
Anticipated merger between NYSE Group, Inc. and Euronext N.V.

The OFT's decision on reference under section 33(1) given on 9 October 2006.
Full text of decision published 12 October 2006.

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

PARTIES

1. **NYSE Group, Inc. (NYSE)** is a publicly-listed holding company formed on 2 May 2005. NYSE operates the New York Stock Exchange and another U.S.-based securities exchange, NYSE Arca, via subsidiaries. NYSE's total revenue attributable to UK customers was approximately £[] in 2005.
2. **Euronext N.V. (Euronext)** was formed in September 2000 by the merger of the Amsterdam, Brussels, and Paris stock exchanges. Euronext has since expanded through acquisition to include the Portuguese stock exchange, the London-based derivatives exchange, London International Financial Futures and Options Exchange (Euronext.liffe), and a stake in MTS SpA, an electronic market for European wholesale fixed income securities. Euronext achieved turnover in the UK of approximately £[] million in 2005.

TRANSACTION

3. Euronext and NYSE have agreed to combine the two companies in a merger of equals pursuant to a Combination Agreement. Upon completion, NYSE and Euronext will each become subsidiaries of NYSE Euronext Inc., a Delaware holding company (NYSE Euronext, or the merged firm). The transaction is subject to shareholder and applicable regulatory approvals.

JURISDICTION

4. Neither of the merging parties will continue to be carried on under the same ownership or control. The parties will thereby 'cease to be distinct' for the purposes of section 26 of the Enterprise Act 2002 (the Act).
5. In the context of this transaction, both parties' turnover in the UK must exceed £70 million to qualify as a relevant merger situation pursuant to section 23(1)(b) of the Act. As NYSE's relevant turnover falls well short of that level, the turnover test is not met.
6. However, the share of supply test, set out in section 23(4) of the Act, is met in respect of the supply of secondary listings services to UK companies:
 - **Supply of secondary listing services.** The supply of such services, described in more detail below (at para. 27ff) constitutes a reasonable description of supply under section 23(4) of the Act.
 - **Supply in the UK.** Services are supplied in the UK to customers who are located in the UK. That is, in most circumstances, where the deal is made, where the turnover for the supplier in question is generated, and where competition with alternative suppliers takes place.¹ Customers of secondary listing services will almost invariably be multinational companies. The OFT considers it reasonable to regard secondary listing services as supplied in the UK where the companies concerned have their head office in the UK, since, in most circumstances, that is where the relevant procurement decision is likely to be taken, owing to its strategic nature and where, in turn, any competition between suppliers takes place.
 - **Share thresholds.** As a convenient proxy, the OFT has had regard to data from the parties on the total number of secondary listings by all

¹ Compare the Commission Notice on calculation of turnover under Council Regulation (EEC) 4064/89 on the control of concentration between undertakings, OJ C66 2/3/98 at p 25, para. 46; compare also Draft Commission Consolidated Jurisdictional Notice under Council Regulation (EC) 139/2004 the control of concentration between undertakings, available at <http://ec.europa.eu/comm/competition/mergers/legislation/jn.pdf>, paras.165, 168.

companies incorporated under UK law.² The parties' combined share of supply is [greater than 25 per cent].

7. Notwithstanding the parties' submissions,³ therefore, the OFT considers that the parties overlap in a relevant share of supply in the UK, and that their combined share exceeds 25 per cent. Nor does the OFT's assessment of market definition or competitive effects affect the validity of conclusions as to its jurisdiction. Accordingly, the share of supply test is met and 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.
8. The parties have informed the OFT that the EC Merger Regulation does not apply, and that, worldwide, the transaction will also be notified for merger clearance in Portugal.

SUBSTANTIVE ASSESSMENT

BACKGROUND

Stock exchange consolidation and prior investigations

9. The subject of global stock exchange consolidation remains an active one. Aside from the proposed transaction under scrutiny, media speculation has considered various merger combinations involving key players on both sides of the Atlantic, including NYSE and Euronext, as well as the Nasdaq Stock Market, Inc (Nasdaq), the London Stock Exchange (LSE), Deutsche Börse AG (DBAG), the Borsa Italiana and OMX AB, the Nordic Baltic exchange.
10. The LSE has been the subject of a significant number of public bids or expressions of interest. In this context, the OFT and the Competition

² This is a close but not perfect proxy: it is possible that secondary listings competition for a minority of customers with an atypical profile – for example, incorporated in the UK for tax reasons but having no strategic operational presence in the UK – may take place purely abroad. However, it would be impractical in the present case to verify individual company facts to this degree of detail, and the parties have treated companies incorporated under UK law as 'UK customers' in their submissions. The OFT therefore regards the data available as a reasonable proxy for establishing that the share of supply test is met in the circumstances of the present case.

³ The parties had submitted that the share of supply test was not met, but accepted the OFT's adjudication, as outlined above, for the purposes of the inquiry leading to this decision.

Commission (CC) have recently conducted a number of merger investigations into markets affected by or related to this transaction.

- In March 2005, the OFT, based on provisional concerns relating to the UK equities trading chain, decided to refer to the CC the proposed acquisitions of the LSE by DBAG and Euronext respectively (the OFT's LSE decisions).⁴
- In November 2005, the CC published its report into these bids (the CC report).⁵ Its key findings relate to the UK equities trading chain, and may be summarised briefly as follows.
- In its horizontal assessment, the CC concluded that the elimination of either bidder's competitive constraint upon the LSE alone would not be expected to result in a substantial lessening of competition (SLC) in equities trading services in the UK. While each of DBAG and Euronext, as potential entrants, provided competitive constraints on the LSE in this regard, there was sufficient surrounding competition to discipline the LSE post-merger: remaining constraints included the other European bidder (DBAG or Euronext as the case may be), virt-X, NYSE, Nasdaq and to a lesser degree, other exchanges and off-book trading services.
- In its vertical assessment, however, the CC concluded that the bids by Deutsche Börse and Euronext each would be expected to result in a SLC because (i) a rival's seamless access to the LSE's post-trade (clearing) infrastructure was critical to its viability as a competitive alternative to the LSE (because customers would require post-trade fungibility between trades made on the LSE and on the rival platform); (ii) each bidder had, or might procure, a substantial interest and influence over the LSE's present or future clearing provider; (iii) the acquirer of the LSE therefore had the ability and incentive to deny or degrade post-trade access to rivals, thus raising barriers to entry and foreclosing the LSE's competitors

⁴ OFT, *Anticipated acquisition by Deutsche Börse of the London Stock Exchange plc*, 29 March 2005 (DBAG/LSE decision); *Anticipated acquisition by Euronext N.V. of the London Stock Exchange plc*, 29 March 2005 (Euronext/LSE decision).

⁵ 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 (CC Report).

- at the trading level. Accordingly, the CC accepted packages of divestment and access remedies from both potential acquirers to resolve these concerns, published in January 2006.
 - In February 2006, the OFT unconditionally cleared the proposed acquisition of the LSE by Macquarie London Exchange Investments Limited.⁶
11. None of the above bids for control of the LSE has materialised to date. Most recently, on 9 March 2006, Nasdaq made an indicative offer for LSE of 950p, which was subsequently withdrawn on 30 March 2006. Under Rule 2.8 of the City Code, having withdrawn its offer in this way, Nasdaq was prohibited from making an offer for the LSE for 6 months except in limited circumstances; this suspension lapsed on 2 October 2006.
12. This rule does not, however, prevent a potential acquirer from raising its shareholding to below 30 per cent. On 19 May 2006, Nasdaq announced that it had acquired 25.1 per cent of the LSE's shares. (This shareholding has subsequently risen to 25.3 per cent as a result of a share buy-back by the LSE.) This shareholding has also been characterised by Nasdaq and by some commentators as a 'strategic' stake,⁷ pending further developments in the climate of anticipated consolidation between and among European and U.S. exchanges.

⁶ OFT, *Anticipated acquisition by Macquarie London Exchange Investments Limited of the London Stock Exchange plc*, 3 February 2006.

⁷ See Nasdaq press release of 19 May 2006: Nasdaq President and CEO, Bob Greifeld, refers to this as a 'strategic investment in excess of the important 25 per cent threshold'. See also, Greifeld, Speech at SIA Annual Market Structure Conference, 24 May 2006 ('... the first to stake our position, in this phase of global consolidation with our investment in the LSE.') For third party comments, see, e.g., 'Nasdaq raises LSE stake, making rival bids harder', Reuters, 19 May 2006 and 'Nasdaq raises LSE stake to block rival', Financial Times, 10 May 2006 (referring to 24.1 per cent stake).

The OFT's inquiry in this case

Focus of the inquiry

13. NYSE and Euronext provide or have interests in a number of different business services including: (a) listing services; (b) equities trading; (c) bonds trading; (d) derivatives trading; (e) clearing and settlement; and (f) information services.
14. A comprehensive introduction to markets relevant to stock exchanges may be found in the CC report and the OFT's LSE decisions. This decision therefore refers, where appropriate, to these market descriptions and 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.
15. However, a merger between NYSE and Euronext raises a set of issues that differ from the issues raised by a bid for the LSE. The principal UK 'overlap' in the services provided by the parties to this transaction is in secondary listings for UK customers, an issue peripheral to earlier inquiries involving the UK's primary listing venue, the LSE. As such, earlier approaches have been refined as appropriate, based on fresh evidence from market participants. Another potential overlap relates to listings provided to non-UK customers - such as international or 'primary' listing services provided to third country (e.g., Russian, Chinese, Indian) companies - but the merger has no material effect on competition or customers in the UK in that regard. Both these overlaps are considered in more detail below.

The appropriate counterfactual

16. 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, i.e., the status quo ante.⁸

17. The OFT acknowledges that the proposed merger between NYSE and Euronext is simply one proposed combination in a round of widely anticipated industry consolidation. There has been speculation as to many possible merger permutations among the major European and U.S. exchanges but as yet no major transaction between key players has actually completed. Nasdaq's substantial minority shareholding in the LSE has arisen after four failed bids, including its own, for control of the LSE.
18. While Nasdaq's shareholding is a fact, it is currently speculative – irrespective of the likelihood of a new Nasdaq bid for the rest of LSE's shares – to conclude that such a bid for full control would satisfy all relevant shareholder and regulatory approvals and complete. Such an outcome does not therefore qualify as a sufficiently likely and imminent change to the status quo ante. Indeed, to assume that Nasdaq would acquire full control of the LSE (assuming it launches such a bid) would, among other things, prejudge competition clearance.⁹
19. For these purposes, therefore, the appropriate counterfactual is the status quo ante, which includes, among other relevant facts, Nasdaq holding in excess of 25 per cent of LSE's shares. Market participants who responded to the OFT's invitation to comment were made aware of this shareholding and were also made aware that it may be considered to amount to 'material influence' over the LSE for the purposes of UK merger law.
20. Accordingly, the OFT considers that the correct comparison, for the purposes of assessing whether it is or may be the case that the NYSE/Euronext merger may be expected to result in substantial lessening of competition is between competition assuming a NYSE/Euronext merger on the one hand, and competition under the status quo ante, on the other.

⁸ See OFT Substantive Guidance, para. 3.23-24; see further, OFT, *Anticipated acquisition by First West Yorkshire Limited of Black Prince Buses Limited*, 27 May 2005, para. 17 and earlier cases cited at note 7 of that decision.

⁹ The OFT notes that were Nasdaq to bid to acquire the remaining LSE shares, such a transaction would, on the evidence available, fall within the OFT's jurisdiction under the Act and the OFT would consider on the basis of full evidence whether such a transaction would raise competition concerns.

21. In any event, in the light of the conclusions set forth below, the OFT's decision on whether to refer the present transaction does not change irrespective of the extent of Nasdaq's shareholding in, or influence on the behaviour of, the LSE.

LISTING SERVICES

22. 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.
23. In previous decisions, 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.

Primary listing services to UK issuers

24. Primary listings are generally made on an issuer's home capital market because, 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. This applies to UK issuers: in its 2004 inquiry into the LSE's issuer (listing) fees, the OFT determined that 'for U.K. companies which decide to raise capital by issuing equity for public trading in the U.K. there is no substitute for the LSE, which is the only primary market in the U.K. where new equity issues are admitted to trading'.¹⁰ The OFT and CC inquiries into the later bids for the LSE corroborate the view that this avenue of corporate finance is a separate product market of UK dimension,¹¹ and responses to this inquiry also reaffirmed the 'home bias' among UK companies in favour of the domestic exchange, the LSE. In this case, therefore, the OFT proceeds on the basis that the relevant market is the supply of primary listing

¹⁰ *London Stock Exchange Issuer Fees – Report of the OFT's Investigation*, OFT 713, March 2004, paragraph 3.27. From the 7 Recognised Investment Exchanges (RIEs) operating in the UK, only LSE receives listings from UK companies. In principle, all of the 7 RIEs could receive primary listings. However, due to lack of liquidity as well as to expertise, each of these operates a particular type of service. As all new listings authorised by the UK Listing Authority (since 2000, the Financial Services Authority must seek admission to trading on an RIE, the LSE is the only exchange on which to list in the UK).

¹¹ CC Report, paras. 4.4-4.13, DBAG/LSE decision, paras. 18-28.

services to UK issuers, and in practice, remains confined to the LSE.

25. As described below under listing services to non-UK issuers, companies with international activities but a relatively underdeveloped domestic capital market may seek a primary listing on a foreign exchange in a major financial centre to access the international capital market. Given the stature of London, this does not of course generally apply to UK companies. There is, however, a tiny fraction (approximately 0.4 per cent¹²) of listed companies incorporated in the UK that have a primary listing on an exchange other than the LSE for idiosyncratic reasons specific to their business or corporate history. The OFT has no reason to believe that NYSE and Euronext are competitive (substitutable) listing choices for such customers.
26. On the contrary, it is clear from third party evidence, which is consistent with previous OFT and CC findings, that Euronext and NYSE are neither actual nor material potential competitors to the LSE in respect of primary listings services to UK customers. Therefore, no concerns arise in this respect, even with respect to the tiny fraction of UK issuers who wish to maintain their primary listing on an exchange other than the LSE.

Secondary listing services to UK issuers

27. In the OFT and CC inquiries into the LSE bids, some consideration was also given to listings other than primary listing services to UK issuers. In addition to defining a UK-wide market for primary listing services to UK issuers, the CC concluded that 'the provision of secondary listing services and primary listing services to companies seeking listings outside their domestic market constitute separate relevant markets with an international geographic dimension.'¹³
28. However, in those bids, the issue of competition between the LSE and either bidder (DBAG or Euronext) for secondary listings of UK companies was not material, because the LSE is the primary listing venue for almost all such companies. In contrast, the present transaction combines two non-UK exchanges, each of which may be a potential secondary listing venue

¹² The best figures available to the OFT suggest that five companies incorporated in the UK fall into this category, while 1,313 have a primary listing on LSE's Main Market.

¹³ CC Report, paras. 4.14 and 4.77.

for UK issuers. Accordingly, the OFT has considered afresh the evidence from market participants on the substitutability of listings with NYSE and Euronext from the point of view of a UK company seeking a secondary listing.

29. It is evident from earlier inquiries that access to a highly-developed capital market is a need that UK customers can and do satisfy domestically, by listing on the LSE. As such, UK companies with Euronext and/or NYSE secondary listings who responded to our request for information stated that the primary reason(s) for their secondary listing(s) were not access to international capital, but rather significant business interests in, or historical ties to, the country where the secondary listing was sought.
30. Accordingly, UK customers of such services are most likely to be inframarginal: they will not switch between exchanges and exercise a competitive choice, because there is almost always only one realistic provider that serves the national capital market in which they seek to have a listing presence. For example, a UK company with business and historical ties to France may consider a secondary listing on Euronext Paris to maintain its exposure to French investors, but is unlikely to consider NYSE, or, for that matter, Nasdaq, Deutsche Börse, or other exchanges, as a substitute in this regard.¹⁴

¹⁴ The introduction of the EU Prospectus Directive (2003/71/EC) allows companies listed on an EU 'regulated market' to make offers across the EEA with a single prospectus approved by the competent authority of the company's home Member State. However, third parties were mixed as to whether the Directive would (and if so, how quickly) discourage companies with a primary listing on a European exchange seeking to have a secondary listing on another European exchange.

31. The United States, as the largest national economy, is in the unusual position of having multiple equities exchanges (NYSE, Nasdaq, AMEX). It is conceivable that a UK company seeking greater U.S. exposure may be choosing between these U.S. exchanges, but again, the choice will be within that national capital market, and not between exchanges based in Europe (e.g., Euronext Paris, Amsterdam, Brussels, Lisbon) and these U.S. venues. This reasoning is supported by market participants; as one third party explained:

Historically, companies would rarely choose between the NYSE and Euronext as alternatives. This implies that NYSE and Euronext have been complements, chosen for entirely different reasons.

32. Other market participants also characterised the parties as complementary propositions for UK issuers. Indeed, while the evidence does not support the proposition that NYSE and Euronext are substitutable choices, they do appear to be complementary for some UK customers: six companies with a secondary or dual listing on Euronext also maintain a secondary listing on NYSE.¹⁵

33. Finally, evidence available to the OFT supports the view that the competitive variable within the control of exchanges (listing fees or other unregulated aspects of terms and conditions) are not material drivers of choice of exchange. As one respondent explained:

Listing fees are not a significant material issue in the choice of exchange, and it is doubtful that many companies would respond to such an increase by switching. The costs of switching would themselves act as a further deterrent.

34. Consistent both with this general proposition and the lack of material competition between the parties in particular is a recent LSE/Oxera study on cost of capital, which reveals that the differential between issuer admission fees on NYSE and Euronext is very large, while annual NYSE

¹⁵ It does not necessarily follow, conversely, that the parties are substitutes for those customers that have *not* chosen to list on both NYSE and Euronext. Nor is there evidence to support such a view.

issuer fees are between twice and twenty times as expensive as those of Euronext.¹⁶

35. Overall, therefore, the weight of evidence available to the OFT suggests that the parties are not material competitors in respect of supply of secondary listings to UK customers. Given the lack of competition concerns raised, the issue of geographic market definition can ultimately be left open. It is sufficient for present purposes to note that, from the perspective of the relevant UK customers, there is a case for defining separate national markets (e.g., France, the Netherlands, the United States and so forth) and there may be a case for defining broader markets (e.g., Eurozone, Asia) of regional or continental dimension, but a definition that encompasses both parties, such as a market of transatlantic dimension, does not appear sustainable on the evidence.

Listing services to non-UK issuers

36. The other aspect of international competition for listings relates to supply to companies that do not have a suitable home exchange or capital market and which require access to international pools of capital. Russian, Chinese, or Indian companies are the most oft-cited example. Whether or not they are required to have a primary listing on their home exchange, their demand is for a listing in one of the world's principal financial centres.
37. The OFT's duty to refer under section 33 of the Act applies only to mergers that may substantially lessen competition 'within any market or markets in the United Kingdom'. Accordingly, the substantive assessment of the proposed transaction has focused on the issue of harm to competition and customers in the UK, rather than merely extraterritorial effects.¹⁷
38. In this case, the OFT believes that competition to provide international listing services to non-UK (e.g., Chinese, Russian, Indian) issuers does not take place in any market or markets in the UK, and does not otherwise materially impact upon UK customers or consumers. Accordingly, the issue

¹⁶ *The Costs of Capital: An International Comparison*, London Stock Exchange and OXERA, June 2006. In all cases, listings fees are trivial relative to companies' market capitalisation and the typical costs of a UK IPO.

¹⁷ See also the approach in OFT, *Anticipated acquisition by SBC Communications Inc of AT&T Corporation*, 23 August 2005.

of the degree to which the merger may lessen competition for these non-UK customers need not be considered.

THE UK EQUITIES TRADING CHAIN

Horizontal issues in trading

39. In respect of the market for 'on-book equities trading services within the UK'¹⁸ the CC report identified the five most important competitive constraints on the incumbent LSE as Deutsche Börse, Euronext, virt-X, NYSE and Nasdaq, while also recognising weaker constraints from other exchanges and off-book venues.¹⁹ The competitive constraint provided arises 'primarily from the perceived threat of head-to-head competition in the UK',²⁰ as none of the exchanges have hitherto been 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 States²¹ and these supply-side constraints rely critically on demand-side dissatisfaction among the LSE's major customers being sufficient to render a diversion of their liquidity to a rival exchange credible.²²
40. Unlike the earlier bids, where the proposed transaction combined an actual competitor, the incumbent LSE, and a potential entrant (DBAG or Euronext, as appropriate) the OFT in this case has considered the theory of whether a merger of two potential entrants would raise substantial competition concerns. In this case, the relevant theory of harm is elimination of potential competition: that the combination of two of the five most important potential entrants in the UK equities trading would relax constraints on the LSE to such a degree that it could profitably offer a less

¹⁸ 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. It is estimated that approximately two-thirds of equities trading is conducted off-book.

¹⁹ CC Report, paras. 5.64ff.

²⁰ CC Report, para. 5.132. For ease of reference, this decision refers to these exchanges as 'potential entrants' as a shorthand to reflect this perceived threat.

²¹ CC Report, para. 4.59.

²² CC Report, para. 4.57 and 5.57ff.

favourable price and service proposition to its UK equities trading customers.²³

41. In this case, however, the evidence before the OFT does not support the validity of such a theory:

- **The threat of potential entry absent the merger is, at best, uncertain.** For the theory of harm to be sustainable, each party must qualify as a potential entrant into UK equities trading absent the merger (if, for example, Euronext were a potential entrant, but NYSE was not, then the transaction would not result in a merger of potential entrants). Responses by the parties to requests for relevant documentary evidence []. Third party views were divided as regards the status of both parties as independent potential entrants absent the merger. The weight of evidence suggests, however, that, in lieu of organic expansion in the UK, consolidation options appear to be the key driver of forward planning by the parties, consistent with the general industry climate. For example, one market participant noted that while both parties would be potential entrants into the UK market for on-book equities trading, 'the most likely avenue for entry however is by acquiring the London Stock Exchange, rather than by establishing an alternative exchange'. Nor does the OFT [].

²³ There is no evidence to suggest that other principal constraints on the LSE identified by the CC have weakened in the intervening period.

- **Whatever the threat of entry absent the merger, the merger will not materially lessen potential competition and may indeed enhance it.** Irrespective of the precise status of each party as a potential entrant in equities trading in the UK, and therefore independent competitive threat to the LSE, the evidence available suggests that the merged NYSE Euronext would represent at least as strong a constraint upon the LSE as the sum of constraints of either merging party as independent players, and may well represent a greater competitive constraint in respect of the LSE's UK equities business. This view has support, for example, from a significant market participant, who noted that:

Euronext's recent 'Project Tiger' is of itself sufficient to indicate that [Euronext] or [Euronext and NYSE combined] would be – or continue to be – serious potential entrants to the UK market. Moreover [Euronext and NYSE combined] is a more probable entrant than either component on its own; or than the remaining European exchanges.

No third party suggested that the combined entity would pose a *lesser* constraint on LSE than would the two exchanges individually. NYSE's public statements on possible entry into the UK appear to relate to international listings,²⁴ rather than UK equities trading, but are consistent with the proposition that the merger will not lessen potential competition in UK equities trading and may indeed enhance it. In summary, therefore, it cannot be suggested that customers of the LSE are in a materially weaker position vis-à-vis the LSE under the counterfactual than with a newly-formed entrant in the guise of a large transatlantic exchange that spans equities trading in both the U.S. and the Eurozone and may consider offering listings business in London. Accordingly, the overall competitive discipline felt by the LSE in respect of its equities business is not substantially lessened by the merger.

42. Only one third party expressed concerns that the constraint on LSE was reduced to such an extent by the proposed transaction that a substantial lessening of competition in respect of equity trading was inevitable, particularly given Nasdaq's shareholding in LSE, which suggested that

²⁴ See 'NYSE says it could set up London exchange', Financial Times, 19 June 2006.

Nasdaq did not intend to enter the UK market except through acquisition. The net result was that the proposed transaction, along with Nasdaq's shareholding in LSE, reduced the number of constraints from five to three (i.e., NYSE Euronext, virt-X and Deutsche Börse).

43. In the OFT's judgment, the fact that Nasdaq has a significant shareholding in the LSE does not alter its above conclusions. Whatever the significance of the Nasdaq stake for its entry plans absent acquisition, the real threat of entry facing the LSE does not vary simply in proportion to the number of principal potential entrants. Rather, the constraint imposed on the LSE currently and absent the merger depends also on qualitative factors that govern the probability that one of those potential entrants will in fact credibly enter into equities trading competition with the LSE. As noted above, the evidence suggests that whatever the potential for entry by each merging party individually, the merger does not materially lessen any competitive constraint imposed on the LSE, and if anything, *increases* the probability of entry.
44. In these particular circumstances involving a merger of potential entrants to form a larger potential entrant, it is unnecessary and unhelpful to inquire in simple numerical terms how many credible rival trading platform options customers of the LSE require as sufficient leverage to discipline its competitive conduct and, whether, therefore, a '5 to 4' or '4 to 3' contraction in the simple number of principal potential entrants raises concerns.
45. For these above reasons, the OFT does not believe the merger gives rise to a realistic prospect of a substantial lessening of competition in respect of on-book equities trading services within the UK.

Horizontal issues in post-trade services

46. The parties do not overlap in the provision of clearing, settlement, custody or banking services in the UK. Euronext has a 45.1 per cent interest (with voting rights capped at 24.9 per cent) in LCH.Clearnet, which provides clearing services for the LSE, as well as to Euronext's exchanges, amongst others, and a small interest in Euroclear.
47. NYSE has an interest in the Depository Trust & Clearing Corporation (DTCC), the clearing system for US equities trading. The parties also

submitted that DTCC was not a credible entrant into the market for the provision of UK clearing services. In these circumstances, and in the absence of any competition concerns from third parties, there is no reason to suppose that the proposed transaction will meaningfully affect the conditions of competition that exist in relation to the UK equities trading chain.

Foreclosure of trading competition via post-trade services

48. In the relevant CC Report it was stated that fully fungible access to an incumbent exchange's post-trade services is of 'critical importance for successful entry or expansion at the trading level,'²⁵ and that any prospective new entrant to the U.K. cash equities trading market would therefore require fully fungible access to the clearing services provided by LCH.Clearnet. The CC Report concluded that, if the LSE/Euronext merger were to proceed, new entrants might be foreclosed from the U.K. equities trading market, owing to the influence a merged Euronext/LSE could exercise over LCH.Clearnet.
49. No such vertical issues arise in relation to clearing or settlement as a result of the proposed transaction.
50. As regards clearing, in considering the applicable counterfactual in the context of the CC LSE Report, it was concluded 'that a potential competitor offering the prospect of a significant shift in liquidity from LSE would be able to get fully fungible access to the LSE's clearing services in the U.K. today.'²⁶ This situation would remain unaltered by the merger of NYSE Group and Euronext. Euronext would not gain an increased ability or incentive to influence LCH.Clearnet. NYSE Group has no relationship with or influence in respect of LCH.Clearnet. Conversely, NYSE Group would gain no additional influence over DTCC, to the extent DTCC is a potential UK clearing provider. The merger therefore raises no vertical foreclosure issues in relation to clearing services.
51. As to settlement, Euronext has a very small equity interest in Euroclear. This interest is far too small to afford any possibility of influencing the

²⁵ CC Report, at para. 23.

²⁶ CC Report, at para. 5.98.

conduct of Euroclear. No vertical concerns arise from this de minimis shareholding.

52. With one exception, third parties confirmed the lack of any vertical concerns arising from this merger.

OTHER SECTORS

53. In relation to **bonds** and **derivatives**, the parties operate in different markets and trade in different categories of bonds/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. In addition, no third parties raised significant competition concerns regarding these markets, many querying whether there was, in fact, any overlap at all between the parties. Given these responses, the OFT concludes that no competition issues are likely to arise in relation to the trading of bonds or derivatives, and these sectors are not considered further.
54. **Market information services** are provided by exchanges to end-users and to third party vendors. The type of information provided includes proprietary market information, such as real-time pricing data and trading volume data, and non-proprietary data, such as indices and historical information. The CC's LSE Report concluded that non-proprietary data was 'likely to be part of a wider financial services data market'.²⁷ In addition, each exchange is the sole provider of proprietary information, and necessarily there can be no overlap or competition in respect of such information.²⁸ This is consistent with the views of third parties. Therefore, the OFT does not believe there is a material overlap between the merging parties in relation to the supply of information services.

THIRD PARTY VIEWS

55. The OFT received a number of responses from third parties, most of whom had no specific competition concerns and/or thought that the proposed transaction could increase competition between stock exchanges in Europe.

²⁷ CC LSE Report at paragraph 4.76.

²⁸ CC LSE Report at paragraph 4.75.

56. Some third parties did raise concerns about the merger. One third party raised specific competition concerns, each of which has been discussed previously in the decision (i.e., the merger effect on primary international listings, and the reduction of the number of potential competitors to LSE in respect of the trading of equities in the UK). Other third parties raised general concerns, including the fact that the proposed transaction would lead to general consolidation in the industry, the possibility of regulatory encroachment by U.S. authorities in relation to European listings, potential disadvantages arising from the migration of NYSE's/Euronext's systems, future changes to clearing and settlement arrangements, and the need for effective governance and regulatory controls to continue. However, as these concerns fall outside the competition assessment of the proposed transaction, they are not considered in this decision.

ASSESSMENT

57. The proposed transaction will lead to the merger of Euronext and NYSE, two of the leading stock exchanges in Europe and the U.S., respectively.
58. On the weight of the evidence, the OFT concludes that no material merger effects will arise in the UK in respect of bonds, derivatives, clearing and settlement and information. The OFT therefore focused its investigation on the listing and trading services, where certain third parties had raised competition concerns.
59. In relation to listing services to UK issuers, the OFT rules out concerns in relation to primary listings, for which neither party is a material actual or potential competitor to the LSE.
60. In relation to secondary listings for UK issuers, the OFT concludes that, while there is an international component to choosing a secondary listing venue, this does not imply direct competition between Euronext and NYSE. On the contrary, the evidence available to the OFT confirms that the parties are not material competitive choices for UK customers, who choose to list on either party for idiosyncratic historical or commercial reasons, and not to access international capital based on competitively-determined listing terms and conditions set by either merging party.
61. In relation to primary international listings, the OFT concludes that, while Euronext and NYSE might compete for primary international listings from

non-UK issuers, this competition does not take place in a market in the UK and does not otherwise materially impact upon UK customers or consumers. Any possible merger effects in this respect are therefore extra-territorial and outside the scope of the SLC test in section 33 of the Act.

62. In respect of the horizontal effects of the merger on on-book equities trading in the UK, the OFT concludes that the entry threat of organic entry posed by each party absent the merger is at best uncertain, and in any event the merger of the parties to form one larger potential entrant, NYSE Euronext, does not materially lessen the threat posed towards the LSE, and if anything increases it. Accordingly, the LSE's trading customers are not put in a materially worse bargaining position vis-à-vis the LSE than absent the merger. This holds true irrespective of the degree to which Nasdaq is or will remain a potential entrant into UK equities trading.
63. The OFT also concludes that there are no merger effects in respect of any other aspect of the UK equities trading chain, including no material change in the ability or incentive of the parties to raise barriers to entry and foreclose rivals at any level.
64. Overall, third party responses were generally supportive of the merger, although one third party did raise concerns regarding the effect of the merger on primary international listings and equities trading in the UK, particularly given Nasdaq's stake in the LSE. These concerns are dealt with in more detail above. Other third parties expressed certain general concerns regarding the proposed merger, but these were outside the scope of competition concerns under the SLC test in section 33 of the Act.
65. 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

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