

# Decision

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of the Board of Appeal of the European Supervisory Authorities  
given under Article 60 of Regulation (EU) No 1095/2010  
and the Board of Appeal's Rules of Procedure (BOA 2012 002)

**Appeal by**

**Investor Protection Europe sprl  
[Appellant]**

**against**

**European Securities and Markets Authority  
[Respondent]**

**Decision  
Ref. BoA 2014 05**

**Board of Appeal**

William Blair (President)  
Juan Fernández-Armesto (Vice-President and Rapporteur)  
Beata Maria Mrozowska  
Noel Guibert  
Katalin Mero  
Marco Lamandini

Place of this decision: London

10 November 2014



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## I. The appeal

1. This is an appeal by Investor Protection Europe sprl, the appellant, which is a company based in Brussels, Belgium, against the European Securities and Markets Authority, the respondent, in respect of its decision of 10 June 2014. The Board notes at the outset that the respondent contests that this is a decision in respect of which an appeal lies.
2. The appellant's representative is Mr Albert Biebuyck, its managing partner, and the respondent's representative is Ms Sophie Vuarlot Dignac, Head of the Legal Cooperation and Convergence Unit.
3. The appeal is brought under Article 60 of Regulation No 1095/2010 ("the ESMA Regulation"). The ESMA Regulation establishes the European Securities and Markets Authority (ESMA). It provides in Article 6(5) for the Board of Appeal to exercise the tasks set out in Article 60.
4. Article 60(1) of the ESMA 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."

5. The parties have submitted the following documents to the Board of Appeal with attachments:
  - (1). The appellant's Notice of Appeal dated 1 August 2014; this was filed by email on 6 August 2014, and sent by registered letter to ESMA that day;
  - (2). The respondent's application for directions by way of case management dated 21 August 2014 by which the respondent invited the President to give directions that admissibility should be determined as a preliminary matter before submissions were made by the parties as to the merits of the appeal;
  - (3). The appellant's objections dated 24 August 2014 to treating admissibility as a preliminary issue.

6. On 25 August 2014, the President gave the following directions:

"Whereas

- (1). On August 21, 2014 the respondent submitted an Application for Directions from the President of the Board of Appeal (the "Application"), in which it alleged (inter alia) that the appeal is not admissible;



(2). On August 24, 2014 the appellant submitted its position with regards to the Application;

(3). Article 9.1. of the Rules of Procedure states that “if the respondent/s contend/s that the appeal is not admissible under Article 60 of the ESA Regulations, the Board of Appeal shall determine whether or not it is admissible before examining whether it is well founded under Article 60.4”.

The President now issues the following Directions under Article 11.1 of the Rules of Procedure:

(1). Respondent shall state its contentions as to the non-admissibility of the appeal in a submission to be filed not later than two weeks from the date hereof; all evidence regarding these contentions shall be attached to such submission.

(2). Appellant shall state its position with regard to respondent’s contentions as to the non-admissibility of the appeal by way of a submission to be presented not later than four weeks from the date hereof; all evidence with regard to appellant’s position shall be attached to such submission.

(3). Upon receipt of respondent’s and appellant’s submissions, the Board of Appeal may decide to address the issue of non-admissibility in a separate decision, or to join it to the merits.

(4). All communications between the parties and the Board of Appeal may take place by email; if any of the parties wishes to submit extensive documentation, it shall liaise with the Secretariat on the proper way to do so electronically.”

7. Pursuant to these directions, the respondent filed its Response limited to admissibility dated 8 September 2014.

8. The appellant filed its comments on the Response limited to admissibility dated 19 September 2014.

9. On 24 September 2014, the secretariat to the Board of Appeal emailed the parties as follows: “In the light of [the parties’] submissions, the Board of Appeal has decided to address the issue of non-admissibility in a separate decision. The Board of Appeal in principle finds that it has been sufficiently briefed with the parties’ submissions, but it would be prepared to hold a hearing if either of the parties so requests.”

10. On 26 September and 29 September 2014 respectively, the appellant and the respondent informed the secretariat that they did not request a hearing.

11. The Board of Appeal has accordingly considered the question of admissibility on the basis of the parties’ written submissions.



12. On 21 October 2014, the secretariat to the Board of Appeal emailed the parties as follows:  
“The Board of Appeal has been considering the respondent’s objection to admissibility. It refers to the respondent’s objections as set out in paragraphs 89-94 of its submissions dated 8 September 2014, and the appellant’s response in paragraph 11 of its submissions dated 19 September 2014, including footnote 3. Before reaching a decision on admissibility, the Board of Appeal considers that the appellant should have a further opportunity to demonstrate that it has sufficient interest to bring this appeal. In that regard, the Board notes the absence of supporting material in relation to footnote 3. The appellant should also have a further opportunity to give a further explanation of its role in relation to the matters in respect of which it brings its complaint should it wish to do so. The appellant’s response would be appreciated as soon as possible.”
13. On 22 October 2014, the appellant sent its response along with two attachments.
14. On 23 October 2014, the respondent asked to have until 29 October 2014 to reply, which the Board agreed. The respondent sent its reply to the appellant’s response on that day.

## II. Summary of the relevant facts

15. Since this decision is limited to the question of admissibility, the facts can be summarised briefly. By email of 10 October 2012, the appellant raised with the respondent its concerns about what it regarded as breach of Union law by the Commission de Surveillance du Secteur Financier (CSSF), which is the public institution which supervises the professionals and products of the Luxembourg financial sector.
16. [Redacted]
17. The respondent treated the complaint as a request to open an investigation under Article 17 of the ESMA Regulation, which provides for the possibility for ESMA to open an investigation on its “own initiative” for a breach of Union law in cases of non-application or incorrect application by competent authorities of the acts referred to in Article 1(2) of the ESMA Regulation (see its letter of 14 January 2013).
18. The material attached to Notice of Appeal shows that there were exchanges between the appellant and the respondent over the course of the following months. The appellant emphasised (and continues to emphasise) that it seeks action on the part of the respondent in the interest of what it sees as the building of a common Union supervisory culture and consistent supervisory practices, as well as ensuring uniform procedures and consistent approaches throughout the Union (Article 29 of the ESMA Regulation).
19. By letter of 10 June 2014, the respondent wrote to the appellant informing it of its decision not to take action in relation to its complaint. This is the decision in respect of which the



appeal is brought, and as noted, among other things, the respondent maintains that it is not a “decision” within the meaning of Article 60 of the ESMA Regulation.

20. The letter of 10 June 2014 states that the complaint in relation to the application of the Prospectus Directive by the CSSF is admissible, but that under the procedure on breach of Union law investigations adopted by its Board of Supervisors, the respondent had decided not to initiate an investigation under Article 17 of the ESMA Regulation. (The procedure is further described below.) It said that it considered that the matter would be better dealt with by other means, including procedures under national law in Luxembourg.

21. [Redacted]

22. [Redacted]

23. In its Notice of Appeal contesting the decision of 10 June 2014, the appellant sets out the two elements on which its appeal is based. It contends that:

“ESMA’s decision weakens investor protection for at least two reasons:

(1). The investors initiating a law suit in Luxembourg will be weakened by the attitude of the CSSF. KBC Ifima [*which the Board understands is a wholly owned subsidiary of KBC Bank*] will argue in court that the absence of breach is demonstrated by the fact that the CSSF never intervened or concluded that there was a breach. Even though some well informed investors might reply that the CSSF does not always enforce laws and regulations, the position of investors will be weakened. In other words, the CSSF’s attitude puts investors at a disadvantage in a law suit. Would an investigation by ESMA lead to a recommendation to the CSSF to uphold Union law, then investors would be able to initiate a law suit in fair conditions.

(2). The decision of ESMA not to initiate an investigation under Article 17 of the ESMA Regulation sends the wrong message to national regulators. Why would they bother to ensure that financial market participants apply Union law if even ESMA considers that breaches do not require an intervention and are better dealt with in national courts?

Since enhancing the protection of all European investors is a central objective for ESMA, we appeal against ESMA’s decision.”



### III. The arguments of the parties as to admissibility

24. The respondent argues that the question is whether it can be said to have done an act subject to review. Countless acts, it argues, might be described as “decisions”, but an appeal under Article 60 is admissible only on the narrower basis that it is an appeal against an act which constitutes a “decision” within the meaning of that Article as properly interpreted in accordance with EU law. Alternatively, if there was a reviewable act it does not constitute a decision that may be appealed. Finally, the appellant does not demonstrate its interest in challenging the respondent’s action, and seeks a remedy that is not provided for in Article 60 of the ESMA regulation.

25. Each of the respondent’s points is contested by the appellant.

26. In more detail, the parties’ arguments as to admissibility may be considered by reference to the various sections which are contained in the respondent’s Response dated 8 September 2014.

(1). The respondent argues that its letter dated 10 June 2014 is not a “decision” that can be appealed under Article 60 of the ESMA Regulation, because the letter simply informed the appellant of the “conclusion” internally reached by ESMA’s chair. Only “individual decisions” adopted under Article 17(6) and Article 8(2)(e) and (f) are within the appeal rights given by Article 60. To the contrary, the appellant argues that the letter of 10 June 2014 informed it in terms of a “decision” of ESMA, and not an internal “conclusion” of its Chair. It argues that the terms of Article 60 make it clear that the right of appeal is not limited to “individual decisions” of the respondent.

(2). The respondent argues that the “conclusion” reached by its Chair not to open an investigation under Article 17 of the ESMA Regulation is not an act that may be reviewed by the Board of Appeal or the CJEU (Court of Justice of the European Union). It argues that Article 60 of the ESMA Regulation reflects the principles set out in Article 263 TFEU (Treaty on the Functioning of the European Union). Accordingly, it argues that the case law of the CJEU applies on the admissibility of actions for annulment, and in particular, on the characteristics of acts subject to judicial review (reviewable acts). Article 263 TFEU precludes actions for annulment against non-binding acts such as opinions or recommendations. Only legally binding acts warrant a right of challenge. The exercise of powers under Article 17 of the ESMA regulation is purely preparatory to the possibility of the adoption by the respondent of a non-binding recommendation under Article 17(3). Further, such a recommendation must itself be regarded as a preparatory act leading (in case of non-compliance) to an opinion of the Commission, and when necessary, an “individual decision” by ESMA. To the contrary, the appellant argues that the respondent’s decision not to investigate is not a provisional measure leading to a final decision. It is, subject to the current appeal, the final conclusion of the procedure under Article 17 of the



Regulation. It can lead to legally binding decisions in the case of non-compliance with recommendations.

(3). The respondent argues that the “conclusion” reached by its Chair was not “of direct and individual concern” to the appellant as required by Article 60 of the ESMA Regulation. The fact that a complainant is informed of the conclusion reached by the Chair to initiate or not to initiate an investigation under Article 17 does not make the complainant an addressee of, or directly or individually concerned by, the conclusion. The conclusion, by its very nature, can neither change the complainant’s legal position nor adversely affect its interests. To the contrary, the appellant argues that by the terms of Article 60 of the ESMA Regulation, an appeal may be brought by a person against a decision addressed to that person, or against a decision addressed to someone else which is nevertheless of direct and individual concern to that person. The appellant was the addressee of a decision which was not addressed to another person, but to itself, and under the terms of Article 60 it may therefore file an appeal against the decision.

(4). The respondent argues that the “conclusion” reached by its Chair does not substantiate an omission subject to legal review. Article 265 TFEU requires that any proceedings for failure to act requires there to be a duty to take action, and that consequently a failure by a Union body to exercise a discretion cannot be the subject of an action for failure to act. To the contrary, the appellant argues that it has filed an appeal under the ESMA Regulation, not brought a case to the CJEU under the TFEU. The respondent’s decision not to investigate is itself an act rather than a failure to act.

(5). The respondent argues that the appellant has not demonstrated an interest in challenging the conclusion reached by its Chair. It argues that it is a well-established procedural principle under EU law that an applicant for relief must establish that it has an interest, meaning that it must show that it would benefit from the annulment of the contested act. The appellant has failed to demonstrate that it or its members are in a situation where they could be directly or individually concerned by any action taken by the respondent under Article 17 of the ESMA Regulation. The appellant thus does not demonstrate that it has a sufficient interest to bring an appeal under Article 60, whether representing its members, or in its own right. To the contrary, the appellant argues that it does not have to demonstrate an interest since it is the addressee of the relevant decision. In any case, it maintains that it does have an interest in filing the appeal.

(6). The respondent argues that the appellant is not entitled to the remedy it seeks, namely that the Board of Appeal “requires ESMA to initiate an investigation under Article 17 of the Regulation”. The appellant accepts this, but asserts it is entitled to a different remedy under Article 60(5) of the ESMA Regulation, namely the Board of Appeal remitting the case “to the competent body of the Authority”. That is the remedy it will seek should its appeal be found to be admissible.



## IV. The Board of Appeal's reasons

### A. Introduction

27. Article 60(1) of the ESMA Regulation is set out above. It states that any natural or legal person (it is not disputed that the appellant is a such a person) may appeal against a decision of ESMA referred to in Articles 17, 18 and 19 and any other decision taken by ESMA 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".

28. Article 17 of the ESMA Regulation is the relevant Article in this appeal. It 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 Securities and Markets Stakeholder Group, or on its own initiative, and after having informed the competent authority concerned, the Authority may investigate the alleged breach or non-application of Union law."

29. It is not in dispute that CSSF is a "competent authority", and that acts such as the Prospectus Directive which the appellant considers have been applied by the CSSF in a way which was a "breach of Union law", are "acts referred to in Article 1(2)" of the ESMA Regulation. To that extent, it is not in dispute that Article 17 applies.

30. As the respondent points out, there has been no request for an investigation by a competent authority, or by the European Parliament, the Council, the Commission or the Securities and Markets Stakeholder Group. Again, however, it is not in dispute that ESMA may investigate an alleged breach or non-application of Union law "on its own initiative", and that is the power which is relevant in the present appeal.

31. Further, it is not in dispute that ESMA exercises such power according to a Decision of its Board of Supervisors on "Breach of Union law investigations" of 19 June 2012 (ESMA/2012/BS/87), and did so in the present case. This Decision was revised on 9 July 2014, (it is now called "Rules of procedure on breach of Union law investigations"). The Board notes that the revised Decision clarifies the applicable procedure, but the revision came after the decision letter of 10 June 2014 complained of in this appeal.



32. Further, in its Response, the respondent says that it cannot have a duty to initiate an investigation of every complaint of alleged breach or non-application of Union law. Again, that point is not in dispute and the appellant makes no suggestion to the contrary. The Board also made this clear in *SV Capital OÜ v European Banking Authority* (BoA 2013 - 008) at ¶30, stating that even if a complaint is admissible, the power to investigate is discretionary in accordance with the Authority's published procedure.
33. Finally, in the present case, the respondent accepts that the appellant's complaint was admissible. The internal documents annexed to its Response show that it decided that the complaint was admissible, but that an investigation should not be initiated because the "request is more suitable to be dealt with by another person or body". (The letter of 10 June 2014 states that this includes procedures under national law in Luxembourg.) The documents make clear that though the complaint was treated as admissible as concerning an act of Union law (the Prospectus Directive is specifically identified), the respondent exercised its discretion not to investigate taking into account the non-exhaustive list of factors in Annex II to the Decision of its Board of Supervisors on "Breach of Union law investigations" referred to above.
34. However, the respondent does not seek to uphold the decision on this basis (at least at this stage). Though the *complaint* was treated as admissible, the respondent's case on the appeal is that the *appeal* is inadmissible.
35. Article 60(4) of the ESMA Regulation states that, "If the appeal is admissible, the Board of Appeal shall consider whether it is well-founded. ...". In the circumstances, and as stated above, the Board has agreed to the respondent's request to determine admissibility as a preliminary matter.

#### **B. The Board's conclusions on the respondent's arguments**

36. The respondent's central argument as to non-admissibility is the contention that an appeal to the Board of Appeal under Article 60 of the ESMA Regulation is to be treated in the same way as a review of legality by the CJEU under Article 263 TFEU or an action before the CJEU under Article 265 of the TFEU based on a failure to act. Applying the jurisprudence applicable to these provisions, the respondent concludes that, the conclusion reached by its Chair not to open an investigation under Article 17 of the ESMA Regulation and the letter that followed "... are not acts that may be reviewed by the Board of Appeal or the CJEU" (¶15 of the Response limited to admissibility dated 19 September 2014).
37. It is correct, as the Board of Appeal pointed out in ¶27 of its decision in *SV Capital OÜ v European Banking Authority* (BoA 2014 - C1 – 02), that some of the language of Article 60(1) of the ESMA Regulation reflects the language of 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").



38. However, whereas Article 263 of the TFEU provides for proceedings for a review by the Court, Article 60 of the ESMA Regulation provides for “an appeal” to the Board of Appeal. In the Board’s experience, the distinction between a judicial review by a court, and an appeal to a specialist body or tribunal, is well understood in the field of financial regulation and supervision. The effect of the ESMA Regulation is that both remedies are available: quoting the title of the articles, Article 60 provides for “Appeals” to the Board of Appeal, and Article 61 provides for “Actions before the Court of Justice of the European Union”.

39. Accordingly, the Board does not agree with the respondent’s analysis in this respect. The automatic application of limitations applicable to proceedings under Articles 263 and 265 TFEU (which is in effect the respondent’s argument) is, in the Board’s opinion, inappropriate in the case of a right of appeal under Article 60 of the ESMA Regulation. This could extend in principle also to the case-law referred to by the respondent on Article 258 TFEU.

40. It is also incompatible, in the Board’s view, with the purpose of the Board of Appeal, as stated in recital (58) of the ESMA Regulation. This states:

“It is necessary to ensure that the parties affected by decisions adopted by the Authority may have recourse to the necessary remedies. To protect effectively the rights of parties, and for reasons of procedural economy, where the Authority has decision-making powers, parties should be granted a right of appeal to a Board of Appeal. For reasons of efficiency and consistency, the Board of Appeal should be a joint body of the ESAs, independent from their administrative and regulatory structures. The decisions of the Board of Appeal should be subject to appeal before the Court of Justice of the European Union.”

41. Article 60(1) applies to “... 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) ...”. The Board does not consider that this language limits the right of appeal to “individual decisions” adopted under Article 17(6) and Article 8(2)(e) and (f), as argued by the respondent, since it is expressed in general terms.

42. It is correct (as the respondent says) that countless acts of the Authority might be described in a popular sense as “decisions”, but that an appeal under Article 60 is admissible only on the narrower basis that it is an appeal against an act which constitutes a “decision” within the meaning of that Article as properly interpreted in accordance with EU law.

43. However, the Board is only concerned in this case with a particular type of “decision”, namely a decision whether or not to exercise the Authority’s “own initiative” powers of investigation. In the Board’s view the powers conferred upon the Authority by Article 17 are central to deliver the results that justify the establishment of the European System of Financial Supervision. Breaches of Union law by a financial market participant and omissions by a competent authority to take the action required by Union law would or could stand in the way of the establishment of a proper functioning internal market. The Board refers further to



*max.mobil Telekommunikation Service GmbH v Commission*, Case T-54/99 at paragraph 54, and *Commission v T-Mobile Austria GmbH* Case C-141/02 P.

44. It is a feature of the respondent's Response limited to admissibility dated 19 September 2014 that it does not refer to the letter of 10 June 2014 refusing to initiate an investigation as a "decision", but rather calls it a "conclusion" internally reached by the Chair. The term "conclusion" is used throughout the Response.
45. However, in the Board's view, this approach has to be seen against the Decision of the Board of Supervisors on "Breach of Union law investigations" of 19 June 2012 (ESMA/2012/BS/87). The respondent accepts that the procedure laid down in this Decision was applied to the appellant's complaint. The recitals refer to "decisions on opening investigations". The text refers to "decisions" throughout. In deciding whether to initiate an investigation, the Chair has regard to the non-exhaustive list of factors in Annex 2, which is split between positive and negative factors. There are checks and balances on the Chair's decision to initiate an investigation, by way of informing the Vice-Chair on the basis of anonymised information, and in case of objection, the Management Board. As noted above, the Decision as revised is now called, "Rules of procedure on breach of Union law investigations". In the Board's view, these decisions are not, and are not treated as, the kind of routine day-to-day decisions of the Authority which obviously fall outside the ambit of the right of appeal given by the Regulation.
46. The internal documentation used in this respect was very properly disclosed by the respondent. It records a case number given to the appellant's complaint (ESMA/2014/BUL/41 – "BUL means "breach of Union law"). It records a "Decision on admissibility" (which was positive), and a "Decision on whether to initiate an investigation" (which was negative). Both of these documents are signed by the Chair.
47. Finally, the letter of 10 June 2014 informs the appellant of "... our decision in respect of your complaint relating to the CSSF's application of the Prospectus Directive". The Board accepts that the substance is what matters rather than the word used, but considers that all the above shows that in substance there was a decision, and one which fell within the ambit of Article 17 and Article 60 of the ESMA Regulation.
48. The Board does not agree with the respondent that the exercise of powers under Article 17 of the ESMA Regulation is purely preparatory to the possibility of the adoption by the respondent of a non-binding recommendation under Article 17(3), and that an appeal is ruled out on this basis. It prefers the appellant's argument that the decision is, subject to the current appeal, the final conclusion of the procedure under Article 17 of the Regulation.
49. Further, the Board considers that the decision as communicated in the letter of 10 June 2014 was addressed to the applicant within the meaning of Article 60 of the ESMA Regulation, though this, for reasons set out below, does not in the Board's view necessarily give the appellant standing to bring the appeal.



### C. The Board's conclusions on the respondent's arguments as to the appellant's interest

50. The Board now considers the respondent's argument that the appellant has not demonstrated an interest in challenging the decision. It argues that it is a well-established procedural principle under EU law that an applicant for relief must establish that it has an interest, meaning that it must show that it would benefit from the annulment of the contested act. It argues that the appellant has failed to demonstrate that it has a sufficient interest to bring an appeal under Article 60 of the ESMA Regulation, whether representing its members, or in its own right.
51. In the Board's opinion, for an appeal against a decision by the Authority to initiate or not to initiate an "own initiative" investigation under Article 17 of the ESMA Regulation to be admissible, the appellant must show that it has an interest in the decision in question within the meaning of the case law.
52. As the General Court said in Joined Cases T-355/04 and T-446/04, *Co-Frutta Soc. coop. v Commission* at paragraph 40, "It should also be borne in mind that, according to settled case-law, an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the contested measure being annulled (see *MCI v Commission*, paragraph 44 and the case-law cited)".
53. A similar rule applies where the action is brought by a body in a representative capacity. As was said by the Court in ECJ, Case C-362/05 P, *British Aggregates Association v Commission* at paragraph 39, "Contrary to the assertions of the Commission, and as the Court of First Instance correctly pointed out in paragraph 47 of the judgment under appeal, an action brought by an association acting in place of one or more of its members who could themselves have brought an admissible action will itself be admissible (see, inter alia, to that effect, the order in Case C-409/96 P, *Sveriges Betodlares and Henrikson v Commission* [1997] ECR I-7531, paragraphs 46 and 47)".
54. In particular, as noted by the General Court in Case T-236/2010 *Asociación Española de Banca v Commission*, at paragraphs 23 and 24, an action brought by an association based on the representation of its members is admissible where "the association, by bringing its action, has substituted itself for one or more of the members whom it represents, on condition that those members were themselves in a position to bring an admissible action" (*AIUFASS and AKT v Commission*, paragraph 50).
55. As the Court noted in Joined Cases T-447/93 to T-449/93 *AITEC and Others v Commission* [1995] ECR II-1971, paragraph 60, "an action brought by an association presents procedural advantages, since it obviates the institution of numerous separate actions against the same decisions" (see also Case T-182/10 *Associazione italiana delle società concessionarie per la costruzione e l'esercizio di autostrade e trafori stradali (Aiscat) v Commission*, especially at paragraph 48). In turn, however, the Court held that "admissibility of an action brought by an association presupposes that the association acts in place of its members. It follows that an association, acting as the representative of its members, has *locus*



*standi* to bring proceedings for annulment where those members have not themselves brought an action, even though they would have been entitled to do so”.

56. The objection of a lack of interest of the appellant in the decision in question within the meaning of the case law was clearly raised by the respondent in its application for directions by way of case management dated 21 August 2014 at ¶144. In its Response limited to admissibility dated 8 September 2014, the respondent said in ¶192 that:

“The Notice of Appeal refers in fact in a generic manner to “investors put at a disadvantage” and “wrong messages sent to regulators”, but does not specify the persons alleged to be directly or individually concerned. Significantly in that regard, the [appellant] does not suggest – much less demonstrate – that he has an interest. In the [appellant’s] Comments [dated 24 August 2014] no additional information is provided in this respect, the [appellant] claiming erroneously in paragraph 11 that it didn’t have to demonstrate that it had an interest in challenging the conclusion reached by ESMA’s Chair.”

57. The appellant filed its comments on the Response on 19 September 2014. It said that it did not have to demonstrate an interest since it is the addressee of the relevant decision.

58. The appellant said in its Response that anyway it does have an interest in filing the appeal. In a footnote it stated that, “Investor Protection Europe is mandated by several dozen investors who have suffered losses by investing in the “KBC Ifima 5-5-5” bond whose prospectus breaches the Prospectus Directive”. This was the extent of the information given by the appellant as to its status in respect of the matters complained of.

59. This assertion, in the Board’s view, was clearly insufficient to show an interest of the kind that the law requires for the admissibility of an appeal. It agrees with the respondent that an appeal brought by an association is admissible only (i) where the association represents the interests of natural or legal persons who would be entitled to bring proceedings in their own right or (ii) where the association is sufficiently individually concerned in its own interests as an association being affected by the contested measure.

60. As stated, the Board considered that the appellant should have a further opportunity to show such interest. In its further submissions of 22 October 2014, the appellant said that it was a company assisting private and institutional investors working to recover losses, and was remunerated on a success fee. Investors willing to participate in a collective action sign a contract mandating the appellant to defend their interests. It said that it had instituted a collective law suit as regards the KBC Ifima 5-5-5 bond, and that currently 101 investors are taking part. As an example, it annexed such a contract. It also annexed a press release announcing the litigation. However, it did not provide any evidence as regards the court action.

61. In its reply dated 29 October 2014, the respondent objected that it was clear from this further material that the manner of the application of the Prospectus Directive by CSSF had no adverse effect on the appellant itself, which did not itself therefore have an interest in the



appeal. It did not fall within the case law concerning associations, because it is not an association, and the persons which it represents are not its members, but its clients. The respondent also takes objection to the adequacy of the material annexed by the appellant as demonstrating the interest claimed.

62. The Board agrees with the respondent in these respects. As the respondent says, the press release does not provide any evidence as to whether such an action has been brought before a court, or found to be admissible. The Board of Appeal has no further details of the law suit described by the appellant, and does not consider it sufficient to state in footnote 4 of its submission that the appellant offers to provide confidentially "... a copy of the documents (in Dutch) which have been exchanged in the context of the law suit".
63. The Board further agrees with the respondent that the contract annexed does not show that the person who signed invested in the financial instruments. Nor does it provide proof of representation mandating the appellant to bring this appeal on behalf of investors. It concludes, therefore, that the appellant has not shown that it has an interest in the appeal in its own right, or in a representative capacity.



## V. Decision

64. For the reasons given above, the Board of Appeal unanimously decides that the appeal is inadmissible.

65. 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 ESMA Regulation, and to file the original in the Secretariat's records.

66. 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.

# Rectification order

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under Article 23 of the Board of Appeal's Rules of Procedure (BOA 2012 002) relating to the Decision of the Board of Appeal of the European Supervisory Authorities given under Article 60 of Regulation (EU) No 1095/2010

**Investor Protection Europe sprl**  
**[Appellant]**

**against**

**European Securities and Markets Authority**  
**[Respondent]**

**Decision**  
**Ref. BoA 2014 05**

24 November 2014

1. Following the decision given on 10 November 2014 in this matter, under Article 23 of its Rules of Procedure, the Board of Appeal asked the parties to send the secretariat any clerical mistakes, errors in calculation or obvious slips in the decision by 17 November 2014. The appellant responded on 13 November 2014, and the respondent responded on 17 November 2014.
  2. The appellant stated that certain paragraphs of the decision had to do with its complaint to the respondent, but did not concern its appeal to the Board of Appeal. The respondent agreed, stating that the passages in question should be removed.
  3. Whilst these matters do not fall within Article 23, both parties make the request which can be given effect to without changing the substance of the decision in any way, and the Board has decided that the passages in question should be redacted. The paragraphs concerned are 16, 21, and 22.
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4. As the appellant says, the reference to the UCITS Directive in paragraph 29 is inappropriate, and as the respondent says, the reference in paragraph 65 should be to the ESMA Regulation, and the Board corrects both under Article 23.
  5. The appellant also sent the Board of Appeal further details of the law suit mentioned in paragraph 62 of the decision, and as regards paragraph 63 of the decision, proof of investment of other investors participating in the law suit. Whilst an appeal to the Board of Appeal is not specifically included in the mandate, the appellant submits that the mandate is sufficiently broad to include it. Accordingly, the appellant requests that the Board of Appeal reconsiders its decision.
  6. The respondent objects that these matters do not relate clerical mistakes, errors in calculation or obvious slips in the decision and cannot be raised now. The Board agrees.
  7. This rectification order will be annexed to the rectified decision.
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