

Decision of the Board of Supervisors

To adopt a supervisory measure and impose a fine in respect of an infringement committed by Modefinance S.r.l

The Board of Supervisors ('Board'),

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

Having regard to Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)¹, as amended ('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 agencies² ('Regulation'), and in particular Articles 24 and 36a thereof, as amended,

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 Authority³, including rules on the right of defence and temporal provisions,

Whereas:

- i. Following a preliminary investigation, ESMA's Supervisors found in the Supervisory Report dated 1 July 2024 with respect to Modefinance S.r.l. (or the 'PSI') that there were serious indications of the possible existence of facts liable to constitute one of the infringements listed in Annex III to the Regulation.
- ii. Thus an independent investigating officer ('IIO') was appointed on 2 July 2024 pursuant to Article 23e(1) of the Regulation.
- iii. On 17 September 2024, the IIO sent to the PSI her initial Statement of Findings, which found that the entity had committed one of the infringements listed in Annex III to the Regulation.
- iv. In response to the IIO's initial Statement of Findings, written submissions dated 16 October 2024 were made by the PSI.
- v. Following the receipt of written submissions from the PSI, the IIO amended her initial Statement of Findings and incorporated those amendments into her Statement of Findings dated 14 November 2024.
- vi. On 15 November 2024, the IIO submitted to the Board her file relating to the PSI, which included

¹ OJ L 331, 15.12.2010, p. 84.

² OJ L 302 17.11.2009, p. 1

³ OJ L 282 16.10.2012, p. 23

the initial Statement of Findings dated 17 September 2024, the written submissions made by the PSI on 16 October 2024 and the Statement of Findings dated 14 November 2024.

- vii. On 13 December 2024, the Chair, after having assessed the file submitted by the IIO on 15 November 2024, concluded that the file was complete.
- viii. On 30 January 2025, the Board adopted its initial Statement of Findings. The Board's initial Statement of Findings was sent to the PSI on 31 January 2025.
- ix. On 14 February 2025, the PSI provided its written submissions in respect of the Board's initial Statement of Findings.
- x. The Board discussed the case further at its meeting on 3 April 2025.
- xi. Pursuant to Article 36a of the Regulation, 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.
- xii. Pursuant to Article 24 of the Regulation, 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.

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

STATEMENT OF FINDINGS OF THE BOARD OF SUPERVISORS

1 Background

1. The PSI is a limited liability company established in Italy under Italian law. The PSI is registered as a credit rating agency ('CRA') since 10 July 2015⁴.
2. The PSI issues credit ratings on financial and non-financial companies as well as credit assessments and reports, other financial analysis research and credit risk software⁵. At the end of 2023, the PSI was the tenth largest CRA in terms of market share (0.61%) of all CRAs / CRA groups registered in the EU⁶.
3. In the financial year ending 31 December 2023, the PSI employed 59 employees⁷ and had a total

⁴ ESMA's list of registered or certified credit rating agencies (<https://www.esma.europa.eu/credit-rating-agencies/cra-authorization>).

⁵ Supervisory Report, 1 July 2024, Exhibit 3, Transparency report 2023 (published on 28 March 2024) - (<https://cra.Modefinance.com/pdf/Transparency-Report-2023.pdf>), pp. 15-16.

⁶ Supervisory Report, 1 July 2024, Exhibit 5, ESMA84-2037069784-2106_2023_CRA_Market_Share_Calculation, [CRA Market Share Report](#) (ESMA84-2037069784-2106), 20 December 2023.

⁷ Exhibit 1, PSI's Response to the IIO's RFI, 19 August 2024, Annex 1A, p. 51.

revenue of EUR 8,827,166⁸.

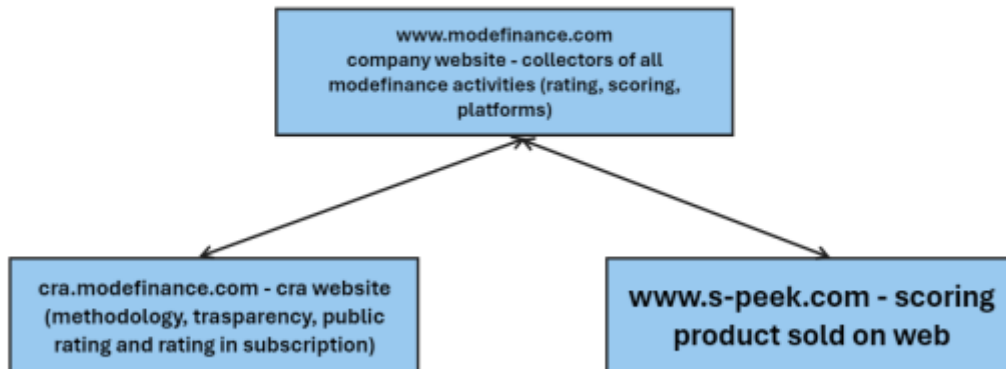
2 The Facts

2.1 Overview of the websites owned by the PSI

4. For the purpose of this investigation, an overview of the three websites administered by the PSI is necessary as it relates to the infringement. According to the PSI⁹:
 - A. <https://cra.modefinance.com/en> - this website includes the institutional sections of the PSI as a CRA, such as methodology, codes of conduct, etc. The website also includes the section where ratings are published, including subscription ones. In this respect, the website is generally publicly available for free, but the subscription ratings section is protected by tailored login/password. Access to the exclusive section may incur a subscription fee when a customer seeks to benefit from the rating activity.
 - B. www.modefinance.com – this is the corporate institutional website of the PSI. It encompasses the PSI’s activities: rating, scoring, fintech platform. It includes a blog where the PSI’s activities are frequently published in terms of technology, rating and business activity. This website is entirely available for free.
 - C. www.s-peek.com – this website allows customer to check the scoring of European companies. It is generally publicly available for free, but the section related to checking and purchase of company scores is protected by tailored login/password. Access to the exclusive section may incur a subscription fee when a customer seeks to benefit from the “s-peek” services.
5. In this regard, according to the PSI, the three websites can be summarised as follows:

⁸ Exhibit 1, PSI’s Response to the IIO’s RFI, 19 August 2024, Question 1, pp. 1-2.

⁹ Exhibit 1, PSI’s Response to the IIO’s RFI, 19 August 2024, Question 4, p. 4 - 5.



2.2 References to ESMA

6. The PSI published on its websites (namely modefinance.com and s-peek.com), the following references to ESMA¹⁰ (relevant to this case):

¹⁰ Supervisory Report, 1 July 2024, Exhibit 20, 'Modefinance websites - table_updated 20231005.xlsx'.

Publication Date	References to ESMA (and unofficial translation from Italian where relevant) ¹¹	Date of correction	Author ¹² and publication process
On modefinance.com website			
27/09/2018	“MORE is modefinance’s Artificial Intelligence methodology for risk assessment and is certified by ESMA” ¹³	27/09/2023	CC handled all stages of the publication: drafting, review, and publication of the statement.
03/09/2019	“The assessments are carried out by the MORE Artificial Intelligence methodology, which has been validated by the European Securities and Markets Authority (ESMA)” ¹⁴	27/09/2023	CC handled all stages of the publication: drafting, review, and publication of the statement.
26/05/2021 ¹⁵	“The assessments are elaborated through the MORE methodology, which has been validated by the European Securities and Markets Authority (ESMA)” ¹⁶	27/09/2023	CC handled all stages of the publication: drafting, review, and publication.
On s-peek.com website			

¹¹ The translated text as reproduced in this table has been agreed to by the PSI. See Exhibit 1, PSI’s Response to the IIO’s RFI, 19 August 2024, Question 5, p. 5.

¹² The names included in the table have been anonymised to protect the personal data of the natural person.

¹³ Supervisory Report, 1 July 2024, Exhibit 20, ‘Modefinance websites - table_updated 20231005.xlsx’, Line 134.

¹⁴ Supervisory Report, 1 July 2024, Exhibit 20, ‘Modefinance websites - table_updated 20231005.xlsx’, Line 21.

¹⁵ The date has been corrected from 15/10/2021 to 26/05/2021, See Exhibit 1, PSI’s Response to the IIO’s RFI, 19 August 2024, Question 6 pp. 5- 6.

¹⁶ Supervisory Report, 1 July 2024, Exhibit 20, ‘Modefinance websites - table_updated 20231005.xlsx’, Line 37.

Publication Date	References to ESMA (and unofficial translation from Italian where relevant) ¹¹	Date of correction	Author ¹² and publication process
27/10/2021	<p>“La metodologia MORE utilizza infatti algoritmi di analisi di Big Data e di Intelligenza Artificiale per valutare l'equilibrio economico-finanziario delle imprese e la sua validità è stata riconosciuta dall'Autorità Europea degli Strumenti Finanziari e dei Mercati (ESMA)”¹⁷</p> <p>(“Indeed, the MORE methodology uses big data and AI algorithms to assess the economic and financial balance of companies and its validity has been recognised by the European Securities and Markets Authority (ESMA).”)</p>	27/09/2023	PV handled the drafting and publication. The content was reviewed by CC.

¹⁷ Supervisory Report, 1 July 2024, Exhibit 20, 'Modefinance websites - table_updated 20231005.xlsx', Line 27.

Publication Date	References to ESMA (and unofficial translation from Italian where relevant) ¹¹	Date of correction	Author ¹² and publication process
11/05/2022	<p>“You can be sure of the objectivity and transparency of the ratings: s-peek’s ratings are issued using the MORE methodology, Multi Objective Rating Evaluation, a proprietary methodology of modefinance, a CRA, and ECAI-recognised rating agency, which is reviewed annually by ESMA”¹⁸</p>	05/10/2023	SA wrote the content based on a previous article issued by CC. This content was reviewed by AG and published by SA.
11/05/2022	<p>“Ne è un esempio s-peek, che fornisce una valutazione di affidabilità creditizia di oltre 25milioni di aziende Europee. Puoi essere sicuro dell'oggettività e della trasparenza dei giudizi: le valutazioni di s-peek sono infatti emesse tramite utilizzo della metodologia MORE, Multi Objective Rating Evaluation, metodologia proprietaria di modefinance, Agenzia di Rating riconosciuta come CRA ed ECAI, sottoposta annualmente alla revisione annuale da parte dell'ESMA.”</p> <p>(“An example of this is S-peek, which provides a creditworthiness assessment of more than 25 million European companies. You can be sure of objectivity and transparency of judgements: in fact, s-peek’s assessments are issued using the MORE methodology, Multi Objective Rating Evaluation, the proprietary methodology of modefinance, Rating Agency recognised as CRA and ECAIs, which is subject annually to ESMA’s annual review.”)</p>	05/10/2023	SD wrote the content based on a previous article issued by CC. This content was reviewed by AG and published by SD.

¹⁸ Supervisory Report, 1 July 2024, Exhibit 20, 'Modefinance websites - table_updated 20231005.xlsx', Lines 6 and 18.

7. In terms of visitors, according to the figures provided by the PSI, which only cover the period between 2 May 2022 and 5 July 2023, [Number: redacted due to confidentiality] users viewed the page www.modefinance.com¹⁹.
8. Based on the information in the file, there were three significant root causes in relation to this matter. Firstly, the lack of adequately trained staff involved in marketing (including marketing, sales and IT functions), secondly the absence of an *ex ante* regulatory compliance control of the drafted articles before publication and an *ex post* regulatory control of the publications, and finally an update to the content of the institutional website in May 2022 which was not controlled by Compliance ahead of the publication²⁰.
9. ESMA Supervisors considered the incident as closed starting from 6 October 2023²¹, which is the date following the communication to ESMA Supervisors, referring to the amendments made by the PSI on its websites²² when using ESMA's name.

3 Applicable Legal Provisions

10. References to the Regulation in this case refer to the text of the 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 case.
11. Article 1 of the Regulation states: "This Regulation introduces a common regulatory approach in order to enhance the integrity, transparency, responsibility, good governance and independence of credit rating activities, contributing to the quality of credit ratings issued in the Union and to the smooth functioning of the internal market, while achieving a high level of consumer and investor protection. It lays down conditions for the issuing of credit ratings and rules on the organisation and conduct of credit rating agencies, including their shareholders and members, to promote credit rating agencies' independence, the avoidance of conflicts of interest, and the enhancement of consumer and investor protection".
12. Article 10(6) of the Regulation reads as follows: "a credit rating agency shall not use the name of ESMA or any competent authority in such a way that would indicate or suggest endorsement or approval by ESMA or any competent authority of the credit ratings or any credit rating activities of the credit rating agency".

¹⁹ Supervisory Report, 1 July 2024, Exhibit 16, 20230817 ComplianceReport-2023-3.pdf, p 2.

²⁰ Exhibit 1, PSI's Response to the IIO's RFI, 19 August 2024, Question 8, p. 8. Exhibit 3, Supervisory Report, 'ESMA85-2002691366-36961 Supervisory Report Case 28', p. 8. Supervisory Report, 1 July 2024, Exhibit 16, 'ComplianceReport-2023-3.pdf', p.3-4.

²¹ Exhibit 3, Supervisory Report, 'ESMA85-2002691366-36961 Supervisory Report Case 28', p.6.

²² The links to the amended websites are provided in Supervisory Report, 1 July 2024, Exhibit 20, 'Modefinance websites - table_updated 20231005.xlsx' under the aforementioned lines. See also Supervisory Report, 1 July 2024, Exhibit 20, Modefinance websites - table_updated 20231005.xlsx and Supervisory Report, 1 July 2024, Exhibit 18, MOFIT_NT_FU_PD_ITEM43_20231006.

13. Point 52 of Section I of Annex III of the Regulation states that “the credit rating agency infringes Article 10(6) by using the name of ESMA or any competent authority in such a way that would indicate or suggest endorsement or approval by ESMA or any competent authority of the credit ratings or any credit rating activities of the credit rating agency”.
14. In addition to this, it is useful to note that Article 3(1)(o) of the Regulation describes the credit rating activities as “data and information analysis and the evaluation, approval, issuing and review of credit ratings”.

4 Legal assessment

15. This section of the decision analyses whether the PSI committed the infringement at Point 52 of Section I of Annex III of the Regulation.

4.1 Analysis with regard to the infringement at Point 52 of Section I of Annex III of the Regulation

16. The issue at stake in this case is whether the PSI breached its obligation under Article 10(6) of the Regulation, in conjunction with Point 52 of Section I of Annex III of the Regulation, not to use the name of ESMA in such a way that would indicate or suggest endorsement or approval by ESMA of the credit ratings or any credit rating activities of the PSI.
17. As described in more detail in Section 2 above, the PSI used ESMA’s name, in the period between 13 July 2015 and 05 October 2023, in several publications. As detailed below, the Board will assess whether these references constitute a breach by the PSI of its obligation under Article 10(6) of the Regulation.
18. Before examining the specific factual circumstances of the instant case, a detailed examination of the wording and the context of Point 52 of Section I of Annex III of the Regulation, along with Article 10(6) of the Regulation is necessary. Below, that analysis is performed before covering the facts.

4.2 Analysis of the relevant provisions of the Regulation

19. The Board takes note of Article 10 of the Regulation, entitled “Disclosure and presentation of credit ratings” and Article 3(1)(o) of the Regulation, which defines credit rating activities and thus links to the infringement set out at Point 52 of Section I of Annex III of the Regulation (as quoted above).
20. In this respect, the Board notes that the terms “approve” and “endorse” are synonyms and mean “to have or express a favourable opinion of”. “Approve” often implies considerable esteem²³, whereas “endorse” suggests an explicit statement of support²⁴.

²³ APPROVE Synonyms: 58 Similar and Opposite Words | Merriam-Webster Thesaurus, <https://www.merriam-webster.com/thesaurus/approve>.

²⁴ ENDORSE Synonyms: 50 Similar and Opposite Words | Merriam-Webster Thesaurus, <https://www.merriam-webster.com/thesaurus/endorse>.

21. The Board considers that the requirement and the related infringement which are the subject of this case are clear and straightforward.
22. The PSI outlined that in its view, the rationale of Article 10(6) of the Regulation is intended to protect investors from information provided by a CRA: “(...) while issuing credit ratings. It should be noted that Article 10(6) is included in Title II of the Regulation, entitled "Issuing of credit ratings", which is entirely devoted to the discipline of the activity of issuing credit ratings. Consistently, the Article is entitled “Disclosure and presentation of credit ratings (...)”²⁵.
23. While Article 10 of the Regulation is indeed entitled “Disclosure and presentation of credit ratings”, the Board finds that the requirement under Article 10(6) of the Regulation extends beyond the disclosure of credit ratings because it also refers to “any credit rating activities”. This is confirmed by the fact that the infringement at Point 52 is listed under the broad heading of Section I of Annex III of the Regulation, which is “Infringements related to conflicts of interest, organisational or operational requirements”. The co-legislators therefore made a link between the misuse of ESMA’s name and the organisational and operational requirements with which CRAs must comply.
24. As mentioned above, according to its Article 1, the Regulation, insofar as it imposes obligations upon a CRA, aims amongst others at improving investor confidence and protection.
25. The requirement at Article 10(6) of the Regulation plays a role in this respect because the wrongful use of ESMA’s name in such a way that would indicate or suggest endorsement or approval by ESMA of the credit ratings or any credit rating activities of a CRA, could expose investors to misinformation and mislead them by over relying on the CRA’s credit ratings, on the assumption they had been approved by ESMA.

4.2.1 Principles of legality and legal certainty

26. The PSI argued that Article 10(6) and Point 52 of Section I of Annex III of the Regulation “must be interpreted in such a way as to avoid leading to conclusions which are not clearly and directly provided for by the same provision, i.e. which are unclear and ambiguous in nature and, therefore, leave a wide margin of discretion to the interpreter”²⁶. The PSI further noted that in its view, the “discretionary degree of interpretation given to Article 10(6) of the Regulation (...) ends up to be in contrast with the principles of legality and legal certainty, which are both fundamental principles of European Union law and have to be observed when applying provisions that lead to the imposition of a fine, given the nature and potential consequences of the same”²⁷.
27. In addition, the PSI cited case-law from the Court of Justice of the European Union (“CJEU”) which considered the principle of legal certainty²⁸ and continued to state that “any European legislation, in particular when it imposes or permits the imposition of sanctions, must be clear and precise so that the persons concerned may know without ambiguity what rights and obligations flow from it and may take steps accordingly”. In this context, the PSI stated that in its view “...a material discretion arises as regards the interpretation of Article 10(6) of the Regulation and that such

²⁵ Exhibit 15, PSI’s Response to the IIO’s initial Statement of Findings, Section 3, p.5.

²⁶ Exhibit 15, PSI’s Response to the IIO’s initial Statement of Findings, Section 2, p. 3.

²⁷ Exhibit 15, PSI’s Response to the IIO’s initial Statement of Findings, p. 3.

²⁸ Exhibit 15, PSI’s Response to the IIO’s initial Statement of Findings, pp. 3 - 4.

discretion ends up being in contrast with the principle of legal certainty. More specifically, based on the reading and interpretation in the case of the above legal provision (...), the scope of such a provision would end up being manifestly unclear and ambiguous. The aforementioned ambiguity is, in fact, reflected in the same [IIO's initial] Statement of Findings, where certain argumentations or allegations highlight the high degree of discretion applied therein in interpreting the scope of Article 10(6) of the Regulation²⁹.

28. In this respect, the Board agrees that the principle of legal certainty is a fundamental principle of law in the EU³⁰. For example, rules imposing charges on a taxpayer must be, according to the case-law, clear and precise so that this individual “may be able to ascertain unequivocally what his rights and obligations are and take steps accordingly”³¹.
29. However, the Board finds that a close examination of the content of Article 10(6) of the Regulation removes any uncertainty. Indeed, as the Board already noted above, the requirement and the related infringement which are the subject of this case are clear and straightforward.
30. Furthermore, it should be noted that the fact that a provision requires interpretation does not automatically mean there is a breach of the principle of legal certainty . For example, the CJEU ruled that “with regard to the alleged infringement of the principle of legal certainty, according to the case-law that principle is a fundamental principle of Community law which requires, in particular, that rules should be clear and precise, so that individuals may be able to ascertain unequivocally what their rights and obligations are and may take steps accordingly. However, where a degree of uncertainty regarding the meaning and scope of a rule of law is inherent in the rule, it is necessary to examine whether the rule of law at issue displays such ambiguity as to prevent individuals from resolving with sufficient certainty any doubts as to the scope or meaning of that rule”³².
31. The Board also refers to the decisions of the Board of Appeal of the European Supervisory Authorities in the case related to the Nordic banks³³. In the Board of Appeal's view, “The fact that a given provision of financial regulation is open to different interpretations does not necessarily invoke the principle of legal certainty in respect of sanctions”³⁴.
32. Therefore, the fact that the interpretation of one requirement is the subject of divergent views does not imply as such that there would be a breach of the principle of legal certainty³⁵. More precisely, the fact that the PSI interpreted Article 10(6) of the Regulation in a way different from the interpretation adopted by ESMA does not imply that there is a breach of the principle of legal certainty in the present case.

²⁹ Exhibit 15, PSI's Response to the IIO's initial Statement of Findings, p. 4.

³⁰ See for example CJEU, Case C-177/96, *Belgian State and Banque Indosuez and Others*, 16 October 1997, point 27.

³¹ CJEU, Case C-177/96, *Belgian State and Banque Indosuez and Others*, 16 October 1997, point 27.

³² General Court, Case T-216/05, *Mebrom NV v Commission of the European Communities*, point 108. See also CJEU, Case C-177/96, *Belgian State and Banque Indosuez and Others*, 16 October 1997.

³³ Board of Appeal of the European Supervisory Authorities, Decisions BoA-D-2019-01, BoA-D-2019-02, BoA-D-2019-03, BoA-D-2019-04, https://www.esma.europa.eu/sites/default/files/library/board_of_appeal_-_27_february_2019_-_decisions_2019_01_02_03_04_-_final.pdf.

³⁴ See Board of Appeal of the European Supervisory Authorities, Decisions BoA-D-2019-01, BoA-D-2019-02, BoA-D-2019-03, BoA-D-2019-04, https://www.esma.europa.eu/sites/default/files/library/board_of_appeal_-_27_february_2019_-_decisions_2019_01_02_03_04_-_final.pdf, Para. 227.

³⁵ Indeed, the PSI seems in agreement with this position. See PSI's written submissions in response to the Board's initial Statement of Findings, p. 5.

33. Additionally, the PSI asserted “that the IIO should have interpreted Article 10(6) of the Regulation in the strictest possible manner, whereas it adopted a broad approach and defined the scope of the prohibition more broadly than permitted by the principles themselves” and “(...) the IIO’s interpretation of Article 10(6) of the Regulation was so broad that it led to a breach of the above criteria that should have been applied in accordance with the principle of legality”³⁶. Further, for the PSI “the relevant issue was the impossibility to clearly identify ex ante where and how a third party may have the impression (...) that ESMA endorsed or approved the credit rating activities of the Company (...)” and “the wording of Article 10(6) of the Regulation (...) does not even identify the relevant conduct which may determine the violation of the prohibition nor the relevant Authorities.”³⁷
34. The Board disagrees with the position of the PSI that the wording of Article 10(6) is subject to a broad and personal discretionary evaluation. Indeed, Article 10(6) of the Regulation is unequivocal in its meaning – it is clearly drafted to prevent a CRA from using the name of ESMA in such a way that would indicate or suggest endorsement or approval by ESMA of the credit ratings or any credit rating activities of the CRA. A diligent market operator is clearly in a position to ascertain its obligations deriving from Article 10(6) of the Regulation and to understand which statements would be in breach, and the degree and modalities of interpretation of this requirement as performed in this case (including by the IIO) do not conflict with the principles of legality and legal certainty. The application of Article 10(6) of the Regulation to the references to ESMA in the case before the Board, as further analysed in Section 4.3.1, is not in contradiction with these principles. On the contrary, the interpretation and analysis of the legal basis of the requirements and their application to facts of the case are undertaken as a standard step in enforcement proceedings.
35. Finally, the Board notes the objective of Article 10(6) of the Regulation, which, as already mentioned, is to protect investors from misinformation and avoid them being misled into over relying on the CRA’s credit ratings or rating activities on the assumption they have been approved by ESMA. Thus, the provision of Article 10(6) of the Regulation is in the interest of the general public and aligns with the principles to promote the transparency and protection of consumers of financial products. In this spirit, the preamble of the Regulation outlines that “Credit rating agencies play an important role in global securities and banking markets, as their credit ratings are used by investors, borrowers, issuers and governments as part of making informed investment and financing decisions”. Indeed, there is a balance in the application of the principle of legal certainty. The application of the principle of legal certainty must be combined with that of the principle of legality: “the principle of respect for legal certainty, important as it may be, cannot be applied in an absolute manner, but (...) its application must be combined with that of the principle of legality”³⁸.

4.2.2 Context in which Article 10(6) of the Regulation applies

36. The PSI argued that the context of the statements referring to ESMA was very important, pointing to “a clear separation between the websites on which the statements were published and the websites dedicated to regulated activities. Access to the latter is effectively restricted by password

³⁶ PSI’s written submissions in response to the Board’s initial Statement of Findings, p. 5.

³⁷ PSI’s written submissions in response to the Board’s initial Statement of Findings, p. 5.

³⁸ CJEU, Cases 42 and 49/59, SNUPAT v High Authority, [1961] ECR 55, see p. 87.

protection, which underlines the lack of contiguity between these platforms (...) the web-sites on which the statements were issued relate exclusively to unregulated activities of the Company”³⁹.

37. The PSI further argued that the “the relevant statements have not been issued nor in the context of the credit rating issuance nor within the performance of a credit rating activity, as defined by the Regulation itself, but only in the provision of commercial information through the Company’s websites”⁴⁰. It is also of note that the PSI stated that:
- “- the web-sites on which the relevant statements were published do not relate to regulated activities;
 - the Company’s web-sites are designed in order to clearly separate credit ratings and credit rating activities from other non-regulated activities”⁴¹.
38. The PSI stated that: “More specifically, regarding the website “modefinance.com”, the initial menu is split into the four areas of operations of the Company: credit rating agency, ESG ratings, “Tigran” and “S-peek”. The first link leads to the website “cra.modefinance.com”, dedicated to the credit ratings and credit rating activities, while the last link leads to the website “s-peek.com”. Therefore, by selecting “S-peek”, it is clear that the user does not intend to and will not receive information related to credit ratings or credit rating activities”⁴².
39. For the PSI, it is “unreasonable to expect that an entity that is subject to ESMA supervision for certain aspects of its activities should be required to apply regulatory rules, obligations and prohibitions to activities that fall entirely outside the scope of regulated activities.”⁴³
40. In this regard, however, the Board first notes the interconnectedness of the above mentioned three websites. In the case of www.modefinance.com, the website is indeed dedicated to all activities of the PSI as was attested also by the PSI. This website includes information on the company’s cloud platform “Tigran” which is a modular and customizable cloud platform for managing credit and financial risks.⁴⁴ The Board notes that www.modefinance.com provides a direct link to its visitors to cra.modefinance.com which the PSI has asserted is the website that is dedicated to the credit rating activities of the company.⁴⁵ Moreover, the website www.modefinance.com also provides direct links to www.s-peek.com. These connections are clear evidence of the link between the websites www.modefinance.com, <https://cra.modefinance.com/en> and www.s-peek.com⁴⁶.
41. Furthermore, as already mentioned, all these websites are websites administered by the PSI.
42. Second, and more importantly, the Board considers that, for the purpose of Article 10(6) of the Regulation, having in mind the objective of investor protection, it is irrelevant on where (i.e. in which publications or on which websites of the CRA) the references to ESMA can be found. The content of the statement is more important than the context. What matters is whether an investor would be in a position to read those incorrect references and thus be exposed to this misinformation.

³⁹ PSI’s written submissions in response to the Board’s initial Statement of Findings, pp. 7-8.

⁴⁰ PSI’s written submissions in response to the Board’s initial Statement of Findings, p. 6.

⁴¹ Exhibit 15, PSI’s Response to the IIO’s initial Statement of Findings, Section 3, p.5.

⁴² Exhibit 15, PSI’s Response to the IIO’s initial Statement of Findings, Section 3, p.5.

⁴³ PSI’s written submissions in response to the Board’s initial Statement of Findings, pp. 7-8.

⁴⁴ Exhibit 19, Extracts from PSI’s websites.

⁴⁵ Exhibit 19, Extracts from PSI’s websites.

⁴⁶ Exhibit 19, Extracts from PSI’s websites.

43. Finally, accepting the argument of the PSI that Article 10(6) of the Regulation requires that references to ESMA be published on a website used exclusively for the publication of credit ratings or credit rating activities would enable registered CRAs to circumvent their obligations under Article 10(6) of the Regulation by simply creating secondary websites where misleading statements about a CRA's credit ratings or credit rating activity would be published. If this were the case, a CRA could easily claim on websites not related to credit ratings or rating activities that ESMA has endorsed or approved its credit ratings or rating activities without ESMA being able to apply Article 10(6) of the Regulation. As set out above, not the place of publication determines whether a violation of the obligations of the Regulation took place, but rather the content of the statement itself.
44. With this in mind, the Board considered each statement in turn below.

4.3 Application to the instant case

45. A CRA commits this infringement by using ESMA's name in such a way that would indicate or suggest endorsement or approval by ESMA of the credit ratings or any credit rating activities of the CRA.
46. In the Board's view, as explained below, the PSI did not comply with its obligation under Article 10(6) of the Regulation on 27/09/2018, 03/09/2019, 26/05/2021, and 27/10/2021 in the publications on its websites.

4.3.1 Arguments raised by the PSI in relation to MORE

47. The PSI argued that for an infringement to be found MORE had to be characterised as a methodology and would need to be part of the "credit rating activities"⁴⁷. According to the PSI "methodologies per se should not be considered as "credit rating activities" as defined by Article 3(1)(o) of the Regulation" and that "MORE cannot even be categorized as a credit rating methodology, as MORE is a scoring system"⁴⁸. The PSI also stated that according to Article 2(2)(b) of the Regulation, the Regulation does not apply to credit scores⁴⁹.
48. In this respect, the PSI further argued that "the violation of Article 10(6) of the Regulation may not derive from references regarding scores (...) if the scores generated by MORE are irrelevant for the purposes of the Regulation, statements related to such scores cannot logically be considered relevant either. (...) It is clear that, within its interpretation of the perimeter of the relevant prohibition, the IIO has effectively overlapped the performance of credit rating activities (or the issuance of credit ratings) with the tools used to perform such activities (...) the relevant prohibition had to be interpreted as applying only to references to credit rating activities or to the performance of credit ratings and not also to mere tools of such activities. This is also in view of the fact that (...)

⁴⁷ Exhibit 15, PSI's Response to the IIO's initial Statement of Findings, Section 4, pp.5-6.

⁴⁸ Exhibit 15, PSI's Response to the IIO's initial Statement of Findings, Section 4, p.6.

⁴⁹ Exhibit 15, PSI's Response to the IIO's initial Statement of Findings, Section 4, p.6.

these references were made in contexts on unregulated activities that are not subject to supervision by ESMA.”⁵⁰

49. The Board carefully considered the PSI's arguments and came to the following conclusion.
50. MORE means the “Multi Objective Rating Evaluation Model”. It is used by the PSI to ease the credit risk assessment of the user⁵¹. First, despite the PSI's claims that MORE is only a credit score, MORE is confusingly referred to as a methodology on the PSI's website. In its documentation, the PSI regularly refers to MORE as a “methodology”. The PSI expressly explains in the description of MORE on its website that MORE “has been developed by Modefinance to evaluate the economic quality and financial health of a company. MORE methodology is used by Modefinance analysts as a fundamental basis for rating evaluation”⁵². According to the PSI's documentation about MORE, at its core, there is a decision support algorithm that collects different opinions about the ratios and assesses the final rating⁵³.
51. Methodologies are clearly part of credit rating activities of CRAs as defined by Article 3(1)(o) of the Regulation (“data and information analysis and the evaluation, approval, issuing and review of credit ratings”) and captured by Article 10(6) of the Regulation.
52. Second, irrespective of MORE's legal qualification under the Regulation and whether it would qualify as a rating methodology or a scoring system, it is clear from the facts in the case and the documentation of the PSI in the file that MORE is an integral part of the process for the PSI to issue a rating. As such MORE is used as an essential part of the credit rating activities of the PSI defined as “data and information analysis and the evaluation, approval, issuing and review of credit ratings”.
53. The Board carefully considered the evidence in the case: while credit scores issued by the PSI (using MORE) are not in the scope of the Regulation, MORE is part of the credit rating activities of the PSI. References to ESMA's name related to MORE are thus in the scope of Article 10(6) of the Regulation.
54. The Board in this respect found particularly relevant the following evidence showing the necessary inclusion of MORE in the PSI's rating process and thus its credit rating activities.
55. The PSI provided the below diagram⁵⁴ representing the credit rating process of the PSI:

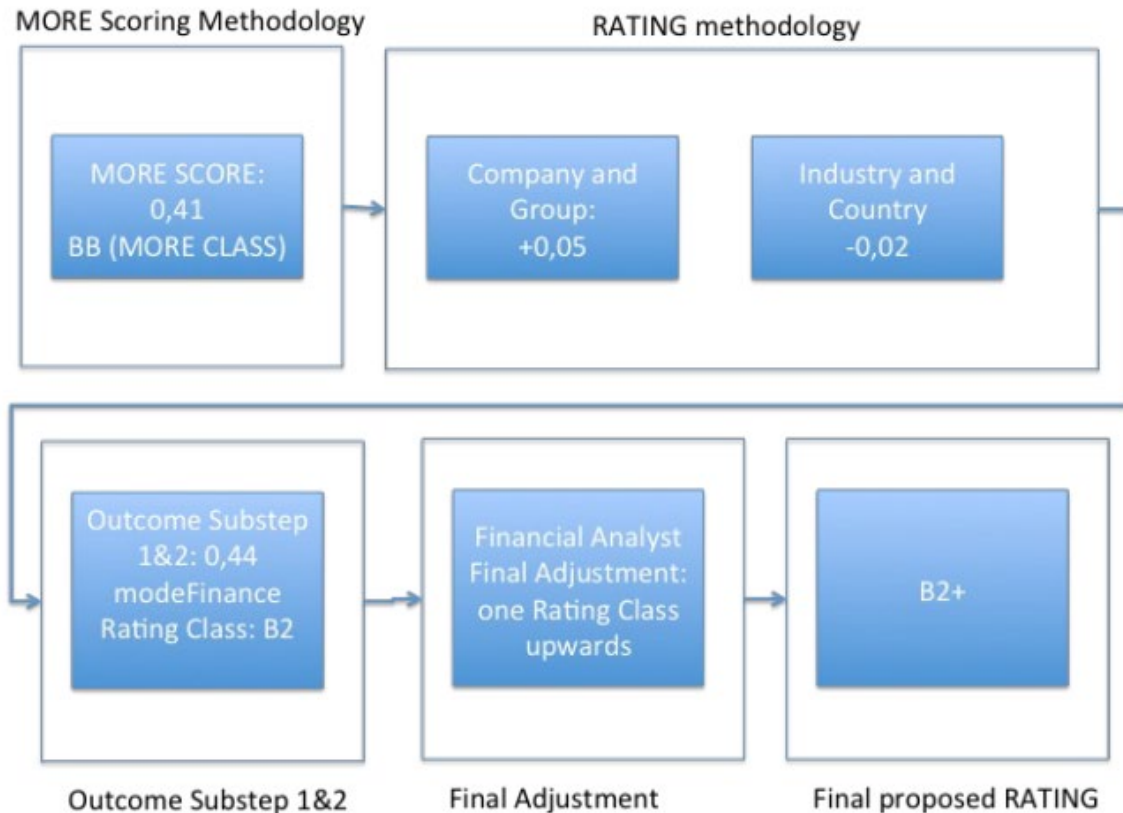
⁵⁰ PSI's written submissions in response to the Board's initial Statement of Findings, p. 9.

⁵¹ Supervisory Report, 1 July 2024, Exhibit 12, Re follow up information 24072023, Attachment MoreMethodology.pdf, pp. 15 (and 34).

⁵² Exhibit 16, pdf MORE methodology, Slide 4. https://res.modefinance.com/system/attachments/attachment_files/000/002/307/original/modefinance-MORE_2020.pdf?1635324063; See also Supervisory Report, 1 July 2024, Exhibit 12, Re follow up information 24072023, Attachment MoreMethodology.pdf, pp. 9 (and 26).

⁵³ Supervisory Report, 1 July 2024, Exhibit 12, Re follow up information 24072023, Attachment MoreMethodology.pdf, pp. 14 (and 33).

⁵⁴ Supervisory Report, 1 July 2024, Exhibit 12, Re follow up information 24072023, Attachment RatingMethodology.pdf, p. 69.



56. This was further confirmed by the PSI, which outlined that the two processes are “two complimentary procedures”⁵⁵. The Board also notes that the PSI, in describing its credit rating activities and rating process, stated that: “The outcome of substep 1. (COMPANY AND THE GROUP) is then the result of an analyst assessment and it consists in a value comprised between -0.1 and +0.1 (negative values reduce the credit score and therefore may lead to a higher rating class, meaning less credit risk is attributed to the entity; and viceversa). The outcome of substep 2. (INDUSTRY AND COUNTRY) as well is the result of an analyst assessment and it consists in a further value comprised between -0.1 and +0.1.(negative values reduce the credit score and therefore may lead to a higher rating class, meaning less credit risk is attributed to the entity; and viceversa). The sum of the two values is added to **the MORE Scoring obtained in the previous steps of the rating process** (emphasis added) and then mapped to a provisional modeFinance Rating Class (...)”⁵⁶.
57. This is also attested by the “Rating Methodology” document provided by the PSI which states that: “The analyst shall consider first the provisional rating class which will be the result of mapping the final score (MORE score +/- Substep 1 +/- Substep 2) into modeFinance Rating classes (...). The analyst would then consider if the provisional rating class describes at best the overall creditworthiness of the entity, taking into account all the information and data regarding the

⁵⁵ Exhibit 15, PSI’s Response to the IIO’s initial Statement of Findings, Section 4, p.6.

⁵⁶ Supervisory Report, 1 July 2024, Exhibit 12. Re follow up information 24072023 Attachment RatingMethodology.pdf, p. 68.

corporate evaluation (MORE score, Company and Group, Industry and Country); and perform a fine tuning of final evaluation, if needed. The final tuning could be of maximum one rating class (in positive or negative)⁵⁷

58. Moreover, this is made clear on the PSI's website⁵⁸ relating to credit rating methodologies. The below diagram which is visible to visitors under the title "Methodologies adopted by modefinance for issuing Credit Ratings" shows the overlap between MORE and ratings:



59. This also visually depicts to visitors of the PSI's website (<https://cra.modefinance.com/en>, which the PSI has asserted as the website that is dedicated to the credit rating activities of the PSI.) that "MORE" is an integral part of the process for the issuance of credit ratings by the PSI⁵⁹.
60. Hence, credit ratings issued by the PSI are the result of "two complementary procedures"⁶⁰: the application of MORE and the Rating methodology. A credit rating can only be issued by the PSI if both are applied together. MORE is thus used as an essential part of the credit rating activities of the PSI.
61. Therefore, the Board concludes that the references to MORE published by the PSI fall into the scope of application of Article 10(6) of the Regulation.

4.3.2 Relevant references published on the PSI's websites

Reference published on 27/09/2018

⁵⁷ Supervisory Report, 1 July 2024, Exhibit 12, Re follow up information 24072023 Attachment RatingMethodology.pdf, p. 76 (and 66)

⁵⁸ Exhibit 17, Extract from website, <https://cra.modefinance.com/en/methodologies>.

⁵⁹ See Exhibit 17, Extract from website, <https://cra.modefinance.com/en/methodologies>.

⁶⁰ Exhibit 15, PSI's Response to the IIO's initial Statement of Findings, Section 4, p.6.

62. In the **reference on 27/09/2018**, the PSI used ESMA's name in the following way:
"MORE is modefinance's Artificial Intelligence methodology for risk assessment and is certified by ESMA".
63. The PSI argued that the reference dated 27/09/2018 is exclusively related to the Oplon platform (previous name of Tigran⁶¹), which the PSI considers as an ancillary service that it provides. The PSI additionally makes arguments of the placement of the above-mentioned statement and says that it is "situated in a paragraph titled "Are there any protection tools? – Oplon allows to" and stating "assess a company or bank creditworthiness: via MORE creditworthiness evaluation tool is it possible to get the credit score and a fundamentals analysis of any company or bank". Besides, the last sentence of the paragraph "The MORE score can be used by financial institutions as part of the IRB or Advanced IRB approaches (as ECAI, Modefinance credit rating are also compliant with the Standard Approach)" clearly opposes the MORE scores available in Oplon with the credit ratings produced by the CRA. It is therefore clear to the reader that the MORE scores are neither credit ratings nor credit rating activities, as they are not permitted to be used in the Basel standard approach"⁶².
64. The PSI further argued that "the background and the placement of the sentence are highly important in this regard in light of the rationale of the prohibition set forth by Article 10(6) of the Regulation (...) it is clear that Modefinance does not perform any relevant activity for the purposes of Article 10(6) of the Regulation through the publication of the MORE scores in Oplon and consequently the statement at issue cannot be considered as an infringement of the abovementioned provision."⁶³
65. The Board does not agree with the PSI's argument. The background and the placement of the sentence quoted above cannot prevent the establishment of an infringement of the Regulation – the content of the statement is decisive. The question to ask is whether the PSI used ESMA's name in such a way in the statement that would indicate or suggest endorsement or approval by ESMA of the credit ratings or any credit rating activities of the PSI.
66. In this respect "certify" implies official endorsement attesting to conformity to set standards⁶⁴. In this publication, the PSI referred to ESMA's name in such a way as if ESMA would have verified and endorsed the PSI's credit rating activities (especially MORE), which is not the case. As provided by Article 23 of the Regulation, in carrying out its duties, ESMA "shall not interfere with the content of credit ratings or methodologies". In addition, the fact that ESMA has registered the PSI as a CRA under the Registration does not imply any certification by ESMA of the credit rating activities of the PSI.
67. Therefore, the Board finds that the reference that "MORE is Modefinance's Artificial Intelligence methodology for risk assessment and is certified by ESMA" published on 27/09/2018 is not in line with the obligation of the PSI outlined in Article 10(6) of the Regulation not to use the name of

⁶¹ See Exhibit 18, Extract from website, <https://www.modefinance.com/en/solutions/tigran> , where the PSI describes Tigran as "a modular and customizable cloud platform for managing credit and financial risks".

⁶² Exhibit 15, PSI's Response to the IIO's initial Statement of Findings, Section 2, p. 8.

⁶³ PSI's written submissions in response to the Board's initial Statement of Findings, p. 10.

⁶⁴ CERTIFY Synonyms: 100 Similar and Opposite Words | Merriam-Webster Thesaurus, <https://www.merriam-webster.com/thesaurus/endorse> .

ESMA in such a way that would indicate or suggest endorsement or approval by ESMA of the credit ratings or any credit rating activities of the credit rating agency.

References published on 03/09/2019, 26/05/2021 and 27/10/2021

68. In the **references on 03/09/2019, 26/05/2021 and 27/10/2021**, the PSI used ESMA's name in the following way:

03/09/2019: "The assessments are carried out by the MORE Artificial Intelligence methodology, which has been validated by the European Securities and Markets Authority (ESMA)"

26/05/2021: "The assessments are elaborated through the MORE methodology, which has been validated by the European Securities and Markets Authority (ESMA)"

27/10/2021 "La metodologia MORE utilizza infatti algoritmi di analisi di Big Data e di Intelligenza Artificiale per valutare l'equilibrio economico-finanziario delle imprese e la sua validità è stata riconosciuta dall'Autorità Europea degli Strumenti Finanziari e dei Mercati (ESMA)."

("Indeed, the MORE methodology uses big data and AI algorithms to assess the economic and financial balance of companies and its validity has been recognised by the European Securities and Markets Authority (ESMA).")

69. In relation to the abovementioned references, the PSI made arguments on the placement of these references to attest that in its view, these are "exclusively related to "S-peek application" and "S-peek ratings""⁶⁵. The PSI went on to state that: "In this respect, it is important to note that Modefinance does not perform any relevant activity for the purposes of Article 10(6) of the Regulation through the publication of "S-peek ratings" through "S-peek". The latter, indeed, represents a mere collection, within an application, of credit scores that have already been issued without involving any rating analysis, evaluation, approval, review or initial issuance of a credit rating. "S-peek ratings", therefore, falls outside the definition of "credit rating" or "credit rating activities" set out in Article 3(1)(a) and 3(1)(o) of the Regulation. Consequently, any statement exclusively referred to "S-peek ratings" or "S-peek" may not determine a breach of Article 10(6) of the Regulation, being such provision referred only to the "credit rating" or "credit rating activities" as defined by the Regulation. In the context of the relevant definitions provided by the Regulation, "S-peek ratings" are credit scores, and the S-peek application rather characterizes as an ancillary service pursuant to Annex I (B.4.) of the Regulation, according to which "[a]ncillary services are not part of credit rating activities; they comprise market forecasts, estimates of economic trends, pricing analysis and other general data analysis as well as related distribution services"."⁶⁶

70. The PSI further argued that "analogue services as "S-peek ratings" and "S-peek" are provided by separate and unregulated entities. Such a circumstance constitutes evidence that the "S-peek ratings", as well as any activity ancillary to (or different from) the credit rating activities, fall outside the scope of Article 10(6) of the Regulation and the relevant definition of "credit rating" and "credit rating activity". Further evidence of the difference between the "S-peek ratings" and the credit rating

⁶⁵ Exhibit 15, PSI's Response to the IIO's initial Statement of Findings, Section 5, p.7.

⁶⁶ Exhibit 15, PSI's Response to the IIO's initial Statement of Findings, Section 5.1, p.8. See also PSI's written submissions in response to the Board's initial Statement of Findings, p. 11.

activities performed by the Company is that the "S-peek" website does not allow navigation to or from the "Credit-Rating-Agency" website."⁶⁷

71. However, as set out above, the evidence shows that the websites of the PSI are all connected via www.modedefinance.com and it cannot be argued that there is no link between the S-peek ratings/S-peek website and the credit rating related website.
72. Furthermore, the Board notes that the credit scores in the s-peek application are calculated with MORE. This constitutes another overlap between S-peek and the PSI's rating activities. Indeed, as further detailed above, MORE forms an integral part of the process performed by the PSI for the issuance of its credit ratings.
73. More importantly, the Board considers that for the purposes of Article 10(6) of the Regulation, it is irrelevant whether these references to ESMA appear next to statements about the "S-peek application" and "S-peek ratings". As set out above, the background and the placement of the sentences quoted above are not determinative, instead the content of the statements determines whether a breach of the Regulation occurred.
74. Thus, the Board turns to the content of the statements. Some common synonyms of "validate" are authenticate, confirm, corroborate, substantiate, and verify. While all these words mean "to attest to the truth or validity of something", validate implies establishing validity by authoritative affirmation or by factual proof⁶⁸. However, as stated before, through the registration of the PSI as a CRA under the Regulation, ESMA has not validated MORE, which is used by the PSI in the process for the issuing of its ratings.
75. Regarding the statement of 27/10/2021, the PSI argued that while "the statement at hand employs the word "validity", it is absolutely not true that the statement refers to the fact that "ESMA has validated MORE". Conversely, and more accurately, the statement explicitly refers to the fact that the "validity" of MORE "has been recognized" by ESMA."⁶⁹ With this argument, the PSI attempted to equate this statement about ESMA recognising MORE to ESMA recognising the PSI's methodologies generally as part of the registration process, which would in its views not imply endorsement by ESMA.
76. This argument cannot be accepted, as this statement refers exclusively to MORE (and not methodologies generally, and in any event, ESMA does not interfere with the content of the methodologies). The operative part of the statement refers to ESMA recognising the validity specifically of MORE, which is factually incorrect and implies endorsement by ESMA of this specific aspect of the PSI's credit rating activity.
77. Therefore, the Board finds that the wording of the three references cited above referred to the fact that ESMA would have validated credit rating activities of the PSI, especially MORE. The references published on 03/09/2019, 26/05/2021 and 27/10/2021 by the PSI are not compliant with the obligation of the PSI outlined in Article 10(6) of the Regulation not to use the name of ESMA in

⁶⁷ PSI's written submissions in response to the Board's initial Statement of Findings, p. 11.

⁶⁸ VALIDATE Synonyms: 66 Similar and Opposite Words | Merriam-Webster Thesaurus, <https://www.merriam-webster.com/thesaurus/validate>.

⁶⁹ PSI's written submissions in response to the Board's initial Statement of Findings, p. 14.

such a way that would indicate or suggest endorsement or approval by ESMA of the credit ratings or any credit rating activities of the credit rating agency.

Reference published on 11/05/2022

78. **In the reference on 11/05/2022**, the PSI used ESMA's name in the following way in English and Italian:

"You can be sure of the objectivity and transparency of the ratings: s-peek's ratings are issued using the MORE methodology, Multi Objective Rating Evaluation, a proprietary methodology of modefinance, a CRA, and ECAI-recognised rating agency, which is reviewed annually by ESMA."

"Ne è un esempio s-peek, che fornisce una valutazione di affidabilità creditizia di oltre 25milioni di aziende Europee. Puoi essere sicuro dell'oggettività e della trasparenza dei giudizi: le valutazioni di s-peek sono infatti emesse tramite utilizzo della metodologia MORE, Multi Objective Rating Evaluation, metodologia proprietaria di modefinance, Agenzia di Rating riconosciuta come CRA ed ECAI, sottoposta annualmente alla revisione annuale da parte dell'ESMA."

("This is an S-peek example, which provides a creditworthiness assessment of more than 25 million European companies. You can be sure of objectivity and transparency of judgements: in fact, s-peek's assessments are issued using the MORE methodology, Multi Objective Rating Evaluation, the proprietary methodology of modefinance, the Rating Agency recognised as CRA and ECAIs, which is subject annually to ESMA's annual review.")

79. Both publications are regarded as one reference as they concern the same information and took place on the same date.

80. The wording "which is reviewed annually by ESMA / which is subject annually to ESMA's annual review" is unclear because it could relate to the fact that ESMA would carry out an annual review of the CRA / PSI or an annual review of MORE.

81. The PSI argued that "The statement at issue should (...) be interpreted in the sense that ESMA would conduct a review of Modefinance itself as a CRA. (...) it is somewhat easier to assume that it is the Company as a CRA that is subject to an "annual review", rather than the MORE methodology."⁷⁰

82. In this respect, while ESMA is not in charge of reviewing the PSI annually and the statement does not reflect the supervision by ESMA precisely, the Board acknowledges that ESMA does undertake on-going supervision of CRAs.

83. Taking the above into account and based on the principle of *in dubio pro reo*, the Board finds that the PSI should be given the benefit of the doubt and considers that no infringement was committed in relation to this statement.

4.4 Intent or negligence

84. Article 36a(1) of the Regulation provides:

⁷⁰ PSI's written submissions in response to the Board's initial Statement of Findings, p. 12.

“Where, in accordance with Article 23e(5), ESMA’s Board of Supervisors finds that a credit rating agency has, intentionally or negligently, committed one of the infringements listed in Annex III, it shall adopt a decision imposing a fine in accordance with paragraph 2”.

“An infringement by a credit rating agency shall be considered to have been committed intentionally if ESMA finds objective factors which demonstrate that the credit rating agency or its senior management acted deliberately to commit the infringement”.

85. In accordance with Article 36a(1) of the Regulation, a finding that an infringement has been committed by a CRA with intention or negligence will lead to the Board imposing a fine.
86. The factual background in this case does not establish that there are objective factors which demonstrate that the PSI, its employees or senior managers acted deliberately to commit the infringement.
87. It should therefore be assessed whether the PSI acted with negligence.

4.4.1 Preliminary remarks regarding negligence

88. The Regulation provides no explicit guidance as regards the concept of “negligence”. However, it follows from the provisions of Articles 24 and 36a of the Regulation that the term “negligence” as referred to in the Regulation requires more than a determination that an infringement was committed.
89. Further, it is clear from the second subparagraph of Article 36a(1) of the Regulation that a negligent infringement is not one which was committed deliberately or intentionally. This position is further supported by the case-law of the CJEU which ruled that negligence may be understood as entailing an unintentional act or omission⁷¹.
90. In addition, “negligence” in the context of the Regulation is an EU law concept – albeit one which is familiar to and an inherent part of the 27 Member States’ legal systems – which must be given an autonomous, uniform interpretation.
91. Taking into account the CJEU jurisprudence⁷², the concept of a negligent infringement of the Regulation is to be understood to denote a lack of care on the part of a CRA when it fails to comply with this Regulation.
92. Based on this, the Board considers 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 its infringement of the Regulation, in circumstances

⁷¹ 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 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.

where a person in such a position who is normally informed and sufficiently attentive could not have failed to foresee those consequences.

93. The following points should be taken into consideration regarding the standard of care to be expected of a CRA.
94. First, one should take into consideration the position taken by the General Court in the Telefonica case, where 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”⁷³. 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.
95. Second, regard should be given to the nature and significance of the objectives and provisions of the Regulation. In this respect, Recitals 1 and 2 of the Regulation emphasise the important role and impact of CRAs in global securities and banking markets, the resulting essential need for credit rating activities to be conducted in accordance with principles of integrity, transparency, responsibility and good governance, and the resulting intention of the legislator to provide stringent requirements in relation to the conduct of CRAs. Further, the weight given to these considerations by the legislator is reflected by the nature and extent of the requirements imposed on CRAs under Annex I of the Regulation and by the corresponding infringement provisions under Annex III of the Regulation. Moreover, of more particular note, the Regulation envisages that an important function of a CRA is to ensure that it monitors its own activities in order to comply with the Regulation and in order to identify instances in which its present practices carry the risk of non-compliance with the Regulation. For instance, the requirement for a CRA to have sound administrative or accounting procedures, internal controls mechanisms or to establish and maintain a compliance function reflects the importance of this function.
96. Therefore, on this basis, the standard of care to be expected of a CRA is high.
97. This high standard of care has been confirmed by the Joint Board of Appeal (“BoA”) of the European Supervisory Authorities, which has stated that “ESMA rightly emphasises that financial services providers (...) 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”⁷⁴.
98. The determination of whether an infringement is committed negligently is a question of fact⁷⁵.

⁷³ Case T-336/07, Telefónica, SA and Telefónica de España, SA v Commission [2012] ECLI:EU:T:2012:172, para. 323.

⁷⁴ See paragraph 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://www.eiopa.europa.eu/content/board-appeal-publishes-its-decision-nordic-banks%E2%80%99-appeals-decisions-esma-%E2%80%9Cshadow-ratings%E2%80%9D_en

See para. 158 of the Board of Appeal’s decision in the Appeal of Scope Ratings GmbH against ESMA’s decision (ref. BoA 2020 D 03) available at: https://www.esma.europa.eu/sites/default/files/library/boa_d_2020_03_decision_on_scope_ratings_v_esma.pdf.

⁷⁵ See para. 159 of the Board of Appeal’s decision in the Appeal of Scope Ratings GmbH against ESMA’s decision (ref. BoA 2020 D 03) available at: https://www.esma.europa.eu/sites/default/files/library/boa_d_2020_03_decision_on_scope_ratings_v_esma.pdf.

4.4.2 Assessment of whether there is negligence in the present case

99. Regarding the assessment of negligence in the present case, the Board notes the following.

100. First, the requirement under Article 10(6) of the Regulation, in conjunction with Point 52 of Section I of Annex III of the Regulation, not to use the name of ESMA in such a way that would indicate or suggest endorsement or approval by ESMA of the credit ratings or any credit rating activities of the credit rating agency is clear and straightforward. CRAs are held to a high standard of care when it comes to using ESMA's name. The PSI did not follow this standard, as there have been four instances where the PSI misused ESMA's name.

101. Second, in the instant case, the PSI did not perform a number of steps to ensure that the name of ESMA was not used in a way that would indicate or suggest endorsement or approval by ESMA. The evidence in the file clearly demonstrates that the PSI failed to perform a review of the ESMA references' content before and after the publication⁷⁶. The PSI also failed to provide its personnel with the necessary skills and knowledge to identify potential violations through publications on the website.

102. This led to the incorrect use of ESMA's name over the period of several years. The PSI did not respond to these serious issues for several years, despite ESMA having already highlighted to the PSI on 5 May 2021⁷⁷ the risks associated with using ESMA's name in its publications.

103. Overall, on the basis of the elements described above, the Board considers that the PSI failed to take the special care expected of a CRA. As a professional firm in the financial services sector subject to stringent regulatory requirements, the PSI 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 the result of that failure, it has not foreseen the consequences of its acts or omissions, including particularly its infringement of the Regulation, in circumstances where a CRA in such a position that is normally informed and sufficiently attentive could not have failed to foresee those consequences.

104. Therefore, it is considered that the PSI has been negligent when committing the infringement of Point 52 of Section I of Annex III of the Regulation.

4.5 Fine

4.5.1 Basic amount of the fine

105. Article 36a of the Regulation provides in paragraph 2 as follows:

"The basic amount of the fines referred to in paragraph 1 shall be included within the following limits: (...) (b) for the infringements referred to in points 6, 7, 8, 16, 17, 18, 21, 22, 22a, 24, 25, 27, 29, 31, 34, 37 to 40, 42, 42a, 42b, 45 to 49a, 52, 53 and 54 of Section I of Annex III, the fines shall amount to at least EUR 300 000 and shall not exceed EUR 450 000 (...)

⁷⁶ Exhibit 1, PSI's Response to the IIO's RFI, 19 August 2024, Question 8, p. 8.

⁷⁷ Supervisory Report, 1 July 2024, Exhibit 10, ESMA80-189-10704 Closing letter – Modefinance.

To decide whether the basic amount of the fines should be set at the lower, middle or 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”.

106. It has been established that the PSI committed the infringement set out at Point 52 of Section I of Annex III to the Regulation, by using ESMA’s name on its website in such a way that would indicate or suggest endorsement or approval by ESMA of the credit ratings or any credit rating activities of the PSI.

107. To determine the basic amount of the fine, the Board has regard to the PSI’s annual turnover in the business year preceding the year of the decision or that of the last audited accounts available⁷⁸.

108. In 2023⁷⁹, the PSI had a turnover of EUR 8,827,166.

109. Thus, the basic amount of the fine for the infringement listed in Point 52 of Section I of Annex III of the Regulation is set at the lower end of the limit of the fine set out in Article 36a(2)(b) of the Regulation and shall not exceed EUR 300,000.

4.5.2 Applicable aggravating factors

110. The applicable aggravating factors listed in Annex IV to the Regulation are set out below.

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

111. The infringement of Point 52 of Section I of Annex III of the Regulation was committed 4 times (3 repetitions).

112. The PSI requested the Board to “reduce the amount of the fine from EUR 450,000 to EUR 330,000, by the disapplication of the aggravating factor referred to in Annex IV, Point I.1. of the Regulation.”⁸⁰

113. In this respect it is important to note that the Board, and ESMA more generally, has no discretion “to alter or calibrate fines depending on its subjective view of the seriousness or otherwise of an infringement or based on factors beyond those identified in the Regulation”⁸¹. Where ESMA identifies an infringement that has been committed with negligence, it must apply a fine in

⁷⁸ See paras. 176 and 177 of the decision of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA’s decision (ref. BoA 2020 D 03) available at: https://www.esma.europa.eu/sites/default/files/library/boa_d_2020_03_decision_on_scope_ratings_v_esma.pdf.

When the audited financial statement of the last full business year is not available, the total annual turnover is identified according to the latest available audited financial statement.

⁷⁹ The 2024 audited turnover is not yet available.

⁸⁰ PSI’s written submissions in response to the Board’s initial Statement of Findings, p. 15.

⁸¹ Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA’s decision (ref. BoA 2020 D 03), para. 184, available at: https://www.esma.europa.eu/sites/default/files/library/boa_d_2020_03_decision_on_scope_ratings_v_esma.pdf.

accordance with the arithmetic calculation set out in the Regulation: first applying a basic amount and then adding or subtracting the established aggravating or mitigating factors.

114. In this case, based on the facts, the infringement was committed 4 times and thus the aggravating factor set out in Annex IV, Point I.1. is applicable.

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

115. The infringement was committed for more than six months. The PSI first published an incorrect reference to ESMA's name on 27 September 2018. The erroneous references were corrected in September and October 2023. Each of the erroneous references also lasted more than six months.

116. This aggravating factor is thus applicable.

4.5.3 Mitigating factors

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

Annex IV, Point II. 1 If the infringement relates to a breach listed in Section II or III of Annex III and has been committed for fewer than 10 working days, a coefficient of 0,9 shall apply.

118. This mitigating factor is not applicable; the infringement at Point 52 is listed in Section I of Annex III to the Regulation and not in Section II or III as required by this provision.

Annex IV, Point II. 2 If the credit rating agency's senior management can demonstrate that they have taken all the necessary measures to prevent the infringement, a coefficient of 0,7 shall apply.

119. As a preliminary remark, the application of this mitigating factor should be limited to those situations where the PSI can prove that the infringement was the result of events which were beyond the control of its senior management; for instance, when an employee intentionally circumvents the measures put in place by the senior management. Further, to benefit from the application of this mitigating factor, the measures taken by the CRA must be measures taken *ex ante* (i.e., before the infringement was committed) and not *ex post* (i.e., once the infringement had already been committed). If taken *ex post* the measures might be relevant to the mitigating factor for voluntarily taking measures to ensure that a similar infringement cannot be committed in the future, but not for the application of this mitigating factor.

120. In this regard, the PSI was asked to provide documentation showing specifically the measures taken by the PSI's senior management to prevent the infringement considered in this case: the PSI noted the maintenance of specific internal policies to address disclosure requirements and the presentation of credit ratings. The policies and procedures for the presentation of credit ratings have been designed to incorporate two layers of internal controls, applied on an *ex ante* basis to every credit rating report and its related press release. The responsibility for these controls was divided between an analyst, who handled the first level of control, and the Compliance Officer, who

oversaw the second level of control⁸².

121. However, this does not constitute sufficient evidence that **all** necessary measures were taken by senior management. Indeed, senior management had not taken all necessary measures to ensure that there was adequately trained staff involved in marketing, to establish an ex ante regulatory compliance control of the drafted articles before publication and an ex post regulatory control of the publications, and to prevent an update to the content of the institutional website in May 2022, which was not controlled by Compliance ahead of the publication⁸³.

122. This mitigating factor is therefore not applicable.

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

123. To benefit from the application of this mitigating factor, the PSI must acknowledge to ESMA that it has committed (or believe that it could have committed) an infringement and to do so quickly, effectively, and completely⁸⁴.

124. The Board considers the three requirements (quickness, effectiveness, and completeness) set out at Point II.3 of Annex IV to the Regulation to be cumulative. Therefore, if one of them is not met, the mitigating factor is not applied.

125. There is no evidence to suggest that the PSI brought this infringement to the attention of ESMA; on the contrary, incorrect references to ESMA were discovered by ESMA Supervisors during their investigation. Therefore, this mitigating factor is not applicable.

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.

126. The Board considers that remedial actions have been taken and should ensure that a similar infringement of Point 52 cannot be committed in the future.

127. If the measures were taken voluntarily, the mitigating factor under Annex IV, Point II.4. to the Regulation would be applicable.

128. The Board notes that there is no definition of what "voluntarily" ("de son plein gré" in the French version of the Regulation) precisely means within the context of this mitigating factor. Nevertheless, there are clear-cut examples. It is clear that a CRA has voluntarily taken measures when it has taken them spontaneously without any solicitation from its supervisor. It is also obvious that when there is a specific obligation to take these measures, it can no longer be considered that the

⁸² Exhibit 1, PSI's Response to the IIO's RFI, 19 August 2024, Question 13, pp.14 – 15. pp.11.

⁸³ Exhibit 1, PSI's Response to the IIO's RFI, 19 August 2024, Question 8, p. 8. Exhibit 3, Supervisory Report, 'ESMA85-2002691366-36961 Supervisory Report Case 28', p. 8. Supervisory Report, 1 July 2024, Exhibit 16, 'ComplianceReport-2023-3.pdf', p.3-4.

⁸⁴ See paragraphs 183 and 202 of the Board of Appeal's decision in the Appeal of Scope Ratings GmbH against ESMA's decision (ref. BoA 2020 D 03).

measures are taken voluntarily. The situation is to a certain extent less clear-cut when the CRA takes measures only after a number of requests and interactions with its supervisor aiming at ensuring that the said measures are implemented by the CRA, for example, through an action plan defined and monitored by the supervisor.

129. In the instant case, the PSI provided a description of actions taken to remedy issues identified in the areas covered by the case. In particular, the PSI conducted an internal assessment of its internal Compliance & Risk Report which resulted in various actions including an enhanced compliance training for Marketing & Communications staff, pre-publication compliance checks and comprehensive post-publication reviews.⁸⁵

130. The PSI was not under any compulsion (such as, for example, in light of an ESMA decision) to take the measures outlined above to ensure that similar infringements cannot be committed in the future, and the PSI appears therefore to have done so voluntarily.

131. The mitigating factor is therefore applicable.

4.5.4 Determination of the adjusted fine

132. In accordance with Article 36a(3) of the Regulation, taking into account the applicable aggravating and mitigating factors, the basic amount of EUR 300,000 must be adjusted as follows.

133. The difference between the basic amount and the amount resulting from the application of each individual coefficient linked to the aggravating and mitigating factors set out in Annex IV is added to the basic amount in the case of the aggravating factors and subtracted from the basic amount in the case of the mitigating factors:

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

$$\text{EUR } 300,000 \times 1.1 = \text{EUR } 330,000$$

$$\text{EUR } 330,000 - \text{EUR } 300,000 = \text{EUR } 30,000$$

$$\text{EUR } 30,000 \times 3 = \text{EUR } 90,000$$

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

$$\text{EUR } 300,000 \times 1.5 = \text{EUR } 450,000$$

$$\text{EUR } 450,000 - \text{EUR } 300,000 = \text{EUR } 150,000$$

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

⁸⁵ Exhibit 1, PSI's Response to the IIO's RFI, 19 August 2024, Question 13, pp.14 – 15.

EUR 300,000 x 0.6 = EUR 180,000

EUR 300,000 - EUR 180,000 = EUR 120,000

Adjusted fine taking into account applicable aggravating and mitigating factors:

EUR 300,000 + EUR 90,000 + EUR 150,000 – EUR 120,000 = **EUR 420,000**

134. Consequently, following adjustment by taking into account the applicable aggravating and mitigating factors, the amount of the fine to be imposed on the PSI for the infringement listed in Point 52 of Section I of Annex III of the Regulation amounts to **EUR 420,000**.

4.5.5 Maximum cap of the fine and disgorgement of profits

135. Article 36a(4) of the Regulation provides that “Notwithstanding paragraphs 2 and 3 [of Article 36a], the fine shall not exceed 20% of the annual turnover of the credit rating agency concerned in the preceding business year but, 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”.

136. It should therefore be assessed whether the PSI has directly or indirectly benefited financially from the infringement and, if this is not the case, whether the maximum cap has been exceeded.

Financial benefit from the infringement

137. There is no evidence in the file to suggest that the PSI benefited directly or indirectly from the infringement⁸⁶.

Maximum cap of the fine

138. Without it being necessary to distinguish between the turnover for the rating activities and the turnover for the ancillary services, the fine applicable shall not exceed 20% of the annual turnover of the CRA. In accordance with the current case law⁸⁷, the Board has regard to the PSI’s annual turnover in the business year preceding the year of the decision or that of the last audited accounts available.

139. In the financial year ending 31 December 2023⁸⁸, the PSI generated total annual revenues of EUR 8,827,166.

140. EUR 8,827,166 x 0.2 = EUR 1,765,433.20

141. Therefore, pursuant to Article 36a(4) of the Regulation, the fine applicable shall not exceed EUR 1,765,433.20.

⁸⁶ Exhibit 1, PSI’s Response to the IIO’s RFI, 19 August 2024, Question 9, p. 9.

⁸⁷ See paras. 176 and 177 of the decision of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA’s decision (ref. BoA 2020 D 03) available at:

https://www.esma.europa.eu/sites/default/files/library/boa_d_2020_03_decision_on_scope_ratings_v_esma.pdf.

⁸⁸ The 2024 audited turnover is not yet available.

142. This cap is not reached in this case, and the maximum cap is not to be applied.

4.5.6 Size of the fine to be imposed

143. The PSI requested , in the event the sanction is not dismissed, to “reduce the amount of the fine (...), by the disapplication of the aggravating factor referred to in Annex IV, Point 1.1 of the Regulation”⁸⁹.

144. In determining the appropriate sanction, the Board followed the provisions of the Regulation strictly. The fine is the result of a careful consideration of the relevant aggravating and mitigating factors and application of the corresponding coefficients. The proposed fine therefore reflects the aggravating and mitigating factors in this case.

4.5.7 Conclusion

145. Consequently, the amount of the fine to be imposed on the PSI regarding this infringement amounts to EUR 420,000.

4.5.8 Supervisory Measure

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

147. Given the factual findings in the instant case, only the supervisory measure set out in Article 24(1)(e) of the Regulation is considered appropriate with regard to the nature and the seriousness of the infringement.

148. The Board thus finds that a public notice must be issued.

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

DECIDES

that

Modefinance S.r.l. committed with negligence the infringement set out at Point 52 of Section I of Annex III of the Regulation, by using the name of ESMA in such a way that would indicate or suggest endorsement or approval by ESMA of the credit ratings or any credit rating activities of the CRA.

therefore

⁸⁹ Exhibit 15, PSI's Response to the IIO's initial Statement of Findings, p.10.

IMPOSES

the **fine** of **EUR 420,000** for the infringement set out at Point 52 of Section I of Annex III of the Regulation.

and

ADOPTS

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

Modefinance S.r.l. may avail itself of the remedies of Chapter V of Regulation (EU) No 1095/2010 against this decision.

This decision is addressed to Modefinance S.r.l. – Area Science Park, Loc. Padriciano 99, 34149 Trieste, Italy and shall take effect upon notification.

Done at Paris, on 3 April 2025

[Signed]

For the Board of Supervisors

The Chair

Verena Ross