ICE / TRAYPORT

[Exchange 1] RESPONSE TO THE CMA'S PROVISIONAL FINDINGS ON THE REMITTAL QUESTION RELATING TO THE UNWINDING OF THE POST-MERGER AGREEMENT BETWEEN ICE AND TRAYPORT

INTRODUCTION AND SUMMARY

The **[Exchange 1]** agrees with the conclusions of the CMA's Provisional Findings of 25 April 2017 (PFs).[1] This submission summarises the **[Exchange 1]'s** views on the PFs.

The **[Exchange 1]** does not wish to repeat its previous arguments, some of which are noted or directly quoted in the PFs. These earlier submissions made to the CMA remain the views of the **[Exchange 1]**. However, it is conscious that the CMA is undertaking a fresh investigation of the question of the New Agreement, building on the evidence gathered in its main merger investigation. These earlier submissions must therefore be considered again in light of the judgement of the Competition Appeal Tribunal (CAT),[2] the CMA's provisional conclusions outlined in the PFs, and ICE's continued behaviour as regards the New Agreement and its likely response to the PFs.

In summary, allowing the New Agreement to be implemented would create significant risks to an effective remedy of the SLC. In particular, the New Agreement would raise serious doubts as to whether the divestiture process would enable a new purchaser to both replicate the pre-merger conditions of competition and have an unrestrained ability and incentive to compete with ICE (including in collaboration with exchanges and clearing houses that are in

---

1 Intercontinental Exchange and Trayport: Provisional findings on the questions remitted to the CMA by the CAT on 6 March 2017, 25 April 2017 ('*PFs*')

2 *Intercontinental Exchange, Inc. v CMA and Nasdaq Stockholm AB* [2017] CAT 6. ('*CAT Judgement*')

competition with ICE). From the **[Exchange 1]'**s perspective, these significant risks are intractable and cannot be solved through altering the divestiture process or through an alternative remedy package.

Given these significant risks, the New Agreement jeopardises an effective divestiture remedy. Any purported benefits associated with the New Agreement become immaterial as ICE and Trayport can almost immediately enter into a mutually beneficial agreement, on terms sufficiently attractive to Trayport's new owners, following divestment of Trayport.[3] Indeed, as the **[Exchange 1]** has observed previously, if the New Agreement is beneficial to Trayport as ICE suggests in its submissions to the CMA,[4] the **[Exchange 1]** would expect a similar agreement to be entered into by Trayport's new owners, as would ICE. The quicker the divestiture process, the quicker these purported benefits would be realised.

To be clear, the **[Exchange 1]** has never sought to restrict fair competition or to restrict the ability of independent parties to enter commercial agreements that are mutually beneficial to both sides. The **[Exchange 1]** have always maintained, in particular, that should Trayport's new owners (following divestment) wish to enter an agreement with ICE to display a greater number of ICE products to traders on Trayport, for ICE's clearing house to be available to brokers using Trayport's STP link, or indeed to establish any other commercial arrangement, with ICE or anyone else, this should be a decision entirely for the new owners. If the only ongoing legal challenge in the case relates to the New Agreement, signing an agreement following divestiture would seem to be a more expeditious strategy

---

3 Given ICE's submissions that no new material additional negotiations were required to sign the New Agreement in 2016 (which would have been in breach of the IEO), following earlier negotiations in 2015, it seems a reasonable assumption that the time period in which an agreement could be signed following divestment is short.

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

for ICE to realise the benefits of the New Agreement than the appeals process. The **[Exchange 1]** can only infer that ICE believes that a purchaser of Trayport may not agree to the same terms or wish to enter such an agreement.

The **[Exchange 1]** is aware that ICE has made no submissions to the CMA following the remittal, other than flagging the previous submissions it has made. In light of this, the **[Exchange 1]** would welcome the opportunity to respond to ICE's submission on the PFs, should it feel this is necessary. Similarly, should there be any further information the CMA requires as part of its remittal investigation, the **[Exchange 1]** is available to help wherever possible.

CIRCUMSTANCES OF THE NEW AGREEMENT

As the terms of the agreement remain confidential, the **[Exchange 1]** is not in a position to determine the extent to which the arrangements (which presumably include detailed interface development and support arrangements, as well as pricing) are more favourable to ICE than other trading venues or compared to what would otherwise have been the case absent the merger. The fact that ICE has refused to make available the terms of the New Agreement on grounds that doing so may harm their respective business interests, despite CMA requests to make a confidential version available, suggests the terms of the agreement are very specific to, and potentially favourable to, ICE.

Nevertheless, the **[Exchange 1]** agrees with the CMA, noting in particular that an agreement concluded post-merger between parent and subsidiary cannot reasonably be considered 'arms-length' and, as a result, it is not certain that the agreement would have been entered into and, if it had, if it would have been entered into in its current form absent the merger. The CMA has also rightly recognised the reluctance of ICE and Trayport to cooperate prior to the merger. It

is the **[Exchange 1]'s** view that, due to the competitive relationship between ICE and Trayport, in addition to the existing commercial relationship between them, no further cooperation would have taken place absent the merger or terms would have been highly favourable to Trayport to persuade them to engage with ICE.

To support the uncertainty over the terms agreed, the **[Exchange 1]** notes that Trayport has exercised strong bargaining power on its existing customers (brokers, exchanges, traders) recently when a contract has come to an end or an extension in scope is required. For example, the **[Exchange 1]** has experienced increased prices, longer required contract durations or the contract scope being very much in Trayport's favour with limited opportunity for any negotiation.[5] In this context, while the **[Exchange 1]** acknowledges ICE's argument about management changes driving the step-change in interaction between the companies, it is sceptical, first, as to whether ICE could ever have agreed more attractive terms now than previously and, second, that any judgement of the terms of the New Agreement could be meaningfully compared to what might occur otherwise. For example, considering the price and technical conditions alone would not be sufficient. The extent to which Trayport exercised its bargaining power to obtain additional benefits from ICE would be required. In particular, in light of the fact that ICE wanted to add contracts to Trayport that were of sufficient importance to ICE to reset relations between the two firms, Trayport would certainly have requested hugely punitive terms and conditions to allow this.

The **[Exchange 1]** agrees with the CAT and CMA that whether the agreement is 'arms-length' or not (which it clearly was not) is not determinative. This is important, not just because of the alternative business model that a purchaser may

---

5 [✂]

have and the differing strategic objectives that different purchasers may have but also the different time period for assessing the commercial benefits of the agreement. ICE signed this agreement a year ago (and supposedly negotiated it all two years ago). The question at issue is whether imposing such a contract on Trayport's new owners *now* would risk an effective remedy of the SLC. As outlined above, the **[Exchange 1]** believes such a conclusion is incontrovertible.[6]

RESTRICTING THE COMMERCIAL FLEXIBILITY OF TRAYPORT'S NEW OWNERS

The New Agreement restricts the commercial flexibility of Trayport's new owners. As a result, this could potentially limit the attractiveness of Trayport and the potential pool of purchasers, creating risks for the divestment process. It also risks the ability of Trayport to compete as effectively as it would otherwise, with the terms either directly affecting Trayport's ability and incentive to compete with ICE or indirectly in the sense that, if Trayport is burdened by a contract on unfavourable terms, its ability to compete with ICE is hindered (where competition can also reflect the competition Trayport provides in collaboration with other exchanges, Trayport being a critical input to the competitive effectiveness of the **[Exchange 1]** and other exchanges and clearing houses against ICE).

The **[Exchange 1]** therefore agrees with the CMA's assessment of the possible risks associated with implementation of the New Agreement.[7] The **[Exchange 1]** is not in a position to determine the extent to which the commercial flexibility of the new owner may be restricted or whether the agreement would be unfavourable to a new owner of Trayport. However, given these risks exist to the effectiveness of the

---

6 ICE undertook a similar time-limited assessment itself by making its offer from 7 May 2015 valid for only 60 days and conditional on there being no change of ownership of Trayport, suggesting that given new owners, the value of the agreement to ICE may change. Clearly in those circumstances, the value of the agreement – and the risks it poses – to Trayport may also change.

7 As summarised at paragraphs 2.14 and 2.15 of the PFs.

remedy of the SLC as a result of the New Agreement, it ought to be unwound. The **[Exchange 1]** agrees with the CAT's framework for the threshold in which the CMA ought to consider such risks, in particular, that:

> *'it would be wrong to insist that.. [the] assessment should aspire to an unattainable degree of certainty, especially where the incidence and scale of any disadvantage to the new owner of Trayport will only be known once that owner has been identified and has fully established the impact of the New Agreement.'*[8]

To be clear, if the CMA, rather than order the New Agreement to be unwound, allowed it to be implemented, the **[Exchange 1]** would have very serious concerns as to whether divestiture would effectively remedy the SLC due to the risks outlined above and in the PFs and the potential disadvantage conferred on any (prospective) purchaser from having the post-merger contract imposed on them by ICE. It therefore seems entirely consistent with the '*need* [under the CMA's duty to remedy] *to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it*'[9] to require the unwinding of the agreement. The CMA would be remiss not to do so. Trayport's new owner should be given complete commercial flexibility over the New Agreement and this can only be enabled by unwinding the agreement.

[✂]

---

8 CAT Judgement, paragraph 204.

9 Section 41(4) of the Enterprise Act 2002.

The **[Exchange 1]** expects a number of traders to provide comments to the CMA that support allowing implementation of the New Agreement. The **[Exchange 1]** believes the benefits associated with the New Agreement are spurious and not supported by evidence. The **[Exchange 1]** recognises that, in theory, there may be short-term benefits to traders, for example, those using Trayport will now have access to additional ICE contracts within the Trayport liquidity pool. However, these purported benefits cannot be considered independent of the competitive effects of the merger. Indeed, this could easily be the first step that might be expected as part of any long-term foreclosure strategy. [✂]

Finally, the **[Exchange 1]** notes that any benefits could easily be realised once divestment occurs. A new commercial agreement could be entered into between ICE and Trayport allowing these benefits to be realised. The idea that a divestiture process could delay any benefits is simply not credible as it is not clear if those benefits would have been realised absent the merger. A divestiture process of six months to a year (which we assume ICE has already begun) so is, in effect, part way complete at the time of the PFs, would not provide any meaningful delay and ICE could expedite these benefits if it stopped litigating to preserve the terms of their commercial agreement with Trayport in its exact current form.

IMPORTANCE OF MONITORING THE DIVESTMENT PROCESS

Given ICE has gone to significant lengths to retain this agreement on the current signed terms through legal proceedings, when it could sign a commercially fair and reasonable agreement with the new owners, the **[Exchange 1]** emphasises again the importance of ensuring a rigorous and transparent divestiture process. ICE cannot be allowed to informally influence or select the purchaser of Trayport with reference to this agreement or any new agreement between ICE and Trayport. The sales process must be independent from, and precede, any

commercial negotiations for the distribution of ICE products through Trayport or licensing of Trayport's Clearing Link.

The CMA's original report on the merger stated that '*the New Agreement should be fully unwound thereby giving the new owner of Trayport the choice as to whether to negotiate (or not) an agreement with ICE either* ***as part of the divestiture process****, or in the future*' [emphasis added].[10] In light of developments, the **[Exchange 1]** believes the possibility that an agreement could be negotiated '*as part of the divestiture process*' would be a wholly unsatisfactory outcome and would create serious and unmanageable risks to the effectiveness of the remedy of the SLC. To allow any interference, influence, overlap, or arrangement whereby an ongoing commercial agreement between ICE and Trayport is negotiated or discussed, formally or informally alongside or as part of the divestment process would be completely unacceptable.

Indeed, in light of developments in particular with regard to the New Agreement, the **[Exchange 1]** now believes that a divestiture trustee should be appointed to oversee and monitor the divestment process. The role of this trustee, in the first instance, would not be to facilitate the sales process, unless ICE was unable to make a sale within the divestment period granted by the CMA. However, the trustee ought to have full access to negotiations between ICE and the potential purchasers, to ICE's assessment of the most suitable purchaser, and access to each of the main bidders to ensure ICE does not influence its future trading relationship with Trayport under the new owners. This seems the only reasonable way to ensure ICE does not use the implementation of the New Agreement or the imposition of an alternative agreement on the same or similar terms to select the purchaser or influence the final purchaser pool, and that the divestment process

---

10 *ICE/Trayport*: *A report on the completed acquisition by Intercontinental Exchange, Inc. or Trayport*, CMA, 17 October 2016, paragraph 12.73.

remains independent from and precedes any commercial negotiations, formal or informal, for the distribution of ICE's products and access to STP clearing.

It is important to note that, given ICE continues to dispute the CMA's SLC finding and the divestiture remedy, with ongoing litigation, this decreases the likelihood of finding a new buyer, which continues to increase the strategic risks to those exchanges and clearing houses that are reliant on Trayport to compete effectively, including the **[Exchange 1]**.

CONCLUSION

In conclusion, a critical factor in assessing the remedies is the extent to which they would be effective with a sufficient degree of certainty, particularly where specific risks exist that can be managed or removed entirely through appropriate design of the remedies and the divestiture process. The risks posed by the New Agreement clearly raise serious doubts as to whether the divestiture would be effective. Unwinding the New Agreement would be the only practicable way to resolve this issue. Given the minimal costs and that the purported benefits of the New Agreement could be realised through a new commercial agreement between Trayport and ICE, following divestment, unwinding the agreement is also entirely proportionate.