

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1271/4/12/16
1272/4/12/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

30 November 2016

Before:

MR. HODGE MALEK QC
(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

INTERCONTINENTAL EXCHANGE INC
("ICE")

Applicant

- and -

COMPETITION AND MARKETS AUTHORITY
("CMA")

Respondent

- and -

NASDAQ STOCKHOLM AB

Proposed Intervener

*Transcribed by BEVERLEY F NUNNERY & CO.
(a trading name of Opus 2 International Limited)
Official Court Reporters and Audio Transcribers
25 Southampton Buildings, London WC2A 1AL
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com*

CASE MANAGEMENT CONFERENCE

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.

Mr. Robert O'Donoghue (instructed by Nasdaq Stockholm AB) appeared on behalf of the Proposed Intervener.

1 THE CHAIRMAN: Yes, Mr. Harris.

2 MR. HARRIS: May it please the Tribunal; good afternoon, sir. I appear this afternoon on behalf
3 of ICE, with Mr. Lindsay. Ms. Demetriou and Ms. Abram appear on behalf of the
4 Competition and Markets Authority. Mr. O'Donoghue appears on behalf of a proposed
5 intervener, the Nasdaq Exchange.

6 As you know, sir, this is the CMC in a pair of related applications. The Tribunal Registry
7 has, in its usual helpful way, sent out an agenda of issues that have been dealt with in the
8 parties' skeleton arguments. They are largely agreed. I am in the Tribunal's hands. There
9 are some rather mundane issues that we can canvass, or we could jump straight to the main
10 action which is when should the hearing of----

11 THE CHAIRMAN: Looking at the issues, we need to figure out what the time estimate is and
12 what is the earliest practical date to hear this.

13 MR. HARRIS: Yes, sir, I agree.

14 THE CHAIRMAN: The time estimate you have given is 1½ days, which I think is probably a bit
15 short, particularly if we are going to have an intervener. The CMA proposed two to three
16 days. I think probably we should fix for a minimum of two days and have one day possibly
17 as a spill-over, just in case we need it. I think we should aim to try and finish it within two
18 days.

19 Looking at all the availability, it is not just me as the Chairman, but we have to have wing
20 members. The earliest date really is the 23rd and 24th January. If we could have moved it
21 forward, we would have done, but it is just not practical.

22 MR. HARRIS: Sir, that presents somewhat of a difficulty. My job of course is to seek to
23 persuade the Tribunal that there are some objective reasons for urgency.

24 THE CHAIRMAN: You have got urgency. The 23rd January is a pretty quick date in any event.
25 This is a complicated case, and it is an important one for your clients as well as for
26 everyone else. What I want is this case to be really properly prepared. The other way of
27 looking at this is to try and determine when you are going to get your decision. There is no
28 point rushing ahead, me not having time, or the other members not having time, to properly
29 re-read before we have the hearing. Then you wait another four to six weeks before you get
30 a decision. What I want is all the papers to be ready one full week in advance of the
31 hearing. That will give me and the other members time to work through this, and after we
32 have the hearing we should be in a position to give a ruling within two weeks thereafter. I
33 think, in effect, you will have a decision when you hope to get it that way.

1 MR. HARRIS: Sir, there are two responses that I make to that. The first is that our second
2 preferred option would be early January. I was going to endeavour to try to persuade you
3 that before Christmas is the optimal hearing. I have heard the Tribunal's views.

4 THE CHAIRMAN: You are not going to get that, no.

5 MR. HARRIS: The second preferred option then would be early January. That does enable all
6 the paperwork to be completed before that.

7 THE CHAIRMAN: We have not got the availability. I am available, for example, on 9th January,
8 but to find the other two members who have got the time to do this and availability, we just
9 do not have it. The earliest date we really have is 23rd January. If we had an earlier date, I
10 would have done my best to make sure that we could have it, but we do not.

11 MR. HARRIS: Sir, that is an unfortunate position for this reason: if I were to persuade the
12 Tribunal that there are objective reasons for greater urgency, then our respectful submission
13 would be that, that having been established, the Tribunal would have make available
14 sufficient wing members to join you, sir, on 9th January. I appreciate that may be difficult,
15 but the premise of that point, of course, is that I have established sufficient reasons of
16 objective urgency.

17 THE CHAIRMAN: If you look at it, my view is that this case needs at least one week's
18 preparation by whoever is going to decide it if you want to have a decision within a
19 reasonably quick period after it. We can do it the other way where we rush it through, we
20 have a quick hearing and then you are not going to hear anything for a long time because of
21 availability. I have structured myself in a way that I have got the whole week before clear
22 and I have got the week after clear. This way you will get a much quicker decision. We do
23 not have other people available, and I do not consider, if you want me to rule, that this case
24 has got such urgency as to merit an earlier hearing.

25 You can push if you want, but you have had this new agreement since May, you have had
26 the undertaking you have given since June. You have taken the full four weeks before you
27 filed your notice of application. You cannot be unreasonable.

28 MR. HARRIS: Sir, I can address all of those points, and I may do so briefly in a minute, but the
29 other way to look at this is that my client's position, as we have endeavoured to set out
30 clearly, is that there are these reasons of urgency. There is day by day damage. I will
31 elucidate upon that briefly in a moment. In those circumstances, if we cannot get a hearing
32 date earlier than that which you are suggesting, the 23rd, then it is my client's right, if so
33 advised, as indeed it is the right of Trayport, if so advised, to make an application for
34 interim relief.

1 THE CHAIRMAN: Of course you can make an application for interim relief. I am not saying
2 you cannot.

3 MR. HARRIS: Sir, the reason I raise that in the context of the substantive hearing date is as
4 follows: since that is our right, if so advised, or Trayport's, then the Tribunal would simply
5 have to make available a time to hear the interim relief application noticeably in advance of
6 whatever the main substantive hearing date is, otherwise it is a totally otiose exercise. Since
7 that is, if you like, a right that would simply have to be accommodated then the better
8 course, the preferable course, and we say in the interests of all parties, both the Tribunal, the
9 CMA, any interveners and ourselves, would be to use the time that would simply have to be
10 made available for that to deal with the substantive hearing, and thereby avoid the need for
11 the distraction and further expenditure of resource that would be required for an interim
12 relief hearing which, unless we get a hearing date earlier than the 23rd, is a very, very live
13 possibility. Indeed, if directions are given today for a hearing date on the 23rd because
14 nothing else can be accommodated, full stop, then the directions will also have to expressly
15 envisage the timetable for an interim relief application if one is indeed made.

16 THE CHAIRMAN: One of the premises of your submission which I have not accepted, is that
17 this case warrants greater urgency than we have already granted to you. You can make
18 whatever application you want to make.

19 Ms. Demetriou, have you got anything to say about what is being proposed?

20 MS. DEMETRIOU: Sir, we do not accept that this case warrants any greater urgency than the
21 Tribunal has already indicated. I can elaborate on the reasons why, but essentially, sir, you
22 have summarised them yourself: that this agreement has been suspended for a considerable
23 period of time. There is absolutely no good reason that has been given as to why an
24 additional two weeks is going to make a difference at this stage.

25 No application for interim relief has been made, and indeed my learned friend's skeleton
26 argument is quite mealy-mouthed about whether, in fact, they would make one if this were
27 listed for 23rd January.

28 One can see very good reason why such an application might not be successful, because in
29 the past my friend's client has said to the CMA in correspondence that once implemented
30 this agreement would be very difficult to suspend. So, in terms of the balance of
31 convenience, one can see readily that an application for interim relief might not be
32 successful.

33 Sir, we say that in all the circumstances there is no good reason for greater urgency, that we
34 would be placed in difficulty if the hearing were listed sooner than 23rd January. For those

1 reasons, we endorse what you have said in terms of the listing. I can respond to anything
2 my friend says if that would be helpful.

3 THE CHAIRMAN: Thank you very much.

4 MR. HARRIS: Sir, three points effectively raised by Ms. Demetriou, and I have to address them.
5 She raised first the suggestion that the implementation of the new agreement would then be
6 difficult to suspend or terminate. That is simply not correct. If you have had the
7 opportunity, sir, to have regard to some of the underlying evidence - I can take you to it if
8 you like - but both Mr. Bennett for my client and Mr. Heffron for----

9 THE CHAIRMAN: I have read their statements.

10 MR. HARRIS: They say that is a non-point, it can be readily undone without any difficulties, and
11 what is more without any prejudice to any party. So that, with respect to Ms. Demetriou, is
12 a complete non-point on the evidence. She has no contrary evidence. It is, therefore, a bad
13 point.

14 MS. DEMETRIOU: Sir, I do have contrary evidence, and I can show you that. I do not want it to
15 be thought that we do not have any evidence.

16 THE CHAIRMAN: We are not going to argue this now. At the moment, my ruling is that this is
17 going to be heard on 23rd and 24th January, with 27th January as a possibility if we run over
18 the two days. That is what my ruling is. Later on you are free to make out whatever
19 application you want. I am not saying it is going to be accepted. You can make an
20 application in writing if you want to go for an interim order.

21 MR. HARRIS: I understand, sir.

22 May I then briefly address the further suggestions that were made, that there is prejudice to
23 the CMA?

24 THE CHAIRMAN: I do not need to deal with that now because I have directed when this hearing
25 is going to be. If you want to make another application you can make it separately.

26 Can we just deal with the question of the intervener? Mr. O'Donoghue?

27 MR. O'DONOGHUE: I do not know, sir, if you have had a chance to review our position.

28 THE CHAIRMAN: I have. I found that very helpful. Unless anyone objects, I am minded to
29 grant your application. Does anyone object?

30 MR. HARRIS: Sir, I simply point out that no submissions have been made in the notice of
31 application as to how or why Mr. O'Donoghue's client could make any different points in
32 support of the CMA, it is only valuable if he is going to make new and different points.

33 THE CHAIRMAN: It is going to be under the normal terms, he has to avoid any duplication with
34 submissions with the CMA as you have suggested in your skeleton argument. I am not

1 going to hear him for hours on end covering over the same ground that Ms. Demetriou does
2 at the hearing.

3 MR. HARRIS: In those circumstances, sir, we cannot sensibly object. There is, of course, still
4 the issue of the duration of the hearing.

5 THE CHAIRMAN: We will come back to that. Nasdaq Stockholm are granted permission to
6 intervene in support of the CMA on condition it takes all reasonable steps to avoid any
7 duplication of the submissions made by the CMA. Mr. Harris wants to deal with the time
8 estimate. Before we do that, I want to discuss a guillotine on how long you are going to be
9 addressing the Tribunal. How long do you think you will want to speak, because I want the
10 great bulk of those two days to be spent by listening to Mr. Harris and Mr. Demetriou?

11 MR. O'DONOGHUE: Sir, in a sense I am at a disadvantage, I have not yet seen the notice of
12 appeal and what points are raised. What the Tribunal and Mr. Harris have indicated is
13 entirely taken on board. We entirely accept this will be a supportive role and not
14 duplicative. Rather than address this in the abstract today, we will---

15 THE CHAIRMAN: I will give you 90 minutes now, and if you need any further time can you
16 apply in writing so we know exactly where we are.

17 MR. O'DONOGHUE: Sir, I am grateful. I would be very surprised if we require more.

18 THE CHAIRMAN: So maximum 90 minutes for hearing unless otherwise directed.

19 MR. HARRIS: We are slightly surprised in the sense that I have been in this position before and
20 it is certainly my experience, and I appreciate that every hearing is different, is that 30
21 minutes would be the orthodox---

22 THE CHAIRMAN: It may be enough but I am giving him a maximum of 90 minutes. He is not
23 allowed to duplicate what is said by the CMA, and you are probably right, it could just take
24 30 minutes, but I am trying to give him a maximum for now, him knowing that if wants any
25 more he will have to apply, and he is probably going to take less for the reasons that you
26 have given.

27 MR. HARRIS: I am grateful, sir, and of course, I am also conscious that, for the reasons that I
28 have set out in our skeleton, we are very keen that the hearing be absolutely no more than
29 two days. We would not want the extra 60 minutes to be the difference.

30 THE CHAIRMAN: I agree. I fully understand that. Look, we all understand that we will aim for
31 a two day hearing on 23rd and 24th. The 27th is only in reserve if, for unforeseen reasons we
32 go over time and, if need be, on the second day we can start early and finish late just to
33 make sure we – no, we cannot do that, anyway we will make sure we have time.

1 The two applications will be heard together, the forum will be England and Wales for the
2 purpose of Rule 18, and the next thing to talk about is timings. If you understand I want all
3 the steps to be done by 16th January. Mr. Harris, I want all the steps on timing to be done
4 by 16th January, so if we can work to that timetable for now.

5 CMA, you want to put your defence in on 12th December?

6 MS. DEMETRIOU: 12th December.

7 THE CHAIRMAN: Nasdaq, when would you like to suggest for your notice of intervention and
8 any supporting evidence? How long do you need after the CMA?

9 MR. O'DONOGHUE: Sir, one of the points mentioned in your agenda was whether we could
10 effectively do this in a one shot rather than have two rounds of pleadings from parties. One
11 possibility I would like to float is that we could have a single document that could apply as
12 a statement of intervention and, perhaps, a skeleton, that may reduce the workload
13 somewhat.

14 THE CHAIRMAN: What I was envisaging for you is that we have your notice of intervention
15 and any supporting evidence on 21st December, that gives you enough time after seeing the
16 CMA and will enable you to prune down whatever you think you are going to need. I
17 would want your skeleton argument to come after the CMA skeleton argument, it is only
18 once you have seen that that we know what topics you need to avoid or concentrate on.

19 MR. O'DONOGHUE: Yes, sir.

20 THE CHAIRMAN: Your reply, you may have reply evidence, so what I am going to suggest is
21 that your reply and any reply evidence, 4th January, if that is all right.

22 MR. HARRIS: Can I address the statement of intervention?

23 THE CHAIRMAN: Of course you can.

24 MR. HARRIS: Just briefly, we would welcome, if possible, for that to be brought forward by at
25 least two days to 19th. The reason for that is going to have to be for logistical reasons, some
26 front loading, if you like, of the responsive work on our side in the later part of December.
27 So, if the statement of intervention came in, together with the materials in support on the
28 19th, that would be preferential.

29 THE CHAIRMAN: Is that possible? It sounds sensible to me.

30 MR. O'DONOGHUE: We have no objection to that.

31 THE CHAIRMAN: We will change your date to the 19th.

32 MR. HARRIS: Yes, if and insofar as there is to be reply evidence, then that would have to be
33 dealt with early in January. We would ask for the end of that first full week, which I think
34 is Friday, 6th January.

1 THE CHAIRMAN: Can you serve your skeleton arguments at the same time?

2 MR. HARRIS: That was on the basis of a bifurcated suggestion. I was going to suggest that we
3 serve a skeleton and reply evidence together, and that that would be by the end of the
4 following week. That would make it, I think, the 13th off the top of my head, not Friday,
5 6th.

6 THE CHAIRMAN: If I want the bundles and everything to be ready on 16th, that would mean
7 that the last skeleton should be done on 13th January, and clearly the CMA will need some
8 time to do their skeleton. I would have thought they would need maybe four or five days
9 after yours. Let us see how it works. Ms. Demetriou, how long do you think you will need
10 after their skeleton.

11 MS. DEMETRIOU: I think we will need a week after their skeleton.

12 THE CHAIRMAN: You will need a week.

13 MS. DEMETRIOU: They have a considerable amount of time. We are filing our defence on 12th
14 December. If they have until 6th January, that gives them a considerable amount of time to
15 put in their reply and skeleton and I think it is reasonable to give us a week after that to put
16 in a responsive skeleton. I am not sure the date of the 6th would----

17 THE CHAIRMAN: How long is it going to take Nasdaq to do their skeleton after getting yours,
18 that is the thing?

19 MR. O'DONOGHUE: It looks as though we will have to make do with three working days.

20 THE CHAIRMAN: It may have to be even shorter than that. When are you envisaging serving
21 your skeleton, Ms. Demetriou?

22 MS. DEMETRIOU: We would like to serve it a week after we get ICE's skeleton, so the date
23 flows from that. So, if they are prepared to serve theirs on, say, the 4th, then we could do it
24 a week after that, but I think we will need a week.

25 THE CHAIRMAN: Mr. Harris?

26 MR. HARRIS: Sir, having had further regard to the calendar, we suggest that the better dates,
27 particularly if Ms. Demetriou wants a week on behalf of the CMA, would be that everything
28 that we are going to put in, reply evidence and skeleton on Monday, 9th January, followed
29 by everything that the CMA is going to put in by Monday 16th January, which is the date
30 where you wanted----

31 THE CHAIRMAN: I wanted everything then, yes.

32 MR. HARRIS: The only thing outstanding at that stage would be the short non-duplicative
33 submissions of the Nasdaq intervener.

34 THE CHAIRMAN: His skeleton, you are saying that can come a couple of days later?

1 MR. HARRIS: Yes, and the principal importance of that is, of course, to us, because they are
2 intervening in support of the CMA, and we can live with that. It is a loose document slotted
3 in, I mean they are an intervener.

4 THE CHAIRMAN: Will all the bundles be ready, let us say, on the morning of 17th?

5 MR. HARRIS: I have no difficulty with the bundles, because my instructing solicitor has taken
6 some care to prepare the bundles even for today in such a manner that they can simply be
7 added to----

8 THE CHAIRMAN: Which is ideal.

9 MR. HARRIS: --for the substantive hearing. That is how they have been done, so I have no
10 difficulty with any notion of having them, even on the 16th, let alone the morning of the
11 17th.

12 THE CHAIRMAN: So if we work backwards, you are suggesting that the CMA, on that basis,
13 will have 16th to file their skeleton, and that you want the 9th. Your skeleton argument, your
14 reply, and any evidence in reply?

15 MR. HARRIS: Yes, we will make the skeleton/reply one document.

16 THE CHAIRMAN: It can be one document; it is up to you.

17 MR. HARRIS: It is a common direction, these days, yes.

18 THE CHAIRMAN: Whichever way you want to do it. The Nasdaq skeleton argument can be on
19 19th.

20 MR. HARRIS: Wednesday, 18th, Thursday, 19th, it makes not a great deal of difference to us.
21 There is no reason why they cannot have liaised fairly substantially with the CMA as to
22 non-duplication, substantially before the date of actual service.

23 THE CHAIRMAN: It is not really going to make much difference, put it on the 19th, it is going to
24 give them enough time. Will we need a core bundle or not?

25 MR. HARRIS: I do not believe so, no.

26 THE CHAIRMAN: If we can have the bundle for the main hearing together with the copies of
27 the joint bundle of authorities, we want that by 4 pm on the 16th. That may mean that the
28 CMA will have to give you a list of all the authorities they want in the bundle well in
29 advance, but I am sure that is capable of being done.

30 MR. HARRIS: We have a working relationship, so there is no difficulty with that.

31 THE CHAIRMAN: Can we have five copies of everything?

32 MR. HARRIS: Yes.

33 THE CHAIRMAN: Is it possible, and tell me if it is not, to have a hyperlink version of the CMA
34 report? You are working on the confidentiality, and all that. It would be so much easier for

1 me if I have a hyperlink version, so any time there is a reference at the bottom saying, “See
2 something or other”, I can click on that on my screen.

3 MR. HARRIS: I am sure the parties can liaise on that.

4 THE CHAIRMAN: If it is not possible----

5 MS. DEMETRIOU: Sir, can we just understand a bit better what you mean by that?

6 THE CHAIRMAN: If you look at the report, there are certain things which are already
7 hyperlinked. If I look at p.198, you will see two footnotes there, “Tradition response to the
8 Remedies Notice”, and “Exchange D response to the Remedies Notice”. That is not
9 hyperlinked at the moment, is it?

10 MS. DEMETRIOU: I am being told that is fine.

11 THE CHAIRMAN: Can we have an agreed list of issues? By that I mean, set out the issue, then
12 underneath provide which paragraphs of the CMA report that issue relates to, and then
13 underneath that put the reference to where it is dealt with in the pleadings of the parties and
14 the skeletons. Perhaps I can have that on, let us say, the Friday before the hearing?

15 MR. HARRIS: Yes, sir.

16 THE CHAIRMAN: An agreed chronology should not be very difficult, should it? You have put
17 in a chronology which does not seem to be contentious. Ideally I would like to have an
18 agreed chronology with the bundles.

19 MR. HARRIS: Yes, sir.

20 THE CHAIRMAN: Is there a need for a confidentiality club now we have got an intervener?

21 MR. HARRIS: There will probably be a need now there is an intervener. There is, after all,
22 confidential material both in the final report and in the parties’ evidence. I have no doubt
23 that the parties between them, together with Mr. O'Donoghue on behalf of Nasdaq, can
24 create a draft order in the usual sort of format and submit it to the Tribunal.

25 THE CHAIRMAN: That would be very helpful.

26 MR. HARRIS: We can do that as soon as possible this week.

27 THE CHAIRMAN: That is fine. I presume there is no problem with the clock starting for the
28 purposes of divestiture until you have got the decision in this case - is that right?

29 MS. DEMETRIOU: That is the proposal.

30 MR. HARRIS: Yes, there has been some movement on that today, the details of which I am not
31 on top of, but that is the obvious position, and I understand it to have been accepted.

32 THE CHAIRMAN: It has now been accepted. Is there anything else that we need to deal with?

33 MR. HARRIS: There are just the formal matters that are agreed in the skeleton, such as forum,
34 England and Wales. Perhaps I can just check with those instructing me.

1 THE CHAIRMAN: I will just address Mr. O'Donoghue for a second. Mr. O'Donoghue, there
2 has been a disclosure to the parties about the fact that I have acted in the past for ICE in
3 relation to disciplinary proceedings. You have been given a copy of that letter.

4 MR. O'DONOGHUE: Yes.

5 MR. HARRIS: I think, technically, sir, these are the mopping up of the end pieces. Technically,
6 the evidence in each application should stand in the other application?

7 THE CHAIRMAN: Yes.

8 MR. HARRIS: Yes, and I guess there is liberty to apply as regards either another CMC or, for
9 that matter, if we make an application for interim relief then we will do so----

10 THE CHAIRMAN: We will deal with that. Then costs reserved.

11 MS. DEMETRIOU: Technically, we do not know of any other interventions or proposed
12 interventions, but I think, technically, any other proposed interveners have until 5 pm today
13 to make an application.

14 THE CHAIRMAN: We will deal with it when it comes, if it does come, but I would have thought
15 that someone would have put their head above the parapet by now. Thank you.

16 MR. HARRIS: There are no further matters.

17 THE CHAIRMAN: Thank you very much.

18 _____

19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34