Summary of Commission Decision

of 29 March 2017

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

(Case M.7995 — Deutsche Börse/London Stock Exchange)

(notified under document C(2017) 2006)

(Only the English version is authentic)

(2017/C 240/06)

On 29 March 2017 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*

1. INTRODUCTION

(1) The proposed concentration whereby Deutsche Börse AG and London Stock Exchange Group would merge is declared incompatible with the internal market and the functioning of the EEA Agreement, pursuant to Article 8(3) of the Merger Regulation.

2. PROCEDURE

(2) On 24 August 2016, the Commission received a notification of a proposed concentration pursuant to Article 4 the Merger Regulation by which the two previously independent undertakings Deutsche Börse AG (Germany, 'DBAG') and London Stock Exchange Group plc (United Kingdom, 'LSEG') intended to merge within the meaning of Article 3(1)(a) of the Merger Regulation (the 'Transaction'). LSEG and DBAG are hereinafter referred to as the 'Notifying Parties'.

(3) Following the results of the first phase market investigation ('Phase I Market Investigation'), the Commission raised serious doubts as to the compatibility of the merger with the internal market and adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation on 28 September 2016. The Notifying Parties submitted a consolidated version of their reply to the decision opening the proceedings on 9 November 2016, with some additional submissions following on 20 November 2016.

(4) On 19 October 2016, the Notifying Parties requested an extension of 15 working days under Article 10(3) second subparagraph of the Merger Regulation. On 14 December 2016 the Notifying Parties requested a further extension of 5 working days pursuant to Article 10(3) second subparagraph third sentence of the Merger Regulation which was granted by a decision of 16 December 2016.

(5) Following the results of an in-depth market investigation ('Phase II Market Investigation'), the Commission addressed to the Notifying Parties a Statement of Objections on 14 December 2016. The Notifying Parties replied to the Statement of Objections on 6 January 2017 and 13 January 2017, and sent supplementary submissions on 24 January 2017. On 24 January, a State of Play meeting took place.

(6) On 9 January 2017, the Notifying Parties informed the Commission that they did not wish to develop their arguments in an oral hearing.

(7) On 26 January 2017 the Commission issued a letter of facts to which the Notifying Parties responded on 30 January 2017.

(8) On 6 February 2017, the Notifying Parties submitted commitments pursuant to Article 8(3), second subparagraph of the Merger Regulation (the 'Initial Commitments'). Consequently, the period for the adoption of a final decision was extended by 15 working days pursuant to Article 10(3) first subparagraph of the Merger Regulation. Revised versions of these commitments were submitted on 8 and 9 February 2017.

(9) The Commission launched the market test of the Commitments on 9 February 2017. The results of the market test became available on 15-16 February 2017. The Parties were informed of these results immediately on 16 February.

[1] OJ L 24, 29.1.2004, p. 1.

(10) On 27 February 2017, day 80 of the procedure, the Parties formally submitted a new set of Commitments (the 'Final Commitments').

(11) The draft decision was consulted with the Member States during the Advisory Committee on Concentrations on 13 March 2017, which provided a favourable opinion.

(12) The Hearing Officer provided a report on 15 March 2017.

3. **ASSESSMENT**

1. **Introduction**

(13) The Notifying Parties' activities give rise to horizontal overlaps and/or vertical links on a significant number of markets, pertaining to multiple services in the area of financial markets infrastructure ranging from listing to trading and clearing as well as further post-trade services including settlement, custody, and collateral management.

(14) These services cover several financial instruments or asset classes, comprising cash instruments (equities and bonds), repurchasing agreements ('repos'), derivatives, as well as a number of other related areas including index licensing, trade reporting services, and provisioning of market data.

2. **Relevant market definitions**

i. *Bonds*

(15) In relation to bonds, the only market analysed in detail in the Article 8(3) decision is the one for clearing of bonds.

(16) The Commission considered that the relevant market in relation to clearing of bonds corresponds to CCP clearing of bonds, and does not include other 'uncleared' forms of risk management of bonds (i.e. bilateral settlement and matched principal trading). This is because the market investigation has shown that, while 'uncleared' bonds still constitute the most common type of transactions, a separate demand for CCP cleared bonds exists, will continue to exist, and is bound to increase in the near future, in view of the regulatory shifts.

(17) Therefore, for the purposes of the Article 8(3) decision, the Commission considered that the relevant market in relation to bonds is the market for CCP clearing of bonds in the EEA.

ii. *Repos*

(18) In relation to repos, the Commission considered that the markets should be segmented across three key dimensions: triparty versus non-triparty, ATS (electronic) trading versus bilateral trading, and cleared versus uncleared. Relevant markets exist in particular for ATS traded and CCP cleared triparty and non-triparty repos. Customers tend to buy bundles of services comprising trading and clearing, as well as collateral management in the case of triparty repos.

(19) The market investigation has shown that in particular for dealer-to-dealer ('D2D') transactions, liquidity for standardised, short-term repos based on high quality collateral accumulates on automated trading systems ('ATS'). For customers trading such repos, other forms of repos would make poor substitutes.

(20) Therefore, for the purposes of the Article 8(3) decision, the Commission considered that the relevant markets in relation to repos are (i) ATS traded and CCP cleared non-triparty repos, or alternatively the clearing of ATS traded non-triparty repos and (ii) ATS traded and CCP cleared triparty repos. These markets all have an EEA-wide geographic scope.

iii. *Post-trade services*

(21) In relation to post-trade services, the affected markets analysed in the Article 8(3) decision are the markets for settlement and custody services as well as collateral management services ('CMS').

(22) The Commission considered a separate market for settlement and custody services provided by international central securities depositories ('ICSDs') and global custodians in relation to fixed income. ICSDs and global custodians serve international customers for securities issued in various countries, while national central securities depositories ('CSDs') or local custodians are more focused on domestic markets.

(23) Therefore, for the purposes of the Article 8(3) decision, the Commission considered that the relevant market in relation to settlement and custody services for investors is the market for international settlement and custody services provided by ICSDs and global custodians in relation to EEA fixed income securities at least at EEA-level. The question of whether a distinction should be drawn between services provided by global custodians and services provided by ICSDs could be left open for the purposes of the decision.

(24) The Commission also considered a separate market for CMS but did not conclude on a potential further segmentation between international providers (ICSDs and global custodians) vs domestic providers (CSDs and local custodians), a potential distinction between collateral management services for cleared transactions vs collateral management services for uncleared transactions, and a potential distinction between collateral management of fixed income vs collateral management of equities. This is because the Transaction would raise competition concerns on this market irrespective of possible further segmentations.

(25) In view of the foregoing, the Commission considered that, for the purposes of the Article 8(3) decision, the relevant collateral management market is the EEA-wide market for CMS, leaving a potential further segmentation open.

iv. *Financial derivatives*

(26) In relation to financial derivatives, the affected market analysed in detail in the Article 8(3) decision is the market for single stock equity derivatives.

(27) The Commission considered separate markets for trading and clearing of exchange-traded interest rate derivatives and for clearing of OTC traded interest rate derivatives because they have different product characteristics and regulatory requirements, serve different purposes, and tend to be traded by different types of market participants.

(28) The Commission further considered a separate market for exchange-traded single stock equity derivatives, comprising futures and options. It can be left open whether distinct markets exist based on the nationality of the underlying of such derivatives or if the relevant market comprises all single stock equity derivatives based on any European underlying.

(29) Therefore, the Commission considered that, for the purposes of the Article 8(3) decision, the relevant market in relation to financial derivatives is the EEA-wide market for trading and clearing of single stock equity derivatives.

3. **Competitive assessment**

i. *Markets on which competition concerns arise as a result of the Transaction*

(30) The Commission has reached the conclusion that the Transaction would lead to a significant impediment of effective competition through either horizontal and/or vertical effects in the markets for:

a) clearing of bonds,

b) ATS traded and CCP cleared non-triparty repos,

c) ATS traded and cleared triparty repos,

d) settlement and custody services in relation to fixed income (bonds and repos) provided by ICSDs and large custodians, and collateral management, and

e) single stock equity derivatives.

(31) The competitive assessment for each of these markets is summarised below.

a. Clearing of bonds

(32) In the market for CCP clearing of bonds, the Notifying Parties' combined market shares in 2015 were close to 100 % by value, with an increment brought by DBAG (ECAG) of [0-5 %]. The remaining CCPs which only account for a very small fraction of the market do not constitute a credible alternative as they are very small local players with a narrow geographic focus.

(33) The Commission considered that the relatively limited position of DBAG in the bonds clearing market as well as any consideration on the extent to which the Notifying Parties closely compete for the clearing of bonds is not of particular relevance, since the Transaction would eliminate the only relevant (and by definition closest) actual and potential competitor of LSEG in the market for CCP clearing of bonds.

(34) Consequently, the Commission concluded that the Transaction would have led to a significant impediment of effective competition through the strengthening of LSEG's dominant position and creation of a de facto monopoly in the market for clearing of bonds in the EEA.

b. ATS traded and CCP cleared non-triparty repos

(35) The market structure in the market for non-triparty ATS traded and CCP cleared repos is the following:

— Customers trading on MTS (LSEG) or the two third party ATS, BrokerTec and tpRepo, clear through one of LSEG's clearing houses and represent [90-100 %] of the market.

— Eurex Repo provides a vertically integrated offer combining trading and clearing, and has a [0-5 %] market share.

(36) The Notifying Parties' clearing houses clear 100 % of all ATS traded non-triparty repos. DBAG is currently the only competitor to LSEG in this market and therefore its most important competitive constraint.

(37) In view of the fact that the Transaction would result in the elimination the only other player active in clearing ATS traded non-triparty repos, the importance of clearing for customers trading these instruments, and the lack of likely future market entry, the Commission concluded that the Transaction would have led to a significant impediment of effective competition through the strengthening of a dominant position and creation of a monopoly clearing of non-triparty repos.

c. ATS traded and cleared triparty repos

(38) This market is characterised by bundle-to-bundle competition in a sense that competing products on the market are sold in pre-determined bundles of services. On the one hand, DBAG's 'GC Pooling' product offers trading, clearing, and collateral management within a vertically integrated model. On the other hand, LSEG's 'EUR GC Plus' product is a bundle offering which combines trading provided by MTS (LSEG) or by BrokerTec (a third party venue) with clearing provided by LCH SA (LSEG) and collateral management by another third party, Euroclear. Both product bundles are in direct competition with each other.

(39) The Notifying Parties are the only ones active in the market with DBAG being the dominant player holding a market share of [90-100 %].

(40) Therefore, the Commission concluded that, in light of the elimination of DBAG's only competitor and the likely intensification of competition that could be expected to occur absent the Transaction, and the lack of likely market entry, the Transaction would lead to significant impediment of effective competition through the strengthening of a dominant position on the market for ATS traded and cleared triparty repos.

d. Settlement and custody services in relation to fixed income provided by ICSDs and large custodians, and collateral management

(41) As discussed above, the Transaction would create de facto monopolies in several markets upstream of further post-transaction services, namely settlement and custody services as well as collateral management.

(42) As a consequence of the merger, the merged entity would have had the ability and incentive to divert cleared fixed income transaction feeds from its CCPs (upstream) to its settlements subsidiary, Clearstream (downstream). Cleared fixed income transaction feeds (and more particularly cleared repo transaction feeds) are an important input for the provision of settlement and custody services provided by ICSDs and large custodians. This is because cleared repo transactions are short-term transactions, often traded by frequent users such as dealers, for which efficient settlement is important. By being able to divert cleared repo transaction feeds to its own ICSD (Clearstream), the merged entity would have had the ability and incentive to increase the costs and/or degrade the conditions at which competitors like Euroclear Bank SA (the only other ICSD in the EEA and closest competitor of Clearstream) can provide these services.

(43) Collateral management services are generally provided on the basis of assets held in custody at an ICSD or global custodian. Assets used in cleared repo transactions are important inputs for the provision of collateral management services, because they are generally high quality liquid assets like government bonds which are accepted by CCPs as collateral for various other transactions (including derivatives clearing). The ability and incentive of the merged entity to divert cleared fixed income transaction feeds (and more particularly cleared repo transaction feeds) would also have allowed the merged entity to impede the ability of competitors to compete effectively in the market for collateral management services by foreclosing them from accessing important inputs.

(44) In light of the above, the Commission concluded that the merger would have led to an impediment to effective competition in the market for the described settlement and custody services as well as the market for collateral management.

e. Single stock equity derivatives

(45) DBAG's Eurex offers an integrated service of trading and clearing of single stock equity derivatives on exchange which competes directly with a bundled offer comprising trading on a third party platform, Euronext, and clearing offered by LCH SA. In an exchange environment, traders using these instruments can only chose between pre-defined bundles of trading and clearing; there is no free choice of a CCP once the decision for a specific trading venue has been taken.

(46) As a result of the transaction, the merged entity would have been in a position to exercise pricing power not only over Eurex's integrated product, but also over the competing Euronext/LCH offer. Therefore, the Transaction would have led either to a general increase in prices for both products or to a selective change to the detriment of Euronext's offering in favour of Eurex.

(47) Therefore, the Commission concluded that the transaction would have led to a significant impediment of effective competition in the market for trading and clearing of various European single stock equity derivatives. However, the proposed remedy of divesting LCH SA would have addressed this concern because of the disentanglement of the products traded on Euronext from the clearing services provided by the Parties.

ii. *Markets on which the Commission left open if competition concerns would arise as a result of the Transaction*

(48) The Commission has carefully considered the Notifying Parties' arguments and the evidence presented in their response to the Statement of Objections. This includes arguments presented in relation to the markets for (i) trading and clearing of exchange-traded interest rate derivatives, (ii) clearing of OTC traded interest rate derivatives, and (iii) trading and clearing of Italian single stock equity derivatives. It can be left open whether the Transaction gives rise to a significant impediment of effective competition in these markets because the overall assessment of the case would not change. The same holds true for a potential market of integrated clearing services.

(49) As explained in more detail below, the remedies submitted by the Notifying Parties are insufficient to solve competition concerns in the markets for CCP clearing of bonds, for ATS traded and CCP cleared triparty repos, ATS traded and CCP cleared non-triparty repos, as well as on the markets for settlement and custody services in relation to fixed income provided by ICSDs and large custodians and for collateral management. Therefore, the final assessment of the case would not change, irrespective of any additional impediments to effective competition in other markets.

4. **REMEDIES**

(50) In order to render the Transaction compatible with the internal market, the Parties submitted commitments pursuant to Article 8(2) of the Merger Regulation on 6 February 2017 ('Initial Commitments'). The Commitments relate to a binding agreement signed on 3 January 2017 between LSEG and Euronext N.V. on the sale of LCH SA (the 'Divestment Business').

(51) The Commission market tested the Commitments as of 9 February 2017. The results of the market test identified a number of issues related to the future viability of the LCH SA in particular in the markets for bonds and repo clearing.

(52) First, the results of the market test clearly indicated that a direct access of LCH SA to MTS, a trading platform owned by LSEG, is necessary for the viability of LCH SA.

(53) Second, with regard to a pre-merger project to expand the clearing capabilities for certain bonds in LCH SA, the market test revealed uncertainty if this would lead to a transfer of volumes from LCH Ltd to LCH SA in light of the merger. Specifically, the results indicated that customers are interested in pooling fixed income clearing in one currency at one CCP due in particular to balance sheet netting opportunities arising from the introduction of T2S. However, the market test did not allow the conclusion that such a movement would actually happen in the post-merger market structure where the merged entity would have had an incentive to consolidate clearing at LCH Ltd rather than at LCH SA.

(54) Therefore, the Commission could not conclude with the requisite degree of certainty that the Divestment Business would be viable in the markets for bond and repo clearing going forward. As a result it could not be concluded that the market structures would be effectively remedied on a lasting basis.

(55) The Commission informed the Notifying Parties of the results of the market test and its preliminary assessment thereof on 16 February 2017. It also informed the Notifying Parties that, in line with the Remedies Notice and the applicable case law, at that stage of the procedure only clear-cut solutions that would unambiguously and fully address all concerns could be accepted. The divestment of LSEG's fixed income trading platform, MTS, would have been such clear-cut solution.

(56) On 27 February 2017, the Parties submitted the Final Commitments which did not include the divestment of MTS. The proposal essentially consisted of a set of behavioural measures including, but not limited to, granting access of LCH SA to MTS for three years in addition to the Initial Commitments.

(57) The Commission assessed the suitability of the Final Commitments to address the concerns previously identified and analysed in particular their scope, viability, and effectiveness, as well their complexity in light of the timing of their submission.

(58) First, as explained above, the market test of the Initial Commitments revealed in particular that the Divestment Business' viability was dependent on receiving trade feeds from MTS and attracting specific fixed income clearing business from LCH Ltd.

(59) Even with the implementation of the behavioural measures proposed in the Final Commitments, LCH SA would have maintained its structural dependency on MTS and therefore the merged entity. In addition, given the limited duration of the proposed access of LCH SA to MTS, it could not be determined with the requisite degree of certainty that the new commercial structures would be sufficiently lasting as required by the Remedies Notice.

(60) Finally, the measures relating to fixed income clearing activities also appeared insufficient to ensure the expansion of business of LCH SA as planned under the pre-merger conditions. This provided additional uncertainty as to whether the Divestment Business would continue to effectively compete with the merged entity on the market.

(61) As a result, the Commission could not conclude with the requisite degree of certainty that the Final Commitments would satisfactorily address the issues revealed by the market test of the initial Commitments.

(62) Second, the Final Commitments would entail monitoring a set of behavioural commitments which are by nature complex, even more so in light of the specific industry at stake.

(63) Lastly, no market test could be conducted at this late stage of the procedure (i.e. 15 days after the deadline).

(64) In light of all the considerations set out above, in particular the late submission of the Final Commitments, their complexity, their shortcomings in terms of scope, effectiveness and suitability, as well as the difficulties relating to their effective monitoring and implementation, the Commission concluded that the Final Commitments were not sufficient to eliminate all the identified competition concerns.

5. **CONCLUSION**

(65) The Commission declared the proposed concentration incompatible with the internal market and the functioning of the EEA Agreement, in accordance with Article 8(3) of the Merger Regulation.