TO the
Competition & Markets Authority
Project Manager
ICE/Trayport merger inquiry
Victoria house
Southampton Row
London WC1B 4AD

[✂] 30 August 2016

[✂] **SUBMISSION IN RESPONSE TO THE CMA NOTICE OF POSSIBLE REMEDIES IN THE CONTEXT OF THE ICE-TRAYPORT TRANSACTION**

Dear Sirs,

We make reference to the CMA Notice of Possible Remedies in the context of the ICE / Trayport Merger ("Notice").

For each proposed remedy, we will first address CMA´s specific questions and then add any further comments that we deem relevant.

I.   *Divestiture remedy*

(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?**

Based on the past history of Trayport, we think that exchanges are probably the market participants that should be excluded altogether as potential purchasers, since similar issues identified by the CMA in the provisional findings are likely to repeat themselves in the event of another major exchange owning Trayport. Brokers seem to have managed to run Trayport without many of the concerns identified in the provisional findings, regardless of the intrinsic problems of the closed API and other shortcomings of the vertical Trayport structure. Traders, with an appropriate internal governance, would also have an incentive to run Trayport in an efficient manner both for trading purposes and as an investment for future innovation and

improvement. Other potential buyer could be ISVs or financial/private equity firms that would not pose any threat to Trayport running in a neutral way.

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

We understand that 6 months should be enough.

(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?

A divestiture trustee would be highly recommended in this case, given ICE track record, to ensure ICE enforces appropriately any divestment order.

(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?

As it relates to the divestiture remedy, our view is that a full divestiture would not fundamentally solve the 'de-facto' monopoly position held by Trayport, which today controls 85% of the European utilities derivatives trading. The symptoms of Trayport's monopoly position had been apparent well before it was acquired by ICE. In that respect, Trayport changing hands would be unlikely to resolve these issues - any potential buyer would continue to pursue the same strategies of high-fee and pay-for-play innovation that Trayport used before the ICE acquisition in order to get a return on its investment. However, we think that a partial divestiture of some of the Trayport components,, namely the TGW and CL, could be an effective remedy, as further explained below if such partial divestment would be combined with the opening of the relevant Trayport APIs.

Today, the Trayport's ecosystem consists of:

- Trayport GlobalVision *Broker Trading System* (BTS): software that a Broker uses to run an OTF, providing hybrid markets. Brokers using the BTS are called Trayport Native Brokers. As of August 2016, only called Trayport Native Brokers are connected

to the Trayport ecosystem.

- Trayport GlobalVision *Exchange Trading System* (ETS): used to run an Exchange, the ETS is basically a Broker Trading System without the voice capability. Exchanges using the ETS are called Trayport Native Exchanges.

- Trayport GlobalVision *Trading Gateway* (TGW): sold to Trading firms, Trading Gateway aggregates liquidity from the BTS and ETS, along with liquidity from selected non-Trayport venues. It may have straight-Through-Processing (STP) enabled, so as to allow traders to connect 3rd party systems to TGW

- Trayport hosted *Clearing Link* (CL), sold to Broking Firms to allow automated clearing workflows for connected CCPs

- Trayport *GlobalVision Portal* (GV Portal): sold to Exchanges not running ETS, GV Portal aggregates liquidity from these exchanges and makes them available to traders

- *Joule* Trading Screen (Joule) sold to Trading firms as a desktop screen with mobile access for front office personnel, delivered as Software-as-a-Service, and principally connecting to TGW

- Trayport *Complete* (Complete), sold to Trading firms for back office personnel for post-deal execution services like deal confirmation, regulatory reporting, and clearing

A potential partial divestiture of Trayport would allow ICE to keep the ETS and BTS parts of the business, which is aligned with its primary business model, while divesting the TGW and the CL. The other way around would not work as ICE would have little incentive to support innovation on the TGW or the CL as its success leads to reduced liquidity on the primary ICE platform or clearing house.

In addition and in combination with the above, the opening of Trayport's proprietary APIs at the BTS, ETS, TGW, CL, GV Portal and Joule would be necessary to allow Trayport prices and executed trades to be integrated into other alternative trading venues, exchanges and trader tools. In short, opening the APIs would allow to open up the existing Trayport closed system. It is essential that the opening up of the APIs have the following characteristics:

- It must be complete and contain all the messages understood by any of Trayport's existing front- and back-ends, including configuration data messages that enable technical components that access the API to communicate

- It must be easy to use and well documented

- It must be performant, with no restriction on number of messages per second etc

- It must be fairly priced

Finally, as the CMA points out, the opening of Trayport's API is not in itself sufficient to foster competition, and there has to be a credible alternative to Trayport emerging along with such a remedy. Hence the need to accompany opening of the APIs with at least a partial divestment of TGW and CL.

2. **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.[4] 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.**

Given the evidence outlined in the provisional findings, it is consistent that the agreement is terminated and renegotiated at arm´s length with Trayport, after ICE ceasing to be the owner.

II. *FRAND remedy*

(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?**

We do not think this is an appropriate remedy in itself given that the underlying core IT infrastructure lacks the basic elements to be open to competition. In addition, it is rather complex to list and define in this submission all the contractual elements that Trayport should

implement to make its full contractual package fair and reasonable. Last, we do not see any efficient way to detect or deter each instance of Trayport contractual non-compliance in the future, even with an appointed trustee.

We would like to mention however, that data ownership is a major concern which is not addressed in the CMA provisional findings or remedies. The opening of the API should also be accompanied by a specific measure to prevent Trayport, particularly upon implementation of SaaS, from ever claiming ownership to trade data since such data is generated in the first place by the traders and /or venues active in the platform, and this would also foreclose third parties to access to that data for purposes of offering competing services or products.

Last, complete independent management and operation of Trayport from ICE is critical and if Trayport is not divested (in whole or in part), we do not see how venues will agree to share sensitive new projects with Trayport in the future, hence hindering innovation.

In summary, any contractual measures encompass a rather broad scope of issues, which seem rather difficult to identify, clearly define and impose on ICE/Trayport, effectively, in practice. Hence, IT measures (eg, open API) or divestments appear perhaps easier to identify and implement in an efficient manner.

(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?**

(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?

Please see response in a)

III. Open API measure

1. 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**

We would add Clearing Link (CL). to the list of Trayport products mentioned above , that would require the opening of the API to facilitate competition, The opening of Complete is not so compelling, as its market share in post-deal-execution is low.

As explained above, the required measures to achieve an effective opening of the APIs, which must include a partial divestment of TGW and CL components. All measures can be regrouped under the following five guiding principles:

1. *Trayport and ICE must apply the „arm's length principle" to each other.*

2. *All major components of the Trayport application stack shall be open to Third Parties.*

3. *The major components of the Trayport Application Stack shall not be bundled.*

4. *Trayport must divest control of centrally maintained business configuration files, in particular* for *TGW, CL, and GV Portal and must open configuration of these components as part of the newly opened API .*

5. *The development roadmap of major components of the Trayport Application Stack shall be made public and binding.*

Most of these principles are not complied with by Trayport current set-up. In particular, many Trayport components were never made to be open to Third Party components and are inextricably linked to each other using bespoke technical protocols. Trayport GV in particular dates from 1997, and whilst it uses TCP/IP for communication, the business stack on top of it, is proprietary. Therefore, even under the assumptions that both Trayport and ICE would do their best efforts to implement the Open API principles, and that there would be no constraints in terms of manpower applied to this end, it would take many years to translate these principles into practice, during which the market would be faced with a closed application stack. Hence,

the need to accompany the opening of the API with at least a partial divestment of at least TGW, CL and GV Portal in order to avoid ICE/Trayport diverting liquidity within months.

   (b) **whether this might be an effective remedy to the SLC or adverse effects we have provisionally identified.**

Our conclusion is that the full set of measures required for opening the APIs would need constant monitoring of progress by a neutral observer over the years and that a discernible effect would only be visible in the long term. Hence such opening of the API needs to be accompanied by at least the partial divestment of at least the TGW, CL and GV Portal components.

2.   **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.**

Regarding timeliness of such a measure please see the answer to (a) above.
Regarding competition, assuming opening of the API would be successfully achieved within, say 6 months, and that the newly open software is adopted by the industry in perhaps another 6 months, then after 1 year an environment capable of engendering competition based on our current view of the market should have been achieved. However as previously explained a period of 1 year is rather ambitious and, without at least partial divestment of the TGW and CL elements, sustaining a competitive environment would be a rather challenging process.

3.   **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?**

See our answers above.

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

Yes, we believe so to allow competing access to trading venues and in the latter case to innovation in matching and other related services such as credit limit management related to bid/offer matching (lifting); although the primary components considered for open API (as well as partial divestment, as explained before) must be TGW and CL as these act as exclusive gateways controlling access to the trader desktop in the case of TGW and in the case of CL to clearinghouses competing with ICE resulting in disclosure of new product information and potentially traded volumes of competing 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?**

We are skeptical that an open API on its own is sufficient as a long term remedy. As described above, we believe that in practice commercial interest will work against and undermine any technical remedy imposed as a sole remedy.

> **(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)?**

The existence of competing providers is a pre-requisite, however our concerns relate to the actual time it may take to develop, deploy and adopt an open API as well as the long term viability of a technical remedy to remain relevant requiring on-going policing of the status quo for years to come.

> **(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

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.

These have been addressed on our comments to each of the remedy options considered above.

[✂] 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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