

Completed Acquisition by Intercontinental Exchange of Trayport

Submission on Possible Remedies by RWE Supply & Trading

30 August 2016

RWE Supply & Trading (RWEST) welcomes the CMA's provisional findings on the completed acquisition by Intercontinental Exchange (ICE) of Trayport. The CMA's provisional findings report provides a thorough and comprehensive assessment of the competition issues arising from the acquisition. RWEST shares the CMA's conclusion that the acquisition risks a significant lessening of competition (SLC) in trade execution and clearing services to energy traders via the foreclosure of competitors. This lessening of competition, in turn, would lead to adverse effects for energy traders in terms of high fees, reduced market liquidity and the loss of dynamic competition in the development of new platforms, markets and products.

We share the CMA's conclusion that the detriment to competition is sufficient to require remedial action. While divestment would be an effective remedy to the SLC arising from the acquisition, it only addresses the lessening of competition arising from the merger if the new purchaser does not present similar risks, (ie, the purchaser is not a competing exchange or broker with an incentive to foreclose competition). Divestment also does little to address the primary cause of the concerns about competition, ie, the "closed API model" adopted by Trayport and the opportunity that provides to foreclose access to competing platforms. As a consequence, we believe that a requirement for ICE-Trayport to open the API to front-end access and back-end matching products would provide a more effective remedy.

We address the specific questions raises in the Notice of Possible Remedies below.

1. Divestiture Remedy

Divestiture would address the significant lessening of competition arising from the acquisition by removing the potential for ICE as the owner to foreclose competition from the brokers, other exchanges and clearing providers and from reduced competition in the provision of front-end and back-end services.

To be effective, the CMA would need to ensure that any purchaser was suitable and did not also undermine competition. Ownership by other exchanges and/or brokers would raise similar concerns to those identified by the CMA in respect of the ICE acquisition, ie, in respect of reduced competition in the provision of trade execution and clearing services. Ownership by traders does not present the same risks; they have a vested interest in promoting open competition and innovation between venues. However, any ownership structure involving traders would need to ensure that the operation of the platform was effectively ring-fenced from their own trading operations. This would be essential to assure other traders in the market that their trading data remained anonymous and confidential .

If divestiture is ultimately pursued, a period of no more than nine months would appear to be an appropriate timescale to secure binding commitments from a potential purchaser. A divestiture trustee might be useful to oversee the process. While any restrictions on potential purchasers should be relatively straightforward to describe, a degree of judgement on the qualification of individual purchasers may be required to ensure that the sale process is not overly constrained and remains effective. For example, a trustee might determine the approach to potential purchasers operating non-commodity exchanges, exchanges outside the EEA and/or those willing to undertake not to launch an energy commodity platform in the EEA.

We have some reservations about whether a differently configured investment package would be an effective remedy or improve on complete divestiture. The competition concerns arise not from the software components themselves, but from their combination to ensure that the only realistic way to access the OTC energy market is via Trading Gateway. Other trading front ends and back-end matching engine products already exist but Trayport's closed model means that they cannot effectively be deployed independently of Trayport. The corollary of this is that the sale of these components alone would not be sufficient to overcome the "closed" aggregation of market liquidity via the Trading Gateway. Specifically, sale of the back-end systems would still leave ICE-Trayport with the opportunity to foreclose competitors' access to the front-end aggregation services.

To become an effective remedy, the partial divestiture remedy would appear to migrate to the "Open API" remedy, ie, to allow the connection of competing front-end aggregation products to connect to Trayport's back-end broker and exchange trading systems and, vice versa, for competing back-end products to connect independently to Trading Gateway. As discussed below, we believe that this would be a more effective and proportionate remedy than full or partial divestiture.

2. Open API Remedy

RWEST believes that opening Trayport's API to Trayport's front-end access and back-end matching engine products would facilitate the entry of viable alternative platforms to Trayport. The remedy presents several important benefits:

- It directly addresses the SLC resulting from the acquisition; the ability to foreclose competing brokers and exchange platforms is significantly eroded if other front-end aggregation services can access bids and offers from both Trayport and non-Trayport back ends directly rather than via a Trading Gateway;
- It reduces barriers to the entry of competing trading platforms by removing the need to move a viable pool of market liquidity to an alternative platform to successfully launch a new traded product, platform or service. Interoperability ensures that the pooling of market liquidity can occur independently of any single platform.
- It will encourage traders using other front-end services and trading other products (eg, oil) to expand into the gas, power and coal markets thereby expanding market liquidity and competition.
- It improves dynamic competition in trading and trading services by facilitating the development and launch of new, innovative front-end services, back-end matching engines and allows traders to deploy innovative automated trading applications.

RWEST believes that the remedy is more proportionate and effective than divestiture. The remedy avoids potential complications arising out of sale process (including a suitable identity for the purchaser). The remedy also allows ICE to retain ownership of Trayport, but with strong incentives to develop innovative and competitive services. Any upfront cost associated with opening the API and any ongoing costs to the Parties and market participants should be low.

We recognise the Group's concerns in terms of the certainty and timeliness of the entry of a competing platform, but would note:

- There are several potential providers of similar platforms and matching engines and – given an open API – these could be deployed in relatively short timescales.
- Given the speed with which alternatives can be deployed, the threat of future potential entry – and the possibility of its occurring – in itself represents a significant constraint on the extent and likely success of any foreclosure strategy because any benefits would be more short-lived.

RWEST would therefore be reasonably confident that alternatives could and would be deployed in a sufficiently timely and cost-effective manner to provide a sufficient constraint on the SLC's identified by the CMA. It should not be necessary to identify a party committed to the development of a viable alternative as part of the remedy, not least because the remedy is designed to facilitate the potential for several competing offerings.

The API should be open for both front-end access and back-end matching products; this ensures that competing broker trading systems can get numbers listed on the Trading Gateway, while also allowing competing aggregation services access to aggregate bids and offers from Trayport and non-Trayport sources.

The Open API Remedy should be defined as an obligation to provide an open, transparent and effective interface to other front-end access platforms and to back-end trading services. Specific technical requirements would need to be specified to ensure that the remedy cannot be delayed or frustrated by technical difficulties in implementation. For example, ICE-Trayport should be required to:

- Ensure that that data flows can be accessed or readily translated according to standard industry protocols (eg, the Financial Information eXchange (FIX) protocol).
- Provide the details and specification of the API to traders and to providers of other potential front- and back-end solutions;
- Provide reasonable technical support to parties seeking to connect to the platform.
- Ensure that the commercial framework facilitates free and open access, ie, market participants can get a user account with individual brokers independently of Trayport.

3. FRAND Remedy

RWEST shares the Group's view that a behavioural remedy to require ICE-Trayport to offer fair, reasonable and on-discriminatory (FRAND) terms would not be sufficient to preclude the ability of ICE-Trayport to foreclose its rivals. A FRAND remedy would be difficult to enforce and significantly less effective than divestiture or an Open API remedy in addressing the SLC from the acquisition.

Unlike the Open API remedy – which can specify a clear deliverable - a FRAND remedy would be particularly difficult to monitor and enforce as customers would not be able to identify if they were being given access on FRAND terms or not. Customers would not be in a position to compare commercial offers themselves and any monitoring would need to be undertaken by an independent body at a significant ongoing expense. Even with an independent monitor, the means for deployment of Trayport services would make it difficult to assess terms on a “like-for-like” basis. Non-price terms associated with service levels, reliability and maintenance would also make it necessary, but very complex, to monitor ongoing operations in addition to the contractual terms.

4. Relevant Customer Benefits

RWEST does not see any relevant customer benefits arriving from the acquisition.