

Response to CMA notice of possible remedies

1. Divestiture

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?**

Griffin response:

Yes. In our view an SLC would be created by divestiture to any purchasers who competed in the provision of services in the following product markets:

- (a) trade execution services to energy traders;
- (b) trade clearing services to energy traders; and
- (c) provision of market data.

We would also have concerns about the sale of Trayport to a purchaser who exploited Trayport's monopoly to increase fees.

- (b) **What is an appropriate timescale for ICE to secure binding contractual commitments from a potential purchaser to acquire Trayport?**

Griffin response:

As soon as possible but in any event within 6-12 months. Any further delay could result in a material risk of lack of investment/development by Trayport during the period of continued uncertainty. It could also lead to loss of key staff by 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?**

Griffin response:

The appointment of an external monitor would be beneficial.

- (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?**

Griffin response:

Given the interwoven nature of the Trayport network, a partial divestiture would not be practicable and would be impossible without an opening of the APIs.

2. “New Agreement”

The Group is 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.

The Group seeks views on whether the new owner of Trayport should be given the option to terminate, renegotiate the terms of, or implement the New Agreement.

Griffin response:

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3. FRAND

The Group invites views on the effectiveness of a FRAND remedy in terms of specification, circumvention, and monitoring and enforcement risks 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?**

Griffin response:

We acknowledge that the FRAND remedy presents enforcement difficulties as outlined in the Group’s Final Report.

We also believe that a FRAND remedy alone would not be sufficient to remedy effectively the SLC or adverse effects identified by the Group. However, in our view, a FRAND remedy taken alongside an Open API measure (with appropriate contractual changes) could be sufficient.

In our view the FRAND terms, could be defined as follows:

1. A general set of obligations such as:
 - To offer services in an objective, fair, reasonable and non-discriminatory manner;
 - To prevent the inclusion in the licensing agreement of any matters which are not necessary for the provision of the software services (i.e. to guard against the threat of ICE using the provision of Trayport services as leverage to implement rights over other parts of the trade process);

- To prevent the inclusion in the licensing agreement of any restrictive clauses relating to data use/ownership including the removal of the concept of Chained Applications;
 - To exclude from the licensing agreement any terms which are inconsistent with a FRAND remedy such as unreasonable uplifts in fees (current agreements include annual 6% increases).
2. A set of specific Service Level Commitments with material remedies relating to:
- Product development;
 - Listing of contracts; and
 - Service delivery (i.e. service availability, responsiveness, resolution etc).

Parallels can be drawn between obligations under MiFIR (Regulation EU No 600/2014) to provide non-discriminatory access to trading venues and clearing houses (Articles 35 and 36 MiFIR and RTS 15) and a FRAND remedy. One purpose of MiFIR is to remove commercial barriers that may exist to prevent competition and avoid discriminatory practices.

Under MiFIR, clearing houses and trading venues are obliged to allow non-discriminatory access and treatment of contracts. Access can be denied only under specific conditions and MiFIR seeks to strike a balance between imposing an obligation for non-discriminatory access whilst recognising that there may be limits and exceptions which need to be carefully defined to prevent any doors being open to deliberate circumvention.

MiFIR encapsulates general obligations in level 1 legislation with specific service level commitment style obligations in Regulatory Technical Standards which contain, amongst other things, conditions under which access can be denied. A similar structure could be adopted to create a FRAND remedy which could, or example, be drafted to include provisions which:

- require Trayport to schedule work for completion within set periods depending upon complexity;
- require that Trayport must not prioritise ICE above others;
- enable Trayport to decline a request for development/listing for operational or technical reasons including for example – (a) technical barriers; (b) lack of human resources with the necessary knowledge, skills and experience to carry out the work; (c) threats to the resilience or operation of the Trayport Platform.
- require Trayport - where any request is declined – to provide full reasons in writing to the customer.
- prevent Trayport from charging fees in a discriminatory way so as to deter requests although fees can vary for objectively justifiable reasons (i.e. fees must be based upon objective and measurable criteria).

- (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?**

A structure which provided for a set of general obligations alongside more specific Service Level Commitments should be able to accommodate future developments and variations in terms.

Griffin response:

- (c) **Should a FRAND remedy be permanent or should it be subject to a time limit?**

Griffin response:

Permanent.

- (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)?**

Griffin response:

Disputes which cannot be resolved between Trayport and its customers could be determined by an independent body such as the CMA.

Monitoring of compliance would be difficult for a customer because it would not know Trayport's other contractual terms, scheduling obligations, resource allocation and priorities applied to projects.

Ideally, an independent audit should be performed annually with its results published.

- (e) **How might a breach of FRAND terms by ICE/Trayport be remedied (eg imposition of penalties or fines on Trayport)?**

Griffin response:

Breaches would be most effectively remedied through specific performance and damages.

- (f) **What would you estimate to be the initial and ongoing costs to ICE/Trayport or to Trayport's customers of a FRAND remedy?**

Griffin response:

If Trayport has historically been run on a FRAND basis, the costs should not be significant. We cannot foresee any material costs for customers.

4. Open API Measure

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?**

Griffin response:

Open API measure should ensure that APIs are opened:

- To enable access to the TGW; and
- To enable access to the BTS/ETS back-end

coupled with a removal of contractual restrictions on their use.

The Open API measure would need to incorporate provisions which prevented:

- the creation of artificial barriers such as: onerous conformance tests, technical restrictions, poor functional design, time delays and an onerous ISV approval process;
- any differences in treatment between customer hosted, SaaS and other deployment models; and
- the imposition of fees which rendered the Open API measure unworkable.

- (b) **Is it necessary for the API to be opened for both Trayport's front-end access and back-end matching engine products?**

Griffin response:

Yes

- (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?**

Griffin response:

See 4(a) above.

- (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)?**

Griffin response:

See 4(a) above. We do not believe it essential to identify a suitable third party upfront for the Open API measure to be effective. However, in our view, it would take up to three years to introduce an alternative trading system with a material number of participants using it and in the interim, the market would need to rely on a combination of monitored FRAND terms and removal of inconsistent contractual terms for protection.

- (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?**

Griffin response:

An API for ISVs to connect to the Trading Gateway is already in existence so it should not require any significant further investment to develop an API to the BTS.

We do not see this measure as disproportionate as Trayport could still operate a profitable and valuable business by providing a competitive service to its customers. The presence of competition should not, on its own, mean a loss of business for Trayport or automatic migration to alternative systems. It would instead mean that Trayport would be operating in a competitive environment for the first time where it would be judged according to its levels of customer service.

Relevant customer benefits

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.

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.

Griffin response:

We can see no obvious RCBs arising as a result of the merger.

Griffin Markets Limited

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