

DECISION OF THE BOARD OF SUPERVISORS TO ADOPT A SUPERVISORY MEASURE AND IMPOSE A FINE IN RESPECT OF AN INFRINGEMENT BY SKANDINAVISKA ENSKILDA BANKEN AB (publ)

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 agencies¹, 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 Skandinaviska Enskilda Banken AB (publ) ('**SEB**') 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 SEB that set out her finding that SEB had committed the infringement set out in point 54 of Section I of Annex III to Regulation (EC) No 1060/2009.

¹ OJL 302 17.11.2009, p. 1

4. By written submissions dated 9 August 2017, SEB 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.²
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 SEB.
10. On 7 June 2018, SEB 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 SEB, the Board finds that SEB negligently committed the infringement set out at point 54 of Section I of Annex III of Regulation (EC) No 1060/2009.
13. Pursuant to Article 24 of Regulation (EC) No 1060/2009, the Board adopts a supervisory measure in the form of a public notice.
14. Pursuant to Article 36a of Regulation (EC) No 1060/2009, the Board also imposes a fine on SEB as calculated in the Annex to this Decision.

HAS ADOPTED THIS DECISION:

Article 1

² Ruling of the Enforcement Panel (ESMA-2018-CONF-7104)



Skandinaviska Enskilda Banken 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 Skandinaviska Enskilda Banken AB (publ), SE-106 40 Stockholm, Sweden.

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 SEB 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 SEB by email dated 17 May 2018. By letter dated 7 June 2018, SEB provided written submissions in reply. These written submissions were considered by the Board together with the other submissions made on behalf of SEB. The findings below refer to these written submissions where appropriate.

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**') states³ 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 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*'.
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 Art 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*

³ 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/EC⁴ ('MiFID'). Article 24(1) of Directive 2006/73/EC states:

'1. For the purposes of Article 25⁵, '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. SEB 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. SEB is not a registered CRA and has not applied for registration.
13. Between 1 June 2011 and 23 November 2016 ('**the relevant period**'), SEB conducted credit research activities, which included the issuing of documents that SEB has described as credit research reports⁶. These reports tended to relate either to the issuers of bonds or other debt instruments or to those instruments themselves. SEB has stated that the reports were produced as part of its services to corporate bond investors to facilitate their investment decisions⁷. A number of these reports included opinions that were variously described as a 'Corporate rating', a 'Stand-alone rating' or a 'Credit rating' ('**the Ratings**')⁸. It appears that approximately 2 345 of the Ratings were issued by SEB during the relevant

⁴ 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

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

⁶ For examples of this description see Exhibit 7 to the IIO's Statement of Findings – Letter dated 27 March 2017 from SEB to the IIO, Question 3, page 3

⁷ Exhibit 7 to the IIO's Statement of Findings – Letter dated 27 March 2017 from SEB to the IIO, Question 11, page 7

⁸ See the sample reports at Exhibits 34 to 43 to the IIO's Statement of Findings

period⁹. For reasons however set out in paragraphs 67 to 70 below, the Board considers that SEB continued to issue the Ratings until 17 May 2018.

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; (iv) 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); (v) the credit rating agency must have issued credit ratings that were disclosed publicly or distributed by subscription; and (vi) 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 SEB is a legal person established in the Union, specifically a limited liability company with its registered office in Stockholm, Sweden¹⁰. The evidence in the IIO's file leads the Board to conclude that SEB was responsible for the issuing of the Ratings. Specifically, the Ratings were, with one apparent exception, produced by analysts employed by SEB, *[redacted due to confidentiality]*¹¹ *[redacted due to confidentiality]*¹².

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. The IIO file contains descriptions of the Ratings by SEB to that effect, for example, that they were an

⁹ See Exhibit 52 to the IIO's Statement of Findings

¹⁰ See Exhibit 5 to the Supervisory Report

¹¹ See Exhibit 7 to the IIO's Statement of Findings – Letter dated 27 March 2017 from SEB to the IIO, Question 4, page 4. In addition, the legally separate company (SEB AG) invoices SEB on an annual basis for credit research cost allocation, there are 'clear reporting lines' between the analyst and SEB and the credit research is edited by SEB 'without further involvement' of SEB AG – see Exhibit 9 to the IIO's Statement of Findings, Letter dated 24 April 2017, Questions 5 and 6, page 3.

¹² Ibid., Question 6, page 5

‘assessment of the creditworthiness of an issuer/instrument’¹³. Paragraph 145 of the IIO’s Statement of Findings includes further examples. The Board has also considered examples of the Ratings and regards them as being opinions on the creditworthiness of the entity, issuer, financial instrument or other asset specified in the definition of a credit rating that was under consideration. For example, the parts of the research reports that appear to relate directly to the Ratings address issues such as an issuer’s leverage and debt. Separate text boxes listing the ‘Credit Strengths’ and ‘Credit Concerns’ are also often included in the reports. [redacted due to confidentiality]¹⁴. [redacted due to confidentiality]¹⁵.

19. The Board also considers that these opinions were issued using an established and defined system of rating categories. SEB has stated that its use of a rating scale was a means to communicate its views more efficiently to investors. [redacted due to confidentiality] The Ratings considered by the Board all appear to use rating categories, involving as they do rating symbols representing differing levels of risk in relation to the entity, issuer, financial instrument or other asset specified in the definition of a credit rating being assessed e.g. ‘A+’, ‘A-’ and ‘B+’¹⁶.
20. In reaching its views set out in paragraphs 18 and 19 above, the Board notes that the material in the IIO’s file does not necessarily suggest that SEB produced its Ratings using the same methodology or methodologies as those already employed by registered credit rating agencies. 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 credit rating agencies are often, but not exclusively, paid for by the relevant issuer. 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 and recommendations

22. SEB has stated that its Ratings are investment recommendations and/or investment research, the provision of which is regulated by MiFID and MAD/MAR, and are therefore

¹³ Ibid., Section 3, page 2;

¹⁴ Exhibit 4 to the Supervisory Report – Letter dated 20 April 2016 from SEB to ESMA’s Supervision Department

¹⁵ Exhibit 12 to the Supervisory Report

¹⁶ Respectively Exhibits 34, 35 and 41 to the IIO’s Statement of Findings

excluded¹⁷ from the effect of the CRA Regulation by Article 3(2)¹⁸. Specifically, SEB stated that there is an overlap between the scope of the CRA Regulation and that of MiFID and MAD/MAR insofar as opinions on creditworthiness are concerned, which was addressed by the legislator, in SEB's view, by excluding investment research or recommendations from the meaning of a credit rating. Therefore, investment research and recommendations 'may include a rating and a scale for that rating without being considered as credit ratings'¹⁹. SEB disagreed with the IIO's view that the legislator considered 'credit ratings' and 'investment research' to be mutually exclusive concepts. It appears that SEB regards 'investment research' as falling within the legal concept of 'credit ratings', but at the same time benefitting from a deemed exclusion from this concept under Article 3(2)(b).

23. Having considered the matter, the Board considers that the legislation is not definitive as to whether 'credit ratings' and 'investment research' or 'recommendations' 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 part²⁰. 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 effect²¹.
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 and recommendations 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) respectively²². Instead, both 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 determine the

¹⁷ The Board considers that any exclusion from the effect of the CRA Regulation should be subject to the principle that it should be interpreted narrowly.

¹⁸ Exhibit 57 to the IIO's Statement of Findings – Letter dated 9 August 2017 from SEB to the IIO, Section 4, page 3

¹⁹ Exhibit 57 to the IIO's Statement of Findings – Letter dated 9 August 2017 from SEB to the IIO, Section 6, page 7

²⁰ See for example the CJEU, Case C-33/11, A Oy, 19 July 2012

²¹ CJEU, Case C-33/11, A Oy, 19 July 2012, paragraph 49

²² 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; ...'

issue definitively, and might have been equally considered to support either the view that credit ratings and recommendations or investment research 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 203 to 209 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 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)²³. 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*²⁴.' This statement perhaps suggests that there is not normally an overlap between credit ratings and recommendations or investment research 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 and investment research in this context. The Board notes that ESMA's Supervision Department has stated it 'accepts' that investment research can contain opinions on creditworthiness²⁵, 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 *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 23 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

²³ Communication from the Commission on Credit Rating Agencies (2006/C 59/02), OJ C 59/2 11.3.2006

²⁴ *Ibid.*, Section 3.1, page 59/5

²⁵ For example see the Supervisory Report at paragraph 131, page 36

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 does not wholly accept the 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 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 'credit ratings'. 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 also that the Ratings (in the sense of the rating categories) do not in themselves appear to recommend or suggest an investment strategy, such as would have been expected of investment research pursuant to its definition.
32. The Board also notes that the Ratings were generally included in the research reports, where applicable, in close proximity to relevant 'Public Ratings' i.e. credit ratings on the same issuer or instrument issued by registered CRAs. The Board notes SEB's statement that the fact that the Ratings were not included in the 'Public ratings' section show that SEB 'did not consider its [credit] assessment to be a rating'²⁶. However the Board considers that the inclusion of the two types of 'rating' (as the Ratings were described during the relevant period) in close proximity to each other suggests that they were considered 'of a piece' i.e. to be of a similar kind or type.
33. In conclusion, the Board considers that the Ratings were credit ratings within the meaning of the CRA Regulation and therefore that SEB issued credit ratings during the relevant period.

Occupation including the issuing of credit ratings on a professional basis

34. The Board considers that SEB'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 Findings²⁷. In particular, the Board noted that an earlier draft of the CRA Regulation²⁸ referred to the 'principal occupation' of a credit rating agency being

²⁶ Exhibit 7 to the IIO's Statement of Findings – Letter dated 27 March 2017 from SEB to the IIO, Question 20, page 10

²⁷ At paragraphs 128 to 139

²⁸ Exhibit 19 to the IIO's Statement of Findings

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.

35. The Board has also considered the caselaw to which the IIO refers²⁹. 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 legislation³⁰] 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].*
36. 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.
37. [redacted due to confidentiality]³¹. [redacted due to confidentiality]³². [redacted due to confidentiality]³³. [redacted due to confidentiality]³⁴. As has been stated above at paragraph 13, on the basis of SEB's own statements, 2 345 Ratings appear to have been issued between 1 June 2011 and 23 November 2016. [redacted due to confidentiality]³⁵.
38. In all the circumstances, the Board considers that SEB's issuing of the Ratings (which the Board considers to be credit ratings) was a normal and regular activity for it, and therefore that SEB's occupation between 1 June 2011 and 23 November 2016 included the issuing of credit ratings on a professional basis.

Credit ratings disclosed publicly or distributed by subscription

39. SEB has stated that all its research reports containing the Ratings were published on its research portal [redacted due to confidentiality]³⁶. As at 23 March 2016, there were

²⁹ CJEU, Commission v Italy, C-270/03, 9 June 2005

³⁰ 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)

³¹ Exhibit 7 to the IIO's Statement of Findings – Letter dated 27 March 2017 from SEB to the IIO, Questions 3 and 4, pages 3 and 4

³² Exhibit 45 to the IIO's Statement of Findings

³³ Exhibit 57 to the IIO's Statement of Findings – Letter dated 9 August 2017 from SEB to the IIO, Section 5, page 4

³⁴ Exhibit 9 to the IIO's Statement of Findings, Letter dated 24 April 2017 from SEB to the IIO, Questions 9, page 4

³⁵ Exhibit 7 to the IIO's Statement of Findings – Letter dated 27 March 2017 from SEB to the IIO, Question 2, page 3

³⁶ Exhibit 7 to the IIO's Statement of Findings – Letter dated 27 March 2017 from SEB to the IIO, Question 4, page 4

[redacted due to confidentiality] recipients of SEB's reports³⁷. The Board considers on the basis of this evidence that SEB issued credit ratings that were disclosed publicly or distributed by subscription.

Lack of application for registration as a CRA

40. It appears to the Board to be uncontested that SEB 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 SEB, and SEB has been consistent in maintaining that it did not need to make such an application. The Board finds that SEB did not apply to be registered as a CRA during the period 1 June 2011 to 23 November 2016.
41. In summary, the Board considers that during the relevant period SEB, 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 SEB committed the infringement at point 54 of Section I of Annex III of the CRA Regulation between the period 1 June 2011 to 23 November 2016.

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

42. The Board has previously set out its views in relation to the negligent commission of an infringement³⁸. 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 consequences³⁹.

³⁷ Exhibit 4 to the Supervisory Report – SEB's letter dated 23 March 2016, page 12

³⁸ 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

³⁹ 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*

43. 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 omission⁴⁰.
44. 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*".⁴¹ 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.
45. 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.
46. 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 SEB as to whether it had previously assessed the potential application to it of the CRA Regulation⁴². The IIO asked SEB for internal documents relating to any such 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'⁴³ and 'CRAR III'⁴⁴).
47. SEB stated⁴⁵ that its Group Compliance was responsible for the following of regulatory developments relevant to SEB's regulated business activities. It appears that at the time of

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'.

⁴⁰ See footnote 39 – the Intertanko case

⁴¹ Case T-336/07 Telefónica, SA and Telefónica de España, SA v European Commission, para. 323

⁴² Exhibit 6 – The IIO's first Request for Information dated 3 March 2017

⁴³ 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

⁴⁴ 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

⁴⁵ Exhibit 7 to the IIO's Statement of Findings – Letter dated 27 March 2017 from SEB to the IIO, Questions 15, 16 and 17, page 8

the CRA Regulation's implementation in September 2009, SEB concluded it was not applicable to it, given the 'scope of the exemption' provided by Article 3(2). SEB states that, as was usual for a negative conclusion, no record was kept of the conclusion that the legislation was inapplicable. SEB states that on both occasions that the CRA Regulation was amended (in 2010 and 2013), 'there was no need to reevaluate (*sic*) its conclusion of the non-applicability' of the Regulation to SEB's research activities, given the definition of a credit rating and the 'exemption' in Article 3(2) had not been amended. SEB also refers in this part of its response to the IIO's Statement of Findings to a 'thorough analysis' that it undertook, concluding that its research activities were excluded from the scope of the CRA Regulation. The Board understands this analysis to have been that which led to the initial view taken by SEB's Group Compliance prior to the implementation of the CRA Regulation.

48. As stated above, an entity must take special care to comply with the CRA Regulation. The Board has therefore considered what steps SEB 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 Board considers that SEB might have been expected to subject its initial conclusion to periodic review.
49. The Board takes note of SEB's reasons, but observes that SEB has not produced any documentary evidence of its initial analysis of its position in respect of the CRA Regulation prior to the legislation's implementation in 2009. Further, it appears that SEB did not thereafter conduct any review of the conclusion drawn in this initial analysis. There is also no evidence in the file that the SEB took steps to contact either its National Competent Authority or ESMA in relation to these issues. SEB's written submissions in response to the IIO's initial Statement of findings in particular did not include details of any steps in this respect⁴⁶.
50. 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 SEB has taken to comply with the CRA Regulation. 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.
51. 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. The lack of documentary evidence does not assist the Board in determining whether SEB did take special care at this time in assessing the risks of this activity. While taking note of the test, the Board has decided not to follow the manner in which it was applied by the IIO.
52. In respect of the initial assessment that SEB states it took around the time of the implementation of the CRA Regulation, it would seem appropriate to the Board that SEB 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

⁴⁶ Exhibit 57 to the IIO's Statement of Findings - Letter dated 9 August 2017 from SEB to the IIO

lack of documentary evidence of this assessment does not assist the Board in determining whether SEB did take special care at this time in assessing the risks of this activity.

53. Further, a logical consequence of an entity's responsibilities in SEB'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 SEB'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.
54. 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. For example, 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 were used in similar contexts as the credit ratings of registered CRAs. For example, as stated before, their inclusion in the research reports in close proximity to the 'Public Ratings' of CRAs suggests to the Board that the two types of 'rating' were of a similar kind. Given the nature of the Ratings described above and the legal position as the Board understands it, if it had taken special care SEB 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.
55. SEB 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 reasonably expected of it given the role and expertise of those external parties, also suggests that SEB did not meet the high standard of care required of it.
56. In addition, that SEB seems not to have reviewed its position periodically or indeed at all after its initial assessment 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 does not accept SEB's contention that because the substance of relevant parts of the CRA Regulation had not changed, there was no need to re-evaluate its position. The Board considers that an entity's duty to take special care to comply with the CRA Regulation would require a more active approach to the assessment of its obligations.
57. Therefore, in all the circumstances, had SEB taken the required special care it would have identified that SEB would be likely to meet the definition of a CRA provided by the CRA Regulation and therefore that SEB 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, SEB could 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 SEB would have foreseen the consequences of its actions. That is,

in not applying to be registered as a CRA, SEB was committing an infringement of the CRA Regulation.

58. The Board considers that its findings above lead to the finding that SEB negligently committed the Infringement.
59. The failure of SEB 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.
60. SEB makes a number of points in its written submissions dated 7 June 2018 in relation to the issue of negligence. At section 3.2 of those written submissions, SEB refers to the lack of clarity in the relevant legislation and stated that 'not even the Board... can settle the precise legal interpretation' of the CRA Regulation 'in the vital part of the exemption of investment research/investment recommendations'. In reply, the Board would emphasise that the final interpretation of Union legislation lies of course with the Court of Justice of the European Union. In terms of the CRA Regulation, the Board indeed considers that this legislation is not definitive as to the relationship between 'credit ratings' and 'investment research', 'recommendations' or 'opinions'. However, 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 evidence, the Board considers that SEB should have identified that the Ratings were likely to fall within this definition, and that they did not meet the definitions of the other terms.
61. SEB also appears to state, in section 3.3 of its written submissions, that the Board sets obligations and requirements that go 'far beyond' those that had been previously communicated to it as being necessary. The Board would emphasise however that it does not seek to impose obligations or requirements. Instead, in assessing whether SEB committed the Infringement negligently, the Board considered a number of steps that *might* have been taken by SEB. None of these steps in themselves should be considered mandatory in terms of meeting the high standard of care that the Board considers to have been required of SEB. However whether any of these steps were taken would be relevant overall to the question of whether SEB met that high standard of care.
62. The Board would also add, in relation to paragraph 3.3 of SEB's written submissions, that it understands SEB's National Competent Authority to have been the relevant supervisory authority at the time of the introduction of the CRA Regulation up until 2011, pursuant to the provisions of that legislation. In those circumstances, the Board considers that SEB might have been expected to have taken external steps in relation to that National Competent Authority.
63. To the extent that SEB 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 SEB might have better had regard to this wider area in considering its conduct. It appears that SEB would have had sufficient resources to have done so over the relevant period and indeed may have operated across such geographical scope.

64. Finally, in relation to section 3.4 of SEB's written submissions, which relate to what are now paragraphs 52 and 53 of this statement of findings, the Board would state that it has not taken a view in respect of any specific risk assessment undertaken by SEB in this matter, as SEB appears to understand to be the case. That is, in these paragraphs of the statement of findings the Board considered only the assessment undertaken by SEB of its legal position at the time of the implementation of the CRA Regulation.
65. In summary, the Board finds that SEB negligently committed the Infringement.
66. The Board does not find that the Infringement was committed intentionally as the evidence before the Board does not support such a finding.
67. During the course of the IIO's investigation⁴⁷, SEB indicated that it had amended its practice in relation to the Ratings in two ways: (1) it would 'going forward refrain' from using the 'unfortunate vocabulary' of 'shadow ratings'; and (2) it was now refraining from displaying its 'credit assessments' (as it now describes its shadow ratings) at the top left-hand-side of the first page of reports above the 'Public ratings' section. The statement relating to the first of these changes in practice repeated an assertion that SEB had made previously to ESMA's Supervision Department⁴⁸.
68. When reaching its initial statement of findings adopted on 4 May 2018, the Board noted that in a later letter to ESMA's Supervision Department⁴⁹, SEB stated that it still 'expresses its creditworthiness using a scale to facilitate the recipients' (i.e. investors being clients of SEB) ability to assess and compare issuers and financial instruments'. The Board also noted the IIO's observation in her Statement of Findings⁵⁰, based on a review of a sample of SEB's reports, that after the end of the relevant period, SEB appeared still to be producing opinions on creditworthiness using an established and defined rating scale. The Board considered the report specifically cited by the IIO⁵¹, [redacted due to confidentiality], which included SEB's view that [redacted due to confidentiality]⁵² was now 'a BBB issuer instead of a BBB+ issuer'.
69. The Board therefore considered in its initial statement of findings that the 'credit assessments' then being produced by SEB appeared in substance to be the same as the Ratings, notwithstanding that they were not being included in the same location in the reports (i.e. not in the top left-hand-side of the first page) and were no longer referred to as 'shadow ratings'. These credit assessments appeared still to meet the definition of a credit rating specified by Article 3(1)(a) of the CRA Regulation. As noted by the IIO, SEB appeared to have conceded that its changes to its practice may not have been sufficient to be in compliance with the CRA Regulation – that is, if the 'interpretation advocated by the

⁴⁷ Exhibit 7 to the IIO's Statement of Findings – Letter dated 27 March 2017 from SEB to the IIO, Question 20, page 10

⁴⁸ Exhibit 28 to the Supervisory Report – Letter dated 23 November 2016 from SEB to ESMA's Supervision Department, page 1

⁴⁹ Exhibit 53 to the IIO's Statement of Finding – Letter dated 3 April 2017 from SEB to ESMA's Supervision Department, section 4.2, page 2

⁵⁰ At paragraph 262

⁵¹ Exhibit 54 to the IIO's Statement of Findings

⁵² [redacted due to confidentiality]

IIO [in respect of Article 3(2) of the CRA Regulation] shall prevail...'⁵³. SEB therefore appeared at the time of the Board's initial statement of findings to be continuing to commit the Infringement.

70. In section 5 of its written submissions dated 7 June 2018, SEB states that 'immediately following' the receipt of the Board's initial statement of findings it had 'taken actions to procure that the Bank complies' with the CRA Regulation as interpreted by the Board. Specifically it had 'ceased to include credit assessments that have been deemed as credit ratings' in its research reports, and 'removed tables including the same on its website'. In light of these submissions, on the basis that SEB was sent the initial statement of findings by email on 17 May 2018, the Board considers that SEB ceased to commit the Infringement on 17 May 2018.

C. Supervisory measure to be adopted

71. 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 Article⁵⁴.
72. In accordance with Article 24(2) of the CRA Regulation,⁵⁵ 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.

D. Calculation of Fine for the negligent commission of the Infringement

73. The Board has found that SEB negligently committed the Infringement by not applying for registration for the purposes of Article 2(1) of the CRA Regulation. Article 36a(1) of the

⁵³ Exhibit 57 to the IIO's Statement of Finding – Letter dated 9 August 2017 from SEB to the IIO, section 9, page 11

⁵⁴ 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.

⁵⁵ 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.*'

CRA Regulation therefore requires the Board to impose a fine for the Infringement.⁵⁶ 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

74. 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.”

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

76. In 2017, SEB had a total turnover of SEK 42 390 million⁵⁷ (EUR 4 399 million)⁵⁸.

⁵⁶ 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.’

⁵⁷ According to the published Annual Report 2017; available at:

https://sebgroup.com/siteassets/investor_relations1/annual_reports/annual_report_2017.pdf p.78

⁵⁸ 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

77. Therefore, as SEB'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 450 000.⁵⁹

Submissions on behalf of SEB

78. The Board takes into account the written submissions of SEB dated 7 June 2018, whereby SEB stated that 'immediately following' the receipt of the Board's initial statement of findings it had 'taken actions to procure that the Bank complies' with the CRA Regulation as interpreted by the Board. In particular, SEB stated that it had 'ceased to include credit assessments that have been deemed as credit ratings' in its research reports, and 'removed tables including the same on its website'.

Application of aggravating and mitigating factors

79. 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

80. 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 SEB's infringement of not having applied for registration was committed negligently from 1 June 2011 until 17 May 2018. The coefficient for committing an infringement for more than six months should therefore be applied to the basic amount.

81. 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

82. 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 has found that SEB took its own steps to end the Infringement. There is no evidence in the file to suggest that the Infringement could be committed in the future. The coefficient provided by this Point set out above should therefore be applied to the basic amount.

⁵⁹ In accordance with Article 36a(2)(b) of the CRA Regulation

83. Having considered the material in the file including the submissions to date, the Board concludes that no further mitigating factors as provided in Section II of Annex IV of the CRA Regulation apply in the present case.

Resulting fine

84. 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 SEB 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

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

APPENDIX TO THE STATEMENT OF FINDINGS OF THE BOARD

PUBLIC NOTICE

Skandinaviska Enskilda Banken AB (publ) ('SEB') 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. SEB 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 SEB. It appeared that SEB was 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 SEB 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 SEB had committed an infringement of the Regulation, ESMA reviewed SEB's conduct in appearing to issue credit ratings. In particular ESMA considered whether SEB was issuing credit ratings as they are defined by the Regulation.

B) Factual findings and analysis of the Board

Between 1 June 2011 and 17 May 2018, SEB 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 a 'Corporate rating', a 'Stand-alone rating' or a 'Credit rating' (**'the Ratings'**). It appears that at least 2 345 of the Ratings were issued by SEB during this period. SEB continued to issue similar opinions after 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 SEB had committed the Infringement as a consequence of issuing the Ratings.

Furthermore, the Board found that SEB 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 SEB had committed the Infringement for more than six months. The Board also took into account the mitigating factor that SEB had voluntarily taken measures to ensure that similar infringement could not be committed in the future. The Board has therefore fined SEB EUR 495 000.

Supervisory measures 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



The fine imposed on SEB is EUR 495 000.