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from: Secretary-General of the European Commission,
 signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 7 February 2012

to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European
 Union

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Subject: Commission Delegated Regulation (EU) No .../.. of 7.2.2012 supplementing
 Regulation (EC) 1060/2009 of the European Parliament and of the Council
 with regard to fees charged by the European Securities and Markets Authority
 to credit rating agencies

Delegations will find attached Commission document C(2012) 582 final.

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EUROPEAN COMMISSION

Brussels, 7.2.2012
C(2012) 582 final

COMMISSION DELEGATED REGULATION (EU) No .../..

of 7.2.2012

supplementing Regulation (EC) 1060/2009 of the European Parliament and of the Council with regard to fees charged by the European Securities and Markets Authority to credit rating agencies

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 19 (2) of Regulation (EC) No 1060/2009 on credit rating agencies (hereafter – CRA Regulation) as amended by Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 requires the Commission to adopt by means of a delegated act a regulation on fees.

The CRA Regulation sets out the key principles of charging fees to credit rating agencies. Article 19(1) of this Regulation requires that fees paid by CRAs "shall fully cover ESMA's necessary expenditure relating to the registration and supervision of credit rating agencies and the reimbursement of any costs that the competent authorities may incur carrying out work pursuant to this Regulation (...)". Moreover, Article 19(2), subparagraph 2 of the CRA Regulation requires that "the amount of a fee charged to a credit rating agency shall cover all administrative costs and be proportionate to the turnover of the credit rating agency concerned".

This regulation on fees shall determine the type of fees and the matters for which fees are due, the manner in which to calculate the amount of the fees, the way in which they are to be paid and the way in which the European Securities and Markets Authority (ESMA) shall reimburse competent authorities in respect of any costs that they incur carrying out work pursuant to the CRA Regulation.

CONSULTATION PRIOR TO THE ADOPTION OF THE ACT

On 24 February 2011 the European Commission sent a formal request to ESMA for technical advice on the content of the regulation on fees. The advice was due to be delivered to the Commission by 13 May 2011. In order to provide this advice ESMA conducted a public consultation that took place from 13 to 27 April 2011¹. In total, ESMA received 8 responses to the consultation which have been published on ESMA's website. ESMA provided its advice to the Commission on 17 May 2011² (hereafter – Final Report).

On 5 May 2011 the Commission asked ESMA to complement its technical advice by a financial analysis of the options proposed, justifying the amounts proposed to be charged from credit rating agencies. On 1 June 2011 ESMA provided a Financial analysis with the requested data³ (hereafter – Financial Analysis).

Since the key principles of charging fees from credit rating agencies are clearly set by Article 19 of the CRA Regulation and given the extensive technical advice provided by ESMA which contains, among others, estimations on the expected costs for registering and supervising credit rating agencies, it is not necessary to accompany this delegated fee regulation with a separate impact assessment.

¹ Consultation Paper on ESMA's Technical Advice to the Commission on fees for CRA Supervision from 14 April 2011, ESMA/2011/114, available at <http://www.esma.europa.eu/popup2.php?id=7545>.

² Final report ESMA's Technical Advice to the Commission on Fees for CRAs, 17 May 2011; ESMA/2011/144, published at <http://www.esma.europa.eu/popup2.php?id=7586>.

³ Financial analysis to ESMA's Technical Advice to the Commission on fees for CRAs, 1 June 2011, ESMA/2011/169 (confidential).

2. LEGAL ELEMENTS OF THE DELEGATED ACT

Chapter I of the proposed regulation on fees (hereafter – Act) sets out the scope, subject matter and definitions. In accordance with Article 19 of the CRA Regulation the Act only deals with the fees that credit rating agencies will be charged by ESMA (Article 1 of the Act).

Article 2 of the Act provides a key principle that all costs related to supervision of credit rating agencies, including registration and certification, will be reimbursed by these credit rating agencies. This principle is taken from Article 19(1) of the CRA Regulation.

Article 3 defines the terms used in the Act. The Act requires that any deficit of ESMA's budget for the supervision of credit rating agencies should be recovered from the CRAs via increased fees in the following year. This will ensure that credit rating agencies pay at least all the costs related to their supervision.

Chapter II is the core chapter of the Act and provides for the types of fees, their payment modalities and specific conditions for reimbursement of costs of the tasks delegated to or provided by competent authorities under the CRA Regulation.

Article 4 lists types of fees that credit rating agencies will be required to pay as well as the timing and modalities of payments.

Annual supervisory fees for registered credit rating agencies are dealt with in Article 5. Annual fees are intended to cover ESMA's ongoing supervisory activities. The annual supervisory fee for a registered credit rating agency will be proportional to its total turnover as required by Article 19 (2) of the CRA Regulation. Small credit rating agencies which do not belong to a group of credit rating agencies would be exempted from annual supervisory fees if their annual turnover is less than EUR 10 Mio. Where a credit rating agency belongs to a group of credit rating agencies it would only be exempted if the aggregate annual turnover of all EU registered credit rating agencies belonging to the group is less than EUR 10 million.

Exempting small credit rating agencies from supervisory fees is in line with the proportionality principle as specified in Article 19 (2) of the CRA Regulation. Charging supervisory fees to small credit rating agencies would provide disincentives for new CRAs to enter the market and could overburden small credit rating agencies in the start-up phase. The mere management of small fees would in addition create substantial administrative costs for both small CRAs and ESMA that are likely to be disproportionate to the amount to be recovered.

The EUR 10 million threshold has been chosen in order to ensure consistency with other provisions of the CRA Regulation and with other relevant EU acts. Firstly, Article 36(a) (2) of the CRA Regulation uses this threshold to set the level of fines in a proportionate way. Secondly, the 2003 Commission Recommendation⁴ uses a EUR 10 million turnover threshold to define small enterprises. In case of groups of credit rating agencies the 10 million turnover exemption should be applied on the group level in order not to provide incentives to credit rating agencies to split up in small entities with the aim to avoid fees. In addition, the economic strengths of a group of credit rating agencies is reflected by the aggregate turnover of all entities belonging to the group.

⁴ Article 2, point 2, Annex of the COMMISSION RECOMMENDATION of 6 May 2003 (2003/361/EC) concerning the definition of micro, small and medium-sized enterprises.

The turnover of registered credit rating agencies to be used for the calculation of annual supervisory fees will include revenue from both rating and non-rating activities, since the cost of supervision of credit rating agencies providing non-rating (ancillary) services will be higher as ESMA also has to supervise that the provision of ancillary services does not present conflicts of interests with the provision of rating activities.

Article 6 sets requirements in respect to a registration fee. It is a one-off fee that reflects ESMA's costs of processing an application for registration. This is in line with the requirement in Article 19 (2) of the CRA Regulation according to which the amount of a fee charged to a credit rating agency shall cover all administrative costs. ESMA's costs to process an application for registration depend notably on the size of the applying credit rating agency as reflected by the number of employees and on the complexity of the application, i.e.

- (1) whether a credit rating agency intends to issue ratings for structured finance instruments;
- (2) whether a credit rating agency has branches;
- (3) whether a credit rating agency plans to endorse ratings;

Analysis and estimations carried out by ESMA with the input from competent authorities support these criteria.

Depending on these criteria, credit rating agencies will pay a one-off registration fee in the range between EUR 2.000 and EUR 125.000, which is in line with ESMA's estimations regarding the costs of processing applications for registration.

Certified third country credit rating agencies will have to pay a fixed annual supervisory fee of EUR 6.000 (Article 7). This is in line with Article 19 (2) of the CRA Regulation which requires that the amount of a fee charged to a credit rating agency shall cover all administrative costs. The amount is based on the fact that recurring supervision costs of certified credit rating agencies will comprise mainly of costs resulting from communication with third country supervisors and review of information provided by certified credit rating agencies. The amount is set in accordance with ESMA's estimations of annual supervisory costs with respect to certified credit rating agencies. Consistent with the approach taken in Article 5 (annual supervisory fees for registered CRAs) small third country CRAs/groups of CRAs with a total turnover of less than EUR 10 million would be exempted from these fees.

A one-off fee for certification will be fixed at EUR 10.000 (Article 8) and is set in accordance with ESMA's estimations of processing applications for certification. The amount of the certification fee is based on the fact that certification should be generally considered less costly than registration and should be similar for all applications for certification. In accordance to Article 5 paragraph 3 of the CRA Regulation, the certification decision will be based on criteria set out in points (a) to (d) of Article 5 paragraph 1 of the CRA Regulation, including whether a third country credit rating agency is subject to supervision in that third country and whether the third country has a legal and supervisory framework equivalent to the CRA Regulation.

The amounts of registration and certification fees and the exemption thresholds with regard to annual supervisory fees contained in this Regulation should be reviewed by the Commission

within 4 years from its entry into force in order to take account of potentially increasing costs for registering and certifying credit rating agencies and new market developments.

In respect of one-off registration and certification fees, credit rating agencies that decide to withdraw their application will be reimbursed $\frac{3}{4}$ or $\frac{1}{4}$ of fees paid, depending on the time when the credit rating agency withdraws its application. This is justified as ESMA will have less costs if the registration/certification application is withdrawn before ESMA has completed the full decision making process.

In respect to annual supervisory fees, for the year when the registration / certification is completed, the credit rating agency would only pay a part of a first year supervisory fee that is pro-rated according to the time between the date of registration / certification and end of the financial year. Article 9 provides certainty to credit rating agencies and competent authorities of Member States that only ESMA may levy fees from credit rating agencies. If competent authorities perform tasks delegated to them by ESMA or if competent authorities provide assistance to ESMA in accordance with the CRA Regulation, the latter will reimburse the actual costs to these competent authorities.

Finally, chapter III of the Act provides for transitional and final provisions. Since ESMA activities on CRAs in 2011 have been prefunded by ESMA's 2011 budget, Article 10 specifies that credit rating agencies shall pay supervisory fees for 2011 to ESMA for the time period when ESMA was in charge of their supervision. Article 11 provides the time line on the entry into force of the Regulation.

COMMISSION DELEGATED REGULATION (EU) No .../..

of 7.2.2012

supplementing Regulation (EC) 1060/2009 of the European Parliament and of the Council with regard to fees charged by the European Securities and Markets Authority to credit rating agencies

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EC) 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies⁵, and in particular Article 19(2) thereof,

Whereas:

- (1) Article 62 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)⁶ provides that the revenues of the European Securities and Markets Authority (ESMA) should also consist of fees paid to ESMA in cases specified in Union legislation alongside contributions from national public authorities and a subsidy from the Union.
- (2) To ensure an efficient use of ESMA's budget and, at the same time, alleviate the financial burden for Member States and the Union, it is necessary to ensure that credit rating agencies pay at least all the costs related to their supervision. Any deficit that may occur during one financial year should be recovered from credit rating agencies in the following year.
- (3) An annual supervisory fee should be charged to credit rating agencies exceeding a certain threshold of turnover in order to provide for budgetary certainty for both ESMA and the credit rating agencies concerned. Annual supervisory fees should not become a burden for new entrants to the credit rating market. Moreover, small credit rating agencies are expected to engender significantly less supervisory costs than larger ones. It would be therefore proportionate to fully exempt small credit rating agencies from paying the annual supervisory fee where the credit rating agency or the group of credit rating agencies to which it belong do not exceed a certain threshold of turnover.

⁵ OJ L 302, 17.11.2009, p. 1.

⁶ OJ L 331, 15.12.2010, p.84.

- (4) In order to ensure a fair and clear allocation of fees which, at the same time, reflects the actual administrative burden per supervised entity, the supervisory fee should be calculated according to the credit rating agencies' turnover, generated from rating activities and ancillary services, since the cost of supervision is higher for larger credit rating agencies than for smaller ones. Moreover, the provision of ancillary services requires additional supervisory effort as possible conflicts of interests resulting from the provision of ancillary services need monitoring. Credit rating agencies should not circumvent the fair allocation of fees according to this Regulation by reallocating revenue to other entities within their group in order to reduce their fee contributions. ESMA should monitor and report any critical developments in this respect.
- (5) A registration fee should be charged to credit rating agencies established in the Union to reflect ESMA's costs for processing the application for registration. The complexity of an application and costs associated to assessing the application increase where a credit rating agency applies for issuing ratings for structured finance instruments or plans to endorse ratings from third country agencies or has branches. Therefore the registration fee should be calculated according to those factors. The processing costs also depend to a large extent on the size of the applicant credit rating agency. As the future turnover of a new credit rating agency would not be known at the moment of its application for registration, the number of employees should replace turnover as a common basis for calculation of all credit rating agencies.
- (6) This Regulation should provide for fees to be charged to third country credit rating agencies that apply for certification in the Union according to Article 5 (2) of Regulation (EC) No 1060/2009 in order to cover their certification and annual supervisory costs. In this regard, ESMA's necessary expenditure relates to the certification of such third country credit rating agencies according to Article 5 (3) of Regulation (EC) No 1060/2009 which follows a similar procedure as the one applicable to the registration of credit rating agencies established in the Union, as well as ESMA's expenditure necessary for the supervision of certified credit rating agencies.
- (7) Credit rating agencies should be reimbursed a percentage of the fee initially charged for their registration or certification when withdrawing their application during the registration or certification process as ESMA's costs for processing the application would be lower in such cases.
- (8) In view of possible future developments, it is appropriate for the thresholds for exempting credit rating agencies from paying annual supervisory fees and the amounts of registration and certification fees to be reviewed and updated as necessary. The Commission should assess the correct application of these measures within four years from the entry into force of this Regulation and report to the European Parliament and the Council on the possible need to review it.
- (9) National competent authorities incur costs when carrying out tasks delegated to them by ESMA in accordance with Article 30 of Regulation (EC) 1060/2009 and when providing assistance to ESMA in the other cases specified in that Regulation. The fees to be charged by ESMA to credit rating agencies should also cover those costs. In order to avoid that competent authorities incur loss or realise profit from carrying out delegated tasks or from assisting ESMA, ESMA should reimburse the actual costs incurred by that national competent authority.

- (10) This Regulation should form the basis for ESMA's right to charge fees to credit rating agencies. In order to immediately facilitate effective and efficient supervisory and enforcement activity, it should enter into force on the third day following that of its publication.

HAS ADOPTED THIS REGULATION:

CHAPTER I GENERAL PROVISIONS

Article 1 Subject matter

This Regulation lays down rules regarding the fees that the European Securities and Markets Authority (ESMA) shall charge to credit rating agencies for supervision, registration and certification.

Article 2 Recovery of supervisory costs in full

The fees charged to credit rating agencies shall cover:

- (a) all costs relating to the supervision of credit rating agencies by ESMA in accordance with Regulation (EC) No 1060/2009, including costs resulting from the registration and certification of credit rating agencies;
- (b) all costs for the reimbursement of competent authorities to which ESMA has delegated tasks in accordance with Article 30 of Regulation (EC) No 1060/2009;
- (c) all costs for the reimbursement of competent authorities that have provided assistance to ESMA in accordance to Article 23c (4) and Article 23d (5) of Regulation (EC) No 1060/2009.

Article 3 Applicable turnover

- (a) For the purposes of calculating the fees referred to in Article 5, Article 7 (1) and Article 11 (1) and (2), the applicable turnover for a given financial year (n) shall be the revenues of a credit rating agency as published in its audited accounts of the previous year (n-1) generated from rating activities and ancillary services.
- (b) Where the credit rating agency did not operate during the full year (n-1), the applicable revenue shall be estimated by extrapolating that amount for the whole financial year.

CHAPTER II FEES

Article 4 Types of fees and general payment modalities

1. Credit rating agencies established in the Union that apply for registration in accordance with Article 14 (1) of Regulation (EC) No 1060/2009 shall be charged the following types of fees
 - (a) annual supervisory fees according to Article 5;
 - (b) registration fees according to Article 6.
2. Credit rating agencies established in third countries that apply for certification in accordance with Article 5 (2) of Regulation (EC) No 1060/2009 shall be charged the following types of fees:
 - (a) flat annual supervisory fees according to Article 7;
 - (b) certification fees according to Article 8.
3. The fees shall be payable in Euros. They shall be payable as specified in Article 5(3), Article 6(6), Article 7(2) and Article 8(2).

Any late payments shall incur a daily penalty equal to 0,1% of the amount due.

Article 5 Annual supervisory fee for registered credit rating agencies

1. A registered credit rating agency shall be charged an annual supervisory fee.

By way of derogation from the first subparagraph, a registered credit rating agency shall be exempted from paying an annual supervisory fee where its total revenues as published in its most recent audited accounts is less than EUR 10 million, or in case it belongs to a group of credit rating agencies, where the group of credit rating agencies has aggregate total revenues of less than EUR 10 million.
2. The annual supervisory fee for a given financial year shall be calculated as follows:
 - (a) the basis for the calculation of the annual supervisory fee for a given financial year shall be the estimate of expenditure relating to the supervision of credit rating agencies as included in the ESMA budget for that year, set out and approved in accordance with Article 63 of Regulation (EU) No 1095/2010;
 - (b) the relevant amount for the calculation of the annual supervisory fee for a given financial year shall be the estimate of expenditure according to point (a) reduced by any annual supervisory fees to be charged to certified credit rating

agencies for a given financial year according to Article 7 and increased by any deficit from the previous financial year;

- (c) a registered credit rating agency as referred to in paragraph 1 shall pay as an annual supervisory fee a part of the relevant amount which corresponds to the ratio of the credit rating agency's applicable turnover to the total applicable turnover of all registered credit rating agencies required to pay an annual supervisory fee in accordance with paragraph 1.

- 3. The annual supervisory fee for a given financial year shall be paid in two instalments.

The first instalment shall be due by the end of February of that year and shall amount to two thirds of the estimated annual supervisory fee. If the applicable turnover is not yet available at that time, ESMA shall base the calculation on the turnover included in the most recent audited accounts available.

The second instalment shall be due by the end of August. The amount of the second instalment shall be the annual supervisory fee calculated according to paragraph 2 reduced by the amount of the first instalment.

ESMA shall send the invoices for the instalments to the credit rating agencies at least 30 days before the respective payment date.

Article 6 *Registration fee*

- 1. The amount of the registration fee to be paid by individual credit rating agencies applying for registration shall be proportionate to the complexity of the application and the size of the credit rating agency as specified in paragraphs 2 to 5.
- 2. For the purposes of calculating the amount of the registration fee, the following criteria shall be taken into consideration:
 - (a) whether a credit rating agency intends to issue ratings for structured finance instruments;
 - (b) whether a credit rating agency has a branch in another Member State or in a third country;
 - (c) whether a credit rating agency intends to endorse ratings.
- 3. Where none of the criteria set out in paragraph 2 apply, the registration fees shall be calculated according to the number of employees, as follows:
 - (a) credit rating agencies with fewer than 15 employees shall pay EUR 2000;
 - (b) credit rating agencies with 15 to 49 employees shall pay EUR 15 000;
 - (c) credit rating agencies with at least 50 employees shall pay EUR 40 000.

4. Credit rating agencies that only meet one of the criteria set out in paragraph 2 shall pay the following registration fees according to the number of their employees, as follows:
 - (a) credit rating agencies with fewer than 15 employees shall pay EUR 10 000 ;
 - (b) credit rating agencies with 15 to 49 employees shall pay EUR 40 000 ;
 - (c) credit rating agencies with at least 50 employees shall pay EUR 100 000.
5. Credit rating agencies that meet at least two of the criteria set out in paragraph 2 shall pay the following registration fees according to the number of their employees, as follows:
 - (a) credit rating agencies with fewer than 15 employees shall pay EUR 30 000 ;
 - (b) credit rating agencies with 15 to 49 employees shall pay EUR 85 000 ;
 - (c) credit rating agencies with at least 50 employees shall pay EUR 125 000.
6. The registration fee shall be payable in full at the time the credit rating agency applies for registration.
7. If a credit rating agency withdraws its application for registration before ESMA has notified it that the application is complete in accordance with the second subparagraph of Article 15(4) of Regulation (EC) No 1060/2009, ESMA shall reimburse three quarters of the registration fee paid. If the application is withdrawn after this date, but before ESMA adopts the reasoned decision to register or refuse registration, ESMA shall reimburse one quarter of the registration fee paid.
8. By way of derogation from Article 5, a registered credit rating agency that is required to pay an annual supervisory fee in accordance with Article 5(1) shall pay in the year of its registration an initial supervisory fee of EUR 500 for each complete month in the time period between the date of registration and the end of the financial year. This fee shall be payable in full once the registration is notified to the credit rating agency.

Article 7

Flat annual supervisory fee for certified credit rating agencies

1. A credit rating agency certified in accordance with Regulation (EC) No 1060/2009 shall pay an annual supervisory fee of EUR 6 000.

By way of derogation from the first subparagraph, a certified credit rating agency shall be exempted from paying an annual supervisory fee where its total revenues as published in its most recent audited accounts is less than EUR 10 million, or in case it belongs to a group of credit rating agencies, where the group of credit rating agencies has aggregate total revenues of less than EUR 10 million.

2. The annual supervisory fee for a certified credit rating agency shall be due by the end of February. ESMA shall send a payment invoice to a certified credit rating agency at least 30 days before that date.

*Article 8
Certification fee*

1. A credit rating agency applying for certification shall pay a certification fee of EUR 10 000.
2. The certification fee shall be payable in full at the time the credit rating agency applies for certification.
3. If a credit rating agency withdraws its application for certification before ESMA has notified it that the application is complete in accordance with the second subparagraph of Article 15(4) of Regulation (EC) No 1060/2009, ESMA shall reimburse three quarters of the certification fee. If the application is withdrawn after that date, but before ESMA adopts the reasoned decision to certify or refuse certification, ESMA shall reimburse one quarter of the certification fee.
4. By way of derogation from Article 7, a certified credit rating agency that is required to pay an annual supervisory fee according to Article 7(1) shall pay in the year of its certification an initial supervisory fee of EUR 500 for each complete month in the time period between the date of certification and the end of the financial year. This fee shall be payable in full once the certification is notified to the credit rating agency.

*Article 9
Reimbursement of competent authorities*

1. Only ESMA shall charge fees to credit rating agencies for their registration, certification and supervision. Competent authorities shall not charge fees to credit rating agencies, including cases where those authorities carry out tasks on behalf of ESMA according to Article 30 of Regulation (EC) No 1060/2009.
2. ESMA shall reimburse a competent authority for the actual costs incurred as a result of carrying out delegated tasks in accordance with Article 30 of Regulation (EU) No 1060/2009 or as a result of assisting ESMA in accordance with Article 23c (4) or Article 23d (5) of that Regulation. Costs to be reimbursed shall comprise all fixed costs and variable costs related to the performance of the delegated tasks or the assistance provided to ESMA.

CHAPTER III TRANSITIONAL AND FINAL PROVISIONS

Article 10 Fees in 2011

1. Credit rating agencies registered in 2011 shall pay, for 2011, an initial supervisory fee of EUR 500 for each complete month in the period between the date of registration, but not earlier than 1 July 2011, and 31 December 2011. This fee shall be payable in full by end of April 2012.

By way of derogation from the first subparagraph a registered credit rating agency shall be exempted from paying a supervisory fee in 2011 where its total revenues as published in its most recent audited accounts is less than EUR 10 million, or in case it belongs to a group of credit rating agencies, where the group of credit rating agencies has aggregate total revenues of less than EUR 10 million.

2. Credit rating agencies certified in 2011 shall pay, for 2011, an initial supervisory fee of EUR 500 for each completed month between the date of certification, but not earlier than 1 July 2011, and 31 December 2011. This fee shall be payable in full by end of April 2012.

By way of derogation from the first subparagraph, a certified credit rating agency shall be exempted from paying a supervisory fee in 2011 where it has an applicable turnover of less than EUR 10 million, or in case it belongs to a group of credit rating agencies, where the group of credit rating agencies has an aggregate applicable turnover of less than EUR 10 million.

Article 11 Entry into force

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 7.2.2012

For the Commission

*The President
José Manuel BARROSO*