

**Communication from the Commission published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case AT.39745 — CDS Information Market — Markit**

(2016/C 153/07)

**1. Introduction**

- (1) According to Article 9 of Council Regulation (EC) No 1/2003 <sup>(1)</sup>, 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. A Commission decision pursuant to Article 9 does not find an infringement.

**2. Summary of the Case**

- (2) On 1 July 2013 the Commission adopted a Statement of Objections ('SO') within the meaning of Article 10 of Commission Regulation (EC) No 773/2004 <sup>(2)</sup> concerning an alleged infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement by Markit affecting the market for unfunded credit derivatives traded over-the-counter (OTC) and the potential market for unfunded credit derivatives traded on exchange. An SO can serve as a preliminary assessment for the purpose of Article 9 of Regulation (EC) No 1/2003.
- (3) According to the SO, there could be a one-direction one-off migration from the market of OTC trading of credit derivatives to the potential market for exchange trading of credit derivatives, as exchange-traded credit default swaps ('CDS') or credit futures would be reasonable substitutes for liquid and standardised OTC-traded CDS. While in OTC trading, investment banks are needed as bilateral intermediaries between buyers and sellers, they play an important role as liquidity providers in the start-up phase of exchange trading, and are later disintermediated in an all-to-all and anonymous trading environment.
- (4) Markit is a financial information and services company, collecting and monetising data on credit derivatives and other asset classes. In 2008, Markit owned all rights for the iTraxx and CDX indices ('Indices') which it had acquired a year before from certain CDS dealers. Dealers continued to play an important role in Markit's Index advisory committees, including advising Markit on licensing the Indices for new types of product. According to the SO, in 2008 hedge fund Citadel and the Chicago Mercantile Exchange wanted to launch exchange trading for CDS through a joint venture (CMDX). They approached Markit to seek a licence for iTraxx and CDX in order to launch a platform that would have enabled users to trade CDS both OTC and eventually also all-to-all (including through a Central Limit Order Book, 'CLOB'). Markit allegedly refused to license the iTraxx and CDX Indices for purposes other than request for quote ('RFQ') OTC trading and clearing. According to the SO, Markit explicitly excluded CLOB trading from the scope of its licence, excluding all-to-all trading.
- (5) The SO raised a preliminary competition concern that this conduct may have prevented Citadel and CME from successfully launching an exchange trading platform for credit derivatives. According to the SO, Markit took the decision not to license the Indices for exchange trading purposes after consulting CDS dealers on Markit's three index advisory committees.
- (6) According to the SO, Markit's alleged refusal constituted a decision of an association of undertakings which restricted potential competition within the meaning of Article 101 of the Treaty and Article 53 of the EEA Agreement.

<sup>(1)</sup> 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.

<sup>(2)</sup> OJ L 123, 27.4.2004, p. 18.

### 3. The Main Content of the Offered Commitments

- (7) Markit does not agree with the preliminary conclusions of the SO. Markit has nevertheless offered behavioural and organisational commitments pursuant to Article 9 of Regulation (EC) No 1/2003 to meet the Commission's preliminary competition concerns. The key elements of the commitments are described below.

#### (a) Behavioural Commitments

- (8) As regards licensing, Markit commits to act and grant licences in a fair, reasonable and non-discriminatory (FRAND) manner in response to requests for licences to create and/or trade exchange-traded financial products (including swaps, futures and options products) based on an iTraxx or CDX index, or a successor product. To the extent that an existing licence issued by Markit still excludes the use of an Index for exchange trading, Markit commits to amend such licence or to offer a new one on FRAND terms and conditions. Markit may decline a request for an Index licence on FRAND terms and conditions:

(a) where the proposed exchange-traded product creates significant legal or regulatory risks or very significant reputational risks for Markit and/or for the Indices which cannot adequately be addressed by a disclaimer or other contractual provisions; or

(b) where the trading venue has insufficient experience and resources to develop and launch the proposed exchange-traded product. The launch of a new product does not in itself constitute insufficient experience.

- (9) Where an existing licence contains an exclusivity period, the commitments will only apply after expiry of any mandatory exclusivity period, to the extent that the commitments and the exclusivity terms are incompatible. New exclusivity periods may not be granted. The FRAND commitment does not prevent Markit from granting preferential or advantageous terms for an initial period of no more than two years if the creation and development of a new product based on an index requires material up-front investments and if comparable entrants are treated similarly.

- (10) Markit will seek to reach agreement with a requesting party within three months of each FRAND licence request, but such negotiation period may under certain circumstances be extended to six months. Once Article 37(1) MIFIR<sup>(1)</sup> enters into application, such negotiating period may not exceed the duration foreseen under the Regulation, currently three months. If parties are unable to agree terms and conditions by the end of the negotiation period, the requesting party may request in writing to Markit that the matter be submitted to independent third party arbitration for deciding the appropriate procedure and method for determining FRAND terms and conditions.

- (11) Disputes concerning the determination of FRAND terms, or those arising from the refusal to grant a licence on the basis of the considerations set out in paragraph (8) (a) and (b) above, will be submitted to arbitration by a three-member arbitration panel whose decision shall be binding. The arbitration will be governed by the laws of England and Wales and be subject to the rules of the London Court of International Arbitration. If the arbitrators do not render a decision within nine months, the requesting party may submit the matter to the courts of England and Wales.

#### (b) Organisational Commitments

- (12) Markit commits to enlarging membership of its two remaining CDS Index Advisory Committees (IMC and CDX) ('the committees'), which will include a range of relevant market participants other than CDS dealers. The committees will have at least 25 members, including up to four market makers in either the Index or the underlying market that are not large dealers, at least six non-dealer buy-side firms or other asset managers and at least five trading platforms, exchanges, clearing houses or similarly interested market participants. Members will serve for up to two years (extension possible), membership will rotate, and at least 50 % of the initial members within each category shall change after the first year.

- (13) Markit moreover commits to amending the terms of reference of the committees to limit discussions to technical, operational and administrative matters. Markit will ban discussions on licensing decisions or on the terms, commercial aspects or revenue generation proposals relating to the CDX and iTraxx Indices, on the merits of proposed new exchange-traded financial products referencing such Indices or the merits of any new exchange or similar platform designed for the trading of products that reference such Indices ('excluded issues'). A Markit lawyer will attend and record all meetings and conference calls and will take written minutes. Such minutes and recordings as well as papers tabled for discussions will be retained by Markit for five years.

<sup>(1)</sup> Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

- (14) A Monitoring Trustee will be appointed by Markit after approval by the Commission. The Trustee will annually report to the Commission on Markit's compliance with the proposed commitments. In particular, a Monitoring Trustee will verify that dealers do not unduly influence Markit's licensing decisions in committees and that no excluded matters are discussed.
- (15) With regard to a future availability of the Final Price on FRAND terms to any requesting legal entity, Markit will remove from the [www.creditfixings.com](http://www.creditfixings.com) website clauses that exclude the use of the Final Price for exchange trading and will not require a licence for the Final Price or charge royalties where ISDA has granted a licence.
- (16) Markit commits to implementing these commitments with effect from the date of notification of the Commission's decision under Article 9(1) of Regulation (EC) No 1/2003 for so long as Markit owns and controls the indices, or for a period of 10 years, whichever is the earlier.
- (17) The commitments are published on the website of the Directorate-General for Competition at:
- [http://ec.europa.eu/competition/index\\_en.html](http://ec.europa.eu/competition/index_en.html)

#### **4. Invitation to make Comments**

- (18) Subject to market testing, the Commission intends to adopt a decision under Article 9(1) of Regulation (EC) No 1/2003 declaring binding the commitments summarised above and published on the internet on the website of the Directorate-General for Competition.
- (19) 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. 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 any information they claim to be business secrets and other confidential information should be deleted and replaced as required by a non-confidential summary and by the words 'business secrets' or 'confidential'. Third parties may also in exceptional circumstances submit observations on an anonymous basis and in such hypothesis may provide a non-confidential version which redacts the company's identity.
- (20) Observations and comments should preferably be reasoned and should set out the relevant facts. If you identify a problem with any part of the proposed commitments, the Commission would also invite you to suggest a possible solution.
- (21) Observations can be sent to the Commission under reference number AT.39745 CDS Information Market either by e-mail ([COMP-GREFFE-ANTITRUST@ec.europa.eu](mailto:COMP-GREFFE-ANTITRUST@ec.europa.eu)) or by post to the following address:

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