ESMA PUBLIC USE
11 July 2019
ESMA41-139-1231

Decision 2019/4

DECISION OF THE BOARD OF SUPERVISORS

to adopt a supervisory measure in respect of an infringement by Svenska Handelsbanken AB and to repeal its decision of 11 July 2018

The Board of Supervisors ('the Board') of the European Securities and Markets Authority ('ESMA'),

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC[1], and in particular Article 60(5) thereof,

Having regard to Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies[2], and in particular Article 24 thereof,

Whereas:

1. Following preliminary investigation, the Supervision Department within ESMA concluded, in a report dated 15 December 2016, that with respect to Svenska Handelsbanken AB ('Handelsbanken') there were serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in Annex III to Regulation (EC) No 1060/2009.

2. On 12 January 2017 ESMA's Executive Director appointed an investigating officer ('IIO') pursuant to Article 23e(1) of Regulation (EC) No 1060/2009 to investigate the matter.

[1] OJ L 331, 15.12.2010, p. 84.
[2] OJ L 302 17.11.2009, p. 1.

3. The IIO sent her initial statement of findings dated 16 June 2017 to Handelsbanken that set out her findings that Handelsbanken had committed the infringement set out at point 54 of Section I of Annex III to Regulation (EC) No 1060/2009.

4. By written submissions dated 17 July 2017, Handelsbanken responded to the findings of the IIO.

5. On 27 September 2017, the IIO submitted to the Board her file relating to the case, which included an amended statement of findings.

6. The Board discussed the IIO's findings and the case at its meeting on 14 December 2017.

7. On 2 March 2018, the Panel established by the Board to assess the completeness of the file submitted by the IIO adopted a ruling of completeness in respect of that file.[3]

8. The Board discussed the case further at its meeting on 22 March 2018.

9. On 17 May 2018, on behalf of the Board, ESMA sent a Statement of Findings to Handelsbanken.

10. On 7 June 2018, Handelsbanken provided written submissions to ESMA in relation to the matter.

11. The Board discussed the case further at its meeting on 11 July 2018.

12. On the basis of the file containing the IIO's findings and having considered the submissions made on behalf of Handelsbanken, the Board found that Handelsbanken negligently committed the infringement set out at point 54 of Section I of Annex III of Regulation (EC) No 1060/2009. Thus, the Board adopted a decision on 11 July 2018, imposing a supervisory measure and a fine on Handelsbanken (the 'Appealed Decision').

13. In particular, pursuant to Article 24 of Regulation (EC) No 1060/2009, the Board adopted a supervisory measure in the form of a public notice and pursuant to Article 36a of Regulation (EC) No 1060/2009, the Board also imposed a fine of EUR 495,000.

14. On 6 September 2018, Handelsbanken filed a Notice of Appeal addressed to the Board of Appeal of the European Supervisory Authorities (the 'Board of Appeal'), contending that the Appealed Decision was wrong, and that the case should be remitted to the Board for an amended decision.

[3] Ruling of the Enforcement Panel (ESMA-2018-CONF-7104).

15. On 9 October 2018, the Board of Appeal directed that Handelsbanken's appeal would be heard together with the appeals notified by Skandinaviska Enskilda Banken AB, Swedbank AB, and Nordea Bank Abp, as these raised issues, which were the same or similar.

16. On 20 November 2018, ESMA served its response to Handelsbanken's Notice of Appeal.

17. On 21 December 2018, Handelsbanken served its reply to ESMA's response to the Notice of Appeal.

18. On 23 January 2019, ESMA served its rejoinder.

19. On 6 February 2019, pursuant to Article 60(4) of Regulation (EU) No 1095/2010, the parties' oral representations were heard by the Board of Appeal in Frankfurt a. M., Germany.

20. On 27 February 2019, the Board of Appeal issued its decision[4] (the 'Board of Appeal Decision') that Handelsbanken had committed the infringement set out at point 54 of Section I of Annex III of Regulation (EC) No 1060/2009, however had not acted negligently and remitted the decision to the Board pursuant to Article 60(5) of Regulation (EU) No 1095/2010.

21. The Board considered the Board of Appeal Decision and the case at its meeting on 11 July 2019.

22. On the basis of the file containing the IIO's findings, the submissions made on behalf of Handelsbanken, and the Board of Appeal Decision, the Board found that Handelsbanken, without intent or negligence, committed an infringement listed in Section I of Annex III of Regulation (EC) No 1060/2009.

23. Pursuant to Article 24 of Regulation (EC) No 1060/2009, where the Board finds that a credit rating agency has committed one of the infringements listed in Annex III, it shall take a supervisory measure, taking into account the nature and seriousness of the infringement.

HAS ADOPTED THIS DECISION:

Article 1

Svenska Handelsbanken AB, without intent or negligence, committed the infringement set out at point 54 of Section I of Annex III of Regulation (EC) No 1060/2009.

[4] For an electronic version of the Board of Appeal Decision, please see https://www.esma.europa.eu/sites/default/files/library/board_of_appeal_-_27_february_2019_-_decisions_2019_01_02_03_04_-_final.pdf.

Article 2

The Board of Supervisors adopts a supervisory measure in the form of a public notice to be issued in respect of the infringement referred to in Article 1.

Article 3

This Decision shall enter into force on the date of its adoption.

Article 4

This Decision is addressed to Svenska Handelsbanken AB, Sweden, SE-106 70 Stockholm.

Article 5

The decision of the Board of Supervisors of 11 July 2018 to adopt a supervisory measure and impose a fine in respect of an infringement by Svenska Handelsbanken AB is repealed.

Done at Paris on 11 July 2019

[Personal Signature]

For the Board of Supervisors

Steven Maijoor

The Chair

ANNEX

STATEMENT OF FINDINGS OF THE BOARD

1. Having considered the statement of findings of the IIO, the submissions made on behalf of Handelsbanken in connection therewith, the material in the IIO's file, and the Board of Appeal Decision, the Board sets out its findings and the reasons for its findings as follows.

A. Findings of the Board with regard to the infringement set out at point 54 of Section I of Annex III of Regulation (EC) No 1060/2009

Legislative provisions

2. Under specific circumstances a credit rating agency ('CRA') must apply to ESMA to be registered. Article 14(1) of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies ('the CRA Regulation') states[5] that "A credit rating agency shall apply for registration for the purposes of Article 2(1) provided that it is a legal person established in the Union".

3. This requirement refers to Article 2(1) of the CRA Regulation, which states that the CRA Regulation "applies to credit ratings issued by credit rating agencies registered in the Union and which are disclosed publicly or distributed by subscription".

4. Article 2(2) of the CRA Regulation sets out exemptions regarding the scope of the Regulation. Among others, Article 2(2)(a) states that the CRA Regulation does not apply to "private credit ratings produced pursuant to an individual order and provided exclusively to the person who placed the order and which are not intended for public disclosure or distribution by subscription".

5. A "credit rating agency" is defined by Article 3(1)(b) of the CRA Regulation as a "legal person whose occupation includes the issuing of credit ratings on a professional basis".

6. A failure to apply to be registered as a CRA (where required to do so) is an infringement of Article 14(1). Point 54 of Section I of Annex III of the CRA Regulation provides that a "credit rating agency, where it is a legal person established in the Union, infringes Article 14(1) by not applying for registration for the purposes of Article 2(1)" ('the Infringement').

7. A constituent part of the definition of a CRA is that the credit ratings issued by it must be credit ratings as defined by Article 3(1)(a) of the CRA Regulation. Article 3(1)(a) defines a

[5] Earlier versions of the Regulation referred to the "Community" rather than the "Union".

credit rating as “an opinion regarding the creditworthiness of an entity, a debt or financial obligation, debt security, preferred share or other financial instrument, or of an issuer of such a debt or financial obligation, debt security, preferred share or other financial instrument, issued using an established and defined ranking system of rating categories”.

8. The term “rating category” is defined by Article 3(1)(h) of the CRA Regulation, which states that it “means a rating symbol, such as a letter or numerical symbol which might be accompanied by appending identifying characters, used in a credit rating to provide a relative measure of risk to distinguish the different risk characteristics of the types of rated entities, issuers and financial instruments or other assets”.

9. Article 3(2) of the CRA Regulation states:

   “2. For the purposes of paragraph 1(a), the following shall not be considered to be credit ratings:

   (a) recommendations within the meaning of Article 1(3) of Commission Directive 2003/125/EC;

   (b) investment research as defined in Article 24(1) of Directive 2006/73/EC and other forms of general recommendation, such as “buy”, “sell” or “hold”, relating to transactions in financial instruments or to financial obligations; or

   (c) opinions about the value of a financial instrument or a financial obligation.”

10. Commission Directive 2003/125/EC[6] (‘2003 Commission Investment Directive’), which implements Directive 2003/6/EC[7] (‘MAD’), referred to in Article 3(2)(a) of the CRA Regulation as set out above, thus defines recommendations. MAD was applicable during most of the relevant period and was repealed by Regulation (EU) No 596/2014[8] (‘MAR’). Both legal texts provide a definition of recommendations. For example, Article 1(3) of the 2003 Commission Investment Directive provides that:

    “‘recommendation’ means research or other information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers of financial instruments, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public”.

[6] Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest, OJ L 339, 24.12.2003, p. 73-77.
[7] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ L 96, 12.4.2003, p. 16.
[8] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ L 173, 12.06.2014, p. 1. For most of its provisions, MAR applies from 3 July 2016.

11. Further, Article 1(4) of the 2003 Commission Investment Directive specifies that:

"'research or other information recommending or suggesting investment strategy' means:

(a) information produced by an independent analyst, an investment firm, a credit institution, any other person whose main business is to produce recommendations or a natural person working for them under a contract of employment or otherwise, that, directly or indirectly, expresses a particular investment recommendation in respect of a financial instrument or an issuer of financial instruments;

(b) information produced by persons other than the persons referred to in (a) which directly recommends a particular investment decision in respect of a financial instrument".[9]

12. Article 3(2)(b) of the CRA Regulation refers to the definition of investment research that appears in Directive 2006/73/EC[10], which implemented Directive 2004/39/EC[11] ('MiFID'). Article 24(1) of Directive 2006/73/EC states:

"'investment research' means research or other information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers of financial instruments, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public, and in relation to which the following conditions are met:

(a) it is labelled or described as investment research or in similar terms, or is otherwise presented as an objective or independent explanation of the matters contained in the recommendation;

(b) if the recommendation in question were made by an investment firm to a client, it would not constitute the provision of investment advice for the purposes of Directive 2004/39/EC."

[9] From 3 July 2016, MAR provides the following definitions in Article 3(1): "(34) 'information recommending or suggesting an investment strategy' means information: (i) produced by an independent analyst, an investment firm, a credit institution, any other person whose main business is to produce investment recommendations or a natural person working for them under a contract of employment or otherwise, which, directly or indirectly, expresses a particular investment proposal in respect of a financial instrument or an issuer; or (ii) produced by persons other than those referred to in point (i), which directly proposes a particular investment decision in respect of a financial instrument;
(35) 'investment recommendations' means information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public".

[10] Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, OJ L 241, 2.9.2006, p. 26.

[11] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L145, 30.4.2004, p. 1.

Facts and analysis

13. Handelsbanken is a credit institution established in Sweden and authorised by the Swedish Financial Supervisory Authority (Finansinspektionen) to carry out banking activities, which include issuing investment research and other forms of general research relating to transactions in financial instruments. Handelsbanken is not a registered CRA and has not applied for registration.

14. Between 1 June 2011 and 30 August 2016 ('the relevant period'), Handelsbanken conducted credit research activities, which included the issuing of documents that Handelsbanken has described as credit research reports.[12] A number of these reports included opinions that were variously described as an "Indicative rating", an "Indicative corporate rating", an "Indicative issue rating", or an "Indicative issuer rating" ('the Ratings'). Approximately 285[13] of the Ratings were issued by Handelsbanken during the relevant period. Handelsbanken has stated that by 2009 "it was already market practice in the Swedish market to refer to indicative ratings in order to communicate the creditworthiness of the issuer/instrument described in investment research reports. […] A factor that contributed to the growing use of indicative ratings on the Swedish krona market were the limited availability of reliable prices/spreads for Swedish krona bonds at the time."[14]

15. For an entity to be found to have committed an infringement of Article 14(1), each of the following elements must be satisfied: (i) the relevant entity must be a legal person established in the Union; (ii) the legal person must have issued credit ratings as defined by Article 3(1)(a) of the CRA Regulation; (iii) the occupation of the legal person must have included the issuing of credit ratings on a professional basis (the legal person will therefore be a CRA); (iv) the CRA must have issued credit ratings that were disclosed publicly or distributed by subscription; and (v) the CRA must not have applied for registration for the purposes of Article 2(1) of the CRA Regulation.

16. In addition, further to the assessment of the elements above, the Board also considers below the application of Article 3(2) of the CRA Regulation in this case.

17. The findings of the Board are as follows.

Legal person established in the Union

18. The Board considers that Handelsbanken is a legal person established in the Union, specifically a public limited liability company with its registered office in Stockholm, Sweden. The evidence in the IIO's file leads the Board to conclude that Handelsbanken

[12] See for example Exhibit 7 to the IIO's Statement of Findings, Letter dated 20 March 2017 from Handelsbanken to the IIO, Question 3, page 1.
[13] Exhibit 9 to the IIO's Statement of Findings, Letter dated 24 April 2017 from Handelsbanken to the IIO, Question 2, pages 1-2. See in particular, Exhibit 48 to the IIO's Statement of Findings, Attachment 5 "Relevant Activities".
[14] Exhibit 7 to the IIO's Statement of Findings, Letter dated 20 March 2017 from Handelsbanken to the IIO, Question 7, page 4.

was responsible for the Ratings. Specifically, the Ratings were produced by analysts employed by Handelsbanken, including those relevant analysts that were located in Norway.[15]

Legal person issuing credit ratings within the meaning of Article 3(1)(a) of the CRA Regulation

19. The Ratings can only constitute credit ratings if they were: (1) an opinion on the creditworthiness of one of the types of entity, issuer, financial instrument or other asset specified in the definition of a credit rating, which includes debt securities or an issuer of them; and (2) issued using an established and defined ranking system of rating categories.

20. The Board considers that the Ratings were opinions on the creditworthiness of one of the types of entity, issuer, financial instrument or other asset specified in the definition of a credit rating, specifically debt instruments and the issuers of such instruments. The IIO's file contains descriptions by Handelsbanken of the Ratings to that effect, for example, that "In order for the research reports to work as meaningful input for an investors' investment decision the research needs to contain a measure of relative credit quality."[16] The Board considered in particular the examples set out in paragraphs 137 and 138 of the IIO's statement of findings.

21. The Board also considers that these opinions were issued using an established and defined system of rating categories. Handelsbanken stated that its 'core framework for analysing non-financial companies is a hybrid that is partly based on S&P's methodology but which has been modified in key areas.[17] The Board notes the rating categories employed by Handelsbanken that represented different levels of risk in the range from "AAA" to "D", where "[t]he scale measures the relative creditworthiness with AAA representing the highest indicative rating (and the lowest credit risk) and D (default) representing the lowest indicative rating."[18]

22. In this regard, the Board also notes the examples of the use of an established and defined ranking system of rating categories set out in paragraph 146 of the IIO's statement of findings and included in the IIO's file. These rating symbols represent differing levels of risk in relation to the issuers or instruments being assessed.

23. In reaching its views, the Board notes that the definition of a credit rating provided by the CRA Regulation does not state that to be credit rating, a credit rating must be produced in a particular way. Instead, the definition focusses on the product of a given process, on its qualities and characteristics. The Ratings possess those qualities and characteristics.

[15] Exhibit 7 to the IIO's Statement of Findings, Letter dated 20 March 2017 from Handelsbanken to the IIO, Questions 3 and 4, page 1 and 2.
[16] Exhibit 5 to the Supervisory Report, Letter dated 29 April 2016 from Handelsbanken to ESMA, page 12.
[17] Exhibit 5 to the Supervisory Report, Letter dated 29 April 2016 from Handelsbanken to ESMA, page 5.
[18] Exhibit 5 to the Supervisory Report, Letter dated 29 April 2016 from Handelsbanken to ESMA, page 12.

24. The Board also notes that Ratings were not paid for by issuers, the creditworthiness of which, or the creditworthiness of whose instruments, was assessed. However, the Board notes that the definition of a credit rating does not require that a credit rating be produced at the instigation of a particular party to be a credit rating. Thus, this factor is irrelevant to the Board's decision-making in this regard.

25. Therefore, the Board finds that the Ratings meet the definition of a credit rating provided by Article 3(1)(a) of the CRA Regulation.

Occupation including the issuing of credit ratings on a professional basis

26. The Board finds that Handelsbanken's occupation included the issuing of credit ratings on a professional basis. In this respect the Board has considered the findings of the IIO on the issue.[19] In particular, the Board notes that an earlier draft of the CRA Regulation[20] referred to the "principal occupation" of a CRA being the issuance of credit ratings, but that the final version refers simply to its "occupation". The Board therefore is of the view that the issuance of credit ratings does not have to be the *principal* occupation of a CRA.

27. The Board also has regard to the case law to which the IIO refers.[21] The Court of Justice of the European Union ('CJEU') found that "the words "on a professional basis" […] are not synonymous with the expressions "in the course of their business activity" or "as a part of their business activity"".[22] It held, regarding the activity in question in the case before it, that "on a professional basis" did not mean that the activity "must be the sole or even the principal activity of the undertakings concerned, it must be a normal and regular activity of those undertakings".[23]

28. Although this judgement does not relate directly to the CRA Regulation, the Board considers it relevant to the present case. Thus, the Board finds that the correct interpretation of acting "on a professional basis" involves conduct that is a "normal and regular activity" of the undertaking in question. The Board notes that this case law does not suggest that the undertaking should receive income directly as a result of the relevant activity.

29. In this case, the Board notes that Handelsbanken had been issuing the Ratings for a number of years, and that the credit research reports, which included the Ratings, were produced by a separate department within Handelsbanken ("Research"), which was part of the Equity and Credit Research Department.[24] Approximately seven people[25] have been

[19] See paragraphs 121-131 of the IIO's Statement of Findings.
[20] Exhibit 19 to the IIO's Statement of Findings, Commission's proposal for a Regulation of the European Parliament and of the Council on Credit Rating Agencies, COM(2008) 704 final, 2008/0217 (COD), 12/11/2008.
[21] See paragraph 123 of the IIO's Statement of Findings.
[22] Case C-270/03, Commission v Italy, ECLI:EU:C:2005:371, paragraph 26.
[23] Case C-270/03, Commission v Italy, ECLI:EU:C:2005:371, paragraph 28.
[24] Exhibit 5 to the Supervisory Report, Letter dated 29 April 2016 from Handelsbanken to ESMA, page 1.
[25] Please note that off the twelve analysts employed some were "equity analysts who have been co-authors of a report with Relevant Activities […] responsible for the equity coverage of the respective company"; they have thus been excluded from the

employed over the relevant period, while the maximum number of analysts that at any time were involved in producing credit research reports was four.[26] Issuing Ratings constituted a growing part of Handelsbanken's credit research over the relevant period, Ratings being included in the following approximate amounts of its credit research: 5% in 2010, 100% in 2013, 2014, 2015, and 56% in 2016.[27] On the basis of Handelsbanken's own statements, the Board understands that 285[28] Ratings were issued during the relevant period. Furthermore, Ratings had already been issued before 2011 but in more limited amount.[29] Handelsbanken has stated that none of its turnover during this period could be assigned to the Ratings.[30]

30. Taking this into account, the Board finds that Handelsbanken's issuing of the Ratings was a normal and regular activity for it, and further that Handelsbanken's occupation during the relevant period included the issuing of the Ratings on a professional basis.

Credit ratings disclosed publicly or distributed by subscription

31. Handelsbanken has stated that all its credit research reports containing the Ratings were simultaneously distributed via e-mail and published on its research homepage (accessible without a password).[31] In addition, such reports were also published on Bloomberg.[32] The credit research reports were emailed to recipients on a mailing list, the number of recipients being 551 as of 24 March 2016.[33] In addition to credit research reports, Handelsbanken also made public a "Credit Rating List", which contained all current indicative ratings, by publishing these lists on its research homepage (accessible without a password) and by distributing them via e-mail to recipients on a mailing list, the number of recipients being 802 as of 24 March 2016.[34] Handelsbanken has itself stated that it considered its credit research reports to be public.[35]

32. The Board, taking into account the IIO's findings, thus finds on the basis of this evidence that Handelsbanken issued credit ratings that were disclosed publicly or distributed by subscription.

Lack of application for registration as a CRA

33. During the relevant period, it is uncontested and thus the Board finds that Handelsbanken did not apply for registration for the purposes of Article 2(1) of the CRA Regulation. The

count. See Exhibit 7 to the IIO's Statement of Findings, Letter dated 20 March 2017 from Handelsbanken to the IIO, Question 5, page 2.

[26] Exhibit 7 to the IIO's Statement of Findings, Letter dated 20 March 2017 from Handelsbanken to the IIO, Question 5, page 2.
[27] Exhibit 9 to the IIO's Statement of Findings, Letter dated 24 April 2017 from Handelsbanken to the IIO, Question 3, pages 2-4.
[28] Exhibit 9 to the IIO's Statement of Findings, Letter dated 24 April 2017 from Handelsbanken to the IIO, Question 2, pages 1-2. See in particular, Exhibit 48 to the IIO's Statement of Findings, Attachment 5 "Relevant Activities".
[29] Exhibit 7 to the IIO's Statement of Findings, Letter dated 20 March 2017 from Handelsbanken to the IIO, Question 7, page 4.
[30] Exhibit 7 to the IIO's Statement of Findings, Letter dated 20 March 2017 from Handelsbanken to the IIO, Question 2, page 1.
[31] Exhibit 5 to the Supervisory Report, Letter dated 29 April 2016 from Handelsbanken to ESMA, page 21.
[32] Exhibit 5 to the Supervisory Report, Letter dated 29 April 2016 from Handelsbanken to ESMA, page 21.
[33] Exhibit 5 to the Supervisory Report, Letter dated 29 April 2016 from Handelsbanken to ESMA, page 22.
[34] Exhibit 5 to the Supervisory Report, Letter dated 29 April 2016 from Handelsbanken to ESMA, page 22.
[35] Exhibit 5 to the Supervisory Report, Letter dated 29 April 2016 from Handelsbanken to ESMA, page 21.

evidence in the IIO's file is that ESMA did not receive such an application from Handelsbanken, and Handelsbanken has been consistent in maintaining that it did not need to make such an application.

Article 3(2) of the CRA Regulation regarding investment research and recommendations

34. Handelsbanken has stated that as a MiFID regulated investment firm, its Ratings are investment recommendations or investment research, the provision of which is regulated by MiFID and MAD/MAR. Further, based on its own interpretation of the CRA Regulation, Handelsbanken argued that investment recommendations or investment research are therefore excluded from the effect of the CRA Regulation by Article 3(2).[36] Specifically, Handelsbanken's interpretation of the wording of Article 3(2) of the CRA Regulation, and in particular of the expression "for the purposes of paragraph 1(a), the following [i.e. recommendations and investment research] shall not be considered to be credit ratings", contends that while recommendations and investment research could include a credit rating, if they do they should not be considered to fall within the definition of "credit ratings" laid down by Article 3(1)(a) of the CRA Regulation.

35. With such a reading of Article 3(2) of the CRA Regulation, the Ratings included in Handelsbanken's investment research would not be considered for the purposes of Article 3(1)(a) to be credit ratings, and thus Handelsbanken would not be considered to be a CRA having failed to register under the CRA Regulation.

36. According to Handelsbanken, "when an investment research report contains an opinion on creditworthiness expressed through a rating symbol, it falls under the definition of credit rating but is exempt because of" Article 3(2) of the CRA Regulation.[37]

37. As noted by the Board above, the Ratings meet the conditions for being qualified as a credit rating within the meaning of Article 3(1)(a) of the CRA Regulation and they are also within the scope of the CRA Regulation as provided by its Article 2. Thus, the Board has to decide whether the application of Article 3(2) of the CRA Regulation would imply that the Ratings should not be considered to be credit ratings.

38. In reaching its view, the Board has kept in mind the principle that, when interpreting a provision of Union law, it is necessary to consider not only its wording but also its context and the objectives pursued by the rules of which it is part.[38] Moreover, if Article 3(2) of the CRA Regulation were to be considered an exemption, it is settled case law that this exemption should be interpreted strictly as it would constitute an exception to general principles.[39] However, the CJEU also ruled that a "requirement of strict interpretation does

[36] Exhibit 56 to the IIO's Statement of Findings, Letter dated 17 July from Handelsbanken to the IIO, pages 1 and 2.
[37] Exhibit 56 to the IIO's Statement of Findings, Letter dated 17 July from Handelsbanken to the IIO, pages 1 and 2.
[38] See for example Case C-33/11, A Oy, ECLI:EU:C:2012:482.
[39] See for example Case C-33/11, A Oy, ECLI:EU:C:2012:482.

not mean that the terms used to specify the exemptions should be construed in such a way as to deprive those exemptions of their intended effect."[40]

39. To come to a decision, the Board (in line with the Board of Appeal Decision) notes the importance of the legislative history of the provisions dealing with investment research and credit ratings with a view to assisting to establish the correct construction of Article 3(2).

40. In particular, as established by the Board of Appeal, Article 3(2) of the Commission's original proposal of 12 November 2008[41] "was different and had the opposite purpose of the current text of Article 3(2) [of the adopted CRA Regulation]. In the Commission's proposal, paragraph 2 was as follows: "For the purposes of point (a) of paragraph 1, credit ratings shall not be considered recommendations within the meaning of Article 1(3) of Commission Directive 2003/125/EC".[42]

41. The Board of Appeal thus considered that "The intended purpose was to specify that a credit rating, albeit being an opinion regarding the creditworthiness of an issuer or of a debt security, was not to be confused with an investment recommendation within the market abuse framework. [It] was clearly intended […] as a clarification for the benefit of credit rating agencies. The original proposal did not address the question whether the provision of (regulated or unregulated) investment services, in the form specifically of investment recommendations, investment research and other opinions by entities which were not credit rating agencies, could be considered a credit rating activity."[43]

42. On 23 April 2009, the European Parliament adopted its position on first reading.[44] This text contained both recital (20) and Article 3(2) as they currently stand in the adopted CRA Regulation, despite no such proposals having been tabled by the ECON Committee Report[45] of 1 April 2009 or by the ECB in its Opinion[46] of 21 April 2009.[47]

43. It is unclear at which stage and for which reasons the drafting of Article 3(2) of the CRA Regulation was modified between the version in the Commission's proposal and the final version.[48] As the Board of Appeal pointed out, "A provision originally directed at credit rating agencies became a provision directed at entities issuing recommendations under MAD or engaging in investment research and other forms of general recommendations

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[40] Case C-33/11, A Oy, ECLI:EU:C:2012:482, paragraph 49.
[41] Exhibit 19 to the IIO's Statement of Findings, Commission's proposal for a Regulation of the European Parliament and of the Council on Credit Rating Agencies, COM(2008) 704 final, 2008/0217 (COD), 12/11/2008.
[42] Board of Appeal Decision, paragraph 238.
[43] Board of Appeal Decision, paragraph 239.
[44] See Position of the European Parliament adopted at first reading on 23 April 2009 with a view to the adoption of Regulation (EC) No .../2009 of the European Parliament and of the Council on Credit Rating Agencies (EP-PE_TC1-COD(2008)0217), 23 April 2009.
[45] Report on the proposal for a regulation of the European Parliament and of the Council on Credit Rating Agencies (COM(2008)0704 – C6-0397/2008 – 2008/0217(COD)), Rapporteur MEP Jean-Paul Gauzès (A6-0191/2009).
[46] Opinion of the European Central Bank of 21 April 2009 on a proposal for a regulation of the European Parliament and of the Council on credit rating agencies (CON/2009/38), OJ 2009/C 115/01.
[47] See Board of Appeal Decision, paragraphs 240-242.
[48] See also paragraph 202 of the IIO's Statement of Findings.

under MiFID or otherwise providing "opinions about a value of a financial instrument or a financial obligation"."[49] The Board of Appeal also noted that the "negotiations between the co-legislators led to the result that the original Article 3(2) of the Commission's proposal was fundamentally transformed."[50]

44. Yet, as the Board of Appeal Decision set out in its analysis of the legislative history, the opening sentence "For the purposes of paragraph (1)(a)…" "remained, just in a slightly different form from the original "for the purposes of point (a) of paragraph 1", but in a completely different context: one in which, as noted, the original purpose of paragraph (2) was reversed, it not being specified that the rating that was not a recommendation for the purposes of MAD, but that recommendations under MAD and MIFID were not ratings, to the effect that those providing such recommendations should be deemed outside the scope of [the CRA Regulation]."[51]

45. The Board of Appeal also voiced some doubts on the real intention of the co-legislators, due to "the circumstance that Article 3(2), as it stands now, was not entirely drafted from scratch in its current version but was amended during the legislative process, and that its [opening sentence] was already there in the Commission's proposal with the purpose of defining what credit rating is." [52]

46. Thus, the Board finds that, as acknowledged by the Board of Appeal, "there is a significant ambiguity in the wording of Article 3(2) and in the combined reading of Article 3(1)(a) and Article 3(2) and that this ambiguity cannot be resolved with certainty by looking at the legislative history of the provision."[53]

47. Moreover, (as already set out in the Board of Appeal Decision[54]), the Board's view is that the legislative history does not support the assertion that the provisions should be considered as clear and unambiguous so as to be decisive on the question of interpretation.

48. In such cases, the case law of the CJEU provides that in interpreting a provision of European Union law, it is necessary to consider also the context and the objectives pursued by the rules of which is it part, i.e. in the case of Article 3(2), the context and the objectives pursued by the CRA Regulation.

49. As the Board of Appeal, the Board "agrees with the conclusion of the IIO that it is also necessary to consider whether the literal interpretation as advocated by [Handelsbanken] would make [the CRA Regulation] devoid of at least some of its purposes and would, to

[49] Board of Appeal Decision, paragraph 244.
[50] Board of Appeal Decision, paragraph 244.
[51] Board of Appeal Decision, paragraph 245.
[52] Board of Appeal Decision, paragraph 247.
[53] Board of Appeal Decision, paragraph 249.
[54] Board of Appeal Decision, paragraph 261.

some extent, contradict the scope of [the CRA Regulation], as defined in Article 2, opening an unreasonable loophole in the system (subject to Article 4, Use of credit ratings)."[55]

50. First, the CRA Regulation establishes a specific regulatory framework (separate from the MAR/MiFID framework) with distinct objectives for the issuing of credit ratings.[56] This ensures for example that credit ratings are of adequate quality.

51. As noted by the Board of Appeal, "As opposed to investment recommendations/research governed by the MAR/MIFID frameworks, credit rating activities are reserved activities, i.e. they may be conducted only by entities that are registered in accordance with Article 14(1) [of the CRA Regulation] (or otherwise recognised under [the CRA Regulation]).

    Credit ratings are subject to specific requirements that do not have any equivalent in the MAR/MIFID frameworks and aim at addressing specific risks that these ratings may present to the financial system, including provisions (i) limiting the use of credit ratings by market participants (Article 4 [of the CRA Regulation]), (ii) imposing certain requirements on the credit rating process and methodology (Article 8 [of the CRA Regulation]) and (iii) imposing requirements in terms of presentation and disclosure of credit ratings including discontinuance of ratings and unsolicited ratings (Article 10 […] and Section D of Annex I [of the CRA Regulation])."[57]

52. The Board of Appeal further noted that, "whereas investment recommendations/research activities remain supervised principally by national market or banking authorities, credit rating activities are supervised exclusively by a single EU authority (ESMA) and are outside the scope of competence of national market or banking authorities."[58]

53. Second, in this context, the Board also notes the objectives pursued by the rules of which Article 3(2) of the CRA Regulation is part. According to Recital 7, "The principal aim of this Regulation is to protect the stability of financial markets and investors". Recital 75 also states: "the objective of this Regulation, namely to ensure a high level of consumer and investor protection by laying down a common framework with regard to the quality of credit ratings". In particular, according to Recital 43, the registration requirement aims at ensuring "a high level of investor and consumer confidence".

54. Thus, as set out by the Board of Appeal, "There is certainly no indication that it was intended to open a major exception to the operation of [the CRA Regulation. …] The effect of [Handelsbanken's] interpretation would be that market participants (including those not subject to the MiFID framework because general investment recommendations/research is not a reserved activity, and also because Article 3(2)(c) also includes a potentially very wide class of "opinions about the value of a financial instrument or a financial obligation"

[55] Board of Appeal Decision, paragraph 249.
[56] See Board of Appeal Decision, paragraphs 208, which held that "credit rating activities are subject to a specific regulatory framework, which is distinct from the MAR/MIFID frameworks".
[57] Board of Appeal Decision, paragraph 208.
[58] Board of Appeal Decision, paragraph 208.

which are not recommendations or investment research as defined in letters (a) and (b)), and even (potentially) registered CRAs, would be able to avoid the application of [the CRA Regulation] simply by including credit ratings in documents containing recommendations or investment research or even "opinions about the value of a financial instrument". In other words, subject to the market abuse framework, anyone could at least in theory issue credit ratings so long as the ratings were included in a document that fell within the Article 3(2) definitions. […] These ratings could not have the regulatory use set out in Article 4 (this Article expressly requiring that for regulatory purposes credit ratings can be used only if they are official and issued by registered credit rating agencies), but would nonetheless be (and present themselves as) credit ratings."[59]

55. Thus, as pointed out by the Board of Appeal Decision[60] and the IIO[61], having in mind the objectives pursued by the CRA Regulation, the Board finds that it is very unlikely that the legislator would have intended to leave completely open the possibility for non-registered companies to issue ratings without any other conditions than just inserting them in a recommendation or an investment research.

56. Moreover, considering another point highlighted by the IIO, the Board considers that this would allow unfair competition from these companies compared to CRAs registered under the CRA Regulation and subject to strict rules regarding the issuing of ratings. This would also lead to the issuing of credit ratings on another legal basis than the CRA Regulation, thus undermining *de facto* the scope of the CRA Regulation.[62]

57. Third, as remarked by the Board of Appeal, such a reading of Article 3(2) "does not necessarily deprive Article 3(2) of effect, the purpose of which may simply be one of clarifying the general position of investment recommendation or investment research which is consistent with its treatment in earlier legislation. Alternatively, […] a product may be developed which does fall into both categories, which is not an impossible outcome given the propensity of the financial markets to change over time. The fact that [there are no current] examples is of limited significance."[63]

58. Fourth, the same document may be treated as having different components for regulatory purposes. For example, a document could contain both a recommendation and a credit rating: there could be a recommendation described at the top of the document as "overweight" (i.e. a recommendation to buy), and at the bottom of the document a credit rating explaining that the issuer is considered to be "an investment grade issuer in the BBB+ range".[64] The Board's reading, in line with the Board of Appeal Decision, of such a

[59] Board of Appeal Decision, paragraph 262.
[60] See Board of Appeal Decision, paragraph 263.
[61] See paragraph 205 of the IIO's Statement of Findings.
[62] See paragraph 206 of the IIO's Statement of Findings.
[63] Board of Appeal Decision, paragraph 264.
[64] Board of Appeal Decision, paragraph 266.

document is that the “BBB+” content is a credit rating, whereas the content "overweight" is investment advice.

59. In addition, as held by the Board of Appeal Decision, “if the recommendation “overweight” was accompanied by an official credit rating issued by a registered rating agency […], the presence in the same document of such a credit rating would not make the whole document a credit rating (Article 3(2) clarifies that such a transmutation is prevented); both the recommendation content and the rating content would remain what they are, but in such a case the coexistence of these two components in the same document prepared by [Handelsbanken] would be fully lawful, because the official credit rating is not issued by [Handelsbanken] but by a registered rating agency.”[65]

60. The Board considers, following the Board of Appeal Decision, that the same document “may have content which consists of recommendations or investment research within the Article 3(2) exclusion, and content which consists of “credit ratings” within the meaning of the definitions of “credit rating” in Article 3(1)(a) and (h) of [the CRA Regulation]. If so, and if the other requirements of [the CRA Regulation] are satisfied, the communication, for its rating component, will fall within [the CRA Regulation], and the issuer will require to be registered.”[66]

Conclusion

61. In conclusion, based on the above reasons, the material in the IIO’s file and the Board of Appeal Decision, the Board finds that the Ratings were credit ratings within the meaning of the CRA Regulation and therefore that Handelsbanken issued credit ratings during the relevant period.

62. In addition, the Board holds that Handelsbanken cannot benefit from the application of Article 3(2) of the CRA Regulation to argue that the Ratings do not fall within the definition of credit ratings within the meaning of the CRA Regulation.

63. Thus, the Board notes that during the relevant period, Handelsbanken, a legal person established in the Union, was a CRA and did not apply for registration for the purposes of Article 2(1) of the CRA Regulation. The Board thus finds that Handelsbanken committed the Infringement set out at Point 54 of Section I of Annex III of the CRA Regulation during the relevant period (i.e. 1 June 2011 to 30 August 2016).

[65] Board of Appeal Decision, paragraph 268.
[66] Board of Appeal Decision, paragraph 269.

B. Findings of the Board with regard to the negligent or intentional commission of the Infringement

64. The Board has previously set out its views in relation to the negligent commission of an infringement.[67] These views have been confirmed by the Board of Appeal Decision.[68] Negligence is established for a CRA where, as a professional firm in the financial services sector subject to stringent regulatory requirements, it is required to take special care in assessing the risks that its acts or omissions entail, and has failed to take that care. Further, as a result of that failure, the CRA has not foreseen the consequences of its acts or omissions, including particularly its infringement of the CRA Regulation, in circumstances when a person in such a position who is normally informed and sufficiently attentive could not have failed to foresee those consequences.[69]

65. Negligence is a Union law concept in the context of the CRA Regulation, albeit one which is familiar to, and an inherent part of, all Member States' legal systems, and must be given an autonomous, uniform interpretation. From the provisions of Articles 24 and 36a of the CRA Regulation, the term "negligence" in the context of that Regulation requires more than a determination that an infringement has been committed. It is clear from the second subparagraph of Article 36a(1) of the CRA Regulation that a negligent infringement is not one that was committed deliberately or intentionally. This position is further supported by case law of the CJEU, which ruled that negligence may be understood as entailing an unintentional act or omission.[70]

66. Having regard to the CJEU jurisprudence, the concept of a negligent infringement of the Regulation is to be understood to denote a lack of care on the part of a CRA when it fails to comply with the CRA Regulation.

67. The Board notes the position taken by the General Court in the Telefonica case, where the General Court spoke of persons "carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on that account be expected to take special care in assessing the risks that such activity entails".[71]

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[67] See for example DBRS Ratings Limited: Board of Supervisors Decision of 24 June 2015, ESMA 2015/1048; Fitch Ratings Limited: Board of Supervisors Decision of 21 July 2016, ESMA/2016/1131; and Moody's Deutschland GmbH and Moody's Investors Service Ltd: Board of Supervisors Decision dated 23 May 2017, ESMA41-137-1005.
[68] See in particular Board of Appeal Decision, paragraph 283. See also paragraphs 277-282.
[69] The Board has considered the Opinion of Advocate-General Mayras in Case C-26/75, General Motors Continental NV v. Commission, ECLI:EU:C:1975:141, where it is stated that "the concept of negligence must be applied where the author of the infringement, although acting without any intention to perform an unlawful act, has not foreseen the consequences of his action in circumstances where a person who is normally informed and sufficiently attentive could not have failed to foresee them." The Board has also considered Case C-308/06, International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport ECLI:EU:C:2008:312, paragraph 77 where the CJEU states that negligence should be understood as "entailing an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation".
[70] See for instance Case C-308/06, International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport ECLI:EU:C:2008:312, where the CJEU noted at paragraph 75 of its judgment that all of the Member States' legal systems "have recourse to the concept of negligence which refers to an unintentional act or omission by which the person responsible breaches his duty of care".
[71] Case T-336/07 Telefónica, SA and Telefónica de España, SA v European Commission, ECLI:EU:T:2012:172, paragraph 323.

Similarly the Board considers that in circumstances where, operating within the framework of a regulated industry, an entity which holds itself out as a professional entity and carries out regulated activities is expected to exercise special care in assessing the risks that its acts and omissions may entail. The Board is of the view that a high standard of care is to be expected of a CRA.[72]

68. The nature and extent of the requirements imposed on CRAs by Annex I of the CRA Regulation, and of the corresponding infringement provisions under its Annex III, reflect the weight given to these considerations by the legislator. The Board considers that to ensure a high standard of care by CRAs, the acts and omissions of a CRA should be judged with these considerations in mind.

69. Applying the test described above to the facts of this case, the Board notes the IIO's file, the Board of Appeal Decision and, in particular, the reference by the Board of Appeal Decision to the "very unusual"[73] circumstances of the case.

70. Overall, with particular regard to and in line with the Board of Appeal Decision, the Board concludes that Handelsbanken did not commit the Infringement negligently.

71. In addition, the Board does not find that the Infringement was committed intentionally as the material before the Board does not support such a finding.

C. Supervisory measure to be adopted

72. Article 24(1) of the CRA Regulation provides that where one of the infringements listed in Annex III of the CRA Regulation is found, the Board must adopt one or more of the supervisory measures listed in that Article.

73. In accordance with Article 24(2) of the CRA Regulation[74], the Board considers that it is appropriate to issue a public notice in respect of the infringement found in the present case. The Appendix to this Statement of Findings of the Board contains a draft of the public notice.

[72] See e.g. Case C-48/98, Firma Söhl & Söhlke v Hauptzollamt Bremen ECLI:EU:C:1999:548, paragraph 58.
[73] Notably, Board of Appeal Decision, paragraph 311.
[74] Article 24(2) of Regulation (EC) No 1060/2009 states: "When taking the decisions referred to in paragraph 1, ESMA's Board of Supervisors shall take into account the nature and seriousness of the infringement, having regard to the following criteria: (a) the duration and frequency of the infringement; (b) whether the infringement has revealed serious or systemic weaknesses in the undertaking's procedures or in its management systems or internal controls; (c) whether financial crime was facilitated, occasioned or otherwise attributable to the infringement; (d) whether the infringement has been committed intentionally or negligently".

APPENDIX TO THE STATEMENT OF FINDINGS OF THE BOARD

[DRAFT] PUBLIC NOTICE

Svenska Handelsbanken AB ('Handelsbanken') is a credit institution established in Sweden that is authorised by the Swedish Financial Supervisory Authority (Finansinspektionen) to carry out banking activities.

Regulation (EC) No 1060/2009 on credit rating agencies ('the CRA Regulation') lays down obligations for a credit rating agency ('CRA') in the conduct of its activities. In conjunction with its role as supervisor of CRAs under the CRA Regulation, the European Securities and Markets Authority ('ESMA') has functions and powers to take enforcement action in relation to infringements of the CRA Regulation by CRAs. A firm that is a CRA must apply to be registered to issue credit ratings publicly or by subscription. Handelsbanken is not a registered CRA and has not applied to be registered.

In December 2016, the supervisors of CRAs within ESMA formed the view that there were serious indications of possible infringements of the CRA Regulation by Handelsbanken. It appeared that Handelsbanken had issued credit ratings although it had not applied to be registered.

The matter was then referred to an independent investigating officer ('IIO') who, having conducted an investigation, submitted her findings to ESMA's Board of Supervisors ('the Board').

Having considered in particular the evidence and the decision of 27 February 2019 of the Board of Appeal of the European Supervisory Authorities, the Board has found that Handelsbanken committed without intent or negligence an infringement of the CRA Regulation as follows.

Infringement

A) Relevant legislation

Article 14(1) of the CRA Regulation obliges a CRA, in given circumstances, to apply for registration.

A failure by a CRA to apply for registration where required to do so is an infringement of the CRA Regulation – as provided by point 54 of Section I of Annex III of the CRA Regulation ('the Infringement').

A credit rating is defined by Article 3(1)(a) of the CRA Regulation.

Article 3(1)(b) of the CRA Regulation defines a CRA as firm whose occupation includes the issuing of credit ratings on a professional basis.

In considering whether Handelsbanken had committed an infringement of the CRA Regulation, ESMA reviewed Handelsbanken's conduct in appearing to issue credit ratings. In particular ESMA considered whether Handelsbanken was issuing credit ratings as they are defined by the CRA Regulation. ESMA also considered the application of Article 3(2) of the CRA Regulation to Handelsbanken's case.

B) Factual findings and analysis of the Board

Between 1 June 2011 and 30 August 2016, Handelsbanken issued credit research reports as part of its credit research activities. These reports related to either issuers of bonds or debt instruments or those instruments themselves. A number of these reports included opinions that were variously described as an "Indicative rating", an "Indicative corporate rating", an "Indicative issue rating", or an "Indicative issuer rating" ('the Ratings'). Approximately 285 of the Ratings were issued by Handelsbanken during this period.

The Board found that the Ratings met the definition of a credit rating provided by the CRA Regulation.

C) Finding of infringement

The Board therefore found that Handelsbanken had committed the Infringement as a consequence of issuing the Ratings.

However, the Board did not find intent or negligence to be established. In accordance with the relevant provisions of the CRA Regulation, no fine is imposed for the Infringement.

Supervisory measure

Public notice

Pursuant to Article 24 of the CRA Regulation, the Board decided that the Infringement warranted a supervisory measure in the form of the publication of this public notice.