

## EUROPEAN LAWYER

Mars 2007

extraterritoriality

# Is Euronext under the US net?

Despite being hailed a 'merger of equals', the first transatlantic stock market has many European issuers nervous about their potential exposure to the pervasive reach of American law. JOEL A ADLER examines the legal position

**T**he recently announced business combination of the NYSE and Euronext, which operates securities markets in Paris, Amsterdam, Brussels and Lisbon, has raised some interesting questions over the extraterritorial reach of US securities law. It is well established that various US statutes can, and do, reach beyond its territory and the country's securities laws are among those with the greatest sweeping extraterritorial effect – causing the Securities and Exchange Commission (SEC) in some cases to curb this long arm, with regulations adopted under the Securities Act of 1933 (the 'Securities Act') and the Securities Exchange Act of 1934 (the 'Exchange Act').

Generally, in the US, the sale of a company's securities to the public requires the filing of a

### The markets

The New York Stock Exchange LLC (NYSE) is the largest equities market in the world, by volume. The equities of more than 2,760 companies are listed on it (together with its subsidiary, NYSE Arca) and that number includes approximately 500 non-US companies. The market capitalisation of the companies listed on the NYSE exceeds \$17 trillion, of which more than \$7 trillion are securities of non-US companies.

The Euronext NV markets in the aggregate are home to approximately 1,250 companies, having an approximate market capitalisation of €2.3 trillion. ■

registration statement that includes a prospectus setting out a great deal of business and financial information. Although the proposed NYSE-Euronext tie up (expected to close late in the first half of this year) has been set up in such a way that issuers whose securities are traded solely on the Euronext markets will not be subject to US laws or regulations, only time will tell whether this truly will be the case.

Under the NYSE and

Euronext's proposed business combination, NYSE Group Inc, the owner of the NYSE, and Euronext will become subsidiaries of a newly formed holding company, NYSE Euronext, a Delaware corporation. The combination has been structured such that companies listing their securities only on markets operated by Euronext will not become subject to US laws, including the Sarbanes-Oxley Act of 2002, or to regulation by the US

SEC. Companies listed only on the NYSE or its subsidiary, NYSE Arca, similarly will be exempt from European laws and regulations. The NYSE Euronext common stock will be traded on the NYSE and on the Paris market of Euronext.

### Legal framework

However, there are some remaining ambiguities regarding how issuers trading on Euronext may be affected by US law. Regulation S under the Securities Act exempts from the Act's registration requirements, under certain circumstances, public sales of securities to Americans made in offshore transactions – where 'offshore' means through the facilities of a 'designated offshore securities market'. At the time of writing, Euronext is not listed in Regulation S as >

> a designated offshore securities market; yet, presumably, following the completion of the combination, the SEC either will amend Regulation S to include Euronext or will take other administrative action to establish it as a 'designated offshore securities market'.

The Regulation S exemption relates solely to the registration provisions and not to the anti-fraud or other provisions of the Securities Act or the Exchange Act.

The extraterritorial reach of US securities laws extends to non-US broker-dealers that do business with US residents, even if the transactions relate to non-US companies and are executed on a non-US securities market. What's more, Rule 15a-6 of the Exchange Act exempts non-US broker-dealers, under certain conditions, from the registration requirements of the Exchange Act when effecting transactions in non-US securities with US institutional investors. Given the results that the combination is expected to achieve, the SEC might consider broadening Rule 15a-6's scope to include categories of investors other than US institutional investors.

But while the US clearly takes the position that its laws can have extraterritorial application, the NYSE Euronext bylaws contain provisions to the effect that NYSE Euronext's officers, directors and employees who primarily

work and live outside of the US shall irrevocably submit to the jurisdiction of the US federal courts and the SEC for legal proceedings based upon a violation of the US securities laws instituted by the SEC in connection with its US subsidiaries. There is a parallel provision for the European securities regulations.

#### **Securities and Exchange Commission**

The SEC has expressed its position that US laws shall not be made applicable to the markets operated by Euronext. But nothing is forever.

In addition to those related to securities, other US laws also have extraterritorial application – including antitrust laws, patent law, anti-terrorist statutes and the employment laws. Moreover, the SEC, as an administrative agency, has the authority to adopt rules and regulations without legislative approval so long as they are consistent with the statutes under which they are framed. Sometimes, of course, those rules and regulations are overturned on procedural grounds – a recent example being the investment adviser registration rules. If in the future the SEC perceives problems with the NYSE Euronext structure, it is likely that new regulations, including those having extraterritorial effect, may be adopted.

#### **Private rights of action**

Also, even if the SEC

continues to maintain a hands-off approach to the European markets operated by NYSE Euronext, that is not the end of the analysis. American courts have often found that investors injured by a violation of the US securities laws have a private right of action to recover damages, even though the relevant statute or regulation does not expressly provide for a private party to do so.

Keep in mind that NYSE Euronext is a Delaware corporation that controls Euronext, the implications of which are set forth as follows. Section 20(a) of the Exchange Act provides:

"Every person who directly or indirectly controls any person liable under any provision of this Act or of any rule or regulation thereunder shall also be liable *jointly and severally* with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action." [Emphasis supplied].

NYSE Euronext is a Delaware corporation and, accordingly, the US federal courts can have *in personam* jurisdiction over it. In addition, section 27 of the Exchange Act gives the US federal courts subject matter jurisdiction over claims based upon violations of the US securities laws, providing in

relevant part:

"The district courts of the US ... shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder ... Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder ... may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."

Thus, should it be alleged that certain misconduct has occurred on a market operated by Euronext, then, notwithstanding the SEC's hands-off approach, a private litigation (presumably a class action) could be instituted against NYSE Euronext, which clearly controls Euronext and is thus jointly liable with the body.

It is not possible now to know how the US courts would react to any such litigation, but even if the suit is dismissed, it will be a costly adventure for NYSE Euronext. And, with certain exceptions not here relevant under the 'American Rule', the prevailing party does not recover its legal costs from the losing party. ■