

EXCHANGE D

RESPONSE TO ICE/TRAYPORT'S PROPOSAL TO REMEDY THE SLC IDENTIFIED BY THE CMA

I. Overview

- We begin by reiterating our view that a **full divestiture is the only remedy that will sufficiently address the SLC and constitute a viable remedy**. Behavioural remedies are generally difficult to effectively monitor and enforce. In addition, our heightened concerns in relation to behavioural remedies in this instance are based on the specific facts of this case and for the reason outlined below, **we do not believe behavioural remedies are viable to sufficiently address the SLC**. Furthermore, it is not apparent that sufficient damages would be available for breaches of these behavioural remedies – the nature of these marketplaces make it very difficult for a harmed market participant to recover its lost liquidity.
- ICE/Trayport's proposed remedies may seem reasonable at first blush but they do not address the specific facts of these particular marketplaces. Upon closer review, the proposed remedies reveal significant shortcomings that highlight our concerns and support our view that behavioural remedies are not satisfactory in this case.
- ICE/Trayport's proposal also omits any solution regarding opening the Trayport API. As we previously stated, in the event behavioural remedies are found acceptable, in order to be minimally effective they must include a combination of a) **FRAND** access criteria, b) **confidentiality** firewalls between ICE and Trayport (which would incorporate autonomous operation of Trayport), and c) an **Open API** policy. Given the lack of clarity of what an Open API should consist of in relation to Trayport, if the CMA were inclined to consider behavioural remedies, we would strongly urge creation of 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.

II. ICE/Trayport's commercial proposals do not include necessary commitments and FRAND proposals are not achievable

- 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 paragraph A.3 of the proposal, ICE/Trayport note that FRAND terms will be “judged in relation to (1) the customer's chosen term, user numbers and market coverage and (2) the commercial terms in effect between Trayport and similarly situated customers including ICE affiliates.” But given the number of variables included in this comparison and the diversity of customers and products, it is highly unlikely there will be a broad enough basis upon which to measure equal treatment.

- ICE/Trayport’s proposals regarding FRAND access are limited to licence terms. In paragraphs A.5 and A.6 of the proposal, ICE/Trayport discuss maintenance and upgrades of Key Products but without any guarantees of equal prioritisation or service levels. As identified by ourselves and many other third parties throughout the CMA's review process and as previously recognized by the CMA, these are the nuanced ways ICE could use Trayport to harm its rivals even in the face of otherwise “equal” licence terms.
- An additional consideration with respect to a FRAND behavioural remedy is whether there should be a first-mover’s advantage available to Trayport’s venue and clearinghouse customers other than ICE. One of the ways innovation occurs in the European Utility marketplaces is by venues and clearinghouses bringing additional liquidity through new products and solutions. But almost all of these improvements are dependent on Trayport for their distribution because of Trayport’s overall importance in the European Utility marketplaces. A blanket application of FRAND terms across all aspects of Trayport’s services could negate a first-mover’s advantage and therefore stifle innovation. This is another example of why a FRAND remedy would not be viable given the unique nature of Trayport’s business as the key two-way link between traders, on the one hand, and venues and clearinghouses, on the other hand.
- Finally, and without prejudice to our general objections in relation to a FRAND-based behavioural remedy, the 5-year additional period for FRAND licenses specified in paragraph A.3 of the proposal should at a minimum be extended so that the FRAND licences are available through the end of the 10-year period of ICE/Trayport’s general obligations under Section A.

III. Many of the ICE/Trayport proposals contain only soft commitments and are easily circumvented

- Many points in ICE/Trayport’s proposal use language that is either ambiguous or hollow. At best, this illustrates the difficulty of crafting remedies with the necessary bite to address the concerns at hand. And at worst, it is the result of ICE’s careful construction of proposals that will still allow them to work around the edges to achieve the advantages of the SLC. Regardless, the end result is the same – these proposals do not guarantee the intended results. Here are some examples:
 - Paragraph A.5: “Trayport will maintain substantially similar or improved performance of Key Products” and paragraph A.6: “Trayport without additional charge will make available ordinary course upgrades to Key Products to all relevant customers at substantially the same time including ICE affiliates”. As discussed at length throughout this process, ICE has an opportunity to use Trayport to its benefit in subtle ways. For example, how Trayport orders products in the software interface or “default” clearing or trade reporting options can have a substantial impact on the success of other venues and clearinghouses. Because of the nature of these concerns, requirements qualified by a standard of “substantially similar” are not sufficient.

- Paragraph A.7: “Provided, however, that if the amount of revenue derived by Trayport from licensing the Key Products materially decreases, Trayport shall be permitted to make a corresponding reduction in the amount of resources committed with the prior consent of the CMA which consent shall not be unreasonably withheld or delayed”. One of the main theories of harm is ICE using Trayport to divert more European Utility revenues to its own platforms. If ICE were successful, Trayport’s revenues would be reduced potentially eliminating some of the main commercial commitments in ICE/Trayport’s proposal.
- Paragraph A.8: “Trayport will make commercially reasonable efforts to respond to customer requests with respect to development of Key Products, consistent with Trayport’s past practice”. The “commercially reasonable efforts” standard is difficult to define but at the very least allows ICE/Trayport to make decisions based on business considerations. This means they could provide worse customer support (including in relation to ICE) to clients that threaten their business or strategy. This is the opposite of FRAND principles. And including a “consistent with Trayport’s past practice” standard on some of these proposals provides further latitude for ICE to skirt the intent of these types of requirements.
- Section B: definition of “Relevant Employee”. If ICE is serious about its proposal to “operate [Trayport] as a separate and distinct business” there is no reason why Trayport needs to share Commercially Sensitive Information with any ICE employees. As drafted, “Relevant Employee” includes only a subset of ICE employees.
- Paragraph C.20(a): “All commercial agreements [between ICE and Trayport] will be on an arms-length basis”. As evidenced by the diversity of Trayport’s current client contracts, arms-length negotiations can lead to a wide range of results depending on the relevant bargaining power of each party. Under the FRAND-based remedy proposal, ICE will maintain implicit leverage over Trayport that will influence the negotiation of any commercial agreement.

IV. ICE/Trayport's proposals cannot be effectively monitored or enforced

- Because they have limited information beyond their own businesses, it will be very difficult for Trayport’s clients to effectively monitor ICE/Trayport’s commercial commitments in Section A. Trayport’s clients will also be unable to monitor ICE/Trayport’s commitments with respect to a confidentiality firewall (Section B) and the autonomous operation of Trayport (Section C).
- ICE/Trayport’s monitoring and enforcement proposals in Section D are not realistic. First, because of how quickly liquidity can move among European Utility products, any protracted enforcement process may permanently harm the aggrieved party. Second, because most market participants are completely dependent on Trayport they will be reluctant to further jeopardize the relationship by pursuing dispute resolution. And finally, it is not realistic to expect smaller market participants to expend valuable resources to assume the role of monitor.

- At the very least, and without prejudice to our above comments, if the CMA contemplates behavioural remedy proposals, ICE should be required to utilize, and pay all costs associated with, an Independent Monitor appointed by the CMA. Given the complexity and nature of these proposals, the Independent Monitor would need full access to ICE's and Trayport's operations and interactions and the ability to hire additional resources as needed.