Summary of Commission Decision

of 1 February 2012

declaring a concentration incompatible with the internal market and the functioning of the EEA Agreement

(Case M.6166 — Deutsche Börse/NYSE Euronext)

(notified under document C(2012) 440 final)

(Only the English version is authentic)

(Text with EEA relevance)

(2014/C 254/06)

On 1 February 2012 the Commission adopted a Decision in a merger case under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (1)*, and in particular Article 8(3) of that Regulation. A non-confidential version of the full Decision can be found in the authentic language of the case on the website of the Directorate-General for Competition, at the following address: http://ec.europa.eu/comm/competition/index_en.html*

I. INTRODUCTION

1. On 29 June 2011, the European Commission received a notification of a proposed concentration pursuant to Article 4 ECMR by which the undertakings NYSE Euronext ('NYX') and DB (hereinafter referred to as 'the Notifying Parties') enter into a full merger within the meaning of Article 3(1)(a) ECMR (2) ('the Transaction').

2. After preliminary examination of the notification, the Commission concluded that the Transaction raised serious doubts as to its compatibility with the internal market, in particular as concerns the market for derivatives trading and clearing services and the market for cash trading and post-trade services. Therefore, on 4 August 2011, the Commission adopted a decision to initiate proceedings pursuant to Article 6(1)(c) ECMR (3).

3. On 5 October 2011, a Statement of Objections ('SO') pursuant to Article 18 of the Merger Regulation was addressed to the Notifying Parties. The Notifying Parties replied to the SO on 24 October 2011. At the Notifying Parties' request, an Oral Hearing took place on 27 and 28 October 2011 (4). Twenty-three interested third parties were admitted to the proceedings, ten of them participated in the Oral Hearing.

4. In order to address competition concerns identified in the SO, the Notifying Parties submitted initial commitments on 17 November 2011, and subsequently revised these commitments on 21 November 2011 (5). The Commission launched a market test of the commitments of 21 November 2011 on 22 November 2011. On 12 December 2011, a new set of commitments was submitted, with a revised version being submitted on 13 December 2011 (6). The Commission launched a market test of the commitments of 13 December 2011 on 14 December 2011.

(1) OJ L 24, 29.1.2004, p. 1.
(2) OJ C 199, 7.7.2011, p. 9.
(3) The Commission conducted a wide-reaching market investigation using all tools provided for under the Merger Regulation. In this context, in the first phase, the Commission sent over 600 detailed requests for information pursuant to Article 11 of the Merger Regulation, with almost 250 responses received, while in the second phase, over 150 questionnaires were sent, with over 100 responses received. In addition, the Commission conducted more than 20 teleconferences and meetings with a range of customers and competitors and analyzed a substantial number of the Notifying Parties' pre-merger internal documents. See e.g. Decision, recitals 23.
(4) On 20 October 2011, the time limit for taking a final decision in this case was extended by 7 working days pursuant to the second subparagraph of Article 10(3) of the Merger Regulation.
(5) Accordingly, the legal deadline for the Commission's Article 8 decision was extended by 15 working days, pursuant to Article 10(3) first subparagraph of the Merger Regulation.
(6) To allow a market test of the new set of commitments to be conducted, the Commission agreed with the Notifying Parties on a further extension of 13 working days pursuant to Article 10(3) second subparagraph, third sentence of the Merger Regulation. A market test was launched on 14 December 2011.

5. The Commission found that the Transaction would have given rise to the creation of the biggest stock exchange in the world in terms of revenue, combining the current numbers two and three, and implied a merger to monopoly in a number of markets. NYX is a U.S. holding company that was formed in 2007 through the merger of NYSE Group, Inc. and Euronext N.V. and operates numerous exchanges in the US and Europe (Paris, Amsterdam, Brussels and Lisbon). It has four main businesses: (i) cash listing services; (ii) cash trading services; (iii) derivatives trading and clearing services through NYSE Liffe ('Liffe'); and (iv) information services and technology solutions. DB is a German listed corporation vertically integrated in all aspects of cash and derivatives markets. Its activities therefore include cash listing, trading and clearing, derivatives trading and clearing (through its subsidiary 'Eurex'), cash post-trade services, namely settlement and custody, collateral management, market data and information services. Following an extensive market investigation and on the basis of a careful and impartial assessment of the totality of the available evidence, the Commission found that:

— the Transaction would not significantly impede effective competition on several markets, which will not be further discussed: (i) cash listing, trading and post-trading services ([1]); (ii) market data ([2]); (iii) information services and technology solutions ([3]); and (iv) collateral management ([4]).

— the transaction would significantly impede effective competition on for a number of derivatives trading and clearing markets.

6. This below is a summary of the Decision with respect to the following points: derivatives market definition, competitive assessment, efficiencies and remedies.

II. **MARKET DEFINITION**

7. Eurex and Liffe operate exchanges allowing derivatives users to trade certain derivatives contracts and have them cleared. Derivatives are financial contracts whose value is derived form an underlying (asset) and allow the transfer of risk from one economic agent to another ([5]). Depending on their relationship between the underlying and the derivative contract derivatives can be subdivided into futures, options and swaps ([6]).

8. Derivative contracts traded on exchanges are designed, introduced, and regulated by the derivatives exchanges that created them. They are commonly referred to as 'exchange-traded derivatives' or 'ETDs'. Each category of contracts has its own specifications and delivery processes, which the exchange determines and oversees to best match customers' preferences ([7]). Successful derivatives contracts become very liquid, reaching several million of contracts traded per day ([8]).

9. Trading of derivatives contracts consists of matching buyers and sellers, that is, two parties willing to take opposite positions in the same contract. Matching between buyers and sellers may be bilateral or multilateral. Bilateral matching is trading in which the quoting of prices and execution are conducted between two parties in such a way that other market participants do not observe the trading. Bilateral matching is done only in the over-the-counter (or 'OTC') space through voice brokerage and telephone trading ([9]). In multilateral matching, market participants can observe the others' price quotes and trade executions in the market-place. Multilateral matching of derivatives buyers and sellers is performed either on exchanges or on some OTC trading platforms, operated by broker dealers, as concerns OTC derivatives contracts ([10]).

([1]) Section 7 of the Decision.
([2]) Section 8 of the Decision.
([3]) Section 9 of the Decision.
([4]) Section 10 of the Decision.
([5]) Recital 221 of the Decision.
([6]) Recitals 343ff of the Decision.
([7]) Recitals 222 and 321-342 of the Decision.
([8]) Recital 222 of the Decision.
([9]) Voice Broking is the traditional method of communicating quotes to market participants: the negotiation is conducted over the telephone, either end-user-to-dealer or dealer-to-dealer, but it is nowadays enhanced through the use of electronic bulletin boards by the dealers for posting their quotes and often highly automated.
([10]) In addition, the landscape of multilateral trading of derivatives has been made potentially accessible to Multilateral Trade Facilities ('MTFs'), which were created as a result of MiFID (Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments ('MiFID') (OJ L 145, 30.4.2004, p. 1). See recitals 223-227 of the Decision and recital 255.

10. With respect to derivatives market definition, the Notifying Parties submitted that the relevant market in the present case is one single global market for risk transfer comprising trading in a wide variety of derivatives irrespective of the underlying asset, both on-exchange and OTC. They argued that all derivatives perform the same functions, and that the demand-side of the market is represented by an international community of highly sophisticated financial institutions. From the supply-side perspective, there would be an increasing convergence in the functionality of derivatives available on-exchange and OTC and in the respective trading mechanisms. In addition, the Notifying Parties claimed that the current regulatory convergence between the exchange and OTC environments is likely to make the OTC and the exchange spaces even more homogeneous ([1]).

11. The Decision concludes that the market for derivatives in the asset classes where the Notifying Parties overlap should be first subdivided according to the execution environment — i.e. into ETDs and OTC derivatives ([2]). ETDs are complementary rather than substitutable to OTC derivatives. While OTC derivatives are used to provide a perfect hedge to any risk, ETDs are used both for taking positions, and for short-term imperfect hedging until a perfect hedge is found ([3]).

12. Contrary to the Notifying Parties' claim that the fact that 90 % of OTC derivatives are standardised and that this standardization, combined with market regulatory developments, will dramatically increase the competitive pressure that OTC derivatives exert on ETD trading, the Decision concluded that OTC derivatives are only standardized in their legal terms (as opposed to their key economic parameters) and are used in different circumstances than ETDs, which limits any competitive pressure that derivatives traded OTC are likely to exert on ETDs ([4]).

13. While exchanges do also compete to win new business by capturing contracts that are currently in the OTC environment, the Commission considered in the Decision that, rather than proving substitution between ETDs and OTC derivatives, the evidence rather points towards natural one-way development whereby OTC contracts, as they become sufficiently standardized, tend to move to regulated exchanges where the liquidity in these contracts ultimately develops. The Commission therefore concluded that for asset classes concerned by the Decision trading derivatives OTC does not provide a competitive constraint to ETDs and is not substitutable for ETDs ([5]).

14. Moreover, the fact that a switching from ETDs to OTC derivatives is not an observable phenomenon (except for marginal switching to ETD lookalikes when it comes to certain customers) is also consistent with the fact that listed derivatives, in particular those traded on exchanges' order books, are not generally suitable to be traded away from the exchange environment ([6]).

15. In this context the Decision found that a category of derivatives users exists that, due to their operational setup, risk management preference, accounting reasons or various regulations, can only hold ETDs in their portfolios or hedge their portfolios only with ETDs. This category of customers includes retail investors as well as some institutional market participants who do not trade derivatives OTC even through a broker.

([1]) Recital 257 of the Decision.
([2]) Section 11.1.12.2.1 of the Decision.
([3]) Recital 262 of the Decision.
([4]) As concerns ETDs, full standardization of all terms, in particular the economic parameters, is a prerequisite for exchange trading. See recitals 271, 280, 282, 283 of the Decision.
([5]) See recital 364 of the Decision.
([6]) As concerns the implications of upcoming regulation, while the final shape of any legislative initiative is at this stage unclear, and hence any reliance on the content of various proposals would be speculative and inappropriate, the Commission notes that should regulation indeed bring about convergence between ETDs and OTC derivatives in the sense that it would require standardized OTC derivatives to be subject to mandatory clearing, this would not imply that ETDs and OTC derivatives would become substitutable in both directions. On the contrary, the rationale for derivatives users to use OTC derivatives is unlikely to disappear and the one-way development could be reinforced whereby OTC contracts move to regulated exchanges because it would become mandatory to trade some of the derivatives previously traded OTC on exchanges. As such, it would not alter the fundamental characteristics of OTC derivatives or ETDs nor the differences between them, but would rather shift the boundary between them. See recital 284 and footnote 171 of the Decision.

16. In addition, the Decision concludes that even for customers that trade both ETDs and OTC derivatives, the ability to directly substitute between ETDs and OTC derivatives would be at best limited to ETD lookalikes [1] (contracts offering the same economic exposure as ETD contracts but traded bilaterally away from an exchange and not cleared by a CCP [2]. These contracts represent a small portion of all available contracts in the OTC environment and are principally designed for and by large banks in the interdealer market). The bulk of OTC products address different customer needs than ETDs, in particular the need to achieve a customized perfect hedge which is not possible with an ETD contract [3]. The Decision concluded that the question whether ETD lookalikes belong to the same market as ETDs traded on the central order book can be left open as the competitive assessment remains the same regardless of whether or not lookalikes are included [4].

17. The Decision concludes that for most derivatives users, the demand to trade derivatives is specific to a certain asset class and cannot be substituted by trades in a different asset class. For hedging purposes, derivatives users seek to hedge a specific risk associated with their positions in a certain asset, and, when using derivatives for leveraged investing purposes, they similarly are sensitive to the type of asset [5].

18. The Notifying Parties mainly offer derivatives contracts on the following underlyings: European interest rates which can be subdivided into long-term interest rates ('LTIR') or capital market rates and short-term interest rates ('STIR') or money market rates; European single stocks that can be further subdivided according to the underlying stock; European equity indices (at pan-European and national level) [6].

19. The Decision concludes that interest rate derivatives based on different currencies, be they short-term or long-term, are not generally substitutable as they have an intrinsic link with the currency on which the underlying is based [7]. The Decision left open the exact definition of the market for listed interest rate derivatives and its subdivision into short-term and long-term interest rate derivatives because the Transaction would have eliminated the closest actual and potential competitor under all possible market definitions [8].

20. As to European single equity derivatives, while acknowledging that from the demand-side perspective, there is no substitution between derivatives based on different stock equities [9], the Decision finds that traders do not just buy once a single equity derivatives contract but typically implement broader trading strategies [10]. The Decision, however, leaves open the question of whether the product market for listed single stock equity futures and options should be subdivided according to the individual stock or should comprise a wider set of stocks as a significant impediment to effective competition will arise under all alternative market definition (individual, national and European levels) [11].

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(1) Recital 367 of the Decision.
(2) Clearing consists of a range of post-trade operations, in particular management of positions throughout the lifetime of contract, collateral management to address the counterparty risk and cash management. Clearing can be bilateral whereby each party is exposed to the other party's risk (in the OTC space) or via a Central Counterparty ('CCP'). As concerns ETDs, clearing is performed by a CCP. A CCP provides a performance guarantee by legally interposing itself between the buyer and the seller, assuming the risk of counterparty default on behalf of trading parties. To this end, the CCP assesses the level of risk and manages it throughout the lifetime of each contract. To cover itself against the risk, the CCP determines so-called margin (collateral) requirements and establishes a default fund to which each trading member has to contribute according to its position. CCPs charged to clear ETDs are chosen by the derivatives exchange platform – therefore, derivatives users generally have no choice of CCP for their derivatives trades executed on-exchange. Exchanges typically offer an integrated service for which some exchanges running vertically integrated models, such as Eurex, charge a single fee. See recitals 230-236 of the Decision.
(3) See recitals 316-332 and 367, see also recitals from 351 to 359 of the Decision.
(4) Recital 445 of the Decision.
(5) See recitals 396-400.
(6) See recital 400.
(7) See recital 406.
(8) See recital 419.
(9) See recital 421.
(10) See recital 422.
(11) See recital 426.

21. As to equity index derivatives, the Decision concludes that from the demand-side perspective, individual indices are not substitutable as they offer different exposures ([1]). From the supply-side perspective, indices are usually protected by IP rights and cannot be freely used. Therefore, separate relevant product markets exist for trading and clearing of each of the Notifying Parties' families of equity indices. However, the Decision concludes that the Notifying Parties compete in innovation in the area of new European index products (both national and pan-European) ([2]).

22. The Decision considers that options, futures, and swaps constitute different instruments used for different purposes. The Decision concludes that swaps constitute a separate category due to their different characteristics (tailored to a particular date), use (not traded for less than 2 years) and environment in which they are traded (only OTC). From the demand side perspective, the demand to trade options and futures derivatives is generally specific to the type of contract such that futures and options would not be substitutable. From the supply-side perspective, exchanges offer both futures and options on underlyings on which they list contracts, since once an exchange has established liquidity in futures on an underlying, it can start offering options at minimum cost. The Decision, however, leaves open the question as to whether futures and options belong to the same product market as this would not affect the competitive assessment in this case ([3]) ([4]).

23. Finally, the relevant markets in the area of derivatives trading and clearing where the Notifying Parties' activities overlap and on which the effects of the transaction are assessed are the following:

— As concerns customers that can trade only ETDs, the relevant markets are the market for exchange-traded European interest rate futures and options possibly subdivided into STIR and LTIR, the market for European single stock equity futures and options, and, in respect of product innovation, the market for European equity index futures and options;

— As concerns customers that trade both ETDs and OTC derivatives, the relevant markets are the market for exchange-traded European interest rate futures and options possibly subdivided into STIR and LTIR and possibly comprising ETD lookalikes, the market for European single stock equity futures and options possibly comprising ETD lookalikes, and, in respect of product innovation, the market for European equity index futures and options. Indeed, given the small size of the ETD lookalikes segment, it can be left open whether, for this category of customers, ETD lookalikes belong to the same market as ETDs traded on the central order book as the competitive assessment remains the same regardless of whether or not, for this category of customers, ETD lookalikes are included in the relevant product market ([5]) ([6]).

([1]) See recital 428.
([2]) See recitals 430-432.
([3]) See recitals 433-443.
([4]) As a result the term ETD will be used to generally refer to exchange traded options and futures taken together (recital 443 of the Decision).
([5]) See recitals 444-446.
([6]) The Application does not contest the following conclusions on the markets for Off-order book services – registration, confirmation and CCP clearing of block size ETD contracts and Trade registration, confirmation and central counterparty clearing services for flexible versions of European equity futures and options traded OTC. Although off-order book services are agreed bilaterally, they concern the same contracts and use the same infrastructure as on-order book services. However, there is no, or at best limited, demand substitutability between the two services, as off-order book services relate to block trades that could not be executed on order book without significant price impact. As a result, the Decision concludes that off-order book services belong to a distinct, although closely linked market, to on-order book services. The Notifying Parties' activities also overlap with respect to post trade services for 'flex' contracts. Trades entered into these facilities generally lack the level of standardization in economic parameters that would make them eligible for order book trading. As a result, the Decision concluded that these services cannot be substitutable with either on-order or off-order book services. See recitals 463ff.

24. As to the geographic market, the Decision concludes that irrespective of whether the geographic scope of the market for each of the relevant product markets described above is defined as worldwide or limited to the EEA, the proposed transaction will impede effective competition under both alternative market definitions. This is because while from the demand side customers are located around the world, from the supply side only Eurex and Liffe (and to a less limited extent some other European exchanges) offer derivatives contracts based on European underlying in the areas where the Notifying Parties overlap [1].

III. **COMPETITIVE ASSESSMENT**

25. The Notifying Parties are *de facto* the only two players offering exchange trading in European interest rate futures and options, and they occupy predominant positions in trading of single equity derivatives [2] and equity index derivatives. They together control over 90 % of all derivatives based on European underlyings traded around the world:

— In European interest rates ETDs, Eurex and Liffe together control [90-100 %] of the market (NYSE [40-50 %] and DB [40-50 %]);

— In European equity index ETDs, DB controls [90-100 %] of ETD contracts based on STOXX index while NYX has a near-monopoly in the UK FTSE index (FTSE index is also licensed to Turquoise). Eurex and have monopolies in their respective national indices, the DAX, CAC, AEX, BEL and PSI.

— In European single stock equity ETDs, NYX has [20-30 %] and DB [60-70 %], for a combined total of [80-90 %]. There are significant overlaps between the Parties in contracts on individual equities from Belgium, France, Austria, Finland, Germany, Italy, Portugal, Switzerland and the UK [3].

III.1. **General parameters of competition in derivatives trading and clearing**

26. The total cost of trading is composed of several elements: (i) exchange and clearing fees and collateral costs (direct component), (ii) realized bid-ask spread and any market impact (indirect component). The latter is typically several times larger than the former. Exchanges compete not only in terms of the direct component of the cost of trading but also through incentives designed to reduce the indirect component. Headline fees are supplemented on a case-by-case basis with rebates to individual members. In general, competition leads to lower fees, more efficient collateral policies and greater liquidity [4].

27. In addition to head-to-head competition in listed contracts [5], exchanges compete to introduce new products which will be attractive to their existing users. This type of competition takes into account the fact that a successful contract may well capture most or all liquidity for a considerable time [6].

28. Exchanges also compete in system performance and trading functionalities as well as processes and market design. Whilst innovation in these areas is partly driven by customer demand, it is also partly a result of competitive rivalry and the risk that, as happened with the Bund contract, liquidity could migrate if an exchange were to fall behind its competitors [7].

29. Competition between Eurex and Liffe takes the form of actual and potential competition to introduce new or improved products [8]. Potential competition is a significant disciplining force between the Parties, who are each other's closest competitors due to the size and scope of their respective margin pools, membership and know-how. It is illustrated by a number of cases of actual and planned competition in the past which have had an actual and significant effect on fees, and operates on an ongoing basis. Existence of actual (even if low) market shares for certain products on the part of the challenger underlines further the existential nature of this competitive threat. This uniquely close competitive relationship, amply illustrated by internal documents and confirmed by customers and competitors, would have been eliminated by the Transaction [9].

(1) See recitals 447-464.
(2) See recitals 498, 543 and 572.
(3) Recitals 498, 499.
(4) Recitals 501-514.
(5) Recitals 543-559.
(6) Recitals 515-519 and 560-603.
(7) Recitals 520-526.
(8) Recitals 560-603.
(9) Recitals 543-559, in particular recital 546.

30. The fact that new ideas may arise initially in the OTC market does not mean that there is not competition between the Parties to standardize these contracts and create liquidity on exchange. On the contrary, significant amounts are invested by them in innovation, and notwithstanding the many barriers to success, there is a constant stream of new products from both Parties. Moreover, even if quantitatively innovation were to continue on the same level, the commercial terms on which such innovations were made and remained available to the market would have been negatively impacted by the Transaction ([1]). In respect of technology, experience in the cash markets since MIFID has shown that competition is a fundamental accelerator of the rate of innovation.

III.2. **Competition between the Parties — European interest rate futures and options** ([2])

31. Whilst direct overlaps between the Parties in the field of European interest rates derivatives are presently limited but by no means unimportant, the Decision concluded that Eurex and Liffe are the closest potential competitors in this area.

32. The overlaps concern futures and options on Euro denominated short term interest rates, as well as a degree of head to head competition between Liffe's offering of strips and bundles of Euribor futures and DB's two and five year German sovereign rate derivatives.

33. Eurex and Liffe were involved in a struggle for establishment of the Euribor benchmark for over a year at the time of introduction of the euro. In recent years Eurex has had a small market share (since 2007 [0-5 %]) in Euribor futures but together the Parties achieve a near-monopoly. Eurex and Liffe are the only exchanges that have a significant margin pool in this contract. CME's recent Euribor launch achieved almost no trading. CME's margin pool in Euro denominated STIR derivatives is insignificant, and by no means can be comrade to Liffe's and even Eurex'. Concerning options on Euribor futures, DB was involved in a push which in the space of six months brought their monthly volumes up to almost 5 % just before the announcement of the Transaction. This was in response to dissatisfaction of users with the terms offered by Liffe. In addition to being an episode of actual competition, it underlines the threat of potential competition exerted by Eurex and Liffe on each other. Liffe was forced to lower its fees as a result.

34. In respect of Euribor packs and bundles, the Decision found that these compete with the two- and five-year German rates for certain users, namely those exposed to long term commercial interest rates, for whom they represent a better but less liquid hedge ([3]). DB's offering constrains NYX directly in this area even if the opposite may not apply.

35. The Decision outlines efforts by Liffe to enter the German sovereign rate space both directly with equivalent contracts and indirectly with similar ones ([4]). It similarly outlines efforts by Eurex in relation to UK interest rates, where Liffe currently has a monopoly ([5]).

36. There is currently and in the foreseeable future no realistic threat to the Parties' franchises from any other competitor. Attempts by customers to sponsor a new interest rate trading platform – Project Rainbow – were thwarted when Liffe took steps to prevent fungibility ([6]) and margin offset ([7]) with positions traded on its own platform.

37. The Parties are also each other's closest competitor in respect of innovation in the area of European interest rate derivatives.

([1]) Recitals 527-531.
([2]) Recitals 641-814.
([3]) Recitals 681ff.
([4]) Recitals 713ff.
([5]) Recitals 736ff.
([6]) Footnote 110.
([7]) Recital 238.

III.3. **Competition between the Parties — single stock equity options and futures** ([1])

38. In this area, Eurex and Liffe have businesses of similar size and compete to a significant extent head-to-head. 75 % of futures and 63 % of options available on Liffe are also available on Eurex. Additionally, Eurex lookalikes can be cleared on Liffe. In equity derivatives from DB's home German market, over 20 % of trading takes place also on Liffe. Over a quarter of trading in French derivatives takes place on Eurex. In a number of stocks, the majority of trading is away from the home market. The Parties overlap in all of their home markets and achieve a combined market share of [90-100 %] in these markets.

39. Even in certain markets outside of their original home markets, the Parties have achieved significant market shares at the expense of the historical incumbent. Liquidity in major Spanish equities is split between Eurex and Liffe, with the domestic exchange, MEFF, in second or third place.

40. The Decision concludes that it is likely that, as a result of the gravitational effect of its enlarged margin pool, the merged entity would have been able progressively to eliminate the incumbent competitor and achieve a monopoly in all European markets, not just its home markets (including some such as Denmark where only Liffe is present today). This would eliminate significant fee competition. Given the overwhelming market position of the merged entity, *a fortiori* there would have been no prospect of significant new entry to constrain fees.

III.4. **Competition between the Parties: equity indices** ([2])

41. Competition between the Parties in European equity index derivatives concerns only innovation. The Transaction would have a negative impact on innovation both by Eurex and Liffe and by third parties, with knock-on effects on the related market for index licensing. The prospect of significant innovation by third parties, as attempted by Chi-X in combination with Russell indices would also be eliminated.

III.5. **Barriers to entry and expansion** ([3])

42. Potential new entrants into the markets for exchange-traded derivatives based on European underlyings are faced with high barriers to entry given the importance of liquidity and open interest and the related netting and cross-margining benefits ([4]). This is in particular because of the characteristic of derivatives markets whereby netting and margining possibilities play a much more significant role than in cash markets. Indeed, counterparty risk is managed for a significantly longer period of time than for cash markets where settlement takes place within a few days of trading and therefore the posting of collateral by users in derivatives markets can be significant ([5]).

43. Furthermore, the possibility for competitors to offer equity index derivatives and thereby also gain a foothold in the related single equity derivatives products is also limited given that the benchmark index products are protected by intellectual property rights. The existence of a large installed base of existing users (membership base) which 'distributes' the exchange's products to investors, characterized by unavoidable sunk connection costs, is also an important barrier to entry.

44. The barrier to entry in single stock derivatives resulting from the pool of open interest and liquidity in index products – which are protected by proprietary IP rights – is not only related to possible margin offsets with the related equity index derivatives, but also to the desire of certain market participants to trade the index and some of the component underlying derivatives (as well as the index and the component cash equities) together.

([1]) Recitals 815-892.
([2]) Recitals 893-925.
([3]) Recitals 926-1008.
([4]) For the definition of netting and cross margining, see footnote 108 of the Decision. Traders can benefit from netting and cross margining opportunities to the extent that, when they have open interest in one trading venue, collateral requirements for additional trades on the same venue can be lower. See recitals 934ff of the Decision.
([5]) See also recital 104 of the Decision.

45. The Decision therefore concluded that it is unlikely that sufficient and timely entry would have occurred post-merger in any of the relevant markets to mitigate the anti-competitive effects of the Transaction.

III.6. **No countervailing buyer power** (1)

46. During the administrative proceedings, DB and NYX argued that large investment banks have significant buyer power, which would prevent the merged entities from increasing fees post-merger. The Parties claimed in particular that these large investment banks could unite to sponsor successful entry since they allegedly control order flow. However, there are no examples of this having occurred in the relevant markets, despite some failed attempts. In addition, any such attempt is implausible, since, inter alia, it would have to involve a very substantial number of players. The Decision concludes that to the extent there is a constraint today, this would be the result of the rivalry between the Parties and the threat of customers migrating business from one to the other. Accordingly this constraint would have been eliminated by the merger.

III.7. **Conclusions on competition between the Parties in trading and clearing of exchange traded derivatives**

47. The Decision concluded that the proposed transaction would have combined the two leading European derivatives exchanges, leading to the creation of a near-monopoly position in each of the relevant markets for trading and clearing services for:

— European exchange-traded interest rate futures and options;

— European exchange-traded single stock equity futures and options;

— New European exchange-traded equity index futures and options;

— Off-order book services for block size European ETD contracts (2); and

— Trade registration, confirmation and CCP clearing services for flexible versions of European equity futures and options traded OTC (3).

48. In each case, and given the high barriers to entry and expansion and the lack of countervailing buyer power, the Transaction would have given rise to significant impediment of effective competition by eliminating:

— existing competition, potential competition and the important competitive constraint Eurex and Liffe currently and uniquely exert upon each other, as closest competitors, as regards trading and clearing services in respect of each of the markets outlined above;

(1) Recitals 1009-1024.

(2) Eurex and Liffe offer similar and largely overlapping services in this area also, and face no other competitors (or at most one other competitor in certain non-home single equity derivative markets). A significant amount of the cleared volume on Eurex and Liffe is represented by trades negotiated away from the order book and reported to them for confirmation and clearing. Similar issues arise for all the relevant markets as in on-book trading since the overlaps are the same. In addition, Eurex lookalikes can be cleared on Liffe. Whilst not fungible with the Eurex contract, these benefit from the two other key advantages of ETDs, namely margin offset and elimination of counterparty risk and therefore represent the closest out-of-market constraint. See recitals 463 ff and 1025 ff.

(3) The Parties offer similar and largely overlapping services in this area also, where Liffe was first to innovate with its BClear service, described as a 'runaway success'. They face no other competitors, with all those competitors who offer similar services not offering such services in relation to any of the equity underlyings from the Parties' home markets. This service allows them to capture significant volumes for clearing which would otherwise remain OTC, and is set to grow in importance under the G20 reforms. Liffe has made significant inroads into German and Swiss underlyings, but also DB into underlyings from Liffe's home markets. The Parties compete closely on fees and service offering. Meaningful entry is unlikely. See recitals 477 ff and 1071 ff.

— competition between Eurex and Liffe in respect of product innovation within each of these product markets, for which they are each others' closest competitors; and

— competition between Eurex and Liffe in technology, processes, service and market design.

IV. **EFFICIENCIES**

49. The Notifying Parties claimed that the Transaction would benefit the users of their cash and derivatives exchanges by giving rise to significant efficiencies. They argued that users would see the costs of operating on these platforms fall, that users would have to pledge less collateral to clear transactions, and that users would benefit from greater liquidity and, therefore, lower implicit trading costs. The Notifying Parties argued that the liquidity effects of the Transaction would spill over to benefit firms and consumers throughout the economy. They claimed that (i) firms would benefit from a reduced cost of capital, (ii) governments would be able to fund themselves more cheaply which would free resources for both public and private investment, and (iii) consumers would benefit from greater employment, innovation and economic growth.

50. In the light of the near monopoly resulting from the Transaction in a number of relevant markets as identified in the Decision, any efficiencies, even if they were found to be verifiable, merger specific, and likely to benefit consumers, would have to be particularly substantial to prevent the significant impediment to effective competition set out above, including the loss of actual and potential competition and the loss of competition in innovation ([1]).

51. On the basis of the evidence that the Notifying Parties submitted, the Decision concluded that (i) the efficiencies claimed by the Notifying Parties in the area of IT and user access costs were not verifiable ([2]), (ii) it was likely that some efficiencies would accrue to customers from increased cross-margining opportunities which would therefore translate into collateral savings. However, the Commission observed that some of these efficiencies could be achieved through less anti-competitive means and that it was possible that there will be some pass-on to customers although the size of this effect could not be determined ([3]), (iii) the claimed liquidity impact on integrated cash exchanges was not verifiable ([4]) and (iv) the claimed liquidity impact of integrating the Parties' derivatives trading platforms was not verifiable. Even if these liquidity impacts had been verifiable, there would have been some pass-on to customers, but the size of this effect could not be determined on the basis if the available data ([5]). Moreover, the Commission considered that economy-wide efficiencies was not verifiable in this case ([6]) and stated that it was unlikely that fixed cost savings would be passed on to customers ([7]).

V. **REMEDIES**

52. In order to address the competition concerns identified by the Commission, the Notifying Parties submitted two sets of remedies, a first one on 17 November 2011 and, following the negative result of the market test of this first set, a second one on 14 December 2011. Both sets included a divestment commitment in the area of single equity derivatives and an access remedy for new equity index and interest rates derivatives. In addition, the second remedies set included a software licensing commitment for the trading of existing and new interest rate derivatives.

53. The Commission analysed the suitability of the commitments package submitted on 14 December 2011 to remedy the entirety of competition concerns identified in the Decision. To this end, the Commission analysed the appropriateness of the scope of the proposed commitments, the likelihood of a timely and sufficient entry on the basis of the proposed commitments as well as their likely effectiveness in practice. The Commission found that these commitments were incapable of eliminating the identified competitive problem.

([1]) Recital 1337.
([2]) Recital 1187.
([3]) Recital 1243.
([4]) Recital 1303.
([5]) Recital 1327.
([6]) Recital 1330.
([7]) Recital 1334.

VI. **CONCLUSION OF THE DECISION**

54. The Decision concluded that the Transaction would significantly impede effective competition in the internal market or a substantial part thereof within the meaning of Article 2(3) of the Merger Regulation. This is because the Transaction would result in the creation of a dominant or near-monopoly position and the elimination of the closest actual and potential competitor in European exchange-traded single stock equity derivatives and European exchange-traded interest rate derivatives products (including competition in product innovation), and in new European equity index derivatives. In addition, the transaction would significantly impede effective competition by creating a dominant or near-monopoly position and eliminating the closest actual and potential competitor in the markets for off-order book services for block size European ETD contracts (irrespective of how this market might be further divided), and for trade registration, confirmation and CCP clearing services for flexible versions of European equity futures and options traded OTC ([1]).

([1]) Recital 1483.