

EN

***Case No COMP/M.6873 -
INTERCONTINENTAL
EXCHANGE / NYSE
EURONEXT***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 24/06/2013

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EUROPEAN COMMISSION

Brussels, 24.6.2013
C(2013) 4078

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE

To the notifying party

Dear Sir/Madam,

**Subject: Case No COMP/M.6873 – INTERCONTINENTAL EXCHANGE / NYSE
EURONEXT
Commission decision pursuant to Article 6(1)(b) of Council Regulation
No 139/2004¹**

- (1) On 17 May 2013, the European Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which InterContinentalExchange ("ICE", US), acquires within the meaning of Article 3(1) (b) of the Merger Regulation sole control of the whole of NYSE Euronext ("NYX", US) by way of purchase of shares.² ICE and NYX are hereinafter collectively referred to as the "Parties".

1. THE PARTIES

- (2) ICE is an operator of futures exchanges, over the counter ("OTC") derivatives trading platforms and futures and derivatives clearing houses around the world, in particular in the US and in Canada. In Europe, ICE operates a futures exchange (i.e. ICE Futures Europe, for trading of energy futures) and provides the related clearing

¹ OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

² OJ C 159, 5.6.2013.

services (via ICE Clear Europe, which also provides clearing services for European Credit Default Swaps).

- (3) NYX is an operator of derivatives and securities exchanges in the US and Europe. It has four main businesses: (i) cash listing services; (ii) cash trading services; (iii) derivatives trading and clearing services; and (iv) information services and technology solutions. In Europe, NYX owns Liffe A&M, which operates a London-based derivatives exchange, together with derivatives exchanges in Amsterdam, Brussels, Lisbon and Paris (referred to collectively as "Liffe").

2. THE OPERATION AND THE CONCENTRATION

- (4) On 20 December 2012 ICE and NYX signed the Merger Agreement, which has subsequently been revised on 19 March 2013. Under the revised Merger Agreement, each of ICE and NYX will become wholly-owned subsidiaries of a newly formed holding company, IntercontinentalExchange Group, Inc. ("ICE Group"). ICE shareholders will own two thirds of the shares in ICE Group and NYX shareholders will own one third. The Board of Directors of ICE Group will be composed of eleven current directors of ICE and four current directors of NYX. Decisions will be adopted by majority vote.
- (5) Therefore, the notified transaction constitutes a concentration within the meaning of Article 3(1) (b) of the Merger Regulation.

3. EU DIMENSION

- (6) The concentration in the case at hand does not have a Union dimension within the meaning of Article 1(2) or Article 1(3) of the Merger Regulation since (i) the combined aggregate worldwide turnover of ICE and NYX in 2012 amounts to EUR 2.7 billion and (ii) the combined aggregate turnover of ICE and NYX in 2012 exceeds EUR 100 million only in one Member State[...]³
- (7) Nevertheless, the proposed concentration fulfils the two conditions set out in Article 4(5) of the Merger Regulation since (i) it is a concentration within the meaning of Article 3 of the Merger Regulation, and (ii) it is capable of being reviewed under the national competition laws of at least three Member States.⁴
- (8) On 18 March 2013, the Parties submitted, by means of a reasoned submission, a referral request pursuant to Article 4(5) of the Merger Regulation with respect to the proposed concentration. A copy of this submission was transmitted to the Member States on 19 March 2013.
- (9) As, within the time limits foreseen by the Merger regulation, none of the Member States competent to review the proposed concentration expressed its disagreement as regards

³ Turnover calculated in accordance with Article 5 of the Merger Regulation.

⁴ The United Kingdom, Portugal and Spain.

the request to refer the case, on 22 April 2013⁵ the notified concentration acquired Union dimension following a referral pursuant to Article 4(5) of the Merger Regulation.

4. COMPETITIVE ASSESSMENT

4.1. INTRODUCTION

- (10) The activities of ICE and NYX overlap in the provision of trading and clearing services for certain exchange traded derivatives ("ETDs") and in the provision of bond trading services.
- (11) Both Parties are also active in the provision of proprietary market data and co-location services. Nonetheless, since both proprietary market data and co-location services are specifically related to an individual trading venue, no overlap can be identified between the Parties' activities in these areas⁶.
- (12) Vertical relationships exist between ICE derivative clearing services and NYX derivative trading services and between ICE's front-end execution technology services and connectivity to NYX platforms.

4.2. DERIVATIVE TRADING AND CLEARING

4.2.1. Product market definition

- (13) *Derivatives* are financial contracts which derive their value from another asset (called the "underlying"), which could for instance be a commodity, equity or fixed income instrument or an equity index.
- (14) *Trading* is the activity of buying and selling financial instruments, such as derivatives, and it can occur in a multi-party trading environment such as an exchange (exchange traded derivatives – "ETDs"), or over-the-counter ("OTC").
- (15) *Clearing* services consist in all those activities which take place after a trade is executed and before settlement, in particular management of positions throughout the lifetime of contracts and management of collateral to address the counterparty default risk prior to settlement. In a multi-party trading environment, clearing services are typically provided by a Central Counterparty ("CCP") which interposes itself between the buyer and the seller; for OTC trades clearing by a CCP is less common, and normally each party is exposed to the other party's risk.⁷

⁵ Due to a technical problem with the delivery of the submission to one Member State the deadline for the Member States to express their disagreement or agreement to the referral request, originally scheduled on 15 April 2013, was postponed to 22 April 2013.

⁶ See Case No COMP/M.6166 *Deutsche Börse / NYSE Euronext*, paragraphs 152 and 186 ff.

⁷ Although Regulation (EU) No. 648/2012 on OTC derivatives, central counterparties and repositories (known as European Market Infrastructure Regulation, "EMIR"), OJ L201, 27.7.2012, introduced a clearing obligation for standardised derivatives, which will contribute to a shift towards more cleared OTC derivatives.

- (16) With respect to ETDs, the Parties agree with the Commission's approach in *Deutsche Börse / NYSE Euronext*⁸ that the relevant product market comprises trading and clearing together. Indeed, also for the derivative contracts concerned by the case at hand trading and clearing services are provided to customers on a bundled basis⁹ and therefore should be considered together as one single product. In *Deutsche Börse / NYSE Euronext* the Commission considered that a separate market could exist for the provision of clearing services for third party platforms, including OTC platforms.¹⁰ Since only ICE is active in the provision of these services, no overlap would arise in this regard in the case at hand.¹¹
- (17) In line with the *Deutsche Börse / NYSE Euronext* decision¹², the Parties submit that the product market definition should be based on (i) the type of contract (such as futures, options, swaps) ; (ii) the underlying asset class (such as equities, equity indices, agricultural products etc.); and (iii) the execution environment (OTC or on exchange).

4.2.1.1. Classification of derivatives according to the type of contract

- (18) As regards the type of contract, in the *Deutsche Börse / NYSE Euronext* decision, with regard to European financial derivatives the Commission left open the question as to whether options and futures were part of the same market due to the high degree of supply side substitutability between them (whilst it appeared that they were not substitutable from the demand side).¹³ The Parties generally agree with the Commission's approach also for the asset classes concerned by the case at hand. However, the Parties submit that no supply side substitutability would exist between U.S. equity index options and futures.¹⁴
- (19) Indeed, exchanges offering equity index options on one index could not start offering futures on the same index immediately and without any additional investment. This is because equity and equity index futures and options on futures, on the one hand, and options, on the other hand, are subject to separate regimes, as well as to separate intellectual property licensing. In fact in the U.S. different

⁸ See Case No COMP/M.6166 *Deutsche Börse / NYSE Euronext*, paragraphs 242 and 243.

⁹ With the exception of the clearing fee for NYX's Paris market which is charged by LCH.SA, French entity of LCH.Clearnet.

¹⁰ See Case No COMP/M.6166 *Deutsche Börse / NYSE Euronext*, footnote 117.

¹¹ In *Deutsche Börse/NYSE Euronext*, the Commission identifies separate markets for wholesale trading services, i.e. on-exchange registration, confirmation and clearing of trades agreed away from an exchange, whether "block" or "flex" trades. Both Parties are active in the provision of these services, however no overlap can be identified with respect to the derivative contracts for which the Parties provide such services.

¹² See Case No COMP/M.6166 *Deutsche Börse / NYSE Euronext*, paragraphs 255.

¹³ See Case No COMP/M.6166 *Deutsche Börse / NYSE Euronext*, paragraphs 433-444.

¹⁴ This asset class was not analysed in the *Deutsche Börse / NYSE Euronext* decision.

regulatory¹⁵ and clearing¹⁶ regimes apply to options, on the one hand, and to futures and options on futures, on the other hand.¹⁷ Moreover, index providers typically license the rights to use their trademarks to separate entities with respect to options, on the one hand, and futures and options on futures on the other hand. This is confirmed when looking at the product offerings of exchanges as regards U.S. equity index derivatives, which are either offering options or futures and options on futures. For U.S. equity index derivatives there is therefore limited supply-side substitutability between options and futures, whilst options on futures follow the same regime of futures.

- (20) In the light of the above, for the assessment of the case at hand, the Commission concludes that U.S. equity index options, on the one hand, and U.S. equity index futures and options on futures, on the other hand, do not belong to the same market.¹⁸ For other asset classes of derivatives, the Commission concludes that the question as to whether options and futures are part of the same market can be left open since the proposed transaction does not give rise to serious doubts as to its compatibility with the internal market under any possible market definition.

¹⁵ More precisely, in the US, equity and equity index options and futures (including options on futures) are regulated as separate products, are subject to different regulatory regimes and two different federal agencies have been assigned to oversee their activities.

With respect to options, the competent body is the Securities and Exchange Commission ("SEC"), which was created by the US Securities Exchange Act of 1934. Indeed the SEC holds primarily responsibility for enforcing the federal securities laws and regulating the securities markets, including stocks and options exchanges and other electronic securities markets. Under the SEC's regulatory scheme, equity and equity index options can only be traded on a securities exchange under the jurisdiction of the SEC, and all of the 11 options exchanges currently operating in the US are registered with, and supervised, by the SEC.

With respect to futures, and options on futures, it is the Commodity Futures Trading Commission ("CFTC") which has the jurisdiction. Created by the Commodity Futures Trading Commission Act of 1974, the CFTC has jurisdiction not only on the trading in futures on physical and agricultural commodities but also on trading in futures contracts based on financial instruments. Therefore, in the US, any market that seeks to provide a trading facility to trade futures or options on futures on commodities or financial instruments must apply to the CFTC to be designated as a contract market

¹⁶ For U.S. equity and equity index options, clearing services are provided under the jurisdiction of SEC by the Options Clearing Corporations ("OCC"). OCC operates a model where there is one common clearing pot, whereby all member exchanges are able to offset their open interest in that pot against all the correlated positions of the other member exchanges allowing for competition at the level of the exchanges.

This clearing model does not apply to U.S. equity and equity index futures. For these derivatives, the clearing model is similar to the European one, where exchanges operate vertical silo.

¹⁷ Such specificities do not exist for European equity and equity index derivatives, which were analysed in the *Deutsche Börse / NYSE Euronext* decision.

¹⁸ It is instead not necessary to conclude whether futures and options on futures are part of the same market because the assessment of the case would be the same.

4.2.1.2. Classification of derivatives according to the underlying asset class

- (21) As regards the underlying asset class, the Parties agree with the Commission's approach in *Deutsche Börse / NYSE Euronext*¹⁹ to define separate product markets for different underlyings. Following this approach the transaction could give rise to overlaps in trading and clearing of certain soft and agricultural ETDs, foreign exchange ETDs and U.S. equity index ETDs.²⁰

4.2.1.2.1. Soft and agricultural commodity derivatives

- (22) Both Parties offer derivatives contracts having as underlyings barley, cocoa, coffee, corn, milling wheat, rapeseed and sugar. Depending on the market definition finally retained, it is within the area of soft and agricultural derivatives that the proposed transaction would give rise to the most significant overlaps. Trading and clearing of these products accounted in 2012 for [0-5]% of NYX's and [10-20]% of ICE's total revenues respectively.
- (23) Soft and agricultural commodities have the specificity of being perishable and of having a high volume-to-value ratio, meaning that transport costs are relatively more important for such commodities and distinguishing them from, for example, metals or energy. There are two types of typical users of soft and agricultural commodity derivatives: commercial buyers and sellers of the physical underlying, on the one hand, and financial users on the other hand, in particular liquidity providers, speculators and brokers.²¹ The former category is the largest and the main driver of these markets.²² Soft and agricultural commodity derivatives are used by these market participants mainly for hedging purposes (risk management), i.e. to provide predictability as to the price at which a given commodity will be sold or bought in the future.
- (24) The Parties argue that the market definition should be narrowed down to take into account the significant differences between the Parties' derivatives within these types of commodities in terms of (i) the underlying product (e.g. Arabica vs. Robusta coffee;

¹⁹ See Case No COMP/M.6166 *Deutsche Börse / NYSE Euronext*, paragraph 396.

²⁰ It is worth noting that these overlap do not arise in the Parties' core derivative business. In fact [...]% of ICE's total 2012 revenues were derived from energy derivatives, where NYX is not active, whilst approximately [...]% of NYX's derivatives revenue from financial and equity derivatives with European underlyings (derivatives activities accounted for less than [...]% of NYX's total revenues in 2012), where ICE is not active.

²¹ Commercial and financial users may also not be direct exchange members but access the exchanges through a broker. However, the market investigation unanimously indicated that brokers do not have any discretion and are bound by precise instructions from end users as to what contracts to trade and on which platform. Therefore ultimately the trading decision is taken by end users.

²² By reference to open interest as of 31 January 2013, commercial entities account for more than [...]% of all open interest in each of ICE's cocoa, coffee and sugar contracts (cocoa [...]%; coffee [...]%; sugar [...]%). Likewise, by reference to open interest as of 29 January 2013, [...] commercial entities account for more than [...]% of all open interest in each of NYX's cocoa, coffee and sugar contracts (cocoa [...]%; coffee [...]%; sugar [...]%). The "open interest" is the total number of contracts that are not closed or delivered on a particular day.

raw vs. refined sugar; rapeseed vs. its genetically modified variant canola), (ii) the delivery destination (in particular US vs. EU) and /or (iii) the origin of the product.²³ According to the Parties all of these elements would be crucial for the accuracy of the hedge for both commercial and non-commercial users, whose trading decision would be based on the specific underlying physical product, its origin and delivery point. This would be essential even for speculators, who would employ research teams to analyse and understand the supply and demand dynamics for the underlying physical good of each contract and make decisions based on this research.

- (25) On this basis, the Parties submit that each of their contracts corresponds to distinct demands and that there is therefore no competitively relevant overlap between their respective activities.
- (26) The market investigation has confirmed these claims, as further set out below.
- (27) Commodity derivative markets, just as derivative markets more generally, are characterised by strong network effects, so that liquidity tends to concentrate in one contract which has become popular and the market benchmark for a specific product. Since most users of exchange-traded commodity derivatives take positions in order to hedge, it is important that at any point in time there is sufficient liquidity, i.e. counterparties allowing them to enter into the required position, to exit the position and realise the hedging strategy. Thus, traders themselves are, as a rule, not incentivized to split liquidity among multiple, less liquid contracts. This is specifically the case for soft commodity derivatives, which are already fairly limited liquid markets.²⁴
- (28) The market investigation has confirmed, in line with the Parties' claim, that, in respect of each of the commodity classes for which they overlap, ICE's and NYX's contracts represent distinct benchmarks. These contracts present specifications which reflect the characteristics of different physical underlying products. Therefore, when customers trade a specific physical good (i.e. commercial derivatives users), they can obtain a satisfactory hedge of the price risk linked to this transaction only by using the derivative contract which has as underlying the same specific good. The same holds for financial users of derivatives, who trade mainly for speculative purposes. This is because each of the different physical products in question presents distinct economic dynamics and therefore different and inadequately correlated price movements: the pivotal element of functioning of the commodity markets is the relationship between each derivative contract and the underlying physical market which ensures what is called convergence between cash and futures, i.e. the convergence of prices in the two markets. Such convergence, which is ultimately

²³ According to the Parties, even where their contracts have the same specifications, there exist significant differences in practice. For example, whilst the Parties' cocoa contracts both specify cocoa from any origin, in practice African origin cocoa accounts for virtually all products delivered against the NYX's Liffe cocoa contract, whereas cocoa from other originating countries (e.g. in Asia) accounts for approximately half of products delivered against the ICE contracts.

²⁴ For example, according to the data provided by the Parties, in 2010 the cocoa market including all contracts has a volume of roughly 8 million contracts. This can be compared with the volume of more than 7 billion contracts in the market, for European interest rates derivatives which was assessed in the *Deutsche Börse / NYSE Euronext* decision.

ensured by the possibility of the physical delivery of the product at expiry of the derivative contract, is crucial to hedging strategies by commercial users, because it allows efficient price risk management, but it is also essential for speculators because it allows monitoring of price movements.²⁵

- (29) This has been confirmed also by data provided by the Parties on the price correlation between their contracts. This data shows that the price of the Parties' contracts is not always highly correlated (although it may be in certain periods and over the short term). This is because region-specific supply/demand shocks have a material impact on the price of one of the Parties' contracts but not on the other. As the purpose of hedging is precisely to offset such unexpected risks, it can be considered that the Parties' contracts represent benchmarks for different hedging strategies and are not substitutes.
- (30) The following paragraphs will explain in further detail these findings for each asset class where the Parties' contracts *prima facie* might otherwise be considered to overlap.

(i) Cocoa derivatives

- (31) Both ICE and NYX offer cocoa futures and options on futures, which according to the contract specifications can be sourced from any origin. However, in practice [90-100]% of cocoa delivered against NYX contracts over the last five years was sourced from Africa, whilst approximately [40-50]% of the cocoa delivered against ICE contracts was sourced from Asia and South and Central America. To reflect this, the NYX contract listed in London is benchmarked against (and better reflects the price movements of) cocoa from Ivory Coast, whilst it gives a discount for cocoa of other origins, and the ICE contract listed in the U.S. is benchmarked against (and better reflects the price movements of) cocoa originated in Asia and it gives a premium for cocoa originated in Africa and discounts for cocoa from other origins.²⁶

²⁵ This is similar to the Commission's findings as regards single stock equity derivatives in *Deutsche Börse / NYSE Euronext*. Also for the users of those derivatives hedging accuracy is an important driver and therefore, from the demand side perspective, there is no substitutability between different single stock derivatives (see Case COMP.M/6.166 *Deutsche Börse / NYSE Euronext*, paragraph 421). However, in that case the Commission left open the question as to whether listed single equity derivatives should be subdivided according to the individual stock. In fact the Commission found that traders do not just buy once a single equity derivatives contract, but often implement trading strategies, for instance covering a number of single stock equity derivatives within one country or industry. This is because concentrating correlated contracts on one exchange increases the cross-margining opportunities in the exchange's clearing house as well as offering operational trading advantages.

As further explained in section 4.2.3.2.1, such cross margining opportunities do not exist for the soft and agricultural commodities concerned by the present case, nor does it seem that they would be relevant for derivative users.

²⁶ Each contract has quality specifications that define the minimum standards for acceptance for exchange delivery, which vary between the Parties' contracts. In addition to minimum standards, some contracts apply premiums and/or discounts to account for variability in quality of the delivered goods compared to the benchmark.

- (32) Furthermore, the ICE contract is denominated in USD and it specifies as delivery points only U.S. ports, whilst the NYX contract is denominated in GBP and it specifies as delivery points only EU ports.²⁷ Both contracts specify physical delivery as settlement mode.
- (33) The market investigation has confirmed that on the basis of these elements there is very limited scope for substitution between ICE's and NYX's cocoa derivatives contracts and that the differences between them make the two contracts, if anything, rather complements than alternatives.
- (34) Indeed, as regards the difference in the origin of the cocoa it should be noted that for chocolate manufacturers in need of African cocoa the most suitable hedge is the NYX contract. Conversely, those in need of Indonesian cocoa hedge with the ICE contract.²⁸ The origin of the cocoa has a direct effect on the dynamics of supply and demand. Data provided by the Parties on the price correlation between their contracts shows how region specific shocks (e.g. civil unrest in the Ivory Coast or poor weather conditions) have impacted the price of one contract significantly more than the other, so that the price movement curves present significant divergences²⁹.
- (35) Concerning the difference between the ICE and the NYX contracts in terms of currency, customers consider this difference to be an important factor limiting substitution. This difference reflects the difference in terms of origin of the underlying products. For historical reasons West African cocoa beans are commercially traded in GBP and therefore hedging with the NYX contracts, GBP denominated, is more convenient because it avoids incurring a currency risk, whilst Indonesian and Central/ South American beans are traded commercially in USD and therefore it is more convenient to hedge these trades with the ICE contract for the same reasons.
- (36) As a result, a clear majority of customers indicated that in case of an increase of the total cost of trading by 5 to 10% in either ICE's or NYX's contracts they would not switch to the other Party's contract, indicating that the choice of contract overrides

²⁷ The market investigation has indicated that it is the difference in the delivery points specified by the two contracts which determines the difference in the origin of the cocoa delivered against them, despite the contract specifications of both NYX and ICE indicate that cocoa can be sourced from any origin. In fact, market participants, as well as the Parties, explained that for historical reason African cocoa is normally delivered in Europe, whilst others origin of cocoa are delivered in the U.S.

²⁸ This is consistent with the Commission's decision in case M.6872 - *Barry Callebaut /Petra Foods - Cocoa Ingredients Division*. Whilst that decision left open the question on whether the cocoa beans from different origin constitutes separate markets because competition problem would have not arisen under any scenario, the market investigation had indicated that West Africa cocoa beans may constitute a separate market. In this case it is not necessary to conclude on the scope of the physical markets: what is clear, however, is that even if customers may consider both West-African and South-American cocoa beans at the time when contracting the physical good with a supplier, once they have made that decision they no longer have a choice in where to hedge the price risk, i.e. they could only find the most accurate hedge in the derivative contract whose price movement is linked to cocoa beans of a specific origin.

²⁹ In this regard it can be recalled that even the very high correlation between European equity index contracts found in *Deutsche Börse / NYSE Euronext* (frequently in excess of 99%) was insufficient for these contracts to be considered by users as viable substitutes.

considerations relating to trading and clearing fees or the amount of collateral to be posted. The market investigation has in fact confirmed that trading costs represent a small fraction of the value of the risk covered by the contract; the cost of a less accurate hedge would be significantly higher. In this vein, several customers indicated that "*fees are not an issue*", whilst another customer indicated that it "*would not use solely one platform even if fees on the other increased somewhat as it has a real need for both contracts. The two contracts are used in a complementary way.*"

- (37) The market investigation has also confirmed that customers who normally trade one contract would only start trading the other contract in exceptional circumstances in order to perform arbitrage strategies based on the relative value of two contracts. Such strategies are nonetheless based on the existence of two different markets, with very different price movements, and would occur when, for example, price movements in one contract are extreme due to shortage or excess of production in one country of origin as a consequence of particular weather, social or political events (e.g. civil unrest in Ivory-Coast).
- (38) In light of the above and, in particular, in view of the differences between NYX's and ICE's cocoa derivative contracts in terms of currency, quality, origin, and delivery point of the underlying products for which they offer a benchmark, the Commission concludes that, for the purposes of this case, NYX's and ICE's cocoa derivative contracts belong to two separate markets.

(ii) Coffee derivatives

- (39) NYX lists Robusta coffee futures and options on futures in London and ICE offers Arabica coffee futures and options on futures in the US. Both contracts specify physical delivery as settlement mode.
- (40) The evidence collected through the market investigation has confirmed the lack of substitutability between ICE's and NYX's coffee contracts. This is because the two contracts have different types of coffee as physical underlyings: one is based on Robusta (NYX) and the other is based on Arabica (ICE). For customers, both commercial and financial users, the difference in terms of underlying product is a key factor. The Parties' data on the price correlation of their contracts corroborate this finding: the very different price movements of the two contracts evidence very different supply/demand dynamics applying to the physical underlyings.
- (41) In this context, the overwhelmingly majority of customers indicated that they trade coffee contracts on the basis of the physical underlying which they purchase or trade and that therefore they do not consider ICE and NYX contracts as realistic alternatives. Only in very exceptional circumstances which happen extremely rarely, e.g. if a given grade of Arabica (normally considered superior in quality) trades at a discount to Robusta prices, might customers choose to hedge a physical trade in Arabica coffee using Robusta futures: again this would be to perform an arbitrage strategy based on the relative value of the two contracts.
- (42) As the choice of the contract is driven by the customers' need for the most accurate hedge, any potential difference between trading and clearing fees, or the amount of collateral to be posted, on ICE and NYX do not normally play a role in the decision on where to trade. Indeed the market investigation has confirmed that in reaction to

an increase of 5 to 10% of the overall cost of trading on one of the exchanges, the vast majority of customers would not switch to the other contract. Similarly, the vast majority of customers do not see ICE and NYX's contracts as competing with each other due to their fundamental difference in terms of underlying product and currency.

- (43) In light of the above, for the purposes of this case, the Commission concludes that Arabica and Robusta derivative contracts belong to two separate markets.

(iii) Sugar derivatives

- (44) NYX offers in its London market white (or refined) sugar futures and options on futures and ICE offers for trading on its U.S. platform raw sugar futures and options on futures. Both contracts specify physical delivery as settlement mode.
- (45) The evidence collected through the market investigation has confirmed that customers would not substitute between the Parties' contracts and that rather the two contracts complement each other. The fundamental difference between the two contracts is whether the sugar has been subject to a refinery process or not. For commercial customers, but also for financial users, the type of sugar traded, produced or processed in the physical sugar transaction determines which contract should be used for hedging. In line with this, the Parties' data on correlation of their sugar contracts shows several significant divergences in the price movements: such sudden and unpredictable divergences would be expected to frustrate a hedging strategy as they would imply an additional risk that customers would generally be unwilling to bear.
- (46) Consequently, the vast majority of customers consider that the two contracts are not realistic alternatives. Only a small minority of customers indicated that the two contracts may be substitutable to a certain extent, depending on the physical contract. This is the case of lower quality white sugar that could be hedged against either the ICE or the NYX contract, with the physical price adjusted and representing either a premium to the raw sugar value or a discount to the white sugar value accordingly. This is because in such instance an adequate hedge would not exist. However, also these customers consider that ICE's contract is most relevant to hedge raw sugar physical transactions, while NYX is more relevant to hedge refined sugar physical transactions.
- (47) In addition, the market investigation revealed that if there exists exceptionally the possibility for arbitrage trade in proportion to the cost of refining sugar into white sugar, however, this type of arbitrage relies on the relative value and the price differences between the two contracts, which are driven by the fundamental differences between underlying products.
- (48) The market investigation has also confirmed that for the overwhelming majority of customers trading and clearing fees and the amount of collateral to be posted do not play a role in the decision of which contract to trade. Again this is because the trading choice is driven by the commercially relevant physical underlying. In this context, in reaction to a 5 to 10% increase of the overall cost of trading the vast majority of the customers would not switch from trading in one contract to trading in the other.

(49) In light of the above, for the purposes of this case, the Commission concludes that white and raw sugar derivative contracts belong to two separate markets.

(iv) Canola / rapeseed derivatives

(50) NYX offers rapeseed futures and options on futures for trading on its Paris exchange, whilst ICE Canada lists canola futures and options on futures. Canola is a genetically modified organism ("GMO") of rapeseed. The two contracts differ also in terms of (i) origin (ICE's contract specifies origin from Canada whilst NYX's contract specifies all origins, but in practice almost all rapeseed traded against this contract comes from Europe); (ii) delivery points (whilst ICE contracts specify Western Canada only, the NYX contract specifies France, Germany and Belgium). Both contracts specify physical delivery as settlement mode.

(51) The evidence gathered through market investigation has confirmed the lack of substitutability between ICE and NYX contracts. Customers, either commercial or financial users, explain that if they trade both contracts they do so on the basis of the specifications of the corresponding physical contract in each case. The distinction between ICE and NYX contracts is determined by the nature of the physical goods for which the price risk is being hedged. ICE canola is GMO tenderable whilst NYX rapeseed is GMO free. Customers confirmed that the ICE Canadian canola contract essentially reflects supply/demand in North America while NYX contracts reflect conditions in Europe. Therefore European clients use the rapeseed contract which most closely reflects their own crop and the conditions of demand in the European market. The data provided by the Parties on price correlation between their contracts confirms the different supply and demand dynamics applying to the two different products.

(52) In this context, a clear majority of customers indicated that they do not consider the ICE and NYX contracts as alternative. If some of them see both exchanges as potential alternatives to a certain extent, this is limited to exceptional situations; for example in case temporarily one of the two products is under- or over-priced due to exceptional weather turbulence in one part of the world. So again, as for cocoa or sugar contracts, this seems to be driven by willingness to undertake arbitrage strategies based on the relative value of the contracts and is rather marginal in the overall trade of canola and rapeseed.

(53) The market investigation has also confirmed that for the majority of customers trading and clearing fees and the amount of collateral to be posted do not play a role in the decision on whether to trade canola or rapeseed derivatives contracts. As a result, if they were faced with a 5 to 10% increase in the overall cost of trading in one contract, few customers would switch to the other contract because they are not equivalent enough to be used as alternatives.

(54) In light of the above, for the purposes of this case, the Commission concludes that canola and rapeseed derivative contracts belong to two separate markets.

(v) Other agricultural commodity derivatives

- (55) The Parties' contracts overlap also with regard to barley, corn and milling wheat. Also within these asset classes the NYX and ICE contracts present differences as regards the physical underlyings, in particular as regards the origin and delivery points.³⁰ An affected market would arise only with regard to milling wheat if no segmentation were to be undertaken according to the origin and delivery points. However also under this possible market definition, the combined market shares of the Parties would be below 25% with a negligible increment ([0-5]%) brought about by ICE, whilst Chicago Mercantile Exchange (CME) is the market leader with market shares above [70-80]%.
- (56) In light of the above, for the purposes of this case, the Commission concludes that the product market definition for barley, corn and milling wheat can be left open since the proposed transaction does not give rise to serious doubts as to its compatibility with the internal market under any possible market definition in relation to any of these agricultural commodity derivative markets.

(vi) Cash settled contracts

- (57) The Parties consider that cash settled contracts and physically delivered contracts are part of the same market.³¹ The contract specifications for the Parties' offerings in the asset classes analysed in this decision provide for physical delivery as settlement type.
- (58) [...]The main player currently offering cash settled contracts in the asset classes concerned by this transaction is the CME, which lists cocoa, Arabica coffee and raw sugar cash settled contracts based on ICE physically delivered contracts.
- (59) The settlement data provided by the Parties shows that physical delivery in all the asset classes concerned by the present transaction takes place only for trades representing [0-5]% of the volume of trades³². Therefore, in the majority of the instances customers do not hold the contract till maturity and do not take (or provide) physical delivery, but rather close out their positions or roll them into a new contract with later expiry date. This could lead to considering that cash settled contracts represent an alternative for traders because they do not aim at receiving physical delivery from the exchange. However, the market investigation has provided evidence of the contrary. The market investigation has revealed that

³⁰ In particular, with respect to milling wheat, differences are not only in terms of origin (Canada and US for ICE respectively for Canadian milling wheat and US milling wheat, against the EU for NYX) and delivery points (Canada for ICE Canadian milling wheat and France for NYX contract; ICE U.S. contract is cash settled by reference to CME's wheat contract, which is settled to delivery points in the US), but also in terms of quality of the products. Whilst Canadian milling wheat (ICE) are hard red, contain high protein and are used for bread, European milling wheat (NYX) are soft, contain low protein and are used for baking.

³¹ Physically delivered contracts are derivatives contracts that, once they reach maturity/expiry, are settled by the underlying product (e.g. cocoa) being physically delivered by the seller to the buyer in exchange for a specified payment. Cash settled contracts are instead derivatives contracts which, upon maturity/expiration, do not allow the underlying product to be physically delivered and are settled for an amount of money equivalent to the value of the physical product which would be delivered if the derivative contract would allow doing so.

³² [...]

derivative users in general have little interest in cash settled contracts as these contracts are mainly targeted to financial investors, which are not the drivers of the soft commodity markets.

- (60) Derivative users show a strong preference for physically delivered contracts. Indeed, customers virtually unanimously have indicated not to trade cash settled contracts. This is because of the pivotal role played in the commodity markets by the principle of convergence between the derivative price and the actual value of the underlying mentioned above. If this was not the case, the market would not serve its purpose of price discovery mechanism and hedging venue. If the exchange price and the market value of the commodity do not converge, in case of urgent need to buy or sell the underlying commodity, the party concerned might need to sell its product at depressed prices or buy the product needed at inflated prices. Customers explain that the optionality to physically deliver, or take delivery, is extremely important in the commodity markets because this ensures that the price of the physical goods and the derivative contracts converge. Indeed, even though traders may, as a rule, cash settle their contracts, they have to take delivery when they are not able to settle financially or if they are in need of the physical product for their production. The exchanges represent the last resort of the physical market when it comes to delivery, but the fact that this option exists is extremely important for market participants.
- (61) The same principle has been expressed by competitors and warehouses, the latter depicting themselves as the last ring of the chain allowing cash and futures convergence. In particular this is the view expressed also by one important Parties' competitor (CME) in explaining its failure to gain liquidity by its cash settled contracts, as shown by the very limited open interests in its contracts.³³
- (62) In any event, in light of the above, for the assessment of this case, the Commission concludes that the question whether cash settled and physically delivered contracts are part of one market can be left open as the competitive assessment would be the same, given the very limited relevance of trading of cash settled contracts.

4.2.1.2.2.U.S. equity index derivatives

- (63) ICE US offers Russell 1000 and 2000 futures and options on futures, whilst NYX offers Russell 100 ETFs³⁴ options and Russell 2000 options on its US platforms Amex and Arca. In *Deutsche Börse / NYSE Euronext* the Commission found that the individual indices are not substitutable as they offer different exposures and considered families of European indices as separate markets.³⁵ Following this approach the Parties' activities will overlap in their offering of US equity index derivatives based on Russell indices

³³ On 20 May 2013 CME cocoa contract had no open interest, the coffee contract had open interest of 24 contracts and the sugar contract had open interest of 65 contracts.

³⁴ Exchange Traded Funds are investment funds that hold assets, such as stocks, and trade close to their net asset value over the course of a trading day. Most ETFs track an index, such as an equity index or bond index.

³⁵ See Case No COMP/M.6166 *Deutsche Börse / NYSE Euronext*, paragraph 428.

only if options, on the one hand, and futures and options on futures, on the other hand, were considered to be part of the same market.

- (64) The Parties submit that different types of contracts constitute separate markets and that in particular options, on the one hand, and futures and options on futures, on the other hand, belong to separate markets. Moreover, according to the Parties, if a broader market were to be defined, this should encompass derivatives based on all families of U.S. equity indices since they all track and provide exposure to a broad basket of U.S. equities. According to the Parties, such market would encompass not only equity indices derivatives, but also derivatives having as underlying ETFs.
- (65) The Commission has concluded that, that for the assessment of the present case, US equity index options, on the one hand, and futures and options on futures, on the other hand, do not belong to the same market. On this basis, the Parties' activities in U.S. equity derivatives do not overlap. Therefore, the question as to whether the relevant markets include all US equity index and ETFs derivatives tracking the performance of companies of the same size can be left open, since overlaps would not arise under any possible product market definition.

4.2.1.2.3.Foreign exchange derivatives

- (66) Whilst ICE offers derivatives on a wide variety of foreign exchanges ("FX") pairs, NYX offers only one currency pair (Euro /Dollar).
- (67) In the absence of any precedent in the Commission's decision making practice, the Parties submit that a separate market should be defined for each different type of FX currency pair (Euro/Dollar; Euro/Yen; Dollar/Pound; etc.). They argue in particular that this approach is consistent with the fact that different currency pairs offer exposure to specific currencies, and are therefore not substitutable with one another. However, the Parties concede that the product market definition can be left open.
- (68) Following this approach the Parties' activities would overlap only in Euro/Dollar FX ETDs, but affected markets would not arise under any possible market definition.
- (69) In light of the above, for the assessment of this case, the Commission concludes that the product market definition can be left open as regards FX derivatives since the proposed transaction does not give rise to serious doubts as to its compatibility with the internal market under any possible market definition.

4.2.1.3.Classification of derivatives according to the execution mode

- (70) As regards the execution mode, in *Deutsche Börse / NYSE Euronext* the Commission considered that OTC and ETDs belong to different markets. The Parties to the case at hand argue, however, that the OTC constraint varies significantly depending on the type of the underlying product. Therefore, they argue that it cannot be assumed that the Commission's findings in *Deutsche Börse / NYSE Euronext* regarding the relationship between ETDs and OTC in relation to financial derivatives with European underlyings (the asset classes under scrutiny in that case) can be applied *mutatis mutandis* to the derivatives markets at stake in this case. Nevertheless, the Parties submit that in the current case the question on whether some or all OTC derivatives are in the same market as ETDs can be left open, since the competitive

assessment would be the same even if a separate market for ETDs were to be defined.

- (71) In particular, as regards soft and agricultural derivatives, for the underlyings where the Parties' activities overlap, the Parties estimate that less than [0-5]% of trading is done OTC. The market investigation has confirmed the very limited importance of the OTC market in the asset classes of commodities derivatives at stake in the present transaction. However, in line with the findings in *Deutsche Börse / NYSE Euronext* as regards European financial derivatives, customers have also expressed the view that the OTC market also in these asset classes is used as a complement to ETDs, to perform strategies that they cannot do on exchange.
- (72) In any event, in the light of the above, for the assessment of this case, the Commission concludes that the question whether ETDs and OTC derivatives are part of the same market can be left open as the competitive assessment would be the same, given the very limited relevance of OTC derivatives in the asset classes concerned in the case at hand.

4.2.2. *Geographic market definition*

4.2.2.1. Soft and agricultural commodity derivatives

- (73) The Parties submit that the relevant geographic market may be global, but provided information also for narrower geographic markets.
- (74) Overlaps would arise only if the market were to be considered global in scope. For the assessment of this case, the Commission concludes that it is not necessary to conclude on the exact scope of the geographic market since the proposed transaction does not give rise to serious doubts as to its compatibility with the internal market under any possible market definition.

4.2.2.2. U.S. equity index derivatives

- (75) Following the Commission approach in *Deutsche Börse / NYSE Euronext*³⁶, the Parties consider that the relevant market would be either U.S. wide or global. Indeed, trading in U.S. equity index derivatives takes place in the U.S. and there is limited demand for these products from other jurisdictions, including the EEA. Moreover, trading in U.S. equity index derivatives is only offered by U.S. exchanges. However, the Parties consider that the precise geographic scope can be left open in this case as no concerns arise on any basis.
- (76) Overlaps would arise only if the market were to be considered global in scope. However, for the assessment of this case, the Commission concludes that it is not necessary to conclude on the exact scope of the product market since the proposed transaction does not give rise to serious doubts as to its compatibility with the internal market under any possible market definition in relation to U.S. equity index derivatives.

³⁶ See Case No COMP/M.6166 *Deutsche Börse / NYSE Euronext*, paragraphs 452 and 453.

4.2.2.3. Foreign exchange derivatives

- (77) The Parties submit that the relevant geographic market is either EEA-wide or global.
- (78) No affected market would arise under any possible market definition. Therefore, for the assessment of this case, the Commission concludes that it is not necessary to conclude on the exact scope of the geographic market since the proposed transaction does not give rise to serious doubts as to its compatibility with the internal market under any possible market definition.

4.2.3. *Competitive assessment*

4.2.3.1. Horizontal effects: actual competition

4.2.3.1.1. Soft and agricultural commodity derivatives

- (79) Under the market definitions established above for the asset classes of commodity derivatives concerned by the present transaction, the Parties' activities do not overlap.³⁷ Therefore, although ICE is currently the market leader for cocoa futures and options on futures with delivery in the US³⁸, as well as for Arabica coffee, raw sugar and canola futures and options on futures, whilst NYX is the leader for cocoa futures and options on futures with delivery in the EU³⁹, Robusta coffee futures and options on futures, rapeseed and white sugar options on futures (market shares close to or equivalent to [90-100]%, depending on whether cash settled contracts are included or not), the Commission concludes that the proposed transaction does not give rise to serious doubts as to its compatibility with the internal market as a result of a loss of actual competition as regards soft and agricultural commodity derivatives.

4.2.3.1.2. U.S. equity index derivatives

- (80) Under the market definition retained above, the Parties' activities do not result in any overlap. Indeed, in this asset class area, NYX only offers options and ICE only offers futures and options on futures. Therefore the Commission concludes that the proposed transaction does not give rise to serious doubts as to its compatibility with the internal market as a result of a loss of actual competition as regards U.S. equity index derivatives.

4.2.3.1.3. Foreign exchange derivatives

- (81) The proposed transaction does not give rise to affected market under any possible market definition. Therefore, the Commission concludes that the proposed transaction does not give rise to serious doubts as to its compatibility with the internal market as a result of a loss of actual competition as regards FX derivatives.

³⁷ For milling wheat see above paragraph (55) of this decision.

³⁸ See footnote 27 above.

³⁹ See footnote 27 above.

4.2.3.2. Horizontal effects: potential competition

- (82) In *Deutsche Börse / NYSE Euronext* the Commission found that the "fact that liquidity has settled on one platform does not per se preclude competition between exchanges [...]. Indeed, even in the instances where there are marked asymmetries in market shares between the Notifying Parties (one controlling the bulk of liquidity while the other having a less significant market share), this does not mean that the Notifying Parties do not exercise a significant competitive constraint on each other. Indeed, [...], the mere threat that liquidity might shift, in whole or in part, to the other platform, is a credible constraint on the competitive behaviour of exchanges. In this context, exchanges keep each other on their toes constantly".⁴⁰
- (83) The situation in this case differs from the situation assessed by the Commission in *Deutsche Börse / NYSE Euronext*. In that case, the Commission found that even if markets were narrowly defined (e.g. short term interest rate ETDs and long term interest rate ETDs constituting separate markets), the transaction would lead to the elimination of an important competitive constraint as the investigation revealed different attempts of the Parties to enter each other's markets and the analysis of internal documents showed the strong competitive constraint exerted by the Parties' on each other. In addition, the Parties were ideally placed to enter each other's respective markets because (*inter alia*) of collateral benefits at the clearing level.
- (84) The case at hand is different. Apart from two isolated unsuccessful examples which are commented further below⁴¹, the analysis of the Parties' past behaviour and strategic internal documents concerning the asset classes relevant in the case at hand do not reveal attempts to enter each other's markets, nor that ICE and NYX consider each other as a potential competitive threat able to shift liquidity to a greater extent than other exchanges. As further explained below, the Parties' closely follow activities of several other major trading venues and react to their behaviour in order to prevent loss of liquidity. In addition, as will be further explained below, ICE and NYSE do not benefit from advantages that would place them in a better position than other exchanges to enter each other's markets.
- (85) Within this framework and in line with the Horizontal Merger Guidelines⁴², the Commission has analysed if the present transaction may lead to a loss of potential competition in the markets for trading and clearing of soft and agricultural commodities and U.S. equity index derivatives, where one of the Parties already holds a significant market position and/or is the market leader and the other Party has plans to enter and/or may appear to be the best placed exchange to shift liquidity. The analysis as regards the loss of potential competition has been performed also as regards OTC clearing.

⁴⁰ See Case COMP/M.6166 *Deutsche Börse / NYSE Euronext*, paragraph 518.

⁴¹ See paragraphs 21 and 22.

⁴² Commission's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Horizontal Merger Guidelines"), OJ C 31, 5.2.2004, paragraphs 58-60.

4.2.3.2.1. Soft and agricultural commodity derivatives

- (86) The Parties concede that they are potential competitors in soft and agricultural derivatives, but they argue that the transaction will result in no material loss of potential competition. They submit that there are other exchanges already active in soft or agricultural derivatives, or otherwise have the necessary expertise and are well placed to offer competing contracts. These include:
- Australian Securities Exchange (ASX) offering milling wheat, feed barley and canola futures and options;
 - BM&F Bovespa, a Brazilian exchange offering trading of equities, fixed income securities, financial, soft and agricultural derivatives (including Arabica coffee and corn) and spot foreign exchange, operating four clearing houses for the transactions carried out on its trading systems;
 - CME, the largest derivatives exchange operator in the world, offering derivatives across all asset classes (capital market derivatives, money market derivatives, equity index derivatives, foreign exchange, agricultural and energy derivatives etc.); CME offers clearing services for its listed derivatives through CME Clearing;
 - Dalian Commodity Exchange (DCE) offering agricultural futures products with a very strong position in corn derivatives;
 - Hong Kong Exchanges and Clearing (HKEx) operating securities and derivatives market in Hong Kong as well as the clearing houses for those markets, which recently purchased London Metal Exchange and announced to further develop into other types of commodity derivatives, including soft and agricultural derivatives;
 - Johannesburg Stock Exchange, providing electronic trading, clearing and settlement in equities, financial and agricultural derivatives (milling wheat, corn, soybean derivatives);
 - Singapore Exchange (SGX) – world's largest market for Asian equity futures centred on China, India and Japan offering trading, clearing, settlement and depository services; its derivatives business includes futures on rubber, fuel oil, metals, it also offers physically delivered Robusta coffee futures;
 - Zhengzhou Commodity Exchange (ZCE), offering derivatives in cotton, milling wheat, white sugar, rapeseed oil and canola.
- (87) Many of these exchanges have already entered or launched new soft or agricultural derivatives. The Parties argue that in terms of constraint on ICE, CME is the most relevant and significant entity to consider given its size, the geographic location of its exchange, its breadth of experience in commodities and the similarity of its trading hours and fees with those of ICE. The Parties claim that CME has the ability to quickly bring to market new or competing contracts, whether cash-settled or physically delivered.
- (88) The market investigation has shown that, indeed, it is possible to identify other exchanges already offering physically settled contracts, which potentially could

enter the Parties' markets, including some with a stronger strategic focus on soft and agricultural commodities compared to ICE and in particular NYX. It should be recalled that, as mentioned above, trading and clearing of these products accounted for only [10-20]% and [0-5]% of ICE's and NYX's total 2012 revenues respectively.

- (89) CME, in particular, is better placed than either of the Parties to compete in soft and agricultural derivatives and thereby acts as a more significant competitive constraint, which will continue to constrain the merged entity in this area: indeed CME is already an established exchange for trading of soft and agricultural derivatives. Built on the heritage of CME, CBOT and KCBT, CME describes itself as providing "*participants with the most liquid and extensive selection of agricultural futures, options and cleared OTC swaps of any exchange. Many of our contracts are recognized as global benchmarks, with trading on grains, oilseeds, livestock, dairy, lumber and more.*"⁴³ In particular it already offers grains and oilseeds as physically delivered contracts. On 26 April 2013, CME publicly confirmed that it had hired two soft and agricultural derivative specialists previously working for NYX.⁴⁴ Last year, there were press reports that the CME Group met with soft commodities traders to discuss the possibility of launching similar contracts to those offered by ICE.
- (90) Moreover, over the last three years other exchanges have exerted a competitive pressure on the Parties considerably higher than the Parties have done on each other. In particular, since 2010 several exchanges launched contracts in the area of soft and agricultural commodities, but not the Parties themselves. In January 2013 BM&F Bovespa began trading new commodity derivatives developed for the sugar sector. In 2012, ZCE launched its rapeseed physically delivered future which has gained considerable liquidity and is now the highest volume rapeseed future contract. In 2010, SGX launched a physically delivered Robusta coffee: in response to this entry NYX explored possible reactions, but eventually the SGX contract failed and was delisted in 2011.
- (91) Furthermore, it does not appear that the Parties would have any particular advantage in setting up a new physically delivered contract competing with the other Party.
- (92) The market investigation has confirmed the Parties' claim according to which any established exchange trading soft and agricultural derivatives can make use of its experience to set up a new contract and that a number of these exchanges could pose a competitive threat to the combined entity. The main challenges involve relevant expertise, relationships with the relevant market participants and market supervision functions. In this respect, the market investigation has in particular revealed that introducing a new contract might take one to two years but that the costs are relatively insignificant relative to exchange turnover.
- (93) In order to set up a physically delivered contract it is also necessary to establish relationships with warehouses for the storage, grading, quality testing etc. of a given

⁴³ See CME's website, Annual Leading Products Guide, February 2013, <http://www.cmegroup.com/trading/files/leading-products-guide.pdf>, visited on 18 June 2013.

⁴⁴ See <http://www.reuters.com/article/2013/04/26/cme-softs-idUSL6N0DD3LT20130426>, visited on 13 June 2013.

underlying commodity. However, ICE and NYX licensing provisions for deliverable products are not exclusive and ICE- or NYX-licensed warehouse operators have the right also to license the same space with any other exchange offering a future on the same product. Moreover, the market investigation, in particular the warehouses operators, have confirmed that they are open to new arrangements, that they can always provide for additional capacity if need be and that to a large extent the costs of certification and the licensing are bore by the warehouses.

- (94) The main challenge in setting up a successful contract lies in the breaking of the traders' resistance to shift the liquidity from one contract to another being faced with the risk of lack of liquidity. Nevertheless, this challenge is similar for all the exchanges trying to set up a new contract, including the Parties.
- (95) In *Deutsche Börse / NYSE Euronext* the Commission found that potential competition could have a significant constraining effect on an incumbent exchange, in particular when the other competitor already has a large margin pool of closely correlated contracts.⁴⁵
- (96) This element does not, however, apply in the case hand. Firstly, there is very little correlation *across* commodity classes (for example, between coffee and cocoa contracts or coffee and corn), much less between commodities and other assets classes where the Parties are also present. Therefore, there is little if any scope for margin offsets and correlation in the margin pool does not play a role in assessing the credibility of a competitive threat. In line with this, cross margining⁴⁶ does not appear to be common business practice for either of the Parties in the commodity space. The Parties do not offer cross-margining for the soft commodity derivatives contracts concerned by this assessment. For ICE's soft products, clearing members must be fully margined at all times for each product separately, since ICE Clear does not provide any inter-commodity margin benefit to its clearing members who hold positions across cocoa, coffee and/or sugar derivatives contracts, regardless of the clearing venue. The same applies to NYX's clearing houses which similarly do not provide any inter-commodity margin offsets. It is likely that, post-merger, the Parties would still require the position held in each soft commodity contract to be fully margined and that the clearing houses for the current ICE and NYX contracts will be kept separate (ICE Clear US and ICE Clear Europe). From this perspective the transaction would not significantly affect the competitive dynamics between the Parties and their competitors.
- (97) The Parties would not have any advantage in this regard even if looking at correlation *within* the same broad class of commodities (for example, between different types of coffee contracts).
- (98) On the basis of the data provided by the Parties, the degree of correlation is particularly low for coffee, where the level of prices is very different. A good

⁴⁵ See Case COMP/M.6166 *Deutsche Börse / NYSE Euronext*, paragraph 539.

⁴⁶ Cross margining involves calculating the amount of collateral required from a counterparty to cover the risk presented by that counterparty's portfolio. Unlike netting, which only applies to the same products, cross margining applies to a range of different products which display a degree of risk correlation.

illustration of this is the failed attempt by ICE to introduce a physically delivered Robusta contract in 2007 without offering cross margining between Arabica and Robusta coffee. According to ICE, cross-margining was not offered because the two coffee contracts were not sufficiently correlated.

- (99) The degree of correlation is somewhat greater for sugar, canola/rapeseed and cocoa. However, also for these contracts, as indicated in section 4.2.1.2.1 above, significant price divergences can be observed due to the different supply and demand dynamics applying to the underlying physical products. This limits the extent to which the short term correlation between the products which is observed can serve as a basis for according margin offsets. This appears to be confirmed by the fact that the Parties' clearing houses do not provide any intra-commodity margin offsets and there is no indication that there is any intention or incentive for this policy to change post-merger.
- (100) Even in those limited cases where, within soft commodities, cross-margining is offered, it does not play an important role in driving trading decisions. Indeed, past experience shows that in the commodity markets, which are already characterised by small size and liquidity compared to, for example, financial derivatives, cross margining is not a driving element for customers' trading choices: when in February 2007 NYX offered a physically delivered raw sugar contract with cross margining opportunities with its white sugar contract, it still failed to gain any liquidity due to customers' reluctance to split liquidity in raw sugar, and the contract was delisted. In fact the market investigation has confirmed that the traders of soft commodities derivatives are not so much interested in the cross-margining opportunities as their choice of contract or a venue to trade is not driven by the trading costs, including the cost of clearing and the amount of collateral to be posted. The primary driver of customer choice is whether the particular contract addresses a customer's specific hedging need and trading requirements. Customers in these markets will therefore generally trade on the exchange that offers the contract most suited to their needs, irrespective of the possibility of cross margining.⁴⁷
- (101) It follows that the fact that NYX and ICE may already have a pool of open interests in contracts which are to some extent correlated, providing the theoretical possibility for them to offer cross margining, does not seem to provide a particular competitive advantage in this case.
- (102) Finally, in *Deutsche Börse / NYSE Euronext* the Commission further considered that potential competition could have a significant constraining effect on an incumbent exchange when the other competitor has a similar membership base.⁴⁸ This element does not apply in the present case. In fact, there are very limited overlaps in terms of

⁴⁷ The Parties have also provided data on the rolling monthly correlation of daily hedged prices for ICE and NYX cocoa, coffee, sugar and canola/rapeseed contracts. These data show that the correlation of prices varies significantly over time and is very often low or even negative. According to the Parties, this variability is significant because it illustrates the differences between the contracts in terms of basis risk and exposure to the physical market and means that customers would face a serious disadvantage if they used the "wrong" contract to manage their price risk or execute their trading strategy.

⁴⁸ See Case COMP/M.6166 *Deutsche Börse / NYSE Euronext*, paragraph 539.

customers between ICE and NYX with respect to soft and agricultural commodities derivatives, as common customers are estimated by the Parties to account for less than [10-20]% of the total open interest held by each Party. Therefore, also from this point of view, the Parties are not particularly well placed to shift liquidity from each other.

- (103) Against this background, the Commission concludes that the proposed transaction does not give rise to serious doubts as to its compatibility with the internal market as a result of a possible loss of potential competition as regards soft and agricultural commodity derivatives.

Potential competition with cash settled contracts

- (104) If the relevant markets were considered to include both physically delivered contracts and cash settled contracts, *prima facie* it could be considered that the transaction entails a loss of potential competition [...].

- (105) However, this hypothesis can be rejected for the following reasons.

- (106) [...]

- (107) Second, the competitive threat exerted on incumbent physically delivered contracts by cash settled contracts seems to be fairly limited. This is because, as confirmed by the market investigation, the soft and agricultural commodity markets are driven by the cash and futures convergence principle. Therefore the embedded option to make or take physical delivery has a significant value to market participants, especially for commercial users which account for the majority of the liquidity in these markets. This is illustrated by the very limited success achieved by CME's cash settled contracts.⁴⁹ In the same vein, customers confirmed that they have strong preference for the physically settled contracts.

- (108) Third, the market investigation has not shown any particular advantage that the Parties might have in launching successful cash settled contracts compared to other exchanges. In this regard see above paragraphs (86) onwards of this decision.

- (109) Against this background, the Commission concludes that the proposed transaction does not give rise to serious doubts as to its compatibility with the internal market as a result of a loss of potential competition as regards soft and agricultural commodity derivatives [...].

4.2.3.2.2.U.S. equity index derivatives

- (110) Potential competition concerns can also be excluded with regard to U.S. equity index derivatives, in particular as regard the introduction of new products, because, post-transaction, the combined entity would still continue to face a strong competitive constraint by several exchanges already active in indices derivatives and with significant market positions and a broader product offering. This is the case of

⁴⁹ In any market where it offers cash settled contracts, CME has not achieved more than [0-5]% market share.

CBOE and NASDAQ, which are closer competitors to NYX than ICE because they are active in options, and CME, closer competitor of ICE than NYX because it is already active in futures and options on futures.

- (111) Against this background, the Commission concludes that the proposed transaction does not give rise to serious doubts as to its compatibility with the internal market as a result of a loss of potential competition as regards U.S. equity index derivatives.

4.2.3.2.3. OTC Clearing

- (112) As mentioned above, ICE is active in the provision of clearing services for OTC platforms. More precisely, ICE clears CDS derivatives which are traded OTC via brokers and submitted to ICE for clearing and it also makes clearing services available to certain OTC platforms with respect to energy, oil and natural gas/international coal trading. NYX is not active in the provision of these services.
- (113) The evolving regulatory framework will seek *inter alia* to move standardised OTC contracts to exchanges or electronic trading platforms. In particular, in the EU EMIR⁵⁰ has introduced an obligation for all standardised OTC derivatives to be cleared through a central counterparty ("CCP") or clearing house.
- (114) As indicated in *Deutsche Börse / NYSE Euronext*⁵¹ these regulatory developments will likely result in new opportunities for exchanges to compete in capturing derivatives volumes which would absent the regulatory changes stay in the OTC world.
- (115) In this context, as will be further explained in the next Section, prior to the announcement of the proposed transaction NYX was developing its internal clearing capability to establish its own CCP for clearing of all NYX's EU derivatives. [...]
- (116) In view of the proposed transaction these plans were put on hold and Liffe A&M signed an agreement with ICE Clear whereby ICE Clear Europe will provide clearing services for Liffe A&M on an outsourced basis when the existing LCH Ltd arrangements terminate.⁵² Despite this the merger cannot be considered as resulting in loss of potential competition in the market for OTC clearing.
- (117) Indeed, according to the approach followed in *Deutsche Börse / NYSE Euronext*⁵³ and in this decision, the derivative markets should be subdivided according to the underlying asset class comprising the whole series of contracts within each asset class. In this framework ICE would have a market share above [20-30]% only for clearing of OTC energy and CDS derivatives, [...].

⁵⁰ See footnote 7.

⁵¹ See Case COMP/M.6166 *Deutsche Börse / NYSE Euronext*, paragraph 1109.

⁵² In this regard, see more in detail the next Section.

⁵³ See Case COMP/M.6166 *Deutsche Börse / NYSE Euronext*, paragraph 444.

- (118) Against this background, the Commission concludes that the proposed transaction does not give rise to serious doubts as to its compatibility with the internal market as a result of a loss of potential competition as regards clearing of OTC derivatives.

4.2.3.3. Vertical effects

- (119) Whilst ICE has its own clearing houses, NYX has outsourced certain of its European derivative clearing services to LCH.Clearnet.⁵⁴
- (120) Already prior to its proposed merger with Deutsche Börse, NYX had taken the decision in principle to fully in-source all clearing functions for its EU derivatives markets through developing and expanding its internal clearing capability to establish an upgraded fully functional and self-sufficient CCP in anticipation of new European regulatory requirements for CCPs contained in EMIR ("Project Gemini"). Project Gemini was put on hold pending the outcome of the transaction with Deutsche Börse, since, had the merger completed the merged entity would have used Deutsche Börse clearing house, Eurex Clearing.
- (121) Following the Commission's decision to prohibit the planned merger with Deutsche Börse NYX announced its intention to transfer all clearing functions for its European derivatives markets in-house and was in the process of building its own clearing house: the plan was that clearing for its European derivatives would be carried out by the upgraded CCP from mid-2013. As part of this project, NYX announced its intention to terminate its outsourcing arrangements with LCH Ltd (entity of LCH.Clearnet) in March 2012⁵⁵ and formally gave notice to terminate the arrangements in June 2012. Formal termination notice had already been given to LCH SA in respect of NYX Continental European derivatives clearing in May 2010.
- (122) [...] Consequently, ICE Clear Europe and Liffe A&M entered into an agreement for the provision of clearing services when the existing arrangements with LCH.Clearnet will terminate. This agreement will remain in force even if the proposed transaction would not ultimately take place.
- (123) On the basis of all the evidences gathered it appears that NYX would not have continued with the current clearing arrangements for its London derivatives exchange as its outsourcing arrangement with LCH Ltd is due to expire at the end of June 2013 and could not be extended as it is not EMIR compliant.
- (124) In this context, given the counterfactual (i.e. the contract with LCH.Clearnet had already been terminated as regards derivative clearing and NYX's intention to build-up its own clearing house) the Commission concludes that the proposed transaction does not give rise to serious doubts as to its compatibility with the internal market as a result of vertical foreclosure effects in relation to clearing of derivatives.

⁵⁴ Despite of not being fully vertically integrated with respect to clearing, NYX already has operated as a vertical silo, since access to the margin pool for contracts executed on NYX platforms was not granted to contracts executed on NYX competitors's platforms.

⁵⁵ See NYX' website, <http://www.nyse.com/press/1332846019834.html>, visited on 13 June 2013.

4.3. BOND TRADING

4.3.1. Product market definition

- (125) *Bonds* (fixed income securities, or debt instruments) guarantee the right to repayment, with interest, of the borrowed amount, at a specific date. They can be issued by governments (public issuers), semi-private entities (such as public law companies) or private companies.
- (126) In *Deutsche Börse/NYSE Euronext*, the Commission distinguished bond trading from equity trading, but left open whether the market should be further segmented according to (i) whether the venue on which an instrument is traded is the same on which that instrument was issued (primary vs. secondary markets); (ii) the execution environment (OTC vs. regulated markets and MTFs); (iii) the type of instrument (government bonds, corporate bonds, etc.); etc.⁵⁶
- (127) The Parties considers that for the purpose of defining the relevant market for bond trading it is not appropriate to distinguish between different types of trading venues or types of bonds traded for the purpose of assessing the present transaction. Indeed, according to the Parties, these distinctions would not be justified since they are not considered by the relevant regulations, nor are relevant for traders and OTC trading represents the vast majority of bonds trading. In any event, according to the Parties the precise product market definition can be left open in the current case.
- (128) No affected market would arise under any possible market definition.
- (129) In light of the above, for the assessment of this case, the Commission concludes that it is not necessary to conclude on the exact scope of the product market since the proposed transaction does not give rise to serious doubts as to its compatibility with the internal market under any possible market definition.

4.3.2. Geographic market definition

- (130) In *Deutsche Börse / NYSE Euronext*, the Commission found that investors residing in a specific country also use trading venues in other countries and therefore concluded that the relevant geographic market is at least EEA-wide.⁵⁷
- (131) The Parties submit that in the current case the precise geographic market definition can be left open since their combined markets shares should not reach 15% under any possible market definitions.
- (132) No affected market would arise under any possible market definition.
- (133) In light of the above, for the assessment of this case, the Commission concludes that it is not necessary to conclude on the exact scope of the geographic market since the

⁵⁶ See Case No. COMP/M.5495 *Unicredit/Banca IMI/EuroTLX SIM JV* and *Deutsche Börse / NYSE Euronext*, paragraphs 114-116.

⁵⁷ See Case No. COMP/M.5495 *Deutsche Börse / NYSE Euronext*, paragraph 84.

proposed transaction does not give rise to serious doubts as to its compatibility with the internal market under any possible market definition.

4.3.3. *Competitive assessment*

- (134) Since no affected market would arise under any possible market definition, the Commission concludes that the proposed transaction does not give rise to serious doubt as to its compatibility with the internal market in relation to bond trading.

4.4. **TECNOLOGY SERVICES**

4.4.1. *Product market definition*

- (135) *Front-end trade execution services* involve the provision to market participants of trade execution functionality so that trading opportunities can be assessed and trades can be executed on exchanges and other trading platforms. On most exchanges (including ICE and NYX), these services are provided by independent software vendors ("ISVs") who enable trading participants to view multiple products, across multiple exchanges/platforms, on one screen. In some cases, front-end trade execution services can also be provided by the exchange via a proprietary solution. Only ICE is active in the provision of these services to its own trading venues and to third parties.
- (136) *Connectivity services* to an exchange platform are an input for the provision of front-end trade execution services. Such services consist in the provision of physical infrastructure allowing market participants to be connected to a trading venue, including co-location, proximity hosting and network connectivity. Both Parties are active in the provision of these services.
- (137) In *Deutsche Börse / NYSE Euronext* the Commission looked into technology products and services offered to the financial services industry in view of the overlap between the Parties' offering in that case. In that Decision the Commission found that co-location services are likely to be venue specific and not substitutable.⁵⁸ However the Commission ultimately left the market definition open for all the possible segments of technology products and services.⁵⁹
- (138) The possible issue in the case at hand relates to the vertical relationship between ICE's front-end trade execution services and connectivity to NYX's exchanges, whilst no overlap exist between the Parties' activities in these markets. The worst case scenario for the assessment of this vertical relationship would be the one where the downstream market where ICE is active is the narrowest possible, i.e. front-end trade execution services, and NYX is sole upstream provider of connectivity services to its own trading venues. In such a case the transaction would result in a vertically affected market downstream.

⁵⁸ See Case No COMP/M.6166 *Deutsche Börse / NYSE Euronext*, paragraphs 186 ff.

⁵⁹ See Case No COMP/M.6166 *Deutsche Börse / NYSE Euronext*, paragraph 180.

(139) However, competition problems can be excluded even under this worst case scenario. Therefore, for the assessment of this case, the Commission concludes that it is not necessary to conclude on the exact scope of the product market since the proposed transaction does not give rise to serious doubts as to its compatibility with the internal market under any possible market definition.

4.4.2. *Geographic market definition*

(140) In *Deutsche Börse / NYSE Euronext* the Commission has considered EEA wide and worldwide markets as possible alternatives, but left the exact geographic scope open.⁶⁰

(141) Likewise, for the assessment of this case, the Commission concludes that it is not necessary to conclude on the exact scope of the geographic market since the proposed transaction does not give rise to serious doubts as to its compatibility with the internal market under any possible market definition.

4.4.3. *Competitive assessment*

(142) As mentioned, only ICE is currently active in the provision of front-end trade execution technology services. More precisely it owns a proprietary front-end trade execution technology solution known as WebICE. WebICE allows access to ICE's markets. Moreover, ICE provides WebICE to third party, non-exchange markets operated and overseen by ICAP Energy Limited ("ICAP"), Platts (a division of McGraw-Hill Financial) ("Platts") and Griffin Markets Limited ("Griffin"), respectively, on a white label basis.

(143) NYX does not own or provide a proprietary front-end execution technology (either in respect of its own exchanges or those of third parties). Customers wishing to execute trades on NYX's exchanges must contract directly with a third party ISV or develop their own front-end execution solution (which is the case for some larger customers). Currently over 30 ISV providers have been approved for these purposes on NYX's markets.⁶¹

(144) During the market investigation concerns were raised as regards possible customer foreclosure of ISV providers with respect to NYX's platforms in case the merged entity would extend to NYX's platforms the front-end trade execution technology solution currently offered by ICE.

(145) However, it is unlikely that any such extension would result into customer's foreclosure.

⁶⁰ See Case No COMP/M.6166 *Deutsche Börse / NYSE Euronext*, paragraph 180.

⁶¹ For a list of ISV providers with regard to NYX's venues see NYX's website, https://europeanequities.nyx.com/sites/europeanequities.nyx.com/files/nyse_euronext_cash_-_isv_list_-_nov_2012.pdf and <https://globalderivatives.nyx.com/connecting/utp/isv>, visited on 14 June 2013.

- (146) First, ICE's merchant market presence in the market for front-end trade execution technology services is marginal (less than [0-5]% at both worldwide and EEA levels.⁶²)
- (147) Second, already today WebICE is one of multiple front-ends that can be used to access ICE's markets.⁶³ Whilst the number of daily connections to ICE's platforms via WebICE may have increased in the last years, ⁶⁴ still in 2012 this accounted for less than [15-25]% of futures trade orders across all ICE venues.
- (148) Third, it is of interest for an exchange to maximise distribution for and access to its markets, because it is by capturing the largest possible number of transaction orders that it maximizes its revenues. Therefore, it would appear not to make any commercial sense for an exchange to foreclose ways in which this can be achieved.
- (149) As a result, given the limited reach of ICE's front-end trade execution technology services and the fact that already pre-merger ICE grants connectivity to many ISV providers with regard to its own platforms, the Commission considers it unlikely that the proposed transaction would result into customer's foreclosure. Even if the merged entity would had the ability to foreclose access to NYX's venues it does not appear that it would have an incentive to do so.
- (150) Against this background, the Commission concludes that the proposed transaction does not give rise to serious doubts as to its compatibility with the internal market as a result of vertical foreclosure effects in relation to front-end trade execution technology services.

5. CONCLUSION

- (151) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1) (b) of the Merger Regulation.

For the Commission

⁶² Parties' estimates.

⁶³ For a list of ISV providers with regard to ICE's venues see ICE's website, <https://www.theice.com/isv.jhtml>, visited on 14 June 2013.

⁶⁴ According to the Annual Reports on Form 10-K filed with the SEC, the number of daily connections increased from 8,000 in 2010 to over 10,000 in each of 2011 and 2012.

(signed)
Joaquín ALMUNIA
Vice-President