SHEARMAN & STERLING LLP

ICE / TRAYPORT

RESPONSE TO REMEDIES NOTICE

31 AUGUST 2016

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ICE / TRAYPORT – RESPONSE TO REMEDIES NOTICE

1. INTRODUCTION

1.1 The parties have carefully considered the CMA's Provisional Findings ("PFs") and Notice of Possible Remedies ("Remedies Notice") dated 16 August 2016.

1.2 For reasons explained in their separate response to the PFs, the parties are strongly of the view that the SLC finding is not supported by the evidence and analysis presented in the PFs.

1.3 Without prejudice to this position, in this submission the parties provide their feedback on the Remedies Notice. In brief:

(a) The SLC to address is (i) ICE obtaining access to confidential competitor information and (ii) the partial foreclosure of ICE's competitors from access to Trayport's software and connectivity. The appropriate remedial action to address a vertical SLC of this nature is to impose a confidentiality firewall and a FRAND access remedy which ensures that Trayport does not favour ICE.

(b) The Remedies Notice seeks views on a FRAND access remedy, with reference to a number of potential risks to the effectiveness of such a remedy. The CMA appears to have overlooked the substantial use of FRAND access mechanisms in financial markets and in competition remedies by senior enforcement agencies. These risks can all be addressed through appropriate specification of Trayport's service obligations.

(c) Divestment of Trayport is noted as a potential remedy in the Remedies Notice but this would be disproportionate given the nature of the SLC and availability of effective alternative remedies which preserve the customer benefits arising from ICE's ownership of Trayport. Divestment of Trayport would not be in the best interests of Trayport or its customers.

1.4 The above points are explained in more detail below. The parties welcome the opportunity to elaborate on these issues further at the hearing on 7 September 2016.

2. DIVESTMENT REMEDY

2.1 The parties recognise that the CMA must consider the possibility of divestment and that it would in principle be an effective remedy (self-evidently given that it would in effect prohibit the merger). In this case, however, divestment is unnecessary and disproportionate.

Divestment would be disproportionate to the SLC

2.2 A partial divestment (e.g. of Trayport's back end matching engine products) is not a realistic option. The software products and customer relationships relevant to the SLC are integral and essential to Trayport's overall business model and network. Therefore, a divestment remedy would involve the outright divestment of the Trayport business – i.e. a prohibition of the transaction.

2.3 The CAT has stated that "[i]*n applying[…] the relevant proportionality test […], where the CC has taken such a seriously intrusive step as to order a company to divest itself of a major*

business asset […], the Tribunal will naturally expect the CC to have exercised particular care in its analysis of the problem[…] and of the remedy it assesses is required."[1]

2.4 In this regard, the nature of the SLC in this case is important. The SLC does not concern the loss of horizontal competition and rivalry between the merging parties. It concerns a vertical relationship and a concern over the possibility of a partial input foreclosure regarding access to Trayport's software by ICE's competitors. It would be exceptional to require divestment and prohibit an acquisition due to a limited vertical foreclosure concern. Mergers giving rise to vertical competition concerns are routinely cleared on the basis of behavioural remedies; including in respect of software provision.[2] The default assumption should therefore be that effective behavioural remedies are in principle available and the preferred option in this case.

Divestment would lose significant customer benefits

2.5 A divestment of Trayport would deprive its current and new customers of the benefits arising from ICE's ownership of Trayport:

(a) Trayport and its customers will benefit from Trayport having access to ICE's world-class technology infrastructure.

For example, ICE owns and operates two top-tier data centres in the US and UK that house critical global financial infrastructure including the UK's largest derivatives exchange and clearinghouse, the publisher of key benchmarks such as LIBOR, all New York Stock Exchange systems, and the consolidated price feed for all NYSE-listed stocks and the entire US options market. Trayport will be able to utilise ICE's data centres, which represents a significant performance upgrade compared to the current data centre service Trayport currently obtains from its previous owner.

ICE's high-speed global communications network connects thousands of customers around the world not only to ICE exchanges and clearinghouses, but also to many competing exchanges and clearinghouses, including LSE, LME, Eurex, Euronext, and CME.

A large information security organization within ICE oversees a sophisticated cyber security program deploying the latest technologies and approaches for risk identification, protection, detection, response, and recovery. ICE's leading-edge software development organization maintains the highest standards for systems development, testing, and deployment. As a wholly owned subsidiary of ICE and beneficiary of this massive infrastructure investment, Trayport can deliver a level of performance, reliability, and security to its customers not offered by its previous owners. In fact, upon closing the acquisition, ICE prioritized technology investment to remediate the urgent capacity, security, and reliability concerns of Trayport's management.

(b) Trayport will achieve material cost savings from access to ICE's global procurement group, for example in respect of purchasing IT hardware and software.

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1 BAA v Competition Commission [2012] CAT 3, paragraph 20(7).

2 See paras 3.5 to 3.7

(c) ICE acquired Trayport as part of its broader strategy to diversify its business. Trayport will serve as an important distribution channel for the data services that ICE is developing both organically and through acquisition (e.g. IDC). Trayport's customers will benefit from enhanced services that Trayport will be able to provide with access to assets and expertise within ICE's data services business.

Enhancements planned to be offered in the short term are listed below. The expectation is that it will be possible to develop significant further enhancements over the longer term. The effect will be to significantly increase the rivalry to incumbent data services providers such as Bloomberg and Reuters. In the short term, Trayport will be able to offer the following to its customers:

(i) ICE Market Data terminal offering from the IDC business which provides a rich set of analytics, news and charting capabilities.

(ii) ICE Instant Messaging platform which provides a chat offering to facilitate more efficient methods of communication from brokers and their utility customers.

(iii) ICE Options Analytical software which provides robust options pricing and analytics offering on the desktop.

Customers will be able to log onto one (Trayport) desktop front end screen and access all of these services in one place as a consolidated service which will improve their efficiency and workflow.

(d) The combination of Trayport and ICE's complementary expertise will enhance the delivery and use by customers of Trayport's own software products; e.g. Trayport can capitalise on ICE's expertise with regard to access to and use of software products via mobile/iPad/Mac devices.

(e) Based on the SLC finding in the PFs and without prejudice to the parties' separate submission on the PFs, the CMA's counterfactual underpinning the SLC is that the new contract between the parties signed in May 2016 (the "New Contract") is merger specific. Accordingly, in a remedy scenario where the CMA upholds its SLC finding despite the parties' submissions, the CMA must take into account the efficiencies and benefits to customers of the new commercial understanding between the parties reflected in the contract which flow from the PFs analysis and findings – related to improved distribution of ICE contracts via Trayport and the establishment of a Trayport STP Link with ICE's clearinghouse.

With regard to distribution of ICE's contracts, this most obviously relates to the new continental power contracts that ICE recently launched (e.g. German power). There are also benefits for customers, however, in respect of existing ICE contracts already available via Trayport. Without ICE's acceptance of Trayport's normal commercial terms for exchange connectivity in the New Contract, Trayport would continue its past practice of permitting access to ICE contracts on a case by case basis if a customer insists, but would not routinely and proactively establish access for all ICE contracts across its customer base.

The PFs find that Trayport's STP Link is advantageous to customers because it is a higher quality STP link than the alternative STP links. On this basis, in a remedy scenario, this aspect of the New Contract is also a customer benefit given the extent of OTC clearing.

2.6 The CMA must address the fact that, by its own logic, these customer benefits would be lost if ICE was required by the CMA to divest Trayport.

Trayport is better served by remaining part of the ICE Group

2.7 ICE retaining Trayport would also avoid the disruption and potential for harm to the Trayport business from a further sale process. These processes are a significant distraction and burden for the management and ICE's acquisition of Trayport is already the second sale process Trayport has undergone in two years. Trayport's management team, who have together created the Trayport business and are invested in its future success, are firmly of the view that the interests of Trayport and its customers are best served by Trayport remaining part of the ICE group -- with formal commitments in place to reassure customers that Trayport will indeed continue to support them as currently.

2.8 The downside of a divestment is exacerbated by the divestment buyer likely being a private equity firm, based on the CMA's counterfactual finding in the PFs. A future exit/sale, typically within a 3-5 year timeframe, would inevitably be part of the private equity firm's acquisition strategy. This is in contrast to ICE's plans for Trayport to be a permanent part of the ICE Group.

2.9 Further, a private equity firm is highly unlikely to provide the same level of industry expertise, support and investment that would be available under ICE ownership. Certainly, the customer benefits discussed above would not be available.

2.10 Indeed, this is why financial buyers are routinely discounted as suitable divestment buyers by competition authorities, with trade buyers preferred. In this particular case, however, another buyer who operates financial markets (whether exchanges or OTC markets) would likely raise similar ownership issues as ICE – as the CMA's counterfactual findings in respect of CME confirm.

2.11 Therefore, both ICE and Trayport urge the CMA to discount a divestment remedy on the basis that it is unnecessary, disproportionate and not in the best interests of Trayport and its customers.

Inappropriate to interfere in New Contract

2.12 The CMA has raised the possibility that a divestment buyer should be given the option of terminating or renegotiating the terms of the New Contract.

2.13 Interfering in the New Contract would be wholly inappropriate. It is a legitimate commercial agreement which was negotiated in good faith by the parties and closely tracks the terms of a pre-acquisition commercial agreement that was being negotiated between the parties but which was put on hold during the sale process. ICE's terms are not preferential compared to other Trayport venues and clearinghouse customers.

2.14 More importantly, the New Contract is unambiguously positive for Trayport and its customers.

(a) Customers benefit from enhanced distribution of ICE contracts.

(b) Trayport obtains the benefit of the substantially more favourable economics that result from ICE switching to Trayport's normal commercial terms for exchanges, i.e. ICE pays Trayport for connectivity and contractually commits to use Trayport as a distribution channel for an extended period of time, thereby mitigating Trayport's exposure to wasted developments costs. These benefits apply not only to the new

continental power contracts that ICE has recently launched; it equally applies to the existing contracts which are already accessible via Trayport where the old commercial relationship continues given the suspension of the New Contract -- i.e. ICE is still not paying Trayport for connectivity.

2.15 Given the above, any further uncertainty and delay to implementation of the New Contract will be damaging to Trayport and its customers (in direct conflict with the objectives of a divestment) – and, on the basis of the findings in the PFs, unnecessarily continue the distortion of normal and fair competition between ICE and EEX.

3. FRAND ACCESS REMEDY

3.1 The SLC prompting the potential need for a remedy is a partial vertical foreclosure concern that ICE's competitors in European utility trading and/or clearing markets might be competitively disadvantaged due to impaired access to Trayport compared to ICE, and ICE obtaining access to their confidential data and 'soft' information held by Trayport.

3.2 The confidentiality concern is readily addressed via a confidentiality firewall, as discussed in Section 4 below.

3.3 The concern about competitors receiving impaired access to Trayport relates to services that Trayport will supply to ICE on the same or similar terms. Therefore, it is in principle a situation where a FRAND access remedy is suitable.

3.4 This is evident from the regular use of behavioural remedies based on FRAND access to address vertical foreclosure concerns in merger clearance decisions (and indeed horizontal concerns in some cases), including in respect of the provision of complex software services. It is also noteworthy that the FRAND concept is used to facilitate access to important market infrastructure in financial sector regulation in the UK.

Precedents indicate that a FRAND access obligation is the appropriate remedy

3.5 There is a wealth of European Commission decisional practice that demonstrates FRAND access remedies are effective and the appropriate remedy for the competition concerns at issue. The list of cases is long but recent examples include:

(a) In *Worldline/Equens/Paysquare*[3], a case decided in April 2016, the parties committed to a remedies packing including the granting of a license for the "Poseidon" software and its modules to third-party network service providers under FRAND terms as well as a monitoring mechanism to ensure compliance with FRAND terms by a licensing trustee and by a group composed of network service providers.

(b) In the *PRSfM/ STIM/ GEMA* joint venture[4], as part of a behavioural remedies package the joint venture committed to offering key copyright administration services to other collecting societies on terms that are fair, reasonable and non-discriminatory when compared to the terms offered to its parents PRSfM, STIM and GEMA.

[3] Case No COMP/M.7873 - Worldline/Equens/Paysquare

[4] Case No COMP/M.6800 - PRSfM/ STIM/ GEMA/JV

(c) In *Liberty Global/ Corelio/ W+W/ De Vijver Media*[5] the parties committed to offer specified TV channels and related services (such as catch-up) under fair, reasonable and non-discriminatory terms to any interested TV distributor in Belgium.

(d) In *SNCF Mobilités/Eurostar International Limited*[6], Eurostar and its shareholders committed to provide any new entrant with fair and non-discriminatory access to: (i) standard and cross-Channel areas and services, such as ticket offices; (ii) the maintenance centres in France, the UK, and Belgium; and (iii) the train paths currently used by Eurostar at peak times.

(e) In *Lenovo/Motorola Mobility*[7] an existing standard essential patent (SEP) FRAND commitment was sufficient for the Commission to conclude that the proposed transaction was unlikely to give rise to any input or customer foreclosure concerns in relation to the SEPs.

3.6 The CMA, including its predecessors, has also utilised FRAND obligations in developing merger remedies. For example:

(a) In *Centrica*[8], the concepts of undue discrimination, preferential treatment and unfair commercial advantage for the parent company post-acquisition were built into the remedy package and employee code of conduct.

(b) In *Macquarie/National Grid*[9]the parties committed to provide transmission services on fair and reasonable terms, conditions and charges and undertook not to unduly discriminate against particular persons or against a particular description of persons, in relation to matters connected with the provision of transmission services.

(c) In *First Group/Scottish Rail*[10] the parties undertook to invite other actual or potential bus operators in Scotland to participate in a new multi-modal ticket scheme on terms that are fair, reasonable, and no less favourable than the terms on which the bus subsidiaries participate in the scheme.

3.7 In the US, vertical mergers in the technology space have been remedied with behavioural commitments based on FRAND principles. In *Google/ITA* (2011)[11], the DOJ was concerned that Google would have the ability and incentive to deny or degrade access to ITA's airfare pricing and shopping software to rival flight search competitors. ITA's software is used to provide "extremely complex and customised flight search functionality". The DOJ was also concerned about reduced innovation and Google access to confidential licensee information.

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5 Case No COMP/M.7194 - Liberty Global/ Corelio/ W+W/ De Vijver Media

6 Case No COMP/M.7449 - SNCF Mobilités/Eurostar International Limited

7 Case No COMP/M.7202 - Lenovo/ Motorola Mobility

8 Completed Acquisition by Centrica PLC of Dynegy Storage Ltd and Dynegy Onshore Processing UK Ltd

9 Completed Acquisition by Macquarie UK Broadcast Ventures Ltd of National Grid Wireless Group

10 In the Matter of a Reference Relating to the Proposed Acquisition by Firstgroup Plc of the Scottish Passenger Rail Franchise

11 United States of America v. Google Inc. and ITA Software, Inc. 11-cv-00688, U.S. District Court, District of Columbia (Washington)

3.8 Google addressed these concerns with a remedies package which committed it to (i) continue to license ITA's software to other companies on FRAND terms, (ii) devote substantially as many resources to research and development for the software as ITA did prior to the acquisition and (iii) erect a firewall to prevent Google from accessing sensitive competitive information.

Financial sector regulation demonstrates that FRAND supply can be effectively enforced

3.9 The FRAND concept is used throughout financial sector regulation to safeguard access to important financial sector infrastructure/services.

3.10 An example is the FCA's benchmark rules[12]. In its consultation paper published in June 2015, the FCA stated that: "*Introducing a FRAND pricing obligation rule will be an effective instrument to ensure that benchmark administrators' terms of access remain fair. By putting in place a rule and guidance in advance, we intend to reduce uncertainty as to what price a benchmark administrator may charge*."

3.11 The EU Benchmarks Regulation[13] that came into force in June 2016 has adopted the FRAND concept in relation to the mitigation of market power of critical benchmark administrators.[14]

3.12 FRAND terms are used throughout the FCA's Handbook. For instance, recognised investment exchanges (including, for example, CME) must have objective, non-discriminatory access criteria[15] and if they offer firms access to their arrangements for publishing quotes, must do so on reasonable commercial terms and on a non-discriminatory basis. There are also FRAND style requirements in relation to the publication of pre and post trade information. Outside of the FCA Handbook, FRAND is used in other areas of financial services, for example payment systems operators are required to provide access on a FRAND basis.[16]

3.13 Accordingly, various ICE businesses are subject to FRAND commitments, as are ICE rivals affected by the Trayport acquisition including EEX, CME and Nasdaq.

A FRAND access remedy would be effective in this case

3.14 The nature of the software services supplied by Trayport is not an obstacle to implementing an effective behavioural remedy based on FRAND access – consistent with such remedies being used to address foreclosure concerns in respect of software supply in past mergers (e.g. *Google/ITA*).

3.15 It is feasible to identify the aspects of Trayport's provision of software services that must be safeguarded to avoid an SLC and ensure that there is not a "substantial impact on the ability of ICE's rivals to compete" -- and to benchmark and monitor Trayport's performance in this regard against its pre-acquisition behaviour and the service provided in future to ICE.

3.16 The parties are confident that these protective measures would be effective. Certainly, they constitute a remedy that is proportionate to the likelihood and nature of the potential SLC –

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12 Benchmarks (Amendment No 2) Instrument 2016 (FCA 2016/8)

13 Regulation (EU) 2016/1011

14 Regulation (EU) 2016/1011, Article 22.

15 REC2.7.1A UK

16 General Direction 2 from the Payment Systems Regulator.

especially when balanced against the significant customer benefits which would be lost if a divestment was ordered instead.

3.17 With regard to monitoring mechanisms, there are a number of options. ICE's suggestion is that it implements a complaints procedure substantially similar to those used by its regulated entities ICE Future Europe and ICE Benchmark Administration and approved by the FCA – backed up with a binding arbitration dispute resolution mechanism for any disputes that cannot be resolved via the complaints procedure.

3.18 This case is not more complex than other cases where FRAND remedies have been used. There is no reason for it to be unsuitable here.

4. CONFIDENTIALITY REMEDY

4.1 Trayport will continue to operate as a separate business within the ICE Group. It is therefore entirely feasible to ring-fence and safeguard its customers' confidential data and 'soft' information from access by ICE affiliates including its exchanges and clearinghouses.

4.2 There are numerous precedents which demonstrate that an effective confidentiality firewall remedy can be implemented.

5. OPEN API

5.1 The Remedies Notice references a potential remedy based on opening up Trayport's API. This is neither a realistic nor proportionate remedy.

5.2 The functional integration of Trayport's back end and aggregation/front end technology (the so-called 'closed network') is integral to Trayport's business model and ability to provide the service so valued by its customers. Trayport would quite simply never countenance taking such a step.

5.3 The CMA has done no analysis of what this remedy would do to Trayport in the medium term, and Trayport sees it as an existential threat to its business.

5.4 The suggested remedy is an attempt, as is common, by other market competitors to get a free-riding advantage from the regulatory process.

6. CONCLUSION

6.1 ICE and Trayport are confident that a confidentiality firewall and FRAND access remedy would be an effective and proportionate remedy if the CMA was ultimately to find an SLC.

6.2 The parties are of course willing to work constructively with the CMA to develop this remedy proposal.