COMMISSION IMPLEMENTING DECISION

of 28 April 2014

on the recognition of the legal and supervisory framework of Hong Kong as equivalent to the requirements of Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies

(Text with EEA relevance)

(2014/249/EU)

THE EUROPEAN COMMISSION,

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

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 Article 5(6) thereof,

Whereas:

(1) On 22 October 2012 the Commission granted a mandate to the European Securities and Markets Authority (ESMA), requesting its advice with regard to the technical assessment of the legal and supervisory framework of Hong Kong in respect of credit rating agencies (CRAs).

(2) In its technical advice delivered on 31 May 2013, ESMA indicated that in its outcomes, the Hong Kong legal and supervisory framework in respect of CRAs is comparable to that laid down in Regulation (EC) No 1060/2009.

(3) Pursuant to the second subparagraph of Article 5(6) of Regulation (EC) No 1060/2009, three conditions need to be fulfilled in order to consider a third country legal and supervisory framework equivalent to the requirements of that Regulation.

(4) According to the first condition, CRAs in third countries must be subject to authorisation or registration and to effective supervision and enforcement on an ongoing basis. The Hong Kong legal and regulatory framework for CRAs consists of the Securities and Futures Ordinance (SFO) and the Code of Conduct for Persons Providing Credit Rating Services (COC), the relevant amendments to which came into effect on 1 June 2011. CRAs and their rating analysts who provide credit rating services in Hong Kong are required to be licensed for providing credit rating services and are subject to supervision by the Securities and Futures Commission (SFC) of Hong Kong. The Hong Kong legal and supervisory framework endows SFC with a comprehensive range of powers allowing it to investigate whether CRAs comply with their legal obligations. The SFC can compel both unregulated and regulated persons to produce information and documents relevant to the investigation, including trade records, bank records, telephone records, internet records and beneficial ownership information. This power applies to both persons under investigation or whom the SFC has reasonable cause to believe are in possession of information relevant to the investigation. In addition, where there is fear of destruction or removal of evidence, flight of target or other concerns, the SFC has the power to access private premises of both unregulated and regulated persons upon the grant of a search warrant by a judicial authority. In addition, the SFC has a full range of powers to take criminal, civil, administrative and other actions. This includes the administrative power to impose disciplinary sanctions against persons licensed or registered with the SFC, to impose restrictions on licensed or registered persons regarding their business activities, to revoke or suspend a licensed or registered person's licence or registration and to reprimand, impose obligations or fine the licensed or registered person up to a maximum of 10 million Hong Kong dollars or three times of profit gained or loss avoided. The SFC also has the power to apply to the relevant court for injunctive or remedial orders. The SFC conducts, in addition to onsite inspections, offsite supervision through interactions with licensed CRAs to understand their business models and plans and the risks inherent in such activities, with a view to identifying and assessing the risks arising from their business activities. Information on licensed CRAs is collected through filings with the SFC, including but not limited to annual audited accounts and annual control review reports. The SFC also follows up on complaints and self-reported breaches. Since the Hong Kong CRA regime became effective on 1 June 2011, all licensed CRAs are

([1]) OJ L 302, 17.11.2009, p. 1.

subject to ongoing supervision and enforcement powers of the SFC. The cooperation agreement concluded between ESMA and SFC provides for information exchange with regard to enforcement and supervisory measures taken against cross border CRAs. On this basis, it should be considered that CRAs in Hong Kong are subject to authorisation or registration requirements equivalent to those laid down in Regulation (EC) No 1060/2009 and the Hong Kong supervisory and enforcement arrangements applicable to CRAs are effectively applied and enforced.

(5) According to the second condition, CRAs in the third country must be subject to legally binding rules which are equivalent to those set out in Articles 6 to 12 and Annex I to Regulation (EC) No 1060/2009, with the exception of Articles 6a, 6b, 8a, 8b, 8c and 11a, point (ba) of point 3 and points 3a and 3b of Section B of Annex I to that Regulation. When assessing the fulfilment of this condition due regard should be paid to Article 2(1) of Regulation (EU) No 462/2013 of the European Parliament and of the Council ([1]) in respect of the date of application of certain provisions of Regulation (EC) No 1060/2009. The Hong Kong legal and supervisory framework lays down detailed corporate governance requirements. The board of directors and responsible officers for the regulated activities bear primary responsibility for ensuring the maintenance of appropriate standards of conduct and adherence to proper procedures by the CRA. CRAs must have two responsible officers, both of whom have to be approved by the SFC, and at least one of them has to be an executive director under the SFO. Extensive provisions are in place regarding conflicts of interest, requiring CRAs to identify and eliminate or manage conflicts of interest and to be organised in a manner that ensures its business interest does not impair the independence and accuracy of its credit ratings as well as organisational requirements, including outsourcing, record keeping and confidentiality. In terms of organisational requirements, the General SFC Code and COC lay down requirements CRAs must fulfil such as those regarding policies and procedures for ensuring compliance with legal obligations and a permanent and effective compliance function. CRAs are also required to establish a review function responsible for periodically reviewing rating methodologies and models and significant changes thereto. The Hong Kong legal and supervisory framework contains a broad range of disclosure requirements, such as public disclosure of the ratings and annual public disclosures on the rating and ancillary activities. Therefore, the Hong Kong legal and supervisory framework should achieve the same outcomes as Regulation (EC) No 1060/2009 in respect of the management of conflicts of interest, the organisational processes and procedures that a CRA needs to have in place, the quality of ratings and of rating methodologies, the disclosure of credit ratings and the general and periodic disclosure of credit rating activities. It thus should provide for equivalent protection in terms of integrity, transparency, good governance of CRAs and reliability of the credit rating activities.

(6) According to the third condition, the regulatory regime in the third country must prevent interference by the supervisory authorities and other public authorities of that third country with the content of credit rating and methodologies. Sections 4 and 5 of the SFO set out the regulatory objectives and functions and powers of the SFC respectively, which do not include any power for the SFC to interfere in any credit rating issued by a CRA or in a rating methodology of that CRA. As far as it can be ascertained there is no legal provision empowering SFC or any other public authority to influence the content of credit rating or methodologies.

(7) In view of the factors examined, the conditions laid down in the second subparagraph of Article 5(6) of Regulation (EC) No 1060/2009 can be considered to be met by the Hong Kong legal and supervisory framework for CRAs. Therefore, the Hong Kong legal and supervisory framework for CRAs should be considered equivalent to the legal and supervisory framework established by Regulation (EC) No 1060/2009. The Commission, informed by ESMA, should continue to monitor the evolution of the Hong Kong legal and supervisory framework for CRAs and the fulfilment of the conditions on the basis of which this decision has been taken.

(8) The measures provided for in this Decision are in accordance with the opinion of the European Securities Committee,

HAS ADOPTED THIS DECISION:

Article 1

For the purposes of Article 5 of Regulation (EC) No 1060/2009, the legal and supervisory framework for credit rating agencies in force in Hong Kong shall be considered as equivalent to the requirements of Regulation (EC) No 1060/2009.

([1]) 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).

Article 2

This Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels, 28 April 2014.

For the Commission
The President
José Manuel BARROSO