CMA
Competition & Markets Authority

Intercontinental Exchange and Trayport

Final report on the question remitted to the Competition and Markets Authority by the Competition Appeal Tribunal on 6 March 2017

7 July 2017

Website: www.gov.uk/cma

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The Competition and Markets Authority has excluded from this published version of the 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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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 in this remittal report.

2. The Report concluded that the acquisition 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 2017, ICE made a further application to the CAT pursuant to section 120 of the Act against written directions which had been issued by the CMA 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.

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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).

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 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 insufficient.

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 arising from the New Agreement as a legacy effect of ICE's acquisition of Trayport; and (ii) those which could adversely impact the divestiture process. In reaching our 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 three headings:

   (a) The impact of the New Agreement on our ability to comprehensively and effectively remedy the SLC identified. This assessment was carried out by reference to the potential risks created by the New Agreement and identified at paragraph 8 above. As part of this assessment we considered 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.

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[3] The Judgment [2017] CAT 6, paragraph 193.

(b) The effectiveness of any alternative remedies.

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

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

10. As set out in paragraph 8 above, we considered two categories of risk to the effectiveness of the divestiture as a comprehensive remedy to the SLC: *(i)* risks arising from the New Agreement as a legacy effect of ICE's acquisition of Trayport; and *(ii)* risks arising from the New Agreement which could adversely impact the divestiture process.

11. To assess the legacy effect risks we first considered the circumstances in which the New Agreement was entered into and its terms:

(a) The Parties have told us throughout the main inquiry and the remittal process that the New Agreement was agreed on an arm's–length basis. In the Parties' view, such an arrangement would be less likely to generate adverse legacy effects as its terms provided a reflection of independent commercial choice by Trayport in its dealings with a contractual counterparty. We therefore considered whether it was possible to reach a conclusion on whether or not the New Agreement was entered into on an arm's–length basis, that is, whether it was possible to conclude that the terms would have been essentially the same had they been entered into with Trayport under different ownership.

(b) As set out in the Report, ICE and Trayport have not historically cooperated[5] and, while some discussions had taken place prior to ICE's acquisition of Trayport, they had been unable to establish a commercial relationship equivalent to the one which would be established under the terms of the New Agreement if it were 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. In view of the importance of each of ICE and Trayport in their respective areas of business, any cooperation between them would logically be a significant element of their individual commercial strategies. The New Agreement is a manifestation of the Parties' relationship and strategy at the time it was entered into. It was a result of negotiations under a parent–subsidiary

[4] Merger Remedies: Competition Commission Guidelines (CC8) (November 2008, adopted by the CMA board), paragraph 1.9.
[5] The Report, paragraphs 7.107–7.11 and 7.172–7.182.

relationship, and was only concluded after the merger had completed. As a starting point, we found that these are not circumstances which can be typically said to be arm's–length and it is unclear whether the New Agreement would have been entered into at all had Trayport been under different ownership.

(c) We also considered the specific terms of the New Agreement and the findings of a report submitted by the Parties after publication of our remittal provisional findings and prepared by PricewaterhouseCoopers (the PwC Report). We found that the New Agreement provides a unique set of services and contains a series of individually negotiated commercial terms including: the consideration paid, the term, termination rights, scope of the products to be listed on the Trayport platform and the nature of connectivity into the Trayport platform. In such circumstances, 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. Overall, we found it was not possible to conclude that the New Agreement was entered into on an arm's–length basis. We identified four key reasons why it was 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, and even though some of these responses may have been commercially motivated, we still place some weight on this evidence.

(c) The New Agreement reflects the Parties' commercial strategy at the time it was entered into and when Trayport was under ICE ownership.

(d) In a situation where the New Agreement provides a unique set of services and contains a number of individually negotiated 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.

13. 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 our duty to comprehensively and effectively remedy the SLC identified.

14. Having first considered the circumstances in which the New Agreement was entered into, we then considered the following legacy effect risks to an effective remediation of the SLC resulting from the New Agreement:

    (a) The New Agreement might restrict the commercial freedom of Trayport's future owner and its ability to set its own future strategy towards ICE. This is exacerbated by setting the Parties' commercial relationship for a period of up to [✂] 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).

    (b) The New Agreement might unfairly benefit ICE as a result of it receiving better commercial terms compared with terms that it would have achieved had it not owned Trayport when entering into the New Agreement (assuming the New Agreement would have been entered into at all in such circumstances).

    (c) The New Agreement might affect Trayport's (and its new owner's) incentives to act as a facilitator playing an important role in enabling and promoting competition between trading venues and between clearinghouses.

15. If any of these legacy effect risks were to materialise, this could 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 or defending volumes which may mean that it will have to compete less vigorously (in terms of fee levels, quality of service and innovation) in order to grow. This means that the New Agreement, which was brought about during the period of ICE's control of Trayport, could result in a number of indirect effects which put at risk our ability to comprehensively and effectively remedy the SLC identified in the Report.

16. We therefore concluded that the New Agreement is a legacy effect of ICE's control and presents a number of risks to our being able to comprehensively and effectively address the SLC identified.

17. With respect to divestiture process risks, we considered whether the New Agreement presents risks to our ability to implement an effective divestiture process. In view of the significant interest in purchasing Trayport from third parties, we did not consider that the divestiture process risks posed by the New Agreement would result in the CMA being unable to approve a suitable purchaser for the Trayport business. However, we found that the New

Agreement does present a risk that ICE may be incentivised to sell to a buyer who, in advance of the sale, has agreed to enter into the New Agreement or a replacement agreement on essentially the same terms. As part of the divestment process, the CMA must approve the suitability of the purchaser under a number of criteria.[6] One limb of this assessment considers whether any purchaser of the Trayport business is independent of ICE, including a consideration of the relevance of any agreements between them. We consider that this risk can be addressed through our purchaser suitability criteria as part of the divestiture process.

18. Overall, we concluded that the evidence shows that the issues identified, both individually and collectively in the round, do 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 concluded that this provides a sufficient basis on which to require the termination of the New Agreement.

Effectiveness of alternative remedies

19. In the Report we considered that termination of the New Agreement was necessary in order to implement an effective divestiture. We remain of the 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).

20. 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 concluded that each of the legacy risks to our implementation of an effective remedy, which are identified above, would crystallise during any temporary period of implementation, rendering this option ineffective.

21. We also noted that in the event that a new owner decided that the terms were not in its commercial interests and required termination of the New Agreement after temporary implementation, this would result in the removal of ICE products 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.

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[6] For the CMA's purchaser suitability criteria see Merger Remedies: Competition Commission Guidelines (CC8), paragraph 3.15.

22. We therefore concluded that the only effective remedy to mitigate the risks posed by the New Agreement was its immediate termination.

The cost of remedies and proportionality

23. We agreed with the CAT that the direct costs of terminating the New Agreement to the Parties and to any of their wider interests are 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.

24. We noted the Parties' submissions and the submission from five traders that suspension of the New Agreement results in opportunity costs because 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. 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 lengthy. On the other hand, the adverse effects resulting from the New Agreement could be significant and long–lasting. As such, the risks of implementation would clearly outweigh the costs of terminating the New Agreement.

25. We also considered ICE's submission that it was [✂] as a result of the New Agreement being suspended, in particular, for Dutch power and emissions contracts. We found that that there were a number of limitations as to the weight we could place on the evidence submitted. Moreover, even if any such loss were attributable to the suspension of the New Agreement, we were of the view that the magnitude of these costs was low and that it would be a short–term loss, should ICE and the new owner enter into a similar agreement after the divestiture of Trayport.

26. Finally, we considered whether termination of the New Agreement posed a risk to the Trayport business' ability to assist its customers in meeting their obligations under the Markets in Financial Instruments Directive II (MiFID II).[7] Trayport told us that [✂]. We found that the risk of these potential costs to the Trayport business materialising had been effectively dealt with by a derogation from the Intercontinental Exchange, Inc. and Trayport Merger Inquiry Order 2017 (Final Order) granted by the CMA.[8]

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[7] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L173, 12.6.2014, p. 349 – 496.
[8] See the derogation to the final order.

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

Conclusion

28. We 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.

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).[9] 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 in this remittal report.

1.2 In the Report, we decided that it would be necessary to issue a final order requiring: *(i)* the full divestiture of Trayport; and *(ii)* the unwinding of an agreement entered into on 11 May 2016 which was a new interface development and support agreement relating to the display of additional ICE products on Joule/Trading Gateway[10] 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 this remittal report.

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 by the CMA under the initial enforcement order dated 11 January 2016 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).[11] 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:

(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

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

Agreement would have been entered into absent the acquisition of Trayport by ICE.

(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 powers to require termination of the New Agreement and to require its continued suspension pending such termination in order to ensure the effectiveness of the divestiture remedy, the CAT found that, in principle, termination of an agreement may be an appropriate remedy to address an SLC. However, the CAT found that the evidence and analysis relied on by the CMA in reaching its conclusion that termination was an appropriate remedy were not made sufficiently clear in the Report:

> [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.[12]

1.6 Therefore, the question of whether the Parties should be required to terminate the New Agreement (the New Agreement question) was remitted to the CMA by the CAT for reconsideration,[13] noting 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

[12] The Judgment [2017] CAT 6, paragraph 196.
[13] 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.

> New Agreement is required to ensure the full effectiveness of the divestiture remedy.[14]
>
> […] In our view, it would be wrong to insist that that 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.
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> Any remedy relating to the New Agreement must, therefore, be framed on the basis of a risk assessment. […] [15]

1.7 On 17 March 2017, ICE sought permission from the CAT to appeal the CAT's Judgment. The CAT rejected ICE's application for permission to appeal on 24 March 2017.[16] ICE then requested permission from the Court of Appeal. On 10 May 2017, the Court of Appeal issued an order denying ICE permission to appeal further.[17]

1.8 Given the scope of this remittal, we have not considered issues beyond the New Agreement question. In particular, the issue of the appropriate counterfactual (see Ground 1 above) is outside the scope of this remittal. The findings of the Report on the issue (set out below) were upheld by the CAT:

> […] 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 such, it is unclear that the negotiations would have been successfully concluded in circumstances where funds

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[14] The Judgment [2017] CAT 6, paragraph 199.
[15] The Judgment [2017] CAT 6, paragraphs 204 and 205.
[16] Intercontinental Exchange, Inc. v Competition and Markets Authority and Nasdaq Stockholm AB [2017] CAT 8.
[17] Intercontinental Exchange, Inc. v Competition and Markets Authority & ANR, ORDER made by Rt. Hon. Justice Lewison, signed 10 May 2017.

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.[18]

[…] 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.[19]

1.9 In reaching the findings below, we have taken into account all relevant evidence relating to the New Agreement question received in the course of the merger inquiry; this has been supplemented with evidence gathered from the Parties and third parties in response to our consultation on the Conduct of Remittal Notice and in response to our provisional findings issued on 25 April 2017 (the Remittal Provisional Findings).[20]

2. Background to the remittal

2.1 In the section below, following a brief chronology of events leading up to the remittal, we 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 lastly outline our approach to the New Agreement question.

Chronology

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

- **29 April 2015**: BGC Partners. Inc. (BGC)/GFI Group Inc. (GFI) announces its 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.[21]

[18] The Report, paragraphs 6.29 and 6.30.
[19] The Report, paragraph 6.34.
[20] Provisional Findings on the remittal, dated 25 April 2017.
[21] 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.

- **June 2015**: ICE commences formal participation in the auction by BGC/GFI of Trayport.[22]

- **23 June 2015**: BGC/GFI halt negotiations between ICE and Trayport regarding a potential interface development and support 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 to May 2016**: ICE and Trayport negotiate the terms of the New Agreement.

- **3 May 2016**: The merger is referred by the CMA for a phase 2 investigation.

- **11 May 2016**: ICE and Trayport sign the New Agreement.

- **16 May 2016**: In their fortnightly compliance statement, required under the terms of the initial enforcement order, the Parties first inform the CMA of the existence of the New Agreement.

- **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 while the CMA's merger investigation is ongoing.

- **17 October 2017**: The CMA publishes the Report, concluding that ICE should divest Trayport and 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**: The CMA issues a direction[23] 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 to the CAT.

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[22] 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.
[23] A variation to the direction was issued on 28 November 2016.

- **17 November 2016**: ICE submits NoA2 to the CAT.
- **6 March 2017**: The CAT Judgment is issued. The CAT upholds the CMA's conclusion that the New Agreement would not (on the balance of probabilities) have been entered into absent the merger.
- **24 March 2017**: The CAT issues a ruling refusing ICE's request for permission to appeal.
- **Early April 2017**: ICE seeks leave to appeal from the Court of Appeal.
- **10 May 2017**: The Court of Appeal issues an order denying ICE permission to appeal further.

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

(a) The bulk of detailed negotiation on the New Agreement occurred between January and May 2016 when Trayport was already under ICE's 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 agreed to suspend the New Agreement while the CMA's investigation was ongoing.

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

(e) As set out in our counterfactual in the Report, and as upheld by the CAT, the CMA's starting point is that the New Agreement would not have been entered into absent the merger.[24]

2.4 We refer to these events where relevant throughout the remittal report.

[24] During the course of the remittal investigation, evidence was brought to the attention of the CMA (including contemporaneous documents) which was not provided during the main investigation. Some of this new evidence further supported our counterfactual finding in the Report that it was not, on the balance of probabilities, sufficiently certain that the New Agreement would have been entered into absent the merger for it to form part of the counterfactual. More specifically, the evidence indicated that for some individuals within the Parties, the commercial relationship as between ICE and Trayport appeared to remain at an [✂].

The process on remittal

2.5 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.[25]

2.6 We invited submissions on the New Agreement and stated that we did not propose to hold hearings prior to the publication of our Remittal Provisional Findings.

2.7 We published our Remittal Provisional Findings on 25 April 2017 and consulted on these for a period of two weeks. Non–confidential versions of the responses to our Remittal Provisional Findings from the Parties and third parties were published on the case page. We subsequently held hearings with each of the Parties and this evidence has been referred to where relevant in the remittal report.

2.8 As noted above, the remittal process is limited to consideration of the New Agreement question. We were not required to reconsider any other aspect of the Report as part of the remittal and, accordingly, we have not done so.

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

The statutory framework for remedies implementation

2.10 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 which has resulted from or may be expected to result from the SLC.

2.11 Section 41(4) requires the CMA, in particular, 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.[26]

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[25] Remittal Notice.
[26] The Judgment [2017] CAT 6, paragraph 194.

2.12 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, termination of an agreement may be an appropriate indirect remedy: indeed the Act recognises as much in paragraph 13(3)(d) of Schedule 8.[27] It must however, be appropriately linked to the purpose of remedying the SLC for which all of the CMA's remedial powers are conferred.'[28] The CAT found, however, that the reasoning in the Report linking the termination of the New Agreement with the remedying of the SLC was insufficient.

2.13 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

2.14 In the Report, and as summarised above, we concluded that the merger would result in an SLC.[29]

2.15 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.[30] Bearing in mind that the New Agreement would not have been entered into absent the merger, 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'.[31]

2.16 We have therefore considered whether implementation of the New Agreement presents any risks to our ability to comprehensively and effectively remedy the SLC and any adverse effects resulting from it. A list of the risks considered during the remittal is set out below. For the purposes of the remittal report, the risks identified in paragraph 2.16(a)(i) to (a)(iii) below are categorised as risks arising from the New Agreement as a legacy effect of ICE's acquisition of

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[27] 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, paragraphs 2 and 13 of Schedule 8 to the Act, both of which confer the power to require termination of an agreement. While the power in paragraph 13 is supplementary to the power to order division of any business or group, the power in paragraph 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.
[28] The Judgment [2017] CAT 6, paragraph 195.
[29] 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.
[30] The Judgment [2017] CAT 6, paragraph 195.
[31] The Judgment [2017] CAT 6, paragraph 205.

Trayport, including consideration of the circumstances in which the New Agreement was entered into, while the risks set out in paragraph 2.16(b)(i) to (b)(iii) are categorised as risks arising from the New Agreement which could impact the divestiture process:

(a) Legacy effect risks:

(i) the New Agreement might restrict Trayport's commercial freedom (and therefore that of its new owner) and its ability to set its own future strategy towards ICE. This is exacerbated by setting the Parties' commercial relationship for a period of up to [✂] 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);

(ii) the New Agreement might unfairly benefit ICE as a result of granting ICE better commercial terms compared with terms that it would have achieved had it not owned Trayport when entering into the New Agreement (if the agreement would have been entered into at all in those circumstances); and

(iii) the New Agreement might affect Trayport's (and its new owner's) incentives to act as a facilitator playing an 'important role in enabling and promoting competition between trading venues and between clearinghouses'.[32]

(b) Divestiture process risks:

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

(ii) 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 of suitable purchasers presented to the CMA by ICE for approval; and

(iii) in a worst–case scenario, the impact of the New Agreement on purchasers' willingness to participate and ICE's incentives could

[32] The Report, paragraph 7.183.

mean that the CMA might be unable to approve any of the shortlisted purchasers submitted by ICE as a prospective purchaser.[33]

2.17 In reaching our findings we have 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. In light of the statutory duty on 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, if the CMA finds sufficient evidence of any of the risks identified in paragraph 2.16 above, this would provide a sufficient basis on which to require a remedy in relation to the New Agreement that was reasonable and practicable, and proportionate in the circumstances.[34]

2.18 Accordingly, we have considered the New Agreement question under three headings:

(a) The impact of the New Agreement on our ability to comprehensively and effectively remedy the SLC identified (Section 3). This assessment is carried out by reference to the potential risks identified at paragraph 2.16 above. As part of this assessment we have considered 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 effectiveness of any alternative remedies (Section 4).

(c) The cost of the effective remedies and proportionality (Section 5).[35]

2.19 We set out the evidence for and our assessment of each of these below.

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[33] 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'.

[34] 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.

[35] CC8, paragraph 1.9.

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

3.1 Taking each of the risks identified in paragraph 2.16 above in turn, we have considered whether the New Agreement has an impact on our ability to comprehensively and effectively remedy the SLC identified and any of its adverse effects.

3.2 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 for each risk category.

Parties' submissions

3.3 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.'[36]

3.4 In that submission, the Parties listed the evidence which they considered was relevant to the New Agreement question and which had been placed before the CAT during the appeal process. That evidence related in the main to the circumstances in which the New Agreement had been concluded and, in particular, was relevant to the questions of whether the New Agreement was entered into on an arm's–length basis, and whether it would have been entered into absent the merger. We have set out this evidence in detail in Appendix B to the remittal report and considered it where appropriate in our assessment.

3.5 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 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

[36] Parties' 'Initial Observations on the Remittal', dated 16 March 2017.

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.[37]

3.6 In response to the Remittal Provisional Findings, the Parties made a further submission, which addressed each of the categories of risk identified in paragraph 2.16 above, and made further representations regarding the circumstances in which the New Agreement was entered into. As an annex to this submission, the Parties provided a report prepared by PricewaterhouseCoopers (PwC) which compared the terms of the New Agreement with those of other Trayport exchange customers with analogous or comparable contracts (the PwC Report).[38]

3.7 With respect to whether the New Agreement can be considered to be a residual or legacy effect of ICE's control of Trayport (ie the acquisition) which could prevent the SLC from being remedied, the Parties submitted that our Remittal Provisional Findings identified three issues each of which could be discounted for the following reasons:[39]

(a) The New Agreement does not, by virtue of its duration, restrict Trayport's commercial freedom; the PwC Report concludes that the New Agreement's duration is not out of line with that of Trayport's contracts with other venue customers. [✂].

(b) There is no exclusivity in favour of ICE, [✂] nor any other term which confers a material advantage on ICE.[40]

(c) The CMA, having made clear that it would have no objection to a new owner accepting the terms of the New Agreement, now speculates that

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[37] Parties' 'Response to Remittal Working Paper', dated 4 April 2017, paragraphs 2.1 – 2.3.
[38] ICE/Trayport Response to CMA's Provisional Findings on the Remittal Question, dated 9 May 2017
[39] ICE/Trayport Response to CMA's Provisional Findings on the Remittal Question, dated 9 May 2017, p13.
[40] PwC Report, paragraphs 4.2 – 4.4.

there is a risk that Trayport will, as a result of the New Agreement, be less incentivised to deal with ICE's rivals.[41] The Parties submit that this aspect of the inquiry goes beyond the scope of the remittal question and should be discounted.

3.8 With respect to risks associated with the divestiture process, ICE stated that it was confident that any buyer of Trayport would want to benefit from the New Agreement.[42] In its view, potential buyers are likely to require full visibility of the relationship between ICE and Trayport before completion of their acquisition of Trayport and would therefore want either the New Agreement or a replacement agreement in place. PwC suggested that any question of transparency could be addressed through an independently prepared Vendor Due Diligence report[43] and during the remittal hearing ICE confirmed that it would be open to considering this approach. ICE also submitted that any buyers that would have a problem with the terms of the New Agreement would likely present competition issues and, therefore, would not be suitable purchasers.[44] The Parties submitted that, contrary to the CMA's position, termination of the New Agreement would in fact deter prospective buyers and that it was not credible to suggest that prospective buyers would not participate in a sales process.[45] When asked for evidence to support this claim, ICE told us that 'in terms of the CMA's analysis of the risks to an effective divestiture process, the CMA should assume that there is a large pool of suitable purchasers outside of private equity and venues that are not on Trayport (around [✂]) which encompasses a range of different players'.[46] In response to a further request for evidence to support this assertion, ICE subsequently provided a list of [✂] prospective purchasers of Trayport by whom it had been approached and listed over [✂] others who had contacted other bankers ICE deals with and/or may have made investments in financial technology infrastructure.[47]

3.9 Contrary to our provisional finding that the New Agreement presented risks to an effective divestiture process, the Parties stated that the New Agreement would likely contribute to a successful sale by providing certainty around the commercial arrangements between the Parties after the divestment, and that

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[41] The Parties also submitted that reference in our Remittal Provisional Findings to adverse effects resulting from the New Agreement and not just from the SLC went beyond the scope of the inquiry.
[42] ICE/Trayport Response to CMA's Provisional Findings on the Remittal Question, dated 9 May 2017, p5.
[43] PwC Report, paragraphs 4.5 and 4.13.
[44] ICE Remittal Hearing Transcript, p17, lines 12 – 18.
[45] ICE/Trayport Response to CMA's Provisional Findings on the Remittal Question, dated 9 May 2017, pp5 and 10.
[46] ICE response to CMA questions, dated 17 May 2017.
[47] ICE response to CMA questions, dated 19 May 2017.

termination of the New Agreement would result in a decrease in the value of Trayport.

3.10 The Parties also submitted that our Remittal Provisional Findings relied on speculation from commercially motivated third parties and the fact that these third parties perceive that the New Agreement was not concluded on an arm's–length basis is not evidence that prospective buyers would not participate in a divestiture process.[48]

Third party submissions

3.11 The CMA has received views from a number of third parties in relation to the New Agreement question, including: (i) the oral evidence during response hearings following the publication on 16 August 2016 of its Remedies Notice[49] in the merger inquiry; (ii) responses to its Conduct of Remittal Notice, published on 13 March 2017; and (iii) responses to the Remittal Provisional Findings, published on 25 April 2017. Full details of those views are set out on the case page and a summary is available in Appendix B.

3.12 The majority of third parties who responded to our consultations on the Remedies Notice, the Conduct of Remittal Notice and the Remittal Provisional Findings were sceptical that an agreement between parent and subsidiary, ie between ICE and Trayport, could have been concluded on an arm's–length basis. Even those traders who were in favour of the New Agreement being implemented only held that view if the CMA was able conclude that it was entered into on an arm's–length basis (see the 'other third party responses' section set out below).

3.13 The Parties did not agree to disclosure of the terms of the New Agreement (including its duration, fee structure, product scope, pricing or any other commercial terms) to third parties for reasons of commercial sensitivity. These details were therefore not set out in the Conduct of Remittal Notice, Remedies Notice or the Report.[50] 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 on the question of whether the terms were likely to have been reached at arm's–length. In an effort to address the issue for the purposes of the remittal, the CMA asked the Parties to provide a redacted version of the New

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[48] ICE/Trayport Response to CMA's Provisional Findings on the Remittal Question, dated 9 May 2017, p10.
[49] Remedies Notice, dated 16 August 2016.
[50] 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.'

Agreement or a non–confidential summary of its key terms in order to assist the CMA with its consultation. However, that request was likewise 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.'[51]

3.14 As an alternative, 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)?'[52] The Parties submitted that this proposed approach was intended to generate probative evidence from market participants taking into account their business models which the CMA could then cross–check against the New Agreement.[53]

3.15 We did not make this request of third parties for the reasons set out in our Remittal Provisional Findings[54] and we remain of the view that expecting third parties to identify every contractual term, or combination of terms, that would be concerning is impractical. Moreover, identification of a particular term or terms is not necessarily informative without consideration of the totality of the agreement. Subsequently, and notwithstanding their previous position that disclosure of the details of terms contained in the New Agreement would be commercially harmful, the Parties did disclose specific terms which do not feature in the New Agreement, for example that it does not contain an exclusivity clause or a [✂], in their response to our Remittal Provisional Findings and in a letter to the European Federation of Energy Traders (EFET).[55] We have referred to EFET's response to Trayport's letter in our assessment below and the full version is available on the case page.[56]

3.16 Below we have set out in turn the specific evidence we have received from third parties in relation to the two categories of risk that we have identified.

Legacy effects

3.17 In commenting on the risks to the effective remediation of the SLC posed by the New Agreement as a legacy effect of ICE's control, ICAP plc. (ICAP) provided the following views:[57]

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[51] Email from Shearman & Sterling to the CMA, dated 20 March 2017.
[52] Email from Shearman & Sterling to the CMA, dated 20 March 2017.
[53] ICE/Trayport Response to CMA's Provisional Findings on the Remittal Question, dated 9 May 2017, p19.
[54] Remittal Provisional Findings, paragraphs 3.12 – 3.14.
[55] Letter from Trayport to EFET, dated 4 May 2017.
[56] EFET response to the Provisional Findings.
[57] ICAP remittal submission.

> [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 Services Limited (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.

3.18 ICAP went on to say that:

> […] 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.

3.19 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.[58]

3.20 In response to our Remittal Provisional Findings, Exchange 1 further submitted that:

> [Exchange 1] therefore agrees with the CMA's assessment of the possible risks associated with implementation of the New Agreement. [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 remedy of the SLC as a result of the New Agreement, it ought to be unwound.

3.21 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

[58] Exchange 1 remittal submission.

> 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, 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.[59]

3.22 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.'[60]

3.23 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.[61]

The divestiture process

3.24 In response to the Remittal Provisional Findings, EFET submitted that ICE should not be allowed to put itself in a position to determine or influence the choice of purchaser according to the attitude of that purchaser to any replacement agreement.[62]

3.25 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.[63]

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[59] Summary of call with Party X, paragraph 1.
[60] Summary of call with Party X, paragraph 2.
[61] Independent software vendor remittal submission.
[62] EFET response to the Provisional Findings, p2.
[63] Exchange C, summary of response hearing.

3.26 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 appeal process], 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.

3.27 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.'[64]

3.28 In response to the Remittal Provisional Findings, Exchange 1 submitted that the New Agreement presented a significant risk to the divestiture process; a risk that was so great that a divestiture trustee [sic][65] should be appointed to monitor and oversee the divestment process to ensure that ICE does not influence purchaser selection on the basis of the New Agreement and/or influence its future trading relationship with Trayport under the new owners.[66]

3.29 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.[67]

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[64] Exchange 1 remittal submission.
[65] We consider the role that Exchange 1 is referring to in this submission would actually be performed by the monitoring trustee.
[66] Exchange 1 response to the Provisional Findings, pp5 and 6.
[67] ICAP remittal submission.

3.30 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.[68]

3.31 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.[69]

3.32 BGC/GFI told us that 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 long

[68] Party X initial submission.
[69] Summary of call with Party X.

term value to any buyer but would also keep ICE interested as both a buyer and a user.[70]

Other third party submissions

3.33 If the CMA were able to reach the conclusion that the New Agreement was entered into on an arm's–length basis, five trading companies favoured that the New Agreement being 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.

3.34 Trading Company B said that it would welcome it if ICE was marketing its products directly on Trayport's platform, although it 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.'[71]

3.35 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 are 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.'[72]

3.36 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.'[73]

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[70] Email from BGC to CMA, dated 7 April 2017.
[71] Trading Company B remittal submission.
[72] Trading Company C remittal submission.
[73] Trading Company D remittal submission.

3.37 RWE Supply & Reading GmbH (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.'[74]

3.38 Eneco Energy Trade B.V. (EET) submitted that, '[…] 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 (ie as a venue–neutral aggregator), EET views the New Agreement favourably, on the basis that it enables enhanced distribution of IFEU and ICE Endex EU utilities products.'[75]

Our assessment

3.39 Taking into account the evidence set out above, and in Appendix B, we set out below our assessment of: (i) the legacy effect risks; and (ii) the divestiture process risks presented by the New Agreement.[76]

Legacy effects

3.40 The Parties have told us throughout the main inquiry and the remittal process that the New Agreement was agreed on an arm's–length basis. In the Parties' view such an arrangement would be less likely to represent a legacy effect of the control acquired by ICE as its terms would provide a reflection of independent commercial choice by Trayport in its dealings with a contractual counterparty. Furthermore, as set out above, the issue of whether the New Agreement was concluded on an arm's–length basis was central to the views of a number of third parties.

3.41 We use the term 'arm's–length' in this case as a benchmark against which to assess whether it is possible to conclude that the New Agreement would have been essentially the same had it been concluded at a time when ICE did not own Trayport. For instance, if it were clear that the New Agreement was entered into on standard terms identical to those entered into by Trayport with other customers in a similar position to ICE, such that there could be little or no scope for the New Agreement to be on preferential terms, that would suggest an arm's–length arrangement. We note that arm's–length negotiations will not necessarily result in identical terms being agreed between different counterparties because the terms of any agreement can be

[74] RWE Supply &Trading remittal submission.
[75] EET remittal submission.
[76] See paragraph 2.16 above.

expected to reflect the differing commercial objectives and strategies of the parties to the negotiation, unless one of the counterparties is able to insist on the use of its own standard terms and conditions.

3.42 Taking account of all relevant evidence (as set out in more detail below) as part of our assessment of the legacy effect risks, we first considered if it is possible to conclude whether the New Agreement could be said to have been concluded on an arm's–length basis. The CAT Judgment noted that while the circumstances in which the New Agreement was entered into were not determinative with respect to the overall 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 measures must still be explicitly justified by reference to remediation, directly or indirectly, of the SLC.[77]

3.43 We agree with the CAT that the conclusion as to whether the New Agreement was entered into on an arm's–length basis is not itself determinative of the remitted issue. However, we do consider that our conclusions on this point are informative for our assessment of the legacy effect risks.

3.44 In the CMA's view, in assessing the arm's–length nature of an agreement, both the overall context and the individual terms of the agreement are relevant. The Parties have submitted that the Remittal Provisional Findings focus disproportionately on the context in which the New Agreement was entered into rather than the actual provisions and effects of the New Agreement.[78] However, the CMA remains of the view that the context in which the New Agreement was entered into (as set out in the chronology above) remains highly relevant.

3.45 In terms of overall context, by 11 May 2016, the date on which the New Agreement was signed, the control giving rise to the SLC had been in place for five months and the CMA's investigation of the transaction had, just one week previously, been referred for an in–depth review. A possible outcome of

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[77] The Judgment [2017] CAT 6, paragraph 201.
[78] ICE/Trayport Response to CMA's Provisional Findings on the Remittal Question, dated 9 May 2017, p6.

the CMA's review (as indeed transpired) was that ICE would be required to divest the Trayport business.

3.46 As set out in the Report, ICE and Trayport had historically not cooperated and, prior to the merger, while the Parties had commenced discussions on a potential agreement, they had been unable to establish a commercial relationship equivalent to the one which would be established under the terms of the New Agreement if it were to be implemented. The New Agreement therefore signalled a step change in relations between ICE, as the leading European utilities exchange, and Trayport whose software underpins over 85% of European utilities trading. In view of the importance of each of ICE and Trayport in their respective areas of business, any cooperation between them would logically be a significant element of their individual commercial strategies. Given our findings that the New Agreement was not part of the counterfactual, the New Agreement can be seen as a manifestation of the Parties' relationship and strategy at the time it was agreed. It was entered into as a result of negotiations under a parent–subsidiary relationship, and only concluded after the merger had completed. As a starting point, these are not circumstances which can be typically said to be arm's–length. In addition, it was ICE's control of Trayport that brought about the SLC identified in the Report. Accordingly, it is appropriate that an assessment of whether the New Agreement was entered into on an arm's–length basis proceeds from a cautious starting point.

3.47 In response to the Remittal Provisional Findings, the Parties submitted that having individually negotiated contractual terms does not make it impossible to reach a finding that the New Agreement was concluded on an arm's–length basis. They reiterated their position that the CMA could and should have carried out an analysis of the New Agreement as compared with other venue contracts.[79] They also referred the CMA to the conclusion of the PwC Report, submitted by the Parties after publication the Remittal Provisional Findings, which stated that both the contractual terms and the level of the fees in the New Agreement are comparable with those in rivals' contracts which were analysed.[80] Therefore, based on the PwC report, the Parties say it is reasonable to conclude that the terms of the New Agreement would not have been materially different even if ICE had not, at the time of concluding the agreement, controlled the Trayport business.[81]

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[79] ICE/Trayport Response to CMA's Provisional Findings on the Remittal Question, dated 9 May 2017, p6.
[80] ICE/Trayport Response to CMA's Provisional Findings on the Remittal Question, dated 9 May 2017, p20.
[81] ICE/Trayport Response to CMA's Provisional Findings on the Remittal Question, dated 9 May 2017, pp7 and 18.

3.48 The PwC Report set out its approach to comparing other Trayport customer contracts with the New Agreement as follows:

> Section 3 focuses on the commercial terms of the New Agreement, by comparing it with certain analogous Comparison Contracts. The New Agreement includes three distinct services that are provided by Trayport to ICE. **The same combination of Trayport services has not been provided to any other party, and thus, in order to provide a meaningful comparison, we compare the commercial terms of each of these individually with analogous services provided within the Comparison Contracts**. Where the service provided with the New Agreement, and the terms thereof, are identical to those provided to others within the Comparison Contracts, the commercial terms are compared directly. **In cases where identical services have not been provided to any Other Party, we undertake a simulation exercise.** In this exercise, we hold constant the pricing variables within the New Agreement, and use these to calculate what the fees would be under Comparison Contracts.[82] (emphasis added)

3.49 The PwC approach reflects the difficulties inherent in carrying out any meaningful comparison exercise, which are exacerbated by the unique combination of services provided by Trayport to ICE under the terms of the New Agreement. PwC was able only to carry out a comparison against analogous services, and where identical services had not been provided to other Trayport customers, PwC had to resort to carrying out a simulation.[83] This is consistent with the CMA's position that the New Agreement contains a series of individually negotiated commercial terms. These terms include the consideration paid, the term, termination rights, scope of the products to be listed on the Trayport platform and the nature of connectivity to the Trayport platform (for example, a bespoke connectivity such as ICE Link[84] rather than a standard licensing arrangement for GV Portal[85]). In such circumstances, a detailed review of the individual terms of the New Agreement in comparison with analogous contracts is not determinative as to whether the same commercial terms would have been agreed absent the merger and in an entirely different commercial context.

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[82] PwC Report, paragraph 1.5(b).
[83] PwC Report, paragraph 1.5(b).
[84] A description of ICE Link is set out in paragraphs 6.14 and 6.15 of the Report.
[85] A description of GV Portal is set out in paragraph 3.26 of the Report.

3.50 We note PwC's position that it is reasonable to conclude that the terms of the New Agreement would not have been materially different had Trayport been under different ownership.[86] PwC also concludes that the New Agreement does not contain any terms that would impact Trayport's ability to operate and develop its business and deal effectively with third parties, in particular, given the absence of an exclusivity clause or [✂].[87] We recognise that the New Agreement does not contain such terms. However, we do not agree with PwC's conclusions. This is because a comparison of individual terms across contracts takes no account of commercial context or the effect of the agreement as whole. As set out above, the New Agreement is a manifestation of the Parties' change of strategy once Trayport was under ICE ownership and, in such circumstances, it is not clear whether the agreement would have been entered into at all, let alone whether the Parties would have agreed to essentially the same terms if ICE had not acquired control of Trayport. Moreover, as a result of a significant change in Trayport's strategy towards ICE the commercial freedom of Trayport's new owner to determine that relationship and engage in strategies which may assist ICE's rivals is restricted. We discuss this risk in further detail below.

Conclusion on circumstances in which the New Agreement was entered into

3.51 Overall, we consider that it is not possible to conclude that the New Agreement was entered into on an arm's–length basis for four 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, and while some of these submissions from ICE's rivals may have been commercially motivated, we place some weight on this evidence.

(c) The New Agreement is a reflection of the Parties' commercial strategy at the time it was entered into and when Trayport was under ICE ownership.

(d) In a situation where the New Agreement offers a unique set of services and contains a series of individually negotiated terms, comparisons with other Trayport customer contracts in the PwC Report are not informative

[86] PwC Report, paragraph 1.6(a).
[87] PwC Report, paragraphs 1.6(d) and 4.2.

as to whether the New Agreement was entered into on an arm's–length basis.

3.52 Notwithstanding the above, we have considered in paragraphs 3.70 to 3.86 some of the specific commercial terms which were identified in the Remittal Provisional Findings as being individually negotiated and we have considered the Parties' submissions on these.

3.53 Below we set out a brief summary of the SLC identified in the Report. We then address in turn the risks presented by the New Agreement to being able to comprehensively and effectively remedy the SLC identified.

The SLC identified in the Report

3.54 In the Report it was found that the New Agreement would (on the balance of probabilities) not have been entered into absent the merger, being concluded by the parties when Trayport was under the control of ICE; the control which gave rise to the SLC. In this sense, it is clear that the New Agreement is a legacy effect of ICE's control of Trayport. However, the New Agreement did not form part of the SLC, which related to ICE's use of Trayport to disadvantage ICE's rivals. For ease of reference, we restate below the key findings at the core of the SLC. This provides a framework within which to consider whether the New Agreement, as a legacy effect of the control which gave rise to the SLC as identified in the Report, presents a risk to our ability to remedy the SLC in an effective and comprehensive manner.

3.55 The Report characterised the pre–merger role of Trayport as follows:

> […] we concluded that Trayport was not a passive software provider but that it was active in its efforts to influence competition between trading venues and between clearinghouses in order to ensure that volumes flow through the Trayport platform […] we also found that Trayport plays an important role in enabling and promoting dynamic competition and that it seeks to influence market structures in favour of its customers, and often in competition with ICE.[88]

3.56 Accordingly, in the Report, we did not find that Trayport was a venue–neutral aggregation platform but that it actively enabled and promoted competition between venues. We identified evidence of Trayport strategies which actively sought to introduce competition between its customers and ICE. This is

[88] The Report, paragraphs 7.185 and 7.189.

significant for our assessment as to whether the New Agreement presents any risks to Trayport's role in facilitating competition, as discussed below.

3.57 The SLC in the Report was approached within the vertical foreclosure framework set out in our merger assessment guidance[89] under which we considered the Parties' ability and incentive to implement a foreclosure strategy and its effect on competition:

> […] we concluded that the effect of any foreclosure strategy would be to harm ICE's main rivals and, as a result have an impact on their ability to compete effectively with ICE for the execution and clearing of trades
>
> […] in the longer term, we concluded that there would likely be a loss of competition between ICE and other trading venues/clearinghouses to be the principal host of liquidity and/or clearing volumes.[90]

3.58 We identified a loss of dynamic competition as being particularly important:

> […] we also considered that under ICE ownership, Trayport would no longer seek to promote competition and shape market structures in favour of its venue customers, and in competition with ICE. We placed particular weight on the loss of this dynamic competition which is likely to harm traders by offering them a more limited range of trading opportunities and tools.[91]

3.59 Lastly, we considered the potential effect on competition resulting from the loss of horizontal rivalry between the Parties for front–end access services. We found that there would likely be a reduction in competition but on its own this was not sufficient to represent a substantial effect.[92]

3.60 The SLC therefore resulted from the impact of the merger on the overall relationship between Trayport and ICE's rivals (ie Trayport's customers) – this is the very nature of an input foreclosure theory of harm. We found that all of ICE's rivals are heavily dependent on Trayport and that ICE's ownership of Trayport would harm their competitiveness, and that this would help ICE to win additional trading activity.

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[89] Merger Assessment Guidelines, paragraph 5.6.6.
[90] The Report, summary paragraphs 42 and 43.
[91] The Report, summary paragraph 44.
[92] The Report, paragraphs 8.161 – 8.169.

Consideration of the risks presented by the New Agreement

3.61 Having regard to the SLC set out in the Report and its possible adverse effects, and taking into account the fact that the New Agreement is a legacy or residual effect of ICE's control, we identified the following possible legacy risks posed by the New Agreement to our ability to comprehensively and effectively remedy the SLC identified:

(a) The New Agreement might restrict the commercial freedom of Trayport's future owner and its ability to set its own future strategy towards ICE, which is exacerbated by setting the Parties' commercial relationship for a period of up to [✂] 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).

(b) The New Agreement might unfairly benefit ICE as a result of it receiving better commercial terms compared with terms that it would have achieved had it not owned Trayport when entering into the New Agreement (assuming the New Agreement would have been entered into at all in such circumstances).

(c) The New Agreement might affect Trayport's (and its new owner's) incentives to act as a facilitator playing an important role in enabling and promoting competition between trading venues and between clearinghouses.

3.62 We have considered each of these risks in turn below.

- *Restriction of Trayport's commercial freedom*

3.63 As discussed above, historically ICE and Trayport did not cooperate. The New Agreement therefore represented a significant step–change in relations between the Parties which happened when ICE controlled Trayport. As such, should the New Agreement be implemented, any new owner would have lost the option to determine Trayport's strategy with respect to its approach to ICE. It is our responsibility to remedy the SLC identified (not to ensure that the pre–merger conditions of competition are replicated). A new owner may wish to cooperate with ICE going forward. However, it is important for competition that the new owner of Trayport is able to determine its strategy towards ICE independently given the significance of the relationship.

3.64 The New Agreement itself was not part of the SLC finding. However, this is a complex industry and, as noted above, the critical role of Trayport in underpinning the entire trading lifecycle was at the core of the SLC. In light of

our finding in the Report that Trayport actively facilitates competition between its customers, including between ICE and its rivals, the basis on which Trayport engages with industry participants is of critical importance for competition. As such, the New Agreement risks being a means through which the SLC identified would remain unremedied because ICE's control has influenced Trayport's strategy and potentially enabled it to obtain an agreement and/or terms it otherwise would not have done absent the merger. Consequently, the New Agreement might directly impact ICE's rivals' relationship with Trayport on the basis of a strategy determined while under ICE ownership. One example of this impact is provided by oil markets (see paragraphs 3.73 to 3.76 below for more detail): in the absence of the merger Trayport may have sought to satisfy its customers by pushing aggressively in its negotiations with ICE to bring exchange–based oil trading products onto its platform in order to benefit traders and to help ICE's rivals win business in this commodity thereby growing the Trayport platform. However, the New Agreement does not include ICE's oil trading activities and while this may benefit ICE (by protecting these volumes from being challenged), it is to the detriment of traders, who will not have access to these products on the Trayport platform, and to the detriment of ICE's rivals who will find it more difficult to win exchange–based oil trading volumes from ICE than if ICE oil products had been brought onto the Trayport platform. This is a legacy effect of ICE's control of Trayport and represents one route by which ICE has used its control of Trayport to affect Trayport's approach to the market in a way which risks being of detriment to customers.

3.65 Furthermore, these restrictions on Trayport's commercial freedom are exacerbated by the duration of the New Agreement. The New Agreement is a major commercial arrangement which would be in place for a period of up to [✂] years (a period of [✂] years with a [✂]–year extension available [✂]) with Trayport having [✂]. Consequently, any adverse effects would be sustained for a significant period. We note in this regard the conclusion in the PwC Report submitted as part of the Parties' response to the Remittal Provisional Findings that the duration of the New Agreement was not out of line with Trayport's contracts with other customers. However, of the agreements reviewed by PwC for its report, [✂][93] Indeed, not only is the duration [✂] an isolated example, but the circumstances in which it was settled between [✂] and Trayport are also far from normal; [✂].[94]

3.66 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

[93] See PwC Report at paragraph 2.8.
[94] An email [✂].

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 creating a significant and long–lasting restriction on any new owner's commercial freedom to engage on different terms with ICE, and which might have a knock–on detrimental effect on the competition between ICE and its rivals.

- *The risk of ICE obtaining an agreement on terms better than it otherwise would have done had Trayport been under different ownership*

3.67 Given our finding that it is not possible to conclude whether the New Agreement was entered into on an arm's–length basis, as set out above, we are of the view that there is a risk that by leaving the New Agreement in place the SLC will not be effectively remedied. This is because ICE may, as a result of its ownership of Trayport have secured an agreement it otherwise would not have, either at all or on equivalent terms, given the Parties' long history of not cooperating. This might make ICE a more attractive venue in the eyes of traders and harm the relative attractiveness of its rivals (particularly if it were to shift liquidity away from them). It may also assist ICE in gaining or defending 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. Therefore, the New Agreement, as a legacy effect of ICE's control, may prevent our being able to effectively remedy the SLC identified in the Report.

3.68 In their response to our Remittal Provisional Findings, the Parties referred to the CMA's position that it would have no objection to a new owner accepting the terms of the New Agreement.[95] The CAT also stated in the Judgment that '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.'[96] In the Report, our conclusion was that a new owner 'would face no restrictions on approaching ICE to discuss a similar agreement (eg an agreement that would provide the same benefits but on different commercial terms). We considered that a similar agreement could be negotiated between ICE and the new owner of Trayport should this be in their respective commercial interests'.[97] However, because it is not possible to know whether the New Agreement terms would have been the same or materially different if Trayport were under alternative ownership (if it were entered into at all in such

[95] ICE/Trayport response to the provisional findings on the remittal question, dated 9 May 2017, p13.
[96] The Judgment [2017] CAT 6, paragraph 205(2).
[97] The Report, paragraph 12.198.

circumstances), this statement in the Report merely recognised that a new owner might be satisfied with the terms of the New Agreement depending on its commercial objectives and future strategy. This statement was not intended to endorse the New Agreement or any similar agreement, rather it was a recognition that entering into any commercial relationship would be a choice for two independent entities following the divestiture process.

3.69 We consider that the risk that ICE may have obtained better terms than it otherwise would have done had Trayport been under different ownership applies to the totality of the New Agreement, which offers a unique set of services to ICE and contains a series of individually negotiated terms. In turn, this poses a significant risk for competition given Trayport's active role in stimulating competition. However, as set out in our Remittal Provisional Findings, the risk may be particularly acute in relation to the terms considered in paragraphs 3.70 to 3.86 below.

- *Price*

3.70 The fees paid by different venues to Trayport for its services are individually negotiated to reflect the different services provided and the number of users. There is no 'list price' or fixed tariff. We are aware of the fees to be paid by ICE as consideration for the services to be carried out under the New Agreement, and those which its rivals pay. However, in view of the lack of comparable services in other customers' contracts and the fact that price is not agreed in isolation without reference to the Parties' respective bargaining positions and other contractual variables (eg the term of the contract), it is not possible to know whether the price paid would have been equivalent had Trayport been under different ownership even if the current terms are at least comparable to sums paid by other venues.

3.71 Exchange 1 submitted that the extent to which Trayport exercised its bargaining power is highly relevant to the assessment, and in its view Trayport would have required highly punitive terms to reset the relationship between the Parties if it were not under ICE ownership.[98] We do not know whether Trayport would have sought punitive terms but there is at least a risk that certain terms including the price paid would have been different.

3.72 Taking into account the above, the findings of the PwC Report cannot prove either way whether the price was agreed on an arm's–length basis and whether it would have been essentially the same had Trayport been under different ownership. In potentially achieving a lower price than it otherwise

[98] Exchange 1 response to the Provisional Findings, p3.

would have done absent the merger, and in a long–term contract, ICE may be more cost effective. This would provide it with a merger–specific advantage that could unfairly enable it to win liquidity from its rivals and which could detract from its rivals' ability to compete with ICE in the future once liquidity has shifted for certain markets.

- *Scope of the New Agreement*

3.73 Trayport provided data that showed that [✂][99] [✂].[100] [✂], ICE's oil products are excluded from the scope of the New Agreement and these are not available for listing on Joule/Trading Gateway.[101]

3.74 The Parties submitted that ICE is not an outlier on this point because [✂]. Further, they argued that Trayport is not relevant for oil trading which is a factual misunderstanding on behalf of the CMA. ICE also stated that the contract does not oblige venues to make specified contracts/products available and that whilst there is no standard product coverage there is significant product correlation between its available products and EEX's ([✂]% correlation).[102] However, we note Trayport's submission in its remittal hearing that [✂].[103]

3.75 EFET, in its response to the Remittal Provisional Findings, and having received a detailed letter from Trayport on the terms of the New Agreement, stated that it believed a greater number of ICE products/contracts would have been made available if the agreement had been negotiated on an arm's–length basis.[104]

3.76 The evidence available to us indicates that the product scope is agreed following a negotiation between Trayport and each venue customer. Contrary to the Parties' submission, it is well understood by the CMA that Trayport has not historically held a significant presence in oil markets. However, as set out in the Report, Trayport has previously entered into arrangements with ICE's competitors in an attempt to generate liquidity in this asset class in order to grow the size of the Trayport platform. Taking into account this evidence, and the views of third parties, we consider that it is not possible to know whether Trayport would have leveraged its strength in distributing prices for other asset classes in order to gain access to ICE's valuable oil products had it been under different ownership. In such a scenario, and as set out in

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[99] The Report, paragraph 2.2.
[100] [✂].
[101] The Report, paragraphs 3.16 – 3.20.
[102] ICE/Trayport Response to CMA's Provisional Findings on the Remittal Question, dated 9 May 2017, p24.
[103] Trayport remittal hearing transcript, p41, lines 12 to 20.
[104] EFET response to the Provisional Findings, p1.

paragraph 3.64 above, ICE's rivals may have been able to compete more effectively with it across a number of asset classes. As such, ICE may have achieved better terms which are different to those which it would have achieved had Trayport been under different ownership and in turn its rivals may be able to compete less effectively with it.

- *Data multicasting*

3.77 The CMA asked Trayport if the New Agreement allows for ICE data to be made available on a multicasting[105] basis utilising Trayport's software as a service (SaaS) model using Joule Direct. Multicasting enables Trayport to send data to multiple recipients (ie traders) using a single data stream. This allows for a real time data feed for multiple clients and by using multicasting Trayport can save network resources and improve the multicast content transmission. Under the terms of the New Agreement, [✂].[106] [✂].[107]

3.78 The Parties stated that the New Agreement reflects the Parties' agreement at the time to continue using the existing method of data dissemination subject to planned upgrades in the future.[108] As set out above, and in the Remittal Provisional Findings, the New Agreement envisages a possibility that multicasting could be used in the future. However, this would require Trayport to become an ICE data market vendor, and the CMA understands that [✂] prior to such an agreement being entered into.[109]

3.79 As noted in the Report (see paragraph 3.18), Trayport has long held plans to migrate from a deployed model to a SaaS model (see paragraph 3.18 of the Report for details on this migration) and this migration work is ongoing. [✂] Put together, we consider that this evidence indicates that the [✂].[110] [✂] is an important issue for the Trayport business. This further supports our view that Trayport might have required [✂] as part of the New Agreement had it been under different ownership.

3.80 Based on the available evidence, ICE remains an outlier relative to its rivals in terms of the ability of Trayport to multicast its data. While ICE has expressed a willingness to enter into a further Quote Vendor Agreement with Trayport in the future, this remains subject to ICE's satisfaction as to Trayport's capabilities. It is not possible to know whether under different ownership

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[105] 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.
[106] [✂].
[107] Trayport response to CMA Request for information of 18 April.
[108] ICE/Trayport Response to CMA's Provisional Findings on the Remittal Question, dated 9 May 2017, p24.
[109] ICE Main Party Hearing Transcript, p38, lines 4 – 10.
[110] Trayport internal document: [✂].

Trayport would have insisted on being granted multicasting capability as part of the New Agreement, particularly, in circumstances where it had already commenced rolling out its SaaS model using Joule Direct and with the prospective need for multicasting of ICE data already identified (including in the New Agreement). If Trayport had secured this ability it may have been able to offer an enhanced data service to its trader customers, as set out in paragraph 3.77 above.

- *Nature of connectivity*

3.81 The New Agreement also provides for ICE to be connected into [✂]. This bespoke connectivity is a further point of difference to its rivals who typically use BTS,[111] ETS[112] or GV Portal[113] in order to list their venue's prices on Joule/Trading Gateway.

3.82 In response to the Remittal Provisional Findings, the Parties submitted that the method of connectivity simply reflects the Parties' agreement at the time to continue using the existing infrastructure.[114]

3.83 We observe that in the first half of 2016, and following ICE's acquisition of Trayport, Trayport incurred costs updating ICE Link in order to make it more scalable – Trayport spent approximately [✂] and the update took [✂]. It stated that it is common for it to incur some expenses prior to a contract being entered into.[115] However, as the Report notes, [✂][116] [✂], and it is not possible to know whether Trayport would have agreed to incur this expense and scale up ICE Link had it not been under ICE ownership.

3.84 In our remittal hearing with Trayport, we were informed for the first time that Trayport had now changed its strategy and that [✂] and that discussions are underway to provide [✂] but that nothing has yet been agreed. Trayport envisages that these migrations are likely to occur during the course of [✂]. It told us that the rationale for [✂] both Trayport and the venue need to run projects consecutively to implement the changes.[117]

3.85 The evidence provided to the CMA indicates that the discussions on [✂] are currently high level and the timing is uncertain. In the interim, there are clear discernible benefits to ICE from [✂] which it would enjoy from implementation of the New Agreement (were this to happen) and when its rivals are being [✂]

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[111] The Report, paragraphs 3.21 – 3.24.
[112] The Report, paragraph 3.25 – 3.27.
[113] The Report, paragraph 3.25 – 3.27.
[114] ICE/Trayport Response to CMA's Provisional Findings on the Remittal Question, dated 9 May 2017, p27.
[115] Trayport response to CMA further questions, dated 12 May 2017.
[116] The Report, paragraph 6.18.
[117] Trayport response to CMA further questions, dated 12 May 2017.

(at the earliest). ICE has also not had to pay for [✂] which was developed and updated at Trayport's expense. This puts ICE's rivals at a clear disadvantage as compared with ICE because ICE will have [✂].

3.86 Overall, there is a clear and identifiable risk that ICE may have achieved a better combination of terms than it would have achieved had it not owned Trayport. Were the New Agreement not to be terminated and the new owner not allowed to decide what form of replacement agreement (if any) to enter into, ICE's rivals and accordingly broader market outcomes may suffer a competitive detriment and therefore the divestiture of Trayport would not remedy the SLC in as comprehensive a manner as is reasonable and practicable.

- *Trayport's incentives to engage with market participants as a facilitator of competition*

3.87 In our Report, we found that as a result of the merger it is likely that Trayport would no longer seek to promote competition and shape market structures in favour of its venue customers, and in competition with ICE. We placed particular weight on this loss of dynamic competition as part our identification of an SLC in the round and we found that this loss of competition is likely to harm traders by offering them a more limited range of trading opportunities and tools.

3.88 We consider that there is a risk that when the New Agreement was entered into, Trayport would have been less incentivised to engage in strategies and engage with ICE in a manner which would assist ICE's rivals because its strategy was set with ICE's ownership in mind. A new owner may want to develop Trayport's strategy in line with its pre–merger role as a facilitator of competition, including between ICE and its rivals. However, with the New Agreement in place, which we consider to be a legacy effect of ICE's control, it will be restricted in its ability to do so. This means that there is a risk that, having fixed this element of its strategy, Trayport may be less able to engage with ICE in a manner which may assist ICE's rivals, depending on its preferred strategy, or engage with ICE's rivals in partnerships if such a partnership would target ICE's exchange activities.

3.89 We disagree with the Parties' submission that this risk is outside the scope of the New Agreement question. We recognise that, as noted above, the New Agreement was not part of the SLC identified in the Report which focused on Trayport's relations with ICE's competitors. However, insofar as the New Agreement represents an outcome of the control which gave rise to that SLC and which further exacerbates the potential for harm to ICE's rivals and to

market outcomes, we consider that the New Agreement poses a risk to our being able to comprehensively address the SLC.

3.90 We concluded that the New Agreement does create each of the risks in relation to legacy effects identified in paragraph 2.16(a) above and that unless removed, these risks would impact on our ability to ensure the effective remediation of the SLC (via the divestiture of Trayport) in as comprehensive a manner as is reasonable and practicable. Accordingly, although the New Agreement itself did not give rise to an SLC, we conclude that it does present risks to the effective and comprehensive remedying of the SLC identified in the Report and its adverse effects, and therefore it is necessary to terminate the New Agreement as a legacy effect of the control giving rise to the SLC.

The divestiture process

3.91 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 to make a decision on the suitability of any proposed purchaser which ICE put forward as a buyer for the Trayport business.[118]

3.92 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. Therefore, in the Remittal Provisional Findings, we concluded that there was a risk that the New Agreement would reduce the pool of potential purchasers at the outset of the divestiture process as a result of this perception.[119] We also provisionally stated that the pool of suitable purchasers may 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 are submitted and when they have been taken through to the second stage of the divestiture process). We also considered that 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. We considered in the Remittal Provisional Findings that in a worst–case scenario, there was a

[118] See the Report, Figure 13.
[119] 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.

risk that we may be unable to approve any of the shortlisted purchasers submitted by ICE as a prospective purchaser.

3.93 Having considered the evidence further, and in light of the significant interest from a number of third parties in purchasing Trayport, with or without the New Agreement,[120] we are of the view that the risks set out in paragraphs 2.16(b)(i) and 2.16(b)(iii) above are unlikely to materialise. It would be open to prospective purchasers to factor the existence of the New Agreement into the price they offer for Trayport, depending on whether they consider it to be favourable to their interests or not. The evidence indicates that prospective purchasers will continue to be interested in acquiring Trayport whether or not the New Agreement is included unless the terms of the New Agreement are so vexatious as to immediately threaten Trayport's viability, which we do not consider to be the case. Accordingly, we have also ruled out the worst–case scenario that no suitable purchaser will be found.

3.94 We consider that the risk that 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 or a similar replacement agreement (set out in paragraph 2.16(b)(ii) above) remains. As set out above, ICE will control the divestiture process[121] and this means that ICE decides which prospective purchasers to accept at the various stages of the sales process and ultimately which purchasers to put forward for approval by the CMA. However, it is for the CMA to approve any eventual purchaser taking into account the purchaser suitability criteria set out in the CMA's guidance.[122] More specifically, as set out in the Report, and in Schedule 1 of the Final Order,[123] the CMA is required to ensure that any eventual purchaser is independent of ICE:

> (a) Independence – The Potential Purchaser should have no significant connection to ICE that may compromise the Potential Purchaser's incentives to compete with ICE or provide incentives to favour ICE over other exchanges and clearing houses, for example, an equity interest, shared directors, reciprocal trading relationships or continuing financial assistance.[124]

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[120] Although we cannot know for certain, as potential purchasers have expressed interest in acquiring Trayport during the CMA's consideration of this remittal, we consider that such purchasers must have done so in recognition of the uncertainty as to whether the New Agreement will be in place at the point of divestiture.
[121] Subject to supervision by a monitoring trustee and a reserved ability for the CMA to appoint a divestiture trustee in the event that no suitable purchaser is identified by ICE.
[122] CC8, paragraph 3.15.
[123] Final Order.
[124] Final Order, Schedule 1.

3.95 We will therefore scrutinise any existing or proposed relationship between ICE and any prospective purchaser put forward by ICE as part of our assessment of independence which is a part of the overall assessment of the suitability of the purchaser. Specifically, this will include scrutinising existing or proposed reciprocal trading relationships. In light of this, we consider that the risk of ICE limiting the pool of purchasers identified in the Remittal Provisional Findings would only present a risk to the effective remediation of the SLC, if it were to result in the CMA ultimately being unable to approve any of the purchasers put forward by ICE when it came to assessing their suitability against the criteria set out in the guidance. In view of the number of interested purchasers we consider this risk to be minimal.

3.96 Finally, we note ICE's submission that terminating the New Agreement is likely to generate a risk to the divestiture process by creating uncertainty as to the Parties' future relationship. We do not accept this. Based on the evidence that purchasers have already expressed interest in spite of the uncertainty around the New Agreement, and in particular in light of ICE's expressed view that it was 100% certain that it would enter into an agreement with a new owner if it were terminated,[125] we consider that whether or not the New Agreement is included as part of a sales package, a sufficient number of suitable purchasers are likely to be interested.

Conclusion

3.97 We first considered the circumstances in which the New Agreement was entered into. As set out in the Report, ICE is the leading European utilities exchange and Trayport is the primary front–end screen for traders active in European utilities trading and any cooperation between them forms an important part of their individual commercial strategies. In circumstances where Trayport could walk away from an agreement with ICE, ie under different ownership, it is not clear whether it would have leveraged its position as a critical input into European utilities trading to achieve different commercial terms or, indeed, whether it would have ultimately entered into any agreement at all.

3.98 We found that the PwC Report confirms the CMA's position that the New Agreement provides a unique set of services and contains a series of individually negotiated commercial terms resulting from five months of negotiations, including: the consideration paid, the term, termination rights, scope of the products to be listed on the Trayport platform, the nature of connectivity into the Trayport platform, and a range of other terms. The PwC

[125] ICE remittal hearing transcript, p8, lines 24 to 25 and p9, lines 1 to 6.

Report also shows that Trayport's other venue contracts are different from each other and therefore there is no real benchmark against which to assess the New Agreement. In such circumstances, a detailed review of the individual terms of the New Agreement is not determinative for the assessment as to whether the same commercial terms would have been agreed absent the merger especially when looking at the New Agreement as a whole. Accordingly, the PwC Report is not evidence of whether these terms would have been accepted had Trayport been under different ownership.

3.99 Overall, and in the circumstances of this case, we remain of the view that it is not possible to conclude that the New Agreement was entered into on an arm's–length basis for four 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, and while some of these submissions from ICE's rivals may have been commercially motivated, we place some weight on this evidence.

(c) The New Agreement reflects the Parties' commercial strategy at the time it was entered into and when Trayport was under ICE ownership.

(d) In a situation where the New Agreement offers a unique set of services and contains a series of individually negotiated terms, comparisons with other analogous Trayport customer contracts in the PwC Report are not informative as to whether the New Agreement was entered into on an arm's–length basis.

3.100 With respect to our assessment of the legacy effect risks posed by the New Agreement to our ability to comprehensively and effectively remedy the SLC identified, we have concluded that the New Agreement presents the following risks:

(a) The New Agreement might restrict the commercial freedom of Trayport's future owner and its ability to set its own future strategy towards ICE, which is exacerbated by setting the Parties' commercial relationship for a period of up to [✂] 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).

(b) The New Agreement might unfairly benefit ICE as a result of it receiving better commercial terms compared with terms that it would have achieved

had it not owned Trayport when entering into the New Agreement (assuming the New Agreement would have been entered into at all in such circumstances).

(c) The New Agreement might affect Trayport's (and its new owner's) incentives to act as a facilitator playing an important role in enabling and promoting competition between trading venues and between clearinghouses.

3.101 With respect to the divestiture process risks we identified, in light of the significant interest in purchasing Trayport from third parties we did not consider that these risks would result in the CMA being unable to approve a suitable purchaser. However, we concluded that 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 or a similar replacement agreement. We are of the view that this risk can be successfully dealt with by ensuring that any eventual purchaser of the Trayport business is independent of ICE as defined in the Final Order.

3.102 In the round, we 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 legacy effects, independently provide a sufficient basis on which to require a remedy in relation to the New Agreement provided such remedy is proportionate in the circumstances.

4. Effectiveness of alternative remedies

4.1 In the Report we considered that outright termination of the New Agreement was necessary in order to implement an effective remedy. We remain of the view that immediate termination of the New Agreement would mitigate the risks to an effective remediation of the SLC that we have identified above.

4.2 In considering whether other effective, but less intrusive measures than termination of the New Agreement are available to the CMA, 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…

4.3 The CAT added that 'In particular, the CMA will need to consider whether these [alternative] proposals would affect the effectiveness of the divestiture remedy'.[126]

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

Parties' submissions

4.5 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.

4.6 This position contrasts with the Parties' submission of 1 June 2016, made during the merger inquiry, that the roll–out process for the New Agreement is not one that lends itself to straightforward suspension.[127] In contrast, during the appeal process, ICE submitted that a temporary implementation was feasible and that 'the difficulties faced by Trayport described in the 1 June 2016 submission 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'.[128] In the submission made during the appeal process, no indication was given that following implementation of the New Agreement it would be costly or difficult

[126] The Judgment [2017] CAT 6, paragraph 224.
[127] 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.
[128] The Parties' submission in NoA2.

to terminate it, so long as Trayport customers were made aware of the possibility.

4.7 The Parties did not make any submissions in their response to the Remittal Provisional Findings on the question of alternative remedies.

Third party submissions

4.8 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, any new owner should be able to renegotiate it or terminate it without penalties.[129]

Our assessment

4.9 We note that in the event that a new owner decided that the terms were not in its commercial interests and required termination of the New Agreement after temporary implementation, this would result in the removal of ICE products 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 direct costs of immediate termination are very low (see our assessment below) whereas the potential costs of temporary implementation would be higher.

4.10 We also consider that each of the risks to our implementation of an effective remedy which are identified above applies equally to a scenario where the New Agreement is temporarily implemented with an option for a future purchaser to terminate it. This is because the risks that we have identified above would materialise for the temporary implementation period. Moreover, 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.

4.11 Finally, and as set out above, 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

[129] Trading Company C remittal submission.

temporary implementation with an option to terminate, any prospective buyer's hand would be forced in this regard.

Conclusion on effectiveness

4.12 We 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 for the SLC identified in the Report.

5. The cost of remedies and proportionality

5.1 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 next considered whether termination would be proportionate in the circumstances.

5.2 In applying the principle of proportionality, the CMA will select the least costly remedy, or package of remedies, that it considers to be effective. In this case, as noted above, the CMA has concluded that termination of the New Agreement is the only effective remedy in the circumstances. However, 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 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.[130]

Parties' submissions

5.3 In a submission dated 4 November 2016, informing the CMA of their intention to implement the New Agreement (see the chronology above, paragraph 2.2), 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 was as follows:

(a) Trayport:

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

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[130] CC8, paragraphs 1.8 – 1.9.

(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 [✂]–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, which benefit from additional connectivity that is not available to ICE – thereby in particular reinforcing EEX's incumbency advantage in German power.

(c) Customers:

(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.

5.4 In response to our Remittal Provisional Findings, the Parties repeated their position that the New Agreement was beneficial to Trayport and to ICE (and its customers).[131] They cited evidence submitted by traders (and referred to in paragraphs 3.33 to 3.38 above) which demonstrated support for the implementation of the New Agreement provided that it did not contain terms that would unfairly benefit ICE and/or that would constrain Trayport's commercial freedom.

5.5 The Parties also stated that the CMA wrongly discounted in its Remittal Provisional Findings the detrimental impact already being felt by the Parties and end users as a result of the continued delay to the implementation of the New Agreement.[132] It said that the effect of the delay was to reduce ICE's

[131] ICE/Trayport Response to CMA's Provisional Findings on the Remittal Question, dated 9 May 2017, p15.
[132] ICE/Trayport Response to CMA's Provisional Findings on the Remittal Question, dated 9 May 2017, p16.

ability to compete on an equal footing with other trading venues and clearinghouses, and in this regard it submitted evidence that [✂].

5.6 At its remittal hearing, Trayport raised for the first time a further risk to the Trayport business.[133] It submitted that if the New Agreement were terminated, Trayport would [✂].[134,135] It stated that [✂].[136] Trayport stated that waiting until after the end of any divestiture period would risk it being unable to implement the necessary changes prior to MiFID II coming into force in January 2018.[137]

5.7 In response to the CMA's questions subsequent to the Trayport remittal hearing, Trayport further clarified its view on [✂]. It stated that not having an STP Link from Trayport's BTS system to ICE's clearinghouse would mean that its brokers will have to manually submit block futures trades[138] for clearing at ICE's clearinghouse and [✂]. It stated that this means [✂]. In its view, this put at risk [✂] and in the long term could risk [✂].

5.8 We asked ICE how it intended to ensure that its customers will be MiFID II compliant for OTC block futures transactions cleared with ICE. It confirmed that it is taking its own steps to ensure compliance: '[…] ICE is *inter alia* making changes to its APIs (Order Routing, Trade Capture, Impact Multicast and Private Order Feed) and screens (ICEBlock and WebICE) to support the additional data required under MiFID II/MiFIR.'[139] ICE also stated that for block trades, brokers will need to ensure they are able to facilitate a workflow that allows traders to provide relevant data to the venue (eg ICE). This could be STP or manual submission with the former being the substantially more elegant solution.[140]

Third party submissions

5.9 We have set out below third party responses which address costs arising from termination of the New Agreement and which can be categorised as follows:

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[133] This risk was not identified in the Parties' written response to the Remittal Provisional Findings.
[134] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.
[135] Trayport main party hearing transcript, p6, lines 3 – 6.
[136] Trayport main party hearing transcript, pp18 – 19 and 22.
[137] Trayport main party hearing transcript, p7, lines 16 – 17.
[138] A 'block future trade' is a one–off trade, which may be for very large volumes, and which is privately negotiated rather than anonymously matched, distinguishing it from standard exchange trades. The trade is first arranged off exchange by the counterparties with the assistance of a broker, an in accordance with the exchange's special block trading rules. It is then registered on the exchange and cleared normally. It is subsequently equivalent to any other standardised futures trade made by the parties. Block trades are used to allow a large trade to be made and cleared at a single reasonable price without distorting the market and also to allow private negotiation with a particular known counterparty, combining the advantages of normal exchange and broker trading.
[139] ICE Response to CMA request for information dated 5 June 2017.
[140] ICE Response to CMA request for information dated 5 June 2017.

(i) the prospects of executing a replacement agreement; (ii) the opportunity costs of additional ICE products not being listed on Joule/Trading Gateway; and (iii) risks and costs associated with MiFID II compliance.

- *Prospects of executing a replacement agreement*

5.10 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'.[141]

5.11 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)'.[142]

5.12 In its response to the CMA's Conduct of the Remittal Notice, an Independent Software Vendor 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'.[143]

- *Opportunity costs*

5.13 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

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[141] ICAP remittal submission.
[142] Exchange 1 remittal submission.
[143] 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.[144]

5.14 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 the New Agreement to be implemented.[145]

5.15 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.

[144] See views of Trading Company B.
[145] See views of Trading Company C.

5.16 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.[146]

- *MiFID II*

5.17 We requested views from brokers on their reporting obligations under MiFID II with respect to OTC block futures trades which are sent to ICE's clearinghouse. One broker told us that the venue for execution of block futures trades is the exchange itself rather than the broker; the broker's role is in the arrangement of the transaction. It stated that this was critically important to any assessment of the risks of being non–compliant with MiFID II. It stated that it currently submitted block futures for clearing at ICE's clearinghouse using ICE's own 'ICE Block' software.[147] It did not view MiFID II as impacting its role in block futures trading and that this was consistent for ICE and all other exchanges.

5.18 All other brokers we spoke to confirmed that they either currently routed block futures trades for clearing at ICE's clearinghouse using ICE Block or via an alternative STP link, and that these were fit for purpose. Each of these brokers stated that they were not yet aware of what consequences MiFID II would have on their requirements for block futures trading.

Our assessment

5.19 We note that the CAT stated in the Judgment with respect to the prospects of a replacement agreement being concluded:[148]

> 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

[146] RWE Supply &Trading remittal submission.
[147] https://www.theice.com/technology/ICE–Block.
[148] The Judgment [2017] CAT 6, paragraph 205(2).

> 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.

5.20 We agree with the CAT that the cost of terminating the New Agreement to the Parties and to any of their wider interests is likely to be extremely modest.[149] As the New Agreement has been suspended since it was signed in May 2016 (see chronology above, paragraph 2.2) neither party has established any current business activity on the basis of the New Agreement and, as such, is unlikely to incur any material direct costs as result of its termination.

5.21 We note the Parties' submissions and the submission from five 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 additional ICE products. 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 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 following conclusion of the sale. As such, while we recognise that there are some limited opportunity costs associated with termination of the New Agreement we do not consider that this makes termination disproportionate in view of the risks to the effective remediation of the SLC that we have identified.

5.22 We also note ICE's submission that it has been unable to [✂]. We note that ICE has historically not achieved any [✂] and, as such, the cost is one of potentially lost opportunity. Per the above, we consider that 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 any such opportunity cost will be short lived.

5.23 At its main party hearing, ICE flagged that it was also [✂] product classes and that, in its view, this was as a result of not being able to implement the New Agreement. The Parties provided further evidence to substantiate this claim.[150] However, we note that there are a number of limitations as to the weight we can place on this evidence: (i) it relates to only two products whereas ICE and EEX compete head to head in many more; (ii) the available

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[149] See paragraph 3.68 for clarification on the CMA's views regarding a replacement agreement.
[150] Response to CMA request for Information of 12 May 2017.

evidence covers only a relatively short timeframe (three months); (iii) it is not clear that we can attribute this loss to the suspension of New Agreement as opposed to a number of other factors and in a context where certain of ICE's products have not been listed on Joule/Trading Gateway for many years; and (iv) the scale of the loss was relatively low when compared with ICE's high market share.[151] To the extent that any such loss is attributable to the suspension of the New Agreement, which we are unable to judge, we are again of the view that the magnitude of any losses would be low and it would be for a short–term period should ICE and the new owner enter into an agreement after the divestiture of Trayport.

5.24 Finally, we considered the risks posed to the Trayport business by the MiFID II issue, which had been raised by Trayport for the first time at the remittal hearing.[152] While the evidence from brokers indicated that ensuring compliance with MiFID II was the responsibility of the exchange, Trayport stated [✂]. We considered this risk and discussed with Trayport whether there were alternatives to [✂] which would obviate the risk it had identified. We understood from Trayport that the MiFID II compliance issue concerned only one element of the New Agreement, which was the provision of the STP link to ICE's clearinghouse.

5.25 Although the likelihood of [✂] appeared to be low, we considered that the impact could be high if this risk did materialise. In view of this, we considered that an appropriate and proportionate response would be to grant Trayport and ICE a derogation from the relevant provisions of the Final Order permitting them to conduct development discussions regarding establishing STP Link connectivity, carry out technical work and enter into discussions regarding the terms of an agreement subject to CMA approval. This derogation was limited to the purpose of allowing Trayport to carry out actions which are necessary to ensure its [✂] customers are MiFID II compliant as of January 2018. Having granted this derogation, we therefore consider that we have provided the Parties with the opportunity to avert any of the costs relating to MiFID II compliance which might be incurred if the New Agreement were to be terminated.

Conclusion

5.26 In the absence of any material direct costs that 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 view

[151] [✂].
[152] This issue was not raised in the Parties' written response to the Remittal Provisional Findings.

that it is reasonable and proportionate in the circumstances to require its termination.

6. Conclusion on the New Agreement question

6.1 As set out in paragraph 2.16, we considered two categories of risk: (i) risks arising from the New Agreement as a legacy effect of ICE's acquisition of Trayport; and (ii) risks arising from the New Agreement which would impact the divestiture process.

6.2 With respect to the legacy effect risks, we first considered the circumstances in which the New Agreement was entered into. We found that it is not possible to conclude whether the New Agreement was entered into on an arm's–length basis 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 it is not possible to reach a conclusion did impact on our assessment of the potential risks.

6.3 We then considered the legacy effect risks to an effective remediation of the SLC resulting from the New Agreement and identified the following:

(a) The New Agreement might restrict the commercial freedom of Trayport's future owner and its ability to set its own future strategy towards ICE, which is exacerbated by setting the Parties' commercial relationship for a period of up to [✂] 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).

(b) The New Agreement might unfairly benefit ICE as a result of it receiving better commercial terms compared with terms that it would have achieved had it not owned Trayport when entering into the New Agreement (assuming the New Agreement would have been entered into at all in such circumstances).

(c) The New Agreement might affect Trayport's (and its new owner's) incentives to act as a facilitator playing an important role in enabling and promoting competition between trading venues and between clearinghouses.

6.4 If any of these legacy effect risks were to materialise, it 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 or defending 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. This means that the New Agreement,

which was brought about during the period of ICE's control of Trayport, could result in a number of indirect effects which risk our ability to comprehensively and effectively remedy the SLC identified in the report.

6.5 With respect to the divestiture process risks, we considered whether the New Agreement presents risks to our ability to implement an effective divestiture process. In view of the significant interest in purchasing Trayport from third parties, we did not consider that the divestiture process risks posed by the New Agreement would result in the CMA being unable to approve a suitable purchaser for the Trayport business. However, we found that the New Agreement does present a risk that ICE may be incentivised to sell to a buyer who in advance of the sale has agreed to enter into the New Agreement or a replacement agreement on essentially the same terms. In light of the CMA's powers to ensure that any purchaser of the Trayport business will be independent of ICE as part of the divestiture process, we consider that this risk can be addressed at that time.

6.6 Overall, we concluded that the evidence shows that the risks identified, 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 have regard to the need 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 concluded that this provides a sufficient basis on which to require the termination of the New Agreement.

6.7 We considered whether there were any effective alternatives to immediate termination of the New Agreement but found that the only effective remedy to mitigate the risks posed by the New Agreement is its immediate termination.

6.8 The adverse effects resulting from the New Agreement could be significant and long–lasting, which can be contrasted with there being no material direct costs, and only short–term opportunity costs, which would result from its termination. We consider that the risks raised by Trayport in the context of its customers' obligation under MiFID II have been effectively dealt with by derogation to the initial enforcement order, which ensures that Trayport is able to do what is strictly necessary in order to protect its business from these risks and to ensure [✂]. We therefore conclude that termination is reasonable and proportionate in the circumstances.

6.9 Taking into account the foregoing, we 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.

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. On 25 April 2017, we published a non-confidential version of the remittal provisional findings report, appendices and glossary on the case page.

7. On 11 May 2017, we held remittal hearings with ICE and Trayport separately.

8. In May 2017, the CMA received the Parties' response to the remittal provisional findings and four responses to the remittal provisional findings report from a utility company, an exchange, an independent software vendor and a trade association.

9. We published a non-confidential version of the final report on 7 July 2017.

10. We would like to thank those who have assisted us in dealing with the remittal.

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 remittal report document.

2. This appendix 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

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

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

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 is appointed as Managing Director of Utility Markets at ICE.

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

   (c) 29 April 2015: BGC announces its 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'.

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

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[3] The Judgment [2017] CAT 6, 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.

(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]

13. In response to the request for contemporaneous documents, the Parties provided two emails: an email from Nick Langford (Trayport) to Gordon

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[7] Witness statement of Kevin Heffron.
[8] The Judgment [2017] CAT 6, 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).

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 does not necessarily demonstrate why the final agreed terms of the New Agreement, which were concluded in May 2016 when Trayport had been

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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 [2017] CAT 6, paragraph 136.

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 ICE has dropped out of the process. Is this

[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).

> 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 discussions that it was ICE's intention that a new agreement [New

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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.

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

[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 on

[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').

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: *(i)* 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 *(ii)* Section 6 of the Provisional Findings contained an almost identical definition of the New Agreement, but with the following additional details that (emphasis added): *(i)* '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 *(ii)* '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 [sic] 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.[199]

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.
CAT Judgment / the Judgment	The CAT judgment of 6 March 2017, setting out the CAT's conclusion on each of the grounds of review, see Intercontinental Exchange, Inc. v Competition and Markets Authority and Nasdaq Stockholm AB ([2017] CAT 6).
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.
EEA	European Economic Area.

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

EET	Eneco Energy Trade B.V.
EEX	European Energy Exchange AG.
EFET	European Federation of Energy Traders.
ETS	GlobalVision Exchange Trading System. **Trayport back-end system** software to facilitate **exchange** trading activities.
EUA	Dutch power and emissions market.
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.
GFI	GFI Group, Inc. a wholly-owned subsidiary, and business division, of **BGC**.
Griffin Markets	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.
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**.
MiFID II	Markets in Financial Instruments Directive II 2014.

Nasdaq	Nasdaq Inc. An **exchange**.
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**).
NoA1	An application from **ICE** to the **CAT** pursuant to section 120 of the **Act** against **the Report,** dated 11 November 2016.
NoA2	A further application from **ICE** to the **CAT** pursuant to section 120 of the **Act** against written directions which had been issued under the initial enforcement order dated 11 January 2016 requiring **ICE** and **Trayport** to cease and suspend the implementation of the **New Agreement**, dated 17 November 2016.
Parties	**ICE** and **Trayport** are together referred to as the 'Parties'.
PwC	PricewaterhouseCoopers International Limited.
Remittal Provisional Findings	The CMA's provisional findings on the new agreement question issued on 25 April 2017.
RWEST	RWE Supply & Reading GmbH.
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.
STP Link	Straight-through-processing link.
The CAT Judgment	The **CAT** judgment setting out its conclusion on each of the grounds of review, dated 6 March 2017.
The Group	The Group of CMA panel members appointed to produce a Report on the merger.
The PwC Report	A Report commissioned by the Parties and prepared by **PwC**.

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**.
WebICE	**ICE**'s front-end software through which **traders**, brokers, financial institutions and utilities can access **ICE** products, supplied to brokers, financial institutions and utilities for free.