15 April 2024

Case 1/2023

FINAL DECISION

[.] and [.]

v

the Single Resolution Board

Christopher Pleister, Chair
Luis Silva Morais, Vice-Chair
Marco Lamandini, Co-Rapporteur
David Ramos Muñoz, Co-Rapporteur
Kaarlo Jännäri

TABLE OF CONTENTS

FINAL DECISION

In Case 1/2023,

APPEAL under Article 85(3) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010[1] (hereinafter the "**SRMR**"),

[.], with headquarters [.] and **[.]**, with headquarters in [.], both represented by [.] and [.], [.], [.], [.] (hereinafter, individually and/or collectively as the case may be, the "**Appellant**")

v

the Single Resolution Board (hereinafter the "**Board**" or "**SRB**")

(the Appellant and the Board collectively referred to hereinafter as the "**parties**"),

THE APPEAL PANEL,

composed of Christopher Pleister (Chair), Luis Silva Morais (Vice-Chair), Marco Lamandini (Co-Rapporteur), David Ramos Muñoz (Co-Rapporteur) and Kaarlo Jännäri,

makes the following final decision:

Background of facts

1. This appeal was initiated by the Appellant against the original decision dated 24 March 2023 determining MREL and instructing the national resolution authority to implement the MREL ([.]) (hereinafter the "**Original Decision**") and, following the replacement of such Original Decision, which has been repealed and superseded from the date it was adopted, it now relates to the decision of 11 October 2023 – [.] (hereinafter the "**Contested Decision**") determining the minimum requirement for own funds and eligible liabilities (hereinafter the "**MREL**") for [.] and [.] as Banking Union subsidiaries of [.].

2. The appeal against the Original Decision was submitted on 31 May 2023 and was notified by the Secretariat of the Appeal Panel to the Board on 7 June 2023 informing the same that the response of the Board had to be submitted within two weeks.

3. On 22 June 2023, upon reasoned request of the Board, the Appeal Panel extended the deadline to submit the Board's response by four weeks, namely until 19 July 2023.

4. On 14 July 2023, the Board informed the Appeal Panel of its intention to amend the Original Decision in the course of the third quarter of 2023, to take into account the findings of the

[1] OJ L 225, 30.7.2014, p.1.

Appeal Panel's decision in case 1/22 (hereinafter the "**[.]**"). In the same letter, the Board requested the Appeal Panel to stay these proceedings until the adoption by the SRB of such amended decision. The request of the Board was as follows:

[…]

> II. **Application for a stay of the Appeal**
>
> [……]
>
> III. **Petition**
>
> (vii) In light of the foregoing arguments, the SRB respectfully asks the Appeal Panel, in accordance with 11(2) of the RoP and in line with the principle underlying Article 6(6) RoP, to stay the Appeal until the SRB amends the Appealed Decision.

5. In response to the Board's request, on 20 July 2023 the Appellant requested that the Appeal Panel (i) "order the SRB to comply with the timeline order of 22 June 2023 subject to a short extension of the 19 July 2023 deadline to 31 July 2023, (ii) abstain from taking any decision in relation to the purported amending decision to be issued by the SRB until such time as such decision is effectively issued, and (iii) if and when such decision is issued, allow the Appellants to modify their notice of appeal, in line with applicable law".

6. In its procedural order dated 25 July 2023, the Appel Panel decided that "[t]hese appeal proceedings are not stayed, but the [SRB]'s deadline for its response is extended and the [SRB] is hereby granted time until the close of business of 15 September 2023 for: (i) either producing the amended MREL decision that it has announced with its submissions on 14 July 2023; (ii) or, if such an amended decision is not produced, to submit its response to the original appeal of the [Original Decision]".

7. On 14 September 2023, the Board communicated to the Appellant a draft decision setting MREL for each of the Appellants.

8. On the same day, the Board also informed each of the Appellants that it had an opportunity to provide written comments on the proposed MREL determination as part of a formal right to be heard process (hereinafter "**RTBH**").

9. On 15 September 2023, the Board filed a letter requesting the Appeal Panel to "stay the Appeal until the [amended MREL decision] is adopted", having "made its official position on the [amended MREL decision] known to the Appellant within the deadline set out by the Appeal Panel in its Procedural Order".

10. In its procedural order dated 20 September 2023, the Appel Panel (i) decided to "stay the proceedings in case 1/2023 until the adoption of the amended MREL Decision", (ii) ordered "the [Board] to notify to the Appellant and to the Appeal Panel the amended decision upon its final adoption", and (iii) allowed "the Appellant to modify its appeal in case 1/23, to appeal in these proceedings, instead of the [Original Decision], the amended MREL

decision" should "the Appellant decide to challenge the amended MREL decision", by "serving on the [SRB] and filing with the Secretariat a separate document within the time limit of six weeks set out in Article 85 SRMR, running from the notification to the Appellant of the amended MREL decision".

11. In a letter dated 28 September 2023, the Appellant provided comments on the amended MREL draft decision to the SRB as part of the RTBH process.

12. On 11 October 2023, the SRB adopted the Contested Decision, which was notified to the [.] on 13 October 2023 and which replaces the Original Decision. On 16 October 2023, the Contested Decision was addressed by the [.] to [.].

13. The Contested Decision states in its Article 6 that the Contested Decision "repeals and supersedes [the Original Decision] dated 24.03.2023, from the date the latter was adopted".

14. On 18 October 2023, the Board informed the Appeal Panel that it had adopted the Contested Decision "[f]ollowing the Appeal Panel's Procedural Order No. 2 of 20 September 2023."

15. On the same day, the Appeal Panel informed the Appellant that, in accordance with the procedural order of 20 September 2023, the Appellant would now be entitled to modify the appeal to appeal the Contested Decision instead of the Original Decision within six weeks.

16. In a letter dated 30 October 2023, the SRB informed the Appellant that, by decision of 11 October 2023, it had updated the group resolution plan (hereinafter the "**Amended Resolution Plan**") and provided a summary of the key elements of the Amended Resolution Plan. In the letter, the SRB noted that the decision on the Amended Resolution Plan "repeals and supersedes the previous decision on the group resolution plan ([.] dated 14.04.2023), the management summary of which was communicated to you on 28 April 2023".

17. In this context, and in accordance with Article 11(4) of the Rules of Procedure and Article 86 of the Rules of Procedure of the General Court, as well as the Appeal Panel's procedural order of 20 September 2023, the Appellant modified the original appeal on 27 November 2023. The statement of modification of the appeal was notified to the Board by the Secretariat of the Appeal Panel on 28 November 2023, informing the Board that, in line with the procedural order of 20 September 2023, the Board could file its response within six weeks and namely by 9 January 2024.

18. On 11 December 2023, upon reasoned request of the Board, and to the extent that the request was also agreed by the Appellant, the Appeal Panel extended the deadline to submit the response of one week.

19. On 16 January 2024, the Board submitted its response. The response was notified by the Secretariat of the Appeal Panel to the Appellant on 17 January 2024, informing the Appellant that, in line with the procedural order of 20 September 2023, the Appellant could file its reply to the Board's response within three weeks.

20. On 7 February 2024, the Appellant submitted its reply. The reply was notified by the Secretariat of the Appeal Panel to the Board on 8 February 2024.

21. On 19 February 2024, upon reasoned request of the Board, and to the extent that the request was also agreed by the Appellant, the Appeal Panel extended the deadline for the Board to submit the rejoinder to the Appellant's reply of one week until 29 February 2024 and informed the parties that a hearing in the case would have taken place on 13 March 2024.

22. On 29 February 2024, the Board submitted its rejoinder to the Appellant's reply.

23. At the hearing both parties appeared and presented oral arguments, where they reiterated their respective positions, adding further considerations of fact and law. The parties also answered questions from the Appeal Panel for the clarification of facts relevant for the just determination of the question of admissibility of the appeal.

24. At the hearing and with communication of 14 March 2024, the Appeal Panel authorised the parties to submit their speaking notes at the hearing by 15 March 2024. The parties submitted their written pleadings at the hearing as resulting from the speaking notes.

25. On 21 March 2024, the Appeal Panel notified the parties that the Chair considered that the evidence was complete and thus that the appeal had been lodged for the purposes of Article 85(4) of Regulation 806/2014 and Article 20 of the Appeal Panel's Rules of Procedure.

Main arguments of the parties

26. The main arguments of the parties are briefly summarised below. However, to avoid unnecessary duplications, the description in this section of the Appeal Panel's decision is limited to the illustration of the essential elements of the pleas of the Appellant and of the responses of the Board to such pleas, because the more detailed arguments of both parties are then thoroughly described and considered in the findings of the Appeal Panel's decision with respect to each of the several grounds of appeal raised by the Appellant. It is specified that the Appeal Panel considered all arguments raised by the parties, irrespective of the fact that a specific mention to each of them is not expressly reflected in this decision.

Appellant

27. The Appellant, with its statement of modification of the original appeal, has maintained the entirety of the pleas in law and arguments developed in support of the original appeal against the Original Decision, which are therefore to be considered as raised now against the Contested Decision and also introduced new arguments and adaptations of the original arguments to take into account the new elements contained in the Contested Decision.

28. In substance, the Appellant challenges the Contested Decision raising several grounds of appeal in respect to (i) the Board's approach in adopting the Contested Decision, (ii) the methodology applied to material subsidiaries of non-EU C-SIIs, (iii) the setting in the

Contested Decision of the recapitalisation amount (hereinafter the "**RCA**") for the Appellant and (iv) the imposition with the Contested Decision of a market confidence charge (hereinafter "**MCC**") for the Appellant.

29. As to the Board's approach in adopting the Contested Decision, the Appellant claims that, by adopting the Contested Decision, the Board has violated (a) Articles 8(12) and 12(4) SRMR, (b) the principle of good administration and the Appeal Panel's procedural order of 25 July 2023 as well as (c) Article 41 of the Charter of EU Fundamental Rights and (d) the principle of equal treatment. In this context, the Appellant argues that the Board, with the Contested Decision, has not properly taken into account the findings of the Appeal Panel in the [.] and has modified with the Contested Decision the reference data from 31 December 2021 to 30 September 2022, "the sole effect of which is to impose a significantly higher MREL requirement to the detriment of the Appellant in advance of the 2023 RPC".

30. As to the methodology, the Appellant claims that the Board has violated Article 12e(2), (3) and (4) SRMR by failing to apply a mandatory provision of law, and more specifically maintains that the SRB has failed to establish the need for an add-on specifically in the case of the Appellant as required by Article 12e(1)-(3) SRMR, and to provide a full assessment and justification of the relevant elements of MREL as required by Articles 12e(4) and 12d(8) SRMR. Furthermore, the Appellant claims that the Board has also breached Article 12e(4) SRMR and its duty to state reasons for its decision.

31. As to the RCA, the Appellant claims that, by adopting the Contested Decision, the SRB has violated (a) Article 12d(6)a(ii) and (b)(ii) SRMR by failing to apply bank-specific adjustments to TREA and LRE, (b) the principle of protection of legitimate expectations by failing to apply TREA and LRE in accordance with its own MREL Policy, as well as (c) Articles 12d(8) and 12e(4) SRMR and its obligations to state reasons.

32. As to the imposition of the MCC, the Appellant claims that in setting the internal MCC ("**iMCC**") for each Appellant, the Board has violated the sixth and eighth subparagraphs of Article 12d(6) SRMR by failing to determine the reference period, by failing to establish the necessity to impose an iMCC on the basis of specific characteristics of each Appellant and by failing to assess an adjustment of the iMCC. The Appellant also maintains that the SRB, when setting the iMCC, has allegedly breached the principles of legitimate expectations and good administration, and has failed to state the reasons with respect to all elements relevant for the iMCC setting.

33. With the rejoinder the Appellant replied to the arguments raised by the Board with its response and, maintaining all grounds previously raised, requested the Appeal Panel to reject all the arguments made by the Board.

Board

34. The Board argues that, based on the facts of the case and the legal framework, the appeal is unfounded. With regard to all pleas developed by the Appellant in the original notice of

appeal against the Original Decision which in the statement of modification are not referred and are not explicitly adapted to the Contested Decision, the Board argues that these pleas are inadmissible. In its rejoinder, however, the Board also acknowledges that the Appellant, with its reply, has clarified that it is no longer challenging the Original Decision but rather only the Contested Decision.

35. As to the merit of all grounds of appeal, the Board argues that they are unfounded.

36. As to the adoption of the Contested Decision, the Board argues that it has correctly exercised its power to determine the MREL for the Appellant and, in particular, that (a) it has correctly applied Articles 8(12) and 12(4) SRMR, (b) has complied with Article 41 of the Charter, the principle of good administration and the Appeal Panel's procedural order of 25 July 2023 as well as (c) the principle of equal treatment has been fully respected.

37. As to the methodology and the application of Article 12e SRMR, the Board argues that it has fully complied with Article 12e(2), (3) and (4) SRMR and has provided a full assessment, justification and statement of reasons of the relevant elements of MREL as required by Articles 12e(4) and 12d(8) SRMR.

38. As to the RCA, the Board argues that the Contested Decision correctly set the RCA for each Appellant, and in particular correctly applied Article 12d(6)a(ii) and (b)(ii) SRMR and observed the principle of protection of legitimate expectations. The Board further argues that it properly discharged its obligations to state reasons and complied with Article 12d(8) and 12e(4) SRMR.

39. As to the imposition of the MCC, the Board argues that the Contested Decision correctly set the iMCC for each Appellant, because the Board has correctly applied the sixth and eighth subparagraphs of Article 12d(6) SRMR, has respected the principles of legitimate expectations, good administration and equal treatment, and has conducted a full assessment of all relevant elements of the MREL calculation and has given reasons in accordance with Article 12d(8) SRMR.

40. With its rejoinder, the Board reiterated and further clarified such arguments and replied to the arguments raised by the Appellant with its reply to its response and insisted that it has correctly applied the SRMR.

Findings of the Appeal Panel

41. The parties have filed written submissions on the appeal and have also made oral representations at the hearing, where they have also answered questions raised by the Appeal Panel. All the parties' contentions have been taken into account by the Appeal Panel, whether expressly referred to herein or not. The Appeal Panel acknowledges and duly appreciates the technical contributions of the parties' legal counsels to enlighten in detail all relevant aspects of this appeal.

(a) Preliminary questions

(i) On the appeal of the Original Decision and of the Contested Decision.

42. The Appellant has first appealed, with the notice of appeal, the Original Decision and, once the Original Decision has been replaced by the Board with the Contested Decision, it has then appealed with the statement of modification the Contested Decision. Both parties acknowledge, and the Appeal Panel agrees, that, after the adoption of the Contested Decision and the statement of modification of the original appeal, the Appellant is no longer maintaining its appeal against the Original Decision. The appeal against the Original Decision must therefore be declared moot, whereas these proceedings remain valid as an appeal against the Contested Decision.

43. The Appellant has challenged the Contested Decision with its statement of modification maintaining all pleas in law and arguments already submitted with the notice of appeal against the Original Decision. The Board argues that all pleas and arguments of the notice of appeal which in the statement of modification are not expressly developed and explicitly adapted to the Contested Decision should be declared inadmissible. The Appeal Panel sides however with the Appellant that the statement of modification, as specifically construed, has indeed maintained all pleas in law and arguments already submitted against the Original Decision unless as modified to the extent necessary to take into account the amendments brought about by the Contested Decision. The Appeal Panel shall therefore consider all pleas raised by the Appellant, both in the notice of appeal and in the statement of modification, to the extent that they relate to the Contested Decision.

(b) On the appeal submitted by [.]

44. The appeal and the statement of modification have been submitted by [.] and by [.].

45. In its comments 1 and 15 in the RTBH assessment memorandum attached to the Contested Decision, the Appellant noted that "the SRB does not take into account the fact [.] [….]".

46. The Appeal Panel, at the hearing, asked the parties to confirm that the factual circumstance mentioned in the above comments in the RTBH assessment memorandum was still valid and the parties agreed that, […..].

47. The Appeal Panel further notes that, responding to comment 15 in the RTBH assessment memorandum, the Board had already specified that "[.] […..]".

48. [……].

49. [……]

(b) The first ground of appeal concerning the Board's approach in adopting the Contested Decision.

50. The Appellant claims that, by adopting the Contested Decision, the Board has violated (a) Articles 8(12) and 12(4) SRMR, (b) the principle of good administration and the Appeal Panel's procedural order of 25 July 2023 as well as (c) Article 41 of the Charter of EU Fundamental Rights and (d) the principle of equal treatment. In this context, the Appellant argues that the Board, with the Contested Decision, has not properly taken into account the findings of the Appeal Panel in the [.] and has modified with the Contested Decision the reference data from 31 December 2021 to 30 September 2022, "the sole effect of which [was] to impose a significantly higher MREL requirement to the detriment of the Appellant in advance of the 2023 RPC".

51. More specifically, the Appellant argues that in its procedural order of 25 July 2023 the Appeal Panel decided to extend the SRB's deadline for its response and "granted time until the close of business of 15 September 2023 for […] producing the amended MREL decision" that "it has announced with its submissions on 14 July 2023", i.e., a decision to be amended for the purpose of taking into account the Appeal Panel decision in case 1/2022. However, instead of amending the Original Decision to the extent required in order to take into account the Appeal Panel's findings in the decision in case 1/2022, the Board has issued the Contested Decision which, in the Appellant's view (i) disregards the findings of the Appeal Panel's decision in the [.], (ii) uses supervisory information as of 30 September 2022 (instead of information as of 31 December 2021 as in the Original Decision), which the Board did not announce in its 14 July 2023 submission and was not agreed by the Appellant or the Appeal Panel, and which departs from its practice of using end-of-year data, with no apparent purpose other than imposing a higher MREL requirement on the Appellant in advance of the 2023 resolution planning cycle. The Appellant further argues that, in so doing, the Board has also adopted an out-of-cycle Amended Resolution Plan amending MREL data but failing to carry out a full update of the resolution plan (in the Appellant's words, the SRB (i) updated the MREL figures in the resolution plan on the basis of 30 September 2022 data but (ii) left the remainder of the plan unchanged, continuing to base it on 2021 end-of-year supervisory information, e.g. assessments concerning the main internal and external interdependencies, including as to funding, which are based on 2021 year-end data relating to intra-group assets and liabilities, as well as to corporate non-financial placements).

52. The Appellant claims that, by proceeding in this manner, the Board has violated (a) Articles 8(12) and 12(4) SRMR, (b) the principle of good administration and the Appeal Panel's Procedural Order of 25 July 2023, and (c) Article 41 of the Charter of EU Fundamental Rights and (d) the principle of equal treatment.

53. The Board contends that in its notice of appeal the Appellant considered that the SRB, by adopting the Original Decision, had infringed Article 12e SRMR since that decision had not taken into account the condition of 'material subsidiary' of the Appellant, even if that condition had actually been only acquired late in the decision-making process of the

Original Decision. For that reason, the Board based instead the Contested Decision on the reference data as of 30 September 2022.

54. Furthermore, the Board denies that, as claimed by the Appellant, it "failed to review and update the resolution plan other than with respect to the MREL determination". The Board submits that Article 8(12) SRMR explicitly requires the SRB to review a resolution plan at least annually and, in any case, where a material change to the legal or organisational structure or to the business or the financial position of the entity so requires. However, in the Board's view and contrary to the Appellant's allegations, the update of that plan, unlike its review, is not automatically required after that review has taken place, but only necessary where appropriate. It follows that, in the Board's view, Article 8(12) SRMR clearly distinguishes the notion of "review" from that of "update". While the review refers to the resolution plan in its entirety, the update could, as envisaged by the Union co-legislator themselves by introducing two different and independent notions, have a different scope and target only the parts that are necessary to update.

55. In addition, the Board contends that it enjoys a margin of technical discretion in the exercise of its resolution planning powers that needs to be respected unless there is a manifest error of assessment. That manifest error can only be established if the evidence adduced by the Appellant is sufficient to make the factual assessments used in that decision implausible. The Board argues that the Appellant has brought no evidence to support the allegations of incoherence and inconsistency of the resolution planning exercise or to show that those incoherence and inconsistency render implausible the assumptions on which the MREL calibration is based.

56. With regard to the Appellant's submissions that "[i]t cannot be seriously argued that, […], the assessment of "main internal and external interdependencies" may be based on financial data as of 31 December 2021 while the MREL calibration […] is based on financial data as of 30 September 2022, without the coherence and reliability of the plan being affected"; "it is simply not credible that […] the Appellants' becoming "material subsidiaries" […] was relevant to no aspect of the Appellants' resolution plan other than the calibration of MREL"; "it is the resolution plan on which the Amended MREL Decision must be premised that is based on an inconsistent set of data. […] it cannot be seriously argued that [the different reference date to assess interdependencies and MREL] has no impact whatsoever on the resolution plan's coherence", the Board argues that the Appellant does not explain why it is incoherent to assess "interdependencies" based on financial data as of December 2021 and calibrate MREL taking also into account the Appellant's status of material subsidiary as from September 2022, or why it is not credible that the latter aspect would only be relevant for the update of MREL related parts of the resolution plan.

57. The Appeal Panel considers to some extent peculiar that, in the somehow convoluted circumstances of the instant case, the Board first adopted the Original Decision on 24 March 2023 based on the Appellant's financial data as of 31 December 2021, without considering that, meanwhile, and as clearly shown by the financial data as of 30 September 2022, the

Appellant had incurred into a material change in status and risk profile and had become a "material subsidiary" to the effect of Article 12e SRMR. Indeed, this could have implications for the MREL determination as eventually shown by the Contested Decision.

58. The Board justifies this by saying that the change of status to "material subsidiary" occurred during the resolution planning cycle at a date when the procedure for the adoption of the Original Decision was too advanced for the Board to include in its assessment those financial data as of 30 September 2022 and the finding that the Appellant had become a material subsidiary.

59. The Appeal Panel notes however that the financial data as of 30 September 2022 were available to the Board several months before the final adoption of the Original Decision. Thus, to the extent that the different status of the Appellant flowing from those data, and more in general the differences between the financial data of the Appellant as of 31 December 2021 and 30 September 2022 constituted a material change which could have a material effect on the effectiveness of the resolution plan and on the MREL determination, the Board, in the Appeal Panel's view, should have considered those elements in the course of the procedure leading to the adoption of the Original Decision. Article 8(12) SRMR requires that the Board's determination is made not only "annually" but also "after any material change" and that the institutions, the ECB and the national competent authorities shall "promptly" communicate to the Board any change that necessitates such revision. This suggests, in the Appeal Panel's view, that also the amendments to the annual MREL determination should be made promptly, once a material change occurs which is relevant of such a determination, so long as, at least, as in the case at hand, the procedure for the adoption of the annual determination is not only still ongoing but also, judging from the timeline of the 2022 resolution planning cycles booklet published by the SRB (at page 17), at a stage still compatible with the prompt onboarding of such a material change. In the case at hand, at the end of September 2022 the procedure was at the end of the period of data analysis and finalisation of the initial draft decision, yet two months before the end of the stage of the ECB consultation period and six months ahead of the end of the stage that the SRB itself characterises a "of internal review" of the draft and approval thereof, which culminated indeed with the final adoption of the decision on 24 March 2023. In this context, in the Appeal Panel's view, it is only fair that the procedure be adapted to onboard promptly the material changes duly communicated by the institution to the Board which have implications on the MREL determination, provided that these changes (i) are truly material and (ii) have been communicated to the Board reasonably in advance of the final adoption of the MREL decision. As already noted, in the Appeal Panel's view, financial data which were available almost six months before the adoption of the Original Decision were communicated to the Board reasonably in advance of the date of adoption of the Original Decision.

60. The Appeal Panel does not consider grounded, however, as the Appellant alluded at the hearing, that the Board has used with the Contested Decision the financial data as of 30 September 2022 to send the message that an appeal against a MREL determination may end

up for the Appellant with stricter MREL requirements. Such a behaviour would clearly be in bad faith and would constitute a misuse of powers (judgments of the Court of Justice of 8 December 2020, case C-620/18, Hungary v Parliament and Council, EU:C:2020:1001, paragraph 82, and of 5 May 2015, case C-146/13, Spain v Parliament and Council, EU:C:2015:298, paragraph 56, among many) and would be blatantly contrary to the principle of good administration. However, in the Appeal Panel's view, there are no indications in the file which may support this conclusion, let alone the "objective, relevant and consistent evidence" required by the case-law of the European courts to show that misuse of powers.

61. Based upon the content of the file and the relevant evidence therein included the Appeal Panel accepts instead the explanations given by the Board that it based the Contested Decision on the reference data as of 30 September 2022 because in its notice of appeal the Appellant claimed that the Board had breached Article 12e SRMR in its Original Decision, by failing to take into account the Appellant's condition of 'material subsidiary', which resulted from the data as of 30 September 2022. Indeed, at the time the Contested Decision was adopted, not only the condition of 'material subsidiary' had occurred more than one year before; the Appellant had also raised a specific claim in its notice of appeal, drawing the Board's attention to an issue it had overlooked in the Original Decision. As a consequence, the Appeal Panel is not persuaded that the Board infringed Article 41 of the Charter, the principle of good administration and the Appeal Panel's procedural order of 25 July 2023.

62. Furthermore, the Appeal Panel essentially agrees with the Board when it points out (i) that none of the rules for the determination of MREL provide for any prior authorisation by the Appeal Panel on the way in which the SRB may exercise its power to determine the MREL for a given entity, (ii) that the Appeal Panel's procedural directions do not and cannot limit, replace or otherwise modify the substantive and procedural requirements governing the SRB's power to determine MREL for a given entity, and (iii) that the reasons justifying the request (and the eventual granting) of a stay of the proceedings do not and cannot be interpreted as limiting or modifying that power either.

63. However, even if the Appeal Panel cannot (and has not) limited the Board's power, the request to the Appeal Panel made by the Board in 14 July 2023 to stay the proceedings was justified by expressly saying that "the SRB considers that the Appeal raises a number of issues which the Appeal Panel has examined in its decision in case 1/22" and "in particular, the notice of appeal contains arguments that are analogous to the arguments that were raised by the appellant in case AP 1/22 and on which basis the Appeal Panel remitted the case to the SRB. In light of those similarities, the SRB intends to amend the [Contested] Decision taking into account the findings of the Appeal Panel in its decision in case 1/22". This is relevant to the extent that the Board's announcement created, due to its objective content, the legitimate expectation of the Appellant that its main purpose was to review the Original Decision in light of the Appeal Panel's findings in its previous [.] in case 1/22.

64. Conversely, the Board's announcement did not preclude the Board from undertaking certain other changes in the MREL determination. For example, changes by which the Board took into account the Appellant's status as "material subsidiary" could not breach the principle of legitimate expectations because the Appellant itself had pointed to the fact that the Original Decision had mistakenly failed to take this into account (so there could be no expectation) and the status of material subsidiary is a matter of law, and not discretion (so any expectation could not be legitimate). Likewise, the use, for purposes of calculating MREL, of new data as of 30 September 2022, in and of itself, can be justified on the basis of the principle of good administration. More careful consideration must be given, however, to those aspects where the Board did not limit itself to update the data, or review elements of the MREL determination that had been previously announced, or were expected or reasonably to be expected by the Appellant, or predetermined by the law. This is the case of the balance sheet depletion effect, to be considered separately under the third ground.

65. Thus, the Appeal Panel is satisfied that the Board did not breach the provisions that regulate the review and update of MREL by adopting the new, Contested Decision. The Appeal Panel has seen no evidence whatsoever of a Board's attempt to disregard the guidance given by the Appeal Panel in its [.] (the Board has instead followed such guidance as further discussed below) nor to use opportunistically the amendment of the Original Decision through the Contested Decision to selectively increase the MREL requirement to the Appellant's detriment. Nothing in the file, or the evidence that the Appellant was able to provide, suggests that.

66. The Appeal Panel further holds that there has been no violation of the principle of equal treatment, because the out-of-cycle adoption of the Contested Decision to amend the Original Decision in an attempt to promptly align such decision to the guidance given by the Appeal Panel in a previous case is, in the Appeal Panel's view, in full conformity with the principles of procedural economy and good administration.

67. The Appellant's other claims that the Board failed to review and update the Resolution Plan in a uniform and consistent manner are inadmissible to the extent that they concern the validity of the Amended Resolution Plan, as falling outside the remit of the Appeal Panel as set out in Article 85 SRMR. To the extent that those claims may have implications on the MREL determination, the Appellant has not discharged as such the burden of proving that the Board, by not including the financial data as of 30 September 2022 in all parts of the Amended Resolution Plan, failed to "review" and "update" the resolution plan other than with respect to the MREL determination in violation of Article 8(12) and 12(4) SRMR. The Appeal Panel considers that, to support such conclusion, the Appellant should have shown which were the aspects of the resolution plan for which the Appellants becoming "material subsidiaries" based upon the financial data as of 30 September 2022 were relevant other than for the calibration of MREL, including the "internal and external interdependencies" alluded to by the Appellant. Yet the Appellant failed to do so. The Appeal Panel considers, therefore, that there is no evidence in the file which convincingly demonstrates that the Board's claim that it has indeed "reviewed" the entire resolution plan at the time of adoption

of the Contested Decision and of the Amended Resolution Plan, but it has considered necessary to "update" it only where necessary, is unfounded or implausible.

68. The first ground of appeal must therefore be dismissed.

(c) The (second) ground of appeal: the methodology for material EU subsidiaries.

69. In the second limb of the second ground of appeal of its statement of modification the Appellant alleges that, in setting the MREL for a material subsidiary of a non-EU G-SII the Board breached several provisions of law, the duty to make a full assessment, and the duty to state reasons. The Board, for its part, argues that the Appellant conflates the separate obligations embedded in Article 12e SRMR, and completely disregards the reasoning provided in the relevant decision.

70. In the first limb of the second ground of appeal the Appellant alleges that, in setting the MREL levels the Board violated provisions of law, notably Article 12e SRMR, which contemplates the setting of MREL levels in case of resolution entities of G-SIIs and material subsidiaries of non-Union G-SIIs. The Appellant argues that the Board uses a circular methodology, and breaches the law because, fails to assess whether the TLAC standard is adequate to meet the requirements of Article 12d SRMR.

71. The relevant provisions are Article 12e (2) and (3) SRMR. Article 12e (2) states that:

> 2. The requirement referred to in Article 12a(1) for a Union material subsidiary of a non-EU G-SII shall consist of the following:
>
> (a) the requirements referred to in Articles 92b and 494 of Regulation (EU) No 575/2013; and
>
> (b) any additional requirement for own funds and eligible liabilities that has been determined by the Board specifically in relation to that material subsidiary in accordance with paragraph 3 of this Article which is to be met using own funds and liabilities that meet the conditions of Article 12g and Article 92b(2) of Regulation (EU) No 575/2013.

72. Article 12e (3) SRMR, for its part, states that:

> 3. The Board shall impose an additional requirement for own funds and eligible liabilities referred to in point (b) of paragraph 1 and point (b) of paragraph 2 only:
>
> (a) where the requirement referred to in point (a) of paragraph 1 or point (a) of paragraph 2 of this Article is not sufficient to fulfil the conditions set out in Article 12d; and
>
> (b) to an extent that ensures that the conditions set out in Article 12d are fulfilled.

73. The Appellant alleges that these provisions must be interpreted in the sense that the Board should impose an MREL add-on only when strictly necessary, and that this strict necessity depends on the determination that (i) the TLAC is not sufficient to meet the criteria set out in Article 12d(1), (ii) the total TLAC + MREL amount that would be sufficient to meet these

criteria is determined on the basis of the specific characteristics of the entity, and (iii) the MREL add-on is the difference between the two.

74. The Appeal Panel has examined the relationship between Articles 12e and 12d SRMR, first, in its decision in case 1/22, and subsequently in its decision in case 5/23, to which the Appeal Panel refers for further analysis. Absent an authoritative interpretation by the Court of Justice or the General Court, the Appeal Panel concluded that, under a textual, contextual and finalistic interpretation of the text of the relevant provisions, including also the international standard on which such provisions were based, the Board has the possibility of setting a level of MREL higher than the common minimum of the TLAC, but, if such possibility is used, the Board must justify the need of a MREL add-on in the given circumstances of each specific case (decision 1/22, paragraphs 144-154).

75. In case 1/22 the Appeal Panel considered that the Board's justification fell short of the requirement under Article 12e(4) SRMR. In its decision in case 5/23 the Appeal Panel found that the justification offered by the Board, especially in the RTBH assessment memorandum, was sufficient.

76. Applying these precedents to the present case, the Appeal Panel notes that, in the Contested Decision, specifically in Section Ib, Recitals (3) and (4) the Board includes a detailed explanation of how the factors specific to the relevant entities were taken into consideration when calculating the MREL add-on. Section Ib, Recital (4), makes specific and detailed considerations about [.] (i) size (ii) business model, (iii) funding, (iv) risk profile, or (v) the potential impact of the entity's failure in financial stability.

77. This, in the Appeal Panel's view, complies with the requirement, under Article 12e SRMR, to impose an MREL add-on when TLAC is insufficient to comply with the conditions required by Article 12d SRMR.

78. The Appellant has criticised the Board for failing to make an assessment that is both quantitative and qualitative, or sufficiently comprehensive or for failing to draw a link between the factors outlined above and the need to impose an MREL add-on. Conversely, the Appellant has not offered a compelling, alternative vision of what this assessment should look like, that might illustrate and evidence the aforementioned claim of an insufficient assessment of such matter by the Board.

79. Article 12e SRMR balances TLAC and MREL by stating that the Board "shall impose" an add-on "only" if TLAC is insufficient to comply with the conditions of MREL, i.e., loss absorbency and recapitalisation amounts (LAA + RCA) including adjustments. The Appeal Panel has concluded that (i) although the Board must acknowledge TLAC and MREL as two separate standards (Appeal Panel decision in case 1/22, at paragraph 203), (ii) Article 12e SRMR does not require a separate methodology to assess MREL for G-SIIs (or material subsidiaries of non-EU G-SIIs) (decision 1/22, at paragraphs 203-204), but (iii) the provision requires a robust assessment and justification of why TLAC is insufficient to

comply with loss absorbency and recapitalisation requirements under Article 12d SRMR, and what levels would be needed to do so (Appeal Panel decision in case 5/23, at paragraph 79).

80. Thus, to comply with Article 12e SRMR the Board must show that TLAC is insufficient to comply with the LAA + RCA, plus the corresponding adjustments. Quantitatively speaking, an entity with Pillar 1 requirements of 8% and Pillar 2 requirements of more than 1%, will have an LAA higher than 9% (something over which the Board has no control); and, if its features require an RCA equivalent to the LAA or higher, the total figure will be higher than TLAC's 18%, and an MREL add-on will be needed. This is not a consequence of an allegedly flawed methodology by the Board, but of the language of the SRMR itself. The Board did not breach the provision so much as follow its literal language, which was correct in this normative context.

81. Furthermore, in the present case the Board has not limited itself to make a quantitative calculation, providing figures for the LAA and the RCA and adjustments. The Board has also assessed the TLAC amount against the LAA and RCA bearing in mind the specific features of the individual entity, concluding that the MREL add-on was warranted in light of those features. In this regard, as shown by the Appeal Panel in cases 1/22 and 5/23, compliance with Article 12e SRMR relies on both the quantitative calculation, and the assessment and justification described under Article 12e(4) SRMR. However, since the Appellant has made a separate allegation that the Board's assessment and justification failed to comply with Article 12e(4) SRMR, this aspect is analysed separately below.

82. In the second limb of the second ground the Appellant argues that the Board has failed to carry out an assessment of the elements required by Article 12e(3) (as cross referenced by Article 12e(4) SRMR), and to include such assessment, and the reasons for it, in the decision, in a manner that allows the Appellant, and the Appeal Panel, to understand the result, and that it has offered reasons that are all a proxy of size, does not clarify what specifications of the Appellant would differentiate it from its peers, and it says nothing about why TLAC requirements would be insufficient.

83. The Board alleges that the Contested Decision provided the Appellant with clear and unequivocal information to understand the decision itself, and whether it was vitiated by an error in law.

84. Article 12e (4) SRMR states that:

> 4. Any decision by the Board to impose an additional requirement for own funds and eligible liabilities under point (b) of paragraph 1 of this Article or point (b) of paragraph 2 of this Article shall contain the reasons for that decision, including a full assessment of the elements referred to in paragraph 3 of this Article, and shall be reviewed by the Board without undue delay to reflect any changes in the level of the requirement referred to in Article 104a of Directive 2013/36/EU that applies to the resolution group or the Union material subsidiary of a non-EU G-SII.

85. Since this refers to Article 12e (3) SRMR, the Board needs to assess, and justify, why TLAC is insufficient to comply with loss absorbency and recapitalisation requirements under Article 12d SRMR, and what levels would be needed to do so (see to this effect Appeal Panel decision in case 5/23, at paragraph 79) in light of the entity's individual features.

86. However, this is what the Board does in the Contested Decision. First, it provides a quantitative assessment of LAA, RCA, and adjustments. Second, it provides a qualitative assessment and justification of the economic reality behind these calculations. Contrary to the Appellant's assertions, the Board's considerations are not all "proxies for size" nor fail to explain the specificities of the relevant entity. […..].

87. Thus, for each element, the Board (1) explains the entity's individual features, making comparisons with its peers, where appropriate, (2) draws a specific conclusion, and (3) links this conclusion to the concepts and items that are relevant to calculate the RCA. This, in the Appeal Panel's view, complies with the requirements under Article 12e SRMR.

88. The second ground of appeal must therefore be dismissed.

(d) The (third) ground of appeal concerning the RCA: the balance sheet depletion effect

89. The Appellant claims that, by adopting the Contested Decision, the SRB has violated (a) Article 12d(6)a(ii) and (b)(ii) SRMR by failing to apply bank-specific adjustments to TREA and LRE, (b) the principle of protection of legitimate expectations by failing to apply TREA and LRE in accordance with its own MREL Policy, as well as (c) Articles 12d(8) and 12e(4) SRMR and its obligations to state reasons.

90. The Appellant in essence complains, under the three limbs of this ground of appeal, that, despite the Original Decision had made adjustments to TREA and LRE as a result of "resolutions actions foreseen in the resolution plan, including balance sheet depletion", the same adjustments were not made in the Contested Decision.

91. The Appeal Panel understands that, despite the literal wording of the Original Decision, the immediate change in regulatory capital identified, explained and quantified by the Original Decision was a result (solely) of the balance sheet depletion effect. This balance sheet depletion effect was considered credible in the calibration of MREL based upon the financial data of the Appellant as of 31 December 2021.

92. In contrast, the same balance sheet depletion was not recognised any longer with the Contested Decision, and in particular in Section Ib, Recital 4(iv) because, based upon the financial data of the Appellant as of 30 September 2022, the Board concluded that the "entity risk profile has changed materially: in particular the contribution of credit risk exposure amount to [.] TREA has reduced by […..]. […].

93. With regard to the adjustments to the RCA, including the balance sheet depletion effect, the Board states, in paragraphs 23 and 24 of its MREL Policy, the following (emphasis added):

> 23. The SRB may apply bank-specific adjustments related to balance sheet depletion, binding restructuring plans and recovery options. The SRB will allow, on a bank-by-bank basis with due justification, downwards adjustment of the projected TREA post-resolution that serves as a basis for determining the RCA of the MRELTREA, including the market confidence charge. The same adjustment would apply for determining the RCA of the MREL-LRE.
>
> 24. The prevalence of credit risk in the bank's risk profile acts as an indicator for considering the balance sheet depletion effect. At the time of failure, the banking group may have a smaller balance sheet than at the time of resolution planning, particularly if the failure is due to credit risk losses. The higher the contribution of credit risk to the own funds' requirement, the greater the likelihood that the balance sheet effect will be applied by the SRB. In any case, the adjustment of assets is limited to an amount equal to the LAA plus CBR, and should in all cases not exceed 10% of total assets.

94. In light of the European courts' case-law, and the Appeal Panel's own precedents, with the MREL Policy the Board imposed a limit on its discretion, although this did not relieve the Board of the obligation to examine specific circumstances (Appeal Panel decisions in case 1/22, paragraphs 215-216, and case 5/23, paragraphs 166-167). The Appeal Panel held that (i) this is a bank-by-bank assessment; (ii) since a bank "may have a smaller balance sheet […] particularly if the failure is due to credit losses"; (iii) the "prevalence" of credit risk "acts as an indicator" (though no other indicator is given); and increases the "likelihood" of applying the balance sheet depletion effect. This, however, does not clarify how these elements apply in individual cases, and thus an approach and methodology were likely to follow. In this case, that approach and methodology present two issues.

95. First, the Board does not explain the rationale […] to exclude the balance sheet depletion effect. In principle, even assuming that balance sheet depletion could occur only with a "prevalence" of credit risk (as stated in the MREL Policy), such depletion may occur with different balance sheet compositions, greater with a higher credit risk component, lesser (but still present) with a lower credit risk component, as the MREL Policy seems to acknowledge ("At the time of failure, the banking group may have a smaller balance sheet than at the time of resolution planning, particularly if the failure is due to credit risk losses").

96. […].

97. The Appeal Panel acknowledges that this approach and methodology are an exercise of discretion by the Board. However, within such exercise, the Board does not explain […]. This is especially relevant because, as noted above, the MREL Policy refers to "prevalence" (not even "strong prevalence") of credit risk, and yet a bank may, as in the present case, present what to an external observer may seem as a "prevalence" of credit risk [.], and still not benefit from the balance sheet depletion effect […].

98. […].

99. […].

100. This brings us to the second issue, which is based on the peculiar circumstances of this case. When the Board adopted the Original Decision, plugging in the financial data as of 31 December 2021, it was aware by then of the financial data as of 30 September 2022, which had been duly communicated by the Appellant. Thus, the material change of the Appellant's risk profile had been known to the Board for several months at the time of adoption of the Original Decision in March 2023, […]. This objective element, in the Appeal Panel's view, justifies the legitimate expectation of the Appellant that the same approach would have been followed also with the decision amending the Original Decision within the same 2022 RPC.

101. Thus, since substance should prevail over form, by failing to change this element, the Board seemed to be signalling to the Appellant that, "on a bank-by-bank basis" the Board had decided to recognise the balance sheet depletion effect in its MREL determination for the 2022 RPC, […].

102. The legitimate expectation of the Appellant was further reinforced by the fact that, in the present case, the Appellant showed a "prevalence" of credit risk in its risk profile ([.]) which, [...], could still be seen sufficient, on a case-by-case assessment, to maintain the balance sheet depletion effect, at least temporarily, during the ongoing RPC.

103. Indeed, since the MREL Policy provides that "the SRB will allow on a bank-by-bank basis with due justification downwards adjustments", one must not forget that, among the circumstances in this particular case, the Board had to duly consider that the Contested Decision was meant to replace the Original Decision for the same 2022 RPC. Although the Contested Decision was based on the financial data as of 30 September 2022 and the Original Decision was based on the financial data as of 31 December 2021, the former data and the material changes of the risk profile of the Appellant reflected herein were already known by the Board at the time of adoption of the Original Decision.

104. The Board could have dispelled any ambiguity about its intent in July 2023, when it requested to stay the appeal, by pointing out that, in addition to taking on board the Appeal Panel's findings in case 1/22, the Board also needed to make adjustments resulting from material changes in the data that exposed a significantly higher risk, which needed to be reflected.

105. Thus, the Board can change the MREL calibration cyclically, as new data are plugged into the formula, the Board can review its MREL determinations to bolster its methodology or justification, if some shortcomings have been highlighted by an Appeal Panel decision, or by the bank, and are acknowledged by the Board. And the Board needs to review its decision if some material change suddenly comes to the Board's attention, and this is adequately justified. What is not respecting the legitimate expectations of the Appellant is for the Board to announce a review of the MREL decision with a specific stated purpose, and then make substantial changes that entail a new exercise of discretion, when those

changes are prompted by facts that were all known well in advance of the Original Decision to the Board, and which could be moreover incorporated in the next RPC, if need be, and this without offering any additional and specific reasoning as to why the changes could not wait (considering that, if the Original Decision had not been appealed, those changes would not have been made by the Board before the following RPC).

106. Thus, […], the Appellant could legitimately expect that the same change would not be considered relevant, in its individual assessment, to deny in the same 2022 RPC the recognition of the balance sheet depletion effect with the Contested Decision.

107. The Appeal Panel concludes, thus (i) that in light of its own approach outlined in the MREL Policy, the Board offered an insufficient justification of its methodology for excluding the balance sheet depletion effect […], and (ii) that, in the very specific circumstances of the case, the Appellant was justified in its legitimate expectation that the same balance sheet depletion effect would have been maintained in the Contested Decision, adopted to amend within the same 2022 RPC the Original Decision, and any changes would have been reflected in the decision for the next RPC.

108. Having upheld the second limb of this ground of appeal, the Appeal Panel considers that there is no need to discuss the first and third limb of the same ground of appeal, which can be declared absorbed.

(e) The (fourth) ground of appeal concerning the imposition and calibration of the MCC

109. As to the imposition of the iMCC, the Appellant claims that in setting it for the Appellant, the Board has violated the sixth and eighth subparagraphs of Article 12d(6) SRMR by failing to determine the reference period, by failing to establish the necessity to impose an iMCC on the basis of specific characteristics of each Appellant and by failing to assess an adjustment of the iMCC. The Appellant also maintain that the Board, when setting the iMCC, has allegedly breached the principles of legitimate expectations and good administration, and has failed to state the reasons with respect to all elements relevant for the iMCC setting.

110. It is important to note, from the outset, that the Appellant has not argued, in this fourth ground, that the Board committed an "error" or "manifest error" of assessment with regard to the iMCC. The Appellant's arguments concern its alleged disregard of legal provisions, failure to assess all relevant elements of the situation, follow its own guidelines (the MREL Policy) or state reasons. This aspect was further clarified and settled during the hearing, where, upon the Board's insistence about its discretion to set the iMCC, and the absence of a "manifest error" the Appellant replied that they had introduced no such plea.

111. In light of this, it is important to acknowledge that, first, pursuant to the case-law of European Courts, the Appeal Panel must only examine of its own motion (*ex officio*) matters of public policy, such as whether the statement of reasons is lacking or inadequate, or other

essential procedural safeguards (judgment of the Court of Justice (Grand Chamber) of 10 December 2013, case C-272/12 P, Commission v Ireland and others, EU:C:2013:812, paragraph 28, and authorities cited). Second, save for these exceptions, the proceedings are *inter partes,* and thus it is for the Appellant to raise pleas in law against the decision and to adduce evidence in support of those pleas (judgments of the Court of Justice of 8 December 2011, case C-386/10 P Chalkor v Commission, EU:C:2011:815, paragraphs 64-65; and case C-272/09 P, KME Germany and others v Commission, EU:C:2011:810, paragraphs 101, 104-105). The authority, the Board in this case, must establish the relevant elements of the decision, but the Appellant is required to identify the impugned elements of the contested decision, to formulate grounds of challenge in that regard and to adduce evidence – direct or circumstantial – to demonstrate that its objections are well founded (KME Germany and others, paragraph 105; Chalkor v Commission paragraph 65; judgment of the Court of Justice, 24 October 2013, case C-510/11 P Kone Oyj and others v Commission, EU:C:2013:696, paragraph 30). Third, this does not change in the case of proceedings before an administrative appeal, like that conducted before the Appeal Panel, which is not required to undertake a *de novo* review, but to rely on the parties' arguments and evidence, in light of the principles applicable to adversarial proceedings (judgment of the General Court of 20 September 2019, case T-125/17 BASF v ECHA, EU:T:2019:638, paragraphs 61, 66, 92, 106, 109, among others, and judgment of the Court of Justice of 9 March 2023, case C-46/21 P ACER v Aquind P, EU:C:2023:182, paragraph 59).

112. The Appeal Panel will apply these principles when examining the arguments raised by the Appellant in its fourth ground of appeal.

(a) First limb of fourth ground: alleged breach of legal provisions, the setting of the iMCC, reference period and downwards adjustments.

113. In the first limb of its fourth ground of appeal the Appellant submits that in setting the iMCC the Board has violated Article 12d(6) subparagraph 6 and subparagraph 8 SRMR by failing to determine the reference period, by failing to establish the necessity to impose an iMCC on the basis of the specific characteristics of the entities, and by failing to assess the appropriateness of the iMCC, in particular the possibility of a (downwards) adjustment of the iMCC.

114. More specifically, the Appellant claims that, in Section Ib Recital (8) the Board failed to take into consideration the [.]SA, and failed to make an assessment of the relevant reference period, or to include any explanation of the relevance of the "complexity" criterion for making the assessment.

115. The Board, for its part, argues that Article 12d(6) SRMR provides the SRB with discretion on whether to set an iMCC for non-resolution entities with a language analogous to that of the provision applicable to resolution entities, and with technical discretion to set the iMCC levels, and that the SRB made its assessment for the Appellant in line with the reference period of one year mentioned in the sixth subparagraph of Article 12d(6) SRMR.

116. Leaving aside the [.]SA, which introduces a relatively new consideration in this case, and will be the subject of separate attention below, the other arguments raised by the Appellant have been analysed by the Appeal Panel in its previous decisions in cases 1/22 and/or 5/23, to which the Appeal Panel refers for further analysis.

117. The text of Article 12d(6), subparagraphs 6, 7 and 8 SRMR provide as follows (emphasis added):

> The Board shall be able to increase the requirement provided in point (a)(ii) of the first subparagraph by an appropriate amount necessary to ensure that, following resolution, the entity is able to sustain sufficient market confidence for an appropriate period, which shall not exceed one year.
>
> Where the sixth subparagraph of this paragraph applies, the amount referred to in that subparagraph shall be equal to the combined buffer requirement that is to apply after the application of the resolution tools, less the amount referred to in point (a) of point (6) of Article 128 of Directive 2013/36/EU.
>
> The amount referred to in the sixth subparagraph of this paragraph shall be adjusted downwards if, after consulting the competent authorities, including the ECB, the Board determines that it would be feasible and credible for a lower amount to be sufficient to sustain market confidence and to ensure both the continued provision of critical economic functions by the institution or entity referred to in Article 12(1) and its access to funding without recourse to extraordinary public financial support other than contributions from the Fund, in accordance with Article 27(7) and Article 76(3), after implementation of the resolution strategy. That amount shall be adjusted upwards if, after consulting the competent authorities, including the ECB, the Board determines that a higher amount is necessary to sustain sufficient market confidence and to ensure both the continued provision of critical economic functions by the institution or entity referred to in Article 12(1) and its access to funding without recourse to extraordinary public financial support other than contributions from the Fund, in accordance with Article 27(7) and Article 76(3), for an appropriate period which shall not exceed one year.

118. Article 12d(8) SRMR contemplates the Board's duty to make a full assessment and provide reasons, and it states that (emphasis added):

> "Any decision by the Board to impose a minimum requirement of own funds and eligible liabilities under this Article shall contain the reasons for that decision, including a full assessment of the elements referred to in paragraphs 2 to 7 of this Article, and shall be reviewed by the Board without undue delay to reflect any changes in the level of the requirement referred to in Article 104a of Directive 2013/36/EU".

119. Thus, the iMCC allows the Board, once it determines that the resolution entity may need, in order to sustain market confidence for a period not exceeding a year, an amount higher than the basic RCA, to sustain such market confidence. To make the calculation more concrete, the rule provides a "base amount", equal to the combined buffer requirement (hereinafter the "**CBR**") applicable after resolution tools, less the amount under Article 128(6)(a) CRD, minus or plus a (downwards or upwards) adjustment set by the Board after consulting with the competent supervisory authority, including the ECB (see to this effect, Appeal Panel

decision of 14 April 2023, in case 1/22 at paragraph 158, and Appeal Panel decision of 19 February, 2024, at paragraph 87). The Board shall assess the relevant elements and provide reasons (Appeal Panel decision of 14 April 2023, in case 1/22 at paragraphs 257-287, and Appeal Panel decision of 19 February, 2024, in case 5/23, paragraphs 184-187).

120. The Appellant alleges that to demonstrate both the need for the iMCC and the reasonableness of the amount of the iMCC, the Board relied on mere proxies instead of making the assessment required by Article 12d(6), subparagraph 6 and subparagraph 8 SRMR, and that the Board failed to determine the reference period for market confidence, while the Board alleges that its assessment is in line with legal requirements.

121. In its decision in case 1/22, paragraphs 273-284, and its decision in case 5/23, paragraphs 183-184 the Appeal Panel reflected on the assessment of the necessity of an MCC based on the entity's complexity and strong reliance on wholesale funding, and concluded that this criterion, which applies the Board MREL Policy, paragraph 30, is aligned with the legal framework, and thus not in breach of Article 12d(6) sub 6. In its decision in case 1/22 the Appeal Panel reasoned that a higher level of wholesale funding can result in a more unstable funding base, which makes an entity more dependent on retaining market confidence, which *prima facie* justifies the presence of an MCC, and that, even if different circumstances could influence the situation in practice, the fact that the Board had to reason from the crisis scenario backwards, justified the use of an element like funding that proved relevant in past crises (Appeal Panel decision 1/22, paragraphs 274-280). In that decision the Appeal Panel found the Board's justification of "complexity" was insufficient, but in case 5/23 the Appeal Panel acknowledged the link between complexity and systemic importance, and that an entity's complexity could complicate its resolution and thus make it more dependent on market confidence (decision 5/23, paragraphs 184, 191). As to the MCC "base amount", this is equal to the CBR minus the amount of Article 128(6)(a) CRD. Thus, using the CBR as a basis is in line with what the law requires. There is no reason to deviate from those previous findings in this decision. The use by the Board of the elements described in this paragraph is therefore correct.

122. The Appellant, however, argues that the Board breached Article 12d(6) subparagraph 8 and Article 12d(8) SRMR, because subparagraph 7 states that the base amount "shall be adjusted" downwards or upwards depending on whether certain conditions are met, and the Board used the base amount and failed to "assess" the appropriate amount of MCC.

123. As the Appeal Panel held in case 1/2022, determining the amount of MCC that may be necessary in the future is a complex and uncertain exercise, which is why the law enhances legal certainty, by providing a reference, or base amount, such as the CBR post resolution, and the possibility of upwards and downwards adjustments, and the fact that the Board chooses to maintain the base amount does not mean that it has failed to assess the appropriate levels for the MCC (decision 1/22, at paragraph 165). This finding was reiterated in case 5/23 (at paragraph 96).

124. The Appellant also argues that the Board provides no explanation about the amount of time, within one year, that is used as a reference point for determining the appropriate levels of MCC, in breach of Article 12d(1) and Article 12d(6) SRMR.

125. The Appeal Panel discussed this point in its Decision in case 5/23, in relation to Article 12d(3) subparagraph 6 SRMR, which refers to the MCC in analogous language as Article 12d(6) SRMR. In that case the Appeal Panel held that the reference to a period of "one year" could be construed in the sense that the co-legislators "may have considered that, one year after the execution of the resolution, the loss of confidence of market participants vis-à-vis the resolved entity should be ultimately overcome, and, conversely, that strengthened requirements may be needed for a period "not exceeding one year" for the purpose of restoring market confidence (decision 5/23, at paragraph 95). The Appeal Panel also held that, if "the Board sets an MCC amount equal to the CBR post-resolution, in line with the one existing pre-resolution, then, in the Appeal Panel's view, it is justified for the Board to conclude that such MCC shall apply not only in the period not exceeding one year following resolution, yet also thereafter. This is tantamount to saying that to restore market confidence the entity should have a CBR after resolution equivalent to the one before resolution, and that, since the CBR is not a requirement that necessarily expires or changes after one year, it may continue to be necessary after such period of one year" (decision 5/23, at paragraph 98).

126. Within the circumstances of the present case the Appeal Panel sees no reason to deviate from these findings. In line with decision 5/23, paragraph 98, the Board's view appears to be that an iMCC equivalent to the CBR would be needed after resolution for a period not exceeding one year, and possibly also thereafter, as long as the supervisory authority would not determine a different CBR following resolution. Limiting the amount to the equivalent of the pre-resolution CBR, adjusted to the expected TREA post resolution does not seem a failure to assess, but rather a proportionate assessment. Thus, it cannot constitute the basis to establish a breach of law.

127. Apart from its other allegations about the Board's approach to the determination of the MCC, which have been analysed by the Appeal Panel above, in light of its precedents, the Appellant's broader point is that the Board failed to provide an assessment and justification of the iMCC based on of the entity's characteristics, as required by Article 12d(8) SRMR, and in particular any downwards or upwards adjustments. In its initial appeal the Appellant also mentioned the absence of evidence of consultation with the ECB. The Appeal Panel will proceed to deal with these allegations, discussing first those that can justify a more straightforward assessment easily disposed of, and proceeding then to those that require more detailed and thorough assessment.

128. First, as previously held in its cases 1/22 and 5/23, in the Appeal Panel's view, the fact that the Board set an iMCC equivalent to the existing CBR adjusted to the projected TREA post-resolution and that it determined that such a minimum amount should be available post resolution suggests that no further downward adjustment was considered feasible and

credible. It does not suggest a failure to consider this possibility, or to consult competent supervisory authorities (see to this effect, Appeal Panel decision of 14 April 2023, in case 1/2022, at paragraph 164, and Appeal Panel decision of 19 February 2024, in case 5/23, at paragraph 101).

129. Second, recital (4) of the Contested Decision clearly refers to the consultation with the ECB, whereby the Board states that:

> "[….]".

130. Thus, the Board clarifies that the ECB did not provide any comments, especially in the determination of the iMCC levels. The Board also adds that nothing in the ECB's response, had it provided any comment, would have supported a determination for a lower iMCC amount, i.e., the Board seems to clarify that it was ultimately its assessment and its decision.

131. The Appeal Panel finds that this complies with the requirement under Article 12d(6) sub 8 and Article 12d(8) SRMR. In line with its findings in decision in case 5/23, there is nothing in the file that could suggest that the statements in the Contested Decision are inaccurate, nor does the Appellant allege that they are, nor are there any reasons to believe that the Board may have failed to take the required procedural step of consulting the ECB.

132. Then, on the more specific elements of the Board's assessment and justification of the necessity and appropriateness of the MCC, the approach to scrutinise this assessment and justification should be in line with that followed in cases 1/22 and 5/23.

133. The Appeal Panel, in its decision of 14 April 2023 in case 1/2022 examined whether, and how, the Contested Decision assessed, explained and connected the more general aspects of the resolution strategy and other considerations in the summary of the resolution plan, to the specific features of the entity, and these with the determination of the RCA, including the MCC. Thus, aside from the concrete assessment and justification of the MCC and its downward adjustments (or lack of them) the Board's assessment of the resolution strategy and the group can provide useful context for this determination. Thus, in its Decision in case 1/22 the Appeal Panel found that in the summary provided, "the explanation of the resolution strategy remain[ed] considerably high-level and d[id] not refer to any relevant features of the group" (paragraph 183) and "the explanation of the resolution strategy ma[de] no reference to the process leading there, nor to the interactions between the Board and the group, where such choice was explained or discussed" (paragraph 184). Subsequently, the Appeal Panel also found that, for example, the Board had not adequately substantiated its assessment of the elements such as an entity's "complexity" (paragraphs 284-291).

134. In contrast, in this case the summary of the Amended Resolution Plan is quite specific in detailing the group's features, […]. Thus, although there were no changes in this part of the summary of the resolution plan between the Original Decision and the Contested Decision, the summary initially provided was already detailed on the key elements of the resolution

strategy. These are consistent with the specific considerations about the entity's critical functions and core business lines, which emphasize […].

135. These aspects are complemented and developed further in the Contested Decision, and especially in Section Ib, Recital (4) (i) to (iv), which discusses the economic features of the entity, in terms of its size, business model, funding, risk profile, or impact of its failure on financial stability. These factors are not only pertinent to assess the insufficiency of TLAC to fulfil the requirements of Article 12d, making an MREL add-on necessary as considered above. They are also relevant to assess and justify a more specific element, such as the iMCC.

136. Thus, when the Contested Decision indicates in Section Ib, Recital (8) that it is increasing the RCA with an MCC due to its complexity, and reliance on wholesale funding, this should be understood in light of the further explanation in Recital 4, (i), (ii), (iii) and (iv) about [….]. And these factors can also be understood in light of the further analysis in the summary of the resolution plan (and Amended Resolution Plan).

137. This, in the Appeal Panel's view, shows that the Board complied with the requirement under Article 12d(8) SRMR to make "a full assessment" of the relevant elements, and, in particular, of whether "it would be feasible and credible for a lower amount to be sufficient" to satisfy the conditions of Article 12d(6) subparagraph 8.

138. This, in the Appeal Panel view, also shows that, although the Board relies on proxies, such as "complexity" or "reliance on wholesale funding", as stated in its MREL Policy for setting an iMCC for subsidiaries, this does not stop it from considering other factors, where these factors are relevant. Some such factors are size and systemic importance. The Appellant accepts that the Board has considered size. In fact, the Appellant complains that the Board has attached too much importance to size, by considering factors that are all proxies of size, although the Appeal Panel has concluded above that they are not. Therefore, the Appeal Panel finds that the assessment and justification by the Board of the necessity of an MCC and appropriateness of its level is in compliance with the legal requirements and sides with the Board in this point.

139. Among the arguments raised by the Appellant in its plea of illegality (first limb of the fourth ground of appeal) the reference to the [.]SA offers the greater degree of novelty.

140. The Appellant argues specifically that the Board (emphasis in the original) "entirely disregarded the "existence of the [.], which entitles [.] to receive financial support from its [.] parent in the case of a failure of [.]" (the "Support Agreement") due to the allegedly "high adverse impact that a failure of [.] would have on financial stability in the EU" (Section Ib, §8). The SRB invokes "financial stability", but fails to take into account, and even consider, the concrete impact of the Support Agreement on critical functions and funding of the post-resolution entity. The failure to take into account, impartially and with

due care, all relevant elements of the case, is a violation of the principle of good administration".

141. The Appeal Panel notes that in some of its submissions the Appellant suggests that the Board failed to take into consideration the relevance of intragroup support when assessing the "necessity" of an iMCC. This submission can be dealt with as a preliminary matter. The Board has alleged that, since this submission was introduced in the Appellant's reply, it should be disregarded. In any event, the argument is unconvincing. The assessment of the iMCC depends on the existence of conditions such as "complexity" and "strong reliance on wholesale funding". If those conditions apply, intragroup support can justify a downwards adjustment. However, intragroup support as a substitute of MREL is only contemplated in very specific cases, e.g., collateralised guarantees between entities in the same Member State (Article 12g(3) SRMR), or guarantees between entities in the same Member State, when they constitute evidence that there are no "current or foreseeable material legal or practical impediment for the prompt transfer of funds" (Article 12h SRMR, and Appeal Panel decisions in cases 2/2021, 3/2021, or 1/2022). Conversely, where a guarantee does not comply with these conditions, as it happens in the present case, where the parent is outside the EU, an entity cannot claim a legitimate expectation that the Board will deviate from its methodology for assessing the need of an iMCC, and consider the intragroup support as a substitute of the iMCC, or any other element of MREL. Thus, by failing to mention the intragroup support in the assessment of the "necessity" of an MCC the Board did not violate Article 12d (6) subparagraph 8 SRMR.

142. The Board referred to the intragroup support in Recital (8), when it assessed the possibility of an upwards or downwards adjustment of the MCC. However, in its plea of illegality the Appellant treats the disregard of the [.]SA for purposes of a downwards adjustment as "a violation of the principle of good administration". Thus, the Appeal Panel will deal with this argument below, in the third limb of the fourth ground of appeal.

143. In light of these considerations, the first limb of the fourth ground of the amended appeal must therefore be dismissed and the Appeal Panel sides with the Board on this.

(b) Second and fifth limbs of the fourth ground: protection of legitimate expectations, the MREL Policy, and the assessment of "complexity" and "reliance on wholesale funding"

144. In the second limb of the fourth ground of the appeal the Appellant alleges that the Board violated the principle of legitimate expectations by failing to apply its own MREL Policy with respect to the "complexity" and "wholesale funding" criteria, and to the exceptional nature of the MCC. In the Appellant's view, the Board used a definition of "wholesale funding" that is not aligned with the legislation, failed to explain what exceptional circumstances distinguished the Appellant from other banks, and took some statements about the Appellant's business out of context to justify "complexity".

145. In the fifth limb of the fourth ground the Appellant alleges that the Board breached the principle of equal treatment, notably by using a non-transparent methodology and by failing to provide a similar level of information to justify its decision as in the case 1/22.

146. The Board, for its part, alleges that it did comply with its MREL Policy in assessing the relevant elements to determine the iMCC, and that it complied with the principle of equal treatment.

147. As noted above, the Appeal Panel has already held, following the case-law of European courts, that, once it has adopted its MREL Policy the Board has imposed itself a limit on the exercise of its discretion, and could not, as a general rule, depart from this policy, at the risk of being in breach of principles such as equal treatment or the protection of legitimate expectations.

148. Paragraph 30 of the MREL Policy states that (emphasis added):

> "An MCC does not seem essential for ensuring the viability of a subsidiary that will be recapitalized by the resolution entity at the point of non-viability without placing it under resolution, except in specific circumstances. Accordingly, the SRB does not set the MCC for internal MREL for nonresolution entities, except (i) for the operating bank that is a direct subsidiary of a holding company identified as a resolution entity; or (ii) where the SRB concludes that the MCC is necessary to sustain market confidence because of the subsidiary's complexity and strong reliance on wholesale funding".

149. Thus, the standard to which the Board constrained itself is that the iMCC "does not seem essential […] except in specific circumstances". Those exceptional circumstances are linked to "complexity" and "strong reliance on wholesale funding".

150. Regarding "wholesale funding", the Appeal Panel refers to its decision in case 1/22, paragraph 294, where it considered the issue of reliance on wholesale funding to the purposes of the determination of the MCC and of the related statement of reasons and concluded that:

> In principle, choosing, like the Board did, a definition of "wholesale funding" that focuses on the entity's needs, or sources of funding, appears to the Appeal Panel reasonable.

151. This finding was reiterated in the Appeal Panel decision in case 5/23, paragraph 185, where the Appeal Panel held that the concept of "wholesale funding" under Commission Implementing Regulation (EU) 2018/1624 of 23 October 2018 (hereinafter "**CR 1624**"), which was relied upon by the Appellant in that case, and is, again, referred to by the Appellant in the RTBH assessment memorandum refers to "lending and borrowing activities in wholesale markets to and from financial counterparties (credit institutions and other financial corporations)" because it implements Articles 11 and 13 BRRD. The Board relies instead on the definition of "wholesale funding" under Commission Delegated Regulation 2021/451 (hereinafter "**CR 451**"), which implements Regulation 575/2013 (CRR).

152. The Appeal Panel concluded in its decision in case 1/2022, at paragraph 292, and in its decision in case 5/23, paragraph 186, that the purpose of the "wholesale funding" definition under CR 1624 is to identify the critical functions provided by the entity or group, whereas the purpose of the definition under CR 451 is to assess an entity's liquidity risk, and it focuses on the funding received by the entity. Thus, the latter offers a reasonable yardstick to measure an entity's reliance on types of funding that may present an added source of risk, and may justify an MCC. In both decisions, the Appeal Panel analysed the criterion for determining whether an entity shows a "strong" reliance on wholesale funding, which is based on the statistical distribution of the different entities, where the threshold for "strong" reliance is placed in the third. The Board continues to have the same criterion, which was considered reasonable in both cases.

153. In particular, regarding the claims that the method is arbitrary and discriminatory, the Appeal Panel found in case 5/23 that the Board transparently informed the Appellant of the criteria applicable, and the methodology based on a statistical distribution, which relied on the wholesale funding of the relevant bank but also of all other banks, a methodology that appears justified by the desire to ensure equal treatment, while the Appellant failed to show why this criterion yields unreasonable results, or that other more suitable criteria would be available for the purpose of at the same time identifying the individual reliance of the relevant credit institution on wholesale funding and of ensuring an objective and non-discriminatory treatment of all banks (Appeal Panel decision in case 5/23, paragraphs 200-202).

154. There is no reason to deviate from those findings in this case. Recital (8) of the Contested Decision clearly identifies the concept of wholesale funding it relies upon, including its normative source, and its statistical methodology. [.]. Furthermore, the Board also expands on the rationale for using this concept, by linking it to the specific situation of the entity, stating that:

> "[…]".

155. The Appeal Panel considers that the Board's application of the criterion of "strong reliance on wholesale funding" is in line with the contents of its MREL Policy, and the relevant legislation. Furthermore, the Appeal Panel concludes that the Board has adequately assessed and why this criterion justifies the imposition of an MCC.

156. Regarding the "complexity" criterion, in its initial appeal the Appellant submitted that the Board did not so much focused on complexity as it did on size and systemic importance. In its statement of modification of the appeal, however, since the Board discusses complexity in its Contested Decision, the Appellant disagrees with the Board's assessment of complexity. The disagreement can be seen in the parties' respective submissions, and in the Contested Decision RTBH assessment memorandum. […], and that the issue had been extensively discussed between the IRT and the entity, and the Appellant itself had acknowledged the entity's complexity […]; (iii) to which the Appellant replied that these

statements about the entity's complexity had been taken out of context, since the considerations made therein could not be extrapolated to the resolution scenario envisaged for purposes of making the MREL calculations, and the assessment of an MCC.

157. The Appeal Panel finds that the Board's assessment of the entity's complexity is sufficient to justify the imposition of an iMCC, especially in combination with the criterion of reliance on wholesale funding. […]. Thus, in the event of resolution, all these elements would need to be kept together and functioning without disruption in order for the resolution strategy to succeed.

158. These features would, in the Appellant's view, affect the success prospects of a resolution variant strategy consisting […].

159. The Appellant is correct in stating that the warnings about "complexity" […] had a specific context. In the case of the dual IPU application, the Appellant stated that: "Given the nature, complexity and size of [.], and the number of transactions that take place between [.] and [.], it would be imprudent […].

160. The statements about complexity [.], for their part, were made to justify the preferred [.] strategy, and […]. As the Appellant has argued, […], "many of the issues we have identified in this [.] would not arise in the context of the [.] strategy […]".

161. However, even if these facts are clearly relevant to justify the choice between resolution strategies, [….], that does not mean that they are completely irrelevant within the preferred resolution strategy. In particular, the features described by the Appellant suggest an integrated activity [..], […] that need to be kept going to avoid disruption. This seems very much aligned with the idea of a "complex system" with multiple interacting parts. And although this suggests a preference for keeping the system intact, it also suggests that the system may be more vulnerable to sudden disruptions in its funding, which seems the type of scenario for which an iMCC is conceived.

162. Thus, one can agree with the Appellant that some of its statements are taken out of context, and also conclude that the facts underpinning those statements remain relevant outside the context where the statements were made. If one puts together a funding structure […], and a business structure that requires multiple pieces functioning together, it not only seems that the "complexity" and "wholesale funding" have been assessed in line with the MREL Policy, but also that their pertinence to justify an iMCC are clearly established.

163. For these reasons, the second and fifth limbs of the fourth ground of appeal must be dismissed.

(c) Third limb of the fourth ground of appeal: the principle of good administration, the [.]SA, and the Appellant's observations about its funding structure.

164. In the third limb of its fourth ground of appeal the Appellant argues that the Board has breached the principle of good administration, under Article 41 of the Charter of Fundamental Rights, by failing to examine carefully and impartially all the relevant elements of the case at hand. In its initial appeal the Appellant claimed (1) that the Board had failed to take into account the status of "material subsidiary" of the relevant entities, (2) that the Board failed to take into account the existence of [.]SA in its assessment of the iMCC, and (3) that the Board stated that its assessment of the Appellant's reliance on wholesale funding was "consistent" with the Appellant's "own assessment", a statement for which it took out of context the figures reported in the Appellant's […].

165. However, in its subsequent statement of modification, the Appellant primarily stressed that the Board had disregarded: (1) the [.]SA as an element justifying a downwards adjustment, (2) the fact that the "[…]" methodology pursuant to which the Appellants' resolution plan has been prepared is already calibrated taking into account the need to sustain market confidence, and (3) the Appellant's other statements made in connection with its funding and liquidity plan in the RTBH assessment memorandum. This must be completed with the Appellant's observation, in its plea of illegality (first limb of fourth ground of the amended appeal), that the Board's invocation of financial stability fails to consider the impact of intragroup support on critical functions or post-resolution funding.

166. The Board, for its part, argues that it duly took into account the existence of the [.]SA, […], and that the Appellant's other statements simply reflect the Appellant's disagreement with the concept of "wholesale funding" used by the Board, and do not, in any event, alter the figure of "wholesale funding" for the Appellant, or the threshold used by the Board to determine a "strong reliance".

167. In its reply the Appellant criticises the Board's methodology to determine "wholesale funding" and "strong reliance". The Appellant also stresses the importance of intragroup support in several points. It suggests that the Board's disregard of this element means that (i) its assessment of the "necessity" of an iMCC is in breach of law, while also (ii) reiterating that the Board's failure to provide a concrete analysis of the [.]SA on critical functions or post-resolution funding.

168. In its rejoinder, the Board argues that the Appellant tries to introduce a new claim, concerning the "necessity" of the MCC, which must be disregarded, as a new claim, and also as one that misunderstands the provisions on the setting of RCA, and that, in any event, the Board duly considered the [.]SA, […]

169. Both parties seem to agree that the [.]SA is a relevant factor for intragroup dependencies. Both parties have raised arguments that are technical and important regarding the role of that [.]SA. The parties disagree about how the [.]SA would be deployed *ex post*, and its impact on the *ex ante* setting of the iMCC, based on detailed considerations.

170. However, neither party has produced the […].

171. […].

172. How to assess the effect on the review of the Contested Decision of an element that cannot be directly observed, like the Appeal Panel is asked to do in this case in respect to the [.]SA, depends on the applicable standard discussed by the Appeal Panel at the beginning of the fourth ground of appeal. Whereas the Board must establish the relevant elements leading to its conclusion, the Appellant has the burden to identify the impugned elements of the Contested Decision, to formulate grounds of challenge in that regard and to adduce evidence – direct or circumstantial – to demonstrate that its objections are well founded.

173. By those standards, the Appellant has failed to offer compelling arguments and evidence for its plea of the breach of the principle of good administration. The Appellant's argument is that the Board has failed to consider the [.]SA when assessing the need for an MCC, or the possibility of a downwards adjustment. However, the Contested Decision, in its Recital (8) addresses the matter of the [.]SA, concluding that, in its presence, an upwards adjustment of the iMCC is not justified, but also that a downwards adjustment is not justified either.

174. The decision appears to consider the potential impact on financial stability as the factor deciding the Board against a downwards adjustment, which is not against the tenor of Article 12d (6) subparagraph 8 SRMR, which states that the downwards adjustment shall take place when "the Board determines that it would be feasible and credible for a lower amount to be sufficient to sustain market confidence and to ensure both the continued provision of critical economic functions by the institution or entity referred to in Article 12(1) and its access to funding […] after implementation of the resolution strategy". The Appeal Panel is not persuaded that, as stated by the Appellant, by invoking "financial stability", the Board "fails to take into account, and even consider, the concrete impact of the Support Agreement on critical functions and funding of the post-resolution entity".

175. […].

176. A different matter is whether the Board's description of the reasons for its ultimate rejection of the possibility of a downward adjustment is sufficient, but this will be considered below.

177. The Appeal Panel also notes that the Appellant has not argued that the Board committed a manifest error, or error, of assessment. Nor has the Appellant expanded on the reasons why, in its view, the Board failed to consider the "concrete impact" of the [.]SA on critical functions or post/resolution funding. This is, admittedly, difficult to do without producing the actual [.]SA. And it is virtually impossible for the Appeal Panel to assess the concrete impact of an agreement such as the [.]SA that it cannot examine.

178. The Appellant also claims as a breach of the principle of good administration the Board's failure to take into account that the amount of both pre-positioned internal TLAC and of intra-group arrangements has already been calibrated to maintain market confidence under the […], which makes an additional MCC unnecessary and a duplication of efforts.

179. The Appeal Panel is not persuaded that this allegation could show a breach of the principle of good administration by the Board. At most, it could show that the question of what requirements are needed to ensure market confidence post-resolution can have different answers in the [.] and the EU, which may depend on the different legislation (the law is not equivalent in the [.] and the EU), the methodology used by different authorities, or their points of view, given that the priority for each authority is financial stability in its own jurisdiction.

180. Even so, the [.] referred to by the Appellant as the normative source for setting the levels of pre-positioned resources and support agreements is useful and enlightening. The Guidance describes the "[….]".

181. However, in a different part, concerning "secured support agreements" the [.] also considers the trade-offs between those agreements and pre-positioned internal TLAC, […].

182. Finally, the [.] state that:

> […..].

183. Therefore, it appears that, whereas (i) [.] have their own methodology for setting levels of pre-positioned internal TLAC to ensure market confidence, and (ii) they may continue analysing the impact of intragroup support in setting internal TLAC, also for material subsidiaries [.], (iii) they also consider that intragroup support agreements are not necessarily a substitute of pre-positioned TLAC, and that (iv) ensuring the confidence of non-US authorities is crucial, and thus (v) engagement with them remains key.

184. Thus, if the issue arises because [.] and EU authorities have different criteria for setting the levels of pre-positioned resources that ensure market confidence, the answer would appear to lie in the engagement between these authorities, in order to reach a "shared understanding" of the level of pre-positioned resources, and the role that intragroup support may play in adjusting those levels. In such a context, the fact that different authorities could have different views does not, in and of itself, justify a conclusion that one of the authorities is necessarily wrong.

185. Finally, the Appellant argues that, in assessing the iMCC, and the possibility of a downwards adjustment, the Board failed to consider the allegations made by the Appellant in exercise of its RTBH regarding its funding and liquidity plan.

186. These allegations were made in the RTBH comment [.]. Some of the considerations therein refer to the Board's definition of "wholesale funding" and have been addressed above, under the third limb of the fourth plea, on the protection of legitimate expectations, to which the Appeal Panel refers.

187. Some of the allegations, however, refer to the composition of the bank's main source of funding, and to the bank's funding and liquidity plan. In essence, the Appellant alleges that,

according to its forecasts, long-term funding, in the form of capital, iMREL and structured notes would exceed forecasted loan balances, and thus it would be using long-term funding (and thus not relying on non-contractual deposits) to fund long-term assets, even if the lending book were to grow more than expected […].

188. While the Appellant presents the argument, it does not clarify for the required legal purposes how the information was disregarded. The point made by the Appellant with its comment 6 of the RTBH assessment memorandum suggests that the entity's asset/liability structure does not present maturity mismatches. However, it provides no detail about, e.g., what are the third-party loans singled-out in the comment, how they are measured, or whether they are the only relevant long-term (or medium-term) assets, nor how the overall asset/liability structure could be affected in scenarios of stress.

189. The concept of "wholesale funding" used by the Board refers to the source of funding, not to the long-term or short-term nature of the funding. Thus, even if wholesale funding may present a risk that is especially acute in scenarios of wholesale short-term funding, and especially if there are maturity mismatches, it does not seem that the relevance of wholesale funding is exhausted by those scenarios. It is possible to envisage stressed scenarios involving other combinations, e.g., an entity reliant on wholesale funding, and a business model that results in a relatively low quantity of loans, and a high volume of securities, which are revalued due to changes in underlying market conditions, which may, in turn, justify an additional charge to bolster market confidence. Thus, the Appeal Panel fails to see how, by not making an express reference to the information provided by the Appellant about the maturity of the funding and the assets, the Board could breach the principle of good administration.

190. In any event, these considerations, if adequately elaborated and expanded upon, seem more fitting to substantiate an allegation that the Board committed an "error" or "manifest error", rather than an allegation that it breached the principle of good administration.

(d) Fourth limb of the fourth ground of appeal: the duty to state reasons.

191. In the fourth limb of its fourth ground of appeal the Appellant alleges that the Board failed to comply with its duty to state reasons. The Appellant argues (1) that the Board failed to provide reasons as to how it determined the reference period for the MCC, (2) how it arrived at the conclusion that an iMCC was necessary, taking into account that the elements provided by the Board refer to size, not complexity, and that there is insufficient information about the methodology for the "wholesale funding" indicator, and the threshold used by the Board. The Appellant also argues (3) that the Board fails to explain how it took into account the intragroup support, and the group's preferred resolution strategy, (4) that the Board fails to justify the Appellant's interconnectedness with the financial system, and why its failure would be highly adverse to financial stability in the EU, and (5) that the summary of the resolution plan is silent in these respects.

192. The Board, for its part, argues that it provided an appropriate statement of reasons for each of the relevant elements of the iMCC, and it refers to the different parts of the decision, where the Board justified the decision to impose an MCC, in light of the Appellant's "complexity" and "strong reliance on wholesale funding" (explaining both the concept of wholesale funding used, and the methodology for the wholesale funding indicator).

193. The Appeal Panel has dealt with the statement of reasons and its relevance in other cases, notably those involving the determination of MREL, including its decision of 14 April 2023, in case 1/22, and its decision of 19 February 2024, in case 5/23, where the Appeal Panel discussed the applicable legal standard, which follows that of European Courts, as well as Article 12d (8) SRMR, and its concrete application to the justification of elements such as the link between the summary of the resolution plan and the justification of MREL levels, or the calibration of the MCC, including the justification of "complexity" and "wholesale funding", or the "reference period". The Appeal Panel refers to those decisions for further analysis, specifically to its decision in case 1/22, paragraphs 167-210, 235-239, 270-298, and to its decision in case 5/23, paragraphs 74-120, 199-206. Those decisions show that, since Article 12d(8) SRMR states that the Board's decision "shall contain the reasons for that decision, including a full assessment of the elements" the Appeal Panel's finding that the Board has made a "full assessment", as required by the law, also result in a finding that the Board has complied with its duty to state reasons, if the elements of the assessment were adequately included in the decision.

194. In light of this, the arguments raised by the Appellant about the Board's breach of its duty to state reasons are similar to the ones raised in the first, second and third limbs of the fourth ground, in what concerns the justification of the "necessity" of the iMCC, the "reference period", or the "complexity" and "strong reliance on wholesale funding", and must be dismissed. The Appeal Panel has already concluded that the Board's assessment of these elements, as deduced from the reasons and explanations offered by the Board in the Contested Decision, including its recitals, sections, and the RTBH assessment memorandum was compliant with the relevant legal requirements. Furthermore, unlike its findings in its decision on case 1/22, where it found that the summary of the resolution plan was too succinct on certain relevant aspects, and that this was not balanced by a greater detail in the MREL decision, the Appeal Panel already held in the first limb of the fourth ground of appeal that, in this case, the summary of the resolution plan initially provided more detail about certain aspects of the business model and resolution strategy, which were then completed by the more detailed explanation in the Contested Decision, especially in Section Ib, Recital (4). Those same reasons make it possible for the Appellant to understand on which basis and according to what methodology the MCC was determined, and for the Appeal Panel, or a court, to exercise review (decision in case 1/22, paragraphs 167, 186-187, and decision in case 5/23, paragraphs 119-120, 205-206).

195. The Appellant's allegation about the Board's lack of a proper statement of reasons and justification of the Appellant's "interconnectedness", or why its failure would be "highly adverse to financial stability" in the EU is not analogous to the Appellant's allegations in its

other limbs of the fourth ground of appeal. However, it must be equally dismissed. In Section Ib, Recital (4)(v) the Board clearly explains its view on the entity's "interconnectedness", with other entities, as a result of […]. This, in turn, would result in "highly adverse" consequences for financial stability throughout the EU, in case the entity were to fail. The Board's reasoning is straightforward, and is consistent with the assessment and statement of reasons of the entity's size, business model, funding model, and risk profile provided in Section Ib, Recital (4) points (i) to (iv), and with the Board's assessment of the business model and the resolution strategy, as outlined in the summary of the resolution plan.

196. The only element that presents differences is that concerning the relevance of the [.]SA. It is important to note that Section Ib, Recital (8) dedicates a paragraph to summarize the Board's assessment of the [.]SA. That paragraph states that:

> When considering the necessity of adjusting the amount referred to in Article 12d(6) sixth subparagraph of Regulation (EU) 806/2014 upwards, the Board assessed that this is not necessary due to the existence of the [.], which entitles Banking Union Subsidiary 2 to receive financial support from [.] in the case of a failure of [.]. When considering the possibility of adjusting the amount referred to in Article 12d(6) sixth sub-paragraph of Regulation (EU) 806/2014 downwards, the Board has assessed that due to the high adverse impact that a failure of Banking Union Subsidiary 2 would have on financial stability in the EU, it would not be prudent to determine that a lower amount would be sufficient to allow the Banking Union Subsidiary 2 to sustain sufficient market confidence for up to one year, as required by Article 12d(6) sixth sub-paragraph of Regulation (EU) 806/2014.

197. Thus, the Board concludes that the existence of the [.]SA has been an important factor to conclude that no upwards adjustment of the MCC is needed, but also that a downwards adjustment is not justified either because it would not be "prudent", in light of the adverse impact on financial stability of the entity's failure.

198. The argument seems clear enough. However, it does not fully capture the Board's rationale for its assessment of the [.]SA. […].

199. […].

200. The Appeal Panel has examined the [.] normative sources relied on by the Appellant as guidance for its pre-positioning of TLAC and intragroup support, finding that, in the view of [.] themselves, support agreements are not necessarily substitute for pre-positioned TLAC. With these clarifications and sources in mind, and based upon the evidence in the file, the Appeal Panel has found that there are no grounds to conclude that the Board committed a breach of mandatory provisions, or of the principle of good administration by disregarding an element that is relevant for its assessment.

201. However, even if the Appeal Panel found that the Board committed no breaches of law, nor failed to assess all the relevant elements of the situation, in line with the principle of good administration, or that the Appellant failed to offer compelling reasons to support the

opposite, the proceedings have shown that the reasoning included in the Contested Decision has not addressed aspects pertaining to the [.]SA […] were deemed not enough to justify a downward adjustment of the iMCC.

202. Those arguments include (i) the presence of different authorities in the [.], with potentially different criteria about the impact of the [.]SA in the RCA and/or the MCC (ii) the crisis management powers envisaged in [.] regulations, and the risk they present for the effective enforcement of the [.]SA, and (iii) even assuming near-certain deployment of the [.]SA, the need to balance according to the precautionary principle the risks for the EU financial stability arising from a slim probability that, due to […], it may not be deployed.

203. Although the Board makes a general mention to financial stability, those specific elements, […], cannot be read in, nor deduced from, the text of the Contested Decision. This is a material omission, because it relates to the interplay to be expected between [.] and EU legal and supervisory frameworks in addressing the resolution planning and crisis management of a G-SII. Thus, it is necessary, in the Appeal Panel's view, to expressly include in the reasoning of the decision all the arguments pertaining to these aspects, and relied upon by the Board in adopting the Contested Decision, […].

204. For these reasons the Appeal Panel finds that, the statement of reasons offered by the Board on this aspect should address the considerations pertaining to the [.]SA in a more comprehensive manner to meet the standard repeatedly set by the Appeal Panel in its decisions in cases 1/22 and 5/23, in line with the case-law of European courts in resolution matters.

205. For these reasons, the fourth limb of the fourth appeal is dismissed, except with regard to the considerations pertaining to the effect of the [.]SA.

On those grounds, and within the limits set out above concerning the third ground and the fourth limb of the fourth ground, the Appeal Panel hereby:

Remits the case to the Board.

David Ramos Muñoz
Co-Rapporteur
[SIGNED]

Kaarlo Jännäri
[SIGNED]

Luis Silva Morais
Vice-Chair
[SIGNED]

Marco Lamandini
Co-Rapporteur
[SIGNED]

Christopher Pleister
Chair
[SIGNED]

For the Secretariat of the Appeal Panel:

[.]
SIGNED