

DECISION OF THE BOARD OF SUPERVISORS

to adopt supervisory measures and impose fines in respect of infringements committed by FITCH España S.A.U.

The Board of Supervisors ('Board') of the European Security and Markets Authority ('ESMA')

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), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC,

Having regard to Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies¹, and in particular Articles 24 and 36c thereof,

Whereas:

1. Following preliminary investigation, the Supervision Department within ESMA concluded, in a report submitted to the Executive Director on 4 August 2017, that with respect to Fitch España S.A.U. ("Fitch Spain") and other CRAs belonging to the Fitch Group there were serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in Annex III to Regulation (EC) No 1060/2009.
2. On 4 August 2017 ESMA's Executive Director appointed an independent investigating officer ('IIO'), pursuant to Article 23 e(1) of Regulation (EC) No 1060/2009, to investigate the matter.

¹ OJ L 302 17.11.2009, p. 1

3. On 19 March 2018, the IIO sent her Initial Statement of Findings to Fitch Spain and to the other Persons Subject to Investigation (PSIs). In her Statement of Findings, the IIO concluded that Fitch Spain had committed with negligence two infringements set out at Point 20 of Section I of Annex III of Regulation (EC) No 1060/2009.
4. By written submissions on their behalf, dated 20 April 2018, Fitch Spain and the other PSIs responded to the Initial Statement of Findings of the IIO raising a limited set of issues for consideration by the IIO.
5. The IIO amended the Initial Statement of Findings, taking into account the PSIs' Response to her Initial Statement of Findings.
6. On 27 June 2018, the IIO submitted to the Board of Supervisors the Amended Statement of Findings together with the file relating to the case.
7. The Board discussed the IIO's findings and the case at its meeting on 18 December 2018.
8. On 18 January 2019, the Panel established by the Board to assess the completeness of the file submitted by the IIO adopted a ruling of completeness in respect of that file².
9. The Board discussed the case further at its meeting on 30 January 2019 and adopted its Initial Statement of Findings.
10. On 6 February 2019, on behalf of the Board, ESMA sent the Board's Initial Statement of Findings to Fitch Spain and the other PSIs.
11. On 20 February 2019 the Board of Supervisors received written submissions on behalf of Fitch Spain and the other PSIs.
12. The Board has discussed the case further at its meeting on 26 March 2019.
13. On the basis of the complete file submitted by the IIO containing, inter alia, the IIO's findings and having considered the written submissions made on behalf of Fitch Spain, the Board found that Fitch Spain had committed two of the infringements listed in Section I of Annex III of Regulation (EC) No 1060/2009, one of which was committed with negligence.
14. Pursuant to Article 24 of Regulation (EC) No 1060/2009, 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.

² Ruling of the Enforcement Panel (ESMA-2019-CONF-1)

15. Pursuant to Article 36a of Regulation (EC) No 1060/2009, 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.

HAS ADOPTED THIS DECISION:

Article 1

Infringements

Fitch España S.A.U. committed the following infringements:

i) with negligence, the infringement set out at Point 20 of Section I of Annex III of the Regulation (EC) No 1060/2009; and

ii) without negligence, the infringement set out at Point 20 of Section I of Annex III of the Regulation (EC) No 1060/2009;

for the reasons stated in the Annex to this Decision.

Article 2

Public Notice

The Board of Supervisors adopts a supervisory measure in the form of a public notice to be issued in respect of the infringements referred to in Article 1.

Article 3

Fines

The Board imposes the following fine, as calculated in the Annex to this Decision:

EUR 1 125 000 for the infringement set out at Point 20 of Section I of Annex III of Regulation (EC) No 1060/2009, committed with negligence.

Article 4

Remedies

Fitch Spain may avail itself of the remedies of Chapter V of Regulation (EU) No 1095/2010 against this Decision.



Article 5

Entry into force

This Decision shall enter into force on the date of its adoption.

Article 6

Addressee

This Decision is addressed to **Fitch España S.A.U.** - Av. Diagonal 601, 08028, Barcelona, Spain.

Done at Paris, on 26 March 2019

[PERSONAL SIGNATURE]

For the Board of Supervisors

Steven Maijor

The Chair

ANNEX

STATEMENT OF FINDINGS OF THE BOARD OF SUPERVISORS

1. The Board notes that on 6 February 2019 ESMA sent the Board's Initial Statement of Findings dated 30 January 2019 to Fitch España S.A.U. and the other PSIs belonging to the Fitch group.
2. By email dated 20 February 2019, written submissions in reply were provided on behalf of the PSIs. The PSIs took note of the Initial Statement of findings. With respect to the adverse findings in relation to infringement and fines, the PSIs disagreed for the reason set out in previous submissions; however, they had no new submissions to make in this regard.
3. The Board notes that, in their written submissions, the PSIs clarified that they will in any event respect the final decision of the Board. The PSIs are fully committed to compliance with the CRA Regulation and to the effective implementation of the measures taken to ensure that similar situations will not arise in the future.
4. These written submissions were considered by the Board together with the other submissions previously made on behalf of Fitch Spain.
5. Having considered the Statement of Findings of the IIO, the written submissions made on behalf of Fitch Spain in relation to this matter and the material in the IIO's file, the Board sets out its findings and the reasons for its findings below.

EXECUTIVE SUMMARY

6. Fitch Spain's entire capital is owned by Fitch. Fitch's entire capital is owned by Fitch Ratings Inc., a credit rating agency based in the United States of America. Fitch Ratings Inc. is in turn 100% owned by Fitch Group Inc.
7. Fitch Group Inc. is a holding company. Between 20 June 2013 and 11 April 2018, it was 20% indirectly owned by [redacted due to confidentiality: an individual ("FSC")], through [redacted due to confidentiality: Company E], based in France.
8. Therefore, in the described period, [FSC], through a complex multi-layer legal structure, has been holding more than 10% of Fitch Spain.

Fitch Spain committed negligently the infringement set out at Point 20 of Section I of Annex III of the Regulation (by having issued ratings on Renault S.A.S., despite the fact that a shareholder holding more than 10% of their capital/voting rights was a board member of Renault)

9. According to the Regulation, a credit rating agency (“CRA”) is forbidden from issuing new credit ratings if a shareholder holding 10% or more of the capital/voting rights of that CRA is a member of the administrative or supervisory board of the rated entity.
10. [redacted due to confidentiality: FSC], who was a shareholder holding more than 10% of the capital/voting rights of Fitch Spain, was a board member of Renault.
11. Between 20 June 2013 and 21 May 2015, Fitch Spain issued 8 new ratings on Renault. These ratings were not on the issuer itself (i.e. Renault) but on instruments newly issued by Renault.
12. Fitch Spain argued that the ratings on issuances would be covered by the (old) ratings on the entity, being intrinsically linked to them, and therefore would not constitute new ratings. For that reason, Fitch Spain considered that these would not be subject to the mentioned requirement.
13. The Board agrees with the IIO, noting on the contrary that Point 3(ca) of Section B of Annex I of the Regulation refers to “credit ratings” and that the Regulation does not make a difference between ratings of entities and ratings of instruments. Ratings on instruments are captured by structure of Point 3(ca) of Section B of Annex I of the Regulation. The main elements of the provisions shall apply as a consequence.
14. Therefore, on the basis of the assessment of the complete file submitted by the IIO, and having taken into account the written submissions made on behalf of Fitch, the Board finds that Fitch Spain failed to comply with the requirement of Article 6(2), in conjunction with Point 3 first paragraph and Point 3(ca) of Section B of Annex I of the Regulation, and thus committed the infringement set out at Point 20 of Section I of Annex III of the Regulation.
15. In addition, based on the facts, Fitch Spain must be considered to have acted negligently (but not intentionally) when it committed the infringement.
16. In accordance with the relevant provisions of the Regulation, taking into account applicable aggravating and mitigating factors, the fine to be imposed for such a negligent infringement would amount to EUR 1.125.000. Furthermore, the infringements would require the adoption of a supervisory measure taking the form of a public notice.

Fitch Spain committed the infringement set out at Point 20 of Section I of Annex III of the Regulation (by not having immediately disclosed that the existing ratings on Renault S.A.S. were potentially affected by the fact that a shareholder holding more than 10% of its capital/voting rights was a board member of Renault).

17. According to the Regulation, in relation to existing ratings, a CRA has an obligation to disclose immediately the fact that a shareholder holding 10% or more of the capital/voting rights of that CRA is a member of the administrative or supervisory board of the rated entity.
18. Fitch Spain issued an upgrade on 10 November 2014 of Renault's existing ratings. The corresponding rating action commentary did not include the disclosure that [FSC] was a board member of Renault. This omission was corrected with the publication of a non-rating action commentary on 6 January 2015.
19. Consequently, the IIO found that Fitch Spain failed to comply with the requirement of Article 6(2), in conjunction with the first paragraph of Point 3 of Section B of Annex I of the Regulation, and thus committed the infringement set out at Point 20 of Section I of Annex III of the Regulation.
20. In addition, the IIO found Fitch Spain to have acted negligently (but not intentionally) when it committed the infringement and therefore proposed a fine of EUR 375.000 to be issued against Fitch Spain.
21. The Board, on the basis of an assessment of the complete file submitted by the IIO, and having taken into account the written submissions made on behalf of Fitch Spain, finds that that Fitch Spain failed to comply with the requirement of Article 6(2), in conjunction with the first paragraph of Point 3 of Section B of Annex I of the Regulation, and thus committed the infringement set out at Point 20 of Section I of Annex III of the Regulation.
22. However, the Board does not find negligence established. In accordance with the relevant provisions of the Regulation, no fine would be imposed for such an infringement. Furthermore, the infringement would require the adoption of a supervisory measure taking the form of a public notice.

ESMA's Board of Supervisors has considered the following facts:

23. Fitch Spain was one of the PSIs (Persons Subject to Investigation), belonging to the Fitch Group that were subject to ESMA investigation and enforcement procedure. The Fitch group is among the three most relevant rating agencies' groups in terms of revenue and size.

Fitch Group's multi-layered legal structure

24. The Group is characterised by a multi-layered legal structure described below:

- Fitch is the parent company (100% ownership of the other PSIs: Fitch France and Fitch Spain; 100% of Fitch CIS, Fitch Deutschland and Fitch Polska and 97% of Fitch Italia; the remaining 3% is held by Fitch Ratings).
- The entire capital of Fitch is owned by Fitch Ratings, based in the USA.
- Fitch Ratings is in turn 100% owned by Fitch Group (holding company).
- Fitch Group: until April 2018, was 80% indirectly owned by [redacted due to confidentiality: Company Z] (based in USA) and 20% indirectly owned by [Company E] (based in France).
- [Company E]'s controlling shareholder is an individual [redacted due to confidentiality: FSC].

[FSC]'s board memberships

25. During the investigation by ESMA's Supervision Department, the PSIs indicated that "[redacted due to confidentiality: Company E], [redacted due to confidentiality: Company Z] and [FSC] are the only shareholders holding 5% or more (directly or indirectly) of either the capital or voting rights of Fitch Ratings Ltd or being otherwise in a position to exercise significant influence on the business activities of Fitch³".
26. In addition, Fitch stated that "[FSC] is/has served on the Board of the following entities rated by Fitch during the review period: Renault and (...) - for the review period⁴". Therefore, [FSC] is a board member of Renault.

Ratings of the PSIs on companies in which [FSC] was a board member

27. Before describing the ratings that were issued by the PSIs, it should be noted that credit ratings may relate either to an entity itself or to a debt or financial obligation, debt security, preferred share or other financial instruments. The former is referred to⁵ as "issuer rating" and the latter as "issue ratings" by the PSIs.
28. According to the PSIs' own policy and procedure⁶, "Fitch's credit ratings relating to issuers are an opinion on the relative ability of an entity to meet financial commitments, such as

³ Supervisory Report, Exhibit 9.1, Fitch's reply to questions 1 & 2, p. 1.

⁴ Supervisory Report, Exhibit 9.1, Fitch's reply to questions 1 & 2, p. 1.

⁵ See for example Supervisory Report, Exhibit 9.2.2, List of ratings.

⁶ Exhibit 65, PSIs' Response to the IIO's First RFI, Annex 5, Rating Definitions - 17 March 2017, p. 3.

interest, preferred dividends, repayment of principal, insurance claims or counterparty obligations. Credit ratings relating to securities and obligations of an issuer can include a recovery expectation [...]”.

29. In addition, for each existing rating (irrespective of whether it is an “issuer rating” or an “issue rating”), a number of rating actions can take place (e.g. due to the requirement of Article 8(5) of the Regulation to review credit ratings on an ongoing basis and at least annually). For example, affirmations and upgrades are rating actions regarding an existing rating⁷. The PSIs defined⁸ an affirmation of an existing rating as “The rating has been reviewed with no change in rating” and an upgrade as “The rating has been raised in the scale”. These rating actions on an existing rating differ from the assignment of a new rating, which is defined by the PSIs as “A rating has been assigned to a previously unrated issuer or issue⁹”.
30. This is consistent with the Commission Delegated Regulation (EU) 2015/2 of 30 September 2014 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to regulatory technical standards for the presentation of the information that credit rating agencies make available for the European Securities and Markets Authority¹⁰ (“Delegated Regulation 2015/2”). Table 2 of Part 2 of Annex I of Delegated Regulation 2015/2 contains “Data about the individual credit rating actions”. It defines “credit rating action type” as information, which “identify the type of action carried out by the credit rating agency with respect to a specific rating¹¹”. These can for example be upgrades, downgrades and affirmations. For each rating action of an existing rating, a different rating action identifier is reported; however, all these rating actions relate to the same existing rating and are thus reported under the same rating identifier¹².

Ratings on Renault

31. The PSIs first assigned a rating on Renault on 11 June 1999, well before October 2002 when [FSC] joined its board and the entry into force of the CRA III Regulation. This “issuer rating” was thus existing when the CRA III Regulation entered into force.

⁷ Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 5. See also Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 6. See also Exhibit 28, Supervision Department’s Response to the IIO, Question 7.

⁸ Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 5. See also Exhibit 65, PSIs’ Response to the IIO’s First RFI, Annex 5, Rating Definitions - 17 March 2017, p. 13.

⁹ Exhibit 65, PSIs’ Response to the IIO’s First RFI, Annex 5, Rating Definitions - 17 March 2017, p. 13.

¹⁰ Commission Delegated Regulation (EU) 2015/2 of 30 September 2014 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to regulatory technical standards for the presentation of the information that credit rating agencies make available for the European Securities and Markets Authority, OJ L 2, 6.1.2015, p. 24.

¹¹ Commission Delegated Regulation 2015/2, Table 2 of Part 2 of Annex I, Field N°6.

¹² As an illustration, please see Exhibit 30, Supervision Department’s Second Response to the IIO.

32. Between the date on which Renault was first rated and the entry into force of the CRA III Regulation, the PSIs issued 36 “issue ratings” on Renault¹³ (all in fact between the date on which [FSC] joined Renault’s board and the entry into force of the CRA III Regulation¹⁴).
33. After the entry into force of the CRA III Regulation, the PSIs issued 8 ratings regarding Renault¹⁵. They were all “issue ratings”:
- Rating on Renault regarding ISIN JP525019AD65 issued on 24 June 2013,
 - Rating on Renault regarding ISIN FR0011568963 issued on 1 October 2013,
 - Rating on Renault regarding ISIN FR0011052117 issued on 18 October 2013,
 - Rating on Renault regarding ISIN JP525019ADB2 issued on 13 December 2013,
 - Rating on Renault regarding ISIN FR0011769090 issued on 10 March 2014,
 - Rating on Renault regarding ISIN JP525019BE63 issued on 26 June 2014,
 - Rating on Renault regarding ISIN JP525019AE64 issued on 26 June 2014, and
 - Rating on Renault regarding ISIN FR0012354132 issued on 22 December 2014¹⁶.
34. The primary analyst in charge of these 8 ratings on Renault was employed by Fitch Spain¹⁷.

¹³ Exhibit 24, PSIs’ Response to the IIO’s Second RFI, Question 1. This figure excludes affirmations, upgrades and other subsequent rating actions. It only concerns the initial assignment of the “issue rating”.

¹⁴ Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 7. This figure excludes affirmations, upgrades and other subsequent rating actions. It only concerns the initial assignment of the “issue rating”.

¹⁵ Supervisory Report, Exhibit 9.2.2, List of ratings. This figure excludes affirmations, upgrades and other subsequent rating actions. It only concerns the initial assignment of the “issue rating”.

¹⁶ Supervisory Report, Exhibit 9.2.2, List of ratings.

¹⁷ Supervisory Report, Exhibit 11.5, Fitch’s reply to question 4, 19 October 2015, pp. 5-6.

35. The relevant RACs applicable to Renault¹⁸ included the disclosure that [FSC] was a board member of Renault, except for the RAC published on 10 November 2014 regarding an upgrade by the PSIs¹⁹ of a number of existing “issue” and “issuer” ratings.
36. More precisely, the RAC about the upgrade on 10 November 2014 of the Renault’s issuer²⁰ rating did not include the disclosure about the fact that [FSC] was a board member of Renault. The RAC dated 10 November 2014²¹ also covered 14 upgrades regarding “issue ratings” concerning Renault²². In the PSIs’ Response to the IIO’s Statement of Findings, the PSIs accepted “that the RAC concerning the upgrade on 10 November 2014 of Renault’s “issuer rating” did not include the disclosure that [FSC] was a board member of Renault²³”.
37. In their Comments on the Supervisory Report, the PSIs indicated that “the omission of the required disclosure in the Renault RAC dated 10 November 2014 was [...] identified [...] by GOM (Global Operations Management) in the course of its regular [...] control exercise in accordance with Fitch’s control framework²⁴”.
38. This omission was corrected with the publication of a non-rating action commentary (“NRAC”) on 6 January 2015 with the following wording: “This announcement corrects the version published on 10 November 2014 to include disclosure language relating to [Company E] controlling shareholder [FSC]’s service on the board of Renault, S.A.²⁵”.

Relevant PSIs’ policies and procedures regarding conflicts of interests related to board membership of shareholders

39. The compliance function covering the PSIs’ activities was formally entrusted to Fitch. The “agreement concerning the provision of compliance, credit policy and internal control

¹⁸ See Supervisory Report, Exhibit 9.2.20, Renault – Rating Action Commentaries Excel List 20 December 2013, Supervisory Report, Exhibit 9.2.21, Renault – Rating Action Commentaries Excel List 29 May 2014, and Supervisory Report, Exhibit 9.2.23, Renault – Rating Action Commentary 18 September 2013. It should be noted that these RACs do not refer to the eight “issue ratings” specifically mentioned above at para. 33 because according to the PSIs, RACs are drafted only “following the conclusion of the Rating Committee” and “although no RAC may be published with respect to a given issuance, that issuance will be included in the RAC marking the annual review of the issuer’s rating (including the relevant applicable disclosure)”, See Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 8.

¹⁹ Supervisory Report, Exhibit 9.2, Fitch’s reply to questions 3 & 4, 3 July 2015. Please also note that regarding Renault, the PSIs identified that this disclosure was also missing in a RAC published in 2012; however, the IIO noted that this took place before the entry into force of the CRA III Regulation.

²⁰ Supervisory Report, Exhibit 9.2.22, Renault – Rating Action Commentary 10 November 2014.

²¹ Supervisory Report, Exhibit 9.2.22, Renault – Rating Action Commentary 10 November 2014.

²² See Supervisory Report, Exhibit 9.2.2, List of ratings, Supervisory Report, Exhibit 9.2.22, Renault – Rating Action Commentary 10 November 2014, and Supervisory Report, Exhibit 11.5.14.1, Renault MS 7 November 2014, p. 5. See also Exhibit 28, Supervision Department’s Response to the IIO, Question 8.

²³ See PSIs’ Response to the IIO’s Statement of Findings, para. 3.1.

²⁴ Exhibit 9, PSIs’ Comments on the Supervisory Report, Point 4.1, p. 7.

²⁵ Supervisory Report, Exhibit 9.2.25, Renault – Corrective Rating Action Commentary 6 January 2015.

services” which was entered into in September 2011 between the different companies of the Fitch group²⁶ provides that Fitch “[omitted due to confidentiality]²⁷.

40. The PSIs’ procedural framework on the independence and avoidance of conflicts of interest in relation to direct and indirect shareholders or holders of voting rights consists of the following policies and procedures:

- The Code of Conduct²⁸: it states in section 2.2.7 that “Fitch’s disclosures of known actual and potential conflicts of interest shall be timely, clear, concise, specific, and prominent”.
- The Bulletin 10 - Firewall Policy²⁹: it “sets forth, among other things, mandatory disclosure requirements with respect to potential conflicts of interest presented by Fitch shareholders. The Policy also sets forth certain situations, related to these potential conflicts, in which the assignment of a new rating is prohibited³⁰”.
- The Bulletin 10A³¹: it helps analysts to identify cases where disclosures are required or the assignment of new ratings is prohibited in accordance with sections VI, VII and VIII of the Firewall Policy. According to the PSIs, it “is aligned with the provisions of the Firewall Policy and identifies the then current companies with respect to which either (i) such disclosures are required, or (ii) the assignment of new ratings is prohibited³²”.

41. However, companies in which [Company Z] had a shareholding were not listed in Bulletin 10A³³. Instead, Bulletin 10A stated that “BRM will advise the relevant Group Head in the

²⁶ Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 3.

²⁷ Exhibit 61, PSIs’ Response to the IIO’s First RFI, Annex 3, Agreement Concerning the Provision of Compliance, Credit Policy and Internal Control Services with Respect to the EU Regulation (EC) no 1060/2009 of the European Parliament and of the Council of Sept. 16, 2009 on credit rating agencies, Clause 1.

²⁸ Supervisory Report, Exhibit 23.8, Exhibit 9a - Bulletin 1 Code of Conduct , version 9, 18 Dec 2012, Supervisory Report, Exhibit 23.9, Exhibit 9b - Bulletin 1 Code of Conduct, version 10, 20 Jun 2013, Supervisory Report, Exhibit 23.10, Exhibit 9c - Bulletin 1 Code of Conduct, version 11, 1 Aug 2014, and Supervisory Report, Exhibit 23.11, Exhibit 9d - Bulletin 1 Code of Conduct, version 12, 26 Feb 2016.

²⁹ See Supervisory Report, Exhibit 9.3.1, Bulletin 10 – Firewall Policy – version 7, 15 May 2012, Supervisory Report, Exhibit 9.3.2, Bulletin 10 – Firewall Policy – version 8, 20 June 2013. Supervisory Report, Exhibit 23.16, Exhibit 11 - Firewall Policy 15 June 2015, and Supervisory Report, Exhibit 30, Bulletin 10 – Firewall Policy – version 10 (please also see the published version: Exhibit 79, Bulletin 10: Firewall Policy, Version 10, 17 March 2017).

³⁰ Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015.

³¹ See Supervisory Report, Exhibits 9.3.3 to 9.3.14 for Bulletin 10A, version 3 to 14, and Supervisory Report, Exhibit 24.11, Exhibit 27 - Bulletin 10A, version 15, as well as Exhibit 78, PSIs’ Response to the IIO’s First RFI, Annex 40.2.14, Bulletin 10A Firewall Disclosures - V16 December 2015, and Supervisory Report, Exhibit 15.3, Bulletin 10A, version 17.

³² Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015, p. 1.

³³ See Supervisory Report, Exhibit 9.3.26, Extract of the Rating Procedures Manual, version 4, p. 37: “at the request of the [Company Z], such holdings shall not be explicitly listed within Bulletin 10A, but instead shall be provided to a limited number of BRM and Accounting and Finance staff as designated by the Global Head of BRM so that the designated individuals can ensure that in the event that such a disclosure becomes necessary, the relevant analyst is notified”.

event that Fitch would be assigning a rating to an entity for which such a disclosure would be required³⁴.

42. Bulletin 10A, version 15 of 10 August 2015, changed this and included in section II.B the entities in which [Company Z] had an equity interest.
43. In addition, it is in August 2015 that Bulletin 10A³⁵ started to differentiate between the entities in which the PSIs' shareholders held more than 10%, compared to entities in which they held between 5% to 9.99%.
44. The Rating Process Manual ("RPM")³⁶: it contains the language to be inserted for the required disclosures relating to the Firewall Policy: for example, "[FSC] has an equity interest greater than 5% in or serves on the board of Name of the Rated Entity. [FSC] is the controlling shareholder of [Company E], which in turn is Fitch's majority shareholder³⁷".
45. As of 31 March 2015, the RPM contains instructions for analysts to check periodically Bulletin 10A to identify cases where disclosures may be required³⁸ and "that any exceptions to the RPM that could violate the Code of Conduct (including those provisions related to conflicts of interest) should be notified to the Chief Compliance Officer³⁹".
46. The procedure called Firewall Disclosure Procedures⁴⁰, which prior to becoming a stand-alone procedure was contained in the Rating Procedures Manual: it sets out the steps that the PSIs' compliance function has to carry out to verify and update the information

³⁴ See Supervisory Report, Exhibits 9.3.3 – 9.3.14, Section II.B of Bulletin 10A version 3, effective date: 18 October 2012; Bulletin 10A, version 4, effective date: 11 February 2013; Bulletin 10A, version 5, effective date: 26 April 2013; Bulletin 10A, version 6, effective date: 7 June 2013; Bulletin 10A, version 7, effective date: 16 August 2013; Bulletin 10A, version 8, effective date: 18 October 2013; Bulletin 10A, version 9, effective date: 27 January 2014; Bulletin 10A, version 10, effective date: 15 May 2014; Bulletin 10A, version 11, effective date: 15 July 2014; Bulletin 10A, version 12, effective date: 13 November 2014; Bulletin 10A, version 13, effective date: 6 February 2015; and Bulletin 10A, version 14, effective date: 29 April 2015.

³⁵ Supervisory Report, Exhibit 24.11, Exhibit 27 – Bulletin 10A, 10 August 2015.

³⁶ See Supervisory Report, Exhibits 9.3.15 – 9.3.25 for Rating Process Manual, version 4 to 13.

³⁷ See Supervisory Report, Exhibits 9.3.15 – 9.3.21, Rating Process Manual, version 4 to 9. This wording was updated according with changes in [Company E]'s shareholding. See Supervisory Report, Exhibits 9.3.22 – 9.3.24, Rating Process Manual, version 10 to 12, p. 40: "[FSC] serves on the board of Name of Rated Entity. [FSC] is the controlling shareholder of [Company E], which owns a 50% equity interest in Fitch". See also Supervisory Report, Exhibit 9.3.25, Rating Process Manual – version 13, 31 March 2015, p. 45: "[FSC] serves on the board of Name of Rated Entity. [FSC] is the controlling shareholder of [Company E], which owns a 20% equity interest in Fitch".

³⁸ Supervisory Report, Exhibit 9.3.25, Rating Process Manual – version 13, 31 March 2015, p. 44, footnote 37

³⁹ Supervisory Report, Exhibit 23, Fitch's Response to the Fourth Request for Information I, 28 April 2017, p. 3. See also Supervisory Report, Exhibit 9.3.25, Rating Process Manual – version 13, 31 March 2015, p. 5: "Exceptions to the RPM or other internal bulletin that would conflict with Fitch's Code of Conduct may only be submitted to the Exception Log with prior approval of Fitch's Chief Executive Officer, Fitch's President, or their designee. In such cases, notification of the exception must also be sent to the Chief Compliance Officer or their designee".

⁴⁰ Originally, the procedural steps could be found in Supervisory Report, Exhibits 9.3.26 to 9.3.28, Extract of the Rating Procedures Manual, version 4 to 6. In July 2014, the PSIs created a separate procedure, see Supervisory Report, Exhibit 9.3.29, Firewall Disclosure Procedures.

contained in Bulletin 10A. The PSIs relied on shareholders' self-declarations for the identification of the relevant persons and entities to list in Bulletin 10A⁴¹. For that purpose, [regular] emails were sent to [Company E] and [Company Z].

47. From 10 April 2014 onwards, the Procedure 10A – Procedure for Reviewing RACs and Private Rating Letters in connection with the Firewall Policy Disclosures (“GOM Procedure in connection with the Firewall Policy Disclosures”)⁴²: it sets out the steps Global Operations Management (“GOM”) follows in its [regular] checks of rating action commentaries (“RACs”) in relation to rated entities listed in Bulletin 10A to determine whether they contained the right disclosures⁴³.
48. From 1 January 2016, Bulletin 2A (The BRM Process Manual) sets out the steps that the Business Relationship Management (“BRM”) follows in relation to Bulletin 10A⁴⁴.
49. Finally, it should be added that towards the end of 2012⁴⁵, a working group established within the PSIs (“CRA3 Working group” or “CRA3WG”) started to assess the changes in the PSIs' internal procedures and policies that would be needed because of the CRA III Regulation.
50. Regarding the new provisions introduced by the CRA III Regulation in Point 3 of Section B of Annex I of the Regulation, new versions of the Firewall Policy - Bulletin 10 (version 8 effective on 20 June 2013) and of the Rating Procedures Manual (version 5 effective on 19 August 2013) were adopted.
51. Concerning the Firewall Policy – Bulletin 10 a new section VI.E was added, with the following wording:
 - "If any of [FSC], [Company E] or [Company Z] [...] is a member of the administrative or supervisory board of such entity (or in the case of [Company E] or [Company Z], has a seat on the board), then Ratings will not initiate a rating on that entity⁴⁶".
 - "If any of [FSC], [Company E] or [Company Z] [...] becomes a member of the administrative or supervisory board of such Rated Entity (or in the case of [Company

⁴¹ The IIO noted that from the autumn of 2015, Fitch [...] “began checking the information provided by [Company E] against [Company E]’s most recent annual report. Fitch then commenced using [...] external news services [...] to conduct independent screening for news related to its shareholders in Q2 of 2016. The first relevant search results were identified on 12 May 2016.” See Supervisory Report, Exhibit 21, Fitch’s Response to the Third Request for Information, p. 6.

⁴² See Supervisory Report, Exhibit 9.3.30, GOM Procedure 10A – Reviewing Firewall Policy Disclosures – version 1, 10 April 2014 and Exhibit 9.3.31, Exhibit GOM Procedure 10A – Reviewing Firewall Policy Disclosures – version 2, 13 May 2015.

⁴³ Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015, p. 2.

⁴⁴ Supervisory Report, Exhibit 14, BRM Process Manual, version 1, 1 January 2016.

⁴⁵ Exhibit 9, PSIs’ Comments on the Supervisory Report, p. 4.

⁴⁶ Supervisory Report, Exhibit 9.3.48, Bulletin 10 – Firewall Policy – version 8, 20 June 2013, p. 4.

E] or [Company Z], acquires a seat on the board), then Fitch shall (i) immediately disclose where the existing rating(s) and rating outlook(s) of the Rated Entity could be potentially affected by the acquisition or new memberships and (ii) assess whether there are grounds for re-rating or withdrawing the existing rating(s) and rating outlook(s) of the Rated Entity⁴⁷.

52. Amendments were also introduced in the Rating Procedures Manual, in particular: "[...] Section VI.E. of Bulletin 10 prohibits Fitch from assigning a new rating to an entity in which any of [FSC], [Company E] or the [Company Z] has an equity interest of 10% or more, or an entity in which any of these three parties is a member of, or has a seat on, the administrative or supervisory board⁴⁸".
53. Following the entry into force of the CRA III Regulation, the PSIs also introduced some changes in the [regular] emails. Initially, the PSIs' compliance function asked in these emails the shareholders to (i) "either confirm that the information held remains accurate and complete, or (ii) provide all necessary corrections⁴⁹", as well as to "provide notification of changes that occur to the information provided between notifications periods in a timely manner⁵⁰". The updated emails asked the shareholders to "identify any companies where [[Company Z]/[Company E]] has a seat on the board, EXCLUDING any that are already captured by the list of entities provided in which [[Company Z]/[Company E]] has an equity stake of more than 5%⁵¹". The emails also provided extracts of the EU Regulation and requested that the shareholders confirm that they have noted the prohibitions and that they are "not currently engaged in any investment or business activities that are inconsistent with such provisions⁵²".
54. Moreover, reference is also made to Fitch's publication procedure. Although not directly related to the conflict of interest, it has a fundamental impact on disclosure of the conflict of interest situations.
55. It is worth noting that the Rating Process Manual also indicates that "All RACs must be drafted in accordance with established policies and procedures of the Corporate Communications Group. The Corporate Communications (Media) Group is responsible for ensuring that these procedures are followed". It also provides that "The posting of all ratings, Rating Outlooks, Rating Watches and research reports to the Fitch website is the

⁴⁷ Supervisory Report, Exhibit 9.3.48, Bulletin 10 – Firewall Policy – version 8, 20 June 2013, p. 4.

⁴⁸ Supervisory Report, Exhibit 9.3.27, Extract of the Rating Procedures Manual, version 5, 19 August 2013, p. 34.

⁴⁹ Supervisory Report, Exhibit 9.3.26, Extract of the Rating Procedures Manual, version 4, 17 December 2012, p. 38.

⁵⁰ Supervisory Report, Exhibit 9.3.26, Extract of the Rating Procedure Manual, version 4, 17 December 2012, p. 38.

⁵¹ Supervisory Report, Exhibit 9.3.136, CRA3 changes – email notification to [Company E], and Exhibit 9.3.137, CRA3 changes – email notification to [Company Z].

⁵² Supervisory Report, Exhibit 9.3.136, CRA3 changes – email notification to [Company E], and Exhibit 9.3.137, CRA3 changes – email notification to [Company Z].

responsibility of the Information Services (Publishing) Group. However, if an analyst becomes aware of any error on the Fitch website, they must bring it to the attention of the Information Services Group promptly so that it may be corrected”⁵³.

Relevant PSIs’ internal control mechanisms

56. The following actors within the PSIs were in charge of the internal control mechanisms regarding the compliance with the provisions of the Regulation on the conflicts of interest presented by shareholders or holders of voting rights.
57. While the PSIs’ “analytical staff were responsible for ensuring that required disclosures were made⁵⁴” for each of the ratings issued and while all employees have an obligation according to the Code of Conduct⁵⁵ to “report [...] the activities about which they have knowledge that a reasonable person would question as a potential violation of this Code or applicable law⁵⁶”, three groups within the PSIs were specifically responsible for the relevant internal control measures: Regulatory Compliance, Business Relationship Management (“BRM”) and Global Operations Management (“GOM”).
58. First, Regulatory Compliance was responsible for contacting [Company E] and [Company Z] to receive information about their shareholdings and board memberships and for updating Bulletin 10A in accordance with Bulletin 10 in response to this⁵⁷.
59. The PSIs described the process in the following way: “[...] Regulatory Compliance gathered, from [Company Z] and [Company E] (including with respect to [FSC]) on a [regular] basis, information necessary to implement the relevant provisions of Bulletin 10. Regulatory Compliance then updated Bulletin 10A based on the responses provided by [Company E] and [Company Z]. [...]”⁵⁸.
60. Until autumn 2015, the PSIs relied on self-declarations by their shareholders to update Bulletin 10A on a [regular] basis. From autumn 2015, Regulatory Compliance “began checking the information provided by [Company E] against [Company E]’s most recent annual report. Fitch then commenced using external news services [...], to conduct

⁵³ Supervisory Report, Exhibit 9.3.23, Rating Process Manual – version 11, 1 July 2014, p. 41.

⁵⁴ Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015, p. 1. See also Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 34.

⁵⁵ Supervisory Report, Exhibit 23.8, Exhibit 9a - Bulletin 1 Code of Conduct , version 9, 18 Dec 2012, Supervisory Report, Exhibit 23.9, Exhibit 9b - Bulletin 1 Code of Conduct, version 10, 20 Jun 2013, Supervisory Report, Exhibit 23.10, Exhibit 9c - Bulletin 1 Code of Conduct, version 11, 1 Aug 2014, and Supervisory Report, Exhibit 23.11, Exhibit 9d - Bulletin 1 Code of Conduct, version 12, 26 Feb 2016.

⁵⁶ Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 34.

⁵⁷ Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015, p. 2.

⁵⁸ Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015, pp. 2-3.

independent screening for news related to its shareholders in Q2 of 2016. The first relevant search results were identified on 12 May 2016⁵⁹.

61. Following the update of Bulletin 10A, the information was posted to [...] ⁶⁰ a software platform used by the PSIs to manage and publish internally their policy documents⁶¹. Regulatory Compliance also provided “to a limited number of BRM staff as designated by the Global Head of BRM⁶²” the list of entities in which [Company Z] had an equity interest greater than 5% (rather than disclosing this information through Bulletin 10A).
62. Second, according to the PSIs, Business Relationship Management (“BRM”) was “responsible for ensuring that Fitch did not issue ratings in contravention of the requirements in Bulletin 10⁶³”.
63. In particular, BRM kept a record on the relevant [Company Z] entities and “was responsible for checking whether Fitch had rated any companies held by [Company Z]⁶⁴”. This meant that “each month, BRM and Accounts produced a report listing all mandates signed with issuers in such month. They provided a copy of this report to the designated BRM members. These designated BRM members then checked to see whether any of these issuers were on the list of companies held by [Company Z]⁶⁵”.
64. In January 2016, “BRM enhanced its controls by launching an automated Firewall Alert System within its cloud-based Customer Relationship Management (CRM) platform [...] to help Fitch identify and manage any potential conflicts with respect to Bulletins 10 & 10A⁶⁶”. The system cross-references all entities identified in Bulletin 10A with interactions and automatically sends “an e-mail alert to the user, reminding them of the Bulletin 10 and 10A requirements. [...]. In addition, BRM’s Policy and Operations Group, [...] were responsible for cross referencing the entities listed in Bulletin 10A with a [...] generated report prepared on a [regular] basis detailing all anticipated future mandates (the “pipeline” report) to identify if any mandates under discussion could not proceed due to the Firewall Policy⁶⁷”.

⁵⁹ Supervisory Report, Exhibit 21, Fitch’s Response to the Third Request for Information, p. 6. See also Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 15.

⁶⁰ Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015, pp. 2-3.

⁶¹ Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 14.

⁶² Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015, pp. 1. Footnote 1. See also Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015, p. 3.

⁶³ Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015, p. 1. See also Supervisory Report, Exhibit 9.3.29, Firewall Disclosure Procedures, July 2014 and Supervisory Report, Exhibit 23.5, Exhibit 5 – Section 1.6 BRM Process Manual 1 Jan 2016.

⁶⁴ Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015, p. 2.

⁶⁵ Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015, p. 2. See also Supervisory Report, Exhibit 11.7, Fitch’s reply to question 6, 19 October 2015.

⁶⁶ Supervisory Report, Exhibit 23, Fitch’s Response to the Fourth Request for Information I, 28 April 2017, pp. 4-5.

⁶⁷ Supervisory Report, Exhibit 23, Fitch’s Response to the Fourth Request for Information I, 28 April 2017, p. 5.

65. Third, Global Operations Management (“GOM”) staff “was responsible, inter alia, for checking whether Fitch had rated any companies held by [Company E], and checking that any required disclosures with respect thereto and with the respect to [FSC]’s board memberships had been made⁶⁸”.
66. The PSIs described the process in the following way: “At the end of each [period], [...] GOM reviewed all RACs published during such [period] that related to Fitch Ratings rated entities, if any, then included in Bulletin 10A to determine whether appropriate disclosures were made⁶⁹”.
67. The PSIs indicated that this procedure was in place since 2011, but that “In April 2014, at the request of Compliance, GOM documented its longstanding practice⁷⁰”, i.e. these steps were codified in the GOM Procedure in connection with the Firewall Policy Disclosures⁷¹ effective on 10 April 2014.

The Board of Supervisors has considered the following applicable legal provisions:

68. Besides the provisions of the (initial) Regulation, which entered into force in December 2009, account must consequently be taken of the amendments to the Regulation introduced through Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies⁷² (“CRA II Regulation”), which entered into force on 1 June 2011.
69. Further amendments to the Regulation were also introduced through Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011⁷³ as well as through Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013⁷⁴ amending Regulation (EC) No 1060/2009 on credit rating agencies (“CRA III Regulation”). The amendments introduced by the CRA III Regulation entered into force on

⁶⁸ Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015, p. 2.

⁶⁹ Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 13. See also Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015, p. 2.

⁷⁰ Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 13.

⁷¹ Supervisory Report, Exhibit 9.3.30, GOM Procedure 10A – Reviewing Firewall Policy Disclosures – version 1, 10 April 2014. See also Supervisory Report, Exhibit 9.3.31, Exhibit GOM Procedure 10A – Reviewing Firewall Policy Disclosures – version 2, 13 May 2015. See also Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 13.

⁷² Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies, OJ L 145, 31.5.2011, p. 30.

⁷³ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ L 174, 1.7.2011, p. 1.

⁷⁴ Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies, OJ L 146, 31.5.2013, p. 1.

20 June 2013. Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014⁷⁵ also introduced limited changes to the Regulation.

Relevant legal provisions regarding conflicts of interest

70. Following the CRA III Regulation, 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”.
71. 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”.
72. Following the CRA III Regulation, Point 3 of Section B of Annex I of 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:”
73. Point 3(ca) of Section B of Annex I 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”.
74. Following the CRA III Regulation, the second paragraph of Point 3 of Section B of Annex I of the Regulation reads as follows: “A credit rating agency shall also immediately assess whether there are grounds for re-rating or withdrawing the existing credit rating or rating outlook”.
75. Regarding the infringements, following the CRA III Regulation, Point 20 of Section I of Annex III provides that “The credit rating agency infringes Article 6(2), in conjunction with the first paragraph of point 3 of Section B of Annex I, by issuing a credit rating or rating outlook in any of the circumstances set out in the first paragraph of that point or, in the case

⁷⁵ Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulations (EC) No 1060/2009, (EU) No 1094/2010 and (EU) No 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority), OJ L 153, 22.2.14, p.1.

of an existing credit rating or rating outlook, by not disclosing immediately that the credit rating or rating outlook is potentially affected by those circumstances”.

76. In addition, Recital 20 of the CRA III Regulation (which introduced the Point 3(ca) of Section B of Annex I of the Regulation regarding the CRA’s shareholders) indicated that “The independence of a credit rating agency vis-à-vis a rated entity is also affected by possible conflicts of interest of any of its significant shareholders with the rated entity. A shareholder of a credit rating agency could be a member of the administrative or supervisory board of a rated entity or a related third party. Regulation (EC) No 1060/2009 addresses this type of situation only as regards the conflicts of interest caused by rating analysts, persons approving the credit ratings or other employees of the credit rating agency. That Regulation is, however, silent as regards potential conflicts of interest caused by shareholders or members of credit rating agencies. With a view to enhancing the perception of independence of credit rating agencies vis-à-vis the rated entities, it is appropriate to extend the existing rules set out in that Regulation on conflicts of interest caused by employees of the credit rating agencies to those caused by shareholders or members holding a significant position within the credit rating agency. Hence, the credit rating agency should abstain from issuing credit ratings or should disclose that the credit rating may be affected, where a shareholder or member holding 10 % of the voting rights of that agency is also a member of the administrative or supervisory board of the rated entity or has invested in the rated entity when the investment reaches a certain size. Furthermore, the fact that a shareholder or member holding at least 5 % of the voting rights of that credit rating agency has invested in the rated entity or is a member of the administrative or supervisory board of the rated entity should be disclosed to the public, at least if the investment reaches a certain size”.

Other relevant legal provisions

77. Other provisions of the Regulation may be relevant for the purposes of this investigation. In particular, it is worth noting the following definitions provided by the Regulation.
78. Article 3(1) (a) of the Regulation defines a credit rating as followed: “‘credit rating’ means an opinion regarding the creditworthiness of an entity, a debt or financial obligation, debt security, preferred share or other financial instrument, or of an issuer of such a debt or financial obligation, debt security, preferred share or other financial instrument, issued using an established and defined ranking system of rating categories”.
79. Article 3(1)(f) provides that a “‘rated entity’ means a legal person whose creditworthiness is explicitly or implicitly rated in the credit rating, whether or not it has solicited that credit rating and whether or not it has provided information for that credit rating”.

Having considered the IIO's Amended Statement of Findings, the submissions made on behalf of Fitch Spain in connection therewith, and the material in the file, the Board sets out its findings under the following headings.

A. Findings of the Board with regard to the infringement at Point 20 of Section I of Annex III of Regulation (EC) No 1060/2009 – issuance of new ratings on Renault.

80. This section of the Statement of Findings analyses whether Fitch Spain, with regards to ratings issued on Renault, breached the following requirement: “A credit rating agency shall not issue a credit rating or a rating outlook in any of the following circumstances [...]”, i.e. “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” (Point 3 first paragraph in conjunction with Point 3(ca) of Section B of Annex I of the Regulation).
81. If this requirement is not met, this would constitute the infringement set out at Point 20 of Section I of Annex III of the Regulation.
82. [FSC] was a shareholder holding more than 10% of PSIs' capital/voting rights⁷⁶.
83. The PSIs first assigned a rating on Renault on 11 June 1999⁷⁷.
84. [FSC] became a board member of Renault in October 2002⁷⁸.
85. Between the date of entry into force of CRA III Regulation and the first RFI from ESMA's Supervision department (21 May 2015), 8 ratings on Renault were issued⁷⁹. These ratings were not on the issuer itself (i.e. Renault) but on instruments issued by Renault. For that reason, they are referred to by the PSIs as “issue rating” rather than “issuer rating”.
86. It results clearly from these facts that after the entry into force of the CRA III Regulation, which introduced the relevant Point 3 first paragraph in conjunction with Point 3(ca) of Section B of Annex I of the Regulation, the PSIs issued new ratings on instruments related to Renault, despite the fact that [FSC] was a board member of Renault.

⁷⁶ See Supervisory Report, Exhibit 9.1, Fitch's reply to questions 1 & 2, p. 1 and Supervisory Report, Exhibit 1, Fitch Ratings Transparency Report 2016, p. 3.

⁷⁷ Exhibit 22, PSIs' Response to the IIO's First RFI, Question 7.

⁷⁸ Exhibit 22, PSIs' Response to the IIO's First RFI, Question 7.

⁷⁹ Exhibit 22, PSIs' Response to the IIO's First RFI, Question 7.

Arguments raised by the PSIs

87. The defence of Fitch Spain and the other PSIs, presented in a memorandum of [an external lawyer] of July 2016⁸⁰, provides several arguments summarised below as a background information.
88. The wording of Point 3 of Section B of Annex I of the Regulation which makes a distinction between the case of an existing rating and the other cases when the CRA shall not issue a credit rating would not be “informative” and would “not have a self-evident meaning”. It could not be “determinative”. In particular, according to [the] memorandum, “The preamble to the CRA 3 Regulation [...] does not provide guidance”. Furthermore, “the wording of the preamble and the wording of Section B, point 3 actually appear to contradict each other. The wording in the preamble appears to envisage that the credit rating agency has a generally-applicable choice [i.e. abstain from issuing credit ratings or disclosing that the credit rating may be affected by the potential conflicts of interest]. In contrast, the text of point 3 appears to impose different mandatory outcomes in different (albeit difficult to identify) situations - without any choice for the credit rating agency”.
89. The context would suggest that a rating is “existing” where the entity concerned is currently rated. In particular, according to [the] memorandum, the Commission proposed the new provision of Point 3 of Section B of Annex I of the Regulation on the assumption that it applied on a “per entity” basis.
90. According to [the] memorandum, “An interpretation of Section B, point 3 that argues for a distinction between ratings of an entity and its past issuances, on the one hand, and its future issuances, on the other hand, does not reflect a difference existing in the real world or in the regulatory scheme envisaged by Regulation 1060/2009. On the contrary, such “old” ratings are, in reality, kept current and up to date – they are as current and meaningful for investors as ratings for new issuances. Both sets of ratings present the current opinion of the credit rating agency to investors, and it would be fundamentally illogical for Section B, point 3 to distinguish between them”.
91. According to [the] memorandum, “ratings for new issuances are intrinsically linked to ratings for the entity and old issuances”.
92. The approach of other CRAs would be consistent with the PSIs’ interpretation of Point 3 of Section B of Annex I of the Regulation.
93. The legislative objective of Point 3 of Section B of Annex I of the Regulation would be best served “by treating ratings for the entity and all its issuances together”. In particular,

⁸⁰ Exhibit 9, PSIs’ Comments on the Supervisory Report, Appendix C, Memorandum from [...] dated 13 July 2016 on Rating new issuances of Renault.

according to [the] memorandum⁸¹, “preventing the initial credit rating agency from rating all the issuances of the entity concerned inevitably deprives the investor of unique and valuable information”.

94. Finally, [the] memorandum claims that “ESMA’s interpretation would imply that Section B, point 3 is invalid as disproportionate”. More precisely, “ESMA’s interpretation of Section B, point 3 would cause substantial damage to the businesses of credit rating agencies, without any corresponding benefit for investors. That interpretation would therefore render Section 8, point 3 invalid for infringement of the EU law principle of proportionality”.

Position of ESMA’s Board of Supervisors

95. From the arguments summarised above, it is evident that the legal analysis developed by the Law Firm defending Fitch Spain and the other PSIs aims at demonstrating that a rating is “existing”, and therefore non “new”, where the entity concerned is currently rated. According to [the external lawyers]’ memorandum, the ratings on new issuance (issue ratings) are intrinsically linked to rating for the entity (issuer ratings) and therefore, even if issued in a situation of conflict, would be “covered” by the existing ratings on the relevant rated entities.
96. Therefore, Fitch Spain’s reading of the relevant requirements would assert the following:
97. where an entity is currently rated, the CRA must immediately disclose that its ratings are potentially affected by the conflict situation, and on that basis may continue to rate all present and future ratings for the entity and individual issuances of that entity;
98. where an entity has not previously been rated, the CRA should not issue a rating, whether for the entity itself or an individual issuance.
99. For the full reasoning, reference is made to the full version of [the defensive memorandum.
100. The Board has assessed the arguments raised by the PSIs in [the] memorandum and examined in detail the wording and the context of Point 3 of Section B of Annex I of the Regulation
101. ESMA’s Board of Supervisors considers that the requirement of Point 3 first paragraph in conjunction with Point 3(ca) of Section B of Annex I of the Regulation is clear, especially in light of the definition of a “credit rating” set out in Article 3(a) of the Regulation.
102. The basic assumption of the defence of Fitch Spain is that the distinction between existing ratings and the new ratings set in the applicable provision of the CRA Regulation would

⁸¹ Exhibit 9, PSIs’ Comments on the Supervisory Report, Appendix C, Memorandum from [...] dated 13 July 2016 on Rating new issuances of Renault, see p. 7.

not be informative and would not have a self-evident meaning. All the other arguments are built up on this assumption.

103. With the aim to verify the validity of the basic assumption of the defence of Fitch Spain, the Board has conducted the following legal reasoning.
104. In order to understand the meaning and scope of Point 3 first paragraph in conjunction with Point 3(ca), it is fundamental to analyse the definition of “credit rating”, set forth in article 3, para. 1(a) of the CRA: “credit rating” means an opinion regarding the creditworthiness of an entity, a debt or *financial obligation*, debt security, preferred share or other financial instrument, *or of an issuer* of such a debt or financial obligation, debt security, preferred share or other financial instrument, issued using an established and defined ranking system of rating categories.
105. The definition of “credit rating” is crystal clear in including both issuer credit ratings and issue credit ratings (the latter is the common terminology to refer to credit ratings concerning issuances). It is evident that the definition contained in the Regulation treats the issue ratings as autonomous ones.
106. Therefore, in this respect, an issue rating is definitely captured by structure of Point 3(ca) of Section B of Annex I of the CRA Regulation. Once this principle has been established, the main elements of this provision should apply as a consequence. In particular, as a direct consequence of this reasoning, an issue rating would be considered a new rating if issued under the conflict situation described in Point 3(ca).
107. What follows from the reasoning above is that the basic assumption of the defence of Fitch Spain and the other PSIs (i.e. that the wording of the provision is not informative) is not correct. The rest of the arguments developed on behalf of the PSIs, especially with respect to the need to infer the interpretation of the provisions from the context and from the COM proposal of CRA III, are forced and founded on a partial reasoning. In the view of the Board, the elements that are based on the incorrect assumption do not deserve analysis, especially in consideration that the defence’s arguments shift the focus of the relevant provision from existing/new rating to issuer/issue rating, which makes the analysis misleading.
108. For the sake of completeness of the reasoning regarding the meaning of the applicable provisions, it is worth to notice that the memorandum of [the external lawyer] does not take into due consideration the last element of the CRA III requirement: in case of existing ratings, the CRA shall immediately assess whether there are grounds for re-rating or withdrawing the existing credit rating.
109. The last paragraph of Point 3 of Section B of Annex I indicates that a CRA shall also immediately assess whether there are grounds for re-rating or withdrawing the existing credit rating. The above requirement aims at triggering a “phasing out” of the existing ratings. Therefore, in the meantime, CRAs can maintain existing ratings on the entities

(also because their sudden withdrawal could be detrimental for the interest of the investors) but must not issue new ratings related to that entity, including issue ratings.

110. On this basis, the Board agrees with the findings submitted by the IIO and considers that the arguments raised by Fitch Spain and the other PSIs must be rejected.
111. With regards to the legal entities to which the infringements are attributable, the Board acknowledges the following.
112. In line with the guidance on this topic from the Committee of European Securities Regulators (“CESR”, which existed before the establishment of ESMA, ESMA being the legal successor of CESR)⁸², the IIO had regard to the location of the lead rating analyst to determine which CRA is deemed to have issued a given rating and thus legally responsible for that rating⁸³.
113. The IIO noted that the 8 ratings on Renault were issued by Fitch Spain. This can be derived from the information submitted by the PSIs about the primary analyst in charge of these ratings who was employed by Fitch Spain⁸⁴.
114. The IIO also noted that Renault was explicitly listed in Bulletin 10A⁸⁵ prepared by the PSIs’ compliance function. In addition, the Firewall Policy – Bulletin 10 had the following wording: “If any of [FSC], [Company E] or [Company Z] [...] is a member of the administrative or supervisory board of such entity (or in the case of [Company E] or [Company Z], has a seat on the board), then Ratings will not initiate a rating on that entity⁸⁶”.

⁸² Supervisory Report, Exhibit 45, CESR’s Guidance on Registration Process, Functioning of Colleges, Mediation Protocol, Information set out in Annex II, Information set for the application for Certification and for the assessment of CRAs systemic importance, 4th June 2010, CESR/10-347.

⁸³ See Supervisory Report, Exhibit 45, CESR’s Guidance on Registration Process, Functioning of Colleges, Mediation Protocol, Information set out in Annex II, Information set for the application for Certification and for the assessment of CRAs systemic importance, 4th June 2010, CESR/10-347, p. 31: “158. The CRA deemed to have issued a given rating and thus deemed legally responsible for that rating is determined by the location of the lead rating analyst (Article 3.1 (e)) upon the publication of the rating, and upon each subsequent review (including rating upgrades, downgrades and affirmations). Upon each review CRAs are required to disclose the name, job title and location of the lead rating analyst (Article 4.2, Annex I.D.1). CRAs should not shift a lead rating analyst to another CRA in order to circumvent the Regulation”.

⁸⁴ Supervisory Report, Exhibit 11.5, Fitch’s reply to question 4, 19 October 2015, pp. 5-6.

⁸⁵ See Supervisory Report, Exhibits 9.3.7 to 9.3.14 for Bulletin 10A, version 7 to 14, Supervisory Report, Exhibit 24.11, Bulletin 10A, version 15, as well as Exhibit 78, PSIs’ Response to the IIO’s First RFI, Annex 40.2.14, Bulletin 10A Firewall Disclosures - V16 December 2015, and Supervisory Report, Exhibit 15.3, Bulletin 10A, version 17.

⁸⁶ Supervisory Report, Exhibit 9.3.48, Bulletin 10 – Firewall Policy – version 8, 20 June 2013, p. 4. See also Supervisory Report, Exhibit 9.3.27, Extract of the Rating Procedures Manual, version 5, 19 August 2013, p. 34: “[...] Section VI.E. of Bulletin 10 prohibits Fitch from assigning a new rating to an entity in which any of [FSC], [Company E] or the [Company Z] has an equity interest of 10% or more, or an entity in which any of these three parties is a member of, or has a seat on, the administrative or supervisory board”.

115. On that basis, the Board agrees with the IIO finds that the infringement related to the issuance of ratings on Renault despite the fact that [FSC] was a board member of Renault is attributable to Fitch Spain.
116. To conclude, on the basis of the assessment of the complete file submitted by the IIO and having taken into account the written submissions made on behalf of Fitch, the Board finds that Fitch Spain infringed Article 6(2) of the Regulation, in conjunction with Point 3 first para. and Point 3(ca) of Section B of Annex I, by having issued ratings on Renault despite the fact that [FSC] was a board member of Renault. This constitutes the infringement set out at Point 20 of Section I of Annex III of the Regulation.

Intent or negligence

117. Article 36a (1) of the Regulation provides as follows:
118. “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.”
119. “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”.
120. 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.
121. Consequently, the findings of the Board of Supervisors need to include also findings considering that the relevant infringement has been committed by the PSIs intentionally or negligently.
122. 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”.
123. The factual background as set out in this Statement of Findings does not establish that there are objective factors which demonstrate that Fitch Spain, its employees or senior managers acted deliberately to commit the infringements of Point 20 of Section I of Annex III of the Regulation regarding Renault.
124. It should therefore be assessed whether there was negligence.

Considerations on negligence

125. There is no explicit guidance as regards the concept of “negligence” in the Regulation. However, it is clear 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 there has been the commission of an infringement.
126. Further, it is clear from the second subparagraph of Article 36a(1) of the Regulation that a negligent infringement is not an infringement which was committed deliberately or intentionally. This position is further reinforced by the case-law of the CJEU which ruled that negligence may be understood as entailing an unintentional act or omission⁸⁷.
127. In addition, “negligence” in the context of the Regulation is an EU law concept—albeit a concept which is familiar to and an inherent part of the 28 Member States’ legal systems—which must be given an autonomous and uniform interpretation.
128. Taking into account the CJEU jurisprudence⁸⁸, 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.
129. Based on this, negligence will be considered 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 when a person in such a position who is normally informed and sufficiently attentive could not have failed to foresee those consequences.
130. The following points should be taken into consideration regarding the standard of care to be expected of a CRA.
131. First, the position taken by the General Court in the Telefonica case must be considered. In this case, 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 entails⁸⁹”. Similarly, it is considered that, operating within the

⁸⁷ 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”.

⁸⁸ 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.

⁸⁹ Case T-336/07, *Telefónica, SA and Telefónica de España, SA v Commission* [2012] ECLI:EU:T:2012:172, para. 323.

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.

132. In this respect, the PSIs in their Response to the IIO's Statement of Findings noted that "The Telefonica case cited by the IIO and other relevant judgments clearly place significant weight on the available precedents that put those parties in a position of being able to foresee the consequences of their actions. Moreover, as set out above, the Court relied specifically on the fact that the undertaking concerned "could not have been unaware" that its conduct was contrary to the applicable legal rules. Accordingly, Fitch Ratings submits that the standard of care expected of a CRA cannot be so "high" that negligence is established simply because the CRA adopts an interpretation of words in the CRA Regulation with which ESMA subsequently disagrees. [...] Once ESMA has adopted a definitive official position on such issues then it might be negligence – as in the Telefonica case – to ignore that position. But that is not the present situation⁹⁰".
133. However, the Board agrees with the IIO and considers that the logic of requiring ESMA to adopt an official position (or to rely on a previous decisional practice) in addition to the obligations set out in the Regulation⁹¹, would lead to absurd situations. Based on this logic, negligence would never be considered in enforcement cases which concern the first-time application of a provision of the Regulation on which ESMA's guidance or previous decisions have not yet elaborated. In such cases, the CRA would never be deemed negligent and no fine would be imposed as there would neither exist previous official positions nor a decisional practice on the issue.
134. In addition, contrary to the PSIs' claims, the high standard of care expected of a CRA does not establish negligence "automatically" where ESMA's and the CRA's interpretation on the Regulation differ. Nevertheless, the standard of care expected of a CRA is of such a degree that a CRA is required to take special care. In this respect, if a CRA does not understand the requirements of the Regulation or has any doubts concerning their interpretation, the standard of care expected from it requires that, for example, it takes (before performing a given act) "appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences that a given act may entail⁹²". The same would apply if the CRA intends to follow an interpretation of a requirement of the Regulation, which would not be the interpretation to be derived, for example, from a plain reading of the relevant provision.

⁹⁰ Exhibit 111, PSIs' Response to the IIO's Statement of Findings, paras. 2.9.

⁹¹ This is all the more the case as regulations do not require any measures of transposition to be directly applicable.

⁹² Case T-336/07, Telefónica, SA and Telefónica de España, SA v Commission [2012] ECLI:EU:T:2012:172, para. 323.

135. Moreover, the Board agrees with the IIO and notes that in the cases cited by the PSIs where there were divergent positions between the Commission and the national authorities⁹³, the previous practices of the Commission were mentioned because they had the function of countering the differing views of the national authorities. The argument that the PSIs try to derive from this case-law regarding the need of ESMA's previous precedents must all the more be rejected in this investigation as there has been no diverging previous position.
136. Second, regard should be given to the nature and significance of the objects 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 of the Regulation and by the corresponding infringement provisions under Annex III of 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.
137. The Board finds, on this basis, that the standard of care to be expected of a CRA is high.

Assessment of negligence in the present investigation

138. The Board notes that both Renault was listed in Bulletin 10A⁹⁴ and that the Firewall Policy – Bulletin 10 had the following wording: "If any of [FSC], [Company E] or [Company Z] [...] is a member of the administrative or supervisory board of such entity (or in the case of [Company E] or [Company Z], has a seat on the board), then Ratings will not initiate a rating on that entity⁹⁵".

⁹³ See Case T-271/03 Deutsche Telekom AG v Commission [2008] EU:T:2008:101, para. 295; Case C-280/08 P Deutsche Telekom AG v Commission [2010] EU:C:2010:603, para. 124 and the case-law cited; Case C-295/12 P Telefonica, SA and Telefonica de España, SA v Commission [2014] EU:C:2014:2062, para. 156 and Case T-336/07, Telefónica, SA and Telefónica de España, SA v Commission [2012] ECLI:EU:T:2012:172, para. 319.

⁹⁴ See Supervisory Report, Exhibits 9.3.7 to 9.3.14 for Bulletin 10A, version 7 to 14, Supervisory Report, Exhibit 24.11, Bulletin 10A, version 15, as well as Exhibit 78, PSIs' Response to the IIO's First RFI, Annex 40.2.14, Bulletin 10A Firewall Disclosures - V16 December 2015, and Supervisory Report, Exhibit 15.3, Bulletin 10A, version 17.

⁹⁵ Supervisory Report, Exhibit 9.3.48, Bulletin 10 – Firewall Policy – version 8, 20 June 2013, p. 4. See also Supervisory Report, Exhibit 9.3.27, Extract of the Rating Procedures Manual, version 5, 19 August 2013, p.

139. However, Fitch Spain issued ratings on Renault. According to the PSIs' interpretation, the PSIs were not prevented from issuing ratings on instruments issued by entities which were already rated by the PSIs and in which [FSC] was a board member.
140. To understand by which process the PSIs decided to rely on this interpretation, the IIO analysed the work which was conducted internally where the requirements stemming from the circumstances of [FSC]'s board membership entered into force.
141. In order to assess whether changes to the PSIs' control framework were required due to the CRA III Regulation, the PSIs established towards the end of 2012⁹⁶ a working group entitled "CRA3 Working group" (or "CRA3 WG"). The PSIs indicated⁹⁷ that the CRA3 WG took a number of steps, including analysing the amendments to the Regulation introduced by the CRA III Regulation and reviewing "Fitch Ratings' existing procedures and how they had been applied to the relevant rated entities (i.e., amongst others, Renault)". The PSIs also stated that "Based on an assessment of Fitch Ratings' existing procedures and the CRA3 requirements, the CRA3 WG concluded that no procedural gap had been identified" and "The overall results of the CRA3 WG's assessment (i.e. that the CRA3 WG believed that the relevant Fitch Ratings entity could continue to rate companies where [FSC] is a board member as long as this was disclosed and that there was no conflict of interest) is documented in the CRA3 Implementation Chart".
142. The first version of the "CRA3 Implementation Chart" shows that regarding the new requirement of Point 3(ca) of Section B of Annex I, it is indicated "New provisions. [Should we include these in the Firewall Policy?]" and a specific person employed by the PSIs ([QR, Senior Counsel]) is identified for this task⁹⁸.
143. On 16 January 2013, [QR] wrote an email saying "I have spoken with both [BD, Senior Counsel] and [YF, Senior Officer] and we agree that there is language in CRA 3 that may give us latitude in continuing to rate entities where [FSC] is a board member. We are going to discuss this possibility with senior management⁹⁹".
144. In the next version of the "CRA3 Implementation Chart" (23 January 2013), in the "status" column, it is then indicated regarding the new requirement of Point 3(ca) of Section B of Annex I that "The wording 'A credit rating agency shall disclose where an existing credit rating or rating outlook is potentially affected by the following' means that we believe we

34: "[...] Section VI.E. of Bulletin 10 prohibits Fitch from assigning a new rating to an entity in which any of [FSC], [Company E] or the [Company Z] has an equity interest of 10% or more, or an entity in which any of these three parties is a member of, or has a seat on, the administrative or supervisory board".

⁹⁶ Exhibit 9, PSIs' Comments on the Supervisory Report, p. 4.

⁹⁷ Exhibit 22, PSIs' Response to the IIO's First RFI, Question 11.

⁹⁸ Supervisory Report, Exhibit 15.1.1, CRA 3 Implementation GM Jan17, 17 January 2013, p. 15.

⁹⁹ Supervisory Report, Exhibit 16.8, CRA 3 email, 16 January 2013, p. 1.

can continue to rate companies where [FSC] is a board member as long as we disclose it and are satisfied there is no conflict of interest¹⁰⁰.

145. In an email dated 23 January 2013 and attaching the version of the “CRA3 Implementation Chart” of 23 January 2013, [YF, Senior Officer] indicated to [redacted due to confidentiality: Fitch’s employees having high positions in the managerial, analytical and compliance functions] that: “We would like to get your agreement on our approach to the following subjects before we go any further. [...] Rating companies for which our shareholder sits of their board¹⁰¹”.
146. In a document prepared for a meeting on 24 January 2013, it was mentioned “We presented our interpretation of the most important rules to [redacted due to confidentiality: the above Fitch’s employees having high positions in managerial, analytical and compliance functions] on Jan 23. Most of our interpretations were accepted¹⁰²”.
147. On 29 January 2013, [YF] sent an email setting out the “10 most important points” regarding the CRA III Regulation. In point 2 about “Rating companies for which our shareholder sits of their board”, it includes the assessment that “We are allowed to continue rating these companies as long as we have deemed that there are no conflicts of interest¹⁰³”.
148. In her RFI, the IIO asked the PSIs to provide explanations and all available background documentation on why [QR] indicated “we agree that there is language in CRA 3 that may give us latitude in continuing to rate entities where [FSC] is a board member¹⁰⁴”.
149. In this respect, the PSIs responded the following¹⁰⁵: “It is confirmed that there is no further background documentation or internal documentation in response to this request, nor is there any additional documentation setting forth the internal legal analysis supporting the conclusion that Fitch Ratings’ ESMA-registered CRAs could continue to rate entities where [FSC] was a Board member, as well as the issuances of those entities [QR, Senior Counsel], discussed the relevant language of CRA3 with [KC, High level Counsel]. Given that the relevant Fitch Ratings entity had been disclosing [FSC]’s relationship with Fitch Ratings together with his board membership of the relevant companies since 2005 (well before CRA3 came into force on 20 June 2013), they both concluded that, on a plain reading of the relevant CRA3 language, each relevant Fitch Ratings entity was in compliance with CRA3. Section B(3) of Annex I allows the continuation of ratings (given the reference to rerating), and Section B(3a) of Annex I refers specifically to making such disclosures. Furthermore, given that the rating of an entity’s securities is inextricably linked

¹⁰⁰ Supervisory Report, Exhibit 15.1.2, CRA 3 Implementation Jan 23, 23 January 2013, p. 18.

¹⁰¹ Supervisory Report, Exhibit 16.29, Email CRA 3 Implementation Meeting - documents attached, p. 1.

¹⁰² Supervisory Report, Exhibit 21.8, Agenda for [...] catch-up meeting of 24 January 2013, p. 1. See also Exhibit 26, PSIs’ Response to the IIO’s Third RFI, Question 6 and Exhibit 105, PSIs’ Response to the IIO’s Third RFI, Annex 6.

¹⁰³ Supervisory Report, Exhibit 16.24, CRA 3 briefing email, 29 January 2013, p. 35.

¹⁰⁴ Supervisory Report, Exhibit 16.8, CRA 3 email, 16 January 2013, p. 1.

¹⁰⁵ Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 9.

to the rating of the entity itself – that is, the rating of an operating company's securities is derived from the rating of that company itself – a reasonable interpretation of these provisions of CRA3 was, and is, that the relevant Fitch Ratings entity can continue rating both the entity and its current and future securities. As a result, [QR] and [KC] saw no reason to obtain an external legal opinion to assist them in their analysis as the meaning of these provisions of CRA3 was, and is, clear”.

150. The PSIs were also asked by the IIO to provide all internal documentation (including legal internal analysis) which served as a basis to draw the PSIs’ conclusion that “The wording “A credit rating agency shall disclose where an existing credit rating or rating outlook is potentially affected by the following” means that we believe we can continue to rate companies where [FSC] is a board member as long as we disclose it and are satisfied there is no conflict of interest¹⁰⁶”. The PSIs did not provide any document and referred to the explanation quoted above¹⁰⁷.
151. In their Response to the IIO’s Statement of Findings, the PSIs argued that “It is clear from this full response, and from the various other considerations of Fitch Ratings noted by the IIO in the Statement of Findings, that this issue of interpretation was given careful consideration, including by Fitch Ratings' most senior lawyer [...]. The fact that there is no written note of this legal assessment does not mean that the matter was not considered carefully. To the contrary, the evidence provided by Fitch Ratings is that the interpretation of the relevant provisions was given careful consideration by senior individuals within the business, with the benefit of legal advice, and they settled on what they considered to be a clear and reasonable interpretation of the language of the Regulation. As discussed, simply because this interpretation later turned out to differ from ESMA's does not make it somehow an unreasonable position given the understanding of Fitch Ratings at the time¹⁰⁸”. The IIO however considered the PSIs’ assertion not supported by any documentation. The PSIs did not provide any evidence for their claimed “careful consideration”. The documents in the file only state the conclusion but do not give any reasons for the conclusion reached by the PSIs that “we agree that there is language in CRA 3 that may give us latitude in continuing to rate entities where [FSC] is a board member¹⁰⁹”. An argument according to which any decision taken by a senior staff member or senior lawyer would be considered reasoned by virtue of their position cannot be accepted. The senior position of a decision-maker within an organisation also does not automatically make all of his or her decisions informed ones. Despite the requests from ESMA’s Supervision Department and the IIO, the PSIs have been unable to find documentation that would show an in-depth and proper legal assessment of this issue at that time. As a side remark, the IIO also noted that the very cautious wording of the

¹⁰⁶ Supervisory Report, Exhibit 16.29, Email CRA 3 Implementation Meeting - documents attached, p. 20.

¹⁰⁷ Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 10.

¹⁰⁸ Exhibit 111, PSIs’ Response to the IIO’s Statement of Findings, paras. 2.16-17.

¹⁰⁹ Supervisory Report, Exhibit 16.8, CRA 3 email, 16 January 2013, p. 1.

conclusion “[...] may give us latitude [...]” did not seem to imply that the PSIs considered that their interpretation was the most straightforward and only possible one.

152. The Board endorses the analysis performed by the IIO and finds that Fitch Spain failed to take the special care expected of a CRA. In particular, Fitch Spain decided to rely on an interpretation of the relevant requirement, which was not backed by a specific detailed legal assessment.
153. As a result of that failure, Fitch Spain did not foresee the consequences of their acts, in particular these infringements of the Regulation, in circumstances when a person in such a position who is normally informed and sufficiently attentive could not have failed to foresee those consequences.
154. Therefore, it is found that Fitch Spain has been negligent when committing the infringements of Point 20 of Section I of Annex III of the Regulation concerning Renault.

Fines

Determination of the basic amount

155. Article 36a of the Regulation provides in paragraph 2 as follows: “2. 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; [...]
156. In order to decide whether the basic amount of the fines should be set at the lower, the middle or the 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”.
157. It has been established that Fitch Spain committed the infringement set out at Point 20 of Section I of Annex III of the Regulation, by issuing ratings on Renault while [FSC] was a board member of Renault. These ratings matured or were withdrawn at the latest in December 2016¹¹⁰.

¹¹⁰ See the assessment in this Section 8.1.3 of the aggravating factor of Annex IV, Point I. 2 of the Regulation.

158. To determine the basic amount of the fine, the Board has regard to Fitch Spain's annual turnover in the preceding business year.

159. In 2015, Fitch Spain had a turnover of EUR 15.54 million¹¹¹.

160. Thus, the basic amount of the fine for the infringement listed in Point 20 of Section I of Annex III of the Regulation is set at the middle of the limit of the fine set out in Article 36a(2)(a) of the Regulation and shall not exceed EUR 625 000.

Aggravating factors

161. Annex IV of the Regulation lists the aggravating factors to be taken into consideration for the adjustment of the fine. Their application to the present investigation is assessed below.

162. Annex IV, Point I. 1. If the infringement has been committed repeatedly, for every time it has been repeated, an additional coefficient of 1,1 shall apply.

163. Regarding the infringement of Point 20 of Section I of Annex III of the Regulation by Fitch Spain concerning the issuance of ratings on Renault, it has been committed each time that Fitch Spain has issued a rating on Renault in contradiction with Article 3 of Section B of Annex I of the Regulation, i.e. 8 times. Therefore, putting aside the first time Fitch Spain has committed the infringement, it has been repeated 7 times.

164. This aggravating factor is thus applicable for the infringement by Fitch Spain.

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

166. Concerning the 8 ratings issued on Renault by Fitch Spain which constitute the infringement by Fitch Spain of Point 20 of Section I of Annex III of the Regulation, none of them was withdrawn or matured within a period of less than six months from the date of their issuance. Thus, each time Fitch Spain committed the repeated infringement, this lasted for more than six months.

167. In particular:

- Renault's rating regarding ISIN JP525019AD65 issued on 24 June 2013: matured on 12 June 2015¹¹²,

¹¹¹ Exhibit 22, PSIs' Response to the IIO's First RFI, Question 1. See also Supervisory Report, Exhibit 1, Fitch Ratings Transparency Report 2016, p. 22. The revenue derived from ratings activities amounted to EUR 15.536 million.

¹¹² Supervisory Report, Exhibit 11.5, Fitch's reply to question 4, p. 2. See also Exhibit 1, Supervisory Report, Table 1.

- Renault's rating regarding ISIN FR0011568963 issued on 1 October 2013: (maturity date 19 September 2018), withdrawn on 23 December 2016¹¹³,
- Renault's rating regarding ISIN FR0011052117 issued on 18 October 2013: matured on 25 May 2016¹¹⁴,
- Renault's rating regarding ISIN JP525019ADB2 issued on 13 December 2013: matured on 27 November 2015¹¹⁵,
- Renault's rating regarding ISIN FR0011769090 issued on 10 March 2014: withdrawn on 23 December 2016¹¹⁶,
- Renault's rating regarding ISIN JP525019BE63 issued on 26 June 2014: withdrawn on 30 August 2016¹¹⁷,
- Renault's rating regarding ISIN JP525019AE64 issued on 26 June 2014: matured on 6 June 2016¹¹⁸, and
- Renault's rating regarding ISIN FR0012354132 issued on 22 December 2014: withdrawn 23 December 2016¹¹⁹.

168. This aggravating factor is thus applicable for the infringement by Fitch Spain concerning the issuance of ratings on Renault.

169. Annex IV, Point I. 3. If the infringement has revealed systemic weaknesses in the organisation of the credit rating agency, in particular in its procedures, management systems or internal controls, a coefficient of 2,2 shall apply.

170. The Board noted that the Regulation does not provide guidance on what constitutes "systemic weaknesses in the organisation of the credit rating agency". However, based on

¹¹³ Supervisory Report, Exhibit 11.5, Fitch's reply to question 4, p. 2, and Supervisory Report, Exhibit 40, RAC for Withdrawal of Renault Issue Ratings. See also Exhibit 1, Supervisory Report, Table 1 and Exhibit 30, Supervision Department's Second Response to the IIO, p. 11.

¹¹⁴ Supervisory Report, Exhibit 11.5, Fitch's reply to question 4, p. 2. See also Exhibit 1, Supervisory Report, Table 1 and Exhibit 30, Supervision Department's Second Response to the IIO, pp. 11-12.

¹¹⁵ Supervisory Report, Exhibit 11.5, Fitch's reply to question 4, p. 2. See also Exhibit 1, Supervisory Report, Table 1 and Exhibit 30, Supervision Department's Second Response to the IIO, p. 12.

¹¹⁶ Supervisory Report, Exhibit 11.5, Fitch's reply to question 4, p. 2, and Supervisory Report, Exhibit 40, RAC for Withdrawal of Renault Issue Ratings. See also Exhibit 1, Supervisory Report, Table 1 and Exhibit 30, Supervision Department's Second Response to the IIO, p. 12.

¹¹⁷ Supervisory Report, Exhibit 11.5, Fitch's reply to question 4, p. 2, and Exhibit 63, PSIs' Response to the IIO's Second RFI, Annex 7, Extracts from the PSIs' Rating Desk applications.

¹¹⁸ Supervisory Report, Exhibit 11.5, Fitch's reply to question 4, p. 2. See also Exhibit 1, Supervisory Report, Table 1 and Exhibit 30, Supervision Department's Second Response to the IIO, p. 13.

¹¹⁹ Supervisory Report, Exhibit 11.5, Fitch's reply to question 4, p. 2 and Supervisory Report, Exhibit 40, RAC for Withdrawal of Renault Issue Ratings. See also Exhibit 1, Supervisory Report, Table 1 and Exhibit 30, Supervision Department's Second Response to the IIO, p. 13.

the wording of the terms used, not all weaknesses in the procedures, management systems or the internal controls will necessarily constitute “systemic weaknesses in the organisation of a CRA”.

171. In the analysis on whether the aggravating factor applies, the Board considers the type and the level of seriousness of the failure in the PSIs’ procedure and internal controls.
172. The Fitch Group had a specific procedure and an internal control framework to avoid conflicts of interests in general, which included for example the Firewall Policy. It consisted of a number of levels of control involving different persons at different levels of the organisation. The infringement is in particular linked to the interpretation by the PSIs of the applicable requirement. However, there is no evidence that the PSIs’ procedures in general and the PSIs’ wider system of internal controls, which the PSIs use to comply with the other obligations under the Regulation, also have weaknesses.
173. The Board therefore does not consider that the infringement by Fitch Spain reveals a systemic weakness in the organisation of the CRAs, in particular in their procedures, management systems or internal controls. This aggravating factor is thus not applicable.
174. Annex IV, Point I. 4. If the infringement has had a negative impact on the quality of the ratings rated by the credit rating agency concerned, a coefficient of 1,5 shall apply.
175. Evidence of a negative impact on the ratings could for example be inferred from evidence of deviations of ratings between the ratings that were issued by the PSIs and the ratings that would have been issued if there would have been no infringement of Point 20 of Section I of Annex III of the Regulation by Fitch Spain concerning the issuance of ratings on Renault, if these deviations could not be explained by other reasons. Such a demonstration would be very difficult to achieve in the present case because the infringement is precisely that no rating should have been issued. In the present investigation, there is no evidence in the file that would support such a demonstration.
176. It should also be noted that the PSIs indicated the following¹²⁰: “Fitch Ratings’ [...] Credit Officer carried out [in response to the IIO’s First RFI¹²¹] a review of the quality of the credit ratings for Renault, [...] to ensure the ratings were timely, robust and consistent with other Fitch Ratings’ ratings. [...] His review of these factors leads to the conclusion that even if an infringement were established in the present case there was no negative impact on the quality of these ratings”.
177. Concerning Renault, this review¹²² noted that “[...] rating of Renault was in line with criteria and with similar decisions taken for other automakers. The movement in Renault’s ratings during the period was mostly attributable to changes in its financial profile”. In addition,

¹²⁰ Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 39.

¹²¹ Exhibit 24, PSIs’ Response to the IIO’s Second RFI, Question 5.

¹²² Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 39.

“Moody’s, Standard & Poor’s and Fitch France all downgraded the company at similar times based on the worsening financial metrics. [...] All three rating agencies rated Renault at BBB-“ and “Neither Fitch France nor any other Fitch Ratings entity has ever received an analytical complaint from an internal or external market participant with regards to Renault”.

178. On that basis, it is not established in the present investigation that the infringements of Point 20 of Section I of Annex III of the Regulation committed by Fitch Spain concerning the issuance of Renault’s ratings had a negative impact on the quality of these ratings. The aggravating factor is therefore not applicable.
179. Annex IV, Point I. 5. If the infringement has been committed intentionally, a coefficient of 2 shall apply.
180. This aggravating factor is not applicable because there is no evidence that the infringement of Point 20 of Section I of Annex III of the Regulation committed by Fitch Spain concerning Renault has been committed intentionally.
181. Annex IV, Point I. 6. If no remedial action has been taken since the breach has been identified, a coefficient of 1,7 shall apply.
182. The PSIs were asked by the IIO to provide a detailed description of the remedial actions that they took. In particular, the PSIs mentioned the following remedial action¹²³ which may be relevant for the infringements of Point 20 of Section I of Annex III of the Regulation committed by Fitch Spain concerning the issuance of Renault’s ratings.
183. Referring to ESMA’s Action Plan¹²⁴: “Action 1 – If [FSC] remains on the Renault board, withdraw ratings on Renault securities issued after 20 June 2013, and cease issuing ratings on Renault securities going forward. This has been completed¹²⁵”.
184. The Board acknowledges that in their response to ESMA’s Action Plan¹²⁶, the PSIs indicated that “As Fitch has previously informed ESMA, [FSC] has informed Fitch that he intends to maintain his position as an independent director of Renault SA. In light of this fact, Fitch has withdrawn the “issue ratings” for Renault SA issued since 20 June 2013” and provided evidence of the withdrawal of the ratings issued after 20 June 2013 on Renault’s instruments¹²⁷.

¹²³ For a full description of the remedial actions, please see Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 41.

¹²⁴ Supervisory Report, Exhibit 19, ESMA/2016/1453, Action Plan following the investigation on Fitch Rating’s Firewall Policy, 11 October 2016.

¹²⁵ Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 41.

¹²⁶ Supervisory Report, Exhibit 39, Information provided to ESMA by Fitch Ratings in response to remedial actions due by 31 December 2016 under ESMA’s “Action Plan following its investigations of Fitch Ratings’ Firewall Policy”, 30 December 2016, p. 1.

¹²⁷ Supervisory Report, Exhibit 40, RAC for Withdrawal of Renault Issue Ratings 23 December 2016.

185. More generally, version 10 of the Bulletin 10 – Firewall Policy¹²⁸ (which was published on 17 March 2017) clarified that the prohibition to issue a rating on an entity of which [FSC] is a board member covers both the entity and its instruments. The Policy now states that “In the interests of clarification in the EU, if [FSC] serves on the board of an entity, Fitch is unable to assign a new Credit Rating to that entity or its securities. If [FSC] joins the board of an entity that Fitch already rates, or whose securities Fitch already rates, Fitch must assess whether it can continue to maintain any of these Credit Ratings. [...]. However, in all cases, Fitch cannot rate any new securities issued by this entity after the date that [FSC] joins its board¹²⁹”.
186. In addition, from the same date (17 March 2017), this is also mirrored in Bulletin 10A¹³⁰, which states that “In the EU, if [FSC] serves on the board of directors of an entity, Fitch Ratings is prohibited from assigning a new Credit Rating to that entity or its Securities. If [FSC] joins the board of directors of an entity that Fitch Ratings already rates, or whose securities Fitch Ratings already rates, Fitch Ratings must assess, whether it can continue to maintain any of these Credit Ratings as set out in Bulletin 10. However, in all cases, Fitch Ratings cannot rate any new Securities issued by such an entity after the date that [FSC] joins its board of directors¹³¹”.
187. On that basis, it is considered that remedial actions have been taken by the PSIs and therefore this aggravating factor is not applicable to the infringements of Point 20 of Section I of Annex III of the Regulation committed by Fitch Spain concerning the issuance of Renault’s ratings.
188. Annex IV, Point I. 7. If the credit rating agency’s senior management has not cooperated with ESMA in carrying out its investigations, a coefficient of 1,5 shall apply.
189. The Board considers that there is no evidence that the PSIs (including their senior management¹³²) have not cooperated with the IIO during her investigation. Similarly, there is in the file no sign of a lack of cooperation of the PSIs at the stage of the investigation by ESMA’s Supervision Department.

¹²⁸ Supervisory Report, Exhibit 30, Bulletin 10 – Firewall Policy – version 10, 17 March 2017. Please also see the published version: Exhibit 79, Bulletin 10: Firewall Policy, Version 10, 17 March 2017.

¹²⁹ Supervisory Report, Exhibit 30, Bulletin 10 – Firewall Policy – version 10, 17 March 2017, Point 1.2. See also Point 3.1. Please also note that under this policy, “Security” is defined as “any security or other financial instrument” (Point 2.16).

¹³⁰ Exhibit 80, PSIs’ Response to the IIO’s Third RFI, Annex 2.5, Bulletin 10A, 17 March 2017. See also Exhibit 81, PSIs’ Response to the IIO’s Third RFI, Annex 2.6, Bulletin 10A, 10 August 2017, Exhibit 82, PSIs’ Response to the IIO’s Third RFI, Annex 2.7, Bulletin 10A, 8 September 2017, Exhibit 83, PSIs’ Response to the IIO’s Third RFI, Annex 2.8, Bulletin 10A, 24 October 2017, and Exhibit 84, PSIs’ Response to the IIO’s Third RFI, Annex 2.9, Bulletin 10A, 2 February 2018.

¹³¹ See Exhibit 80, PSIs’ Response to the IIO’s Third RFI, Annex 2.5, Bulletin 10A, 17 March 2017, p. 2.

¹³² The IIO’s RFIs were sent to and the responses were received from the PSIs’ contact person as designated by the PSIs’ legal representative.

190. The Board agrees with the IIO and considers that the aggravating factor relating to a lack of cooperation is not applicable.

Mitigating factors

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

192. 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.

193. This mitigating factor is not applicable; the infringement at Point 20 is listed in Section I of Annex III of the Regulation and not in Section II or III as required by this provision.

194. 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.

195. The Board acknowledges that, in her RFI, the IIO requested the PSIs to provide any documentation showing specifically the measures taken by the PSIs' senior management to prevent the infringements. The PSIs provided numerous documents, including different versions of the Firewall Policy, the Bulletin 10A, the Firewall Disclosure Procedures, GOM procedure, Audit Activity policies and plans, training materials, Code of Conducts, etc¹³³. The IIO also has received the documentation showing the information on the progress of the implementation of the CRA III Regulation which was reported to the PSIs' board of directors¹³⁴.

196. This documentation is relevant to understand the framework within which the breaches took place. However, the Board did not find evidence in the file that the senior management of Fitch Spain and of the other PSIs has taken all the necessary measures to prevent the infringement of Point 20 of Section I of Annex III of the Regulation.

¹³³ Exhibit 22, PSIs' Response to the IIO's First RFI, Question 40.

¹³⁴ Supervisory Report, Exhibit 31, Minutes of the Joint Meeting of the Independent Directors and Compliance Committee with attachments, 5 February 2013; Supervisory Report, Exhibit 32, Minutes of the Joint Discussion of Directors of FRL and Fitch Inc 11 July 2013 (with Exhibits), 11 July 2013; Supervisory Report, Exhibit 33, Minutes of the Joint Meeting of the Independent Directors and Compliance Committee 10 July 2013 (with Exhibits), 10 July 2013; Supervisory Report, Exhibit 34, Minutes of the Joint Discussion of Directors of FRL and Fitch Inc with Exhibits 14 Nov 2013, 14 November 2013; Supervisory Report, Exhibit 35, Minutes of the Joint Meeting of the Independent Directors and Compliance Committee 14 Nov 2013 (with Exhibits), 14 November 2013; Supervisory Report, Exhibit 36, Minutes of the Joint Discussion of Directors of FRL and Fitch Inc with Exhibits 29 April 2014, 29 April 2014; Supervisory Report, Exhibit 37, Minutes of the Joint Meeting of the Independent Directors and Compliance Committee 28 April 2014 (with Exhibits), 28 April 2014; and Exhibit 106, Supervision Department's Response to the IIO, T – Minutes of the Joint Meeting 28 Jan 2014.

197. This mitigating factor is thus not applicable.
198. 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.
199. This mitigating factor is not applicable because Fitch Spain and the other PSIs have not brought "quickly, effectively and completely the infringement to ESMA's attention". On the contrary, it was following the RFI from ESMA's Supervision Department that the PSIs informed ESMA of the issuances of ratings related to Renault¹³⁵.
200. 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.
201. As explained above regarding the aggravating factor set by Annex IV, Point I. 6. of the Regulation, the Board agrees with the IIO and considers that a number of remedial actions have been taken. The Board considered that these remedial actions should ensure that similar infringements cannot be committed in the future.
202. The Board acknowledges that the IIO assessed whether these measures were taken voluntarily, which would imply that the mitigating factor provided by Annex IV, Point II.4. of the Regulation would be applicable. In doing so, the IIO noted that there is no definition of what "voluntarily" ("*de son plein gré*" in the French version of the Regulation) precisely means within the context of this mitigating factor. Nevertheless, there are clear-cut examples. It is clear that a CRA has voluntarily taken measures when it has taken them spontaneously without any solicitation from its supervisor. It is also obvious that when there is a specific obligation to take these measures, it can no longer be considered that the measures are taken voluntarily. The situation is to a certain extent less clear-cut when the CRA takes measures only after a number of 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
203. In the present investigation, the Board acknowledges the following.
204. First, a number of the remedial actions were identified by the PSIs¹³⁶ before the receipt of the Action Plan of 11 October 2016 established by ESMA. The PSIs indicated that "from March 2016, a Firewall Working group ("FWG") started to meet" to enhance some aspects of its Firewall Policy and controls. The PSIs also mentioned that "All updated bulletins and procedures referred to were available in draft form by October 2016. Fitch Ratings made the conscious decision not to finalise these documents, given that ESMA had not yet provided its Action Plan. Fitch ratings wanted to ensure that all updates reflected any additional points that might be raised by ESMA", which makes sense in the IIO's view.

¹³⁵ Supervisory Report, Exhibit 9.2.2, List of ratings.

¹³⁶ Exhibit 22, PSIs' Response to the IIO's First RFI, Questions 41 and 42.

205. More specifically, on the review of Bulletin 10 – Firewall Policy, it is indicated in the Action Plan that “ESMA takes note that Fitch is currently revising written procedures related to the Firewall Policy¹³⁷”, which shows indeed that the PSIs started to review the applicable policy before the Action Plan.
206. Nevertheless, the Action Plan had to explicitly indicate the following: “Fitch to ensure that the revised written procedures related to the Firewall Policy cover at least the following points: - incorporate a clear prohibition to issue new credit ratings, including issue ratings, related to entities which have as board member a shareholder of Fitch who holds 10% or more of either capital or voting rights”.
207. Even though the Action Plan provides that it “sets out the remedial actions that Fitch is requested to undertake¹³⁸” and identifies specific deadlines in particular for the review of Bulletin 10 – Firewall Policy, the decision of whether or not to take these measures was, at the date of implementation of these measures, within the PSIs’ remit; there was for example no decision from ESMA ordering the PSIs to put an end to the practices.
208. Therefore, the Board agrees with the IIO and considers that this mitigating factor is applicable for the infringements of Point 20 of Section I of Annex III of the Regulation committed by Fitch Spain concerning Renault.

Determination of the adjusted fines

209. 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.
210. The difference between the basic amount and the amount resulting from the application of each individual coefficient linked to the aggravating factors set out in Annex IV, Point I.1 and Point I.2, and the mitigating factor set out in Annex IV, Point II.4 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.1:

EUR 625 000 x 1.1 = EUR 687 500

EUR 687 500 – EUR 625 000 = EUR 62 500

7 repetitions: 7 x EUR 62 500 = EUR 437 500

¹³⁷ Supervisory Report, Exhibit 19, ESMA/2016/1453, Action Plan following the investigation on Fitch Rating’ Firewall Policy, 11 October 2016, p. 8.

¹³⁸ Supervisory Report, Exhibit 19, ESMA/2016/1453, Action Plan following the investigation on Fitch Rating’ Firewall Policy, 11 October 2016, p. 6.

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 437 500 + EUR 312 500 – EUR 250 000 = EUR 1 125 000

211. Consequently, following adjustment by taking into account the applicable aggravating and mitigating factors, the amount of the fine to be imposed on Fitch Spain amounts to EUR 1 125 000.

Financial benefit from the infringements

212. Article 36a (4) of the Regulation provides that “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”.

213. In this respect, it should be noted that in response to a request to provide the revenues received by the PSIs for the 8 ratings on Renault of 2013 and 2014 (which were solicited¹³⁹), the PSIs indicated the following: “[Omitted due to confidentiality]¹⁴⁰”.

214. The revenues received by the PSIs’ group were thus lower than the fines, so Article 36a (4) of the Regulation is not applicable.

Supervisory measures

215. Article 24(1) of Regulation (EC) No 1060/2009 provides that where one or more infringements of the Regulation are found, the Board must adopt one or more of the supervisory measures listed in that Article. In accordance with Article 24(2) of Regulation (EC) No 1060/2009,¹⁴¹ the Board considers that it is appropriate to issue a public notice in

¹³⁹ Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 45.

¹⁴⁰ Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 44.

¹⁴¹ Article 24(2) of Regulation (EC) No 1060/2009 states: “When taking the decisions referred to in paragraph 1, ESMA’s Board of Supervisors shall take into account the nature and seriousness of the infringement, having regard to the following criteria: (a) the duration and frequency of the infringement;

respect of the infringements found in the present case. The Appendix to this Statement of Findings of the Board contains a draft of the public notice to be adopted.

B. Findings of the Board of Supervisors with regard to the infringement at Point 20 of Section I of Annex III of the Regulation (EC) No 1060/2009 – existing ratings on Renault, lack of immediate disclosure.

216. This section analyses whether Fitch Spain breached the following requirement concerning Renault:
217. “A credit rating agency [...] 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 [...] 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” (Point 3(ca) of Section B of Annex I of the Regulation).
218. If this requirement is not met, this would constitute the infringement set out at Point 20 of Section I of Annex III of the Regulation.
219. [FSC] was a shareholder holding more than 10% of PSIs’ capital/voting rights¹⁴².
220. [FSC] became a board member of Renault in October 2002¹⁴³.
221. A rating was first assigned on Renault by the PSIs on 11 June 1999¹⁴⁴. It was an existing rating when the CRA III Regulation (and the related requirement on immediate disclosure in case of existing ratings where a shareholder of the CRA is a board member of the rated entity) entered into force.

(b) whether the infringement has revealed serious or systemic weaknesses in the undertaking's procedures or in its management systems or internal controls; (c) whether financial crime was facilitated, occasioned or otherwise attributable to the infringement; (d) whether the infringement has been committed intentionally or negligently.”

¹⁴² Supervisory Report, Exhibit 9.1, Fitch’s reply to questions 1 & 2, p. 1 and Supervisory Report, Exhibit 1, Fitch Ratings Transparency Report 2016, p. 3.

¹⁴³ Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 7.

¹⁴⁴ Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 7.

222. A number of rating actions took place concerning this existing rating on Renault: it was for example affirmed on 18 September 2013 and 23 December 2013 and upgraded on 10 November 2014¹⁴⁵.
223. Fitch Spain and the other PSIs clarified that “The applicable disclosure is made in RACs”¹⁴⁶, i.e. the fact that [FSC] was a board member of Renault was to be mentioned in the relevant RACs.
224. In particular, the disclosure about the fact that [FSC] was a board member of Renault was included in the RACs covering the affirmations of 18 September 2013¹⁴⁷ and 23 December 2013¹⁴⁸.
225. However, the RAC¹⁴⁹ concerning the upgrade on 10 November 2014 of the Renault’s “issuer rating” did not include the disclosure about the fact that [FSC] was a board member of Renault. This RAC dated 10 November 2014¹⁵⁰ also covered 14 upgrades regarding “issue ratings” concerning Renault¹⁵¹.
226. In the PSIs’ Response to the Statement of Findings, the PSIs accepted “that the RAC concerning the upgrade on 10 November 2014 of Renault’s “issuer rating” did not include the disclosure that [FSC] was a board member of Renault¹⁵²”.
227. Furthermore, in their Comments on the Supervisory Report, the PSIs indicated that “the omission of the required disclosure in the Renault RAC dated 10 November 2014 was [...] identified [...] by GOM in the course of its regular [...] control exercise in accordance with Fitch’s control framework”¹⁵³.
228. This omission was corrected with the publication of a NRAC on 6 January 2015 with the following wording: “This announcement corrects the version published on 10 November 2014 to include disclosure language relating to [Company E] controlling shareholder [FSC]’s service on the board of Renault, S.A.”¹⁵⁴.
229. The Board acknowledges that, without this correction, investors would have been unable to understand that [FSC] was still a board member of Renault. The fact that this information was disclosed in RACs anterior to the one of 10 November 2014 was not sufficient. On the

¹⁴⁵ Supervisory Report, Exhibit 9.2.2, List of ratings.

¹⁴⁶ Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 8.

¹⁴⁷ Supervisory Report, Exhibit 9.2.23, Renault – Rating Action Commentary 18 September 2013, p. 2.

¹⁴⁸ Supervisory Report, Exhibit 9.2.20, Renault – Rating Action Commentaries Excel List 20 December 2013, p. 3.

¹⁴⁹ Supervisory Report, Exhibit 9.2.22, Renault – Rating Action Commentary 10 November 2014.

¹⁵⁰ Supervisory Report, Exhibit 9.2.22, Renault – Rating Action Commentary 10 November 2014.

¹⁵¹ See Supervisory Report, Exhibit 9.2.2, List of ratings, Supervisory Report, Exhibit 9.2.22, Renault – Rating Action Commentary 10 November 2014 and Supervisory Report, Exhibit 11.5.14.1, Renault MS 7 November 2014, p. 5. See also Exhibit 28, Supervision Department’s Response to the IIO, Question 8.

¹⁵² See Exhibit 111, PSIs’ Response to the IIO’s Statement of Findings, para. 3.1.

¹⁵³ Exhibit 9, PSIs’ Comments on the Supervisory Report, Point 4.1, p. 7.

¹⁵⁴ Supervisory Report, Exhibit 9.2.25, Renault – Corrective Rating Action Commentary 6 January 2015.

contrary, without the correction, investors would understand that the lack of disclosure in the RAC dated 10 November 2014 meant that the condition for including the disclosure was no longer met (e.g. [FSC] could have resigned from his board membership) and thus that the previous RACs were outdated.

230. Point 3 of Section B of Annex I of the Regulation provides, in the case of an existing credit rating, for an “immediate” disclosure where a shareholder holding 10% or more of the CRA is a board member of the rated entity.
231. For the interpretation of “immediate” for the purposes of Point 3 of Section B of Annex I of the Regulation, the Board notes that the Regulation does not expand on the meaning of “immediate” for the purposes of these two provisions.
232. This expression must therefore be given an autonomous and uniform interpretation, having regard to the usual meaning of this word, the context of the relevant articles and the objectives pursued by the legislation of which they are part, in accordance with settled case-law from the CJEU¹⁵⁵.
233. The usual meaning of the term “immediate”, according to the Oxford University Press’ Oxford Dictionaries and the Collins Dictionary of English, refers to “occurring or done at once; instant” and “taking place or accomplished without delay”, respectively¹⁵⁶.
234. Regarding the context of “immediate” in Point 3 of Section B of Annex I of the Regulation, the IIO noted that the disclosure which is provided by Point 3a of Section B of Annex I of the Regulation where an existing rating is potentially affected by the fact that a shareholder holding more than 5% of the CRA is a board member of the rated entity is not indicated as being “immediate”. This comparison implies that immediate disclosure (in case of holding of more than 10%) is distinct from other type of disclosures, which might not have to be so immediate.
235. Regarding the objective pursued, one of the core objectives of the Regulation is to promote the independence of credit rating activities and the avoidance of conflicts of interests¹⁵⁷. The immediate disclosure provided for by Point 3 of Section B of Annex I of the Regulation aims at ensuring that investors are informed of any existing or potential conflicts of interest or business relationship that could affect an existing credit rating. If this information is delayed, then it loses its value and does not achieve its goal because investors continue relying in the meantime on an existing credit rating without being aware of the fact that it could be affected by a conflict of interests.

¹⁵⁵ See for example Case C-549/07 *Wallentin-Hermann* [2008] ECR I-11061, para. 17, and Case C-119/12 *Probst* [2012] ECR, para. 20.

¹⁵⁶ See Exhibit 59, Definition of “immediate”, Oxford Dictionaries, and Exhibit 60, Definition of “immediate”, Collins English Dictionary.

¹⁵⁷ See for instance Article 1 of the Regulation.

236. In the present case, the RAC published by the PSIs on 10 November 2014 did not include the disclosure regarding the fact that [FSC] was a board member of Renault. This RAC covered the upgrade of the existing “issuer rating” on Renault, as well as a number of upgrades of existing “issue ratings” on Renault.
237. The disclosure took place on 6 January 2015, i.e. almost 2 months after the publication of the initial RAC, through the publication of a NRAC.
238. Therefore, regarding the existing ratings on Renault which were upgraded on 10 November 2014, there was no immediate disclosure of the potential conflict of interests relating to [FSC]’s board membership of Renault.
239. This constitutes a breach of Article 6(2), in conjunction with Point 3 of Section B of Annex I of the Regulation. Therefore, the Board finds the infringement of Point 20 of Section I of Annex III of the Regulation.
240. Regarding the Legal entity to which the infringement is attributable, the Board acknowledges that the RAC of 10 November 2014¹⁵⁸ mentions [RT] (who is employed by Fitch Spain¹⁵⁹) as the supervisory analyst and indicates that “For regulatory purposes in various jurisdictions, the supervisory analyst named above is deemed to be the primary analyst for this issuer”. Fitch Spain is also indicated in this RAC. In line with CESR’s guidance on the topic¹⁶⁰, this means that the upgrades on the existing Renault ratings are to be considered as issued by Fitch Spain.
241. On the issue, the Board notes that [FSC]’s board membership of Renault was clearly indicated in the relevant Bulletins 10A¹⁶¹ prepared by the compliance function.
242. The lack of immediate disclosure in November 2014 of [FSC]’s board membership regarding the existing ratings on Renault was linked to the preparation and publication of the relevant RAC.

¹⁵⁸ Supervisory Report, Exhibit 9.2.22, Renault – Rating Action Commentary 10 November 2014, p. 1.

¹⁵⁹ Supervisory Report, Exhibit 11.5, Fitch’s reply to question 4, 19 October 2015, p. 6.

¹⁶⁰ See Supervisory Report, Exhibit 45, CESR’s Guidance on Registration Process, Functioning of Colleges, Mediation Protocol, Information set out in Annex II, Information set for the application for Certification and for the assessment of CRAs systemic importance, 4th June 2010, CESR/10-347, p. 31: “158. The CRA deemed to have issued a given rating and thus deemed legally responsible for that rating is determined by the location of the lead rating analyst (Article 3.1 (e)) upon the publication of the rating, and upon each subsequent review (including rating upgrades, downgrades and affirmations). Upon each review CRAs are required to disclose the name, job title and location of the lead rating analyst (Article 4.2, Annex I.D.1). CRAs should not shift a lead rating analyst to another CRA in order to circumvent the Regulation”.

¹⁶¹ See Supervisory Report, Exhibits 9.3.11 to 9.3.13 for Bulletin 10A, version 11 to 13, p. 3.

243. The PSIs submitted a number of relevant documents that explained the different steps followed in order to ensure the publication of a RAC, including the interactions between the analyst and the press team/Corporate Communications group¹⁶².
244. In particular, the Rating Process Manual applicable on November 2014¹⁶³ explicitly indicates, in case of [FSC]'s board membership to a rated entity, that “such fact must be disclosed in every RAC involving the assignment of a new public rating or rating action relating to such Rated Entity”. The language to be included is indicated in the Rating Process Manual as being the following: “[FSC] has an equity interest of greater than 5% in or serves on the board of Name of Rated Entity. [FSC] is the controlling shareholder of [Company E], which owns a 50% equity interest in Fitch”.
245. This Rating Process Manual also provides that “Whenever a rating action is taken on a public rating or a rating outlook, the relevant analytical team must publish a RAC¹⁶⁴”. Footnote 32 of the Rating Process Manual states that “Analysts are responsible for ensuring correct RAC disclosures except for [omitted due to confidentiality]¹⁶⁵”.¹⁶⁶
246. The Board acknowledges that, according to the PSIs, the relevant analyst responsible for the inclusion of the relevant disclosure in the RAC on Renault dated 10 November 2014 was [RT]¹⁶⁷, who works for Fitch Spain¹⁶⁸.
247. In an exchange of emails¹⁶⁹ between [RT] and a number of colleagues within the PSIs, [RT] was reminded that “The RPM makes analysts responsible for ensuring correct RAC disclosures [...]. The RPM also specifically covers Bulletin #10 Firewall Policy on page 39 where footnote 28 confirms that 'analysts' should refer to Bulletin 10A periodically to identify cases where disclosure may be required”.
248. In the same chain of emails, [RT] indicated that “In this case, the analysts did their job correctly and could not do anything further since this latest version gone to approval did include the disclosure” and [a high level officer in the Corporate Department] wrote that

¹⁶² Exhibit 22, PSIs' Response to the IIO's First RFI, Question 28. See also Exhibit 66, PSIs' Response to the IIO's First RFI, Annex 28.1, DPC overview Dec 2012, Exhibit 67, PSIs' Response to the IIO's First RFI, Annex 28.2, Description of the workflow process within the DPC, Exhibit 68, PSIs' Response to the IIO's First RFI, Annex 28.4.1, GPM for CC 2014, and Exhibit 69, PSIs' Response to the IIO's First RFI, Annex 28.4.2, GPM for CC 2015. For the applicable versions of the Rating Process Manual, see Supervisory Report, Exhibits 9.3.23-9.3.24.

¹⁶³ See Supervisory Report, Exhibit 9.3.23, Rating Process Manual – version 11, 1 July 2014, pp. 39-40. See also Supervisory Report, Exhibits 9.3.15-9.3.25 for the other versions of the Rating Process Manual.

¹⁶⁴ Supervisory Report, Exhibit 9.3.23, Rating Process Manual – version 11, 1 July 2014, p. 35.

¹⁶⁵ See Supervisory Report, Exhibit 9.3.23, Rating Process Manual – version 11, 1 July 2014, p. 36.

¹⁶⁶ See Supervisory Report, Exhibit 9.3.23, Rating Process Manual – version 11, 1 July 2014, p. 39.

¹⁶⁷ Supervisory Report, Exhibit 11.8, Fitch's reply to question 7, 19 October 2015, p. 1.

¹⁶⁸ See Supervisory Report, Exhibit 11.5, Fitch's reply to question 4, pp. 5-6.

¹⁶⁹ Supervisory Report, Exhibit 11.10, Renault email chain re 10 Nov 2014 RAC, p. 3.

“the editors were informed of a necessary disclosure in the draft and let the RAC go out without the disclosure”.

249. Thus, in this specific case, the relevant analyst, [RT], did include the required disclosure in line with the applicable Rating Process Manual. The lack of immediate disclosure was due to a mistake made by the Publication Department.
250. In their Comments on the Supervisory Report, the PSIs indeed indicated that “the absence of immediate disclosure [...] was the result of an error by a single person in Fitch’s publication department (which was identified by Fitch’s control framework and corrected) and not the whole publication team¹⁷⁰”. The PSIs reaffirmed this in their Response to the IIO’s Statement of Findings, arguing that “the lack of disclosure in this instance was the result of an error of one person working in the Publication Department, and not the result of any systemic weakness in the procedures, management systems or internal controls of Fitch Ratings¹⁷¹”.
251. The PSIs provided¹⁷² a copy of a document entitled “Renault RAC Post-editing pre-publication”. It is apparent from this document that the following disclosure is included on page 3: “Note to Editors: [FSC], [deleted due confidentiality], is also a member of Renault’s board. [FSC] does not participate in any rating committees, including Renault”. According to the PSIs, “This is the final version of the Word document the contents of which were then cut and pasted by the relevant editor into the document publishing system (“DPC”). It can clearly be seen that the disclaimer relating to [FSC] appears on its own at the top of page 3. The only logical explanation for its omission in the published RAC is that the editor responsible for publishing the RAC copied the content of pages 1 and 2, which constitutes the typical RAC content, and missed the relevant disclaimer on page 3¹⁷³”.
252. The PSIs added that “The RAC editor/publisher responsible for the entire content job, including the copy and paste into DPC, was [GZ, editor] reporting to [the Senior Officer] [in the] Corporate Communications¹⁷⁴”.
253. It is worth noting that the Rating Process Manual also indicates that “All RACs must be drafted in accordance with established policies and procedures of the Corporate Communications Group. The Corporate Communications (Media) Group is responsible for ensuring that these procedures are followed”. It also provides that “The posting of all ratings, Rating Outlooks, Rating Watches and research reports to the Fitch website is the responsibility of the Information Services (Publishing) Group. However, if an analyst

¹⁷⁰ Exhibit 9, PSIs’ Comments on the Supervisory Report, Point 4.4, p. 7.

¹⁷¹ See PSIs’ Response to the IIO’s Statement of Findings, para. 3.2.

¹⁷² Exhibit 70, PSIs’ Response to the IIO’s First RFI, Annex 26, Draft Renault RAC. See also Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 27.

¹⁷³ Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 26. See also Question 27.

¹⁷⁴ Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 26.

becomes aware of any error on the Fitch website, they must bring it to the attention of the Information Services Group promptly so that it may be corrected¹⁷⁵.

254. Overall, it seems clear that it was the responsibility of the analyst ([RT], Fitch Spain) to include the disclosure in the draft RAC, which he did, and that the lack of disclosure was the result of a mistake of a person working in the Publication Department. The Publication Department is part of Fitch.
255. On that basis, even though the lack of disclosure is the result of an error within the Publication Department of Fitch, it was the responsibility of Fitch Spain to comply with the requirement of the immediate disclosure of [FSC]'s board membership (as prescribed by Point 3 of Section B of Annex I) applicable to the existing ratings on Renault that Fitch Spain upgraded in November 2014. Therefore, the Board considers that the breach is attributable to Fitch Spain.
256. To conclude, the Board, on the basis of an assessment of the complete file submitted by the IIO, and having taken into account the written submissions made on behalf of Fitch Spain, considers that Fitch Spain infringed Article 6(2) of the Regulation, in conjunction with Point 3 of Section B of Annex I by not having immediately disclosed that the existing ratings on Renault were potentially affected by the fact that [FSC] was a board member of Renault. This constitutes the infringement set out at Point 20 of Section I of Annex III of the Regulation.

Intent or negligence

257. Article 36a (1) of the Regulation provides as follows:
258. "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."
259. "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".
260. 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.
261. Consequently, the findings of the Board of Supervisors need to include also findings considering that the relevant infringement has been committed by the PSIs intentionally or negligently.

¹⁷⁵ Supervisory Report, Exhibit 9.3.23, Rating Process Manual – version 11, 1 July 2014, p. 41.

262. 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”.
263. The factual background as set out in this Statement of Findings does not establish that there are objective factors which demonstrate that Fitch Spain, its employees or senior managers acted deliberately to commit the infringement of Point 20 of Section I of Annex III of the Regulation regarding the existing ratings on Renault.
264. Moreover, on the basis of a thorough assessment of the complete file submitted by the IIO and having taken into account the written submissions made on behalf of Fitch Spain, the Board did not find negligence established. In accordance with the relevant provisions of the Regulation, no fine would be imposed for such an infringement.

Supervisory measures

265. Article 24(1) of Regulation (EC) No 1060/2009 provides that where one or more infringements of the Regulation are found, the Board must adopt one or more of the supervisory measures listed in that Article. In accordance with Article 24(2) of Regulation (EC) No 1060/2009,¹⁷⁶ the Board considers that it is appropriate to issue a public notice in respect of the infringements found in the present case. The Appendix to this Statement of Findings of the Board contains a draft of the public notice to be adopted.

¹⁷⁶ Article 24(2) of Regulation (EC) No 1060/2009 states: “When taking the decisions referred to in paragraph 1, ESMA's Board of Supervisors shall take into account the nature and seriousness of the infringement, having regard to the following criteria: (a) the duration and frequency of the infringement; (b) whether the infringement has revealed serious or systemic weaknesses in the undertaking's procedures or in its management systems or internal controls; (c) whether financial crime was facilitated, occasioned or otherwise attributable to the infringement; (d) whether the infringement has been committed intentionally or negligently.”

CONCLUSIONS

266. This Statement of Findings of the Board of Supervisors concludes that Fitch Spain committed:

- with negligence, the infringement set out at Point 20 of Section I of Annex III of the Regulation (by having issued ratings on Renault despite the fact that [FSC] was a board member of Renault); and
- without negligence, the infringement set out at Point 20 of Section I of Annex III of the Regulation (by not having immediately disclosed that the existing ratings on Renault were potentially affected by the fact that [FSC] was a board member of Renault).

267. Regarding the fines, the Board notes that 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”.

268. However, the Board does consider that Article 36a (4) of the Regulation is not applicable in the present case because there is not one same “act or omission” that constitutes by itself more than one infringement by a same CRA.

269. Therefore, taking into account applicable aggravating and mitigating factors, the overall fine to be imposed on Fitch Spain for one infringement committed with negligence would amount to EUR 1.125.000.

270. Finally, the infringements committed (with or without negligence) would require the adoption of a supervisory measure taking the form of a public notice concerning the PSIs. The Appendix to this Statement of Findings of the Board contains a draft of the public notices to be adopted.

[DRAFT] PUBLIC NOTICE

Fitch Ratings España S.A.U. (“Fitch Spain”) is a credit rating agency (CRA) established in Spain and is 100% owned by Fitch Ratings Limited (Fitch).

Fitch’s entire capital is owned by Fitch Ratings Inc., a rating agency based in the United States of America. Fitch Ratings Inc. is in turn 100% owned by Fitch Group Inc.

Fitch Group Inc. is a holding company. Between 20 June 2013 and 11 April 2018, it was 20% indirectly owned by an individual (“the Shareholder”), through a company based in France.

Therefore, in the described period, the Shareholder, through a complex multi-layer legal structure, has been holding more than 10% of Fitch Spain.

Regulation (EC) No 1060/2009 on credit rating agencies (“The Regulation”) lays down obligations for a CRA in the conduct of its activities. In conjunction with its role of supervisor of CRAs under the Regulation, the European Securities and Markets Authority (“ESMA”) has functions and powers to take enforcement actions in relation to infringements of the Regulation by CRAs.

The Regulation provides that in order to avoid any conflict of interest that may influence the ratings, a CRA is prohibited to issue a (new) credit rating if a shareholder or a member of the CRA itself holding 10% or more of the capital or voting rights is a member of the administrative or supervisory body of the rated entity or a related third party.

Moreover, in case of existing ratings (i.e. existing at the moment in which the circumstance of conflict of interests takes place), the CRA shall immediately disclose where the credit rating is potentially affected by the described circumstance. Furthermore, the CRA shall immediately assess whether there are grounds for re-rating or withdrawing the existing credit rating.

In August 2017, the supervisors of CRAs in ESMA formed their view that there were serious indications of possible infringements of the Regulation by four CRAs belonging to the Fitch Group, including Fitch Spain.

The matter was then referred to an independent investigating officer (“the IIO”) who, having conducted an investigation, submitted her findings to the Board of Supervisors (“the Board”).

Having considered the evidence, the Board has found that Fitch Spain committed two infringements, and in particular:

1. with negligence, the infringement set out at Point 20 of Section I of Annex III of the Regulation (by having issued ratings on Renault despite the fact that the Shareholder was a board member of Renault); and

2. without negligence, the infringement set out at Point 20 of Section I of Annex III of the Regulation (by not having immediately disclosed that the existing ratings on Renault were potentially affected by the fact that the Shareholder was a board member of Renault).

Relevant legal provisions

Article 6 (*Independence and avoidance of conflicts of interest*)

“(1) 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.

(2) 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. “

Annex I, Section B (*Operational requirements*)

Point 3 first para. 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:

Point 3(ca) 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.

Point 3 second para. A credit rating agency shall also immediately assess whether there are grounds for re-rating or withdrawing the existing credit rating or rating outlook.

Annex III, Section (*List of infringements*)

Point 20. The credit rating agency infringes Article 6(2), in conjunction with the first paragraph of point 3 of Section B of Annex I, by issuing a credit rating or rating outlook in any of the circumstances set out in the first paragraph of that point or, in the case of an existing credit rating or rating outlook, by not disclosing immediately that the credit rating or rating outlook is potentially affected by those circumstances.

First infringement

Fitch Spain committed negligently the infringement set out at Point 20 of Section I of Annex III of the Regulation (by having issued ratings on Renault despite the fact that a shareholder holding more than 10% of their capital/voting rights was a board member of Renault).

A) Legal background

According to the Regulation, a credit rating agency (“CRA”) is forbidden from issuing new credit ratings if a shareholder holding 10% or more of the capital/voting rights of that CRA, is a member of the administrative or supervisory board of the rated entity.

B) Factual findings and analysis of the Board

The Shareholder, who was holding more than 10% of the capital/voting rights of Fitch Spain, was a board member of Renault.

Between 20 June 2013 and 21 May 2015, Fitch Spain issued 8 new ratings on Renault. These ratings were not on Renault, but on instruments newly issued by Renault.

Fitch Spain argued that the ratings on issuances would be covered by the (old) ratings on the entity, being intrinsically linked to them, and therefore would not constitute new ratings. For that reason, Fitch Spain considered that these would not be subject to the mentioned requirement.

The Board noted on the contrary that Point 3(ca) of Section B of Annex I of the Regulation refers to “credit ratings” and that the Regulation does not make a difference between ratings of entities and ratings of instruments. Ratings on instruments are captured by structure of Point 3(ca) of Section B of Annex I of the Regulation. The main elements of the provisions shall apply as a consequence.

C) Finding of infringement

On the basis of the assessment of the complete file submitted by the IIO, the Board found that Fitch Spain failed to comply with the requirement of Article 6(2), in conjunction with Point 3 first para. and Point 3(ca) of Section B of Annex I of the Regulation, and thus committed the infringement set out at Point 20 of Section I of Annex III of the Regulation.

Furthermore, the Board found that Fitch Spain did not meet the special care expected from a CRA as a professional firm in the financial services sector. Therefore, the Board found that Fitch Spain had committed the infringement negligently and was liable to a fine. In calculating the fine, the Board took account of the applicable aggravating and mitigating factors and has therefore fined Fitch EUR 1.125.000.

D) Supervisory measure and fine

Public notice

Pursuant to Article 24 of the Regulation, the Board decided that the infringement warranted a supervisory measure in the form of the publication of this public notice.

Fine

The fine imposed on Fitch Spain is EUR 1.125.000.

Second infringement

Fitch Spain committed the infringement set out at Point 20 of Section I of Annex III of the Regulation (by not having immediately disclosed that the existing ratings on Renault were potentially affected by the fact that a shareholder holding more than 10% of its capital/voting rights was a board member of Renault).

A) Legal background

According to the Regulation, in relation to existing ratings, a CRA has an obligation to disclose immediately the fact that a shareholder holding 10% or more of the capital/voting rights of that CRA, is a member of the administrative or supervisory board of the rated entity.

B) Factual findings and analysis of the Board

The Shareholder, who was holding more than 10% of the capital/voting rights of Fitch Spain, was a board member of Renault.

Fitch Spain issued an upgrade on 10 November 2014 of Renault's existing ratings. The corresponding rating action commentary did not include the disclosure that the Shareholder was a board member of Renault. This omission was corrected with the publication of a non-rating action commentary on 6 January 2015.

Consequently, the Board found that Fitch Spain failed to comply with the requirement set out at Point 3 of Section B of Annex I of the Regulation, and thus committed the infringement set out at Point 20 of Section I of Annex III of the Regulation.

C) Finding of infringement

The Board, on the basis of an assessment of the complete file submitted by the IIO, found that Fitch Spain failed to comply with the requirement of Article 6(2), in conjunction with the first paragraph of Point 3 of Section B of Annex I of the Regulation, and thus committed the infringement set out at Point 20 of Section I of Annex III of the Regulation.

However, the Board did not find negligence established. In accordance with the relevant provisions of the Regulation, no fine is imposed for such an infringement.

D) Supervisory measure

Public notice

Pursuant to Article 24 of the Regulation, the Board decided that the infringement warranted a supervisory measure in the form of the publication of this public notice.