European Commission Adopts a Prohibition Decision Against Proposed Combination of Deutsche Börse AG and NYSE Euronext Inc.[1]

February 2, 2012

On February 1, 2012, the European Commission announced in a press release that it has decided to prohibit the proposed combination of Deutsche Börse AG ("DB") and NYSE Euronext Inc. ("NYX") under the European Union Merger Regulation.[2] The European Commission asserted that the proposed transaction would have resulted in a "quasi-monopoly in the area of European financial derivatives traded globally on exchanges" and that the commitments proposed by the parties were insufficient to alleviate the European Commission's competition concerns.

The prohibition decision is the 22nd prohibition decision adopted by the European Commission under the European Union Merger Regulation since its entry into force over 20 years ago.[3] The European Commission last adopted a prohibition decision in 2011 blocking the proposed merger between Aegean Airlines and Olympic Air and, before that, in 2007 when it rejected Ryanair's proposed acquisition of Aer Lingus.

BACKGROUND TO THE CASE

DB and NYX operate financial exchanges globally and provide, among others, cash listing and trading services, derivatives trading and clearing services, and information services. DB and NYX operate European financial derivatives exchanges *via* Eurex and Liffe, respectively.

DB and NYX notified their proposed combination to the European Commission on June 29, 2011. On August 4, 2011 the European Commission decided to open an in-depth investigation, alleging concerns raised during the market investigation such as (i) the negative impact on innovation as a result of the combination of the two largest financial derivatives exchanges in Europe, (ii) the increase in the barriers to entry for competing platforms absent access to the combined entity's "vertical silo," *i.e.*, the combination of the exchange plus the exchange's own

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1 Simpson Thacher & Bartlett LLP represented J.P. Morgan Securities LLC as financial advisor to Deutsche Börse AG in its proposed combination with NYSE Euronext Inc.

2 *See* Eur. Comm'n, Press Release: Mergers: Commission Blocks Proposed Merger Between Deutsche Börse and NYSE Euronext (Feb. 1, 2012), and Eur. Comm'n, Memo: Mergers: Commission Prohibits Proposed Merger Between Deutsche Börse and NYSE Euronext - Frequently Asked Questions (Feb. 1, 2012). A redacted version of the decision will be published at a later stage, once the parties' confidential information has been redacted.

3 *See* Eur. Comm'n, Merger Statistics, 21 September 1990 to 31 December 2011.

clearing house, and (iii) competitive issues in equities trading and settlement and index licensing.

Despite the fact that the investigation period was extended twice and the parties offered remedies, the European Commission ultimately decided to block the proposed combination because it concluded that (i) the combined entity would have had a combined share exceeding 90% of the relevant market (European financial derivatives "traded on exchanges"), (ii) the combined entity's remaining competitors (and potential new competitors) would not have been a credible threat, and (iii) even though the parties offered commitments, they were, in the Commission's view, insufficient to alleviate the European Commission's concerns.

THE ANALYSIS

Relevant Market – The European Commission found that the proposed combination raised competitive concerns on the market for European financial derivatives "traded on exchanges" ("ETDs"). The market investigation suggested that even though European financial derivatives are traded both on exchanges and over the counter ("OTC"), ETDs and OTC derivatives do not belong to the same relevant market. While ETDs are typically "highly liquid, relatively small size . . . and fully standardised contracts," OTC derivates are "much bigger contracts . . . that allow customisation of their legal and economic terms and conditions." In addition, ETDs execution is generally cheaper than OTC derivatives execution and some customers are not authorized to operate in the OTC market.

The European Commission seems to have left open the relevant geographic market definition but noted that regardless of whether the relevant market was Europe-wide or worldwide, the proposed combination would create a near monopoly.

Competitive Effects – The European Commission noted that DB and NYX, which are each other's closest competitors, would have had a combined share exceeding 90% of European ETDs globally. Although the Chicago Mercantile Exchange and the Singapore Stock Exchange are also active in European ETDs, they are marginal competitors. In addition, the combination of DB's and NYX's respective "closed vertical silos," *i.e.*, the combination of their respective exchange platforms and their own clearing houses, would have increased the barriers to entry for new competitors.

As a result, the European Commission concluded that the proposed merger would have likely led to a price increase in the form of higher fees and less innovation.

Efficiency Defense – The parties argued that the proposed combination would result in the following efficiencies: (i) greater liquidity and (ii) collateral savings. The European Commission, however, rejected the liquidity claim as it did not satisfy the "verifiability" condition set forth in the Guidelines on the Assessment of Horizontal Mergers (the "Horizontal Guidelines"), and the Commission rejected the collateral savings claim as it did not satisfy the "merger specificity" condition set forth in the Horizontal Guidelines. In any event, the European Commission concluded that the parties' collateral savings claim did not outweigh the anticompetitive effects of the transaction.

Remedies – DB and NYX offered a three-fold remedy package consisting of: (i) a partial divestiture of Liffe's European business, (ii) a partial access to the combined entity's clearing house, and (iii) a license covering some software.

However, based on the market tests, the European Commission concluded that none of these remedies would alleviate the competitive concerns raised by the transaction. The partial divestiture remedy raised viability concerns, while the partial access and license remedies were "insufficient" and "immaterial," respectively. The market test evidenced that the scope of the partial access remedy was too limited and, in practice, would have no effect. The license remedy was considered immaterial as most of the competitors already had the relevant software. In addition, the European Commission noted that no competitor showed credible interest in the commitments as a whole, and for all of these reasons, rejected the remedy package as insufficient.

In the end, although there has been a noticeable trend towards a greater merger enforcement convergence between the European Union and the US, where the proposed combination has been cleared, the decision shows that significant differences can still arise between the U.S. and E.U. enforcement authorities.

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