



PRESS RELEASE

Today the Board of Appeal publishes its decision in the Nordic banks' appeals from the decisions of the Board of Supervisors of ESMA in the "shadow ratings" cases

1. The appeals were brought by four Swedish banks, Svenska Handelsbanken AB, Skandinaviska Enskilda Banken AB, Swedbank AB, and Nordea Bank Abp, from decisions of the Board of Supervisors of ESMA.
2. The ESMA Board of Supervisors found that the Credit Rating Agencies Regulation (CRAR) had been negligently infringed by the banks by including "shadow ratings" in their credit research reports. It adopted supervisory measures in the form of public notices and fines of EUR 495,000 on each bank.
3. Skandinaviska Enskilda Banken AB applied to suspend the decision of the ESMA Board of Supervisors as far as it applied to it, but the Board of Appeal refused that application by its Decision of 30 November 2018.
4. In deciding the appeals, and in summary, the Board of Appeal upheld the decision of the ESMA's Board of Supervisors on the central question, which was whether the banks' credit research reports fell within CRAR, but held that the banks (which had voluntarily desisted during the course of ESMA's investigation) had not acted negligently.
5. In reaching its decision:
 - (1) the Board of Appeal rejected the banks' contention that their practice of including "shadow ratings" in their credit research reports and similar reports fell within the exclusion in CRAR which covers investment recommendations and investment research;
 - (2) the Board of Appeal rejected the banks' contention that the ESMA's Board of Supervisors' decisions were vitiated under the doctrines of legal certainty and lack of due process;
 - (3) the Board of Appeal agreed with the Board of Supervisors of ESMA on the central point arising on the appeals, namely that the activities of the appellant banks fell within the provisions CRAR with the consequence that to carry them on the banks required to be registered under CRAR;
 - (4) the Board of Appeal considered that though the banks voluntarily desisted during the course of ESMA's investigation, the Board of Supervisors of ESMA was right to find that infringements of CRAR had taken place by reason of the non-registration;

- (5) the Board of Appeal considered that the Board of Supervisors of ESMA was obliged to take supervisory measures, and since the activities had ceased, was fully entitled to take the view that public notices were appropriate;
- (6) the Board of Appeal considered that the Board of Supervisors of ESMA correctly analysed the legal requirements for the establishment of negligence, which is a precondition for imposing a fine;
- (7) the Board of Appeal differed from the ESMA's Board of Supervisors in its assessment (reflected in the public notices) of whether the banks acted negligently;
- (8) the Board of Appeal concluded in the very unusual circumstances in which the banks' practice was one which had been carried on in the Nordic debt markets for many years, it not being appreciated that CRAR impacted on this practice, and applying the high standard care required of banks, that the infringements by the banks were not committed negligently;
- (9) that being so, and it not being suggested that the infringements were committed intentionally, the Board of Appeal decided that the Board of Supervisors of ESMA could not adopt decisions imposing a fine;
- (10) accordingly, under Article 60(5) of the ESMA Regulation, the Board of Appeal remitted the cases to the Board of Supervisors of ESMA to adopt amended decisions.

Notes for editors

The Board of Appeal is a joint body of the European Supervisory Authorities (EBA, EIOPA and ESMA) together called the "ESAs". It has been introduced to effectively protect the rights of parties affected by decisions adopted by the Authorities. As an appeal body of ESMA, the Board of Appeal must decide whether the decisions of the Board of Supervisors of ESMA were correct or not, and may confirm the decisions or remit the cases to the ESMA Board of Supervisors.

The members of the Board of Appeal 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).