

Intercontinental Exchange and Trayport Merger Inquiry Provisional Findings and Remedies

Submission by Tradition Financial Services Ltd (TFS)

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We write in response to the Provisional Findings Report (“**Report**”) and the Notice of Possible Remedies (the “**Remedies Notice**”) published by the CMA on the 16th August 2016. TFS would like to offer its assessment and viewpoints regarding the possible remedial actions proposed by the CMA.

In summary, TFS agrees with the view espoused by the CMA that structural rather than behavioural remedies are more likely to provide an effective remedy to the SLC identified by the CMA.

Divestiture Remedy

We note the CMA’s views on a Divestiture remedy and the need to ensure that the nature of an alternative purchaser would not present similar SLC risks in the market.

FRAND Remedy

Regarding the other proposed remedies, we find the “FRAND” remedy proposal flawed and open to circumvention, both in logic and in practice. We consider that it would be practically impossible to assess or quantify (and thereby impossible to enforce) any commitment by ICE to grant customers access to its products and services on “fair, reasonable and non-discriminatory” terms. In concluding this, we draw, *inter alia*, on our current contractual experience with Trayport under which terms we currently enjoy “most favoured nation” type contractual protection.¹ Given the broad variety of services (and thereby the number of service permutations) capable of being taken by a client, and the diverse levels of usage of such services, it can be challenging to compare “like for like” in order to make a “most favoured nation” type assessment. In other words, it becomes simpler for a service provider to justify “different terms” on the basis that a “different service” is being taken. This is aside from the lack of transparency of contractual and commercial terms secured by other clients – which makes any assessment even harder to make, police and enforce.

Any FRAND terms would therefore, in our view, be almost impossible to enforce and open to a speculative and subjective interpretation between ICE/Trayport and clients. Further, we imagine that any construct involving a third party supervisor of all ICE/Trayport client terms (in order to ensure FRAND principles are observed) would incur significant costs and administrative effort to operate and enforce, if it is indeed practicable at all.

Notwithstanding the above, we acknowledge that FRAND commitments, made by ICE/Trayport, as part of its remedy commitments to the CMA, have some level of promissory value. However, we would stress that it is our belief that FRAND commitments alone would be insufficient effectively to mitigate the SLC risks identified by the CMA.

¹ “Most Favoured Nation” contractual provisions seek to prohibit the service provider from providing services to a third party client on more favourable terms than those given to the recipient of the MFN protection.

Open API Measure Remedy

Regarding the CMA's proposed "Open API measure" remedy, we consider this remedy has the greatest scope for providing a mitigating effect to the projected SLC risks, by facilitating alternative ISV entrance into the energy space and providing to clients and service providers a choice of market access, thus incubating wider competition in the market.

We note the CMA's concerns at paragraph 22 of the Remedies Notice. We acknowledge that an "Open API measure" remedy may not be "timely" in relation to alternative market access, but we consider this step is an **essential foundation block** for the development of competition in the market space. Certainly, without the remedy, we would expect the *status quo* "captive" market to continue. Our view is that, given the history of real and continued interest from third party ISVs (wishing to provide both front- and back-end technology²), were an "Open API measure" remedy be put in place, this would provide the necessary catalyst to the introduction of alternative market technologies in the energy space, ultimately providing clients with choice of market technology (including ICE/Trayport).

To ensure any measure of an "open API" delivers the intended SLC-mitigating effects or adverse effects identified by the CMA, TFS believes that a working group with interested parties (market participants, ISVs, ICE/Trayport, etc) should be established. The working group would act to establish minimum technical requirements for the open API. The open API would be agreed by a working group specifying mandatory functionality and overseen by the CMA to ensure any such specification will provide a level playing field across ISVs for market access offered on a non-exclusive, perpetual license and reasonable commercial terms.

² As noted in previous submissions, such interest has stalled in the past due to third party ISVs technical inability to operate due to Trayport's "closed" API structure.