COMMISSION IMPLEMENTING DECISION (EU) 2019/1276

of 29 July 2019

repealing Commission Implementing Decision 2012/627/EU on the recognition of the legal and supervisory framework of Australia 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)

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) Article 5(6) of Regulation (EC) No 1060/2009 empowers the Commission to adopt an equivalence decision, stating that the legal and supervisory framework of a third country ensures that credit rating agencies ('CRAs') authorised or registered in that third country comply with legally binding requirements which are equivalent to the requirements set out in that Regulation and which are subject to effective supervision and enforcement in that third country. In order to be considered as equivalent the legal and supervisory framework is to fulfil at a minimum the conditions set out in Article 5(6) of Regulation (EC) No 1060/2009.

(2) On 5 October 2012, the Commission adopted Implementing Decision 2012/627/EU ([2]), observing these three conditions are fulfilled and considering the Australian legal supervisory framework for CRAs as equivalent to the requirements of Regulation (EC) No 1060/2009 in force at that time.

(3) The Australian legal and supervisory framework still fulfils the three conditions originally laid down in Article 5(6) of Regulation (EC) No 1060/2009. Regulation (EU) No 462/2013 of the European Parliament and of the Council ([3]) introduced additional requirements for CRAs registered in the Union making the legal and supervisory regime for those CRAs more stringent. These additional requirements include rules on rating outlooks, conflicts of interest management, confidentiality requirements, quality of rating methodologies, and the presentation and disclosure of credit ratings.

(4) Pursuant to point (1)(b) of the second paragraph of Article 2 of Regulation (EU) No 462/2013, the additional requirements apply for the purposes of assessing the equivalence of third country legal and supervisory frameworks from 1 June 2018.

(5) Against this background, on 13 July 2017 the Commission requested advice to European Securities and Markets Authority ('ESMA') on the equivalence of the legal and supervisory framework of *inter alia* Australia with these additional requirements introduced by Regulation (EU) No 462/2013 and its judgement on the material importance of any differences.

(6) In its technical advice published on 17 November 2017, ESMA concluded that the Australian legal and supervisory framework does not include sufficient provisions, which could meet the objectives of the additional requirements introduced by Regulation (EU) No 462/2013.

(7) Article 3(1)w introduces a definition of a rating outlook and Regulation (EC) No 1060/2009 now extends certain requirements applicable to credit ratings to rating outlooks. The Australian legal and supervisory framework does not explicitly recognise rating outlooks, but the Australian Securities and Investment Commission considers rating outlooks to fall within the definition of 'financial product advice' and thus subject to the same requirements as credit ratings.

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

([2]) Commission Implementing Decision 2012/627/EU of 5 October 2012 on the recognition of the legal and supervisory framework of Australia as equivalent to the requirements of Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies (OJ L 274, 9.10.2012, p. 30).

([3]) 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).

(8) With a view to enhancing the perception of independence of credit rating agencies vis-à-vis the rated entities, Regulation (EU) No 462/2013 extends in Article 6(4), 6a and 6b of Regulation (EC) No 1060/2009 the rules on conflicts of interest to those caused by shareholders or members holding a significant position within the CRA. The Australian legal and supervisory framework requires a CRA to have in place adequate arrangements for the management of conflicts of interest that arise in the course of their business. However, it does not address explicitly conflicts of interests relating to shareholders. Consequently, there are no similar requirements to prohibit a CRA from issuing a credit rating on an entity, which holds more than 10 % of its shareholding or from providing consulting or advisory services on an entity, which holds more than 5 % of its shareholding.

(9) Regulation (EU) No 462/2013 introduces new provisions to ensure that confidential information is only used for purposes related to credit rating activities and is protected from fraud, theft or misuse. To that effect, Article 10(2a) of Regulation (EC) No 1060/2009 requires CRAs to treat all credit ratings, rating outlooks and information relating thereto as inside information up until the point of disclosure. The Australian legal and supervisory framework sets out detailed requirements regarding the steps CRAs must take to protect confidential information in their possession relating to issuers. There is thus a credible framework in place to protect against the misuse of confidential information.

(10) Regulation (EU) No 462/2013 aims to increase the level of transparency and quality of rating methodologies. It introduces in Annex I, Section D, Subsection I paragraph 3 of Regulation (EC) No 1060/2009 an obligation for CRAs to provide a rated entity with the opportunity to indicate any possible factual errors ahead before publication of the credit rating or the rating outlook. The Australian legal and supervisory framework does not have an explicit requirement for a CRA to inform a rated entity about a credit rating prior to its publication. Instead, under the Australian legal and supervisory framework, a CRA would only notify a rated entity when 'feasible and appropriate' without prescribing a minimum time to respond.

(11) Regulation (EU) No 462/2013 introduces safeguards in Article 8(5a), (6) aa and ab and (7) of Regulation (EC) No 1060/2009 to ensure that any modification to rating methodologies does not result in less rigorous methodologies. The Australian legal and supervisory framework requires that rated entities affected by any change to a methodology be informed. However, there is no requirement for CRAs to consult with market participants prior to making a material change to a methodology, to notify the supervisor, or to disclose on the CRA's website about any errors identified in a rating methodology.

(12) Regulation (EU) No 462/2013 strengthens the requirements regarding the presentation and disclosure of credit ratings. Pursuant to Article 8(2) and Annex I, Section D, Subsection I paragraph 2a of Regulation (EC) No 1060/2009 a CRA shall accompany the disclosure of rating methodologies, models and key rating assumptions with clear and easily comprehensible guidance, which explains any assumptions, the parameters, limits and any uncertainties surrounding the models and rating methodologies used in credit rating process. Under the Australian legal and supervisory framework, although CRAs are required to disclose whether a credit rating was solicited and whether the rated entity participated and to provide information on any limitations of credit ratings, there is no requirement to provide such guidance to the public on the methodology behind a credit rating.

(13) With the aim of strengthening competition and limiting the scope for conflicts of interest in the CRA sector, Regulation (EU) No 462/2013 introduces a requirement in Annex I, Section E, Subsection II of Regulation (EC) No 1060/2009 that fees charged by CRAs for credit ratings and ancillary services should be non-discriminatory and based on actual costs. It requires CRAs disclose certain financial information. The Australian legal and supervisory regime requires CRAs to disclose information about the revenue streams to the public and certain information to the supervisor by means of an annual report, with the exception of small CRAs. In addition, there is no requirement for CRAs to disclose to the public preliminary ratings and to report their fees schedules or fees charged to clients to the supervisor. Furthermore, there is no requirement that fees charged to clients are to be cost based and non-discriminatory.

(14) In view of the factors examined, the Australian legal and supervisory framework for CRAs does not satisfy all the conditions for equivalence laid down in the second subparagraph of Article 5(6) of Regulation (EC) No 1060/2009. Therefore, it cannot be considered as equivalent to the legal and supervisory framework established by that Regulation.

(15) Implementing Decision 2012/627/EU should therefore be repealed.

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

HAS ADOPTED THIS DECISION:

Article 1

Implementing Decision 2012/627/EU is repealed.

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, 29 July 2019.

For the Commission
The President
Jean-Claude JUNCKER