

## **INTERCONTINENTAL EXCHANGE, INC. AND TRAYPORT MERGER INQUIRY ORDER 2017, No 2**

### **Background**

1. On 3 May 2016, the Competition and Markets Authority (CMA), exercising its powers under section 22 of the Enterprise Act 2002 (the Act) referred the completed acquisition by Intercontinental Exchange, Inc. (ICE) of Trayport, Inc. and GFI TP Ltd., including their subsidiaries (together Trayport), (the Merger) for further investigation and report by a group of CMA panel members.
2. GFI TP Ltd changed its name to Trayport Holdings Limited on 10 August 2016 pursuant to a resolution of its members and is the parent company of Trayport Limited.
3. On 11 January 2016, the CMA issued an Initial Enforcement Order to ICE in respect of the Merger pursuant to section 72 of the Act to prevent further integration of Trayport, and to ensure that no action is taken pending final determination of any reference under section 22 of the Act which might prejudice that reference or impede the taking of any action by the CMA under Part 3 of the Act which might be justified by the CMA's decision on the reference.
4. The CMA issued directions to ICE under the Initial Enforcement Order:
  - (a) on 18 May 2016 to appoint a monitoring trustee; and
  - (b) on 10 November 2016 that ICE and Trayport must suspend the implementation of certain agreements, as subsequently defined in a variation to the directions on 28 November 2016.
5. The CMA published *Intercontinental Exchange and Trayport: A report on the completed acquisition by Intercontinental Exchange, Inc. of Trayport* (the Report) on 17 October 2016. In the Report, the CMA concluded, in accordance with section 35 of the Act, that:
  - (a) a relevant merger situation has been created as a result of the Merger;
  - (b) the creation of that situation has resulted or may be expected to result in a substantial lessening of competition (SLC) within the market for the supply

of trade execution services to energy traders and trade clearing services to energy traders in the EEA, including to UK based customers;

- (c) the CMA should take action 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; and
  - (d) the full divestiture of Trayport by ICE would be an effective and proportionate remedy to the SLC and any adverse effects which have resulted from, or may be expected to result from, the SLC.
6. ICE made an application to the Competition Appeal Tribunal (the CAT) pursuant to section 120 of the Act against the Report on 11 November 2016 and on 17 November ICE made an application to the CAT pursuant to section 120 of the Act against the direction issued by the CMA on 10 November 2016.
  7. The CMA published a notice on 30 November 2016 of its intention to make an order to remedy the adverse effects on competition that it had identified. The CMA published the order on 5 January 2017 (the January 2017 Order) giving effect to the findings in the Report. The January 2017 Order provided that the time period within which the obligations set out in Articles 2 and 10 had to be met would not start to run until the day following the date on which proceedings in the CAT were finally determined. The Initial Enforcement Order ceased to be in force on the date of the January 2017 Order in accordance with sections 72 and 79 of the Act.
  8. On 6 March 2017, the CAT handed down its judgment setting out its conclusion on each of the grounds of review (the Judgment). The full divestiture of Trayport by ICE was upheld by the CAT as being an effective and proportionate remedy to the SLC. However, the question of whether ICE and Trayport should be required to terminate the New Agreement (as defined in the Report) was remitted to the CMA for reconsideration (the New Agreement question). In accordance with an order of the CAT dated 24 March 2017, the following parts of the January 2017 Order were quashed: (i) the words 'or the date for termination of the New Agreements specified in Article 10.1' as occurring twice at Article 6.1 of the January 2017 Order; and (ii) Article 10 of the January 2017 Order in its entirety.
  9. The CMA's Report on the New Agreement question (the Remittal Report) was published on 7 July 2017. The CMA concluded that ICE and Trayport should be required to terminate the New Agreement.
  10. This order (the Order) updates and supersedes the January 2017 Order to reflect the Judgment and the CMA's findings in the Remittal Report.
  11. On the making of this Order the reference has now been finally determined.

## THE ORDER

The CMA makes this Order in performance of its duty under section 41 and in exercise of its powers under section 84(1), (2) and (3), section 86(1) to (5), section 87 and paragraphs 2, 11, 13, 19, 20C, 21, 22 of Schedule 8 to the Enterprise Act 2002 (the Act), for the purpose of remedying, mitigating or preventing the SLC specified in the Report and any adverse effects which have resulted from, or may be expected to result from, the SLC specified in the Report.

### 1. Title, Commencement, application and interpretation

- 1.1 The title of this Order is 'Intercontinental Exchange, Inc. and Trayport Merger Inquiry Order 2017, No 2'.
- 1.2 This Order comes into force on the Commencement Date. This Order supersedes the January 2017 Order.
- 1.3 This Order may be varied or revoked by the CMA under section 84 of the Act.
- 1.4 This Order applies to Intercontinental Exchange, Inc. and its subsidiaries (ICE), Intercontinental Exchange International, Inc., Trayport Holdings Limited, and any person who is an Affiliate with respect to ICE, and to a Divestiture Trustee or Hold Separate Manager appointed under this Order.
- 1.5 The Interpretation Act 1978 shall apply to this Order as it does to Acts of Parliament.
- 1.6 The Schedules form part of this Order.
- 1.7 The purpose of this Order is to give effect to the Report and this Order shall be construed accordingly. In the event of conflict between this Order and the Report, this Order prevails.
- 1.8 Any words or expressions used in this Order or the recitals of this Order shall, unless otherwise defined herein and/or the context otherwise requires, have the same meaning as in the Act and the Report.
- 1.9 References to any statute or statutory provision shall be construed as references to that statute or statutory provisions as amended, re-enacted or modified, whether by statute or otherwise.
- 1.10 In this Order:

**Act** means the Enterprise Act 2002;

**Affiliate** means a person is an affiliate of another person if they or their respective enterprises are to be regarded as being under common control for the purposes of section 26 of the Act;

**Approved Purchaser** means a Potential Purchaser which the CMA considers to satisfy the Suitable Purchaser Criteria and approves in accordance with Article 2.3;

**CMA** means the Competition and Markets Authority;

**Commencement Date** means the date on which this Order is made by the CMA;

**Compliance Statement** means a statement provided by ICE in accordance with Article 4 and Schedule 5;

**Decision Date** means the day following the date on which the Remittal Report is published by the CMA;

**Directions** means the directions issued by the CMA under the Initial Enforcement Order on 10 November 2016 directing ICE not to implement the New Agreements;

**Divestiture Period** means the period starting with the Decision Date and ending [✂] after the Decision Date and, in the event of an extension under Article 6, means the period as extended;

**Divestiture Shares** means all shares in Trayport Limited and Trayport, Inc.;

**Divestiture Trustee** means any person appointed in accordance with Article 7;

**Divestiture Trustee Mandate** means the mandate approved by the CMA given by ICE to the Divestiture Trustee on terms specified by the CMA in directions issued to appoint a Divestiture Trustee pursuant to Article 7;

**Divestiture Trustee Obligation** means the obligation on the Divestiture Trustee to bring about an Effective Divestiture of the Divestiture Shares;

**Effective Divestiture** means the completed divestment of the Divestiture Shares to an Approved Purchaser;

**Hold Separate Manager** means any person appointed in accordance with Article 8;

**Hold Separate Manager Mandate** means the mandate approved by the CMA given by ICE to the Hold Separate Manager on terms specified by the CMA in directions issued to appoint a Hold Separate Manager pursuant to Article 8;

**Hold Separate Manager Obligation** means the obligation on the Hold Separate Manager to exercise day-to-day management and control of Trayport so as to preserve and, if necessary, restore effective competition in the markets affected by the Merger;

**ICE** means Intercontinental Exchange, Inc. and all of its subsidiaries;

**Initial Enforcement Order** means the order made by the CMA on 11 January 2016 pursuant to section 72(2) of the Act;

**Intercontinental Exchange Business** means the business run by ICE with the exclusion of Trayport;

**January 2017 Order** means the order published by the CMA on 5 January 2017 giving effect to the findings in the Report;

**Merger** means the acquisition by Intercontinental Exchange, Inc. of Trayport, Inc. and GFI TP Ltd., including their subsidiaries;

**Monitoring Trustee** means the person appointed by ICE pursuant to the directions issued by the CMA on 18 May 2016, under the Initial Enforcement Order and whose appointment will continue in accordance with Article 5;

**Monitoring Trustee Mandate** means the mandate containing the terms of appointment of the Monitoring Trustee, dated 25 May 2016;

**New Agreements** means the Interface Development and Support Agreement between Intercontinental Exchange Holdings, Inc. and Trayport Limited dated 10 and 11 May 2016; and the Trade Registration Development Agreement between Trayport Limited, Intercontinental Exchange, Inc., ICE Endex Derivatives B.V., ICE Endex Gas B.V. and ICE Endex Gas Spot Limited, dated 11 May 2016;

**Notice** means a written communication sent by post, personal delivery or, with prior consent of the recipient, by email;

**Potential Purchaser** means a proposed purchaser of the Divestiture Shares put forward by ICE for approval by the CMA in accordance with Article 2, and includes any members of a consortium or connected entities beneficially interested in the purchase of the Divestiture Shares;

**Pre-Approval Agreement** means any agreement between one or more of ICE, Intercontinental Exchange International, Inc. and Trayport Holdings Limited, and an Approved Purchaser for the divestment of the Divestiture Shares which is conditional on CMA approval;

**Relevant Information** has the meaning given in Article 11.2;

**Remittal Report** means the report of the CMA entitled *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* published on 7 July 2017;

**Report** means the report of the CMA entitled *Intercontinental Exchange and Trayport: A report on the completed acquisition by Intercontinental Exchange, Inc. of Trayport* published on 17 October 2016;

**Subsidiary** has the meaning given by section 1159 of the Companies Act 2006;

**Suitable Purchaser Criteria** means the criteria contained in Schedule 1 of this Order and shall be construed as consistent with and giving effect to paragraphs 12.40 and 12.52-12.54 of the Report;

**Trayport** means Trayport Limited and Trayport, Inc.;

**Trayport Business** means the business run by Trayport; and

**Working Day** means any day which is not a Saturday, Sunday, Christmas Day, Good Friday or bank holiday in any part of the United Kingdom under the Banking and Financial Deadlines Act 1971.

## 2. Divestiture

- 2.1 ICE, Intercontinental Exchange International, Inc. and Trayport Holdings Limited shall within the Divestiture Period divest the Divestiture Shares to an Approved Purchaser pursuant to a Pre-Approval Agreement. Following the Decision Date, and as soon as reasonably practicable, ICE shall provide the CMA, for its comment and approval, ICE's proposed timetable setting out the key milestones to complete Effective Divestiture within the Divestiture Period. ICE shall notify the CMA as soon as reasonably practicable of any material changes or amendments to the timetable as approved by the CMA.
- 2.2 ICE shall submit to the CMA for approval a list of one or more Potential Purchasers of the Divestiture Shares in accordance with the timetable as approved by the CMA under Article 2.1.

- 2.3 The CMA shall, following receipt from ICE of a list of Potential Purchasers, and such information in relation to Potential Purchasers as the CMA may reasonably require, engage with the Potential Purchasers and confirm to ICE which, if any, of the Potential Purchasers are Approved Purchasers.
- 2.4 Prior to entering into a Pre-Approval Agreement with an Approved Purchaser, ICE shall submit the Pre-Approval Agreement to the CMA in accordance with Article 11 and the timetable as approved by the CMA under Article 2.1.
- 2.5 In accordance with the timetable as approved by the CMA under Article 2.1, the CMA shall, following further engagement with the relevant Approved Purchaser if necessary, assess any Pre-Approval Agreement submitted by ICE, and approve a Pre-Approval Agreement which it considers would effectively remedy the substantial lessening of competition identified in the Report.

### **3. Measures to maintain the Trayport business**

- 3.1 Except with the prior written consent of the CMA, ICE and Trayport Holdings Limited shall not, from the Commencement Date until Effective Divestiture, take any action that might prejudice the Effective Divestiture, the CMA's decisions in the Report and the Remittal Report or otherwise impair the CMA's ability to take such action 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 findings, including any action which might:
  - 3.1.1 lead to the integration of the Trayport Business with the Intercontinental Exchange Business;
  - 3.1.2 transfer the ownership or control of the Trayport Business or any of its subsidiaries; or
  - 3.1.3 otherwise impair the ability of the Trayport Business to compete independently in any of the markets affected by the Merger.
- 3.2 Further and without prejudice to the generality of Article 3.1, ICE and Trayport Holdings Limited shall at all times until Effective Divestiture procure that, except with the prior written consent of the CMA:
  - 3.2.1 the Trayport Business is carried on separately from the Intercontinental Exchange Business and the Trayport Business's separate sales or brand identity is maintained;

- 3.2.2 the Trayport Business is maintained as a going concern and sufficient resources are made available for the development of the Trayport Business on the basis of its pre-merger business plans;
- 3.2.3 except in the ordinary course of business, no substantive changes are made to the organisational structure of the Trayport Business;
- 3.2.4 no changes have been made to the organisational structure of the Intercontinental Exchange Business which would alter, impede or frustrate the implementation, carrying out or enforcement of the Order;
- 3.2.5 except in the ordinary course of business, no substantive changes are made to the management responsibilities within the Trayport Business;
- 3.2.6 the nature, description, range and quality of goods and/or services supplied by the Trayport Business are maintained and preserved;
- 3.2.7 except in the ordinary course of business for the separate operation of the two businesses:
  - 3.2.7.1 all of the assets of the Trayport Business are maintained and preserved, including facilities and goodwill;
  - 3.2.7.2 none of the assets of the Trayport Business are disposed of; and
  - 3.2.7.3 no interest in the assets of the Trayport Business is created or disposed of.
- 3.2.8 There is no integration of the information technology of the Trayport and Intercontinental Exchange Businesses, and the software and hardware platforms of the Trayport Business shall remain essentially unchanged, except for routine changes and maintenance, which for the avoidance of doubt shall include [X] subject always to the conditions set out in Schedule 4;
- 3.2.9 The customer and supplier lists of the two businesses shall be operated and updated separately and any negotiations with any existing or potential customers and suppliers in relation to the Trayport Business will be carried out by the Trayport Business alone and for the avoidance of doubt the Intercontinental Exchange Business will not negotiate on behalf of the Trayport



Business (and vice versa) or enter into any joint agreements with the Trayport Business (and vice versa);

3.2.10 All existing contracts of the Trayport Business and the Intercontinental Exchange Business continue to be serviced by the business to which they were awarded;

3.2.11 No changes are made to key staff of the Trayport Business;

3.2.12 No key staff are transferred between the Trayport Business and the Intercontinental Exchange Business;

3.2.13 All reasonable steps are taken to encourage all key staff to remain with the Trayport Business; and

3.2.14 No business secrets, know-how, commercially sensitive information, intellectual property or any other information of a confidential or proprietary nature relating to either of the two businesses shall pass, directly or indirectly, from the Trayport Business (or any of its employees, directors, agents or Affiliates) to the Intercontinental Exchange Business (or any of its employees, directors, agents or Affiliates), or vice versa, except where strictly necessary in the ordinary course of business (for example, where required for compliance with external regulatory and/or accounting obligations) and on the basis that, following Effective Divestiture, any records or copies (electronic or otherwise) of such information that have passed, wherever they may be held, will be returned to the business to which they relate and any copies destroyed.

3.3 All directions and derogations issued in relation to or pursuant to the Initial Enforcement Order and the January 2017 Order shall continue in force until Effective Divestiture unless cancelled or revoked by the CMA.

#### **4. Compliance**

4.1 ICE shall provide to the CMA such information or statement of compliance as it may from time to time require for the purposes of monitoring compliance by ICE with this Order. In particular, on 28 July 2017 and subsequently every two weeks (or, where this does not fall on a working day, the first working day thereafter) the Chief Executive Officer, President and Chief Operating Officer of Intercontinental Exchange, Inc. or other persons as agreed with the CMA shall, on behalf of ICE provide a statement to the CMA in the form set out in Schedule 5 to this Order confirming compliance with this Order.

- 4.2 At all times, ICE shall, and shall procure that Trayport shall, actively keep the CMA informed of any material developments relating to the Trayport Business, which includes but is not limited to:
- 4.2.1 Details of key staff who leave or join the Trayport Business;
  - 4.2.2 Any interruption of the Trayport Business (including without limitation its procurement, production, logistics, sales and employee relations arrangements) that has prevented it from operating in the ordinary course of business for any period of time that could be expected to have a material and detrimental impact on Trayport and/or its customers;
  - 4.2.3 All substantial customer volumes won or lost or substantial changes to the customer contracts for the Trayport Business including any substantial changes in customers' demand; and
  - 4.2.4 Substantial changes in the Trayport Business's contractual arrangements or relationships with key suppliers.

## **5. Monitoring Trustee**

- 5.1 The appointment of the Monitoring Trustee under the Initial Enforcement Order shall be extended by ICE and shall continue from the Commencement Date. Subject to Article 5.4 the appointment and work of the Monitoring Trustee shall continue until Effective Divestiture.
- 5.2 In addition to the obligations of the Monitoring Trustee under the Monitoring Trustee Mandate, from the Decision Date the Monitoring Trustee shall monitor and, every two weeks until the date on which Effective Divestiture takes place, report to the CMA on the work undertaken and progress by ICE towards Effective Divestiture; compliance with this Order; any issues arising which the Monitoring Trustee considers might prejudice the intended and effective outcome of the divestiture process, or Effective Divestiture within the Divestiture Period; and any other matter that the CMA may direct.
- 5.3 ICE shall make such changes to the Monitoring Trustee Mandate (to be approved by the CMA) as are required to give effect to Articles 5.1 and 5.2.
- 5.4 The monitoring obligation imposed under Article 5.2 shall cease to apply to the Monitoring Trustee in the event that a Divestiture Trustee is appointed under Article 7.

## **6. Extension of time limits**

6.1 The CMA may issue directions extending the Divestiture Period or the date for termination of the New Agreements specified in Article 10.1, following receipt of a request in writing from ICE or at its own discretion. Directions extending the Divestiture Period or the date for termination of the New Agreements specified in Article 10.1 shall specify the duration of the extension.

## **7. Divestiture Trustee**

7.1 If the CMA considers that Effective Divestiture is unlikely to occur within the Divestiture Period, including but not limited to circumstances where ICE has breached any provision of Article 2, or if the Divestiture Period for any reason expires without Effective Divestiture, the CMA may issue directions to ICE to appoint a Divestiture Trustee, in accordance with Schedule 2, to bring about Effective Divestiture (the Divestiture Trustee Obligation).

7.2 ICE shall enter into a Divestiture Trustee Mandate with the Divestiture Trustee.

## **8. Hold Separate Manager**

8.1 In the event that there is no Effective Divestiture within the Divestiture Period, or in the event that ICE is in breach of this Order, ICE shall appoint a Hold Separate Manager at the written direction of the CMA, in accordance with Article 15 and Schedule 3.

8.2 The Hold Separate Manager shall perform the functions set out in paragraphs 9-15 of Schedule 3 and shall undertake such matters preparatory to giving effect to those functions as the CMA may specify in the directions referred to in Article 8.1.

## **9. Re-acquisition prohibition**

9.1 ICE shall not, without the prior written consent of the CMA, re-acquire the Divestiture Shares (in whole or in part) or any assets relating to the Trayport Business for a period of 10 years from Effective Divestiture.

## **10. Termination of the New Agreements**

10.1 ICE and Trayport shall mutually terminate the New Agreements, disclaiming any notice period or liability accruing between themselves under the terms of the New Agreements, by the date falling two weeks after the Commencement Date or, if sooner, by the date on which Effective Divestiture takes place.

10.2 ICE and Trayport shall not rely on or enforce any of the provisions of the New Agreements from the Commencement Date.

## **11. Procedure for consent and approval**

11.1 Where the consent or approval of the CMA is required by ICE (however that requirement is expressed in this Order), ICE will seek the consent or approval in writing.

11.2 Any application by ICE for the CMA's consent or approval must make full disclosure of every fact and matter within its knowledge that it reasonably believes is relevant to the CMA's decision (the Relevant Information). Where the CMA considers that full disclosure has not been provided, it shall inform ICE, and ICE must promptly provide such additional information as the CMA requires.

11.3 Where the CMA grants consent or approval on the basis of misleading or incomplete information, the consent or approval is voidable at the election of the CMA.

11.4 In the event that ICE discovers that an application for consent or approval has been made without full disclosure of the Relevant Information to the CMA, ICE must:

11.4.1 inform the CMA in writing, identifying the Relevant Information that it omitted to include in the application for consent within two working days of becoming aware that the Relevant Information is incomplete or incorrect; and

11.4.2 at the same time, or no later than two working days starting with the date on which ICE has informed the CMA of the omission or inaccuracy, provide to the CMA an application for consent that includes the missing and/or correct Relevant Information.

11.5 ICE must use all reasonable endeavours to make each application for consent or approval so that it is received by the CMA at least 15 working days, or such lesser period as the CMA may allow, before the day on which the CMA's consent or approval is necessary to avoid a breach of this Order.

## **12. Severability**

12.1 If any provision of this Order is or becomes contrary to law or invalid for any reason, ICE, Intercontinental Exchange International, Inc. and Trayport Holdings Limited shall continue to observe the remaining provisions.

12.2 ICE shall not rely on any default or want of authority on the part of ICE or Trayport or of any officer or employee of ICE or Trayport in the execution of this Order unless directed so to do by the CMA.

### **13. Provision of Information to the CMA**

13.1 Any person to whom this Order applies shall promptly provide to the CMA such information as the CMA may reasonably require for the purposes of enabling the CMA to monitor the carrying out of this Order or any provisions of this Order; to review the effectiveness of the operation of this Order, or any provision of this Order; or perform any of its functions under this Order or sections 84 and 92, 93 or 94 of the Act.

13.2 Any person to whom this Order applies may be required by the CMA to keep and produce those records specified in writing by the CMA that relate to the operation of any provisions of this Order.

13.3 Any person to whom this Order applies and whom the CMA believes to have information which may be relevant to the monitoring or the review of the operation of any provisions of this Order may be required by the CMA to attend and provide such information in person.

13.4 Subject always to Part 9 of the Act, the CMA may publish any information or documents that it has received in connection with the monitoring or the review of this Order or any provisions of this Order for the purpose of assisting the CMA in the discharge of its functions under or in connection with this Order.

13.5 If ICE has any reason to suspect that any provision of this Order has been breached or is likely to be breached it shall immediately write to the CMA to advise the CMA of the circumstances of such suspicions.

### **14. Service**

14.1 Any communication from ICE to the CMA under this Order shall be addressed to the Remedies Officer, Competition and Markets Authority, Victoria House, Southampton Row, London WC1B 4AD or such other person or address as the CMA may notify ICE of in writing.

### **15. Powers of direction**

15.1 The CMA may give directions falling within this Order to:

15.1.1 A person specified in the directions; or

15.1.2 A holder for the time being of an office so specified in any body or person corporate or unincorporated.

15.2 Directions fall within this Article if they are written directions:

15.2.1 To take such steps as may be described in the directions for the purpose of carrying out or ensuring compliance with this Order; or

15.2.2 To do, or refrain from doing, anything so described which the person might be required by this Order to do or refrain from doing.

15.3 The CMA may vary or revoke any directions so given.

## **16. Governing Law**

16.1 This Order shall be governed and construed in all respects in accordance with English law.

16.2 Any dispute arising concerning this Order shall be subject to the jurisdiction of the courts of England and Wales.

16.3 Any contractual obligations arising out of or in connection with this Order shall be governed and construed in all respects in accordance with English law.

## **17. Termination**

17.1 This Order shall continue in force until such time as it is varied or revoked under the Act.

17.2 The variation or revocation of this Order shall not affect the validity or enforceability of any rights or obligations that arose prior to such variation or revocation.

## **Schedule 1: Suitable Purchaser Criteria**

The criteria on which the suitability of a Potential Purchaser of the Divestiture Shares will be assessed are as follows:

- (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.
- (b) *Capability* – The Potential Purchaser must have access to appropriate financial resources, expertise and assets to enable Trayport to be an effective competitor in the market. This access should be sufficient to enable Trayport to continue to develop as an effective competitor. For example, a highly leveraged acquisition of Trayport that left little scope for competitive levels of capital expenditure or product development is unlikely to satisfy this criterion.
- (c) *Commitment to relevant market* – The CMA will wish to satisfy itself that the Potential Purchaser has an appropriate business plan and objectives for competing in the relevant markets.
- (d) *Absence of competitive or regulatory concerns* – Divestiture to the Potential Purchaser should not create a realistic prospect of further competition or regulatory concerns.

## **Schedule 2: Appointment and Functions of the Divestiture Trustee**

### ***Nomination of a Divestiture Trustee***

1. Within the period of five working days following the day on which the CMA issues a direction pursuant to Article 7 of this Order, ICE shall submit to the CMA for approval a list of two or more persons whom ICE proposes to appoint as Divestiture Trustee.
2. Each person on the list referred to in paragraph 1 above shall be independent of and unconnected to ICE and Trayport, possess the qualifications necessary for the performance of the Divestiture Trustee Mandate and shall on appointment and thereafter be free of any conflict of interest including any conflict of interest that might arise by virtue of the terms of remuneration.
3. The CMA may approve or reject any or all of the proposed persons (such approval not to be unreasonably withheld) and may approve the proposed Divestiture Trustee Mandate subject to any modifications it deems necessary for the Divestiture Trustee to fulfil the Divestiture Trustee Obligation. If only one proposed person is approved, ICE shall use its reasonable endeavours to appoint the person concerned as Divestiture Trustee in accordance with the Divestiture Trustee Mandate approved by the CMA. If more than one proposed person is approved, ICE shall decide which person to appoint as Divestiture Trustee from among the approved persons. ICE shall appoint the Divestiture Trustee within two working days from the CMA's approval and on the terms of the Divestiture Trustee Mandate.
4. If all the proposed Divestiture Trustees are rejected by the CMA, ICE shall submit the names of at least two further persons within four working days from being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 1 to 3 above.
5. The provisions of paragraph 6 shall apply if:
  - 5.1 ICE fails to nominate further persons in accordance with paragraph 4;
  - 5.2 Those further persons nominated by ICE in accordance with paragraph 4 are rejected by the CMA, acting reasonably; or
  - 5.3 ICE is unable for any reason to conclude the appointment of the Divestiture Trustee within the time limit specified by the CMA.
6. The CMA shall nominate one or more persons to act as Divestiture Trustee, and ICE shall appoint one of those Divestiture Trustees within two working



days starting with the date of nomination under the terms of the Divestiture Trustee Mandate.

7. The function of the Divestiture Trustee is distinct from the function of the Monitoring Trustee, although the two functions may be performed by the same person subject to that person meeting the requirements of paragraph 2.
8. ICE shall remunerate and reimburse the Divestiture Trustee for all reasonable costs properly incurred in accordance with the terms and conditions of his or her appointment and in accordance with the directions or instructions given in paragraph 10, in such a way so as not to impede the Divestiture Trustee's independence or ability to effectively and properly fulfil the Divestiture Trustee Obligation.

### ***Divestiture Trustee Obligation***

9. The Divestiture Trustee shall undertake such preparatory matters as it considers necessary to discharge the Divestiture Trustee Obligation and for these purposes may give written directions to ICE. ICE shall comply with any such written directions.
10. The CMA may, on its own initiative or at the request of the Divestiture Trustee or ICE, give written directions or instructions to the Divestiture Trustee in order to assist it in the discharge of the Divestiture Trustee Obligation (including directions as to the divestiture of such property, assets, rights, consents, licences, privileges or interests as the CMA considers necessary to bring about Effective Divestiture).
11. The Divestiture Trustee may enter into such agreements, deeds, instruments of transfer and other instruments and documents as are necessary for the performance of its Divestiture Trustee Obligation, on such terms and conditions as it reasonably considers appropriate.
12. The Divestiture Trustee shall protect the legitimate financial interests of ICE subject to the Divestiture Trustee's overriding obligation to give effect to the Divestiture Trustee Obligation which may include the Effective Divestiture of the Divestiture Shares at no minimum price.
13. The Divestiture Trustee shall take such steps and measures as it considers necessary to discharge the Divestiture Trustee Obligation. To that end the Divestiture Trustee may give written directions to ICE. ICE shall comply with such directions and take such steps as the Divestiture Trustee may specify.
14. The Divestiture Trustee shall act solely on the instructions of the CMA in the performance of the Divestiture Trustee Obligation and shall not be bound by

any instruction of ICE. ICE shall not seek to create or vary the obligations and duties of the Divestiture Trustee except with the CMA's prior written consent.

15. The Divestiture Trustee shall every two weeks until the date on which Effective Divestiture takes place, report to the CMA on its progress towards Effective Divestiture, compliance with this Order and any other matter specified by the CMA.

***Divestiture Trustee – obligations of ICE***

16. ICE shall enable the Divestiture Trustee to carry out the Divestiture Trustee Obligation.
17. ICE shall provide the Divestiture Trustee with all such cooperation, assistance and information (including the production of financial or other information whether or not such information is in existence at the time of the request but excluding any material subject to legal privilege) as the Divestiture Trustee may reasonably require in the discharge of the Divestiture Trustee Obligation.
18. The Divestiture Trustee shall be entitled, subject to the duty of confidentiality, to full and complete access to the books, records, documents, management or other personnel, facilities, sites and technical information necessary for the fulfilment of its duty (save where material is subject to legal privilege). ICE shall provide the Divestiture Trustee with copies of any such document upon request. On the request of the Divestiture Trustee, ICE shall make available to the Divestiture Trustee one or more offices on its premises and ensure that personnel are available where necessary for meetings in order to provide the Divestiture Trustee with all information necessary for the performance of the Divestiture Trustee Obligation.
19. ICE shall grant reasonable and comprehensive powers of attorney to the Divestiture Trustee on terms approved by the CMA to enable the Divestiture Trustee to discharge the Divestiture Trustee Obligation. ICE shall, upon the reasonable request of the Divestiture Trustee, execute the documents required to give effect to the Divestiture Trustee Obligation. The powers of attorney shall include the appointment of advisers to assist with the divestiture process. Before appointing any advisers, the Divestiture Trustee will consider using the advisers already appointed by ICE and will only appoint advisers (whether in replacement of, or in addition to ICE's advisers) if it reasonably considers the appointment of such advisers necessary or appropriate in the discharge of the Divestiture Trustee Obligation. The CMA may issue directions requiring any action specified in this paragraph.

20. ICE shall hold the Divestiture Trustee, its employees, agents or advisers harmless against any liabilities arising out of the proper performance of the Divestiture Trustee Obligation. The Divestiture Trustee, its employees, agents or advisers shall have no liability to ICE for any liabilities arising out of the performance of the Divestiture Trustee Obligation.
21. ICE shall make no objection to the fulfilment by the Divestiture Trustee of the Divestiture Trustee Obligation or any part thereof save on the grounds of bad faith by the Divestiture Trustee or failure of the Divestiture Trustee to reasonably protect the legitimate financial interests of ICE, subject always to the Divestiture Trustee Obligation; and where ICE wishes to make an objection on these grounds it shall submit to the CMA a notice setting out its objections promptly and no later than two working days from the day on which it became aware of the facts giving rise to its objection.

***Divestiture Trustee – replacement, discharge, and reappointment***

22. If the Divestiture Trustee ceases to perform the Divestiture Trustee Obligation, or for any other good cause, including the exposure of the Divestiture Trustee to a conflict of interest, the CMA may issue directions to dismiss the Divestiture Trustee.
23. If the Divestiture Trustee is removed under paragraph 22 above, the Divestiture Trustee may be required to continue in its post until a new Divestiture Trustee is in place to whom the Divestiture Trustee has effected a full handover of all relevant information. The new Divestiture Trustee shall be appointed in accordance with the procedure in paragraphs 1 to 6.
24. Other than in accordance with paragraph 22, the Divestiture Trustee shall cease to act as Divestiture Trustee only after the CMA has discharged it from its duties at a time when all the functions with which the Divestiture Trustee has been entrusted have been met.

## **Schedule 3: Appointment and Functions of the Hold Separate Manager**

### ***Nomination of a Hold Separate Manager***

1. ICE shall within the period of five working days starting with the day on which a direction is made by the CMA pursuant to Article 8 of this Order, submit to the CMA for approval a list of two or more persons who they propose to appoint as Hold Separate Manager. The proposal shall contain sufficient information for the CMA to verify that each proposed person fulfils the requirements set out in paragraph 2 below and shall include a schedule of the steps to be taken to give effect to the Hold Separate Manager Mandate.
2. Each person on the list referred to in paragraph 1 above shall be independent of and unconnected to ICE, possess the qualifications necessary for the performance of the Hold Separate Manager Mandate and shall on appointment and thereafter be free of any conflict of interest including any conflict of interest that might arise by virtue of the terms of remuneration.
3. The CMA may approve or reject any or all of the proposed persons (such approval not to be unreasonably withheld) and may approve the proposed mandate subject to any modifications it deems necessary for the Hold Separate Manager to fulfil the Hold Separate Manager Obligation. If only one proposed person is approved, ICE shall use its reasonable endeavours to appoint the person concerned as Hold Separate Manager in accordance with the Hold Separate Manager Mandate. If more than one proposed person is approved, ICE shall decide which person to appoint as Hold Separate Manager from among the approved persons. ICE shall appoint the Hold Separate Manager within two working days from the CMA's approval and on the terms of the Hold Separate Manager Mandate.
4. If all the proposed Hold Separate Managers are rejected by the CMA, ICE shall submit the names of at least two further persons within four working days from being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 1 to 3 above.
5. The provisions of paragraph 6 shall apply if:
  - 5.1 ICE fails to nominate further persons in accordance with paragraph 4;
  - 5.2 Those further persons nominated by ICE in accordance with paragraph 4 are rejected by the CMA, acting reasonably; or
  - 5.3 ICE is unable for any reason to conclude the appointment of the Hold Separate Manager within the time limit specified by the CMA.

6. The CMA shall nominate one or more persons to act as Hold Separate Manager, and ICE shall appoint one of those Hold Separate Managers within two working days starting with the date of nomination under the terms of the Hold Separate Manager Mandate.
7. The function of the Hold Separate Manager is distinct from the function of the Divestiture Trustee, although the two functions may be performed by the same person subject to that person meeting the requirements of paragraph 2.
8. ICE shall remunerate and reimburse the Hold Separate Manager for all reasonable costs properly incurred in accordance with the terms and conditions of his or her appointment and in accordance with the directions or instructions given in paragraph 12, in such a way so as not to impede the Hold Separate Manager's independence or ability to effectively and properly fulfil the Hold Separate Manager Obligation.

### ***Hold Separate Manager Obligation***

9. The primary obligation of the Hold Separate Manager will be to exercise day-to-day management and control of Trayport so as to preserve and, if necessary, restore effective competition in the markets affected by the Merger. The Hold Separate Manager will exercise management and control of Trayport in such a way as to ensure that it is held separate from the Intercontinental Exchange Business.
10. The Hold Separate Manager Obligation shall include the performance of any other act or task necessary for the performance of the primary obligation of the Hold Separate Manager including the performance of the reporting obligations at paragraph 15 below.
11. The Hold Separate Manager shall take such steps as the Hold Separate Manager reasonably considers necessary including but not limited to:
  - 11.1. Giving such directions to the officers and staff of ICE or Trayport including any person holding such position on a temporary basis as are necessary for the fulfilment of the Hold Separate Manager Obligation;
  - 11.2. Attending such meetings of employees, officers (including board meetings, and meetings of any committee of the board) and members of ICE and Trayport as the Hold Separate Manager considers necessary for the fulfilment of the Hold Separate Manager Obligation; and
  - 11.3. Complying with such requests as the CMA may reasonably make for the purpose of ensuring ICE and Trayport enable the Hold Separate Manager to fulfil the Hold Separate Manager Obligation.

12. The CMA may, on its own initiative or at the request of the Hold Separate Manager or ICE, give written directions or instructions to the Hold Separate Manager in order to assist it in the discharge of the Hold Separate Manager Obligation (including directions as to the divestiture of such property, assets, rights, consents, licences, privileges or interests as the CMA considers necessary to bring about Effective Divestiture).
13. The Hold Separate Manager may enter into such agreements, deeds, instruments of transfer and other instruments and documents on behalf of Trayport as are necessary for the performance of its duty, on such terms and conditions as it reasonably considers appropriate.
14. The Hold Separate Manager shall work with the Divestiture Trustee, if applicable, to bring about Effective Divestiture in a timely manner.

### ***Hold Separate Manager Reporting Obligations***

15. The Hold Separate Manager will provide to the CMA:
  - 15.1. Within seven days from the date of his appointment a written report reporting on such matters as are specified by the CMA, including any events giving rise to their appointment as Hold Separate Manager; and
  - 15.2. Thereafter at such other times to be agreed with the CMA from the Hold Separate Manager's appointment to Effective Divestiture a written report on the matters set out in paragraphs 9-14 above.

### ***Hold Separate Manager – ICE and Trayport Obligations***

16. ICE and Trayport shall enable the Hold Separate Manager to carry out the Hold Separate Manager Obligation.
17. The Hold Separate Manager shall act solely on the instructions of the CMA in the performance of the Hold Separate Manager Obligation and shall not be bound by any instruction of ICE. ICE shall not seek to create or vary the Hold Separate Manager Obligation except with the CMA's prior written consent.
18. ICE shall remunerate the Hold Separate Manager, and reimburse the Hold Separate Manager in full for all reasonable costs and expenses properly incurred, in accordance with the terms and conditions of the Hold Separate Manager's appointment, provided that such remuneration and reimbursement shall not give rise to any conflict of interest or otherwise impair the ability of the Hold Separate Manager to discharge the Hold Separate Manager Obligation. For the avoidance of doubt such reimbursement shall include the fees and disbursements of such legal or other professional advisers,

consultants and assistants as the Hold Separate Manager reasonably considers necessary for the discharge of the Hold Separate Manager Obligation.

19. The Hold Separate Manager may give written directions to ICE and/or Trayport. ICE and Trayport shall comply with such directions as the Hold Separate Manager may specify and cooperate fully with the Hold Separate Manager in its performance of the Hold Separate Manager Obligation.
20. Without prejudice to the generality of paragraph 19 above, that cooperation shall include:
  - 20.1. The grant to the Hold Separate Manager of all such rights, powers and authorities as are necessary for the performance of the Hold Separate Manager Obligation;
  - 20.2. Ensuring that personnel are available where necessary for meetings in order to provide the Hold Separate Manager with all information necessary for the performance of the Hold Separate Manager Obligation;
  - 20.3. The provision of such facilities as are necessary for the discharge by the Hold Separate Manager of the Hold Separate Manager Obligation; and
  - 20.4. The provision of full and complete access to all personnel, books, records, documents, facilities and information of Trayport as the Hold Separate Manager may reasonably require.

***Hold Separate Manager – replacement, discharge, and reappointment***

21. If the Hold Separate Manager ceases to perform the Hold Separate Manager Obligation, or for any other good cause, including the exposure of the Hold Separate Manager to a conflict of interest, the CMA may issue directions to dismiss the Hold Separate Manager.
22. If the Hold Separate Manager is removed under paragraph 25 above, the Hold Separate Manager may be required to continue in its post until a new Hold Separate Manager is in place to whom the Hold Separate Manager has effected a full handover of all relevant information. The new Hold Separate Manager shall be appointed in accordance with the procedure in paragraphs 1 to 6.
23. Other than in accordance with paragraph 25, the Hold Separate Manager shall cease to act as Hold Separate Manager only after the CMA has

discharged it from its duties at a time when all the functions with which the Hold Separate Manager has been entrusted have been met.



**Schedule 4: [✂]**

[✂]

1. [✂];
2. [✂];
3. [✂];
4. [✂];
5. [✂]; and
6. [✂].

## **Schedule 5: Compliance Statement for Intercontinental Exchange, Inc.**

I [insert name] confirm on behalf of Intercontinental Exchange, Inc. that:

### ***Compliance in the Relevant Period***

1. In the period from [insert date] to [insert date] (the Relevant Period):
  - (a) Intercontinental Exchange, Inc. has complied with the Order made by the CMA in relation to the Merger on 21 July 2017 (the Order); and
  - (b) Intercontinental Exchange, Inc.'s subsidiaries have also complied with this Order.
2. Except with the prior written consent of the CMA:
  - (a) No action has been taken by Intercontinental Exchange, Inc. that might prejudice the Effective Divestiture, the CMA's decisions in the Report or otherwise impair the CMA's ability to take such action 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 finding, including any action which might:
    - (i) Lead to the integration of the Trayport Business and the Intercontinental Exchange Business;
    - (ii) Transfer the ownership or control of the Trayport Business or any of its subsidiaries; or
    - (iii) Otherwise impair the ability of the Trayport Business to compete independently in any of the markets affected by the Merger;
  - (b) The Trayport Business has been carried on separately from the Intercontinental Exchange Business and the Trayport Business's separate sales or brand identity has been maintained;
  - (c) The Trayport Business has been maintained as a going concern and sufficient resources have been made available for the development of the Trayport Business, on the basis of its pre-merger business plans;
  - (d) No substantive changes have been made to the organisational structure of the Trayport Business, except in the ordinary course of business;
  - (e) No changes have been made to the organisational structure of the Intercontinental Exchange Business which would alter, impede or frustrate the implementation, carrying out or enforcement of the Order;

- (f) No substantive changes are made to the management responsibilities within the Trayport Business except in the ordinary course of business;
- (g) The nature, description, range and quality of goods and/or services supplied by the Trayport Business have been maintained and preserved;
- (h) Except in the ordinary course of business for the separate operation of the two businesses:
  - (i) All of the assets of the Trayport Business, including facilities and goodwill, have been maintained and preserved;
  - (ii) None of the assets of the Trayport Business have been disposed of; and
  - (iii) No interest in the assets of the Trayport Business has been created or disposed of;
- (i) There has been no integration of the information technology of the Trayport and Intercontinental Exchange Businesses, and the software and hardware platforms of the Trayport Business have remained essentially unchanged, except for routine changes and maintenance;
- (j) The customer and supplier lists of the two businesses have been operated and updated separately and any negotiations with any existing or potential customers and suppliers in relation to the Trayport Business have been carried out by the Trayport Business alone and the Intercontinental Exchange Business has not negotiated on behalf of the Trayport Business (and vice versa) or entered into any joint agreements with the Trayport Business (and vice versa);
- (k) All existing contracts of the Trayport Business and the Intercontinental Exchange Business have been serviced by the business to which they were awarded;
- (l) No changes have been made to key staff of the Trayport Business;
- (m) No key staff have been transferred between the Trayport Business and the Intercontinental Exchange Business;
- (n) All reasonable steps have been taken to encourage all key staff to remain with the Trayport Business;
- (o) Except as permitted by the Order, no business secrets, know-how, commercially-sensitive information, intellectual property or any other information of a confidential or proprietary nature relating to either of the two businesses, has passed, directly or indirectly, from the Trayport

Business (or any of its employees, directors, agents or Affiliates) to the Intercontinental Exchange Business (or any of its employees, directors, agents or Affiliates), or vice versa;

- (p) Except as listed in paragraph (q) below, there have been no:
  - (i) Changes to the key staff of the Trayport Business;
  - (ii) Interruptions of the Trayport Business (including without limitation its procurement, production, logistics, sales and employee relations arrangements) that have prevented it from operating in the ordinary course of business for any period of time that could be expected to have a material and detrimental impact on Trayport and/or its customers;
  - (iii) Substantial customer volumes won or lost or substantial changes to the customer contracts for the Trayport Business; or
  - (iv) Substantial changes in the Trayport Business's contractual arrangements or relationships with key suppliers.

(q) [list of material developments]

- 3. Intercontinental Exchange, Inc. and its subsidiaries remain in full compliance with the Order and will continue actively to keep the CMA informed of any material developments relating to the Trayport or the Intercontinental Exchange Businesses in accordance with Article 4 of the Order.

***Interpretation***

- 4. Terms defined in the Order have the same meaning in this compliance statement.

FOR AND ON BEHALF OF INTERCONTINENTAL EXCHANGE, INC

Signature .....

Name .....

Title .....

Date .....