

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

### **Summary of Response Hearing with Griffin on 24 August 2016**

#### **Introduction**

1. Griffin said that they agreed with the SLC finding in the CMA's Provisional Findings Report and that they believed that the proposed remedies were proportionate.

#### **Remedies - Divestment**

2. Griffin said that a remedy whereby ICE divested Trayport would be an effective remedy as long as the divestiture was to the right purchaser. Griffin said that Trayport should not be sold to any business that was competing in the relevant market. This includes:
  - (a) businesses providing trade execution services;
  - (b) businesses providing trade clearing services; and
  - (c) businesses providing relevant market data [✂].
3. Griffin said that a suitable purchaser could be another independent software vendor (ISV) who was not competing in the relevant area.
4. Griffin said that the sale should be completed quickly to avoid the risks of Trayport suffering a lack of investment during the interim period and avoiding the loss of key staff at Trayport. Trayport would be unable to adapt to changes in the marketplace whilst it was in 'limbo' due to the ongoing sale process. Griffin estimated that the divestment of Trayport could take between six and 12 months.
5. [✂].
6. Griffin noted that a divestment remedy would not address any issues or problems raised by Trayport's monopoly position in the market. Trayport has been in a position to exploit this monopoly position, as demonstrated by the 6% annual price uplift in Griffin's contract – this was non-negotiable - and there being no meaningful service level agreements within the Griffin contract, which again was non-negotiable.

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

7. Griffin said that the concerns expressed in relation to the FRAND remedy in the remedies notice were reasonable. Griffin said that the FRAND remedy could be effective, but only if it was coupled together with and an open Application Programming Interface (API) and a removal of offensive contractual provisions that conflict with an open API and FRAND. A FRAND remedy would probably require new contracts between Trayport and its customers as the new FRAND terms will need to be included in these contracts.
8. Griffin said that if the CMA were to adopt a FRAND remedy, this should be a set of general provisions backed up with specific service level commitments.
9. Griffin said that it would be difficult to understand how customers would be able to identify any breaches to the FRAND terms. For example, Griffin believes that some of Trayport's customers may have included 'most favoured nation' clauses in their current agreements, but Griffin consider that it is difficult for the customer to effectively manage this clause and would be relatively easy for Trayport to differentiate any contract in order to justify the granting of better terms.
10. Griffin said that if FRAND were adopted, remedies for breach should include specific performance (wherever possible) and damages. Another possibility could be for an independent annual audit of Trayport to be carried out and published.
11. Griffin said that the cost of operating a FRAND system should not be too onerous on Trayport, if Trayport has historically been operating on a fair, reasonable and non-discriminatory basis. Griffin said that there should not be any specific costs for Griffin in putting in place a FRAND remedy.
12. Griffin said that it would be difficult for the CMA to consider how FRAND terms could meet and future developments in the market as there is no certainty as to how the market will develop in the future. Griffin said they would expand further on how a FRAND remedy could be framed in a similar way to new financial regulations in their written response.

## **Remedies – Open API**

13. Griffin said that it agreed that opening the API would, in part, help to address the issues raised by the CMA in the provisional findings report.

14. Griffin said that effective competition following the decision to open up the API was likely to take at least three years. It was not key to have an alternative provider actively competing with Trayport from the start, but it stated that the threat of an alternative provider should be sufficient to constrain Trayport's activities. Other ISVs, such as Exxeta, could potentially act as alternative providers and be a viable alternative to Trayport.
15. Griffin said that one of the challenges that would be faced by any competitor to Trayport would be persuading brokers and traders to switch away from Trayport. To avoid operating two platforms during a transition from one system to another, a broker would need to migrate a critical mass of traders between platforms overnight – a 'big bang'.
16. Griffin also said that an Open API would also need to operate by allowing connection into Trayport's front-end Trading Gateway and in connecting to its back-ends. Griffin said that it is likely to be easier to open up the front-end access than the back end access.
17. Griffin said that it would be concerned about what action Trayport could take over the three year development process that might defeat the goals of opening up the API. Griffin noted that the current Trayport contracts prevent the development of aggregating software by its customers.
18. Griffin said that it would be concerned if the CMA's remedy was just to open the API. The CMA would also need to incorporate some elements of a FRAND remedy in addition to opening up the API so that ICE could not exploit its position as owner of Trayport in the interim and so that the open API remedy would be effective, for example, in preventing Trayport from introducing excessive compliance terms to gain access to the Trayport network.

### **Remedies - Combination**

19. Griffin said that FRAND on its own and an open API on its own would perhaps not be sufficient but those combinations together could, potentially, be sufficient.

### **Remedies – partial divestment**

20. Griffin said that a partial divestment of Trayport would not be an effective solution to the SLC identified by the CMA in its provisional findings unless this was accompanied by the opening up of the API.

## **Benefits of the merger**

21. Griffin said that they had not seen any benefits of the merger.