Anticipated acquisition by Nasdaq Stock Market, Inc of the London Stock Exchange plc

The OFT's decision on reference under section 33(1) given on 18 January 2007. Full text of decision published 24 January 2007.

Please note that square brackets indicate figures or text which have been deleted or replaced with a range at the request of the parties for reasons of commercial confidentiality.

PARTIES

1. **The Nasdaq Stock Market, Inc. (NASDAQ)** is a U.S.- based provider of securities, trading, listing and information products and services. Approximately 3,200 companies were listed on NASDAQ in 2006. In 2005, NASDAQ's revenues were approximately USD 880 million, generated predominantly from U.S.-based customers.

2. The **London Stock Exchange plc (LSE)** is a Recognised Investment Exchange under the Financial Services and Markets Act 2000. The LSE de-mutualised in 2000 and became a listed UK plc in 2001. The LSE's principal business activities are listing and trading services, the generation and distribution of information products and the development, implementation and operation of IT solutions for financial markets and market participants. The LSE's UK turnover for the financial year ended 31 March 2006 was £297.5 million.

TRANSACTION

3. Following a number of acquisitions of the ordinary share capital of the LSE throughout 2006, NASDAQ announced on 20 November 2006 that

it was making a public offer (through its wholly owned subsidiary, Nightingale Acquisition Limited) to acquire the LSE. The LSE publicly rejected the offer. NASDAQ made a final cash offer on 12 December 2006, also rejected by the LSE.

4. NASDAQ's submission was declared satisfactory on 20 November 2006. The OFT's 40-working day administrative deadline expires on 18 January 2007.

JURISDICTION

5. As a result of this transaction, NASDAQ and the LSE will cease to be distinct. The UK turnover of the LSE exceeds £70 million, so the turnover test in section 23(1)(b) of the Enterprise Act 2002 (the Act) is satisfied. The OFT therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

6. The parties informed the OFT that EC Regulation 139/04 (the EC Merger Regulation, ECMR) does not apply. In 2005, the OFT gave careful consideration whether to seek a transfer of the proposed bids for the LSE by Deutsche Börse AG and Euronext N.V. to the European Commission pursuant to Article 22 ECMR. The OFT concluded that the UK authorities were best-placed to consider those bids and therefore retained jurisdiction.[1] In this case, one complainant suggested that the OFT was under a duty to consider whether it was appropriate to cede jurisdiction to the European Commission by way of Article 22 ECMR. At the relevant time, the OFT did not make an Article 22 request as the legal criteria for that test were, on their face, not met: the transaction does not threaten significantly to affect competition within the territory of the UK. In any event, given previous consideration of the issue and the OFT's subsequent experience, the OFT is also the best-placed authority to examine this transaction.

[1] See OFT press release PN 29/2005, 16 February 2005.

FOCUS OF INQUIRY

Background

7. NASDAQ and LSE provide or have interests in a number of different business services including: a) listing; b) equities trading; c) bonds trading; d) derivatives trading; and e) information services.

8. The LSE has been the subject of a significant number of public bids or expressions of interest, none of which have materialised. NASDAQ's public offers which are the subject of this investigation, is the latest of these bids. A description of the active nature of proposed stock exchange consolidation and prior investigations by the OFT and the Competition Commission (CC) [2] was set out at length in the OFT's 2006 decision clearing the merger between the New York Stock Exchange Group, Inc. (NYSE) and Euronext N.V. (Euronext) (*NYSE/Euronext*).[3] A comprehensive introduction to markets relevant to stock exchanges can be found in the 2005 CC Report and OFT's decisions in relation to the bids by Deutsche Börse AG (Deutsche Börse) and Euronext for the LSE (hereafter, the CC Report and the *LSE* decisions).

9. This decision refers, where appropriate, to these market descriptions and the conclusions contained therein. Where the OFT has received no evidence contrary to prior findings, and the OFT has no basis for supposing that material facts have changed, the OFT proceeds on the basis that such prior findings of fact continue to have validity for the purposes of this assessment.

10. In this case the OFT has considered both primary and secondary listing services provided by the parties to this transaction for UK customers.

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[2] Competition Commission, *Deutsche Börse AG, Euronext NV and London Stock Exchange plc: A report on the proposed acquisition of London Stock Exchange by Deutsche Börse AG or Euronext NV*, November 2005. OFT, *Anticipated acquisition by Deutsche Börse of the London Stock Exchange plc*, 29 March 2005 and *Anticipated acquisition by Euronext N.V. of the London Stock Exchange plc*, 29 March 2005.

[3] *Anticipated merger between NYSE Group, Inc. and Euronext N.V.,* 12 October 2006.

As a result of third party concerns, it has also considered so-called international listing services provided to non-UK customers, for example, Russian, Chinese or Indian companies. The decision also considers potential competition regarding equities trading in the UK. Finally, it briefly comments on the lack of material overlaps in other sectors, such as bonds, derivatives and market information services.

The appropriate counterfactual

11. The counterfactual in merger analysis is the situation absent the merger. It is the benchmark outcome or 'world' against which the post-merger outcome is compared in order to assess whether the merger may be expected to result in a substantial lessening of competition. In the absence of suitable evidence of sufficiently likely and imminent changes to pre-merger conditions which will occur even if the merger does not go ahead, the OFT's default counterfactual is competition as it exists prior to the merger, that is, the status quo ante.[4]

12. At the date of this decision, the proposed merger between NYSE and Euronext has not completed. Irrespective of the likelihood that it will proceed, the OFT has considered the relevant counterfactual in this case on the basis of a completed merger between NYSE and Euronext. This is arguably the least favourable position to the merging parties, as it assumes greater transatlantic industry consolidation than otherwise. Where appropriate, NYSE and Euronext will be referred to as the merged firm, NYSE Euronext.

13. In any event, in light of the conclusions below, the OFT's decision of whether to refer the present transaction does not change irrespective of whether NYSE and Euronext are assumed to be independent or merged firms.

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[4] See OFT Substantive Guidance, paragraph 3.23-24 and the *NYSE/Euronext* decision. See further, *Anticipated acquisition by First West Yorkshire Limited of Black Prince Buses Limited*, 27 May 2005, paragraph 17 and earlier cases cited at note 7 of that decision.

LISTING SERVICES TO UK ISSUERS

14. Listing allows firms to raise capital through an initial sale of equities as well as subsequent equity issues. It also facilitates information production and dissemination and allows equities to be traded amongst investors.

15. In previous inquiries, a distinction has been made between primary and secondary listings. While a company may have listings on multiple exchanges, its main listing is referred to as its primary listing, while subsequent listings on other exchanges are referred to as secondary listings. These are complementary services constituting separate product markets. For convenience, they are discussed together below.

16. Primary listings are generally made on an issuer's home capital market. For the most part that is where investor awareness and interest in the stock resides and where, due to the network externalities present, liquidity tends to concentrate, typically around a single trading platform. Previous OFT and CC merger investigations have corroborated the conclusion in the OFT's 2004 Issuer Fees Report that for UK companies choosing to raise capital by issuing equity for public trading in the UK, there is no substitute for the LSE, which is the only primary market in the UK where new equity issues are admitted to trading.[5] This tendency towards 'home bias' was also supported by the weight of third party responses in this investigation, and no market participant proposed a geographic market for this service wider than the UK.

17. In light of the evidence available, the OFT therefore believes that the supply of primary listing services to UK issuers is a relevant market of UK dimension that, in practice to date, remains confined to the LSE.

18. As to primary listings, there is no evidence that NASDAQ is a material actual or potential competitor to the LSE. No market participant characterised NASDAQ as a credible potential entrant that could win primary UK listings business from the LSE. As to secondary listings, the

[5] *London Stock Exchange Issuer Fees – Report of the OFT's Investigation*, OFT 713, March 2004, paragraph 3.27 and see further, the *LSE* decisions and the CC Report.

LSE is by definition not an actual or potential secondary listings competitor in respect of all those UK companies for which it is already their primary listings venue. The above strongly suggests that no merger effects arise in respect of either primary or secondary listings services procured by the overwhelming majority of UK issuers.

19. For the sake of completeness, the best figures available suggest that – out of total of an estimated 13,000 public limited companies incorporated in the UK – less than ten have a primary listing on an exchange other than LSE, of which less than five have their primary listing on NASDAQ.

20. As a matter of theory, such issuers could conceivably consider the parties to be competitive substitutes for primary or secondary listings. However, the evidence available suggests that this is not the case. For this narrow class of customer the choice of separate jurisdictions for incorporation and primary and/or secondary listing venue appears to be driven by idiosyncratic factors that create a strong preference for a particular exchange – an example might be a technology company incorporated in the UK but seeking a listing alongside Silicon Valley and other peer technology stocks on NASDAQ. These customers therefore appear to be infra-marginal: they do not consider the parties to be competitive substitutes. Moreover, even assuming that all such customers did regard the parties as competitive substitutes (that is, were marginal), it is implausible that switching by such a trivial number of customers would generate material competition that would constrain the parties' listing fees or non-price terms, and there is no evidence to suggest that this is the case.

21. Given the absence of evidence suggesting material actual or potential competition between the parties in respect of primary or secondary listing services to UK issuers, no competition concerns in listings arise in the UK in respect of domestic customers.

LISTING SERVICES TO NON-UK ISSUERS

Background facts

22. Both NASDAQ and LSE provide listings for non-UK companies that do not have a suitable home exchange or capital market because they require access to a pool of capital that is deeper or better-suited to their needs (for example because it has a better understanding of their industry sector). Whether or not they are required to have a primary listing on their home exchange, their demand is for a listing in the principal global financial centre or centres where investor awareness and interest in – and hence liquidity for – that stock is most likely to reside. This line of commerce is typically referred to as international listings business.

23. Chinese, Indian, Russian, Canadian, Israeli and Brazilian companies have been frequent sources of international listings and IPO customers, though the list of countries in which relevant third-country (non-UK, non-U.S.) customers are based extends more widely. Companies from these countries have listed on a wide variety of exchanges, though the pattern of non-domestic listings by issuers from different countries of origin varies. Of the three countries of origin most often mentioned as being significant sources of international listings business attracted to the UK:

    - Chinese companies have variously chosen to list across six non-mainland exchanges: two of the major Asian financial centres (Hong Kong and Singapore), the three New York exchanges (AMEX, NASDAQ, NYSE) and London (LSE);

    - Indian companies have variously chosen to list across five foreign exchanges: both major New York exchanges (NASDAQ, NYSE), two European exchanges (LSE and Luxembourg), and, of other Asian exchanges, in Singapore.

- Russian companies have variously chosen to list across two European and two U.S. exchanges: the LSE, Luxembourg, NASDAQ and NYSE.

Canadian, Israeli and Brazilian issuers have listed across ten, seven and five different foreign exchanges, respectively. In terms of recent and future prospects, China appears in global terms to be the most lucrative source of potential issuer revenue. The OFT is aware that at least four of the six exchanges selected by Chinese companies (see above) have offices in the region: the Hong Kong Stock Exchange, NYSE and NASDAQ all have offices in mainland China itself, while the LSE has a sales office in Hong Kong.[6]

Applicability of section 33 of the Act

24. The OFT's duty to refer under section 33 of the Act is limited to mergers that may substantially lessen competition 'within any market or markets in the United Kingdom'.

25. In two previous cases under the Act where the issue of extraterritoriality was raised, the OFT considered it appropriate that its substantive assessment of a proposed transaction under the Act focus on the issue of harm to competition and customers in the UK, rather than extraterritorial effects.

    - In *SBC/AT&T*, the OFT focused on those theories of harm advanced by complainants that related to the worldwide markets for global telecommunications services and global internet connectivity, both of which included UK customers. It did not consider further theories advanced which, taken at face value, could only give rise to material effects outside the UK (specifically, alleged harm to U.S. customers in certain U.S. metropolitan areas, which the U.S. Department of Justice was investigating).[7]

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[6] See Ernst & Young, *Accelerating Growth Global IPO Trends 2006,* page 39.

[7] *Anticipated acquisition by SBC Communications Inc of AT&T Corporation*, 23 August 2005.

- In *NYSE/Euronext*, in respect of international listing services to non-UK issuers, the OFT concluded that competition to provide international listing services to non-UK issuers does not take place in any market or markets in the UK.[8]

26. Notwithstanding the OFT's findings in *NYSE/Euronext*, the OFT received concerns from several interested parties in the current investigation to the effect that the transaction would result in a substantial lessening of competition in the UK and should therefore be referred to the CC. For example, the following public complaint was put to the OFT by the Mayor of London:

> The LSE is in direct competition with NASDAQ for listings, particularly international listings and for small- and medium-sized enterprises. A combination would therefore reduce from 3 to 2 (the other being NYSE/Euronext) the number of credible players in these important markets and effectively eliminate the only real competitor to the two major US exchanges. This is likely to result in a substantial lessening of competition.[9]

27. Given these concerns, the OFT considered it prudent to re-examine the applicability of section 33 of the Act to this market. In doing so, the OFT sought comment from a substantial number of non-UK international listings customers and competitors in the relevant market to ascertain how competition took place for international listings, and whether there was evidence to suggest the merger might fall within the ambit of section 33 of the Act.

28. In order for section 33 to apply, the Act provides that the relevant market or markets must operate in the UK (section 22(6) of the Act). In considering the application of this requirement in this case, the OFT has investigated a series of issues.

[8] *NYSE/Euronext,* paragraphs 36-38.

[9] See letter from Ken Livingstone to Annette Baxter, OFT, 30 November 2006, available at www.london.gov.uk/view_press_release.jsp?releaseid=10032

29. First, the OFT has considered whether there are any UK customers in the relevant market(s). A market requires at least one customer in order to operate; therefore, to show a market that operates 'in the UK' it might be thought necessary to identify at least one UK customer.

30. By definition, companies incorporated in the UK are not customers in the market(s) for listings for non-UK issuers.

31. Further, the participation of non-UK incorporated companies in the market(s) appears to be located outside the UK. In *NYSE/Euronext*, the OFT was required to examine where two non-UK exchanges whose listing services were ultimately delivered outside the UK - that is, at the exchange locations in New York, Paris and elsewhere – should be deemed to provide their services for the purposes of the share of supply test. The OFT noted that UK incorporated issuers who were listings customers of the exchanges were likely to have multinational operations. Despite this, absent evidence to the contrary, the OFT decided that services provided to such UK issuers should be deemed to be provided in the UK because these companies were likely to have UK head offices and to have exercised their choice of secondary listings venue at that head office given the strategic nature of a decision.[10] The OFT has followed an equivalent approach in this case, but has tested whether its assumption that listings decision should be deemed to be taken at an issuer's head office by contacting a range of non-UK issuers directly to ask them how and where they made their listings decision. Every responding customer indicated that the decision regarding their listing was taken in the company's home jurisdiction.

32. Second, the OFT considered whether the market(s) might be said to operate in the UK in any other sense. A potentially relevant issue in this regard is where competition in the market should be considered to take place. In its guidelines on the allocation of turnover, the European Commission takes the view that competition generally takes place at

[10] Accordingly, the OFT asserted jurisdiction because it treated the parties as supplying in the UK to customers located in the UK, and because other relevant requirements were also met: see *NYSE/Euronext* at paragraph 6.

the location of the customer.[11] As set out above, the relevant customer location would appear to be that of the non-UK head office, notwithstanding the multi-national scope of customer operations. This would indicate that competition takes place outside the UK in this case.

33. Other evidence examined by the OFT indicates that the process of competition in this market operates outside the UK at issuers' head offices. In order to compete for listings from mainland Chinese companies, of the six foreign (non-mainland) exchanges most frequently chosen by such companies, three – the Hong Kong exchange, NYSE and NASDAQ – have local sales offices or representatives based in mainland China (such as in Beijing, Shanghai, Guangzhou). A fourth, the LSE, has established an office in Hong Kong. [12] The fact that these exchanges are prepared to undertake this capital outlay suggests that there is a need to be 'on location' in order to compete most effectively – in other words, proximate to company executives that make or influence the ultimate listings decision at the relevant foreign headquarters. Indeed, discussions and pitches by suppliers in the lead-up to selection would appear predominantly to take place in the jurisdiction of the issuer's head office and, therefore, outside the UK, though some such marketing discussions may take place abroad, for example at the location of the exchange in New York or London.

34. Finally, the OFT considered whether there was any other basis on which it could properly conclude that the relevant market(s) operate in the UK. It was submitted that the mere fact that the LSE is located in the UK would be a sufficient basis for jurisdiction. However, the OFT's

[11] Compare Commission Notice on the calculation of turnover under Council Regulation (EEC) 4064/89 on the control of concentrations between undertakings, OJ C66 2/3/98, at p 25, paragraph 46. For the Commission, the issue is relevant to the geographical allocation of turnover which can, in some cases, be determinative of its merger jurisdiction.

[12] See also Ernst & Young, *Accelerating Growth Global IPO Trends 2006,* page 39.

general approach is to define markets based primarily on customer location rather than supplier location.[13] For example, merger jurisdiction over a so-called 'foreign-to-foreign' merger would not be precluded under the Act merely because two merging suppliers with no UK presence supplied UK customers purely on the basis of imports of goods or, for example, supplied service to UK customers over the Internet. Moreover, consistent with its approach in *NYSE/Euronext*, the OFT takes the view that the services provided by LSE to non-UK issuers should be treated as being provided outside the UK. As a result, LSE would not appear to be operating on the relevant market(s) in the UK, notwithstanding that it is located in the UK.

35. On the basis of the evidence described above, the OFT is satisfied that the relevant market(s) do not operate in the UK (irrespective of the relevant geographic scope of the market(s)) and that these aspects of the merger do not therefore fall within the ambit of section 33 of the Act.

Substantive assessment

36. The OFT also considered it prudent to seek relevant evidence on the extent to which the parties compete with one another.

37. The concerns expressed based on the view that the parties and NYSE Euronext are the only credible international listings venues (the '3 to 2' theory) imply that the parties are reasonably close competitors, and probably first and second choices for a substantial proportion of relevant customers.

38. However, evidence obtained by the OFT suggests that neither party is a close competitor of the other for Chinese, Russian, Indian or other issuers. Accordingly, there is no realistic prospect that the merger would relax close competitive constraints each party imposes on the

[13] This is consistent with OFT guidance, which indicates that the OFT views competition as a process of rivalry that is valuable because it deliver benefits to customers and, if its effectiveness is diminished, will result in customer detriment. See *Mergers – Substantive Assessment Guidance* (OFT 516) at paragraph 3.5.

other, such that the merger would provide NASDAQ with the incentive to raise price, reduce service, or retard innovation post-acquisition.

39. Apparent 'competition' between exchanges in different jurisdictions relates primarily to factors that are outside the exchange's control (exogenous factors). Customer responses and other evidence indicate that issuers choose between exchanges in different jurisdictions – and in particular between the parties – primarily on the basis of exogenous factors. These include market liquidity, culture, regulatory costs and burdens, the advice of financial advisors, and the associated fees not payable to exchanges. Public reports to this effect include the 2006 report by the LSE and OXERA comparing the international costs of capital. [14] Exchanges market these exogenous factors to customers, effectively operating as 'ambassadors' of their respective jurisdictions. This is not, however, competition for the purposes of merger control. When customers choose a listings regime based on liquidity, regulation and so forth, their choice is not materially driven by the factors within, or primarily within, the exchange's control. Accordingly, the threat of customer substitution to an exchange in a different regime because that regime is considered preferable does not constrain an exchange in relation to factors that generally are within its control – price, service or innovation decisions. In relation to those primary elements of customer choice driven by exogenous regime factors, two exchanges in different regimes are not rivals in the relevant sense.[15]

40. Moreover, on the evidence available in respect of this market(s), residual elements of customer choice that do relate to variables within exchanges' control generate relatively weak competitive constraints between the parties, and are not sufficient to bring NASDAQ and the LSE within the same antitrust market. All issuers responding to the OFT indicated that they would not switch on the basis of a 5 per cent to 10 per cent increase in listing fees, which would make them each a

[14] LSE and OXERA, *The Costs of Capital: An International Comparison*, June 2006.

[15] Instead, the threat of customer substitution based on regime factors (such as the debate as to whether U.S. Sarbanes-Oxley regulation deters foreign listings and diverts them to the UK) is a matter for public debate as to appropriate regulatory and other regime choices. These are public interest issues, not competition issues, and fall outside section 33 of the Act.

separate monopolist under the standard test for market definition, the 'hypothetical monopolist' or 'SSNIP' test. Further, within the class of customers identified by the OFT as prima facie most likely to regard the parties as close substitutes, only one responded to the OFT's questions and that customer indicated that the parties' services did not compete as they were complements rather than substitutes.

41. NASDAQ's closest competitor is NYSE rather than the LSE. As set out above, the evidence evaluated by the OFT indicates that exchanges in different jurisdictions are not generally close substitutes and that the parties in particular appear to operate in different relevant markets. As exchanges within the same jurisdiction (the U.S.), NASDAQ and NYSE are however in an entirely different position.
NASDAQ internal documents indicate that NYSE is its closest competitor in relation to non-domestic listings: for example, [ ]. Indeed, it seems that there may be genuine competition between NASDAQ and NYSE to the extent that customer choice between them is driven wholly or substantially by elements of their value proposition to customers that are within their control, including brand strength (NYSE's general prestige and NASDAQ's reputation for listing technology stocks), listings fees, service proposition and platform innovation. This is because the regime factors that prevail in the context of exchanges in different regimes tend largely to 'net out' when two exchanges are in the same regime, as those exogenous factors are common and will not distinguish the listings proposition of the two suppliers.

42. Nor is there support for the view that the merger reduces credible listings options from 3 to 2. Irrespective of the issues addressed above, which suggest a lack of competitive substitutability across regimes, the available evidence does not support the theory that customer choice in non-domestic listings is limited to three exchanges: the two parties plus NYSE Euronext. Records of actual choices made by Chinese, Indian and Russian companies among others clearly reveal that these customers are willing to list on various exchanges other than the parties and NYSE Euronext, including Hong Kong, Singapore and Luxembourg, which they regard as credible alternatives. For example, for mainland Chinese

issuers, the largest market for new listings, Hong Kong, where the LSE has an office, cannot realistically be characterised as an exchange that lacks credibility. Indeed, the focus of NYSE, NASDAQ and LSE for these customers appears to be to divert them from Hong Kong, which describes itself as 'the natural overseas market' based on proximity, language, culture, liquidity and regulatory standards.[16]

43. Overall, therefore, the weight of evidence available to the OFT does not support the view that LSE and NASDAQ are close competitors in the provision of listing services to third country issuers, and therefore does not support the view that such customers would suffer antitrust harm from the merger. Accordingly, the OFT sees no basis for concluding that the merger would harm UK customers or consumers, assuming the issues canvassed above fell within the ambit of section 33 of the Act.

[16] Richard Williams, Head of Listing, Hong Kong Exchange, cited in Ernst & Young, *Accelerating Growth: Global IPO Trends 2006*, p. 17.

EQUITIES TRADING SERVICES

44. In respect of the market for 'on-book equities trading services within the UK'[17] the CC Report identified the five most important potential alternative trading platforms to the incumbent LSE as Deutsche Börse, Euronext, virt-x, NYSE and NASDAQ, while also recognising weaker constraints from other exchanges and off-book venues.[18] The competitive constraint provided arises 'primarily from the perceived threat of head-to-head competition in the UK'[19] as none of the exchanges are a direct actual competitor to the LSE in trading. This threat was judged sufficient to warrant definition of a geographic market that includes Europe and the United States.[20] For ease of reference, this decision refers to this threat as one of 'entry' and the relevant exchanges as 'potential entrants'.

45. The analysis of these supply-side constraints is in fact a function of buyer power: the possibility that LSE customers representing a critical mass of trading business would switch their liquidity to a rival exchange in response to dissatisfaction with the LSE's trading fees or other terms.[21] As the CC noted, trading firms 'have the incentive and ability to exert significant buyer power through collective action'.[22] However, collective action creates a problem of coordination: because of the network externalities associated with liquidity, each customer needs to know that sufficient others will shift their volume too in order to make a liquidity shift viable and create a credible alternative trading venue and, at the same time, the proposed entrant must seek such commitment from these various customers, to assure itself that its entry would be a success.[23]

[17] Once listed, securities can be traded by brokers and dealers for profit, both on their own account and acting as intermediaries for other investors. Fees are charged to brokers, dealers and investors, generally on a per-trade basis. Equities trading may be conducted either on or off the central order book operated by an exchange. [ ].
[18] CC Report, paragraphs. 5.64ff.
[19] CC Report, paragraph 5.132.
[20] CC Report, paragraph 4.59.
[21] CC Report, paragraph 4.57 and 5.57ff.
[22] CC Report, paragraph 5.124.
[23] See further the CC Report discussion at 5.115 to 5.124.

46. Despite the considerable problem of coordination, the prospect of customers switching a critical mass of business to a rival exchange to the LSE was considered by the CC to exert competitive constraints on the LSE, especially given the consequences of a liquidity shift: once the 'tipping point' is reached the threat is to much, if not the entirety, of the LSE's equities business, not just a portion of its market share. The CC Report also concluded that the elimination of one potential target for customer switching (Deutsche Börse or Euronext) did not materially lessen the overall competitive threat facing the LSE and did not therefore result in a substantial lessening of competition.

47. Third parties during our investigation did not consider NASDAQ a likely entrant, nor did they consider it a more likely entrant than one of the other exchanges identified by the CC. Although NASDAQ has recently publicly stated it would consider entering absent the merger, there is still no evidence to suggest that, absent the merger, NASDAQ was the most likely choice of customers as an alternative platform to the LSE.

48. In terms of the ways in which buyer power through collective customer action was most likely to be exercised, the CC in 2005 considered that their least likely strategy to discipline the LSE was the establishment of a rival trading platform by the customers themselves. Since that time, the situation has materially changed: 'Project Turquoise' is the name given to the venture by seven of the major international investment banks – Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, Merrill Lynch, Morgan Stanley, UBS – to set up a rival exchange platform in competition with the LSE, among others. These customers without doubt account for a substantial volume of LSE' trading business (press reports indicate the figure is 55 per cent).[24] On the most recent reports, this project is proceeding as planned,[25] and, irrespective of timing, creates a credible threat to the LSE that will apply post-merger. Indeed, a joint venture of this type appears better-placed to overcome

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[24] See for example 'Search starts for chief executive to run rival exchange', *The Independent,* January 13, 2007.

[25] See above and see quote from Project Turquoise in 'LSE announces lower fees', *Financial Times*, January 18, 2007 ('Project Turquoise scoffed at the notion the [LSE's fee] cuts would derail the rival trading platform. It said the 'banks are not going to be blown off course by something like this. This was very much expected.'')

any coordination problem between customers in determining whether they would collectively shift volume to a third party entrant.

49. Indeed, even if Project Turquoise were not to proceed, the fact that a large group of customers representing a large proportion of LSE's equities trading volumes have been in recent contact in relation to switching away from the LSE is significant: these measures, along with the forum of the London Investment Bankers' Association (LIBA), assists these customers in overcoming the coordination issue. Accordingly, Project Turquoise aside, there remains no reason to depart from the view that each of Deutsche Börse, NYSE Euronext, and virt-X are alternative platforms to which such major LSE customers could divert their liquidity, and that this risk disciplines the LSE. Consistent with the OFT's decision in *NYSE/Euronext*, the fact that there would, numerically, be one less potential platform after this transaction does not materially diminish the entry threat faced by the LSE (which does not vary simply in proportion to the number of candidate alternative platforms). The probability that the LSE will lose its trading business to a rival will remain largely unaffected provided customers have sufficient alternative platforms to which they can collectively switch their business, and in the circumstances, again leaving aside Project Turquoise, the three alternatives remaining after the merger should be more than sufficient.

50. Overall, it is unrealistic to conclude that the LSE could raise prices or reduce service absent the entry threat from NASDAQ. If the merged firm did so, it would still face the risk that dissatisfied customers will proceed with self-sponsored entry and/or threaten to switch business by sponsoring entry of one or more of NYSE Euronext, virt-X or Deutsche Börse, any of which outcomes would have severe financial consequences for the LSE because it threatens much, if not all, of its UK equities trading business. In other words, while NASDAQ does, in numerical terms, represent a fifth potential option for customers as a venue to threaten to switch liquidity, the evidence does not suggest that removal of a fifth option post-merger would materially lessen the totality of the switching threat that the LSE faces absent the merger.

51. On the basis of the factors set out above, the OFT does not believe the merger gives rise to a substantial lessening of competition in respect of on-book equities trading services within the UK.

OTHER SECTORS

52. The parties operate in different markets and trade in different categories of bonds and derivatives, generally specific to the geographic region within which they operate. The OFT received no evidence that there was potential for head-to-head competition and third parties raised no concerns. As there are no significant overlaps between the parties for the trading of bonds or derivatives, the OFT therefore believes that no competition concerns arise in relation to these sectors.

53. Exchanges provide end-users and third party vendors with proprietary market information, such as real-time pricing data and trading volume data, and non-proprietary data, such as indices and historical information.[26] The CC Report concluded that non-proprietary data was 'likely to be part of a wider financial services data market'[27] and each exchange is the sole provider of its proprietary market information, therefore, there can be no overlap or competition in respect of such information.[28] The parties and third parties confirmed that no competition issues arise. The OFT believes that as there is no material overlap between the merging parties, no competition concerns arise in relation to the supply of market information services.

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[26] CC Report, paragraph 4.74.
[27] CC Report, paragraph 4.76.
[28] CC Report, paragraph 4.75.

THIRD PARTY CONCERNS

54. The OFT received a number of responses from third parties, most of whom had no overall competition concerns in relation to the proposed transaction. Concerns relevant to the competition assessment of the merger have been addressed above.

Non-competition concerns

55. Two third parties were concerned that the proposed transaction could damage London's position as a leading international market place. Whilst the OFT does not consider this to be a competition concern capable of analysis under the Act, it did refer the issue to the Department of Trade and Industry for consideration under section 42 of the Act.

56. Similarly, a number of third parties expressed concerns regarding the potential for U.S. regulations to be imposed on UK companies as a result of the merger, saying that if this were to occur, consumers would be left with less choice and NASDAQ would raise fees to the currently higher U.S. levels. Again, these are issues for other branches of government, including the Financial Services Authority.

57. Concerns about increased trading costs were raised by three third parties. For the reasons set out above, the OFT has concluded that such concerns will not materialise as a result of a substantial lessening of competition. The third parties appear to have additional concerns to the effect that either (i) NASDAQ would not run the LSE in customers' interests or (ii) NASDAQ would struggle to maintain the level of investment required for information technology and product development in LSE. These are primarily matter for shareholders and in any event fall outside the OFT's merger assessment.

ASSESSMENT

58. The proposed transaction will lead to the merger of NASDAQ and LSE, two of the world's leading stock exchanges.

59. Consistent with previous findings, a close assessment reveals that NASDAQ does not materially compete for the LSE's primary listings business to UK issuers, nor is there any other material competition between the parties for secondary listings by UK issuers.

60. In respect of listing services provided to non-UK issuers, the OFT concludes that the relevant market or markets do not operate in the UK. Any possible merger effects in this respect therefore fall outside the scope of the merger provisions of the Act. In any event, the evidence suggests that the merger will not result in competitive harm to customers in the relevant market or markets.

61. In respect of equities trading in the UK, to the extent the transaction removes one potential alternative platform to which the LSE's customers could turn, this will not materially reduce customer's ability to switch to an alternative platform or materially relax the competitive constraints currently facing the LSE. The LSE's major customers are threatening to establish their own rival exchange, and retain the option to switch their business to several other exchanges.

62. Finally, the OFT concludes that no concerns arise in respect of any other market sector, such as bonds and derivatives trading services, or market information services.

63. Consequently, the OFT does not believe that it is or may be the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

DECISION

64. This merger will therefore not be referred to the Competition Commission under section 33(1) of the Act.