

## **INTERCONTINENTAL EXCHANGE/TRAYPORT MERGER INQUIRY**

### **Summary of Response Hearing with Exchange C on 30 August 2016**

#### **Introduction**

1. Exchange C supported the CMA's Provisional Findings.

#### **Remedies - Divestment**

2. Exchange C said that divestment of Trayport was the best option to meet the CMA's concerns.
3. Exchange C said that there are a large number of potential purchasers for Trayport, however, some classes of potential purchasers should be excluded:
  - (a) other exchanges who are active in the relevant sectors should be excluded as these would raise similar issues to ICE as an owner, albeit with a lesser ability to foreclose the market than ICE as ICE holds a very strong position in the relevant markets;
  - (b) brokers face similar incentives as exchanges, even though they are not active in exchange or clearing. A consortium of brokers, rather than a single broker, buying Trayport would be preferable;
  - (c) utilities should be excluded from buying Trayport as there were risks that ownership could give utilities access to confidential information on their competitors. A consortium of utilities, rather than a single utility company, buying Trayport would be preferable;
  - (d) financial investors and IT companies would be the logical choice, but the CMA would need to be careful that ICE sells to a company ready to invest in Trayport. Independent software vendors (ISVs) would be interested in trying to invest in Trayport and expand the areas where Trayport does business;
  - (e) Market data providers would not be bad owners of Trayport as they do not operate exchanges or clearinghouses. However, the CMA should be careful to ensure that these businesses have appropriate plans for Trayport, in particular, for development of the back-end of the business, market data providers do not currently operate back end systems.

4. Exchange C said that if the CMA considered a consortium of companies as potential bidders for Trayport, then the CMA would need to be careful that no one member of the consortium held material influence over the consortium in order to prevent one company influencing the strategic decisions of Trayport in the future. The governance of the consortium and the rights of shareholders should indicate if any one company holds material influence.
5. Exchange C said that the potential purchaser should not be a weak buyer and that Trayport should be a good fit for the current portfolio of the potential purchaser. Exchange C said that any potential purchaser should be interested in acquiring all of Trayport, not just one part.
6. Exchange C said that the sale should be completed as rapidly as possible – within six months – and that ICE should not be allowed to delay the process. Uncertainty causes difficulties within the relevant markets for market participants and further delays in finalising the future of Trayport will cause additional harm to participants.
7. In terms of safeguards, at a minimum, the hold separates should be maintained during the sale process. Additional safeguards should be put in place if the sales process is lengthy – over six months – as there will be market uncertainty until the identity of the new owner is known.
8. Exchange C said that currently – with Trayport operating a closed Access Programming Interface (API) – Exchange C is captive to Trayport. Opening Trayport's API during the sales process, would free up competition to Trayport and ensure that Trayport remained competitive. However, opening the API would need to be an irreversible step as no software company is going to invest the resources to develop the software to make use of Trayport's new open API if the open API is going to be removed in six/12 months once the sale process is completed.
9. Exchange C said that it understood that a number of businesses were interested in purchasing Trayport when it was bought by ICE last year. Exchange C said that it was likely that these companies would still be interested in purchasing Trayport now. IT companies specialized in finance, investment funds and market data providers would for example likely be interested in purchasing Trayport.
10. Exchange C said that retention of staff within Trayport during the sales process would be important. Exchange C said that Trayport appeared to have a strong team spirit as they have stayed together in spite of being under a sales process for four years and it does not appear to be likely that key staff will leave if there is a further divestment. Changes in ownership do not appear

to have impacted on the Trayport business (save for the impact of the hold separate agreement).

11. Exchange C said that it did not know whether the new agreement negotiated between ICE and Trayport should stand as it had no details of the agreement and could not judge whether the terms were commercially reasonable. Exchange C said that the CMA statement on this favourable contracts worried them about its content and potential short term impact on its business. The CMA should consider the terms of the agreement and make an early judgment as to what will happen to the agreement. The Monitoring Trustee should also be involved to help judge whether the agreement was negotiated on an arm's length basis.

### **Remedies - Fair, reasonable and non-discriminatory (FRAND) terms**

12. Exchange C said that they were strongly opposed to a FRAND remedy as this would be ineffective. In order to be effective, a FRAND remedy would also need to be coupled with:
  - (a) an open API;
  - (b) monitoring arrangements to ensure compliance, and
  - (c) strong governance arrangements.
13. Exchange C said that FRAND terms can work in some industries, but, in this case, FRAND terms would not work as:
  - (a) FRAND terms would not capture and manage the strategic nature of Trayport to ICE;
  - (b) breaches of the FRAND terms could have catastrophic effects on the market participants affected;
  - (c) a FRAND remedy would leave market participants as captive customers of ICE/Trayport;
  - (d) a FRAND remedy would not address the information sharing concerns;
  - (e) it would be difficult to define what "reasonable" terms might be when Trayport is owned by ICE;
  - (f) a FRAND remedy would need to be in place for many years and would need to be updated on a regular basis to take account of evolving technology; and

- (g) if a FRAND remedy were in place ICE would still be able to strategically operate Trayport in favour of ICE.
14. Exchange C said that a FRAND remedy would not deal with any foreclosure strategy that ICE might adopt as the FRAND terms would not cover this strategy. For example, Trayport would be free to raise prices as this would not harm ICE as a customer as it would be moving profits from one part of the organisation to another. Exchange C said that if ICE continued to own Trayport, any new pricing decision made by Trayport could be influenced by ICE.
  15. Exchange C said that a FRAND remedy would be difficult to police as any breaches of the FRAND terms would be difficult to prove, in addition, the harm to Exchange C resulting from the breach will have already transpired.

## **Remedies – Open API**

16. Exchange C said that the Open API is at the core of the bottleneck of ICE's ownership of Trayport. This is a key issue that needs to be addressed, however, Exchange C said that addressing the closed API independently would not be an adequate solution of the identified SLCs.
17. Exchange C said that the opening of the API must be sufficiently quick to allow competition to develop. Key to this is that Trayport must put in sufficient staff and resources to make sure that the development of an open API is delivered in a timely fashion. This would be a fundamental change to Trayport's strategy.
18. Exchange C said that in order to develop a successful open API, a FRAND type approach would need to be adopted in conjunction. There would also need to be an information barrier between Trayport and the rest of ICE to ensure that there is no sharing of Trayport information with the rest of ICE.
19. Exchange C said that it could be up to two years before a competitor to Trayport emerged. If this option was chosen, the CMA would, therefore, need to take a long-term view of Trayport's terms and conditions to ensure that competition was maintained in the interim. In addition, Exchange C said that Trayport has been embedded within companies for so long that they may find it difficult to switch in any case as a number of their systems will have been set-up to deal with Trayport.
20. Exchange C said that with an open API customers could threaten to switch from Trayport as part of their negotiations. This threat is currently not credible.

21. Exchange C said that in order to be able to switch to a non-Trayport supplier, Exchange C would first have to find a provider who could offer all the features that are necessary to have a continuous offering and to be able to list the same types of products with all the specifications. However, this provider would be reliant on good levels of service from Trayport to make sure that reliability and performance is good.
22. Exchange C said that if an open API were introduced, ICE would have an incentive to degrade the services provided through the open API. The processes would be complicated, this would make it difficult to distinguish whether disruptions have been caused by operational issues, or intentional delays.
23. Exchange C said that an open API would also result in the current contracts with Trayport needing to be renegotiated.
24. Exchange C said that a FRAND option by itself, or an open API option would not be a workable solution. The only real option would be to have an open API supported by FRAND terms and conditions.

### **Remedies – partial divestment**

25. Exchange C said that it could imagine a scenario where ICE partially divested Trayport, selling off either the back-end or the front-end of the business. In theory, as 70 – 80% of Trayport's revenues comes from the front-end of the business, it would be possible to sell the front end of Trayport as a stand-alone business. However, the CMA would need to look at any such proposal in detail before agreeing to a partial divestment.

### **Benefits of the merger**

26. Exchange C said that in the past ICE and Trayport were competing with each other, as a result, not all ICE products were listed on Trayport. A benefit of the merger is that now ICE products will be available on Trayport increasing liquidity in the market but only a few ICE contracts in the gas and power areas were missing on Trayport. Thus, Exchange C said this was a small benefit.