BoA 2013-008

Decision

of the **Board of Appeal** of the European Supervisory Authorities
given under Article 60 Regulation (EU) No 1093/2010
and the Board of Appeal's Rules of Procedure (BOA 2012 002)

Appeal by

SV Capital OÜ
[Appellant]

against

European Banking Authority
[Respondent]

Decision
Ref. EBA C 2013 002

Board of Appeal

William Blair (President)
Juan Fernández-Armesto (Vice-President and Rapporteur)
Arthur Docters van Leeuwen
Noel Guibert
Katalin Mero
Bob Wessels

Place of this decision: Frankfurt/Main
24 June 2013

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Index

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I The appeal

1. This is an appeal by SV Capital OÜ, the appellant, which is an Estonian company, against the European Banking Authority, the respondent, in respect of its decision Ref. EBA C 2013 002 of 25 January 2013. The appellant's Notice of Appeal was sent by email on 14 February 2013, and received by registered mail by the respondent on 5 March 2013.

2. The appeal is brought under Article 60 of Regulation No 1093/2010 ("the EBA Regulation"). The EBA Regulation establishes the European Banking Authority (EBA). It provides in Article 6(5) for the Board of Appeal to exercise the tasks set out in Article 60.

3. Article 60(1) of the EBA Regulation provides for the right of appeal as follows:

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

4. The parties have submitted the following documents to the Board of Appeal with attachments: (1) the appellant's Notice of Appeal; (2) the respondent's Response dated 22 March 2013; (3) the appellant's Reply dated 8 April 2013; (4) the respondent's Counter Reply dated 24 April 2013; (5) observations by the appellant on the respondent's Counter Reply dated 2 May 2013. No other material (apart from legal citations) was put before the Board of Appeal.

5. Article 60(4) of the EBA Regulation provides that parties to the appeal proceedings shall be entitled to make oral representations. In its Notice of Appeal, the appellant asked to make oral representations, and requested that the language of the case including the oral hearing be English.

6. Article 60(4) of the EBA Regulation provides that if the appeal is admissible, the Board of Appeal shall examine whether it is well-founded. The respondent submits that the appeal is not admissible. In accordance with Article 11 of its Rules of Procedure on 19 March 2013, the President on behalf of the Board of

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Appeal directed that the hearing would deal both with the question of admissibility, and the substance of the appeal, should it be admissible.

7. The hearing took place on 29 May 2013 in Frankfurt, Germany. The Board of Appeal consisted of William Blair (President), Juan Fernández-Armesto (Vice-President and Rapporteur), Arthur Docters van Leeuwen, Noel Guibert, Katalin Mero and Bob Wessels. The name of the responsible Secretariat member is Kai Kosik of EIOPA. There was a transcript which was circulated to the parties, and after appropriate comments made by the parties, the transcript was incorporated into the file.

8. The appellant was represented by Maksim Greinoman of Advokaadibüroo Greinoman & Co, Tallinn, Estonia, and the respondent was represented by Joseph Mifsud, Legal Expert, and Patricia Juanes Burgos, Legal Officer.

9. At the conclusion of the hearing, the material submitted by the parties being complete, the President notified the parties that the appeal was lodged under Article 60(2) of the EBA Regulation and Article 20 of Board of Appeal's Rules of Procedure.

II Summary of the relevant facts

10. A summary of the relevant facts is as follows. By a letter of 24 October 2012 from Advokaadibüroo Greinoman & Co on behalf of the appellant, the appellant requested the EBA to initiate an investigation regarding an alleged breach of Union law.

11. In support of its request, the appellant relied on (and relies in this appeal on) Article 17 of the EBA Regulation. The text of Articles 17 is set out below so far as relevant. Among other things, it provides that where a competent authority (which in this context means the financial supervisor of a Member State), has acted in breach of Union law by failing to ensure that a financial institution satisfies the requirements of Union law, the EBA may investigate the alleged breach or non-application of Union law on its own initiative.

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12. The appellant's letter of 24 October 2012 to the EBA included fourteen attachments. The appellant alleges that it brought court proceedings in Estonia against Nordea Bank Finland PLC in the Harju County Court. The claims were in respect of the operation of a current account held with the Estonian branch of the bank. The appellant alleges that by a judgment of the court dated 22 December 2011, the Court found that two "governors" of the branch had not given truthful evidence.

13. Based on this allegation, it appears that in February 2012 the appellant asked Finantsinspektsioon (which is the Estonian Financial Supervision Authority) to take steps to remove these persons. In May 2012, Finantsinspektsioon responded to the effect that the suitability of the managers of a branch of a bank of significant importance was within the competence of the supervisory authority of the home state of the credit institution in question, in this case, Finland.

14. It appears that the appellant then raised the matter with Finanssivalvonta (the Finnish Financial Supervision Authority) which responded in July 2012 to the effect that it would not take action because it had been informed that the appellant's claims were not true.

15. In its letter of 24 October 2012 to the EBA, the appellant requested the EBA to initiate an investigation against the Estonian and Finnish Financial Supervision Authorities, because of what it alleges is their failure to remove the two named governors of the Estonian branch of Nordea Bank Finland PLC, who, in the view of the appellant, are not fit and proper persons to be key function holders in a bank.

16. The EBA's reply of 25 January 2013 (confirming an earlier email) is the decision which is the subject matter of this appeal. In the letter, the EBA referred to Article 11 of Directive 2006/48/EC, saying that its understanding was that the assessment of the suitability of the members of the management body in the management function (that is, the persons directing the business) applies to the credit institution (i.e. to Nordea Bank Finland PLC), and not to its branch. On this basis, EBA said that it understood that there was no breach of

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Union law by the two competent authorities. It furthermore explained that it had not assessed whether applicable national law contains further obligations regarding the assessment of the heads of branches of EU credit institutions, because this did not fall within the EBA's responsibility. It concluded that the complaint could therefore not be upheld.

17. The letter also said that the EBA was referring the complaint to the Finnish and Estonian authorities. It duly did so, asking to be provided with any relevant information. The material before the Board of Appeal does not contain the response of the authorities.

III The arguments of the parties

18. The respondent raised the question of the appellant's standing. It said that there was no decision addressed to Mr Greinoman, and no decision which, although in the form of a decision addressed to another person is of direct and individual concern to that person (see Article 60(1) of the EBA Regulation set out above). In response, the appellant says though literally addressed to its lawyers, Advokaadibüroo Greinoman & Co, the decision was in substance addressed to the appellant. It also referred to the EBA's Internal Processing Rules on Investigation regarding Breach of Union Law of 5 July 2012. Article 2.3 states that "Informers shall not have to demonstrate a formal interest; nor shall they have to prove that they are principally and directly concerned by the breach or non-application complained of". These points were stated but not developed by either party in their written documents.

19. The main contention between the appellant and the respondent is whether the facts *could* give rise to a breach of Union law, because otherwise Article 17 of the EBA Regulation does not apply. If as the respondent argues, Union law as to the mandatory assessment of the suitability of the management of a credit institution is limited to the persons who effectively direct the business of the credit institution under Article 11 of Directive No. 2006/48/EC, then the appellant's complaint, and therefore its appeal, is not admissible. The Board of Appeal understands the appellant to accept this reading.

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20. However, the appellant argues that the respondent was wrong to conclude that it did not have power to intervene. It argues that there can be a violation of EU law if unfit persons are appointed governors of a branch of a bank. The appellant argues that the respondent had competence to intervene, and that the complaint was admissible. The appellant identifies five aspects of Union law in respect of which it alleges a failure by the EBA to act, which constitute its five grounds of appeal. First, under Article 1 (2), (3), (5) of the EBA Regulation. Second, under Article 9(4) of Directive 2002/87/EC on financial conglomerates. Third, under Article 25 (4) of Directive 2007/64/EC on payment services. Fourth, under Articles 22 (1) 40, 42 of Directive No. 2006/48/EC on credit institutions (it argues that these provisions are to be construed in a way that individuals responsible for the management of a branch are an object of EU law). Fifth, the appellant argues that the respondent was under duty to act under Article 8 of the EBA Regulation, but by the contested decision failed to do so.

21. The respondent argues that none of these provisions apply to the suitability of managers of a branch. It argues that Article 11 of Directive 2006/48/EC on credit institutions is the only statement of Union law so far as the suitability of members of the management of a credit institution is concerned, and it only applies to the persons who effectively direct the business of the credit institution. It argues that "the question whether an Estonian branch of Nordea [bank] is governed by fit and proper individuals or not is not a matter of EU law". It is solely a matter for national law. Since the suitability of the management of a branch falls outside Union law, it argues that the complaint was not admissible, and the EBA had no power to entertain it, and nor is the appeal to the Board of Appeal admissible.

22. These are the arguments of the parties. In terms of remedies, the appellant asks the Board of Appeal to declare the appeal admissible and well-founded; to annul the decision of the EBA of 25 January 2013, and to remit the case to the EBA to review the complaint by SV Capital OÜ dated 24 October 2012 as to its substance.

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23. The respondent asks the Board of Appeal to confirm its decision of 25 January 2013. It accepts that if the Board disagrees with its arguments, the appropriate course is to remit the case under Article 60(5) of the EBA Regulation.

IV The Board of Appeal's reasons

A) The Article 60(1) point

24. As regards standing to bring an appeal, Article 60(1) of the EBA Regulation states that any natural or legal person (SV Capital OÜ is a legal person) may appeal against a decision of the EBA referred to in Articles 17, 18 and 19 (and any other decision taken by the EBA in accordance with the Union acts referred to in Article 1(2)) "which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person". This provision reflects Article 263 TFEU (more specifically its paragraph 4 ("Any natural or legal person may ... institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures").

25. The respondent referred to this issue, but it was not developed in its written material or oral representations. In its Response, the respondent says that the decision letter was addressed to Mr Maksim Greinoman, and not to the appellant. However, as the appellant says, it was clearly addressed to Mr Greinoman in his capacity as legal representative of the appellant. The Board of Appeal agrees that the decision was addressed to the appellant within the meaning of Article 60(1), and that the requirements for admissibility of appeals required by Article 60(1) have been complied with.

B) The Article 17 point

26. As the respondent rightly emphasised, the EBA does not supervise national banks. Its tasks and powers are set out in Article 8 of the EBA Regulation, and include promoting supervisory convergence in the areas of banking and payments, as well as on issues related to corporate governance, auditing and financial reporting.

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27. It has certain powers of intervention, and for present purposes the relevant power is contained in Article 17 of the EBA Regulation. This gives the EBA limited powers to (as stated in recital (28)) "... investigate alleged incorrect or insufficient application of Union law obligations by national authorities in their supervisory practice...".

28. The relevant part of Article 17 of the EBA Regulation provides that:

> "1. Where a competent authority has not applied the acts referred to in Article 1(2), or has applied them in a way which appears to be a breach of Union law, including the regulatory technical standards and implementing technical standards established in accordance with Articles 10 to 15, in particular by failing to ensure that a financial institution satisfies the requirements laid down in those acts, the Authority shall act in accordance with the powers set out in paragraphs 2, 3 and 6 of this Article.
>
> 2. Upon a request from one or more competent authorities, the European Parliament, the Council, the Commission or the Banking Stakeholder Group, or on its own initiative, and after having informed the competent authority concerned, the Authority may investigate the alleged breach or non-application of Union law."

29. In the case under appeal, the request to investigate did not come from one of the entities named in Article 17(2). The appellant is invoking the EBA's "own initiative" power to investigate the alleged breach or non-application of Union law.

30. The respondent has also emphasised, correctly, that even if the complaint is admissible, the power to investigate contained in Article 17 is discretionary. Article 17(2) provides that it *may* investigate the alleged breach or non-application of Union law, not that it must do so. As the respondent submitted, as a small body, it is in no position to investigate every admissible complaint that may be made to it.

31. There are internal rules which govern its procedures in this respect. On 5 July 2012, a Decision was adopted by the Board of Supervisors of the EBA concerning the Internal Processing Rules on Investigation regarding Breach of Union Law. It sets out among other things some non-exclusive examples of factors that the EBA will take into account when considering potential investigations. For example, a positive factor is that the alleged breach

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undermines the foundations of the rule of law because it relates to systemic infringements. A negative factor is that the request is more suitable to be dealt with by another body, such as the European Commission, or a national authority.

32. It is important to make clear that this appeal is not concerned with the discretionary element of the EBA's powers to investigate. The respondent's Counter Reply makes it plain that although the EBA's power to investigate is discretionary, because the complaint did not allege a breach or non-application of Union law, it could not and did not exercise such discretion.

33. The issue the Board of Appeal has to decide, therefore, is whether the complaint, and therefore the appeal, is inadmissible because it did not allege a breach or non-application of Union law within the scope of Article 17 of the EBA Regulation. As explained above, this depends on whether or not the respondent is correct to say that the question whether a branch of a credit institution is governed by fit and proper individuals is not a matter of EU law, but is solely a matter for national law.

34. The Board of Appeal points out that Article 17 creates a new process, and will be developed in the light of experience. Recital 27 to the EBA Regulation provides:

> "Ensuring the correct and full application of Union law is a core prerequisite for the integrity, transparency, efficiency and orderly functioning of financial markets, the stability of the financial system, and for neutral conditions of competition for financial institutions in the Union. A mechanism should therefore be established whereby the Authority addresses instances of non-application or incorrect application of Union law amounting to a breach thereof. That mechanism should apply in areas where Union law defines clear and unconditional obligations."

Views may vary as to the contents of and scope of "... areas where Union law defines clear and unconditional obligations", and only the Court of Justice of the European Union can give an authoritative interpretation. In the present case, the appeal depends solely on the scope of Union law. Although a prerequisite of the power to investigate, it is only part of the overall picture. The Board of Appeal

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considers that in appropriate cases in the future, there should in principle be no objection to the EBA expressing a decision not to investigate under Article 17 on alternative grounds. If applying its discretion properly it forms the view that it would not investigate even if the alleged breach is a breach of Union law, it should be able to frame its decision on this basis.

THE FIRST GROUND RELIED ON BY THE APPELLANT

35. The appellant's first ground raises the question as to the scope of the acts of Union law which lie within Article 17(1) of the EBA Regulation. This refers to "the acts referred to in Article 1(2)".

36. Article 1(2) sets these acts out as follows:

> "The Authority shall act within the powers conferred by this Regulation and within the scope of Directive 2006/48/EC, Directive 2006/49/EC, Directive 2002/87/EC, Regulation (EC) No 1781/2006, Directive 94/19/EC and, to the extent that those acts apply to credit and financial institutions and the competent authorities that supervise them, within the relevant parts of Directive 2005/60/EC, Directive 2002/65/EC, Directive 2007/64/EC and Directive 2009/110/EC, including all directives, regulations, and decisions based on those acts, and of any further legally binding Union act which confers tasks on the Authority."

37. The appellant relies on Article 1(3) to argue for what it calls an "all-encompassing" interpretation. Article 1(3) provides that:

> "The Authority shall also act in the field of activities of credit institutions, financial conglomerates, investment firms, payment institutions and e-money institutions in relation to issues not directly covered in the acts referred to in paragraph 2, including matters of corporate governance, auditing and financial reporting, provided that such actions by the Authority are necessary to ensure the effective and consistent application of those acts."

38. Although the appellant is correct to say that this provision in couched in mandatory terms, and includes matters of corporate governance, the Board of Appeal prefers the respondent's argument on this point. Article 17(1) applies where "a competent authority has not applied the acts referred to in Article 1(2)". As the respondent says, the last words of Article 1(3) make it clear that it is concerned with the effective and consistent application of *those* acts. Article

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1(3) cannot in our view in itself provide a basis for an investigation under Article 17(2).

THE SECOND GROUND RELIED ON BY THE APPELLANT

39. The appellant's second ground asserts a failure to apply Article 9(4) of Directive 2002/87/EC on financial conglomerates. This is one of the acts of Union law referred to in Article 1(2). Article 9(4) is part of a provision to do with internal control mechanisms, and provides for the production of information relevant for supervisory purposes. Nordea Bank Group is identified by the EBA as a financial conglomerate. However, the Board agrees with the respondent that on the question that this appeal raises, the financial conglomerates directive does not take matters further than Directive 2006/48/EC relating to the business of credit institutions. The appellant's second ground is rejected.

THE THIRD GROUND RELIED ON BY THE APPELLANT

40. The appellant's third ground asserts a failure to apply Article 25(4) of Directive 2007/64/EC on payment services. This is one of the acts of Union law referred to in Article 1(2). Article 25(4) has to do with the exchange of information between supervisory authorities, and contains a reference to branches. Again, the Board agrees with the respondent that on the question that this appeal raises, the payment services directive does not take matters further than Directive 2006/48/EC relating to the business of credit institutions. The appellant's third ground is rejected.

THE FOURTH GROUND RELIED ON BY THE APPELLANT

41. The appellant's fourth ground asserts a failure to apply Articles 22(1), 40 and 42 of Directive No. 2006/48/EC of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions. This is one of two directives comprising the Capital Requirements Directive (CRD) which is the key Directive in the banking sector. Most of the argument on the appeal concerned the effect of this directive.

42. It is noted that there is a Multilateral Cooperation and Coordination Agreement for the Nordea Group Supervisory College. This is a public document made between the competent authority responsible for the supervision of Nordea on a

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consolidated basis (the home supervisor) which is Finansinspektionen, Sweden, and the other competent authorities (the host supervisors). It is intended to facilitate the effective supervision of the Nordea banking group. One of the other competent authorities identified is "Finantsinspektsioon, Estonia, Host Supervisor of the significant branch of Nordea in Estonia". This is the branch the management of which is alleged by the appellant to be deficient.

Art. 11 of Directive No. 2006/48/EC

43. As regards the suitability of the management of a branch of a bank (in this case, a significant branch), the respondent's case on the appeal is that it is a matter governed by national law, not Union law. The respondent's case is that the only applicable provision of Union law so far as suitability of bank managers is concerned is Article 11 of Directive No. 2006/48/EC.

44. Article 11(1) provides that:

> "The competent authorities shall grant an authorisation to the credit institution only when there are at least two persons who effectively direct the business of the credit institution.
> They shall not grant authorisation if these persons are not of sufficiently good repute or lack sufficient experience to perform such duties."

45. In the phrases often used in this context, the persons concerned must be "suitable" or "fit and proper". It is to be noted that the provision only in terms applies the requirement to the time when the credit institution is being authorised. The respondent's case on the appeal is that as a matter of Union law "the fit and proper assessment is only mandatory to the persons who direct the business of a credit institution".

The EBA Guidelines

46. This area is now the subject of important guidance in the form of EBA Guidelines which were issued on 22 November 2012. They are contained in a document called, "*Guidelines on the assessment of the suitability of members of the management body and key function holders*". (Members of the management body are defined to mean members of the governing body of the credit institution. The definition of key function holder is set out below.)

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47. The Guidelines are issued pursuant to Article 16 of the EBA Regulation, and by Article 16(3), "competent authorities and financial institutions shall make every effort to comply with [them]".

48. Paragraph 2.1 explains that Article 11(1) of Directive 2006/48/EC entrusts the EBA with the task of ensuring the existence of guidelines for the assessment of the suitability of the persons who effectively direct the business of a credit institution.

Art. 22 of Directive No. 2006/48/EC

49. There follows a reference to Article 22 of Directive No. 2006/48/EC (which is the provision relied on by the appellant in this appeal). Article 22(1) provides that:

> "Home Member State competent authorities shall require that every credit institution have robust governance arrangements, which include a clear organisational structure with well defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks it is or might be exposed to, and adequate internal control mechanisms, including sound administrative and accounting procedures."

50. As regards Article 22, paragraph 2.4 of the Guidelines says:

> "Furthermore Article 22 of Directive 2006/48/EC provides that Home State competent authorities shall require every credit institution to have robust governance arrangements in place. According to Article 16 of its founding Regulation the EBA shall issue guidelines addressed to competent authorities and financial institutions to ensure common, uniform and consistent application of Union law, including Directive 2006/48/EC. The present Guidelines aim to establish harmonised criteria for the assessment of the suitability of the members of the management body as part of such governance arrangements. For the same reason the Guidelines set out uniform criteria for the mandatory assessment of key function holders by credit institutions and their discretionary assessment by competent authorities. It is important to ensure also the suitability of key function holders as those persons are responsible for the day-to-day management of the credit institution under the overall responsibility of the management body."

51. Paragraph 2.5 goes on to explain that the Guidelines are deliberately broader in scope than Article 11. It says that:

> "In summary, in order to achieve the necessary and desirable degree of harmonisation in this area these Guidelines are deliberately broader in scope than Article 11 of Directive 2006/48/EC in the following three respects: a) the Guidelines look beyond authorisation to ongoing

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suitability; b) the entities within scope include financial holding companies, and c) the persons within scope are not limited to those who effectively direct the business, but include all members of the management body as well as key function holders."

52. Thus, the Guidelines on assessment of suitability go beyond the persons who effectively direct the business of the credit institution referred to in Article 11 of the Directive. Based on Article 22, they extend to all members of the management body. They also extend to key function holders. The reason given for this approach is that key function holders have a crucial role in the day-to-day management of the business. It is important, as the Guidelines say, to ensure the suitability of key function holders because they are responsible for the day-to-day management of the credit institution under the overall responsibility of the management body.

53. In the present case, it is unlikely that the reference to the "management body" has any relevance. But the definition of "key function holders" could be relevant. The definition of "key function holders" in the Guidelines is that they are "... those staff members whose positions give them significant influence over the direction of the credit institution, but who are not members of the management body. Key function holders might include heads of significant business lines, EEA branches, third country subsidiaries, support and internal control functions". On this basis, whether particular staff members such as managers of a significant branch are "key function holders" is a question of fact.

The respondent's counter-arguments

54. The respondent argues that this is a matter that falls outside Union law for three main reasons. First, Article 11 of Directive 2006/48/EC is a complete statement of the law for these purposes. Second, the Guidelines are not legally binding and cannot extend the scope of EU law. Third, under the Guidelines the assessment of key function holders is discretionary on the part of competent authorities.

55. The Board of Appeal's conclusions on these arguments are as follows. First, in assessing the scope of Union law as to suitability requirements, account must be taken of Article 22 of Directive 2006/48/EC, which is wider in scope than

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Article 11. Under it, competent authorities must require credit institutions to have robust governance arrangements, effective processes to manage risk, and adequate internal control mechanisms. This is wide enough to cover the suitability of key function holders.

56. Second, even on the basis that the EBA Guidelines are not legally binding, they address the matter from a practical perspective, and assist in the interpretation of the scope of the provisions of Directive 2006/48/EC. It is noted that both the Finnish and the Estonian supervisory authorities have confirmed that they comply or intend to comply with the Guidelines.

57. Third, it is correct that the Guidelines set out uniform criteria not only for the mandatory assessment of key function holders by credit institutions, but also for their discretionary assessment by competent authorities. Thus paragraph 11.8 under Title 1 provides that, "Competent authorities may assess the suitability of key function holders and should ensure that the applicable process is publicly available". However, in the Board of Appeal's view, the fact that their assessment by competent authorities is discretionary, does not mean that the suitability of key function holders falls outside Directive 2006/48/EC and lies solely within the ambit of national law.

Additional arguments by appellant

58. The appellant also places reliance on Articles 40 and 42 of Directive 2006/48/EC, the latter expressly referring to branches. In this respect, the Board notes that there are other references to branches in the directive, for example in Articles 25 and 26 (dealing with the exercise of the right of establishment), and Article 30 (dealing with the powers of the competent authorities of the host Member State in respect of a branch).

59. Articles 42 of Directive 2006/48/EC provides that:

> "The competent authorities of the Member States concerned shall collaborate closely in order to supervise the activities of credit institutions operating, in particular through a branch, in one or more Member States other than that in which their head offices are situated. They shall supply one another with all information concerning the management and ownership of such credit institutions that is likely to facilitate their supervision and the examination of the conditions for their authorisation,

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and all information likely to facilitate the monitoring of such institutions, in particular with regard to liquidity, solvency, deposit guarantees, the limiting of large exposures, administrative and accounting procedures and internal control mechanisms."

60. It is noted that a reference to "administrative and accounting procedures and internal control mechanisms" also appears in Article 22(1). The Board considers that these provisions are consistent with the view we have expressed above.

61. In its decision letter of 25 January 2013, the respondent's reason for refusing to consider the appellant's complaint was that under EU law, assessment of suitability is limited to persons who effectively direct the business of the credit institution under Article 11 of Directive 2006/48/EC. For the reasons given above, the Board of Appeal considers that this was too narrow a view.

THE FIFTH GROUND RELIED ON BY THE APPELLANT

62. The appellant's fifth ground asserts a failure to act under Article 8 of the EBA Regulation. This Article sets out the tasks and powers of the EBA. The Board of Appeal does not think that this adds anything to the other grounds of appeal.

V Conclusion

63. As stated above, Board of Appeal considers that the decision was addressed to the appellant within the meaning of Article 60(1) of the EBA Regulation, and that the requirements for admissibility of appeals set out in Article 60(1) have been complied with.

64. Article 60(4) of the EBA Regulation provides that if the appeal is admissible, the Board of Appeal shall examine whether it is well-founded.

65. The issue in that respect is whether, by its decision of 25 January 2013, the respondent rightly declared the appellant's complaint inadmissible on the basis that the alleged facts did not amount to a breach or non-application of Union law as required by Article 17 of the EBA Regulation. This depends on whether the respondent correctly decided that Union law so far as suitability is concerned is restricted to the (at least two) persons who effectively direct the business of the credit institution. For reasons set out above, the Board of Appeal considers that

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it is not so restricted, and interprets Directive No. 2006/48/EC consistently with the EBA Guidelines issued on 22 November 2012 on the assessment of the suitability of members of the management body and key function holders.

66. The complaint was therefore not inadmissible on the above stated basis, which was the basis on which it was decided not to admit it. In the present case, on this limited issue, the Board of Appeal considers that the appeal is well-founded in law. Although the appellant has criticised the way in which the EBA dealt with its complaint, the Board makes it clear that it does not accept that criticism.

67. Further, as stated above, Article 17(2) provides only that the EBA may investigate an alleged breach or non-application of Union law. The Board of Appeal expresses no view as to how that discretion should be exercised, because this is a question which has not arisen on this appeal. The Board also expresses no view on whether (as the appellant alleges) the "governors" of the Estonian branch of Nordea Bank Finland PLC are to be considered as key function holders, and whether they are required to meet the fit and proper test.

68. It is agreed that if this is the view of the Board of Appeal, the appropriate course is to remit the case to the competent body of the EBA under Article 60(5) of the EBA Regulation.

69. In its Notice of Appeal, the appellant seeks an order that the EBA pays its costs of the appeal. However, the Board of Appeal considers that the EBA dealt with the complaint in an appropriate manner. The Board has only allowed one out of the appellant's five grounds of appeal. The ground on which the appeal has been allowed is one of interpretation of the applicable legal provisions. It does not in any way imply an opinion as to the underlying merits of the complaint. The Board considers that there should be no order as to costs.

VI Decision

70. For the reasons given above, the Board of Appeal unanimously decides:

1. The appeal is admissible.

2. The case is remitted to the competent body of the EBA, for such competent body to adopt the appropriate decision in accordance with the findings of this appeal.

3. Each party shall bear its own costs.

71. The Secretariat is instructed to forthwith send a certified copy of this Decision to the parties, informing them of the right of appeal under Article 61 of the EBA Regulation, and to file the original in the Secretariat's records.

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

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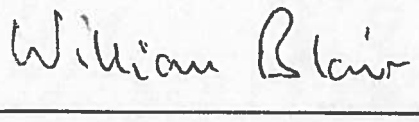
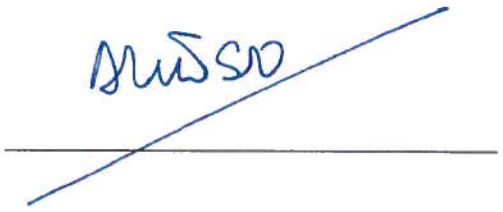
William Blair (President)



Juan Fernández-Armesto (Vice-President and Rapporteur)



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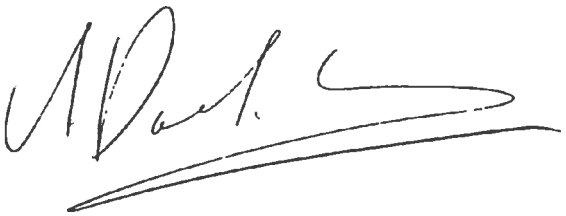
Arthur Docters van Leeuwen



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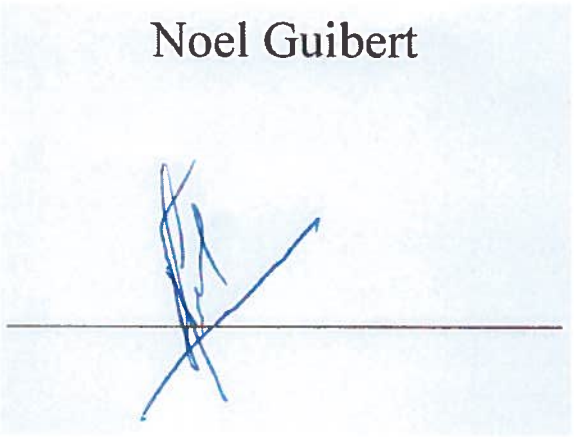
Noel Guibert



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Katalin Mero

Katalin Mero

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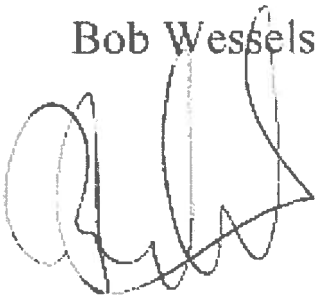
Bob Wessels



On behalf of the Secretariat

Kai Kosik