

# Completed Acquisition by Intercontinental Exchange of Trayport: Submission on Remedies Proposed by ICE-Trayport

## RWE Supply & Trading

21 September 2016

RWE Supply & Trading (RWEST) welcomes the opportunity to comment on ICE-Trayport's proposal to remedy the significant lessening of competition (SLC) identified by the CMA in the ICE-Trayport Merger Inquiry.

A commitment to continue to license, improve and support key software products used by traders, trading venues and clearing houses is not sufficient to address concerns about the potential foreclosure for competing trading venues and providers of trading services. Although the confidentiality firewall and a commitment to autonomous operation of Trayport would address many of our concerns in relation to the use (and potential misuse) of trade data, this provides only partial and limited relief and would not be sufficient to address the wider lessening of competition for trade-related services. RWEST therefore remains of the view that the best remedy to the SLC is to open the API to increase the scope for competition from other trading venues and providers of trade-related services. In the absence of an open API, full divestiture to an appropriate party would also address the SLC resulting from the acquisition.

The commitment to continue to license, improve and support key software product used by traders, trading venues and clearing houses is largely a commitment to offer Fair, Reasonable and Non-Discriminatory (FRAND) terms on an ongoing basis. As we noted in our response to the CMA's notice of possible remedies, it will be particularly difficult to monitor and enforce these provisions and customers would not be able to identify if they were being given access on FRAND terms or not. Customers cannot compare commercial offers themselves and even an independent monitor, would find it difficult to assess terms on a "like-for-like" basis given differences in the use and deployment of Trayport services and potential variation in non-price terms associated with service levels, reliability and maintenance. While the proposed commitment offers a degree of independence to Trayport management and COO, we do not believe that the separation will be sufficient to address these wider concerns about competition and to provide genuine scrutiny and challenge.

The commitment to preserve the ongoing availability and maintenance and development of existing "key products" and successor products presents more fundamental concerns about the future development of the underlying systems and potential competition.

- The commitment locks in the status quo and fails to address the underlying SLC associated with an exchange acquiring Trayport's de facto monopoly. As such, it fails to tackle the potential for ongoing foreclosure of competing trading venues and providers at source. The tenor of the commitment – 10 years – further exacerbates the problem and presents the danger that these commitments merely become a "licence" to continue with business as usual for an extended period.

- The commitment to the research and development and maintenance of the Key Products is insufficient to secure the development of newer, innovative, open and flexible technologies by Trayport. This risks the technology “withering on the vine” and becoming increasingly outdated and incompatible with the technologies and platforms used more widely in the market by Trayport’s customers. This would effectively undermine the ability of the OTC brokers to compete effectively with ICE and other exchanges.
- The reference to successor products is insufficiently precise or verifiable to rule out a “managed migration” by ICE-Trayport to a new suite of products which present the same core concerns: ie, a closed API and a de facto monopoly over trade aggregation and access to the brokers.

The proposed commitment to “not include an exclusivity term that prohibits the customer using alternative software products sold by companies other than Trayport” raises additional concerns and questions.

- Firstly, the commitment begs the significant question of whether Trayport currently employ contractual restrictions which prohibit brokers and other customers from using alternative software products sold by companies other than Trayport. If such restrictions are in place, the barrier to entry presented by the need for a coordinated migration of liquidity to an alternative or open platform is not just high, it is insuperable.
- Secondly, a commitment not to use contractual exclusivity terms would make little difference in practice to the barriers faced by competing venues and service providers. Trayport’s effective monopoly over access to the brokered OTC market results from the “natural monopoly” associated with aggregation of the pool of liquidity which means that it has not been viable for any trader or broker to operate independently of Trayport without losing access to market liquidity.

The CMA should consider this effective or contractual exclusivity further in the development of remedies. Specifically, any remedies should ensure that brokers and other customers do not face an prohibition on the use of competing platforms and are contractually – and effectively - free to make an open choice. The Open API remedy would address this issue at source, but any divestment remedy should also proceed on the basis that any such prohibitions are removed from existing contracts.

In summary, the commitments proposed by ICE-Trayport will not be sufficient to overcome the SLC presented by ICE’s acquisition of Trayport. While the commitments would achieve some degree of independence in data use and management control, they do little to tackle the wider scope to foreclose competition from competing service providers and trading venues. The commitments further risk locking in an absence of wider innovation and competition and do little to address the significant barriers to entry facing competing providers. These concerns, coupled with the failure to tackle the effective (or indeed contractual) monopoly over access to the OTC brokers reinforces RWEST’s conclusion that only an opening of the API or divestment to an appropriate party remain viable remedies.