

## RESPONSE TO CMA PROVISIONAL FINDINGS AND REMEDIES NOTICE REGARDING COMPLETED ACQUISITION OF INTERCONTINENTAL EXCHANGE, INC. (ICE) OF TRAYPORT

### Provisional Findings

- Overall, we **agree in principle** with the CMA's provisional findings.
- Our view is the foreclosure effects of the Merger causing the SLC result from ICE's significant strength and leading position in relation to a number of European and UK energy derivative products. In particular, we would echo the CMA's sentiments in paragraph 38 of the "Summary of Provisional Findings" that ICE's ownership of Trayport presents a unique competitive concern because ICE *"has a different position in the market for execution services, including a particularly strong incumbent position relative to other venues in a number of asset classes"*.
- We have already seen potential effects of the Merger with regards to ICE's coal volumes. On the basis of ICE's public volume data, in the period from 1 January 2016 to 30 June 2016 only approximately 11% of ICE's Rotterdam coal volumes was traded on exchange, whereas from 1 July to 9 September, this percentage has increased to on average 44%.

### Divestiture Remedy

- Our view is that a **full divestiture is the only remedy that will sufficiently address the SLC**. Based on Trayport's interdependent feature set and its importance to the European Utility marketplace we do not believe a partial divestiture is viable or in the best interest of the trading community. And because foreclosure concerns exist with respect to both the front- and back-ends of the Trayport platform, it is unlikely that a partial divestiture would solve the competition concerns outlined by the CMA.
- We believe that **restrictions should be placed on who can be the purchaser** of the divested business. In particular, the **new owner cannot have the same position as ICE** in the European Utility marketplace, which includes a strong incumbent position and a widely used trading front-end.
- **A consortium of market participants could be a potential satisfactory purchaser**. A common theme in this process has been the 'network effects' resulting from Trayport's overall importance in the European Utility marketplace. One logical conclusion of this situation is that Trayport should be run like a utility for the marketplace. That would involve ownership and governance by a broad group of traders, brokers, and exchanges (which could include ICE). It would be important for the consortium to be constructed so no one member has control over the strategic positioning and operation of Trayport.
- We believe the **Trayport divestiture process could be completed on an expedited basis** in as little as 3-6 months. We would support the use of a Divestiture Trustee to ensure completion of this process. In our view, the structure of the divestiture should be relatively straightforward because Trayport is a standalone business and entity. And

given the recent sales processes concerning Trayport, it should be easier to identify potential acquirers, many of whom may already be familiar with the asset. Finally, Trayport is well positioned to endure a sales process (including staff retention) because it has undergone several changes of ownership over the last three years and has maintained its business to date.

- In addition, we believe a **full divestiture is the only remedy that successfully addresses the secondary aspects of the SLC**. As identified by ourselves and many other third parties throughout this process and recognized by the CMA, ICE could additionally use Trayport to harm its rivals by, among others, de-prioritising their products, using ‘soft’ confidential information to gain a first-mover advantage, and reducing the general service levels provided to their venue and clearinghouse customers. Because of their natural limitations discussed below, the proposed behavioural remedies do not seem capable of addressing these additional concerns. Given these concerns, we would also suggest the use of a Monitoring Trustee to ensure Trayport will be held separate from ICE's business and sufficiently ring-fenced to avoid the exchange between ICE and Trayport of confidential information that Trayport is receiving from its contract partners.
- The **New Agreement between ICE and Trayport should not be implemented**. A new owner should have the ability to fully negotiate this agreement on an arm’s length basis, including terminating it or significantly altering its current terms. If an approach of behavioural remedies is used, the New Agreement should not be implemented prior to the remedies being put in place and then should be subject to the FRAND access requirement and the confidentiality firewall.

### Other Potential Measures

- **Absent a full divestiture**, we would recommend a combination of a) **FRAND** access criteria, b) **confidentiality** firewalls between ICE and Trayport, and c) an **Open API** policy. Given the lack of clarity of what an Open API should consist of in relation to Trayport, we would propose a **working group** representing the various market participants to define the aspects of the Open API policy that would be appropriate. We would also recommend that these measures are **overseen by an Independent Monitor** appointed by the CMA.
- **Time** is an important element of introducing these behavioural remedies as any prolonged uncertainty on exactly how Trayport will operate will harm the European Utility marketplace, including product development. It **should not take more than 3-6 months to put in place these fully operational remedies**.
- However, it is our opinion that these **behavioural remedies would still be difficult to monitor and enforce** and for these reasons may not be viable. Also, it is not apparent that sufficient damages would be available for breaches of these behavioural remedies. Because of the nature of these marketplaces, it would be very difficult for a harmed market participant to win back its lost liquidity. Finally, these remedies would likely need to be enforced indefinitely, which would add to the difficulty of enforcement.

- FRAND: Without full access to information, it will be very difficult for market participants on an ongoing basis to ensure that they are provided FRAND access terms, especially with respect to new products or services offered by Trayport and prioritisation of resources. In addition, given the diversity of customers and products, it is not reasonable for all potential contractual possibilities to be listed and therefore there will be no basis upon which to measure equal access and prioritisation.
- Confidentiality: These types of firewall restrictions are very difficult to implement and monitor. Market participants would have little insight into this aspect of Trayport's business so responsibility would fall almost entirely to the Independent Monitor. The Independent Monitor would need to devote a significant amount of time to the process and have full access to ICE's and Trayport's operations and interactions.
- Open API: The concept of an Open API likely means different things to different parties (as evidenced by the diversity of responses received by the CMA on this point). From our perspective, the only potential way to implement such a technical remedy would be by establishing a group of market participants working alongside the Independent Monitor. Still, the process will be slow and costly and there is no certainty any potential outcome would sufficiently address the SLC. Finally, an Open API requirement would need to be accompanied by FRAND access terms as otherwise ICE/Trayport could frustrate or circumvent the Open API, including by requiring excessive compliance terms to gain access to the Trayport network or to utilise Trayport support resources. From our experience, if the criteria for accessing an open API are onerous or access approval is made otherwise cumbersome, it does not matter if the platform is in principle open.

### **Relevant Customer Benefits**

- **We do not foresee any relevant customer benefits** from the Merger situation.