# 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. BoA 2014 - C1 - 02**

**Board of Appeal**

William Blair (President)
Juan Fernández-Armesto (Vice-President and Rapporteur)
Lars Afrell
Noel Guibert
Katalin Mero
Bob Wessels

Place of this decision: Frankfurt/Main

14 July 2014

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## I The appeal

1. This is an appeal by SV Capital OÜ, the appellant, which is a company incorporated under the laws of Estonia, against the European Banking Authority, the respondent, in respect of its decision of 21 February 2014. This is the second appeal to be considered by the Board of Appeal in this matter between the same parties. The appellant's Notice of Appeal was sent by email on 31 March 2014, and the hardcopy by registered mail.

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 as above; (2) the respondent's Response sent on 6 May 2014 (a short extension being allowed for service at the respondent's request because of the Easter public holiday; (3) the appellant's Reply dated 20 May 2014; (4) as regards disclosure of documents, the respondent's letter dated 3 June 2014, the appellant's response dated 11 June 2014, and the respondent's letter of 13 June 2014. No other material (apart from legal citations) was put before the Board of Appeal, except for further material emailed to the Board of Appeal on 27 June 2014, and the appellant's objection to that material dated 28 June 2014.

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 this decision the Board of Appeal deals both with the question of admissibility, and the substance of the appeal, should it be admissible.

7. The hearing took place on 27 June 2014 in Frankfurt, Germany. The Board of Appeal consisted of William Blair (President), Juan Fernández-Armesto (Vice-President and Rapporteur), Lars Afrell, Noel Guibert, Katalin Mero and Bob Wessels. (Lars Afrell was alternate to Arthur Docters van Leeuwen who was prevented by illness from sitting. Neither party raised an objection.) The name of the responsible Secretariat member is Kai Kosik of EIOPA. There was a transcript which was circulated on 10 July to the parties and incorporates comments received.

8. The appellant was represented by Maksim Greinoman of Advokaadibüroo Greinoman & Co, Tallinn, Estonia, and the respondent was represented by Jonathan Overett Somnier and Zoi Jenny Giotaki of the EBA, assisted by Filip Tuytschaever of Contrast European & Business Law.

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 Article 17 of the EBA Regulation which 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".

12. The appellant's case is that it brought court proceedings in Estonia against Nordea Bank Finland PLC ("the bank") 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 says 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, in February 2012 the appellant asked Finantsinspektsioon (which is the Estonian Financial Supervision Authority) to take steps to remove these two individuals. 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, i.e. the bank, in question, in this case, Finland.

14. 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 request had been cancelled because the 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 individuals as 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. By letter of 17 January 2013, the appellant sent the respondent a printout from the Estonian Public Broadcasting website saying that an issue as to wrongdoing on the part of a third named individual had not yet been resolved. This individual was said to be a former governor of the Bank of Estonia, who "now runs Nordea Bank in Estonia".

17. The EBA replied on 25 January 2013 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 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.

18. The appellant appealed to the Board of Appeal. The respondent contended that the appeal was inadmissible because there was no decision addressed to the appellant, and no decision which, although in the form of a decision addressed to another person was of direct and individual concern to that person. The respondent further contended that 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, and the appellant's complaint, and therefore its appeal, was not admissible.

19. By its decision of 24 June 2013 (BoA 2013-008; Ref. EBA C 2013 002), the Board decided that the appeal was admissible. The Board decided that 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 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, the Board decided, to cover the suitability of key function holders.

20. Accordingly, the case was remitted to the competent body of the EBA, for it to adopt the appropriate decision in accordance with the findings of the appeal.

21. On 21 February 2014, the respondent made a "Decision of non-initiation of investigation". It stated that it had balanced the investigation factors in its Internal Processing Rules on Investigation regarding Breach of Union Law, that there was no substantial evidence that led it to believe that there was a breach undermining the rule of law, and that according to the information provided by the Finnish supervisor, neither of the two named individuals were key function holders, and that the alleged breach with regard to the third individual was better dealt with by the Finnish supervisor in cooperation with the Estonian supervisor if required. In view of these considerations, the respondent came to the conclusion that there were insufficient grounds for initiating an investigation for a breach of Union law. This is the decision which is the subject of the present appeal.

## III The arguments of the parties

22. The appellant argues that its appeal is admissible, and that the Board should reject the respondent's objections to admissibility, and in its Notice of Appeal relies on the following grounds in support of its appeal:

(1) The contested decision is vitiated by errors of fact. This is on the basis that all three named individuals were directors of the branch, and that the respondent erroneously proceeded on the basis that they were not "key function holders".

(2) The respondent incorrectly applied its discretionary power. It is contended that Estonia is notorious for failing to investigate failings in the financial sector, and that taken as a whole, the material shows the failure is systemic, that it undermines the foundation of the rule of law, and that the decision not to investigate was arbitrary and manifestly wrong. Further, the respondent failed properly to apply its own Internal Processing Rules on Investigation regarding Breach of Union Law. The fact that there was not a separate complaint to the supervisors as regards the third named person does not matter because they were well aware of the issue.

(3) The respondent breached Article 39 (1) of the EBA Regulation by not making it possible for the appellant to express its views on the matter and to correct errors of fact and obvious flaws in argumentation, which appeared in the contested decision.

(4) The respondent breached Articles 3.3, 3.4 and 3.5 of the Internal Processing Rules on Investigation regarding Breach of Union Law as the Chairperson did not inform the EBA's Alternate Chairperson about his decision not to initiate an investigation before making the final decision.

(5) The EBA misused its powers and acted unreasonably and in breach of Article 41(1) of the Charter of Fundamental Rights of the European Union since it had all information it needed to make a definite decision

upholding or rejecting the complaint rather than declining to investigate. In that regard, the appellant sought disclosure of the exchanges between the respondent and the Finnish and Estonian supervisors as regards this matter.

23. The respondent argues that the appeal is inadmissible, because:

(1) The letter of the EBA of 21 February 2014 is not a reviewable act within the meaning of Article 60 and 61 of the EBA Regulation and Article 263 TFEU.

(2) The appellant does not have a direct and individual concern in appealing it.

(3) The respondent is not obliged to open an investigation, even if the appellant were to show a direct and individual concern.

24. As regards the appellant's five grounds, the respondent argues as follows:

(1) The respondent did not err in fact, but legitimately reached its conclusion not to open an investigation based on the information which it received regarding the status of the three individuals referred to by the informer, and without its own assessment and decision on that status.

(2) The respondent did not commit a manifest error of appraisal of the facts and legal particulars adduced by the appellant, and it gave a proper statement of reasons for closing the file on the request in light of its power to apply different degrees of priority.

(3) The respondent did not violate Article 39(1) of the EBA Regulation, as the letter of 21 February 2014 is not a decision as referred to in that provision.

(4) The respondent did not breach Article 3 of the Internal Processing Rules on Investigation regarding Breach of Union Law when adopting the letter, even on the assumption that this provision applies, which is not the case.

(5) The appellant does not adduce any evidence of its claim that the respondent would have infringed Article 41(1) of the Charter of Fundamental Rights of the European Union or Article 11 of the EBA Code of Good Administrative Behaviour. The respondent contended that disclosure should not be ordered primarily on confidentiality grounds, and the availability of a procedure under the EBA's access to documents rules.

25. As regards the disclosure sought by the appellant, the Board ruled that it would decide the issue having heard the parties' arguments on the questions of admissibility.

## IV The Board of Appeal's reasons

### *A) Admissibility*

26. 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".

27. This provision reflects Article 263 TFEU (more specifically its paragraph 4), that states "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".

28. On the first appeal, which resulted in the Board's decision of 24 June 2013 (BoA 2013-008; Ref. EBA C 2013 002), the respondent argued that the decision letter was addressed to Mr Maksim Greinoman, and not to the appellant. However, it was clearly addressed to Mr Greinoman in his capacity as legal representative of the appellant, and the Board did not accept the respondent's argument that the appeal was inadmissible on this ground.

29. On the appeal at hand, the respondent's arguments have been different. It argues that the letter of 21 February 2014 did not create a reviewable act. It accepts that it is open to everyone to submit information to the EBA and to ask for an "own initiative" investigation under Article 17 of the EBA Regulation. However, the decision whether or not to make such an investigation must lie with the EBA, otherwise it would be obliged to investigate each complaint.

30. The respondent argues that a formidable legal burden lies on an appellant to show that a decision of this kind is reviewable. The respondent submits that it is not reviewable because (1) the EBA has a discretion under Article 17(2), and the

letter of 21 February 2014 was purely informative in that respect; (2) The communication of advice is not subject to an appeal merely because it has been addressed to a particular person; (3) A refusal to act cannot be regarded as producing legal effects if the Union body is not obliged to open investigations proceedings. (4) The appellant does not have an individual interest in the matter and the decision is not of "direct and individual concern" to the appellant. Article 17 is a public interest tool, the respondent concludes, and not a means of satisfying individual claims.

31. The appellant argues that it is the substance not the form of the decision that matters and that in the present case the letter of 21 February 2014 is clearly marked "Decision". It is addressed to the appellant, and that is sufficient under the terms of Article 60 of the EBA Regulation. In the EBA's Internal Processing Rules on Investigation regarding Breach of Union Law, the EBA is to inform an "informer" of alternative forms of redress, such as recourse to the European Ombudsman. A party in the position of the appellant alleging measures or practices indicating breach or non-application of Union law by a competent authority is called an "informer". If that form of redress is available, an appeal to the Board of Appeal should be available. Reference was made to other European instruments such as Regulation (EC) No 1367/2006 and the Commission Decision of 30 April 2008.

32. The Board's conclusion on this matter is as follows. First, the Board notes that Article 60 of the EBA Regulation permits any person to appeal an EBA decision which is addressed to it. In this case, the letter of 21 February 2014 is labelled "Decision" and is addressed to appellant. *Prima facie* the Regulation seems to provide appellant with the right to appeal.

33. On the other hand, in *T-Mobile Austria GmbH v Commission* Case C-141/02P, the Court held that a mobile phone company did not have standing to bring an action challenging the Commission's decision to refuse to take action against Austria for an alleged breach of the competition rules. The Board considers that this supports the respondent's contention that that notification by the EBA to a person that it will not exercise its "own initiative" powers to investigate an

alleged breach or non-application of Union law will not normally constitute a reviewable decision.

34. However, the present case is unusual. In its decision of 24 June 2013, the Board rejected the respondent's objection to admissibility on the basis of the arguments then advanced to it. Following that decision, the EBA issued a decision dated 15 October 2013 to the effect that the complaint was admissible. The Board considers that in this particular case, the decision of 21 February 2014 went beyond a mere communication of information or advice of non-action. The Board's view is that this was a reviewable decision addressed to the appellant within the meaning of Article 60 EBA Regulation, and as such, the appeal against it is admissible. In those circumstances, the Board need not decide the parties' contentions as to whether the decision was of "direct and individual concern" to the appellant.

***B) The appellant's grounds of appeal***

*(1) Errors of fact*

35. The appellant's case is that the respondent approached its decision on a factually incorrect basis. It submits that publicly available information shows that in Estonia foreign companies have to appoint directors for a branch (Article 385 Commercial Code of Estonia). The commercial register shows that each of the three named individuals are (or were) directors of the branch. In such positions, there are "exceptionally strong grounds to consider them key function holders". The appellant argues that the respondent disregarded such evidence in reaching the opposite decision. Rather than treating the question as one of fact, the respondent wrongly treated it as a matter of the law of Finland.

36. The respondent argues that it did not decide that the two named individuals were key function holders. It did not decide that question, but relied as it was entitled to rely upon information provided by the Finnish supervisor that neither was a key function holder within the meaning of the EBA Guidelines. The respondent did not make a factual error, because it did not independently assess the status of the three individuals in reaching its conclusion on whether to open an investigation or not. The view of the Finnish supervisor was not "manifestly

erroneous". The Finnish supervisor did not deal with the third named individual, who had not been named in the appellant's complaint.

37. The Board's conclusion on this issue is as follows. The appellant's case on breach of Union law depends on the assertion that the named individuals are "key function holders", and that they are not fit to be in such positions. As the Board said in paragraph 53 of its first decision of 24 June 2013, whether particular staff members such as managers of a significant branch are "key function holders" within the EBA Guidelines is a question of fact.

38. The available material was the subject of discussion with the parties at the hearing. It is correct (as the appellant points out) that all three named individuals (and others) are or were identified as directors of the branch on the public register. However, it does not follow that these individuals were key function holders within the meaning of the Guidelines. For example, a branch officer may be a signatory capable of binding the bank, without being a key function holder for regulatory purposes. Nor does the Board consider that descriptions of their role such as "regional senior project manager" or "head of strategy" (information which can be found on the Nordea website), has in itself any great significance in this respect.

39. The question in the Board's view is whether the respondent was entitled to rely on the views expressed by the Finnish supervisor in this respect. The case law indicates that it would not be entitled to do so if there had been a manifest error of appraisal on the part of the supervisor (*Haladjian Frères SA v Commission*, Case T-204/03), or the supervisor's view was based on factual premises which were manifestly erroneous (*BUPA v Commission* Case T-289/03). However, that was not in the Board's view the position here. It follows that the respondent was entitled to rely on the view of the Finnish supervisor that the two named individuals were not key function holders of the bank.

40. The Finnish supervisor does not appear to have expressed a view as to the status of the third named individual (who was not the subject of the original complaint). The Board agrees with the appellant that this is not entirely

satisfactory in the light of material that suggests that the individual was running the branch. If that is the case, the EBA Guidelines on key function holders may be relevant since this is a significant branch (see paragraph 42 of the Board's decision of 24 June 2013). However, this information consists of press reports from the internet which cannot carry great weight, and some of which came late, and this is not factually established in the Board's view.

41. The Board's conclusion is that this ground of appeal is not established.

*(2) Failure properly to exercise discretion*

42. 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.

43. The Board notes that the matter in the present appeal is not a case in which there has been a request for an investigation of an alleged breach or non-application of Union law from a national supervisory authority, or from the European Parliament, the Council, the Commission or the Banking Stakeholder Group. The contested decision is that the respondent failed to investigate the alleged breach Union law on its own initiative.

44. The respondent applies its Internal Processing Rules on Investigation regarding Breach of Union Law which set out admissibility criteria in relation to requests to open investigations including those that are received from third parties, and factors that the EBA will take into account when considering potential investigations.

45. The Rules state that an informer does not have to demonstrate a formal interest, nor do they have to prove that they are principally and directly concerned by the breach or non-application complained of.

46. Following receipt of all necessary information from the competent authority concerned, the EBA's Chairperson has to decide whether to initiate an investigation, having regard to the non-exhaustive list of factors set out in Annex 2 of the Internal Processing Rules. These set out positive factors, such as where the alleged breach "undermines the foundations of the rule of law" or is systemic, and negative factors such as where the request appears frivolous or vexatious.

47. It is not suggested that these Internal Processing Rules are deficient in any way. Also it is not disputed by the appellant that the respondent has a discretion under Article 17 of the EBA regulation whether or not to investigate an alleged breach or non-application of Union law. Further (as appears from case law examined at the hearingthe Board considers that the EBA is entitled to set priorities in this regard (*AEPI Elliniki v Commission* Case C-425/07 P). Otherwise, the EBA could face an unmanageable number of complaints.

48. The appellant's argument is that Estonia is notorious about failing to investigate wrongdoing in the financial sector, and that the Estonian supervisor is unwilling to provide effective supervision which is a structural problem amounting to systemic infringement. However, to bring its complaint within the EBA Regulation, it has to show that a breach of Union law has occurred. As stated, it seeks to do this on the basis that unsuitable people are in the position of key function holders with Nordea Bank, and the national supervisors are not taking the required steps.

49. In that regard, the evidence that the appellant advances is as follows. A dispute arose when the current account of a company called Instmark OÜ was frozen by Nordea in the context of alleged money laundering. Instmark OÜ's claim was assigned to SV Capital OÜ, the appellant. This ultimately resulted in a

judgment of the Harju County Court in Tallinn, Estonia, dated 22 December 2011. In that Judgment, Judge Meeli Kaur found that "the declaration of [Nordea] that [Nordea] was not in possession of the contract entered into between OOO FinansGrupp and Instmark OÜ on 01.12.2006 is not true". The declaration was a letter from Nordea to the Harju County Court signed by the two named individuals. The claim against Nordea was ultimately unsuccessful, seemingly as the damages claimed were not foreseeable (although the court concluded that Nordea's actions in freezing the account were unlawful).

50. Clearly, presenting untruthful evidence to a court is a serious matter, but the Board notes that so far as the two named individuals are concerned, the judgment does not appear to go beyond a statement that the content of the relevant letter was incorrect, and there does not appear to be a finding of dishonesty or fraud. The Board does not consider it to be reasonably arguable that the failure to investigate shows a failure on the part of the Finnish or Estonian supervisors amounting to a breach of EU law "undermining the foundation of the rule of law" as the appellant contends.

51. The appellant has produced a press article published on 12 March 2014 which suggests that a criminal case has been commenced in Estonia, which it appears will concern behaviour by the third named individual. This is potentially a matter of concern, but this development came after the respondent reached its decision, and cannot invalidate it.

52. As to the test to be applied on an appeal against the EBA's decision not to initiate an "own initiative" investigation, the respondent says that there will be a high threshold, as where the EBA based its view on materially incorrect facts, committed a manifest error of appraisal or misused its discretionary powers. Similarly, the appellant accepts that the case must be one in which the EBA incorrectly applied its discretion, resulting in a manifestly wrong decision.

53. The Board agrees that there is a high threshold, but it need not decide this issue definitively, because on no view is the material adduced by the appellant sufficient to show that the EBA exercised its discretion wrongly. There are

concerning features about this case, but the Board considers that the evidence shows that the refusal by the EBA to commence an own initiative investigation was a reasonable one in the circumstances.

54. In the Board's view, none of the other matters relied on by the appellant invalidate the respondent's discretionary decision. The reference in the letter of 21 February 2014 to "balancing the investigation factors of Annex II of EBA Internal Rules" does not suggest that no other factors have been considered. The Board sees no basis for concluding that relevant arguments were not taken into account, nor that there is any ground for the suggestion that the respondent erroneously declined to investigate a systemic infringement. Nor, in the Board's view, was the decision an arbitrary one. With regard to the third named individual, the respondent's opinion that the more general issue of the application of the EBA Guidelines for the assessment of suitability of key function holders was more suitably dealt with through the peer review procedure was a reasonable one in the circumstances.

55. The Board's conclusion is that this ground of appeal is not established.

*(3) The Article 39(1) point*

56. The appellant's case is that the respondent breached Article 39(1) of the EBA Regulation, which requires that "before taking the decisions provided for in this Regulation, the [EBA] shall inform any named addressee of its intention to adopt the decision, setting a time limit within which the addressee may express its views on the matter, taking full account of the urgency, complexity and potential consequences of the matter".

57. It is not in dispute that this procedure was not followed in respect of the decision of 21 February 2014. The respondent argues that there is no breach of Article 39(1), because there has been no "decision" capable of producing binding legal effect. However, as set out above, the Board has not accepted this contention on the particular facts.

58. In the Notice of Appeal, the appellant suggests that the question is whether the fact that Article 39 was not followed was a material breach of process. The Board considers that that this approach is the right one when considering whether the decision is invalidated.

59. Whether a breach of process of this kind is material depends on all the facts. The appellant says that had the respondent followed Article 39(1), it could have corrected errors of fact and obvious flaws in arguments. The Board does not think that this is realistic. By the time the respondent gave its decision of 21 February 2014, the original decision had been the subject of an appeal to the Board of Appeal, and the respondent had issued a decision accepting the admissibility of the complaint on 15 October 2013. In its letter of 2 July 2013 reiterating the complaint in the light of the Board's earlier decision, the appellant "reinstated" its earlier arguments. The Board considers that the appellant had had a fair opportunity to express its views, and the fact that it was not given a further opportunity to express its views prior to the adoption of the decision on 21 February 2014 does not render the process unfair or the decision otherwise open to challenge.

60. That being so, the Board need not decide whether Article 39(1) applies to "no-action" decisions as opposed to decisions adverse to a party, The Board's conclusion is that this ground of appeal is not established.

*(4) Failure to inform the EBA's Alternate Chairperson*

61. Articles 3.3, 3.4 and 3.5 of the EBA's Internal Processing Rules on Investigation regarding Breach of Union Law state that the EBA's Chairperson shall inform the EBA's Alternate Chairperson about the decision to initiate an investigation or not, on the basis of anonymised information. An objection by the Alternate Chairperson means that the decision is to be reviewed by the Chairperson.

62. The appellant's case is that the contested decision does not make any reference to this procedure having been followed, and the timing suggests that it did not happen.

63. In its response, the respondent says that the procedure was followed, and sets out the dates by which the relevant steps were taken.

64. When the absence of the primary material was raised during the hearing, the respondent emailed the relevant letters to the Board, which were forwarded to the appellant's legal representative immediately after the hearing. The appellant objected, and the Board concurs that it did not have the chance to consider this material during the hearing and make representations. The Board has decided to leave this material out of account.

65. However, the Board considers that there is no reason not to accept the factual statements set out in the Response even without seeing the documents. On the basis of the Response, the procedure was followed, and the Board does not need to consider what (if any) consequences might have flowed from failure to follow the procedure.

66. The Board's conclusion is that this ground of appeal is not established.

*(5) Article 41(1) of the Charter of Fundamental Rights*

67. The aspect of the appeal is based on Article 41(1) of the EU Charter of Fundamental Rights, which states that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the agencies of the Union. The appellant argues that the EBA's conduct was not fair and reasonable. It argues that the right not to start an investigation is intended to avoid allocating resources on de minimis cases, rather than "using it as an excuse not to investigate cases for the sake of keeping good relations with certain national FSAs. The investigation resulting in a definite decision satisfying or rejecting the complaint should be normally preferred to the decision not to investigate. This is particularly the case when all the information is already at hand". The appellant submits that it was fair and reasonable to make a definite decision, and that taking into account the effort already spent dealing with the case, there was no good reason not to decide the substance of the complaint. In this regard, the appellant requests production of the

documents received by the respondent from the Estonian and Finnish supervisors concerning the case.

68. The respondent submits that there is no evidence that it refrained from investigating for the sake of keeping good relations with the national supervisors. It declines to produce the document requested on the grounds that they were confidential.

69. The Board has referred above to the letters written by the parties on the subject of disclosure. On 4 June 2014, the President asked the respondent to give a general outline of the material in question, and whether the confidentiality claim affected all of it, or only some aspects of it.

70. The respondent complied by letter of 13 June 2014. This refers to letters it received from both the Finnish and the Estonian supervisors. From this, it appears that the respondent received a letter from the Finnish supervisor of 10 December 2013 to the effect that it had "carefully assessed whether or not supervisory action was needed, and considered that this was not the case". As regards branches, it regarded the provisions on suitability to cover the head of the branch. It said that according to its supervisory assessment, the two named individuals were not key function holders of Nordea Bank, and that it never assessed the complaint pertaining to the third named individual, since no complaint was filed with it by the appellant. Save as disclosed in this letter, the respondent maintains that its communications with the supervisors are "covered by confidentiality in its entirety".

71. The appellant invited the Board to make an order for disclosure, arguing in particular that it could not properly advance its argument as to institutional bias without seeing the letters themselves.

72. In deciding the disclosure issue, the Board does not accept the respondent's contention that the appropriate procedure was for the appellant to apply for access to the documents in question pursuant to Decision EBA DC 036 of 27 May 2011 on Access to Documents. This is the appropriate way to seek access

to administrative documents which may be covered by confidentiality, but an appellant cannot be expected to use this procedure when appealing to the Board of Appeal against a decision of the respondent. In any case, as the appellant says, there is no reason to suppose that such an application would have produced a different outcome.

73. Further, whilst the Board accepts the importance of the respondent's obligations of confidentiality as regards its communications with national supervisors, and in no way seeks to detract from these obligations, it does not accept the respondent's alternative suggestion which is that the documents are shown to the Board of Appeal only and not to the appellant. Such a course would (in the Board's opinion) render the procedure unfair.

74. The Board accepts the appellant's contention that the governing provision is Article 16(2) of its Rules of Procedure, by which, in case of disagreement between the parties, the Board "... may give directions for the production of further documents, but shall only do so if it considers it to be necessary for the just determination of the appeal".

75. The Board notes that the respondent has provided a summary of its communications with the national supervisors. The Board does not think that there is any basis for the appellant's submission that the documents themselves should be produced because of its assertion that the respondent was motivated by a desire to keep good relations with the national supervisors. Nor does it agree that a decision to investigate should normally be preferred to a decision not to investigate.

76. This ground of appeal overlaps with the appellant's second ground of appeal. For reasons set out there, the Board's view is that there are no grounds for concluding that the respondent infringed the appellant's right to have its affairs handled impartially and fairly as provided for in Article 41 of the Charter. The Board's view is that the respondent was right to raise the matter with the national supervisors, but having done so, was entitled to take no further action in

the light of their responses. It does not accept the appellant's contention that it should have made a definite decision in its favour.

77. That being its conclusion, the Board is of the view that it is not necessary for the just determination of the appeal that the communications received by the respondent from the Finnish and Estonian supervisors are themselves are produced. The summary is sufficient.

## V Conclusion

78. In its decision of 24 June 2013, the Board decided that 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 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, the Board decided, to cover the suitability of key function holders.

79. The Board notes that the provisions of Article 22 are now to be found in Article 74 of Directive 2013/36/EU of 26 June 2013 (which repeals Directive 2006/48/EC). This provides that, "1. Institutions shall 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 they are or might be exposed to, adequate internal control mechanisms, including sound administration and accounting procedures, and remuneration policies and practices that are consistent with and promote sound and effective risk management". By Article 74.2, "EBA shall issue guidelines on the arrangements, processes and mechanisms referred to in paragraph 1 …". The Board need say no more about these provisions in this decision, save that they are entirely consistent with the conclusion which the Board reached in its earlier decision.

80. The Board's conclusion is as follows:

    (1) The Board decides that the appeal is admissible. However, it points out that this reflects the particular facts of the case. This ruling does not imply a general conclusion that an appeal against a decision of the EBA not to investigate an alleged breach or non-application of Union law on its own initiative is admissible.

    (2) The Board dismisses the appellant's appeal against the decision of the EBA of 21 February 2014. The Board's view is that this was a reasonable decision in all the circumstances, and that none of the appellant's grounds of appeal are established.

81. The respondent in its Response asks for its legal costs of the appeal in the event that it is successful. (The appellant made a similar request in the Notice of Appeal.) However, the Board did not receive submissions from either party on the subject of costs. In the event, it considers that the matters raised by the appellant were significant, and that the case was conducted in a manner which minimised time and expense. As in the case of the first appeal, the Board has decided that each party shall bear its own costs.

## VI Decision

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

    1. The appeal is admissible.

    2. The appeal is dismissed.

    3. Each party shall bear its own costs.

83. 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.

84. 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.