



COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 120 OF THE ENTERPRISE ACT 2002

CASE No. 1272/4/12/16

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 17 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 10 November 2016 (the “Direction”) 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).

The notice of application is closely connected to a notice of application filed on 11 November 2016 and registered by the Tribunal as Case No. 1271/4/12/16 (“the Main Application”).¹ The Main Application challenges a decision of the CMA on 17 October 2016 (“the Main Report”). The Main Report relates to a completed acquisition of Trayport, Inc. (“Trayport”) by ICE. In its Main Report the CMA decided to to compel the divestment of Trayport and the unwinding of an agreement entered into between Trayport and ICE (together “the Parties”) following the acquisition (“the New Agreement”).

On 11 January 2016, the CMA made an initial enforcement order pursuant to which Trayport had to carry on its business separately from ICE. On 4 November 2016, the Parties wrote to the CMA to inform it of their intention to implement the New Agreement. On 10 November 2016 the CMA issued the Direction, which required the Parties to cease implementation of the New Agreement. The Direction states that the CMA considers that the implementation of the New Agreement would be in “direct conflict” with the CMA’s finding that the New Agreement should be unwound, thereby pre-empting and impeding the CMA’s ability to implement the findings in the Main Report.

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

1. Paragraph 12.73 of the Main Report on which the CMA relies to justify its Direction is *ultra vires* for the reasons given in Ground 5 of the Main Application, with the consequence that the Direction is also *ultra vires*.
2. The CMA was irrational in identifying a “direct conflict” as at the date of the Direction. There is no present conflict between ICE implementing the New Agreement and any new owner of Trayport retaining a choice about whether to negotiate as such a conflict could be managed before the new owner of Trayport took ownership.
3. The CMA was disproportionate and irrational in ordering the Parties to cease implementation of the Agreement. The CMA could have achieved its objective through more proportionate alternative means which could provide for the termination of the New Agreement before the transfer of ownership of Trayport.

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.

¹ See Summary of Application published on 15 November 2016 in Case No. 1271/4/12/16 at <http://www.catribunal.org.uk/237-9512/1271-4-12-16-Intercontinental-Exchange-Inc.html>.

2. A quashing order pursuant to section 120(5)(a) of the Act in respect of the Direction.
3. An order referring the matter back to the CMA with a direction to reconsider and make a new decision in accordance with the Ruling of the Tribunal pursuant to 120(5)(b) of the Act.
4. Costs.

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 21 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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