EUROPEAN
COMMISSION

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COMMISSION DECISION

of 20.7.2016

addressed to The International Swaps and Derivatives Association, Inc. relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement

Case AT.39745 - CDS Information Market

(Only the English text is authentic)

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Case AT.39745 - CDS Information Market

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to 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 EC Treaty[1], in particular Article 9(1) thereof,

Having regard to the Commission decision of 20 April 2011 to initiate proceedings in this case,

Having expressed its concerns in the Statement of Objections of 1 July 2013,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer,

Whereas:

1. SUBJECT MATTER

(1) This Decision is addressed to The International Swaps and Derivatives Association, Inc ('ISDA').

(2) It concerns the market for unfunded credit derivatives, in particular credit default swaps ('CDS'), and decisions taken by ISDA in its capacity as an association of undertakings in relation to the licensing of the 'Final Price' for trading credit default swaps on exchanges.

(3) In a Statement of Objections of 1 July 2013, addressed to 13 investment banks active in the CDS market ('the CDS dealers'), Markit and ISDA, the Commission came to the provisional conclusion that an agreement/concerted practice entered into by the CDS dealers addressed in the Statement of Objections, together with the implementing decisions of the associations of undertakings Markit and ISDA,

[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 102, respectively, of the Treaty on the Functioning of the European Union.

constituted a single and continuous infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement. The Commission reached the preliminary conclusion that the object and effect of that single and continuous infringement was to foreclose exchanges from the market for exchange-traded unfunded credit derivatives from 2006 to 2009 and, thereby, to delay and prevent the emergence of that new market. According to the Statement of Objections, the decisions of the associations of undertakings Markit and ISDA to refuse to license the requested inputs for exchange trading also constituted infringements of Article 101 of the Treaty and Article 53 of the EEA Agreement in their own right.

(4) The specific objection in the Statement of Objections in respect of ISDA was that it denied licences for the Final Price to Eurex, a subsidiary of Deutsche Börse, in 2007 and to CMDX, a joint venture of Chicago Mercantile Exchange and Citadel, in 2009. In addition, ISDA's Board of Directors adopted a resolution in 2007 excluding the licensing of the Final Price for any futures or exchange-traded product or transaction. According to the Statement of Objections, that resolution was implemented in a Use Agreement on the website www.creditfixings.com. Those exclusions in the Use Agreement remain in force today.

(5) The Statement of Objections came to the preliminary conclusion that ISDA's conduct may have prevented or delayed the emergence of all-to-all exchange trading of unfunded credit derivatives to the detriment of investors who remained constrained to trading credit derivatives over the counter ('OTC'). The Statement of Objections took the preliminary view that ISDA's refusals to licence may qualify as 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.

(6) On 4 December 2015 the Commission decided to partially close antitrust proceedings against the CDS dealers involved in its investigation while keeping the investigation open against ISDA and Markit).[2]

(7) In April 2016 ISDA and Markit separately offered commitments under Article 9(1) of Regulation (EC) No 1/2003 to address the Commission’s preliminary competition concerns as set out in the Statement of Objections. This Decision makes the commitments offered by ISDA legally binding on ISDA. A separate decision makes the commitments offered by Markit legally binding on Markit.

2. THE UNDERTAKING CONCERNED

(8) ISDA is a trade association representing participants in the derivatives OTC market, with headquarters in New York. ISDA has a broad membership of more than 850 member institutions from 67 countries, including derivatives dealers, buy-side firms, service providers and end users. Members also include large investment banks active, *inter alia,* on the market for unfunded credit derivatives.

(9) ISDA manages risk for derivative users globally. To this end, ISDA publishes the ISDA Master Agreement, the most commonly used documentation framework for standard terms for OTC derivatives transactions. In addition, ISDA has developed standard documentation for OTC-traded credit derivatives (Credit Derivatives Definitions), incorporating a method to settle CDS contracts through auctions following a credit event. The auctions provide the parties to a credit derivative

[2] Commission press release MEX/15/6254 of 4 December 2015.

contract with a price for the residual value of an underlying defaulted bond which is used to settle related CDS contracts and CDS index contracts. This auction price is the '(ISDA) Final Price'. ISDA claims intellectual property rights to the Final Price. Markit, a financial information and services company, co-administers the auction.

3. PROCEDURAL STEPS UNDER REGULATION (EC) NO 1/2003

(10) On 20 April 2011 the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003.

(11) On 1 July 2013, the Commission adopted a Statement of Objections setting out the Commission's preliminary competition concerns. The Statement of Objections constitutes a preliminary assessment for the purposes of Article 9(1) of Regulation (EC) No 1/2003. By letter of 2 July 2013, the Commission notified that assessment to ISDA.

(12) On 28 January 2014, ISDA submitted its reply to the Statement of Objections. On 12 May 2014 ISDA was heard in an oral hearing.

(13) On 19 April 2016, ISDA submitted commitments ('the Commitments') to the Commission in response to the competition concerns raised in the Statement of Objections.

(14) On 29 April 2016 a notice was published in the Official Journal of the European Union pursuant to Article 27(4) of Regulation (EC) No 1/2003 ("the Article 27(4) Notice"), summarising the case and the Commitments and inviting interested third parties to give their observations on those Commitments within one month following publication.

(15) On 2 June 2016 the Commission informed ISDA of the observations received from interested third parties following the publication of the notice.

(16) In June 2016 the Advisory Committee on Restrictive Practices and Dominant Positions was consulted.

4. PRELIMINARY ASSESSMENT

4.1. Background

4.1.1. Derivatives and credit default swaps

(17) Derivative contracts are initially traded OTC when they are bespoke and illiquid. In an OTC market, derivative contracts are negotiated privately and bilaterally between buyers and sellers without public price or volume reporting of individual transactions. The lack of liquidity and transparency requires intermediation between supply and demand, as otherwise search and information costs would be prohibitive. Those intermediation services are provided by large investment banks ('dealers', 'sell-side'), which promise to be a buyer to every seller and a seller to every buyer ('market making'). The profit from market making is the difference between buy and sell price, the 'bid-ask spread'. Dealers are distinct from the numerous 'buy-side' investors, which include hedge funds, mutual funds, pension funds, insurers and end-users such as corporations or municipalities.

(18) A credit default swap ('CDS') is a financial contract. A CDS purchaser pays a periodic fee expressed as a contract coupon ('spread', quoted in basis points of the amount insured) to a seller, in return for a contingent payment in the event that the

corporate or sovereign debtor of a debt obligation specified in the contract defaults. CDS spreads increase if financial markets perceive a greater risk of default and thus become a pricing reference. There is no obligation for the protection buyer to have an insured interest, that is to say, he does not have to own a note deliverable on the contract. These characteristics facilitated the evolution from insurance-like hedging to investing. Hedging protects against the risk of the value of the debt instruments decreasing due to the debt issuer's default or declining credit quality. Investing makes it possible to trade without a parallel investment in the underlying debt instrument and to express a view on the future change in the debt issuer's credit quality, yielding a profit if the view is correct. CDS indices transfer credit risk more efficiently than single CDS, but when traded OTC share the latter's characteristics. They are standardised contracts and reference a fixed number of debtors with shared characteristics which are changed ('rolled') regularly.

(19) Over time, OTC-traded derivatives that are traded regularly and in larger volumes become standardised. Investors then also become interested in trading such derivatives on exchange where they can be traded at lower cost, as bid-ask spreads are compressed due to competition and all-to-all trading through a Central Limit Order Book ('CLOB'). The migration of more liquid OTC trades to CLOB trading on-exchange, where trades are centrally cleared by the clearing house of the exchange, also increases market stability and benefits investors by reducing counterparty risk[3] and trading costs. Exchange trading of credit derivatives is also open to investors whose statutes oblige them to trade on regulated markets, only.

4.1.2. ISDA's role in licensing the Final Price

(20) If a credit event occurs during the term of a CDS contract, this triggers the obligation of the protection seller to make the contingent payment to the buyer of credit protection. To settle such obligation, the parties can elect for physical settlement, where the protection buyer receives the full notional amount of the contract and physically delivers the defaulted bonds. The alternative is cash settlement, where the protection seller pays the difference between the full notional amount of the defaulted debt specified in the contract and its market value. By 2005, cash settlement of CDS became essential because the exponential growth of the market for unfunded credit derivatives caused the notional value of OTC CDSs to exceed by far the total value of underlying obligations. Physical settlement therefore became less appropriate as attempts to settle would have distorted the value on the deliverable obligations through excess demand.

(21) To address this issue, ISDA, as the trade association of the CDS industry, developed an auction for cash settlement on the basis of a methodology developed by a group of CDS dealers. The Final Price resulting from the ISDA auction determines a market-wide recovery rate for CDS and has become a de facto industry standard.

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3 'Counterparty risk' is the risk that the other party of a contract will not fulfil its contractual obligations. Due to the duration of CDS contracts, counterparty risk is significant. 'Clearing' of derivatives is a process after trading. The trading partners register a trade with a 'Central Clearing Party' (CCP or 'clearing house') which enters the transaction and becomes the buyer to the seller and the seller to the buyer. The CCP guarantees the performance of the derivative contract in case of buyer or seller default. Clearing significantly reduces systemic risks inherent to derivatives trading as it replaces opaque bilateral counterparty risks with a centralised and transparent system of risk control. Contrary to OTC trading, where uncleared trading is still commonplace, every trade on an exchange is centrally cleared.

(22) The Statement of Objections reached the preliminary conclusion that exchanges have no real alternatives to ISDA's Final Price if they want to successfully launch all-to-all trading of credit derivatives.

(23) The Statement of Objections moreover reached the preliminary conclusion that ISDA’s Board of Directors, where the CDS dealers were represented, refused licences for the Final Price to Eurex in 2007 and to CMDX in 2009 for exchange traded credit derivatives. In 2007 ISDA also approved a Use Agreement which excludes the licensing of the Final Price for exchange-trading purposes in general. Any undertaking that wishes to obtain the auction values which result from ISDA's credit event auctions must access the data on a website operated by auction administrator Markit. On that website the Final Price is subject to ISDA’s Use Agreement which users must accept by clicking ‘I Agree’.

4.2. Relevant markets

4.2.1. Product market

(24) In the Statement of Objections the Commission reached the preliminary conclusion that there is a market for unfunded credit derivatives that are traded OTC and a potential new market for exchange-traded unfunded credit derivatives.

(25) The Commission also reached the preliminary conclusion that there is no demand-side substitutability for OTC-traded unfunded credit derivatives from underlying non-derivative debt instruments such as bonds, loans or mortgage-backed securities, as CDS allow for the separation of credit risk from interest rate risk, can be traded more easily and have lower transaction costs. Nor can CDS be substituted by other classes of derivatives such as interest rate swaps, equity or commodity derivatives, as their risks are not interchangeable with credit risks.

(26) In *Deutsche Börse/NYSE Euronext* the Commission held that exchange- and OTC-traded derivatives form separate markets in the absence of short-term substitution, but noted a one-off long-term move from OTC to exchanges when contracts become more liquid, without competitive constraints on the exchange.[4] Within this one-way substitutability, exchange-traded CDS may become substitutes to standardised OTC-traded CDS.

(27) The Commission also reached the preliminary conclusion that there is no supply-side substitutability for OTC unfunded credit derivatives because of entry barriers. For OTC those barriers are, in particular, different risk profiles, extensive balance sheet and documentation requirements and the need for access to a very large amount of price data. For exchanges, the barriers consist in clearing, making entry with an alternative trading and clearing platform very difficult in view of the inefficiencies of maintaining margins at two clearing houses in respect of the same or similar products and the difficulties in competing with existing liquidity pools, in particular where an existing clearing house is vertically integrated. Such entry is more likely where access to an existing clearing house is granted, but even then entry will be difficult and may not exercise sufficient competitive constraint on the existing exchange.

[4] Case M.6166 *Deutsche Börse/NYSE*, paragraph 308, upheld in case T-175/12 *Deutsche Börse*, EU:T:2015:148, paragraph 106.

4.2.2. Geographic market

(28) The Commission reached the preliminary conclusion in the Statement of Objections that each of the relevant product markets, OTC-traded unfunded credit derivatives and exchange-traded unfunded credit derivatives, is world-wide in scope.

4.3. Position of ISDA on the relevant market

(29) ISDA plays a central role on the market for unfunded credit derivatives because of its ownership of the industry standard methodology for determining the price for settling CDS contracts through auctions following a credit event and its control of access to that data.

4.4. Practices raising concerns

(30) According to the Statement of Objections, Deutsche Börse (Eurex) launched an exchange-traded credit futures product in March 2007 and CMDX, a joint venture of hedge fund Citadel and the Chicago Mercantile Exchange, intended to launch an exchange-traded CDS product at the end of 2008. According to the Statement of Objections, both entities sought licences to reference ISDA's Final Price in their exchange traded credit derivatives in order to price their credit futures following a credit event.

(31) According to the Statement of Objections, ISDA's Board of Directors denied a licence for the Final Price to Eurex in 2007 and to CMDX in 2009. Moreover, in 2007 ISDA approved a Use Agreement which excludes the licensing of the Final Price for exchange-trading purposes in general.

(32) The Statement of Objections raised the preliminary competition concern that ISDA's conduct may have prevented potential entrants from successfully launching all-to-all exchange trading for credit derivatives.

(33) The Statement of Objections preliminarily qualified ISDA's refusals to grant licenses as decisions of an association of undertakings which may have restricted potential competition within the meaning of Article 101 of the Treaty and Article 53 of the EEA Agreement.

(34) With regard to the effect of the alleged behaviour, the Statement of Objections concluded that exchanges have no viable alternatives to ISDA’s Final Price to settle exchange traded credit derivatives in the event of of a default. In the event of a default, the residual value of bonds and of CDS contracts and exchange-traded contracts referencing a CDS must all settle with reference to the same values in order to avoid basis risk. Investors interested in trading CDS on exchange will revert to OTC traded derivatives if there are concerns about the robustness of pricing the exchange traded contract in the case of default. This significantly undermines the attractiveness of an exchange-traded contract as a substitute for OTC traded CDS.

(35) In the absence of a license for ISDA’s Final Price, an exchange would have to determine the residual price of the exchange traded credit derivative by other means such as an arbitrary fixed percentage for the recovery value or by operating another auction resulting in a different recovery value due to the different and more limited participation than ISDA’s auction, in particular due to the likely absence of the most important CDS dealers already attending ISDA’s auction. Any alternative solution would also imply an inefficient duplication of settlement procedures, including risk management, for users who hold both OTC and exchange positions.

(36) According to the preliminary conclusions in the Statement of Objections, ISDA's Final Price therefore represented an indispensable input for exchange trading credit derivatives and ISDA's refusal may consequently have foreclosed Eurex and CMDX from access to this potential new market.

(37) ISDA contests that the Final Price was indispensable for settling exchange traded credit derivatives. ISDA put forward a number of concerns relating to the integrity of the credit event auction if the Final Price were licensed for exchange trading purposes, including the manipulation of auction results by bidders trying to benefit from open contracts traded outside the auction on-exchange.

4.5. Effect on trade between Member States

(38) The Court of Justice of the European Union has consistently held that, in order to find that an agreement or a practice may affect trade between Member States and Contracting Parties to the EEA Agreement, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. While Article 101(1) of the Treaty does not require that infringements have actually affected trade between Member States, it requires that it be established that the agreements are capable of having that effect.[5]

(39) It is common for a customer located in one Member State or Contracting Party to the EEA Agreement to buy credit protection through a CDS dealer located in another from a seller which may be located in a third Member State or Contracting Party to the EEA Agreement. As CDS trading is a global business and transactions of unfunded credit derivatives are regularly cross-border, the Commission´s preliminary view in the Statement of Objections was that the described conduct had an appreciable effect on trade between Member States within the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.

5. PROPOSED COMMITMENTS

(40) In order to meet the Commission's concerns as expressed in the Statement of Objections, ISDA offered commitments on 19 April 2016 (see recitals 41 to 47).

5.1. Licensing commitment

(41) ISDA has given a commitment to grant licences to use the Final Price for the purpose of exchange trading on fair, reasonable and non-discriminatory (FRAND) terms and conditions within a negotiating period of 120 days, with a possible agreed extension of 30 days. Exchange trading is defined as 'trading on a regulated market, a multilateral trading facility, an organised trading facility or on a third-country market considered to be equivalent to a regulated market, including anonymous all-to-all trading on a CLOB basis'.

(42) If there is no agreement on FRAND terms and conditions, a licence applicant is entitled to submit the dispute to an independent arbitrator. If the dispute is not resolved through arbitration within 45 or, at the very most 75 days, the parties may bring the dispute before a court. With regard to other disputes, an independent Monitoring Trustee will issue a decision, which is binding on the parties, within 15

5 Case C-306/96 *Javico*, EU:C:1998:173, paragraphs 15, 16 and 17; Case C-238/05 *Asnef-Equifax*, EU:C:2006:734, paragraph 43.

days following submissions by ISDA and the applicant, ISDA bearing the burden of proof.

(43) ISDA is relieved from its obligations under the Commitments, and may file a claim for injunctive relief in only a few instances: if an applicant fails to agree or comply with the provisions of a licence agreement (for example failure to pay royalties), if the applicant is facing imminent default and fails to provide guarantees for the payment of its licensing fees, or if a licence is terminated following demonstration by ISDA that auction participants have manipulated an auction due to specific features of an exchange traded credit derivative that has been licensed by ISDA and no less disruptive measures other than the termination of the license are available to address the auction manipulation concern. The right of termination is subject to review by the Monitoring Trustee, which will issue a binding decision within 30 days following submissions by ISDA and the licensee. In the context of manipulation, the Monitoring Trustee will decide whether it is necessary to approve ISDA's request for termination of a licence or whether other less disruptive means are available to protect the integrity of the credit event auction, including changes to the auction rules and to the design of the exchange traded credit derivative.

(44) ISDA may also ask licensed trading venues to cooperate in good faith with the auction administrator Markit by providing information concerning such matters as the net open interest of licensed credit futures.

(45) ISDA has also given a commitment to instruct the administrator(s) of the www.creditfixings.com website to remove any restrictions inhibiting the use of the Final Price for exchange trading purposes.

5.2. Organisational commitments

(46) ISDA has given a commitment to modify its procedures for considering applications/requests for licenses regarding the Final Price to exclude CDS dealers from ISDA's licensing decisions. The authority to award licences of the Final Price will no longer rest with ISDA's Board of Directors (composed of CDS dealers) or a sub-committee thereof, but will be vested in ISDA's Chief Executive Officer (CEO). While ISDA’s CEO may consult members (CDS dealers) on purely technical issues to develop the credit event auction methodology, such consultation must neither directly nor indirectly relate to the merits of individual licensing requests. The CEO is consequently not allowed to consult CDS dealers on individual licensing requests by exchanges. Where individual licensing requests require changes to the process or the organisation of the auction, ISDA may seek technical advice from independent experts.

5.3. Duration of Commitments and Monitoring Trustee

(47) The Commitments will be binding on ISDA for ten years from adoption of this Decision. A Monitoring Trustee will report annually to the Commission on the implementation of the Commitments.

6. ARTICLE 27(4) NOTICE

(48) In response to the publication of the Article 27(4) Notice on 29 April 2016, the Commission received two responses from interested third parties.

(49) The respondents did not question the general aim of the Commitments, namely facilitating the entry of exchanges into the market for unfunded credit derivatives and limiting dealer influence over ISDA's licensing decisions.

(50) The limited observations received did not identify new competition concerns and contained no points such as to make the Commission reconsider the concerns it expressed in the Statement of Objections with regard to ISDA. In view of the results of the market test, the Commission maintains the position that it took in the Article 27(4) Notice, namely that the Commitments are adequate to meet the competition concerns expressed in the Statement of Objections.

7. PROPORTIONALITY OF THE COMMITMENTS

7.1. Principles

(51) The principle of proportionality requires that the measures adopted by institutions of the Union must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued.[6]

(52) In the context of Article 9 of Regulation (EC) No 1/2003, application of the principle of proportionality entails, first, that the commitments in question address the concerns expressed by the Commission in its preliminary assessment and, second, that the undertakings concerned have not offered less onerous commitments that also address those concerns adequately.[7] When carrying out that assessment, the Commission must take into consideration the interests of third parties.[8]

7.2. Application in this case

(53) The Commitments offered by ISDA, as set out in Section 5 of this Decision, are sufficient to address the concerns identified by the Commission in its Statement of Objections and summarised in section 4 of this Decision. The commitments ensure that ISDA will not be able to refuse licences for exchange trading on the basis of its ownership of the Final Price with regard to any potential licensee willing to enter into a licence agreement on FRAND terms and conditions. The commitments further ensure that CDS dealers will not exercise influence over ISDA with regard to individual licensing decisions for specific licensing requests.

(54) Moreover, ISDA has not offered less onerous commitments in response to the Statement of Objections that would also address the Commission’s concerns adequately.The need to ensure increased deterrence through the imposition of fines has been removed by the submission of the Commitments which will be made legally binding and enforceable through this Decision. This effectively removes the risk of recidivism and has positive effects on the market structure and consumers in the Union.

(55) The Commission has taken into consideration the interests of third parties, including those of the interested third parties that responded to the Article 27(4) Notice.

(56) This Decision accordingly complies with the principle of proportionality.

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6 See for instance, Case T-260/94 *Air Inter v. Commission*, EU:T:1994:265, paragraph 144 and Case T-65/98 *Van den Bergh Foods v. Commission*, EU:T:2003:281, paragraph 201.

7 Case C-441/07 P *Commission v Alrosa*, EU:C:2010:377, paragraph 41.

8 Case C-441/07 P, paragraph 41.

8. CONCLUSION

(57) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes commitments, offered by the undertakings concerned to meet the Commission's concerns expressed in its preliminary assessment, binding upon them. Recital 13 of the Preamble to the Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement.

(58) The Commission's assessment of whether the Commitments offered by ISDA are sufficient to meet its concerns with regard to ISDA expressed in the Statement of Objections represents the view of the Commission based on the underlying investigation and analysis, and the observations received from a third party following the publication of the Article 27(4) Notice.

(59) In the light of the Commitments offered by ISDA, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case with regard to ISDA should therefore be brought to an end.

(60) The Commission retains full discretion to investigate and open proceedings under Article 101 of the Treaty and Article 53 of the EEA Agreement as regards practices that are not the subject matter of this Decision,

HAS ADOPTED THIS DECISION:

Article 1

The Commitments in the Annex shall be binding on ISDA for a period of 10 years from the adoption of this Decision.

Article 2

There are no longer grounds for action in this case as regards ISDA. The proceedings in respect of ISDA are therefore brought to an end.

Article 3

This Decision is addressed to:

The International Swaps and Derivatives Association, Inc.

One Bishops Square
London EI 6AD
United Kingdom

Done at Brussels, 20.7.2016

For the Commission
Margrethe VESTAGER
Member of the Commission

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION