

Journal of Law & Commerce

Vol. 32, No. 1 (2013) • ISSN: 2164-7984 (online)
DOI 10.5195/jlc.2013.60 • <http://jlc.law.pitt.edu>

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*Latoya C. Brown**

I. INTRODUCTION

Some of the world's largest, successful exchanges are dinosaurs. From one angle, they are dinosaurs because of their age.¹ For example, the London Stock Exchange and the Amsterdam Exchange's timelines began in the 17th Century.² The New York Stock Exchange traces its beginnings to 1792.³ NASDAQ began trading over-the-counter securities in 1971.⁴ The Deutsche Borse traces its roots to 1585.⁵ From another angle, some are dinosaurs because of their clinging to outdated systems, or their failure to quickly adapt to significant changes with regards to how trading is done.⁶

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¹ *How NYSE fits among world stock exchanges*, USA TODAY, Dec. 20, 2012, <http://www.usatoday.com/story/money/markets/2012/12/20/world-stock-exchanges/1782267/> ("Large nations have had their own stock exchanges for decades, sometimes centuries.").

² *London: The LIFFE*, NYSE, <http://www.nyx.com/who-we-are/history/london>; *Amsterdam Stock Exchange*, NYSE, <http://www.nyx.com/who-we-are/history/amsterdam> (last visited Nov. 25, 2013).

³ *New York Stock Exchange*, NYSE EURONEXT, <http://www.nyx.com/who-we-are/history/new-york> (last visited Aug. 28, 2013).

⁴ *How NYSE fits among world stock exchanges*, *supra* note 1.

⁵ *Id.*

⁶ *See infra* Part III. *See also generally* Nathaniel Popper, *Buying the NYSE, in One Shot*, N.Y. TIMES, Jan. 19, 2013, http://www.nytimes.com/2013/01/20/business/jeffrey-sprechers-improbable-path-to-buying-the-nyse.html?pagewanted=all&_r=0 (speaking of the NYSE: "At the exchange itself last Wednesday, the 900-some men and women who work on the Big Board's floor filed through the doors at 11 Wall Street in trading jackets of blue, red and green. Over the years, their number has dwindled steadily as computerized trading put many out of work.").

For example, the International Petroleum Exchange and the New York Board of Trade continued much of their trading with the dated open outcry approach.⁷ What results? Both these exchanges were acquired by a company that did not even exist thirteen years ago, and upon acquisition, trading floors gave way to the new age of technology.⁸

This new kid on the block, making such bold acquisitions, is the IntercontinentalExchange (“ICE”): ICE was founded in 2000.⁹ In only a little over a decade, ICE is already being recognized as a market leader and a prominent market player.¹⁰ Part II of this paper looks at ICE’s beginnings and its impressive growth. Part III evaluates the impending merger between ICE and the New York Stock Exchange Euronext (“NYX”). And in Part IV this paper will discuss the implications of the merger by examining how

⁷ Popper, *supra* note 6.

⁸ *See id.*

⁹ IntercontinentalExchange, Inc., Annual Report (Form 10-K) (2013) [hereinafter 2012 Annual Report (Form 10-K)] (“We were formed in May 2000 as an OTC energy marketplace. Since that time, we have expanded our business into commodity futures markets and clearing houses through acquisitions and internal development.”); Christopher C. Faille, *Zero-Sum Game: The Rise of the World’s Largest Derivatives Exchanges* by Erika S. Olson, 58 FED. LAW. 58, 59 (June 2011) (book review); *Global Markets in Clear View: IntercontinentalExchange*, ICE, 2 (2013) http://files.shareholder.com/downloads/ICE/0x0x654206/F9D195E8-84BA-448A-ACCC-C32CCCB82857/ICE_at_a_glance.pdf [hereinafter *Global Markets in Clear View*] (“IntercontinentalExchange is formed to develop a transparent marketplace for managing risk in the OTC energy markets.”).

¹⁰ *Annual Volume Survey*, FUTURES INDUS. ASS’N, 4 (Mar. 2011), [http://www.futuresindustry.org/downloads/Volume-Mar_FI\(R\).pdf](http://www.futuresindustry.org/downloads/Volume-Mar_FI(R).pdf) (ranking ICE as #14 of Top Derivatives Exchanges Worldwide, based on number of futures and options traded and/or cleared in 2010); Karen T.Y. Shaw, *A Comparative Analysis of the Regulation of Derivatives Under the Dodd-Frank Act and the Québec Derivatives Act*, 26 BANKING & FIN. L. REV. 491, 507 (2011) (“Market players such as the CME Group and IntercontinentalExchange (also known as ICE) are just two prominent clearing houses already established in the market and these organizations have a more advantageous position in gathering a dominant market share over any new entrant.”); Houman B. Shadab, *Counterparty Regulation and Its Limits: The Evolution of the Credit Default Swaps Market*, 54 N.Y.L. SCH. L. REV. 689, 704 (2009/2010) (“As of November 2009, clearinghouses operated by the IntercontinentalExchange in both the United States and Europe had established themselves as market leaders in clearing over \$2 trillion in CDS indexes.”); Popper, *supra* note 6 (“In the United States, ICE is now the second-most-important futures trading company, after the Chicago Mercantile Exchange.”); Leslie Josephs & Jacob Bunge, *ICE Thickened With Clever Moves: 12-Year-Old Company Dominates Commodity-Futures Trading, Aggressively Expanded Into Other Market Platforms*, WALL ST. J., Dec. 20, 2012, <http://online.wsj.com/article/SB10001424127887324731304578191562650145522.html> (explaining that ICE “has been quietly transforming the way energy and other commodities are traded for more than a decade.”).

issues of globalization, demutualization, fragmentation, regulation, and antitrust factor in.¹¹

This paper ultimately concludes that the ICE-NYX merger embodies the model exchanges should seek to emulate in order to remain competitive in the global financial services industry: that is, a mega-exchange with dominant electronic trading platforms. As humans are substantially being replaced by machines, and transactions are occurring at the speed of light, exchanges need to continuously reinvent themselves to keep up.¹² Furthermore, the ICE-NYX merger is a necessary move not only for the two companies involved but also for the American markets as a whole, in which exchanges are losing their dominance.¹³

II. ICE'S DEVELOPMENT

ICE is the brainchild of Jeffrey Sprecher and is backed by some of the largest investment bankers and energy traders.¹⁴ Hence, ICE's impressive growth and success should probably not be that surprising. Sprecher purchased Continental Power Exchange ("CPE"), ICE's predecessor, in 1997.¹⁵ CPE, which provided an electronic trading platform, seemed poised

¹¹ These concepts are very broad and an expansive look is beyond the scope of this article. Hence the discussion will be brief and to the extent needed to discuss the ICE-NYX merger.

¹² See Tom C.W. Lin, *The New Investor*, 60 UCLA L. REV. 678, 681 (2013) ("Computer technology has made finance faster, larger, more global, and more interconnected in form and function. An industry once monopolized by humans has evolved into an industry in which machines play a larger and more influential role. Modern finance is a stage on which the main players are no longer entirely human. Instead, they are cyborgs: part machine, part human. Modern finance is transforming into what this Article calls "cyborg finance," or "cy-fi." This sea change is ongoing, incomplete, and without a final judgment on its normative impact and consequences."). See also *infra* Part III.

¹³ Chris Isidore, *NYSE to be sold to IntercontinentalExchange*, CNN (Dec. 20, 2012), <http://money.cnn.com/2012/12/20/investing/nyse-merger/index.html> ("With the continued growth of electronic trading, New York City's Wall Street continues to lose its dominance as the world's financial capital.").

¹⁴ *Addressing High Gas Prices*, 154 CONG. REC. S.5565 (daily ed. June 12, 2008) (statement of Sen. Bernie Sanders), 154 CONG. REC. S.5565, at *5572 (LEXIS) ("Goldman Sachs, Morgan Stanley, BP and other major institutional investors even co-founded the IntercontinentalExchange that now trades West Texas Intermediate crude oil to U.S. investors free of U.S. regulatory oversight."); Popper, *supra* note 6; *A Plan for Online Trading of Metals and Oil*, N.Y. TIMES, Mar. 22, 2000, <http://www.nytimes.com/2000/03/22/business/a-plan-for-online-trading-of-metals-and-oil.html>. See also Louise Story, *A Secretive Banking Elite Rules Trading in Derivatives*, N.Y. TIMES, Dec. 11, 2010, http://www.nytimes.com/2010/12/12/business/12advantage.html?pagewanted=all&_r=0.

¹⁵ 2012 Annual Report (Form 10-K), *supra* note 9, at 52.

for unlimited success until Enron developed its own platform and went on to dominate.¹⁶ Enron's threat to CPE's vitality was, however, Sprecher's blessing in disguise. Enron was the buyer and seller for each transaction done on its electronic platform, and this model did not go over well with Wall Street banks, which were some of the biggest traders of energy products.¹⁷

Hence, when Sprecher began seeking investors for CPE, banks like Morgan Stanley and Goldman Sachs were happy to invest in Enron's competitor.¹⁸ To facilitate the deal, Sprecher gave up a large percent of his ownership interest to the banks, which in turn gave their own stakes to several of the largest power companies.¹⁹ CPE was renamed IntercontinentalExchange, and headquartered in Atlanta.²⁰ After Enron's demise ICE became, and remains, one of the most prominent players in the marketplace.²¹ ICE became a publicly-traded company in 2005.²²

ICE's unapologetic and reformatory business approach came to light way before its current efforts to merge with market giant, NYX. In 2001, ICE outbid Nymex to acquire the International Petroleum Exchange ("IPE").²³ In 2007, ICE completed acquisition of the then 127-year-old New York Board of Trade ("NYBOT").²⁴ In that same year, ICE purchased

¹⁶ Popper, *supra* note 6.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* ("In the negotiations that followed, Mr. Sprecher used what would become a trademark strategy: giving up part of the ownership of his company in exchange for a promise that the recipients would use his platform. In this case, he gave up 80 percent of the ownership to the two banks. The banks soon turned around and gave part of their own stakes to several of the largest power companies, including Shell, Total and British Petroleum, which committed to using what was soon rechristened as IntercontinentalExchange.").

²⁰ *Id.*

²¹ Honorable Walt Lukken, Keynote Address at American University Washington College of Law Administrative Law Review Symposium: Energy Law (Oct. 2, 2008) ("The most prominent ECM [exempt commercial market] is the IntercontinentalExchange in Atlanta (ICE)"), in 61 ADMIN. L. REV. 653, 655 (Summer 2009); Popper, *supra* note 6; *IntercontinentalExchange Now #284 Largest Company, Surpassing DTE Energy*, FORBES, Mar. 6, 2013, <http://www.forbes.com/sites/dividendchannel/2013/03/06/intercontinental-exchange-now-284-largest-company-surpassing-dte-energy/>.

²² IntercontinentalExchange, Inc., Annual Report (Form 10-K), at 58 (2008).

²³ *Global Markets in Clear View*, *supra* note 9, at 2.

²⁴ *Creating the Premier Global Market Operator IntercontinentalExchange Agreement to Acquire NYSE Euronext*, ICE, 15 (Dec. 20, 2012), available at <http://files.shareholder.com/downloads/ICE/2435641743x0x622759/517e2eb3-f841-428f-98b4-bb89c1ef09ef/ICE%20NYSE%20Investor%20Presentation%2012-20-12%20Final.pdf> [hereinafter *ICE Agreement to Acquire NYX*].

the then 120-year-old Winnipeg Commodity Exchange.²⁵ ICE continued its expansion in 2008 with the acquisition of Creditex, an entity which executed and processed credit default swaps, with operations in the United States, Europe, and Asia.²⁶ And in 2010 ICE bought Climate Exchange, which operated carbon emissions exchanges.²⁷

In terms of its business, ICE operates five clearinghouses, two over-the-counter (“OTC”) markets, three futures exchanges, and a market data business (including real-time trades, daily indices, forward curves, and market time validations).²⁸ By 2013, ICE’s global product offering is broken down as: 62% energy, 11% agriculture, 14% financial, and 13% market data and miscellaneous.²⁹ Of the 1.4 billion in revenue the company reported in 2012, 52% is accounted to the United States and 48% internationally.

With its global operations and presence, ICE is subject to regulatory oversight by various agencies, including the U.S. Securities and Exchange Commission (“SEC”), U.S. Commodities Futures Trading Commission (“CFTC”), UK’s Financial Services Authority (“FSA”), and Canada’s Manitoba Securities Commission (“MSC”).³⁰

²⁵ Roberta Rampton, *Winnipeg grain traders unfazed by ICE takeover*, REUTERS, Aug. 22, 2007, <http://www.reuters.com/article/2007/08/22/ice-winnipeg-takeover-idUSN2235341620070822>.

²⁶ Press Release, IntercontinentalExchange, IntercontinentalExchange Announces Acquisition of Creditex Group Inc. (June 3, 2008), available at <http://ir.theice.com/releasedetail.cfm?ReleaseID=313527>.

²⁷ See Press Release, IntercontinentalExchange, IntercontinentalExchange Announces Acquisition of Climate Exchange (Apr. 30, 2010), available at <http://ir.theice.com/investors-and-media/press/press-releases/press-release-details/2010/IntercontinentalExchange-Announces-Acquisition-of-Climate-Exchange/default.aspx>; *ICE buys Climate Exchange*, REUTERS, Apr. 30, 2010, <http://www.reuters.com/article/2010/04/30/us-jlc-ice-climate-exchange-idUSTRE63T3FG20100430>. There were a number of other acquisitions or expansions efforts between its inception in 2000 and 2012. For a concise overview, see *ICE Agreement to Acquire NYX*, *supra* note 24, at 15.

²⁸ See *Global Markets in Clear View*, *supra* note 9, at 1–2; *ICE Commodity & Derivatives Markets*, ICE, http://files.shareholder.com/downloads/ICE/0x0x324982/157de031-b9a5-4718-95fd-b1617d01886d/ICE_Org_Structure.pdf (last visited Aug. 28, 2013).

²⁹ *Global Markets in Clear View*, *supra* note 9, at 1–2. See also *ICE Commodity & Derivatives Markets*, *supra* note 28, at 1.

³⁰ 2012 Annual Report (Form 10-K), *supra* note 9, at 97–98.

III. THE ICE-NYX MERGER AGREEMENT

In order to expand its roots from commodities into new areas of financial services, ICE announced its acquisition of NYX—pending regulatory approval—in December 2012.³¹ The deal, as structured, is valued at \$33.12 per NYSE share and gives NYX shareholders the right to choose cash, stock, or a combination of those two, subject to proration.³² After the merger is completed, NYSE shareholders will own approximately 36% of ICE shares.³³ Though the transaction is currently valued at 8.6 billion, “[t]he final purchase price will be based on the actual market price per share of ICE common stock on the closing date of the acquisition, which is anticipated in the second half of 2013, subject to regulatory approvals.”³⁴ Sprecher will be Chairman and CEO of the combined company, and four persons from the NYX Board of Directors will become part of ICE’s fifteen member board of directors.³⁵

ICE has a track record of significantly changing or erasing business models of its acquired entities.³⁶ In the case of its merger with NYX, ICE

³¹ *Id.* at 4; Isidore, *supra* note 13 (“NYSE Euronext, the operator of the venerable New York Stock Exchange, has agreed to be bought for \$8.2 billion by an upstart that runs other international trading exchanges.”); Tom Groenfeldt, *IntercontinentalExchange (ICE) Merger With NYSE Euronext Will Reshape Markets*, FORBES (Mar. 22, 2013), <http://www.forbes.com/sites/tomgroenfeldt/2013/03/22/intercontinentalexchange-ice-merger-with-nyse-uronext-will-reshape-markets/> [hereinafter (*ICE Merger With NYX*)]; *Global Markets in Clear View*, *supra* note 9, at 2.

³² The detailed breakdown of the blended consideration is as follows: “NYSE Euronext shareholders will have the option to elect to receive consideration per NYSE Euronext share of (i) \$33.12 in cash, (ii) 0.2581 IntercontinentalExchange common shares or (iii) a mix of \$11.27 in cash plus 0.1703 ICE common shares, subject to a maximum cash consideration of approximately \$2.7 billion and a maximum aggregate number of ICE common shares of approximately 42.5 million.” Press Release, IntercontinentalExchange, IntercontinentalExchange to Acquire NYSE Euronext for \$33.12 Per Share in Stock and Cash, Creating Premier Global Market Operator (Dec. 20, 2012), *available at* <http://ir.theice.com/releasedetail.cfm?ReleaseID=728039> [hereinafter Dec. 2012 Press Release]. In terms of financing, “The cash portion of the transaction will be funded by a combination of cash on hand and existing ICE credit facilities.” *Id.*

³³ *ICE Agreement to Acquire NYX*, *supra* note 24, at 6.

³⁴ 2012 Annual Report (Form 10-K), *supra* note 9, at 4.

³⁵ *ICE Agreement to Acquire NYX*, *supra* note 24, at 6.

³⁶ *See, e.g.*, Popper, *supra* note 6 (discussing ICE’s removal of historic trading floors of IPE and NYBOT); Josephs & Bunge, *supra* note 10 (“But ICE continues to move forward with its electronic-trading platform. In October, the exchange shut down open-outcry trading for options on orange juice, arabica coffee, raw sugar, cocoa and cotton. Soft commodities became the last markets on ICE to switch to solely electronic trading.”).

has maintained, however, that it “is committed to preserving the NYSE Euronext brand . . . [and] will maintain dual headquarters in Atlanta and . . . in the Wall Street building, home to the iconic trading floor.”³⁷ In addition, ICE plans to maintain NYSE Liffe in London, which is a market operator for derivatives products.³⁸

One of the prudent parts of the structuring of this deal is ICE’s formation of a new holding company, ICE Group Inc., under which NYX and ICE will operate as wholly-owned subsidiaries.³⁹ This strategy, as Part V of this article will explain, may help avert regulatory quandaries because the companies’ products and status will, for the most, remain in recognizable form. Furthermore, the formation of ICE Group does not change the consideration NYSE shareholders are promised under the initial merger agreement, and “each share of ICE common stock will be converted into the right to receive one share of ICE Group common stock.”⁴⁰

Undoubtedly, the ICE-NYX merger is motivated by the prospects of increasing financial wealth and acquiring more prominence in global

³⁷ Dec. 2012 Press Release, *supra* note 32.

³⁸ *Id.*

³⁹ IntercontinentalExchange Group, Inc., The Amended and Restated Merger Agreement, U.S. SEC. & EXCHANGE COMMISSION (Mar. 20, 2013), available at <http://www.sec.gov/Archives/edgar/data/1174746/000119312513115772/d506903d425.htm> [hereinafter ICE’s Form 425] (“Pursuant to the Amended and Restated Merger Agreement, ICE and NYSE Euronext have agreed to revise the structure of their previously announced merger transaction to provide that ICE will acquire NYSE Euronext under a newly formed holding company, ICE Group, to facilitate the implementation of the governance provisions that will be required to be put into effect. Under the revised structure, following successive merger transactions, each of ICE and NYSE Euronext will become wholly-owned subsidiaries of ICE Group. The terms, economics and conditions of the Amended and Restated Merger Agreement otherwise are substantially the same as the terms of the Original Merger Agreement, including the merger consideration to be paid to NYSE Euronext stockholders. The Amended and Restated Merger Agreement provides that each share of ICE common stock will be converted into the right to receive one share of ICE Group common stock. Upon the completion of the mergers, ICE Group’s common stock is expected to be listed for trading on the New York Stock Exchange under ICE’s current ticker symbol, ‘ICE.’”); see also ZACKS.COM, *ICE-NYSE Attempt to Ease Merger—Analyst Blog*, NASDAQ (Mar. 20, 2013), <http://www.nasdaq.com/article/icenyse-attempt-to-ease-merger-analyst-blog-cm229168>; Ruchika Tulshyan, *ICE forms holding company for NYSE Euronext acquisition*, ATLANTA BUS. CHRON., Mar. 21, 2013, <http://www.bizjournals.com/atlanta/news/2013/03/21/ice-forms-holding-company-for-nyse.html>; Jacob Bunge, *IntercontinentalExchange Chief’s Pay Down 15%*, WALL ST. J., Mar. 29, 2013, <http://online.wsj.com/article/SB10001424127887323501004578390540829139244.html> (stating that ICE and NYX “will be subsumed under a new entity called IntercontinentalExchange Group that retains the ICE ticker symbol”).

⁴⁰ ICE’s Form 425, *supra* note 39.

markets.⁴¹ And, even though the ICE Group will be a market leader, it will be playing catch up, at least in some areas, to market giants, such as the CME Group Inc.⁴² But ICE's acquisition of NYX is more than simple economics: arguably, it is a necessary move for the companies to be able to maximize their growth potential in the evolving market landscape, remain competitive, and meet customers' needs.⁴³

For example, by merging their multi-asset class companies, the ICE-NYX merger promises not only for growth and competitiveness in the marketplace internationally, but also for: capital efficiency, by cutting costs via the combination of trading platforms for example; maximization of revenues; diversification of revenue sources; and unlocking of value through merger related cost synergy.⁴⁴ This is in no way saying that this mega-merger, or others of its kind, poses no potential detriment or systemic risks.⁴⁵ But the existence of those risks does not change the fact that mega-

⁴¹ Already, in their own respects, ICE and NYX are very successful entities. For example, ". . . ICE outearned other U.S.-listed exchange companies last year, including NYSE, [and] the Atlanta-based company's [had a] 8% rise in net income to \$552 million . . ." Bunge, *supra* note 39. The NYSE has been ranked number one based on the largest domestic equity market capitalizations at year-end 2012 and 2011, according to data by the World Federation of Stock Exchanges ("WFE"). *2012 WFE Market Highlights*, WORLD FED'N EXCHANGES, 6 (Jan. 22, 2013), <http://www.world-exchanges.org/files/statistics/2012%20WFE%20Market%20Highlights.pdf>.

⁴² Jacob Bunge, *NYSE takeover deal passes U.S. antitrust overseers*, MARKETWATCH (Feb. 19, 2013), <http://www.marketwatch.com/story/nyse-takeover-deal-passes-us-antitrust-overseers-2013-02-19-124855035> ("While both exchange companies offer U.S. futures linked to stock indexes, their markets combined are far smaller in terms of trading activity than similar equity-focused markets run by competitor CME Group Inc. (CME).").

⁴³ See *(ICE) Merger With NYX*, *supra* note 31 (Speaking at an event held by the Futures Industry Association, Sprecher is quoted as follows: "ICE has acquired asset classes in different jurisdictions, but not just for growth . . . [A]part from regulation, the customs change in different locales, so it helps to have assets in Europe and U.S. Our customers are big and global and they are trying to figure out how to manage risk globally. We have had to move things around like chess pieces in order to keep up with clients' needs. M&A isn't so much trying to be big but to have enough pieces to solve customer problems."); Dec. 2012 Press Release, *supra* note 32.

See also 2012 Annual Report (Form 10-K), *supra* note 9 (statement of CEO, Sprecher: "believe that the combination of ICE with NYSE Euronext will result in an expanded portfolio of products and services available to our customers and provide new growth and diversification opportunities for investors.").

⁴⁴ Dec. 2012 Press Release, *supra* note 32; *ICE Agreement to Acquire NYX*, *supra* note 24, at 4–21.

⁴⁵ Commentators have acknowledged the potential risks concerns associated with exchange mergers. See, e.g., Christina D. Cress, Note & Comment, *The Failed NYSE Euronext-Deutsche Borse Group Merger: Foreshadowing Future Consolidation of the Global Stock Exchange Market?*, 16 N.C. BANKING INST. 375, 388–400 (2012) (discussing the risks in the context of the attempted and failed

mergers are strategic answers, from a business perspective, to the current financial landscape.⁴⁶

In fact, as depicted below, exchange merger and acquisition has been the increasing trend over the last decade.⁴⁷

Tabular Depiction of Exchange Merger/Consolidation Activity

2000	Merger of Paris Bourse, the Amsterdam Stock Exchange, and the Brussels Stock Exchange to form Euronext N.V.	Successful
2001	ICE acquires International Petroleum Exchange.	Successful
2002	Euronext purchases London International Financial Futures and Options (LIFFE).	Successful
2003	OM London Exchange and the Helsinki Stock Exchange.	Successful
2004	Deutsche Börse makes offer for LSE.	Failed
2005	OMX merges with Copenhagen Stock Exchange.	Successful

NYX-Deutsche Börse merger); Peter Kim, Note, *Securities Exchange Merger Activity*, 26 ANN. REV. BANKING & FIN. L. 85, 86–98 (2007). See also *supra* Part III.

⁴⁶ See *supra* Part III.

⁴⁷ Table sources: *London: The LIFFE*, *supra* note 2; Nu Ri Jung, *The Present and Future of the Financial Services Industry: Convergence, Consolidation, Conglomeration, and Collaboration*, 29 QUINNIAC L. REV. 729, 741–42 (2011); Roberta S. Karmel, *The Once and Future New York Stock Exchange: The Regulation of Global Exchanges*, 1 BROOK. J. CORP. FIN. & COM. L. 355, 355 (2007); Ioannis Kokkoris & Rodrigo Olivares-Caminal, *Some Issues on Cross-Border Stock Exchange Mergers*, 29 U. PA. J. INT'L L. 455, 456 (2007); *ICE Agreement to Acquire NYX*, *supra* note 24, at 15; Brenda Goh, *Factbox: A history of global exchange merger activity*, REUTERS, May 16, 2011, <http://www.reuters.com/article/2011/05/16/us-factbox-exchanges-idUSTRE74F4RJ20110516>; *CME and CBOT Complete Merger Creating the Leading Global Financial Exchange*, CME GROUP INC. (July 12, 2007), <http://investor.cmegroup.com/investor-relations/releasedetail.cfm?ReleaseID=254207>; Kim, *supra* note 45, at 85–99; *New York Stock Exchange*, *supra* note 3.

See also Cress, *supra* note 45, at 375–76 (“‘Megamergers,’ such as the proposed NYSE Euronext-Deutsche Börse Group (NYX-DB) merger, are not new phenomena. The trend towards globalization within the international stock exchange market began more than a decade ago.”); Kokkoris & Olivares-Caminal, *supra* note 47, at 459.

In addition, “[c]ommodity exchanges began to negotiate cross-border linkages prior to such transactions between security exchanges,” with a few of these linkages occurring between 1984 and 1998. Karmel, *supra* note 47, at 379.

2006	NYSE merges with Archipelago Holdings.	Successful
	OMX buys Iceland Stock Exchange in a deal valued at 250 million SEK.	
	Hostile takeover attempt of London Stock Exchange (LSE) by Nasdaq.	Failed
	Australia Stock Exchange and Sydney Futures Exchange.	Successful
	OMX AB consolidates and acquires Iceland Stock Exchange.	Successful
	Consolidated all of the companies from its Stockholm, Helsinki and Copenhagen exchanges and acquires Icelandic stock exchange.	
	Deutsche Börse's offer for Euronext.	Failed
2007	Deutsche Börse and International Securities Exchange.	Successful
	NYSE merges with Euronext N.V.	Successful
	ICE acquires NYBOT.	Successful
	CME merges with CBOT.	Successful
	NASDAQ merges with OMX Nordic Exchanges.	Successful
	LSE purchases Borsa Italiana.	Successful
	ICE acquires Winnipeg Commodity Exchange.	Successful
	Toronto Stock Exchange merges with Montreal Stock Exchange.	Successful
2008	NYSE Euronext acquired the American Stock Exchange.	Successful
	Merger between Brazil's BM&F SA (local commodities and futures exchange) and Bovespa Holding SA (managed the Brazilian Stock Exchange).	Successful
	CME acquired NYMEX.	Successful

2010	ICE acquires Climate Exchange.	Successful
2011	Singapore Exchange bid for Australian Stock Exchange Ltd.	Failed
	Nasdaq and IntercontinentalExchange bid for NYSE Euronext.	Failed

Both ICE and the NYX have been on trend with regards to consolidations within the financial markets. Within its relatively short thirteen-year life span, ICE already has made at least ten acquisitions.⁴⁸ Not to be outdone, NYSE merged with Euronext to become the “first trans-Atlantic linkup of stock and derivatives markets.”⁴⁹

The ICE-NYX merger, and exchange mergers in general, is necessary because of the current globalized and fragmented financial service industry.⁵⁰ “Significant advances in information, transportation, and

⁴⁸ See *supra* notes 23–27. In addition, ICE acquired YellowJacket in 2008, The Clearing Corporation in 2009, and Ballista in 2011. *ICE Agreement to Acquire NYX*, *supra* note 24, at 15. Of course, its merger with NYX is contingent on regulatory approval.

⁴⁹ Karmel, *supra* note 47, at 355.

⁵⁰ Jung, *supra* note 47, at 732. (2011) (“For example, ‘[g]lobally, foreign ownership of financial assets reached U.S. \$67 trillion at the beginning of 2008, roughly one-third of total global financial assets, up from just U.S. \$17 trillion, or one-fifth of global financial assets, a decade earlier.’”) (citing *The Future of the Global Financial System*, WORLD ECON. F., 14 (2009), http://www3.weforum.org/docs/WEF_Scenario_FutureGlobalFinancialSystem_Report_2010.pdf).

Concededly, consolidation may also be motivated by changes in the regulatory environment, which also sparks competitive pressures. See U.S. SEC. & EXCHANGE COMMISSION, MARKET STRUCTURE REPORT OF THE NEW YORK STOCK EXCHANGE SPECIAL COMMITTEE ON MARKET STRUCTURE GOVERNANCE AND OWNERSHIP, 2 (last visited Nov. 18, 2013), www.sec.gov/rules/sro/ny9948/media/buck1.pdf [hereinafter SPECIAL COMMITTEE ON MARKET STRUCTURE GOVERNANCE AND OWNERSHIP] (“Globalization, technology (both at the point of order execution and order origination) and regulatory change have spurred new competition for the traditional securities markets, including the NYSE.”).

See also Concept Release on Equity Market Structure, 75 Fed. Reg. 3594, 3594 (proposed Jan. 21, 2010) [hereinafter Concept Release on Equity Market Structure] (“Changes in market structure also reflect the markets’ response to regulatory actions such as Regulation NMS, adopted in 2005, the Order Handling Rules, adopted in 1996, as well as enforcement actions, such as those addressing anti-competitive behavior by market makers in NASDAQ stocks.”); Lin, *supra* note 12, at 687–88 (“This transformation resulted from advances in technology and regulatory reforms over the last few decades. Beginning in the 1990s, advances in technology encouraged the Securities and Exchange Commission (SEC) to introduce reforms like decimalization and Regulation Alternative Trading System (Reg ATS) to permit new trading systems and electronic communication networks for finance, which made today’s Wall Street possible. . . . By the mid-1990s, computers took over significant functions at major financial

telecommunication technologies have transformed global capital markets [I]ntensified competition, and triggered traditional market players to rethink their business strategies and rework their operations.”⁵¹ Exchanges need fresh, new business models that allow them to keep apace and be competitive. One response by the exchanges, for example, has been to merge stock and derivative exchanges, as ICE-NYX is now doing.⁵² This kind of merger, especially, puts entities in a position to more completely meet customers’ needs via a broader range of asset classes.⁵³

As other industries, such as banking, become more centralized and cross-border, there is more pressure on exchanges to follow suit for cost effectiveness and efficiency.⁵⁴ The benefit of merging two companies with extensive operations, such as ICE and NYX, is that operating costs will likely be significantly reduced.⁵⁵ In the case of cross-border merger, for example, exchanges, by combining different geographic markets, can exploit economies of scale in trading.⁵⁶

institutions. By then, computerized networks initiated and managed significant trading in many important financial markets such as stocks, bonds, currency, and commodities.”)

⁵¹ Jung, *supra* note 47, at 729–30 (citing J. WILLIAMS HICK, INTERNATIONAL DIMENSIONS OF U.S. SECURITIES LAW § 1:11 (Dec. 2012) (citing Margaret Chew, *Reform of Financial Services: The Effect on the Regulator*, 5 SINGAPORE J. INT’L & COMP. L. 569, 569 (2001))).

⁵² See, e.g., Kokkoris & Olivares-Caminal, *supra* note 47, at 459 (“Stock exchanges have merged with derivative exchanges (for example, Euronext and LIFFE) and with settlement operators (for example, Deutsche Börse and Clearstream.”)).

⁵³ One of the stated objectives of the ICE-NYX merger is exactly this—to provide customers with a more extensive financial service. See Dec. 2012 Press Release, *supra* note 32 (“Our transaction is responsive to the evolution of market infrastructure today and offers a range of growth opportunities, while enhancing competition in U.S. and European markets and broadening our ability to address new markets and offer innovative products and services on a global platform,” said ICE Chairman and CEO Jeffrey C. Sprecher. “We believe the combined company will be better positioned to compete and serve customers across a broad range of asset classes by uniting our global brands, expertise and infrastructure. With a track record of growth and returns, clearing and M&A integration, we are well positioned to transform our combined companies into a premier global exchange operator that remains a leader in market evolution.”); Kokkoris & Olivares-Caminal, *supra* note 47, at 459.

⁵⁴ Kokkoris & Olivares-Caminal, *supra* note 47, at 456.

⁵⁵ See, e.g., Dec. 2012 Press Release, *supra* note 32; Kokkoris & Olivares-Caminal, *supra* note 47, at 474 (“. . . the integration of the French, Belgian, Dutch, and Portuguese stock exchanges ‘allowed Euronext to rationalize its operations and significantly reduce its operating costs.’”) (citing Marco Pagano & A. Jorge Padilla, *Efficiency gains from the integration of exchanges: lessons from the Euronext “natural experiment,”* COMPETITION COMMISSION, 4 (May 4, 2005), http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/inquiry/ref2005/lse/main_submission_receiv_uronext_nv_lecg_2).

⁵⁶ Kokkoris & Olivares-Caminal, *supra* note 47, at 459.

Demutualization can be perceived both as a response to the global economy and fragmentation, as well as a facilitator of globalized financial markets.⁵⁷ Simply defined, demutualization refers to the restructuring of exchanges from “non-profit, member-owned organizations to for-profit, investor-owned stock corporations with a further step of becoming publicly traded companies.”⁵⁸ As a facilitator, demutualization allows for the once closed-off, members-only exchanges to open up not only to new possibilities of capital formation (from shareholders), but also to the possibility of consolidating with exchanges across different geographies. Hence, “demutualization features the convergence, consolidation, and conglomeration of the financial services industry in the interface context.”⁵⁹

As a response mechanism, demutualization is a way for exchanges to compete in an increasingly competitive, technological, concentrated global environment.⁶⁰ By demutualizing and turning into publicly-listed companies, exchanges can maximize profits for their shareholders and raise

⁵⁷ Demutualization in the U.S. began relatively late. The first exchange demutualization in the U.S. occurred well over a decade after the first demutualization—that of the Stockholm Exchange in 1993. Roberta S. Karmel, *IOSCO’s Response to the Financial Crisis*, 37 J. CORP. L. 849, 892 (2012); Jung, *supra* note 47, at 740–41. In 2001, the Chicago Mercantile Exchange (“CME”) became the first U.S. exchange to demutualize. Roberta S. Karmel, *Turning Seats into Shares: Causes and Implications of Demutualization of Stock and Futures Exchanges*, 53 HASTINGS L.J. 367, 368 (2002).

CME’s demutualization—and demutualization of other U.S. exchanges—followed in close proximity to the SEC’s 1998 release which stated that:

In this release, the Commission also expresses its view that registered exchanges may structure themselves as for-profit organizations. This will allow alternative trading systems, which are typically proprietary, to choose to register as exchanges without changing their organizational structure. In addition, currently registered exchanges—which are all membership organizations—could choose to demutualize.

Regulation of Exchanges and Alternate Trading Systems, 63 Fed. Reg. 70844, 70848 (Dec. 22, 1998).

In general, by 2005, 60% of the members of the World Federation of Exchanges had demutualized, and “[i]n 2007, seventy-six percent of the then fifty-three member exchanges of the World Federation of Exchanges were for-profit, and forty-one percent were publicly traded.” Jung, *supra* note 47, at 740.

⁵⁸ Jung, *supra* note 47, at 739. ICE went public in 2005, while NYX began trading publicly in March 2006. *Global Markets in Clear View*, *supra* note 9, at 1; *Company Overview: NYSE Euronext—Unlocking the World’s Potential*, NYSE EURONEXT, <http://www.nyx.com/who-we-are/company-overview> (last visited Apr. 19, 2013).

⁵⁹ Jung, *supra* note 47, at 742.

⁶⁰ See Andreas M. Fleckner, *Stock Exchanges at the Crossroads*, 74 FORDHAM L. REV. 2541, 2542 (2006) (“Today, domestic and international competition increasingly compels stock exchanges to give up their exclusivity, undergo restructuring, and become publicly traded, for-profit companies, a process referred to as demutualization.”).

additional capital.⁶¹ Another take on demutualization as a response mechanism, is that it is a solution for the exchanges to regain or maintain their competitive edge in an increasingly fragmented financial world.⁶² The concept of fragmentation will be explored in subpart B, below.

Outside of being a facilitator or response mechanism, demutualization has been criticized for being problematic: particularly to the extent that it raises conflict of interest issues.⁶³ Conflict arises because a demutualized exchange has to balance its role as a self-regulatory organization (SRO) and the need to maximize profits for its shareholders.⁶⁴ ICE Futures Canada, for example, is “a commodity futures exchange and a self-regulatory organization under the Commodities Futures Act, 1996.”⁶⁵ The concern has been that the overarching profit motive of demutualized, public exchanges may inhibit exchanges from developing and maintaining high listing standards, especially where these standards are unpopular with shareholders.⁶⁶ One response to this concern has often been that “SROs have strong incentives to preserve their reputations as fair and prestigious

⁶¹ See Kokkoris & Olivares-Caminal, *supra* note 47, at 459; Kim, *supra* note 45, at 85 (stating that one day after the merger between the NYSE and Archipelago Holdings was completed, “the newly formed NYSE Group began to trade on the NYSE, completing the demutualization of the exchange and the beginning of its life as a public company. One of the evident reasons for the IPO was to use high-priced shares to make acquisitions.”).

⁶² Special Study Group of the Committee on Federal Regulation of Securities, American Bar Association, Section of Business Law, *Special Study on Market Structure, Listing Standards and Corporate Governance*, 57 BUS. LAW. 1487, 1492 (2002) [hereinafter *Special Study on Market Structure, Listing Standards and Corporate Governance*] (“One response to the competitive pressures caused by increasing fragmentation has been the decision by Nasdaq to demutualize.”).

⁶³ See, e.g., Jung, *supra* note 47, at 739–40 (“Demutualization changes the regulatory framework of stock exchanges ‘to emphasize shareholder value and customer focus,’ and incurs the tension between an exchange’s role as a self-regulatory organization (SRO) and, at the same time, being a for-profit entity.”); *Special Study on Market Structure, Listing Standards and Corporate Governance*, *supra* note 62, at 1492 (“Yet, demutualization raises potential conflicts of interest between profit-seeking and regulatory interests.”).

⁶⁴ See *Special Study on Market Structure, Listing Standards and Corporate Governance*, *supra* note 62, at 1540.

⁶⁵ *Regulation: Regulated Markets Across Borders*, INTERCONTINENTALEXCHANGE, <https://www.theice.com/regulation.jhtml> (last visited Apr. 19, 2013). It is primarily regulated by the Manitoba Securities Commission. *Id.*

⁶⁶ *Special Study on Market Structure, Listing Standards and Corporate Governance*, *supra* note 62, at 1540.

markets through requirements such as corporate governance listing standards.”⁶⁷

Acknowledging this concern, the challenge is going to be for regulators to be vigilant in their oversight because demutualization is here to stay. It is an important aspect of exchanges’ strategy to remain competitive in the marketplace. It is a necessary response to the effect of globalization and technology on the financial services industry.

A. Implications of the Merger in a Fragmented Market

There is not only a correlation between globalization and demutualization, but also one with fragmentation. Fragmentation is “when investor order flow is directed to different markets that are not connected or are ineffectively connected.”⁶⁸ A primary impetus behind fragmentation is the technological innovations that have come to dominate trading and markets in general.⁶⁹ Globally, there has been a dramatic change in secondary market structure from “primarily manual trading to a market structure with primarily automated trading.”⁷⁰

⁶⁷ *Id.*

⁶⁸ Maureen O’Hara & Mao Ye, *Is Market Fragmentation Harming Market Quality?*, 4 (Mar. 10, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1356839. See also Concept Release on Equity Market Structure, *supra* note 50, at 3594 (“Trading equities today is no longer as straightforward as sending an order to the floor of a single exchange on which a stock is listed. As discussed in section III below, the current market structure can be described as dispersed and complex: (1) Trading volume is dispersed among many highly automated trading centers that compete for order flow in the same stocks; and (2) trading centers offer a wide range of services that are designed to attract different types of market participants with varying trading needs.”); SPECIAL COMMITTEE ON MARKET STRUCTURE GOVERNANCE AND OWNERSHIP, *supra* note 50, at 3 (stating that fragmentation refers to “the trading of orders in several locations without interaction among the orders. . .”).

⁶⁹ Concept Release on Equity Market Structure, *supra* note 50, at 3594 (“A primary driver and enabler of this transformation of equity trading has been the continual evolution of technologies for generating, routing, and executing orders.”).

⁷⁰ *Id.* See also O’Hara & Ye, *supra* note 68, at 1 (“While the traditional exchanges continue to execute orders, they now face a host of competitors ranging from electronic platforms such as ECNS (electronic communication networks) and ATS (alternative trading systems), to the trading desks of broker/dealer firms, and even to a variety of new entrants such as futures and options markets. . . . And these changes are not just confined to the U.S. markets. European equity trading has seen dramatic growth of electronic platforms such as Chi-X and BATS, and even Canada, where the Toronto Stock Exchange (now known as the TMX group) enjoyed a virtual monopoly on trading, faces the prospect of a fragmented market with the addition of electronic venues such as Alpha, Pure and MATCH Now.”). See also Lin, *supra* note 12, at 690–91 (“While significant volumes of algorithmic trading still occur on

Electronic communication networks (“ECNs”) and alternative trading systems (“ATS”), for example, have been significant competitors to the traditional exchanges.⁷¹ And these have forced many exchanges to move a lot of their operation on screen to compete—customers may even have come to expect this.⁷² For example, after the acquisition of NYBOT was complete, ICE gave customers the choice of traditional trading floors or electronic trading.⁷³ Most customers soon chose electronic trading.⁷⁴ And soon NYBOT’s trading floors gave way to electronic trading.⁷⁵

It may be a hyperbole to call changes in the NASDAQ stock market “extraordinary,” since that market became highly automated earlier on.⁷⁶ But “extraordinary” has been a word used to describe “changes in the nature of trading for NYSE-listed stock.”⁷⁷ This is probably best explained using a numbers timeline. In a 2000 concept release, the SEC stated that:

The markets for listed equities currently reflect a fairly low degree of fragmentation. In September 1999, for example, 74.4% of the trades and 83.9% of the share volume in NYSE-listed equities were executed on the NYSE. Similarly, approximately 68.7% of the trades and 70.5% of the share volume in Amex-listed securities were executed on the Amex. Thus, a large proportion of

public exchanges, a growing volume of trades are taking place in private exchanges and dark pools, away from the purview of the public. ‘A dark pool is an anonymous crossing network that allows institutions to hide their orders from the marketplace.’”)

⁷¹ O’Hara & Ye, *supra* note 68, at 1.

⁷² See, e.g., Rene Pastor & Marcy Nicholson, *WRAPUP 3-NYBOT Launches Electronic Trade, Eyes on NYMEX*, REUTERS, Feb. 2, 2007, <http://www.reuters.com/article/2007/02/02/markets-nybot-electronic-idUSN0238916720070202>.

⁷³ *Supra* note 6.

⁷⁴ *Id.*

⁷⁵ Zachery Kouwe, *It’s Now Curtains for Commodities at NYBOT*, N.Y. POST, Dec. 14, 2007, http://www.nypost.com/p/news/business/item_4ui3IdznzHBGcRJVUP0ApL.jsessionid=F9993F0521C39E092D59604DF6400BAB; Gregory Meyer, *ICE to Close New York Trading Floor*, FIN. TIMES, July 26, 2012, <http://www.ft.com/cms/s/0/308212ce-d74d-11e1-a378-00144feabdc0.html#axzz2RDeWSH62>.

⁷⁶ See Concept Release on Equity Market Structure, *supra* note 50, at 3594; see also Commission Request for Comment on Issues Relating to Market Fragmentation, Release No. 30-42450, File No. SR-NYSE-99-48, Feb. 23, 2000.

⁷⁷ Concept Release on Equity Market Structure, *supra* note 50, at 3595 (“The changes in the nature of trading for NYSE-listed stocks have been extraordinary, as indicated by the comparisons of trading in 2005 and 2009. . . .”). See also Lin, *supra* note 12, at 691 (“In 2010, more than 60 percent of trading in stocks listed on the NYSE occurred on separate computerized exchanges.”).

the order flow in listed equity securities currently is routed to a single market center with . . . only one market maker—the specialist.⁷⁸

Fast forward by a decade, and another concept release by the Commission stated that “NYSE executed approximately 79.1% of the consolidated share volume in its listed stocks in January 2005, compared to 25.1% in October 2009 NYSE’s average speed of execution for small, immediately executable (marketable) orders was 10.1 seconds in January 2005, compared to 0.7 seconds in October 2009.”⁷⁹ Additionally, research done in 2009 revealed that “more than 50% of volume [was] trading away from the listing exchange.”⁸⁰

Fragmentation has its benefits and its vices. In terms of benefits, the SEC, in a 2010 concept release, highlighted that fragmentation promotes beneficial competition among markets.⁸¹ “The benefits of such competition include incentives for trading centers to create new products, provide high quality trading services that meet the needs of investors, and keep trading fees low.”⁸² Furthermore price competition may be enhanced where there are multiple dealers in different market centers competing for order flow on the basis of displayed quotations.⁸³ In addition, the existence of multiple trading centers has provided more trading options, which has created “greater latency and more sophisticated crossing networks.”⁸⁴

But without proper balance in market structure, fragmentation may be problematic: Fragmentation may have a potentially adverse effect on “efficiency, price transparency, best execution of investor orders, and order interaction.”⁸⁵ In terms of pricing, the existence of multiple market centers “may reduce competition on price, which is one of the most important benefits of greater interaction of buying and selling interest in an individual

⁷⁸ Commission Request for Comment on Issues Relating to Market Fragmentation, *supra* note 76, at 10579 (emphasis added).

⁷⁹ Concept Release on Equity Market Structure, *supra* note 50, at 3595–96. The emphasis in this quote was added by the author.

⁸⁰ O’Hara & Ye, *supra* note 68, at 1.

⁸¹ Concept Release on Equity Market Structure, *supra* note 50, at 3597.

⁸² *Id.* (“On the other hand, mandating the consolidation of order flow in a single venue would create a monopoly and thereby lose the important benefits of competition among markets.”).

⁸³ Commission Request for Comment on Issues Relating to Market Fragmentation, *supra* note 76, at 10580.

⁸⁴ O’Hara & Ye, *supra* note 68, at 1.

⁸⁵ Concept Release on Equity Market Structure, *supra* note 50, at 3597.

security.”⁸⁶ There also is concern that fragmentation harms market quality by “reducing the liquidity available not only in individual markets but in the aggregate market as well.”⁸⁷ Also, the plethora of disconnected trading venues may not only be fragmenting the market but rather “fracturing [it] into many disparate pieces.”⁸⁸

How regulators achieve this balance or and to what extent, if any, fragmentation should be curbed, is beyond the scope of this paper. What is of interest is how the ICE-NYX merger factors into this discussion. At least with regards to the U.S., ICE’s CEO, Sprecher, has indicated that fragmentation has gone too far: “The pendulum of electronification of markets went too far in the case of U.S. equities—to the point that people want to know there’s a human being watching over their trades. . . .”⁸⁹ Sprecher also highlights that while “[c]ompetition is good[,] fragmentation creates risks which aren’t priced in.’ The U.S. probably doesn’t need 70 execution venues and 200 internalizers.”⁹⁰ The plan is therefore to maintain the trading floors of the NYSE after (and if) the merger is completed.⁹¹ And by merging two market giants the ICE-NYX transactions seem to be a move toward consolidation.⁹² ICE, however, as was discussed in Part II of this paper, has a history of reforming or substantially altering business structure after its acquisitions. Hence, ultimately, only time will tell the true price of this merger on an already fragmented financial service market.

⁸⁶ Commission Request for Comment on Issues Relating to Market Fragmentation, *supra* note 76, at 10580.

⁸⁷ O’Hara & Ye, *supra* note 68, at 1.

⁸⁸ *Id.* at 2.

⁸⁹ Popper, *supra* note 6 (Sprecher made this statement while explaining that ICE did not plan to uproot the floors of the NYSE when (and if) the merger is completed because “[t]he American stock market, and the nation, need it.”).

⁹⁰ (ICE) Merger With NYX, *supra* note 31.

⁹¹ Popper, *supra* note 6. *Cf.* Lin, *supra* note 12, at 690 (“Later in December 2012, the IntercontinentalExchange, an electronic derivatives and commodities exchange, announced a takeover of the NYSE. In light of these developments, it is probably safe to predict that a day will come in the near future when human traders no longer roam the NYSE’s famed trading floor.”).

⁹² (ICE) Merger With NYX, *supra* note 31 (quoting Sprecher as saying: “[C]ontinental Europe needs more consolidation in the exchange space. . . . I want Euronext to be the first mover in continued consolidation or federation. We are trying to stimulate that conversation in Europe.”).

B. The Merger as Impetus or Retardant for SEC-CFTC Consolidation

A lot of contested legal issues are discussed for a short while but then fade away into the world of scholarly forgetfulness. That, however, is not the case when it comes to the issue of whether the SEC and CFTC should be consolidated into one entity.⁹³ One scholar suggests that this discussion regarding the consolidation of the SEC and CFTC into one regulatory body started as early as 1988.⁹⁴ The discourse continues because the dynamism of the markets and the innovation surrounding financial products are unrelentingly pushing at jurisdictional boundaries: to the point that demarcations as to what lies within the SEC's jurisdiction and what falls on CFTC's turf are beginning to appear artificial. One area in which this is very evident is in the swaps market: because of their "unique" nature swaps require regulation both by the SEC and CFTC.⁹⁵

⁹³ See John D. Benson, *Ending the Turf Wars: Support for a CFTC/SEC Consolidation*, 36 VILL. L. REV. 1175 (1991); John C. Coffee, Jr., *Competition Versus Consolidation: The Significance of Organizational Structure in Financial and Securities Regulation*, 50 BUS. LAW. 447, 449–50 (1995); Mark Frederick Hoffman, *Decreasing the Costs of Jurisdictional Gridlock: Merger of the Securities and Exchange Commission and the Commodity Futures Trading Commission*, 28 U. MICH. J.L. REFORM 681 (1995); David B. Esau, *Joint Regulation of Single Stock Futures: Cause or Result of Regulatory Arbitrage and Interagency Turf Wars?*, 51 CATH. U. L. REV. 917 (2002); Kai Kramer, *Aren't We Still in the "Garden of Forking Paths"? A Comment on Consolidation of the SEC and CFTC*, 4 HOUS. BUS. & TAX L.J. 410, 442–45 (2004); Richard Carlucci, *Harmonizing U.S. Securities and Futures Regulations*, 2 BROOK. J. CORP. FIN. & COM. L. 461, 461 (2008); Jerry W. Markham, *Merging the SEC and CFTC—A Clash of Cultures*, 78 U. CIN. L. REV. 537, 586–611 (2009). See also Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, (2010); Elizabeth F. Brown, *E Pluribus Unum—Out of Many, One: Why the United States Needs a Single Financial Services Agency*, 14 U. MIAMI BUS. L. REV. 1, (2005).

⁹⁴ Coffee, *supra* note 93, at 449–51 ("Since the Brady Report recommended that both the SEC and the CFTC be placed under the general oversight of the Federal Reserve Board, proposals to reallocate or consolidate authority between the SEC and the CFTC have been common."). "The Brady Report recommended a single regulatory agency that would have oversight responsibility over the SEC, the CFTC, and other agencies. It proposed that this oversight role be given to the Federal Reserve Board." *Id.* at n.12.

⁹⁵ See M. Holland West & Matthew K. Kerfoot, *The Impact of Dodd-Frank on Derivatives*, 18 FORDHAM J. CORP. & FIN. L. 269, 273 (2013) ("Dodd-Frank allocates jurisdiction over the OTC derivatives markets between the SEC for 'security-based swaps' and certain participants in the security-based swaps markets, and the CFTC for all other 'swaps' and certain participants in the swaps markets."). See also Kevin Drawbaugh, *Factbox: Some Financial Reforms Missing from U.S. Legislation*, REUTERS, June 10, 2010, <http://www.reuters.com/article/2010/06/10/us-financial-regulation-missing-idUSTRE6594UB20100610>; Markham, *supra* note 93, at 552 ("One part of that effort is its recommendation to combine the SEC and CFTC. This recommendation seems, at least on

In addition, market failures and crises—as the one spawning 2007/2008 in the United States—raise the question as to the efficiency of having a fragmented regulatory framework.⁹⁶ Furthermore, those who argue for consolidation also highlight that the U.S. regulatory structure disadvantageously comprises of “a thicket of complicated rules,” and lots of “overlapping and unnecessary regulation.”⁹⁷ This complex structure coupled with a litigious society, it is argued, has made the United States unattractive to investors.⁹⁸ This line of reasoning, however, is a matter that goes beyond the issue of extensive, overlapping rules of the SEC and CFTC: rather, it is a product of the U.S. regulatory framework, in general.⁹⁹

the surface, to be an improvement because both agencies largely regulate financial products, and the two markets are rapidly converging.”).

⁹⁶ Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CAL. L. REV. 327, 332 (2013) (“This Article argues that the agency independence paradigm is under attack. The financial crisis of 2007–08 prompted policy makers worldwide to establish new regulatory mechanisms designed to monitor financial institutions more thoroughly and to facilitate intervention in case of emergency.”).

⁹⁷ Markham, *supra* note 93, at 538–39.

⁹⁸ See Elizabeth F. Brown, *The Tyranny of the Multitude Is a Multiplied Tyranny: Is The United States Financial Regulatory Structure Undermining U.S. Competitiveness?*, 2 BROOK. J. CORP. FIN. & COM. L. 369, 376 (2008); Markham, *supra* note 93, at 540 (“In 2006, only one such offering was listed on a U.S. exchange, and foreign firms delisting from U.S. exchanges set a record that year. Statistics also evidenced that foreign firms were turning to unregulated private offerings when they sought to raise funds in the United States. IPOs by U.S. companies abroad also significantly increased.”); Karmel, *supra* note 47, at 356–57 (“However, the primary reasons why the NYSE has been losing listings is that foreign issuers are disenchanted with the U.S. stock market because of the costs of compliance with the requirements of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) and because of the U.S. culture of shareholder litigation.”).

⁹⁹ This is not to say that the SEC’s or CFTC’s regulatory scheme is without fault. Criticism of rules imposed on companies under Sarbanes-Oxley Act (“SOX”)—measured against the benefits reaped—has been voiced to a point of exhaustion. See, e.g., Karmel, *supra* note 47, at 356–57 (citing the costs of compliance with requirements of SOX as one factor dissuading investors); Cress, *supra* note 45, at 398 (2012) (“Some argue that the Sarbanes-Oxley Act of 2002 hindered the United States’ competitive position in the global exchange market.”).

Also note that the cry for this kind of reform of the U.S. regulatory system is not uniform. See, e.g., Renee M. Jones, *Back to Basics: Why Financial Regulatory Overhaul Is Overrated*, 4 ENTREPRENEURIAL BUS. L.J. 389, 389 (2010) (“In this essay, I suggest that regulatory overhaul is the wrong prescription for our times. We should instead pursue a ‘Back to Basics’ approach to regulatory reform. A Back to Basics strategy is founded on the notion that the regulatory system erected as part of the New Deal, while imperfect, worked for more than seventy years to forestall the kind of catastrophic collapse we are currently experiencing. On this analysis, the current crisis cannot be properly attributed to a failure to modernize financial regulation. It is instead more appropriate to view the current collapse as the end result of a systematic effort to dismantle the regulatory structure created during the New Deal.”).

In the United States, there are over 115 state and federal agencies regulating the financing services industry.¹⁰⁰ This so-called functional approach has been criticized not only for being the most expensive in the world, but also for an inability to adapt to market changes, and for inconsistent regulations among competitors.¹⁰¹ Furthermore, one report stated concerns that not one these agencies would be fully equipped to handle the exigencies of a crisis by itself.¹⁰² Also, the multiple-agency structure actually hinders the government from catching and monitoring crises at their early stages.¹⁰³

Despite these concerns, and the recent financial crisis, the United States has not changed its regulatory model. Nonetheless, taking small steps, the Financial Stability Oversight Council (“FSOC”) was created by the Dodd-Frank Act of 2010.¹⁰⁴ FSOC’s primary objectives are: to identify risks to the United States’ financial system, that could arise within and outside of the financial services marketplace; promote market discipline by eliminating the idea that companies are too big to fail; and “respond to emerging threats to the stability of the U.S. financial system.”¹⁰⁵ The effectiveness of FSOC is yet to be tested (and ideally it will not need to be).

Hence, even after the recent post-crisis reform, the SEC and CFTC remain independent agencies. Furthermore, any merger between the two is unlikely: even if there is to be a consolidation, it will not be anytime soon. The lack of a SEC-CFTC merger is not because such a restructuring would not be logical—considering the growing overlap of the products and

¹⁰⁰ Brown, *supra* note 93, at 11. *See also* Kokkoris & Olivares-Caminal, *supra* note 47, at 440–71 (“The case of the United States is very interesting since there are four sets of norms issued by different regulators: (1) federal laws passed by the U.S. Congress, (2) state laws passed by State legislatures, (3) regulations enacted by agencies (e.g., the U.S. Securities and Exchange Commission), and (4) regulation enacted by self-regulatory organizations (“SROs,” e.g., Nasdaq, the NYSE, the Chicago Board Options Exchange, and the Chicago Mercantile Exchange.”).

¹⁰¹ Brown, *supra* note 93, at 3.

¹⁰² *Id.* at 6 (citing U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO THE CHAIRMAN, COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, U.S. SENATE, FINANCIAL REGULATION—INDUSTRY CHANGES PROMPT NEED TO RECONSIDER U.S. REGULATORY STRUCTURE 110 (Oct. 2004)).

¹⁰³ *Id.* at 6.

¹⁰⁴ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C.); Fin. Stability Oversight Council, 2012 Annual Report, U.S. DEP’T TREASURY, 11 (2012), <http://www.treasury.gov/initiatives/fsoc/Documents/2012%20Annual%20Report.pdf> [hereinafter *FSOC Report 2012*].

¹⁰⁵ *FSOC Report 2012*, *supra* note 104, at 11.

industries they regulate, it probably is. Rather, this result is more a product of politics: For many, “in a perfect world the two agencies would be combined, but that just isn’t Washington.”¹⁰⁶ Sure enough, as the financial world continues to converge, the case for unified regulation becomes stronger. In addition, the trend of consolidation among exchanges—including stock and derivative markets—will continue to make justification of the independent agency approach a lot more difficult.¹⁰⁷

Other theories put forward to explain why the two agencies will not give up their jurisdiction includes: (1) the daunting challenge of “combining the often-conflicting cultures of the agencies,” and (2) the fight over allocation of jurisdiction that would ensue between competing congressional committees.¹⁰⁸ After the recent crisis, this age-old suggestion of consolidating the two agencies was one of the suggested reform proposals for buttressing the U.S. financial system.¹⁰⁹ It should come as no shock to know that the proposal did not come to fruition.¹¹⁰

This article also argues that the ICE-NYX merger does not necessitate a consolidation of the two entities. By forming ICE Group—a holding

¹⁰⁶ Drawbaugh, *supra* note 95; *see also supra* note 93.

¹⁰⁷ The challenge in finding the right balance between a multi-regulator system and market growth and change becomes even more daunting in the context of cross-border mergers. *See, e.g.*, Phillip M. Johnson, *Exchange Consolidations: Help or Hospice*, 116 PENN. ST. L. REV. 977, 984 (2012) (“Where more than one regulator has the burden of market integrity and performance, neither will want to reduce its grip over policy, supervision, or enforcement. For cross-border link-ups, this impediment is magnified. In a European/U.S. merger like Deutsche Boerse and NYSE Euronext, each of the national regulators wanted to retain the tools necessary to protect the people they are sworn to serve. Even if one regulator is assigned “primary” responsibility, others retain a seat at the table for key decisions and during crises. This could not only produce a shifting regulatory landscape for the combined exchanges but require that key functions—clearing, surveillance, rule enforcement—remain separate in order to accommodate local authorities and thus reduce the normal cost benefits of consolidations.”).

¹⁰⁸ Markham, *supra* note 93, at 552.

¹⁰⁹ Gadinis, *supra* note 96, at 365–66 (“Other countries consolidated some of their existing regulators but allowed them to maintain separate existences from the countries’ central banks However, the United States abandoned a more ambitious plan that involved the merger of the SEC with the CFTC.”); Drawbaugh, *supra* note 95 (“The Securities and Exchange Commission and the Commodity Futures Trading Commission regulate such closely linked markets that critics have long argued the two agencies should be one. When the Obama administration took over in 2009 and the financial crisis was at its peak, a CFTC-SEC merger looked possible. But as Congress began hammering out a politically realistic set of reforms, the merger slipped from view. Neither agency wanted it since it would threaten jobs and turf. Financial services industry lobbyists were divided.”). *See also* Markham, *supra* note 93, at 538 (discussing the proposal to merge the SEC and the CFTC).

¹¹⁰ Gadinis, *supra* note 96, at 365–66.

company—under which both ICE and NYX will operate as wholly-owned subsidiaries, the regulatory status quo can be maintained.¹¹¹ This kind of arrangement was successful—as to avert much change in terms of regulatory oversight—in the NYSE-Euronext merger, and should be the same in this instance.

C. Antitrust and Nationalist Issues

One of the biggest hurdles companies face in efforts to successfully complete a merger is antitrust law. This is even more burdensome in cases of cross border exchanges where the approval of different jurisdictions is required.¹¹² In instances of mega-mergers or mergers between prominent derivatives and stock exchanges, regulators are very wary of the large potential for monopoly.¹¹³ Antitrust and competition laws seek to protect free markets and, for the benefit of customers, protect competition.¹¹⁴ Exchange mergers invoke this body of law because of the severe impact these mergers may have on competition among stock exchanges.¹¹⁵ These mergers may not only lead to higher fees or lower quality service, but also “to a post-merger market characterized by a lower degree of competition, and thus a lower degree of innovation and improvement in exchange services.”¹¹⁶ Hence, “[e]ven the potential for eliminating the possibility of dual listings of the same securities or derivatives could give antitrust authorities reason for pause.”¹¹⁷

In instances of cross-border mergers, ultimate approval or disapproval by regulators oftentimes is contingent not only on competition rules but also nationalist tendencies. In terms of nationalist tendencies, exchanges are

¹¹¹ ICE’s Form 425, *supra* note 39.

¹¹² Johnson, *supra* note 107, at 983–84 (“This concern is elevated for cross-border alliances, not only because multiple competition reviews will occur but because a sense of “dominance” at the international level would touch a far wider economy.”).

¹¹³ See, e.g., Aaron Lucchetti & Thomas Catan, *Feds Sink Nasdaq’s Bid to Buy Big Board*, WALL ST. J., May 17, 2011, <http://online.wsj.com/article/SB10001424052748703421204576326870121498918.html> (stating that Nasdaq’s and ICE’s bid for NYSE would be a “merger to monopoly.”).

¹¹⁴ See Bruce J. Prager, *Antitrust Issues in Mergers and Acquisition*, SU016 ALI-ABA 137, at 139 (2012).

¹¹⁵ Kokkoris & Olivares-Caminal, *supra* note 47, at 455.

¹¹⁶ *Id.*

¹¹⁷ Johnson, *supra* note 107, at 983–84.

often seen as “historic landmarks of national pride.”¹¹⁸ There is also a fear—for economic and nationalist reasons—of becoming subject to the regulation of a foreign country.¹¹⁹ Foreigners are particularly wary about becoming subject to U.S. regulatory scheme, which many find expensive and extensive.¹²⁰

Nationalist pride played a significant role in precluding mergers between the London Stock Exchange (“LSE”) and Canada’s TMX Group (“TMX”), and Singapore Exchange Ltd. and Australia’s ASX Ltd.¹²¹ With regards to the LSE-TMX merger, the Maple Group—“[a] consortium of thirteen Canadian banks, pension plans and financial firms”—sought a “made-in-Canada” alternative by launching a rival bid.¹²² Similarly, there was a strong opposition to the NYX merger especially among political figures, who called for a “European solution”: the perception was that “the American NYSE would dominate the French exchange.”¹²³ Of course, the merger was successful in the end.

Moving back to the umbrella issue of antitrust, within the last few years there has been a number of instances where competition laws blocked exchange mergers. Joint efforts by Nasdaq and ICE to acquire NYSE were thwarted when the DOJ indicated that it would challenge the transaction.¹²⁴ There was concern that, if successful, this transaction would have potentially created a monopoly and “would have substantially eliminated competition for corporate stock listing services, opening and closing stock

¹¹⁸ Bo Harvey, *Exchange Consolidation and Models of International Securities Regulation*, 18 DUKE J. COMP. & INT’L L. 151, 151 (2007). See also Lucchetti & Catan, *supra* note 113 (“The Big Board’s roots as an icon of American capitalism go back to 1792, when traders signed an agreement under a buttonwood tree on Wall Street.”) (emphasis added); Isidore, *supra* note 13 (“The NYSE lists shares of most of the nation’s leading companies, and its trading floor is the very symbol of Wall Street.”).

¹¹⁹ See Cress, *supra* note 45, at 385–89.

¹²⁰ *Id.*

¹²¹ Pav Jordan & Luke Jeffs, *LSE, TMX abort their merger, leaving both in play*, REUTERS (June 29, 2011, 5:26 PM), <http://www.reuters.com/article/2011/06/29/us-tmx-halt-idUSTRE75S5KL20110629> (“The failure, which follows Singapore Exchange Ltd.’s scuttled bid for Australia’s ASX Ltd, is the latest sign of nationalist pride frustrating cross-border deals for highly symbolic capital markets.”); Johnson, *supra* note 107, at 984.

¹²² Jordan & Jeffs, *supra* note 121; *TSX, LSE takeover falls apart*, CBC NEWS (June 29, 2011, 1:07 PM), <http://www.cbc.ca/news/business/story/2011/06/29/tsx-lse-takeover.html>.

¹²³ Kim, *supra* note 45, at 86.

¹²⁴ Lucchetti & Catan, *supra* note 113.

auction services, off-exchange stock reporting services and real-time proprietary equity data products.”¹²⁵ On the other hand, although there were concerns that a CME-CBOT merger would have been anticompetitive, since it would concentrate 85% of the “United States’ market for exchange-traded futures in a single exchange,” the merger was ultimately successful.¹²⁶

In terms of cross-border linkages, one that fell victim to antitrust issues in recent years was the NYX-Deutsche Börse Group (NYX-DB) merger.¹²⁷ The concern was that, aggregating futures and options, NYX-DB would have controlled a substantial portion of the European derivatives market—approximately 91%.¹²⁸ Although U.S. antitrust authorities approved the deal, the European Commission believed “the deal would create a ‘quasi-monopoly’ in exchanges’ trading of European derivatives.”¹²⁹

At this stage, the ICE-NYX deal has successfully passed U.S. antitrust requirements.¹³⁰ It has also been approved by European regulators who “confirmed that the proposed transaction would not raise competition concerns as NYX and ICE are not direct competitors in the markets concerned and would continue to face competition from a number of other competitors.”¹³¹ The Commission did not identify any competition concerns “as regards the vertical relationship between trading and clearing of derivatives” and, furthermore, “NYX and ICE are offering contracts belonging to different product markets so their activities do not overlap.”¹³²

¹²⁵ Prager, *supra* note 114, at 1; Lucchetti & Catan, *supra* note 113 (DOJ stating the transaction would be “a merger to monopoly.”).

¹²⁶ Kim, *supra* note 45, at 93; Ginger Szala, *CME/CBOT merger goes through*, FUTURE (July 18, 2007), <http://www.futuresmag.com/2007/07/18/cmecbot-merger-goes-through>.

¹²⁷ See, e.g., Cress, *supra* note 45, at 375.

¹²⁸ *Id.* at 388.

¹²⁹ Jason Bunge, *NYSE-Deutsche Börse Joins Dead-Deal List*, WALL ST. J., Feb. 2, 2012, <http://online.wsj.com/article/SB10001424052970204652904577196443573399260.html>. See also Press Release, European Comm’n, Mergers: Commission prohibits proposed merger between Deutsche Börse AG and NYSE Euronext—frequently asked questions (Feb. 1, 2012), http://europa.eu/rapid/press-release MEMO-12-60_en.pdf.

¹³⁰ Bunge, *supra* note 42; Jacob Bunge & Michelle Price, *ICE, NYSE Seek European Clearance for Merger*, WALL ST. J. (Mar. 21, 2013, 6:14 PM), <http://online.wsj.com/article/SB10001424127887324557804578374912171699822.html>.

¹³¹ Press Release, Eur. Comm’n, Mergers: Commission approves acquisition of NYSE Euronext by IntercontinentalExchange (June 24, 2013), http://europa.eu/rapid/press-release_IP-13-597_en.pdf.

¹³² *Id.*

IV. CONCLUSION

The ICE-NYX merger embodies what the financial services industry is becoming and captures the model that will allow exchanges to remain competitive in today's marketplace: mega-exchanges with broader asset classes and electronic platforms. As technology and globalization threaten their vitality, exchanges will need to continue reinventing and adapting.¹³³ Increasingly over the last decade they have done so by merging and by moving, at least a part of, their operations on screen. ICE is a good model for other exchanges to follow. It has been able to establish itself as a market leader in a very short period of time—thirteen years, compared to exchanges that have been around for hundreds of years. It has done so by exploiting electronic trading. If successful, the ICE-NYX merger will raise the bar once more for the industry.

¹³³ Lucchetti & Catan, *supra* note 113 (“[Nasdaq’s] impending takeover of the NYSE follows a consolidation wave among exchanges around the world as they seek new sources of growth and try to avoid being left behind other exchanges that are joining forces.”); *see also* Cress, *supra* note 45, at 388–89 (“Proponents of the [failed NYX-DB merger] argued that this merger would actually be beneficial . . . but for the derivatives market as a whole. Because of the rapidly growing and high-yielding nature of the derivatives market, an integrated and cost-efficient market structure is ideal. . . . This merger would . . . allow the companies and the market to realize incredible cost efficiencies and economies of scale that would be all but impossible without the combined resources of both companies.”); *id.* at 397–98 (“Because of the increasing number of worldwide stock exchanges—over 300—the United States has seen a steady decline in its share of the global equity market, down to thirty-one percent in 2009, as compared to sixty-six percent in 1990.”).