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U.S. Justice Department Conditionally Approves Combination of Stock Exchange Groups, European Review Still Pending

Jeffrey May (Wolters Kluwer) · Friday, December 23rd, 2011

The prospects for the merger of Deutsche Börse AG and NYSE Euronext are looking a little brighter, since the U.S. Department of Justice Antitrust Division conditionally approved the transaction yesterday.

U.S. antitrust approval is a major hurdle; however, the combination of the two leading stock exchange groups, which was announced in February, still requires clearance by the European Commission (EC).

Although the Antitrust Division settlement would only resolve concerns over the merger's impact on U.S. markets, it indicates that the parties are willing to make concessions to get the deal done. It is a positive sign for a deal that continues to evolve in an effort to satisfy EC competition concerns.

U.S./European Cooperation

The Antitrust Division said that it worked closely with the EC in reviewing the deal. The parties provided waivers to facilitate cooperation between the agencies.

"The open dialogue between the Antitrust Division and the European Commission was very effective and allowed each agency to conduct its respective investigation while mindful of ongoing work and developments in the other jurisdiction," said Sharon A. Pozen, Acting Assistant Attorney General in charge of the Antitrust Division.

Proposed U.S. Consent Decree

Under the terms of a proposed consent decree, which requires the approval of the federal district court in Washington, D.C., Deutsche Börse would have to direct its subsidiary International Securities Exchange Holdings Inc. (ISE) to sell its 31.5 percent stake in Direct Edge Holdings LLC and agree to other restrictions to resolve U.S. antitrust concerns. Direct Edge is the fourth largest stock exchange operator in the United States.

The relief required by the consent decree is intended to settle U.S. allegations that the merger would substantially lessen competition or potential competition in three relevant markets: (1) displayed equity trading services; (2) listing services for exchange-traded products (ETPs), including exchange-traded funds; and (3) real-time proprietary equity data products in the United States. According to the government's complaint, NYSE and Direct Edge are head-to-head competitors in displayed equities trading services and in the provision of real-time proprietary equity data products. Direct Edge is allegedly a potential competitor to NYSE in listing services for ETPs.

European Commission Investigation

Meanwhile, the EC investigation continues. The in-depth investigation into the transaction was opened in August, after the EC's initial market investigation indicated competition concerns in a number of areas.

The EC said in August that it had particular concerns in the field of derivatives trading and clearing. Derivatives are financial contracts whose value is derived from an underlying asset or variable, such as stocks, interest rates, or currencies. Derivatives are generally used for hedging, investment purposes, and overall risk management in financial markets. Clearing plays an important role in derivatives trading, managing the risk of the trading parties in the interim period between trading and settlement, the EC explained.

The merging parties announced on December 13 that they had submitted revised remedies to the EC Directorate-General for Competition. "[T]he parties have strengthened their original proposal with respect to European single equity derivatives by increasing the assets to be included in the divestiture, and to provide the purchaser of that business with an option to access Eurex Clearing for single equity derivatives products," according to an NYSE announcement. "The parties have also improved the coverage of their clearing access remedy for innovative equity index and interest rate derivatives. In addition, the parties committed to license the Eurex trading system to a third party interested in launching interest rate derivatives."

It has been reported, however, that the remedies offered by the parties are still not sufficient to allay customer concerns in Europe.

The parties also have agreed to extend the review period in Europe. A decision is expected in February 2012.

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