

DECISION OF THE BOARD OF SUPERVISORS

To adopt supervisory measures and impose fines in respect of infringements committed by Moody's UK

The Board of Supervisors ('Board'),

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

Having regard to Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)¹, as amended by Regulation (EU) 2019/2175 of 18 December 2019² ('ESMA Regulation'), and in particular Article 43(1) thereof,

Having regard to Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies³ (the 'CRA Regulation'), and in particular Articles 24 and 36a thereof,

Having regard to Commission Delegated Regulation (EU) No 946/2012 of 12 July 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to rules of procedure on fines imposed to credit rating agencies by the European Securities and Markets Authority⁴, including rules on the right of defence and temporal provisions (the 'Procedural Regulation'),

Whereas:

- i. The Supervision Department within ESMA concluded, following preliminary investigations, that, with respect to Moody's Investors Service Limited ('Moody's UK' or the 'PSI') and other four EU-based entities belonging to the Moody's group (the 'PSI's

¹ OJ L 331, 15.12.2010, p. 84.

² OJ L 334, 27.12.2019, p. 1–145.

³ OJ L 302 17.11.2009, p. 1.

⁴ OJ L 282 16.10.2012, p. 23.

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 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies.

- ii. On 7 October 2019 ESMA Executive Director appointed an independent investigating officer ('IIO') pursuant to Article 23e (1) of Regulation (EC) No 1060/2009.
- iii. On 27 May 2020, the IIO sent to the PSI's group her initial Statement of Findings, which found that the PSI and the other four entities belonging to the PSI's group had committed one or more of the infringements listed in Annex III to Regulation (EC) No 1060/2009.
- iv. In response to the IIO's initial Statement of Findings, written submissions dated 29 June 2020 were made by the PSI's group.
- v. Following the receipt of written submissions referred to in point iv. above, the IIO amended her initial Statement of Findings and incorporated those amendments into the Statement of Findings dated 17 September 2020.
- vi. On 17 September 2020, the IIO submitted to the Board her file relating to the PSI and the other four entities belonging to the PSI's group, which included the initial Statement of Findings dated 27 May 2020, the written submissions made by the PSI on 29 June 2020 and the Statement of Findings dated 17 September 2020.
- vii. On 25 January 2021, 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 file⁵.
- viii. The Board thoroughly discussed the case at its meeting of 28 January 2021. Having considered the complete file submitted by the IIO, the facts described therein, and the applicable legal provisions, the Board expressed agreement with most but not all the IIO's findings.
- ix. The Board, at its meeting on 28 January 2021, provided clear directions and delegated the Chair to finalise, adopt and submit to the PSI the Board's initial Statement of Findings.

⁵ Ruling of the Enforcement Panel (ESMA41-356-101)

- x. On 18 February 2021, on behalf of the Board, ESMA sent the Board's initial Statement of Findings to the PSI and the other four entities belonging to the PSI's group.
- xi. On 4 March 2021, the PSI and the other four entities belonging to the PSI's group informed ESMA that they did not wish to provide any further written submissions in respect of the Board's initial Statement of Findings.
- xii. The Board discussed the case further at its meeting on 23 March 2021.
- xiii. 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.
- xiv. 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.
- xv. The Board decided to issue separate decisions addressed to the PSI and the other four entities belonging to the PSI's group.

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

STATEMENT OF FINDINGS OF THE BOARD OF SUPERVISORS

1 Background

1. The PSI is part of the group of credit rating agencies ("CRAs") of the Moody's Group. The ultimate parent of the PSI, through a multi-layered legal structure, is Moody's Corporation ("MCO"). MCO is based in the United States of America.
2. The Moody's group constitutes one of the largest CRA groups in terms of revenues and size for rating business activity. It is active in the European Union through many subsidiaries.

3. As regards the financial year ended 31 December 2019, based on the Transparency Report⁶, Moody's UK's total revenues (including branches) were EUR 208.5 million (including EUR 192.4 million derived from credit rating services).
4. On 31 October 2011, the college of supervisors in charge of the registration of the PSI's group agreed to the registration of Moody's UK. The authority competent for the registration, in the capacity as home member state authority, issued an individual registration decision⁷.

2 Facts

Relevant PSI's shareholders and rated entities

5. MCO is the parent company of the PSI and of the entities belonging to the PSI's group. Regarding the main shareholders of MCO, the PSI's group provided the following table:

| Name of shareholders | 30 June 2013 | 30 June 2014 | 30 June 2015 | 30 June 2016 | 30 June 2017 | 30 June 2018 |
|--------------------------------|--------------|--------------|--------------|--------------|--------------|--------------|
| Berkshire Hathaway, Inc. | 11.3% | 11.4% | 12.3% | 12.8% | 12.9% | 12.86% |
| The Vanguard Group, Inc. | 6.3% | 6.8% | 7.1% | 7.6% | 8.5% | 8.72% |
| BlackRock Fund Advisors | 5.6% | 5.8% | 6.0% | 5.6% | 5.4% | 5.75% |
| TCI Fund Management, LTD | 3.5% | 5.2% | 1.9% | 0.1% | 0.8% | 0.9% |
| Capital World Investors (U.S.) | 7.7% | 7.0% | 2.5% | 1.4% | 0.7% | 0.7% |

6. Considering that the CRA III Regulation⁹ requirements regarding conflicts of interests entered into force at the end of June 2013, account must be taken to the shareholders holding more than 5% of the PSI's capital/voting rights. Amongst them, Berkshire Hathaway ('BH') was above the 10% threshold.
7. According to the information provided by the PSI's group, during the period covered by the investigation of ESMA Supervisors (i.e. the Sample Period, from 1 January 2013 to 4 September 2017), BH held 10% or more of the capital or voting rights or a board membership position in several entities rated by the PSI's group¹⁰.

⁶ Transparency Report concerning year ended 31 December 2019, available at: https://www.moodys.com/sites/products/ProductAttachments/BP55477_EU_TransparencyReport_2020.pdf

⁷ Supervisory Report, Exhibit 2, ESMA Press release, 31 October 2011; Supervisory Report, Exhibit 3, BaFin notification of registration, 31 October 2011; Supervisory Report, Exhibit 4, AMF notification of registration, 28 October 2011; Supervisory Report, Exhibit 5, Consob notification of registration, 28 October 2011; Supervisory Report, Exhibit 6, CNMV notification of registration, 31 October 2011; Supervisory Report, Exhibit 7, FSA notification of registration, 31 October 2011. See also Exhibit 16, ESMA Supervisors' Response to the IIO, 22 April 2020, Question 1.

⁸ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, 9 December 2019, Annex I, Question 1. Please also see the caveats provided by the PSI's group regarding this table.

⁹ 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

¹⁰ Supervisory Report, Exhibit 115, List of MIS relevant entities, 14 June 2019. See also Exhibit 1, Supervisory Report, Table 2, p. 43 and Exhibit 16, ESMA Supervisors' Response to the IIO, 22 April 2020, Questions 4 and 5.

8. These rated entities (nine in total) were part of either the Powergrid Holdings group (Northern Electric Finance plc, Northern Powergrid (Northeast) Limited¹¹, Northern Powergrid (Yorkshire) Limited (“NPY”), Northern Powergrid Holdings Company, Yorkshire Power Finance Limited and Northern Electric plc) or the Munich Re group (Munich Reinsurance Co, Ergo Lebensversicherung AG, Victoria Lebensversicherung AG).
9. The Board acknowledges that the information provided by the PSI’s group on these matters is quite confusing, because the PSI’s group provided various versions of the list of the rated entities and also indicated that some shareholding percentage levels are not shown because not publicly disclosed¹².

Relevant ratings

10. On 19 March 2015¹³, a rating committee was convened to assign or affirm a number of ratings. Amongst other, the rating memorandum recommended to “assign (...) A3 senior unsecured rating to the proposed £150 million bond issuance by Northern Powergrid (Yorkshire)¹⁴”. This new rating on a NPY’s instrument (£ 150 million bond) was issued on 26 March 2015¹⁵. No press release was published on this rating. The PSI’s group indicated that they do not always publish press releases for “Anticipated / Subsequent” credit ratings¹⁶.
11. At the date of the rating, BH held a board membership in NPY and there are also indications that it had more than 10% of the capital or voting rights¹⁷.
12. The rating was withdrawn on 21 December 2018 and in the press release it was indicated that “Moody’s has decided to withdraw the rating for shareholding reasons. The application of the shareholding provisions of the European regulation on credit rating agencies requires MIS to withdraw the rating¹⁸”.
13. In Autumn 2013, following the entry into force of the new requirements on conflicts of interest regarding shareholders, the PSI’s group performed an assessment¹⁹ of whether there was a need to withdraw or re-rate the existing ratings concerning the rated entities of the Powergrid Holdings group and the Munich Re group, in which BH held 10% or more of

¹¹ Regarding the reasons why this entity is included, please see Exhibit 16, ESMA Supervisors’ Response to the IIO, 22 April 2020, Question 5.

¹² See for example Supervisory Report, Exhibit 40, MIS First Response to the Sixth RFI, 14 June 2019. See also footnote 134 of the Exhibit 1, Supervisory Report, listing the different versions of the list of rated entities which were provided by the PSI’s group.

¹³ Supervisory Report, Exhibit 120, Rating Committee package, 18 March 2015.

¹⁴ Supervisory Report, Exhibit 121, Rating Committee Memo, 19 March 2015, p. 7.

¹⁵ Supervisory Report, Exhibit 118, List of credit ratings, 9 October 2017; Supervisory Report, Exhibit 119, List of credit ratings, 18 June 2019.

¹⁶ Supervisory Report, Exhibit 12, MIS Response to the Second RFI, 23 October 2017, p. 2.

¹⁷ Exhibit 5, PSIs’ Comments on the Supervisory Report, 30 October 2019, p. 10. See also Supervisory Report, Exhibit 115, List of MIS relevant entities, 14 June 2019, as well as Exhibit 1, Supervisory Report, Table 2, p. 43 and Exhibit 16, ESMA Supervisors’ Response to the IIO, 22 April 2020, Questions 6,7 and 8.

¹⁸ Supervisory Report, Exhibit 122, Press release – NPY withdrawal, 21 December 2018.

¹⁹ Supervisory Report, Exhibit 116, Email correspondence regarding Munich Re Entities, October 2013; Supervisory Report, Exhibit 117, Email correspondence regarding Powergrid Holdings Entities, October 2013.

the capital or voting rights or a board membership position. According to the PSI's group, "(...) no ratings required re-rating or withdrawal (...)"²⁰.

Relevant disclosures

14. In the present case the Board assesses how the PSI's group complied with the obligations regarding the disclosure of potential conflicts of interest related to relevant shareholders. The PSI's group indicated that it "(...) consider that the policy and / or procedure organising the quarterly and annual disclosures are contained in the Process Walk Thru and the run books²¹".
15. In the Procedure on Shareholding, during the Sample Period, it was indicated that "The ratings Delivery & Data Group will disclose in a Press Release when it becomes aware that an EU Credit Rating is currently assigned to a 5% Rated Entity. This disclosure will also be available on the Ratings Disclosure page of www.moodys.com²²". A similar provision exists for 10% shareholder with the addition of "immediate" regarding the disclosure.
16. In the Process Walk-Thru in place during the Sample Period, a number of steps were described²³ about "Disclosing Relationships" and a template was provided for the "Disclosure page for major shareholders and their interests in rated entities²⁴". This page included the list of "5% Rated Entities". A "5% Rated Entity" was defined as "an entity rated by Moody's in the EU in which a 5% Shareholder: (i) holds 5% or more of either the capital or voting rights of the Rated Entity, or of a Related Third party or any other ownership interest in that entity or party, excluding holdings in diversified collective investment schemes and managed funds such as pension funds or life insurance; or (ii) is a member of the Rated Entity or a Related Third Party's administrative or supervisory board". A "5% Shareholder" was itself defined as "a shareholder: (i) holding 5% or more of either the capital or the voting rights of Moody's Corporation, excluding holdings in diversified collective investment schemes and managed funds such as pension funds or life insurance; or (ii) being otherwise in a position to exercise significant influence on the business activities of Moody's Corporation".
17. In the Shareholder Report Run Book²⁵, there are also a number of tasks described regarding the disclosure. Regarding the process for disclosure, the PSI's group indicated that "(...) the Data Governance team assesses the data on the PSIs' 5% (or more) indirect shareholders provided by Investor Relations (working with Ipreo) and the data on entities rated by the PSI provided by Commercial to identify EU entities rated by the PSIs and impacted by their 5% (or more) indirect shareholders. Data Governance determines if the

²⁰ Supervisory Report, Exhibit 14, MIS First Response to the Third RFI, 3 January 2018, p. 9.

²¹ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 32, p. 16. For examples of quarterly and annual disclosures, please see Exhibit 16, ESMA Supervisors' Response to the IIO, 22 April 2020, Question 11.

²² Supervisory Report, Exhibit 71, Procedure on Shareholding, effective date of 3 June 2013, p. 1.

²³ See for example, Supervisory Report, Exhibit 57, Process Walk-thru CRA3, last modified: 3 June 2013, "Process 1.4", p. 4.

²⁴ Supervisory Report, Exhibit 57, Process Walk-thru CRA3, last modified: 3 June 2013, p. 12-13.

²⁵ See Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 32, Document ESMA_00000045. The IIO notes that the version provided by the PSI's group as the one regarding disclosures made between 2013 and 2017 is labelled as "First draft" on page 1.

names in the list provided by Investor Relations reflect the issuance name or the issuer name and then checks this information against the list of rated entity names in the PSIs' internal data base produced by Commercial using a 'fuzzy match' algorithm followed by a manual review (...) ²⁶.

Lack of disclosure or incomplete disclosures²⁷

18. During the investigation by ESMA Supervisors, the PSI's group informed ESMA of a number of disclosures which were not correct.
19. The latest figures provided ²⁸ show that there was a total of 278 cases of lack of disclosure or incomplete disclosures during the Sample Period²⁹. They concerned 101 rated entities.
20. The PSI's group provided an excel table³⁰ which shows a split of the cases of lack of disclosure or incomplete disclosures per country of location of the lead analyst of the rated entities.
21. Regarding rated entities for which the lead analyst was located in the United Kingdom, there were 206 cases of lack of disclosure or incomplete disclosures of which 53 took place in 2013, 58 in 2014, 44 in 2015, 41 in 2016 and 10 in 2017. In total, 65 rated entities were subject to a lack of disclosure or incomplete disclosures³¹.
22. Following questions from the IIO, the PSI's group provided detailed explanations on the reasons that led to the lack of appropriate disclosures. There are four main reasons.
23. First, 60 cases of lack of disclosure or incomplete disclosures³² during the Sample Period were caused by errors in the data script used to compile the disclosures. These errors in the data script were spotted following a review of the functionality in the excel file used to

²⁶ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 33, p. 17.

²⁷ Also referred to in the Exhibits as 'Under-disclosures'.

²⁸ The PSI's group provided conflicting figures during the investigation.

²⁹ Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 37: the PSI's group mentioned 280 under-disclosures. However, it results from Document ESMA_00000100 provided as evidence to Question 37 that 2 of these disclosures are related to analysts located in the US, and they are therefore excluded from the scope of this investigation.

³⁰ Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch; and Exhibit 20, Document ESMA_00000100.

³¹ Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch; and Exhibit 20, Document ESMA_00000100. 34 entities (3i Group plc, Arkema SA, Ashtead Group Plc, Aviva Plc, Banco Popolare Societa Cooperativa, Barclays Plc, BP p.l.c., Brenntag AG, British Sky Broadcasting Group plc, Cable & Wireless Communications plc, Centrica plc, Deutsche Lufthansa Aktiengesellschaft, ELIOR GROUP S.A., First Quantum Minerals Ltd, Hammerson Plc, Inmarsat plc, ITV plc, Kerry Group Plc, Legal & General Group Plc, Liberty Global plc, Lloyds Banking Group plc, Marks & Spencer P.L.C., National Grid Plc, Prudential Public Limited Company, Reckitt Benckiser Group Plc, Royal Dutch Shell Plc, Sanitec Oyj, Severn Trent Plc, SSE plc, Stagecoach Group Plc, Telenet Group Holding NV, Tullow Oil plc, UBS AG and William Hill plc.) were subject to one under-disclosure; ten entities (Cable & Wireless Communications Limited, easyJet Plc, Glencore International AG, innogy SE, Intesa Sanpaolo S.p.A., Old Mutual Plc, Taylor Wimpey plc, Tele Columbus AG, Wm Morrison Supermarkets plc and ICAP plc.) were subject to two under-disclosures; four entities (Bank of Ireland, Friends Life Limited, NOVAE Group plc and SPIE SA) were subject to three under-disclosures; four entities (Aspen Insurance Holdings Limited, Rexel SA, UBI Banca International S.A. and Zurich Insurance Company Ltd) were subject to four under-disclosures; ING Groep N.V. was subject to five under-disclosures; three entities were subject to six under-disclosures; two entities (Investec plc and The Royal Bank of Scotland Group plc.) were subject to seven under-disclosures; three entities (Gold Fields Limited, HSBC Holdings plc and Tate & Lyle plc.) were subject to nine under-disclosures; ArcelorMittal was subject to 11 under-disclosures; National Westminster Bank PLC was subject to 15 under-disclosures; Unilever PLC was subject to 17 under-disclosures and Barclays Bank PLC was subject to 17 under-disclosures.

³² Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 39. See also Exhibit 20, PSIs' Response to the IIO's First RFI, Third Batch, Document ESMA_00000100. There were 10 under-disclosures due to script errors which are related to a rated entity for which the lead analyst was located in France, 6 in Germany and 44 in the UK.

identify the quarterly shareholdings disclosures. This review was prompted in March 2018 by an Internal audit review³³. The PSI's group indicated that "(...) the most likely explanation for the errors in the data script would have been an error on the part of those in the Data Governance team/ Ratings Delivery and Data Team ("RD" / "RDD") tasked with drafting the data script³⁴".

24. Second, 43 cases of lack of disclosure or incomplete disclosures³⁵ are due to the identification of a 5% shareholder close to the timing for publication of the PSIs' quarterly disclosure in the last trimester of 2013. It was indicated that "BlackRock, Inc was identified as a 5% shareholder close to the timing for publication of the PSIs' Q4 2013 disclosure. As such, it was not possible before that publication to complete the PSIs' process to identify the impacted entities, i.e. those EU-rated entities in which BlackRock had a 5% shareholding, for inclusion in the disclosure. (...) the PSIs included BlackRock, Inc as a 5% entity in their Q4 2013 disclosure and then conducted their process to include the identified impacted entities in a further disclosure published in April 2014 (...) ³⁶". A similar problem happened in two instances³⁷ for another 5% shareholder³⁸, for which the impacted rated entities were not identified in time to be properly disclosed in the quarterly disclosure of the last trimester of 2013.
25. Third, it was indicated that 144 cases of lack of disclosure or incomplete disclosures³⁹ are due to the fact that an "(...) error resulted in certain 5% rated entities that were not classified as "ultimate parents" erroneously being excluded from the PSIs' disclosures during the Review Period. (...) the Data Governance team had been taking the erroneous approach of only including in the PSIs' disclosures the rated entity "ultimate parents"⁴⁰".
26. The PSI's group consider that these cases of lack of disclosure or incomplete disclosures were caused by an "human error⁴¹". On the contrary, the Board agrees with the IIO and notes that this exclusion was conducted by a team on 144 occasions throughout the Sample Period.

³³ Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 39.

³⁴ Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 39.

³⁵ Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 38: the PSI's group mentioned 45 under-disclosures. However, it results from Document ESMA_00000100 provided as evidence to Question 38 that 2 of these disclosures are related to analysts located in the US, and they are therefore excluded from the scope of this investigation. There were 7 under-disclosures due to the impossibility to identify in time the impacted rated entities for which the lead analyst was located in France, 6 in Germany, 3 in Italy, 2 in Spain and 25 in the UK.

³⁶ Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 38.

³⁷ Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 38, the PSI's group mentioned 3 instances. However, it results from Exhibit 20, PSIs' Response to the IIO's First RFI, Third Batch, Document ESMA_00000100 provided as evidence to Question 38 that 1 of these instances was related to an analyst located in the US, and it is therefore excluded from the scope of this investigation.

³⁸ Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 38 and Exhibit 20, PSIs' Response to the IIO's First RFI, Third Batch, Document ESMA_00000100: The PSIs' shareholder concerned is Capital World Investors.

³⁹ Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 37. See also Exhibit 20, PSIs' Response to the IIO's First RFI, Third Batch, Document ESMA_00000100. There was 1 under-disclosure due to the exclusion of rated entities not classified as "ultimate parents" which is related to a rated entity for which the lead analyst was located in France, 6 in Germany, 19 in Spain and 118 in the UK.

⁴⁰ Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 37.

⁴¹ Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 37.

27. Fourth, there are 31 cases of lack of disclosure or incomplete disclosures⁴² which are due to errors which “(...) arose from the compilation of the disclosures reports from the source data (...)”⁴³. These errors were identified by the PSI’s group when reviewing the source data in 2018.
28. It was indicated that “These errors are believed by the PSIs to be human errors within the Data Governance team⁴⁴”. On the contrary, the Board notes that the causes of these errors are not clear and led to 31 cases of lack of disclosure or incomplete disclosures throughout the Sample Period.

Relevant PSI’s policies, procedures and organisational and administrative arrangements regarding conflicts of interest related to board memberships and holdings of shareholders

29. As a result of the internal review process performed by the PSI’s group to be prepared for the new requirements stemming from the CRA III Regulation, new versions of a series of policies and procedures were adopted: among others, the Shareholding Policy⁴⁵, the Procedure on Shareholding⁴⁶ and the new guidance document covering the requirements of the CRA Regulation concerning conflicts of interest related to shareholders (the “Process Walk-Thru”)⁴⁷.
30. The Shareholding Policy, dealing, among others, with the conflict of interests related to shareholders or holders of voting rights, during the Sample Period indicated that “In certain circumstances, MIS will disclose those Shareholders who hold certain threshold levels of shares in Moody’s Corporation and/or in Rated Entities or who have significant relationships with Rated Entities. MIS will also assess whether there are grounds for

⁴² Exhibit 19, PSIs’ Response to the IIO’s First RFI, Third Batch, Question 37. See also Exhibit 20, PSIs’ Response to the IIO’s First RFI, Third Batch, Document ESMA_00000100. There were 7 under-disclosures due to the errors identified in the source data which are related to a rated entity for which the lead analyst was located in France, 4 in Germany, 1 in Italy and 19 in the UK.

⁴³ Exhibit 19, PSIs’ Response to the IIO’s First RFI, Third Batch, Question 37.

⁴⁴ Exhibit 19, PSIs’ Response to the IIO’s First RFI, Third Batch, Question 37.

⁴⁵ Supervisory Report, Exhibit 68, Policy on Shareholding (v1), 3 June 2013; and Supervisory Report, Exhibit 69, Policy on shareholding, 3 April 2017. For the current version, please see Exhibit 38, PSIs’ Response to the IIO’s First RFI, First Batch, Document ESMA_000000010, Policy on Shareholding, 9 December 2019.

⁴⁶ Supervisory Report, Exhibit 71, Procedure on Shareholding, 3 June 2013; Supervisory Report, Exhibit 72, Procedure on Shareholding, 5 October 2015; Supervisory Report, Exhibit 73, Procedure on Shareholding, 1 February 2016; Supervisory Report, Exhibit 74, Procedure on Shareholding, 6 September 2016; Supervisory Report, Exhibit 75, Procedure on Shareholding, 3 April 2017. For the current version of the Procedure on Shareholding, please see Exhibit 38, PSIs’ Response to the IIO’s First RFI, First batch), 9 December 2019, Document ESMA_000000010, Procedure on Shareholding, 9 December 2019.

⁴⁷ Various versions of the Process Walk-Thru were provided: See for example Supervisory Report, Exhibit 10, MIS Response to the First RFI, 9 October 2017; Supervisory Report, Exhibit 57, Process Walk-Thru, 6 June 2013; Supervisory Report, Exhibit 61, Process Walk-Thru (v4), 25 October 2013; Supervisory Report, Exhibit 62, Process Walk-Thru, 9 November 2013; Supervisory Report, Exhibit 63, Process Walk-Thru, 9 April 2014; Supervisory Report, Exhibit 64, Process Walk-Thru, 26 August 2015; Supervisory Report, Exhibit 65, Process Walk-Thru, 6 January 2016; Supervisory Report, Exhibit 66, Process Walk-Thru, 9 September 2016, and Supervisory Report, Exhibit 67, Process Walk-Thru, 31 August 2017. For the current version, see Exhibit 17, PSIs’ Response to the IIO’s First RFI, First Batch, and Exhibit 21, PSIs’ Response to the IIO’s First RFI, First Batch, Document ESMA_000000011, Process Walk-Thru, 2 December 2019.

maintaining, withdrawing, or refraining from issuing EU Credit Ratings affected by these threshold levels and, if applicable, their related rating Outlooks or rating Reviews⁴⁸”.

31. Referring also to the conflict of interests related to shareholders or holders of voting rights, the Procedure on Shareholding indicated that “MIS will not assign new EU Credit Ratings to a 10% Shareholder or an Impacted Rated Entity. MIS will not assign new EU Credit Ratings to a Moody’s Corporation Shareholder which becomes a 10% Shareholder and/or a Rated Entity which becomes an Impacted Rated Entity after the Effective Date. The above provisions do not apply to Anticipated/Subsequent Ratings that relate to Credit Ratings already in existence at the relevant time⁴⁹”.
32. An Impacted Rated Entity is defined as: “an EU Rated Entity in which a 10% Shareholder: (i) holds 10% or more of either the capital or voting rights or any other ownership interest of the relevant EU Rated Entity, or a Related Third Party, excluding holdings in diversified collective investment schemes and managed funds such as pension funds or life insurance; or (ii) is a member of its or a Related Third Party’s administrative or supervisory board⁵⁰”.
33. Finally, the Process Walk-Thru was designed to capture in particular the internal control mechanisms put in place to meet the CRA III Regulation requirements. In the version dated 6 June 2013⁵¹, the Process Walk-Thru is divided in four major sections, which are: (i) Guidelines on ban on rating and consideration of withdrawal of rating and disclosure in relation to major shareholders and their interests in rated entities, (ii) Guidelines on Ban on Cross-Shareholding, (iii) Guidelines on Ban on Consultancy or Advisory Services, and (iv) Guidelines on the two ratings requirements for Structured Finance and the requirement for all issuers to consider using a small CRA when requesting two ratings⁵².
34. The PSI’s group indicated that the Process Walk-Thru was treated as “business Guidelines⁵³” and that it was owned simultaneously by four business areas, i.e. Investor

⁴⁸ Supervisory Report, Exhibit 68, Policy on Shareholding (v1), 3 June 2013; and Supervisory Report, Exhibit 69, Policy on shareholding, 3 April 2017.

⁴⁹ Supervisory Report, Exhibit 71, Procedure on Shareholding, 3 June 2013; Supervisory Report, Exhibit 72, Procedure on Shareholding, 5 October 2015; Supervisory Report, Exhibit 73, Procedure on Shareholding, 1 February 2016; Supervisory Report, Exhibit 74, Procedure on Shareholding, 6 September 2016; Supervisory Report, Exhibit 75, Procedure on Shareholding, 3 April 2017.

⁵⁰ Supervisory Report, Exhibit 71, Procedure on Shareholding, 3 June 2013; Supervisory Report, Exhibit 72, Procedure on Shareholding, 5 October 2015; Supervisory Report, Exhibit 73, Procedure on Shareholding, 1 February 2016; Supervisory Report, Exhibit 74, Procedure on Shareholding, 6 September 2016, and Supervisory Report, Exhibit 75, Procedure on Shareholding, 3 April 2017.

⁵¹ Supervisory Report, Exhibit 57, Process Walk-Thru, 6 June 2013, Table of Contents, p. 1.

⁵² In the version of the Walk-thru dated 25 October 2013, a fifth section named “Definitions” was added. See Supervisory Report, Exhibit 61, Process Walk-Thru (v4).

⁵³ Supervisory Report, Exhibit 36, MIS Response to the Fourth RFI, 29 March 2019, Question 2.6, p. 11, and Exhibit 17, PSIs’ Response to the IIO’s First RFI, First Batch, Question 21, p. 11, in which it is explained that “The Process Walk-thru was a first line (i.e. business) document, intended to effectuate the framework provided by the Policy and Procedure on Shareholding. It was classified as ‘business guidelines’ because it was intended to guide the relevant process owners in fulfilling the Policy and Procedure on Shareholding, which implemented the PSIs’ obligations under the Regulation. The Procedure on Shareholding explained which teams would track information to identify affected entities and that RDD would be responsible for disclosing any affected entities in order to meet the PSIs’ obligations under the Regulation. The Process Walk-thru was intended to provide business guidance on a series of process steps that would allow the teams to work together to produce the ultimate disclosure list. Compliance supported and advised on the design of the Process Walk-thru prior to its implementation and assessed its suitability to meet the PSIs’ obligations under the Regulation”.

Relations, Commercial Group, Global Middle Office (“GMO”) and RD (or RDD)⁵⁴. Each of these business areas implemented the Process Walk-Thru and was responsible for some steps of the process⁵⁵.

35. According to the Process Walk-Thru, the sources of information to be used by the PSI’s group were the US Securities and Exchange Commission (“SEC”) website and Ipreo’s Corporate Intelligence website. The PSIs added that “the data received from MIS’s EU rated entities was the sole source of third-party data to identify board memberships held by MCO’s 5% (or more) shareholders in rated entities. It was not, however, the sole data source for identifying shareholder data to meet the Shareholder Provisions⁵⁶”. Moreover, the PSI’s group indicated that they relied on the provision of regulatory filings and data provided by third parties and that they could not rule out the possibility that MCO 5% Shareholders hold shares in other rated entities that were not included on the list⁵⁷.

Relevant PSI’s internal control mechanisms

36. Regarding the internal control mechanisms which are relevant in this case concerning the conflicts of interest linked to shareholders, the Board acknowledges the following.

37. First, in the version dated 6 June 2013, the part of the Process Walk-Thru related to the “guidelines on ban on rating and consideration of withdrawal of rating and disclosure in relation to major shareholders and their interests in Rated Entities” defined 32 steps allocated to different actors⁵⁸:

- Investor Relations was responsible to obtain the information from the relevant sources and map them⁵⁹;
- Commercial was responsible to (i) request to EU rated entities to provide information about their shareholders and board members, at least annually; (ii) cross-check the new issuers against the Shareholders’ list provided by Investor Relations and notify to RD the identification of any new and relevant issuers; and (iii) issue letters to potential new issuers requesting information regarding their shareholders and board memberships⁶⁰;

⁵⁴ Supervisory Report, Exhibit 57, Process Walk-Thru, 6 June 2013, Process Owners, p.1. In the version of the Walk-thru dated 25 October 2013, “RD” was renamed “RDD”: See Supervisory Report, Exhibit 61, Process Walk-Thru (v4), 25 October 2013.

⁵⁵ See for example Supervisory Report, Exhibit 57, Process Walk-Thru, 6 June 2013.

⁵⁶ Supervisory Report, Exhibit 36, MIS Response to the Fourth RFI, 29 March 2019, Question 3.1, p.13.

⁵⁷ Supervisory Report, Exhibit 10, MIS Response to the First RFI, 9 October 2017, Question 3, p.4.

⁵⁸ Supervisory Report, Exhibit 57, Process Walk-Thru, 6 June 2013. To be noted that, from the version of the Process Walk-Thru dated 25 October 2013, there have been 34 steps, which were amended from time to time. See Supervisory Report, Exhibit 61, Process Walk-Thru (v4), 25 October 2013.

⁵⁹ See for example Supervisory Report, Exhibit 57, Process Walk-Thru, 6 June 2013, mainly steps 1 and 3, p. 2.

⁶⁰ See for example Supervisory Report, Exhibit 57, Process Walk-Thru, 6 June 2013, mainly steps 9, 11-a, 11-b, 11-c, 12, 13, 14, 16, 17, 18 and 19, pp. 3 and 4.

- RD: (i) in cooperation with the GMO⁶¹, was responsible to review the Shareholders' list provided by Investor Relations and the data retrieved by Commercial to identify rated entities and related third parties that might be affected by the "5% or 10% shareholding or board membership situations". For this review, RD applied a "fuzzy logic" algorithm⁶², the results of which were further qualitatively reviewed⁶³; (ii) was responsible to maintain and update a shareholder tracker, which captured the shareholders' information and the information on the outreach to shareholders and EU rated entities, and it was required to notify, at least on a quarterly basis, the outcome to GMO and Commercial in case of occurrence of any change; and (iii) was responsible to determine, at the end of the process, which entities were valid for inclusion on the relevant quarter's disclosure⁶⁴; and
- Legal was required to evaluate, in real time and continuously, the significant influence of MCO shareholders against criteria stated in the Process Walk-Thru⁶⁵.

38. The implementation of the Process Walk-Thru during the Sample Period was documented in a table named "Walk-thru Implementation" and provided by the PSIs in two subsequent versions⁶⁶. According to the second version of the "Walk-thru Implementation" table, if we do not take into consideration the steps which were considered by the PSIs as non-applicable, there are lots of steps where there is no or only partial records of completion (for example, steps 1, 2, 5a, 6, 7, 8, 14, 15, 16, 17, 18, 19, 20, 21 and 25 of the Process Walk-Thru)⁶⁷.

⁶¹ However, as described in Supervisory Report, Exhibit 87, Walk-thru implementation, 26 March 2018, and Supervisory Report, Exhibit 88, Walk-thru implementation, 29 March 2019: from Q1 2016 onwards, GMO's review "was discontinued as it was no more relevant for the process". This change was not reflected in the Process Walk-Thru. MIS explained, in Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, Question 11, p. 6, that "The GMO review was discontinued because it did not provide any additional information or analysis beyond that provided by Data Governance".

⁶² Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 10, pp. 4-5, where the "fuzzy logic" algorithm is described by the PSI's group as follows: "The 'fuzzy match' algorithm, referred to in the Supervisory Report as the 'fuzzy logic' algorithm, used is the Jaro-Winkler algorithm, which measures the similarity of two strings of text. It was used by Rating, Delivery & Data ("RDD") to compare the list provided by Ipreo of entities in which each 5% (or more) indirect shareholder in the PSIs held a 5% (or more) interest against the list of PSIs' EU Rated organisations. The algorithm would review each individual entity name in the Ipreo list and attempt to identify the best match (or the most similar text string) among the names on the EU Rated organisations list. (...) The best matches returned by the algorithm that had a similarity score above the threshold of 0.8 were then manually reviewed by RDD".

⁶³ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 10, p. 5: the PSIs explained that the qualitative review is a manual review of the results of the "fuzzy logic" algorithm. In particular, "The manual review by RDD (i.e. the qualitative review) was conducted independently by two separate individuals who would manually review the entity name in the list provided by Ipreo against the PSIs' EU Rated organisation name which the algorithm determined was a best match. In some cases the reviewers would compare the names against internal and external sources to verify if the matched names were truly the same entity. For each pair of names matched by the algorithm, each reviewer was to confirm if the output from the algorithm (a) was matched appropriately, (b) needed further review or (c) was not a match. (...) The results of the two independent reviews would then be compared. Any conflicting results, or results which the reviewers thought needed further review were escalated to a third reviewer who would ultimately assess whether the pair of names was or was not a true match".

⁶⁴ See for example Supervisory Report, Exhibit 57, Process Walk-Thru, 6 June 2013, mainly steps 5-a, 5-b, 5-c, 6, 8, 20, 21, 22, 23, 24 and 25, pp. 2-4.

⁶⁵ Supervisory Report, Exhibit 36, MIS Response to the Fourth RFI, 29 March 2019, point 3.1, p. 4.

⁶⁶ Supervisory Report, Exhibit 87, Walk-thru implementation, 26 March 2018, and Supervisory Report, Exhibit 88, Walk-thru implementation, 29 March 2019.

⁶⁷ Supervisory Report, Exhibit 88, Walk-thru implementation, 29 March 2019. See also Exhibit 16, ESMA Supervisors' Response to the IIO, 22 April 2020, 22 April 2020, Question 9, pp. 5-9.

39. The PSI's group indicated that the implementation of a number of steps was not documented by formal evidences because they were performed through conversations, either oral or via telephone, or in other informal ways⁶⁸.

3. Relevant legal provisions

Preliminary remarks

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

41. Besides the provisions of the (initial) CRA Regulation, which entered into force in December 2009, account must consequently be taken of the amendments to the CRA 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 agencies⁶⁹ ("CRA II Regulation"), which entered into force on 1 June 2011.

42. Further amendments to the CRA Regulation were also introduced through Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011⁷⁰ as well as through Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013⁷¹ 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 16 April 2014⁷² and Regulation (EU) 2017/2402 of 12 December 2017⁷³ also introduced limited changes to the CRA Regulation.

Relevant legal provisions regarding conflicts of interest

43. Following the CRA III Regulation, Article 6(1) of the CRA 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

⁶⁸ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 14, p. 6.

⁶⁹ 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.

⁷⁰ 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.

⁷¹ 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.

⁷² 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.

⁷³ Regulation (EU) No 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012, OJ L 347, 28.12.2017, p. 35.

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”.

44. Article 6(2) of the CRA 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”.
45. Following the CRA III Regulation, Point 3 of Section B of Annex I of the CRA 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”.
46. Point 3(aa) 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, holds 10 % or more of either the capital or the voting rights of the rated entity or of a related third party (...)”.
47. Point 3(ca) of Section B of Annex I also includes as one of these circumstances: “a shareholder or member of a credit rating agency holding 10 % or more of either the capital or the voting rights of that credit rating agency or being otherwise in a position to exercise significant influence on the business activities of the credit rating agency, is a member of the administrative or supervisory board of the rated entity or a related third party”.
48. 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”.
49. Furthermore, the CRA Regulation imposes requirements in case of a shareholder or member of a credit rating agency holding 5% or more of either the capital or the voting rights of that credit rating agency. Point 3a of Section B of Annex I of the CRA Regulation provides that: “A credit rating agency shall disclose where an existing credit rating or rating outlook is potentially affected by either of the following:
 - (a) a shareholder or member of a credit rating agency holding 5 % or more of either the capital or the voting rights of that credit rating agency or being otherwise in a position to exercise significant influence on the business activities of the credit rating agency, holds 5 % or more of either the capital or the voting rights of the rated entity or of a related third party, or of any other ownership interest in that rated entity or third party (...);

(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”.

50. The corresponding infringement is set out at Point 20a of Section I of Annex III of the CRA 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”.

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

52. Finally, more specifically on disclosures, Article 11 of the CRA Regulation states that “A credit rating agency shall fully disclose to the public and update immediately information relating to the matters set out in Part I of Section E of Annex I” and Point 1 of Part I of Section E of the CRA Regulation provides that “A credit rating agency shall generally disclose (...) any actual and potential conflicts of interest referred to in point 1 of Section B”.

53. The corresponding infringement is laid down in Point 11 of Section III of Annex III of the CRA Regulation: “The credit rating agency infringes Article 11(1) by not fully disclosing or immediately updating information relating to the matters set out in Part I of Section E of Annex I”.

Relevant legal provisions regarding internal procedures and internal controls

54. Recital 26 of the CRA 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”.

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

56. In addition, Point 4 of Section A of Annex I of the CRA 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.

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”.

57. Furthermore, Point 7 of Section A of Annex I of the CRA Regulation states that “A credit rating agency shall establish appropriate and effective organisational and administrative arrangements to prevent, identify, eliminate or manage and disclose any conflicts of interest referred to in point 1 of Section B (...)”.

58. Finally, Point 10 of Section A of Annex I of the CRA Regulation provides that “A credit rating agency shall monitor and evaluate the adequacy and effectiveness of its systems, internal control mechanisms and arrangements established in accordance with this Regulation and take appropriate measures to address any deficiencies”.

59. Regarding the infringements, Point 11 of Section I of Annex III of the CRA 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”.

60. Point 12 of Section I of Annex III of the CRA 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”.

61. Point 15 of Section I of Annex III of the CRA Regulation provides that “The credit rating agency infringes Article 6(2), in conjunction with point 7 of Section A of Annex I, by not establishing appropriate and effective organisational or administrative arrangements to prevent, identify, eliminate or manage and disclose any conflicts of interest referred to in point 1 of Section B of Annex I (...)”.

62. Point 18 of Section I of Annex III of the CRA Regulation reads as follows: “The credit rating agency infringes Article 6(2), in conjunction with point 10 of Section A of Annex I, by not monitoring or evaluating the adequacy and effectiveness of its systems, internal control mechanisms and arrangements established in accordance with this Regulation or by not taking appropriate measures to address any deficiencies”.

Other relevant legal provisions

63. Other provisions of the CRA Regulation may be relevant for the purposes of this investigation. In particular, it is worth noting the following definitions provided by the CRA Regulation.

64. Article 3(1)(a) of the CRA 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”.

65. 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”.

4. Infringement set at Point 11 of Section I of Annex III of the CRA Regulation concerning adequate policies and procedures

66. This section of the decision analyses the breach of the CRAs' obligation to establish adequate policies and procedures to ensure compliance with their obligations under the CRA Regulation, as prescribed by Point 3 of Section A of Annex I of the CRA Regulation. If the legal requirement is not met, the infringement set out at Point 11 of Section I of Annex III of the CRA Regulation is established.

Analysis

67. In accordance with Point 3 of Section A of Annex I of the CRA Regulation, the PSI shall have established adequate policies and procedures to ensure compliance with their obligations under this Regulation, including their obligations under Point 3 of Section B of Annex I.

68. In this respect, the Board notes the following. On the one hand, the PSI had specific policies and procedures to avoid conflicts of interest in general, which included the Shareholding Policy⁷⁴ and the Procedure on Shareholding⁷⁵. On the other hand, however, these policies and procedures were not adequate to ensure compliance with Point 3 of Section B of Annex I of the CRA Regulation regarding the prohibition to issue new ratings where a shareholder holding 10 % or more of the PSI holds 10 % or more of the rated entity or is a member of the administrative or supervisory board of the rated entity.

69. In their Comments on the Supervisory Report, the PSI indicated that "MIS acknowledges that its Policy and Procedure on Shareholding provided an exclusion that permitted anticipated / subsequent (i.e. issue) ratings for Impacted Rated Entities until 1 January 2019" and "MIS therefore treated these ratings as being "existing" ratings⁷⁶".

70. Indeed, the Procedure on Shareholding indicated that "MIS will not assign new EU Credit Ratings to a 10% Shareholder or an Impacted Rated Entity. MIS will not assign new EU Credit Ratings to a Moody's Corporation Shareholder which becomes a 10% Shareholder and/or a Rated Entity which becomes an Impacted Rated Entity after the Effective Date. The above provisions do not apply to Anticipated/Subsequent Ratings that relate to Credit Ratings already in existence at the relevant time⁷⁷". Anticipated / Subsequent Ratings were

⁷⁴ Supervisory Report, Exhibit 68, Policy on Shareholding (v1), 3 June 2013; and Supervisory Report, Exhibit 69, Policy on shareholding, 3 April 2017.

⁷⁵ Supervisory Report, Exhibit 71, Procedure on Shareholding, 3 June 2013; Supervisory Report, Exhibit 72, Procedure on Shareholding, 5 October 2015; Supervisory Report, Exhibit 73, Procedure on Shareholding, 1 February 2016; Supervisory Report, Exhibit 74, Procedure on Shareholding, 6 September 2016; Supervisory Report, Exhibit 75, Procedure on Shareholding, 3 April 2017.

⁷⁶ Exhibit 5, PSIs' Comments on the Supervisory Report, p. 1.

⁷⁷ Supervisory Report, Exhibit 71, Procedure on Shareholding, 3 June 2013; Supervisory Report, Exhibit 72, Procedure on Shareholding, 5 October 2015; Supervisory Report, Exhibit 73, Procedure on Shareholding, 1 February 2016; Supervisory Report,

defined as follows in the PSI's Procedure on Shareholding: "Credit Ratings that are derived exclusively from an existing Credit Rating of a program, series, category/class of debt or primary Rated Entity. This includes: An assignment of a Credit Rating to a new issuance, take-down or take-down-like debt within or under an existing rated program, without impact on the program's Credit Rating (including covered bonds, frequent issues from a "shelf registration" or Credit Ratings released from MTN and Euro MTN queues); Credit Ratings based on the pass-through of a primary Rated Entity's Credit Rating, including monoline or guarantee linked ratings; An assignment of Credit Ratings to securities of the same seniority and general terms as previously rated debt when existing Credit Ratings had already contemplated issuance of that debt (including Credit Ratings released from Federal Agency Queue issued by federal agencies or other specialty common queues). This also includes Credit Ratings assigned to new debts or amended and extended credit facilities which replace similarly structured debts or credit facilities at the same rating level; An assignment of a definitive Credit Rating to replace a previously assigned provisional rating (i.e., (P) rating) at the same rating level, or a definitive rating assigned to a security being issued from a program carrying a provisional rating, in each case where the transaction structure and terms have not changed prior to the assignment of the definitive Credit Rating in a manner that would have affected the Credit Rating⁷⁸".

71. The Board acknowledges the reasoning developed by the IIO and considers that she mainly relied on the Board's reasoning, linked to the distinction between 'Issuer ratings' and 'Issue ratings', developed in the Board's Decision of 28 March 2019⁷⁹ (the 'Fitch Decision'). The IIO indeed considered that the matter of anticipated / subsequent ratings is more broadly related to the distinction between what is often referred to as "issue rating" (rating on an instrument) and "issuer rating" (rating on an issuer) and noted that the issue has been already the subject of the previous decisions of the Board.

72. In particular, in that precedent the Board stated that: "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. 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

Exhibit 74, Procedure on Shareholding, 6 September 2016; Supervisory Report, Exhibit 75, Procedure on Shareholding, 3 April 2017.

⁷⁸ Supervisory Report, Exhibit 71, Procedure on Shareholding, 3 June 2013, p. 2-3; Supervisory Report, Exhibit 72, Procedure on Shareholding, 5 October 2015, p. 3; Supervisory Report, Exhibit 73, Procedure on Shareholding, 1 February 2016, p. 3; Supervisory Report, Exhibit 74, Procedure on Shareholding, 6 September 2016, p. 3; Supervisory Report, Exhibit 75, Procedure on Shareholding, 3 April 2017, p. 2-3.

⁷⁹ Decision of the Board of Supervisors to adopt supervisory measures and impose fines in respect of infringements committed by Fitch Ratings Limited UK, 28 March 2019, ESMA-41-356-11, publicly available at https://www.esma.europa.eu/sites/default/files/library/cra_1-2018_decision_on_fitch_uk.pdf; Decision of the Board of Supervisors to adopt supervisory measures and impose fines in respect of infringements committed by Fitch Espana S.A.U., 28 March 2019, ESMA-41-356-13, publicly available at https://www.esma.europa.eu/sites/default/files/library/cra_1-2018_decision_on_fitch_spain.pdf.

evident that the definition contained in the CRA Regulation treats the issue ratings as autonomous ones. 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 consequence⁸⁰.

73. In the present case, the IIO had the same reading of the CRA Regulation and reached the same conclusion. She considered that new issue ratings should not be considered as “existing” ratings for the purposes of the CRA Regulation. In the IIO’s view, this also implies that “Anticipated / Subsequent” ratings cannot be excluded as such from being new ratings and should not have been excluded by the PSI from the ban on new ratings.
74. The Board also acknowledges that in the Response to the IIO’s initial Statement of Findings⁸¹, the PSI argued that the “Anticipated / Subsequent” ratings “are not synonymous with Issue Ratings”, they “are a narrow subset of Issue Ratings with a distinguishable ratings approach that is not capable of being influenced by shareholder conflicts”, and “the low incidence of AS Ratings is a further distinction between the current case and the Fitch Decision”, which would imply in the PSI’s view that “the reasoning of the Fitch Decision is not applicable and should not have been relied on in the SoF”.
75. The Board hereby conducts its independent assessment, starting by exploring the features of the category of ‘Anticipated / Subsequent ratings’.
76. In the Procedure on Shareholdings the ‘Anticipated / Subsequent ratings’ were described as “Credit Ratings that are derived exclusively from an existing Credit Rating of a programme, series, category/class of debt or primary Rated Entity”.
77. As clarified in the Supervisory Report⁸², in the PSI’s view, the concept supporting the ‘Anticipated / Subsequent ratings’ is that the analysis undertaken for an initial credit rating envisages or supports all the credit ratings that are derived from it. In the PSI’s view, credit ratings exclusively derived from existing ratings should benefit the same treatment.
78. On this basis, the Board understands that in the PSI’s view the ratings belonging to the category of ‘Anticipated / Subsequent ratings’, even if issued in a situation of conflict (which is legally presumed in the case of the 10% shareholder threshold), would be “covered” by the existing ratings and treated as such.
79. The Board notes that the distinction between ‘Issuer ratings’ and ‘Issue ratings’ is valid in the case of credit ratings derived by existing ratings of primary Rated Entity. The findings of the Fitch Decisions are therefore directly applicable.

⁸⁰ Decision of the Board of Supervisors to adopt supervisory measures and impose fines in respect of infringements committed by Fitch Ratings Limited UK, 28 March 2019, ESMA-41-356-11, paras 126-128, publicly available at https://www.esma.europa.eu/sites/default/files/library/cra_1-2018_decision_on_fitch_uk.pdf.

⁸¹ Exhibit 159, PSIs’ Response to the IIO’s initial Statement of Findings, pp. 19-20.

⁸² Exhibit 1, Report to the Executive Director, paras. 53-54.

80. More broadly, and with specific regards to the other elements/sub-categories belonging to the category of ‘Anticipated / Subsequent ratings’ (i.e. Credit Ratings that are derived exclusively from an existing Credit Rating of a programme, series, category/class of debt), the Board conducted a literal, contextual and teleological analysis of Point 3 in conjunction with Point 3(ca) of Section B of Annex I of the CRA Regulation, also taking into account the main findings of the Fitch Decision.

Literal interpretation

81. ESMA’s Board considers that the requirement of Point 3 first paragraph in conjunction with Point 3(ca) of Section B of Annex I of the CRA Regulation is clear, especially in light of the definition of a “credit rating” set out in Article 3(a) of the CRA Regulation: “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.
82. The definition of “credit rating” does not make any distinction based on the ‘derivative origin’ of the ratings and therefore necessarily includes also those ratings that are “derived exclusively from an existing Credit Rating of a programme, series, category/class of debt”. As a consequence, such ratings, categorised by the PSI as ‘Anticipated / Subsequent Ratings’ are to be considered as autonomous ratings for the purpose of the CRA Regulation, i.e. not covered by existing ratings.
83. In this respect, it is clear that the ‘Anticipated / Subsequent Ratings’ are captured by structure of Point 3(ca) of Section B of Annex I of the CRA Regulation.
84. Therefore, the Board believes that there is no need to verify if and how the category of ‘Anticipated / Subsequent Ratings’ overlaps with the category of ‘Issue ratings vs. Issuer ratings’. The general rule that can be easily inferred from the literal interpretation of the provisions is that any credit rating, irrespective of any link with pre-existing ratings shall be considered as a new rating for the purpose of the CRA Regulation.
85. Once this principle has been established, the main elements of Point 3(ca) of Section B of Annex I of the CRA Regulation should apply as a consequence. In particular, as a direct consequence, the CRA is forbidden from issuing new ratings in a situation of conflict of interests related to the 10% shareholder threshold.

Contextual and teleological analysis

86. As the Board already stated in the Fitch Decision, it is to be contextually considered that the CRA Regulation includes specific provisions which regulate the treatment of the category of existing ratings in a situation of conflict of interests related to the 10% shareholder threshold.

87. The last paragraph of Point 3 of Section B of Annex I indeed indicates that a CRA shall immediately assess whether there are grounds for re-rating or withdrawing the existing credit rating.
88. From a teleological perspective, the above requirement aims at triggering a “phasing out” of the existing ratings. While, in the meantime, CRAs can maintain existing ratings (also because their sudden withdrawal could be detrimental for the interest of the investors), they cannot issue new ratings.
89. The Board considers that by treating the ‘Anticipated / Subsequent ratings’ as ‘existing ratings’, and therefore by exempting the mentioned category from the ban of new issuances, the PSI illegitimately enlarged the scope of the existing rating as conceived in the CRA Regulation and as a consequence deviated from the purpose of the CRA Regulation itself.
90. For the sake of completeness, the Board also specifically assessed the PSI’s argument that ‘Anticipated / Subsequent ratings’ would be characterised by “a distinguishable rating approach that is not capable of being influenced by shareholder conflicts”.
91. The Board considers that the legal ban of new issuances and the obligation to assess the need to re-rate or withdraw the existing ratings in a situation of conflict of interests related to the 10% shareholder threshold are based on a legal presumption of the influence on the ratings by the shareholder conflicts.
92. No room is therefore left to any interpretation regarding the potential/actual existence of such influence. The alleged lack of capability of the so-called ‘Anticipated / Subsequent ratings’ of being influenced by the shareholder conflicts is therefore irrelevant and immaterial.

Conclusions

93. On this basis, the Board agrees with the IIO’s conclusions and considers that the arguments raised by the PSI must be rejected.
94. The Board finds that Moody’s UK negligently committed the infringement set at Point 11 of Section I of Annex III of the CRA Regulation, by not having established adequate policies and procedures to ensure compliance with its obligation under the CRA Regulation.
95. Moreover, the Board notes that the PSI incorrectly classified the Process Walk-Thru as ‘business guidelines’, formally excluding it from the PSI’s policies and procedures.
96. According to the information provided, the Process Walk-Thru “was classified as ‘business guidelines’ because it was intended to guide the relevant process owners in fulfilling the

Policy and Procedure on Shareholding, which implemented the PSIs' obligations under the CRA Regulation. (...) (...) ⁸³".

97. Nonetheless, the Board notes that the Policy on Shareholding was a short and limited document, while the Process Walk-Thru was the document which framed the implementation by the business of its obligations regarding the conflicts of interest requirements.
98. The Board considers that the Process Walk-Thru is key in the framework put in place by the PSI's group to comply with their obligations under the CRA Regulation. In practice, it constitutes the main document to explain to the relevant teams which steps and actions should be taken to fulfil the provisions of the CRA Regulation regarding the conflicts of interest related to shareholders. For example, the PSI's group indicated that they "(...) consider that the policy and / or procedure organising the quarterly and annual disclosures are contained in the Process Walk Thru (...) ⁸⁴".
99. The above choice, which has a clear negative impact on the completeness of the PSI's procedures, factually integrates the establishment of the infringement set out at Point 11 of Section I of Annex III of the CRA Regulation.

Attribution of the infringement

100. This sub-section assesses to which legal entity within the PSI's group the infringement related to the adequate policies and procedures is attributable. The Board acknowledges the reasoning of the IIO.
101. As a preliminary remark, Article 9 of the CRA Regulation provides that "Outsourcing of important operational functions shall not be undertaken in such a way as to impair (...) the ability of ESMA to supervise the credit rating agency's compliance with obligations under this Regulation".
102. Regarding the facts relevant in this investigation, it was indicated in the Procedure on Shareholding ⁸⁵ that the procedure was issued by the Compliance Department of the PSI's group.
103. The PSI's group submitted a copy of the Rating Services Agreement entered into by each of the entities belonging to the PSI's group and Moody's Investor Services, Inc. (established in the US) ⁸⁶. This agreement relates among other things to the compliance function within the PSI's group in the period from 2013 to 2018. More precisely, it covers

⁸³ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 21, p. 11.

⁸⁴ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 32, p. 16.

⁸⁵ Supervisory Report, Exhibit 71, Procedure on Shareholding, 3 June 2013; Supervisory Report, Exhibit 72, Procedure on Shareholding, 5 October 2015; Supervisory Report, Exhibit 73, Procedure on Shareholding, 1 February 2016; Supervisory Report, Exhibit 74, Procedure on Shareholding, 6 September 2016; Supervisory Report, Exhibit 75, Procedure on Shareholding, 3 April 2017.

⁸⁶ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 24, and Exhibit 25, PSIs' Response to the IIO's First RFI, First Batch, Document ESMA_00000032, Rating Services Agreement.

compliances services, which are defined as including the “monitoring and, on a regular basis, assessing the adequacy and effectiveness of the policies and procedures put in place to ensure compliance with relevant laws and regulations, and the actions taken to address any deficiencies in the credit rating agency's compliance with such obligations (...)”⁸⁷.

104. The PSI's group indicated that “Operating under the Rating Services Agreement, the Compliance function does not sit within one legal entity” and it “(...) operates globally, but on a fully integrated basis. Local Compliance officers in the EU are supported by the central Compliance team, which itself is spread across multiple entities in the PSI's group”⁸⁸.
105. In this respect, the IIO noted that there is in the file an excel table which details the staff of the compliance function during the Sample Period⁸⁹. It results from this table that most of this staff was employed by the US-based legal entities of the PSIs' group, a few by Moody's UK, and by the other EU-based entities belonging to the PSI's group (two out of which got an exemption from having to comply with a number of requirements such as the presence of a compliance officer⁹⁰).
106. In addition, in the Response to the IIO's initial Statement of Findings, the PSI's group indicated that “As demonstrated by the spreadsheet setting out the location of the members of Shareholder Workstream, the head of the Shareholder Workstream, (redrafted: Legal representative in the Shareholder Workstream) and the vast majority of other EU-based members were located in the UK, which was, at the time, the PSIs' EU hub. Accordingly, if the IIO considers the Shareholder Workstream to have negligently infringed the CRA Regulation by deciding to treat AS Ratings as “existing ratings”, only Moody's UK should be found to have infringed the CRA Regulation in this regard”⁹¹. The IIO noted that it results from this spreadsheet⁹² that most of the members of Shareholder Workstream were employed in the US and that, excluding these employees, all the EU-based members were employed in the UK (with the exception of one).
107. Therefore, the IIO considered that overall, based on the information provided by the PSIs and in the very specific circumstances of this investigation, the infringement related to the adequate policies and procedures is attributable to Moody's UK.
108. The Board, in agreement with the IIO, finds that Moody's UK infringed Article 6(2) of the CRA Regulation, in conjunction with Point 3 of Section A of Annex I by not having

⁸⁷ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 24, and Exhibit 25, PSIs' Response to the IIO's First RFI, First Batch, Document ESMA_00000032, Rating Services Agreement, Schedule A, Point 2, p. 13.

⁸⁸ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 24, p. 13.

⁸⁹ Exhibit 72, Excel file detailing changes to staff for Commercial Group, RDD, Investor Relations, GMO, Legal, Compliance and Internal Audit during the Review Period. See also Exhibit 16, ESMA Supervisors' Response to the IIO, 22 April 2020, Question 24.

⁹⁰ Supervisory Report, Exhibit 5, Consob notification of registration, 28 October 2011; Supervisory Report, Exhibit 6, CNMV notification of registration, 31 October 2011.

⁹¹ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, p. 26.

⁹² Exhibit 160, ESMA_00000106.

adequate policies and procedures. This constitutes the infringement set out at Point 11 of Section I of Annex III of the CRA Regulation.

Intent or negligence

109. Article 36a(1) of the CRA Regulation provides as follows: “Where, in accordance with Article 23e(5), ESMA’s Board of Supervisors finds that a credit rating agency has, intentionally or negligently, committed one of the infringements listed in Annex III, it shall adopt a decision imposing a fine in accordance with paragraph 2”. “An infringement by a credit rating agency shall be considered to have been committed intentionally if ESMA finds objective factors which demonstrate that the credit rating agency or its senior management acted deliberately to commit the infringement”.

110. In accordance with Article 36a(1) of the CRA 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. Moreover, 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”.

111. The Board notes that there is evidence in the file that the discussions around the exclusion of Anticipated / Subsequent ratings from the prohibition to issue new ratings in certain situations of conflicts of interest were initiated following concerns raised from a business point of view: “Has Commercial been alerted to the prohibition against rating new debt for these frequent issuers? (...) This prohibition will also have considerable and immediate operational impact to GMO and analyst teams, particularly in cases where we may have rated programs⁹³”. This may cast doubts on PSI’s willingness to abide by the rules because of the business implications of the new requirements and could point to the commitment of the infringement by intent.

112. However, the Board, in agreement with the IIO, considers that there are no other elements in the file indicating the PSI’s intent in relation to the subject matter of this infringement. On that basis, the Board considers that the factual background as set out in this Statement of Findings does not establish that there are objective factors which demonstrate that the PSI, its employees or senior managers acted deliberately to commit the infringement of Point 11 of Section I of Annex III of the CRA Regulation.

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

Preliminary remarks

114. There is no explicit guidance as regards the concept of “negligence” in the CRA Regulation. However, it is clear from the provisions of Articles 24 and 36a of the CRA

⁹³ Exhibit 26, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000071.

Regulation that the term “negligence” as referred to in the CRA Regulation requires more than a determination that there has been the commission of an infringement.

115. Further, it is clear from the second subparagraph of Article 36a(1) of the CRA 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 omission⁹⁴.

116. In addition, “negligence” in the context of the CRA 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.

117. Taking into account the CJEU jurisprudence⁹⁵, the concept of a negligent infringement of the CRA 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.

118. Based on this, the Board will consider negligence to be established in circumstances where the CRA, as a professional firm in the financial services sector subject to stringent regulatory requirements, is required to take special care in assessing the risks that its acts or omissions entail, and has failed to take that care; and as result of that failure, the CRA has not foreseen the consequences of its acts or omissions, including particularly the infringement of the CRA 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.

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

120. 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 entails⁹⁶”. 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.

121. Second, regard should be given to the nature and significance of the objectives and provisions of the CRA Regulation. In this respect, Recitals 1 and 2 of the CRA Regulation

⁹⁴ 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”.

⁹⁵ See for instance Case C-48/98, *Firma Söhl & Söhlke v Hauptzollamt Bremen* [1999] ECR I-7877, para. 58; Case C-64/89, *Deutscher Fernsprecher* [1990] ECR I-2535, para. 19.

⁹⁶ Case T-336/07, *Telefónica, SA and Telefónica de España, SA v Commission* [2012] ECLI:EU:T:2012:172, para. 323.

emphasise the important role and impact of CRAs in global securities and banking markets, the resulting essential need for credit rating activities to be conducted in accordance with principles of integrity, transparency, responsibility and good governance, and the resulting intention of the legislator to provide stringent requirements in relation to the conduct of CRAs. Further, the weight given to these considerations by the legislator is reflected by the nature and extent of the requirements imposed on CRAs under Annex I of the CRA Regulation and by the corresponding infringement provisions under Annex III of the CRA Regulation. Moreover, of more particular note, the CRA Regulation envisages that an important function of a CRA is to ensure that it monitors its own activities in order to comply with the CRA Regulation and in order to identify instances in which its present practices carry the risk of non-compliance with the CRA 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.

122. Therefore, on this basis, the standard of care to be expected of a CRA is high. This high standard of care has been confirmed by the Joint Board of Appeal of the European Supervisory Authorities, which has stated⁹⁷ that “ESMA rightly emphasises that financial services providers and CRAs play an important role in the economy of the EU, as well as in the financial stability and integrity of the financial markets” and that “[a] high standard of care is to be expected of such persons”.

Assessment of negligence in the present case

123. The Board notes the following. In the Comments on the Supervisory Report, the PSI (together with the other entities belonging to the PSI’s group) indicated that it “(...) spent considerable time ahead of the implementation of CRA III designing its Policy and Procedure on Shareholding (...)”⁹⁸.
124. To understand by which process the PSI decided to rely on an interpretation according to which Anticipated / Subsequent rating would be considered as “existing” rating, it is relevant to analyse the work which was conducted internally where the new requirements on conflicts of interest entered into force.
125. In order to get ready for the entry into force of the new requirements stemming from the CRA III Regulation, in the PSI’s group it was established a “CRA3 Project”, which was composed of seven workstreams⁹⁹. These were (i) ‘Sovereign/ Sub-Sovereign’, (ii)

⁹⁷ See para. 285 of the decisions of the Board of Appeal in the Appeals of Svenka Handelsbanken AB, Skandinaviska Enskilda Banken AB, Swedbank AB and Nordea Bank Abp against ESMA’s decision in the Nordic Banks case (ref. BoA D 2019 01, BoA D 2019 02, BoA D 2019 03 and BoA D 2019 01), available at https://eiopa.europa.eu/Publications/Board%20of%20Appeal%20-%2027%20February%202019%20-%20Decisions%202019_01_02_03_04%20-%20Final.pdf.

⁹⁸ Exhibit 5, PSIs’ Comments on the Supervisory Report, p. 10.

⁹⁹ Supervisory Report, Exhibit 42, CRA III – Project overview, 13 November 2012, p. 1, 9-10.

'Methodologies & Unsolicited Ratings', (iii) 'Shareholder Rules', (iv) 'Disclosures/ Conflict Mgmt', (v) 'Fees', (vi) 'Agency Rotation' and (vii) 'Rating Data'¹⁰⁰.

126. Under the CRA3 Project, the responsibilities of the Steering Committee consisted of providing guidance and recommendations to project teams, review and approve project team's key decisions and implementation proposals and deliver communications updates to the respective lines of business¹⁰¹. The project teams were to review and analyse provisions, attend weekly meetings, develop implementation proposals for provisions, translate the latter to actionable work plans for execution, and oversee execution of work plans¹⁰².
127. The "Shareholder Workstream" was incepted in November 2012 and tasked with providing recommendations to the PSIs' Steering Committee for the implementation of the provisions of the CRA III Regulation related to shareholders¹⁰³. It ranked in priority, in the following order, four main shareholding provisions that were (i) 'Ban or disclosure of rating of major shareholders and their interests', (ii) 'Ban on consultancy or advisory services', (iii) 'Ban on cross shareholding (common shareholders in more than one group of CRAs)', and (iv) 'Two ratings requirement for structured finance'¹⁰⁴.
128. It is within the framework of the Shareholder Workstream that the Shareholding Procedure, which introduced an exception to the ban of new ratings for Anticipated / Subsequent ratings, was developed.
129. The PSI was thus asked to provide all documentation from 2012-2013 which served as a basis to decide to insert the exception to the prohibition to issue new rating for Anticipated / Subsequent ratings¹⁰⁵ or which shows a specific assessment of the notion of "existing ratings" and its relationship with Anticipated / Subsequent ratings¹⁰⁶ or which shows a specific legal assessment on this issue¹⁰⁷.
130. Having reviewed the documentation in the file, the Board considers that the PSI did not provide any evidence which would show, that a "carefully considered policy" was adopted when deciding to exclude Anticipated / Subsequent ratings from the prohibition to issue new ratings.
131. The documentation submitted shows that on 11 April 2013, a discussion took place about the concept of existing ratings. The advice which was provided by the Legal representative in the Shareholder Workstream was recorded in an email as follows: "We will immediately disclose where existing ratings are affected by the 10% plus threshold. We will also immediately assess whether there are grounds for re-rating or withdrawing

¹⁰⁰ Supervisory Report, Exhibit 42, CRA III – Project overview, 13 November 2012, p. 8-10.

¹⁰¹ Supervisory Report, Exhibit 42, CRA III – Project overview, 13 November 2012, p. 16.

¹⁰² Supervisory Report, Exhibit 42, CRA III – Project overview, 13 November 2012, p. 16.

¹⁰³ Exhibit 17, PSIs' Response to the IIO's First RFI, Question 6, p. 2.

¹⁰⁴ Supervisory Report, Exhibit 45, Steering Committee Presentation, 13 November 2012, p. 3.

¹⁰⁵ Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, Question 6, p. 1. See also Question 5, p. 1.

¹⁰⁶ Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, Question 7, p. 5.

¹⁰⁷ Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, Question 8, p. 6.

existing credit ratings or outlooks. If there are no grounds for withdrawing them, we will maintain existing ratings and take further rating actions in relation to them, continuing to disclose the shareholding connection. However, we cannot rate new debt that we did not previously have a rating for in relation to those 10%+ entities¹⁰⁸. Therefore, the initial view was clear that rating of new debts was prohibited, i.e. issue rating was covered by the prohibition.

132. The Board also notes that this is in line with the view already presented to the Steering Committee on 15 March 2013 during the “CRA 3 Policy Review Update”, where it was indicated that “The obligation not to rate new debt for 10+% shareholders is set out. Are we comfortable with refusing to rate new issuance but maintaining the rating for existing issuance¹⁰⁹”. The prohibition to rate new issuances is clearly affirmed, the point raised here being about whether to maintain existing ratings which is not forbidden as such under the legislation.
133. The Board finds interesting that following the clear advice by the Legal representative in the Shareholder Workstream given on 11 April 2013, an internal discussion started about the business impact of this new rating prohibition. On 11 April 2013 (23:41), the following point was raised from a business perspective¹¹⁰: “Has Commercial been alerted to the prohibition against rating new debt for these frequent issuers? (...) This prohibition will also have considerable and immediate operational impact to GMO and analyst teams, particularly in cases where we may have rated programs¹¹¹”.
134. Following this email, the Legal representative in the Shareholder workstream wrote the following on 12 April 2013 (08:15): “I was thinking about this some more overnight and think we would probably have a good argument to exclude “Anticipated/Subsequent Ratings” that are linked to Credit Ratings already in existence before the “conflict” (...)”¹¹². Therefore, on the basis of “overnight” thoughts, without any precise explanations to justify this claim, the PSI’s group considered that there were “good arguments” to exclude Anticipated / Subsequent ratings from the prohibition of new ratings. In the Board’s view, this does not point at an in-depth and legally solid consideration of the matter.
135. On 16 April 2013, the (redrafted: high level member of Relationship Management) asked the following to the Legal representative in the Shareholder Workstream: “(...) is there a prohibition on subsequent ratings on (say) Munich re if they issue a new bond? Or ask us to rate a new MTN programme?¹¹³”. Without any precise justification, the reply was the following: “I think we have a reasonable argument to carve these [anticipated / subsequent ratings] out and put them in the “existing ratings” bracket¹¹⁴”.

¹⁰⁸ Exhibit 26, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000071. Bold added by the IIO.

¹⁰⁹ Supervisory Report, Exhibit 43, CRA 3 Policy Review Update Steering Committee, 15 March 2013, p. 8.

¹¹⁰ See Exhibit 159, PSIs’ Response to the IIO’s initial Statement of Findings, p. 22.

¹¹¹ Exhibit 26, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000071.

¹¹² Exhibit 26, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000071.

¹¹³ Exhibit 26, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000071.

¹¹⁴ Exhibit 26, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000071.

136. In addition, the Board notes that in an email dated 17 April 2013 from the (redrafted: member of Compliance) summarizing a call to which she participated with the Legal representative in the Shareholder Workstream and the (redrafted: high level member of Legal), it is stated that “[the legal representative] raised the point on shareholding and rating new debt for an existing rated issuer where there is a 10 percent shareholder. [The (redrafted: high level member of Legal)] is adamant that we should keep assigning ratings where we have a relationship - i.e. to new programmes and debt as well as to subsequent ratings of an entity we already rate that hits the 10 percent threshold. ESMA is consulting and can tell us otherwise but he believes we have a right to tell investors in the market what we think about the debt and disclose the conflict¹¹⁵”. In the Board’s view, the opinion of the PSI about the rating of a new debt for existing rated entities does not appear in this email to be based on a solid and in-depth legal assessment. In this respect, the Board notes that it cannot be accepted that any opinion of a senior lawyer would be considered reasoned by virtue of its position, if there are no evidence that this opinion was based on solid legal grounds. In addition, it results from this email that the fact that other interpretations are possible, in particular the fact that ESMA might have a different interpretation, is clearly acknowledged.
137. Furthermore, on 25 April 2013, the Legal representative in the Shareholders Workstream referring to a call that he had with the (redrafted: high level member of Legal) made the following comment: “Although I didn’t specifically discuss with [(redrafted: high level member of Legal) ¹¹⁶], I think we have a good argument to exclude “Anticipated/Subsequent Ratings” that are linked to Credit Ratings already in existence before the “conflict”. So we can treat these as if they are “existing credit ratings¹¹⁷”. Here again there is a reference to “good argument” without any precise in-depth legal argumentation.
138. Interesting to note, as background information regarding this call, that it is mentioned regarding the general prohibition to issue new ratings that “If the business desires, we could rate these from outside the EU¹¹⁸”. This seems to indicate a willingness of the PSIs to circumvent the new requirements stemming from the CRA III Regulation “if the business desires” by moving the location of the lead analysts outside the EU.
139. This is on the basis of the above-mentioned email of 25 April 2013 that the drafting of the Procedure of Shareholding started. In an email dated 26 April 2013, the (redrafted: member of Compliance) circulated a version of this Procedure “to reflect the latest decision made by (redrafted: high level member of Legal) [the (redrafted: high level member of Legal)] (as communicated by your email of April 25 and as I understood them)¹¹⁹”. It is also

¹¹⁵ Exhibit 27, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000061.

¹¹⁶ As per the request of the PSI’s group in Exhibit 161, 2020.06.29, Cover letter to Response to IIO’s SoF, the names of the relevant employees and/or directors of such entities have been anonymised. However, the job titles are left in order for ESMA’s Board members to understand the discussions which are referred to.

¹¹⁷ Exhibit 28, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000070.

¹¹⁸ Exhibit 28, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000070.

¹¹⁹ Exhibit 29, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000064.

mentioned that “If MIS decides to maintain existing EU ratings, MIS will continue to monitor those ratings and assign Anticipated/Subsequent ratings as applicable¹²⁰”.

140. On 1 May 2013, the Legal representative in the Shareholders Workstream sent his comments on the draft Procedure on Shareholding¹²¹. He inserted the exception to the ban on assigning new ratings for Anticipated / Subsequent Ratings: “The above provisions [i.e. the ban] do not apply to Anticipated/Subsequent Ratings that are referable to Credit Ratings already in existence at the relevant time¹²²”.

141. Moreover, in an email dated 17 May 2013 which summarizes discussions that took place on 16 May 2013 with the (redrafted: high level member of Legal), the Legal representative in the Shareholders Workstream indicated the following: regarding Shareholder Holdings, “our basic position is that we would rate anticipated/subsequent ratings and rate “new” issuance from outside of the EU¹²³”; regarding “Anticipated / Subsequent ratings”, “For now, treat all as “existing ratings” i.e. disclosure but not ban - rationale: (1) “automatically” connected to “existing ratings”; (2) no chance of conflict because no separate rating committee; (3) incidence should be very low as only applies to 10%/10% situation. (...) Be reactive to different interpretation by ESMA¹²⁴”. In this document, it is clear that the PSI’s group was fully aware that their interpretation might not be ESMA’s one. In addition, the rationale given is not based on a detailed assessment of the relevant requirement, but rather on factual elements such as the fact that the incidence would be low and that there would be no rating committee. In practice, this investigation showed that, irrespective of the alleged low incidence, one rating on NPY’s instrument was issued on 26 March 2015 and it was issued following a rating committee¹²⁵.

142. On 21 May 2013, the final version of the Procedure on Shareholding, which was described as final “following (redrafted: high level member of Legal)’s decision on Anticipated / Subsequent Ratings¹²⁶”, was circulated. It includes¹²⁷ the relevant provision in both the section on the ban on assigning new ratings and the section on assessment of existing ratings: “The above provisions do not apply to Anticipated/Subsequent Ratings that relate to Credit Ratings already in existence at the relevant time”. It also includes the definition of Anticipated / Subsequent Ratings.

143. Overall, the Board, in agreement with the IIO, considers that there are clear evidences in the file of internal discussions and calls about whether to exclude Anticipated / Subsequent ratings from the prohibition to issue new ratings. The Legal representative in the Shareholders Workstream and the (redrafted: high level member of Legal) seem to have

¹²⁰ Exhibit 30, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000066, comments on Procedure on Shareholding.

¹²¹ Exhibit 31, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000073.

¹²² Exhibit 32, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000058, comments on Procedure on Shareholding.

¹²³ Exhibit 33, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000062.

¹²⁴ Exhibit 33, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000062.

¹²⁵ Supervisory Report, Exhibit 120, Rating Committee package, 18 March 2015.

¹²⁶ Exhibit 34, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000054.

¹²⁷ Exhibit 35, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000076, Procedure on Shareholding.

played an important role in these discussions. However, they were neither backed nor based on a specific in-depth and legally solid analysis. There is clearly no evidence in the file pointing to an in-depth and proper legal assessment of the issue at that time.

144. On the contrary, the PSI and its group decided not to follow the evident¹²⁸ interpretation of the new requirement. The PSI's view evolved from a clear statement implying that ratings of new debts of existing rated entities were prohibited to more ambiguous statements, after in particular comments raised from a business perspective, that it could be "reasonable", based on "good arguments", to exclude Anticipated / Subsequent ratings.

145. The fact that there might be other interpretations, particularly from ESMA, was also clearly acknowledged ("Be reactive to different interpretation by ESMA¹²⁹"; "ESMA (...) can tell us otherwise¹³⁰"). The very cautious wording used by the PSI ("good argument", "reasonable argument") also does not seem to imply that the PSI considered that their interpretation was the most straightforward one.

146. However, the PSI did not contact ESMA to check whether their interpretation of the new obligations was correct regarding Anticipated / Subsequent ratings.

147. The Board notes that in the Response to the IIO's initial Statement of Findings¹³¹, the PSI tried to explain the various quotes and documents mentioned above, arguing in particular that "The PSIs' approach to AS Ratings was based on a reasonable and proper legal assessment¹³²". However, the Board does not find that these arguments are convincing and disagrees with the PSIs' interpretation and reading of the above evidence. As indicated by the PSIs, "one should first consider what legal question was being asked and how complicated that question was¹³³". The Board agrees with the IIO and considers that this implies that the decision by a CRA (subject to a high standard of care) to diverge from the straightforward interpretation of the CRA Regulation while acknowledging "(...) as (redrafted: Legal representative in the Shareholder Workstream) considered at the time, that "existing ratings", as an undefined term, was open to different interpretations¹³⁴", notably from the regulator, must be justified by a solid and in-depth legal argumentation. The Board agrees with the IIO's view that there is no evidence in the file that would support the existence of such an argumentation, rather the contrary. Having in mind the high

¹²⁸ Regarding the use of the word "evident", see, by analogy, Decision of the Board of Supervisors to adopt supervisory measures and impose fines in respect of infringements committed by Fitch Ratings Limited UK, 28 March 2019, ESMA-41-356-11, paras 126-128, publicly available at https://www.esma.europa.eu/sites/default/files/library/cra_1-2018_decision_on_fitch_uk.pdf.

¹²⁹ Exhibit 33, PSIs' Response to the IIO's First RFI, Second Batch, Document ESMA_00000062.

¹³⁰ Exhibit 27, PSIs' Response to the IIO's First RFI, Second Batch, Document ESMA_00000061.

¹³¹ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, see in particular pp. 21-26.

¹³² Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, p. 21.

¹³³ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, p. 24. In this respect, the IIO also notes that the PSI's group referred in their Response to the IIO's initial Statement of Findings (Exhibit 159, e.g. p. 25) to the decisions of the Board of Appeal in the Nordic Banks case (Appeals of Svenka Handelsbanken AB, Skandinaviska Enskilda Banken AB, Swedbank AB and Nordea Bank Abp against ESMA's decision (ref. BoA D 2019 01, BoA D 2019 02, BoA D 2019 03 and BoA D 2019 01), available at https://eiopa.europa.eu/Publications/Board%20of%20Appeal%20-%2027%20February%202019%20-%20Decisions%202019_01_02_03_04%20-%20Final.pdf). However, the IIO points out that the facts and nature / background of the legal matters to be interpreted in the Nordic Banks case were clearly different from the ones in the present investigation.

¹³⁴ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, p. 24.

standard of care required from CRAs, the arguments raised by the PSI do not change the conclusions regarding negligence.

148. In addition, it should be noted that the PSI indicated that during the registration process of Moody's Investors Service EMEA Limited¹³⁵, i.e. in 2014 one year after the entry into force of the CRA III requirements, a version of the Procedure on Shareholding which included the relevant exclusion regarding Anticipated / Subsequent credit rating was provided to ESMA¹³⁶. However, the PSIs also clarified that "(...) the PSIs do not have a record of this exclusion being explicitly raised with ESMA during the registration procedure of MIS EMEA Limited¹³⁷" and "The PSIs did not affirmatively raise the exclusion to the attention of ESMA during the registration procedure for MIS EMEA Limited because it was fully disclosed and was considered by the PSIs to be a reasonable interpretation of the Regulation (...) ¹³⁸". The PSIs also mentioned other instances where they referred to subsequent ratings in their correspondence to ESMA ¹³⁹. Suffice to note that these documents date back from before the entry into force of the relevant requirements on conflicts of interest in June 2013. These mentions are in fact very general and do not at all give any insight to ESMA regarding the fact that the PSIs treat new issue ratings as "existing" ratings for the purpose of the conflicts of interest rules. In any event, contrary to the PSIs' argumentation¹⁴⁰, the fact that the relevant PSIs' provision excluding Anticipated / Subsequent ratings might have been unnoticed by ESMA Supervisors for some time does not relieve the PSIs from their high duty of care under the CRA Regulation.

149. On the basis of the above, the Board agrees with the IIO's establishment of the PSI's negligence.

Fines

150. The Board preliminary notes that the basic amount of the applicable fine is calculated taking as a reference the latest available official financial statements regarding the PSI's annual turnover in the business year preceding the year of the decision, as recommended by the Joint Board of Appeal of the three ESAs in its Decision of 28 December 2020. Given the proximity of the end of 2020 financial year, the official financial statements of the PSI

¹³⁵ The registration by ESMA of Moody's Investors Service EMEA Ltd took effect on 24 November 2014 (see https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-1399_esma_approves_moodys_investors_service_emea_as_a_credit_rating_agency.pdf). The registration of this CRA was withdrawn by ESMA in July 2019 (see <https://www.esma.europa.eu/press-news/esma-news/esma-withdraws-registration-moodys-investors-service-emea-ltd>).

¹³⁶ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 4, p. 3.

¹³⁷ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 4, p. 4. See also Exhibit 16, ESMA Supervisors' Response to the IIO, 22 April 2020, Question 2: ESMA Supervisors confirmed that the Procedure on Shareholding was included in the application for registration of MIS EMEA Limited and that, to the best of their knowledge, there were no questions or comments raised regarding the Procedure on Shareholding in assessing the application for registration of MIS EMEA Limited.

¹³⁸ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 4, p. 4.

¹³⁹ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 4, p. 4 referring to PSIs' application for registration in 2010 and a letter from the PSI's group to ESMA dated 23 November 2011. Please also see Exhibit 18, PSIs' Response to the IIO's First RFI, Second batch, Question 7, p. 5; Exhibit 36, PSIs' Response to the IIO's First RFI, Second batch, Document ESMA_00000052, and Exhibit 37, PSIs' Response to the IIO's First RFI, Second batch, Document ESMA_00000053.

¹⁴⁰ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, pp. 20-21.

for the FY 2020 are not yet available, thus reference is made to the latest official statements available, namely for the full financial year ended 31 December 2019.

151. The description of the basic amount of the fine as well as the assessment regarding the application of the aggravating and mitigating factors is set out below.

Determination of the basic amount

152. Article 36a of the CRA 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; [...]

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”.

153. It has been established that Moody’s UK committed the infringement set out at Point 11 of Section I of Annex III of the CRA Regulation by not having adequate policies and procedures.

154. To determine the basic amount of the fine, the Board has regard to the latest official financial statements regarding the annual turnover of the PSI.

155. In 2019, Moody’s UK had a total turnover of GBP 197 767 000, corresponding to EUR 225 434 603¹⁴¹ (including branches).

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

Applicable aggravating factors

157. Annex IV of the CRA Regulation lists the aggravating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO’s findings and

¹⁴¹ Based on the official exchange rate for GBP v EUR in 2019: 1.1399
https://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/eurofxref-graph-gbp.en.html

considers applicable to the present case the aggravating factor set out in Annex IV, Point I. 2: If the infringement has been committed for more than six months, a coefficient of 1,5 shall apply.

158. The PSI indeed indicated¹⁴² that “its Policy and Procedure on Shareholding provided an exclusion that permitted anticipated / subsequent (i.e. issue) ratings for Impacted Rated Entities until 1 January 2019”, i.e. there was an infringement related to the inadequate policies and procedures from June 2013 to January 2019.

Applicable mitigating factors

159. Annex IV of the CRA Regulation lists the mitigating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO’s findings and considers applicable to the present case the mitigating factor set out in 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.

160. The Board considers that a remedial action has been taken and considers that this should ensure that a similar infringement cannot be committed in the future. The PSI’s group indeed removed the exclusion related to the Anticipated / Subsequent Ratings from the ban of new ratings in case of conflicts of interest with shareholders. The Procedure on Shareholding reads as follows: “MIS will not assign new EU Credit Ratings (...) (including Anticipated/Subsequent Credit Ratings) to a 10% Shareholder, to a Controlling Shareholder of MCO or to a 10% Impacted Rated Entity¹⁴³”.

161. The Board therefore assesses whether the measure was taken voluntarily. There is no definition of what “voluntarily” (“*de son plein gré*” in the French version of the CRA Regulation) precisely means within the context of this mitigating factor. Nevertheless, there are clear-cut examples. It is clear that a CRA has voluntarily taken measures when it has taken them spontaneously without any solicitation from its supervisor. It is also obvious that when there is a specific obligation to take these measures, it can no longer be considered that the measures are taken voluntarily. The situation is to a certain extent less clear-cut when the CRA takes measures only after a number of requests and interactions with its supervisor aiming at ensuring that the said measures are implemented by the CRA, for example, through an action plan defined and monitored by the supervisor.

162. In this case, the Board notes the following. The PSI acknowledged that the amendment to the Procedure on Shareholding was prompted following interaction with ESMA Supervisors¹⁴⁴. In particular, this change was agreed by the PSI’s group as a response¹⁴⁵ to ESMA’s Remedial Action Plan.

¹⁴² Exhibit 5, PSI’s Comments on the Supervisory Report, p. 1.

¹⁴³ Exhibit 38, PSIs’ Response to the IIO’s First RFI, First Batch, Document ESMA_00000010, Procedure on Shareholding, 1 January 2019.

¹⁴⁴ Exhibit 18, PSIs’ Response to the IIO’s First RFI, Second Batch, Question 47, pp. 14 and 15.

¹⁴⁵ Supervisory Report, Exhibit 25, Action 1, p. 2.

163. In this respect, the Board notes that, even though the measure was listed in ESMA's Remedial Action Plan¹⁴⁶, the decision of whether or not to take these measures was, at the date of implementation of these measures, within the PSI's remit; there was for example no decision from ESMA ordering to put an end to the practices.

164. Therefore, the Board considers that this mitigating factor is applicable for the infringement of Point 11 of Section I of Annex III of the CRA Regulation concerning the inadequate policies and procedures.

Determination of the adjusted fine

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

166. 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.:

$$\text{EUR } 750\,000 \times 1.5 = \text{EUR } 1\,125\,000$$

$$\text{EUR } 1\,125\,000 - \text{EUR } 750\,000 = \text{EUR } 375\,000$$

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

$$\text{EUR } 750\,000 \times 0.6 = \text{EUR } 450\,000$$

$$\text{EUR } 750\,000 - \text{EUR } 450\,000 = \text{EUR } 300\,000$$

Adjusted fine taking into account applicable aggravating and mitigating factors:

$$\text{EUR } 750\,000 + \text{EUR } 375\,000 - \text{EUR } 300\,000 = \text{EUR } 825\,000$$

167. Consequently, following adjustment by taking into account the applicable aggravating and mitigating factors, the amount of the fine to be imposed on Moody's UK amounts to EUR 825 000.

Financial benefit from the infringement

168. Article 36a(4) of the CRA 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".

¹⁴⁶ Supervisory Report, Exhibit 23, ESMA80-189-4347 - Remedial Action Plan, p. 6.

169. In this respect, the only indirect financial benefit which is related to the infringement related to the inadequate policies and procedures consists of the revenues received by the PSI for the rating on NPY. The PSI indicated that the fee charged for the issuance of the rating concerning NPY on 26 March 2015 was (omitted)¹⁴⁷. Annual monitoring fees were also charged by the PSI's group, which nevertheless indicated that these fees would have had to be paid "even if no rating had been issued on 26 March 2015"¹⁴⁸.

170. The revenues received by the PSI's group were thus lower than the fine to be imposed on each PSI, so Article 36a(4) of the CRA Regulation is not applicable.

Supervisory measures

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

172. Given the factual findings in the present case and in particular the fact that the exclusion related to the Anticipated / Subsequent Ratings has been already removed from the Procedure on Shareholding, only the supervisory measure set out in Article 24(1)(e) of the CRA Regulation may be considered appropriate with regard to the nature and the seriousness of the infringement. It must thus be held that the issue of a public notice is the only proportionate supervisory measure.

5. Infringement set at Point 20 of Section I of Annex III of the CRA Regulation concerning the issuance of a rating on Northern Powergrid (Yorkshire) Limited ("NPY")

173. This section of the decision analyses the breach of the legal prohibition imposed on CRAs to issue a credit rating or a rating outlook in any circumstances where a shareholder or member of a credit rating agency holding 10 % or more of either the capital or the voting rights of that credit rating agency or being otherwise in a position to exercise significant influence on the business activities of the credit rating agency holds 10 % or more of either the capital or the voting rights of the rated entity or is a member of the administrative or supervisory board of the rated entity. The prohibition is prescribed by Point 3(aa) and Point 3(ca) of Section B of Annex I of the CRA Regulation. If the legal requirement is not met, the infringement set out at Point 20 of Section I of Annex III of the CRA Regulation is established.

¹⁴⁷ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 3, p. 3. See also Exhibit 41, PSIs' Response to the IIO's First RFI, First Batch, Document ESMA_00000006.

¹⁴⁸ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 3, p. 3.

Analysis

174. A rating on a NPY's instrument (£ 150 million bond) was issued on 26 March 2015¹⁴⁹. At the date of the rating, Berkshire Hathaway ("BH") (which is a PSI's shareholder above the 10% threshold) held a board membership of NPY and there are also indications that it had more than 10% of the capital or voting rights¹⁵⁰.
175. This is confirmed in the Comments on the Supervisory Report where it is indicated that "MIS acknowledges the facts relevant to this alleged infringement, that is, that (1) BH owned 10% or more of the capital and voting rights of NPY and had a board member at NPY (...); and (2) MIS applied a subsequent issue rating to NPY (...)"¹⁵¹.
176. Nevertheless, the PSI's group claimed that "the inherent nature of Anticipated/Subsequent Credit Ratings means they should be treated as "existing" credit ratings for the purposes of the shareholder provisions¹⁵²". They indicated that "the Procedure treats Anticipated/Subsequent Credit Ratings as "existing" credit ratings. The concept underpinning Anticipated/Subsequent Credit Ratings, irrespective of the category, (...) is that analysis undertaken for an initial credit rating (as monitored over time), envisages or analytically supports the credit ratings that are derived from it. This includes issuance of debt in the same class or under the same programme, where the originally assigned credit rating is actively monitored and updated and future issuance in the same class/under the same programme derives its rating from that monitored analysis; this was the case for Northern Powergrid (Yorkshire) plc that was part of ESMA's examination (...)"¹⁵³.
177. If the rating on NPY of 26 March 2015 were to be considered as an existing rating for the purposes of the CRA Regulation, it would not have been subject to the prohibition to issue a rating. On the contrary, if it were to be considered as a new rating for the purposes of the CRA Regulation, it should have been subject to the ban.
178. The rating on NPY of 26 March 2015 was considered by the PSI's group as "existing" because it fell within the exception of "Anticipated / Subsequent" rating provided in the Procedure on Shareholding.
179. Since the infringement of Point 20 of Section I of Annex III of the CRA Regulation is related to the inclusion in the Procedure on Shareholding of the exclusion of Anticipated / Subsequent ratings, the Board reiterates the independent analysis developed above with regards to the category of 'Anticipated / Subsequent Ratings', which is relevant and applicable also in the assessment of this infringement. The Board therefore considers that

¹⁴⁹ Supervisory Report, Exhibit 118, List of credit ratings, 9 October 2017; Supervisory Report, Exhibit 119, List of credit ratings, 18 June 2019.

¹⁵⁰ Supervisory Report, Exhibit 115, List of MIS relevant entities, 14 June 2019. See also Exhibit 1, Supervisory Report, Table 2, p. 43 and Exhibit 16, ESMA Supervisors' Response to the IIO, 22 April 2020, Questions 6,7 and 8.

¹⁵¹ Exhibit 5, PSIs' Comments on the Supervisory Report, 30 October 2019, p. 10.

¹⁵² Supervisory Report, Exhibit 77, Letter from MIS to ESMA, 28 June 2018, p. 4.

¹⁵³ Supervisory Report, Exhibit 77, Letter from MIS to ESMA, 28 June 2018, p. 4.

'Anticipated / Subsequent' ratings should not have been excluded from the prohibition to issue new ratings.

180. On that basis, the issuance on 26 March 2015 of a rating concerning NPY was a "new" rating and not an "existing" rating, although it was about an instrument of NPY.

181. Therefore, the issuance of the rating concerning NPY on 26 March 2015 constitutes a breach of Article 6(2) of the CRA Regulation, in conjunction with Point 3 of Section B of Annex I of the CRA Regulation.

Attribution of the infringement

182. This sub-section assesses to which legal entity within the PSI's group the infringement related to the issuance of a rating on NPY is attributable.

183. 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), the Board has 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 rating¹⁵⁴.

184. The Board notes that the rating on NPY was issued by Moody's UK. This can be derived from the information about the lead analyst in charge of this rating who was employed by Moody's UK¹⁵⁵.

185. On that basis, the infringement related to the issuance of a rating on NPY is attributable to Moody's UK.

Conclusion

186. To conclude, the Board agrees with the IIO and considers that Moody's UK infringed Article 6(2) of the CRA Regulation, in conjunction with Point 3 of Section B of Annex I, by having issued a rating concerning NPY on 26 March 2015. This constitutes the infringement set out at Point 20 of Section I of Annex III of the CRA Regulation.

Intent or negligence

187. Regarding the assessment of intent or negligence for the infringement of Point 20 of Section I of Annex III of the CRA Regulation, the Board acknowledges that, in the

¹⁵⁴ See Exhibit 42, 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, 4 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".

¹⁵⁵ Supervisory Report, Exhibit 14, MIS First Response to the Third RFI, p. 8.

Comments on the Supervisory Report, the PSI indicated that “At the time that it issued this rating, MIS was following a policy that it believed was appropriately designed to fulfil the purpose of, and otherwise comply with, the relevant provisions of the Regulation (...)”¹⁵⁶ and it “(...) spent considerable time ahead of the implementation of CRA III designing its Policy and Procedure on Shareholding (...)”¹⁵⁷. It added that “(...) the NPY anticipated / subsequent rating was issued by MIS in line with its carefully considered policy, and in good faith belief that the rating could properly be characterised as an existing rating”¹⁵⁸.

188. The Board notes, in agreement with the IIO, that the evidence supporting the establishment of the negligence in the infringement set at Point 11 of Section I of Annex III of the CRA Regulation concerning adequate policies and procedures is applicable and valid also in this case.

189. In particular, the PSI’s interpretation around Anticipated / Subsequent ratings was not backed and based on a specific in-depth and legally solid analysis. The fact that there might be other interpretations, particularly from ESMA, was also clearly acknowledged (“Be reactive to different interpretation by ESMA”¹⁵⁹; “ESMA (...) can tell us otherwise”¹⁶⁰). The very cautious wording used by the PSI (“good argument”¹⁶¹, “reasonable argument”¹⁶²) also does not seem to imply that the PSI considered that the interpretation of the PSI’s group was the most straightforward one. However, the PSI did not contact ESMA to check whether their interpretation of the new obligations was correct regarding Anticipated / Subsequent ratings.

190. The Board acknowledges that in the Response to the IIO’s initial Statement of Findings¹⁶³, the PSI’s group pointed out that “The PSIs submit that, without taking into account the alleged negligence found in the SoF in relation to the decision to treat AS Ratings as “existing ratings”, the issuing of the NPY Rating cannot be negligent. This is because the NPY Rating was issued in compliance with the Procedure on Shareholding and therefore that act alone cannot be negligent. To suggest otherwise would be to require the relevant PSI employees to have deviated from the applicable procedure. Such an argument is unsustainable.

191. The Board rejects the argument and notes that the lack of care of the PSI when it drafted and adopted the Procedure on Shareholding (thus providing for an illegitimate exception to the prohibition to issue new ratings in case of conflicts of interest linked to a 10% shareholder) is relevant to establish a lack of care in the issuance of a rating on a NPY’s instrument on 26 March 2015. The Board indeed finds that the negligence in the moment of the issuance constitutes the necessary consequence, due to a cascading effect,

¹⁵⁶ Exhibit 5, PSIs’ Comments on the Supervisory Report, p. 10.

¹⁵⁷ Exhibit 5, PSIs’ Comments on the Supervisory Report, p. 10.

¹⁵⁸ Exhibit 5, PSIs’ Comments on the Supervisory Report, p. 11. See also p. 1-3.

¹⁵⁹ Exhibit 33, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000062.

¹⁶⁰ Exhibit 27, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000061.

¹⁶¹ Exhibit 28, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000070 and Exhibit 26, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000071.

¹⁶² Exhibit 26, PSIs’ Response to the IIO’s First RFI, Second Batch, Document ESMA_00000071.

¹⁶³ Exhibit 159, PSIs’ Response to the IIO’s initial Statement of Findings, see for example p. 18, pp. 26-27.

of the lack of care of the PSI in the process of drafting and adopting the Procedure on Shareholding.

192. Based on the above elements, the Board thus considers that the PSI (together with the PSI's group) failed to take the special care expected of a CRA.

193. As a result of that failure, the PSI did not foresee the consequences of its acts, in particular this infringement of the CRA 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.

194. Therefore, it is considered that the PSI has been negligent when committing the infringement of Point 20 of Section I of Annex III of the CRA Regulation concerning NPY.

Fines

195. The Board preliminary notes that the basic amount of the applicable fine is calculated taking as a reference the latest available official financial statements regarding the PSI's annual turnover in the business year preceding the year of the decision, as recommended by the Joint Board of Appeal of the three ESAs in its Decision of 28 December 2020. Given the proximity of the end of 2020 financial year, the official financial statements of the PSI for the FY 2020 are not yet available, thus reference is made to the latest official statements available, namely for the full financial year ended 31 December 2019.

196. The description of the basic amount of the fine as well as the assessment regarding the application of the aggravating and mitigating factors is set out below.

Determination of the basic amount

197. Article 36a of the CRA 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; [...]

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”.

198. It has been established that Moody's UK committed the infringement set out at Point 20 of Section I of Annex III of the CRA Regulation by issuing a rating on NPY.
199. To determine the basic amount of the fine, the Board has regard to the latest official financial statements regarding the PSI's annual turnover.
200. In 2019, Moody's UK had a total turnover of GBP 197 767 000, corresponding to EUR 225 434 603¹⁶⁴ (including branches).
201. Thus the basic amount of the fine for the infringement listed in Point 20 of Section I of Annex III of the CRA Regulation is set at the higher end of the limit of the fine set out in Article 36a(2)(a) of the CRA Regulation and shall not exceed EUR 750 000.

Applicable aggravating factors

202. Annex IV of the CRA Regulation lists the aggravating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO's findings and considers applicable to the present case the aggravating factor set out in Annex IV, Point I. 2: If the infringement has been committed for more than six months, a coefficient of 1,5 shall apply.
203. The rating issued on NPY was withdrawn on 21 December 2018¹⁶⁵. It was thus not withdrawn or did not mature within a period of less than six months from the date of its issuance.
204. Therefore, the infringement lasted for more than six months and this aggravating factor is applicable.

Applicable mitigating factors

205. Annex IV of the CRA Regulation lists the mitigating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO's findings and considers applicable the mitigating factor set out in 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.
206. The Board indeed notes that the PSI (together with other entities belonging to the PSI's group) was asked by the IIO to provide a detailed description of the remedial actions that they took. In particular, the PSI referred to the following remedial actions¹⁶⁶ which may be relevant for the infringement of Point 20 of Section I of Annex III of the CRA Regulation committed by Moody's UK by the issuance of a rating concerning NPY.

¹⁶⁴ Based on the official exchange rate for GBP v EUR in 2019: 1.1399

https://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/eurofxref-graph-gbp.en.html

¹⁶⁵ Supervisory Report, Exhibit 122, Press release – NPY withdrawal, 21 December 2018.

¹⁶⁶ For a full description of the remedial actions, please see Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Questions 46-47-48, p. 14-33.

207. First, the PSI withdrew the relevant rating on 21 December 2018¹⁶⁷.
208. Second, the current version of the Shareholding Procedure does not include anymore the exception to the ban of new ratings which was related to “Anticipated/ Subsequent” ratings. On the contrary, it reads as follows: “MIS will not assign new EU Credit ratings (...) (including Anticipated/ Subsequent Credit Ratings) to a 10% Shareholder, to a Controlling Shareholder of MCO or to a 10% Impacted Rated Entity¹⁶⁸”.
209. On that basis, it is considered that remedial actions have been taken by the PSI and therefore this aggravating factor is not applicable to the infringement of Point 20 of Section I of Annex III of the CRA Regulation committed by Moody’s UK concerning the issuance of a rating on NPY. The Board therefore considers that these remedial actions should ensure that similar infringements cannot be committed in the future.
210. The Board should assess whether these measures were taken voluntarily, which would imply that the mitigating factor provided by Annex IV, Point II.4. of the CRA Regulation would be applicable.
211. As already noted above, there is no definition of what “voluntarily” (“de son plein gré” in the French version of the CRA Regulation) precisely means within the context of this mitigating factor. Nevertheless, there are clear-cut examples. It is clear that a CRA has voluntarily taken measures when it has taken them spontaneously without any solicitation from its supervisor. It is also obvious that when there is a specific obligation to take these measures, it can no longer be considered that the measures are taken voluntarily. The situation is to a certain extent less clear-cut when the CRA takes measures only after a number of requests and interactions with its supervisor aiming at ensuring that the said measures are implemented by the CRA, for example, through an action plan defined and monitored by the supervisor.
212. In the present case, the Board notes the following. The PSI’s group acknowledged that the amendment to the Procedure on Shareholding and the withdrawal of the relevant rating on 21 December 2018 were prompted following interaction with ESMA Supervisors¹⁶⁹. In particular, those changes were agreed by the PSI as a response¹⁷⁰ to ESMA’s Remedial Action Plan.
213. In this respect, even though the measures were listed in ESMA’s Remedial Action Plan¹⁷¹, the decision of whether or not to take these measures was, at the date of implementation of these measures, within the PSI’s remit; there was for example no decision from ESMA ordering the PSI to put an end to the practices.

¹⁶⁷ Supervisory Report, Exhibit 122, Press release – NPY withdrawal, 21 December 2018.

¹⁶⁸ See Exhibit 17, PSIs’ Response to the IIO’s First RFI, First Batch, Question 9, and Exhibit 38, PSIs’ Response to the IIO’s First RFI, First Batch, Document ESMA_00000010, Procedure on Shareholding, 1 January 2019.

¹⁶⁹ Exhibit 18, PSIs’ Response to the IIO’s First RFI, Second Batch, Question 47, pp. 14, 15 and 31.

¹⁷⁰ Supervisory Report, Exhibit 25, Actions 1 and 3, p. 2.

¹⁷¹ Supervisory Report, Exhibit 23, Actions 1 and 3, pp. 6-7.

214. Therefore, the Board, in agreement with the IIO, considers that this mitigating factor is applicable for the infringement of Point 20 of Section I of Annex III of the CRA Regulation committed by Moody's UK concerning NPY.

Determination of the adjusted fine

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

216. 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

$$\text{EUR } 750\,000 \times 1.5 = \text{EUR } 1\,125\,000$$

$$\text{EUR } 1\,125\,000 - \text{EUR } 750\,000 = \text{EUR } 375\,000$$

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

$$\text{EUR } 750\,000 \times 0.6 = \text{EUR } 450\,000$$

$$\text{EUR } 750\,000 - \text{EUR } 450\,000 = \text{EUR } 300\,000$$

Adjusted fine taking into account applicable aggravating and mitigating factors:

$$\text{EUR } 750\,000 + \text{EUR } 375\,000 - \text{EUR } 300\,000 = \text{EUR } 825\,000$$

217. Consequently, following adjustment by taking into account the applicable aggravating and mitigating factors, the amount of the fine to be imposed on Moody's UK would amount to EUR 825 000.

Financial benefit from the infringement

218. Article 36a(4) of the CRA 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".

219. In this respect, it should be noted that in response to a request to provide the revenues received by the PSI's group for the rating on NPY, the PSI's group indicated that the fee

charged for the issuance of the rating concerning NPY on 26 March 2015 was (omitted)¹⁷². Annual monitoring fees were also charged by the PSI's group, which nevertheless indicated that these fees would have had to be paid "even if no rating had been issued on 26 March 2015"¹⁷³. The revenues received by the PSI's group were thus lower than the fine, so Article 36a(4) of the CRA Regulation is not applicable.

Application of the fine

220. The Board notes that Article 36a(4) of the CRA Regulation, second paragraph, sets 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".

221. The Board considers that the infringement related to the adequate policies and procedures (established by the Board above under Section 4) and the present infringement due to the issuance of a rating on NPY, despite being autonomous, are stemming from the same (incorrect) treatment of the 'Anticipated / Subsequent Ratings' as 'existing' for the purpose of the CRA Regulation.

222. Article 36a(4) of the CRA Regulation, second paragraph, is applicable regarding the fines calculated for the infringements by Moody's UK related to the adequate policies and procedures and the issuing of a rating on NPY. Only the highest fine should be imposed, and since in this case the two fines are of the same amount, only one fine of EUR 825 000 should be imposed.

Supervisory measures

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

224. Given the factual findings in the present case and in particular the fact that the PSI withdrew the relevant rating on NPY on 21 December 2018¹⁷⁴, only the supervisory measure set out in Article 24(1)(e) of the CRA Regulation is considered appropriate with regard to the nature and the seriousness of the infringement. It must thus be held that the issue of a public notice is the only proportionate supervisory measure.

¹⁷² Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 3, p. 3. See also Exhibit 41, PSIs' Response to the IIO's First RFI, First Batch, Document ESMA_00000006.

¹⁷³ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 3, p. 3.

¹⁷⁴ Supervisory Report, Exhibit 122, Press release – NPY withdrawal, 21 December 2018.

6. Infringement set at Point 20a of Section I of Annex III of the CRA Regulation concerning the disclosure of conflicts of interest

225. This section of the decision analyses the breach of the CRAs' obligation to disclose where an existing credit rating or rating outlook is potentially affected by a situation where a shareholder or member of a credit rating agency holding 5 % or more of either the capital or the voting rights of that credit rating agency or being otherwise in a position to exercise significant influence on the business activities of the credit rating agency, holds 5 % or more of either the capital or the voting rights of the rated entity, or of any other ownership interest in that rated entity or is a member of the administrative or supervisory board of the rated entity or a related third party". This requirement is prescribed by point 3a of Section B of Annex I of the CRA Regulation).
226. If the requirement is not met, the infringement set out at Point 20a of Section I of Annex III of the CRA Regulation is established.

Analysis

227. It results from Point 3a of Section B of Annex I of the CRA Regulation that there is a clear obligation for the CRAs to disclose to the public where an existing rating is potentially affected by a conflict of interests when one of its shareholders holding more than 5% of its capital / voting rights holds 5% or more of the capital / voting rights of the rated entity or has a board membership in the rated entity.
228. There is no indication in the CRA Regulation regarding the timing of the disclosure in case of conflicts linked to the 5% shareholding. As highlighted by ESMA Supervisors, this differs from the obligation applicable in case of 10% shareholding where, according to Point 3 of Section B of Annex I of the CRA Regulation, the disclosure has to be "immediate".
229. In addition, the CRA Regulation does not prescribe in detail which arrangements should be followed by the CRAs to meet this requirement. CRAs have thus some leeway in this respect as long as the arrangements comply with the relevant requirement. In this case, the PSI's group performed the disclosure obligations through quarterly and annual disclosures¹⁷⁵.
230. Regarding the above considerations, the Board agrees with the IIO's view that the disclosure in case of conflicts linked to the 5% shareholding does not have to be immediate. However, it has to take place within a delay which should be reasonable in line with the internal arrangements defined by the PSI's group. In this respect, the Board agrees with

¹⁷⁵ See for example Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 32, p. 16.

the IIO and considers that the quarterly and annual disclosures established by the PSI's group would make sense if they would have been correctly implemented.

231. However, in the Comments on the Supervisory Report, the PSI's group indicated that "MIS acknowledges that there were relevant 5% linked rated entities that were not disclosed by MIS during the Review Period¹⁷⁶". Similarly, in the Response to the IIO's initial Statement of Findings, the PSI's group indicated that "The PSIs do not dispute that on a number of occasions during the Sample Period, they failed to make certain of the required disclosures¹⁷⁷".

232. The latest¹⁷⁸ figures provided by the PSI's group show that there was a total of 278 cases of lack of disclosure or incomplete disclosures during the Sample Period¹⁷⁹. They concerned 101 rated entities. This means that for these rated entities, the PSI's group did not implement their internal arrangements regarding the disclosure of conflicts of interest and did not comply with the relevant requirement of the CRA Regulation to disclose where an existing rating is potentially affected by a conflict of interests linked to a 5% shareholding.

233. Finally, the PSI's group considered that "(...) the obligation to disclose must be read purposively as an obligation to take reasonable steps to identify potentially affected entities and to disclose those entities identified as being potentially affected, rather than as a strict liability test of disclosing all actually affected entities¹⁸⁰".

234. The Board shares the IIO's view and disagrees with the PSI's group's interpretation. In fact, the relevant disclosure obligation is objective and if the required disclosure did not take place in compliance with the CRA Regulation, then there is an infringement. The steps taken by the PSI's group to ensure that they comply with the disclosure obligation are elements that can be taken into consideration when assessing whether the infringement was committed with intent or negligence.

235. Therefore, the Board considers that the infringement at Point 20a of Section I of Annex III of the CRA Regulation concerning the disclosure of conflicts of interest linked to 5% shareholding is established.

Attribution of the infringement

236. This sub-section assesses to which legal entities within the PSI's group the infringement related to the lack of disclosure of conflicts of interest is attributable.

¹⁷⁶ Exhibit 5, PSIs' Comments on the Supervisory Report, p. 11.

¹⁷⁷ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, p. 28.

¹⁷⁸ The PSIs provided conflicting figures during the investigation.

¹⁷⁹ Exhibit 19, PSIs' Response to the IIO's First RFI, Third batch, Question 37: the PSIs mentioned 280 under-disclosures. However, it results from Document ESMA_00000100 provided as evidence to Question 37 that 2 of these disclosures are related to analysts located in the US, and they are therefore excluded from the scope of this investigation.

¹⁸⁰ Exhibit 5, PSIs' Comments on the Supervisory Report, pp. 11-12.

237. When asked by the IIO to explain which team within which legal entity of the PSI's group was in charge of performing the quarterly and annual disclosures, the PSI's group responded that "The Data Governance team (formerly RDD) is responsible for the overall process of obtaining and collating shareholding data in order to identify entities to be disclosed in the relevant disclosure list. This function is split across multiple legal entities, with individuals forming part of the Data Governance team while being employed by separate entities (...)¹⁸¹". The PSI's group specified that these entities were "namely, Moody's Investor Services, Inc. and Moody's Shared Services Inc.¹⁸²" (i.e. legal entities established in the US). In this respect, there is in the file an excel table which details the RDD staff involved during the Sample Period in the execution of the processes relating to the EU shareholders provisions¹⁸³. This excel table confirms that all this staff is employed by the US-based legal entities of the Moody's group.

238. The PSI's group also added that "Individual analysts are not responsible for ensuring proper disclosure in accordance with the obligation under Article 6(2) in conjunction with point 3a of Section B of Annex I of the CRA Regulation; nor do they exercise any discretion in this respect. The PSIs established the centralised process (...) [with the Data Governance Team] that did not involve the individual analysts¹⁸⁴".

239. In addition, the PSI's group was asked to provide a copy of the outsourcing agreement applicable between 2013-2018 within the Moody's group regarding the disclosure process. The PSI's group provided conflicting information to the IIO on this matter. Initially, the PSI's group provided a copy of the Rating Services Agreement¹⁸⁵, which would have covered the services provided by the Data Governance Team from 2013 to 2018. According to the PSI's group, they were covered by the term "Other analytical services¹⁸⁶". This Agreement was signed between Moody's Investor Services, Inc. (established in the US) and each of the entities of the PSI's group¹⁸⁷. At a later stage, the PSI's group indicated that "the PSIs would clarify that, as a consequence of various internal reorganisations, Data Governance services provided by Moody's Shared Services are provided pursuant to the Corporate Services Agreement¹⁸⁸". The Corporate Services Agreement provided by the PSI's group¹⁸⁹ was entered into between Moody's Investor Services, Inc., Moody's Shared Services, Inc. (both established in the US), the PSI and each of the entities belonging to

¹⁸¹ See Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 33, p. 16-17.

¹⁸² Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 35, p. 18.

¹⁸³ Exhibit 72, Excel file detailing changes to staff for Commercial Group, RDD, Investor Relations, GMO, Legal, Compliance and Internal Audit during the Review Period. See also Exhibit 16, ESMA Supervisors' Response to the IIO, 22 April 2020, Question 24.

¹⁸⁴ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 34, p. 17-18.

¹⁸⁵ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 35, p. 18, and Exhibit 25, PSIs' Response to the IIO's First RFI, First Batch, Document ESMA_00000032, Rating Services Agreement.

¹⁸⁶ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 35, p. 18.

¹⁸⁷ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 35, p. 18; Exhibit 43, PSIs' Response to the IIO's First RFI, First Batch, Document ESMA_00000027; Exhibit 44, PSIs' Response to the IIO's First RFI, First Batch, Document ESMA_00000028; Exhibit 45, PSIs' Response to the IIO's First RFI, First Batch, Document ESMA_00000029; Exhibit 46, PSIs' Response to the IIO's First RFI, First Batch, Document ESMA_00000030 and Exhibit 47, PSIs' Response to the IIO's First RFI, First Batch, Document ESMA_00000031.

¹⁸⁸ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, footnote 24, p. 6.

¹⁸⁹ Exhibit 48, PSIs' Response to the IIO's First RFI, First Batch, Document ESMA_00000039, Amended and Restated Corporate Services Agreement.

the PSI's group¹⁹⁰. Even though there is an article about indemnification and limitation of liability¹⁹¹ in both agreements, there is no specific clause which would deprive each of the entities of the PSI's group of the responsibilities regarding the disclosure of conflicts of interest.

240. In any event, each of the registered entities of the PSI's group had an obligation to comply with its requirements under the CRA Regulation regarding the disclosure of conflicts of interest. This is also consistent with Article 9 of the CRA Regulation which provides that "Outsourcing of important operational functions shall not be undertaken in such a way as to impair (...) the ability of ESMA to supervise the credit rating agency's compliance with obligations under this Regulation".

241. In line with the guidance on this topic from CESR, the Board agrees with the IIO and has 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 rating¹⁹². Similarly, the Board considers that the location of the lead analyst is to be taken into consideration for determining which legal entity is responsible for the disclosure of conflicts of interest linked to these ratings¹⁹³.

242. The Board notes that in their Response to the IIO's initial Statement of Findings, the PSI's group noted that "(...) they accept that the correct interpretation of Point 3a of Section B of Annex I of the CRA Regulation is that the CRA issuing the rating is responsible for ensuring that potential conflicts of interest in relation to that rating are disclosed to the market. It is more appropriate to attribute liability to the CRA entity issuing the rating in relation to under-disclosures (...)"¹⁹⁴.

243. On that basis, the Board considers that the infringement related to the lack of disclosure of conflicts of interest is attributable to each of the registered entities of the PSI's group based on the location of the lead analyst of each rated entity for which there was no disclosure.

¹⁹⁰ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 31, p. 16.

¹⁹¹ Exhibit 25, PSIs' Response to the IIO's First RFI, First Batch, Document ESMA_00000032, Rating Services Agreement, Article 9 and Exhibit 48, PSIs' Response to the IIO's First RFI, First Batch, Document ESMA_00000039, Amended and Restated Corporate Services Agreement, Article 9.

¹⁹² See Exhibit 42, 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, 4 June 2010, CESR/10-347, p. 31.

¹⁹³ Regarding disclosure infringements attributable to the CRA responsible for the existing rating based on the location of the lead analyst, see also the Decision of the Board of Supervisors to adopt supervisory measures and impose fines in respect of infringements committed by Fitch Espana S.A.U., 28 March 2019, ESMA-41-356-13, publicly available at https://www.esma.europa.eu/sites/default/files/library/cra_1-2018_decision_on_fitch_spain.pdf; and the Decision of the Board of Supervisors to adopt supervisory measures and impose fines in respect of infringements committed by Fitch France S.A.S., 28 March 2019, ESMA-41-356-14, publicly available at https://www.esma.europa.eu/sites/default/files/library/cra_1-2018_decision_on_fitch_france.pdf.

¹⁹⁴ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, Footnote 104.

244. Amongst the evidence of this case, the Board notes an excel table¹⁹⁵ which shows a split of the cases of lack of disclosure or incomplete disclosures per country of location of the lead analyst of the rated entities.
245. Regarding rated entities for which the lead analyst was located in the United Kingdom, there were 206 cases of lack of disclosure or incomplete disclosures which concerned 65 rated entities¹⁹⁶.
246. Therefore, based on the information provided by the PSI's group, the Board considers that the infringement related to the lack of disclosure of conflicts of interest is attributable to Moody's UK

Conclusion

247. To conclude, the Board agrees with the IIO and finds that Moody's UK, as well as other CRAs belonging to the PSI's group which are subject to separate decisions, infringed Article 6(2) of the CRA Regulation, in conjunction with Point 3a of Section B of Annex I of the CRA Regulation by not having ensured the appropriate disclosures regarding conflicts of interest linked to the shareholders. This constitutes the infringement set out at Point 20a of Section I of Annex III of the CRA Regulation.

Intent or negligence

248. The factual background of the present case does not establish that there are objective factors which demonstrate that the PSI, its employees or senior managers acted deliberately to commit the infringement of Point 20a of Section I of Annex III of the CRA Regulation regarding the disclosures.
249. It should therefore be assessed whether there was negligence.
250. Regarding the concept of negligence for the purposes of the CRA Regulation, the Board refers to the developments provided above under Section 4, notably paragraphs 114 - 122.

¹⁹⁵ Exhibit 20, PSIs' Response to the IIO's First RFI, Third Batch, Document ESMA_00000100.

¹⁹⁶ Exhibit 20, PSIs' Response to the IIO's First RFI, Third Batch, Document ESMA_00000100. 34 entities (3i Group plc, Arkema SA, Ashtead Group Plc, Aviva Plc, Banco Popolare Societa Cooperativa, Barclays Plc, BP p.l.c., Brenntag AG, British Sky Broadcasting Group plc, Cable & Wireless Communications plc, Centrica plc, Deutsche Lufthansa Aktiengesellschaft, ELIOR GROUP S.A., First Quantum Minerals Ltd, Hammerson Plc, Inmarsat plc, ITV plc, Kerry Group Plc, Legal & General Group Plc, Liberty Global plc, Lloyds Banking Group plc, Marks & Spencer P.L.C., National Grid Plc, Prudential Public Limited Company, Reckitt Benckiser Group Plc, Royal Dutch Shell Plc, Sanitec Oyj, Severn Trent Plc, SSE plc, Stagecoach Group Plc, Telenet Group Holding NV, Tullow Oil plc, UBS AG and William Hill plc.) were subject to one under-disclosure; ten entities (Cable & Wireless Communications Limited, easyJet Plc, Glencore International AG, innogy SE, Intesa Sanpaolo S.p.A., Old Mutual Plc, Taylor Wimpey plc, Tele Columbus AG, Wm Morrison Supermarkets plc and ICAP plc.) were subject to two under-disclosures; four entities (Bank of Ireland, Friends Life Limited, NOVAE Group plc and SPIE SA) were subject to three under-disclosures; four entities (Aspen Insurance Holdings Limited, Rexel SA, UBI Banca International S.A. and Zurich Insurance Company Ltd) were subject to four under-disclosures; ING Groep N.V. was subject to five under-disclosures; three entities were subject to six under-disclosures; two entities (Investec plc and The Royal Bank of Scotland Group plc.) were subject to seven under-disclosures; three entities (Gold Fields Limited, HSBC Holdings plc and Tate & Lyle plc.) were subject to nine under-disclosures; ArcelorMittal was subject to 11 under-disclosures; National Westminster Bank PLC was subject to 15 under-disclosures; Unilever PLC was subject to 17 under-disclosures and Barclays Bank PLC was subject to 17 under-disclosures.

251. Regarding the application to the infringement of Point 20a of Section I of Annex III of the CRA Regulation, the Board notes that the PSI's group indicated that "MIS acknowledges (...) that the issues [around the Process Walk-Thru] may have affected the quality of information gathering (...)¹⁹⁷".
252. In addition, the PSI's group provided explanations of the reasons that led to the lack of appropriate disclosures regarding conflicts of interest linked to 5% shareholding. In particular, the PSI's group referred to four main reasons.
253. First, 60 cases of lack of disclosure or incomplete disclosures¹⁹⁸ during the Sample Period are caused by errors in the data script used to compile the disclosures. Second, 43 cases of lack of disclosure or incomplete disclosures¹⁹⁹ are due to the identification of a 5% shareholder close to the timing for publication of the quarterly disclosure in the last trimester of 2013. Third, the PSI's group indicated that 144 cases of lack of disclosure or incomplete disclosures²⁰⁰ are due to the fact that an "(...) error resulted in certain 5% rated entities that were not classified as "ultimate parents" erroneously being excluded from the PSIs' disclosures during the Review Period. (...) the Data Governance team had been taking the erroneous approach of only including in the PSI's group's disclosures the rated entity "ultimate parents"²⁰¹". Fourth, there are 31 cases of lack of disclosure or incomplete disclosures²⁰² which are due to errors which "(...) arose from the compilation of the disclosures reports from the source data (...)²⁰³".
254. Therefore, the reasons for the lack of appropriate disclosures varied in nature (i.e. error in IT script, error due to timing issues and late identification of a relevant shareholder, error in the interpretation of the requirements, error when compiling information) but, considered separately and all together, all are signs of negligence from a CRA group which is subject to a high standard of care. They could have been avoided with more care from the PSI's group. In addition, they were repeated and were identified by the PSI's group only in the context of the interactions with ESMA²⁰⁴. Contrary to the PSI's group's allegations²⁰⁵, the Board considers that each of these errors taken individually is in itself a sign of negligence.
255. In addition, it should be noted that there were thus multiple errors and problems of various nature which took place and were repeated over time. This also shows that the PSI's group did not put in place the checks that could be expected of a professional firm

¹⁹⁷ Exhibit 5, PSIs' Comments on the Supervisory Report, p. 12.

¹⁹⁸ Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 39. See also Document ESMA_00000100.

¹⁹⁹ Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 38: the PSI's group mentioned 45 under-disclosures. However, it results from Exhibit 20, PSIs' Response to the IIO's First RFI, Third Batch, Document ESMA_00000100 provided as evidence to Question 38 that 2 of these disclosures are related to analysts located in the US, and they are therefore excluded from the scope of this investigation.

²⁰⁰ Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 37. See also Exhibit 20, PSIs' Response to the IIO's First RFI, Third Batch, Document ESMA_00000100.

²⁰¹ Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 37.

²⁰² Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 37. See also Exhibit 20, PSIs' Response to the IIO's First RFI, Third Batch, Document ESMA_00000100. There were 7 under-disclosures due to the errors identified in the source data which are related to a rated entity for which the lead analyst was located in France, 4 in Germany, 1 in Italy and 19 in the UK.

²⁰³ Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 37.

²⁰⁴ Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, p. 32.

²⁰⁵ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, pp. 28-29, paras 17.4 and 17.5.

and did not take the required special care in assessing the process regarding disclosure of conflicts of interest so as to prevent that the identified problems would lead to a lack of compliance with the requirements of the CRA Regulation.

256. Moreover, as pointed out by ESMA Supervisors²⁰⁶, ESMA set out its expectations regarding a number of requirements stemming from the CRA III Regulation in its “Questions and Answers, Implementation of the CRA Regulation (EU) No 462/2013 on Credit Rating Agencies²⁰⁷”. The first version of this document was published on 17 December 2013²⁰⁸. Question 5 of this document was last updated in December 2013 and reads as follows: “How are CRAs supposed to identify relevant (more than 5%) shareholders in order to be compliant with the provisions concerning conflicts presented by shareholders (...)?²⁰⁹”. The answer is the following: “Regarding the identification of indirect shareholders, ESMA is aware that, where information is not public or only disclosed periodically, CRAs may not be able to identify indirect shareholders. CRAs should keep records of the steps undertaken and evidence of their best efforts to identify their shareholders (for instance, written refusal of a shareholder to provide the CRA with information or regulatory provisions in legal texts) and should consider – when allowed by national company law - limiting the corporate rights of shareholders in the most serious cases of non-cooperation²¹⁰”. In this respect, the multiple errors and problems of various nature that led to the lack of appropriate disclosures mentioned above are not even linked as such to the difficulties to identify the indirect shareholders. Overall, this denotes a lack of care on the part of CRAs, which are professional firms in the financial services sector subject to stringent regulatory requirements.

257. The Board acknowledges the different arguments raised by the PSI’s group in order to argue that there was no negligence²¹¹. However, the Board has in mind the high standard of care required from CRAs and considers, in agreement with the IIO, that these arguments are to be rejected.

258. For example, in relation to the errors in the IT script, the PSI’s group claimed that there was no evidence of any negligence “on the part of those in Data Governance who drafted the data script, and such an error would not have been readily apparent to those who were using the disclosures generated by the Excel file²¹²”. However, the high duty of care required from a CRA under this Regulation covers among others the IT scripts which are used to comply with its obligations and this implies negligence in this case at least from those who drafted the data script or from their managers, for not having reviewed it with due care.

²⁰⁶ Exhibit 1, Supervisory Report, paragraph 206.

²⁰⁷ Supervisory Report, Exhibit 135. The version provided with the Supervisory Report is dated 18 December 2018, but we can see clearly for each question at which date the last update took place.

²⁰⁸ Supervisory Report, Exhibit 135, p. 3.

²⁰⁹ Supervisory Report, Exhibit 135, Questions and Answers, Implementation of the Regulation (EU) No 462 2013 on Credit Rating Agencies, p. 10.

²¹⁰ Supervisory Report, Exhibit 135, Questions and Answers, Implementation of the Regulation (EU) No 462 2013 on Credit Rating Agencies, p. 10.

²¹¹ See in particular Exhibit 159, PSIs’ Response to the IIO’s initial Statement of Findings, pp. 28-31.

²¹² Exhibit 159, PSIs’ Response to the IIO’s initial Statement of Findings, p. 29.

259. In relation to the errors due to timing issues following the late identification of a relevant shareholder close to the publication date for the disclosures, the PSI's group claimed that the errors were due to the fact that fixing them would have implied to delay the disclosures²¹³. However, this argument is immaterial and cannot exclude the negligence. A diligent CRA should identify the relevant shareholders on time and be ready to publish the correct disclosures, especially when the CRA has some leeway regarding its disclosure arrangements (as long as the arrangements comply with the relevant requirement).
260. In relation to the errors in the interpretation of the requirements, the PSI's group claimed that a number of cases of lack of disclosure or incomplete disclosures "were caused by certain 5% Rated Entities that were not classified as "ultimate parents" in the PSIs' records being excluded from the disclosures²¹⁴". This happened as, in the PSI's group's view, "there was no instruction to this effect in the Process Walk-Thru and the error was caused by a misunderstanding of the approach to be taken when the shareholding relationship between an ultimate parent entity and a rated subsidiary was uncertain, that individual incorrectly understood that only ultimate parents should be included in disclosures and any subsidiary [...] should be excluded²¹⁵". Also in this case, the negligence is confirmed, because no instruction was provided for such cases and there were no sufficient checks at the PSI's group level to avoid that the incorrect interpretation by one individual led to breaches of the CRA Regulation.
261. Finally, in relation to the errors made when compiling information, the PSI's group explained that they "(...) were due to Data Governance mistakenly missing some 5% Rated Entities when transferring information from data sources to the disclosures²¹⁶". In consideration of the nature of the errors and the fact that there were no checks in place to ensure that these mistakes would be detected and corrected in due time before leading to a breach of their obligations, such errors are clear sign of negligence.
262. Therefore, the Board agrees with the IIO and considers that the PSI, together with the other CRAs belonging to the PSI's group, was negligent in committing the infringement set out at Point 20a of Section I of Annex III of the CRA Regulation by not having ensured the appropriate disclosures regarding conflicts of interest.

Fines

263. The Board preliminary notes that the basic amount of the applicable fine is calculated taking as a reference the latest available official financial statements regarding the PSI's annual turnover in the business year preceding the year of the decision, as recommended by the Joint Board of Appeal of the three ESAs in its Decision of 28 December 2020. Given the proximity of the end of 2020 financial year, the official financial statements of the PSI

²¹³ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, pp. 29-30.

²¹⁴ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, p. 30.

²¹⁵ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, p. 30.

²¹⁶ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, p. 31.

for the FY 2020 are not yet available, thus reference is made to the latest official statements available, namely for the full financial year ended 31 December 2019.

Determination of the basic amount

264. Article 36a of the CRA 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:

(h) for the infringements referred to in point 20a of Section I of Annex III, points 4 to 4c, 6, 8 and 10 of Section III of Annex III, the fines shall amount to at least EUR 90 000 and shall not exceed EUR 200 000; [...]

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”.

265. It has been established that Moody’s UK committed the infringement set out at Point 20a of Section I of Annex III of the CRA Regulation by not having ensured the appropriate disclosures regarding conflicts of interest linked to their shareholders.

266. To determine the basic amount of the fine, the Board has regard to the latest official financial statements regarding the annual turnover of the PSI.

267. In 2019, Moody’s UK had a total turnover of GBP 197 767 000, corresponding to EUR 225 434 603²¹⁷ (including branches).

268. Thus the basic amount of the fine for Moody’s UK for the infringement listed in Point 20a of Section I of Annex III of the CRA Regulation is set at the higher end of the limit of the fine set out in Article 36a(2)(h) of the CRA Regulation and shall not exceed EUR 200 000.

Applicable aggravating factors

269. Annex IV of the CRA Regulation lists the aggravating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO’s findings and considers applicable the aggravating factor set out below.

²¹⁷ Based on the official exchange rate for GBP v EUR in 2019: 1.1399
https://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/eurofxref-graph-gbp.en.html

270. 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.
271. The PSI's group provided an excel table²¹⁸ which shows the number of missing disclosures. On the basis of this table, it results that regarding Moody's UK, there were 206 cases of lack of disclosure or incomplete disclosures which concerned 65 rated entities²¹⁹.
272. Therefore, the infringement has been committed repeatedly and this aggravating factor is applicable.
273. The Board acknowledges that in order to calculate the number of repetitions, the IIO decided, in favour to the PSI, not to have regard to the number of missing disclosures as such, because this number is to some extent related to the internal arrangements of the PSI's group to have quarterly and annual disclosures, but rather to the number of rated entities for which there was a lack of appropriate disclosures.
274. In addition, the Board acknowledges that in their Response to the IIO's initial Statement of Findings, the PSI's group argued that the reasons for the cases of lack of disclosure or incomplete disclosures (i.e. error in IT script, error due to timing issues and late identification of a relevant shareholder, error in the interpretation of the requirements, error when compiling information) should also be taken into consideration to calculate the number of repetitions: within each group of cases of lack of disclosure or incomplete disclosures for the first three mentioned reasons of lack of disclosure or incomplete disclosures, "Each under-disclosure was caused by the same omission and is not a separate, repeated infringement²²⁰".
275. The Board notes that the IIO accepted this argument. This means in practice that the cases of lack of disclosure or incomplete disclosures caused by the error in the IT script have not been considered as separate and as a repetition of the same infringement; they have been counted as one. The same logic applies to the cases of lack of disclosure or incomplete disclosures caused by the error due to timing issues and the ones due to the error in the interpretation. On the contrary, and correctly, the cases of lack of disclosure or

²¹⁸ Exhibit 20, PSIs' Response to the IIO's First RFI, Third batch, Document ESMA_00000100.

²¹⁹ Exhibit 20, PSIs' Response to the IIO's First RFI, Third batch, Document ESMA_00000100. 34 entities (3i Group plc, Arkema SA, Ashtead Group Plc, Aviva Plc, Banco Popolare Societa Cooperativa, Barclays Plc, BP p.l.c., Brenntag AG, British Sky Broadcasting Group plc, Cable & Wireless Communications plc, Centrica plc, Deutsche Lufthansa Aktiengesellschaft, ELIOR GROUP S.A., First Quantum Minerals Ltd, Hammerson Plc, Inmarsat plc, ITV plc, Kerry Group Plc, Legal & General Group Plc, Liberty Global plc, Lloyds Banking Group plc, Marks & Spencer P.L.C., National Grid Plc, Prudential Public Limited Company, Reckitt Benckiser Group Plc, Royal Dutch Shell Plc, Sanitec Oyj, Severn Trent Plc, SSE plc, Stagecoach Group Plc, Telenet Group Holding NV, Tullow Oil plc, UBS AG and William Hill plc.) were subject to one under-disclosure; ten entities (Cable & Wireless Communications Limited, easyJet Plc, Glencore International AG, innogy SE, Intesa Sanpaolo S.p.A., Old Mutual Plc, Taylor Wimpey plc, Tele Columbus AG, Wm Morrison Supermarkets plc and ICAP plc.) were subject to two under-disclosures; four entities (Bank of Ireland, Friends Life Limited, NOVAE Group plc and SPIE SA) were subject to three under-disclosures; four entities (Aspen Insurance Holdings Limited, Rexel SA, UBI Banca International S.A. and Zurich Insurance Company Ltd) were subject to four under-disclosures; ING Groep N.V. was subject to five under-disclosures; three entities were subject to six under-disclosures; two entities (Investec plc and The Royal Bank of Scotland Group plc.) were subject to seven under-disclosures; three entities (Gold Fields Limited, HSBC Holdings plc and Tate & Lyle plc.) were subject to nine under-disclosures; ArcelorMittal was subject to 11 under-disclosures; National Westminster Bank PLC was subject to 15 under-disclosures; Unilever PLC was subject to 17 under-disclosures and Barclays Bank PLC was subject to 17 under-disclosures.

²²⁰ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, p. 31.

incomplete disclosures caused by errors when compiling information have been counted as separate and repeated²²¹.

276. The Board agrees with the methodology of calculation developed by the IIO and recognises that is favourable to the PSI.

277. Therefore, combining the information regarding the reasons of the cases of lack of disclosure or incomplete disclosures and the number of rated entities per PSI impacted by the under-disclosure, it results that regarding Moody's UK, within the cases of lack of disclosure or incomplete disclosures which concerned 65 rated entities, there were 44 linked to errors in IT script affecting 10 rated entities²²², 25 linked to errors due to timing issues and late identification of a relevant shareholder, affecting 25 rated entities²²³, 118 linked to errors in the interpretation of the requirements, affecting 22 rated entities²²⁴ and 19 linked to errors when compiling information affecting eight rated entities²²⁵.

278. Taking out the first under-disclosure (which is never counted in the repetitions), counting each group of cases of lack of disclosure or incomplete disclosures as one under-disclosure when due to the error in IT script, the error linked to timing issues and the error in the interpretation of the requirements, and counting each under-disclosure of a rated entity as one when due to the error when compiling information, the Board thus considers that the infringement has been repeated ten times for Moody's UK (i.e. 1 repetition for errors in IT script, 1 repetition for errors due to timing issues and late identification of a relevant shareholder, 1 repetition for errors in the interpretation of the requirements, 8 repetitions for errors in compilation).

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

279. The infringement related to the lack of disclosure of the conflicts of interest linked to 5% shareholding was committed for more than six months, because the identified missing disclosures took place from 2013 to 2017 and were corrected only in June 2018²²⁶.

²²¹ The PSI's group did not claim that a different way of counting should be applied, see Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, p. 31.

²²² Exhibit 20, PSIs' Response to the IIO's First RFI, Third batch, Document ESMA_00000100. The affected rated entities are Aspen Insurance Holdings Limited, Aviva Plc, Elior Group SA, HSBC Holdings plc, ING Groep NV, Lloyds Banking Group plc, Prudential Public Limited Company, RSA Insurance Group plc, Tate & Lyle plc and The Royal Bank of Scotland Group plc.

²²³ Exhibit 20, PSIs' Response to the IIO's First RFI, Third batch, Document ESMA_00000100. The affected rated entities are 3i Group plc, Arkema SA, Ashtead Group plc, Barclays plc, BP plc, British Sky Broadcasting Group plc, Cable & Wireless Communications plc, Centrica plc, Deutsche Lufthansa Aktiengesellschaft, First Quantum Minerals Ltd, Hammerson plc, Inmarsat plc, ITV plc, Kerry Group plc, Legal & General Group plc, Liberty Global plc, Marks & Spencer plc, National Grid plc, Reckitt Benckiser Group plc, Royal Dutch Shell plc, Severn Trent plc, SSE plc, Stagecoach Group plc, Tullow Oil plc and William Hill plc.

²²⁴ Exhibit 20, PSIs' Response to the IIO's First RFI, Third batch, Document ESMA_00000100. The affected rated entities are ArcelorMittal, Banco Popolare Societa Cooperativa, Bank of Ireland, Barclays Bank plc, Cable & Wireless Communications Limited, Friends Life Limited, Glencore International AG, Gold Fields Limited, ICAP plc, innogy SE, Investec plc, London Stock Exchange plc, National Westminster Bank plc, NOVAE Group plc, Sanitec Oyj, SPIE SA, Tele Columbus AG, Telenet Group Holding NV, Travelport Limited, UBI Banca International SA, UBS AG and Unilever plc.

²²⁵ Exhibit 20, PSIs' Response to the IIO's First RFI, Third batch, Document ESMA_00000100. The affected rated entities are Brenntag AG, easyJet plc, Intesa Sanpaolo S.p.A., Old Mutual plc, Rexel SA, Taylor Wimpey plc, Wm Morrison Supermarkets plc and Zurich Insurance Company Ltd.

²²⁶ Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, p. 33.

280. Therefore, the Board considers that this aggravating factor is applicable.

Applicable mitigating factors

281. Annex IV of the CRA Regulation lists the mitigating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO's findings and considers applicable the mitigating factors set out below.

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.

282. The PSI's group indicated that the missing disclosures relating to conflicts of interest were corrected in June 2018²²⁷.

283. Therefore, the Board agrees with the IIO and considers that a remedial action has been taken because as indicated by the PSI's group, "identification of these issues led to the PSIs taking steps to correct the disclosures and republish them on 1 June 2018"²²⁸.

284. Nonetheless, the Board believes that these measures cannot give certainty that similar infringements cannot be committed in the future.

285. On the one hand, the Board notes that in the Internal Audit's report dated July 2019 which covered the period from September 2018 to May 2019, the following was noted: "Shareholding Disclosure: The Q4 2018 Shareholding Disclosure was republished three times during our review due to several errors. The errors were caused by an incorrect implementation of logic to identify Rated Entities and related subsidiaries (management identified), failure in manual review processes (management identified), and lack of systematic approach to analyzing board membership data²²⁹". Therefore, at that time, there were still numerous significant weaknesses in the disclosure process of the PSI's group.

²²⁷ Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, p. 33. See also Exhibit 16, ESMA Supervisors' Response to the IIO, 22 April 2020, Question 25; Exhibit 135, 4.1 Clean version of Schedule D disclosure as of 30 June 2013, 8 October 2013; Exhibit 136, 4.2 Clean version of Schedule D disclosure as of 30 September 2013, 6 December 2013; Exhibit 137, 4.3 Clean version of Schedule D disclosure as of 31 December 2013, 6 March 2014; Exhibit 138, 4.4 Clean version of Schedule D disclosure, supplemented with data from Commercial Outreach, as of 31 December 2013, 6 March 2014; Exhibit 139, 4.5 Clean version of Schedule D disclosure as of 31 March 2014, 30 June 2014; Exhibit 140, 4.6 Clean version of Schedule D disclosure, supplemented with data from Commercial Outreach, as of 31 March 2014; Exhibit 141, 4.7 Clean version of Schedule D disclosure as of 30 June 2014, 16 September 2014; Exhibit 142, 4.8 Clean version of Schedule D disclosure as of 30 September 2014, 19 December 2014; Exhibit 143, 4.9 Clean version of Schedule D disclosure as of 31 December 2014, 2 April 2015; Exhibit 144, 4.10 Clean version of Schedule D disclosure as of 31 March 2015, 5 June 2015; Exhibit 145, 4.11 Clean version of Schedule D disclosure, supplemented with data from Commercial Outreach, as of 31 March 2015, 5 June 2015, Exhibit 146, 4.12 Clean version of Schedule D disclosure as of 30 June 2015, 16 October 2015; Exhibit 147, 4.13 Clean version of Schedule D disclosure as of 30 September 2015, 17 December 2015; Exhibit 148, 4.14 Clean version of Schedule D disclosure as of 31 December 2015, 15 March 2016; Exhibit 149, 4.15 Clean version of Schedule D disclosure as of 31 March 2016, 7 June 2016; Exhibit 150, 4.16 Clean version of Schedule D disclosure as of 30 June 2016, 21 September 2016; Exhibit 151, 4.17 Clean version of Schedule D disclosure, supplemented with data from Commercial Outreach, as of 30 June 2016, 21 September 2016; Exhibit 152, 4.18 Clean version of Schedule D disclosure as of 30 September 2016, 16 December 2016; Exhibit 153, 4.19 Clean version of Schedule D disclosure as of 31 December 2016, 8 March 2017; Exhibit 154, 4.20 Clean version of Schedule D disclosure as of 31 March 2017, 8 June 2017; and Exhibit 155, 4.21 Clean version of Schedule D disclosure as of 30 June 2017, 25 August 2017.

²²⁸ Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, p. 33.

²²⁹ Exhibit 24, PSIs' Response to the IIO's First RFI, Second Batch, Document ESMA_0000087, Internal Audit's Report, p. 5.

286. On the other hand, the PSI's group explained that they implemented a number of "enhanced controls" which "are intended to reduce the risk of similar issues arising in future²³⁰". These enhanced controls include the following.

287. Regarding disclosures, there were two distinct sections in the revised version of Process Walk-Thru²³¹: one about the quarterly identification and disclosure process and another one about ad-hoc identification and disclosure process. In particular, the PSI's group highlighted²³² that "To ensure the accuracy of the quarterly disclosure reports, Data Governance (formerly RDD) must adopt additional checks and perform final quality assurance as described in the (...) Run Book (...) prior to coordinating the publication of the relevant disclosures²³³". Furthermore, the review by the compliance function was extended to include the "testing of steps followed by Investors Relations to create a list of 5% or more shareholders", the "testing of completeness and accuracy of quarterly shareholding disclosures" and the "testing of performance by data Governance of steps relating to updating and distribution of quarterly exception list²³⁴".

288. In addition, "Since October 2019, monthly meetings have been taking place between representatives of Compliance, Data Governance and MIS Technology to share updates, review regulatory reporting items, identify risks and propose changes to the existing process on a proactive, ongoing basis. These meetings are intended to complement the Process Walk-thru and provide a feedback mechanism to support the enhancement and consistent execution of a robust and repeatable process²³⁵".

289. The Board also notes the actions that were listed in ESMA's Remedial Action Plan, which had an impact on the disclosures²³⁶.

290. The PSI's group also referred to a number of measures which are not yet finalised. For example, "The PSIs have commenced work to establish a governance process over organizational hierarchy data used in regulatory reporting, including identifying roles, responsibilities, and controls. The next steps, which will be undertaken between Q1 and Q3 2020, include inter alia working with stakeholders to agree a system of record for all organizational hierarchy datasets and developing a governance framework that includes process and business owners to ensure data is accurate, complete and timely²³⁷". Another example provided is the fact that "The PSIs are considering the feasibility of integrating

²³⁰ Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, p. 33.

²³¹ See Exhibit 21, PSIs' Response to the IIO's First RFI, First Batch, Document ESMA_00000011, Process Walk-Thru, 2 December 2019.

²³² For more details on the enhanced controls, please see, in particular, Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, pp. 22-23, 26 and 28.

²³³ Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, p. 22. To see the PSIs' Run Book, please refer to Exhibit 49, PSIs' Response to the IIO's First RFI, First Batch, Document ESMA_00000044, ESMA CRA3: Shareholder Rules Report Run Book, 28 May 2019.

²³⁴ Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, p. 26.

²³⁵ Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, p. 23.

²³⁶ See Supervisory Report, Exhibit 23, Remedial Action Plan, for example Actions 4, 7, 9, 10 and 11.

²³⁷ Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, p. 23.

process automation upgrades into the preparation of shareholder disclosures to streamline processes and further mitigate the risk of errors²³⁸”.

291. Overall, there is still a level of uncertainty on the impact in the future of these measures on the disclosure process, which was characterised in the past by numerous and significant weaknesses. However, the Board, conscious of the principle of *in dubio pro reo*, believes that, in the present circumstances, the PSI’s group should be given the benefit of the doubt.
292. The Board should assess whether these measures were taken voluntarily, which would imply the applicability of the mitigating factor at hand.
293. As already explained, there is no definition of what “voluntarily” precisely means within the context of this mitigating factor.
294. In the present case, the Board notes the following. The PSI’s group indicated that the issues related to the lack of disclosures were “self-identified by the PSI’s group in the context of interaction with ESMA Supervision²³⁹”. They added that the measures regarding the scope of the testing by the compliance function were prompted following interaction with ESMA Supervisors²⁴⁰, and those related to the Process Walk-Thru partly by these interactions and partly by the Internal Audit²⁴¹.
295. In this respect, even though some of these measures were prompted by ESMA, the decision of whether or not to take these measures was, at the date of implementation of these measures, within the remit of the PSI’s group; there was for example no decision from ESMA ordering to put an end to the practices.
296. Therefore, the Board considers that this mitigating factor is applicable for the infringement of Point 20a of Section I of Annex III of the CRA Regulation committed by the PSI.

Determination of the adjusted fine

297. In accordance with Article 36a(3) of the CRA Regulation, taking into account the applicable aggravating and mitigating factors, the basic amount of EUR 200 000 must be adjusted as follows.
298. 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 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:

²³⁸ Exhibit 18, PSIs’ Response to the IIO’s First RFI, Second Batch, p. 23.

²³⁹ Exhibit 18, PSIs’ Response to the IIO’s First RFI, Second Batch, p. 32.

²⁴⁰ Exhibit 18, PSIs’ Response to the IIO’s First RFI, Second Batch, p. 25.

²⁴¹ Exhibit 18, PSIs’ Response to the IIO’s First RFI, Second Batch, p. 20.

Aggravating factor set out in Annex IV, Point I. 1:

EUR 200 000 x 1.1 = EUR 220 000

EUR 220 000 – EUR 200 000 = EUR 20 000

Ten repetitions: 10 x EUR 20 000 = EUR 200 000

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

EUR 200 000 x 1.5 = EUR 300 000

EUR 300 000 – EUR 200 000 = EUR 100 000

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

EUR 200 000 x 0.6 = EUR 120 000

EUR 200 000 – EUR 120 000 = EUR 80 000

Adjusted fine taking into account applicable aggravating and mitigating factors:

EUR 200 000 + EUR 200 000 + EUR 100 000 – EUR 80 000 = EUR 420 000

299. Consequently, following adjustment by taking into account the applicable aggravating and mitigating factors, the amount of the fine to be imposed on Moody's UK amounts to EUR 420 000.

300. However, given the considered overlap of the root cause for the eight repetitions, caused by the errors in compilation of disclosure reports, and the infringement set at Point 15 of Section I of Annex III of the CRA Regulation arrangements (analysed further below under Section 7. Infringement set at Point 15 of Section I of Annex III of the CRA Regulation concerning appropriate and effective organisational and administrative arrangements), by virtue of application of Article 36a(4), second paragraph of the CRA Regulation, the amount corresponding to such eight repetitions should be deducted from the final amount of the fine to be imposed for the infringement regarding disclosure requirements. Consequently, the fine should be adjusted as follows:

Eight repetitions : 8 x EUR 20 000 = EUR 160 000

Adjusted fine taking into account applicable aggravating and mitigating factors, and deductions concerning the eight repetitions caused by errors in compilation:

EUR 420 000 – EUR 160 000 = EUR 260 000

Financial benefit from the infringement

301. Article 36a(4) of the CRA 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”.

302. In this respect, there is no evidence that the PSI would have benefitted financially from the infringement. Article 36a(4) of the CRA Regulation is thus not applicable.

Supervisory measures

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

304. Given the factual findings in the present investigation and in particular the fact that the missing disclosures relating to conflicts of interest were corrected²⁴², only the supervisory measure set out in Article 24(1)(e) of the CRA Regulation is considered appropriate with regard to the nature and the seriousness of the infringements. It must thus be held that the issue of a public notice is the only proportionate supervisory measure.

7. Infringement set at Point 15 of Section I of Annex III of the CRA Regulation concerning appropriate and effective organisational and administrative arrangements

305. This section of the decision analyses the breach of the CRAs' obligation to establish appropriate and effective organisational and administrative arrangements to prevent, identify, eliminate or manage and disclose any conflicts of interest, as prescribed by Point 7 of Section A of Annex I of the CRA Regulation. If this requirement is not met, the infringement set out at Point 15 of Section I of Annex III of the CRA Regulation is established.

Analysis

306. It results from Point 7 of Section A of Annex I of the CRA Regulation that the PSI had to establish appropriate and effective organisational and administrative arrangements to prevent, identify, eliminate or manage and disclose any conflicts of interest referred to in Point 1 of Section B of Annex I of the CRA Regulation.

307. The Board agrees with the IIO's view that the actual or potential conflicts of interest which are referred to in broad terms in Point 1 of Section B of Annex I of the CRA Regulation include amongst others the conflicts of interest linked to CRAs' shareholders such as the ones which are more precisely identified in Points 3 and 3a of Section B of Annex I, i.e. the conflicts of interest related to 5% and 10% shareholdings and board memberships.

308. On this point, the Board acknowledges that, in the Response to the IIO's initial Statement of Findings²⁴³, the PSI's group challenged the IIO's interpretation of the CRA Regulation as, in their view, Point 1 of Section B of Annex I of the CRA Regulation "was

²⁴² Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, p. 33.

²⁴³ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, p. 39.

not intended to cover conflicts relating to 5% and 10% rated entities²⁴⁴. The Board endorses the IIO's view and disagrees with such comments. The fact that Points 3 and 3a of Section B of Annex I of the CRA Regulation establish specific requirements in terms of prohibition of ratings and disclosures does not imply that the conflicts of interests related to 5% and 10% shareholdings and board memberships cannot be part of the actual or potential conflicts of interest which are referred to in broad terms in Point 1 of Section B of Annex I of the CRA Regulation. On the contrary, the wording used in Point 1 of Section B of Annex I of the CRA Regulation refers to "any actual or potential conflicts that may influence the analyses and judgements of its ratings analysts, employees, or any other natural person whose services are placed at the disposal or under the control of the credit rating agency (...)". The broad terms used in this provision (e.g. "any", "actual or potential", "that may influence") do not point towards a restrictive and narrow interpretation of the mentioned conflicts of interests. On the contrary, the IIO notes that Recital 10 of the CRA III Regulation states explicitly that "relationships between the shareholders of credit rating agencies and the rated entities may cause conflicts of interest" and Recital 20 provides that "The independence of a credit rating agency vis-à-vis a rated entity is also affected by possible conflicts of interest of any of its significant shareholders with the rated entity". It is therefore difficult to see how conflicts of interest linked to 5% and 10% shareholdings would be excluded. Also, for example, regarding the broad wording of Point 1 of Section B of Annex I, a holding of more than 10% in a rated entity by a CRA's 10% shareholder "may influence the analyses", at least potentially, of the CRA's employees.

309. In addition, as explicitly stated by Point 7 of Section A of Annex I of the CRA Regulation, the organisational and administrative arrangements must not only be established, but also be appropriate and effective to prevent, identify, eliminate or manage and disclose conflicts of interest.

310. In order to appropriately and effectively identify the conflicts of interest related to 5% and 10% shareholdings and board memberships, it is key that the organisational and administrative arrangements allow the PSI to get access to data and information of a reasonably sufficient reliability about their shareholders and the impacted rated entities.

311. In this respect, the PSI's group explained²⁴⁵ that they relied on two sources to get the relevant information: the first level of information resulted from a review of public regulatory filings, and the second level of information consisted in the Moody's commercial team's outreach to issuers.

312. More precisely, the PSI's group indicated²⁴⁶ that first, Investors Relations assessed data in the SEC regulatory filings made by each 5% or more MCO shareholder, identifying entities in which they own in turn 5% or more. Investors Relations used a third-party data provider, Ipreo. In addition, the PSI's group indicated that "Commercial, at least annually, informs each MIS EU rated entity of the identity of MCO's 5% (or more) shareholders and

²⁴⁴ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, p. 39.

²⁴⁵ Exhibit 5, PSIs' Comments on the Supervisory Report, p. 4.

²⁴⁶ Supervisory Report, Exhibit 36, MIS Response to the Fourth RFI, 29 March 2019, p. 3-4.

requests them to disclose if they are owned 5% (or more) by the same entities or if an MCO 5% (or more) shareholder is a member of their administrative or supervisory board. This annual process is supplemented with further ad hoc notifications to EU rated entities whenever a new 5% (or above) MCO shareholder is identified. Commercial also sends a reminder communication to EU rated entities who have not opened the initial email or who opened the web form but did not complete it²⁴⁷. Then, RDD assessed the data provided by Investor Relations and by Commercial to identify EU entities rated by the PSI's group and therefore impacted by the MCO's 5% (or more) shareholders. This implied, in particular, checks regarding the names of the EU entities.

313. However, the Board agrees with the IIO and considers that the information source used to identify the relevant conflicts of interest was unreliable, because the organisational and administrative arrangements used by the PSI's group to obtain the relevant information had significant shortcomings, as explained below.

314. First, the EU issuers contacted by the PSI's group barely provided the relevant information or provided only incomplete information. Even though the PSI's group was aware of it, they did not change their organisational and administrative arrangements to remedy this lack of reliability of the source information.

315. Moreover, according to the Process Walk-Thru, a shareholder tracker was established, with the purpose of capturing certain information related to the shareholders and to the outreach to shareholders and EU rated entities. RDD²⁴⁸ was tasked to maintain and update such shareholders tracker and to notify, on a quarterly or an *ad hoc* basis as necessary, GMO and Commercial of any changes made to it. The problem is that the shareholder tracker for March and July 2014²⁴⁹ shows that only 555 out of the 2332 contacted entities responded to the PSI's group. Further, the shareholder tracker for July 2015²⁵⁰ shows that only 321 of the 1520 contacted entities responded to the PSI's group. The Board also acknowledges that the shareholder trackers provide conflicting figures to some extent²⁵¹. Irrespective of the precise figures, it is clear that the PSI's group only received responses from a very low part of the entities which they had contacted. In addition, the shareholder tracker ceased to be maintained and updated. The PSI's group indicated that "Data Governance made a few *ad hoc* updates to its shareholder tracker in Q4 2015 and some updates on 15 March 2016 but it was not being systematically maintained at this stage" and then "Data Governance stopped producing its shareholder tracker²⁵²".

²⁴⁷ Supervisory Report, Exhibit 36, MIS Response to the Fourth RFI, 29 March 2019, p. 4.

²⁴⁸ According to Supervisory Report, Exhibit 57, Process Walk-Thru, 6 June 2013, this was a task of the RDD, as shown in steps 6 and 7 of the Process Walk-Thru.

²⁴⁹ Supervisory Report, Exhibit 84, Shareholder tracker for March and July 2014, 3 September 2014, see the second sheet of the excel table "graphs 2014".

²⁵⁰ Supervisory Report, Exhibit 86, Shareholder tracker for July 2015, July 2015, see the second sheet of the excel table "graphs 2015".

²⁵¹ For example, Supervisory Report, Exhibit 86, Shareholder tracker for July 2015, July 2015, see the second sheet of the excel table "graphs 2015": in the table, it is mentioned that 321 entities responded whereas in one of the charts, it is indicated that 153 entities responded.

²⁵² Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, Question 12, p. 7.

316. Furthermore, according to the Process Walk-Thru, the entities belonging to the PSI's group were requesting in their template letter to 5% shareholders²⁵³ to provide information on their holdings, voting rights, board members, control or dominant influence, etc. regarding any other EU registered CRA. This request for information is key for the PSI's group to be able to comply with their obligation under Article 6(a) of the CRA Regulation regarding the ban on CRA cross-shareholding. However, the template does not provide for a similar information to be requested to the 5% shareholders about their interests in other entities than the EU-registered CRAs that would allow the PSI's group to comply with their obligations under the CRA Regulation regarding conflicts of interest of shareholders with rated entities. When asked, the PSI's group replied that they "could not compel their indirect shareholders to provide information on entities in which those shareholders had a 5% interest²⁵⁴". The Board shares the IIO's view and does not agree with the PSI's group's argument, because this is not about "compelling" their 5% shareholders but rather trying to get another source of information which would help complying with the applicable requirement exactly in the same way as they tried to do it regarding their obligation related to the ban of CRA cross-shareholding.
317. Finally, the Board acknowledges that in the Response to the IIO's initial Statement of Findings²⁵⁵, the PSI's group challenged the IIO's conclusions, stating that "the IIO does not give due regard to the use of regulatory filings which were, and are, the primary source of information" and "There were two, not one single, information sources and the PSIs put in place arrangements that focused on the primary and most reliable source: regulatory filings".
318. In this respect, the Board believes, on the basis of the case file, that the IIO duly took into account that the regulatory filings were one source of information. The infringement related to the organisational and administrative arrangements is not related to the number of sources of information, but rather linked to their lack of appropriateness and effectiveness.
319. In this context, the Board considers that regulatory filings have clear limitations as acknowledged by the PSI's group ("Filing Data is not comprehensive as not all entities are required to file (and not all relevant information has to be included in filings²⁵⁶"; "SEC filings deal with major shareholdings in US listed companies only²⁵⁷"). Besides that, the other source of information had significant shortcomings, as already explained.
320. Therefore, on the basis of the above elements, the Board agrees with the IIO and considers that the organisational and administrative arrangements of the PSI's group

²⁵³ See for example Supervisory Report, Exhibit 61, Process Walk-Thru, 25 October 2013, Appendix E.

²⁵⁴ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 15, p. 7.

²⁵⁵ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, pp. 40-41.

²⁵⁶ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, p. 41.

²⁵⁷ Exhibit 50, PSIs' Response to the IIO's First RFI, Second Batch, Document ESMA_00000077. See also Exhibit 33, PSIs' Response to the IIO's First RFI, Second Batch, Document ESMA_00000062.

regarding the identification of the rated entities affected by conflicts of interest linked to shareholders were not appropriate and effective.

321. This constitutes the infringement set out at Point 15 of Section I of Annex III of the CRA Regulation.

Attribution of the infringement

322. This sub-section assesses to which legal entity within the PSI's group the infringement related to the appropriate and effective organisational and administrative arrangements is attributable.

323. In the Response to the IIO's initial Statement of Findings, the PSI's group presented arguments aimed at attributing the infringement to Moody's UK only²⁵⁸.

324. As a preliminary remark, Article 9 of the CRA Regulation provides that "Outsourcing of important operational functions shall not be undertaken in such a way as to impair (...) the ability of ESMA to supervise the credit rating agency's compliance with obligations under this Regulation".

325. At the time of the infringement, the Process Walk-Thru was simultaneously owned by four business areas, i.e. Investor Relations, Commercial Group, Global Middle Office ("GMO") and RD (or RDD)²⁵⁹. Each of these business areas implemented the Process Walk-Thru. In particular, Investors Relations, the Commercial group and RDD were involved in the steps covering the sources of information to identify potential conflicts of interest linked to shareholders.

326. The PSI's group provided information on the employing entities of the staff of Investors Relations, the Commercial group, GMO and RDD which were involved during the Sample Period in the execution of the processes relating to the EU shareholdings rules²⁶⁰. It results that RDD / GMO staff and Investors Relations staff were employed by the US-based legal entities of the PSI's group, whereas the staff from the Commercial group was mainly employed by Moody's UK.

327. In addition, it emerges from the case file that "The relevant decisions in relation to [this] Infringement (...) were taken by the Shareholder Rules Workstream in designing the Process Walk-Thru which was developed as a business guideline document for the Policy and Procedure on Shareholding. (...) the vast majority of EU-based members of this workstream were based in the UK, which was the EU hub of MIS at the relevant time. If found, this infringement should therefore be attributed only to Moody's UK²⁶¹". Further to

²⁵⁸ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, 29 June 2020, see in particular pp. 9, 13-15, 43.

²⁵⁹ Supervisory Report, Exhibit 57, Process Walk-Thru, 6 June 2013, Process Owners, p.1. In the version of the Walk-thru dated 25 October 2013, "RD" was renamed "RDD": See Supervisory Report, Exhibit 61, Process Walk-Thru (v4), 25 October 2013.

²⁶⁰ Exhibit 72, Excel file detailing changes to staff for Commercial Group, RDD, Investor Relations, GMO, Legal, Compliance and Internal Audit during the Review Period. See also Exhibit 16, ESMA Supervisors' Response to the IIO, 22 April 2020, Question 24.

²⁶¹ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, p. 43.

that, the Board acknowledges that it results from this spreadsheet²⁶² that most of the members of Shareholder Workstream were employed in the US and that, excluding these employees, all the EU-based members were employed in the UK, except one in France.

328. Overall, on the basis of the case file and in the very specific circumstances of the present case, the infringement related to the appropriate and effective organisational and administrative arrangements is attributable to Moody's UK.

Conclusion

329. To conclude, the Board agrees with the IIO and considers that Moody's UK infringed Article 6(2), in conjunction with Point 7 of Section A of Annex I of the CRA Regulation by not having appropriate and effective organisational and administrative arrangements. This constitutes the infringement set out at Point 15 of Section I of Annex III of the CRA Regulation.

Intent or negligence

330. The factual background of this case does not establish that there are objective factors which demonstrate that the PSI, its employees or senior managers acted deliberately to commit the infringement of Point 15 of Section I of Annex III of the CRA Regulation regarding the appropriate and effective organisational and administrative arrangements.

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

332. Regarding the concept of negligence for the purposes of the CRA Regulation, the Board refers to the developments provided above under Section 4, notably paragraphs 114 - 122. Regarding the application to the infringement of Point 15 of Section I of Annex III of the CRA Regulation, the Board notes the following.

333. On the one hand, the PSI's group indicated that "While MIS recognises that the process of obtaining information from public regulatory filings, coupled with additional commercial outreach, was not perfect, MIS believes that it was reasonably designed to meet the objectives of the shareholder disclosure requirements²⁶³". In particular, according to the PSI's group, "MIS's approach in contacting EU-rated entities was a legitimate, relevant and reliable source of information in the context that it was used²⁶⁴".

334. However, it results from the information in the file that from the start, the PSI's group was clearly aware of the difficulties and limitations arising from the arrangements contemplated in order to obtain the source data and identify the potential conflicts of interest linked to their shareholders.

²⁶² Exhibit 160, Spreadsheet of employing entity of members of the Shareholder Workstream during the Sample Period, ESMA_00000106.

²⁶³ Exhibit 5, PSIs' Comments on the Supervisory Report, p. 5.

²⁶⁴ Exhibit 5, PSIs' Comments on the Supervisory Report, p. 4.

335. ESMA's expectations regarding the requirements related to the conflicts of interest linked to shareholders were explained to the PSI's group in ESMA's Supervisory Newsletter of 7 May 2013²⁶⁵. ESMA indicated that "CRAs must have appropriate controls in place in order to ensure that they respect the new ratings issuance prohibitions and disclosure requirements regarding conflicts of interest caused by CRAs' shareholders" and "regarding the identification of indirect shareholders, (...) ESMA would recommend that CRAs keep record of the steps undertaken and evidence of their best efforts to identify shareholders (e.g. written refusal of a shareholder to provide the CRA with information, (...))²⁶⁶".
336. In a table dated 17 May 2013²⁶⁷, the PSI's group identified the main difficulties in meeting these expectations. In particular, the PSI's group indicated the following²⁶⁸ regarding the sources of information to ensure compliance with the relevant requirement on conflicts of interest: "Inability to get comprehensive reliable data from public sources"; "There is no single methodology that is capable of producing a reliable comprehensive list of the holdings of Moody's shareholders"; "SEC filings deal with major shareholdings in US listed companies only"; "It would be inappropriate for us to take important prohibition and disclosure decisions based on potentially unreliable or incomplete information". It also stated the following²⁶⁹: "Data from third parties may not be forthcoming or reliable"; "Our shareholders are not obliged to tell us about their other holdings if we ask them"; "Shareholders or issuers may (deliberately or inadvertently) provide untimely, incomplete, inaccurate, false or misleading etc information".
337. Those difficulties were then expressed to ESMA in the letter by the PSI's group dated 31 May 2013²⁷⁰. According to the information in the file, no further interactions took place between the PSI's group and ESMA on this precise topic²⁷¹, despite the clear confirmation by ESMA of its expectations in its Questions and Answers published on 17 December 2013²⁷².
338. In the Response to the IIO's initial Statement of Findings²⁷³, the PSI's group raised a number of arguments to challenge the establishment of negligence. In particular, they claimed that the above-mentioned internal analysis was just general observations on the difficulties in collecting shareholder data, that they should not be penalised for having raised concerns about the practical implementation of the CRA Regulation and that "there was no perfect arrangement". In this respect, it is important to note that the negligence is

²⁶⁵ Exhibit 125, Email from MIS to ESMA, and Exhibit 124, ESMA 2013_532 Supervisory Newsletter 2013 of 7 May 2013. See also Exhibit 16, ESMA Supervisors' Response to the IIO, 22 April 2020, p. 15.

²⁶⁶ Exhibit 125, Email from MIS to ESMA, and Exhibit 124, ESMA 2013_532 Supervisory Newsletter 2013 of 7 May 2013, p. 8.

²⁶⁷ Exhibit 50, PSIs' Response to the IIO's First RFI, Second Batch, Document ESMA_00000077. See also Exhibit 33, PSIs' Response to the IIO's First RFI, Second Batch, Document ESMA_00000062.

²⁶⁸ Exhibit 50, PSIs' Response to the IIO's First RFI, Second Batch, Document ESMA_00000077, p. 1.

²⁶⁹ Exhibit 50, PSIs' Response to the IIO's First RFI, Second Batch, Document ESMA_00000077, p. 2.

²⁷⁰ Exhibit 126, Response to ESMA Supervisory Newsletter re Shareholder Rules of 31 May 2013. See also Exhibit 16, ESMA Supervisors' Response to the IIO, 22 April 2020, p. 15.

²⁷¹ Exhibit 16, ESMA Supervisors' Response to the IIO, 22 April 2020, p. 15.

²⁷² Supervisory Report, Exhibit 135, Questions and Answers, Implementation of the regulation (EU) No 462/2013 on Credit Rating Agencies, first published on 17 December 2013, p. 3.

²⁷³ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, pp. 41-42.

not established for such reasons, but because the PSI's group, even though they knew the difficulties in getting the right information, did not address them in a proper manner in line with a high standard of care, rather the contrary.

339. Indeed, in May 2013, the PSI's group knew the limitations of the arrangements that they were putting in place and the fact these arrangements were unlikely to meet ESMA's expectations as first expressed in the Supervisory Newsletter of May 2013 and then confirmed in ESMA Questions & Answers of 17 December 2013. However, as previously established in this Statement of Findings, the PSI's group did not make the best efforts to identify the concerned entities and, on the contrary, did not keep appropriate records and evidence. For example, the shareholder tracker for March and July 2014²⁷⁴ shows that only 555 out of the 2332 contacted entities responded. Further, the shareholder tracker for July 2015²⁷⁵ shows that only 321 of the 1520 contacted entities responded. The EU issuers contacted barely provided the relevant information or provided only incomplete information. The PSI's group was clearly aware of it but did not address these limitations in a proper manner, as this would be required by the high standard of care which applies to CRAs registered under this Regulation. On the contrary, the shareholder tracker ceased to be maintained and updated²⁷⁶.

340. The above elements, including the fact that the PSI's group was aware that it was relying on incomplete and inaccurate information, denote a clear lack of care, contrary to what is expected from a professional regulated financial firm. The PSI's group, and in particular Moody's UK for the purpose of the present decision, did not take the required special care so as to prevent non-compliance with the requirements of the CRA Regulation.

341. Therefore, the Board considers that Moody's UK was negligent when committing the infringement related to the appropriate and effective organisational and administrative arrangements.

Fines

342. The Board preliminary notes that the basic amount of the applicable fine is calculated taking as a reference the latest available official financial statements regarding the PSI's annual turnover in the business year preceding the year of the decision, as recommended by the Joint Board of Appeal of the three ESAs in its Decision of 28 December 2020. Given the proximity of the end of 2020 financial year, the official financial statements of the PSI for the FY 2020 are not yet available, thus reference is made to the latest official statements available, namely for the full financial year ended 31 December 2019.

²⁷⁴ Supervisory Report, Exhibit 84, Shareholder tracker for March and July 2014, 3 September 2014, see the second sheet of the excel table "graphs 2014".

²⁷⁵ Supervisory Report, Exhibit 86, Shareholder tracker for July 2015, July 2015, see the second sheet of the excel table "graphs 2015".

²⁷⁶ Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, Question 12, p. 7.

Determination of the basic amount

343. Article 36a of the CRA 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; [...]

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”.

344. It has been established that Moody’s UK committed the infringement set out at Point 15 of Section I of Annex III of the CRA Regulation by not having appropriate and effective organisational and administrative arrangements.

345. To determine the basic amount of the fine, the Board has regard to the latest official financial statements regarding the annual turnover of the PSI.

346. In 2019, Moody’s UK had a total turnover of GBP 197 767 000, corresponding to EUR 225 434 603²⁷⁷ (including branches).

347. Thus the basic amount of the fine for Moody’s UK regarding the infringement listed in Point 15 of Section I of Annex III of the CRA Regulation is set at the higher end of the limit of the fine set out in Article 36a(2)(a) of the CRA Regulation and shall not exceed EUR 750 000.

Applicable aggravating factors

348. Annex IV of the CRA Regulation lists the aggravating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO’s findings and considers applicable the aggravating factor set out in Annex IV, Point I. 2: If the infringement has been committed for more than six months, a coefficient of 1,5 shall apply.

349. The infringement related to the appropriate and effective organisational and administrative arrangements was committed for more than six months, because it started

²⁷⁷ Based on the official exchange rate for GBP v EUR in 2019: 1.1399
https://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/eurofxref-graph-gbp.en.html

in June 2013 with the entry into force of the new requirements on conflicts of interest related to shareholders and it lasted until the Process Walk-Thru was updated in 2019.

350. Therefore, the Board considers that this aggravating factor is applicable.

Applicable mitigating factors

351. Annex IV of the CRA Regulation lists the mitigating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO's findings and considers applicable the mitigating factor set out in 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.

352. The Board indeed considers that remedial actions have been taken regarding the infringement related to the appropriate and effective organisational and administrative arrangements, since significant changes have been introduced into the process through which the PSI's group identify potential conflicts of interest related to shareholders.

353. In particular, as regards the current situation in terms of source of information used to obtain data on shareholders, the PSI's group indicated that they "currently used three sources of information (...): (i) regulatory filings via Ipreo; (ii) direct outreach to significant shareholders: and (iii) shareholding and board membership data from Bureau van Dijk²⁷⁸". Regarding the second source of information, "Investor Relations sends a shareholder outreach letter to the shareholders holding (indirectly) 5% or more of the shares in the PSIs' group one to three days following the end of the previous quarter. (...) Investor Relations sends a reminder to the relevant shareholders if it does not receive a response after 14 days²⁷⁹". This was included in the version of the Process Walk-Thru effective on 2 December 2019.

354. In addition, additional steps were added in the Process Walk-Thru effective on 2 December 2019 regarding the on-boarding process enabling them to get better information. These steps are as follows²⁸⁰: "Commercial must include in credit rating applications, pursuant to a prescribed template: i) a warranty seeking confirmation from the issuer that it does not have a relevant relationship with an MCO Significant Shareholder and ii) a provision obliging issuers to provide information regarding direct and indirect shareholdings and board composition. If the issuer does not provide the warranty, Commercial will request more information to determine the nature of any relevant relationship. The On-boarding Process will not continue if satisfactory information is not provided". Furthermore, "With respect to potential new EU customers: (A) If the information provided indicates that the entity is a 10% Impacted Rated Entity (as defined in the Procedure on Shareholding) or the entity refuses to provide the information, the credit rating application must be refused (...). (B) Commercial must cross-check the latest information provided by Investor

²⁷⁸ Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, Question 16, p. 7.

²⁷⁹ Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, Question 16, p. 8.

²⁸⁰ Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, p. 20-21.

Relations (i.e. the list of Significant Shareholders) for entities which are controlling shareholders or 10% shareholders of MCO, with any matches resulting in the refusal of the credit rating application”. Finally, there is a check by the Rating Transaction Services (“RTS”) against the RTS exception list prior to the assignment of a credit rating.

355. The PSI’s group also indicated to have revised their approach so as to “contact significant shareholders directly on at least a quarterly basis to enable information to be incorporated into the PSIs’ disclosures²⁸¹”. Another example of measures taken relates to the use of “Prescribed templates for communications between Commercial and new customers as part of the On-boarding Process and between Investor Relations and significant shareholders as part of the outreach process²⁸²”.

356. Additionally, with a letter dated 26 June 2020²⁸³, further amendments to the Process Walk-Thru were signalled to the IIO. In particular this latest available version of the Process Walk-Thru reflects the following enhancements: “adjusting the shareholder outreach process, whereby Investor Relations contacts certain potential significant shareholders in order to reconfirm on a quarterly basis information that was previously provided by those shareholders” and “introducing outreach by Commercial to potential EU 10% Impacted Rated Entities identified through regulatory filing data²⁸⁴”.

357. However, the Board, in order to assess whether these measures would ensure that a similar infringement cannot be committed in the future, notes the following.

358. The IIO was informed by the PSI’s group of the issuance of ratings on 31 January 2020 which were subsequently withdrawn and finally reinstated²⁸⁵. The following explanation was given:

“(omitted)

On 7 February 2020, having made this determination, MISL expunged the withdrawals, reinstated the ratings on the two term loans, and updated their disclosures accordingly²⁸⁶”.

359. It results from the information above that even though the ratings of 31 January 2020 were not at the end prohibited by the CRA Regulation, a relevant team within the PSI’s group thought at the date of the issuance that this was the case on the basis of the available information at that time and this was not conveyed in sufficient time to the team in charge of the issuance. After further research and analysis, the PSI’s group considered that no infringement was committed with the issuance of the ratings on 31 January 2020.

²⁸¹ Exhibit 18, PSIs’ Response to the IIO’s First RFI, Second Batch, p. 19.

²⁸² Exhibit 18, PSIs’ Response to the IIO’s First RFI, Second Batch, p. 24.

²⁸³ Exhibit 162, Email from SM to ESMA, 26 June 2020, and Exhibit 163, SM letter to ESMA, 26 June 2020. The PSIs also attached a new version of the Process Walk-Thru, i.e. Exhibit 164, Process Walk-Thru with Appendices, June 2020.

²⁸⁴ Exhibit 163, SM letter to ESMA, 26 June 2020, p.1.

²⁸⁵ Exhibit 51, PSIs’ letter to the IIO dated 9 March 2020.

²⁸⁶ Exhibit 51, PSIs’ letter to the IIO dated 9 March 2020, p. 1-2.

360. The Board notes that in the IIO's view, this incident with the issuances, the subsequent withdrawals and reinstatements show that the arrangements in place within the PSI's group to identify potential conflicts of interest linked to shareholders still have serious weaknesses.
361. The PSI's group indicated that "The events (...) highlighted to the PSIs the benefit of directly approaching issuers to validate third party data that identifies an entity as a potential 10% Impacted Rated Entity. Accordingly, the PSIs have prepared an update to the Process Walkthrough, which is currently going through the internal governance process²⁸⁷".
362. As already mentioned above, with a letter dated 26 June 2020²⁸⁸, the PSI's group informed the IIO of amendments to the Process Walk-Thru, providing further enhancements in order to address the issues identified by the PSI's group in the last months.
363. With the same letter²⁸⁹, the PSI's group also informed the IIO of the implementation of corrections in the computer code used for the disclosures of Q2 2019 (a logic error in the computer code initially used led to omissions in these disclosures) and an update to the technical coding requirements document.
364. On that basis, the Board concludes that these measures should ensure that a similar infringement related to the appropriateness and effectiveness of the organisational and administrative arrangements regarding the identification of potential conflicts of interest linked to shareholders cannot be committed in the future, even though this cannot be excluded either. The Board, conscious of the principle of *in dubio pro reo*, believes that, in the present circumstances, the PSI's group should be given the benefit of the doubt.
365. The Board assesses whether these measures were taken voluntarily, which would imply that the mitigating factor provided by Annex IV, Point II.4. of the CRA Regulation would be applicable.
366. As already explained, there is no definition of what "voluntarily" precisely means within the context of this mitigating factor. Having regard to the facts, the Board notes that, even though some of these measures were prompted by ESMA, the decision of whether or not to take these measures was, at the date of implementation of these measures, within the remit of the PSI's group; there was for example no decision from ESMA ordering to put an end to the practices.
367. This mitigating factor is thus applicable.

²⁸⁷ Exhibit 51, PSIs' letter to the IIO dated 9 March 2020, p. 2-3.

²⁸⁸ Exhibit 162, Email from SM to ESMA, 26 June 2020, and Exhibit 163, SM letter to ESMA, 26 June 2020. The PSIs also attached a new version of the Process Walk-Thru, i.e. Exhibit 164, Process Walk-Thru with Appendices, June 2020.

²⁸⁹ Exhibit 163, SM letter to ESMA, 26 June 2020, pp. 2-3.

Determination of the adjusted fine

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

369. 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 the applicable aggravating and mitigating factors:

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

370. Consequently, following adjustment by taking into account the applicable aggravating and mitigating factors, the amount of the fine to be imposed on Moody's UK amounts to EUR 825 000.

Financial benefit from the infringement

371. Article 36a(4) of the CRA 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”.

372. In this respect, the Board considers that there is no evidence that the PSI would have benefitted financially from the infringement.

373. Article 36a(4) of the CRA Regulation is thus not applicable.

Application of the fine

374. The Board notes that Article 36a(4) of the CRA Regulation, second paragraph, sets 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”.

375. In the present case, the Board considers that it is impossible to exclude that the significant shortcomings related to the data source did not affect the compilation of the disclosure reports (i.e. one of the reasons of the cases of lack of disclosure or incomplete disclosures described in Section 6. Infringement set at Point 20a of Section I of Annex III of the CRA Regulation concerning the disclosure of conflicts of interest of the present decision). On this basis the Board, conscious of the principle of *in dubio pro reo*, considers, in favour to the PSI, that the infringement concerning the lack of appropriate and effective organisational and administrative arrangements and the infringement regarding the lack of appropriate disclosure of the situation of conflict of interest (for the part due to the errors in the compilation of the disclosure reports) both derive from the lack of proper and adequate identification of the situations of conflicts of interest related to the 5% threshold.

376. The Board thus considers Article 36a(4), second paragraph, of the CRA Regulation as partially applicable to the two infringements attributed to Moody's UK. Only the highest fine - between the one calculated for the lack of appropriate and effective organisational and administrative arrangements and the partial amount of the fine attributable to the 8 repetitions of the errors in the compilation of the disclosure reports – should be applied by adjusting the final amount of the fine imposed under Section 6. Infringement set at Point 20a of Section I of Annex III of the CRA Regulation concerning the disclosure of conflicts of interest.

377. In the specific case, therefore, the fine applied to the infringement set at Point 15 of Section I of Annex III of the CRA Regulation concerning appropriate and effective organisational and administrative arrangements amounts to EUR 850 000 while the fine applied to the infringement set at Point 20a of Section I of Annex III of the CRA Regulation concerning the disclosure of conflicts of interest amounts to EUR 260 000 (after deduction of the amount of the fine attributable to the 8 repetitions of the errors in the compilation of the disclosure reports).

Supervisory measures

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

379. Given the factual findings in the present investigation and in particular the fact that a number of measures were already taken by the PSI's group, only the supervisory measure set out in Article 24(1)(e) of the CRA Regulation is considered appropriate with regard to the nature and the seriousness of the infringement. It must thus be held that the issue of a public notice is the only proportionate supervisory measure.

8. Infringement set at Point 12 of Section I of Annex III of the CRA Regulation concerning internal control mechanisms

380. This section of the decision analyses the breach of the CRAs' obligation to have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for

information processing systems. The internal control mechanisms shall be designed to secure compliance with decisions and procedures at all levels of the credit rating agency, as prescribed by Point 4 of Section A of Annex I of the CRA Regulation. If this requirement is not met, the infringement set out at Point 12 of Section I of Annex III of the CRA Regulation is established.

Analysis

381. CRAs shall have, among others, sound administrative and accounting procedures and internal control mechanisms. In addition, under Point 4 of Section A of Annex I of the CRA Regulation, those internal control mechanisms shall be designed to secure compliance with both the decisions and procedures of the CRA, thus including the decisions taken by the CRA and the procedures that the CRA must establish under Point 3 of Section A of Annex I of the CRA Regulation to ensure compliance with its obligations under the CRA Regulation (thus including its obligations regarding conflicts of interest linked to shareholders).

382. In this respect, on the one hand, as already noted, the PSI's group had a specific procedure and internal control mechanisms to avoid conflicts of interest in general, which included the Shareholding Policy²⁹⁰, the Procedure on Shareholding²⁹¹ and the Process Walk-Thru²⁹². It consisted of a number of levels of control involving different persons at different levels of the organisation.

383. As indicated by the PSI's group, "the Process Walk-thru forms part of the business guidelines designed to deliver compliance with the Shareholder rules²⁹³". Moreover, the "Process Walk-thru sets out a rigorous process that allocates procedural and analytical responsibilities across the various internal groups and external third parties involved in identifying relevant shareholders and their holdings²⁹⁴".

384. The PSI's group also indicated that "While MIS is prepared to accept that its approach to the implementation of the Process Walk-thru could be improved, it is important to recognise that this is just one, relatively narrow, example of a shortcoming within a wider set of adequate and effective compliance controls. MIS further observes that there were

²⁹⁰ Supervisory Report, Exhibit 68, Policy on Shareholding (v1), 3 June 2013; and Supervisory Report, Exhibit 69, Policy on shareholding, 3 April 2017.

²⁹¹ Supervisory Report, Exhibit 71, Procedure on Shareholding, 3 June 2013; Supervisory Report, Exhibit 72, Procedure on Shareholding, 5 October 2015; Supervisory Report, Exhibit 73, Procedure on Shareholding, 1 February 2016; Supervisory Report, Exhibit 74, Procedure on Shareholding, 6 September 2016; Supervisory Report, Exhibit 75, Procedure on Shareholding, 3 April 2017.

²⁹² Various versions of the Process Walk-Thru were provided: See for example Supervisory Report, Exhibit 10, MIS Response to the First RFI, 9 October 2017; Supervisory Report, Exhibit 57, Process Walk-Thru, 6 June 2013; Supervisory Report, Exhibit 61, Process Walk-Thru (v4), 25 October 2013; Supervisory Report, Exhibit 62, Process Walk-Thru, 9 November 2013; Supervisory Report, Exhibit 63, Process Walk-Thru, 9 April 2014; Supervisory Report, Exhibit 64, Process Walk-Thru, 26 August 2015; Supervisory Report, Exhibit 65, Process Walk-Thru, 6 January 2016; Supervisory Report, Exhibit 66, Process Walk-Thru, 9 September 2016, and Supervisory Report, Exhibit 67, Process Walk-Thru, 31 August 2017.

²⁹³ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 14, p. 6.

²⁹⁴ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 14, p. 6.

also numerous steps within the Process Walk-thru that were applied consistently in practice and that were effective²⁹⁵.

385. However, “MIS acknowledges (...) that clearer and more effective responsibility for ownership of the Process Walk-thru could have reduced the risk of the issues identified by ESMA being realised in practice²⁹⁶”.

386. In particular, it is noted that the ownership of the Process Walk-Thru was fragmented across four functions (Investor Relations, Commercial, RDD and GMO) which led to unclear responsibilities and a lack of oversight on the end-to-end process designed to ensure compliance with the Procedure on Shareholdings. In the Internal Audit’s report dated May 2018²⁹⁷ which “(...) focused on processes and controls performed from January 2017 to December 2017²⁹⁸”, it is concluded that “The overall process lacks an end-to-end owner to ensure compliance, accountability and data integrity throughout the process²⁹⁹”.

387. In addition, the following substantial shortcomings in the relevant internal control mechanisms of the PSI’s group have been identified.

Shortcomings related to the controls

388. The Board believes that there must be in the internal control mechanisms of the PSI’s group a clear identification of the type of control activities to be carried out and of 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 IIO identified substantial shortcomings due to an inadequate identification of the control activities and/or persons in charge, and/or inadequate implementation.

389. In particular, the Process Walk-Thru was not properly updated in line with changes to business practices. The PSI’s group confirmed that “the Process Walk-thru was not consistently updated to reflect prevailing practice³⁰⁰”.

390. For example, the PSI’s group confirmed that regarding the shareholders list, “the GMO review was discontinued” because “it did not provide any additional information or analysis beyond that provided by Data Governance³⁰¹”. The PSI’s group specified that this was decided in Q1 2016³⁰² but the step was only formally removed from the Process Walk-Thru in its version effective at the end of 2018³⁰³.

²⁹⁵ Exhibit 5, PSIs’ Comments on the Supervisory Report, p. 5.

²⁹⁶ Exhibit 5, PSIs’ Comments on the Supervisory Report, p. 4.

²⁹⁷ Supervisory Report, Exhibit 89, Internal Audit Report (May 2018).

²⁹⁸ Exhibit 17, PSIs’ Response to the IIO’s First RFI, First Batch, Question 26, p. 14.

²⁹⁹ Supervisory Report, Exhibit 89, Internal Audit Report (May 2018), p. 3.

³⁰⁰ Exhibit 5, PSIs’ Comments on the Supervisory Report, p. 3.

³⁰¹ Exhibit 18, PSIs’ Response to the IIO’s First RFI, Second Batch, Question 11, p. 6.

³⁰² See Supervisory Report, Exhibit 88, Walk-Thru Implementation, step 5a.

³⁰³ Exhibit 18, PSIs’ Response to the IIO’s First RFI, Second Batch, Question 11, p. 6.

391. Another example relates to the shareholders trackers that the PSI's group had to put in place according to the Process Walk-Thru³⁰⁴. The PSI's group provided a copy of the shareholders trackers³⁰⁵ and indicated that some were maintained by the Commercial team, others by Data Governance / RDD³⁰⁶. In total, there are a limited number of shareholders trackers during the Sample Period. The PSI's group indicated that "Data Governance made a few *ad hoc* updates to its shareholder tracker in Q4 2015 and some updates on 15 March 2016 but it was not being systematically maintained at this stage" and then "Data Governance stopped producing its shareholder tracker as it considered that: (i) GMO, Commercial and other groups already received the information on significant shareholders and the shareholders' relationships with EU rated entities through the quarterly and annual disclosure process; and (ii) it was not necessary for those teams to receive a tracker on the progress of the outreach to EU rated entities, particularly as Commercial itself was conducting the outreach³⁰⁷".
392. With a Process Walk-Thru which was not up to date, it was impossible to identify the type of control activities to be carried out and the persons that are in charge of these control activities at the different organisational levels. It is also impossible to know with certainty whether a step was not performed (i) because this was considered as no longer needed but the Process Walk-Thru had not been updated or (ii) because the step was not implemented by the persons in charge.
393. In addition, regarding the shortcomings related to the implementation of the control activities, the PSI's group indicated that "MIS acknowledges that the Process Walk-thru contained steps that, largely through human error, were not carried out in all cases (...)"³⁰⁸.
394. For example, in the Internal Audit's report dated May 2018³⁰⁹, the conclusions are clear regarding the lack of implementation of certain tasks designed to ensure compliance with the Procedure on Shareholdings. In particular, it is noted regarding the tasks assigned to Data Governance that "certain processes are not adequately reviewed³¹⁰". Regarding the tasks allocated to the Commercial group, it is indicated that "MIS Commercial Group failed to consistently execute onboarding procedures designed to detect entities which Moody's is prohibited from rating³¹¹".
395. Therefore, the Board agrees with the IIO and considers that there was an inadequate definition of the control activities to be carried out in order to ensure compliance with the

³⁰⁴ See, for example, Supervisory Report, Exhibit 57, Process Walk-Thru dated 6 June 2013: the Shareholders Tracker is mentioned at steps 6, 7, 8, 9, 14, 16 and 20.

³⁰⁵ Supervisory Report, Exhibit 84, Shareholder tracker for March and July 2014; Supervisory Report, Exhibit 86, Shareholder tracker for July 2015; See also Exhibit 127, 2013 Q3 6.1 Shareholder tracker as of 8 March 2018, 8 March 2018 and Exhibit 128, 2.1.12 2014 Q3 6.1 Shareholder tracker as of March 2016, March 2016.

³⁰⁶ Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, Question 12, p. 6.

³⁰⁷ Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, Question 12, p. 7.

³⁰⁸ Exhibit 5, PSIs' Comments on the Supervisory Report, p. 3. See also Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, Question 13, p. 7.

³⁰⁹ Supervisory Report, Exhibit 89, Internal Audit Report (May 2018).

³¹⁰ Supervisory Report, Exhibit 89, Internal Audit Report (May 2018), p.6.

³¹¹ Supervisory Report, Exhibit 89, Internal Audit Report (May 2018), p. 3. See also p. 4. This is related to the steps 15 to 19 of the Process Walk-Thru (see Supervisory Report, Exhibit 57, process Walk-thru dated 3 June 2013).

procedures about the conflicts of interest of the shareholders, as well as an inadequate identification of the persons in charge and an inadequate implementation.

Shortcomings related to the documentation

396. 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.
397. In this case, there is a lack of documentation of the controls carried out, which constitute a significant shortcoming.
398. This lack of documentation concerns the steps that had to be implemented according to the Process Walk-Thru. For example, the implementation of the Process Walk-Thru during the Sample Period was documented in a table named “Walk-thru Implementation” and provided by the PSIs in two subsequent versions³¹². According to the second version of the “Walk-thru Implementation” table, even if we do not take into consideration the steps which were considered by the PSI’s group as non-applicable, there are a lot of steps where there is no or only partial records of completion (for example, steps 1, 2, 5a, 6, 7, 8, 14, 15, 16, 17, 18, 19, 20, 21 and 25 of the process Walk-Thru)³¹³.
399. The PSI’s group indicated that “the lack of documentation of each step does not mean that these steps were not carried out. Certain of these steps do not lend themselves to formal documentation³¹⁴”. When asked by the IIO to explain this last statement, the PSI’s group responded in particular that “this is particularly true both for precursor steps and steps that involve someone “checking” a point of information with another team³¹⁵” and that a number of steps “(...) would be expected to be evidenced by the existence of an output or an email³¹⁶”. The PSI’s group referred for that purpose to a number of steps.
400. However, the PSI’s group also confirmed that “not all the steps in the process Walk-thru were formally documented during the Review period³¹⁷”. In particular, the following was indicated: “The PSIs acknowledge that of the Commercial Steps (broadly, steps 9-20), not all were formally documented during the period³¹⁸”. Also, “the determination of significant influence was not systematically documented and provided to the Data Governance Team³¹⁹”; this is step 5c which involve the check by the PSI’s group’s legal staff based in New York of the significant influence shareholders.

³¹² Supervisory Report, Exhibit 87, Walk-thru implementation, 26 March 2018, and Supervisory Report, Exhibit 88, Walk-thru implementation, 29 March 2019.

³¹³ Supervisory Report, Exhibit 88, Walk-thru implementation, 29 March 2019. See also Exhibit 16, ESMA Supervisors’ Response to the IIO, 22 April 2020, 22 April 2020, Question 9, pp. 5-9.

³¹⁴ Exhibit 5, PSIs’ Comments on the Supervisory Report, p. 4.

³¹⁵ Exhibit 17, PSIs’ Response to the IIO’s First RFI, First Batch, Question 14, p. 6.

³¹⁶ Exhibit 17, PSIs’ Response to the IIO’s First RFI, First Batch, Question 14, p. 6.

³¹⁷ Exhibit 18, PSIs’ Response to the IIO’s First RFI, Second Batch, Question 13, p. 7.

³¹⁸ Exhibit 17, PSIs’ Response to the IIO’s First RFI, First Batch, Question 14, p. 6.

³¹⁹ Exhibit 17, PSIs’ Response to the IIO’s First RFI, First Batch, Question 14, p. 6.

401. In the Internal Audit's report dated May 2018³²⁰, the conclusions are clear regarding the lack of records of controls and steps to be implemented to ensure compliance with the Procedure on Shareholdings. In particular, it is noted regarding the tasks assigned to Data Governance that "The review procedures are not formally documented (...) and sufficient evidence of a review is not retained³²¹". Regarding the tasks assigned to Investor Relations, it is indicated that "Investors Relations does not retain evidence of their completeness and accuracy checks performed between Ipreo data and SEC filings or equivalents. Additionally, no evidence is retained of the checks performed to ensure that when Investor Relations aggregates and formats the data provided by Ipreo, no data relevant to the disclosure is lost³²²".
402. Moreover, the Board notes that "MIS acknowledges (...) that the lack of documentation may have affected the quality of oversight and verification of the steps in the Process Walk-thru³²³".
403. On that basis, the Board agrees with the IIO and considers that the lack of documentation showing the controls that were carried out (if these controls took place) is a substantial shortcoming in the internal control mechanisms of the PSI's group.

Conclusion

404. To conclude on Point 4 of Section A of Annex I of the CRA Regulation, the Board considers, for the reasons explained above, that the PSI's group 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 the conflicts of interest linked to the shareholders.

Attribution of the infringement

405. This sub-section assesses to which legal entity within the PSI's group the infringement related to the internal control mechanisms is attributable.
406. While in the Supervisory Report, it was considered that the related serious indications were attributable to several entities belonging to the PSI's group³²⁴ (and the PSI's group did not comment on this point in the Comments on the Supervisory Report³²⁵), in the Response to the IIO's initial Statement of Findings, the PSI's group strongly argued that the infringement should be attributable only to Moody's UK³²⁶.

³²⁰ Supervisory Report, Exhibit 89, Internal Audit Report (May 2018).

³²¹ Supervisory Report, Exhibit 89, Internal Audit Report (May 2018), p.6.

³²² Supervisory Report, Exhibit 89, Internal Audit Report (May 2018), p.5. This is related to steps 1 and 3 of the Process Walk-Thru (see, for example, Supervisory Report, Exhibit 57, process Walk-Thru dated 3 June 2013).

³²³ Exhibit 5, PSIs' Comments on the Supervisory Report, p. 4.

³²⁴ Exhibit 1, Supervisory Report, paragraph 154.

³²⁵ Exhibit 5, PSIs' Comments on the Supervisory Report, 30 October 2019.

³²⁶ Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, 29 June 2020, see in particular pp. 9, 13-15, 45.

407. The Board preliminary notes that Article 9 of the CRA Regulation provides that “Outsourcing of important operational functions shall not be undertaken in such a way as to impair (...) the ability of ESMA to supervise the credit rating agency’s compliance with obligations under this Regulation”.
408. Regarding the facts relevant in this case, when asked to provide a copy of the outsourcing agreement applicable during 2013-2018 within the PSI’s group regarding internal control, the PSI’s group submitted a copy of the Rating Services Agreement entered into by each of the PSI’s group and Moody’s Investor Services, Inc. (established in the US)³²⁷. This agreement relates among other things to the compliance function within the Moody’s group in the period from 2013 to 2018 as well as to other analytical services³²⁸.
409. Even though there is an article about indemnification and limitation of liability³²⁹, no specific clause in this agreement deprives the PSI’s group of responsibilities regarding the internal control mechanisms.
410. In addition, the PSI’s group provided information on the employing entities of the staff of Investors Relations, the Commercial group, GMO, RDD and Compliance which were involved during the Sample Period in the execution of the processes relating to the EU shareholdings rules³³⁰. It results that RDD / GMO staff and Investors Relations staff were employed by the US-based legal entities of the PSI’s group; the staff from the Commercial group was mainly employed by Moody’s UK and a few by the other entities of the PSI’s group; the compliance staff was employed by the US-based legal entities of the group, and a few by Moody’s UK and the other entities of the PSI’s group.
411. Moreover, in the Response to the IIO’s initial Statement of Findings, the PSI’s group indicated that “The relevant decisions in relation to [this] Infringement 6 were taken by the Shareholder Rules Workstream which considered the implementation of the CRA III Regulation and designed the Process Walk-Thru. (...) the vast majority of the EU-based members of this workstream were based in the UK, which was the EU hub for MIS at the relevant time. Accordingly, this infringement can properly be attributed only to Moody’s UK³³¹”. It results from this spreadsheet³³² that most of the members of Shareholder Workstream were employed in the US and that, excluding these employees, all the EU-based members were employed in the UK, except one in France.

³²⁷ Exhibit 17, PSIs’ Response to the IIO’s First RFI, First Batch, Question 24, and Exhibit 25, PSIs’ Response to the IIO’s First RFI, First Batch, Document ESMA_00000032, Rating Services Agreement.

³²⁸ Exhibit 17, PSIs’ Response to the IIO’s First RFI, First Batch, Question 24, and Exhibit 25, PSIs’ Response to the IIO’s First RFI, First Batch, Document ESMA_00000032, Rating Services Agreement, Schedule A, p. 13.

³²⁹ Exhibit 17, PSIs’ Response to the IIO’s First RFI, First Batch, Question 24 and Exhibit 25, PSIs’ Response to the IIO’s First RFI, First Batch, Document ESMA_00000032, Rating Services Agreement, Article 9.

³³⁰ Exhibit 72, Excel file detailing changes to staff for Commercial Group, RDD, Investor Relations, GMO, Legal, Compliance and Internal Audit during the Review Period. See also Exhibit 16, ESMA Supervisors’ Response to the IIO, 22 April 2020, Question 24.

³³¹ Exhibit 159, PSIs’ Response to the IIO’s initial Statement of Findings, p. 45.

³³² Exhibit 160, Spreadsheet of employing entity of members of the Shareholder Workstream during the Sample Period, ESMA_00000106.

412. On the basis of the above elements and in the very specific circumstances of this case, the Board, in agreement with the IIO, considers that – overall - the infringement related to the internal control mechanisms is attributable to Moody's UK.

Conclusion

413. To conclude, the Board finds that Moody's UK infringed Article 6(2) of the CRA Regulation, in conjunction with Point 4 of Section A of Annex I regarding the internal control mechanisms. This constitutes the infringement set out at Point 12 of Section I of Annex III of the CRA Regulation.

Intent or negligence

414. The factual background of this case does not establish that there are objective factors which demonstrate that the PSI, its employees or senior managers acted deliberately to commit the infringement of Point 12 of Section I of Annex III of the CRA Regulation regarding the internal control mechanisms.

415. It should therefore be assessed whether there was negligence. Regarding the concept of negligence for the purposes of the CRA Regulation, the Board refers to the developments provided above under Section 4, notably paragraphs 114 - 122.

416. Regarding the application to the infringement of Point 12 of Section I of Annex III of the CRA Regulation, the Board notes the following.

417. First, the IIO requested³³³ the PSI's group to provide a copy of all internal documentation showing that an internal assessment was performed in 2012-2013 to determine specifically whether an enhancement of the internal controls applicable to conflicts of interest was needed because of the entry into force of the CRA III Regulation. The PSI's group referred³³⁴ to the work of the CRA3 project and its seven workstreams, including the Shareholder Workstream. However, this cannot be considered as a specific internal assessment dedicated to the internal controls applicable to conflicts of interest.

418. Second, the infringement related to the internal control mechanisms is hereby established because of the shortcomings which occurred in the internal controls of the PSI's group related to the Process Walk-Thru.

419. The Board considers these shortcomings to be significant and obvious signs of negligence. The non-implementation of some steps and controls provided in the Process Walk-Thru and the missing records and documentation are clear examples that individually and together denote a lack of care, contrary to what is expected from a professional regulated financial firm.

³³³ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 23, p. 12.

³³⁴ Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 23, p. 12.

420. This shows that the PSI's group, in particular Moody's UK, did not put in place a process and the checks that could be expected of a professional firm in the financial services sector subject to stringent regulatory requirements and did not take the required special care so as to prevent non-compliance with the requirements of the CRA Regulation.

421. The Board acknowledges the arguments raised by the PSI's group³³⁵ to dismiss negligence regarding the present infringement. However, having in mind the high standard of care required from CRAs, these arguments are to be rejected. In particular, the absence of a specific internal assessment of internal controls represents only one of the factors considered in the establishment of negligence. Moreover, it is noted that the assessment of negligence is naturally founded on the nature and type of facts / omissions which led to the infringement being committed.

422. Therefore, the Board, in agreement with the IIO, considers that Moody's UK was negligent when committing the infringement related to the internal control mechanisms.

Fines

423. The Board preliminary notes that the basic amount of the applicable fine is calculated taking as a reference the latest available official financial statements regarding the PSI's annual turnover in the business year preceding the year of the decision, as recommended by the Joint Board of Appeal of the three ESAs in its Decision of 28 December 2020. Given the proximity of the end of 2020 financial year, the official financial statements of the PSI for the FY 2020 are not yet available, thus reference is made to the latest official statements available, namely for the full financial year ended 31 December 2019.

Determination of the basic amount

424. Article 36a of the CRA 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; [...]

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

³³⁵ Exhibit 159, PSIs' Response to the initial Statement of Findings, pp. 44-45.

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”.

425. It has been established that Moody’s UK committed the infringement set out at Point 12 of Section I of Annex III of the CRA Regulation regarding the internal control mechanisms.

426. To determine the basic amount of the fine, the Board has regard to the latest official financial statements regarding the annual turnover of the PSI.

427. In 2019, Moody’s UK had a total turnover of GBP 197 767 000, corresponding to EUR 225 434 603³³⁶ (including branches).

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

Applicable aggravating factors

429. Annex IV of the CRA Regulation lists the aggravating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO’s findings and considers applicable the aggravating factor set out in Annex IV, Point I. 2: If the infringement has been committed for more than six months, a coefficient of 1,5 shall apply.

430. The infringement was committed for more than six months, because it started in June 2013 with the entry into force of the new requirements on conflicts of interest and the related Process Walk-Thru and it lasted until the Process Walk-Thru was updated in 2019.

431. Therefore, the Board considers that this aggravating factor is applicable.

Applicable mitigating factors

432. Annex IV of the CRA Regulation lists the mitigating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO’s findings and considers applicable the aggravating factor set out in 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.

433. The Board considers that remedial actions have been taken since the infringement related to the internal control mechanisms was identified. Significant changes have been introduced into the Process Walk-Thru.

³³⁶ Based on the official exchange rate for GBP v EUR in 2019: 1.1399
https://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/eurofxref-graph-gbp.en.html

434. Indeed, the Board notes that the IIO asked the PSI's group to provide a description of the remedial actions taken in relation to the infringement related to the internal control mechanisms. The PSI's group listed many actions, including the following.
435. Regarding the fact that the ownership of the Process Walk-Thru was fragmented across different functions, the PSI's group' indicated that "As of June 2018, the (redrafted: a senior member of Data Operations and Governance) was appointed as the single owner for the oversight of the EU Shareholding Rules processes ". In addition, the Process Walk-Thru was updated to be in line with the changes to the business practices and to remove legacy steps. The PSI's group also indicated that the Process Walk-Thru effective 2 December 2019 included additional controls, in particular regarding the onboarding process. Finally, regarding the lack of records and documentation about the steps and controls which are implemented, the PSI's group mentioned that "Potential issues identified in respect of lack of documentation are addressed in the current version of the Process Walk-thru ", in particular "A clear guideline to section owners that they are required to keep a record of all steps performed", "Express requirements for information to be shared between business functions by email" and a requirement to "store the data files generated in preparing quarterly and ad hoc disclosure reports ".
436. The Board considers that these measures should ensure that a similar infringement cannot be committed in the future.
437. The Board assessed whether these measures were taken voluntarily, which would imply that the mitigating factor provided by Annex IV, Point II.4. of the CRA Regulation would be applicable. As already explained, there is no definition of what "voluntarily" precisely means within the context of this mitigating factor.
438. In the present case, the Board notes that the PSI's group indicated that these measures were partially prompted by the interactions with ESMA, but they were also justified by the fact that similar issues were raised by the PSI's group's internal audits which took place in 2018 and 2019 regarding the EU shareholder rules³³⁷.
439. Regarding the measures which were prompted by ESMA, the Board notes that the decision of whether or not to take these measures was, at the date of implementation of these measures, within the PSI's group's remit; there was for example no decision from ESMA ordering to put an end to the practices.
440. Therefore, the Board considers that this mitigating factor is applicable for the infringement of Point 12 of Section I of Annex III of the CRA Regulation committed by the PSI.

³³⁷ Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, Question 47, p. 14, p. 17-24.

Determination of the adjusted fine

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

442. 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

443. Consequently, following adjustment by taking into account the applicable aggravating and mitigating factors, the amount of the fine to be imposed on Moody's UK amounts to EUR 825 000.

Financial benefit from the infringement

444. Article 36a(4) of the CRA 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”.

445. In this respect, the Board considers that there is no evidence that the PSI's group would have benefitted financially from the infringement.

446. Article 36a(4) of the CRA Regulation is thus not applicable.

Supervisory measures

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

448. Given the factual findings in the present investigation and in particular the fact that significant changes were introduced by the PSI's group to the Process Walk-Thru, only the supervisory measure set out in Article 24(1)(e) of the CRA Regulation is considered

appropriate with regard to the nature and the seriousness of the infringement. It must thus be held that the issue of a public notice is the only proportionate supervisory measure.

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

DECIDES

that

Moody's Investors Service Limited committed with negligence the following infringements:

- infringement set out at set out at Point 11 of Section I of Annex III of the Regulation (by not having established adequate policies or procedures to ensure compliance with its obligations under this Regulation);
- infringement set out at Point 20 of Section I of Annex III of the Regulation (by having issued a rating concerning Northern Powergrid (Yorkshire) Limited (“NPY”) despite the fact that, at the date of the rating, a shareholder holding more than 10% of its capital/voting rights was a board member of NPY);
- infringement set out at Point 20a of Section I of Annex III of the Regulation (by not having ensured the appropriate disclosures regarding conflicts of interest linked to shareholders);
- infringement set out at Point 15 of Section I of Annex III of the Regulation (by not having appropriate and effective organisational and administrative arrangements);
- infringement set out at Point 12 of Section I of Annex III of the Regulation (by not having sound administrative and accounting procedures and internal control mechanisms).

therefore

IMPOSES

the following **fin**es:

- 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 20 of Section I of Annex III of Regulation (EC) No 1060/2009;
- EUR 420 000 for the infringement set Point 20a of Section I of Annex III of Regulation (EC) No 1060/2009;

- EUR 825 000 for the infringement set Point 15 of Section I of Annex III of Regulation (EC) No 1060/2009;
- EUR 825 000 for the infringement set Point 12 of Section I of Annex III of Regulation (EC) No 1060/2009,

Upon having applied Article 36a(4), second paragraph, of Regulation (EC) No 1060/2009 in respect of the fines imposed for the infringements set out at Point 11 and Point 20 of Section I of Annex III, whereby the fine of EUR 825 000 is applied for both infringements; and in respect of the partial overlap of the root cause for the infringements set out at Point 20a and Point 15 of Section I of Annex III, whereby the fine for the infringement set out at Point 20a partially absorbs the fine set out at Point 15 insofar as relating to the eight repetition, thus resulting in the reduction of the fine for the infringement set out at Point 20a of Section I of Annex III from EUR 420 000 to EUR 260 000;

for the overall amount of EUR **2 735 000**

and
ADOPTS

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

Moody's UK may avail itself of the remedies of Chapter V of Regulation (EU) No 1095/2010 against this decision.

This decision is addressed to **Moody's Investors Service Ltd.** – One Canada Square - Canary Wharf London E14 5FA (United Kingdom) and shall enter into force on the date of its adoption.

Done at Paris, on 23 March 2021

[PERSONAL SIGNATURE]

For the Board of Supervisors

Steven Maijoor

The Chair