

## **COMPLETED ACQUISITION BY INTERCONTINENTAL EXCHANGE, INC. (ICE) OF TRAYPORT**

### **Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market, and special reference groups**

#### **Introduction**

1. On 3 May 2016, the Competition and Markets Authority (CMA), in exercise of its duty under section 22(1) of the Enterprise Act 2002 (the Act), referred the completed acquisition by Intercontinental Exchange, Inc (ICE) of Trayport, Inc. and GFI TP Limited, including their subsidiaries (together Trayport) (the Merger), for further investigation and report by a group of CMA panel members (the Group).
2. In its provisional findings on the reference notified to ICE and Trayport (the main parties) on **16 August 2016** (the Provisional Findings), the Group, *inter alia*, provisionally concluded that the Merger resulted in the creation of a relevant merger situation and that the situation may be expected to result in a substantial lessening of competition (SLC) in the supply of trade execution services to energy traders and trade clearing services to energy traders in the EEA, including to UK-based customers, as a result of the merged entity implementing a partial foreclosure strategy.
3. The Group provisionally expects that the Merger will lead to adverse effects in the form of higher fees or worse terms for traders, as well as a more limited range of trading opportunities and tools resulting from the loss of dynamic competition, than would otherwise have been the case, absent the Merger. The full text of the Provisional Findings is available on the [case page](#).
4. This notice of possible remedies (Remedies Notice) sets out the actions which the Group considers it might take for the purpose of remedying the SLC and resulting adverse effects identified in the Provisional Findings. The Group invites comments on the possible remedies by **5pm on 30 August 2016**.

#### **Criteria**

5. In choosing appropriate remedial action, the CMA shall have regard to the need to achieve as comprehensive a solution as is reasonable and

practicable to remedy the SLC and any adverse effects resulting from it.<sup>1</sup> When deciding on an appropriate remedy, the CMA will consider the effectiveness of different possible remedies and their associated costs and will have regard to the principle of proportionality. Between two remedies that the CMA considers equally effective, it will choose that which imposes the least cost or restriction. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. For completed mergers, the CMA will not normally take account of the costs or losses that will be incurred by the merged parties as a result of a divestiture remedy.<sup>2</sup>

### **Possible remedies on which views are sought**

6. In merger inquiries, the CMA will generally prefer structural remedies, such as divestiture or prohibition, rather than behavioural remedies because:
  - (a) structural remedies are likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;
  - (b) behavioural remedies may not have an effective impact on the SLC and its resulting adverse effects, and may create significant costly distortions in market outcomes; and
  - (c) structural remedies do not normally require monitoring and enforcement once implemented.<sup>3</sup>
7. In determining an appropriate remedy, the Group will consider the extent to which different remedy options could be effective in remedying, mitigating or preventing the SLC or any resulting adverse effect that has been provisionally identified. The Group will also consider whether a combination of measures is required to achieve a comprehensive solution, and will evaluate the cumulative impact of any such combination of measures on the SLC or any resulting adverse effect.
8. At this stage, the Group considers that a complete divestiture of Trayport by ICE (Divestiture remedy) would be likely to be an effective remedy to the SLC and the resulting adverse effects that it has provisionally identified.
9. During the course of the inquiry, parties proposed two other measures: a behavioural remedy requiring Trayport to grant all of its customers access to its products and services on 'fair, reasonable and non-discriminatory' (FRAND) terms and a measure opening up Trayport's closed 'access

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<sup>1</sup> Section 36(3) of the Act.

<sup>2</sup> *Merger Remedies: CC8* (November 2008), paragraphs 1.9 and 1.10. CC8 has been adopted by the CMA board.

<sup>3</sup> *CC8*, paragraph 2.14.

programming interface' (API) across its software products. These are described later in this notice and will be considered by the Group.

10. The Group will also consider any other structural or behavioural remedies put forward as part of this consultation.

### ***Divestiture remedy***

11. Divestiture of the acquired business would remove at source the SLC that the Group has provisionally identified. It would therefore represent a comprehensive solution to all aspects of the identified SLC and present very few risks in terms of effectiveness.
12. In evaluating a divestiture as a remedy to the provisional SLC identified, the Group will consider the likelihood of achieving a successful divestiture and the associated risks. In reaching its view, the Group will have regard to the following critical elements of the design of a Divestiture remedy:
  - (a) **The scope of the divestiture package:** in order to be effective in remedying the provisional SLC, any divestiture package would need to be appropriately configured to be attractive to potential purchasers and to enable the purchaser to operate effectively as an independent competitor.
  - (b) **Identification of a suitable purchaser:** the Group will wish to satisfy itself that a prospective purchaser is independent of the main parties, has the necessary financial and reputational capability to compete, is committed to competing in the relevant markets and that divestiture to the purchaser will not create further competition concerns.
  - (c) **An effective divestiture process:** the Group will consider the appropriate timescale for achieving a divestiture and what procedural safeguards would be needed to minimise the risk associated with this remedy option.
13. The Group welcomes all views in relation to the Divestiture remedy and any issues that might arise as a result of such a divestiture, but it specifically invites feedback on the following areas:
  - (a) In determining whether a potential purchaser is suitable, the Group will have regard, *inter alia*, to whether divestiture of Trayport to that purchaser would raise further competition concerns. Are there any market participants (eg traders, brokers or exchanges) or any other types of potential purchasers that would not be suitable purchasers for the Trayport business?

- (b) What is an appropriate timescale for ICE to secure binding contractual commitments from a potential purchaser to acquire Trayport?
  - (c) What types of procedural safeguards might be needed to ensure an effective divestiture process? Should ICE be required to appoint an external monitor (eg a divestiture trustee) to oversee the divestiture process?
  - (d) Finally, could a differently configured divestiture package (eg a partial divestiture of Trayport's back-end matching engine products to a suitable purchaser) also be an effective remedy? If so, would you amend any of your responses to the questions above under this 'partial divestiture' scenario?
14. We are also inviting views on the treatment of an agreement which ICE and Trayport entered into in May 2016 (New Agreement) but whose implementation is currently pending. Should the New Agreement be implemented, Trayport's services would be extended to additional ICE Futures Europe and ICE Endex European utilities products.<sup>4</sup> We seek views on whether the new owner of Trayport should be given the option to terminate, renegotiate the terms of, or implement the New Agreement.

### ***Other potential measures***

15. During the course of our inquiry, it was put to us that a behavioural remedy requiring Trayport to grant all of its customers access to Trayport's products and services on 'fair, reasonable and non-discriminatory' (ie FRAND) terms might be an effective remedy option.
16. Separately, a number of parties told us that Trayport's closed API policy in relation to its front-end access and back-end matching engine products<sup>5</sup> was a substantial barrier to the establishment of a viable competitor to Trayport's platform. Some parties suggested that opening up Trayport's API across its software products would increase the likelihood of an alternative and viable platform to Trayport emerging and by lowering these barriers to entry the measure could remedy the SLC.

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<sup>4</sup> This agreement is an interface development and support agreement (IDSA), under which Trayport will display additional ICE Futures Europe and ICE Endex products to Trayport's Joule and Trading Gateway customers, and provide a straight-through processing link to ICE Clear Europe for broker intermediated transactions. See also Section 6 of the Provisional Findings on the 'Counterfactual'.

<sup>5</sup> Trayport's front-end access products being Joule/Trading Gateway, and its back-end matching engine products being Broker Trading System (BTS), Exchange Trading System (ETS) and GlobalVision Portal (GV Portal).

17. We set out below our initial views on these measures and invite parties to put forward their views in relation to their effectiveness as well as any other remedies they wish to put forward.

#### *FRAND remedy*

18. In our Provisional Findings, whilst we found that Trayport customers already received certain contractual protections from Trayport, our provisional view was that these contractual provisions would not be sufficient to preclude the ability of the merged ICE/Trayport entity to foreclose its rivals.<sup>6</sup>
19. The Group has concerns that a FRAND remedy may not be effective as:
- (a) such a remedy would not produce the innovation and efficiency generated by dynamic competition;
  - (b) it would be impossible to design the remedy so that it covered all new products and services; and
  - (c) customers might not be able to identify if they were being given access on FRAND terms.
20. We invite views on the effectiveness of a FRAND remedy in terms of specification, circumvention, and monitoring and enforcement risks (see footnote for definitions of these risks),<sup>7</sup> and in particular:
- (a) How would FRAND terms be defined and specified to remedy effectively the SLC or the resulting adverse effects we have provisionally identified, including the adverse effects associated with the loss of dynamic competition?
  - (b) How would a FRAND remedy address any future developments in the products or services offered by Trayport and also address the fact that Trayport's customers do not purchase Trayport's products and services on the same terms as each other?

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<sup>6</sup> See also the 'Summary' section of the Provisional Findings.

<sup>7</sup> *Specification risks*: these arise if the form of conduct required to address the SLC or its adverse effects cannot be specified with sufficient clarity to provide an effective basis for monitoring and compliance. *Circumvention risks*: in order to avoid, or reduce, the risk of circumvention, behavioural remedies need to deal with all the likely substantial forms in which enhanced market power may be applied, which in practice, may not be feasible or may make the behavioural remedy too complex to monitor. *Monitoring and enforcement risks*: even if the specification risks could be overcome, a behavioural remedy may be subject to significant risks of ineffective monitoring and enforcement. This may be due to a variety of causes, eg asymmetry of information between the monitoring agency and the business concerned and the long timescale of enforcement relative to a rapidly moving market. Source: [CC8](#), paragraph 4.2.

- (c) Should a FRAND remedy be permanent or should it be subject to a time limit?
- (d) How might compliance by Trayport of the FRAND remedy be monitored and any disputes be resolved? Could compliance be monitored by Trayport's customers, or should there be an independent body charged with this function? Are there any circumstances or situations where compliance by ICE/Trayport of the FRAND remedy would be difficult to monitor (eg because it would be unavoidably complex, or prohibitively costly to do so)?
- (e) How might a breach of FRAND terms by ICE/Trayport be remedied (eg imposition of penalties or fines on Trayport)?
- (f) What would you estimate to be the initial and ongoing costs to ICE/Trayport or to Trayport's customers of a FRAND remedy?

#### *Open API measure*

- 21. A large number of parties have cited Trayport's closed API as a significant barrier to the establishment of a viable alternative platform to Trayport. The Group is inviting views on:
  - (a) whether opening Trayport's API to Trayport's front-end access (Joule/Trading Gateway) and back-end matching engine products (BTS, ETS and GV Portal), would facilitate the entry of a viable alternative platform to Trayport; and
  - (b) whether this might be an effective remedy to the SLC or adverse effects we have provisionally identified.
- 22. At this stage, the Group has concerns that the intended benefits of opening Trayport's API may not be sufficiently certain or timely, both in relation to (i) whether entry on a sufficient scale would take place and the timeliness of any such entry, and (ii) whether any new competing platform would be able to impose a sufficient constraint to remedy the SLC or adverse effects we have provisionally identified.
- 23. The Group is seeking views on the effectiveness of an Open API measure in terms of specification, circumvention, and monitoring and enforcement risks, in particular:
  - (a) How should an Open API measure be designed and specified to ensure it remedies the SLC or adverse effects we have provisionally identified?

- (b) Is it necessary for the API to be opened for both Trayport's front-end access and back-end matching engine products?
- (c) Once Trayport's API is opened, what are the necessary next steps that must take place for an Open API measure to have its intended effects of remedying the SLC or adverse effects we have provisionally identified?
- (d) Are any additional measures required to ensure that an Open API measure achieves its intended effects in a timely manner (eg identification of a suitable upfront third party who would be committed to the development of a viable alternative to Trayport's platform)?
- (e) What are the costs (upfront and ongoing) to ICE/Trayport or other parties of implementing the Open API measure, including any loss of value to the business or unintended consequences or distortions in this or other markets?

### **Relevant customer benefits**

24. The Group will have regard to the effects of remedial action on any relevant customer benefits (RCBs), within the meaning of section 30 of the Act, arising from the Merger situation. Such benefits might comprise lower prices, higher quality, or greater choice of goods or services, or greater innovation in relation to such goods or services. A benefit is only an RCB if the CMA believes that:
- (a) the benefit has accrued as a result of the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period as a result of the creation of that situation; and
  - (b) the benefit was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.
25. The Group welcomes views on the nature of any RCBs and on the scale and likelihood of such benefits, and the extent to which these are preserved by the different remedy options we are considering.

### **Next steps**

26. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the Group to consider, by **5pm on 30 August 2016** (see note (i)).
27. A copy of this notice will be posted on the CMA website.

*Note*

- (i) This notice of possible actions to remedy the SLC and any resulting adverse effects is given having regard to the Provisional Findings. The main parties have until **5pm on 6 September 2016** to respond to the Provisional Findings. The Group's findings may alter in response to comments it receives on its Provisional Findings, in which case the Group may consider other possible remedies, if appropriate.