Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies (Text with EEA relevance)

REGULATION (EU) No 462/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 21 May 2013

amending Regulation (EC) No 1060/2009 on credit rating agencies

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) Regulation (EC) No 1060/2009 of the European Parliament and of the Council[(4)] requires credit rating agencies to comply with rules of conduct in order to mitigate possible conflicts of interest, and to ensure high quality and sufficient transparency of credit ratings and the rating process. Following the amendments introduced by Regulation (EU) No 513/2011 of the European Parliament and of the Council[(5)], the European Supervisory Authority (European Securities and Markets Authority) (ESMA), established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council[(6)], has been empowered to register and supervise credit rating agencies. This Regulation complements the current regulatory framework for credit rating agencies. Some of the most important issues, such as conflicts of interest due to the issuer-pays model and disclosure for structured finance instruments, have been addressed and the framework will need to be reviewed after having been in place for a reasonable period of time to assess whether it fully resolves those issues. Meanwhile the need to review transparency, procedural requirements and the timing of publication specifically for sovereign ratings was highlighted by the current sovereign debt crisis.

(2) The European Parliament's resolution of 8 June 2011 on credit rating agencies: future perspectives[(7)], called for enhanced regulation of credit rating agencies. At its informal meeting of 30 September and 1 October 2010, the Ecofin Council acknowledged that further efforts should be made to address a number of issues related to credit rating

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activities, including the risk of over-reliance on credit ratings and the risk of conflicts of interest stemming from the remuneration model of credit rating agencies. The European Council of 23 October 2011 concluded that progress is needed on reducing over-reliance on credit ratings.

(3) At the international level, the Financial Stability Board (FSB), of which the European Central Bank (ECB) is a member institution, endorsed on 20 October 2010 principles to reduce the reliance of authorities and of financial institutions on credit ratings ('the FSB principles'). The FSB principles were endorsed by the G20 Seoul Summit in November 2010. It is therefore appropriate that the sectoral competent authorities assess market participants' practices and encourage those market participants to mitigate the impact of such practices. The sectoral competent authorities should decide upon the measures for encouragement. ESMA, where appropriate in cooperation with the European Supervisory Authority (European Banking Authority), established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council[(8)], and with the European Supervisory Authority (European Insurance and Occupational Pensions Authority), established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council[(9)], should take action to facilitate convergence of supervisory practices in accordance with Regulation (EU) No 1095/2010, and within the framework of this Regulation.

(4) Credit rating agencies should make investors aware of the data on the probability of default of credit ratings and rating outlooks based on historical performance, as published on the central repository created by ESMA.

(5) Pursuant to the FSB principles, 'central banks should reach their own credit judgments on the financial instruments that they will accept in market operations, both as collateral and as outright purchases. Central bank policies should avoid mechanistic approaches that could lead to unnecessarily abrupt and large changes in the eligibility of financial instruments and the level of haircuts that may exacerbate cliff effects'. Furthermore, the ECB stated in its opinion of 2 April 2012 that it is committed to supporting the common objective of reducing over-reliance on credit ratings. In that respect, the ECB reports regularly on the various measures taken by the Eurosystem to reduce reliance on credit ratings. Pursuant to Article 284(3) of the Treaty on the Functioning of the European Union (TFEU), the ECB is to address an annual report on the activities of the European System of Central Banks (ESCB) and on the monetary policy of both the previous and current years to the European Parliament, the Council and the Commission, and also to the European Council. The President of the ECB is to present that report to the European Parliament, which may hold a general debate on that basis, and to the Council. Further, the ECB could, in such reports, describe how it has implemented the FSB principles and the alternative assessment mechanisms it uses.

(6) The Union is working towards reviewing, at a first stage, whether any references to credit ratings in Union law trigger or have the potential to trigger sole or mechanistic reliance on such credit ratings and, at a second stage, all references to credit ratings for regulatory purposes with a view to deleting them by 2020, provided that appropriate alternatives to credit risk assessment are identified and implemented.

(7) The relevance of rating outlooks for investors and issuers and their effects on markets are comparable to the relevance and effects of credit ratings. Therefore, all the requirements of Regulation (EC) No 1060/2009 which aim at ensuring that rating actions are accurate, transparent and free from conflicts of interest should also apply to rating outlooks. According to current supervisory practice, a number of requirements of that Regulation apply to rating outlooks. This Regulation should clarify the rules and provide legal certainty by introducing a definition of rating outlooks and clarifying which specific provisions apply to such rating outlooks. The definition of rating outlooks should also encompass opinions regarding the likely direction of a credit rating in the short term, commonly referred to as credit watches.

(8) In the medium term, further action should be evaluated to delete references to credit ratings for regulatory purposes from financial regulation and to eliminate the risk-weighting of assets by means of credit ratings. However, for the time being, credit rating agencies are important participants in the financial markets. As a consequence, the independence and integrity of credit rating agencies and their credit rating activities are of particular importance in guaranteeing their credibility vis-à-vis market participants, in particular investors and other users of credit ratings. Regulation (EC) No 1060/2009 provides that credit rating agencies are to be registered and supervised as their services have considerable impact on the public interest. Credit ratings, unlike investment research, are not mere opinions about a value or a price for a financial instrument or a financial obligation. Credit rating agencies are not mere financial analysts or investment advisors. Credit ratings have regulatory value for regulated investors, such as credit institutions, insurance companies and other institutional investors. Although the incentives to rely excessively on credit ratings are being reduced, credit ratings still drive investment choices, in particular because of information asymmetries and for efficiency purposes. In that context, credit rating agencies must be independent and must be perceived as such by market participants, and their rating methods must be transparent and be perceived as such.

(9) Over-reliance on credit ratings should be reduced and all the automatic effects deriving from credit ratings should be gradually eliminated. Credit institutions and investment firms should be encouraged to put in place internal procedures in order to make their own credit risk assessment and should encourage investors to perform a due diligence exercise. Within that framework, this Regulation provides that financial institutions should not solely or mechanistically rely on credit ratings. Therefore, those institutions should avoid entering into contracts where they solely or mechanistically rely on credit ratings and should avoid using them in contracts as the only parameter to assess the creditworthiness of investments or to decide whether to invest or divest.

(10) Regulation (EC) No 1060/2009 already provided a first round of measures to address the question of independence and integrity of credit rating agencies and their credit rating activities. The objectives of guaranteeing the independence of credit rating agencies and of identifying, managing and, to the extent possible, avoiding any conflicts of interest that could arise were already underpinning several provisions of that Regulation. The selection and remuneration of the credit rating agency by the rated entity (the issuer-

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pays model) engenders inherent conflicts of interest. Under that model, there are incentives for credit rating agencies to issue complacency ratings on the issuer in order to secure a long-standing business relationship in order to guarantee revenues or to secure additional work and revenues. Moreover, relationships between the shareholders of credit rating agencies and the rated entities may cause conflicts of interest, which are not sufficiently dealt with by the existing rules. As a result, credit ratings issued under the issuer-pays model may be perceived as the credit ratings that suit the issuer rather than the credit ratings needed by the investor. It is essential to reinforce the conditions of independence applying to credit rating agencies in order to increase the level of credibility of credit ratings issued under the issuer-pays model.

(11) In order to increase competition in a market that has been dominated by three credit rating agencies, measures should be taken to encourage the use of smaller credit rating agencies. It has been the practice in recent times for issuers or related third parties to seek credit ratings from two or more credit rating agencies, and therefore, where two or more credit ratings are sought, the issuer or a related third party should consider appointing at least one credit rating agency which does not have more than 10 % of the total market share and which could be evaluated by the issuer or a related third party as capable of rating the relevant issuance or entity.

(12) The credit rating market shows that, traditionally, credit rating agencies and rated entities enter into long-lasting relationships. This raises the risk of familiarity, as the credit rating agency may become too sympathetic to the desires of the rated entity. In those circumstances, the impartiality of credit rating agencies could, over time, become questionable. Indeed, credit rating agencies appointed and paid by a corporate issuer have an incentive to issue overly favourable ratings on that rated entity or on its debt instruments in order to maintain the business relationship with such issuer. Issuers are also subject to incentives that favour long-lasting relationships, such as the lock-in effect whereby an issuer refrains from changing credit rating agency as this could raise concerns of investors regarding the issuer's creditworthiness. This problem was already identified in Regulation (EC) No 1060/2009, which required credit rating agencies to apply a rotation mechanism providing for gradual changes in analytical teams and credit rating committees so that the independence of the rating analysts and persons approving credit ratings would not be compromised. The success of those rules, however, was highly dependent on a behavioural solution internal to the credit rating agency, namely the actual independence and professionalism of the employees of the credit rating agency vis-à-vis the commercial interests of the credit rating agency itself. Those rules were not designed to provide a sufficient guarantee towards third parties that the conflicts of interest arising from the long-lasting relationship would effectively be mitigated or avoided. A way to achieve this could be by limiting the period during which a credit rating agency can continuously provide credit ratings on the same issuer or its debt instruments. Setting out a maximum duration of the contractual relationship between the issuer which is rated or which issued the rated debt instruments and the credit rating agency should remove the incentive for issuing favourable credit ratings with respect to that issuer. Additionally, requiring the rotation of credit rating agencies as a normal and regular market practice should also effectively mitigate the problem

of the lock-in effect. Finally, the rotation of credit rating agencies should have positive effects on the credit rating market, as it would facilitate new market entries and offer existing credit rating agencies the opportunity to extend their business to new areas.

(13) It is, however, important that the implementation of a rotation mechanism is designed in such a way that the benefits of the mechanism more than outweigh its possible negative consequences. For example, frequent rotation could result in increased costs for issuers and credit rating agencies because the cost associated with rating a new entity or financial instrument is typically higher than the cost of monitoring a credit rating that has already been issued. It also takes a considerable amount of time and resources to get established as a credit rating agency, whether as a niche player or covering all asset classes. Further, ongoing rotation of credit rating agencies could have a significant impact on the quality and continuity of credit ratings. Equally important, a rotation mechanism should be implemented with sufficient safeguards to allow the market to adapt gradually before possibly enhancing the mechanism in the future. This could be achieved by limiting the scope of the mechanism to re-securitisations, which is a limited source of bank funding, while allowing credit ratings that are already issued to continue to be monitored upon request even after rotation becomes mandatory. Thus, as a general rule, rotation should only affect new re-securitisations with underlying assets from the same originator. The Commission should review whether it is appropriate to maintain a limited rotation mechanism or to apply it to other asset classes as well and, if so, whether other classes warrant different treatment with respect to, for example, the length of the maximum duration of the contractual relationship. If the rotation mechanism is established for other asset classes, the Commission should evaluate whether it is necessary to introduce an obligation on the credit rating agency to provide, at the end of the maximum duration period of the contractual relationship, information on the issuer and on the rated financial instruments (a handover file), to the incoming credit rating agency.

(14) It is appropriate to introduce rotation on the credit rating market for re-securitisations. First, that is the segment of the European securitisations market that has underperformed since the financial crisis, and it is therefore the one in which the need to address conflicts of interest is greatest. Second, while the credit risk on debt instruments issued by, for instance, corporates to a high degree depends on the debt servicing capacity of the issuer itself, the credit risk on re-securitisations is generally unique to each transaction. Therefore, when a re-securitisation is created the risk of knowledge being lost by hiring a new credit rating agency is not high. In other words, although there is currently only a limited number of credit rating agencies active in the credit rating market for re-securitisations, that market is more naturally open to competition and a rotation mechanism could be a driver for creating more dynamics in that market. Finally, the credit rating market for re-securitisations is dominated by a few large credit rating agencies but there are other players who have been building up expertise in this area.

(15) Regular rotation of credit rating agencies issuing credit ratings on re-securitisations should bring more diversity to the assessment of creditworthiness. Multiple and different views, perspectives and methodologies applied by credit rating agencies should produce more diverse credit ratings and ultimately improve the assessment

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of the creditworthiness of re-securitisations. For such diversity to play a role and to avoid complacency of both originators and credit rating agencies, the maximum period during which the credit rating agency is allowed to rate re-securitisations from the same originator must be restricted to a level that guarantees regular fresh assessments of creditworthiness. Those factors, together with the need to provide certain continuity of approach to credit ratings, mean that a period of four years is appropriate. Where at least four credit rating agencies are appointed, the objectives for a rotation mechanism have already been achieved so the requirement to rotate should not apply. In order to ensure real competition, such an exemption should only be applicable where at least four of the appointed credit rating agencies rate a certain proportion of the outstanding financial instruments of the originator.

(16) It is appropriate to structure a rotation mechanism for re-securitisations around the originator. Re-securitisations are issued out of special-purpose vehicles without any significant capacity to service the debt. Therefore, structuring rotation around the issuer would render the mechanism ineffective. Conversely, structuring rotation around the sponsor would mean that the exemption would almost always apply.

(17) A rotation mechanism could be an important tool for lowering the barriers to entry to the credit rating market for re-securitisations. At the same time, however, it could make it more difficult for new market players to secure a foothold in the market because they would not be allowed to hold on to their clients. It is therefore appropriate to introduce an exemption from the rotation mechanism for small credit rating agencies.

(18) In order to be effective, the rotation mechanism needs to be enforced in a credible manner. The rotation requirement would not achieve its objectives if the outgoing credit rating agency were allowed to rate re-securitisations from the same originator again within too short a period. Therefore, it is important to provide for an appropriate period within which the outgoing credit rating agency cannot be appointed to rate re-securitisations from the same originator again. That period should be sufficiently long to allow the incoming credit rating agency to provide its credit rating services effectively, to ensure that the re-securitisations are truly exposed to a new scrutiny under a different approach, and to guarantee that the credit ratings issued by the new credit rating agency provide enough continuity. At the same time, for a rotation mechanism to function properly, the length of the period is constrained by the supply of credit rating agencies with sufficient expertise in the area of re-securitisations. Therefore, the length of the period should be proportionate, should generally be equal to the length of the expired contract of the outgoing credit rating agency but should not exceed four years.

(19) Requiring a regular rotation of credit rating agencies is proportionate to the objective pursued. The requirement only applies to registered credit rating agencies, which are regulated and which provide a service affecting the public interest (credit ratings that can be used for regulatory purposes) under the issuer-pays model and for a particular asset class (re-securitisations). The privilege of having its services recognised as playing an important role in the regulation of the financial services market and being approved to carry out this function, gives rise to the need to respect certain obligations in order to guarantee independence and the perception of independence in all circumstances. A

credit rating agency which is prevented from rating re-securitisations from a particular originator would still be allowed to rate re-securitisations from other originators as well as rating other asset classes. In a market context where the rotation rule applies to all participants, business opportunities will arise since all credit rating agencies would need to rotate. Moreover, credit rating agencies can always issue unsolicited credit ratings on re-securitisations from the same originator capitalising on their experience. Unsolicited credit ratings are not constrained by the issuer-pays model and therefore are theoretically less affected by potential conflicts of interest. For the clients of credit rating agencies, the maximum duration of the contractual relationship with a credit rating agency and the requirement to employ more than one credit rating agency also represent restrictions on their freedom to conduct their own business. However, those restrictions are necessary on public-interest grounds considering the interference by the issuer-pays model with the necessary independence of credit rating agencies to guarantee independent credit ratings that can be used by investors for regulatory purposes. At the same time, those restrictions do not go beyond what is necessary and should rather be seen as increasing the creditworthiness of re-securitisations towards other parties, and ultimately the market.

(20) The independence of a credit rating agency vis-à-vis a rated entity is also affected by possible conflicts of interest of any of its significant shareholders with the rated entity. A shareholder of a credit rating agency could be a member of the administrative or supervisory board of a rated entity or a related third party. Regulation (EC) No 1060/2009 addresses this type of situation only as regards the conflicts of interest caused by rating analysts, persons approving the credit ratings or other employees of the credit rating agency. That Regulation is, however, silent as regards potential conflicts of interest caused by shareholders or members of credit rating agencies. With a view to enhancing the perception of independence of credit rating agencies vis-à-vis the rated entities, it is appropriate to extend the existing rules set out in that Regulation on conflicts of interest caused by employees of the credit rating agencies to those caused by shareholders or members holding a significant position within the credit rating agency. Hence, the credit rating agency should abstain from issuing credit ratings, or should disclose that the credit rating may be affected, where a shareholder or member holding 10 % of the voting rights of that agency is also a member of the administrative or supervisory board of the rated entity or has invested in the rated entity when the investment reaches a certain size. Furthermore, the fact that a shareholder or member holding at least 5 % of the voting rights of that credit rating agency has invested in the rated entity or is a member of the administrative or supervisory board of the rated entity should be disclosed to the public, at least if the investment reaches a certain size. Moreover, where a shareholder or member is in a position to exercise significant influence on the business activity of the credit rating agency, that person should not provide consultancy or advisory services to the rated entity or a related third party regarding its corporate or legal structure, assets, liabilities or activities.

(21) In order to ensure a workable application of the rules on independence and prevention of conflicts of interest set out in Regulation (EC) No 1060/2009 and to prevent them from becoming ineffective, there is a need for a sufficiently high number of credit rating

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agencies, unconnected with both the outgoing credit rating agency in case of rotation and the credit rating agency providing credit rating services in parallel to the same issuer. It is appropriate to require a strict separation of the outgoing agency from the incoming credit rating agency in the case of rotation as well as of the two credit rating agencies providing credit rating services in parallel to the same issuer. The credit rating agencies concerned should not be linked to each other by control, by being part of the same group of credit rating agencies, by being a shareholder or a member of or being able to exercise voting rights in any of the other credit rating agencies, or by being able to appoint members of the administrative or supervisory boards of any of the other credit rating agencies.

(22) Credit rating agencies should establish, maintain, enforce and document an effective internal control structure governing the implementation of policies and procedures for the prevention and control of possible conflicts of interest and for ensuring the independence of credit ratings, rating analysts and rating teams regarding shareholders, administrative and management bodies and sales and marketing activities. Standard Operating Procedures (SOPs) should be put in place relating to corporate governance, organisational matters, and the management of conflicts of interest. SOPs should be periodically reviewed and monitored to evaluate their effectiveness and whether they should be updated.

(23) The perception of independence of credit rating agencies would be particularly affected should the same shareholders or members be investing in different credit rating agencies not belonging to the same group of credit rating agencies, at least if such investment reaches a certain size that could allow those shareholders or members to exercise a certain influence on the credit rating agency's business. Therefore, in order to ensure the independence (and the perception of independence) of credit rating agencies, it is appropriate to provide for stricter rules regarding the relations between the credit rating agencies and their shareholders or members. For that reason, no person should simultaneously hold a participation of 5 % or more in more than one credit rating agency, unless the credit rating agencies concerned belong to the same group.

(24) The objective of ensuring sufficient independence of credit rating agencies requires that investors not hold simultaneously investments of 5 % or more in more than one credit rating agency. Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market[(10)] provides that those persons controlling at least 5 % of the voting rights in a listed company disclose that fact to the public, because, inter alia, the investors have an interest in knowing about changes in the voting structure of such a company. The 5 % level is therefore considered to be a major holding capable of influencing the voting structure in a company. It is therefore appropriate to use the 5 % level for the purposes of restricting the simultaneous investment in more than one credit rating agency. The measure cannot be considered to be disproportionate, given that all registered credit rating agencies in the Union are non-listed undertakings and, therefore, not subject to the transparency and procedural rules that apply to listed companies in the Union in accordance with Directive 2004/109/EC. Often unlisted undertakings are governed by

shareholders' protocols or agreements and the number of shareholders or members is usually low. Therefore, even a minority position in an unlisted credit rating agency could be influential. Nevertheless, in order to ensure that purely economic investments in credit rating agencies are still possible, this limitation to simultaneous investments in more than one credit rating agency should not be extended to investments channelled through collective investment schemes managed by third parties independent from the investor and not subject to the investor's influence.

(25) The provisions in this Regulation regarding conflicts of interest with regard to the shareholder structure should not only refer to direct but also to indirect shareholdings as otherwise those rules could be easily circumvented. Credit rating agencies should make all efforts to know their indirect shareholders so that they can avoid any potential conflicts of interest in this respect.

(26) The effectiveness of the rules on independence and prevention of conflicts of interest which require that credit rating agencies not provide credit rating services to the same issuer for a long period of time could be undermined if credit rating agencies were allowed to become significant shareholders or members of other credit rating agencies.

(27) It is important to ensure that modifications to the rating methodologies do not result in less rigorous methodologies. For that purpose, issuers, investors and other interested parties should have the opportunity to comment on any intended change to rating methodologies. This will help them to understand the reasons behind new methodologies and for the change in question. Comments provided by issuers and investors on the draft methodologies may provide valuable input for the credit rating agencies in defining the methodologies. ESMA should also be notified of intended changes. Although Regulation (EC) No 1060/2009 confers on ESMA the power to verify that methodologies used by credit rating agencies are rigorous, systematic, continuous and subject to validation based on historical experience, including back-testing, that verification process should not grant ESMA any power to judge the appropriateness of the proposed methodology or of the credit ratings issued following the application of the methodologies. Where appropriate, rating methodologies should take into account financial risks deriving from environmental hazards.

(28) Due to the complexity of structured finance instruments, credit rating agencies have not always succeeded in ensuring a sufficiently high quality of credit ratings issued on such instruments. This has led to a loss of market confidence in this type of credit ratings. In order to regain confidence it would be appropriate to require issuers or related third parties to engage at least two different credit rating agencies for the provision of credit ratings on structured finance instruments, which could lead to different and competing assessments. This could also reduce the over-reliance on a single credit rating.

(29) The proposal for a directive on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and the proposal for a regulation on prudential requirements for credit institutions and investment firms, which are to replace Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions[(11)] and Directive 2006/49/EC of the European Parliament and of the Council

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of 14 June 2006 on the capital adequacy of investment firms and credit institutions[12], introduce a requirement for credit institutions and investment firms to assess the credit risk of entities and financial instruments in which they invest themselves and not simply to rely in this respect on credit ratings. That requirement should be extended to other financial market participants regulated under Union law, including investment managers. For all financial market participants, however, that requirement should be enforced in a proportional manner taking into account the nature, scale, and complexity of the participant in question. Member States should not be entitled to impose or maintain rules that allow stricter reliance by those investors on credit ratings.

(30) Furthermore, the ability of investors to make an informed assessment of the creditworthiness of structured finance instruments would be improved if investors were provided with sufficient information on those instruments. For example, as the risk on structured finance instruments to a large extent depends on the quality and performance of the underlying assets, investors should be provided with more information on the underlying assets. This would reduce investors' dependence on credit ratings. Moreover, disclosing relevant information on structured finance instruments is likely to reinforce the competition between credit rating agencies, because it could lead to an increase in the number of unsolicited credit ratings. The Commission should, by January 2016, review and report on the appropriateness of extending the scope of that disclosure requirement to other financial products. For example, there are other financial products, such as covered bonds and other secured debt, where the risk to a large extent depends on the characteristics of any underlying collateral and where it could be relevant to provide investors with more information about the collateral.

(31) Investors, issuers and other interested parties should have access to up-to-date rating information on a central website. A European rating platform should be established by ESMA and should allow investors to easily compare all credit ratings that exist with regard to a specific rated entity. It is important that the European rating platform website shows all available credit ratings per instrument in order to allow investors to consider the whole variety of opinions before taking their own investment decision. However, in order not to undermine the ability of credit rating agencies to operate under the investor-pays model, such credit ratings should not be included in the European rating platform. The European rating platform should help smaller and new credit rating agencies to gain visibility. The European rating platform should incorporate ESMA's central repository with a view to creating a single platform for all available credit ratings per instrument and for information on historical performance data, published on the central repository. The European Parliament supported the establishment of such publication of credit ratings in its resolution on credit rating agencies of 8 June 2011.

(32) Credit ratings, whether issued for regulatory purposes or not, have a significant impact on investment decisions and on the image and financial attractiveness of issuers. Hence, credit rating agencies have an important responsibility towards investors and issuers in ensuring that they comply with Regulation (EC) No 1060/2009 so that their credit ratings are independent, objective and of adequate quality. However, investors and issuers are not always in a position to enforce credit rating agencies' responsibility towards them. It can be particularly difficult to establish the civil liability of a credit

rating agency in the absence of a contractual relationship between a credit rating agency and, for instance, an investor or an issuer rated on an unsolicited basis. Issuers can also face difficulties in enforcing credit rating agencies' civil liability towards them even when they have a contractual relationship with the credit rating agency concerned: for instance, a downgrade of a credit rating, decided on the basis of an infringement of Regulation (EC) No 1060/2009 committed intentionally or with gross negligence, can impact negatively the reputation and funding costs of an issuer, therefore causing this issuer damage even if it is not covered by contractual liability. Therefore, it is important to provide for an adequate right of redress for investors who have reasonably relied on a credit rating issued in breach of Regulation (EC) No 1060/2009 as well as for issuers who suffer damage because of a credit rating issued in breach of Regulation (EC) No 1060/2009. The investor and issuer should be able to hold the credit rating agency liable for damages caused by an infringement of that Regulation which had an impact on the rating outcome. While investors and issuers who have a contractual relationship with a credit rating agency may choose to base a claim against that credit rating agency on a breach of contract, the possibility of claiming damages for an infringement of Regulation (EC) No 1060/2009 should be available for all investors and issuers, regardless of whether there is a contractual relationship between the parties.

(33) It should be possible for credit rating agencies to be held liable if they infringe intentionally or with gross negligence any obligations imposed on them by Regulation (EC) No 1060/2009. This standard of fault is appropriate because the activity of credit rating involves a certain degree of assessment of complex economic factors and the application of different methodologies may lead to different rating results, none of which can be considered as incorrect. Also, it is appropriate to expose credit rating agencies to potentially unlimited liability only where they breach Regulation (EC) No 1060/2009 intentionally or with gross negligence.

(34) The investor or issuer claiming damages for an infringement of Regulation (EC) No 1060/2009 should present accurate and detailed information indicating that the credit rating agency has committed such an infringement of that Regulation. This should be assessed by the competent court, taking into consideration that the investor or issuer may not have access to information that is purely within the sphere of the credit rating agency.

(35) Regarding matters concerning the civil liability of a credit rating agency which are not covered by or defined in this Regulation, including causation and the concept of gross negligence, such matters should be governed by the applicable national law as determined by the relevant rules of private international law. In particular, Member States should be able to maintain national civil liability regimes which are more favourable to investors or issuers or which are not based on an infringement of Regulation (EC) No 1060/2009. The competent court to decide on a claim for civil liability brought by an investor or issuer should be determined by the relevant rules on private international law.

(36) The fact that institutional investors including investment managers are obliged to carry out their own assessment of the creditworthiness of assets should not prevent courts

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from finding that an infringement of Regulation (EC) No 1060/2009 by a credit rating agency has caused damage to an investor for which that credit rating agency is liable. While this Regulation will improve the possibilities of investors to make an own risk assessment they will continue to have more limited access to information than the credit rating agencies themselves. Furthermore, in particular smaller investors may lack the capability to review a credit rating provided by a credit rating agency critically.

(37) Member States and ESMA should ensure that any penalties imposed pursuant to Regulation (EC) No 1060/2009 are publicly disclosed only where such public disclosure would be proportionate.

(38) In order to further mitigate conflicts of interest and facilitate fair competition in the credit rating market, it is important to ensure that the fees charged by credit rating agencies to clients are not discriminatory. Differences in fees charged for the same type of service should only be justifiable by a difference in the actual costs in providing this service to different clients. Moreover, the fees charged for credit rating services to a given issuer should not depend on the results or outcome of the work performed or on the provision of related (ancillary) services. Furthermore, in order to allow for the effective supervision of those rules, credit rating agencies should disclose to ESMA the fees received from each of their clients and their general pricing policy.

(39) In order to contribute to the issuance of up-to-date and credible sovereign ratings and to facilitate users' understanding, it is important to regularly review those ratings. It is also important to increase transparency about the research work carried out, the staff allocated to the preparation of sovereign ratings and the underlying assumptions behind the credit ratings made by credit rating agencies in relation to sovereign debt.

(40) It is essential that investors have appropriate information to assess the creditworthiness of Member States. In the framework of its surveillance of economic and fiscal policies of Member States, the Commission collects and processes data on the economic, financial and fiscal situation and performance of all Member States, most of which are published by the Commission and which can therefore be used by investors to assess the potential creditworthiness of Member States. Where appropriate and available, and subject to the relevant confidentiality rules applicable in the framework of its surveillance of economic and fiscal policies of Member States, the Commission should complement existing reporting on economic performance of Members States by possible additional elements or indicators, which may help investors to assess the creditworthiness of Member States. Those elements should be made available to the public, complementing the existing publications and other publicly disclosed information, with a view to providing investors with further data in order to help them assess the creditworthiness of sovereign entities and their debt information. Bearing this in mind, the Commission should examine the possibility of developing a European creditworthiness assessment, to allow investors to make an impartial and objective assessment of Member States' creditworthiness, taking into account the specific economic and social development. If necessary, the Commission should submit appropriate legislative proposals.

(41) The current rules provide for credit ratings to be announced to the rated entity 12 hours before their publication. In order to avoid such notification taking place outside working hours and to leave the rated entity sufficient time to verify the correctness of data underlying the credit rating, the rated entity should be notified a full working day before publication of the credit rating or of a rating outlook. A list of the persons entitled to receive such notification should be limited and should be clearly identified by the rated entity.

(42) In view of the specificities of sovereign ratings and in order to reduce the risk of volatility, it is appropriate and proportionate to require credit rating agencies to publish those ratings only after close of business of the trading venues established in the Union and at least one hour before their opening. On the same basis, it is also appropriate and proportionate that, at the end of December, credit rating agencies should publish a calendar for the following 12 months setting the dates for the publication of sovereign ratings and, corresponding thereto, the dates for the publication of related rating outlooks where applicable. Such dates should be set on a Friday. Only for unsolicited sovereign ratings should the number of publications in the calendar be limited between two and three. Where this is necessary to comply with their legal obligations, credit rating agencies should be allowed to deviate from their announced calendar, while explaining in detail the reasons for such deviation. However, such deviation should not happen routinely.

(43) On the basis of the evolution of the market, the Commission should submit a report to the European Parliament and the Council exploring the appropriateness of, and ways to, support a European public credit rating agency dedicated to assessing the creditworthiness of Members States' sovereign debt and/or a European credit rating foundation for all other credit ratings. If necessary, the Commission should submit appropriate legislative proposals.

(44) In view of the specificities of sovereign ratings and in order to avoid a risk of contagion across the Union, statements announcing a revision of a given group of countries should be prohibited if not accompanied by individual country reports. Furthermore with the view to enhancing the validity and accessibility of sources of information used by credit rating agencies in public communications on potential changes in sovereign ratings, other than credit ratings, rating outlooks and accompanying press releases, such communications should always be based on information within the sphere of the rated entity which has been disclosed with the consent of the rated entity unless that information is available from generally accessible sources. Where the legal framework governing the rated entity provides that the rated entity must not disclose such information, such as in the case of inside information as defined in point (1) of Article 1 of Directive 2003/6/EC of the European Parliament and the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)[(13)], the rated entity must not give its consent.

(45) For the purpose of transparency, when publishing their sovereign ratings, credit rating agencies should explain in their press releases or reports the key elements underlying those credit ratings. However, transparency for sovereign ratings should

Changes to legislation: *There are outstanding changes not yet made to Regulation (EU) No 462/2013 of the European Parliament and of the Council. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details)*

not be conclusive to the direction of national policies (economic, labour or other). Therefore, whilst those policies may serve as an element for the credit rating agency to assess creditworthiness of a sovereign entity or its financial instruments, and may be used in explaining the main reasons for a sovereign rating, direct or explicit requirements or recommendations from credit rating agencies to sovereign entities as regards those policies should not be allowed. Credit rating agencies should refrain from any direct or explicit policy recommendations on policies of sovereign entities.

(46) Technical standards in the financial services sector should ensure an adequate protection of depositors, investors and consumers across the Union. As a body with highly specialised expertise, it would be efficient and appropriate to entrust ESMA, with the elaboration of draft regulatory and implementing technical standards which do not involve policy choices, for submission to the Commission.

(47) The Commission should adopt the draft regulatory technical standards developed by ESMA regarding the content, frequency and presentation of the information to be provided by issuers on structured finance instruments, the presentation of the information, including structure, format, method and timing of reporting, that credit rating agencies should disclose to ESMA in relation to the European rating platform and the content and format of the periodic reporting on fees charged by credit rating agencies for the purposes of ongoing supervision by ESMA. The Commission should adopt those standards by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

(48) Regulation (EC) No 1060/2009 allows credit ratings issued in third countries to be used for regulatory purposes if they are issued by credit rating agencies certified in accordance with that Regulation or endorsed by credit rating agencies established in the Union in accordance with that Regulation. Certification requires that the Commission has adopted an equivalence decision regarding the third country's regulatory regime for credit rating agencies and endorsement requires that the conduct of the third-country credit rating agency fulfils requirements which are at least as stringent as the relevant Union rules. Some of the provisions introduced by this Regulation should not apply to the equivalence and endorsement assessments. This is the case for those provisions that only establish obligations on issuers but not on credit rating agencies. In addition, provisions that relate to the structure of the credit rating market within the Union rather than establishing rules of conduct for credit rating agencies should not be considered in this context. In order to grant third countries sufficient time to review their regulatory frameworks regarding the remaining new substantive provisions, the latter should only apply for the purpose of the equivalence and endorsement assessments as of 1 June 2018. It is important to recall in this respect that a third-country regulatory regime does not have to have identical rules as those provided for in this Regulation. As already provided for in Regulation (EC) No 1060/2009, in order to be considered equivalent to or as stringent as the Union regulatory regime, it should be sufficient that the third-country regulatory regime achieve the same objectives and effects in practice.

(49) Since the objectives of this Regulation, namely to reinforce the independence of credit rating agencies, to promote sound credit rating processes and methodologies, to mitigate

the risks associated with sovereign ratings, to reduce the risk of over-reliance on credit ratings by market participants, and to ensure a right of redress for investors, cannot be sufficiently achieved by the Member States and can therefore, by reason of the pan-Union structure and impact of the credit rating activities to be supervised, be better achieved at the Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(50) The Commission should put forward, by the end of 2013, a report regarding the feasibility of a network of smaller credit rating agencies in order to increase competition in the market. That report should evaluate Union financial and non-financial support and incentives for the creation of such a network, taking into consideration the potential conflicts of interest arising from such public funding.

(51) The European Data Protection Supervisor has been consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data[(14)] and has adopted an opinion[(15)].

(52) Regulation (EC) No 1060/2009 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

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(**1**) OJ C 167, 13.6.2012, p. 2.

(**2**) OJ C 181, 21.6.2012, p. 68.

(**3**) Position of the European Parliament of 16 January 2013 (not yet published in the Official Journal) and decision of the Council of 13 May 2013.

(**4**) OJ L 302, 17.11.2009, p. 1.

(**5**) OJ L 145, 31.5.2011, p. 30.

(**6**) OJ L 331, 15.12.2010, p. 84.

(**7**) OJ C 380 E, 11.12.2012, p. 24.

(**8**) OJ L 331, 15.12.2010, p. 12.

(**9**) OJ L 331, 15.12.2010, p. 48.

(**10**) OJ L 390, 31.12.2004, p. 38.

(**11**) OJ L 177, 30.6.2006, p. 1.

(**12**) OJ L 177, 30.6.2006, p. 201.

(**13**) OJ L 96, 12.4.2003, p. 16.

(**14**) OJ L 8, 12.1.2001, p. 1.

(**15**) OJ C 139, 15.5.2012, p. 6.

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