THE EUROPEAN COMMISSION PROHIBITS THE MERGER BETWEEN NYSE EURONEXT AND DEUTSCHE BÖRSE

On February 1, 2012, the European Commission (the "Commission") prohibited the $9.7 billion merger between Deutsche Börse AG ("Deutsche Börse") and New York Stock Exchange Euronext Inc. ("NYSE Euronext"), which would have led to the creation of the world's largest exchange for equities and derivatives (the "Transaction").[1] In so doing, the Commission resisted both Commissioner Michel Barnier's appeal for further investigations and the clearance issued by the U.S. Department of Justice (the "DOJ") on December 22, 2011. The Commission cooperated with the DOJ during its merger review but focused its analysis on derivatives trading, while the DOJ had focused on equity trading on stock exchanges.

Deutsche Börse is a German financial services company active in trading, clearing and settling financial instruments. It operates stock exchanges worldwide, including the Frankfurt Stock Exchange and the Eurex derivatives exchange.[2] NYSE Euronext, a Euro-American financial services company, was formed after NYSE's $11 billion takeover of Euronext NV in 2007 and operates the New York Stock Exchange, the Liffe derivatives exchange and stock exchanges in Europe (Paris, Amsterdam, Brussels and Lisbon), Eurex (Zurich) and Liffe (London), along with the Chicago Mercantile Exchange, are regarded as the Big Three derivative exchanges worldwide.

On the day of the prohibition decision, Joaquín Almunia, the Commission's Vice-President responsible for Competition Policy, commented that "[i]f allowed, the merger would have resulted in a quasi-monopoly in exchange traded financial derivatives based on European underlyings, where the two companies control more than 90% of the global market." In addition, the Commissioner stated that "[u]nfortunately, the parties only offered remedies which were very limited in scope." The Parties expressed a different view, stating that "this is a black day for Europe and for its future competitiveness on global financial markets."

The Transaction was submitted to the Commission on June 29, 2011, under the EC Merger Regulation.[3] The Commission's initial investigation identified competition concerns in a number of areas, notably in derivatives trading and clearing. On August 4, 2011, the Commission decided to open an in-depth (Phase II) investigation into the planned merger. The Parties received a Statement of Objections on October 5, 2011, and submitted a series of remedies, subsequently renewed, which the Commission assessed before handing down its prohibition decision of February 1, 2012.

---

1 Case COMP/M.6166, *DEUTSCHE BÖRSE/NYSE EURONEXT*, Commission decision of February 1, 2012.

2 Derivatives are financial contracts the value of which derives from an underlying asset (*e.g.* interest rate, equity, index, etc.).

3 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

The Commission's investigation focused on the markets for European financial derivatives (derivatives based upon European interest rates, single-stock equity securities, and equity index derivatives) traded on exchanges, which the Commission found to be "of key importance for the European economy." The Eurex and Liffe exchanges, the two largest exchanges in the world for financial derivatives based on European underlyings, were presented as competing head-to-head and as being each other's closest competitor.

A substantial part of the analysis concerned market definition. Derivatives can be traded either on exchanges (*i.e.*, exchange-traded derivatives ("ETDs")) or over-the-counter ("OTC"). The Parties argued that the Commission should have included derivatives traded outside stock exchanges along with non-European derivatives, which allegedly would have led to a 16% market share when considered on a global basis.

The Commission concluded that ETDs and OTCs are traded in separate product markets, based on their differing characteristics: while ETDs are highly liquid, relatively small in size, and fully standardized, OTCs are200-times larger on average and narrowly customized. The Commission said that its investigation showed that ETDs and OTCs are generally not considered substitutable by customers since: (i) ETDs and OTCs are generally used for different purposes and in different circumstances, (ii) some financial operators are not authorized to operate in the OTC market due to risk management considerations, and (iii) when available, ETDs are generally preferred, being much cheaper than OTCs. The Commission held that whether the geographic market was defined as global or European, the merger would lead to a near monopoly in the ownership of exchanges on which ETDs are traded, as Eurex and Liffe control more than 90% of the global trade in ETDs. As a result, the Commission focused its analysis on European financial derivatives traded globally on exchanges.

With no effective competitive constraints left in the market, the Commission considered that "the benefits of price competition would be taken away from customers." Moreover, market investigations showed that a successful new entry by a trading venue into the ETD sector would be unlikely due to high barriers to entry. Additionally, the Commission found a substantial risk of weakened innovation in a sector in which competition and innovation were deemed vital. While the Commission acknowledged that the Chicago Mercantile Exchange provided similar services on a worldwide basis, it noted that it did so only marginally in the asset classes concerned.

The Commission noted that both Eurex and Liffe linked their exchanges vertically to their clearing houses. It concluded that such linkage created a substantial barrier to entry because the advantages of clearing similar derivatives in a single clearing house would make customers reluctant to switch to competing exchanges.

The Parties argued that the proposed merger would allow for the advent of a European champion and would benefit the European economy. More specifically, they submitted that the merger would entail greater liquidity and a lesser requirement for customers to deposit collateral to secure the derivatives bought. While efficiencies appeared to have been a key topic during the merger review, the Commission noted that these benefits were uncertain, could be achieved (at least in part) without the merger, and would be unlikely to be fully passed on to customers. The Commission concluded that the efficiencies presented by the Parties would not be substantial enough to outweigh the harm caused to the internal market.

To address the Commission's concerns, the Parties offered a remedy package that included: (i) the divestiture of a part of Liffe's European single stock derivatives business, (ii) access to the merged entity's clearing house for certain new derivatives, and (iii) a license to Eurex's trading system to enable third parties to trade interest-rate derivatives. The Commission also took note of the Parties' pledge not to increase list prices for a period of three years.

On the basis of two market tests, the Commission concluded that the Parties' proposed remedy package would be insufficient in scope, difficult to implement, and unlikely to be effective in practice. The Commission explained, *inter alia*, that the divested assets were too limited and not sufficiently diversified to be viable on a stand-alone basis. The Commission stated that parties must offer comprehensive divestiture remedies to meet competition concerns in cases involving a merger leading to a quasi-monopoly. The Commission suggested that divestiture of the whole of either Eurex or Liffe would have been appropriate; those were measures that the Parties did not offer.

Finding that no competitor showed credible interest in the remedy package as a whole, the Commission declined to accept the package and concluded that the proposed merger "would significantly impede effective competition in the internal market or a substantial part of it." Thus, pursuant to Article 8(3) of the EC Merger Regulation, the Commission issued a decision declaring that the proposed merger was incompatible with the Common Market. The Parties reportedly agreed to abandon the Transaction but could still lodge an appeal before the General Court in Luxemburg within a two-month period (although, as of today, the Parties have not indicated their intention to do so).

The Deutsche Börse/NYSE prohibition decision is the 22nd such decision in the history of EU merger control, and is the second in the past four years. The most recent previous prohibition case[4] was handed down in 2011 and concerned a proposed concentration between Greece's two largest airlines. When compared with the more than 4,500 transactions reviewed by the Commission since the EC Merger Regulation first came into force on September 21, 1990, those 22 prohibition decisions represent less than 0.5% of the transactions reviewed.

* * * * * * * * * * * * * * * *

If you have any questions regarding this memorandum, please contact Charlotte Breuvart (+32 2 290 1836, cbreuvart@willkie.com), Maxime de l'Estang (+32 2 290 18 41, mdelestang@willkie.com), or the Willkie attorney with whom you regularly work.

[4] Case COMP/M.5830, *OLYMPIC/AEGEAN AIRLINES*, Commission decision of January 26, 2011.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our website is located at www.willkie.com.

February 14, 2012