Intercontinental Exchange and Trayport

Provisional findings on the question remitted to the Competition and Markets Authority by the Competition Appeal Tribunal on 6 March 2017

Notified: 25 April 2017

The Competition and Markets Authority has excluded from this published version of the provisional findings report information which the Inquiry Group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂].

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Appendices

Summary

1. On 17 October 2016, the Competition and Markets Authority (CMA) published a report on the completed acquisition by Intercontinental Exchange, Inc. (ICE) of Trayport, Inc. and GFI TP Ltd., including their subsidiaries (together referred to as Trayport) (the Report).[1] A group of CMA panel members (the Group) found that the transaction constituted a relevant merger situation, and concluded that it may be expected to result in a substantial lessening of competition (SLC) in the supply of trade execution services to energy traders and trade clearing services to energy traders in the European Economic Area (EEA), including to UK–based customers. ICE and Trayport are together referred to as the Parties or the main parties.

2. The Report concluded that the acquisition had resulted, or may be expected to result, in an SLC in two markets, and that the only effective remedy would be the total divestiture of Trayport by ICE, which would include unwinding an agreement entered into by the Parties on 11 May 2016 and defined as the 'New Agreement' in paragraph 6.11 of the Report. This agreement is referred to as the New Agreement throughout this summary.

3. On 11 November 2017, ICE made an application to the Competition Appeal Tribunal (CAT) pursuant to section 120 of the Enterprise Act 2002 (the Act) against the Report. On 17 November ICE made a further application to the CAT pursuant to section 120 of the Act against written directions which had been issued under the initial enforcement order requiring ICE and Trayport to cease and suspend the implementation of the New Agreement.

4. On 6 March 2017, the CAT handed down its judgment setting out its conclusion on each of the grounds of review (the CAT Judgment or the Judgment).[2] The CAT found in favour of the CMA on four out of five of the grounds of appeal against the Report. However, the question of whether the Parties should be required to terminate the New Agreement (the New Agreement question) was remitted to the CMA for reconsideration.

The statutory framework for remedies implementation

5. The CMA's remedy powers under the Act are limited to those required to remedy the SLC or its adverse effects in a way which is as comprehensive a solution as is reasonable and practicable to address the SLC.[3] Remedy

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[1] A report on the completed acquisition by Intercontinental Exchange, Inc. of Trayport, dated 17 October 2016 (the Report)
[2] Intercontinental Exchange, Inc. v Competition and Markets Authority and Nasdaq Stockholm AB [2017] CAT 6 (the Judgment [2017] CAT 6).
[3] The Judgment [2017] CAT 6, paragraph 193.

measures under section 84 of the Act may be implemented pursuant to section 41(2) and 41(4) of the Act in order either:

(a) to **directly** remedy the SLC; or

(b) to **indirectly** remedy the SLC, by ensuring that measures directly remedying the SLC are effective.

6. In this case, the direct measure taken to remedy the SLC is the full divestment of Trayport. In the Report, the CMA also required the Parties to terminate the New Agreement. However, the CAT held that the reasoning in the Report on this aspect of the remedy was inadequate.

7. It is within this statutory context that the CMA has considered the New Agreement question.

The CMA's approach

8. We identified a number of risks posed by the New Agreement to the effectiveness of the divestiture as a comprehensive remedy to the SLC. We categorised these risks as: (i) those which would impact the divestiture process; and (ii) those which are residual or legacy effects of ICE's acquisition of Trayport. In reaching our provisional conclusions we considered in the round the overall risk posed to the effective remediation of the SLC taking into account our views on each of the potential risks identified.

9. We considered the New Agreement question under four headings:

(a) The circumstances in which the New Agreement was entered into: As the CAT noted in the Judgment, if the New Agreement was not entered into on an arm's–length basis it is more likely that remedial measures will be appropriate, provided that these are explicitly justified by reference to remediation, directly or indirectly, of the SLC.

(b) The impact of the New Agreement on our ability to comprehensively and effectively remedy the SLC identified: this assessment is carried out by reference to the potential risks posed by the New Agreement.

(c) The effectiveness of any available remedies.

(d) The cost of the effective remedies and proportionality.[4]

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[4] CC8, paragraph 1.9.

The circumstances in which the New Agreement was entered into

10. As set out in the Report, ICE and Trayport have not historically cooperated[5] and they had been unable to establish a commercial relationship equivalent to the one which would be established under the terms of the New Agreement once implemented. Consequently, the New Agreement creates a step–change in relations between ICE, as the leading European utilities exchange, and Trayport whose software underpins over 85% of European utilities trading. Given that ICE's control of Trayport brought about the SLC identified in the Report and that the New Agreement was entered into when ICE controlled Trayport, our starting point is to be cautious.

11. It was not possible to conclude that the New Agreement was entered into on an arm's–length basis. We identified five key reasons why it is not possible to make this determination in the circumstances of this case:

    (a) Prima facie, negotiations between parent and subsidiary cannot be assumed to have been carried out on an arm's–length basis.

    (b) The majority of third parties perceive that an agreement entered into between parent and subsidiary is unlikely to have been concluded on an arm's–length basis.

    (c) What is considered to be arm's–length by one party under its business model may be different for another party. In other words, the term 'arm's-length' is a relative one.

    (d) The New Agreement contains terms which are specific to ICE, ie it includes bespoke counterparty terms.

    (e) In a situation where the New Agreement contains a number of bespoke terms, comparisons with other Trayport customer contracts are not informative as to whether or not the New Agreement was entered into on an arm's–length basis.

12. We agreed with the CAT that whether or not the New Agreement was concluded on an arm's–length basis is not determinative for the New Agreement question. We did, however, consider that the fact that we have been unable to conclude that the New Agreement was entered into on an arm's length basis has an impact on our assessment of the risks that the New Agreement poses to the effectiveness of the divestiture remedy.

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[5] The Report, paragraphs 7.107 to 7.11 and 7.172 to 7.182.

Impact of the New Agreement on our ability to comprehensively and effectively remedy the SLC identified

13. We considered whether termination of the New Agreement was necessary to remedy the SLC identified in the Report in as comprehensive a way as is reasonable and practicable. We are of the provisional view that the New Agreement presents the following risks to an effective remediation of the SLC:

    (a) potential purchasers might perceive the New Agreement to be potentially disadvantageous such as to affect their willingness to participate in the divestiture process;

    (b) ICE might be incentivised to present the CMA only with purchasers who are content with the New Agreement, and who will accept any impact it may have on their commercial freedom to determine their relationship with ICE, thereby reducing the number, or quality, of suitable purchasers presented to the CMA by ICE for approval;

    (c) in a worst–case scenario, there is a risk that we may be unable to approve any of the shortlisted purchasers submitted by ICE as a prospective purchaser;

    (d) the New Agreement restricts the future owner of Trayport's long term commercial freedom since it sets the Parties' commercial relationship for a period of [✂] years (plus any extension) on the basis of an agreement that was entered into at a time when ICE controlled Trayport (an acquisition which was found to give rise to an SLC);

    (e) the New Agreement might unfairly benefit ICE as a result of it receiving preferential commercial terms compared with its rivals; and

    (f) the New Agreement reduces Trayport's (and its new owner's) incentives to engage with ICE and its rivals as a facilitator playing an important role in enabling and promoting competition between trading venues and between clearinghouses, if such partnerships would target ICE's activities.

14. In light of the statutory duty on the CMA to achieve as comprehensive a solution as is reasonable and practicable to the SLC identified and any adverse effects resulting from it,[6] we provisionally concluded that, whether considered individually or collectively, the risks relating to the divestiture process (paragraphs (a) to (c)) or legacy effects (paragraphs (d) to (f)) created

[6] Section 41(4) of the Act.

by the New Agreement provide a sufficient basis on which to require its termination.

Effectiveness of any available remedies

15. In the Report we considered that termination of the New Agreement was necessary in order to implement an effective divestiture. We remain of the provisional view that immediate termination of the New Agreement would mitigate the risks to the effective remediation of the SLC that we have identified above, and that it would be reasonable and practicable to do so (see below).

16. We considered whether temporary implementation of the New Agreement subject to a termination right for the future owner of Trayport would constitute an effective alternative to termination.We considered that each of the risks to our implementation of an effective remedy, which are identified above, apply equally to this scenario.

17. We also noted that in the event that a new owner decided that the terms were not commercially fair and required termination of the New Agreement after temporary implementation, ICE products would have to be removed from the Trayport platform. This would lead not only to costs for ICE and Trayport, but would be disruptive for traders and potentially damage the relationship between any new owner and Trayport's customers.

18. We therefore provisionally concluded that the only effective remedy to mitigate the risks posed by the New Agreement was its immediate termination. We also provisionally concluded that any new owner should not be required by ICE to enter into discussions on its willingness to enter into the New Agreement or on the terms of such an agreement during the divestiture process.

The cost of remedies and proportionality

19. We agreed with the CAT that the direct costs of terminating the New Agreement to the Parties and to any of their wider interests is likely to be extremely modest. Neither party has established any current business activity on the basis of the New Agreement and, as such, neither party should incur any direct costs as a result of its termination.

20. We noted the Parties' submissions and the submission from four traders that suspension of the New Agreement results in opportunity costs in that ICE is losing out on the opportunity to compete with its rivals more fiercely as a result of not using the Trayport platform, and that traders will not have access

to ICE's products on the Trayport platform during that period of time. However, we are of the view that any such opportunity cost would be of limited duration and would only subsist for the period in which Trayport is being sold, which we do not consider should be a lengthy period of time. On the other hand, the adverse effects resulting from the New Agreement could be significant and long–lasting. As such, the risks of implementation far outweigh the costs of terminating the New Agreement.

21. We therefore provisionally concluded that termination of the New Agreement was reasonable and practicable and was proportionate in the circumstances.

Provisional conclusion

22. We provisionally concluded that it is necessary for the Parties to terminate the New Agreement in order to ensure the effective remediation of the SLC identified in the Report.

Provisional findings

1. Introduction

1.1 On 17 October 2016, the CMA published a report on the completed acquisition by Intercontinental Exchange, Inc. (ICE) of Trayport, Inc. and GFI TP Ltd., including their subsidiaries (together referred to as Trayport) (the Report).[7] A group of CMA panel members (the Group) found that the transaction constituted a relevant merger situation, and concluded that it may be expected to result in a substantial lessening of competition (SLC) in the supply of trade execution services to energy traders and trade clearing services to energy traders in the EEA, including to UK–based customers. ICE and Trayport are together referred to as the Parties or the main parties in this document.

1.2 In the Report, we decided that it would be necessary to issue a final order requiring: *(a)* the full divestiture of Trayport; and *(b)* the unwinding of an agreement entered into on 11 May 2016 which was a new interface development and support agreement relating to the additional display of ICE products on Joule/Trading Gateway[8] and which was defined as the 'New Agreement' in paragraph 6.11 of the Report. This agreement is referred to as the New Agreement throughout these provisional findings.

1.3 On 11 November 2016, ICE made an application to the CAT pursuant to section 120 of the Act against the Report (NoA1). On 17 November 2016 ICE made a further application to the CAT pursuant to section 120 of the Act against written directions which had been issued under the initial enforcement order requiring ICE and Trayport to cease and suspend the implementation of the New Agreement (NoA2).

1.4 On 6 March 2017, the CAT handed down its judgment setting out its conclusion on each of the grounds of review set out in NoA1 and NoA2 (the CAT Judgment or the Judgment).[9] The CAT dismissed the first four grounds of ICE's challenge to the CMA's findings in the Report, as set out in NoA1, which can be summarised as follows:

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[7] A report on the completed acquisition by Intercontinental Exchange, Inc. of Trayport, dated 17 October 2016 (the Report).
[8] The Report, paragraphs 3.16 – 3.20
[9] Intercontinental Exchange, Inc. v Competition and Markets Authority and Nasdaq Stockholm AB [2017] CAT 6 (the Judgment [2017] CAT 6).

(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: ICE made 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 had erred in its assessment of the costs to the merged group of implementing a partial foreclosure strategy.

(d) Ground 4: ICE challenged the CMA's rejection of the remedy proposal put forward by the Parties.

1.5 With respect to Ground 5 of NoA1 and Ground 1 of NoA2, in which ICE challenged the CMA's vires to require termination of the New Agreement and to require its continued suspension pending such termination, the CAT stated that, in principle, termination of an agreement may be an appropriate remedy to address an SLC. However, the CAT found that the Report did not make the evidence and analysis relied on by the CMA sufficiently clear. The question of whether the Parties should be required to terminate the New Agreement (the New Agreement question) was therefore remitted to the CMA for reconsideration.[10]

1.6 As set out above (see Ground 1), the CMA's conclusion on the counterfactual was upheld by the CAT in the Judgment and is therefore outside the scope of this remittal which relates only to the New Agreement question. In relation to the relevant counterfactual, we treated the New Agreement as merger specific and in the Report we stated that:

> […] while it is possible ICE and Trayport would have successfully entered into the New Agreement absent the Merger this is not sufficiently certain in order to be included as part of the most likely counterfactual, particularly, in light of there being no draft agreement, including no final agreement on the scope of ICE products to be listed on Trayport, and the Parties' previous reluctance to cooperate (the evidence available in the Parties' internal documents demonstrates strategic reasons for their lack of cooperation…) […]
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> Importantly, we note that the New Agreement was concluded post-Merger, with Trayport already forming part of the ICE Group. As

[10] Given the CAT's conclusions in relation to Ground 5 of NoA1 and Ground 1 of NoA2, the CAT did not consider it necessary to determine Grounds 2 and 3 of NoA2.

such, it is unclear that the negotiations would have been successfully concluded in circumstances where funds were not being transferred intra–group and/or if Trayport were under alternative ownership, in the absence of the Merger. We note that even if these discussions had been successfully concluded, absent the Merger, it is uncertain whether the final terms would have been materially equivalent to the terms negotiated in the New Agreement'.[11]

[…] Finally, we concluded that it was not sufficiently certain that the New Agreement, in its current form, would have been entered into absent the Merger, and therefore we did not include the New Agreement as part of the counterfactual.[12]

1.7 This document sets out our provisional findings on the New Agreement question. The CAT Judgment states in relation to the New Agreement question that the Report:

> simply records that, in view of the uncertainty as to whether the same agreement would have been signed under alternative ownership, it would be appropriate for the new owner of Trayport to accept or reject those terms – without explaining how that bears on the effectiveness of the divestiture remedy. The need for such an explanation is rendered all the more important by the CMA's conclusion that the terms of the New Agreement do not in themselves give rise to the SLC identified in the Report.[13]

1.8 The Judgment also states that:

> Whilst we have concluded that the CMA's reasoning is deficient, we consider that there is material in the Report upon the basis of which the CMA could lawfully conclude that termination of the New Agreement is required to ensure the full effectiveness of the divestiture remedy.[14]

1.9 In light of this, we have taken into account all relevant evidence relating to the New Agreement question received in the course of the merger inquiry as reflected in the Report and supplemented this with evidence gathered from

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[11] The Report, paragraphs 6.29 & 6.30.
[12] The Report, paragraph 6.34.
[13] The Judgment [2017] CAT 6, paragraph 196.
[14] The Judgment [2017] CAT 6, paragraph 199.

the Parties and third parties in response to our consultation on the Conduct of Remittal Notice.

1.10 Below we first outline the process that we followed for the remittal. We then set out the statutory context for the implementation of remedies by the CMA and our approach to the New Agreement question.

2. Background to the remittal

Chronology

2.1 We have set out below a chronology of the key events relevant to the New Agreement question:

- *29 April 2015:* BGC/GFI announces intention to sell Trayport.
- *February to May 2015:* initial negotiations take place between ICE and Trayport regarding a proposed new interface development and support agreement.[15]
- *June 2015:* ICE commences formal participation in the auction by BGC/GFI of Trayport.[16]
- *23 June 2015:* BGC/GFI halt negotiations between ICE and Trayport regarding the proposed new agreement as a result of ICE's participation in the Trayport sale process.
- *11 December 2015:* ICE completes its acquisition of Trayport.
- *11 January 2016*: The CMA issues an initial enforcement order requiring ICE and Trayport to hold–separate their respective businesses.
- *January – May 2016*: ICE and Trayport negotiate the terms of the New Agreement.
- *3 May 2016*: The merger was referred by the CMA for a phase 2 investigation.
- *11 May 2016:* ICE and Trayport sign the New Agreement.

[15] ICE informed the CMA that these negotiations concerned the agreement which was signed on 11 May 2016 and which is referred to as the New Agreement.
[16] The CMA has subsequently learned that ICE had signed a non–disclosure agreement with BGC as of January 2015 to enable them to start discussing the acquisition of Trayport.

- *14 June 2016:* following communication of the CMA's intention to issue a direction ordering that implementation of the New Agreement be suspended, ICE and Trayport voluntarily agree to suspend implementation whilst the CMA's merger investigation is ongoing.

- *17 October 2017:* The CMA publishes the Report and concludes that the New Agreement should be terminated.

- *4 November 2016:* ICE and Trayport inform the CMA of their intention to implement the New Agreement as of 14 November 2016.

- *10 November 2016:* CMA issues a direction[17] to ICE and Trayport under its initial enforcement order requiring ICE and Trayport to cease and suspend implementation of the New Agreement.

- *11 November 2016:* ICE submits NoA1.

- *17 November 2016:* ICE submits NoA2.

- *6 March 2017*: The CAT Judgment is issued. The CAT upholds the CMA's conclusion that the New Agreement is merger specific.

2.2 In relation to the above chronology of events, we observe the following points:

(a) The bulk of detailed negotiation occurred between January and May 2016 when Trayport was already under ICE control.

(b) The Parties moved quickly to sign the New Agreement (11 May 2016) after the CMA commenced its phase 2 investigation (3 May 2016).

(c) The Parties informed the CMA of their intention to implement the New Agreement after publication of the Report in which we concluded that it should be terminated.

(d) As set out in our counterfactual in the Report, and as upheld by the CAT, our starting point is that the New Agreement is merger specific.

2.3 We refer to these events where relevant throughout these provisional findings.

[17] A variation to the direction was issued on 28 November 2016.

The process on remittal

2.4 On 13 March 2017, we published a Conduct of Remittal Notice setting out how we intended to conduct the remittal process, particularly with regard to gathering and considering further evidence.[18]

2.5 We invited submissions on the New Agreement and stated that we did not propose to hold hearings prior to the publication of our provisional findings. We intend to hold hearings with each of the main parties after they have had the opportunity to consider our provisional findings and we will consider whether it would be appropriate to hold any third party hearings in view of the responses to our provisional findings that we receive.

2.6 The remittal process is limited to consideration of the New Agreement question. We were not required to consider any other aspect of the Report as part of the remittal and, accordingly, we have not done so.

2.7 More detail on the conduct of the remittal is set out in Appendix A.

The statutory framework for remedies implementation

2.8 Where the CMA finds that a merger has led or may be expected to lead to an SLC, it is required by section 35(3) of the Act to decide whether action should be taken under section 41(2) of the Act for the purpose of remedying, mitigating or preventing the SLC or any adverse effect that has resulted or may be expected to result from the SLC.

2.9 Section 41(4) requires the CMA to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC identified and any adverse effects resulting from it. Remedy measures under section 84 of the Act may be implemented pursuant to section 41(2) and 41(4) of the Act in order either:

(a) to **directly** remedy the SLC; or

(b) to **indirectly** remedy the SLC, by ensuring that measures directly remedying the SLC are effective.[19]

2.10 In this case, the direct measure taken to remedy the SLC is the full divestment of Trayport. In the Report, the CMA also required the Parties to terminate the New Agreement. The CAT ruled that there is '…no doubt that, in principle,

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[18] Remittal Notice.
[19] The Judgment [2017] CAT 6, paragraph 194.

termination of an agreement may be an appropriate indirect remedy: indeed the Act recognises as much in para 13(3)(d) of Schedule 8.[20] It must however, be appropriately linked to the purpose of remedying the SLC for which all of the CMA's remedial powers are conferred.'[21] The CAT found that the reasoning in the Report linking the termination of the New Agreement with the remedying of the SLC was inadequate.

2.11 It is within this context that the CMA has reconsidered the New Agreement question. We set out below our approach to this question in light of the CAT Judgment.

The CMA's approach

2.12 In the Report, and as summarised above, we concluded that the merger would result in an SLC.[22]

2.13 The CAT confirmed that any remedy must be appropriately linked to the purpose of remedying the SLC for which all of the CMA's remedial powers are conferred, and that the nature of that linkage can vary from case to case.[23] Bearing in mind the merger specific nature of the New Agreement, the question that we have to consider '…is whether, having regard to the risks that the New Agreement poses to the effective remediation of the substantial lessening of competition, it is reasonable and practicable to impose the remedy under consideration'.[24]

2.14 We have therefore considered whether implementation of the New Agreement presents any risks to the effectiveness of the divestiture as a comprehensive remedy to the SLC and any adverse effects resulting from it, and have provisionally identified the following potential risks for further consideration:

(a) potential purchasers may perceive the New Agreement to be potentially disadvantageous such as to affect their willingness to participate in the divestiture process;

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[20] We note that the Intercontinental Exchange Inc. and Trayport Merger Inquiry Order 2017, made by the CMA following the Report, is expressed to be made in exercise of the CMA's powers under, inter alia, paras 2 and 13 of Schedule 8 of the Act, both of which confer the power to require termination of an agreement. Whilst the power in para 13 is supplementary to the power to order division of any business or group, the power in para 2 is free-standing. Neither party took any point in this respect and, in our judgment, it has no bearing on the present assessment: whichever power is engaged, in this case it has been exercised to ensure the effectiveness of the divestiture remedy.
[21] The Judgment [2017] CAT 6, paragraph 195.
[22] For the avoidance of doubt, the Report did not conclude that the terms of the New Agreement formed part of the SLC and this is not being reconsidered as part of the New Agreement question.
[23] The Judgment [2017] CAT 6, paragraph 195.
[24] The Judgment [2017] CAT 6, paragraph 205.

(b) ICE might be incentivised to present the CMA only with purchasers who are content with the New Agreement, and who will accept any impact it may have on their commercial freedom to determine their relationship with ICE, thereby reducing the number, or quality, of suitable purchasers presented to the CMA by ICE for approval;

(c) in a worst–case scenario, the impact of the New Agreement on purchasers' willingness to participate and ICE's incentives could mean that the CMA might be unable to approve any of the shortlisted purchasers submitted by ICE as a prospective purchaser;[25]

(d) the New Agreement restricts the future owner of Trayport's long term commercial freedom since it sets the Parties' commercial relationship for a period of [✂] years (plus any extension) on the basis of an agreement that was entered into at a time when ICE controlled Trayport (an acquisition which was found to give rise to an SLC);

(e) the New Agreement might unfairly benefit ICE as a result of it receiving preferential commercial terms compared with its rivals; and

(f) the New Agreement might reduce Trayport's (and its new owner's) incentives to engage with ICE and other market participants as a facilitator playing an 'important role in enabling and promoting competition between trading venues and between clearinghouses'.[26]

2.15 For the purposes of these provisional findings, the risks identified in paragraph 2.14 (a) to (c) are categorised as risks which would impact the divestiture process, while the risks set out in paragraph 2.14 (d) to (f) are categorised as risks arising from the legacy effects of ICE's acquisition of Trayport. In reaching our provisional conclusions we will consider in the round the overall risk posed to the effective remediation of the SLC taking into account our views on each of the potential risks identified. For the avoidance of doubt, in light of the statutory duty on the CMA to achieve as comprehensive a solution as is reasonable and practicable to the SLC identified and any adverse effects resulting from it, if the CMA finds sufficient evidence of any of the risks identified at paragraph 2.14 above, this would provide a sufficient basis on which to require a remedy in relation to the New

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[25] In this regard, the CMA notes that in paragraph 12.65 of The Report, the CMA expanded the Monitoring Trustee reporting obligations under the initial enforcement order to provide the CMA 'with regular updates on the progress of the divestiture process, which would highlight', among others, '*(b)* details of any issues arising during the divestiture process which the Monitoring Trustee considers might prejudice the intended and effective outcome of the divestiture process, or cause considerable delay to the completion of the divestiture within the agreed timescales'.
[26] The Report, paragraph 7.183.

Agreement that was reasonable and practicable, and proportionate in the circumstances.[27]

2.16 Accordingly, we have considered the New Agreement question under four headings:

(a) The circumstances in which the New Agreement was entered into (section 3 below): As the CAT noted in the Judgment, if the New Agreement was not entered into on an arm's–length basis it is more likely that remedial measures will be appropriate, provided that these are explicitly justified by reference to remediation, directly or indirectly, of the SLC.

(b) The impact of the New Agreement on our ability to comprehensively and effectively remedy the SLC identified (section 4): this assessment is carried out by reference to the potential risks identified at paragraph 2.14 above.

(c) The effectiveness of any alternative remedies (section 5).

(d) The cost of the effective remedies and proportionality (section 6).[28]

2.17 Under each heading, we first set out the Parties' submissions; second we refer to any relevant evidence received from third parties; and third, we set out our assessment of the evidence in each area.

3. Circumstances in which the New Agreement was entered into

3.1 The CAT Judgment noted that while the circumstances in which the New Agreement was entered into were not determinative with respect to the New Agreement question, they could be informative. Specifically:

> Considerable attention was devoted at the hearing to the significance of the question whether the New Agreement might or might not be on an arm's length basis. In our view, **that question is not, of itself determinative**. It is of course, more likely that remedial measures will be appropriate in respect of an agreement that is not on an arm's length basis but such

[27] In relation to the standard of proof for the implementation of remedies, the Court of Appeal has stated: 'What the CMA has to decide on the ordinary civil standard of proof [ie balance of probabilities] is whether an SLC has or may be expected to result. Once it has reached that conclusion then the action which it has to take must be such as to remedy or prevent the SLC concerned. It is not at that stage in the exercise concerned with weighing up probabilities against possibilities but rather with deciding what will ensure that no SLC either continues or occurs.' See *Ryanair Holdings Plc v The Competition and Markets Authority & Anor* [2015] EWCA Civ 83 (12 February 2015), paragraph 57.
[28] CC8, paragraph 1.9

> measures must still be explicitly justified by reference to remediation, directly or indirectly, of the SLC'.[29]

3.2 During our investigation of the merger, we considered the circumstances in which the New Agreement was entered into as part of our assessment of the relevant counterfactual. As set out above, the CMA's conclusion on the counterfactual was upheld in the CAT Judgment and is therefore outside the scope of this remittal. However, in light of the new evidence submitted by the Parties during the CAT proceedings, we have considered whether it is possible to determine whether the New Agreement was concluded on arm's-length terms.

3.3 Below we have set out a summary of the Parties' submissions and third party submissions on the circumstances in which the New Agreement was entered into. We have then set out our assessment of these circumstances and their relevance to the New Agreement question.

Parties' submissions

3.4 On 16 March 2017, in response to the CMA's Conduct of Remittal Notice, the Parties submitted that they considered the CMA already had 'adequate evidence before it to conclude that the New Agreement poses no risk to the effective remediation of the SLC or its adverse effects as identified in the CMA's Final Report.'[30]

3.5 In this submission, the Parties listed evidence which they considered was relevant to the New Agreement question and which had been placed before the CAT during the litigation proceedings (the CAT proceedings). This evidence generally related to the circumstances in which the New Agreement was made and, in particular, was relevant to the questions of whether the New Agreement was entered into on arm's–length terms and whether it would have been entered into absent the merger. We have set out this evidence in detail in Appendix B to these provisional findings.

3.6 In addition to their submission of 16 March 2017, on 4 April 2017 the Parties submitted a response to a CMA working paper on the New Agreement question stating that:

> It is noteworthy that, despite being an expert competition authority with significant experience in analysing complex contractual arrangements (both in the context of merger

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[29] The Judgment [2017] CAT 6, paragraph 201.
[30] Parties' 'Initial Observations on the Remittal', dated 16 March 2017.

reviews and market investigations), the CMA persists in its reluctance to carry out an analysis of the New Agreement – both on its own terms and in comparison with Trayport's other venue customer contracts (all of which were provided to the CMA during the Phase 2 process).

The question of whether the New Agreement contains any terms that could affect the willingness of potential buyers to participate in a divestiture process or impede a new owner's ability to compete effectively or otherwise be detrimental to competition is of central importance to the remittal inquiry […].

ICE is confident that the CMA, if it were willing to carry out such an analysis, has the means to do this and would be in a position to conclude that the New Agreement does not contain any such terms and, accordingly, that it does not need to be terminated.'[31]

3.7 The CMA has considered the above submissions, and the evidence set out in Appendix B (as necessary), in its assessment below.

Third party submissions

3.8 The CMA has received views from a number of third parties that are relevant to the New Agreement question, including the oral evidence the CMA received during response hearings following the publication of its Remedies Notice[32] in the merger inquiry on 16 August 2016 and responses to its Conduct of Remittal Notice, published on 13 March 2017. Full details of those views are set out in Appendix B.

3.9 The majority of third parties who responded to our consultations on the Remedies Notice and the Conduct of Remittal Notice were sceptical that an agreement between parent and subsidiary, ie between ICE and Trayport, could have been concluded on arm's–length terms. However, some third parties were in favour of the New Agreement being implemented but only if the CMA could conclude that it was entered into on an arm's–length basis (see the trading company responses set out in section 5 below).

3.10 Other than a brief description of the New Agreement, the Parties resisted the terms of the New Agreement being disclosed, including its duration, fee

[31] Parties' 'Response to Remittal Working Paper', dated 4 April 2017, paragraphs 2.1 - 2.3
[32] Remedies Notice, dated 16 August 2016

structure, product scope, pricing or any other commercial terms, and these were not disclosed in either the Conduct of Remittal Notice, Remedies Notice or the Report since these were considered commercially sensitive.[33]

3.11 In the absence of any disclosure of the terms of the New Agreement, third parties told us that they were unable to give detailed views. To try to address this for the purposes of the remittal, the CMA asked the Parties to provide a redacted version of the New Agreement or a non–confidential summary of its key terms in order to assist the CMA with its consultation. The request was declined on the basis that the '…New Agreement is a non–public commercial arrangement between two independent entities. Publication of any of the terms of the New Agreement would harm the legitimate business interests of the two companies, and Trayport in particular.'[34]

3.12 As an alternative to disclosing a non–confidential version of the New Agreement, the Parties proposed that the CMA ask third parties: 'What type of contractual provisions, if they were contained in the New Agreement, would give you cause for concern (as a prospective buyer of Trayport)?'[35]

3.13 We considered whether to issue such a request to third parties. As noted by the CAT, what may be arm's length to one party in the context of its own business model, may not be so to another.[36] It follows that certain contractual terms may be problematic for one party in the context of its business model but they may not be problematic for another. Asking third parties to imagine every conceivable contractual term or combination of terms that may be problematic would be impractical and not necessarily informative given third parties' differing business models making each response a subjective one. Moreover, consideration of any individual contract term in isolation is not informative without consideration of the totality of the agreement. As discussed further below, the New Agreement contains a number of bilaterally negotiated terms including, for example, the consideration paid, the scope of products to be listed on the Trayport platform and the method of connectivity. Receiving a list of contractual terms which may be concerning to third parties would not enlighten us as to whether these specific contractual terms or the combination of these terms were or were not problematic. The Parties' refusal to make available any terms of the New Agreement on grounds that doing so

[33] The Remedies Notice, paragraph 14, footnote 4, defined the New Agreement as follows: 'This agreement is an interface development and support agreement (IDSA), under which Trayport will display additional ICE Futures Europe and ICE Endex products to Trayport's Joule and Trading Gateway customers, and provide a straight-through processing link to ICE Clear Europe for broker intermediated transactions.'
[34] Email from Shearman & Sterling to the CMA, dated 20 March 2017
[35] Email from Shearman & Sterling to the CMA, dated 20 March 2017
[36] The Judgment [2017] CAT 6, paragraph 202.

may harm their respective business interests, supports the conclusion that certain terms are bespoke.

3.14 Taking into account the above points, we did not consider it would be useful to ask third parties the question proposed by the Parties.

Our assessment

3.15 As set out in the Report, ICE and Trayport have not historically cooperated and they had been unable to establish a commercial relationship equivalent to the one which would be established under the terms of the New Agreement once implemented. Consequently, the New Agreement creates a step-change in relations between ICE, as the leading European utilities exchange, and Trayport whose software underpins over 85% of European utilities trading. Given that ICE's control of Trayport brought about the SLC identified in the Report and that the New Agreement was entered into when ICE controlled Trayport, our starting point is to be cautious.

3.16 The Parties have referred us to evidence that was submitted during the CAT proceedings in the context of ICE's challenge to the CMA's conclusions on the relevant counterfactual in the Report (as set out in paragraphs 6.29 to 6.31 and paragraph 6.34 of the Report, and repeated above). We have considered if it is possible to conclude whether the New Agreement could be said to have been concluded on an arm's–length basis taking into account this evidence. In carrying out our assessment, we encountered a number of hurdles preventing us from doing so, as set out below.

3.17 The CMA notes the Parties' submission that as an expert competition body the CMA should be able to judge whether the New Agreement was entered into on arm's–length terms by comparing the terms of the New Agreement with the terms of Trayport's other customer contracts. In this regard, we make two observations:

(a) The terms of the New Agreement were entered into as a result of bilateral negotiations between parent and subsidiary and the New Agreement was only concluded after the acquisition, which is not a circumstance which can be typically said to be arm's–length.

(b) The New Agreement contains a number of bespoke commercial terms resulting from five months of bilateral negotiations, including the consideration paid, scope of the products to be listed on the Trayport platform and the nature of connectivity into the Trayport platform (for

example, a bespoke connectivity such as ICE Link[37] rather than a standard licensing arrangement for GV Portal[38]). It is impossible to judge whether these terms would have been accepted under different ownership.

3.18 When considering whether negotiations can be considered to have been carried out on an arm's–length basis, our starting point is to be cautious where these have been carried out between a parent and its subsidiary. It may be possible to consider that such an agreement was concluded on an arm's–length basis depending on the facts of the case, for instance if there were evidence to show that the New Agreement was entered into on standard terms which were the same as those entered into by Trayport with all of its customers without variation, such that there could be little or no scope for the New Agreement to be on preferential terms.

3.19 The sum paid by different venues to Trayport for their services is not fixed. Whilst we are aware of the sum to be paid by ICE as consideration for the services to be carried out under the New Agreement, it is not possible to know whether a different owner would have agreed to the same sum.

3.20 To understand better the standardised nature of the New Agreement, or otherwise, we gathered further evidence in relation to the scope of ICE's products covered by the New Agreement, as compared with Trayport's other venue customers.

3.21 Trayport provided data that showed that [✂][39][✂].[40] [✂]. Contrary to the position of its rivals, [✂].[41] This evidence indicates that ICE's position under the New Agreement is not the same as that of its rivals with respect to the products within the scope of the contract.

3.22 The CMA also asked Trayport if the New Agreement allows for ICE data to be made available on a multicasting[42] basis utilising Trayport's software as a service (SaaS) model. Under the current terms of the New Agreement [✂][43] [✂].[44]

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[37] A description of ICE Link is set out in paragraphs 6.14 & 6.15 of the Report.
[38] A description of GV Portal is set out in paragraph 3.26 of the Report.
[39] The Report, paragraph 2.2.
[40] [✂].
[41] The Report, paragraph 3.16 – 3.20
[42] Multicasting means the ability to use a single data stream in order to provide data to multiple recipients subject to the permission of the relevant venue for the grant of access for each recipient's use.
[43] [✂].
[44] Trayport response to CMA Request for information of 18 April.

3.23 The New Agreement also provides that ICE would be connected into [✂]. This bespoke connectivity is a further point of difference to its rivals who typically use BTS[45], ETS[46] or GV Portal[47] in order to list their venue's prices on Joule/Trading Gateway.

3.24 In light of this evidence, we conclude that there are (at least) four areas where the terms of the New Agreement may have differed had the New Agreement been negotiated with Trayport under alternative ownership: (i) the consideration paid; (ii) the scope of products available for listing on Joule/Trading Gateway; (iii) the availability of multicasting; and (iv) the method of connectivity.

3.25 Finally, even if we were able to conclude that the New Agreement could fairly be regarded as arm's–length by ICE in the context of its own business model, we agree with the CAT that it would not necessarily follow that it would be so regarded by a new owner which might have a different business model and/or strategy: indeed, different potential owners may have differing business models and thus may have different views about what would constitute arm's-length terms for an agreement with ICE.[48] In a situation where the new owner of Trayport is as yet unknown, this complicates the question further.

Provisional conclusion

3.26 In the circumstances of this case, it is not possible to conclude that the New Agreement was entered into on an arm's–length basis for five key reasons:

(a) *Prima facie,* negotiations between parent and subsidiary cannot be assumed to have been carried out on an arm's–length basis.

(b) The majority of third parties perceive that an agreement entered into between parent and subsidiary is unlikely to have been concluded on an arm's–length basis.

(c) What is considered to be arm's–length by one party under its business model may be different for another party. In other words, the term arm's–length is a relative one.

(d) The New Agreement contains terms which are specific to ICE, ie it includes bespoke counterparty terms.

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[45] The Report, paragraphs 3.21 – 3.24
[46] The Report, paragraph 3.25 – 3.27
[47] The Report, paragraph 3.25 – 3.27
[48] The Judgment [2017] CAT 6, paragraph 202.

(e) In a situation where the New Agreement contains bespoke terms, comparisons with other Trayport customer contracts are not informative as to whether the New Agreement was entered into on an arm's–length basis.

3.27 Nonetheless, we agree with the CAT that whether or not the New Agreement was concluded on an arm's–length basis is not determinative for the New Agreement question. We do, however, consider that the fact that we have been unable to conclude that the New Agreement is at arm's length has an impact on our assessment of the risks that the New Agreement poses to the effectiveness of the divestiture remedy as set out below.

4. Impact of the New Agreement on our ability to comprehensively and effectively remedy the SLC identified

4.1 We have considered whether termination of the New Agreement is necessary to remedy the SLC identified in the Report and any adverse effects resulting from it in as comprehensive a way as is reasonable and practicable. As set out in paragraphs 2.14 – 2.15 above, we have carried out our assessment considering two categories of risk:

(a) whether there is a risk that the New Agreement may adversely impact the divestiture process; and/or

(b) whether the New Agreement can be considered a residual or legacy effect of ICE's control of Trayport (ie the acquisition) which could prevent the SLC from being remedied in a way which is as comprehensive as is reasonable and practicable.

4.2 We have first set out the evidence we have received from the Parties and third parties. We then set out our assessment of these two risk categories.

Parties' submissions

4.3 The Parties did not make any submissions on the specific risks that the New Agreement may pose to the effectiveness of the divestiture or our ability to remedy the SLC. ICE's position is that the New Agreement poses no risk to the effective remediation of the SLC.[49]

[49] See Appendix B.

Third party submissions

The divestiture process

4.4 At its response hearing on 6 September 2016, following our Remedies Notice, Exchange C told the CMA, that if the New Agreement gave ICE a 'strategic advantage' that was 'non–standard', then ICE may 'favour a buyer' that would retain the New Agreement.[50]

4.5 Exchange 1, in its response to the CMA's Conduct of the Remittal document, stated that:

> Given that ICE have gone to significant lengths to retain this agreement on the current signed terms through legal proceedings [ie the CAT 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.

4.6 Exchange 1 further stated that 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.'[51]

4.7 ICAP, in its response to the CMA's Conduct of the Remittal document, told the CMA that:

> […] 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 on the commercial terms of the New Agreement; for instance its duration, termination provisions and pricing.[52]

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[50] Exchange C, summary of response hearing.
[51] Exchange 1 remittal submission.
[52] ICAP remittal submission.

4.8 Party X expressed concerns about the New Agreement's impact on the sales process:

> Party X would like to express its concern about the contents of the currently confidential 'New Agreement' and the nature of any sales process that could follow the conclusion of the remittal process. Any sales process is likely to be expedited, thus Party X has two primary concerns:
>
> - Given the context in which the 'New Agreement' was established it could, include terms that favour the parent company, impacting Trayport's future business as a standalone entity.
>
> - Specifics of the 'New Agreement' will need to be disclosed sufficiently early to enable prospective buyers to make a proper determination of its effect on the value of the business.[53]

4.9 In a call with the CMA, Party X further noted that:

> […] if the terms of the New Agreement were advantageous to ICE such that it would trigger a negative reaction from brokers and other exchanges, then it would expect ICE to grant modifications or amendments to the terms before the New Agreement was implemented. However, under this scenario, if the New Agreement could not be amended, then it considered that the New Agreement would undermine Trayport's long term strategic position.[54]

4.10 BGC/GFI told us with respect to its requirement for Trayport to halt negotiations with ICE on the terms of a prospective agreement in June 2015 once BGC/GFI's sale process for Trayport had commenced:

> It has proven difficult to reconstruct all the dynamics at work [at the time of BGC/GFI's sales process] but we believe that in light of ICE's strong negotiating position it is reasonable to conclude that GFI/BGC was of the view that entering into no agreement with ICE would not only contribute to maximizing Trayport's

[53] Initial submission of Party X
[54] Summary of call with Party X

long term value to any buyer but would also keep ICE interested as both a buyer and a user.[55]

Legacy effects

4.11 As regards other risks to the effective remediation of the SLC, which we consider relate to the prospect of the New Agreement being a legacy effect of ICE's control, ICAP provided the following views:[56]

> [ICE was]…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 [Trayport's main trading venue customer group]….
>
> [Given that] … 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 [eg ICE] which aggressively promotes its own front–end trading software ie by aggregating ICE markets into the Trayport Trading Gateway, would not, and has never, made commercial sense for Trayport.
>
> [Therefore,] … 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, eg 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.

4.12 ICAP went on further to say that:

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[55] Email from BGC to CMA, dated 7 April 2017
[56] ICAP remittal submission.

> […] 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 […].
>
> […] 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.

4.13 Exchange 1 submitted that:

> 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.[57]

4.14 Party X told us that

> […] without seeing the detailed terms of the New Agreement, and given the context of ICE's and Trayport's historic relationship and the circumstances in which the New Agreement had been signed, it believed that the New Agreement was unlikely to have been established on a truly arm's length basis, and therefore could contain terms that

[57] Exchange 1 remittal submission.

> would favour ICE and impact on Trayport's future business. In particular, the New Agreement was concluded after the commencement of the CMA process, when the scenario of divestiture was a reality. Therefore, it is not unreasonable to assume that it might contain clauses advantageous to ICE.[58]

4.15 Party X also said that '…when determining the extent to which the terms of the New Agreement might undermine Trayport's market position, the 'devil was in the detail' of the New Agreement terms.'[59]

4.16 An independent software vendor submitted in response to our Conduct of Remittal Notice that:

> It is difficult to believe that the New Agreement was negotiated at arm's length, or aligned to similar agreements negotiated by Trayport with other unrelated third party venues, given that the New Agreement was negotiated "intra–group", between a parent company (ICE) and its wholly–owned subsidiary (Trayport), with natural opportunity for the parent to impose terms on the subsidiary. Consequently, […] it would be potentially harmful to ICE competing venues on Trayport and rather unattractive and even risky to operate for a potential future acquirer of Trayport.[60]

Other third party submissions

4.17 Four trading companies considered that the New Agreement should be implemented. These views were expressed to be subject to the New Agreement not containing terms that would unfairly benefit ICE and/or that would constrain Trayport's commercial freedom.

4.18 Trading Company B said that it would welcome it if ICE was marketing its products directly on Trayport's platform, although they also stated 'we consider it important that any agreement concluded between ICE and Trayport would be done at arm's length and without exclusivity that could prevent other platforms from entering and competing in the market. Therefore, the current focus on providing a generic trading backend should be remained [sic] and not bring any restrictions to other market places and competitors.'[61]

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[58] Summary of call with Party X, paragraph 1.
[59] Summary of call with Party X, paragraph 2.
[60] Independent software vendor remittal submission.
[61] Trading Company B remittal submission.

4.19 Trading Company C submitted that the New Agreement should be implemented to allow for 'potential benefits for liquidity and efficiency of trading' although the CMA should only allow this 'as long as there no material differences in terms that are applicable to other trading platforms' and provided the CMA can 'ensure it would not prejudice the effective divestment of Trayport or prevent any new owner to continue with the agreement or renegotiate or terminate without any penalties.'[62]

4.20 Trading Company D stated that, '….if the CMA finds the terms to be within standards set by other similar entities, and provided that the New Agreement does not contain any anti–competitive provisions that would provide ICE with an unfair advantage and/or constrain Trayport's ability to operate its business as currently, we would like to see an immediate implementation of the New Agreement.' It also said that, '[…] continuing to delay unfairly prevents ICE from being able to compete with other exchanges on an equal playing field going forward. This creates distorted market outcomes and may have a negative impact on the functioning of certain wholesale markets for EU gas and power.'[63]

4.21 RWEST submitted that, 'RWEST would therefore support the implementation (non-termination) of the New Agreement provided that the CMA can assure itself that the New Agreement operates at arm's length and that it does not confer any material advantage on ICE when compared to other venue customers in the period leading up to divestment.'[64]

Our assessment

The divestiture process

4.22 In the Report, the CMA concluded that the only effective remedy to the SLC that had been identified would be to require ICE to divest Trayport together with the termination of the New Agreement. The divestiture process would be run by ICE, subject to supervision by a monitoring trustee, and – following expressions of interest from prospective buyers – the CMA would be required

[62] Trading Company C remittal submission.
[63] Trading Company D remittal submission.
[64] RWE Supply &Trading remittal submission.

to make a decision on the suitability of any proposed purchaser which ICE put forward as a buyer for the Trayport business.[65]

4.23 In the Report, the 'identification, and availability, of suitable purchasers' was one important aspect of designing an effective divestiture remedy, and the CMA set out in the Report the criteria from our guidelines against which it would assess purchaser suitability:[66]

(a) Independence: 'the purchaser should have no significant connection to the Parties that may compromise the purchaser's incentives to compete independently from ICE…'

(b) Capability: 'the purchaser must have access to appropriate financial resources, expertise and assets to enable the divested business to be an effective competitor in the market. This access should be sufficient to enable the divestiture package to continue to develop as an effective competitor.'

(c) Commitment to the relevant market: 'the purchaser should have an appropriate business plan and objectives for competing in the relevant market.'

(d) Absence of competitive or regulatory concerns: 'divestiture to the purchaser should not create a realistic prospect of further competition or regulatory concerns.'

4.24 An effective divestiture remedy is not simply a case of finding any buyer at any price, but rather finding a suitable purchaser whose ownership will comprehensively address the SLC brought about by ICE's control of Trayport.

4.25 As set out above, in this section we have considered whether the New Agreement presents a risk to the effectiveness of the divestiture process because:

(a) potential purchasers might perceive the New Agreement to be potentially disadvantageous such as to affect their willingness to participate in the divestiture process;

(b) ICE might be incentivised to present the CMA only with purchasers who are content with the New Agreement, and who will accept any impact it may have on their commercial freedom to determine their relationship with

[65] See the Report, Figure 13.
[66] Merger Remedies: Competition Commission Guidelines (CC8), paragraph 3.15.

ICE, thereby reducing the number, or quality, of suitable purchasers presented to the CMA by ICE for approval; and

(c) in a worst–case scenario, this might result in the CMA being unable to approve any of the shortlisted purchasers submitted by ICE as a prospective purchaser.[67]

4.26 As set out above, and in Appendix B, we have received evidence that the majority of third parties perceive that the New Agreement was not concluded on an arm's–length basis. In light of this evidence and given that potential purchasers are likely to be aware of the existence of the New Agreement but would only be aware of its exact terms following due diligence as part of the sales process, the CMA believes that there is a risk that the New Agreement would reduce the pool of potential purchasers at the outset of the divestiture process as a result of a perception that it was not entered into on an arm's–length basis.[68] Furthermore, even those third parties who were in favour of the New Agreement being implemented submitted that their views were subject to the CMA being satisfied that the New Agreement did not contain terms that would unfairly benefit ICE and/or restrict Trayport's commercial freedom.

4.27 The pool of suitable purchasers may also be further reduced because the terms of the New Agreement will only become apparent at a relatively advanced stage of the divestiture process and only when potential purchasers are provided with access to the full details of the New Agreement in a data room (which may not be until after indicative bids were submitted and when they were taken through to the second stage of the divestiture process). This risks the possibility that on viewing the New Agreement some suitable purchasers may withdraw.

4.28 Finally, ICE will control the divestiture process, subject to a reserved ability for the CMA to appoint a divestiture trustee in the event that no suitable purchaser is identified by ICE. This means that ICE decides which prospective purchasers it accepts during the various stages of the sales process and ultimately which purchasers are put forward for approval by the CMA. ICE might be incentivised to limit the pool of purchasers to those that would be content to accept the New Agreement on its current terms and, as such, may put forward a different set of purchasers to that which would have been

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[67] In this regard, the CMA notes that in paragraph 12.65 of the Report, the CMA expanded the Monitoring Trustee reporting obligations under the initial enforcement order to provide the CMA 'with regular updates on the progress of the divestiture process, which would highlight', among others, '*(b)* details of any issues arising during the divestiture process which the Monitoring Trustee considers might prejudice the intended and effective outcome of the divestiture process, or cause considerable delay to the completion of the divestiture within the agreed timescales'.

[68] The CMA notes its position in paragraph 12.55 of the Report that the risk of not finding a suitable purchaser was low. However, this statement was made in the context of the New Agreement having been terminated.

presented absent the New Agreement. This again could reduce the pool of suitable purchasers, and/or the quality of suitable purchasers, put forward for approval by the CMA. We also consider that the prospective purchasers should not be required by ICE to enter into discussions on their willingness to enter into the New Agreement or to negotiate its terms during the sale process as this could also affect the number and type or purchasers who choose to participate.

4.29 Overall, we consider that there is a risk that the pool of suitable purchasers put forward to the CMA for approval may be reduced as a result of the New Agreement. This may lead to a reduction in the number and quality of suitable purchasers. In this respect, whilst we consider that there is a low likelihood of the worst–case scenario materialising, ie no suitable purchaser being found, it would have a significant impact on the divestiture process if it did. Overall, we therefore consider that the New Agreement poses an unacceptable risk to the effectiveness of the divestiture process.

Legacy effects

4.30 We have assessed whether the New Agreement can be considered a residual or legacy effect of ICE's control of Trayport (ie the acquisition) which might prevent our fully remedying the SLC identified because it:

(a) restricts Trayport's commercial freedom since it sets the Parties' commercial relationship for a period of [✂] years (plus any extension) on the basis of an agreement that was entered into at a time when ICE controlled Trayport (the basis of the SLC);

(b) unfairly benefits ICE as a result of it receiving preferential commercial terms compared with its rivals; and

(c) reduces Trayport's (and its new owner's) incentives to engage with ICE and other market participants as a facilitator playing an important role in enabling and promoting competition between trading venues and between clearinghouses.

4.31 We note that the New Agreement would be in place for a period of [✂] years (plus any extension) and, consequently, any adverse effects would be sustained for a significant period. The new owner of Trayport would be in a commercial relationship with ICE that was established during ICE's ownership, and as such any new owner's commercial freedom would be restricted since it would be more difficult to negotiate a new relationship with ICE during the term of the New Agreement. Moreover, the restriction on the new owner's commercial freedom may potentially last longer than the duration

of the New Agreement if the effects of the New Agreement cannot be immediately or easily reversed. For example, as a result of Trayport's trader customers continuing to demand ICE liquidity it may be commercially unattractive or even impossible to terminate the New Agreement once implemented. This risks there being a significant and long lasting restriction on any new owner's commercial freedom to engage on different terms with ICE.

4.32 As set out above, it is not possible to conclude whether the New Agreement was entered into on an arm's–length basis. We therefore consider that there is a risk that by leaving the New Agreement in place, ICE may have secured preferential terms or a combination of terms which could give it an unfair position as compared with its rivals. This might make ICE a more attractive venue in the eyes of traders and harm the relative attractiveness of its rivals (particularly if it shifts liquidity away from them). It may also unfairly assist ICE in gaining volumes which may mean it will have to compete less vigorously (in terms of fee levels, quality of service and innovation) in order to grow.

4.33 During the CAT proceedings and as set out in the Judgment, the CMA stated that 'the "nub" of the SLC was that ICE's control of Trayport would change Trayport's incentives so as to promote ICE and disadvantage ICE's rivals'. We also stated 'unequivocally that the New Agreement did not form part of the SLC…'.[69] The purpose of these provisional findings is not to revisit the question of whether the New Agreement forms part of the SLC – it does not.

4.34 However, we consider that there is a risk that as a result of the New Agreement Trayport will be less incentivised to engage in strategies with ICE's rivals as: *(a)* a facilitator playing an important role in enabling and promoting competition between trading venues and between clearinghouses; and/or *(b)* a promoter of dynamic competition between its customers and its customers' rivals with a view to creating new markets and/or to shift traditionally voice brokered markets onto electronic trading platforms.[70] For example, as a result of the New Agreement, Trayport may cease to engage with ICE's rivals in partnerships intended to transfer traditionally illiquid broker venue markets on to the Trayport platform, such as oil, because such a partnership would target ICE's exchange activities. In a scenario where we have not been able to conclude whether or not the New Agreement was concluded on arm's length terms, these risks cannot be dismissed.

[69] The Judgment [2017] CAT 6, paragraph 164.
[70] See for example, the Report, paragraphs 27–29 and 7.171–7.187.

4.35 Overall, we consider that the New Agreement does create each of the risks in relation to legacy effects identified at paragraphs 2.14 and 4.30 above.

Provisional conclusion

4.36 We must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC identified and any adverse effects resulting from it. We are of the provisional view that the New Agreement presents the following risks to an effective remediation of the SLC:

(a) potential purchasers might perceive the New Agreement to be potentially disadvantageous such as to affect their willingness to participate in the divestiture process;

(b) ICE might be incentivised to present the CMA only with purchasers who are content with the New Agreement, and who will accept any impact it may have on their commercial freedom to determine their relationship with ICE, thereby reducing the number, or quality, of suitable purchasers presented to the CMA by ICE for approval;

(c) in a worst–case scenario, there is a risk that we may be unable to approve any of the shortlisted purchasers submitted by ICE as a prospective purchaser;[71]

(d) the New Agreement restricts the future owner of Trayport's long term commercial freedom since it sets the Parties' commercial relationship for a period of [✂] years (plus any extension) on the basis of an agreement that was entered into at a time when ICE controlled Trayport (an acquisition which was found to give rise to an SLC);

(e) the New Agreement might unfairly benefit ICE as a result of it receiving preferential commercial terms compared with its rivals; and

(f) the New Agreement reduces Trayport's (and its new owner's) incentives to engage with ICE and its rivals as a facilitator playing an important role in enabling and promoting competition between trading venues and

[71] In this regard, the CMA notes that in paragraph 12.65 of the Report,, the CMA expanded the Monitoring Trustee reporting obligations under the initial enforcement order to provide the CMA 'with regular updates on the progress of the divestiture process, which would highlight', among others, '*(b)* details of any issues arising during the divestiture process which the Monitoring Trustee considers might prejudice the intended and effective outcome of the divestiture process, or cause considerable delay to the completion of the divestiture within the agreed timescales'.

between clearinghouses[72], if such partnerships would target ICE's activities.

4.37 In the round, we provisionally conclude that the New Agreement does pose a risk to the effective remediation of the SLC. In light of the statutory duty on the CMA to achieve as comprehensive a solution as is reasonable and practicable to the SLC identified and any adverse effects resulting from it (section 41(4) of the Act), we also conclude that any of the risks relating to (i) the divestiture process (paragraphs 4.36(a) to 4.36(c)); or (ii) legacy effects (paragraphs 4.36(d) to 4.36(f)) provide a sufficient basis on which to require a remedy in relation to the New Agreement provided it is reasonable and practicable, and proportionate in the circumstances.

5. Effectiveness of any available remedies

5.1 As set out in the Report, we considered that outright termination of the New Agreement was necessary in order to implement an effective divestiture. We remain of the provisional view that immediate termination of the New Agreement would mitigate the risks to an effective remediation of the SLC that we have identified above.

5.2 On whether less intrusive measures were open to be adopted by the CMA other than an outright termination of the New Agreement, the CAT stated that:

> Assuming we had found under Ground 5 of NoA1 [Notice of Application 1] that the unwinding of the New Agreement had been properly reasoned, then our view would be that the CMA was justified and acted wholly rationally, based on the materials before it, in determining that an outright unwinding of the New Agreement was the appropriate course as opposed to other courses falling short of an outright unwinding. Courses falling short of an outright unwinding of the New Agreement would have conflicted with its Report. It was incumbent upon ICE to explain in advance of the Direction, as it has belatedly done in NoA2 [Notice of Application 2], why it considered other less intrusive measures were open to be adopted by the CMA…

5.3 The CAT added that 'In particular, the CMA will need to consider whether these proposals would affect the effectiveness of the divestiture remedy'.[73]

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[72] The Report, paragraph 7.183.
[73] The Judgment [2017] CAT 6, paragraph 224.

5.4 We have considered below whether there are any effective alternatives to terminating the New Agreement.

Parties' submissions

5.5 In its NoA2, ICE argued that temporary implementation of the New Agreement, with an option to terminate for a prospective purchaser, would be an equally effective remedy and would have been more proportionate than termination.

5.6 ICE submitted during the CAT proceedings, that a temporary implementation was feasible and that 'the difficulties faced by Trayport described in the 1 June 2016 submission[74] resulted from the fact that Trayport had already informed its customers that the New Agreement was to be implemented'. It added that if the implementation of the New Agreement was 'conditional on there being a possibility of termination by the new owner, traders would be aware of the position in advance and Trayport would not face reputational damage caused by having unexpectedly to withdraw the display of ICE's products'.[75] This submission contrasts with the submission of 1 June 2016 made during the merger inquiry that the roll–out process is not one that lends itself to straightforward suspension (see footnote 74). In the submission made during the CAT proceedings, no indication was given that following implementation of the New Agreement it would be costly or difficult to terminate it, so long as Trayport customers were made aware of the possibility.

Third party submissions

5.7 Third parties who were not in favour of retaining the New Agreement did not submit any alternatives to an outright termination of the New Agreement. Third parties who were in favour of implementing the New Agreement also did not provide any specific comments on this topic, although Trading Company C did say that if the CMA were to permit implementation of the New Agreement,

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[74] The Parties' submission of 1 June 2016, made at a time when ICE was resisting the suspension of the New Agreement, stated that the nature of the roll-out process is not one which lends itself to straightforward suspension. It noted that Trayport would need to inform customers that it will need to delay and may not be able to guarantee meeting their expectations – and in some cases not be able to guarantee honouring their contracts. It noted that aside from Trayport's opportunity cost in terms of lost revenues etc, the disruption to market participants would be significant and reflect badly on Trayport. ICE later submitted that this reputational damage could be averted if implementation were conditional on there being a possibility of termination by the new owner from the outset.

[75] The Parties' submission in NoA2.

any new owner should be able to renegotiate it or terminate it without penalties.[76]

Our assessment

5.8 We note that in the event that a new owner decided that the terms were not commercially fair and required termination of the New Agreement after temporary implementation, ICE products would have to be removed from the Trayport platform. This would lead not only to costs for ICE and Trayport, but would be disruptive for traders and potentially damage the relationship between any new owner and Trayport's customers. As set out in the chronology above, the New Agreement is currently suspended and, therefore, the costs of immediate termination are very low (see our assessment below) whereas the potential costs of temporary implementation would be higher.

5.9 We therefore consider that each of the risks to our implementation of an effective remedy which are identified above apply equally to a scenario where the New Agreement is temporarily implemented with an option for a future purchaser to terminate it.

5.10 Finally, we consider that any prospective new owner should not have to engage on the commercial fairness, or otherwise, of the New Agreement during the sales process should it not wish to. By allowing temporary implementation with an option to terminate, any prospective buyer's hand would be forced in this regard.

Provisional conclusion

5.11 We provisionally conclude that the immediate termination of the New Agreement is the only effective remedy which would mitigate the risks created by the New Agreement, as identified above, and which therefore ensures the effectiveness of our divestiture remedy to the SLC identified in the Report.

6. The cost of remedies and proportionality

6.1 Having concluded that termination is the only effective remedy to address the risks that the New Agreement poses to our effective remediation of the SLC identified in the Report, we then considered whether termination would be proportionate in the circumstances.

6.2 In exceptional circumstances, even the least costly but effective remedy might be expected to incur costs that are disproportionate to the scale of the SLC

[76] Trading Company C remittal submission.

and its adverse effects (for instance if the costs incurred by the remedy on third parties were likely to be greater than the likely scale of adverse effects). In these exceptional circumstances, the CMA would not pursue the remedy in question.[77]

Parties' submissions

6.3 In their submission dated 4 November 2016, informing the CMA of their intention to implement the New Agreement (see the chronology above), the Parties highlighted the adverse impact of the suspension of the New Agreement on each of ICE, Trayport and customers. The impact of the suspension on each of Trayport, ICE and customers set out in this submission were as follows:

(a) Trayport:

(i) is unable to optimise its role as an aggregator without the additional connectivity placing it at a competitive disadvantage;

(ii) faces customer dissatisfaction, and, indeed, customer loss, from the continuing lack of the additional ICE connectivity;

(iii) is deprived of the substantial fees that ICE (in common with direct competitor exchanges) would pay for the enhanced connectivity, while currently ICE pays nothing for the connectivity it has; and

(iv) does not have the security of the 5 year term of the New Agreement, instead being on one month's notice under the current arrangements.

(b) ICE:

(i) is prevented from using a popular route to market used by many market participants; and

(ii) cannot compete on a level playing field with other exchanges, such as CME and EEX, who benefit from additional connectivity that is not available to ICE – thereby in particular reinforcing EEX's incumbency advantage in German power.

(c) Customers:

[77] CC8, paragraph 1.9

(i) in the case of traders, are deprived of accessing certain ICE markets on a popular choice for viewing aggregated markets; and

(ii) in the case of brokers, are unable to optimise their offering on the aggregated screen.

Third party submissions

6.4 In ICAP's response to the CMA's Conduct of Remittal Notice, it told us that if the New Agreement was a 'bona fide commercial agreement between two independent parties acting in their own interests', then ICE and the new owner of Trayport could 'quickly and easily reach this agreement again with minimum effort and fuss'. It added that its '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'.[78]

6.5 Exchange 1, in its response to the CMA's Conduct of the Remittal Notice, stated the following:

(a) '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'.

(b) It added that: 'If the agreement is beneficial to Trayport, as ICE suggests in its submissions to the CMA, then 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)'. [79]

6.6 In its response to the CMA's Conduct of the Remittal Notice, ISV A told the CMA that, 'a replacement agreement by ICE and Trayport should be perfectly doable in the future, since other similarly situated competitors of ICE have been able to successfully sign up with Trayport'.[80]

6.7 Trading Company B stated:

> Also from a business perspective, we would welcome [it] if ICE was marketing its products directly on Trayport's trading platform: As a producer we rely on liquid markets for hedging

[78] ICAP remittal submission.
[79] Exchange 1 remittal submission.
[80] Independent software vendor remittal submission.

> purposes, but also need to manage our cost base. ICE offers a cost efficient market access, but is limited by only being able to use its own trading platform (webICE), which is not as popular as Trayport in the Energy Trading Business and not so widely spread.[81]

6.8 Trading Company C stated that the greater the degree of aggregation offered through a service such as Trayport, the greater the potential benefits for liquidity and efficiency of trading. It stated that as long as there are no material differences in terms that are applicable to other trading platforms, the CMA should permit it be implemented.[82]

6.9 Trading Company D said:

> […] the New Agreement will enhance choice of execution and clearing for market participants, such as our company, who are active in wholesale EU gas/power markets, thereby increasing competition for these services that we believe would be beneficial for market participants. We have been told that this agreement has so far been blocked by the CMA as part of the ongoing assessment of the ICE/Trayport divestment decision. Given we do not have the details within the New Agreement, if the CMA finds the terms to be within standards set by other similar entities, and provided that the New Agreement does not contain any anti–competitive provisions that would provide ICE with an unfair advantage and/or constrain Trayport's ability to operate its business as currently, we would like to see an immediate implementation of the New Agreement. We feel waiting for the entire divestment process to go through, which could take months or even years, would be fundamentally harmful for competition and market efficiency. We also feel that continuing to delay unfairly prevents ICE from being able to compete with other exchanges on an equal playing field going forward. This creates distorted market outcomes and may have a negative impact on the functioning of certain wholesale markets for EU gas and power.

[81] See views of Trading Company B.
[82] See views of Trading Company C.

6.10 RWEST also submitted its support for the implementation (or non-termination) of the New Agreement provided that the CMA can assure itself that the New Agreement operates at arm's length.[83]

Our assessment

6.11 We note that the CAT stated in the Judgment with respect to the prospects of a replacement agreement being concluded:[84]

> The CMA has made it clear that it has no objection to ICE and Trayport (once it is under new ownership) executing a replacement agreement on the same terms as the New Agreement or on such other terms as may be agreed. If ICE continues to be as enthusiastic to become a "normal venue customer" as it professes to be now and Trayport continues to pursue its long–standing policy of maximising the number of venues to whom its system is supplied, there should be a real prospect that a replacement agreement would be concluded (whether on the same or other terms is immaterial for present purposes). In those circumstances, the cost of the termination order to the parties and to any wider interests is likely to be extremely modest: it would follow that the prejudice to the parties' proprietary interests caused by the termination order is correspondingly low. If, to the contrary, it is not possible to reach an agreement on the same or other terms, that would tend to confirm the CMA's concerns about the New Agreement.

6.12 We agree with the CAT that the costs of terminating the New Agreement to the Parties and to any of their wider interests is likely to be extremely modest. As the New Agreement has been suspended since it was signed in May 2016 (see chronology above) neither party has established any current business activity on the basis of the New Agreement and, as such, can incur no costs as result of its termination.

6.13 We note the Parties' submissions and the submission from four traders that suspension of the New Agreement results in opportunity costs such that ICE is losing out on the opportunity to compete with its rivals more fiercely as a result of not using the Trayport platform, and that traders will not have access to ICE's products. However, we are of the view that any such opportunity cost would be one of limited duration and would only subsist for the period in which

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[83] RWE Supply &Trading remittal submission.
[84] The Judgment [2017] CAT 6, paragraph 205(2).

Trayport is being sold, and which should not be a lengthy process. As set out above, if it is in the commercial interests of the new owner of Trayport and ICE to enter into the same or a similar agreement then they can do so upon conclusion of the sale.

Provisional conclusion

6.14 In light of the extremely modest costs which would result from terminating the New Agreement since it has never been implemented, and the short term nature of any opportunity costs arising from its termination, we are of the provisional view that it is reasonable and proportionate in the circumstances to require its termination.

7. Provisional conclusion on the New Agreement question

7.1 It is not possible to conclude whether the New Agreement was entered into on arm's–length terms in the circumstances of this case. We did not consider that this was determinative for the outcome of the New Agreement question, although the fact that we could not conclude did impact on our assessment of the potential risks.

7.2 We identified the following risks to an effective remediation of the SLC resulting from the New Agreement:

(a) potential purchasers might perceive the New Agreement to be potentially disadvantageous such as to affect their willingness to participate in the divestiture process;

(b) ICE might be incentivised to present the CMA only with purchasers who are content with the New Agreement, and who will accept any impact it may have on their commercial freedom to determine their relationship with ICE, thereby reducing the number, or quality, of suitable purchasers presented to the CMA by ICE for approval;

(c) in a worst–case scenario, there is a risk that we may be unable to approve any of the shortlisted purchasers submitted by ICE as a prospective purchaser;[85]

[85] In this regard, the CMA notes that in paragraph 12.65 of The Report, the CMA expanded the Monitoring Trustee reporting obligations under the initial enforcement order to provide the CMA 'with regular updates on the progress of the divestiture process, which would highlight', among others, '*(b)* details of any issues arising during the divestiture process which the Monitoring Trustee considers might prejudice the intended and effective outcome of the divestiture process, or cause considerable delay to the completion of the divestiture within the agreed timescales'.

(d) the New Agreement restricts the future owner of Trayport's long term commercial freedom since it sets the Parties' commercial relationship for a period of [✂] years (plus any extension) on the basis of an agreement that was entered into at a time when ICE controlled Trayport (an acquisition which was found to give rise to an SLC);

(e) the New Agreement might unfairly benefit ICE as a result of it receiving preferential commercial terms compared with its rivals; and

(f) the New Agreement reduces Trayport's (and its new owner's) incentives to engage with ICE and its rivals as a facilitator playing an important role in enabling and promoting competition between trading venues and between clearinghouses,[86] if such partnerships would target ICE's activities.

7.3 We consider that the evidence shows that these considerations, both individually and collectively in the round, pose a risk to the effective remediation of the SLC. In light of the statutory duty on the CMA to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it (section 41(4) of the Act), we provisionally conclude that this provides a sufficient basis on which to require the termination of the New Agreement.

7.4 We considered whether there were any effective alternatives to immediate termination of the New Agreement but we provisionally conclude that the only effective remedy to mitigate the risks posed by the New Agreement is its immediate termination. We also consider that any new owner should not be required by ICE to enter into discussions on its willingness to enter into the New Agreement or on its terms during the divestiture process.

7.5 The adverse effects resulting from the New Agreement could be significant and long–lasting which can be contrasted with the extremely modest costs, and only short term opportunity costs, which would result from its termination. We therefore provisionally conclude that termination is reasonable and proportionate in the circumstances.

7.6 Taking into account the foregoing, we provisionally conclude that it is necessary for the Parties to terminate the New Agreement in order to ensure the effective remediation of the SLC identified in the Report.

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[86] The Report, paragraph 7.183.

Conduct of the remittal

Conduct of the remittal

1. On 6 March 2017, the Competition Appeal Tribunal upheld the CMA's findings that the Merger results in a loss of competition and that in order to resolve this, ICE must sell the Trayport business. The CMA announced on 9 March 2017 that it was reconsidering the one aspect of the divestiture process that the CAT had remitted to it. The biographies of the members of the inquiry group were published on 10 March 2017 and the administrative timetable for the inquiry on 13 March 2017.

2. We invited a wide range of interested parties to comment on the remittal. These included customers and competitors of ICE and Trayport. Third party submissions are published on the case page.

3. In March 2017 we received the Parties' submission. A non-confidential version of the Parties' submission was published on 12 April 2017.

4. In April 2017, we received five submissions from two exchanges and two traders and one independent software provider.

5. During the course of our inquiry, we sent the Parties a working paper, and other parties were sent extracts of this working paper, for comment.

6. A non-confidential version of the provisional findings report has been placed on the CMA's webpages.

7. We would like to thank those who have assisted us in dealing with the remittal, so far.

Evidence on the circumstances the New Agreement was entered into

Introduction

1. This appendix sets out the evidence referred to by the Parties, which relates to the circumstances in which the New Agreement was entered into. Defined terms herein are as defined in our provisional findings document.

2. This evidence also sets out evidence received from third parties commenting on the circumstances in which the New Agreement was entered into.

Parties' submissions

3. On 16 March 2017, ICE submitted its response to the CMA's request to provide further written submissions on whether the New Agreement should be terminated.[1]

4. ICE told the CMA that it considered that the CMA already has 'adequate evidence before it' (as listed below) 'to conclude that the New Agreement poses no risk to the effective remediation of the SLC or its adverse effects as identified in the CMA's Final Report':[2]

   (a) the New Agreement itself;

   (b) Trayport's agreements with other venue customers;

   (c) the Parties' submission regarding the New Agreement dated 1 June 2016;

   (d) the Parties' letter to the CMA dated 4 November 2016;

   (e) the witness statements of Kevin Larkin Heffron (Trayport Chief Operating Officer) and accompanying exhibits, including the extract from the CMA hearing transcript containing Mr. Heffron's opening statement;

   (f) the witness statements of Gordon Scott Bennett (ICE Managing Director of Utility Markets) and accompanying exhibits including the email of 14 May 2015 from Nick Langford of Trayport; and

[1] CMA Conduct of the Remittal, published on 13 March 2017.
[2] Parties' initial submission in response to the Conduct of the Remittal document.

(g) the agreed chronology submitted to the CAT on 19 January 2017.

5. The witness statements of Kevin Heffron and Gordon Bennett (both dated 11 November 2016) were not available to the CMA during the merger investigation, and were appended to the NoA1 for the CAT proceedings. It is noted in the Judgment, that these witness statements were 'deployed in these [CAT] proceedings without objection from the CMA, but without concession as to their accuracy'.[3]

6. By way of overview of the background to the circumstances in which the New Agreement was signed, during the CAT proceedings, the 'Agreed Chronology' document set out a timeline of certain key events. Based on this chronology the key dates are as follows:[4]

   (a) 16 February 2015*:* Gordon Bennett was appointed as Managing Director of Utility Markets at ICE.

   (b) 27 February 2015: BGC announces completion of tender offer for GFI.

   (c) 29 April 2015: BGC announces intention to sell Trayport.

   (d) February to May 2015: negotiations take place between ICE and Trayport regarding a proposed new agreement.

   (e) June 2015: ICE commences participation in auction by BGC of Trayport.

   (f) 23 June 2015: email from Kevin Heffron to BGC stating his 'understanding' that negotiations should be halted given ICE's participation in the Trayport sale process.

   (g) 11 December 2015: ICE completes its acquisition of Trayport.

   (h) 11 May 2016: ICE and Trayport sign the New Agreement.

7. A CMA note of a call between Trayport and the CMA during the merger investigation recorded that:[5]

   (a) 'Discussions started when Gordon Bennett joined ICE from Marex Spectron in Jan/Feb 2015.[6] He had a good relationship with Trayport and they soon started negotiations'.

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[3] The Judgment, paragraph 4.
[4] ICE v CMA – Agreed_Chronology.
[5] CMA note of call between Trayport and the CMA on the New Agreement (25 May 2015).
[6] According to Gordon Bennett's witness statement, Gordon Bennett joined ICE on 16 February 2015.

(b) 'The first meeting was held on 4 April 2015'.

(c) 'Proposal sent to Gordon Bennett on 7 May with most of the technical and commercial issues in covered [sic] … ICE responded that Trayport would not get lucrative oil markets – just the core power and gas markets'.

8. In Kevin Heffron's witness statement, he stated that 'I noticed a change in ICE's willingness to make this concession following ICE's recruitment of Gordon Bennett in February 2015 to head ICE's European utilities business. I understand from internal conversations that he was keen to have all ICE European utilities markets accessible via Trayport'.[7]

9. Of possible relevance to the circumstances in which the New Agreement was signed, is the similarity in timing of both these negotiations and ICE's interest in acquiring Trayport. The CAT had noted in its Judgment that the 'May 2015 email exchanges occurred only after the announcement by BGC of its announcement to sell Trayport on 29 April 2015 and after ICE had already indicated to BGC its interest in purchasing Trayport'.[8]

10. In this regard, while it was known at the time of the Report that BGC had received an approach from ICE before its announcement to sell Trayport in April 2015,[9] the CMA has subsequently learned that ICE had signed a non-disclosure agreement with BGC as of January 2015 to enable them to start discussing the acquisition of Trayport.[10] Therefore, ICE's interest in acquiring Trayport pre-dated the appointment of Gordon Bennett in February 2015 and ICE's first meeting with Trayport in April 2015. As such, it is uncertain whether ICE's interest in acquiring Trayport influenced its negotiations with Trayport in any way.

11. In their submissions, the Parties maintained that the terms of the New Agreement were negotiated at arm's length. This evidence is set out below.

12. A CMA note of a call between ICE and the CMA on 24 May 2016 recorded that 'Negotiations resumed post ICE/Trayport merger and were conducted between respective commercial teams and ICE emphasised that the terms were arm's-length'. It also recorded that the CMA 'asked ICE to provide' the CMA 'with contemporaneous documents to corroborate this'.[11]

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[7] Witness statement of Kevin Heffron.
[8] The Judgment, paragraph 139.
[9] The Report, paragraph 6.6.
[10] Monitoring Trustee notes from its initial meeting with ICE on 26 May 2016 – disclosed in an e-mail to CMA on 13 March 2017.
[11] CMA note of call between ICE and the CMA on the New Agreement (24 May 2015).

13. In response to the request for contemporaneous documents, the Parties provided two emails: an email from Nick Langford (Trayport) to Gordon Bennett (ICE) dated 7 May 2015, and another email showing Gordon Bennett's response to Nick Langford dated 13 May 2015:

(a) In the 7 May 2015 email, Nick Langford provided a summary of Trayport's and ICE's 'dialogue to date on how a future relationship' between ICE and Trayport 'might work (subject to agreement)', Nick Langford's email concluded with 'N.B. This offer is valid for 60 days and not valid if there is a change of ownership of Trayport'.[12]

(b) Gordon Bennett's response to Nick Langford (dated 13 May 2015) commented on some of the terms mentioned in Mr Langford's email (above), including the point that oil would not be included in this agreement, but no comment was made of the 'change of ownership' condition mentioned in Nick Langford's earlier email.

14. During the CAT proceedings, ICE submitted two new pieces of evidence on the negotiation of the New Agreement which had not been previously presented to the CMA during the merger inquiry:

(a) contemporaneous evidence in the form of an email dated 14 May 2015 from Nick Langford replying to Gordon Bennett's email of 13 May 2015, in which Nick Langford stated that 'To confirm, re point a) below, "Connectivity from Trayport TGW [Trading Gateway] user front ends directly to ICE Futures Europe and ICE Endex"… is acceptable subject to commercial terms being agreed';[13] and

(b) a witness statement from Gordon Bennett made during the CAT proceedings which stated that 'In late May [2015, the senior management of ICE] gave me approval to agree a deal with Trayport including paying a substantial fee for connectivity. In my view this was the significant change which made an agreement with Trayport not just possible but probable'.[14] During the CAT proceedings, the CMA had noted that this comment indicated that 'as at the time of the 13-14 May 2015 emails ICE had not authorised the conclusion of the New Agreement'.[15]

15. While the May 2015 emails provide contemporaneous evidence that negotiations were in fact taking place between ICE and Trayport around this time when Trayport was still under BGC ownership, the evidence available

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[12] E-mail from Nick Langford (Trayport) to Gordon Bennett (ICE) (7 May 2015).
[13] E-mail from Nick Langford (Trayport) to Gordon Bennett (ICE) (14 May 2015).
[14] Witness statement of Gordon Bennett.
[15] The Judgment, paragraph 136.

does not necessarily demonstrate why the final agreed terms of the New Agreement, which were concluded in May 2016 when Trayport had been under ICE ownership for five months, should be considered arm's length, and in particular whether these would also be considered arm's length by any future owner of Trayport.

16. The CMA notes, for example, that the 14 May 2015 email shows that negotiations were still ongoing as their agreement was still 'subject to commercial terms being agreed'.[16] It was also noted that the final scope of the ICE products covered by the New Agreement, defined as the 'Covered Products', did not entirely match with the scope of the products mentioned in the May 2015 email correspondence.[17] The terms of the New Agreement were only settled after five months of negotiation following ICE's purchase of Trayport.

17. Furthermore, it is noted in Nick Langford's email of 7 May 2015 that Trayport's offer was 'valid for 60 days and not valid if there is a change of ownership of Trayport'.[18] This condition is perhaps all the more pertinent given that BGC had already announced publicly on 29 April 2015 that it intended to sell Trayport, making that prospect of a change of ownership more likely. While the May 2015 exchange of emails does not explain why a change of ownership would have a bearing on whether Trayport's offer would be valid or not, the CMA notes that once ICE progressed to the second round of the Trayport sale process these negotiations were halted by BGC. The evidence relating to this event is considered below.

18. The CMA note of a call between Trayport and the CMA on 25 May 2016 recorded Trayport's views that the 'Parties [were] close to an agreement before the BGC non-disclosure agreement stopped discussions until the acquisition was complete'.[19]

19. Contemporaneous evidence that explained why these negotiations were stopped was provided in the form of an email dated 23 June 2015 from Kevin Heffron to BGC's Graham Goodkin and Charles Edelman:

> It is our understanding that ICE has signed an NDA related to the sales process and is therefore through to round2 [sic]. It is also our understanding that this means all commercial discussions should be shut down until the process is complete or it is clear the

[16] E-mail from Nick Langford (Trayport) to Gordon Bennett (ICE) (14 May 2015).
[17] The New Agreement.
[18] E-mail from Nick Langford (Trayport) to Gordon Bennett (ICE) (7 May 2015).
[19] CMA note of call between Trayport and the CMA on the New Agreement (25 May 2015).

> ICE has dropped out of the process. Is this correct [sic]. Not an issue either way but need to know to make sure we handle the local comms.[20]

20. During the CAT proceedings, further (but non-contemporaneous) evidence was received in relation to BGC halting the negotiations between ICE and Trayport:

(a) Kevin Heffron stated the following in his witness statement:

> In June 2015 I was instructed over the phone by Graham Goodkin and Charles Edelman at BGC (Trayport's owner at that time) to suspend these commercial negotiations with ICE… when it was clear that ICE was involved in the sale process of Trayport. The negotiations restarted in December 2015 when ICE had completed its acquisition of Trayport and BGC was no longer involved.[21]

(b) Gordon Bennett in his witness statement provided the ICE perspective on the negotiations being halted in June 2015:

> Following this a number of meetings were held between ICE and Trayport, but in mid-June 2015 when I understand ICE senior management met to discuss acquiring Trayport I recall that contacts with Trayport on the new agreement tailed off. I understood from internal conversations that BGC had decided that the negotiations should cease due to ICE's participation in their auction of Trayport.[22]

21. In the Report, it was noted that: 'ICE told us that these negotiations were halted in June 2015 at the instruction of BGC following ICE's involvement in the Trayport sales process, and resumed in January 2016 after ICE completed its acquisition of Trayport'.[23]

22. When negotiations between ICE and Trayport resumed in December 2015/January 2016, Trayport was under ICE ownership. The Parties have maintained that these subsequent negotiations and their conclusion were on arm's-length terms. In Gordon Bennett's witness statement dated 11 November 2016, Gordon Bennett stated that 'I am aware from internal

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[20] E-mail (subject: 'ICE') from Kevin Heffron (23 June 2015).
[21] Witness statement of Kevin Heffron.
[22] Witness statement of Gordon Bennett.
[23] The Report, paragraph 6.21.

discussions that it was ICE's intention that a new agreement [New Agreement] should be on arm's length commercial terms so that the venue neutrality of Trayport would be preserved'.[24]

23. According to the witness statement from Kevin Heffron dated 11 November 2016, 'The new negotiations were carried out on arm's length basis, just as they would have been if ICE was not the owner of Trayport. The negotiations were led by Nick Langford… and the Trayport commercial team approached the negotiations in the same way as with other customers, cognisant of the requirement that they do their best for Trayport, and not to have regard to ICE's interests as owner in light of the Order [initial enforcement order]'. Kevin Heffron added 'I was satisfied that the agreement reached was beneficial to Trayport and consequently signed the contract on behalf of Trayport on 10 May 2016. I would have signed the contract regardless of our owner. The contract was something that Trayport had been trying to achieve for many years'.[25]

24. In ICE's submission dated 1 June 2016, ICE reiterated its position that the New Agreement represented arm's-length terms:[26]

(a) the negotiations were carried out on arm's-length terms and it had not secured 'preferential terms' from Trayport, with the terms being 'fair and consistent compared to other Trayport venue customers';

(b) 'the commercial arrangement was a long-standing commercial objective of Trayport which pre-dated ICE's acquisition, and was a contract that Trayport would have agreed to irrespective of its ownership'; and

(c) the 'addition of ICE markets to the Trayport aggregation offer and the associated commercial terms' under this agreement represented a 'good deal' for Trayport, and that Trayport would have signed up to this agreement in May 2015 even if Trayport came under new different ownership.

25. Kevin Heffron stated in his witness statement that 'I am aware from discussions with Nick Langford, Head of Venue, who was leading the negotiations, that by 13/14 May 2015 the key commercial terms had been agreed, for example, the minimum annual fee ([✂]), the term ([✂]) and the portfolio of ICE products to made available ([✂]). We had discussed a wider

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[24] Witness statement of Gordon Bennett.
[25] Witness statement of Kevin Heffron.
[26] ICE submission titled 'Observations regarding CMA comments about additional ICE/Trayport connectivity' (1 June 2016).

set of products including oil but we agreed that these would not be part of the agreement'.[27]

26. The above position in Kevin Heffron's witness statement was also mentioned in the Report, which stated that while the 'Parties submitted that the key commercial terms were essentially agreed via an exchange of emails in May 2015, and that these terms were virtually identical to those contained in the New Agreement', the CMA noted that 'at the time of the acquisition:[28]

(a) the negotiations had not advanced beyond discussions and email correspondence;

(b) these discussions were relatively high level, and there was no draft agreement available reflecting the Parties' position at that point in time; and

(c) no final agreement had been reached as to which ICE utilities markets were to be included as part of any deal'.

27. In the context of discussing CME's proposed acquisition of Trayport back in 2014, one internal ICE Endex document (prepared in September 2014) referred to market commentators' views that the acquisition of Trayport could give CME an '[✂]' and that it was '[✂]' (*emphasis* added).[29] This is not evidence regarding the circumstances of negotiations on the New Agreement but could be said to illustrate that third parties may at least perceive that the negotiations were carried out on non-arm's-length terms.

Third party submissions

28. In the CMA's Remedies Notice, the CMA asked the open question of how the New Agreement should be treated under a possible divestiture remedy scenario:

> We are also inviting views on the treatment of an agreement which ICE and Trayport entered into in May 2016 (New Agreement) but whose implementation is currently pending. Should the New Agreement be implemented, Trayport's services would be extended to additional ICE Futures Europe and ICE Endex European utilities products. We seek views

[27] Witness statement of Kevin Heffron.
[28] The Report, paragraph 6.22.
[29] 'ICE Endex General Market Update' (26 September 2014), Q13, Annex 22, ICE OTS (taken from the CMA's 'Transaction and Counterfactual Working Paper').

on whether the new owner of Trayport should be given the option to terminate, renegotiate the terms of, or implement the New Agreement.[30]

29. Other than a brief description of the New Agreement, there was no disclosure in either the Remedies Notice or the provisional findings of the precise commercial terms of the New Agreement, including its duration, fee structure, pricing or any other commercial terms since these were deemed to be commercially sensitive.[31]

30. Combined with the oral evidence the CMA received from response hearings with a selection of third parties, the CMA received views from six third parties on this question, namely Exchange C, ISV A, ISV B, Exchange A, ICAP and RWE.

31. In the absence of any disclosure of the terms of the New Agreement, third parties were unable to give a definitive view on whether the terms of the New Agreement might be considered arm's length. This was expressly stated by two third parties:

(a) Exchange C told the CMA that it did not have any details on the New Agreement, hence it was difficult to know the extent to which ICE may have obtained more favourable terms.[32]

(b) ISV B told the CMA that it was 'not aware of' the 'details of the [New Agreement]',[33] and did not comment on how the New Agreement should be treated under a possible divestiture remedy.

32. Some third parties explained why the circumstances in which the New Agreement had been signed raised concerns. These views are set out below:

(a) Exchange C told the CMA that in light of the context for the signing of the New Agreement (eg the reluctance of ICE and Trayport to cooperate prior

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[30] Remedies Notice, paragraph 14.
[31] Instead of disclosing the full details of the New Agreement: *(a)* a footnote to this question in the Remedies Notice defined the New Agreement as follows: 'This agreement is an interface development and support agreement (IDSA), under which Trayport will display additional ICE Futures Europe and ICE Endex products to Trayport's Joule and Trading Gateway customers, and provide a straight-through processing link to ICE Clear Europe for broker intermediated transactions. See also Section 6 of the Provisional Findings on the 'Counterfactual'' (source: Remedies Notice, paragraph 14, footnote 4); and *(b)* Section 6 of the Provisional Findings contained an almost identical definition of the New Agreement, but with the following additional details that (emphasis added): *(a)* 'ICE told us that under the New Agreement, Trayport's services would be extended to **all IFEU and ICE Endex European utilities markets**';[31] and *(b)* 'the discussions [on the New Agreement] focused on making additional ICE markets accessible to traders on Joule/Trading Gateway via **that [existing] connectivity [ie ICE Link]**' (source: provisional findings, paragraph 6.24).
[32] Exchange C response hearing transcript, p.17, lines 1-25 to p.18, lines 1-13 (30 August 2016)
[33] ISV B response to the Remedies Notice.

to the merger, and the fact that the New Agreement was signed post-merger), the new owner of Trayport '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'.[34]

(b) ISV A told the CMA that given 'the evidence outlined in the provisional findings, it is consistent that the agreement is terminated and renegotiated at arm's length with Trayport, after ICE ceasing to be the owner'.[35]

33. ICAP, in its response to the CMA's Conduct of the Remittal document, told the CMA 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', and that it did 'not believe that it is likely that the New Agreement would have been made without Trayport under ICE ownership'. It added that it made 'no independent commercial or strategic sense and is inconsistent with Trayport's past behaviour'.[36]

34. ICAP provided the following reasons in its submission for its views:[37]

(a) Pre-merger, Trayport and ICE 'had conflicting aims and no history of cooperation but under common ownership very quickly entered into the New Agreement'.

(b) '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'.

(c) ICE was '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'.

(d) '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 [Trayport's main trading venue customer group]… '.

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[34] Exchange C response to the Remedies Notice.
[35] ISV A response to the Remedies Notice.
[36] ICAP initial submission in response to the Conduct of the Remittal document.
[37] ICAP initial submission in response to the Conduct of the Remittal document.

(e) Given that '… 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 [eg ICE] which aggressively promotes its own front-end trading software ie by aggregating ICE markets into the Trayport Trading Gateway, would not, and has never, made commercial sense for Trayport'.

(f) Therefore, '… 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', eg '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'.

35. Exchange 1, submitted the following in its response to the CMA's Conduct of the Remittal document:[38]

(a) Given the 'context for its signing' [ie the agreement was concluded post-merger], and Exchange 1 'not knowing either its content[39] or the duration of this contract', it believed 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'. It considered that 'anything that materially restricts that [commercial] flexibility may reduce the effectiveness of the divestiture remedy'.

(b) It also stated that it was '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'.

(c) It noted that the 'intensity of [ICE's] 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.

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[38] Exchange C 1 initial submission in response to the Conduct of the Remittal document.
[39] In relation to the 'content' of the New Agreement, Exchange 1 referred to 'detailed interface development and support arrangements, as well as pricing'. Source: Exchange C 1 initial submission in response to the Conduct of the Remittal document.

(d) It added that 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'.

36. In its response to the CMA's Conduct of the Remittal document, an Independent Software Vendor told the CMA that 'based on the facts known to' it, the 'termination of the New Agreement' seemed 'the logical and consequential conclusion to the SLC'. In relation to Area 1, it stated that it was 'difficult to believe that the New Agreement was negotiated at arm's length, or aligned to similar agreements negotiated by Trayport with other unrelated third party venues, given that the New Agreement was negotiated "intra-group", between a parent company (ICE) and its wholly-owned subsidiary (Trayport), with natural opportunity for the parent to impose terms on the subsidiary'.[40]

37. Party X told the CMA that without seeing the detailed terms of the New Agreement, and given the context of ICE's and Trayport's historic relationship and the circumstances in which the New Agreement had been signed, it believed that the New Agreement was unlikely to have been established on a truly arm's length basis, and therefore could contain terms that would favour ICE and impact on Trayport's future business. In particular, it told the CMA that the New Agreement was concluded after the commencement of the CMA process, when the scenario of divestiture was a reality. Therefore, it considered that it was not unreasonable to assume that it might contain clauses advantageous to ICE.[41]

38. In its response to the CMA's Conduct of the Remittal document, Trading Company C told the CMA that although it was 'not aware of the terms and conditions' of the New Agreement, it believed that 'as long as there [are] no material differences in terms that are applicable to other trading platforms, the CMA should permit it be implemented, particularly as any divestment of Trayport could take time to implement'. It added that if the CMA permitted the implementation of the New Agreement, then the CMA should ensure that 'it would not prejudice the effective divestment of Trayport or prevent any new owner to continue with the agreement or renegotiate or terminate without any penalties'.[42]

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[40] Independent Software Vendor initial submission in response to the Conduct of the Remittal document.
[41] Summary of call with Party X.
[42] Trading Company C initial submission in response to the Conduct of the Remittal document.

39. Trading Company B told the CMA in its response to the CMA's Conduct of the Remittal document that ICE and Trayport should not be required to terminate the New Agreement for the following reasons:[43]

(a) 'Due to Trayport's strong market position, Trayport would be violating EU competition law if it was refusing to grant ICE access to Trayport's trading platform to market their products directly'.

(b) It would benefit Trading Company B's cost base if ICE 'was marketing its products directly on Trayport's trading platform', given that whilst ICE offered 'cost efficient market access', it was 'limited by only being able to use its own trading platform' (ie WebICE), 'which is not as popular' or as 'widely spread' as Trayport for energy trading.

(c) Trading Company B considered it 'important that any agreement concluded between ICE and Trayport would be done at arm's length and without exclusivity that could prevent other platforms from entering and competing in the market. Therefore, the current focus on providing a generic trading backend should be remained and not bring any restrictions to other market places and competitors'.

40. In its response to the CMA's Conduct of the Remittal document, Trading Company D told the CMA that the CMA should 'undergo a thorough review of the terms between ICE and Trayport in the New Agreement', and that if 'this review proves that ICE and Trayport have an agreement in place similar to other market venues (such as exchanges and OTC [over-the-counter] platforms) that does not create a competitive disadvantage' (ie 'the New Agreement does not contain any anti-competitive provisions that would provide ICE with an unfair advantage and/or constrain Trayport's ability to operate its business as currently'), then it believed that 'allowing the New Agreement to be put into force immediately will be in the best interest of a fully functioning marketplace and in the spirit of fair competition'. It added that 'waiting for the entire divestment process to go through, which could take months or even years, would be fundamentally harmful for competition and market efficiency', and that 'continuing to delay unfairly prevents ICE from being able to compete with other exchanges on an equal playing field going forward', and 'creates distorted market outcomes and may have a negative impact on the functioning of certain wholesale markets for EU gas and power'.[44]

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[43] Trading Company B initial submission in response to the Conduct of the Remittal document.
[44] Trading Company D initial submission in response to the Conduct of the Remittal document.

41. RWE, in its response to the CMA's Conduct of the Remittal document, told the CMA that RWE was 'not in a position to judge whether the New Agreement was concluded on an arm's length basis or whether the terms of the New Agreement could undermine competition both before and after Trayport's divestment'. It added however that 'an agreement between ICE and Trayport which allowed a greater number of ICE products to be displayed on Joule/Trading Gateway could offer several advantages to market participants in facilitating the aggregation of market liquidity, increasing competition between platforms and streamlining connectivity to ICE products'. Therefore, it told the CMA that it would 'support the implementation (non-termination) of the New Agreement provided that the CMA can assure itself that the New Agreement operates at arm's length and that it does not confer any material advantage on ICE when compared to other venue customers in the period leading up to divestment'.[45]

42. RWE added that if 'the CMA allows the New Agreement to be implemented, the CMA should also ensure that its presence does not prevent the effective divestment of Trayport or influence the choice of purchaser'. It explained that this 'can be achieved by ensuring that the New Agreement provides the new owner with the unconditional right to terminate the agreement upon completion of their acquisition', and added that the CMA 'would also need to ensure that ICE's sale process and the selection of a purchaser showed no preference to any party on the grounds that they would agree to or were more likely to maintain the New Agreement'. It considered that these 'conditions should be sufficient to ensure that ICE receives no undue advantage from the New Agreement and that Trayport's new owners have the opportunity to renegotiate their relationship with ICE if they find the terms of the New Agreement unsatisfactory'.[46]

[45] RWE initial submission in response to the Conduct of the Remittal document.
[46] RWE initial submission in response to the Conduct of the Remittal document.

Glossary

Note that some of the explanations in the glossary refer to terms defined in the CMA's report on the completed acquisition by ICE of Trayport, dated 17 October 2016.[1]

Act	The Enterprise Act 2002.
BGC	BGC Partners, Inc.
Broker	A broker is an individual or firm that arranges **OTC** transactions in financial or non-financial markets. **Brokers** provide a point of contact for **traders** seeking to buy or sell financial or non-financial products.
BTS	GlobalVision Broker Trading System. **Trayport's back-end system** software used by **brokers** to operate **OTC** trading activities.
CAT	Competition Appeal Tribunal.
Clearing	Activities between **trade execution** and final settlement. See also **Clearinghouse**.
Clearing Link	**Trayport's** straight-through processing link which connects **venues'** back-ends to **clearinghouses**.
Clearinghouse	A central counterparty which acts as a buyer to the seller and a seller to the buyer, guaranteeing the transaction against default by either party between **execution** and delivery of the contract.
CMA	Competition and Markets Authority.
CME	CME Group, Inc.
CME Direct	A **front-end access** product owned by **CME**.
EEA	European Economic Area.
EEX	European Energy Exchange AG.
EFET	European Federation of Energy Traders.

[1] Appendices and glossary to the CMA's Report on the completed acquisition by ICE of Trayport, 17 October 2016.

Electronic trading platforms	Trading conducted on an electronic platform, with no **voice** component.
ETS	GlobalVision Exchange Trading System. **Trayport back-end system** software to facilitate **exchange** trading activities.
European Utilities	European gas and power, coal and emissions **underlyings**.
Exchange	A marketplace/**venue** in which securities, **commodities**, **derivatives** and other financial instruments are traded.
Exchange-traded	See **on–exchange**.
GFI	GFI Group, Inc. a wholly-owned subsidiary, and business division, of **BGC**.
Griffin	Griffin Markets Services Limited.
GV Portal	GlobalVision Portal. A software interface owned by **Trayport** which allows non–**ETS exchanges** to connect to **Trading Gateway**.
ICAP	ICAP plc.
ICE	Intercontinental Exchange, Inc.
ICE Endex	A regulated **futures** and **options** trading platform for trading continental European gas and power.
ICE exchange	Exchange owned by **ICE**.
ISV	Independent software vendor.
Joule	The **Trayport** screen that each **trader** sees when it signs into the **Trayport** system.
Liquidity	**Venue** liquidity is the degree to which an **asset** can be quickly bought or sold in the market without affecting the **asset's** price. **Clearinghouse** liquidity refers to the concentration of trades being cleared by any one **clearing house**, usually split by **commodity**.
Nasdaq	Nasdaq Inc. An **exchange**.

NDA	Non-disclosure agreement.
New Agreement	A new interface development and support agreement between **ICE** and **Trayport** entered into on 11 May 2016.
New Agreement question	The question remitted by the CAT to the CMA for reconsideration (ie whether the **Parties** should be required to terminate the **New Agreement**).
On exchange	Trades **executed** on an **exchange**.
Parties	**ICE** and **Trayport** are together referred to as the 'Parties'.
SAAS	Software as a service. Provision of **Joule/Trading Gateway** whereby **Trayport** hosts the software, (rather than on a deployed basis where it is hosted at the customer's site).
SLC	Substantial lessening of competition.
The CAT judgment	The **CAT** Judgment setting out its conclusion on each of the grounds of review, dated 6 March 2017.
The report	**CMA** report on the completed acquisition by **ICE** of **Trayport**, dated 17 October 2016.
Trading Gateway	GlobalVision Trading Gateway, **Trayport's** aggregation software sold to **traders**, **brokers**, financial institutions and **utilities** (see also **Joule**).
Trader	An individual or company which buys and sells **assets**, either for itself or on behalf of another individual or institution.
Trade	An agreement between parties to exchange the goods or services of one for the goods or services of the other. In this case it is typically an agreement to exchange a **commodity** for cash-flow.
Trading venue	An **OTC broker** or an **exchange**.
Trayport	Collective term used for Trayport Inc. and GFI TP Ltd, and their subsidiaries as well as Trayport Limited.
Trayport Limited	The primary trading entity within Trayport.
Trayport platform	Combination of Trayport's **front–end**, back–end, and straight-through processing link, which together support the various stages

	involved in the lifecycle of a **trade** from price discovery to **execution** to **clearing**.
Venue	See **trading venue**.
Voice brokered markets	Trading that takes place verbally, without an electronic component.