

Date: 11 July 2018  
ESMA41-137-1147

## **DECISION OF THE BOARD OF SUPERVISORS TO ADOPT A SUPERVISORY MEASURE AND IMPOSE A FINE IN RESPECT OF AN INFRINGEMENT BY SVENSKA HANDELSBANKEN AB**

**The Board of Supervisors ('the Board'),**

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

Having regard to Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies<sup>1</sup>, and in particular Articles 24 and 36c thereof,

**Whereas:**

1. Following preliminary investigation the Supervision Department within ESMA concluded, in a report dated 15 December 2016, that in respect of 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.
3. The IIO sent her initial statement of findings dated 16 June 2017 to Handelsbanken that set out her finding that Handelsbanken had committed the infringement set out at point 54 of Section I of Annex III to Regulation (EC) No 1060/2009.

<sup>1</sup> OJL 302 17.11.2009, p. 1

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 of Supervisors 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.<sup>2</sup>
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 finds that Handelsbanken 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 Handelsbanken as calculated in the Annex to this Decision.

<sup>2</sup> Ruling of the Enforcement Panel (ESMA-2018-CONF-7104)

**HAS ADOPTED THIS DECISION:**

**Article 1**

Svenska Handelsbanken AB (publ) negligently committed the infringement set out at point 54 of Section I of Annex III of Regulation (EC) No 1060/2009.

**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**

The Board of Supervisors imposes a fine for the infringement referred to in Article 1 in the amount of EUR 495 000.

**Article 4**

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

**Article 5**

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

Done at Paris on 11 July 2018

*[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 relation to this matter and the material in the IIO's file, the Board sets out its findings and the reasons for its findings below.
2. The Board notes that ESMA sent an initial statement of findings by the Board dated 4 May 2018 to Handelsbanken by email dated 22 May 2018. By letter dated 13 June 2018, Handelsbanken provided written submissions in reply. These written submissions were considered by the Board together with the other submissions made on behalf of Handelsbanken. The findings below refer to these written submissions where relevant.

#### **A Findings of the Board with regard to the infringement listed at point 54 of Annex III of Regulation (EC) No 1060/2009**

##### **Legislative provisions**

3. Under specific circumstances a credit rating agency ('**CRA**') must apply to the European Securities and Markets Authority ('**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<sup>3</sup> 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*'.
4. This provision 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*'.
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) of the CRA Regulation. 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 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*

<sup>3</sup> Earlier versions of the Regulation referred to the 'Community' rather than the 'Union'.

*such a debt or financial obligation, debt security, preferred share or other financial instrument, issued using an established and defined system of rating categories’.*

8. The last term in this definition, that of a rating category, is defined by Article 3(1)(h) of the CRA Regulation. This Article states that a ‘rating category’ *‘...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 by 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 (**‘MAD’**), referred to in Article 3(2)(a) of the CRA Regulation as set out above, was repealed by Regulation (EU) No 596/2014 on market abuse (**‘MAR’**), which states at 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.’*

11. Article 3(2)(b) of the CRA Regulation refers to the definition of investment research that appears in Directive 2006/73/EC, which implements Directive 2004/39/EC<sup>4</sup> ('MiFID'). Article 24(1) of Directive 2006/73/EC states:

*'1. For the purposes of Article 25<sup>5</sup>, '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.'*

## **Facts and analysis**

12. Handelsbanken is a credit institution established in Sweden and is authorised by the Swedish Financial Supervisory Authority (Finansinspektionen) to carry out banking activities, which includes 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.
13. 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<sup>6</sup>. 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'**)<sup>7</sup>. It appears that approximately 285 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 Ratings 'in order to communicate the creditworthiness of the issuer/instrument described in investment research reports'. A factor that contributed to the

<sup>4</sup> 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

<sup>5</sup> Article 25 of Directive 2006/73/EC relates to additional organisational requirements where a firm produces and disseminates investment research

<sup>6</sup> For examples of this description see Exhibit 7 to the IIO's Statement of Findings – Letter dated 20 March 2017 from Handelsbanken to the IIO, page 1

<sup>7</sup> See the sample reports at Exhibits 35 to 45 to the IIO's Statement of Findings

growing use of the Ratings was a 'limited of availability of reliable prices/spreads for Swedish krona bonds at the time'<sup>8</sup>.

14. 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 credit rating agency); (iv) the credit rating agency must have issued credit ratings that were disclosed publicly or distributed by subscription; and (v) the credit rating agency must not have applied for registration for the purposes of Article 2(1) of the CRA Regulation.
15. The findings of the Board are as follows.

#### *Legal person established in the Union*

16. The Board considers that Handelsbanken is a legal person established in the Union, specifically a limited liability company with its registered office in Stockholm, Sweden. The evidence in the IIO's file leads the Board to conclude that Handelsbanken was responsible for the Ratings. Specifically, the Ratings were produced by analysts employed by Handelsbanken, including those relevant analysts that were located in Norway<sup>9</sup>.

#### *Legal person issuing credit ratings within the meaning of the CRA Regulation*

##### Credit ratings within Art 3(1)(a) of the CRA Regulation

17. The Ratings will constitute credit ratings only 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. The CRA Regulation specifies a number of exclusions from its effect, for example, for 'investment research', which is considered below.
18. The Board considers that the Ratings were opinions on the creditworthiness of two 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. Paragraph 137 of the IIO's Statement of Findings sets out examples of 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 investor's investment decision the research needs to contain a

<sup>8</sup> Exhibit 7 to the IIO's Statement of Findings – Letter dated 20 March 2017 from Handelsbanken to the IIO, page 4

<sup>9</sup> 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

measure of relative credit quality<sup>10</sup>. The Board also considered examples of the Ratings themselves.

19. In addition, the Board considers that these opinions were issued using an established and defined system of rating categories. Handelsbanken has 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'<sup>11</sup>. The Board noted 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'<sup>12</sup>.
20. In reaching its views set out in paragraphs 18 and 19 above, the Board notes that in its opinion, credit ratings do not need to be produced by using the same methodology or methodologies as those already employed by registered CRAs. The Board's understanding of the definition of a credit rating provided by the CRA Regulation is that the definition does not suggest that to be credit rating, a credit rating must be produced in particular way. Instead, the definition appears to focus on the product of a given process, on its qualities and characteristics. The Ratings appear to the Board to possess those qualities and characteristics.
21. The Board also notes that the Ratings were not paid for by the issuer, the creditworthiness of which, or the creditworthiness of whose instruments, was the subject of assessment. The Board understands that credit ratings produced by registered CRAs are often, but not exclusively, paid for by the relevant issuer<sup>13</sup>. Similarly to its understanding in the immediately preceding paragraph however, the Board does not consider the definition of a credit rating to require that to be a credit rating, a credit rating must be produced at the instigation of a particular party. The Board is of the view that the Ratings appear to meet the definition of a credit rating provided by the CRA Regulation.

#### Investment research, recommendations and opinions

22. Handelsbanken has stated that its Ratings were an 'integral part' of its investment research and 'as such exempt from the CRA Regulation...' i.e. pursuant to Article 3(2)<sup>14</sup>. It considered that a conclusion by the IIO in her statement of findings, which seemed to be that 'the exemption of investment research... is only applicable if everything contained in the investment research report falls outside the definition of a credit rating', was 'illogical and deprives the exemption of its intended effect'. Further, 'when an investment research report

<sup>10</sup> IIO's Statement of Findings, Section 6, page 15

<sup>11</sup> Exhibit 5 to the Supervisory Report – Letter dated 29 April 2016 from Handelsbanken to ESMA, page 5

<sup>12</sup> Ibid., page 12; such categories have also been employed in the Ratings noted by the Board, respectively, Exhibits 35-37 to the IIO's Statement of Findings

<sup>13</sup> That is, an 'issuer-pays' model

<sup>14</sup> For example see Exhibit 21 to the Supervisory Report – letter dated 9 August 2016 from Handelsbanken to ESMA's Supervision Department, page 1



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)<sup>15</sup>.

23. In the Board's view, these arguments appear to rely on a view that the concept of 'investment research' is a subset of a 'credit rating'. In this respect however, the Board notes the IIO's view that the legislator considered 'credit ratings' and 'investment research' to be mutually exclusive concepts. Having considered the matter, the Board considers that the legislation is not definitive as to whether 'credit ratings' and 'investment research', 'recommendations' or 'opinions' are mutually exclusive terms or if there is an overlap between them, or indeed if they are related in some other way. In reaching this 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<sup>16</sup>. If Article 3(2) of the CRA Regulation is to be considered an exemption (although, as stated above, the Board does not consider the legislation to be definitive), it is settled case-law that it should be interpreted strictly as it would constitute an exception to general principles. However, the exemption should not be construed so as to deprive it of its intended effect<sup>17</sup>.
24. The Board referred to the stated aims and objectives of the CRA Regulation. In particular, Recital 1 thereof states that it is '*essential*' that CRA activities are conducted in accordance with '*the principles of integrity, transparency, responsibility and good governance*', in order to ensure that the resulting credit ratings are '*independent, objective and of adequate quality*'. Recital 2 of the CRA Regulation also refers to the need for issued credit ratings to be of adequate quality, stressing the importance of laying down rules for that goal and for CRAs to be subject to stringent requirements.
25. In respect to the enacting terms of the CRA Regulation, the Board noted that investment research<sup>18</sup>, recommendations and opinions are not directly excluded from its scope in the same way that, for example, private ratings or credit scores are by Article 2(2)(a) and (b) respectively<sup>19</sup>. Instead, the former concepts (as defined by other legislation) '*shall not be considered to be credit ratings*' under Article 3(2). This wording did not in the Board's opinion help to determine the issue definitively, and might have been equally considered to support either the view that credit ratings, recommendations and opinions are mutually exclusive or that they may overlap. The relevant Recital of the CRA Regulation, Recital 20, also did not appear to assist as it consists of largely the same wording as Article 3(2).
26. The Board has also considered the IIO's views at paragraphs 194 to 200 of her Statement of Findings. While it is not wholly persuaded by the conclusion drawn by the IIO from the CESR advice and IOSCO Code referred to therein (i.e. the conclusion that it is clear from

<sup>15</sup> Exhibit 56 to the IIO's statement of findings, pages 1 and 2

<sup>16</sup> See for example the CJEU, Case C-33/11, A Oy, 19 July 2012

<sup>17</sup> CJEU, Case C-33/11, A Oy, 19 July 2012, paragraph 49

<sup>18</sup> The Board notes that the definition of 'investment research' suggests it is to be considered to be a sub-set of 'recommendations'

<sup>19</sup> Article 2(2)(a) and (b) of the CRA Regulation states '(2) This Regulation does not apply to: (a) 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; (b) credit scores, credit scoring systems or similar assessments related to obligations arising from consumer, commercial or industrial relationships; ...'

them that credit ratings and recommendations are distinct) the Board does take note of the Communication from the Commission on Credit Rating Agencies (2006/C 59/02)<sup>20</sup>. In particular, in this analysis of the 'issue' of CRAs (undertaken before the financial crisis that led to the adoption of the CRA Regulation), the Commission considers the relevance of MiFID to CRAs. In considering where MiFID is not applicable to the rating process, the Commission states '*In other words, the issuing of a credit rating will normally not result in the credit rating agency also providing 'investment advice' within the meaning of Annex I to the MiFID*<sup>21</sup>.' This statement perhaps suggests that there is not normally an overlap between credit ratings and recommendations, investment research or opinions and perhaps that they are distinct.

27. The Board considers, on the basis of the material before it and without expressing a firm or settled view, that it appears that a credit rating is a distinct concept from recommendations, investment research and opinions in this context. The Board notes that ESMA's Supervision Department has stated it 'accepts' that investment research can contain opinions on creditworthiness<sup>22</sup>, and that the IIO concurs with this view. The Board would also tend towards this position. It may therefore be that a distinguishing factor, but not the sole determining factor, between credit ratings and investment research is that the former uses an established and defined ranking system of rating categories.
28. If that is the case, the Board considers it is also possible that a given document could contain both investment research or recommendation *and* a credit rating, depending on the character of the opinions put forward and the manner in which they are expressed. That is, an opinion, contained in a publicly-available document (or one distributed by subscription) that otherwise comprises investment research, which relates to the creditworthiness of an entity, issuer, financial instrument or other asset set out in the definition of a credit rating in Article 3(1)(a) of the CRA Regulation and which is issued using an established and defined ranking system of rating categories, is likely to be considered a credit rating within the scope of that Regulation.
29. The Board has reached this view, which as stated above is not settled, taking into consideration the aims of the CRA Regulation referred to in paragraph 24 above. The Board has noted that producers of investment research and other forms of recommendation will be likely to be subject to regulation under MiFID and MAR in respect of its production. Nevertheless, it seems to the Board that the CRA Regulation establishes a separate regime with distinct objectives, for example that issued credit ratings are of adequate quality. If credit ratings (that is, opinions that meet the definition of a credit rating) could be included in investment research or other recommendations published by entities not registered as credit rating agencies, it is possible that these aims (such as credit ratings being of adequate quality) might be frustrated.
30. Similarly, the Board could not accept a suggestion that investment research or recommendations could contain a rating scale and not be considered to be credit ratings, as its categorisation as a credit rating would seem to be more likely, in light of the aims of

<sup>20</sup> Communication from the Commission on Credit Rating Agencies (2006/C 59/02), OJ C 59/2 11.3.2006

<sup>21</sup> *Ibid.*, Section 3.1, page 59/5

<sup>22</sup> For example see the Supervisory Report at paragraph 118, page 31

the Regulation. It follows that the legislator might indeed have intended to bring already-regulated entities within the scope of the CRA Regulation if the activities of those entities extend to the substance of that legislation.

31. As stated above, the Board's views on these issues are not settled. However, the Board has formed the view that the Ratings are credit ratings within the meaning of the CRA Regulation. It has reached this view on the basis of the facts in the case i.e. on the material in the IIO file. Considering the Ratings themselves, they would appear to the Board to fall most precisely within the CRA Regulation definition of a 'credit rating'. This view follows from the analysis summarised in paragraphs 18 to 21 above. The Ratings do not appear to fall within the definitions of either a recommendation or investment research. In particular, the Board has noted that the Ratings (in the sense of the rating categories) do not in themselves appear to recommend or suggest an investment strategy, which would have been expected of investment research pursuant to its definition.
32. Handelsbanken addresses this issue in its written submissions dated 13 June 2018, maintaining that it has not committed the Infringement as its credit research reports fell within the 'exemption' relating to investment research provided by Article 3(2)(b) of the CRA Regulation. Handelsbanken helpfully summarises its 'prior position' in section 1.1 of these written submissions, setting out a number of points that the Board considers it addresses in its findings above, given they relate to arguments previously put forward by Handelsbanken.
33. The Board however notes in particular that at paragraphs 11 to 16 of its written submissions Handelsbanken refers to the aim of the CRA Regulation. In addition to its statements on this issue at paragraphs 24 and 29 above, it appears to the Board that the CRA Regulation is concerned with the activities of entities, rather than with their existing state of regulatory supervision. In addition, the Board considers that it could be said that if the legislator had intended to exclude from the effect of the CRA Regulation entities that were already subject to regulation pursuant to MiFID and/or MAR, it could have done so expressly in the CRA Regulation. Instead, however, the legislation does not appear to make such provision.
34. In section 1.2 of its written submissions, Handelsbanken refers to the Board's description of some of its views in its initial statement of findings as being 'not settled', and suggests the Board views Article 3(2) of the CRA Regulation as 'not definitive'. For the sake of clarity, the Board would emphasise its assertion in its initial statement of finding that it considers the legislation is 'not definitive' only as to the relationship between 'credit ratings' and 'investment research', 'recommendations' or 'opinions', specifically as to whether they are mutually exclusive terms. By contrast, the Board considers that the definition of a 'credit rating' in the CRA Regulation is clear, as are the definitions of the other terms in the relevant legislation. On the facts, it appears that the Ratings both fall within the definition of a credit rating and do not meet the definitions of investment research or recommendations.
35. The Board also notes Handelsbanken's statement in paragraph 22 of its written submissions that the 'scope of the exemption' of Article 3(2) of the CRA Regulation 'quickly becomes non-existent, without any legal meaning, if investment research cannot contain elements such as opinions on the relative creditworthiness of issuers (or bonds)'. While the Board stated in its initial statement of finding that it tended toward the view that investment research can contain opinions on creditworthiness, it also notes that neither legislative definition of investment research or of investment recommendations refer to an opinion on

creditworthiness, nor do they require that such an opinion is included. Further, only the definition of a credit rating, of the definitions of the terms under consideration, includes ‘an established and defined system of rating categories’. In other words, the legislation does not appear to require that investment research contain an opinion on creditworthiness.

36. In conclusion, the Board considers that the Ratings were credit ratings within the meaning of the CRA Regulation and therefore that Handelsbanken issued credit ratings during the relevant period.

*Occupation including the issuing of credit ratings on a professional basis*

37. The Board considers that Handelsbanken’s occupation included the issuing of credit ratings on a professional basis. In this respect, the Board has considered the statements by the IIO on the issue in her Statement of Findings<sup>23</sup>. In particular, the Board noted that an earlier draft of the CRA Regulation<sup>24</sup> referred to the ‘principal occupation’ of a credit rating agency being the issuance of credit ratings, but that the final version refers simply to its ‘occupation’. The Board therefore considered that the issuance of credit ratings does not have to be the *principal* occupation of a credit rating agency.
38. The Board has also considered the caselaw to which the IIO refers<sup>25</sup>. At paragraph 26 of that Judgement the Court states that ‘*First of all, 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...’*’ At paragraph 28 of the Judgement the Court states ‘*Lastly, the requirement that the transport [of waste, a point of issue in the Judgement] be ‘on a professional basis’ means that, even if Article 12 [of the relevant legislation<sup>26</sup>] does not provide that the transport of waste must be the sole or even the principal activity of the undertakings concerned, it must be a normal and regular activity of those undertakings’ [emphasis added].*
39. Although this Judgement does not relate directly to the CRA Regulation, the Board understood from it that the phrase ‘on a professional basis’ involved conduct that is a ‘normal and regular activity’ of the undertaking in question. The Board noted that this caselaw does not appear to suggest that the undertaking should receive income directly as a result of the relevant activity.
40. In this case, the Board noted 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<sup>27</sup>. Approximately 12 people have been employed over the relevant period, while the maximum number of analysts that at any time

<sup>23</sup> At paragraphs 117 to 127

<sup>24</sup> Exhibit 19 to the IIO’s Statement of Findings

<sup>25</sup> CJEU, Commission v Italy, C-270/03, 9 June 2005

<sup>26</sup> Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p.39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p.32)

<sup>27</sup> Exhibit 5 to the Supervisory Report – Letter dated 29 April 2016 from Handelsbanken to ESMA, page 1

were involved in producing Credit Research reports was 4<sup>28</sup>. Issuing Ratings appears to have 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<sup>29</sup>. As has been stated above at paragraph 12, on the basis of Handelsbanken's own statements, 285 Ratings appear to have been issued between 1 June 2011 and 30 August 2016. Furthermore, Ratings had already been issued before 2011 but in more limited amounts<sup>30</sup>. Handelsbanken has stated that none of its turnover during this period can be assigned to the Ratings<sup>31</sup>.

41. In all the circumstances, the Board considers that Handelsbanken's issuing of the Ratings (which the Board considers to be credit ratings) was a normal and regular activity for it, and therefore that Handelsbanken's occupation between 1 June 2011 and 30 August 2016 included the issuing of credit ratings on a professional basis.

#### *Credit ratings disclosed publicly or distributed by subscription*

42. 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)<sup>32</sup>. In addition, such reports were also published on Bloomberg. The Credit Research reports were emailed to recipients on a mailing list, the number of recipients being 551 as of 24 March 2016<sup>33</sup>. In addition to Credit Research reports, Handelsbanken also made public Credit Rating Lists, which contained all current indicative ratings, by publishing them 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<sup>34</sup>. Handelsbanken has itself stated that it considered its Credit Research reports to be public<sup>35</sup>. The Board considers 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*

43. It appears to the Board to be uncontested that Handelsbanken has not applied for registration for the purposes of Article 2(1) of the CRA Regulation. The evidence in the IIO file is that ESMA has not received such an application from Handelsbanken, and Handelsbanken has been consistent in maintaining that it did not need to make such an

<sup>28</sup> Exhibit 7 to the IIO's Statement of Findings – Letter dated 20 March 2017 from Handelsbanken to the IIO, page 2

<sup>29</sup> IIO's Statement of Findings, Section 6, page 16

<sup>30</sup> Exhibit 7 to the IIO's Statement of Findings – Letter dated 20 March 2017 from Handelsbanken to the IIO, page 4

<sup>31</sup> Exhibit 7 to the IIO's Statement of Findings – Letter dated 20 March 2017 from Handelsbanken to the IIO, page 1

<sup>32</sup> Exhibit 5 to the Supervisory Report – Letter dated 29 April 2016 from Handelsbanken to ESMA, page 21

<sup>33</sup> Ibid., page 22

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.



application. The Board finds that Handelsbanken did not apply to be registered as a CRA during the period from 1 June 2011 to 30 August 2016.

44. In summary, the Board considers 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 finds that Handelsbanken committed the infringement at Point 54 of Section I of Annex III of the CRA Regulation between the period from 1 June 2011 to 30 August 2016.

## **B. Findings of the Board with regard to the negligent commission of the Infringement**

45. The Board has previously set out its views in relation to the negligent commission of an infringement<sup>36</sup>. 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 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<sup>37</sup>.
46. Negligence is an Union law concept in the context of the CRA Regulation, albeit one which is familiar to, and an inherent part of, the 28 Member States' legal systems, and must be given an autonomous, uniform interpretation. It would appear, from the provisions of Articles 24 and 36a of the CRA Regulation, that 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 caselaw in which the Court of Justice of the European Union (CJEU) has said that negligence may be understood as entailing an unintentional act or omission<sup>38</sup>.

<sup>36</sup> See e.g. DBRS: Board of Supervisors Decision of 24 June 2015, ESMA 2015/1048; Fitch Ratings Limited: Board of Supervisors Decision of 19 July 2016, ESMA/2016/1131; Moody's: Board of Supervisors Decision dated 23 May 2017, ESMA41-137-1005

<sup>37</sup> The Board has considered the Opinion of Advocate-General Mayras in Case 26/75 General Motors Continental NV v. Commission, 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 The Queen on the application of: International Association of Independent Tanker Owners (Intertanko) and Others Secretary of State for Transport, para.77 (3 June 2008) where the CJEU states 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.*'

<sup>38</sup> See footnote 37 – the Intertanko case

47. The CJEU jurisprudence suggests that the concept of a negligent infringement of the CRA Regulation is to be understood as denoting a lack of care on the part of a CRA in complying with the CRA Regulation. 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. They can on that account be expected to take special care in assessing the risks that such activity entails*”.<sup>39</sup> 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 should be 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.
48. 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, appear to reflect the weight given to these considerations by the legislator. The Board considers that in order to ensure a high standard of care by CRAs, the acts and omissions of a CRA should be judged with these considerations in mind.
49. Applying the test described above to the facts of this case, the Board notes that in the course of her investigation the IIO made enquires of Handelsbanken as to whether it had previously assessed the potential application to it of the CRA Regulation<sup>40</sup>. The IIO asked Handelsbanken for internal documents relating to any such an assessment conducted during three periods, corresponding to the time before the date of application of the Regulation and around the times of two subsequent amendments to it (‘CRAR II’<sup>41</sup> and ‘CRAR III’<sup>42</sup>).
50. Handelsbanken replied, in relation to any such documents at all the relevant points in time, that no ‘such documents has (sic) been located’<sup>43</sup>. More generally it agreed that the standard of care expected of it ‘should be assessed taking into account a person in the same position, being normally informed and sufficiently attentive. Handelsbanken disagreed however that any facts gave any indication that it had been negligent. It believed that, as well as other Nordic market participants, it had ‘interpreted the exemption in article 3.2 according to its wording’ i.e. that it covered investment research.
51. As stated above, an entity must take special care to comply with the CRA Regulation. The Board has therefore considered what steps Handelsbanken could have taken to meet this obligation. In the Board’s view, such steps might have included, for example, an initial evaluation as to whether the CRA Regulation might apply to its production of the Ratings, the taking of legal advice on the scope and effect of the CRA Regulation and/or seeking advice from their National Competent Authority and/or ESMA on those issues. In addition to such an initial evaluation (that is, prior to the CRA Regulation’s implementation), the

<sup>39</sup> Case T-336/07 Telefónica, SA and Telefónica de España, SA v European Commission, para. 323

<sup>40</sup> Exhibit 6 to the IIO’s Statement of Findings– The IIO’s first Request for Information dated 3 March 2017

<sup>41</sup> Regulation EU No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies, OJ L 145, 31.5.2011, p. 30

<sup>42</sup> Regulation EU No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies, OJ L 146, 31.5.2013, p. 1

<sup>43</sup> Exhibit 7 to the IIO’s Statement of Findings – Letter dated 20 March 2017 from Handelsbanken to the IIO, Questions 14-15, page 6

Board considers that Handelsbanken might have been expected to subject any initial opinion to periodic review.

52. The Board notes that Handelsbanken has not produced documentary evidence of any assessment it may have conducted of its position in respect of the CRA Regulation prior to the legislation's implementation in 2009. Further, Handelsbanken has not produced documentary evidence that it thereafter conducted a review of any conclusion drawn in such an assessment. There is also no evidence in the file that Handelsbanken took steps to contact either its National Competent Authority or ESMA in relation to these issues. Handelsbanken's written response to the IIO's initial statement of findings in particular did not include details of any steps in this respect<sup>44</sup>.
53. In the Board's view, there is a very limited amount of material on the file that might provide evidence of any special care that Handelsbanken has taken to comply with the CRA Regulation. The lack of documentary evidence does not assist the Board in determining whether Handelsbanken did take special care at this time in assessing the risks of this activity. While this limited amount of material is not in itself evidence of negligence, the Board can take the fact of it into account when considering the test for negligence.
54. The Board notes the test for negligence set out by the IIO in her Statement of Findings and the way in which she has applied it. While taking note of the test, the Board has decided not to follow the manner in which it was applied by the IIO.
55. In respect of the assessment of its position that Handelsbanken appears to have made around the time of the implementation of the CRA Regulation, it would seem appropriate to the Board that Handelsbanken did undertake an assessment then of the risks of issuing the Ratings, given the high standard of care expected of it. The quality of that assessment is however at issue. The lack of documentary evidence of this assessment does not assist the Board in determining whether Handelsbanken did take special care at this time in assessing the risks of this activity.
56. Further, a logical consequence of an entity's responsibilities in Handelsbanken's position would appear to the Board to be that it should rely only on a considered interpretation of the law insofar as it relates to its actions. To the extent that Handelsbanken's interpretation of the law may be distinct from its assessment of the risks associated with the Ratings, the lack of documentary evidence associated with it also does not assist the Board in taking a view as to its adequacy.
57. Overall, the nature and characteristics of the Ratings are such, in the view of the Board, that any assessment of them that concluded their issuing would not infringe the CRA Regulation is likely to have been inadequate. Specifically, the Ratings are on their face very similar to the credit ratings produced by registered CRAs, being expressed in seemingly the same terms i.e. using the same established and defined rating scales. The Ratings appear to have been intended to serve a similar purpose to credit ratings, that is, to express an opinion on the creditworthiness of, in this case, issuers of debt instruments or those instruments themselves. A scale was used to allow investors to compare the relative risk of different issuers and/or their instruments. Finally, it appears on the facts that the Ratings

<sup>44</sup> Exhibit 56 to the IIO's Statement of Findings - Letter dated 17 July 2017 from Handelsbanken to the IIO



were used in similar contexts as would have been the credit ratings of registered CRAs. Given the nature of the Ratings described above and the legal position as the Board understands it, Handelsbanken would have foreseen that the Ratings were likely to be considered to be credit ratings within the meaning of the definition of the CRA Regulation.

58. Handelsbanken appears not to have taken any steps externally, such as with its National Competent Authority or ESMA, to confirm its assessment of the risks associated with its conduct. The Board takes the view that this absence of action, which might have been expected of it given the role and expertise of those external parties, also suggests that Handelsbanken did not meet the high standard of care required of it.
59. In addition, that Handelsbanken seems not to have reviewed its position periodically might also amount in the Board's view to a failure to take the required special care in assessing the risks involved in issuing the Ratings. The Board considers that an entity's duty to take special care to comply with the CRA Regulation would require an active approach to the assessment of its obligations.
60. In all the circumstances, the Board considers that had Handelsbanken taken the required special care it would have identified that Handelsbanken would be likely to meet the definition of a CRA provided by the CRA Regulation and therefore that Handelsbanken should apply to be registered if it wished to issue the Ratings. The Board considers that if had it taken special care in assessing the risks of its conduct, Handelsbanken would not have failed to foresee that its issuing of the Ratings would amount to an infringement of the CRA Regulation. The Board considers that a normally informed party in the position of Handelsbanken would have foreseen the consequences of its actions. That is, in not applying to be registered as a CRA, Handelsbanken was committing an infringement of the CRA Regulation.
61. The Board considers that its findings above lead to the finding that Handelsbanken negligently committed the Infringement.
62. The failure of Handelsbanken to comply with the CRA Regulation is not explained, in the Board's view, by any supervening circumstance or anything else of such a nature as to be unforeseeable even by a normally informed and sufficiently attentive CRA exercising special care.
63. Handelsbanken addresses the issue of negligence in section 2 of its written submissions dated 13 June 2018, maintaining that it has not acted negligently. The Board notes that at paragraphs 38 and 39 Handelsbanken 'fundamentally disagrees' with the level of the standard of care that the Board considers Handelsbanken should meet i.e. a high standard of care. Although Handelsbanken does not appear to state so explicitly, it appears that it considers a 'reasonable' standard of care to be appropriate e.g. in paragraphs 32 and 43.
64. Handelsbanken states that the 'circumstances of a financial institution' are very different from that of the entity at issue in the jurisprudence referred to by the Board, the *Telefonica* case<sup>45</sup>. That entity has 'an extensive and potentially dominant market position'. However, in the view of the Board, the General Court in this case did not appear to base its view that an entity should be required to take special care on an entity's market position. Instead, the

<sup>45</sup> Case T-336/07 Telefónica, SA and Telefónica de España, SA v European Commission, para. 323

General Court's justifications for this requirement appear to be that entity's carrying on of a professional activity and it being used to having to proceed with a high degree of caution. These factors would also seem to be applicable, in the view of the Board, to Handelsbanken, and it should therefore be required to meet a high standard of care.

65. Further, on the evidence, the Board considers that if Handelsbanken had taken care to this standard it would have identified that the Ratings were likely to fall within the definition of credit ratings, and that they did not meet the definitions of investment research or recommendations. It was therefore foreseeable for Handelsbanken that issuing the Ratings would entail an infringement of the CRA Regulation.
66. Handelsbanken refers at paragraph 33 to steps it took 'in the process of ESMA's investigation' that culminated in it ceasing to produce the Ratings. However in the Board's view as this conduct, by its nature, only occurred at the end of the Infringement, bringing it to a close, it is not relevant to the question of whether Handelsbanken acted negligently for the period of the Infringement i.e. for the time beforehand. The Board does however take this aspect of Handelsbanken's conduct into account where appropriate below.
67. Handelsbanken also refers to two 'presumptions' on which it states the Board has reached its findings i.e. that Handelsbanken 'cannot have acted with due care' if (1) no written evidence exists; or (2) if it did not contact its domestic supervisor or ESMA to 'clarify the status of its investment reports'. In response to both of these points, the Board would emphasise that it has based its findings on the evidence before it and not on any presumptions. The Board would also restate its view that the apparent lack of both documentation and of seeking external advice is not proof in itself that Handelsbanken acted negligently in committing the Infringement. This lack can however be taken into account by the Board in its overall assessment of the evidence as to whether Handelsbanken did so act.
68. To the extent that Handelsbanken suggests the general understanding in the Nordic region was that the issuing of shadow ratings did not infringe the CRA Regulation, and that other financial institutions were also issuing such ratings for the Nordic markets, the Board notes that the CRA Regulation applies across the Union, not just the Nordic region. The Board considers that the Banks might have better had regard to this wider area in considering its conduct. It appears that Handelsbanken would have had sufficient resources to have done so over the relevant period and indeed may have operated across such geographical scope.
69. In summary, the Board finds that Handelsbanken negligently committed the Infringement.
70. The Board does not find that the Infringement was committed intentionally as the evidence before the Board does not support such a finding.
71. The evidence before the Board has led it to conclude that towards the end of the August 2016, Handelsbanken stopped using a rating scale to summarise its opinions on the creditworthiness of the issuer or debt instrument under consideration. In particular, the evidence is that Handelsbanken discontinued using the Ratings after 30 August 2016 i.e. all new reports were 'without reference to a scale for credit quality'. The Board therefore finds that Handelsbanken stopped issuing credit ratings within the meaning of the CRA Regulation at this point.

### **C. Supervisory measure to be adopted**

72. Article 24(1) of the CRA Regulation provides that where the Board finds that a CRA has committed one of the infringements listed in Annex III of the Regulation, the Board must adopt one or more of the supervisory measures listed in that Article<sup>46</sup>.
73. In accordance with Article 24(2) of the CRA Regulation,<sup>47</sup> the Board considers that it is appropriate to issue a public notice in respect of the Infringement. The Appendix to this Statement of Findings of the Board contains a draft of the public notice it proposes be issued.
74. The Board notes Handelsbanken's statements in section 3.1 of its written submissions in relation to the imposition of sanctions, in particular at paragraph 53 that 'ESMA's power to impose sanctions is focused on compliance'. Handelsbanken states at paragraph 54 that 'it would appear to be unjustified to impose any sanction' on it. Further, in section 3.2 of the written submissions, in relation to the proposed supervisory measure of a public notice, Handelsbanken submits that there is 'no justification' to impose such a supervisory measure 'considering that compliance has already been achieved'.
75. The Board notes these submissions, but considers that the wording of the CRA Regulation, specifically Article 24(1) of the CRA Regulation, requires the Board to take a decision imposing a supervisory measure once it has found an infringement under the CRA Regulation. Further, the Board considers that it should only take into account the factors in Article 24(2)(a) to (d) of the CRA Regulation when taking a decision in respect of a supervisory measure. In this case, taking into account the nature and seriousness of the Infringement pursuant to Article 24(2) the CRA Regulation, the Board considers that the issuing of a public notice is the most appropriate supervisory measure.

### **D. Calculation of fine for the negligent commission of the Infringement**

76. The Board has found that Handelsbanken negligently committed the Infringement by not applying for registration for the purposes of Article 2(1) of the CRA Regulation. Article

<sup>46</sup> Article 24(1) provides that where it has found an infringement, ESMA's Board of Supervisors shall take one or more of the following decisions; (a) withdraw the registration of the CRA; (b) temporarily prohibit the CRA from issuing credit ratings with effect throughout the Union, until the infringement has been brought to an end; (c) suspend the use, for regulatory purposes, of the credit ratings issued by the CRA with effect throughout the Union, until the infringement has been brought to an end (d) require the CRA to bring the infringement to an end; and (e) issue public notices.

<sup>47</sup> 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.*'

36a(1) of the CRA Regulation therefore requires the Board to impose a fine for the infringement.<sup>48</sup> The Board must determine the basic amount of the fine and then consider whether the basic amount of the fine should be adjusted to take account of any relevant aggravating or mitigating factors.

#### *Determination of the basic amount*

77. The determination of the basic amount of any applicable fine is to be undertaken in accordance with Article 36a(2) of the CRA Regulation which provides, insofar as is relevant to the present case, that:

*“The basic amount of the fines referred to in paragraph 1 shall be included within the following limits:*

...

*(b) for the infringements referred to in points 6, 7, 8, 16, 17, 18, 21, 22, 22a, 24, 25, 27, 29, 31, 34, 37 to 40, 42, 42a, 42b, 45 to 49a, 52, 53 and 54 of Section I of Annex III, the fines shall amount to at least EUR 300 000 and shall not exceed EUR 450 000;*

...

*In order to decide whether the basic amount of the fines should be set at the lower, the middle or the higher end of the limits set out in the first subparagraph, ESMA shall have regard to the annual turnover in the preceding business year of the credit rating agency concerned. The basic amount shall be at the lower end of the limit for credit rating agencies whose annual turnover is below EUR 10 million, the middle of the limit for the credit rating agencies whose annual turnover is between EUR 10 and 50 million and the higher end of the limit for the credit rating agencies whose annual turnover is higher than EUR 50 million.”*

78. To calculate the basic amount of the fine to be imposed on Handelsbanken, the Board must have regard to the annual turnover of Handelsbanken in the preceding business year.

79. In 2017, Handelsbanken had a total turnover of SEK 39 652 million<sup>49</sup> (EUR 4 114 million)<sup>50</sup>.

<sup>48</sup> Paragraph 1 of Article 36a(1) of Regulation (EC) No 1060/2009 reads: ‘Where, in accordance with Article 23e(5), ESMA’s Board of Supervisors finds that a credit rating agency has, intentionally or negligently, committed one of the infringements listed in Annex III, it shall adopt a decision imposing a fine in accordance with paragraph 2.’

<sup>49</sup> According to the published Annual Report 2017, available at: [https://www.handelsbanken.com/shb/inet/icentsv.nsf/vlookuppics/investor\\_relations\\_en\\_q-reports\\_hb\\_2017\\_eng\\_annualreport/\\$file/hb\\_2017\\_eng\\_annualreport.pdf](https://www.handelsbanken.com/shb/inet/icentsv.nsf/vlookuppics/investor_relations_en_q-reports_hb_2017_eng_annualreport/$file/hb_2017_eng_annualreport.pdf) p.166. Figure determined using the same basis for ‘turnover’ used by Handelsbanken (i.e. total operating income) in Exhibit 7 to the IIO’s Statement of Findings – Question 1, page 1

<sup>50</sup> The exchange rate calculations are based on the ECB’s reference exchange rate which states that the average exchange rate for 2017 was EUR 1 = SEK 9,6370; available at: [https://sdw.ecb.europa.eu/quickview.do?SERIES\\_KEY=120.EXR.Q.SEK.EUR.SP00.A&start=&end=&trans=AF&submitOptions.x=0&submitOptions.y=0](https://sdw.ecb.europa.eu/quickview.do?SERIES_KEY=120.EXR.Q.SEK.EUR.SP00.A&start=&end=&trans=AF&submitOptions.x=0&submitOptions.y=0)

80. Therefore, as Handelsbanken's total turnover for the preceding business year is greater than EUR 50 million, the Board sets the basic amount of the fine for not applying for registration for the purposes of Article 2(1) of the CRA Regulation at EUR 450 000.<sup>51</sup>

#### Submissions on behalf of Handelsbanken on the calculation of the fine

81. The Board considers that Handelsbanken raised issues relevant to the calculation of the fine in its letter to the IIO dated 6 February 2017, its response to the Supervisory Report<sup>52</sup>.

82. In addition, further to its statements in section 3.1 of its written submissions in relation to the imposition of sanctions (see paragraph 73 above) Handelsbanken states in section 3.3, at paragraph 61, that 'considering that compliance has already been achieved... there is no justification to impose a fine'. However similarly to the Board's understanding in relation to the taking of a supervisory measure, the Board understands that pursuant to Article 36(1) of the CRA Regulation it must impose a fine if it finds that an infringement of that Regulation was committed negligently. The Board must therefore impose a fine in this case.

#### *Application of aggravating and mitigating factors*

83. Article 36a(3) of the CRA Regulation states that "[t]he basic amounts defined within the limits set out in paragraph 2 shall be adjusted, if need be, by taking into account aggravating or mitigating factors in accordance with the relevant coefficients set out in Annex IV."

#### Aggravating factors

84. The Board notes that point 2 in Section I of Annex IV of the CRA Regulation provides that "If the infringement has been committed for more than six months, a coefficient of 1,5 shall apply." The Board has found that Handelsbanken's infringement of not having applied for registration was committed negligently throughout the period of investigation i.e. the period from 1 June 2011 until 30 August 2016. The coefficient for committing an infringement for more than six months should therefore be applied to the basic amount.

85. Having considered the material in the file including the submissions to date, the Board concludes that no further aggravating factor coefficients apply in the present case.

#### Mitigating factors

86. The Board notes that Point 4 in Section II of Annex IV of the CRA Regulation provides that "If the credit rating agency has voluntarily taken measures to ensure that similar infringement cannot be committed in the future, a coefficient of 0,6 shall apply." The Board

<sup>51</sup> In accordance with Article 36a(2)(b) of the CRA Regulation

<sup>52</sup> Exhibit 5 to the IIO's Statement of Findings – page 6

has found that Handelsbanken took its own steps to end the Infringement. Further, Handelsbanken has indicated that under the 'current regulatory uncertainty' it had 'no intention to refer to the previous practice of issuing "shadow ratings"'<sup>53</sup>. The coefficient provided by this Point set out above should therefore be applied to the basic amount.

87. Having considered the material in the file including the submissions to date, the Board concludes that no further mitigating factor coefficients apply in the present case.

#### *Resulting fine*

88. Paragraph 2 of Article 36a(3) of the CRA Regulation states:

*'The relevant aggravating coefficient shall be applied one by one to the basic amount. If more than one aggravating coefficient is applicable, the difference between the basic amount and the amount resulting from the application of each individual aggravating coefficient shall be added to the basic amount.'*

Accordingly, based on the findings set out above, the resulting fines are calculated as follows. The fine for Handelsbanken for its negligent infringement is:

Calculation of aggravating factor set out in Annex IV, Section I, point 2:

EUR 450 000 (basic amount) x 1,5 (coefficient) = EUR 675 000

EUR 675 000 – EUR 450 000 = EUR 225 000

Calculation of mitigating factor set out in Annex IV, Section II, point 4:

EUR 450 000 (basic amount) x 0,6 (coefficient) = EUR 270 000

EUR 450 000 – EUR 270 000 = EUR 180 000

Calculation of net fine, taking into account aggravating and mitigating factors:

EUR 450 000 + EUR 225 000 - EUR 180 000 = EUR 495 000

89. In conclusion, Handelsbanken is fined EUR 495 000 in respect of its negligent commission of the infringement of not having applied for a registration as a CRA.

<sup>53</sup> Ibid.

*This Decision was not confirmed by the Joint Board of Appeal of the ESAs (27 February 2019).*



## **APPENDIX TO THE STATEMENT OF FINDINGS OF THE BOARD**

### **PUBLIC NOTICE**

Svenska Handelsbanken Bank 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 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 Regulation, the European Securities and Markets Authority ('ESMA') has functions and powers to take enforcement action in relation to infringements of the Regulation by CRAs. A firm that is a credit rating agency must apply to be registered if it is 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 in ESMA formed the view that there were serious indications of possible infringements of the Regulation by Handelsbanken. It appeared that Handelsbanken had been issuing 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 the evidence, the Board has found that Handelsbanken negligently committed an infringement of the Regulation as follows.

#### **Infringement**

##### **A) Relevant legislation**

Article 14(1) of the 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 Regulation – as provided by point 54 of Section I of Annex III of the Regulation ('the Infringement').

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



Article 3(1)(b) of the 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 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 Regulation.

## **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 tended to relate 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**). It appears that 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 Regulation.

## **C) Finding of infringement**

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

Furthermore, the Board found that Handelsbanken had committed the Infringement negligently and was therefore liable to a fine. In calculating the fine, the Board took into account the aggravating factor that Handelsbanken had committed the Infringement for more than six months. The Board also took into account the mitigating factor that Handelsbanken had voluntarily taken measures to ensure that similar infringement could not be committed in the future. The Board has therefore fined Handelsbanken EUR 495 000.

## **Supervisory measure and fine**

### **Public notice**

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

### **Fine**

*This Decision was not confirmed by the Joint Board of Appeal of the ESAs (27 February 2019).*

The fine imposed on Handelsbanken is EUR 495 000.