**ICAP Response to Notice of Possible Remedies: ICE/Trayport Acquisition**

ICAP broadly agrees with the Group's provisional findings and we believe that a structural remedy would be more appropriate and successful than a behavioural one. As such, we would support the full divestiture remedy and agree with the Group that it would represent a comprehensive and low risk solution. We would make the following points with regard to all three potential remedies advanced.

## Divestment Remedy

### Suitable Purchaser

Market participants with similar incentives and ability to foreclose, either fully or partially, would not be suitable purchasers. An important point is that whereas ICE may have a strong existing presence in European energy markets, the fact that other exchanges may lack this presence, or may not have any presence at all, would not mean they would lack similar foreclosure incentives and abilities. Indeed, the lack of any presence could make these incentives stronger still. As such, we believe most, if not all, exchange groups should be excluded.

With regard to brokers as potential owners, we again believe that foreclosure incentives such as favouring broker execution over exchange execution or the ability to favour its own position over others may be present. We don't believe that the incentives or means would be as strong as with ICE and we don't believe that former broker owners used Trayport to significantly advance their position. However, the potential existence of these incentives may mean that FRAND terms would be required for any broker owner and we discuss our view of the difficulties of achieving effective FRAND terms below.

In a similar vein, other major trading venue and data provision businesses [✂] would attract ownership concerns comparable to, but probably greater than, brokers. These types of potential owners may currently lack market presence in European energy but would still have potential incentives to misuse their ownership position.

Traders could potentially be acceptable owners of Trayport from a broker perspective but other traders may have concerns over this type of ownership, particularly with respect to data protection and fair and reasonable access. Price reporting agencies may also be suitable purchasers, subject to addressing any concerns over their potential treatment of data.

Clearly, these concerns narrow the universe of potential buyers but we believe that financial investors such as private equity or software providers would be suitable owners. We believe that during the last Trayport sale process these types of buyers were interested and we have no reason to think that they would not be interested again. We believe that if an open and fair sales process was carried out by the parties there would be no issue in finding suitable buyers.

### Timescale and Procedural Safeguards

Given that Trayport has been recently sold as a standalone business, integration with ICE halted and is an asset well known in the market we would assume that there would be no reason why a sale could not be achieved within a relatively short timeframe such as 6-9 months.

Safeguards such as the current enforcement order should remain in place and a divestiture trustee should be appointed to oversee the sales process. It would be important to ensure there is no opportunity to interfere with the business during the period of the sale process or unnecessarily delay the divestment.

Scope of Divestiture Package

We believe that, in practice, anything other than a full divestment would not be an effective remedy. In theory, a partial divestment may appear an attractive and potentially effective remedy which could foster genuine competition in the front and back-end technology markets. However, in practice the incentive and ability to foreclose would remain as would the high barriers to entry which have thus far prevented competitors to Trayport emerging. In our view this would mean that this remedy would be high risk and would also require both FRAND and open API terms to be applied.

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Examples of how this could be achieved would be by poor integration of other venues e.g. Trayport broker and exchange systems, poor API design and implementation, API pricing, developing the WebICE front-end and not that of Trayport to provide traders with a better experience in WebICE than Trayport or even prioritising WebICE orders or order functionality in Trading Gateway over other venues.

In theory, with the front-end and back-end under different owners, either or both would be able to establish connectivity to third party providers e.g. non-Trayport front or back ends. However, in practice, given the dependence of the energy trading community upon Trayport which the Group has identified, any new non-Trayport back-end or front-end would need to integrate with the complementary Trayport software i.e. a non-Trayport back-end would need to integrate with the Trayport front-end and vice versa. Whilst this process may be easier to achieve than under the current structure it would still face the same network effects which mean a coordinated and concentrated movement of liquidity would be key to success.

In addition it is not clear to us that Trayport's technical architecture lends itself to an easy and effective split of the business and partial divestment. Even if this were possible, it may be that it would significantly delay the implementation of the remedy and potentially be subject to interference by the parties hence increasing the risk of not achieving a successful remedy. In any event, a partial divestment would certainly take far longer than a full divestment.

Indeed, given that the Trayport software in itself is not unique and the company gains its value from its closed and integrated structure, it may be that under a partial divestment scenario the owner of each separate part has a strong incentive to contract with the other owner to effectively recreate the current market structure thereby further expanding the foreclosure strategies available to ICE under this remedy.

Treatment of ICE and Trayport Interface Development and Support Agreement

We believe there is considerable doubt as to if this agreement would have been signed in its current form absent the transaction and the safest, lowest risk course of action is that it should be cancelled. As the Group noted, Trayport and ICE pre-transaction had conflicting aims and no history of cooperation but under common ownership very quickly agreed this contract. If it was a bona-fide commercial agreement between two independent parties acting in their own best interests then the new owners of Trayport and ICE can quickly and easily reach this agreement again.

**FRAND Remedy**

We do not believe that a FRAND remedy is either practical or likely to be effective and hence should not be the remedy of choice. FRAND remedies are notoriously difficult to design, implement and monitor as well as ensuring that the remedy is effective both now and in all potential future situations.

We are also unable to identify any reasonable and proportionate penalties and compensation for breaches given that not only may a breach be difficult or impossible to identify, but it may lead to total loss of current and future market share with all the consequential effects that would have for the breached party's business.

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In addition, any FRAND remedy would need to take into account both commercial contractual terms such as rate cards and minimum commitments and non-commercial terms such as software performance and service levels. It would be implausible to believe that all potential current and future services, products and access rights could be definitively listed and protected contractually. For example, for commercial terms is a broker whose activity is predominately in smaller or new markets entitled to cheaper rates and lower minimum commitments than one whose activity is predominantly in larger markets? If so, at what level of activity in larger markets does this broker's activity mean it is no longer entitled to cheaper rates? How are activity and market size defined and does this change over time?

For non-commercial terms, areas to be covered would include new product and instrument support and development, API access, clearing link access, data rights and provisions, access to test environments and technical support and development. There may also be ambiguity over which are the most favourable of comparable contract terms e.g. a certain level and type of right over data may be more favourable to one broker or exchange whereas other brokers or exchanges may want to negotiate different contractual terms which they see as equally or less favourable in general, but of more use to them specifically, but which ICE/Trayport view to be more favourable and therefore unavailable.

Clearly, without even scratching the surface the implausibility of even specifying an effective FRAND remedy is demonstrated and this is before considering monitoring and enforcement issues.

[✂], and our general views above, we do not think this would be an effective remedy.

**Open API Remedy**

An open API remedy is the most attractive remedy from our commercial perspective as if it were possible to implement, it would address both the SLC concern and the monopolistic nature of

Trayport which already existed pre-transaction. However, we doubt if, much like a FRAND remedy, an open API remedy can be implemented effectively and we also recognise that the CMA investigation and remedy process is not necessarily mandated to address existing market concerns.

We believe that it would be practically impossible to specify, implement and monitor a mandatory open API without the high risk that this was circumvented or frustrated in any number of ways. There are many methods in which open API access could be frustrated whilst still apparently complying with the letter of the requirement. For example, conformance testing could be complicated and difficult to pass, API documentation could be poor or incomplete, the API could be unreliable or unstable (even short service interruptions or disconnections would create a huge and potentially insurmountable difference between Trayport and non-Trayport providers), the API could change with no or limited notice or even change frequently with notice to effectively impose higher technical costs on non-Trayport systems, Trayport/ICE could refuse or frustrate support for key or unique functionality of other systems and API fees could be onerous, amongst any number of other alternative methods which are difficult to identify ex-ante and without intimate technical knowledge of Trayport.

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These points are mentioned to illustrate our major concern with an open API remedy in that it may be appealing in theory, but in practice it would be impossible to identify, document and protect against all potential disruptive actions, such as the ones described above. There will always be a method by which an unwilling party can circumvent the letter of regulation. Hence, unless there is a true will to provide an open API by the party, we doubt it will ever come to pass, no matter how complete the regulations appear to be at outset.

In addition we also have the same concerns as we have with a FRAND remedy in that we are unable to identify any reasonable and proportionate penalties and compensation for breaches given that not only may a breach be difficult or impossible to identify, but it may lead to total loss of current and future market share with all the consequential effects that would have for the breached party's business.

**Relevant Customer Benefits**

We are unable to identify any relevant customer benefits.

**Summary**

We doubt the possibility of designing effective FRAND and open API remedies but even in the event this was possible, the complexity of implementation with regard to monitoring and dispute identification and resolution mean that the risk of failure is high. When compared to the ease, effectiveness and low risk of a full divestment, we believe that a full divestiture is the compelling remedy.