

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

Explanatory Note

This note is not a part of the Order

Introduction

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, (the Merger) for further investigation and report by a group of CMA panel members.
2. 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 under [section 38](#) of the Act. 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.
3. By an application made before the Competition Appeal Tribunal (the CAT) dated 11 November 2016 ICE challenged the findings in the Report pursuant to [section 120](#) of the Act. By an application made before the CAT dated 17 November 2016 ICE challenged the direction issued by the CMA to suspend

implementation of an agreement between ICE and Trayport which relates to Article 10 of this Order.

4. The Intercontinental Exchange, Inc. and Trayport Merger Inquiry Order 2017 dated 5 January 2017 (the January 2017 Order) gave effect to the remedies included in the Report. However, 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.
5. 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.
6. 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.
7. This Order (the Order) updates and supersedes the January 2017 Order to reflect the Judgment and the CMA's findings in the Remittal Report.
8. A review can be sought in relation to the Order under section 120 of the Act.

Possible consequences of not complying with the Order

9. [Section 94](#) of the Act places a duty on any person to whom this Order applies to comply with it. Any person who suffers loss or damage due to a breach of this duty may bring an action.
10. Section 94 of the Act also provides that the CMA can seek to enforce the Order by civil proceedings for an injunction or for any other appropriate relief or remedy.
11. The CMA has power under the Order to give directions, including directions to a person in their capacity as an office holder, for the purpose of carrying out, or ensuring compliance with, the Order.

12. [Section 87](#) of the Act provides that, if there is a failure to comply with a direction under the Order, the CMA can seek to enforce the direction in court and may recover the costs or expenses of such enforcement.

Review of this Order

13. The CMA has a duty under [section 92](#) of the Act to monitor the operation of the Order. This includes a duty to consider, from time to time, whether the Order should be varied or revoked in the light of a change of circumstances.

Status of this explanatory note

14. Nothing in this explanatory note is legally binding. In the event of a conflict between this explanatory note and any provision of the Order, the Order shall prevail.

Structure of the Order

15. The Order contains 17 Articles and 5 Schedules as follows:
 - General provisions (Articles 1 and 16 and 17), which include specifying when the Order comes into force, the scope of the Order and definitions that are used throughout the Order (and which are also used in this explanatory note), the governing law and termination provisions.
 - The divestiture (Article 2), whereby ICE, Intercontinental Exchange International, Inc. and Trayport Holdings Limited are required to divest the shares in Trayport Limited and Trayport, Inc. within the Divestiture Period.
 - The prohibition against re-acquisition of the divested shares within 10 years (Article 9)
 - The requirement to terminate the New Agreements within two weeks following the publication of the Order (Article 10).
 - Interim Measures, including the role of the Monitoring Trustee and reporting obligations (Articles 3, 4, and 5).
 - Compliance provisions including, extension of time limits, appointment of a Divestiture Trustee and Hold Separate Manager, procedure for consent, severability, provision of information to the CMA, service, and the CMA's power to issue directions (Articles 6, 7, 8, 11, 12, 13, 14 and 15).
 - Schedule 1 contains the Suitable Purchaser Criteria and relates to Article 2.

- Schedule 2 contains provisions for the appointment and functions of the Divestiture Trustee, if applicable, and relates to Article 7.
- Schedule 3 contains provisions for the appointment and functions of the Hold Separate Manager, if applicable, and relates to Article 8.
- Schedule 4 contains the conditions under which ICE and Trayport are permitted to work towards [✂] and relates to Article 3.2.8.
- Schedule 5 contains the template for a Compliance Statement for ICE as provided for in Article 4.

Scope of this explanatory note

16. This explanatory note deals with each of the articles in the Order.

Article 1 – Title, commencement, application and scope

17. This provides that the Order applies to Intercontinental Exchange, Inc. and its subsidiaries, Intercontinental Exchange International, Inc., Trayport Holdings Limited, any person who is an Affiliate with respect to ICE, and to a Divestiture Trustee or Hold Separate Manager appointed under this Order.
18. The Commencement Date for the Order is the date on which it is made.
19. The obligations of ICE under Article 2 (divestiture) and the obligations of the Monitoring Trustee under Article 5.2 apply from the day following the date on which the Remittal Report was published by the CMA (the Decision Date). The obligations of ICE and Trayport under Article 10 (Termination of the New Agreements) apply from the date of publication of the Order (the Commencement Date).

Article 2 – Divestiture

20. Article 2.1 provides that ICE, Intercontinental Exchange International, Inc. and Trayport Holdings Limited shall divest shares in Trayport Limited and Trayport, Inc. (the Divestiture Shares) within a Divestiture Period. ICE is required to provide a timetable to the CMA for approval which sets out the timeframe and steps towards Effective Divestiture.
21. Article 2.2 requires ICE to submit a list of Potential Purchasers of the Divestiture Shares for approval by the CMA, in line with the approved timetable.
22. Article 2.4 provides that ICE shall submit any agreement with an Approved Purchaser for the purchase of the Divestiture Shares to the CMA for approval

prior to entering into it. Article 2.5 describes the CMA's process for approval of the same.

Article 3 – Measures to Maintain the Trayport Business

23. Article 3 provides for interim measures to maintain the Trayport business. This is required to prevent pre-emptive action by ICE prior to Effective Divestiture as the Initial Enforcement Order (IEO) dated 11 January 2016 fell away when the January 2017 Order was made.
24. The interim measures apply from the Commencement Date until Effective Divestiture takes place.
25. Article 3.3 allows the directions and derogations issued previously under the IEO and the January 2017 Order to remain in place even once the IEO and the January 2017 Order cease to have effect on publication of the Order.

Article 4 – Compliance

26. Article 4.1 imposes an obligation on ICE to provide the CMA with compliance statements in the form set out in Schedule 5 to enable the CMA to monitor compliance with the interim measures set out in Article 3.
27. Article 4.2 requires ICE to, and to procure that Trayport shall, inform the CMA of material developments relating to the Trayport Business which would affect its ability to operate independently and sustainably.

Article 5 – Monitoring Trustee

28. Article 5.1 provides for the Monitoring Trustee to continue in post.
29. Article 5.2 provides that the Monitoring Trustee's obligations shall extend, following the Decision Date, to reporting to the CMA on the progress made towards Effective Divestiture, compliance with the Order, and any issues which could prejudice the effective outcome of the divestiture process.
30. Article 5.3 requires ICE to amend the Monitoring Trustee Mandate under which ICE appointed the Monitoring Trustee in order to give effect to Articles 5.1 and 5.2.
31. Article 5.4 means that the additional reporting obligation in Article 5.2 ceases to apply on the appointment of a Divestiture Trustee to avoid an overlap in functions.

Article 6 – Extension of Time Limits

32. Article 6 enables the CMA to extend the Divestiture Period, or the period in which the New Agreements must be terminated under Article 10.

Article 7 – Divestiture Trustee

33. Article 7 provides that the CMA may require ICE to appoint a Divestiture Trustee, in accordance with Schedule 2, where Effective Divestiture does not occur within the Divestiture Period or where the CMA does not consider it likely that it will do so.

Article 8 – Hold Separate Manager

34. Article 8.1 requires ICE to appoint a Hold Separate Manager in circumstances where Effective Divestiture does not occur on time or where ICE breaches the Order. The appointment and functions of the Hold Separate Manager are provided for in Schedule 3.

Article 9 – Re-acquisition Prohibition

35. Article 9 prohibits the reacquisition by ICE of the Trayport Business or any of its assets within 10 years of Effective Divestiture.

Article 10 – Termination of the New Agreements

36. Article 10 requires ICE and Trayport to terminate the New Agreements within two weeks of the Commencement Date or, if sooner, by the date of Effective Divestiture. ICE and Trayport are also prohibited from implementing or relying on the New Agreements before termination.

Article 11 – Procedure for consent and approval

37. Article 11 provides for the procedure, content, timing and correction of any application by ICE for consent or approval from the CMA.

Article 12 – Severability

38. Article 12.1 provides that the remaining provisions of the Order shall survive if some become invalid or contrary to law.
39. Article 12.2 prohibits ICE from relying on any default or want of authority by ICE, Trayport or their employees in the execution of the Order unless directed so to do by the CMA.

Article 13 – Provision of Information to the CMA

40. Article 13.1 requires any person to whom the Order applies to provide information so the CMA can monitor compliance with and the effectiveness of the Order and fulfil its functions.
41. Articles 13.2 and 13.3 require the production of records and provision of information in person to assist in the discharge of the CMA's functions in relation to the Order.
42. Article 13.4 highlights that the CMA may publish information received in connection with the Order in compliance with Part 9 of the Act.
43. Article 13.5 requires ICE to inform the CMA immediately if it suspects that the Order has been or is likely to be breached.

Article 14 – Service

44. This Article sets out the address to be used by ICE for any communications or applications to the CMA in writing under the Order.

Article 15 – Powers of Direction

45. Article 15 provides that the CMA may give written directions as to compliance with the Order.

Article 16 – Governing Law

46. Article 16 stipulates that the Order and contractual obligations connected with the Order are governed by English law and that any dispute connected with the Order is to be heard in the courts of England and Wales.

Article 17 – Termination

47. Article 17 provides for the Order to remain in force until varied or revoked under the Act. Any obligations or rights survive termination of the Order.