II-6.22: The American Department of Justice informed Nasdaq and ICE that it rejected their IPO on NYSE Euronext because of its anticompetitive effects, and the two companies therefore abandoned their plan. NYSE Euronext and Deutsche Börse have decided to merge.

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MAIN INFORMATION

In May 2011, Nasdaq OMX and its partner Intercontinental Exchange (ICE) were authorized by their respective boards of directors to perform a tender offer on the stock market operator NYSE Euronext. The American Department of Justice was worried about the consequences that this operation would have on competition, and despite the remedies proposed by the two companies, notified them that it would refuse the merger. On May 16, 2011, this potential refusal was enough for Nasdaq OMX and ICE to abandon their plan. This game of signals demonstrates the power of interregulation between merger review and the regulation of tender offers.

CONTEXT AND SUMMARY

Just as the global banking market is becoming more concentrated, the market for stock markets is also becoming more consolidated. But corporation's desire for mergers and acquisitions is hindered by merger review, which is usually considered to be part of competition law. Financial markets are owned by corporations in competition with one another to attract publicly listed corporations, securities, and investors. Stock markets compete to reduce costs, and increase efficiency and security in order to develop their attractiveness on the global market.

The stock market operator Nasdaq OMX, specialized in technological companies, had unsuccessfully tried to acquire the London Stock Exchange (LSE) in 2006.

In May 2011, Nasdaq OMX launched a joint tender offer with Intercontinental Exchange (ICE) in order to take over NYSE Euronext. The amount offered was around eleven billion dollars.

The alliance between the two companies was simply intended to take over the target company, and the project was to dismantle the target. Nasdaq OMX would take over NYSE Euronext's share listing and trading activities on all markets, while ICE wanted to take over all activities relating to derivatives. The boards of directors of both companies gave their green light in early May.

But, merger review is an obstacle course that companies often get through only by proposing "remedies" in order to reduce the structural effects that the takeover engenders on the concerned market. In this case, during negotiations with the American Department of Justice, the prospective purchasers had offered to divest the self-regulation body that governs these financial markets. In mid May, the Department of Justice informed the companies concerned by the tender offer that if they continued and succeeded in acquiring NYSE Euronext, they would be prosecuted under American antitrust law. The Department of Justice justified its

position by saying that the takeover would have caused a situation in which competition on the market for listing publicly traded companies' shares would be substantially eliminated.

On May 16, 2011, the potential acquirers therefore decided to abandon their tender offer in order to avoid prosecution.

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BRIEF COMMENTARY

This is a perfect example of interregulation's apparent aporia and its de facto resolution. Indeed, there has long been concern over the shock between the specificities of takeover bids for listed corporations—a mechanism that is part of corporate law—and merger review, which is considered to be part of competition law. Even though the refinement of legal systems, following the English model, often means takeover bids only take place when merger review is likely to succeed, it is true that this expectation is a handicap (without taking the possibility of appeal into account), because shareholders have less incentive to sell their shares to bidders when they believe merger review is likely to be a failure, and they cannot know whether or not such review is likely to succeed or not at the time they purchased their shares. This is why reality mirrors law: as we can see here, the authority that regulates competition (merger review is a true form of regulation since it affects ex ante the market's structures) gives a "signal" that the merger will be refused even before the takeover bid has been launched. Of course, this is simply a piece of information. Companies, since they are not legally bound by this piece of information, could launch their takeover bid in perfect legality in accordance with corporate law. But what is the use? If the body that has sent the message is sufficiently credible—and the American Department of Justice is—it will not change its mind. This is why companies prefer to abandon their takeover bid. Therefore, the regulator's credibility is sufficient so that the signals it emits are binding. Furthermore, authorities have the power to inverse the calendar: before launching a takeover bid for more than eleven billion dollars, companies want to make sure that the bid will be approved, even though the law did not intend the sequence of events to take place in this order. This is "cognitive ex ante" at work (1). Therefore, even though merger review should legally come last, it comes first because it is more economically rational this way: economic agents anticipate the decision in order to diminish their risk, especially when these risks are legal. In another perspective, we observe that general law naturally intervenes when specialized branches of law no longer fulfill their purpose. We can wonder whether general competition law, meaning the law applicable to ordinary markets for goods and services, has not intervened here in order to palliate financial regulators' lack of power.

Indeed, financial regulators are principally in charge of preventing systemic risk. But, poorly managed stock markets are a potential source of major systemic risk, and the bankruptcy of a stock market operator would cause the failure of the global financial system. Stock market operators' concentration, like bank concentration, increases systemic risk. And yet, financial regulators are not in control of this phenomenon of consolidation of stock markets. One observes that the authority in charge of merger review takes over in order to palliate the silence of the law. This is why the American Department of Justice can only justify its decision by citing the substantial reduction of competition, since it cannot explicitly say that the reason is the substantial increase in systemic risk. But, this is the true reason behind the

decision. For all of these reasons, this is a perfect example of the success of interregulation. Since the Department of Justice's refusal, NYSE Euronext and Deutsche Börse have announced that they would merge. On July 7, shareholders of the former approved the merger, and on July 14, shareholders of the latter did the same. The European Commission immediately began merger review proceedings, and therefore did not perform the aforementioned inversion of the normal sequence of events. The first phase of review will terminate on August 4, 2011, and phase two will last for a number of months, during which uncertainty will reign. What is the best modus operandi? From a strictly legal standpoint, the European solution is certainly better. But, from a standpoint of efficient regulation, the American approach seems preferable.

1. FRISON-ROCHE, M.-A., Le couple Ex Ante – Ex Post, justificatif d'un droit spécifique et propre de la régulation, in Les engagements dans les systèmes de régulations, coll. "Droit et Economie de la Régulation", vol.4, Presses de Sciences-Po / Dalloz, 2006, pp. 33-48.