

DECISION OF THE BOARD OF SUPERVISORS

Decision to adopt a supervisory measure taking the form of a public notice and to impose a fine in accordance with Article 23e(5), 24, 36a and 36c of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies

The Board of Supervisors (“Board”),

Having regard to the Treaty on the Functioning of the European Union (“Treaty”),

Having regard to Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (“ESMA Regulation”), and in particular Article 43(2) and Article 44(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 (“CRA Regulation”), in particular Articles 6(2), 23e, 24, 25, 36a and 36c 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, including rules on the right of defence and temporal provisions (“Procedural Regulation”), in particular Article 3 thereof,

Whereas:

1. On the basis of the file containing the investigating officer's findings, and the Board not having received submissions on behalf of DBRS Ratings Limited prior to the expiry of the prescribed time limit for the receipt of those submissions, the Board finds that the registered credit rating agency DBRS Ratings Limited has committed the infringements listed in paragraphs 11, 12, 13 and 14 of Annex III.I and paragraph 1 of Annex III.II of the CRA Regulation.
2. Based on the evidence put before it, the Board finds that DBRS Ratings Limited negligently committed the infringement listed in paragraph 1 of Annex III.II of the CRA Regulation.
3. The Board considers that the evidence before it does not allow it to conclude that DBRS Ratings Limited negligently committed the infringements listed in paragraphs 11, 12, 13 and 14 of Annex III.I of the CRA Regulation.
4. The Board thus decides to adopt a supervisory measure taking the form of a public notice in accordance with Article 24 of the CRA Regulation.
5. The Board further decides to impose a fine of €30,000 (being thirty thousand euro) in respect of the negligent commission of the infringement listed in paragraph 1 of Annex III.II of the CRA Regulation, in accordance with Article 36a of the CRA Regulation.

Has adopted this decision:

Article 1

The Board of Supervisors finds that the registered credit rating agency DBRS Ratings Limited has committed the infringements listed in paragraphs 11, 12, 13 and 14 of Annex III.I and paragraph 1 of Annex III.II of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies.

Article 2

The Board of Supervisors takes the decision to adopt a supervisory measure taking the form of the following public notice, in accordance with Articles 23e(5) and 24 of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies:

Public notice regarding compliance, corporate governance and record-keeping breaches by DBRS Ratings Limited

DBRS Ratings Limited (“DBRS”) is a credit rating agency registered in the European Union and is part of a corporate group which also operates credit rating agencies in Canada and the USA. DBRS was registered as a credit rating agency under Regulation (EC No 1060/2009 on credit rating agencies (the “CRA Regulation”) on 31 October 2011. The CRA Regulation confers functions and powers on ESMA to supervise and enforce the provisions of the Regulation in relation to credit rating agencies registered in the European Union.

Some six months after registration, ESMA’s supervisory unit conducted an investigation into DBRS. The scope of this investigation included corporate governance and compliance and internal control functions of DBRS. The core period covered by this investigation was from registration until 1 July 2012.

As a result of that investigation, ESMA’s supervisory unit formed the view that there were “serious indications of the possible existence of facts liable to constitute one or more of the infringements” listed in the CRA Regulation. The matter was accordingly referred to an independent investigating officer (the “IIO”). The IIO considered the evidence referred to him and conducted further investigations, before submitting his findings to ESMA’s Board of Supervisors (the “ESMA Board”).

Based on the findings of the IIO and the evidence put before it, the ESMA Board found on 24 June 2015 that an examination of the facts showed that DBRS had committed the following infringements of the CRA Regulation.

DBRS committed an infringement of the CRA Regulation by failing to meet the organisational requirements set out in Annex I, Section A, points 3 and 4, of the CRA Regulation

A) The relevant legal provisions

The CRA Regulation at Annex I, Section A, point 3, provides:

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

At Annex I, Section A, point 4, the CRA Regulation provides:

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

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

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

Annex III.I, paragraph 11, of the CRA Regulation provides:

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

Annex III.I, paragraph 12, of the CRA Regulation provides:

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

B) The factual background

The evidence put before the ESMA Board showed that DBRS had a governance arrangement whereby the board of directors and a body called the “Executive Group” worked alongside one another. There was no delegation by the directors, who as a matter of law were responsible for the management of the company’s business and exercised all the powers of the company, to the “Executive Group”, nor did the two bodies report to each other.

C) The infringements committed by DBRS

Based on the evidence put before it, the ESMA Board found that DBRS did not meet the requirements set out in the CRA Regulation to establish adequate policies and procedures and to maintain decision-making procedures and organisational structures which clearly and in a documented manner specify reporting lines and allocate functions and responsibilities and that DBRS had thus committed the infringements specified at Annex III, Section I, points 11 and 12.

In particular, the Board considered that by putting in place an arrangement whereby the board of directors and the “Executive Group” worked alongside one another without a delegation by the board of directors to the “Executive Group” and reporting between these bodies, DBRS had failed to meet the requirements of the CRA Regulation.

The ESMA Board considered however that the evidence put before it did not allow it to conclude that DBRS had committed the relevant infringements intentionally or negligently.

DBRS committed an infringement of the CRA Regulation by failing to meet the requirements for an effective compliance function set out in Annex I, Section A, points 5 and 6, of the CRA Regulation

A) The relevant legal provisions

The CRA Regulation at Annex I, Section A, point 5, provides:

“A credit rating agency shall establish and maintain a permanent and effective compliance function department (compliance function) which operates independently. The compliance function shall monitor and report on compliance of the credit rating agency and its employees with the credit rating agency’s obligations under this Regulation. The compliance function shall:

(a) monitor and, on a regular basis, assess the adequacy and effectiveness of the measures and procedures put in place in accordance with point 3, and the actions taken to address any deficiencies in the credit rating agency's compliance with its obligations;

(b) advise and assist the managers, rating analysts, employees as well as 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 who is responsible for carrying out credit rating activities, to comply with the credit rating agency's obligations under this Regulation."

At Annex I, Section A, point 6, the CRA Regulation provides:

"In order to enable the compliance function to discharge its responsibilities properly and independently, a credit rating agency shall ensure that the following conditions are satisfied:

(a) the compliance function has the necessary authority, resources, expertise and access to all relevant information;

(b) a compliance officer is appointed and is responsible for the compliance function and for any reporting with regard to compliance required by point 3;

(c) the managers, rating analysts, employees and 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 who is involved in the compliance function is not involved in the performance of credit rating activities they monitor;

(d) the compensation of the compliance officer is not linked to the business performance of the credit rating agency and is arranged so as to ensure the independence of his or her judgement.

The compliance officer shall ensure that any conflicts of interest relating to the persons placed at the disposal of the compliance function are properly identified and eliminated.

The compliance officer shall report regularly on the carrying out of his or her duties to senior management and the independent members of the administrative or supervisory board.”

Annex III.I, paragraph 13, of the CRA Regulation provides:

“The credit rating agency infringes Article 6(2), in conjunction with point 5 of Section A of Annex I, by not establishing or maintaining a permanent and effective compliance function department (compliance function) which operates independently.”

Annex III.I, paragraph 14, of the CRA Regulation provides:

“The credit rating agency infringes Article 6(2), in conjunction with the first paragraph of point 6 of Section A of Annex I, by not ensuring that the conditions enabling the compliance function to discharge its responsibilities properly or independently, as set out in the first paragraph of that point, are satisfied.”

B) The factual background

The evidence put before the ESMA Board showed, notably, that

- DBRS’ compliance department did not by June 2012 have a formal work plan;
- DBRS’ compliance records were at best incomplete;
- No risk assessment activities were carried out by DBRS between registration and July 2012.

C) The infringements committed by DBRS

Based on the evidence put before it, the ESMA Board found that DBRS had failed to meet the requirements to establish and maintain a permanent and effective compliance function and to ensure that the compliance function has the necessary authority, resources, expertise and access to all relevant information and that DBRS had thus committed the infringements set out at Annex III, Section I, points 13 and 14.

The ESMA Board considered that the facts showed a less than fully-effective compliance department without, in particular, the necessary resources and access to all relevant information, and one where expertise and necessary authority were not in evidence.

The ESMA Board considered however that the evidence put before it did not allow it to conclude that DBRS had committed the relevant infringements intentionally or negligently.

DBRS committed an infringement of the CRA Regulation by failing to meet the requirements for adequate record keeping set out in Annex I, Section B, point 7, of the CRA Regulation

A) The relevant legal provisions

Annex I, Section B, point 7, of the CRA Regulation provides:

“A credit rating agency shall arrange for adequate records and, where appropriate, audit trails of its credit rating activities to be kept. Those records shall include:

[...]

(g) records of the procedures and measures implemented by the credit rating agency to comply with this Regulation;”

Annex III.II, paragraph 1, of the CRA Regulation provides:

“The credit rating agency infringes Article 6(2), in conjunction with point 7 of Section B of Annex I, by not arranging for records or audit trails of its credit rating activities as required by those provisions.”

B) The factual background

The evidence put before the ESMA Board showed that in its responses to requests by ESMA during the supervisory investigation DBRS could not confirm whether or to what extent documents provided by DBRS to ESMA represented the totality of all

existing or previously existing records of the procedures and measures implemented by DBRS to comply with the CRA Regulation. In certain instances DBRS' response was that documents may exist but could not be located, in other instances that DBRS could not 'validate' certain documents which it was providing to ESMA. More significantly the broader position emerging from DBRS's responses is that, apart from the documentation which it had provided to ESMA, it could not confirm the extent to which other records of its compliance-related activities existed.

C) The infringements committed by DBRS

Based on the evidence put before it, the ESMA Board found that DBRS had failed to meet the requirement of the CRA Regulation to arrange for adequate records and, where appropriate, audit trails and that DBRS had thus committed the infringement specified in paragraph 1 of section II of Annex III of the CRA Regulation.

The ESMA Board considered that DBRS's responses to requests by ESMA's supervisory unit showed a failure to comply with the requirement under point 7(g) of Section B of Annex I to arrange for adequate records and, where appropriate, audit trails of its credit rating activities, in particular including records of the procedures and measures implemented by the credit rating agency to comply with the CRA Regulation.

Based on the evidence put before it, the ESMA Board furthermore found that DBRS had committed the relevant infringement negligently.

Supervisory measure and fine

Public notice

Based on the provisions of Article 24 of the CRA Regulation, the ESMA Board decided that the relevant infringements warranted a supervisory measure in the form of the publication of this public notice.

Fine

Article 36a of the CRA Regulation states that the ESMA Board shall impose a fine when it finds that an infringement was committed with intention or negligence. The ESMA Board considered that on the evidence before it, DBRS negligently committed

the infringement as regards the requirement under the CRA Regulation to arrange for adequate records and, where appropriate, audit trails, and thus decided to impose a fine. Taking into account the mitigating factor that DBRS had voluntarily taken measures to address the shortcomings the fine imposed on DBRS was set at EUR 30,000.

Article 3

The Board takes the decision to impose a fine of €30,000 (being thirty thousand euro) in respect of the negligent commission of the infringement listed in paragraph 1 of Annex III.II of the CRA Regulation, in accordance with Articles 23e(5) and 36a of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies.

Article 4

This decision is addressed to DBRS Ratings Limited, 10th Floor, 1 Minister Court, Mincing Lane, London EC3R 7AA, United Kingdom.

Article 5

This decision takes effect upon its notification to the addressee.

The addressee may appeal against this decision to the Board of Appeal of the European Supervisory Authorities in accordance with Article 60 of the ESMA Regulation. The appeal, together with a statement of grounds, shall be filed in writing within 2 months of the date of notification of this decision. The appeal shall not have suspensive effect but the Board of Appeal may, if it considers that circumstances so require, suspend the application of this decision.

Done at Paris on 24 June 2015

A handwritten signature in blue ink, appearing to be 'S/M', is written over a light blue horizontal line.

Steven Maijoor

Chair

For the Board of Supervisors