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ICE / TRAYPORT
EXCHANGE C INITIAL RESPONSE TO CMA NOTICE OF POSSIBLE REMEDIES

1. INTRODUCTION

EXCHANGE C agrees with the main conclusions in the CMA's Provisional Findings of 16 August 2016 (**PFs**). This submission sets out EXCHANGE C's views on whether the remedies outlined in the CMA's Notice of Possible Remedies (the **Remedies Notice**) would be effective in addressing the substantial lessening of competition (**SLC**) expected to result from the acquisition of Trayport by ICE. Please note that EXCHANGE C has had only limited time in which to consider the CMA's PFs and the Remedies Notice. Recognising the CMA is subject to strict timetables, EXCHANGE C has sought to be as helpful as possible so has provided its initial views on the proposed remedies. As initial views, these may be supplemented or subject to revision or clarification.

The CMA has proposed a complete divestiture of Trayport. It is also seeking views on a behavioural remedy whereby Trayport grants all of its customers, and ICE's competitors, access to its products and services on FRAND terms and the opening up of Trayport's closed API.

As the CMA is aware, EXCHANGE C uses Trayport [✂] technology [✂]. the central clearing house for EXCHANGE C [✂], uses Trayport's STP Clearing Link. As a result, EXCHANGE C is well placed to comment on the extent to which remedies stipulating access to Trayport's front-end, back-end and STP link are likely to be effective and practicable and whether an open access API will be sufficient alone or alongside FRAND access to address the competition concerns identified by the CMA.

2. FULL DIVESTITURE IS THE MOST EFFECTIVE REMEDY

Scope of the divestiture package

EXCHANGE C strongly believes that full divestiture is the most effective way to remedy the competition concerns identified by the CMA. A successful full divestiture will maintain the competitive structure of the market and thus deal with the SLC more directly and comprehensively than any possible package of behavioural remedies. Following the sale of Trayport the clear cut nature of the remedy would avoid the need to appoint a monitoring trustee. With a divestiture, the CMA and the divestiture trustee, should one be required, would be able to ensure that the new owner is entirely independent of ICE and no commercial arrangements are made, formal or otherwise, that may lead the new owner to favour ICE in its future business dealings. The nature of the Trayport assets means that, with sale to a suitable purchaser and an effective divestiture process, there are limited risks associated with the CMA's preferred remedy.

A suitable purchaser must be independent

Due to the importance of Trayport, EXCHANGE C believes that divestment to a party independent of trading and clearing services would be effective at addressing the SLC. A Trayport operated independently of firms active in trading and clearing will ensure there is no incentive for Trayport to favour or advantage the volumes or development of any trading or clearing venue.

Sale to an exchange would have the potential to raise competition concerns similar to those identified in the PFs. While any prospective exchange purchaser would raise less concerns than those raised with sale to ICE, the importance of Trayport in facilitating trading and clearing volumes would give an exchange – particularly one active in both trading and clearing – the ability to disadvantage competing trading venues and to benefit from such actions. In the context of the CMA's PFs, which point, for example, to the potential for ICE's control of Trayport to help it gain control of new markets, even where an exchange is currently less active than ICE in head-to-head competition with other trading venues, there may remain a risk from reduced potential head-to-head competition and/or dynamic competition in a narrower set of products or markets. Where the exchange is currently active, ownership of Trayport will facilitate that exchange protecting its existing incumbent position. As a result, divestment to a single exchange will always have the potential to raise competition issues.

Sale to a broker or consortium of brokers would not raise major issues. EXCHANGE C was generally satisfied with the commercial relationship it had with Trayport while it was owned by the brokers GFI and subsequently BGC. Brokers are not active as central clearing houses, which, as noted in the CMA's PFs, reduces their incentives as owners of Trayport to foreclose competing trading venues relative to an exchange. With the right balance of participating venues, sale to a consortium of brokers and exchanges together would also have the potential to raise minimal issues.

Sale to a trading company would not be appropriate. This would raise competition issues associated with possible foreclosure of other traders and a range of issues around the insider status of the acquirer stemming from the visibility and control of prices that ownership of Trayport would give the trader. It would also give the trader such significant leveraging power over trading venues that this may raise anti-competitive buyer power concerns and have an exclusionary impact towards the trader's own competitors. As above, with the right balance of market participants, sale to a consortium of brokers, exchanges and traders would also have the potential to raise minimal issues.

EXCHANGE C believes that, given its profitability and continued growth, a number of parties – for example, **financial investors or IT companies** – would be interested in purchasing Trayport and that such a purchase would be an attractive prospect for straightforward commercial, rather than strategic or potentially anti-competitive, reasons. The risks of not finding a suitable purchaser is low.

[✂] Given Trayport's critical role in European energy and commodity markets, the nature of the owner is very important not just to ensure no competitive harm arises but for the continued well-functioning of these markets. [✂]. As is highlighted in the CMA's PFs, many of the trading and clearing venues that ICE competes with are reliant on Trayport. A Trayport sold to a less capable or committed purchaser could have the same harmful consequences as that of ownership by ICE. EXCHANGE C therefore believes that the due diligence and purchaser approval process must seek to ensure the purchaser is financially strong, committed to invest and develop Trayport, and committed to the expansion and development of the energy and commodity trading and clearing markets.

An effective divestiture process should give rapid effect to the remedy

Trayport is a successful standalone company. The absence of any carve-out issues and the likely interest of numerous suitable purchasers means that the divestiture can be undertaken swiftly. The CMA is aware of the significant ongoing business risks associated with ICE's attempted takeover of Trayport and until resolved the uncertainty, for example, over EXCHANGE C's IT strategy continues to impede business development and constitutes a major risk given the inability currently to envisage full [✂]alternative scenarios in the absence of API opening. EXCHANGE C remains extremely nervous about the possibility

for an information breach by ICE or for ICE to influence Trayport during the merger review process. While it is reassured by the CMA's interim measures, EXCHANGE C has significant concerns over the risks during the divestiture period, in particular that ICE may seek to reduce the competitive capability of Trayport or deliberately seek to extend the period of uncertainty for competing trading venues dependent on Trayport.

While EXCHANGE C recognises the importance of a full due diligence and purchaser approval process to ensure a committed and credible purchaser, it strongly supports the CMA imposing its standard six month divestiture period and sees no reason for the CMA to depart from this approach. EXCHANGE C also supports any subsequent efforts that the CMA considers necessary to effect the remedy, including the use of a divestiture trustee, to minimise the significant risks associated with the transfer of ownership not being completed within the initial divestiture period.

The ongoing uncertainty caused by Trayport's closed API

While the hold separates put in place by the CMA through its Initial Enforcement Order (**IEO**) are hopefully effective at preventing further integration or causing harm to competing trading and clearing venues during the limited time of the CMA's merger review process, in the event of a full divestiture there is strong likelihood that ICE will appeal this decision. A protracted appeals process over the divestiture remedy would extend the risks to the businesses of competing trading venues increasing the risks of a harmful impact on competition, particularly in such a fast moving, rapidly developing and technologically advanced industry as energy and commodity trading and clearing.

Immediate opening of the Trayport API could potentially alleviate some of the uncertainty by giving competing trading venues greater commercial power towards Trayport and flexibility to envisage other choices in their IT strategy, which is impossible at the moment. EXCHANGE C recognises that further interim measures at this stage may not be possible but wanted to emphasise the importance of opening the API to ensure effective interim relief, particularly if ICE seeks to appeal a divestiture remedy extending the uncertainty regarding the target IT landscape (which is key to the business) of Trayport customers.

Trayport's new owner should be given complete commercial flexibility over the New Agreement

The CMA is also seeking views on the post-merger agreement between ICE and Trayport relating to the display of additional IFEU and ICE Endex products to Trading Gateway and Joule customers. EXCHANGE C is not in a position to determine the extent to which the interface development and support arrangements are more favourable to ICE than other trading venues or compared to what would otherwise have been the case absent the merger.

Signing of the agreement appears to be a clear breach by ICE of the IEO. The IEO stipulates, amongst other things, that the business of ICE and Trayport be carried on separately, that no action is taken which might lead to the integration of ICE and Trayport, and that any negotiations with any existing or potential customers in relation to Trayport will be carried out by Trayport alone and ICE will not enter into any [joint] agreements with Trayport. The CMA notes in its PFs that it was only informed of the New Agreement on 16 May 2016 when ICE submitted a fortnightly compliance statement. In order to have reached this agreement, significant discussions must have taken place about the display of ICE products on Trading Gateway and Joule customers in advance of this agreement being signed.

As the CMA has rightly noted in its PFs, the New Agreement was concluded post-merger and it is not certain that the agreement would have been entered into at all and, even if it had, if it would have been entered into in its current form absent the merger. Importantly, the CMA has also rightly recognised the reluctance of ICE and Trayport to cooperate prior to the merger. It is EXCHANGE C's view that, due to the

competitive relationship between ICE and Trayport, in addition to the existing commercial relationship between them, no further cooperation would have taken place absent the merger.

In light of the context for its signing, EXCHANGE C believes that the new owner must be given the commercial flexibility to determine what agreements it enters into, independent of possible strategic and anti-competitive reasons for the agreement having been signed. The new owner should be given the option to terminate, renegotiate the terms of, or implement the New Agreement.

Partial divestiture would not resolve the competition concerns identified by the CMA

EXCHANGE C believes that a partial divestiture of Trayport's back-end matching engine products may resolve some of the competition concerns identified in the CMA's PFs (this would however depend on the commercial and technical conditions by which the API of this spin-off back-end would be opened) but would certainly not resolve all of them. Consequently, partial divestiture would be insufficient to address the SLC. By divesting only the back-end, competing trading venues would for example not be protected from the range of foreclosure strategies that would be implemented through use of the Trayport front-end. Foreclosure by ICE can occur through use of both the Trayport back-end and the Trayport front-end. The range of foreclosure strategies available to ICE is highlighted in EXCHANGE C's submission of [✂] and are confirmed by the CMA in its PFs (e.g. paragraph 8.65). For example, the CMA notes that ICE would be able to partially foreclose its rivals through delaying the listing of their new products on Trading Gateway and rightly recognises the importance of the network effects in making Trayport such a critical front-end price discovery platform.

A partial divestiture would also raise additional concerns as it is not clear if Trayport would remain a viable competitor if split in two. Splitting Trayport in two may significantly reduce its commercial ability and incentives to grow and to invest and develop. Further, it is very difficult to assess the extent to which such a remedy would even be technically feasible, given the complex technical processes connecting the Trayport front-end and back-end.

3. FRAND ACCESS WOULD BE IMPOSSIBLE TO DESIGN, MONITOR AND ENFORCE

The CMA is seeking views on a remedy requiring Trayport to grant all of its customers access to the Trayport front-end, back-end and STP Clearing Link on fair, reasonable and non-discriminatory (**FRAND**) terms.

EXCHANGE C stresses that any FRAND access terms could not under any circumstances be an effective remedy alone. Assuming FRAND access terms can be both set out comprehensively and monitored and enforced effectively, in a way that is sufficient to address the SLC, which, as outlined below EXCHANGE C is highly sceptical of, alongside the FRAND access terms the remedies would have to:

- **Open the Trayport API**: it is through the closed API to the back-end that has made Trayport's customers (brokers, exchanges, clearing houses and traders) captive and locked-in to the Trayport platform. Any customer that wants to trade prices available in the Trayport back-end is forced to use one of the Trayport front-ends (direct screen for accessing a single venue or Joule/Trading Gateway to compare prices for multiple venues). While the competition concerns arising from the merger are wide in scope and relate to numerous foreclosure strategies, one of the core drivers underpinning all of the concerns is the significant barriers to entry imposed by Trayport's closed

API. The proposal to open up the API as part of the remedies package is discussed further below, including noting: that FRAND access terms would be required alongside opening the API as Trayport can, for example, choose who is listed in Trading Gateway or connected to Trayport Clearing Link and under what commercial conditions access is granted; and the importance of customers being able to switch without requiring coordination. Where FRAND terms are different to existing contracts, companies should naturally be in a position to negotiate and potentially refuse those new terms and switch to an alternative provider. The closed API does not allow this.

- **Involve significant information barriers** imposed on it that would ensure there was no chance of any meaningful information being passed from Trayport to ICE. The enormous amount of information that a monitoring trustee would have to monitor would mean the trustee would require a team of people involved in the daily operations of Trayport. Such monitoring would place significant constraints on the way that Trayport could do business. Indeed the only way EXCHANGE C can see information barriers being sufficient is through arrangements that make Trayport so independent, operationally and at management level, that the outcome is close to structural separation.

- **Impose corporate governance arrangements** that ensure full operational and decision-making separation. For the FRAND remedy to be effective, ICE must have no operational control over Trayport. This would likely have to involve, for example, a separate independent Board, accounting separation, ICE's voting rights capped, separate IT teams, separate sales teams, separate offices and data centres, separate remuneration policies and employee pools and very limited shared services generally.

The list above is not exhaustive but serves to highlight a number of additional provisions that would be required alongside FRAND access which alone would be completely inadequate at preventing an SLC from arising.

In relation to FRAND access terms specifically, EXCHANGE C believes **it would be extremely difficult to design a FRAND remedy which would effectively prevent any foreclosure from occurring and huge issues would arise in monitoring and enforcing compliance with the remedies**. These issues specific to the FRAND remedy are summarised below.

Significant circumvention and specification risks

The CMA's package of behavioural remedies would not directly address the loss of competition in trading or clearing. The remedies would be designed to ensure access and so the risks of circumventing the remedies and an SLC arising in spite of the FRAND access terms is high.

Any obligations stipulated by the CMA would struggle to be sufficiently comprehensive that ICE could not circumvent these specific obligations by foreclosing competitors through other means. EXCHANGE C in its submission of [✂] outlined a wide range of foreclosure strategies available to ICE. The CMA in its PFs (for example, at paragraph 8.56 and 8.65) recognises this wide range of disparate strategies. Some of these strategies involve nuanced changes, for example, to the timing of new products being listed, to delays in prices being displayed on Trayport, or involving transfer of 'soft' confidential information on new product development and launches. Foreclosure in practice may involve a combination of a number of different strategies.

EXCHANGE C believes that designing FRAND terms to cover all of the substantial ways through which foreclosure could arise is simply not feasible. FRAND terms would have to apply to Trading Gateway, the Trayport back-ends and the STP Clearing Link. Furthermore, designing FRAND terms to cover all of the products to which foreclosure strategies may be applied would also be impossible. Trading venues are active in a large number of products with different characteristics with each trading venue operating under different technical and commercial terms with Trayport, reflecting also the maturity and level of development of the market under consideration. Capturing all these situations in a FRAND framework is impossible and new situations appear all the time due to the constantly changing nature of the European energy business. The scope of any FRAND access terms would have to be incredibly wide extending into all areas of Trayport's business operations and cover individual relationships with customers. In the past, Trayport has always kept a large degree of flexibility in its pricing which allowed it to cover this diversity. Applying predefined and uniform FRAND access terms and pricing may have a debilitating effect on Trayport.

Determining 'fair', 'reasonable' and 'non-discriminatory' are all very difficult

Any commercial decision by Trayport that harms competitors – even a justified price increase – would need to be rigorously examined as such a price increase applied non-discriminately to all trading venues or all exchanges will harm competitors but will not harm ICE who will be paying an increased price to itself. There is a strong incentive for ICE to align terms at the highest price. Determining where a change of terms is 'fair' or 'reasonable' would be very difficult, including a detailed analysis of cost structures and contracts. Trayport or a monitoring trustee would be required to review its major suppliers on an ongoing basis to ensure it is obtaining the best deal for its customers.

A likely necessary requirement under FRAND would be transparent standard terms employed by Trayport, both for access but also for the process through which Trayport will work with and prioritise the development and introduction of new products by customers which would potentially create distortion risks. Such terms have the potential to significantly limit the commercial flexibility of Trayport, creating significant distortion risks, as discriminatory pricing and access exists currently. For example, the amount trading venues (such as CME, Nasdaq and the EEX Group) pay to Trayport is likely to be very different, reflecting the variety and nature of products they each trade and the different technical set-ups of each. Would prices automatically be aligned at the higher of the two to ensure uniform access terms that are non-discriminatory?

More generally, there are many ways to set prices or allow access and determining what is fair, reasonable and ensuring no discrimination between customers would be almost impossible. For example, if ICE was to change the pricing structure to for example volume-based pricing. This may be considered as "fair" pricing but it would, in effect, be very harmful to competitors vis-à-vis ICE as this pricing structure would be equivalent to paying a tax on our success to ICE.

In addition, many Trayport functions that are crucial for competitive access are not easily specified. Access commitments would have to be specified in such significant and technical detail that would not only make monitoring infeasible but would also limit the commercial flexibility of Trayport. EXCHANGE C does not believe that remedy obligations could be detailed with sufficient clarity to ensure all possible harm to competitors could be avoided.

Significant monitoring and enforcement risks

Foreclosure not readily identifiable

As outlined in its previous submissions, EXCHANGE C believes that many of the foreclosure strategies available to ICE are not readily identifiable to customers (brokers, exchanges and clearing houses) and

EXCHANGE C would be unable to confidently identify a breach of FRAND terms. The CMA recognises this point in its PFs (para. 8.57). For example, EXCHANGE C would find it very difficult to detect where ICE had impeded its trading activity, where a technical malfunction had occurred or where 'soft' confidential information had passed from Trayport to ICE. The volume and complexity of the information that would need to be monitored would be substantial and the asymmetry of information on technical details of Trayport's operations would make monitoring infeasible. A permanent separate regulator would need to be established at huge cost to monitor compliance with FRAND terms and when a full divestiture offers a feasible alternative this would be both disproportionate and significantly impede innovation and the day to day workings of a fast moving market.

As mentioned above, discriminatory pricing and access already exist. Determining fairness in this context would be very challenging and, as outlined above, there would be a risk that ICE could align prices in its favour.

Network effects make enforcement impossible

Trading venues including EXCHANGE C and ICE are competing for liquidity. In markets characterised by very strong network effects each market in which one or both is active is at risk of potentially tipping if either one can win sufficient liquidity. If a portion of EXCHANGE C's volumes are lost to ICE through foreclosure, the liquidity on ICE and the spreads it can offer will be at a level at which EXCHANGE C would find it very difficult to win these volumes back. While it will still have commercial strategies to compete, such as reducing fees, these may not be sufficient to offset the more attractive spreads that result from the volumes that have shifted. The impact of foreclosure can be immediate and can potentially have a persistent, or irreversible, effect in the long-run far greater than the actual volumes switching suggest.

Due to this importance of liquidity, and the range of foreclosure strategies available to ICE, enforcing FRAND terms *ex-post* is not possible. Any foreclosure could cause a shift in liquidity and the damage to the market position of EXCHANGE C will have been done already, rendering any dispute resolution over a breach of a FRAND term, if it can be detected and attributed to foreclosure, utterly pointless.

Attempting to remedy the breach of the FRAND term is meaningless as competition has been lost. While the losing Exchange C an potentially be compensated, competition between the exchanges may have been permanently affected to the detriment of traders. Traders would also need to be compensated on a long term basis as they would suffer the impact of reduced competition.

Rapid innovation makes enforcement impossible

In developing a new product, EXCHANGE C must engage at an early stage with Trayport to ensure the relevant software development and to develop the processes required for listing on Trayport. If ICE were to be aware of any plans to develop a new product, ICE could take this idea and develop it itself. As Trayport is always informed about the targeted launch date, Trayport could potentially slow the process for EXCHANGE C to list the product, in order to give ICE sufficient time to develop a competing product. This could be very harmful as the most difficult liquidity to win is the initial liquidity. This concern is true whether the exchange (or the broker) is using the Trayport back-end or not. Indeed, if customers continue to use the Trayport front-end, the need to discuss new initiatives with Trayport will remain. The CMA recognises this dynamic in its PFs.

Such monitoring of new product development would require *ex-ante* assessment by an independent regulator to ensure ICE were not abusing its ownership of Trayport. EXCHANGE C could not monitor this

or detect a breach. Importantly, this would not just affect EXCHANGE C's ability to develop any given product and enter any particular market but it would fundamentally alter its incentives to innovate, develop new products and enter new markets.

Resources required to monitor and enforce would be unthinkable

Monitoring would require a large team of staff equivalent to an independent adjudicator with the powers and resources necessary to carry out its functions of monitoring compliance with the vast number of undertakings imposed on Trayport. The team of trustees would need to be present at an operational level in Trayport's day-to-day business activity. Indeed, as outlined above, an adjudicator with the objective of resolving disputes *ex-post* would be inadequate given the importance of immediate monitoring and enforcement as a result of the risks of a breach of FRAND terms and the long-term consequences on competition. This degree of oversight would likely be very burdensome for Trayport and harmful to Trayport's commercial flexibility.

4. OPENING THE API

Trayport's closed API to its back-end (BTS and ETS) has enabled Trayport to maintain a closed commercial model that has kept its customers (brokers, exchanges, clearing houses and traders) captive and locked-in to the platform. Any customer that wants to trade prices available in an ETS or BTS is forced to use one of the Trayport front-ends (direct screen for accessing a single venue or Joule/Trading Gateway to compare prices for multiple venues). This closed commercial model, as explained in previous submissions by EXCHANGE C , is at the core of the concerns posed by this merger. While the competition concerns arising from the merger are wide in scope and relate to numerous foreclosure strategies, one of the core drivers underpinning all of the concerns is the significant barriers to entry imposed by Trayport's closed API.

EXCHANGE C believes opening the Trayport API is a necessary condition for an effective remedies package short of divestiture, although it is not sufficient and would require an effective package of FRAND access terms alongside it, which, as outlined above, would be very difficult to specify and enforce. If Trayport back-ends were to have an open API this would allow different ISVs to connect to Trayport and reduce the market dependency on Trayport for brokers, exchanges and traders. ISVs would be in a better position to develop technically and to match Trayport's functionality, as well as providing equivalent front-end price matching services that traders could more easily switch to without a significant reduction in quality.

Currently, as Trayport does not offer an open API, the only way to access Trayport ETS and BTS systems is through the Trayport front-end systems. An ISV must purchase Trading Gateway from Trayport and, as a result, ISVs are always dependent on Trayport as Trayport's BTS back-ends are only accessible to traders via Trayport front-ends.

For the opening of the API to be an effective remedy, it would have to lead to entry or expansion of a viable alternative and that this entry would be timely and sufficient. In particular, the CMA generally considers entry or expansion within less than two years as timely.[1] EXCHANGE C believes it is extremely unlikely that an alternative to Trayport that would enable it to compete effectively – including benefiting from significant network effects – could be developed within a two year time frame. Even if this was the case, it is not clear what protections would exist within that time period until the new alternative emerges, given the

[1] CMA *Merger Assessment Guidelines*, paragraph 5.8.11.

inadequacy of FRAND access conditions as a remedy and the potential for shifts in liquidity to have a long-run impact on competition within that period. Below EXCHANGE C outlines the importance of an open API and its impact on competition.

Closed API has blocked emergence of direct competition on the front-end side

If a trading company wants to use an alternative ISV (like Exxeta), this ISV has to align with the Trading Gateway API and not with the ETS or BTS back-end API as the latter is not available. This lack of an open API to the back-end thus forces customers to always purchase (the expensive) Trading Gateway software on top of the cost of the ISV, doubling in practice the software cost and making the architecture extremely complex and risky. Moreover, as Trading Gateway must always be paid for, a customer cannot use switching or the threat of switching to an alternative ISV as a means to obtain better terms and negotiate with Trayport.

This commercial and technical policy is unique in the back-end industry globally as it always ensures Trayport front-end software (direct screen or TGW) exists between the trader and the back-end even when an ISV is used, allowing Trayport to always control and be remunerated for price distribution.

Proposed conditions mean that indirect ISVs would not be interested

Moreover, if an ISV decides to align with the Trayport TGW API (thus becoming an indirect ISV), it will have to sign a '*chained application*' contract with Trayport that imposes very restrictive commercial and legal conditions. The ISV would have to explain the exact functioning of its application (revealing potentially commercially sensitive intellectual property conditions) that very few ISVs have dared to sign.

Last year, EXCHANGE C discussed with Trayport [✂]. Without remedies, this would give an ICE-owned Trayport the ability to refuse certain customers access to EXCHANGE C .

Lack of ISVs limits Exchange C nd broker development

For certain type of customers (for example numerous non-European and European hedge funds), their front-end of choice is not Trayport but other ISVs. These companies have thus not been able to access the prices of Trayport's back-end, limiting the liquidity of the exchanges and brokers operating with ETS or BTS. In contrast, ICE with its open back-end has been able to attract such trading customers. ICE volumes are confidential but it is well known that the key success factor of ICE in European energy products has been gained by its capacity to attract these financial firms.

In the competitive battle between ICE and EXCHANGE C [✂] , in the absence of remedies to open the API, EXCHANGE C strongly fears that ICE could leverage this restriction on EXCHANGE C and use Trayport's closed API as a way to block the access of financial firms to EXCHANGE C .

Open Trayport price ownership along with the API

When a customer is using Trading Gateway or an ISV/customer connecting to the TGW API, it has to agree that the price ownership is transferred to Trayport (like all data going through the TGW network).

This question of price ownership is extremely important and EXCHANGE C believes that opening this aspect should be considered by the CMA with the same level of importance as opening the API. Indeed, all exchange, broker and user data may become otherwise (indirectly) ICE data, which ICE can use to its own advantage. From a competition and regulatory perspective, this is critical and could additionally lead ICE to impose unfavourable commercial conditions on the access/use of this key market data.

Closed API and Trayport dominance are blocking any switching options

In a stand-alone setup prior to the merger, the closed API has allowed Trayport to benefit from substantial network effects that would not otherwise be as significant and impose punitive terms on customers with no room for negotiation for its customers. If Trayport is owned by a single Exchange C and clearing venue like ICE, the lack of open API could lead to even higher prices or unacceptable conditions being imposed.

Due to the closed API and because of the Trayport network effects, any switch from certain customers (exchanges, brokers, customers) could only occur through a '*big bang'* shift where all the industry (exchanges, brokers, customers) switches front-end and back-end at the same time. Such an approach is impractical as it would involve significant operational risks and would take many years to be deployed and tested to ensure a successful launch and initial start; there are hundreds of firms that would need to coordinate. The gas and power trading environment operates in real time with tens of thousands of trades in any given day. A trading firm cannot afford to not have access to market liquidity for a single day. Certain firms may be stranded without the ability to trade (e.g. firms that could not be ready technically on time or that were cut commercially/legally from alternatives) and threaten their survival in a very short time.

An example helps explain the circularity of this requirement:

Let's imagine that some or all brokers decide to switch on a certain date to an alternative back-end supplier X and that Trayport refuses to list X in Trading Gateway (as they did when Griffin wanted to use the WebICE back-end). In such a scenario, if the brokers have worked with front-end provider Y to build a front end and aggregators towards all X back-ends, only the trading firms ready to use Y front-ends will be able to continue to access broker liquidity and the rest of the trading firms will be left out without liquidity, potentially threatening their market access.

Moreover, for the brokers and exchanges remaining on Trayport back-end, this new front-end Y will be considered as an ISV by Trayport and will not be granted access to BTS and ETS (as it will be identified as a major competitor of Trayport). Thus these brokers and exchanges will remain invisible from the new aggregator screen Y and this will kill their liquidity in a few days.

This example demonstrates the dependency of the front-end and back-end and the requirement to move both simultaneously due to Trayport's closed API. The only option would be a 'big bang' switch that is unrealistic from an operational point of view.

Implementing the opening of the API

To open the API a full technical assessment would need to be performed with IT specialists at exchanges and ISV firms in order to determine the most standard and efficient way to connect to the Trayport back-ends (ETS/BTS). EXCHANGE C is unable to give a precise technical description at this stage but standards such as Fix Protocol (which – to our knowledge – had been implemented on Trayport back-ends several years ago but was since discontinued) should be a possibility. This API should be documented and cover all functions that allow ISV competitors of Trayport to implement front-ends with identical features and performance.

Commercially, this API should be made available under a price structure similar to market standards: free access or a reasonable price per connection that does not make the ISV alternatives disadvantaged and less preferable for customers (as it is currently with the need to contract systematically to a very expensive TGW aggregator even to access a single venue). As this API will be critical for the operations of competing

venues to ICE, a trustee should ensure that the highest care and appropriate investment are made to ensure well-functioning software. In case of default for Trayport, adequate penalties should be determined.

Regarding TGW and Clearing Link, as explained above, these software components should also be made open in order for Trayport not to be able to block access to certain venues or clearing houses.

Need for opening the API and accompanying the switch

In light of the above, EXCHANGE C believes that in any remedy short of divestiture it is absolutely fundamental for Trayport's API to be opened and this should be done as soon as possible in order for the markets not be captive to ICE which is incentivised to leave the market in a state of significant uncertainty as regards market access.

The API to the back-ends needs to be open technically and commercially to other front-ends (i.e. ensuring that ISVs could connect to Trayport's back-end with no charge) but also ensure that the front-end Trading Gateway allows connection to any other back-ends, otherwise only one side of the problem will be solved. Opening the back-end API is thus not sufficient and Trading Gateway needs to be opened to other back-ends in order to ensure that gradual competitive solutions could emerge without the need for a dramatic 'big bang' switch. In the same way, the possibility to develop and maintain alternative technology to the Clearing Link to connect the broker backend (BTS) to various clearing houses through Trayport Clearing Link would also be needed.

Such a transition scenario would require careful monitoring by the CMA through an appointed trustee to ensure all commercial and technical conditions for a soft and successful emergence of competitors in the front-end and back-end would be possible. All these discussions with potential alternative front-end and back-end providers, on exchange switching plans would need to be done without any knowledge of these plans by ICE as this could give them an advantage over competitors.

Consequently, EXCHANGE C believes that the opening of the back-end API (and opening Trading Gateway and BTS back-ends for alternative STP solutions) could not be done without the FRAND conditions enforced but also changing the data ownership policy of Trayport, ensuring stringent information barriers, and additional corporate governance arrangements.

For EXCHANGE C, allowing ICE to retain ownership of Trayport while ensuring opening of the API alongside FRAND access terms looks extremely complex and difficult to enforce and could threaten the financial viability of Trayport (creating another risk over the extent to which Trayport would be able to invest and operate its software to the highest standard), and divestment appears as the most preferable solution.