



## **DECISION**

given by

the

**BOARD OF APPEAL**

**OF THE EUROPEAN SUPERVISORY AUTHORITIES**

**In the appeal case brought by**

**“A” [the Appellant]**

**Against**

**The European Securities and Markets Authority**

Decision D 2021 02

**Board of Appeal**

Marco Lamandini (President and Co-Rapporteur)

Giuseppe Godano

Katalin Mero

Niamh Moloney (Co-Rapporteur)

Beata Maria Mrozowska

Michele Siri

Place of this decision: Paris

**Date: 12 March 2021**

## **APPEAL under Article 60 of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010 and Regulation (EU) No 1095/2010 of the European Parliament and of the Council (the “ESAs Regulations”)**

1. This is the decision of the Joint Board of Appeal of the European Supervisory Authorities on the appeal filed with notice of appeal of 4 December 2020 (the “**Notice of Appeal**”) by an institution that will be referred to as “A” (the “**appellant**”) under Article 60 of the ESAs Regulations. The respondent is the European Securities and Markets Authority (“**ESMA**”) established by Regulation (EU) No 1095/2010 and represented in the appeal by ESMA in-house Senior Legal Officer John Lynch and Legal Officer Mar Huertas.

### **Background of facts**

2. On 20 July 2020, A submitted a request to ESMA (ESMA/2020/BUL/310) (the “**Request to ESMA**”, Annex 2 to the Notice of Appeal) under Article 17 of Regulation (EU) No 1095/2010, as revised (the “**ESMA Regulation**”), requesting that ESMA investigate the approach adopted by the Member State’s national competent authority as regards the valuation of Structured Retail Products (“**SRPs**”) and identifying a series of EU law provisions which, A argues, have not been applied correctly by the National Competent Authority (“**NCA**”)
3. Article 17 empowers ESMA to investigate potential breaches or non-applications of EU law by a national competent authority and to take identified actions. The Request to ESMA relates to the approach adopted by the NCA to the concept of “fair value” of SRPs and, specifically, which implicit costs should be regarded as being included within the fair value of an SRP and which other costs and fees can be regarded as separate and external to fair value. In its Request to ESMA, A seeks to highlight to ESMA its view that the NCA is erring in law in applying a specific NCA methodology, whereby the fair value of an SRP is based, in the NCA’s practice, only on the estimation of the cash flows to be generated by the SRP, excluding all other implicit costs (such as, in case of issuer repurchases of SRPs, the unwind costs suffered by the issuer relating to the cancellation of the derivative embedded in the SRP and other financial costs incurred in the cancellation of the SRP).
4. This approach by the NCA to fair value has implications for disclosures to clients. In particular, the appellant in its Request to ESMA outlines that the NCA considers, in this context, that all costs related to the SRP, including implicit costs such as the costs of unwinding a derivative, should be notified by the relevant intermediary to its clients separately from the disclosed fair value, as

is the case with fees and other explicit costs charged by the issuers or distributors of such SRPs.

5. As noted in the Request to ESMA, this position of the NCA as regards SRP valuation is stated, e.g., in a report issued by the NCA Valuation Unit of 17 January 2020 in which the underpinning rationale of this position is summarised as follows: “in contrast to its value component, the price paid or received for a structured product generally includes commissions, profit margins and costs that do not influence the future payments that the product will make or provide any real value to the investor. This category includes, in addition to implicit or explicit fees, costs that are passed on to the investor, such as, for example, entry or exit costs, internal hedging costs assumed by the entities or liquidity spreads (bid-mid or mid-ask spreads), among others. *None of these elements provide real value for the investor and therefore are elements that should not be included in the fair value*” (emphasis added).
6. Based upon this understanding of fair value, and as noted in the Request to ESMA, the NCA, after a supervisory review in 2017 of the appellant’s distribution in the Member State of A’s SRPs over April to November 2016, initiated on 5 July 2019 an enforcement procedure (No 11/2019) against the appellant for alleged breach of its obligation to properly manage conflicts of interest because the appellant had not informed its clients of the “differential” existing, in the NCA’s view, between the repurchase price paid by A and the fair value of the SRP when it repurchased certain A SRPs from retail clients. The NCA found that this amounted to a breach of the appellant’s obligations to properly manage conflicts of interest.
7. By contrast, in A’s view, the repurchase price paid by A did represent the fair value, and there was no differential in the SRP pricing if all elements of such fair value (including, importantly, derivative unwind costs) were taken into consideration, as required, in A’s view, by applicable EU law.
8. In support, the appellant in its Request to ESMA refers, inter alia, to the Markets in Financial Instruments Directive II 2014/65 (MiFID II) and the Packaged Retail and Insurance-based Investment Products Regulation (EU) No 128/2014 (PRIIPS) (albeit that these measures came into force after the enforcement action), noting specifically also that Commission Delegated Regulation (EU) 2017/653 (the “**PRIIPs RTS**”) confirms that (1) implicit costs (unwind costs, exit costs) must be included for the purpose of the calculation of a product’s fair value and (2) this type of cost must be calculated according to the internal policy of each intermediary (Annex VI, paragraph 30 of the PRIIPS RTS).
9. The appellant further notes that, before the entry into force of the PRIIPs RTS, MiFID I and its delegated rules (specifically Article 33 of Commission Delegated

Directive 2006/73), which were in force at the time of the contested valuation and repurchase of the A SRPs, were not clear on how fair value was to be calculated and, in particular, did not specify any specific methodology for calculating fair value. As a matter of fact, as noted by ESMA in its Call for Evidence of 17 July 2019 (ESMA35-43-1905) on the impact of the inducements and costs and charges disclosure requirements under MiFID II, “Article 33 [of the MiFID Implementing Directive] referred to all related fees, commissions, charges or expenses, but did not provide any further specification that could help the common understanding and application of these items. In addition, it emphasised the possibility that other costs that are not imposed by the firm but are related to transactions may arise for the clients. This could imply that costs arising from third parties may be excluded from the MiFID I costs and charges disclosures”.

10. Further, the appellant notes that the only specific indication in EU regulation and soft law as to the appropriate method for the valuation of SRPs, over the period covered by the NCA’s supervisory review of the appellant’s actions as regards the repurchase of the A SRPs, was the ESMA Opinion of 27 March 2014 on Structured Retail Products (ESMA/2014/332). This Opinion seemed to allow for several valuation options (valuation according to IFRS 13 or according to a summative calculation, including of the intrinsic value components), to be chosen by each intermediary in adopting its own valuation methodology. In particular, the appellant in its Request to ESMA refers to paragraph 33 of the 2014 ESMA Opinion on SRP which recommended that it was good practice that the value of products be established by using standards generally accepted and recognised in the market, such as the IFRS 13 standard. The Opinion also stated that the SRP valuations could be based on the concept of intrinsic value, regarded as valuation based on the separate summation of the value of each component of the SRP (e.g. the known or estimated costs and fees, the embedded derivative and its base component), including estimated costs and fees, while reflecting the market and pricing conditions at the moment when the value is communicated to investors. The appellant notes in the Request to ESMA therefore that the ESMA Opinion specifically allowed the summation of additional costs and fees related to an SRP’s embedded derivative (such as the unwind costs that arise in the case of the repurchase and cancellation of an SRP) in the calculation of the fair value of an SRP.
11. The appellant complains in the Request to ESMA, therefore, that the enforcement procedure initiated by the NCA in 2019 is based on a misguided interpretation of the applicable EU law provisions and amounts to a breach of Union law, and that the NCA has incorrectly come to the conclusion that there was a “differential” between the repurchase price paid by A and the “fair value”, which should have been disclosed by the appellant to clients. This alleged error by the NCA could lead to serious consequences for the appellant, as – in the

words of the appellant – “the consequences of the NCA’s position are very serious for A, as the NCA have levied a fine for a significant amount and intend to publish a public notice of the infringement”.

12. The appellant further notes in the Request to ESMA that, in addition to the enforcement procedure referred to above, the NCA, in the context of a general review of practices in the banking industry, sent a letter to it on 22 November 2019 in which, in relation to complex products and SRP valuations, the NCA reiterated its position on fair value. The letter reiterated the view of the NCA that (i) fair value should not include the specific operating or distribution costs that individual institutions may incur, including but not limited to the costs of hedging or underdoing a hedge and that (ii) fair value should be calculated solely on the basis of the items of each product that have an impact on the expected payments that the customer may receive. Similar letters were sent by the NCA to other banks in the Member State, leading to banking industry concern as to the consequences of the NCA’s position. Accordingly, the National Industry Association expressed, with a letter of 29 November 2019 to the NCA, its disagreement with the NCA’s approach (the “**NIA Letter**”), but the matter remains unresolved.
13. Accordingly, in its Request to ESMA the appellant requests ESMA to “analyse and confirm” that (i) in 2016 there was no specific mandatory formula or methodology to calculate the fair value of SRPs in the case of a repurchase, given that the 2014 ESMA Opinion on SRPs states that financial entities were permitted to use several options for the valuation of the repurchase price; (ii) in 2016 financial entities were permitted to calculate fair value not only based on an estimate of SRP cash flows but also by including an estimate of the implicit costs suffered by the issuer in the repurchase and cancellation of the SRP (such as the unwind costs of cancelling the embedded derivative and exit costs) and that, accordingly, financial entities were not obliged by EU law to notify investors of these implicit costs separately from the fair value; and (iii) that under the current MiFID II and PRIIPs rules, financial entities are permitted to aggregate not only the estimate of the cash flows to be generated by a SRP but also the estimate of the implicit costs suffered by the issuer in the repurchase and cancellation of an SRP (such as the unwind costs of cancelling the embedded derivative and exit costs) and, therefore, that financial entities are not obliged by EU law to disclose these implicit costs separately from fair value.
14. On 25 September 2020 ESMA’s Enforcement Team sent an email to the appellant in response to its request of 20 July 2020 (ESMA/2020/BUL/310), informing the appellant that:
  - a) “The Chair of ESMA has considered that [the] complaint is deemed admissible insofar as it consists of an allegation that a national competent

authority would have breached certain of its obligations under several EU Acts referred to in Article 1(2) of Regulation No 1095/2010”;

b) “However, after a preliminary assessment of the facts described in the request, the Chair has also made the determination that no investigation should be launched into this matter. This conclusion was reached after due consideration of Article 17 of the ESMA Regulation, ESMA’s tasks and objectives, the information available to ESMA about this matter and the positive and negative investigation factors set out in Annex II of the Rules of Procedure on breach of Union law investigations (ESMA43-318-5630). In particular, ESMA has taken into account the fact the matter [described in the request] has been the subject of an enforcement procedure in the Member State and, therefore, [the] request is more suitable to be dealt with by another person or body, such as a national court (see Point 4 of Annex II to the Rules of Procedure on breach of Union law investigations)”.

15. Based upon these findings and reasons, the ESMA email of 25 September 2020 concludes that ESMA “will now consider this file as closed”.

### **The appeal against the Contested Decision and the proceedings before the Board of Appeal.**

16. On 4 December 2020, the appellant filed the Notice of Appeal with the Joint Board of Appeal of the European Supervisory Authorities pursuant to Article 60 of the ESMA Regulation. In the Notice it requested the Board of Appeal to refer “the case to the competent body of ESMA (Enforcement Team/Legal and Enforcement Department), so such body, bound by the decision of the Board of Appeal, adopts an amended decision to launch an investigation into the alleged breach of EU law by the NCA as described in the complaint”.

17. The Notice of Appeal, which was sent by letter to ESMA and not accompanied by a digital version, was delivered to the Secretariat of the Board of Appeal in the Board of Appeal’s mailbox on 14 December 2020. On 15 December 2020, the Secretariat of the Board of Appeal notified to the parties the following communication from the President of the Board of Appeal:

*Dear Parties,*

*The President thanks the Appellant for the appeal sent by mail service on 4 December 2020 and received by the Board of Appeal Secretariat on 14 December 2020.*

*The President, having consulted with the Board of Appeal, makes the following observations:*

*Subject to the view of the parties, in light of Article 6 of the BoA Rules of Procedure, the President proposes giving (i) ESMA three weeks from the notice of these directions to respond to the appeal, (ii) the appellant two weeks to reply to ESMA response; (iii) ESMA two weeks to present, if any, a rejoinder to the appellant's reply. Due to the imminent holidays, the President proposes to suspend the three weeks period from December 23 to January 3. In this way, ESMA response would be due on January 18, 2021. The parties are required to address both the admissibility and the merit of the appeal.*

*According to Article 18 of the BoA Rules of Procedures, parties are entitled to make oral representations. In the absence of a request, the Board of Appeal may require oral representations if it considers it to be necessary for the just determination of the appeal. Both parties are invited therefore to communicate to the Secretariat of the Board of Appeal, one week from the expiry of the deadline for ESMA to present a rejoinder to the appellant's reply if they intend to make oral representations. The Board of Appeal shall issue further case management directions after the expiry of the above-mentioned deadline concerning the hearing and, if deemed necessary by the Board, further submissions in the merits.*

*The parties are asked to confirm this proposal with the Secretariat and raise any other points they wish to raise at this stage.*

*The President wishes also to inform the parties that the filing and service of any further communication between the Parties and between the Parties and the Board of Appeal and its Secretariat (including the filing and service of the Respondent's response pursuant to Article 6 of the Rules of Procedure and of any other submissions of the parties) may take place by email. The acting secretariat of the Board of Appeal ([boardofappeal@eba.europa.eu](mailto:boardofappeal@eba.europa.eu)) must always be copied.*

*The parties shall be informed in due course about the sitting composition of the Board of Appeal according to Article 3(4) of the BoA Rules of Procedure and about the designated rapporteur or co-rapporteurs for the case*

18. On 22 December 2020, ESMA filed an application for directions, asking the Board of Appeal to amend the original case management directions issued on 15 December 2020, in order to determine first the admissibility of the appeal (the “**ESMA Response**”).

19. On 22 December 2020, the Secretariat of the Board of Appeal notified to the parties the following communication from the President of the Board of Appeal

*Dear Parties,*

*The President thanks ESMA for its Application for Directions dated 22 December 2020.*

*The President, having consulted with the Board of Appeal, proposes to amend the case management directions issued on 16 December 2020, in order to take into account ESMA's Application for Directions as follows.*

*ESMA has contended, with its Application for Directions following the case management directions of 16 December 2020, that the appeal is not admissible and ESMA has also requested that the Board of Appeal determines first on the admissibility in accordance with Article 9(1) of the Rules of Procedure. In light of the foregoing, the Board of Appeal considers that the issue of admissibility must be decided prior to the full consideration of the merits of the appeal. Indeed., according to Article 9 of the Rules of Procedures, if the respondent contends that the appeal is not admissible under Article 60 of the ESA Regulations, the Board shall examine whether or not the appeal is admissible before examining whether it is well founded under Article 60.4.*

*Before determining on the admissibility of the appeal, however, the Board of Appeal considers necessary to ensure to both parties their full right to be heard granting appropriate terms for complete submissions on the admissibility of the appeal.*

*Subject to the view of the parties, considering that the appellant offered initial views on the issue of admissibility in the Notice of Appeal and ESMA in the Application for Directions, the President, having consulted with the Board of Appeal, proposes giving both parties:*

*a) two weeks starting from 4 January 2020 to make complete submissions on the issue of admissibility*

*and*

*b) two weeks starting from 18 January 2020 to reply to the other party's complete submissions on the issue of admissibility.*

*In the event the appeal is then determined to be admissible by the Board of Appeal, both parties shall be granted in due course, with other directions of case management, appropriate terms for their submissions in the merits (also complying with the terms set out in Article 6 of Rules of Procedure). It is specified that, according to Article 9 of the Rules of Procedure, such terms for the submissions on the merit shall only start to run from when the Board of Appeal has determined the admissibility of the appeal and issued the new case management directions for the merit.*

*These directions amend, in light of the ESMA's Application for Directions, those issued on 16 December 2020 and already notified to the parties.*

*The parties are asked to confirm in writing their agreement with this proposal with the Secretariat by the close of December 31, 2020 and may raise any other points they wish to raise at this stage.*

*The President wishes also to remind parties that the filing and service of any further communication between the Parties and between the Parties and the*

*Board of Appeal and its Secretariat (including the filing and service of the Respondent's response pursuant to Article 6 of the Rules of Procedure and of any other submissions of the parties) may take place by email. The acting secretariat of the Board of Appeal ([boardofappeal@eba.europa.eu](mailto:boardofappeal@eba.europa.eu)) must always be copied.*

*Finally, the parties are hereby informed that, in the present appeal, the President has designated co-rapporteurs for the case himself and Professor Niamh Moloney and that the sitting composition of the Board of Appeal according to Article 3(4) of the BoA Rules of Procedure is as follows.*

- *Marco Lamandini (President and Co-Rapporteur)*
- *Giuseppe Godano*
- *Katalin Mériő*
- *Niamh Moloney (Co-Rapporteur)*
- *Beata Mrozowska*
- *Michele Siri*

20. Both parties agreed in writing with the amended case management directions of 22 December 2020.

21. On 13 January 2021, ESMA sent an email whereby it referred to, and reiterated, its submissions on admissibility in its application for directions dated 22 December 2020 and it reserved the right to reply to the appellant's submissions on the issue of admissibility after 18 January 2021, in accordance with the directions issued by the Board of Appeal and notified to ESMA on 22 December 2020.

22. On 18 January 2021, the appellant sent an email whereby, building on the considerations on admissibility already stated in section (i) of the Notice of Appeal, it made additional submissions on the admissibility of the appeal (the appellant's "**Additional Admissibility Submission**").

23. On 1 February 2021, ESMA filed a reply to the appellant's submissions on admissibility, building on the submissions it had previously made as regards admissibility in its application for directions dated 22 December 2020 (the "**Rejoinder**").

24. On 4 February 2021, the Board of Appeal, in consideration of the specificities of the case and of the importance of the determination on admissibility in the case, invited the parties to communicate within one week if they intended to make oral representations, anticipating that, due to the restrictions imposed to counteract the Coronavirus pandemic, the hearing, if requested, would have to be held via videoconference and that the Board of Appeal reserved, in the event the parties did not intend to make oral representation, the right to ask questions in writing, if need be.

25. On 9 February 2021, ESMA informed the Board of Appeal that it did not intend to make oral representations, in consideration of the extensive written submissions and documentation already exchanged between the parties. On 11 February 2021, the appellant, on the contrary, informed the Board of Appeal that it considered a hearing useful to explain the special circumstances of the case. The right for both parties to make oral representations at an online hearing was therefore granted by the Board of Appeal and the parties agreed to hold a hearing on 1 March 2021.
26. On 17 February 2021, the President issued case management directions as to the organisation and management of the hearing, which were agreed with the parties.
27. On 1 March 2021, the hearing was held via Webex videoconference. During the hearing, the parties exercised their right under Article 60(4) of the ESMA Regulation to make oral representations, answered the questions raised by all sitting members of the Board of Appeal and were granted the opportunity to make short final replies. At the end of the hearing, the President informed the parties that the Board of Appeal considered the file complete to determine on the issue of admissibility.

### **The contentions of the parties.**

#### The appellant

28. In its Notice of Appeal and in its further submissions, the appellant argues that the email received from ESMA on 25 September 2020 (the “**Contested Decision**”) is a decision capable of appeal within the scope of Article 60 of ESMA Regulation. The appellant notes, in this respect, that the Board of Appeal has also “held in other cases (Investor Protection Europe v European Securities and Markets Authority: BoA 2014 05, 10 November 2014) that decisions akin to the one dealt with hereto constituted "decisions" in the sense of Article 60 of the ESMA Regulation”.
29. Specifically, in the Notice of Appeal, the appellant argues that the appeal is admissible within the terms of Article 60 of the ESA Regulations, for reasons including the fact that the appellant is directly and individually concerned by the Contested Decision. The appellant notes in this regard its view that ESMA declared the original complaint (the Request to ESMA) to be admissible as formulated, and suggests further that, having considered the extensive supporting documentation, ESMA implicitly deemed the complaint to be substantiated.

30. The appellant also notes that the facts outlined in the Request to ESMA clearly involve and have a direct impact on the provision of investment services and securities markets within the remit and supervision of ESMA. The appellant further argues that the Request to ESMA can be distinguished from other complaints in that it was preceded by the Member State's National Industry Association Letter (the NIA Letter).
31. Finally, the appellant notes that the contested interpretation by the NCA of how to calculate fair value is "the backbone of the enforcement procedure" which puts the appellant at clear risk of being sanctioned. The appellant therefore argues that it is in a situation where it is directly and individually concerned by a Decision taken by ESMA under Article 17 and has a legitimate interest in an investigation into the alleged breach of MiFID II and PRIIPs being launched by ESMA.
32. According to the appellant, this "singular factual base", linked with the earlier recognition by the Board of Appeal in *Investor Protection Europe v European Securities and Markets Authority* (BoA 2014 05, 10 November 2014) that, in principle, an appeal could lie from a refusal by ESMA to initiate an investigation under Article 17, renders the appeal admissible under Article 60 of the ESAs Regulation.
33. Specifically, the appellant acknowledges the leading case of *SV Capital* (judgment of the General Court of 9 September 2015, in case T-660/14, *SV Capital OU v EBA*, EU:T:2015:608; and judgment of the Court of Justice of the EU of 14 December 2016, in case C-577/15 P, *SV Capital OU v EBA*, EU:C:2016:947), discussed ahead, in which the General Court and the Court of Justice of the EU ruled that the Board of Appeal did not have jurisdiction to hear an appeal from a failure by the European Banking Authority ("**EBA**") to initiate an investigation under Article 17, but argues that the instant facts differ substantially.
34. The appellant points to the NIA Letter which supports its position. It also points to the fact that the NCA's approach to the valuation of SRPs has led directly to the initiation of an enforcement procedure against the appellant. The facts are therefore, the appellant argues, distinguishable from those in issue in *SV Capital*.
35. Finally, the appellant argues, the ESMA Chairperson has, in assessing the ESMA Request to ESMA, taken a definitive decision under Article 17 of the ESMA Regulation, and so the Contested Decision is not simply a mere notification or decision taken within a day-to-day management context (referring in support to the Decision of the Board of Appeal in *Investor*

Protection Europe v ESMA which characterised such definitive decisions under Article 17 as being potentially appealable to the Board of Appeal).

36. The appellant's arguments as to admissibility are reiterated and expanded on by the appellant in its Additional Admissibility Submissions. The appellant argues that, given the specific factual context of the Request to ESMA, the no-investigation decision taken by ESMA falls within the jurisdiction of the Board of Appeal, given the approach taken by the Board of Appeal previously in *Investor Protection Europe v ESMA* (BoA 2014 05, 10 November 2014) to decisions akin to the one at issue in the instant case. Specifically, the appellant argues that there is a "similarity between such "decisions" based on the fact that: (a) [these decisions are] the final conclusion of the procedure under Article 17 of the ESMA Regulation of the breach of Union law procedure ("In the Board's view, these decisions are not, and are not treated as, the kind of routine day-to-day decisions of the Authority which obviously fall outside the ambit of the right of appeal given by the Regulation" - BoA 2014 05; paragraph 45) [the appellant also notes in this regard that the Board of Appeal also stated that "It prefers the appellant's argument that the decision is, subject to the current appeal, the final conclusion of the procedure under Article 17 of the Regulation" - BoA 2014 05; paragraph 48]" and (b) the substance of the decision taken by the ESMA Chair points to the fact that there was a real decision and prevails over any wording used by ESMA ("The Board accepts that the substance is what matters rather than the word used, but considers that all the above shows that in substance there was a decision, and one which fell within the ambit of Article 17 and Article 60 of the ESMA Regulation" - BoA 2014 05; paragraph 47). The appellant also argues that "if considered within the specific context of the complaint brought by the Appellant, the decision of no-investigation taken by ESMA goes beyond "a mere communication of information or advice of non-action". The determination made by the ESMA Chair that no investigation should be launched into the facts described in the Request to ESMA is therefore, the appellant argues, capable of being considered a "decision" for the purposes of the instant case.
37. The appellant further argues, expanding on the Notice of Appeal, that the Contested Decision, and the appeal thereof, relate to "ad hoc factual and legal circumstances", which depart from all precedents, particularly as regards the enforcement action taken by the NCA and the backing of the appellant's position by the NIA Letter.
38. In particular, and as regards the enforcement process, the appellant claims that the appellant is "in a situation where it is directly and individually concerned by [the Contested Decision] under Article 17 of the ESMA Regulation and has a legitimate interest in an investigation into the alleged breach of MiFID II and

PRIIPS framework being launched by the Legal & Enforcement Department, as the enforcement procedure would be illegal as based on a declared breach of Union law by a national competent authority, in accordance with the well-established procedural principle under EU law that an applicant for relief must establish that it has an interest (i.e. it must show that it would benefit from the annulment of the contested act) (among others, C-486/01 P Front National v Parliament)". In the appellant's view, "by having its complaint shelved, the appellant is left exposed to the outcome of an enforcement procedure which may eventually carry the imposition of notable monetary sanctions to the appellant based upon an alleged breach of European Union key-regulations".

39. As a result, the appellant suggests that "the factual situation of the appellant, who has a direct concern and a legitimate interest thereof, is sufficiently genuine in itself to depart from the SV Capital case as decided before the Court of Justice of the European Union (Case T-660/14) [and] to be singularly distinguished on its own facts and, therefore, worth of a different legal treatment with regard to the admissibility of this appeal".

40. The appellant further notes in this respect that "this ad hoc factual base and the legitimate interest shown by the appellant deserve a likewise distinguished legal treatment linked to the very specific circumstances of this case, as being concerned with a general and systematic approach taken by the NCA versus credit institutions in the Member State, which is considered to be in breach of EU law also on a sectorial level, as stated in the NIA Letter".

41. In the Notice of Appeal the appellant also sets out its specific grounds for appealing the Contested Decision, including as to the ad hoc factual situation of the appellant; the approach taken by ESMA to the weighting of and reasoning regarding the different factors taken into account by it when taking the Contested Decision; and the specific remedy sought by the appellant. As this Decision by the Board of Appeal is concerned with the admissibility of the appeal and not with its substance, these arguments are not further summarised here.

## ESMA

42. In its Response to the Notice of Appeal, ESMA contends that the appeal is inadmissible. ESMA relies in this regard upon the General Court's ruling of 9 September 2015 in SV Capital v EBA (Case T-660/14), as confirmed on appeal by the Court of Justice's ruling of 14 December 2016 (Case 577/15). In the SV Capital case, the competence of the Board of Appeal to hear an appeal against the EBA's discretionary determination not to open an Article 17 investigation against a national competent authority (where the request was made by a person not specified in Article 17 as having standing to make such a request),

was in issue. The General Court found that such an EBA act, advising a complainant not specified in Article 17 as having standing to request that EBA consider opening an investigation that EBA would not be opening such an investigation, does not come within the scope of the Board of Appeal's jurisdiction.

43. Noting that the Board of Appeal's jurisdiction in this regard rests on the EBA decision being one "referred to" in Article 17, the Court found that such a decision not to proceed is not a decision referred to in Article 17, as the complainant is not specified in Article 17 as having standing to request an investigation, and so the decision cannot be challenged before the Board of Appeal in accordance with Article 60(1) and (2) of that Regulation, and that the Board of Appeal is therefore not competent to hear such challenges (see paragraph 72 of the judgment).
44. Consistent with the judgment of the General Court and the Court of Justice, ESMA considers that the Board of Appeal lacks competence to hear the Appeal. Specifically, ESMA notes that the appellant, not being specified in Article 17 of the ESMA Regulation as one of the actors with standing to request ESMA to undertake an Article 17 investigation, does not have *locus standi* to appeal ESMA's conclusion not to initiate an investigation under Article 17.
45. Further, ESMA relies upon the decision taken by the Board of Appeal on 10 September 2018 (B v ESMA, BoA D 2018 02) and which referred to the SV Capital ruling. In this decision, the Board of Appeal indicated that "the main ground of the Court's decision (and that particularly relied on by the respondent) is that the appellant was not one of the entities expressly referred to in article 17(2) of the Regulation that is entitled to request an investigation, and that consequently the Board of Appeal had no jurisdiction to hear its appeal against the refusal of the relevant authority (in that case the EBA) to do so" (paragraph 44). The decision goes on: "[t]he practical effect of the decision is to limit appeals against decisions of the European Supervisory Authorities (that is, ESMA, the EBA and EIOPA) to investigate or not to investigate alleged breaches or non-application of Union law to national competent authorities, the European Parliament, the Council, the Commission or the Securities and Markets Stakeholder Group. The fact that the Authority may initiate investigations on its own initiative does not affect this conclusion" (paragraph 46).
46. ESMA acknowledges that, since the SV Capital ruling, the text of Article 17 has been revised. Specifically, since the entry into force of Regulation (EU) 2019/2175 (amending among others Regulation (EU) No 1095/2010), Article 17(2) of Regulation (EU) No 1095/2010 mentions "well substantiated

information from natural or legal persons” as a potential basis for ESMA to decide to start a breach of Union law investigation on its own initiative.

47. However, this does not, ESMA argues, affect the conclusion reached by the Court of Justice of the European Union and the Board of Appeal in the abovementioned cases. This approach is supported, in ESMA’s view, by the decision of the Board of Appeal of 9 October 2020 (*Howerton v ESMA*, BoA D 2020 014), in which, notwithstanding the amendment of Article 17(2), the Board took the view that the principle as set out in *SV Capital v EBA* applied, and that a conclusion by ESMA not to initiate proceedings under Article 17 was an act which was not reviewable by the Board of Appeal. Moreover, ESMA notes that pursuant to the amendments introduced by Regulation (EU) 2019/2175, Article 17(2) emphasises the discretion given to ESMA by stating that ESMA can undertake investigations “where appropriate”.
48. ESMA’s arguments as to admissibility are reiterated and expanded on its Rejoinder of 1 February 2021 to the appellant’s Additional Admissibility Submissions.
49. ESMA first notes, by way of preliminary observation, that questions as to the admissibility of a complaint under Article 17 and the admissibility of a subsequent appeal to the Board of Appeal are separate and distinct and that the view of the ESMA Chairperson on the admissibility of the Request to ESMA has therefore no bearing on the admissibility of the instant appeal.
50. ESMA also notes “for the avoidance of doubt” that, in its view, there was no implicit acknowledgement in the Contested Decision that the appellant’s complaint was “well-founded”. ESMA conducted a preliminary assessment and did not enter into the substance of the complaint. ESMA finally notes, by way of preliminary observation, its view that the appellant appears to be using the Article 17 procedure to achieve an interlocutory ruling from ESMA on the NCA’s contested interpretation of relevant EU law, but that this, in ESMA’s view, is not the purpose of Article 17.
51. ESMA contends, building on the ESMA Response, that the Contested Decision is not a decision within the meaning of Article 60 of the ESAs Regulation and so cannot be challenged. Referring to the appellant’s reference to *Investor Protection Europe v ESMA* to the effect that ESMA decisions not to initiate Article 17 investigations “are not, and are not treated as, the kind of routine day-to-day decisions of the Authority which obviously fall outside the ambit of the right of appeal given by the Regulation”, it notes that the Contested Decision was, in fact, a routine decision, particularly in light of the 196 requests to take action under Article 17 received in 2020. ESMA also reiterates its argument as to the effect of the *SV Capital* rulings, as also applied by the Board of Appeal

(most recently in *Howerton v ESMA*), on the admissibility of the appeal. Given that the *SV Capital* rulings restrict standing to take an appeal from an Article 17 decision to those actors who can, within the terms of Article 17, be the addressees of an Article 17 decision, the only decisions addressed to an individual financial institution under Article 17 and which are appealable to the Board of Appeal, are those which require such a financial institution to take all necessary action to comply with its obligations under EU law. As the Contested Decision is not such a decision, the Board of Appeal lacks competence to hear the appeal.

52. ESMA also responds in its Rejoinder to the arguments made by the appellant that it is individually and directly concerned by the Contested Decision, which accordingly comes within the jurisdiction of the Board of Appeal under Article 60. ESMA does not concede that the Contested Decision is amenable to appeal but, even if it was, ESMA argues that the appellant is neither directly nor individually concerned by the Contested Decision. Drawing on settled EU case law, ESMA argues that the appellant is not individually concerned in that the issues raised in the Request to ESMA as to the correct application of relevant EU law, specifically MiFID II and PRIIPs, affect a very broad class of persons and so, in accordance with settled EU case law, the appellant is not affected by means of certain attributes peculiar to it or by reason of circumstances in which it is differentiated from all other persons and by virtue of these factors distinguishes it individually just as in the case of the person addressed by such a decision (applying General Court ruling of 14 December 2017, *PGNiG Supply & Trading v Commission*, Case T-849/16, EU:T:2017:924, paragraph 37). Also with reference to settled EU case law, ESMA argues that the exposure of the appellant to enforcement proceedings does not change the fact that the appellant is not individually concerned (applying Court of Justice ruling of 17 September 2009, *Commission v Koninklijke FrieslandCampina*, Case C-519/07P, EU:C:2009:556). In this regard, the NIA letter does not bear on individual concern but simply denotes that there may be others who have an interest in the matter.
53. As regards the question of direct concern, ESMA argues that the Contested Decision does not, as required by settled EU case law, directly affect the legal situation of the individual (applying also *PGNiG Supply & Trading*) in that the opening or not opening of an Article 17 investigation would have no immediate bearing on the appellant's legal situation. If an investigation were opened, ESMA might (but would have no obligation to) address a recommendation to the competent authority concerned but this would not be binding.
54. While the Commission might subsequently take action against the NCA, it would not be required to do so. Accordingly, the discretionary nature of

subsequent Article 17 action means that the Contested Decisions cannot be considered of direct concern to the appellant.

55. Finally, ESMA argues that even if standing could be established to bring an appeal, the Contested Decision could not be appealed because ESMA has discretion to decide whether or not to initiate an investigation. In this regard, ESMA refers to the SV Capital rulings which affirm the discretionary nature of action under Article 17, as well as to the text of Article 17 which provides that ESMA is to initiate an investigation under Article 17 “where appropriate.” ESMA also refers to settled EU case law (including SV Capital) which provides that where an EU institution or body is not bound to initiate a procedure but has a discretion which excludes the right for individuals to require it to adopt a specific position, it is not open to persons who have lodged a complaint to bring an action before the EU judicature against a decision to take no further action on their complaint; that possibility only arises where those persons have procedural rights comparable to those they might have under the rules governing the Commission’s powers in the field of competition law. As those persons requesting ESMA to take investigatory action under Article 17, but who are not specified as having standing to do so, do not have such procedural rights, they cannot, according to settled EU case law, challenge ESMA’s exercise of its discretion.

### **Discussion by the Board of Appeal of the parties’ contentions**

56. The Board of Appeal is part of the governance structure of ESMA (and the other European Supervisory Authorities of which it is a joint body under their founding regulations). The members are required to be independent in making their decisions and undertake to act independently and in the public interest (Article 59 of the ESMA Regulation).

57. As an appeal body of ESMA, the Board of Appeal must decide whether the decisions of the Board of Supervisors were correct or not and may confirm the decisions or remit the cases to the Board of Supervisors (Article 60(5) of the ESMA Regulation). If ESMA contends, preliminarily, that an appeal is not admissible and requests that the Board of Appeal determines first on the admissibility in accordance with Article 9(1) of the Rules of Procedure, the Board of Appeal considers that the issue of admissibility must be decided prior to the full consideration of the merits of the appeal. Article 9 of the Rules of Procedure stipulates indeed that, if the respondent contends that the appeal is not admissible under Article 60 of the ESA Regulations, the Board shall examine whether or not the appeal is admissible before examining whether it is well founded under Article 60.4.

58. The parties have filed written submissions on their diverging views on the admissibility of the appeal and have also made oral representations. This was particularly helpful in illuminating the issue and has been carefully considered by the Board of Appeal. All the parties' contentions have been taken into account, whether expressly referred to herein or not.

59. This appeal raises interconnected issues relating to two questions of admissibility. The first relates to the admissibility of and the related procedures governing requests to ESMA, in accordance with Article 17 of the ESMA Regulation, to undertake an investigation relating to an alleged breach or non-application of EU law by a competent authority. The second relates to the admissibility of an appeal to the Board of Appeal against a determination by ESMA not to undertake such an investigation on foot of a request by an actor that is not specified in Article 17 as having standing to request such action of ESMA. The findings of the Board of Appeal are as follows.

### **I – ESMA competence on breach of Union law under Article 17 of the ESMA Regulation and the related ESMA Rules of Procedure.**

60. The Board of Appeal notes by way of preliminary observation the importance of Article 17 as a means for allowing interested parties to request ESMA to undertake investigations where a national competent authority is alleged to have breached or not to have applied EU law. It notes further that Article 17 of the ESMA Regulation forms a critical element of the governance of the European System of Financial Supervision. It empowers ESMA to undertake investigations of potential breaches or non-applications of EU law by national competent authorities and confers on ESMA the power to take specified actions where ESMA finds such a breach. It accordingly supports the single rulebook as well supervisory coordination and convergence, while also providing interested parties with a means of raising their concerns where they are of the view that a national competent authority is in breach of or has not correctly applied EU law. Revised in 2019, Article 17 provides as follows:

#### *Article 17*

##### ***Breach of Union law***

*1. Where a competent authority has not applied the acts referred to in Article 1(2), or has applied them in a way which appears to be a breach of Union law, including the regulatory technical standards and implementing technical standards established in accordance with Articles 10 to 15, in particular by failing to ensure that a financial market participant satisfies the requirements laid down in those acts, the Authority shall act in accordance with the powers set out in paragraphs 2, 3 and 6 of this Article.*

*2. Upon request from one or more competent authorities, the European Parliament, the Council, the Commission, the Securities and*

*Markets Stakeholder Group, or on its own initiative, including when this is based on well substantiated information from natural or legal persons, and after having informed the competent authority concerned, the Authority shall outline how it intends to proceed with the case and, where appropriate, investigate the alleged breach or non-application of Union law.*

*Without prejudice to the powers laid down in Article 35, the competent authority shall, without delay, provide the Authority with all information which the Authority considers necessary for its investigation, including with regard to how the acts referred to in Article 1(2) are applied in accordance with Union law.*

*Without prejudice to the powers laid down in Article 35, the Authority may, after having informed the competent authority concerned, address a duly justified and reasoned request for information directly to other competent authorities whenever requesting information from the competent authority concerned has proven, or is deemed to be, insufficient to obtain the information that is deemed necessary for the purpose of investigating an alleged breach or non-application of Union law.*

*The addressee of such a request shall provide the Authority with clear, accurate and complete information without undue delay.*

*2a. Without prejudice to powers under this Regulation and before issuing a recommendation as set out in paragraph 3, the Authority shall engage with the competent authority concerned where it considers such engagement appropriate in order to resolve a breach of Union law, in an attempt to reach agreement on actions necessary for the competent authority to comply with Union law.*

*3. The Authority may, not later than 2 months from initiating its investigation, address a recommendation to the competent authority concerned setting out the action necessary to comply with Union law.*

*The competent authority shall, within ten working days of receipt of the recommendation, inform the Authority of the steps it has taken or intends to take to ensure compliance with Union law.*

*4. Where the competent authority has not complied with Union law within 1 month from receipt of the Authority's recommendation, the Commission may, after having been informed by the Authority or on its own initiative, issue a formal opinion requiring the competent authority to take the action necessary to comply with Union law. The Commission's formal opinion shall take into account the Authority's recommendation.*

*The Commission shall issue such a formal opinion no later than 3 months after the adoption of the recommendation. The Commission may extend this period by 1 month.*

*The Authority and the competent authorities shall provide the Commission with all necessary information.*

*5. The competent authority shall, within ten working days of receipt of the formal opinion referred to in paragraph 4, inform the Commission and the Authority of the steps it has taken or intends to take to comply with that formal opinion.*

*6. Without prejudice to the powers of the Commission pursuant to Article 258 TFEU, where a competent authority does not comply with the formal opinion referred to in paragraph 4 of this Article within the period specified therein, and where it is necessary to remedy in a timely manner such non-compliance in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system, the Authority may, where the relevant requirements of the legislative acts referred to in Article 1(2) of this Regulation are directly applicable to financial market participants, adopt an individual decision addressed to a financial market participant requiring it to take all necessary action to comply with its obligations under Union law including the cessation of any practice.*

*The decision of the Authority shall be in conformity with the formal opinion issued by the Commission pursuant to paragraph 4.*

*7. Decisions adopted in accordance with paragraph 6 shall prevail over any previous decision adopted by the competent authorities on the same matter.*

*When taking action in relation to issues which are subject to a formal opinion pursuant to paragraph 4 or to a decision pursuant to paragraph 6, competent authorities shall comply with the formal opinion or the decision, as the case may be.*

*8. In the report referred to in Article 43(5), the Authority shall set out which competent authorities and financial market participants have not complied with the formal opinions or decisions referred to in paragraphs 4 and 6 of this Article.*

61. ESMA's jurisdiction under Article 17 is discretionary. Identified actors (exhaustively specified as national competent authorities; the European Parliament; the Council; the Commission; and the ESMA Securities and Markets Stakeholder Group) may request ESMA to undertake an investigation, but they cannot compel an investigation. Where such a request is made, ESMA is required to "outline how it intends to proceed with the case". It is not required to undertake an investigation, being empowered to investigate potential breaches of EU law by national competent authorities "where appropriate". ESMA also has an own-initiative jurisdiction under Article 17 to undertake an investigation. Other actors not specified in Article 17, such as natural and legal persons, do not have standing to request ESMA to undertake an investigation. Article 17 envisages, however, that potential breaches or non-applications of EU law by national competent authorities may come to ESMA's attention, for the purposes of its own-initiative jurisdiction, from such other actors. Article 17 accordingly provides that ESMA can undertake an investigation on its own initiative "including when this is based on well substantiated information from natural or legal persons." Article 17 clearly foresees, accordingly, that actors other than those specified in Article 17 can raise with ESMA the possibility of it activating its own-initiative competence under Article 17.

62. ESMA has indicated that such informal requests are not unusual and that communications from ESMA to such parties, advising that it will not be undertaking an investigation, are “routine”, with 196 complaints being made to ESMA in 2020 from actors not specified as having standing to request an investigation under Article 17.
63. As already noted, Article 17 is a critical element of ESMA’s governance arrangements and supports the delivery of ESMA’s mandate to contribute to the consistent application of legally binding Union acts (ESMA Regulation, Article 8). While a discretionary power, it must be exercised in accordance with EU law and in a manner that is procedurally efficient and transparent, in particular in light of ESMA’s objectives of contributing to a sound, effective and consistent level of regulation and supervision and enhancing supervisory convergence in the internal market (ESMA Regulation, Article 1(5)). The Board of Appeal also notes in this regard the clear intention of the co-legislators to allow interested parties to request ESMA to undertake an own-initiative investigation.
64. ESMA has, since 2012, had in place procedural rules governing its application of Article 17 and which therefore impose internal procedural constraints on this discretionary power. The currently in force version of its rules of procedure on breach of Union law investigations was adopted by the ESMA Board of Supervisors on 14 September 2020 in order to reflect the amendments to Article 17 made by Regulation (EU) No 2019/2179 (the “**Rules**”).
65. The Rules clarify, first (recital 3), that, “although decisions on initiating investigations into alleged non-application or breaches of Union law remain within ESMA’s discretion”, “for reasons of transparency and legal certainty” they “set out factors, criteria and other related matters to be taken into account in relation to requests to initiate investigations that are received from third parties or, to the extent relevant, to ESMA’s own initiative investigations”.
66. Consistently, Article 1 of the Rules provides that the Rules set out “the procedure for applying Article 17 of the Regulation on investigating breaches of Union law. The Rules of Procedure shall apply to requests to investigate a competent authority received by ESMA as well as, to the extent relevant, to breach of Union law investigations initiated by ESMA on its own initiative in the absence of a request”.
67. In turn, Chapter 2 of the Rules specifies the procedural steps to be followed by ESMA once it receives from a “Requester” (as noted below) a request to investigate a breach of Union law. The procedure is as follows.

68. Reflecting Article 17, Chapter 2 of the Rules provides that requests may be made by one or more competent authorities, the European Parliament, the Council, the European Commission or the Securities and Markets Stakeholder Group. However, and reflecting ESMA's own-initiative competence under Article 17, "the [ESMA] Chairperson may also initiate investigations on his/her own initiative, including on the basis of well substantiated information received from any other legal or natural person (also referred to as a "Requester") and pointing to measures or practices of a competent authority which appear to constitute a breach or non-application of Union law" (Article 2(2) of the Rules).
69. Requesters shall not have to demonstrate a formal interest; nor shall they have to prove that they are principally and directly concerned by the breach or non-application which is the subject of the request. However, it is expressly specified that "ESMA shall outline how it intends to proceed with a request and, where appropriate, investigate the alleged breach or non-application of Union law in accordance with these Rules of Procedure" (Article 2(4) of the Rules).
70. Article 3 of the Rules lays down certain admissibility criteria for any requests (whether from actors specified in Article 17 or otherwise). Specifically, to be admissible as a request, a request shall "set out a clear grievance explaining how a competent authority has not applied the acts referred to in Article 1(2) of the Regulation, or has applied them in a way which appears to be a breach of Union law, including the technical standards established in accordance with Articles 10 to 15 of the Regulation, in particular a failure of a competent authority to ensure that a financial market participant satisfies the requirements laid down in those acts; and not fall into any of the categories set out in Annex I."
71. More importantly, for the purposes of this appeal, Article 5 of the Rules provides (under the title "Closure of the Request without opening an investigation") that "the Chairperson may close the Request without initiating an investigation, where he/she considers that: (...) the Request is admissible, but an investigation should not be initiated, as a matter of discretion, taking into account the non-exhaustive list of factors included in Annex II".
72. Paragraph 2 of Article 5 further specifies that: "Where the Chairperson closes a Request without initiating an investigation, the fact that the Request has been closed shall be notified to the Requester and, if the competent authority concerned has been notified of the Request, to that authority. Where relevant, the Requester shall also be informed of appropriate alternative forms of redress, such as recourse to national courts, the European Ombudsman, a national ombudsman or any other national or international complaints procedure".

73. The factors listed in Annex II to be taken into consideration by the Chair in the exercise of his/her discretion are as follows:

**Positive investigation factors**

1. *The alleged breach undermines the foundations of the rule of law (for example, systemic infringements, breaches of human rights or fundamental freedoms);*
2. *The alleged breach concerns a repeated or systemic infringement (for example a pattern of complaints indicating systematic incorrect application, interpretation, practice or approach of the competent authority concerned) or a general policy or supervisory approach;*
3. *The alleged breach may have a significant, direct impact on ESMA's objective to protect the public interest by: contributing to the short, medium and long-term stability and effectiveness of the financial system for the Union economy, its citizens and businesses, improving the functioning of the internal market including in particular a sound, effective and consistent level of regulation and supervision; ensuring the integrity, transparency, efficiency and orderly functioning of financial markets; strengthening international supervisory coordination; preventing regulatory arbitrage and promoting equal conditions of competition; ensuring that the taking of investment and other risks are appropriately regulated and supervised; enhancing customer and investor protection and enhancing supervisory convergence across the internal market.*

**Negative investigation factors**

4. *The Request is more suitable to be dealt with by another person or body, such as inter alia, the European Commission, another European Supervisory Authority, a national competent authority, a national complaints scheme or a court, or such other person or body is already dealing with it or has already dealt with it;*
5. *The Request is more suitable to be dealt with by other means (for example peer review, mediation, guidelines);*
6. *The Request sets out a grievance which does not relate to a clear and unconditional obligation in an act referred to in Article 1(2) of the Regulation;*
7. *The alleged breach does not concern a repeated or systematic infringement (for example a pattern of complaints indicating systematic incorrect application, interpretation, practice or approach of the competent authority concerned) or a general supervisory or policy approach.*

## **II - Settled case law of the CJEU on the admissibility of an appeal before the Board of Appeal against a decision under Article 17 of the ESAs Regulations on breach of Union law.**

74. At the heart of the admissibility question at issue in this appeal is the question of if, and to what extent, a Requester (in the sense specified under Article 2(2) of the Rules, and therefore also a legal or natural person which is not a competent authority, the European Parliament, the Council, the European Commission or the Securities and Markets Stakeholder Group) can appeal to the Board of Appeal the conclusion reached by the Chair to close the request without opening an investigation, “as a matter or discretion, taking into account the non-exhaustive list of factors included in Annex II”.

75. As noted by both parties, whether such an appeal can be taken to the Board of Appeal is not a new issue. It has previously been addressed by the Board of Appeal, initially in *SV Capital OU v EBA*, Decision of 24 June 2013 (BoA 2018-008). This Decision, as regards the admissibility of an appeal from a determination by (in this case) EBA not to proceed with an Article 17 investigation following a request by an actor not specified in Article 17, was appealed to the General Court and subsequently to the Court of Justice, which confirmed the ruling of the General Court. The ruling was subsequently applied by the Board of Appeal to ESMA determinations not to act under Article 17 in *B v ESMA*, Decision of 10 September 2018 (BoA-D-2018-02) and *Howerton v ESMA*, Decision of 9 October 2020 (BoA 2020-001). Given the pivotal importance of the General Court and Court of Justice rulings to this appeal, they are outlined below.

76. In its judgement of 9 September 2015, in case T-660/14, *SV Capital OU v EBA*, EU:T:2015:608, the General Court, on its own motion, stated the following as regards the discretionary nature of the power of EBA (and by extension, ESMA) to initiate an Article 17 investigation, and as regards the related inadmissibility of an appeal to the Court to annul a determination by EBA not to initiate an investigation:

46 In that respect, it must be borne in mind that the applicant's complaint was based on Article 17(2) of Regulation No 1093/2010, according to which, upon a request from one or more competent authorities, the European Parliament, the Council, the Commission or the Banking Stakeholder Group, or on its own initiative, and after having informed the competent authority concerned, the EBA ‘may’ investigate the alleged breach or non-application of EU law.

47 It follows from that provision that the EBA has a discretion as regards the initiation of investigations, both when it receives a request from one of the entities expressly mentioned in Article 17(2) of Regulation No 1093/2010 and when it acts on its own initiative.

48 According to settled case-law, developed in the context of actions for annulment of Commission decisions refusing to initiate infringement proceedings, and applicable by analogy to the present case, where an EU institution or body is not bound to initiate a procedure, but has a discretion which excludes the right for individuals to require it to adopt a specific position, it is not open to persons who have lodged a complaint to bring an action before the EU judicature against a decision to take no further action on their complaint. That possibility would arise only if those persons had procedural rights, comparable to those they might have in the case of a procedure under Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1), enabling them to require that institution or body to inform them and to grant them a hearing (see, to that effect, orders of 17 July 1998 in *Sateba v Commission*, C-422/97 P, ECR, EU:C:1998:395, paragraph 42, and 14 January 2004 in *Makedoniko Metro and Michaniki v Commission*, T-202/02, ECR, EU:T:2004:5, paragraph 46).

49 Since the applicant is not one of the entities expressly mentioned in Article 17(2) of Regulation No 1093/2010, it cannot be equated to complainants benefiting from procedural rights which may be enforced before the EU judicature, with the result that the case-law relating to the rejection of, or decisions to take no further action on, complaints brought by interested parties concerning State aid under Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1) (see, to that effect, judgment of 17 July 2008, *Athinaiki Techniki v Commission*, C-521/06 P, ECR, EU:C:2008:422, paragraphs 36 and 53 and the case-law cited) or by complainants, under Regulation No 1/2003 and Commission Regulation (EC) No 773/2004, of 7 April 2004, relating to the conduct of proceedings by the Commission pursuant to Articles [101 TFEU] and [102 TFEU] (OJ 2004 L 123, p. 18) (see, to that effect, judgment of 18 September 1992 in *Automec v Commission*, T-24/90, ECR, EU:T:1992:97, paragraph 79, and order of 5 June 2014 in *Stanleybet Malta and Stanley International Betting v Commission*, T-416/13, EU:T:2014:567, paragraph 23 and the case-law cited), is not applicable in the present case.

50 In view of the foregoing, the action must be dismissed as inadmissible in so far as it seeks the annulment of the EBA decision (...).

77. In that case, the General Court also raised of its own motion the plea relating to the Board of Appeal's lack of competence to decide on the appeal brought before it against a decision of the EBA not to initiate an investigation under Article 17. In this regard, the Court held the following:

60 In that respect, the applicant submits that the Board of Appeal had competence to decide on the appeal brought before it, since, irrespective of its form, the decision of the EBA fell within the scope of Article 60(1) of Regulation No 1093/2010. Furthermore, it argues that that interpretation is consistent with recital 58 in the preamble to that regulation and with the guarantees that the rights of the parties concerned will be protected, as stated in that recital.

61 The EBA, supported by the Commission, submits that the Board of Appeal should have declared that the appeal brought before it against the EBA's decision was inadmissible, since the requirements of Article 60(1) of Regulation No 1093/2010, which reflect those of Article 263 TFEU, were not satisfied and that, consequently, the action before the Court, for the purposes of that article, was also inadmissible. The EBA did not, however, expressly state its views on whether the Board of Appeal had competence to decide on the appeal. When questioned by the Court on that issue at the hearing, the EBA stated that the Board of Appeal did not have competence to decide on the appeal brought before it.

62 The Commission adds that it is apparent from a reading of Article 58 to 60 of Regulation No 1093/2010 that the Board of Appeal is not a judicial body, but an internal body of the EBA, and that it only has competence to confirm decisions taken by the competent body of the EBA or to remit the case to that body for it to adopt a decision. At the hearing, the Commission added that the Board of Appeal should have declared the appeal before it inadmissible in accordance with Article 60(4) of Regulation No 1093/2010.

63 In the present case, it must be recalled, first of all, that the applicant made a complaint to the EBA, under Article 17 of Regulation No 1093/2010, alleging infringement of Directive 2006/48 by the Estonian and Finnish financial sector supervisory authorities, which constitute 'competent authorities' within the meaning of Article 4(4) of that directive, read in conjunction with Article 4(2)(i) of that regulation.

64 In that respect, it must also be recalled that, under Article 17(1) of Regulation No 1093/2010, where a competent authority has not applied the acts referred to in Article 1(2) of that regulation, or has applied them in a way which appears to be a breach of EU law, including the regulatory technical standards and implementing technical standards established in accordance with Articles 10 to 15 of the regulation, in particular by failing to ensure that a financial institution satisfies the requirements laid down in those acts, the EBA is to act in accordance with the powers set out in Article 17(2), (3) and (6) of the regulation.

65 Next, it must be noted that, in accordance with Article 60(1) of Regulation No 1093/2010, any natural or legal person, including competent authorities, may appeal against a decision of the EBA referred to in Articles 17, 18 and 19 of that regulation and any other decision taken by the EBA in accordance with the EU acts referred to in Article 1(2) of the regulation which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.

66 It follows that, in order for an appeal to the Board of Appeal to lie against a decision of the EBA, for the purpose of Article 60 of Regulation No 1093/2010, that decision must either have been taken in accordance with the EU acts referred to in Article 1(2) of that regulation, or be one of the decisions referred to in Articles 17 to 19 of the regulation.

67 First, and despite the fact that infringement of certain provisions of Directive 2006/48 was alleged in support of the complaint, the decision of the EBA was not based on Article 1(2) of Regulation No 1093/2010. The EBA did not express any view in its decision on whether or not that directive had been infringed by the competent authorities or by the credit institution concerned.

68 Secondly, it suffices to point out that the decision of the EBA is clearly not one of the decisions referred to in Articles 18 and 19 of Regulation No 1093/2010, by which the EBA may require national supervisory authorities to take specific action to address an emergency or to settle disagreements that may arise in cross-border situations between those authorities, and this is common ground between the parties. Furthermore, it suffices to note that no breach of the regulatory technical standards and implementing technical standards established in accordance with Articles 10 to 15 of that regulation, as referred to in Article 17(1) of the regulation, was alleged in support of the applicant's complaint, and this was confirmed by the applicant at the hearing. In addition, contrary to what is claimed by the applicant, it is not apparent either from the letter of 2 July 2013 that it sent to the EBA, or from its reply to the EBA's response, submitted on 20 May 2014 in the administrative procedure, that the applicant alleged breach of the standards referred to in Articles 10 to 15 of Regulation No 1093/2010 following the submission of the complaint.

69 Thirdly, as pointed out in paragraphs 46 and 49 above, it suffices to note that the applicant is not one of the entities expressly referred to in Article 17(2) of Regulation No 1093/2010 which may request the EBA to initiate an investigation into an alleged breach of or failure to apply EU law (which are limited to the competent authorities, the Parliament, the Council, the Commission and the Banking Stakeholder Group).

70 The applicant also does not claim to be a member of the Banking Stakeholder Group, established in accordance with Article 37 of Regulation No 1093/2010, to help facilitate consultation with stakeholders in areas relevant to the tasks of the EBA. In that respect, it can be seen from Article 37(2) that that group is composed of 30 members, representing in balanced proportions credit and investment institutions operating in the European Union, their employees' representatives as well as consumers, users of banking services and representatives of SMEs.

71 Fourthly, it should be noted that, except in the case of a refusal to initiate an investigation upon a request by one of the entities exhaustively listed in Article 17(2) of Regulation No 1093/2010, the recommendations made or decisions taken by the EBA pursuant to Article 17(2) to (6) of that regulation are addressed to either the competent authorities or the financial institutions concerned. Article 17(3) of that regulation provides that 'the [EBA] may ... address a recommendation to the competent authority concerned setting out the action necessary to comply with Union law'. According to Article 17(4), '[w]here the competent authority has not complied with Union law ... the Commission may, after having been informed by the [EBA], or on its own initiative, issue a formal opinion requiring the competent authority to take the action necessary to comply with Union law'. In addition, Article 17(6) of Regulation No 1093/2010 states that 'where a competent authority does not

comply with the formal opinion ..., the [EBA] may ... adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Union law including the cessation of any practice'.

72 It follows from the examination of the relevant provisions of Regulation No 1093/2010 that the decision of the EBA challenged before the Board of Appeal in the present case cannot be regarded as being based, having regard to its nature, on one of those provisions. Accordingly, the Board of Appeal did not have competence to decide on the appeal brought before it on the basis of Article 60(1) of Regulation No 1093/2010.

78. On appeal, the Court of Justice, with judgment of 14 December 2016, in case C-577/15 P, SV Capital OU v EBA, EU:C:2016:947, upheld the General Court judgment and reasoned as follows.

35 (...) as the General Court pointed out in paragraph 66 of the judgment under appeal, in order for an appeal to the Board of Appeal to lie against an EBA decision, that decision must be either one of the decisions referred to in Articles 17 to 19 of Regulation No 1093/2010 or a decision taken in accordance with the Union acts referred to in Article 1(2) thereof.

36 As the General Court was fully entitled to note in paragraphs 67 to 71 of the judgment under appeal, none of those conditions is satisfied in the present case.

37 In the first place, the EBA decision of 21 February 2014 is not based on Article 1(2) of Regulation No 1093/2010. As the General Court rightly noted in paragraph 67 of the judgment under appeal, notwithstanding the fact that infringement of certain provisions of Directive 2006/48 was alleged in support of the SV Capital's complaint, the EBA did not express any view in that decision on whether or not that directive had been infringed by the competent authorities or by the credit institution concerned.

38 In the second place, it is common ground that that decision is not one of the decisions, referred to in Articles 18 and 19 of Regulation No 1093/2010, by which the EBA may require national supervisory authorities to take specific action, respectively, to address an emergency or to settle disagreements that may arise in cross-border situations between those authorities.

39 In the third place, contrary to the requirements of Article 17(1) of Regulation No 1093/2010, no breach of the regulatory technical standards and implementing technical standards established in accordance with Articles 10 to 15 of that regulation was alleged in support of that complaint.

40 In the fourth place, the appellant is not one of the entities expressly referred to in Article 17(2) of Regulation No 1093/2010 which may request the EBA to initiate an investigation into an alleged breach or failure to apply EU law. In particular, the appellant does not claim to be a member of the Banking

Stakeholder Group, established in accordance with Article 37 of Regulation No 1093/2010.

41 Moreover, the General Court's finding that the appellant is not one of the entities expressly referred to in Article 17(2) of Regulation No 1093/2010 is in no way altered, contrary to what the appellant seems to claim, by the fact that the EBA may initiate investigations on its own initiative.

42 Therefore, since the General Court's findings in the judgment under appeal are not vitiated by any error of law, the second ground of appeal must also be rejected.

79. The SV Capital rulings therefore confirm that ESMA's Article 17 powers are discretionary, and a natural or legal person not specified as having standing to request an Article 17 investigation, does not have standing to challenge (seek the annulment of) a determination by ESMA not to undertake an Article 17 investigation. The rulings also confirm that any such determination by ESMA cannot be appealed to the Board of Appeal. This is because such a determination does not fall within Article 60 of the ESAs Regulation which confers jurisdiction on the Board of Appeal. Article 60 provides that an appeal may be taken to the Board of Appeal, *inter alia*, "against a decision of the Authority referred to in Article 17." The SV Capital rulings provide, however, that the relevant Article 17 decisions relate to: decisions related to a request for an investigation made by one of the actors exhaustively listed in Article 17(2) as having standing to request an investigation (the European Parliament, the Council, the Commission, and the Securities and Markets Stakeholder Group); and the recommendations or decisions that, under Article 17, may be addressed by ESMA to the relevant national competent authority, the Commission, or relevant financial institutions on foot of its completion of an Article 17 investigation (SV Capital General Court Judgment, paragraphs 71-72; SV Capital Court of Justice Judgment, paragraphs 40-42). Any natural or legal person that requests ESMA to take an investigation, but does not have standing to make such a request cannot, accordingly, be an addressee of a "decision referred to in Article 17" and so an ESMA determination not to undertake an investigation cannot be appealed to the Board of Appeal.

80. This interpretation (of the General Court) was previously applied by the Board of Appeal in the context of EBA's Article 17 jurisdiction in *Kluge v EBA*, Decision of 7 January 2016 (BoA/2016/001), in the following manner:

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

81. Subsequent to the ruling of the Court of Justice in *SV Capital*, the Board of Appeal confirmed this approach as regards ESMA's Article 17 jurisdiction in *B v ESMA*, Decision of 10 September 2018 (BoA D 2018 02):

"The practical effect of the decision is to limit appeals against decisions of the European Supervisory Authorities (that is, ESMA, the EBA and EIOPA) to investigate or not to investigate alleged breaches or non-applications of Union law to national competent authorities, the European Parliament, the Council, the Commission or the Securities and Markets Stakeholder Group. The fact that the Authority may initiate investigations on its own initiative does not affect this conclusion. The instant case is concerned with the jurisdiction of the Board of Appeal to hear an appeal from a determination by the ESMA Chairperson not to undertake an Article 17 investigation. In order to consider this appeal, the Board must apply relevant EU law, including the *SV Capital* rulings, consider its previous Decisions, and assess the application by ESMA of the Rules in this case (paragraph 46)."

82. The Board took a similar approach most recently in *Howerton v ESMA*, Decision of 9 October 2020 (BoA D 2020 01), finding that:

"A second, and concurrent, reason of inadmissibility stems from the case-law of the Court of Justice. The court, in its judgments of 9 September 2015, T-660/14 *SV Capital OÜ v EBA*, T-660/14, EU:T:2015:608 and, on appeal, of 14 December 2016, *SV Capital OÜ v EBA*, C-577/15 P, EU:C:2016:947 clarified that a decision adopted by one of the ESAs (in that case, the European Banking Authority; but the same principle applies in the present case, where the relevant ESA is ESMA) not to initiate a proceedings under Article 17 is an act which is not reviewable by the Board of Appeal. Thus, even assuming that the Contested Conclusion were to be considered a decision to the effect of Article 17 and Article 60 of Regulation (EU) No 1095/2010 (as the Board of Appeal believes it is not), the Contested Conclusion could not be appealed before the Board of Appeal (paragraph 15)."

83. The Board of Appeal notes in this regard that the Board's earlier decision on the admissibility of an appeal against a refusal by ESMA to initiate an investigation under Article 17 in *Investor Protection Europe v European Securities and Markets Authority*, Decision of 10 November 2014 (BoA 2014 05), which accepted that, in principle, an appeal could lie from an ESMA decision not to take investigatory action under Article 17 as long as the requisite interest was established, and which is relied on in particular by the appellant in its submissions, was adopted before the clarifications given by the CJEU and must now be read in light of this subsequent CJEU and also Board of Appeal jurisprudence.

### **III – Whether or not the appeal against the Contested Decision is admissible in the factual and legal circumstances of the present case.**

84. As noted above, the instant case is concerned with the jurisdiction of the Board of Appeal to hear an appeal on a determination by the ESMA Chairperson not

to undertake an Article 17 investigation (the Contested Decision). In order to consider this appeal, the Board must apply relevant EU law, including the SV Capital rulings, consider its previous decisions, and assess the application by ESMA of its Rules to the instant facts.

85. While ESMA's exercise of its discretion under Article 17, and in particular its application of the Rules which structure its discretion, may be of relevance to this appeal, the threshold determination relates to whether or not the Board of Appeal has jurisdiction to hear this appeal from the Contested Decision. Previous Board of Appeal Decisions and the SV Capital rulings suggest that an appeal does not lie to the Board of Appeal from a determination by the ESMA Chairperson not to undertake an investigation under Article 17 on foot of a complaint by an actor not specified as having standing to make such a request in Article 17.
86. Nonetheless, the Board of Appeal, in light of the submissions by the appellant and the respondent, has also considered whether there are factual and legal circumstances at issue in this case which are to some extent different from those at issue in previous relevant Board of Appeal decisions and in the SV Capital rulings and which might, accordingly, distinguish the position of the appellant and so lead to a different conclusion on the admissibility of an appeal concerning the communication that the ESMA Chair determined not to open an investigation according to Article 5 of the Rules (and Annex II thereto).
87. As regards the admissibility of the appellant's complaint to ESMA, and as far as the application by ESMA of its Rules is concerned, the Request to ESMA made by A on 20 July 2020 included "well substantiated information" and "pointed to measures or practices of a competent authority which appear to constitute a breach or non-application of Union law", as required by Article 2(2) of the Rules. The Board of Appeal is persuaded of this from its review of the Notice of Appeal.
88. The Board of Appeal takes note that the substance of the appellant's complaint is accordingly factually different from the findings in the SV Capital case (see CJEU judgment of 14 December 2016, in case C-577/15, paragraph 37), but it is not (*mutatis mutandis*) from the findings of the Board of Appeal decision of 7 January 2016, *Andrus Kluge and Others v EBA* (BoA 2016 01) and decision of 10 September 2018, *B v ESMA* (BoA D 2018 02), both of which address appeals against EBA and ESMA determinations, respectively, not to act under Article 17.
89. It is not disputed either that the appellant's request was deemed admissible in accordance with the specific requirements of Article 3 of the Rules, because the request set out "a clear grievance explaining how a competent authority has

not applied the acts referred to in Article 1(2) of the ESMA Regulation or has applied them in a way which appears to be a breach of Union law, including the technical standards established in accordance with Articles 10 to 15 of the ESMA Regulation”, as required by Article 3(4)(a) of the Rules.

90. Further, the request did not fall into any of the categories set out in Annex I of the Rules, the application of which mean that a request is inadmissible. In particular it did not appear “clearly unsubstantiated” or “frivolous or vexatious” and it did not fail to set out a grievance or set out a grievance which is outside the scope of the acts referred to in Article 1(2) of the ESMA Regulation.
91. As a matter of fact, as ESMA acknowledges with the Contested Decision, the appellant made clear allegations that the Member State’s NCA would have breached certain of its obligations under MiFID I (Directive 2004/39/EC) and MiFID II (Directive 2014/65/EU) and under the PRIIPs Regulation (Regulation (EU) No 1286/2014) as well as Commission delegated acts implementing the same, including Commission Delegated Regulation (EU) No 2017/653 laying down regulatory technical standards on PRIIPs’ key information documents.
92. It is undisputed therefore that the threshold admissibility conditions applied by ESMA under its Rules were met (unlike in the case of SV Capital).
93. ESMA’s powers under Article 17, while framed by the procedure established by the Rules, are, however, discretionary and the admissibility of a complaint does not imply that an investigation follows. Article 5 of the Rules reflects this discretion by providing that the ESMA Chairperson can, where a request is admissible, determine that an investigation should not be initiated as a matter of discretion, taking into account the non-exhaustive list of factors included in Annex II.
94. In the instant case, the ESMA Chairperson determined that an investigation would not be initiated as a matter of discretion, taking into account the non-exhaustive list of factors included in Annex II to the Rules and specifically that “the request is more suitable to be dealt with by other means”, given that the matter was the subject of an enforcement procedure in the EU Member State, is in accordance with EU law.
95. Discretionary acts must, however, comply with relevant EU law and with the Rules, which structure this discretion and the ways in which it must be exercised. Given the centrality of the Article 17 procedure, appropriate exercise of discretion by ESMA is all the more important.

96. However, whether or not an appeal can lie to the Board of Appeal depends on the scope of the Board of Appeal's jurisdiction, set out in Article 60 of the ESAs Regulation:

*Article 60*

**Appeals**

*1. Any natural or legal person, including competent authorities, may appeal against a decision of the Authority referred to in Articles 17, 18 and 19 and any other decision taken by the Authority in accordance with the Union acts referred to in Article 1(2) which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.*

*2. The appeal, together with a statement of grounds, shall be filed in writing at the Authority within three months of the date of notification of the decision to the person concerned, or, in the absence of a notification, of the day on which the Authority published its decision.*

*The Board of Appeal shall decide upon the appeal within three months after the appeal has been lodged.*

*3. An appeal lodged pursuant to paragraph 1 shall not have suspensive effect.*

*However, the Board of Appeal may, if it considers that circumstances so require, suspend the application of the contested decision.*

*4. If the appeal is admissible, the Board of Appeal shall examine whether it is well-founded. It shall invite the parties to the appeal proceedings to file observations on its own notifications or on communications from the other parties to the appeal proceedings, within specified time limits. Parties to the appeal proceedings shall be entitled to make oral representations.*

*5. The Board of Appeal may confirm the decision taken by the competent body of the Authority, or remit the case to the competent body of the Authority. That body shall be bound by the decision of the Board of Appeal and that body shall adopt an amended decision regarding the case concerned.*

*6. The Board of Appeal shall adopt and make public its rules of procedure.*

*7. The decisions taken by the Board of Appeal shall be reasoned and shall be made public by the Authority.*

97. Central to this appeal is the Board of Appeal's jurisdiction over Article 17 decisions (Article 60(1)). It is undisputed, and follows from the admissibility of the appellant's Request to ESMA, that the appellant's request for an investigation is relevant as regards ESMA's exercise of its own-initiative powers under Article 17 of the ESAs Regulation as it concerns allegations that "a competent authority has not applied the acts referred to in Article 1(2), or has applied them in a way which appears to be a breach of Union law, including the regulatory technical standards and implementing technical standards established in accordance with Articles 10 to 15".

98. The Board of Appeal notes that, although this appeal is factually different from the case of SV Capital (see Court of Justice judgment of 14 December 2016, in case C-577/15, paragraph 39), in the instant case, as in the SV Capital case and as regards EBA, ESMA, like EBA in the SV Capital, “did not express any view in its decision on whether or not that [EU Directives and Regulations] had been infringed by the competent authority concerned” (see General Court judgement of 9 September 2015, in case T-660/14, paragraph 67). As already noted, this is not different (*mutatis mutandis*) from the findings of the Board of Appeal decision of 7 January 2016, *Andrus Kluge and Others v EBA* (BoA 2016 01).
99. The Board of Appeal further notes that the ESMA determination not to pursue an investigation under Article 5 of the Rules relates, in general terms, to Article 17 and that the appellant is the addressee of the Contested Decision. The Board of Appeal is also persuaded that, were ESMA ultimately to take subsequent action against the NCA on foot of an investigation, and to find a breach or non-application of EU law, that any such further ESMA action (and related decision), while not addressed to the appellant, would potentially be of interest to the appellant, because of the enforcement procedure initiated by the NCA against the appellant in the Member State based upon its contested reading of fair value for RSPs, which, in the appellant’s view, is in breach of the relevant Union law provisions. *De facto*, therefore, the appellant has an interest in ESMA undertaking an investigation and, relatedly, in appealing ESMA’s determination not to initiate an investigation. The Board of Appeal also notes, by way of observation, that Article 17 provides an important mechanism for allowing interested parties to raise legitimate concerns with ESMA as to alleged breaches or non-applications of EU law by national competent authorities, and that this procedure is of particular significance where the alleged breach or non-application of EU law carries serious consequences, including as regards enforcement action.
100. The Board of Appeal is accordingly persuaded that the Request to ESMA was admissible under the Rules and that the appellant has a clear and understandable factual interest in ESMA undertaking an investigation and also in appealing against the ESMA determination not to pursue an investigation, for the purposes of Article 60(1) of ESMA Regulation. However, the fundamental question which remains to be addressed is whether or not such factual interest translates into a right for the appellant to appeal before the Board of Appeal the determination of ESMA’s Chair that an investigation not be undertaken.
101. With such a determination, the Chair, based upon the information received from the appellant, and in accordance with Article 17(2) of ESMA Regulation “outline[s] how it intends to proceed with the case” and, specifically

in this case, concludes that it is not “appropriate” for ESMA to “investigate the alleged breach or non-application of Union law”.

102. Therefore, while the Board of Appeal recognises the factual interest of the appellant in an investigation being undertaken by ESMA, critical to this appeal is whether or not this determination comes within the scope of Article 60. The Board of Appeal is of the view that, in light of the SV Capital ruling, it does not. The Board recognises that, as noted above, the facts obtaining in this appeal can be distinguished from those obtaining in SV Capital and it acknowledges the factual interest of the appellant. Nonetheless, the appellant has not established that the Contested Decision is a decision within the scope of the Board’s jurisdiction under Article 60 in accordance with the SV Capital rulings. According to these rulings, the Board of Appeal’s jurisdiction under Article 60 as regards Article 17 decisions is limited to: (i) decisions as regards the undertaking of an investigation following a request by the European Parliament, the Council, the Commission and the Securities and Markets Stakeholder Group and addressed to these actors; and (ii) decisions on the foot of any subsequent action by ESMA where an investigation is taken, whether (a) recommendations to national competent authorities or the Commission, or (b) decisions addressed to financial institutions. The Board of Appeal agrees with ESMA that the Contested Decision is not such a decision adopted on the basis of Article 17 and so cannot be challenged in accordance with Article 60 as interpreted by the CJEU in the SV Capital case.

103. The appellant has argued that the appeal is admissible having regard to its specific legal and factual circumstances which justify, in its view, a departure from the SV Capital ruling, pointing to (i) the Letter of 29 November 2019 from the National Industry Association (the NIA Letter) to the NCA, which backs the appellant’s position on the alleged breach of EU law by the NCA; and (ii) the exposure of the appellant to enforcement activity by the NCA, which enforcement could be in breach of EU law.

104. The Board of Appeal notes, first, that its decisions as regards its jurisdiction must follow settled EU case law as it applies to the specific facts before it. In the instant case, the Board of Appeal finds that the circumstances raised by the appellant do not allow for a dis-application of the SV Capital rulings. First, the NIA Letter, while clearly of interest to the appellant, does not vitiate the defect in jurisdiction. The NIA Letter only underlines the pan-industry concern in the Member State as to the approach of the NCA, being issued following supervisory action by the NCA asking the appellant and other banks in the Member State to adopt the NCA approach to fair value calculation.

105. Second, and as regards the enforcement action taken by the NCA against the appellant and with respect to the appellant’s approach to fair value,

while the Board of Appeal acknowledges that the appellant has a clear factual interest in ESMA undertaking an investigation given its potential relevance for the enforcement proceedings currently being taken against it by the NCA, again, the Board of Appeal agrees, however, with ESMA that Article 17 is not designed to serve as a means for requesting an interlocutory ruling on the validity of the NCA's interpretation of MiFID II and PRIIPs, which would inform ongoing enforcement action by the NCA against the appellant. It observes in this regard that, were this otherwise, ESMA might find itself in the position of being requested, through Article 17, to intervene in multiple actions across the Member States where the application of EU law by a national competent authority was in issue. This is clearly not foreseen by Article 17.

106. For the sake of completeness, the Board of Appeal notes that this application of SV Capital reflects wider EU jurisprudence on the limited reviewability of decisions relating to refusals to initiate investigation/infringement procedures. As noted above, in the SV Capital case, the General Court held that “according to settled case-law, developed in the context of actions for annulment of Commission decisions refusing to initiate infringement proceedings, and applicable by analogy to the present case, where an EU institution or body is not bound to initiate a procedure, but has a discretion which excludes the right for individuals to require it to adopt a specific position, it is not open to persons who have lodged a complaint to bring an action before the EU judicature against a decision to take no further action on their complaint. That possibility would arise only if those persons had procedural rights, comparable to those they might have in the case of a procedure under Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1), enabling them to require that institution or body to inform them and to grant them a hearing (see, to that effect, orders of 17 July 1998 in *Sateba v Commission*, C-422/97 P, ECR, EU:C:1998:395, paragraph 42, and 14 January 2004 in *Makedoniko Metro and Michaniki v Commission*, T-202/02, ECR, EU:T:2004:5, paragraph 46)”.

107. The Board of Appeal has consistently applied the principle stated by the General Court and confirmed by the CJEU in several subsequent cases (see decision of 7 January 2016, *Andrus Kluge and Others v EBA* (BoA 2016 01); decision of 10 September 2018, *B v ESMA* (BoA D 2018 02) and decision of 9 October 2020, *Howerton v ESMA* (BoA D 2020 01); it should be noted however that this latter decision concerned a complaint which also fell outside the scope of application of the acts referred to in Article 1(2) of ESMA Regulation).

108. The Board of Appeal further recalls that in its decision of 7 January 2016, *Andrus Kluge and Others v EBA*, paragraphs 33-35 (BoA 2016 01), it held that the rules of procedure for investigation of breach of Union law adopted by EBA

in 2014 did not give persons different from the “qualified” entities listed in Article 17(2) a right of appeal because “the General Court refer[red] expressly to the internal processing rules in paragraph 7 of the [SV Capital] decision and it follows that the rules were not regarded by the Court as extending rights of appeal which would not otherwise exist”.

109. In turn, in its decision of 10 September 2018, *B v ESMA*, paragraph 52 (BoA D 2018 02) the Board of Appeal held that ESMA Rules (at the time ESMA/2012/BS/87rev: see paragraph 50 of the Board of Appeal’s decision) “do not, and could not, widen the scope of ESMA’s investigatory powers and duties, which come from the ESMA Regulation”.

110. The Board of Appeal acknowledges, however, the materiality of the issues being raised by the appellant as regards the potential breach of EU law by the NCA and also the acuity of the appellant’s factual interest in the outcome of any investigation by ESMA given the ongoing enforcement proceedings. Similarly, the Board of Appeal previously thought it right to add, in its decision of 10 September 2018, *B v ESMA*, paragraph 60 (BoA D 2018 02), that “the issues raised by the appellant are of very significant concern. It is entirely understandable that the appellant and others in such a position should be seeking a remedy”.

111. In this line of reasoning, the Board of Appeal finds necessary to address the final question of whether the changes introduced by Regulation (EU) 2019/2175 to Article 17(2) of ESMA Regulation may be conducive to a different conclusion from the one adopted by the CJEU in the *SV Capital* case.

112. It must be recalled, in this context, that Article 17(2) was amended in 2019 with the effect of further structuring ESMA’s discretion as regards the undertaking of Article 17 investigations, in particular its own initiative powers of investigation under Article 17, by adding that ESMA may initiate on own initiative an investigation under Article 17 also “when this is based on well substantiated information from natural or legal persons”.

113. ESMA’s Article 17 discretion was further structured by the addition that “the Authority [instead of, as it was provided for in the original text, “may investigate the alleged breach or non-application of Union law”] shall outline how it intends to proceed with the case and, where appropriate, investigate the alleged breach or non-application of Union law”.

114. While recognizing the novelty and sensitivity of ESMA’s powers under Article 17, and the importance of careful textual, teleological, and contextual interpretation, the Board of Appeal finds it reasonable to interpret these textual revisions as leading to greater specification or structuring of how ESMA is to

exercise its discretion and power of investigation, whether on own-initiative or following a request by a party with standing to so request. The question therefore arises as to whether this change might be regarded as altering the Board of Appeal's application of SV Capital.

115. It might in particular be suggested that the distinction between those parties with standing to request an Article 17 investigation, and other parties who may only bring relevant matters to ESMA's attention, which distinction drives the Board of Appeal's jurisdiction over Article 17 decisions, has been blurred somewhat. Although there remains a textual and functional difference between the "request from one or more competent authorities, the European Parliament, the Council, the Commission or the Securities and Markets Stakeholder Group" and "well substantiated information from natural or legal persons", the amended provision of Article 17(2) of the ESMA Regulation clarifies that in both cases the Authority is not obliged to initiate an investigation, which must be made "where appropriate" but it must "outline how it intends to proceed with the case".

116. To be true, the (ambiguous) drafting of Article 17(2) does not make clear whether ESMA must "outline how it intends to proceed with the case" where "well substantiated information" has been received or if this obligation applies only to requests made by the parties identified in Article 17(2) and to ESMA's exercise of its own initiative jurisdiction. The recitals to the 2019 ESAs Regulation are silent on this point. ESMA's Rules, however, adopt a wide interpretation, as they commit ESMA, under Article 2(4) of the Rules, to outlining, regardless of who initiates a request for action, how it intends to proceed.

117. This, also in light of the functional concerns already raised in several occasions by this Board of Appeal, may, to some extent, invite a prudent reconsideration of the rigid divide, for the purposes of the reviewability of the determination not to initiate an investigation for breach of Union law, between one or more competent authorities, the European Parliament, the Council, the Commission or the Securities and Markets Stakeholder Group, on one hand, and any other natural or legal persons providing well substantiated information on the other, as indicated in paragraphs 40-41 of the General Court judgment in the SV Capital case. This would appear better consistent also with Article 5 of the Rules, which does not differentiate among these different "requesters" and, irrespective of the fact that the investigation of breach of Union law was initiated upon request of the entities referred to in Article 5(1) or on own initiative on the basis of the information provided by other natural or legal persons, stipulates that the Chairperson may close the proceedings without initiating an investigation when he/she considers that "the Request is admissible but an

investigation should not be initiated as a matter of discretion, taking into account the non-exhaustive list of factors included in Annex II”.

118. The Board of Appeal also notes the importance of Article 17 to ESMA’s objective of contributing to a sound effective and consistent level of regulation and supervision and to enhancing supervisory convergence (ESMA Regulation, Article 1(5)(a) and (g)). It notes further the importance of effective information-gathering to ESMA’s capacity to deploy Article 17 effectively and the importance, accordingly, of not deterring natural and legal persons from drawing potential breaches of EU law to ESMA’s attention given a lack of procedural equity.

119. Based upon the foregoing, in the Board of Appeal’s view, since the General Court appeared to concede that the requester listed in Article 17(2) of the ESMA Regulation and in Article 2(1) of the Rules may challenge the determination of the Chairperson not to initiate an investigation, it seems that it cannot be fully excluded - in light of the 2019 amendments to the ESAs Regulations and lacking a determination of the CJEU on the new text of Article 17(2) and given the importance of the Article 17 procedure - that the narrowing of the difference between the requesters brought about by the 2019 amendments to Article 17(2) may be conducive to the CJEU finding that, after such 2019 amendments, any requester (as defined in Article 2 of the Rules) could have *locus standi* in challenging (albeit in quite exceptional circumstances as specified below) a determination of the Chairperson under Article 5, despite the very fact that the latter has a discretion which excludes the right for parties to require it to adopt a specific position.

120. However, the Board of Appeal also finds that, unlike in the context of a procedure under Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1), where persons who have lodged a complaint have more extensive procedural rights, in this context the right to challenge, if allowed, should in any event be confined within a very narrow space, because the determination of the Chairperson of ESMA on the opening or not of the investigation is discretionary as clearly evidenced by the expression “where appropriate” in Article 17(2) of the ESMA Regulation and by Article 5(1) letter (b), of the Rules, which qualifies this conclusion “as a matter of discretion”. The Board of Appeal is also mindful in this regard of the imperatives of good administrative governance and that ESMA’s discretion must be protected to avoid it having to deal with an excessive (and potentially vexatious) volume of appeals. In this regard, it refers to its Decision in *SV Capital v EBA* where it noted that the Article 17 power was discretionary and that EBA, as a small body, was not in a position to investigate every admissible

complaint and that, assuming a correct application of its discretion, was empowered not to undertake an investigation even where the request was formally admissible (paragraph 30 and 34).

121. In the Board of Appeal's view this means that, even if one could assume that the determination of the ESMA Chairperson could be considered by the CJEU, after the 2019 amendments to Article 17(2) of the ESMA Regulation, a challengeable decision (and the Board of Appeal does not come to a conclusion in this regard as the textual revisions to Article 17(2) are not clear enough as to suggest a different application of SV Capital as long as the CJEU has not determined on this), it could not be challenged on the merits and a court (and even more so the Board of Appeal) could never substitute its own assessment for that of the Chairperson by taking into account other factors or by weighing differently the same factors taken into account by the Chairperson.

122. Accordingly, and assuming that the determination not to open an investigation might be challenged, the Board of Appeal's control on review would be strictly limited to verifying that the determination actually states its reasons as required by Article 296 TFEU and by Article 41(2)(c) of the Charter of Fundamental Rights, in such a way to enable the persons concerned to ascertain that the determination was not arbitrary but justified, also taking into consideration the non-exhaustive list of factors indicated in Annex II.

123. In the instant case, however, the appellant does not claim that the determination of the Chairperson of ESMA did not state its reasons but, instead, disputes the suitability of the factor considered decisive by ESMA, and notably that the request is more suitable to be dealt with by another person or body, such as a national court. This is, however, a factor that the Chairperson is not only fully entitled to consider (it is also listed in Annex II) but also to assess, in its full discretion, as the decisive one in weighing all possible different factors against each other. Incidentally, the Board of Appeal also holds that this determination is particularly convincing in the case at hand, because the complaint raised by the appellant raises an important question of interpretation and application of EU law for which national courts, if need be, can refer the matter to the CJEU for a preliminary ruling, and so are clearly better placed than an administrative agency like ESMA, which cannot refer the matter to the CJEU. Given that the purpose of Article 17 is to support the single rulebook and supervisory convergence, it would be quixotic were the Board of Appeal's jurisdiction over Article 17 to potentially disrupt the efficient transmission of important questions of interpretation of EU law to the CJEU.

124. By way of related observation, however, and while emphasising the discretionary nature of ESMA's powers under Article 17 (as also affirmed frequently by the Board of Appeal), the Board of Appeal notes the wide grounds

on which ESMA, in accordance with its Rules and settled EU law, can decide not to investigate a complaint. The Board acknowledges in this regard the appellant's argument to the effect that ESMA's refusal to take action on the grounds of the request being more suitable to be dealt with by another person or body (here potentially the Member State's courts given that the issue was the subject of enforcement action, which was in principle reviewable) gives ESMA a very wide discretion to refuse to investigate, given that all actions of the NCA are, in theory, subject to judicial review by the Member State's courts. The Board of Appeal also notes in this regard the brief rationale offered by the Contested Decision. It acknowledges, however, ESMA's need to operate with due procedural efficiency and, as outlined in the preceding paragraph, ESMA's full discretion in assessing and weighing the factors under its Rules, which structure its discretion as regards Article 17 investigations.

125. It must be also recalled (because it appears to be applicable also in this context by analogy) that it is well settled that the Commission can reject a complaint on the ground that the complainant can bring an action to assert its rights before national courts and authorities (see, to that effect, judgments of 18 September 1992, *Automec v Commission*, T-24/90, EU:T:1992:97, paragraphs 88 to 96; of 24 January 1995, *Tremblay and Others v Commission*, T-5/93, EU:T:1995:12, paragraphs 65 to 74; and of 9 January 1996, *Koelman v Commission*, T-575/93, EU:T:1996:1, paragraphs 78 and 79; see, also, notice on the handling of complaints, point 44, first indent, and Chapter II).

126. The above shows, in the Board of Appeal's view, that, even if one would assume that, after the 2019 amendments to the ESMA Regulation, the determination not to open an investigation might be challenged by the natural or legal person having given "well substantiated information" to ESMA claiming that the determination did not state its reasons, in the instant case the appellant made an appeal for grounds which are by far exceeding the lack of reasons. The appeal would therefore be inadmissible even if one would accept that the Board of Appeal could review under Article 60 a decision adopted under Article 17 of the ESMA Regulation not to initiate an investigation on foot of a request by a party not specified in Article 17(2).

## **The decision**

**On these grounds the Board of Appeal unanimously decides that the appeal is inadmissible.**

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

Marco Lamandini (President and  
Co-Rapporteur) (SIGNED)

Giuseppe Godano  
(SIGNED)

Niamh Moloney (Co-Rapporteur)  
(SIGNED)

Katalin Mero  
(SIGNED)

Beata Mrozowska  
(SIGNED)

Michele Siri  
(SIGNED)

On behalf of the Secretariat  
Tijmen Swank  
(SIGNED)

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