

SHEARMAN & STERLING^{LLP}

BROADGATE WEST | 9 APOLO STREET

LONDON EC2A 2AP

WWW.SHEARMAN.COM | T +44.20.7655.5000 | F +44.20.7655.5500

The Committee of European Securities Regulators

11-13 avenue de Friedland

75008 Paris France

12th November 2009

Dear Sirs,

Re: Response to consultation

1. We refer to your consultation paper issued on 21 October, 2009, entitled "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".
2. In this consultation paper, CESR requested the public to provide their views on various issues discussed in the paper. Shearman & Sterling LLP is a leading international law firm with offices in the most important financial jurisdictions of the world, including in several Member States of the European Union. The purpose of this letter is provide CESR with our views on the following question in the consultation paper, namely:

"Q4: Do you agree with the proposals for the language regime of the application? Please state your reasons."¹

3. In the consultation paper, CESR proposes that, in some cases, an application for registration by a credit rating agency ("**CRA**") may be submitted only in the local language. The local language would be treated as the "language customary in the sphere of international finance" for the purposes of Article 15.3 of the proposed Regulation on credit rating agencies (the "**Regulation**"). An example of a situation where this interpretation of the language requirement would apply is where a CRA with a registered office in one Member State only does not have plans to establish a branch in another jurisdiction or where its ratings are not widely used for regulatory purposes or are unlikely to have a significant impact in another jurisdiction.

¹ See page 9 of the consultation paper.

4. This extremely broad interpretation of the language requirement upon applicants for registration as a CRA is misconceived for the following reasons.
5. Article 15(3) of the Regulation states that an application shall be submitted in the language required by its home Member State and also in a language customary in the sphere of international finance. As English is the language customary in the sphere of international finance, if the home Member State requires an application to be made in any language other than English then the CRA must submit its application in two languages.
6. CESR seems to take the view that the concept of a "language customary in the sphere of international finance" embraces any language that has application in the financial markets of a country. This runs counter to the fundamental element of the definition, which is that the language be used customarily for conducting transactions in the international financial markets, as opposed to national or regional financial markets. The definition is predicated upon two limbs:
 - (i) first, that the language be used in international financial markets; and
 - (ii) that the language be so used customarily as opposed to occasionally, idiosyncratically or for non-essential purposes (such as for keeping records, to comply with official language policy or for interpretive purposes).
7. As regards the first limb, the international financial markets include the markets for Eurobonds, Eurocurrencies as well as other markets for internationally traded capital instruments. In all of these markets, English has evolved as the language customarily used for conducting transactions. The term "international finance" entails use beyond a specific continent or region. Otherwise, the legislation would have used a more restricted concept, such as "Community financial markets". Therefore, a language that is not customary in international finance but merely used within a particular region, group of countries or economic association would not qualify as a language customary in the sphere of international finance. A language used for capital instruments traded mainly on a national stock exchange or a national bond market would not qualify.
8. The second requirement excludes languages that are used for reasons other than the custom of the relevant market. It excludes languages that are used mainly to satisfy official language legislation, for keeping records or where one party requires, for its own corporate governance or other reasons, that a translation be made from the customary language. On a proper interpretation, therefore, the concept would exclude a "local language" or a language used exclusively in one Member State.
9. The reasoning behind using the concept of a "language customary in international finance" is presumably that English, besides being the accepted international language of finance, is also the working language of CESR. CESR is charged with the responsibility of registering CRAs². CESR is clearly intended to be involved in the

² Paragraph 6.6 of the Explanatory Memorandum to the Proposal to establish the European Securities and Markets Authority. We refer to CESR in this response although we are aware that the European Securities Markets Authority is to assume the responsibilities of CESR under the current European Commission proposals to reform the financial services supervisory framework.

registration process in view of the fact that the application must be sent to CESR as opposed to the home Member State³ and because CESR must advise the home Member State competent authority of the completeness of the application⁴.

10. The European Commission's proposals in September 2009 and October 2009 to reform the financial services supervision framework place the responsibility for supervision and registration of CRAs firmly on CESR. CESR will not be able to perform its supervisory functions properly if the initial application is not in its own working language. For example, when a CRA notifies CESR, the home Member State and the facilitator of any material changes to the conditions for initial registration, CESR must be in a position to understand what those changes are and could only do so by proper reference to the initial application for registration. CESR will also be unable to consider the issue of any applicable exemptions.
11. The requirement to provide the application in a language customary in the sphere of international finance recognises the cross border nature of most credit ratings. By missing the vital content of a registration application, CESR's oversight of CRAs in the European Union will be profoundly impaired.
12. Part of CESR's responsibility under the Regulation is to "ensure coherence" in the application of the Regulation. CESR's role is to enhance and facilitate the cooperation and coordination of competent authorities in supervisory activities and issue guidance where necessary⁵. If CESR is unaware of the detail contained in a registration application then it will be unable properly to perform these functions.
13. A copy of the registration application is to be sent to the competent authorities of all Member States⁶. The purpose of this provision is to enable the other competent authorities to assess whether or not they should join the relevant college of supervisors. CESR notes that, by providing the other competent authorities with a summary of the CRA's programme of operations⁷, such information will be sufficient to enable competent authorities to make a decision as to whether they should join the relevant college or not. This argument ignores the other important information that is required to be included in the application for registration and that would also be material to other competent authorities' assessment of whether they should join the relevant college. This information includes a statement of the ancillary activities which the application proposes to carry out (which may well have cross-border implications). Although an English translation of the entire application could be requested, this will only serve to lengthen the registration process, possibly to the detriment of the applicant.

³ Article 15(1) of the Regulation.

⁴ Article 15(4) of the Regulation.

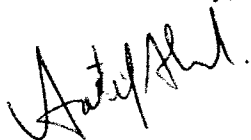
⁵ Recital 65 to the Regulation.

⁶ Article 15(4) of the Regulation.

⁷ Required under item 10 of Annex II of the Regulation.

14. The phrase "language customary in the sphere of international finance" is not new to European legislation (see, for example, the Prospectus Directive⁸). This phrase should not be given an idiosyncratic interpretation merely to achieve a certain result. An interpretation that ignores the requirement for the language to be used in international financial markets and to be used "customarily" is liable to cause confusion and potentially disastrous consequences in other legislative spheres where the phrase is also used. It would create uncertainty in an area where it has always been accepted that English is the international language of finance. Although consideration of pragmatic ways in which to implement the Regulation is welcome, pragmatism should not be allowed to distort the law, especially where apparent pragmatism in one area may trigger dislocation in other areas.

Yours Faithfully,



Barney Reynolds (Partner) and Aatif Ahmad (Associate)

Financial Institutions Advisory & Financial Regulatory Group

Shearman & Sterling (London) LLP

⁸ Directive 2003/71/EC.