II-6.28: The European Commission prohibited the merger between NYSE Euronext and Deutsche Boerse.

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MAIN INFORMATION

On February 1st, 2012, the European Commission rejected proposed merger between the NYSE-Euronext and Deutsche Boerse. The Commission did it, considering that, on the relevant market of financial derivatives, the concentration would give the new firm almost monopoly and that the proposed remedies, notably the access for competitors to the clearing house, are Insufficient.

CONTEX AND SUMMARY

Financial markets are private infrastructure, which are controlled by the competition authorities in case of structural change, that is to say during movement of mergers. This is one of the contact points between competition law and financial law, in their structural dimension. Indeed, merger control is one of the ways in which competition law interferes with the regulation.

When NASDACQ and NYSE-Euronext in 2011 decided to merger, the Justice Department put the kibosh, by a simple press release in May 2011. It stated in advance that if this project went ahead more, it would be stopped by a refusal of merger. Companies had informed that they immediately gave up. NYSE-Euronext indicated that the merger would take place with Deutsche Börse.

The financial logic of the operation could more be supported because of the euro area. Today, this zone is marked by the coincidence between the institutional and political will of financial and banking common Europe with building a business and prevailing financial integrated market. But the logic of competition is not necessarily the same that of the financial logic. That is why the process started with the European Commission by a notification dated June 29, 2011, was uncertain.

The Commission, whose decision was not yet entirely public, because the competition authority has not organize with the parties that the information will remain secret because secrecy business, has identified the different relevant markets and measured for each concentration risks that could make them run.

Thus, concerning the equity markets or bond markets, the Commission found that the concentration would not produce a significant anticompetitive damage. It found that the situation was different in regard to the specific market of derivatives.

Indeed, these products circulate in a global market. But the first two world stock exchanges on which investors operate on financial derivatives, namely Eurex and Liffe, depend on companies that want to merger: Eurex is the platform of Deutsche Borsche and Liffe is operated by Euronext. This cause difficulty because, in addition, they control the clearing houses: so the process from negotiation to compensation is vertically integrated.

The companies then offered remedies in the second phase of the control procedure of concentration, opened by the European Commission on August 4, 2011. They offer the sale of assets, corresponding to European derivatives on individual stocks, to enable a company to acquire them, this new entrant entering the market to compete with the dominant companies. The European Commission has estimated that this structural commitment was not enough, because the assets sold were too limited and the company that had acquired had not been viable to compete with the dominant operator.

The second proposed remedy was not structural but behavioral, companies offering to open their clearing house to certain categories of new financial products. Again, the European Commission was not satisfied, because the effectiveness of the opening of the clearing house to the other competitors is a major issue; for the Commission, it did not acceptable that this access does not extend to existing financial products in competition.

As a result, the Commission decided to reject outright the project of concentration.

BRIEF COMMENTARY

First, we find that merger control is certainly the most powerful tools available to Governments on private power, some powerful they may be. The power to say No is the greatest of powers. The first is that the powers of speech negatively. It is the Government who hold. We have here a perfect example, as companies powerful, globalized, with all other businesses depend for their financing, are themselves dependent on the refusal of the administration.

Secondly, we can observe once again that merger control is a regulatory tool, in that it is ex ante, but also in the sense it directly organizes the market structures and not just prevents behaviors of firms which the power market will increase due to the concentration. In this, the merger control is currently the subtitution of an industrial policy that Europe still fails to develop.

Now, how the European Commission argues she ? To understand what we can, if it considers that the remaining competitors may have had, through a behavioral remedie, access to the clearing house, to close out all operations for financial derivatives, then concentration would have been eligible.

To understand this reasoning a contrario, the concentration rejecting the merger only because companies didn’t want offer access to new business to clearing house for all financial products, it should be useful to return to the description by the Commission of what is technically the financial market. It describes the technical system as producing a "vertical silo" offering to dominant market firms market from negotiation to compensation, thank to this economic and technical integration.

The firms tried to obtain the authorization because the merger would increase the liquidity on the financial market, but the European Commission estimated that it wasn’t proved and it is the competition which could increase this liquidity and not a concentration of operators.

If we take the analysis not in substance but in its method, one observes that the Commission rejects the argument made by companies that increased liquidity would have increased product concentration, asserting it is competition that increases liquidity in a market and not the effect of size and growth efficiency. As such, it performs well as a competition authority and, in the same way that bank supervisors are entrusted with the bank failures, one wonders if we should not entrust the European financial supervisory merger control in a subject in which they would likely use the same methods.

In addition, probably for a financial supervisor, the financial market is itself a competing good, and the investor does not choose between two places of the same type but between several types of place, that the technique relevant market, specific competition law, which continues to segment, can hardly consider.

More and thirdly, what seems most radically criticized the European Commission to businesses, is the vertical integration. Conversely, the merger would be better accepted, even though many doubt about behavioral remedies, if firms were engaged by a behavior remedy for all competitors access to clearing houses actually regarding all financial derivatives.

We are exactly a reasoning for a liberalization in the network industry.

Forward, that does not allow the Commission to apply the same reasoning in the consolidation of financial markets, only because we have a technical vertical integration. Yet global competition between certain types of investment could be justified only if the European powers to effect global market. But vertical integration was an original sin in telecommunications, electricity and gas. It seems to be today the same way, using the same method of reasoning, for financial matters.

The solution, which the Commission regrets the lack of adoption is universal access to the clearing house, exact counterpart of universal access to the transmission system in telecommunication or energy sectors.

The logical error is that we are not in a logic of market liberalization, in which the adminitration would break the power of historic vertically integrated companies. We are in the opposite case: the construction of a European integrated financial market. This seemed to lead to a favorable solution to the European power. We understand that the North American regulator did not have wanted. No one understands the least from the European regulator.