

PROCEDURES RELATING TO THE IMPLEMENTATION OF COMPETITION POLICY

EUROPEAN COMMISSION

Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/39.592 — EFAMA vs. S&P

(Text with EEA relevance)

(2011/C 144/09)

1. INTRODUCTION

(1) According to Article 9 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the TFEU ⁽¹⁾, the Commission may decide — in cases where it intends to adopt a decision requiring that an infringement be brought to an end and the parties concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment — to make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission. According to Article 27(4) of the same Regulation, the Commission shall publish a concise summary of the case and the main content of the commitments. Interested parties may submit their observations within the time limit fixed by the Commission.

2. SUMMARY OF THE CASE

(2) On 13 November 2009, the Commission adopted a Statement of Objections pursuant to Article 27(1) of Regulation (EC) No 1/2003 read in conjunction with Article 10(1) of Commission Regulation (EC) No 773/2004 ⁽²⁾ against Standard & Poor's (S&P), a division of The McGraw-Hill Companies, Inc. of the United States. The Statement of Objections, which constitutes a preliminary assessment within the meaning of Article 9(1) of Regulation (EC) No 1/2003, outlines the Commission's preliminary view that S&P has infringed Article 102 of the TFEU and Article 54 of the EEA Agreement by setting unfairly high prices for the distribution of International Securities Identification Numbers (ISINs).

(3) ISINs are the international key identifiers for securities based on the international standard ISO 6166. They are

indispensable for a number of operations such as interbank communication, clearing and settlement, custody, reporting to authorities and reference data management. ISINs are generated, allocated and made available to market participants by National Numbering Agencies (NNAs).

(4) In respect of US securities, S&P has been designated by the American Bankers Association as the competent NNA and as such enjoys a monopoly for the issuance and the first-hand distribution of ISINs.

(5) The business model of S&P in respect of the issuance and distribution of ISINs can be described as follows. An undertaking registered in the US that issues a new security may request an ISIN from S&P, so that the security can be uniquely identified on the financial markets. S&P then issues the ISIN for which it charges an issuance fee.

(6) Once ISINs are issued, they are distributed to market participants for the purposes of clearing, settlement and other functions. As regards distribution, two groups of users can be distinguished. First, S&P distributes ISINs to Information Service Providers (ISPs), i.e. financial data vendors and to some financial institutions who wish to obtain their numbers directly from S&P (direct users). Most financial institutions, however, prefer to get ISINs from ISPs together with other data rather than directly from S&P (indirect users). S&P charges both direct and indirect users a licence fee for the distribution and the use of ISINs.

(7) The Statement of Objections took the view that ISO standard 6166 was developed at the international level as a public service to the financial services industry. Under the ISO's cost recovery principle, NNAs cannot charge for the distribution of ISINs more than necessary to recover the costs incurred in doing so provided that they are the direct supplier of ISINs. Furthermore, according to the same principle, in the absence of a

⁽¹⁾ OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and, respectively, 102 of the TFEU. The two sets of provisions are in substance identical. For the purposes of this notice references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82 of the EC Treaty when applicable.

⁽²⁾ OJ L 123, 27.4.2004, p. 18.

direct supply, NNAs should not charge for the mere use of ISINs. In other words, charges to direct users should observe the cost recovery principle and there should be no charges to indirect users.

- (8) Given the specific circumstances of the case, the Statement of Objections considered that the ISO cost recovery principle provides a strong and useful indication for the assessment whether the prices charged by S&P are unfair within the meaning of Article 102 of the TFEU.
 - (9) On that basis, the Statement of Objections expressed the concern that S&P's licensing fees for US ISINs are unfair for several reasons. Firstly, S&P applies a licensing fee vis-à-vis indirect users, which is not in line with the aforementioned principles. The Commission also noted that S&P is the only NNA that charges licence fees to indirect users. Secondly, the licensing fees that S&P demands from direct users significantly exceed the costs incurred for that activity. The alleged infringement was facilitated by S&P's practice of only selling a complete ISIN database, whereas financial institutions generally only need the ISIN number and the minimum descriptive data necessary to identify a security (the ISIN Record).
- 3. THE MAIN CONTENT OF THE OFFERED COMMITMENTS**
- (10) S&P does not agree with the Commission's preliminary assessment. It has nevertheless offered commitments pursuant to Article 9 of Regulation (EC) No 1/2003, to meet the Commission's competition concerns. The commitments offered by S&P are briefly summarised below. A non-confidential version of the commitments is published in full in English on the website of the Directorate-General for Competition at: http://ec.europa.eu/competition/index_en.html
 - (11) S&P commits to abolish all charges to indirect users for the use of ISINs within the EEA. This implies, firstly, that licensing fees paid by all indirect users currently having a licensing agreement with S&P allowing them to use ISINs within the EEA will be discontinued. Secondly, S&P commits not to impose licensing fees on any indirect user not having currently a contract with S&P. Indirect users will, however, have to conclude an agreement with S&P that prohibits the extraction of CUSIPs (the equivalent of US ISINs for national use) from the ISIN data as well as the redistribution and resale of ISINs to companies other than those belonging to the same group as the user. This agreement can take the form of an on-line click-through agreement, with a view to minimising the administrative burden. ISPs will be required to incorporate these restrictions into their agreements with indirect users as well. S&P's agreements with indirect users that are Service Bureaus (i.e. entities that provide outsourced data management services) expressly stipulate that Service Bureaus must incorporate the same restrictions into their agreements with their clients.
 - (12) In respect of direct users and ISPs, S&P commits to distribute ISIN records separately from other added value information, consisting solely of the ISIN Record, via an FTP delivery on a daily basis. The initial price of this service will be set at USD 15 000 per year, to be adjusted each year in line with inflation. Based on a review of S&P's business processes and the allocation of costs between different activities and products, in particular between CUSIPs and ISINs, the Commission considers that this price is not excessive. The agreements with direct users contain the same restrictions as those with indirect users, namely the prohibition of the extraction of CUSIPs from ISINs and a prohibition of redistribution and resale of ISINs, except to companies belonging to the same group as the user. The agreements with ISPs also stipulate the non-extraction of CUSIPs as well as a prohibition of resale to other ISPs, with the exception of companies belonging to the same group as the ISP in question.
 - (13) The commitments will be implemented within five months from the date when the Commission's decision based on Article 9 of Regulation (EC) No 1/2003 is notified to S&P. The exact date ('implementation date') will be communicated to the Commission.
 - (14) Direct and indirect users, as well as ISPs currently in contractual relationship with S&P for the use and/or distribution of ISINs, will have, following prior notification from S&P, a right to early termination of their existing contracts with S&P, effective from the implementation date. From implementation date they will have the options of subscribing to the new ISIN Record Service, to continue with their existing contracts or to subscribe to any other product S&P offers.
 - (15) S&P committed to submit to the Commission a yearly confidential report on the implementation of the commitments. The commitments will have a five years' duration, starting from the implementation date.
- 4. INVITATION TO MAKE COMMENTS**
- (16) Subject to the comments in response to this notice, the Commission intends to adopt a decision under Article 9(1) of Regulation (EC) No 1/2003 declaring the commitments summarised above and published on the Internet, on the website of the Directorate-General for Competition, to be binding. If there are substantial changes to the commitments, a new market test will be launched.
 - (17) In accordance with Article 27(4) of Regulation (EC) No 1/2003, the Commission invites interested third parties to submit their observations on the proposed commitments.

(18) In this context, the Commission asks interested parties to comment as well on the following questions:

- (a) What is your opinion on the clause that prohibits the redistribution and resale of ISINs by ISPs to other ISPs? Are such exclusions usually accepted in the practice of financial data vendors?
- (b) What do you think the effects of the commitments on global ISPs will be?

(19) Comments and answers — whether they are related to the specific questions or to any other aspect of the commitments — should, as far as possible, be substantiated with a detailed reasoning, containing the necessary facts on which comments and answers are based and, if a problem is identified, a proposal for a solution of the identified problem.

(20) These observations must reach the Commission not later than one month following the date of this publication.

Interested third parties are also asked to submit a non-confidential version of their comments, in which commercial secrets and other confidential passages are deleted and are replaced as required by a non-confidential summary or by the words 'commercial secrets' or 'confidential'. Legitimate requests will be respected. If no non-confidential version of the comments is sent, the Commission will be entitled to consider that the comments do not contain confidential information. The Commission also invites commenting parties to outline the reasons behind their observations.

(21) Observations can be sent to the Commission under reference number 'Case COMP/39.592 — EFAMA vs. S&P' either by e-mail (COMP-GREFFE-ANTITRUST@ec.europa.eu), by fax (+32 22950128) or by post, to the following address:

European Commission
Directorate-General for Competition
Antitrust Registry
1049 Bruxelles/Brussel
BELGIQUE/BELGIË