

The NYSE and Deutsche Boerse Merger: Major Regulatory Aspects Under EU and German Law

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Should it manifest, the spectacular merger of the NYSE parent company and Deutsche Boerse AG will be a complex multi-jurisdictional transaction governed by both U.S. and EU law.¹ Under a new holding company given the preliminary name of “AlphaBeta Netherlands Holding N.V”, incorporated in the Netherlands, it will combine:

- on the NYSE’s part, the New York Stock Exchange, the Euronext holding group, including regulated markets such as: stock exchanges located in Belgium (Euronext Brussels), France (Euronext Paris, MATIF² and MONEP³), Netherlands (Euronext Amsterdam and Euronext Amsterdam Derivatives Market), Portugal (Euronext Lisbon and the Futures and Options Market), and the UK (LIFFE⁴), as well as Archipelago Holding;
- on the part of Deutsche Boerse AG, the regulated markets/exchanges: Frankfurter Wertpapierboerse, Eurex Deutschland (50% share in co-ownership with SIX Swiss Exchange AG) and the U.S. International Securities Exchange Holdings, Inc. (indirectly held through the 50% Eurex group share).

EU Exchange Regulation

At the EU level, exchange regulation is governed by the Directive 2004/39 EC on Markets in Financial Instruments (“MIFID”), with the principles of minimum requirements and homecountry control. According to Art. 4 (14) of the MIFID, exchanges are “Regulated Markets”, defined as “a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments...”

Each Regulated Market, i.e. the exchange itself, and its market operator, are separate entities, governed by their respective national laws implementing the MIFID. According to Art. 48 of the MIFID, the competent regulatory authorities are national, and are designated by national law. An official list of the EU Regulated Markets, their operating entities and their respective authorities for licensing and market oversight is published on an annual basis.⁵ As the merger proposal assumes to maintain each national exchange under its individual regulatory authority, the implications of the merger have to be analysed under the respective national laws.

German Exchange Regulations

The specific entities in Germany affected by the merger are the Frankfurter Wertpapierboerse, operated by Deutsche Boerse AG, and Eurex Deutschland, operated by Eurex Frankfurt AG. At the national level, the competences of the German federal authority BAFin⁶ in respect of exchange regulation are restricted to the oversight of insider regulation

¹ For details see <http://www.nyse.com/press/1297768048707.html> and the transaction-specific website <http://www.global-exchange-operator.com>

² Marché a Terme International de France

³ Marché des options negociables de Paris

⁴ London International Financial Futures and Options Exchanges

⁵ Most recent version EU OJ C 348/9, 21st Dec. 2010.

⁶ „Bundesanstalt für das Finanzwesen“

and market manipulation according to § 4 of the German Securities Trading Act (“Wertpapierhandelsgesetz” - WpHG). In particular, takeover filings and filings of prospectuses for participation offers have to be filed with the BAFin, whereas licensing and the control of legality of the exchanges, as well as trading oversight are governed by the German Exchange Act (“Boersengesetz” - BoersG), and entrusted to the State (“Länder”) regulatory authorities, acting in co-operation with specific bodies established within the exchanges, the Trading Oversight Units (“Handelsüberwachungsstellen”). Both Frankfurter Wertpapierboerse and Eurex Deutschland are supervised by the Ministry of Economy of Hesse (“Hessisches Ministerium für Wirtschaft, Verkehr und Landesentwicklung, Wiesbaden”).

A clear understanding of the necessary procedures to implement the merger is only possible against the structural background of the German exchanges. Under the German Exchange Act, the Exchange (the Regulated Market) itself is established as an administrative agency under public law (“Boersenanstalt”), exercising sovereign powers and vested with partial legal capacity whose bodies are acting as authorities. On the contrary, the exchange operator is established under and governed by civil law. The operator is obliged to provide the necessary financial and human resources, including management structures as a corporate entity. It may operate several exchanges and perform other activities as well. The licence to establish the exchange (i.e. the administrative agency) is granted to its operator as an administrative act under public law (§ 4 of the German Exchange Act).

According to § 6 of the German Exchange Act, the intention to acquire a significant participation in an exchange operator, i.e. at least 10% of the shares or votings rights,⁷ to be held directly or indirectly, has to be notified to the competent exchange authority – in this case, the Ministry of Economy of Hesse, with regard to both the Deutsche Boerse AG and the Eurex Frankfurt AG. The Ministry may ban the proposed acquisition within one month following receipt of the notification (which must fully meet the requirements stipulated by § 6 of the German Exchange Act). However, such ban is only legal based on one of the following reasons, which must be justified by satisfactory evidence:

- the acquiring legal person or one of its legal representatives (executive directors) is not trustworthy or does not meet the requirements of the solid and prudent conduct of an exchange operator’s business;
- the financial means or the acquisition have been attained by criminal activities;
- the orderly operation and appropriate further development of the exchange is adversely affected by the proposed participation.

As this list of causes is preclusive, a rejection can not be legally based on other reasons, such as antitrust considerations. As a result, it seems unlikely that the proposed takeover could be rejected by the Ministry of Economy of Hesse.

A very particular issue, however, has to be observed with regard to Deutsche Boerse AG. The existing licence to establish and operate the Frankfurter Wertpapierboerse is an administrative act ad personam, in favour of Deutsche Boerse AG. By merging Deutsche Boerse AG into the Dutch Holding company following a complete takeover or squeeze-out, the legal personality of Deutsche Boerse AG will cease to exist, to be replaced by AlphaBeta Netherlands Holding N.V.⁸ In short, the exchange – i.e. the administrative agency – will lose its licence and cease to exist with the termination of its operator (Deutsche Boerse AG). A re-establishment would be burdensome including re-establishment of the agency’s bodies and re-listing of all companies and products formerly listed with Frankfurter Wertpapierboerse. According to prevailing legal view, this can be avoided by applying for a new licence for the new operating company to take effect immediately upon the termination of the Deutsche Boerse AG licence. Nevertheless, in the case of a merger, AlphaBeta Netherlands Holding N.V. will have to apply for a new licence under § 4 of the German Exchange Act. The application would have to cover:

- evidence of sufficient financial resources;

⁷ as defined by § 1 (9) of the German Banking Act („KWG“)

⁸ This transaction will be governed by the German Act on Transformation of Companies („Umwandlungsgesetz“ - UmwG).

- names of the operator's managers and evidence of their integrity and expertise;
- a business plan;
- shareholder structure including significant shareholders;
- evidence of shareholders' and their managers' integrity.

According to § 4 of the German Exchange Act, a licence would have to be denied “in particular” if one of the following causes applies:

- failure to verify sufficient financial resources;
- evidence that one of the operator's managers is not trustworthy or lacking expertise;
- evidence that a significant shareholder or one of its managers is not trustworthy or does not meet the requirements of the solid and prudent conduct of an exchange operator's business;
- the documents filed with the application give reason for doubt regarding the capability to meet the legal requirements for operating an exchange.

No doubt the AlphaBeta Netherlands Holding N.V. will meet all these requirements. However, the list of causes for rejection stipulated by the German Exchange Act is not exhaustive, which has been clarified by adding the words “in particular” in the course of the legislative process.⁹ Rather, the granting of the licence is subject to sound and lawful discretion by the exchange authority. Such discretion cannot be based on economic needs, but on appropriately weighting the legitimate interests of the public and of the applicant, in particular carrying out a prognosis of the orderly functioning of the respective financial markets.

The exchange authority's decision is subject to review before the German administrative courts according to § 40 and 114 of the German Law on Administrative Procedures (“Verwaltungsverfahrensgesetz” - VwVfG). The applicant does not, however, have a claim on approval but only on a decision free of excess of appropriate discretionary powers. There is a strong argument that such discretion may not be based on antitrust considerations, because antitrust law is a separate legal field, subject to German Antitrust and EU competition law (although German law would be overruled by EU law; see below). Given the lack of transaction-specific case law, however, this might in practice be a door-opener for negotiations and political considerations.

EU and German Antitrust Law

Considering the scope of EU exchanges and the economic dimensions with combined revenues of USD 5.4 bn and a combined EBITDA of USD 2.7 bn, the proposed merger is a “concentration” with a Community-wide dimension under Article 1 in conjunction with Art. 3 of Council Regulation 139/2004 EC (“the Merger Regulation”) on the Control of Concentrations between Undertakings. In particular, the Eurex and NYSE/LIFFE derivatives will create a clear global derivatives market leader handling more than 19m derivatives contracts per day. This means that, according to Art. 21 of the Council Regulation, the competition issues will be decided exclusively by the European Commission, and not under the German Antitrust Act (“Gesetz gegen Wettbewerbsbeschränkungen” - GWB).

According to Art. 2 (3) of the Council Regulation, the European Commission has to ban the merger, if it “would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position...” Prior notification has to be filed according to Article 4 of the Council Regulation. The time limit for a related decision would be 25 working days following the receipt of the

⁹ See legislative considerations re. the draft German Exchange Act 2007, BTDr 16/4028, pp. 80; BR-Drucks. 833/1/06, p.18; BTDr. 16/4899, pp.30.

complete notification (Art. 10 of the Council Regulation). Given the discretion by the European Commission within the guidelines set by Art. 2 of the Council Regulation, there will be wide scope for negotiations and political considerations, including disposal of individual business fields. The decisions by the European Commission are subject to review before the European Court of Justice (Art. 21 of the Council Regulation).

German and EU Takeover Law

As far as German takeover law is concerned, the proposed transaction is subject to the German Securities Acquisition and Takeover Act (“Wertpapiererwerbs- und Übernahmegesetz” - WpÜG), which implements the respective EU Directive 2004/25 EC. AlphaBeta Netherlands Holding N.V. has to launch a public exchange offer under which the Deutsche Boerse AG shareholders may tender their shares for a certain number (proposed: equal number) of shares of the new holding company. Completion of the transaction will be made subject to 75% of shareholders agreeing to the exchange offer. In preparation of implementation, the future holding company has to file an offer document with the German BaFin applying for approval of its publication (which can be barred based on § 15 WpÜG, but is more or less a matter of form). The prior announcement required by sect. 10 para.1 sentence 1 in conjunction with sect. 29 para. (1,34 of the German Securities Acquisition and Takeover Act has already been published (www.global-exchange-operator.com website). According to § 14 WpÜG, the comprehensive offer document has to be filed with BaFin within four weeks. Thereafter, the shareholders have a maximum of 10 weeks to tender their shares. Having acquired 95% or more of the Deutsche Boerse AG, the Dutch Holding N.V. may initiate squeeze-out of the remaining shareholders under § 39a WpÜG.¹⁰ A subsequent merger will be governed by the German Act on Transformation of Companies (“Umwandlungsgesetz” - UmwG).

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¹⁰ Using this procedure, the alternative squeeze- out procedures under § 327a pp. of the German Stock Companies Act (“Aktiengesetz“ - AktG) would be excluded.

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