

## **DECISION OF THE BOARD OF SUPERVISORS TO ADOPT A SUPERVISORY MEASURE AND IMPOSE A FINE IN RESPECT OF AN INFRINGEMENT BY NORDEA BANK AB (publ)**

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

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

Having regard to Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating 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 Nordea Bank AB (publ) ('**Nordea**') 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 Nordea that set out her finding that Nordea had committed the infringement set out in point 54 of Section I of Annex III to Regulation (EC) No 1060/2009.
4. By written submissions dated 9 August 2017, Nordea responded to the findings of the IIO.

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



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 Nordea.
10. On 7 June 2018, Nordea 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 Nordea, the Board finds that Nordea 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 Nordea as calculated in the Annex to this Decision.

## **HAS ADOPTED THIS DECISION:**

### **Article 1**

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

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



**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 Nordea Bank AB (publ), 105 71 Stockholm, Sweden.

Done at Paris on 11 July 2018

*[PERSONAL SIGNATURE]*

*For the Board of Supervisors*

*Steven Maijoor*

*The Chair*



## ANNEX

### STATEMENT OF FINDINGS OF THE BOARD

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

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

##### **Legislative provisions**

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

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



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

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

9. Article 3(2) of the CRA Regulation states:

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

*(a) recommendations within the meaning of Article 1(3) of Commission Directive 2003/125/EC;*

*(b) investment research as defined by Article 24(1) of Directive 2006/73/EC and other forms of general recommendation, such as ‘buy’, ‘sell’ or ‘hold’, relating to transactions in financial instruments or to financial obligations; or*

*(c) opinions about the value of a financial instrument or a financial obligation.’*

10. Commission Directive 2003/125/EC (**‘MAD’**), referred to in Article 3(2)(a) of the CRA Regulation as set out above, was repealed by Regulation (EU) No 596/2014 on market abuse (**‘MAR’**), which states at Article 3(1):

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

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

*(ii) produced by persons other than those referred to in point (i), which directly proposes a particular investment decision in respect of a financial instrument;*

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



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

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

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

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

## **Facts and analysis**

12. Nordea is a credit institution established in Sweden and is authorised by the Swedish Financial Supervisory Authority (Finansinspektionen) to carry out banking activities, which includes issuing investment research and other forms of general research relating to transactions in financial instruments. Nordea is not a registered CRA and has not applied for registration.
13. Between 1 June 2011 and 29 August 2016 (**'the relevant period'**), Nordea conducted credit research activities, which included the issuing of documents that Nordea has described as credit or investment research reports<sup>6</sup>. These reports tended to relate either to the issuers of bonds or other debt instruments or to those instruments themselves. A number of these reports included opinions that were variously described as a 'Corporate rating', a 'Company Rating', a 'Bond rating' or a 'shadow rating' (**'the Ratings'**)<sup>7</sup>. It appears that approximately 1558 of the Ratings were issued by Nordea during the relevant period<sup>8</sup>.

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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 respectively Exhibit 5 to the IIO's Statement of Findings – Letter dated 7 February 2017 from Nordea to the IIO, section 1(d), page 2; and Exhibit 7 to the IIO's Statement of Findings – Letter dated 27 March 2017 from Nordea to the IIO, Question 3, page 2

<sup>7</sup> See the sample reports at Exhibits 35 to 43 to the IIO's Statement of Findings

<sup>8</sup> See Exhibit 34 to the IIO's Statement of Findings (the figure of 1558 excludes Ratings in research reports produced by Nordea Bank Norge ASA)



14. Nordea has stated that its predecessor group's Capital Markets unit had started to include 'shadow ratings' in its investment research in 1999, the credit quality of several Nordic issuers of commercial paper<sup>9</sup> being typically summarised using Standard & Poor's K-scale<sup>10</sup>. Nordea had adopted the 'publicly available methodology from S&P' when these issuers sought to issue longer-dated debt instruments and investors started to require 'a view on their credit risk'<sup>11</sup>. Nordea has stated that it uses shadow ratings 'merely as a common terminology with which to reference a certain credit quality as an input to [its] investment research'<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 Nordea is a legal person established in the Union, specifically a limited liability company with its registered office in Stockholm, Sweden<sup>13</sup>. The Board notes Nordea's statements that during the relevant period the Nordea Group consisted of Nordea as the parent entity, with Nordea Bank Danmark A/S, Nordea Bank Finland Plc and Nordea Bank Norge ASA as its direct subsidiaries<sup>14</sup>. Since 2 January 2017, Nordea has been the 'only Nordic banking entity of the group', following the merger of the three subsidiaries into it. On the basis of this merger, the Board is of the view that Nordea was responsible for the issuing of the Ratings. In forming this view, the Board has followed the approach of the IIO and excluded from the Ratings any opinions in research reports produced by analysts that were employed by Nordea Bank Norge ASA<sup>15</sup>.

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

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<sup>9</sup> That is, short-term debt instruments

<sup>10</sup> Exhibit 7 to the IIO's Statement of Findings – Letter dated 27 March 2017 from Nordea to the IIO, Question 7, page 4

<sup>11</sup> Ibid.

<sup>12</sup> See Exhibit 4 to the Supervisory Report – letter dated 22 April 2016 from Nordea to ESMA's Supervision Department, section C(1), page 11

<sup>13</sup> Ibid, section A(1), page 5

<sup>14</sup> Exhibit 7 to the IIO's Statement of Findings – Letter dated 27 March 2017 from Nordea to the IIO, Question 4, page 2

<sup>15</sup> See the IIO's Statement of Findings at paragraph 56



### 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. Nordea has stated that one of the primary purposes of its credit research was to 'provide investors with a thorough, comprehensible, independent and quantifiable assessment of the risks associated with investing in a security...' Further, that one way of summarizing its risk assessment is 'to provide a view on the creditworthiness of an issuer or a specific bond by applying tested and proven methodologies, established and published by the rating agencies'<sup>16</sup>. The IIO refers in her Statement of Findings at paragraph 137 to further examples of similar statements by Nordea relating its opinions on creditworthiness. The Board has also considered examples of the Ratings themselves in reaching this conclusion.
20. The Board also considers that these opinions were issued using an established and defined system of rating categories. Nordea has stated that it had not elaborated its own 'system of categories/scales' and used S&P's rating scale and ratings definitions 'as a tool for communicating' its shadow ratings<sup>17</sup>. The Ratings considered by the Board all appear to use rating categories, involving as they do rating symbols representing differing levels of risk in relation to the entity, issuer, financial instrument or other asset specified in the definition of a credit rating being assessed e.g. 'A-', 'BBB+' and 'BB-'<sup>18</sup>.
21. In reaching its views set out in paragraphs 19 and 20 above, the Board notes that in its opinion, credit ratings do not need to be produced by using the same methodology or methodologies as those already employed by registered CRAs. The Board's understanding of the definition of a credit rating provided by the CRA Regulation is that the definition does not suggest that to be credit rating, a credit rating must be produced in particular way. Instead, the definition appears to focus on the product of a given process, on its qualities and characteristics. The Ratings appear to the Board to possess those qualities and characteristics.
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>19</sup>. Similarly to its understanding in the

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<sup>16</sup> See Exhibit 4 to the Supervisory Report – letter dated 22 April 2016 from Nordea to ESMA's Supervision Department, section A(9), page 9

<sup>17</sup> Ibid sections C(3) and (4), page 13

<sup>18</sup> Respectively Exhibits 36, 35 and 41 to the IIO's Statement of Findings

<sup>19</sup> That is, an 'issuer-pays' model





immediately preceding paragraph however, the Board does not consider the definition of a credit rating to require that to be a credit rating, a credit rating must be produced at the instigation of a particular party. The Board is of the view that the Ratings appear to meet the definition of a credit rating provided by the CRA Regulation.

#### Investment research and recommendations

23. Nordea has stated that its Ratings are investment recommendations or investment research, the provision of which is regulated by MIFID and MAD/MAR, and are therefore excluded<sup>20</sup> from the effect of the CRA Regulation by Article 3(2). The Ratings would be excluded in this way even where the 'investment research material' included a 'conclusion of credit quality by reference to a scale'. Nordea has further submitted that 'a communication' cannot be both 'a credit rating and investment research'<sup>21</sup>. In the early stages of ESMA's supervisory considerations of its conduct, Nordea also suggested that it was not possible for 'only part of a communication to be classified' as an investment recommendation or investment research that would 'allow' another part of the 'same communication' to be characterised as a credit rating<sup>22</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' or 'recommendations' are mutually exclusive terms or if there is an overlap between them, or indeed if they are related in some other way. In reaching this view, the Board has kept in mind the principle that, when interpreting a provision of Union law, it is necessary to consider not only its wording but also its context and the objectives pursued by the rules of which it is part<sup>23</sup>. If Article 3(2) of the CRA Regulation is to be considered an exemption (although, as stated above, the Board does not consider the legislation to be definitive), it is settled case-law that it should be interpreted strictly as it would constitute an exception to general principles. However, the exemption should not be construed so as to deprive it of its intended effect<sup>24</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

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<sup>20</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>21</sup> Exhibit 5 to the IIO's Statement of Findings – Letter dated 7 February 2017 from Nordea to the IIO, section 2, page 2

<sup>22</sup> See Exhibit 4 to the Supervisory Report – letter dated 22 April 2016 from Nordea to ESMA's Supervision Department, page 1

<sup>23</sup> See for example the CJEU, Case C-33/11, A Oy, 19 July 2012

<sup>24</sup> CJEU, Case C-33/11, A Oy, 19 July 2012, paragraph 49



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 and recommendations are not directly excluded from its scope in the same way that, for example, private ratings or credit scores are by Article 2(2)(a) and (b) respectively<sup>25</sup>. Instead, both concepts (as defined by other legislation) *'shall not be considered to be credit ratings'* under Article 3(2). This wording did not in the Board's opinion help to determine the issue definitively, and might have been equally considered to support either the view that credit ratings and recommendations 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>26</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>27</sup>.'* This statement perhaps suggests that there is not normally an overlap between credit ratings and recommendations or investment research and perhaps that they are distinct.
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 and investment research in this context. The Board notes that ESMA's Supervision Department has stated it 'accepts' that investment research can contain opinions on creditworthiness<sup>28</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 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)

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<sup>25</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>26</sup> Communication from the Commission on Credit Rating Agencies (2006/C 59/02), OJ C 59/2 11.3.2006

<sup>27</sup> *Ibid.*, Section 3.1, page 59/5

<sup>28</sup> For example see the Supervisory Report at paragraph 121, page 35



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 does not wholly accept the suggestion that investment research or recommendations could contain a rating scale and not be considered to be credit ratings, as its categorisation as a credit rating would seem to be more likely, in light of the aims of the Regulation. It follows that the legislator might indeed have intended to bring already-regulated entities within the scope of the CRA Regulation if the activities of those entities extend to the substance of that legislation.
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 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.
33. The Board also notes that the Ratings were generally included in the research reports, where applicable, in close proximity to relevant 'Company Ratings' i.e. credit ratings on the same issuer or instrument issued by registered CRAs. The Board considers that the inclusion of the two types of 'rating' (as the Ratings were described during the relevant period) in close proximity to each other suggests that they were considered 'of a piece' i.e. to be of a similar kind or type.
34. Nordea makes a number of points in relation to this issue in its written submissions dated 7 June 2018, specifically in a section entitled 'Applicability of the CRA Regulation to Nordea's investment research'. Further to its views expressed above, the Board would not accept Nordea's specific assertion that investment research is exempted from the definition of a credit rating even where it 'includes a view on creditworthiness of an issuer and/or a rating'. The Board considers that an opinion on creditworthiness issued using a rating category



would be more likely to fall, depending on the particular facts, within the meaning of a credit rating. Nordea also states that to serve its purpose, credit research ‘will need to include an opinion on creditworthiness’. The Board however does not consider that the definitions of either investment research or of investment recommendations refer to an opinion on creditworthiness, nor do they require that such an opinion is included.

35. A similar point is relevant to Nordea’s assertion that a communication of creditworthiness ‘needs to be expressed by reference to some sort of scale’ in order ‘to be meaningful’. That is, it appears to the Board that only the definition of a credit rating, of the definitions of the terms under consideration, includes ‘an established and defined system of rating categories’. The Board does not therefore agree with Nordea’s assertion in this respect.
36. The Board notes Nordea’s statements in relation to the purpose of the CRA Regulation and the intention of the legislator in enacting it. In particular, the Board notes Nordea’s assertion that ‘had the legislator intended to impose stricter requirements on, or ban, expressions of credit quality in investment recommendations or investment recommendations’ it could have done so by a revision of MiFID or MAD. The Board also considers however that it could be equally said that had the legislator intended to exclude from the effect of the CRA Regulation entities that were already subject to regulation pursuant to MiFID and/or MAR, it could have done so expressly in the CRA Regulation. Instead, however, it appears to the Board that the CRA Regulation is concerned with the activities of entities, rather than with their existing state of regulatory supervision.
37. Finally, the Board would specifically reject Nordea’s statement in the final paragraph of this section that the Board’s conclusion is ‘predicated by a policy perspective of ESMA’. The Board has reached its findings on the basis on the evidence before it.
38. In conclusion, the Board considers that the Ratings were credit ratings within the meaning of the CRA Regulation and therefore that Nordea issued credit ratings during the relevant period.

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

39. The Board considers that Nordea’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>29</sup>. In particular, the Board noted that an earlier draft of the CRA Regulation<sup>30</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.
40. The Board has also considered the caselaw to which the IIO refers<sup>31</sup>. At paragraph 26 of that Judgement the Court states that ‘*First of all, the words ‘on a professional basis’...are*

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<sup>29</sup> At paragraphs 121 to 131

<sup>30</sup> Exhibit 19 to the IIO’s Statement of Findings

<sup>31</sup> CJEU, *Commission v Italy*, C-270/03, 9 June 2005



*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>32</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].*

41. 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.
42. In this case, the Board noted that Nordea had been issuing the Ratings for a number of years, and that credit research, which included the Ratings, was produced by an independent team of credit analysts within Nordea<sup>33</sup>. This team was located in the investment research unit that is part of the public side of Nordea Markets. Approximately 23 people appear to have been employed in this team over the period at issue<sup>34</sup>. Nordea estimates that during the relevant period approximately 9-11% of its investment research was credit research (as distinct from equity research), most of which contained a Rating<sup>35</sup>. As has been stated above at paragraph 12, on the basis of Nordea’s own statements, 1 558 Ratings appear to have been issued between 1 June 2011 and 29 August 2016. Nordea has stated that none of its turnover during this period can be assigned to the Ratings<sup>36</sup>. However, ‘the aim is for Nordea to indirectly generate revenues from its credit research activities’ by serving their customers’ needs<sup>37</sup>.
43. In all the circumstances the Board considers that Nordea’s issuing of the Ratings (which the Board considers to be credit ratings) was a normal and regular activity for it, and therefore that Nordea’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*

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

<sup>33</sup> Exhibit 7 to the IIO’s Statement of Findings – Letter dated 27 March 2017 from Nordea to the IIO, Questions 10 and 11, pages 5 and 6

<sup>34</sup> Exhibit 7 to the IIO’s Statement of Findings – Letter dated 27 March 2017 from Nordea to the IIO, Question 5, page 2 and 3

<sup>35</sup> Exhibit 7 to the IIO’s Statement of Findings – Letter dated 27 March 2017 from Nordea to the IIO, Question 8, page 4

<sup>36</sup> Exhibit 7 to the IIO’s Statement of Findings – Letter dated 27 March 2017 from Nordea to the IIO, Question 2, page 1

<sup>37</sup> See Exhibit 4 to the Supervisory Report – letter dated 22 April 2016 from Nordea to ESMA’s Supervision Department, section 8(ii), page 8



44. Nordea has stated<sup>38</sup> that its investment research, which contained the Ratings, is available over the following channels: (1) Email; (2) Web (both open and closed); and (3) via third-party distributor (Bloomberg). *[redacted due to confidentiality]* The Board considers on the basis of this evidence that Nordea issued credit ratings that were disclosed publicly or distributed by subscription.

*Lack of application for registration as a CRA*

45. It appears to the Board to be uncontested that Nordea 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 Nordea, and Nordea has been consistent in maintaining that it did not need to make such an application. The Board finds that Nordea did not apply to be registered as a CRA during the period from 1 June 2011 to 29 August 2016.
46. In summary, the Board considers that during the relevant period Nordea, 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 Nordea 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**

47. The Board has previously set out its views in relation to the negligent commission of an infringement<sup>39</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

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<sup>38</sup> See Exhibit 4 to the Supervisory Report – letter dated 22 April 2016 from Nordea to ESMA’s Supervision Department, Section D(2), pages 19 to 21

<sup>39</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



circumstances when a person in such a position who is normally informed and sufficiently attentive could not have failed to foresee those consequences<sup>40</sup>.

48. Negligence is an Union law concept in the context of the CRA Regulation, albeit one which is familiar to, and an inherent part of, the 28 Member States' legal systems, and must be given an autonomous, uniform interpretation. It would appear, from the provisions of Articles 24 and 36a of the CRA Regulation, that the term 'negligence' in the context of that Regulation requires more than a determination that an infringement has been committed. It is clear from the second subparagraph of Article 36a(1) of the CRA Regulation that a negligent infringement is not one that was committed deliberately or intentionally. This position is further supported by caselaw in which the Court of Justice of the European Union (CJEU) has said that negligence may be understood as entailing an unintentional act or omission<sup>41</sup>.
49. 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>42</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.
50. 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.
51. 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 Nordea as to whether it had previously assessed the potential application to it of the CRA Regulation<sup>43</sup>. The IIO asked Nordea for internal documents relating to any such an assessment conducted during three periods,

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<sup>40</sup> The Board has considered the Opinion of Advocate-General Mayras in Case 26/75 *General Motors Continental NV v. Commission*, where it is stated that "*the concept of negligence must be applied where the author of the infringement, although acting without any intention to perform an unlawful act, has not foreseen the consequences of his action in circumstances where a person who is normally informed and sufficiently attentive could not have failed to foresee them.*" The Board has also considered Case C-308/06 *The Queen on the application of: International Association of Independent Tanker Owners (Intertanko) and Others Secretary of State for Transport*, para.77 (3 June 2008) where the CJEU states negligence should be understood as '*entailing an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation*'.

<sup>41</sup> See footnote 40 – the Intertanko case

<sup>42</sup> Case T-336/07 *Telefónica, SA and Telefónica de España, SA v European Commission*, para. 323

<sup>43</sup> Exhibit 6 – The IIO's first Request for Information dated 3 March 2017



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>44</sup> and 'CRAR III'<sup>45</sup>).

52. Nordea has stated that when the CRA Regulation was introduced, Nordea did not do, or find reasons to do, 'any detailed analysis of the applicability' of the Regulation to its 'then already existing credit research activities'. Nordea believes that none of the other Nordic banks would have undertaken such analysis. Nordea's understanding was that the Regulation 'was not targeted at banks and their already existing activities'. It was 'therefore not foreseen, or reasonable to expect, that banks already subject to separate regulation of their research activities' would be subject to the CRA Regulation. Nordea's understanding is also that it had 'no indications from regulators, industry organisations, local legislators or other sources' at the time that the CRA Regulation would be applicable to banks. Nordea also states moreover that 'had we done a detailed analysis' it would have concluded that its credit research reports would be excluded from the scope of the CRA Regulation by virtue of Article 3(2)(b)<sup>46</sup>.
53. Nordea also did not subsequently conduct any detailed analysis of the applicability of the CRA Regulation to its credit research activities, specifically not around the time of the introduction of either CRAR II or CRAR III. The scope of the revision of the CRA Regulation for the CRAR II 'did not give reason for Nordea to reconsider its [the CRA Regulation's] applicability'. Nordea's understanding is that Article 3(2)(b) was neither debated or amended at the time. Further, this Article 'remained unchanged' with the introduction of CRAR III. In both cases, as before, Nordea does not believe it would be reasonable to expect it to have conducted an assessment of the scope of the CRA Regulation in relation to its credit research activities.
54. As stated above, an entity must take special care to comply with the CRA Regulation. The Board has therefore considered what steps Nordea 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 Nordea might have been expected to subject any initial opinion to periodic review.
55. The Board takes note of Nordea's reasons, but observes that Nordea did not undertake any initial analysis of its position in respect of the CRA Regulation prior to the legislation's implementation in 2009. Further, Nordea did not thereafter conduct any review of the conclusion drawn in this initial analysis. There is also no evidence in the file that the Nordea took steps to contact either its National Competent Authority or ESMA in relation to these

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<sup>44</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>45</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>46</sup> Exhibit 7 to the IIO's Statement of Findings – Letter dated 27 March 2017 from Nordea to the IIO, Question 14, page 8





issues. Nordea's written response to the IIO's initial statement of findings in particular did not include details of any steps in this respect<sup>47</sup>.

56. 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 Nordea has taken to comply with the CRA Regulation. The lack of documentary evidence does not assist the Board in determining whether Nordea did take special care at this time in assessing the risks of this activity. While this limited amount of material is not in itself evidence of negligence, the Board can take the fact of it into account when considering the test for negligence.
57. 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.
58. The Board notes that Nordea 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 Nordea should have considered whether the CRA 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, their inclusion in the research reports in close proximity to the 'Company Ratings' of registered CRAs suggests to the Board that the two types of 'rating' were of a similar kind.
59. Further, if had Nordea considered whether the CRA Regulation might apply to it, the Board's view is that Nordea 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, Nordea 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.
60. Nordea 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 Nordea did not meet the high standard of care required of it.
61. In addition, that Nordea 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 does not accept Nordea's contention that because the substance of the relevant parts of the CRA Regulation had not changed, there was no need to re-evaluate its position. The Board considers that an entity's duty to take

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<sup>47</sup> Exhibit 49 to the IIO's Statement of Findings - Letter dated 9 August 2017 from Nordea to the IIO



special care to comply with the CRA Regulation would require a more active approach to the assessment of its obligations.

62. In all the circumstances, the Board considers that had Nordea taken the required special care it would have identified that Nordea would be likely to meet the definition of a CRA provided by the CRA Regulation and therefore that Nordea 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, Nordea 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 Nordea would have foreseen the consequences of its actions. That is, in not applying to be registered as a CRA, Nordea was committing an infringement of the CRA Regulation.
63. The Board considers that its findings above lead to the finding that Nordea negligently committed the Infringement.
64. The failure of Nordea 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.
65. Nordea addressed the issue of negligence in its written submissions dated 7 June 2018, maintaining that it had not acted negligently. The Board notes Nordea's reference to the 'lack of guidance' in relation to Article 3(2) of the CRA Regulation and its statement that 'it is far from clear on the face of the wording that the exemption... has the meaning given to it by ESMA'. The Board does consider that the CRA Regulation is not definitive as to the relationship between 'credit ratings' and 'investment research', 'recommendations' or 'opinions'. However, the Board considers that the definition of a 'credit rating' in the CRA Regulation is clear, as are the definitions of the other terms in the relevant legislation. On the evidence, the Board considers that if Nordea had taken special care it would have identified that the Ratings were likely to fall within the definition of a credit rating, and that they did not meet the definitions of the other terms.
66. Nordea also states that it believes that if it had 'discussed the matter with the Swedish FSA [its national supervisor], they would have reached same conclusion' as Nordea did. The Board does not however consider that it can take such a hypothetical outcome into account. In deciding whether Nordea met the high standard of care expected of it, the Board should consider only those steps that Nordea did or did not take in the particular factual circumstances. Had Nordea consulted with its national supervisor, the Board would have been likely to take that fact in account in its deliberations, together with any response that Nordea had received.
67. Nordea also refers to a legal opinion it received from the law firm *[redacted due to confidentiality]*. The Board notes however that the opinion is dated 6 February 2017, that is, after the appointment of the IIO and after the end of the period of the Infringement under consideration by the Board. This opinion does not therefore appear to be relevant to the question of whether Nordea acted negligently in committing the Infringement. In respect of Nordea's interactions with ESMA, to which Nordea refers at the bottom of page 4 of its submissions, the Board notes that it was ESMA that brought these issues to Nordea's



attention. Insofar as Nordea discontinued the use of its shadow ratings, this conduct by its nature occurred at the end of the relevant period and should not therefore be considered by the Board in assessing whether the Infringement was committed negligently in the time beforehand.

68. The Board notes Nordea's reference to an impact assessment that was apparently conducted by the Ministry of Finance in Finland, to which Nordea refers on page 5 of its written submissions. As the Board understands Nordea's submissions, Nordea was not aware of the impact assessment or its conclusions during the relevant period. As the assessment appears to have had no effect on Nordea's conduct during this time, it would not in the Board's view be relevant to the issue of negligence.
69. Nordea also considers that as '[n]o one in the regulatory community raised an issue with shadow ratings', it and other banks were given a 'legitimate expectation' that the Ratings were not within the scope of the CRA Regulation. The Board does not however take the view that an absence of concerns being raised in respect of the Ratings would in itself necessarily create a legitimate expectation that their issuing would not lead to an infringement of the CRA Regulation. The Board considers that in the circumstances the creation of a legitimate expectation would require a positive act by a relevant party, rather than an absence of the sort referred to by Nordea.
70. To the extent that Nordea suggests the general understanding in the Nordic region was that the issuing of shadow ratings did not infringe the CRA Regulation, and that other financial institutions were also issuing such ratings for the Nordic markets, the Board notes that the CRA Regulation applies across the Union, not just the Nordic region. The Board considers that the Banks might have better had regard to this wider area in considering its conduct. It appears that Nordea would have had sufficient resources to have done so over the relevant period and indeed may have operated across such geographical scope.
71. Finally, in relation to Nordea's submissions on the issue of negligence, the Board would reject the assertion that it has reversed the burden of proof for regulatory compliance. The Board has reached its findings only on the basis of the evidence before it.
72. In summary, the Board finds that Nordea negligently committed the Infringement.
73. The Board does not find that the Infringement was committed intentionally as the evidence before the Board does not support such a finding.
74. In Section 4, 'Mitigating Factors', of its letter to the IIO dated 7 February 2017, its response to the Supervisory Report<sup>48</sup>, Nordea sets out the steps it has taken since being contacted by ESMA in relation to its issuing of the Ratings. In particular, on 29 August 2016, Nordea published a report entitled "Discontinuation of shadow ratings/outlooks", and withdrew its 'Shadow ratings from the market'<sup>49</sup>. The evidence before the Board has led it to conclude that Nordea stopped around this time using a rating scale to summarise its opinions on the creditworthiness of the issuer or debt instrument under consideration. The Board therefore

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<sup>48</sup> Exhibit 5 to the IIO's Statement of Findings

<sup>49</sup> Exhibit 45 to the IIO's Statement of Findings



finds that Nordea stopped issuing credit ratings within the meaning of the CRA Regulation at this point.

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

75. 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>50</sup>.
76. In accordance with Article 24(2) of the CRA Regulation,<sup>51</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**

77. The Board has found that Nordea 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>52</sup> The Board must determine the basic amount of the fine and then consider whether the basic

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<sup>50</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>51</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>52</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*

78. 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.”*

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

80. In 2017, Nordea had a total turnover of SEK 11 488 million<sup>53</sup> (EUR 1 192 million)<sup>54</sup>.

81. Therefore, as Nordea’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>55</sup>

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<sup>53</sup> According to the published Annual Report 2017, available at: <https://www.nordea.com/Images/33-247331/Annual%20Report%20Nordea%20Bank%20AB%202017.pdf> p.178. Figure calculated using the formula for ‘turnover’ provided by Nordea in Exhibit 7 to the IIO’s Statement of Findings – question 2, page 1, footnote 1

<sup>54</sup> The exchange rate calculations are based on the ECB’s reference exchange rate which states that the average exchange rate for 2017 was EUR 1 = SEK 9,6370; available at: [https://sdw.ecb.europa.eu/quickview.do?SERIES\\_KEY=120.EXR.Q.SEK.EUR.SP00.A&start=&end=&trans=AF&submitOptions.x=0&submitOptions.y=0](https://sdw.ecb.europa.eu/quickview.do?SERIES_KEY=120.EXR.Q.SEK.EUR.SP00.A&start=&end=&trans=AF&submitOptions.x=0&submitOptions.y=0)

<sup>55</sup> In accordance with Article 36a(2)(b) of the CRA Regulation



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

82. The Board considers that Nordea raised issues relevant to the calculation of the fine in its letter to the IIO dated 7 February 2017, its response to the Supervisory Report<sup>56</sup>. In particular, Nordea states that it had ‘made significant efforts to promptly implement remedial actions to secure compliance with the CRA Regulation...’ Nordea believes that its action ‘is a mitigating factor that ESMA should take into account if it considers issuing a sanction on Nordea’.

### *Application of aggravating and mitigating factors*

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

### Aggravating factors

84. The Board notes that point 2 in Section I of Annex IV of the CRA Regulation provides that “*If the infringement has been committed for more than six months, a coefficient of 1,5 shall apply.*” The Board has found that Nordea’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.
85. Having considered the material in the file including the submissions to date, the Board concludes that no further aggravating factor coefficients apply in the present case.

### Mitigating factors

86. The Board notes that point 4 in Section II of Annex IV of the CRA Regulation provides that “*If the credit rating agency has voluntarily taken measures to ensure that similar infringement cannot be committed in the future, a coefficient of 0,6 shall apply.*” The Board has found that Nordea 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.
87. Having considered the material in the file including the submissions to date, the Board concludes that no further mitigating factor coefficients apply in the present case.

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<sup>56</sup> Exhibit 5 to the IIO’s Statement of Findings – Section 4, pages 4 to 6



*Resulting fine*

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

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

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

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

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

EUR 675 000 – EUR 450 000 = EUR 225 000

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

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

EUR 450 000 – EUR 270 000 = EUR 180 000

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

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

89. In conclusion, Nordea 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**

Nordea Bank AB (publ) ('Nordea') is a credit institution established in Sweden that is authorised by the Swedish Financial Supervisory Authority (Finansinspektionen) to carry out banking activities.

Regulation (EC) No 1060/2009 on credit rating agencies ('the Regulation') lays down obligations for a Credit Rating Agency ('CRA') in the conduct of its activities. In conjunction with its role as supervisor of CRAs under the Regulation, the European Securities and Markets Authority ('ESMA') has functions and powers to take enforcement action in relation to infringements of the Regulation by CRAs. A firm that is a credit rating agency must apply to be registered if it is to issue credit ratings publicly or by subscription. Nordea 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 Nordea. It appeared that Nordea 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 Nordea 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 Nordea had committed an infringement of the Regulation, ESMA reviewed Nordea's conduct in appearing to issue credit ratings. In particular ESMA considered whether Nordea 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, Nordea issued credit research reports as part of its investment research activities. These reports tended to relate to either issuers of bonds or debt instruments or those instruments themselves. A number of these reports included opinions that were variously described as a 'Corporate rating', a 'Company Rating', a 'Bond rating' or a 'shadow rating' (**'the Ratings'**). It appears that approximately 1558 of the Ratings were issued by Nordea 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 Nordea had committed the Infringement as a consequence of issuing the Ratings.

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

## **Supervisory measure and fine**

### **Public notice**

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

### **Fine**

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



The fine imposed on Nordea is EUR 495 000.