COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 120 OF THE ENTERPRISE ACT 2002

CASE No. 1271/4/12/16

Pursuant to rules 14 and 26 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the "Rules"), the Registrar gives notice of the receipt on 11 November 2016 of an application for review under section 120 of the Enterprise Act 2002 (the "Act"), by Intercontinental Exchange, Inc. ("ICE") against a decision dated 17 October 2016 (the "Decision") made by the Competition and Markets Authority (the "CMA"). ICE is represented by Shearman & Sterling LLP of 9 Appold St, London EC2A 2AP (ref: Matthew Readings).

ICE is a global operator of derivatives exchanges and clearinghouses, including in respect of derivatives in European gas, power, coal and emissions underlying commodities. Trayport Inc. ("Trayport") supplies software products to traders, brokers, exchanges and clearinghouses. On 11 December 2015, ICE completed its purchase of the entire issued share capital of Trayport ("the Merger").

Post-Merger, ICE and Trayport signed an agreement on new interface development and support ("the New Agreement") putting their relationship on an arm's length, normal course of business basis. The terms of the New Agreement were substantially similar to the terms agreed between ICE and the then-owner of Trayport prior to the Merger.

The completed acquisition was referred for investigation and report by the CMA on 3 May 2016. The CMA considered what would have been the competitive situation in the absence of the Merger ("the Counterfactual"). During the CMA's investigation, ICE argued that the New Agreement should be treated as part of the Counterfactual because it would have been signed irrespective of the Merger. 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 so the CMA therefore did not include the New Agreement as part of the Counterfactual. The CMA went on to find that the transaction was likely to result in a substantial lessening of competition ("SLC") because the merged group was likely to pursue a "partial foreclosure" strategy, *i.e.* deliberately worsening Trayport's offering to its customers (exchanges, brokers and clearinghouses) in order to cause traders (*i.e.* the customers of Trayport's customers) to switch to ICE.

The CMA issued a notice of possible remedies on 16 August 2016. In response, ICE and Trayport proposed a package of behavioural remedy measures ("the Remedies Proposal"), which included access to Trayport's software on FRAND terms combined with measures to ensure operational separation of Trayport from ICE ("the Separation Element") and a confidentiality firewall. The CMA rejected the Remedies Proposal and concluded that full divestiture of Trayport was the only effective remedy for the SLC it had identified. The CMA also concluded that the New Agreement should be unwound because it was uncertain whether it would have been entered into on the same terms with Trayport under alternative ownership.

In summary, ICE argues that the Decision is defective in the following respects:

1. The CMA erred in finding that the New Agreement should not be included in the Counterfactual.

2. The CMA erred in its assessment of the benefits to ICE of implementing a partial foreclosure strategy. In particular, the CMA failed to establish convincingly, or at all, that such a strategy would be effective to cause traders to switch substantial volumes from ICE's rivals to ICE or to enable ICE to retain volumes that it would otherwise have lost.

3. The CMA erred in its assessment of the costs of the merged group of implementing a partial foreclosure strategy (in terms of reduced profits for Trayport and loss of revenues for 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.

4. The CMA erred in law in assessing the Remedies Proposal in: (a) focussing 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 SLC finding; and (b) misdirecting itself in law as to the duties of the proposed independent directors of Trayport under ICE's Remedies Proposal.

5. 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 a SLC or any resulting adverse effects. However, the CMA did not find that the New Agreement is itself a SLC or has any adverse effect.

By way of relief, ICE seeks:

1. A declaration pursuant to section 120(4) of the Act that one or more of the grounds of review are well-founded.

2. A quashing order pursuant to section 120(5)(a) of the Act in respect of the Decision.

3. In respect of grounds 1 to 4, an order referring the matter back to the CMA with a direction to reconsider and make a new decision under section 36 of the Act in accordance with the Ruling of the Tribunal pursuant to 120(5)(b) of the Act.

4. Costs.

ICE submits that the application merits a high degree of urgency as the Decision relates to a completed acquisition and the CMA has decided that divestment and the unwinding of a contract are required.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules. Pursuant to the Order of the President of the Tribunal abridging time for applying for permission to intervene (made on 14 November 2016), any request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London, WC1A 2EB, so that it is received **no later than 5pm on 30 November 2016**.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or email (registry@catribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar

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