

INTERCONTINENTAL EXCHANGE/TRAYPORT MERGER INQUIRY

Summary of Response Hearing with ICAP on 24 August 2016

Introduction

1. ICAP had no major comments on the CMA's Provisional Findings and agreed, in principle, with the CMA's provisional conclusions.
2. ICAP had a number of comments on the proposed remedies, as outlined below.

Remedies - Divestment

3. ICAP said that a divestment remedy would be an effective remedy, dealing with the relevant issues identified by the CMA in its Provisional Findings. However, ICAP emphasised that only a full divestment of Trayport would be suitable to address the substantial lessening of competition (SLC) identified by the CMA. A partial divestment (of, for example, the front-end or the back-end systems) would leave Intercontinental Exchange (ICE) with the same incentives, albeit with a lessened ability, to try to foreclose the market.
4. ICAP said that the CMA should place restrictions on the potential purchasers of a divested business:
 - (a) no exchange with its own front-end business, [X], should be considered as a potential purchaser as these businesses would face the same incentives as ICE to foreclose the market;
 - (b) ICAP was concerned that major infrastructure and data service providers who are dominant in other spaces, [X], would also face similar incentives and ability to ICE to foreclose the market and so should not be considered as potential purchasers;
 - (c) brokers could be considered as potential purchasers, but ICAP had some concerns that a broker purchasing the divested business could have an incentive to use Trayport to enhance its own position. ICAP recognised that, prior to the merger, a broker had owned Trayport. ICAP said that they were never happy with this ownership, but that the action of the previous owner in setting up Chinese walls in the business appeared to have been effective. Fair, reasonable and non-discriminatory (FRAND)

terms would be needed if the divestment business were to be sold to a broker.

(d) ICAP said that it didn't think it would be concerned with a sale to a data provider or price reporting agency, [REDACTED], although it may be prudent to consider how these types of owners would propose to use the data generated on the platform.

(e) ICAP said that it could see no other issues with selling the divestment business to a trader, a private equity firm or a software provider

5. ICAP said that it did not have a feel for how long the sale of the divestment business would take, but pointed out that Trayport has been marketed recently, so it is well known as an asset.
6. ICAP also said that the protection for Trayport provided by the Initial Enforcement Order and the Monitoring Trustee appeared to be sufficient protection for the divestment business during the course of any sale and that no additional protection should be added.
7. ICAP said that the agreement between ICE and Trayport that is currently on hold should be cancelled and that any new owner should be free to negotiate a new deal with ICE once the divestment is complete.
8. ICAP mentioned that during the course of the investigation and as a result of increased cooperation between ICE and Trayport, ICE appears to have gained business in coal execution through its WebICE front-end. Prior to the merger, about 1% of coal flowed through WebICE, and last month this had risen to 17%.
9. ICAP said that divestment would not, however, address the existing monopoly position of Trayport being the main provider of software services to the market. ICAP recognised though, that these issues existed pre-merger and so the divestment process should not be designed to address existing market issues.

Remedies - FRAND

10. ICAP said that they were concerned about a FRAND remedy, mainly because this would be difficult to police.
11. [REDACTED].
12. ICAP said that it was aware that Trayport offers better terms to new start-ups, [REDACTED].

13. ICAP also said that appointing an adjudicator would not be an adequate solution because resolving issues via an adjudicator would take too long and the impact on ICAP's business as a result of poor service would be very quick.

Remedies – Open Access Programming Interface (API)

14. ICAP said that introducing an effective open API remedy could be the most effective remedy from a commercial perspective. This would not only deal with the SLC that the CMA identified as part of its Provisional Findings, but an Open API would also reduce the monopolistic power that Trayport held in the market prior to the merger. However, ICAP feared that, in practice, an open API would not be achieved as it would be relatively straightforward for ICE/Trayport to follow the rules in form, but not in spirit.
15. ICAP said that an example of this would be that Trayport could make conformance testing very complicated. Trayport would also be free to make small changes in code that would render connections useless and be slow to fix these. This would result in traders preferring WebICE to broker execution as reliability is a really important feature for traders.
16. ICAP said that putting in place an adjudicator would not resolve these issues as the damage to ICAPs business would already have been done before any adjudicator became involved.
17. ICAP said that a properly implemented open API could reduce the monopolistic power of Trayport and, as a result, this would likely result in a fall in the value of Trayport.

Remedies - Combination

18. ICAP said that a combination of remedies could be effective, in particular the combination of divestment and an open API may help to resolve the CMA's competition concerns. However, this would depend on who the buyer is.

Benefits of the merger

19. ICAP said that they could not identify any relevant customer benefits resulting from the merger.