

2013 No. 1637

FINANCIAL SERVICES AND MARKETS

The Credit Rating Agencies (Civil Liability) Regulations 2013

<i>Made</i> - - - -	<i>3rd July 2013</i>
<i>Laid before Parliament</i>	<i>4th July 2013</i>
<i>Coming into force</i> - -	<i>25th July 2013</i>

The Treasury are designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b) in relation to financial services.

The Treasury, in exercise of the powers conferred by section 2(2) of the European Communities Act 1972, make the following Regulations:

Citation and commencement

1. These Regulations may be cited as the Credit Rating Agencies (Civil Liability) Regulations 2013 and shall come into force on 25th July 2013.

Interpretation

2. In these Regulations—

“Article 35a” means Article 35a of the EC Regulation(c);

“credit rating” has the meaning given by Article 3(1)(a) of the EC Regulation;

“credit rating agency” has the meaning given by Article 3(1)(b) of the EC Regulation;

“the EC Regulation” means Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies(d);

“an infringement” means an infringement listed in Annex III to the EC Regulation;

“an investor” has the same meaning as in Article 35a;

“an issuer” has the meaning given by Article 3(1)(s) of the EC Regulation(e);

“rating category” has the meaning given by Article 3(1)(h) of the EC Regulation;

“related third party” has the meaning given by Article 3(1)(i) of the EC Regulation;

(a) S.I. 2012/1759

(b) 1972 c.68. Section 2(2) was amended by section 27(1)(a) of the Legislative and Regulatory Reform Act 2006 (c.51) and the European Union (Amendment) Act 2008 (c.7), Schedule 1, Part 1.

(c) Article 35a was inserted into the EC Regulation by Article 1(22) of Regulation (EU) No 462/2013 (OJ L 146, 31.5.2013, p. 1).

(d) OJ L 302, 17.11.2009, p.1; the Regulation was amended by Directive 2011/61/EU (OJ L 174 1.7.2011), Regulation (EU) No 513/2011(OJ L 145 31.5.2011) and Regulation (EC) No 462/2013 and was corrected by Corrigendum, OJ L 350, 29.12.2009 p. 59

(e) The definition of “issuer” was inserted into Article 3(1) by Article 1(3)(a)(iv) of Regulation (EC) No 462/2013.

“senior management” has the meaning given by article 3(1)(n) of the EC Regulation.

“Intention”

3. In Article 35a, an infringement shall be considered to have been committed intentionally by the credit rating agency if the senior management of the credit rating agency acted deliberately to commit the infringement.

“Gross negligence”

4.—(1) In Article 35a, an infringement shall be considered to have been committed with gross negligence if the senior management of the credit rating agency were reckless as to whether the infringement occurred.

(2) For the purposes of this regulation, the senior management of a credit rating agency are reckless if they act without caring whether an infringement occurs.

“Impact”

5. In Article 35a, an infringement has an impact on a credit rating if it results in a different rating category being assigned to the issuer or the financial instrument of the issuer to which the credit rating relates.

“Reasonably relied”

6.—(1) In Article 35a, an investor reasonably relies upon a credit rating where—

- (a) the investor relies upon a credit rating when making an investment decision, and
- (b) that reliance is reasonable.

(2) The test for whether the reliance is reasonable is the same as for whether it is reasonable for a person to rely on a statement for the purposes of determining whether the statement gives rise to a duty of care in negligence.

“Due care”

7. In Article 35a, an investor shall be considered to have exercised due care if the investor took the care a reasonably prudent investor would have exercised in the circumstances.

“Caused”

8. In Article 35a, the test of causation in negligence applies for the purposes of determining whether an infringement caused damage.

Reasonable and proportionate limitations on liability

9. For the purposes of Article 35a(3)—

- (a) a limitation on liability is allowed by the law of the United Kingdom; and
- (b) “reasonable and proportionate” means the limitation on liability is reasonable and proportionate in all the relevant circumstances of the case, having regard to such of the factors in regulations 10, 11 and 12 as the court considers relevant.

Issuers: solicited credit ratings

10.—(1) If the claimant is an issuer and it, or a related third party, has entered into a contract with a credit rating agency to assign a credit rating in respect of such issuer or a financial instrument issued by such issuer, the court may consider the following factors, amongst others, to be indications that a limitation on liability is reasonable and proportionate—

- (a) the limitation resulted from contractual negotiations between the issuer, or a related third party, and the credit rating agency;
- (b) the price agreed between the issuer or a related third party and the credit rating agency reflects the extent of the limitation on liability;
- (c) the credit rating agency gave the issuer a reasonable opportunity to submit additional factual information not previously available to the credit rating agency, or to clarify any factual inaccuracies regarding the proposed credit rating, before the credit rating was issued, and took account of those submissions or comments when finalising the credit rating;
- (d) the limitation relates to losses which the credit rating agency could not reasonably have foreseen when it assigned the credit rating;
- (e) the limitation relates to losses which no credit rating agency could reasonably insure against on a prudent commercial basis;
- (f) the limitation relates to losses which no credit rating agency would reasonably be expected to have the resources to meet.

(2) The absence of a factor or factors in paragraph (1) does not indicate that a limitation on liability is unreasonable or disproportionate.

Issuers: unsolicited credit ratings

11.—(1) If the claimant is an issuer and a credit rating agency has assigned a credit rating in respect of such issuer or a financial instrument issued by such issuer, without the issuer, or a related third party, entering into a contract with that credit rating agency to assign a credit rating, the court may consider the following factors, amongst others, to be indications that a limitation on liability is reasonable and proportionate—

- (a) the credit rating agency gave the issuer a reasonable opportunity to submit additional factual information not previously available to the credit rating agency, or to clarify any factual inaccuracies regarding the proposed credit rating, before the credit rating was issued, and took account of those submissions or comments when finalising the credit rating;
- (b) the limitation relates to losses which the credit rating agency could not reasonably have foreseen when it assigned the credit rating;
- (c) the limitation relates to losses which no credit rating agency could reasonably insure against on a prudent commercial basis;
- (d) the limitation relates to losses which no credit rating agency would reasonably be expected to have the resources to meet.

(2) The absence of a factor or factors in paragraph (1) does not indicate that a limitation on liability is unreasonable or disproportionate.

Investors

12.—(1) If the claimant is an investor. the court may consider the following factors, amongst others, to be indications that a limitation on liability is reasonable and proportionate—

- (a) the limitation resulted from contractual negotiations between the investor and the credit rating agency;
- (b) the price agreed between the investor and the credit rating agency reflects the extent of the limitation on liability;
- (c) there is no relationship of proximity between the credit rating agency and the investor;
- (d) the limitation relates to losses resulting from unexpected or unusual uses of the credit rating;
- (e) the limitation relates to losses which the credit rating agency could not reasonably have foreseen when it assigned the credit rating;

- (f) the limitation relates to losses which no credit rating agency could reasonably insure against on a prudent commercial basis;
- (g) the limitation relates to losses which no credit rating agency would reasonably be expected to have the resources to meet.

(2) The absence of a factor or factors in paragraph (1) does not indicate that a limitation on liability is unreasonable or disproportionate.

(3) A limitation of liability is not likely to be reasonable and proportionate if the credit rating agency fails to take reasonable steps to bring the limitation to the attention of investors.

Issuers: general approach to determining damages

13.—(1) The damages recoverable by an issuer in a claim under Article 35a are—

- (a) where the issuer, or a related third party, has entered into a contract with a credit rating agency to assign a credit rating in respect of such issuer or a financial instrument issued by such issuer, the damages recoverable by the issuer in accordance with that contract; or
- (b) where there is no such contract, the increase in the financing costs of the issuer resulting from the affected credit rating.

(2) For the purpose of this regulation, “affected credit rating” means, where a credit rating agency has committed an infringement, the rating category that the credit rating agency assigned to the issuer or financial instrument, where such rating category is different to that which would have been assigned if the infringement had not occurred.

Investors: general approach to determining damages

14. The damages recoverable by an investor in a claim under Article 35a are—

- (a) where the investor enters into a contract with a credit rating agency to provide a credit rating, the damages recoverable by the investor in accordance with that contract; or
- (b) where there is no such contract, the damages that would be recoverable by the investor if the investor had succeeded in a claim against the credit rating agency in the tort of negligence.

Issuers and investors: duty to mitigate loss and contributory negligence

15.—(1) The common law principle that a claimant’s damages may be reduced if the claimant fails to mitigate their loss applies to any damages assessed under regulations 13 and 14.

(2) The provisions of the Law Reform (Contributory Negligence) Act 1945(a) apply to any damages assessed under regulations 13 and 14.

Limitation Period

16. No claim may be brought under Article 35a after the expiry of the period of one year beginning with the date on which the claimant discovered the infringement, or could with reasonable diligence have discovered it.

Courts with jurisdiction to hear Article 35a claims

17. A claim under Article 35a must be brought in the High Court or, in Scotland, the Court of Session.

(a) 1945 c.28

Review

18.—(1) The Treasury must from time to time—

- (a) carry out a review of these Regulations,
- (b) set out the conclusions of the review in a report, and
- (c) publish the report.

(2) In carrying out the review, the Treasury must, so far as is reasonable, have regard to how Article 35a is implemented in other member States.

(3) The report must in particular—

- (a) set out the objectives intended to be achieved by these Regulations,
- (b) assess the extent to which those objectives are achieved, and
- (c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

(4) The first report under this regulation must be published before the end of the period of five years beginning with the day on which these Regulations come into force.

(5) Reports under this regulation are afterwards to be published at intervals not exceeding five years.

Robert Goodwill

Mark Lancaster

Two of the Lords Commissioners of Her Majesty's Treasury

3rd July 2013

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement Article 35a of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies (“the EC Regulation”) by defining certain terms, providing for how certain terms will be interpreted and applied, applying a limitation period for claims under Article 35a, and determining which courts have jurisdiction to hear a claim brought under Article 35a.

Article 35a was inserted into Regulation 1060/2009 by Regulation (EU) No 462/2013, and provides for the civil liability of credit rating agencies when an agency, either intentionally or with gross negligence, commits any of the infringements listed in Annex III to the EC Regulation. Article 35a(4) permits Member States to interpret and apply certain terms used in Article 35a which are not defined therein.

The terms “intention”, “gross negligence”, “impact”, “reasonably relied”, “due care”, and “caused” are defined in regulations 3 to 8.

Regulation 9 provides that where a determination is to be made of whether a limitation of liability is “reasonable and proportionate”, regard shall be had to those of the factors referred to regulations 10 to 12 that the court considers relevant. If any such factors are considered relevant, that indicates that a limitation is reasonable and proportionate.

Regulations 13 to 15 provide for how damages shall be determined where a claimant is successful in a claim made under Article 35a. Where a contract exists between an investor or issuer and a credit rating agency, regulations 13(a) and 14(a) limit the level of damages recoverable under Article 35a to that recoverable under the contract. Where there is no such contract, regulation 13(b) limits the damages recoverable by an issuer of a financial instrument to the increase in the issuer's financing costs resulting from the affected credit rating, and regulation 14(b) limits the damages recoverable by an investor to those which the investor would recover if the investor had succeeded in a claim in tort. Regulation 15 applies to damages assessed under regulations 13 and 14 the common law principle that a claimant's damages may be reduced if the claimant fails to mitigate their loss and the provisions of the Law Reform (Contributory Negligence) Act 1954.

Regulation 16 establishes a limitation period of one year during which claims must be brought. Regulation 17 requires that cases under Article 35a be brought in the High Court (in England, Wales and Northern Ireland) or the Court of Session (in Scotland). Regulation 18 requires the Treasury to review the operation and effect of these Regulations and publish a report within five years after they come into force and within every five years after that. Following a review it will fall to the Treasury to consider whether the Regulations should remain as they are, or be revoked or be amended. A further instrument would be needed to revoke the Regulations or to amend them.

An impact assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen. Further information is available from HM Treasury, 1 Horse Guards Road, London SW1A 2HQ and on the HM Treasury website (www.hm-treasury.gov.uk).

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£5.75

UK2013070315 07/2013 19585

<http://www.legislation.gov.uk/id/uksi/2013/1637>

ISBN 978-0-11-110095-0



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