

# Decision of the Board of Supervisors

To adopt supervisory measures and impose fines in respect of infringements committed by Scope Ratings GmbH

## The Board of Supervisors ('Board'),

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

Having regard to Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)<sup>1</sup>, as amended ('ESMA Regulation'), and in particular Article 43(1) thereof,

Having regard to Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies<sup>2</sup> ('Regulation'), and in particular Articles 24 and 36a thereof, as amended,

Having regard to Commission Delegated Regulation (EU) No 946/2012 of 12 July 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to rules of procedure on fines imposed to credit rating agencies by the European Securities and Markets Authority<sup>3</sup>, including rules on the right of defence and temporal provisions,

## Whereas:

- i. Following preliminary investigations, ESMA's Supervisors found in the Supervisory Report dated 27 October 2022 with respect to Scope Ratings GmbH (or the 'PSI') that there were serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in Annex III to the Regulation.
- ii. On 8 November 2022, an independent investigating officer was appointed pursuant to Article 23e(1) of the Regulation. On 20 February 2023, following the resignation from ESMA of the first independent investigating officer, ESMA's Executive Director appointed a second independent investigating officer ('the IIO').
- iii. On 26 June 2023, the IIO sent to the PSI his initial Statement of Findings, which found that the entity had committed one or more of the infringements listed in Annex III to the Regulation.
- iv. In response to the IIO's initial Statement of Findings, written submissions dated 25 August 2023 were made by the PSI.
- v. Following the receipt of written submissions from the PSI, the IIO amended his initial Statement of Findings and incorporated those amendments into his Statement of Findings dated 29

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<sup>1</sup> OJ L 331, 15.12.2010, p. 84.

<sup>2</sup> OJ L 302 17.11.2009, p. 1.

<sup>3</sup> OJ L 282 16.10.2012, p. 23.

September 2023.

- vi. On 29 September 2023, the IIO submitted to the Board his file relating to the PSI, which included the initial Statement of Findings dated 26 June 2023, the written submissions made by the PSI on 25 August 2023 and the Statement of Findings dated 29 September 2023.
- vii. On 26 October 2023, the Chair, after having assessed the file submitted by the IIO on 29 September 2023, concluded that the file was complete.
- viii. The Board thoroughly discussed the case at its meeting on 13 December 2023 and expressed agreement with most but not all the IIO's findings. It provided clear directions and delegated to the Chair the finalisation, adoption and submission to the PSI of the Board's initial Statement of Findings.
- ix. On 18 December 2023, the Board's initial Statement of Findings was adopted by the Chair on behalf of the Board and sent to the PSI.
- x. On 15 January 2024, the PSI provided its written submissions in respect of the Board's initial Statement of Findings.
- xi. The Board discussed the case further at its meeting on 20 March 2024.
- xii. Pursuant to Article 36a of the Regulation, where the Board finds that a credit rating agency has, intentionally or negligently, committed one of the infringements listed in Annex III, it shall adopt a decision imposing a fine.
- xiii. Pursuant to Article 24 of the Regulation, where the Board finds that a credit rating agency has committed one of the infringements listed in Annex III, it shall take a supervisory measure, taking into account the nature and seriousness of the infringement.

**Having considered the IIO's Statement of Findings, the material in the complete file and the written submissions made by the PSI, the Board sets out below its findings.**

## **STATEMENT OF FINDINGS OF THE BOARD OF SUPERVISORS**

### **1 Background**

1. The PSI is a private company established in Germany under German corporate law<sup>4</sup>. The PSI is registered as a credit rating agency ('CRA') since 24 May 2011<sup>5</sup>, with branch offices in Germany, France, Italy, Norway, Poland and Spain.

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<sup>4</sup> On 24 January 2018, the PSI changed its legal form from AG (Aktiengesellschaft) to GmbH (Gesellschaft mit beschränkter Haftung) - Exhibit 1, 'Scope Ratings GmbH\_HRB' (see Supervisory Report, Exhibit 2, 'RE Message from ESMA -- On intended legal change.doc' and Supervisory Report, Exhibit 3, 'RE Message from ESMA -- On intended legal change').

<sup>5</sup> ESMA's list of registered or certified credit rating agencies (<https://www.esma.europa.eu/credit-rating-agencies/cra-authorisation>). PSR Rating was registered by the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) on 24 May 2011 and in January 2012, Scope Holding GmbH took over the shares of PSR Rating and renamed it.

2. The PSI is wholly owned by Scope SE & Co. KGaA ('Scope KG')<sup>6</sup>. Scope KG together with its wholly owned direct subsidiaries (including the PSI) are hereinafter referred to together as 'Scope Group'.
3. The PSI issues credit ratings on corporates, financial institutions, public finance, structured finance and sovereigns<sup>7</sup>. At the end of 2023, the PSI was the fifth largest CRA in terms of market share (1.72%) of all CRAs registered in the EU in accordance with the Regulation<sup>8</sup>.
4. In the financial year ending 31 December 2022, the PSI's total revenues (including from branches) were EUR 19,623,147.

## 2 The facts

5. This case relates to concerns regarding potential conflicts of interest related to structural shortcomings, and specific concerns in relation to a failure to identify, eliminate, or manage and disclose a potential conflict of interest and the provision by the PSI of ancillary services.
6. Thus the decision provides an account of the PSI's policies and procedures and internal controls (as detailed in Sections 2.2 and 2.3), as it forms the basis for the analysis of infringements concerning policies and procedures, internal controls and organisational and administrative arrangements as detailed at Sections 4.1, 4.2 and 4.3 of the legal assessment.
7. The organisational structure of the PSI and in particular the Ambassadors Council (as detailed in Section 2.1.1), as well as the role of the individual called [AB: redacted due to confidentiality] (as detailed in Section 2.5) are relevant to the infringement assessed in Section 4.4.
8. The account of the services provided by the PSI to the [Company A: redacted due to confidentiality] entities (as detailed in Section 2.4) is germane to the assessment of the infringement related to the provision of ancillary services at Section 4.5.

### 2.1 The organisational structure of the PSI and Scope KG

9. The PSI and its parent company Scope KG have different management bodies and boards, each of which is assigned particular tasks.
10. In the PSI itself, the Management Board is of particular relevance, together with the Beirat, i.e. the extended Administrative Board<sup>9</sup>. Within Scope KG, the Supervisory Board<sup>10</sup> is relevant, as is the Ambassadors Council (former Advisory Board)<sup>11</sup>. Finally, the Executive Board of Scope

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<sup>6</sup> Supervisory Report, Exhibit 4, 'Transparency\_Report\_2021', p. 8.

<sup>7</sup> On 1 August 2016, Scope KG acquired FERI EuroRating Services AG (FERI) and transferred FERI's sovereign rating business to the PSI. Supervisory Report, Exhibit 7, 'esma71-99-376\_feri\_eurorating\_services\_credit\_rating\_agency\_registration\_withdrawn'.

<sup>8</sup> Exhibit 4, 'esma80-416-1564\_report\_on\_cra\_market\_share\_calculation', p. 6.

<sup>9</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 2, p. 3.

<sup>10</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 2, p. 3.

<sup>11</sup> Exhibit 15, PSI's Response to the IIO's RFI, questions 3 to 5, pp. 7-8.

Management SE<sup>12</sup> (Scope KG's general partner) manages the business of Scope KG and thereby of Scope Group<sup>13</sup>.

11. The Ambassadors Council (formerly the Advisory Board) is of particular relevance to this case.

### **2.1.1 The Ambassadors Council (formerly the Advisory Board) of Scope KG**

12. The Ambassadors Council of Scope KG has changed its name and structure many times. It was first created with the title "Advisory Board" as an informal body in 2007, before the establishment of the PSI as a CRA under the Regulation<sup>14</sup>.
13. According to the first two articles of its statutes, the Advisory Board was an international broad-based body and its members were "tasked with the representation of Scope Group and the accompaniment of Scope Group in its establishment as globally active, leading European rating agency"<sup>15</sup>. The members also had a consultative role with the Executive Board of Scope KG and senior management of Scope Group, and a networking role for the purpose of Scope Group's business development<sup>16</sup>. The PSI stressed that the Advisory Board, later renamed the Ambassadors Council, has not and never had an executive or supervisory function<sup>17</sup>.
14. Each member of the Advisory Board was entitled to receive allowances for attendance at meetings, plus further fees relating to services provided within their remits<sup>18</sup>. According to the PSI, the Advisory Board convened in a meeting only once per year, and interacted only a few other times during the course of a typical year<sup>19</sup>.

## **2.2 The relevant policies, procedures, and organisational and administrative arrangements of the PSI**

15. During the period from November 2013 to April 2021<sup>20</sup>, the PSI had in place several policies and procedures which covered conflicts of interest. These policies and procedures were supplemented by a defined terms glossary.

### **2.2.1 The Defined Terms Glossary (first available version dated February 2018)**

16. The Defined Terms Glossary's ('Glossary') purpose is to "facilitate the application and understanding of Scope's codes, policies and procedures to all Employees and other associated

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<sup>12</sup> [CD: redacted due to confidentiality] and [EF: redacted due to confidentiality] each hold 40% of the shares of Scope Management SE and Scope Foundation has held 20% of the shares since May 2020 (see Supervisory Report, Exhibit 4, 'Transparency\_Report\_2021', pp. 8-9).

<sup>13</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 2, p. 3.

<sup>14</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 4, pp. 7-8.

<sup>15</sup> Supervisory Report, Exhibit 54, '8.2\_Statutes Advisory Board EN (March 2018)', article 1(3), p.1.

<sup>16</sup> Supervisory Report, Exhibit 54, '8.2\_Statutes Advisory Board EN (March 2018)', articles 1 and 2, p.1.

<sup>17</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 5, p. 8.

<sup>18</sup> Supervisory Report, Exhibit 54, '8.2\_Statutes Advisory Board EN (March 2018)', article 3, p. 1.

<sup>19</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 5, p. 8.

<sup>20</sup> Since August 2022, the PSI has implemented changes in its policies and procedures. These revised policies are not directly relevant to the assessment of infringements but are mentioned below in other sections of this decision, particularly insofar as they are germane to the assessment of the mitigating factors.

non-Employees<sup>21</sup>, to which they apply”<sup>22</sup>. The document applies to Scope KG and its subsidiaries including the PSI and has been published on the PSI’s website and made available to Employees on its intranet. It is of note that the Glossary does not contain a definition of ‘Associated non-Employees’ or ‘Advisory Board’. The Glossary was updated in April 2021 (‘the Amended Glossary’)<sup>23</sup>.

## **2.2.2 Conflicts of Interest Policy (first available version dated November 2013)**

17. The Conflicts of Interests Policy (‘Col Policy’) “sets forth requirements related to the prevention, identification, management and disclosure of actual or potential conflicts of interest”<sup>24</sup>. It contains general principles but does not set out details on how to apply and implement them<sup>25</sup>. The policy is available on the PSI’s website and, for Employees, on the PSI’s intranet<sup>26</sup>. Until May 2017, it was called the Conflict of Interest Management Policy<sup>27</sup>.

## **2.2.3 Policy on Corporate Conflicts of Interest (first available version dated April 2021)**

18. The Policy on Corporate Conflicts of Interest<sup>28</sup> aims to ensure that credit ratings are independent and not affected by any existing or potential conflict of interest or business relationship involving “[r]elevant CRA Members and/or Relevant Shareholders of Scope CRAs (‘Corporate Conflict of Interest’). Scope CRAs identify, eliminate, or manage and disclose, clearly and prominently, any actual or potential Corporate Conflicts of Interest that may arise from a certain relationship between their Relevant CRA Members and/or Relevant Shareholders and an Impacted Entity, an Impacted Related Third Party, or the Controlling Shareholder of an Impacted Entity or Impacted Related Third Party”<sup>29</sup>. The policy is published on the PSI’s website and made available on the PSI’s intranet<sup>30</sup>. Of note is the fact that the earliest version of the policy dates only from April 2021.

## **2.2.4 SRG<sup>31</sup> Shareholders conflicts procedures (first available version dated June 2019)**

19. The PSI’s Procedures on potential shareholder related conflicts of interest<sup>32</sup> (‘SRG Shareholder conflicts procedures’) dated 25 June 2019<sup>33</sup> “define the mechanism for the prevention, identification, management and disclosure of actual or potential conflicts of interests at Scope

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<sup>21</sup> It should be noted that the reference to associated non-Employees was amended to ‘Associated Individuals’ in 2021.

<sup>22</sup> Supervisory Report, Exhibit 86, ‘11.4 Scope Group Defined Terms Glossary\_(20180219), p. 2’.

<sup>23</sup> Supervisory Report, Exhibit 87, ‘11.2 ScopeGroup Defined Terms Glossary (20210400)’.

<sup>24</sup> Supervisory Report, Exhibit 104, ‘18.10 Scope Ratings Conflicts of Interests Policy(20170511)’, p. 2.

<sup>25</sup> Exhibit 1, Supervisory Report, 27 October 2022, para. 63.

<sup>26</sup> Supervisory Report, Exhibit 104, ‘18.10 Scope Ratings Conflicts of Interests Policy(20170511)’, p. 2.

<sup>27</sup> Exhibit 15, PSI’s Response to the IIO’s RFI, question 28, p. 18.

<sup>28</sup> Exhibit 15, PSI’s Response to the IIO’s RFI, question 28, p. 19.

<sup>29</sup> Supervisory Report, Exhibit 112, ‘18.14 Scope Ratings Corporate COI Policy (20210400) -Draft’, p. 2.

<sup>30</sup> Supervisory Report, Exhibit 112, ‘18.14 Scope Ratings Corporate COI Policy (20210400) -Draft’, p. 2.

<sup>31</sup> SRG is Scope Ratings GmbH, i.e. the PSI.

<sup>32</sup> Supervisory Report, Exhibit 113, ‘18.24 Scope Ratings\_Shareholder Conflicts Procedures\_(20190625)’.

<sup>33</sup> The PSI introduced its procedures on potential shareholder related Col in June 2019. See Exhibit 15, PSI’s Response to the IIO’s RFI, question 28, p. 19.

Ratings GmbH (“Scope Ratings”) related to Scope Group’s shareholders”<sup>34</sup>. The SRG Shareholder conflicts procedure specifies rules regarding the sourcing of information on relevant shareholders<sup>35</sup>.

## **2.2.5 The Code of Business Conduct (first available version dated August 2018)**

20. The Code of Business Conduct (‘CoBC’)<sup>36</sup> sets out standards and general principles of the PSI’s business conduct. It does not detail the implementation and application of these standards and principles<sup>37</sup>. The CoBC aims at “[promoting] the objectivity and integrity of its business and the transparency of its operations”<sup>38</sup>. It covers the PSI and Scope Ratings UK Ltd (previously Scope Ratings AG)<sup>39</sup>.

## **2.2.6 The Code of Ethics (first available version dated February 2018)**

21. The Code of Ethics (‘CoE’)<sup>40</sup> sets out standards of business ethics at Scope Group<sup>41</sup> and aims to “[promote] the objectivity and integrity of [Scope Group] business and the transparency of its operations. Those requirements emphasise Scope’s commitment to conducting its business in an ethical manner and with integrity”<sup>42</sup>. It covers Scope KG and its subsidiaries<sup>43</sup>. From 2017, the CoE was updated multiple times, i.e. on 21 March 2018, in November 2020, in January 2021 and in April 2021. It contains numerous references to conflicts of interest, but the relevant content is of a general nature; it does not provide any details on the implementation of internal processes<sup>44</sup>.

## **2.2.7 The Record Keeping Policy (first available version dated December 2018) and Procedure (first available version dated January 2017)**

22. The Record Keeping Policy “sets out the principles and standards for Business Records that have to established and/or retained ... in order to maintain appropriate documentation in line with legal and regulatory requirements that Scope Ratings is subject to” as of 15 December 2018<sup>45</sup>. The policy states which rating-related business records and, where appropriate, audit trails should be kept, such as for instance the business records of the procedures and measures implemented by the PSI to comply with the Regulation, and copies of internal and external

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<sup>34</sup> Supervisory Report, Exhibit 113, ‘18.24 Scope Ratings\_Shareholder Conflicts Procedures\_(20190625)’, p. 2.

<sup>35</sup> “Relevant Shareholders” means “shareholders who hold 5% or more of the capital or voting rights of Scope Group, or who are otherwise in a position to exercise significant influence on the business activities of Scope Group including Scope Ratings”. See Supervisory Report, Exhibit 113, ‘18.24 Scope Ratings\_Shareholder Conflicts Procedures\_(20190625)’, p. 2.

<sup>36</sup> Supervisory Report, Exhibit 95, ‘18.05 Scope Ratings\_Code of Business Conduct (20170802)’.

<sup>37</sup> Exhibit 1, Supervisory Report, 27 October 2022, para. 63.

<sup>38</sup> Supervisory Report, Exhibit 95, ‘18.05 Scope Ratings\_Code of Business Conduct (20170802)’, p. 2.

<sup>39</sup> Supervisory Report, Exhibit 95, ‘18.05 Scope Ratings\_Code of Business Conduct (20170802)’, p. 2.

<sup>40</sup> Supervisory Report, Exhibit 88, ‘18.01 Scope Group\_Code of Ethics (20180219)’. All references made to Exhibit 88 are identical in the other available versions of the document unless specified otherwise.

<sup>41</sup> Supervisory Report, Exhibit 88, ‘18.01 Scope Group\_Code of Ethics (20180219)’, p. 2.

<sup>42</sup> Supervisory Report, Exhibit 88, ‘18.01 Scope Group\_Code of Ethics (20180219)’, p. 2.

<sup>43</sup> Supervisory Report, Exhibit 88, ‘18.01 Scope Group\_Code of Ethics (20180219)’, p. 2.

<sup>44</sup> Exhibit 1, Supervisory Report, 27 October 2022, para. 63.

<sup>45</sup> Supervisory Report, Exhibit 117, ‘003 Scope Ratings Record keeping policy 2018’, p. 2. Please note that all references to Exhibit 117 below are identical in Exhibit 118. See Supervisory Report, Exhibit 118, ‘005 Scope Ratings Record keeping policy 2021’.



communications, including electronic communications received and sent by the PSI and its employees, that are related to credit rating activities<sup>46</sup>. The policy does not mention conflicts of interest.

23. The Record keeping procedures, which complement the Record Keeping Policy, “set out the minimum requirements for Business Records that have to be retained and/or established ... in order to maintain appropriate documentation in line with legal and regulatory requirements that Scope Ratings is subject to as a Credit Rating Agency”<sup>47</sup>. The procedures do not contain specific rules regarding conflicts of interest.

## **2.2.8 The Rating Process Manual (first available version dated February 2018)**

24. The Rating Process Manual (the ‘RPM’) “supplements the Scope Ratings’ Code of Business Conduct as well as Scope Ratings’ Rating Governance Policy and sets requirements for the ratings process”<sup>48</sup>. Pursuant to this policy, when the rating process is initiated, there is an obligation to confirm that no conflicts exist. The RPM requires that conflict checks be performed prior to the convening of a rating committee but does not provide any guidance as to how such checks should be performed.

## **2.3 The relevant internal control mechanisms of the PSI**

25. As to the internal control mechanisms which are relevant to this case, the Board notes that the relevant policies and procedures detailed above do not clearly specify internal control mechanisms related to conflicts of interest.
26. The Col Policy<sup>49</sup> does not describe with any detail or precision the steps to be taken if a situation of conflict of interest is identified. The only reference concerns a possible violation of the policy which should be reported by a Covered Employee to Compliance or a situation of potential infringements of the requirements indicated in the policy which should be reported to Senior Management<sup>50</sup>. No other steps are indicated in the policy, and it is not clear what the difference is between “a possible violation” and “potential infringements of the requirements”<sup>51</sup>.
27. The same applies to the Policy on Corporate Conflicts of interest which is of a general nature and does not specify internal control procedures.
28. The only procedure specifically related to conflicts of interest, dated 2019<sup>52</sup>, concerns shareholder conflicts (the SRG shareholders conflicts procedures); as noted above, they detail the responsibilities of the Investors Relations Team (maintaining close contacts with the PSI’s shareholders, informing Rating Operations, the analytical head and Rating Compliance on

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<sup>46</sup> Supervisory Report, Exhibit 117, ‘003 Scope Ratings Record keeping policy 2018’, p. 2.

<sup>47</sup> Supervisory Report, Exhibit 122, ‘006 ScopeRatings\_Record Keeping Procedures (2021)’, p. 2.

<sup>48</sup> Supervisory Report, Exhibit 97, ‘18.17 Scope Ratings\_Rating Process Manual (20180219)’, p. 3.

<sup>49</sup> Supervisory Report, Exhibit 104, ‘18.10 Scope Ratings\_Conflicts of Interests Policy(20170511)’.

<sup>50</sup> Supervisory Report, Exhibit 104, ‘18.10 Scope Ratings\_Conflicts of Interests Policy(20170511)’, p.4

<sup>51</sup> Supervisory Report, Exhibit 104, ‘18.10 Scope Ratings\_Conflicts of Interests Policy(20170511)’, p.4.

<sup>52</sup> As noted above, the procedures were amended in April 2021; this resulted in the removal of references to the ‘Greylist’ and the ‘Blacklist’.

changes on the Greylist and the Blacklist); Markets Division (handover for all requests from external clients to perform credit rating services to the analytical units; notifying Rating Operations and Rating Compliance of relevant instances based on the Greylist and the Blacklist); and Rating Operations (marking issuers based on the Greylist and the Blacklist in an internal database and taking steps to add disclosure statements).

29. Further observations on the PSI's internal control mechanisms are detailed in the analysis of the infringement at Point 12 of Section I of Annex III to the Regulation in Section 4.2.

## 2.4 Services provided by the PSI to [Company A] Entities

30. One of the infringements in this case concerns the provision of ancillary services by the PSI. In broad terms, ancillary services are services provided by a CRA that are not credit rating services. This distinction is explored further in the legal assessment at Section 4.5
31. From November 2017, Scope Group companies provided credit rating and ancillary services to [Company A] Bank AG ('[Company A] Bank') and [Company A] Capital (UK) Limited ('[Company A] Capital' and, together with [Company A] Bank, the '[Company A] Entities'). Other than credit rating services, the PSI and its sister company Scope Risk Solutions GmbH ('SRS') provided inter alia: services related to the assessment of credit risks ('AOCR'), i.e. "an approximate assessment of the credit quality of an entity or debt instrument based on company ratings' credit scorecards or company ratings methodologies"<sup>53</sup>; the licence to use the Scope Credit Model, fund rating services and country and industry risks reports services<sup>54</sup>; and, credit review scores and credit review reports on given companies<sup>55</sup>.
32. For all services (i.e. credit rating and ancillary services), the [Company A] Entities paid Scope Group the following amounts: EUR 87,500 in 2017, EUR 362,917 in 2018, EUR 617,349 in 2019, EUR 704,679 in 2020 and EUR 264,327 in 2021<sup>56</sup>, amounting to a total of EUR 2,036,772.
33. In November 2020, the PSI and SRS merged and on 1 January 2021, all the services that SRS provided were transferred to the PSI. The employees of SRS were transferred within Scope Group, including within the PSI<sup>57</sup>. Therefore, starting from 1 January 2021, the PSI became the legal successor of SRS.
34. The following paragraphs detail the services provided by the PSI, directly or as the legal successor of SRS, to the [Company A] Entities.

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<sup>53</sup> Exhibit 1, Supervisory Report, para. 72.

<sup>54</sup> Exhibit 1, Supervisory Report, para. 72.

<sup>55</sup> Exhibit 1, Supervisory Report, para. 72.

<sup>56</sup> Exhibit 1, Supervisory Report, para. 68.

<sup>57</sup> Supervisory Report, Exhibit 8, '20201126 SRS Integration' (communicated to ESMA on 27 November 2020 – see Exhibit 9, 'RE Call with Scope Group representatives 24th November 2pm-4pm -- Main agenda points') and Supervisory Report, Exhibit 10, 'Updated Service List for Scope Ratings'.



#### **2.4.1 The ratings issued by the PSI for [Company A] Entities**

35. On 22 May 2019, the PSI and [Company A] Bank entered into an agreement for the PSI to issue a credit rating for [Company A] Bank, with a rating fee of EUR 80,000<sup>58</sup>. The credit rating was published on 19 July 2019 with an “A-/Stable” level<sup>59</sup>.
36. In the following years, the PSI performed further rating activities relating to [Company A] Bank: a monitoring review on 23 March 2020 resulting in a “no action” (i.e. no change) decision<sup>60</sup>; a rating action<sup>61</sup> published on 17 September 2020<sup>62</sup>, resulting in a downgrade from an “A-” level to a “BBB+/negative outlook” level; and a rating action published on 5 March 2021 resulting in a downgrade from a “BBB+/negative outlook” level to a “B-/negative outlook” level, with a subsequent withdrawal of all ratings on 5 March 2021<sup>63</sup>.
37. Under an agreement concluded between the PSI and [Company A] Capital, which took effect on 10 August 2018<sup>64</sup>, the PSI provided rating services to [Company A] Capital, such as the rating for the [Company A] Fund issued on 24 April 2019<sup>65</sup>.

#### **2.4.2 Ancillary services provided by the PSI to [Company A] Entities**

38. Alongside the rating activities outlined above, the PSI provided numerous ancillary services to the [Company A] Entities<sup>66</sup>:
39. Under a Master Service Agreement concluded between SRS and [Company A] Capital with effect from 13 November 2017<sup>67</sup>, the PSI, as legal successor of SRS from January 2021,

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<sup>58</sup> Supervisory Report, Exhibit 140, ‘5.01 [Company A] Bank AG [redacted due to confidentiality] 22 May 2019’.

<sup>59</sup> Supervisory Report, Exhibit 141, ‘16.60 09\_Published press release, 19 July 2019’.

<sup>60</sup> Supervisory Report, Exhibit 145, ‘16.64 Post monitoring review documentation, 20 March 2020’ and Exhibit 5, ESMA Supervisors’ Response to the IIO’, question 24, p. 18.

<sup>61</sup> Supervisory Report, Exhibit 146, ‘16.92 Published press release’ and Exhibit 5, ESMA Supervisors’ Response to the IIO, question 25, pp. 18-19.

<sup>62</sup> Supervisory Report, Exhibit 146, 16.92 Published Press Release, 17 September 2020.’

<sup>63</sup> Supervisory Report, Exhibit 149, ‘16.104 Press release.msg, 5 March 2021’.

<sup>64</sup> Supervisory Report, Exhibit 150, ‘5.91 [Company A] Capital UK Ltd [redacted due to confidentiality] 10 August 2018’.

<sup>65</sup> Supervisory Report, Exhibit 151, ‘16.13 13\_Press release, 24 April 2019’.

<sup>66</sup> For the purposes of this case, only the orders for ancillary services placed by emails from January 2021, i.e. after the merger of SRS into the PSI on 1 January 2021, and the agreements which continued after 1 January 2021 were considered.

<sup>67</sup> Supervisory Report, Exhibit 194, ‘5.34.2 [Company A] Capital UK Ltd [redacted due to confidentiality] 13 November 2017’.

provided AOCR services<sup>68</sup> and portfolio model services<sup>69</sup> to [Company A] Capital, along with the licence to use the Scope Credit Model<sup>70</sup>.

40. Under a Master Service Agreement concluded between SRS and [Company A] Bank, which took effect on 1 October 2018<sup>71</sup>, the PSI, as legal successor of SRS from January 2021<sup>72</sup>, continued to provide services to [Company A] Bank relating to the provision of statistics and defaults information<sup>73</sup>, AOCR services<sup>74</sup> and services relating to the provision of industry and country risk reports<sup>75</sup>.
41. Under a Credit Review Scores Product Agreement concluded by the PSI and [Company A] Bank and with effect from 1 July 2020<sup>76</sup>, the PSI provided credit review scores to [Company A] Bank.
42. The PSI also provided AOCR services relating to a specific Project Finance case to [Company A] Bank. The order for these services was placed on 25 January 2021<sup>77</sup>; this was not covered under the Master Service Agreement with effect from 1 October 2018<sup>78</sup>.

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<sup>68</sup> The relevant orders relating to the AOCR services starting from January 2021 are detailed in the following exhibits: Supervisory Report, Exhibit 236, '5.75 [Company A] Capital UK Ltd [redacted due to confidentiality] 27 January 2021'; Supervisory Report, Exhibit 237, '5.76 [Company A] Capital UK Ltd [redacted due to confidentiality] 27 January 2021'; Supervisory Report, Exhibit 238, '5.77 [Company A] Capital UK Ltd [redacted due to confidentiality] 27 January 2021'; Supervisory Report, Exhibit 239, '5.78 [Company A] Capital UK Ltd [redacted due to confidentiality] 24 February 2021'; Supervisory Report, Exhibit 240, '5.79 [Company A] Capital UK Ltd [redacted due to confidentiality]'; Supervisory Report, Exhibit 241, '5.80 [Company A] Capital UK Ltd [redacted due to confidentiality]'; Supervisory Report, Exhibit 242, '5.81 [Company A] Capital UK Ltd [redacted due to confidentiality]'; Supervisory Report, Exhibit 243, '5.82 [Company A] Capital UK Ltd [redacted due to confidentiality] 24 February 2021'; Supervisory Report, Exhibit 244, '5.83 [Company A] Capital UK Ltd [redacted due to confidentiality]'; Supervisory Report, Exhibit 245, '5.84. [Company A] Capital UK Ltd [redacted due to confidentiality] 1 March 2021'; Supervisory Report, Exhibit 246, '5.85. [Company A] Capital UK Ltd [redacted due to confidentiality] 24 February 2021'; Supervisory Report, Exhibit 247, '5.86. [Company A] Capital UK Ltd [redacted due to confidentiality] 1 March 2021'; Supervisory Report, Exhibit 248, '5.87 [Company A] Capital UK Ltd [redacted due to confidentiality] 24 February 2021'; Supervisory Report, Exhibit 249, '5.88 [Company A] Capital UK Ltd [redacted due to confidentiality] 1 March 2021'.

<sup>69</sup> The portfolio model services are detailed in Supervisory Report, Exhibit 194, '5.34.2 [Company A] Capital UK Ltd [redacted due to confidentiality]', p. 14.

<sup>70</sup> The licence to use Scope Credit Model is evidenced by Supervisory Report, Exhibit 252, '5.90.1 [Company A] Capital UK Ltd [redacted due to confidentiality]' and Supervisory Report, Exhibit 253, '5.90.2 [Company A] Capital UK Ltd [redacted due to confidentiality]'.

<sup>71</sup> Supervisory Report, Exhibit 163, '5.34 - 88. [Company A] Bank AG [redacted due to confidentiality] 5 October 2018'.

<sup>72</sup> The relevant orders for the instant case have been all placed by emails starting from January 2021, i.e. after the merge of SRS into the PSI on 1 January 2021.

<sup>73</sup> The order was placed on 1 October 2018 and the nature of services is detailed in Supervisory Report, Exhibit 164, '5.03 [Company A] Bank AG [redacted due to confidentiality] 1 October 2018', p. 2.

<sup>74</sup> The AOCR services were provided following orders placed on 4 January 2019 (Supervisory Report, Exhibit 165, '5.04 [Company A] Bank AG [redacted due to confidentiality] 7 January 2019', and Supervisory Report, Exhibit 166, '5.05 [Company A] Bank AG [redacted due to confidentiality] 7 January 2019') and on 15 March 2019 (Supervisory Report, Exhibit 171, '5.10 [Company A] Bank AG [redacted due to confidentiality]', and Supervisory Report, Exhibit 172, '5.11 [Company A] Bank AG [redacted due to confidentiality] 24 May 2019').

<sup>75</sup> The services relating to the provision of industry and country risks reports were placed with an order on 26 June 2019. See Supervisory Report, Exhibit 173, '5.12.1 [Company A] Bank AG [redacted due to confidentiality] 3 July 2019'.

<sup>76</sup> Supervisory Report, Exhibit 158, '5.02 [Company A] Bank AG [redacted due to confidentiality] 13 July 2020'.

<sup>77</sup> Supervisory Report, Exhibit 254, '5.32 [Company A] Bank AG [redacted due to confidentiality]' and Supervisory Report, Exhibit 255, '5.33 [Company A] Bank AG [redacted due to confidentiality] 25 January 2021'.

<sup>78</sup> Supervisory Report, Exhibit 254, '5.32 [Company A] Bank AG [redacted due to confidentiality]' and Supervisory Report, Exhibit 255, '5.33 [Company A] Bank AG [redacted due to confidentiality] 25 January 2021', Supervisory Report, Exhibit 163, '5.34 - 88. [Company A] Bank AG [redacted due to confidentiality] 5 October 2018'.

## 2.5 The relevant roles and holdings of [AB]

43. Alongside the provision of rating and ancillary services by the PSI to the [Company A] Entities as detailed above, from 2015 onwards, there were several interactions between an individual ([AB]), [Company A] Bank, [Company A] Capital and the Scope Group.
44. These interactions related to different aspects of the PSI's business and fell under three broad headings: first, the corporate interests and positions held by [AB] in the Scope Group; second, the positions held by [AB] in the [Company A] entities; and, third, the role of [AB] in bringing [Company A] entities as a client to companies of the Scope Group and his interactions with PSI staff involved in rating activities. Each aspect is dealt with in turn below.

### 2.5.1 Positions of [AB] in [Company A] Entities

45. From 25 September 2014 until 22 January 2018, [AB] was the non-executive chairman of [Company A] Capital<sup>79</sup>.
46. From June 2014, he was also Chairman of the supervisory board of [Company A] Bank<sup>80</sup>. [AB] still occupied this position until at least 21 September 2022<sup>81</sup>.

### 2.5.2 Holdings and positions of [AB] in Scope KG

47. [AB] acquired a minority stake in Scope KG in September 2015. His holding of shares and voting rights fluctuated between 0.27% in December 2015 and 0.23% on 31 December 2020<sup>82</sup>.
48. As to the positions held by [AB] in the Scope Group, he was a member of Scope KG's Advisory Board<sup>83</sup> from 2 July 2015<sup>84</sup>. He was suspended from that role, at his own request, on 16 March 2021<sup>85</sup>.

### 2.5.3 The role of [AB] in bringing [Company A] Entities as a client to companies of the Scope Group and his interactions with PSI staff involved in rating activities

49. In the period from 2 July 2015 to 16 March 2021, as an Advisory Board member, [AB] played a role in the conclusion of multiple agreements between the [Company A] Entities and the Scope Group<sup>86</sup>. For this work, he received two commissions: EUR 12,950 for the acquisition of

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<sup>79</sup> Supervisory Report, Exhibit 51, '10.2\_150727 [AB] Questionnaire'.

<sup>80</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 6, p. 9.

<sup>81</sup> See Exhibit 15, PSI's Response to the IIO's RFI, question 6, p. 9.

<sup>82</sup> Supervisory Report, Exhibit 53, '1.1 Scope – Shareholders' ledger (since 2015)'.

<sup>83</sup> For an in-depth analysis of this Board within Scope KG, please refer to Section 2.1.1.

<sup>84</sup> Supervisory Report, Exhibit 57, '9.3 Scope Advisory Board - Members 2015-2021'.

<sup>85</sup> Supervisory Report, Exhibit 57, '9.3 Scope Advisory Board - Members 2015-2021', and Supervisory Report, Exhibit 60, '10.4 210316 [AB] Suspension Scope Advisory Board'.

<sup>86</sup> The list of such agreements and the detail of the services provided by Scope Group to the [Company A] Entities can be found below in Section 2.4 .

[Company A] Capital as a new client for the provision of services in 2017 and Q1 2018<sup>87</sup>, and EUR 10,795.85 for the acquisition of [Company A] Capital and [Company A] Bank as new clients for the provision of other (ancillary) services in Q2 and Q4 2018<sup>88</sup>.

50. While [AB] was a member of the Advisory Board, he had three types of relevant interactions with Scope Group employees, including employees of the PSI.
51. First, [AB] interacted with commercial staff within the Scope Group at three meetings (14 August 2017, 27 November 2017 and 11 July 2018). These meetings were with the sales staff in the Corporate & Business Development division of Scope KG and [AB] acted as account manager for the [Company A] Entities<sup>89</sup>.
52. Second, [AB] interacted with the PSI's Lead Analyst and Head of Financial Institutions and other analysts in meetings on 27 June 2019, 25 June 2020 and 3 July 2020<sup>90</sup>. The PSI specified that [AB] took part in such meetings exclusively in his capacity of chairman of the supervisory board of [Company A] Bank and never without other members of the bank<sup>91</sup>. It was further explained that the "credit analysts used these meetings to gain a better understanding of the credit risk of an issuer and compare the message from the management of the issuer with its financial status and standing. An issuer's managers often take the opportunity in these meetings to present their company too positive when it comes to risk and to management. Experienced credit analysts therefore understand that messages from such meetings are often biased"<sup>92</sup>. The PSI also underlined that none of the meetings which [AB] attended were rating committees<sup>93</sup>.
53. Finally, based on the information provided by the PSI, [AB] met as a representative of [Company A] Entities with the management of Scope KG in two instances: on 20 February 2018 and on 16 November 2020<sup>94</sup>.

### 3 Applicable Legal Provisions

54. References to the Regulation in this Statement of Findings refer to the text of the Regulation (EC) No 1060/2009 (as amended where relevant) in force at all material times in relation to the matters which are the subject of this investigation.

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<sup>87</sup> Supervisory Report, Exhibit 61, '14.1 180508 Commission [AB]'.

<sup>88</sup> Supervisory Report, Exhibit 62, '14.2 190313 Commission [AB]'. In particular, the whole commission paid to [AB] amounted to EUR 18.295,85. However, EUR 7.500 were attributable to the fact that [AB] place Scope KG shares to third parties to the instant case.

<sup>89</sup> Supervisory Report, Exhibit 72, '4.1 Item 4 - List of the business developers in charge of the commercial relationship with [Company A]', Supervisory Report, Exhibit 73, '4.2 Response to ESMA Query on Item 4', and Supervisory Report, Exhibit 74, '3c2'.

<sup>90</sup> Supervisory Report, Exhibit 67, '16.272 Meetings Overview' and Supervisory Report, Exhibit 74, '3c2'.

<sup>91</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 10, p. 10.

<sup>92</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 10, p. 10.

<sup>93</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 11, p. 10.

<sup>94</sup> Supervisory Report, Exhibit 74, '3c2', pp. 3 and 17.

### **3.1 Relevant legal provisions regarding policies and procedures, internal controls and administrative arrangements**

55. Article 6(1) of the Regulation reads as follows: “A credit rating agency shall take all necessary steps to ensure that the issuing of a credit rating or a rating outlook is not affected by any existing or potential conflicts of interest or business relationship involving the credit rating agency issuing the credit rating or the rating outlook, its shareholders, managers, rating analysts, employees or any other natural person whose services are placed at the disposal or under the control of the credit rating agency, or any person directly or indirectly linked to it by control”.
56. Article 6(2) of the Regulation provides that “In order to ensure compliance with paragraph 1, a credit rating agency shall comply with the requirements set out in Sections A and B of Annex I”.
57. Point 3 of Section A of Annex I to the Regulation provides that “A credit rating agency shall establish adequate policies and procedures to ensure compliance with its obligations under this Regulation”.
58. The corresponding infringement is set out at Point 11 of Section I of Annex III to the Regulation, which reads as follows: “The credit rating agency infringes Article 6(2), in conjunction with point 3 of Section A of Annex I, by not establishing adequate policies or procedures to ensure compliance with its obligations under this Regulation”.
59. In addition, Point 4 of Section A of Annex I to the Regulation states: “A credit rating agency shall have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems”.
60. The corresponding infringement is set out at Point 12 of Section I of Annex III to the Regulation, which provides that: “The credit rating agency infringes Article 6(2), in conjunction with point 4 of Section A of Annex I, by not having sound administrative or accounting procedures, internal control mechanisms, effective procedures for risk assessment, or effective control or safeguard arrangements for information processing systems; or by not implementing or maintaining decision-making procedures or organisational structures as required by that point”.
61. Furthermore, Point 7 of Section A of Annex I to the Regulation provides that: “A credit rating agency shall establish appropriate and effective organisational and administrative arrangements to prevent, identify, eliminate or manage and disclose any conflicts of interest referred to in point 1 of Section B ...”.
62. The corresponding infringement is laid down in Point 15 of Section I of Annex III to the Regulation: “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 organisational or 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 ...”.
63. Lastly, it should be noted that Recital 26 of the Regulation indicated “Credit rating agencies should establish appropriate internal policies and procedures in relation to employees and other persons involved in the credit rating process in order to prevent, identify, eliminate or manage

and disclose any conflicts of interest and ensure at all times the quality, integrity and thoroughness of the credit rating and review process. Such policies and procedures should, in particular, include the internal control mechanisms and compliance function”.

### **3.2 Relevant legal provisions regarding conflicts of interest**

64. Article 6(1) of the Regulation reads as follows: “A credit rating agency shall take all necessary steps to ensure that the issuing of a credit rating or a rating outlook is not affected by any existing or potential conflicts of interest or business relationship involving the credit rating agency issuing the credit rating or the rating outlook, its shareholders, managers, rating analysts, employees or any other natural person whose services are placed at the disposal or under the control of the credit rating agency, or any person directly or indirectly linked to it by control”.
65. Article 6(2) of the Regulation provides that “In order to ensure compliance with paragraph 1, a credit rating agency shall comply with the requirements set out in Sections A and B of Annex I”.
66. Point 1 of Section B of Annex I provides that:  
“A credit rating agency shall identify, eliminate, or manage and disclose, 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 credit rating activities and persons approving credit ratings and rating outlooks”.
67. The corresponding infringement is set out at Point 19 of Section I of Annex III and states that: “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 or prominently, any actual or potential conflicts of interest that may influence the analyses or 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 credit rating activities or persons approving credit ratings and rating outlooks”.
68. Point 3 of Section B of Annex I to the Regulation reads as follows: “A credit rating agency shall not issue a credit rating or a rating outlook in any of the following circumstances, or shall, in the case of an existing credit rating or rating outlook, immediately disclose where the credit rating or rating outlook is potentially affected by the following”.
69. Point 3(aa) of Section B of Annex I to the Regulation includes as one of these circumstances: “a shareholder or member of a credit rating agency holding 10 % or more of either the capital or the voting rights of that credit rating agency or being otherwise in a position to exercise significant influence on the business activities of the credit rating agency, holds 10 % or more of either the capital or the voting rights of the rated entity or of a related third party ...”.
70. Point 3(ca) of Section B of Annex I also includes as one of these circumstances: “a shareholder or member of a credit rating agency holding 10 % or more of either the capital or the voting rights of that credit rating agency or being otherwise in a position to exercise significant influence on the business activities of the credit rating agency, is a member of the administrative or supervisory board of the rated entity or a related third party”.



71. Furthermore, Point 3a of Section B of Annex I to the Regulation imposes requirements in case of a shareholder or member of a credit rating agency holding 5% or more of either the capital or the voting rights of that credit rating agency. Point 3a of Section B of Annex I to the Regulation provides that:

“A credit rating agency shall disclose where an existing credit rating or rating outlook is potentially affected by either of the following:

a shareholder or member of a credit rating agency holding 5 % or more of either the capital or the voting rights of that credit rating agency or being otherwise in a position to exercise significant influence on the business activities of the credit rating agency, holds 5 % or more of either the capital or the voting rights of the rated entity or of a related third party, or of any other ownership interest in that rated entity or third party ...;

a shareholder or member of a credit rating agency holding 5 % or more of either the capital or the voting rights of that credit rating agency or being otherwise in a position to exercise significant influence on the business activities of the credit rating agency, is a member of the administrative or supervisory board of the rated entity or a related third party”.

72. In this regard, it should be noted that Recital 27 of the Regulation stated that “Credit rating agencies should avoid situations of conflict of interest and manage those conflicts adequately when they are unavoidable in order to ensure their independence. Credit rating agencies should disclose conflicts of interest in a timely manner. They should also keep records of all significant threats to the independence of the credit rating agency and that of its employees and other persons involved in the credit rating process, as well as the safeguards applied to mitigate those threats”.

### **3.3 Relevant legal provisions regarding ancillary services**

73. Article 6(1) of the Regulation reads as follows: “A credit rating agency shall take all necessary steps to ensure that the issuing of a credit rating or a rating outlook is not affected by any existing or potential conflicts of interest or business relationship involving the credit rating agency issuing the credit rating or the rating outlook, its shareholders, managers, rating analysts, employees or any other natural person whose services are placed at the disposal or under the control of the credit rating agency, or any person directly or indirectly linked to it by control”.
74. Article 6(2) of the Regulation provides that “In order to ensure compliance with paragraph 1, a credit rating agency shall comply with the requirements set out in Sections A and B of Annex I”.
75. The third paragraph of Point 4 of Section B of Annex I to the Regulation provides that: “... A credit rating agency shall ensure that the provision of ancillary services does not present conflicts of interest with its credit rating activities and shall disclose in the final ratings reports any ancillary services provided for the rated entity or any related third party”.
76. The corresponding infringements are set out at Point 23 of Section I of Annex III ( “The credit rating agency infringes Article 6(2), in conjunction with the first part of the third paragraph 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”) and at Point 2 of Section III of

Annex III ( “The credit rating agency infringes Article 6(2), in conjunction with the second part of the third paragraph 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 any related third party”).

77. Finally, it should be noted that Recital 6 of the Regulation provides that: “In addition to issuing credit ratings and performing credit rating activities, credit rating agencies should also be able to perform ancillary activities on a professional basis. The performance of ancillary activities should not compromise the independence or integrity of credit rating agencies’ credit rating activities”.
78. Recital 22 of the Regulation further states that: “In order to avoid potential conflicts of interest, credit rating agencies focus in their professional activity on the issuing of credit ratings. A credit rating agency should not be allowed to carry out consultancy or advisory services. In particular, a credit rating agency should not make proposals or recommendations regarding the design of a structured finance instrument. However, credit rating agencies should be able to provide ancillary services where this does not create potential conflicts of interest with the issuing of credit ratings”.

## **4 Legal assessment**

### **4.1 Findings with regard to the infringement at Point 11 of Section I of Annex III to the Regulation concerning adequate policies and procedures**

79. This section of the Statement of Findings analyses whether the PSI breached the following requirements:

“A credit rating agency shall take all necessary steps to ensure that the issuing of a credit rating or a rating outlook is not affected by any existing or potential conflicts of interest or business relationship involving the credit rating agency issuing the credit rating or the rating outlook, its shareholders, managers, rating analysts, employees or any other natural person whose services are placed at the disposal or under the control of the credit rating agency, or any person directly or indirectly linked to it by control” (Article 6(1) of the Regulation).

“In order to ensure compliance with paragraph 1, a credit rating agency shall comply with the requirements set out in Sections A and B of Annex I” (Article 6(2) of the Regulation).

“A credit rating agency shall establish adequate policies and procedures to ensure compliance with its obligations under this Regulation” (Point 3 of Section A of Annex I to the Regulation).

80. If these requirements are not met, this would constitute the infringement set out at Point 11 of Section I of Annex III to the Regulation.

### 4.1.1 Analysis

81. The infringement at Point 11 of Section I of Annex III to the Regulation shall be called the “policies and procedures infringement”.
82. In relation to the policies and procedures infringement, the issue is whether the PSI has breached its obligation under Article 6(2) of the Regulation, in conjunction with Point 3 of Section A of Annex I thereto, to establish adequate policies and procedures to ensure compliance with its obligations under this Regulation regarding actual and potential conflicts of interest.
83. The PSI had specific policies and procedures concerning avoidance and management of conflicts of interest and other aspects of its structure and business, as described in Section 2.2. These policies and procedures included the CoI Policy<sup>95</sup>, the Policy on Corporate Conflicts of Interest<sup>96</sup>, the SRG Shareholder conflicts procedure<sup>97</sup>, the CoBC<sup>98</sup>, the CoE<sup>99</sup>, the Record Keeping Policy<sup>100</sup> and Procedure<sup>101</sup> and the RPM<sup>102</sup>.
84. However, these policies and procedures were not adequate to ensure compliance with the Regulation. Below, in the detailed analysis, are set out the general shortcomings, before covering issues related specifically to conflicts of interest.

#### 4.1.1.1 General shortcomings of the policies and procedures

85. There are several general issues which are relevant to the policies and procedures infringement.
86. First, certain policies and procedures complement or supplement each other, but it is unclear exactly how this occurs, as procedures do not refer to the policy they complement, and the policies do not refer to the procedures that complement them, where relevant<sup>103</sup>. Further, when policies and procedures replace older versions, occasionally entailing a change to the name of the policy or procedure, no mention is made of the fact that they are replacing earlier versions<sup>104</sup>. This is an obvious shortcoming. It is also of note that some of the documents examined in this case were marked as ‘draft’ and it is not clear which version is final<sup>105</sup>.

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<sup>95</sup> Supervisory Report, Exhibit 104, ‘18.10 Scope Ratings\_Conflicts of Interests Policy(20170511)’.

<sup>96</sup> Supervisory Report, Exhibit 112, ‘18.14 Scope Ratings\_Corporate COI Policy (20210400) -Draft’.

<sup>97</sup> Supervisory Report, Exhibit 113, ‘18.24 Scope Ratings\_Shareholder Conflicts Procedures\_(20190625)’.

<sup>98</sup> Supervisory Report, Exhibit 95, ‘18.05 Scope Ratings\_Code of Business Conduct (20170802)’.

<sup>99</sup> Supervisory Report, Exhibit 88, ‘18.01 Scope Group\_Code of Ethics (20180219)’.

<sup>100</sup> Supervisory Report, Exhibit 117, ‘003 Scope Ratings Record keeping policy 2018’.

<sup>101</sup> Supervisory Report, Exhibit 119 ‘001 2017 Scope Ratings Record keeping procedures (Jan 2017)’

<sup>102</sup> Supervisory Report, Exhibit 97, ‘18.17 Scope Ratings\_Rating Process Manual (20180219)’.

<sup>103</sup> See for instance, Supervisory Report, Exhibit 104, ‘18.10 Scope Ratings\_Conflicts of Interests Policy(20170511)’. The CoI Policy does not mention which procedures complement it; and Supervisory Report, Exhibit 113, ‘18.24 Scope Ratings\_Shareholder Conflicts Procedures\_(20190625)’. The SRG Shareholders conflicts procedures do not mention what is its relationship with the CoI Policy.

<sup>104</sup> Exhibit 1, Supervisory Report, para. 110. See for instance Exhibit 15, PSI’s Response to the IIO’s RFI, question 28, p. 18: “Before June 2019, the Scope CRAs maintained a Conflict of Interest Management Policy (all versions are annexed to this letter as Annexes 28-1 to and including 28-3), which was renamed as the Conflict of Interest Policy in August 2017 (all versions are annexed to this letter as Annexes 28-4 to and including 28-6). This policy comprised one section on individual CoI and another on business-related CoI”.

<sup>105</sup> See for instance Supervisory Report, Exhibit 112, ‘18.14 Scope Ratings\_Corporate COI Policy (20210400) -Draft’.

87. Second, regarding the Glossary<sup>106</sup>, which supplements the PSI's policies and procedures, the references in various policies to this document do not mention the version of the glossary to which they refer. Further, before its update in 2021<sup>107</sup>, there were important lacunae in the Glossary, as it did not include definitions of, inter alia, 'ancillary services', the 'relevant CRA Member', the 'Relevant Shareholder', '5% or 10% CRA Member', '5% or 10% Shareholder' and 'significant influence'. These important terms were defined only in the Amended Glossary<sup>108</sup>. It is worth noting that apart from the lack of the definition of 'significant influence', there is also no explanation as to how to assess this in any of the documents<sup>109</sup>.
88. Third, it is not clear to whom the policies and procedures apply as the reference to 'Associated non-Employees', which can be found in numerous policies and procedures<sup>110</sup>, is not defined in any of the versions of the Glossary. Importantly, it is not clear if the members of the Advisory Board were covered by any policies and procedures: apart from the definition of 'Associated Individuals' introduced in 2021<sup>111</sup>, there is no suggestion that the policies and procedures apply to the members of the Advisory Board.
89. Fourth, it is not clear what steps are to be taken if a relevant person suspects violations of the relevant policies. For instance, the Col Policy provides that Covered Employees must immediately report violations to Compliance and that any potential infringements will be investigated and reported to Senior Management<sup>112</sup>. However, the policy does not set out the responsibilities of Compliance or Senior Management in such a scenario, nor the steps that they should take.

#### 4.1.1.2 Shortcomings specifically related to conflicts of interest

90. Alongside the general issues listed above, there were shortcomings in the PSI's policies and procedures as regards the specific obligation of CRAs under the Regulation to "identify, eliminate, or manage and disclose, 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 credit rating activities and persons approving credit ratings and rating outlooks".
91. There was no clarity in any of the relevant policies and procedures as to the exact functions and roles involved at each step of the process to ensure the identification, management and disclosure of potential and existing conflicts<sup>113</sup>. For example, the Col Policy<sup>114</sup> and the Policy on Corporate Conflicts of Interest<sup>115</sup> are of a general nature and do not provide for any procedural

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<sup>106</sup> Supervisory Report, Exhibit 86, '11.4 Scope Group\_Defined Terms Glossary\_(20180219)'.

<sup>107</sup> Supervisory Report, Exhibit 86, '11.4 Scope Group\_Defined Terms Glossary\_(20180219)'.

<sup>108</sup> Supervisory Report, Exhibit 87, '11.2 ScopeGroup\_Defined Terms Glossary (20210400)'.

<sup>109</sup> Exhibit 1, Supervisory Report, para. 110.

<sup>110</sup> See for instance Supervisory Report, Exhibit 104, '18.10 Scope Ratings\_Conflicts of Interests Policy(20170511)', p. 2 and Supervisory Report, Exhibit 113, '18.24 Scope Ratings\_Shareholder Conflicts Procedures\_(20190625)', p. 2.

<sup>111</sup> Supervisory Report, Exhibit 87, '11.2 ScopeGroup\_Defined Terms Glossary (20210400)', p. 2.

<sup>112</sup> Supervisory Report, Exhibit 104, '18.10 Scope Ratings\_Conflicts of Interests Policy(20170511)', p. 4.

<sup>113</sup> Exhibit 1, Supervisory Report, para. 110. See for instance, Supervisory Report, Exhibit 104, 18.10 'Scope Ratings Conflicts of Interests Policy(20170511)' which does not mention any functions or roles regarding conflicts of interest.

<sup>114</sup> Supervisory Report, Exhibit 104, '18.10 Scope Ratings\_Conflicts of Interests Policy(20170511)'.

<sup>115</sup> Supervisory Report, Exhibit 112, '18.14 Scope Ratings\_Corporate COI Policy (20210400) -Draft'.

steps to identify, eliminate, or manage and disclose conflicts; nor do they identify persons responsible for implementation. Further, while the SRG Shareholders conflicts procedures<sup>116</sup>, established only in 2019, set out the duties of the Investors Relations Team as responsible for, inter alia, sourcing of information on shareholders, they do not specify any concrete principles and steps to govern the work of the Investors Relations Team as it gathers, monitors or updates information and, subsequently update the Greylist and the Blacklist, which serve as a basis for the identification of certain conflicts of interest (apart from mentioning that such information shall be sourced from publicly available information and/or by way of direct contacts with the relevant shareholder which should commit to proactively inform the PSI about relevant changes)<sup>117</sup>. Moreover, while the SRG Shareholders conflicts procedures state that the sources used to gather information on shareholders should be updated every quarter, it does not mention that both lists should be updated in accordance with this revision, when necessary<sup>118</sup>.

92. A vivid example of the shortcomings in the PSI's policies and procedures as they relate to (potential) conflicts of interest is found in the case of [AB], who was put on the 'Watch list' by the PSI on 17 March 2021<sup>119</sup>, during an ESMA on-site inspection. The consequences of this action are unclear, as the 'Watch' list is not defined in the policies and procedures, and it is not apparent how the information incorporated under the 'Watch' flag will be used and for which purpose. Furthermore, the PSI itself explained that "'Watch' can have various meanings: incomplete information, subject to interpretation of the CRA Regulation, holdings close to a threshold; but in any case, it imposes a prohibition to issue any rating without prior consultation of Compliance"<sup>120</sup>. Finally, in response to a question from ESMA's Supervisors on whether maintaining the above-mentioned lists is foreseen in the PSI's policies and procedures, the PSI said "The list preparation is described in our policies and procedures, please refer to the documents listed below: 1. 18.24 Scope Ratings Shareholder Conflicts Procedures\_(20190625) – Valid since June 2019 – March 2021, describes Blacklist, Greylist"<sup>121</sup>. Therefore, the term 'Watchlist' was not defined in this context. Additional confusion flows from the fact that the Glossary defines another type of 'Watchlist' as "current lists of securities based on each Line of Business in which employee transactions are restricted, it includes the date and time the security was added to the list (and eventually the date and time the security was deleted from the list)"<sup>122</sup>. The term 'Watchlist' therefore had at least two completely different meanings: one as set out in the Glossary and another meaning which was used by the PSI relating to [AB]'s potential conflict of interest.
93. Furthermore, Points 3 and 3a of Section B of Annex I of the Regulation impose obligations on CRAs where a shareholder holding 5% or 10% or more of the PSI holds 5% or 10% or more of the rated entity, or is a member of the administrative or supervisory board of the rated entity, or otherwise exercises significant influence. While the PSI's policies and procedures sought to ensure compliance with these obligations, they did not do so in a satisfactory manner. The Board notes in particular the following.

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<sup>116</sup> Supervisory Report, Exhibit 113, '18.24 Scope Ratings\_Shareholder Conflicts Procedures\_(20190625)'.  
<sup>117</sup> Supervisory Report, Exhibit 113, '18.24 Scope Ratings\_Shareholder Conflicts Procedures\_(20190625)', pp. 2-3.  
<sup>118</sup> Exhibit 1, Supervisory Report, para. 110.  
<sup>119</sup> Supervisory Report, Exhibit 265, 'List of actual and potential conflict of interests (Jan 2017 to Dec 2021)' embedded in Exhibit 44, 'SRG Response – TOPIC 1 20220502 (Part II of II)', p. 12.  
<sup>120</sup> Exhibit 24, '44-1 Scope Response to ESMA Query 7 June 2021 FINAL', p. 1.  
<sup>121</sup> Exhibit 24, '44-1 Scope Response to ESMA Query 7 June 2021 FINAL', p. 2.  
<sup>122</sup> Supervisory Report, Exhibit 86, '11.4 Scope Group\_Defined Terms Glossary\_(20180219)', p. 6.

94. First, until May 2021, while the CoI Policy sought to describe situations in which the PSI would not issue a credit rating<sup>123</sup>, it did not refer to situations of holding 5% or more of the PSI's capital or voting rights or of a rated entity or of a related third party, nor did it explain the situations in which significant influence might be exercised on the business activities of the PSI. In its versions from 30 May 2018 to May 2021, in the section entitled 'Disclosure of potential conflicts of interests related to the issuance of Credit Ratings', the CoI Policy only mentioned that "potential conflicts of interest related to the issuance of Credit Ratings shall be disclosed on the PSI's website. Upon discovery of issuance of a Credit Rating affected by an actual or potential conflict of interest Scope Ratings shall disclose this fact in a timely manner"<sup>124</sup> but did not contain anything more specific, such as a mention of the percentage threshold or the concept of significant influence. Additionally, none of the procedures and policies provided for an assessment and / or recording of changes in the holdings of shareholders below but close to 5%<sup>125</sup>.
95. Second, the Policy on Corporate Conflicts of Interest envisages that in "certain circumstances, Scope CRAs will disclose actual or potential Corporate Conflicts of Interest on their website"<sup>126</sup>. It is however not further specified what 'certain circumstances' mean in this case. Further, the policy does not explicitly set out any requirements related to the 5% threshold.
96. Finally, as to the assessment of conflicts of interest in the provision of ancillary services, there are no references to their identification, management or elimination and disclosure of conflicts, but a mere reference in the RPM to actions to assess conflicts of interest in relation to shareholding when credit ratings are issued<sup>127</sup>. Hence, there was no guidance which would take into account the specificities of the provision of ancillary services in the assessment of conflicts of interest. While the PSI eventually established an Ancillary Services Policy<sup>128</sup>, this only occurred in December 2022.
97. It is of note in this context that these issues "all originate from an imperfect understanding of some regulatory requirements, which translated into less stringent policies and procedures. We therefore acknowledge that Scope did not develop the adequate awareness quickly enough to properly manage the perception of conflicts of interest ... Scope had implemented policies and procedures that provided for a narrow interpretation of the regulatory requirements"<sup>129</sup>.
98. In light of the above, the Board finds that for many years the PSI did not establish policies and procedures that were adequate to ensure compliance with the PSI's conflict of interest obligations under the Regulation. This constitutes the infringement set out at Point 11 of Section I of Annex III to the Regulation.

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<sup>123</sup> Supervisory Report, Exhibit 104, '18.10 Scope Ratings\_Conflicts of Interests Policy(20170511)', p. 3. However, this reference was deleted in May 2021. See in comparison Supervisory Report, Exhibit 111, 'Conflicts of Interests Policy dated May 2021'.

<sup>124</sup> Supervisory Report, Exhibit 108, 'Conflicts of Interests Policy dated 30 May 2018', p. 3.

<sup>125</sup> Exhibit 1, Supervisory Report, para. 110.

<sup>126</sup> Supervisory Report, Exhibit 112, '18.14 Scope Ratings\_Corporate COI Policy (20210400) -Draft', p. 2.

<sup>127</sup> Supervisory Report, Exhibit 97, '18.17 Scope Ratings\_Rating Process Manual (20180219)', p. 3; Supervisory Report, Exhibit 98, '18.18 Scope Ratings\_Rating Process Manual (20180530)', p. 3.

<sup>128</sup> Exhibit 25, 'Scope CRAs Ancillary Services Policy', 1 December 2022. It can also be found here (last update: 5 June 2023): <https://scoperatings.com/dam/jcr:cf9e63a-b1f0-43d8-8959-b23ede15568d/Scope%20CRA%20Ancillary%20Services%20Policy.pdf>.

<sup>129</sup> Exhibit 11, PSI's Comments on the Supervisory Report', pp. 2-3.



## 4.1.2 Intent or negligence

99. Article 36a(1) of the Regulation provides:

“Where, in accordance with Article 23e(5), ESMA’s Board of Supervisors finds that a credit rating agency has, intentionally or negligently, committed one of the infringements listed in Annex III, it shall adopt a decision imposing a fine in accordance with paragraph 2.

An infringement by a credit rating agency shall be considered to have been committed intentionally if ESMA finds objective factors which demonstrate that the credit rating agency or its senior management acted deliberately to commit the infringement”.

100. In accordance with Article 36a(1) of the Regulation, a finding that an infringement has been committed intentionally requires a finding of “objective factors which demonstrate that the credit rating agency or its senior management acted deliberately to commit the infringement”.

101. The factual background as set out in this decision does not establish that there are objective factors which demonstrate that the PSI, its employees or senior managers acted deliberately to commit the infringement.

102. It should therefore be assessed whether the PSI acted with negligence.

### 4.1.2.1 Preliminary remarks regarding negligence

103. The Regulation provides no explicit guidance as regards the concept of “negligence”. However, it follows from the provisions of Articles 24 and 36a of the Regulation that the term “negligence” as referred to in the Regulation requires more than a determination that an infringement was committed.

104. Further, it is clear from the second subparagraph of Article 36a(1) of the Regulation that a negligent infringement is not one which was committed deliberately or intentionally. This position is further supported by the case-law of the Court of Justice of the European Union (“CJEU”) which ruled that negligence may be understood as entailing an unintentional act or omission<sup>130</sup>.

105. In addition, “negligence” in the context of the Regulation is an EU law concept – albeit one which is familiar to and an inherent part of the 27 Member States’ legal systems – which must be given an autonomous, uniform interpretation.

106. Considering the CJEU jurisprudence<sup>131</sup>, the concept of a negligent infringement of the Regulation is to be understood to denote a lack of care on the part of a CRA when it fails to comply with this Regulation.

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<sup>130</sup> See for instance Case C-308/06, *International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I- 4057, where the CJEU noted at para. 75 of its judgment that all of the Member States’ legal systems “have recourse to the concept of negligence which refers to an unintentional act or omission by which the person responsible breaches his duty of care”.

<sup>131</sup> See for instance Case C-48/98, *Firma Söhl & Söhlke v Hauptzollamt Bremen* [1999] ECR I-7877, para. 58; Case C-64/89, *Deutscher Fernsprecher* [1990] ECR I-2535, para. 19.

107. Based on this, the Board considers negligence to be established in circumstances where the CRA, as a professional firm in the financial services sector subject to stringent regulatory requirements, is required to take special care in assessing the risks that its acts or omissions entail, and has failed to take that care; and as result of that failure, the CRA has not foreseen the consequences of its acts or omissions, including particularly its infringement of the Regulation, in circumstances where a person in such a position who is normally informed and sufficiently attentive could not have failed to foresee those consequences.
108. The following points should be taken into consideration regarding the standard of care to be expected of a CRA.
109. First, one should consider the position taken by the General Court in the Telefonica case, where the General Court spoke of persons “carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on that account be expected to take special care in assessing the risks that such an activity entails”<sup>132</sup>. Similarly, operating within the framework of a regulated industry, a CRA which holds itself out as a professional entity and carries out regulated activities should be expected to exercise special care in assessing the risks that its acts and omissions may entail.
110. Second, regard should be given to the nature and significance of the objectives and provisions of the Regulation. In this respect, Recitals 1 and 2 of the Regulation emphasise the important role and impact of CRAs in global securities and banking markets, the resulting essential need for credit rating activities to be conducted in accordance with principles of integrity, transparency, responsibility and good governance, and the resulting intention of the legislator to provide stringent requirements in relation to the conduct of CRAs. Further, the weight given to these considerations by the legislator is reflected by the nature and extent of the requirements imposed on CRAs under Annex I to the Regulation and by the corresponding infringement provisions under Annex III to the Regulation. Moreover, of more particular note, the Regulation envisages that an important function of a CRA is to ensure that it monitors its own activities in order to comply with the Regulation and in order to identify instances in which its present practices carry the risk of non-compliance with the Regulation. For instance, the requirement for a CRA to have sound administrative or accounting procedures, internal controls mechanisms or to establish and maintain a compliance function reflects the importance of this function.
111. Therefore, the standard of care to be expected of a CRA is high.
112. This high standard of care has been confirmed by the Joint Board of Appeal (“BoA”) of the European Supervisory Authorities, which has stated that “ESMA rightly emphasises that financial services providers ... play an important role in the economy of the EU, as well as in the financial stability and integrity of the financial markets” and that “[a] high standard of care is to be expected of such persons”<sup>133</sup>.

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<sup>132</sup> Case T-336/07, Telefónica, SA and Telefónica de España, SA v Commission [2012] ECLI:EU:T:2012:172, para. 323.

<sup>133</sup> See para. 285 of the decisions of the Board of Appeal in the Appeals of Svenka Handelsbanken AB, Skandinaviska Enskilda Banken AB, Swedbank AB and Nordea Bank Abp against ESMA’s decision in the Nordic Banks case (ref. BoA D 2019 01, BoA D 2019 02, BoA D 2019 03 and BoA D 2019 01), available at [https://www.esma.europa.eu/sites/default/files/library/board\\_of\\_appeal\\_-\\_27\\_february\\_2019\\_-\\_decisions\\_2019\\_01\\_02\\_03\\_04\\_-\\_final.pdf](https://www.esma.europa.eu/sites/default/files/library/board_of_appeal_-_27_february_2019_-_decisions_2019_01_02_03_04_-_final.pdf) 01, BoA D 2019 02, BoA D 2019 03 and BoA D 2019 01), available at

113. The determination as to whether an infringement is committed negligently is a question of fact<sup>134</sup>.

#### 4.1.2.2 Assessment of negligence

114. Concerning Point 11 of Section I of Annex III to the Regulation, had the PSI taken the special care required of a CRA, it would have foreseen that it did not establish policies and procedures, which were adequate to ensure compliance with Point 3 of Section A of Annex I to the Regulation by not having identified in the PSI's relevant procedures<sup>135</sup> the appropriate definitions and the appropriate guidance on the assessment of conflicts of interest.

115. For example, in relation to the definitions which should form a basis of the relevant policies and procedures, there were numerous shortcomings in the Glossary<sup>136</sup> which led in particular to confusion as regards the assessment of 'significant influence' and the applicability of the policies and procedures to the Advisory Board<sup>137</sup>.

116. Moreover, as already noted above, there were general shortcomings of the policies and procedures because they are unclear as to the functions and roles involved at each step of the process to ensure that conflicts of interest are properly identified, managed and disclosed<sup>138</sup>. It is also unclear what consequences flow from the 'Watch' classification as this is not defined anywhere. Finally, none of the policies and procedures set out how to address situations in which entities hold an interest or shares of 5% and the related issue of significant influence.

117. The Board finds that these shortcomings amount to strong evidence of negligence as the failings go to the heart of the PSI's obligations under the Regulation, and in particular insofar as those obligations relate to the proper management of conflicts of interest.

118. Therefore, the PSI was negligent when committing the infringement at Point 11 of Section I of Annex III to the Regulation.

### 4.1.3 Fine

#### 4.1.3.1 Determination of the basic amount

119. Article 36a of the Regulation provides in paragraph 2 as follows:

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[https://www.esma.europa.eu/sites/default/files/library/board\\_of\\_appeal\\_-\\_27\\_february\\_2019\\_-\\_decisions\\_2019\\_01\\_02\\_03\\_04\\_-\\_final.pdf](https://www.esma.europa.eu/sites/default/files/library/board_of_appeal_-_27_february_2019_-_decisions_2019_01_02_03_04_-_final.pdf)

See also para. 158 of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA's decision (ref. BoA 2020 D 03) available at: [https://www.esma.europa.eu/sites/default/files/library/boa\\_d\\_2020\\_03\\_decision\\_on\\_scope\\_ratings\\_v\\_esma.pdf](https://www.esma.europa.eu/sites/default/files/library/boa_d_2020_03_decision_on_scope_ratings_v_esma.pdf).

<sup>134</sup>See also para. 159 of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA's decision (ref. BoA 2020 D 03) available at: [https://www.esma.europa.eu/sites/default/files/library/boa\\_d\\_2020\\_03\\_decision\\_on\\_scope\\_ratings\\_v\\_esma.pdf](https://www.esma.europa.eu/sites/default/files/library/boa_d_2020_03_decision_on_scope_ratings_v_esma.pdf).

<sup>135</sup>As described in Section 2.2.

<sup>136</sup>Supervisory Report, Exhibit 86, '11.4 Scope Group\_Defined Terms Glossary\_(20180219)'.

<sup>137</sup>The only reference made to the Advisory Board relates to the definition of "Associated Individuals" established in 2021 which covers members of the Advisory Board. See Supervisory Report, Exhibit 87, '11.2 ScopeGroup\_Defined Terms Glossary (20210400)', p. 2.

<sup>138</sup>Exhibit 1, Supervisory Report, para. 110. See for instance, Supervisory Report, Exhibit 104, '18.10 Scope Ratings Conflicts of Interests Policy(20170511)' which does not mention any functions or roles regarding conflicts of interest.

“The basic amount of the fines referred to in paragraph 1 shall be included within the following limits: (a) for the infringements referred to in points 1 to 5, 11 to 15, 19, 20, 23, 26a to 26d, 28, 30, 32, 33, 35, 41, 43, 50, 51 and 55 to 62 of Section I of Annex III, the fines shall amount to at least EUR 500,000 and shall not exceed EUR 750,000 [...]

To decide whether the basic amount of the fines should be set at the lower, middle or higher end of the limits set out in the first subparagraph, ESMA shall have regard to the annual turnover in the preceding business year of the credit rating agency concerned. The basic amount shall be at the lower end of the limit for credit rating agencies whose annual turnover is below EUR 10 million, the middle of the limit for the credit rating agencies whose annual turnover is between EUR 10 and 50 million and the higher end of the limit for the credit rating agencies whose annual turnover is higher than EUR 50 million”.

120. It has been established that the PSI committed the infringement set out at Point 11 of Section I of Annex III to the Regulation, by not having in place policies and procedures adequate to ensure compliance with Point 3 of Section A of Annex I to the Regulation.
121. To determine the basic amount of the fine, the Board has regard to the PSI's annual turnover in the business year preceding the year of the decision or that of the last audited accounts available<sup>139</sup>.
122. In 2022, the PSI had a turnover of EUR 19,623,147.
123. Thus, the basic amount of the fine for the infringement listed in Point 11 of Section I of Annex III to the Regulation is set at the middle of the limit set out in Article 36a(2)(a) of the Regulation and shall not exceed EUR 625,000.

#### 4.1.3.2 Applicable aggravating factor

124. The applicable aggravating factor listed in Annex IV to the Regulation is set out below.  
Annex IV, Point I. 2. If the infringement has been committed for more than six months, a coefficient of 1,5 shall apply.
125. The infringement was committed for more than six months. The deficiencies in the relevant policies and procedures, as described in Section 2.2 were evident over a number of years and continued at least until the measures taken by the PSI that are relevant to the mitigating factor at Annex IV, Point II. 4 below.
126. Therefore, the Board finds that this aggravating factor is applicable.

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<sup>139</sup> See paras. 176 and 177 of the decision of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA's decision (ref. BoA 2020 D 03) available at: [https://www.esma.europa.eu/sites/default/files/library/boa\\_d\\_2020\\_03\\_decision\\_on\\_scope\\_ratings\\_v\\_esma.pdf](https://www.esma.europa.eu/sites/default/files/library/boa_d_2020_03_decision_on_scope_ratings_v_esma.pdf). When the audited financial statement of the last full business year is not available, the total annual turnover is identified according to the latest available audited financial statement.

127. The other aggravating factors were not applicable. In this respect, Board considers that the aggravating factors in relation to the infringement being committed repeatedly or intentionally, revealing systemic weaknesses in the organisation of the PSI, or having a negative impact on the quality of the ratings rated by the PSI were not applicable in this case. In addition, the Board also found that the PSI had taken remedial action since the breach had been identified and the PSI's senior management had cooperated with ESMA in carrying out its investigations, thus aggravating factors related to those requirements were also not applicable.

#### 4.1.3.3 Mitigating factors

128. Annex IV to the Regulation lists the mitigating factors to be taken into consideration for the adjustment of the fine. Their application is assessed below.

Annex IV, Point II. 1. If the infringement relates to a breach listed in Section II or III of Annex III and has been committed for fewer than 10 working days, a coefficient of 0,9 shall apply.

129. This mitigating factor is not applicable; the infringement at Point 11 is listed in Section I of Annex III to the Regulation and not in Section II or III as required by this provision.

Annex IV, Point II. 2. If the credit rating agency's senior management can demonstrate that they have taken all the necessary measures to prevent the infringement, a coefficient of 0,7 shall apply.

130. As a preliminary remark, the application of this mitigating factor should be limited to those situations where the PSI can prove that the infringement was the result of events which were beyond the control of its senior management; for instance, when an employee intentionally circumvents the measures put in place by the senior management. It also means that to benefit from the application of this mitigating factor, the measures taken by the CRA must be measures taken ex ante (i.e., before the commission of the infringement) and not ex post (i.e., once the infringement had already been committed). If taken ex post the measures might be relevant to the mitigating factor for voluntarily taking measures to ensure that a similar infringement cannot be committed in the future, but not for the application of this mitigating factor.

131. In this case, the PSI noted, as measures taken to prevent infringements generally, the maintenance of an active dialogue with ESMA to ensure proper action and interpretation of the law in the absence of sufficiently specific guidance related to the conflicts of interest management; development of policies and procedures; the provision of mandatory training; material investment decisions to reinforce control functions; operational implementation of measures; monitoring of (potential) conflict of interest situations by the Management Board and Extended Management of Scope Ratings and the Beirat; and engaging external counsel and consultants in cases of unclear application of the CRA Regulation<sup>140</sup>.

132. However, this does not constitute sufficient evidence that the PSI's senior management has taken **all** necessary measures, as the measures outlined above failed to prevent the infringement at Point 11 of Section I of Annex III.

133. The Board thus finds that this mitigating factor is not applicable.

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<sup>140</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 48, p. 32.

Annex IV, Point II. 3. If the credit rating agency has brought quickly, effectively, and completely the infringement to ESMA's attention, a coefficient of 0,4 shall apply.

134. To benefit from the application of this mitigating factor, the PSI must acknowledge that it has committed (or believe that it could have committed) an infringement and then brought it to the attention of ESMA quickly, effectively, and completely<sup>141</sup>.
135. The Board considers the three requirements (speed, effectiveness, and completeness) set out at Point II.3 of Annex IV to the Regulation to be cumulative. Therefore, if one of them is not met, the mitigating factor cannot be applied.
136. In this case, there is no evidence to suggest that the PSI brought this infringement to the attention of ESMA; therefore the Board finds that this mitigating factor is not applicable.

Annex IV, Point II. 4. If the credit rating agency has voluntarily taken measures to ensure that similar infringement cannot be committed in the future, a coefficient of 0,6 shall apply.

137. In the instant case, the PSI provided a description of actions taken to remedy issues identified in the areas covered by the investigation. In particular, the PSI conducted an internal assessment of its internal control framework, which resulted in various actions including an extensive revision of the compliance framework focusing on the various policies governing conflict of interest management in relation to individual, business and corporate conflicts of interest as well as record retention<sup>142</sup>.
138. The PSI also stated that it had made "diligent efforts [...] to complete and fully execute the associated remediation action plan [sent by ESMA], which demonstrates our commitment to rectify any shortcomings of the past"<sup>143</sup>.
139. This should ensure that similar infringements of Point 11 of Section I of Annex III cannot be committed in the future.
140. If the measures were taken voluntarily, this would imply that the mitigating factor under Annex IV, Point II.4. to the Regulation would be applicable.
141. There is no definition of what "voluntarily" ("de son plein gré" in the French version of the Regulation) means in the context of this mitigating factor. Nevertheless, there are clear-cut examples: a CRA has voluntarily taken measures when it has taken them spontaneously without

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<sup>141</sup> See para. 183 of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA's decision (ref. BoA 2020 D 03) available at: [https://www.esma.europa.eu/sites/default/files/library/boa\\_d\\_2020\\_03\\_decision\\_on\\_scope\\_ratings\\_v\\_esma.pdf](https://www.esma.europa.eu/sites/default/files/library/boa_d_2020_03_decision_on_scope_ratings_v_esma.pdf): "the Board finds that ESMA was correct in not applying the mitigating coefficient as it finds it clear on the facts that the appellant did not acknowledge that it had committed (or believe it could have committed) an infringement, and done so quickly, effectively, and completely". See also para. 202: "Specifically, the Board of Appeal finds as regards the mitigation coefficient adjustment set out in point II.3 of Annex IV that it is clear that the appellant did not quickly, efficiently, and completely bring the infringement to ESMA's attention. The relevant notification of clarifications to ESMA did not in any way indicate expressly to ESMA that an infringement had been committed. Further, on the facts presented to the Board of Appeal, the notification in question was provided in the course of the appellant's ongoing supervisory relationship with ESMA and as part of its periodic disclosures; it was not presented in the form of an express acknowledgement of an infringement that is clearly required by point II.3 of Annex IV. The Board of Appeal notes and gives weight in this regard that ESMA only came to have notice of the infringements following supervisory and subsequently IIO action (following, in turn, a complaint). On the facts, therefore, ESMA was correct in finding that this coefficient could not be applied".

<sup>142</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 49, pp. 34-37.

<sup>143</sup> PSI's written submissions in response to the Board's initial Statement of Findings, p. 2.



any solicitation from its supervisor. It is also obvious that when there is a specific obligation to take these measures, they were not taken voluntarily. The situation is to a certain extent less clear-cut when the CRA takes measures only after several requests and interactions with its supervisor aiming at ensuring that the said measures are implemented by the CRA: for example, through an action plan defined and monitored by the supervisor.

142. In this case, the PSI was not under any compulsion (such as, for example, in light of an ESMA decision) to take the measures outlined above to ensure that similar infringements cannot be committed in the future, and the PSI has done so voluntarily.
143. The Board thus deems that the mitigating factor is applicable to the infringement at Point 11 of Section I of Annex III to the Regulation.

#### 4.1.3.4 Determination of the adjusted fine

144. In accordance with Article 36a(3) of the Regulation, taking into account the applicable aggravating and mitigating factors, the basic amount of EUR 625,000 must be adjusted as follows.

145. The difference between the basic amount and the amount resulting from the application of each individual coefficient set out in Annex IV is added to the basic amount in the case of the aggravating factor and subtracted from the basic amount in the case of the mitigating factor:

Aggravating factor set out in Annex IV, Point I. 2:

$$\text{EUR } 625,000 \times 1.5 = \text{EUR } 937,500$$

$$\text{EUR } 937,500 - \text{EUR } 625,000 = \text{EUR } 312,500$$

Mitigating factor set out in Annex IV, Point II. 4:

$$\text{EUR } 625,000 \times 0.6 = \text{EUR } 375,000$$

$$\text{EUR } 625,000 - \text{EUR } 375,000 = \text{EUR } 250,000$$

Adjusted fine taking into account applicable aggravating and mitigating factors:

$$\text{EUR } 625,000 + \text{EUR } 312,500 - \text{EUR } 250,000 = \text{EUR } 687,500$$

146. Consequently, following adjustment by taking into account the applicable aggravating and mitigating factors, the amount of the fine to be imposed on the PSI for the infringement listed in Point 11 of Section I of Annex III to the Regulation amounts to EUR 687,500.

#### **4.1.4 Supervisory measure**

147. Regard must be had to Article 24, paragraphs 1 and 2, of the Regulation.

148. Given the factual findings in the present case and in particular the fact that changes were eventually introduced by the PSI to the relevant policies and procedures, only the supervisory measure set out in Article 24(1)(e) of the Regulation may be considered appropriate with regard to the nature and the seriousness of the infringement.
149. The Board thus finds that a public notice must be issued.

## **4.2 Findings with regard to the infringement at Point 12 of Section I of Annex III to the Regulation concerning internal control mechanisms**

150. This section of the Statement of Findings analyses whether the PSI breached the following requirements:

“A credit rating agency shall take all necessary steps to ensure that the issuing of a credit rating or a rating outlook is not affected by any existing or potential conflicts of interest or business relationship involving the credit rating agency issuing the credit rating or the rating outlook, its shareholders, managers, rating analysts, employees or any other natural person whose services are placed at the disposal or under the control of the credit rating agency, or any person directly or indirectly linked to it by control” (Article 6(1) of the Regulation).

“In order to ensure compliance with paragraph 1, a credit rating agency shall comply with the requirements set out in Sections A and B of Annex I” (Article 6(2) of the Regulation).

“A credit rating agency shall have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems.

Those internal control mechanisms shall be designed to secure compliance with decisions and procedures at all levels of the credit rating agency.

A credit rating agency shall implement and maintain decision-making procedures and organisational structures which clearly and in a documented manner specify reporting lines and allocate functions and responsibilities” (Point 4 of Section A of Annex I to the Regulation).

151. If these requirements are not met, this would constitute the infringement set out at Point 12 of Section I of Annex III to the Regulation.

### **4.2.1 Analysis**

152. The Board considers that there are similarities between the infringements at Points 11 and 12 of Section I of Annex III to the Regulation. Notwithstanding the overlap, they have a different scope. As described above, the first provision (Point 11) refers to a CRA’s “policies and procedures” whereas the second (Point 12) is broader and relates to a CRA’s “administrative and accounting procedures, internal control mechanisms [and] effective procedures for risk assessment”. In addition, so as not to commit the infringement at Point 12, a CRA’s internal control mechanisms must be designed to secure compliance with decisions and “procedures”

of the CRA, i.e. including those procedures that the CRA must establish so as not to commit the infringement at Point 11<sup>144</sup>.

153. The infringement at Point 12 shall be called the “internal control infringement”.
154. As to the assessment of the internal control infringement, the issue at stake in this investigation is whether the PSI has breached its obligation under Article 6(2) of the Regulation, in conjunction with Point 4 of Section A of Annex I thereto, to have internal control mechanisms “to ensure that the issuing of a credit rating or a rating outlook is not affected by any existing or potential conflicts of interest or business relationship involving the credit rating agency issuing the credit rating or the rating outlook, its shareholders, managers, rating analysts, employees or any other natural person whose services are placed at the disposal or under the control of the credit rating agency, or any person directly or indirectly linked to it by control.”
155. The Board considered the wording and the context of Article 6(2) of the Regulation and Point 4 of Section A of Annex I thereto. The conclusions are set out below.
156. According to the Regulation, a CRA is obliged to have in place internal control mechanisms designed to secure compliance with decisions and procedures at all levels of that CRA. As already noted, the PSI had specific procedures and internal control mechanisms to avoid conflicts of interest in general, as analysed above. These were deficient, but also implemented in an inadequate way. This inadequacy in implementation forms the basis of the internal control infringement. The shortcomings fall into three broad areas: guidance, controls and documentation, each of which is dealt with in turn below<sup>145</sup>.

#### 4.2.1.1 Shortcomings related to guidance

157. The notion of control implies that there is a set of pre-established (regulatory-compliant) standards setting out the actions to be taken to enable the staff of the PSI to identify conduct which does, or does not, comply with this standard. In the instant case, the PSI’s guidance to staff on how to comply with the relevant requirements on conflicts of interests was unclear in several respects.
158. First, is it not clear if ‘Employees’, as defined in the Glossary<sup>146</sup> and ‘other individuals (not defined in the Glossary) and ‘Associated Individuals’ as of 2021<sup>147</sup> were well-informed as to which of the relevant policies or procedures applied to them and how the terms included in the glossary related to them. This is because the PSI’s policies and procedures<sup>148</sup> refer to a term ‘non-Employees’ which is undefined (as confirmed by the PSI<sup>149</sup>). Additionally, the CoBC required that only Covered Employees need to confirm, on an annual basis, that they read and

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<sup>144</sup> This approach to the interpretation of Points 11 and 12 of Section I of Annex III to the Regulation is consistent with that taken in previous decisions of the Board of Supervisors, such as ESMA Decision CRA 2018/1 (Fitch UK), available at this link: [https://www.esma.europa.eu/sites/default/files/library/cra\\_1-2018\\_decision\\_on\\_fitch\\_uk.pdf](https://www.esma.europa.eu/sites/default/files/library/cra_1-2018_decision_on_fitch_uk.pdf).

<sup>145</sup> It should be noted that this distinction between three categories of shortcomings was endorsed in previous cases. See for example ESMA Decision CRA 2018/1 (Fitch UK), para. 33 available at this link: [https://www.esma.europa.eu/sites/default/files/library/cra\\_1-2018\\_decision\\_on\\_fitch\\_uk.pdf](https://www.esma.europa.eu/sites/default/files/library/cra_1-2018_decision_on_fitch_uk.pdf).

<sup>146</sup> Supervisory Report, Exhibit 86, ‘11.4 Scope Group\_Defined Terms Glossary\_(20180219)’, p. 3.

<sup>147</sup> Supervisory Report, Exhibit 87, ‘11.2 ScopeGroup\_Defined Terms Glossary (20210400)’, p. 2.

<sup>148</sup> Such as Supervisory Report, Exhibit 104, ‘18.10 Scope Ratings\_Conflicts of Interests Policy(20170511)’.

<sup>149</sup> Supervisory Report, Exhibit 104, ‘18.10 Scope Ratings\_Conflicts of Interests Policy(20170511)’.

understood the CoBC and “all applicable Scope policies”<sup>150</sup>; however, it is not clear if other persons were required that they are familiar with the relevant policies and procedures. Finally, there was an absence of clear guidance as to the roles of the members of the Advisory Board, and whether interaction between ratings analysts and Advisory Board members was permitted.

159. Second, employees did not receive sufficient guidance on how to report any possible violation of the policies and procedures, which is a central aspect of a compliant internal control system; for example, the Col Policy envisages that Covered Employees must immediately report (suspected) violations to Compliance, without giving any guidance as to how such reports might be made, or further detail regarding matters such as the timing of these reports<sup>151</sup>.
160. It is also not clear whether individuals should keep records of meetings and conversations. Until January 2021, there was an obligation on employees to make file notes of the relevant conversations and document meetings<sup>152</sup>, though the PSI was not able to retrieve minutes for each meeting as requested by ESMA’s Supervisors, and when the PSI provided minutes, these were often incomplete, or handwritten, or ex post and based on recollection<sup>153</sup>.
161. Given the foregoing, the Board finds that there were substantial shortcomings in the PSI’s internal control mechanisms because its guidance to staff on how to comply with the relevant requirements on conflicts of interest was unclear, as was the procedure for reporting any breaches of the guidance and recording relevant meetings and conversations.

#### 4.2.1.2 Shortcomings related to controls

162. A CRA’s internal control mechanisms must clearly identify the type of control activities to be carried out and the persons responsible for these control activities. The rules, roles and control activities set out in the internal control mechanisms must also ensure that they are implemented in practice. On those two aspects, there were substantial shortcomings because of an inadequate identification by the PSI of the control activities and / or persons in charge, and / or inadequate implementation.
163. First, the exact role and responsibilities of the Compliance function are not clearly defined in any of the relevant policies and procedures, which for instance only state in very general terms that “Compliance along with Scope Ratings Management will be responsible for the implementation and the enforcement of these Procedures”<sup>154</sup> without any further reference to the responsibilities of Compliance. Moreover, the PSI noted that Rating Operations only inform Compliance of a 10% shareholding (and not a 5% shareholding) since Rating Operations performs the first check for any potential corporate Col starting at the 5% threshold<sup>155</sup>, showing that Compliance is only involved in instances where a relevant shareholding reaches 10% and is not involved in

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<sup>150</sup> Supervisory Report, Exhibit 95, ‘18.05 Scope Ratings\_Code of Business Conduct (20170802)’, p. 4.

<sup>151</sup> Supervisory Report, Exhibit 104, ‘18.10 Scope Ratings\_Conflicts of Interests Policy(20170511)’, p. 4.

<sup>152</sup> Supervisory Report, Exhibit 119, ‘001 2017 Scope Ratings Record keeping procedures (Jan 2017), p. 2’.

<sup>153</sup> Exhibit 1, Supervisory Report, para. 63. Supervisory Report, Exhibit 123, ‘16.168 2019.06.20 Meeting Notes’, Supervisory Report, Exhibit 124, ‘16.169 2020.06.03 Meeting Notes’, Supervisory Report, Exhibit 125, ‘16.170 2020.03.03-G Call Notes (Nunnerich, arbonus, D , cvb)’, Supervisory Report, Exhibit 126, ‘16.171 2020.06.25 Meeting Notes’ and Exhibit 127, ‘16. 172 2020.07.03 Meeting Notes’.

<sup>154</sup> Supervisory Report, Exhibit 104, ‘18.10 Scope Ratings\_Conflicts of Interests Policy(20170511)’, p. 4.

<sup>155</sup> Exhibit 15, PSI’s Response to the IIO’s RFI , question 36, p. 23.

situations of 5% shareholding. Rating Operations cannot replace the Compliance function and the lack of involvement of Compliance in the latter instance is a shortcoming.

164. Second, for the most part, the PSI's policies did not describe any control activities and there was no clear allocation of functions and responsibilities. By way of example, the Col Policy<sup>156</sup> and the Policy on Corporate Conflicts of Interest<sup>157</sup> do not provide for any guidance on control activities and persons responsible for conflicts of interest. Moreover, even though the SRG Shareholder conflicts procedure identifies<sup>158</sup> certain responsibilities for the Investors Relations Team, Markets Division, Rating Operations and Compliance, it is not clear how those parts of the business should interact with each other and there is no clear sequence of steps to be taken by each of them in their roles managing actual or potential conflicts of interest. This failure to allocate responsibilities is also evident in relation to the 'Blacklist', 'Greylist' and 'Watch' list (where the 'Watch' list in this context is not satisfactorily defined anywhere, as already indicated): while the PSI asserts that the checks to establish the lists were conducted by Investor Relations, Rating Operations and Markets (the head of Investor Relations was also in charge of the Markets team from August 2018 until the end of 2020)<sup>159</sup>, it is not clear what responsibilities each of these teams had or the division of tasks between them.
165. Given the foregoing, the Board finds that there were substantial shortcomings in the PSI's internal control mechanisms because of deficient controls, as evidenced inter alia by a failure to allocate functions and responsibilities properly.

#### 4.2.1.3 Shortcomings related to documentation

166. Documenting and recording the controls carried out is essential to having internal control mechanisms that ensure that checks were performed and that flaws that come to light are addressed.
167. Regarding record-keeping, Scope Group IT informed the PSI's Compliance function about limitations regarding back up files and audit trails. The PSI's Compliance function then shared this information with ESMA's Supervisors in an email of July 2021 detailing the following limitations regarding back up of files and audit trails: only partial back up and no audit trails for the communication channel Skype for Business; no audit trail functionality available for the legacy application sharedrive which was used for record retention until the official introduction of MS Sharepoint on 22 June 2021; audit trail functionality of maximum 1 year for MS Teams, Sharepoint and OneDrive until 21 July 2021; no back up functionality introduced for MS Teams and Sharepoint until 27 June 2021; no back up functionality introduced for OneDrive until 15 June 2021<sup>160</sup>. Consequently, deleted chats and files could not be recovered after a 90-day period. Because of these failings, a notification of a potential breach of the Regulation was sent by the PSI on 22 July 2021 to ESMA's Supervisors<sup>161</sup>. This notification referred to Article 6(2) of the Regulation, as well as to Point 4 of Section A of Annex I to the Regulation (which sets out

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<sup>156</sup> Supervisory Report, Exhibit 104, '18.10 Scope Ratings\_Conflicts of Interests Policy(20170511)'.  
<sup>157</sup> Supervisory Report, Exhibit 112, '18.14 Scope Ratings\_Corporate COI Policy (20210400) -Draft'.  
<sup>158</sup> Supervisory Report, Exhibit 113, '18.24 Scope Ratings\_Shareholder Conflicts Procedures\_(20190625)', pp. 2-3.  
<sup>159</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 44, pp. 29-30.  
<sup>160</sup> Supervisory Report, Exhibit 128, 'FW ESMA Investigation - Alignment on IT related concerns'.  
<sup>161</sup> Supervisory Report, Exhibit 129, 'FW Notification of potential breach of CRA regulation'.

obligations regarding internal controls) and Points 7, 8 and 9 of Section B of Annex I to the Regulation (which cover several obligations regarding record-keeping and audit trails).

168. As to shortcomings related specifically to conflicts of interest and gathering information for the 'Blacklist', 'Greylist' and 'Watch list', the PSI asserted that until the end of 2019 the shareholder structure of the PSI was static, simple and clear with regard to the regulatory conflict of interest thresholds and that, in relation to the two 'relevant shareholders', it requested information verbally<sup>162</sup>. This is a clear shortcoming as the PSI did not keep a record of information on potential and actual conflicts of interest, in circumstances where those conflicts were directly relevant to its ability to comply with its obligations under the Regulation. The PSI did not adequately document and record the controls that it carried out in relation to conflicts of interest. This was significant, as evidenced by the fact that the PSI saw fit to inform ESMA of a potential breach of the Regulation<sup>163</sup>.
169. In light of the above, the Board finds that, by not establishing effective internal control mechanisms such as clear guidance to staff on how to comply with the relevant requirements regarding conflicts of interest, adequate identification of the control activities and/or persons in charge, as well as by failing properly to document the controls that were carried out, the PSI failed for many years to comply with the Regulation. This constitutes the infringement set out at Point 12 of Section I of Annex III to the Regulation.

#### **4.2.2 Intent or negligence**

170. Article 36a(1) of the Regulation provides:

"Where, in accordance with Article 23e(5), ESMA's Board of Supervisors finds that a credit rating agency has, intentionally or negligently, committed one of the infringements listed in Annex III, it shall adopt a decision imposing a fine in accordance with paragraph 2.

An infringement by a credit rating agency shall be considered to have been committed intentionally if ESMA finds objective factors which demonstrate that the credit rating agency or its senior management acted deliberately to commit the infringement".

171. In accordance with Article 36a(1) of the Regulation, a finding that an infringement has been committed intentionally requires a finding of "objective factors which demonstrate that the credit rating agency or its senior management acted deliberately to commit the infringement".
172. The factual background as set out in this decision does not establish that there are objective factors which demonstrate that the PSI, its employees or senior managers acted deliberately to commit the infringement.
173. It should therefore be assessed whether the PSI acted with negligence.

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<sup>162</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 44, pp. 29-30.

<sup>163</sup> Supervisory Report, Exhibit 129, 'FW Notification of potential breach of CRA regulation'.



#### 4.2.2.1 Assessment of negligence

174. As regards the preliminary remarks regarding negligence, reference is made to the considerations of the Board set out above.
175. Concerning Point 12 of Section I of Annex III to the Regulation, a CRA that is normally informed and sufficiently attentive would have foreseen that there were several significant shortcomings affecting the guidance provided and the identification, implementation and documentation of internal controls. In particular, taking into account the duty to take special care, a person who is normally informed and sufficiently attentive would have understood that there were significant shortcomings in its controls such as the lack of steps of the process to identify, manage, disclose the existence of (potential) conflicts of interest, and a lack of clarity on the processes that are necessary to control the implementation of the policies and procedures as described in Section 2.2.
176. As noted above, the shortcomings in the PSI's internal control mechanisms can be divided into shortcomings related to guidance, controls and documentation. As to insufficient guidance, the Board concluded that, for instance, the PSI's Employees and Associated Individuals (as of 2021<sup>164</sup>) could not be properly informed as to which of the relevant policies or procedures applied to them and how the terms included in the glossary related to them. As to shortcomings related to controls, the Board identified for instance that the role and responsibilities of Compliance were not set out with sufficient clarity<sup>165</sup>, that the PSI's policies and procedures did not describe any control activities, and there was no clear allocation of functions and responsibilities. Finally, in relation to documentation, the Board concluded that there were numerous shortcomings in record-keeping such as improper gathering of information for the 'Blacklist', 'Greylist' and 'Watch list'<sup>166</sup>.
177. The Board finds that these shortcomings in internal control amount to strong evidence of negligence as the failings exposed go to the heart of the PSI's obligations under the Regulation, and in particular insofar as those obligations relate to the proper management of conflicts of interest.
178. On the basis of the foregoing, taking into account the duty to take special care incumbent on the PSI, it must be concluded that the failure to meet its obligations under Point 4 of Section A of Annex I to the Regulation is the result of a failure to take special care and that, as a result of that failure, the PSI did not foresee what it should have foreseen, namely breaches of the Regulation.
179. On the basis of the facts described above, the Board finds that the PSI failed to take the special care expected of a CRA. As a professional firm in the financial services sector subject to stringent regulatory requirements, the PSI is required to take special care in assessing the risks that its acts or omissions entail, and has failed to take that care; and as the result of that failure, it has not foreseen the consequences of its acts or omissions, including particularly its

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<sup>164</sup> Supervisory Report, Exhibit 87, '11.2 ScopeGroup\_Defined Terms Glossary (20210400)', p. 2.

<sup>165</sup> See for instance, Supervisory Report, Exhibit 104, '18.10 Scope Ratings\_Conflicts of Interests Policy (20170511)', p. 4. Compliance is described in very general terms.

<sup>166</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 44, pp. 29-30.

infringement of the Regulation, in circumstances where a CRA in such a position that is normally informed and sufficiently attentive could not have failed to foresee those consequences.

180. Therefore, the PSI was negligent when committing the infringement at Point 12 of Section I of Annex III to the Regulation.

### **4.2.3 Fine**

#### **4.2.3.1 Determination of the basic amount**

181. Article 36a of the Regulation provides in paragraph 2 as follows:

“The basic amount of the fines referred to in paragraph 1 shall be included within the following limits: (a) for the infringements referred to in points 1 to 5, 11 to 15, 19, 20, 23, 26a to 26d, 28, 30, 32, 33, 35, 41, 43, 50, 51 and 55 to 62 of Section I of Annex III, the fines shall amount to at least EUR 500,000 and shall not exceed EUR 750,000 [...]

To decide whether the basic amount of the fines should be set at the lower, middle or higher end of the limits set out in the first subparagraph, ESMA shall have regard to the annual turnover in the preceding business year of the credit rating agency concerned. The basic amount shall be at the lower end of the limit for credit rating agencies whose annual turnover is below EUR 10 million, the middle of the limit for the credit rating agencies whose annual turnover is between EUR 10 and 50 million and the higher end of the limit for the credit rating agencies whose annual turnover is higher than EUR 50 million”.

182. It has been established that the PSI committed the infringement set out at Point 12 of Section I of Annex III to the Regulation, by not having in place internal control mechanisms adequate to ensure compliance with Point 4 of Section A of Annex I to the Regulation.
183. To determine the basic amount of the fine, the Board has regard to the PSI's annual turnover in the business year preceding the year of the decision or that of the last audited accounts available<sup>167</sup>.
184. In 2022, the PSI had a turnover of EUR 19,623,147.
185. Thus, the basic amount of the fine for the infringement listed in Point 12 of Section I of Annex III to the Regulation is set at the middle of the limit set out in Article 36a(2)(a) of the Regulation and shall not exceed EUR 625,000.

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<sup>167</sup> See paras. 176 and 177 of the decision of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA's decision (ref. BoA 2020 D 03) available at: [https://www.esma.europa.eu/sites/default/files/library/boa\\_d\\_2020\\_03\\_decision\\_on\\_scope\\_ratings\\_v\\_esma.pdf](https://www.esma.europa.eu/sites/default/files/library/boa_d_2020_03_decision_on_scope_ratings_v_esma.pdf). When the audited financial statement of the last full business year is not available, the total annual turnover is identified according to the latest available audited financial statement.

#### 4.2.3.2 Applicable aggravating factor

186. The applicable aggravating factor listed in Annex IV to the Regulation is set out below.

Annex IV, Point I. 2. If the infringement has been committed for more than six months, a coefficient of 1,5 shall apply.

187. The infringement was committed for more than six months. The deficiencies in the internal controls were evident over a number of years and continued at least until the measures taken by the PSI that are relevant to the mitigating factor at Annex IV, Point II. 4 below.

188. Therefore, the Board finds that this aggravating factor is applicable.

189. The other aggravating factors were not applicable. In this respect, Board considers that the aggravating factors in relation to the infringement being committed repeatedly or intentionally, revealing systemic weaknesses in the organisation of the PSI, or having a negative impact on the quality of the ratings rated by the PSI were not applicable in this case. In addition, the Board also found that the PSI had taken remedial action since the breach had been identified and the PSI's senior management had cooperated with ESMA in carrying out its investigations, thus aggravating factors related to those requirements were also not applicable.

#### 4.2.3.3 Mitigating factors

190. Annex IV to the Regulation lists the mitigating factors to be taken into consideration for the adjustment of the fine. Their application is assessed below.

Annex IV, Point II. 1. If the infringement relates to a breach listed in Section II or III of Annex III and has been committed for fewer than 10 working days, a coefficient of 0,9 shall apply.

191. This mitigating factor is not applicable; the infringement at Point 12 is listed in Section I of Annex III to the Regulation and not in Section II or III as required by this provision.

Annex IV, Point II. 2. If the credit rating agency's senior management can demonstrate that they have taken all the necessary measures to prevent the infringement, a coefficient of 0,7 shall apply.

192. In this case, the PSI noted, as measures taken to prevent infringements generally, the maintenance of an active dialogue with ESMA to ensure proper action and interpretation of the law in the absence of sufficiently specific guidance related to the conflicts of interest management; development of policies and procedures; the provision of mandatory training; material investment decisions to reinforce control functions; operational implementation of measures; monitoring of (potential) conflict of interest situations by the Management Board and Extended Management of Scope Ratings and the Beirat; and engaging external counsel and consultants in cases of unclear application of the CRA Regulation<sup>168</sup>.

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<sup>168</sup> Exhibit 15, PSI's Response to the IO's RFI, question 48, p. 32.

193. However, in line with the preliminary remarks set out in Section 4.1.3.3 above, this does not constitute sufficient evidence that **all** necessary measures were taken by senior management, as the measures outlined above failed to prevent the infringement at Point 12 of Section I of Annex III.

194. The Board thus finds that this mitigating factor is not applicable.

Annex IV, Point II. 3. If the credit rating agency has brought quickly, effectively, and completely the infringement to ESMA's attention, a coefficient of 0,4 shall apply.

195. To benefit from the application of this mitigating factor, the PSI must acknowledge that it has committed (or believe that it could have committed) an infringement and then brought it to the attention of ESMA quickly, effectively, and completely<sup>169</sup>.

196. The Board considers the three requirements (speed, effectiveness, and completeness) set out at Point II.3 of Annex IV to the Regulation to be cumulative. Therefore, if one of them is not met, the mitigating factor cannot be applied.

197. In this case, while the PSI sent a notification on 22 July 2021 to ESMA's Supervisors<sup>170</sup>, regarding shortcomings it had identified in relation to its information storage, this notification did not include all details on shortcomings related to record keeping more generally, guidance and control activities. Furthermore, the notification came only after the deficiencies in the internal controls had already been evident over a number of years and after ESMA's Supervisors had started their investigation<sup>171</sup>. This notification can thus not amount to quickly, effectively, and completely bringing the infringement to ESMA's attention.

198. There is no other evidence to suggest that the PSI brought this infringement quickly, effectively, and completely to the attention of ESMA; the Board therefore finds this mitigating factor is not applicable.

Annex IV, Point II. 4. If the credit rating agency has voluntarily taken measures to ensure that similar infringement cannot be committed in the future, a coefficient of 0,6 shall apply.

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<sup>169</sup> See para. 183 of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA's decision (ref. BoA 2020 D 03) available at: [https://www.esma.europa.eu/sites/default/files/library/boa\\_d\\_2020\\_03\\_decision\\_on\\_scope\\_ratings\\_v\\_esma.pdf](https://www.esma.europa.eu/sites/default/files/library/boa_d_2020_03_decision_on_scope_ratings_v_esma.pdf): "the Board finds that ESMA was correct in not applying the mitigating coefficient as it finds it clear on the facts that the appellant did not acknowledge that it had committed (or believe it could have committed) an infringement, and done so quickly, effectively, and completely". See also para. 202: "Specifically, the Board of Appeal finds as regards the mitigation coefficient adjustment set out in point II.3 of Annex IV that it is clear that the appellant did not quickly, efficiently, and completely bring the infringement to ESMA's attention. The relevant notification of clarifications to ESMA did not in any way indicate expressly to ESMA that an infringement had been committed. Further, on the facts presented to the Board of Appeal, the notification in question was provided in the course of the appellant's ongoing supervisory relationship with ESMA and as part of its periodic disclosures; it was not presented in the form of an express acknowledgement of an infringement that is clearly required by point II.3 of Annex IV. The Board of Appeal notes and gives weight in this regard that ESMA only came to have notice of the infringements following supervisory and subsequently IIO action (following, in turn, a complaint). On the facts, therefore, ESMA was correct in finding that this coefficient could not be applied".

<sup>170</sup> Exhibit 129 'FW Notification of potential breach of CRA regulation'.

<sup>171</sup> From 31 March 2021, please see Supervisory Report, Exhibit 22, 'ESMA80-189-11891 Investigation decision - Scope Ratings'. See also Supervisory Report, Exhibit 23, 'ESMA80-189-11892 Written authorisation and decision Scope Ratings' and Supervisory Report, Exhibit 25, 'ESMA80-189-22372 AMENDED Written authorisation - Scope Ratings'.

199. In the instant case, the PSI provided a description of actions taken to remedy issues identified in the areas covered by the investigation. In particular, the PSI pointed to the creation of a dedicated Conflicts of Interest Management function that manages the categorisation (Blacklist, Greylist, and Watchlist) of legal entities that it must track to mitigate potential or actual Col<sup>172</sup> and the extensive internal and external information sources used for conflict checks<sup>173</sup>.
200. The PSI also stated more generally that it had made “diligent efforts [...] to complete and fully execute the associated remediation action plan [sent by ESMA], which demonstrates our commitment to rectify any shortcomings of the past”<sup>174</sup>.
201. This should ensure that similar infringement of Point 12 cannot be committed in the future.
202. In line with the remarks set out in Section 4.1.3.3 above, the PSI was not under any compulsion (such as, for example, in light of an ESMA decision) to take the measures outlined above to ensure that similar infringements cannot be committed in the future, and the PSI has done so voluntarily.
203. The Board thus deems that the mitigating factor is applicable to the infringement at Point 12 of Section I of Annex III to the Regulation.

#### 4.2.3.4 Determination of the adjusted fine

204. In accordance with Article 36a(3) of the Regulation, taking into account the applicable aggravating and mitigating factors, the basic amount of EUR 625,000 must be adjusted as follows.
205. The difference between the basic amount and the amount resulting from the application of each individual coefficient set out in Annex IV is added to the basic amount in the case of the aggravating factor and subtracted from the basic amount in the case of the mitigating factor:

Aggravating factor set out in Annex IV, Point I. 2:

EUR 625,000 x 1.5 = EUR 937,500

EUR 937,500 – EUR 625,000 = EUR 312,500

Mitigating factor set out in Annex IV, Point II. 4:

EUR 625,000 x 0.6 = EUR 375,000

EUR 625,000 – EUR 375,000 = EUR 250,000

Adjusted fine taking into account applicable aggravating and mitigating factors:

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<sup>172</sup> Exhibit 15, PSI’s Response to the IIO’s RFI, question 44, pp.30.

<sup>173</sup> Exhibit 15, PSI’s Response to the IIO’s RFI, question 45, pp.30.

<sup>174</sup> PSI’s written submissions in response to the Board’s initial Statement of Findings, p. 2.

EUR 625,000 + EUR 312,500 – EUR 250,000 = EUR 687,500

206. Consequently, following adjustment by taking into account the applicable aggravating and mitigating factors, the amount of the fine to be imposed on the PSI for the infringement listed in Point 12 of Section I of Annex III to the Regulation amounts to EUR 687,500.

#### **4.2.4 Supervisory measure**

207. Regard must be had to Article 24, paragraphs 1 and 2, of the Regulation.
208. Given the factual findings in the present case and in particular the fact that changes were eventually introduced to the PSI's internal control mechanisms, the only supervisory measure set out in Article 24(1)(e) of the Regulation may be considered appropriate with regard to the nature and the seriousness of the infringement.
209. The Board thus finds that a public notice must be issued.

### **4.3 Findings with regard to the infringement at Point 15 of Section I of Annex III to the Regulation concerning appropriate and effective organisational and administrative arrangements**

210. This section of the Statement of Findings analyses whether the PSI breached the following requirement concerning appropriate and effective organisational and administrative arrangements:

“A credit rating agency shall take all necessary steps to ensure that the issuing of a credit rating or a rating outlook is not affected by any existing or potential conflicts of interest or business relationship involving the credit rating agency issuing the credit rating or the rating outlook, its shareholders, managers, rating analysts, employees or any other natural person whose services are placed at the disposal or under the control of the credit rating agency, or any person directly or indirectly linked to it by control” (Article 6(1) of the Regulation).

“In order to ensure compliance with paragraph 1, a credit rating agency shall comply with the requirements set out in Sections A and B of Annex I” (Article 6(2) of the Regulation).

“A credit rating agency shall establish appropriate and effective organisational and administrative arrangements to prevent, identify, eliminate or manage and disclose any conflicts of interest referred to in point 1 of Section B. It shall arrange 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, as well as the safeguards applied to mitigate those threats” (Point 7 of Section A of Annex I to the Regulation).

211. If this requirement is not met, this would constitute the infringement set out at Point 15 of Section I of Annex III to the Regulation.



### 4.3.1 Analysis

212. The issue in this case is whether the PSI breached its obligation under Article 6(2) of the Regulation, in conjunction with Point 7 of Section A of Annex I to establish appropriate and effective organisational and administrative arrangements to prevent, identify, eliminate or manage and disclose conflicts of interest referred to in Point 1 of Section B of Annex I to the Regulation.
213. Before analysing the specific facts of the case, it is worth drawing a distinction between Point 15 on the one hand, which refers to “appropriate and effective organisational and administrative arrangements” to “prevent, identify, eliminate or manage and disclose any conflicts of interest” and Points 11 and 12 on the other, which (as noted above) concern policies and procedures, and internal control mechanisms, respectively.
214. Point 7 of Section A of Annex I to the Regulation aims to ensure that a CRA establishes organisational and administrative arrangements which prevent, identify, eliminate or manage and disclose any conflicts of interest. In terms relevant to the instant case, the PSI was obliged to have organisational and administrative arrangements in place to allow it to access sufficiently reliable data and information about its shareholders and the impacted rated entity, in order to appropriately and effectively identify conflicts of interest. This question of the PSI's arrangements for accessing information is therefore of great importance in assessing the infringement at Point 15 of Section I of Annex III to the Regulation. Alongside this, as stated in Point 15, the PSI must arrange for records to be kept of all significant threats to the independence of the credit rating activities, as well as safeguards.
215. By contrast, the infringement at Point 11 of Section I of Annex III to the Regulation covers policies and procedures which should be adequate to ensure compliance with the Regulation more broadly, and Point 12 refers to a broad range of requirements, such as sound administrative or accounting procedures, internal control mechanisms, effective procedures for risk assessment, or effective control or safeguard arrangements for information processing systems.
216. To assess whether the infringement under Point 15 of Section I of Annex III has been committed, it is necessary not only to assess whether the organisational and administrative arrangements of the PSI to prevent, identify, eliminate or manage and disclose any actual or potential conflicts of interest were in place, but also whether they were appropriate and effective to prevent, identify, eliminate or manage and disclose conflicts. These actual or potential conflicts include among others those linked to the CRA's shareholders such as the ones which are more specifically identified in Points 3 and 3a of Section B of Annex I to the Regulation, i.e., the conflicts of interest related to shareholdings of five and ten per cent<sup>175</sup> and significant influence.
217. The Board has examined in detail the wording and the context of Article 6(2) of the Regulation and Point 7 of Section A of Annex I thereto. The conclusions are set out below.

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<sup>175</sup> See para. 307 of the Board of Supervisors' Decision 2021/1 of 23 March 2021 on Moody's II, available at [https://www.esma.europa.eu/sites/default/files/library/esma41-356-114\\_decision\\_1-2021\\_moody's\\_uk.pdf](https://www.esma.europa.eu/sites/default/files/library/esma41-356-114_decision_1-2021_moody's_uk.pdf).

218. In 2019, the PSI put in place specific organisational and administrative arrangements related to shareholders' conflicts of interest, i.e. the SRG Shareholders conflicts procedures, as described below. However, they were not capable of preventing, identifying, eliminating or managing and disclosing conflicts; thus they were not appropriate or effective.
219. Several aspects of the SRG Shareholders conflicts procedures are pertinent<sup>176</sup>.
220. First, it is worth noting at the outset that the SRG Shareholders conflicts procedures were only established in 2019<sup>177</sup>; for many years, therefore, there was a marked absence of relevant organisational and administrative arrangements. One of the few examples of a check was the conflict of interest questionnaire given to potential members of the Advisory Board (from at least July 2015) which was in any event inadequate, in that it focused almost exclusively on the network of the potential member, and contained a single question on conflicts, asking only about investments of more than 2.5% in other companies<sup>178</sup>.
221. Second, the SRG Shareholders conflicts procedures only mandated that the Investor Relations team take steps to source information on the PSI's shareholders who held 5% or more of the capital or voting rights in the PSI, or who were otherwise in a position to exercise significant influence, and that this information should be sourced from publicly available information and/or by way of direct contacts with the Relevant Shareholders<sup>179</sup>. However, the procedures did not explain how the notion of 'significant influence' was to be understood or assessed; in the absence of that information, the PSI could not appropriately and effectively manage conflicts of interest. The Board acknowledges that this has been mentioned already in the analysis of the policies and procedures infringement. However, it should be emphasised that the analysis of Point 15 focuses on specific administrative and organisational arrangements, and not on the policies and procedures as a whole.
222. The procedures also failed to provide for the monitoring of shareholders holding less than but close to 5% on an ongoing basis, so that the PSI would be informed when they reached the 5% threshold. They only envisaged that, in case of changes to the Greylist or Blacklist that affect an active credit rating, the Investor Relations team would provide the information on the change to the relevant persons without undue delay and, in case of a change in the Greylist, Rating Operations would take the 'necessary steps' regarding disclosures. If there was a change in the Blacklist, Compliance and Management was tasked with assessing whether the credit rating was to be withdrawn<sup>180</sup>. It was not however explained how this information was to be obtained and there were therefore no specific organisational and administrative arrangements in this respect. Thus, the SRG Shareholders conflicts procedures did not provide for monitoring arrangements which would assess changes in shareholding (especially in relation to shareholders which are below but close to the threshold). The Board considers that the PSI should have put in place arrangements which allow it to identify situations when a shareholder reaches the threshold of 5%. This could be done by requiring shareholders to provide information on a regular basis, which was not the case.

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<sup>176</sup> Supervisory Report, Exhibit 113, '18.24 Scope Ratings\_Shareholder Conflicts Procedures\_(20190625)'.

<sup>177</sup> Supervisory Report, Exhibit 113, '18.24 Scope Ratings\_Shareholder Conflicts Procedures\_(20190625)'. See Exhibit 24, '44-1 Scope Response to ESMA Query 7 June 2021 FINAL', p. 2.

<sup>178</sup> Supervisory Report, Exhibit 51, '10.2\_150727 [AB] Questionnaire'.

<sup>179</sup> Supervisory Report, Exhibit 113, '18.24 Scope Ratings\_Shareholder Conflicts Procedures\_(20190625)', pp. 2-3.

<sup>180</sup> Supervisory Report, Exhibit 113, '18.24 Scope Ratings\_Shareholder Conflicts Procedures\_(20190625)', p. 3.

223. Moreover, the organisational and administrative arrangements for the gathering of information were insufficient and ineffective: the PSI should not have based its assessment of actual or potential conflicts of interest solely on public information and on contacts with shareholders<sup>181</sup>. This could lead to delays, misinformation or inadequate information as no official database was used by the PSI<sup>182</sup>. Specific procedures and safeguards should have been put in place to ensure that the information was reliable and up-to-date: as noted above, there was no strict commitment of the relevant shareholders to provide information necessary to establish the ‘Greylist’ and the ‘Blacklist’ and this led to inappropriate and ineffective arrangements: if the relevant information is not gathered properly, the assessment cannot be appropriate and effective. In this context the PSI later greatly updated its processes for gathering information, including the sources and systems used for conflict of interest reviews and storage of information<sup>183</sup>.
224. Further, many relevant employees of the PSI were unaware of the proper operation of the ‘Greylist’, the ‘Blacklist’ and the Watchlist. By way of example, most of the analysts working on the [Company A] Bank ratings (the Lead analyst, the Chair of the rating committee, one voting member of the rating committee) were not aware of the existence of these lists. In interviews conducted by the Supervisors, these analysts only referred to Col checks as related to their own potential Col concerning to their personal investments and holdings. Overall, none of them considered “corporate Col” as a point to check and which may trigger reporting requirements to compliance or rating prohibitions<sup>184</sup>. The PSI stated “Analysts may not have been aware of the List ... This can be explained by the fact that shareholder-related COI are always reviewed and cleared before a new mandate is handed over to the analytical teams. The analysts rely on the handover template, which confirms the absence of a COI. Consequently, in practice, corporate COI, and the List in particular, are generally not relevant for the analysts”. The Board acknowledges that the primary responsibility of analysts is not to conduct conflict of interest checks. However, conflict of interest management is such a fundamental aspect of a CRA’s work that analysts should be aware of the ongoing risks of conflicts arising, and therefore aware of the relevant lists, since conflicts can arise even after analysts have begun their work; this in turn helps to ensure that the organisational and administrative arrangements to prevent, identify, eliminate or manage and disclose any actual or potential conflicts of interest are appropriate and effective.
225. Finally, the Regulation requires the PSI to put in place arrangements ensuring that records are kept of all significant threats to the independence of the credit rating activities, as well as safeguards. It is therefore of note that the PSI stated that “until the end of 2019 the shareholder structure of Scope SE & Co. KGaA was very static, simple, and clear with regard to the regulatory Col thresholds. Only two shareholders held above 5%: [CD] and [EF], each with well above 10%. With regard to these two “relevant shareholders” we not only used public information but also requested detailed information from these shareholders. Concerning [CD], the information was requested verbally because of his physical presence in the Scope office and his absence of any

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<sup>181</sup> This understanding has been also confirmed by the PSI: “Investor Relations ... is in charge of preparing this Black-, Grey- and Watchlist on the basis of information requested from the relevant shareholders and board members and public sources of information on a quarterly basis”. See Exhibit 24, ‘44-1 Scope Response to ESMA Query 7 June 2021 FINAL’, p. 1.

<sup>182</sup> Exhibit 1, Supervisory Report, para. 127.

<sup>183</sup> Exhibit 15, PSI’s Response to the IIO’s RFI, question 45, p.30.

<sup>184</sup> Supervisory Report, Exhibit 29, ‘ESMA80-189-32701-RAP Scope Ratings 2021 investigation’, p. 27. The [Company A] Bank RC Chair explained in her interview with ESMA (10 September 2021): “I was not aware of this (watch)list for the initial rating RC meeting and for the following meetings. I was only aware of this potential Col with [Company A] at the last RC in March 2021, when things came into light (public)”.

relevant holding beyond that of Scope SE & Co. KGaA. Concerning [EF], this was also discussed verbally since he was and still is the second largest shareholder of Scope SE & Co. KGaA (we were and are in continuous contact with his family office) ... Two sources were used to identify relevant shareholders (and shareholders or potential shareholders that might exceed the 5% or 10% threshold): Scope SE & Co. KGaA's official share register maintained by Investor Relations, and detailed knowledge about ongoing discussions with potential and future shareholders"<sup>185</sup>. It is not appropriate for a CRA not to keep records of such an important process. If the records were not kept, it cannot be said that the Investor Relations team had detailed knowledge about ongoing discussions. Therefore the PSI failed to ensure that records were kept of all significant threats to the independence of the credit rating activities.

226. As noted above, the SRG Shareholders conflicts procedures were established only in June 2019. Prior to that, there was an absence of adequate organisational and administrative arrangements related to conflicts of interests.
227. Given the foregoing, the Board concludes that the PSI's organisational and administrative arrangements to obtain the relevant information had significant shortcomings. Therefore, the arrangements to prevent, identify, eliminate or manage and disclose any actual or potential conflicts of interest were not appropriate or effective.
228. The Board thus finds that the PSI failed over a number of years to establish appropriate and effective organisational and administrative arrangements related to conflicts of interests. This constitutes the infringement set out at Point 15 of Section I of Annex III to the Regulation.

#### 4.3.2 Intent or negligence

229. Article 36a(1) of the Regulation provides:
- "Where, in accordance with Article 23e(5), ESMA's Board of Supervisors finds that a credit rating agency has, intentionally or negligently, committed one of the infringements listed in Annex III, it shall adopt a decision imposing a fine in accordance with paragraph 2.
- An infringement by a credit rating agency shall be considered to have been committed intentionally if ESMA finds objective factors which demonstrate that the credit rating agency or its senior management acted deliberately to commit the infringement".
230. In accordance with Article 36a(1) of the Regulation, a finding that an infringement has been committed intentionally requires a finding of "objective factors which demonstrate that the credit rating or its senior management acted deliberately to commit the infringement".
231. The factual background as set out in this decision does not establish that there are objective factors which demonstrate that the PSI, its employees or senior managers acted deliberately to commit the infringement.
232. Negligence should therefore be assessed.

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<sup>185</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 44, pp. 29-30.

#### 4.3.2.1 Assessment of negligence

233. As regards the preliminary remarks regarding negligence, reference is made to the considerations of the Board set out above.
234. Had the PSI taken the special care required of a CRA, it would have foreseen that there was a need to establish appropriate and effective organisational and administrative arrangements to prevent, identify, eliminate or manage and disclose conflicts of interest. However, prior to the establishment of the SRG Shareholders conflicts procedures in 2019, no such arrangements were in place at all.
235. Further, as noted above, the SRG Shareholders conflicts procedures were themselves flawed, in that they failed to explain how the fundamental notion of 'significant influence' was to be understood or assessed, failed to provide for the monitoring of shareholders holding less than but close to 5% on an ongoing basis, and provided for the gathering of information on conflicts of interest that relied only on public information and on contacts with shareholders. Also, many relevant employees of the PSI were unaware of the proper operation of the various lists, and the PSI failed to ensure that records were kept of all significant threats to the independence of the credit rating activities, as well as safeguards.
236. These shortcomings amount to strong evidence of negligence as the failings exposed go to the heart of the PSI's obligations under the Regulation: without the appropriate and effective organisational and administrative arrangements in place to allow information to be gathered, conflicts may go undetected.
237. Overall, on the basis of the elements described above, the Board finds that the PSI failed to take the special care expected of a CRA. As a professional firm in the financial services sector subject to stringent regulatory requirements, the PSI is required to take special care in assessing the risks that its acts or omissions entail, and has failed to take that care; and as the result of that failure, it has not foreseen the consequences of its acts or omissions, including particularly its infringement of the Regulation, in circumstances where a CRA in such a position that is normally informed and sufficiently attentive could not have failed to foresee those consequences.
238. Therefore, the PSI was negligent when committing the infringement of Point 15 of Section I of Annex III to the Regulation.

### **4.3.3 Fine**

#### 4.3.3.1 Determination of the basic amount

239. Article 36a of the Regulation provides in paragraph 2 as follows:

"The basic amount of the fines referred to in paragraph 1 shall be included within the following limits: (a) for the infringements referred to in points 1 to 5, 11 to 15, 19, 20, 23, 26a to 26d, 28, 30, 32, 33, 35, 41, 43, 50, 51 and 55 to 62 of Section I of Annex III, the fines shall amount to at least EUR 500,000 and shall not exceed EUR 750,000 [...]"

To decide whether the basic amount of the fines should be set at the lower, middle or higher end of the limits set out in the first subparagraph, ESMA shall have regard to the annual turnover in the preceding business year of the credit rating agency concerned. The basic amount shall be at the lower end of the limit for credit rating agencies whose annual turnover is below EUR 10 million, the middle of the limit for the credit rating agencies whose annual turnover is between EUR 10 and 50 million and the higher end of the limit for the credit rating agencies whose annual turnover is higher than EUR 50 million”.

240. It has been established that the PSI committed the infringement set out at Point 15 of Section I of Annex III to the Regulation, by not establishing appropriate and effective organisational or administrative arrangements to prevent, identify, eliminate or manage and disclose any conflicts of interest referred to in Point 1 of Section B.
241. To determine the basic amount of the fine, the Board has regard to the PSI’s annual turnover in the business year preceding the year of the decision or that of the last audited accounts available<sup>186</sup>.
242. In 2022, the PSI had a turnover of EUR 19,623,147.
243. Thus, the basic amount of the fine for the infringement listed in Point 15 of Section I of Annex III to the Regulation is set at the middle of the limit set out in Article 36a(2)(a) of the Regulation and shall not exceed EUR 625,000.

#### 4.3.3.2 Applicable aggravating factor

244. The applicable aggravating factor listed in Annex IV to the Regulation is set out below.

Annex IV, Point I. 2. If the infringement has been committed for more than six months, a coefficient of 1,5 shall apply.

245. The infringement was committed for more than six months. The SRG Shareholders conflicts procedure did not exist before 2019 and in any event, it did not establish appropriate and effective organisational or administrative arrangements to prevent, identify, eliminate or manage and disclose any conflicts of interest. The infringement was therefore committed for at least six months until the measures detailed in relation to the mitigating factor at Annex IV, Point II. 4 below.
246. Therefore, the Board finds that this aggravating factor is applicable.
247. The other aggravating factors were not applicable. In this respect, Board considers that the aggravating factors in relation to the infringement being committed repeatedly or intentionally, revealing systemic weaknesses in the organisation of the PSI, or having a negative impact on the quality of the ratings rated by the PSI were not applicable in this case. In addition, the Board

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<sup>186</sup> See paras. 176 and 177 of the decision of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA’s decision (ref. BoA 2020 D 03) available at: [https://www.esma.europa.eu/sites/default/files/library/boa\\_d\\_2020\\_03\\_decision\\_on\\_scope\\_ratings\\_v\\_esma.pdf](https://www.esma.europa.eu/sites/default/files/library/boa_d_2020_03_decision_on_scope_ratings_v_esma.pdf). When the audited financial statement of the last full business year is not available, the total annual turnover is identified according to the latest available audited financial statement.



also found that the PSI had taken remedial action since the breach had been identified and the PSI's senior management had cooperated with ESMA in carrying out its investigations, thus aggravating factors related to those requirements were also not applicable.

#### 4.3.3.3 Mitigating factors

248. Annex IV to the Regulation lists the mitigating factors to be taken into consideration for the adjustment of the fine. Their application is assessed below.

Annex IV, Point II. 1. If the infringement relates to a breach listed in Section II or III of Annex III and has been committed for fewer than 10 working days, a coefficient of 0,9 shall apply.

249. This mitigating factor is not applicable; the infringement at Point 15 is listed in Section I of Annex III to the Regulation and not in Section II or III as required by this provision.

Annex IV, Point II. 2. If the credit rating agency's senior management can demonstrate that they have taken all the necessary measures to prevent the infringement, a coefficient of 0,7 shall apply.

250. In this case, the PSI noted, as measures taken to prevent infringements generally, the maintenance of an active dialogue with ESMA to ensure proper action and interpretation of the law in the absence of sufficiently specific guidance related to conflicts of interest management; development of policies and procedures; the provision of mandatory training; material investment decisions to reinforce control functions; operational implementation of measures; monitoring of (potential) conflict of interest situations by the Management Board and Extended Management of Scope Ratings and the Beirat; and engaging external counsel and consultants in cases of unclear application of the CRA Regulation<sup>187</sup>.

251. However, in line with the preliminary remarks set out in Section 4.1.3.3 above, this does not constitute sufficient evidence that **all** necessary measures were taken by senior management, as the measures outlined above failed to prevent the infringement at Point 15 of Section I of Annex III.

252. The Board thus finds that this mitigating factor is not applicable.

Annex IV, Point II. 3. If the credit rating agency has brought quickly, effectively, and completely the infringement to ESMA's attention, a coefficient of 0,4 shall apply.

253. To benefit from the application of this mitigating factor, the PSI must acknowledge that it has committed (or believe that it could have committed) an infringement and then brought it to the attention of ESMA quickly, effectively, and completely<sup>188</sup>.

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<sup>187</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 48, p. 32.

<sup>188</sup> See para. 183 of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA's decision (ref. BoA 2020 D 03), available at: [https://www.esma.europa.eu/sites/default/files/library/boa\\_d\\_2020\\_03\\_decision\\_on\\_scope\\_ratings\\_v\\_esma.pdf](https://www.esma.europa.eu/sites/default/files/library/boa_d_2020_03_decision_on_scope_ratings_v_esma.pdf): "the Board finds that ESMA was correct in not applying the mitigating coefficient as it finds it clear on the facts that the appellant did not acknowledge that it had committed (or believe it could have committed) an infringement, and done so quickly, effectively, and completely". See also para. 202: "Specifically, the Board of Appeal finds as regards the mitigation coefficient adjustment set out in point II.3 of Annex IV that it is clear that the appellant did not quickly, efficiently, and completely bring the infringement to ESMA's attention. The relevant notification of clarifications to ESMA did not in any way indicate expressly to ESMA that an infringement had been committed. Further, on the facts presented to the Board of Appeal, the notification in question was provided in the course of the appellant's ongoing supervisory relationship with ESMA and as part of its periodic disclosures; it was not

254. The Board considers the three requirements (speed, effectiveness, and completeness) set out at Point II.3 of Annex IV to the Regulation to be cumulative. Therefore, if one of them is not met, the mitigating factor cannot be applied.
255. In this case, there is no evidence to suggest that the PSI brought this infringement to the attention of ESMA; the Board therefore finds that this mitigating factor is not applicable.

Annex IV, Point II. 4. If the credit rating agency has voluntarily taken measures to ensure that similar infringement cannot be committed in the future, a coefficient of 0,6 shall apply.

256. In the instant case, the PSI provided a description of actions taken to remedy potential issues identified in the areas covered by the investigation. Regarding the Blacklist, Greylist and Watchlist in particular, the PSI noted that “a dedicated Col Management function now manages the categorisation (Blacklist, Greylist, and Watchlist) of legal entities that [the PSI] must track to mitigate potential or actual Col. Updates reflect changes to relevant information (business interests) on existing and new shareholders or members of the different boards. Details regarding the list can be found in Section 5.5 and Section 5.6 of the Col SOP of December 2022 ...”<sup>189</sup>. The PSI’s Operational Conflicts of Interest (COI) Management Standard Operating Procedure provides for categories of conflicts of interests (‘red’, ‘black’, ‘grey’, ‘watch’) and envisages the monitoring/review activities the Col Management function may conduct to ensure adherence to mitigation strategies, such as those related to changes within existing relations which could lead to a conflict of interest<sup>190</sup>. Importantly for the infringement under assessment, the PSI also noted that the sources and systems used for conflict of interest reviews and storage of information had changed:

“The Col Management Function uses various internal and external information sources to perform Col Checks. Sources include:

- Information included in the Col Request (stored in SharePoint).
- Information already available from previous/archived Col Checks (stored in SharePoint).
- External information sources that include, but are not limited to:
  - Bona Fide Declarations of Scope Shareholders and Relevant CRA Members (stored in SharePoint).
  - Scope Credit Rating coverage data (Scope Works), Scope’s Contract Database (Scope Works), and ANOP (Jira), among other Scope information sources.
  - S&P Capital IQ and similar reputable service providers, public registries, and publicly available information where relevant.

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presented in the form of an express acknowledgement of an infringement that is clearly required by point II.3 of Annex IV. The Board of Appeal notes and gives weight in this regard that ESMA only came to have notice of the infringements following supervisory and subsequently IIO action (following, in turn, a complaint). On the facts, therefore, ESMA was correct in finding that this coefficient could not be applied”.

<sup>189</sup> Exhibit 15, PSI’s Response to the IIO’s RFI, question 44, pp.30.

<sup>190</sup> Exhibit 27, ‘44-10 COI SOP.pdf’.

• Any information from these sources is documented and saved with the respective CoI Check folder in SharePoint. ... The sources are not exhaustive and will be supplemented as required. If the quality of the data from the main provider S&P Capital IQ is not satisfactory and a conclusive assessment of the CoI case is not possible, other sources are consulted ...”<sup>191</sup>.

257. The PSI also stated more generally that it had made “diligent efforts [...] to complete and fully execute the associated remediation action plan [sent by ESMA], which demonstrates our commitment to rectify any shortcomings of the past”<sup>192</sup>.
258. This should ensure that a similar infringement cannot be committed in the future.
259. In line with the remarks set out in Section 4.1.3.3 above, the PSI was not under any compulsion (such as, for example, in light of an ESMA decision) to take the measures outlined above to ensure that similar infringement cannot be committed in the future, and the PSI has done so voluntarily.
260. The Board thus deems that the mitigating factor is applicable to the infringement at Point 15 of Section I of Annex III to the Regulation.

#### 4.3.3.4 Determination of the adjusted fine

261. In accordance with Article 36a(3) of the Regulation, taking into account the applicable aggravating and mitigating factors, the basic amount of EUR 625,000 must be adjusted as follows.
262. The difference between the basic amount and the amount resulting from the application of each individual coefficient set out in Annex IV is added to the basic amount in the case of the aggravating factor and subtracted from the basic amount in the case of the mitigating factor:

Aggravating factor set out in Annex IV, Point I. 2:

EUR 625,000 x 1.5 = EUR 937,500

EUR 937,500 – EUR 625,000 = EUR 312,500

Mitigating factor set out in Annex IV, Point II. 4:

EUR 625,000 x 0.6 = EUR 375,000

EUR 625,000 – EUR 375,000 = EUR 250,000

Adjusted fine taking into account applicable aggravating and mitigating factors:

EUR 625,000 + EUR 312,500 – EUR 250,000 = EUR 687,500

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<sup>191</sup> Exhibit 15, PSI’s Response to the IIO’s RFI, question 45, pp.30.

<sup>192</sup> PSI’s written submissions in response to the Board’s initial Statement of Findings, p. 2.

263. Consequently, following adjustment by taking into account the applicable aggravating and mitigating factors, the amount of the fine to be imposed on the PSI for the infringement listed in Point 15 of Section I of Annex III to the Regulation amounts to EUR 687,500.

#### **4.3.4 Supervisory measure**

264. Regard must be had to Article 24, paragraphs 1 and 2, of the Regulation.
265. Given the factual findings in the present case and in particular the fact that the PSI took measures to ensure that a similar infringement cannot be committed in the future, only the supervisory measure set out in Article 24(1)(e) of the Regulation may be considered appropriate with regard to the nature and the seriousness of the infringement.
266. The Board thus finds that a public notice must be issued.

#### **4.4 Findings regarding the infringement at Point 19 of Section I of Annex III to the Regulation concerning the identification, elimination, or management and disclosure in a clear and prominent manner of any existing or potential conflicts of interest**

267. This section of the Statement of Findings analyses whether the PSI breached the following requirement regarding the identification, elimination, or management and disclosure of any existing or potential conflicts of interest:

“A credit rating agency shall take all necessary steps to ensure that the issuing of a credit rating or a rating outlook is not affected by any existing or potential conflicts of interest or business relationship involving the credit rating agency issuing the credit rating or the rating outlook, its shareholders, managers, rating analysts, employees or any other natural person whose services are placed at the disposal or under the control of the credit rating agency, or any person directly or indirectly linked to it by control” (Article 6(1) of the Regulation).

“In order to ensure compliance with paragraph 1, a credit rating agency shall comply with the requirements set out in Sections A and B of Annex I” (Article 6(2) of the Regulation).

“A credit rating agency shall identify, eliminate, or manage and disclose, 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 credit rating activities and persons approving credit ratings and rating outlooks” (Point 1 of Section B of Annex I to the Regulation).

268. If this requirement is not met, this would constitute the infringement set out at Point 19 of Section I of Annex III to the Regulation.

#### 4.4.1 Analysis

269. The issue in this investigation is whether the PSI has breached its obligation under Article 6(2) of the Regulation, in conjunction with Point 1 of Section B of Annex I thereto, to “identify, eliminate, or manage and disclose, clearly and prominently, any actual or potential conflicts of interest that may influence the analyses and judgments of its rating analysts or any other person directly involved in credit rating activities, including in the approval of credit ratings and rating outlooks.”
270. The Board has examined in detail the wording and the context of Article 6(2) of the Regulation and Point 1 of Section B of Annex I thereto and the conclusions are set out below.
271. The general obligation on CRAs regarding conflicts of interest is referenced in Recital 27 of the Regulation: “Credit rating agencies should avoid situations of conflict of interest and manage those conflicts adequately when they are unavoidable in order to ensure their independence. Credit rating agencies should disclose conflicts of interest in a timely manner ...”.
272. Article 6 of the Regulation expands on this by identifying various circumstances in which conflicts of interest can arise. It is relevant to note that Article 6(1) of the Regulation mentions “existing or potential conflicts of interest”, as well as a “business relationship involving the credit rating agency issuing the credit rating or the rating outlook, its shareholders, managers, rating analysts, employees or any other natural person whose services are placed at the disposal or under the control of the credit rating agency, or any person directly or indirectly linked to it by control”. This broad provision is a clear attempt by the co-legislators to encompass many actual or potential instances of conflicts of interest and the corresponding infringement must be seen in that light. It may be helpful to note that the provision is broader than those underlying the infringements at Points 20 and 20a of Section I of Annex III to the Regulation, as analysed in previous decisions of the Board<sup>193</sup>. These latter infringements relate to very specific instances in which inter alia shareholdings reach certain thresholds or a significant influence is evident.
273. The PSI implied in its defence in this case that Article 6(1) of the Regulation only related to shareholders, managers, analysts or employees, or other individuals listed in Article 6(1) with links to the PSI.<sup>194</sup> However, this assertion of the PSI is legally incorrect. The relevant provisions do not restrict a CRA’s obligations to circumstances involving shareholders, managers, rating analysts, employees or the other listed individuals. CRAs must take a broader view, and effectively address **any** actual or potential conflicts “that may influence the analyses and judgments of its rating analysts or any other person directly involved in credit rating activities” (as required by Point 1 of Section B of Annex I to the Regulation). Therefore the Board considers this broad interpretation, also adopted by the IIO, as the correct one.
274. In the Board’s view, the requirement established by Point 1 of Section B of Annex I is to be interpreted as imposing three principal obligations on a CRA: the identification of any actual or potential conflict of interests; the elimination of the identified actual or potential conflict of

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<sup>193</sup> For example regarding Point 20, please see ESMA Decision CRA 2018/1 (Fitch UK), available at this link: [https://www.esma.europa.eu/sites/default/files/library/cra\\_1-2018\\_decision\\_on\\_fitch\\_uk.pdf](https://www.esma.europa.eu/sites/default/files/library/cra_1-2018_decision_on_fitch_uk.pdf). Regarding Point 20a, please see Board of Supervisors’ Decision 2021/1 of 23 March 2021 on Moody’s II, available at [https://www.esma.europa.eu/sites/default/files/library/esma41-356-114\\_decision\\_1-2021\\_moodys\\_uk.pdf](https://www.esma.europa.eu/sites/default/files/library/esma41-356-114_decision_1-2021_moodys_uk.pdf).

<sup>194</sup> Exhibit 41, Response to the Initial SoF, pp. 33-34.

interests or, alternatively, their management; and, in cases of management, the disclosure of the actual or potential conflict of interest.

275. As to the nature of any disclosure, it must be specific and clear, and done in a way that it is easily seen or noticed. Regarding timing, as noted above, Recital 27 of the Regulation, provides that "... Credit rating agencies should disclose conflicts of interest in a timely manner ...". In common parlance<sup>195</sup>, "timely" is defined as "happening at exactly the right time", or "appropriate or adapted to the times or the occasion".
276. With regard to the application of the requirements above to the instant case, the PSI should have been able to perform each of the actions mentioned above, i.e. first identifying an actual or potential conflict of interest, then eliminating or managing and disclosing it; and finally the PSI should have ensured that its disclosure was clear and prominent (i.e. it had to be specific and clear and done in a way that it is easily seen or noticed) as well as timely.
277. In this specific case, the Board analysed whether an infringement of Point 19 can be found in relation to [AB]'s role, holdings and positions and the services provided by the PSI to the [Company A] Entities. Section 2.5 sets out the background.
278. There were several interactions and connections between the PSI, [AB] and the [Company A] Entities from 2015, relevant for the assessment:
279. First, [AB] was a shareholder in Scope KG. In this respect the PSI noted that [AB] was not a shareholder of the PSI and that his shareholding in Scope KG was below 0.3%, which was "vastly below the relevant threshold for [conflict of interest] assessments ... the shareholding of [AB] did not constitute a [conflict of interest] on its own"<sup>196</sup>. Nevertheless, [AB]'s shareholding in the PSI's parent company was a relevant consideration in assessing potential conflicts of interest in the instant case.
280. Second, [AB] was a member of Scope KG's Advisory Board. The PSI claimed that the Advisory Board was a "non-corporate body without any influence" and that it had "no relevant function under corporate law ... no means of exerting any relevant influence on [the PSI]" and "no direct connection to [the PSI]"<sup>197</sup>. However, as this is clearly set out in Section 2.1.1, the members of the Advisory Board were not restricted in their activities to working with and for the PSI's parent company, but with Scope Group, which included the PSI. The members were "tasked with the representation of Scope Group and the accompaniment of Scope Group in its establishment as a globally active, leading European rating agency". Further, as noted in the legal assessment of Point 11 at Section 4.1, there was an absence of policies and procedures in relation to the Advisory Board and its members, which meant that there was considerable ambiguity as to their roles and responsibilities.
281. Third, [AB] attended meetings of [Company A] and PSI representatives.

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<sup>195</sup> Definitions taken from: <https://www.oxfordlearnersdictionaries.com/> and <https://www.merriam-webster.com/>.

<sup>196</sup> In Exhibit 41, Response to the Initial SoF, p. 32.

<sup>197</sup> In Exhibit 41, Response to the Initial SoF, pp. 32-33.



282. Fourth, [AB] held positions in [Company A] Entities (as non-executive chairman of [Company A] Capital and, from June 2014, chairman of the supervisory board of [Company A] Bank).
283. Fifth, the PSI provided credit rating and ancillary services to [Company A] Entities.
284. The PSI emphasised that [AB] had no direct connection to the PSI and that he participated in only three meetings. However, [AB] had connections to Scope Group (i.e. including the PSI) as a member of the Advisory Board and he took part in three meetings attended by analysts from the PSI<sup>198</sup>.
285. In this respect, the PSI averred more generally that “[a]ll potential [conflicts of interest] related to [AB] were verifiably identified, assessed and actively managed”<sup>199</sup>. The Board does not agree with this conclusion.
286. First, there is ample evidence of a potential conflict of interest involving [AB], because, as outlined in Section 2, alongside his roles as a member of the Advisory Board from 2 July 2015 to 16 March 2021 (which put him in a position to acquire new clients and investors for the companies of Scope Group, including the PSI) and the holder of a minority stake in Scope KG from 2015, [AB] was from 25 September 2014 until 22 January 2018 the non-executive chairman of [Company A] Capital and, from June 2014, was also Chairman of the supervisory board of [Company A] Bank (a role which entailed the supervision of executives deciding on commercial matters within the Bank).
287. Further, [AB] played a role in bringing [Company A] entities as a client to the member companies of Scope Group and had three interactions with PSI staff involved in rating activities, as noted in Section 2.5.3. For bringing [Company A] entities as a client to Scope Group, [AB] received commissions of EUR 12,950 for the acquisition of [Company A] Capital as a new client for the provision of services in 2017 and 2018<sup>200</sup>, and EUR 10,795 for the acquisition of [Company A] Capital and [Company A] Bank as new clients for the provision of other (ancillary) services in 2018<sup>201</sup>.
288. It was against this background that the PSI issued the credit rating for [Company A] Bank on 19 July 2019. In the Board’s view, the potential for a conflict of interest was obvious from at least that date, given the wider context, and in particular [AB]’s role as a member of the Advisory Board and in the [Company A] Entities, the PSI’s interest in keeping [Company A] Bank as a client, and [AB]’s interest in continuing to receive fees as someone who brings clients to the member companies of Scope Group.
289. However, the evidence shows that the PSI failed to properly identify the potential conflict. [AB] was provided only once with a Conflict of Interest questionnaire (in July 2015) which focused almost exclusively on the network of the potential member, and contained a single question on conflicts, which asked only about investments of more than 2.5% in other companies, and was

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<sup>198</sup> In Exhibit 41, Response to the Initial SoF, p. 29.

<sup>199</sup> Exhibit 41, Response to the Initial SoF, p. 36.

<sup>200</sup> Supervisory Report, Exhibit 61, ‘14.1 180508 Commission [AB]’.

<sup>201</sup> Supervisory Report, Exhibit 62, ‘14.2 190313 Commission [AB]’. The whole commission paid to [AB] amounted to EUR 18.295,85.

left unanswered by [AB]<sup>202</sup>. As for the reason why the PSI did not request a new questionnaire before the renewal of [AB]’s Advisory Board membership in March 2018, the PSI explained that it had already been informed by [AB] of his relevant business activities through regular exchanges<sup>203</sup> and that it did not attribute any significant influence to Advisory Board membership due to the non-official capacity of the role. Therefore, in the PSI’s view, “there was no reason to further investigate the matter”<sup>204</sup>. There is evidence that the potential compliance issues arising from the Advisory Board were underestimated or not even apparent to the PSI; as it stated, “The goal was to maintain the participation of reputable members [sic.] and attract further high-profile members”<sup>205</sup>. In February 2019, the CEO of the PSI, the Head of Compliance of the PSI and the Head of Coordination & Monitoring in the Corporate and Business Development Division of Scope KG exchanged views in relation to the potential significant influence exerted by [AB], but no assessment was provided by the Head of Compliance of the PSI in relation to any potential conflict of interest relating specifically to membership of the Advisory Board<sup>206</sup>. The only assessment done was in relation to the narrow question of [AB]’s shareholding, which was below the 5% threshold<sup>207</sup>. There was also no identification of a potential conflict of interest relating to [AB]’s holdings and positions when it should have been obvious, namely in July 2019<sup>208</sup>.

290. The PSI noted regarding the Advisory Board that it “... had been identified as a non-corporate body with no relevant influence on Scope KGaA nor its subsidiaries. Since then we have taken into account ESMA’s consideration related to the assessment of combined influence and interpretation that an Advisory Board could be perceived as having an influence. This interpretation, however, contradicts the setting of the German KGaA structure”<sup>209</sup>. However, the observation that the compliance issues were not fully apparent to the PSI, relates specifically to the status and role of the Advisory Board as described in this decision and does not rely on German corporate law. The nature of the Advisory Board should have prompted the PSI to act in relation to potential conflicts of interest arising or related to membership of the Advisory Board.
291. As to the management of the potential conflict (which, as noted above, was unacknowledged at the time by the PSI), the PSI also fell short of the expected standard: when it issued the credit rating for [Company A] Bank on 19 July 2019, its Head of Compliance advised that no direct interactions were supposed to take place between [AB] and the analytical team in relation with the debt fund rating<sup>210</sup>. This advice was not followed<sup>211</sup>.

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<sup>202</sup> Supervisory Report, Exhibit 51, ‘10.2\_150727 [AB] Questionnaire’.

<sup>203</sup> Exhibit 15, PSI’s Response to the IIO’s RFI, question 9, pp. 9-10.

<sup>204</sup> Exhibit 15, PSI’s Response to the IIO’s RFI, question 9, pp. 9-10.

<sup>205</sup> Exhibit 15, PSI’s Response to the IIO’s RFI, question 8, p. 9.

<sup>206</sup> Exhibit 1, Supervisory Report, para. 135.

<sup>207</sup> Exhibit 1, Supervisory Report, para. 135 and Exhibit 41, Response to the Initial SoF, p. 31.

<sup>208</sup> Exhibit 1, Supervisory Report, para. 135.

<sup>209</sup> Exhibit 41, Response to the Initial SoF, p. 30.

<sup>210</sup> Exhibit 1, Supervisory Report, para. 136. See also Supervisory Report, Exhibit 264, ‘03 My team is working on a debt fund rating for [Company A], 5 February 2019’ where the Head of Compliance of the PSI stated the following: “If his [[AB]] stake is below 5% there is no disclosure obligation, which would formally apply to credit ratings only and since this is a debt fund rating, we should be clean from a formal pt of view. In the situation I would suggest, however, to strictly apply the protections around the rating process and to not have any direct interaction between the chairman and the analytical team in relation with the debt fund rating”.

<sup>211</sup> Exhibit 1, Supervisory Report, para. 136. In particular, meetings between [AB] and the Lead Analyst and Head of Financial Institutions of the PSI were held on 27 June 2019, 5 June 2020 and 3 July 2020. For further details, see Supervisory Report, Exhibit 67, ‘16.272 Meetings Overview’.

292. The PSI asserted that [AB] did not participate in a rating committee<sup>212</sup>; in particular, the PSI stressed that [AB] participated in meetings exclusively in his capacity as a supervisory board member of [Company A] Bank and as a representative of [Company A], and never without other members of the bank<sup>213</sup>. Further, it was claimed that [AB] attended such meetings as [Company A] Bank considered it necessary that he attended meetings with the rating analysts to communicate on [Company A] Bank's strategy and risk management<sup>214</sup>. However, as noted above, the requirement under Point 1 of Section B of Annex I to the Regulation is broad, and includes "any existing or potential conflicts of interest or business relationship involving the credit rating agency issuing the credit rating or the rating outlook, its shareholders, managers, rating analysts, employees or any other natural person whose services are placed at the disposal or under the control of the credit rating agency, or any person directly or indirectly linked to it by control". Therefore, it should have been obvious that these types of meetings could lead to potential conflicts of interest.
293. Given the foregoing, it is evident that the role of [AB] on the Advisory Board could have led to a potential conflict of interest; this should have been the object of an in-depth assessment by the PSI even prior to the issuance of the rating in July 2019, but as confirmed by the PSI, such an exercise was not performed<sup>215</sup>.
294. It is also notable that in failing to identify and manage the relevant potential conflict of interest, the PSI did not follow the advice of its own Head of Compliance, who said "it was better to avoid direct interaction between rating analysts and [AB]". In this respect, the PSI argued that [Company A] Bank deemed [AB]'s presence necessary, and emphasised that he never met analysts alone<sup>216</sup>.
295. The PSI claimed that that it identified the potential conflict of interest relating to [AB] but took a "too narrow" interpretation of the requirement<sup>217</sup>. The PSI emphasised that its assessment was based on its understanding of regulatory requirements at the time<sup>218</sup>. Notwithstanding this, in its view, the PSI identified and assessed the potential conflict of interest in relation to [AB]'s positions and holdings and, following ESMA's feedback, it states that it amended its policies to avoid similar failures in the future<sup>219</sup>. While the amendment of policies may be welcome, it remains the case that the PSI failed to comply with the requirements of the Regulation as regards the identification and management of the potential conflict of interest arising from [AB]'s role, holdings and positions and the services provided by the PSI to the [Company A] Entities.
296. As a consequence of the failure to identify and manage the potential conflict of interest, no disclosure was made.
297. In light of the above, the Board concludes that, by not having identified and, consequently, managed and disclosed the potential conflicts of interest arising from the relationships between

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<sup>212</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 11, p. 10.

<sup>213</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 10, p. 10.

<sup>214</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 12, p. 11.

<sup>215</sup> Exhibit 11, PSI's Comments on the Supervisory Report', pp. 3 and 4.

<sup>216</sup> Exhibit 15, PSI's Response to the IIO's RFI, questions 10-12, pp. 10-11.

<sup>217</sup> Exhibit 11, PSI's Comments on the Supervisory Report', p. 3.

<sup>218</sup> Exhibit 11, PSI's Comments on the Supervisory Report', p. 3.

<sup>219</sup> Exhibit 11, PSI's Comments on the Supervisory Report', p. 4.

the [Company A] Entities, [AB] and the PSI, the PSI failed to comply with the requirements set out under Article 6(2) and Point 1 of Section B of Annex I to the Regulation.

298. The Board thus finds that the PSI committed the infringement set out at Point 19 of Section I of Annex III to the Regulation.

#### **4.4.2 Intent or negligence**

299. Article 36a(1) of the Regulation provides:

“Where, in accordance with Article 23e(5), ESMA’s Board of Supervisors finds that a credit rating agency has, intentionally or negligently, committed one of the infringements listed in Annex III, it shall adopt a decision imposing a fine in accordance with paragraph 2.

An infringement by a credit rating agency shall be considered to have been committed intentionally if ESMA finds objective factors which demonstrate that the credit rating agency or its senior management acted deliberately to commit the infringement”.

300. In accordance with Article 36a(1) of the Regulation, a finding that an infringement has been committed intentionally requires a finding of “objective factors which demonstrate that the credit rating agency or its senior management acted deliberately to commit the infringement”.
301. In the instant case, the PSI did not identify the potential conflict of interest arising from the membership of [AB] in the Advisory Board and, consequently, did not manage and disclose the conflict. Notwithstanding the fact that the PSI failed to follow the advice of its own Head of Compliance regarding meetings with [AB], the Board considers that, overall, the factual background as set out in this decision does not establish that there are objective factors which demonstrate that the PSI, its employees or senior managers acted deliberately to commit the infringement.
302. It should therefore be assessed whether the PSI acted with negligence.

##### 4.4.2.1 Assessment of negligence

303. As regards the preliminary remarks regarding negligence, reference is made to the considerations of the Board set out above.
304. Avoiding conflicts of interest and enhancing the transparency of credit rating activities are key aims of the Regulation<sup>220</sup>; CRAs are required to identify, eliminate or manage and disclose, clearly and prominently, any actual or potential conflicts of interest that occur. This requirement is expressly set out in Point 1 of Section B of Annex I to the Regulation.
305. The PSI failed to ensure that it complied with the above requirement. In particular, the PSI did not identify the potential conflict of interest arising from the membership of [AB] on the Advisory Board. Furthermore, as already indicated, the PSI failed to follow the advice of its own Head of

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<sup>220</sup> Article 1 of Regulation.

Compliance regarding meetings with [AB]<sup>221</sup>. Consequently, this potential conflict was not managed and not disclosed

306. In this respect, the PSI noted that, while the advice of its Head of Compliance did not appear to have been followed, this was not an issue when [AB] attended meetings with analysts, because he could provide insight and had no influence on the Scope Group or the PSI<sup>222</sup>. The PSI also claimed that if its management had been aware of the attendance of [AB], it would have pointed out [AB]'s membership of the Advisory Board and shareholding in Scope KG to attendees, but would also have made clear that "... these positions do not grant [AB] any influence over SRG and [management] would have instructed the analysts to immediately notify the compliance team if they had the impression that [AB] had been attempting to use his positions to influence the rating". The PSI went on to state: "We acknowledge that the shift in perspective has led SRG to assess this situation differently today, as we better appreciate the importance of protecting ourselves against any form of perception of potential conflicts. It is for this reason that, as of today, any contact between an Advisory Board member (now "Ambassador") and an analyst is formally prohibited without exception"<sup>223</sup>. The PSI also noted that [AB] did not use his position to affect the rating.
307. The failure to heed the advice of the PSI's Head of Compliance is only one factor in the assessment of negligence. Further, the fact that the PSI said that if its management had been aware of the attendance of [AB], the attendees of the meeting would have been warned to be wary of any attempt by [AB] to influence the rating<sup>224</sup>, is an implicit acknowledgement that there was a potential conflict of interest and that it was not properly managed.
308. Therefore, the Board concludes that the shortcomings detailed above amount to strong evidence of negligence. The failings exposed go to the heart of the PSI's obligations under the Regulation: a CRA must be able to identify, manage and disclose potential conflicts of interest, particularly in circumstances where such potential conflicts should have been obvious. If CRAs do not identify potential conflicts, it may serve to undermine the confidence of investors in the market and thereby be detrimental to the aims of the Regulation.
309. Given the matters outlined above, the Board finds that the PSI failed to take the special care expected of a CRA. As a professional firm in the financial services sector subject to stringent regulatory requirements, the PSI is required to take special care in assessing the risks that its acts or omissions entail, and has failed to take that care; and as a result of that failure, it has not foreseen the consequences of its acts or omissions, including particularly its infringement of the Regulation, in circumstances where a CRA in such a position that is normally informed and sufficiently attentive could not have failed to foresee those consequences.

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<sup>221</sup> See Supervisory Report, Exhibit 264, '03 My team is working on a debt fund rating for [Company A], 5 February 2019' where the Head of Compliance of the PSI stated: "If his [[AB]] stake is below 5% there is no disclosure obligation, which would formally apply to credit ratings only and since this is a debt fund rating, we should be clean from a formal pt of view. In the situation I would suggest, however, to strictly apply the protections around the rating process and to not have any direct interaction between the chairman and the analytical team in relation with the debt fund rating". Contrary to the advice, in Exhibit 1, Supervisory Report, para. 136 it is evidenced that meetings between [AB] and the Lead Analyst and Head of Financial Institutions of the PSI were held on 27 June 2019, 5 June 2020 and 3 July 2020. For further details, see Supervisory Report, Exhibit 67, '16.272 Meetings Overview'.

<sup>222</sup> Exhibit 41, Response to the Initial SoF, pp. 35-36.

<sup>223</sup> Exhibit 41, Response to the Initial SoF, pp. 35-36.

<sup>224</sup> Exhibit 41, Response to the Initial SoF, pp. 35-36.

310. Therefore, the PSI was negligent when committing the infringement of Point 19 of Section I of Annex III to the Regulation.

### **4.4.3 Fine**

#### **4.4.3.1 Determination of the basic amount**

311. Article 36a of the Regulation provides in paragraph 2 as follows:

“The basic amount of the fines referred to in paragraph 1 shall be included within the following limits: (a) for the infringements referred to in points 1 to 5, 11 to 15, 19, 20, 23, 26a to 26d, 28, 30, 32, 33, 35, 41, 43, 50, 51 and 55 to 62 of Section I of Annex III, the fines shall amount to at least EUR 500,000 and shall not exceed EUR 750,000 [...]

To decide whether the basic amount of the fines should be set at the lower, middle or higher end of the limits set out in the first subparagraph, ESMA shall have regard to the annual turnover in the preceding business year of the credit rating agency concerned. The basic amount shall be at the lower end of the limit for credit rating agencies whose annual turnover is below EUR 10 million, the middle of the limit for the credit rating agencies whose annual turnover is between EUR 10 and 50 million and the higher end of the limit for the credit rating agencies whose annual turnover is higher than EUR 50 million”.

312. It has been established that the PSI committed the infringement set out at Point 19 of Section I of Annex III to the Regulation, by not having identified, managed and disclosed a potential conflict of interest.

313. To determine the basic amount of the fine, the Board has regard to the PSI’s annual turnover in the business year preceding the year of the decision or that of the last audited accounts available<sup>225</sup>.

314. In 2022, the PSI had a turnover of EUR 19,623,147.

315. Thus, the basic amount of the fine for the infringement listed in Point 19 of Section I of Annex III to the Regulation is set at the middle of the limit set out in Article 36a(2)(a) of the Regulation and shall not exceed EUR 625,000.

#### **4.4.3.2 Applicable aggravating factor**

316. The applicable aggravating factor listed in Annex IV to the Regulation is set out below.

Annex IV, Point I. 2. If the infringement has been committed for more than six months, a coefficient of 1,5 shall apply.

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<sup>225</sup> See paras. 176 and 177 of the decision of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA’s decision (ref. BoA 2020 D 03) available at: [https://www.esma.europa.eu/sites/default/files/library/boa\\_d\\_2020\\_03\\_decision\\_on\\_scope\\_ratings\\_v\\_esma.pdf](https://www.esma.europa.eu/sites/default/files/library/boa_d_2020_03_decision_on_scope_ratings_v_esma.pdf). When the audited financial statement of the last full business year is not available, the total annual turnover is identified according to the latest available audited financial statement.



317. The infringement was committed for more than six months, because it started on 19 July 2019 (with the publication, by the PSI, of a credit rating for [Company A] Bank<sup>226</sup>) and it lasted at least until 16 March 2021 (with the suspension of [AB] from the membership of the Advisory Board).
318. Therefore, the Board finds that this aggravating factor is applicable.
319. The other aggravating factors were not applicable. In this respect, Board considers that the aggravating factors in relation to the infringement being committed repeatedly or intentionally, revealing systemic weaknesses in the organisation of the PSI, or having a negative impact on the quality of the ratings rated by the PSI were not applicable in this case. In addition, the Board also found that the PSI had taken remedial action since the breach had been identified and the PSI's senior management had cooperated with ESMA in carrying out its investigations, thus aggravating factors related to those requirements were also not applicable.

#### 4.4.3.3 Mitigating factors

320. Annex IV to the Regulation lists the mitigating factors to be taken into consideration for the adjustment of the fine. Their application is assessed below.

Annex IV, Point II. 1. If the infringement relates to a breach listed in Section II or III of Annex III and has been committed for fewer than 10 working days, a coefficient of 0,9 shall apply.

321. This mitigating factor is not applicable; the infringement at Point 19 is listed in Section I of Annex III to the Regulation and not in Section II or III as required by this provision.

Annex IV, Point II. 2. If the credit rating agency's senior management can demonstrate that they have taken all the necessary measures to prevent the infringement, a coefficient of 0,7 shall apply.

322. In this case, the PSI noted, as measures taken to prevent infringements generally, the maintenance of an active dialogue with ESMA to ensure proper action and interpretation of the law in the absence of sufficiently specific guidance related to the conflicts of interest management; development of policies and procedures; the provision of mandatory training; material investment decisions to reinforce control functions; operational implementation of measures; monitoring of (potential) conflict of interest situations by the Management Board and Extended Management of Scope Ratings and the Beirat; and engaging external counsel and consultants in cases of unclear application of the CRA Regulation<sup>227</sup>.

323. However, in line with the preliminary remarks set out in Section 4.1.3.3 above, this does not constitute sufficient evidence that **all** necessary measures were taken by senior management, as the measures outlined above failed to prevent the infringement at Point 19.

324. The Board thus finds that this mitigating factor is not applicable.

Annex IV, Point II. 3. If the credit rating agency has brought quickly, effectively, and completely the infringement to ESMA's attention, a coefficient of 0,4 shall apply.

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<sup>226</sup> Supervisory Report, Exhibit 141, '16.60 09\_Published press release', 19 July 2019.

<sup>227</sup> Exhibit 15, PSI's Response to the IO's RFI, question 48, pp. 32-34.

325. To benefit from the application of this mitigating factor, the PSI must acknowledge that it has committed (or believe that it could have committed) an infringement and then brought it to the attention of ESMA quickly, effectively, and completely<sup>228</sup>.
326. The Board considers the three requirements (speed, effectiveness, and completeness) set out at Point II.3 of Annex IV to the Regulation to be cumulative. Therefore, if one of them is not met, the mitigating factor cannot be applied.
327. In this case, there is no evidence to suggest that the PSI brought this infringement to the attention of ESMA; the Board therefore finds that this mitigating factor is not applicable.

Annex IV, Point II. 4. If the credit rating agency has voluntarily taken measures to ensure that similar infringement cannot be committed in the future, a coefficient of 0,6 shall apply.

328. In the instant case, the PSI provided a description of actions taken to remedy potential issues identified in the areas covered by the investigation. The PSI conducted an internal assessment to review the circumstances surrounding the assignment of the rating of [Company A] Bank and an assessment of its internal control framework, which resulted in various actions; these included an extensive revision of the compliance framework focusing on the various policies governing conflict of interest management in relation to individual, business and corporate conflicts of interest as well as record retention<sup>229</sup>. In particular the PSI noted that “a dedicated Col Management function now manages the categorisation (Blacklist, Greylist, and Watchlist) of legal entities that [the PSI] must track to mitigate potential or actual Col. Updates reflect changes to relevant information (business interests) on existing and new shareholders or members of the different boards”<sup>230</sup> (emphasis added). The status of members of the Advisory Board was also clarified in the Amended Glossary of April 2021<sup>231</sup>, and the PSI’s procedures also provide for the monitoring and review of changes within existing relations which could lead to a conflict of interest<sup>232</sup>.
329. The PSI also stated that it had made “diligent efforts [...] to complete and fully execute the associated remediation action plan [sent by ESMA], which demonstrates our commitment to rectify any shortcomings of the past”<sup>233</sup>.
330. This should ensure that a similar infringement cannot be committed in the future.

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<sup>228</sup> See para. 183 of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA’s decision (ref. BoA 2020 D 03) available at: [https://www.esma.europa.eu/sites/default/files/library/boa\\_d\\_2020\\_03\\_decision\\_on\\_scope\\_ratings\\_v\\_esma.pdf](https://www.esma.europa.eu/sites/default/files/library/boa_d_2020_03_decision_on_scope_ratings_v_esma.pdf): “the Board finds that ESMA was correct in not applying the mitigating coefficient as it finds it clear on the facts that the appellant did not acknowledge that it had committed (or believe it could have committed) an infringement, and done so quickly, effectively, and completely”. See also para. 202: “Specifically, the Board of Appeal finds as regards the mitigation coefficient adjustment set out in point II.3 of Annex IV that it is clear that the appellant did not quickly, efficiently, and completely bring the infringement to ESMA’s attention. The relevant notification of clarifications to ESMA did not in any way indicate expressly to ESMA that an infringement had been committed. Further, on the facts presented to the Board of Appeal, the notification in question was provided in the course of the appellant’s ongoing supervisory relationship with ESMA and as part of its periodic disclosures; it was not presented in the form of an express acknowledgement of an infringement that is clearly required by point II.3 of Annex IV. The Board of Appeal notes and gives weight in this regard that ESMA only came to have notice of the infringements following supervisory and subsequently IIO action (following, in turn, a complaint). On the facts, therefore, ESMA was correct in finding that this coefficient could not be applied”.

<sup>229</sup> Exhibit 15, PSI’s Response to the IIO’s RFI, question 49, pp.34-36.

<sup>230</sup> Exhibit 15, PSI’s Response to the IIO’s RFI, question 44, pp.30.

<sup>231</sup> Supervisory Report, Exhibit 87, ‘11.2 ScopeGroup\_Defined Terms Glossary (20210400)’, p. 2.

<sup>232</sup> Exhibit 27, ‘44-10 COI SOP.pdf’.

<sup>233</sup> PSI’s written submissions in response to the Board’s initial Statement of Findings, p. 2.

331. If the measure was taken voluntarily, this would imply that the mitigating factor under Annex IV, Point II.4. to the Regulation would be applicable.
332. In line with the remarks set out in Section 4.1.3.3 above, the PSI was not under any compulsion (such as, for example, in light of an ESMA decision) to take the measures outlined above to ensure that similar infringements cannot be committed in the future, and the PSI has done so voluntarily.
333. The Board thus deems that the mitigating factor is applicable to the infringement at Point 19 of Section I of Annex III to the Regulation.

#### 4.4.3.4 Determination of the adjusted fine

334. In accordance with Article 36a(3) of the Regulation, taking into account the applicable aggravating and mitigating factors, the basic amount of EUR 625,000 must be adjusted as follows.
335. The difference between the basic amount and the amount resulting from the application of each individual coefficient set out in Annex IV is added to the basic amount in the case of the aggravating factor and subtracted from the basic amount in the case of the mitigating factor:

Aggravating factor set out in Annex IV, Point I. 2:

$$\text{EUR } 625,000 \times 1.5 = \text{EUR } 937,500$$

$$\text{EUR } 937,500 - \text{EUR } 625,000 = \text{EUR } 312,500$$

Mitigating factor set out in Annex IV, Point II. 4:

$$\text{EUR } 625,000 \times 0.6 = \text{EUR } 375,000$$

$$\text{EUR } 625,000 - \text{EUR } 375,000 = \text{EUR } 250,000$$

Adjusted fine taking into account applicable aggravating and mitigating factors:

$$\text{EUR } 625,000 - \text{EUR } 250,000 + \text{EUR } 312,500 = \text{EUR } 687,500$$

336. Consequently, following adjustment by taking into account the applicable aggravating and mitigating factors, the amount of the fine to be imposed on the PSI for the infringement listed in Point 19 of Section I of Annex III to the Regulation amounts to EUR 687,500.

#### **4.4.4 Supervisory measure**

337. Regard must be had to paragraphs 1 and 2 of Article 24, of the Regulation.
338. Given the factual findings in the instant case, only the supervisory measure set out in Article 24(1)(e) of the Regulation may be considered appropriate with regard to the nature and the seriousness of the infringement.

339. The Board thus finds that a public notice must be issued.

## **4.5 Findings with regards to the infringement at Point 2 of Section III of Annex III to the Regulation concerning the disclosure of the provision of ancillary services**

340. This section of the Statement of Findings analyses whether the PSI breached the following requirement regarding the disclosure of the provision of ancillary services:

“A credit rating agency shall take all necessary steps to ensure that the issuing of a credit rating or a rating outlook is not affected by any existing or potential conflicts of interest or business relationship involving the credit rating agency issuing the credit rating or the rating outlook, its shareholders, managers, rating analysts, employees or any other natural person whose services are placed at the disposal or under the control of the credit rating agency, or any person directly or indirectly linked to it by control” (Article 6(1) of the Regulation).

“In order to ensure compliance with paragraph 1, a credit rating agency shall comply with the requirements set out in Sections A and B of Annex I” (Article 6(2) of the Regulation).

“... A credit rating agency may provide services other than issue of credit ratings (ancillary services). Ancillary services are not part of credit rating activities; they comprise market forecasts, estimates of economic trends, pricing analysis and other general data analysis as well as related distribution services.

A credit rating agency shall ensure that the provision of ancillary services does not present conflicts of interest with its credit rating activities and shall disclose in the final ratings reports any ancillary services provided for the rated entity or any related third party” (second and third paragraphs of Point 4 of Section B of Annex I to the Regulation).

341. If these requirements are not met, this would constitute the infringement set out at Point 2 of Section III of Annex III to the Regulation.

### **4.5.1 Analysis**

342. The issue in this case is whether the PSI breached its obligation to disclose ancillary services provided to rated entities or any related third parties in final ratings reports.

343. It goes without saying that the provision of ancillary services may give rise to a conflict of interest. A failure to disclose in the final rating report an ancillary service provided for the rated entity or any related third party may result in harm to investors and to market transparency.

344. The Board has examined in detail the wording and context of Article 6(2) of the Regulation and the second and third paragraphs of Point 4 of Section B of Annex I thereto. The conclusions are set out below.

345. There is no bar to a CRA providing ancillary services: it is plain from a reading of the second paragraph of Point 4 of Section B of Annex I to the Regulation that it is permitted, and the same provision gives a helpful definition of such services; they “are not part of credit rating activities; they comprise market forecasts, estimates of economic trends, pricing analysis and other general data analysis as well as related distribution services”. However, the following paragraph makes it clear that there is a duty on CRAs to ensure that “the provision of ancillary services does not present conflicts of interest with its credit rating activities and [that they] shall disclose in the final ratings reports any ancillary services provided for the rated entity or any related third party”.
346. Article 3(1)(i) of the Regulation describes a ‘related third party’ as “the originator, arranger, sponsor, servicer or any other party that interacts with a credit rating agency on behalf of a rated entity, including any person directly or indirectly linked to that rated entity by control”.
347. Point 2 of Section III of Annex III to the Regulation provides that a breach of the duty to disclose an ancillary service in the final rating report is an infringement.
348. Given the foregoing, it is clear that the infringement under Point 2 of Section III of Annex III to the Regulation is made out if there is a failure to disclose, in the final ratings report, the provision of an ancillary service for a rated entity or for any related third party.
349. The term ‘final ratings report’ is undefined in the Regulation; for the purpose of this case, this report can be defined in broad terms as a communication from a CRA about a rating that is published and is not in draft form.
350. As to the facts of the instant case, as noted at Section 2.4 above, on 22 May 2019, the PSI and [Company A] Bank entered into an agreement whereby the PSI was to issue a credit rating for [Company A] Bank. The credit rating was published on 19 July 2019 bearing an “A-/Stable” level<sup>234</sup>. This credit rating announcement featured only a generic sentence in relation to conflicts of interest, i.e. “Please see [www.scoperatings.com](http://www.scoperatings.com) for a list of potential conflicts of interest related to the issuance of credit ratings”<sup>235</sup>.
351. Further, as described in more detail in Section 2, from November 2017, companies of the Scope Group provided ancillary services to the [Company A] entities<sup>236</sup>. For the purposes of the instant case, it is relevant that the PSI itself from July 2020, or the PSI as legal successor of SRS from January 2021, provided the following services to [Company A] Bank: first, from 1 July 2020, the PSI itself provided credit review scores services to [Company A] Bank. Moreover, it provided AOCC services relating to a project finance case to [Company A] Bank with an order placed on 25 January 2021; second, from 1 January 2021, as the legal successor of SRS, the PSI provided services relating to the provision of statistics and defaults information, AOCC services and services relating to the provision of industry and country risks reports to [Company A] Bank.
352. As noted above, AOCC is an abbreviation for ‘Assessment of Credit Risks’, which is defined by the PSI in its Services List as “an approximate assessment of the credit quality of an entity or

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<sup>234</sup> Supervisory Report, Exhibit 141, ‘16.60 09\_Published press release, 19 July 2019’.

<sup>235</sup> Supervisory Report, Exhibit 141, ‘16.60 09\_Published press release, 19 July 2019’, p. 2.

<sup>236</sup> See Section 2.4.2.

debt instrument based on Scope Credit Scorecards or Scope's rating methodologies. AOCRs are provided either under a comprehensive form, resulting in a comprehensive report, or under a compact form, resulting in a report addressing only high-level analytical information"<sup>237</sup>. It is apparent from the same document that AOCRs are not credit ratings (which are defined separately). These services fall squarely within the definition of ancillary services as set out in the second subparagraph of Point 4 of Section B of Annex I to the Regulation ("...not part of credit rating activities ... comprise market forecasts, estimates of economic trends, pricing analysis and other general data analysis") and are therefore ancillary services for present purposes.

353. The timeline is clear: following the publication of the credit rating for [Company A] Bank on 19 July 2019, the PSI itself provided ancillary services from July 2020 onwards. From this latter date, the PSI was obliged to disclose in any final ratings report on [Company A] Bank that it was providing ancillary services to that entity and / or a related third party. However, in the next rating report on [Company A] Bank, published on 17 September 2020, no mention was made of the provision of ancillary services<sup>238</sup>.
354. The first mention of the provision of ancillary services is to be found in the subsequent rating announcement issued on 5 March 2021, in which the PSI noted under "Potential conflicts": "Scope has provided ancillary and other services to the rated entity. Please see [www.scooperatings.com](http://www.scooperatings.com) under Governance & Policies/EU Regulation/Disclosures for a list of potential conflicts of interest related to the issuance of credit ratings"<sup>239</sup>.
355. The Board concludes that from 17 September 2020, the PSI was under a duty to disclose that it was providing ancillary services to [Company A] Bank; however, it did not do so until 5 March 2021.
356. By not disclosing, in any final ratings reports, the provision of ancillary services to [Company A] Entities, the Board finds that the PSI failed to comply with the requirements of Article 6(2) and the third subparagraph of Point 4 of Section B of Annex I to the Regulation. This constitutes the infringement set out at Point 2 of Section III of Annex III to the Regulation.

## 4.5.2 Intent or negligence

357. Article 36a(1) of the Regulation provides:
- "Where, in accordance with Article 23e(5), ESMA's Board of Supervisors finds that a credit rating agency has, intentionally or negligently, committed one of the infringements listed in Annex III, it shall adopt a decision imposing a fine in accordance with paragraph 2.

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<sup>237</sup> Exhibit 26, 'Scope\_Ratings\_Services\_List', January 2023, available at [https://www.scooperatings.com/dam/jcr:b3910e61-0efa-4d7e-8253-e94085d8d7f6/Scope\\_Ratings\\_Services\\_List.pdf](https://www.scooperatings.com/dam/jcr:b3910e61-0efa-4d7e-8253-e94085d8d7f6/Scope_Ratings_Services_List.pdf).

<sup>238</sup> Supervisory Report, Exhibit 146, '16.92 Published Press Release', 17 September 2020. In particular, the disclosure made at p. 3 reads this way: "Please see [www.scooperatings.com](http://www.scooperatings.com) for a list of potential conflicts of interest related to the issuance of credit ratings".

<sup>239</sup> Supervisory Report, Exhibit 149, '16.104 Press release.msg', 5 March 2021, p.3.



An infringement by a credit rating agency shall be considered to have been committed intentionally if ESMA finds objective factors which demonstrate that the credit rating agency or its senior management acted deliberately to commit the infringement”.

358. In accordance with Article 36a(1) of the Regulation, a finding that an infringement has been committed by a CRA with intention or negligence will lead to the imposition of a fine by the Board of Supervisors.
359. In accordance with Article 36a(1) of the Regulation, a finding that an infringement has been committed intentionally requires a finding of “objective factors which demonstrate that the credit rating agency or its senior management acted deliberately to commit the infringement”.
360. In the instant case, it is notable that the PSI did not disclose the provision of ancillary services and that it did not appear to have any reasonable justification for this failure. However, this is not sufficient to draw the conclusion that this infringement was committed intentionally. Overall, the factual background as set out in this decision does not establish that there are objective factors which demonstrate that the PSI, its employees or senior managers acted deliberately to commit the infringement.
361. An assessment of negligence is therefore necessary.

#### 4.5.2.1 Assessment of negligence

362. As regards the preliminary remarks regarding negligence, reference is made to the considerations of the Board set out above.
363. Avoiding (potential) conflicts of interests and enhancing the transparency of credit rating activities are key aims of the Regulation<sup>240</sup>; in this context, CRAs are required to disclose any provision of ancillary services to rated entities or related third party in final ratings reports.
364. This requirement is clear from a simple reading of the third subparagraph of Point 4 of Section B of Annex I to the Regulation and does not leave room for interpretation. Indeed, the fact that the PSI did comply with the requirement a little over five months after the duty arose means that it understood its obligation. However, a CRA from which a high standard of care is expected should have complied with such a requirement from the moment that it arose.
365. The PSI therefore failed to show the special care expected of a legal person operating as a CRA in one of the most fundamental areas of its work, namely ensuring transparency and appropriate disclosure of ancillary services provided to rated entities or related third parties. Properly managing and disclosing actual or potential conflicts of interest in a CRA is crucial, as if this is not done, it could have a grave effect on investor confidence in the market.
366. Given the matters outlined above, the Board finds that the PSI failed to take the special care expected of a CRA. As a professional firm in the financial services sector subject to stringent regulatory requirements, the PSI is required to take special care in assessing the risks that its

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<sup>240</sup> Article 1 of Regulation, p.1.

acts or omissions entail, and has failed to take that care; and as a result of that failure, it has not foreseen the consequences of its acts or omissions, including particularly its infringement of the Regulation, in circumstances where a CRA in such a position that is normally informed and sufficiently attentive could not have failed to foresee those consequences.

367. Therefore, the PSI was negligent when committing the infringement of Point 2 of Section III of Annex III to the Regulation.

### **4.5.3 Fine**

#### **4.5.3.1 Determination of the basic amount**

368. Article 36a of the Regulation provides in paragraph 2 as follows:

“The basic amount of the fines referred to in paragraph 1 shall be included within the following limits: [...] (g) for the infringements referred to in points 1 to 3 and 11 of Section III of Annex III, the fines shall amount to at least EUR 150,000 and shall not exceed EUR 300,000 [...]

To decide whether the basic amount of the fines should be set at the lower, middle or higher end of the limits set out in the first subparagraph, ESMA shall have regard to the annual turnover in the preceding business year of the credit rating agency concerned. The basic amount shall be at the lower end of the limit for credit rating agencies whose annual turnover is below EUR 10 million, the middle of the limit for the credit rating agencies whose annual turnover is between EUR 10 and 50 million and the higher end of the limit for the credit rating agencies whose annual turnover is higher than EUR 50 million”.

369. It has been established that the PSI committed the infringement set out at Point 2 of Section III of Annex III to the Regulation, by not having disclosed the provision of ancillary services to a rated entity or related third party.

370. To determine the basic amount of the fine, the Board has regard to the PSI's annual turnover in the business year preceding the year of the decision or that of the last audited accounts available<sup>241</sup>.

371. In 2022, the PSI had a turnover of EUR 19,623,147.

372. Thus, the basic amount of the fine for the infringement listed in Point 2 of Section III of Annex III to the Regulation is set at the middle of the limit set out in Article 36a(2)(g) of the Regulation and shall not exceed EUR 225,000.

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<sup>241</sup> See paras. 176 and 177 of the decision of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA's decision (ref. BoA 2020 D 03) available at: [https://www.esma.europa.eu/sites/default/files/library/boa\\_d\\_2020\\_03\\_decision\\_on\\_scope\\_ratings\\_v\\_esma.pdf](https://www.esma.europa.eu/sites/default/files/library/boa_d_2020_03_decision_on_scope_ratings_v_esma.pdf). When the audited financial statement of the last full business year is not available, the total annual turnover is identified according to the latest available audited financial statement.

#### 4.5.3.2 Applicable aggravating factor

373. Based on the evidence in the file, the Board considers that none of the aggravating factors listed in Annex IV of the Regulation are applicable in relation to the infringement set out at Point 2 of Section III of Annex III to the Regulation.

#### 4.5.3.3 Mitigating factors

374. Annex IV to the Regulation lists the mitigating factors to be taken into consideration for the adjustment of the fine. Their application is assessed below.

Annex IV, Point II. 1. If the infringement relates to a breach listed in Section II or III of Annex III and has been committed for fewer than 10 working days, a coefficient of 0,9 shall apply.

375. The infringement at Point 2 of Section III of Annex III to the Regulation did not last less than ten working days. The PSI should have disclosed the provision of ancillary services in the rating announcement dated 17 September 2020 and only made the disclosure in the next rating action dated 5 March 2021.

376. Therefore, the Board finds that this mitigating factor is not applicable.

Annex IV, Point II. 2. If the credit rating agency's senior management can demonstrate that they have taken all the necessary measures to prevent the infringement, a coefficient of 0,7 shall apply.

377. The PSI noted a number of measures<sup>242</sup> taken to prevent infringements generally; however, none of them is relevant for this breach.

378. On this basis and in line with the preliminary remarks set out in Section 4.1.3.3 above, the Board thus finds that this mitigating factor is not applicable.

Annex IV, Point II. 3. If the credit rating agency has brought quickly, effectively, and completely the infringement to ESMA's attention, a coefficient of 0,4 shall apply.

379. To benefit from the application of this mitigating factor, the PSI must acknowledge that it has committed (or believe that it could have committed) an infringement and then brought it to the attention of ESMA quickly, effectively, and completely<sup>243</sup>.

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<sup>242</sup> Exhibit 15, PSI's Response to the IIO's RFI, question 48, pp. 32-34.

<sup>243</sup> See para. 183 of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA's decision (ref. BoA 2020 D 03) available at: [https://www.esma.europa.eu/sites/default/files/library/boa\\_d\\_2020\\_03\\_decision\\_on\\_scope\\_ratings\\_v\\_esma.pdf](https://www.esma.europa.eu/sites/default/files/library/boa_d_2020_03_decision_on_scope_ratings_v_esma.pdf): "the Board finds that ESMA was correct in not applying the mitigating coefficient as it finds it clear on the facts that the appellant did not acknowledge that it had committed (or believe it could have committed) an infringement, and done so quickly, effectively, and completely". See also para. 202: "Specifically, the Board of Appeal finds as regards the mitigation coefficient adjustment set out in point II.3 of Annex IV that it is clear that the appellant did not quickly, efficiently, and completely bring the infringement to ESMA's attention. The relevant notification of clarifications to ESMA did not in any way indicate expressly to ESMA that an infringement had been committed. Further, on the facts presented to the Board of Appeal, the notification in question was provided in the course of the appellant's ongoing supervisory relationship with ESMA and as part of its periodic disclosures; it was not presented in the form of an express acknowledgement of an infringement that is clearly required by point II.3 of Annex IV. The Board of Appeal notes and gives weight in this regard that ESMA only came to have notice of the infringements following supervisory and subsequently IIO action (following, in turn, a complaint). On the facts, therefore, ESMA was correct in finding that this coefficient could not be applied".

380. The Board considers the three requirements (speed, effectiveness, and completeness) set out at Point II.3 of Annex IV to the Regulation to be cumulative. Therefore, if one of them is not met, the mitigating factor cannot be applied.
381. In this case, there is no evidence to suggest that the PSI brought this infringement to the attention of ESMA; the Board thus finds that this mitigating factor is not applicable.

Annex IV, Point II. 4. If the credit rating agency has voluntarily taken measures to ensure that similar infringement cannot be committed in the future, a coefficient of 0,6 shall apply.

382. In the instant case, the PSI provided a description of actions taken to remedy potential issues identified in the areas covered by the investigation<sup>244</sup>. The PSI further stated that it had made “diligent efforts [...] to complete and fully execute the associated remediation action plan [sent by ESMA], which demonstrates our commitment to rectify any shortcomings of the past”<sup>245</sup>. Those actions as enumerated by the PSI did not include any specific actions that appeared relevant to (potential) conflicts of interest arising from the provision of ancillary services.
383. However, the Board received from the IIO an analysis of a recent policy on ancillary services<sup>246</sup>, which he found during his investigation. The policy dates from December 2022 and refers to the requirement that the provision of ancillary services not present conflicts of interest. It also sets out the disclosure obligation: “Whenever an Ancillary Service has been provided to an Issuer or a Related Third Party to which a Public, Subscription or Restricted Subscription Credit Rating has also been provided on an issuer-paid basis, the Rating Action Release must contain the related regulatory disclosure”. The policy therefore sets out the relevant obligations clearly.
384. This should ensure that a similar infringement cannot be committed in the future.
385. If the measure was taken voluntarily, this would imply that the mitigating factor under Annex IV, Point II.4. to the Regulation would be applicable.
386. In line with the remarks set out in Section 4.1.3.3 above, the Board concludes that the measure was taken voluntarily. The Board thus deems that this mitigating factor is applicable.

#### 4.5.3.4 Determination of the adjusted fine

387. In accordance with Article 36a(3) of the Regulation, taking into account the applicable aggravating factor, the basic amount of EUR 225,000 must be adjusted as follows.
388. The difference between the basic amount and the amount resulting from the application of the individual coefficient linked to the mitigating factor set out in Annex IV is subtracted from the basic amount:

Mitigating factor set out in Annex IV, Point II. 4:

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<sup>244</sup> Exhibit 15, PSI’s Response to the IIO’s RFI, question 49, pp. 34-36.

<sup>245</sup> PSI’s written submissions in response to the Board’s initial Statement of Findings, p. 2.

<sup>246</sup> Exhibit 25, ‘Scope CRAs Ancillary Services Policy’, 1 December 2022. It can also be found here (last update: 5 June 2023): <https://scoperatings.com/dam/jcr:cf9e63a-b1f0-43d8-8959-b23ede15568d/Scope%20CRA%20Ancillary%20Services%20Policy.pdf>.

EUR 225,000 x 0.6 = EUR 135,000

EUR 225,000 – EUR 135,000 = EUR 90,000

Adjusted fine taking into account the applicable mitigating factor:

EUR 225,000 - EUR 90,000 = EUR 135,000

389. Consequently, following adjustment by taking into account the applicable mitigating factor, the amount of the fine to be imposed on the PSI for the infringement listed in Point 2 of Section III of Annex III to the Regulation amounts to EUR 135,000.

#### **4.5.4 Supervisory measure**

390. Regard must be had to paragraphs 1 and 2 of Article 24 of the Regulation.
391. Given the factual findings in the instant case, only the supervisory measure set out in Article 24(1)(e) of the Regulation may be considered appropriate with regard to the nature and the seriousness of the infringement.
392. The Board thus finds that a public notice must be issued.

#### **4.6 Application of Article 36a(4) of the Regulation to the case**

393. Article 36a(4) of the Regulation provides that “Notwithstanding paragraphs 2 and 3 [of Article 36a], the fine shall not exceed 20% of the annual turnover of the credit rating agency concerned in the preceding business year but, where the credit rating agency has directly or indirectly benefitted financially from the infringement, the fine shall be at least equal to that financial benefit”.
394. The second paragraph of Article 36a(4) of the Regulation states that “Where an act or omission of a credit rating agency constitutes 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 those infringements shall apply”.
395. It should therefore be assessed whether the PSI has directly or indirectly benefitted financially from the infringement and, if this is not the case, whether the maximum cap has been exceeded. The PSI also raised more general arguments in relation to the size of the fine, which are addressed by the Board below.
396. Further to this the Board then assesses whether any act or omission of the PSI constituted more than one infringement.
397. Its conclusions are set out below.

#### 4.6.1 Direct or indirect financial benefit, maximum cap and size of the fine

398. The Board considers that there is no evidence in this case to suggest that the PSI benefited directly or indirectly from the infringements.
399. In addition to this, the adjusted fine applicable must not exceed 20% of the annual turnover of the PSI.
400. To assess this point, in accordance with the current case law<sup>247</sup>, the Board must take into account the turnover of the PSI in the year preceding the decision or that of the last audited accounts available.
401. In the financial year ending 31 December 2022, the PSI generated a total annual turnover of EUR 19,623,147.
402.  $EUR\ 19,623,147 \times 0.2 = EUR\ 3,924,629.40$
403. Therefore, pursuant to Article 36a(4) of the Regulation, the adjusted fine applicable shall not exceed EUR 3,924,629.40.
404. This cap is not reached in this case and the maximum cap is not to be applied.
405. In relation to Article 36a(4) of the Regulation, the Board takes the view that in line with the Regulation, this provision refers to the fine for each individual infringement. However, even if one were to take the view that this cap should refer to the aggregate fine, this cap (EUR 3,924,629.40) would not be exceeded in the instant case, even if the Board were to impose the total fine on the basis of each infringement (namely EUR 2,885,000).
406. The PSI objected to the size of the fine in more general terms and submitted that “the final amount of the sanction remains very tangible in relation to the company’s financial capabilities”<sup>248</sup> and further that it “... poses a significant financial challenge for a company of our scale. [...] While we acknowledge our failure to meet the anticipated professional standards, we hold the view that the recommended fine does not tangibly represent the mitigating factors”<sup>249</sup>, which were applied in the case.
407. In this respect, it is important to note that, as acknowledged by the Board of Appeal, the Board has no discretion “to alter or calibrate fines depending on its subjective view of the seriousness or otherwise of an infringement or based on factors beyond those identified in the Regulation”<sup>250</sup>. Where the Board identifies an infringement that has been committed with negligence, it must apply a fine in accordance with the arithmetic calculation set out in the Regulation: first applying

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<sup>247</sup> See paras. 176 and 177 of the decision of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA’s decision (ref. BoA 2020 D 03) available at:

[https://www.esma.europa.eu/sites/default/files/library/boa\\_d\\_2020\\_03\\_decision\\_on\\_scope\\_ratings\\_v\\_esma.pdf](https://www.esma.europa.eu/sites/default/files/library/boa_d_2020_03_decision_on_scope_ratings_v_esma.pdf). When the audited financial statement of the last full business year is not available, the total annual turnover is identified according to the latest available audited financial statement.

<sup>248</sup> PSI’s written submissions in response to the Board’s initial Statement of Findings, p. 1.

<sup>249</sup> Exhibit 41, Response to the Initial SoF, p. 3.

<sup>250</sup> Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA’s decision (ref. BoA 2020 D 03), para. 184, available at: [https://www.esma.europa.eu/sites/default/files/library/boa\\_d\\_2020\\_03\\_decision\\_on\\_scope\\_ratings\\_v\\_esma.pdf](https://www.esma.europa.eu/sites/default/files/library/boa_d_2020_03_decision_on_scope_ratings_v_esma.pdf).



a basic amount and then adding or subtracting the established aggravating or mitigating factors. In determining the appropriate sanction, the Board followed these provisions of the Regulation strictly and the PSI did not challenge the specifics of the Board's analysis of aggravating and mitigating factors.

408. The PSI is also protected from disproportionately high fines by the fact that the basic amount of any fine is set within predetermined bands according to the CRA's turnover, so as to ensure proportionality. On this latter point, in line with the wording of the Regulation, the Board has no discretion in setting the basic amount of the fine by (for example) operating a sliding scale within the determined bands.
409. The size of the fine in this case thus also stems from the fact that the Regulation provides high basic amounts for infringements related to conflicts of interests and structural shortcomings. These are considered as very serious infringements under the Regulation.
410. In conclusion, the fine is the result of the strict application of Article 36a, including calculating the basic amounts and adjusting those in line with the relevant aggravating and mitigating factors, as well as taking into account any direct or indirect financial benefit and applying the maximum cap of the fine.

#### **4.6.2 Analysis of the acts or omissions constituting more than one infringement**

411. As set out above, the second paragraph of Article 36a(4) of the Regulation requires that where an act or omission of a credit rating agency constitutes more than one infringement listed in Annex III, only the higher fine must be applied.
412. This means that if more than one infringement is based on the same facts, only one fine can be imposed. However, this is not the same as an overlap between the acts or omissions underlying infringements. It is almost inevitable in circumstances where several infringements are established during the same investigation that there may be a degree of factual overlap. Such overlap is particularly likely in cases where all infringements fall under the same umbrella heading (e.g. 'conflicts of interest') and structural infringements (such as those under Points 11 and 12 of Section I of Annex III to the Regulation) are established alongside specific infringements (such as those under Point 19 of Section I of Annex III to the Regulation).
413. In this respect, the PSI argued that it "is penalised separately both for the cause of an act or omission (i.e., "Internal Controls Failure") and then four times for the directly associated effect of it (Policies and Procedures, Disclosure etc.) respectively" and that "all infringements ... originate from one omission, that is, the failures of [the PSI's] internal control framework, as described in ESMA's Guidelines on Internal Control for CRAs"<sup>251</sup>.
414. However, this prompts the question as to what the purpose of the co-legislators was in setting out numerous infringements in the Regulation if every instance would be covered by the single infringement at Point 12 of Section I of Annex III. Given the way the different infringements are particularised in the Regulation, it cannot have been the intention of the co-legislators to cover

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<sup>251</sup> See Exhibit 41, Response to the Initial SoF, p. 6.

everything under the umbrella of internal controls: such an interpretation of the Regulation does not stand up to scrutiny.

415. Nevertheless, as acknowledged in this decision, there are similarities between the requirements underlying the first four infringements listed above, namely those at Points 11, 12, 15 and 19 of Section I of Annex III to the Regulation.
416. The application of Article 36a(4) of the Regulation can take place only once infringements have been already established. Thus, after having established more than one infringement, the Board makes its assessment whether the facts underlying those infringements are the same<sup>252</sup>.
417. Further to the Board's thorough analysis of the IIO's Statement of Findings and the facts in the case, the Board agrees with the IIO's analysis and finds that the infringements in the case do not in fact rely upon the same acts or omissions, except for the infringement set out at Point 15 of Section I of Annex III to the Regulation concerning appropriate and effective organisational and administrative arrangements.
418. In this regard, the Board notes that the assessment of the policies and procedures infringement (at Point 11 of Section I of Annex III to the Regulation) relies upon an analysis of the shortcomings of several policies and procedures, namely the Defined Terms Glossary, the SRG Conflicts of Interest Policy, the Policy on Corporate Conflicts of Interest, the SRG Shareholders conflicts procedures, the Code of Business Conduct, the Code of Ethics, the Record keeping policy, the Record keeping procedure and the Rating Process Manual. The analysis above identifies general failings of these policies, such as the fact that many of them do not clearly identify the individuals to whom they apply, as well as failings related specifically to conflicts of interest, such as the fact that none of the policies and procedures gives clarity on the exact functions and roles involved at each step of the process to ensure the identification, management and disclosure of potential and existing conflicts.
419. In contrast, the assessment of the internal control infringement (at Point 12 of Section I of Annex III to the Regulation) relies in broad terms not on the policies and procedures themselves but on the implementation of controls that are in some instances set out in those policies and procedures. Therefore, differently from the other established infringements, the assessment examines guidance (or the lack thereof), deficiencies in controls such as the fact that the role of the compliance function was not defined, and concerns about documentation.
420. The Board considered further that some of the facts establishing the infringement at Point 19 of Section I of Annex III to the Regulation are also present elsewhere in the assessment of the case: in the analysis of the internal control infringement, reference is made to a questionnaire that [AB] completed in 2015 and to the absence of follow-up, and with regard to the infringement at Point 15 of Section I of Annex III to the Regulation, the same questionnaire is referenced. However, the Board finds that these limited examples are not sufficient to engage the second paragraph of Article 36a(4), because the infringement at Point 19 of Section I of Annex III to the Regulation relies on the specific factual matrix of [AB]'s holdings and positions and the issuance of the credit rating for [Company A] Bank in July 2019.

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<sup>252</sup> See ESMA Decision CRA 2018/1 (Fitch UK), available at this link: [https://www.esma.europa.eu/sites/default/files/library/cra\\_1-2018\\_decision\\_on\\_fitch\\_uk.pdf](https://www.esma.europa.eu/sites/default/files/library/cra_1-2018_decision_on_fitch_uk.pdf).

421. To respond to the PSI's submissions, the Board also considered the infringement at Point 2 of Section III of Annex III to the Regulation. It concerns a failure by the PSI to disclose the provision of ancillary services in a final ratings report in September 2020; the facts underlying the infringement are not relied upon in the assessment of any of the other infringements. There is no overlap between the evidence underlying this infringement and those at Points 11, 12, 15 and 19 of Section I of Annex III to the Regulation.
422. Finally, regarding the infringement set out at Point 15 of Section I of Annex III to the Regulation, the Board, having considered the facts as set out above, finds that due to the specific factual circumstances underlying the establishment of the infringement, the second paragraph of Article 36a(4) of the Regulation is applicable.
423. This means that only the "higher fine" must be applied. Given that the fines for Points 11, 12, 15 and 19 of Section I of Annex III to the Regulation are all the same, no fine shall be imposed in relation to the infringement related to Point 15 of Section I of Annex III to the Regulation in accordance with the second paragraph of Article 36a(4) of the Regulation.

## 4.7 Publication

424. The PSI requested that any decision reached by the Board not be made public.
425. The Board carefully considered the request. In line with Article 36d(1) of the Regulation and relevant case law<sup>253</sup>, it finds that the decision should be made public.
426. In particular, the Board assessed in depth the specificities of the case and applied the relevant case law. For example, in *VQ v ECB*<sup>254</sup>, the CJEU was asked to rule on whether the ECB's non-anonymised publication of a sanction which it imposed on a credit institution was disproportionately damaging<sup>255</sup>. The CJEU confirmed that in principle all penalties must be published to ensure their dissuasive effect<sup>256</sup> and found that the effects of publication without anonymisation must exceed those resulting from the reputational damage inherent to publication<sup>257</sup>.
427. Nevertheless, in line with ESMA's practice, personal data and business secrets are removed in the public version of the decision.

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<sup>253</sup> See for example Case T-203/18, *VQ v European Central Bank* [2020] ECLI:EU:T:2020:313 and Case T-198/03, *Bank Austria Creditanstalt AG v Commission*, [2006] ECLI:EU:T:2006:136.

<sup>254</sup> Case T-203/18, *VQ v European Central Bank* [2020] ECLI:EU:T:2020:313.

<sup>255</sup> Case T-203/18, *VQ v European Central Bank* [2020] ECLI:EU:T:2020:313, paras. 69-100.

<sup>256</sup> Case T-203/18, *VQ v European Central Bank* [2020] ECLI:EU:T:2020:313, paras. 82-85.

<sup>257</sup> Case T-203/18, *VQ v European Central Bank* [2020] ECLI:EU:T:2020:313, paras. 98-99.

**On the basis of the above Statement of Findings, the Board hereby**

**DECIDES**

**that**

Scope Ratings GmbH committed with negligence the following infringements:

- the infringement at Point 11 of Section I of Annex III to the Regulation concerning adequate policies and procedures, by not having policies and procedures adequate to ensure compliance with its obligations under the Regulation.
- the infringement at Point 12 of Section I of Annex III to the Regulation concerning internal control mechanisms, by not having internal control mechanisms adequate to ensure compliance with its obligations under the Regulation.
- the infringement at Point 15 of Section I of Annex III to the Regulation concerning appropriate and effective organisational and administrative arrangements, by not establishing appropriate and effective organisational and administrative arrangements to prevent, identify, eliminate or manage and disclose any conflicts of interest.
- the infringement at Point 19 of Section I of Annex III to the Regulation concerning the identification, elimination, or management and disclosure in a clear and prominent manner, of any existing or potential conflicts of interest, by failing to identify, eliminate, or manage and disclose in a clear and prominent manner a potential conflict of interest.
- the infringement at Point 2 of Section III of Annex III to the Regulation concerning the disclosure of the provision of ancillary services, by failing to comply with its obligation to disclose the provision of ancillary services provided to the rated entity or any related third party.

**therefore**

**IMPOSES**

**the following fines:**

- a. EUR 687,500 for the infringement at Point 11 of Section I of Annex III to the Regulation concerning adequate policies and procedures, by not having policies and procedures adequate to ensure compliance with the obligations under the Regulation.
- b. EUR 687,500 for the infringement at Point 12 of Section I of Annex III to the Regulation concerning internal control mechanisms, by not having internal control mechanisms adequate to ensure compliance with the obligations under the Regulation.
- c. EUR 687,500 for the infringement at Point 15 of Section I of Annex III to the Regulation concerning appropriate and effective organisational and administrative arrangements, by not establishing appropriate and effective organisational and administrative

arrangements to prevent, identify, eliminate or manage and disclose any conflicts of interest.

However, in line with Article 36a(4), second paragraph, of the Regulation, no fine shall be applied in relation to this infringement.

- d. EUR 687,500 for the infringement at Point 19 of Section I of Annex III to the Regulation concerning the identification, elimination, or management and disclosure in a clear and prominent manner, of any existing or potential conflicts of interest, by failing to identify, eliminate, or manage and disclose in a clear and prominent manner a potential conflict of interest.
- e. EUR 135,000 for infringement at Point 2 of Section III of Annex III to the Regulation concerning the disclosure of the provision of ancillary services, by failing to comply with the obligation to disclose the provision of ancillary services provided to the rated entity or any related third party.

for the overall amount of **EUR 2,197,500**

**and**

**ADOPTS**

a **supervisory measure** in the form of a **public notice** to be issued in respect of the infringements.

Scope Ratings GmbH may avail itself of the remedies of Chapter V of Regulation (EU) No 1095/2010 against this decision.

This decision is addressed to Scope Ratings GmbH – Lennéstraße 5, 10785 Berlin, Germany.

Done at Paris, on 20 March 2024

[signed]

For the Board of Supervisors

The Chair

Verena Ross