

TO the  
**Competition & Markets Authority**  
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[X]

[X], 1 July 2016

**CONFIDENTIAL**

**[X] COMMENTS IN THE CONTEXT OF ICE / TRAYPORT INITIAL SUBMISSION**

Dear Sirs,

We make reference to the ICE/Trayport Submission to the CMA dated 16 May 2016. Our first general comments to the ICE Submission is that it explains to a great length what ICE does not intend to do in the future, but omits any detailed explanation as to what ICE intends to do in the future in order to extract value from Trayport acquisition.

I. ICE not-do's in the future

**“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.”**

We do agree with the ICE Submission that Trayport TGW is a unique product as there is no other alternative aggregator trading channel. The years have proven that regardless of Trayport aggressive and harsh contractual and pricing licensing terms, there has been no alternative started in the market, namely due to the difficulty of creating from scratch a competing venue with the same broad “network” of traders and venues. Indeed, the cost of leaving Trayport would have been higher for venues and traders (as no alternative available), than the cost of taking on more unfavorable Trayport contractual and pricing terms.

Neutrality of the venue has been guaranteed because brokers generally do not venture into exchange traded business. At least, we are not aware of any such precedent.

However, the opposite is true and there are precedents of exchanges stealing business from other exchanges or even entering the broker business. The best example is ICE itself which in the US has entered the brokered business by acquiring in 2007 100% of Chatham Energy, an inter-dealer broker specialized in energy products. ICE acquisition was described as follows: *“The new business will be operated as a wholly owned subsidiary of ICE that will be called Chatham Energy, LLC. Chatham is a leading brokerage firm that specializes in structuring and facilitating transactions in the over-the-counter (OTC) markets for energy options. Chatham’s clients include many of the world’s largest commercial energy firms, utilities and financial institutions. Chatham will support the execution of ICE’s strategic plans to develop the leading electronic marketplace for the execution of OTC energy options.”*

(See <http://www.prnewswire.com/news-releases/intercontinentalexchange-announces-acquisition-of-chatham-energy-partners-57942327.html> and <https://www.theice.com/service/broker-services#chatham>)

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Therefore, all statements throughout the paper regarding ICE inability or non-incentive to foreclose or upset competitors are simply not proven or credible in view of ICE precedent conduct in the US. In addition, ICE track-record as a ruthless, abusive and dominant competitor/service provider in Europe (which we understand has been evidenced by the numerous submissions with concerns to CMA in Phase I) questions the credibility of ICE’s noble intentions for the future towards competitors and traders in the energy markets. In summary, ICE is rather likely planning to (mis-)use Trayport dominant screen to favor ICE existing on-exchange traded business and related ancillary services, as well as to venture into OTC brokered business and new data services, by resorting to all sort of soft, contractual and pricing anti-competitive practices. The risk of both vertical and horizontal foreclosure by ICE cannot therefore be excluded.

## II. ICE intentions for the future

**“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).”**

While ICE enounces in these two paragraphs its intentions as to how to extract value from Trayport acquisition (if one believes ICE's noble intentions regarding non-foreclosure), the rest of the Submission does not elaborate at all but rather focuses on ICE not-do's for the future explained above. We believe that ICE / Trayport data appropriation and ownership is the other key to ICE future value creation via Trayport.

ICE is well-known from generally claiming broad proprietary rights and ownership in all the data and information stored in ICE platforms and systems. For example, recently ICE group have gone as far as even denying access to traders to their own ICE trade data for purpose of the traders meeting their REMIT reporting obligations. ICE response was to simply offer its (captive) trader clients its own proprietary reporting service (ICE Vault), without any alternative choice. Such response from ICE did not go down very well at some major energy trading houses, who first tried to force onto ICE to connect to alternative reporting services, so that traders would not be captive of ICE Vault. But ICE did not give in and the most the traders could get from ICE was some manual access to their individual ICE trade data. This compromise imperfect solution forces traders to manually download, collect and route every day their trade data from ICE Trade Vault to the trader's preferred reporting service. Therefore, by claiming ownership to the data, ICE is foreclosing direct automated access to other reporting services and only allowing manual individual download by traders, increasing cost and operational risk for ICE trader client base. (See [https://www.theice.com/publicdocs/circulars/16042\\_attach\\_2.pdf](https://www.theice.com/publicdocs/circulars/16042_attach_2.pdf)).

Furthermore, ICE disclaims any responsibility for the accuracy of its own proprietary data! *"Upon the request of Market Participant and to assist Market Participant, the Exchange will produce a file in the format requested by Market Participant, being either CSV or XML, in accordance with schema XSD published by ACER where applicable, however the Exchange does not provide any warranty, whether express or implied, nor does it guarantee that the (i) file will be accepted by ACER or a third party RRM (whether directly*

*compatible or consumable) or (ii) that the data contained in the file is accurate. Market Participants should undertake their own checks to ensure the format, data and file are compatible and sufficiently accurate upon submission to ACER or another third party RRM."*

Similarly, Trayport also offers reporting services to their trader clients and initially publicly claimed to have ownership to all data routed via its TGW platform. However, Trayport faced strong opposition by its bigger broker clients who counter argued that contractually they had not released their data rights to Trayport. By contrast, smaller brokers using Trayport new SaaS platform, are said to be forced to contractually release all rights to their broker platforms to Trayport.

Such broad claims of data ownership by both ICE and Trayport translate in a complete isolation of their vertically-integrated silos and consequent foreclose of any other

“competing” third parties to connect to such closed silos and offer alternative services, at any level of the silo. Perhaps ICE /Trayport intention is to soften their closed approach to an apparent open approach where “pay-per-use” is the key. Therefore, ICE/Trayport future business would be based on monetizing any use of their proprietary data, by charging any third party that would connect or use such data, regardless of which entity or venue generated that data in the first place. As way of example, Trayport reporting service terms includes an additional fee for traders wishing to query the Trayport API in order to access their own historical trade data in the platform.

Regarding ICE fees for data usage by third party vendors, we attach a sample of ICE template contracts where for example, ICE goes as far as requiring a fee plus a 20% profit sharing payment from the third party service provider that wishes to use the ICE platform data. [REDACTED]

We also understand from market rumors that Trayport is planning to migrate its current service model to a SaaS model, where such data ownership will be appropriated, in line with ICE long-standing company policy. ICE can then move to own its proprietary OTC broker business, as they have done in the US, and then charge any third party brokers, venue, service provider or trader for use of the ICE/Trayport data. In addition, ICE /Trayport can build new benchmark data services [REDACTED] as well as ancillary services (reporting, confirmation etc) as any (efficient) competitor downstream will be inevitably put at a pricing disadvantage due to ICE “pay-per-use” data policy.

Perhaps an analogy to ICE /Trayport platform would be to Microsoft or Google who respectively own the Windows or Android operating systems, that prevail in PCs and phones worldwide. Time has shown that temptation has always been high on both Microsoft and Google to use soft, contractual or pricing dubious practices in order to ensure that their own proprietary internet search engines and software/apps would be favored to those of competitors. The same rationale will apply to ICE acquisition of Trayport and the temptation for ICE to (mis-)use Trayport platform, that prevails in European traders desk, to the disadvantage and foreclosure (horizontal and vertical) of ICE competitors.

[REDACTED] remains at your disposal for any question, or additional information, you may have in the context of this letter.

Yours sincerely

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An additional appendix was redacted in full.