

AMF Position no. 2013-14
Scope of the regulation on credit rating agencies

Reference texts: Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies, as amended by Regulation (EU) No 513/2011 and Regulation (EU) No 462/2013

The AMF applies all of the guidelines and recommendations issued by ESMA pertaining to the scope of the regulation on credit rating agencies (ESMA/2013/720).

These guidelines and recommendations clarify how to apply certain provisions of the regulation on credit rating agencies and, more specifically, those pertaining to the following:

- the requirement to be registered
- credit rating activities and registration exemptions
- private credit ratings
- the establishment of branches in third countries
- the application of the scope of the regulation on credit rating agencies and cooperation with competent domestic authorities

They also set out best practice on the disclosure of credit scores for firms establishing such scores and rating agencies established in third countries.

Scope

This Position applies to credit rating agencies as defined in Article 3, paragraph 1, point (b) of the regulation on credit rating agencies.

Incorporation into the AMF's supervisory practices

The AMF points out that the provisions of the regulation on credit rating agencies should be understood in the light of the provisions set out in this Position, which itself reproduces the ESMA guidelines and recommendations 2013/720.

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1. Obligation to register under Art. 2(1), 3(b), 4, 5, and 14(1) of the CRA Regulation

Credit rating agencies without a physical presence in the EU and fulfilling the prerequisites of Article 5 of the CRA Regulation shall obtain certification from ESMA before distributing credit ratings for regulatory purposes in the EU.

Credit rating agencies established in the EU that are carrying out credit rating activities in the EU without prior registration are operating in breach of Article 2(1) and 14(1) of the CRA Regulation. Any credit rating agency that intends to carry out credit rating activities shall immediately apply for registration by ESMA. Entities must not issue credit ratings until they are registered as CRAs. Such obligations also apply to legal entities established in the EU which employ rating analysts providing rating services to a third-country entity.

Only a legal person can apply for registration. A natural person cannot apply for registration.

ESMA shall take a supervisory measure according to Article 24 of the CRA Regulation against credit rating agencies that operate without registration or, where appropriate, certification in the Union and impose a fine pursuant to Article 36a and Annex III.54 of the CRA Regulation.

2. Credit rating activities and exemptions from registration (Art. 2 and 3 of the CRA Regulation)

Credit ratings, as defined in Article 3(1)(a) of the CRA Regulation, include quantitative analysis and sufficient qualitative analysis, according to the rating methodology established by the credit rating agency. A measure of creditworthiness derived from summarising and expressing data based only on a pre-set statistical system or model, without additional substantial qualitative rating-specific analytical input from a rating analyst should not be considered as a credit rating.

A rating which is provided to different persons belonging to a list of subscribers does not fall within the definition of “private rating” in Article 2(2)(a) of the CRA Regulation. On the other hand, Article 2(2) of the CRA Regulation does not mean that any transmission of the rating to a third party by the person that ordered it would correspond to public disclosure or distribution by subscription. The recipient of a private rating is allowed to share the rating with a limited number of third parties and on a strictly confidential basis – as long as such disclosure does not correspond to public disclosure or distribution by subscription - to ensure that the private rating is not disclosed further. For instance, when applying for a loan, the recipient of a private rating may share his rating with his bank on a strictly confidential basis, or a bank can circulate a private rating to a restricted number of other banks for the purposes of a business transaction.

In accordance with Article 2(2)(a) of the CRA Regulation, credit rating agencies should ensure that the agreements for the issuance of private ratings cover the duty of confidentiality and limitations on the distribution of the ratings. When issuing private ratings, credit rating agencies should assess whether the person who placed the order, as recipient of the private rating, has any intention to use the rating in a way that would bring it into the public domain or to use it for regulatory purposes. Where the credit rating agencies can reasonably conclude that a private rating could be disclosed to the public, for instance taking into account that the same client already breached the duty of confidentiality in the past, ESMA identifies as best practice the implementation by credit rating agencies of measures needed to avoid such disclosure or to refrain from issuing such a rating.

3. Establishment of branches outside the Union by registered credit rating agencies under art. 14(3) of the CRA Regulation

Since branches do not have a separate legal personality from their parent, credit ratings issued in branches established outside the Union are deemed to be issued by their EU parent. Therefore, infringements by the branches of the CRA Regulation are attributable to the parent CRA which shall be the object of ESMA’s supervisory measures, imposition of fines and/or periodic penalty payments.

ESMA might be prevented from performing its supervisory tasks if important operational functions of credit rating agencies were based and primarily operated outside the Union. Moreover, CRAs should demonstrate that there is an objective reason for credit ratings to be issued in branches set up outside the Union. For instance, the need to

ensure an adequate presence in the third country in question. ESMA would take action according to Article 24, 36a, 36b and 36ter in case of infringements by CRAs of Annex III part II points 2, 4, 5, 6, 7 and 8 of the CRA Regulation.

Important operational functions, as set out in Art. 9 of the CRA Regulation, should not be based or primarily operated in offices established in third-countries with no (or very limited) involvement of EU-based managers, systems or procedures of the credit rating agency. Important operational functions include units or divisions in charge of elaboration and issuance of credit ratings, credit analysis, rating methodology development and review, compliance, internal quality control, data storage/record keeping and systems maintenance or support. However, the identification of important operational functions may require case-by-case consideration. As regards the compliance function, CRAs should ensure that their internal control system is fully operational also in third-country branches.

Credit rating agencies shall not establish branches in third countries to perform activities that are subject to supervision by ESMA if this prevents ESMA from conducting supervisory tasks in relation to such activities of those branches as set out in articles 23b to 23d of the Regulation, including the ability to carry out on-site inspections and investigations. In this respect:

- a) credit rating agencies should cooperate with ESMA in case of inspections or investigations, including on-site visits, regarding credit ratings or credit rating activities carried out in non-EU branches;
- b) ESMA will assess the need to enter into cooperation arrangements with the local competent regulators to ensure the adequate supervision of branches located outside the Union;
- c) prior to establishing branches in third countries, credit rating agencies should ensure that those branches will abide immediately with any request set forth by the officials of ESMA in the exercise of powers pursuant to Articles 23b to 23d of the CRA Regulation, including granting of access to premises, systems and resources in case of on-site inspections and investigations.

4. Enforcement of the rules concerning the scope of the CRA Regulation

ESMA shall impose periodic penalty payments in order to compel the credit rating agency to put an end to the infringement of issuing credit ratings without being registered by ESMA, and impose fines where appropriate, in accordance respectively with Articles 36(b) and 36(a) of the CRA Regulation.

Whenever the AMF receives a request for information or any other form of request concerning the regulation on credit rating agencies, including on registration or certification, the Authority should immediately notify ESMA and refer the financial market participant that has submitted the request to ESMA as the sole competent supervisory authority in the Union.

5. Best practice on disclosure in relation to Article 16, paragraph 1 of the ESMA regulation

ESMA identifies as a best practice that firms establishing credit scores and CRAs that distribute credit scores to the public in the Union should provide clear and prominent disclosure that those scores are not credit ratings issued in accordance with the CRA Regulation. ESMA is keen that export credit agencies acting under Article 2, paragraph 2, point (c) of the regulation also give the same indication.

ESMA also identifies as a best practice that where firms establishing credit scores and export credit agencies decide to publish such information, they should retain full responsibility for the disclosure indicated in the previous paragraphs when their credit scores or ratings are distributed to the public in the territory of the Union via agreement with third parties.

Credit scores or ratings are publicly disclosed within the European Union when they are disclosed to an undetermined or undeterminable generality of individuals domiciled in the EU for instance, through a press

release. Credit scores or ratings are also distributed to the public when they are issued through a web-site registered with a domain corresponding to one of the Member States of the EU.