

15 January 2020

European Securities and Markets Authority  
201-203 rue de Bercy  
CS 80910  
75589 Paris Cedex 12  
France

Dear Madam or Sir,

**RE: ESMA's Consultation Paper regarding Procedural rules for penalties imposed on Third-Country CCPs, TRs and CRAs dated 13 December 2019 (the Consultation)**

Fitch Ratings (**Fitch**) appreciates the opportunity to review and comment on the Consultation. Our response is structured as follows: first, we set out our comments about the approach adopted in relation to the Consultation; and second, we set out our substantive and legal concerns with respect to the proposed amendment to the CRA Commission Delegated Regulation in relation to interim decisions as described in paragraph 102 of the Consultation (the **Proposal**).

Consistent with the Consultation, this response uses the terminology "CRA Regulation" to refer to Regulation (EC) No 1060/2009 of 16 September 2009 and "CRA Commission Delegated Regulation" to refer to the Commission Delegated Regulation (EU) No 946/2012 of 12 July 2012.

The Consultation Process

*Background to the Consultation.* The Consultation was initiated in response to the provisional request (the **Request**) of the European Commission (the **Commission**) for technical advice on a possible delegated act concerning procedural rules for penalties imposed on third-country central counterparties (**TC-CCPs**) and on possible amendments to the delegated act concerning procedural rules for penalties imposed on trade repositories (**TRs**). The Request understandably followed the amendments to the European Market Infrastructure Regulation (**EMIR**). (Fitch notes that there have been no recent amendments to the CRA Regulation.)

The Request did not make any reference to CRAs nor did it include any invitation to advise on amendments to the CRA Commission Delegated Regulation. The Commission specifically limited its invitation to ESMA to advise on whether a degree of consistency in the procedures applicable to TC-CCPs and to TRs is appropriate.

*Text of the Consultation.* The Consultation does not contain specific text regarding the proposed interim decision making process for CRAs; rather, it states that the rules "... would be similar to the ones proposed for TRs ...". Therefore in considering this Consultation, Fitch has made certain

assumptions regarding the proposals, as detailed in the next section. Fitch suggests that the provision of specific text is necessary for interested parties to review the proposals and would reduce the possibility of misunderstanding during the consultation process.

*Scope of the Consultation.* Fitch is concerned that, notwithstanding the specific instructions from the Commission, ESMA chose to include CRAs in the Consultation. We note that ESMA has not offered a detailed explanation as to why the CRA Commission Delegated Regulation should be amended in order to ensure a degree of consistency with the procedures applicable to TC-CCPs, TRs and CRAs. However, even if there were such a more detailed explanation, we believe the introduction of the Proposal as a measure to ensure consistency would be an unauthorised change to the CRA Commission Delegated Regulation.

ESMA's role under the Request is limited to the provision of technical advice. As the Request states, delegated acts should be adopted in accordance with Article 290 of TFEU, the 290 Communication and the Framework Agreement (as defined in Annex II of the Consultation). Pursuant to these texts, the Commission has the power to adopt non-legislative acts of general application only to supplement or amend non-essential elements of a legislative act. Fitch believes that the Proposal, and in particular with respect to the curtailment of the rights of defence, cannot be described as technical advice or a non-essential element of a legislative act. Therefore, we further believe that the Proposal is not in conformity with the Request or these texts.

*Transparency of Process.* Fitch notes that the Consultation has been tagged to the "Post Trading" section of ESMA's public website but not to the "Credit Rating Agencies" section<sup>1</sup>. The absence of such tagging may have negatively affected the ability of CRAs and other interested parties to respond to the Consultation. (We would ask ESMA to ensure that all consultation papers applicable to CRAs are, in future, tagged to the "Credit Rating Agencies" section of ESMA's public website.) Given that CRAs and other interested parties may not have been made aware of the Proposal, and given that the Request only relates to technical advice in respect of TC-CCPs and TRs, Fitch believes that the Proposal should not be subject to the deadline set by the Commission for ESMA to deliver technical advice in relation to EMIR in Q1 2020. Excluding the Proposal from this deadline would have no impact on the ability of EMIR as amended to be fully operational. ESMA would thus be able to impose fines or periodic penalty payments on TC-CCPs according to the indicative timetable set out in the Request.

## Response to Question 14 of the Consultation with respect to Paragraph 102 of the Consultation

*Substance of the Proposal.* As mentioned above, the Consultation does not contain specific language for the proposed amendments to the CRA Commission Delegated Regulation. Fitch understands from the Consultation that the Proposal is intended to amend the CRA Commission Delegated Regulation in

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<sup>1</sup> We note also that the Consultation is identified on ESMA's website as "Consultation on CCP Penalties".

order to incorporate language similar to that proposed for TC-CCPs and TRs (i.e., as contained in Section 8.2 of the Consultation).<sup>2</sup>

Fitch has therefore interpreted the Proposal to mean that ESMA intends for the Commission to amend the CRA Commission Delegated Regulation in order to provide rules of procedure on an interim decision making process “in order to prevent significant and imminent damage to the financial system”. Fitch also understands that the Proposal would allow an independent investigating officer to make findings with regards to alleged infringements under the CRA Regulation (including aggravating and mitigating factors of those infringements), and submit those findings to ESMA’s Board of Supervisors (the **Board of Supervisors**), without providing the CRA with access to the file during the investigation and without giving any person subject to investigation the opportunity to be heard on matters being investigated by the independent investigating officer. Based on these findings, the Board of Supervisors would decide on the imposition of potential interim non-monetary supervisory measures against the CRA.<sup>3</sup>

This removal of basic defence rights is contrary to the CRA Regulation which provides, to persons subject to investigation, the opportunity to be heard by the independent investigating officer and also provides that “[t]he rights of defence of the persons concerned shall be fully respected during investigations under this Article” (see Article 23e(3)).

In fact, Article 25(1) of the CRA Regulation limits the right of the CRA to be heard by the Board of Supervisors when adopting an interim measure “if urgent action is needed in order to prevent significant and imminent damage to the financial system”. However, this limitation does not curtail the basic defence rights applicable prior to the adoption of an interim measure, including during an independent investigating officer’s investigation. The limitation on the CRA’s rights of defence is confined to the Board of Supervisor’s power under Article 25(1) in order to comport with Article 25(2), which specifies that “[t]he rights of defence of the persons subject to the proceedings shall be fully respected during the proceedings”. Fitch is surprised and concerned that the Proposal purports to remove basic defence rights at the stage of the proceedings conducted by an independent investigating officer, and Fitch would strongly suggest that such a change would be contrary to the CRA Regulation as detailed below.

*Legal Basis of the Proposal.* Fitch believes that the substance of the Proposal cannot be supported under Article 25 or Article 23e of the CRA Regulation. The only delegated authority in Chapter 2 (Supervision by ESMA) of Title III (Surveillance of Credit Rating Activities) of the CRA Regulation is contained in Article 23e(7), specifically in relation to the rules of procedure with respect to the imposition of fines or periodic penalty payments. The delegated authority in Article 23e (7) permitted

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<sup>2</sup> In responding to the Consultation, Fitch has made the following assumptions regarding the proposed amendments to the CRA Commission Delegated Regulation. Firstly, the reference to “Regulation (EU) No 648/2012” (contained in the text of Section 8.2 of the Consultation) is assumed to be replaced with “Regulation (EU) No 1060/2019”. Secondly, references to “Annex I of Regulation (EU) No 648/2012” (contained in the text of this Section 8.2) are assumed to be replaced with “Annex III of Regulation (EU) No 1060/2019”. Thirdly, references to “points (a), (c) and (d) of Article 73(1)” (contained in the text of this Section 8.2) are assumed to be replaced with “points (a), (b), (c), (d) and (e) of Article 24(1)”.

<sup>3</sup> These non-monetary supervisory measures are the following: withdrawal of registration, temporary prohibition on issuing credit ratings, suspension of the use of credit ratings for regulatory purposes, requirement to end the infringement or issuance of a public notice

the adoption of the CRA Commission Delegated Regulation. Article 25 does not contain any delegated authority and therefore does not provide a legal basis for the Proposal. Moreover, Article 25 is limited to decisions taken by the Board of Supervisors under Article 24(1)<sup>4</sup>, relating exclusively to the imposition of non-monetary supervisory measures. Consequently, the introduction of non-monetary supervisory measures into the CRA Commission Delegated Regulation as per the Proposal is not only precluded by Article 25 but would also exceed the delegated authority contained in Article 23e(7). As a result, we think that the Commission has not been empowered to adopt rules of procedure such as the Proposal and that the inclusion of the Proposal in the Consultation is beyond the scope of the Commission's mandate.

Section 8.2 of the Consultation (for TRs), and therefore assumed by Fitch as proposed for inclusion in the CRA Commission Delegated Regulation, states the following: "The investigation officer shall inform the person subject to investigation of his/her findings but shall not provide that person with the opportunity to make submission". As highlighted above, Fitch is concerned about this aspect of the Proposal, which would prohibit persons subject to investigation from making any submission to the investigating officer prior to the adoption of an interim measure. This prohibition would be contrary to (i) the rights of defence of the persons subject to the proceedings and (ii) the explicit provisions of Articles 23e(3) and 25(2) of the CRA Regulation.

Specifically, Fitch notes that Article 23e(3) of the CRA Regulation requires that "... the investigating officer shall give the persons subject to investigation the opportunity to be heard on the matters being investigated. The investigating officer shall base his findings only on facts on which the persons subject to investigation have had the opportunity to comment", and further requires that "[t]he rights of defence of the persons concerned shall be fully respected during investigations under this Article". We believe that these provisions relating to the ability of the persons subject to investigation to make representations to the investigating officer, as set out explicitly in Article 23e(3) of the CRA Regulation, were considered by the EU institutions, when enacting the CRA Regulation, to be necessary in order to safeguard the integrity of the investigation process and the factual accuracy of proceedings, consistent with Article 25(2) of the CRA Regulation.

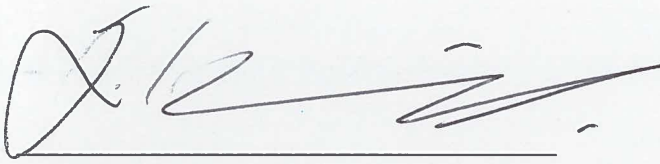
For the reasons set out above, Fitch respectfully objects to the Proposal.

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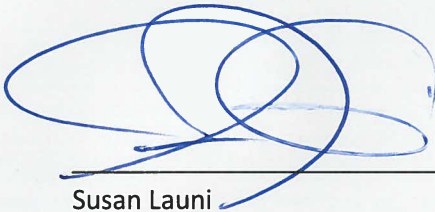
<sup>4</sup> Article 24(1) of the CRA Regulation provides for the power of the Board of Supervisors to impose supervisory measures other than fines or periodic penalty payments.

Fitch thanks ESMA for the opportunity to provide its thoughts and recommendations with respect to the Consultation. Given that our comments relate to the powers of the Commission as well as those of ESMA, we are providing a copy of this letter to Alain Deckers at the Commission. Should you have any questions with regard to our submission, please do not hesitate to contact Susan Launi (on +44 20 3530 1368 or [susan.launi@fitchratings.com](mailto:susan.launi@fitchratings.com)).

Kind regards,



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