COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Date: 4 June 2010
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FEEDBACK STATEMENT

CESR's consultation on Registration process, Functioning of Colleges, Mediation Protocol, Information set out in Annex II, Information set for the application for Certification and for the assessment of CRAs systemic importance

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I. INTRODUCTION

Background

1. The EU Regulation of the European Parliament and Council on Credit Rating Agencies (CRAs) was published in the Official Journal[1] on 17 November 2009 and came into force on 7 December 2009.

2. According to the Regulation, CESR is required to discharge important co-ordination and advisory functions alongside its traditional role of promoting convergence through Level 3 guidelines and recommendations. In particular, Article 21 sets out a list of guidance CESR is required to publish.

3. To this end CESR issued a public consultation in October 2009 to seek comments from market participants on CESR's initial proposal on a set of guidance due to be published by June 2010. The consultation gathered market views on the registration process, the functioning of colleges, the mediation protocol, the common standards on presentation of information for registration and endorsement (Annex II) and the information for the application of certification and for the assessment for CRAs systemic importance.

4. Following the publication of the Consultation Paper, CESR gave market participants and other interested parties a deadline of 30 November 2009. To facilitate the consultation process, CESR held an Open Hearing on November 2009 in Paris at the CESR premises, where over sixteen people attended.

5. CESR received seventeen responses to the Consultation document, all respondents coming from the credit rating and banking sectors In line with standard CESR's practices, responses to the Consultation were published on CESR's website (http://www.cesr-eu.org/index.php?page=responses&id=152) unless it was clearly specified by the respondent that they should remain confidential.

6. This feedback statement outlines the main points which were made by respondents in the consultation process and explains the policy options which CESR decided upon.

II. GUIDANCE ON THE REGISTRATION PROCEDURE (Articles 14-20 of the Regulation)

1. General issues applicable to the registration process

Scope of the Regulation – CESR proposed an approach to the main differences between credit ratings and credit scores.

7. Some respondents raised some doubts about the differentiation between credit ratings and credit scores, and the possibility for entities which only produce credit scores to apply for registration, even on a voluntary basis.

Having considered the feedback received regarding the scope of the regulation, CESR has decided to amend paragraphs of the consultation paper in order to further explain the differences between credit ratings and credit scores and to add a new paragraph discarding the possibility of credit scores entities to register on a voluntary basis in the final Guidance.

[1] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0001:0031:EN:PDF

Question 1: CESR asked for views regarding its proposed definition of working day.

8. None of the respondents envisaged problems with the proposed definition of working day.

2. Application for registration

Question 2: CESR asked for opinions about its proposal on the structure of the application for groups of credit rating agencies.

9. One of the respondents made a proposal regarding the structure of the application that is also related to the language of the application described in question 3 below.

> *According to this proposal, the structure of the pack of the application for registration for a group of CRAs would contain a formal application for each of the applicants, that would comprise the details listed in the final Guidance, and also, as it was already envisaged, a general part including all the disclosures common for all the CRAs members of the group, and a separate section including the specific additional disclosures for each of the applicants.*

Question 3: CESR asked for views on its proposal of language of the application for credit rating agencies established in more than one Member State.

10. Respondents indicated a general concern about the translation obligations envisaged in the Guidance, which in their opinion, will be too costly, burdensome, and will place the deadlines for the application process under significant pressure.

11. As indicated in paragraph 5 above, one respondent proposed a modification to the structure of the application for registration, introducing a document denominated formal application which would be the only one subject to translation in those jurisdictions where this is required by law. It also proposed that the submission of the application in a language customary in the sphere of international finance would start the administrative process and that any translation required could be submitted at a later stage provided that it is done before a final decision is taken by the home competent authority. The respondent suggested that the resulting Guidance expresses clearly that the application for registration will be deemed complete without any additional translations at the time of the submission of the application.

12. Another respondent requested clarification on whether the applicant must translate into the legally mandated language only the separate section of the group application that refers specifically to a subsidiary subject to this obligation, but not the part applicable to all members of the group, and also, whether responses to additional requests for information, both during the registration process and as part of any subsequent day-to-day supervision, would also be captured by these translation requirements. It urged CESR to clarify these subjects and also encouraged CESR to consider the approach used by the Committee of European Banking Supervisors ("CEBS") during the External Credit Assessment Institution ("ECAI") process as a possible approach to balancing national language requirements.

13. Another respondent suggested that it would be most efficient for all documents to be submitted only in ESMA's working language, if that has been determined at that stage. An alternative approach, including in the case where ESMA's working language is not known at the time applications are due, may be the one which has already been put into practice for ECAI applications under the Capital Requirements Directive, which is that only "local information"' (i.e. information specific to a particular member of the CRA group) or a cover letter is provided in the local language and that the general information common to all group members is provided in English.

Question 4: CESR asked for views on the language regime of the application in cases in which colleges are only composed of one Member State.

14. Some respondents disagreed with CESR's approach, which envisages that in cases where the college is only composed of one Member State, the local language of that Member State would be consider customary in the sphere of finance for the purpose of the application of registration, without any further translation requirements.

15. These respondents argued that all the applications should be translated into English, given that it is CESR'S working language and due to CESR's involvement in the process of registration.

Question 5: CESR asked for views regarding the proposed format of the application.

16. Respondents agreed with CESR's approach.

Having considered the feedback to questions 1 to 5 above, CESR has decided to amend the guidance in order to reduce the burden of the translation obligations. CESR agrees to introduce a formal application, with the content listed in the final Guidance, as the only document subject to translation for those jurisdictions in which it is legally required.

Regarding the start of the administrative process for registration, it will require the submission of the whole application in a language customary in the sphere of international finance along with the translation of the formal application, as a way to fulfil the language regime of those countries where translation is mandatory.

3. Assessment and decision on the completeness of the application for registration

Question 6: CESR requested views on college assessment on the completeness of the application for registration – Beginning of the assessment period.

17. One of the respondents proposed that the calculation of the dates for the assessment of the completeness of the application begins from the date on which CESR sends the application to the Member States, as a way to avoid situations where the timeline for consideration by Member States begins on different dates.

18. The respondent also requested to be notified on the submission of the application by CESR to Member States, so as to allow it to calculate the relevant time periods envisaged under the Regulation.

19. Finally, it requested CESR to insert a provision stating that it will circulate the applications immediately, but in any event, within 5 days after receipt from the applicant as contemplated in Article 15.4.

Question 7: CERS requested views on college assessment on the completeness of the application for registration –Notification of the completeness of application in case of groups of CRAs.

20. Respondents agreed with this approach, with an indication by one of them, which requested that the minimum timeframe by which an incomplete application may be corrected should not be less than 20 working days.

Question 8: CESR asked for views on college assessment on the completeness of the application for registration – Non complete applications. Deadline for applicants to provide additional information and for competent authorities to assess the additional information requested.

21. The comments received from respondents referred to the necessity of clarifying the moment in which the timeframe for providing additional information by applicants would start, and second, a suggestion to add an indication in the Guidance, stating that in setting the deadline, the relevant competent authority or college, as the case may be, should take into consideration the amount and type of information being requested.

Having considered the feedback to questions 6 to 8 above CESR has decided to introduce amendments in order to allow for transparency in the calculation of the time periods envisaged in the Regulation, and also to establish a timeframe for the applicants to provide additional information, that could be extended conditioned to the amount and type of information requested. CESR also further clarified the period to revise additional information.

4. Examination of the application for registration of a CRA by the competent authorities

Question 9: CESR's proposal regarding the period of examination.

22. Respondents agreed with CESR's approach regarding the period of examination.

Question 10: CESR's advice on the compliance of the CRA with the requirements for the registration.

23. Some respondents argued that CESR should also intervene giving its advise about the compliance with the requirements of registration, upon request by a CRA, in cases where only the home competent authority forms the respective college.

Question 11: CESR requested views on exemptions.

24. In general terms there seems to be a concern about the capacity of reaction of some CRAs if an exemption is not granted, provided that some of the requirements take a long time to be implemented and therefore may cause important delays in the process. Respondents also asked for further indications about the information which should be provided to prove the fulfilments of the conditions (Art 6.3).

25. One respondent strongly disagreed with the proposed timing of the notification to a CRA of the decisions regarding exemptions outlined in paragraph 55. It believed that CRAs that are requesting exemptions should be told as soon as possible whether they will be granted. If an exemption is denied, the CRA would then be required, as applicable, to engage independent directors, establish one or several rotation systems and/or hire one or several compliance officers which will take time.

26. Other respondent required advice on the method of assessing that the requirements are not proportionate. It also proposed that a preset timeframe (to provide information to prove the fulfilment of the requirements by CRAs) should be pointed out in the Guidance (e.g. 25 working days).

27. Another participant proposed that the college process for consideration of the application for a group of CRAs was not interrupted by a negative exemption decision, and that the decision on registration was duly taken by each home Member State, subject to the entity affected by the exemption decision being required to put in place the required function within a defined period of time.

Having evaluated the feedback to questions 9 to 11 above CESR has decided to further explain CESR's intervention in the process of advising compliance of a CRA with the requirements for registration, and to clarify that registration decisions shall not be given conditioned to a later fulfilment of the requirements of exemptions and that applicants would be given sufficient time within the process of registration to fulfil these conditions. CESR has also agreed that in order to

facilitate the registration process for a group of CRAs, an indication should be added stating that a negative decision on exemption by a competent authority shall not interrupt the process of examination of the application and registration of the other members of the group of CRAs.

Finally CESR has analysed and considers that there's no need to change a CESR's possible intervention in cases where only the home competent authority forms the respective college of a CRA.

5. Adoption of a fully reasoned registration or refusal decision by the competent authority of the home Member State

Question 12: CESR's intention to produce a common format for notifications of decisions for its members.

28. Respondents agreed with CESR's approach.

6. Notification of the decision on the registration, refusal of registration or the withdrawal of registration of a credit rating agency

Question 13: Should CESR issue guidance about the transparency of the registration procedure? If yes, please provide your views on the following issues:
1) Should the competent authority of the home Member State publish the decision on the registration, refusal of registration requested by existing CRAs or withdrawal of registration? If yes, what information should be published?
2) What information should contain the notification by the competent authority to the Commission, CESR, other competent authorities and the applicant (i.e. regarding the description of opinions of any dissenting authorities) of any decision under Article 16, 17 or 20?

29. All the respondents gave a common affirmative approach about the disclosure of registration and withdrawal decisions.

30. When it came to the refusal of registration, seven out of twelve participants agreed upon its disclosure. One of the respondents argued that, though it is not a standard practice within the EU for administrative decisions declining registration to be made public, it considered that a decision to decline registration to existing CRAs will need to be made public.

31. Regarding the information that should be included for these disclosures, most respondents gave a common view that the announcement to the public should only contain general information about the CRA and the decision itself. Information for the Commission, CESR, the competent authorities and the applicant should contain detailed explanations of the determination and the dissenting opinions.

32. Regarding the lapse of time, in terms of disclosure, that could arise between the withdrawal of registration, (with a transitional period of 10 days for stopping to use a rating for regulatory purposes), and the 30 days timeframe to update the list of the registered CRAs, two respondents asked how this should work in practice, how long decisions on CRAs will take to be published in the Official Journal and CESR website, and if national regulators will publish separate lists before the Commission. A respondent expressed its preference for a Europe-wide list to be distributed simultaneously to all credit institutions upon each modification.

33. Some respondents also indicated that guidance on the process for a refusal decision should be drafted and that an appeals process for refusal decisions and exemptions should be established with accompanying guidance as to how it would work at the home competent authority, college and/or CESR levels, as applicable. They also believe – by reference to paragraphs 57 to 61 of the

Consultation Paper - that any decision to publish information around a refusal or withdrawal of registration should only be made after the applicant/registered CRA had been afforded an opportunity to challenge that refusal or withdrawal (as referred to in paragraphs 130 and 131 of the Consultation Paper). A respondent also suggested that a CRA with External Credit Assessment Institution ("ECAI") recognition should maintain its ECAI standing without prejudice during the appeals process.

Having evaluated the feedback, CESR agrees that there is a need to issue guidance about the transparency of the registration procedure. .

7. Notification of any material changes to the conditions for initial registration

Question 14: CESR requested market participants' views on the type of circumstances that should be considered as material changes to the conditions for initial registration.

34. Respondents indicated that the following circumstances could be consider material changes:

    a. Changes in the legal form.

    b. Changes in the group structure (mergers, acquisitions or splits).

    c. Changes in the structure of the organization affecting different functions such as internal audit, compliance function, and rating activities.

    d. Significant changes in the Board or in the working team.

    e. Opening or closing of branches.

    f. Changes in the rating processes, business models or type of ratings issued, including distinction between solicited or unsolicited.

    g. Material changes in the governance, the geographic markets and the products of the CRA.

35. Four of the respondents considered that CESR should publish a list of circumstances that could be considered material changes to the conditions for initial registration.

36. Another respondent indicated that guidance on the concept of material change has been already provided in paragraph 155 of the Consultation Paper as a constructive starting point.

Having evaluated the responses about the events that could be considered material changes, CESR agrees to introduce a non exhaustive list in the guidance as a reference of some of these circumstances.

III. GUIDANCE ON THE PROCEDURE FOR ENDORSEMENT (Article 4.3 of the Regulation)

1. Procedures with competent authorities

Question 15: CESR asked for views on the proposed procedures with competent authorities regarding endorsement.

37. Respondents completely disagreed with the proposed endorsement procedure. According to their opinion there isn't any requirement in Regulation regarding a pre-approval to allow CRAs to endorse ratings. The only requirement set out in Article 4 of the Regulation is that the CRA must be able to demonstrate that it satisfies various ongoing conditions in relation to its home Member State regulator. Article 4 does not state that, once registered, a CRA will be required to

go through any separate or further approval procedure before it can endorse ratings. The Regulation does not provide for a process that requires scrutiny by the college, and CESR should therefore not create one.

38. One respondent recommended that paragraph 64 should quote exactly the regulation instead of summarizing, and also explained that CRAs also need swift and clear feedback from the relevant home competent authority as to whether any intended use of endorsement will be approved or not, since a decision not to permit endorsement will be extremely disruptive to the users of its ratings.

Having evaluated the responses, CESR disagrees with the view that the Regulation does not provide support for a prior approval for the use of endorsements by competent authorities. Provisions envisaged in Annex II (item 16), which requires documents and detailed information related to the expected use of endorsement, and also, Recital 52, which stipulates that significant changes in the endorsement regimes should be considered as material changes to the conditions for initial registration of a credit rating agency, back the interpretation of a prior approval by the competent authority. It would be pointless requiring the applicant to provide the detailed information required by annex II if the competent authority could not do anything with it.

It is also important to note that there are conditions under article 4.3 that are beyond the CRA's control (cooperation arrangements with the foreign authority), which also supports the idea that endorsement not only depends on CRAs but also on the competent authorities developments, that the applicant might not be aware of. The guidance will therefore be amended in order to quote exactly the regulation.

2. Endorsement procedure

Question 16: CESR asked market participant's views regarding the endorsement procedure.

39. Two respondents indicated that it should be clarified that demonstration of compliance of an endorsement by a CRA should be done ex post facto and upon request of the relevant competent authority.

40. Another respondent asked for clarification regarding the need to include a separate identifier in order to indicate that the rating is endorsed.

CESR agrees the necessity to slightly amend the language to clarify upon those two subjects.

3. Registration without the conditions for endorsement being met

Question 17: CESR proposed approach to register CRAs without the conditions of endorsement being met.

41. One respondent indicated that firms need to know well before the Regulation takes effect whether relevant ratings that they wish to use for regulatory purposes can be endorsed or not, and that it was important to ensure that the timetable for implementation of the Regulation takes this need into account.

CESR agrees that this information is very relevant for the market, but the decision to endorse ratings lies on the CRAs. In this respect, CESR has published a first batch of Q&A on 8 March 2010 on its website, and question 8 addresses this issue.

4. Transparency regarding the third-country CRAs whose ratings may be endorsed by EU CRAs

Question 18: CESR asked market participants if authorities and/or CESR should publish a list of third-country CRAs whose ratings a registered CRA is authorised to endorse.

42. Five out of eight respondents which answered the question agreed that CESR should publish a list with these third-country CRAs whose ratings can be endorsed.

43. The other two respondents disagreed with the proposal because it was built upon the idea that a pre-approval of jurisdiction was necessary for endorsement.

Having evaluated the responses, CESR agrees that the disclosure of the third-countries CRAS in which endorsement has been authorised could be of interest for market participants. In this regard CESR considers that it would be useful for endorsed ratings to indicate the third-country CRA that issued it. The guidance will therefore be amended in order to include this indication.

IV. GUIDANCE ON THE PROCEDURE FOR CERTIFICATION (Article 5 of the Regulation)

1. Procedures with competent authorities

Question 19: CESR asked for views on the proposed procedures with competent authorities regarding certification.

44. One respondent indicated that a group of CRAs would, by definition, be systematically important, and therefore not eligible for certification, and that if a CRA becomes systematically important, it will need to create an establishment in the EU and follow the Regulation accordingly. It also indicated that paragraph 75 of the initially published version (Ref: CESR/09-955) should be amended in order to quote exactly the Regulation.

CESR agrees the necessity to slightly amend the language to clarify those subjects.

2. Language of application for certification

Question 20: CESR asked for comments regarding the language of the application for certification.

45. Respondents agreed with CESR's approach.

3. Systemic importance

Question 21: CESR asked for comments regarding the systemic importance approach.

46. Respondents agreed with CESR's approach.

4. Withdrawal of the certification

Question 22: CESR asked for comments regarding the withdrawal of certification approach.

47. Respondents agreed with CESR's approach.

5. Relationship between equivalence and endorsement

Question 23: Do you agree that the quality requirements as regards credit ratings endorsed and credit ratings issued by a certified CRA should not be different, in order to achieve the same level of investor and consumer protection in both cases?

48. Most respondents agreed that the two regimes should be based on the same quality requirements, in order to achieve equivalent objectives in terms of investor and consumer protection.

49. However, some respondents highlighted that, because the two systems are separate, in cases where the Commission has not published an equivalence decision, or if the equivalence decision is negative, this should not preclude the requirements for endorsement being met through the presence of requirements "as stringent as" established by the CRA on a voluntary basis and assessed by the competent authorities as such.

Having analyzed the responses CESR has not altered its view on the relationship between the quality requirements of the endorsement regime and equivalence assessments: there are no objective reasons to set different requirements for the third country CRAs depending on the mechanisms used. Furthermore, CESR still considers that these requirements should be provided by the legal and supervisory frameworks of the third country regime in place after the 18 months transitional period. Therefore the final guidance will remain unaltered.

Question 24: CESR asked views on what impact would a decision on equivalence have on the condition set out in Article 4.3 (b) for endorsement?

50. Nearly all respondents agreed that an equivalence decision by the European Commission recognizing the legal and supervisory framework of the third country as equivalent to the requirements of the Regulation should be sufficient for the endorsing EU CRA to demonstrate that the third-country CRA fulfils requirements that are at least as stringent as those set out in Articles 6 to 12 of the Regulation. See also the answer to Q23.

51. One respondent suggested that an equivalence assessment from the European Commission should not determine whether the relevant third country CRA fulfills requirements 'as stringent as' those of the EU Regulation, because the two regimes are different and should be based on different criteria: the assessment of the presence of requirements "as stringent as" should be based on the standard of conduct of the CRA.

On the basis of the responses received CESR maintains its view that a positive equivalence assessment would be very important for a CRA to demonstrate that the requirements imposed on a third-country CRA are appropriate to allow for endorsement by a registered CRA. However, CESR considers it is appropriate to make the text of the Guidance concerning the relationship between equivalence and endorsement consistent with the position expressed by the Commission and communicated to CESR: this position states that the presence of an equivalence assessment in the third country "would certainly facilitate" the demonstration that the conduct of the third country CRA fulfils requirements which are at least as stringent as the requirements provided for in the Regulation, but this demonstration would not automatically follow the equivalence assessment. With regard to this issue, some further elements to demonstrate the presence of requirements "at least as stringent as" are described in the final Guidance.
The Guidance will be changed accordingly.

Questions 25 and 26: Do you agree that the Article 4.3 (b) requires local legal and regulatory requirements as stringent as those in Articles 6 to 12 of the EU Regulation? Do

you agree that in the event there is a negative equivalence assessment by the Commission it is still possible to meet the conditions for endorsement set out in Article 4.3?

52. Most respondents to the consultation disagreed on the interpretation given by the Commission to the assessment of the 'requirements at least as stringent as' for endorsement purposes and highlighted in the Consultation Paper.

53. Some respondents highlighted that the provisions of paragraphs (f) to (h) of Article 4.3 indicated that the applicable standards required under Article 4.3 (b) do not have to be enforceable by a regulator in the third country. They indicated that Article 4.3 (f) only requires that the third country CRA be subject to domestic regulatory supervision but not that this supervision to be equivalent to the supervision provided for EU-registered CRAs under the Regulation. In relation to this view it was also suggested that the absence of reference to Article 4.3 (b) in the transitional period set out in Article 41 indicated that Article 4.3 (b) was not based on the equivalence of a third country regulatory regime and was instead based on requirements for CRA conduct.

54. They highlighted that both CESR and the Commission had indicated that during the transitional period set out in Article 41 that Article 4.3 (b) would be based on self-imposed controls within the CRA and that the activation of Articles 4.3 (f), (g), and (h) could not alter the meaning of another Article of the Regulation.

55. Respondents further highlighted that, under the requirement in Article 4.3 (h), there should be cooperation arrangements in place between the EU competent authority and the third country regulatory authority, but argued that this does not require an equivalence of regulatory frameworks and therefore could not be used to justify the interpretation of Article 4.3 (b).

56. One respondent also highlighted that Article 4.6 is also highly relevant, in that it states that in cases where the Commission has recognised the regulatory regime in another jurisdiction as being equivalent under Article 5, it will no longer be necessary for the endorsing CRA to verify or demonstrate that the condition in Article 4.3 (g) is fulfilled. They consider it is significant that this exemption only focuses on the requirement of the Regulation that relates to analytical independence, and not the other numerous requirements. They consider this demonstrates that Article 4.3 (b) only focuses on the conduct of the third country CRA, and not the requirements of the regulatory regime within the third country.

57. They also argued that this interpretation would make very difficult for CRAs to endorse ratings issued in a third-country, given that, after the expiration of the transition period of 18 months, to continue to endorse ratings issued in a third country there should be in place in this jurisdiction a regulatory regime including rules provided by Art. 6 to 12 of the Regulation. Particularly as the establishment of a regulatory regime, and its structure, is not within a CRA's control. This situation could, according to some respondents, potentially bring market disruption due to its impact on the users of ratings, particularly EU financial institutions. One respondent agreed with the interpretation that Art. 4.3 (b) requires local legal and regulatory requirements as stringent as those in Articles 6 to 12 of the EU Regulation.

58. Concerning Question 26, nearly all respondents agreed that in the event there is a negative equivalence assessment by the Commission it should still be possible to meet the conditions for endorsement set out in Article 4.3. Some respondents challenged the interpretation given by the Commission and argued that in case of negative equivalent assessment the competent authorities may still assess the existence of requirements "as stringent as" in the third country, even if established by the CRA on a voluntary basis.

CESR has not changed its view that after the transitional period the requirements referred to in Article 4.3 (b) must be imposed by the local regulatory and legal systems. This is because CESR continues to consider the arguments presented in the consultation paper are valid and outweigh

the arguments presented by the respondents. CESR highlights that the EU CRA Regulation has been put in place in order to respond to manifested deficiencies of a self-regulatory model in the CRA industry. Therefore, one of the key elements of the EU Regulation – i.e. a third country regime applicable to systemically important CRAs active globally – could not imply a return to voluntary compliance with rules of conduct that are not written in binding legislation and cannot be subject to enforcement in the place of activity.

Also allowing EU registered CRAs to endorse ratings issued by CRAs located in a 3rd country in the absence of an appropriate regulatory and supervisory regime would raise concerns as to the enforceability of the standards set by the Regulation. It is also questionable whether a cooperation arrangement with such a third country supervisor could fulfil the objectives and criteria as specified in Article 4.3 (h).

Furthermore, CESR does not consider the Regulation envisage the creation of a dual system of compliance with its requirements, whereby local legal/regulatory duties in a third country would be "topped up" by policies and procedures self-imposed by the third country CRA or the EU-registered, endorsing CRA. Therefore, the requirements as stringent as those set out in Articles 6 to 12 should be established in law or regulation of that third country in order to satisfy the condition laid down in Article 4.3 (b).

This interpretation is further reinforced by the provision in Article 41, which differentiates between the application dates of the different conditions for endorsement (Article 41 2nd subparagraph 2nd indent). This extended transition period was envisaged to give time to third countries to establish a regulatory regime which would meet sufficiently high regulatory standards.

CESR does recognise that more guidance is required on the process by which CRAs must demonstrate that they are self-imposing requirements on third-country CRAs in the 18 month transitional period.

Furthermore CESR considers it to highlight that demonstration of compliance with requirements as stringent as should be demonstrated, as necessary, also on an ex-post basis (i.e. that supervisors will be able to satisfy themselves that compliance was met also with regard to the activity of the CRA). Therefore 2 new paragraphs will be added in the final Guidance.

V. GUIDANCE ON THE GENERAL AND PERIODIC DISCLOSURES AND THE TRANSPARENCY REPORT (Articles 11 and 12 of the Regulation)

1. Language of the disclosure and the transparency report

Question 27: CESR requested views regarding the language of the disclosure and the transparency report.

59. Most of the respondents disagreed with the approach that the disclosures required under Articles 11.1, 11.3 and 12 should be subject to the same translation requirements that apply for registration. With respect to Articles 11.1 and 12, the required disclosures are to be made on the CRA's website, therefore, the disclosure should be in the language of the CRA's website; there should be no requirement for translation.

Having evaluated the responses, CESR agrees that the translation obligations should not be extended to the general and periodic disclosures and the transparency report (Articles 11.1, 11.3 and 12), given that this information is intended to ensure transparency on a global basis for all

market participants, and therefore should be provided in a language common in the sphere of international finance.

2. Means of publication

Question 28: CESR asked for comments regarding the means of publication related to the transparency report.

60. Respondents agreed with CESR´s approach.

3. Timing for the publication or submission of the information

Question 29: CESR asked for comments regarding the timing for the publication and submission of information related to the transparency report and the general and periodic disclosures.

61. One respondent required clarification regarding whether the updates of the information indicated in paragraph 110 of the consultation paper referred to the annual updates contemplated in Article 11.1, and whether the list of clients mentioned in paragraph 102 of the consultation paper referred to the one already envisaged in paragraph 105.

62. Another respondent disagreed with the timeframe established in the Guidance for the disclosure of the list of significant clients, stating that the three months deadline after the financial year-end would be inconsistent with existing financial services legislation, including the Transparency Obligations Directive 1, which (in Article 4) provides for a four month period.

Having evaluated the responses, CESR agrees the necessity to slightly amend the language of the paragraphs to clarify these two subjects.

Finally regarding the timeframe established for the disclosure of the list of significant clients, CESR agrees that this is valid argument, however it agrees not to modify the guidance, as the publication of the referred list within three months after the end of each financial year, would not be burdensome for CRAs as they are in any case required to publish their transparency report three months after the end of each financial year.

VI. OPERATIONAL FUNCTIONING OF COLLEGES

1. Selection of facilitator

Question 30: Can you suggest any efficient methods, particularly by identifying some appropriate quantitative indicators, for assessing this criteria in a manner that allows differentiation between various member states?

63. One respondent indicated that appropriate indicators for assessing criteria B for selection of the facilitator could be the number of CRAs operating in the country, the total number of rated entities in the jurisdiction, the number of offices in the country and the number of analysts per office in that country.

Question 31: Are there any other factors that should be considered in assessing which competent authority should be facilitator under the above criteria?

64. Respondents that made comments on this issue indicated that they agreed that the selection of facilitator should consider arrangements currently in place in CEBS for the ECAI regime.

65. One respondent indicated that they disagreed that it was appropriate to restrict competent authorities from being the facilitator of a CRA based on holding this role for another CRA.

Question 32: Do you foresee there to be any problems with collecting the information required to assess these criteria?

66. Respondents did not perceive a problem with collecting the information, although one respondent did indicate that it would be the interpretation that would be the problematic aspect.

Having considered the feedback to questions 30 to 32 above, CESR has decided that the only amendment to the guidance is the addition of specific quantitative indicators to assess criteria B.

2. Cross-college consistency

67. Respondents indicated that CESR has a very important role in ensuring cross-college consistency, one indicated that this should be a clear and pronounced objective of CESR.

68. Respondents indicated that CESR should have a role in collecting and promoting best practices for college and one suggested that decisions made by the colleges should be available to CRAs by CESR so that they could evaluate the consistency of the colleges' decisions.

69. It was highlighted that CESR's focus should not purely be on the colleges of supervisors but also the activities of competent authorities supervising CRAs for which there was no college.

Having evaluated the feedback, CESR agrees that there is a need for CESR to take a central role in the promotion of regulatory consistency. The guidance will therefore be amended to indicate that:

a. CESR will accumulate and assess the decisions of colleges and their approach to supervision to ensure best practice and consistent decision making is promulgated;

b. That CESR will monitor the decisions made with regard to CRAs for which there is no supervisory college, to ensure regulatory consistency; and

c. Where legally possible there will be publication of regulatory decisions so CRAs are operating in a fair and equitable environment.

The Guidance will be amended accordingly.

3. Interaction with CEBS and CEIOPS

70. Responses supported CEBS and CEIOPS having a non-voting role on colleges and highlighted the need for coordination between CEBS and CESR with regard to CRA supervision and sanctioning.

The Guidance will be amended in order to clarify that CEBS and CEIOPS will be invited to attend the meetings of the supervisory colleges and that this also applies to colleges that only consists of one home competent authority. A new paragraph will be added to indicate the possibility for CEBS and CEIOPS to request information regarding the registered CRAs.

4. Non-members participation in college activities

71. No responses disagreed with the proposals put forward by CESR with regard to the participation of non-members of the college.

5. Decision Making

72. Respondents were supportive of the clarification over the role of college members in terms of various decisions, particularly the impact of majority voting. One respondent highlighted that any request for advice to CESR should indicate both the majority and minority viewpoints expressed by college members.

73. Feedback highlighted concerns over the lack of an appeals process integrated into the college decision making process.

74. One respondent suggested that there should be an appeal process for various decisions at the college and not just the national level. Whilst they were supportive that the matter would be returned to the college in the event the national process uncovered any new information or concerns over the validity of the college decision they considered it would be appropriate to have the chance to make representations at an earlier stage.

Based on the feedback received CESR will amend the Guidance to indicate that both the majority and minority views of the college will be included in any request for advice to CESR.

At this stage CESR does not consider it is appropriate to amend the Guidance on the decision making process to give an appeal process that is not based on the text of the Regulation. CESR will however make clear in the final Guidance that CRAs will be given appropriate opportunity to provide evidence and information in these processes so that the risk of decisions being based on flawed information is minimised. The appeal process will, however, remain at the national level.

Registration

75. There were no specific comments indicating a need to alter this section of the guidance, other than those relating the need for an appeals process at college level which are addressed above.

Withdrawal of registration

Question 33: Is this an appropriate system for dealing with the withdrawal decision process?

76. A number of comments indicated changes were required to this section of the guidance. One suggested amendment was the need to introduce an appeals process for this decision, this has been responded to above. Another material comment was that it was unnecessary and potentially inappropriate to prescriptively limit the maximum time allowed for CRAs to present additional information and make representations to the college to 25 working days as set out in the guidance. The same response also indicated that due to the impact on the CRA and the market of a withdrawal decision the minimum time for comment should be set at 2 months or 45 working days.

77. A number of comments indicated that the guidance should highlight that national authorities 'should' provide rather than 'may' provide a formal indication to a CRA once it has been determined that withdrawal proceedings should be begun in the college.

CESR agrees that it may be inappropriate to unnecessarily and prescriptively limit the amount of time in which the CRA can provide additional information – however it is also the case that in

some circumstances this will need to be provided in a short time period. The Guidance will not be amended to indicate that the baseline for providing information will be 45 working days but will be clear that the home competent authority can extend or reduce this time limit as circumstances dictate.)

National law will dictate the process for appeal of a decision by a competent authority. Whether a home competent authority provides an additional opportunity for a CRA to provide information once it has agreed in the college to begin a withdrawal procedure and before making the final decision will depend on national law. It is expected that in the process of agreeing the withdrawal procedure in the college the matter will have been discussed in depth and the CRA will have had sufficient opportunity to present relevant information. Therefore CESR does not intend to alter this section of the Guidance at this time.

Supervisory measures/Sanctions

Question 34: Is this an appropriate system for dealing with supervisory measures/sanctions?

78. The comments regarding this section of the consultation mirrored to a great extent those regarding the decisions on the withdrawal of registration.

As with withdrawal decisions CESR agrees that it may be inappropriate to unnecessarily and prescriptively limit the amount of time in which the CRA can provide additional information – however it is also the case that in some circumstances this will need to be provided in a short time period. The Guidance will be amended to indicate that the baseline for providing information will remain 25 working days but that the home competent authority can extend or reduce this time limit as circumstances dictate.

National law will dictate the process for appeal of a decision by a competent authority. Whether a home competent authority provides an additional opportunity for a CRA to provide information once it has agreed in the college to begin the procedure to implement a supervisory measure and before making the final decision will depend on national law. It is expected that in the process of agreeing to utilise the supervisory measure in the college the matter will have been discussed in depth and the CRA will have had sufficient opportunity to present relevant information. Therefore CESR does not intend to alter this section of the guidance at this time.

The Guidance will be amended accordingly.

College coordination meetings

79. Responses indicated support for the approach to coordinating supervisory work. One material comment was that additional work outside the work plan agreed should only be considered in the event of circumstances unforeseen in work plan.

CESR agrees that the work plan would not have value if it did not reflect a commitment from all competent authorities and therefore additional work would be the result of new information or events being uncovered that was not available at the point the work plan agreed. The Guidance will be updated accordingly.

On-site inspections

80. There were no material comments on this section of the consultation and therefore the guidance will not be amended.

6. Location of issuance and impact on supervisory responsibility

Questions 35 and 36: Which of the criteria should be used to identify the issuing office and why? Are there any reasons that the requirements set out in paragraph 166 cannot be met?

81. Respondents were generally supportive of the need to identify a responsible office for a rating and therefore a responsible competent authority. Respondents were slightly divided in their approach to identifying the criteria for this.

82. One respondent suggested that there should not be one fixed criteria and that a CRA would need to evaluate a number of factors when determining the location. Other respondents indicated that this should be a fixed location to give certainty, of these responses there was support for the location of the lead analyst, the country in which the rated assets are located and the location of the committee Chair.

83. One respondent highlighted a discrepancy with paragraph 188 of the consultation which indicates that a CRA must provide 'processes for determining which office is responsible for a credit rating where applicable and the procedures for disclosing this information.' They highlighted that this indicated that the CRA would assess for itself the place of issuance.

84. A number of respondents commented that it was necessary to 'fix' the location of issuance at the time of issuance to provide clarity and certainty to CRAs and other market participants.

Having considered the responses and evaluated the available alternatives CESR has determined that the criterion to allocate the issuance of a rating should be simple and easily applicable. In this regard CESR has decided that the CRA that will be considered to have issued a given rating and thus legally responsible for that rating will be determined by the location of the lead rating analyst (Article 3.1 (e)) upon the publication of the rating, and upon each subsequent review (including rating upgrades, downgrades and affirmations). CRAs will required to disclose the name, job title and location of the lead rating analyst (Article 4.2, Annex I.D.1) upon each review. CRAs should not shift a lead rating analyst to another CRA in order to circumvent the Regulation.

VII. MEDIATION PROTOCOL

1. Mediation Mechanism

Question 37: Do you envisage any problems with this mediation mechanism?

Further to some comments whether the proposed mediation mechanism could be used by CRAs and other interested parties to appeal decisions of competent authorities, it has been clarified that the mediation mechanism is solely an internal dispute resolution system. The national jurisdictions provide for any appeal against the decisions of competent authorities.

VIII. GUIDANCE ON THE INFORMATION SET OUT IN ANNEX II

1. General guidelines on the information to be submitted

Question 38: Do respondents have any comments on the guidance as set out in the remainder of section VIII?

85. CESR received numerous responses to this question from market participants. The main points which were made are outlined below.

86. One respondent suggested that statistics to be provided to competent authorities on the remuneration of employees should be limited to rating analysts for confidentiality purposes.

In order for competent authorities to assess the potential risks of conflicts of interests and the independence of credit ratings, CESR considers essential that information on how persons approving ratings and senior management are remunerated is provided, in particular what basis and what level.

87. Other markets participants considered that structural features, such as organization charts, as well as financial information should be provided on a global basis given the cross-border nature of CRAs business.

CESR noted this comment but considers such request relevant for the purposes of assessing CRAs applications, to the extent available by CRAs. The information should be provided at a subsidiary level. However, as stated in the guidance, if in exceptional cases an applicant does not submit any specific information, a clear explanation should be provided. The applicant should also provide an explanation as to how it demonstrates compliance with the relevant requirements of the Regulation as set out in the guidance. Competent authorities will consider these explanations and retain the ability to request further supporting material from the applicant on these points.

88. One respondent mentioned that it may be very challenging for an endorsing CRA to verify the rationale for the location of each rating that it endorses. Instead, the respondent in question believes that the endorsing CRA should be expected to explain the general approach of the group, and in particular which analysts work on which ratings.

CESR acknowledges that CRAs are not expected to verify each rating endorsed but should rather describe the procedures and reasons for ratings to be elaborated in a specific third country. However, endorsing CRAs should be able to explain ex post facto and when required by the relevant competent authority, why the credit rating activities with respect to a given rating were performed in a specific country.

89. With respect to the statutory requirements concerning CRAs established in a third country and the regulatory framework providing for independence of CRAs in their professional capacity, one respondent suggested such information be provided in the language of the third country. The same respondent also suggested that competent authorities should obtain this information directly from the competent authority in the third country as they will be negotiating with such authority and cooperation agreements are currently being put in place.

CESR noted the comment received but did not find appropriate to amend the Guidance for the following reasons:

a. CESR is responsible for checking the completeness of each application received. In order to do so, it is therefore expected that information be provided in the language customary in the sphere of finance.

b. *The applicant remains responsible for demonstrating compliance with the requirements of the Regulation. The purpose of the guidance is to set out the information that competent authorities would expect to receive as part of an application for registration by a CRA. However, CESR expects the applicant to provide detailed information and evidence as to how they demonstrate compliance with the applicable requirements of the Regulation.*

Question 39: We would appreciate comments from market participants on the usefulness of adding the additional ECAI information requirements within this consultation paper.

90. Most of the respondents recognized that it would be useful to include the ECAI2 information requirements in the guidance to the extent they are different from those necessary for registration under the Regulation. This was reiterated during the Open Hearing although it was also recognized that ECAI status and CRA registration were two different processes that should be kept separate.

91. Furthermore, a few participants requested a distinction be made in the guidance between CRAs that already have the ECAI status and those that do not, so that it is clear that the former are not expected to provide this information once more.

CESR acknowledged the feedback received both in the responses and at the Open Hearing and as a result decided to remove the ECAI information requirements from the Guidance on the basis that registration is a necessary condition, although not sufficient, for being recognized as an ECAI. Additional conditions have to be satisfied by CRAs for being granted this status and the Committee of European Banking Supervisors will be responsible for assessing each ECAI application.

2. Guidance on requests for historic data and information

Question 40: Do respondents have a view on whether the highlighted bullet points (in italics and contained within square brackets []) of historic data and information should be included within this Guidance? If your view is that CESR should ask for historic data and information, what period do you think is appropriate?

92. Whilst one respondent suggested that three to five years of historic data and information should be required by CESR for assessing CRAs' applications in an appropriate manner, all other respondents considered that historic data should not be requested for the reasons outlined below:

    a. Such requirement may be challenging for CRAs to comply with as this information may not exist. It indeed refers to obligations that would not have been applicable prior to the introduction of the EU Regulation. As a result, CRAs may not have had the appropriate systems in place to keep track of the necessary information. The majority of respondents claim that CESR should only request current data as an application assessment would need to be made on the CRA at the time of application, which should not be based on their historical structure, actions or performance;

    b. Such requirement indicates that CESR expects CRAs to have been meeting the criteria of the Regulation for the past three years when Article 40 of the Regulation indicates that CRAs should comply by September 2010. This requirement is retroactive and conflicts with the Regulation.

    c. In some cases such requirement would create a disproportionate burden on the CRAs in terms of resource required to collate the data; and

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d. Such requirement could, in certain circumstances, undermine the legal certainty under which the CRA operated during the past three to five years.

CESR noted the mixed view expressed by market participants on the appropriateness of requesting historic data for assessing applications. CESR decided that the majority of the highlighted bullet points in italics and contained within square brackets would be deleted on the basis that competent authorities have the powers to request any information deemed necessary for the conduct of their activities.

IX. GUIDANCE ON THE INFORMATION SET THAT A CREDIT RATING AGENCY MUST PROVIDE FOR THE APPLICATION FOR CERTIFICATION AND FOR THE ASSESSMENT OF ITS SYSTEMATIC IMPORTANCE TO THE FINANCIAL STABILITY OR INTEGRETY OF FINANCIAL MARKETS REFERRED TO IN ARTICLE 5

1. General guidelines on the information to be submitted

Question 41: Do respondents have any comments on the guidance as set out in the remainder of section IX?

93. Few respondents answered this question. A couple of observations came to the attention of CESR. One respondent stated that the information necessary to assess whether a CRA is systemically important should be tracked over time in order to identify a CRA that was not previously judged to be systemically important but subsequently became systemically important. In such a case, the certified CRA should be required to create an establishment in the EU and follow the EU Regulation accordingly. Another observation made by a market participant relates to the requirement expecting CRAs applying for certification to identify if they have, or intend to seek, the ECAI recognition in any EU jurisdiction. The respondent in question claimed that it was not clear why a CRA that had ECAI recognition in the EU would not be, by definition, systemically important.

94. One respondent also mentioned the fact that the information requirements set out for systemically important CRAs seemed to be more numerous than those required for certified CRAs.

CESR noted these observations and amended the Guidance to ensure consistency of approach in terms of amount of information required for systemically important CRAs and certified CRAs. CESR however considered that the other observations even though relevant, did not fall within the scope of this Guidance and as a result decided not to amend it.

2. Scope of information requested in the guidance

Question 42: Do respondents have a view on whether the highlighted bullets points (in italics) of this section IX should be included within this Guidance?

95. One respondent answered this question and clearly stated that the requirements in italics should be removed from the guidance mainly because they are retroactive and therefore conflict with article 40 of the Regulation.

CESR noted the comment received but decided to retain the requirements in italics in the Guidance to ensure consistency of approach in terms of amount of information required for systemically important CRAs and certified CRAs.