



BoA-D-2019-05

DECISION

given by

the

BOARD OF APPEAL OF THE EUROPEAN SUPERVISORY AUTHORITIES

under Article 60 of Regulation (EU) No 1093/2010
and the Board of Appeal's Rules of Procedure (BoA 2012 002)

In the appeal by

Creditreform Rating AG

[Appellant]

Against decision of

The European Banking Authority (EBA)

[Respondent]

Decisions Ref.:

BoA-2019-D-05

Board of Appeal

Marco Lamandini (President)

Juan Fernandez Armesto

William Blair

Katalin Mero

Beata Maria Mrozowska

Michele Siri

Place of this decision: Frankfurt a.M.

Date: 13 September 2019

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APPEAL under Article 60 of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010 and Regulation (EU) No 1095/2010 of the European Parliament and of the Council (the “ESAs Regulations”)

1. This is the decision of the Board of Appeal of the European Supervisory Authorities on the appeal and application for suspension filed by the appellant Creditreform Rating AG (“Creditreform” or “appellant”) under Article 60 of the ESAs Regulations.

I. Background of facts

2. The appellant has filed on 16 July 2019 an appeal which challenges the adoption by the respondent of certain draft implementing technical standards and has made an application for suspension until the appeal proceedings are concluded.
3. The appealed draft implementing technical standards have been adopted, in the form of a final report titled “Draft implementing technical standards amending Implementing Regulation (EU) 2016/1799 (“IR 2016/1799”) on the mapping of ECAs’ credit assessments under Article 136(1) and (3) of Regulation (EU) No 575/2013” (“CRR”), by the Joint Committee of the European Supervisory Authorities (“ESAs”), i.e. the European Banking Authority (“EBA”, or “the respondent”), the European Securities and Markets Authority (“ESMA”) and the European Insurance and Occupational Pensions Authority (“EIOPA”), on 13 May 2019 and have been submitted to the European Commission for approval on 21 May 2019. With the final report, the Joint Committee of the ESAs (i) adopted the draft implementing technical standards proposed for endorsement by the European Commission under Article 15 of the ESAs Regulations and (ii) proposed to the European Commission to amend the correspondence (“mapping” in the CRR nomenclature) between certain of Creditreform’s long-term corporate credit assessments and certain credit quality steps (“CQS”) as set out in Section 2 of Chapter 2 of Title II of Part Three of CRR. CQS are to be used in determining capital requirements for credit institutions under CRR (the Capital Requirements Regulation), in particular to assign risk weights to certain exposures.
4. More specifically, the appealed draft implementing technical standards provide, in an annex which would replace the current Annex III to IR 2016/1799, certain changes in the correspondence of Creditreform’s long-term corporate rating “BBB”, “BB” and “B”. While the current mapping provides that Creditreform’s “BBB” corresponds to CQS3, “BB” to CQS4 and “B” to CQS5, the new annex to the draft implementing technical standards would change this to provide that Creditreform’s “BBB” corresponds to CQS4, “BB” to CQS5 and “B” to CQS6. The appellant challenges the legality of this downgrade.
5. Creditreform has appealed to the Board of Appeal pursuant to Article 60(1) of Regulation (EU) No 1093/2010 (“the EBA Regulation”) which provides for appeals against certain decisions of EBA. The appellant contends that, since the contested decision includes a downgrading of the correspondence of Creditreform’s long-term corporate ratings “BBB”, “BB” and “B” to the relevant CQSs, the appealed decision concerns the appellant individually and directly. The appellant further contends, in the

merit, that the appealed decision is unlawful and violates the appellant's rights on a number of grounds (as further explained below).

6. The appeal was notified to EBA on 18 July 2019 by Notice of Appeal dated 16 July 2019.
7. On 23 July 2019 EBA filed with the Board of Appeal's Secretariat an application for directions by way of case management from the President of the Board of Appeal. Such application was sent by the Secretariat to the appellant, asking for comments, if any, by the close of 29 July 2019. The appellant submitted its comments on 29 July 2019. Having considered EBA's application and the appellant's reply, on 29 July 2019 the President issued the requested directions of case management as follows.

"The President thanks EBA for its Application for Directions dated 23 July 2019 and the appellant for its reply on this of 29 July 2019.

The President notes that the appellant asks the Board of Appeal to suspend EBA's draft implementing technical regulation of 20 May 2019. In its reply of 29 July 2019 the appellant, due to the importance of the questions raised, asks the Board of Appeal to determine on the merits and on admissibility together.

Having consulted with the Board of Appeal, the President makes the following observations:

Clearly the suspension application should be dealt with at a relatively early stage. However, in the circumstances of the case, where the appellant is challenging a preparatory act – and namely a draft implementing technical standard prepared by EBA - to be adopted by endorsement by the European Commission, the Board of Appeal considers that the issue of suspension must be decided by the Board together with the ruling on admissibility of the appeal, prior to the full consideration of the merits of the appeal. This is so because the issues related to suspension and admissibility are strictly intertwined in the instant case and under Article 9 of the Rules of Procedure the Board shall examine whether or not the appeal is admissible before examining whether it is founded; but also because in this way the Board can ensure that, due to the importance of the questions raised in the merits, the parties timely identify the proper venue for their adjudication.

Before determining on the suspension application, the Board of Appeal considers necessary to ensure to both parties their right to be heard granting appropriate terms for submissions on the suspension and admissibility of the appeal.

Subject to the view of the parties, in light of Articles 6(6) and 10 of the Rules of Procedure, the President, having consulted with the Board of Appeal, proposes giving EBA two weeks from the notice of these directions (29 July 2019) to respond to the application as to the suspension request and the admissibility of the appeal, and the appellant one week to reply to the EBA's response.

In the event the appeal is determined to be admissible with the decision which will also determine on the suspension application, both parties shall be then granted in due course, with other directions of case management, appropriate terms for their submissions in the merits.

The parties are asked to confirm this proposal with the Secretariat, and raise any other points they wish to raise at this stage.

As per the EBA request as to filing and service, it is confirmed that the filing and service of any further communication between the Parties and between the Parties and the Board of Appeal and its Secretariat (including the filing and service of the Respondent's response pursuant to Article 6 of the Rules of Procedure and of any other submissions of the parties) may take place by email. The Secretariat must always be copied.

The parties are hereby further informed about the composition of the Board of Appeal according to Article 3(4) of the Board of Appeal Rules of Procedure:

- Juan Fernandez Armesto
- William Blair
- Marco Lamandini
- Katalin Mero
- Beata Mrozowska
- Michele Siri”

8. Both parties confirmed their full acceptance of the terms of these directions with the Board of Appeal’s Secretariat on 29 July 2019 and raised no other points.
9. The application to suspend is made by the appellant pursuant to Article 60(3) of the EBA founding Regulation. This provides that an appeal shall not have suspensive effect. There is an exception provided for in these terms:

“However, the Board of Appeal may, if it considers that circumstances so require, suspend the application of the contested decision.”
10. The application to suspend is opposed by the respondent. The respondent further submits that the appeal is inadmissible (as further explained below).
11. Nothing in this decision should be taken as expressing a view as to the merits of the appeal. It is concerned solely with the application to suspend and the admissibility of the appeal.

II The contentions of the parties on the suspension application and on admissibility of the appeal.

Creditreform Rating AG [The appellant]

12. In its Notice of Appeal, Creditreform sets out its case that the decision to propose an amendment to IR 2016/1799 to the effect that the mapping of Creditreform’s long-term corporate ratings “BBB”, “BB” and “B” to, respectively, CQS3, CQS4 and CQS5 would be downgraded (with a new correspondence of those ratings to CQS4, CQS5 and CQS6 respectively) is not transparently justified because the mapping methodology used as part of the mapping exercise by the relevant authorities was never explained in detail and EBA did not provide specific reasons for the proposed downgrade. The appellant further argues that the mapping exercise has been conducted using different methodologies for different credit rating agencies, and thus in a way which discriminates among credit rating agencies, and without ensuring the proper application of the prudential approach required by IR 2016/1799 to safeguard smaller rating agencies (like the appellant) vis-à-vis major US rating agencies.
13. In its Notice of Appeal and in its reply of 30 August 2019, Creditreform sets out its case on the suspension application and on the admissibility of the appeal.
14. In its Notice of Appeal the appellant says that in an informal e-mail in 2017 EBA requested the appellant to fill in various information on the current ratings and the definition of the defaults and to submit them to the EBA in an excel file. The EBA did

not clarify at the time that the collection of this information was for the purpose of a new mapping under CRR and IR 2016/1799. The appellant sent to the EBA the information requested, pointing out that Creditreform's default rates had remained constant, but for a segment-specific anomaly in the area of German SMEs. However, the appellant noted that this was, in the appellant's view, irrelevant to the effect of mapping because (i) since 2016 Creditreform had changed its business model, (ii) it had introduced a change in methodology for the SMEs' segment and (iii) SMEs represented less than 2% of all Creditreform's ratings.

15. The appellant further says that by email of 9 July 2018 the EBA "suddenly" sent a draft report describing and proposing the downgrading of the appellant's mapping challenged in this appeal. During a following conference call, the EBA clarified that the downgrading was based upon the information received in 2017, considering the defaults which had occurred. The EBA, in the appellant's view, did not accept to consider, as a valid justification, all the qualitative factors mentioned by the appellant (including the factor that, meanwhile, the appellant's methodology for issuing SME-ratings had been completely changed).
16. On 28 October 2018 the draft mapping report, including the downgrade of the correspondence of certain appellant's long-term corporate ratings with CQS under CRR was published for consultation on the EBA website. The appellant submitted a detailed 28-page response to the public consultation. On 21 February 2019 a second conference call took place with EBA's officials, but they informed the appellant that all its objections raised in response to the public consultation were deemed insufficient to modify the proposed downgrade. Consistently, the final report containing the draft implementing technical standards amending IR 2016/1799 proposed for endorsement of the European Commission was adopted as originally envisaged as to the downgrade of the appellant's mapping.
17. The appellant argues that the public consultation and the pre-publication of the proposal to modify and downgrade the appellant's mapping have caused considerable damage to the image and business of the appellant and led to its financial losses in 2019.
18. On the issue of admissibility, the appellant argues, in its Notice of Appeal, that the appealed decision includes the downgrading of the mapping of certain Creditreform's ratings and the results of this decision concern therefore the appellant individually and directly. Moreover, the challenged act is a draft of implementing technical standards in accordance with Article 15 of the ESAs Regulations and is based on an EU act within the meaning of Article 1(2) of EBA Regulations in connection with CRR. The appellant argues therefore that the appeal is directed against an EBA's decision within the meaning of Article 60 of EBA Regulation and is therefore admissible.
19. In turn, the application for suspension constitutes a form of interim relief pending the Board of Appeal's decision on the merits of the case.
20. The appellant argues in the Notice of Appeal that it seeks the suspensive effect of the appealed decision as the only appropriate measure of averting already existing and imminent damage to the appellant. It says in this respect that since 28 October 2018 the appellant has registered a significant decline in orders due to the negative mapping

downgrading envisaged by the proposed EBA decision and now expects further order cancellations, which may likely threaten the existence of the appellant.

21. The appellant further argues that, in weighing the interest of all parties in these proceedings, the EBA decision could be postponed without damage for EBA or the public whereas the implementation of the EBA decision can have for the appellant an immediate impact with an immense potential damage. The protection of the appellant from the occurrence of further damage can only be guaranteed, in the appellant's view, if the EBA decision is corrected and after legal clarification from the Board of Appeal or another competent authority.
22. The appellant concludes therefore, that the grant of the requested suspensive effect is the only and most appropriate measure to prevent further damage to the appellant, without prejudice to EBA's rights.
23. Accordingly, the appellant asks the Board of Appeal to grant suspensive effect to the appeal and to revoke the decision of the EBA and withdraw it, taking into account the objections made in the appeal.
24. In its reply of 30 August 2019 to EBA's response, the appellant further argues that "the acting authorities have acted unlawfully and thus discriminatory in the preparation of the mapping" and, despite any inadmissibility claim by EBA, the Board of Appeal "as the sole reviewing body responsible for all decisions of the ESAs must have an interest in reviewing the serious and intolerable infringements against the appellant".
25. As to the admissibility of the appeal, the appellant argues that the final report adopting the draft implementing technical standard is a decision under Article 60(1) of the ESAs Regulations, interpreted in light of the original intention of the legislator and of recital (58) of the ESAs Regulations. This is so, in the appellant's view, because, Article 60(1) refers to "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" without distinguishing whether the decision concerns the preparation of a draft implementing or regulatory technical standard or a sanction decision. In the instant case, the adoption of the final report is such a decision and recital (58) requires that such a decision be subject to review of the Board of Appeal.
26. The appellant, in its reply of 30 August 2019, further addresses specifically the arguments raised by EBA with its response of 12 August 2019, noting, i.a., that: (i) the appellant did not intend to challenge, with its appeal, the European Commission decision endorsing the ESAs proposal, but the ESAs decision adopting, with its final report, the draft implementing technical standard; (ii) in the suspension stage, the balance of interest does not support the maintenance of the status quo but rather the prompt elimination of an "obviously unlawful act"; (iii) the CJEU case law mentioned by the EBA to support its claim that a challenge of a preparatory act is inadmissible does not apply to Article 60 of the ESAs Regulations and it is therefore not relevant in the instant case; this is even more so, because the ESAs final report was made public and "a number of investors (...) have announced that they will cancel orders in the event of a mapping downgrade"; (iv) the provisions of CRA Regulation are not relevant for the determination of what constitutes an appealable decision under Article 60 of the

ESAs Regulations; (v) the appellant offers the Board of Appeal access to all its business documents to prove the damages suffered.

The EBA [The Respondent]

27. The EBA filed its response to the Notice of Appeal on 12 August 2019 and submits that the appeal is inadmissible as it is a challenge to a preparatory act which does not have legal effects bringing about a change in the legal position of Creditreform and is therefore not a “decision” within the meaning and scope of Article 60(1) of the ESAs’ Regulations. The EBA notes in this respect that (i) only the European Commission is competent to take the final step of ultimately adopting the technical standards in the form of an implementing regulation which will have binding effects vis-à-vis third parties; (ii) as it results from the wording and context of the applicable legislative framework, draft implementing technical standards have no legal effects; (iii) in the circumstances of the case, the intention of the EBA was not to do anything other than adopt a purely preparatory act not having legal effects vis-à-vis the appellant (and the EBA refers for instance to page 5 of the final Report); (iv) the final content of the technical standards will take the form of a Commission regulation titled as such, and Article 2 provides for entry into force on a future date, following publication in the Official Journal of the Commission regulation.
28. The EBA concludes by pointing out that although an ESA’s adoption of draft technical standards may in reality indicate to a person “some degree of likelihood” that it will in the future incur an element of burden, this is merely a factual consequence, and not a legal effect which brings about a distinct change in the legal position of the person.
29. The EBA further submits that the appeal is also inadmissible because, being a preparatory act, the contested act is not a decision to the effect of Article 60(1) of the ESAs’ Regulations. EBA refers to the CJEU case law (*Case 60/81, IBM v Commission*; *Case C-445/00 Austria v Council*; *Case T-725/15, Arysta LifeScience Netherlands BV v European Food Safety Authority*) according to which preparatory acts having no independent legal effects are unreviewable.
30. The EBA also submits that the draft technical standards are not a decision addressed to the appellant or in the form of a decision addressed to another person as required under Article 60(1) of the ESAs’ Regulations. In addition the EBA clarifies that, for the avoidance of doubt, insofar as the appellant might be understood as challenging the discrete act of the taking of the decision itself in relation to the adoption of the draft technical standards, such discrete act (namely the vote on the adoption of the Final Report) did not take the form of a decision addressed to the appellant or to any other person.
31. Accordingly, in the EBA’s view, the appeal is inadmissible.
32. As to the application for suspension the EBA argues that (i) the application is manifestly inadmissible as it seeks suspension of an act which has no legal effects vis-à-vis the appellant and is only preparatory; (ii) the application is manifestly inadmissible as it seeks suspension of a future Commission action, which would be beyond the remit of the Board of Appeal pursuant to Article 60(3) of the ESAs’ Regulations and an unwarranted and disproportionate interference in the exercise by the European

Commission of its implementing powers; (iii) the appellant has failed to substantiate and evidence its case for suspension (the appellant's claims as to financial damages appearing of a purely general nature and being expressed without indicating the perceived degree of probability that the alleged potential damage will crystallise).

33. The EBA further argues that the appellant failed to pursue the appeal with urgency having waited for nearly two months and has given no explanation for not bringing its appeal sooner.
34. Finally, the EBA argues that suspension would be disproportionate and prejudicial to the EBA, third parties and the public interest because it does not appear possible to merely suspend the Creditreform mapping downgrade (i.e. the provisions in the draft implementing technical standard relating to it) and an order would suspend in its entirety the process for the adoption by the Commission of an implementing regulation, which provides for numerous significant matters extending beyond Creditreform's mapping downgrade (the EBA refers for instance to the fact that the ESAs have proposed that certain rating grades of a competitor, European Rating Agency, be upgraded and that new mappings for certain ratings be introduced for other nine credit agencies). The EBA considers therefore that the balance of interests in the instant case favours preserving the status quo and, accordingly, the application for suspension should be refused.

III Discussion by the Board of Appeal of the parties' contentions

35. The Board of Appeal fully appreciates the importance of this appeal to all parties, and fully appreciates the importance of the application to suspend the challenged act. It expresses its appreciation for the clear submissions made by both parties.
36. As the Board anticipated in its case management directions of 29 July 2019, in the circumstances of the case, where the appellant is challenging a preparatory act, and namely draft implementing technical standards submitted by the Joint Committee of the ESAs for endorsement by the European Commission, the Board of Appeal considers that the issue of suspension must be decided by the Board together with the ruling on admissibility of the appeal, prior to the full consideration of the merits of the appeal. This is so because the issues related to suspension and admissibility are strictly intertwined in the instant case, and under Article 60(4) of the EBA Regulation and Article 9 of the Rules of Procedure, the Board shall examine whether the appeal is admissible before examining whether it is well-founded. Yet this is also so, because in this way the Board can ensure, in the best interest of the parties, that, due to the importance of the questions raised in the merits, the parties timely identify the proper venue for adjudication of such important matters.
37. The legal background of the dispute is as follows.
38. Article 136(1) CRR requires the specification for so called External Credit Assessment Institutions ("ECAIs") of the correspondence ('mapping') of the relevant credit assessments issued by an ECAI to the credit quality steps ("CQS") set out in Section 2 of CRR. ECAIs are credit rating agencies that are registered or certified in accordance with Regulation (EC) No 1060/2009 or a central bank issuing credit ratings which are exempt from the application of that Regulation.

39. As also clarified by IR 2016/1799, the mapping has the objective of assigning the appropriate risk weights under CRR to the rating categories of an ECAI. Therefore, it should be able to identify not only relative differences of risk but also the absolute levels of the risk of each rating category, ensuring appropriate levels of capital of the relevant credit institutions under the standardised approach.
40. The mapping can therefore be understood as the correspondence of the rating categories of an ECAI with a regulatory scale which has been defined by the competent supervisory authorities for prudential purposes. A different mapping should be conducted for each relevant set of rating categories.
41. Both quantitative and qualitative factors should be used to produce a mapping, with the qualitative factors being considered in a second stage, as and when necessary and especially where quantitative factors are not adequate. As a result, qualitative factors should assist in reviewing, correcting and enhancing any initial mapping done based on quantitative factors, where such review is justified and necessary. This two-step approach is required in order to contribute to the objectivity of the mapping and to ensure that the mapping represents the correspondence of the rating categories of an ECAI with a regulatory scale which has been defined for prudential purposes. At the same time, however, it is also necessary to avoid causing undue material disadvantage to those ECAs which, due to their more recent entrance into the market, present limited quantitative information, with the view to balancing prudential with market concerns. In this context the relevance of the quantitative factors can be relaxed; yet the default rate associated with items assigned the same rating category remains the most representative quantitative factor.
42. With IR 2016/1799 of 7 October 2016 the European Commission has laid down the implementing technical standards currently in force with regard to such mapping in accordance with Articles 136(1) and 136(3) CRR.
43. Article 16 of IR 2016/1799 sets out that mapping tables are attached to the Regulation as an integral part thereof and that the correspondence of the rating categories of each ECAI with the CQS set out in Section 2 of Chapter 2 of Title II of Part Three of CRR is that set out in Annex III.
44. Annex III, as attached to the original Regulation (EU) shows the mapping tables for the purposes of Article 16, including the CQS related to the long-term credit rating scale of Creditreform.
45. The proposal of new draft implementing technical standards amending IR 2016/1799, and its Annex III, propose to downgrade Creditreform's CQS 3, 4 and 5 as illustrated above at paragraphs 4 and 12.
46. A considerable number of points are raised in relation to the parties' respective cases for suspension and admissibility, which the Board of Appeal considers below. Preliminarily the Board notes, however, that this is not the first application that has been made to this Board for suspension under Article 60(3) of the ESAs Regulations. Specifically, the Board has had to consider the correct legal approach to such an application already in *Skandinaviska Enskilda Banken AB v ESMA* and clarified its view on several points of some relevance also in this case.

47. In *Skandinaviska Enskilda Banken AB v ESMA* the Board of Appeal held that, when deciding on a suspension, there is no question of ruling on the merits, because any suspension would be purely temporary pending the outcome of the appeal and the decision of the Board on an application for suspension is by its nature interim, in the sense that it would not prejudice the future decision on the substance of the case nor render it illusory by depriving it of effectiveness (see, to that effect, CJEU, judgment of 24 March 1993, C-313/90 R *CIRFS and Others v Commission*, EU:C:1993:111, at paragraph 24; GCEU, judgment of 19 May 1999, T-203/95 R *Connolly v Commission*, EU:T:1999:101, at paragraph 16). The suspension would only have effect until the Board’s final decision on the appeal.
48. The Board of Appeal further held that it is empowered to adopt interim measures allowing an entity to continue an activity as in the past, even if the appealed decision has found that this breaches the applicable rules. The Board considered that the scope of the suspensive provision in Article 60(3) of the ESAs Regulations is, in general terms, empowering the Board of Appeal, if it considers that circumstances so require, to “suspend the application of the contested decision”. The power, therefore, goes to the “application of the contested decision”, and this is sufficiently broad to cover a suspension allowing an entity to continue its business as in the past pending an appeal. This may be necessary to give an effective remedy in a particular case and there is no reason to read Article 60(3) as excluding it.
49. As to the legal interest in requesting the suspension, the Board referred to settled case law, specifically to the order of 2 March 2016, C-162/15 P-R, *Evonik Degussa GmbH v European Commission*, EU:C:2016:142, at paragraph 103, where the Court clarified that:
- “... in accordance with settled case-law, the risks associated with each of the possible disposals of the case must be weighed in the proceedings for interim measures. In practical terms, that means examining whether or not the interest of the applicant in obtaining suspension of the operation of the contested act outweighs the interest in its immediate implementation. In that examination, it must be determined whether the possible annulment of that act by the judgment on the substance would make it possible to reverse the situation that would have been brought about by its immediate implementation and conversely whether suspension of its operation would be such as to impede the objectives pursued by the contested act in the event of the main action being dismissed (orders of the President of the Court in *Commission v Atlantic Container Line and Others*, C-149/95 P(R), EU:C:1995:257, paragraph 50 and *Belgium and Forum 187 v Commission*, C-182/03 R and C-217/03 R, EU:C:2003:385, paragraph 142, and order in *United Kingdom v Commission*, C-180/96 R, EU:C:1996:308, paragraph 89).”
50. The Board further noted that the effect of Articles 278 TFEU and 279 TFEU, read in conjunction with Article 256(1) TFEU, is that a judge may order that the application of an act contested before the General Court be suspended if it is established that such an order is justified in order to avoid serious and irreparable harm to the applicant before a decision is reached on the main action. However, it does not in the Board’s opinion follow that such an approach is necessarily applicable in the case of a suspension decision under Article 60(3). The Board of Appeal is not a court, but an integral part of the three ESAs: see Article 6(5) of the ESAs Regulations. It is part of the system of checks and balances contained in the ESAs Regulations providing participants in the

financial markets with an avenue for the review of a supervisory decision, which is itself subject to appeal to the General Court of the European Union (see Article 61(1) of the ESAs Regulations).

51. This, in the Board’s view, would give proper effect to the terms of Article 60(3) which in its terms gives the Board a general power to suspend “if it considers that circumstances so require”.

52. At paragraph 126 of the order of 20 July 2016, T-718/15 R, *PTC Therapeutics International v. EMA*, EU:T:2016:425, the President of the Court draws a distinction between proceedings which relate to the lawfulness of payment obligations (such as a fine), and those that relate more broadly to the protection (in that case) of allegedly confidential information:

“ ... a clear distinction must, in particular, be made between the present proceedings, which relate to the protection of allegedly confidential information, and proceedings relating to the lawfulness of payment obligations imposed by a decision of the Commission, such as a fine or the obligation to reimburse State aid. In the latter category of proceedings, the dismissal of an application for interim measures on the ground that the serious and irreparable damage condition is not met cannot neutralise in advance the consequences of a future annulment of the contested decision, since the applicant would obtain repayment of the sum paid or reimbursed, including interest, and would therefore be fully restored financially.”

53. The Board of Appeal’s view in *Skandinaviska Enskilda Banken AB v ESMA* has been that the Board may take into account all the circumstances of the case in deciding whether to suspend the application of a contested decision under Article 60(3) of the ESAs Regulations. The decisive factor should be the weighing of interests, weighing the damage caused to the appellant if the application for suspension is rejected and the appellant eventually succeeds, against the damage to ESAs, to third parties and to the public interest if a suspension is granted and eventually the ESAs succeed. In practical terms, that means examining whether the interest of the applicant in obtaining suspension of the operation of the appealed decision outweighs the interest in its immediate implementation. In that examination, it must be determined whether the success of the appellant in the appeal on the substance would make it possible to reverse the situation that would have been brought about by its immediate implementation and conversely whether suspension of its operation would be such as to impede the objectives pursued by the contested act in the event of the appeal being dismissed (see to that effect orders of the President of the Court of 19 July 1995, C-149/95 P R *Commission v Atlantic Container Line and Others*, EU:C:1995:257, at paragraph 50 and of 22 June 2006, C-182/03 R and C-217/03 R, *Belgium and Forum 187 v Commission*, EU:C:2006:416, at paragraph 142, and order of 12 July 1996, *United Kingdom v Commission*, C-180/96 R, EU:C:1996:308, at paragraph 89; lastly, order of 2 July 2019, C-619/18 R, *Commission v Polish Republic*, EU:C:2019:575). Irreparable damage to the applicant would clearly be important in that regard if demonstrated, and equally lack of damage, or minor damage, or the fact that damage that would be made good by the supervisory authority if that is the case, would also be important. But the Board’s provisional view in *Skandinaviska Enskilda Banken AB v ESMA* was that the correct interpretation of Article 60(3) in context is not restricted to these considerations, and further, that the public interest is likely to be an important consideration in deciding the outcome.

54. The Board adopts the same approach as in *Skandinaviska Enskilda Banken AB v ESMA*. Moreover, in the instant case, the Board considers that to grant a suspension it must consider at the same time if the appeal is admissible, and for the reasons stated below, Creditreform's appeal is, in the Board's view, not admissible.

55. The Board accepts that, although the appeal refers to an act of general application (a draft implementing technical standard under Article 15 of the ESAs Regulations), in the instant case the amendment of Annex III would be a decision of individual and direct concern to the appellant under the so called *Plaumann* test (judgment of 15 July 1963, C-25/62, EU:C:1963:17). Indeed, in the instant case, the implementing technical standard, once endorsed by the European Commission, does not require any further implementing measure and at the same time its Annex III makes specific factual mapping references to the appellant, which is in this way differentiated from all other credit rating agencies: a finding sufficient, in the Board of Appeal's view, to consider, from this perspective, an application to challenge such particular technical standards admissible pursuant to Article 263 TFEU and to grant *locus standi* to the applicant (the Board of Appeal refers in this to CJEU, judgment of 3 October 2013, C-583/11, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:C:2013:625 where the Court has confirmed (at paragraph 72) that:

“According to that case-law, natural or legal persons satisfy the condition of individual concern only if the contested act affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed”.

56. The principle that *locus standi* can be granted not only to the addressee of an ESA's decision but also to a person different from the addressee for which the decision is of direct and individual concern is valid also in the context of appeals in front of the Board of Appeal under the ESAs Regulation, although the wording of Article 263(4) TFEU is not identical to the one of Article 60 of the ESAs' Regulations.

57. Article 263(4) is as follows:

“Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures”.

58. Article 60 is differently phrased and is 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”

59. The textual difference, whilst it offers a useful indication that in the legislative intent regulatory acts drafted by the ESAs are not contemplated as the subject-matter of an appeal to the Board of Appeal and are not considered decisions addressed to a specific person or another person (as correctly argued by the EBA), is not such as to prevent a

person who is not the addressee of a decision from appealing a decision which is of direct and individual concern to the appellant.

60. In the instant case, however, the appealed act is not a decision under Article 60 of the ESAs Regulation because it is merely a preparatory act without immediate legal effects vis-à-vis the appellant; it is a proposal for a *draft* implementing regulation, which will be adopted through endorsement via a final decision of the European Commission according to Article 15 of the ESAs Regulations.

61. Article 15 of the ESAs' Regulations is as follows:

“Article 15

Implementing technical standards

1. The Authority may develop implementing technical standards, by means of implementing acts pursuant to Article 291 TFEU, in the areas specifically set out in the legislative acts referred to in Article 1(2). Implementing technical standards shall be technical, shall not imply strategic decisions or policy choices and their content shall be to determine the conditions of application of those acts. The Authority shall submit its draft implementing technical standards to the Commission for endorsement.

(...)

Within 3 months of receipt of a draft implementing technical standard, the Commission shall decide whether to endorse it. The Commission may extend that period by 1 month. The Commission may endorse the draft implementing technical standard in part only, or with amendments, where the Union's interests so require.

Where the Commission intends not to endorse a draft implementing technical standard or intends to endorse it in part or with amendments, it shall send it back to the Authority explaining why it does not intend to endorse it, or, as the case may be, explaining the reasons for its amendments. Within a period of 6 weeks, the Authority may amend the draft implementing technical standard on the basis of the Commission's proposed amendments and resubmit it in the form of a formal opinion to the Commission. The Authority shall send a copy of its formal opinion to the European Parliament and to the Council.

If, on the expiry of the six-week period referred to in the fifth subparagraph, the Authority has not submitted an amended draft implementing technical standard, or has submitted a draft implementing technical standard that is not amended in a way consistent with the Commission's proposed amendments, the Commission may adopt the implementing technical standard with the amendments it considers relevant or reject it.

The Commission shall not change the content of a draft implementing technical standard prepared by the Authority without prior coordination with the Authority, as set out in this Article”

62. It is apparent from the clear reading of Article 15(1) of the ESAs Regulations that a draft implementing technical standard developed by the ESAs is merely a *preparatory* act which is part of a compound procedure the outcome of which is represented by the endorsement decision adopted by the European Commission. The IR is an act of the European Commission.

63. The GCEU in its judgment of 26 November 2002, T-40/00, *Artedogan and others v. Commission*, EU:T:2002:283 at paragraphs 197-199 held that:

“The procedure established in Article 15a of Directive 75/319 is characterised by the vital role accorded to an objective and detailed scientific assessment by the CPMP of the substances in question. Although the CPMP's opinion does not bind the Commission, it is none the less extremely important so that any unlawfulness of that opinion must be regarded as a breach of essential procedural requirements rendering the Commission's decision unlawful. Since the Commission is not in a position to carry out scientific assessments of the efficacy and/or harmfulness of a medicinal product, the aim of the mandatory consultation of the CPMP is to provide the Commission with the evidence of scientific assessment which is essential for it to be able to determine, in full knowledge of the facts, the appropriate measures to ensure a high level of public health protection (see, by analogy, on cosmetic products, Case C-212/91 *Angelopharm* [1994] ECR I-171, paragraphs 31, 32 and 38, and *Bergaderm and Goupil v Commission*, cited above, paragraph 64). Against that background, for the purposes of assessing the lawfulness of a Commission decision based on Article 15a of Directive 75/319, the Community judicature may be called upon to review, first, the formal legality of the CPMP's scientific opinion and, second, the Commission's exercise of its discretion.”

64. It follows that, in accordance with settled case law of the CJEU that the Board of Appeal must follow also in its interpretation of Article 60 of the ESAs Regulations, acts having a preparatory nature adopted by a European agency contributing to the formulation of subsequent binding acts of the Commission are not subject to an autonomous judicial review but are subject to review through a check of the legitimacy of the final act. This is so also when the preparatory act, whilst not binding for the Commission, yet it has “decisive importance for the purpose of the adoption of the decision by the Commission”. Likewise, the GCEU, with order of 1 March 2007, T-311/06, *FMC Chemical SPRL v. EFSA*, EU:T:2007:67, held that a non-binding opinion given by a EU agency (EFSA) assisting the European Commission in the procedure leading the European Commission to adopt the final decision cannot undergo autonomous and direct judicial review, since it forms part of a compound procedure and is just an element in the process of adoption of the final decision by the Commission. Those wishing to challenge these acts must therefore file an application against the final decision adopted by the European Commission in front of the General Court under Article 263 TFEU (compare more recently GCEU judgment of 14 December 2018, T-725/15, *Arysta LifeScience Netherlands v. European Food Safety Authority*, EU:T:2018:977).
65. A similar finding applies when administrative proceedings are vertically, rather than horizontally, compound and are composed therefore of a non-binding preparatory act developed by a national authority and a final European decision. In this respect it is settled case law that “Article 263 TFEU confers upon the Court of Justice of the European Union exclusive jurisdiction to review the legality of acts adopted by the EU institutions. Any involvement of the national authorities in the course of the procedure leading to the adoption of such acts cannot affect their classification as EU acts where the acts of the national authorities constitute a stage of a procedure in which an EU institution exercises, alone, the final decision-making power without being bound by the preparatory acts or the proposals of the national authorities” (judgment of 18 December 2007, *Sweden v. Commission*, C-64/05 P, EU:C:2007:802, paragraphs 93 and 94; judgment of 18 December 2003, T-326/99, *Fern Olivieri v. Commission and EMEA*, EU:T:2003:351, specifically in paragraphs 51-54).

66. The only exception is when it is apparent from the division of powers between the national authorities and the EU institutions that the act adopted by the national authority is a necessary stage of a procedure for adopting an EU act in which the EU institutions have only a limited or no discretion (see, to that effect, judgment of 3 December 1992, *Oleificio Borelli v Commission*, C-97/91, EU:C:1992:491, paragraphs 9 and 10).
67. This exception has however a narrow scope and must be interpreted narrowly, as recently confirmed by the CJEU, with its judgment of 19 December 2018, in case C-219/17, *Silvio Berlusconi and Fininvest v Banca d'Italia*, EU:C:2018:1023.
68. In the instant case, it is apparent that, according to Article 15 of the ESAs Regulation, the European Commission is not bound by the draft implementing technical standards prepared by the ESAs and has significant discretion as to the final determination of the content of such standards at the stage of adoption as an EU act. In the Board's view, this means that the non-binding draft implementing technical standards prepared by the ESAs, despite its undeniable importance in assisting the European Commission in the procedure leading to the adoption of such implementing technical standards, cannot undergo autonomous and direct judicial review, since such draft forms part of a compound procedure and is just an element in the ordinary process of adoption of the final decision by the Commission. Those willing to challenge these acts can do so only by filing an application for annulment under Article 263 TFEU against the final decision adopted by the European Commission in front of the General Court, asking the General Court to consider the alleged errors in fact or in law of the ESAs' preparatory act (the draft implementing technical standards) which, in the appellant's view, vitiate the European Commission's final decision.
69. This conclusion, based on settled case law, excludes the admissibility of an application to the GCEU for annulment of the draft technical standards; the Board considers that this conclusion is also valid to exclude the admissibility of an appeal to the Board of Appeal against the draft implementing technical standard, because so long as the draft is not endorsed by the European Commission and therefore adopted in its final form via a decision of the European Commission, the draft developed and proposed by the ESAs, despite the negative factual consequences that can be reasonably expected by its public disclosure (as noted by the appellant), has no legal effects vis-à-vis the appellant (for the finding that, to be appealable, an act must have legal effects, see judgment of 11 November 1981, C-60/81 *IBM v Commission* [1981] ECR 2639, paragraph 9; judgment of 17 July 2008, C-521/06 P *Athinaiki Techniki v Commission* [2008] ECR I-5829, paragraph 29; judgment of 18 November 2010, C-322/09 P *NDSHT v Commission* [2010] ECR I-11911, paragraph 45; and judgment of 13 October 2011, Joined Cases C-463/10 P and C-475/10 P *Deutsche Post v Commission* [2011] ECR I-9639, paragraphs 36 to 38). It follows that the decision which has legal effects vis-à-vis the appellant is only the European Commission decision which adopts the final implementing technical standard and which can be subject to an application for annulment in front of the General Court under Article 263 TFEU (with an application for suspension, if necessary).
70. The Board of Appeal notes that this is also consistent with the language of Article 60 of the ESAs Regulations, which does not contemplate, among the ESAs' decisions subject to the review of the Board of Appeal, acts of the ESAs under Article 15 (as well as under Articles 10-14) of the ESAs Regulations.

71. In the result, although it will be apparent from the above that the Board has fully appreciated the importance of the matters discussed in the instant case by the parties, and in particular the contention of the appellant that damage to its business is occasioned by the adoption of the draft implementing technical standards, the Board considers that the appeal, for the reasons stated above, is inadmissible. In those circumstances, the question of a suspension pending a hearing on the merits does not arise.
72. The Board of Appeal considers nonetheless that the adoption of this decision in the instant case may prove beneficial to both parties because it has sought to clarify the proper venue for adjudication of the matters of merit (alleged unlawfulness and discriminatory nature of the draft technical standards adopted by the ESAs) raised in the appeal and does so in a timely way.

IV The decision

On these grounds the Board of Appeal unanimously decides to dismiss the suspension application and the appeal as inadmissible.

The original of this Decision is signed by the Members of the Board in electronic format, as authorised by Article 22.2 of the Rules of Procedure and countersigned by hand by the Secretariat.

Marco Lamandini
(President)

(SIGNED)

Juan Fernandez Armesto

(SIGNED)

William Blair

(SIGNED)

Beata Maria Mrozowska

(SIGNED)

Katalin Mero

(SIGNED)

Michele Siri

(SIGNED)

On behalf of the Secretariat
Kai Kosik

(SIGNED)

A signed copy of the decision is held by the Secretariat