UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Antitrust Division
U.S. Department of Justice
450 Fifth Street, NW, Suite 7100
Washington, DC 20530

Plaintiff,

v.

DEUTSCHE BÖRSE AG,
Mergenthalerallee 61
65760 Eschborn
Germany

and

NYSE EURONEXT,
11 Wall Street
New York, NY 10005

Defendants.

Case: 1:11-cv-02280
Assigned To : Howell, Beryl A.
Assign. Date : 12/22/2011
Description: Antitrust

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action pursuant to the antitrust laws of the United States to enjoin the proposed merger of Deutsche Börse AG ("DB") and NYSE Euronext ("NYSE") and to obtain such other equitable relief as the Court deems appropriate. The United States alleges as follows:

NATURE OF ACTION

1. DB is among the largest operators of financial exchanges in the world. While most of its businesses are in Europe, DB, through various subsidiaries, is also the largest unitholder of Direct Edge Holdings LLC ("Direct Edge"), the fourth-largest operator of stock exchanges in the United States. Direct Edge competes head-to-head with NYSE and is an exchange innovator, leading in technology, pricing, and in the development of exchange models.

2. NYSE operates some of the oldest, largest, and most prestigious stock exchanges in the United States. It stands at the center of American financial markets, with its exchanges handling roughly a third of the equities traded daily in the United States, and considerably more for certain equities and certain times of day. NYSE exchanges list the vast majority of the listed exchange-traded products, including the majority of exchange-traded funds, and they supply key market data to customers making investment decisions.

3. On February 15, 2011, NYSE and DB agreed to merge in a transaction worth roughly $9 billion. NYSE and DB propose to combine under a new Dutch holding company ("NewCo"), which would be the largest exchange group in the world, with dual headquarters in Frankfurt and New York. NewCo would own 100% of NYSE and 31.54% of Direct Edge.

4. The proposed transaction would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, because it would substantially lessen competition and potential competition in at least three lines of commerce in the United States: (a) displayed equities trading services; (b) listing services for exchange-traded products ("ETPs"), including exchange-traded funds ("ETFs"); and (c) real-time proprietary equity data products.

JURISDICTION, VENUE AND COMMERCE

5. The United States brings this action under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to prevent and restrain defendants from violating Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

6. The Court has subject matter jurisdiction over this action and the defendants pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, and 28 U.S.C. §§ 1331, 1337(a), and 1345. NYSE and DB provide and sell displayed equity trading services and real-time proprietary equities trading data. NYSE also provides and sells listing services for exchange traded products. Sales of these services in the United States represent a regular, continuous, and substantial flow of interstate commerce, and have a substantial effect upon interstate commerce.

7. This Court has personal jurisdiction over each defendant and venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. §§ 1391(b)(1) and (c). Defendants transact business within the District of Columbia. DB and NYSE acknowledge personal jurisdiction in this District and consent to venue.

DEFENDANTS AND THE TRANSACTION

8. DB is a German *Aktiengesellschaft* that operates financial exchanges and related businesses in the United States and Europe. It generates revenue from, among other things, listing fees, stock trading transaction fees, market data licensing fees, and technology licensing arrangements. Through its subsidiaries, DB is the largest holder of equity in Direct Edge, a leading stock exchange operator in the United States. DB owns 50% of the equity and controls Frankfurt-based Eurex Group, a leading European derivatives exchange operator. DB has announced an agreement to buy the remaining equity in Eurex after DB completes its merger

with NYSE. Eurex owns International Securities Exchange Holdings, Inc. ("ISE"), a leading options exchange in New York that also owns a 31.54% equity interest in Direct Edge. In 2010, DB's subsidiaries earned substantial revenues from sales in the United States.

9. NYSE is a publicly traded Delaware corporation with its principal place of business located in New York, New York. The company operates financial exchanges in the United States and Europe. In the United States, NYSE operates three stock exchanges: (i) the New York Stock Exchange LLC; (ii) NYSE Arca, Inc., an all-electronic exchange; and (iii) NYSE Amex LLC, an exchange that lists the stock of primarily small- and medium-sized companies. NYSE generates revenue from, among other things, listing fees, stock trading transaction fees, market data licensing fees, and technology licensing arrangements. In 2010, NYSE earned over $3 billion in total revenues from within the United States.

10. Direct Edge is a Delaware limited liability company with its principal place of business in Jersey City, New Jersey. Direct Edge, through its subsidiary Direct Edge Holdings, Inc., owns and operates two leading U.S. stock exchanges, EDGA Exchange, Inc. and EDGX Exchange, Inc. Direct Edge is majority-owned by a group including ISE, Goldman Sachs Group Inc., Citadel Investment Group LLC, and Knight Capital Group Inc. ISE owns 31.54% of Direct Edge and holds certain key voting and special veto rights, such as the right to veto entry by Direct Edge into options trading. ISE also has the right to appoint three members to the Direct Edge board of managers and one member to each of the corporate boards of EDGA Exchange, Inc. and EDGX Exchange, Inc. Goldman Sachs, Citadel, and Knight each own 19.9% of Direct Edge. The remaining 8.76% is owned by a group of five brokers, including affiliates of JP Morgan Chase & Co. (through LabMorgan Corp.), Bank of America (through Merrill Lynch L.P. Holdings, Inc.), Nomura Securities International, Inc., Deutsche Bank USA (through DB US

Financial Markets Holding Corporation), and Sun Partners LLC. Direct Edge's exchanges compete head-to-head with the NYSE exchanges. In 2010, Direct Edge earned substantial revenues in the United States.

11. DB and NYSE have proposed to merge into a NewCo that will house all their current corporate holdings. NewCo will be a Dutch holding company, with dual headquarters in New York City and outside Frankfurt, Germany. Combined annual net revenues of NewCo are expected to be over $5 billion, with revenue sources including market data and technology; equities trading and listings; derivatives trading and listings; and settlement and custody. NewCo will own many of the world's leading brands in finance. Its post-merger leadership will be split between former executives from both NYSE and DB. The current DB Chief Executive Officer will stay on as Chairman, and the current NYSE CEO will remain CEO of the combined entity.

RELEVANT MARKETS

Displayed Equities Trading Services

12. Displayed equities trading services comprise a relevant antitrust product market and a "line of commerce" within the meaning of Section 7 of the Clayton Act. These services include providing mechanisms and ancillary services to facilitate the public purchase and sale of exchange-traded stocks (those defined as "NMS stock" under Rule 600(b)(47) of Regulation NMS, 17 C.F.R. § 200 *et. seq.*). These services are offered mainly by national stock exchanges registered under Section 6 of the Securities Exchange Act of 1934, 15 U.S.C. § 78f, and also by electronic communications networks ("ECNs") regulated by Regulation ATS, 17 C.F.R. §242.300 *et seq.*

13. Several key attributes separate displayed from undisplayed or "dark" equities trading services, including the continuous pre-trade publication of the best-priced quotations for buying and selling exchange-traded stocks in a national consolidated data stream, the display of certain customer limit orders (offers to buy and sell stock at particular prices), and the provision of deep and reliable liquidity for a broad array of exchange-traded stocks. Displayed trading venues, in particular those operated by NYSE, The NASDAQ OMX Group, Inc., Direct Edge, and BATS Global Markets, Inc. form the backbone of the American national market system and over the past several years have accounted for roughly 65% to 75% of the overall average daily trading volume in the United States. Broker-dealers, institutional investors, and other customers rely on displayed trading venues to provide meaningful price discovery for exchange-traded stocks and to act as exchanges of last resort, especially for thinly traded stocks, in times of market volatility or stress.

14. Undisplayed trading services account for roughly 25% to 35% of total average daily trading volume and serve a very different purpose for investors: to allow for anonymous matching of orders without publicly revealing the intention to trade before execution. Institutional investors and other traders use these services to minimize the likelihood that their trades will cause the stock price to move against their interest. Most of the undisplayed trading centers offer less liquidity on most stocks (indeed, an alternative trading system providing undisplayed trading must account for less than 5% trading volume in a stock or the venue automatically becomes displayed by regulations promulgated by the U.S. Securities and Exchange Commission ("SEC")) and base their prices on those prevailing in the displayed equities trading centers.

15. The relevant geographic market is the United States. Trading equities on a foreign exchange is not an adequate substitute for trading on an exchange in the United States. Trading on an exchange outside the United States exposes traders to risks like foreign exchange risk, country risk, reputational risk, different or potentially lax regulatory environments for trading, lack of analyst coverage, different accounting standards, time differences, and language differences, among other things. Additionally, the majority of American companies choose to list on domestic exchanges. Therefore, to trade most publicly-listed American stocks, investors must use stock exchanges located in the United States.

16. The market for displayed equities trading services in the United States satisfies the hypothetical monopolist test. A profit-maximizing monopolist in the offering of displayed equities trading services in the United States likely would impose at least a small but significant and non-transitory increase in the price of such services. Not enough customers would switch to alternative means of trading equities in undisplayed trading centers or foreign exchanges to render this price increase unprofitable.

Listing Services for Exchange-Traded Products

17. The provision of ETP listing services constitutes a relevant antitrust product market and a "line of commerce" within the meaning of Section 7 of the Clayton Act. An ETP is typically an exchange-listed equity security instrument other than a standard corporate cash equity, the performance of which is designed to track another specific instrument, asset or group of assets, such as a market index or a selected basket of corporate stocks. ETPs are typically sponsored by firms that monitor and manage the composition and performance of the ETP. The most popular type of ETP today is an exchange-traded fund, an equity fund with a form of exchange-listed securities (often trust units) that can be traded like a stock but that is also

benchmarked against another stock, index or other asset. Buying an ETP offers a simple way for investors to diversify their portfolios without having to buy each individual corporate stock or other financial instrument directly. For instance, the SPDR S&P 500 exchange-traded fund tracks the S&P 500 U.S. stock index, which comprises widely held American stocks. ETFs and other ETPs are very popular and serve as the cornerstone of many individual investors' portfolios.

18. The relevant geographic market is the United States. Listing an ETP on a foreign exchange is not an adequate substitute for listing on an exchange in the United States. U.S. sponsors of ETPs overwhelmingly choose to list domestically, because it allows them to build brand awareness and reputation and stay close to U.S. capital markets and investors in the United States considering the purchase and sale of ETFs and other ETPs, as well as the analysts that cover ETPs and ETFs and, in many cases, the underlying or related assets, indexes, or products.

19. The market for ETP listing services in the United States satisfies the hypothetical monopolist test. A profit-maximizing monopolist that was the only present and future firm in the offering of ETP listing services in the United States likely would impose at least a small but significant and non-transitory increase in the price of ETP listings. Not enough customers would switch to alternatives to render this price increase unprofitable.

Real-time Proprietary Equity Data

20. Real-time proprietary equity data is a relevant antitrust product market and a "line of commerce" within the meaning of Section 7 of the Clayton Act. Access to affordable, reliable and timely data about the stock market is essential for informed stock trading. NYSE and Direct Edge are among only four major competitors that aggregate and disseminate certain market data to brokers, dealers, investors, and news organizations. They sell (or with little lead time could

easily sell) competing proprietary market data products derived from trading activities occurring both on and off their exchanges.

21. The product market for real-time proprietary equity data consists of what is commonly referred to in the industry as "non-core" data. Market participants generally refer to two broad categories of critical market data: "core" and "non-core." Core data refers to the transaction data the SEC requires stock exchanges to report to securities information processors for consolidation and public distribution, including the current best bid and offer for each stock on every exchange and information on each stock trade, including the last sale. Non-core data includes trading volume and "depth of book" data that certain exchanges collect and sell, *i.e.*, the underlying quotation data on any given exchange. Non-core data helps traders determine where liquidity for a given stock exists during the day and the depth of that liquidity. Each exchange (or other trading platform) owns non-core data and can distribute it voluntarily for a profit in competition with data from other exchanges. Non-core data products can be made to replicate core data and exchanges can package and sell both core and non-core data together.

22. The market for real-time proprietary equity data satisfies the hypothetical monopolist test. A profit-maximizing monopolist in the offering of real-time proprietary equity data likely would impose at least a small but significant and non-transitory increase in the price of its equity data products. Not enough customers would switch to other products or services to render this price increase unprofitable.

23. The relevant geographic market is the United States. Real-time proprietary equity data in this context relate only to domestic trading of U.S.-listed stock. Customers needing real-time proprietary equity data relating to U.S.-listed stocks cannot turn to foreign alternatives.

ANTICOMPETITIVE EFFECTS

NYSE and Direct Edge Are Head-to-Head Competitors

24. NYSE and Direct Edge compete head-to-head in displayed equities trading services and in the provision of real-time proprietary equity data products. Direct Edge over the years has been a force in modernizing stock trading with cutting edge technology, faster trading times, lower prices, and new market models. Direct Edge began in 1998 as an electronic communication network named Attain. By 2007, it was a major trading venue owned and supported by broker-dealers Knight Capital, Citadel and Goldman Sachs. These broker-dealers used Direct Edge as a counterweight to the exchange duopoly of NYSE and NASDAQ. In December 2008, Direct Edge and ISE agreed that ISE would buy part of Direct Edge and Direct Edge would take control of the struggling ISE Stock Exchange. In March 2010, Direct Edge received approval from the SEC to convert its two ECNs into national securities exchanges under Section 6 of the Securities Exchange Act of 1934 ("Exchange Act").

25. Direct Edge was first to offer two trading platforms using the same technology, but with different pricing schemes. EDGA historically has been operated as a lower cost exchange, being typically free or nearly free for many traders to make offers to buy or sell stock at certain posted prices (*i.e.*, "post liquidity") as well as for customers to trade against these offers and buy and sell stock (*i.e.*, "take liquidity"), making EDGA attractive to traders sensitive to execution charges. Approximately one-third of Direct Edge volume trades over EDGA. EDGX historically has offered a more traditional pricing structure whereby the exchange normally pays customers to post liquidity and charges a fee for them to take liquidity. Although the two platforms have different pricing structures and cater to different segments, they share technology, support, code, and data centers.

26. NYSE has responded to Direct Edge's aggressive tactics in part by improving its own technology and changing its pricing. For example, NYSE in 2009 replaced its trading system in an effort to regain business lost mainly to the sophisticated electronic platforms at Direct Edge and BATS. The new system was faster, reducing transaction processing time to less than 10 milliseconds, which at the time made NYSE roughly as fast as its rivals. NYSE largely was able to stabilize its share of trading volume by implementing a new market model and introducing a new pricing scheme, which gave rebate incentives to certain designated market makers (*i.e.*, those market participants that agreed to buy and sell particular stocks at certain prices for certain amounts of time).

27. Direct Edge's investors, mainly broker-dealers, use its exchanges to put downward pressure on trading fees at NYSE and other exchanges. When possible, Direct Edge's broker-dealer investors often send trades to a Direct Edge exchange in order to keep their overall transaction costs down. In this way, Direct Edge helped spur a 2009 pricing war that substantially reduced the cost of trading stocks in the United States.

28. NYSE and Direct Edge also are head-to-head competitors in the provision of real-time proprietary equity data. Both are well-situated to offer new real-time equity data products and equity data products that replicate portions of core data offerings, but with even faster feeds.

Direct Edge Is A Potential Competitor to NYSE In Listing Services for Exchange-Traded Products

29. Direct Edge is a potential competitor to NYSE in listing services for ETPs. An ETP, including an ETF, must be listed on a registered stock exchange in order to be widely-traded in the United States. Exchanges typically compete for listings based on market structure, market maker incentives, marketing, and other associated services.

30. NYSE dominates the business of providing listing services for ETPs. NYSE's major competitors are NASDAQ, with a small share, and recent entrant BATS. Direct Edge, as a leading operator of registered stock exchanges, is uniquely situated for entry and already imposes competitive discipline on NYSE: its potential entry has already affected NYSE decisions to innovate and its pricing decisions in its ETP listings business.

This Merger Would Substantially Lessen Competition

31. NYSE and Direct Edge are currently vigorous competitors and closely monitor each other's competitive positions in at least two highly-concentrated markets. They are also close potential competitors in a third highly-concentrated market, listing services for ETPs, in which NYSE is a dominant player. Upon consummation of the proposed transaction, NewCo would own NYSE and would be able to control NYSE's management decisions.

32. Upon consummation of the proposed transaction, NewCo also would become, through ISE, the largest equity owner and most influential member of Direct Edge. NewCo would be able to appoint three of the eleven Direct Edge managers, and one representative to each of the EDGA and EDGX exchange's respective corporate boards. NewCo would have important ancillary rights at Direct Edge: veto rights over certain major corporate actions, representation on key committees, and shareholder rights under corporate law, such as the right

to file shareholder derivative lawsuits. NewCo also would have access to Direct Edge's non-public, competitively sensitive information, and to the company's officers and employees. NewCo's ownership interests and associated rights would give it influence over Direct Edge's management decisions.

33. NewCo's presence on the Direct Edge boards would also likely chill board-level discussions of competition with NYSE. Direct Edge was formed, in part, as a customer-owned foil to NYSE and NASDAQ. When NYSE or NASDAQ fails to innovate or price competitively, broker-dealers can encourage Direct Edge to innovate or can shift their business to Direct Edge. If a NYSE-affiliate were sitting on Direct Edge boards, the broker-dealer board members would likely not want to discuss or reveal Direct Edge's potential innovations or other competitive initiatives targeting NYSE.

34. NewCo would have the incentive and ability to use its ownership, influence, and access to information as to both NYSE and Direct Edge to reduce competition between the companies in markets where they are significant competitors or potential competitors, resulting in an increase in prices or a reduction in innovation and quality for a significant number of trading, listings, and data customers.

ENTRY

35. Supply responses from competitors or entry of new potential competitors in the relevant markets—displayed equities trading services, ETP listing services, and real-time proprietary equity data—would not prevent the likely anticompetitive effects of the proposed merger. The merged firm would possess significant advantages that any new or existing competitor would have to overcome to successfully compete with the merged firm.

36. Barriers to entry into each of these markets are formidable. In the market for displayed equities trading services, any entrant would have to overcome hurdles of reputation, scale and network effects to successfully challenge the incumbents. In ETP listing services, any entrant would have to overcome numerous barriers to successfully challenge NYSE, including regulation, reputation, scale, and liquidity. Direct Edge is in a strong position to enter because it is already a registered stock exchange with reputation, scale and liquidity. Finally, competition in real-time proprietary equity data is largely limited to registered securities exchanges, and is closely linked to and derived from an exchange's presence in trading and market data collection. Only four exchange operators today have large enough public trading volume and existing facilities for collecting, aggregating, and disseminating data to meaningfully compete. They enjoy a significant advantage over any possible entrant.

VIOLATIONS ALLEGED

37. The United States incorporates the allegations of paragraphs 1 through 36.

38. The proposed transaction between DB and NYSE would substantially lessen competition in interstate trade and commerce in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

39. Unless restrained, the transaction will have the following anticompetitive effects, among others:

a. Actual and potential competition between NYSE and Direct Edge in displayed equities trading services and real-time proprietary equity data products in the United States will be substantially lessened;

b. Potential competition between NYSE and Direct Edge in ETP listing services in the United States will be substantially lessened;

c. Prices for displayed equities trading services, ETP listing services, and real-time proprietary equity data products likely will increase; and

d. Innovation in displayed equities trading services, ETP listing services, and real-time proprietary equity data products likely will decrease.

RELIEF REQUESTED

40. The United States requests that:

a. the proposed merger of NYSE and DB be adjudged to violate Section 7 of the Clayton Act, 15 U.S.C. §18;

b. DB and NYSE be enjoined from carrying out the proposed merger or carrying out any other agreement, understanding, or plan by which DB and NYSE would acquire, be acquired by, or merge with each other;

c. The United States be awarded the costs of this action; and

d. The United States receives such other and further relief as the case requires and the Court deems just and proper.

Dated: December 22, 2011

Respectfully submitted,

FOR PLAINTIFF UNITED STATES:

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