התנועה למען איכות השלטון בישראל (ע"ר)

The Movement for Quality Government in Israel الحركة من أجل جودة السلطة في إسرائيل

נייר עמדה

בדבר טרום תזכיר חוק ניירות ערך (שינוי מבנה הבורסה), התשע"ה-2014

שוק הסליקה בפרספקטיבה בינלאומית

התנועה למען איכות השלטון (ע"ר)

ד' אלול התשע"ה

19.08.2015

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الحركة من أجل جودة السلطة في إسرائيل The Movement for Quality Government in Israel

שוק הסליקה בפרספקטיבה בינלאומית

1. תקציר

אחת ההנמקות המרכזיות מצד רשות ניירות ערך לשינוי מבנה הבעלות בבורסה היא, כי זהו המצב הרווח במרבית מדינות העולם המפותחות.

אולם, ברי כי אם לשיטת הרשות יש להתאים את המצב בישראל לזה במדינות מפותחות אחרות, הרי שאין לבחור להנהיג רק חלק מהשינויים.

בתשובת הרשות לניירות ערך לפניית התנועה מיום 28.5.2015 **הוסבר כי גיבוש ההסדרה לגבי המסלקה נעשה בין היתר על בסיס השוואה לדינים בינלאומיים רלוונטיים** ומטרתה להבטיח התנהלות תקינה של מסלקת הבורסה גם לאחר מהלך שינוי הבעלות. לפיכך, הרי שעלינו לשאת עינינו אל המציאות השוקית הנהוגה בתחום בעולם.

ממצאי בדיקה שביצעה התנועה מעלים כי באירופה, ארצות-הברית, והודו, בהן פועלות הבורסות הגדולות בעולם, ישנו ככלל <u>ניתוק מובהק</u> בין הבעלות בבורסה לבין הבעלות במסלקת הבורסה. מבנה בעלות זה מאפשר תחרותיות בכל שלב משלבי ההשתתפות בשוק ההון- החל מהרישום למסחר והמסחר, דרך הסליקה וכלה בשירותי המשמורת. עקרון חופש בחירת הספק המועדף הנו עקרון עליון בבורסות אירופה ומיושם הלכה למעשה בבורסות ברחבי העולם.

מודל הבעלות הצפוי בישראל לאחר הפיכת הבורסה לחברה למטרות רווח, לפיו בעלי השליטה בבורסה ישלטו ב-100% במסלקה הוא <u>במעט חסר תקדים בפרספקטיבה בינלאומית</u>, ואינו עומד בקנה אחד עם מטרות המהלך המוצע בתזכיר החוק.

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2. בחינה בינלאומית

א. שוק הסליקה באיחוד האירופי

כאמור, באירופה, **עקרון עליון במסחר בשוק ההון הוא החופש של משתתפים בשוק לבחור את הספק המועדף** עליהם, בנפרד לכל שלב בפעולה, לשלבי המסחר והסליקה. כתוצאה, **שוק הסליקה והמשמורת האירופאי מבוזר מאוד**.

במסמך מכונן של האיחוד האירופי בקרת ניגודי האינטרסים נמנתה כאחד משלושת העקרונות החשובים ביותר בפיקוח על מסלקות.[1]
ניתוח עדכני שביצעה התנועה בנוגע למבנה הבעלות של חברות המעניקות שירותי סליקה ומשמורת של מניות מעלה כי **ב-61% מהמקרים הבורסה אינה מחזיקת מניות במסלקות כלל או שאחזקתה מזערית**, וב-71% מהמקרים הבורסה אינה בעלת המניות היחידה במסלקה.[2]

לגבי יתרת הבורסות אשר מחזיקות במסלקות- יש לזכור כי **דיריקטיבת האיחוד האירופי מחייבת את מדינות האיחוד לדרוש ממסלקות ובורסות להיפתח למסחר בצורה שוויונית**, שאינה מפלה, במודל של שוק פתוח, נגיש ותחרותי. כל **הערמת קשיים** או מניעת התחברות מגופים פיננסיים **הינה אסורה**. כך, למעשה, **100% מהמסלקות והבורסות באיחוד האירופי חשופות לתחרות** משמעותית **וגם מיעוט המסלקות שנמצאות תחת בעלות הבורסה מתחרות במסלקות ובגופי מסחר שונים** ומחויבות לאפשר חיבור לכל.

ביטוי לעקרונות אלו ניתן לראות **בהחלטה לאסור מיזוג בין שתי בורסות אירופאיות מחשש ליצירת מונופול במסחר ובסליקה של נגזרים אירופאיים**:

> ***EU Merger Control 2015 Chapter***
>
> *"In case of M.6166 Deutsche Borse/NYSE Euronext, the Commission stated that both Eurex and Liffe operate "**closed***

[1] להרחבה, ראה מסמך של הפרלמנט הבריטי בנושא: http://www.parliament.the-stationery-office.co.uk/pa/ld200910/ldselect/ldeucom/93/9308.htm.

[2] נתוני 2014, אתר ה-ECSDA, http://ecsda.eu/facts/2014database.

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vertical silos linking their exchange to their own clearing house". Since the transaction would have resulted in a single vertical silo that would trade and clear more than 90% of the global market for European financial exchange-traded derivatives, the Commission considered it difficult for a new player to enter the market. *The advantages of clearing similar contracts through a single clearing house were such that costumers would have been reluctant to trade similar derivatives on another exchange.* ***This would have reinforced the monopolistic position created by the merger resulting in higher prices and lower incentives to innovate."***[3]

קרי, **מבנה הבעלות המוצע בישראל** לפיו לאחר השינוי המסלקה תישאר בבעלות מלאה של הבורסה, **אינו רווח ביותר מ-70% מהמקרים באירופה**. בעוד באירופה ערך עליון הוא, כאמור, חופש הבחירה בספק המסחר והסליקה, בישראל אין הדבר אפשרי מכיוון שכל פעולה בשוק ההון נסלקת דרך מסלקת הבורסה היחידה שנמצאת בבעלות הבורסה בתל-אביב.

[3] לפרטים נוספים ראה: http://europa.eu/rapid/press-release_IP-12-94_en.htm.

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ב. <u>שוק הסליקה בבריטניה</u>

הבורסה בלונדון, השלישית בנפח המסחר בעולם, **מאפשרת לסוחרים דרכה לבחור בין שלוש מסלקות שונות**:[4] EuroCCP N.V., LCH.Clearnet Ltd., SIX x-clear. בבעלות החברה המחזיקה בבורסה בלונדון ובבורסה האיטלקית גם כ-57% מאחת מן המסלקות, LCH.Clearnet, אולם **רגולציה מחמירה בבריטניה מונעת העדפת אחת מהמסלקות על פני האחרות, בצורה שהצרכן הסוחר במניות בבורסה בלונדון נהנה מתחרות בין שלוש מערכות סליקה שונות, בשונה מישראל.**[5]

במסמך שפרסמה בורסת לונדון מודגש, כי הבורסה מאפשרת לחברות הבורסה לבחור בין שלושת המסלקות משיקולי תחרותי:

> *"[...] because of the belief that **competition enhances markets** and **delivers lower costs and increased service levels** to market participants [...] choice of central counterparty is intended to **provide more flexibility** to members and to ensure that central counterparty services are **of higher quality and are delivered at lower prices through open competition**".*[6]

לפי העקרונות המנחים שפרסמה הבורסה **כל צד למסחר (מוכר וקונה) יוכל לבחור בחופשיות בין גופי סליקה שונים, גופי הסליקה יפעלו תחת תנאים שווים ומבחינת הלקוח לא יהיה כל הבדל בין המסלקות, פרט למחירים.**[7]

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[4] לפרטים נוספים: http://www.lseg.com/areas-expertise/our-markets/turquoise/equities/clearing-and-settlement-0.

[5] להרחבה, ראה מסמך של Bank of England: http://www.bankofengland.co.uk/financialstability/Documents/fmi/directions.pdf.

[6] להרחבה, ראה: http://www.londonstockexchange.com/products-and-services/technical-library/technical-guidance-notes/competitive-clearing-service.pdf.

[7] שם.

ג. <u>שוק הסליקה בארצות-הברית</u>

למרות שבמדינה פועלות שתי הבורסות הגדולות בעולם (ה-NASDAQ וה-NYSE), והמסלקות הגדולות בעולם, לצד מסלקות משמעותיות נוספות- ועל אף שהמסלקות והבורסות חשופות לתחרות פנים-ארצית, בשונה מהמצב בישראל, **הבורסות הגדולות אינן שולטות במסלקה הגדולה ביותר**. אחת מהבורסות הגדולות, ה-NYSE, שולטת במספר מסלקות קטנות יותר שחשופות לתחרות תמידית. כל המסלקות חשופות לביקורת מחמירה מצד הפדרל ריזרב **ואף בורסה או מסלקה לא נהנית ממעמד מונופוליסטי**.

בארה"ב סליקת המסחר בבורסה בניירות ערך הקשורים לגופים מדינתיים מנוהלת באמצעות ה-Fedwire Securities Service המופעלת על-ידי הפדרל ריזרב. קרי, **שאחת המסלקות המשמעותיות ביותר בארצות-הברית נמצאת תחת בעלות, פיקוח ושליטה של הבנק המרכזי במדינה**. לצידה פועלת המסלקה הגדולה בעולם- The Clearing House Interbank Payments System (CHIPS), אשר מפוקחת בידי הפדרל רזרב, סולקת בין השאר עסקאות בניירות ערך שאינם קשורים לגופים מדינתיים ומתחרה בה ורוכשת ממנה שירותים שונים בו זמנית.

ה-CHIPS נמצא בבעלות הבנקים המסחריים הגדולים בעולם, ובהם- Santander, Deutsche Bank, Bank of America, Barclays, HSBC, JPMorgan Chase, UBS, USbank, Citibank, PNC Bank, Wells Fargo ועוד.

זאת, בעוד הבנקים האלו **אינם מחזיקי מניות משמעותיים באחת משתי המרכזיות בארה"ב- ה-NASDAQ (הנמצאת, בעיקר, בבעלות גופים מוסדיים).**

מנגד, תאגיד ה-Intercontinental Exchange מחזיק בבעלותו 11 בורסות ברחבי העולם, ביניהן ה-NYSE, לצד 7 מסלקות משנה בינלאומיות שונות החשופות לתחרות פנים ארצית ובינלאומית, ונמצא בבעלות מוסדית מבוזרת לגמרי.

ד. שוק הסליקה באסיה

הבורסה הגדולה בהודו וה-10 בגודלה בעולם (מבחינת נפחי מסחר), ה- Bombay Stock Exchange, סולקת את פעילותה דרך חברת בת של Bank of India המולאם, והם אינם מוחזקים בבעלות צולבת.[8] במזרח אסיה, סליקת המסחר בבורסה המלזית, האינדונזית והפיליפינית מבוצעת באמצעות ישות סליקה נפרדת מהבורסה.[9]

[8] להרחבה בנושא ראה: http://www.bis.org/cpmi/publ/d97_in.pdf .
[9] להרחבה בנושא ראה: http://www.gtb.db.com/docs/13_03_Post-trade_integration_in_ASEAN.pdf .

התנועה למען איכות השלטון בישראל (ע"ר)

The Movement for Quality Government in Israel الحركة من أجل جودة السلطة في إسرائيل

הדירקטיבה האירופית בדבר פתיחת המסחר והסליקה לתחרות באיחוד האירופי

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2004L0039 — EN — 04.01.2011 — 004.002

►B DIRECTIVE 2004/39/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 21 April 2004

on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC

(OJ L 145, 30.4.2004, p.1)

Amended by:

		Official Journal		
		No	page	date
►M1	Directive 2006/31/EC of the European Parliament and of the Council Text with EEA relevance of 5 April 2006	L 114	60	27.4.2006
►M2	Directive 2007/44/EC of the European Parliament and of the Council Text with EEA relevance of 5 September 2007	L 247	1	21.9.2007
►M3	Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008	L 76	33	19.3.2008
►M4	Directive 2010/78/EU of the European Parliament and of the Council Text with EEA relevance of 24 November 2010	L 331	120	15.12.2010

Corrected by:

►C1	Corrigendum, OJ L 045, 16.2.2005, p. 18 (2004/39)
►C2	Corrigendum, OJ L 054, 22.2.2014, p. 23 (2010/78)

market.

2. Member States shall not impose any additional regulatory or administrative requirements, in respect of matters covered by this Directive, on investment firms exercising the right conferred by paragraph 1.

Article 34

Access to central counterparty, clearing and settlement facilities and right to designate settlement system

1. Member States shall require that investment firms from other Member States have the right of access to central counterparty, clearing and settlement systems in their territory for the purposes of finalising or arranging the finalisation of transactions in financial instruments.

Member States shall require that access of those investment firms to such facilities be subject to the same non-discriminatory, transparent and objective criteria as apply to local participants. Member States shall not restrict the use of those facilities to the clearing and settlement of transactions in financial instruments undertaken on a regulated market or MTF in their territory.

2. Member States shall require that regulated markets in their territory offer all their members or participants the right to designate the system for the settlement of transactions in financial instruments undertaken on that regulated market, subject to:

(a) such links and arrangements between the designated settlement system and any other system or facility as are necessary to ensure the efficient and economic settlement of the transaction in question; and

(b) agreement by the competent authority responsible for the supervision of the regulated market that technical conditions for settlement of transactions concluded on the regulated market through a settlement system other than that designated by the regulated market are such as to allow the smooth and orderly functioning of financial markets.

This assessment of the competent authority of the regulated market shall be without prejudice to the competencies of the national central banks as overseers of settlement systems or other supervisory authorities on such systems. The competent authority shall take into account the oversight/supervision already exercised by those institutions in order to avoid undue duplication of control.

3. The rights of investment firms under paragraphs 1 and 2 shall be without prejudice to the right of operators of central counterparty, clearing or securities settlement systems to refuse on legitimate commercial grounds to make the requested services available.

Article 35

Provisions regarding central counterparty, clearing and settlement arrangements in respect of MTFs

1. Member States shall not prevent investment firms and market operators operating

an MTF from entering into appropriate arrangements with a central counterparty or clearing house and a settlement system of another Member State with a view to providing for the clearing and/or settlement of some or all trades concluded by market participants under their systems.

2. The competent authority of investment firms and market operators operating an MTF may not oppose the use of central counterparty, clearing houses and/or settlement systems in another Member State except where this is demonstrably necessary in order to maintain the orderly functioning of that MTF and taking into account the conditions for settlement systems established in Article 34(2).

In order to avoid undue duplication of control, the competent authority shall take into account the oversight/supervision of the clearing and settlement system already exercised by the national central banks as overseers of clearing and settlement systems or by other supervisory authorities with a competence in such systems.

TITLE III

REGULATED MARKETS

Article 36

Authorisation and applicable law

1. Member States shall reserve authorisation as a regulated market to those systems which comply with the provisions of this Title.

Authorisation as a regulated market shall be granted only where the competent authority is satisfied that both the market operator and the systems of the regulated market comply at least with the requirements laid down in this Title.

In the case of a regulated market that is a legal person and that is managed or operated by a market operator other than the regulated market itself, Member States shall establish how the different obligations imposed on the market operator under this Directive are to be allocated between the regulated market and the market operator.

The operator of the regulated market shall provide all information, including a programme of operations setting out inter alia the types of business envisaged and the organisational structure, necessary to enable the competent authority to satisfy itself that the regulated market has established, at the time of initial authorisation, all the necessary arrangements to meet its obligations under the provisions of this Title.

2. Member States shall require the operator of the regulated market to perform tasks relating to the organisation and operation of the regulated market under the supervision of the competent authority. Member States shall ensure that competent authorities keep under regular review the compliance of regulated markets with the provisions of this Title. They shall also ensure that competent authorities monitor that regulated markets comply at all times with the conditions for initial authorisation established under this Title.

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פרסום הבורסה בלונדון- שינויים לעידוד התחרות בסליקה

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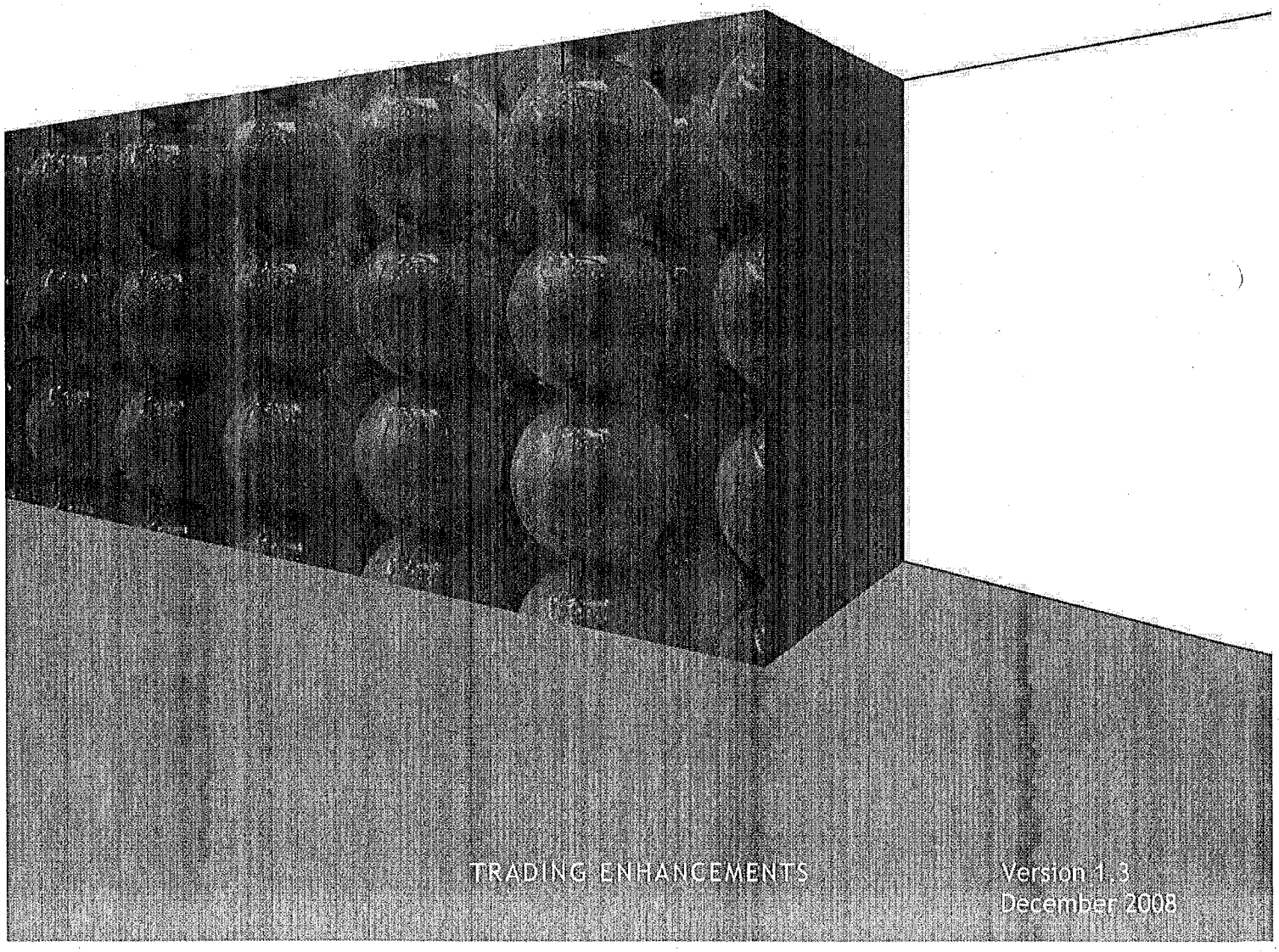
London Stock Exchange

SERVICE DESCRIPTION

Competitive Clearing

2008



TRADING ENHANCEMENTS

Version 1.3
December 2008

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1. Introduction

1.1 Objectives of competitive clearing

The London Stock Exchange ("the Exchange") started using the London Clearing House ("LCH") as the central counterparty for its UK equity order book, SETS[1], in 2001. Since then, the service has been enhanced in a number of ways: the range of stocks has expanded considerably, SETSqx has been introduced for less liquid stocks and settlement netting has also been introduced. During this period, LCH has become part of LCH.Clearnet Group.

The Exchange now intends to provide its member firms with a choice of central counterparty between LCH and SIX x-clear AG ("x-clear") because of the belief that competition enhances markets and delivers lower costs and increased service levels to market participants.

The introduction of choice of central counterparty is intended to provide more flexibility for members and to ensure that central counterparty services are of higher quality and are delivered at lower prices through open competition between central counterparties as well as a level playing field between CCPs.

1.2 Key characteristics of competitive clearing

1. Customers will have freedom of choice regarding which of the central counterparties above to use.
2. The two central counterparties will operate on equal terms, i.e. neither central counterparty will operate as a "sub-CCP" of the other.
3. The solution will be based on existing and/or proposed infrastructure to reduce the impact for all stakeholders where reasonably possible.
4. There will be no material impact for customers that choose to keep their current clearing arrangements.
5. Routing of trade information to the relevant central counterparty(s) will be carried out centrally. For the initial implementation, this will be by the Euroclear UK and Ireland Limited ("EUI") system.

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[1] In this document, the term "SETS" should be taken to include those segments of SETSqx that use central counterparty clearing.

6. No material change is expected to current settlement arrangements in the near future.

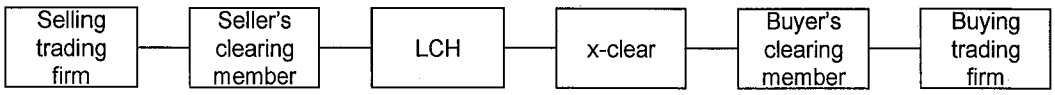
7. Customers will only have to interact with their chosen central counterparty. It should make no difference to them whether their trading counterparty is using the same central counterparty or a different one. All the clearing and settlement processes for the customer will be the same in either case.

Under the competitive clearing service, three possible scenarios exist:

1. Both the buyer and the seller use LCH as their central counterparty.

2. Both the buyer and the seller use x-clear as their central counterparty.

3. One of the buyer and seller uses LCH and the other uses x-clear as their central counterparties. In this case, the contractual chain will be as follows (the diagram below depicts the flow of cross-CCP trades with the seller using LCH and the buyer x-clear):



1.3 Purpose of this service description

This service description provides a high level description of the initial implementation of competitive clearing and its impact on users of the market. Information about the future development of the service is provided in section 0.

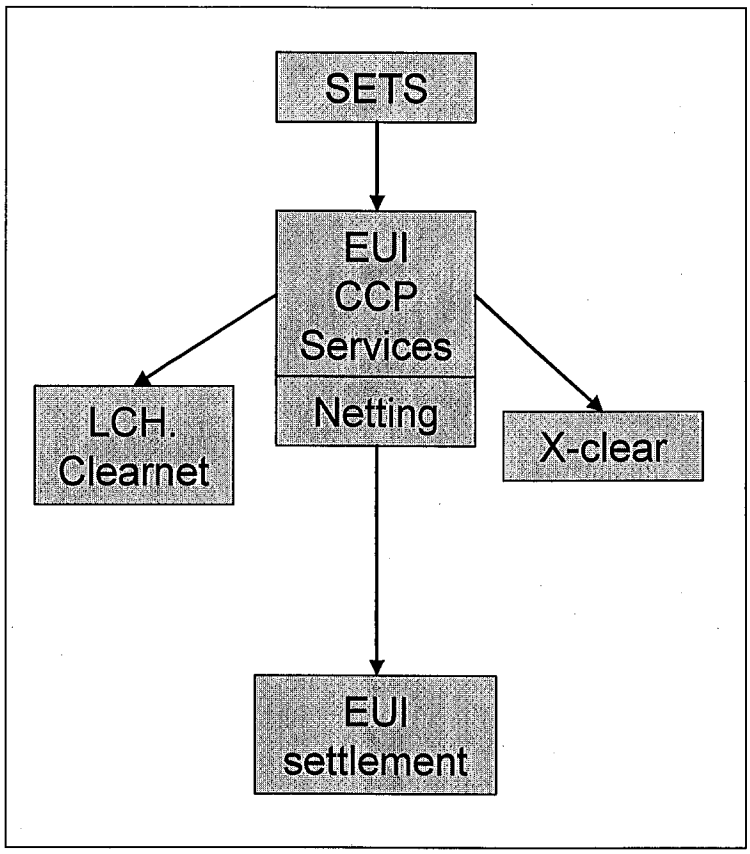
The service description also outlines the proposed implementation approach.

The description is applicable to UK equity trading and not to other markets operated by the Exchange.

1.4 Implementation approach

In the initial implementation of competitive clearing, x-clear will make use of an enhanced version of the EUI CCP Services that will support multiple CCPs. The basic operation will however be essentially the same as with a single CCP. This means that both central counterparties will primarily provide risk management, with EUI providing most of the transaction processing.

The diagram below illustrates the high-level flow between the Exchange, LCH, x-clear and EUI for the exchange of transaction information as a result of the introduction of competitive clearing.



1.5 Interoperability

Interoperability between the CCPs allows for a choice of CCP service provider for the trades executed on the Exchange. As the trading system maintains full anonymity, trading participants are not able to determine which CCP their trading counterparty is using, and it makes no difference to their post-trade processing, which is only with their own CCP. The cross-CCP positions that arise are dealt with between the two CCPs without member involvement.

1.6 Information about x-clear

X-clear is part of the SIX Group, based in Switzerland. X-clear currently provides central counterparty services to SWX Europe and SIX Swiss Exchange.

X-clear has been recognized by the Financial Services Authority in the UK (FSA) under the Financial Services and Market Act 2000 (FSMA) as a Recognized Overseas Clearing House (ROCH) since 2004. The company also has a banking license under Swiss law and is thus regulated and supervised by the Swiss Federal Banking Commission (SFBC) and under the oversight of the Swiss National Bank.

More information about x-clear can be found at www.ccp.sisclear.com/ccp/index.htm.

1.7 Information about LCH

LCH currently provides central counterparty services for cash equity trades to the London Stock Exchange and SWX Europe. It also provides central counterparty services in other products to other markets. LCH is regulated as a Recognized Clearing House by the Financial Services Authority.

More information about LCH can be found at www.lchclearnet.com.

1.8 Further information about competitive clearing

Information about the use of EUI systems to support competitive clearing can be found at www.euroclear.co.uk.

Further information about the Exchange's use of central counterparties can be found at www.londonstockexchange.com.

2. Description of competitive clearing

The description is intended to highlight key impacts arising from the move from one to two central counterparties and to answer other likely questions.

It is not intended to be a complete description of either the LCH.Clearnet or x-clear services, especially those areas that are not impacted by the introduction of competitive clearing and/or do not need to change.

Exchange members execute trades on the SETS order book. After each trade is executed, it is confirmed to the Exchange members involved. LCH.Clearnet and x-clear act as the CCPs for all SETS trades.

Details of the CCP-eligible trades are transmitted from the Exchange to EUI using a proprietary data format.

Either LCH.Clearnet or x-clear or both will act as the CCP(s) for a SETS trade, depending on the clearing arrangements of the buyer and seller. Each member will see their central counterparty identifier as its trading counterparty, providing post-trade anonymity for these trades. Members will not be able to tell which CCP is being used by their trading counterparty on SETS.

1.9 Scope

The scope of the service will be the same range of securities, participants and trades as today (subject to any changes that occur before implementation).

The Exchange does not intend to change the operation of its markets as a consequence of introducing competitive clearing. In particular, there will be no change to market hours or to the processing of contra trades.

1.10 Trade feed

The Exchange will continue to send its trade feed to the EUI system in real time as today.

1.11 EUI trade processing and routing

1.11.1 SDRT, Irish stamp duty and transaction reporting

These processes will continue to be carried out by the EUI system using the information in the trade feed.

1.11.2 Transaction processing

Transaction processing will be similar to processing today, with the EUI system carrying out most of the processing, including trade registration on behalf of the central counterparties and optional settlement netting, and the central counterparties carrying out the counterparty risk management. Settlement will continue to be in EUI.

The EUI system will validate trade messages received from the Exchange. If the trade is valid, then it will create the relevant transactions for both central counterparties, including the inter-central counterparty settlements when required. If the trade is not valid, then none of the transactions will be created until the problem is resolved.

1.11.3 Trade routing

Each trade will be routed so that it can be processed by the relevant central counterparty(s). The routing is expected to occur very shortly after the trade execution.

Where the buyer and the seller are using different central counterparties, the trade information will be made available to both central counterparties with the other central counterparty identified in place of the participant using it.

The process will create the resulting inter-central counterparty settlements; this will be invisible to participants other than the central counterparties.

The routing will be based on the preferences expressed by the participants.

The routing will be static, ie it will not be possible for a trading participant to route different trades to different central counterparties unless they operate effectively as two different trading participants (ie with different Member IDs on the Exchange's trading system). This is similar to the way that the EUI system currently determines which clearing members and settlement participants apply to each side of a trade.

1.12 Risk management

Each central counterparty will be free to determine and operate its own risk management processes independently of the other central counterparty.

The central counterparties do not have to operate the same methods of risk management.

The Exchange expects that the central counterparties will operate risk management processes between each other to manage the counterparty risk that they will generate against each other.

1.13 Operating calendar

Both LCH and x-clear will accept trades for clearing purposes on all days on which the Exchange is open for trading.

1.14 Settlement with the central counterparties

Trades on the Exchange and cleared by LCH and/or x-clear are settled at EUI.

Participants will continue to settle with their chosen central counterparty as they do today.

Both central counterparties will offer a choice of gross settlement or net settlement using trade date netting (the current approach to netting).

1.15 Corporate actions

The EUI system will handle corporate action processing on the open trades which are eligible for corporate action benefits, as it does today.

The potential presence of two CCPs in the transaction chain will have no impact on end customers.

1.16 Settlement fails

1.16.1 Current mechanisms

Settlement fails due to lack of stock are currently handled by a combination of four different mechanisms. It should be noted that the FSA requires that exchanges and clearing houses regulated by it have methods of monitoring and dealing with settlement fails as part of the FSA Recognition Requirements.

1. The EUI settlement discipline regime, which fines participants with settlement performances below pre-set limits.

2. Buying-in at buyer request by the Exchange. Buyers can request action by the Exchange once individual settlements are more than a fixed number of days late.

3. Buying-in by LCH. LCH can choose to buy in against individual settlements that are more than a fixed number of days late (currently 30 days). The LCH threshold for this is after the Exchange's threshold for buying-in at the buyer's request – ie the buyer will have had an opportunity to ask the Exchange to take action before LCH reach their threshold.

4. Invoicing Back by LCH. This is a process of canceling an outstanding transaction, with cash compensation paid, that LCH would use if there was no realistic prospect of the transaction settling.

1.16.2 The impact of competitive clearing

The EUI settlement discipline regime is not expected to change.

The Exchange will continue to offer buying-in at the buyer's request.

Both central counterparties will be able to operate their own buying-in or invoicing back procedures. It is not a requirement of competitive clearing that the two regimes are identical. In some cases, the action of one central counterparty could be to buy in against the other central counterparty.

The two central counterparties are also free to operate other processes that would tend to improve settlement efficiency, for example borrowing stock to cover unsettled deliveries. It is possible that none, one or both central counterparties could offer this.

There is no proposal to introduce fining for late settlements.

1.17 Default

Each central counterparty will operate its own protection mechanisms against the default of clearing members, including its own approach to calculating margin levels and default fund contributions. There is no requirement that the two central counterparties use identical methods or parameters in these areas.

1.18 Migration

The migration approach for firms to move between central counterparties will be to set a date for change for each such firm. From that date, new trades will be routed to the new central counterparty for that firm. It will not be possible to transfer outstanding positions between the central counterparties if a firm changes central counterparty, however it would be expected that most outstanding positions would disappear within three days as a result of normal settlement.

1.19 Validation

Where a validation failure occurs, the Exchange, together with EUI and the relevant CCP(s), will work together to resolve it and have the trade processed by the CCP(s). If resolution of the validation problem is not possible, then the trade will become a bilateral trade between the trading counterparties and will not be centrally cleared. Further information is available in the Exchange rules at: www.londonstockexchange.com/products/marketdata/directcustomers/services/rules.htm.

3. Impact on market participants

1.20 Trading

There will be no impact on trading. There are no changes to any TradElect messages as a result of competitive clearing.

1.21 Clearing

1.21.1 Impact of competitive clearing

The introduction of competitive clearing should cause no material impact on clearing members that choose to continue to clear through LCH.

1.21.2 Membership of both CCPs

Customers can also be participants of more than one CCP at the same time, however all trades executed under the same Member ID and dealing capacity must be cleared through the same CCP.

There is no requirement from the Exchange for General Clearing Members (or any other clearing member) to be members of both central counterparties. This is entirely the decision of the clearing member. It will be possible for a General Clearing Member to use both central counterparties with the trades for some of its non-clearing members being cleared by one central counterparty and trades of the others being cleared by the other central counterparty.

1.21.3 Changing CCP

Clearing members that choose to change central counterparty will have to go through the relevant membership processes for their new central counterparty and agree an effective date for the change with the Exchange and the new central counterparty. Trades done before the effective date will be sent to the previous central counterparty. Trades done on or after the effective date will be sent to the new central counterparty. The settlement of trades done before the effective date will remain with the previous central counterparty and will not be transferred to the new one.

1.22 Settlement

It is not expected that participants that change central counterparty will have to change their settlement procedures to settle with the new central counterparty.

4. General requirements

The general membership requirements are published on the London Stock Exchange website www.londonstockexchange.com.

To have trades effected on the Exchange and cleared by LCH or x-clear, Exchange members are also required to be members of the LCH or x-clear or to use a GCM that is a member of one of those CCPs, and also to be either participants in EUI or to make use of a settlement agent.

Each member must comply with the infrastructure requirements of the Exchange, LCH, x-clear and EUI, as applicable.

5. Implementation

1.23 Project approach

TradElect and the systems operated by LCH, x-clear and EUI have all been updated to support competitive clearing.

The Exchange's rule changes were carried out as part of the rule review for MiFID.

1.24 Timescale

Information about the timescale is available from x-clear.

1.25 Testing

Please contact your Technical Account Manager for more details on testing and development.

1.26 Exchange rules

There will be no change to the Exchange rules as a result of the introduction of competitive clearing (the necessary changes were made as part of the pre-MiFID review).

6. Future enhancements

During 2009, the Exchange intends to introduce its own routing service, X-TRM, to provide the multi-CCP aspects of its service. X-TRM will also support clearing of markets that do not settle in EUI and the Exchange's forthcoming CFD product.

With regard to the clearing of UK equities, X-TRM will support:

1. Real-time information feeds to traders, clearing members and CCPs.
2. Support of multiple CCPs in a standard model.
3. The ability for customers to choose which system provides settlement netting for them: X-TRM itself, their CCP or EUI.
4. Optional routing of settlement instructions to EUI.

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התנועה למען איכות השלטון בישראל (ע"ר)

The Movement for Quality Government in Israel الحركة من أجل جودة السلطة في إسرائيل

הרגולציה האירופאית על מסלקות- כפי שהיא מוסברת בפרסומי הפרלמנט הבריטי

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The future regulation of derivatives markets: is the EU on the right track? - European Union Committee Contents

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CHAPTER 5: The EU regulation of CCP clearing houses

What does the Commission propose?

107. The Commission intends to propose legislation governing the activities of CCPs "so as to eliminate any discrepancies among national legislations and ensure safety, soundness and proper governance". This legislation would cover the following areas:

· Minimum standards for risk management, conduct of business and governance, including addressing conflicts of interest and transparency of risks and procedures.

· Authorisation for CCPs to operate in the EU, to be granted by ESMA. ESMA may be granted direct supervisory powers over CCPs.

· Recognition of third country CCPs by ESMA, based on criteria including comparable supervision and regulation in the third countries in which the CCPs are based.

· Legal protection to collateral and positions, including segregation of assets and portability of client assets and positions.

Proposals for legislation on CCP minimum standards

108. The proposal to set minimum standards for CCPs at an EU level received support from our witnesses. Most witnesses agreed that globally developed minimum standards should be applied at an EU level (FOA, p 88, Deutsche Bank, p 83, Investment Management Association, p 104, Managed Funds Association, pp 112). There was, however, disagreement over what such minimum standards should involve.

109. The International Swaps and Derivatives Association (ISDA) agreed that the EU should implement global standards. They noted that global standards were important to avoid regulatory arbitrage in a highly mobile market (QQ 76-78). Deutsche Bank argued that EU minimum standards would increase the confidence of market participants in CCPs' operational standards (p 83).

110. The Government supported "high global standards" for CCPs and noted that the Committee on Payment and Settlement Systems (CPSS) and the Technical Committee of the International Organization of Securities Commissions (IOSCO) were undertaking an international review of the operational and prudential standards for CCPs. Once agreed, these standards should be

"consistently applied across EU jurisdiction" (QQ 2-5). They said that minimum standards for CCPs in EU legislation would have the benefit of both promoting a single market for CCPs and ensuring that EU CCPs were run to high prudential and operational standards. High standards for CCPs were necessary given their "increasing systemic importance" (Q 5). They emphasised that minimum standards should focus upon three areas: prudential requirements, including margin requirements; operational requirements, including robust corporate governance arrangements, management of conflicts of interest and business continuity; and conduct of business rules, including disclosure requirements (Q 42).

111. LCH.Clearnet agreed with other witnesses that minimum standards for CCPs were appropriate, but argued they were likely to be "very broad in nature" and "it would be a mistake" to legislate on specific calculations conducted by the CCP, including the level of margin a CCP should call from its clients, which should be determined by the clearing house itself (Q 121).

112. The Commission noted in its second Communication that the derivatives market was global. It stated "the Commission intends to further develop the technical details in cooperation with its G20 partners, the Financial Stability Board, and in particular with the US."

113. Minimum standards for CCPs have the potential both to raise the operational performance of CCPs and to facilitate the single market through removing regulatory differences. This in turn will increase the confidence of market participants in CCPs and further encourage their use. We encourage the Government to support minimum standards for CCPs through EU legislation. **We welcome the Commission's acknowledgement of the need to develop a coordinated global approach in line with the work of CPSS and IOSCO. We also recommend that the Commission's Impact Assessment should examine in detail where minimum standards are appropriate and whether specific calculations on risk and margins are best left to the clearing house itself.** We intend to return to these requirements when we come to scrutinise the specific proposals.

Supervision of CCPs

114. While it was generally agreed amongst witnesses that the EU was the correct level for regulation of minimum standards for CCPs, most witnesses did not believe this was the correct level for their supervision. The second Communication argued that ESMA should authorise CCPs and raised the possibility of supervision also being undertaken by ESMA, given the cross-border nature of some CCPs.

115. The Government disagreed. They told us that "as the Commission or a pan-European regulatory body cannot bear the fiscal responsibility in the event of a failure of the CCP, supervisory responsibility and authorisation should therefore remain with the competent home authority." They added "if you are supervising a CCP, then you should be authorising it" (Q 52). In his letter to the Committee, the Minister told us that at the moment no pan-European body would have the funds to bear the fiscal responsibility in the event of the failure of a UK CCP (p 17).

116. ISDA acknowledged that "you could in theory gain greater backing for any bailout of a CCP by broadening the scope of the funds available to do that". However, "in practical terms, that would not seem to be a realistic option" and "the logic of national supervision seems hard to avoid" (Q 79). The Futures and Options Association (FOA) noted that having ESMA authorising CCPs, but national authorities supervising them, would "create needless conflict, duplication and confusion" (p 90). They agreed with the HMT/FSA paper that "it is unclear what additional benefits the introduction of authorisation and supervision at a pan-European level ... can deliver."[34]

117. As with other aspects of the financial system,[35] cross-border supervision by an EU-wide body such as CCPs has some attractions. However, the political reality is that the cost of any failure of a financial institution, including a CCP, will be borne by the government of the Member State in which the CCP is situated. **We recognise that the absence of any cross-border fiscal burden-sharing arrangements for failing financial institutions means that supervision of CCPs at EU level is probably unrealistic. It may be appropriate to develop a supervisory system at EU level along the lines of that currently under negotiation for EU banking supervision, in which supervisory best practice is shared and technical standards defined.**[36]

Separation of collateral

118. The Communication calls for legal protection for collateral provided by clearing members' counterparties. This is relevant because in the event of the collapse of a clearing house or a counterparty, unless collateral is separated from the other assets of the clearing house, counterparties may not be able to retrieve it, worsening a crisis by reducing liquidity. This is explained in detail in Box 9.

BOX 9

Lehman Brothers' involvement in OTC derivatives and financial crisis

Lehman Brothers was a counterparty to many OTC derivative transactions. The clearing of these transactions can be considered a success since the margins provided by different counterparties were sufficient to close out the positions after the default of Lehman Brothers. However, an unexpected adverse consequence arose because of the lack of segregation of collateral payments provided by Lehman clients from those of Lehman's other assets.

Some financial institutions such as hedge funds used Lehman Brothers as a prime broker and provided it with margin and collateral payments. To reduce funding costs, these clients did not insist on the segregation of these payments from other Lehman assets. From the investment bank's perspective, not segregating these payments gave it the ability to use the collateral to fund further business activity, a process called rehypothecation.

After the Lehman bankruptcy, some funds were unable to reclaim assets they had posted against derivatives and other trades because the collateral had been reused in the bank's other businesses, including in the UK, and was blocked in bankruptcy proceedings. Several hedge funds suffered a liquidity crisis due to their inability to close positions entered with or through Lehman. This liquidity crisis coincided with redemptions by hedge fund investors.

As a result hedge funds were forced to pull capital from other still healthy investment banks to meet investor redemptions. Since many of these still healthy investment banks were heavily reliant on wholesale funding,[37] these in turn suffered a liquidity crisis.

119. The MFA described the protection of customer positions and collateral as "absolutely critical" and urged the Commission to bring forward rules separating the initial margin posted by counterparties from the assets of the swap dealer. They explained that such requirements would have lessened the knock-on effect of the failure of Lehman Brothers (p 112). LCH.Clearnet explained that after the collapse of Lehman Brothers, counterparties were "not able to retrieve, on a timely basis at least, the collateral locked up as part of the whole administrative process of Lehman Brothers." This would in turn make it difficult "to disentangle a specific client's collateral and transfer it, together with the related contractual obligations, to another (solvent) clearing member." They agreed that

collateral should be separated from other assets in the EU legislation, but noted they were "confident" the continuing consultation process would lead to a more satisfactory structure (Q 111 and p 49).

120. **The separation of collateral from clearing houses' other assets can help maintain liquidity in a crisis. We agree with the Commission that proposals to include specific requirements for separation of assets are attractive.** We intend to scrutinise such requirements in detail when we examine the specific proposals.

CCP competition

121. CCP clearing houses are privately owned entities, and as such their location and number are subject to market forces. Competition between clearing houses is relevant to the quality of risk management that they offer, as the parties in a derivatives contract choose which to use. One clearing house may attempt to offer lower margins than a competitor to attract custom, but to the detriment of risk management. The Minister told us that 20 CCPs currently operate within the EU, but many of these are local in scale (Q 38).

122. Commenting on this issue, LCH.Clearnet told us that larger clearing houses are able to offer lower margins because a large portfolio allows more opportunities to offset risks (Q 122). They argued that "the most desirable outcome of that would be to have clearing as a highly concentrated activity, because the fewer clearing houses there are the more benefit from this offsetting and netting you get" (Q 104). ISDA agreed that "the more you can put in one place the more efficient the margining," but noted that having fewer CCPs concentrated risk. They told us that they were currently encouraging multiple CCPs, but expected to see industry consolidation in the next five years (Q 84). The Commission agreed that "competition between market infrastructures would most likely have an effect on the future market landscape" (p 88).

123. The Minister noted that while appropriate prudential and operating standards in Europe were necessary to avoid a "race to the bottom in terms of risk management", market forces should determine the number of CCPs. He agreed with ISDA and the Commission in envisaging activity focusing around two or three CCPs in Europe in the future (Q 38).

124. The competition between CCPs also reinforces the need for appropriate regulation and supervision of risk management standards. **Supervision will be more effective if it ensures that CCPs compete on quality of service, rather than size of margins.**

Systemic risk

125. Concerns have been raised that, if the role of CCPs is increased through increasing the number and proportion of contracts they clear, they will themselves become systemically significant, and that their collapse would pose a significant risk to the stability of the market as a whole. The Minister acknowledged the increasing reliance on CCPs for financial stability and noted that this made effective regulation and supervision increasingly important and noted that a CCP could collapse if there was an "extraordinary movement in prices" which left several counterparties with losses beyond existing liquidity and capital (QQ 50 and 58). LCH.Clearnet agreed that a CCP might collapse if it had "seriously miscalculated the level of risk that it had in its portfolio" and was unable to close defaulting counterparties' positions (Q 132).

126. ISDA argued that "any time you focus that many financial trades through one entity, at some point it is just going to be so large and it is going to be handling such a high percentage of trades that it just, by virtue of its size, becomes systemically significant." Increasing systemic importance of CCPs "could create the next problem potentially" (QQ 71 and 74).

127. ISDA told us that some CCPs have examined the possibility of central banks providing liquidity lines. We asked LCH.Clearnet whether they believed CCPs should have access to central bank liquidity in the event of a crisis of liquidity at the CCP. They noted that there were times when central bank liquidity would be "beneficial" during a crisis. However, Roger Liddell, CEO of LCH.Clearnet, commented that personally he believed businesses should never rely on the central bank providing liquidity as a last resort, because of the moral hazard issues this raised. The business models of businesses should assume that they would receive no support in the event of a crisis (QQ 137-9).

128. **Increasing the role of CCPs in the derivatives market increases their effect on market stability. If the number of CCPs operating in Europe falls in the future, as predicted by witnesses, this will also have the effect of increasing the systemic importance of the CCPs that remain. We agree with the Minister that this reinforces the importance of effective regulation and supervision of CCPs.**

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34 HMT/ FSA, *OTC Derivatives,* p. 15. Back

35 The reports European Union Committee, 14th Report (2008-9), *The future of EU financial regulation and supervision* (HL Paper 106) and 3rd Report (2009-10), *Directive on Alternative Investment Fund Managers* (HL Paper 48) discuss the proposals for EU supervision of banking and investment funds. Back

36 The Committee discussed proposals for EU supervision of banking in a letter to Lord Myners of 25 November 2009: EU Sub-Committee A, *Correspondence with Ministers*: http://www.parliament.uk/hleua Back

37 Wholesale funding is a method that banks use in addition to core demand deposits to finance operations and manage risk. Back

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התנועה למען איכות השלטון בישראל (ע"ר)

The Movement for Quality Government in Israel الحركة من أجل جودة السلطة في إسرائيل

פסילת מיזוג בין בורסות באירופה מחשש ליצירת מונופול במסחר ובסליקה

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EUROPEAN COMMISSION - PRESS RELEASE

Mergers: Commission blocks proposed merger between Deutsche Börse and NYSE Euronext

Brussels, 01 February 2012 - The European Commission has prohibited, on the basis of the EU Merger Regulation, the proposed merger between Deutsche Börse and NYSE Euronext, as it would have resulted in a quasi-monopoly in the area of European financial derivatives traded globally on exchanges. Together, the two exchanges control more than 90% of global trade in these products. The Commission's investigation showed that new competitors would be unlikely to enter the market successfully enough to pose a credible competitive threat to the merged company. The companies offered, in particular, to sell certain assets and to provide access to their clearinghouse for some categories of new contracts, but overall, the commitments were inadequate to solve the identified competition concerns.

Commission Vice President in charge of competition policy Joaquín Almunia said: "*The merger between Deutsche Börse and NYSE Euronext would have led to a near-monopoly in European financial derivatives worldwide. These markets are at the heart of the financial system and it is crucial for the whole European economy that they remain competitive. We tried to find a solution, but the remedies offered fell far short of resolving the concerns.*"

Eurex, operated by Deutsche Börse, and Liffe, operated by NYSE Euronext, are the two largest exchanges in the world for financial derivatives based on European underlyings. They compete head-to-head and are each other's closest competitors.

The proposed merger would have eliminated this global competition and created a quasi-monopoly in a number of asset classes, leading to significant harm to derivatives users and the European economy as a whole. With no effective competitive constraint left in the market, the benefits of price competition would be taken away from customers. There would also be less innovation in an area where a competitive market is vital for both SMEs and larger firms.

Summary of the Commission's conclusions

1. Relevant market

The Commission's analysis focused on the effects of the proposed merger on the markets for European financial derivatives (European interest rate, single stock equity and equity index derivatives) traded on exchanges. It did not identify any significant competition issues in other areas, such as cash listing, trading and post-trading activities.

Derivatives are financial contracts whose value is derived from an underlying asset (e.g. interest rate, equity). They are used by companies and financial institutions to manage financial risk. They are also used as an investment vehicle by retail and institutional investors – including mutual and pension funds investing on behalf of final consumers. See MEMO/12/60

Derivatives can be traded on exchanges or "over-the-counter" (OTC). Exchange-traded derivatives (ETDs) are highly liquid, relatively small size (around €100 000 per trade) and fully standardised contracts in all their legal and economic terms and conditions. In contrast, OTC derivatives typically concern much bigger contracts (around €200 000 000 per trade) that allow customisation of their legal and economic terms and conditions. The investigation showed that ETDs and OTCs are generally not considered as substitutes by customers, since they use them for different purposes and in different circumstances. Some users of exchanges are also not authorised by their mandates to operate in the OTC market due to risk management considerations.

2. Near monopoly on European financial derivatives traded on exchanges

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Although other companies, including the Chicago Mercantile Exchange (CME), provide similar services worldwide, they only do so marginally in the asset classes concerned. The investigation showed that due to the high barriers to entry, no other player would be able to develop trading in European financial derivatives on a sufficient scale to keep the market competitive.

Both Eurex and Liffe operate closed vertical silos linking their exchange to their own clearing house. The merger would have resulted in a single vertical silo, trading and clearing more than 90% of the global market of European financial ETDs. It would have been difficult for a new player to enter the market because given the advantages of clearing similar contracts in a single clearing house, customers would have been reluctant to trade similar derivatives at another exchange. Therefore, the dynamics of the market would have reinforced the monopolistic position of the merger thus resulting in higher prices and lower incentives to innovate.

The two companies claimed that the merger would benefit customers through greater liquidity. However, it is unlikely that the merger would directly yield such

benefits. Historically, competition - rather than exchange consolidation - has generated liquidity gains.

The companies also argued that customers would benefit from having to post less collateral for security. However, these benefits would be significantly less than argued by the merging companies and they could in part be achieved without the merger.

In any case, any efficiencies would not be substantial enough to outweigh the harm to customers caused by the merger. Because of the creation of a near monopoly, any benefits would also be unlikely to be fully passed on to customers.

3. Remedies proposed by the two companies

The two companies offered in particular to sell Liffe's European single stock equity derivatives products where these compete with Eurex. However, the divested assets would be too small and not diversified enough to be viable on a stand-alone basis.

In the commercially more significant area of European interest rate derivatives, the companies did not offer to sell overlapping derivatives products, but only offered to provide access to the merged company's clearing for some categories of "new" contracts. This was considered as insufficient, in particular because it did not extend to existing competing products. There were also fundamental concerns about the workability and the effectiveness of such an access remedy.

The Commission, therefore, had no alternative but to conclude that the concentration "*would significantly impede effective competition in the internal market or a substantial part of it*" (Art 2.3 of the Merger Regulation) and prohibited the transaction.

Previous steps

The merger was notified on 29 June 2011. On 4 August 2011, the Commission decided to launch an in-depth investigation. The deadline for a ruling was extended twice in order to assess the remedies. The parties were advised in a Statement of Objections sent in October 2011 that the merger as notified raised serious concerns and, in the absence of a sufficient remedy, might be prohibited.

More information on the case will be available at:

http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_6166

See also MEMO/12/60

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