



EUROPEAN COMMISSION

Internal Market and Services DG

The Director General

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Mr Eddy Wymeersch
 Chairman
 Committee of European Securities
 Regulators (CESR)
 11-13 avenue de Friedland
 F – 75008 Paris

Subject: Request for CESR technical advice on the equivalence between certain third country legal and supervisory frameworks and the EU Regulatory regime for credit rating agencies

Dear Eddy,

In the context of the Regulation (EC) on Credit Rating Agencies ("CRA Regulation") approved by the European Parliament on 23 April 2009 and by the Council, I enclose a mandate to CESR for advice on the equivalence between regulatory (legal and supervisory) frameworks of third countries applicable to the activity of credit rating agencies and the regulatory framework for credit rating agencies introduced in the Community by the CRA Regulation. The mandate consists of two parts:

- (i) technical assistance for the assessment of the regulatory frameworks of the USA, Canada and Japan" and;
- (ii) a fact finding exercise to establish whether other additional jurisdictions should be assessed.

The issue of the third country regime was the most debated point during the negotiation of the CRA Regulation. The regime agreed upon should work effectively. As you know, in order to favour competition from smaller players that are not systemically important for EU markets – and in a way avoid that third country firms provide ratings that are used in the EU without respecting the EU framework – a 'certification system' has been conceived based on an equivalence assessment of both the legal framework as well as the supervisory and enforcement system of a third country. As a key precondition for the certification mechanism, the Commission will have to recognise that the third country's regulatory and supervisory regime for credit rating agencies is equivalent to the one in the EU. Third country jurisdictions currently in the process of developing their regulatory frameworks for credit rating agencies shall ensure that rules applicable and supervisory capacity match EU standards.

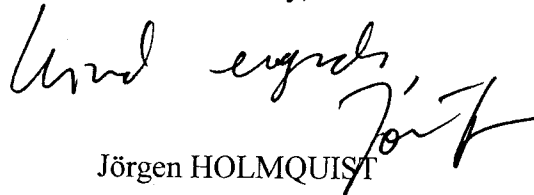
On the contrary, systemically important credit rating agencies will always need to go through an 'endorsement mechanism' of the credit rating by the affiliated entity which is established in the EU. This is necessary in order to attach responsibility to a player within the EU and also allow for efficient supervision by EU regulators.

Concerning the equivalence assessment, following G-20 recommendations agreed last April all G-20 members should put in place a legal framework and oversight regime for credit rating agencies. Nevertheless, we are conscious that at this stage it would be impossible – and not necessarily useful – to assess the regulatory framework of all these countries. In this context, technical assistance by CESR is requested for the priority equivalence assessment of United States, Canada and Japan, since, according to preliminary information we have received, a number of small credit rating agencies from these countries might be interested in providing credit ratings in the EU. In addition, in order to preserve the continuity of the use of credit ratings within the EU and to avoid any unintended disruption in the financial markets, it is necessary to identify whether credit rating agencies from other jurisdictions are already providing credit ratings to EU financial institutions or have the intention to do so in the future. Thus, a fact-finding exercise is necessary to identify other jurisdictions which might need to be assessed.

As the formal adoption of the CRA Regulation is foreseen by the end of September, we anticipate receiving the CESR technical advice by 15 February 2010 in order to allow the formal comitology procedures to be in place at due time before October 2010 (expected date for the mandatory use of credit ratings issued by registered or certified credit rating agencies). The timetable is very tight as the Commission will have to obtain the formal opinion of the European Parliament during the comitology procedure, before adoption of the implementing measures. It is important that both the Commission and CESR cooperate under this very tight timetable in order to avoid any unintended disruption of the financial markets.

DG MARKT services and CESR have a long standing and successful cooperation record in working together in the preparation of implementing legislation for EU legal acts. I am confident that we will all deploy our best efforts for a successful outcome.

Yours sincerely,


Jörgen HOLMQUIST

Enclosure: - Formal mandate to CESR for technical advice

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EUROPEAN COMMISSION

Internal Market and Services DG

**FORMAL MANDATE TO CESR FOR TECHNICAL ADVICE
ON THE EQUIVALENCE BETWEEN CERTAIN THIRD COUNTRY LEGAL AND
SUPERVISORY FRAMEWORKS AND THE EU REGULATORY REGIME FOR
CREDIT RATING AGENCIES (CRAs)**

The present mandate takes into consideration the agreement on implementing the Lamfalussy recommendations reached with the European Parliament on 5 February 2002. In this agreement, the Commission committed itself to a number of important points, including increasing transparency. For this reason, this request for technical advice will be made available on DG Internal Market and Services' web site once it has been sent to CESR. The European Parliament has also been duly informed.

This mandate focuses on a technical issue which follows from the adoption of Regulation (EC) XX/2009 on Credit Rating Agencies (approved by the European Parliament on 23 April 2009 and by the Council on the same day; formal adoption pending): it relates to the recognition of regulatory (legal and supervisory) frameworks of third countries applicable to the activity of credit rating agencies as being equivalent to the regulatory framework for CRAs introduced in the Community by the afore-mentioned Regulation.

The legal base for future implementing measures is Article 4a(3) of Regulation (EC) XX/2009 (pending formal adoption the reference text is the one approved by the European Parliament on 23rd April 2009: P6_TA-PROV(2009)0279).

1. CONTEXT

1.1. Legal context

Role of the equivalence assessment

The CRA Regulation envisages in Article 4a(3) that the Commission may adopt an equivalence decision in accordance with the adequate comitology procedure (regulatory procedure¹), stating that the legal and supervisory framework of a third country ensures that credit rating agencies authorised or registered in that third country comply with legally binding requirements which are equivalent to the requirements resulting from this Regulation and which are subject to effective supervision and enforcement in that third country. The CRA Regulation also stipulates that the Commission would, in accordance with the adequate comitology procedure (regulatory procedure with scrutiny²), specify

¹ Article 5 and Article 7 of Council Decision 1999/468/EC, OJ L184, 17.07.1999, p.23.

² Article 5a(1) to (4) and Article 7 of Council Decision 1999/468/EC as amended by Council Decision 2006/512/EC, OJ L200, 17.07.2006, p.11.

further or amend the criteria for assessing the equivalence in order to take account of developments on financial markets.

A positive equivalence determination will allow qualifying credit rating agencies from that third country to apply for certification in accordance with the conditions and the procedure laid down in Article 4a. Those CRAs, which have been certified by the EU competent authorities, would be able to seek exemptions from specific organisational requirements set out in Section A of Annex I and Article 6(4) and as well as from the requirement of physical presence in the Community. Any reliefs in those respects would be offered by the EU competent authorities on a case-by-case basis.

It should be stressed that a positive outcome of equivalence assessment (and resulting equivalence decision by the Commission) alone does not automatically entitle credit rating agencies from a third country concerned to operate in the European Union without any registration. Pursuant to Article 4a(1) credit rating agencies issuing ratings related to entities established or financial instruments issued in third countries would be able to apply for certification, provided that the following criteria are met in addition to a positive equivalence decision of the Commission:

- (a) the credit rating agency is authorised or registered and is subject to supervision in a third country;
- (b) the cooperation arrangements between the third country supervisor and the EU competent authorities are operational;
- (c) the credit ratings issued by the credit rating agency and its credit rating activities are not of systemic importance to the financial stability or integrity of the financial markets of one or more Member States.

Only after all of the above conditions are satisfied and the credit rating agency from a third country has been certified, may its ratings be used in the European Union by financial institutions and other persons and may the credit rating agency from a third country be recognised as External Credit Assessment Institution ("ECAI") under Directive 2006/48/EC³.

This specific registration procedure consisting of the recognition of equivalence of the legal and supervisory framework of a third country and the individual certification assessment of credit rating agencies from that third country is intended to enhance competition in the credit rating business. Therefore, once equivalence of the legal and supervisory framework of a third country is recognized, the credit rating agencies from that third country will have new business opportunities in the European Union.

Elements of the equivalence assessment

According to the CRA Regulation⁴, a third-country legal and supervisory framework may be considered equivalent to this Regulation if the third country framework fulfils at least the following conditions:

³ OJ L 177, 30.6.2006, p.1 as amended

⁴ See Article 4a(3) points (a) to (c) of the second subparagraph.

- (a) credit rating agencies in the third country are subject to authorisation or registration and are subject to effective supervision and enforcement on an ongoing basis;
- (b) credit rating agencies are subject to legally binding rules which are equivalent to those set out in Articles 5 to 10 and Annex I of this Regulation; and
- (c) the third-country regulatory regime prevents interference of supervisory authorities and other public authorities of that country with the content of credit ratings and methodologies.

As stated above, the same Article 4a(3) of the CRA Regulation stipulates that the Commission would specify further or amend the criteria for assessing the equivalence in order to take account of developments on financial markets. Those measures, designed to amend non-essential elements of this Regulation, should be adopted in accordance with the adequate comitology procedure (regulatory procedure with scrutiny⁵).

1.2. Mechanism for assessing the equivalence

The Commission intends to apply, in full agreement with the European Securities Committee, the following mechanism:

- the European Securities Committee will assist the Commission as the regulatory committee under the existing comitology framework (Article 33(2) and (3) of the CRA Regulation);
- CESR should provide a technical advice for the assessment of the equivalence of regulatory (legal and supervisory) frameworks of third countries for CRAs with the regulatory framework introduced by the CRA Regulation.

1.3. Deadline for CESR's technical advice: 15 February 2010

This mandate takes into consideration that CESR needs enough time to prepare its technical advice and that the European Commission needs to formalise the relevant comitology measure while respecting the legal deadlines set within the comitology process. More importantly, it takes into account the fact that 12 months after the entry into force of the Regulation, financial institutions will be allowed to use for regulatory purposes exclusively credit ratings from registered/certified CRAs or ratings endorsed by EU-registered CRAs. For these reasons, the deadline set to CESR to deliver the technical advice is 15 February 2010.

The establishment of the deadline is based on the following timetable. In case the entry into force of the Regulation was delayed due to late publication in the Official Journal of the European Union, deadlines could be further extended if appropriately justified.

⁵ Article 5a(1) to (4) and Article 7 of Council Decision 1999/468/EC as amended by Council Decision 2006/512/EC, OJ L200, 17.07.2006, p.11.

Deadline	Action
October 2009 (assumption)	Expected entry into force of the CRA regulation (20 days after publication in the Official Journal of the European Union)
15 February 2010	CESR technical advice
March 2010	Formal Commission draft comitology measure sent to the European Securities Committee and published on the Internet
March – June 2010	Examination of the draft comitology measure in the European Securities Committee
June 2010	Vote in the ESC on the comitology measure
April 2010	CRA regulation becomes applicable in the EU (six months after entry into force of the Regulation)
July 2010	Formal adoption of the comitology measure by the Commission (period for right of oversight by European Parliament taken into account)
October 2010	Financial institutions required to use for regulatory purposes exclusively ratings from registered/certified CRAs or ratings endorsed by EU-registered CRAs (12 months after the entry into force of the Regulation)

2. THE PRINCIPLES THAT CESR SHOULD TAKE ACCOUNT OF

2.1. Nature of the assessment

The CRA Regulation has set up a strict EU legal and supervisory framework which should be preserved by all actors and market participants in order to underpin confidence in the financial markets. Therefore, the assessment to be done by CESR is of a technical nature and should not contain political considerations.

2.2. The working approach

On the working approach, CESR is invited to take account of following principles:

- CESR should provide comprehensive technical analysis on the subject matters described below covered by the delegated powers included in the relevant comitology provision of the CRA Regulation, in the corresponding recitals as well as in the relevant Commission request included in the mandate;
- CESR should address to the Commission any questions they might have concerning the clarification on the text of the CRA Regulation, which they should consider of relevance to the preparation of its technical advice;
- The technical analysis carried out should contain sufficient and detailed explanations for the assessment done, and be presented in an easily understandable language respecting current legal terminology used in the field of securities markets and company law at European level.

2.3. Objectives to be observed in the examination

In giving its advice, CESR should take full account of the following key objectives:

- In the assessment whether credit rating agencies authorised or registered in a third country comply with legally binding requirements which are equivalent to the requirements resulting from the CRA Regulation and whether they are subject to effective supervision and enforcement in that third country, the priority should lie in assuring that users of ratings in the EU would benefit from equivalent protections in terms of CRAs' integrity, transparency, good governance and reliability of the credit rating activities (cf. Article 1 of the CRA Regulation). An indicative description of the areas which should be considered in the assessment, as well as the regulatory principles to be respected by the examined third country regime, has been included in the Table below.

Measures to ensure integrity and independence

- A CRA identifies and eliminates (or manages and discloses) conflicts of interest.
- A CRA ensures that business interest does not impair the independence and accuracy of ratings.
- A CRA does not provide consultancy or advisory services; an exhaustive and limited list of ancillary services, which may be provided by a CRA, is defined in the third country legal framework;
- A CRA refrains from issuing a rating when it has direct or indirect interest in the entity asking for a rating;
- Rating analysts cannot make proposals or recommendations on the design of structured finance products;
- Rating analysts are not involved in the negotiation of the fees or payments with any rated entity, related third party or any person directly or indirectly linked to the rated entity by control;
- Rating analysts' compensation and performance evaluation is de-linked from the revenue they generate for the CRA;

- A stringent rotation policy is put in place (lead rating analysts to rotate client at least every 4 years);
- A CRA keeps records and audit trails of all its activities;
- A CRA has a compliance function, which operates independently;
- Two independent directors on the CRA's administrative or supervisory board are tasked with monitoring the credit rating policy, effectiveness of the internal quality control system as well as the internal controls and measures established to deal with conflicts of interest.
- Competent authorities do not interfere with the content of ratings or the CRAs methodologies.

Measures relating to ratings' quality and enhancing the transparency of the rating activity

- A CRA discloses to what extent it has examined the quality of information used in the rating process and whether it is satisfied with the quality of information it bases its rating on. It will not be allowed to rate financial instruments if it does not have sufficient quality information to base its ratings on.
- A CRA discloses the models, methodologies and key assumptions on which it bases its ratings.
- A CRA differentiates the ratings of structured products by adding a specific symbol.
- A CRA has a function devoted to the periodical review of methodologies and models (review function).
- A CRA applies consistently the changes in methodologies and models to existing ratings.
- A CRA monitors its ratings and methodologies on an on-going basis and at least annually.
- A CRA has a clear and fair policy in relation to unsolicited ratings, which shall be differentiated as such.
- A CRA collects and provides on a regular basis historical performance data (default and transition studies), in accordance with commonly agreed standards.
- A CRA ensures on an on-going basis general disclosure of key information relating to its activity (i.e. on managing conflicts of interest, ancillary services provided, compensation arrangements for its staff, policy on the publication of credit ratings, etc)
- A CRA makes periodical disclosures (i.e. data on the historical default rates, the 20 largest clients by revenue)
- A CRA makes public an annual transparency report with information on the ownership of the agency, staff allocation, description of the quality control system,

outcome of the internal review of independence compliance, financial information regarding the revenue streams, etc.

– A global and holistic assessment of the regulatory framework in question should be carried out from a technical point of view. It should not be limited to just assessing the third country's commitment to any international convergence initiatives aiming at a single set of regulatory standards, such as the Code of Conduct Fundamentals developed by the International Organisation of Securities Commissions (IOSCO). Moreover, the regulatory framework of the third country must include mandatory requirements for the registered CRAs; voluntary regimes are not to be considered equivalent to the regulatory and supervisory framework introduced by the CRA Regulation. CESR should also examine what type of remedies could be applied in case of discrepancy in some limited areas (e.g. introduction in the third country of a special regime for CRAs established in that third country that intend to apply for certification under the CRA Regulation) as specified in point 3.3. of this mandate.

– The global and holistic technical assessment should be based on the entirety of the third country regulatory framework in force in that country. The assessment should focus on the differences between the regulatory regime established at EU level and the third country framework in question. CESR should evaluate and give its judgement on the material importance of such differences. In doing so it should focus on technical criteria and not take into account any considerations of a political nature.

- The third country regulatory and supervisory framework should enter into force at the latest twelve months after entry into force of the CRA Regulation; otherwise the CRAs registered in that third country should apply for registration in the EU and comply with the requirement of being a legal person established in the Community.

– The assessment of whether CRAs are subject to effective supervision and enforcement in that third country should be made in due consideration of the legal and institutional setting in which the third country supervisory authority operates (including its ability to impose sanctions) as well as of its supervisory programme and operational ability to ensure effective compliance.

- Following CESR's technical advice the Commission will decide on the equivalence or otherwise of the third country jurisdictions and adopt a decision following the procedure under Article 4a(3) of the CRA Regulation.

3. CESR IS INVITED TO PROVIDE TECHNICAL ADVICE BY 15 FEBRUARY 2010

3.1. Scope of the assessment

3.1.1. Priority assessment

It is essential that the smooth functioning of the internal market in financial services is preserved; therefore it is necessary to start the equivalence assessment with those third countries where a significant number of ratings used in the EU are produced. CESR is invited to assess by 15 February 2010 the equivalence of the regulatory regimes of the following jurisdictions:

- a) United States of America,
- b) Japan and
- c) Canada.

Prioritisation of these 3rd country jurisdictions takes into account that:

- some small to medium sized CRAs, established in third countries and specialised in financial instruments issued in third countries and entities established in third countries, have already been recognised as an External Credit Assessment Institution (ECAIs) under the Directive on Capital Requirements (Directive 2006/48/EC on the taking up and pursuit of the business of credit institutions),
- following the G-20 recommendations the third countries in which the CRAs are established have started the appropriate legislative procedures in order to amend their regulatory and supervisory framework for CRAs,
- some small credit rating agencies in certain jurisdictions have shown interest to access the EU market,
- one of the objectives of the CRA Regulation is to create incentives for the emergence of new CRAs in the market.

3.1.2. Additional jurisdictions

CESR should also assess whether, beyond the three countries mentioned in point 3.1.1., other third countries regulatory and supervisory frameworks should be included in the present evaluation. CESR is therefore invited to carry out a fact-finding exercise of the use in the European Union of credit ratings issued by credit rating agencies established in third countries other than the three mentioned in point 3.1.1. which refer to the creditworthiness of entities established in those third countries and/or to financial instruments issued in those third countries.

Should there be a confirmed need to examine the equivalence of the regulatory regimes of other third countries, the European Commission will send a new request to CESR to undertake such examination as well.

3.2. Objective of the assessment

CESR is invited to:

- a) undertake a global assessment of a third country regulatory regime in accordance with Point 2.2. first indent of this Mandate;
- b) advise on an early warning mechanism in case of significant changes to the third country regulatory framework foreseen after 15 February 2010; and
- c) describe the supervisory arrangements provided for in the each of the above mentioned jurisdictions which ensure that the regulatory framework applicable to CRAs registered/authorised there is respected.

3.3. Negative outcome of the equivalence assessment

In case where CESR's advice to the Commission would be that there is no equivalence of a third country regulatory regime, CESR is invited to identify clearly those areas where significant discrepancies exist. It is also invited to suggest any solutions which could be considered by the Commission to overcome such discrepancies. Such solutions could be sought from that third country in the context of expected bilateral discussions between the Commission and the third country authorities concerned in order to reach a positive outcome of the equivalence assessment.