Project Manager
ICE/Trayport Remittal Inquiry
Competition and Markets Authority
Victoria House
37 Southampton Row
London WC1B 4AD

By email

27 March 2017

Dear Sir/Madam,

EXCHANGE 1 VIEWS ON THE NEW AGREEMENT REMITTAL

The Competition Appeal Tribunal (CAT), in its judgement of 6 March 2017, remitted to the CMA the requirement for Intercontinental Exchange to unwind the agreement entered into between Trayport and ICE post-merger.[1] Following this, the CMA has requested submissions on whether or not this agreement should be terminated.

Exchange 1 refers the CMA to its Initial Response to the CMA's Notice of Possible Remedies dated 26 August 2016 for an outline of its initial views on this agreement.

Exchange 1 is not in a position to determine the extent to which the arrangements (which presumably include detailed interface development and support arrangements, as well as pricing) are more favourable to ICE than other trading venues or compared to what would otherwise have been the case absent the merger. Nevertheless, as noted in the CMA's Final Report on the merger,[2] the agreement was concluded post-merger and, as a result, it is not certain that the agreement would have been entered into and, if it had, if it would have been entered into in its current form absent the merger. The intensity of defence against the CMA decision leads to the assumption that there might be differences in the New Agreement compared to those already existing between Trayport and other trading venues such as companies of Exchange 1.

In the light of the context for its signing and not knowing either its content or the duration of this contract, Exchange 1 restates its belief that the new owner must be given the commercial flexibility to determine what agreements it enters into, independent of possible strategic and anti-competitive reasons for the agreement having been signed. The new owner should be given the option to terminate, renegotiate the terms of, or implement the agreement.

On the specific point as to the extent to which the agreement impacts effective remediation of the substantial lessening of competition finding, Exchange 1 believes that, given the new owner ought to be given commercial flexibility, anything that materially restricts that flexibility may reduce the effectiveness of the divestiture remedy.

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1 *Intercontinental Exchange, Inc. v CMA and Nasdaq Stockholm AB* [2017] CAT 6.

2 *ICE/Trayport*: *A report on the completed acquisition by Intercontinental Exchange, Inc. or Trayport*, CMA, 17 October 2016.

As stated above, Exchange 1 is not in a position to determine the *extent* to which this flexibility may be restricted or whether the agreement would be unfavourable to a new owner of Trayport. However, given there is a risk that this may be the case, and that a new owner may decide not to enter into the agreement on those terms, it seems reasonable and practicable to require its termination. Being aware of the fact that Trayport uses standard agreements for licensing its products, Exchange 1 has no concerns if the new owners of Trayport wish to enter into an agreement with ICE on terms; that would be a commercial decision for the new owners. If the agreement is beneficial to Trayport, as ICE suggests in its submissions to the CMA,[3] Exchange 1 – and importantly, ICE itself – would expect this to occur (and indeed this would seem to be a more expeditious strategy for ICE to realise the benefits of the agreement than the appeal process).

Given that ICE have gone to significant lengths to retain this agreement on the current signed terms through legal proceedings, when it could sign a commercially fair and reasonable agreement with the new owners, Exchange 1 emphasises again a final point regarding the importance of ensuring a rigorous and transparent divestiture process. ICE cannot be allowed to informally influence or select the purchaser of Trayport with reference to this agreement or any new agreement between ICE and Trayport. The sales process must be independent from, and precede, any commercial negotiations for the distribution of ICE products through Trayport or licensing of Trayport's Clearing Link. And it might be worth analysing the contract with respect to its duration and differences as compared to other agreements Trayport entered into with other trading venues.

Finally, it should be taken into consideration that ICE already has, or had through its subsidiary ICE-Endex, agreements with Trayport in place allowing it to list their energy products on Trayport frontends and presumably using the Trayport Clearing Link.

Exchange 1 would welcome the opportunity to comment on the CMA's provisional findings regarding the new agreement remittal. Similarly, should there be any further information the CMA requires as part of its investigation, Exchange 1 is available to help wherever possible.

Kind regards,

Exchange 1

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3 *Intercontinental Exchange, Inc. v CMA and Nasdaq Stockholm AB* [2017] CAT 6, paragraph 57