Neutral citation [2017] CAT 6

IN THE COMPETITION APPEAL TRIBUNAL

Case Numbers: 1271-1272/4/12/16

Victoria House
Bloomsbury Place
London WC1A 2EB

6 March 2017

Before:

HODGE MALEK QC

(Chairman)

PROFESSOR COLIN MAYER

WILLIAM ALLAN

Sitting as a Tribunal in England and Wales

BETWEEN:

INTERCONTINENTAL EXCHANGE, INC.

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

NASDAQ STOCKHOLM AB

Intervener

Heard at Victoria House on 23-24 January 2017

JUDGMENT (NON-CONFIDENTIAL VERSION)

APPEARANCES

Mr Paul Harris QC and Mr Alistair Lindsay (instructed by Shearman & Sterling LLP) appeared on behalf of the Applicant.

Ms Marie Demetriou QC and Ms Sarah Abram (instructed by CMA Legal) appeared on behalf of the Respondent.

Note: Excisions in this Judgment (marked "[…][✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

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A. INTRODUCTION

1. On 11 December 2015 Intercontinental Exchange, Inc. ("ICE") completed the purchase of the entire issued share capital of Trayport Inc and GFI TP Ltd and their subsidiaries (together referred to as "Trayport") (the "Transaction") from BGC Partners Inc ("BGC") and its subsidiary GFI Group Inc ("GFI").

2. On 11 January 2016, the Competition and Markets Authority ("CMA") exercising its powers under section 72(2) of the Enterprise Act 2002 ("the Act") made an initial enforcement order ("IEO") pursuant to which Trayport had to carry on its business separately from ICE.

3. On 3 May 2016 the completed acquisition was referred under section 22 of the Act for investigation and report by the CMA. In its final report dated 17 October 2016 ("the Report")[1] the CMA concluded that the Transaction was likely to result in a substantial lessening of competition ("SLC") within the meaning of section 35 of the Act. The CMA, pursuant to sections 35(3)-(4), 41(2) and 84 of the Act, decided it would be appropriate to impose a final order requiring: (a) a full divestiture of Trayport through a sales process under a trustee; and (b) the unwinding of an agreement entered into between Trayport and ICE ("the Merging Parties")[2] on 11 May 2016, that is, five months after the acquisition and around one week after the Phase 2 reference ("the New Agreement").

4. By an application filed on 11 November 2016 ("NoA1"), ICE challenges the lawfulness of the Report on various grounds. It seeks an order that all or part of the Report and the decisions to compel the divestiture of Trayport and the unwinding of the New Agreement be quashed by the Tribunal exercising its judicial review function under section 120 of the Act. Appended to NoA1 were two witness statements deployed in these proceedings without objection

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1 All references in the footnotes of this judgment are to the Report unless otherwise stated.

2 We use the term "Merging Parties" to refer to ICE and Trayport and "parties" to refer to the parties in these review proceedings. References to "the Parties" in quotations taken from the Report should be read as references to the Merging Parties.

by the CMA, but without concession as to their accuracy. One was a statement of Mr Kevin Heffron, Chief Operating Officer of Trayport Limited. The other was a statement by Mr Gordon Bennett, Managing Director of Utility Markets at ICE.

5. On 4 November 2016, just over two weeks after the publication of the Report, the Merging Parties wrote to the CMA to inform it of their intention to implement the New Agreement. On 10 November 2016 the CMA issued a decision directing the Merging Parties to cease implementation of the New Agreement ("the Direction").

6. By a further application filed on 17 November 2016 ("NoA2"), ICE challenges the lawfulness of the Direction on various grounds, some of which overlap with the grounds of review in NoA1. ICE seeks an order of the Tribunal quashing the Direction.

7. At a case management conference held on 30 November 2016 the Tribunal ordered that the two applications be heard together. The Tribunal also gave permission to Nasdaq Stockholm AB ("Nasdaq") to intervene in the proceedings in support of the CMA. Nasdaq submitted a statement of intervention and a skeleton argument, but was not represented at the hearing of the applications.

8. The structure of this judgment is to set out the industry background relevant to these proceedings (Section B), the legal framework (Section C), the Report, the Direction and the further evidence relied on in support of the applications (Section D), the appropriate intensity of review required in these proceedings (Section E), ICE's grounds of review together with our conclusion on each ground (Section F) and, finally, our overall conclusion (Section G).

9. The grounds of review in NoA1 are as follows:

   (1) **Ground 1**: The CMA should have found that the New Agreement was part of the counterfactual, that is, that the New Agreement would have

been entered into absent the Transaction. This ground contains three elements:

(i) **Ground 1(a)** argues that, when considering whether the New Agreement should be included in the counterfactual, the CMA wrongly asked itself whether it was more likely than not that the New Agreement would have been entered into in its "current form", rather than whether, absent the Transaction, ICE would have become one of Trayport's "normal venue customers";

(ii) **Ground 1(b)** contends that the CMA was unreasonable in not concluding on the evidence that the New Agreement was likely to be signed "in its current form" absent the Transaction; and

(iii) **Ground 1(c)** complains that the CMA: (1) found that the New Agreement was not part of the counterfactual (it is common ground that this was the CMA's finding); but also (2) found that the New Agreement was not attributable to the merger (i.e. that it was not merger-specific), when it came to consider relevant customer benefits ("RCBs").

(2) **Ground 2**: This ground contains several arguments regarding the CMA's assessment of the benefits to ICE of a partial foreclosure strategy (part of the CMA's incentives analysis):

(i) **Ground 2(a)** argues that, by placing limited weight on a quantitative analysis, the CMA accepts that it could not predict whether ICE would obtain benefits from a partial foreclosure strategy;

(ii) **Ground 2(b)** contends that the CMA did not properly investigate or provide evidence in support of its finding that

ICE would benefit from partially foreclosing its rivals in terms of increased trading volumes;

(iii) **Ground 2(c)** complains that there are inconsistencies between the CMA's quantitative analysis and the CMA's (main) qualitative analysis;

(iv) **Ground 2(d)** argues that the CMA was obliged to consider whether the law prohibiting Trayport from abusing a dominant position would have restrained ICE's incentives to pursue a partial foreclosure strategy; and

(v) **Ground 2(e)** challenges the rationality of the CMA's finding that differences between ICE's ownership of Trayport and Trayport's previous owner, GFI, mean that no conclusions can be drawn from Trayport's previous ownership as to ICE's incentives to pursue a foreclosure strategy.

(3) **Ground 3**: The CMA erred in its assessment of the costs to the merged group of implementing a partial foreclosure strategy.

(4) **Ground 4**: This ground challenges the CMA's rejection of the remedy proposal put forward by the Merging Parties (the "Separation element") and consists of two parts:

(i) **Ground 4(a)** argues that the CMA asked itself the wrong question in analysing the Separation element of the Merging Parties' remedy proposal; and

(ii) **Ground 4(b)** complains that footnote 292 to the Report misinterprets the law on directors' duties under section 172 of the Companies Act 2006.

(5) **Ground 5**: The CMA lacks the vires to require termination of the New Agreement, and to require in the Direction that implementation of the New Agreement should continue to be suspended pursuant to the IEO.

10. ICE's grounds of review in NoA2 are:

(1) **Ground 1**: The Direction to cease implementation of the New Agreement is ultra vires for the same reason as the finding in the Report that the New Agreement should be terminated (this ground replicates Ground 5 of NoA1).

(2) **Grounds 2 and 3**: Both of these grounds assume that the CMA had the requisite *vires* to require the termination of the New Agreement and to require that its implementation be suspended (i.e. they assume that ICE has failed on Ground 5). These grounds attack the rationality/proportionality of the Direction to suspend implementation. It is said in both grounds that the Merging Parties could and should have been allowed to implement the New Agreement at least in the short term, until any new owner of Trayport took ownership.

B. THE INDUSTRY BACKGROUND

11. The relevant industry background is set out in Section 2 of the Report, which we briefly summarise in this section.

12. ICE and Trayport both operate in the wholesale energy trading market, mainly at different levels but with some horizontal overlap.[3] Wholesale energy trading allows energy generators to find a constant source of buyers to match their level of production, and similarly allows retail suppliers (or energy consuming companies) to secure a constant source of energy to match their precise needs. Financial institutions also speculate on wholesale energy trading markets.

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[3] The energy industry encompasses a range of different commodities, including coal, oil, gas, power (electricity) and emissions (together, these are referred to as European utilities).

13. Energy trading allows companies to trade in advance of expected demand, allowing companies to de-risk the chance of price spikes during key periods of consumption (e.g. winter for retail suppliers) - this is known as "hedging". For hedging to be most effective, the market has to be "liquid", that is, assets can be quickly bought and sold in the market without the price being affected. Para 2.6 of the Report explains why liquidity is important in the following terms:

> "The more liquid a market is the more efficient hedging can be as companies can quickly match demand changes without causing peaks and troughs to pricing. Typically, the more liquid the market the lower the transaction costs. Higher liquidity also encourages competition by giving smaller firms opportunities to trade and source supply lines, and provides price signals for investment decisions." (Footnote 13 omitted).

14. Para 2.17 also explains that knowledge of where the highest liquidity resides in any market is an important factor in obtaining the best price for a trade.

15. The term "trading venue" or "venue" is used to refer to two types of intermediaries where trading can take place: (a) exchanges; and (b) brokers.

16. Exchanges offer anonymised trading on screens in standardised contracts for the commodity for standardised volumes for delivery on standardised dates. Brokers offer over the counter ("OTC") trades in the commodity, either by telephone ("voice") or through prices indicated on screens. Brokers offer not only standardised contracts but also bespoke transactions reflecting the particular requirements of their buying or selling clients.

17. In addition, traders, such as major utilities, may deal directly with one another OTC without interposing an exchange or broker.

18. Trades agreed on exchange are cleared through the clearinghouse that serves such exchange (in these markets, the clearinghouse is normally within the same exchange group). The function of a clearinghouse is to manage the risk of default between the execution of a contract and its physical delivery by acting as a central counterparty so as to mutualise risk. It effectively interposes itself as a buyer from the seller and a seller to the buyer, and requires traders to

contribute "margin" in order to mutualise the risk of default in the transactions.

19. Trades concluded via brokers may be cleared through a clearinghouse agreed between the parties ("OTC cleared"), thereby eliminating counterparty credit risk with the transaction, or may be uncleared, leaving the parties at risk of default by one another in the period between execution and contract expiration ("OTC bilateral"). Traders that have dealt with each other for many years are often content to conduct OTC bilateral trades, since they each know the other counterparty and the level (if any) of credit risk that arises.

20. As noted in paragraphs 13-14 above, liquidity is an important characteristic of wholesale energy trading. Liquidity tends to be self-reinforcing: the more people trade at a particular venue the greater the liquidity that gathers at the venue and the more people will trade at the venue. In the same manner as the venue used, the choice of clearinghouse is also driven by the location of greatest liquidity. The Report states that the result of these network effects is that liquidity is to some extent "sticky", preventing traders from easily switching between venues and/or clearinghouses[4] with the result that specific venues tend to secure substantial shares in the wholesale trading of particular commodities.

21. The Report notes that European utilities trading markets are dynamic and continue to evolve. However, there has been a longer term trend towards greater exchange based trading and a general decline in broker trading.[5]

C. THE LEGAL FRAMEWORK

(1) The relevant legislation

22. Section 22 of the Act concerns the circumstances in which a completed merger is to be referred for report by a CMA group under Schedule 4 to the Enterprise

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4 Para 2.60.
5 Para 2.67.

and Regulatory Reform Act 2013 (a so-called "Phase 2 Review"). Pursuant to section 35(1)(b) of the Act the CMA must decide whether a relevant merger situation has been created, which in this case is undisputed, and, if so:

> "whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods and services."

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

(1) is obliged 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 35(4) of the Act); and

(2) may have regard to the effect of any action on any relevant customer benefits ("RCBs") in relation to the creation of the relevant merger situation (section 35(5) of the Act). RCBs comprise a benefit to relevant customers in the form of lower prices, higher quality or greater choice of goods or services that has accrued or may be expected to accrue within a reasonable period as a result of the creation of the relevant merger situation concerned, and that was or is unlikely to accrue without that situation or a similar lessening of competition (sections 30(1)(a) and 30(2) of the Act).

24. If the CMA decides that action should be taken under section 41(2) of the Act, it is obliged to take such action under sections 82 or 84 as it considers to be reasonable and practicable to remedy, mitigate or prevent the SLC and any adverse effects that have resulted from it or may be expected to result from it. Like sections 35(4) and 35(5), sections 41(4) and 41(5) require the CMA to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable and specifically empower it to have regard to the effect of any action on RCBs.

25. Section 82 allows the CMA to accept, from such persons as it considers appropriate, undertakings to take action specified or described in the undertakings. Section 84 allows the CMA to make a final order, which may contain anything permitted by Schedule 8 of the Act, and any supplementary, consequential or incidental provision as the CMA considers appropriate. Schedule 8 empowers the CMA to make orders including:

(1) For the termination of an agreement (para 2). Further, section 86(3) provides that enforcement orders may prohibit the performance of an agreement already in existence when the order is made.

(2) For the divestment of property (para 13). Para 13(3)(d) states that "[a]n order made by virtue of this paragraph may contain such provision as the relevant authority considers appropriate to effect or take account of the division, including, in particular, provision as to- […] the adjustment of contracts (whether by discharge or reduction of any liability or obligation or otherwise)".

26. Section 72 of the Act enables the CMA to make IEOs. Section 72(2) provides that "[t]he CMA may by order, for the purpose of preventing pre-emptive action - (a) prohibit or restrict the doing of things which the CMA considers would constitute pre-emptive action".

27. Section 72(8) defines pre-emptive action as "action which might prejudice the reference concerned or impede the taking of any action under this Part which may be justified by the CMA's decisions on the reference". The CMA is entitled to enforce such orders by civil proceedings (sections 94(6) and 86(6)).

28. Section 87 of the Act provides that enforcement orders may authorise the person making the order to give directions to ensure compliance with the enforcement order. Section 87(4) allows the court to make orders requiring directions to be complied with.

(2) Review in the Tribunal

29. Section 120 of the Act allows a person aggrieved by a decision of the CMA to apply to the Tribunal for a review of the decision. In determining such an application, the Tribunal is to apply "the same principles as would be applied by a court on an application for judicial review" (section 120(4)).

30. It appeared to be accepted before us that the Tribunal's judgment in *BAA Ltd v Competition Commission* [2012] CAT 3 ("*BAA*"), which related to an application under section 179 of the Act, identified the relevant principles that apply in the context of a review under section 120 of the Act. At para 20 of that judgment, the Tribunal stated as follows:

> "20. Section 179(4) of the Act provides that on an application to it for review of a decision of the CC the Tribunal "shall apply the same principles as would be applied by a court on an application for judicial review." There were no major differences between the parties as regards the approach that these principles require on the part of the Tribunal, but there were potentially significant differences of emphasis. In our judgment, the principles to be applied are as follows:
>
> (1) Sections 134(4) and (6) and 138(2) and (4) of the Act (set out above), read together, require that any remedies that the CC recommends or adopts must be reasonable, practicable and – subject to those parameters – comprehensive;
>
> (2) In light of the relevance of the Convention right in Article 1P1 in this context, section 3(1) of the HRA requires that sections 134 and 138 should be read and given effect in a way compatible with that Convention right, which means that any such remedies must satisfy proportionality principles. Also, the CC accepts in its published guidance that any such remedies must satisfy proportionality principles (paragraph 4.9 of the Competition Commission Guidelines on Market Investigation References, June 2003). There was common ground as to the formulation of the proportionality test to be applied by the CC in taking measures under the Act (and by the Tribunal in reviewing its actions):
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> > "… the measure: (1) must be effective to achieve the legitimate aim in question (appropriate), (2) must be no more onerous than is required to achieve that aim (necessary), (3) must be the least onerous, if there is a choice of equally effective measures, and (4) in any event must not produce adverse effects which are disproportionate to the aim pursued" (*Tesco plc v Competition Commission* [2009] CAT 6 at [137], drawing on the formulation by the Court of Justice in Case C-331/88 *R v Ministry of Agriculture, Fisheries and Food, ex p. Fedesa* [1990] ECR I-4023, para. 13)

In addressing proportionality, the following observation of the Tribunal at para. [135] of its judgment in Tesco should particularly be borne in mind:

> "[C]onsideration of the proportionality of a remedy cannot be divorced from the statutory context and framework under which that remedy is being imposed. The governing legislation must be the starting point. Thus the Commission will consider the proportionality of a particular remedy as part and parcel of answering the statutory questions of whether to recommend (or itself take) a measure to remedy, mitigate or prevent the AEC and its detrimental effects on customers, and if so what measure, having regard to the need to achieve as comprehensive a solution to the AEC and its effects as is reasonable and practicable."

(3) The CC, as decision-maker, must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it (in this case, most prominently, whether it remained proportionate to require BAA to divest itself of Stansted airport notwithstanding the MCC the CC had identified, consisting in the change in government policy which was likely to preclude the construction of additional runway capacity in the south east in the foreseeable future): see e.g. *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B per Lord Diplock; *Barclays Bank plc v Competition Commission* [2009] CAT 27 at [24]. The CC "must do what is necessary to put itself into a position properly to decide the statutory questions": *Tesco plc v Competition Commission* [2009] CAT 6 at [139]. The extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the CC, as to which it has a wide margin of appreciation as it does in relation to other assessments to be made by it: compare, e.g., *Tesco plc v Competition Commission* at [138]-[139]. In the present context, we accept Mr Beard's primary submission that the standard to be applied in judging the steps taken by the CC in carrying forward its investigations to put itself into a position properly to decide the statutory questions is a rationality test: see *R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] QB 37 at [34]-[35] and the following statement by Neill LJ in *R v Royal Borough of Kensington and Chelsea, ex p. Bayani* (1990) 22 HLR 406, 415, quoted with approval in *Khatun*:

> "The court should not intervene merely because it considers that further inquiries would have been desirable or sensible. It should intervene only if no reasonable [relevant public authority – in that case, it was a housing authority] could have been satisfied on the basis of the inquiries made."

(4) Similarly, it is a rationality test which is properly to be applied in judging whether the CC had a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did. There must be evidence available to the CC of some probative value on the basis of which the CC could rationally reach the conclusion it did: see e.g. *Ashbridge Investments*

Ltd v Minister of Housing and Local Government [1965] 1 WLR 1320, 1325; *Mahon v Air New Zealand* [1984] AC 808; *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142; [2004] ICR 1364 at [93]; *Stagecoach v Competition Commission* [2010] CAT 14 at [42]-[45];

(5) In some contexts where Convention rights are in issue and the obligation on a public authority is to act in a manner which does not involve disproportionate interference with such rights, the requirements of investigation and regarding the evidential basis for action by the public authority may be more demanding. Review by the court may not be limited to ascertaining whether the public authority exercised its discretion "reasonably, carefully and in good faith", but will include examination "whether the reasons adduced by the national authorities to justify [the interference] are 'relevant and sufficient'" (see, e.g., *Vogt v Germany* (1996) 21 EHRR 205 at para. 52(iii); also *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, paras. 135-138). However, exactly what standard of evidence is required so that the reasons adduced qualify as "relevant and sufficient" depends on the particular context: compare *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 at [26]-[28] per Lord Steyn. Where social and economic judgments regarding "the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken" are called for, a wide margin of appreciation will apply, and – subject to any significant countervailing factors, which are not a feature of the present case – the standard of review to be applied will be to ask whether the judgment in question is "manifestly without reasonable foundation": *James v United Kingdom* (1986) 8 EHRR 123, para. 46 (see also para. 51). Where, as here, a divestment order is made so as to further the public interest in securing effective competition in a relevant market, a judgment turning on the evaluative assessments by an expert body of the character of the CC whether a relevant AEC exists and regarding the measures required to provide an effective remedy, it is the "manifestly without reasonable foundation" standard which applies. One may compare, in this regard, the similar standard of review of assessments of expert bodies in proportionality analysis under EU law, where a court will only check to see that an act taken by such a body "is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion": Case C-120/97 *Upjohn Ltd v Licensing Authority* [1999] ECR I-223; [1999] 1 WLR 927, paras. 33-37. Accordingly, in the present context, the standard of review appropriate under Article 1P1 and section 6(1) of the HRA is essentially equivalent to that given by the ordinary domestic standard of rationality. However, we also accept Mr Beard's submission that even if the standards required of the CC by application of Article 1P1 regarding its investigations and the evidential basis for its decisions were more stringent than under the usual test of rationality, the CC would plainly have met those more stringent standards as well;

(6) It is well-established that, despite the specialist composition of the Tribunal, it must act in accordance with the ordinary principles of judicial review: see *IBA Health v Office of Fair Trading* [2004]

EWCA Civ. 142 per Carnwarth LJ at [88]–[101]; *British Sky Broadcasting Group plc v Competition Commission* [2008] CAT 25, [56]; *Barclays Bank plc v Competition Commission* [2009] CAT 27, [27]. Accordingly, the Tribunal, like any court exercising judicial review functions, should show particular restraint in "second guessing" the educated predictions for the future that have been made by an expert and experienced decision-maker such as the CC: compare *R v Director General of Telecommunications, ex p. Cellcom Ltd* [1999] ECC 314; [1999] COD 105, at [26]. (No doubt, the degree of restraint will itself vary with the extent to which competitive harm is normally to be anticipated in a particular context, in line with the proportionality approach set out by the ECJ in Case C-12/03P *Commission v Tetra Laval* [2005] ECR I-987 at para. 39, but that is not something which is materially at issue in this case). This is of particular significance in the present case where the CC had to assess the extent and impact of the AEC constituted by BAA's common ownership of Heathrow, Gatwick and Stansted (and latterly, in its judgment, Heathrow and Stansted) and the benefits likely to accrue to the public from requiring BAA to end that common ownership. The absence of a clearly operating and effective competitive market for airport services around London so long as those situations of common ownership persisted meant that the CC had to base its judgments to a considerable degree on its expertise in economic theory and its practical experience of airport services markets and other markets and derived from other contexts;

(7) In applying both the ordinary domestic rationality test and the relevant proportionality test under Article 1P1, where the CC has taken such a seriously intrusive step as to order a company to divest itself of a major business asset like Stansted airport, the Tribunal will naturally expect the CC to have exercised particular care in its analysis of the problem affecting the public interest and of the remedy it assesses is required. The ordinary rationality test is flexible and falls to be adjusted to a degree to take account of this factor (cf *R v Ministry of Defence, ex p. Smith* [1996] QB 517, 537-538), as does the proportionality test (see *Tesco plc v Competition Commission* at [139]). But the adjustment required is not as far-reaching as suggested by Mr Green at some points in his submissions. It is a factor which is to be taken into account alongside and weighed against other very powerful factors referred to above which underwrite the width of the margin of appreciation or degree of evaluative discretion to be accorded to the CC, and which modifies such width to some limited extent. It is not a factor which wholly transforms the proper approach to review of the CC's decision which the Tribunal should adopt;

(8) Where the CC gives reasons for its decisions, it will be required to do so in accordance with the familiar standards set out by Lord Brown in *South Buckinghamshire District Council v Porter (No. 2)* [2004] UKHL 33; [2004] 1 WLR 1953 (a case concerned with planning decisions) at [36]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions

> were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

> In applying these standards, it is not the function of the Tribunal to trawl through the long and detailed reports of the CC with a fine-tooth comb to identify arguable errors. Such reports are to be read in a generous, not a restrictive way: see *R v Monopolies and Mergers Commission, ex p. National House Building Council* [1993] ECC 388; (1994) 6 Admin LR 161 at [23]. Something seriously awry with the expression of the reasoning set out by the CC must be shown before a report would be quashed on the grounds of the inadequacy of the reasons given in it."

31. This Tribunal has previously stated that the proper approach to review of a decision of the CMA is to read it as a whole and not to analyse it as if it were a statute, but the CMA cannot supplement (or, necessarily, amend) its Decision at this stage: *Tesco v Competition Commission* [2009] CAT 6 ("*Tesco*") at paras 79 and 125. Nor can the Tribunal substitute its own view of the evidence: see *R (Bushell) v Newcastle Upon Tyne Licensing Justices* [2004] EWHC 446 (Admin), which was adopted by this Tribunal in *Groupe Eurotunnel SA v Competition Commission* [2013] CAT 30 at paras 122-123.

32. Also of relevance is these proceedings is *R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] EWCA Civ 1291 ("*Derbyshire*"). This case is authority for the principle that, when a public authority contends that an error of law would have made no difference to the decision under

challenge, that authority must show that the decision would inevitably have been the same absent the error. *Per* May LJ:

> "10. […] Probability is not enough. The defendant would have to show that the decision would inevitably have been the same and the court must not unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of the decision."

This principle is also referred to in *R v Broadcasting Complaints Commission, ex p. Owen* [1985] 1 QB 1153. *Per* May LJ at 1117D:

> "Where one is satisfied that although a reason relied on by a statutory body may not be properly described as insubstantial, nevertheless even without it the statutory body would have been bound to come to precisely the same conclusion on valid grounds, then it would be wrong for this court to exercise its discretion to strike down, in one way or another, that body's conclusion".

D. THE REPORT, THE DIRECTION AND FURTHER EVIDENCE

(1) ICE

33. ICE operates derivatives exchanges and clearinghouses. ICE also provides a product known as WebICE. This is a "front-end screen", which shows prices for trades and enables traders to enter quotes and execute transactions on ICE's exchanges.

34. ICE also has its own "back-end" software, which matches bids with sales prices so as to enable trades to be concluded.

(2) Trayport

35. Trayport supplies the following products:

    (1) A front-end screen, known as Joule/Trading Gateway (the screen is called Joule and the software behind it is called Trading Gateway). This product enables traders to see prices on offer from numerous trading venues, including both exchanges and brokers. Joule/Trading Gateway is unique in this respect; no other front-end screen offers a

comparable level of "aggregation" (the term used to describe the display of products offered by different venues). Brokers act as a point of contact between individual buyers and sellers and, unlike exchanges, can offer bespoke transactions in addition to standard products. Traders can use Joule/Trading Gateway to submit quotes and execute trades.

(2) Back-end software matching bids with sales prices; Trayport's back-end software for brokers is known as BTS and its back-end software for exchanges is known as ETS.

(3) A straight-through processing ("STP") link, Clearing Link. This connects Trayport's broker venues' back-ends to clearinghouses. This allows trades entered into via a broker to be routed through a clearinghouse, without the trade having to be manually registered on an exchange by the broker.

(4) GV Portal: a product which connects the back-end software used by exchange venues that do not use Trayport's ETS software to Joule/Trading Gateway. This enables traders to use Joule/Trading Gateway to see prices and execute trades on exchanges that do not use Trayport's back-end software.

36. Trayport's software products communicate with each other through an application programming interface ("API"). Trayport has a "Closed API" policy, which means that Trayport does not allow users of its back-end systems to connect to a front-end screen other than Joule/Trading Gateway or to an STP link other than Clearing Link without Trayport's permission.

(3) The parties' market positions

37. ICE is the largest exchange active in European utilities trading.[6]

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[6] Para 3.1.

38. So far as Trayport's products are concerned:

(1) Joule/Trading Gateway is the primary front-end screen for European utilities trading and underpins around 85% of trading in this field.[7]

(2) All major brokers active in European utilities trading use Trayport's back-end BTS software. Because of Trayport's Closed API policy, those brokers are unable to connect their Trayport back-end to an alternative front-end screen; they are therefore dependent on Joule/Trading Gateway to reach traders.[8]

(3) All of the major exchanges that are active in European utilities trading either use Trayport's back-end ETS software or connect to Trading Gateway from their own back-end matching software via GV Portal.[9]

(4) Trayport's Clearing Link software is differentiated from other third party STP links because it is part of Trayport's "end-to-end" software offering. This means that Trayport can offer technology to support the whole of a trade from price discovery and entering bids (via Joule/Trading Gateway) through to price matching (via BTS and ETS) and clearing (via Clearing Link).[10]

39. It is common ground that Trayport enjoys the benefits of a network effect: in broad terms, the more transactions are carried out on a particular platform (i.e. the more liquidity there is), the better the prices that will be available. It follows that Trayport is made more attractive to buyers by the fact that it is used by many sellers, and vice versa. In particular:

(1) Traders generally look to have access to the greatest possible range of venues offering the products that they trade. In this respect, the unrivalled degree of aggregation offered by Trayport is extremely

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7 Para 3.20.
8 Para 3.21.
9 Para 3.27.
10 Para 3.28.

attractive. In fact, around 80% of traders have a Trayport screen on their desk; the next most popular front-end product (other than WebICE) is used by fewer than 10% of traders.[11]

(2) The fact that so many traders use Trayport makes it all the more attractive to venues, which can market their products to as many traders as possible using Joule/Trading Gateway. The network effect is self-reinforcing: the fact that venues market their products via Joule/Trading Gateway makes the Trayport platform all the more attractive to traders, further increasing its ubiquity.

40. Trayport's end-to-end software offering combined with its Closed API policy leverage that network effect across Trayport's range of products. For instance, because Trayport does not allow users of its back-end software to access a front-end screen other than Joule/Trading Gateway without permission, all brokers who use BTS (and, as noted above, all the major brokers do use BTS) are heavily incentivised to use Joule/Trading Gateway.

41. In the Report the CMA found that barriers to entry in the market to compete with Trayport are high and previous attempts at creating a serious rival to Trayport have failed.[12] After Trayport, the most widely used utilities trading software is WebICE, ICE's proprietary product that enables trading on ICE's exchanges.[13]

(4) The Transaction

42. ICE acquired the entire issued share capital of Trayport in December 2015. It is common ground that this created a relevant merger situation for the purposes of the Act.[14] ICE did not seek prior clearance of the Transaction from the CMA, nor did it make its acquisition conditional upon there being no reference of the merger to the CMA.

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11 Table 4 (para 7.119).
12 Paras 9.36 and 7.122-7.124.
13 Paras 7.119-7.120.
14 Report, section 4.

43. Under the heading "The rationale for the merger" the Report states the following:

> "ICE said that the acquisition of Trayport was part of a strategic decision to diversify into new and complementary business areas involving software and data, to offset the volatility of transaction based revenue streams with recurring licence fee based revenues. ICE also said that ICE's internal papers supported ICE's stated rationale and showed a clear intention to continue to operate and grow Trayport as a distinct business within ICE."[15] (Footnotes omitted)

44. In the Report the CMA considered that Trayport plays an important role in enabling and promoting competition between venues and clearinghouses (i.e. between the players at the levels of the market where ICE is active)[16] and by virtue of its acquisition of Trayport, ICE, the largest European utilities trading exchange, will control Trayport's strategic direction, innovation priorities and levels of investment.[17]

45. More specifically, the Report finds that ICE's control of Trayport will give ICE the *ability* to harm its rivals in various ways, for example by reducing service levels for the Trayport product (which may encourage traders to use WebICE rather than Trayport) or delaying and frustrating its rivals' product development.[18]

46. The Report finds that ICE would be likely to gain trading volumes and its rivals would be likely to lose trading volumes as a result of these measures[19] and ICE would have the *incentive* to take these measures because the benefits of them to ICE would exceed their costs.[20]

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15 Para 4.2.
16 Paras 7.171-7.187.
17 Para 8.11.
18 Paras 8.9-8.88.
19 Paras 8.156-8.157.
20 Paras 8.143-8.148.

(5) The New Agreement

(a) The position before the New Agreement

47. Before the New Agreement was entered into in May 2016, in order for ICE's prices to be visible on Joule/Trading Gateway, Trayport built a separate link, "ICE Link", to connect Trading Gateway to the ICE matching engines.[21] ICE Link was only available (1) for certain asset classes; and (2) if customers paid Trayport an additional sum for an ICE Link licence.[22]

48. Prior to the New Agreement:[23]

    (1) There was no general commercial agreement between ICE and Trayport for the distribution of the full range of ICE products through the standard Trading Gateway screen, or for routing orders between Trading Gateway and the ICE back-end software. In practical terms, this meant that the standard Joule/Trading Gateway product used by a trader (1) would not show prices for products available on ICE exchanges; and (2) could not be used to execute trades on ICE exchanges. In that respect, ICE was different from other exchanges, which make their prices available to traders on Joule/Trading Gateway either by using Trayport's ETS back-end software or by licensing GV Portal to connect to the exchange's own back-end software.

    (2) There was also no agreement for the licensing by ICE of Trayport's Clearing Link. When an exchange licenses Clearing Link, that exchange's products are made available on the back-ends used by brokers (i.e. Trayport's BTS software). That enables transactions entered into via a broker (which would not automatically be cleared) to be routed via an STP link to the relevant exchange's clearinghouse for clearing.

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21 Para 6.14.
22 Para 6.15.
23 Para 6.13.

(b) The effect of the New Agreement

49. The effect of the New Agreement would be as follows:

(1) A greater number of ICE products would be displayed to all traders using Joule/Trading Gateway. ICE would pay Trayport for this service, whereas ICE did not previously pay for ICE Link.

(2) ICE would take a licence to Clearing Link, so that its products would be available to brokers using Trayport's BTS software. This would mean that transactions entered into via a broker could be routed to ICE's clearinghouse for clearing via an STP link.

(c) Negotiation of the New Agreement: information before the CMA

Previously strained negotiating relationship

50. In the Report the CMA found that, prior to the Transaction, ICE and Trayport were rivals, who did not want to work together and/or who found it difficult to collaborate (paras 7.107-7.111 and 7.172-7.182). Certain of the underlying documents were drawn to the Tribunal's attention in the course of the hearing to provide an indication of the evidence that the CMA used to support this finding. In particular:

(1) An ICE document entitled "*Strategic objectives*", created in June 2014 refers to ICE's strategy for 2013-2014, and refers to "[…][✂]" and identifies a "*Longer term*" aim in relation to Trayport as "[…][✂]".[24]

(2) A Trayport document entitled "*Trayport business snapshot*", dated May 2014, gives a projection of "*Trayport in 2018*" including "[…][✂]"[25].

[24] Annex 13 to Defence (pp 4 and 7).
[25] Annex 5 to Defence (p 3).

Chronology of the negotiations

51. The negotiations which ultimately led to the conclusion of the New Agreement are said by ICE and Trayport to have started in early 2015. A first meeting between ICE and Trayport took place on 4 April 2015.[26] On 29 April 2015 BGC announced its intention to sell Trayport: prior to that announcement, BGC had received numerous approaches from potential purchasers interested in acquiring Trayport (either on its own or with other GFI businesses), including an approach from ICE.[27] In the first half of May 2015 certain emails were exchanged between ICE and Trayport about a possible new agreement between them. The negotiations were halted on 23 June 2015 at the instruction of BGC following ICE's involvement in the Trayport sales process. The negotiations resumed in January 2016 after ICE completed its acquisition of Trayport. The New Agreement was not concluded until some months later on 11 May 2016.

Material before the CMA

52. The conclusion of the New Agreement was notified to the CMA on 16 May 2016 by way of ICE's fortnightly compliance statement required under the IEO. The CMA replied by email on 20 May 2016 to indicate that it was concerned that the implementation of the New Agreement "could have implications at the end of the phase 2 process should the investigation lead to a consideration of remedies". The CMA expressed its wish to speak to ICE and Trayport separately.

53. A call between ICE and the CMA took place on 24 May 2016 at which the negotiation of the New Agreement was discussed. The CMA's note of the call states:

> "ICE told us that new agreements related to negotiations between ICE and Trayport which commenced in the first half (H1) of 2015.

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26 This is recorded in the CMA's note of its call with Trayport on 25 May 2016, referred to below at paragraph 54.

27 Report, para 6.6.

> […]
>
> Negotiations resumed post ICE/Trayport merger and were conducted between respective commercial teams and ICE emphasised that the terms were arm's length.
>
> […]
>
> We asked ICE to provide us with contemporaneous documents to corroborate this."

54. A further call between Trayport and the CMA took place the following day on 25 May 2016. The CMA's note of that call records that:

> "Discussions started when Gordon Bennett joined ICE from Marex Spectron in Jan/Feb 2015.[28] He had a good relationship with Trayport and they soon started negotiations.
>
> […]
>
> The first meeting was held on 4 April 2015. […]
>
> […]
>
> Proposal sent to Gordon Bennett on 7 May with most of the technical and commercial issues in covered:
>
> […]
>
> ICE responded that Trayport would not get lucrative oil markets – just the core power and gas markets.
>
> Parties close to an agreement before the BGC non-disclosure agreement stopped discussions until the acquisition was complete." (Emphasis added.)

55. It appears that either during or shortly after these calls the CMA indicated its view to ICE's solicitors that the New Agreement may have been entered into in breach of the IEO and that a direction to suspend its implementation might be issued. ICE's solicitors wrote to the CMA on 5 June 2016 indicating that "there is no need for a CMA Direction" because the Merging Parties would voluntarily suspend implementation. This arrangement was confirmed by the Merging Parties on 14 June 2016.

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[28] We note that, according to Mr Bennett's witness statement, he joined ICE on 16th February 2015.

56. In response to the CMA's request for contemporaneous documents, the Merging Parties provided the CMA with emails dated 7 and 13 May 2015.

(1) The 7 May 2015 email from Trayport to ICE sets out: "a summary of our dialogue to date on how a future relationship between ICE (including ICE Endex) and Trayport might work (subject to agreement) and the terms on which such a deal would be based." Under the heading "Commercial relationship" the scope of the agreement is set out. It is stated, *inter alia*, that the agreement will cover "a) Connectivity from Trayport TGW user front ends directly to ICE Futures Europe and ICE Endex.". The final paragraph of the email states: "This offer is valid for 60 days and [is] not valid if there is a change of ownership of Trayport."[29]

(2) The 13 May 2015 email is a response from ICE to Trayport which states: "[o]n point a) we need to make clear what markets i.e. these do not include Oil. It's only for […][✂]."[30]

57. In submissions to the CMA dated 1 June 2016, ICE stated that the New Agreement represented a "good deal" for Trayport and that it was a deal that Trayport would have signed up to in May 2015 even if Trayport came under new ownership.[31]

(d) Exclusion of the New Agreement from the counterfactual

58. In its Report the CMA found that the conclusion of the New Agreement was insufficiently likely to be included in the counterfactual:

> "[…] We are of the view that while it is possible ICE and Trayport would have successfully entered into the New Agreement absent the Merger this is not sufficiently certain in order to be included as part of the most likely counterfactual, particularly, in light of there being no draft agreement, including no final agreement on the scope of ICE products to be listed on

29 NoA1, Tab 11.
30 Ibid.
31 Para 6.26.

> Trayport, and the Parties' previous reluctance to cooperate […]" [32] (Emphasis added.)

(e) Further evidence annexed to NoA1

59. In response to the CMA's finding at para 6.29 of its Report, and for the purpose of these applications, ICE submitted two new pieces of evidence on the negotiation of the New Agreement in the Annexes to NoA1. These pieces of evidence had not been placed before the CMA during the merger investigation process.

(1) An e-mail dated 14 May 2015 from Trayport to ICE, responding to the email of 13 May referred to at 56(2) above, stating:

> "To confirm, re point a) below, "Connectivity from Trayport TGW user front ends directly to ICE Futures Europe and ICE Endex for […][✂]" is acceptable subject to commercial terms being agreed [...]".

(2) A witness statement from Mr Bennett which stated:

> "9. 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".

60. The 14 May 2015 email clarifies that Trayport agreed ICE's position that oil would be outside the scope of any new agreement, which went further than the position stated to the CMA by Mr Bennett on 25 May 2016 when he had told it that ICE had responded to Trayport that they would not get the oil market (see quoted text emphasised in paragraph 54 above). Nevertheless, the final scope of the New Agreement does not entirely match that set out in the email correspondence. The scope of the finalised agreement is set out in Schedule 1 in the following terms:

> "Covered Products: The interface(s) will work with the following Spot and Futures instruments, […][✂]."

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[32] Para 6.29.

The final scope of the agreement includes reference to two products (namely […][✂]), which had not been canvassed in the 13 May 2015 email (see paragraph 56(2) above).

(f) Direction suspending implementation of the New Agreement

61. On 4 November 2016, the Merging Parties informed the CMA that they intended to resume implementation of the New Agreement on 14 November 2016. On 10 November 2016, the CMA issued a Direction pursuant to para 10 of the IEO, requiring the Merging Parties to cease implementation. ICE filed NoA2 shortly afterwards, on 17 November 2016.

(6) The CMA's analysis of the merger

(a) Counterfactual (Section 6 of the Report)

62. The CMA found that the counterfactual would not be materially different to the pre-merger situation as it found that:

(1) Trayport would have likely been sold to an alternative purchaser that would not have raised competition concerns[33]; and

(2) It was not sufficiently certain that the New Agreement would have been entered into absent the merger to include it in the counterfactual (see para 6.29 quoted at paragraph 58 above).

ICE originally objected that the CMA had applied the incorrect standard of proof to point (2) but, by the time of the hearing, it was common ground that the CMA had reached that conclusion on the balance of probabilities. Consistent with that position, the CMA's skeleton argument stated that "the CMA found, on the balance of probabilities, that the New Agreement would not have been concluded absent the merger." For convenience, we adopt the same formulation in our judgment.

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[33] Para 6.33.

(b) Pre-merger competition (Section 7 of the Report)

63. The CMA examined the competitive conditions in the counterfactual to allow it to analyse whether ICE's ownership of Trayport could adversely affect competition in any market.

Factors affecting competition

64. The CMA concluded that the key factors affecting competition in the relevant markets were as follows:

(1) The primary factors affecting traders' choice of trading venue were liquidity and contract price, which are inextricably linked. Execution fees are also an important, but secondary, driver of competition between venues.[34]

(2) The extent to which exchanges and brokers were in competition depended on a number of factors; competition was greater where markets were more liquid and products were standardised.[35]

65. The key factors determining traders' decisions about where to clear transactions were margin (the amount of collateral that a trader needs to advance to the clearinghouse in case of default) and open interest (the number and size of open transactions of that trader with a clearinghouse; this influences the amount of margin required because a new trade may be able to be netted off against existing open transactions). The level of clearing fees was a secondary factor.[36] The availability and quality of an STP link may also be a factor in choosing between clearinghouses.[37]

Competitive constraints on ICE

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34 Para 7.10.
35 Para 7.11.
36 Para 7.12.
37 Para 7.14.

66. So far as ICE is concerned:

(1) The CMA found that there is substantial actual and potential head-to-head competition between exchanges. That is the case even where one exchange may currently hold most or all of the liquidity in a particular asset class. There is also dynamic competition between exchanges to compete with each other over time, to launch new products and innovate in other ways. ICE has particularly strong market positions in exchange-based trades for European gas and emissions, with a share of over 90% in both cases. It has a smaller presence in exchange-based European power trades, but competes in this market nevertheless.[38]

(2) The CMA also considered the extent to which ICE competes with rival clearinghouses to clear trades that are executed by brokers or bilaterally between the parties (collectively, over the counter or "OTC" trades).[39] The CMA concluded that there is head-to-head competition between clearinghouses that hold existing volumes in the same asset classes and equivalent products. There is also potential head-to-head competition between clearinghouses that threaten to take clearing volumes for products where they are not currently active. Finally, there is dynamic competition between clearinghouses, which seek to win business by innovating. ICE is the leading exchange in clearing OTC traded gas, emissions and oil, with a 90-100% market share in gas and emissions.[40]

(3) The closest competition amongst venues is likely to be between venues of the same type, i.e. broker-to-broker and exchange-to-exchange. The evidence showed, however, that there was also competition between ICE and brokers. This competition would be closest in gas and emissions, where ICE was the leading exchange. ICE would in

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38 Paras 7.41-7.45.

39 There was no need for the CMA to consider competition between clearinghouses for trades that are executed on-exchange, because in this case the exchange used automatically routes the trade for clearing at its own clearinghouse: para 7.46.

40 Paras 7.62-7.64.

particular be in competition with brokers to win cleared trades, but over the longer term there would be competition to win uncleared bilateral trades too.[41]

The market role played by Trayport

67. So far as Trayport was concerned:

(1) The CMA found that Trayport was very important for market participants "and it was difficult, or impossible, to trade effectively without licensing its products and thereby gaining access to the Trayport platform". This was in particular because of the network effects of the Trayport platform, which are reinforced by the fact that it offers an aggregation of multiple venues on one screen and by its Closed API policy. The CMA's conclusion was that there was "a lack of viable alternatives for market participants".[42]

(2) In certain asset classes nearly all electronic trading appears to involve both traders and venues using Trayport products.[43] There is a "ubiquitous use of the Trayport platform by traders, venues and clearinghouses, which generates network effects and deeply embeds the value of the Trayport platform".[44]

(3) Brokers are particularly dependent on Trayport compared to exchanges, although exchanges that have tried to enter and compete for liquidity in asset classes where they did not have significant presence or to introduce new products have generally done so through Trayport.[45]

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41 Paras 7.85-7.86.
42 Para 7.167.
43 Para 7.168.
44 Para 7.169.
45 Para 7.168.

(4) Clearinghouses were also dependent on Trayport to achieve distribution of their products amongst brokers and traders, but to a lesser extent than venues.[46]

68. The CMA also found that rather than being a passive software provider, Trayport is active in making efforts to influence competition between trading venues and between clearinghouses. For example:

(1) Trayport invests in understanding market dynamics and focuses its resources on Trayport customers who are thought likely to succeed. This drives dynamic competition and market structures in favour of the Trayport platform.

(2) Trayport supports its customers' efforts to encourage electronic trading, e.g. as opposed to voice-brokered trades or in nascent markets.[47]

(3) The CMA concluded that "by supporting and defending its customers' businesses, Trayport builds and protects its own business and, in doing so, promotes and enables dynamic competition between venues and between clearinghouses".[48]

(c) Competitive assessment (Section 8 of the Report)

69. Since the market relationship of the Merging Parties is principally vertical rather than horizontal, the CMA noted that the most likely competitive harm would be that the merged firm could harm competition at one level of the supply chain through its behaviour at another level of the supply chain (i.e. foreclose its rivals).[49]

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46 Para 7.170.
47 Para 7.185.
48 Para 7.187.
49 Paras 8.3-8.4.

70. The CMA assessed the effect of the Transaction by reference to the following three questions:

(a) *Ability:* Would the merged firm have the ability to harm rivals, for example through raising prices or refusing to supply them?

(b) *Incentive:* Would it find it profitable to do so?

(c) *Effect:* Would the effect of any action by the merged firm be sufficient to reduce competition in the affected market to the extent that, in the context of the market in question, it gives rise to an SLC?[50]

71. The CMA also noted that foreclosure cases might involve total foreclosure, where the merged firm stops supplying its rivals altogether, and partial foreclosure, where the merged firm makes it more difficult for rivals to compete, e.g. by raising prices.[51]

Ability

72. The CMA concluded that the merged firm would be able to harm ICE's rivals. In particular, the CMA considered that ICE, as the sole owner of Trayport, would be able to control its strategic direction, innovation priorities and/or levels of investment. In the longer term, ICE would have the ability to direct Trayport's strategy and commercial priorities in a manner that might benefit ICE to the detriment of its rivals. ICE's ability to harm its rivals would be increased by the following factors:

(1) ICE's rivals are dependent on Trayport;

(2) Alternatives to Trayport are weak;

(3) Trayport has a role in enabling and promoting competition; and

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50 Guidelines at para 5.6.6; Report at para 8.5.

51 Para 8.6.

(4) Barriers to entry and expansion to compete with Trayport are high.[52]

73. The CMA found that the merged firm would be able to pursue a number of foreclosure mechanisms, including the following:

(1) Refusing to supply rivals;

(2) Increasing prices;

(3) Lowering service levels;

(4) Delaying and frustrating product development and innovation; and

(5) Using confidential knowledge of rivals' plans and innovations.[53]

Incentive

74. The question of incentive to foreclose was considered by the CMA in five stages.[54]

(i) Qualitative versus quantitative analysis

75. First, the CMA explained that it had primarily analysed incentives to foreclose using a qualitative (as opposed to a quantitative) assessment. The CMA considered that a quantitative assessment would not be particularly informative, in view of the relatively long period over which the effects of the Transaction had to be assessed and because of the difficulty in predicting precisely which foreclosure mechanisms Trayport would adopt.[55]

(ii) Benefits of foreclosure to merged firm

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52 Paras 8.9-8.12.
53 Para 8.85.
54 Summarised at para 8.101.
55 Paras 8.102-8.106.

76. Second, the CMA analysed the benefits to the merged firm of pursuing a foreclosure strategy. The CMA noted that, before the Transaction, ICE and Trayport had conflicting incentives, as follows:

(1) Trayport's objective was to support competition between venues. The existence of multiple competing venues, with liquidity fragmented between them, meant that Trayport's aggregation software offered significant value to industry participants.

(2) ICE's goal has been and continues to be to have as much trading as possible concentrated on its venues and clearinghouses.

(3) This raises the prospect that, after the Transaction, Trayport's focus will change from supporting competition between multiple venues and clearinghouses to trying to move liquidity towards ICE's venues and clearinghouses.[56]

77. The CMA's view was that the use of the foreclosure mechanisms identified by it "would have a substantial negative impact on the competitiveness of ICE's rivals" and, as a result, "rival venues and clearinghouses would find it more difficult to attract and retain the business of traders, who would be more disposed to use ICE instead".[57]

78. The CMA identified the following five potential benefits to ICE of using Trayport to engage in total or partial foreclosure of ICE's rivals:

(1) ICE would over time be likely to be able to grow its position in products where it already has a substantial presence at the expense of its rivals.[58]

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56 Paras 8.107-8.108.
57 Para 8.109.
58 Para 8.111.

(2) Total and/or partial foreclosure of ICE's rivals would help to prevent these from challenging ICE to win volumes in future in products where ICE already has a strong position.[59]

(3) ICE would be able to use its control of Trayport to accelerate pre-existing long-term industry trends and to direct them in its favour.[60]

(4) Total and/or partial foreclosure could over time help ICE to obtain volumes from its rivals in existing products where it has little or no current position.[61]

(5) ICE's control of Trayport would be likely to help ICE to gain control of new markets and segments as these emerge in future.[62]

79. The CMA found that, because of the complex and multifaceted nature of the Trayport platform, ICE would in the long run be able to exercise a high degree of flexibility over a partial foreclosure strategy, so as to target foreclosure mechanisms at rivals and products where it saw the greatest benefit for ICE's exchanges and clearinghouses.[63]

80. The benefits of foreclosure were likely to be substantial. Some would emerge relatively quickly and others might take some time to emerge.[64]

(iii) Costs of foreclosure to merged firm

81. Third, the CMA analysed the costs to the merged firm of the foreclosure strategy.

82. In relation to partial foreclosure:

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59 Para 8.112.
60 Para 8.113.
61 Para 8.114.
62 Para 8.115.
63 Para 8.116.
64 Para 8.118.

(1) The CMA considered that the costs of a partial foreclosure strategy would be likely to be small, even if the Merging Parties faced some costs in terms of lost revenues from Trayport's business activities and an associated reduction in value of the Trayport business.[65] The value of lost revenues would be limited by the facts that all brokers and most exchanges were highly dependent on Trayport, with no effective current alternatives, and that barriers to entry were high.[66]

(2) Further, "[t]he fact that partial foreclosure would take the form of incremental changes also means that it would not fundamentally undermine the Trayport platform, and therefore would not force market participants to use an alternative".[67]

(3) The CMA did not accept the Merging Parties' argument that market participants would retaliate against any partial foreclosure mechanisms by switching their trading activity away from ICE's exchanges and clearinghouses to rivals. This was unlikely, because switching in this way would bring additional costs for traders. Neither did the CMA accept that brokers would be able to retaliate against ICE by switching clearing volumes to rival clearinghouses; it is almost always the trader, rather than the broker, that decides which clearinghouse to use.[68]

(4) The CMA also found that "many – though not all – of the potential mechanisms the merged firm are likely to use will be difficult for market participants to even detect and attribute to a specific action and intention of the merged entity, meaning that they are particularly unlikely to trigger a response".[69]

83. The CMA considered that a total foreclosure strategy was less likely, because the merged firm would incur substantial costs if it was to engage in total

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65 Para 8.120.
66 Para 8.121.
67 Para 8.121.
68 Paras 8.123-8.125.
69 Para 8.126.

foreclosure. In particular, total foreclosure of existing customers would have an impact on Trayport's profitability and might lead to the creation of a rival system.[70]

(iv) Quantitative analysis of foreclosure

84. Fourth, the CMA discussed the quantitative analysis of foreclosure. Although, as noted above, the CMA placed limited weight on quantitative analysis, a high-level quantitative analysis was performed as a cross-check on the qualitative assessment. For each partial foreclosure scenario that the CMA considered, the results of the analysis were consistent with those of the qualitative analysis, namely that the benefits of partial foreclosure were likely to be substantially greater than the costs.[71]

(v) Comparison with previous owner, GFI

85. Fifth, the CMA considered the Merging Parties' submission on the comparison between ICE's ownership of Trayport and its previous owner, GFI. GFI is a broker that owned Trayport prior to the Transaction. The CMA found that there were a number of differences between ownership by GFI and by ICE, which meant that conclusions on the likelihood of foreclosure after the merger could not be drawn from Trayport's previous ownership.[72]

Effects

86. The CMA found that a partial foreclosure strategy would result in an SLC in the supply of trade execution services and trade clearing services to energy traders.[73] Specifically:

(1) The CMA considered that "post-Merger ICE's ownership of Trayport would be used to disadvantage ICE's rivals and/or favour ICE". This

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70 Paras 8.130-8.132.
71 Paras 8.133-8.134.
72 Paras 8.138-8.142.
73 Para 8.160.

would result in an immediate loss of rivalry with a longer term effect on competition, including head-to-head competition between ICE and its rivals, and dynamic competition between ICE and its rivals to launch new products and to innovate.[74]

(2) The CMA continued that in the long term, "it is likely to result in liquidity remaining with ICE in asset classes where it already has a strong position and that it may ultimately result in liquidity shifting away from ICE's rivals in asset classes where it is currently weak and/or has no position. It would also increase the likelihood that ICE would take a leading position in new product markets or where innovation shifted the balance of power".[75]

Horizontal effects

87. The CMA also considered whether the Transaction might result in an SLC in the market for the supply of energy trading front-end access screens (i.e. as between Joule/Trading Gateway and WebICE). The CMA decided that it was likely that there would be a reduction in competition in this market but that this was not sufficient to represent a substantial effect.[76]

(d) Barriers to entry and Efficiencies (Sections 9 and 10 of the Report)

88. Having found that the Transaction has resulted or may be expected to result in an SLC, the CMA analysed whether market entry or expansion might prevent an SLC. It concluded that entry and/or expansion by a new alternative to the Trayport platform would not be timely, likely and sufficient to mitigate the SLC.[77]

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74 Para 8.156.
75 Para 8.157.
76 Para 8.169.
77 Para 9.36.

89. Next, the CMA assessed whether the Transaction would give rise to efficiencies, so as to enhance rivalry such that the merger does not give rise to an SLC. The CMA rejected that possibility.[78]

(e) Remedies (Section 12 of the Report)

90. The CMA considered the following potential remedies:

(1) A structural remedy requiring the full or partial divestiture of Trayport by ICE;

(2) A behavioural remedy requiring the Merging Parties to provide access to Trayport's products and services on fair, reasonable and non-discriminatory ("FRAND") terms;

(3) An "Open API measure", requiring Trayport to allow third party software to connect to Trayport's software platform components; and

(4) A proposal first put forward by the Merging Parties on 7 September 2016,[79] at the hearing to discuss the CMA's Provisional Findings Report. After prompting by the CMA (Annex 2 to Defence), the Merging Parties produced a document summarising this remedies proposal (the "Parties' Remedy Proposal", Annex 3 to Defence).

91. The CMA decided that a complete divestiture of Trayport to a suitable purchaser (which would, amongst other things, need to be a purchaser that did not raise competition concerns) would be achievable and effective in addressing the SLC.[80] The Merging Parties did not dispute that a full divestiture would be an achievable and effective remedy.

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78 Para 10.4.

79 The Merging Parties had previously put forward another remedy proposal, involving FRAND access to Trayport's products and a confidentiality firewall.

80 Para 12.75.

92. The CMA rejected the FRAND remedy,[81] the Open API measure[82] and a partial divestiture.[83] There is no challenge to any of these aspects of the CMA's Decision.

Parties' Remedy Proposal

93. This proposal had the following elements:

(1) A commitment to provide Trayport products and services on FRAND terms (the "FRAND element");

(2) The implementation of a confidentiality firewall between ICE and Trayport (the "Firewall element"); and

(3) Measures to ensure operational separation of Trayport from ICE (the "Separation element").[84]

94. The CMA considered each element of the Parties' Remedy Proposal separately before reaching a conclusion in the round on the package as a whole. The CMA's conclusion was that the Parties' Remedy Proposal would not be effective, for the following reasons:

(1) The Separation element would not be effective because it would not achieve the full independence and autonomy of Trayport from ICE that would be necessary for this to be an effective remedy. It would follow that ICE would still be in a position to influence Trayport directly or indirectly. Further, there would be a need for ongoing monitoring and compliance by an external monitor, and it would be difficult for such a monitor to verify compliance.[85]

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81 Para 12.101.
82 Para 12.175.
83 Para 12.38.
84 Para 12.102.
85 Para 12.128.

(2) As to the FRAND element, it would be difficult to specify what the FRAND requirements were and these "specification risks cannot be mitigated in a dynamic market [...] where Trayport's customers have different development requirements and needs and where products and services could change significantly".[86]

(3) As to the Firewall element, "there would be considerable specification risks in relation to designing a comprehensive Firewall element such that it would cover all types of 'soft information' and their means of transfer between ICE and Trayport".[87]

(4) The constituent elements of the proposal would not address each others' deficiencies and the CMA's concerns could not be addressed by means of amendments to the proposal. It followed that the Parties' Remedy Proposal would not be an effective remedy to the SLC and its resulting adverse effects.[88]

Relevant customer benefits

95. The CMA had regard to the effects of remedial action on any RCBs arising from the merger. The Merging Parties had identified a number of alleged RCBs,[89] but the CMA found that none of these was in fact an RCB within the meaning of the Act.[90] There is no challenge to this finding.

86 Para 12.154(b).
87 Para 12.154(c).
88 Paras 12.154(d)-(f).
89 Listed at para 12.180.
90 Para 12.201.

E. INTENSITY OF REVIEW

(1) Review: relevance of divestiture remedy

(a) ICE's argument

96. According to ICE, the context of this case calls for careful scrutiny for two reasons:

(1) The CMA intends to make the most far-reaching remedies order available to it, including requiring divestment of property.[91] Where the CMA has taken such a "seriously intrusive step" the Tribunal will expect the CMA "to have exercised particular care in its analysis of the problem affecting the public interest and of the remedy it assesses is required".[92] This intrusive step modifies the margin of discretion and degree of evaluative discretion that the CMA enjoys; and

(2) The Tribunal in *BAA* emphasised that whilst the Tribunal should ordinarily show "particular restraint in 'second guessing' the educated predictions for the future" that have been made by the CMA, "the degree of restraint" varies "with the extent to which competitive harm is normally to be anticipated in a particular context, in line with the proportionality approach set out by the Court of Justice ["CJEU"] in Case C-12/03P *Commission v. Tetra Laval* [2005] ECR I-987 ["*Tetra Laval*"] at para. 39".[93]

(b) The CMA's response

97. The CMA contends that the context in which the Tribunal made its comment in *BAA* was materially different from that in the present case. When (as in this case) the CMA investigates a completed merger, the risk of an order for

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91 Together with the unwinding of a contract, namely the New Agreement.

92 *BAA* at para 20(7), referring both to "the ordinary domestic rationality test and the relevant proportionality test under Article 1P1".

93 *BAA* at para 20(6).

divestment is one of the Merging Parties' own making; there would be no such risk if the Merging Parties had notified the merger to the CMA before it had taken place. In the merger context, an order for divestment simply restores the market to the status quo before the merger. In contrast, in *BAA*, the Competition Commission (the "CC") had ordered BAA to divest Stansted airport as part of a *market investigation*. An order for divestment in a market investigation context may be more intrusive, since it intervenes in an existing market situation and requires a change to the status quo.

98. The CMA further contends that if it had a reduced margin of discretion in cases requiring a divestment of property, it would be more difficult for the CMA to show that it was entitled to require the unwinding of a completed merger than to prohibit an anticipated merger. This could have the effect of disincentivising merging parties to co-operate with the merger regime by notifying mergers to and seeking approval from the CMA before they take place. That would be an undesirable outcome and was plainly not intended by the Tribunal's comments in *BAA*.

99. Moreover, it can be seen from para 20(7) of *BAA* that the Tribunal emphasises that the intrusiveness of the step ordered by the CMA "is a factor which is to be taken into account alongside and weighed against other very powerful factors [...] which underwrite the width of the margin of appreciation or degree of evaluative discretion to be accorded to the CC, and which modifies such width to some limited extent. It is not a factor which wholly transforms the proper approach to review of the CC's decision which the Tribunal should adopt".

(c) The Tribunal's conclusion

100. This Tribunal has considered the issue of divestiture remedies on a number of previous occasions. In *Ryanair Holdings Plc v Competition Commission* [2014] CAT 3 ("*Ryanair*") the Tribunal stated:

> "[182] There have been a number of cases where divestiture remedies have been considered by the Tribunal. In *British Sky Broadcasting Group plc v.*

(1) Competition Commission (2) Secretary of State for Business, Enterprise and Regulatory Reform [2008] CAT 25 ("*BSkyB*"), the CC had found that the acquisition by BSkyB of 17.9% of the shares in ITV plc had resulted in an SLC, and recommended partial divestiture of shares down to a 7.5% holding. The Secretary of State issued a decision following the recommendation contained in the CC's report. The Tribunal rejected Sky's contention that the recommended remedy was disproportionate and irrational. Whilst *BSkyB* was concerned with section 47 as opposed to section 35, the principles as to remedy considered in that case are, at least in broad terms, applicable here. The Tribunal in BSkyB considered the margin of assessment available to the CC in connection with its selection of remedy at paragraphs 284 to 287 of the judgment as follows:

> "284. It is not in dispute that the Commission and the Secretary of State have a margin of assessment with regard to appropriate action for remedying the SLC created by a merger (see, to that effect, Somerfield (above) at paragraph [88]).
>
> 285. In deciding what remedy to recommend to the Secretary of State the Commission is required by subsection 47(9) of the Act in particular to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and consequent adverse effects on the public interest.
>
> 286. The CC Guidelines state that the Commission's starting point will normally be to choose the remedial action that will restore the competition that has been, or is expected to be, substantially lessened as a result of an RMS (paragraph 4.23). The CC Guidelines further state that remedies that aim to restore all or part of the market structure prior to a merger are likely to be a direct way of addressing the adverse effects (ibid).
>
> 287 In Somerfield, in the context of the selection of a remedy for SLC under subsections 35(3) and 35(4) of the Act (which are expressed in very similar terms to subsections 47(7), (8) and (9)), the Tribunal said:
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> > "… in our view, it is not unreasonable for the CC to consider, as a starting point, that "restoring the status quo ante" would normally involve reversing the completed acquisition unless the contrary were shown. After all, it is the acquisition that has given rise to the SLC, so to reverse the acquisition would seem to us to be a simple, direct and easily understandable approach to remedying the SLC in question." (paragraphs [98]-[99])."

[183] The Tribunal recognised that the CC has to exercise its judgment in deciding whether partial divestiture was the appropriate remedy (at [293] and [302]):

> "293. These arguments fall to be considered in the light of the Commission's statutory obligation to have regard to the need to achieve "as comprehensive a solution as is reasonable and practicable" to remedy the SLC and its adverse effects on the public interest. The Tribunal considers that in the light of this obligation the

Commission was clearly entitled to consider whether and if so at what level a partial divestiture would ensure that there would be no realistic prospect of Sky being able to exercise material influence over ITV's strategy. We agree with the Commission that this is not simply a matter of calculation, but includes a significant element of judgment on the part of the Commission.

…

302. Whether a remedy, structural or behavioural, will provide as comprehensive a solution as is reasonable and practicable to address the SLC together with any adverse effects resulting from it, must be examined by the Commission on a case-by-case basis in the light of the available evidence and using the experience and knowledge of the members. The fact that behavioural remedies typically require ongoing monitoring and enforcement, and the associated risks, are relevant considerations for the Commission. Despite the general concerns about such remedies outlined in the CC Guidelines, the Commission did not dismiss the voting trust or undertaking not to vote out of hand but rather assessed them in the light of the facts of this case."

[184] Sky argued that the proposed remedy was disproportionate and the CC should have accepted its proposed remedies. The Tribunal rejected these arguments in the following terms (at [306] to [308]):

"306. The main thrust of Sky's challenge to the Commission's reasoning on this issue concerned the view (expressed at paragraph 6.69 of the Report) that the costs which Sky would incur if required to dispose part of its shareholding in ITV were irrelevant. At the hearing Sky referred to *Interbrew* (above) in which Moses J. said:

> "… in the instant case, I do not think that a question of balance arose. There will be cases where it is necessary to consider whether a remedy is disproportionate in the sense that the advantages to be gained are outweighed by the detriment to the one against whom the measure is directed. But in this case no such issue required consideration. This was not a case where the Commission took the view that the divestment of Whitbread with Stella Artois would be an effective remedy but that the divestment of Bass Brewers would be more effective. Rather, the majority of the Commission took the view that the divestment of Whitbread with Stella Artois would not be an effective remedy for the reasons it gave at 2.214. In those circumstances it availed Intrebrew nothing to contend that the remedy was disproportionate. No question of weighing the advantage of divestment of Whitbread with Stella Artois against the detriment to Interbrew of the divestment of Bass arose."

307. This authority provides no support for Sky's argument which in our view is misconceived. The Commission expressed its conclusions on proportionality at paragraphs 6.67 to 6.71 of the Report. It stated that when choosing between remedies which the Commission considers would be equally effective it would choose the remedy that

> imposed the least cost or that is least restrictive. In the present case the Commission took the view that the full or partial divestiture of Sky's shareholding in ITV would be an effective remedy. As between those remedies the Commission concluded that partial divestiture was the more proportionate because it was less intrusive in that it required Sky to divest a smaller proportion of its shareholding.
>
> 308. Having already concluded that neither of Sky's proposed remedies would be an effective remedy there was no need for the Commission to examine the proportionality of those remedies vis-à-vis the divestiture remedies or at all. In those circumstances it does not assist Sky to contend that the partial divestiture remedy was disproportionate when compared with its own proposals. As in *Interbrew*, no question arises of weighing the merits of either of the behavioural remedies against the cost to Sky of the partial divestiture or its shareholding in ITV. In any event, the Commission noted that Sky's proposals would themselves be likely to be far from cost-free in view of the monitoring and enforcement requirements and other implications set out in the Report."

[185] We agree with the approach of the Tribunal in *BSkyB*. The CC has a wide margin of appreciation in the selection of the remedy which it considers would be effective in remedying the SLC found. In general it is not obliged on proportionality grounds to select a remedy which is not effective to remedy the SLC. Proportionality is most relevant when looking at remedies which would be effective. Whilst significant costs may be incurred as a result of divestiture, these may have to be borne if behavioural or other structural remedies would not be effective.

[186] The parties agreed that the four-fold approach to proportionality in *Tesco* is applicable in the present case. In that case, the Tribunal summarised the principles as follows:

> "136. A useful summary of the proportionality principles is contained in the following passage from the judgment of the ECJ in Case C-331-88 *R. v. Ministry of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa* [1990] ECR I-4023, paragraph [13], to which we were referred by the Commission:
>
> "By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."
>
> 137. That passage identifies the main aspects of the principles. These are that the measure: (1) must be effective to achieve the legitimate aim in question (appropriate), (2) must be no more onerous than is required to achieve that aim (necessary), (3) must be the least onerous, if there is a choice of equally effective measures, and (4) in any event must not produce adverse effects which are disproportionate to the aim pursued."

> [187] In *BAA*, the CC had issued a market investigation report on the supply of airport services by BAA in the UK. It found an adverse effect on competition and required that BAA divest itself of certain airports. We have already quoted at paragraph 47 above paragraph 20 of the judgment of this Tribunal which sets out the relevant principles on proportionality. We adopt and follow that analysis."

101. We agree that divestiture by ICE of its interest in Trayport would be an intrusive step, but not so seriously intrusive as an order for divestiture in a market investigation. This is because, in the case of a completed merger, the merging parties have taken the foreseeable risk that the CMA may make an order for divestiture. In contrast, an order for divestment in a market investigation context may be more intrusive, since it requires a change in the *status quo* and intervenes in an existing structure which, quite possibly, comprises integrated activities that represent the product of investment and development over a long period of time. This distinction however does not undermine the fact that divestiture is an intrusive remedy where one would expect the CMA to have exercised appropriate care in the analysis of the SLC and selection of the remedy required. Even in such a case as emphasised in *BAA* at para 20(7) the CMA retains a wide margin of appreciation and discretion. As in *Ryanair*, we adopt and follow the relevant principles of proportionality set out in *BAA* at para 20.

(2) Review: vertical mergers and Tetra Laval

(a) ICE's argument

102. ICE argues that a greater degree of scrutiny of CMA decisions is required in the context of a vertical merger, because these are less likely to cause competitive harm.

103. In *Tetra Laval* the CJEU stated:

> "42. A prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events — for which often many items of evidence are available which make it possible to understand the causes — or of current events, but rather a prediction of events which are more or less likely to occur in future if a

> decision prohibiting the planned concentration or laying down the conditions for it is not adopted.
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> 43. Thus, the prospective analysis consists of an examination of how a concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a serious impediment to effective competition. Such an analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely.
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> 44. The analysis of a 'conglomerate-type' concentration is a prospective analysis in which, first, the consideration of a lengthy period of time in the future and, secondly, the leveraging necessary to give rise to a significant impediment to effective competition mean that the chains of cause and effect are dimly discernible, uncertain and difficult to establish. That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important, since that evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible." (Emphasis added.)

104. ICE submits that whilst horizontal mergers may be anticipated to cause competitive harm, the same is not true of conglomerate mergers (in issue in *Tetra Laval*) or vertical mergers (in issue in the present case), as the CMA emphasises in its Merger Assessment Guidelines (the "Guidelines" or "Merger Guidelines"):[94]

> "Non-horizontal mergers [including conglomerate and vertical mergers] do not involve a direct loss of competition between firms in the same market, and it is a well-established principle that most are benign and do not raise competition concerns".

105. According to ICE, the CJEU's judgment in *Tetra Laval* cautions the CMA (and, by extension, this Tribunal) against placing undue reliance on scenarios which may be negative for consumers, without recognising that there are other potential scenarios which may have a different outcome.

106. ICE referred us to para 20(6) of *BAA* which it described as having endorsed the principles set out in *Tetra Laval*:

> "No doubt, the degree of restraint will itself vary with the extent to which competitive harm is normally to be anticipated in a particular context, in line with the proportionality approach set out by the ECJ in Case C-12/03P

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[94] CC2, September 2010, at para 5.6.1.

Commission v Tetra Laval [2005] ECR I-987 at para. 39, but that is not something which is materially at issue in this case."

(b) The CMA's response

107. The CMA argues that the level and standard of review of European Commission merger decisions by the courts of the EU is a matter of EU law, with no direct relevance to the Tribunal. Instead the principles applicable to review by the Tribunal of CMA merger decisions are governed by section 120(4) of the Act, which provides that the Tribunal "shall apply the same principles as would be applied by a court on an application for judicial review".

108. In the CMA's view those principles were authoritatively set out by the Tribunal in *BAA*. The key part of *BAA* is para 20(4), where the Tribunal noted that "it is a rationality test which is properly to be applied in judging whether the CC had a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did. There must be evidence available to the CC of some probative value on the basis of which the CC could rationally reach the conclusion it did".

109. As to the content of that rationality test, the Tribunal explained in *BAA* (at para 20(3), quoting from an earlier case, *Bayani*) that "[t]he court should not intervene merely because it considers that further inquiries would have been desirable or sensible. It should intervene only if no reasonable [relevant public authority – in that case, it was a housing authority] could have been satisfied on the basis of the inquiries made".

110. Further or alternatively, the CMA submits that if or to the extent that the standard of review in EU law is relevant, the CMA notes that ICE's challenge in Grounds 2 and 3 is to the CMA's assessment of the facts. It is settled that the European Commission has a "margin of discretion" with regard to complex economic assessments such as those that are in issue here, and that the EU courts will not intervene unless there has been a manifest error of assessment (*Tetra Laval*, paras 38-39). Specifically, "review by the

Community Courts of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the margin of discretion implicit in the provisions of an economic nature which form part of the rules on concentrations".

111. The CMA also rejects ICE's contention that there is a difference in the level of scrutiny applicable to vertical as opposed to horizontal mergers. The note in the Guidelines that most vertical mergers "are benign and do not raise competition concerns" is irrelevant in this respect.[95] The Guidelines go on to state that vertical mergers may give rise to an SLC in a number of situations, including where there is a "vertical merger between an upstream supplier and a downstream customer which purchases the supplier's goods"[96] (as is the case here). Whether the merger is vertical or horizontal, the applicable (SLC) test is the same.

112. The Guidelines on Merger Remedies also make express that an SLC arising from a vertical merger may be remedied effectively by structural measures.[97] In either case, the question for the Tribunal is whether the CMA's decision to require unwinding of the merger is irrational or perverse.

113. According to the CMA, the context of *Tetra Laval* is quite different from that in issue in these proceedings. The present case concerns a vertical merger raising serious foreclosure concerns – which the CMA described in its skeleton argument as "a textbook case in which a vertical merger may cause an SLC".[98] By contrast, *Tetra Laval* involved a conglomerate merger - a merger between undertakings with no competitive relationship, whether as direct competitors or as suppliers and customers. That is an inherently different context, in which it is relatively unusual for mergers to raise competition concerns. The CJEU particularly emphasised that context in *Tetra Laval*, holding that a review by the Union courts "is all the more necessary in the case of a prospective analysis required when examining a

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95 Guidelines, para 5.6.1.
96 Guidelines, para 5.6.2, first bullet.
97 *Merger Remedies: Competition Commission Guidelines*, CC8, November 2008, at para 4.12.
98 We were referred in particular to the Guidelines, para 5.6.5.

planned merger with conglomerate effect". [99] Thus, the Tribunal's comment in *BAA* that "the degree of restraint" to be exercised "will itself vary with the extent to which competitive harm is normally to be anticipated in a particular context"[100] supports the CMA's case that a greater degree of restraint is required in the present case, which involves a vertical merger, than in *Tetra Laval*, which was a relatively unusual conglomerate merger case.

(c) The Tribunal's conclusion

114. It is clear that vertical mergers can and do raise competition concerns. Whether a particular merger is likely to give rise to an SLC is fact specific. Here we do not consider that there is any special elevated evidential burden on the CMA in deciding whether this merger gives rise to a SLC. Any conclusions by the CMA must be based on evidence and it is for the CMA carefully to review the evidence and make such enquiries it considers appropriate in order to reach a rational conclusion in accordance with the principles stated in *BAA*.

115. With respect to the reference to *Tetra Laval* in para 20(6) of *BAA* upon which ICE relied, we note that the Tribunal did not treat *Tetra Laval* as binding upon it but, rather, as a useful analogy when applying the ordinary principles of judicial review. As such, it stands for the straightforward point, made in the previous paragraph and reflected in the *Merger Guidelines* upon which the CMA relies, that the likelihood of an SLC in any given case varies with the facts of that case – and that any reviewing court should take account of that variation.

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99 *Tetra Laval*, para 39.

100 *BAA*, para 20(6).

F. ICE'S GROUNDS OF REVIEW

(1) The counterfactual (Ground 1 of NoA1)

(a) Preliminary remarks

Analytical framework for the counterfactual

116. The Report explains that the counterfactual provides "a benchmark against which the expected effects of the merger can be assessed" comprising "what we expect would have been the competitive situation in the absence of the Merger".[101]

117. The Guidelines state, in a sentence not quoted in the Report,[102] that:

> "To help make this judgement on the likely future situation in the absence of the merger, the [CMA] may examine several possible scenarios, one of which may be the continuation of the pre-merger situation; but, ultimately, *only the most likely scenario will be selected as the counterfactual*." (emphasis added)

118. The Guidelines go on to state, in language quoted at para 6.1 of the Report, that:

> "The [CMA] will typically incorporate into the counterfactual only those aspects of scenarios that appear likely on the basis of the facts available to it and the extent of its ability to foresee future developments."

119. In the circumstances of this case, the CMA had to make a determination in respect of:

(1) The most likely outcome of the Trayport sale process in the absence of the Transaction; and

(2) The future trading relationship, in those circumstances, between ICE and Trayport.

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101 Para 6.1.

102 Guidelines, para 4.3.6.

120. The precise terms of the question that the CMA considered (and should have considered) under paragraph 119(2) above comprises the dispute in Ground 1(a) of NoA1.

The CMA's assessment

121. As to the first question, the CMA concluded that "absent the Merger, Trayport would have been sold and the most likely alternative purchaser was unlikely to raise competition concerns" so that "the conditions of competition [...] would not be materially different from the pre-Merger conditions of competition".[103] ICE does not challenge this conclusion.

122. As to the second question, the CMA 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."[104]

123. This finding has the necessary implication that, in the counterfactual, there would only be a limited trading relationship between ICE and Trayport, based on the arrangements established prior to 2015 (as described in paragraph 48 above).

Standard of review by the Tribunal

124. Following *BAA* para 20(4), for the purpose of this Ground it is necessary for the Tribunal to consider whether the CMA had a sufficient basis in light of the totality of the evidence available to it for making the assessments that it did, as to which there must be evidence available to the CMA of some probative value on the basis of which the CMA could rationally reach the conclusion that it did.

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103 Para 6.10.
104 Para 6.34.

Convenient approach to assessing ICE's challenge

125. By its Ground 1(a) of NoA1, ICE challenges whether the CMA asked itself the correct question. ICE contends that the CMA should have asked itself whether ICE would have become one of Trayport's "normal venue" customers. Ground 1(b) of NoA1 goes on to contend that the CMA erred in not concluding that the New Agreement was likely to be signed in its current form (we refer to this argument as "Ground 1(b)(i)") or acted unfairly in making a finding on that issue without putting the point to the parties to provide rebuttal evidence, having led them to believe that it accepted their case (we refer to this argument as "Ground 1(b)(ii)"). Finally, under Ground 1(c) of NoA1 ICE contends that the CMA's treatment of the New Agreement in the counterfactual and in its assessment of RCBs was inconsistent and irrational.

126. In view of the dispute as to the proper way in which to frame the question, we consider it appropriate to address ICE's challenge in the following order:

(1) Was the CMA irrational in concluding, on the evidence, that the New Agreement would not have been signed in its current form absent the merger? (Ground 1(b)(i) of NoA1).

(2) Did the CMA act unfairly in finding that the New Agreement would not have been signed in its current form absent the merger, without putting the point to the Merging Parties for them to provide rebuttal evidence, having led them to believe that it accepted their case? (Ground 1(b)(ii) of NoA1).

(3) Did the CMA ask itself the wrong question in considering whether the New Agreement was likely to be signed instead of considering whether ICE would have become one of Trayport's "normal venue customers"? (Ground 1(a) of NoA1).

(4) Did the CMA treat the New Agreement inconsistently in the analyses of the counterfactual and RCBs? (Ground 1(c) of NoA1).

(b) Was the CMA irrational in concluding, on the evidence, that the New Agreement would not have been signed in its current form absent the merger? (Ground 1(b)(i) of NoA1)

The CMA's finding

127. The CMA excluded the New Agreement from the counterfactual[105] on the grounds that it was not "sufficiently certain" that it would have been entered into in its current form absent the merger because:

(1) The Merging Parties had previously been reluctant to cooperate.

(2) There was no draft agreement by the time of the merger, including no final agreement on the scope of the ICE products to be listed on Trayport.

(3) The New Agreement was concluded post-merger. Para 6.30 of the Report explained: "it is unclear that the negotiations would have been successfully concluded in circumstances where funds were not being transferred intra-group and/or if Trayport were under alternative ownership, in the absence of the Merger".

128. Although ICE initially contended that the CMA had misdirected itself as to the standard of proof to be applied, by the time of the hearing it was common ground that the CMA applied the correct test, namely whether it was more likely than not that there would have been such an agreement between the Merging Parties absent the merger.

129. We consider in the following subsections first the parties' arguments based on the evidence before the CMA at the time of the Report and then their arguments relating to the material submitted with NoA1 on the assumption that the CMA was at fault for that material not being provided to it during the administrative procedure. The question as to whether the CMA was at fault

105 Para 6.29.

for not having received the evidence submitted with NoA1 is addressed in section F(1)(c) below.

The parties' arguments – evidence before the CMA

130. Mr Harris, for ICE, argued that the evidence that ICE and Trayport would have reached agreement absent the merger was "overwhelming" and that the points relied on by the CMA do not stack up in light of the evidence viewed as a whole. He accepted that he faced a "high-hurdle" to pass, but argued that the CMA had an inadequate evidence base to conclude that the New Agreement would not have been entered into.[106]

131. Regarding the Merging Parties' historic reluctance to cooperate, ICE did not dispute that the relationship had previously been characterised by a lack of cooperation. Rather, ICE contended that a fundamental shift in negotiation stance had taken place – independently of the merger – in early 2015. ICE relies upon evidence of Mr Heffron of Trayport given at a hearing before the CMA on 12 July 2016 regarding ICE's changed negotiating stance, a transcript of which was exhibited to Mr Heffron's first witness statement:

> "[…] I think the critical point was not the acquisition by ICE. […] The critical point was their acceptance of our business model, which had taken place in 2015. They were our oldest exchange client. We have known them for years, and years and years. They had always refused to pay.
>
> When they came to us and said, 'Actually, we will pay for the connectivity', that was a 'on the road to Damascus moment' […] [t]hey were saying, 'Okay, we will join your ecosystem in the way so that you do not have to explain to the other people in our business why effectively we get a free ride and they do not'. That discussion was contemporaneous with Gordon Bennett who was a person we know very well, from one of our broker clients moving over to ICE and saying, 'There is something to be gained by having a healthy and mutually beneficial relationship with Trayport on these sorts of commercial terms'."

132. According to Mr Harris, this change of attitude on the part of ICE meant that it became undeniably in the interests of both of the Merging Parties for the New Agreement to then be entered into. In particular, a deal was an important asset

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106 Day 1/ p30 lines 26ff.

for Trayport which would obtain ICE as a "big-paying" client.[107] The New Agreement would have been entered into pre-merger but for the BGC non-disclosure agreement.

133. Mr Harris described the 7 May 2015 email (see paragraph 56(1) above) as a detailed heads of terms, agreement on all the key elements including that the deal be on standard terms, albeit subject to contract. The CMA by contrast described the email exchange as "relatively high level"[108] and emphasised the absence of a draft agreement. The CMA also suggested that the five month period to finalise the agreement after negotiations had resumed indicated that the New Agreement was far from a *fait accompli*. In its Defence the CMA also referred to an agreement in principle between ICE and Trayport to co-operate in 2013 which it asserted had failed to come to fruition, but accepted by the time of the hearing that this assertion was incorrect. The CMA therefore contended that it was entitled to take the view that the Merging Parties' discussions were preliminary in nature.

The parties' arguments – evidence annexed to NoA1

134. ICE relies on the 14 May 2015 email by which Trayport agreed to the exclusion of oil from the arrangement (see paragraph 59(1) above) as establishing that the scope of the New Agreement had been agreed, contrary to the Report's finding at para 6.29.

135. The CMA replies that, even taking account of the 14 May 2015 email, the scope of the agreement was not finalised: two other products (specifically: […][✂]) were included in the final agreement which were not referred to in the email exchange and other elements did not correspond, including price paid.[109] According to it, applying *Derbyshire*, the CMA would have inevitably reached the same conclusion even assuming it were at fault for this material not being placed before it.

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107 Day 1/ p30 lines 10ff.
108 Day 2/ p3 line 11.
109 Day 2/ p7 lines 4ff.

136. The CMA also relies on para 9 of the witness statement of Mr Gordon Bennett (see paragraph 59(2)), which indicates that as at the time of the 13-14 May 2015 emails ICE had not authorised the conclusion of the New Agreement. The CMA contended that this material was not before it in the administrative proceedings, but that it nevertheless validated the decision it had made on the material before it.[110] Mr Harris, for ICE, argued that this information was before the CMA, albeit not in documentary form, as it had been provided via telephone conversations.[111]

The Tribunal's conclusion on Ground 1(b)(i) of NoA1

137. *Scope of the agreement*: On the basis of the material before it the CMA was entitled to take the view that the scope of the agreement was unclear. The CMA clearly had an evidential base to reach the view that the scope of the agreement was unclear, in particular because of the question left open by the 13 May 2015 email regarding oil.

138. Even if the CMA ought to have concluded, whether it had a copy of the 14 May 2015 email or not, that the list of products for any potential agreement had been agreed, we consider that the CMA's overall conclusion would inevitably have been the same. The negotiations do not appear to have advanced a great deal from the position in early May by the time the negotiations were called off at the end of June 2015. The email of 14 May 2015 made clear that whilst the scope was acceptable, it was subject to commercial terms being agreed. No draft agreement was drawn up at that time. The CMA had formed the provisional view that it was more likely than not that no such agreement would have been concluded in its provisional findings report (the "PFs") (as to which see paragraph 144 below) without raising the specific point about oil. Even if Trayport had agreed in principle the products to be included in any new agreement, it did not necessarily follow that an agreement would be included with the same list of products. Indeed when much later the New Agreement was concluded at a time when Trayport

110 Day 2/ p5 lines 2ff.
111 Day 2/ p76, lines 1ff.

was under ICE's ownership, the product schedule included two further products in addition to the four products agreed in principle in May 2015 (see paragraph 60 above).

139. *Merging Parties' previous reluctance to cooperate / relevance of the New Agreement being concluded post-merger*: In our view ICE's evidence regarding the importance of the arrival of Gordon Bennett provides a plausible explanation as to why the Merging Parties were able to reach an agreement despite their previously strained relationship. However, we do not consider this explanation as "overwhelming" in the sense that it is so likely to be the main factor behind the conclusion of the agreement that it would outweigh all other potential considerations. In our view, it was open to the CMA, acting rationally, to consider that other factors (in particular the merger situation) may have influenced the conclusion of the New Agreement. In this regard, we note that the terms of the 7 May 2015 email were specifically stated to be not valid in the event of a change of ownership of Trayport (see paragraph 56(1) above). It appears to us relevant also 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.

140. Further there is no evidence of any email or other documents being exchanged between the second half of May and 23 June 2015. None were produced to the CMA or this Tribunal and, even if they do exist, they have not been relied upon by ICE.

141. As noted at para 6.26 of the Report, it had been submitted to the CMA by ICE that Trayport would have signed up to the New Agreement in May 2015 even if Trayport had come under different ownership. Our overall conclusion is that there was ample material on which the CMA could reach a rational decision to the contrary. In particular:

(1) The scant documentary evidence produced by ICE of the negotiations - confining themselves to the emails of 7 and 13 May 2015 which clearly did not amount to a detailed agreement on all material terms;

(2) The offer email of Trayport dated 7 May 2015 itself was expressed to be not valid in the event of a further change of ownership of Trayport;

(3) No documents were produced to the CMA relating to the period between the second half of May and 23 June 2015;

(4) It took five months post-merger to conclude the New Agreement; and

(5) The fact that such negotiations as there were prior to the merger, and in particular the exchange of emails in early May 2015, took place substantially in the context of the prospective sale process for Trayport in which ICE had already declared itself to be an interested participant.

142. In view of the discussion above, we conclude that the CMA reached a rational decision in excluding the New Agreement from the counterfactual and would have inevitably reached the same view even if the CMA were at fault for not having been provided with the 14 May 2015 email. We therefore dismiss Ground 1(b)(i).

(c) Did the CMA act unfairly in finding that the New Agreement would not have been signed in its current form absent the merger, without putting the point to the Merging Parties for them to provide rebuttal evidence, having led them to believe that it accepted their case? (Ground 1(b)(ii) of NoA1).

143. Ground 1(b)(ii) is as follows:

> "The CMA […] acted unfairly in making a finding [that it was not sufficiently certain that the New Agreement would have been concluded absent the Transaction] without having put the point to the Parties for them to provide rebuttal evidence, having led them to believe that it accepted their case."

The parties' arguments

144. ICE contends that it believed that the CMA had accepted its contention that the scope of the New Agreement had been settled by the email exchange of 7 and 13 May 2015. ICE referred us to para 6.27 of the CMA's provisional findings report of 16 August 2016 which states:

> "[…] We are provisionally of the view that while it is possible that ICE and Trayport would have successfully entered into the New Agreement absent the Merger this is not sufficiently likely for the purposes of the counterfactual, particularly in the light of their previous reluctance to cooperate and on the basis of evidence in the Parties' internal documents which clearly demonstrate strategic reasons for their lack of cooperation […]."

145. This PF became para 6.29 of the Report, which states:

> "[…] We are of the view that while it is possible that ICE and Trayport would have successfully entered into the New Agreement absent the Merger this is not sufficiently certain in order to be included in the most likely counterfactual, particularly, in light of there being no draft agreement, including no final agreement on the scope 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 […])" (emphasis added)

146. ICE argued that the PFs had given it the impression that the CMA had accepted its submission that the scope of the New Agreement had been settled. ICE emphasised that the PFs did not refer to the absence of a draft agreement or uncertainty as to scope of the products under the agreement. Had the CMA flagged its concern that the 13 May 2015 email left the scope of the New Agreement open, then ICE contends that it could and would have produced the 14 May 2015 email to show that it was agreed that oil was out of scope.

147. ICE also relies on the evidence of Mr Heffron (Chief Operating Officer of Trayport) that the CMA was told on a telephone call during its investigation that it was agreed that oil was out of scope, which Mr Harris suggested the CMA does not contest.[112] There is no transcript of the call, nor did ICE make a note of the call. The CMA's note of that call (see paragraph 54 above) does not record this submission, but does refer to Trayport having indicated that the

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[112] Day 1/ p38 lines 5ff.

Merging Parties were "close to an agreement" which Mr Harris contended supported Mr Heffron's sworn evidence.[113]

148. The CMA responds that its PFs were "crystal clear" in indicating that the CMA did not accept that the New Agreement did not form part of the counterfactual. The Merging Parties were on notice that the CMA was against them on this point and failed to produce contemporaneous evidence after the CMA had requested them to do so (see the final bullet of the CMA's note of its call with ICE set out at paragraph 53 above).[114] Further, procedural fairness does not require every possible point to be extracted and put to the other party; they need to be told the gist of the case against them, and this was done in this case through the PFs.[115]

The Tribunal's conclusion on Ground 1(b)(ii) of NoA1

149. This Tribunal has considered the question of procedural fairness on a number of previous occasions. The law is conveniently summarised in *Ryanair* at paras 131-132 in the following terms:

> "131. The extent of the duty to disclose as part of the duties to consult and procedural fairness has been considered in some detail by the Tribunal in *BMI Healthcare Ltd v. Competition Commission* [2013] CAT 24 ("*BMI*") and *Eurotunnel*. It is not necessary to set out in this judgment the various dicta in the numerous cases on the subject in other contexts. Nevertheless, the six general principles as to the requirements for a fair hearing of Lord Mustill in *R. v. Home Secretary, ex parte Doody* [1994] 1 AC 531 at 560 are a useful starting point:
>
> > "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the

113 Day 1/ p39 lines 16ff.
114 Day 2/ p6 lines 18ff.
115 Day 2/ p8 lines 16ff.

context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

132. *BMI* considered the CC's market investigation jurisdiction, which like section 104 (merger investigations) contains at section 169 a duty to consult in respect of such investigations. We agree with the approach set out in paragraph 39 of that judgment, which set out a number of clear propositions as to the correct approach. That paragraph set out seven propositions as follows (we have added the references to section 104):

"39. We consider the following propositions to be clear:

(1) The starting point in considering the Commission's duty to consult must be the Act, which deals expressly with the Commission's responsibilities in this regard, and which also makes provision for the protection of confidential information. ... Sections 169(2) and (3) [104(2) and (3)] of the Act require the Commission to consult before making a decision, and to give reasons for that decision before it is made, but in neither case is this obligation absolute. It is qualified ("so far as practicable"), in particular by the Commission's duties in relation to specified information ….

(2) However, as is clear from section 241, the protection of specified information can give way "for the purpose of facilitating the exercise by the authority of any function it has under or by virtue of this Act", and one of the functions of the Commission is the Commission's duty to consult under section 169 [104] of the Act.

(3) The Act thus establishes both the duty to consult and the duty to protect confidential (specifically, "specified") information. Section 244 … then describes three conditions to which the Commission should – "so far as practicable" – have regard "before disclosing any specified information".

(4) The Act thus contains a fairly comprehensive code dealing with the duty to consult and the duty to protect confidential information. There is nothing in the Act which obliges the Commission to withhold material that ought to be disclosed pursuant to the Commission's section 169 [104] duty to consult, simply because that would involve the disclosure of specified information. But, conversely, the Commission is not obliged to disclose each and every piece of specified information as part of its duty to consult. We consider that the Act contains a perfectly clear and workable code. Although we have had in mind the statement in *Lloyd v. McMahon* [1987] 1 AC 702-703 that "it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by

the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness", we do not consider it necessary to imply into the Act anything by way of additional safeguard. The provisions of the Act are, in themselves, quite sufficient for this purpose.

(5) The Commission's guidance in relation to confidential information as set out in the CC7 Guidance is entitled to great weight. None of the Applicants criticised this guidance, and it appears to set out a rational and helpful approach to dealing with specified information.

(6) Moreover, whilst what is a fair process in the context of the Act is one for the Tribunal as a matter of law, the Commission's approach in any given case is entitled to great weight. The consideration of the potentially competing interests of due process and the protection of confidential information is a nuanced one, to be undertaken in light of all the circumstances. It is the Commission, and not the Tribunal, that stands in the front line when assessing such matters, and the Tribunal should be slow to second-guess decisions of the Commission, in particular as to how confidential certain material is, and how best to protect the confidentiality in that material. We have well in mind the statement of Lloyd LJ in *R. v. Panel on Take-Overs and Mergers, ex parte Guinness plc* [1990] 1 QB 146 at 184:

> "Mr Buckley argued that the correct test is *Wednesbury* unreasonableness, because there could, he said, be no criticism of the way in which the panel reached its decision on 25 August. It is the substance of that decision, viz., the decision not to adjourn the hearing fixed for 2 September, which is in issue. I cannot accept that argument. It confuses substance and procedure. If a tribunal adopts a procedure which is unfair, then the court may, in the exercise of its discretion, seldom withheld, quash the resulting decision by applying the rules of natural justice. The test cannot be different, just because the tribunal decides to adopt a procedure which is unfair. Of course the court will give great weight to the tribunal's own view of what is fair, and will not lightly decide that a tribunal has adopted a procedure which is unfair, especially so distinguished and experienced a tribunal as the panel. But in the last resort the court is the arbiter of what is fair. I would therefore agree with Mr. Oliver that the decision to hold the hearing on 2 September is not to be tested by whether it was one which no reasonable tribunal could have reached."

In short, whilst it is for the Tribunal to decide what is and what is not fair, the Commission's approach should be given "great weight".

(7) Finally, whilst Lord Mustill's sixth proposition refers to a person affected by a decision being informed of the "gist" of the case which he has to answer, what constitutes the "gist" of a case is acutely context-sensitive. Indeed, "gist" is a peculiarly vague term. Competition cases are redolent with technical and complex issues, which can only be understood, and so challenged or responded to, when the detail is revealed. Whilst it is obviously, in the first instance, for the Commission to decide how much to reveal when consulting, we have little doubt disclosing the "gist" of the Commission's reasoning will often involve a high level of specificity. Indeed, this can be seen in the Commission's

> practice, described in paragraph 7.1 of the CC7 Guidance, of disclosing its provisional findings as part of its consultation process. This point is well-illustrated by the approach taken by the Court of Appeal in *R (Eisai Limited) v. National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438, which concerned the judicial review of guidance issued by NICE in relation to the use of a particular drug. Although NICE's procedures involved "a remarkable degree of disclosure and of transparency in the consultation process" (at [66]), nevertheless procedural fairness required the release of still more material - in this case, the release of a fully executable version of an economic model used by NICE, and not merely a "read only" version – so that consultees could fully check and comment on the reliability of the economic model upon which NICE had based its decision (see [49])."

150. There are three issues we must determine:

(1) Whether the CMA unfairly gave ICE the impression that it had accepted ICE's case that the scope of the New Agreement was agreed in mid-May 2015.

(2) Whether the CMA was at fault for ICE not providing it with the 14 May 2015 email.

(3) Whether the CMA in any case failed to provide ICE with the gist of the case against it by failing to refer to the absence of a draft agreement (and uncertainty as to its product scope) in its PFs such that ICE was not alerted to the fact it needed to provide the CMA with the 14 May 2015 email or further evidence that it was accepted by Trayport that oil was excluded.

151. On the first issue, we note that the CMA disputes that Mr Heffron stated during its inquiry on a conference call on 25 May 2016 that the exclusion of oil was accepted by Trayport. Any such statement is not recorded in the CMA's note of the call, nor did Mr Heffron make a note himself of the call. Further, ICE's written submission a week later (1 June 2016) made no express reference to any agreement in May 2015 by Trayport as to the precise products to be included, and the exclusion of oil. Whilst it is conceivable that Mr Heffron may have mentioned to the CMA that Trayport had agreed the scope of the products, and the exclusion of oil, it is evidently the case that the point

did not get through to the CMA in sufficiently clear and concrete terms. The lack of follow-up on this point in ICE's written submission following the call which only produced the 7 and 13 May 2015 emails, is not in our view the fault of the CMA. Those two emails formed a chain of emails and ICE did not provide the email dated 14 May 2015 in response to the 13 May 2015 email which excluded oil from the markets to be covered by any agreement. We consider that whilst Mr Heffron may genuinely believe he informed the CMA during the call, it is more likely that he did not do so and we accept the CMA's argument on this point.

152. Even had this information been adequately conveyed to the CMA, this does not in our view mean that the CMA can be taken as having accepted ICE's case that the scope of the agreement was finally settled. ICE does not suggest that the CMA told it that it affirmatively accepted their case on this point; rather it infers it through the absence of an explicit rejection of its case in the PFs. We do not consider that ICE could reasonably have considered the CMA to have assented to its case based on the CMA's silence.

153. On the second issue, we are of the view that (whatever impression it gave) the CMA was in any event not at fault for ICE's failure to provide the 14 May 2015 email. The CMA had asked ICE to produce contemporaneous documents in relation to the negotiations said by ICE to have occurred in the first half of 2015. ICE had understood this request and produced the 7 and 13 May 2015 emails. Given that the 14 May 2015 email formed part of the same email chain, it is not clear to us why this email was not produced together with the earlier emails when the CMA's request was made. It seems to us that either ICE failed to find the email (a failure which is not the fault of the CMA) or that it inexplicably decided not to produce the entire email chain despite the CMA's request (a decision for which the CMA is not at fault). We can see no good reason for it not having been produced.

154. Of particular relevance to the third issue is para 39(7) of *BMI*, which concerns the provision of the "gist" of a case. In our view para 6.27 of the PFs adequately set out the gist of the CMA's case against ICE: it was clear that the

CMA considered it uncertain that the agreement would have been entered into, ICE was alerted to the fact that it needed to provide evidence to suggest any uncertainty was minimal or trivial. Producing further contemporaneous documents (to the extent they had not already been produced) or witness evidence to support assertions that the negotiations were at an advanced stage would have been an obvious step. Obviously, the PFs could have been more detailed and could have referred to "oil" as being out of scope, but we accept that the CMA need not set out every facet of its reasoning as long as the gist is provided. Had the PFs referred to the "oil" point, no doubt ICE would have then produced the 14 May 2015 email. However, for the reasons set out at paragraph 137 above, we find that this would not have made a difference to the CMA's conclusion as it would have considered the scope of the agreement unclear in any event. Further, the scope of the agreement was only one part of the factors which led the CMA to conclude that it was insufficiently certain, absent the merger, that the merger would have been entered into. The absence of a draft agreement, the sparse documentation passed between the parties, the absence of an agreement after mid-May 2015 before negotiations were halted later, and the period from the conclusion of the merger and the entering into the New Agreement, were all matters which supported the CMA's overall assessment.

155. For these reasons, we dismiss Ground 1(b)(ii).

(d) Did the CMA ask itself the wrong question in considering whether the New Agreement was likely to be signed instead of considering whether ICE would have become one of Trayport's "normal venue customers"? (Ground 1(a) of NoA1).

156. Ground 1(a) is as follows:

> "The CMA asked itself the wrong question in focusing on whether the New Agreement would have been signed "in its current form" absent the Transaction, and as a result took account of an irrelevant consideration and failed to take account of a relevant one. The relevant question was whether ICE would or would not become one of Trayport's normal "venue customers" and not whether, absent the Transaction, the New Agreement would have been reached on precisely the terms the Parties ultimately signed, since the CMA's assessment of the competitive effects of the Transaction depended on whether or not ICE and Trayport were in a normal "venue customer" relationship and not on the precise commercial terms that would have been agreed."

157. The Report states:

> "6.30 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 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.
>
> 6.31 Given that we did not consider it sufficiently certain that the New Agreement, in its current form, would have been entered into absent the Merger, we have decided not to include the New Agreement as forming part of the counterfactual." (Emphasis added.)

158. On its face Ground 1(a) contains raises two issues:

(1) Should the CMA have asked itself whether ICE would have become one of Trayport's normal venue customers (as opposed to the question it did ask itself)?

(2) Did the CMA's assessment of competitive effects depend on whether or not ICE and Trayport were in a normal venue customer relationship?

The parties' arguments

159. To make good his contention that the CMA's assessment of competitive effects depended upon whether or not ICE and Trayport were in a "normal venue customer" relationship, Mr Harris referred us to a number of passages of the Report concerning the Trayport's impact upon competition between its customers and its customers' rivals:

> "[…] We concluded that Trayport was not a passive software supplier but it engaged in active strategies on behalf of its venue and clearinghouse customers, which are ICE's rivals, in order to ensure trading volumes continued to flow through the Trayport platform. […]"[116]
>
> "The internal documents we reviewed clearly indicate that Trayport actively engaged in strategies to promote dynamic competition between its customers and its customers' rivals […]"[117]
>
> "[W]e reviewed evidence indicating that Trayport's strength, and the reliance of traders, venues and clearinghouses on it, enabled it to pick certain customers to support in competition with ICE and it potentially influenced the movement of volumes between them."[118]
>
> "[…] 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."[119]
>
> "[…] We considered that Trayport carried out such a strategy in order to ensure that trading volumes continued to flow through the Trayport platform, and that specific strategies were often aimed at ensuring its customers could effectively compete with ICE […]"[120]
>
> "[…] We considered that Trayport carried out such a strategy in order to ensure that trading volumes continued to flow through the Trayport platform, and that specific strategies were often aimed at ensuring its customers could effectively compete with ICE. […]"[121]

160. Mr Harris contended that the CMA had drawn a clear distinction between those "in the club" (i.e. venue customers) and those "out of the club" (i.e. those who are not venue customers).[122] Mr Harris contended that if ICE and Trayport had entered into a "normal venue customer" relationship *absent the*

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116 Para 16.
117 Para 7.186.
118 Para 7.197.
119 Para 7.199.
120 Para 8.12
121 Para 8.84
122 Day 1/ p23 lines 31ff.

merger then this "sea change" in the competitive structure would not have come about at all.[123] Mr Harris therefore contended that what the CMA ought to have addressed when reviewing the New Agreement was whether or not ICE would have become a "venue customer" (i.e. "in the club" or "out of the club"), and that what the CMA incorrectly focussed on was whether ICE would have entered into an agreement in its "current form".[124]

161. In its written submissions, the CMA contended that para 6.30 of the Report showed a clear two stage analysis: first, whether *any* agreement would have been entered into absent the merger (which it found to be "unclear"); and second, whether an agreement materially equivalent to the New Agreement would have been entered into absent the merger (which it found to be uncertain). ICE was wrong to contend that the CMA had focussed entirely on whether precisely the same agreement would have been entered into.

162. Ms Demetriou submitted at the hearing there was no difference between the "normal venue customer" approach advocated by ICE and the approach actually adopted by the CMA.[125] Ms Demetriou contended that the concept of "normal venue customer" was meaningless in the abstract. When assessing normality, it is necessary to assess the normality of the relationship between ICE and Trayport against some kind of norm. It is necessary to look at the range of products and the price paid, because if the price were unrealistic that would not be a normal venue customer relationship. In other words, one needs to look at whether the terms are materially equivalent. There was therefore no distinction between the CMA finding that ICE would not have entered an agreement materially equivalent to the New Agreement and finding that ICE would not have become a "normal venue customer".

163. Ms Demetriou also contended that Mr Harris's points concerning the "in the club" vs "out of the club" finding were in any event beside the point because

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123 Day 1/ p21 lines 25ff.
124 Day 1/ p26 lines 7ff.
125 Day 2/ p10 lines 17ff.

the New Agreement is not connected to the SLC.[126] In fact, this point was raised as a general defence to all the sub-grounds of Ground 1, although for convenience we deal with it here. Ms Demetriou's contention was that the relevant SLC was the fact that ICE would "control" Trayport and referred us in particular to the following passages of the Report:

> "[W]e considered that ICE, as the sole owner of Trayport, would have the ability to control its strategic direction, innovation priorities and/or levels of investment. We considered that in the longer term ICE would have the ability to direct Trayport's strategy and commercial priorities in such a manner that may benefit ICE to the detriment of its rivals. […]."[127]
>
> "[P]re-Merger, ICE and Trayport had conflicting incentives. Trayport's objective was to support competition between multiple competing venues, with liquidity fragmented between them, which meant that its aggregation software offered significant value to industry participants. […]
>
> In contrast, ICE's goal has been, and continues to be, to have as much trading as possible concentrated on its venues and clearinghouse. This raises the prospect that under ICE's control Trayport's focus will change from supporting continued competition between multiple venues and clearinghouses, to actively trying to move liquidity towards ICE's venues and clearinghouse at the expense of rival exchanges, brokers and clearinghouses, through the use of the various mechanisms discussed in our assessment of its ability to foreclose above." [128]

164. Ms Demetriou stated that the "nub" of the SLC was that ICE's control of Trayport would change Trayport's incentive so as to promote ICE and disadvantage ICE's rivals.[129] Ms Demetriou stated unequivocally that the New Agreement did not form part of the SLC and that it therefore would not have mattered if the New Agreement had formed part of the counterfactual.[130]

The Tribunal's conclusion on Ground 1(a) of NoA1

165. As a preliminary point, we note that ICE did not seriously pursue the contention, made in Ground 1(c), that the CMA had asked whether "precisely the terms the Parties ultimately signed" would have been signed absent the merger. We accept the CMA's submission that the CMA asked itself whether

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126 Day 2/ p74 lines 23ff.
127 Para 8.11.
128 Paras 8.107-8.108.
129 Day 1 / p88 lines 19ff.
130 Day 2 / p15 lines 1ff.

ICE would have entered into an agreement "materially equivalent" to the New Agreement absent the merger.

166. As noted at paragraph 158 above, Ground 1(a) raises two issues. Adjusting those issues in the light of the parties' arguments and our finding in paragraph 165, we need to address the following questions:

(1) Should the CMA have asked itself whether ICE would have become one of Trayport's "normal venue customers" absent the merger (as ICE contends) as opposed to whether ICE would have entered into an agreement "materially equivalent" to the New Agreement?

(2) Assuming that the CMA was incorrect to conclude that the New Agreement was merger-specific, would the CMA in any event have found an SLC?

167. On the first question, we reject ICE's contention that the CMA should have asked whether ICE would have become one of Trayport's "normal venue customers". We accept Ms Demetriou's argument that there is no meaningful difference between, on the one hand, ICE entering into an agreement on terms "materially equivalent" to those actually agreed and, on the other hand, entering into a "normal venue customer" relationship. In any event, we find it inherently implausible to believe that, (in the context of the chronology described in paras 51ff above) if the New Agreement (which had been discussed between the Merging Parties) had not been signed, some unspecified alternative which was not "materially equivalent" to the New Agreement would have had a better prospect of being signed by the Merging Parties.

168. On the second question, as we have already dismissed ICE's argument that the CMA was irrational to find that the New Agreement was merger-specific (see section F(1)(b) above), we therefore need not determine this question to dismiss ground 1(a).

169. However, we will proceed to address this question on the assumption that the New Agreement was not merger-specific. Applying the *Derbyshire* principle, we must be persuaded that it would have been "inevitable" that the CMA would have reached the same finding regarding the SLC even if the New Agreement had featured in the counterfactual. We are not satisfied that the CMA passes this high hurdle. Although the CMA may well have reached the same conclusion that it ultimately did reach in the Report, we are not convinced that it was bound to have done so. This is because the various portions of the Report to which we have been referred show a consistent picture of ICE's position as a non-customer being a factor which the CMA considered relevant when assessing the competitive situation and the SLC.

170. For the reasons stated in paragraphs 167 and 168 we dismiss Ground 1(a). However, had ICE succeeded on Ground 1(b)(i) (i.e. had the CMA irrationally excluded the New Agreement from the counterfactual), then it would have succeeded on Ground 1(a) also.

(e) Did the CMA treat the New Agreement inconsistently in the analyses of the counterfactual and RCBs? (Ground 1(c) of NoA1)

171. We have found that the CMA's conclusion at paras 6.30-6.31 of the Report that the New Agreement would not have been concluded but for the merger was one it was entitled to reach (see paragraph 142 above). Ground 1(c) of NoA1 (which is set out in full further below) concerns an alleged inconsistency in the Report with this finding in the section of the Report dealing with RCBs.

172. Paragraphs 12.196 and 12.197 of the Report state:

> "In their joint response to our Remedies Notice, the Parties argued that our Provisional Findings adopted a counterfactual where the New Agreement was treated as being Merger-specific, and therefore the 'efficiencies and benefits' to customers of the New Agreement should be treated as a customer benefit that would be lost under a Divestiture remedy.
>
> We considered that ICE had mischaracterised the counterfactual. However, even if we were to treat the New Agreement in its current form as Merger-

specific, we did not consider that the cited benefits of the New Agreement would necessarily be lost under our Divestiture remedy."

173. Ground 1(c) is that:

> "The CMA's treatment of the New Agreement in the counterfactual and in considering relevant customer benefits was inconsistent and, therefore, irrational. The CMA simultaneously found both that the New Agreement was not part of the counterfactual and that it was not merger-specific (i.e. a consequence of the Transaction). Logically, however, the New Agreement is either part of the scenario in which the merger does not occur (the counterfactual), or it is a consequence of the merger occurring (merger-specific). It cannot exist "in the ether", without forming part of either scenario."

174. Counsel for ICE and the CMA dealt with Ground 1(c) only briefly at the hearing. Mr Harris argued that the reasoning of the CMA at paras 12.196-12.197 was unsatisfactory, illogical and internally inconsistent.[131] Ms Demetriou argued that, however the point was phrased in those paragraphs, the CMA treated the New Agreement as merger-specific for the purpose of assessing RCBs. The CMA found no RCBs arising from the New Agreement and this finding was not challenged by ICE. The point therefore took ICE nowhere.[132]

The Tribunal's conclusion on Ground 1(c) of NoA1

175. The CMA found that the New Agreement was merger-specific at paras 6.29-6.31 of the Report. We consider para 12.197 to be expressed in language inconsistent with those other portions of the Report:

(1) ICE and Trayport were correct to state in their response to the CMA's Remedies Notice that the New Agreement had been treated as merger-specific in the CMA's PFs.

(2) The CMA was therefore incorrect to state at para 12.197 that they had "mischaracterised the counterfactual" in their response to the Remedies Notice.

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131 Day 1/ p41 lines 26-27.
132 Day 2/ p12 lines 9ff.

176. The poor phrasing of the language in section 12 of the Report may have arisen from the fact that the CMA accepts that the New Agreement *might potentially* have been entered into absent the merger, albeit not on the balance of probabilities.

177. However, although the language at para 12.197 is unsatisfactory, we accept that the CMA correctly assessed RCBs on the basis that they were merger-specific. This aspect of the Report therefore does not contain any error of assessment and so it takes ICE nowhere. For the avoidance of doubt, we also find that the inconsistent language does not cast any doubt upon the CMA's finding that the New Agreement would not have been entered into absent the merger. We are conscious that the Report must be read as a whole and, doing so, we consider that these poorly drafted paragraphs do not undermine the assessment at paras 6.30-6.31.

(f) Conclusion on Ground 1 of NoA1

178. For the reasons set out in this section we dismiss Ground 1 of NoA1.

(2) Vires to suspend New Agreement (Ground 5 of NoA1; Ground 1 of NoA2)

(a) The Report and ICE's challenge

179. ICE's Ground 5 of NoA1 concerns whether the CMA had the *vires* to order the unwinding of the New Agreement. The relevant portion of the Report explaining this decision is set out below:

> "12.71 As set out in our assessment of the counterfactual in Section 6, we concluded that it was not sufficiently certain that the New Agreement would have been entered into by ICE and Trayport on the same terms absent the Merger. Accordingly, it follows that it is unclear whether under alternative ownership the same agreement would have been signed.
>
> 12.72 Given this uncertainty, we concluded that it would be appropriate for any new owner of Trayport to decide whether to accept or reject the terms of the New Agreement entered into whilst Trayport was under ICE ownership.
>
> 12.73 In order to provide the eventual purchaser of Trayport under this remedy with sufficient flexibility to make this decision, we considered that the New Agreement should be fully unwound thereby giving the new owner

of Trayport the choice as to whether to negotiate (or not) an agreement with ICE either as part of the divestiture process, or in the future.

12.74 For the avoidance of doubt, following the termination of the New Agreement, ICE would be under no obligation under this remedy to enter into negotiations with the new owner of Trayport in relation to this agreement."

180. ICE's Ground 5 of NoA1 is as follows:

> "The CMA erred in law in requiring the New Agreement to be unwound as it had no statutory power to make such an order. The CMA's statutory power is to take action to remedy, mitigate or prevent the substantial lessening of competition or any resulting adverse effects. The CMA has required ICE to unwind the New Agreement because it is "…appropriate for any new owner of Trayport to decide whether to accept or reject the terms…". There is no suggestion that the New Agreement is itself a substantial lessening of competition or has any adverse effect; indeed, such a claim would be untenable, since the CMA would expressly be content for a new owner of Trayport to agree to the very same terms with ICE. The CMA has, accordingly, acted ultra vires by adopting a remedy that it is not empowered to impose under the Act".

181. ICE's Ground 1 of NoA2 challenges the Direction. It is worded as follows:

> "The paragraph of the Main Report on which the CMA relies to justify its direction [namely, para 12.73] is *ultra vires*, with the consequence that the direction is also *ultra vires*".

(b) Issues in dispute

182. The relevant legislative framework is set out at section C(1) above. For present purposes section 41 of the Act is germane. It provides as follows:

> "(2) The CMA shall take such action under section 82 or 84 as it considers to be reasonable and practicable —
>
> (a) to remedy, mitigate or prevent the substantial lessening of competition concerned; and
>
> (b) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition.
>
> […]
>
> (4) In making a decision under subsection (2), the CMA shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it."

183. Section 84 of the Act, in conjunction with schedule 8 para 13(3)(d), provides the statutory power to require unwinding of agreements (see the text of these provisions at paragraph 25 above).

184. It is common ground that section 41(2) requires the CMA to remedy, mitigate or prevent the SLC and any adverse effects resulting from it. The CMA found that the SLC would be remedied by requiring the divestiture of Trayport and that other remedies falling short of full divestiture would not remedy the SLC or its adverse effects. Subject to Grounds 1-4, ICE does not dispute these findings. It was also common ground that the New Agreement did not form part of the SLC or an adverse effect. Indeed, the CMA expressly found that it would have been content for the new owner to enter into a deal on the same terms of the New Agreement:

> "We would note that whilst our view is that under a Divestiture remedy, the New Agreement should be unwound, the new owner of Trayport 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 voluntarily negotiated between ICE and the new owner of Trayport should this be in their commercial interests. […]"[133]

185. Section 41(4) requires the CMA to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and its adverse effects.

186. The CMA's skeleton argument contained the following proposition:

> "67. The CMA concluded that, in order to make the divestiture remedy effective (thereby addressing the SLC caused by the Transaction in as comprehensive a way as possible), it was necessary to allow the new purchaser of Trayport to decide whether to enter into an agreement with ICE, and on what terms. […]"

Mr Harris, for ICE, accepted that <u>if</u> the CMA had concluded that the unwinding of the New Agreement was necessary to make the divestiture remedy effective, then the CMA would have had the *vires* to make such a

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133 Para 12.198.

direction.[134] However, Mr Harris denied that the CMA had reached such a conclusion in its Report.

187. The position of the CMA as to why the divestment was necessary was set out further in its skeleton argument:

> "68. Since the CMA did not know whether the New Agreement was on arm's length commercial terms, an order requiring the divestment of Trayport but allowing the continued existence of the New Agreement might have encumbered Trayport's new owner with an agreement that a truly independent Trayport would never have signed up to (either at all or on materially similar terms). In that case, an order for divestment alone would not remedy the SLC, or the adverse effects resulting from it, and certainly would not provide as comprehensive a solution as was reasonable and practicable. […]
>
> 69. […] The CMA's requirement that the New Agreement should be terminated was […] a step taken in order to ensure that the new owner of Trayport was not lumbered with an agreement that might not be commercially fair to it."

188. Mr Harris's response to the CMA is threefold:

(1) The reasoning set out in paras 68-69 of the CMA's skeleton argument is not to be found anywhere in the Report. The CMA cannot rely on the reasoning set out in its skeleton argument owing to the prohibition on post-report enhancement stated in *Tesco* (paragraph 31 above).

(2) The fact that the CMA did not know whether or not the New Agreement was arm's length is irrelevant: this forms no part of the statutory test.

(3) In any event, the New Agreement *was* arm's length and represented an excellent deal for Trayport. To support this point Mr Harris relied in particular on the witness evidence of Mr Heffron (of Trayport).

189. Ms Demetriou was not able to refer us to any provisions of the Report supporting the reasoning set out in the skeleton argument quoted above. Instead, Ms Demetriou referred us to the structure of the Report and suggested

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134 Day 1/ p43 lines 27ff.

that the assessment of the New Agreement was "part and parcel" of the CMA's assessment of the effectiveness.[135] Ms Demetriou suggested that the rational and proper approach, in circumstances where the CMA could not be sure that an agreement was arm's length, is to require unwinding.[136]

190. Before expressing our conclusions on this Ground, it is useful to set out in greater detail the structure of the Report insofar as it addresses the New Agreement. The discussion is to be found in the section headed "Effectiveness assessment of the Divestiture Remedy" which comprises paras 12.17 to 12.75 of the Report. That section is divided into a number of sub-sections which discuss in turn the three topics that are routinely considered in this context: (i) the scope of the divestiture package, (ii) the identification and availability of suitable purchasers and (iii) ensuring an effective divestiture process.[137] At paras 12.24 and 12.25 of the Report, the CMA said that:

> "12.24 To ensure that a Divestiture remedy would achieve its intended effects, we considered [the three topics noted above].
>
> 12.25 As part of this assessment, we also considered how the New Agreement should be treated under the Divestiture remedy."

191. Notwithstanding the terms of para 12.25, the treatment of the New Agreement is discussed after the three routine topics and without reference to the significance of those issues for the treatment of the New Agreement. Rather, in para 12.69, the Report records the views of the Merging Parties (that the New Agreement was beneficial and should be implemented) and, in para 12.70, the views of third parties (none of whom favoured implementation and some of whom believed that the New Agreement should be terminated outright or at the option of the divestment purchaser). Following that summary

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135 Day 2/ p19 lines 11ff.

136 Day 2/ p18 lines 31ff.

137 The central importance of these issues is reflected in the CMA's statement of divestiture principles (see *the Merger Remedies Guidelines, footnote 97 above*, at para 3.1):
"To be effective in restoring or maintaining rivalry in a market where the CC has decided that there is an SLC, a divestiture remedy should involve the sale of an appropriate divestiture package to a suitable purchaser through an effective divestiture process. These critical elements of the design of a divestiture remedy are discussed in detail in subsequent sections."

of the representations received, the CMA stated its conclusions in the four paragraphs quoted in para 177 above.

(c) Conclusion on Ground 5 of NoA1 and Ground 1 of NoA2

192. For the purpose of this subsection we use the term "SLC" as shorthand for "SLC or its adverse effects".

193. Our starting point is that the CMA's remedy powers under the Act are limited to those required to remedy the SLC (per section 41(2) of the Act) in a fashion which is as comprehensive a solution as reasonable and practical to address the SLC (as per section 41(4) of the Act).

194. 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:

(1) To *directly* remedy the SLC; or

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

195. In this case the 'direct measure' taken to remedy the SLC is the full divestment of Trayport. The CMA argued that the requirement to unwind the New Agreement was a measure designed to ensure the divestiture was effective. We have no doubt that, in principle, termination of an agreement may be an appropriate indirect remedy: indeed, the Act expressly recognises as much in para 13(3)(d) of Schedule 8.[138] It must, however, be appropriately linked to the purpose of remedying the SLC for which all of the CMA's remedial powers are conferred. The nature of that linkage may, no doubt, vary from case to case. For example, the CMA may consider that termination is

[138] We note that the Intercontinental Exchange Inc and Trayport Merger Inquiry Order 2017, made by the CMA following the Report, is expressed to be made in exercise of the CMA's powers under, inter alia, paras 2 and 13 of Schedule 8 of the Act, both of which confer the power to require termination of an agreement. Whilst the power in para 13 is supplementary to the power to order division of any business or group, the power in para 2 is free-standing. Neither party took any point in this respect and, in our judgment, it has no bearing on the present assessment: whichever power is engaged, in this case it has been exercised to ensure the effectiveness of the divestiture remedy.

appropriate to ensure an effective divestiture process or to eliminate any legacy effect of the control that gave rise to the SLC. In every case, however, the evidence and analysis upon which the CMA relies must be made sufficiently clear, in accordance with the principle stated in para 20(8) of *BAA*, quoted above.

196. The Report provides no articulation as to why the requirement to unwind the New Agreement would help ensure the effectiveness of the divestiture remedy in either of the ways noted in paragraph 194 or at all. As we have already observed (in paragraph 191), the effectiveness assessment of the New Agreement was not integrated into the assessment of the three topics under which that issue is routinely assessed, making it impossible to determine which, if any, of those points the CMA had in mind in reaching its conclusion. That conclusion itself, as stated in paras 12.71-12.74, does not fill that gap: it 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.

197. The CMA did belatedly purport to provide such reasoning in its defence and skeleton argument, but this cannot assist the CMA before this Tribunal to justify the requirement to unwind the New Agreement in view of the prohibition on post-report enhancement stated in *Tesco* (paragraph 31 above). That being so, it is not for us to determine in this judgment whether incorporation of that reasoning into the Report would have been sufficient to defeat this challenge. We would simply caution that no assumption to that effect should be made.

198. We conclude, therefore, that the Report fails to satisfy the requirements specified by Lord Brown in *South Buckinghamshire District Council v Porter (No. 2)* (quoted in para 20(8) of *BAA*). The reasons for the CMA's decision in

this respect are too cursory and too conclusory to meet the standards of intelligibility and adequacy. That, in our view, does represent a serious failure and, for these reasons, the Tribunal will quash this aspect of the Report.

199. Whilst we agree with ICE's criticisms of the sufficiency of the CMA's reasoning, we do not accede to its claim that this part of the Report should be quashed without remission to the CMA. That claim is based on the premise that the findings of the CMA that the New Agreement does not form part of the SLC identified in the Report exclude the possibility that termination of the New Agreement could be a permissible remedy for that SLC. We disagree. Whilst we have concluded that the CMA's reasoning is deficient, we consider that there is material in the Report upon the basis of which the CMA could lawfully conclude that termination of the New Agreement is required to ensure the full effectiveness of the divestiture remedy.

200. It is necessarily implied by para 12.72 that the CMA had formed the view that the new owner of Trayport may, given a free choice, consider the terms of the New Agreement to be so disadvantageous that it would prefer to reject the entire agreement even if that meant forfeiting the prospect of a full trading relationship with ICE. Upon further consideration, the CMA may conclude that the possibility of that disadvantage is such as to prejudice an effective divestment process or the effective remediation of the SLC. Whilst the CMA would have to provide adequate reasoning for any such conclusions, neither possibility is, in our view, necessarily excluded by the CMA's conclusion that the New Agreement did not form part of the SLC.

201. 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.

202. Conversely, the proposition that there can be no objection to the New Agreement if it is on arm's length terms is based on an assumption that there is a single arm's length standard that can be identified in respect of a given agreement. Trayport's perspective of what constitutes arm's length terms with ICE may well depend on the business model and perspective of Trayport's owner. The fact that the New Agreement is fairly regarded as arm's length by ICE in the context of its own business model does not necessarily mean that it would be so regarded by a new owner which might have a different business model: indeed, different potential owners may have differing business models and thus may disagree amongst themselves as to what would constitute arm's length terms for an agreement with ICE. Whether this is the case is a matter for the CMA to assess.

203. Moreover, leaving aside questions of business model, and depending on its assessment of the facts, the CMA may or may not conclude that a sufficient number of potential buyers might *perceive* the terms of the New Agreement to be potentially disadvantageous such as to affect their willingness to participate in the divestiture process. If that were found to be the case, the CMA might consider itself in a position to conclude that the effectiveness of the divestiture remedy was threatened, despite the absence of any conclusion on its part that the New Agreement is non-arm's length.

204. Whether the matters discussed in the preceding paragraphs or any other considerations are sufficient to warrant re-imposition of the termination requirement is, of course, a matter for the CMA to determine on remittal. 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.

205. Any remedy relating to the New Agreement must, therefore, be framed on the basis of a risk assessment. The question that the CMA has to consider is whether, having regard to the risks that the New Agreement poses to the

effective remediation of the SLC, it is reasonable and practicable to impose the remedy under consideration. In that context, it is legitimate for the CMA to take account of the particular circumstances including:

(1) *The circumstances in which the New Agreement was made*. The New Agreement was only executed on 11 May 2016, eight days after the CMA initiated its Phase 2 inquiry, and has yet to be implemented. In those circumstances, we consider that any claim that ICE has to invoke the protection of A1P1 (or any equivalent consideration under domestic law) is, to say the least, doubtful. Entry into the New Agreement at a time when ICE's relationship with Trayport was under critical examination by the CMA means that any expectation entertained by ICE or Trayport can only be regarded as highly contingent. The fact that the delay in implementation arises from the CMA's interim enforcement action is beside the point: the fact is that neither party has established any current business activity on the basis of the New Agreement.

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

206. That the New Agreement was not the cause of the SLC does not imply that its removal is unnecessary to give effect to the remedy. The divestiture may be required to address the problem without providing an adequate resolution on its own. What may be arm's length from the perspective of ICE may not be from that of the new owner and could therefore impede the new owner's ability to compete effectively after the divestiture. While free to do so, there can therefore be no presumption that the new owner will choose to reinstate the New Agreement after its termination.

207. ICE is therefore wrong to conclude that the CMA necessarily erred in suggesting that the New Agreement could be detrimental to competition after divestiture, even if it was perceived from ICE's perspective to be at arm's length before the divestiture, or that elimination of the New Agreement might be necessary to give effect to the remedying of the SLC, even if it was not its cause. There are therefore potentially valid grounds on which to argue both assertions. However, neither is obvious and neither has been reasoned to the required standard in the Report.

208. We therefore consider that this question must be remitted to the CMA for its reconsideration. Accordingly, we quash the Report to the extent that it requires the unwinding of the New Agreement and remit to the CMA to reconsider this aspect of its Report in the light of our findings.

209. Given that we have found that para 12.173 of the Report is *ultra vires*, it would normally follow that the Direction made pursuant to that provision must also be quashed. However, as it is an open question as to whether the implementation of the New Agreement would undermine the divestiture it would not be appropriate to permit implementation until the CMA has reconsidered the position. We will deal with this issue on paper if the CMA and ICE are unable to agree an appropriate approach to resolving this issue.

(3) Suspension of the New Agreement (Grounds 2 and 3 of NoA2)

(a) Preliminary remarks

210. ICE's Grounds 2 and 3 of NoA2 proceed on the basis that the CMA has the *vires* to make the Direction, i.e. that ICE has failed on Ground 1 of NoA2. We have quashed the relevant portion of the Report and remitted to the CMA for it to consider after taking any enquiries it considers appropriate the question of whether the New Agreement should be unwound and if so on what basis. Nevertheless, there are certain remarks that we consider it appropriate to make now so we proceed to set out the grounds and the parties' arguments.

(b) The Direction

211. Section 72 of the Act empowers the CMA to make IEOs to restrain pre-emptive action, namely action which "might prejudice the reference concerned or impede the taking of any action […] which may be justified by the CMA's decisions on the reference" (emphasis added). Para 4 of the IEO reflects this statutory language and directs ICE not to "take any action which might prejudice a reference of the transaction under section 22 of the Act or impede the taking of any action under the Act by the CMA which may be justified by the CMA's decisions on such a reference" except with the prior written consent of the CMA.

212. The Direction, issued pursuant to para 10 of the IEO, requires ICE to cease implementation of the New Agreement. The reasoning underlying the Direction is set out at page 2:

> "(d) The CMA concluded in the Report at paragraph 12.73 that "the New Agreement should be fully unwound thereby giving the new owner of Trayport the choice as to whether to negotiate (or not) an agreement with ICE either as part of the divestiture process, or in the future"; and
>
> (e) The CMA considers that the implementation of the Agreements would be in direct conflict with the CMA's finding that the Agreements should be unwound, thereby pre-empting and impeding the CMA's ability to implement the findings in the Report in contravention of paragraph 4 of the Order."

(c) The grounds of review

213. Under Ground 2 of NoA2 ICE argues that the CMA was irrational in finding that implementation of the New Agreement would create a "direct conflict" with the CMA's finding that the New Agreement should be unwound so that the new owner of Trayport would have the choice whether or not to negotiate an agreement with ICE. ICE contends that there would be no conflict if the new owner were to retain a choice to negotiate.

214. Under Ground 3 of NoA2 ICE argues that it was disproportionate and irrational to order the Merging Parties to cease implementation of the New Agreement, the CMA should have selected a less onerous solution to achieve the aim of giving the new owner a choice as to whether or not to negotiate an agreement with ICE.

(d) The parties' arguments

215. The CMA's primary argument is as follows:

(1) For the purpose of Grounds 2 and 3 of NoA2 it is assumed that the CMA has *vires* to order the unwinding of the New Agreement since these grounds only arise if Ground 1 of NoA2 has failed.

(2) If the CMA has *vires* then it follows, in the language of section 72 of the Act, the unwinding of the New Agreement is an "action which might be" (or, as assumed here, actually <u>is</u>) "justified by the CMA's decisions on the reference".

(3) Para 4 of the IEO is drafted in the same language as section 72 of the Act. Accordingly, unwinding the New Agreement "might be" (or, as assumed here, actually <u>is</u>) "justified" with the result that entering into the New Agreement therefore constituted:

(i) Pre-emptive action which prejudiced the reference under section 72 of the Act; and

(ii) A breach of the IEO.

(4) ICE did breach the IEO by failing to seek the CMA's consent before entering into the New Agreement. Ms Demetriou described ICE's conduct as "cavalier"[139] and submitted that:

> "the IEO is broad […] and this was a very major agreement that had been entered into five months after the merger against a backdrop -- an agreement between the parties, not with third parties, […] against a backdrop whereby the parties had not been in a commercial relationship of this sort for 15 years. We say that to put the point at its very lowest […] it should have been obvious to the applicant that this is something that the CMA might have wanted to know about and that it might come within the IEO and that they should have applied for consent, otherwise one wonders what the purpose of the IEO is."[140]

(5) The CMA is entitled to restrain pre-emptive action. It cannot be irrational or disproportionate to restrain a breach of the IEO and ICE cannot benefit from having breached the IEO.

216. ICE denied that there had been a breach of the IEO. Mr Harris emphasised that the CMA had not found that the New Agreement was on non-arm's length terms and argued that the CMA "cannot on the one hand say it is obviously a breach because it might not have been on arm's length terms in circumstances where [their] own case is '[We] can't tell whether it is arm's length or not'."[141] Further, he referred us to the witness statement of Mr Bennett which made clear that ICE had considered internally whether or not it needed to notify the CMA of the conclusion of the New Agreement and had reached a *bona fide* view that notification was not necessary because it was intended that the negotiation would be arm's length and on normal commercial terms.[142]

217. The CMA's secondary argument is that based on the material and submissions before it at the time the Direction was made, it was entitled to take the view that temporary implementation was not technically or commercially feasible.

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139 Day 2/ p27 lines 9ff.
140 Day 2/ p26 lines 10-19.
141 Day 2/ p78 lines 21-23.
142 Day 2/ p78 lines 24ff.

The CMA referred to ICE's submission of 1 June 2016 made at a time when ICE was resisting the suspension of the New Agreement. The submission stated:

> "17. The go live date for the new contract is 6 June 2016. Trayport has already communicated and committed to this launch date to the market. Many traders already have the necessary connectivity in their contracts. They are expecting the additional ICE contracts to appear and be accessible on Joule/TGW as of this date.
>
> 18. Some traders need additional connectivity to benefit from the enhanced service […]. Trayport has reached out to a significant number of traders about the enhanced service and is in the process of adding and testing such links for a number already. Trayport is also in the midst of technical testing for the STP Link with a number of brokers in order to have this clearing link operational from 6 June 2016 or soon thereafter.
>
> 19. Accordingly the nature of the roll-out process is not one which lends itself to straightforward suspension. 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. Quite 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. Understandably, Kevin Heffron is extremely concerned that this would be very detrimental to the Trayport business".

218. The CMA also argued that ICE could and should have made it clear, in response to the CMA's Remedies Working Paper or its letter of 4 November 2016 indicating ICE's intention to resume implementation of the New Agreement, that a temporary suspension was feasible, contrary to its earlier submission. ICE's response is that the CMA had misunderstood the factual position. As explained in evidence served with NoA2, 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. By contrast, 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.

(e) The Tribunal's remarks relating to Grounds 2 and 3 of NoA2

The alleged breach of the IEO

219. We need not rule on the issue of whether ICE in fact breached the IEO because we have remitted the question of whether the CMA had *vires* to require the New Agreement to be terminated. We note that the alleged breach of the IEO was not relied upon by the CMA in its Report as a ground giving it *vires* to unwind the New Agreement.

220. Nevertheless, we think it appropriate to observe that "pre-emptive action" is a broad concept. It concerns conduct which might prejudice the reference or which might impede action justified by the CMA's ultimate decision. The IEO in these proceedings is phrased in similarly broad language and should be interpreted to give full effect to its legitimate precautionary purpose. We reject Mr Harris's suggestion that the fact that the CMA has made no finding that the New Agreement is on non-arm's length terms is inconsistent with its stance that there has been a breach of the IEO. The word "might" means that it is the possibility of prejudice to the reference or an impediment to justified action which is prohibited. The IEO catches more than just actual prejudice or impediments, which is why the onus is on the addressee of the IEO to seek consent from the CMA if their conduct creates the possibility of prejudice or an impediment.

221. While we do not rule on it, we are inclined to the view that ICE should have sought consent from the CMA before implementing the New Agreement. The New Agreement is, after all, a major commercial contract with a multi-year duration between parties which had previously had no commercial relationship on a similar scale. Certainly, we consider that on any view the prudent course would have been to have sought the CMA's consent before signing.

222. We note that Mr Bennett's evidence at para 13 of his first statement that it was his understanding from "internal discussion" that the IEO would not prevent the negotiation and signing of an agreement "so long as it was on arm's length

basis and on normal commercial terms (as we intended)." It is not suggested that external legal advice was sought in relation to this issue.

223. We recognise that it must obviously be the case that not every agreement between merging parties will in all cases require the CMA's prior consent. However, where an IEO has been issued, it is incumbent on parties to take a carefully considered view as to whether their conduct might arouse the reasonable concern of the CMA that the agreements that they reach are significant enough that they might prejudice the reference or impede justified action if the agreement is non-arm's length. Where the merging parties have a long-standing prior commercial relationship (which is more likely to be the case with vertical mergers, as opposed to horizontal mergers), full and frank discussions with the CMA as to the implications of the IEO for any adjustments to the terms of that relationship that are required in the ordinary course of business would be the obvious way in which to reconcile the requirements of business continuity and protection of the merger process.

Whether the CMA acted within its powers based on the materials before it

224. Assuming we had found under Ground 5 of NoA1 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, why it considered other less intrusive measures were open to be adopted by the CMA. We therefore would have been inclined to dismiss these Grounds on this basis. However, as we have remitted the question of *vires* to the CMA to reconsider, there will now be an opportunity for the CMA to consider these issues also. Our findings in relation to Ground 5 of NoA1 will be relevant to this question also. In particular, the CMA will need to consider whether these proposals would affect the effectiveness of the divestiture remedy.

(4) The benefits of partial foreclosure (Ground 2 of NoA1)

(a) Introduction

225. ICE does not contest the CMA's finding that the merged entity has the ability to harm rivals, but it does contest the finding that it has the incentive to do so. By its Grounds 2(a)-(c) and 2(e) of NoA1, ICE argues that the CMA made various failures in its factual assessment of the benefits to the merged entity of pursuing a vertical foreclosure strategy. By Ground 2(d) of NoA1, ICE argues that the CMA made an error of law by failing to consider whether Trayport would be under a duty not to abuse a dominant position contrary to the Chapter II prohibition and/or Article 102 TFEU. ICE contends that these errors vitiate the CMA's finding of an SLC.

(b) Portions of the Report relevant to Ground 2 of NoA1

226. The CMA's analysis of the benefits of foreclosure is found primarily at paras 8.107 to 8.118 of the Report and involves four principal steps.

(1) The CMA investigated the four partial foreclosure mechanisms and concluded that the merged group would have the ability to implement them and that their implementation "would have a substantial negative impact on the competitiveness of ICE's rivals".[143] The four partial foreclosure mechanisms are identified in paras 8.17-8.70 of the Report as follows:

(i) Increasing prices;

(ii) Lowering service standards;

(iii) Delaying product development; and

(iv) Listing and the use of confidential data.

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143 Para 8.109.

(2) The CMA concluded that "the use of these mechanisms by the merged firm would have a substantial negative impact on the competitiveness of ICE's rivals."[144]

(3) In assessing the impact of these mechanisms, the CMA "took into account [its] findings […] that ICE competes closely with other exchanges, clearinghouses and, to a substantial degree, with brokers, […]. In light of [which, it] identified five potential benefits to ICE's execution and clearing activities of using Trayport to engage in total and/or partial foreclosure of ICE's rivals,"[145] all of which involve ICE winning new volumes or retaining volumes that it would otherwise have lost. The five potential benefits are as follows:

(i) ICE would over time likely be able to further grow its position in products where it already has a substantial presence at the expense of its rivals.

(ii) Total and/or partial foreclosure of ICE's rivals would help to prevent ICE's rivals from challenging to win its volumes in the future in products where it already has a strong position.

(iii) Where there are pre-existing long-term industry trends, ICE would be able to use its control of Trayport to accelerate these and direct them in its favour.

(iv) Total and/or partial foreclosure could over time help ICE to obtain volumes from its rivals in those existing products where it has little or no current position.

(v) ICE's control of Trayport would likely help it to gain control of new markets and segments as these emerge in future, which is particularly relevant given that dynamic competition is

144 Para 8.109.
145 Para 8.110.

important in this industry, and that first-mover advantages exist.

(4) The CMA concluded that "based on this assessment, our view is that these benefits of foreclosure are likely to be substantial."[146]

(c) Preliminary points

227. Before turning to discuss the individual sub-grounds of Ground 2, we address two overarching arguments common to a number of the sub-grounds. The first concerns whether the CMA accepted the Merging Parties' stated rationale for the Transaction and the second concerns the extent to which the CMA relied on long-term forecasts and the implications of such reliance.

(i) The parties' arguments regarding commercial rationale of the Transaction

228. ICE argues that there was no evidence that its commercial rationale in entering the Transaction was to implement a vertical foreclosure strategy. According to it, the CMA did not contest its case that the Transaction rationale was to diversify ICE's business into new and complementary business areas to generate a steadier income stream, a rationale which ICE argues requires it to nurture and grow the Trayport business. ICE argues that there is no indication in the Report that the CMA did not accept ICE's rationale.

229. The CMA denies that it accepted ICE's claimed rationale. Rather, it contends that it merely recorded ICE's case. It suggests that its non-acceptance of ICE's argument is evident from its conclusion that ICE would have the ability and incentive to use its control of Trayport to harm ICE's rivals.

The Tribunal's conclusion regarding commercial rationale

230. We do not consider that, even if diversification were to be a rationale for ICE in entering the Transaction, this of itself excludes ICE having both the ability

146 Para 8.118.

and incentive to use its control of Trayport to harm its rivals. To the contrary, the possibility of a tension between the two propositions is, in any event, taken into account when assessing the costs to ICE of pursuing a foreclosure strategy. We do not dispute that diversification was at least a major factor in ICE's decision to acquire Trayport.

(ii) The parties' arguments regarding the CMA's reliance on long-term forecasts

231. ICE argues that when the Report is read as a whole, it is evident that the CMA's analysis was based on long-term forecasts in circumstances where particular care is required to justify any conclusions adverse to the Transaction. The CMA in its Report emphasised that it would "take a relatively long-term view on the impact of the merger" to consider how it "plays out over the course of several years" (para 8.103). It referred to "the need to base this forward-looking long-term analysis on historic data" (para 8.104), referred to the "need to make a number of speculative assumptions about the potential long-term gains and losses of foreclosure for the merged firm" (para 8.105) and said "this is particularly the case in light of our view that here it is appropriate for us to take a relatively long-term assessment horizon" (para 8.109). In para 8.157, the CMA stated:

> "In the long-term, we considered that it is likely to result in liquidity remaining with ICE in asset classes where it already has a strong position and that it may ultimately result in liquidity shifting away from ICE's rivals in asset classes where it is currently weak and/or has no position."

232. The CMA counters that its conclusions on the benefits of foreclosure were based on a combination of short and long term forecasts as to ICE's behaviour and its effects. The CMA refers us in particular to para 8.118 (stating its conclusions on ICE's incentives) and para 8.156 (stating its overall conclusions on foreclosure):

> "8.118 [O]ur view is that these benefits of foreclosure are likely to be substantial. Moreover, some of these benefits, in particular expanding its presence in existing products and protecting itself from the challenge of rivals, are likely to emerge relatively quickly. Other benefits, such as those

> relating to new markets or segments, may take some time to emerge, but are likely to accumulate for many years into the future" (Emphasis added.)
>
> "8.156 Considering all of the evidence in the round, we concluded that post-Merger ICE's ownership of Trayport would be used to disadvantage ICE's rivals and/or favour ICE. We considered that this would result in an immediate loss of rivalry with a longer term effect on competition [...]" (Emphasis added.)

The Tribunal's conclusion regarding the CMA's reliance on long-term forecasts

233. It is not disputed or disputable that, as a general proposition, the more distant the forecast effect, the greater the care that is required in making such forecasts and in making use of them. In the present case, we consider that ICE's contention that the CMA's analysis failed to meet that standard is unfounded. As Nasdaq observed in its skeleton argument, the CMA's analysis was not solely based on longer term issues: rather, the CMA concluded that the merger would lead to an immediate loss of rivalry with a longer term effect on competition (para 8.156 of the Report, quoted in paragraph 231 above). In assessing the longer term effects, the CMA paid due attention to the factors (such as "stickiness" in the market) which militated against an anti-competitive effect and placed limited weight on its long term quantitative analysis (which it nonetheless found to be consistent with its qualitative assessment (paras 8.104-8.106 of the Report)).

234. We consider that there was no deficiency in the CMA's general approach to the assessment of the competitive effects over the long term such as to mean that its conclusions in that respect are irrational or not reasonably sustainable by sufficient evidence of probative value.

(d) Was the CMA's finding that there would be 'substantial' switching of liquidity rational? (Ground 2(a) of NoA1)

The Report and ICE's challenge

235. ICE's Ground 2(a) of NoA1 concerns the CMA's finding that there would be substantial switching of liquidity as a result of ICE implementing various partial foreclosure strategies. In challenging this finding, ICE relies in particular on the CMA's finding at para 8.104(b) of its Report that a quantitative assessment would have limited value. Para 8.104 is set out in full below:

> "In light of this long time assessment horizon, and the specific features of this industry, our view is that a quantitative assessment – particularly if it seeks to be highly detailed – will not be particularly informative of the Parties' foreclosure incentives. We reached this view on the basis of a number of factors:
>
> (a) The mechanisms of foreclosure identified above primarily relate to Trayport's strategy around what initiatives to promote, as well as the listing of rivals' new products and prioritisation of software developments that may only emerge in future. Therefore, we necessarily could not identify the specific changes that Trayport would make and quantify how this would affect the competitiveness of each of ICE's rivals.
>
> (b) In addition, while a loss of competitiveness may result in a reduction in the volumes hosted by ICE's rivals in the longer term, as discussed below, the precise impact on specific products is unavoidably harder to predict in this industry than most because liquidity is sticky and tends to gather on a certain venue for a particular asset class. As discussed in Section 7, the importance of liquidity and open interest gives rise to strong network effects. The implication of this is that in response to a loss of competitiveness a rival may suffer only a very limited loss of volumes in some products, but a very dramatic loss in others, with it being difficult to identify in advance exactly where these large shifts in volumes will take place. This difficulty is exacerbated by the need to base this forward-looking long-term analysis on historical data, which may not reflect prevailing circumstances in the market as and when these foreclosure mechanisms are gradually introduced in the future."

236. ICE's Ground 2(a) of NoA1 is as follows:

> "The CMA recognised [at para 8.104 of the Report] that it could not forecast whether liquidity (i.e. trading) would switch as a result of implementation of the four partial foreclosure strategies, and it was therefore illogical and irrational to find that there would be "substantial" switching."

The parties' submissions

237. ICE argues that the CMA accepted in its Report that it cannot predict whether liquidity (i.e. trading volumes) will switch and that it therefore could not predict whether ICE would obtain benefits from a partial foreclosure strategy. ICE submits that the CMA accepted this point when it took the view that a quantitative assessment would not be particularly informative in this case. ICE relies in particular on the following passage of para 8.104(b):

> "[…] the precise impact on specific products is unavoidably harder to predict in this industry than most because liquidity is sticky and tends to gather on a certain venue for a particular asset class […]. The implication of this is that in response to a loss of competitiveness a rival may suffer only a very limited loss of volumes in some products, but a very dramatic loss in others, with it being difficult to identify in advance exactly where these large shifts in volumes will take place […]".

238. ICE argues that, once the CMA accepts that it cannot predict whether liquidity will shift in particular products because that prediction is too speculative, it cannot logically predict that liquidity will switch in any product and, therefore, that it cannot rationally predict that there will be "substantial" switching.

239. ICE argues that, given that there are only around two dozen European utilities products hosted by the Merging Parties and their rivals,[147] the CMA ought to have identified some particular switching. According to it, the CMA's failure to do so reveals that its long-term forward-looking assessments are too speculative and lack robustness.

240. The CMA responds that Ground 2(a) of NoA1 is based on a false premise. The CMA submits that ICE is wrong to say that the CMA accepts in para 8.104 that it cannot predict whether liquidity will shift; the analysis there is directed to a different question, namely the difficulties in predicting precisely where liquidity would shift.

241. The CMA refers in particular to the finding at para 8.157 that the merger in the long-term:

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147 Para 8.105.

> "is likely to result in liquidity remaining with ICE in asset classes where it already has a strong position and that it may ultimately result in liquidity shifting away from ICE's rivals in asset classes where it is currently weak and/or has no position. It would also increase the likelihood that ICE would take a leading position in new product markets or where innovation shifted the balance of power".

The CMA argues that this shows that it found that the Transaction was "likely" to result in a shift in liquidity, whilst it also acknowledged that it could not be sure precisely where that shift would happen (i.e. in relation to which products and between which market players).

242. The CMA also argues that it considered in its quantitative analysis whether the degree of uncertainty about the precise magnitude of switching cast any doubt on its findings that the benefits of foreclosure would be both substantial and greater than the costs. In this sensitivity analysis the CMA concluded that even the lowest estimate of benefits exceeded the highest estimate of costs; this showed that the "result was highly robust to alternative assumptions".[148]

243. The CMA submits that its analytical approach was focussed on the salient question to the competition analysis, namely whether a partial foreclosure strategy would lead to switching to ICE. This, it contended, is in line with para 75 of the Tribunal's judgment in *BSkyB v Competition Commission* [2008] CAT 25 where the Tribunal stated:

> "where there is a range of ways in which competition in a market might be lessened substantially, the Commission is not required in respect of each potential transaction identified by the Commission to establish that it is more likely than not to occur".

Nasdaq

244. Nasdaq argues that ICE's argument is flawed. It argues that in the context of a merger where a competitor newly-acquires a key input supplier, the CMA is necessarily predicting the future impact of the parties' behaviour. ICE fails to show that the CMA had no rational basis for the cost/benefit analysis underpinning its decision. Its true complaint therefore is to say that there

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148 Appendix F to the Report, at paras 60-61.

might be other ways in which the future might resolve itself. But this does not suffice in a judicial review context.

(e) Conclusion on Ground 2(a) of NoA1

245. We find no error of principle in the CMA's approach. As the Tribunal held in *BSkyB*, at the conclusion of a detailed discussion of the issues and authorities in which the citation in para 241 appears:

> "80 So, in the context of an assessment as to whether there is likely to be an SLC in the future, the Commission must give full and proper consideration to the evidence which it has gathered, and apply the "probabilistic test" at the end-point. In other words, it must ultimately ask itself whether it is satisfied on the balance of probabilities that there will be an SLC caused by the RMS, but the Commission is not under an obligation to make findings of fact (whether on a balance of probabilities or otherwise) in respect of each item of evidence. Nor is it obliged to find that any particular potential investment is more likely than not to occur before it can take it into account in its overall assessment of the probability of SLC."

The specific reference in the final sentence to "potential investment" reflects the fact that, in that case, the point at issue concerned the extent and consequences of the influence that BSkyB would obtain over ITV's future investments. Substituting the general concept of "foreclosure mechanism" for the specific reference, we adopt the following as a statement of the applicable general principle: "*Nor is the CMA obliged to find that any particular foreclosure mechanism is more likely than not to occur before it can take it into account in its overall assessment of the probability of SLC.*"

246. We also find no error of assessment in the CMA's approach, nor can its conclusion be fairly categorised as irrational or lacking any factual basis. The assessment of facts and forecasts of what may happen in the future is a matter primarily for the CMA's judgement. It was fully aware of the limitations of a quantitative assessment. Essentially, for the reasons it gave in the Report and in its submissions, the CMA was entitled to conclude that foreclosure by ICE was likely to reap benefits in favour of ICE in the form of shifts in liquidity to the advantage of ICE. The fact that it was not possible to predict exactly when and where those shifts would occur does not undermine the CMA's conclusion that shifts would occur and the benefits were likely to exceed costs. When

looking to the future, any assessment is likely to be imprecise and unpredictable, but the CMA's assessment is not in our view an unreasonable one.

(f) Was the CMA rational to find that the partial foreclosure strategies would lead to substantial switching from other venues to ICE? (Ground 2(b) of NoA1)

The Report and ICE's challenge

247. ICE's Ground 2(b) of NoA1 challenges the CMA's finding that ICE had an incentive to implement partial foreclosure strategies to harm its rivals. In considering this ground it is helpful to set out the section of the Report dealing with assessment of the benefits of foreclosure in some detail.

> "*The benefits of foreclosure*
>
> [8.107] We first noted that, pre-Merger, ICE and Trayport had conflicting incentives. Trayport's objective was to support competition between multiple competing venues, with liquidity fragmented between them, which meant that its aggregation software offered significant value to industry participants. […].
>
> [8.108] In contrast, ICE's goal has been, and continues to be, to have as much trading as possible concentrated on its venues and clearinghouse. This raises the prospect that under ICE's control Trayport's focus will change from supporting continued competition between multiple venues and clearinghouses, to actively trying to move liquidity towards ICE's venues and clearinghouse at the expense of rival exchanges, brokers and clearinghouses, through the use of the various mechanisms discussed in our assessment of its ability to foreclose above.
>
> [8.109] We considered in more detail whether the merged firm would want to engage in either the total or partial foreclosure of ICE's rivals using the various mechanisms outlined in the previous section on Trayport's ability to foreclose. As set out in that section, our view is that the use of these mechanisms by the merged firm would have a substantial negative impact on the competitiveness of ICE's rivals. As a result of the delays in listing their products, restricted functionality of the software they rely on, and the potential leaking of their confidential 'soft' information resulting in a loss of first-mover advantage, rival venues and clearinghouses would find it more difficult to attract and retain the business of traders, who would be more disposed to use ICE instead. […]
>
> [8.110] In assessing the impact of these total and partial foreclosure mechanisms, we took into account our findings in Section 7 above that ICE competes closely with other exchanges and clearinghouses and, to a

substantial degree, with brokers – a point the Parties have themselves emphasised. In light of these findings, we identified five potential benefits to ICE's execution and clearing activities of using Trayport to engage in total and/or partial foreclosure of ICE's rivals.

[8.111] First, ICE would over time likely be able to further grow its position in products where it already has a substantial presence at the expense of its rivals. For example, this could include moving additional TTF trading volumes from the EEX Group onto its own exchanges, and by gaining additional coal OTC clearing volumes from CME. [Footnote 187: These gains would come primarily from switching volumes executed on other exchanges and volumes executed with brokers that are not cleared by ICE. We accepted the Parties' point that ICE would have less of an incentive to switch OTC volumes that it currently clears onto its exchanges, as this would not necessarily directly result in any additional revenue. However, we considered that ICE may still obtain some benefit from such switching because this would serve to increase the liquidity of its exchanges and therefore its ability to compete effectively.] ICE already has liquidity and open interest in each of these products and it is an existing head-to-head competitor to these rivals. It is therefore likely to be seen as a particularly effective alternative to them in the eyes of traders.

[8.112] Second, total and/or partial foreclosure of ICE's rivals would help to prevent ICE's rivals from challenging ICE to win its volumes in the future in products where it already has a strong position, for example TTF, NBP and EUA. […].

[8.113] Third, where there are pre-existing long-term industry trends, ICE would be able to use its control of Trayport to accelerate these and direct them in its favour. In particular, it may be able to increase the rate at which OTC bilateral trades switch to being cleared, with the aim that OTC trading more generally moves onto exchange, and can likely direct traders to adopt ICE's exchanges and clearinghouse as they do so by making rival clearinghouses and exchanges less attractive. […]

[8.114] Fourth, total and/or partial foreclosure could over time help ICE to obtain volumes from its rivals in those existing products where it has little or no current position, for example German power. [In section 7 above we] concluded that liquidity can shift, and that venues and clearinghouses do compete through potential head-to-head competition. [T]his possibility is demonstrated by the […] example of CME's successful entry into coal. […]

[8.115] Fifth, ICE's control of Trayport would likely help it to gain control of new markets and segments as these emerge in future, which is particularly important given that dynamic competition is important in this industry, and that important first-mover advantages exist. For example, this could relate to new types of assets and geographies as they migrate from voice to electronic trading, and new types of offering that emerge in light of regulatory developments. […]

[8.116] We found in our assessment of ICE's ability to foreclose that [ICE would in the long run be able] to engage in the targeted foreclosure of specific rivals in individual products where it saw the greatest benefit for ICE's exchanges and clearinghouse.

> [8.117] For example, ICE could make it difficult for any rival to launch new products that might challenge its own. […]
>
> [8.118] Based on this assessment, our view is that these benefits of foreclosure are likely to be substantial. Moreover, some of these benefits, in particular expanding its presence in existing products and protecting itself from the challenge of rivals, are likely to emerge relatively quickly. Other benefits, such as those relating to new markets and segments, may take some time to emerge, but are likely to accumulate for many years into the future."

248. ICE's Ground 2(b) of NoA1 is as follows:

> "There was no, or no sufficient, evidence of probative value on which the CMA could rationally conclude that the implementation by ICE of the four partial foreclosure mechanisms (or any of them) would be effective to cause traders to switch their trading venue and to make ICE (as opposed to some other venue) the beneficiary of any such switch in respect of "substantial" (or any) trading volumes."

The parties' submissions

249. ICE does not challenge the CMA's finding that by acquiring Trayport it would gain the ability to harm its rivals. However, by Ground 2(b) of NoA1 ICE contends that the CMA lacked adequate evidence to support a finding that ICE (as opposed to one or more other venues) would benefit from the exercise of that ability. In other words, ICE argues that the CMA simply assumed that ICE would have the incentive to use its ability to foreclose.

250. ICE contended that there were important gaps in the CMA's analysis of the incentive to foreclose. In particular, ICE suggested that the CMA "jumped" between the following steps without basing its conclusions on probative evidence.

(1) **First finding**: the CMA found that ICE had the ability to foreclose rivals (step 1);

(2) **Second finding:** the partial foreclosure mechanisms "would have a substantial negative impact on the competitiveness of ICE's rivals" and traders "would be more disposed to use ICE"[149] (step 2);

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149 Para 8.109

(3) **Third finding:** there were five potential benefits to ICE recorded in the Report under which ICE "would", "could" or "may" win new volumes or retain volumes that it would otherwise not have won or retained[150] (step 3); and

(4) **Fourth finding:** these shifts in volume would be "substantial"[151] (step 4).

251. The CMA accepts that, to establish that ICE would have an incentive to harm its rivals, the likely benefits of doing so must outweigh the likely costs, and that thus an undertaking with the "ability" to foreclose does not automatically have the incentive to foreclose. However, the CMA argues that in this case the analysis of ability and incentive is very closely related and overlapping.[152] At the hearing the CMA referred us to paras 5.6.6 and 5.6.7 of the Guidelines to support its contention:

> "Despite differences in detail between cases, the Authorities will typically frame their analysis of non-horizontal mergers by reference to the following three questions:
>
> (a) *Ability*: Would the merged firm have the ability to harm rivals, for example through raising prices or refusing to supply them?
>
> (b) *Incentive*: Would it find it profitable to do so?
>
> (c) *Effect*: Would the effect of any action by the merged firm be sufficient to reduce competition in the affected market to the extent that, in the context of the market in question, it gives rise to an SLC?
>
> In practice, the analysis of these questions may overlap and many of the factors may affect more than one question. Therefore, the Authorities' analysis of ability, incentive and effect may not be in distinct chronological stages but rather as overlapping analyses. So as to reach an SLC finding, all three questions must be answered in the affirmative." (Emphasis added.)

252. The CMA argues that Ground 2(b) of NoA1 must fail because ICE focuses on one detailed part of the CMA's reasoning, in contravention of the principle that its Report must be read as a whole. The CMA refers to other findings in the Report which it contends are relevant, in particular its findings that:

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150 Paras 8.111 to 8.115.
151 Para 8.118.
152 Day 2/ p35 lines 28ff.

(1) Trayport is very important for all market participants and it is difficult, or impossible, to trade effectively without access to the Trayport platform: para 7.167.

(2) All of ICE's rival venues and, to a lesser extent, clearinghouses, are dependent on Trayport to disseminate their prices and offerings to traders in order to generate liquidity: paras 7.168-7.169.

(3) ICE is less dependent on Trayport than its rivals by virtue of its own front-end screen product: para 7.108.

(4) Trayport plays an important role in enabling and promoting competition between venues and clearinghouses. It is not merely a passive software provider: paras 7.171-187.

(5) By virtue of its purchase of Trayport, ICE will control its strategic direction, innovation priorities and/or levels of investment: para 8.11.

(6) ICE competes closely with rival exchanges, clearinghouses and (to a lesser extent) brokers, in particular in the European gas and emissions asset classes: para 7.88.

253. The CMA therefore argues that it is clear from its findings read in context that, if ICE has the ability to use its control of Trayport to harm its rivals, it will quite plainly benefit from additional trading volumes. The benefits to ICE of implementing the various foreclosure mechanisms are the flipside of its ability to harm its rivals. In particular, if ICE is able to harm all of its rivals, it must benefit from the exercise of that ability.

254. The CMA argues that it did investigate and find (on the basis of proper evidence) that ICE would benefit from the four identified partial foreclosure mechanisms.

(g) Conclusion on Ground 2(b) of NoA1

255. ICE's Ground 2(b) of NoA1 requires a careful review of whether the CMA found (on the basis of proper evidence) that ICE would benefit from the four partial foreclosure mechanisms. (i) increasing prices, (ii) lowering service standards, (iii) delaying product development and listing, and (iv) use of confidential data.

256. Prior to that review, we comment on ICE's general objection that the CMA has impermissibly conflated the distinct steps in the analysis which we have set out in para 248 above. In our judgment, there is considerable force in the CMA's response that there is a substantial degree of overlap between the successive steps in the analysis. In truth, ICE's objection is a variation on the theme, rejected by the Tribunal in *BSkyB*, that the CMA's analysis should be expressed (and, therefore, scrutinised) in a minutely particularised way. We consider, therefore, that para 80 of *BSkyB* (quoted in para 243 above) answers the generality of this objection.

257. We review the four identified foreclosure mechanisms in turn below.

(i) Increasing prices

258. ICE argues that there was no evidence that would reasonably support the conclusion that the increased prices would result in ICE (as opposed to other firms) winning or retaining volumes that it would otherwise have lost. ICE refers to para 8.104(b) of the Report (quoted in full at paragraph 237 above) where the CMA stated "a loss of competition may result in a reduction in the volumes hosted by ICE's rivals" (emphasis added) and argued that this amounted to no more than speculation on the part of the CMA.

259. In our view ICE's reliance on para 8.104(b) is misplaced. Paras 8.23-8.30 of the Report contains a careful consideration of the likely impact of price increases on the competitive dynamics of the market. Of particular relevance is the CMA's finding at para 8.23:

> "a significant price increase would likely have an effect on the ability of some rival venues to compete with ICE, particularly, those for which Trayport's licence fees represented a higher percentage of their overall operating costs and/or EBITDA. An increase in operating costs could result in some of ICE's rivals becoming less competitive for execution and clearing fees".[153]

260. It is clear from this passage that the CMA found that it would be ICE which would benefit from the reduction in competitiveness of its rivals. If rivals are made weaker, ICE's relative position is strengthened. Indeed, it is unsurprising that an increase in Trayport's fees to all of ICE's rivals will make traders more likely to use ICE as a venue. It is, of course, also the case that an increase in Trayport's fees to all of its clients including ICE could have the same effect: the price increase to ICE would be internalised within the ICE group whilst ICE's rivals would still feel its full effects. We therefore conclude that the finding at para 8.30 of the Report that "increasing rivals' Trayport costs would likely harm their ability to compete with ICE […] over the longer-term" was a rational finding and not mere speculation as ICE contends.

(ii) Lowering service levels

261. ICE contended that the CMA had no evidence which could reasonably support a finding that lowering Trayport service levels would generate a benefit for ICE. ICE contends that the CMA asked traders relevant questions as to how they would react in response to lowered service levels, but the CMA did not rely on the responses.

262. We reject ICE's criticism of this aspect of the Report. Reviewing paras 8.31-8.33 and 8.38-8.41 of the Report it is clear that the CMA had a substantial evidence base upon which it could reasonably form the view that a reduction in Trayport service levels (relative to the levels that may be expected in the counterfactual) would harm rivals and thereby directly benefit ICE. See, for instance, the submissions of interested third parties which the CMA accepted:

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153 Para 8.23.

(1) Nasdaq (an exchange) feared that "the merged entity could provide ICE with a better technical solution, or a first-mover advantage in adaptation of systems". [154] (Emphasis added.)

(2) ICAP (a broker) "said that there was potential for ICE to mothball technology development of Trayport while continuing to develop WebICE, effectively forcing traders to use WebICE".[155] (Emphasis added.)

We note that, as that evidence indicates, the service reduction to rivals could take the form of giving a technical preference to ICE (the example given by Nasdaq) or inflicting a technical detriment on rivals (the example given by ICAP).

263. We reject the suggestion that there is a "missing link" between the CMA's finding of ability to foreclose and incentive to foreclose. The CMA was entitled to conclude that ICE would directly benefit from the partial foreclosure strategies under consideration. This is supported for example by the CMA's conclusion at para 8.43 that Trayport needed to engage in continuous and complex development work to ensure that ICE's rivals could successfully compete against it.

(iii) Product development and listing

264. ICE challenges the CMA's finding that the merger could enable ICE more easily to gain a first-mover advantage over rivals by delaying the launch of rival exchanges' new products for short periods of time.[156] The CMA maintained that its assessment of the importance of dynamic competition was supported by reference to three examples where Trayport had been identified as playing a role in innovation and development by venues.[157] ICE contends

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154 Para 8.31.
155 Para 8.32.
156 Para 8.58.
157 See Tullet oil broker example at para 7.179; Griffin credit API product example at paras 8.47 and 8.59; and Powernext screen design example at Appendix D of the Report, para 46.

that, given Trayport's presence in the industry since 1993, three examples fail to provide an adequate evidence base for the CMA to find that a "substantial" benefit would accrue to ICE through such partial foreclosure mechanisms, even in the long-term.

265. We reject ICE's challenge to this element of the CMA's Report. This argument is in our view no more than an argument that the CMA incorrectly evaluated the evidence before it. We are not persuaded that the CMA's conclusion was in any way irrational: there was sufficient evidence before the CMA for it to reach a rational finding that dynamic competition could be hampered by ICE to its own benefit. We also note that the examples given relate to the period prior to ICE's acquisition of control over Trayport: though the CMA did not specifically rely upon this point in this context, it did make the more general point (which is challenged unsuccessfully in Ground 2(e)) that the past ownership is an inadequate predictor of the risks presented by ICE. In any event, the possibility that the CMA could have come to a different view does not exclude the fact that this conclusion was amongst the range of reasonable findings open to it.

(iv) Use of confidential data

266. ICE did not separately identify any grounds for challenge to the CMA's finding that "the sharing of information about product developments and customer requests [...] is likely to be of significant advantage to ICE"[158] or its assessment was that "there are likely to be important instances where ICE could obtain a significant advantage from obtaining prior warning of innovation from rivals".[159] That being so, there is no basis upon which these findings can be criticised, especially in view of our rejection of ICE's general objections to the CMA analytical method and our rejection of ICE's specific objections to the CMA's findings in respect of service levels and product development and listing to which these findings are closely related.

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158 Para 8.68.
159 Para 8.69.

Overall conclusion on Ground 2(b) of NoA1

267. The CMA came to the following overall conclusion as to the benefits of the partial foreclosure strategies to ICE:

> "[…] Our analysis of historical shifts in liquidity described in Section 7 suggests that a combination of, for example, increased prices, delays to new products and a lowering quality of service would likely harm a rival venue's ability to challenge ICE's incumbent position or defend a concerted strategy by ICE to gain liquidity from a rival. […]"[160]

268. In addition to ICE's challenges to the individual findings which we have rejected at subsections (i) to (iv) above, ICE argues that this overall conclusion stops short of finding that the partial foreclosure mechanisms in combination would result in a relevant benefit to ICE. We reject this contention as well. In our view this finding is unimpeachable. The CMA came to a rational finding that ICE would benefit from various partial foreclosure strategies. It was not necessary for the CMA to identify in advance which of those partial foreclosure strategies would be employed and what precise gains would arise for it to conclude, as it did, that ICE would have benefitted from the use of those strategies.

269. For the reasons set out in this section, we dismiss ICE's Ground 2(b) of NoA1.

(h) Does the CMA's quantitative work vitiate its qualitative findings? (Ground 2(c) of NoA1)

The Report and ICE's challenge

270. In its Ground 2(c) of NoA1, ICE argues that there are inconsistencies in the CMA's qualitative and quantitative analyses which render its assessment of the benefits of the proposed partial foreclosure strategies unsafe.

271. ICE's Ground 2(c) of NoA1 is as follows:

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160 Para 8.86.

> "The CMA's quantitative work on this topic (on which the CMA emphasises that it placed limited weight) reveals that, in making its (crucial) qualitative finding that "substantial" trading volumes would switch to ICE, the CMA unreasonably acted without an adequate evidence base."

272. Of relevance to this Ground are the CMA's findings at paras 8.113 and 7.65-7.66 and 2.67, which relate to the CMA's finding on the switching of OTC bilateral trading onto exchanges and para 8.114 concerning gains that ICE might make in markets where it has no existing volumes. We set out these portions of the Report below, before turning to the parties' arguments:

> *OTC Bilateral*
>
> "[8.113] Third, where there are pre-existing long-term industry trends, ICE would be able to use its control of Trayport to accelerate these and direct them in its favour. In particular, it may be able to increase the rate at which OTC bilateral trades switch to being cleared, with the aim that OTC trading more generally moves onto exchange, and can likely direct traders to adopt ICE's exchanges and clearinghouse as they do so by making rival clearinghouses and exchanges less attractive. For example, there is currently a very large volume of TTF trading taking place on an OTC bilateral basis, which as the leading exchange for TTF volumes ICE would be well placed to capture if some of this switched to being cleared or being executed on exchange. Our view is that this is not inconsistent with the OFT's decision in ICE/APX-Endex, as cited by the Parties', because there can be a degree of long run competitive interaction between two segments that are not in the same relevant market. [Footnote 188: In our quantitative cross-check we reflect this by analysing a lower degree of switching between OTC uncleared and exchange trading than between other segments.]"
>
> "[7.65] Firstly, we considered competition between ICE and brokers for trades that are currently executed OTC bilaterally, ie without being cleared. […]
>
> [7.66] In examining ICE's internal documents, we found a mixed picture on the extent to which ICE is seeking to win volumes from the OTC bilateral segment. Overall, based on the evidence we have gathered, our view is that whilst there is a degree of competitive interaction between these two market segments, especially over the longer term, the extent of this will be less than that between exchanges and the OTC cleared segment. We have therefore not considered competition in this segment in further detail for the purposes of our assessment by segment. However, in light of the important industry trends towards exchange trading (see paragraph 2.67 above), we do consider that exchanges may target bilateral trades at least to some extent in order to bring these on exchange and, therefore, it is appropriate to include this in our analysis of the Parties' incentives to foreclose, although using a lower diversion rate reflecting the lesser degree of competitive interaction."
>
> "[2.67] As a result of regulation and standardisation, there has been a longer term trend towards greater exchange based trading and a general decline in broker trading […].

Potential gains where ICE has no existing presence

> [8.114] Fourth, total and/or partial foreclosure could over time help ICE to obtain volumes from its rivals in those existing products where it has little or no current position, for example German power. In relation to the Parties' argument that liquidity is sticky and would not move as a result of foreclosure, in Section 7 above we accepted that this is the case to some extent, but ultimately concluded that liquidity can shift, and that venues and clearinghouses do compete through potential head-to-head competition. Most obviously, this possibility is demonstrated by the Parties' own example of CME's successful entry into coal. Moreover, the potential magnitude of the gains to ICE if liquidity was to move to its exchanges could be substantial, implying that overall this would constitute a material benefit of foreclosure."

The parties' submissions

273. ICE contends that potential switching from OTC bilateral trades (i.e. uncleared trades) to ICE forms an important part of the CMA's qualitative conclusion that substantial liquidity would shift to ICE because in the CMA's medium scenario the gains associated with this category of gain account for over a third of the total predicted gains of employing foreclosure strategy (it also represents the largest single source of such gains).[161] This approach, according to ICE, is irrational given the CMA's decision at para 7.66 not to consider competition in this segment in detail and amounts to speculation in reliance on the trend, identified at para 2.67, that there is a general shift from OTC bilateral to exchange trading.

274. The CMA responds that the potential shifting of OTC bilateral trades to ICE was not pivotal to its analysis. It points out that in its "low-case" switching scenario it assumed that there would be zero switching of OTC bilateral trades, yet it still came to the overall conclusion that even the lowest forecast of gains would exceed the highest estimate of potential costs: namely £[…][✂] million and £[…][✂] million respectively.[162] According to it, the CMA's mid-case scenario and high gain scenario were merely an exploration of potential foreclosure effects.

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161 See Table 2 in Appendix F to the Report.

162 Compare Tables 2 and 4 in Appendix F to the Report.

275. Regarding ICE's forecast gains in markets where it has no existing presence, ICE argues that the CMA's analysis does not stack up. Even in the "low-case" switching scenario, the CMA estimated the potential gains from this category at 23% of the total forecast gains.[163] Further, the CMA refers to just two instances in 23 years where a new entrant gained volume in an area where it had no previous existence.[164] ICE also argued that Trayport was irrelevant to these new entries. The CMA replies that its Report shows that exchanges and clearinghouses can and do gain liquidity in markets where they have no existing liquidity, relying on the examples identified and ICE's own internal documents which indicate the ICE is seeking to establish itself […][✂]. It also refers to para 7.141 of the Report where it reports EEX's subsidiary's view that "Trayport's input [was] key to the early success of its TTF product".

(i) Conclusion on Ground 2(c) of NoA1

276. We accept the CMA's argument that its assessment of switching of OTC Bilateral trades did not form a key underpinning of its assessment of the benefits of ICE's potential foreclosure strategies. Its view was that those strategies would be profitable even where there was zero switching. We also consider that the CMA had sufficient material before it to form a rational conclusion that ICE might make gains in markets where it has no existing presence (see also our conclusion in relation to Ground 2(a) of NoA1). Again, Ground 2(c) of NoA1 is in reality an attack on the merits of the CMA's assessment of evidence before it which must be dismissed.

(j) Ground 2(d) of NoA1

ICE's challenge

277. ICE's Ground 2(d) is as follows:

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163 See Table 2 in Appendix F to the Report.

164 Namely EEX's expansion in TTF (Dutch gas trading) (see para 7.141) and CME's entry into entered the market for the clearing of executed coal trades (see para 7.56).

> "The CMA erred in law in that it wrongly failed to consider whether, on its findings, Trayport would be under a duty not to abuse a dominant position and whether such a duty, if it exists, would deter ICE from pursuing a partial foreclosure strategy."

The parties' submissions

278. ICE submits that the material before the CMA gave rise to an obligation on the CMA to investigate whether ICE's incentives to pursue the partial foreclosure strategy would be affected by any legal obligation not to abuse a dominant position (although it also contends that Trayport does not hold a dominant position).

279. ICE relies on Case T-210/01 *General Electric Company v. Commission* [2005] ECR II-5575, a merger case under Regulation 4064/69, where the Court of First Instance (now the General Court of the European Union) stated, at [73], that "[…] the Commission must, in principle, take into account the potentially unlawful, and thus sanctionable, nature of certain conduct as a factor which might diminish, or even eliminate, incentives for an undertaking to engage in particular conduct […]".

280. ICE also refers to the Commission's merger clearance Decision in Case COMP/M.6381 *Google / Motorola Mobility* ("*Google/Motorola*").[165] This case was considered under Regulation 139/2004 (the successor to Regulation 4064/89) and included an assessment of the vertical effects of the merger. In the "Verticals" section, the European Commission specifically applied *General Electric* to an assessment of incentives in a vertical merger, stating "the Commission considers that Google's incentives to use the threat of injunctions to forcibly extract cross-licences from good faith licensees are most likely be constrained by the prospect of an investigation based on Article 102 TFEU."[166]

281. The CMA responds as follows:

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165 Decision C(2012) 1068 of 13 February 2012.

166 *Google/Motorola*, para 132.

(1) The CMA was under no duty to consider whether ICE was dominant and ICE identifies no authority which establishes such a duty.

(2) In any event, on ICE's own case, the CMA was obliged to decide that Trayport was not dominant.

(3) Even if the CMA had considered that Trayport held a dominant position, the law prohibiting abuse of dominance would only have been a factor that it was open to the CMA to take into account as the Commission did in *Google/Motorola*. *Google/Motorola* is not authority for the proposition that the Commission (or the CMA) must find that the prospect of an abuse finding would rule out the pursuit of partial foreclosure strategies.

(4) In any event, certain of the partial foreclosure strategies that ICE might adopt might be hard to detect. Market participants should be protected against the risk of an undetected abuse of dominance by ICE by resolving the SLC before such an abuse is allowed to arise.

282. Nasdaq submits that, in any event, ICE's point goes nowhere because whereas in *Google/Motorola* the Commission had found that the FRAND commitment would be effective (see quoted passage at paragraph 280 above) whereas in the present proceedings the CMA had found that ICE's proposed FRAND commitment was insufficient to address the SLC.[167] In substance, therefore, the CMA had conducted a similar assessment to that which took place in *Google/Motorola* but concluded that that the prohibition on abuse of dominance would be ineffective, a conclusion which is not challenged by ICE.

(k) Conclusion on Ground 2(d) of NoA1

283. We consider it an unpromising and unattractive stance for ICE to contend on the one hand that Trayport did not hold a dominant position, but at the same time contend that the CMA ought to have considered whether it did and hence

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[167] Paras 12.90 and 12.100.

that ICE may be deterred from pursuing a partial foreclosure policy in view of the legal duties owed by dominant undertakings. In such circumstances, it is to be expected that, if the question were to become a live issue following clearance of the merger, ICE would (quite lawfully) mount a robust challenge against any allegation or dominance of abuse. Moreover, experience demonstrates that there are many obstacles to the swift and effective determination of such cases. Even if a case is taken up by a competent authority, its resolution is commonly complex, costly and protracted. Many complaints are not taken up in view of the authorities' enforcement priorities, in which case complainants must rely upon their private law rights which it is similarly complex and protracted and even more costly to vindicate. In the present circumstances, specifically, we do not consider that the CMA was obliged to find that Trayport held a dominant position or that ICE would have been deterred in the way suggested.

284. Had the CMA found that Trayport held a dominant position, we consider it inevitable (for the reasons indicated in the previous paragraph) that the CMA would have reached the conclusion that the potential deterrent effect of abuse of dominance findings would not sufficiently reduce the incentive for partial foreclosure. The law on prohibiting abuse of dominance would only have been relatively minor factor for the CMA's consideration, not least because certain of the partial foreclosure strategies might be difficult to detect.

285. We think it appropriate to add a few more general comments on this topic. For the reasons stated above, we consider that the CMA would be justified in being both cautious and sceptical when such arguments are put forward unless they are couched in terms that delineate quite precisely the scope of the applicable competition law constraints and (importantly) indicate an acceptance that such constraints would indeed be binding upon the party making the argument. Even then, it may be reasonable for the CMA to insist (having regard to the need to find a comprehensive solution for any SLC) that that position be embodied in appropriate undertakings or orders so that the

uncontestable availability of immediate and effective enforcement powers is assured.[168]

(l) Was the CMA irrational to reject ICE's argument that evidence that the previous owner of Trayport (GFI) did not use Trayport against its rivals showed that ICE would have no incentive to foreclose? (Ground 2(e) of NoA1)

The Report and ICE's challenge

286. By this Ground ICE challenges the rationality of the CMA's finding that differences between ICE's ownership of Trayport and Trayport's previous owner, GFI, mean that no conclusions can be drawn from Trayport's previous ownership as to ICE's incentives to pursue a foreclosure strategy.

287. The relevant portion of the Report where the CMA considered Trayport's previous ownership is set out below:

> "*Comparison with GFI ownership*
>
> [8.138] We also considered the Parties' point that the experience of GFI's ownership of Trayport, which the Parties submit did not use Trayport strategically against its rivals, demonstrates that ICE would not have an incentive to foreclose its rivals. We did not undertake an analysis of GFI's ownership. However, in light of our discussion of the costs and benefits of foreclosure outlined above, we consider that there are a number of important differences between the two cases that mean we cannot draw conclusions from Trayport's previous ownership.
>
> [8.139] First is the fact that, as well as execution, ICE also undertakes the clearing of trades. As set out in Appendix B, detailing ICE's revenue breakdown, ICE makes […][✂] of its European utilities revenues from the provision of clearing services than it does from execution; whereas GFI, as a broker, was reliant solely on execution fees under its business model. This means that ICE is likely to have substantially greater incentives to use Trayport to foreclose its rivals than GFI did.
>
> [8.140] A second important difference is that, as shown by Table 4 in Section 7, ICE is the only execution venue or clearinghouse that has its own integrated software platform with significant front-end screen penetration among European utilities traders. This means that any partial foreclosure

[168] In relation to the availability of swift remedies, we are of course aware that the competition authorities have the power to order interim measures but those are limited to cases of proven urgency and, in practice, rarely deployed.

> strategy that resulted in a reduction in Trayport's quality would more adversely affect its Trayport-dependent rivals. The fact that ICE has its own distribution channel means that it would be somewhat insulated from any such quality reduction – a protection that GFI would not have enjoyed. This also means that the benefits of foreclosing rivals are likely to be greater for ICE than they were for GFI, as this may have the additional benefit of driving adoption of ICE's own screen, from which ICE is likely to perceive a strategic advantage.
>
> [8.141] Third is the fact that, following our discussion of competition by segment in Section 7 above, as an exchange ICE's closest competitors – and therefore its main targets for partial foreclosure – are other exchanges, in contrast to GFI whose closest competitors are other brokers. Our view is that exchanges are a less important element of the Trayport platform than brokers, as demonstrated by two points. First, the fact that they account for only […][✂] as much of Trayport's revenues as brokers, and, second, that Trayport has historically been a broker-focussed platform – implying that if exchanges were to leave this would be less likely to fundamentally undermine it than if brokers were to do so.192 This means that, to the extent ICE would face some limited risks from foreclosing its closest competitors, these are likely to be smaller than those that GFI would have faced from doing the same.
>
> [8.142] More generally, revenues from Trayport represent a significantly smaller proportion of ICE's overall revenues than they did for GFI, implying it may be less focussed on protecting and growing these Trayport revenues and more focussed on using Trayport to ensure the success of its main operations.

288. ICE's Ground 2(e) is as follows:

> "Before ICE owned Trayport it was owned by a broker, GFI, which did not use its ownership of Trayport strategically against its rivals, even though it would have benefited had it been able successfully to pursue a partial foreclosure strategy. ICE contended that, if one vertically integrated venue operator (GFI) did not pursue a partial foreclosure strategy, then it was unlikely that another vertically integrated venue operator (ICE) would have an incentive to do so. The CMA found that there were differences between ownership by ICE and by GFI that meant that the CMA could not draw conclusions from GFI's previous ownership about ICE's incentives to pursue a partial foreclosure strategy. The CMA was irrational in reaching this conclusion in that each of the points of difference identified by the CMA was inconsistent with other findings made by the CMA."

The parties' submissions

289. At the hearing, Mr Harris submitted that the conduct of GFI, the former owner of Trayport, was the only "real world" evidence before the CMA as to whether someone controlling Trayport would have the incentive to foreclose other

market participants.[169] GFI was also a trading venue and could, *ex hypothesi*, also have engaged in partial foreclosure strategies if this were profitable to it. ICE challenges, as inconsistent with other findings in the Report, the four points of difference between GFI and ICE identified at paras 8.139-8.142 which underpinned the CMA's conclusion that GFI was not a relevant comparator.

290. *Para 8.139 - relevance of ICE's clearinghouse income:* ICE argues the CMA's analysis of ICE's incentive to foreclose did not turn on the benefits to its clearing business, and that it is therefore illogical for the CMA to rely on the fact ICE had a clearinghouse income to distinguish it from GFI. ICE argues that the CMA's key finding was that there would be "significant gains"[170] to ICE from a foreclosure strategy (including from execution fees) and that "the costs […] would likely be small".[171] Since the costs of GFI undertaking the same foreclosure strategy would also likely be small, GFI would have had the same incentive as ICE to pursue such partial foreclosure strategies even if the gains were potentially less significant. The CMA responds that its finding was entirely logical on the ground that, since ICE makes significantly more revenues from clearing trades than from execution fees, its incentive to foreclose would be significantly greater.

291. *Para 8.140 - relevance of ICE having its own front-end software:* ICE argues that the strategies the CMA investigated concern targeted foreclosure of specific rivals,[172] as opposed to a blanket degradation in the quality of Trayport, harming all users. There was no reason to suppose that GFI would not itself use targeted strategies against specific rivals. The CMA responds that its main concern was that "ICE's goal has been, and continues to be, to have as much trading as possible concentrated on its venues and clearinghouse".[173] Thus, according to the CMA, ICE might have an incentive to damage the quality of the Trayport product. The possibility identified in

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169 Day 1/ p65 lines 9ff.
170 Para 11.6
171 Para 11.8.
172 Para 8.116.
173 Para 8.108.

para 8.116 that, "in the long run", ICE would be able to target its activities at particular rivals was a particular concern, but not the sum of the concerns. There was therefore no inconsistency in finding that ICE's execution and clearing activities would be protected from a reduction in quality of Trayport because of its ownership of an alternative front-end product, whereas GFI's execution activities would not.

292. *Para 8.141 – relevance of the CMA's assessment that GFI would likely target brokers rather than exchanges:* ICE argues that the CMA found an SLC as a result of the foreclosure by ICE of rival "venues" (i.e. exchanges and brokers) and clearinghouses and not rival exchanges alone.[174] ICE submits that it is illogical for the CMA to articulate a theory of harm based on ICE foreclosing exchanges, brokers and clearinghouses but to then argue that GFI would not have sought to foreclose brokers only since the potential costs were too great. If those costs of such a strategy of foreclosing brokers would be too great for GFI, then they would equally have been too great for ICE. The CMA argues that in para 8.141 it was not contemplating that the owner of Trayport (whether ICE or GFI) would only seek to foreclose its closest competitors. It was simply recognising that the strongest incentive to foreclose would relate to the owner's closest competitors, and that because Trayport is more reliant on brokers than exchanges, that would have reduced GFI's incentives to target its closest competitors for foreclosure. In comparison, ICE could benefit substantially from foreclosing its closest competing rival exchanges, with more limited costs, since these products account for a smaller share of Trayport's overall revenues. According to the CMA, there is no failure of logic in that reasoning.

293. *Para 8.142 - relevance of the fact Trayport represents a smaller proportion of ICE's revenues than GFI's revenues:* ICE contends that the CMA's finding that ICE would be less focussed on growing Trayport revenues because it represents a smaller share of its total revenues (compared to GFI) amounts to no more than irrational speculation, and is inconsistent with its acceptance of

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174 Para 8.109.

ICE's claimed rationale for the merger – namely, that it wished to diversify its business. The CMA counters that it did not accept the business rationale put forward by ICE.

(m) Conclusion on Ground 2(e) of NoA1

294. In our view, each of ICE's challenges to the CMA's findings at paras 8.139 to 8.142 are to be rejected.

(1) With regard to para 8.139, we consider it rational for the CMA to take into account the potentially greater gains to be made by ICE than GFI owing to its clearinghouse income.

(2) With regard to para 8.140, we consider that the CMA did have a legitimate concern that ICE might damage the quality of Trayport's product and that the fact ICE owned alternative software would influence its incentive to seek to foreclose rivals since its own services would suffer less (compared to GFI).

(3) With regard to para 8.141, we consider that it was rational for the CMA to consider the comparative incentive of GFI and ICE to target their closest rivals, and the view it took that ICE would have a greater incentive to foreclose, based on the lower risk it faced, was a relevant consideration.

(4) With regard to para 8.142, we consider that ICE's stated intention to diversify its business (which we accept was at least a major factor underlying its acquisition of Trayport, see paragraph 230 above) is not inconsistent with it having an incentive to foreclose rivals. The fact that ICE wanted to diversify its business at least to some extent does not preclude the CMA from reaching the view that GFI (a much smaller operation to that of ICE) had a stronger incentive to maximise Trayport's revenues. The CMA could reasonably conclude that ICE might decide not to grow Trayport to the maximum extent possible if it

saw alternative profit avenues available from not doing so (it would still benefit from having a more diverse business than it would otherwise have even in this scenario).

(n) Overall conclusion on Ground 2 of NoA1

295. For the reasons set out above, we dismiss Ground 2 of NoA1 in its entirety.

(5) The costs of partial foreclosure (Ground 3 of NoA1)

(a) Introduction

296. By its Ground 3 ICE challenges the CMA's assessment of the costs to the Merging Parties of a partial foreclosure strategy and its conclusion that "the magnitude of these costs is likely to be small".[175] The full text of Ground 3 is as follows:

> "The CMA erred in its assessment of the costs to the merged group of implementing a partial foreclosure strategy (in terms of reduced profits for Trayport and loss of revenues to ICE from retaliation) in that it unreasonably failed to take straightforward steps to acquaint itself with how market participants would respond to a partial foreclosure strategy and, instead, speculated as to the position."

(b) The parties' submissions

297. ICE submits that the CMA speculated on two crucial issues, rather than taking straightforward investigatory steps by questioning customers and traders. The two issues are:

(1) The risk of Trayport's customers switching to another supplier because the market foreclosure strategies would, or might, cross the "limit on how far the merged entity could go without provoking a market wide shift in liquidity away from Trayport".[176] and

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175 Para 8.120.
176 Para 8.148.

(2) Potential retaliation by traders against a partial foreclosure strategy by switching away from the merged entity's services.

298. ICE argues that:

(1) The two issues were crucial because, if they were determined in its favour, they might well have resulted in the merger being approved unconditionally.

(2) The CMA could readily have investigated these issues. The CMA does not suggest that an investigation was not possible. ICE suggests that the CMA may have decided not to investigate retaliation by customers because in its PFs it considered that the partial foreclosure mechanisms would all be "hard to detect" (implying that there would be no point in asking customers and traders how they would react).[177] However, this is not a good reason for not investigating because the Report concluded that certain partial foreclosure mechanism would be detectable.[178]

(3) Given the CMA's finding that there was "a limit on how far the merged entity could go without provoking a market wide shift in liquidity away from Trayport"[179] it could not be confident that customers and traders would not react against the implementation of partial foreclosure strategies by ICE. Although market participants had not successfully sponsored a new entrant with liquidity whilst Trayport operated as a venue-neutral aggregator, it did not inquire whether the position would have been different if Trayport were operated so as to favour ICE.

299. Given the points above, ICE argues that the CMA acted irrationally in not investigating these issues, in particular because the costs of retaliation would have been extremely high to ICE.[180] Its decision not to investigate was

177 PFs, para 11.9.
178 Para 8.126.
179 Para 8.148.
180 Day 1/ p69 lines 30ff.

outside its margin of appreciation in assessing whether it is necessary to carry out investigations.

300. The CMA argues that it recognised that implementing a partial foreclosure strategy would likely cause the Merging Parties to "face some costs" as a result of lost revenues from the Trayport business, but that these would be "limited" in amount (in the region of £[…][✂] million per year).[181] That was a reasonable conclusion, based on the four reasons given by the CMA in the Report:

(1) Many, although not all, of the partial foreclosure mechanisms would be hard for market participants to detect. [182]

(2) Venues (especially brokers) are "highly dependent on Trayport, with no effective current alternatives to its services".[183]

(3) The market has high barriers to entry for an alternative system. It stated:

> "we do not consider that entry and/or expansion by a new alternative to the Trayport platform, including the supply of front-end, back-end and STP link software independently, would be timely, likely and sufficient to mitigate the SLC […]".[184]

(4) Partial foreclosure would take the form of incremental changes, which would not fundamentally undermine the Trayport platform or force market participants to use an alternative.[185]

301. The CMA argued that its conclusion was that retaliation was "not credible"[186] was reasonable. Any such retaliation would have to overcome the following two hurdles:

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181 Paras 8.120 and 8.129; paras 57-59 of Appendix F to the Report.
182 Para 8.128.
183 Para 8.121.
184 Para 9.36.
185 Para 8.121.
186 Para 8.123.

(1) Retaliation could logically only respond to any partial foreclosure mechanisms implemented by ICE that traders were actually able to detect. It would be particularly difficult for traders to detect foreclosure strategies, because they are further removed from ICE's rival venues and clearinghouses, against whom such strategies would be likely to be implemented. Further, it would be all the more difficult for traders to detect a loss of dynamic competition in the form of a slowing of product improvements that would otherwise have been made, or the non-introduction of new products.[187] ICE would, therefore be able to mitigate the costs by exploiting the possibility of undertaking methods of partial foreclosure without detection by traders.

(2) Second, the risk of retaliation is a risk that traders might choose to use venues and clearinghouses that would be less attractive than ICE (i.e. that the traders would otherwise have rejected in favour of ICE), in order to seek to damage ICE. The CMA was right to find that this was an inherently unlikely proposition.[188] ICE is therefore suggesting that individual traders would deliberately make themselves less competitive than other market participants (i.e. potentially damage their own businesses) by rejecting ICE products, without being able to have any confidence that this would have any negative effect on ICE. That is not a credible proposition and the CMA was right to reject it.

302. According to the CMA, it therefore acted within the scope of its wide margin of appreciation in deciding not to carry out further investigations.

303. Nasdaq supported the CMA and argued that the CMA was not irrational in finding on the evidence before it, that an effective alternative to the Trayport platform would need to offer an integrated equivalent and it would need to engineer a coordinated shift in liquidity away from Trayport, the latter being inherently unlikely.

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187 Para 8.127.
188 Para 8.123.

304. ICE replies that the market participants are sophisticated entities and so it cannot be assumed that they would not retaliate in response to the incremental implementation of partial foreclosure strategies. Whether or not they would retaliate was something that should have been investigated. Mr Harris emphasised that this Ground relied upon the threat of 'group' retaliation, with the result that it was not the case that individual traders would risk making themselves less attractive than their competitors – they would shift *en masse*.[189]

(c) Conclusion on Ground 3 of NoA1

305. When considering this Ground, we remind ourselves that, in accordance with para 20(3) of *BAA*, the CMA is under an obligation "to take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it" and that the "extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the [CMA], as to which it has a wide margin of appreciation". A rationality test is to be applied, which both ICE and the CMA agreed was a "high hurdle".

306. In our view, ICE does not come close to surpassing the hurdle before it. The CMA had ample evidence before it on which it could rationally conclude that retaliation against ICE was unlikely to constrain the merged entity's behaviour. Although the costs of retaliation to ICE might have been high if it succeeded, this does not undermine the decision not to investigate since the CMA had good reason for concluding that retaliation was very unlikely to succeed. In a merger case, where there might be a large number of very unlikely events which might potentially have a very significant impact on the merged entity, an expert authority such as the CMA has a discretion to not investigate such scenarios if it can reasonably consider them not credible. Given the CMA's findings regarding the barriers to new entry, the CMA had a

189 Day 1/ p72 lines 22ff.

proper basis for dismissing as not credible ICE's argument that traders might switch from it individually or *en masse*.

307. For these reasons we dismiss Ground 3 of NoA1.

(6) Did the CMA err in its assessment of the Parties' Remedies Proposal? (Ground 4 of NoA1)

308. ICE's Ground 4 of NoA1 is that the CMA made two errors in assessing the Merging Parties' remedies proposal, namely, (a) asking itself the wrong question in assessing the Separation element of its proposed remedy and (b) misdirecting itself in law as to the duties of independent directors. We review these Grounds in turn below.

(a) The Separation element (Ground 4(a) of NoA1)

The Report and ICE's challenge

309. The relevant approach to assessing remedies is as follows:

(1) Any remedy must remedy, mitigate or prevent the SLC or any adverse effect resulting from it (section 35(3)(a)); and

(2) The CMA is required to have regard to the need to achieve as comprehensive a solution as reasonable and practicable to the SLC and any adverse effects (section 35(4)). The CMA achieves this in two stages:

(i) At the first stage, the CMA identifies the remedies that are effective in addressing the SLC and its adverse effects (Guidance/para 1.7), including amongst those proposed by the Merging Parties (Guidance para 1.24); and

(ii) If more than one remedy is equally effective in addressing the SLC and its adverse effects, the CMA selects the least costly or least restrictive remedy (Guidance/paras 1.7 and 1.9).

(3) The CMA has a wide margin of appreciation in the selection of the remedy which it considers would be effective in remedying the SLC found. In general it is not obliged on proportionality grounds to select a remedy which is not effective to remedy the SLC. Proportionality is most relevant when looking at remedies which would be effective. Whilst significant costs may be incurred as a result of divestiture, these may have to be borne if behavioural or other structural remedies would not be effective (*Ryanair* at [185]).

310. The relevant portion of the Report where the CMA considered ICE's proposed remedies is set out below:

> *"Parties' Remedy Proposal: Separation element overview*
>
> 12.110 We provide a summary of the Separation element below (with further details in Appendix H):
>
> (a) *New Trayport Board:* Trayport would remain a separate legal entity within the ICE Group, with a new Trayport Board of directors (defined above as the New Board) comprising a majority of 'non-ICE affiliated' directors (including the Chairman), and a minority of directors representing ICE. The participation of directors representing ICE would be limited where appropriate, eg due to conflicts of interest or confidentiality requirements. The New Board would be responsible for Trayport senior management remuneration and appointments, as well as appointing replacements for any 'non-ICE affiliated' directors.
>
> (b) *Reporting lines:* Trayport's senior management would report to ICE's data services business, subject to the confidentiality safeguards under the Firewall element (see below for its description). There would be no management reporting lines to ICE's exchange or clearinghouse businesses.
>
> (c) *ICE veto rights:* ICE would limit its veto rights to ensure that ICE did not interfere in Trayport's ordinary course of business, and did not have 'decisive influence'.
>
> (d) *ICE/Trayport commercial arrangements:* all commercial arrangements would be made at arm's length. Neither Trayport nor ICE would tie the sale of any other products or services to the products covered by the FRAND element, ie the Key Products.

[…]

12.122 In our view, the primary issue which would undermine the effectiveness of the Separation element lay in ICE being the ultimate owner of 100 per cent of Trayport, which we considered to be incompatible with a fully independent and autonomous Trayport:

(a) We considered that ICE's full ownership of Trayport combined with its industry knowledge, standing and greater financial resources would likely result in ICE's influence being disproportionate to its voting rights.

(b) Even if ICE representatives on the New Board did not retain any voting rights (although the Parties had not proposed this), we considered that other members on the New Board would still attach weight to their views and that ICE would still retain the ability to influence the New Board.

12.123 In our view, the Separation element effectively represents a 'hold-separate' behavioural remedy measure insofar as it would be implemented as an ongoing and indefinite measure designed to regulate/constrain the behaviour of the Parties.

12.124 For any 'hold-separate' arrangement, and in the absence of the CMA (or any external monitor) having to monitor Trayport's day-to-day activities and its dealings with its customers (including with ICE), we considered that in practice, compliance would likely take the form of periodic audits or compliance checks which would largely be based on the representations made by ICE/Trayport in relation to their compliance, including the reporting of any breaches. We did not consider this monitoring arrangement to be effective in this case, given that this would not be materially different in substance from self-monitoring, in particular given our concerns in relation to the extent to which Trayport would truly be independent from ICE.

Separation element: practicability

12.125 As noted above, we concluded that ICE continuing to hold Trayport as a wholly-owned subsidiary was incompatible with the aim of achieving autonomy from ICE for a newly-formed Trayport board. Nevertheless, even if we had concluded that the Parties' proposals on operational autonomy were effective, we considered that the Separation element would require ongoing monitoring and that compliance with the Separation element would itself be difficult to monitor.

12.126 This ongoing monitoring, supervision and oversight would give rise to monitoring costs for an indefinite period given that we have not concluded that the SLC would be time-limited. In addition, we concluded that the need for monitoring would introduce risk as to the overall effectiveness of the Parties' Remedy Proposal.

Separation element: risk profile

12.127 Given our concerns that ICE's ultimate ownership of Trayport would undermine the full independence and autonomy of Trayport under the proposed structure, we concluded that there was a high risk that this would

not be effective in addressing the SLC. We considered that this risk would ultimately be borne by Trayport's customers.

Our conclusions on the Separation element

12.128 Based on the above, we concluded that the Separation element would not be effective. In summary, we concluded that:

(a) complete autonomy from ICE for a newly-formed Trayport Board would be incompatible with Trayport being wholly-owned by ICE;

(b) there would be a need for ongoing monitoring and compliance over this remedy to ensure Trayport's independence, and we would not find it acceptable to entrust this to the New Board for self-regulation. We also have concerns in relation to how an external monitor might be able to verify compliance (see paragraph 12.124); and

(c) given our concerns as to its effectiveness, this proposal has an unacceptable risk profile.

12.129 As mentioned above, we had considered that if the Separation element was effective, and Trayport was fully autonomous and independent of ICE, this would not necessitate the FRAND or Firewall elements. However, based on our assessment above, we did not consider this to be the case." (footnotes omitted).

311. ICE's Ground 4 of NoA1 is as follows:

"In assessing the Parties' remedy proposal the CMA erred in law in:

(a) focusing on whether the Separation element would provide Trayport with "full independence" and "true autonomy" when it should legally have asked whether the Parties' remedy proposal would be effective to prevent ICE pursuing the partial foreclosure strategies that formed the basis of the substantial lessening of competition finding; and

(b) misdirecting itself in law as to duties of the proposed independent directors of Trayport under ICE's Remedies proposal."

The parties' submissions

312. ICE developed this ground in the following way. The CMA's primary concern was that the Separation element would not provide Trayport with "full independence" and "true autonomy" (see paras 12.122 and 12.128(a) of the Report). In formulating its concern in this way, the CMA was asking itself whether the Parties' Remedy Proposal would have effects identical to the Divestiture remedy.

313. ICE submits that this was the wrong legal question. The correct question under the Act is whether the Parties' Remedy Proposal would be effective for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effect which may be expected to result from the substantial lessening of competition. In deciding this question, the CMA is required, in particular, 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.

314. In this case, the SLC arose because the CMA identified four mechanisms that the merged group might choose to implement as part of a partial foreclosure strategy.

315. The SLC would have been remedied or prevented by remedies which prevented the merged group from implementing those four mechanisms. Thus, the relevant legal question was whether the Merging Parties' remedies would prevent the merged group from (i) raising the price of Trayport's software, (ii) deprioritising the development and improvement of its software so as to disadvantage ICE's rivals, (iii) hampering ICE's rivals' ability to launch new products by delaying their listing on the Trayport platform and (iv) providing ICE with "soft" confidential information.

316. ICE contends that the CMA has not considered or explained whether the Separation element would address those four strategies. The relevant legal question is whether ICE would be able to use its influence to raise the price of Trayport's software beyond the price that is optimal for Trayport's business and/or to cause Trayport to operate its business in a way which is sub-optimal for Trayport but is biased in ICE's favour.

317. ICE refers to *Deutsche Börse/Euronext/ London Stock Exchange,*[190] an electronic trading case where the Competition Commission considered that a mixed structural/behavioural remedy was more proportionate than outright

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190 A report on the proposed acquisition of London Stock Exchange plc by Deutsche Börse AG or Euronext NV, November 2005.

prohibition. The remedy that was employed in that case was an independent board, without veto rights, with a degree of monitoring. ICE submits that a similar remedy should have been imposed by the CMA in the present proceedings.

318. The CMA submits that there are two fundamental reasons why ICE's challenge to the CMA's rejection of ICE's remedy proposal should not succeed.

319. First, the Parties' Remedy Proposal was that Trayport would be wholly owned by ICE, but would operate autonomously from ICE, as a separate business, with a Board of Directors comprised of a majority of non-ICE affiliated members. The CMA's view that "complete autonomy from ICE for a newly-formed Trayport Board would be incompatible with Trayport being wholly-owned by ICE"[191] was wholly rational and correct. As the CMA explained:

(1) Trayport's autonomy and independence would be limited by ICE's request for a degree of operational and financial control over Trayport, including in relation to budgets and reporting requirements.[192]

(2) The fact of ICE's full ownership of Trayport combined with its industry knowledge, standing and financial resources would in practice give ICE disproportionate influence to its voting rights.[193]

320. Second, the CMA argues that Ground 4 of NoA1 goes nowhere because ICE only attacks one of the CMA's two reasons for rejecting the Separation element of the Parties' Remedy Proposal. The CMA explained at para 12.128 that "the Separation element would not be effective", because:

> "(a) complete autonomy from ICE for a newly-formed Trayport Board would be incompatible with Trayport being wholly-owned by ICE"; and
>
> "(b) there would be a need for ongoing monitoring and compliance over this remedy to ensure Trayport's independence, and we would not find it

191 Para 12.128(a).
192 Para 12.120.
193 Para 12.122.

> acceptable to entrust this to the New Board for self-regulation. We also have concerns in relation to how an external monitor might be able to verify compliance".

321. The CMA says that ICE makes no criticism of the CMA's concerns regarding monitoring and compliance of the Separation element. It is clear from the Report that this was in itself a reason for rejecting the Parties' Remedy Proposal; for instance, the CMA found at para 12.124 that "[w]e did not consider this monitoring arrangement to be effective in this case, given that this would not be materially different in substance from self-monitoring […]". Although the CMA went on to note that this conclusion was strengthened "in particular given our concerns in relation to the extent to which Trayport would truly be independent from ICE", it is clear that this was merely an additional factor and that concerns over monitoring and compliance were in themselves a reason for finding that the Separation element would not be an effective remedy.

(b) Conclusion on Ground 4(a) of NoA1

322. We find no flaw in the CMA's approach. The CMA asked itself the correct question in assessing the Separation element. The CMA considered whether the Separation element would be effective in addressing the SLC, either alone or as part of a package of remedies. This is evident from para 12.127 of the Report where the CMA concluded that "[g]iven our concerns that ICE's ultimate ownership of Trayport would undermine the full independence and autonomy of Trayport under the proposed structure, we concluded that there was a high risk that this would not be effective in addressing the SLC". The CMA was not seeking to "over-remedy the concern", but was instead finding that the Separation element would need to ensure true independence and autonomy in order effectively to remedy the SLC it had identified.

323. We consider that it was not necessary for the CMA to consider each of the identified means of potential foreclosure in order to determine whether the Separation element would remedy the SLC. The basis for the finding of an SLC was that ICE could control Trayport's strategic direction for its own

benefit and to harm its rivals. Unless the Separation element would remove ICE's ability and incentive to do so, the proposal would not remedy the SLC.

324. It should be noted that the Parties' Remedy Proposal[194] stated that there should be "[a]utonomous operation of Trayport", so that Trayport would "operate as a separate and distinct business with its own independent Board of Directors and senior management team". It was therefore rational for the CMA's analysis to consider whether the Parties' Remedy Proposal actually achieved the "autonomy" and "independence" that (1) ICE claimed would be created; and (2) ICE contended would remedy the SLC.

325. We now turn to the CMA's argument that even if Ground 4 of NoA1 is successful on the first reason for rejecting the Separation element, it should not result in the Report being quashed, because the CMA also found that the Merging Parties' remedy would require ongoing monitoring and compliance and the CMA had "concerns in relation to how an external monitor might be able to verify compliance" (para 128(b)).

326. Applying the *Derbyshire* principle to the present case, the CMA must show that it would inevitably have rejected the Parties' Remedy Proposal despite (*ex hypothesi*) having erred in its conclusion that the Separation element was not effective to remedy the SLC.

327. Ms Demetriou, for the CMA, argued that the CMA did meet this threshold.[195] Ms Demetriou relied in particular on paras 12.125 and 12.126 of the Report, which we repeat below:

> [12.125] […] even if we had concluded that the Parties' proposals on operational autonomy were effective, we considered that the Separation element would require ongoing monitoring and that compliance with the Separation element would itself be difficult to monitor.
>
> [12.126] This ongoing monitoring, supervision and oversight would give rise to monitoring costs for an indefinite period given that we have not concluded that the SLC would be time-limited. In addition, we concluded that the need

194 Proposal to remedy the Provisional SLC, 9 September 2016.
195 Day 2 / pp56-57.

> for monitoring would introduce risk as to the overall effectiveness of the Parties' Remedy Proposal.

328. On a fair reading of the Report, the autonomy and monitoring arguments and findings of the CMA are sequential rather than parallel elements. Whilst the lack of complete autonomy might increase the risk that the separation proposal would not be effective in addressing the SLC, so too would be the difficulties in monitoring. Both entailed separate and independent significant risks that the separation proposal might not be effective in remedying the SLC. Even had the CMA been satisfied that the proposal entailed autonomy, the CMA would still have found the monitoring risk unacceptable.

329. For the reasons set out above we dismiss Ground 4(a) of NoA1.

(c) Directors' duties (Ground 4(b) of NoA1)

The Report and ICE's challenge under Ground 4(b) of NoA1

330. At para 12.122 of the Report the CMA found that ICE would have influence over Trayport because of its shareholding and its industry knowledge, standing and financial resources.

331. The CMA stated at footnote 292:

> "In addition, under section 172 of the of the Companies Act 2006, Directors must act in a way they consider most likely to promote the success of the company for its members (ie shareholders) as a whole and in doing so must have regard to a number of matters. As such, the Directors would be required to consider ICE's interests."

332. Section 172 of the Companies Act 2006 states:

> "(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
>
> […]
>
> (c) the need to foster the company's business relationships with suppliers, customers and others,

[…]

(e) the desirability of the company maintaining a reputation for high standards of business conduct […]"

333. ICE's Ground 4(b) of NoA1 is as follows:

> In assessing the Parties' remedy proposal the CMA erred in law in […] misdirecting itself in law as to [the] duties of the proposed independent directors of Trayport under ICE's Remedies proposal.

The parties' submissions

334. ICE argues that the correct legal question is: what duties would the independent directors of Trayport have if ICE held a 100% stake in Trayport and ICE wished to pursue a vertical foreclosure strategy?

335. In ICE's submission, a director is required to promote "the success of the company", not the interest of its members/shareholders. The members/shareholders will benefit from the success of the company. The essence of a vertical foreclosure concern is that the merged group will sacrifice the interests of one company (Trayport in this case) in order to deliver outweighing benefits on another company (ICE in this case).

336. ICE argues that the independent directors of Trayport would clearly be prohibited by s.172(1) from taking decisions in a manner that promotes the interests of a 100% shareholder in that company when doing so would be detrimental to the success of the company. This interpretation is supported by *Hawkes v. Cuddy* in which HHJ Havelock-Allan QC stated that "the appointees' primary loyalty is to the company of which he is a director. He is obliged to act in the best interests of that company. He is quite entitled to have regard to the interests or requirements of the appointer to the extent those interests are not incompatible with his duty to act in the best interests of the company […]". [196]

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196 [2007] EWHC 1789 (Ch), at para 27.

337. The CMA highlights that footnote 292 is a note to para 12.122 of the Report, in which the CMA sets out its effectiveness assessment of the Separation element. Thus, the CMA argues that this footnote is no more than a subsidiary reason as to why the Separation element would not be effective.

338. In any event, the CMA argues that footnote 292 accurately reflects section 172(1) of the Companies Act 2006, which provides that "[a] director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole [...]". This reflects the established English law rule that a director's obligation to act in the best interests of the company does not mean putting the interests of the company, as a commercial entity, above those of the shareholders. Instead, the director must act in the interests of the company and the shareholders, taken together and as a whole. As a result of the Transaction, ICE owned 100% of Trayport. It follows that the directors' obligation to act for the benefit of Trayport's owners points unambiguously in favour of acting in ICE's interests.

339. The CMA contends that if ICE's interpretation of section 172 were correct, there could never be any objection to a vertical merger, because section 172(1) would protect against vertical foreclosure concerns. That is plainly incorrect; section 172(1) does not and was not intended to render vertical mergers incapable of challenge under competition rules.

(d) Conclusion on Ground 4(b) of NoA1

340. Footnote 292 is a footnote to para 12.122(b) of the Report. It opens with the words "[i]n addition". In our view these opening words indicate that the reasoning contained in it is a subsidiary and additional element to the reasoning relied on in the Report. Indeed, on a fair reading of paras 12.119 to 12.124 of the Report (in particular paras 12.123 and 12.124), it is clear that the CMA placed no material reliance on section 172 to support its conclusion that ICE's ownership of Trayport would undermine the effectiveness of the Separation element.

341. In our view, a director has a duty to act in the best interests of the company for the benefit of the members as a whole. A director is entitled to have regard to the requirements or interests of the shareholder who has appointed him and hence an ICE appointed director of Trayport may have regard to ICE's interests. In normal circumstances where there are no competition or solvency concerns, directors who advance the interests of the sole shareholder over and above those of the company are unlikely to be challenged. However, this does not entitle the directors to damage the business of Trayport in order to benefit ICE (in the absence of a shareholders' resolution). We do not consider that footnote 292 in itself is incorrect as far as it goes. It was evidently not intended to be a detailed analysis of the legal position.

342. The CMA is correct in stating that the directors of Trayport are entitled (if not required) to have regard to the interests of ICE and this would apply to the whole board and not merely ICE's representatives on the board. The fact that the directors may also owe a duty to act in such a way as not to damage the business of Trayport does not mean that the foreclosure strategies identified by the CMA may not be pursued in practice.

343. For the reasons above we dismiss Ground 4(b) of NoA1.

(e) Overall conclusion on Ground 4 of NoA1

344. For the reasons set out in this section, we dismiss Ground 4 of NoA1.

G. CONCLUSION

345. For the reasons set out above, we have reached the following unanimous decisions.

(1) We dismiss Grounds 1 to 4 of NoA1.

(2) In relation to Ground 5 of NoA1 and Ground 1 of NoA2:

(i) We quash the Report to the extent that it requires the unwinding of the New Agreement and remit to the CMA to reconsider whether or not to require the New Agreement to be unwound in the light of our findings.

(ii) We will not quash the Direction (see paragraph 209 above) pending the CMA's reconsideration of the issues as regards the unwinding of the New Agreement. We invite the CMA and ICE to agree a form of Order to address the position pending the remittal.

346. Given our conclusions in relation to Ground 5 of NoA1 and Ground 1 of NoA2, we do not consider it necessary to determine Grounds 2 and 3 of NoA2.

Hodge Malek QC William Allan Prof. Colin Mayer

Charles Dhanowa
O.B.E., Q.C. (*Hon*)
Registrar

6 March 2017

ANNEX 1

List of cases referred to in the Judgment

No.	Case Name and citation	First reference in Judgment
UK Cases		
1.	*BAA Ltd v Competition Commission* [2012] CAT 3 ***("BAA")***	Para [30]
2.	*Tesco v Competition Commission* [2009] CAT 6 ***("Tesco")***	Para [31]
3.	*R (Bushell) v Newcastle Upon Tyne Licensing Justices* [2004] EWHC 446 (Admin)	Para [31]
4.	*Groupe Eurotunnel SA v Competition Commission* [2013] CAT 30	Para [31]
5.	*R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] EWCA Civ 1291 ***("Derbyshire")***	Para [32]
6.	*R v Broadcasting Complaints Commission, ex p. Owen* [1985] 1 QB 1153	Para [32]
7.	*Ryanair Holdings Plc v Competition Commission* [2014] CAT 3 ***("Ryanair")***	Para [100]
8.	*BMI Healthcare Ltd v. Competition Commission* [2013] CAT 24 ***("BMI")***	Para [154]
9.	*South Buckinghamshire District Council v Porter (No. 2)* [2004] UKHL 33	Para [198]
10.	*BSkyB v Competition Commission* [2008] CAT 25 ***"(BSkyB")***	Para [243]
11.	*Hawkes v. Cuddy* [2007] EWHC 1789 (Ch)	Para [336]
EU Cases		
12.	Case C-12/03P *Commission v. Tetra Laval* [2005] ECR I-987 ***("Tetra Laval")***	Para [96]
13.	Case T-210/01 *General Electric Company v. Commission* [2005] ECR II-5575 ***("General Electric")***	Para [279]
14.	Case COMP/M.6381 *Google / Motorola Mobility*	Para [280]