



Final Report of the Hearing Officer¹

Deutsche Börse / NYSE Euronext

(COMP/M.6166)

1. BACKGROUND

1. On 29 June 2011 the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation² by which the undertaking NYSE Euronext and Deutsche Börse (hereinafter referred to as "the Notifying Parties") would enter into a full merger within the meaning of Article 3(1)(a) of the Merger Regulation. On 4 August 2011 the Commission initiated proceedings pursuant to Article 6(1)(c) of the Merger Regulation.

2. WRITTEN PROCEDURE

2.1. *The statement of objections*

2. The Commission sent a statement of objections (the "SO") to the Notifying Parties on 5 October 2011 with a deadline to respond on 19 October.
3. The Notifying Parties expressed concerns that the deadline to submit remedies without triggering a 15 working day extension of the proceedings pursuant to Article 10(3) (i.e. before day 55) fell before the date tentatively fixed for the oral hearing. Subsequently, the Notifying Parties agreed with the Commission to an extension of the procedure by seven working days pursuant to Article 10(3), second paragraph, of the Merger Regulation. At the same time, I decided to extend the deadline to respond to the SO until the 24 October 2011, and postponed the Oral Hearing from 24 and 25 October to 27 and 28 October.

2.2. *Access to file*

4. The Notifying Parties were given access to the file after the SO initially on 6 October 2011. Subsequently, the Notifying Parties were given access to the file on a regular basis until the consultation of the Advisory Committee, in line with paragraph 43 of the Merger Best Practices.³

¹ Pursuant to Articles 16 and 17 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29, (the "Terms of Reference").

² Council Regulation (EC) No 139/2004 of 20 January 2004, OJ L 24, 29.1.2004, p.1 (the "Merger Regulation").

³ DG Competition Best Practices on the conduct of EC Merger Control Proceedings.

5. The Notifying Parties did not make any request to me as regards access to the file.

2.3. *Applications of interested third persons*

6. There was an unusually high number of persons wishing to participate in the proceedings. I accepted the status of interested third persons for the following 23 undertakings and associations after they had demonstrated that they had sufficient interest in the outcome of the proceedings:

ACCOR S.A., Association Belge des Sociétés Cotées, Association Française des Entreprises Privées, the Association for Financial Markets in Europe, The Bank of New York Mellon, BNP Paribas Arbitrage, Chi-X Europe Ltd., [CONFIDENTIAL], LCH.Clearnet Group Limited, CME Group Inc., Euroclear Group, IMC Financial Markets, ICAP Securities Limited, IntercontinentalExchange Inc., Kyte Group Limited, London Stock Exchange Group plc, Nasdaq OMX Nordic OY, L'Oreal S.A., Robeco Groep N.V., [...]*, Solvay SA, ThromboGenics N.V., and Vlaamse Federatie van Belegclubs en Beleggers vzw.

7. The Notifying Parties were informed of the identity of the undertakings that had been granted interested third persons status.

8. I rejected two requests for the status of interested third persons:

- The first was an application by an individual, [...]* Stichting NYSE Euronext. He did not demonstrate that he had sufficient interest in the outcome of the procedure within the meaning of Article 18(4) of the Merger Regulation. Furthermore, the relationship between Stichting NYSE Euronext and the Notifying Parties raised doubts as to whether [...]* actually was a "third person" within the meaning of Article 18 of the Merger Regulation. I informed [...]* of my intention to reject his application and invited him to make known his views, which he did not do. I thus rejected his application by formal decision.⁴
- The second was an application of NEVIR (the Dutch Association of Investors Relations). Based on the application, I found that the association itself had no sufficient interest in the outcome of the Commission proceeding. Further, in light of its statutes, I found that the association did not represent the interests of commercial undertakings but rather of a particular group of professionals, i.e. investor relation officers, and had serious doubts that their individual interests were sufficiently affected by the proceedings within the meaning of Article 18(4) of the Merger Regulation. I informed NEVIR of my intention to reject its application and invited it to make known its views, which it did not do. I thus rejected its application by formal decision.⁵

* Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

⁴ Pursuant to Article 5 of the Terms of Reference. Instead, Mr de Larosière gave a presentation as part of the Notifying Parties' delegation.

⁵ Pursuant to Article 5 of the Terms of Reference.

9. A few other applicants did not maintain their initial application after they had been explained the implications of their request – most of these wanted only to attend the oral hearing as observers – or after they had been asked to further substantiate their interest. In this respect, it should be recalled that third persons showing sufficient interest have a right to be heard in writing, and may only participate in the oral hearing of the parties if it is considered appropriate by the Commission, for example if they can usefully contribute to the clarification of the relevant facts of the case.⁶
10. Among the 23 interested third persons, ten actually exercised their right to submit written comments to the Commission after having received a non-confidential version of the SO.⁷

3. ORAL PROCEDURE

11. The Notifying Parties requested an Oral Hearing, which was held on 27 and 28 October 2011 in Brussels.
12. The following participants attended the oral hearing:
 - The Notifying Parties and their advisers;
 - The relevant Commission services;
 - Representatives of the Member States;
 - A representative from the United States Department of Justice, whom I admitted to the hearing upon her application, and after having obtained the consent of the Notifying Parties; and
 - Certain interested third persons.
13. I rejected the application of one interested third person to attend the oral hearing for the following reasons. First, the application was not submitted timely (one day and a half before the oral hearing). Second the third person had not participated in the proceedings until that point. It did not provide any comment to the Commission following the publication of the notification⁸ or the initiation of proceedings⁹ in the Official Journal. Nor did it reply to the questionnaire sent by the Directorate General for Competition of the Commission ("DG Competition") in the context of its market investigation. Overall, I considered that it was unlikely that this third person would contribute usefully to the clarification of the relevant facts at the oral hearing and thus rejected its request to attend the oral hearing. Also noteworthy as regards interested third persons is the fact that certain of them, although admitted to the oral

⁶ See Article 16(2) of Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 133, 30.4.2004, p. 1–39) and Recital 13 of the Terms of Reference.

⁷ Pursuant to Article 16(2) of Commission Regulation (EC) No 802/2004.

⁸ OJ C 199, 7.7.2011, p. 9

⁹ OJ C 234, 10.8.2011, p. 2

hearing, later withdrew their request to attend as interested third persons but rather decided to appear as part of the delegation of the Notifying Parties¹⁰.

4. PROCEDURE AFTER THE ORAL HEARING

4.1. Commitments

14. In order to address competition concerns identified in the SO, the Notifying Parties submitted commitments on 17 November 2011. On 21 November 2011 the Notifying Parties submitted a revised version of these commitments. The Commission launched a market test of these commitments on 22 November 2011. On 12 December 2011, the Notifying Parties submitted a second set of commitments which was later amended on 14 December 2011. The market test of the second set of commitments was launched on 14 and 15 December 2011.
15. I have received no complaint from the Notifying Parties on the market tests conducted by the Commission on the commitment proposals.

4.2. Other procedural request from the notifying parties

16. On 1 December 2011, the Notifying Parties addressed a letter to DG Competition claiming that, at a meeting on 23 November 2011 with the Notifying Parties, the Chief Economist Team of DG Competition invoked a number of new arguments that had not previously been advanced and referred to certain additional economic analysis undertaken by the Chief Economist's Team.
17. DG Competition responded by letter of 8 December 2011 explaining why the analysis presented to the Notifying Parties on 23 November did not contain or represent any new elements of facts or new objections, but instead simply illustrated arguments presented in the SO. Further explanations on the economic analysis presented by the Chief Economist Team were included in the letter and minutes of the meeting of 23 November were attached, together with the hand-out to which reference was made during the meeting and which includes the Stata used by the Chief Economist Team for its analysis. The Notifying Parties were given until 13 December 2011 (9.00am) to submit any further comment
18. On 13 December 2011 (5.40pm), the Notifying Parties responded by reiterating their position that the analyses presented by the Chief Economist Team as regards two matters was new, and therefore raised serious questions about their ability to exercise their rights of defence. They nevertheless submitted an economic analysis from their economic advisers commenting on the analyses presented to them by the Chief Economist Team. They also submitted a revised version of the minutes of the 23 November 2011 meeting.
19. The above-mentioned procedural issue calls for the following comments. First, the Notifying Parties' letters did not explain why the Notifying Parties were not in a position to effectively exercise their rights of defence and why the Commission's explanations about the lack of any new arguments or objections would have been insufficient. Indeed, by submitting written comments, they were able to make known their views on the elements presented to them by the Chief Economist Team

¹⁰ This concerned five interested third persons.

on 23 November and further detailed in the Commission's letter of 8 December. In addition, the Notifying Parties did not raise the matter with me directly. Although I was put in copy of the two letters mentioned above, the Notifying Parties did not make use of the possibility, set out in Article 3(7) of the Terms of Reference of the Hearing Officer, to refer any issue regarding the effective exercise of procedural rights to the Hearing Officer for independent review when no resolution is reached with DG Competition. This suggests that the matter was indeed resolved by the Commission's explanations about the lack of any new arguments or objections and the possibility exercised by the Notifying Parties to submit written comments. In conclusion, I consider that the Notifying Parties' procedural rights have been effectively exercised in connection with this matter.

5. THE DRAFT COMMISSION DECISION

20. Pursuant to Article 16 of the Terms of Reference, the Final Report shall consider whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views.
21. Upon review of the draft decision, I conclude that it does not deal with any objection upon which the Notifying Parties have not been given the opportunity of making known their views.

6. CONCLUSION

22. I conclude that the Notifying Parties and the other persons involved in the proceedings have been able to effectively exercise their procedural rights in this case.

Brussels, 19 January 2012.

(signed)

Michael ALBERS