European Securities and Markets Authority

Date: 28 March 2019
ESMA-41-356-14

DECISION OF THE BOARD OF SUPERVISORS

to adopt supervisory measures and impose fines in respect of infringements committed by FITCH FRANCE S.A.S.

The Board of Supervisors ('Board') of the European Security and Markets Authority ('ESMA')

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC,

Having regard to Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies[1], and in particular Articles 24 and 36c thereof,

Whereas:

1. Following preliminary investigation, the Supervision Department within ESMA concluded, in a report submitted to the Executive Director on 4 August 2017, that with respect to Fitch France S.A.S. ("Fitch France") and other CRAs belonging to the Fitch Group there were serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in Annex III to Regulation (EC) No 1060/2009.

[1] OJ L 302 17.11.2009, p. 1

2. On 4 August 2017 ESMA's Executive Director appointed an independent investigating officer ('IIO'), pursuant to Article 23e (1) of Regulation (EC) No 1060/2009, to investigate the matter.

3. On 19 March 2018, the IIO sent her Initial Statement of Findings to Fitch France and to the other Persons Subject to Investigation (PSIs). In her Statement of Findings, the IIO concluded that Fitch France had committed with negligence the infringement set out at Point 20 of Section I of Annex III of the Regulation (EC) No 1060/2009;

4. By written submissions on their behalf, dated 20 April 2018, Fitch France and the other PSIs responded to the Initial Statement of Findings of the IIO raising a limited set of issues for consideration by the IIO.

5. The IIO amended the Initial Statement of Findings taking into account the PSIs' Response to her Initial Statement of Findings.

6. On 27 June 2018, the IIO submitted to the Board of Supervisors the Amended Statement of Findings together with the file relating to the case.

7. The Board discussed the IIO's findings and the case at its meeting on 18 December 2018.

8. On 18 January 2019, the Panel established by the Board to assess the completeness of the file submitted by the IIO adopted a ruling of completeness in respect of that file[2].

9. The Board discussed the case further at its meeting on 30 January 2019 and adopted its Initial Statement of Findings.

10. On 6 February 2019, on behalf of the Board, ESMA sent the Board's Initial Statement of Findings to Fitch France and the other PSIs.

11. On 20 February 2019 the Board of Supervisors received written submissions on behalf of Fitch France and the other PSIs.

12. The Board has discussed the case further at its meeting on 26 March 2019.

13. On the basis of the complete file submitted by the IIO containing, inter alia, the IIO's findings and having considered the written submissions made on behalf of Fitch France, the Board found that Fitch France had committed with negligence one infringement listed in Section I of Annex III of Regulation (EC) No 1060/2009.

[2] Ruling of the Enforcement Panel (ESMA-2019-CONF-1)

14. Pursuant to Article 24 of Regulation (EC) No 1060/2009, where the Board finds that a credit rating agency has committed one of the infringements listed in Annex III, it shall take a supervisory measure, taking into account the nature and seriousness of the infringement.

15. Pursuant to Article 36a of Regulation (EC) No 1060/2009, where the Board finds that a credit rating agency has, intentionally or negligently, committed one of the infringements listed in Annex III, it shall adopt a decision imposing a fine.

HAS ADOPTED THIS DECISION:

Article 1

Infringements

Fitch France S.A.S. negligently committed the infringement set out at Point 20 of Section I of Annex III of the Regulation (EC) No 1060/2009 for the reasons stated in the Annex to this Decision.

Article 2

Public Notice

The Board of Supervisors adopts a supervisory measure in the form of a public notice to be issued in respect of the infringements referred to in Article 1.

Article 3

Fines

The Board imposes the following fine, as calculated in the Annex to this Decision:

EUR 812 500 for the infringement set out at Point 20 of Section I of Annex III of Regulation (EC) No 1060/2009.

Article 4

Remedies

Fitch France may avail itself of the remedies of Chapter V of Regulation (EU) No 1095/2010 against this Decision.

Article 5

Entry into force

This Decision shall enter into force on the date of its adoption.

Article 6

Addressee

This Decision is addressed to **Fitch France S.A.S.** – 60 Rue de Monceau 75008 Paris, France.

Done at Paris, on 26 March 2019

[PERSONAL SIGNATURE]

For the Board of Supervisors
Steven Maijoor
The Chair

ANNEX

STATEMENT OF FINDINGS OF THE BOARD OF SUPERVISORS

1. The Board notes that on 6 February 2019 ESMA sent the Board's Initial Statement of Findings dated 30 January 2019 to Fitch France S.A.S. and the other PSIs belonging to the Fitch group.

2. By email dated 20 February 2019, written submissions in reply were provided on behalf of the PSIs. The PSIs took note of the Initial Statement of findings. With respect to the adverse findings in relation to infringement and fines, the PSIs disagreed for the reason set out in previous submissions; however, they had no new submissions to make in this regard.

3. The Board notes that, in their written submissions, the PSIs clarified that they will in any event respect the final decision of the Board. The PSIs are fully committed to compliance with the CRA Regulation and to the effective implementation of the measures taken to ensure that similar situations will not arise in the future.

4. These written submissions were considered by the Board together with the other submissions previously made on behalf of Fitch France.

5. Having considered the Statement of Findings of the IIO, the written submissions made on behalf of Fitch France in relation to this matter and the material in the IIO's file, the Board sets out its findings and the reasons for its findings below.

EXECUTIVE SUMMARY

6. Fitch France's entire capital is owned by Fitch. Fitch's entire capital is owned by Fitch Ratings Inc., a credit rating agency based in the United States of America. Fitch Ratings Inc. is in turn 100% owned by Fitch Group Inc.

7. Fitch Group Inc. is a holding company. Between 20 June 2013 and 11 April 2018, it was 20% indirectly owned by [redacted due to confidentiality: an individual ("FSC")], through [redacted due to confidentiality: Company E.], based in France.

8. Therefore, in the described period, [FSC], through a complex multi-layer legal structure, has been holding more than 10% of Fitch France.

Fitch France committed negligently the infringement set out at Point 20 of Section I of Annex III of the Regulation (by not having immediately disclosed that the existing rating on *Fondation Nationale des Sciences Politiques* (FNSP) was potentially affected by the fact that a shareholder holding more than 10% of its capital/voting rights was a board member of FNSP).

9. According to the Regulation, in relation to existing ratings, a CRA has an obligation to disclose immediately the fact that a shareholder holding 10% or more of the capital/voting rights of that CRA is a member of the administrative or supervisory board of the rated entity.

10. [FSC], who was a shareholder holding more than 10% of the capital/voting rights of Fitch France, was a board member of the *Fondation Nationale des Science Politiques* (FNSP) between 9 November 2001 and 10 May 2016.

11. Fitch France rated FNSP on 8 September 2004. It was thus an existing rating when the mentioned requirement entered into force in June 2013.

12. Two rating actions took place concerning this existing rating on FNSP: an affirmation on 10 September 2013 and an affirmation on 9 September 2014.

13. [FSC]'s board membership of FNSP was disclosed only on 29 January 2016.

14. Fitch France argued that the board of directors of FNSP was not to be considered as an "administrative or supervisory board" for the purposes of Point 3(ca) of Section B of Annex I of the Regulation, as it did not function like the board of a corporate or a financial institution and did not have the powers, strategic influence or control over the activities of FNSP in the way of a "normal" corporate board.

15. The IIO, giving an autonomous European law reading to the meaning of a "board", and on the basis of the fact that the Regulation does not make any distinction regarding board membership depending on the specific legal structure of the rated entity, considered that FNSP's board was an "administrative or supervisory board" for the purposes of Point 3(ca) of Section B of Annex I of the Regulation. In any event, in the specific case of FNSP's board, this board had a number of significant tasks during the period of the existence of the rating on FNSP. These included (but were not limited to) tasks regarding the budget, acquisitions, and the investment of available funds.

16. Consequently, the IIO found that Fitch France failed to comply with the requirement of Article 6(2), in conjunction with the first paragraph of Point 3 of Section B of Annex I of the Regulation, and thus committed the infringement set out at Point 20 of Section I of Annex III of the Regulation.

17. On the basis of an assessment of the complete file submitted by the IIO and having taken into account the written submissions made on behalf of Fitch France, the Board finds that Fitch France failed to comply with the requirement of Article 6(2), in conjunction with the

first paragraph of Point 3 of Section B of Annex I of the Regulation, and thus committed the infringement set out at Point 20 of Section I of Annex III of the Regulation.

18. In addition, based on the facts, Fitch France must be considered to have acted negligently (but not intentionally) when it committed the infringement.

19. In accordance with the relevant provisions of the Regulation, taking into account applicable aggravating and mitigating factors, the fine to be imposed on Fitch France for such a negligent infringement would amount to EUR 812 500. Furthermore, the infringement would require the adoption of a supervisory measure taking the form of a public notice.

ESMA's Board of Supervisors has considered the following facts:

20. Fitch France was one of the PSIs (Persons Subject to Investigation), belonging to the Fitch Group that were subject to ESMA investigation and enforcement procedure. The Fitch group is among the three most relevant rating agencies' groups in terms of revenue and size.

Fitch Group's multi-layered legal structure

21. The Group is characterised by a multi-layered legal structure described below:

- Fitch is the parent company (100% ownership of the other PSIs: Fitch France and Fitch Spain; 100% of Fitch CIS, Fitch Deutschland and Fitch Polska and 97% of Fitch Italia; the remaining 3% is held by Fitch Ratings).
- The entire capital of Fitch is owned by Fitch Ratings, based in the USA.
- Fitch Ratings is in turn 100% owned by Fitch Group (holding company).
- Fitch Group: until April 2018, was 80% indirectly owned by [redacted due to confidentiality: Company Z] (based in USA) and 20% indirectly owned by [Company E] (based in France).
- [Company E]'s controlling shareholder is an individual [redacted due to confidentiality: FSC].

[FSC]'s board memberships

22. During the investigation by ESMA's Supervision Department, the PSIs indicated that "[redacted due to confidentiality: Company E], [redacted due to confidentiality: Company Z] and [redacted due to confidentiality: FSC] are the only shareholders holding 5% or more

(directly or indirectly) of either the capital or voting rights of Fitch Ratings Ltd or being otherwise in a position to exercise significant influence on the business activities of Fitch[3]".

23. In addition, in their response to the second RFI of ESMA's Supervision Department, the PSIs indicated that "although [FSC] did not inform us of his position on this board prior to the ESMA inquiry, we checked with [Company E] and we confirm that [FSC] is a member of the Board of Directors of the "*Fondation Nationale des Sciences Politiques*" (FNSP) since the November 9, 2001[4]".

24. Therefore, [FSC] served as board member of FNSP until 10 May 2016[5].

Ratings of the PSIs on companies in which [FSC] was a board member

25. As a preliminary remark, before describing the ratings that were issued by the PSIs, it should be noted that credit ratings may relate either to an entity itself or to a debt or financial obligation, debt security, preferred share or other financial instruments. The former is referred to[6] as "issuer rating" and the latter as "issue ratings" by the PSIs.

26. According to the PSIs' own policy and procedure[7], "Fitch's credit ratings relating to issuers are an opinion on the relative ability of an entity to meet financial commitments, such as interest, preferred dividends, repayment of principal, insurance claims or counterparty obligations. Credit ratings relating to securities and obligations of an issuer can include a recovery expectation […]".

27. In addition, for each existing rating (irrespective of whether it is an "issuer rating" or an "issue rating"), a number of rating actions can take place (e.g. due to the requirement of Article 8(5) of the Regulation to review credit ratings on an ongoing basis and at least annually). For example, affirmations and upgrades are rating actions regarding an existing rating[8]. The PSIs defined[9] an affirmation of an existing rating as "The rating has been reviewed with no change in rating" and an upgrade as "The rating has been raised in the scale". These rating actions on an existing rating differ from the assignment of a new rating, which is defined by the PSIs as "A rating has been assigned to a previously unrated issuer or issue[10]".

---

[3] Supervisory Report, Exhibit 9.1, Fitch's reply to questions 1 & 2, p. 1.
[4] Supervisory Report, Exhibit 11.1, Fitch's reply to question 1, 19 October 2015.
[5] Supervisory Report, Exhibit 18, Fitch's letter ESMA Preliminary Views Following the Investigation of Fitch Ratings Firewall Policy, p. 5.
[6] See for example Supervisory Report, Exhibit 9.2.2, List of ratings.
[7] Exhibit 65, PSIs' Response to the IIO's First RFI, Annex 5, Rating Definitions - 17 March 2017, p. 3.
[8] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 5. See also Exhibit 22, PSIs' Response to the IIO's First RFI, Question 6. See also Exhibit 28, Supervision Department's Response to the IIO, Question 7.
[9] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 5. See also Exhibit 65, PSIs' Response to the IIO's First RFI, Annex 5, Rating Definitions - 17 March 2017, p. 13.
[10] Exhibit 65, PSIs' Response to the IIO's First RFI, Annex 5, Rating Definitions - 17 March 2017, p. 13.

28. This is consistent with the Commission Delegated Regulation (EU) 2015/2 of 30 September 2014 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to regulatory technical standards for the presentation of the information that credit rating agencies make available for the European Securities and Markets Authority[11] ("Delegated Regulation 2015/2"). Table 2 of Part 2 of Annex I of Delegated Regulation 2015/2 contains "Data about the individual credit rating actions". It defines "credit rating action type" as information, which "identify the type of action carried out by the credit rating agency with respect to a specific rating[12]". These can for example be upgrades, downgrades and affirmations. For each rating action of an existing rating, a different rating action identifier is reported; however, all these rating actions relate to the same existing rating and are thus reported under the same rating identifier[13].

Rating of FNSP

29. Fitch France rated FNSP on 8 September 2004[14].

30. Following the entry into force of the CRA III Regulation, the PSIs issued the following rating actions on the existing rating on FNSP: an affirmation on 10 September 2013[15] and an affirmation on 9 September 2014[16].

31. A change in the rating denomination also took place on 13 December 2013[17]. ESMA's Supervision Department indicated that in its views, the change in the rating denomination did not amount to a real rating action[18].

32. For the two affirmations of 10 September 2013 and 9 September 2014, both the primary analyst and the analytical manager were based and employed by Fitch France[19].

33. The RAC of the affirmations of 10 September 2013[20] and 9 September 2014[21] did not include any disclosure of the fact that [FSC] was a board member of FNSP.

---

[11] Commission Delegated Regulation (EU) 2015/2 of 30 September 2014 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to regulatory technical standards for the presentation of the information that credit rating agencies make available for the European Securities and Markets Authority, OJ L 2, 6.1.2015, p. 24.
[12] Commission Delegated Regulation 2015/2, Table 2 of Part 2 of Annex I, Field N°6.
[13] As an illustration, please see Exhibit 30, Supervision Department's Second Response to the IIO.
[14] Supervisory Report, Exhibit 48, Full Rating Report, "Credit analysis on FNSP", 8 September 2004.
[15] Supervisory Report, Exhibit 49, Rating Action Commentary FNSP, 10 September 2013.
[16] Supervisory Report, Exhibit 50, Rating Action Commentary FNSP, 9 September 2014.
[17] Exhibit 64, Supervision Department's Response to the IIO, S – Press release Rating Action 13 December 2013.
[18] See Supervisory Report, footnote 166. See the detailed reasoning in Exhibit 28, Supervision Department's Response to the IIO, Question 12.
[19] Supervisory Report, Exhibit 49, Rating Action Commentary FNSP, 10 September 2013 and Exhibit 50, Rating Action Commentary FNSP, 9 September 2014. See also Supervisory Report, Exhibit 23, Fitch's Response to the Fourth Request for Information I, 28 April 2017, p. 2.
[20] Supervisory Report, Exhibit 49, Rating Action Commentary FNSP, 10 September 2013.
[21] Supervisory Report, Exhibit 50, Rating Action Commentary FNSP, 9 September 2014.

34. In this respect, the following should be noted. The PSIs became aware of the issue following the receipt of ESMA's Supervision Department's second RFI dated 18 September 2015[22]. There was a delay of four months between this notification and the disclosure by the PSIs of [FSC]'s board membership of FNSP.

35. The PSIs explained this delay as follows[23]: "[TS, Officer in the Compliance Department], received the notification. [TS] did not instigate a re-assessment of the rating (…), nor did brief the successor, [RZ], upon assumption of the role in November 2015, about [FSC]'s board membership of FNSP. [RZ] became aware in early January 2016 that [FSC] served on the board of FNSP (…). Because [FSC]'s board membership had not been disclosed in the previous RACs, [RZ] and [BD, Senior Counsel] thought it would be prudent (i) to publish a Non-rating Action Commentary ("NRAC") disclosing [FSC]'s board membership of FNSP and his relationship with Fitch Ratings, and (ii) on a going forward basis and for as long as [FSC] remained on the FNSP board, to require this same disclosure in all relevant future RACs and reports related to the FNSP rating".

36. On 29 January 2016, the PSIs published a NRAC indicating that "this announcement corrects Fitch's previous disclosure with respect to its rating action commentaries about *Fondation Nationale des Sciences Politiques* (FNSP). [FSC], has served on the Board of Directors of the *Fondation Nationale des Sciences Politiques* since 9 November 2001. [FSC] is the controlling shareholder of [Company E], which currently owns a 20% equity interest in Fitch[24]".

Relevant PSIs' policies and procedures regarding conflicts of interests related to board membership of shareholders.

37. The compliance function covering the PSIs' activities was formally entrusted to Fitch. The "agreement concerning the provision of compliance, credit policy and internal control services" which was entered into in September 2011 between the different companies of the Fitch group[25] provides that Fitch [omitted due to confidentiality][26].

38. The PSIs' procedural framework on the independence and avoidance of conflicts of interest in relation to direct and indirect shareholders or holders of voting rights consists of the following policies and procedures:

[22] Supervisory Report, Exhibit 10, ESMA/2015/1270, Request for information concerning Fitch Ratings firewall policy 18 September 2015, Question 1.
[23] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 16.
[24] Supervisory Report, Exhibit 51, Non-Rating Action Commentary FNSP, 29 January 2016.
[25] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 3.
[26] Exhibit 61, PSIs' Response to the IIO's First RFI, Annex 3, Agreement Concerning the Provision of Compliance, Credit Policy and Internal Control Services with Respect to the EU Regulation (EC) no 1060/2009 of the European Parliament and of the Council of Sept. 16, 2009 on credit rating agencies, Clause 1.

- The Code of Conduct[27]: it states in section 2.2.7 that "Fitch's disclosures of known actual and potential conflicts of interest shall be timely, clear, concise, specific, and prominent".

- The Bulletin 10 - Firewall Policy[28]: it "sets forth, among other things, mandatory disclosure requirements with respect to potential conflicts of interest presented by Fitch shareholders. The Policy also sets forth certain situations, related to these potential conflicts, in which the assignment of a new rating is prohibited[29]".

- The Bulletin 10A[30]: it helps analysts to identify cases where disclosures are required or the assignment of new ratings is prohibited in accordance with sections VI, VII and VIII of the Firewall Policy. According to the PSIs, it "is aligned with the provisions of the Firewall Policy and identifies the then current companies with respect to which either (i) such disclosures are required, or (ii) the assignment of new ratings is prohibited[31]".

39. However, companies in which [Company Z] had a shareholding were not listed in Bulletin 10A[32]. Instead, Bulletin 10A stated that "BRM will advise the relevant Group Head in the event that Fitch would be assigning a rating to an entity for which such a disclosure would be required[33]".

40. Bulletin 10A, version 15 of 10 August 2015, changed this and included in section II.B the entities in which [Company Z] had an equity interest.

---

[27] Supervisory Report, Exhibit 23.8, Exhibit 9a - Bulletin 1 Code of Conduct , version 9, 18 Dec 2012, Supervisory Report, Exhibit 23.9, Exhibit 9b - Bulletin 1 Code of Conduct, version 10, 20 Jun 2013, Supervisory Report, Exhibit 23.10, Exhibit 9c - Bulletin 1 Code of Conduct, version 11, 1 Aug 2014, and Supervisory Report, Exhibit 23.11, Exhibit 9d - Bulletin 1 Code of Conduct, version 12, 26 Feb 2016.

[28] See Supervisory Report, Exhibit 9.3.1, Bulletin 10 – Firewall Policy – version 7, 15 May 2012, Supervisory Report, Exhibit 9.3.2, Bulletin 10 – Firewall Policy – version 8, 20 June 2013. Supervisory Report, Exhibit 23.16, Exhibit 11 - Firewall Policy 15 June 2015, and Supervisory Report, Exhibit 30, Bulletin 10 – Firewall Policy – version 10 (please also see the published version: Exhibit 79, Bulletin 10: Firewall Policy, Version 10, 17 March 2017).

[29] Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, 3 July 2015.

[30] See Supervisory Report, Exhibits 9.3.3 to 9.3.14 for Bulletin 10A, version 3 to 14, and Supervisory Report, Exhibit 24.11, Exhibit 27 - Bulletin 10A, version 15, as well as Exhibit 78, PSIs' Response to the IIO's First RFI, Annex 40.2.14, Bulletin 10A Firewall Disclosures - V16 December 2015, and Supervisory Report, Exhibit 15.3, Bulletin 10A, version 17.

[31] Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, 3 July 1015, p. 1.

[32] See Supervisory Report, Exhibit 9.3.26, Extract of the Rating Procedures Manual, version 4, p. 37: "at the request of [Company Z], such holdings shall not be explicitly listed within Bulletin 10A, but instead shall be provided to a limited number of BRM and Accounting and Finance staff as designated by the Global Head of BRM so that the designated individuals can ensure that in the event that such a disclosure becomes necessary, the relevant analyst is notified".

[33] See Supervisory Report, Exhibits 9.3.3 – 9.3.14, Section II.B of Bulletin 10A version 3, effective date: 18 October 2012; Bulletin 10A, version 4, effective date: 11 February 2013; Bulletin 10A, version 5, effective date: 26 April 2013; Bulletin 10A, version 6, effective date: 7 June 2013; Bulletin 10A, version 7, effective date: 16 August 2013; Bulletin 10A, version 8, effective date: 18 October 2013; Bulletin 10A, version 9, effective date: 27 January 2014; Bulletin 10A, version 10, effective date: 15 May 2014; Bulletin 10A, version 11, effective date: 15 July 2014; Bulletin 10A, version 12, effective date: 13 November 2014; Bulletin 10A, version 13, effective date: 6 February 2015; and Bulletin 10A, version 14, effective date: 29 April 2015.

41. In addition, it is in August 2015 that Bulletin 10A[34] started to differentiate between the entities in which the PSIs' shareholders held more than 10%, compared to entities in which they held between 5% to 9.99%.

42. The Rating Process Manual ("RPM")[35]: it contains the language to be inserted for the required disclosures relating to the Firewall Policy: for example, "[FSC] has an equity interest greater than 5% in or serves on the board of Name of the Rated Entity. [FSC] is the controlling shareholder of [Company E], which in turn is Fitch's majority shareholder[36]".

43. As of 31 March 2015, the RPM contains instructions for analysts to check periodically Bulletin 10A to identify cases where disclosures may be required[37] and "that any exceptions to the RPM that could violate the Code of Conduct (including those provisions related to conflicts of interest) should be notified to the Chief Compliance Officer[38]".

44. The procedure called Firewall Disclosure Procedures[39], which prior to becoming a stand-alone procedure was contained in the Rating Procedures Manual: it sets out the steps that the PSIs' compliance function has to carry out to verify and update the information contained in Bulletin 10A. The PSIs relied on shareholders' self-declarations for the identification of the relevant persons and entities to list in Bulletin 10A[40]. For that purpose, [regular] emails were sent to [Company E] and [Company Z].

45. From 10 April 2014 onwards, the Procedure 10A – Procedure for Reviewing RACs and Private Rating Letters in connection with the Firewall Policy Disclosures ("GOM Procedure

---

[34] Supervisory Report, Exhibit 24.11, Exhibit 27 – Bulletin 10A, 10 August 2015.
[35] See Supervisory Report, Exhibits 9.3.15 – 9.3.25 for Rating Process Manual, version 4 to 13.
[36] See Supervisory Report, Exhibits 9.3.15 – 9.3.21, Rating Process Manual, version 4 to 9. This wording was updated according with changes in [Company E]'s shareholding. See Supervisory Report, Exhibits 9.3.22 – 9.3.24, Rating Process Manual, version 10 to 12, p. 40: "[FSC] serves on the board of Name of Rated Entity. [FSC] is the controlling shareholder of [Company E], which owns a 50% equity interest in Fitch". See also Supervisory Report, Exhibit 9.3.25, Rating Process Manual – version 13, 31 March 2015, p. 45: "[FSC] serves on the board of Name of Rated Entity. [FSC] is the controlling shareholder of [Company E], which owns a 20% equity interest in Fitch".
[37] Supervisory Report, Exhibit 9.3.25, Rating Process Manual – version 13, 31 March 2015, p. 44, footnote 37
[38] Supervisory Report, Exhibit 23, Fitch's Response to the Fourth Request for Information I, 28 April 2017, p. 3. See also Supervisory Report, Exhibit 9.3.25, Rating Process Manual – version 13, 31 March 2015, p. 5: "Exceptions to the RPM or other internal bulletin that would conflict with Fitch's Code of Conduct may only be submitted to the Exception Log with prior approval of Fitch's Chief Executive Officer, Fitch's President, or their designee. In such cases, notification of the exception must also be sent to the Chief Compliance Officer or their designee".
[39] Originally, the procedural steps could be found in Supervisory Report, Exhibits 9.3.26 to 9.3.28, Extract of the Rating Procedures Manual, version 4 to 6. In July 2014, the PSIs created a separate procedure, see Supervisory Report, Exhibit 9.3.29, Firewall Disclosure Procedures.
[40] The IIO noted that from the autumn of 2015, Fitch […] "began checking the information provided by [Company E] against [Company E]'s most recent annual report. Fitch then commenced using external news services […] to conduct independent screening for news related to its shareholders in Q2 of 2016. The first relevant search results were identified on 12 May 2016." See Supervisory Report, Exhibit 21, Fitch's Response to the Third Request for Information, p. 6.

in connection with the Firewall Policy Disclosures")[41]: it sets out the steps Global Operations Management ("GOM") follows in its [regular] checks of rating action commentaries ("RACs") in relation to rated entities listed in Bulletin 10A to determine whether they contained the right disclosures[42].

46. From 1 January 2016, Bulletin 2A (The BRM Process Manual) sets out the steps that the Business Relationship Management ("BRM") follows in relation to Bulletin 10A[43].

47. Finally, it should be added that towards the end of 2012[44], a working group established within the PSIs ("CRA3 Working group" or "CRA3WG") started to assess the changes in the PSIs' internal procedures and policies that would be needed because of the CRA III Regulation.

48. Regarding the new provisions introduced by the CRA III Regulation in Point 3 of Section B of Annex I of the Regulation, new versions of the Firewall Policy - Bulletin 10 (version 8 effective on 20 June 2013) and of the Rating Procedures Manual (version 5 effective on 19 August 2013) were adopted.

49. Concerning the Firewall Policy – Bulletin 10 a new section VI.E was added, with the following wording:

- "If any of [FSC], [Company E] or [Company Z] […] is a member of the administrative or supervisory board of such entity (or in the case of [Company E] or [Company Z], has a seat on the board), then Ratings will not initiate a rating on that entity[45]".

- "If any of [FSC], [Company E] or [Company Z] […] becomes a member of the administrative or supervisory board of such Rated Entity (or in the case of [Company E] or [Company Z], acquires a seat on the board), then Fitch shall (i) immediately disclose where the existing rating(s) and rating outlook(s) of the Rated Entity could be potentially affected by the acquisition or new memberships and (ii) assess whether there are grounds for re-rating or withdrawing the existing rating(s) and rating outlook(s) of the Rated Entity[46]".

50. Amendments were also introduced in the Rating Procedures Manual, in particular: "[…] Section VI.E. of Bulletin 10 prohibits Fitch from assigning a new rating to an entity in which any of [FSC], [Company E] or [Company Z] has an equity interest of 10% or more, or an

[41] See Supervisory Report, Exhibit 9.3.30, GOM Procedure 10A – Reviewing Firewall Policy Disclosures – version 1, 10 April 2014 and Exhibit 9.3.31, Exhibit GOM Procedure 10A – Reviewing Firewall Policy Disclosures – version 2, 13 May 2015.
[42] Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, 3 July 2015, p. 2.
[43] Supervisory Report, Exhibit 14, BRM Process Manual, version 1, 1 January 2016.
[44] Exhibit 9, PSIs' Comments on the Supervisory Report, p. 4.
[45] Supervisory Report, Exhibit 9.3.48, Bulletin 10 – Firewall Policy – version 8, 20 June 2013, p. 4.
[46] Supervisory Report, Exhibit 9.3.48, Bulletin 10 – Firewall Policy – version 8, 20 June 2013, p. 4.

entity in which any of these three parties is a member of, or has a seat on, the administrative or supervisory board[47]".

51. Following the entry into force of the CRA III Regulation, the PSIs also introduced some changes in the [regular] emails. Initially, the PSIs' compliance function asked in these emails the shareholders to (i) "either confirm that the information held remains accurate and complete, or (ii) provide all necessary corrections[48]", as well as to "provide notification of changes that occur to the information provided between notifications periods in a timely manner[49]". The updated emails asked the shareholders to "identify any companies where [[Company Z]/[Company E]] has a seat on the board, EXCLUDING any that are already captured by the list of entities provided in which [[Company Z]/[Company E]] has an equity stake of more than 5%[50]". The emails also provided extracts of the EU Regulation and requested that the shareholders confirm that they have noted the prohibitions and that they are "not currently engaged in any investment or business activities that are inconsistent with such provisions[51]".

Relevant PSIs' internal control mechanisms

52. The following actors within the PSIs were in charge of the internal control mechanisms regarding the compliance with the provisions of the Regulation on the conflicts of interest presented by shareholders or holders of voting rights.

53. While the PSIs' "analytical staff were responsible for ensuring that required disclosures were made[52]" for each of the ratings issued and while all employees have an obligation according to the Code of Conduct[53] to "report […] the activities about which they have knowledge that a reasonable person would question as a potential violation of this Code or applicable law[54]", three groups within the PSIs were specifically responsible for the

[47] Supervisory Report, Exhibit 9.3.27, Extract of the Rating Procedures Manual, version 5, 19 August 2013, p. 34.
[48] Supervisory Report, Exhibit 9.3.26, Extract of the Rating Procedures Manual, version 4, 17 December 2012, p. 38.
[49] Supervisory Report, Exhibit 9.3.26, Extract of the Rating Procedure Manual, version 4, 17 December 2012, p. 38.
[50] Supervisory Report, Exhibit 9.3.136, CRA3 changes – email notification to [Company E], and Exhibit 9.3.137, CRA3 changes – email notification to [Company Z].
[51] Supervisory Report, Exhibit 9.3.136, CRA3 changes – email notification to [Company E], and Exhibit 9.3.137, CRA3 changes – email notification to [Company Z].
[52] Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, 3 July 2015, p. 1. See also Exhibit 22, PSIs' Response to the IIO's First RFI, Question 34.
[53] Supervisory Report, Exhibit 23.8, Exhibit 9a - Bulletin 1 Code of Cond, version 9, 18 Dec 2012, Supervisory Report, Exhibit 23.9, Exhibit 9b - Bulletin 1 Code of Conduct, version 10, 20 Jun 2013, Supervisory Report, Exhibit 23.10, Exhibit 9c - Bulletin 1 Code of Conduct, version 11, 1 Aug 2014, and Supervisory Report, Exhibit 23.11, Exhibit 9d - Bulletin 1 Code of Conduct, version 12, 26 Feb 2016.
[54] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 34.

relevant internal control measures: Regulatory Compliance, Business Relationship Management ("BRM") and Global Operations Management (“GOM”).

54. First, Regulatory Compliance was responsible for contacting [Company E] and [Company Z] to receive information about their shareholdings and board memberships and for updating Bulletin 10A in accordance with Bulletin 10 in response to this[55].

55. The PSIs described the process in the following way: “[…] Regulatory Compliance gathered, from [Company Z] and [Company E] (including with respect to [FSC]) on a [regular] basis, information necessary to implement the relevant provisions of Bulletin 10. Regulatory Compliance then updated Bulletin 10A based on the responses provided by [Company E] and [Company Z]. […][56]”.

56. Until autumn 2015, the PSIs relied on self-declarations by their shareholders to update Bulletin 10A on a [regular] basis. From autumn 2015, Regulatory Compliance “began checking the information provided by [Company E] against [Company E]’s most recent annual report. Fitch then commenced using external news services [omitted due to confidentiality] to conduct independent screening for news related to its shareholders in Q2 of 2016. The first relevant search results were identified on 12 May 2016[57]”.

57. Following the update of Bulletin 10A, the information was posted to [omitted due to confidentiality][58], which is a software platform used by the PSIs to manage and publish internally their policy documents[59]. Regulatory Compliance also provided “to a limited number of BRM staff as designated by the Global Head of BRM[60]” the list of entities in which [Company Z] had an equity interest greater than 5% (rather than disclosing this information through Bulletin 10A).

58. Second, according to the PSIs, Business Relationship Management ("BRM") was “responsible for ensuring that Fitch did not issue ratings in contravention of the requirements in Bulletin 10[61]”.

59. In particular, BRM kept a record on the relevant [Company Z] entities and “was responsible for checking whether Fitch had rated any companies held by [Company Z][62]”. This meant that “each month, BRM and Accounts produced a report listing all mandates signed with

[55] Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015, p. 2.
[56] Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015, pp. 2-3.
[57] Supervisory Report, Exhibit 21, Fitch’s Response to the Third Request for Information, p. 6. See also Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 15.
[58] Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015, pp. 2-3.
[59] Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 14.
[60] Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015, pp. 1. Footnote 1. See also Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015, p. 3.
[61] Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015, p. 1. See also Supervisory Report, Exhibit 9.3.29, Firewall Disclosure Procedures, July 2014 and Supervisory Report, Exhibit 23.5, Exhibit 5 – Section 1.6 BRM Process Manual 1 Jan 2016.
[62] Supervisory Report, Exhibit 9.4, Fitch’s reply to question 7, 3 July 2015, p. 2.

issuers in such month. They provided a copy of this report to the designated BRM members. These designated BRM members then checked to see whether any of these issuers were on the list of companies held by [Company Z][63]*".*

60. In January 2016, "BRM enhanced its controls by launching an automated Firewall Alert System within its cloud-based Customer Relationship Management (CRM) platform […] to help Fitch identify and manage any potential conflicts with respect to Bulletins 10 & 10A[64]". The system cross-references all entities identified in Bulletin 10A with interactions and automatically sends "an e-mail alert to the user, reminding them of the Bulletin 10 and 10A requirements. […]. In addition, BRM's Policy and Operations Group, […] were responsible for cross referencing the entities listed in Bulletin 10A with a […] generated report prepared on a [regular] basis detailing all anticipated future mandates (the "pipeline" report) to identify if any mandates under discussion could not proceed due to the Firewall Policy[65]".

61. Third, Global Operations Management ("GOM") staff "was responsible, inter alia, for checking whether Fitch had rated any companies held by [Company E] and checking that any required disclosures with respect thereto and with the respect to [FSC]'s board memberships had been made[66]".

62. The PSIs described the process in the following way: "At the end of each [redacted due to confidentiality: period], […] GOM reviewed all RACs published during such [period] that related to Fitch Ratings rated entities, if any, then included in Bulletin 10A to determine whether appropriate disclosures were made[67]".

63. The PSIs indicated that this procedure was in place since 2011, but that "In April 2014, at the request of Compliance, GOM documented its longstanding practice[68]", i.e. these steps were codified in the GOM Procedure in connection with the Firewall Policy Disclosures[69] effective on 10 April 2014.

---

[63] Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, 3 July 2015, p. 2. See also Supervisory Report, Exhibit 11.7, Fitch's reply to question 6, 19 October 2015.
[64] Supervisory Report, Exhibit 23, Fitch's Response to the Fourth Request for Information I, 28 April 2017, pp. 4-5.
[65] Supervisory Report, Exhibit 23, Fitch's Response to the Fourth Request for Information I, 28 April 2017, p. 5.
[66] Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, 3 July 2015, p. 2.
[67] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 13. See also Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, 3 July 2015, p. 2.
[68] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 13.
[69] Supervisory Report, Exhibit 9.3.30, GOM Procedure 10A – Reviewing Firewall Policy Disclosures – version 1, 10 April 2014. See also Supervisory Report, Exhibit 9.3.31, Exhibit GOM Procedure 10A – Reviewing Firewall Policy Disclosures – version 2, 13 May 2015. See also Exhibit 22, PSIs' Response to the IIO's First RFI, Question 13.

The Board of Supervisors has considered the following applicable legal provisions:

64. Besides the provisions of the (initial) Regulation, which entered into force in December 2009, account must consequently be taken of the amendments to the Regulation introduced through Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies[70] ("CRA II Regulation"), which entered into force on 1 June 2011.

65. Further amendments to the Regulation were also introduced through Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011[71] as well as through Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013[72] amending Regulation (EC) No 1060/2009 on credit rating agencies ("CRA III Regulation"). The amendments introduced by the CRA III Regulation entered into force on 20 June 2013. Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014[73] also introduced limited changes to the Regulation.

Relevant legal provisions regarding conflicts of interest

66. Following the CRA III Regulation, Article 6(1) of the Regulation reads as follows: "A credit rating agency shall take all necessary steps to ensure that the issuing of a credit rating or a rating outlook is not affected by any existing or potential conflicts of interest or business relationship involving the credit rating agency issuing the credit rating or the rating outlook, its shareholders, managers, rating analysts, employees or any other natural person whose services are placed at the disposal or under the control of the credit rating agency, or any person directly or indirectly linked to it by control".

67. Article 6(2) of the Regulation provides that "In order to ensure compliance with paragraph 1, a credit rating agency shall comply with the requirements set out in Sections A and B of Annex I".

68. Following the CRA III Regulation, Point 3 of Section B of Annex I of the Regulation reads as follows: "A credit rating agency shall not issue a credit rating or a rating outlook in any of the following circumstances, or shall, in the case of an existing credit rating or rating

[70] Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies, OJ L 145, 31.5.2011, p. 30.
[71] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ L 174, 1.7.2011, p. 1.
[72] Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies, OJ L 146, 31.5.2013, p. 1.
[73] Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulations (EC) No 1060/2009, (EU) No 1094/2010 and (EU) No 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority), OJ L 153, 22.2.14, p.1.

outlook, immediately disclose where the credit rating or rating outlook is potentially affected by the following".

69. Point 3(ca) of Section B of Annex I includes as one of these circumstances: "a shareholder or member of a credit rating agency holding 10 % or more of either the capital or the voting rights of that credit rating agency or being otherwise in a position to exercise significant influence on the business activities of the credit rating agency, is a member of the administrative or supervisory board of the rated entity or a related third party".

70. Regarding the infringements, following the CRA III Regulation, Point 20 of Section I of Annex III provides that "The credit rating agency infringes Article 6(2), in conjunction with the first paragraph of point 3 of Section B of Annex I, by issuing a credit rating or rating outlook in any of the circumstances set out in the first paragraph of that point or, in the case of an existing credit rating or rating outlook, by not disclosing immediately that the credit rating or rating outlook is potentially affected by those circumstances".

71. In addition, Recital 20 of the CRA III Regulation (which introduced the Point 3(ca) of Section B of Annex I of the Regulation regarding the CRA's shareholders) indicated that "The independence of a credit rating agency vis-à-vis a rated entity is also affected by possible conflicts of interest of any of its significant shareholders with the rated entity. A shareholder of a credit rating agency could be a member of the administrative or supervisory board of a rated entity or a related third party. Regulation (EC) No 1060/2009 addresses this type of situation only as regards the conflicts of interest caused by rating analysts, persons approving the credit ratings or other employees of the credit rating agency. That Regulation is, however, silent as regards potential conflicts of interest caused by shareholders or members of credit rating agencies. With a view to enhancing the perception of independence of credit rating agencies vis-à-vis the rated entities, it is appropriate to extend the existing rules set out in that Regulation on conflicts of interest caused by employees of the credit rating agencies to those caused by shareholders or members holding a significant position within the credit rating agency. Hence, the credit rating agency should abstain from issuing credit ratings or should disclose that the credit rating may be affected, where a shareholder or member holding 10 % of the voting rights of that agency is also a member of the administrative or supervisory board of the rated entity or has invested in the rated entity when the investment reaches a certain size. Furthermore, the fact that a shareholder or member holding at least 5 % of the voting rights of that credit rating agency has invested in the rated entity or is a member of the administrative or supervisory board of the rated entity should be disclosed to the public, at least if the investment reaches a certain size".

72. Finally, it is worth noting that the Regulation also imposes requirements in case of a shareholder or member of a credit rating agency holding 5% or more of either the capital or the voting rights of that credit rating agency. They are different than the ones applicable in the case of a shareholder holding 10% or more of the CRA's capital or voting rights.

Point 3a of Section B of Annex I of the Regulation[74] indeed provides that "A credit rating agency shall disclose where an existing credit rating or rating outlook is potentially affected by either of the following: […] (b) a shareholder or member of a credit rating agency holding 5 % or more of either the capital or the voting rights of that credit rating agency or being otherwise in a position to exercise significant influence on the business activities of the credit rating agency, is a member of the administrative or supervisory board of the rated entity or a related third party".

Other relevant legal provisions

73. Other provisions of the Regulation may be relevant for the purposes of this investigation. In particular, it is worth noting the following definitions provided by the Regulation.

74. Article 3(1)(a) of the Regulation defines a credit rating as followed: "'credit rating' means an opinion regarding the creditworthiness of an entity, a debt or financial obligation, debt security, preferred share or other financial instrument, or of an issuer of such a debt or financial obligation, debt security, preferred share or other financial instrument, issued using an established and defined ranking system of rating categories".

75. Article 3(1)(f) provides that a "'rated entity' means a legal person whose creditworthiness is explicitly or implicitly rated in the credit rating, whether or not it has solicited that credit rating and whether or not it has provided information for that credit rating".

Having considered the IIO's Amended Statement of Findings, the submissions made on behalf of Fitch France in connection therewith, and the material in the file, the Board sets out its findings under the following heading.

Findings of the Board of Supervisors with regard to the infringements at Point 20 of Section I of Annex III of the Regulation (EC) No 1060/2009 – existing rating on FNSP

76. This section analyses whether Fitch France breached the following requirement concerning FNSP:

77. "A credit rating agency […] shall, in the case of an existing credit rating or rating outlook, immediately disclose where the credit rating or rating outlook is potentially affected by […]"

[74] The corresponding infringement is set out at Point 20a of Section I of Annex III of the Regulation, which reads as follows: "The credit rating agency infringes Article 6(2), in conjunction with point 3a of Section B of Annex I, by not disclosing that an existing credit rating or rating outlook is potentially affected by any of the circumstances set out in letters (a) and (b) of that point".

"a shareholder or member of a credit rating agency holding 10 % or more of either the capital or the voting rights of that credit rating agency or being otherwise in a position to exercise significant influence on the business activities of the credit rating agency, is a member of the administrative or supervisory board of the rated entity or a related third party" (Point 3(ca) of Section B of Annex I of the Regulation).

78. If this requirement is not met, this would constitute the infringements set out at Point 20 of Section I of Annex III of the Regulation.

79. [FSC] was a shareholder holding more than 10% of PSIs' capital/voting rights[75].

80. [FSC] was a board member of FNSP from 9 November 2001[76] until 10 May 2016[77].

81. Fitch France rated FNSP on 8 September 2004[78]. It was an existing rating when the CRA III Regulation (and the related requirements on immediate disclosure in case of existing ratings where a shareholder of the CRA is a board member of the rated entity) entered into force.

82. It is thus clear that when the CRA III entered into force, (i) [FSC] was a board member of FNSP and (ii) the rating on FNSP was existing. However, no disclosure related to [FSC]'s board membership of FNSP took place when the CRA III Regulation entered into force.

83. In addition, two rating actions took place concerning this existing rating on FNSP: an affirmation on 10 September 2013[79] and an affirmation on 9 September 2014[80]. The PSIs clarified that "The applicable disclosure is made in RACs" [81]. However, the relevant RACs on FNSP did not include the disclosure related to [FSC]'s board membership of FNSP[82].

84. In order to assess whether an infringement of the Regulation has been committed by the PSIs regarding the existing rating of FNSP, the IIO has first considered whether the fact that [FSC] was a member of the board of directors of FNSP is to be understood as being covered by Point 3(ca) of Section B of Annex I, i.e. whether [FSC] was to be considered as "a member of the administrative or supervisory board of the rated entity" for the purposes of this Point 3(ca).

---

[75] Supervisory Report, Exhibit 9.1, Fitch's reply to questions 1 & 2, p. 1 and Supervisory Report, Exhibit 1, Fitch Ratings Transparency Report 2016, p. 3.
[76] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 7.
[77] Supervisory Report, Exhibit 18, Fitch's letter ESMA Preliminary Views Following the Investigation of Fitch Ratings Firewall Policy, p. 5.
[78] Supervisory Report, Exhibit 48, Full Rating Report, "Credit analysis on FNSP", 8 September 2004.
[79] Supervisory Report, Exhibit 49, Rating Action Commentary FNSP, 10 September 2013.
[80] Supervisory Report, Exhibit 50, Rating Action Commentary FNSP, 9 September 2014.
[81] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 8.
[82] Supervisory Report, Exhibit 49, Rating Action Commentary FNSP, 10 September 2013, and Supervisory Report, Exhibit 50, Rating Action Commentary FNSP, 9 September 2014.

85. This argument has been raised by the PSIs which indicated that "three analysts based in the Paris office misinterpreted the policy requirement and failed to notify Compliance of [FSC]'s board membership on FNSP and continued to rate it while they knew that [FSC] was a board member. Fitch's analysts for FNSP considered that the board referred to did not have strategic influence or control over the activities of FNSP in the way that a normal corporate board influences and controls limited liability companies, and thus concluded (wrongly) that the board position of FNSP was not subject to the requirements of the Firewall Policy" [83]. The PSIs added that the Board of FNSP "did not function like the board of a corporate or a financial institution" [84] and "the role of the FNSP board was to promote FNSP and to raise private donations for the school. FNSP is a not-for-profit foundation with no share capital. It pays no dividends. […] the French government controls FNSP – that is, the board does not have the power of a corporate board"[85].

86. In this respect, the Board acknowledges the following considerations of the IIO.

87. First, according to the case-law of the CJEU, EU law should be given an autonomous and uniform interpretation: "According to settled case law, the need for the uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question" [86]. Across the EU and in each Member State, there is a diversity of legal structures for establishing entities which would be rated by CRAs. Nevertheless, for the purpose of determining the meaning and scope of the circumstance laid down in Point 3(ca) of Section B of Annex I of the Regulation, "a member of the administrative or supervisory board of the rated entity" must be given an autonomous and uniform interpretation, so as to avoid potential circumvention of the Regulation and non-application by a CRA of the requirements related to conflicts of interest based on the diversity of the legal structures of rated entities across the EU.

88. Second, the Regulation does not make any distinction regarding the board membership on the basis of the specific legal structure of the rated entity. For example, the Regulation does not distinguish between corporate entities and public entities or entities controlled by the state in order to define CRAs' obligations under the Regulation. Point 3(ca) of Section B of Annex I of the Regulation does not include such distinction. In the same way, this distinction is not provided by the definition of "rated entities" laid down by Article 3(1), letter (f) of the Regulation: "'rated entity' means a legal person whose creditworthiness is

[83] Supervisory Report, Exhibit 18, Fitch's letter ESMA Preliminary Views Following the Investigation of Fitch Ratings Firewall Policy, 22 July 2016, p. 5.
[84] Supervisory Report, Exhibit 21, Fitch's Response to the Third Request for Information, 18 November 2016, p. 3.
[85] Supervisory Report, Exhibit 21, Fitch's Response to the Third Request for Information, 18 November 2016, p. 3.
[86] CJEU, Case C-204/09, Flachglas Torgau GmbH, 14 February 2012, point 37.

explicitly or implicitly rated in the credit rating, whether or not it has solicited that credit rating and whether or not it has provided information for that credit rating"[87]. The rated entity must be a legal person, irrespective of whether it is a limited liability company, a non-profit foundation, a public (sector) company, etc.

89. Third, it is irrelevant for the purposes of interpreting "a member of the administrative or supervisory board of the rated entity" to assess whether the board of the rated entity did have specific tasks or did perform in practice these tasks. For the same reasons related to the need to ensure a uniform interpretation of EU law including Point 3(ca) of Section B of Annex I of the Regulation, it is not possible to make the applicability of this Point 3(ca) dependant, on a case-by-case basis, on the tasks performed in theory or in practice by the board of the rated entity. Across the EU and even within each Member State, there is variety in the type of tasks performed by a board.

90. In any event, in the specific case of FNSP's board, this board had a number of significant tasks during the period of the existence of the PSIs' rating on FNSP. FNSP is in charge of the administrative and financial management[88] of the *Institut d'Etudes Politiques (IEP) de Paris* (frequently called "Sciences Po Paris"). Article 3 of the decree N° 46-492 of 22 March 1946 on FNSP[89] (applicable until the end of 2015) listed the type of matters on which the board took decisions. This included the budget, the acquisitions, the investment of available funds, etc. This list was not exhaustive as clearly indicated by the word "notamment" (i.e. "in particular/especially") at the beginning of Article 3. This shows that FNSP's board could also take other decisions. Following the decree N° 2015-1829 (in force since 2016), the list of tasks of FNSP's board has been clarified and extended: the board decides on the business of FNSP and as such, it votes the budget and authorises acquisitions, loans and the issuance of debt securities, amongst other tasks[90].

---

[87] Article 3(1)(f) of the Regulation.

[88] See Exhibit 39, Article L758-1 of «Code de l'éducation», in both the version in force between 22 June 2000 and 10 April 2015, and Exhibit 40 for the version in force after 10 April 2015: FNSP «assure la gestion administrative et financière de l'Institut d'études politiques de Paris».

[89] See Exhibit 41, Article 3 of the « Décret No 46-492 du 22 mars 1946, Fondation Nationale des Sciences Politiques », in force until 31 December 2015. See also Supervisory Report, Exhibit 52, "Sciences Po; Une forte ambition, une gestion defaillante", Cour des Comptes, Rapport Public thématique, 2012, footnote 8, p. 22, in French only : « Les règles de gouvernance de la FNSP, issues de l'ordonnance de 1945 et complétées par la loi du 2 juillet 1998, ont été inscrites dans le code de l'éducation. Elles ont été approuvées par son conseil d'administration à l'occasion de la séance du 2 décembre 2001. Ces règles sont complétées par un décret du 22 mars 1946 et par un décret du 28 décembre 1972, modifié par des décrets du 15 mars 1996 et du 26 mars 1999 ».

[90] Exhibit 42, Décret n° 2015-1829 du 29 décembre 2015 portant approbation des statuts de la Fondation nationale des sciences politiques, JORF n°0303 du 31 décembre 2015, p. 25260. See in particular Article 21 of the decree : « Le conseil d'administration règle, par ses délibérations, les affaires de la fondation. A ce titre: 1° Il fixe le cadre général de l'action de l'Institut d'études politiques de Paris ; 2° Il vote le budget ; […] 4° Il accepte les libéralités et autorise, à l'exception de la gestion des affaires courantes, les acquisitions et cessions de biens immobiliers, les marchés, les baux et contrats de location, la constitution d'hypothèques et les emprunts, ainsi que les cautions et garanties accordées au nom de la fondation ; […] 7° Il autorise les prises de participations dans les sociétés régulièrement constituées, conformément à l'objet de la fondation ; 8° Il autorise l'émission de titres de créances de la fondation ; […] ».

91. The PSIs referred to a report of the French Court of Auditors, which establishes deficiencies in the management of FNSP and the lack of vigilance of its board[91]. However, the fact that according to the French Court of Auditors, FNSP's board did not properly perform its tasks cannot have any impact on whether Point 3(ca) of Section B of Annex I of the Regulation is applicable; otherwise this would clearly undermine the uniform application of EU law by making the applicability of Point 3(ca) dependant on a case-by-case assessment of the way the board of a rated entity has performed its function.

92. Finally, the PSIs' also indicated that "although [FSC]'s presence on FNSP's board may give the appearance of a potential conflict of interest, there was no actual conflict of interest"[92]. The IIO disagrees with this argument. First, the conflict of interest was not only of a potential nature. [FSC][93] did attend or gave a proxy in a number of the relevant meetings of FNSP's board[94]. More importantly, the provision of Point 3 of Section B of Annex I of the Regulation specifically defines the requirements applicable to a CRA in precise circumstances, i.e. if certain circumstances are met, certain requirements must be met. It does not distinguish between what could be an actual conflict of interest and what could be only the "appearance of a potential conflict of interest". Furthermore, according to Article 6(2) of the Regulation, the requirements set out in Section B of Annex I aim at ensuring compliance with Article 6(1) which covers "any existing or potential conflicts of interest or business relationship".

93. The Board agrees with the IIO and concludes that the fact that [FSC] was a member of the board of directors of FNSP was covered by Point 3(ca) of Section B of Annex I of the Regulation. The argument of the PSIs about the specificities of FNSP's board cannot be accepted.

94. Therefore, because the rating on FNSP was existing and [FSC] was a board member of FNSP for the purposes of Point 3(ca) of Section B of Annex I of the Regulation, the PSIs

---

[91] Supervisory Report, Exhibit 52, "Sciences Po; Une forte ambition, une gestion defaillante", Cour des Comptes, Rapport Public thématique, 2012, pp. 106-107: « Au titre des contrôles internes, la Cour relève que les instances délibérantes de Sciences Po n'ont pas joué leur rôle de supervision des décisions prises par l'exécutif. Les défaillances constatées dans la gestion de l'établissement soulignent à tout le moins le défaut de vigilance du conseil d'administration de la FNSP et du conseil de direction de l'IEP. Elles invitent à une limitation de la durée des mandats de président des deux organes délibérants ».

[92] Supervisory Report, Exhibit 21, Fitch's Response to the Third Request for Information, 18 November 2016, p. 3.

[93] As background information, [FSC] was appointed as board member of FNSP by the French Prime Minister in the category of board members chosen because of their political, economic or social activity ("personnalités choisies par la Premier Ministre en raison de leur activité politique, économique ou sociale"). In addition, [FSC] was also a member of FNSP's Remuneration Commission. See Supervisory Report, Exhibit 52, "Sciences Po; Une forte ambition, une gestion defaillante", Cour des Comptes, Rapport Public thématique, 2012, pp. 118 and 122.

[94] See Exhibits 44-58, Minutes of FNSP's board meetings, from the entry into force of the CRA III Regulation until [FSC]'s resignation as a Board member of FNSP. The IIO derives from these minutes that [FSC] was present at FNSP's board meetings of 11 February 2014 and 10 February 2015 and gave a proxy for the boards of 8 October 2013, 17 December 2013, 25 March 2014, 29 April 2014, 13 May 2014, 21 October 2014, 9 December 2014, 12 May 2015, 8 September 2015, 6 October 2015, and 15 December 2015.

were subject to the requirements of Article 6(2) of the Regulation, read in conjunction with Point 3 of Section B of Annex I.

95. Point 3 of Section B of Annex I of the Regulation provides, in the case of an existing rating, for an "immediate" disclosure where a shareholder holding 10% or more of the CRA is a board member of the rated entity.

96. The IIO noted that the Regulation does not expand on the meaning of "immediate" for the purposes of these two provisions.

97. This expression must therefore be given an autonomous and uniform interpretation, having regard to the usual meaning of this word, the context of the relevant articles and the objectives pursued by the legislation of which they are part, in accordance with settled case-law from the CJEU[95].

98. The usual meaning of the term "immediate", according to the Oxford University Press' Oxford Dictionaries and the Collins Dictionary of English, refers to "occurring or done at once; instant" and "taking place or accomplished without delay", respectively[96].

99. Regarding the context of "immediate" in Point 3 of Section B of Annex I of the Regulation, the IIO noted that the disclosure which is provided by Point 3a of Section B of Annex I of the Regulation where an existing rating is potentially affected by the fact that a shareholder holding more that 5% of the CRA is a board member of the rated entity is not indicated as being "immediate". This comparison implies that immediate disclosure (in case of holding of more than 10%) is distinct from other type of disclosures, which might not have to be so immediate.

100. Regarding the objective pursued, one of the core objectives of the Regulation is to promote the independence of credit rating activities and the avoidance of conflicts of interests[97]. The immediate disclosure provided for by Point 3 of Section B of Annex I of the Regulation aims at ensuring that investors are informed of any existing or potential conflicts of interest or business relationship that could affect an existing credit rating. If this information is delayed, then it loses its value and does not achieve its goal because investors continue relying in the meantime on an existing credit rating without being aware of the fact that it could be affected by a conflict of interests.

101. As regards the facts, it is only on 29 January 2016 that the PSIs published a NRAC indicating that "this announcement corrects Fitch's previous disclosure with respect to its rating action commentaries about *Fondation Nationale des Sciences Politiques* (FNSP). [FSC], has served on the Board of Directors of the *Fondation Nationale des Sciences*

[95] See for example Case C-549/07 *Wallentin-Hermann* [2008] ECR I-11061, para. 17, and Case C-119/12 *Probst* [2012] ECR, para. 20.
[96] See Exhibit 59, Definition of "immediate", Oxford Dictionaries, and Exhibit 60, Definition of "immediate", Collins English Dictionary.
[97] See for instance Article 1 of the Regulation.

Politiques since 9 November 2001. [FSC] is the controlling shareholder of [Company E], which currently owns a 20% equity interest in Fitch[98]".

102. There was no earlier disclosure about [FSC]'s board membership of FNSP. In particular, no such disclosure took place "immediately" after the entry into force of the CRA III Regulation or "immediately" after the affirmation of this existing rating on 10 September 2013[99] and 9 September 2014[100]. On the contrary, regarding these affirmations, the relevant RACs did not include this disclosure[101].

103. On this basis, considering the time taken by the PSIs in the present case to perform the relevant disclosure provided for by Article 6(2) read in conjunction with Point 3 of Section B of Annex I of the Regulation concerning the existing rating on FNSP, the Board considers that it is clear that they cannot be considered as having been "immediate".

104. The Board therefore considers that since [FSC] was a board member of FNSP and there was an existing rating on FNSP, this constitutes a breach of the first paragraph of Point 3 of Section B of Annex I of the Regulation.

105. The Board agrees with the considerations developed by the IIO regarding the legal entity within the PSIs' group which the infringement regarding the lack of immediate disclosure of the fact that [FSC] was a board member of FNSP is attributable to.

106. The Board notes that FNSP's rating was issued in 2004 by Fitch France[102]. In addition, for the two affirmations of 10 September 2013 and 9 September 2014, both the primary analyst and the analytical manager were based and employed by Fitch France[103]. In line with CESR's guidance on this topic[104], Fitch France was thus responsible for these two affirmations[105].

---

[98] Supervisory Report, Exhibit 51, Non-Rating Action Commentary FNSP, 29 January 2016.
[99] Supervisory Report, Exhibit 49, Rating Action Commentary FNSP, 10 September 2013.
[100] Supervisory Report, Exhibit 50, Rating Action Commentary FNSP, 9 September 2014.
[101] Supervisory Report, Exhibit 49, Rating Action Commentary FNSP, 10 September 2013, and Supervisory Report, Exhibit 50, Rating Action Commentary FNSP, 9 September 2014.
[102] Supervisory Report, Exhibit 48, Full Rating Report, "Credit analysis on FNSP", 8 September 2004.
[103] Supervisory Report, Exhibit 49, Rating Action Commentary FNSP, 10 September 2013 and Exhibit 50, Rating Action Commentary FNSP, 9 September 2014. See also Supervisory Report, Exhibit 23, Fitch's Response to the Fourth Request for Information I, 28 April 2017, p. 2.
[104] See Supervisory Report, Exhibit 45, CESR's Guidance 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, 4th June 2010, CESR/10-347, p. 31: "158. The CRA deemed to have issued a given rating and thus deemed legally responsible for that rating is 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). Upon each review CRAs are required to disclose the name, job title and location of the lead rating analyst (Article 4.2, Annex I.D.1). CRAs should not shift a lead rating analyst to another CRA in order to circumvent the Regulation".
[105] Supervisory Report, Exhibit 49, Rating Action Commentary FNSP, 10 September 2013 and Exhibit 50, Rating Action Commentary FNSP, 9 September 2014. See also Supervisory Report, Exhibit 23, Fitch's Response to the Fourth Request for Information I, 28 April 2017, p. 2.

107. According to the PSIs' applicable internal policies and procedures, the relevant analysts of Fitch France were thus responsible for the disclosures relating to board membership of the PSIs' shareholders. The PSIs indicated that "Fitch's analytical staff were responsible for ensuring that required disclosures were made[106]". Indeed, the applicable versions of Bulletin 10A provided that [omitted due to confidentiality] [107].

108. In the results of her investigation, the IIO also added that the relevant analysts of Fitch France "knew that [FSC] was a board member" [108] of FNSP.

109. On the other side, there are a number of factual findings that point to the role of the compliance function, and thus Fitch, in the commitment of the infringement regarding the lack of disclosure of [FSC]'s board membership of FNSP.

110. In particular, the IIO noted that the non-disclosure is linked to a certain extent to the fact that FNSP was not listed in Bulletin 10A when the CRA III Regulation entered into force as well as when the affirmations on FNSP took place[109].

111. It was the responsibility of the compliance function to liaise with the PSIs' shareholders in order to get the information on the ownership interests and board memberships of the PSIs' shareholders to prepare Bulletin 10A. The compliance officers were in charge of updating the Bulletin 10A[110]. At that time, the applicable PSIs' internal policies and procedures did not require them to verify the information received from the shareholders on their board membership[111]. The compliance function later became responsible with the task of checking this information[112].

112. The Board acknowledges that the IIO also noted that the lack of immediate disclosure of [FSC]'s board membership of FNSP is also linked to a certain extent to the work of the CRA3 Working group which concluded that "The relevant Fitch Ratings entity had been disclosing that [FSC] was a board member of the relevant rated entity in its RACs since 2005". The CRA3 Working group did not assess the situation for FNSP since FNSP was not mentioned on the Bulletin 10A. In this respect, the IIO noted that the CRA3 Working group was comprised of the compliance function (along Global Operations Management,

---

[106] Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, p. 1.
[107] See Supervisory Report, Exhibits 9.3.6 to 9.3.14 for Bulletin 10A, versions 6-14.
[108] Supervisory Report, Exhibit 18, Fitch's letter ESMA Preliminary Views Following the Investigation of Fitch Ratings Firewall Policy, 22 July 2016, p. 5.
[109] See Supervisory Report, Exhibits 9.3.6 to 9.3.12 for Bulletin 10A, version 6-12.
[110] Supervisory Report, Exhibit 9.4, Fitch's reply to question 7, 3 July 2015, p. 2.
[111] Supervisory Report, Exhibit 18, Fitch's letter ESMA Preliminary Views Following the Investigation of Fitch Ratings Firewall Policy, p. 8 and Supervisory Report, Exhibit 21, Fitch's Response to the Third Request for Information, p. 6.
[112] The PSIs confirmed that in autumn 2015, [TS, Officer in the Compliance Department] "began checking the information provided by [Company E] against the most recent [Company E] annual report at the request of the then manager […]. There are no documents in support of this as the request was made orally". Exhibit 22, PSIs' Response to the IIO's First RFI, Question 15.

Legal and Credit Policy and "under the oversight of members of Fitch Ratings' Executive Committee and its then Chief Compliance Officer" [113])[114].

113. Overall, despite the factual findings about the role of the compliance function (Fitch), the Board considers that the infringement of Point 20 of Section I of Annex III of the Regulation concerning FNSP is attributable to Fitch France, which issued the rating and the two affirmations on FNSP and was in charge of implementing the relevant disclosure requirements.

114. To conclude, on the basis of an assessment of the complete file submitted by the IIO and having taken into account the written submissions made on behalf of Fitch France, the Board finds that Fitch France infringed Article 6(2) of the Regulation, in conjunction with the first paragraph of Point 3 of Section B of Annex I by not having immediately disclosed that the existing rating on FNSP was potentially affected by the fact that [FSC] was a board member of FNSP. This constitutes the infringement set out at Point 20 of Section I of Annex III of the Regulation.

Intent or negligence

115. Article 36a(1) of the Regulation provides as follows:

116. "Where, in accordance with Article 23e (5), ESMA's Board of Supervisors finds that a credit rating agency has, intentionally or negligently, committed one of the infringements listed in Annex III, it shall adopt a decision imposing a fine in accordance with paragraph 2."

117. "An infringement by a credit rating agency shall be considered to have been committed intentionally if ESMA finds objective factors which demonstrate that the credit rating agency or its senior management acted deliberately to commit the infringement".

118. In accordance with Article 36a(1) of the Regulation, a finding that an infringement has been committed by a CRA with intention or negligence will lead to the imposition of a fine by the Board of Supervisors.

119. Consequently, the findings of the Board of Supervisors need to include also findings considering that the relevant infringement has been committed by the PSIs intentionally or negligently.

120. In accordance with Article 36a(1) of the Regulation, a finding that an infringement has been committed intentionally requires a finding of "objective factors which demonstrate that the

[113] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 19.
[114] Supervisory Report, Exhibit 21, Fitch's Response to the Third Request for Information 18 November 2016, p. 2.

credit rating agency or its senior management acted deliberately to commit the infringement".

121. The factual background as set out in this Statement of Findings does not establish that there are objective factors which demonstrate that Fitch France, its employees or senior managers acted deliberately to commit the infringement of Point 20 of Section I of Annex III of the Regulation regarding FNSP.

122. It should therefore be assessed whether there was negligence.

Considerations on negligence

123. There is no explicit guidance as regards the concept of "negligence" in the Regulation. However, it is clear from the provisions of Articles 24 and 36a of the Regulation that the term "negligence" as referred to in the Regulation requires more than a determination that there has been the commission of an infringement.

124. Further, it is clear from the second subparagraph of Article 36a (1) of the Regulation that a negligent infringement is not an infringement which was committed deliberately or intentionally. This position is further reinforced by the case-law of the CJEU which ruled that negligence may be understood as entailing an unintentional act or omission[115].

125. In addition, "negligence" in the context of the Regulation is an EU law concept– albeit a concept which is familiar to and an inherent part of the 28 Member States' legal systems– which must be given an autonomous and uniform interpretation.

126. Taking into account the CJEU jurisprudence[116], the concept of a negligent infringement of the Regulation is to be understood to denote a lack of care on the part of a CRA when it fails to comply with this Regulation.

127. Based on this, negligence will be considered to be established in circumstances where the CRA, as a professional firm in the financial services sector subject to stringent regulatory requirements, is required to take special care in assessing the risks that its acts or omissions entail, and has failed to take that care; and as result of that failure, the CRA has not foreseen the consequences of its acts or omissions, including particularly its infringement of the Regulation, in circumstances when a person in such a position who is normally informed and sufficiently attentive could not have failed to foresee those consequences.

---

[115] See for instance Case C-308/06, *International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I- 4057, where the CJEU noted at para. 75 of its judgment that all of the Member States' legal systems "have recourse to the concept of negligence which refers to an unintentional act or omission by which the person responsible breaches his duty of care".

[116] See for instance Case C-48/98, *Firma Söhl & Söhlke v Hauptzollamt Bremen* [1999] ECR I-7877, para. 58; Case C-64/89, *Deutscher Fernsprecher* [1990] ECR 1-2535, para. 19.

128. The following points should be taken into consideration regarding the standard of care to be expected of a CRA.

129. First, the position taken by the General Court in the Telefonica case must be considered. In this case, the General Court spoke of persons "carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on that account be expected to take special care in assessing the risks that such an activity entails[117]". Similarly, it is considered that, operating within the framework of a regulated industry, a CRA, which holds itself out as a professional entity and carries out regulated activities, should be expected to exercise special care in assessing the risks that its acts and omissions may entail.

130. In this respect, the PSIs in their Response to the IIO's Statement of Findings noted that "The Telefonica case cited by the IIO and other relevant judgments clearly place significant weight on the available precedents that put those parties in a position of being able to foresee the consequences of their actions. Moreover, as set out above, the Court relied specifically on the fact that the undertaking concerned "could not have been unaware" that its conduct was contrary to the applicable legal rules. Accordingly, Fitch Ratings submits that the standard of care expected of a CRA cannot be so "high" that negligence is established simply because the CRA adopts an interpretation of words in the CRA Regulation with which ESMA subsequently disagrees. […] Once ESMA has adopted a definitive official position on such issues then it might be negligence – as in the Telefonica case – to ignore that position. But that is not the present situation[118]".

131. However, the Board agrees with the IIO and considers that the logic of requiring ESMA to adopt an official position (or to rely on a previous decisional practice) in addition to the obligations set out in the Regulation[119], would lead to absurd situations. Based on this logic, negligence would never be considered in enforcement cases which concern the first-time application of a provision of the Regulation on which ESMA's guidance or previous decisions have not yet elaborated. In such cases, the CRA would never be deemed negligent and no fine would be imposed as there would neither exist previous official positions nor a decisional practice on the issue.

132. In addition, contrary to the PSIs' claims, the high standard of care expected of a CRA does not establish negligence "automatically" where ESMA's and the CRA's interpretation on the Regulation differ. Nevertheless, the standard of care expected of a CRA is of such a degree that a CRA is required to take special care. In this respect, if a CRA does not understand the requirements of the Regulation or has any doubts concerning their interpretation, the standard of care expected from it requires that, for example, it takes

[117] Case T-336/07, Telefónica, SA and Telefónica de España, SA v Commission [2012] ECLI:EU:T:2012:172, para. 323.
[118] Exhibit 111, PSIs' Response to the IIO's Statement of Findings, paras. 2.9.
[119] This is all the more the case as regulations do not require any measures of transposition to be directly applicable.

(before performing a given act) “appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences that a given act may entail[120]”. The same would apply if the CRA intends to follow an interpretation of a requirement of the Regulation, which would not be the interpretation to be derived, for example, from a plain reading of the relevant provision.

133. Moreover, the Board agrees with the IIO and notes that in the cases cited by the PSIs where there were divergent positions between the Commission and the national authorities[121], the previous practices of the Commission were mentioned because they had the function of countering the differing views of the national authorities. The argument that the PSIs try to derive from this case-law regarding the need of ESMA’s previous precedents must all the more be rejected in this investigation as there has been no diverging previous position.

134. Second, regard should be given to the nature and significance of the objects and provisions of the Regulation. In this respect, Recitals 1 and 2 of the Regulation emphasise the important role and impact of CRAs in global securities and banking markets, the resulting essential need for credit rating activities to be conducted in accordance with principles of integrity, transparency, responsibility and good governance, and the resulting intention of the legislator to provide stringent requirements in relation to the conduct of CRAs. Further, the weight given to these considerations by the legislator is reflected by the nature and extent of the requirements imposed on CRAs under Annex I of the Regulation and by the corresponding infringement provisions under Annex III of the Regulation. Moreover, of more particular note, the Regulation envisages that an important function of a CRA is to ensure that it monitors its own activities in order to comply with the Regulation and in order to identify instances in which its present practices carry the risk of non-compliance with the Regulation. For instance, the requirement for a CRA to have sound administrative or accounting procedures, internal controls mechanisms or to establish and maintain a compliance function reflects the importance of this function.

135. The Board finds, on these bases, that the standard of care to be expected of a CRA is high.

Assessment of negligence in the present investigation

136. Regarding the application of negligence to the infringement of Points 20 of Section I of Annex III of the Regulation regarding FNSP, the Board notes that in December 2013, ESMA adopted a Q&A on the implementation of CRA III ("Questions and Answers, Implementation of the Regulation (EU) No 462/2013 on Credit Rating Agencies"). This Q&A

[120] Case T-336/07, Telefónica, SA and Telefónica de España, SA v Commission [2012] ECLI:EU:T:2012:172, para. 323.
[121] See Case T-271/03 Deutsche Telekom AG v Commission [2008] EU:T:2008:101, para. 295; Case C-280/08 P Deutsche Telekom AG v Commission [2010] EU:C:2010:603, para. 124 and the case-law cited; Case C-295/12 P Telefonica, SA and Telefonica de España, SA v Commission [2014] EU:C:2014:2062, para. 156 and Case T-336/07, Telefónica, SA and Telefónica de España, SA v Commission [2012] ECLI:EU:T:2012:172, para. 319.

indicated that "CRAs are required to make all their best efforts to identify their relevant shareholders and frequently monitor the activities, stake, rights, interests and affiliations of its shareholders in rated entities so as to make sure that it does not breach the new regulatory issuance prohibitions and disclosure requirements. The frequency of monitoring should depend on different factors. For instance, the closer the stake of a shareholder is to any regulatory limitation, the more frequently a CRA should engage with this shareholder[122]".

137. However, Fitch's compliance function which was in charge of liaising with PSIs' shareholders was not aware of [FSC]'s board membership to FNSP. FNSP was thus not listed in Bulletin 10A.

138. At that time, Fitch's compliance function relied fully on the information received from the PSIs' shareholders without performing any checks. As indicated by the PSIs, "[FSC] did not inform us of his position on this board prior to the ESMA inquiry[123]".

139. However, [FSC]'s board membership was a public information. It was not difficult to find; ESMA's Supervision Department discovered it on the basis of the information publicly available[124].

140. Furthermore, within the PSIs' group, a number of employees were aware of [FSC]'s membership in FNSP. In particular, the analysts of Fitch France who rated FNSP and were in charge of the affirmations on this existing rating knew this board membership of [FSC][125].

141. Even when asked specifically by ESMA's Supervision Department in its first RFI to provide a list of the rated entities for which [FSC] was a board member[126], the PSIs did not make the appropriate check and did not mention FNSP[127].

142. It is thus ESMA's Supervision Department which informed the PSIs on 18 September 2015 that according to public information, [FSC] was a board member of FNSP[128].

---

[122] Supervisory Report, Exhibit 47, Questions and Answers, Implementation of the Regulation (EU) No 462/2013 on Credit Rating Agencies, pp. 8-9.
[123] Supervisory Report, Exhibit 11.1, Fitch's reply to question 1, 19 October 2015.
[124] Exhibit 1, Supervisory Report, p. 52, para 177.
[125] See Supervisory Report, Exhibit 18, Fitch's letter ESMA Preliminary Views Following the Investigation of Fitch Ratings Firewall Policy, 22 July 2016, p. 5, Supervisory Report, Exhibit 21, Fitch's Response to the Third Request for Information, 18 November 2016, p. 3, and Exhibit 22, PSIs' Response to the IIO's First RFI, Response 16.3 (g), p. 20.
[126] Supervisory Report, Exhibit 8, ESMA/2015/877, Request for information concerning Fitch's firewall policy, 21 May 2015, Question 2.
[127] Supervisory Report, Exhibit 9.1, Fitch's reply to Questions 1 & 2, Question 2.
[128] Supervisory Report, Exhibit 10, ESMA/2015/1270, Request for information concerning Fitch Ratings firewall policy 18 September 2015, Question 1. Exhibit 22, PSIs' Response to the IIO's First RFI, Question 16.

143. It is only in autumn 2015 that [TS, Compliance department Senior Officer] "began checking the information provided by [Company E] against the most recent [Company E] annual report at the request of the manager […][129]".

144. In addition, the Board notes that when the CRA III requirements entered into force, the CRA3 Working group (a working group established within the PSIs, that towards the end of 2012[130] started to assess the changes needed in the PSIs' internal policies and procedures because of the CRA III Regulation), while assessing whether the existing disclosures were sufficient, did not assess the existing rating on FNSP because it fully relied on the information received from the PSIs' shareholders and did not make any further checks to see if there were other board memberships to be taken into consideration.

145. Finally, the PSIs initially indicated to ESMA's Supervision Department that "three analysts based in the Paris office misinterpreted the policy requirement and failed to notify Compliance of [FSC]'s board membership on FNSP and continued to rate it while they knew that [FSC] was a board member. Fitch's analysts for FNSP considered that the board referred to did not have strategic influence or control over the activities of FNSP in the way that a normal corporate board influences and controls limited liability companies, and thus concluded (wrongly) that the board position of FNSP was not subject to the requirements of the Firewall Policy. ([Company E]'s Legal Department also shared this view, which formed the basis for not disclosing [FSC]'s membership to Compliance)[131]".

146. In their Comments on the Supervisory Report, the PSIs clarified their position in this respect: "With the benefit of hindsight, the comment […] that the relevant analysts should have contacted Fitch's Compliance Department concerning FNSP was incorrect, because it is clear […] that the analysts' belief that the "board" of FNSP was not a board in the sense envisaged by CRA III was correct – so that notification was not required; alternatively (for the same reasons) Fitch's Compliance Department would have reached that conclusion had they been asked the question" [132].

147. As already mentioned, the relevant analysts who were in charge of implementing the relevant disclosure were thus fully aware of [FSC]'s board membership of FNSP. However, the IIO has not found in the file evidence that would show that "the analysts' belief that the "board" of FNSP was not a board in the sense envisaged by CRA III [133]" has been at that time assessed carefully and justified for example on the basis of an internal or external specific assessment of the concept of "board" under the Regulation. On the contrary, when asked by the IIO about whether an internal or external legal assessment of the notion of "administrative or supervisory board" was prepared in view of the entry into force of the

[129] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 15.
[130] Exhibit 9, PSIs' Comments on the Supervisory Report, p.4.
[131] Supervisory Report, Exhibit 18, Fitch's letter ESMA Preliminary Views Following the Investigation of Fitch Ratings Firewall Policy, 22 July 2016, p. 5.
[132] Exhibit 9, PSIs' Comments on the Supervisory Report, p. 6.
[133] Exhibit 9, PSIs' Comments on the Supervisory Report, p. 6.

Regulation or the CRA III Regulation, the PSIs were unable to submit any specific document[134]. They only refer to the work of the CRA3 Working group, but there is no evidence whatsoever that this group performed a specific assessment of the concept of "board" under the Regulation.

148. On the basis of the above-mentioned elements, the Board finds that Fitch France failed to take the special care expected of a CRA. In particular, until autumn 2015, no checks (even basic ones, on the basis of publicly available information) were performed on the information submitted by their shareholders. As Fitch France is a registered CRAs, it is upon it that the CRA requirements do apply. For that purpose, Fitch France should in particular ensure and check that the information used to comply with its regulatory obligations is sufficiently reliable.

149. As a result of that failure, Fitch France did not foresee the consequences of its acts, in particular the infringement of the Regulation, in circumstances when a person in such a position who is normally informed and sufficiently attentive could not have failed to foresee those consequences. On this basis, it is considered that Fitch France has been negligent when committing the infringement of Point 20 of Section I of Annex III of the Regulation concerning FNSP.

Fines

Determination of the basic amount

150. Regarding Point 20 of Section I of Annex III of the Regulation, Article 36a of the Regulation provides in paragraph 2 as follows:

"2. The basic amount of the fines referred to in paragraph 1 shall be included within the following limits:

(a) for the infringements referred to in points 1 to 5, 11 to 15, 19, 20, 23, 26a to 26d, 28, 30, 32, 33, 35, 41, 43, 50, 51 and 55 to 62 of Section I of Annex III, the fines shall amount to at least EUR 500 000 and shall not exceed EUR 750 000; […]

151. In order to decide whether the basic amount of the fines should be set at the lower, the middle or the higher end of the limits set out in the first subparagraph, ESMA shall have regard to the annual turnover in the preceding business year of the credit rating agency concerned. The basic amount shall be at the lower end of the limit for credit rating agencies whose annual turnover is below EUR 10 million, the middle of the limit for the credit rating

[134] Exhibit 26, PSIs' Response to the IIO's Third RFI, Question 8. See also Supervisory Report, Exhibit 23, Fitch's Response to the Fourth Request for Information I, 28 April 2017, Question 6.

agencies whose annual turnover is between EUR 10 and 50 million and the higher end of the limit for the credit rating agencies whose annual turnover is higher than EUR 50 million".

152. It has been established that Fitch France committed the infringement set out at Point 20 of Section I of Annex III of the Regulation, by not having immediately disclosed that the existing rating on FNSP was potentially affected by the fact that [FSC] was a board member of FNSP. A NRAC correcting the disclosure was published in January 2016[135].

153. To determine the basic amount of the fine, the Board has regard to Fitch France's annual turnover in the preceding business year.

154. In 2015, Fitch France had a turnover of EUR 28.53 million[136].

155. Thus, the basic amount of the fine for the infringement listed in Point 20 of Section I of Annex III of the Regulation is set at the middle of the limit of the fine set out in Article 36a(2)(a) of the Regulation and shall not exceed EUR 625 000.

Aggravating factors

156. Annex IV of the Regulation lists the aggravating factors to be taken into consideration for the adjustment of the fine. Their application to the present investigation is assessed below.

157. Annex IV, Point I. 1. If the infringement has been committed repeatedly, for every time it has been repeated, an additional coefficient of 1,1 shall apply.

158. Regarding the infringement by Fitch France of Point 20 of Section I of Annex III of the Regulation with regard to FNSP's existing rating, the IIO noted that it has been committed three times: there was no immediate disclosure of [FSC]'s board membership of FNSP (i) at the entry into force of the CRA III Regulation, (ii) when it was affirmed on 10 September 2013 and (iii) when it was affirmed on 9 September 2014 (as shown in the relevant RACs). Therefore, putting aside the first time Fitch France has committed the infringement, it has been repeated 2 times.

159. This aggravating factor is thus applicable for the infringement by Fitch France of Point 20 of Section I of Annex III of the Regulation.

160. Annex IV, Point I. 2. If the infringement has been committed for more than six months, a coefficient of 1,5 shall apply.

[135] Supervisory Report, Exhibit 51, Non-Rating Action Commentary FNSP, 29 January 2016.
[136] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 1. See also Supervisory Report, Exhibit 1, Fitch Ratings Transparency Report 2016, p. 22. The revenue derived from ratings activities amounted to EUR 28.53 million.

161. The infringement by Fitch France of Point 20 of Section I of Annex III of the Regulation was committed for more than six months: the correcting disclosure[137] regarding the existing FNSP rating and its affirmations of 10 September 2013 and 9 September 2014 took place only in January 2016, whereas these requirements entered into force with the CRA III in June 2013 when the FNSP rating was existing.

162. This aggravating factor is thus applicable to the infringement by Fitch France of Point 20 of Section I of Annex III of the Regulation.

163. Annex IV, Point I. 3. If the infringement has revealed systemic weaknesses in the organisation of the credit rating agency, in particular in its procedures, management systems or internal controls, a coefficient of 2,2 shall apply.

164. The Board acknowledges that the Regulation does not provide guidance on what constitutes "systemic weaknesses in the organisation of the credit rating agency". However, based on the wording of the terms used, not all weaknesses in the procedures, management systems or the internal controls will necessarily constitute "systemic weaknesses in the organisation of a CRA".

165. In the analysis on whether the aggravating factor applies, the Board acknowledges the considerations formulated by the IIO on the type and the level of seriousness of the failure in the PSIs' procedure and internal controls.

166. The IIO noted that the Fitch group had a specific procedure and an internal control framework to avoid conflicts of interests in general, which included for example the Firewall Policy. It consisted of a number of levels of control involving different persons at different levels of the organisation. The infringement of Points 20 is linked to a number of factors, some of them pointing at the role of the compliance function. However, there is no evidence that the PSIs' procedures in general and the PSIs' wider system of internal controls, which the PSIs use to comply with the other obligations under the Regulation, also have weaknesses.

167. Thus, the Board does not consider that the infringement of Point 20 by Fitch France of Section I of Annex III reveals a systemic weakness in the organisation of the CRAs, in particular in their procedures, management systems or internal controls. This aggravating factor is thus not applicable.

168. Annex IV, Point I. 4. If the infringement has had a negative impact on the quality of the ratings rated by the credit rating agency concerned, a coefficient of 1,5 shall apply.

169. Evidence of a negative impact on the ratings could for example be inferred from evidence of deviations of ratings between the ratings that were issued by the PSIs and the ratings that would have been issued if there would have been no infringement of Points 20 of

[137] Supervisory Report, Exhibit 51, Non-Rating Action Commentary FNSP, 29 January 2016.

Section I of Annex III of the Regulation concerning FNSP, if these deviations could not be explained by other reasons. Such a demonstration would be very difficult to achieve. In the present investigation, there is no evidence in the file that would support such a demonstration.

170. It should also be noted that the PSIs indicated the following[138]: “Fitch Ratings' [Senior] Credit Officer carried out [in response to the IIO’s First RFI[139]] a review of the quality of the credit ratings for […] FNSP to ensure the ratings were timely, robust and consistent with other Fitch Ratings' ratings. […] His review of these factors leads to the conclusion that even if an infringement were established in the present case there was no negative impact on the quality of these ratings”. In particular, this review noted that “Fitch France's rating of FNSP was in line with criteria. The main rationale of the FNSP rating since Fitch France first rated it in 2004 is the application of the Public Sector Entity criteria, as FNSP is a not-for-profit higher education institution and is fully controlled and supervised by the French state. FNSP's rating is based on a bottom-up analysis and therefore combines the financial strength of FNSP with Fitch France's view that ultimately government intervention is likely in the event of any distress”. In addition, “Neither Fitch France nor any other Fitch Ratings entity has ever received an analytical complaint from an internal or external market participant with regards to FNSP”.

171. On that basis, it is not established in the present investigation that the infringement of Point 20 of Section I of Annex III of the Regulation committed by Fitch France concerning the FNSP rating had a negative impact on the quality of its ratings. The aggravating factor is therefore not applicable.

172. Annex IV, Point I. 5. If the infringement has been committed intentionally, a coefficient of 2 shall apply.

173. This aggravating factor is not applicable because there is no evidence that the infringement of Point 20 of Section I of Annex III of the Regulation committed by Fitch France concerning the FNSP rating have been committed intentionally.

174. Annex IV, Point I. 6. If no remedial action has been taken since the breach has been identified, a coefficient of 1,7 shall apply.

175. In relation to the infringement of Point 20 of Section I of Annex III of the Regulation, the Board notes that Fitch France issued a NRAC correcting the disclosure on FNSP on 29 January 2016[140].

176. In addition, the Board considers that the PSIs were asked by the IIO to provide a detailed description of the remedial actions taken. In particular, the PSIs mentioned the following

[138] Exhibit 22, PSIs’ Response to the IIO’s First RFI, Question 39.
[139] Exhibit 24, PSIs’ Response to the IIO’s Second RFI, Question 5.
[140] Supervisory Report, Exhibit 51, Non-Rating Action Commentary FNSP, 29 January 2016.

remedial actions[141] which are relevant for the infringement of Point 20 of Section I of Annex III of the Regulation committed by Fitch France concerning FNSP:

- Initiation of checks by the compliance function on the ownership interests and board memberships of [Company Z] and [Company E] by using […][142].

- The compliance function will "make and update all disclosures centrally, avoiding the need to make the disclosures on individual RACs" [143].

177. It should also be noted that [FSC] resigned from his membership to FNSP's board[144].

178. In addition, version 10 of the Bulletin 10 – Firewall Policy (which was published on 17 March 2017) also made it clear that "The requirements with respect to Rated Entities as set forth in this Policy apply regardless of the type, nature or legal form of the Rated Entity, including whether it is a for-profit or not-for-profit entity" [145].

179. This version 10 of the Bulletin 10 – Firewall Policy also provides for a specific "assessment process within the EU" as follows "If an EU Fitch CRA is currently maintaining a Credit Rating on a Rated Entity and/or its Securities, and Compliance subsequently obtains knowledge that there is a Disqualifying Interest in the EU with respect to this Rated Entity, then Compliance will initiate the assessment process […] to determine whether this Credit Rating can continue to be maintained [146]". This assessment process is further defined: "Upon identifying a new potential conflict of interest that may trigger a prohibition as per Section 3.3, convening a group of internal stakeholders charged with performing a documented assessment of: (i) the specifics of the potential conflict, (ii) whether Fitch Ratings may provide, or continue to provide, a Credit Rating to the entity or its Securities given the new potential conflict, and if so, whether the Credit Rating should be re-examined, (iii) the type and nature of the appropriate disclosures, and (iv) whether any additional measures are required to manage the new potential conflict; and communicating the results of such assessment to the relevant Fitch Ratings employees [147]".

180. On that basis, it is considered that remedial actions have been taken by the PSIs and therefore this aggravating factor is not applicable to the infringement of Point 20 of Section I of Annex III of the Regulation.

---

[141] For a full description of the remedial actions, please see Exhibit 22, PSIs' Response to the IIO's First RFI, Question 41.
[142] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 41, p. 51.
[143] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 41, p. 51.
[144] [FSC] resigned on 10 May 2016. See Supervisory Report, Exhibit 18, Fitch's letter ESMA Preliminary Views Following the Investigation of Fitch Ratings Firewall Policy, p. 5.
[145] Supervisory Report, Exhibit 30, Bulletin 10 – Firewall Policy – version 10, 17 March 2017, Point 2.14. Please also see the published version: Exhibit 79, Bulletin 10: Firewall Policy, Version 10, 17 March 2017.
[146] Supervisory Report, Exhibit 30, Bulletin 10 – Firewall Policy – version 10, 17 March 2017, Point 3.3.
[147] Supervisory Report, Exhibit 30, Bulletin 10 – Firewall Policy – version 10, 17 March 2017, Point 5.2.

181. Annex IV, Point I. 7. If the credit rating agency's senior management has not cooperated with ESMA in carrying out its investigations, a coefficient of 1,5 shall apply.

182. The Board considers that there is no evidence that the PSIs (including their senior management[148]) have not cooperated with the IIO during her investigation. Similarly, there is in the file no sign of a lack of cooperation of the PSIs at the stage of the investigation by ESMA's Supervision Department.

183. Therefore, it is considered that the aggravating factor relating to a lack of cooperation is not applicable.

Mitigating factors

184. Annex IV of the Regulation lists the mitigating factors to be taken into consideration for the adjustment of the fine. Their application to the present investigation is assessed below.

185. Annex IV, Point II. 1. If the infringement relates to a breach listed in Section II or III of Annex III and has been committed for fewer than 10 working days, a coefficient of 0,9 shall apply.

186. This mitigating factor is not applicable; the infringement at Points 20 is listed in Section I of Annex III of the Regulation and not in Section II or III as required by this provision.

187. Annex IV, Point II. 2. If the credit rating agency's senior management can demonstrate that they have taken all the necessary measures to prevent the infringement, a coefficient of 0,7 shall apply.

188. The Board acknowledges that in her first RFI, the IIO requested the PSIs to provide any documentation showing specifically the measures taken by the PSIs' senior management to prevent the infringements. The PSIs provided numerous documents, including different versions of the Firewall Policy, the Bulletin 10A, the Firewall Disclosure Procedures, GOM procedure, Audit Activity policies and plans, training materials, Code of Conducts, etc. [149]

189. This documentation is relevant to understand the framework within which the breaches took place. However, the Board agrees with the IIO and considers that it does not establish that the PSIs' senior management has taken all the necessary measures to prevent the infringements. The Board does not find evidence in the file that the PSIs' senior management has taken all the necessary measures to prevent the infringement of Point 20 of Section I of Annex III of the Regulation regarding FNSP.

190. This mitigating factor is thus not applicable.

[148] The IIO's RFIs were sent to and the responses were received from the PSIs' contact person as designated by the PSIs' legal representative.
[149] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 40.

191. Annex IV, Point II. 3. If the credit rating agency has brought quickly, effectively and completely the infringement to ESMA's attention, a coefficient of 0,4 shall apply.

192. This mitigating factor is not applicable because the PSIs have not brought "quickly, effectively and completely the infringements to ESMA's attention". On the contrary, the compliance function of Fitch became aware of [FSC]'s board membership of FNSP following the receipt of ESMA's Supervision Department's second RFI dated 18 September 2015[150].

193. Annex IV, Point II. 4. If the credit rating agency has voluntarily taken measures to ensure that similar infringement cannot be committed in the future, a coefficient of 0,6 shall apply.

194. As explained above regarding the aggravating factor set by Annex IV, Point I. 6. of the Regulation, the Board considers that a number of remedial actions have been taken. The Board considers that these remedial actions should ensure that similar infringements cannot be committed in the future.

195. The Board acknowledges that the IIO assessed whether these measures were taken voluntarily, which would imply that the mitigating factor provided by Annex IV, Point II. 4. of the Regulation would be applicable. In doing so, the IIO noted that there is no definition of what "voluntarily" ("*de son plein gré*" in the French version of the Regulation) precisely means within the context of this mitigating factor. Nevertheless, there are clear-cut examples. It is clear that a CRA has voluntarily taken measures when it has taken them spontaneously without any solicitation from its supervisor. It is also obvious that when there is a specific obligation to take these measures, it can no longer be considered that the measures are taken voluntarily. The situation is to a certain extent less clear-cut when the CRA takes measures only after a number of requests and interactions with its supervisor aiming at ensuring that the said measures are implemented by the CRA, for example, through an action plan defined and monitored by the supervisor

196. The Board acknowledges the following.

197. First, a number of the remedial actions were identified by the PSIs[151] before the receipt of the Action Plan of 11 October 2016 established by ESMA's Supervision Department. The PSIs indicated that "from March 2016, a Firewall Working Group ("FWG") started to meet" to enhance some aspects of its Firewall Policy and controls. The PSIs also mentioned that "All updated bulletins and procedures referred to were available in draft form by October 2016. Fitch Ratings made the conscious decision not to finalise these documents, given that ESMA had not yet provided its Action Plan. Fitch ratings wanted to ensure that all

[150] Supervisory Report, Exhibit 10, ESMA/2015/1270, Request for information concerning Fitch Ratings firewall policy 18 September 2015, Question 1.
[151] Exhibit 22, PSIs' Response to the IIO's First RFI, Questions 41 and 42.

updates reflected any additional points that might be raised by ESMA", which makes sense in the IIO's view.

198. Second, ESMA's Supervision Department indicated in its Action Plan that it "lays out the actions proposed by Fitch, as amended by ESMA[152]". A number of actions of the ESMA's Action Plan are based on the proposals from the PSIs.

199. In addition, even though the Action Plan provides that it "sets out the remedial actions that Fitch is requested to undertake[153]" and identified specific deadlines, the decision of whether or not to take these measures was, at the date of implementation of these measures, within the PSIs' remit; there was for example no decision from ESMA ordering the PSIs to put an end to the practices.

200. Therefore, the Board considers that Fitch France, together with the other PSIs, has voluntarily taken measures to ensure that similar infringements cannot be committed in the future. The mitigating factor is thus applicable for the infringement of Points 20 of Section I of Annex III of the Regulation concerning FNSP.

Determination of the adjusted fines

201. With regards to Fitch France's commitment of the infringement set out at Point 20 of Section I of Annex III of the Regulation concerning FNSP, in accordance with Article 36a(3) of the Regulation, taking into account the applicable aggravating and mitigating factors, the basic amount of EUR 625 000 must be adjusted as follows.

202. The difference between the basic amount and the amount resulting from the application of each individual coefficient linked to the aggravating factors set out in Annex IV, Point I.1 and Point I.2 and the mitigating factor set out in Annex IV, Point II.4 is added to the basic amount in the case of the aggravating factor and subtracted from the basic amount in the case of the mitigating factor:

Aggravating factor set out in Annex IV, Point I.1:

EUR 625 000 x 1.1 = EUR 687 500

EUR 687 500 – EUR 625 000 = EUR 62 500

2 repetitions: 2 x EUR 62 500 = EUR 125 000

[152] Supervisory Report, Exhibit 19, ESMA/2016/1453, Action Plan following the investigation on Fitch Rating' Firewall Policy, 11 October 2016, p. 1.
[153] Supervisory Report, Exhibit 19, ESMA/2016/1453, Action Plan following the investigation on Fitch Rating' Firewall Policy, 11 October 2016, p. 6.

Aggravating factor set out in Annex IV, Point I.2:

EUR 625 000 x 1.5 = EUR 937 500

EUR 937 500 – EUR 625 000 = EUR 312 500

Mitigating factor set out in Annex IV, Point II.4:

EUR 625 000 x 0.6 = EUR 375 000

EUR 625 000 – EUR 375 000= EUR 250 000

Adjusted fine, taking into account applicable aggravating and mitigating factors:

EUR 625 000 + EUR 125 000 + EUR 312 500 – EUR 250 000 = EUR 812 500

203. Consequently, following adjustment by taking into account the applicable aggravating and mitigating factors, the amount of the fine to be imposed on Fitch France amounts to EUR 812 500.

Financial benefit from the infringements

204. Article 36a (4) of the Regulation provides that "where the credit rating agency has directly or indirectly benefitted financially from the infringement, the fine shall be at least equal to that financial benefit". In this respect, it should be noted that in response to a request to provide the revenues received by the PSIs for the affirmations on FNSP of 10 September 2013 and 9 November 2014 (which were solicited[154]), the PSIs indicated the following: "[omitted due to confidentiality]"[155].

205. Without the need to decide whether these revenues are an indirect benefit of the infringements, it suffices to note that these revenues were lower than the fines, so Article 36a (4) of the Regulation is not applicable.

Supervisory measures

206. Article 24(1) of Regulation (EC) No 1060/2009 provides that where one or more infringements of the Regulation are found, the Board must adopt one or more of the supervisory measures listed in that Article. In accordance with Article 24(2) of Regulation

[154] Exhibit 22, PSI's Response to the IIO's First RFI, Question 45. See also Exhibit 24, PSI's Response to the Second RFI, Question 8.
[155] Exhibit 22, PSIs' Response to the IIO's First RFI, Question 44.

(EC) No 1060/2009,[156] the Board considers that it is appropriate to issue a public notice in respect of the infringements found in the present case. The Appendix to this Statement of Findings of the Board contains a draft of the public notice to be adopted.

CONCLUSIONS

207. This Statement of Findings of the Board of Supervisors concludes that Fitch France committed negligently the following infringement:

- Infringement set out at Point 20 of Section I of Annex III of the Regulation (by not having immediately disclosed that the existing rating on FNSP was potentially affected by the fact that [FSC] was a board member of FNSP).

208. Regarding the fines, the Board notes that Article 36a (4) of the Regulation states that "Where an act or omission of a credit rating agency constitutes more than one infringement listed in Annex III, only the higher fine calculated in accordance with paragraphs 2 and 3 and related to one of those infringements shall apply".

209. However, the Board does consider that Article 36a (4) of the Regulation is not applicable in the present case because there is not one same "act or omission" that constitutes by itself more than one infringement by a same CRA.

210. Therefore, taking into account the applicable aggravating and mitigating factors, the overall fines to be imposed on Fitch France for one infringement committed with negligence would amount to EUR 812.500.

211. Finally, the infringement committed would require the adoption of a supervisory measure taking the form of a public notice concerning the PSI. The Appendix to this Statement of Findings of the Board contains a draft of the public notices to be adopted.

[156] Article 24(2) of Regulation (EC) No 1060/2009 states: "*When taking the decisions referred to in paragraph 1, ESMA's Board of Supervisors shall take into account the nature and seriousness of the infringement, having regard to the following criteria: (a) the duration and frequency of the infringement; (b) whether the infringement has revealed serious or systemic weaknesses in the undertaking's procedures or in its management systems or internal controls; (c) whether financial crime was facilitated, occasioned or otherwise attributable to the infringement; (d) whether the infringement has been committed intentionally or negligently.*"

[DRAFT] PUBLIC NOTICE

Fitch France S.A.S. ("Fitch France") is a credit rating agency (CRA) established in France and is 100% owned by Fitch Ratings Limited (Fitch).

Fitch's entire capital is owned by Fitch Ratings Inc., a credit rating agency based in the United States of America. Fitch Ratings Inc. is in turn 100% owned by Fitch Group Inc.

Fitch Group Inc. is a holding company. Between 20 June 2013 and 11 April 2018, it was 20% indirectly owned by an individual ("the Shareholder"), through a company based in France.

Therefore, in the described period, the Shareholder, through a complex multi-layer legal structure, has been holding more than 10% of Fitch France.

Regulation (EC) No 1060/2009 on credit rating agencies ("The Regulation") lays down obligations for a CRA in the conduct of its activities. In conjunction with its role of supervisor of CRAs under the Regulation, the European Securities and Markets Authority ("ESMA") has functions and powers to take enforcement actions in relation to infringements of the Regulation by CRAs.

The Regulation provides that in order to avoid any conflict of interest that may influence the ratings, a CRA is prohibited to issue a (new) credit rating if a shareholder or a member of the CRA itself holding 10% or more of the capital or voting rights is a member of the administrative or supervisory body of the rated entity or a related third party.

Moreover, in case of existing ratings (i.e. existing at the moment in which the circumstance of conflict of interests takes place), the CRA shall immediately disclose where the credit rating is potentially affected by the described circumstance. Furthermore, the CRA shall immediately assess whether there are grounds for re-rating or withdrawing the existing credit rating.

In August 2017, the supervisors of CRAs in ESMA formed their view that there were serious indications of possible infringements of the Regulation by four CRAs belonging to the Fitch Group, including Fitch France.

The matter was then referred to an independent investigating officer ("the IIO") who, having conducted an investigation, submitted her findings to the Board of Supervisors ("the Board").

Having considered the evidence, the Board has found that Fitch France negligently committed one infringement of the Regulation as follows.

Infringement

Fitch France committed negligently the infringement set out at Point 20 of Section I of Annex III of the Regulation (by not having immediately disclosed that the existing rating on *Fondation Nationale des Sciences Politiques* (FNSP) was potentially affected by the fact that the Shareholder was a board member of FNSP).

A) Relevant legal provisions

Article 6 *(Independence and avoidance of conflicts of interest)*

(*1) A credit rating agency shall take all necessary steps to ensure that the issuing of a credit rating or a rating outlook is not affected by any existing or potential conflicts of interest or business relationship involving the credit rating agency issuing the credit rating or the rating outlook, its shareholders, managers, rating analysts, employees or any other natural person whose services are placed at the disposal or under the control of the credit rating agency, or any person directly or indirectly linked to it by control.*
(2) In order to ensure compliance with paragraph 1, a credit rating agency shall comply with the requirements set out in Sections A and B of Annex I.

Annex I, Section B *(Operational requirements)*

Point 3 first para. A credit rating agency shall not issue a credit rating or a rating outlook in any of the following circumstances, or shall, in the case of an existing credit rating or rating outlook, immediately disclose where the credit rating or rating outlook is potentially affected by the following:

Point 3(ca) a shareholder or member of a credit rating agency holding 10 % or more of either the capital or the voting rights of that credit rating agency or being otherwise in a position to exercise significant influence on the business activities of the credit rating agency, is a member of the administrative or supervisory board of the rated entity or a related third party.

Annex III, Section I *(List of Infringements)*

Point 20. The credit rating agency infringes Article 6(2), in conjunction with the first paragraph of point 3 of Section B of Annex I, by issuing a credit rating or rating outlook in any of the circumstances set out in the first paragraph of that point or, in the case of an existing credit rating or rating outlook, by not disclosing immediately that the credit rating or rating outlook is potentially affected by those circumstances.

B) Factual findings and analysis of the Board

According to the Regulation, in relation to existing ratings, a CRA has an obligation to disclose immediately the fact that a shareholder holding 10% or more of the capital/voting rights of that CRA, is a member of the administrative or supervisory board of the rated entity.

The Shareholder, who was holding more than 10% of the capital/voting rights of Fitch France, was a board member of FNSP between 9 November 2001 and 10 May 2016.

Fitch France rated FNSP on 8 September 2004. It was thus an existing rating when the mentioned requirement entered into force in June 2013.

Two rating actions took place concerning this existing rating on FNSP: an affirmation on 10 September 2013 and an affirmation on 9 September 2014.

The Shareholder's board membership of FNSP was disclosed only on 29 January 2016.

Fitch France argued that the board of directors of FNSP was not to be considered as an "administrative or supervisory board" for the purposes of Point 3(ca) of Section B of Annex I of the Regulation, as it did not function like the board of a corporate or a financial institution and did not have the powers, strategic influence or control over the activities of FNSP in the way of a "normal" corporate board.

The Board, giving an autonomous European law reading to the meaning of a "board", and on the basis of the fact that the Regulation does not make any distinction regarding board membership depending on the specific legal structure of the rated entity, as well as the facts in this case, considered that FNSP's board was an "administrative or supervisory board" for the purposes of Point 3(ca) of Section B of Annex I of the Regulation.

In any event, in the specific case of FNSP's board, this board had a number of significant tasks during the period of the existence of the rating on FNSP. These included (but were not limited to) tasks regarding the budget, acquisitions, and the investment of available funds.

C) Finding of infringement

On the basis of the assessment of the complete file submitted by the IIO, the Board found that Fitch France failed to comply with the requirement of Article 6(2), in conjunction with Point 3 first para. and Point 3(ca) of Section B of Annex I of the Regulation, and thus committed the infringement set out at Point 20 of Section I of Annex III of the Regulation.

Furthermore, the Board found that Fitch France did not meet the special care expected from a CRA as a professional firm in the financial services sector. Therefore, the Board found that Fitch France had committed the infringement negligently and was liable to a fine. In calculating the fine, the Board took account of the applicable aggravating and mitigating factors and has therefore fined Fitch France EUR 812.500.

D) Supervisory measure and fine

Public notice
Pursuant to Article 24 of the Regulation, the Board decided that the infringement warranted a supervisory measure in the form of the publication of this public notice.

Fine
The fine imposed on Fitch France is EUR 812.500.