

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

### **Conduct of the Remittal**

#### ***Introduction***

1. By judgment of the Competition Appeal Tribunal (CAT), dated 6 March 2017, the question of whether Intercontinental Exchange, Inc. (ICE), Trayport, Inc and GFI TP Ltd. (together the Parties) should be required to terminate the New Agreement (as defined at paragraph 6.11 of the final report dated 17 October 2016 (the Report)<sup>1</sup>) was remitted to the Competition and Markets Authority (the CMA) for consideration.<sup>2</sup> Specifically, the CAT required the CMA to reconsider whether, having regard to the risk that the New Agreement poses to the effective remediation of the substantial lessening of competition (SLC) or its adverse effects as identified in the Report, it is reasonable and practicable to require its termination (the New Agreement question).<sup>3</sup> The finding of the CMA in the Report that the New Agreement should be terminated was quashed.
2. The CAT dismissed the four other grounds of ICE's challenge to the CMA's findings in the Report, which can be summarised as follows:
  - (a) Ground 1: ICE submitted that the CMA should have found that the New Agreement was part of the counterfactual, that is, that the New Agreement would have been entered into absent the Transaction.
  - (b) Ground 2: This ground contained several arguments regarding the CMA's assessment of the benefits to ICE of a partial foreclosure strategy.
  - (c) Ground 3: ICE argued that the CMA erred in its assessment of the costs to the merged group of implementing a partial foreclosure strategy.

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<sup>1</sup> A report on the completed acquisition by Intercontinental Exchange, Inc. of Trayport, dated 17 October 2016

<sup>2</sup> *Intercontinental Exchange, Inc. v Competition and Markets Authority and Nasdaq Stockholm AB* [2017] CAT 6 (the Judgment [2017] CAT 6)

<sup>3</sup> The Judgment [2017] CAT 6, paragraph 205

- (d) Ground 4: This ground challenged the CMA's rejection of the remedy proposal put forward by the Parties.
3. The CMA sets out below the way in which it intends to conduct the remittal process, particularly with regard to gathering and considering further evidence.

### ***Information gathering and analysis***

4. The CMA proposes to consider submissions made by ICE and Nasdaq Stockholm AB to the CAT during the course of the appeal proceedings as further evidence on whether termination of the New Agreement might be necessary to give effect to remedying the SLC and/or to ensure the effectiveness of the divestiture remedy. The CMA will seek such additional information as it deems appropriate including with regard to the following potential issues raised by the CAT in its Judgment:
- (a) the circumstances in which the New Agreement was made (ie with Trayport under ICE ownership) and whether the New Agreement can be considered to have been concluded on an arm's length basis;<sup>4,5</sup>
  - (b) whether the existence of the New Agreement would affect the willingness of potential purchasers to participate in the divestiture process;<sup>6</sup>
  - (c) the prospects for execution of a replacement agreement should the New Agreement be terminated;<sup>7</sup> and
  - (d) whether the New Agreement could impede a new owner's ability to compete effectively or otherwise be detrimental to competition.<sup>8</sup>
5. The CMA requests any persons wishing to **provide written comments on whether or not the New Agreement should be terminated to do so by 27 March 2017**. The CMA will consider any submissions made to it on this point, along with any other information or evidence which any interested party wishes to submit relevant to this question provided that such submissions and material are received by this date.
6. The CMA proposes to issue a report of its provisional findings on the New Agreement question and will invite submissions on its provisional findings.

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<sup>4</sup> The Judgment [2017] CAT 6, paragraphs 201, 202

<sup>5</sup> The Judgment [2017] CAT 6, paragraph 205(1)

<sup>6</sup> The Judgment [2017] CAT 6, paragraph 203

<sup>7</sup> The Judgment [2017] CAT 6, paragraph 205(2)

<sup>8</sup> The Judgment [2017] CAT 6, paragraphs 206, 207

7. The CMA does not propose to hold hearings prior to publication of its provisional findings report, but may hold hearings with parties following receipt of submissions on its provisional findings report.
8. The CMA notes that the Report was only quashed and remitted to it to the extent required to enable it to reconsider the New Agreement question. Therefore, the CMA will not therefore consider any other aspects of its Report as part of the remittal process.
9. The CMA requests, in accordance with its guidance (CC7 (Revised)), all parties making submissions to it to provide both a confidential and non-confidential version of those submissions. The non-confidential submissions will either be published on the CMA website (along with a summary of any hearing which the CMA holds) or, in cases of sensitivity, will be provided to the main parties and selected third parties.

### ***Duration of remittal***

10. Given the urgency around resolution of this issue, the CMA proposes to issue a new decision within a period of approximately 10 - 12 weeks from the date of the publication of this paper. The CMA anticipates publishing its provisional findings on the New Agreement question by mid-late April 2017.
11. An administrative timetable is published along with this notice. Compliance with any deadlines specified will help to ensure that the timetable is met. Anyone wishing to comment on the timetable should do so by 20 March 2017.
12. Comments should be made, by email or in writing, to:

[Ice.Trayport@cma.gsi.gov.uk](mailto:Ice.Trayport@cma.gsi.gov.uk)

or

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