

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

DEUTSCHE BÖRSE AG,

and

NYSE EURONEXT,

Defendants.

Case:
Assigned To:
Date:
Description: Antitrust

[PROPOSED] FINAL JUDGMENT

WHEREAS, Plaintiff United States of America (“United States”) filed its Complaint on December 22, 2011, the United States and Defendants Deutsche Börse AG and NYSE Euronext, by their respective attorneys, have consented to entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants agree to be bound by the provisions of the Final Judgment pending its approval by the Court;

AND WHEREAS, the United States requires that Defendants agree to undertake certain actions and refrain from certain conduct for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Defendants have represented to the United States that the actions and conduct restrictions can and will be undertaken and that Defendants will later raise no claim of

hardship or difficulty as grounds for asking the Court to modify any of the provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of Defendants, it is ORDERED, ADJUDGED AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of, and each of the parties to, this action. The Complaint states a claim upon which relief may be granted against defendants under Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

II. DEFINITIONS

As used in this Final Judgment:

A. “Deutsche Börse” means defendant Deutsche Börse AG, an *Aktiengesellschaft* organized under the laws of the Federal Republic of Germany with its principal place of business in Eschborn, Germany, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees. This definition expressly includes International Securities Exchange Holdings as a subsidiary of Deutsche Börse.

B. “NYSE” means defendant NYSE Euronext, a Delaware corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. The “Deutsche Börse/NYSE Merger” means the transaction to be undertaken

pursuant to the Business Combination Agreement, dated as of February 15, 2011, by and among Deutsche Börse, NYSE, Alpha Beta Netherlands Holding N.V., and Pomme Merger Corporation, under which Deutsche Börse and NYSE will combine their businesses under a new holding company, Alpha Beta Netherlands Holding N.V.

D. “Direct Edge” means Direct Edge Holdings LLC, a Delaware limited liability company with its principal place of business in Jersey City, New Jersey, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees. Direct Edge includes, but is not limited to, its subsidiaries Direct Edge, Inc., EDGA Exchange, Inc. and EDGX Exchange, Inc.

E. “Direct Edge Equity” means any equity interest, whether voting or nonvoting, of Direct Edge that defendants own or control, directly or indirectly, including, but not limited to, the units of interest in the ownership and profits and losses of Direct Edge and such rights to receive distributions from Direct Edge (defined as “Units” in the Operating Agreement) owned by Deutsche Börse through International Securities Exchange Holdings as of the date of the filing of this Final Judgment.

F. “Divestiture Assets” means the Direct Edge Equity required to be divested under this Final Judgment.

G. “International Securities Exchange Holdings” means International Securities Exchange Holdings, Inc., a Delaware corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

H. “Mutual Services Agreement” means the Mutual Services Agreement by and between ISE and Direct Edge, dated as of November 4, 2010, including any modifications,

amendments, restatements, or other versions of the Mutual Services Agreement existing at the time of this Final Judgment or in the future.

I. “Operating Agreement” means the Fifth Amended and Restated Limited Liability Company Operating Agreement of Direct Edge Holdings LLC, dated as of June 12, 2010, including any modifications, amendments, restatements, or other versions of the Operating Agreement existing at the time of this Final Judgment or in the future.

J. “Own” means to have or retain any right, title, or interest in any asset, including any ability to control or direct actions with respect to such asset, either directly or indirectly, individually or through any other party.

K. “Regulatory Services Agreements” means the Regulatory Services Agreement by and between ISE and EDGX Exchange, Inc., dated as of January 21, 2010, and the Regulatory Services Agreement by and between ISE and EDGA Exchange, Inc., dated as of January 21, 2010, including any modifications, amendments, restatements, or other versions of the Regulatory Services Agreements existing at the time of this Final Judgment or in the future.

III. APPLICABILITY

This Final Judgment applies to Deutsche Börse and NYSE and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV. CERTIFICATION OF PASSIVE INTEREST

A. Defendants are hereby ordered and directed to take all necessary steps to render the Direct Edge Equity passive and to divest the Direct Edge Equity, consistent with the time limits, rights and restrictions specified elsewhere herein and in conformance with all applicable

statutes, rules, regulations, and policies of relevant federal authorities.

B. Defendants are hereby ordered and directed, before closing of the Deutsche Börse/NYSE Merger, to provide a written plan outlining the steps defendants will take to comply with the terms of this Final Judgment, and written certification and supporting documentation to the United States demonstrating that such plan complies with this Final Judgment and that all voting, director, or other rights Deutsche Börse enjoyed under the Operating Agreement, the Certificate of Incorporation and By-Laws of EDGA Exchange, Inc., the Certificate of Incorporation and By-Laws of EDGX Exchange, Inc., or any other organizational documents of Direct Edge, have been eliminated (except any such rights specifically reserved or provided for herein).

V. DIVESTITURE OF DIRECT EDGE EQUITY

A. Defendants are ordered and directed, in a manner consistent with this Final Judgment, on or before two (2) years from the date of closing of the Deutsche Börse/NYSE Merger, to divest the Direct Edge Equity sufficient to cause defendants to own no outstanding equity in Direct Edge. The United States, in its sole discretion, may extend the two (2) year time limit in this Section V.A for up to three (3) additional extensions of one (1) year each upon written application of the Defendants.

B. Defendants are enjoined and restrained from the date of entry by the Court of the Stipulation and Order until the completion of the divestiture required by Section V.A from acquiring, directly or indirectly, any additional Direct Edge equity (including Units, options or any other forms of equity rights or warrants) or ownership interest or rights, except pursuant to a transaction that does not increase defendants' proportion of the outstanding equity of Direct Edge, such as a stock split, stock dividend, rights offering, recapitalization, reclassification,

merger, consolidation, or corporate reorganization. Any additional Direct Edge equity acquired by defendants as specifically permitted in this Section V.B shall be part of the Direct Edge Equity and be subject (1) to the divestiture obligations of Section V.A of this Final Judgment; and (2) to the rights and restrictions set forth herein.

C. The divestiture required by Section V.A may be made by open market sale, public offering, private sale, private placement, repurchase by Direct Edge, or a combination thereof, subject to the restrictions outlined herein. Such divestiture shall not be made by private sale or private placement to any person unless the United States, in its sole discretion, shall otherwise agree in writing pursuant to the procedures set out in Section VIII.

D. Defendants shall notify the United States no less than sixty (60) calendar days prior to the expiration of the time period for divestiture required by Section V.A of this Final Judgment as to the arrangements made to complete the required divestiture in a timely fashion.

E. Upon completion of the divestiture required by Section V.A, defendants may not acquire, directly or indirectly, any additional equity (in any form) or ownership interest or rights in Direct Edge.

F. Defendants may not acquire debt obligations of Direct Edge, enter into any loan agreements with Direct Edge, or provide any financing to Direct Edge.

G. Defendants shall not take any action that will impede in any way the divestiture of the Divestiture Assets.

VI. DIRECT EDGE GOVERNANCE

A. Within two (2) business days after the closing of the Deutsche Börse/NYSE Merger, any Deutsche Börse officer, director, manager, employee, affiliate, or agent shall resign from the Board of Managers or Board of Directors of Direct Edge, Direct Edge, Inc., EDGA

Exchange, Inc., and EDGX Exchange, Inc., and from any executive committees, advisory committees, or other comparable positions.

B. Except to the extent permitted elsewhere herein, from the date of the filing of this Final Judgment and until its expiration, defendants are enjoined and restrained, directly or indirectly, from:

1. Suggesting, designating or nominating, individually or as part of a group, any candidate for election to the Board of Managers or Board of Directors of Direct Edge, Direct Edge, Inc., EDGA Exchange, Inc. or EDGX Exchange, Inc., or having any officer, director, manager, employee, or agent serve as an officer, director, manager, employee, or in a comparable position with or for Direct Edge, Direct Edge, Inc., EDGA Exchange, Inc. or EDGX Exchange, Inc.;
2. participating in, being present at, or receiving any notes, minutes, or agendas of, information from, or any documents distributed in connection with, any nonpublic meeting of the Board of Managers or Board of Directors of Direct Edge, Direct Edge, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., or any committee thereof, any other governing body of Direct Edge, or any nonpublic meeting of members, shareholders, Unitholders, or any other type of equity owners of Direct Edge in which the business, operations, or ownership of Direct Edge are discussed, except to the extent it is necessary to disclose such information to the defendants in order to implement the provisions of this Final Judgment (the term “meeting” here includes any action taken by consent in lieu of a meeting);
3. voting, causing to be voted or permitting to be voted any Direct Edge shares, Units, or other equity that defendants own in any Direct Edge entity, except to the

extent that Direct Edge determines that Deutsche Börse must vote its Units in Direct Edge, in which case Deutsche Börse shall vote in an amount and manner proportional to the vote of all other votes cast by other Direct Edge owners;

4. using or attempting to use any ownership interest in Direct Edge to exert any influence over Direct Edge in the conduct of Direct Edge's business;
5. using or attempting to use any rights or duties under any agreement or relationship between Deutsche Börse and Direct Edge, including but not limited to the Regulatory Services Agreements and Mutual Services Agreement, to influence Direct Edge in the conduct of Direct Edge's business;
6. communicating to or receiving from any officer, director, manager, member, owner, employee, or agent of Direct Edge any nonpublic information regarding any aspect of defendants' or Direct Edge's business, including any plans or proposals with respect thereto; *provided, however*, that defendants shall be allowed to receive from Direct Edge quarterly financial information, including profit and loss information, of Direct Edge, to the extent necessary for defendants to comply with their financial reporting obligations; and
7. preventing, or attempting to prevent, Direct Edge from making any changes in any corporate governance documents necessary to implement the prohibitions contained in Sections IV.A, IV.B, or in this Section VI. B.

C. Except as set out elsewhere herein, nothing in this Final Judgment is intended to prevent Deutsche Börse from continuing to provide services for Direct Edge under the Regulatory Services Agreements and Mutual Services Agreement or from agreeing with Direct Edge to amend or terminate such agreements.

a. During the period of any Regulatory Services Agreement and Mutual Services Agreement between defendants and Direct Edge, defendants shall construct and maintain in place a firewall that prevents any information obtained pursuant to those agreements from flowing to any employee of the defendants except those necessary to provide the services under the Regulatory Services Agreements and Mutual Services Agreement. Defendants shall not use information obtained pursuant to the Regulatory Services Agreements and Mutual Services Agreement for any purpose other than in connection with providing the agreed upon services under the Regulatory Services Agreements and Mutual Services Agreement. To implement this provision, defendants are required to identify those employees necessary to provide the services under the Regulatory Services Agreements and Mutual Services Agreement. All identified employees shall be prohibited from passing on information obtained pursuant to the Regulatory Services Agreements and Mutual Services Agreement to non-identified employees, and all non-identified employees shall be prohibited from receiving any information obtained pursuant to the Regulatory Services Agreements and Mutual Services Agreement. For the avoidance of doubt, identified employees of the defendants may become employees of a self-regulatory organization (as that term is defined in Section 3(a)(26) of the Securities Exchange Act of 1934) other than a self-regulatory organization owned or operated by the defendants and such employees may continue to receive information obtained pursuant to the Regulatory Services Agreements and Mutual Services Agreement as necessary to provide the services under the Regulatory Services Agreements and Mutual Services Agreement.

b. Defendants shall, within ten (10) business days of the entry of the Stipulation and Order, submit to the Department of Justice a document setting forth in detail its procedure to effect compliance with provision VI.C.a. The Department of Justice shall have the sole discretion to approve defendant's compliance plan and shall notify defendants within three (3) business days whether it approves of or rejects the compliance plan. In the event that defendant's compliance plan is rejected, the reasons for the rejection shall be provided to defendants and defendants shall be given the opportunity to submit, within two (2) business days of receiving the notice of rejection, a revised compliance plan. If the parties cannot agree on a compliance plan within an additional three (3) business days, a plan will be devised by the Department of Justice and implemented by defendants.

VII. APPOINTMENT OF TRUSTEE

A. In the event that the United States, in its sole discretion, determines (a) that, upon receipt of the notice called for in Section V.D, defendants have not made arrangements that will result in completion of any divestiture within the time limits specified in Section V.A, (b) that defendants have not completed the divestiture required in Section V.A within the specified time limits, or (c) the defendants have not complied with the requirements of Section IV herein, the Court shall, upon application of the United States, appoint a trustee selected by the United States to effect such divestiture. Plaintiff may request a trustee before any of the time periods for divestiture specified in Section V.A expire. After the appointment of a trustee becomes effective, only that trustee shall have the right to sell the Divestiture Assets. The trustee shall have the power and authority to accomplish the divestiture to an acquirer(s) acceptable to the United States at such price and on such terms as are then obtainable upon the best reasonable effort by

the trustee, and shall have such other powers as the Court shall deem appropriate. The trustee may hire at the cost and expense of defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

B. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by defendants must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Sections VII.E and F.

C. The trustee shall serve at the cost and expense of defendants, on such terms and conditions as the United States approves, and shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendants and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the trustee with incentives based on the price and terms of the divestiture and the speed with which they are accomplished, but timeliness is paramount.

D. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestiture. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to all information held by defendants relating to the Divestiture Assets. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestiture.

E. After its appointment, the trustee shall file monthly reports with the United States

and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent that such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets by means of private sale or placement, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

F. If the trustee has not accomplished such divestiture within six (6) months after his or her appointment, the trustee shall promptly file with the Court a report setting forth: (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee at the same time shall furnish such reports to the United States, which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it deems appropriate to carry out the purpose of this Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

VIII. NOTICE OF PROPOSED DIVESTITURE

A. Within two (2) business days following execution of a definitive divestiture agreement for private sale or private placement, defendants or the trustee, whichever is then

responsible for effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by this Final Judgment. If the trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from defendants, the proposed Acquirer(s), any other third party, or the trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer(s), and any other potential Acquirer. Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from defendants, the proposed Acquirer(s), any third party, and the trustee, whichever is later, the United States shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to defendants' limited right to object to the sale under Section VII.B of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer(s) or upon objection by the United States, a divestiture proposed under Section V or Section VII shall not be consummated. Upon objection by defendants under Section VII.B, a divestiture proposed under Section VII shall not be consummated unless approved by the Court.

IX. FINANCING

Defendants shall not finance all or any part of any purchase made pursuant to this Final Judgment.

X. COMPLIANCE INSPECTION

A. For the purpose of determining or securing compliance with this Final Judgment, or determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, duly authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, be permitted:

1. access during defendants' office hours to inspect and copy, or at the option of the United States, to require defendants to provide hard copies or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of defendants, relating to any matters contained in this Final Judgment; and
2. to interview, either informally or on the record, defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendants.

B. Upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this

Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If, at the time information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. NO REACQUISITION

Defendants may not reacquire any part of the Divestiture Assets or any other equity interest in Direct Edge during the term of this Final Judgment.

XII. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish any violations of its provisions.

XIII. EXPIRATION OF FINAL JUDGMENT

Unless extended by this Court, this Final Judgment shall expire ten (10) years from the date of its entry.

XIV. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States's responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

DATED: _____

Court approval subject to
the Antitrust Procedures and
Penalties Act, 15 U.S.C. § 16.

United States District Judge