



BOA 2016 001

Decision

of the Board of Appeal of the European Supervisory Authorities given under Article 60 of Regulation (EU) No 1094/2010 and the Board of Appeal's Rules of Procedure (BOA 2012 002)

Appeal by

**Andrus Kluge, Boris Belyaev, Radio Elektroniks OÜ and Timur Dyakov
[appellants]**

against

**European Banking Authority
[respondent]**

Decision

Ref. EBA/2015/D/2015 of 19 August 2015

William Blair (President)
Juan Fernández-Armesto (Vice-President and Rapporteur)
Noel Guibert
Beata Maria Mrozowska
Katalin Mero
Marco Lamandini

Place of this decision: Paris
7 January 2016

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I The Appeal

1. This is an appeal by Mr Andrus Kluge, Mr Boris Belyaev, Radio Elektroniks OÜ, and Mr Timur Dyakov against the European Banking Authority, the respondent, in respect of a decision set out in a letter of 19 August 2015. The appellants' Notice of Appeal was sent by email on 15 October 2015, and in hardcopy by courier the same day.
2. The appellants are represented by Mr Toomas Vaher, Attorney-at-Law, law firm Raidla Ellex, Tallinn, Estonia.
3. The respondents are represented by Mr Jonathan Overett Somnier, Head of Legal Unit, and Ms Anna Gardella, Legal Expert, both of the European Banking Authority.
4. The appeal is brought under Article 60 of Regulation No 1093/2010 (the EBA Regulation"). The EBA Regulation establishes the European Banking Authority (EBA). It provides in Article 6(5) for the Board of Appeal to exercise the tasks set out in Article 60.
5. Article 60(1) of the EBA Regulation provides for the right of appeal 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.”
6. On 4 November 2015, the respondent sought directions that the Board of Appeal should determine its competence to hear the Appeal as a preliminary matter pursuant to Article 9.1 of the Rules of Procedure, and set out reasons why it contended that that the appeal had to be dismissed on grounds of lack of competence.
7. On 19 November 2015, the appellants requested the Board of Appeal to reject the request for such directions and hear the arguments on competence at the same time as the merits of the case. Alternatively, if the Board of Appeal

decided to hear the competence issue separately from the merits, the appellants requested a reasonable time to respond to the respondent's arguments.

8. Having considered the parties' observations, on 23 November 2015 the Board of Appeal decided that the competence issue must be determined as a preliminary matter. In response to the appellants' request for a reasonable time to respond to the arguments advanced by the respondent, the appellants were asked to file a response by 3 December 2015, the respondents to file a reply by 10 December 2015.
9. The appellants duly sent their response as to admissibility on 3 December 2015.
10. The respondents duly replied on 10 December 2015.

II Summary of relevant facts

11. By complaint dated 21 May 2013 under Article 17 of the EBA Regulation, the appellants requested the respondent to investigate alleged breaches by the Estonian Financial Supervision Authority ("EFSA") of the requirements of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions ("the Credit Institutions Directive") in relation to its supervision of the affairs of the credit institution AS Eesti Krediidipank.
12. The underlying dispute relates to the acquisition of shares in Krediidipank by a Russian bank. The appellants are members of the supervisory board or shareholders, and their case is that the alleged failure of supervision has had a direct effect on them.
13. Article 17 of the EBA Regulation provides that:
 1. Where a competent authority has not applied the acts referred to in Article 1(2), or has applied them in a way which appears to be a breach of Union law, including the regulatory technical standards established in accordance with Articles 10 to 15, in particular by failing to ensure that a financial institution satisfies the requirements laid down in those acts, the Authority

shall act in accordance with the powers set out in paragraphs 2, 3 and 6 of this Article.

2. Upon a request from one or more competent authorities, the European Parliament, the Council, the Commission or the Banking Stakeholder Group, or on its own initiative, and after having informed the competent authority concerned, the Authority may investigate the alleged breach or non-application of Union law.

14. The appellants' complaint requested the respondent to investigate the alleged breach of Union law by EFSA being a competent authority under its "own initiative" powers in Article 17(2) of the EBA Regulation.

15. By letter of 15 January 2014, the respondent informed the appellants that the complaint had been considered admissible pursuant to the EBA Internal Processing Rules on Investigation Regarding Breach of Union Law ("EBA Internal Processing Rules").

16. By letter of 19 December 2014, the respondent informed the appellants that it was minded to close the case without opening an investigation. Further letters were sent on behalf of the appellants thereafter.

17. By letter of 19 August 2015 (EBA/2015/D/205) the respondent informed the appellants that it had "concluded not to open an investigation under Article 17 of the EBA Regulation".

18. The appellants seek to appeal under Article 60(1) of the EBA Regulation (set out above) on the basis that this letter is a decision addressed to them, or a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to them.

III Whether or not the Board of Appeal has competence to decide on the appeal

19. The respondent's objection as to lack of competence is based on the judgment of the General Court (Third Chamber) of 9 September 2015 in case T-660/14 (SV Capital OÜ v European Banking Authority).

20. In that case, SV Capital OÜ, an Estonian company, brought an appeal against a refusal by the EBA to open an investigation into the Estonian and Finnish supervisory authorities in respect of the supervision of an Estonian bank (not the bank the subject of the present dispute).
21. The Board of Appeal dismissed the company's appeal. On further appeal, the General Court dismissed the company's action, but also found that the Board of Appeal lacked competence to decide on the appeal. The respondent's case is that the present appeal is indistinguishable, and that the Board of Appeal equally lacks competence.
22. The General Court held that in order for an appeal to the Board of Appeal to lie against a decision of the EBA under Article 60 of the EBA Regulation, the decision must either have been taken in accordance with the Union acts referred to in Article 1(2) of the Regulation, or be one of the decisions referred to in Article 17 to 19 of the Regulation. So far as Article 17 is concerned (also the relevant Article in the present case), it was held that except in the case of a refusal to initiate an investigation upon a request by one of the entities exhaustively listed in Article 17(2), the recommendations made or decisions taken by the EBA pursuant to Article 17(2) to (6) of the Regulation are addressed to either (i) the competent authorities authorised to request an investigation or (ii) to the financial institutions concerned (paragraphs 66 to 71). Thus the right of appeal is restricted to the competent authorities, the European Parliament, the Council, the Commission or the Banking Stakeholder Group, or (as paragraph 71 makes clear) a financial institution to which a decision is addressed.
23. The respondent submits that the effect of the decision of the General Court is that private individuals, like the appellant, not listed in Article 17(2) of the EBA Regulation may request the EBA to initiate an investigation against a competent authority, but they cannot be addressees of a decision pursuant to Article 17 of the Regulation so as to give them a right of appeal to the Board of Appeal. Because they are not included in the exhaustive list in Article 17(2) of the EBA Regulation (European Parliament, the Council, the Commission or the Banking Stakeholder Group), such individuals do not have standing before the Board of

Appeal to challenge the EBA's determination not to open an "own initiative" investigation.

24. The Board of Appeal agrees with the respondent's analysis of the effect of the decision. Persons other than the entities listed can (and do) ask the EBA to open "own initiative" investigations, and (as in this case) the EBA may accept the complaint as admissible, and make subsequent enquiries, but it follows from the decision of the General Court that they have no right of appeal to the Board of Appeal against the Authority's decision in that regard.

25. In its response, the appellants state that the decision of the General Court has been appealed to the CJEU, and submit that the Board of Appeal should not rely on the reasoning since it is not yet settled, or should consider a stay pending a final decision by the CJEU.

26. However, the fact that a decision of the General Court may be the subject of a pending appeal does not affect its binding quality. As to stay, the respondent submits that in any case the Board of Appeal has no power to stay an appeal. However, nothing in the EBA Regulation suggests that the Board of Appeal should be precluded to stay an appeal, if there is good reason to do so (subject to the time limit established in Article 60(2) of the EBA Regulation). For example, common sense suggests that the Board should not issue a decision if a ruling by the court is imminent which will determine the matter one way or the other, but it is not suggested that this is the case here. The Board finds that there are no grounds for a stay, even if it has the power to grant one.

IV The appellants' grounds

27. The appellants raise three substantive grounds on which they contend that the decision in Case T-660/14 is distinguishable, and that the Board of Appeal has competence to hear the appeal.

28. First, the appellants point out that under Article 60(1) of the EBA Regulation, aside from an appeal under Article 17, an appeal lies against "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”. Article 1(2) refers to a number of directives including the Credit Institutions Directive and “all directives, regulations, and decisions based on those acts, and of any further legally binding Union act which confers tasks on the Authority”.

29. The appellants point out that at paragraph 67 of Case T-660/14, the General Court states: “... despite the fact that infringement of certain provisions of Directive 2006/48 [the Credit Institutions Directive] was cited in support of the complaint, the decision of the EBA was not based on Article 1(2) of [the EBA Regulation]. The EBA did not express any view in its decision on whether or not that directive had been infringed by the competent authorities or by the credit institution concerned”.
30. The appellants submit that the General Court has interpreted Article 60(1) in a way that if the decision of the EBA subject to review expressed a view that the Credit Institutions Directive had been infringed or not, then the decision could fall under Article 60(1) of the EBA Regulation. The appellants submits that the 19 August 2015 letter analysed extensively if the relevant competent authority had breached the Credit Institutions Directive, hence, it is submitted that the Board of Appeal has jurisdiction on this alternative basis.
31. The respondent contends that its decision not to open an investigation is not “taken in accordance with the Union acts referred to in Article 1(2)”. Rather, it is the outcome of the discretionary assessment as to the opportunity to open an “own initiative” investigation. The respondent contends that paragraph 67 of the General Court’s judgment must be interpreted as referring to decisions that the sectoral acts referred to in Article 1(2) mandate the EBA to adopt. It says that “... no alternative interpretation of the General Court’s statement is viable”.
32. The Board of Appeal accepts the respondent’s contention. Applying the decision in Case T-660/14, an appeal under Article 60(1) of the EBA Regulation lies in respect of decisions taken by the Authority under the Union acts referred to in Article 1(2) of the Regulation, but not decisions refusing to open an “own initiative” investigation into complaints which concern such acts. On this basis,

neither of the avenues of appeal referred to in Article 60(1) of the EBA Regulation is open to the appellants.

33. Second, the appellants contend that the Decision of the European Banking Authority adopting Rules of Procedure for Investigation of Breach of Union Law (EBA/DC/2014/100 of 14 July 2014), gives persons in the position of the appellants the same rights as those listed in Article 17(2) of the EBA Regulation. The appellants contend that this was not taken into account in the decision in Case T-660/14.
34. The respondent contends that the Internal Processing Rules cannot give any appeal rights which are not afforded by the EBA Regulation. The Internal Processing Rules are simply setting out good administrative practice in dealing with complaints.
35. The Board of Appeal notes that the General Court refers expressly to the Internal Processing Rules in paragraph 7 of the decision. It follows that the Rules were not regarded by the court as extending rights of appeal which would not otherwise exist. This ground is rejected therefore.
36. Third, the appellants submit that the scheme of Article 60 and 61 of the EBA Regulation is that the remedy available before the Board of Appeal under Article 60 must be exhausted before proceedings may be brought in the Court of Justice under Article 61. Hence, it is contended that the Board of Appeal must have jurisdiction, and that this is supported by the fact that the General Court found that the appeal against the decision of the Board of Appeal was admissible.
37. The Board notes that as regards actions before the court in circumstances such as the present, the General Court refers to settled case law developed in the context of actions for annulment of Commission decisions refusing to initiate infringement proceedings, saying that these are applicable by analogy to the present case. These decisions establish that it is not open to persons who have lodged a complaint to bring an action before the EU judicature against a decision to take no further action on their complaint: see paragraph 48 of the decision.

38. However, the General Court distinguished between the questions whether the appeal to the Board of Appeal was admissible, and whether the proceedings in the General Court as regards the decision of the Board of Appeal were admissible. There is no discussion by the Court as to whether and in what circumstances remedies before the Board must be exhausted before a case may be brought before the Court, and that question may remain to be decided, but it cannot affect the question of competence in this case. The Board accepts the respondent's submissions in this respect.

39. Fourth, the appellants contend that their appeal should be deemed admissible based on the aims of the Board of Appeal. It submits that it would be wrong to exclude a remedy where matters of the seriousness which they allege in the present case are at issue, and it invites the Board of Appeal to adopt a "more expansive interpretation" than that adopted by the General Court.

40. However, it is axiomatic that the Board of Appeal must apply the decisions of the General Court and the Court of Justice of the European Union, and that these decisions are authoritative.

41. The Board of Appeal has concluded that there is no distinction of substance between the position in the present case and that in the case of SV Capital OÜ. It follows that the Board of Appeal lacks competence to decide on the appeal and that, in the language of Article 60(4) of the EBA Regulation, the appeal is inadmissible.

42. In accordance with Article 25.2 of the Rules of Procedure, the apportionment of the costs of the appeal shall be dealt with after publication of the decision if any of the parties makes representations in that regard.

V Decision

43. For the reasons given above, the Board of Appeal unanimously decides:

1. The Board of Appeal lacks competence to consider this appeal and/or the appeal is inadmissible.

2. The decision on costs is deferred.

44. The Secretariat is instructed to forthwith send a certified copy of this Decision to the parties, informing them of the right of appeal under Article 61 of the EBA Regulation, and to file the original in the Secretariat's records.

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

William Blair (President)

Juan Fernández-Armesto (Vice-President)

(SIGNED)

(SIGNED)

Noel Guibert

Beata Maria Mrozowska

(SIGNED)

(SIGNED)

Katalin Mero

Marco Lamandini

(SIGNED)

(SIGNED)

On behalf of the Secretariat

Jakub Michalik

(SIGNED)

A signed copy of the decision is held by the Secretariat.