correlated assets / underlyings can lead to offsets (i.e. savings) with regard to how much margin (i.e. collateral) a trader has to hold at a clearing house to cover the default exposure associated with its trades. Traders also prefer to trade on the same venues as other market participants as the greater the volume of trading (liquidity) on a venue, the more

confident that trader can be of being able to close in and out of trading positions. In addition, higher trading volumes (deeper liquidity) generally results in lower implicit trading costs i.e. tighter spreads and more limited market movements.

5.9 Thus the pattern is that, for a particular underlying (e.g. German power), derivatives trading and clearing (both OTC clearing and clearing of ETDs) will generally coalesce on the same venue – e.g. EEX in the case of German power.

5.10 As will be seen from the analysis which follows, the above market reality means that the possibility of a foreclosure attempt can in practice be discounted – for all categories of rivals using Trayport software/connectivity.

6. WHAT ARE THE HYPOTHETICAL FORECLOSURE THEORIES OF HARM?

6.1 The hypothesis to test is whether ICE might use Trayport's software and connectivity to foreclose rivals. In practice, this means diverting trading and clearing away from rivals so as to capture significant incremental trading and clearing revenues/profit – in other words:

(a) *Capture of ETD trading (and clearing of those trades) from other exchanges*: The key target would be EEX and in particular its liquidity in German power.

Further, EEX would have to be foreclosed for <u>all</u> European utilities markets targeted in a foreclosure strategy because otherwise the relevant ETD trading liquidity could divert to EEX rather than ICE. Note that foreclosure of EEX in this way is a necessary but not sufficient condition for a successful foreclosure strategy because Nasdaq and CME are also alternatives where trading/clearing could be diverted (for all European utilities trading).

(b) *Capture of OTC clearing from other clearing houses*: The key target would again be EEX given that ETD trading/clearing and OTC clearing coalesce at the same integrated exchange/clearing house. CME would also be a target in respect of OTC clearing of coal derivatives (coal derivatives are effectively only traded OTC and there is hardly any ETD trading).

Again, EEX, CME and Nasdaq would all have to be foreclosed as they can all provide OTC clearing across European utilities markets.

(c) *Capture of OTC trading from broker trading venues* in the sense of switching that trading to ETD trading on ICE's exchanges: The OTC trading liquidity is generally split across OTC trading venues, so all of the major brokers would be targets – and all the brokers would need to be foreclosed simultaneously otherwise there would be no possibility of diverting OTC trading from one broker to ICE's exchange.

6.2 The CMA's Phase 1 decision does not suggest that a total foreclosure strategy is a potential concern and instead focuses on potential partial foreclosure strategies relating to price increases for, or degradation of the Trayport service provided to, exchanges, clearing houses and brokers.

6.3 Given the importance of liquidity and open interest, however, any partial foreclosure strategy would have to force traders to use ICE against their preferences in order to be effective and actually divert trading/clearing and associated revenues to ICE away from a rival (e.g. EEX). This is simply not plausible – for many of the same reasons that presumably led the CMA to discount a total foreclosure concern.

6.4 Put simply, unless ICE can cut off access to the incumbent exchange / clearing house that it is targeting (e.g. EEX for German power), traders will not contemplate using ICE's exchange /

clearing house. In addition, ICE would also need to cut off access to other trading venues and clearing houses which are alternatives – and this would include the brokers as well as the other exchange groups. But controlling Trayport and its software/connectivity does not give ICE the ability to do this.

6.5 More fundamentally, it would be commercially irrational for ICE to attempt such a course of action. It would have a major adverse impact on traders who are the lifeblood of ICE's energy business. It is not possible for ICE to foreclose rivals without prejudicing the position of traders who are the source of and control the trading liquidity on which ICE is dependent.

6.6 The above fundamental obstacles to a coherent foreclosure concern are explained in more detail below.

6.7 For completeness, it is noted that the CMA Phase 1 decision references the idea of ICE using a foreclosure strategy to protect trading/clearing already carried out on ICE's exchanges / clearing houses (i.e. its incumbency positions). In reality, since trading and clearing typically coalesces on a single venue, there are no material incremental trading/clearing volumes for ICE to capture in those markets. Furthermore, ICE can be confident of retaining its incumbency position provided that it continues to provide a competitive offering. Therefore, there is no meaningful financial upside to a foreclosure strategy in those markets. Rather, the only substantive issue to address is the possibility of ICE targeting trading/clearing markets in which another exchange group is the incumbent.

6.8 A potential concern has also been raised about ICE gaining access via Trayport to confidential information relating to ICE's competitors (i.e. exchange groups) which would give ICE an unfair competitive advantage. This is not the case, for the reasons explained in Annex 2.

7. RELEVANT EXCHANGE GROUPS ARE NOT DEPENDENT ON TRAYPORT SOFTWARE

7.1 None of EEX, CME or Nasdaq use Trayport's exchange trading solution (ETS) to operate their exchanges. The one exception is the Powernext exchange which currently uses Trayport's ETS

trading solution. Powernext is part of the EEX Group, however, and could switch to using EEX technology (including within the applicable termination period for its ETS licence).

7.2 Their use of Trayport software is connectivity via GV Portal and/or clearing links. Those interfaces are contractually protected via existing Trayport licences.

	CME	EEX Group (inc. EEX, ECC, Epex Spot and Powernext)	Nasdaq
Contractual Protection			
Duration / Termination	[redacted] **Access to CME alone is sufficient to defeat any foreclosure attempt to divert OTC clearing**	[redacted] **Access to EEX alone is sufficient to defeat any foreclosure attempt to divert ETD trading**	[redacted]
Variation	Only with CME consent	Only with relevant EEX entities' consent	Only with Nasdaq consent

7.3 See the Contract Appendix for full details on the contractual position.

7.4 In any event, regardless of the contractual position, ICE is simply unable to use its control of Trayport's software/connectivity to divert traders away from the exchange or clearing house of current choice – nor would it ever have an incentive to attempt to do this.

8. ETD TRADING CANNOT BE FORECLOSED (EXCHANGES)

8.1 As explained above, the liquidity that would be targeted is currently on an EEX exchange -- and EEX would have to be foreclosed for any foreclosure strategy, partial or total, to succeed.

8.2 It is implausible that Trayport software could in any way be used to force traders to switch to trading on ICE's exchanges:

(a) EEX already has the liquidity and is approximately 30% owned by the major German utility traders (RWE, etc.) who are its main users.

(b) Traders have open positions on EEX which mean they will need to continue trading on its exchanges for the reasons specified in para 5.8.

(c) EEX has adopted a multi-front end connectivity strategy which means there are multiple ways to trade on its exchanges without using Trayport connectivity/software (i.e. TGW) -- for example, via other 3rd party ISVs such at Trading Technologies (TT).

(d) EEX's connectivity to/access via TGW is contractually protected by its GV Portal agreement.

8.3 EEX's multi-front end connectivity strategy is particularly noteworthy. It means that traders can trade on EEX exchanges without using Trayport's TGW screen / connectivity. Indeed, the majority of EEX trades seemingly already bypass the Trayport network / TGW.

8.4 [Redacted].

8.5 The above chart is based on the position in 2012/13 but ICE is confident that the position will be similar today given Trayport's interactions with EEX and EEX's continuing publicly stated policy for multiple front end access. For example:

"*Our aim is to open up as many channels as possible into the exchange*."

Source: Slide 9 https://www.eex.com/blob/88458/851a5d4e026670450f97ab067afe7e38/3-technology-update-data.pdf

8.6 The above confirms that EEX is not dependent on Trayport for trading on its exchanges. This is a fundamental obstacle to a successful foreclosure strategy in respect of ETD trading (and indeed OTC clearing).

9. OTC CLEARING CANNOT BE FORECLOSED (CLEARING HOUSES)

9.1 Existing Trayport STP Link agreements with the exchange groups / clearing houses preclude a foreclosure concern (see para 7.2). For example, CME has [redacted] and foreclosure of CME of itself is a necessary (though not sufficient) condition for a successful foreclosure strategy in respect of OTC clearing (and indeed ETD trading).

9.2 Leaving aside the contractual protections, as a technical matter, Trayport software simply cannot be used by ICE to dictate where OTC trades are submitted for clearing.

9.3 First, the choice of clearing provider is usually determined by the trader, given the importance of clearing where open interest is already held. If the trader does not express a preference, its broker will invariably have a preference. The volume of OTC cleared trades for which neither the trader nor the broker expressed a preference is *de minimis*.

9.4 Accordingly, there is no opportunity for default settings to play a role in diverting OTC clearing to ICE. Again, for a diversion strategy to be effective (e.g. in respect of CME clearing OTC coal trades), Trayport would need to expressly countermand and ignore its customers' preferences. This would be immediately noticed and risk retaliation as discussed below.

9.5 Secondly, it is in any event not necessary to use Trayport's STP link/interface to submit OTC trades for clearing – even for trades executed on an OTC trading venue which utilises Trayport's BTS trading solution.

9.6 Direct clearing links / straight through processing which bypass Trayport's STP link/interface can be and are already used. Direct STP clearing links can be established from the Trayport

BTS 'back end' to a clearing house which bypasses Trayport and use the exchange group's proprietary API which is not a link that Trayport can degrade or tamper with.

9.7 Several BTS brokers already use alternatives links, not Trayport STP link, to clear at competitors to ICE, for example:

(a) [redacted];

(b) [redacted];

(c) [redacted]; and

(d) [redacted].

9.8 Consequently, given the importance to traders of clearing OTC trades where they hold open interest, any attempt to use Trayport software to divert OTC clearing to ICE would be ineffective – and moreover expose ICE to significant financial risk from retaliation by market participants. The experience in respect of clearing OTC coal derivatives trading demonstrates this risk. See section 11.

10. OTC TRADING CANNOT BE FORECLOSED (BROKERS)

10.1 Fundamentally, ICE is too dependent upon its broker relationships to be able to foreclose OTC trading. These relationships are worth upwards of $[redacted], given the range of ICE businesses which rely on inputs from brokers.

10.2 Further, ICE is able to attract OTC clearing without capturing the OTC trades themselves and clearing is the key driver of revenue and profitability for exchange groups; not trade execution. The OTC trading that ICE would most logically target would be of underlyings for which ICE is the incumbent OTC clearer.

10.3 It would therefore be irrational to try to divert OTC trading from broker OTC platforms to ICE's exchanges and thereby put at risk existing OTC clearing revenues and opportunities.

10.4 This is especially the case when there is no guarantee that foreclosed OTC trading would divert to ICE's exchange. It is more likely to divert to voice broking or another exchange, e.g. EEX or Nasdaq.

10.5 Brokers are large, highly sophisticated and well-resourced. They, along with their trader customers, would not hesitate to punish ICE to stop any such foreclosure attempt. If ICE tried to divert OTC trading markets to its exchange, brokers would be able to divert OTC clearing flows to rival clearing houses like CME and ECC/EEX in order to punish ICE. The risk of retaliation is significant and is addressed in more detail below.

10.6 In any event, brokers are contractually protected from any foreclosure strategy. [redacted]

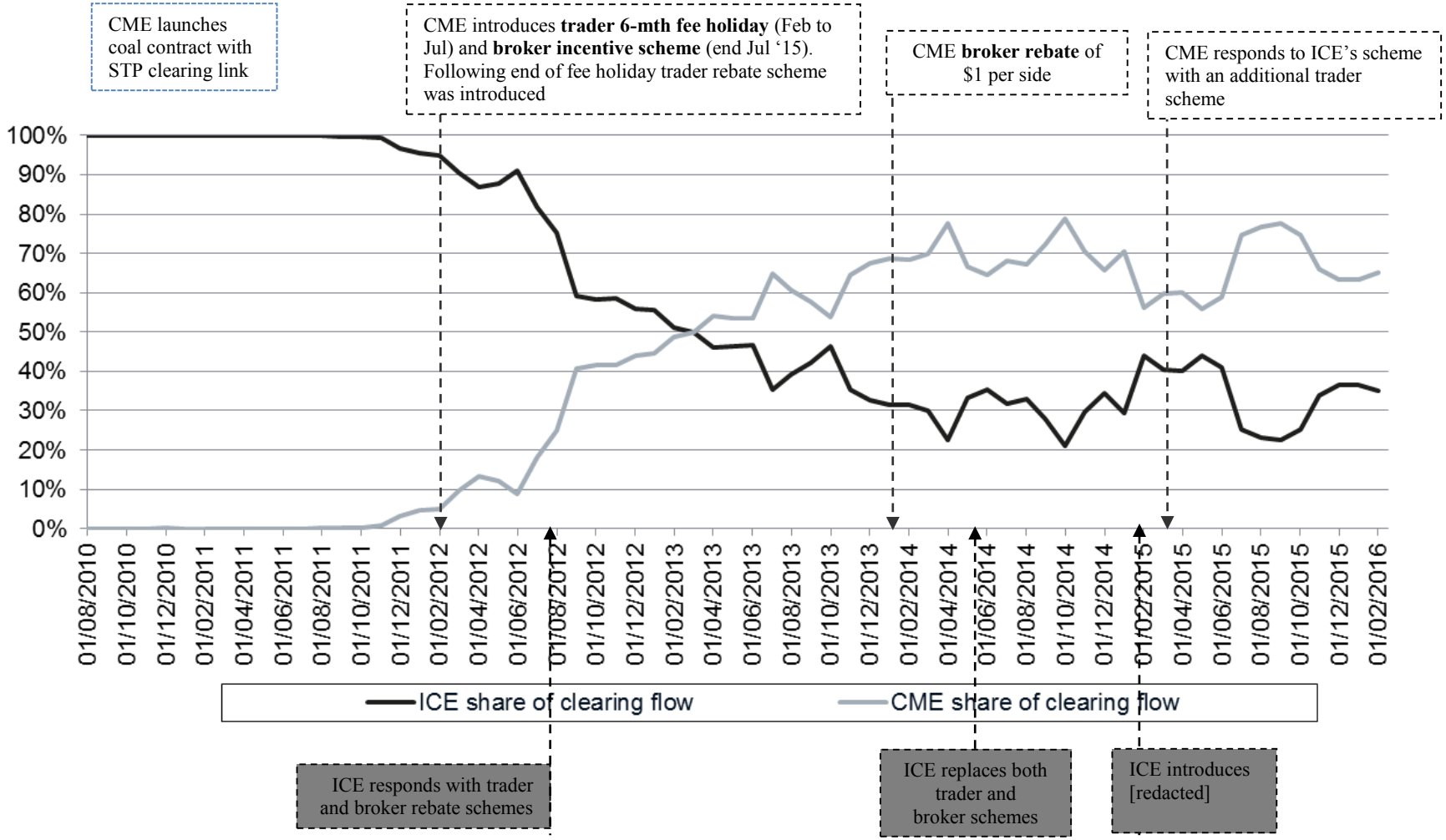
11. COAL EXPERIENCE DEMONSTRATES THE CONSTRAINT AND RISKS FACED BY ICE

11.1 Clearing OTC trades of coal derivatives is a case study which demonstrates the risks if ICE attempted to use Trayport to divert OTC clearing (or indeed any trading/clearing) to itself against the wishes of market participants. Specifically, it shows how retaliatory action on the

part of brokers/traders can switch an entire market away from ICE with major financial downside for ICE.

11.2 The chart on the following page shows how OTC coal clearing was switched from ICE to CME.

Coal demonstrates constraint – lost coal OTC clearing costs ICE $[redacted] p.a.[3]



[3] Estimate of foregone revenues assumes ICE keeps 100% share of clearing and net RPC is as in actual.

11.3 To explain: ICE was historically the incumbent clearer of coal derivatives. On this occasion, however, ICE failed to respond to customer demand. This created an opportunity for CME to exploit and to make inroads by offering a fee holiday and a broker incentive scheme in addition to the STP link to its clearing house. For the clearing link, CME used Trayport's STP Link but, for the reasons discussed in section 9, this is not a significant factor – an alternative clearing link could have been used to equivalent effect.

11.4 When ICE failed to match CME's offering, traders/brokers effectively switched the market to CME. It will be seen that ICE's share dropped dramatically. ICE has since responded, introducing a trade registration API to enable equivalent STP links and changing its incentive schemes. However, ICE has not been able to win back its original share.

11.5 This translates to lost revenue of about $[redacted] a year.

12. FINANCIAL RISKS ELIMINATE ANY CONCEIVABLE INCENTIVE TO FORECLOSE

12.1 The experience in respect of the coal market equally applies to other European utilities derivatives, in particular bearing in mind that ICE's major rivals each have offerings in all European utilities markets.

12.2 If the full extent is taken into account of the financial risks that ICE would face from such retaliation if it attempted to divert trading/clearing to itself against traders' wishes, it becomes evident that ICE would never contemplate attempting a foreclosure strategy.

12.3 ICE's energy business operates in a highly competitive environment; it faces fierce competition from major exchange groups including the EEX Group, CME and Nasdaq in particular. The exchange and clearinghouses of those groups already list equivalent futures contracts for all of ICE's core markets (e.g. NBP and emissions) and have relationships with the relevant traders and brokers.

12.4 If ICE attempted to divert trading and/or clearing, this would be a major issue for traders in particular. It would prejudice their ability to manage their trading positions and collateral requirements – thereby creating business risk which potentially could have regulatory risks.

12.5 As a result, there would be significant risk of retaliation in the sense of traders switching trading/clearing liquidity from ICE's core markets (and revenue generators) to another exchange – or indeed to OTC trading options. Given the concentration of liquidity amongst a relatively small group of traders, there is a very real and credible risk of co-ordinated action to switch liquidity to another execution venue. The retaliation could well extend to ICE's oil markets, given the overlap in customers.

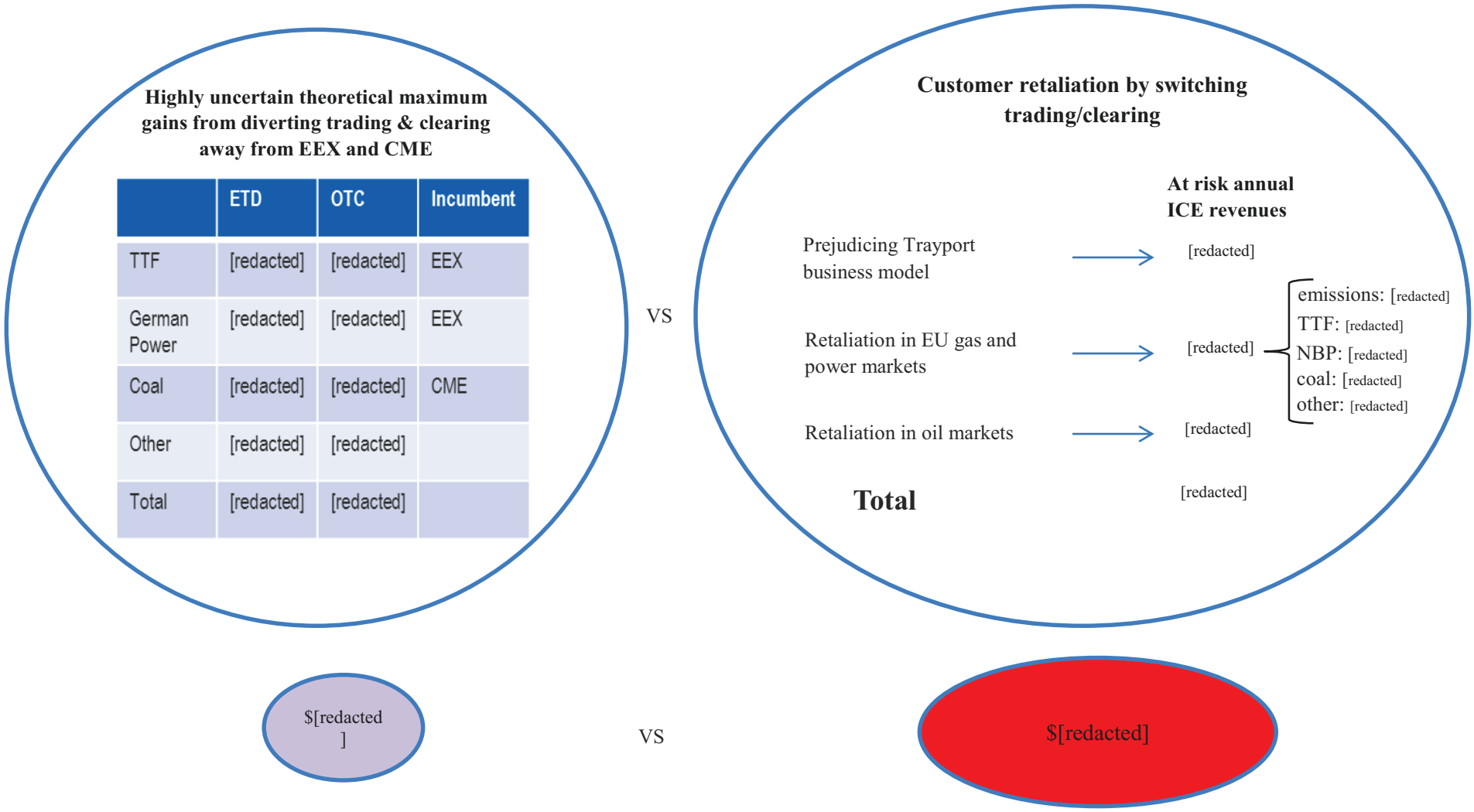
12.6 ICE's experience in the coal market is a concrete example of this risk. Failure to respond adequately to market participants' demands resulted in the coal market effectively switching to CME, costing ICE an estimated [redacted] a year in diverted clearing volumes.

12.7 Moreover, whatever the mechanism used to try to divert trading/clearing, it would inevitably undermine the venue-neutral aggregation business model of Trayport and the reason why it is currently so widely used. In such a scenario, Trayport's utility and USP is destroyed, creating the environment for users to sponsor a replacement for Trayport. This is a real risk because, while it has developed a customer-friendly user interface, there is nothing unique about Trayport's actual software; equivalent software/technology is available from a wide range of other ISVs. Hence, Trayport's annual revenues of $75m would also be at risk – not to mention ICE's $650m investment to acquire Trayport.

12.8 Accordingly, the revenues would be enormous (over [redacted]) that ICE would be putting at risk if it attempted a foreclosure strategy. They dwarf the theoretical gains even if ICE was successful in diverting trading and clearing volumes ([redacted]) – which in practice it never would be for all the reasons discussed above.

12.9 The following chart illustrates this financial trade-off which makes it wholly implausible that ICE would ever attempt to use Trayport to foreclose its rivals and divert trading and/or clearing of European utilities derivatives to itself.

Financial risks eliminate any possible incentive to foreclose[4]



[4] Including contracts that ICE does not currently offer increases the total theoretical maximum from foreclosure of exchanges to $[redacted] and clearing houses to $[redacted], i.e., a total theoretical maximum gain of $[redacted]. Theoretical gains from Nordic power accounts for $[redacted] of this $[redacted] increment.

12.10 These financial risks are explained in more detail in Annex 3, which contains the underlying analysis carried out by Oxera.

12.11 For this reason alone, the foreclosure theories of harm can be discounted on the basis that ICE has no incentive to pursue a foreclosure strategy.

13. CONCLUSION

13.1 Trayport's software and connectivity plays an important role in facilitating the trading and clearing of European utilities derivatives markets. It is no surprise, therefore, that market participants have raised concerns about a competitor acquiring control of Trayport.

13.2 Proper analysis of the commercial reality, however, demonstrates that these concerns can be discounted. There is no question of ICE in practice being able or having the incentive to use Trayport strategically to undermine its competitors.

13.3 This conclusion is borne out by ICE future plans for ICE – and the experience of how Trayport was operated under GFI/BGC's ownership.

ANNEX 1

NO HORIZONTAL ISSUE

Summary: ICE and Trayport are not competitors and their interaction does not give rise to any rational theories of harm with regard to horizontal competition or constraint on each other's businesses.

OTC and on-exchange trading can be substitutes, so there is a competitive dynamic between OTC execution venues operated by brokers and exchanges operated by ICE and other exchange groups. Trayport's software 'platform' is used by the main OTC trading venues. Hence Trayport is routinely conflated with brokers and OTC trading. (This confusion was evident in the third party comments cited as evidence for the horizontal theory of harm in the Phase 1 Issues Paper.) The comments concerned the interaction between OTC and on-exchange trading; they did not demonstrate horizontal competition between Trayport and ICE.

This confusion may be driven by a misunderstanding with regard to the scope of the aggregation carried out by Trayport. The Joule/TGW screen is used by traders; it is an aggregated screen which enables traders to (i) view contracts available for trading on all connected trading venues and (ii) initiate a trade on those venues. This is the extent of the aggregation by Trayport. Specifically, the venues themselves are not aggregated with regard to execution of trading. They do not form a single 'virtual' execution venue under an umbrella 'Trayport platform' – nor do they present themselves this way. Each venue that is connected to Joule/TGW (whether by ETS, BTS or GV Portal) remains a separately regulated and operated trading venue with its central order book. Further, this is evident to traders. A trader viewing the Joule/TGW screen knows on which trading venue a specific contract is listed and chooses to trade on this basis. Further, bids/offers and buyers/sellers can only be initiated to send a message to the respective regulated broker or exchange venue if the bid and offer is within the same tradingvenue and order book. There is no possibility via the Joule/TGW screen to match, say, a buyer on ICAP's OTC platform with a seller on GFI's OTC platform even if the contract is economically equivalent – use of Trayport's software connectivity does not allow bids and offers to be matched across distinct venues. *This is why it makes absolutely no sense to view Trayport as the 'OTC competitor' to ICE's exchanges*.

The above points are further explained by the diagrams and screen shots set out below:

Trayport TGW/Joule screen vs WebICE – trading stacks comparison

Trayport Joule

- Charged [redacted]
- Unregulated software product routing orders to/from multiple regulated trade execution venues – making traders' jobs and workflows easier
- Supports transparency across venues enabling traders to achieve better market view and execution
- Orders can be traded via screen or voice for OTC broker platforms and electronically into the various exchanges' platforms – enables complex and hybrid workflows
- Designed to support trader workflows not regulated venue rules (e.g. allows trading 'through' the stack)

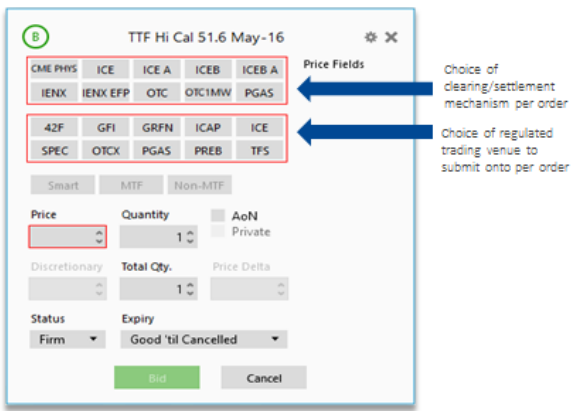
WebICE

- Free of charge for subscribers of ICE's proprietary real-time market data
- Provided to ICE's direct customers to view and trade ICE only liquidity on the ICE exchange only and clearing only at ICE's clearing houses
- Designed to support ICE only workflows and regulatory rules
- 100% anonymous central limit order book – prices that match on screen will trade
- Matching subject to best price execution exchange rules – this means that (unlike on TGW/Joule) trades can only be generated from matches between the best bid/offer in the market

Trayport TGW/Joule screen vs WebICE – order initiation screens

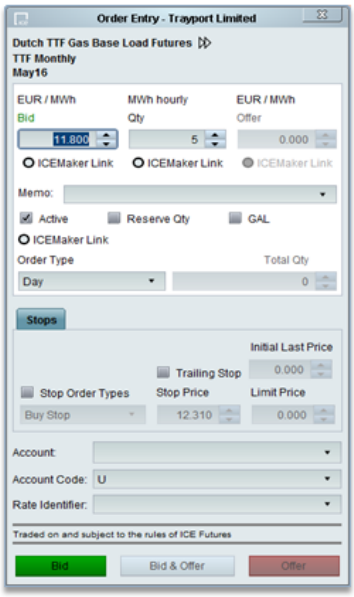
Trayport Joule

- Traders must pick a venue
- **Orders can only be nominated into a single discreet platform at a time and subsequently matched only with liquidity on that venue; therefore matching of orders across venues is impossible**
- As per choice on execution, traders must choose a single clearing house between multiple choices or between bilateral and cleared
- Enables traders to split/share their liquidity across multiple regulated trade execution venues
- The transactions resulting from TGW are identical to transactions that would have otherwise resulted from standalone direct screens



WebICE

- No choice between venues; orders can only be nominated to the ICE exchange for ICE products, all cleared at one of ICE's clearing houses
- All orders will be tradable to all ICE users with trading permissions and will execute anonymously and electronically



Potential concerns relating to ICE's ability and incentives to leverage control of Trayport's software to undermine ICE's competitors, who are Trayport customers, do not stem from a loss of competition; they are vertical foreclosure issues – and addressed in the main body of this document.

A horizontal theory of harm is also irreconcilable with the findings on which the OFT based its decision that it did not have jurisdiction to review GFI's (a regulated broker venue) acquisition of Trayport in 2008 on the basis that the transaction was "*purely vertical in nature*".

The availability of WebICE does not indicate a constraint on Trayport. WebICE can only be used to trade on ICE's own exchanges[5] whereas the essence of the Joule/TGW business model is aggregation of multiple execution venues; they are not substitutes.

Consequently, there is no sustainable horizontal theory of harm. Trayport and ICE are not competitors.

[5] Many third party ISVs also provide access to ICE exchanges. A list of approved ISVs can be found at: https://www.theice.com/connectivity/isv.

ANNEX 2

NO ISSUE REGARDING ACCESS TO CONFIDENTIAL INFORMATION

Summary: There is no risk that ICE will gain access and be able to misuse Trayport customer data to gain an unfair competitive advantage over competitors – hence a theory of harm concerning access to confidential information can be ruled out.

It appears that third parties have expressed concern during the Phase 1 process that ICE might misuse confidential information held by Trayport. Such fears are easily allayed, for the reasons explained below. More generally, this issue is not unique to Trayport/ICE; similar situations arise in many other contexts, both within and outside the ICE group. The experience and track record is unambiguously that these types of intuitive concerns are not an issue in practice.

Most of the confidential customer information held or accessible by Trayport is not competitively sensitive as between ICE and its rivals. The most sensitive is trading activity at a user level – but even then it is debatable whether this could give ICE an appreciable advantage over its competitors.

In any event, due to confidentiality constraints in its licences with venues and traders and explicit data ownership references in the hands of Trayport customers, Trayport is contractually restricted from sharing or utilising such confidential customer information (e.g. transaction data) with third parties – this includes affiliates within the ICE group. (It is noted that the same restrictions applied during GFI's ownership of Trayport – and GFI's broker rivals were customers of Trayport.)

More fundamentally, this theory of harm would entail a material breach of Trayport's existing governance policies, procedures and controls, which are extremely stringent. Underpinning these controls is Trayport's adherence to the ISO/IEC 27001 information security management standard – a comprehensive set of information security control objectives and generally accepted good practice security procedures. ISO accreditation encompasses the storage of customers' confidential information. Trayport is periodically (and independently) audited in this regard. Inability to maintain the integrity of customer information would seriously harm Trayport's core business model and thus jeopardise ICE's entire acquisition.

For its part, as a highly regulated, publicly listed exchange/clearing house group, ICE regards information security equally if not more seriously; the reputational harm in the event of a breach (inadvertent or otherwise) would be significant. It is to be expected that other trading venue customers of Trayport have similarly stringent policies/procedures as a result of being regulated entities. Accordingly, any a breach of information security by Trayport (which this theory of harm necessarily entails) involve significant breaches of trading venues' obligations to their end customers – with the consequent risk of harm to their regulatory status.

It is simply implausible to suggest that this would even be attempted; it would certainly be detected and punished. Therefore, on this basis alone, the theory of harm be discounted – even without considering the relevant contractual obstacles.

ANNEX 3

FINANCIAL RISKS OF FORECLOSURE

[redacted]