

## DECISION

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given by

**THE BOARD OF APPEAL  
OF THE EUROPEAN SUPERVISORY AUTHORITIES**

under Article 60.4 Regulation (EU) No 1095/2010  
and the Board of Appeal's Rules of Procedure (BOA 2012 002)

in an **Appeal** by

**FinancialCraft Analytics Sp. z o.o. (formerly named Global Rating Sp. z o.o.)  
[Appellant]**

against a decision of

**The European Securities and Markets Authority  
[Respondent]**

**Decision  
Ref. BoA 2017 01**

**Board of Appeal**

William Blair (President)  
Juan Fernández-Armesto (Vice-President and Rapporteur)  
Anna Konstantinou  
Marco Lamandini  
Katalin Mero  
Beata Maria Mrozowska

Place of this decision: London

**Date: 3 July 2017**



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## I. Procedural Background

1. This is an appeal by Global Rating Sp. z o.o. (the appellant), which is a Polish company now named FinancialCraft Analytics Sp. z o.o..
2. The appeal is against decision ESMA/2016/1626 of the Board of Supervisors of the European Securities and Markets Authority (the respondent, ESMA) dated 8 December 2016 refusing to register the appellant as a credit rating agency pursuant to Article 16(3) of Regulation (EC) No 1060/2009 (the “refusal decision”).
3. Regulation (EC) No 1060/2009 on credit rating agencies is referred to in this decision as “CRAR”. A credit rating agency is referred to in this decision as “CRA” (or in the plural, “CRAs”).
4. The appellant’s representative is Paweł Goźliński, the President of the appellant’s Management Board. The respondent’s representative is Tarot Stephens, Senior Legal Officer, and Enrico Gagliardi, Legal Officer, ESMA.
5. The appeal is brought under Article 60 of Regulation (EU) No 1095/2010 (which is referred to in this decision as the “ESMA Regulation”). The ESMA Regulation establishes the European Securities and Markets Authority (ESMA) and (together with the regulations establishing the other two European Supervisory Authorities) the Board of Appeal.
6. The appellant requests the refusal decision to be amended, and that it be registered as a CRA in accordance with CRAR.
7. Article 6(5) of the ESMA Regulation provides for the Board of Appeal to exercise the tasks set out in Article 60. Article 60(1) gives a right of appeal as follows:  
  
*“Any natural or legal person, including competent authorities, may appeal against a decision of the Authority referred to in Articles 17, 18 and 19 and any other decision taken by the Authority in accordance with the Union acts referred to in Article 1(2) which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.”*
8. It is not in contention that a right of appeal lies against the refusal decision under Article 60 of the ESMA Regulation. The appellant was directed to the available remedies in the decision.
9. The Notice of Appeal is dated 28 December 2016. It is in the Polish language. It has 19 annexes, some of which are in the Polish language. It was forwarded to the Board of Appeal secretariat on 4 January 2017.
10. On 27 January 2017, it was agreed by the parties that the respondent’s Response should await determination of the issue of translation.



11. On 21 February 2017, following discussions with the parties, the President gave directions as to the translation of documents into the language of the refusal decision (the English language), including the Notice of Appeal, which was to be sent to the Translation Centre for the Bodies of the European Union (Translation Centre), and due to be returned on 31 March 2017.
12. On 23 March 2017, the appellant agreed an extension of time for the respondent's Response to 27 April 2017 in view of public holidays about this time.
13. The translation of the Notice of Appeal was received by the parties and the Board of Appeal on 31 March 2017.
14. On 11 April 2017, the respondent asked for a two-week extension for the Response because of the number of points the appellant had challenged relating to each section of the refusal decision.
15. Following the appellant's objection to the extension, the President gave an extension of 10 days only.
16. The Response was sent by the respondent on 8 May 2017.
17. A Reply was sent by the appellant on 12 May 2017.
18. On 17 and 18 May 2017 respectively, the appellant and the respondent informed the Board of Appeal that they did not wish to exercise their right to an oral hearing under Article 60(4) of the ESMA Regulation and Article 18 of the Rules of Procedure, and were content to have the case decided by the Board of Appeal on the basis of the documents.
19. By letter of 23 May 2017, the appellant sent formal notification that its name has been changed effective 12 May 2017 to FinancialCraft Analytics Sp. z o.o..
20. On 23 May 2017, the President notified the parties that, "*... Having consulted with the members, the President considers that the evidence is complete, and notifies the parties that the appeal has been lodged for the purposes of Article 60.2 of the ESA Regulations. The Board will now consider the Appeal and will communicate its decision to the parties in due course.*"
21. The Board of Appeal has considered the appeal on the basis of the documents. The Board of Appeal consisted of William Blair (President), Juan Fernández-Armesto (Vice-President and Rapporteur), Anna Konstantinou, Marco Lamandini, Katalin Mero and Beata Maria Mrozowska. The name of the responsible Secretariat officer is Anne Tiedemann of the EBA.
22. By Article 60(7) of the Regulations establishing each of the European Supervisory Authorities (including the ESMA Regulation), "*The decisions taken by the Board of Appeal shall be reasoned and shall be made public by the Authority*".



## II. Facts

23. According to the documents, the appellant is a limited liability company established in Poland, which is owned by Mr Paweł Goźliński (99.71%) and his wife (0.29%). The appellant does not have any parent company, branches or subsidiaries.
24. It has applied to issue solicited and unsolicited credit ratings for the following rating categories: (1) Sovereign and Public Finance ratings; and (2) Corporate ratings, including ratings on financial institutions, insurance undertakings and corporate issuers that are not considered financial institutions or insurance undertakings. The appellant also conducts ancillary services, namely valuations of companies, financial instruments, receivables and intangible assets, as well as market analysis and financial analysis of companies. As regards other services, the appellant also provides non-public ratings and training.
25. On 1 April 2015, the appellant submitted an application to ESMA for registration as a credit rating agency in accordance with CRAR. On 20 October 2015, ESMA issued a decision refusing to register the appellant as a credit rating agency (ESMA/2015/1574).
26. A refusal of registration does not prevent a party from making a further application for registration, and on 25 April 2016, the appellant submitted a second application, the refusal of which is the subject of the appeal.
27. The application process is set out in CRAR and related material. The application must contain information on the matters set out in Annex II of CRAR, and in Commission Delegated Regulation (EU) No 449/2012 (the regulatory technical standard, or RTS, on registration information) before it is treated as complete.
28. On 27 May 2016, the respondent issued a formal notification of incompleteness, and on 24 June 2016, the appellant provided additional information. On 25 July 2016, the respondent issued a further notification of incompleteness, and on 22 August 2016, the appellant provided additional information.
29. On 19 September 2016, the respondent notified the appellant that it considered the application to be complete.
30. On 20 September 2016, the respondent commenced assessment of the appellant's compliance.
31. On 30 September 2016, the respondent requested clarification in relation to the allocation of resources. The appellant voluntarily submitted additional information as to plans to hire new resources upon commencement of credit rating activity.
32. On 8 December 2016, the respondent issued the refusal decision.



### III. Law

33. The Board of Appeal set out the applicable legal principles in its decision in *Global Private Rating Company “Standard Rating” Ltd v ESMA* (BoA 2013-14). As stated in paragraph 33 of the decision, credit rating agencies largely fell outside the scope of financial regulation until relatively recently. However, the financial crisis raised considerable concern as to the operation of such agencies, and the accuracy of their ratings.
34. As stated in recital (10) of CRAR: “*Credit rating agencies are considered to have failed, first, to reflect early enough in their credit ratings the worsening market conditions, and second, to adjust their credit ratings in time following the deepening market crisis. The most appropriate manner in which to correct those failures is by measures relating to conflicts of interest, the quality of the credit ratings, the transparency and internal governance of the credit rating agencies, and the surveillance of the activities of the credit rating agencies...*”
35. CRAR provided for the first time for credit rating agencies to register with their respective national financial supervisory authorities.
36. CRAR was amended by Regulation (EU) No 513/2011 of 11 May 2011 which conferred responsibility for the registration and supervision of credit rating agencies on ESMA (i.e. the respondent). ESMA assumed these powers on 1 July 2011. Regulation (EU) No 462/2013 of 21 May 2013 further amending CRAR entered into force on 20 June 2013.
37. As summarised by the respondent, the objectives of this latter regulation were (inter alia) to enhance requirements relating to conflicts of interest and the independence of credit rating agencies, to improve activities relating to sovereign ratings and to increase competition and the use of smaller credit rating agencies.
38. This is relevant in the present case. It is plainly articulated by recital (11) of Regulation (EU) No 462/2013 which states as follows: “*In order to increase competition in a market that has been dominated by three credit rating agencies, measures should be taken to encourage the use of smaller credit rating agencies.*”
39. The actual position is made manifest by the most recent statistics published by ESMA, which show that in 2015, the “big three” CRAs accounted for 92.85% of the applicable turnover from credit rating activities and ancillary services in the EU (ESMA, ‘*Competition and choice in the credit rating industry*’ (16 December 2016)).
40. In considering the position of the appellant, which is a small company, the Board has sought to bear in mind this important policy goal.
41. The relevant requirements as regards registration are set out in CRAR as amended and regulatory technical standards (RTS) issued by the respondent. There are also



“Guidelines and Recommendations on the Scope of the CRA Regulation” (ESMA/2013/720).

42. Article 18(1) of CRAR as amended provides:

*“Within five working days of the adoption of a decision ... ESMA shall notify its decision to the credit rating agency concerned. Where ESMA refuses to register the credit rating agency or withdraws the registration of the credit rating agency, it shall provide full reasons in its decision.”*

43. Article 60 of the ESMA Regulation provides for appeals against such decisions. Article 60(1) gives a right of appeal against a decision taken by the respondent in accordance with the Union acts referred to in Article 1(2) which is addressed to that person. CRAR is among the Union acts referred to in Article 1(2).

44. As regards the approach to be taken on an appeal against the refusal to register a credit rating agency under CRAR, the Board stated the position in paragraph 44 of the *Global Private* decision (see above).

45. Having regard to European jurisprudence, the Board considers the approach should be as follows. With respect to the grounds raised by the appellant, the Board has to consider whether the respondent correctly applied the applicable Regulations and other applicable instruments, whether the respondent was entitled to reach the refusal decision, or was wrong to refuse registration, and whether the decision was vitiated by procedural irregularity or unfairness. In respect of technical matters about credit rating such as methodologies, the Board thinks that the decision of the respondent acting as a specialist regulator is entitled to some margin of appreciation.

46. As stated above, the application process is set out in CRAR and related material. ESMA distinguishes between two stages of the process, the first being the completeness of the information provided by the applicant, and the second being the examination of that information for compliance with the requirements of CRAR.

47. So far as an appeal is concerned, in principle an appellant cannot remedy deficiencies in its application by the provision of new information on appeal, and the Board of Appeal will not receive such information, though (similarly to ESMA’s own approach at the examination stage) the Board can take into account additional information which it considers necessary properly to understand or deal with the appeal.

#### **IV. The Parties’ contentions on the Appeal**

48. The appellant’s contentions are contained in its Notice of Appeal dated 28 December 2016 and annexes, and its Reply dated 12 May 2017. The respondent’s contentions are contained in its Response and annexes dated 8 May 2017.



49. The appellant summarises its grounds as follows. It says that the requisite descriptions and information that the respondent alleges to be lacking are in fact included in the documentation submitted to the respondent during the registration process and that there is a limit as to how specific a description can be. The respondent's allegations that its policies, procedures, methodologies and models are not specific enough can be made *ad infinitum*, as one can request that more and more specific information be provided again and again. The process must be stopped at some point because a description cannot be made any more specific. Methods for measuring and assessing efficiency cannot be exhaustive.
50. The appellant also says that it is not necessary to provide for various matters in its policies and procedures that the respondent alleges to be lacking since these are already provided for in the law. In any case, effectiveness and efficiency demands that the appellant's organisational structure and methodologies are set out in the way that they have been.
51. The appellant submits that by demanding proof that its methodology has been verified and validated, the respondent is impermissibly using technical requirements to prevent the appellant from entering the market.
52. There has been a misinterpretation of the appellant's intention behind its application for exemption from some of the requirements of CRAR.
53. Provisions in its documentation have been taken out of context, which provisions may seem inappropriate when considered individually, but which do not compromise the efficiency of the policies and procedures adopted by the appellant taken as a whole.
54. Further, the decision contains many subjective opinions on the part of the respondent which are not substantiated, and which are unfounded.
55. Certain obvious errors in the documentation submitted have been given weight, but the appellant contends that these errors do not compromise the correctness of the factual situation described in the other documents.
56. The respondent submits that the appellant's grounds of appeal are not well-founded. The appellant failed to demonstrate compliance with CRAR in the course of its registration process and the respondent could not therefore register it. The refusal decision includes six separate headings of non-compliance detailing the reasons the respondent reached this conclusion. The respondent may only register a credit rating agency if it complies with all of the requirements set out in CRAR. As Article 2 of the refusal decision provides, the respondent assessed the appellant's application as non-compliant with 19 specific requirements of CRAR.
57. In respect of the information provided by the appellant in the course of the registration process, the respondent is obliged to assess whether the totality of that information is sufficiently detailed and coherent to demonstrate compliance with all of the requirements of CRAR. In making this assessment, the respondent does not



expect an applicant to make provision for every potential scenario in its policies and procedures. Equally, however, an applicant cannot simply assert that it will comply with the requirements of CRAR without explaining how it will achieve this. In its technical assessment of the information provided by the appellant, the respondent concluded that the insufficient level of detail, the inconsistencies and the weaknesses present in the application provided by the appellant failed to demonstrate compliance with CRAR.

58. The respondent acknowledges that the appellant is a small company and welcomes new entrants, large or small, to the CRA industry. The respondent notes that CRAR includes a special regime for small CRAs, enabling them to benefit from certain exemptions. However, although the appellant requested exemption from three specific requirements of CRAR, it did not put in place the necessary arrangements to meet the conditions of the exemption. The appellant claims that the respondent misunderstood its request. The respondent rejects this.
59. The refusal decision is a document of 25 pages, containing 126 paragraphs.
60. Paragraph 54 of the Notice of Appeal states that the appellant “...*does not agree with any point on which ESMA’s Decision in question is based ...*” It states that “... *all the points based on which ESMA demonstrates non-compliance with Regulation (EC) No 1060/2009 and based on which the Board of Supervisors decided to refuse to register Global Rating as a rating agency are incorrect...*”.
61. The fact that the appellant does not agree with any of the points on which the decision is based has led to a multiplicity of points being raised by the appellant on the appeal. All of these have been taken into account by the Board of Appeal whether expressly referred to below or not. However, the Board notes that an appeal under Article 60 of the ESMA Regulation is by way of appeal, and should not be treated (in effect) as an *ab initio* assessment of compliance.
62. The points raised are dealt with in the Annex to this decision which is a table which contains an indicative summary of the parties’ contentions.
63. The table is set out as to (1) requirements of CRAR, etc, (2) the refusal decision, (3) the Notice of Appeal (4) the respondent’s Response, (5) the appellant’s Reply, and (6) some specific comments of the Board of Appeal (the Board’s conclusions being set out below). The table is organised by reference to the section headings in the refusal decision (other than as to general organisation and governance which is mainly factual, and in respect of which the points are picked up elsewhere). The numbers set out in square brackets in the table indicate the relevant paragraph in the document to which the column relates. The numbering in the column to the far left is for convenience of reference.



## V. The Board's conclusions

64. The section headings in the refusal decision are also adopted in the Notice of Appeal and the respondent's Response and in the Annex. The same headings (omitting section numbers) are used below where the Board of Appeal sets out its conclusions in respect of the issues.
65. The respondent's case is that each and every requirement of CRAR must be satisfied. On the other hand, some of the objections are minor or relatively minor. Others are clearly central to the refusal decision, for example, rating methodologies. If an appellant does not satisfy the requirements on such a point, an appeal based on the substantive incorrectness of a refusal decision will not succeed. No question of procedural irregularity arises on this appeal.

### *General organisation and governance*

66. Any misdescription of the objectives of the Credit Rating Unit is immaterial. The typographical error as to the first name of Mr Goźliński's wife is regrettable but not material. Exemptions are dealt with below.

### *Internal controls*

67. This section deals with the internal controls that an applicant for registration as a CRA has to have in place to ensure that it is able to adequately discharge its functions as a credit rating agency. See points 1 to 18 of the Annex.
68. In relation to the issue of whether and how the relevant functions would be segregated and allocated where the Management Board consists of less than three members, the appellant says that in practice, the number of members of the Management Board can be reduced only if it ceases to conduct credit rating activities. The appellant also says that the independent member of the Management Board would not be reporting on and assessing her own work since an independent audit procedure has been put in place. In any case, she can always increase the number of staff in her office and the appellant only intends to operate on a small scale. The appellant draws a distinction between typical supervisory activities and periodic checks and further states that there should be no clear divide between the internal control function and the compliance function since it is more efficient for functions to be performed by a single person.
69. The respondent contends that the appellant's application displayed an insufficient level of detail, inconsistencies and weaknesses in this regard. Additional information contained in the Notice of Appeal, including amendments to various aspects of the appellant's organisation, was not provided during the registration process and therefore, could not have been taken into account by the respondent. The respondent says that the appellant has failed to demonstrate how the independent member of the Management Board will have immediate access to information to perform her duties or how she will be excluded from having exposure to commercial activities. The respondent insists that the concentration of tasks in the independent member cannot ensure that compliance controls are effective, irrespective of any external audit procedure. The respondent maintains that this is a structural problem which cannot



be remedied by an increase of resources or the fact that the appellant only has a small number of ratings planned for the year.

70. The Board's conclusion is as follows. The Board accepts the appellant's point that the internal controls as set out in the documentation provided by the appellant during the registration process would provide a degree of flexibility in the way the internal arrangements actually worked.
71. However, the Board agrees that the respondent is correct to point out that there should be a clear divide between the internal control function and compliance function which cannot be dispensed with to increase efficiency. It is the appellant's responsibility to demonstrate compliance with CRAR to the requisite level of detail, during the registration process. The Board agrees that merely quoting from CRAR or pointing to existing laws is not sufficient to demonstrate compliance. The appellant has not made out a case in this respect.

#### ***Conflicts of interest***

72. This section deals with the requirement for an applicant for registration as a CRA to establish appropriate and effective organisational and administrative arrangements to ensure that any conflicts of interest that may influence the analyses or judgments of those involved in credit rating activities are identified, eliminated or managed and disclosed in a timely and effective manner. See points 19 to 23 of the Annex.
73. The appellant says that the documentation provided to ESMA during the registration process clearly indicates that persons carrying out rating activities will not also carry out commercial activities and to do so would constitute a violation of the law. The appellant points to the fact that CRAR provides that an independent member of the Management Board cannot be dismissed without justification before the end of his or her term of office. In relation to the controls performed by Mr Goźliński, the appellant further states that the scope of his duties is specified throughout its documentation and the member of the Management Board responsible for compliance and performing due diligence on the controls performed by Mr Goźliński is subject to an annual external audit.
74. The respondent contends that the appellant's application failed to identify all actual or potential conflicts of interest and displayed an insufficient level of detail and clarity as to the activities to be performed by the external auditor, as well as the manner in which any conflict of interest would be managed and disclosed. The respondent states that the appellant's policies and procedures, which it was provided with during the registration process, did not address the risks or provide for sufficient safeguards. The respondent also maintains that simply quoting from CRAR is not sufficient and the mere existence of a legal requirement does not remove the potential for any conflict of interest of a person who fails to comply.
75. The Board's conclusion is as follows. The Board accepts that there is some force in the appellant's reference to the legal requirements in CRAR, and the general law. However, this can only be a starting point.



76. The respondent is correct to point out that actual or potential conflicts of interest must be identified during the registration process and the way in which any conflict of interest would be identified, eliminated or managed and disclosed must be set out in sufficient detail. It is the appellant's responsibility to demonstrate compliance with CRAR to the requisite level of detail, during the registration process. The Board agrees that merely quoting from CRAR or pointing to existing laws is not sufficient to demonstrate compliance. The Board accepts that the appellant did identify in the Register of Conflicts of Interest (Ref. No. 025/16) various potential conflicts of interest, but at a fairly superficial level. The appellant has not made out a case in this respect.

***Independence of the credit rating process from business interests***

77. This section deals with the requirement for an applicant for registration as a CRA to establish appropriate and effective organisational arrangements and internal control systems to ensure that credit ratings and rating outlooks are not affected by any conflict of interest. See points 24 to 31 of the Annex.
78. In relation to the respondent's concern that the appellant's organisational arrangements and internal control systems fail to ensure that the appellant would be able to segregate its credit rating activities from its sales and marketing activities if its Management Board is reduced to one member, the appellant says that in practice, it is impossible to reduce the number of members of the Management Board whilst it operates as a CRA. The appellant also says that the separation of individual activities is provided for in its documentation and results directly from its organisational structure. The appellant further states that although Ms O is allowed to have access to information concerning fees charged to CRAs which may influence her decision-making on credit ratings, Ms O only has a limited influence on credit rating decisions and her remuneration does not depend on the level of ratings that she assigns.
79. The respondent contends that additional information and explanations have been provided in the Notice of Appeal which were not available during the registration process. Nevertheless, the respondent maintains that it has considered each of the policies cited by the appellant. The respondent is of the view that the policies failed to include sufficient and adequate organisational measures to ensure the physical separation or adequate safeguarding of the independence of persons carrying out credit rating functions from commercial activities. The respondent concluded that Ms O would in fact have a substantial influence on credit rating decisions, contrary to the appellant's assertions to the contrary.
80. The Board's conclusion is as follows. The Board accepts that in practice, it may be impossible for the appellant to reduce the number of members of its Management Board whilst it operates as a CRA. It notes however that this point was only made in the appellant's Notice of Appeal.
81. The Board agrees that the respondent was justified in having concerns regarding Ms O's ability to access information concerning the fees charged to credit rated entities. The Board considers that the respondent was entitled to conclude that Ms O would in fact have an appreciable influence on credit rating decisions. The Board accepts that



there was a lack of sufficient explanation and detail provided as to the appellant's organisational measures to ensure the physical separation or adequate safeguarding of persons carrying out independent functions. It is the appellant's responsibility to demonstrate compliance with CRAR to the requisite level of detail during the registration process. The appellant has not made out a case in this respect.

***Rating methodology, models and key rating assumptions***

82. This section deals with the requirement for an applicant for registration as a CRA to have in place "rigorous" methodologies to ensure that it is able to adequately discharge its functions as a credit rating agency. See points 32 to 38 of the Annex.
83. In relation to the respondent's objection that the appellant has failed to provide an adequate explanation, analysis or evidence to support the validity of its methodology and models to demonstrate how various factors are relevant in determining the creditworthiness of an entity or financial instrument, the appellant contends that its methodology could not have been validated by the time of the registration process since the appellant has not provided credit rating services yet and its methodology which has only recently been developed, has not been used for credit rating activities yet. The appellant contends that a fixed parameter has been used, and no description of the method for calculating market risk has been provided, since it intends to provide services only in Poland. The appellant further maintains that the respondent did not make requests for information and a 'high-level' description is sufficient since there is a limit to how specific a description can be.
84. The respondent asserts that the appellant has not provided any justification for the weights assigned to quantitative factors and has provided no indication of the weight given to certain factors. The respondent contends that although CRAR uses the term 'high-level description', any description provided by an applicant for registration as a CRA cannot be so 'high-level' that ESMA is prevented from assessing its compliance with the relevant requirements, and that it is the appellant's responsibility to demonstrate compliance with CRAR to the requisite level of detail during the registration process.
85. The Board's conclusion is as follows. It is correct that Article 16(1) of Commission Delegated Regulation (EU) No. 449/2012 provides that "*A credit rating agency shall provide ESMA, for each class of credit rating, with a high-level description of the range of core models and methodologies used to determine credit ratings*" (emphasis added). It may also be fair to comment that though the methodologies of the "big three" were complex prior to the Global Financial Crisis, complexity did not prevent their ratings becoming discredited in 2007/2008. Nevertheless, it is clear that there must be an adequate degree of specificity, since otherwise the rating will lack objective criteria (see paragraph 84 of the refusal decision in this regard).
86. The Board acknowledges that the appellant has spent a large amount of time and effort in preparing documentation detailing its credit rating methodology (Ref No. 008/16). However, it does not accept the assertions of the appellant that its methodology could not have been validated by the time of the registration process since it has not yet provided credit rating services. But the respondent's Response is



not particularly cogent in explaining precisely how it says that the appellant's methodology fell short.

87. The Board reiterates that in respect of technical matters about credit rating such as methodologies, the decision of the respondent acting as a specialist regulator is entitled to some margin of appreciation (see paragraph 45 above). Further, despite what the Board regards as an under-developed Response in this regard, the refusal decision itself sets out in a comprehensive and detailed manner the reason why the respondent considers that the appellant has failed to comply with CRAR in this regard. On balance, the Board is reluctant to interfere with the respondent's conclusions in this regard. The appellant has accordingly, not made out a case in this respect.

### ***Credit rating process***

88. This section deals with the requirement for an applicant for registration as a CRA to publish and submit a calendar to ESMA on a yearly basis and to inform credit rated entities of unsolicited credit ratings before the publication of any credit rating or rating outlook. See points 39 to 42 of the Annex.
89. In relation to the yearly requirement to publish and submit a calendar to ESMA setting out the dates for publication of sovereign ratings and related rating outlooks, the appellant says that the way in which dates are sent is not an essential aspect warranting refusal by ESMA. The appellant states that no dates can be set as it has not yet conducted any credit rating activities and that the approved means of communication between CRAs and ESMA is commonly known. The appellant further contends that this objection was not raised by ESMA in the appellant's first application for registration as a CRA and the measures taken to ensure that the law is complied with have been provided in the documentation.
90. The respondent is of the view that it is reasonable to expect the appellant's policies and procedures to include sufficient detail on how it intends to comply with requirements that would become applicable from the date of its registration. The respondent notes that each application for registration as a CRA must be separately examined and that following a previous registration refusal decision, the respondent is not precluded from raising additional points of non-compliance in a further refusal decision in respect of a separate and subsequent registration application.
91. The Board agrees with the appellant that this is a relatively minor issue and taken on its own, does not justify a refusal of the appellant's application. The respondent has not made out its case in this respect.

### ***Exemptions***

92. This section deals with the exemptions that may be granted by the respondent pursuant to Article 6(3) of CRAR to an applicant for registration as a CRA (on request) from having to comply with various requirements as to independence, compliance and review functions. See points 43 to 47 of the Annex.



93. In relation to the respondent's objection that the appellant has not ensured that the regulatory objective of having an independent oversight level is met, the appellant says that for the reasons set out in paragraph 52 of the Notice of Appeal, the respondent has incorrectly identified the scope of the exemptions that it has applied for.
94. The respondent rejects the appellant's contention that it has incorrectly identified the scope of the exemptions applied for and observes that although the appellant claims to apply for a partial exemption only, the terms of its exemption request do not substantiate this claim. Further, the respondent has set out full reasons in the refusal decision as to why the appellant's request for exemption was not granted.
95. The Board considers that the respondent has fully and comprehensively dealt with the appellant's grounds on this issue in both its refusal decision and in its Response, including providing a reasoned decision and explanation as to how the scope of the exemptions that the appellant has applied for has been identified and why the appellant's request for exemption was not granted. The Board further notes that although recital (3) of Commission Delegated Regulation (EU) No 449/2012 alludes to the possibility of newly-established CRAs applying for an exemption, this does not release any applicant applying for registration as a CRA from having to comply with the requisite provisions of CRAR, including the requirement that credit rating processes must be independent from any business interests (see paragraphs 77 to 81 above). Therefore, the appellant has not made out a case in this respect.

#### ***Remedies sought and conclusion***

96. The Board has accepted the appellant's case on one of the above grounds. The Board has also accepted several of the appellant's arguments.
97. However, the Board has accepted the respondent's contentions as regards all of the other grounds. It considers that the respondent was entitled to find that the appellant's application was non-compliant in these respects. Taken together, these raised significant matters, and this amounted in the Board's view to substantial non-compliance with the CRAR requirements. In those circumstances, it considers that the respondent was entitled to refuse to register the appellant as a credit rating agency. The Board further considers that the refusal decision was a fully reasoned one as required by Articles 16(3) and 18(1) of CRAR.
98. It follows that the Board of Appeal concludes that the appeal should be dismissed, and that the respondent's refusal decision dated 8 December 2016 should be confirmed.

## **VI. Decision**

99. For the reasons expressed above, the Board of Appeal unanimously decides that the appeal should be dismissed, and confirms the respondent's decision of 8 December 2016 refusing the appellant's registration as a credit rating agency.



100. The Secretariat is instructed to forthwith send a certified copy of this Decision to the parties, informing them of the right of appeal under Article 61 of the ESMA Regulation, and to file the original in the Secretariat's records.
101. The original of this Decision is signed by the Members of the Board in electronic format, and countersigned by hand by the Secretariat.



William Blair (President)

(SIGNED)

Juan Fernández-Armesto (Vice-President)

(SIGNED)

Anna Konstantinou

(SIGNED)

Marco Lamandini

(SIGNED)

Katalin Mero

(SIGNED)

Beata Maria Mrozowska

(SIGNED)

On behalf of the Secretariat

Anne Tiedemann

(SIGNED)

In accordance with Article 23 of the Rules of Procedure, the Board of Appeal decided on 17 July 2017 at the request of the respondent to rectify the Annex, adding a reference to paragraph 135 in row 21, third column, correcting the reference to paragraph 67 in row 22, second column, and deleting “unsolicited” in row 42, first column. Clerical mistakes have been corrected as regards the reference from EC to EU in paragraph 5, the addition of a reference to CRAR and Commission Delegated Regulation in paragraph 27, a change to a capital letter in paragraph 41, the inclusion of the word between in paragraph 46, a grammatical adjustment in paragraph 49, a change from or to and in row 22, first column of the Annex as well as a correction of the heading of the first column.

In addition paragraph 95 was rectified to include a reference to Commission Delegated Regulation (EU) No 449/2012.

A signed copy of the Decision is held by the Secretariat.



**Appeal against ESMA decision refusing application for registration as a credit rating agency  
 - Global Rating Sp. z o.o. (a.k.a. FinancialCraft Analytics Sp. z o.o.) ('appellant') –**

	<b>Reg (EC) No. 1060/2009 ('CRAR')</b>	<b>ESMA Refusal Decision (8 December 2016) ('Decision')</b>	<b>Appellant's Appeal (28 December 2016, translated 31 March 2017) ('Appellant's Notice of Appeal')</b>	<b>ESMA's Response (8 May 2017)</b>	<b>Appellant's Reply (12 May 2017)</b>	<b>Any specific comments of the Board of Appeal</b>
<b>II. Internal Controls</b>						
1.	Points 3 and 4 of Section A of Annex I (adequate policies and procedures to ensure compliance and which clearly allocate functions and responsibilities)	Lack of specificity and failure to describe how relevant requirements would be implemented in practice [34]: <ul style="list-style-type: none"> <li>- Actions to be conducted / order of actions / manner in which actions are to be conducted are not specified</li> <li>- Extracts of CRAR are quoted without any description or explanation of how the relevant requirements would be applied and implemented in practice</li> </ul>				
2.		(1) Failure to describe how the review and validation of methodologies will actually be carried out (Policy on the Review and	(1) Relevant information is in fact provided for [10] (2) Limits to how specific a description can be [1] (3) Misinterpretation of the appellant's	(1) Application displayed insufficient level of detail, inconsistencies and weaknesses [4] (2) Policies provided were merely verbatim quotes from	(1) Relevant detail was provided in the Appeal [1] (2) No additional information was provided	It is the appellant's responsibility to show compliance with CRAR -ESMA is not able to assess information that is not provided



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		Development of Methodologies) [34(a)]	intention [3] (4) Methodologies must be selected in such a way as to ensure their effective implementation and cannot be exhaustive [1] (5) Measures to be taken relating to potential new methodology cannot be described in detail since there is no such methodology [9(i)] (6) Size of a statistically significant sample cannot be made specific in advance without knowing the approximate size of the population [9(iv)]	regulations without demonstrating how tasks would be performed [66] (3) Review and development of methodologies was described in a separate document that was not provided during the registration process [77] (4) Differences in processes covered by different documents meant that it was unclear on which basis and to what extent policies and procedures relating to the rating process would be applied in	-any new information were merely examples [5(a)]	during the registration process



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			<p>(7) ESMA is preventing the appellant from entering the market [1]</p>	<p>the methodology validating process [78]</p> <p>(5) The appellant does not address the issue of the application of data used for the purpose of methodologies [79]</p> <p>(6) The appellant must demonstrate at the time of its application how it will comply with CRAR requirements [80] -the Notice of Appeal contained additional information that was not provided during the registration process [82]</p>		



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3.		(2) Failure to describe how sales and fee negotiation tasks have been designed to ensure the actual segregation of Ms L and Ms O from these activities (Management Board Policy) [34(b)]	(1) Limits to how specific a description can be [1] (2) Misinterpretation of the appellant's intention (3) An administrative staff member acts as the first point of contact with potential clients and directs them to the correct person such that enquiries are directed only to the President of the Management Board [11(a)] (4) Ms L is not authorised to	(1) Additional information was provided in the Appeal that was not provided during the registration process [85] (2) The fact that Ms L does not represent the appellant does not automatically exclude her from having exposure to commercial activities [87]	No new information was provided [5(b)] -information resulted explicitly from the hierarchy established within the structure of the organisation	It is the appellant's responsibility to show compliance with CRAR -The fact that enquiries are directed only to the President of the Management Board was not explicitly made during the registration process -It is not sufficient for the appellant merely to point to existing laws in place without demonstrating how



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			represent the appellant individually [11(b)]  (5) Violating the procedures is tantamount to violating the law [11(c)]			any procedures established will ensure that Ms L and Ms O will be excluded from having exposure to commercial activities
4.		(3) Failure to indicate how the responsibilities of the Management Board are discharged, what criteria are used in the assessment conducted and what is the decision-making process to	(1) Limits to how specific a description can be [1]  (2) Misinterpretation of the appellant's intention  (3) All issues are regulated in Section 11 of the Conflict of Interest Policy and Procedures (Ref. No. 015/16) and the	(1) Description of Management Board's activity does not impact upon ESMA's reasoning [91]  (2) Regular checks to be conducted by independent member of Management Board are not described in detail		Appellant's internal controls provide it with a degree of flexibility



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		remedy any deficiencies identified (Corporate Governance Policy) [34(c)]	Internal Control Rules (Ref. No. 016/16) [14]  (4) Manner in which members carry out their duties may become restricted if rules are overly specific [15]	and no criteria to be used is set down [94]  (3) The appellant cannot demonstrate compliance with CRAR simply by quoting from regulations verbatim without providing practical guidance on how provisions will be applied [95]		
5.		(4) Failure to explain whether and how the terms of office of the Management Board members may be renewed (Management Board Policy)	(1) Limits to how specific a description can be [1]  (2) Subjective opinion only [4]  (3) Pointless to establish renewal terms since term of office cannot	Failure to demonstrate how policies would prohibit the renewal of independent Board members' contracts [97]		It is the appellant's responsibility to show compliance with CRAR  -Relevant details may have been provided but were



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		[34(d)]	be renewed by law [16]			not sufficiently detailed to the requisite level  -It is not sufficient for the appellant merely to point to existing laws in place without demonstrating whether and how its policies are in compliance with the law
6.		Inconsistent provisions; Allocation of functions and responsibilities is not clear:				
7.		(1) Person responsible for compliance function (Code of	Obvious error made in a document that is voluntarily applied [18]	Decision was made on the basis of the totality of information provided		Error did not affect the outcome of the Decision



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		Conduct) [35(a)]		[99]		
8.		(2) Whether and how functions would be segregated and allocated where the Management Board consists of less than 3 members (Corporate Governance Policy) [35(b)]	Provision was taken out of context -in practice, it is impossible to reduce the number of members of the Management Board whilst the appellant operates as a CRA [3] -number of members can be reduced only if the appellant e.g. ceases to conduct credit rating activities [20]	Additional information was provided in the Appeal that was not submitted during the registration process [101(d)]	This new information was only an example [5(c)] and was unequivocal [6]	Appellant's internal controls provide it with a degree of flexibility
9.	Points 5 and 6 of Section A of Annex I	Concentration of tasks results in Ms L having to monitor and assess	(1) Incorrect assessment that Ms L would report on and assess	Concentration of tasks cannot ensure effectiveness of	Paradoxical [10]	Failure to demonstrate how monitoring activity



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	(effective and independent performance of tasks; regular monitoring and assessment; adequate compliance function)	her own work since she is responsible for reviewing methodologies as well as assessing the compliance of the appellant [40]	her own work -annual audit would be the key component of assessment of Ms L's work and compliance function [23]  (2) Transferring individual duties to a senior management level improves efficiency [25(i)(b)]	compliance controls irrespective of any further external audit potentially observing irregularities [107] -failure to demonstrate how monitoring activity can be carried out independently if a person must monitor his own work [105]	Ms L does not perform her responsibilities alone [10]	can be carried out independently  -Even if Ms L does not perform her responsibilities alone, she would still be reporting on and assessing her own work  -Having an external audit does not mitigate the problems involved with having tasks concentrated in one person
10.		No independent line of reporting:	(1) Misinterpretation of the appellant's intention	(1) Concerns regarding quality of external audit [109]		No explanation is provided as to how the Shareholders



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		(1) Ms L reports directly to the Shareholders Meeting [41]  (2) Ms L also performs the role of independent board member [42]  (3) No other independent line of reporting has been established [42]	(2) Required by Polish law [25(i)(c)]  (3) Does not mean that Shareholders Meeting can put pressure on the independent members of the Management Board [25(i)(c)]  (4) Independent audit procedure has been put in place [25(ii)]	(2) Proposed audit function would not substitute the role, duties and reporting lines of the compliance function required by CRAR [109]		Meeting would be prevented from putting pressure on independent members of the Management Board if they have to report directly to the Shareholders Meeting  Having an audit function in place is not a substitute for having a compliance function
11.		No assurance that Ms L will be able to access relevant information to conduct compliance controls:				



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12.		(1) Access to information is subject to Mr G's decision who manages access to electronic and paper documentation [43]	(1) Provision was taken out of context [3] (2) Subjective opinion only [4] (3) Member of Management Board responsible for compliance has permanent access to all documents which he or she may view during working hours [26]	Important for Compliance Officer to have ad-hoc, immediate access to information to perform its duties [112]		ESMA is not concerned with whether the compliance officer has permanent access or not; the emphasis is on immediate access to information which is not available since the documents are managed by Mr G
13.		(2) 5 business days' advance notice must be given to parties who are subject to	(1) Provision was taken out of context [3] (2) Subjective opinion only [4]	5 days' notice period impairs the effectiveness of the appellant's compliance activities [112]  This is new information		It is the appellant's responsibility to show compliance with CRAR



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		<p>compliance control which may result in the evidence being tampered with [43]</p>	<p>(3) Distinction between typical supervisory activities and periodic checks [27]                      -broad nature of annual check means that it cannot be carried out if persons are not prepared                      -all employees subject to checks are aware that regular checks are conducted</p>	<p>that was provided in the appellant's Notice of Appeal which was not provided during the registration process [113]</p>		<p>-New information subsequently provided may have been pertinent to the Decision but could not have been considered since it was not provided at the time of registration</p>
14.		<p>Review of credit rating activity at least every 3 years does not allow instances of non-compliance to be detected and addressed in a timely manner [46]</p>	<p>(1) Provision was taken out of context [3]                      (2) Subjective opinion only [4]                      (3) Compliance activities are carried out on an</p>	<p>(1) Document Ref No. 015/16 provides for annual checks without specifying what checks would be conducted [118]</p>		<p>It is the appellant's responsibility to show compliance with CRAR                      -New information subsequently</p>



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			<p>ongoing basis [29(a)]</p> <p>(4) Ongoing checks carried out every year are confirmed by an annual check during the 3-year internal audit cycle [29(b) and (e)]</p> <p>(5) Legislation does not indicate how often checks should be carried out [29(d)]</p>	<p>(2) No reference to frequency of controls [118]</p> <p>(3) Time frequency of 3 years would not allow the appellant to detect and address any non-compliance in a timely manner [123]</p> <p>(4) The appellant has revised various organisational aspects in its Notice of Appeal which differs from information provided during the registration process e.g. updated policies, new controls, significantly enlarged staff and functions [121]</p>		<p>provided may have been pertinent to the Decision but could not have been considered since it was not provided at the time of registration</p> <p>-Insufficient level of detail provided</p>



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15.		Overlap between internal audit and compliance tasks means that there is a lack of clarity as to the boundaries and expectations of each role [46]	(1) Provision was taken out of context [3] (2) Subjective opinion only [4] (3) No clear divide between internal control function and compliance function -more efficient for functions to be performed by a single person [29(c)]	Separation of the two activities is crucial [120] -overlap of the two functions would not provide clarity regarding the allocation of the different tasks and responsibilities [120]		The appellant may consider the overlap of functions to be more efficient but this would not provide clarity regarding the allocation of the different tasks and responsibilities
16.	Point 9 of Section A of Annex I	Failure to ensure that the review and validation of	(1) Member of the Management Board who is responsible			



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	(independent review and validation of methodologies)	methodologies is independent from the business lines that are responsible for credit rating activities. In particular, Ms O is involved in approving reports on the review and validation of methodologies and is able to comment on or reject proposed changes to methodologies [51]	for reviews is the only person who can make changes to methodologies [30(a)]  (2) Shareholders Meeting cannot be deprived of information on activities carried out to review methodologies which is guaranteed by Polish law [30(c)]			
17.	Point 10 of Section A of Annex I (internal control mechanisms)	Concentration of tasks means that Ms L is not able to challenge and independently assess the effectiveness of the work that she carries	(1) Subjective opinion only [4]  (2) Ms L has 1 employee at her disposal and can increase the	Structural problem is not remedied by resources at Ms L's disposal or the small number of ratings planned per year [127]	ESMA failed to take into account the small scale of the appellant's activities [8]	The structural problem is not remedied by the resources at Ms L's disposal or the small number of



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		out since she is responsible for controlling and assessing her own work [55]	number of staff in her office [31(a)]  (3) The appellant will operate on a small scale [31(b)]			ratings that the appellant has planned per year
18.		No information is provided as to how the activities of the external auditors would be carried out, their scope and objective, and how they will fit into the appellant's control framework and decision-making processes [56]	(1) Limits to how specific a description can be [1]  (2) Subjective opinion only [4]  (3) Clear description provided in many places [32(a)]  (4) Additional criteria would restrict auditor's independence or	Documents provided did not provide specific references or indications on how the external auditor's function would be performed [129]		Appellant's internal controls provide it with a degree of flexibility



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			quality of work [32(b)]			
<b>III. Conflicts of Interests</b>						
19.	Point 1 of Section B of Annex I (actual and potential conflicts of interest)	Failure to identify all actual or potential conflicts of interest:				
20.	Annex I (actual and potential conflicts of interest)	(1) Appointment of Ms O as Vice President of the Management Board means that she may end up performing tasks that could impair her independence when conducting credit rating activities (e.g.	(1) Misinterpretation of the appellant's intention (2) Subjective opinion only [4] (3) Reference made in point 3 of the Register [33] (4) Appellant's documentation makes clear that persons	(1) Policies and procedures provided during the registration process did not address risks or provide for sufficient safeguards [132]	ESMA is merely quoting from the Decision [3]	Various potential conflicts of interest are identified in the appellant's Register of Conflicts of Interest but at a fairly superficial level



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		commercial activities) [62(a)]	carrying out credit rating activities will not also carry out commercial activities which would constitute a deliberate violation of legal rules [33]			
21.		(2) Mr G is able to decide on the remuneration and dismissal of Ms O and Ms L -the appellant has not adopted any criteria to determine their remuneration or dismissal and there is nothing to mitigate the risk	(1) Subjective opinion only [4] (2) This is regulated by CRAR [34(a)] -independent member of the Management Board cannot be dismissed without justification before the end of his or her term of office (3) There are laws	(1) The existence of a legal requirement does not eliminate any potential conflict of interest of a person who does not comply [133] (2) The register only identifies 5 existing and potential conflicts of interest (135)	The Shareholders Meeting is responsible for establishing the number of its members and the amounts of remuneration [4]	It is the appellant's responsibility to demonstrate whether and how its policies are in compliance with the law



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		that Mr G may influence Ms O and Ms L's credit rating or methodology decisions by reducing their remuneration or recalling their appointment [62(b)]	providing for this issue [35]			
22.	Point 7 of Section A of Annex I (organisational and administrative arrangements to identify, eliminate or manage and disclose	Failure to establish appropriate and effective organisational or administrative arrangements to identify, eliminate or manage and disclose conflicts of interest that may influence the analyses or judgments of those who are	(1) Misinterpretation of the appellant's intention  (2) Independent member of Management Board is required to maintain a register of potential conflicts of interest [36(a)]  (3) Difficult to imagine a	Verbatim quotes from the regulations is not adequate -no sufficient detail on how conflicts of interest would be managed and disclosed [138]		It is the appellant's responsibility to show compliance with CRAR  -Insufficient level of detail provided



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	conflicts of interest)	involved in credit rating activities [67]	conflict of interests without any ties [36(b)]			
23.	Points 3 and 4 of Section B of Annex I (arrangements to ensure the appellant will refrain from providing credit ratings or advisory and consultancy services in certain circumstances)	No arrangements are established to ensure that the controls performed by Mr G are accurate and independent and to detect and address in a timely manner any irregularity in these controls -Mr G is responsible for performing controls to identify circumstances when the appellant should refrain from assigning credit ratings or providing services; the policy does not specify whether or when other members of the Management Board	(1) Limits to how specific a description can be [1]  (2) Scope of duties is specified throughout the appellant's documents [37]  (3) Member of the Management Board who is responsible for compliance is subject to an annual external audit [37]	(1) Lack of clarity as to whether or when other Management Board members would exercise due diligence on controls performed by Mr G and how possible disagreement would be addressed [140]  (2) No sufficient controls, due diligence or monitoring of controls is established [142]		Lack of specificity



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		will perform due diligence on Mr G's controls and how any disagreement would be resolved [70]		(3) Failure to identify actual control activities to be performed by the external auditor [143]		
<b>IV. Independence of credit rating process from business interests</b>						
24.	Arts 6(1) and 6(4) and Point 2 of Section A of Annex I	Failure of organisational arrangements and internal control system to ensure that:				
25.	(ensuring that credit ratings and rating outlooks are not affected by any conflicts of interest)	(1) The appellant will be able to segregate its credit rating activities from its sales and marketing activities if its Management Board is reduced to 1	Provision was taken out of context -in practice, it is impossible to reduce the number of members of the Management Board whilst the appellant operates as a CRA [3;	This explanation is provided for the first time in the appellant's Notice of Appeal [149]	Value judgment which is not justified; ridiculous accusation [4] -shareholders must be able to determine the	It is the appellant's responsibility to show compliance with CRAR  -New information subsequently provided may have



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		member only [75(a)]	38]		number of members and their remuneration	been pertinent to the Decision but could not have been considered since it was not provided at the time of registration
26.		(2) Any risk or problem affecting the independence of credit rating activities will be identified in a timely and effective manner and the findings will be reported to an independent function [75(b)]	Unfounded conclusion [39] -specific opinions are given with no additional justification			It is the appellant's responsibility to show compliance with CRAR to the requisite level



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27.		(3) Ms O and Ms L will perform their duties independently [75(c)]				
28.		(4) Conflicts of interest will be prevented, identified, eliminated or managed and disclosed [75(d)]				
29.		Organisational arrangements do not ensure that the review and validation of methodologies will be	(1) Misinterpretation of the appellant's intention  (2) Provision was taken	(1) Mr G has a clear and direct interest in the appellant's business [154]		Inadequate level of explanation



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		independent from the business interests of the appellant's shareholders [76]	out of context [3] (3) Member of the Management Board who is responsible for reviews is the only person who can make changes to methodologies [40(a)] (4) Shareholders Meeting cannot be deprived of information [40(c)]	(2) No sufficient explanation of the purpose of reporting or of safeguards surrounding any potential interference by shareholders with the independent function carried out by Ms L [155]		
30.		Ms O is allowed to access information concerning fees charged to rated entities which may influence her decision-making on credit ratings [77]	(1) Misinterpretation of the appellant's intention (2) Ms O has limited influence on credit rating decisions	Ms O has a rather substantial influence on rating decisions: (1) Ms O is the member of the Management Board responsible for		Ms O has an appreciable influence on credit rating decisions



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			<p>[41(a)]</p> <p>(3) Ms O should have the best possible knowledge of obligations under contracts performed [41(b)]</p> <p>(4) Ms O's remuneration does not depend on the level of credit ratings that she assigns [41(d)]</p>	<p>credit rating activities [159(a)]</p> <p>(2) Ms O is responsible for the Credit Rating Unit [159(b)]</p> <p>(3) Ms O is Chair of the Rating Committee [159(c)]</p> <p>(4) Ms O determines the fees paid to the other Credit Rating Committee members [159(d)]</p> <p>(5) Mere assertions are propounded without any supporting evidence [162]</p>		
31.		Policies are silent in	(1) Misinterpretation of	Each of the policies cited		It is the appellant's



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		relation to the physical separation, sharing of resources and other organisational arrangements in place to ensure the separation between staff conducting credit rating activities and those conducting commercial activities [78]	the appellant's intention  (2) Issue is regulated in the appellant's documentation [42]  (3) Separation of individual activities results directly from the appellant's organisational structure [42]	by the appellant were considered by ESMA [166] -appellant's policies did not include sufficient organisational measures that adequately ensure the physical separation or adequate safeguarding of the independence of analysts from commercial activities in case resources are shared		responsibility to show compliance with CRAR to the requisite level -organisational measures put in place are not sufficient
<b>V. Rating methodology, models and key rating assumptions</b>						
32.	Art 8(3); Point (b) of Art 4(1) and Point (a) of	Failure to provide an explanation, analysis or evidence to support the	(1) Limits to how specific a description can be [1]	(1) Description cannot be so high level that it prevents ESMA from		It is the appellant's obligation to demonstrate



	<b>Reg (EC) No. 1060/2009 ('CRAR')</b>	<b>ESMA Refusal Decision (8 December 2016) ('Decision')</b>	<b>Appellant's Appeal (28 December 2016, translated 31 March 2017) ('Appellant's Notice of Appeal')</b>	<b>ESMA's Response (8 May 2017)</b>	<b>Appellant's Reply (12 May 2017)</b>	<b>Any specific comments of the Board of Appeal</b>
	Art 4(3) of Commission Delegated Regulation (EU) No. 447/2012 (rigorous methodologies)	validity of the appellant's methodology and models so as to demonstrate how the driving factors are relevant to determine the creditworthiness of an entity or financial instrument [84]	(2) Methodology cannot be validated since it has only recently been developed and has not been used for credit rating activities yet [43(a)] (3) Weight of individual factors is clearly specified in the descriptions of the model [43(b)] (4) A 'high-level' description is sufficient [43(c)] (5) ESMA did not make any request for information [43(d)]	assessing compliance with the relevant requirements [180] (2) It is the appellant's obligation to demonstrate compliance with the CRAR requirements [175]		compliance with the CRAR requirements -Description cannot be so high level that it prevents ESMA from assessing compliance with the relevant requirements
33.		Failure to provide any	(1) Limits to how	(3) It is the appellant's		It is the appellant's



	<b>Reg (EC) No. 1060/2009 ('CRAR')</b>	<b>ESMA Refusal Decision (8 December 2016) ('Decision')</b>	<b>Appellant's Appeal (28 December 2016, translated 31 March 2017) ('Appellant's Notice of Appeal')</b>	<b>ESMA's Response (8 May 2017)</b>	<b>Appellant's Reply (12 May 2017)</b>	<b>Any specific comments of the Board of Appeal</b>
		justification for the weights assigned to the quantitative factors listed in the models or any indication of the relative importance or weight for the factors to calculate the market risk and the issuer's qualitative analysis [86]	specific a description can be [1] (2) Obvious error concerning the sum of weights exceeding 100% [45(c)] (3) ESMA did not request such information [45(a)] (4) Nothing to describe -fixed market parameter has been adopted since the appellant intends to provide services in Poland only [45(b)]	obligation to demonstrate compliance with the CRAR requirements [175] (4) The appellant did not provide the additional policies and procedures it claims to have done [178] (5) No justification for weights assigned to quantitative factors; no indication of the weight of certain factors [182]		obligation to demonstrate compliance with the CRAR requirements
34.	Art 8(3); Art 5(1) of	No indication of how qualitative and	(1) Limits to how specific a description	(1) Information in application failed to		It is the appellant's obligation to



	<b>Reg (EC) No. 1060/2009 ('CRAR')</b>	<b>ESMA Refusal Decision (8 December 2016) ('Decision')</b>	<b>Appellant's Appeal (28 December 2016, translated 31 March 2017) ('Appellant's Notice of Appeal')</b>	<b>ESMA's Response (8 May 2017)</b>	<b>Appellant's Reply (12 May 2017)</b>	<b>Any specific comments of the Board of Appeal</b>
	Commission Delegated Regulation (EU) No. 447/2012 (systematic application of rating methodology and analytical models)	quantitative analyses are combined to ensure that adjustments lead to a consistent formulation of credit ratings [90]	can be; allegation can be made <i>ad infinitum</i> ; greater specificity prevents methodologies being selected to ensure their effective implementation [1]  (2) ESMA did not make a request for additional explanations to be provided on the issue [46]	demonstrate compliance with the relevant requirements of CRAR [183]  (2) It is the appellant's obligation to demonstrate compliance with the CRAR requirements [175]		demonstrate compliance with the CRAR requirements
35.	Art 8(3); Arts 7(1), 7(3), 7(4) and Art (8) of Commission Delegated	Lack of quantitative evidence to demonstrate the discriminatory power of the appellant's rating methodology or	(1) Limits to how specific a description can be [1]  (2) Methodology cannot	Description cannot be so high level that it prevents ESMA from assessing compliance with the relevant requirements		It is the appellant's obligation to demonstrate compliance with the CRAR



	<b>Reg (EC) No. 1060/2009 ('CRAR')</b>	<b>ESMA Refusal Decision (8 December 2016) ('Decision')</b>	<b>Appellant's Appeal (28 December 2016, translated 31 March 2017) ('Appellant's Notice of Appeal')</b>	<b>ESMA's Response (8 May 2017)</b>	<b>Appellant's Reply (12 May 2017)</b>	<b>Any specific comments of the Board of Appeal</b>
	Regulation (EU) No. 447/2012 (validation process to ensure that systematic credit rating anomalies highlighted by back-testing are addressed)	that it is a sensible predictor of creditworthiness [94]	<p>be validated since it has only recently been developed and has not been used for credit rating activities yet [43(a)]</p> <p>(3) Weight of individual factors is clearly specified in the descriptions of the model [43(b)]</p> <p>(4) A 'high-level' description is sufficient [43(c)]</p> <p>(5) ESMA did not make any request for information [43(d)]</p>	[180]		<p>requirements</p> <p>Description cannot be so high level that it prevents ESMA from assessing compliance with the relevant requirements</p>
36.		Failure to indicate how tasks and criteria for the	Unfounded conclusion [47]	Information in application failed to		Information in application failed



	<b>Reg (EC) No. 1060/2009 ('CRAR')</b>	<b>ESMA Refusal Decision (8 December 2016) ('Decision')</b>	<b>Appellant's Appeal (28 December 2016, translated 31 March 2017) ('Appellant's Notice of Appeal')</b>	<b>ESMA's Response (8 May 2017)</b>	<b>Appellant's Reply (12 May 2017)</b>	<b>Any specific comments of the Board of Appeal</b>
		validation of methodologies will be implemented in practice [96]		demonstrate compliance with the relevant CRAR requirements [183]		to demonstrate compliance with the relevant CRAR requirements
37.		No indication of how the appellant will ensure that systematic credit rating anomalies are identified and addressed (Policy on the Review and Development of Methodologies) [98]	(1) Limits to how specific a description can be [1] (2) Misinterpretation of the appellant's intention (3) Unclear what is meant by 'systematic anomalies' -the appellant believes that these words are mutually exclusive [48(a)] (4) No credit rating is	Information in application failed to demonstrate compliance with relevant requirements of CRAR [183]		Information in application failed to demonstrate compliance with relevant requirements of CRAR



	<b>Reg (EC) No. 1060/2009 ('CRAR')</b>	<b>ESMA Refusal Decision (8 December 2016) ('Decision')</b>	<b>Appellant's Appeal (28 December 2016, translated 31 March 2017) ('Appellant's Notice of Appeal')</b>	<b>ESMA's Response (8 May 2017)</b>	<b>Appellant's Reply (12 May 2017)</b>	<b>Any specific comments of the Board of Appeal</b>
			assigned if the extent of data is insufficient [48(e)]			
38.	Art 14(3) (requirement to notify upon publication of new methodology, models or key rating assumptions)	No indication of whether the appellant will notify ESMA upon publication on its website of proposals to introduce new methodologies (or material changes thereto), models or key rating assumptions [102]	(1) Misinterpretation of the appellant's intention (2) Subjective opinion only [4] (3) All persons related to the appellant are required to comply with internal rules and the law [49]	Bare statement that requirement will be complied with is not sufficient [191]		Bare statement that requirement will be complied with is not sufficient



	<b>Reg (EC) No. 1060/2009 ('CRAR')</b>	<b>ESMA Refusal Decision (8 December 2016) ('Decision')</b>	<b>Appellant's Appeal (28 December 2016, translated 31 March 2017) ('Appellant's Notice of Appeal')</b>	<b>ESMA's Response (8 May 2017)</b>	<b>Appellant's Reply (12 May 2017)</b>	<b>Any specific comments of the Board of Appeal</b>
<b>VI. Credit rating process</b>						
39.	Arts 8a(3) and 8a(4) and Point 3 of Part III of Section D of Annex I (yearly requirement to publish and submit a calendar to ESMA, setting out the dates for publication of sovereign ratings and related rating outlooks)	No indication of whether and how the appellant will comply with:				
40.	Arts 8a(3) and 8a(4) and Point 3 of Part III of Section D of Annex I (yearly requirement to publish and submit a calendar to ESMA, setting out the dates for publication of sovereign ratings and related rating outlooks)	(1) The yearly requirement to publish and submit a calendar to ESMA setting out the dates for publication of sovereign ratings and related rating outlooks [108]	(1) Subjective opinion only [4] (2) Means of communication are commonly known [4] (3) Way in which dates are sent is not essential [4] (4) No dates can be set as the appellant has not conducted any credit rating activities yet [50]	(1) Each registration application must be examined separately [199] (2) Decision cannot be taken to be a complete statement of all points of non-compliance by an applicant CRA [202] (3) Following a previous registration refusal decision, ESMA is	Faulty interpretation of provisions [2] -all relevant issues were addressed in the Appeal	Relatively minor issue



	Reg (EC) No. 1060/2009 ('CRAR')	ESMA Refusal Decision (8 December 2016) ('Decision')	Appellant's Appeal (28 December 2016, translated 31 March 2017) ('Appellant's Notice of Appeal')	ESMA's Response (8 May 2017)	Appellant's Reply (12 May 2017)	Any specific comments of the Board of Appeal
			(5) The appellant has indicated measures taken to ensure compliance with the law [4]  (6) Arbitrary interpretation by ESMA -not raised in First Application [50]	not precluded from raising additional points of non-compliance in a further refusal decision in respect of a separate and subsequent registration application [203]		
41.		(2) The requirement to publish sovereign ratings or related rating outlooks outside of the business hours of regulated markets [108]	Subjective opinion only [4]  (1) Arbitrary interpretation by ESMA -not raised in First Application [50]	Following a previous registration refusal decision, ESMA is not precluded from raising additional points of non-compliance in a further refusal decision in respect of a separate and subsequent registration		Relatively minor issue



	<b>Reg (EC) No. 1060/2009 ('CRAR')</b>	<b>ESMA Refusal Decision (8 December 2016) ('Decision')</b>	<b>Appellant's Appeal (28 December 2016, translated 31 March 2017) ('Appellant's Notice of Appeal')</b>	<b>ESMA's Response (8 May 2017)</b>	<b>Appellant's Reply (12 May 2017)</b>	<b>Any specific comments of the Board of Appeal</b>
				application [203]		
42.	Point 3 of Part I of Section D of Annex I (requirement to inform rated entities of credit ratings before the publication of credit rating or rating outlook)	No indication of any other process to notify the rated entity of unsolicited credit ratings (Policy for assigning, reviewing, updating and publishing credit ratings) [112]	Subjective opinion only [4]			Relatively minor issue
<b>VII. Exemptions</b>						
43.	Point (b) of Art 6(3) and Points	The appellant has not ensured that the regulatory objective of having an independent oversight level are met [120]:				



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44.	2, 5, 6 and 9 of Section A of Annex I (exemptions)	(1) Concentration of tasks in Ms L means that she would monitor her own work and would not act as an independent oversight of controls and processes	Misinterpretation [52]:  Applications for exemptions -the appellant merely wishes to be exempted from having to set up a separate department carrying out these functions [8] -compliance function has been assigned to independent member of Management Board [21]	Terms of Exemption Request do not substantiate claim that the appellant wanted partial exemption only [218]  Detailed reasons have already been provided in the Decision [225]	ESMA is merely quoting from the Decision [3]	The appellant fails to demonstrate how the risk of Ms L's independence being compromised due to the concentration of tasks given to her would be mitigated
45.		(2) Failure to demonstrate how the external auditors will ensure an effective oversight of the governance and internal				



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		controls, conflicts of interest and review function process				
46.		(3) No further arrangement has been established to ensure that the regulatory objective of having an independent oversight level are met				
47.		Absence of any further measure to effectively ensure that the regulatory objective of				



	<b>Reg (EC) No. 1060/2009 ('CRAR')</b>	<b>ESMA Refusal Decision (8 December 2016) ('Decision')</b>	<b>Appellant's Appeal (28 December 2016, translated 31 March 2017) ('Appellant's Notice of Appeal')</b>	<b>ESMA's Response (8 May 2017)</b>	<b>Appellant's Reply (12 May 2017)</b>	<b>Any specific comments of the Board of Appeal</b>
		securing the independence of the review function from business and shareholders' influence and the functions carrying out credit rating activities would be met [124]				
<b>Miscellaneous</b>						
48.			Errors e.g.:  (1) References to Ms G have an erroneous first name [7]	ESMA acknowledges the presence of a small number of typos but asserts that these have no impact on the outcome of the Decision [7; 58; 63; 90; 187]		No impact on the outcome of the Decision



	<b>Reg (EC) No. 1060/2009 ('CRAR')</b>	<b>ESMA Refusal Decision (8 December 2016) ('Decision')</b>	<b>Appellant's Appeal (28 December 2016, translated 31 March 2017) ('Appellant's Notice of Appeal')</b>	<b>ESMA's Response (8 May 2017)</b>	<b>Appellant's Reply (12 May 2017)</b>	<b>Any specific comments of the Board of Appeal</b>
49.				<p>The appellant has made amendments to aspects of the appellant's organisation and policies [121]</p>		
50.				<p>Failure to demonstrate compliance with a significant number of CRAR requirements [229]                      -non-compliance with even one requirement would result in a refusal decision, let alone 19 points of non-compliance [232]</p>		



	<b>Reg (EC) No. 1060/2009 ('CRAR')</b>	<b>ESMA Refusal Decision (8 December 2016) ('Decision')</b>	<b>Appellant's Appeal (28 December 2016, translated 31 March 2017) ('Appellant's Notice of Appeal')</b>	<b>ESMA's Response (8 May 2017)</b>	<b>Appellant's Reply (12 May 2017)</b>	<b>Any specific comments of the Board of Appeal</b>
51.						Misunderstanding due to inconsistencies in English and Polish versions of CRAR [12] -'review function' and 'review unit'

Key

1. Mr G – Mr Paweł Goźliński (majority shareholder; President of Management Board; Chief Executive Officer; member of Management Board responsible for risk function; Strategy Director)
2. Ms L – independent member of Management Board
3. Ms O – Vice President of Management Board; member of Management Board responsible for Credit Rating Unit; Chair of Credit Rating Committee