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NOTE

From: General Secretariat of the Council
To: Delegations
No. prev. doc.: 15097/10 EF 141 ECOFIN 636 CODEC 1078
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Subject: Proposal for a Regulation of the European Parliament and of the Council on amending Regulation (EC) No 1060/2009 on credit rating agencies
- Presidency Compromise

Delegations will find attached a Presidency compromise on the above Commission proposal following the discussions at the working party meeting of 27 October.

Additions and changes to the last compromise text in doc. 15097/10 are denoted by text in **bold underline**.

**REGULATION (EU) No .../... OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL**

On amending Regulation (EC) No 1060/2009 on credit rating agencies

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Acting in accordance with the ordinary legislative procedure²,

Whereas:

- (1) A report published on 25 February 2009 by a high-level group of experts chaired by J. de Larosière, requested by the Commission, concluded that the supervisory framework needs to be strengthened to reduce the risk and severity of future financial crises. Accordingly, it recommended far-reaching reforms to the supervisory structure of the financial sector within the European Union. That group of experts also concluded that a European System of Financial Supervisors (ESFS) should be created, comprising three European Supervisory Authorities (ESA's), one for the securities sector, one for the insurance and occupational pensions sector and one for the banking sector, and the creation of a European Systemic Risk Board.

¹ OJ C , , p. .

² OJ C , , p. .

- (2) The Commission in its Communication of 4 March 2009, entitled "Driving European Recovery"³ proposed to bring forward draft legislation creating the ESFS, and in its Communication of 27 May 2009, entitled "European Financial Supervision"⁴, provided more detail about the possible architecture of such a new supervisory framework, highlighting the specificity of the supervision of credit rating agencies.
- (3) The European Council, in its conclusions of 19 June 2009, recommended that the ESFS, consisting of a network of national financial supervisors working in tandem with the new ESA's, a European Banking Authority (EBA), a European Insurance and Occupational Pensions Authority (EIOPA), and a European Securities and Markets Authority (ESMA), be established. ESFS should be aimed at upgrading the quality and consistency of national supervision, strengthening oversight of cross-border groups through the setting up of supervisory colleges and establishing a European single rule book applicable to all financial market participants in the internal market. The European Council stressed that a European Securities and Markets Authority should have supervisory powers for credit rating agencies. Further, the Commission should retain its competence to enforce the Treaties, in particular Chapter I of Title VII of the Treaty on the Functioning of the European Union regarding the common rules on competition in accordance with the provisions adopted for the implementation of those rules.
- (3a) By Regulation (EU) No .../... [Regulation establishing ESMA], the European Parliament and the Council has established the European Securities and Markets Authority (hereinafter referred to as "ESMA").

³ COM(2009) 114 final.

⁴ COM(2009) 252 final.

- (4) The scope of competence of ESMA should be clearly defined so that financial market participants can identify the authority competent in the field of activity of credit rating agencies. ESMA should be given general competence under Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies⁵ in matters relating to the registration and on-going supervision of registered credit rating agencies.
- (4a) ESMA should be exclusively responsible for the registration and supervision of credit rating agencies in the Union. Where ESMA has delegated specific tasks to competent authorities of the Member States, ESMA should continue to be legally responsible. The heads and other staff of national competent authorities should be involved in the decision making process within ESMA in accordance with the internal rules of the ESMA Regulation, acting as members of ESMA bodies, such as the board of supervisors or internal ESMA panels. ESMA should have the exclusive power to conclude cooperation agreements on information exchange with competent authorities of third countries. To the extent that national competent authorities participate in the decision making process within ESMA or when executing tasks on behalf of ESMA, they should be covered by these cooperation agreements.
- (5) **[deleted]**
- (6) As credit ratings are used throughout the Union, the traditional distinction between the home competent authority and the other competent authorities as well as the use of a college type of supervisory co-ordination are not the most adequate for the supervision of credit rating agencies. With the setting up of ESMA, it is no longer necessary to maintain such a structure. The registration process should thus be streamlined and time limits should be accordingly reduced.
- (7) ESMA should be responsible for the registration and on-going supervision of credit rating agencies, however it should not be responsible for the oversight of the users of credit ratings.

⁵ OJ L 302, 17.11.2009, p. 1.

National competent authorities designated under the relevant sectoral legislation for the supervision of the credit institutions, investment firms, insurance undertakings, assurance undertakings, reinsurance undertakings, undertakings for collective investment in transferable securities (UCITS), institutions for occupational retirement provision and alternative investment funds should thus remain responsible for the supervision of the use of credit ratings by these financial institutions and entities , which are supervised at national level in the context and for the purpose of the application of other financial services directives, and for the use of credit ratings in prospectuses.

- (8) There is a need to introduce an effective instrument to establish harmonised technical standards to facilitate the application of Regulation (EC) No 1060/2009 in the day to day practice and to ensure a level playing field and an adequate protection of investors and consumers across the Union. As a body with highly specialised expertise, it is efficient and appropriate to entrust ESMA with the development of draft technical standards.
- (9) In the field of credit rating agencies, draft technical standards should be submitted concerning the information to be provided by a credit rating agency in its application for registration, the information that the credit rating agency must provide for the application for certification and for the assessment of its systemic importance to the financial stability or integrity of financial markets, the presentation of the information, including structure, format, method and period of reporting, that credit rating agencies shall disclose, (...) concerning the assessment of compliance of credit rating methodologies with the requirements set out in Regulation (EC) No 1060/2009, and the content and format of ratings data periodical reporting to be requested from the credit rating agencies for the on-going supervision by ESMA. In accordance with Regulation (EU) No .../... [Regulation establishing ESMA] the draft technical standards must be adopted by the Commission to give them binding legal effect.
- (10) In areas not covered by technical standards, ESMA should have the power to issue and update non-binding guidelines on issues related to the application of Regulation (EC) No 1060/2009.

In issuing and updating guidelines and in issuing draft technical standards, ESMA shall consider the guidelines already issued by CESR and shall update them if ESMA considers it as appropriate and necessary regarding the content of Regulation (EC) No 1060/2009.

- (11) In order to effectively carry out its duties ESMA should have the right to request by simple request or by decision all necessary information from credit rating agencies, persons involved in credit rating activities, rated entities and related third parties, third parties to whom the credit rating agencies have outsourced operational functions and persons otherwise closely and substantially related or connected to credit rating agencies or credit rating activities. The latter group of persons should cover, for instance, staff of a credit rating agency which is not directly involved in rating activities but which due to its function within the credit rating agency may hold important information on a specific case. Also firms which have provided services to the credit rating agency may fall under this group of persons. The undertakings using the credit ratings do not fall under this group of persons. If ESMA requests such information by simple request, the person from whom this information is requested is not obliged to provide the information but in case of a voluntary reply to the request the information provided should not be incorrect or misleading ;
- (12) In order to effectively exercise its supervisory powers, ESMA should have the right to conduct investigations and on-site inspections. (...)
- (13) Competent authorities should assist and cooperate with ESMA. ESMA and the competent authorities shall also cooperate closely with the sectoral competent authorities responsible for supervision of the undertakings referred to in Article 4(1). ESMA should be able to delegate specific supervisory tasks to the competent authority of a Member State, for instance where a supervisory task requires knowledge and experience with respect to local conditions, which are more easily available at national level. Possible tasks that may be delegated include the carrying out of specific investigatory tasks and on-site inspections.

Prior to the delegation of tasks, ESMA shall consult the relevant competent authority about the detailed conditions relating to such delegation of tasks, including the scope of the task to be delegated, the timetable to perform the task, and the transmission of necessary information by and to ESMA. ESMA shall compensate the competent authorities for carrying out a delegated task according to the regulation on fees issued by the Commission by means of a delegated act.

- (14) It is necessary to ensure that competent authorities are able to request that ESMA examine whether the conditions for withdrawal of a credit rating agency's registration are met and to request that ESMA suspend the use of ratings where a credit rating agency is considered to be in a serious and persistent breach of Regulation (EC) No 1060/2009. ESMA should assess such requests and take any appropriate measure.
- (15) ESMA should be able to impose periodic penalty payments. The purpose of those periodic penalty payments should be to compel credit agencies to put an end to an infringement established by ESMA, to supply complete information requested by ESMA or to submit to an investigation or on-site inspection. Moreover, for deterrence purposes and to compel compliance with Regulation (EC) No 1060/2009, ESMA should also be able to impose fines on credit rating agencies, where it finds that they have committed, intentionally or negligently, an infringement to provisions of Regulation (EC) No 1060/2009. In order to fix the amount of these fines, ESMA should use a two-step methodology. First of all, ESMA should set a basic amount of the fine which should be included between limits according to the seriousness of the infringement, and taking into account the economic capacity of the credit rating agency concerned. After having set the basic amount of the fine, ESMA should increase or decrease it by applying some adjustments' coefficients according to the circumstances wherein the infringement has been committed and provided in Annex IV of this Regulation. Before taking a decision to impose fines or periodic penalty payment, ESMA should give the persons which are subject to proceedings an opportunity of being heard in order to respect their rights of defence.

Member States should remain competent for laying down and implementing the rules on penalties applicable to the infringement of the obligation of financial institutions and other entities to use, for regulatory purposes, only credit ratings issued by credit rating agencies registered in accordance with Regulation (EC) No 1060/2009. **This Regulation should not create a precedent for the imposition of financial or non-financial sanctions or penalties by the ESAs on financial market participants or other undertakings in relation to other types of activity.**

(15a) ESMA should refrain from imposing fines or periodic penalty payments where a prior acquittal or conviction arising from identical fact or facts which are substantially the same has already acquired the force of res judicata as the result of criminal proceedings under national law.

(15b) Fines and periodic penalty payments imposed by ESMA should be enforceable and the enforcement should be governed by the rules of civil procedure which are in force in the State in the territory of which it is carried out. By rules of civil procedures should be meant rules of procedure which are not criminal procedure rules, what means that rules of civil procedure could include rules of administrative procedure.

(16) In case of an infringement committed by a credit rating agency, ESMA should be empowered to take a range of supervisory measures, including, but not limited to, requiring the credit rating agency to bring the infringement to an end, suspending the use of ratings, for regulatory purposes, temporarily prohibiting the credit rating agency from issuing ratings and, as a last resort, withdrawing the registration when the credit rating agency has seriously or repeatedly infringed the provisions of Regulation (EC) No 1060/2009. The supervisory measures should be applied by ESMA taking into account the nature and seriousness of the infringement and should respect the principle of proportionality. Before taking a decision on supervisory measures, ESMA should give the persons which are subject to proceedings an opportunity of being heard in order to respect their rights of defence.

- (16a) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, and by the constitutional traditions **in the** Member States. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles, including the ones relating to freedom of the press and freedom of expression in the media, and the right to interpretation and translation for those who do not speak or understand the language of the proceedings as part of the general right to a fair trial.
- (17) For reasons of legal certainty, it is appropriate to establish clear transitional measures for the transmission of files and working documents from the competent authorities of the Member States to ESMA.
- (18) The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty in respect of the amendment and further specification of the criteria for assessing the equivalence of the regulatory and supervisory framework of a third country in order to take into account the developments on financial markets, the adoption of a regulation on fees, detailed rules concerning fines and periodic penalty payments and the amendment of the annexes. It is of particular importance that the Commission carries out appropriate consultations during its preparatory work, including at experts' level.
- (19) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data⁶ applies to the processing of personal data carried out in application of this Regulation by Member States and operators to which this Regulation applies.

⁶ OJ L 281, 23.11.1995, p. 31.

- (20) The protection of individuals with regard to the processing of personal data is governed by Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data⁷, which is fully applicable to the processing of personal data for the purposes of this Regulation carried out by Union bodies and agencies.
- (21) Since the objectives of this Regulation, i.e. setting up an efficient and effective supervisory framework for credit rating agencies by entrusting one single supervisory authority with the supervision of rating activities in the Union, providing a single point of contact for credit rating agencies and ensuring the consistent application of the rules for credit rating agencies, cannot be sufficiently achieved at the Member State level and can therefore, by reason of the pan-European structure and impact of the credit rating activities to be supervised, be better achieved at the Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (22) Supervision of credit rating agencies by ESMA should only start once ESMA has been established. Therefore the applicability of this Regulation should be deferred until Regulation (EU) No .../...[establishing ESMA] has entered into force.
- (23) Regulation (EC) No 1060/2009 on credit rating agencies should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

⁷ OJ L 8, 12.1.2001, p. 1.

Article 1
Amendments to Regulation (EC) No 1060/2009

Regulation (EC) No 1060/2009 is hereby amended as follows:

- (0) In Article 3 the following points are added:
- "(p) "issuer" means the legal entity defined in Article 2(1) h of Directive 2003/71/EC
 - (q) "competent authorities" means the authorities designated by each Member State for the purpose of this Regulation as provided for in Article 22
 - (r) "sectoral legislation" means the legal acts of the Union referred to in the first subparagraph of Article 4(1);
 - (s) "sectoral competent authorities" means the national competent authorities designated under the relevant sectoral legislation for the supervision of credit institutions, investment firms, insurance undertakings, assurance undertakings, reinsurance undertakings, undertakings for collective investment in transferable securities (UCITS), institutions for occupational retirement provision [and alternative investment funds,]

(1) Article 4 is amended as follows:

(a) in paragraph 1, the first subparagraph is replaced by the following:

"1. Credit institutions as defined in Directive 2006/48/EC, investment firms as defined in Directive 2004/39/EC, insurance undertakings subject to the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the take-up and pursuit of the business of direct insurance other than life assurance^{*}, assurance undertakings as defined in Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance^{**}, reinsurance undertakings as defined in Directive 2005/68/EC of the European Parliament and the Council of 16 November 2005 on reinsurance^{***}, undertakings for collective investment in transferable securities (UCITS) as defined in Directive 2009/65/EC of the European Parliament and the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)^{****}, institutions for occupational retirement provision as defined in Directive 2003/41/EC and [alternative investment funds as defined in Directive 2010/.../EU of the European Parliament and the Council of ... on ...^{*****}] may use credit ratings for regulatory purposes only if they are issued by credit rating agencies established in the Union and registered in accordance with this Regulation.

* OJ L 228, 16.8.1973, p. 3.

** OJ L 345, 19.12.2002, p. 1.

*** OJ L 323, 9.12.2005, p. 1.

**** OJ L 302, 17.11.2009, p. 32.

***** OJ L ..., ..., p.";

(b) paragraph 3 is amended as follows:

(i) points (b), (c) and (d) are replaced by the following:

- "(b) the credit rating agency has verified and is able to demonstrate on an ongoing basis to the European Securities and Markets Authority (hereinafter referred to as "ESMA"), established by Regulation (EU) No .../... of the European-Parliament and of the Council of ... on ...^{*}, that the conduct of credit rating activities by the third-country credit rating agency resulting in the issuing of the credit rating to be endorsed fulfils requirements which are at least as stringent as the requirements set out in Articles 6 to 12;
- (c) the ability of ESMA to assess and monitor the compliance of the credit rating agency established in the third country with the requirements referred to in point (b) is not limited;
- (d) the credit rating agency makes available on request to ESMA all the information necessary to enable ESMA to supervise on an ongoing basis the compliance with the requirements of this Regulation;"

(ii) point (h) is replaced by the following:

"(h) there is an appropriate cooperation arrangement between ESMA and the relevant competent authority of the credit rating agency established in a third country. ESMA shall ensure that such a cooperation arrangement shall specify at least:

(i) the mechanism for the exchange of information between ESMA and the relevant competent authority of the credit rating agency established in a third country; and

(ii) the procedures concerning the coordination of supervisory activities in order to enable ESMA to monitor credit rating activities resulting in the issuing of the endorsed credit rating on an ongoing basis.

* OJ L ..., ..., p.".

(2) Article 5 is amended as follows:

(a) paragraph 2 is replaced by the following:

"2. The credit rating agency referred to in paragraph 1 may apply for certification. The application shall be submitted to ESMA in accordance with the relevant provisions of Article 15.";

(b) in paragraph 3, the first subparagraph is replaced by the following:

"3. ESMA shall examine and decide on the application for certification in accordance with the procedure set out in Article 16. The certification decision shall be based on the criteria set out in points (a) to (d) of paragraph 1 of this Article.";

(c) paragraph 4 is replaced by the following:

"4. The credit rating agency referred to in paragraph 1 may also apply to be exempted:

- (a) on a case-by-case basis from complying with some or all of the requirements set out in Section A of Annex I and Article 7(4) if the credit rating agency is able to demonstrate that the requirements are not proportionate in view of the nature, scale and complexity of its business and the nature and range of its issuing of credit ratings;
- (b) from the requirement of physical presence in the Union where such a requirement would be too burdensome and disproportionate in view of the nature, scale and complexity of its business and the nature and range of its issuing of credit ratings.

An application for such exemptions shall be submitted by the credit rating agency jointly with the application for certification. When assessing the application for exemptions, ESMA shall take into consideration the size of the applicant credit rating agency referred to in paragraph 1, having regard to the nature, scale and complexity of its business and the nature and range of its issuing of credit ratings, as well as the impact of the credit ratings issued by the credit rating agency on the financial stability and integrity of the financial markets of one or more Member States.

On the basis of those considerations, ESMA may grant such exemptions to the credit rating agency referred to in paragraph 1.";

- (d) paragraph 5 is deleted;
- (e) in paragraph 6, the third subparagraph is replaced by the following:

"In order to take account of developments on financial markets, the Commission shall adopt, by means of delegated acts in accordance with Article 38a, and subject to the conditions of Articles 38b and 38c, measures to further specify or amend the criteria set out in points (a), (b) and (c) of the second subparagraph of this Article."

- (f) paragraphs 7 and 8 are replaced by the following:

"7. ESMA shall establish cooperation agreements with the relevant competent authorities of third countries whose legal and supervisory frameworks have been considered equivalent to this Regulation in accordance with paragraph 6. Such arrangements shall specify at least:

- (a) the mechanism for the exchange of information between ESMA and the relevant competent authorities of the third countries concerned;
and
- (b) the procedures concerning the coordination of supervisory activities.

8. Articles 20 and 24 shall apply *mutatis mutandis* to certified credit rating agencies and to credit ratings issued by them."

(3) Article 6(3) is amended as follows:

(a) in the first subparagraph, the introductory part is replaced by the following:

"3. At the request of a credit rating agency, ESMA may exempt a credit rating agency from complying with the requirements of points 2, 5 and 6 of Section A of Annex I and Article 7(4) if the credit rating agency is able to demonstrate that those requirements are not proportionate in view of the nature, scale and complexity of its business and the nature and range of issue of credit ratings and that:";

(b) the second subparagraph is replaced by the following:

"In the case of a group of credit rating agencies, ESMA shall ensure that at least one of the credit rating agencies in the group is not exempted from complying with the requirements of points 2, 5 and 6 of Section A of Annex I and Article 7(4)."

(4) **[deleted]**

(5) Article 9 is replaced by the following:

"Article 9
Outsourcing

Outsourcing of important operational functions shall not be undertaken in such a way as to impair materially the quality of the credit rating agency's internal control and the ability of ESMA to supervise the credit rating agency's compliance with obligations under this Regulation."

(6) Article 10(6) is replaced by the following:

"6. A credit rating agency shall not use the name of ESMA or any competent authority in such a way that would indicate or suggest endorsement or approval by that authority of the credit ratings or any credit rating activities of the credit rating agency."

(7) In Article 11, paragraphs 2 and 3 are replaced by the following:

"2. A credit rating agency shall make available in a central repository established by ESMA information on its historical performance data including the ratings transition frequency and information about credit ratings issued in the past and on their changes. A credit rating agency shall provide information to that repository on a standard form as provided for by ESMA. ESMA shall make that information accessible to the public and shall publish summary information on the main developments observed on an annual basis.

3. A credit rating agency shall provide annually, by 31 March, to ESMA information relating to matters set out in point 2 of Part II of Section E of Annex I."

(8) Article 14 is amended as follows:

(a) paragraph 2 is replaced by the following:

"2. The registration shall be effective for the entire territory of the Union once the registration decision adopted by ESMA as referred to in Article 16(3) or Article 17(3) has taken effect.";

(b) in paragraph 3, the second subparagraph is replaced by the following:

"A credit rating agency shall, without undue delay, notify ESMA of any material changes to the conditions for initial registration, including any opening or closing of a branch within the Union.";

(c) paragraphs 4 and 5 are replaced by the following:

"4. Without prejudice to Articles 16 or 17, ESMA shall register the credit rating agency if it concludes from the examination of the application that the credit rating agency complies with the conditions for the issuing of credit ratings set out in this Regulation, taking into consideration Articles 4 and 6."

5. ESMA shall not impose requirements regarding registration, which are not provided for in this Regulation."

(9) Articles 15 to 20 are replaced by the following:

"Article 15

Application for registration

1. The credit rating agency shall submit an application for registration to ESMA. The application shall contain information on the matters set out in Annex II.
2. Where a group of credit rating agencies applies for registration, the members of the group shall mandate one of their number to submit all the applications to ESMA on behalf of the group. The mandated credit rating agency shall provide the information on the matters set out in Annex II for each member of the group.
3. A credit rating agency shall submit its application in any of the official languages of the institutions of the Union. The provisions of Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community⁸ shall apply *mutatis mutandis* to any other communication between ESMA and the credit rating agencies and their staff.
4. Within twenty working days of receipt of the application, ESMA shall assess whether the application is complete. If the application is not complete, ESMA shall set a deadline by which the credit rating agency is to provide additional information.

After assessing an application as complete, ESMA shall notify the credit rating agency accordingly.

⁸ OJ 17, 6.10.1958, p.385

Article 16

Examination of the application for registration of a credit rating agency by ESMA

1. ESMA shall within 45 working days of the notification referred to in the second subparagraph of Article 15(4) examine the application for registration of a credit rating agency based on the compliance of the credit rating agency with the conditions set out in this Regulation.
2. ESMA may extend the period of examination by fifteen working days, in particular if the credit rating agency:
 - (a) envisages endorsing credit ratings as referred to in Article 4(3);
 - (b) envisages using outsourcing; or
 - (c) requests exemption from compliance in accordance with Article 6(3).
3. Within 45 working days of the notification referred to in the second subparagraph of Article 15(4), or within 60 working days thereof where paragraph 2 of this Article applies, ESMA shall adopt a fully reasoned registration or refusal decision.
4. The decision adopted by ESMA pursuant to paragraph 3 shall take effect on the fifth working day following its adoption.

Article 17

Examination of the applications for registration of a group of credit rating agencies by ESMA

1. ESMA shall within 55 working days of the notification referred to in the second subparagraph of Article 15(4) examine the applications for registration of a group of credit rating agencies based on the compliance of those credit rating agencies with the conditions set out in this Regulation.

2. ESMA may extend the period of examination by fifteen working days, in particular if any of credit rating agencies in the group:
 - (a) envisages endorsing credit ratings as referred to in Article 4(3);
 - (b) envisages using outsourcing; or
 - (c) requests exemption from compliance in accordance with Article 6(3).
3. Within 55 working days of the notification as referred to in the second subparagraph of Article 15(4), or within 70 working days thereof where paragraph 2 of this Article applies, ESMA shall adopt fully reasoned individual registration or refusal decisions for each credit rating agency of the group.
4. The decisions adopted by ESMA pursuant to paragraph 3 shall take effect on the fifth working day following their adoption.

Article 18

Notification of a decision of registration, refusal of registration or withdrawal of registration and publication of the list of registered credit rating agencies

1. Within five working days of the adoption of a decision under Articles 16, 17 or 20 ESMA shall notify its decision to the credit rating agency concerned. Where ESMA refuses to register the credit rating agency or withdraws the registration of the credit rating agency, it shall provide full reasons in its decision.
2. ESMA shall communicate to the Commission, EBA, EIOPA, the competent authorities and the sectoral competent authorities of the Member States, any decision under Articles 16, 17 or 20.

3. ESMA shall publish on its website a list of credit rating agencies registered in accordance with this Regulation. That list shall be updated within five working days of the adoption of a decision under Articles 16, 17 or 20.

Article 19

Registration and supervisory fees

1. ESMA shall charge fees to the credit rating agencies in accordance with this Regulation and the regulation on fees referred to in paragraph 2. Those fees shall fully cover ESMA's expenditure necessary for the registration and supervision of credit rating agencies and for reimbursing any costs that the competent authorities may incur carrying out work under this Regulation, in particular as a result of a delegation of tasks according to Article 30.
2. The Commission shall adopt a regulation on fees. That regulation shall determine in particular the type of fees and the matters for which fees are due, the amount of the fees, the way in which they are to be paid and the way in which ESMA shall reimburse competent authorities in respect of any costs they may incur carrying out work under this Regulation, in particular as a result of a delegation of tasks according to Article 30.

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.

The regulation referred to in the first subparagraph shall be adopted by means of delegated acts in accordance with Article 38a and subject to the conditions of Articles 38b and 38c.

Article 20

Withdrawal of registration

1. ESMA shall withdraw the registration of a credit rating agency where the credit rating agency:
 - (a) expressly renounces the registration or has provided no credit ratings for the preceding six months;
 - (b) has obtained the registration by making false statements or by any other irregular means;
 - (c) no longer meets the conditions under which it was registered.
 - d) [deleted]
2. The competent authority of a Member State in which credit ratings issued by the credit rating agency concerned are used and which considers that one of the conditions referred to in paragraph 1 has been met may request that ESMA examine whether the conditions for the withdrawal of the registration of the credit rating agency concerned are met. If ESMA decides not to withdraw the registration of the credit rating agency concerned, it shall provide full reasons.
3. The decision on the withdrawal of registration shall take immediate effect throughout the Union, subject to the transitional period for the use of credit ratings referred to in Article 24(3)."

- (10) The heading of Chapter II of Title III "CESR and competent authorities" is replaced by the heading "Supervision by ESMA ".

(11) Article 21 is replaced by the following:

"Article 21

European Securities and Markets Authority

1. Without prejudice to Article 25a, ESMA shall ensure that the provisions of this Regulation are applied.
2. In accordance with Article 8 of Regulation xxxx/2010 establishing the European Securities and Markets Authority (ESMA), ESMA shall issue and update guidelines on:
 - (a) [deleted]
 - (b) **the application of the endorsement regime under Article 4(3);**
 - (c) the cooperation between ESMA, the competent authorities and the sectoral competent authorities for the purposes of this Regulation and for those of the relevant sectoral legislation, including the procedures and detailed conditions relating to the delegation of tasks.
 - (ca) the range and type of products which may be considered to be structured finance products for the purposes of this Regulation. ESMA shall issue its guidelines on these matters jointly with EBA in accordance with Article ... of Regulation (EU) No .../... [EBA]. The first set of guidelines shall be issued no later than 6 months after this Regulation enters into force.

3. By five months after the entry into force of this Regulation ESMA shall submit draft **regulatory** technical standards for endorsement by the Commission in accordance with Article 7 of Regulation (EU) No .../... [ESMA] on:
- (a) the information to be provided by a credit rating agency in its application for registration as set out in Annex II;
 - (b) information that the credit rating agency must provide for the application for certification and for the assessment of its systemic importance to the financial stability or integrity of financial markets referred to in Article 5;
 - (ba) **deleted**
 - (c) the presentation of the information, including structure, format, method and period of reporting, that credit rating agencies shall disclose in accordance with Article 11(2) and point 1 of Part II of Section E of Annex I.
 - (d) **deleted**
 - (e) the assessment of compliance of credit rating methodologies with the requirements set out in Article 8(3);
 - (f) the content and format of ratings data periodical reporting to be requested from the credit rating agencies for the on-going supervision by ESMA.

4. ESMA shall publish, annually and for the first time by 1 January 2012, a report on the application of this Regulation. That report shall contain, in particular, an assessment of the implementation of Annex I by the credit rating agencies registered under this Regulation.
5. ESMA shall cooperate with the European Banking Authority established by Regulation (EU) No .../... of the European Parliament and of the Council of ... on ...* and the European Insurance and Occupational Pensions Authority established by Regulation (EU) No .../... of the European Parliament and of the Council of ... on ...** in performing its tasks and shall consult those Authorities before issuing and updating guidelines and submitting draft technical standards referred to in paragraphs 2 and 3.

* OJ L ..., ..., p.

** OJ L ..., ..., p.".

(12) Article 23 is replaced by the following:

"Article 23

Non-interference with content of ratings or methodologies

In carrying out their duties under this Regulation, the ESMA, the Commission or any public authorities of a Member State shall not interfere with the content of credit ratings or methodologies."

(13) The following Articles are inserted:

"Articles 23a0

Exercise of the powers referred to in Articles 23a to 23c

1. The powers conferred on ESMA or any official of ESMA, by Articles 23a to 23c
 - (a) may only be used to obtain information or documents which are necessary for the exercise of ESMA's functions under this Regulation;
 - (b) must in all circumstances be exercised in a manner which is reasonable and appropriate, including as regards the amount and nature of the information required, the person from whom it is required and the urgency with which it is required;
 - (c) may not be used to require the disclosure of information or documents which are subject to legal privilege;
 - (d) may not be used to force persons to admit that they have infringed the provisions of this Regulation.

2. The requests for information, general investigations, and on-site inspections referred to in Articles 23a, 23b and 23c shall be conducted in any one of the languages selected by the person concerned provided that this is an official language of the institutions of the Union in accordance with Regulation 1/1958.

Article 23a

Requests for information

1. ESMA may by simple request or by decision require credit rating agencies, persons involved in credit rating activities, rated entities and related third parties, third parties to whom the credit rating agencies have outsourced operational functions or activities and persons otherwise closely and substantially related or connected to credit rating agencies or credit rating activities to provide all information that is necessary in order to carry out its duties under this Regulation.
2. When sending a simple request for information under paragraph 1, ESMA shall:
 - (a) refer to this Article as the legal basis of the request;
 - (b) state the purpose of the request;
 - (c) specify what information is required;
 - (d) fix the time-limit within which the information is to be provided;
 - (da) inform the person from whom the information is requested that he is not obliged to provide the information but that in case of a voluntary reply to the request the information provided must not be incorrect or misleading;

- (e) indicate the fine provided for in Article 36a in conjunction with Annex III, Section II, g) where the answers to questions asked are incorrect or misleading.
3. When requiring to supply information under paragraph 1 by decision, ESMA shall:
- (a) refer to this Article as the legal basis of the request;
 - (b) state the purpose of the request;
 - (c) specify what information is required;
 - (d) fix the time-limit within which the information is to be provided;
 - (e) indicate the periodic penalty payments provided for in Article 36b where the production of the required information is incomplete;
 - (ea) indicate the fine provided for in Article 36a in conjunction with Annex III, Section II;
 - (g) where the answers to questions asked are incorrect or misleading; and :
 - (f) indicate the right to appeal the decision before ESMA's Board of appeal in accordance with Article of Regulation xxxx/2010 establishing the European Securities and Markets Authority (ESMA) and to have the decision reviewed by the Court of Justice.

3. The persons referred to in paragraph 1 or their representatives and, in the case of legal persons or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested on behalf of the persons concerned. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.
4. ESMA shall without delay forward a copy of the simple request or of its decision to the competent authority of the Member State in whose territory the person referred to in paragraph 1 concerned by the request for information is situated.

Article 23b

General investigations

1. In order to carry out its duties under this Regulation, ESMA may conduct all necessary investigations of persons referred to in Article 23a (1). To that end, the officials and other persons authorised by ESMA shall be empowered to:
 - (a) examine any records, data, procedures and any other material relevant to the execution of its tasks irrespective of the medium on which they are stored;
 - (b) take or obtain certified copies of or extracts from such records, data, procedures and other material;
 - (c) summon and ask any person referred to in Article 23a (1) or their representatives or members of their staff for oral or written explanations on facts or documents related to the subject matter and purpose of the inspection and to record the answers;

- (d) interview any other natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation. ;
 - (e) require records of telephone and data traffic;
 - (f) [deleted].
2. The officials and other persons authorised by ESMA for the purpose of the investigations referred to in paragraph 1 shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the investigation. That authorisation shall also indicate the periodic penalty payments provided for in Article 36b where the production of the required records, data, procedures or any other material, or the answers to questions asked to persons referred to in Article 23a (1) are not provided or incomplete, and the fines provided for in Article 36a in conjunction with Annex III, Section II, h), where the answers to questions asked to persons referred to in Article 23a (1) are incorrect or misleading.
- 2a. The persons referred to in Article 23a (1) are required to submit to investigations launched by decision of ESMA. The decision shall specify the subject matter and purpose of the investigation, the periodic penalty payments provided for in Article 36b, the legal remedies available under ESMA Regulation as well as the right to have the decision reviewed by the Court of Justice.
3. In good time before the investigation, ESMA shall inform the competent authority of the Member State in whose territory the investigation is to be carried out of the investigation and of the identity of the authorised persons. Officials of the competent authority of the Member State concerned shall, at the request of ESMA assist those authorised persons in carrying out their duties. Officials of the competent authority of the Member State concerned may also attend the investigations on request.

4. If the requirement for records of telephone and data traffic provided for in paragraph 1 (e) requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

5. Where authorisation as referred to in paragraph 4 is applied for, the national judicial authority shall control that the ESMA decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the investigations. In its control of the proportionality of the coercive measures, the national judicial authority may ask ESMA for detailed explanations. Such a request for detailed explanations may in particular relate to the grounds ESMA has for suspecting that an infringement of this Regulation has taken place, as well as to the seriousness of the suspected infringement and the nature of the involvement of the person who is subjected to the coercive measures. However, the national judicial authority may not call into question the necessity for the investigation as such nor demand that it be provided with the information in ESMA's file. The lawfulness of ESMA's decision shall be subject to review only by the Court of Justice following the procedure set out in Regulation (EU) No XX/2010 [ESMA].

Article 23c

On-site inspections

1. In order to carry out its duties under this Regulation, ESMA may conduct all necessary on-site inspections at the business premises of the legal persons referred to in Article 23a(1). When the proper conduct and efficiency of the inspections so requires, ESMA may carry out the on-site inspection without prior announcement.

2. The officials and other persons authorised by ESMA to conduct an on-site inspection may enter any business premises and land of the legal persons subject to an investigation decision adopted by ESMA and shall have all the powers stipulated in Article 23b(1). They shall also have the power to seal any business premises and books or records for the period and to the extent necessary for the inspection.
3. The officials and other persons authorised by ESMA to conduct an on-site inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection, and the periodic penalty payments provided for in Article 36b where the persons concerned do not submit to the inspection, In good time before the inspection, ESMA shall give notice of the inspection to the competent authority of the Member State in whose territory it is to be conducted.
4. The persons referred to in Article 23a(1) are required to submit to on-site inspections ordered by decision of ESMA. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the periodic penalty payments provided for in Article 36b, the legal remedies available under ESMA Regulation as well as the right to have the decision reviewed by the Court of Justice. The ESMA shall take such decisions after consulting the competent authority of the Member State in whose territory the inspection is to be conducted.
5. Officials of, as well as those authorised or appointed by, the competent authority of the Member State in whose territory the inspection is to be conducted shall, at the request of ESMA, actively assist the officials and other persons authorised by ESMA. To this end, they shall enjoy the powers set out in paragraph 2. Officials of the competent authority of the Member State concerned may also attend the on-site inspections on request.

6. ESMA may also require competent authorities of the Member States to carry out specific investigatory tasks and on-site inspections as provided for in this Article and in Article 23b(1) on its behalf. To this end, competent authorities shall enjoy the same powers as ESMA as set out in this Article and in Article 23b(1).
7. Where the officials and other accompanying persons authorised by ESMA find that a person opposes an inspection ordered pursuant to this Article, the competent authority of the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their on-site inspection.
8. If the on-site inspection provided for in paragraph 1 or if the assistance provided for in paragraph 7 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure

9. Where authorisation as referred to in paragraph 8 is applied for, the national judicial authority shall control that the ESMA decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask ESMA for detailed explanations. Such a request for detailed explanations may in particular relate to the grounds ESMA has for suspecting that an infringement of this Regulation has taken place, as well as to the seriousness of the suspected infringement and the nature of the involvement of the person who is subjected to the coercive measures. However, the national judicial authority may not call into question the necessity for the inspection as such nor demand that it be provided with the information in ESMA's file. The lawfulness of ESMA's decision shall be subject to review only by the Court of Justice following the procedure set out in Regulation (EU) No XX/2010 [ESMA]

Article 23d

Procedural rules for taking supervisory measures and imposing fines

1. Where, in carrying out its duties under this Regulation, ESMA finds that there are serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in Annex III, ESMA shall appoint an independent investigation officer within ESMA to investigate the matter. The appointed officer shall not be involved in the direct supervision of the credit rating agencies and shall perform his functions independently from the Board of Supervisors
2. The investigation officer shall investigate the alleged infringements, taking into account any comments submitted by the persons who are subject to the investigations, and shall submit a complete file with his findings to the Board of Supervisors.

In order to carry out his tasks, the investigation officer may exercise the power to request information in accordance with Article 23a and to conduct investigations and on-site inspections in accordance with Articles 23b and 23c. When using these powers, the investigation officer shall comply with Article 23a0.

Where carrying out his tasks, the investigation officer shall have access to all documents and information gathered by ESMA in its supervisory activities.

3. Upon completion of his investigation and before submitting the file with his findings to the Board of Supervisors, the investigation officer shall give the persons who are subject to the investigations the opportunity of being heard on the matters being investigated. The investigation officer shall base his findings only on facts on which the persons concerned have been able to comment.

The rights of defence of the persons concerned shall be fully respected during the investigations.

4. When submitting the file with his findings to the Board of Supervisors, the investigation officer shall notify this fact to the persons who are subject to the investigations. The persons subject to the investigations shall be entitled to have access to the file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information affecting third parties.
5. On the basis of the file containing the investigation officer's findings and, when requested by the persons concerned, after having heard the persons subject to the investigations in accordance with Article 25 and 36c, the Board of Supervisors shall decide if one or more of the infringements listed in Annex III has been committed by the persons who have been subject to the investigations, and in such case, shall take a supervisory measure in accordance with Article 24 and impose a fine in accordance with Article 36a.
6. The investigation officer shall not participate in the deliberations of the Board of Supervisors or in any other way intervene in the decision-making process of the Board of Supervisors.
7. The Commission shall adopt **further** rules of procedure for exercising the power to impose fines or periodic penalty payments, including provisions on rights of defence, (...)temporal provisions, **and** the (...)collection of fines or periodic penalty payments, and **shall adopt detailed rules on** the limitation periods for the imposition and enforcement of penalties.

The rules referred to in the first subparagraph shall be adopted by means of delegated acts in accordance with Article 38a and subject to the conditions of Articles 38b and 38c.

8. **ESMA shall refer matters for criminal prosecution to the relevant national authorities where, in carrying out its duties under this Regulation, it finds that there are serious indications of the possible existence of facts liable to constitute criminal offences. In addition, ESMA shall refrain from imposing fines or periodic penalty payments where a prior acquittal or conviction arising from identical fact or facts which are substantially the same has already acquired the force of *res judicata* as the result of criminal proceedings under national law.**

- (14) Articles 24 and 25 are replaced by the following:

"Article 24

Supervisory measures by ESMA

1. Where in accordance with Article 23d, paragraph 5, ESMA's Board of Supervisors finds that a credit rating agency has committed one of the infringements listed in Annex III, it shall take one or more of the following decisions:
 - (a) withdraw the registration of the credit rating agency ;
 - (b) temporarily prohibit the credit rating agency from issuing credit ratings with effect throughout the Union, until the infringement has been brought to an end;
 - (c) suspend the use, for regulatory purposes, of the credit ratings issued by the credit rating agency with effect throughout the Union, until the infringement has been brought to an end;

- (d) require the credit rating agency to bring the infringement to an end;
- (e) [deleted]
- (f) issue public notices.

[deleted]

2. When taking the decisions referred to in paragraph 1, ESMA's Board of Supervisors shall take into account the nature and seriousness of the infringement, having regard to the following criteria:
 - (i) the duration and frequency of the infringement;
 - (ii) whether the infringement has revealed serious or systemic weaknesses in the undertaking's procedures or of the management systems or internal controls;
 - (iii) whether financial crime was facilitated, occasioned or otherwise attributable to the infringement;
 - (iv) [deleted]
 - (v) whether the infringement has been committed intentionally or negligently.
- 2a. Before taking the decisions referred to in points (a) to (c) of paragraph 1, ESMA's Board of Supervisors shall inform EBA and EIOPA thereof.

3. Credit ratings may continue to be used for regulatory purposes following the adoption of the decisions referred to in points (a) and (c) of paragraph 1 during a period not exceeding:
 - (a) ten working days from the date ESMA's decision is made public under Article 24 (4) if there are credit ratings of the same financial instrument or entity issued by other credit rating agencies registered under this Regulation; or
 - (b) three months from the date ESMA's decision is made public under Article 24 (4) if there are no credit ratings of the same financial instrument or entity issued by other credit rating agencies registered under this Regulation.

ESMA's Board of Supervisors may extend, including following a request by EBA or EIOPA, the period referred to in point (b) of the first subparagraph by three months in exceptional circumstances relating to the potential for market disruption or financial instability.

4. Without undue delay, ESMA's Board of Supervisors shall notify any decision adopted pursuant to paragraph 1, to the credit rating agency concerned, and shall communicate it to the competent authorities and the sectoral competent authorities of the Member States, the Commission, EBA and EIOPA. It shall publicly disclose any such decision on its website within **10** working days from the date when it was adopted.

When publicly disclosing its decision as referred to in the first subparagraph, ESMA's Board of Supervisors shall also publicly disclose the right for the credit rating agency concerned to appeal the decision, as well as, where relevant, the fact that such an appeal has been lodged, specifying that such an appeal does not have suspensive effect, as well as the possibility for the Board of Appeal to suspend the application of the contested decision according to 46, (3) of Regulation xxxx/2010 establishing the European Securities and Markets Authority (ESMA) ...

Article 25

Hearing of the persons concerned

1. Before taking any decision provided for in Article 24(1), ESMA's Board of Supervisors shall give the persons which are the subject of the proceedings the opportunity of being heard on the matters to which ESMA has taken objection. ESMA's Board of Supervisors shall base its decisions only on objections on which the parties concerned have been able to comment.

The obligation referred to in the first subparagraph does not apply if urgent action is needed in order to prevent significant and imminent damage to the financial system. In such a case ESMA's Board of Supervisors may adopt an interim decision and shall give the persons concerned the opportunity of being heard as soon as possible after having taken its decision.

2. The rights of defence of the persons concerned shall be fully respected in the proceedings. They shall be entitled to have access to ESMA's file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information."

(15) [moved to 16a].

(16) The following Article is inserted:

"Article 25a

Sectoral competent authorities responsible for the supervision and enforcement of Article 4(1)

(the use of credit ratings)

1. The sectoral competent authorities shall be responsible for the supervision and enforcement of Article 4(1) according to the relevant sectoral legislation.
2. [deleted]
3. [deleted]

(16a) The heading of Chapter III of Title III "Cooperation between competent authorities" is replaced by the heading "Cooperation between ESMA, competent authorities and sectoral competent authorities".

(17) Articles 26 and 27 are replaced by the following:

"Article 26

Obligation to cooperate

1. ESMA, the competent authorities and the sectoral competent authorities shall cooperate where it is necessary for the purposes of this Regulation and for those of the relevant sectoral legislation.

Article 27

Exchange of information

1. ESMA the competent authorities, and the sectoral competent authorities shall, without undue delay, supply each other with the information required for the purposes of carrying out their duties under this Regulation and under the relevant sectoral legislation.
2. ESMA may transmit to the central banks, the European System of Central Banks and the European Central Bank, in their capacity as monetary authorities, the European Systemic Risk Board and, where appropriate, to other public authorities responsible for overseeing payment and settlement systems, confidential information intended for the performance of their tasks. Similarly, such authorities or bodies shall not be prevented from communicating to ESMA information that ESMA may need in order to carry out its duties under this Regulation."

(18) Articles 28 and 29 are deleted.

(19) Articles 30, 31 and 32 are replaced by the following:

"Article 30

Delegation of tasks from ESMA to competent authorities

1. Where it is necessary for the proper performance of a supervisory task, ESMA may delegate specified supervisory tasks to the competent authority of a Member State in accordance with the guidelines issued by ESMA pursuant to Article 21 (2) a). Those supervisory tasks delegated may in particular include the power to carry out information requests in accordance with Article 23a and to conduct investigations and on-site inspections in accordance with Article 23c(6). (...)
2. ESMA shall consult the relevant competent authority prior to the delegation of a task. Such consultation shall concern:
 - a) the scope of the task to be delegated;
 - b) the timetable to perform the task, and
 - c) the transmission of necessary information by and to ESMA.
3. In accordance with the regulation on fees adopted by the Commission pursuant to Article 19 (2), ESMA shall reimburse a competent authority for costs incurred as a result of carrying out delegated tasks.

3a. ESMA shall review the decision referred to in paragraph 1 at appropriate intervals.

4. Delegation of tasks shall not affect the responsibility of ESMA and shall not limit ESMA's ability to conduct and oversee the delegated activity.

Article 31

Notifications and suspension requests by competent authorities

1. Where a competent authority of a Member State is convinced that acts contrary to the provisions of this Regulation are being, or have been, carried out on the

territory of that Member State or on the territory of another Member State, it shall give notice of that fact in as specific manner as possible to ESMA. In case it believes this is appropriate for investigatory purposes, the competent authority of a Member State may also suggest to ESMA to assess the need to use the powers of Articles 23a and 23b towards the credit rating agency involved in these acts.

ESMA shall take appropriate action. It shall inform the notifying competent authority of the outcome and, as far as possible, of any significant interim developments.

2. Without prejudice to the duty to notify set out in paragraph 1, where the notifying competent authority of a Member State considers that a registered credit rating agency, whose credit ratings are used within the territory of that Member State, breaches the obligations arising from this Regulation and the infringements are sufficiently serious and persistent to have a significant impact on the protection of investors or on the stability of the financial system in that Member State, the notifying competent authority may request that ESMA suspend the use, for regulatory purposes, of credit ratings of the credit rating agency concerned by the financial institutions and other entities referred to in Article 4(1). The notifying competent authority shall provide ESMA with full reasons for its request.

Where ESMA considers that the request is not justified, it shall inform the notifying competent authority. Where ESMA considers that the request is justified, it shall take the appropriate measures to resolve the issue.

Article 32

Professional secrecy

1. The obligation of professional secrecy shall apply to ESMA, the competent authorities, and all persons who work or who have worked for ESMA, for the competent authorities or for any other person to whom ESMA has delegated tasks, including auditors and experts contracted by ESMA. Information covered by professional secrecy shall not be disclosed to another person or authority except where such disclosure is necessary for legal proceedings.
2. All the information that under this Regulation is acquired by, or exchanged between ESMA, the competent authorities, the sectoral competent authorities and other authorities and bodies referred to in Article 27(2) shall be considered confidential, except where ESMA or the competent authority or other authority or body concerned states at the time of communication that such information may be disclosed or where such disclosure is necessary for legal proceedings."

(20) Article 33 is deleted.

(21) Articles 34 and 35 are replaced by the following:

"Article 34

Agreement on exchange of information

ESMA may conclude cooperation agreements on exchange of information with the competent authorities of third countries only if the information disclosed is subject to guarantees of professional secrecy which are at least equivalent to those set out in Article 32.

Such exchange of information shall be intended for the performance of the tasks of those competent authorities.

With regard to transfer of personal data to a third country, ESMA shall apply Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data*.

Article 35

Disclosure of information from third countries

ESMA may disclose the information received from competent authorities of third countries only if ESMA or the competent authorities have obtained the express agreement of the competent authority that has transmitted the information and, where applicable, the information is disclosed only for the purposes for which that competent authority gave its agreement or where such disclosure is necessary for legal proceedings.

*OJ L 8, 12.1.2001, p. 1."

(22) The heading of Chapter 1 of Title IV "Penalties, committee procedure and reporting" is replaced by the heading "Penalties, fines, periodic penalty payments, committee procedure, delegated powers and reporting".

(23) In Article 36, the first and second paragraph is replaced by the following:

"Member States shall lay down the rules on penalties applicable to infringements of Article 4(1) shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.

Member States shall ensure that the sectoral competent authority disclose to the public every penalty that has been imposed for infringements of Article 4(1), unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved."

(24) The following Articles are inserted:

"Article 36a

Fines

1. Where in accordance with Article 23d, paragraph 5, ESMA's Board of Supervisors finds that a credit rating agency has committed, intentionally or negligently, one of the infringements listed in Annex III, it shall adopt a decision imposing a fine in accordance with paragraph 2.
2. The basic amounts of the fines referred to in paragraph 1 shall be included within the following limits:

- For the infringements referred to in Annex III, Section I, a, a1, a2, a3, a4, a10, a11, a12, a13, a14, a18, a19, c, h, h2, i, j, l, r, r2, w1, and x, the amounts of the fines shall be at least 500.000 EUR and shall not exceed 750.000 EUR ;
- For the infringements referred to in Annex III, Section I, a5, a6, a7, a15, a16, a17, a20, b, d1, d2, x3, g1, h1, h3, k, n, o, p, q, r1, r4, r5, r6, t, u, (...) and x1, the amounts of the fines shall be at least 300.000 EUR and shall not exceed 450.000 EUR ;
- For the infringements referred to in Annex III, Section I, a8, a9, d3, m, r3, and x2, the amounts of the fines shall be at least 100.000 EUR and shall not exceed 200.000 EUR ;
- For the infringements referred to in Annex III, Section II, a, f, g, and h, the amounts of the fines shall be at least 50.000 EUR and shall not exceed 150.000 EUR ;
- For the infringements referred to in Annex III, Section II, b, d, and e, the amounts of the fines shall be at least 25.000 EUR and shall not exceed 75.000 EUR ;
- For the infringements referred to in Annex III, Section II, c the amounts of the fines shall be at least 10.000 EUR and shall not exceed 50.000 EUR ;
- For the infringements referred to in Annex III, Section III, a, b, c, o, and p, the amounts of the fines shall be at least 150.000 EUR and shall not exceed 300.000 EUR ;
- For the infringements referred to in Annex III, Section III, d, (...) j, l, and n, the amounts of the fines shall be at least 90.000 EUR and shall not exceed 200.000 EUR ;

- For the infringements referred to in Annex III, Section III, i, k, m, and q, the amounts of the fines shall be at least 40.000 EUR and shall not exceed 100.000 EUR.

In order to decide whether the basic amount of the fines should be at the lower end or at the higher end of the limits set out in the first subparagraph, ESMA shall have regard to the seriousness of the infringement, and to the economic capacity of the credit rating agency concerned.

3. The basic amounts defined within the limits set out in paragraph 2 shall be adjusted by taking into account aggravating and mitigating circumstances in accordance with the adjustments' coefficients defined in Annex IV.
4. [deleted]
5. Notwithstanding paragraphs 2 and 3 , the amount of the fine shall not exceed 20% of the annual turnover of the credit rating agency concerned in the preceding business year and where the credit rating agency has directly or indirectly gained a financial benefit from the infringement, the amount of the fine shall be at least equal to that benefit.

In case facts committed by a credit rating agency constitute more than one infringement listed in Annex III, only the higher fine calculated in accordance with paragraphs 2 and 3 and related to one of these infringements shall apply.

Article 36b

Periodic penalty payments

1. ESMA's Board of Supervisors shall by decision impose periodic penalty payments in order to compel:

- (a) a credit rating agency to put an end to an infringement, in accordance with a decision taken pursuant to Article 24(1)(d);
 - (b) [deleted]
 - (c) a person referred to in Article 23a (1) to supply complete information which has been requested by a decision pursuant to Article 23a;
 - (d) a person referred to in Article 23a (1) to submit to an investigation and in particular to produce complete records, data, procedures or any other material required and to complete and correct other information provided in an investigation launched by decision taken pursuant to Article 23b;
 - (e) a person referred to in Article 23a (1) to submit to an on-site inspection ordered by a decision taken pursuant to Article 23c.
2. The periodic penalty payments shall be effective and proportionate.
- The amount of the periodic penalty payments shall be imposed for each day of delay.
3. Notwithstanding paragraph 2, the amount of the periodic penalty payments shall be at least 2% and shall not exceed 5% of the average daily turnover in the preceding business year or, in case of natural persons, 2% or 5% respectively of the average daily income in the preceding calendar year. They shall be calculated from the date stipulated in the decision imposing the periodic penalty payment.

In order to decide whether the amount of the periodic penalty payment should be at the lower end or at the higher end of the limits set out in the first subparagraph, ESMA shall have regard to the nature and the seriousness of the infringement, and concerning the periodic penalty payments imposed in accordance with paragraph 1, (b) to (e), whether the behaviour of the persons referred to in Article 23a (1) was, or not, intentional.

4. Periodic penalty payments may be imposed for a period of no more than six months following the notification of ESMA's decision.

Article 36c

Hearing of the persons concerned

1. Before taking any decision imposing a fine and/or periodic penalty payment as provided for in Articles 36a and 36b, paragraph 1, (a) to (e), ESMA's Board of Supervisors shall give the persons which are the subject of the proceedings the opportunity of being heard on the matters to which ESMA has taken objection. ESMA's Board of Supervisors shall base its decisions only on objections on which the persons concerned have been able to comment.
2. The rights of defence of the persons concerned shall be fully respected in the proceedings. They shall be entitled to have access to the ESMA's file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information.

Article 36d

Disclosure , nature , enforcement and allocation of fines and periodic penalty payments

1. ESMA shall disclose to the public every fine and periodic penalty payment that has been imposed pursuant to Articles 36a and 36b, unless such disclosure to the public would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.
2. Fines and periodic penalty payments imposed pursuant to Articles 36a and 36b shall be of an administrative nature.
3. Fines and periodic penalty payments imposed pursuant to Articles 36a and 36b shall be enforceable.

Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State shall designate for this purpose and shall make known to ESMA and to the Court of Justice of the European Union.

When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority.

Enforcement may be suspended only by a decision of the Court. However, the courts of the country concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner.

4. The amounts of the fines and periodic penalty payments shall be allocated to the general budget of the European Union

Article 36e

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction to review decisions whereby ESMA has imposed a fine or a periodic penalty payment. It may annul, reduce or increase the fine or periodic penalty payment imposed."

- (25) Articles 37 and 38 are replaced by the following:

"Article 37

Amendments to Annexes

In order to take account of developments, including international developments, on financial markets, in particular in relation to new financial instruments, the Commission may adopt, by means of delegated acts in accordance with Article 38a and subject to the conditions of Articles 38b and 38c, measures to amend the Annexes to this Directive, excluding Annex III.

Article 38

Committee procedure

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC*.
2. Where reference is made to this paragraph, Article 5 and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.
3. The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

* OJ L 191, 13.7.2001, p. 45."

(26) The following Articles are inserted:

“Article 38a

Exercise of the delegation

1. The powers to adopt the delegated acts referred to in the third subparagraph of Article 5(6), Article 19(2), **Article 23d (7)** and Article 37 shall be conferred on the Commission for an indeterminate period of time.
2. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

3. The powers to adopt delegated acts are conferred on the Commission subject to the conditions laid down in Articles 38b and 38c.

Article 38b

Revocation of the delegation

1. The delegation of powers referred to in the third subparagraph of Article 5(6), Article 19(2), Article 36a(4) and Article 37 may be revoked at any time by the European Parliament or by the Council.
2. The institution which has commenced an internal procedure for deciding whether to revoke the delegation of powers shall inform the other institution and the Commission at the latest one month before the final decision is taken, indicating the delegated powers which could be subject to revocation and the reasons for a revocation.
3. The decision of revocation shall put an end to the delegation of the powers specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the delegated acts already in force. It shall be published in the *Official Journal of the European Union*.

Article 38c

Objections to delegated acts

1. The European Parliament and the Council may object to a delegated act within a period of two months from the date of notification. At the initiative of the European Parliament or the Council that period shall be extended by one month.

2. If, on expiry of that period, neither the European Parliament nor the Council has objected to the delegated act the delegated act shall be published in the *Official Journal of the European Union* and enter into force at the date stated therein.

The delegated act may be published in the *Official Journal of the European Union* and enter into force before the expiry of that period if the European Parliament and the Council have both informed the Commission of their intention not to raise objections.

3. If the European Parliament or the Council objects to a delegated act, it shall not enter into force. The institution which objects shall state the reasons for objecting to the delegated act."

(27) Article 39 is amended as follows:

- (a) paragraph 2 is deleted;
- (b) paragraph 3 is replaced by the following:

"3. By 1 July 2011, the Commission shall, in the light of developments in the regulatory and supervisory framework for credit rating agencies in third countries, present a report to the European Parliament and to the Council concerning the effects of those developments and of the transitional provisions referred to in Article 40 on the stability of financial markets in the Union."

(28) In Article 40, the third paragraph is replaced by the following:

"Existing credit rating agencies may continue issuing credit ratings which may be used for regulatory purposes by the financial institutions and other entities referred to in Article 4(1) unless registration is refused. Where registration is refused, Article 24(3) and (4) shall apply."

(29) The following Article is inserted:

"Article 40a

Transitional measures related to ESMA

1. All competences and duties related to the supervisory and enforcement activity in the field of credit rating agencies, which were conferred on the competent authorities of the Member States, whether acting as competent authorities of the home Member State or not, and on colleges of competent authorities where those have been established, shall be terminated on 1st July 2011 or on the twentieth day following that of the publication of this Regulation in the *Official Journal of the European Union* if that date is later than 1st July 2011.

However, an application for registration that has been received by the competent authorities of the home Member State or the relevant college by 7 September 2010 shall not be transferred to ESMA, and the registration or refusal decision shall be taken by those authorities and the relevant college.

2. Without prejudice to the second subparagraph of paragraph 1, any files and working documents related to the supervisory and enforcement activity in the field of credit rating agencies, including any on-going examinations and enforcement actions, **or certified copies thereof**, shall be taken over by ESMA on the date as referred to in paragraph 1.

3. The competent authorities and colleges referred to in paragraph 1 shall ensure that any existing records and working papers, **or certified copies thereof**, shall be transferred to ESMA on the date as referred to in paragraph 1. . Those competent authorities and colleges shall also render all necessary assistance and advice to ESMA to facilitate effective and efficient transfer and taking-up of supervisory and enforcement activity in the field of credit rating agencies.
 4. ESMA shall act as the legal successor of the competent authorities and colleges referred to in paragraph 1 in any administrative or judicial proceedings that result from supervisory and enforcement activity pursued by those competent authorities and colleges in relation to matters that fall under this Regulation.
 5. [deleted]
- (30) Annex I is amended in accordance with Annex I to this Regulation.
- (31) New Annexes, the text of which is set out in Annex II to this Regulation, are added.

Article 2

Entry into force

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

It shall apply from ... [the day of entry into force of Regulation (EU) No .../... [ESMA]].

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

Done at Brussels,

For the European Parliament

For the Council

The President

The President

Annex I

Annex I to Regulation (EC) No 1060/2009 is amended as follows:

(1) In point 2 of Section A, the last subparagraph is replaced by the following:

"Opinions of the independent members of administrative or supervisory board issued on the matters referred to in points (a) to (d) shall be presented to the board periodically and shall be made available to ESMA on request."

(2) In point 8 of Section B, the first subparagraph is replaced by the following:

"8. Records and audit trails referred to in point 7 shall be kept at the premises of the registered credit rating agency for at least five years and be made available upon request to ESMA."

Annex II

The following Annexes are added to Regulation (EC) No 1060/2009:

"ANNEX III

List of infringements referred to in Article 24(1) and Article 36a(1)

- I. *Infringements related to conflicts of interest, organisational or operational requirements*
 - (a) The credit rating agency infringes Article 4(3) by endorsing a credit rating issued in a third country without complying with the conditions set out in Article 4(3)(a) to (h), unless the reason for the this infringement is outside the credit rating agency's knowledge of control.
 - (a1) The credit rating agency infringes the second subparagraph of Article 4(4) by using the endorsement of a credit rating issued in a third country with the intention of avoiding the requirements of this Regulation.
 - (a2) The credit rating agency infringes Article 6(2), in conjunction with point 1 of Section A of Annex I, by not establishing an administrative or supervisory board.
 - (a3) The credit rating agency infringes Article 6(2), in conjunction with the first subparagraph of point 2 of Section A of Annex I, by not ensuring that its business interest does not impair the independence or accuracy of the credit rating activities.
 - (a4) The credit rating agency infringes Article 6(2), in conjunction with the second subparagraph of point 2 of Section A of Annex I, by appointing senior management which are not of good repute and sufficiently skilled and experienced that cannot ensure the sound and prudent management of the credit rating agency.

- (a5) The credit rating agency infringes Article 6(2), in conjunction with the third subparagraph of point 2 of Section A of Annex I, by not appointing the required number of independent members of its administrative or supervisory board.
- (a6) The credit rating agency infringes Article 6(2), in conjunction with the first or second sentence of the fourth subparagraph of point 2 of Section A of Annex I, by setting a compensation system for the independent members of its administrative or supervisory board which is linked to the business performance of the credit rating agency or by setting the term of office for the independent members of its administrative or supervisory board to a period exceeding five years.
- (a7) The credit rating agency infringes Article 6(2), in conjunction with the fifth subparagraph of point 2 of Section A of Annex I, by appointing members of the administrative or supervisory board that do not have sufficient expertise in financial services.
- (a8) The credit rating agency infringes Article 6(2), in conjunction with the sixth subparagraph of point 2 of Section A of Annex I, by not ensuring that the independent members of the administrative or supervisory board perform the tasks of monitoring the matters referred in points (a) to (d).
- (a9) The credit rating agency infringes Article 6(2), in conjunction with the seventh subparagraph of point 2 of Section A of Annex I, by not ensuring that the independent members of the administrative or supervisory board present their opinions on the matters referred in points (a) to (d) of the sixth subparagraph of point 2 of Section A of Annex I to the board periodically and make available to the ESMA on request.
- (a10) The credit rating agency infringes Article 6(2), in conjunction with point 3 of Section A of Annex I, by not establishing adequate policies and procedures to ensure compliance with its obligations under this Regulation.

- (a11) The credit rating agency infringes Article 6(2), in conjunction with point 4 of Section A of Annex I, by not having sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems.
- (a12) The credit rating agency infringes Article 6(2), in conjunction with point 5 of Section A of Annex I, by not establishing and maintaining a permanent and effective compliance function department (compliance function) which operates independently.
- (a13) The credit rating agency infringes Article 6(2), in conjunction with point 6 of Section A of Annex I, by not ensuring that the conditions enabling the compliance function to discharge its responsibilities properly and independently as defined in point 6(a) to (d) of Section A of Annex I are satisfied.
- (a14) The credit rating agency infringes Article 6(2), in conjunction with point 7 of Section A of Annex I, by not establishing appropriate and effective organizational and administrative arrangements to prevent, identify, eliminate or manage and disclose any conflicts of interest referred to in point 1 of Section B of Annex I, or by not arranging for records to be kept of all significant threats to the independence of the credit rating activities, including those to the rules on rating analysts referred to in Section C of Annex I, as well as the safeguards applied to mitigate those threats.
- (a15) The credit rating agency infringes Article 6(2), in conjunction with point 8 of Section A of Annex I, by not employing appropriate systems, resources and procedures to ensure continuity and regularity in the performance of its credit rating activities.
- (a16) The credit rating agency infringes Article 6(2), in conjunction with point 9 of Section A of Annex I, by not establishing a review function responsible for periodically reviewing its methodologies, models and key rating assumptions that is independent of the business lines which are responsible for credit rating activities.

- (a17) The credit rating agency infringes Article 6(2), in conjunction with point 10 of Section A of Annex I, by not monitoring and evaluating the adequacy and effectiveness of its systems, internal control mechanisms and arrangements established in accordance with this Regulation and by not taking appropriate measures to address any deficiencies
- (a18) The credit rating agency infringes Article 6(2), in conjunction with point 1 of Section B of Annex I, by not identifying, eliminating or managing and disclosing, clearly and prominently, any actual or potential conflicts of interest that may influence the analyses and judgments of its rating analysts, employees, or any other natural person whose services are placed at the disposal or under the control of the credit rating agency and who are directly involved in the issuing of credit rating and persons approving credit ratings.
- (a19) The credit rating agency infringes Article 6(2), in conjunction with point 3 of Section B of Annex I, by issuing a credit rating or, in the case of an existing credit rating, by not disclosing immediately that the credit rating is potentially affected in the situations described in point 3(a) to (d) of Section B of that Annex.
- (a20) The credit rating agency infringes Article 6(2), in conjunction with the second subparagraph of point 3 of Section B of Annex I, by not immediately assessing whether there are grounds for re-rating or withdrawing an existing credit rating.
- (b) The credit rating agency infringes Article 6(2), in conjunction with the first subparagraph of point 4 of Section B of Annex I, by providing consultancy or advisory services to the rated entity or a related third party regarding the corporate or legal structure, assets, liabilities or activities of that rated entity or related third party.
- (c) The credit rating agency infringes Article 6(2), in conjunction with the first part of the third subparagraph of point 4 of Section B of Annex I, by not ensuring that the provision of an ancillary service does not present a conflict of interest with its credit rating activity.

- (d) [deleted]
- (d1) The credit rating agency infringes Article 6(2), in conjunction with point 5 of Section B of Annex I, by not ensuring that rating analysts or persons who approve ratings do not make proposals or recommendations regarding the design of structured finance instruments on which the credit rating agency is expected to issue a credit rating.
- (d2) The credit rating agency infringes Article 6(2), in conjunction with point 6 of Section B of Annex I, by not designing its reporting and communication channels so as to ensure the independence of the persons referred to in point 1 of Section B from the other activities of the credit rating agency carried out on a commercial basis.
- (d3) The credit rating agency infringes Article 6(2), in conjunction with the second subparagraph of point 8 of Section B of Annex I, by not keeping the records for a term of at least three years once its registration is withdrawn.
- (e) [deleted]
- (f) [deleted]
- (g) [deleted]
- (g1) The credit rating agency infringes Article 7(1) by not ensuring that rating analysts, its employees and any other natural person whose services are placed at its disposal or under its control and who are directly involved in credit rating activities have appropriate knowledge and experience for the duties assigned.
- (h) The credit rating agency infringes Article 7(2) by not ensuring that a person referred to in Article 7(1) initiates or participates in negotiations regarding fees or payments with any rated entity, related third party or any person directly or indirectly linked to the rated entity by control.

- (h1) The credit rating agency infringes Article 7(2), in conjunction with point 3(a) of Section C of Annex I, by not ensuring that a person referred to in point 1 of that Section does not take all reasonable measures to protect property and records in possession of the credit rating agency from fraud, theft or misuse, taking into account the nature, scale and complexity of their business and the nature and range of their credit rating activities.
- (h2) The credit rating agency infringes Article 7(2), in conjunction with point 5 of Section C of Annex I, by imposing negative consequences to a person referred to in point 1 of that Section where that person reports information to the compliance officer when considering that any other such person has engaged in conduct that he or she considers to be illegal.
- (h3) The credit rating agency infringes Article 7(2), in conjunction with point 6 of Section C of Annex I, by not reviewing the relevant work of a rating analyst over two years preceding his or her departure, when the rating analyst terminates his or her employment and joins a rated entity, which he or she has been involved in rating, or a financial firm, with which he or she has had dealings as part of his or her duties at the credit rating agency.
- (i) The credit rating agency infringes Article 7(3), in conjunction with point 1 of Section C of Annex I, by not ensuring that a person referred to in that point does not buy or sell or engage in a transaction with a financial instrument referred to in that point.
- (j) The credit rating agency infringes Article 7(3), in conjunction with point 2 of Section C of Annex I, by not ensuring that a person referred to in point 1 of that Section does not participate in or otherwise influence the determination of a credit rating.

- (k) The credit rating agency infringes Article 7(3), in conjunction with point 3(b), (c) and (d) of Section C of Annex I, by not ensuring that a person referred to in point 1 of that Section does not disclose or use or share confidential information. [point 3(b) refers to "information" not "confidential information"]
- (l) The credit rating agency infringes Article 7(3), in conjunction with point 4 of Section C of Annex I, by not ensuring that a person referred to in point 1 of that Section does not solicit or accept money, gifts or favours from anyone with whom the credit rating does business.
- (m) The credit rating agency infringes Article 7(3), in conjunction with point 7 of Section C of Annex I, by not ensuring that a person referred to in point 1 of that Section does not take up a key management position with the rated entity or its related third party within six months of the credit rating.
- (n) The credit rating agency infringes Article 7(4), in conjunction with point 8(a) of Section C of Annex I, by not ensuring that the lead rating analyst is not involved in credit rating activities related to the same rated entity or its related third parties for a period exceeding four years.
- (o) The credit rating agency infringes Article 7(4), in conjunction with point 8(b) of Section C of Annex I, by not ensuring that a rating analyst is not involved in credit rating activities related to the same rated entity or its related third parties for a period exceeding five years.
- (p) The credit rating agency infringes Article 7(4), in conjunction with point 8(c) of Section C of Annex I, by not ensuring that a person approving credit ratings is not involved in credit rating activities related to the same rated entity or its related third parties for a period exceeding seven years.

- (q) The credit rating agency infringes Article 7(4) in connection with the second subparagraph of point 8 of Section C of Annex I, by not ensuring that a person referred to in the first subparagraph of point 8(a) to (c) of that Section is not involved in credit rating activities within two years of end of the periods set out in those points.
- (r) The credit rating agency infringes Article 7(5) by introducing compensation and performance evaluation contingent on the amount of revenue that the credit rating agency derives from the rated entities or related third parties.
- (r1) The credit rating agency infringes Article 8(2) by not adopting, implementing and enforcing adequate measures to ensure that the credit ratings it issues are based on a thorough analysis of all the information that is available to it and that is relevant to its analysis according to its rating methodologies.
- (r2) The credit rating agency infringes Article 8(3) by not using rating methodologies that are rigorous, systematic, continuous and subject to validation based on historical experience, including back-testing.
- (r3) The credit rating agency infringes the first subparagraph of Article 8(4) by refusing to issue a credit rating of an entity or a financial instrument because a portion of the entity or the financial instrument had been previously rated by another credit rating agency.
- (r4) The credit rating agency infringes the second subparagraph of Article 8(4) by not recording all instances where in its credit rating process it departs from existing credit ratings prepared by another credit rating agency with respect to underlying assets or structured finance instruments providing a justification for the differing assessment.
- (r5) The credit rating agency infringes Article 8(5) by not monitoring its credit ratings or by not reviewing its credit ratings or methodologies on an ongoing basis and at least annually.

- (r6) The credit rating agency infringes the second sentence of Article 8(5) by not establishing internal arrangements to monitor the impact of changes in macroeconomic or financial market conditions on credit ratings.
- (s) [deleted]
- (t) The credit rating agency infringes Article 8(6)(b) by not or not timely reviewing the affected credit ratings when methodologies, models or key rating assumptions are changed.
- (u) The credit rating agency infringes Article 8(6)(c) by not re-rating a credit rating that have been based on methodologies, models or key rating assumptions that are changed if the overall combined effect of those changes affects that credit rating.
- (v) **[deleted]**
- (w) **[deleted]**
- (w1) The credit rating agency infringes Article 9 by undertaking the outsourcing of important operational functions in such a way as to impair materially the quality of the credit rating agency's internal control and the ability of ESMA to supervise the credit rating agency's compliance with obligations under this Regulation.
- (x) The credit rating agency infringes Article 10(2), in conjunction with the second subparagraph of point 4 of Part I of Section D of Annex I, by issuing a credit rating or not withdrawing an existing rating in a case where the lack of reliable data or the complexity of the structure of a new type of financial instrument or the quality of information available is not satisfactory or raises serious questions as to whether the credit rating agency can provide a credible credit rating.

- (x1) The credit rating agency infringes Article 10(6) by using the name of ESMA or a competent authority in such a way that would indicate or suggest endorsement or approval by that authority of the credit ratings or any credit rating activities of the credit rating agency.
- (x2) The credit rating agency infringes the Article 13 by charging a fee for the information provided in accordance with Articles 8 to 12 of this Regulation.
- (x3) The credit rating agency infringes Article 14 (1), by not applying for registration for the purposes of Article 2 (1) when it is a legal person established in the Community.

II. *Infringements related to obstacles to the supervisory activities*

- (a) The credit rating agency infringes Article 6(2), in conjunction with point 7(a) to (h) of Section B of Annex I, by not arranging for records or audit trails as required by those provisions.
- (b) The credit rating agency infringes Article 6(2), in conjunction with the first subparagraph of point 8 of Section B of Annex I, by not keeping the records or audit trails referred to in point 7 of that Section for at least five years or by not making available those records or audit trails to ESMA .
- (c) The credit rating agency infringes Article 6(2), in conjunction with point 9 of Section B of Annex I, by not retaining records which set out the respective rights and obligations of the credit rating agency and the rated entity or its related third parties under an agreement to provide credit rating services for the duration of the relationship with that rated entity or its related third party.
- (d) The credit rating agency infringes the first or second sentence of Article 11(2) by not making available the required information or by not providing that information in the required format.

- (e) The credit rating agency infringes Article 11(3), in conjunction with point 2 of Part II of section E of Annex I, by not providing to ESMA a list of its ancillary services.
- (f) The credit rating agency infringes the second subparagraph of Article 14(3) by not or not timely notifying ESMA of any material changes to the conditions for initial registration.
- (g) The credit rating agency infringes Article 23a (1) by providing incorrect or misleading information in response to a simple request for information pursuant to Article 23a (2) or in response to a decision requiring for information pursuant to Article 23a (3).
- (h) The credit rating agency infringes Article 23b (1) c) by providing incorrect or misleading answers to questions asked pursuant to Article 23b (1) c).

III. *Infringements related to disclosure provisions*

- (a) The credit rating agency infringes Article 6(2), in conjunction with point 2 of Section B of Annex I, by not disclosing to the public the names of the rated entities or related third parties from which it receives more than 5 % of its annual revenue.
- (b) The credit rating agency infringes Article 6(2), in conjunction with the second part of the third subparagraph of point 4 of section B of Annex I, by not disclosing in the final rating report an ancillary service provided for the rated entity or its related third party.
- (c) The credit rating agency infringes Article 8(1) by not disclosing to the public the methodologies, models and key rating assumptions it uses in its credit rating activities as defined in point 5 of Part I of section E of Annex I.
- (d) The credit rating agency infringes Article 8(6)(a) by not disclosing immediately the likely scope of affected credit ratings when methodologies, models or key rating assumptions are changed.

- (e) **[deleted]**
- (f) **[deleted]**
- (g) **[deleted]**
- (h) **[deleted]**
- (i) The credit rating agency infringes Article 10(1) by not disclosing the decisions to discontinue a credit rating including full reasons for the decision.
- (j) The credit rating agency infringes Article 10(2), in conjunction with points 1 or 2, the first subparagraph of point 4 or point 5 of Part I of Section D of Annex I or Part II of Section D of Annex I, by not providing the information as required by those provisions when presenting a rating.
- (k) The credit rating agency infringes Article 10(2), in conjunction with the first part of point 3 of Part I of Section D of Annex I, by not informing the rated entity at least 12 hours before publication of the credit rating.
- (l) The credit rating agency infringes Article 10(3) by not ensuring that rating categories that are attributed to structured finance instruments are clearly differentiated using an additional symbol which distinguishes them from rating categories used for any other entities, financial instruments or financial obligations.
- (m) The credit rating agency infringes Article 10(4) by not disclosing its policies and procedures regarding unsolicited credit ratings.
- (n) The credit rating agency infringes Article 10(5) by not providing the information as required by that Article when issuing an unsolicited credit rating or by not identifying an unsolicited credit rating as such.
- (o) The credit rating agency infringes Article 11(1) by not fully disclosing or immediately updating information relating to the matters set out in Part I of Section E of Annex I.

ANNEX IV

List of the adjustments' coefficients linked to aggravating and mitigating circumstances for application of Article 36a, paragraph 3 of this Regulation

The following adjustments' coefficients shall be applicable on a cumulative way to the basic amounts as referred to in Article 36a, paragraph 2 of this Regulation on the basis of each of the following aggravating and mitigating circumstances:

I. Adjustments' coefficients linked to aggravating circumstances

- (a) if the infringement has been committed repeatedly, an adjustment's coefficient of 1,3 shall be applied;
- (a1) if the infringement has been committed for more than 6 months, an adjustment's coefficient of 1,5 shall be applied;
- (b) if the infringement has revealed serious or systemic weaknesses in the credit rating agency's procedures or of the management systems or internal controls, an adjustment's coefficient of 2,2 shall be applied ;
- (c) if financial crime was facilitated, occasioned or otherwise attributable to the infringement, an adjustment's coefficient of 1,3 shall be applied ;
- (d) if the infringement has got a potential impact on the ratings rated by the credit rating agency concerned, an adjustment's coefficient of 1,5 shall be applied;
- (e) if the infringement has been committed intentionally, an adjustment's coefficient of 2 shall be applied ;

- (f) if benefit was gained or loss avoided, or intended to be gained or avoided, either directly or indirectly, an adjustment's coefficient of 2,3 shall be applied;
- (g) if no remedial action has been taken since the breach has been identified, an adjustment's coefficient of 1,7 shall be applied;
- (h) if the credit rating agency's senior management has not cooperated with ESMA in carrying out its investigations, an adjustment's coefficient of 1,5 shall be applied;

II. Adjustments' coefficients linked to mitigating circumstances

- (a) if the infringement has been committed for less than 10 working days, an adjustment's coefficient of 0,9 shall be applied;
- (b) if the credit rating agency's senior management was not aware of the infringement or of a potential infringement, an adjustment's coefficient of 0,7 shall be applied;
- (c) if the credit rating agency has brought quickly, effectively and completely the infringement to the ESMA's attention, an adjustment's coefficient of 0,4 shall be applied;
- (d) if the credit rating agency has taken **voluntary** measures to ensure that similar infringement cannot be committed in the future, an adjustment's coefficient of 0,6 shall be applied.

ANNEX V:

[deleted]
