



**21 July 2022**

**BoA-D-2022-01**

**D E C I S I O N**

**given by**

**the JOINT BOARD OF APPEAL**

**OF THE EUROPEAN SUPERVISORY AUTHORITIES**

**in the appeal case brought by “C” [the Appellant]**

**Against**

**the European Banking Authority (EBA) [Respondent]**

**APPEAL under Article 60 of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010 and Regulation (EU) No 1095/2010 of the European Parliament and of the Council (the “ESAs Regulations”)**

**Board of Appeal:**

Christos Gortsos (Acting President)

Gerben Everts

Geneviève Helleringer

David Ramos Muñoz

Margarida Lima Rego

Carsten Zatschler

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## Summary<sup>1</sup>

Herewith, you will find the decision by the (Joint) Board of Appeal of the European Supervisory Authorities. The Board of Appeal, composed of six independent members, was responsible for making this decision on this specific case.

The Board of Appeal was properly informed that the Appellant was confronted with a rather abrupt termination of its bank account with its local bank. Consequently, the Appellant questioned the reason and legitimacy of this decision by its bank. The Appellant filed its complaint with its local bank and with the national competent supervisory authority. However, without success.

As a follow up, the Appellant filed a complaint with the European Banking Authority (hereafter “the EBA”). Specifically, the Appellant objected against the individual decision of the EBA not to start an investigation into the alleged breach or non-application of Union law regarding payment services in the EU internal market and access to payment accounts with basic features.

The Board of Appeal is sympathetic to the Appellant’s complaint and effort to seek justice. Access to bank accounts and payment accounts with basic features is a prerequisite for the effective functioning of the EU internal market, the inclusiveness of the EU market for financial services and the protection of consumer rights. The issues the Appellant raised are of significant concern. It is entirely understandable that the Appellant should be seeking a remedy.

However, from this it does not follow that the remedy should consist in allocating the task to the EBA. EBA’s formal responsibilities are protecting the single rulebook, supervisory coordination and convergence. Furthermore, the Board of Appeal is bound by the case law of the Court of Justice of the European Union, and the Board’s decisions can be challenged before the courts. Thus, in reaching its decision, the Board of Appeal has duly taken notice of prior decisions (case law) by the Court of Justice of the European Union on similar cases.

The Board of Appeal concludes that the Appellant’s complaint, irrespective of the significance of the concern, is directed against a decision which is not challengeable. The main reasons underpinning this conclusion are the following.

This appeal raises interconnected issues relating to two distinct questions of admissibility.

*First*, applicable procedures governing requests to the EBA to initiate an investigation relating to an alleged breach or non-application of EU law by a competent authority must be taken into account. The Board of Appeal notes that in the instant case, the EBA informed the Appellant that, according to the information available to it, the EBA did “not have clear indications that the [national competent supervisory authority] failed to assess the lawfulness of the termination of the bank account”.

The Board of Appeal is, however, persuaded that, were the EBA ultimately to take action against the national competent supervisory authority in the context of an investigation, and

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<sup>1</sup> The Summary, while approved by the Board of Appeal, is provided purely for the convenience of the reader, and does not form part of the decision of the Board itself.

to find a breach or non-application of EU law, any such further the EBA action (and related decision) would be of interest to the Appellant.

Accordingly, the Board of Appeal is persuaded that the Appellant has a clear and understandable factual interest in the EBA initiating an investigation, as well as in appealing against the EBA determination not to pursue an investigation. The request to the EBA was therefore admissible under the applicable procedural rules.

*Secondly*, a fundamental question is whether such factual interest results in a right for the appellant to challenge before the Board of Appeal the EBA's determination that no investigation should be initiated.

Entities who can request the EBA to initiate an investigation are listed explicitly and exhaustively in the Regulation governing the EBA (hereafter "EBA Regulation"). While natural and legal persons are not included in that list, the EBA has an own-initiative jurisdiction to initiate an investigation, where appropriate. This includes investigations based on well substantiated information from natural or legal persons. However, under its founding Regulation, the EBA's power regarding the initiation of an investigation is, according to the case law of the General Court, an entirely discretionary one. Accordingly, the EBA cannot be required to initiate an investigation.

The Board of Appeal is also mindful of the imperatives of good administrative governance and recognises that the discretion of the EBA must be protected, including to avoid dealing with an excessive volume of enquiries. This means that, even if a request to investigate is formally admissible, the EBA can refuse to investigate, notably because it sees no grounds, the complaint can be better dealt with by other means, or it lacks the resources. Crucially, this decision is not only discretionary. It is also not subject to review by the General Court or by the Board of Appeal.

In the instant case, the EBA determined that, considering the list of factors set out in its Rules (which were adopted based on the EBA Regulation) and that the request is more suitable to be dealt with by other means, no investigation should be initiated as a matter of discretion. This is not a decision subject to review, according to the case law of the General Court and the Court of Justice of the EU.

The Board of Appeal also considered whether there are factual and legal circumstances at issue in the instant case, which differ from those at issue in previous relevant Board of Appeal decisions and relevant case law, and which might, thus, justify distinguishing the position of the Appellant and potentially lead to a different conclusion on the admissibility of an appeal. No such circumstances were detected.

1. This is the decision of the Joint Board of Appeal of the European Supervisory Authorities (“ESAs”) (hereinafter the “Board of Appeal”) on the appeal filed with notice of appeal of 15 April 2022 (“Notice of Appeal”) by a natural person referred to as “C” (“Appellant”) in accordance with Article 60 of the ESAs Regulations. The respondent is the EBA, which was established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010<sup>2</sup> (EBA Regulation, as in force after its amendment, *inter alia*, by Article 1 of Regulation (EU) No 2019/2175 of the same institutions of 18 December 2019<sup>3</sup>) and represented in the appeal by Jonathan Overett Somnier and Juan Manuel Rodriguez.

## **A. Background of facts**

2. On 14 October 2021, the Appellant filed, by e-mail, to the EBA Chairperson a “Complaint against a Competent Authority (...) concerning a breach or non-application of Union law (Article 17, EBA Regulation)” (“Complaint”), supported by relevant and related documentation. Thereby, the Appellant requested the EBA to investigate an alleged breach of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 “on payment services in the internal market”<sup>4</sup> (“PSD II”) and Directive 2014/92/EU of the same institutions of 23 July 2014 “on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features”<sup>5</sup> (“PAD”) by a Member State’s national competent authority (“NCA”), following the termination of the Appellant’s bank account with a credit institution authorised to operate in that Member State (“Bank”).

3. Article 17 of the EBA Regulation empowers the EBA to investigate potential breaches or non-application of EU law by an NCA and to take the courses of action identified therein. In the Complaint the Appellant raised concerns that the NCA failed to take into consideration the Appellant’s right to have a “basic payment account” as provided for in Article 16 of the PAD. The Appellant further claims, *inter alia*, that credit institutions in that Member State are closing payment accounts or refuse to open them without any reasons to foreign students or entrepreneurs based on nationality. As mentioned in the Complaint:

*“The reason for my complaint is a real case of the discrimination in [the Member State] due to the nationality that is prohibited directly by Art. 18 [TFEU]. There is also the direct breach by the [NCA] the EU’s revised Payment Services Directive (PSD2) & Payment Accounts Directive. I was a client of [the Bank] since the end of November 2019. I opened the account (...) & made only few transfers with small sums. Suddenly I received a message from the bank that my account will be terminated until 28/04/2020. I came to the bank on 06.03.2020 & asked for explanations. The only thing the clerks could do was to fill in the complaint. Finally, I succeeded to get the only explanation “bank decision”. I’ve sent a complaint to bank’s ombudsman on 25/06/2020 but received the same answer from the bank.*

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<sup>2</sup> OJ L 331, 15.12.2010, pp. 12-47.

<sup>3</sup> OJ L 334, 27.12.2019, pp. 1-145. See further Section D below.

<sup>4</sup> OJ L 337, 23.12.2015, pp. 35-127; this repealed Directive 2007/64/EC of the same institutions (OJ L 319, 5.12.2007, pp. 1-36, “PSD”).

<sup>5</sup> OJ L 257, 28.8.2014, pp. 214-246.

*I've sent a complaint to Banking Association (as an Institute of Alternative Dispute) on 15/04/2021 but got the same reply. I've sent a complaint to the [NCA] dd. 15/04/2021, additional complaint dd. 28/04/2021, got their answer & sent my final complaint dd. 14/08/21. The final answer from [the NCA] stayed unchanged. As you can see, my abilities to solve the problem inside [the Member State] are over. Meanwhile it was my single payment account in EU. As you can clearly see from the answers mentioned above, no one, including [the NCA], even didn't hear about EU's revised Payment Services Directive (PSD2), Payment Accounts Directive and other EU legislation. (...) As far as I understand, these EU requirements were set especially to protect the rights of non-nationals in the field of financial services. The person with no accounts is not able to run the ordinary life."*

The Appellant also claims that *"this sort of thing is possible only because of the position of the [NCA], as you can see from their answers (i.e., replies from the [NCA] to the Appellant of 7 July and 19 August 2021 regarding the termination of his bank account with [the Bank])."*

4. Since the Appellant's initial e-mail message did not contain any information that the contract was a basic payment account, the EBA, through its Legal and Compliance Unit, contacted the Appellant on 28 January 2022 asking for any bank document stating that the account was such a basic payment account. The Appellant provided an account statement immediately (on the same date).

5. In response to the Complaint, the EBA addressed to the Appellant a notification on 8 March 2022 ("EBA Notification"). By this, the EBA, *first*, informed the Appellant that, according to the information available to it and after explaining the reasons therefor, the EBA did *"not have clear indications that the [NCA] failed to assess the lawfulness of the termination of the bank account"*.

6. *Furthermore*, the EBA Notification stated the following: *"In your complaint you also express concerns that the [NCA] has failed to take into account your right to have a "basic payment account" as enshrined in Article 16 of the PAD. Since your initial email did not contain any information that your contract was a basic payment account, the Legal and Compliance Unit contacted you on 28 January 2022 asking for any bank document stating that the account was a basic bank account. In your response dated 28 January 2022, you attach your account statement, and you inform us that the bank account of [the] Bank was your basic bank account because you did not have any other bank accounts in [that Member State]. Looking at your submitted evidence, your contract is a standard account and thus, it does not fall within the category of "basic bank account"."*

7. *Finally*, the EBA Notification pointed out the possibility for the Appellant to have recourse to alternative forms of redress, including lodging a complaint against the Notification to the European Ombudsman in accordance with Article 228 of the Treaty on the Functioning of the European Union ("TFEU").

8. In a letter of 11 March 2022, raising objections to the EBA Notification, the Appellant maintained, in relation to the EBA's last point in paragraph 6 above the following: *"I have read very attentively your notification to my complaint (...). There is one point I will never agree with. (...) Let me stress – as a consumer I'm not obliged to know the difference between "basic payment account" and "payment account with basic features". But your Legal and Compliance Unit is obliged. They asked me "could you please clarify whether the bank*

*account at [the] Bank was a basic bank account?” My answer was “Yes, it was my basic bank account (= single bank account). When [the] Bank decided to terminate my account, it was my single bank account”. As I can see now, the type of my account with [the Bank] was called “payment account with basic features”, as stipulated in the Article 16 of the PAD.” This letter concludes by stating that “I really hoped EBA is able to protect my consumer rights to have at least one bank account in [that Member State].”*

## **B. The appeal against the Contested Decision and the proceedings before the Board of Appeal**

9. On 15 April 2022, by Notice of Appeal pursuant to Article 60 of the EBA Regulation, the Appellant filed a claim against the EBA challenging the EBA Notification addressed to the Appellant on 8 March 2022 in response to his complaint of 14 October 2021. The Notice of Appeal was duly sent to the EBA and was delivered to the Secretariat of the Board of Appeal in the Board of Appeal’s mailbox on 15 April 2022.

10. On 27 April 2022, the Secretariat of the Board of Appeal notified to the parties the following communication from the President of the Board of Appeal:

Dear Parties,

The President of the Board of Appeal acknowledges receipt of the Appellant’s appeal sent by mail service and received by the Board of Appeal Secretariat in the e-mail inbox on 19 April 2022. The President, having consulted with the Board of Appeal, gives the following directions:

In light of Article 6 of the BoA Rules of Procedure, the President asks: (i) the EBA within three weeks from the notice of these directions to respond to the appeal (DL 18 May), (ii) the Appellant two weeks to reply to EBA response (DL 1 June), (iii) the EBA two weeks to present, if any, a rejoinder to the Appellant’s reply (DL 15 June). The parties are required to address both the admissibility and the merit of the appeal by that date.

According to Article 18 of the BoA Rules of Procedures, the parties are entitled to make oral representations. In the absence of a request, the Board of Appeal may require oral representations if it considers it to be necessary for the just determination of the appeal. Both parties are invited to communicate to the Secretariat of the Board of Appeal, one week from the expiry of the deadline for EBA to present a rejoinder to the appellant’s reply (iii) if they intend to make oral representations.

The Board of Appeal shall issue further case management directions after the expiry of the above-mentioned deadline concerning the hearing and, if deemed necessary by the Board, further submissions on the merits. The parties are asked to confirm this proposal with the Secretariat (by mail) and raise any other points they wish to raise at this stage.

The President wishes also to inform the parties that the filing and service of any further communication between the Parties and between the Parties and the Board of Appeal and its Secretariat (including the filing and service of the Respondent’s response pursuant to Article 6 of the Rules of Procedure and of any other submissions of the parties) may take place by email. The acting Secretariat of the Board of Appeal ([boardofappeal@eiopa.europa.eu](mailto:boardofappeal@eiopa.europa.eu)) must always be copied.

The parties are herewith also informed about the sitting composition of the Board of Appeal according to Article 3(4) of the BoA Rules of Procedure for this appeal case: Michele

Siri (President), Gerben Everts, Christos Gortsos, Genevieve Helleringer, Margarida Lima Rego, Carsten Zatschler.

11. Within the deadline set, on 6 May 2022, EBA responded by filling an application for directions and submission on admissibility of the appeal (the “EBA Response”), requesting: (i) the President of the Board of Appeal to amend the case management directions issued on 27 April 2022 pursuant to Article 11.2 and 11.3 Rules of Procedure of the Board of Appeal (as in force<sup>6</sup>), suspending the requirement for the EBA to file a Response on the merits pending the determination of the admissibility of the Appeal; (ii) the Board of Appeal to determine its competence to hear the appeal as a preliminary matter pursuant to Article 9.1 of the Board of Appeal Rules of Procedure; and (iii) the Board of Appeal to dismiss the Appeal on grounds of lack of competence.

12. Within the deadline set as well, on 8 May 2022, the Appellant responded to the communication from the President of the Board of Appeal of 27 April 2022. The Appellant in that context also reacted to the EBA’s Response of 6 May 2022 asking not to satisfy the EBA’s request for a “preliminary appeal” and to consider the appeal on the merits.

13. On 20 May 2022, the Secretariat of the Board of Appeal notified to the parties the following communication from the President of the Board of Appeal:

Dear Parties,

On behalf of the acting President of the Board of Appeal, Christos Gortsos, please find below the following directions from the Board of Appeal:

1. Due to health reasons, the President of the Board of Appeal of the ESAs, Michele Siri, is prevented from further participating in the composition of the Board for this Appeal. Pursuant to Article 1 of the Rules of Procedure of the Board of Appeal, the functions of the President have been assigned and will be performed by the Vice-President, Christos Gortsos, and David Ramos Muñoz (an Alternate Member) was appointed as Member. Accordingly, the composition of the Board of Appeal for this Appeal has been amended as follows: Christos Gortsos (acting President), Gerben Everts, Geneviève Helleringer, Margarida Lima Rego, Carsten Zatschler, David Ramos Muñoz

2. Taking into consideration the Respondent's reply of 6 May and the Appellant's letter of 8 May, the Board will, pursuant to Article 9(1) of the Rules of Procedure, examine and determine whether the Appeal is admissible under Article 60 of the EBA Regulation, before examining whether it is well founded. Accordingly, the management directions of 27 April 2022 are hereby being amended to the effect that the Respondent is not required to file a Response on the merits of the case, until the determination has been made by the Board of Appeal on the admissibility of the Appeal.

14. None of the parties informed the Board of Appeal of its intention to make oral representations. By letter of 14 June 2022, EBA’s representatives were invited to provide evidence that they were duly authorised to issue the EBA Notification and to represent the EBA before the Board of Appeal. The evidence requested was duly provided on 22 June. By letter of 14 June as well, the Appellant was invited to lodge a formal response to EBA’s objection of inadmissibility, and to comment on the relevance of the decisions of the Court

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<sup>6</sup> BoA 2020 01.



of Justice of the EU (“CJEU”) in *SV Capital* and of the General Court in *Jakeliūnas*. The Appellant did not respond to that letter.

### **C. The contentions of the parties**

#### ***Appellant***

15. In the Notice of Appeal, the Appellant states that the EBA Notification (of 8 March 2022) is a decision capable of appeal within the scope of Article 60 of the EBA Regulation (“Contested Decision”). In particular, the Appellant proceeds on the basis that the appeal is admissible under Article 60, because the Appellant is a natural person directly and individually concerned by the Contested Decision. Furthermore, the Appellant seeks the following remedy under Article 60(5) of the EBA Regulation. *“To remit the case to the competent body of the EBA. That body shall be bound by the decision of the Board of Appeal and that body shall adopt an amended decision regarding the case concerned.”*

16. In the Appellant’s Response the following is also stated: *“The representative of the EBA on six pages of text with references to the relevant court decisions tries to prove that the ESA does not have the competence to consider this dispute on a formal basis. This position reinforces me in the opinion that the EBA professes a formal approach to the consideration of any appeals.”*

#### ***EBA***

17. In the EBA Response of 6 May, EBA contends that the appeal is inadmissible by referring to the to the so-called “SV Capital rulings” (judgment of the General Court of 9 September 2015, in case T-660/14, *SV Capital OU v EBA*, EU:T:2015:608; and judgment of the CJEU of 14 December 2016, in case C-577/15 P, *SV Capital OU v EBA*, EU:C:2016:947<sup>7</sup>), in which the General Court and the CJEU ruled that the Board of Appeal did not have jurisdiction to hear an appeal from a failure by the EBA to initiate an investigation under Article 17(2) (pursuant to the initial text, which was in force at the time of those rulings, namely before its amendment by Regulation 2019/2175). In particular, in EBA’s view, the action brought before the Board of Appeal against a refusal by the EBA to grant a request for the initiation of an investigation under Article 17 of the EBA Regulation by the Appellant *“should be declared inadmissible as it does not constitute an act open to challenge under Article 60(1) of the EBA Regulation.”*

18. The EBA maintains that, in consistency with this case-law of the General Court and of CJEU, the Board of Appeal lacks competence to hear the present Appeal.

19. Specifically, the EBA notes that the Appellant is neither an entity explicitly identified in Article 17(2) of the EBA Regulation as one of the entities with standing to request the EBA the opening of an ‘Article 17 investigation’ nor a member of the Banking Stakeholder Group established in accordance with Article 37 of that Regulation. Hence, the Appellant does not have *locus standi* to appeal the EBA’s conclusion not to initiate an investigation under Article 17(2), further clarifying that the EBA Notification is not a refusal to open an

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<sup>7</sup> This ruling and this judgement are further discussed in paragraphs 43-47 below.

investigation upon a request by one of the entities exclusively listed in Article 17(2) nor a recommendation or decision taken under Article 17(3)-(6).

20. Furthermore, the EBA makes reference to the following statement from the ruling of the General Court of 9 September 2015 in *SV Capital*: “According to settled case-law, developed in the context of actions for annulment of Commission decisions refusing to initiate infringement proceedings, and applied by analogy to the present case, where an EU institution, body, office or agency is not required to initiate proceedings but has a discretion excluding the right of individuals to require them to take a position in a particular direction, the persons who have lodged a complaint do not, in principle, have the possibility of bringing an action before the Courts of the European Union against a possible decision to close their case. Such a possibility exists only if those persons enjoy procedural rights, comparable to those which they may have in proceedings under Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2002 L 1, p. 1), enabling them to require those institutions, bodies, offices or agencies to inform them and grant them a hearing” (paragraph 48 of the ruling). In the EBA’s view, the General Court eventually only recognises such procedural safeguards, including the right of appeal, to privileged complainants, such as the entities explicitly referred to in Article 17(2) of the EBA Regulation (paragraph 49, *a contrario*).

21. The EBA also maintains that, in accordance with the General Court in its Order of 10 August 2021 in case T-760/20 (*Stasys Jakeliūnas v. ESMA*), “actions brought by natural or legal persons against the Commission’s refusal to initiate infringement proceedings under Article 258 TFEU (...) have been declared inadmissible (...). Similarly, the action brought against a refusal by the European Insurance and Occupational Pensions Authority (EIOPA) to grant a request for the initiation of an investigation under Article 17 of Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 (...) (OJ 2010 L 331, p. 48) was declared inadmissible (...)” (paragraph 26).

22. The EBA also argues that, even if standing could be established to bring an appeal, the Contested Decision could not be appealed because it is apparent from the wording of Article 17(2) that the EBA has discretion to decide whether to initiate an investigation or not. In this regard, the EBA refers (by restating them) to the arguments in the Order of the General Court of 10 August 2021 (paragraph 29) in relation to a similar action brought by a member of the European Parliament against ESMA’s refusal to comply with the request for the initiation of an investigation of an alleged breach of Union law. Furthermore, the EBA maintains that, in accordance with the wording of Article 17(2), interested parties who have submitted a request to the EBA to initiate an investigation do not have procedural rights requiring them to be informed and heard within the meaning of the above-mentioned case-law.

23. Finally, the EBA acknowledges that the text of Article 17(2) has been revised since the *SV Capital* rulings by virtue of Regulation (EU) 2019/2175 (which, as already mentioned, amended, *inter alia*, the EBA Regulation), to the effect that “well substantiated information from natural or legal persons” constitutes a potential basis for the EBA to decide to start a breach of Union law investigation on its own initiative. However, according to the EBA, this does not affect the conclusion reached by the General Court, the CJEU and the Board of Appeal in the above-mentioned cases. The EBA maintains that, although, since the

amendment made to Article 17(2) by Regulation (EU) 2019/2175 the EBA, is required to indicate how it “*intends to deal with the case*”, such an obligation on its part does not amount to recognition, to the profit of interested parties who have submitted a request to the EBA for the initiation of an investigation, of a right to be heard, comparable to that available to persons who have lodged a complaint in the context of proceedings under Council Regulation (EC) No 1/2003.

#### **D. The EBA’s competence on breach of Union law**

##### ***Article 17 of the EBA Regulation***

24. Article 17(2) of the EBA Regulation allows interested parties to request the EBA to open investigations where an NCA is alleged to have breached or not to have applied EU law. Article 17(2) is a critical element of the governance of the European System of Financial Supervision (“ESFS”), empowering the EBA to initiate investigations of potential breaches or non-application of EU law by NCAs and confers upon it the power to take specified actions where it finds such a breach. It helps both to support the single rulebook, as well as supervisory coordination and convergence, and to provide interested parties with a means of raising their concerns where, in those parties’ view, an NCA is in breach of or has not correctly applied EU law.

25. Article 17(1) and (2), first sub-paragraph, as in force after the amendments inserted in 2019 by Article 1 of Regulation (EU) No 2019/2175, reads as follows:

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.

2. Upon request from one or more competent authorities, the European Parliament, the Council, the Commission, the Banking Stakeholder Group, or on its own initiative, including when this is based on well-substantiated information from natural or legal persons, and after having informed the competent authority concerned, the Authority shall outline how it intends to proceed with the case and, where appropriate, investigate the alleged breach or non-application of Union law.<sup>8</sup>

26. In the instant case, the relevant provisions are Article 17(1), which provides that the procedure laid down in that Article is activated (only) if an NCA 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

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<sup>8</sup> The initial phrasing of this sub-paragraph was as follows:

“2. Upon request from one or more competent authorities, the European Parliament, the Council, the Commission, the Banking Stakeholder Group, or on its own initiative, including when this is based on well-substantiated information from natural or legal persons, and after having informed the competent authority concerned, the Authority may investigate the alleged breach or non-application of Union law.”

law, and most importantly the first sub-paragraph of Article 17(2).<sup>9</sup> In relation to the latter, three aspects require a closer look.

27. *First*, notwithstanding EBA’s own-initiative jurisdiction (see just below), the entities who can request the EBA to initiate an investigation are explicitly (and exhaustively) listed in Article 17(2): one or more NCAs, the European Parliament, the Council, the Commission, and the Banking Stakeholder Group. Only these entities have standing to request an investigation. Natural and legal persons are not included in that list. This aspect of Article 17(2) has not been amended by Regulation (EU) No 2019/2175.

28. *Second*, the EBA has a “own-initiative jurisdiction” under Article 17(2) to initiate an investigation. Thus, even though actors not specified (in accordance with the above-mentioned) in Article 17, such as natural and legal persons, do not have standing to request the EBA to initiate an investigation, such persons can bring potential breaches or non-applications of EU law by NCAs to EBA’s attention, to request that it exercises its own-initiative jurisdiction. Under the amended Article 17(2), the EBA can open an investigation on its own initiative “*including when this is based on well substantiated information from natural or legal persons*” (a phrase added by Regulation (EU) No 2019/2175).<sup>10</sup> Hence, the European Parliament’s and Council’s clear intention was to allow actors, other than those explicitly specified in Article 17(2), and namely natural and legal persons, to request the EBA to open an own-initiative investigation.

29. *Third*, Article 17(2) endows the EBA with discretionary powers to initiate (or refuse to initiate) an investigation under its “own initiative jurisdiction”. The initial text of Article 17(2) provided that the EBA “*may investigate the alleged breach or non-application of Union law*”. After the subsequent reform by Regulation (EU) No 2019/2175 these discretionary powers were further structured, since the text of Article 17(2) now provides that the EBA “*shall outline how it intends to proceed with the case and, where appropriate, investigate the alleged breach or non-application of Union law*”.

30. Under both the initial and the amended drafting, the (above-mentioned) entities explicitly identified in Article 17(2) may *request* the EBA to initiate an investigation, but they cannot force the EBA to do so. In accordance with the amended text, however, the EBA is required to “*outline how it intends to proceed with the case*”. It is not required to initiate an investigation, being required to investigate potential breaches of EU law by NCAs (only) “*where appropriate*”. The General Court has held that this wording of Article 17(2) confers discretion on the EBA to determine when this is the case.<sup>11</sup> Even though the drafting of Article 17(2) is not totally clear on this, the general trust is that EBA’s obligation to “outline

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<sup>9</sup> In the following paragraphs of this Decision, any reference made to Article 7(2) of the EBA Regulation, should be read as referring to its first sub-paragraph.

<sup>10</sup> Such informal requests are not unusual and communications from the EBA (and the other two ESAs) to such parties, advising that it will not initiate an investigation, are “routine”.

<sup>11</sup> Case T-760/20, *Jakeliūnas v ESMA*, EU:T:2021:512, paragraph 29.

how it intends to proceed with the case” also applies where “well substantiated information” by natural and legal persons has been received.<sup>12</sup>

31. As already mentioned (in paragraph 24), Article 17 is a critical element of EBA’s governance arrangements (and more generally of those of the ESFS), supporting the delivery of its mandate to contribute to the consistent application of legally binding Union acts.<sup>13</sup>

### ***The EBA Rules of Procedure for investigation of breach of Union law***

32. On 5 July 2012, the EBA’s Board of Supervisors<sup>14</sup> adopted a Decision on the “Internal Processing Rules on Investigation regarding Breach of Union Law” under Article 17, which was repealed and replaced by a new Decision of 23 December 2016.<sup>15</sup> In order to reflect the amendments to Article 17 made by Regulation (EU) No 2019/2175, the latter Decision was repealed and replaced as well by the Board of Supervisors’ Decision of 22 January 2020 “concerning Rules of Procedure for investigation of breach of Union law”<sup>16</sup> (hereinafter “the Rules”).

33. According to recital (2) of the Rules, “*although initiating investigations remains within the EBA’s discretion, for reasons of transparency and legal certainty, these rules (...) set out factors, criteria and other related matters to be taken into account in relation to requests to initiate investigations that are received from third parties or, to the extent relevant, to EBA own initiative investigations.*”

34. Article 1 of the Rules provides that the Rules for applying Article 17 on investigating breaches of Union law set out in the Decision “*shall apply to Requests to investigate that the EBA received, as well as, to the extent relevant, to own initiative investigations in the absence of a Request*”.

35. Article 2 of the Rules on the “Requester” provides (by reflecting Article 17(2) of the EBA Regulation) that requests to investigate can be made by one or more NCAs, the European Parliament, the Council, the Commission, or the Banking Stakeholder Group. In addition, taking into account the EBA’s own-initiative competence under the same EBA Regulation’s Article, “*the Chairperson may also initiate investigations on his/her own initiative and for that purpose may take into account any Request made to the EBA by any*

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<sup>12</sup> The recitals to Regulation (EU) No 2019/2175 are silent on this point. It is also noted that this amendment was not included in the Commission’s proposal of 20 September 2017 (COM/2017/536 final).

<sup>13</sup> EBA Regulation, Article 8(1), point (b).

<sup>14</sup> This is the leading body in the EBA’s governance structure (EBA Regulation, Article 6, point (1)), governed by Articles 40-44.

<sup>15</sup> EBA DC 054 and EBA/DC/2016/174, respectively.

<sup>16</sup> EBA/DC/2020/312. This is in force, as amended on 3 December 2021 (EBA/DC/2021/419). Its legal basis are Articles 17 and 41(4) of the EBA Regulation.

*other legal or natural person (also referred to as a “Requester”) pointing to measures or practices of [an NCA] indicating a breach or non-application of Union law”*.<sup>17</sup>

36. Furthermore, it is expressly specified that “*the EBA shall respond to a Request by outlining how it intends to proceed with the case and, if appropriate, investigate the alleged breach of or non-application of Union law, in accordance with these Rules of Procedure*”.<sup>18</sup> Pursuant to this provision, and in conjunction with recital (2), the Rules commit the EBA to outlining how it intends to proceed, regardless of who initiates a request for action.

37. Article 3(2) of the Rules on the “Submission of a Request and admissibility criteria” sets out that a Request shall fulfil (cumulatively) the following criteria: (i) set out a clear grievance explaining how a competent authority has not applied the acts referred to in Article 1(2) of the EBA Regulation, or has applied them in a way which appears to be a breach of Union law, including the technical standards established in accordance with Articles 10-15 of that Regulation, in particular a failure of a competent authority to ensure that a financial institution satisfies the requirements laid down in those acts; (ii) be based on well substantiated information (where it is made by a natural or legal person); and (iii) not fall into any of the categories set out in Annex 1.”

38. The procedure on the “Closure of the case without opening an investigation” is governed by Article 5 of the Rules. In this respect, Article 5(1) stipulates that the Chairperson is entitled to close the case without initiating an investigation, if he/she considers that: (i) the Request does not meet the (above-mentioned) requirements in Article 3(2) of the Rules; (ii) an investigation should not be initiated “*as a matter of discretion*”, taking into account the non-exhaustive list of investigation factors included in Annex 2; or (iii) agreement has been reached on actions necessary for the NCA to comply with Union law.

39. It is noted that this Article does not differentiate among different types of “Requesters” (as specified in Article 2) and, hence, applies irrespective of whether the investigation of breach of Union law was initiated upon request of the entities explicitly identified in Article 17(2) or on own initiative on the basis of information provided by natural or legal persons.

40. Finally, pursuant to Article 5(3), points (i) and (ii), where the case is closed without initiating an investigation (in accordance with Article 5(1)): (i) the Requester shall be notified of the fact that the case has been closed and the reasons for closing the case; (ii) where the Requester is a natural or legal person, the Requester shall also be informed of appropriate alternative forms of redress, such as recourse to national courts, the European Ombudsman, a national ombudsman, or any other national/international complaints procedure.

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<sup>17</sup> Rules, Article 2(1)-(2).

<sup>18</sup> Rules, Article 2(4).

**E. Case-law of the CJEU on the admissibility of an appeal before the Board of Appeal against a decision under Article 17 of the ESAs Regulations on breach of Union law: the SV Capital rulings**

41. The key question of admissibility in this appeal is whether, and to what extent, a “Requester” (as defined in Article 2(2) of the Rules, including a legal or natural person which has provided the EBA with “*well substantiated information*”) can appeal to the Board of Appeal the conclusion reached by the EBA Chairperson to close the request without opening an investigation “*as a matter of discretion, taking into account the non-exhaustive list of factors included in Annex 2*” (in accordance with Article 5(1), point (ii) of the Rules).

***The General Court’s and Court of Justice’s rulings in cases T-660/14 and C-577/15 P (SV Capital OU v EBA)***

42. The issue whether such an appeal can be taken to the Board of Appeal has been previously addressed by the Board of Appeal, initially in SV Capital OU v EBA, Decision of 24 June 2013 (BoA 2018 008). This Decision, as regards the admissibility of an appeal from a determination by the EBA not to initiate an ‘Article 17 investigation’ following a request by an entity not specifically identified in Article 17(2), was appealed to the General Court and subsequently to the CJEU, which confirmed the ruling of the General Court.

43. In its ruling of 9 September 2015, in case T-660/14, SV Capital OU v EBA (EU:T:2015:608) the General Court, raised the issue of admissibility of its own motion, and stated the following as regards the discretionary nature of the power of the EBA to initiate an ‘Article 17 investigation’, and as regards the related (in) admissibility of an appeal to the Court to annul a determination by the EBA not to initiate an investigation:

(46) In that respect, it must be borne in mind that the applicant’s complaint was based on Article 17 of [the EBA] Regulation, according to which, 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 EBA ‘may’ investigate the alleged breach or non-application of EU law.

(47) It follows from that provision that the EBA has a discretion as regards the initiation of investigations, both when it receives a request from one of the entities expressly mentioned in Article 17 of [the EBA] Regulation and when it acts on its own initiative.

(48) According to settled case-law, developed in the context of actions for annulment of Commission decisions refusing to initiate infringement proceedings, and applicable by analogy to the present case, where an EU institution or body is not bound to initiate a procedure, but has a discretion which excludes the right for individuals to require it to adopt a specific position, it is not open to persons who have lodged a complaint to bring an action before the EU judicature against a decision to take no further action on their complaint. That possibility would arise only if those persons had procedural rights, comparable to those they might have in the case of a procedure under Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1), enabling them to require that institution or body to inform them and to grant them a hearing (see, to that effect, orders of 17 July 1998 in Sateba v Commission, C-422/97 P, ECR, EU:C:1998:395, paragraph 42, and 14 January 2004 in Makedoniko Metro and Michaniki v Commission, T-202/02, ECR, EU:T:2004:5, paragraph 46).

(49) Since the applicant is not one of the entities expressly mentioned in Article 17 of [the EBA] Regulation, it cannot be equated to complainants benefiting from procedural rights which may be enforced before the EU judicature, with the result that the case-law relating to the rejection of, or decisions to take no further action on, complaints brought by interested parties concerning State aid under Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1) (see, to that effect, judgment of 17 July 2008, *Athinaiki Techniki v Commission*, C-521/06 P, ECR, EU:C:2008:422, paragraphs 36 and 53 and the case-law cited) or by complainants, under Council Regulation No 1/2003 and Commission Regulation (EC) No 773/2004, of 7 April 2004, relating to the conduct of proceedings by the Commission pursuant to Articles [101 TFEU] and [102 TFEU] (OJ 2004 L 123, p. 18) (see, to that effect, judgment of 18 September 1992 in *Automec v Commission*, T-24/90, ECR, EU:T:1992:97, paragraph 79, and order of 5 June 2014 in *Stanleybet Malta and Stanley International Betting v Commission*, T-416/13, EU:T:2014:567, paragraph 23 and the case-law cited), is not applicable in the present case.

(50) In view of the foregoing, the action must be dismissed as inadmissible in so far as it seeks the annulment of the EBA decision (...).

44. In that case, the General Court raised of its own motion a plea relating to the Board of Appeal's lack of competence to decide on the appeal brought before it against a decision of the EBA not to initiate an investigation under Article 17. In this regard, the General Court held the following:

(60) In that respect, the applicant submits that the Board of Appeal had competence to decide on the appeal brought before it, since, irrespective of its form, the decision of the EBA fell within the scope of Article 60(1) of [the EBA] Regulation. Furthermore, it argues that that interpretation is consistent with recital 58 in the preamble to that regulation and with the guarantees that the rights of the parties concerned will be protected, as stated in that recital.

(61) The EBA, supported by the Commission, submits that the Board of Appeal should have declared that the appeal brought before it against the EBA's decision was inadmissible, since the requirements of Article 60(1) of [the EBA] Regulation, which reflect those of Article 263 TFEU, were not satisfied and that, consequently, the action before the Court, for the purposes of that article, was also inadmissible. The EBA did not, however, expressly state its views on whether the Board of Appeal had competence to decide on the appeal. When questioned by the Court on that issue at the hearing, the EBA stated that the Board of Appeal did not have competence to decide on the appeal brought before it.

(62) The Commission adds that it is apparent from a reading of Article 58 to 60 of [the EBA] Regulation that the Board of Appeal is not a judicial body, but an internal body of the EBA, and that it only has competence to confirm decisions taken by the competent body of the EBA or to remit the case to that body for it to adopt a decision. At the hearing, the Commission added that the Board of Appeal should have declared the appeal before it inadmissible in accordance with Article 60(4) of [the EBA] Regulation.

(63) In the present case, it must be recalled, first of all, that the applicant made a complaint to the EBA, under Article 17 of [the EBA] Regulation, alleging infringement of Directive 2006/48 by the Estonian and Finnish financial sector supervisory authorities, which constitute 'competent authorities' within the meaning of Article 4(4) of that directive, read in conjunction with Article 4(2)(i) of that regulation.

(64) In that respect, it must also be recalled that, under Article 17(1) of [the EBA] Regulation, where a competent authority has not applied the acts referred to in Article 1(2) of that regulation,



or has applied them in a way which appears to be a breach of EU law, including the regulatory technical standards and implementing technical standards established in accordance with Articles 10 to 15 of the regulation, in particular by failing to ensure that a financial institution satisfies the requirements laid down in those acts, the EBA is to act in accordance with the powers set out in Article 17(2), (3) and (6) of the regulation.

(65) Next, it must be noted that, in accordance with Article 60(1) of [the EBA] Regulation, any natural or legal person, including competent authorities, may appeal against a decision of the EBA referred to in Articles [17-19] of that regulation and any other decision taken by the EBA in accordance with the EU acts referred to in Article 1(2) of the regulation 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.

(66) It follows that, in order for an appeal to the Board of Appeal to lie against a decision of the EBA, for the purpose of Article 60 of [the EBA] Regulation, that decision must either have been taken in accordance with the EU acts referred to in Article 1(2) of that regulation or be one of the decisions referred to in Articles 17 to 19 of the regulation.

(67) First, and despite the fact that infringement of certain provisions of Directive 2006/48 was alleged in support of the complaint, the decision of the EBA was not based on Article 1(2) of [the EBA] Regulation. The EBA did not express any view in its decision on whether or not that directive had been infringed by the competent authorities or by the credit institution concerned.

(68) Secondly, it suffices to point out that the decision of the EBA is clearly not one of the decisions referred to in Articles 18 and 19 of [the EBA] Regulation, by which the EBA may require national supervisory authorities to take specific action to address an emergency or to settle disagreements that may arise in cross-border situations between those authorities, and this is common ground between the parties. Furthermore, it suffices to note that no breach of the regulatory technical standards and implementing technical standards established in accordance with Articles 10 to 15 of that regulation, as referred to in Article 17(1) of [the EBA] Regulation, was alleged in support of the applicant's complaint, and this was confirmed by the applicant at the hearing. In addition, contrary to what is claimed by the applicant, it is not apparent either from the letter of 2 July 2013 that it sent to the EBA, or from its reply to the EBA's response, submitted on 20 May 2014 in the administrative procedure, that the applicant alleged breach of the standards referred to in Articles 10 to 15 of [the EBA] Regulation following the submission of the complaint.

(69) Thirdly, as pointed out in paragraphs 46 and 49 above, it suffices to note that the applicant is not one of the entities expressly referred to in Article 17 of [the EBA] Regulation which may request the EBA to initiate an investigation into an alleged breach of or failure to apply EU law (which are limited to the competent authorities, the Parliament, the Council, the Commission and the Banking Stakeholder Group).

(70) The applicant also does not claim to be a member of the Banking Stakeholder Group, established in accordance with Article 37 of [the EBA] of Regulation, to help facilitate consultation with stakeholders in areas relevant to the tasks of the EBA. In that respect, it can be seen from Article 37(2) that that group is composed of 30 members, representing in balanced proportions credit and investment institutions operating in the European Union, their employees' representatives as well as consumers, users of banking services and representatives of SMEs.

(71) Fourthly, it should be noted that, except in the case of a refusal to initiate an investigation upon a request by one of the entities exhaustively listed in Article 17(2) of [the EBA] Regulation, the recommendations made, or decisions taken by the EBA pursuant to Article 17(2) to (6) of that regulation are addressed to either the competent authorities or the financial institutions concerned.

Article 17(3) of that regulation provides that ‘the [EBA] may (...) address a recommendation to the competent authority concerned setting out the action necessary to comply with Union law’. According to Article 17(4), ‘[w]here the competent authority has not complied with Union law ... the Commission may, after having been informed by the [EBA], or on its own initiative, issue a formal opinion requiring the competent authority to take the action necessary to comply with Union law’. In addition, Article 17(6) of [the EBA] Regulation states that ‘where a competent authority does not comply with the formal opinion ..., the [EBA] may ... adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Union law including the cessation of any practice’.

(72) It follows from the examination of the relevant provisions of [the EBA] Regulation that the decision of the EBA challenged before the Board of Appeal in the present case cannot be regarded as being based, having regard to its nature, on one of those provisions. Accordingly, the Board of Appeal did not have competence to decide on the appeal brought before it on the basis of Article 60(1) of [the EBA] Regulation.

45. On appeal, the CJEU, with its judgment of 14 December 2016 in case C-577/15 P, *SV Capital OU v EBA* (EU:C:2016:947) upheld the General Court judgment (see paragraphs 35-42).

46. Accordingly, the *SV Capital* ruling of the General Court confirmed that the powers of the EBA under Article 17(2), as it stood before its amendment by Regulation (EU) No 2019/2175, are discretionary. They also confirmed that a natural or legal person not explicitly specified therein as having standing to request the opening of an investigation thereunder does not have standing to seek the annulment of a determination by the EBA not to initiate an ‘Article 17 investigation’. These rulings also confirm that any such determination by the EBA cannot be appealed to the Board of Appeal, since such a determination does not fall within Article 60 of the EBA Regulation, which confers jurisdiction on the Board of Appeal by providing that an appeal may be taken to the Board, *inter alia*, “*against a decision of the Authority referred to in Article 17.*”

47. The *SV Capital* rulings provide (General Court Ruling, paragraphs 71- 72; CJEU Judgment, paragraphs 40-42) that the relevant Article 17 decisions relate to: (i) decisions related to a request for opening an investigation made by one of the entities explicitly listed in Article 17(2) as having standing to request such an investigation (i.e., NCAs, the European Parliament, the Council, the Commission, and the Banking Stakeholder Group); and (ii) the recommendations or decisions that, under Article 17, may be addressed by the EBA to the relevant NCA, the Commission, or relevant financial institutions on foot of its completion of an ‘Article 17 investigation’. Any natural or legal person requesting the EBA to take an investigation but not having standing to make such a request cannot, accordingly, be an addressee of a “*decision referred to in Article 17*”; hence, the Board of Appeal lacks competence to review a determination by the EBA not to initiate an investigation.

#### ***Further application of the SV Capital rulings by the Board of Appeal***

48. The interpretation of the General Court was previously applied by the Board of Appeal in the context of EBA’s Article 17 jurisdiction in *Kluge v EBA*, Decision of 7 January 2016 (BoA/2016/001), in the following manner:

(24) “Persons other than the entities listed can (and do) ask the EBA to open “own initiative” investigations, and (as in this case) the EBA may accept the complaint as admissible, and make subsequent enquiries, but it follows from the decision of the General Court that they have no right of appeal to the Board of Appeal against the Authority’s decision in that regard.”

49. Further to the ruling of the CJEU in *SV Capital OU v EBA*, the Board of Appeal confirmed this approach as regards ESMA’s Article 17 jurisdiction in *B v ESMA*, Decision of 10 September 2018 (BoA D 2018 02):

(44) The main ground of the Court’s decision (and that particularly relied on by the respondent) is that the appellant was not one of the entities expressly referred to in article 17(2) of the Regulation that is entitled to request an investigation, and that consequently the Board of Appeal had no jurisdiction to hear its appeal against the refusal of the relevant authority (in that case the EBA) to do so.”

(46) “The practical effect of the decision is to limit appeals against decisions of the [ESAs] (that is, ESMA, the EBA and EIOPA) to investigate or not to investigate alleged breaches or non-applications of Union law to [NCAs], the European Parliament, the Council, the Commission or the Securities and Markets Stakeholder Group. The fact that the Authority may initiate investigations on its own initiative does not affect this conclusion. The instant case is concerned with the jurisdiction of the Board of Appeal to hear an appeal from a determination by the ESMA Chairperson not to undertake an Article 17 investigation. In order to consider this appeal, the Board must apply relevant EU law, including the *SV Capital* rulings, consider its previous Decisions, and assess the application by ESMA of the Rules in this case.”

50. A similar approach was taken by the Board of Appeal in *Howerton v ESMA*, Decision of 9 October 2020 (BoA D 2020 01), finding that:

(15) “A second, and concurrent, reason of inadmissibility stems from the case-law of the Court of Justice. The court, in its judgments of 9 September 2015, *T-660/14 SV Capital OÜ v EBA*, T-660/14, EU:T:2015:608 and, on appeal, of 14 December 2016, *SV Capital OÜ v EBA*, C-577/15 P, EU:C:2016:947 clarified that a decision adopted by one of the ESAs (in that case, the [EBA]; but the same principle applies in the present case, where the relevant ESA is ESMA) not to initiate a proceedings under Article 17 is an act which is not reviewable by the Board of Appeal. Thus, even assuming that the Contested Conclusion were to be considered a decision to the effect of Article 17 and Article 60 of Regulation (EU) No 1095/2010 (as the Board of Appeal believes it is not), the Contested Conclusion could not be appealed before the Board of Appeal.”

51. In that case, decided after the amendment of Article 17(2) by Regulation (EU) No 2019/2175, the Board of Appeal, without addressing the change in wording, proceeded on the basis that the principles set out in *SV Capital OU v EBA* applied, and that a conclusion by ESMA not to initiate proceedings under Article 17 was an act which was not reviewable by the Board of Appeal. The same approach was taken by the Board of Appeal, more recently, in “*A*” v ESMA, Decision of 12 March 2021 (BoA D 2021 02).

### ***The General Court’s ruling in the *Jakeliūnas v ESMA* case***

52. Finally, in its order of 10 August 2021 in Case T-760/20, *Jakeliūnas v ESMA* (EU:T:2021:512), the General Court considered inadmissible a complaint against a decision by ESMA not to open an investigation. The General Court considered the amended drafting of Article 17(2) in the light of Regulation (EU) No 2019/2175 and concluded that from the wording requiring the authority to “state how it intends to deal with the case and, where

appropriate, investigate” that ESMA enjoyed a discretion in deciding whether to open an investigation and, by way of consequence, the decision not to undertake an investigation is not an appealable act (paragraphs 29-30).

#### **F. Specific consideration of the circumstances of the case**

53. The Board of Appeal is part of the governance structure of the EBA<sup>19</sup> (and the other ESAs of which it is a joint body under their founding Regulations). Its members are required to be independent in making their decisions and undertake to act independently, impartially and in the public interest.<sup>20</sup>

54. In accordance with Article 60 of the EBA Regulation, which is in force as (slightly) amended by Regulation (EU) No 2019/2175, the Board of Appeal may confirm a decision of the EBA’s competent body or remit the case to that competent body.<sup>21</sup> Article 60 clearly states that: “*If the appeal is admissible, the Board shall examine whether it is well founded.*”<sup>22</sup> In this respect, if the EBA contends, preliminarily, that an appeal is not admissible and requests that the Board of Appeal rules first on the admissibility, the issue of admissibility must be decided prior to the full consideration of the merits of the appeal. Indeed, pursuant to Article 9(1) of the Rules of Procedure of the Board of Appeal, if the respondent contends that the appeal is not admissible under Article 60 of the ESAs Regulations, the Board shall determine whether it is admissible before examining whether it is well founded under Article 60.4.

55. The question raised is whether the circumstances of the case fall within the framework set by the SV Capital and Jakeliūnas rulings and, thus, whether the precedent set by these rulings must be applied to dismiss the case, or whether the factual or legal circumstances require otherwise. For the reasons stated below, the Board of Appeal considers that there are no reasons to deviate from the SV Capital and Jakeliūnas rulings, and from subsequent precedents of the Board of Appeal.

56. This appeal raises interconnected issues relating to two questions of admissibility:

the *first* relates to the admissibility of, and the related procedures governing requests to EBA, in accordance with Article 17(2) of its founding Regulation, to initiate an investigation relating to an alleged breach or non-application of EU law by an NCA;

the *second* relates to the admissibility of an appeal to the Board of Appeal, in accordance with Article 60 of the EBA Regulation, against a determination by EBA not to initiate an investigation under Article 17(2) on foot of a request by an entity not explicitly specified in that Article.

The findings of the Board of Appeal are as follows:

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<sup>19</sup> EBA Regulation, Article 6, point (5).

<sup>20</sup> EBA Regulation, Article 59.

<sup>21</sup> EBA Regulation, Article 60(5), first sentence.

<sup>22</sup> EBA Regulation, Article 60(4), first sentence.

## **I. Admissibility of the appeal against the Contested Decision in the factual and legal circumstances of the instant case**

57. As already noted, the instant case deals with the Board of Appeal's jurisdiction to hear an appeal on a determination by EBA in its Notification (of 8 March 2022) not to initiate an 'Article 17 investigation' (the "Contested Decision"). In considering this appeal, the Board must apply relevant EU law, including the SV Capital and Jakeliūnas rulings and consider its previous decisions.

58. While EBA's exercise of its discretion under Article 17(2) of the EBA Regulation and its application of the Rules structuring that discretion may be of relevance to this appeal, the key aspect to be determined relates to whether or not the Board of Appeal has jurisdiction to hear this appeal. Previous Board Decisions and the SV Capital rulings suggest that an appeal does not lie to the Board from a determination by the EBA not to initiate an investigation under Article 17(2) on the basis of a complaint by an entity not explicitly listed in that Article as having standing to make such a request.

59. Nevertheless, the Board of Appeal has also considered whether there are factual and legal circumstances at issue in the instant case, which, to a certain extent, are different from those at issue in previous relevant Board of Appeal decisions and in the SV Capital and Jakeliūnas rulings and which might, thus, distinguish the position of the Appellant and so lead to a different conclusion on the admissibility of an appeal concerning the EBA Notification that determined not to initiate an investigation according to Article 5 of the Rules.

### ***Admissibility of the appellant's complaint***

60. As also the EBA acknowledges with the Contested Decision, the appellant made clear allegations that the NCA concerned may have breached certain of its obligations under the PSD II and the PAD. It is undisputed therefore that the threshold admissibility conditions applied by the EBA under Article 17(1) of its founding Regulation and under its Rules were met.

61. Furthermore, in relation to the admissibility of the Appellant's complaint to the EBA as far as the application by the EBA of the Rules is concerned, the Board of Appeal notes the following. *First*, the request to the EBA made by the Appellant "pointed to measures or practices of a competent authority which appear to constitute a breach or non-application of Union law", as required by Article 2(2) of the Rules. The Board of Appeal is persuaded of this from its review of the Notice of Appeal.

62. *Second*, the request set out "a clear grievance explaining how a competent authority has not applied the acts referred to in Article 1(2) of the EBA Regulation or has applied them in a way which appears to be a breach of Union law, including the technical standards established in accordance with Articles 10 to 15 of the EBA Regulation", as required by Article 3(2), point (i) of the Rules.

63. *Third*, the request to the EBA included (after the submission of the additional documents requested by the EBA in its communication with the appellant on 28 January 2022) "well substantiated information" as required by Article 3(2), point (ii) of the Rules.

64. *Finally*, the request did not fall into any of the categories set out in Annex 1 to the Rules, the application of which render a request inadmissible in accordance with Article 3(2), point (iii) of the Rules. In particular, it did not fail to set out a grievance based on well substantiated information, set out a grievance which is outside the scope of the acts referred to in Article 1(2) of the EBA Regulation and to refer to the NCA to which the alleged breach of Union law may be attributed.<sup>23</sup>

### ***EBA's discretionary powers***

65. Notwithstanding the above-mentioned on the admissibility of the appellant's complaint, the Board of Appeal notes that the powers of the EBA under Article 17(2) of the EBA Regulation, as further framed by the procedure established by the Rules, are discretionary and the admissibility of a complaint does not imply *per se* that an investigation follows.

66. Article 5(1), point (ii) of the Rules, which reflects this discretion, provides that the EBA Chairperson can, if a request is admissible, determine that an investigation should not be initiated as a matter of discretion, taking account of the non-exhaustive list of factors included in Annex 2 to the Rules.

67. In the instant case, the EBA informed the Appellant that, according to the information available to it, the EBA did "*not have clear indications that the [NCA] failed to assess the lawfulness of the termination of the bank account*".

68. The Board of Appeal further notes that the determination by the EBA not to open an investigation under Article 5 of the Rules broadly relates to Article 17(2) of the EBA Regulation, even though the Appellant is not included in the list of entities explicitly referred therein, and that the Appellant is the addressee of the Contested Decision.

69. The Board of Appeal is persuaded that the request to the EBA was admissible under the Rules and that the Appellant has a clear and understandable factual interest in the EBA initiating an investigation, as well as in appealing against the EBA determination not to pursue an investigation, for the purposes of Article 60(1). However, the fundamental question is whether such factual interest translates into a right for the appellant to appeal before the Board of Appeal the EBA determination that an investigation should not be initiated. As stated in the following paragraphs, the answer to this is a negative one.

### ***Scope of jurisdiction of the Board of Appeal under Article 60 of the EBA Regulation***

70. Whether an appeal can lie or not to the Board of Appeal depends on the scope of its jurisdiction, as set out in Article 60 of the EBA Regulation. Accordingly, even when the Board recognises the factual interest of an appellant in the EBA opening an investigation, critical is whether or not this determination comes within the scope of Article 60.

71. Thus, central to this appeal is the Board's jurisdiction over 'Article 17 decisions' in accordance with Article 60(1). It follows from the admissibility of the Appellant's request to the EBA that its request for opening an investigation is relevant as regards EBA's exercise of its own-initiative powers under Article 17(2) as it concerns allegations that "*an [NCA]*

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<sup>23</sup> Rules, Annex 1, second – fourth points.

*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 (...)*”.

72. While the Board of Appeal recognises the factual interest of the Appellant in the EBA opening an investigation in light of the SV Capital and Jakeliūnas rulings, the Board is of the view that in this appeal the EBA’s determination not to open an investigation does not come within the scope of Article 60. The Appellant has not established that the Contested Decision is a decision within the scope of the Board of Appeal’s jurisdiction under Article 60 in accordance with the SV Capital rulings, according to which the Board’s jurisdiction under Article 60 as regards Article 17 decisions is limited to decisions: (i) regarding the opening of an investigation following a request by an NCA, the European Parliament, the Council, the Commission and the Banking Stakeholder Group and addressed to these entities; and (ii) on the foot of any subsequent action by the EBA where an investigation is taken, whether (a) recommendations to NCAs or the Commission, or (b) decisions addressed to financial institutions.

73. The Board of Appeal agrees with the EBA that the Contested Decision is not such a decision adopted on the basis of Article 17 and, hence, cannot be challenged in accordance with Article 60 as interpreted by the General Court and the CJEU in the SV Capital and Jakeliūnas rulings.

74. The Appellant has argued, in general, that the appeal is admissible under Article 60. The Board of Appeal notes, however, that its decisions as regards its jurisdiction must follow settled EU case-law as this applies to the specific facts before it. In the instant case, the Board of Appeal finds that the circumstances raised by the Appellant do not allow for a dis-application of the SV Capital rulings.

75. The Appellant has not raised any arguments which would support a different conclusion.

76. For the sake of completeness, the Board of Appeal also notes that application of the SV Capital rulings reflects wider EU case law on the limited reviewability of decisions relating to refusals to initiate investigation/infringement procedures. As already noted, in the SV Capital OU case discussed above, the General Court held that according to settled case-law, developed in the context of actions for annulment of Commission decisions refusing to initiate infringement proceedings, where an EU institution or body is not bound to initiate a procedure, but has a discretion which excludes the right for individuals to require it to adopt a specific position, it is not open to persons who have lodged a complaint to bring an action before the EU judicature against a decision to take no further action on their complaint. That possibility would only arise if those persons had procedural rights, comparable to those in the case of a procedure under Council Regulation (EC) No 1/2003, enabling them to require that institution or body to inform them and to grant them a hearing (paragraph 46).

77. The Board of Appeal has consistently applied the principle stated by the General Court and confirmed by the CJEU in several subsequent cases (see decision of 7 January 2016, *Andrus Kluge and Others v EBA* (BoA 2016 01); decision of 10 September 2018, *B v ESMA* (BoA D 2018 02) and decision of 9 October 2020, *Howerton v ESMA* (BoA D 2020 01) (this latter decision, however, concerned a complaint which also fell outside the scope of application of the acts referred to in Article 1(2) of ESMA Regulation).

78. It is further noted that in its decision of 7 January 2016, *Andrus Kluge and Others v EBA* (BoA 2016 01, paragraphs 33-35) the Board of Appeal held that the rules of procedure for investigation of breach of Union law adopted by the EBA in 2014 did not give persons different from the “qualified” entities listed in Article 17(2) a right of appeal because “*the General Court refer[red] expressly to the internal processing rules in paragraph 7 of the [SV Capital] decision and it follows that the rules were not regarded by the Court as extending rights of appeal which would not otherwise exist*”.

79. However, the Board of Appeal acknowledges the materiality of the issues raised by the Appellant as regards the potential breach of EU law by the NCA. Similarly, the Board previously thought it right to add, in its decision of 10 September 2018, *B v ESMA* (BoA D 2018 02), that “*the issues raised by the appellant are of very significant concern. It is entirely understandable that the appellant and others in such a position should be seeking a remedy*” (paragraph 60).

## **II. The standard of admissibility under the new text of Article 17(2) of the EBA Regulation as amended by Regulation 2019/2175**

80. A final aspect that needs to be addressed is whether the amendments introduced to Article 17(2) of the EBA Regulation by Regulation (EU) 2019/2175, which apply from 1 January 2020,<sup>24</sup> may be conducive to a different conclusion from the one adopted by the CJEU in the *SV Capital* case (hence, under the initial text of the EBA Regulation).

81. As already noted, the first sub-paragraph of Article 17(2) was amended in 2019 with a view to further structuring the procedure for initiating ‘Article 17 investigations’, and in particular EBA’s own-initiative powers of investigation, as well as EBA’s discretionary powers thereunder. While recognising the novelty and sensitivity of EBA’s powers under Article 17(2) and the importance of careful textual, teleological, and contextual interpretation, the Board of Appeal finds it reasonable to interpret the textual revisions as leading to greater specification or structuring of how the EBA can exercise its discretion and power of investigation, whether on a request by an entity with standing to so request or on its own-initiative. The question therefore arises as to whether this change might be regarded as altering the Board of Appeal’s application of *SV Capital*.

82. As discussed by the Board of Appeal in a recent decision (“A” v ESMA, Decision of 12 March 2021, BoA D 2021 02), it could be suggested that the distinction between entities with standing to request the opening of an ‘Article 17 investigation’ and other persons who may only bring relevant matters to the EBA’s attention (a distinction driving the Board of Appeal’s jurisdiction over Article 17 decisions) has been blurred somewhat. The amended text of Article 17(2) is clear in that in both cases the EBA is not obliged to initiate an investigation. This must be made “*where appropriate*”, even though the EBA must “*outline how it intends to proceed with the case*”. Furthermore, Article 2(4) of the Rules commits the EBA to outlining how it intends to proceed, regardless of who initiates a request for action.

83. In light of the functional concerns already raised on several occasions by the Board of Appeal (including in the recent “A” v ESMA, Decision), this may, to some extent, invite a

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<sup>24</sup> Regulation (EU) 2019/2175, Article 7.



prudent reconsideration of the rigid divide, for the purposes of the reviewability of the determination not to initiate an investigation for breach of Union law, between the entities exclusively specified in Article 17(2), on the one hand, and natural or legal persons providing well substantiated information to the EBA in the course of its “own-initiative jurisdiction”, on the other. This would also appear consistent with Article 5 of the Rules, which, as already mentioned, does not differentiate among the different types of “Requesters” (as defined in Article 2(1)-(2)).<sup>25</sup>

84. The Board of Appeal also notes the importance of Article 17 to EBA’s objective of contributing to a sound effective and consistent level of regulation and supervision and to enhancing supervisory convergence (in accordance with Article 1(5)), of effective information-gathering to EBA’s capacity to effectively deploy Article 17<sup>26</sup> and of not deterring natural and legal persons from drawing potential breaches of EU law to EBA’s attention given a lack of procedural equity.

85. On that basis, and since the General Court appeared to concede that a Requester explicitly listed in Article 17(2) of the EBA Regulation and in Article 2(1) of the Rules may challenge the EBA Chairperson’s determination not to initiate an investigation, in the Board of Appeal’s view it seems that it cannot be fully excluded – in light of the 2019 amendments to the ESAs Regulations, lacking a determination of the CJEU on the new text of Article 17(2) and given the importance of the procedure under Article 17 – that the narrowing of the difference between the Requesters brought about by the 2019 amendments to Article 17(2) may be conducive to the CJEU finding that, upon the 2019 amendments, any Requester could have *locus standi* in challenging (albeit in quite exceptional circumstances as further specified below) a determination of the EBA Chairperson under Article 5. This holds despite the very fact that the latter has a discretion, which excludes the right for parties to require it to adopt a specific position.

86. The Board of Appeal is also aware of the imperatives of good administrative governance, which demand that the discretion of the EBA be protected to avoid having it dealing with an excessive (and potentially vexatious) volume of appeals. In this regard, the Board of Appeal refers to its Decision in *SV Capital OU v EBA*. That Decision noted that the EBA has a discretionary power under Article 17(2) of the EBA Regulation, that the EBA is not in a position, as a small body, to investigate every admissible complaint and, assuming a correct application of its discretion, that the EBA is empowered not to initiate an investigation even where the request is formally admissible (paragraphs 30 and 34).

87. Notwithstanding the above, the Board of Appeal is also mindful that the position of the General Court and the Court of Justice has not changed on the issue of the admissibility of an appeal against a discretionary decision before the courts, even after the text of Article

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<sup>25</sup> It is recalled that the EBA Chairperson may close a case without initiating an investigation when, *inter alia*, he/she considers that “*an investigation should not be initiated as a matter of discretion, taking into account the non-exhaustive list of factors included in Annex 2*” (Rules, Article 5(1), point (ii)).

<sup>26</sup> This aspect was further enhanced by the insertion, in 2019, of a new third sub-paragraph in Article 17(2); see also recital (23) of Regulation (EU) 2019/2175.

17(2) was amended by Regulation (EU) 2019/2175. In its judgment of 10 August, Case T-760/20, *Jakeliūnas v ESMA* (EU:T:2021:512), the General Court considered inadmissible a complaint against a decision by ESMA not to open an investigation. The General Court referred to the *SV Capital* case law, to reiterate its position that, to appeal a decision where an institution, body or agency exercises a discretionary power e.g., to initiate or not an investigation procedure, the parties requesting the opening of such procedure cannot appeal the decision unless they have been conferred procedural rights, such as those under Regulation 1/2003, on competition procedures (*Jakeliūnas v ESMA*, paragraph 25). Then, the Court considered the amended drafting of Article 17(2) and concluded that from the wording requiring the authority to “state how it intends to deal with the case and, where appropriate, investigate” it does not follow that the interested parties who requested the opening of the procedure have procedural rights to be informed, or heard, as in Regulation 1/2003 (*Jakeliūnas v ESMA*, paragraph 29), and therefore, the decision not to undertake an investigation is not an appealable act (*Jakeliūnas v ESMA*, paragraph 30). The case does not seem to offer any reason to treat a decision not to proceed with an investigation (as in the present case) differently from a decision not to investigate (as in the case decided by the Court) nor to treat the competence to review by the Board of Appeal differently from the jurisdiction of the Court.

88. By way of related observation, however, and while emphasising the discretionary nature of EBA’s powers under Article 17(2) (as also frequently affirmed by the Board of Appeal), the Board notes the wide grounds on which the EBA, in accordance with its Rules and case law, can decide not to investigate a complaint.

### **G. The decision**

89. On grounds developed above, the Board of Appeal unanimously decides that the appeal is inadmissible because it is directed against a decision which is not challengeable.

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

Christos Gortsos  
(Acting President)

(SIGNED)

Gerben Everts

(SIGNED)

Geneviève Helleringer

(SIGNED)

David Ramos Muñoz

(SIGNED)

Margarida Lima Rego

(SIGNED)

Carsten Zatschler

(SIGNED)

On behalf of the BoA Secretariat  
Kai Kosik

(SIGNED)

A signed copy of the decision is held by the Secretariat