

US-ISIN COMPETITION CASE

CASE COMP/39.592 – EFAMA VS S&P

2008 to 2017

US-ISIN Case History

Case comp/39.592 – efama vs s&p

2

- **16 July 2008: Complaint** filed by EFAMA, BVI, AFG, IPUG, and SIPUG before the European Commission (“EC”) against Standard & Poor’s (“S&P”) CUSIP Service Bureau.
- **Essence of the complaint:** S&P abused a market-dominant position because S&P charged licensing fees and demanded the conclusion of licensing agreements from end users of ISINs issued by S&P (ISIN = International Securities Identification Number).
- **6 January 2009:** EC DG COMP **opens proceedings** against S&P.
- **13 November 2009:** EC DG COMP issues **Statement of Objections (“SO”)** summarizing its preliminary concerns.
- **16 May 2011: Commitments** offered by S&P are published and market tested.
- **15 November 2011:** EC DG COMP issues a **Commitments Decision** (case number 39.592). making S&P’s revised commitments binding upon S&P: http://ec.europa.eu/competition/atitrust/cases/dec_docs/39592/39592_2152_5.pdf
- **August 2012:** Associations market test the implementation of the commitments
- **January 2013:** Associations file 2nd complaint of non-implementation with the EC
- **August 2014:** Publication of revised S&P model agreements not accepted by EFAMA:
<https://www.cusip.com/cusip/cgs-services.htm> (scroll to bottom - CGS for the European Economic Area)
- **September 2014:** EFAMA press release and complainants model agreements:
<https://www.bvi.de/regulierung/positionen/markt-und-stammdaten/isin>
- **3 June 2016:** 3rd Complaint re trade interruption on BBTOMS by S&P and Bloomberg
- **17 March 2017:** S&P extends voluntary measures of 2014:
<http://pages.marketintelligence.spglobal.com/rs/565-BDO-100/images/CGS-Other-Voluntarily%20Extends%20Offering-170317.pdf>
- **17 April 2017:** EC DG COMP Commitments Decision (case number 39.592) expired

S&P Model Agreement 2014

3

- **EC reached agreement with S&P on a "clarification and guidance" of the Commitments** following EFAMA's second complaint in 2013. The Commitments stayed in place unchanged.
- **S&P published Model Agreement** in August 2014 (**not approved by complainants**):
 - Available at: <https://www.cusip.com/cusip/cgs-services.htm>
(scroll to bottom - CGS for the European Economic Area)
 - **Main features** of the Model Agreement
 - No 15.000 \$ fee charged to ISP's offering the US ISIN Basic Service
 - "Decoupling" of end users agreement and US ISIN Basic Service
 - **End user may receive US ISIN free of fees directly from all named ISPs**
 - Contractual changes:
 - liability limited to "material breaches"
 - audit cost limited to "reasonable cost"
 - However, audit rights, NYC law and cost clauses remain!
- Complainants provide for **amended Model Agreement** for negotiation with S&P
[Muster für S&P US-ISIN-Service Bezugsverträge](https://www.bvi.de/regulierung/positionen/markt-und-stammdaten/isin/)
<https://www.bvi.de/regulierung/positionen/markt-und-stammdaten/isin/>.

THIRD EFAMA COMPLAINT

JUNE 2016 (1)

4

- **EFAMA, AFG, BVI, COSSIOM, IPUG, and SIPUG** filed with the European Commission DG Competition on **3 June 2016** a **third complaint**:
 - The new complaint concerns the **interruption of electronic real-time securities trading by S&P – in coordination with Bloomberg L.P.** in two cases of service denials **by blocking the use of US-ISIN in the BBTOMS trading system** concerning a German and a Swiss institution.
 - The real-time electronic trading systems were attacked by **intervention in the application of the international transaction-messaging standard, the FIX protocol, by blocking ISIN information** in the trade messages and thereby breaking straight-through processing (STP) in trading of US securities.
 - **Previously, ISIN interruption was done on specific data files to be delivered via file-transfer protocol (FTP).** This did not directly affect real time functions within a bank's or asset manager's computer system(s) but targeted end-of day processing capabilities.

THIRD EFAMA COMPLAINT

JUNE 2016 (2)

5

- Complainants requests with respect to the implementation of S&P's Commitments to the EC:
 - Prohibition of restrictions S&P applies in practice:
 - not informing existing or new customers in negotiations about the availability of the fee free US ISIN Enduser Agreement provided for in the Commitments,
 - not allowing the use of the fee free US ISIN Enduser Agreement for US-ISINs provided for in the Commitments in cases where customers use both CUSIP (in cases where no US ISINs exists as defined in the Commitments) and US ISIN
 - contractually requiring data vendors ("ISP") to cut off the US ISIN based data transmission and thus forcing users to sign a full CUSIP license in order to avoid the interruption of important services or functions within the financial institution
 - not granting a sufficient grace period to conduct negotiations before any data cut-off.
 - These requests were not addressed by the EC.
- EC Commitment Decision expired on 17 April 2017
- However, S&P extended the 2014 voluntary measures, the "US ISIN Basic Service", without a limitation of term.
 - All US ISIN users in the EU should evaluate this option to be able to obtain and use the identifiers without fees

REMAINING ISSUES OUTSIDE THE COMPLAINT

6

■ The following issues are still unresolved:

- S&P is not required to provide all ISINs allocated to instruments issued in the US and CUSIP serviced jurisdictions such as Canada and Mexico etc.
- S&P retains full audit rights under the model agreements while at the same time financial institutions are faced with excessive audit requests by exchanges and data vendors.
- The Commitments currently do not apply outside the EU which hinders global finance operations. They should apply at least in CH going forward following the EU-Switzerland competition law accord of 2013:
<https://www.admin.ch/opc/de/classified-compilation/20130606/index.html>
- American Bankers Association (ABA) intellectual property in the US ISIN and related data is questioned in the EC Statement of objections.
- American Bankers Association (ABA) and S&P have not obtained certification by ISO and/or ANNA (as the registration authority of the ISO 6166 standard) that the US ISIN license fees are charged on “at cost basis” as mandated by ISO rules.

MACRO-PRUDENTIAL CONCERNS

7

- **Complainants requests with FSB, IOSCO, EU Commission, ESMA, and US-SEC:**
 - From a macro-prudential point of view there is a concern **that contractual issues between the financial sector and exchanges or other data vendors may lead to data interruptions at market participants. Through knock-on effects such data interruptions may in STP based trading and settlement environments lead to flash crash type events** similar to the IT- or human mistake induced market crash events witnessed in the past. Data vendors should be surveyed with regard to the potential systemic risk they pose.
 - **Data disputes between the financial sector and data vendors should be subject to cooling-off periods before data cut-offs can be initiated** in order not to catch the market unaware but to allow for an orderly solution, similar to volatility breaks introduced at exchanges.
 - **Macro-prudential regulation recommendations** may, for example, suggest that **banks and other financial market participants should not deal with exchanges or data vendors if the terms and conditions of these providers do not grant effective dispute settlement mechanisms aimed at preventing an unintended market failure**, for example, a sufficient grace period to conduct negotiations before any data cut-off and submission to arbitration if no agreement can be reached. Exchanges and data vendors should change contract forms following regulation.
- **FSB, IOSCO, EU Commission, ESMA, and US-SEC** have not yet acted on the request.
- **The EU Commission appointed European Post Trade Forum identified the issue as a barrier to the Capital Markets Union.**



Vincent Ingham

Director, Regulatory Policy

Tel: +32 2 513.39.69

E-mail: vincent.ingham@efama.org