

## DECISION OF THE BOARD OF SUPERVISORS

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

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

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

**Having regard** to Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)<sup>1</sup>, as amended by Regulation (EU) 2019/2175 of 18 December 2019<sup>2</sup> ('ESMA Regulation'), and in particular Article 43(1) thereof,

**Having regard** to Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies<sup>3</sup> (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 Authority<sup>4</sup>, 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 Italia S.r.l. ('Moody's Italy' or the 'PSI') and other four EU-based entities belonging to the Moody's group (the 'PSI's group'), there

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

<sup>2</sup> OJ L 334, 27.12.2019, p. 1–145.

<sup>3</sup> OJ L 302 17.11.2009, p. 1.

<sup>4</sup> OJ L 282 16.10.2012, p. 23.

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 file<sup>5</sup>.
- 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.

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<sup>5</sup> 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 Report<sup>6</sup>, Moody's Italy's total revenues were EUR 26.8 million (including EUR 21.7 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 Italy. The authority competent for the registration, in the capacity as home member state authority, issued an individual registration decision<sup>7</sup>. Moody's Italy got an exemption from having to comply with a number of requirements such as the presence of a compliance officer.

## 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<sup>8</sup>:

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 Regulation<sup>9</sup> 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 group<sup>10</sup>.

<sup>6</sup> Transparency Report concerning year ended 31 December 2019, available at: [https://www.moodys.com/sites/products/ProductAttachments/BP55477\\_EU\\_TransparencyReport\\_2020.pdf](https://www.moodys.com/sites/products/ProductAttachments/BP55477_EU_TransparencyReport_2020.pdf)

<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> 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

<sup>10</sup> 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) Limited<sup>11</sup>, 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 disclosed<sup>12</sup>.

### **Relevant disclosures**

10. 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 books<sup>13</sup>”.
11. 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.com](http://www.moodys.com)<sup>14</sup>”. A similar provision exists for 10% shareholder with the addition of “immediate” regarding the disclosure.
12. In the Process Walk-Thru in place during the Sample Period, a number of steps were described<sup>15</sup> about “Disclosing Relationships” and a template was provided for the “Disclosure page for major shareholders and their interests in rated entities<sup>16</sup>”. 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

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

<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> Supervisory Report, Exhibit 71, Procedure on Shareholding, effective date of 3 June 2013, p. 1.

<sup>15</sup> See for example, Supervisory Report, Exhibit 57, Process Walk-thru CRA3, last modified: 3 June 2013, “Process 1.4”, p. 4.

<sup>16</sup> Supervisory Report, Exhibit 57, Process Walk-thru CRA3, last modified: 3 June 2013, p. 12-13.

insurance; or (ii) being otherwise in a position to exercise significant influence on the business activities of Moody's Corporation".

13. In the Shareholder Report Run Book<sup>17</sup>, 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 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 (...)<sup>18</sup>".

Lack of disclosure or incomplete disclosures<sup>19</sup>

14. During the investigation by ESMA Supervisors, the PSI's group informed ESMA of a number of disclosures which were not correct.
15. The latest figures provided<sup>20</sup> show that there was a total of 278 cases of lack of disclosure or incomplete disclosures during the Sample Period<sup>21</sup>. They concerned 101 rated entities.
16. The PSI's group provided an excel table<sup>22</sup> 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.
17. Regarding rated entities for which the lead analyst was located in Italy, there were four cases of lack of disclosure or incomplete disclosures of which three took place in 2013 and one took place in 2017. In total, four rated entities were subject to lack of disclosure or incomplete disclosures<sup>23</sup>.
18. Following questions from the IIO, the PSI's group provided detailed explanations on the reasons that led to the cases of lack of disclosure or incomplete disclosures. There are four main reasons.

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<sup>17</sup> 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.

<sup>18</sup> Exhibit 17, PSIs' Response to the IIO's First RFI, First Batch, Question 33, p. 17.

<sup>19</sup> Also referred to in the Exhibits as 'Under-disclosures'.

<sup>20</sup> The PSI's group provided conflicting figures during the investigation.

<sup>21</sup> 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.

<sup>22</sup> Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch; and Exhibit 20, Document ESMA\_00000100.

<sup>23</sup> Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch; and Exhibit 20, PSIs' Response to the IIO's First RFI, Third Batch, Document ESMA\_00000100. Each entity (Avon Products Inc., British American Tobacco plc, Imperial Tobacco Group PLC and Philip Morris International Inc.) was subject to one under-disclosure.

19. First, 60 cases of lack of disclosure or incomplete disclosures<sup>24</sup> 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 identify the quarterly shareholdings disclosures. This review was prompted in March 2018 by an Internal audit review<sup>25</sup>. 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 script<sup>26</sup>".
20. Second, 43 cases of lack of disclosure or incomplete disclosures<sup>27</sup> 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. 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 (...) <sup>28</sup>". A similar problem happened in two instances<sup>29</sup> for another 5% shareholder<sup>30</sup>, 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.
21. Third, it was indicated that 144 cases of lack of disclosure or incomplete disclosures<sup>31</sup> 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"<sup>32</sup>".

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<sup>24</sup> 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.

<sup>25</sup> Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 39.

<sup>26</sup> Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 39.

<sup>27</sup> 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.

<sup>28</sup> Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 38.

<sup>29</sup> 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.

<sup>30</sup> 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 PSI's shareholder concerned is Capital World Investors.

<sup>31</sup> 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.

<sup>32</sup> Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 37.

22. The PSI's group consider that these cases of lack of disclosure or incomplete disclosures were caused by an "human error"<sup>33</sup>. 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.
23. Fourth, there are 31 cases of lack of disclosure or incomplete disclosures<sup>34</sup> which are due to errors which "(...) arose from the compilation of the disclosures reports from the source data (...) "<sup>35</sup>". These errors were identified by the PSI's group when reviewing the source data in 2018.
24. It was indicated that "These errors are believed by the PSIs to be human errors within the Data Governance team"<sup>36</sup>. 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**

25. 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 Policy<sup>37</sup>, the Procedure on Shareholding<sup>38</sup> and the new guidance document covering the requirements of the CRA Regulation concerning conflicts of interest related to shareholders (the "Process Walk-Thru")<sup>39</sup>.
26. 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

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<sup>33</sup> Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 37.

<sup>34</sup> 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.

<sup>35</sup> Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 37.

<sup>36</sup> Exhibit 19, PSIs' Response to the IIO's First RFI, Third Batch, Question 37.

<sup>37</sup> 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\_00000010, Policy on Shareholding, 9 December 2019.

<sup>38</sup> 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\_00000010, Procedure on Shareholding, 9 December 2019.

<sup>39</sup> 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\_00000011, Process Walk-Thru, 2 December 2019.



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 maintaining, withdrawing, or refraining from issuing EU Credit Ratings affected by these threshold levels and, if applicable, their related rating Outlooks or rating Reviews<sup>40</sup>.

27. 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 time<sup>41</sup>".
28. 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 board<sup>42</sup>".
29. 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 2013<sup>43</sup>, 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 ratings<sup>44</sup>.
30. The PSI's group indicated that the Process Walk-Thru was treated as "business Guidelines<sup>45</sup>" and that it was owned simultaneously by four business areas, i.e. Investor

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<sup>40</sup> Supervisory Report, Exhibit 68, Policy on Shareholding (v1), 3 June 2013; and Supervisory Report, Exhibit 69, Policy on shareholding, 3 April 2017.

<sup>41</sup> 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.

<sup>42</sup> 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.

<sup>43</sup> Supervisory Report, Exhibit 57, Process Walk-Thru, 6 June 2013, Table of Contents, p. 1.

<sup>44</sup> 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).

<sup>45</sup> 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

Relations, Commercial Group, Global Middle Office (“GMO”) and RD (or RDD)<sup>46</sup>. Each of these business areas implemented the Process Walk-Thru and was responsible for some steps of the process<sup>47</sup>.

31. 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 Provisions<sup>48</sup>”. 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 list<sup>49</sup>.

### 3. Relevant legal provisions

#### Preliminary remarks

32. 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.
33. 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 agencies<sup>50</sup> (“CRA II Regulation”), which entered into force on 1 June 2011.
34. 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 2011<sup>51</sup> as well as through Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21

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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”.

<sup>46</sup> 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.

<sup>47</sup> See for example Supervisory Report, Exhibit 57, Process Walk-Thru, 6 June 2013.

<sup>48</sup> Supervisory Report, Exhibit 36, MIS Response to the Fourth RFI, 29 March 2019, Question 3.1, p.13.

<sup>49</sup> Supervisory Report, Exhibit 10, MIS Response to the First RFI, 9 October 2017, Question 3, p.4.

<sup>50</sup> 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.

<sup>51</sup> 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.

May 2013<sup>52</sup> 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 2014<sup>53</sup> and Regulation (EU) 2017/2402 of 12 December 2017<sup>54</sup> also introduced limited changes to the CRA Regulation.

## Relevant legal provisions regarding conflicts of interest

35. 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 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”.
36. 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”.
37. Following the CRA III Regulation, 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

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<sup>52</sup> 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.

<sup>53</sup> 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.

<sup>54</sup> 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.

a member of the administrative or supervisory board of the rated entity or a related third party”.

38. 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”.
39. 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”.
40. Finally, 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”.
41. 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”.

## Other relevant legal provisions

42. 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.
43. 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”.
44. 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 20a of Section I of Annex III of the CRA Regulation concerning the disclosure of conflicts of interest**

45. The Board 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).
46. If this requirement is not met, the infringement set out at Point 20a of Section I of Annex III of the CRA Regulation is established.

### **Analysis**

47. 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.
48. 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".
49. 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 disclosures<sup>55</sup>.
50. 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

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<sup>55</sup> 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.

51. 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 Period<sup>56</sup>". 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 disclosures<sup>57</sup>".
52. The latest<sup>58</sup> 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 Period<sup>59</sup>. 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.
53. 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 entities<sup>60</sup>".
54. 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.
55. 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**

56. 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.
57. 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

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<sup>56</sup> Exhibit 5, PSIs' Comments on the Supervisory Report, p. 11.

<sup>57</sup> Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, p. 28.

<sup>58</sup> The PSIs provided conflicting figures during the investigation.

<sup>59</sup> 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.

<sup>60</sup> Exhibit 5, PSIs' Comments on the Supervisory Report, pp. 11-12.

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 (...)”<sup>61</sup>. The PSI’s group specified that these entities were “namely, Moody’s Investor Services, Inc. and Moody’s Shared Services Inc.”<sup>62</sup> (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 provisions<sup>63</sup>. This excel table confirms that all this staff is employed by the US-based legal entities of the Moody’s group.

58. 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 analysts<sup>64</sup>”.

59. 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 Agreement<sup>65</sup>, 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 services<sup>66</sup>”. This Agreement was signed between Moody’s Investor Services, Inc. (established in the US) and each of the entities of the PSI’s group<sup>67</sup>. 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 Agreement<sup>68</sup>”. The Corporate Services Agreement provided by the PSI’s group<sup>69</sup> 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 the PSI’s group<sup>70</sup>.

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<sup>61</sup> See Exhibit 17, PSIs’ Response to the IIO’s First RFI, First Batch, Question 33, p. 16-17.

<sup>62</sup> Exhibit 17, PSIs’ Response to the IIO’s First RFI, First Batch, Question 35, p. 18.

<sup>63</sup> 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.

<sup>64</sup> Exhibit 17, PSIs’ Response to the IIO’s First RFI, First Batch, Question 34, p. 17-18.

<sup>65</sup> 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.

<sup>66</sup> Exhibit 17, PSIs’ Response to the IIO’s First RFI, First Batch, Question 35, p. 18.

<sup>67</sup> 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.

<sup>68</sup> Exhibit 17, PSIs’ Response to the IIO’s First RFI, First Batch, footnote 24, p. 6.

<sup>69</sup> Exhibit 48, PSIs’ Response to the IIO’s First RFI, First Batch, Document ESMA\_00000039, Amended and Restated Corporate Services Agreement.

<sup>70</sup> Exhibit 17, PSIs’ Response to the IIO’s First RFI, First Batch, Question 31, p. 16.



Even though there is an article about indemnification and limitation of liability<sup>71</sup> 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.

60. 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".
61. 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 rating<sup>72</sup>. 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 ratings<sup>73</sup>.
62. 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 (...)"<sup>74</sup>.
63. 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.
64. Amongst the evidence of this case, the Board notes an excel table<sup>75</sup> 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.

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<sup>71</sup> 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.

<sup>72</sup> 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.

<sup>73</sup> 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](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](https://www.esma.europa.eu/sites/default/files/library/cra_1-2018_decision_on_fitch_france.pdf).

<sup>74</sup> Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, Footnote 104.

<sup>75</sup> Exhibit 20, PSIs' Response to the IIO's First RFI, Third Batch, Document ESMA\_00000100.

65. Regarding rated entities for which the lead analyst was located in Italy, there were four cases of lack of disclosure or incomplete disclosures which concerned four rated entities<sup>76</sup>.
66. Therefore, based on the information provided by the PSI's group, the Board considers that the infringement related to the cases of lack of disclosure of conflicts of interest is attributable to Moody's Italy.

### Conclusion

67. To conclude, the Board agrees with the IIO and finds that Moody's Italy, 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

68. 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.
69. It should therefore be assessed whether there was negligence.

### Preliminary remarks

70. 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 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.
71. 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 omission<sup>77</sup>.

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<sup>76</sup> Exhibit 20, PSIs' Response to the IIO's First RFI, Third Batch, Document ESMA\_00000100. Each entity (Avon Products Inc., British American Tobacco plc, Imperial Tobacco Group PLC and Philip Morris International Inc.) was subject to one under-disclosure.

<sup>77</sup> See for instance Case C-308/06, *International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I- 4057, where the CJEU noted at para. 75 of its judgment that all of the Member States' legal systems "have recourse to the concept of negligence which refers to an unintentional act or omission by which the person responsible breaches his duty of care".

72. 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.
73. Taking into account the CJEU jurisprudence<sup>78</sup>, 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.
74. 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.
75. The following points should be taken into consideration regarding the standard of care to be expected of a CRA.
76. First, the position taken by the General Court in the Telefonica case must be considered. In this case, the General Court spoke of persons “carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on that account be expected to take special care in assessing the risks that such an activity entails<sup>79</sup>”. 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.
77. 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 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

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<sup>78</sup> See for instance Case C-48/98, *Firma Söhl & Söhlke v Hauptzollamt Bremen* [1999] ECR I-7877, para. 58; Case C-64/89, *Deutscher Fernsprecher* [1990] ECR I-2535, para. 19.

<sup>79</sup> Case T-336/07, *Telefónica, SA and Telefónica de España, SA v Commission* [2012] ECLI:EU:T:2012:172, para. 323.

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.

78. 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 stated<sup>80</sup> 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

79. 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 (...)”<sup>81</sup>.

80. 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.

81. First, 60 cases of lack of disclosure or incomplete disclosures<sup>82</sup> 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 disclosures<sup>83</sup> 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 disclosures<sup>84</sup> 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”<sup>85</sup>”. Fourth, there are 31 cases of lack of disclosure or incomplete

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<sup>80</sup> See para. 285 of the decisions of the Board of Appeal in the Appeals of Svenka Handelsbanken AB, Skandinaviska Enskilda Banken AB, Swedbank AB and Nordea Bank Abp against ESMA’s decision in the Nordic Banks case (ref. BoA D 2019 01, BoA D 2019 02, BoA D 2019 03 and BoA D 2019 01), available at [https://eiopa.europa.eu/Publications/Board%20of%20Appeal%20-%2027%20February%202019%20-%20Decisions%202019\\_01\\_02\\_03\\_04%20-%20Final.pdf](https://eiopa.europa.eu/Publications/Board%20of%20Appeal%20-%2027%20February%202019%20-%20Decisions%202019_01_02_03_04%20-%20Final.pdf).

<sup>81</sup> Exhibit 5, PSIs’ Comments on the Supervisory Report, p. 12.

<sup>82</sup> Exhibit 19, PSIs’ Response to the IIO’s First RFI, Third Batch, Question 39. See also Document ESMA\_00000100.

<sup>83</sup> 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.

<sup>84</sup> 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.

<sup>85</sup> Exhibit 19, PSIs’ Response to the IIO’s First RFI, Third Batch, Question 37.

disclosures<sup>86</sup> which are due to errors which “(...) arose from the compilation of the disclosures reports from the source data (...)”<sup>87</sup>.”

82. 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 ESMA<sup>88</sup>. Contrary to the PSI’s group’s allegations<sup>89</sup>, the Board considers that each of these errors taken individually is in itself a sign of negligence.
83. 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 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.
84. Moreover, as pointed out by ESMA Supervisors<sup>90</sup>, 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 Agencies<sup>91</sup>”. The first version of this document was published on 17 December 2013<sup>92</sup>. 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 (...)?”<sup>93</sup>. 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-cooperation<sup>94</sup>”. In this respect, the multiple errors and problems of various nature that led to the lack of

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<sup>86</sup> 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.

<sup>87</sup> Exhibit 19, PSIs’ Response to the IIO’s First RFI, Third Batch, Question 37.

<sup>88</sup> Exhibit 18, PSIs’ Response to the IIO’s First RFI, Second Batch, p. 32.

<sup>89</sup> Exhibit 159, PSIs’ Response to the IIO’s initial Statement of Findings, pp. 28-29, paras 17.4 and 17.5.

<sup>90</sup> Exhibit 1, Supervisory Report, paragraph 206.

<sup>91</sup> 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.

<sup>92</sup> Supervisory Report, Exhibit 135, p. 3.

<sup>93</sup> Supervisory Report, Exhibit 135, Questions and Answers, Implementation of the Regulation (EU) No 462 2013 on Credit Rating Agencies, p. 10.

<sup>94</sup> Supervisory Report, Exhibit 135, Questions and Answers, Implementation of the Regulation (EU) No 462 2013 on Credit Rating Agencies, p. 10.

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.

85. The Board acknowledges the different arguments raised by the PSI's group in order to argue that there was no negligence<sup>95</sup>. 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.
86. 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 file<sup>96</sup>". 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.
87. 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 disclosures<sup>97</sup>. 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).
88. 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 disclosures<sup>98</sup>". 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 excluded<sup>99</sup>". 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.
89. 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

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<sup>95</sup> See in particular Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, pp. 28-31.

<sup>96</sup> Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, p. 29.

<sup>97</sup> Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, pp. 29-30.

<sup>98</sup> Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, p. 30.

<sup>99</sup> Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, p. 30.

Entities when transferring information from data sources to the disclosures<sup>100</sup>". 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.

90. 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**

91. 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 financial year 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**

92. 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".

93. It has been established that Moody's Italy 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.

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<sup>100</sup> Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, p. 31.

94. 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.

95. In 2019, Moody's Italy had a total turnover of EUR 30 546 793.

96. Thus the basic amount of the fine for Moody's Italy for the infringement listed in Point 20a of Section I of Annex III of the CRA Regulation is set at the middle of the limit of the fine set out in Article 36a(2)(h) of the CRA Regulation and shall not exceed EUR 145 000.

### **Applicable aggravating factors**

97. 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.

98. 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.

99. The PSI's group provided an excel table<sup>101</sup> which shows the number of missing disclosures. On the basis of this table, it results that regarding Moody's Italy, there were four cases of lack of disclosure or incomplete disclosures which concerned four rated entities<sup>102</sup>.

100. Therefore, the infringement has been committed repeatedly and this aggravating factor is applicable.

101. 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.

102. 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 infringement<sup>103</sup>".

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<sup>101</sup> Exhibit 20, PSIs' Response to the IIO's First RFI, Third batch, Document ESMA\_00000100.

<sup>102</sup> Exhibit 20, PSIs' Response to the IIO's First RFI, Third batch, Document ESMA\_00000100. Each entity (Avon Products Inc., British American Tobacco plc, Imperial Tobacco Group PLC and Philip Morris International Inc.) was subject to one under-disclosure.

<sup>103</sup> Exhibit 159, PSIs' Response to the IIO's initial Statement of Findings, p. 31.



103. 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 incomplete disclosures caused by errors when compiling information have been counted as separate and repeated<sup>104</sup>.

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

105. 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 Italy, within the cases of lack of disclosure or incomplete disclosures which concerned four rated entities, there were three linked to errors due to timing issues and late identification of a relevant shareholder, affecting three rated entities<sup>105</sup> and one linked to errors when compiling information affecting one rated entity<sup>106</sup>.

106. 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 one time for Moody's Italy.

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

107. 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 2018<sup>107</sup>.

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

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<sup>104</sup> 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.

<sup>105</sup> Exhibit 20, PSIs' Response to the IIO's First RFI, Third batch, Document ESMA\_00000100. The affected rated entities are British American Tobacco plc, Imperial Tobacco Group plc and Philip Morris International Inc.

<sup>106</sup> Exhibit 20, PSIs' Response to the IIO's First RFI, Third batch, Document ESMA\_00000100. The affected rated entity is Avon Products Inc.

<sup>107</sup> Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, p. 33.

## Applicable mitigating factors

109. 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.

110. The PSI's group indicated that the missing disclosures relating to conflicts of interest were corrected in June 2018<sup>108</sup>.

111. 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"<sup>109</sup>.

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

113. 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 data"<sup>110</sup>. Therefore, at that time, there were still numerous significant weaknesses in the disclosure process of the PSI's group.

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<sup>108</sup> 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.

<sup>109</sup> Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, p. 33.

<sup>110</sup> Exhibit 24, PSIs' Response to the IIO's First RFI, Second Batch, Document ESMA\_00000087, Internal Audit's Report, p. 5.

114. 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 future"<sup>111</sup>. These enhanced controls include the following.
115. Regarding disclosures, there are two distinct sections in the revised version of Process Walk-Thru<sup>112</sup>: one about the quarterly identification and disclosure process and another one about ad-hoc identification and disclosure process. In particular, the PSI's group highlighted<sup>113</sup> 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 disclosures<sup>114</sup>". 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 list<sup>115</sup>".
116. 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 process<sup>116</sup>".
117. The Board also notes the actions that were listed in ESMA's Remedial Action Plan, which had an impact on the disclosures<sup>117</sup>.
118. 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 timely<sup>118</sup>". Another example provided is the fact that "The PSIs are considering the feasibility of integrating

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<sup>111</sup> Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, p. 33.

<sup>112</sup> See Exhibit 21, PSIs' Response to the IIO's First RFI, First Batch, Document ESMA\_00000011, Process Walk-Thru, 2 December 2019.

<sup>113</sup> 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.

<sup>114</sup> 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.

<sup>115</sup> Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, p. 26.

<sup>116</sup> Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, p. 23.

<sup>117</sup> See Supervisory Report, Exhibit 23, Remedial Action Plan, for example Actions 4, 7, 9, 10 and 11.

<sup>118</sup> 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 errors<sup>119</sup>”.

119. 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.
120. The Board should assess whether these measures were taken voluntarily, which would imply the applicability of the mitigating factor at hand.
121. As already explained, there is no definition of what “voluntarily” precisely means within the context of this mitigating factor.
122. 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 Supervision<sup>120</sup>”. They added that the measures regarding the scope of the testing by the compliance function were prompted following interaction with ESMA Supervisors<sup>121</sup>, and those related to the Process Walk-Thru partly by these interactions and partly by the Internal Audit<sup>122</sup>.
123. 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.
124. 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**

125. In accordance with Article 36a(3) of the CRA Regulation, taking into account the applicable aggravating and mitigating factors, the basic amount of EUR 145 000 must be adjusted as follows.
126. 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:

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<sup>119</sup> Exhibit 18, PSIs’ Response to the IIO’s First RFI, Second Batch, p. 23.

<sup>120</sup> Exhibit 18, PSIs’ Response to the IIO’s First RFI, Second Batch, p. 32.

<sup>121</sup> Exhibit 18, PSIs’ Response to the IIO’s First RFI, Second Batch, p. 25.

<sup>122</sup> 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 145 000 x 1.1 = EUR 159 500

EUR 159 500 – EUR 145 000 = EUR 14 500

One repetition: 1 x EUR 14 500 = EUR 14 500

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

EUR 145 000 x 1.5 = EUR 217 500

EUR 217 500 – EUR 145 000 = EUR 72 500

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

EUR 145 000 x 0.6 = EUR 87 000

EUR 145 000 – EUR 87 000 = EUR 58 000

Adjusted fine taking into account applicable aggravating and mitigating factors:

EUR 145 000 + EUR 14 500 + EUR 72 500 – EUR 58 000 = EUR 174 000

Consequently, following adjustment by taking into account the applicable aggravating and mitigating factors, the amount of the fine to be imposed on Moody's Italy amounts to EUR 174 000.

### **Financial benefit from the infringement**

127. 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”.

128. 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**

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

130. Given the factual findings in the present investigation and in particular the fact that the missing disclosures relating to conflicts of interest were corrected<sup>123</sup>, 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.

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

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<sup>123</sup> Exhibit 18, PSIs' Response to the IIO's First RFI, Second Batch, p. 33.

**DECIDES**

**that**

**Moody's Italia S.r.l.** committed with negligence the 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 their shareholders)

**therefore**

**IMPOSES**

the **fine** of **EUR 174 000** for the infringement set Point 20a of Section I of Annex III of Regulation (EC) No 1060/2009;

**and**

**ADOPTS**

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

Moody's Italy 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 Italia S.r.l.** - Corso di Porta Romana 68, 20122, Milan, Italy 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*