

**Final Report of the Hearing Officer <sup>(1)</sup>****CDS Information Market — ISDA****(Case AT.39745)**

(2016/C 378/06)

**Introduction**

- (1) The draft decision under Article 9(1) of Council Regulation (EC) No 1/2003 <sup>(2)</sup> is addressed to The International Swaps and Derivatives Association, Inc. ('ISDA') and relates to part of the proceedings in Case AT.39745 – CDS Information Market.
- (2) This case concerned allegations of anti-competitive behaviour involving 13 investment banks ('dealers'), ISDA and financial data vendor Markit Ltd. ('Markit') to boycott entry attempts into the market for exchange traded unfunded credit derivatives, in particular credit default swaps ('CDS'), during the period 2006-2009 and thereby to delay and prevent the emergence of this new market.
- (3) The Commission started the investigation *ex officio* and on 20 April 2011, it initiated proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 against a number of dealers and Markit. After sending requests for information in July 2011, the Commission conducted an announced inspection at the premises of Markit in September 2011, and data rooms at the premises of certain dealers, ISDA and Citadel <sup>(3)</sup> in 2012, to search certain documents they had submitted to the Department of Justice (of the United States) in a parallel investigation. On 26 March 2013, the Commission extended the proceedings to ISDA.
- (4) On 1 July 2013, the Commission adopted a Statement of Objections ('SO') addressed to the dealers, ISDA and Markit (together the 'addressees'). The SO raised preliminary concerns that the addressees had coordinated to foreclose exchanges (Eurex <sup>(4)</sup> and CMDX <sup>(5)</sup>) from the market for exchange-traded unfunded credit derivatives (in particular CDS). More specifically, the SO set out the preliminary concern that ISDA, as an association of undertakings, infringed Article 101 TFEU by refusing to permit exchanges the licensed use of its Final Price for exchange trading purposes in 2007 (Eurex) and 2008-2009 (CMDX) with ongoing effects, because the restrictive Use Agreement remained in place on-line.

**Access to file**

- (5) On 9 July 2013, ISDA was granted access to the file via an access-to-file DVD <sup>(6)</sup>.
- (6) On 29 August 2013, the external advisers of ISDA received access to certain CDS market share data, subject to a confidentiality agreement, in a data room at the Commission's premises. Subsequent to the data room, the external advisers of ISDA prepared a report for ISDA containing non-confidential summaries and analyses of the data reviewed.
- (7) On 10 December 2013, the external advisers of ISDA were provided with a DVD containing the confidential versions of documents originating from addressees, via a negotiated disclosure procedure subject to non-disclosure agreements. The external counsel was allowed to include confidential information contained in the documents reviewed in (a confidential version of) the reply to the SO.
- (8) On 17 December 2013, DG Competition also provided revised non-confidential versions of documents originating from third parties to ISDA, in response to requests for further access to the file. Due to objections of one third party, access to some of these documents was provided in accordance with a decision I had to take pursuant to Article 8(2) of Decision 2011/695/EU.

<sup>(1)</sup> Pursuant to Articles 16 and 17 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ L 275, 20.10.2011, p. 29) ('Decision 2011/695/EU'). The Hearing Officer originally responsible for this case was Mr Wouter Wils. Following my appointment as Hearing Officer as of 16 October 2013, I assumed responsibility for the case.

<sup>(2)</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1) ('Regulation (EC) No 1/2003').

<sup>(3)</sup> Or in other locations as agreed with the undertakings.

<sup>(4)</sup> Eurex is the derivatives exchange arm of Deutsche Börse. In 2007, Eurex launched, yet without success, exchange traded credit futures written on the iTraxx CDS index.

<sup>(5)</sup> CMDX was a joint venture between Chicago Mercantile Exchange ('CME') and Citadel, a hedge fund. According to the SO, in 2008, CMDX attempted to launch a clearing and exchange trading platform for CDS. Eventually the joint venture was dissolved in July 2009, and CME launched on its own a clearing only platform in December 2009.

<sup>(6)</sup> On 31 July 2013, the access-to-file DVD was replaced by a new one due to technical deficiencies.

**Deadline to respond to the SO**

- (9) ISDA replied to parts of the SO in January 2014, after DG Competition and I had extended the initial period of eight weeks in which a reply had to be submitted on grounds related to access to the file.

**Access to other addressees' replies to the SO**

- (10) ISDA requested access to the other addressees' replies to the SO, claiming that such access was necessary for the proper exercise of its right to be heard. In April 2014, DG Competition granted access to the non-confidential versions of the documents annexed to the replies of the other addressees and a list of documents cited in these replies but not annexed to them. ISDA submitted a supplemental response to the SO after the oral hearing, following receipt of the abovementioned documents, in July 2014.

**Oral Hearing**

- (11) The oral hearing lasted six working days (12 to 19 May 2014). All the addressees participated. In particular, ISDA was heard on 12 May 2014.
- (12) On 4 December 2015 the Commission decided to close the investigation in respect of the dealers, based on a thorough analysis of all information received from the addressees in their replies and during the oral hearing of May 2014, as well as on documents obtained through additional fact finding. The evidence was not sufficiently conclusive to confirm the Commission's concerns with regard to the dealers. This closure did not prejudice the outcome of the Commission's investigation regarding Markit and ISDA.

**Commitments**

- (13) On 19 April 2016, ISDA proposed commitments in order to meet the Commission's concerns. On 29 April 2016, the Commission published a notice in accordance with Article 27(4) of Regulation (EC) No 1/2003<sup>(1)</sup> and received observations from two interested third parties. These observations did not lead to any new competition concerns or need to reconsider the concerns expressed in the SO.
- (14) The draft Commission decision makes the commitments offered binding upon ISDA for ten years and concludes that, in light of these, there are no longer grounds for action on its part and thus the proceedings should be brought to an end.
- (15) I have not received any request or complaint from any party to the proceedings with respect to the proposed commitments<sup>(2)</sup>.
- (16) In the light of all the above, I consider that the effective exercise of the procedural rights of ISDA has been respected.

Brussels, 7 July 2016.

Joos STRAGIER

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<sup>(1)</sup> Communication from the Commission pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case AT.39745 — CDS Information Market — ISDA (OJ C 153, 29.4.2016, p. 7).

<sup>(2)</sup> According to Article 15(1) of Decision 2011/695/EU, parties to the proceedings offering commitments pursuant to Article 9 of Regulation (EC) No 1/2003 may call upon the hearing officer at any stage of the procedure in order to ensure the effective exercise of their procedural rights.