Legal Update
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EU Competition: Deutsche Börse and NYSE Euronext merger blocked

On 1st February 2012, the European Commission adopted its decision prohibiting the USD 10.2 billion merger between Deutsche Börse (DB) and NYSE Euronext (NYSE). The decision is notable not the least because it is rare for the Commission to block a merger. Only 21 have been blocked compared to the 4,857 transactions that have been notified under the EU's merger control regime since its inception in 1990.

Companies, markets and position

The main issue related to the effect of the transaction on the worldwide market for European financial derivatives (namely, European interest rate, single stock equity and equity index derivatives) traded on exchanges. A derivate is a financial contract whose value is derived from an underlying asset. The Commission found that the merged entity would have held 90% of the shares on this market.

The parties argued that the market also covered non-European financial derivatives as well as derivatives traded outside of stock exchanges (or over the counter). The Commission nonetheless found that exchanges for derivatives based on European underlyings could be separated from other derivatives. As regards trade outside of stock exchanges, considering that the trades on over the counter exchanges are 200 times higher in value on average, in addition to being more risky and customised, compared to exchange derivatives, they were not considered substitutable by consumers, and as such could be excluded from the market.

According to the Commission in this market for exchange derivatives based on European underlyings, Eurex (DB) and Liffe (NYSE) are the two largest exchanges in the world and are each others closest competitors. The competitive pressure exerted by one on the other was considered strong, with customers threatening to switch to the other exchange, which in turn has lead in the past to lower fees. This raised competitive concerns that the parties failed to address, according to the Commission.

Remedies

Most mergers that involve more serious competitive concerns are usually approved after the parties submit remedies to solve the problem that the merger could eventually create. Such remedies are usually divestitures of branches, participations or assets, and behavioural commitments.

In the present case, the parties offered as remedy a series of three commitments (1) divestment of part of Liffe's European single stock derivatives business, (2) access to the merged entity's clearing house for materially "new" interest rate, bond and equity index derivatives contracts, and (3) licences to Eurex's interest rate derivatives trading software. A non-formal remedy was apparently also discussed in the course of proceedings, relating to the public commitment of the merging parties not to increase their prices for three years.

The Commission did not consider the remedies were responsive fully to the competition concern, as they were either too limited, or hard to implement or to monitor. It would appear the Commission wished for either one of Eurex or Liffe exchanges to be fully divested, which both parties considered as going against the economic rationale of the transaction.

Blocked mergers : a rare occurrence

Since the origin of the EU merger control regime, there have only been 21 formal decisions adopted declaring a proposed merger incompatible with the internal market and thus being prohibited as opposed to the several thousand that have been consented to, most of them unconditionally. Over the last seven years, only two other mergers have been blocked, both of those being mergers between airline operators from the same country (Ryan Air/Aer Lingues for Ireland and Olympic/Aegean for Greece), which on their face can be seen to be likely candidates for a prohibition decision, particularly in the light of previous airline merger decisions.

There is little doubt that the Commission decision blocking the merger while the US Antitrust Division of

the Department of Justice (DoJ) authorised it under conditions, will resurrect the issue of consistency when global mergers are at stake. The same issue arose at the time of the GE/Honeywell proposed merger, but the DB/NYSE case is the first case raising such issues to be blocked since the introduction of the latest EU merger regime and the creation of the International Competition Network (ICN).

However, in the present case, due consideration must be given to the fact that the authorities looked at different markets. The US focused on issues on the US markets, and addressed these, most notably by authorizing the merger with remedies in the US cash equity market, by providing for the sale of DB's stake in the fourth largest stock exchange of the US, Direct Edge.

While a transaction conditionally cleared in the US but blocked in the EU is an uncomfortable prospect in terms of business planning, this is an unavoidable risk when it comes to multi-jurisdictional filing in order to respect the territoriality principle.

Policy aspects

Merger decisions have to be taken collectively by the College of (27) EU Commissioners. It is the normal rule that the College follows the assessment of the Commission's competition department (DG COMP) and thus the Competition Commissioner, and validates the decision without question.

After the Commission had set-out its concerns about the merger in the so-called Statement of Objections, the parties launched a series of public statements. They also presented the "European champion" argument but this rarely appears a convincing one in the context of a competition analysis, even in the context of a College decision where some Commissioners might be persuaded to at least consider policy arguments that go beyond competition. However, in the last days preceding the deadline for decision, a notable event was the "reserve" expressed by the Commissioner for the Internal Market, Michel Barnier, who publicly stated he would need more time to assess the dossier for schedule reasons. Considering the importance of the financial sector to the Commissioner's mandate and in the light of the regulatory framework and foreseen or considered reforms and developments in this area, having a single strong entity on the stock exchange might be considered helpful for policy reasons (stakeholder dialogue, monitoring etc.).

While the parties claimed to have the support of a certain number of Member States and Commission officials, it is not publicly known whether there was any opposition to the decision amongst the Commissioners, as the Commissioner responsible for Competition Policy, Joaquin Almunia refused to comment on that point in a speech he gave on the decision, simply stating "*What I can say is that we didn't vote*".

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