



STATUTORY INSTRUMENTS.

S.I. No. 399 of 2015



EUROPEAN COMMUNITIES (CREDIT RATING AGENCIES) (CIVIL
LIABILITY) REGULATIONS 2015

EUROPEAN COMMUNITIES (CREDIT RATING AGENCIES) (CIVIL LIABILITY) REGULATIONS 2015

I, MICHAEL NOONAN, Minister for Finance, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No.27 of 1972), and for the purpose of giving full effect to Article 35a (inserted by Regulation (EU) No. 462/2013) of Regulation (EC) No. 1016/2009 of the European Parliament and of the Council of 16 September 2009, hereby make the following regulations:

Citation

1. These Regulations may be cited as the European Communities (Credit Rating Agencies) (Civil Liability) Regulations 2015.

Commencement

2. These Regulations shall come into operation on the date of their making.

Definitions

3. In these Regulations—

“Article 35a” means Article 35a (inserted by Regulation (EU) No. 462/2013 of the European Parliament and of the Council of 31 May 2013) of the EC Regulation and a reference to “Article 35a(3)” shall be read accordingly;

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

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

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

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

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

“issuer” has the meaning given to it by Article 3(1)(s) (inserted by Regulation (EU) No. 462/2013 of the European Parliament and of the Council of 31 May) of the EC Regulation;

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

Notice of the making of this Statutory Instrument was published in “Iris Oifigiúil” of 25th September, 2015.

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

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

Article 35a liability — meaning of “intention”

4. For the purposes of Article 35a, an infringement shall be considered to have been committed intentionally by the credit rating agency if one or more members of the senior management of the credit rating agency acted deliberately to commit the infringement.

Article 35a liability — meaning of “gross negligence”

5. (1) For the purposes of Article 35a, an infringement shall be considered to have been committed with gross negligence if—

- (a) the infringement was committed by one or more members of the senior management of the credit rating agency (referred to subsequently in this Regulation as “senior management”) and the one or more members concerned were reckless as to whether the infringement occurred, or
- (b) the infringement was committed by one or more employees or officers of the credit rating agency (not being members of senior management) and—
 - (i) the infringement would not have occurred but for the absence of supervision and control of those employees or officers by one or more members of senior management, and
 - (ii) that absence of supervision and control was reckless.

(2) For the purposes of—

- (a) paragraph (1)(a), the one or more members of senior management were reckless if they acted without regard to whether an infringement would occur by reason of their acts, and
- (b) paragraph (1)(b), the absence of supervision and control on the part of the one or more members of senior management was reckless if they acted without regard to whether an infringement would occur by reason of that absence of supervision and control.

Article 35a liability — when infringement taken to have “impact on credit rating”

6. For the purposes of 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.

Article 35a liability — meaning of investor “reasonably relying” on credit rating

7. (1) For the purposes of 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) In determining whether the reliance referred to in paragraph (1)(b) was reasonable, there shall be applied the rule of law that applies, in a case specified in paragraph (3), in determining whether it is reasonable for a person to have relied on a statement.

(3) The case mentioned in paragraph (2) is one in which it is alleged that the statement concerned gives rise to a duty of care in negligence.

Article 35a liability — when investor to be considered to have exercised "due care"

8. For the purposes of 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.

Article 35a liability — rule to be applied in determining causation

9. For the purposes of Article 35a, in determining whether an infringement caused damage there shall be applied the rule of law that applies in determining causation in cases of negligence.

Article 35a — reasonable and proportionate limitations on liability

10. (1) In this Regulation and Regulations "limitation on liability" means a limitation on liability—

- (a) that is provided for by contract, or
- (b) that, by reason of a disclaimer, is stated to apply,

whether a limitation excluding liability altogether or one limiting the amount of damages payable in the case of an infringement.

(2) For the purposes of Article 35a(3)—

- (a) a limitation on liability is allowed by the law of the State; 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 specified in Regulation 11, 12 or 13 (as the case may be) as the court considers relevant.

Issuers: solicited credit ratings

11. (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 related third party, and the credit rating agency,
- (b) 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,
- (c) the limitation relates to losses which no credit rating 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 fact that one or more of the factors set out in paragraph (1) is absent does not, in itself, indicate that a limitation on liability is unreasonable or disproportionate.

Issuers: unsolicited credit ratings

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

(2) The fact that one or more of the factors set out in paragraph (1) is absent does not, in itself, indicate that a limitation on liability is unreasonable or disproportionate.

Investors

13. (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 limitation relates to losses resulting from unexpected or unusual uses of 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 fact that one or more of the factors set out in paragraph (1) is absent does not, in itself, indicate that a limitation on liability is unreasonable or disproportionate.

(3) Absent the presence of circumstances that the court considers constitute substantial grounds for its holding to the contrary, a limitation of liability shall not be held to be reasonable and proportionate if the credit rating agency had failed to take reasonable steps to bring the limitation to the attention of investors.

Issuers: general approach to determining damages

14. (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, damages, as appropriate—
 - (i) to compensate for an increase in the financing costs of the issuer that results from the affected credit rating, or
 - (ii) in circumstances where, in consequence of the infringement, the issuer is unable to secure finance, to compensate for that fact.

(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 from that which would have been assigned if the infringement had not occurred.

Investors: general approach to determining damages

15. 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

16. (1) The rule of law that a claimant's damages may be reduced if the claimant fails to mitigate his or her loss shall apply to any damages assessed under Regulations 14 and 15.

(2) The provisions of the Civil Liability Act 1961 (No.41 of 1961) shall apply to any damages assessed under Regulations 13 and 14.

Limitation period

17. No claim may be brought under Article 35a after the expiry of the period of 2 years beginning with the date on which the claimant discovered the infringement, or could with reasonable diligence have discovered it.

Court with jurisdiction to hear Article 35a claims

18. A claim under Article 35a shall be brought in the High Court.



GIVEN under my Official Seal,
18 September 2015.

MICHAEL NOONAN,
Minister for Finance.

EXPLANATORY NOTE.

(This note is not part of the instrument and does not purport to be a legal interpretation.)

These Regulations give effect to Article 35a of EU Regulation No. 462/2013 on Credit Rating Agencies. Article 35A (“Civil Liability of Credit Rating Agencies”) goes beyond the remit of contract law and sets out the conditions and circumstances under which an issuer and/or investor may claim for damages from a Credit Rating Agency. The EU Regulation makes clear that Article 35a does not exclude further civil liability claims in accordance with national law.

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