

Broker B Response to Parties' Remedy Proposals

Our opinion is unchanged from our responses to the Provisional Findings and Notice of Possible Remedies. We continue to believe that a full divestiture remedy is the only realistic and practical solution and that FRAND style remedies will be impossible to design, implement, monitor and enforce both now and, importantly, in the future. Hence, a FRAND remedy will not solve the issues identified and we do not believe that the Parties' proposal should be acceptable.

Notwithstanding the fact that we do not believe in a FRAND style remedy being appropriate in this case, we thought it would be useful to address in more detail why the proposals are unsatisfactory and flawed.

Remedy Proposals by the Parties

A: Key Product Licensing

We understand the intention behind the proposals in this section as an attempt to recreate the Parties' view of the current Trayport environment over the next 10 years. Attempting to 'guarantee' past practice going forward is not only an incorrect benchmark but also wholly unsatisfactory for an uncertain future where requirements and reasonable requests are inherently unknown and unpredictable. It is impossible to do this and gives no comfort or guarantee that the SLC will be addressed.

Using past practice and previous behaviour as the benchmark for future behaviour and practice takes no account of future uncertainties and the ability of the Parties to use this to foreclose, notwithstanding the fact that in our opinion there would be opportunity and ability to foreclose now under the current proposals. For example, as proposed, performance will be consistent with past practice but we would expect that in the future performance standards will improve year on year. Rather like having a guarantee that your current computer or phone will perform to the same standard in future years, this will be useless when the technology and standards have rapidly become redundant and competitors, in this case potentially ICE, have moved ahead of you.

Similarly, a commitment to devote resource to research and development and maintenance based on previous years' budgets is meaningless. Firstly, future requirements are unknown, even for the relatively near term. For example, MiFID II, coming into effect at the start of 2018, would be expected to require a substantial increase in resource requirements but even now those requirements are very difficult to predict and we do not believe Trayport has, or could have, fixed resource plans as of yet. Having resource availability based on previous years' requirements does not address actual needs. Secondly, the quantum of resource itself is not a good benchmark. How resource is managed, directed and utilised is also of importance – many highly resourced projects have failed and wasted resource. Resource being guaranteed to be available does not mean it will be used well and in good faith for the benefit of Trayport and its customers when, in many cases, this benefit would be to the detriment of the owner of Trayport itself. Thirdly, how is resource defined and measured? A definition of 'research and development and maintenance of the Key Products for the use of customers' leaves plenty of scope for ambiguity and classification of additional operational, infrastructure or other work under this definition. All of this is without even touching on the subject of monitoring and enforcement which, given the above, is clearly implausible to achieve in any meaningful manner.

Key products may also change as they have done over the last 10 years e.g. STP link which didn't exist in 2006. How can new key products be identified and included (to the extent that inclusion provides any protection over foreclosure)?

We also note that there is no mention of non-commercial terms, which would include areas such as 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.

Ultimately it is easy to envisage scenarios where foreclosure would occur by lack or poor use of limited resources or where Trayport would be denied access to extra investment for product or service improvement.

B: Confidentiality Firewall

Again, these restrictions are extremely difficult to implement and monitor and we agree with many of the other responses which regard to the potential for 'soft' breaches to occur. Common ownership creates a shared corporate goal and no doubt many opportunities over the long term for employees to switch between roles within ICE and Trayport over the course of their careers. It is unrealistic to believe that soft disclosures, whether intentional or otherwise, would not occur over time and that they could be detected or breaches remedied in an effective manner.

The definition of Commercially Sensitive Information being customer-specific is also too narrow – aggregate data would also have great value to the Parties, not just customer-specific data.

C: Autonomous Operation of Trayport

It is impossible to understand how a business wholly owned by another can operate totally autonomously when senior management reporting lines are to the parent, 'independent' directors are initially appointed by the parent (which clearly makes them far from independent of ICE) and it forms part of a much bigger parent group.

The concept that a business can be run in an autonomous manner whilst its senior management (who will also likely form part of the Trayport Board) report to the ICE data services business (who presumably themselves report to the ICE Group senior management) is completely nonsensical and circular in its logic. There is no escaping the fact that under the ownership of ICE, Trayport will be part of the same group and rightly wish to act in the best interests of the ICE Group.

Regardless of the composition or appointment process of the Trayport Board, ICE will exercise control of the business as the ultimate owner. Trayport senior management will report into the ICE Group so it is implausible to suggest that their operational and strategic decision making will not be influenced, either directly or indirectly, by the wider group and, again, detection and resolution is impossible. It is difficult to understand how Trayport senior management will report to an ICE division and operate autonomously of ICE. True autonomous operation would render that reporting line redundant and it would not be required at all.

If, for example, there was a need for investment funds within the Trayport business, how would this investment occur? These funds would almost certainly come from ICE and would definitely come from ICE in the case of equity. Clearly, there are situations where foreclosure strategies could be pursued by either denying investment or even investing and attaching conditions to the investment.

Could confidentiality be maintained whilst evaluating a Trayport investment? The degradation of Trayport could be achieved, inadvertently or otherwise, if limited investment funds were allocated to another business line, possibly even the ICE businesses which compete with Trayport and its customers, which was evaluated by ICE as a better investment case than Trayport. In any event, it is clear that Trayport could not be an autonomous business.

Indeed, this section seems to contain very little in way of meaningful actions which were not already planned by ICE pre the CMA investigation.

D: Monitoring and Enforcement

As mentioned in previous sections, we believe the monitoring and enforcement of these remedies to effectively be impossible. It is not plausible to suggest otherwise.

We also note the proposals lack any mention of penalties and compensation for breaches, in the unlikely event that these could be identified and complaints were then upheld by ICE's own complaints procedure. As we have stated in a previous submission, breach could lead to total loss of current and future market share with all the consequential effects that would have for the breached party's business. We are unable to identify any realistic penalty which would compensate for this and it is instructive that the Parties do not even attempt to do so.

Summary

All of these issues originate from the difficulty of designing reasonable and effective FRAND remedies which will address an SLC and only go to illustrate in more practical and real terms the unsuitability of this behavioural remedy. The ability and opportunity to foreclose will remain in place.