European Securities and Markets Authority

Date: 28 March 2019
ESMA-41-356-11

# DECISION OF THE BOARD OF SUPERVISORS

## to adopt supervisory measures and impose fines in respect of infringements committed by FITCH RATINGS LIMITED UK

**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 agencies[1], 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 Ratings Limited UK ("Fitch") 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.

[1] OJ L 302 17.11.2009, p. 1

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.

3. On 19 March 2018, the IIO sent her Initial Statement of Findings to Fitch and to the other Persons Subject to Investigation (PSIs). In her Statement of Findings, the IIO concluded that Fitch had committed with negligence the following infringements:

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

   ii) the infringement set out at Point 21 of Section I of Annex III of Regulation (EC) No 1060/2009;

   iii) the infringement set out at Point 11 of Section I of Annex III of Regulation (EC) No 1060/2009;

   iv) the infringement set out at Point 12 of Section I of Annex III of Regulation (EC) No 1060/2009;

4. By written submissions on their behalf, dated 20 April 2018, Fitch 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 file[2].

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 and the other PSIs.

11. On 20 February 2019 the Board of Supervisors received written submissions on behalf of Fitch and the other PSIs.

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

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, the Board found that Fitch had committed with negligence four of the infringements listed in Section I of Annex III of Regulation (EC) No 1060/2009.

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.

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 Ratings Limited negligently committed the following infringements:

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

ii) the infringement set out at Point 21 of Section I of Annex III of Regulation (EC) No 1060/2009;

iii) the infringement set out at Point 11 of Section I of Annex III of Regulation (EC) No 1060/2009;

iv) the infringement set out at Point 12 of Section I of Annex III of 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 fines, as calculated in the Annex to this Decision:

EUR 1 050 000 for the infringement set out at Point 20 of Section I of Annex III of Regulation (EC) No 1060/2009;

EUR 495 000 for the infringement set out at Point 21 of Section I of Annex III of Regulation (EC) No 1060/2009;

EUR 825 000 for the infringement set out at Point 11 of Section I of Annex III of Regulation (EC) No 1060/2009;

EUR 825 000 for the infringement set out at Point 12 of Section I of Annex III of Regulation (EC) No 1060/2009;

for the overall amount of EUR 3 195 000.

**Article 4**

***Remedies***

Fitch 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 Ratings Limited UK** – 30 North Colonnade, London, E14 5GN, United Kingdom.

Done at Paris, on 26 March 2019

*[PERSONAL SIGNATURE]*

*For the Board of Supervisors*

*Steven Maijoor*

*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 Ratings Limited UK 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.

5. Having considered the Statement of Findings of the IIO, the written submissions made on behalf of Fitch 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'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.

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

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, was a board member of Casino.

11. Between 20 June 2013 and 21 May 2015, Fitch issued 4 new ratings on Casino. These ratings were not on the issuer itself (i.e. Casino), but on instruments newly issued by Casino.

12. Fitch 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 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 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 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 1 050 000. Furthermore, the infringement requires the adoption of a supervisory measure taking the form of a public notice.

**Fitch committed negligently the infringement set out at Point 21 of Section I of Annex III of the Regulation (by not having immediately assessed whether there were grounds for re-rating or withdrawing the existing credit rating on *Fondation National des Sciences Politiques* (FNSP), because a shareholder holding more than 10% of its capital/voting rights was a board member of FNSP).**

17. According to the Regulation, in relation to existing ratings, a CRA has an obligation to assess immediately whether there are grounds for re-rating or withdrawing a rating, based on 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. Between 9 November 2001 and 10 May 2016, [FSC] was a member of FNSP's board, which is an "administrative or supervisory board" for the purposes of Point 3(ca) of Section B of Annex I of the Regulation.

19. FNSP was rated on 8 September 2004 by Fitch France, belonging to the Fitch group. The rating was thus existing when the mentioned requirement regarding the immediate assessment of whether to re-rate or withdraw existing ratings entered into force in June 2013.

20. Fitch, which was responsible for this assessment within the Fitch group, analysed whether there were grounds to withdraw or re-rate this existing rating only in January 2016.

21. The Board agrees with the IIO and finds that Fitch failed to comply with the requirement of Article 6(2), in conjunction with the second paragraph of Point 3 of Section B of Annex I of the Regulation.

22. 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, finds that Fitch failed to comply with the requirement of Article 6(2), in conjunction with the second paragraph of Point 3 of Section B of Annex I of the Regulation, and thus committed the infringement set out at Point 21 of Section I of Annex III of the Regulation.

23. In addition, based on the facts, Fitch must be considered to have acted negligently (but not intentionally) when it committed the infringement.

24. In accordance with the relevant provisions of the Regulation, taking into account applicable aggravating and mitigating factors, the fine to be imposed on Fitch for such a negligent infringement would amount to EUR 495 000. Furthermore, the infringement requires the adoption of a supervisory measure taking the form of a public notice.

**Fitch committed negligently the infringement set out at Point 11 of Section I of Annex III of the Regulation (by not having adequate policies and procedures to ensure compliance with its obligations under the Regulation).**

25. According to the Regulation, a CRA has an obligation to have in place adequate policies and procedures to ensure compliance with its obligations under the Regulation.

26. The Board notices that until 17 March 2017, with regard to Point 3 of Section B of Annex I of the Regulation, Fitch did not have a policy or procedure in place, which identified the function in charge of performing the assessment of the need to re-rate or withdraw an existing rating.

27. More in general, the Board finds shortcomings in the procedures centralised at the level of Fitch, such as the one that permitted the purely manual publication of the Rating Action Commentaries.

28. 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, finds that Fitch failed to comply with the requirement of Article 6(2), in conjunction with Point 3 of Section A of Annex I of the Regulation, and thus committed the infringement set out at Point 11 of Section I of Annex III of the Regulation.

29. In addition, based on the facts, Fitch must be considered to have acted negligently (but not intentionally) when it committed the infringement.

30. In accordance with the relevant provisions of the Regulation, taking into account applicable aggravating and mitigating factors, the fine to be imposed on Fitch for such a negligent infringement would amount to EUR 825 000. Furthermore, the infringement requires the adoption of a supervisory measure taking the form of a public notice.

**Fitch committed negligently the infringement set out at Point 12 of Section I of Annex III of the Regulation (by not having internal control mechanisms designed to secure compliance with decisions and procedures at all levels).**

31. According to the Regulation, a CRA has an obligation to have in place internal control mechanisms designed to secure compliance with decisions and procedures at all levels of that CRA.

32. The IIO reviewed Fitch's internal control mechanisms regarding conflicts of interests and particularly the obligations set out in Point 3 of Section B of Annex I of the Regulation.

33. Based on this review, the IIO found that there were a number of significant shortcomings in Fitch's internal control mechanisms, such as an unclear guidance to staff on how to comply with the relevant requirements of Point 3 of Section B of Annex I of the Regulation

on conflicts of interests, an inadequate identification of the control activities and/or persons in charge, as well as a lack of documentation of the controls carried out.

34. 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, finds that Fitch failed to comply with the requirement of Article 6(2), in conjunction with Point 4 of Section A of Annex I of the Regulation, and thus committed the infringement set out at Point 12 of Section I of Annex III of the Regulation.

35. In addition, based on the facts, Fitch must be considered to have acted negligently (but not intentionally) when it committed the infringement.

36. In accordance with the relevant provisions of the Regulation, taking into account applicable aggravating and mitigating factors, the fine to be imposed on Fitch for such a negligent infringement would amount to EUR 825 000. Furthermore, the infringement requires the adoption of a supervisory measure taking the form of a public notice.

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

37. Fitch 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.

<u>The Fitch Group's multi-layered legal structure</u>

38. The Group is characterised by the multi-layered legal structure described below:

- Fitch is the parent company (100% ownership of the other PSIs + 100% of 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

39. During the investigation by ESMA's Supervision Department, the PSIs indicated that "[Company E], [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 Fitch[3]". In addition, Fitch stated that "[FSC] is/has served on the Board of the following entities rated by Fitch during the review period: (…) Casino - for the review period[4]".

40. In addition, in their response to the second RFI of ESMA's Supervision Department, the PSIs indicated that "although [FSC] did not inform us of his position on this board prior to the ESMA inquiry, we checked with [Company E] and we confirm that [FSC] is a member of the Board of Directors of the "*Fondation Nationale des Sciences Politiques*" (FNSP) since the November 9, 2001[5]".

41. Therefore, [FSC] served as board member of Casino until 15 September 2016[6] and of FNSP until 10 May 2016[7].

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

42. Before describing the ratings that were issued by Fitch, 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 to[8] as "issuer rating" and the latter as "issue ratings" by the PSIs.

43. According to the PSIs' policy and procedure[9], "Fitch's credit ratings relating to issuers are an opinion on the relative ability of an entity to meet financial commitments, such as 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 […]".

44. 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

[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] Supervisory Report, Exhibit 11.1, Fitch's reply to question 1, 19 October 2015.
[6] Supervisory Report, Exhibit 38, Email from Fitch to ESMA on 19 September 2016.
[7] Supervisory Report, Exhibit 18, Fitch's letter ESMA Preliminary Views Following the Investigation of Fitch Ratings Firewall Policy, p. 5.
[8] See for example Supervisory Report, Exhibit 9.2.2, List of ratings.
[9] Exhibit 65, PSIs' Response to the IIO's First RFI, Annex 5, Rating Definitions - 17 March 2017, p. 3.

rating[10]. The PSIs defined[11] 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 issue[12]".

45. 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 Authority[13] ("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 rating[14]". 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 identifier[15].

Ratings on Casino

46. The PSIs first assigned a rating on Casino on 8 June 1999, well before September 2003 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.

47. Between the date on which Casino was first rated and the entry into force of the CRA III Regulation, the PSIs issued 35 "issue ratings" on Casino[16] (including 27 between the date on which [FSC] joined Casino's board and the entry into force of the CRA III Regulation[17]).

[10] 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.
[11] 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.
[12] Exhibit 65, PSIs' Response to the IIO's First RFI, Annex 5, Rating Definitions - 17 March 2017, p. 13.
[13] 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.
[14] Commission Delegated Regulation 2015/2, Table 2 of Part 2 of Annex I, Field N°6.
[15] As an illustration, please see Exhibit 30, Supervision Department's Second Response to the IIO.
[16] 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".
[17] 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".

48. After the entry into force of the CRA III Regulation, the PSIs issued 4 ratings regarding Casino[18]. They were all "issue ratings":

- Rating on Casino regarding ISIN FR0011606169 issued on 23 October 2013,
- Rating on Casino regarding ISIN FR0011765825 issued on 17 March 2014,
- Rating on Casino regarding ISIN FR0012074284 issued on 1 September 2014, and
- Rating on Casino regarding ISIN FR0012369122 issued on 5 December 2014[19].

49. The primary analyst in charge of these 4 ratings on Casino was employed by Fitch[20].

50. The relevant RACs that were published regarding Casino[21] included the disclosure that [FSC] was a board member of Casino[22].

Rating of FNSP

51. The PSIs rated FNSP on 8 September 2004[23].

52. Following the entry into force of the CRA III Regulation, the PSIs issued the following rating actions on the existing rating on FNSP: an affirmation on 10 September 2013[24] and an affirmation on 9 September 2014[25].

[18] 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".
[19] Supervisory Report, Exhibit 9.2.2, List of ratings.
[20] Supervisory Report, Exhibit 11.5, Fitch's reply to question 4, 19 October 2015, pp. 3-4.
[21] See Supervisory Report, Exhibit 9.2.3, Casino – Rating Action Commentaries Excel List 13 March 2013, Supervisory Report, Exhibit 9.2.4, Casino – Rating Action Commentaries Excel List 20 December 2013, Supervisory Report, Exhibit 9.2.5, Rating Action Commentary 13 March 2013, Supervisory Report, Exhibit 9.2.6, Rating Action Commentary 13 September 2013, Supervisory Report, Exhibit 9.2.7, Rating Action Commentary 15 October 2013, Supervisory Report, Exhibit 9.2.8, Rating Action Commentary 23 October 2013, and Supervisory Report, Exhibit 9.2.9, Rating Action Commentary 18 December 2014. It should be noted that these RACs do not refer to the four "issue ratings" specifically mentioned above at para. 48 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.
[22] Supervisory Report, Exhibit 9.2, Fitch's reply to questions 3 & 4, 3 July 2015. Please also note that regarding Casino, the PSIs identified that this disclosure was 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.
[23] Supervisory Report, Exhibit 48, Full Rating Report, "Credit analysis on FNSP", 8 September 2004.
[24] Supervisory Report, Exhibit 49, Rating Action Commentary FNSP, 10 September 2013.
[25] Supervisory Report, Exhibit 50, Rating Action Commentary FNSP, 9 September 2014.

53. A change in the rating denomination also took place on 13 December 2013[26]. ESMA's Supervision Department indicated that in its views, the change in the rating denomination did not amount to a real rating action[27].

54. For the two affirmations of 10 September 2013 and 9 September 2014, both the primary analyst and the analytical manager were based and employed by Fitch France[28].

55. The assessment on whether there were grounds to withdraw or re-rate the existing rating on FNSP, took place only in January 2016 and no documentation on the performed assessment is available[29].

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

56. The compliance function covering the PSIs' activities was formally entrusted to Fitch. The "agreement concerning the provision of compliance, credit policy and internal control services" which was entered into in September 2011 between the different companies of the Fitch group[30] provides that Fitch "[omitted due to confidentiality][31].

57. 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 Conduct[32]: 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".

[26] Exhibit 64, Supervision Department's Response to the IIO, S – Press release Rating Action 13 December 2013.
[27] See Supervisory Report, footnote 166. See the detailed reasoning in Exhibit 28, Supervision Department's Response to the IIO, Question 12.
[28] Supervisory Report, Exhibit 49, Rating Action Commentary FNSP, 10 September 2013 and Exhibit 50, Rating Action Commentary FNSP, 9 September 2014. See also Supervisory Report, Exhibit 23, Fitch's Response to the Fourth Request for Information I, 28 April 2017, p. 2.
[29] Supervisory Report, Exhibit 21, Fitch's Response to the Third Request for Information, 18 November 2016, p. 2. See also Exhibit 22, PSIs' Response to the IIO's First RFI, Questions 16 and 17. See also Exhibit 24, PSIs' Response to the IIO's Second RFI, Question 2.
[30] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 3.
[31] 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.
[32] 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.

- The Bulletin 10 - Firewall Policy[33]: 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 prohibited[34]".

- The Bulletin 10A[35]: 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 prohibited[36]".

58. However, companies in which [Company Z] had a shareholding were not listed in Bulletin 10A[37]. Instead, Bulletin 10A stated that "BRM will advise the relevant Group Head in the event that Fitch would be assigning a rating to an entity for which such a disclosure would be required[38]".

59. 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.

60. In addition, it is in August 2015 that Bulletin 10A[39] 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%.

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[33] 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).

[34] Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, 3 July 2015.

[35] 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.

[36] Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, 3 July 1015, p. 1.

[37] 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".

[38] 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.

[39] Supervisory Report, Exhibit 24.11, Exhibit 27 – Bulletin 10A, 10 August 2015.

61. The Rating Process Manual ("RPM")[40]: 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 shareholder[41]".

62. As of 31 March 2015, the RPM contains instructions for analysts to check periodically Bulletin 10A to identify cases where disclosures may be required[42] 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 Officer[43]".

63. The procedure called Firewall Disclosure Procedures[44], 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 contained in Bulletin 10A. The PSIs relied on shareholders' self-declarations for the identification of the relevant persons and entities to list in Bulletin 10A[45]. For that purpose, [regular] emails were sent to [Company E] and [Company Z].

64. 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")[46] sets out the steps that the Global Operations Management ("GOM") follows in its [redacted due to confidentiality: regular]

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

[41] 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".

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

[43] 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".

[44] 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.

[45] 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.

[46] 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.

checks of rating action commentaries ("RACs") in relation to rated entities listed in Bulletin 10A to determine whether they contained the right disclosures[47].

65. 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 10A[48].

66. Finally, it should be added that towards the end of 2012[49], a working group established within the PSIs ("CRAIII 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.

67. 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.

68. 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 entity[50]".

- "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 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 Entity[51]".

69. 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 board[52]".

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[47] Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, 3 July 2015, p. 2.
[48] Supervisory Report, Exhibit 14, BRM Process Manual, version 1, 1 January 2016.
[49] Exhibit 9, PSIs' Comments on the Supervisory Report, p. 4.
[50] Supervisory Report, Exhibit 9.3.48, Bulletin 10 – Firewall Policy – version 8, 20 June 2013, p. 4.
[51] Supervisory Report, Exhibit 9.3.48, Bulletin 10 – Firewall Policy – version 8, 20 June 2013, p. 4.
[52] Supervisory Report, Exhibit 9.3.27, Extract of the Rating Procedures Manual, version 5, 19 August 2013, p. 34.

70. Following the entry into force of the CRA III Regulation, the PSIs also introduced some changes in the [redacted due to confidentiality: 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 corrections[53]", as well as to "provide notification of changes that occur to the information provided between notifications periods in a timely manner[54]". The updated emails asked the shareholders to "identify any companies where [the [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%[55]". 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 provisions[56]".

71. Moreover, reference is also made to Fitch's publication procedure. Although not directly related to the conflict of interest, is has a fundamental impact on disclosure of the conflict of interest situations.

72. 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 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" [57].

Relevant PSIs' internal control mechanisms

73. 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.

[53] Supervisory Report, Exhibit 9.3.26, Extract of the Rating Procedures Manual, version 4, 17 December 2012, p. 38.
[54] Supervisory Report, Exhibit 9.3.26, Extract of the Rating Procedure Manual, version 4, 17 December 2012, p. 38.
[55] 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].
[56] 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].
[57] Supervisory Report, Exhibit 9.3.23, Rating Process Manual – version 11, 1 July 2014, p. 41.

74. While the PSIs' "analytical staff were responsible for ensuring that required disclosures were made[58]" for each of the ratings issued and while all employees have an obligation according to the Code of Conduct[59] to "report […] the activities about which they have knowledge that a reasonable person would question as a potential violation of this Code or applicable law[60]", 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").

75. 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 this[61].

76. 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 [redacted due to confidentiality: 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]. […][62]".

77. Until autumn 2015, the PSIs relied on self-declarations by their shareholders to update Bulletin 10A on a [redacted due to confidentiality: 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 the external news services […]t, 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[63]".

78. Following the update of Bulletin 10A, the information was posted to […][64], which is a software platform used by the PSIs to manage and publish internally their policy documents[65]. Regulatory Compliance also provided "to a limited number of BRM staff as designated by the Global Head of BRM[66]" the list of entities in which [Company Z] had an

[58] 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.
[59] 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.
[60] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 34.
[61] Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, 3 July 2015, p. 2.
[62] Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, 3 July 2015, pp. 2-3.
[63] 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.
[64] Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, 3 July 2015, pp. 2-3.
[65] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 14.
[66] 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.

equity interest greater than 5% (rather than disclosing this information through Bulletin 10A).

79. 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 10[67]".

80. 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][68]". 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][69]".

81. 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 & 10A[70]". 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 Policy[71]".

82. 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 made[72]".

83. The PSIs described the process in the following way: "At the end of each [redacted due to confidentiality: period], […] GOM reviewed all RACs published during such [period] that

[67] 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.
[68] Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, 3 July 2015, p. 2.
[69] 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.
[70] Supervisory Report, Exhibit 23, Fitch's Response to the Fourth Request for Information I, 28 April 2017, pp. 4-5.
[71] Supervisory Report, Exhibit 23, Fitch's Response to the Fourth Request for Information I, 28 April 2017, p. 5.
[72] Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, 3 July 2015, p. 2.

related to Fitch Ratings rated entities, if any, then included in Bulletin 10A to determine whether appropriate disclosures were made[73]".

84. 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 practice[74]", i.e. these steps were codified in the GOM Procedure in connection with the Firewall Policy Disclosures[75] effective on 10 April 2014.

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

85. 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 agencies76 ("CRA II Regulation"), which entered into force on 1 June 2011.

86. Further amendments to the Regulation were also introduced through Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011[77] as well as through Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013[78] 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 20 June 2013. Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014[79] also introduced limited changes to the Regulation.

[73] 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.
[74] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 13.
[75] 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.
[76] 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.
[77] 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.
[78] 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.
[79] 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.

Relevant legal provisions regarding conflicts of interest

87. 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”.

88. 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”.

89. 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”.

90. 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”.

91. 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”.

92. 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 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”.

93. Point 21 of Section I of Annex III of the Regulation also states that “The credit rating agency infringes Article 6(2), in conjunction with the second paragraph of point 3 of Section B of Annex I, by not immediately assessing whether there are grounds for re-rating or withdrawing an existing credit rating or rating outlook”.

94. Finally, it is worth noting that the Regulation also imposes requirements in case of a shareholder or member of a credit rating agency holding 5% or more of either the capital

or the voting rights of that credit rating agency. They are different than the ones applicable in the case of a shareholder holding 10% or more of the CRA's capital or voting rights. Point 3a of Section B of Annex I of the Regulation[80] indeed provides that "A credit rating agency shall disclose where an existing credit rating or rating outlook is potentially affected by either of the following: […] (b) a shareholder or member of a credit rating agency holding 5 % or more of either the capital or the voting rights of that credit rating agency or being otherwise in a position to exercise significant influence on the business activities of the credit rating agency, is a member of the administrative or supervisory board of the rated entity or a related third party".

Relevant legal provisions regarding internal procedures and internal controls

95. Recital 26 of the Regulation provides that "Credit rating agencies should establish appropriate internal policies and procedures in relation to employees and other persons involved in the credit rating process, in order to prevent, identify, eliminate or manage and disclose any conflicts of interest and ensure at all times the quality, integrity and thoroughness of the credit rating and review process. Such policies and procedures should, in particular, include the internal control mechanisms and compliance function".

96. Point 3 of Section A of Annex I of the Regulation provides that "A credit rating agency shall establish adequate policies and procedures to ensure compliance with its obligations under this Regulation".

97. In addition, Point 4 of Section A of Annex I of the Regulation states that "A credit rating agency shall have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems. Those internal control mechanisms shall be designed to secure compliance with decisions and procedures at all levels of the credit rating agency.

98. A credit rating agency shall implement and maintain decision-making procedures and organisational structures which clearly and in a documented manner specify reporting lines and allocate functions and responsibilities".

99. Regarding the infringements, Point 11 of Section I of Annex III of the Regulation provides that "The credit rating agency infringes Article 6(2), in conjunction with point 3 of Section A of Annex I, by not establishing adequate policies or procedures to ensure compliance with its obligations under this Regulation".

[80] The corresponding infringement is set out at Point 20a of Section I of Annex III of the Regulation, which reads as follows: "The credit rating agency infringes Article 6(2), in conjunction with point 3a of Section B of Annex I, by not disclosing that an existing credit rating or rating outlook is potentially affected by any of the circumstances set out in letters (a) and (b) of that point".

100. Point 12 of Section I of Annex III of the Regulation states that: “The credit rating agency infringes Article 6(2), in conjunction with point 4 of Section A of Annex I, by not having sound administrative or accounting procedures, internal control mechanisms, effective procedures for risk assessment, or effective control or safeguard arrangements for information processing systems; or by not implementing or maintaining decision-making procedures or organisational structures as required by that point”.

Other relevant legal provisions

101. Other provisions of the Regulation are relevant for the purposes of this enforcement case. In particular, it is worth noting the following definitions provided by the Regulation.

102. 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”.

103. 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 written submissions made on behalf of Fitch 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 Casino.

104. This section of the Statement of Findings analyses whether Fitch, with regards to ratings issued on Casino, 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).

105. 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.

106. [FSC] was a shareholder holding more than 10% of PSIs' capital/voting rights[81].

107. The PSIs first assigned a rating on Casino on 8 June 1999[82].

108. [FSC] became a board member of Casino on 4 September 2003[83]. He resigned from Casino's Board on 15 September 2016[84].

109. Between the date of entry into force of CRA III Regulation and the first RFI from ESMA's Supervision department (21 May 2015), 4 ratings on Casino were issued[85]. These ratings were not on the issuer itself (i.e. Casino) but on instruments issued by Casino. For that reason, they are referred to by the PSIs as "issue ratings" rather than "issuer ratings".

110. 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 Casino, despite the fact that [FSC] was a board member of Casino.

Arguments raised by the PSIs

111. The defence of Fitch, presented in a memorandum of [an external lawyer] of July 2016[86], provides several arguments summarised below as a background information.

112. 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".

113. 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

[81] 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.
[82] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 7.
[83] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 7.
[84] Supervisory Report, Exhibit 38, Email from Fitch to ESMA on 19 September 2016.
[85] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 7.
[86] Exhibit 9, PSIs' Comments on the Supervisory Report, Appendix C, Memorandum from […] dated 13 July 2016 on Rating new issuances of […] Casino.

provision of Point 3 of Section B of Annex I of the Regulation on the assumption that it applied on a "per entity" basis.

114. 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".

115. According to [the] memorandum, "ratings for new issuances are intrinsically linked to ratings for the entity and old issuances".

116. The approach of other CRAs would be consistent with the PSIs' interpretation of Point 3 of Section B of Annex I of the Regulation.

117. 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, according to [the] memorandum[87], "preventing the initial credit rating agency from rating all the issuances of the entity concerned inevitably deprives the investor of unique and valuable information".

118. 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

119. From the arguments summarised above, it is evident that the legal analysis developed by the Law Firm defending Fitch aims at demonstrating that a rating is "existing", and therefore non "new", where the entity concerned is currently rated. According to [the] memorandum [of external lawyers], 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.

120. Therefore, Fitch's reading of the relevant requirements would assert the following:

[87] Exhibit 9, PSIs' Comments on the Supervisory Report, Appendix C, Memorandum from […] dated 13 July 2016 on Rating new issuances of […] Casino, see p. 7.

i) 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;

ii) where an entity has not previously been rated, the CRA should not issue a rating, whether for the entity itself or an individual issuance.

121. For the full reasoning, reference is made to the full version of [the defensive] memorandum.

122. 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.

123. 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.

124. The basic assumption of the Fitch's defence is that the distinction between existing ratings and the new ratings set in the applicable provision of the CRA Regulation would not be informative and would not have a self-evident meaning. All the other arguments are built up on this assumption.

125. With the aim to verify the validity of the basic assumption of Fitch's defence, the Board has conducted the following legal reasoning.

126. In order 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.

127. 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.

128. 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).

129. What follows from the reasoning above is that the basic assumption of Fitch's defence (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.

130. 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.

131. 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.

132. On this basis, the Board agrees with the findings contained in the file submitted by the IIO and considers that the arguments raised by the Fitch and the other PSIs must be rejected.

133. With regards to the legal entity to which the infringements are attributable, the Board acknowledges the following.

134. 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)[88], 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 rating[89].

[88] 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.

[89] 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".

135. The IIO noted that the 4 ratings on Casino were issued by Fitch. 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[90].

136. The IIO also noted that Casino was explicitly listed in Bulletin 10A[91] 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 entity[92]".

137. On that basis, the Board agrees with the IIO and finds that the infringement related to the issuance of ratings on Casino despite the fact that [FSC] was a board member of Casino is attributable to Fitch.

138. To conclude, the Board, on the basis of the complete file submitted by the IIO and having taken into account the written submissions made on behalf of Fitch, finds that Fitch 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 Casino despite the fact that [FSC] was a board member of Casino. This constitutes the infringement set out at Point 20 of Section I of Annex III of the Regulation.

Intent or negligence

139. Article 36a(1) of the Regulation provides as follows:

140. "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."

141. "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".

[90] Supervisory Report, Exhibit 11.5, Fitch's reply to question 4, 19 October 2015, pp. 3-4.
[91] 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.
[92] 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".

142. 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.

143. 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.

144. 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".

145. The factual background as set out in this Statement of Findings does not establish that there are objective factors which demonstrate that Fitch, Fitch's employees or senior managers acted deliberately to commit the infringements of Point 20 of Section I of Annex III of the Regulation regarding Casino.

146. It should therefore be assessed whether there was negligence.

Considerations on negligence

147. 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.

148. 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 omission[93].

149. 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.

[93] 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".

150. Taking into account the CJEU jurisprudence[94], 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.

151. 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.

152. The following points should be taken into consideration regarding the standard of care to be expected of a CRA.

153. 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 entails[95]”. Similarly, it is considered that, operating within the framework of a regulated industry, a CRA, which holds itself out as a professional entity and carries out regulated activities, should be expected to exercise special care in assessing the risks that its acts and omissions may entail.

154. 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 situation[96]”.

[94] 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 1-2535, para. 19.
[95] Case T-336/07, Telefónica, SA and Telefónica de España, SA v Commission [2012] ECLI:EU:T:2012:172, para. 323.
[96] Exhibit 111, PSIs’ Response to the IIO’s Statement of Findings, paras. 2.9.

155. 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 Regulation[97], 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.

156. 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 entail[98]". 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.

157. 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 authorities[99], 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.

158. 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

[97] This is all the more the case as regulations do not require any measures of transposition to be directly applicable.
[98] Case T-336/07, Telefónica, SA and Telefónica de España, SA v Commission [2012] ECLI:EU:T:2012:172, para. 323.
[99] 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.

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.

159. 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

160. The Board notes that Casino was listed in Bulletin 10A[100] 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 entity[101]".

161. However, Fitch issued ratings on Casino. 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.

162. 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.

163. 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 2012[102] a working group entitled "CRA3 Working group" (or "CRA3 WG"). The PSIs indicated[103] 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 the others, Casino)". The PSIs also stated that "Based on an assessment of Fitch Ratings' existing procedures and the

[100] 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.
[101] 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".
[102] Exhibit 9, PSIs' Comments on the Supervisory Report, p. 4.
[103] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 11.

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".

164. 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 task[104].

165. 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 management[105]".

166. 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 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 interest[106]".

167. In an email dated 23 January 2013 and attaching the version of the "CRA3 Implementation Chart" of 23 January 2013, [YF] indicated to [redacted due to confidentiality: Fitch's employees having high positions in 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 board[107]".

168. 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 accepted[108]".

169. 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

[104] Supervisory Report, Exhibit 15.1.1, CRA 3 Implementation GM Jan17, 17 January 2013, p. 15.
[105] Supervisory Report, Exhibit 16.8, CRA 3 email, 16 January 2013, p. 1.
[106] Supervisory Report, Exhibit 15.1.2, CRA 3 Implementation Jan 23, 23 January 2013, p. 18.
[107] Supervisory Report, Exhibit 16.29, Email CRA 3 Implementation Meeting - documents attached, p. 1.
[108] 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.

rating these companies as long as we have deemed that there are no conflicts of interest[109]".

170. 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 member[110]"

171. In this respect, the PSIs responded the following[111]:"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 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".

172. 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 interest[112]". The PSIs did not provide any document and referred to the explanation quoted above[113].

173. 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

[109] Supervisory Report, Exhibit 16.24, CRA 3 briefing email, 29 January 2013, p. 35.
[110] Supervisory Report, Exhibit 16.8, CRA 3 email, 16 January 2013, p. 1.
[111] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 9.
[112] Supervisory Report, Exhibit 16.29, Email CRA 3 Implementation Meeting - documents attached, p. 20.
[113] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 10.

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 time [114] ". 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 member[115]". 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 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.

174. The Board endorses the analysis performed by the IIO and finds that Fitch failed to take the special care expected of a CRA. In particular, Fitch decided to rely on an interpretation of the relevant requirement, which was not backed by a specific detailed legal assessment.

175. As a result of that failure, Fitch did not foresee the consequences of its acts, in particular the 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.

176. Therefore, it is found that Fitch has been negligent when committing the infringement of Point 20 of Section I of Annex III of the Regulation concerning Casino.

**Fine**

Determination of the basic amount

177. 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:

[114] Exhibit 111, PSIs' Response to the IIO's Statement of Findings, paras. 2.16-17.
[115] Supervisory Report, Exhibit 16.8, CRA 3 email, 16 January 2013, p. 1.

(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; […]

178. 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".

179. It has been established that Fitch committed the infringement set out at Point 20 of Section I of Annex III of the Regulation, by issuing ratings on Casino while [FSC] was a board member of Casino. [FSC] resigned from Casino's Board in September 2016[116]. The ratings on Casino that were issued after the entry into force of the CRA III Regulation were withdrawn on 12 January 2018[117].

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

181. In 2015, Fitch had a turnover of GBP 90.21 million[118] (~EUR 124.26 million[119]). In addition, in 2017, Fitch's turnover was GBP 115.64 million[120] (~EUR 131.86 million[121]), i.e. also above the threshold of EUR 50 million mentioned in Article 36a(2) of the Regulation.

182. 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 higher end of the limit of the fine set out in Article 36a(2)(a) of the Regulation and shall not exceed EUR 750 000.

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[116] Supervisory Report, Exhibit 38, Email from Fitch to ESMA on 19 September 2016.
[117] Exhibit 34, Rating Action Commentary: "Fitch Affirms Casino Guichard-Perrachon at 'BB+'; Withdraws Rating", 12 January 2018.
[118] 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 GBP 90.21 million.
[119] The exchange rate calculations are based on the ECB's Economic Bulletin, Issue 1/2018, which states that the average exchange rate for 2015 was EUR 1 = GBP 0.726, see Exhibit 38, ECB, Economic Bulletin, Issue 1/2018, p. S 6.
[120] Fitch Ratings European Union Transparency Report-March 2018 - p. 23 (Point 7 - Information on Revenue Table 1).
[121] The exchange rate calculations are based on the ECB's Economic Bulletin, Issue 1/2018, which states that the average exchange rate for 2017 was EUR 1 = 0.877, see Exhibit 38, ECB, Economic Bulletin, Issue 1/2018, p. S 6.

Aggravating factors

183. 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.

184. 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.

185. Regarding the infringement of Point 20 of Section I of Annex III of the Regulation by Fitch concerning the issuance of ratings on Casino, it has been committed each time that Fitch has issued a rating on Casino in contradiction with Article 3 of Section B of Annex I of the Regulation, i.e. 4 times. Therefore, putting aside the first time Fitch has committed the infringement, it has been repeated 3 times.

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

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

188. Concerning the 4 ratings issued on Casino by Fitch which constitute the infringement by Fitch 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. In addition, [FSC] resigned from Casino's Board only on 15 September 2016[122] Thus each time that Fitch committed the repeated infringement, this lasted for more than six months.

189. In particular:

- Casino's rating regarding ISIN FR0011606169 issued on 23 October 2013[123]: withdrawn on 12 January 2018[124],

- Casino's rating regarding ISIN FR0011765825 issued on 17 March 2014[125]: withdrawn on 12 January 2018[126],

[122] Supervisory Report, Exhibit 38, Email from Fitch to ESMA on 19 September 2016.
[123] Supervisory Report, Exhibit 11.5, Fitch's reply to question 4, p. 3. See also Exhibit 1, Supervisory Report, Table 1 and Exhibit 30, Supervision Department's Second Response to the IIO, pp. 10-11.
[124] Exhibit 34, Rating Action Commentary: "Fitch Affirms Casino Guichard-Perrachon at 'BB+'; Withdraws Rating", 12 January 2018.
[125] 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. 8.
[126] Exhibit 34, Rating Action Commentary: "Fitch Affirms Casino Guichard-Perrachon at 'BB+'; Withdraws Rating", 12 January 2018.

- Casino's rating regarding ISIN FR0012074284 issued on 1 September 2014[127]: withdrawn on 12 January 2018[128], and

- Casino's rating regarding ISIN FR0012369122 issued on 5 December 2014[129]: withdrawn on 12 January 2018[130].

190. This aggravating factor is thus applicable for the infringement by Fitch concerning the issuance of ratings on Casino.

191. 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.

192. 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 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".

193. 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.

194. 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 had weaknesses.

195. The Board therefore does not consider that the infringement by Fitch reveals a systemic weakness in the organisation of the CRA, in particular in its procedures, management systems or internal controls. This aggravating factor is thus not applicable.

196. Finally, the Board notes that the assessment of the application of the aggravating factor under Point I. 3. of Annex IV of the Regulation differs from the one to be conducted with regard to the infringements set out at Points 11 and 12 of Section I of Annex III of the

[127] 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. 9.
[128] Exhibit 34, Rating Action Commentary: "Fitch Affirms Casino Guichard-Perrachon at 'BB+'; Withdraws Rating", 12 January 2018.
[129] 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. 10.
[130] Exhibit 34, Rating Action Commentary: "Fitch Affirms Casino Guichard-Perrachon at 'BB+'; Withdraws Rating", 12 January 2018.

Regulation. For example, not all instances of shortcomings in internal controls are necessarily instances of systemic weaknesses in internal controls. Therefore, the above conclusion regarding the aggravating factor has no influence on the assessment of whether there is an infringement of these provisions in the present case.

197. 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.

198. 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 concerning the issuance of ratings on Casino, 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.

199. It should also be noted that the PSIs indicated the following[131]: "Fitch Ratings' [Senior] Credit Officer carried out [in response to the IIO's First RFI[132]] a review of the quality of the credit ratings for […], Casino […] 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".

200. Concerning Casino, this review[133] noted that "Fitch's rating of Casino was in line with criteria" and "Fitch downgraded Casino to BBB- in June 2005 with Standard & Poor's following a few months later. Both agencies then rated Casino BBB- between November 2005 and February 2016. Standard & Poor's then downgraded Casino to BB+, with Fitch downgrading Casino in April 2017". In addition, "Neither Fitch nor any other Fitch Ratings' entity has ever received an analytical complaint from an internal or external market participant with regards to Casino".

201. On that basis, it is not established in the present investigation that the infringement of Point 20 of Section I of Annex III of the Regulation committed by Fitch concerning the issuance of Casino's ratings had a negative impact on the quality of these ratings. The aggravating factor is therefore not applicable.

202. Annex IV, Point I. 5. If the infringement has been committed intentionally, a coefficient of 2 shall apply.

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[131] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 39.
[132] Exhibit 24, PSIs' Response to the IIO's Second RFI, Question 5.
[133] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 39.

203. This aggravating factor is not applicable because there is no evidence that the infringements of Point 20 of Section I of Annex III of the Regulation committed by Fitch concerning Casino have been committed intentionally.

204. 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.

205. The Board acknowledges that [FSC] resigned from Casino's Board on 15 September 2016[134] and that the ratings on Casino that were issued after the entry into force of the CRA III Regulation were withdrawn on 12 January 2018[135].

206. More generally, version 10 of the Bulletin 10 – Firewall Policy[136] (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 board[137]".

207. In addition, from the same date (17 March 2017), this is also mirrored in Bulletin 10A[138], 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 directors[139]".

208. 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

[134] Supervisory Report, Exhibit 38, Email from Fitch to ESMA on 19 September 2016.
[135] Exhibit 34, Rating Action Commentary: "Fitch Affirms Casino Guichard-Perrachon at 'BB+'; Withdraws Rating", 12 January 2018.
[136] 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.
[137] 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).
[138] 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.
[139] See Exhibit 80, PSIs' Response to the IIO's Third RFI, Annex 2.5, Bulletin 10A, 17 March 2017, p. 2.

I of Annex III of the Regulation committed by Fitch concerning the issuance of Casino's ratings.

209. 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.

210. The Board considers that there is no evidence that Fitch (including its senior management[140]) 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.

211. The Board considers that the aggravating factor relating to a lack of cooperation is not applicable.

**Mitigating factors**

212. 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.

213. 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.

214. 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.

215. 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.

216. 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, etc[141]. 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 directors[142].

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[140] The IIO's RFIs were sent to and the responses were received from the PSIs' contact person as designated by the PSIs' legal representative.
[141] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 40.
[142] 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,

217. 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 Fitch's senior management has taken all the necessary measures to prevent the infringements of Point 20 of Section I of Annex III of the Regulation.

218. This mitigating factor is thus not applicable.

219. 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.

220. This mitigating factor is not applicable because Fitch has 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 Casino[143].

221. 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.

222. As explained above regarding the aggravating factor set by Annex IV, Point I. 6. of the Regulation, a number of remedial actions have been taken. The Board agrees with the findings of the IIO and considers that these remedial actions should ensure that similar infringements cannot be committed in the future.

223. 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

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.

[143] Supervisory Report, Exhibit 9.2.2, List of ratings.

aiming at ensuring that the said measures are implemented by the CRA, for example, through an action plan defined and monitored by the supervisor.

224. The Board acknowledges the following.

225. First, a number of the remedial actions were identified by the PSIs[144] 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.

226. 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 Policy[145]", which shows indeed that the PSIs started to review the applicable policy before the Action Plan.

227. 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".

228. Even though the Action Plan provides that it "sets out the remedial actions that Fitch is requested to undertake[146]" 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.

229. 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 concerning Casino.

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[144] Exhibit 22, PSIs' Response to the IIO's First RFI, Questions 41 and 42.
[145] Supervisory Report, Exhibit 19, ESMA/2016/1453, Action Plan following the investigation on Fitch Rating' Firewall Policy, 11 October 2016, p. 8.
[146] Supervisory Report, Exhibit 19, ESMA/2016/1453, Action Plan following the investigation on Fitch Rating' Firewall Policy, 11 October 2016, p. 6.

**Determination of the adjusted fine**

230. In accordance with Article 36a(3) of the Regulation, taking into account the applicable aggravating and mitigating factors, the basic amount of EUR 750 000 must be adjusted as follows.

231. 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 750 000 x 1.1 = EUR 825 000

EUR 825 000 – EUR 750 000 = EUR 75 000

3 repetitions: 3 x EUR 75 000 = EUR 225 000

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

EUR 750 000 x 1.5 = EUR 1 125 000

EUR 1 125 000 – EUR 750 000 = EUR 375 000

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

EUR 750 000 x 0.6 = EUR 450 000

EUR 750 000 – EUR 450 000= EUR 300 000

Adjusted fine taking into account applicable aggravating and mitigating factors:

EUR 750 000 + EUR 225 000 + EUR 375 000 – EUR 300 000 = EUR 1 050 000

232. Consequently, following adjustment by taking into account the applicable aggravating and mitigating factors, the amount of the fine to be imposed on Fitch amounts to EUR 1 050 000.

Financial benefit from the infringements

233. 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”.

234. In this respect, it should be noted that in response to a request to provide the revenues received by the PSIs for the 4 ratings on Casino of 2013 and 2014 (which were solicited[147]), the PSIs indicated the following: "[omitted due to confidentiality][148]".

235. [From the information provided, it emerges that] The revenues received by the PSIs' group were thus lower than the fine, so Article 36a(4) of the Regulation is not applicable.

**Supervisory measures**

236. 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,[149] 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 issued.

## B. Findings of the Board of Supervisors with regard to the infringement at Point 21 of Section I of Annex III of the Regulation (EC) No 1060/2009 – existing rating on FNSP

237. In this section the Board analyses whether Fitch breached the requirement set at the second paragraph of Point 3 of Section B of Annex I of the Regulation, in the situation identified by Point 3(ca) of Section B of Annex I of the Regulation, with regards to FNSP:

238. "A credit rating agency […] shall, in the case of an existing credit rating or rating outlook, […] 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).

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[147] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 45.
[148] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 44.
[149] 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.*"

239. “[…] immediately assess whether there are grounds for re-rating or withdrawing the existing credit rating or rating outlook” (the second paragraph of Point 3 of Section B of Annex I of the Regulation).

240. If the requirement is not met, this would constitute the infringements set out at Point 21 of Section I of Annex III of the Regulation.

241. [FSC] was a shareholder holding more than 10% of PSIs’ capital/voting rights[150].

242. [FSC] was a board member of FNSP from 9 November 2001[151] until 10 May 2016[152].

243. Fitch France rated FNSP on 8 September 2004[153]. It was therefore an existing rating when the CRA III Regulation (and the related requirement on immediate assessment of the need to re-rate or withdraw in case of existing ratings where a shareholder of the CRA is a board member of the rated entity) entered into force.

244. From the facts it is clear that when the CRA III entered into force, (i) [FSC] was a board member of FNSP and (ii) the rating on FNSP was existing. However, regarding the assessment on whether there are grounds to withdraw or re-rate an existing rating, the PSIs indicated that concerning FNSP, this assessment took place only in January 2016[154] and not when the CRA III Regulation entered into force.

245. In order to assess whether an infringement of the Regulation has been committed by the PSIs regarding the existing rating of FNSP, the IIO has first considered whether the fact that [FSC] was a member of the board of directors of FNSP is to be understood as being covered by Point 3(ca) of Section B of Annex I, i.e. whether [FSC] was to be considered as “a member of the administrative or supervisory board of the rated entity” for the purposes of this Point 3(ca).

246. This argument has been raised by the PSIs which indicated that “three analysts based in the Paris office misinterpreted the policy requirement and failed to notify Compliance of [FSC]’s board membership on FNSP and continued to rate it while they knew that [FSC] was a board member. Fitch’s analysts for FNSP considered that the board referred to did not have strategic influence or control over the activities of FNSP in the way that a normal corporate board influences and controls limited liability companies, and thus concluded (wrongly) that the board position of FNSP was not subject to the requirements of the

[150] 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.
[151] Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 7.
[152] Supervisory Report, Exhibit 18, Fitch’s letter ESMA Preliminary Views Following the Investigation of Fitch Ratings Firewall Policy, p. 5.
[153] Supervisory Report, Exhibit 48, Full Rating Report, “Credit analysis on FNSP”, 8 September 2004.
[154] Supervisory Report, Exhibit 21, Fitch’s Response to the Third Request for Information, 18 November 2016, p. 2.

Firewall Policy" [155]. The PSIs added that the Board of FNSP "did not function like the board of a corporate or a financial institution" [156] and "the role of the FNSP board was to promote FNSP and to raise private donations for the school. FNSP is a not-for-profit foundation with no share capital. It pays no dividends. […] the French government controls FNSP – that is, the board does not have the power of a corporate board".

247. In this respect, the Board acknowledges the following.

248. First, according to the case-law of the CJEU, EU law should be given an autonomous and uniform interpretation: "According to settled case law, the need for the uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question [157]". Across the EU and in each Member State, there is a diversity of legal structures for establishing entities which would be rated by CRAs. Nevertheless, for the purpose of determining the meaning and scope of the circumstance laid down in Point 3(ca) of Section B of Annex I of the Regulation, "a member of the administrative or supervisory board of the rated entity" must be given an autonomous and uniform interpretation, so as to avoid potential circumvention of the Regulation and non-application by a CRA of the requirements related to conflicts of interest based on the diversity of the legal structures of rated entities across the EU.

249. Second, the Regulation does not make any distinction regarding the board membership on the basis of the specific legal structure of the rated entity. For example, the Regulation does not distinguish between corporate entities and public entities or entities controlled by the state in order to define CRAs' obligations under the Regulation. Point 3(ca) of Section B of Annex I of the Regulation does not include such distinction. In the same way, this distinction is not provided by the definition of "rated entities" laid down by Article 3(1), letter (f) of the Regulation: "'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 [158]". The rated entity must be a legal person, irrespective of whether it is a limited liability company, a non-profit foundation, a public (sector) company, etc.

250. Third, it is irrelevant for the purposes of interpreting "a member of the administrative or supervisory board of the rated entity" to assess whether the board of the rated entity did

[155] Supervisory Report, Exhibit 18, Fitch's letter ESMA Preliminary Views Following the Investigation of Fitch Ratings Firewall Policy, 22 July 2016, p. 5.
[156] Supervisory Report, Exhibit 21, Fitch's Response to the Third Request for Information, 18 November 2016, p. 3.
[157] CJEU, Case C-204/09, Flachglas Torgau GmbH, 14 February 2012, point 37.
[158] Article 3(1)(f) of the Regulation.

have specific tasks or did perform in practice these tasks. For the same reasons related to the need to ensure a uniform interpretation of EU law including Point 3(ca) of Section B of Annex I of the Regulation, it is not possible to make the applicability of this Point 3(ca) dependant, on a case-by-case basis, on the tasks performed in theory or in practice by the board of the rated entity. Across the EU and even within each Member State, there is variety in the type of tasks performed by a board.

251. In any event, in the specific case of FNSP's board, this board had a number of significant tasks during the period of the existence of the PSIs' rating on FNSP. FNSP is in charge of the administrative and financial management[159] of the *Institut d'Etudes Politiques (IEP) de Paris* (frequently called "*Sciences Po Paris*"). Article 3 of the decree N° 46-492 of 22 March 1946 on FNSP[160] (applicable until the end of 2015) listed the type of matters on which the board took decisions. This included the budget, the acquisitions, the investment of available funds, etc. This list was not exhaustive as clearly indicated by the word "notamment" (i.e. "in particular/especially") at the beginning of Article 3. This shows that FNSP's board could also take other decisions. Following the decree N° 2015-1829 (in force since 2016), the list of tasks of FNSP's board has been clarified and extended: the board decides on the business of FNSP and as such, it votes the budget and authorises acquisitions, loans and the issuance of debt securities, amongst other tasks[161].

252. The PSIs referred to a report of the French Court of Auditors, which establishes deficiencies in the management of FNSP and the lack of vigilance of its board[162]. However,

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[159] See Exhibit 39, Article L758-1 of « Code de l'éducation », in both the version in force between 22 June 2000 and 10 April 2015, and Exhibit 40 for the version in force after 10 April 2015: FNSP « assure la gestion administrative et financière de l'Institut d'études politiques de Paris ».

[160] See Exhibit 41, Article 3 of the « Décret No 46-492 du 22 mars 1946, Fondation Nationale des Sciences Politiques », in force until 31 December 2015. See also Supervisory Report, Exhibit 52, "Sciences Po; Une forte ambition, une gestion defaillante", Cour des Comptes, Rapport Public thématique, 2012, footnote 8, p. 22, in French only: «Les règles de gouvernance de la FNSP, issues de l'ordonnance de 1945 et complétées par la loi du 2 juillet 1998, ont été inscrites dans le code de l'éducation. Elles ont été approuvées par son conseil d'administration à l'occasion de la séance du 2 décembre 2001. Ces règles sont complétées par un décret du 22 mars 1946 et par un décret du 28 décembre 1972, modifié par des décrets du 15 mars 1996 et du 26 mars 1999».

[161] Exhibit 42, Décret n° 2015-1829 du 29 décembre 2015 portant approbation des statuts de la Fondation nationale des sciences politiques, JORF n°0303 du 31 décembre 2015, p. 25260. See in particular Article 21 of the decree: «Le conseil d'administration règle, par ses délibérations, les affaires de la fondation. A ce titre: 1° Il fixe le cadre général de l'action de l'Institut d'études politiques de Paris ; 2 Il vote le budget ; […] 4 Il accepte les libéralités et autorise, à l'exception de la gestion des affaires courantes, les acquisitions et cessions de biens immobiliers, les marchés, les baux et contrats de location, la constitution d'hypothèques et les emprunts, ainsi que les cautions et garanties accordées au nom de la fondation ; […] 7 Il autorise les prises de participations dans les sociétés régulièrement constituées, conformément à l'objet de la fondation; 8 Il autorise l'émission de titres de créances de la fondation; […]».

[162] Supervisory Report, Exhibit 52, "Sciences Po; Une forte ambition, une gestion defaillante", Cour des Comptes, Rapport Public thématique, 2012, pp. 106-107: « Au titre des contrôles internes, la Cour relève que les instances délibérantes de Sciences Po n'ont pas joué leur rôle de supervision des décisions prises par l'exécutif. Les défaillances constatées dans la gestion de l'établissement soulignent à tout le moins le défaut de vigilance du conseil d'administration de la FNSP et du conseil de direction de l'IEP. Elles invitent à une limitation de la durée des mandats de président des deux organes délibérants ».

the fact that according to the French Court of Auditors, FNSP's board did not properly perform its tasks cannot have any impact on whether Point 3(ca) of Section B of Annex I of the Regulation is applicable; otherwise this would clearly undermine the uniform application of EU law by making the applicability of Point 3(ca) dependant on a case-by-case assessment of the way the board of a rated entity has performed its function.

253. Finally, the PSIs' also indicated that "although [FSC]'s presence on FNSP's board may give the appearance of a potential conflict of interest, there was no actual conflict of interest"[163].

254. The Board notes that the IIO disagrees with this argument and acknowledges the following reasoning. First, the conflict of interest was not only of a potential nature. [FSC][164] did attend or gave a proxy in a number of the relevant meetings of FNSP's board[165]. More importantly, the provision of Point 3 of Section B of Annex I of the Regulation specifically defines the requirements applicable to a CRA in precise circumstances, i.e. if certain circumstances are met, certain requirements must be met. It does not distinguish between what could be an actual conflict of interest and what could be only the "appearance of a potential conflict of interest". Furthermore, according to Article 6(2) of the Regulation, the requirements set out in Section B of Annex I aim at ensuring compliance with Article 6(1) which covers "any existing or potential conflicts of interest or business relationship".

255. The Board agrees with the IIO and concludes that the fact that [FSC] was a member of the board of directors of FNSP was covered by Point 3(ca) of Section B of Annex I of the Regulation. The argument of the PSIs about the specificities of FNSP's board cannot be accepted.

256. Therefore, because the rating on FNSP was existing and [FSC] was a board member of FNSP for the purposes of Point 3(ca) of Section B of Annex I of the Regulation, the PSIs were subject to the requirements of Article 6(2) of the Regulation, read in conjunction with Point 3 of Section B of Annex I.

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[163] Supervisory Report, Exhibit 21, Fitch's Response to the Third Request for Information, 18 November 2016, p. 3.

[164] As background information, [FSC] was appointed as board member of FNSP by the French Prime Minister in the category of board members chosen because of their political, economic or social activity ("personnalités choisies par la Premier Ministre en raison de leur activité politique, économique ou sociale"). In addition, [FSC] was also a member of FNSP's Remuneration Commission. See Supervisory Report, Exhibit 52, "Sciences Po; Une forte ambition, une gestion defaillante", Cour des Comptes, Rapport Public thématique, 2012, pp. 118 and 122.

[165] See Exhibits 44-58, Minutes of FNSP's board meetings, from the entry into force of the CRA III Regulation until [FSC]'s resignation as a Board member of FNSP. The IIO derives from these minutes that [FSC] was present at FNSP's board meetings of 11 February 2014 and 10 February 2015 and gave a proxy for the boards of 8 October 2013, 17 December 2013, 25 March 2014, 29 April 2014, 13 May 2014, 21 October 2014, 9 December 2014, 12 May 2015, 8 September 2015, 6 October 2015, and 15 December 2015.

257. In particular, the second paragraph of Point 3 of Section B of Annex I of the Regulation provides for an "immediate" assessment by the CRA of whether there are grounds for re-rating or withdrawing the existing rating.

258. The IIO noted that the Regulation does not expand on the meaning of "immediate" for the purposes of these two provisions.

259. 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 CJEU[166].

260. 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", respectively[167].

261. 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 that 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.

262. 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 interests[168]. The immediate disclosure and immediate assessment 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. The same risk applies to the assessment of whether there are grounds to re-rate or withdraw an existing credit rating. If this assessment is postponed, it loses its value and does not achieve its goal because the potential withdrawal or re-rating arrives too late and investors continue relying in the meantime on an existing credit rating for which a re-rating or a withdrawal should have taken place.

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[166] 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.
[167] See Exhibit 59, Definition of "immediate", Oxford Dictionaries, and Exhibit 60, Definition of "immediate", Collins English Dictionary.
[168] See for instance Article 1 of the Regulation.

263. As regards the facts, the assessment on whether there are grounds to withdraw or re-rate an existing rating, the PSIs indicated that concerning FNSP, this assessment took place only in January 2016[169]. Contrary to what happened for the other existing ratings (i.e. or Casino) for which this assessment took place when the PSIs were determining whether potential changes were required to implement the CRA III Regulation[170], this assessment did not take place before or "immediately" after the entry into force of the CRA III Regulation. It did not even take place "immediately" after the affirmations of FNSP's existing rating on 10 September 2013 and 9 September 2014.

264. On this basis, considering the time taken by the PSIs in the present case to perform the relevant re-assessment provided for by Article 6(2) read in conjunction with Point 3 of Section B of Annex I of the Regulation concerning the existing rating on FNSP, the Board agrees with the IIO and considers that it is clear that they cannot be considered as having been "immediate".

265. The Board therefore considers that since [FSC] was a board member of FNSP and there was an existing rating on FNSP, this constitutes a breach of the second paragraphs of Point 3 of Section B of Annex I of the Regulation.

266. The following considerations have been developed by the IIO regarding the legal entity within the PSIs' group which the infringement related to the non-immediate assessment of whether there were grounds to re-rate or withdraw the existing rating on FSNP is attributable to.

267. Regarding the assessment of the need to re-rate or withdraw an existing rating, the IIO noted that this is a task entrusted to the PSIs' compliance function. The PSIs indicated that "Although not previously recorded in writing, it was understood by all relevant personnel that the Compliance Department was responsible for the assessment of whether to withdraw or maintain the FNSP rating" [171] and "As the owner of Bulletin 10A, it had always been the responsibility of the Compliance Department to instigate a reassessment of an existing rating" [172]. In addition, this is the CRA3 Working group (comprised in particular of representatives of the compliance function and "under the oversight of members of Fitch Ratings' Executive Committee and its then Chief Compliance Officer" [173]) which concluded that "there was no need to re-rate or withdraw ratings from (…), Casino (…)[174]" but did not

[169] Supervisory Report, Exhibit 21, Fitch's Response to the Third Request for Information, 18 November 2016, p. 2.
[170] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 11: "the CRA3 WG concluded […] that there was no need to re-rate or withdraw ratings from […], Casino […]".
[171] Exhibit 9, PSIs' Comments on the Supervisory Report, p. 7.
[172] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 18.
[173] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 19.
[174] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 11.

assess the existing rating on FNSP. Furthermore, in January 2016, it was [RZ, Fitch's officer] who instituted the assessment[175].

268. In this respect, it should be added that the compliance function covering Fitch France's activities was formally entrusted to Fitch.

269. In particular, the registration decision of Fitch France provides for an exemption from having to comply with the requirements of Points 5 and 6 of Section A of Annex I of the Regulation, which relate to the establishment of a compliance function within the CRA[176]. Furthermore, the "agreement concerning the provision of compliance, credit policy and internal control services" which was entered into in September 2011 between the different companies of the Fitch group[177] provides that [redacted due to confidentiality][178]".

270. On that basis, given the factual findings about the role of the compliance function, the Board agrees with the IIO and considers that the infringement of Point 21 of Section I of Annex III of the Regulation concerning FNSP is attributable to Fitch, which was formally in charge of the compliance function for Fitch France.

271. To conclude, on the basis 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 infringed Article 6(2) of the Regulation, in conjunction with the second paragraph of Point 3 of Section B of Annex I, by not having immediately assessed whether there were grounds for re-rating or withdrawing the existing rating on FNSP because [FSC] was a board member of FNSP. This constitutes the infringement set out at Point 21 of Section I of Annex III of the Regulation.

Intent or negligence

272. Article 36a (1) of the Regulation provides as follows:

273. "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."

274. "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".

[175] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 16.
[176] Supervisory Report, Exhibit 5.4, Autorité des Marchés Financiers' decision to register Fitch France S.A.
[177] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 3.
[178] 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.

275. 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.

276. 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.

277. 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".

278. The factual background as set out in this Statement of Findings does not establish that there are objective factors which demonstrate that Fitch, Fitch's employees or senior managers acted deliberately to commit respectively the infringements of Points 20 and 21 of Section I of Annex III of the Regulation regarding FNSP.

279. It should therefore be assessed whether there was negligence.

280. Regarding the concept of negligence for the purposes of the Regulation, the Board refers to the developments provided for in paragraphs 147-159 of this Statement of Findings.

281. The Board notes that in December 2013, ESMA adopted a Q&A on the implementation of CRA III ("Questions and Answers, Implementation of the Regulation (EU) No 462/2013 on Credit Rating Agencies"). This Q&A indicated that "CRAs are required to make all their best efforts to identify their relevant shareholders and frequently monitor the activities, stake, rights, interests and affiliations of its shareholders in rated entities so as to make sure that it does not breach the new regulatory issuance prohibitions and disclosure requirements. The frequency of monitoring should depend on different factors. For instance, the closer the stake of a shareholder is to any regulatory limitation, the more frequently a CRA should engage with this shareholder" [179].

282. However, Fitch's compliance function which was in charge of liaising with PSIs' shareholders was not aware of [FSC]'s board membership to FNSP. FNSP was thus not listed in Bulletin 10A.

[179] Supervisory Report, Exhibit 47, Questions and Answers, Implementation of the Regulation (EU) No 462/2013 on Credit Rating Agencies, pp. 8-9.

283. At that time, Fitch's compliance function relied fully on the information received from the PSIs' shareholders without performing any check. As indicated by the PSIs, "[FSC] did not inform us of his position on this board prior to the ESMA inquiry" [180].

284. However, [FSC]'s board membership was a public information. It was not difficult to find; ESMA's Supervision Department discovered it on the basis of the information publicly available[181].

285. Furthermore, within the PSIs' group, a number of employees were aware of [FSC]'s membership in FNSP. In particular, the analysts of Fitch France who rated FNSP and were in charge of the affirmations on this existing rating knew this board membership of [FSC][182].

286. Even when asked specifically by ESMA's Supervision Department in its first RFI to provide a list of the rated entities for which [FSC] was a board member[183], the PSIs did not make the appropriate check and did not mention FNSP[184].

287. It is thus ESMA's Supervision Department which informed the PSIs on 18 September 2015 that according to public information, [FSC] was a board member of FNSP[185].

288. It is only in autumn 2015 that [TS, officer in the Compliance Department] "began checking the information provided by [Company E] against the most recent [Company E] annual report at the request of [the] manager" [186].

289. In addition, the Board notes that when the CRA III requirements entered into force, the CRA3 Working group which assessed whether the existing disclosures were sufficient and whether there was a need to re-rate or withdraw the existing ratings from (…) or Casino[187] did not assess the existing rating on FNSP because it fully relied on the information received from the PSIs' shareholders and did not make any further checks to see if there were other board memberships to be taken into consideration.

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[180] Supervisory Report, Exhibit 11.1, Fitch's reply to question 1, 19 October 2015.
[181] Exhibit 1, Supervisory Report, p. 52, para 177.
[182] See Supervisory Report, Exhibit 18, Fitch's letter ESMA Preliminary Views Following the Investigation of Fitch Ratings Firewall Policy, 22 July 2016, p. 5, Supervisory Report, Exhibit 21, Fitch's Response to the Third Request for Information, 18 November 2016, p. 3, and Exhibit 22, PSIs' Response to the IIO's First RFI, Response 16.3 (g), p. 20.
[183] Supervisory Report, Exhibit 8, ESMA/2015/877, Request for information concerning Fitch's firewall policy, 21 May 2015, Question 2.
[184] Supervisory Report, Exhibit 9.1, Fitch's reply to Questions 1 & 2, Question 2.
[185] Supervisory Report, Exhibit 10, ESMA/2015/1270, Request for information concerning Fitch Ratings firewall policy 18 September 2015, Question 1. Exhibit 22, PSIs' Response to the IIO's First RFI, Question 16.
[186] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 15.
[187] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 11.

290. Furthermore, regarding specifically the infringement of Point 21 of Section I of Annex III, the relevant Firewall Policy[188] and the Firewall Disclosures Procedures[189] did not at that time identify the relevant function in charge of performing the assessment of the need to re-rate or withdraw an existing rating. The PSIs indicated that "it is also correct that Fitch did not have a written procedure with respect to the assessment of an existing rating should a potential conflict of the type referred to in Annex I, Section B, point 3 of the EU Regulation occur or be discovered – to determine whether to re-rate, withdraw or maintain the relevant rating" [190].

291. Finally, the PSIs initially indicated to ESMA's Supervision Department that "three analysts based in the Paris office misinterpreted the policy requirement and failed to notify Compliance of [FSC]'s board membership on FNSP and continued to rate it while they knew that [FSC] was a board member. Fitch's analysts for FNSP considered that the board referred to did not have strategic influence or control over the activities of FNSP in the way that a normal corporate board influences and controls limited liability companies, and thus concluded (wrongly) that the board position of FNSP was not subject to the requirements of the Firewall Policy. ([Company E]'s Legal Department also shared this view, which formed the basis for not disclosing [FSC] membership to Compliance) [191]".

292. In their Comments on the Supervisory Report, the PSIs clarified their position in this respect: "With the benefit of hindsight, the comment […] that the relevant analysts should have contacted Fitch's Compliance Department concerning FNSP was incorrect, because it is clear […] that the analysts' belief that the "board" of FNSP was not a board in the sense envisaged by CRA III was correct – so that notification was not required; alternatively (for the same reasons) Fitch's Compliance Department would have reached that conclusion had they been asked the question" [192].

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[188] Supervisory Report, Exhibit 9.3.1, Bulletin 10 – Firewall Policy – version 7, 15 May 2012 and Supervisory Report, Exhibit 9.3.2, Bulletin 10 – Firewall Policy – version 8, 20 June 2013.

[189] During the Sample Period, Fitch's Rating Procedures Manual (version 4, 5 and 6 of the Procedures Manual) contained a relevant section on the relevant disclosure as regards Bulletin 10. In July 2014 Fitch extracted the section previously contained in the Rating Procedures Manual into a procedure called the Firewall Disclosure Procedures. See Supervisory Report, Exhibits 9.3.26 to 9.3.29, Extract of the Rating Procedures Manual, versions 4 – 6 and Firewall Disclosure Procedures.

[190] Supervisory Report, Exhibit 18, Fitch's letter ESMA Preliminary Views Following the Investigation of Fitch Ratings Firewall Policy, 22 July 2016, p. 4. See also Exhibit 24, PSIs' Response to the IIO's Second RFI, Question 2: "There were no formal internal procedures governing the assessment process at the time". Moreover, regarding this exhibit, in the PSIs' Comments on the Supervisory Report, the PSIs indicated that they agree with this factual statement and added "Although not previously recorded in writing, it was understood by all relevant personnel that the Compliance Department was responsible for the assessment of whether to withdraw or maintain the FNSP rating", See Exhibit 9, PSIs' Comments on the Supervisory Report, p. 7.

[191] Supervisory Report, Exhibit 18, Fitch's letter ESMA Preliminary Views Following the Investigation of Fitch Ratings Firewall Policy, 22 July 2016, p. 5.

[192] Exhibit 9, PSIs' Comments on the Supervisory Report, p. 6.

293. However, the Board has not found in the file evidence that would show that "the analysts' belief that the "board" of FNSP was not a board in the sense envisaged by CRA III [193]" has been at that time assessed carefully and justified for example on the basis of an internal or external specific assessment of the concept of "board" under the Regulation. On the contrary, when asked by the IIO about whether an internal or external legal assessment of the notion of "administrative or supervisory board" was prepared in view of the entry into force of the Regulation or the CRA III Regulation, the PSIs were unable to submit any specific document[194]. They only refer to the work of the CRA3 Working group, but there is no evidence whatsoever that this group performed a specific assessment of the concept of "board" under the Regulation.

294. On the basis of the above-mentioned elements, the Board finds that Fitch failed to take the special care expected of a CRA. In particular, until autumn 2015, no checks (even basic ones, on the basis of publicly available information) were performed on the information submitted by their shareholders. As Fitch is a registered CRA, it is upon it that the CRA requirements do apply. For that purpose, Fitch should in particular ensure and check that the information used to comply with their regulatory obligations is sufficiently reliable.

295. As a result of that failure, Fitch did not foresee the consequences of its acts, in particular the 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. On this basis, it is considered that Fitch has been negligent when committing the infringement of Point 21 of Section I of Annex III of the Regulation concerning FNSP.

**Fine**

**Determination of the basic amount**

296. Regarding Point 21 of Section I of Annex III of the Regulation, 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:

(b) for the infringements referred to in points 6, 7, 8, 16, 17, 18, 21, 22, 22a, 24, 25, 27, 29, 31, 34, 37 to 40, 42, 42a, 42b, 45 to 49a, 52, 53 and 54 of Section I of Annex III, the fines shall amount to at least EUR 300 000 and shall not exceed EUR 450 000".

[193] Exhibit 9, PSIs' Comments on the Supervisory Report, p. 6.
[194] Exhibit 26, PSIs' Response to the IIO's Third RFI, Question 8. See also Supervisory Report, Exhibit 23, Fitch's Response to the Fourth Request for Information I, 28 April 2017, Question 6.

297. It has been established that Fitch committed the infringement set out at Point 21 of Section I of Annex III of the Regulation, by not having immediately assessed whether there were grounds for re-rating or withdrawing the existing credit rating on FNSP. This assessment took place in January 2016.

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

299. In 2015, Fitch had a turnover of GBP 90.21 million[195] (~EUR 124.26 million[196]).

300. Thus, the basic amount of the fine for the infringement listed in Point 21 of Section I of Annex III of the Regulation is set at the higher end of the limit of the fine set out in Article 36a (2) (b) of the Regulation and shall not exceed EUR 450 000.

Aggravating factors

301. 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.

302. 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.

303. It does not appear in the file that the infringement by Fitch of Point 21 of Section I of Annex III of the Regulation has been committed repeatedly with regard to FNSP's existing rating.

304. This aggravating factor is thus not applicable for the infringement by Fitch of Point 21 of Section I of Annex III of the Regulation.

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

306. The infringements by Fitch of Point 21 of Section I of Annex III of the Regulation was committed for more than six months: indeed, the reassessment of whether to re-rate or withdraw the FNSP rating took place only in January 2016 [197], whereas the requirement entered into force with the CRA III in June 2013 when the FNSP rating was existing.

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[195] 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 GBP 90.21 million.

[196] The exchange rate calculations are based on the ECB's Economic Bulletin, Issue 1/2018, which states that the average exchange rate for 2015 was EUR 1 = GBP 0.726, see Exhibit 38, ECB, Economic Bulletin, Issue 1/2018, p. S 6.

[197] Supervisory Report, Exhibit 21, Fitch's Response to the Third Request for Information, 18 November 2016, p. 2.

307. This aggravating factor is thus applicable to the infringement by Fitch of Point 21 of Section I of Annex III of the Regulation.

308. 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.

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

310. 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.

311. 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 of Point 21 is linked to a number of factors, some of them pointing at the role of the compliance function. 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.

312. Thus, the Board does not consider that the infringement of Point 21 of Section I of Annex III by Fitch reveals a systemic weakness in the organisation of the CRA, in particular in its procedures, management systems or internal controls. This aggravating factor is thus not applicable.

313. Finally, the Board notes that the assessment of the application of the aggravating factor under Point I.3 of Annex IV of the Regulation differs from the one to be conducted with regard to the infringements set out at Points 11 and 12 of Section I of Annex III of the Regulation. For example, not all instances of shortcomings in internal controls are necessarily instances of systemic weaknesses in internal controls. Therefore, the above conclusion regarding the aggravating factor has no influence on the assessment of whether there is an infringement of these provisions in the present investigation.

314. 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.

315. 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 21 of Section I of Annex III of the Regulation concerning FNSP (i.e. the breach of the obligation to assess immediately if there is a need to re-rate or withdraw the existing rating), if these

deviations could not be explained by other reasons. Such a demonstration would be very difficult to achieve. In the present investigation, there is no evidence in the file that would support such a demonstration.

316. It should also be noted that the PSIs indicated the following: [198]: "Fitch Ratings' [Senior] Credit Officer carried out [in response to the IIO's First RFI[199]] a review of the quality of the credit ratings for […] FNSP 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". In particular, this review noted that "Fitch France's rating of FNSP was in line with criteria. The main rationale of the FNSP rating since Fitch France first rated it in 2004 is the application of the Public Sector Entity criteria, as FNSP is a not-for-profit higher education institution and is fully controlled and supervised by the French state. FNSP's rating is based on a bottom-up analysis and therefore combines the financial strength of FNSP with Fitch France's view that ultimately government intervention is likely in the event of any distress". In addition, "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 FNSP".

317. On that basis, it is not established in the present investigation that the infringement of Point 21 of Section I of Annex III of the Regulation committed by Fitch concerning the FNSP rating had a negative impact on the quality of its ratings. The aggravating factor is therefore not applicable.

318. Annex IV, Point I. 5. If the infringement has been committed intentionally, a coefficient of 2 shall apply.

319. This aggravating factor is not applicable because there is no evidence that the infringement of Point 21 of Section I of Annex III of the Regulation committed by Fitch concerning the FNSP rating have been committed intentionally.

320. 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.

321. In relation to the infringement of Point 21 of Section I of Annex III of the Regulation, the Board notes that the assessment on whether there was a need to re-rate FNSP took place in January 2016[200].

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[198] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 39.
[199] Exhibit 24, PSIs' Response to the IIO's Second RFI, Question 5.
[200] Supervisory Report, Exhibit 21, Fitch's Response to the Third Request for Information, 18 November 2016, p. 2. See also Exhibit 22, PSIs' Response to the IIO's First RFI, Questions 16 and 17. See also Exhibit 24, PSIs' Response to the IIO's Second RFI, Question 2.

322. In addition, the Board considers that the PSIs were asked by the IIO to provide a detailed description of the remedial actions taken. In particular, the PSIs mentioned the following remedial actions[201], which are relevant for the infringement of Point 21 of Section I of Annex III of the Regulation committed respectively by Fitch France and Fitch concerning FNSP:

323. Initiation of checks by the compliance function on the ownership interests and board memberships of [Company Z] and [Company E] by using [omitted due to confidentiality] [202].

324. "Compliance updated its Firewall procedures to formally memorialise Fitch Ratings' process for assessing whether a rating needed to be withdrawn, or re-rated" [203].

325. "Assessment of whether Fitch France needed to withdraw or re-rate […] the FNSP ratings"[204].

326. Moreover, the Board notes that [FSC] resigned from his membership to FNSP's board[205].

327. In addition, version 10 of the Bulletin 10 – Firewall Policy (which was published on 17 March 2017) also made it clear that "The requirements with respect to Rated Entities as set forth in this Policy apply regardless of the type, nature or legal form of the Rated Entity, including whether it is a for-profit or not-for-profit entity" [206].

328. This version 10 of the Bulletin 10 – Firewall Policy also provides for a specific "assessment process within the EU" as follows "If an EU Fitch CRA is currently maintaining a Credit Rating on a Rated Entity and/or its Securities, and Compliance subsequently obtains knowledge that there is a Disqualifying Interest in the EU with respect to this Rated Entity, then Compliance will initiate the assessment process […] to determine whether this Credit Rating can continue to be maintained [207]". This assessment process is further defined: "Upon identifying a new potential conflict of interest that may trigger a prohibition as per Section 3.3, convening a group of internal stakeholders charged with performing a documented assessment of: (i) the specifics of the potential conflict, (ii) whether Fitch Ratings may provide, or continue to provide, a Credit Rating to the entity or its Securities given the new potential conflict, and if so, whether the Credit Rating should be re-examined, (iii) the type and nature of the appropriate disclosures, and (iv) whether any

[201] For a full description of the remedial actions, please see Exhibit 22, PSIs' Response to the IIO's First RFI, Question 41.
[202] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 41, p. 51.
[203] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 41, p. 51.
[204] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 41, p. 52.
[205] [FSC] resigned on 10 May 2016. See Supervisory Report, Exhibit 18, Fitch's letter ESMA Preliminary Views Following the Investigation of Fitch Ratings Firewall Policy, p. 5.
[206] Supervisory Report, Exhibit 30, Bulletin 10 – Firewall Policy – version 10, 17 March 2017, Point 2.14. Please also see the published version: Exhibit 79, Bulletin 10: Firewall Policy, Version 10, 17 March 2017.
[207] Supervisory Report, Exhibit 30, Bulletin 10 – Firewall Policy – version 10, 17 March 2017, Point 3.3.

additional measures are required to manage the new potential conflict; and communicating the results of such assessment to the relevant Fitch Ratings employees [208]".

329. On that basis, it is considered that remedial actions have been taken by the PSIs and therefore this aggravating factor is applicable to neither the infringement of Point 20 of Section I of Annex III of the Regulation nor the one of Point 21 concerning FNSP.

330. 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.

331. The Board considers that there is no evidence that the Fitch (including their senior management[209]) has 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.

332. Therefore, the Board concludes that the aggravating factor relating to a lack of cooperation is not applicable.

Mitigating factors

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

334. 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.

335. This mitigating factor is not applicable; the infringement at Point 21 is listed in Section I of Annex III of the Regulation and not in Section II or III as required by this provision.

336. 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.

337. The Board acknowledges that in her first 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, etc[210].

338. This documentation is relevant to understand the framework within which the breaches took place. However, the Board agrees with the IIO and considers that it does not establish

[208] Supervisory Report, Exhibit 30, Bulletin 10 – Firewall Policy – version 10, 17 March 2017, Point 5.2.
[209] The IIO's RFIs were sent to and the responses were received from the PSIs' contact person as designated by the PSIs' legal representative.
[210] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 40.

that the PSIs' senior management has taken all the necessary measures to prevent the infringements. More generally, the Board does not find evidence in the file that the PSIs' senior management has taken all the necessary measures to prevent the infringement of Point 21 of Section I of Annex III of the Regulation regarding FNSP.

339. This mitigating factor is thus not applicable.

340. 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.

341. This mitigating factor is not applicable because Fitch has not brought "quickly, effectively and completely the infringements to ESMA's attention". On the contrary, the compliance function of Fitch became aware of [FSC]'s board membership of FNSP following the receipt of ESMA's Supervision Department's second RFI dated 18 September 2015[211].

342. 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.

343. As explained above regarding the aggravating factor set by Annex IV, Point I. 6. of the Regulation, the Board considers that a number of remedial actions have been taken. The Board considers that these remedial actions should ensure that similar infringements cannot be committed in the future.

344. The Board notes the following considerations developed by the IIO regarding 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. Regarding the concept of "voluntarily" for the purposes of this mitigating factor, the Board refers to para. 223 of this Statement of Findings.

345. First, a number of the remedial actions were identified by the PSIs[212] before the receipt of the Action Plan of 11 October 2016 established by ESMA's Supervision Department. 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.

[211] Supervisory Report, Exhibit 10, ESMA/2015/1270, Request for information concerning Fitch Ratings firewall policy 18 September 2015, Question 1.
[212] Exhibit 22, PSIs' Response to the IIO's First RFI, Questions 41 and 42.

346. Second, ESMA's Supervision Department indicated in its Action Plan that it "lays out the actions proposed by Fitch, as amended by ESMA" [213]. A number of actions of the ESMA's Action Plan are based on the proposals from the PSIs.

347. In addition, even though the Action Plan provides that it "sets out the remedial actions that Fitch is requested to undertake [214]" and identified specific deadlines, 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.

348. Therefore, the Board considers that the PSIs have voluntarily taken measures to ensure that similar infringements cannot be committed in the future. The mitigating factor is thus applicable to the infringement of Point 21 of Section I of Annex III of the Regulation concerning FNSP.

**Determination of the adjusted fine**

349. With regards to Fitch's commitment of the infringement set out at Point 21 of Section I of Annex III of the Regulation concerning FNSP, in accordance with Article 36a (3) of the Regulation, taking into account the applicable aggravating and mitigating factors, the basic amount of EUR 450 000 must be adjusted as follows.

350. The difference between the basic amount and the amount resulting from the application of each individual coefficient linked to the aggravating factor set out in Annex IV, 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.2:

EUR 450 000 x 1.5 = EUR 675 000

EUR 675 000 – EUR 450 000 = EUR 225 000

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

EUR 450 000 x 0.6 = EUR 270 000

EUR 450 000 – EUR 270 000 = EUR 180 000

[213] Supervisory Report, Exhibit 19, ESMA/2016/1453, Action Plan following the investigation on Fitch Rating' Firewall Policy, 11 October 2016, p. 1.
[214] Supervisory Report, Exhibit 19, ESMA/2016/1453, Action Plan following the investigation on Fitch Rating' Firewall Policy, 11 October 2016, p. 6.

Adjusted fine taking into account applicable aggravating and mitigating factors:

EUR 450 000 + EUR 225 000 - EUR 180 000 = EUR 495 000

351. Consequently, following adjustment by taking into account the applicable aggravating and mitigating factors, the amount of the fine to be imposed on Fitch amounts to EUR 495 000.

Financial benefit from the infringements

352. 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". In this respect, it should be noted that in response to a request to provide the revenues received by the PSIs for the affirmations on FNSP of 10 September 2013 and 9 November 2014 (which were solicited[215]), the PSIs indicated the following: "[redacted due to confidentiality][216]".

353. Without the need to decide whether these revenues are an indirect benefit of the infringements, it suffices to note that these revenues were lower than the fines, so Article 36a (4) of the Regulation is not applicable.

**Supervisory measures**

354. 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,[217] 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 issued.

[215] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 45. See also Exhibit 24, PSIs' Response to the IIO's Second RFI, Question 8.

[216] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 44.

[217] 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.*"

## C. Findings of the Board of Supervisors with regard to the infringements at Points 11 and 12 of Section I of Annex III of the Regulation (EC) No 1060/2009 – Fitch's procedures and internal controls

355. This Section of the Statement of Findings analyses whether Fitch has breached the following requirements:

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

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

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

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

358. If these requirements are not met, this would constitute the infringements set out at Points 11 and 12 of Section I of Annex III of the Regulation.

359. On the assessment of Point 3 of Section A of Annex I of the Regulation: the PSIs shall have established adequate policies and procedures to ensure compliance with their obligations under CRA Regulation, including their obligations under Point 3 of Section B of Annex I. In this respect, the Board acknowledges the following.

360. On the one hand, the PSIs had specific policies and procedures to avoid conflicts of interests in general, which included the Bulletin 10 - Firewall Policy, the Bulletin 10A, the Rating Process Manual, the Firewall Disclosure Procedures (and previously the Rating Procedures Manual), and the GOM Procedure in connection with the Firewall Policy Disclosures.

361. However, none of these PSIs' procedures (in particular, the Firewall Policy[218] and the Firewall Disclosures Procedures[219]) identifies the function in charge of performing the

[218] Supervisory Report, Exhibit 9.3.1, Bulletin 10 – Firewall Policy – version 7, 15 May 2012 and Supervisory Report, Exhibit 9.3.2, Bulletin 10 – Firewall Policy – version 8, 20 June 2013.

[219] Fitch's Rating Procedures Manual (version 4, 5 and 6 of the Procedures Manual) initially contained a relevant section on the relevant disclosure as regards Bulletin 10. In July 2014, Fitch extracted the section

assessment of the need to re-rate or withdraw an existing rating. The PSIs indicated that "it is also correct that Fitch did not have a written procedure with respect to the assessment of an existing rating should a potential conflict of the type referred to in Annex I, Section B, point 3 of the EU Regulation occur or be discovered – to determine whether to re-rate, withdraw or maintain the relevant rating[220]". The PSIs also indicated: "There were no formal internal procedures governing the assessment process at the time[221]".

362. More in general, the Board found shortcomings in the procedures centralised at the level of Fitch, such as one that permitted the purely manual publication of the RACs.

363. In particular, with regards to an infringement separately attributed to another PSI (lack of disclosure in a RAC, due to a purely manual mistake in the publication), the Board took into consideration that the PSIs provided[222] 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], 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 3[223]".

364. Therefore, on the basis of the complete file submitted by the IIO and having taken into account the written submissions made on behalf of the PSIs, the Board considers that the PSIs did not establish policies and procedures, which were adequate to ensure compliance with the requirements of Point 3 of Section B of Annex I of the Regulation, with particular reference to the requirements regarding the assessment of whether to re-rate or withdraw an existing rating.

365. On the assessment of Point 4 of Section A of Annex I of the Regulation: the PSIs shall have, among others, sound administrative and accounting procedures and internal control mechanisms. Those internal control mechanisms shall be designed to secure compliance with decisions and procedures at all levels of the PSIs. In this respect, the Board acknowledges the following.

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previously contained in the Rating Procedures Manual into a procedure called the Firewall Disclosure Procedures. See Supervisory Report, Exhibits 9.3.26 to 9.3.29.

[220] Supervisory Report, Exhibit 18, Fitch's letter ESMA Preliminary Views Following the Investigation of Fitch Ratings Firewall Policy, 22 July 2016, p. 4.

[221] See Exhibit 24, PSIs' Response to the IIO's Second RFI, Question 2.

[222] 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.

[223] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 26. See also Question 27.

366. On the one hand, as already noted, the PSIs had a specific procedure and internal control mechanisms to avoid conflicts of interests in general, which included the Bulletin 10 - Firewall Policy, the Bulletin 10A, the Rating Process Manual, the Firewall Disclosure Procedures (and previously the Rating Procedures Manual), and the GOM Procedure in connection with the Firewall Policy Disclosures. It consisted of a number of levels of control involving different persons at different levels of the organisation.

367. On the other hand, however, the Board acknowledges the following substantial shortcomings in the relevant PSIs' internal control mechanisms.

(i) Shortcomings related to the guidance

368. First, the Board considers that the very notion of control implies that there is a pre-established standard setting out the type of conduct to be adopted so as to enable PSIs' staff to identify conduct which does, or does not, comply with this standard. On this aspect, the Board agrees with the IIO and considers that there was inadequate guidance in the sense that the PSIs' guidance to staff on how to comply with the relevant requirements on conflicts of interests was unclear.

369. The Board acknowledges the following examples highlighted in the IIO's Statement of Findings.

370. It is only in August 2015[224] 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%. This created confusion as raised in an email from [BD, Senior Counsel]: "I'm not quite sure about the drafting of this document […]. It doesn't follow the requirements of the EU CRA Regulation […]. [redacted due to confidentiality: Fitch's Senior Employee] and I have discussed in the past that [redacted due to confidentiality: Fitch's Senior Employees] decided to use a 5% threshold for ownership of the rated entity/potential rated entity, since they got updated info from [Company Z] and [Company E] only […]; using the 5% threshold was meant to trigger a request from BRM/GOM to Compliance; Compliance would then check the current actual shareholding with [Company Z]/[Company E], and apply the appropriate restrictions/requirements from the EU CRA Regulation. So I assume this drafting reflects that approach – but I do find a bit confusing[225]". Similarly, in an email dated 1 July 2015, [EG, High level employee belonging to GOM] stated that "based on the attached information we cannot tell when [Company Z] hits that 10% threshold. Can this information be presented such that we can identify: 1) [Company Z]'s equity interest greater than 5%, and 2) [Company Z]'s equity ownership equal to or greater than 10%. Given the obligations imposed by Bulletin 10, I think we need to have the information presented in a different way[226]".

[224] Supervisory Report, Exhibit 24.11, Exhibit 27 – Bulletin 10A, 10 August 2015.
[225] Supervisory Report, Exhibit 24.10.15, Email Re Bulletin 10A, 28 August 2015.
[226] Supervisory Report, Exhibit 24.10.18, Email RE [Company Z], 1 July 2015.

371. On this point, the PSIs indicated that “The 5% threshold reflected Fitch's pre-existing voluntary disclosure process prior to CRA III but was also an appropriate threshold for the purposes of CRA III, since it is axiomatic that notifying Compliance about shareholdings greater than 5% would capture shareholdings of 10% or more”. The IIO agreed with the PSIs that the PSIs’ relevant policies at the time of their registration provided for a disclosure in case of [FSC]’s board membership and [Company E]’s equity interest of more than 5% in the rated entity. During the registration, the college of supervisors decided to use this 5% threshold to extend the disclosure also to [Company Z]’s equity interest. However, this should not have prevented the PSIs, following the entry into force of specific requirements applicable in case of equity interests of 10% or more, to distinguish in Bulletin 10A the entities in which the PSIs’ shareholders had an equity interest of 10% or more from those in which the equity interest was between 5% to 9.99%. This distinction would have ensured consistency with Bulletin 10 – Firewall Policy which provides for different actions depending on whether the equity interest is below or above 10%. By not having done so, this creates confusion and Bulletin 10A thus provides inadequate guidance in this respect to the relevant staff. In this case, the PSIs’ guidance to their staff on how to comply with the relevant requirements on conflicts of interests was unclear. The Board agrees with the IIO and considers it as a shortcoming.

372. Furthermore, while according to the PSIs, Bulletin 10A “identifies the […] current companies with respect to which either (i) such disclosures are required, or (ii) the assignment of new ratings is prohibited[227]", companies in which [Company Z] had a shareholding were not listed in Bulletin 10A[228] until August 2015. This is particularly confusing for analysts and in particular, it is unclear how analysts could know in advance for which entities a new rating was prohibited, or disclosures were required regarding [Company Z]’s conflicts of interest. Bulletin 10A stated that “BRM will advise the relevant Group Head in the event that Fitch would be assigning a rating to an entity for which such a disclosure would be required[229]”. However, the mentioned sentence only refers to the cases of disclosures regarding existing ratings, rather than the prohibition of ratings regarding entities for which there is no existing rating. Moreover, while the Firewall Disclosure Procedures refer to BRM receiving requests to assign a new rating[230], this is

[227] Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 1015.
[228] 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”.
[229] 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.
[230] See Supervisory Report, Exhibit 9.3.27-9.3.29, Firewall Disclosure Procedures.

not referenced in Bulletin 10A. The IIO considers that it is unclear how before August 2015, BRM would be informed and in a position to intervene before the issuance of the rating without the necessary disclosures if analysts are not aware of the entities in which [Company Z] has an interest. The PSIs indicated that "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 [231]". However, it is unclear through which steps and process the relevant analyst would be notified by BRM. In addition, once again, this refers only to disclosures and not the prohibition of ratings regarding entities for which there is no existing rating.

373. Moreover, also with respect to [Company Z], Bulletin 10A included board memberships but only for those board memberships other than the ones in entities in which [Company Z] held more than 5% equity[232]. This created further confusion and uncertainty for analysts to determine what they needed to do to comply with Bulletin 10 – Firewall Policy. If a board membership was listed in Bulletin 10A, the analysts knew that they had to make a disclosure for an existing rating and refrain from issuing a new rating. However, the inverse was not true. The fact that an entity was not listed did not mean that the analyst did not have to make a specific disclosure or refrain from issuing a rating based on the fact that [Company Z] had a board seat because (i) only [Company Z]'s board seats of entities in which it did not have a shareholding of 5% or more were listed and (ii) analysts were not informed of the list of entities in which [Company Z] had a shareholding of 5% or more. This element is also considered by the IIO as a shortcoming in the PSIs' internal control mechanisms. The Board agrees with the IIO's findings.

374. The various weaknesses identified above regarding [Company Z]'s board membership and shareholding are all the more problematic as BRM's checks were ex-post, i.e. [regular], BRM checked to see if any of the mandates signed with issuers "were on the list of companies held by [Company Z] [233]". This ex-post check by BRM, associated with inadequate guidance to analysts regarding [Company Z]'s board membership and shareholdings, meant that in relation to [Company Z], the PSIs' internal control mechanisms were not designed to secure compliance with the PSIs' Bulletin 10 - Firewall Policy.

375. There was also inadequate guidance on what analysts should do if they became aware of a mistake in the Bulletin 10A. No process was defined that would have clearly set out the analysts' duty to report to the compliance function. For example, the analysts who knew that [FSC] was a board member of FNSP did not raise this issue with the compliance

[231] Supervisory Report, Exhibit 9.3.26, Extract of the Rating Procedures Manual, version 4, p. 37.
[232] See for example Supervisory Report, Exhibit 9.3.14, Bulletin 10A- version 14, p. 4: "Cases where the [Company Z] has a seat on an entity management board (other than those listed in B above)".
[233] Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, 3 July 2015, p. 2.

function of the PSIs[234]. The fact that according to the Code of Conduct[235], analysts were to "report […] the activities about which they have knowledge that a reasonable person would question as a potential violation of this Code or applicable law[236]" does not provide sufficiently detailed guidance in the IIO's view about the duty of the analysts in case of mistake in Bulletin 10A. It is only in response to ESMA's Action Plan that a new version of Bulletin 10A included "the general obligation of all Fitch Ratings staff to notify GCG if they are aware of any errors or omissions in Bulletin 10A" [237].

376. In addition, the guidance note addressed to analysts to supplement Bulletin 10 – Firewall Policy and Bulletin 10A dates from February 2012 and was not modified following the changes introduced in Bulletin 10 – Firewall Policy on the basis of the CRA III Regulation. Therefore, this guidance note was not consistent with the version of the Bulletin 10 – Firewall Policy, which entered into force after the CRA III Regulation. For example, it did not cover the disclosures that are required in case of board membership of [FSC]/[Company Z]/[Company E]. The PSIs indicated[238] that the guidance note was "supplemental" to Bulletin 10 – Firewall Policy. In this respect, it is correct that the guidance note explicitly states that it is not "a substitute for Fitch's policies and procedures and should not be read in lieu of them". However, the guidance note also provides that it is meant "to clarify certain Fitch policies and procedures" and in this respect, the IIO considers that the lack of consistency with the said Bulletin 10 – Firewall Policy does not bring clarity but rather confusion to analysts.

377. For all the different elements mentioned above, the Board agrees with the IIO and considers that there were substantial shortcomings in the PSIs' internal control mechanisms because PSIs' guidance to staff on how to comply with the relevant requirements on conflicts of interests was unclear.

(ii) Shortcomings related to the controls

378. Second, the Board considers that there must be in the internal control mechanisms of the PSIs a clear identification of the type of control activities to be carried out and the persons in charge of these control activities at the different organisational levels. The rules, roles and control activities as set out in the internal control mechanisms must also ensure that they are implemented in practice. On those two aspects, the Board considers that there

[234] See Supervisory Report, Exhibit 18, Fitch's letter ESMA Preliminary Views Following the Investigation of Fitch Ratings Firewall Policy, 22 July 2016, p. 5.
[235] 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.
[236] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 34.
[237] Supervisory Report, Exhibit 54, ESMA Action Plan Point 4 – Report on enhancements to Controls Post ESMA's investigation into the Fitch Ratings Firewall Policy, p. 3.
[238] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 32.

were substantial shortcomings because of an inadequate identification of the control activities and/or persons in charge, and/or inadequate implementation.

379. The Board acknowledges the following issues highlighted by the IIO in her Statement of Findings.

Regarding the control activities to be carried out by GOM:

380. The PSIs indicated that it is only "In April 2014, at the request of Compliance, [that] GOM documented its longstanding practice" [239] of reviewing relevant RACs and checking whether appropriate disclosures took place. They further stated that the GOM procedure was in place since 2011[240]. Irrespective of whether these checks indeed took place, the fact that the GOM Procedure in connection with the Firewall Policy Disclosures[241] was effective only on 10 April 2014 and not when the relevant regulatory obligations entered into force as described in the relevant versions of the Bulletins 10 and 10A is a shortcoming for the purposes of assessing whether the PSIs had internal control mechanisms designed to secure compliance with in particular these Bulletins. Without a formalised procedure, there is uncertainty about the type of controls to be carried out and by whom.

381. In addition, the GOM Procedure in connection with the Firewall Policy Disclosures[242], and its alleged "longstanding practice[243]" before, focused on checking disclosures. The check was made to determine whether the appropriate disclosure took place in the relevant RACs and the process was about the measures to be taken if the disclosure was missing. The procedure did not set out the checks to be performed and the steps GOM had to follow in case a rating would have been issued on a rated entity for which there was before no existing rating[244]. The PSIs indicated that "if Regulatory Compliance were to be contacted by GOM or the designated BRM members because one of the companies on the lists had been rated by Fitch, Regulatory Compliance would have contacted the relevant party at [Company E] (for both [Company E] and [FSC]) or [Company Z] promptly to request clarification on the then current exact size of the equity interest in the entity in question, and/or the then current board membership, as the case may be. In the event that the equity

[239] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 13.
[240] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 13.
[241] 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.
[242] 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.
[243] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 13.
[244] Supervisory Report, Exhibits 9.3.32 to 9.3.40, GOM Report on Firewall Disclosures. See also Supervisory Report, Exhibit 9.3.30, GOM Procedure 10A – Reviewing Firewall Policy Disclosures – version 1, 10 April 2014 and Supervisory Report, Exhibit 9.3.31, Exhibit GOM Procedure 10A – Reviewing Firewall Policy Disclosures – version 2, 13 May 2015.

interest were 10% or more, or the relevant shareholder sat on such entity's board, Compliance would have instructed BRM or GOM, as the case may be, that, in accordance with the Policy, the rating had to be withdrawn[245]". However, this is not reflected in the GOM Procedure in connection with the Firewall Policy Disclosures[246]. Therefore, the IIO considers that there was inadequate definition of the control activities to be carried out in this respect.

382. Moreover, as already indicated, the entities in which [Company Z] held stakes were not disclosed in Bulletin 10A until August 2015. This information was available only to one BRM staff in the European Union[247] [PG, Senior Officer in the Corporate Finance] and there was no process defined for GOM to get this information about [Company Z]. The fact that until August 2015, [Company Z]'s relevant shareholdings were not included in Bulletin 10A meant that the control activities regarding necessary disclosures carried out by GOM (through the [regular] review of RACs) could not include [Company Z][248]. [Company Z]'s shareholdings were not part of Bulletin 10A and were thus not identified by GOM for its review[249]. Regarding [Company Z]'s equity interests, GOM's review of disclosures was therefore non-existent.

383. It should be added that in any event, as already set out above, the reviews of the lists of shareholdings submitted by [Company Z] were inadequate to assure that the PSIs had not rated entities in contravention of the Regulation, as these lists did not distinguish between [Company Z]'s holding between 5-9.99% and 10% and more equity. Thus, the reviewer did not have the necessary information to perform an effective review. This was pointed out by [LM, Senior Officer] of GOM, when further to ESMA's Supervision Department's first RFI, […] went "through the list to make sure none of the entities are rated by Fitch[250]". Due to the fact that that there was no distinction between [Company Z]'s shareholdings between

[245] Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, 3 July 2015, p. 3. See also footnote 2 of the same document.
[246] 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.
[247] Supervisory Report, Exhibit 23, Fitch's Response to the Fourth Request for Information I, 28 April 2017, p. 9.
[248] Supervisory Report, Exhibits 9.3.32 to 9.3.40, GOM Report on Firewall Disclosures. See also Supervisory Report, Exhibit 9.3.30, GOM Procedure 10A – Reviewing Firewall Policy Disclosures – version 1, 10 April 2014 and Supervisory Report, Exhibit 9.3.31, Exhibit GOM Procedure 10A – Reviewing Firewall Policy Disclosures – version 2, 13 May 2015.
[249] Supervisory Report, Exhibit 24, Fitch's Response to the Fourth Request for Information II, p. 1, and FNSP: "Fondation Nationale des Sciences Politiques was not included in Bulletin 10A (the "Bulletin") as an entity on whose board [FSC]sat during the sample period and therefore was not considered in GOM's [regular] reviews of RACs related to the Fitch rated entities included in the Bulletin", Supervisory Report, Exhibit 11.8, Fitch's reply to question 7, p. 2.
[250] Supervisory Report, Exhibit 24.10.18, Email RE [Company Z], 1 July 2015.

5-9.99% and 10% and more equity, […] indicated that […] could not "tell when [Company Z] hits that 10% threshold[251]".

Regarding the control activities to be carried out by BRM:

384. The PSIs indicated that "[redacted due to confidentiality: regularly], BRM and Accounts produced a report listing all mandates signed with issuers in such [a period]. 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][252]". The PSIs also specified that "this BRM standard practice was not formally written down[253]". It is only in January 2016 that the checks and controls to be carried out by BRM were specified in a procedure named BRM Process Manual[254]. On that basis, the IIO considers that the lack of formalisation of the BRM practice before this date is a substantial shortcoming in the relevant internal control mechanisms of the PSIs.

385. Furthermore, in practice, until 10 August 2015, only one employee of BRM in the European Union[255] [PG, Senior Officer in the Corporate Finance] "was responsible in Europe, for reviewing the list setting forth the entities in which [Company Z] had an equity interest greater than 5%[256]". The steps involved in the verification were not set out in any of the PSIs' procedures and the controls regarding [Company Z]. In particular, there were no safeguards in place to ensure that [PG] fulfilled this task in a regular and effective

[251] Supervisory Report, Exhibit 24.10.18, Email RE [Company Z], 1 July 2015.
[252] Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, 3 July 2015, p. 2.
[253] Supervisory Report, Exhibit 11.7, Fitch's reply to question 6, 19 October 2015.
[254] See Supervisory Report, Exhibit 14, BRM Process Manual, version 1, 1 January 2016, pp. 6-7: "On a [regular] basis each of [Company E], [Company Z], and [FSC] provide Fitch's Head of Regulatory Compliance – EMEA & APAC with their reportable Bulletin 10 equity positions and board memberships. Upon receipt of this information, Fitch's Head of Regulatory Compliance […] updates Bulletin 10A and notified BRM's Global Product Heads, and BRM's Head of Policy and Operations that Bulletin 10A has been updated.
BRM's Global Product Heads and Head of Policy and Operations are responsible for:
- Reviewing the updated Bulletin 10A to determine if any of the entities listed in the Bulletin is a Fitch rated entity, and
- Reconciling the Bulletin 10A entities against Fitch's Marketing Communications Group's […] generated list of rating agreements which are expected to close in the upcoming calendar […].
If any of the Bulletin 10A entities are also a Fitch rated entity, or match an entity on the […] Report, BRM's Head of Policy and Operations must notify the following individuals, as applicable, by email or instruct them to follow the requirements of Bulletin 10 (e.g., include required disclosures, terminate certain engagement discussions, etc, as applicable under such Bulletin):
Following each […] review, BRM's Head of Policy and Operations will provide the Global BRM Group Head, Fitch's Head of Regulatory Compliance – EMEA & APAC, and the Global Operations Management group with a report summarizing the findings of the review".
[255] See Supervisory Report, Exhibit 23, Fitch's Response to the Fourth Request for Information I, 28 April 2017, p. 9 and Supervisory Report, Exhibits 9.3.26 to 9.3.29, Firewall Disclosure Procedures.
[256] Supervisory Report, Exhibit 23, Fitch's Response to the Fourth Request for Information I, 28 April 2017, p. 9.

manner[257], and did indeed not forget to carry out this task. This raises significant concerns regarding the risks that this employee could fail to carry out adequately his tasks until.

Regarding the control activities to be carried out by Regulatory Compliance:

386. Until autumn 2015, the PSIs relied on self-declarations by their shareholders to update Bulletin 10A on a [redacted due to confidentiality: regular] basis. There was no identification in the relevant PSIs' procedures of the checks to be performed by the compliance function to verify the accuracy of the information submitted by the PSIs' shareholders. It is only from autumn 2015 that 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 independent screening […]".

387. Furthermore, there was also no identification of a control and person in charge for checking that the compliance function did conduct its task of contacting on a [regular] basis the PSIs' shareholders to update the information of Bulletin 10A.

388. Moreover, the requests to shareholders were not automated. The Firewall Disclosures Policy described a process, which relied on manually putting reminders into calendar and then manually contacting the shareholders. However, while the first three iterations of the policy specifically set out that a member of the team had to insert a calendar entry, from July 2014 this was no longer part of the Policy.

389. In addition, as only one person was responsible for sending these emails, the PSIs ran the risk of the responsible person forgetting or incorrectly sending the [regular] email (for example, omitting some of the requirements). It was the responsibility of [TZ, Compliance Officer], from the first quarter of 2013 to the second quarter of 2014 and of [TS ( Compliance Officer, from the third quarter of 2014 until 2016, to request updates from the shareholders.

390. On this matter also, the Board notes that there was inadequate definition of the control activities to be carried out in order to ensure compliance with the procedures about the conflicts of interest of the PSIs' shareholders.

(iii) Shortcomings related to the documentation

391. Third, the Board considers that documenting and recording the controls carried out is key to having internal control mechanisms that allow knowing and understanding the verifications performed, the result of these verifications and the flaws that were discovered through these verifications and that should be addressed. In this investigation, there is a

[257] Supervisory Report, Exhibit 23, Fitch's Response to the Fourth Request for Information I, 28 April 2017, p. 9: "During the sample period CTM did not conduct any reviews of the activities performed by BRM".

lack of documentation of the controls carried out according to the PSIs, which constitute a significant shortcoming.

392. For example, the PSIs indicated that no record of GOM's verifications carried out with respect to the [Company Z] entities prior to the inclusion of these entities in Bulletin 10A was found[258].

393. In addition, when requested to submit records of the monthly checks performed by BRM before January 2016, the PSIs replied that it "has been unable to identify any records relating to the checks performed by BRM […][259]".

394. On that basis, the Board considers that the lack of documentation showing the controls that were carried out (if these controls have taken place) is a substantial shortcoming in the relevant internal control mechanisms of the PSIs.

395. To conclude on Point 4 of Section A of Annex I of the Regulation, on the basis of the complete file submitted by the IIO and having taken into account the written submissions made on behalf of the PSIs, the Board finds, for the reasons explained above, that the PSIs did not comply with this point because the internal control mechanisms had numerous significant shortcomings and were thus not designed to secure compliance with the procedures regarding, in particular, the conflicts of interest of the PSIs' shareholders.

396. With regards to the legal entity to which the infringements are attributable, the Board acknowledges the following considerations of the IIO.

397. The main control functions for the PSIs operate at a global level and are performed by Fitch. The PSIs indicated that the persons in charge of the internal controls and measures were from the compliance function, the Business Relationship Management (BRM) and the Global Operations Management (GOM) [260].

398. The PSIs also submitted to the IIO a copy of the "agreement concerning the provision of compliance, credit policy and internal control services" which was entered into in September 2011 between the different companies of the Fitch group[261]. This agreement

[258] Supervisory Report, Exhibit 23, Fitch's Response to the Fourth Request for Information I, 28 April 2017, p. 8.
[259] Supervisory Report, Exhibit 23, Fitch's Response to the Fourth Request for Information I, 28 April 2017, pp. 8-9.
[260] Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, 3 July 2015, pp. 3 and 4.
[261] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 3.

provides that Fitch "[…][262]" […][263]. This is consistent with the fact that Fitch France[264], Fitch Spain[265] and Fitch CIS[266] benefited from a derogation regarding the presence of a compliance officer when they were registered.

399. Therefore, on the basis of the above elements, the Board agrees with the IIO and considers that the infringements related to the adequate policies and procedures and the internal control mechanisms are attributable to Fitch.

400. To conclude, on the basis 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 infringed Article 6(2) of the Regulation, in conjunction with Points 3 and 4 of Section A of Annex I, by not having (i) adequate policies and procedures to ensure compliance with its obligations under the Regulation and (ii) internal control mechanisms designed to secure compliance with decisions and procedures at all levels. This constitutes the infringements set out at Points 11 and 12 of Section I of Annex III of the Regulation.

Intent or negligence

401. Article 36a (1) of the Regulation provides as follows:

402. "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."

403. "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".

404. 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.

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[262] 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 4.

[263] 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.

[264] Supervisory Report, Exhibit 5.4, Autorité des Marchés Financiers' decision to register Fitch France SA.

[265] Supervisory Report, Exhibit 5.3, Comisión Nacional de Mercado de Valores' decision to register Fitch Ratings Espana SAU.

[266] Supervisory Report, Exhibit 5.1, FSA's Decision to register Fitch and Fitch Rating CIS Limited, 31 October 2011. According to the PSIs' Transparency Report, during the course of 2013, Fitch CIS "increased its headcount which meant it was no longer eligible to maintain the […] exemption", see Supervisory Report, Exhibit 1, Fitch Ratings Transparency Report 2016, p. 23.

405. 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.

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".

406. The factual background as set out in this Statement of Findings does not establish that there are objective factors which demonstrate that Fitch, their employees or senior managers acted deliberately to commit the infringements of Points 11 and 12 of Section I of Annex III of the Regulation.

407. With regards to the assessment of negligence, the Board acknowledges the following IIO's considerations.

408. Regarding the concept of negligence for the purposes of the Regulation, the Board refers to the developments provided for in paragraphs 147-159 of this Statement of Findings.

409. Regarding the application to the infringements of Points 11 and 12 of Section I of Annex III of the Regulation, the IIO noted the following.

410. Concerning Point 11 of Section I of Annex III of the Regulation, had Fitch taken the special care required from a CRA, it could not have failed to foresee that by not having identified in the PSIs' relevant procedures (in particular, the Firewall Policy and the Firewall Disclosures Procedures ) the function in charge of performing the assessment of the need to re-rate or withdraw an existing rating and by not having provided clarity on the "related third parties", it did not establish policies and procedures, which were adequate to ensure compliance with Point 3 of Section B of Annex I of the Regulation.

411. Concerning Point 12 of Section I of Annex III of the Regulation, a CRA who is normally informed and sufficiently attentive could not have failed to foresee that there were a number of significant shortcomings affecting the guidance provided and the identification, implementation and documentation of the internal controls, which as a consequence implies that its internal control mechanisms were not compliant with the Regulation. In particular, taking into account the duty to take special care, a person who is normally informed and sufficiently attentive would have understood that significant shortcomings such as the lack of records of the controls carried out by GOM and BRM, the lack of formalisation for some time of BRM's and GOM's practice, the confusion regarding the 5% and 10% threshold, the lack of information at the level of analysts and GOM about [Company Z]'s shareholdings, among others, would mean that the internal control mechanisms were in breach of the Regulation.

412. On the basis of the above elements, taking into account the duty to take special care incumbent on Fitch as a CRA, it must be considered that the failure to meet its obligations under Points 3 and 4 of Section A of Annex I of the Regulation is the result of a failure to take special care and that, as a result of that failure, Fitch did not foresee what it should have foreseen, i.e. that its acts and omissions amounted to violations of the Regulation.

413. The Board agrees with the considerations developed by the IIO and finds Fitch to have acted negligently when it committed the infringements of Points 11 and 12 of Section I of Annex III of the Regulation.

**Fines**

**Determination of the basic amounts**

Infringement set out at Point 11 of Section I of Annex III of the Regulation

414. 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; […]

415. 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".

416. It has been established that Fitch committed the infringement set out at Point 11 of Section I of Annex III of the Regulation, by not having in place policies and procedures, which were adequate to ensure compliance with Point 3 of Section B of Annex I of the Regulation. In March 2017, new policies and procedures became effective.

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

418. In 2016, Fitch had a turnover of GBP 92.13 million[267] (~EUR 112.49 million[268]).

419. Thus, the basic amount of the fine for the infringement listed in Point 11 of Section I of Annex III of the Regulation is set at the higher end of the limit of the fine set out in Article 36a(2)(a) of the Regulation and shall not exceed EUR 750 000.

Infringement set out at Point 12 of Section I of Annex III of the Regulation

420. 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; […]

421. 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".

422. It has been established that Fitch committed the infringement set out at Point 12 of Section I of Annex III of the Regulation, by not having in place internal control mechanisms, which were designed to secure compliance with decisions and procedures regarding, in particular, conflicts of interest of the PSIs' shareholders. In March 2017, new policies and procedures[269] became effective.

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

[267] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 1. See also Supervisory Report, Exhibit 7, Fitch Ratings Transparency Report 2017, p. 23. The revenue derived from ratings activities amounted to GBP 92.132 million.
[268] The exchange rate calculations are based on the ECB's Economic Bulletin, Issue 1/2018, which states that the average exchange rate for 2016 was EUR 1 = GBP 0.819, see Exhibit 38, ECB, Economic Bulletin, Issue 1/2018, p. S 6.
[269] See Supervisory Report, Exhibit 53, Compliance Firewall Procedures - 30 Nov 2016, 17 March 2017, and Supervisory Report, Exhibit 30, Bulletin 10 – Firewall Policy – version 10.

424. In 2016, Fitch had a turnover of GBP 92.13 million[270] (~EUR 112.49 million[271]). The previous years, Fitch's turnover was also above the threshold of EUR 50 million[272].

425. Thus, the basic amount of the fine for the infringement listed in Point 12 of Section I of Annex III of the Regulation is set at the higher end of the limit of the fine set out in Article 36a(2)(a) of the Regulation and shall not exceed EUR 750 000.

Aggravating factors

426. 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.

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.

427. Both infringements of Points 11 and 12 of Section I of Annex III of the Regulation have been committed continuously and there is no evidence in the file that would lead to the conclusion that they have been repeated regarding the requirements applicable to the PSIs on conflicts of interests linked to board membership and shareholding of the PSIs' shareholders.

428. This aggravating factor is thus not applicable.

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

429. The two infringements of Points 11 and 12 of Section I of Annex III of the Regulation were committed for more than six months. They started when the CRA III Regulation entered into force and were still on-going on 20 December 2013.

430. This aggravating factor is thus applicable to both infringements of Points 11 and 12.

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.

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

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[270] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 1. See also Supervisory Report, Exhibit 7, Fitch Ratings Transparency Report 2017, p. 23. The revenue derived from ratings activities amounted to GBP 92.132 million.

[271] The exchange rate calculations are based on the ECB's Economic Bulletin, Issue 1/2018, which states that the average exchange rate for 2016 was EUR 1 = GBP 0.819, see Exhibit 38, ECB, Economic Bulletin, Issue 1/2018, p. S 6.

[272] See Exhibit 22, PSIs' Response to the IIO's First RFI, Question 1. For 2014, Fitch's turnover was GBP 99.72 million and for 2015 it was GBP 90.21 million.

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”.

432. The Board also notes that because of their nature, the infringements of Points 11 and 12 of Section I of Annex III of the Regulation imply weaknesses in the PSIs’ procedures and internal controls. Therefore, the application of the aggravating factor set by Point I. 3 of Annex IV of the Regulation should be reserved to the cases where the shortcomings identified for the establishment of the infringements of Points 11 and 12 constitute shortcomings that extend beyond these infringements themselves. There appears to be no specific evidence in the file supporting such a conclusion.

433. This aggravating factor is thus not applicable.

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.

434. 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 infringements of Points 11 and 12 of Section I of Annex III of the Regulation, if these deviations could not be explained by other reasons. Such a demonstration would be very difficult to achieve. In the present investigation, there is no evidence in the file that would support such a demonstration.

435. On that basis, it is not established in the present investigation that the infringements of Points 11 and 12 of Section I of Annex III of the Regulation committed by Fitch had a negative impact on the quality of its ratings. The aggravating factor is therefore not applicable.

Annex IV, Point I. 5. If the infringement has been committed intentionally, a coefficient of 2 shall apply.

436. This aggravating factor is not applicable because there is no evidence that the infringements of Points 11 and 12 of Section I of Annex III of the Regulation by Fitch have been committed intentionally.

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.

437. The PSIs were asked by the IIO to provide a detailed description of the remedial actions taken. The PSIs mentioned a number of remedial actions[273].

438. More generally, regarding remedial actions of the infringement of Point 11 of Section I of Annex III of the Regulation, the Board notes that the Compliance Firewall Procedures effective in March 2017 established a procedure for the assessment of the need to re-rate or withdraw an existing rating[274]. Moreover, the Board found evidence of remedial actions taken with regards to the publication procedure to avoid the occurrence of manual mistakes in the future.

439. Regarding remedial actions of the infringement of Point 12 of Section I of Annex III of the Regulation, the IIO notes that GOM's practices were codified in the GOM Procedure in connection with the Firewall Policy Disclosures on 10 April 2014[275]. In addition to this, GOM's reviews of the RACs regarding [Company Z] were enhanced by including [Company Z]'s shareholdings in Bulletin 10A from 10 August 2015[276]. Moreover, the BRM procedure was enhanced in January 2016 with the introduction of an automated system [omitted due to confidentiality]. An email alert [omitted due to confidentiality][277] would direct a BRM staff member to review Bulletins 10 and 10A to consider whether Fitch may be prevented from issuing a rating or need to disclose an interest[278]". This new process was codified in the BRM Process Manual[279], which also sets out the steps that BRM takes in order to prevent ratings from being issued in circumvention of the Regulation. In addition to this, the Compliance Firewall Procedures effective in March 2017 codified the checks carried out by Regulatory Compliance on the submissions of the PSIs' shareholders[280]. Finally, also effective in March 2017, version 10 of Bulletin 10 – Firewall Policy clarified the role of the analysts[281].

440. On that basis, it is considered that remedial actions have been taken by the PSIs and therefore this aggravating factor is applicable to neither the infringement of Point 11 nor to the one of Point 12 of Section I of Annex III of the Regulation.

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.

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[273] For a full description of the remedial actions, please see Exhibit 22, PSIs' Response to the IIO's First RFI, Question 41.
[274] See Supervisory Report, Exhibit 53, Compliance Firewall Procedures - 30 Nov 2016, 17 March 2017, p. 5.
[275] 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.
[276] Supervisory Report, Exhibit 24.11, Exhibit 27 – Bulletin 10A, 10 August 2015, pp. 4-6.
[277] […] is the PSIs' cloud-based Customer Relationship Management platform.
[278] Supervisory Report, Exhibit 23, Fitch's Response to the Fourth Request for Information I, 28 April 2017, p. 7.
[279] See Supervisory Report, Exhibit 14, BRM Process Manual, version 1, 1 January 2016, pp. 6-7.
[280] See Supervisory Report, Exhibit 53, Compliance Firewall Procedures - 30 Nov 2016, 17 March 2017, p. 4.
[281] Supervisory Report, Exhibit 30, Bulletin 10 – Firewall Policy – version 10, Points 5.1, 5.4. Please also see the published version: Exhibit 79, Bulletin 10: Firewall Policy, Version 10, 17 March 2017.

441. The Board considers that there is no evidence that the PSIs (including their senior management) 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.

442. Therefore, at this stage of the investigation, it is considered that the aggravating factor relating to a lack of cooperation is not applicable.

Mitigating factors

443. 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.

444. 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.

445. This mitigating factor is not applicable; the infringements at Points 11 and 12 are listed in Section I of Annex III of the Regulation and not in Section II or III as required by this provision.

446. 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.

447. The Board notes 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, etc[282].

448. This documentation is relevant to understand the framework within which the breaches took place. However, the Board considers that it does not establish that the PSIs' senior management has taken all the necessary measures to prevent the infringements. More generally, the Board does not find evidence in the file that the PSIs' senior management has taken all the necessary measures to prevent the infringements of Points 11 and 12 of Section I of Annex III of the Regulation.

449. This mitigating factor is thus not applicable.

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

[282] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 40.

450. This mitigating factor is applicable to neither the infringement of Point 11 nor to the one of Point 12 because the PSIs have not brought "quickly, effectively and completely the infringement to ESMA's attention". The PSIs have never brought those infringements at ESMA's attention; they were revealed by the present investigation.

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.

451. As explained above regarding the aggravating factor set by Annex IV, Point I. 6. of the Regulation, the Board considers that a number of remedial actions have been taken. The Board considers that these remedial actions should ensure that similar infringements cannot be committed in the future.

452. The Board must assess 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. Regarding the concept of "voluntarily" for the purposes of this mitigating factor, the Board refers to para. 223 of this Statement of Findings.

453. The Board acknowledges the following.

454. First, a number of the remedial actions were identified by the PSIs[283] before the receipt of the Action Plan of 11 October 2016 established by ESMA and it was acknowledged by ESMA's Supervision Department in its Action Plan that a number of actions of the ESMA's Action Plan are based on the proposals from the PSIs. For example, it is indicated that "ESMA takes note that Fitch has established a working group composed of members of Compliance, GOM, BRM and Legal to enhance the internal control framework for the Firewall Policy[284]".

455. In addition, even though the Action Plan provides that it "sets out the remedial actions that Fitch is requested to undertake[285]" and identified specific deadlines, 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.

456. Therefore, the Board considers that the PSIs have voluntarily taken measures to ensure that similar infringements cannot be committed in the future. The mitigating factor is thus applicable for both the infringement of Point 11 and the one of Point 12 of Section I of Annex III of the Regulation.

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[283] Exhibit 22, PSIs' Response to the IIO's First RFI, Questions 41 and 42.
[284] Supervisory Report, Exhibit 19, ESMA/2016/1453, Action Plan following the investigation on Fitch Rating' Firewall Policy, 11 October 2016, p. 10.
[285] Supervisory Report, Exhibit 19, ESMA/2016/1453, Action Plan following the investigation on Fitch Rating' Firewall Policy, 11 October 2016, p. 6.

**Determination of the adjusted fines**

Infringement set out at Point 11 of Section I of Annex III of the Regulation

457. In accordance with Article 36a (3) of the Regulation, taking into account the applicable aggravating and mitigating factors, the basic amount of EUR 750 000 must be adjusted as follows.

458. The difference between the basic amount and the amount resulting from the application of each individual coefficient linked to the aggravating factor set out in Annex IV, 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.2:

    EUR 750 000 x 1.5 = EUR 1 125 000

    EUR 1 125 000 – EUR 750 000 = EUR 375 000

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

    EUR 750 000 x 0.6 = EUR 450 000

    EUR 750 000 – EUR 450 000= EUR 300 000

    Adjusted fine taking into account applicable aggravating and mitigating factors:

    EUR 750 000 + EUR 375 000 – EUR 300 000 = EUR 825 000

459. Consequently, following adjustment by taking into account the applicable aggravating and mitigating factors, the amount of the fine to be imposed on Fitch would amount to EUR 825000.

Infringement set out at Point 12 of Section I of Annex III of the Regulation

460. In accordance with Article 36a (3) of the Regulation, taking into account the applicable aggravating and mitigating factors, the basic amount of EUR 750 000 must be adjusted as follows.

461. The difference between the basic amount and the amount resulting from the application of each individual coefficient linked to the aggravating factor set out in Annex IV, 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.2:

EUR 750 000 x 1.5 = EUR 1 125 000

EUR 1 125 000 – EUR 750 000 = EUR 375 000

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

EUR 750 000 x 0.6 = EUR 450 000

EUR 750 000 – EUR 450 000= EUR 300 000

Adjusted fine taking into account applicable aggravating and mitigating factors:

EUR 750 000 + EUR 375 000 – EUR 300 000 = EUR 825 000

462. Consequently, following adjustment by taking into account the applicable aggravating and mitigating factors, the amount of the fine to be imposed on Fitch would amount to EUR 825000.

**Supervisory measures**

463. 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[286], 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.

[286] 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**

464. This Final Statement of Findings of the Board of Supervisors concludes that Fitch committed negligently the following infringements:

- Infringement set out at Point 20 of Section I of Annex III of the Regulation (by having issued ratings on Casino despite the fact that [FSC] was a board member of Casino);

- Infringement set out at Point 21 of Section I of Annex III of the Regulation (by not having immediately assessed whether there were grounds for re-rating or withdrawing the existing credit rating on FNSP because [FSC] was a board member of FNSP);

- Infringement set out at Point 11 of Section I of Annex III of the Regulation (by not having adequate policies and procedures to ensure compliance with its obligations under the Regulation), and

- Infringement set out at Point 12 of Section I of Annex III of the Regulation (by not having internal control mechanisms designed to secure compliance with decisions and procedures at all levels).

465. 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".

466. 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.

467. Therefore, taking into account applicable aggravating and mitigating factors, the overall fine to be imposed on Fitch for four infringements committed with negligence would amount to EUR 3 195 000 (EUR 1 050 000 + EUR 495 000 + EUR 825 000 + EUR 825 000).

468. Finally, all the infringements committed will require the adoption of a supervisory measure taking the form of a public notice concerning Fitch. The Appendix to this Statement of Findings of the Board contains a draft of the public notice to be issued.

## APPENDIX - [DRAFT] PUBLIC NOTICE

**Fitch Ratings Limited ("Fitch")** is a credit rating agency (CRA) established in the United Kingdom (UK) and is part of the Fitch Group. It operates mainly in the UK and it has branches in Sweden and Dubai. Fitch controls all the credit ratings (CRAs) of the Fitch Group established in the European Union.

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.

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.

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 interest 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.

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 negligently committed four infringements of the Regulation as follows.

**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 A *(Organisational requirements)*

*Point 3. A credit rating agency shall establish adequate policies and procedures to ensure compliance with its obligations under this Regulation.*

*Point 4. A credit rating agency shall have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems.*

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

*A credit rating agency shall implement and maintain decision-making procedures and organisational structures which clearly and in a documented manner specify reporting lines and allocate functions and responsibilities*

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 *(List of infringements)*
Section I. *Infringements related to conflict of interest, organisational or operational requirements*

*11. The credit rating agency infringes Article 6(2), in conjunction with point 3 of Section A of Annex I, by not establishing adequate policies or procedures to ensure compliance with its obligations under this Regulation.*

*12. The credit rating agency infringes Article 6(2), in conjunction with point 4 of Section A of Annex I, by not having sound administrative or accounting procedures, internal control mechanisms, effective procedures for risk assessment, or effective control or safeguard arrangements for information processing systems; or by not implementing or maintaining decision-making procedures or organisational structures as required by that point.*

*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.*

*21. The credit rating agency infringes Article 6(2), in conjunction with the second paragraph of point 3 of Section B of Annex I, by not immediately assessing whether there are grounds for re-rating or withdrawing an existing credit rating or rating outlook.*

**First infringement**

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

**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, was a board member of Casino.

Between 20 June 2013 and 21 May 2015, Fitch issued 4 new ratings on Casino. These ratings were not on Casino, but on instruments newly issued by Casino.

Fitch 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 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 any 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 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 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 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 1.050.000.

**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 is EUR 1.050.000.

**Second infringement**
Fitch committed negligently the infringement set out at Point 21 of Section I of Annex III of the Regulation (by not having immediately assessed whether there were grounds for re-rating or withdrawing the existing credit rating on FNSP because the Shareholder was a board member of *Fondation Nationale des Sciences Politiques* - FNSP);

**A) Legal background**
According to the Regulation, in relation to existing ratings, a CRA has an obligation to assess immediately whether there are grounds for re-rating or withdrawing a rating based on 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**

Between 9 November 2001 and 10 May 2016, the Shareholder, who was holding more than 10% of the capital/voting rights of Fitch, was a member of FNSP's board, which is an "administrative or supervisory board" for the purposes of Point 3(ca) of Section B of Annex I of the Regulation. Fitch France (100% owned by Fitch) issued a rating on FNSP on 8 September 2004. It was thus an existing rating when the requirement regarding the immediate assessment of whether to re-rate or withdraw existing ratings entered into force in June 2013. Fitch, which was responsible for this assessment within the PSIs' group,

analysed whether there were grounds to withdraw or re-rate this existing rating only in January 2016.

Consequently, the Board found that Fitch failed to comply with the requirement set out at the second paragraph of Point 3 of Section B of Annex I 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 failed to comply with the requirement of Article 6(2), in conjunction with the second paragraph of Point 3 of Section B of Annex I of the Regulation, and thus committed the infringement set out at Point 21 of Section I of Annex III of the Regulation.

Furthermore, the Board found that Fitch 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 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 495.000.

**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 is EUR 495.000.

**Third infringement**
Fitch committed negligently the infringement set out at Point 11 of Section I of Annex III of the Regulation (by not having adequate policies and procedures to ensure compliance with its obligations under the Regulation)

**A) Legal background**

According to the Regulation, a CRA has an obligation to have in place adequate policies and procedures to ensure compliance with its obligations under the Regulation.

**B) Factual findings and analysis of the Board**

Until 17 March 2017, with regard to Point 3 of Section B of Annex I of the Regulation, Fitch did not have a policy or procedure in place, which identified the function in charge of performing the assessment of the need to re-rate or withdraw an existing rating. More in general, the Board found shortcomings in the procedures centralised at the level of Fitch, such as the one that permitted a purely manual publication of the rating action commentaries.

Consequently, the Board found that Fitch failed to comply with the requirement set out at Point 3 of Section A of Annex I 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 failed to comply with the requirement of Article 6(2), in conjunction with Point 3 of Section A of Annex I of the Regulation, and thus committed the infringement set out at Point 11 of Section I of Annex III of the Regulation.

Furthermore, the Board found that Fitch 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 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 825.000.

### 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 is EUR 825.000.

**Fourth infringement**
Fitch committed negligently the infringement set out at Point 12 of Section I of Annex III of the Regulation (by not having internal control mechanisms designed to secure compliance with decisions and procedures at all levels).

### A) Legal background

According to the Regulation, a CRA has an obligation to have in place internal control mechanisms designed to secure compliance with decisions and procedures at all levels of that CRA.

### B) Factual findings and analysis of the Board

Fitch's internal control mechanisms regarding conflicts of interests have been subject to review, with particular attention to the obligations set out in Point 3 of Section B of Annex I of the Regulation.

Based on this review, the Board found that there were a number of significant shortcomings in Fitch's internal control mechanisms, such as an unclear guidance to staff on how to comply with the relevant requirements of Point 3 of Section B of Annex I of the Regulation on conflicts of interests, an inadequate identification of the control activities and/or persons in charge, as well as a lack of documentation of the controls carried out.

Consequently, the Board found that Fitch failed to comply with the requirement set out at Point 4 of Section A of Annex I of the Regulation, and thus committed the infringement set out at Point 12 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 failed to comply with the requirement set out at of Article 6(2), in conjunction with Point 4 of Section A of Annex I of the Regulation, and thus committed the infringement set out at Point 12 of Section I of Annex III of the Regulation.

Furthermore, the Board found that Fitch 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 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 825.000.

**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 is EUR 825.000.

**Overall fine**

The overall fine to be imposed on Fitch for four infringements committed with negligence amount to EUR 3.195.000 (EUR 1.050.000 + EUR 495.000 + EUR 825.000 + EUR 825.000).