



European Securities and  
Markets Authority

# Supervisory Briefing

**A Common Approach to the CRA Regulation's Provisions for Encouraging the use of Smaller CRAs**





## Table of Contents

1	Scope and Purpose.....	2
2	Status of this Document .....	2
3	Definitions .....	3
4	Introduction .....	5
5	Common Supervisory Approach.....	6
5.1	Who is Covered by the Common Supervisory Approach .....	6
5.2	When does the Requirement to “Document” arise .....	7
5.3	Appointment and renewal.....	7
5.4	ESMA Annual Market Share Calculation .....	8
6	Standard Form .....	8
7	Feedback and Input .....	9
	<b>Annex I: Standard Form for Documenting under Article 8d .....</b>	<b>10</b>



## 1 Scope and Purpose

1. ESMA is required<sup>1</sup> to play an active role in building a common supervisory culture by promoting common supervisory approaches and practices among nationally appointed Sectoral Competent Authorities ('SCAs').
2. The purpose of this supervisory briefing is to provide guidance to SCAs in relation to the application of Articles 8c and 8d of the CRA Regulation and promote a common supervisory approach and enforcement of these Articles. In this regard, the Supervisory Briefing includes the following:
  - i. A Common Supervisory Approach as to which issuers and related third parties are covered by Article 8c and 8d; and,
  - ii. A Standard Form for documentation in accordance with article 8d.
3. The common supervisory approach will assist SCAs as well as issuers and related third parties by clearly establishing who should be prioritised for supervision and enforcement under these Articles.
4. The Standard Form will assist SCAs by guaranteeing standardised and consistent data across different issuers and related third parties. It will also assist issuers and related third parties by providing clarity as to how they may meet their regulatory obligations under these Articles and simplify their internal processes by removing the need to develop in-house templates for documenting compliance under Article 8d.
5. The Supervisory Briefing will be published on ESMA's website and on the websites of the nationally appointed SCAs.

## 2 Status of this Document

6. The supervisory briefing is issued under Article 29(2) of the ESMA Regulation which allows ESMA to develop new practical instruments and convergence tools such as supervisory briefings. The purpose of these tools is to promote common supervisory approaches and practices. The provisions set out are not subject to any 'comply or explain' mechanism for SCAs and are non-binding for market participants.

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<sup>1</sup> Regulation 1095/2010 Article 29(1) states "The Authority shall play an active role in building a common Union supervisory culture and consistent supervisory practices, as well as in ensuring uniform procedures and consistent approaches throughout the Union."

### 3 Definitions

7. For the purposes of this document the following definitions apply:

<b>CRA Regulation</b>	Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit ratings agencies as amended by Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011, Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011, Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013, and Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014
<b>Credit Rating</b>	Credit rating means an opinion regarding the creditworthiness of an entity, a debt or financial obligation, debt security, preferred share or other financial instrument, or of an issuer of such a debt or financial obligation, debt security, preferred share or other financial instrument, issued using an established and defined ranking system of rating categories (Regulation 1060/2009 Article 3(1)(a))
<b>Credit Rating Agency</b>	Credit rating agency means a legal person whose occupation includes the issuing of credit ratings on a professional basis (Regulation 1060/2009 Article 3(1)(b))
<b>Issuer</b>	Issuer means a legal entity that issues or proposes to issue securities as defined in Directive 2003/71/EC Article 2(h) (Regulation 1060/2009 Article 3(1)(s)).
<b>Financial Instrument</b>	Financial Instrument means any of the instruments listed in Section C of Annex I to Directive 2004/39/EC (Regulation 1060/2009 Article 3(1)(k). Regulation 1060/2009 Article 3(1)(k)).
<b>Related Third Party</b>	Related third party means ‘the originator, sponsor, servicer or any other party that interacts with a credit rating agency on behalf of a rated entity’ (Regulation 1060/2009 Article 3(1)(b)).
<b>Structured Finance Instrument</b>	Structured Finance Instrument means a financial instrument or other assets resulting from a securitisation transaction or scheme referred to in Article 4(36) of Directive 2006/48/EC (Regulation 1060/2009 Article 3(1)(l)).
<b>Securitisation</b>	Securitisation means a transaction or scheme, whereby the credit risk associated with an exposure or pool of exposures is tranching, having the following characteristics: (a) payments in the transaction or scheme are dependent upon the performance of the exposure or pool of exposures; and (b) the subordination of tranches determines the distribution of losses during the ongoing life of the transaction or scheme (Directive 2006/48/EC Article 4(36)).
<b>Sectoral Competent Authority</b>	Sectoral Competent Authority means “the national competent authorities designated under the relevant sectoral legislation for the supervision of credit institutions, investment firms, insurance undertakings, reinsurance undertakings, institutions for occupational retirement provision, management companies, investment companies, alternative investment fund managers, central counterparties and prospectuses (Regulation 1060/2009 Article 3(1)(r)).
<b>Regulated market</b>	Regulated Market Means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with Title III of this Directive (Directive 2014/65/EU Article 4(21)).



<b>Trading Venue</b>	Trading venue means a regulated market, an MTF or an OTF (Directive 2014/65/EU Article 4(24)).
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## 4 Introduction

8. The CRA Regulation includes a number of requirements for issuers and related third parties regarding the appointment of multiple credit rating agencies to an issuance or entity.
9. In particular, whereas Article 8c creates a double credit rating requirement for structured finance instruments<sup>2</sup>, Article 8d requires that where an issuer or related third party intends to appoint at least two credit rating agencies to an issuance or entity, that issuer or related third party shall consider appointing at least one credit rating agency with no more than 10% market share. Article 8d goes on to specify that where the issuer or related third party does not appoint at least one smaller CRA, this should be documented.
10. The intention of these provisions, and in particular Article 8d, was to encourage competition in the credit rating industry by requiring issuers or related third parties to at least consider appointing a smaller CRA when there was an intention to appoint two or more credit rating agencies for the credit rating of an issuance or entity.
11. Unfortunately, successful implementation of these Articles has been hindered by a lack of clarity in a number of key areas, including but not limited to:
  - Which issuers or related third parties are captured by the requirements.
  - How the requirement to ‘document’ should be met.
12. These difficulties have been noted within the European Commission’s Report on the current situation in the credit rating market<sup>3</sup> which highlighted that the measures proposed by Article 8d had yet to be fully implemented and enforced at national level and that the lack of a mandatory ‘comply or explain’ mechanism had failed to provide sufficient incentive for individual issuers to change CRAs.
13. These difficulties were similarly highlighted in ESMA’s Technical Advice on Competition, Choice and Conflicts of Interest in the CRA Industry<sup>4</sup>. In this Technical Advice ESMA outlined that while some larger CRAs believe competition within the CRA industry has increased, this view was not shared by smaller CRAs and new entrants. In particular, a significant number of smaller CRAs indicated there was a need for SCAs to promote and

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<sup>2</sup> CRA Regulation Article 8c 1. ‘Where an issuer or a related third party intends to solicit a credit rating of a structured finance instrument, it shall appoint at least two credit ratings independently of each other.

<sup>3</sup>REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL: On alternative tools to external credit ratings, the state of the credit rating market, competition and governance in the credit rating industry, the state of the structured finance instruments rating market and on the feasibility of a European Credit Rating Agency: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1476967405955&uri=COM:2016:664:FIN>

<sup>4</sup> ESMA Technical Advice on Competition Choice and Conflicts of Interest in the CRA Industry: [https://www.esma.europa.eu/sites/default/files/library/esma-2015-1472\\_technical\\_advice\\_on\\_competition\\_choice\\_and\\_conflicts\\_of\\_int.pdf](https://www.esma.europa.eu/sites/default/files/library/esma-2015-1472_technical_advice_on_competition_choice_and_conflicts_of_int.pdf)



enforce the provisions of Articles 8c and 8d in order to more fully achieve the objectives of the Regulation.<sup>5</sup>

14. In order to improve the effectiveness of these provisions and assist SCAs in their supervisory responsibilities ESMA has developed the following Common Supervisory Approach and Standard Form for documenting.

## 5 Common Supervisory Approach

15. The scope of the CRA Regulation (and by extension Articles 8c and 8d) is broad and should be understood as applying to all issuers or related third parties (no matter their geographic location) who appoint or solicit a credit rating from an EU registered CRA for an issuance or entity (whether or not it is issued or admitted to trading in the EU).
16. However, Article 25a of CRA Regulation states that the supervision and enforcement of Articles 8c and 8d is the responsibility of the SCAs '*who shall do so in accordance with the relevant sectoral legislation*' (for example Prospectus, UCITS or AIFM Directives etc.). It is this apparent conflict between the broad scope of the CRA Regulation and the more limited basis for supervision and enforcement set out in 25a that has resulted in a lack of clarity among SCAs.
17. Therefore, a practical way forward is to develop a common supervisory approach as to which issuers and related third parties should be prioritised for supervision under these Articles. This approach does not preclude SCAs from expanding their supervision at a national level, or from agreeing to expand the scope of this common supervisory approach, depending on the future availability of information and supervisory experience.
18. It is important to note that the common supervisory approach outlined is a minimum approach and should therefore be read in conjunction with additional standards and requirements imposed by nationally appointed SCAs. In this regard, issuers and related third parties are encouraged to consult the website of the relevant nationally appointed SCA for further details.
19. These additional standards could involve requirements to report or transmit the Standard Form to the SCA on a periodic basis in order to assist the SCA to more actively monitor compliance with Article 8d's requirements. It is therefore important that issuers and related third parties familiarise themselves with the applicable national regime.

### 5.1 Who is Covered by the Common Supervisory Approach

20. For the purposes of the Common Supervisory Approach, the supervision of these Articles should be applicable to at least:

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<sup>5</sup> ESMA Technical Advice on Competition Choice and Conflicts of Interest in the CRA Industry, Section 6.3.2 page 109-110.

- For **Article 8c**: those issuers or related third parties who intend to solicit a credit rating for an SFI that is issued, or proposed to be issued, to the public within the EU or admitted to trading on a trading venue situated within the EU.
- For **Article 8d**: those issuers or related third parties who intend to appoint at least two credit rating agencies for the credit rating of an issuance or entity, that is issued or proposed to be issued to the public within the EU or that is admitted to trading on a trading venue situated within the EU.

## 5.2 When does the Requirement to “Document” arise

21. For the purposes of the Common Supervisory Approach, the requirement to document under Article 8d arises in the following circumstances:

- A.** Did the issuer or related third party intend to appoint at least two credit rating agencies for the credit rating of the issuance or entity?
- If **‘Yes’**, then the issuer or related third party is required to consider appointing a credit rating agency with less than 10% of total market share, **proceed to Step B**.
  - If **‘No’**, then no further action is required under Article 8d.
- B.** Did the issuer or related third party appoint a credit rating agency with no more than 10% market share to rate the issuance or entity?
- If **‘Yes’**, no further action is required under Article 8d.
  - If **‘No’**, then the issuer or related third party is required to document this decision, and may fulfil this documenting requirement by using the template provided in this Standard Form. This should also apply in the specific case outlined in section 5.3 below, provided the conditions of paragraph 24 are met.

## 5.3 Appointment and renewal

22. It is recognised that it can be unclear when the requirement to consider appointing a smaller CRA under Article 8d arises in cases of existing and longstanding contractual relationships between issuers and CRAs.
23. In particular, some pre-existing contracts (at the date of entry into force of the Regulation) between an issuer/related third party and a CRA contain an “automatic renewal clause” (i.e. clause that provides for an automatic renewal of the contract at set time intervals if the client fails to give notice that it does not want to renew the contract).
24. In this regard, issuers or related third parties that have ongoing contracts with at least two CRAs for the rating of the same instrument or issuance should take into account the provisions of Article 8d when:



(a) according to national law and the specific contractual agreements applicable to them, they have the right to give notice to one of the existing CRAs (without any contractual sanction/penalties), in order to prevent the automatic renewal of the contract with that CRA.

(b) none of the contracted CRAs for that instrument/issuance is a CRA with less than 10% of market share.

25. When conditions under both (a) and (b) are met and the issuer or related third party does not appoint at least one small CRA, then the issuer or related third party is required to document this decision.

#### **5.4 ESMA Annual Market Share Calculation**

26. In order to assist issuers and related third parties to identify smaller CRAs that could be capable of providing a credit rating for their issuance or entity, ESMA publishes an annual CRA Market Share Calculation.

27. This calculation provides the market share for each registered CRA<sup>6</sup> as well as information on the categories of credit ratings offered by each. Should issuers and related third parties require further information the document also includes details on the share of supply of credit ratings by asset class and country. ESMA is continually monitoring and reviewing the content of this document to ensure it remains as relevant to issuers and related third parties as possible for the purposes of Article 8d.

28. The Market Share Calculation is available at the following location on [ESMA's website](#) and the [ESMA Library](#).

## **6 Standard Form**

29. In developing a Standard Form that issuers and related third parties can use under Article 8d (“the Standard Form”), the goal has been to create a template that provides SCAs with useful and easily comparable information on the reasons why smaller CRAs have not been selected and appointed. At the same time the Standard Form aims to simplify internal compliance processes by eliminating the need for issuers and related third parties to develop specific in-house templates. The Standard Form is attached at Annex I.

30. Section I of the Standard Form is focused on ensuring that sufficient information is included in order to ensure it can be effectively filed internally and/or transmitted to the SCA as depending on the supervisory approach of SCAs there may be a preference for one practice over the other.

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<sup>6</sup> In accordance with Article 8d of the CRA Regulation the market share calculation is measured with reference to annual turnover generated from credit rating activities and ancillary services at group level.

31. Section II sets out a non-exhaustive check list of triggering events clearly setting out when the requirements of Article 8d apply. The purpose of Section II is to explain these requirements within the Standard Form itself to enable readers to understand the reasons for completion of the Standard Form at a glance, without a need to refer to the Supervisory Briefing or the CRA Regulation.
32. Section III provides a set template which issuers or related third parties can use to indicate the reasons behind their decision not to appoint a smaller CRA. Issuers or related third parties can indicate one or more reasons behind their decision, and provide further detail on each reason in the text box provided. For SCAs, this approach will on the one hand provide easily comparable information, while on the other, accommodate more granular explanations should issuers or related third parties be capable of providing this.
33. Section IV includes the contact details of the nationally appointed SCAs. Issuers or related third parties are encouraged to consult the relevant websites of their SCA in order to understand whether there are any additional national specificities to the implementation of Articles 8c and 8d that they should be aware of and which have not been set out in this Supervisory Briefing.
34. Finally, in order to assist SCAs in their supervision and enforcement of these Articles, the Standard Form includes the recommendation that issuers or related third parties keep it on file for a period of five years from the date of documenting.

## **7 Feedback and Input**

35. In order to enable ESMA and SCAs to monitor the implementation of the Standard Form, and follow up where further convergence is practical and feasible ESMA encourages market participants to share their views on the implementation of the Form via: [cra-info@esma.europa.eu](mailto:cra-info@esma.europa.eu)

**Standard Form for Documenting in accordance with Article 8d of Regulation 1060/2009 (CRA Regulation)**

**I. Details of documenting entity (for filing purposes)<sup>7</sup>**

Name of Documenting Entity:<sup>8</sup>

Date of Documenting:<sup>9</sup>

Person Responsible:<sup>10</sup>

Relevant Sectoral Competent Authority:<sup>11</sup>

Entity Contact Details:<sup>12</sup>

**II. Triggering Events<sup>13</sup>**

<b>Step 1</b>	Did the issuer <sup>14</sup> or related third party <sup>15</sup> <b>intend to appoint</b> at least two credit rating agencies for the credit rating of the issuance or entity <sup>16</sup> ?
<b>If yes</b>	The issuer or related third party is required to consider appointing a credit rating agency with less than 10% of total market share.
<b>If no</b>	No further action is required under Article 8d.
<b>Step 2</b>	Did the issuer or related third party <b>appoint</b> a credit rating agency with no more than 10% market share to rate the issuance or entity?
<b>If yes</b>	No further action is required under Article 8d.
<b>If no</b>	The issuer or related third party <b>is required to document</b> this decision, and may fulfil this documenting requirement by using the template provided in this Standard Form.

<sup>7</sup> Respondents are encouraged to keep this document on file for 5 years.

<sup>8</sup> The issuer or related third party responsible for completing the documenting requirement.

<sup>9</sup> The date the Standard Form was completed.

<sup>10</sup> The name of the person responsible for completing the Standard Form.

<sup>11</sup> The name of the nationally appointed Sectoral Competent Authority responsible for the supervision and enforcement.

<sup>12</sup> Contact details for the Registered Office of the entity listed under '1'.

<sup>13</sup> Documenting of the decision to not appoint a CRA with less than 10% market share is required where conditions under (1) and (2) are met.

<sup>14</sup> Issuer means a legal entity that issues or proposes to issue securities<sup>1</sup>.

<sup>15</sup> Related third party means 'the originator, sponsor, servicer or any other party that interacts with a credit rating agency on behalf of a rated entity'.

<sup>16</sup> Means those issuances or entities, that are issued or proposed to be issued to the public within the EU or that are admitted to trading on a trading venue situated within the EU.

### III. Standard Template for Documenting

Name of Issuer:<sup>17</sup>

Instrument Ref:<sup>18</sup>

Issue Date:<sup>19</sup>

Indicate the reason(s) a CRA with less than 10% Market Share was not appointed: Yes/No

Name of CRA	Level of Investor Acceptance or Knowledge <sup>20</sup>	Quality of Analysis <sup>21</sup>	Methodology <sup>22</sup>	Historical Rating Performance/ ECAI mapping <sup>23</sup>	Fee <sup>24</sup>	Other <sup>25</sup>

For each reason indicated above please provide further details

<sup>17</sup> Name of the Issuer.

<sup>18</sup> The issuance ISIN or entities Legal Entity Identifier (LEI). Where an LEI is unavailable, please provide the number under which the issuer is registered with the business register of its country of incorporation.

<sup>19</sup> The date the instrument was issued or expected to have been issued, or in the case of an already listed entity the date the rating was issued.

<sup>20</sup> Was a determination of the general level of acceptance or knowledge of the agencies ratings among investors a factor in the decision not to appoint a smaller CRA.

<sup>21</sup> Was a determination of the perceived quality of the CRA's analysis a factor in the decision not to appoint a smaller CRA.

<sup>22</sup> Was a determination of the factors, assumptions and information used as part of the agencies' methodology a factor not to appoint a smaller CRA.

<sup>23</sup> Was a determination of the predictive power of the rating according to historical performance data (transition matrices, default statistics, or according to the scale of assessment assigned to credit quality steps (ECAI mapping) a factor not to appoint a smaller CRA.

<sup>24</sup> Was a determination of the fee quoted for the rating of the issuance or entity by the credit rating agency a factor not to appoint a smaller CRA.

<sup>25</sup> Were other factors responsible for the decision not to appoint a smaller CRA.

#### IV. Sectoral Competent Authorities Responsible for the Supervision and Enforcement of Article 8d<sup>26</sup>

Country	Responsible Authority	Website Address
Austria	Financial Market Authority	<a href="http://www.fma.gv.at">www.fma.gv.at</a>
Belgium	Financial Services and Markets Authority	<a href="http://www.fsma.be">www.fsma.be</a>
Bulgaria	Bulgarian FSC	<a href="http://www.fsc.bg">www.fsc.bg</a>
Croatia	HANFA	<a href="http://www.hanfa.hr">www.hanfa.hr</a>
Cyprus	CySec	<a href="http://www.cysec.gov.cy">www.cysec.gov.cy</a>
Czech Republic	Czech National Bank	<a href="http://www.cnb.cz">www.cnb.cz</a>
Denmark	Danish Financial Supervisory Authority	<a href="http://www.finanstilsynet.dk">www.finanstilsynet.dk</a>
Estonia	Financial Supervision Authority	<a href="http://www.fi.ee">www.fi.ee</a>
Finland		
France	Autorité des Marchés Financiers	<a href="http://www.amf-france.org">www.amf-france.org</a>
Germany	BaFin	<a href="http://www.bafin.de">www.bafin.de</a>
Greece	Hellenic Capital Markets Commission	<a href="http://www.hcmc.gr">www.hcmc.gr</a>
Hungary	Central Bank of Hungary	<a href="http://www.mnb.hu">www.mnb.hu</a>
Iceland		
Ireland	Central Bank of Ireland	<a href="http://www.centralbank.ie">www.centralbank.ie</a>
Italy	CONSOB	<a href="http://www.consob.it">www.consob.it</a>
Latvia	Financial and Capital Market Commission	<a href="http://www.fktk.lv">www.fktk.lv</a>
Liechtenstein		
Lithuania	Bank of Lithuania	<a href="http://www.lb.lt">www.lb.lt</a>
Luxembourg	CSSF	<a href="http://www.cssf.lu">www.cssf.lu</a>
Malta	MFSA	<a href="http://www.mfsa.com.mt">www.mfsa.com.mt</a>
Netherlands	AFM	<a href="http://www.afm.nl">www.afm.nl</a>
Norway		
Poland	Polish Financial Supervision Authority	<a href="http://www.knf.gov.pl">www.knf.gov.pl</a>
Portugal	CMVM	<a href="http://www.cmvm.pt">www.cmvm.pt</a>
Romania	ASF	<a href="http://www.asfromania.ro">www.asfromania.ro</a>
Slovakia	National bank of Slovakia	<a href="http://www.nbs.sk">www.nbs.sk</a>
Slovenia	Securities Market Agency	<a href="http://www.a-tvp.si">www.a-tvp.si</a>
Spain	CNMV	<a href="http://www.cnmv.es">www.cnmv.es</a>
Sweden	The Swedish Financial Supervisory Authority	<a href="http://www.fi.se">www.fi.se</a>
United Kingdom	Financial Conduct Authority	<a href="http://www.fca.org.uk">www.fca.org.uk</a>

<sup>26</sup> This is a list of the nationally Sectoral Competent Authorities. In accordance with Article 25a of Regulation 462/2013: 'Sectoral competent authorities are responsible for the supervision and enforcement of Article 4(1) and Articles 5a, 8b, 8c and 8d. The sectoral competent authorities shall be responsible for the supervision and enforcement of Article 4(1) and Articles 5a, 8b, 8c and 8d in accordance with the relevant sectoral legislation.'