

## **DECISION OF THE BOARD OF SUPERVISORS TO ADOPT A SUPERVISORY MEASURE AND IMPOSE A FINE IN RESPECT OF AN INFRINGEMENT BY DANSKE BANK A/S**

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

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

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

### **Whereas:**

1. Following preliminary investigation the Supervision Department within ESMA concluded, in a report dated 15 December 2016, that in respect of Danske Bank A/S ('Danske') there were serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in Annex III to Regulation (EC) No 1060/2009.
2. On 12 January 2017 ESMA's Executive Director appointed an investigating officer ('**IIO**') pursuant to Article 23e(1) of Regulation (EC) No 1060/2009 to investigate the matter.
3. The IIO sent her initial statement of findings dated 16 June 2017 to Danske that set out her finding that Danske had committed the infringement set out at point 54 of Section I of Annex III to Regulation (EC) No 1060/2009.

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

4. By written submissions dated 3 July 2017, Danske responded to the findings of the IIO.
5. On 27 September 2017, the IIO submitted to the Board of Supervisors her file relating to the case, which included an amended statement of findings.
6. The Board discussed the IIO's findings and the case at its meeting on 14 December 2017.
7. On 2 March 2018, the Panel established by the Board to assess the completeness of the file submitted by the IIO adopted a ruling of completeness in respect of that file.<sup>2</sup>
8. The Board discussed the case further at its meeting on 22 March 2018.
9. On 17 May 2018, on behalf of the Board, ESMA sent a Statement of Findings to Danske.
10. On 8 June 2018, Danske provided written submissions to ESMA in relation to the matter.
11. The Board discussed the case further at its meeting on 11 July 2018.
12. On the basis of the file containing the IIO's findings and having considered the submissions made on behalf of Danske, the Board finds that Danske negligently committed the infringement set out at point 54 of Section I of Annex III of Regulation (EC) No 1060/2009.
13. Pursuant to Article 24 of Regulation (EC) No 1060/2009, the Board adopts a supervisory measure in the form of a public notice.
14. Pursuant to Article 36a of Regulation (EC) No 1060/2009, the Board also imposes a fine on Danske as calculated in the Annex to this Decision.

## **HAS ADOPTED THIS DECISION:**

### **Article 1**

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

Danske Bank A/S negligently committed the infringement set out at point 54 of Section I of Annex III of Regulation (EC) No 1060/2009.

## **Article 2**

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

## **Article 3**

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

## **Article 4**

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

## **Article 5**

This Decision is addressed to Danske Bank A/S, 2-12 Holmens Kanal, DK – 1092 Copenhagen K, Denmark.

Done at Paris on 11 July 2018

*[PERSONAL SIGNATURE]*

*For the Board of Supervisors*

*Steven Maijor*

*The Chair*

## ANNEX

### STATEMENT OF FINDINGS OF THE BOARD

1. Having considered the statement of findings of the IIO, the submissions made on behalf of Danske in relation to this matter and the material in the IIO's file, the Board sets out its findings and the reasons for its findings below.
2. The Board notes that ESMA sent an initial statement of findings by the Board dated 4 May 2018 to Danske by email dated 17 May 2018. By letter dated 8 June 2018, Danske provided written submissions in reply. Danske took note of the statement of findings and stated that it 'would stress that we fully acknowledge and accept ESMA's Board of Supervisors' conclusion...' Danske made no other submissions in relation to the statement of findings. These written submissions were considered by the Board together with the other submissions made on behalf of Danske.

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

##### **Legislative provisions**

3. Under specific circumstances, a credit rating agency ('**CRA**') must apply to the European Securities and Markets Authority ('**ESMA**') to be registered. Article 14(1) of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies ('**the CRA Regulation**') states<sup>3</sup> that '*A credit rating agency shall apply for registration for the purposes of Article 2(1) provided that it is a legal person established in the Union*'.
4. This provision refers to Article 2(1) of the CRA Regulation, which states that the CRA Regulation '*applies to credit ratings issued by credit rating agencies registered in the Union and which are disclosed publicly or distributed by subscription*'.
5. A 'credit rating agency' is defined by Article 3(1)(b) of the CRA Regulation as a '*legal person whose occupation includes the issuing of credit ratings on a professional basis*'.
6. A failure to apply to be registered as a CRA (where required to do so) is an infringement of Article 14(1) of the CRA Regulation. Point 54 of Section I of Annex III of the CRA Regulation provides that a '*credit rating agency, where it is a legal person established in the Union, infringes Article 14(1) by not applying for registration for the purposes of Article 2(1)*' ('**the Infringement**').
7. A constituent part of the definition of a CRA is that the credit ratings issued by it must be credit ratings as defined by Article 3(1)(a) of the CRA Regulation. Article 3(1)(a) defines a

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

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

8. The last term in this definition, that of a rating category, is defined by Article 3(1)(h) of the CRA Regulation. This Article states that a 'rating category' *'...means a rating symbol, such as a letter or numerical symbol which might be accompanied by appending identifying characters, used in a credit rating to provide a relative measure of risk to distinguish the different risk characteristics of the types of rated entities, issuers and financial instruments or other assets'*.
9. Article 3(2) of the CRA Regulation states:

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

  - (a) recommendations within the meaning of Article 1(3) of Commission Directive 2003/125/EC;*
  - (b) investment research as defined by Article 24(1) of Directive 2006/73/EC and other forms of general recommendation, such as 'buy', 'sell' or 'hold', relating to transactions in financial instruments or to financial obligations; or*
  - (c) opinions about the value of a financial instrument or a financial obligation.'*
10. Commission Directive 2003/125/EC (**'MAD'**), referred to in Article 3(2)(a) of the CRA Regulation as set out above, was repealed by Regulation (EU) No 596/2014 on market abuse (**'MAR'**), which states at Article 3(1):

*'(34) 'information recommending or suggesting an investment strategy' means information:*

  - (i) produced by an independent analyst, an investment firm, a credit institution, any other person whose main business is to produce investment recommendations or a natural person working for them under a contract of employment or otherwise, which, directly or indirectly, expresses a particular investment proposal in respect of a financial instrument or an issuer; or*
  - (ii) produced by persons other than those referred to in point (i), which directly proposes a particular investment decision in respect of a financial instrument;*

*(35) 'investment recommendations' means information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public.'*

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

*'1. For the purposes of Article 25<sup>5</sup>, 'investment research' means research or other information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers of financial instruments including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public, and in relation to which the following conditions are met:*

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

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

## Facts and analysis

12. Danske is a credit institution established in Denmark and is authorised by the Danish National Competent Authority (Finanstilsynet) to carry out banking activities, which includes issuing investment research and other forms of general research relating to transactions in financial instruments. Danske is not a registered CRA and has not applied for registration.
13. Between 1 June 2011 and 29 August 2016 ("**the relevant period**"), Danske conducted credit research activities, which included the issuing of documents that included what Danske has described as 'shadow ratings'<sup>6</sup>. According to Danske, credit research was a subset of investment research, which encompassed other products such as equity research<sup>7</sup>. These shadow ratings were part of the research reports that tended to relate to either issuers of bonds or debt instruments or those instruments themselves. A number of these reports included shadow ratings that were variously described as a 'Corporate rating', an 'Unsecured rating', a 'Danske Bank Markets' rating ("**the Ratings**")<sup>8</sup>. It appears that approximately 813 of the Ratings were issued by Danske during the relevant period.

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<sup>4</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L145, 30.4.2004, p. 1

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

<sup>6</sup> For examples of this description see Exhibit 5 to the IIO's Statement of Findings – Letter dated 10 February 2017 from Danske to the IIO, page 2, Exhibit 7 to the IIO's Statement of Findings – Letter dated 20 March 2017 from Danske to the IIO, page 1 and 2

<sup>7</sup> Exhibit 7 to the IIO's Statement of Findings – Letter dated 20 March 2017 from Danske to the IIO, page 5

<sup>8</sup> See the sample reports as Exhibits 36 - 46 to the IIO's Statement of Findings

14. Danske has stated that it started to include shadow ratings in credit investment research around 2003/2004, in order to 'meet the expectations of the investor community' that investment research produced by Nordic banks in relation to some Nordic issuers would include shadow ratings<sup>9</sup>. Danske has stated that it used shadow ratings<sup>10</sup> in its research reports 'to efficiently communicate its views on the company's credit quality', which in turn served the purpose of 'establishing an opinion on the relative value on the company's bonds'<sup>11</sup>. Danske had 'elected the same rating letters as most credit rating agencies including Standard & Poor's and Fitch'<sup>12</sup>.
15. For an entity to be found to have committed an infringement of Article 14(1), each of the following elements must be satisfied: (i) the relevant entity must be a legal person established in the Union; (ii) the legal person must have issued credit ratings as defined by Article 3(1)(a) of the CRA Regulation; (iii) the occupation of the legal person must have included the issuing of credit ratings on a professional basis (the legal person will therefore be a credit rating agency); (iv) the credit rating agency must have issued credit ratings that were disclosed publicly or distributed by subscription; and (v) the credit rating agency must not have applied for registration for the purposes of Article 2(1) of the CRA Regulation.
16. The findings of the Board are as follows.

*Legal person established in the Union*

17. The Board considers that Danske is a legal person established in the Union, specifically a limited liability company with its registered office in Copenhagen, Denmark, having branches in several EU countries, e.g., Norway, Sweden and Finland<sup>13</sup>. The evidence in the IIO's file leads the Board to conclude that Danske was responsible for the Ratings. Specifically, the Ratings were produced by analysts employed by Danske, including those relevant analysts that were located in Norway and Sweden<sup>14</sup>.

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

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<sup>9</sup> Exhibit 7 to the IIO's Statement of Findings – Letter dated 20 March 2017 from Danske to the IIO, page 4

<sup>10</sup> 'Shadow ratings' were referred to in the Supervisory Report as 'Issuer ratings and Senior Unsecured ratings'

<sup>11</sup> Exhibit 11 to the Supervisory Report – Annex to the Letter dated 21 April 2016 from Danske to ESMA Supervision Department, page 2

<sup>12</sup> Ibid, page 3

<sup>13</sup> Exhibit 11 to the Supervisory Report – Annex to the Letter dated 21 April 2016 from Danske to ESMA Supervision Department, page 1

<sup>14</sup> Exhibit 7 to the IIO's Statement of Findings – Letter dated 20 March 2017 from Danske to the IIO, Request 4), page 3

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

18. The Ratings will constitute credit ratings only if they were: (1) an opinion on the creditworthiness of one of the types of entity, issuer, financial instrument or other asset specified in the definition of a credit rating, which includes debt securities or an issuer of them; and (2) issued using an established and defined ranking system of rating categories. The CRA Regulation specifies a number of exclusions from its effect, for example, for 'investment research', which is considered below.
19. The Board considers that the Ratings were opinions on the creditworthiness of two of the types of entity, issuer, financial instrument or other asset specified in the definition of a credit rating, specifically debt instruments and the issuers of such instruments. Paragraph 133 of the IIO's Statement of Findings sets out examples of descriptions by Danske of the Ratings to that effect, for example that the "[...] *credit analyses assess the creditworthiness of issuers and obligations*[..]"<sup>15</sup>. The Board has also considered examples of the Ratings and regards them as being opinions on the creditworthiness of the item under consideration. As stated by Danske, its analysts would normally assess financial risks and credit metrics, including leverage and liquidity of the company, as well as benchmark it against rated peers<sup>16</sup>. Separate sections and tables such as 'Liquidity position', 'Financial maturity profile' and 'EBITDA margin', which would relate to an issuer's creditworthiness, are also included in the reports.
20. The Board also considers that these opinions were issued using an established and defined system of rating categories. The Board notes that Danske stated it had elected the same rating letters used by most credit rating agencies, such as Standard & Poor's and Fitch.<sup>17</sup> The sample reports reviewed by the Board appeared to include rating categories that involved rating symbols representing differing levels of risk relating to the entity, issuer, financial instrument or other asset specified in the definition of a credit rating being assessed (e.g., BB, BB-). The reports also included statements such as "*We maintain our BUY recommendation, viewing the group as an 'A-' rated company (APMM has no public rating)*."<sup>18</sup>
21. In reaching its views set out in paragraphs 19 and 20 above, the Board notes Danske's statement that its investment research reports are 'neither based on an established and defined ranking system nor do they follow a rating methodology' established by it<sup>19</sup>. The rating symbols have 'purely informative value' to convey more efficiently to investors Danske's opinions<sup>20</sup>. In the Board's view however, credit ratings do not need to be produced by using the same methodology or methodologies as those already employed by registered

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<sup>15</sup> IIO's Statement of Findings, para.133, page 30

<sup>16</sup> Exhibit 11 to the Supervisory Report – Annex to the Letter dated 21 April 2016 from Danske to ESMA Supervision Department, page 5, 6

<sup>17</sup> Exhibit 11 to the Supervisory Report – Annex to the Letter dated 21 April 2016 from Danske to ESMA Supervision Department, page 5

<sup>18</sup> For example, sample reports provided as Exhibits 37 and 38 to the IIO's Statement of Findings

<sup>19</sup> Exhibit 4 to the Supervisory Report – letter dated 21 April 2016 from Danske to ESMA's Supervision Department, page 3

<sup>20</sup> *Ibid.*, page 4



CRAs. The Board's understanding of the definition of a credit rating provided by the CRA Regulation is that the definition does not suggest that to be credit rating, a credit rating must be produced in particular way. Instead, the definition appears to focus on the product of a given process, on its qualities and characteristics. The Ratings appear to the Board to possess those qualities and characteristics.

22. The Board also notes that the Ratings were not paid for by the issuer, the creditworthiness of which, or the creditworthiness of whose instruments, was the subject of assessment. The Board understands that credit ratings produced by registered CRAs are often, but not exclusively, paid for by the relevant issuer<sup>21</sup>. Similarly to its understanding in the immediately preceding paragraph however, the Board does not consider the definition of a credit rating to require that to be a credit rating, a credit rating must be produced at the instigation of a particular party. The Board is of the view that the Ratings appear to meet the definition of a credit rating provided by the CRA Regulation.

#### Investment research, recommendations and opinions

23. Danske has stated that its Ratings are investment recommendations, investment research or opinions about the value of a financial instrument or financial obligation and are therefore excluded<sup>22</sup> from the effect of the CRA Regulation by Article 3(2)<sup>23</sup>. The provision of investment recommendations and investment research is regulated by MiFID and MAD/MAR. It is Danske's opinion that the use of 'rating-like symbols' in its investment recommendations, investment research or opinions 'cannot alone be considered sufficient' for the Ratings to be qualified as credit ratings within the meaning of the definition in the CRA Regulation<sup>24</sup>. In particular, Danske believed that Article 3(2) could 'legitimately be interpreted as exemptions from an activity that otherwise falls within the definition of "credit rating"<sup>25</sup>.
24. The Board notes the IIO's view that the legislator considered 'credit ratings' and 'investment research' to be mutually exclusive concepts. Having considered the matter, the Board considers that the legislation is not definitive as to whether 'credit ratings' and 'investment research', 'recommendations' or 'opinions' are mutually exclusive terms or if there is an overlap between them, or indeed if they are related in some other way. In reaching this view, the Board has kept in mind the principle that, when interpreting a provision of Union law, it is necessary to consider not only its wording but also its context and the objectives pursued by the rules of which it is part<sup>26</sup>. If Article 3(2) of the CRA Regulation is to be considered an exemption (although, as stated above, the Board does not consider the legislation to be definitive), it is settled case-law that it should be interpreted strictly as it

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<sup>21</sup> That is, an 'issuer-pays' model

<sup>22</sup> The Board considers that any exclusion from the effect of the CRA Regulation should be subject to the principle that it should be interpreted narrowly.

<sup>23</sup> For example see Exhibit 4 to the Supervisory Report – letter dated 21 April 2016 from Danske to ESMA's Supervision Department, page 1

<sup>24</sup> Ibid., page 2

<sup>25</sup> Exhibit 5 to the IIO's Statement of Findings – Letter dated 10 February 2017 from Danske to the IIO, page 2

<sup>26</sup> See for example the CJEU, Case C-33/11, A Oy, 19 July 2012

would constitute an exception to general principles. However, the exemption should not be construed so as to deprive it of its intended effect<sup>27</sup>.

25. The Board referred to the stated aims and objectives of the CRA Regulation. In particular, Recital 1 thereof states that it is '*essential*' that CRA activities are conducted in accordance with '*the principles of integrity, transparency, responsibility and good governance*', in order to ensure that the resulting credit ratings are '*independent, objective and of adequate quality*'. Recital 2 of the CRA Regulation also refers to the need for issued credit ratings to be of adequate quality, stressing the importance of laying down rules for that goal and for CRAs to be subject to stringent requirements.
26. In respect to the enacting terms of the CRA Regulation, the Board noted that investment research<sup>28</sup>, recommendations and opinions are not directly excluded from its scope in the same way that, for example, private ratings or credit scores are by Article 2(2)(a) and (b) respectively<sup>29</sup>. Instead, the former concepts (as defined by other legislation) '*shall not be considered to be credit ratings*' under Article 3(2). This wording did not in the Board's opinion help to determine the issue definitively, and might have been equally considered to support either the view that credit ratings, recommendations and opinions are mutually exclusive or that they may overlap. The relevant Recital of the CRA Regulation, Recital 20, also did not appear to assist as it consists of largely the same wording as Article 3(2).
27. The Board has also considered the IIO's views at paragraphs 195 to 201 of her Statement of Findings. While it is not wholly persuaded by the conclusion drawn by the IIO from the CESR advice and IOSCO Code referred to therein (i.e. the conclusion that it is clear from them that credit ratings and recommendations are distinct) the Board does take note of the Communication from the Commission on Credit Rating Agencies (2006/C 59/02)<sup>30</sup>. In particular, in this analysis of the 'issue' of CRAs (undertaken before the financial crisis that led to the adoption of the CRA Regulation), the Commission considers the relevance of MiFID to CRAs. In considering where MiFID is not applicable to the rating process, the Commission states '*In other words, the issuing of a credit rating will normally not result in the credit rating agency also providing 'investment advice' within the meaning of Annex I to the MiFID*<sup>31</sup>.' This statement perhaps suggests that there is not normally an overlap between credit ratings and recommendations, investment research or opinions and perhaps that they are distinct.
28. The Board considers, on the basis of the material before it and without expressing a firm or settled view, that it appears that a credit rating is a distinct concept from recommendations, investment research and opinions in this context. The Board notes that ESMA's

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<sup>27</sup> CJEU, Case C-33/11, A Oy, 19 July 2012, paragraph 49

<sup>28</sup> The Board notes that the definition of 'investment research' suggests it is to be considered to be a sub-set of 'recommendations'

<sup>29</sup> Article 2(2)(a) and (b) of the CRA Regulation states '(2) This Regulation does not apply to: (a) private credit ratings produced pursuant to an individual order and provided exclusively to the person who placed the order and which are not intended for public disclosure or distribution by subscription; (b) credit scores, credit scoring systems or similar assessments related to obligations arising from consumer, commercial or industrial relationships; ...'

<sup>30</sup> Communication from the Commission on Credit Rating Agencies (2006/C 59/02), OJ C 59/2 11.3.2006

<sup>31</sup> *Ibid.*, Section 3.1, page 59/5

Supervision Department has stated it ‘accepts’ that investment research can contain opinions on creditworthiness<sup>32</sup>, and that the IIO concurs with this view. The Board would also tend towards this position. It may therefore be that a distinguishing factor, but not the sole determining factor, between credit ratings and investment research is that the former uses an established and defined ranking system of rating categories.

29. If that is the case, the Board considers it is also possible that a given document could contain both investment research or a recommendation *and* a credit rating, depending on the character of the opinions put forward and the manner in which they are expressed. That is, an opinion, contained in a publicly-available document (or one distributed by subscription) that otherwise comprises investment research, which relates to the creditworthiness of an entity, issuer, financial instrument or other asset set out in the definition of a credit rating in Article 3(1)(a) of the CRA Regulation and which is issued using an established and defined ranking system of rating categories, is likely to be considered a credit rating within the scope of that Regulation.
30. The Board has reached this view, which as stated above is not settled, taking into consideration the aims of the CRA Regulation referred to in paragraph 25 above. The Board has noted that producers of investment research and other forms of recommendation will be likely to be subject to regulation under MiFID and MAR in respect of its production. Nevertheless, it seems to the Board that the CRA Regulation establishes a separate regime with distinct objectives, for example that issued credit ratings are of adequate quality. If credit ratings (that is, opinions that meet the definition of a credit rating) could be included in investment research or other recommendations published by entities not registered as credit rating agencies, it is possible that these aims (such as credit ratings being of adequate quality) might be frustrated.
31. Similarly, the Board could not accept a suggestion that investment research or recommendations could contain a rating scale and not be considered to be credit ratings, as its categorisation as a credit rating would seem to be more likely, in light of the aims of the Regulation. It follows that the legislator might indeed have intended to bring already-regulated entities within the scope of the CRA Regulation if the activities of those entities extend to the substance of that legislation.
32. As stated above, the Board's views on these issues are not settled. However, the Board has formed the view that the Ratings are credit ratings within the meaning of the CRA Regulation. It has reached this view on the basis of the facts in the case i.e. on the material in the IIO file. Considering the Ratings themselves, they would appear to the Board to fall most precisely within the CRA Regulation definition of ‘credit ratings’. This view follows from the analysis summarised in paragraphs 19 to 22 above. The Ratings do not appear to fall within the definitions of either a recommendation or investment research. In particular, the Board has noted also that the Ratings (in the sense of the rating categories) do not in themselves appear to recommend or suggest an investment strategy, which would have been expected of investment research pursuant to its definition.

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<sup>32</sup> For example see the Supervisory Report at paragraph 125, page 34

33. The Board also notes that the research reports would often state whether the relevant issuer or debt instrument had a 'public rating' i.e. a credit rating on the same issuer or instrument issued by a registered CRA. The Board considers that the reference to the two types of 'rating' (Danske's and a 'public rating') in close proximity to each other suggests that they were considered 'of a piece' i.e. to be of a similar kind or type.
34. In conclusion, the Board considers that the Ratings were credit ratings within the meaning of the CRA Regulation and therefore that Danske issued credit ratings during the relevant period.

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

35. The Board considers that Danske's occupation included the issuing of credit ratings on a professional basis. In this respect, the Board has considered the statements by the IIO on the issue in her Statement of Findings<sup>33</sup>. In particular, the Board noted that an earlier draft of the CRA Regulation<sup>34</sup> referred to the 'principal occupation' of a credit rating agency being the issuance of credit ratings, but that the final version refers simply to its 'occupation'. The Board therefore considered that the issuance of credit ratings does not have to be the *principal* occupation of a credit rating agency.
36. The Board has also considered the caselaw to which the IIO refers<sup>35</sup>. At paragraph 26 of that Judgement the Court states that '*First of all, the words 'on a professional basis'...are not synonymous with the expressions 'in the course of their business activity' or 'as a part of their business activity'...*' At paragraph 28 of the Judgement the Court states '*Lastly, the requirement that the transport [of waste, a point of issue in the Judgement] be 'on a professional basis' means that, even if Article 12 [of the relevant legislation<sup>36</sup>] does not provide that the transport of waste must be the sole or even the principal activity of the undertakings concerned, it must be a normal and regular activity of those undertakings [emphasis added]*'.  
*[emphasis added]*'.
37. Although this Judgement does not relate directly to the CRA Regulation, the Board understood from it that the phrase 'on a professional basis' involved conduct that is a 'normal and regular activity' of the undertaking in question. The Board noted that this caselaw does not appear to suggest that the undertaking should receive income directly as a result of the relevant activity.
38. In this case, the Board noted that Danske had been issuing the Ratings for a number of years, and that the research reports, which included the Ratings, were produced by a separate department, 'Credit Research', within Danske and branches in Sweden and

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<sup>33</sup> At paragraphs 117 to 127

<sup>34</sup> Exhibit 19 to the IIO's Statement of Findings

<sup>35</sup> CJEU, Commission v Italy, C-270/03, 9 June 2005

<sup>36</sup> Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p.39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p.32)

Norway (analysts located outside Denmark would report to their local management)<sup>37</sup>. This team appears to have consisted of approximately 31 people over the period at issue<sup>38</sup>. Issuing Ratings appears to have constituted a growing part of Danske's credit research over the relevant period, Ratings being included in the following approximate amounts of its credit research: 5-10% in 2010 and 2011, 10-15% in 2012, 15-25% in 2013, 20-30% in 2014, 25-35% in 2015, and 30-40% in 2016<sup>39</sup>. Danske has described its Credit Research department as an integrated part of the Debt Capital Market division<sup>40</sup>. As has been stated above at paragraph 12, 813 Ratings appear to have been issued between 1 June 2011 and 29 August 2016. Danske has stated that none of its turnover during this period can be assigned to the Ratings<sup>41</sup>.

39. In all the circumstances, the Board considers that Danske's issuing of the Ratings (which the Board considers to be credit ratings) was a normal and regular activity for it, and therefore that Danske's occupation between 1 June 2011 and 29 August 2016 included the issuing of credit ratings on a professional basis.

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

40. Danske has stated that it used a two-step distribution process for the Ratings: firstly, they were published on Danske's internal subscription page, which made them accessible to subscribers of credit research. This process also sent the Ratings via e-mail to subscribers to the following lists: (i) All Credit Research (approximately 3,132 recipients); (ii) Company Credit Research - Financials (approximately 445 recipients); (iii) Company Credit Research - Corporates (approximately 452 recipients); (iv) Credit Research Periodicals (approximately 765 recipients); and (v) Credit Handbooks (approximately 531 recipients). Secondly, the Ratings were published on Bloomberg where they would be available to subscribers to the Credit Research pages at the Danske's Bloomberg wire.<sup>42</sup> The Board considers on the basis of this evidence that Danske issued credit ratings that were disclosed publicly or distributed by subscription.

#### *Lack of application for registration as a CRA*

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

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<sup>37</sup> Exhibit 11 to the Supervisory Report – Annex to the Letter dated 21 April 2016 from Danske to ESMA Supervision Department, pages 2 and 3 and Exhibit 7 to the IIO's Statement of Findings – Letter dated 20 March 2017 from Danske to the IIO, page 3

<sup>38</sup> Exhibit 34 to the IIO's Statement of Findings

<sup>39</sup> Exhibit 9 to the IIO's Statement of Findings – Letter dated 20 April 2017 from Danske to the IIO, page 2

<sup>40</sup> Exhibit 5 to the IIO's Statement of Findings – Letter dated 10 February 2017 from Danske to the IIO, page 4

<sup>41</sup> Exhibit 7 to the IIO's Statement of Findings – Letter dated 20 March 2017 from Danske to the IIO, page 3

<sup>42</sup> Exhibit 27 to the Supervisory Report – Distribution of Credit Research

maintaining that it did not need to make such an application. The Board finds that Danske did not apply to be registered as a CRA during the period from 1 June 2011 to 29 August 2016.

42. In summary, the Board considers that during the relevant period Danske, a legal person established in the Union, was a CRA and did not apply for registration for the purposes of Article 2(1) of the CRA Regulation. The Board finds that Danske committed the infringement at Point 54 of Section I of Annex III of the CRA Regulation between the period 1 June 2011 to 29 August 2016.

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

43. The Board has previously set out its views in relation to the negligent commission of an infringement<sup>43</sup>. Negligence is established for a CRA where, as a professional firm in the financial services sector subject to stringent regulatory requirements, it is required to take special care in assessing the risks that its acts or omissions entail, and has failed to take that care. Further, as result of that failure, the CRA has not foreseen the consequences of its acts or omissions, including particularly its infringement of the CRA Regulation, in circumstances when a person in such a position who is normally informed and sufficiently attentive could not have failed to foresee those consequences<sup>44</sup>.
44. Negligence is an Union law concept in the context of the CRA Regulation, albeit one which is familiar to, and an inherent part of, the 28 Member States' legal systems, and must be given an autonomous, uniform interpretation. It would appear, from the provisions of Articles 24 and 36a of the CRA Regulation, that the term 'negligence' in the context of that Regulation requires more than a determination that an infringement has been committed. It is clear from the second subparagraph of Article 36a(1) of the CRA Regulation that a negligent infringement is not one that was committed deliberately or intentionally. This position is further supported by caselaw in which the Court of Justice of the European Union

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<sup>43</sup> See e.g. DBRS: Board of Supervisors Decision of 24 June 2015, ESMA 2015/1048; Fitch Ratings Limited: Board of Supervisors Decision of 19 July 2016, ESMA/2016/1131; Moody's: Board of Supervisors Decision dated 23 May 2017, ESMA41-137-1005

<sup>44</sup> The Board has considered the Opinion of Advocate-General Mayras in Case 26/75 General Motors Continental NV v. Commission, where it is stated that "*the concept of negligence must be applied where the author of the infringement, although acting without any intention to perform an unlawful act, has not foreseen the consequences of his action in circumstances where a person who is normally informed and sufficiently attentive could not have failed to foresee them.*" The Board has also considered Case C-308/06 The Queen on the application of: International Association of Independent Tanker Owners (Intertanko) and Others Secretary of State for Transport, para.77 (3 June 2008) where the CJEU states negligence should be understood as '*entailing an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation*'.



(CJEU) has said that negligence may be understood as entailing an unintentional act or omission<sup>45</sup>.

45. The CJEU jurisprudence suggests that the concept of a negligent infringement of the CRA Regulation is to be understood as denoting a lack of care on the part of a CRA in complying with the CRA Regulation. The Board notes the position taken by the General Court in the Telefonica case, where the General Court spoke of persons “*carrying on a professional activity, who are used to having to proceed with a high degree of caution. They can on that account be expected to take special care in assessing the risks that such activity entails*”.<sup>46</sup> Similarly the Board considers that in circumstances where, operating within the framework of a regulated industry, an entity which holds itself out as a professional entity and carries out regulated activities should be expected to exercise special care in assessing the risks that its acts and omissions may entail. The Board is of the view that a high standard of care is to be expected of a CRA.
46. The nature and extent of the requirements imposed on CRAs by Annex I of the CRA Regulation, and of the corresponding infringement provisions under its Annex III, appear to reflect the weight given to these considerations by the legislator. The Board considers that in order to ensure a high standard of care by CRAs, the acts and omissions of a CRA should be judged with these considerations in mind.
47. Applying the test described above to the facts of this case, the Board notes that in the course of her investigation the IIO made enquires of Danske as to whether it had previously assessed the potential application to it of the CRA Regulation<sup>47</sup>. The IIO asked Danske for internal documents relating to any such an assessment conducted during three periods, corresponding to the time before the date of application of the Regulation and around the times of two subsequent amendments to it (‘CRAR II’<sup>48</sup> and ‘CRAR III’<sup>49</sup>).
48. Danske replied that it had not ‘been able to recover any internal documents’ prepared prior to the introduction of the CRA Regulation regarding an assessment by it of the potential application of the Regulation. This statement also applied to any internal documents prepared around the times of the amendments to the CRA Regulation. Danske stated that shadow ratings had been included in investment research in the Nordic markets since c. 2003/2004 and ‘it was not considered an issue whether the issuance of credit research that contained a shadow rating could be continued’. Neither banks, bankers associations, nor the national supervisory authorities (to the best of Danske’s knowledge) considered the ‘introduction of the Regulation to be a hindrance to the continued market practice’<sup>50</sup>. Danske has also stated that prior to becoming aware of ESMA’s concerns in relation to the Ratings, ‘the research team had to rely on the CRA Regulation and the corresponding guidelines

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<sup>45</sup> See footnote 44 – the Intertanko case

<sup>46</sup> Case T-336/07 Telefónica, SA and Telefónica de España, SA v European Commission, para. 323

<sup>47</sup> Exhibit 6 to the IIO’s Statement of Findings– The IIO’s first Request for Information dated 3 March 2017

<sup>48</sup> Regulation EU No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies, OJ L 145, 31.5.2011, p. 30

<sup>49</sup> Regulation EU No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies, OJ L 146, 31.5.2013, p. 1

<sup>50</sup> Exhibit 7 to the IIO’s Statement of Findings – Letter dated 20 March 2017 from Danske to the IIO, pages 5 and 6

and recommendations published by ESMA..., which did not provide sufficient detail or guidance on the interpretation of the relevant exemptions<sup>51</sup>.

49. As stated above, an entity must take special care to comply with the CRA Regulation. The Board has therefore considered what steps Danske could have taken to meet this obligation. In the Board's view, such steps might have included, for example, an initial evaluation as to whether the CRA Regulation might apply to its issuing of the Ratings, the taking of legal advice on the scope and effect of the CRA Regulation and/or seeking advice from their National Competent Authority and/or ESMA on those issues. In addition to such an initial evaluation (that is, prior to the CRA Regulation's implementation), the Board considers that Danske might have been expected to subject an initial opinion to periodic review.
50. The Board takes note of Danske statements, and observes that Danske does not appear to have undertaken any initial analysis of its position in respect of the CRA Regulation prior to the legislation's implementation in 2009. Further, Danske does not appear to have conducted any subsequent analysis of its position in respect of the CRA Regulation. There is also no evidence in the file that the Danske took steps to contact either its National Competent Authority or ESMA in relation to these issues. Danske's written response to the IIO's initial statement of findings in particular did not include details of any steps in this respect<sup>52</sup>.
51. In the Board's view, there is a very limited amount of material on the file that might provide evidence of any special care that Danske has taken to comply with the CRA Regulation. The lack of documentary evidence does not assist the Board in determining whether Danske did take special care during the relevant period in assessing the risks of this activity. While this limited amount of material is not in itself evidence of negligence, the Board can take the fact of it into account when considering the test for negligence.
52. The Board notes the test for negligence set out by the IIO in her Statement of Findings and the way in which she has applied it. While taking note of the test, the Board has decided not to follow the manner in which it was applied by the IIO.
53. The Board notes that Danske appears not to have conducted any assessment of its position in relation to the CRA Regulation since its introduction. In the Board's view, however, the nature of the Ratings was such that Danske should have considered whether the Regulation might apply to it. Specifically, the Ratings are on their face very similar to the credit ratings produced by registered CRAs, being expressed in seemingly the same terms i.e. using the same established and defined rating scales. The Ratings appear to have been intended to serve a similar purpose to credit ratings, that is, to express an opinion on the creditworthiness of, in this case, issuers of debt instruments or those instruments themselves. A scale was used to allow investors to compare the relative risk of different issuers and/or their instruments. Finally, it appears on the facts that the Ratings were used in similar contexts as the credit ratings of registered CRAs. For example, as stated before,

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<sup>51</sup> Exhibit 5 to the IIO's Statement of Findings – Letter dated 10 February 2017 from Danske the IIO, page 4

<sup>52</sup> Exhibit 50 to the IIO's Statement of Findings - Letter dated 3 July 2017 from Danske to the IIO



the reference in the research reports to any ‘public rating’ by a registered CRA suggests to the Board that the two types of ‘rating’ were of a similar kind.

54. Further, if had Danske considered whether the CRA Regulation might apply to it, the Board’s view is that Danske would have undertaken an analysis of its position. Given the nature of the Ratings described above and the legal position as the Board understands it, Danske would have foreseen that the Ratings were likely to be considered to be credit ratings within the meaning of the definition of the CRA Regulation.
55. Danske appears not to have taken any steps externally, such as with its National Competent Authority or ESMA, to confirm its assessment of the risks associated with its conduct. The Board takes the view that this absence of action, which might have been expected of it given the role and expertise of those external parties, also suggests that Danske did not meet the high standard of care required of it.
56. In addition, that Danske seems not to have reviewed its position periodically might also amount in the Board’s view to a failure to take the required special care in assessing the risks involved in issuing the Ratings. The Board considers that an entity’s duty to take special care to comply with the CRA Regulation would require an active approach to the assessment of its obligations.
57. In all the circumstances, the Board considers that had Danske taken the required special care it would have identified that Danske would be likely to meet the definition of a CRA provided by the CRA Regulation and therefore that Danske should apply to be registered if it wished to issue the Ratings. The Board considers that if had it taken special care in assessing the risks of its conduct, Danske would not have failed to foresee that its issuing of the Ratings would amount to an infringement of the CRA Regulation. The Board considers that a normally informed party in the position of Danske would have foreseen the consequences of its actions. That is, in not applying to be registered as a CRA, Danske was committing an infringement of the CRA Regulation.
58. The Board considers that its findings above lead to the finding that Danske negligently committed the Infringement.
59. The failure of Danske to comply with the CRA Regulation is not explained, in the Board’s view, by any supervening circumstance or anything else of such a nature as to be unforeseeable even by a normally informed and sufficiently attentive CRA exercising special care.
60. In summary, the Board finds that Danske negligently committed the Infringement.
61. The Board does not find that the Infringement was committed intentionally as the evidence before the Board does not support such a finding.
62. The evidence before the Board has led it to conclude that towards the end of the August 2016, Danske stopped using a rating scale to summarise its opinions on the creditworthiness of the issuer or debt instrument under consideration. In particular, the evidence is that following a meeting on 26 August 2016 between Danske and ESMA, Danske instructed its staff to stop providing shadow ratings to its clients (as set out in

Danske's statement dated 29 August 2016)<sup>53</sup>. The Board therefore finds that Danske stopped issuing credit ratings within the meaning of the CRA Regulation at this point.

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

63. Article 24(1) of the CRA Regulation provides that where the Board finds that a CRA has committed one of the infringements listed in Annex III of the Regulation, the Board must adopt one or more of the supervisory measures listed in that Article<sup>54</sup>.
64. In accordance with Article 24(2) of the CRA Regulation,<sup>55</sup> the Board considers that it is appropriate to issue a public notice in respect of the Infringement. The Appendix to this Statement of Findings of the Board contains a draft of the public notice it proposes be issued.

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

65. The Board has found that Danske negligently committed the Infringement by not applying for registration for the purposes of Article 2(1) of the CRA Regulation. Article 36a(1) of the CRA Regulation therefore requires the Board to impose a fine for the Infringement.<sup>56</sup> The Board must determine the basic amount of the fine and then consider whether the basic

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<sup>53</sup> Exhibit 5 to the IIO's Statement of Findings – Letter dated 10 February 2017 from Danske to the IIO, page 3 and Exhibit 30 to the Supervisory Report – Danske Bank's Press release 'Credit News' dated 29 August 2016

<sup>54</sup> Article 24(1) provides that where it has found an infringement, ESMA's Board of Supervisors shall take one or more of the following decisions; (a) withdraw the registration of the CRA; (b) temporarily prohibit the CRA from issuing credit ratings with effect throughout the Union, until the infringement has been brought to an end; (c) suspend the use, for regulatory purposes, of the credit ratings issued by the CRA with effect throughout the Union, until the infringement has been brought to an end (d) require the CRA to bring the infringement to an end; and (e) issue public notices.

<sup>55</sup> Article 24(2) of Regulation (EC) No 1060/2009 states: '*When taking the decisions referred to in paragraph 1, ESMA's Board of Supervisors shall take into account the nature and seriousness of the infringement, having regard to the following criteria: (a) the duration and frequency of the infringement; (b) whether the infringement has revealed serious or systemic weaknesses in the undertaking's procedures or in its management systems or internal controls; (c) whether financial crime was facilitated, occasioned or otherwise attributable to the infringement; (d) whether the infringement has been committed intentionally or negligently.*'

<sup>56</sup> Paragraph 1 of Article 36a(1) of Regulation (EC) No 1060/2009 reads: '*Where, in accordance with Article 23e(5), ESMA's Board of Supervisors finds that a credit rating agency has, intentionally or negligently, committed one of the infringements listed in Annex III, it shall adopt a decision imposing a fine in accordance with paragraph 2.*'

amount of the fine should be adjusted to take account of any relevant aggravating or mitigating factors.

#### *Determination of the basic amount*

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

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

...

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

...

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

67. To calculate the basic amount of the fine to be imposed on Danske, the Board must have regard to the annual turnover of Danske in the preceding business year.
68. In 2017, Danske had a total turnover of DKK 24 489 million<sup>57</sup> (EUR 3 292 million)<sup>58</sup>.
69. Therefore, as Danske’s total turnover for the preceding business year is greater than EUR 50 million, the Board sets the basic amount of the fine for not applying for registration for the purposes of Article 2(1) of the CRA Regulation at EUR 450 000.<sup>59</sup>

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<sup>57</sup> According to the published Annual Report 2017, available at: <https://danskebank.com/-/media/danske-bank-com/file-cloud/2018/2/annual-report-2017.pdf> p.167. Figure calculated using the formula for ‘turnover’ provided by Danske in Exhibit 7 to the IIO’s Statement of Findings – Letter dated 20 March 2017 from Danske to the IIO, Request 1, pages 2 and 3

<sup>58</sup> The exchange rate calculations are based on the ECB’s reference exchange rate which states that the average exchange rate for 2017 was EUR 1 = DKK 7,4386; available at: [http://www.ecb.europa.eu/stats/policy\\_and\\_exchange\\_rates/euro\\_reference\\_exchange\\_rates/html/eurofxref-graph-dkk.en.html](http://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/eurofxref-graph-dkk.en.html)

<sup>59</sup> In accordance with Article 36a(2)(b) of the CRA Regulation

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

70. The Board considers that Danske raised issues relevant to the calculation of the fine in its letter to the IIO dated 10 February 2017, its response to the Supervisory Report<sup>60</sup>. In particular, Danske stated that it had ‘immediately instructed its staff to stop providing shadow ratings to its clients’ following a meeting with ESMA on 26 August 2016.

### *Application of aggravating and mitigating factors*

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

### Aggravating factors

72. The Board notes that point 2 in Section I of Annex IV of the CRA Regulation provides that “*If the infringement has been committed for more than six months, a coefficient of 1,5 shall apply.*” The Board has found that Danske’s infringement of not having applied for registration was committed negligently throughout the relevant period i.e. the period from 1 June 2011 until 29 August 2016. The coefficient for committing an infringement for more than six months should therefore be applied to the basic amount.
73. Having considered the material in the file including the submissions to date, the Board concludes that no further aggravating factor coefficients apply in the present case.

### Mitigating factors

74. The Board notes that Point 4 in Section II of Annex IV of the CRA Regulation provides that “*If the credit rating agency has voluntarily taken measures to ensure that similar infringement cannot be committed in the future, a coefficient of 0,6 shall apply.*” The Board has found that Danske took its own steps to end the Infringement. There is no evidence in the file to suggest that the Infringement could be committed in the future. The coefficient provided by the Point set out above should therefore be applied to the basic amount.
75. Having considered the material in the file including the submissions to date, the Board concludes that no further mitigating factor coefficients apply in the present case.

### *Resulting fine*

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

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<sup>60</sup> Exhibit 5 to the IIO’s Statement of Findings – pages 3

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

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

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

$$\text{EUR } 450\,000 \text{ (basic amount)} \times 1,5 \text{ (coefficient)} = \text{EUR } 675\,000$$

$$\text{EUR } 675\,000 - \text{EUR } 450\,000 = \text{EUR } 225\,000$$

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

$$\text{EUR } 450\,000 \text{ (basic amount)} \times 0,6 \text{ (coefficient)} = \text{EUR } 270\,000$$

$$\text{EUR } 450\,000 - \text{EUR } 270\,000 = \text{EUR } 180\,000$$

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

$$\text{EUR } 450\,000 + \text{EUR } 225\,000 - \text{EUR } 180\,000 = \text{EUR } 495\,000$$

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

## APPENDIX TO THE STATEMENT OF FINDINGS OF THE BOARD

### PUBLIC NOTICE

Danske Bank A/S ('Danske') is a credit institution established in Denmark and is authorised by the Danish National Competent Authority (Finanstilsynet) to carry out banking activities.

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

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

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

Having considered the evidence, the Board has found that Danske negligently committed an infringement of the Regulation as follows.

#### **Infringement**

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

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

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

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

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

In considering whether Danske had committed an infringement of the Regulation, ESMA reviewed Danske's conduct in appearing to issue credit ratings. In particular ESMA considered whether Danske was issuing credit ratings as they are defined by the Regulation.

## **B) Factual findings and analysis of the Board**

Between 1 June 2011 and 29 August 2016, Danske issued credit research reports as part of its credit research activities. These reports tended to relate to either issuers of bonds or debt instruments or those instruments themselves. A number of these reports included opinions that were variously described as a 'Corporate rating', an 'Unsecured rating', a 'Danske Bank Markets' rating (**'the Ratings'**). It appears that approximately 813 of the Ratings were issued by Danske during this period.

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

## **C) Finding of infringement**

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

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

## **Supervisory measure and fine**

### **Public notice**

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

### **Fine**



The fine imposed on Danske is EUR 495 000.