

ICAP Remittal Submission Regarding ICE/Trayport New Agreement

As previously stated in our response to the proposed remedies, we continue to believe that the New Agreement should be terminated. With regard to the points raised in the Conduct of Remittal notice, we comment as follows:

1. The circumstances in which the New Agreement was made.

As the Group has noted, Trayport and ICE pre-transaction had conflicting aims and no history of cooperation but under common ownership very quickly entered into the New Agreement. It is worthwhile pointing out that whilst Trayport has historically pursued a policy of venue aggregation this has typically only been with venues using its own software (Trayport Exchange Trading System) and for other venues where Trayport has not perceived a strong competitive threat.

This has not been the case with ICE who is both a very strong competitor of brokers for trade execution (Trayport's main trading venue customer group) and also, by extension, of Trayport itself in that ICE's strategy is to capture and control trade execution on its own platform, not clearing business from trades executed on other platforms which use Trayport software. As such, should Trayport aggregate ICE markets, and should ICE succeed in capturing market share for execution on its platform, this would be at the cost of broker venues. As Trayport earns revenue by encouraging proliferation of broker venues (each additional broker pays Trayport fees and the more brokers in a market the greater the requirement for customers to have an aggregation platform provided exclusively by Trayport), facilitating or encouraging trade execution away from Trayport venues, and particularly on an exchange which aggressively promotes its own front-end trading software i.e. by aggregating ICE markets into the Trayport Trading Gateway, would not, and has never, made commercial sense for Trayport.

Indeed, evidence for this is that Trayport as an independent company had never willingly contemplated ICE aggregation and had also refused to aggregate other venues which it viewed as competitive threats e.g. Griffin Markets when that venue used ICE software and not a Trayport system. Hence the lack of history of cooperation between an independent Trayport and ICE.

Given the above, and that clearly an inter-company transaction where payments remain with the same parent company is very difficult to categorise as on an arm's length basis, we do not believe that it is likely that the New Agreement would have been made without Trayport under ICE ownership. It makes no independent commercial or strategic sense and is inconsistent with Trayport's past behaviour.

2. The New Agreement affecting the willingness of potential purchasers.

As explained above, the implementation of the New Agreement, leading to the aggregation of ICE markets into the Trayport Trading Gateway on terms that it seems unlikely to have been made on a bona fide commercial arm's length basis, creates a distorted market place which is likely to make potential purchasers less willing, or unwilling, to participate in the divestiture process given that the commercial landscape would have been changed to their detriment. This fact is exacerbated by the lack of information of the commercial terms of the New Agreement; for instance its duration, termination provisions and pricing.

3. The prospects for execution of a replacement agreement.

If the New Agreement was a bona-fide commercial agreement between two independent parties acting in their own best interests then the new owners of Trayport and ICE can quickly and easily reach this agreement again with minimum effort and fuss. Our belief would be that this would be unlikely to happen but, if that view were to be wrong, a new agreement would be entered into by the parties in short order and the consequences of the New Agreement having been terminated would be minimal.

However, if the new owner of Trayport is saddled with the New Agreement with terms and conditions they consider to be onerous or disadvantageous, and which they would prefer to not have, the consequences of not having terminated the New Agreement could be grave. This would be with respect to the competitive landscape and ICE's position within it, not to mention the willingness of potential new owners to engage in the divestment process to begin with.

On any reasonable criteria, a risk assessment of terminating the New Agreement or not will quickly conclude that termination bears little risk whilst not terminating bears considerable risk to both the divestment process and remedying the SLC. A termination of the New Agreement creates the cleanest landscape: if it really is an arm's length agreement a new New Agreement will be agreed by the new owner of Trayport and ICE.

4. Could the New Agreement impede a new owner or be detrimental to competition?

As discussed above, we firmly believe that it is difficult to see how implementation of the New Agreement could be consistent with Trayport's strategy or in their long-term commercial interests if Trayport was an independent company. Therefore, an agreement which is not commercially or strategically sensible would impede a new owner's ability to compete effectively.

The New Agreement would also strengthen ICE's competitive position and whilst this in itself may not be detrimental to overall competition, it is important to note that we do not know the exact terms of the New Agreement. As such, and given our doubts as to if this agreement would have been entered into if ICE had not owned Trayport, ICE thus benefitting from a period of ownership that the CMA has deemed potentially anti-competitive, it is eminently conceivable that the terms of the New Agreement favour ICE, especially in relation to their competitors and other Trayport customers. Should ICE be advantaged due to the New Agreement this would clearly be detrimental to competition.

Summary

For all the points raised above we believe that the New Agreement should be terminated in order to remedy the SLC and ensure an effective and unencumbered divestment.