



DECISION

given by the

BOARD OF APPEAL OF THE EUROPEAN SUPERVISORY AUTHORITIES

on

a request for suspension

In the appeal case brought by

Skandinaviska Enskilda Banken AB (SEB)
[Appellant]

against

The European Securities and Markets Authority (ESMA)
[Respondent]

Board of Appeal

William Blair (President)
Juan Fernández-Armesto
Beata Maria Mrozowska
Katalin Mero
Marco Lamandini
Michele Siri

Place of this decision: Frankfurt a.M.

Date: 30 November 2018

1. This is an application made by the appellant, Skandinaviska Enskilda Banken AB (“SEB”), to suspend a decision which it has appealed against until the appeal proceedings are concluded.
2. The decision in question is a decision by the Board of Supervisors of the European Securities and Markets Authority (“ESMA”, or “the respondent”) dated 11 July 2018. By this Decision, ESMA (i) adopted a supervisory measure in the form of a public notice and (ii) imposed a fine of EUR 495,000 on SEB and four other banks. This was on the basis of a finding that the banks had negligently breached Regulation (EC) No 1060/2009 on credit rating agencies as amended (“CRAR”) by issuing credit ratings without being authorised by ESMA to do so.
3. Four of the five banks (including SEB) have appealed to the Board of Appeal pursuant to Article 60(1) of Regulation (EU) No 1095/2010 (“the ESMA founding Regulation”) which provides for appeals against certain decisions of ESMA. The appellant banks contend that the activities concerned fall outside the provisions of CRAR.
4. There is no dispute as to the competence and jurisdiction of the Board of Appeal to hear the appeals. On 9 October 2018, the Board of Appeal directed that four appeals are to be dealt with and heard at the same time.
5. Of the four appellant banks, SEB has sought to suspend the decision. The other three banks have not sought suspension.
6. The application to suspend is made pursuant to Article 60(3) of Regulation (EU) No 1095/2010 (“the ESMA 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.”
7. The application to suspend is opposed by the respondent.
8. Nothing in this decision should be taken as expressing a view as to the ultimate merits of the appeal. It is concerned solely with the application to suspend.

The procedural background

9. Since this is an application to suspend a decision of ESMA pending appeal, the overall timeline of the appeal is of some relevance. In brief, the four Notices of Appeal including that of SEB were received by ESMA between 7 and 10 September 2018. The suspension application is included in SEB’s Notice of Appeal of 7 September 2018.

10. On 13 September 2018, an application was made to the Board of Appeal by ESMA's legal representatives (Cleary Gottlieb Steen & Hamilton LLP, or "CGSH") to be permitted to serve ESMA's responses within four months, that is, by 11 January 2019, on the basis that there were four separate appeals involving complex considerations and over 2,500 pages of documents.
11. On 9 October 2018, directions were given by the Board of Appeal to the effect that the responses were to be served considerably sooner, that is by 20 November 2018 (these have subsequently been served). The appellants' replies to the responses are to be served by 24 December 2018.
12. On 9 October 2018, CGSH made a further application to the Board of Appeal seeking 10 weeks from 24 December 2018 in which to file a rejoinder on behalf of ESMA. On this basis, it was suggested that the hearing of oral representations (to which the parties are entitled under Article 60(4) of the ESMA founding Regulation) should take place on or after 29 March 2019.
13. Following objections by the appellant banks and further submissions on behalf of ESMA, on 25 October 2018 the Board of Appeal ruled that any further rejoinder should be served by ESMA by 23 January 2019. The hearing of the parties' oral representations has been fixed to take place on 7 February 2019 in Frankfurt at EIOPA's premises.
14. The Board of Appeal also gave directions in respect of the suspension application, that is, the application which is the subject of this decision. Pursuant to those directions, CGSH sent submissions in opposition to the application by letter of 8 October 2018, SEB's legal representatives (Allen & Overy LLP or "A&O") sent submissions in reply by letter of 18 October 2018, and CGSH sent a response by letter of 29 October 2018. The Board thanks the parties for these comprehensive submissions.

The contentions of the parties on the suspension application

SEB

15. In its Notice of Appeal, A&O on behalf of SEB sets out its case that it has not committed any infringement of CRAR, and further that it has not committed any negligent infringement. Its case is that the assessments included in its credit research activities fully comply with the applicable EU regulatory framework and market practice.
16. In its Notice of Appeal and more particularly in its subsequent letter of 18 October 2018, A&O on behalf of SEB sets out its case on the suspension application.
17. It says that after the Decision was handed down, it was requested to pay the fine, and after its request for deferred payment was rejected, it had no choice but to pay the fine. The money is lodged in an interest-bearing account opened by the accounting officer of ESMA until such time as the Decision becomes final. It had no option but to pay the fine. The fact that it has paid does not prevent it from making an application for suspensive effect during the appeal proceedings.

18. The application constitutes a form of interim relief pending the Board of Appeal's decision on the merits of the case. It does not aim to lead to a precipitate ruling on the merits, being simply designed to ensure that SEB's fundamental rights are duly respected.
19. The Decision is based on the finding that SEB negligently committed the infringement of CRAR, is inextricable therefrom, and cannot be treated differently from the fine and public notice.
20. Although after the receipt of the Statement of Findings from ESMA, it is right that SEB took steps to comply with CRAR as interpreted by ESMA, it made it clear that it did not agree with ESMA's interpretation. Given that it was, and still is, unwilling to defy ESMA's Decision, it has adapted its credit research activities pending the decision of the Board of Appeal, and if necessary, the Court of Justice. At no point has SEB provided incorrect or misleading information or explanations to ESMA.
21. SEB's application for suspension is fully admissible under Article 60(3) of the ESMA founding Regulation. As ESMA itself recognises, the finding of an infringement "is the necessary first step prior to, and basis for, the decision".
22. The test on such an application for interim relief is the need to weigh the interests at stake. According to the jurisprudence of the Court of Justice, "... 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".
23. In this regard, SEB is seeking to obtain the suspension of the effect of the Decision, which places it in a situation of legal uncertainty and causes it financial damage, and to ensure that its right to an effective remedy is duly respected.
24. Given that the fine paid by SEB remains in an interest-bearing account, suspension would not have any impact on ESMA's financial position and it is evident that the interest of SEB in obtaining suspension outweighs the interest in its immediate implementation for ESMA.
25. As regards financial damage, SEB submits that the criterion linked to the irreparable nature of the financial damage alleged does not apply to the suspension application (*PTC Therapeutics International* case on 20 July 2016), nor is there a requirement of urgency.
26. Even if the Board of Appeal were to consider the criterion applicable, it is in any case fulfilled by SEB. The case at hand is completely unprecedented. ESMA had never initiated enforcement proceedings or imposed a sanction on credit institutions pursuant to the CRA Regulation.

27. As SEB states in its Notice of Appeal, the type of credit research reports under scrutiny had not raised any concerns from European regulators and was considered an important factor in the success of the European corporate bond markets, particularly the Nordic one.
28. For many years, SEB's clients have been dependent on its credit research reports to obtain information on the creditworthiness of issuers who lack resources to buy public ratings from registered credit rating agencies. By deciding that such reports constitute credit, the Decision hinders SEB's credit research activities and reduces its client base.
29. SEB's credit research reports are distributed to a number of clients pursuant to a client selection process; clients receive investment research and recommendations including assessments on the creditworthiness of bond issuers. Failing such assessments from SEB, they are very likely to look elsewhere, and one is faced with exceptional circumstances.
30. The criterion advocated by ESMA is based on the assumption that pecuniary compensation is capable of restoring the applicant to the situation, which obtained before it suffered the damage. But the proceedings are unlikely to allow SEB to obtain pecuniary compensation from ESMA for the harm suffered as a result of the Decision.
31. ESMA disregards the standard of proof set by the Court of Justice, which is met by SEB and does not require to be demonstrated with absolute certainty. The decision was published on subject to a press release on ESMA's website, and it is obvious that irreparable financial and reputational damage is likely to be caused by the Decision.
32. The public interest must be taken into account by the Board of Appeal when deciding, whether to grant the application. The Court of justice has on several occasions taken into account market interest when deciding whether to grant interim relief. The harm suffered by the European corporate bond markets and investors, as well as the personal harm suffered by SEB, must therefore be taken into consideration by the Board of Appeal when deciding whether to grant the Application.
33. The Decision jeopardises SEB's right to an effective remedy enshrined in Article 13 of the European Convention on Human Rights and Article 47 of the Charter. No other interim relief is available pending the Board of Appeal's decision on the merits, which seems unlikely to be issued before mid-2019. At that point in time, SEB will have no possibility of obtaining compensation from ESMA for the damage suffered in the intervening period, such that it will not have benefited from effective judicial protection in breach of Article 47 of the Charter.
34. Overall, SEB submits that ESMA's Decision unjustifiably places it in a position in which it must either (i) pursue its credit research activities and register as a credit rating agency, or (ii) profoundly change the way in which it conducts such activities.

35. It submits that the first option is not viable for a licensed credit institution, and that the second option is not viable because the conditional, ambiguous and unfounded terms of the Decision do not allow the appellant to know exactly how it must change its credit research facilities so as to ensure compliance with CRAR.
36. It submits that the Decision thereby puts it in a situation of legal uncertainty, which is counter-productive for the protection of investors and the stability of the internal market, namely the aims pursued by CRAR which ESMA is entrusted to safeguard.
37. Accordingly, SEB asks the Board of Appeal to:
 - (1) Declare that the application for suspension filed by SEB in its Notice of Appeal and reiterated by letter dated 17 September 2018 is admissible; and
 - (2) Rule that the said application for suspension is well-founded;

As a result:

- (3) Return the EUR 495,000 fine paid by SEB upon ESMA's request; and
- (4) Allow SEB to pursue its credit research activities, without using the term "shadow rating" or being subject to additional enforcement proceedings by ESMA, until a final decision on the merits has been issued by the Board of Appeal in the pending appeal proceedings.

ESMA

38. In its letter of 8 October 2018, and more particularly in its letter of letter of 29 October 2018, CGSH on behalf of ESMA submits that (i) the application for suspension is manifestly inadmissible, and (ii) SEB has not satisfied the requirements that would justify a suspension and its request is therefore manifestly unfounded. It also submits that the relief sought by SEB in its letter of 18 October 2018 goes further than was asked for in the Notice of Appeal.
39. In that regard, the Decision is a decision by ESMA (1) to adopt a supervisory measure consisting of a public notice, and (2) to impose a fine. The suspension of a decision can only refer to the suspension of the operative part of the decision, not its findings.
40. However, it is submitted, SEB does not in fact request the suspension of this decision, since it acknowledges that the decision has already produced its effects, and in particular that the fine has already been paid. A suspension request is devoid of purpose, and therefore inadmissible, if the decision has already been fully executed, as it has been here both as to the fine, and as to the notice.
41. The Board of Appeal does not have the power to grant forms of interim relief other than those set out in Article 60(3) of the ESMA founding Regulation. In any case, it cannot order repayment of the fine on an interim basis, which can stay in an interest-bearing account without prejudice to SEB.

42. SEB is requesting a suspension of ESMA's finding according to which SEB committed the infringement of CRAR. But Article 60(3) allows the Board of Appeal to suspend decisions, not findings.
43. Further, if the Board of Appeal were to suspend ESMA's finding according to which the issuance of shadow ratings without registration constitutes an infringement of CRAR, and allow it to pursue its credit rating activities, the Board of Appeal would be adopting a legal position in that respect and would thereby be ruling on the merits, albeit on a temporary basis.
44. Further, the Board of Appeal is not empowered to prevent ESMA from initiating fresh enforcement proceedings (Case T-52/96, *Sogecable v. Commission*).
45. Further, such a ruling would be inconsistent with the nature and purpose of a suspension, which is to limit the adverse effects that a decision may have on an individual market participant, not to rule on the substance of the case. It would also create significant legal uncertainty because during the suspension period there would be contradictory interpretations of the same provisions of CRAR simultaneously outstanding.
46. ESMA further submits that SEB lacks sufficient legal interest in requesting the suspension. The fine has already been paid, and suspension of the Decision would procure no advantage to SEB. Nor would it immunise SEB from further enforcement actions.
47. Further, SEB claimed during ESMA's enforcement proceedings that it had immediately and voluntarily ceased its shadow rating activities, a statement which ESMA took into account when applying mitigating factors in connection with the calculation of the fine. It was not necessary for ESMA to adopt a supervisory measure requiring SEB to cease such conduct. Either, therefore, SEB voluntarily ceased the contentious rating activities, in which case the justification invoked for the suspension application is false, or SEB made a false statement to ESMA when it claimed to have ceased such activities.
48. Further, such suspension would have no effect on ESMA's legal position, and should SEB decide to issue new shadow ratings on the basis of the suspension, ESMA would not be prevented from initiating further infringement proceedings.
49. As to the test to be applied, the settled case law of the European Court of Justice is that an administrative decision adopted by the institutions of the European Union is presumed to be lawful and may be suspended only in exceptional cases, if the applicant demonstrates urgency, namely that the suspension is necessary to avoid serious and irreparable damage to the interests of the applicant. This principle is reflected in Article 60(3) of the ESMA founding Regulation.
50. SEB fails to satisfy these requirements because it fails to demonstrate that it would suffer serious and irreparable damage if the decision is not suspended, nor is there an allegation of serious and irreparable harm. In any event, it is established that damages of a pecuniary nature do not, by definition, constitute serious and irreparable harm.

51. SEB voluntarily undertook to cease such activities before the Decision was adopted. If ceasing such activities were to cause it irreparable harm threatening its very existence or financial viability, SEB would presumably have raised this issue with ESMA at the time, which it did not do. SEB merely noted its disagreement with ESMA's legal position.
52. ESMA submits that SEB has failed to demonstrate or provide any evidence that absent the conduct of shadow rating activities it will suffer irreparable harm that would put its economic and financial survival at risk. It does not put forward any element establishing that such irreparable harm is certain or even likely. The same applies to the public notice.
53. Further, CGSH submit that if the Decision is overturned, then SEB will be entitled to claim indemnification under the Treaty from ESMA for any damages caused by ESMA's Decision, including during the interim period.
54. The allegation that the Decision would negatively affect the Nordic bond market participants in general is not admissible, because an applicant for suspension cannot plead damage to an interest which is not personal to him.
55. SEB has not responded to ESMA's position as to its lack of legal interest to request the suspension of the Decision, and appears to have conceded this point. It has amended its initial application and now requests not merely the suspension of the Decision, but also the repayment of the fine and the permission to pursue its shadow rating activities without being at risk of enforcement by ESMA. For the reasons stated, these new requests are also manifestly inadmissible and unfounded. It fails to state which of its fundamental rights are allegedly violated.
56. As regards the case-law according to which the test is whether the interest of the applicant in obtaining the suspension outweighs the interest in its immediate implementation, SEB appears to be confusing (i) the existence of a legal interest in obtaining the relief sought, which goes to whether or not the suspension request is admissible (and which SEB has failed to establish) and (ii) the balancing of interests between suspension and implementation, which assumes that the applicant has a legal interest and which goes to whether or not the suspension request is well-founded. The case-law cited by SEB relates to the balancing of interests and is therefore irrelevant to the question of legal interest and admissibility.
57. The Decision does not create any legal uncertainty, because it very clearly states that the shadow ratings issued by SEB meet the definition of "credit rating" under CRAR. The other Nordic banks have stopped issuing shadow ratings, and have set up a credit rating agency which was registered with ESMA with effect from 3 August 2018.
58. Accordingly, the application for suspension should be refused.

Discussion by the Board of Appeal of the parties' contentions

Introduction

59. As it said in its ruling of 25 October 2018 on ESMA's application to serve a rejoinder, the Board of Appeal fully appreciates the importance of these appeals to all parties, and fully appreciates the importance of this application to suspend the Decision to both SEB and ESMA.
60. In the discussion below, the Board will refer neutrally to what are described as "Ratings" in the Annex to the Decision of 11 July 2018 (the Statement of Findings of the Board of Supervisors) as assessments/ratings.
61. In essence, SEB's case is that the practice of including assessments/ratings in credit research reports issued by banks in respect of corporate bond issues in the Nordic market is a long-standing one, and falls outside the provisions of CRAR. It submits that ESMA's decision to the contrary is damaging to the bank, and to the Nordic market generally, and should be suspended pending the resolution of the appeal. It submits that the correct legal approach is to ask whether the interest of the applicant in obtaining suspension of the decision outweighs the interest of the respondent in its immediate implementation, and that this should be answered affirmatively in the present case.
62. In essence, ESMA's case is that the application to suspend is inadmissible because the application is to suspend ESMA's findings rather than the decision itself, and that SEB lacks legal interest to make the application since it has paid the fine, and suspension would not procure any advantage to it – in this regard, damage to the market cannot be taken into account. Because only SEB (and not the other three appellant banks) seeks suspension, to allow the application would create legal uncertainty. It submits that the correct legal approach is to ask whether SEB is suffering irreparable harm because of the decision, and that SEB has not demonstrated that it is suffering irreparable, or any, harm.
63. A considerable number of points are raised in relation to the parties' respective cases, which the Board of Appeal considers below. It notes that this is the first application that has been made to this Board for suspension under Article 60(3), a provision which appears in the founding regulations of each of the three European Supervisory Authorities. The Board has not had to consider the correct legal approach to such an application before.

The circumstances in which SEB ceased including ratings/assessments

64. The circumstances in which SEB ceased including ratings/assessments in its credit research reports is relevant to the admissibility contention advanced on behalf of ESMA, and there is a factual difference between the parties in this respect, which it is necessary for the Board of Appeal to resolve.
65. It is submitted on behalf of ESMA that SEB claimed during ESMA's enforcement proceedings that it had voluntarily ceased its shadow rating activities, which ESMA took into account in the fine. It is said that either SEB did voluntarily

cease the rating activities, in which case it cannot now argue in support of the suspension application that it is not viable to cease them, or it is not possible in practice to do so, in which case SEB made a false statement to ESMA when it claimed to have done so, and the mitigating factors in respect of the fine were nonexistent.

66. In response, SEB emphasises that at no point in the proceedings has it provided incorrect or misleading information or explanations to ESMA.
67. It is not in dispute that the relevant observations were made by SEB to ESMA on 7 June 2018. These are recorded as “written submissions” in recital 10 of the Decision. The submissions read as follows:

“As communicated via email to Mr. [...] SEB has immediately following the receipt of the SoF [*ESMA’s Statement of Findings*] taken actions to procure that the Bank complies with the CRAR as interpreted by the Board. SEB has ceased to include credit assessments that have been deemed as credit ratings under the CRAR in its research reports and removed tables including the same on its web page. SEB has not shared ESMA’s officers’ views on the interpretation of the applicability of the CRAR to investment research/recommendations but SEB has never had the intent to defy a decision by ESMA’s board. Hence, penalty payments to compel SEB to put an end to the infringement are not needed”.

68. SEB submits that it is clear from the above that, contrary to what ESMA now suggests, SEB is not contradicting itself in these proceedings. It has always maintained, and continues to do so, that its credit research activities do not constitute credit ratings under the CRAR. However, it was and still is unwilling to defy the Board of Supervisors’ Decision, and has adapted its credit research activities pending the future decision of the Board of Appeal, and, if necessary, the Court of Justice.
69. The Board of Appeal accepts SEB’s submissions in this regard. It is understandable that a major bank should voluntarily comply with the view of the relevant financial regulator without the necessity of a decision requiring it to do so, but on the basis that it stood by its case as to the true interpretation of the relevant regulation, and would subsequently exercise its right of appeal. There is no basis for the suggestion, in the Board’s view, that SEB made any false or misleading statement in this respect. The fact that it voluntarily desisted in these circumstances should not prejudice its appeal.
70. However, ESMA’s contention is correct to this extent, that SEB (and this is not in dispute) has in fact ceased to include ratings/assessments in its credit research reports. The issue on the application for suspension, therefore, is whether SEB should be permitted to resume this practice pending the resolution of the appeal. That is what the Board of Appeal must decide.

Non-admissibility of suspension application because devoid of purpose

71. Two points are taken on behalf of ESMA as regards what is said to be the non-admissibility of SEB's suspension application. The first is that there is no purpose to the application, because it is an application to suspend findings, rather than the decision itself, and the decision itself is already fully executed.
72. ESMA submission is that the Decision is a decision by ESMA (1) to adopt a supervisory measure consisting of a public notice, and (2) to impose a fine. The suspension of a decision in Article 60(3) can only refer to the suspension of the operative part of the decision, not its findings. In effect, SEB seeks to suspend the finding upon which the decision was based, namely the negligent issuance of credit ratings without authorisation from ESMA.
73. However, it is submitted, SEB does not in fact request the suspension of this decision, since it acknowledges that the decision has already produced its effects, and in particular that the fine has already been paid. A suspension request is devoid of purpose, and therefore inadmissible, if the decision has already been fully executed, as it has been here, both as to the fine, and as to the notice.
74. In response, SEB contends that that the findings are an inextricable part of the decision, and that the entire decision properly forms the subject of a suspension application. Referring to the principle of *res judicata*, it says that the Court of Justice consistently holds that the force of this principle extends to "the grounds of a judgment which constitute the necessary support of its operative part and are therefore inseparable from it" (*Société des produits Nestlé SA*, § 52).
75. The Board's view is as follows. It notes that the structure of the Decision of 11 July 2018 includes recitals which state that:
 12. On the basis of the file containing the IIO's [*independent investigation officer*] findings and having considered the submissions made on behalf of SEB, the Board finds that SEB negligently committed the infringement set out at point 54 of Section I of Annex III of Regulation (EC) No 1060/2009.
 13. Pursuant to Article 24 of Regulation (EC) No 1060/2009, the Board adopts a supervisory measure in the form of a public notice.
 14. Pursuant to Article 36a of Regulation (EC) No 1060/2009, the Board also imposes a fine on SEB as calculated in the Annex to this Decision.

The infringement is the negligent issuance of credit ratings without authorisation from ESMA.
76. These recitals are then restated and implemented in Articles 1, 2, and 3 of the Decision.

77. The Board does not accept, therefore, the submission made on behalf of ESMA that the finding as to negligent infringement is not an operative part of the Decision. On the contrary, it is the first Article of the Decision, and is the necessary basis upon which the following articles of the Decision are made.
78. It is true, as ESMA points out, that there were other supervisory measures that could have been taken, including temporary prohibition, and a requirement to bring infringement to an end. However, for reasons explained above, these were not necessary in the present case because (reasonably in the Board's view), whilst making it clear that it was maintaining its position as to the correct legal position, SEB voluntarily ceased using ratings/ assessments in its credit reports, and availed itself of its right of appeal.
79. This is not simply a matter of the structure of the Decision. Even if the finding as to negligent infringement is not an operative part of the Decision, the Board considers that SEB is entitled to apply for suspension of the decision including the finding, which constitutes the necessary support of the operative part and is, therefore, inseparable from it (C-84/17 P, *Société des produits Nestlé SA v Mondelez UK Holdings & Services Ltd* at paragraph 52). The Board prefers the submissions of SEB in this regard.
80. Contrary to ESMA's submission, 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 like the one of the instant case 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, C-313/90 R *CIRFS and Others v Commission*, at paragraph 24, T-203/95 R *Connolly v Commission*, at paragraph 16). The suspension would only have effect on the practice of the Appellant in relation to the contested ratings/assessments until the Board's final decision on the appeal.
81. There are two further submissions relied upon on behalf of ESMA to support the contention that the right to apply for suspension of the decision pending appeal cannot have the result that SEB is entitled to recommence its practice as to ratings/assessments. It is convenient to deal with these here.
- (1) It is submitted that the Board of Appeal is not empowered to adopt interim measures allowing an entity to continue an activity that has been found by ESMA to breach the applicable rules. The Board does not accept this. The scope of the suspensive provision in Article 60(3) of the founding Regulation 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 sufficiently broad to cover a suspension allowing an entity to continue its business 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.
- (2) It is submitted that there is nothing in Article 60(3) of the founding Regulation to empower the Board of Appeal to prevent ESMA from initiating new enforcement

proceedings and issuing a fresh prohibition. However, the Board does not consider this to be correct either as a matter of law, or as a matter of practice. The position is different from Case T-52/96, *Sogecable v. Commission* relied on by the respondent because the power given to the Board of Appeal to suspend its decisions is contained in ESMA's own founding Regulation. Practically speaking, it is difficult to see a situation arising in which the Board of Supervisors of ESMA would, or would wish to, take a course that circumvented a decision of the Board of Appeal of ESMA in the way suggested.

82. The Board of Appeal rejects the non-admissibility submission on this ground.

Non-admissibility on the basis of lack of legal interest

83. It is further submitted on behalf of ESMA that SEB lacks sufficient legal interest in requesting the suspension. This is on the ground that the fine has already been paid, the supervisory measure in the form of a public notice has already been issued, and suspension of the Decision would procure no advantage to SEB.
84. This is said to have been conceded on the basis that SEB has changed the relief that it is seeking in the light of the CGSH letter of 8 October 2018. However, the Board considers that it was reasonable for SEB's Notice of Appeal to state the case for suspension in general terms, and that the specific relief sought in the letter of 18 October 2018 merely spells out the case as originally put forward.
85. The submission is largely based on the same grounds as the earlier submission, namely that SEB's application is not an application for suspension of a "decision". This is not accepted for the reasons set out above. The Board is satisfied that SEB has sufficient legal interest to bring this application (Case T-368/15, *Alcimos Consulting SMPC v European Central Bank (ECB)*). The Board now turns to the applicable test.

The test applicable to a suspension application

86. As set out above, the permissive power to suspend is stated in Article 60(3) of the ESMA founding Regulation in simple terms. Save that it is stated that the power may be exercised if the Board of Appeal "considers that circumstances so require", no legal criteria are set out, and this is not a question which the Board of Appeal has had to consider before.
87. SEB submits that the correct approach is to weigh the interests at stake. It relies on the following statement in C-162/15 P-R, *Evonik Degussa GmbH v European Commission* at paragraph 103:

"... 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).”

88. It is submitted on behalf of ESMA that the applicant for suspension must demonstrate serious and irreparable harm. It is submitted that:

“Pursuant to the settled case law of the European Court of Justice, an administrative decision or measure adopted by the institutions of the European Union is presumed to be lawful and may be suspended only in exceptional cases, if the applicant demonstrates urgency, namely that the suspension is necessary to avoid serious and irreparable damage to the interests of applicant. This principle is reflected in Article 60(3) of the ESMA Regulation, as well as Article 10 of the Rules of Procedure of the Board of Appeal, which provide that suspension is the exception, not the rule, in line with Article 278 of the Treaty on the Functioning of the European Union.”

89. Support for this proposition in the case law is cited, *ex multis*, from the Order of the President of the General Court in Case T-584/15 (*Cyprus v. Commission*), paragraphs 10-11 as follows:

“Article 278 TFEU establishes the principle that actions do not have suspensory effect, since acts adopted by the institutions of the European Union are presumed to be lawful. It is therefore only in exceptional cases that the judge hearing an application for interim measures may order the suspension of operation of a measure challenged before the General Court or prescribe interim measures (see order of 11 November 2013 in *CSF v Commission*, T 337/13 R, EU:T:2013:599, paragraph 21 and the case-law cited). [...] Accordingly, the judge hearing an application for interim measures may order the suspension of operation of an act, or other interim measures, if it is established that such an order is justified, *prima facie*, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the interests of the party seeking those measures, it must be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent (see order in *CSF v Commission*, cited in paragraph 10 above, EU:T:2013:599, paragraph 22 and the case-law cited).”

90. There is a further difference between the parties in that it is submitted on behalf of ESMA that it is well established that damages of a pecuniary nature do not, by definition, constitute serious and irreparable harm. This is challenged by SEB on the basis that the Article 60(3) of the ESMA founding Regulation is in wider terms. The Board of Appeal’s view is as follows.

91. As is rightly pointed out on behalf of ESMA, 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 (see e.g. the *PTC Therapeutics* case at paragraphs 22 and 23).
92. 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 ESMA: see Article 6(5) of the ESMA founding Regulation. It is part of the system of checks and balances contained in the ESMA founding regulation (and in identical terms in the regulations of each of the European Supervisory Authorities) 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 founding Regulation).
93. The effect of the submission made by ESMA is stated to be that "financial damages are considered to be irreparable under applicable case-law only under exceptional circumstances, i.e. if it would threaten the applicant's very existence or irreparably affect its market position". Clearly, as a major bank, SEB cannot pass that threshold in the present case. In many circumstances in the financial markets, such a threshold would rule out suspension, however meritorious the case for suspension might otherwise be. This, in the Board's view, tends to show that the submission does not 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".
94. At paragraph 126 of the *PTC Therapeutics* case, 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."
95. Such a distinction may apply here, where the true gravamen of the Decision is not the monetary fine (and the public notice) but the finding that the bank negligently breached the Credit Rating Agencies Regulation (EC) No 1060/2009 as amended (i.e. CRAR) by issuing credit ratings without being authorised by ESMA to do so. It is this finding that has the effect that the practice previously adopted by SEB as to ratings/ assessments cannot be continued while the Decision

stands. See the reasoning of the Board set out above. An approach focused solely on the pecuniary effects of the Decision arguably “cannot be reconciled with the need to provide effective provisional protection” pending resolution of the appeal (the *PTC Therapeutics* case at paragraph 130).

96. The Board of Appeal’s provisional view is that it 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 ESMA founding Regulation. 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 ESMA and to the public interest if a suspension is granted and eventually ESMA succeeds. Indeed, according to settled case law, in practical terms, that means examining whether or not the interest of the applicant in obtaining suspension of the operation of the 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 in C-149/95 P R *Commission v Atlantic Container Line and Others*, at paragraph 50 and C-182/03 R and C-217/03 R, *Belgium and Forum 187 v Commission*, at paragraph 142, and order in *United Kingdom v Commission*, C-180/96 R, EU:C:1996:308, paragraph 89; lastly, C-619/18 R, *Commission v Polish Republic*). 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 is 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.
97. However, the Board of Appeal need not express a concluded view in the present case. This is because it considers that, even applying the test advocated by SEB, the threshold for suspension is not passed.

Conclusion on the facts of the present case

98. In support of its application for a suspension, and as summarised above, SEB submits that:
- (1) For many years, its clients have been dependent on its credit research reports in order to obtain adequate information on the creditworthiness of issuers who lack sufficient resources to buy public ratings from registered credit rating agencies. By deciding, for the first time, that such reports constitute credit ratings under CRAR, the Decision hinders SEB’s credit research activities and reduces its client base.
 - (2) SEB’s credit research reports are distributed to a selected number of clients pursuant to a client selection process; clients are selected to receive investment

research and recommendations including assessments on the creditworthiness of bond issuers covered SEB's credit research department. Failing such assessments from SEB, they are very likely to look elsewhere. One is therefore faced with exceptional circumstances.

- (3) The criterion advocated by ESMA is based on the assumption that pecuniary compensation is capable of restoring the applicant to the situation, which obtained before it suffered the damage. This assumption does not apply in the case at hand: neither the appeal proceedings before the Board of Appeal nor the subsequent proceedings before the Board of Supervisors (should the Decision be overturned) are likely to allow SEB to obtain pecuniary compensation from ESMA for the harm suffered as a result of the Decision.
 - (4) ESMA disregards the standard of proof set by the Court of Justice, which is met by SEB and does not require to be demonstrated with absolute certainty. The decision was published on subject to a press release on ESMA's website, and it is obvious that irreparable financial and reputational damage is likely to be caused by the Decision.
 - (5) The public interest must be taken into account by the Board of Appeal when deciding whether to grant the application. The Court of justice has on several occasions taken into account market interest when deciding whether to grant interim relief. The harm suffered by the European corporate bond markets and investors, as well as the personal harm suffered by SEB, must therefore be taken into consideration by the Board of Appeal when deciding whether to grant the Application.
99. As against that, ESMA submits that:
- (1) None of these matters is made out on the evidence, and in particular nothing suggests that SEB is suffering any real damage.
 - (2) Any damage can be compensated for by ESMA in due course should the Decision be set aside.
 - (3) Damage to third parties such as corporate bond issuers cannot be taken into account.
 - (4) SEB voluntarily ceased the activity in May 2018, and has not pursued its claim to recommence it with any urgency.
 - (5) The suspension of the Decision would be productive of legal uncertainty, leaving two regimes in operation, one applying to those banks that are not seeking a suspension, and the other applying to SEB.
100. The conclusion reached by the Board of Appeal is as follows. It has not been disputed that SEB ceased the practice of ratings/assessment in about May 2018 as found by the Board of Supervisors (see paragraph 70 of the Annex to the Decision). The question for the Board of Appeal is whether to permit SEB to resume the practice pending its decision on the appeal.

101. In its submissions, SEB suggests that the appeal will not be decided until mid-2019. This is wrong, because the oral representations to which the parties are entitled under the Regulation will be held earlier than initially requested on behalf of ESMA – see above. In the circumstances, the Board considers that the appeal process itself sufficiently protects SEB’s interest, without the necessity for a suspension.
102. Further, although the Board of Appeal has observed that SEB was entitled to cease the practices concerned on the basis that it maintained its legal position and would pursue its right of appeal, it considers that ESMA is right to submit that the suspension application has not been pursued with any particular urgency. In particular, it was not made clear to ESMA at the time that SEB would apply to suspend any adverse decision. Whilst in a sense understandable, this casts some doubt on SEB’s submission that it is necessary to recommence the practice of ratings/assessment now, as opposed to upon the conclusion of the appeal, should it be successful on the appeal.
103. However, in the Board’s opinion, the decisive factor is the uncertainty which suspending the operation of the Decision would create. As has been noted, of the four appellant banks, only SEB is applying for a suspension. The consequence of a suspension would, as has been submitted on behalf of ESMA, effectively create a dual regulatory regime, one applying to SEB, and the other applying to the other banks and any other party in a similar position to the banks. In the Board’s estimation, this would be conducive to confusion and should be avoided in the wider public interest in an effective system of financial regulation. This confusion would be, in the actual circumstances of the case, further exacerbated if SEB were allowed to resume its practice now - and this would occur a few months after SEB ceased already the practice - and in a few months, the appeal was dismissed, and SEB should then cease again the practice. This reiterated stop-and-go would clearly send very confusing messages to the Nordic financial market and the confusion would become even greater if SEB were granted a suspension now but could then not succeed in the appeal and would eventually bring an action for annulment before the General Court accompanied again, at the same time, by an application for interim measures asking for a new suspension. In the peculiar circumstances of the instant case, where SEB and its competitors in the Nordic market already ceased the practice, the Board considers more appropriate, according to settled case law (T-235/15 R, *Pari Pharma v EMA*, at paragraph 85) to maintain the *status quo* for a limited period of time, and the *status quo*, in the present circumstances, is one where SEB does not publish its ratings/assessments.
104. Finally, it is noted that SEB submitted that the fine should be repaid and the public notice withdrawn on the suspension application. The Board would not have accepted this submission in any event. Under the applicable rules, the fine is held in an account pending determination of the appeal, and clearly, as regards an institution of SEB’s size, the amount is not in itself significant. It would not, in the Board’s view, be appropriate to direct the withdrawal of the public notice on a suspension application. This is because any damage done by the notice has been done already, and SEB has an adequate remedy in pursuing the appeal itself.

105. In the result, although it will be apparent from the above that the Board has accepted many of SEB's contentions, taking all the circumstances into account, the Board is not satisfied that this is an appropriate case for a suspension.

The decision

In the circumstances, the Board of Appeal unanimously decides to dismiss the suspension application.

The original of this Decision is signed by the Members of the Board in electronic format, and countersigned by hand by the Secretariat.

William Blair (President)
(SIGNED)

Juan Fernández-Armesto
(SIGNED)

Marco Lamandini
(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.