

NON-CONFIDENTIAL VERSION

31 August 2016

Project Manager/Chairman of the Inquiry Group – Mr. Simon Polito
ICE/Trayport Merger Inquiry
Competition and Markets Authority
Victoria House
Southampton Row
London
WC1B 4AD

Dear Mr. Polito,

Intercontinental Exchange/Trayport Merger Inquiry – [Financial Institution B’s] Response to the Remedies Notice

This submission is made on behalf of [Financial Institution B] (“**[Financial Institution B]**”) in response to the notice of possible remedies published by the CMA on 16th August 2016 (the “**Remedies Notice**”) in relation to its inquiry into the completed acquisition by Intercontinental Exchange, Inc. (“**ICE**”) of Trayport Inc. and GFI TP Ltd (together “**Trayport**”) (the “**Transaction**”).

[...]

1. The Transaction and the appropriate scope and nature of the required remedies package

[Financial Institution B] is an active participant in the EU energy markets and has significant concerns regarding the impact of the Transaction on competition and liquidity in these markets. As such, [Financial Institution B] welcomes the CMA’s provisional findings that the Transaction may result in a substantial lessening of competition (“**SLC**”) in the supply of trade execution and clearing services to energy traders in the EEA. [Financial Institution B] believes that it is vital that the CMA only approve the Transaction subject to an appropriate remedies package designed to protect market competition and liquidity.

[Financial Institution B] shares the CMA’s current view that a complete divestiture of Trayport by ICE would represent a comprehensive solution to the SLC. In particular, [Financial Institution B] considers the following to be the key advantages of this option: (i) behavioural remedies may be difficult to monitor and enforce; and (ii) a divestiture of Trayport could likely be undertaken relatively quickly and seamlessly. In this regard [Financial Institution B] notes that an initial enforcement order is in place and, as such, there should not be a need for extensive post-sale transitional arrangements.

2. Alternative remedies

Two alternatives to divestiture were detailed in the CMA’s Remedies Notice. These were: (i) a behavioural remedy requiring Trayport to grant all of its customers access to its products and services on fair, reasonable and non-discriminatory terms (the “**FRAND remedy**”); and (ii) requiring Trayport to open-up its closed API (the “**Open API remedy**”).

[Financial Institution B] believes that neither of these alternative remedies would fully address the SLC identified by the CMA. With respect to the FRAND remedy, [Financial Institution B] believes that it would be difficult to design such a remedy in a sufficiently comprehensive manner and that it would be difficult to monitor and enforce. For example, it may not be apparent to market participants whether they are being granted access on FRAND terms given the lack of visibility regarding the commercial negotiations and access arrangements of other market participants.

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With respect to the Open API remedy, market participants would still face significant barriers in developing a viable alternative to Trayport. In order for an alternative front-end solution to be successful, there would need to be a significant migration of market participants from Trayport to the alternative platform. In the absence of another front-end solution, market participants would be left with the option of establishing individual connections to the various brokers and exchanges, a costly and time consuming process. As a result, [Financial Institution B] shares the CMA's current concerns regarding the benefits of the Open API remedy.

[Financial Institution B] believes that, to the extent an alternative remedy to divestiture is adopted by the CMA, such alternative remedy must address the following concerns arising out of the Transaction:

- (i) **Access to confidential trading activities of market participants.** As a result of the Transaction, ICE will have access to confidential data that it cannot currently obtain regarding the trading activities of market participants. Given the widespread use of Trayport for trade execution, ICE will have full visibility into [Financial Institution B's] trading activities in many energy sectors even if the transactions are not executed or cleared at ICE. Therefore, [Financial Institution B] believes stringent additional confidentiality assurances are required from ICE regarding the segregation and use of confidential data obtained via Trayport. Challenges in monitoring compliance with these commitments must also be considered.
- (ii) **Impact on ICE incentive programs.** The dominant position held by the merged entity means that ICE may reconsider offering its current liquidity provider incentive programs in the EU energy markets. The removal of these incentive programs could negatively impact market liquidity and increase costs for traders using ICE's exchanges or clearinghouses. Furthermore, ICE's access to confidential data regarding the trading activities of market participants away from ICE raises additional concerns regarding the use of this data to structure incentive programs that are designed to target other venues, inhibiting competition and ultimately leading to increased costs for market participants. Therefore, [Financial Institution B] believes that, at least for an initial period, the merged entity should be required to continue to offer its current programs on similar terms.
- (iii) **Trayport functionality.** Trayport provides a critical means to access many brokers and exchanges in the EU energy markets. ICE should be prohibited from taking steps to reduce Trayport's functionality or the connectivity offered to other brokers and exchanges. In addition, if ICE were to transition Trayport users to the WebICE front-end, then ICE should be required to offer materially similar functionality and connectivity via the WebICE screen.
- (iv) **Trading costs and licensing arrangements.** [Financial Institution B] believes that rigorous monitoring and oversight will be required around the commercial arrangements offered by the merged entity to market participants. Any remedy that is similar to the proposed FRAND remedy must be actively monitored and enforced to ensure that a dominant market position is not being used to restrict market competition or fair access. In addition, fee arrangements must be continually evaluated from a competition perspective, including both fees paid to Trayport by competitor venues and market participants and fees paid to trade or clear at ICE.

Please let us know if you have any further questions or require any additional insight.

[Financial Institution B]