1 General comment and our concern

[✂]

2 Our remarks regarding “Provisional findings.pdf”

2.1 We address our remarks to section 11.14 of the above mentioned document

Loss of competition for front-end access services is substantial
We agree that the loss of rivalry between the Parties wouldn't have a major negative effect on the front-end access services that the Parties offer due to the effect that ICE never offered a multi-market front-end.

In our view it is more important to look at the loss of competition between Third Parties (e.g. ISVs) and the post-merger ICE/Trayport entity for front-end access services. In this area the merger can have substantial adverse effects.

We would like to bring this point to the discussion and ask you to give it the proper weight in this investigation.

Following is our reasoning why the loss of competition between Third Parties and the Parties for front-end access services should be still substantial for this investigation.

The importance of third-party ISV front-end services

Providing aggregation services by connecting different trading venues and offering value added functionality and benefits to market participants is a highly important aspect and a market driven requirement. This is what strengthens the ability of markets in general and in the energy markets specifically to innovate.

There is a natural conflict of interest if such an aggregation service is provided by a single entity, that

1) is an operator of trading venues or
2) that has an interest in specific trading venues.

The conflict arises from the ambition of the aggregation service to offer the best trading experience across all trading venues and the endeavour of the trading venue operator to maximize transaction profits by increasing market share.

The one embraces the diversity and competition of the markets and the other strives to reduce that diversity which is a precursor to a reduction of innovation.

A third-party provider that does not have an interest in operating a trading venue wouldn’t have this conflict of interest.

Because of the importance of such front-end access services for the operation of markets it is prudent to create and maintain an environment, where independent third-parties (ISVs) can connect to trading venues' back-ends via APIs based on FRAND terms.

This is the basis for them to provide innovative value added services to market participants in a way that doesn't favour one trading venue over the other in a non-discriminatory way.

Status Pre-merger

Pre-merger ICE already had a history of not providing a discrimination free access to selected products like ICE Oil and ICE OCM via API.

The fundament of Trayport's business pre-merger was to not give discrimination free access to "their" markets* via API. By doing so they were able to become the gatekeeper to the largest pool of liquidity in the EEA energy markets.

Pre-Merger the possibility to get access to the "Trayport markets" via read-write API was very limited especially for ISVs. To our knowledge EXXETA is the only ISV that has this capability provided on behalf of its customers.

Post-merger concerns

Without any outside intervention we don't see any reason that the post-merger ICE/Trayport entity would change its course of conduct. On the contrary there is a high incentive for the post-merger entity to continue its conduct and accelerate the implementation of a (partial) foreclosure strategy, which is not only directed at rival trading and clearing venues but also at rival independent providers of front-end access services.

This is a major concern. The basis of independent front-end services is threatened by such a strategy. Without (direct or indirect via TGW) access to trading venues' back-ends via read-write API based on FRAND terms independent front-end services will cease to exist. These are the services that form a vital part of the ability of markets to innovate and to provide cutting-edge functionality and technology from competing providers. Therefore, we ask you to weigh this post-merger risk in your decision.

Our preferred remedy
We think that the "back-end only" Open-API remedy that we outlined in our hearing is the only good remedy. We refer with API to a read-write API in the following.

Recap of the outline of the "back-end only" Open-API remedy
The control of who gets access to a trading venue and on what terms should be shifted from Trayport to the operator of the respective trading venue.
If the trading venue provider based on well-known criteria decides to grant access to its market place via an API, Trayport in turn as a provider of the technical infrastructure should have to enable this API access.

In order for Trayport to fulfil its role as the guardian of the technical operation of the trading venue Trayport could define once technical parameters that need to be fulfilled for getting API access. A certification process would make sure, that each party utilizing the API access respects the technical parameters set forth by Trayport.

The front-end services offered by Trayport would be required to utilize the API under the same terms as the other parties and they would not be allowed to access the trading venues via APIs that are not available to other parties under the same terms.

* namely markets which use Trayport technology BTS or ETS and therefore haven’t got the control on access conditions for their users including respective cost.

Why is the proposed remedy beneficial from our perspective?

1) It is proportional in relation to the SLC and its adverse effects
2) It addresses the concerns that were the focus of the provisional findings and the concern that we stressed here
3) It respects ICE/Trayport's
    a. Intellectual property of its Trayport aggregation platform
    b. Interest to integrate the Trayport distribution channel (network effect) into the consolidated ICE/Trayport offering
4) The specification risk is manageable
5) The effort for the implementation of this remedy is moderate. APIs are already in place. They would need to be opened up by creating the contractual framework that would enable such a remedy.
6) The monitoring wouldn't require a separate central authority. The market participants themselves are very capable of detecting a potential breach of the obligations set forth by this remedy.
7) In order to enforce the remedy a board of mediation should be appointed. This board would only come into action if market participants brought up a relevant case.

3 Our specific view regarding “Notice of possible remedies.pdf”

We refer our comments with respect to the section numbers of the above document

3. “… form of higher fees or worse terms …”

It is important to weigh also that Trayport has already enlarged its fee chain with its Chained Application contracts forcing customer to pay additional fees for third party applications.

12.

(a) The scope of the divestiture package

Attractiveness of Trayport results from the monopoly and the extension of the value chain by forcing customers to pay additional fees for 3rd party software. Breaking this monopoly and establishing FRAND terms which should be generally of concern by each market authority within EEA diminishes the chance in finding a highly interested and suitable purchaser.

(b) Identification of a suitable purchaser

We see this very hard to find because why should a potential purchaser should weaken its position by allowing additional competition when the existing monopoly of Trayport is diminished?

13.

(a): ”Are there any market participants…”

Given the case that FRAND terms are implemented and the market is further opened the potential value of Trayport’s business would decrease. How should a suitable buyer being found when it is not allowed to run the business like Trayport does?

(c): “…procedural safeguards…”

See our proposal in strengthen the role of trading venues.

(d): “…also be an effective remedy?”

We see a slight chance when BTS and ETS could be separated from other business. From our perspective Clearing Link wouldn’t be of importance as it currently is. The same would apply for GVP due to upcoming competition and resulting price pressure.

14.

We are not aware of details of the new agreement. With respect to our experience in the past we would like to mention that ICE oil products were not available via Trayport. Also the new segment ICE OCM (UK Gas Spot) wasn't accessible for 3rd party providers.

Other potential measures

15.

We explicitly would appreciate a FRAND remedy to this in any way due to the existing contradiction in the current behaviour by Trayport failing to comply completely with market regulation rules. Additionally, we see no change in Trayport's behaviour when ICE is taking control over Trayport. This conclusion is mainly derived by the intention of ICE (mentioned in other comments) to establish additional business compared to their traditional transactional business. Taken this into account results in our estimation that existing 3rd party vendors should be pushed out of the markets enabling in turn Trayport to increase their fees (including software and support) and to enlarge their value chain without any competition.

Trayport claims explicitly ownership to its products (ETS and BTS) and derives all related contractual restrictions based on this ownership. On the other hand, there exists a strong regulation demand within Europe for customers to get a discrimination free access to markets especially exchanges which should also include OTC markets run by brokers. Also any competition and resulting innovation based on replaceable 3rd party solutions with direct market access is currently missing.

Instead, Trayport provides a monopolistic solution based on its exclusive direct access to its ETS and BTS markets. We see there a strong conflict and contradiction to consumer interests and an unnecessary restriction to get access only via the Trayport Gateway. A user like [✂] for trading gas spot products within Europe has no choice just to select those markets which it is interested in only when accessing markets only via TGW..

Additionally, we see a huge potential market risk with respect to technology. What happens if Trayport's Gateway fails? Trayport could point to its direct clients. Due to this restriction no other multi-market and multi-commodity solution would exist which could be an alternative for TGW at least for backup purposes.

From our experience and based on talks and emails with our customers and a lot of prospects we see no clear and defined policy for customers to get access to Trayport today and especially in the future. Since it is the decision by Trayport and not the markets who is allowed to get access to, the software provider gained the role of a single gatekeeper for access to essential energy markets within Europe. This always seemed strange to us. Within the last years this policy became more and more restricted due to the implementation of TGW SaaS. From our knowledge there exists a twostep approach by Trayport. Firstly, by providing at the customer-side a piece of software which in turn connects to the TGW SaaS. For this a R/W API is available which is charged with 2,000 GBP each month and customer. Secondly, by extending the TGW SaaS solution in a multi-tenant way upcoming in 2017. For this solution should be no API available at all. This was told us by [✂] which in turn would make other 3rd party solutions worthless. Also other 3rd party vendors would be harmed by this strategy because there would be no alternative to circumvent this upcoming issue until it has signed Trayport's contracts and subduing its conditions though it is a competitor. We see providers like Tradesignal, Updata or Openlink also be stroked by this strategy.

17:

Another approach could be: Just opening the protocol between API and ETS/BTS, see our comments and proposal above

In the past access to Deutsche Börse Group was only possible by installing a so called MISS infrastructural component. Nowadays, DBAG offers access to its markets with transparent protocols and a certification process for each 3rd party provider which likes to connect to T7 or ComXerv.

FRAND remedy
20:
From our perspective control of market access should be up to the specific markets. Each ISV including Trayport should then apply to get access in a FRAND way (fair, reasonable, discrimination free etc.). Due to the fact that each market has a major interest in getting as much connections as possible it should be obvious that each market would then take care of FRAND terms.

20 (b): "How would a FRAND remedy address any future …"
Firstly, it's still completely up to Trayport for innovation but it should be additionally secured that open access is also available. Open APIs provided by each market has also to be used by Trayport.

Taken into account our proposal, Trayport would have a strong interest in providing and implementing best of class back office systems based on the requirements of their customers, also aggregation solutions and other solutions based on multiple market access should be most innovative, efficient etc. to cope with competition. This would give markets the chance to select other back office systems when demanded or which would better fit to their requirements. This kind of opening markets would also keep the existing solutions provided by Trayport in place but on the other hand would enable competitors easier to enter the market without having the risk that their market customer could be squeezed out by Trayport due to its monopoly.

20 (c)
If competition is in place without having a monopole access to broker markets FRAND remedy could stop. In this case competition would replace FRAND remedy.

20 (f)
We see major cost in releasing Trayport's contracts by an authority which in turn checks FRAND remedy. We would include gateway contracts, chained application license agreements and certified service provider contracts in this context. The first step would be proving and releasing standard contracts to comply with FRAND terms. Second step would be the possibility by customers to compare their contracts with those being released in the first step and to complain at a mediation body which has the power to force FRAND compliance.

Open API measure
22:
Please distinguish two cases

1. Providing 3rd parties with Trayport's R/W API for BTS/ETS (which is in our opinion the same piece of software as for getting access to TGW) . As mentioned before it should be in control of the markets. For brokers a read-only API is already available.
2. It is sometimes confusing what is meant exactly by API. In Trayport's context it is a piece of software which is needed to connect (which just means communicate) with their backends. With other markets it could be just the functional and technical description of the communication protocol. Opening the communication protocol would be the easiest step and would also respect further development by Trayport towards SaaS. From a technical perspective communication between backend and API is based on well-known and highly standardised mechanism within distributed IT-systems (Synchronous, Asynchronous, Client/Server or Publish and Subscribe).

23 (b)
[✂] Usually, a frontend has the necessary code for accessing a backend (e.g. a R/W API) included in its code or the means to connect locally to an API. It is just a communication layer on an application level (please refer to communication models like the ISO/OSI model (https://en.wikipedia.org/wiki/OSI_model).

23 (d)
At least one 3rd party provider should be in place which is able to implement a direct full-functioning (Read and Write) connection to a BTS and an ETS. Guaranteeing according functionality should be accompanied by a certification process with predefined and published criteria.

23 (e)
For ICE Future Europe and ICE Endex a 3rd party provider does not pay based on our information for getting access to test markets and their API (protocol). ICE support the certification process. So this is already in place. Establishing a similar process for Trayport's technology should be very cost-efficient if instead of a piece of software just a description of the respective API protocol is provided.
Certification can be handed over to markets which would not produce costs for ICE/Trayport. A similar process is already in place for certification together with TGW.