15 December 2023

Joined Cases 2/2023 and 3/2023

FINAL DECISION

[.],

Appellant,

v

the Single Resolution Board

Christopher Pleister, Chair
Luis Silva Morais, Vice-Chair
Helen Louri-Dendrinou, Co-Rapporteur
Marco Lamandini, Co-Rapporteur
Kaarlo Jännäri

TABLE OF CONTENTS

FINAL DECISION

In Joined Cases 2/2023 and 3/2023,

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] (the "**SRMR**"),

[.], a legal entity with headquarters in [.], represented by [.], [.], with offices in [.] (hereinafter the "**Appellant**")

v

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

(together referred to as the "**parties**"),

THE APPEAL PANEL,

composed of Christopher Pleister (Chair), Luis Silva Morais (Vice-Chair), Helen Louri-Dendrinou (Co-Rapporteur), Marco Lamandini (Co-Rapporteur) and Kaarlo Jännäri

makes the following final decision:

Background of facts

1. This appeal relates, in case 2/2023, to the joint decision determining the minimum requirement for own funds and eligible liabilities for [.], [.], [.] as adopted by the SRB and the [.] on [.] decision [.], hereinafter the "**Contested Joint Decision**") and, in case 3/2023, to the SRB decision determining the minimum requirement for own funds and eligible liabilities for [.], [.], [.] of [.] decision [.], hereinafter the "**Contested SRB Decision**").

2. The notice of appeal in case 2/2023 was submitted on 3 July 2023 and it was directed against the Contested Joint Decision.

3. The notice of appeal in case 3/2023 was submitted on 5 July 2023 and it was directed against the Contested SRB Decision.

4. On 6 and 7 July 2023, the Appeal Panel notified the Board of the appeal in case 2/2023 and 3/2023 respectively.

5. On 11 July 2023, the Board filed a reasoned request for the extension of the deadline for the submission of its response and raised the issue of the language of these proceedings.

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

6. On 17 July 2023, the Appeal Panel informed both parties of its decision to consolidate case 2/2023 and case 3/2023 pursuant to Article 13 of the Appeal Panel's Rules of Procedure. With the same communication the Appeal Panel informed that, following the reasoned request of the Board, the deadline for the Board's response in joined cases 2/2023 and 3/2023 was extended until 25 August 2023 and invited both parties to file their observations on language by 24 July 2023. Both parties timely submitted their observations.

7. On 25 July 2023, the Appeal Panel issued a procedural order on the language of this proceeding as follows:

> "[…] The Appeal Panel, having duly considered both parties' observations and all relevant factual circumstances of the current appeal in Joined Cases 2/2023 and 3/2023 has come to the following conclusions.
>
> The Contested Decision in case 2/2023 is the joint decision determining the minimum requirement for own funds and eligible liabilities of [.] ([.]), whereas the Contested Decision in case 3/2023 is the decision [.]. Both Contested Decisions were drafted and adopted in English, and both were adopted to determine the MREL requirement for [.] and its subsidiaries, including its [.]. (the nationality of such subsidiary being the reason why also a college decision proved necessary).
>
> The Appellant claims that it never agreed with the SRB to the use of the English language in dealings with the SRB itself and that therefore only the [.] language should have been used for the communication and documentation between the parties. For this reason, the Appellant also raises, as first ground of appeal, the plea that the MREL decision violates Article 81(1) SRMR and Article 3 of Regulation No 1 of 1958 because it is not written in English. Likewise, the Appellant considers that also the proceedings before the Appeal Panel should be held in [.] .
>
> In contrast, the Board considers that since the Contested Decision is in English, pursuant to Article 5(2) of the Appeal Panel's Rules of Procedure the language of these proceedings must be English.
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> The Appeal Panel has already determined on the issue of the language of the appeal proceedings against a MREL determination in case 3/2022, where it concluded that, although the MREL decision of that case was in English, the Appellant was entitled in conformity with Article 81(1) SRMR and of Article 2 of Regulation No 1 of 1958 to appeal the Contested Decision in [.] , because there was no evidence that the Appellant had consented to the use of the English language in the proceedings leading to the adoption of the Contested Decision.
>
> The Appeal Panel wishes to stress, in the first place, that this conclusion does not address in any way the different issue, which is raised in the current proceedings by the Appellant as first ground of appeal, whether a MREL decision drafted in English violates Article 81(1) SRMR and Regulation No 1 of 1958 if the bank concerned did not consent to the use of the English language in its relationship with the SRB. The conclusion reached by the Appeal Panel in case 3/2022 addresses only the different issue of the language of the appeal proceedings, once an MREL determination is adopted in English by the SRB and by the college, both using as language their working language, which is English.
>
> More specifically, in case 3/2023 the Appeal Panel noted that the first and second periods of Article 5(2) expressly provide (i) that "the language of the Notice of Appeal and of the appeal proceedings shall be the language chosen by the Appellant in conformity with Article 81(1) of Regulation 806/2014 and *Article 2 (emphasis added)* of Council Regulation Nº. 1 of 1958" and (ii) that "*unless otherwise required under Council Regulation Nº. 1 of 1958* (emphasis added), the language of the

Notice of Appeal and of the appeal proceeding shall be the language of the contested decision". Both sentences acknowledge, in the Appeal Panel's view, that Article 2 of Council Regulation No 1/1958 applies to the notice of appeal and that the language of the contested decision shall be the language of the appeal "*unless otherwise required under Council Regulation No 1/1958*" and thus unless the appellant does not exercise the right conferred upon him by Article 2 of Regulation No 1/1958 to select one of the official languages of the European Union other than the one of the contested decision.

In other words, the Appeal Panel considers that Article 5(2) must be interpreted as identifying the language of the contested decision as the only possible language of the appeal pursuant to Article 6 of Regulation No 1, only where one can infer from the previous behaviour (and choice) of the appellant that he accepted to waive his right under Article 2 of Regulation 1/1958 in the appeal because the appellant agreed with the SRB the language of the proceedings leading to the contested decision (the Appeal Panel noted in this respect that, lodging the appeal in a language different from the one chosen by the same appellant during the proceedings would be tantamount as *venire contra factum proprium*).

For this reason, the Appeal Panel is convinced that the request of the Appellant to have the appeal in Joined Cases 2/2023 and 3/2023 handled in [.] does not violate Article 5(2) of the Appeal Panel Rules of Procedure, as claimed by the Board.

However, unlike in case 3/2022, where the Appellant was not represented by external lawyers and was not familiar with the English language and, thus, its parity of arms would have been undermined if English was adopted as the language of the proceedings, in the different circumstances of this case, (i) the Appellant is represented by an international law firm, comprising [.], a [.] an [.], and the partners of the [.] legal practice (who are the lawyers for the Appellant) are also partners of the [.] partnership, (ii) the Appellant already submitted an English translation of the appeals in both case 2/2023 and 3/2023 and (iii) the language chosen by the parties for the handling of the appeal, as already pointed out, does not have any effect whatsoever on the assessment by the Appeal Panel of the first ground of appeal, which relates to the different issue of the language of the Contested Decision in each of the two joined cases and (iv) the English language is the working language of both the Board and its Legal Team and of the Appeal Panel, and the adoption by consent as language of these proceedings would therefore accelerate and simplify, also in the interest of the Appellant, the proceedings and the drafting of the final decision without imposing any significant burden on the Appellant, which is not only a sophisticated party but also one already represented by lawyers who use English as their main working language.

In light of those circumstances, and in a spirit of good faith and loyal cooperation in the interest of procedural economy and efficiency, and of reasonable limitation of costs, the Appeal Panel wishes to invite and recommend that both parties agree, pursuant to Article 5(2) of the Appeal Panel on the use of the English language as language of these proceedings, with no prejudice whatsoever to the merit of the first ground of appeal raised by the Appellant and with the additional agreement that:

8. Documents drawn up in [.] may be produced without any need for a translation in English;

9. The pleadings at the hearing, if any, may be conducted in [.] or in English, or in both languages, at the choice of the lawyers and representatives of the parties attending the hearing, and, should the Appellant inform that it intends indeed to plead the case in [.] , the Appeal Panel Secretariat shall organize a service of simultaneous translation at the hearing from [.] to English and from English to [.] .

> Both parties are invited to inform the Appeal Panel's Secretariat if they agree with the above recommended course of action on the language issue as proposed by the Appeal Panel by the close of business of 27 July 2023, also considering that the Board response is scheduled on 25 August 2023".

10. Both parties agreed with the course of action proposed by the Appeal Panel and the Appeal Panel, on 31 July 2023, issued the following procedural order:

> ''Following the Appeal Panel's Procedural Order of 25 July 2023 and both parties' submissions of 28 July 2023, transmitted to the parties by the Secretariat on the same day, the Appeal Panel wishes to thank both parties for their agreement on the proposed course of action on the language to be used in these appeal proceedings and, also duly acknowledging the specifications made by the Appellant, hereby confirms, by way of case management procedural order based on the agreement of the parties, that the English language is the language of these proceedings, with no prejudice whatsoever to the merit of the first ground of appeal raised by the Appellant and with the additional specifications that:
>
> A) Documents drawn up in [.] may be produced without any need for a translation in English;
>
> B) The pleadings at the hearing, if any, may be conducted in [.] or in English, or in both languages, at the choice of the lawyers and representatives of the parties attending the hearing, and, should the Appellant inform that it intends indeed to plead the case in [.] , the Appeal Panel Secretariat shall organize a service of simultaneous translation at the hearing from [.] to English and from English to [.] .''

11. It follows from the procedural order of 31 July 2023 based upon the agreement of the parties that the authentic language of this decision is English. A [.] translation of this decision will however be provided for by the Secretariat of the Appeal Panel in due course, as soon as practicable for the translation services of the Union.

12. On 24 August 2023, the Board submitted its response in the joined cases 2/2023 and 3/2023.

13. On 25 September 2023, the Appellant submitted its rejoinder to the Board's response.

14. On 4 October 2023, the Appeal Panel proposed the date of 15 November 2023 as date for the hearing, if the parties wished to discuss the case at a hearing. Both parties informed however that such date was not suitable for them. On 11 October 2023, the Appeal Panel notified the parties that the hearing, if any, would have been held on 27 November 2023.

15. On 25 October 2023, the Board submitted its reply to the Appellant's rejoinder.

16. On 27 October 2023, the Appeal Panel confirmed to the parties that the hearing would take place in joined cases 2/2023 and 3/2023 in Brussels, at the SRB premises, on 27 November 2023. Both parties confirmed their attendance to the hearing and anticipated the list of their participants (legal counsels and representatives of both the Appellant and the SRB).

17. On 27 November 2023, the hearing was held in Brussels. Both parties appeared and presented their oral arguments. Both parties reiterated their respective positions, adding further considerations of fact and law. The parties and their legal counsels answered all questions

from the Appeal Panel for the clarification of facts relevant for the just determination of the appeal.

18. After the hearing, the Appeal Panel invited the parties, if they so wished, to deposit with the Appeal Panel Secretariat by 4 December 2023, the written text of their pleadings at the hearing (specifying that such text had to be the very same used as speaking notes by the counsels at the hearing). Both parties deposited their pleadings at the hearing.

19. On 14 December 2023, the Secretariat of 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 Rules of Procedure.

Main arguments of the parties

20. The main arguments of the parties are briefly summarised below and are more widely considered in the Appeal Panel's findings of this decision. 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

21. The Appellant raises five identical grounds of appeal in both cases 2/2023 and 3/2023 challenging the Contested Joint Decision and the Contested SRB Decision respectively and raises an additional ground of appeal of procedural nature against the Contested SRB Decision in case 3/2023.

22. The Appellant preliminarily notes that in [.] promotional loans from the state are generally granted using the so-called pass-through procedure (*[.]*). Under this procedure the [.] (hereinafter "**[.]**") in particular is not allowed to grant promotional loans directly to the recipients of promotional funding when fulfilling its public mandate to carry out promotional tasks according to the legal provisions that apply to it but must instead involve commercial banks as pass-through institutions [.]).

23. In the [.] banking sector the pass-through procedure used is a two-stage pass-through procedure. This involves the end customer submitting its application for a promotional loan to the local primary institution (*[.]*), which then passes it on to the Appellant [.], which in turn forwards it to the state-owned promotional bank (*[.]*). In the two-stage pass-through procedure, once the promotional loan has been approved by the state-owned promotional bank, three loan agreements are concluded in sequence. First, the state-owned promotional bank concludes a loan agreement with the Appellant, which then enters into a corresponding loan agreement with the local primary institution and then finally, the local primary institution concludes a loan agreement with the respective end customer. In this model, the Appellant merely functions as an intermediary, so as to facilitate an efficient and widespread granting of promotional loans (as recognized by [.]).

24. To secure the liabilities arising from the loan agreement concluded between the Appellant and the state-owned promotional bank, the Appellant is obliged to make sure that the local primary institution's claim against the end customer is assigned to the Appellant, together with all ancillary rights. The Appellant in turn assigns this claim to the state-owned promotional bank together with its own claim against the local primary institution. In the case of [….]. In the Appellant's view, this means that in a scenario involving a resolution of the Appellant – as in the case of the regular implementation of pass-through loans – the validity and economic enforceability of the state-owned promotional bank's claim against the Appellant is not relevant; whenever the state-owned promotional bank wishes to uphold its claims it can always avail itself of the claims it has against the end customers and the local primary institution.

25. This means, in the Appellant's view, that for the Appellant the liabilities towards the state-owned promotional bank that result from pass-through promotional loans amount to no more than technical liabilities, arising only from the Appellant's role as intermediary. The Appellant further notes that in the context of the raising of contributions to the Single Resolution Fund the European Commission explicitly recognized the limited pass-through role played by pass-through institutions such as the Appellant and excluded liabilities arising from pass-through promotional loans from the determination of an institution's liabilities for the purposes of risk adjustment of the calculation basis for ex-ante contributions pursuant to Article 5(1)(f) of Delegated Regulation 2015/63.

26. Based on the above, the Appellant raises the following five identical grounds of appeal against both the Contested Joint Decision and the Contested SRB Decision. In the Appellant's view, (1) both the Contested Joint Decision and the Contested SRB Decision violate Article 81(1) SRMR, Article 3 of Regulation (EEC) 1/1958, because they are not written in the [.] language chosen by the Appellant (First ground of appeal); (2) Both the Contested Joint Decision and the Contested SRB Decision violate Article 12d(8) SRMR and Article 296(2) TFEU, because they do not contain a complete and sufficiently detailed and concrete reasoning (Second ground of appeal); (3) both the Contested Joint Decision and the Contested SRB Decision violate Article 12d(3) subparagraph 4 read in conjunction with Article 27(7)(a) SRMR, because they set the MREL-LRE at [.] TLOF while including the liabilities arising from pass-through promotional loans (Third ground of appeal); (4) both the Contested Joint Decision and the Contested SRB Decision violate Article 12c(4) SRMR, because they set the MREL at [.] TLOF while including the liabilities arising from pass-through promotional loans and determine that, if and to the extent that the MREL has been excessively increased due to the erroneous inclusion of the liabilities arising from pass-through promotional loans, it must be met using subordinated instruments (Fourth ground of appeal). (5) In the alternative: Article 12d(3) subparagraph 4 read in conjunction with Article 27(7)(a) SRMR and Article 12c(4) SRMR are in breach of higher-ranking rules of law (Article 16, 17, 20 and 52 of the Charter of Fundamental Rights), if and to the extent that they could allow the inclusion of liabilities arising from pass-through promotional loans in the TLOF when determining the MREL (Fifth ground of appeal).

27. The appeal in case 3/2023 further raises an additional sixth ground of appeal against the Contested SRB Decision, and namely that it violates Article 45h(1), (7) and (8) BRRD, because it was not adopted on the basis of the Contested Joint Decision.

28. The Appellant has further clarified its grounds of appeal with its rejoinder of 25 September 2023 and discussed all grounds of appeal at the hearing.

Board

29. The Board preliminarily argues that since the Appellant has challenged both the Contested Joint Decision and the Contested SRB Decision, the action against one of these decisions should be declared inadmissible, because it is not possible, in the Board's view, that the Appellant can challenge indistinctively any of those decisions before the Appeal Panel under Article 85(3) SRMR. The Board further notes that this issue (i.e. which act is the reviewable act) is currently *sub judice* in case T-71/22, BNPP v SRB and hence the General Court will provide guidance in due course.

30. On the merit of the appeals, the Board argues that all grounds of appeal are unfounded and the appeals should be dismissed.

31. With regard to the first ground, the Board submits that the language of the Contested Joint Decision in its authentic version is determined by the written arrangements agreed at the time of the setup of the resolution college. Specific agreements between the SRB and the Appellant concerning the language to be used in their bilateral communications are not able to alter the rules set among the members of the resolution college. As to the language of the Contested SRB Decision, the Board argues that such decision was addressed to [.] and the Board was entitled and obliged to adopt it in English pursuant to Article 4 Cooperation Framework. The fact that the Appellant opted against using English as the language for its bilateral communication and exchange of documentation with the SRB is irrelevant.

32. With regard to the second ground, the Board argues that no breach of the duty to state reasons has occurred in light of the principles established by the case-law. This is the case also considering the fact that further guidance on the matter is given by the Board through the MREL policy as well as in the context of the administrative process leading to the decision, including the right to be heard procedure (hereinafter "**RTBH**").

33. With regard to the third ground, the Board argues that liabilities stemming from promotional loans correctly form part of the Appellant's total liabilities including own funds (hereinafter "**TLOF**"). Moreover, the fact that said liabilities are excluded from the calculation of ex ante contributions to the SRF is not relevant in the context of TLOF. Finally, the Board argues that it did not commit any error of assessment by not excluding said liabilities when determining the Appellant's MREL-LRE in accordance with Article 12d(3) subparagraph 4 SRMR.

34. With regard to the fourth ground, the SRB argues that no increase of the Appellant's MREL requirement took place on the basis of Article 12c(4) SRMR.

35. With regard to the fifth ground, the Board submits that the Court of Justice has exclusive jurisdiction over the legality of legislative acts pursuant to Article 263 TFEU. Therefore, the legality of the provisions of the SRMR are beyond the remit of the Appeal Panel.

36. With regard to the additional ground of appeal raised only against the Contested SRB Decision, the Board argues that the fact that the Contested SRB Decision was adopted one day before the receipt of the formal written agreement of the [.] resolution authority to the Joint Decision on MREL does not affect the substance of the Contested SRB Decision nor does make it invalid.

37. The Board has further clarified its position vis-à-vis the Appellant's grounds of appeal in joined cases 2/2023 and 3/2023 with its reply of 24 October 2023 and discussed all grounds of appeal at the hearing.

Findings of the Appeal Panel

38. The Appeal Panel preliminarily wishes to acknowledge that all parties' contentions as developed in their written submissions and in their oral representations at the hearing have been carefully taken into account by the Appeal Panel, whether expressly referred to herein or not. The Appeal Panel further acknowledges that the issues debated in this appeal concerning the liabilities arising from pass-through intermediation in the context of promotional loans granted by [.] raise new and complex questions of law. The Appeal Panel has duly appreciated the informing technical contributions of both parties and is thankful to the legal counsels of both parties for having enlightened so clearly and deeply all relevant aspects of these interesting issues.

(a) The admissibility of the appeal in case 2/2023 and the inadmissibility of the appeal in case 3/2023.

39. The Appellant has challenged both the Contested Joint Decision and the Contested SRB Decision, and claims that both appeals are admissible. In particular, the Appellant refers, as to the admissibility of the appeal against the Contested Joint Decision, to the Appeal Panel's decision of 29 June 2022 in case 1/2022 and notes that the Contested Joint Decision is "of at least direct and individual concern to the institutions concerned". As to the Contested SRB Decision the Appellant claims that this is of "at least direct and individual concern to the Appellant", and notes in particular that both decisions "suffer from procedural deficiencies interfering separately with the Appellant's right to an effective remedy under Article 47 of the Charter of Fundamental Rights" and "this interference is independent of any predetermination of the [Contested SRB Decision] by the [Contested Joint Decision] given the use of the wrong language in both decisions and the manifestly insufficient reasoning of both decisions". In the Appellant's view, "due to those deficiencies, it is objectively impossible to determine the decision's substance with sufficient certainty". For these reasons, the Appellant argues that both the Contested Joint Decision and the Contested SRB Decision are "individually of a distinct and additional legal concern to the Appellant".

40. The Board, on the contrary, argues that the action against one of these decisions should be declared inadmissible, because it is not possible, in the Board's view, that the Appellant can challenge indistinctly any of those decisions before the Appeal Panel under Article 85(3) SRMR. In particular, the Board notes that if the Appeal Panel were to follow its previous practice in this case, the actions against the Contested SRB Decision should be declared inadmissible. The Board further argues that it respectfully disagrees with the decision on admissibility adopted by the Appeal Panel in case 1/2022 and that, in its view, the appeal against the Contested Joint Decision should be declared inadmissible and the appeal against the Contested SRB Decision should be declared admissible.

41. The Board further notes that this issue (i.e., which act is the reviewable act) is currently *sub judice* in case T-71/22, BNPP v SRB and hence the General Court will provide guidance in due course.

42. The Appeal Panel wishes first, as a matter of principle, to clearly state that in future cases it will immediately and fully conform its practice to the findings of the European courts in case [.], once a final decision on this point of law shall be reached. The novelty of the issue means that a clarification from the European courts will be most welcome and of great value for the Appeal Panel.

43. However, so long as the European courts have not otherwise determined on this matter, the Appeal Panel considers that its previous position, as stated and reasoned in the Appeal Panel decision of 29 June 2022 in case 1/2022 (to which the Appeal Panel refers), is to be confirmed and reiterated in this appeal proceedings.

44. Indeed, in the Appeal Panel's view, the essence of any joint decision adopted by a resolution college is that of a bundle of individual decisions, adopted together and in parallel by each of the resolution authorities being part of the college, unless one or more of them disagree, in which case the decisions will be adopted in parallel, but separately. Formally, the joint decision may result in a single document prepared by the resolution authority of the parent resolution entity, to which the individual consent of the other national resolution authorities is also attached. Yet, in substance, that document indicates that all resolution authorities being part of the college did not disagree with the joint decision, and thus adopted in parallel the content of such decision. The effect of this process was to render the decision/s binding in the respective territory and remit of each resolution authority. In the case of the SRB, this means that the joint decision was a binding decision.

45. Accordingly, in the Appeal Panel's view it results from the clear and unambiguous wording of the text of Article 45h BRRD and from its contextual and teleological interpretation that this is a decision, and that this decision marks the end of the process at the college level. Furthermore, from a literal consideration of the relevant provisions in the BRRD, the joint decision, contrary to the Board's view, does not merely "constitute a basis", nor "forms the consensus", for a subsequent decision by resolution authorities. On the contrary, the decision itself "shall ensure compliance" with the relevant provisions on MREL. Article 45h(7) BRRD

states, in turn, that "the joint decision referred to in paragraph 1 […] shall be binding on the resolution authorities concerned".

46. The text of both Article 88 and 45h BRRD, duly read in their overall normative context, imply that the joint decision is not a preliminary decision, but a final decision which is binding on the resolution authorities sitting in the college and having reached their consensus and is capable of affecting the interests of the concerned credit institution by bringing about a distinct change in its legal position.

47. In light of this the Contested SRB Decision, therefore, is simply a confirmatory decision of the Contested Joint Decision, to which it adds specific instructions addressed to the relevant national resolution authorities under the SRMR to the effect of having the binding MREL determination made by the Contested Joint Decision duly communicated and implemented via the competent national resolution authorities at the national level within the Banking Union.

48. This means, in the Appeal Panel's view, that, seen from the procedural and substantive standpoint of the Appellant, the Contested Joint Decision is the decision which has finally determined the MREL requirement, and it is the Contested Joint Decision which needs to be appealed, whereas the following Contested SRB Decision is only confirmatory of such determination and cannot be appealed by the Appellant, since the SRB decision does not introduce any new factor as compared with the Contested Joint Decision *vis-à-vis* the credit institution. The Appeal Panel recalls in this respect that according to settled case-law, a decision is a mere confirmation of an earlier decision where it contains no new factors as compared with the earlier measure and is not preceded by any re-examination of the situation of the addressee of the earlier measure (judgments of 14 April 1970 in Nebe v Commission, 24/69, ECR, EU:C:1970:22, paragraph 8; 10 December 1980 in Grasselli v Commission, 23/80, ECR, EU:C:1980:284, paragraph 18; and 11 June 2002 in AICS v Parliament, T365/00, ECR, EU:T:2002:151, paragraph 30).

49. Nor the Appeal Panel is persuaded that in the present proceedings the fact that the Appellant is claiming that there were "procedural deficiencies interfering separately" with its right to an effective remedy in both the Contested Joint Decision and in the Contested SRB Decision "the use of the wrong language" or "the wrong sequence of events" would make the Contested SRB Decision appealable. Those alleged procedural deficiencies do not actually result in new factors, or a re-examination of the situation of the addressee, in the sense of the relevant case law, nor do they question the fundamental finding that, for the Appellant, it is only the Contested Joint Decision which brought about a distinct change in its legal position.

50. As already held in case 1/2022, the Contested SRB Decision could have been appealed only by the national resolution authority to which it is addressed, because only seen from the position of the national resolution authority the Contested SRB Decision is not confirmatory. This is so, because it contains vis-à-vis the national resolution authority the specific

instruction to it to implement the MREL determination adopted with the joint decision of the resolution college (the Appeal Panel refers on this to its decisions in cases 2/2021 and 3/2021).

51. Based upon the foregoing, the Appeal Panel finds that the appeal in case 2/2023 is admissible and must be considered on the merits, whereas the appeal in case 3/2023 is inadmissible.

(b) The first ground of appeal in case 2/2023.

52. With its first ground of appeal in case 2/2023, the Appellant claims that the Contested Joint Decision violates Article 81(1) SRMR and Article 3 of Regulation (EEC) 1/1958, because it is not written in the [.] language chosen by the Appellant for its communication with the SRB (as documented by the Appellant's letter to the SRB of [.] on its language arrangements with the SRB, in the file of these proceedings).

53. The Board submits, on the contrary, that the language of the authentic version of the Contested Joint Decision is determined by the written arrangements among authorities agreed at the time of the setup of the resolution college. Specific agreements between the SRB and the Appellant concerning the language to be used in their bilateral communications are not able to alter the rules set among the members of the resolution college and the fact that the Appellant opted against using English as the language for its bilateral communication and exchange of documentation with the SRB is irrelevant. The Board further notes that (i) the Contested Joint Decision was notified to the Appellant with a translation in [.], (ii) the RTBH procedure vis-à-vis the Appellant was conducted in [.] and (iii) the [.] resolution authority (hereinafter "**[.]**") notified to the Appellant the MREL decision adopted by the SRB following the Contested Joint Decision, including its annexes in [.]. In such a context the Board argues that the allegations of the Appellant that potential differences between the official English version and the [.] non-binding translation of the Contested Joint Decision may lead to "significant misunderstandings to the detriment of the Appellant" are unsubstantiated and unjustified.

54. The Appeal Panel preliminarily notes that in its admissibility decision of 29 June 2022 in case 1/2022 it has discussed the issue on whether a joint decision such as the Contested Joint Decision could be considered "addressed" to the credit institution concerned and concluded that it could in the sense that the college's joint decision on the MREL determination has binding legal effects vis-à-vis the relevant credit institution. Yet the Appeal Panel also clarified that (i) the MREL determination becomes effective only at a later stage, and namely once notified to the credit institution by the relevant national resolution authority and (ii) the question on whether the credit institution is the "addressee" of such joint decision was discussed to the effect of determining whether it could or could not be appealed before the Appeal Panel and for no other purpose. Thus, in that context, irrespective of the fact that the credit institution could, or could not, be considered the "addressee" of the joint decision, the relevant credit institution certainly was directly and individually concerned by the joint decision and could thus appeal the decision before the Appeal Panel.

55. At paragraph 125 of its decision of 29 June 2022 in case 1/2022 the Appeal Panel discussed also the communication of the joint decision to the relevant credit institution and noted that:

> (…) in the Appeal Panel's view, the Contested Decision had such binding effects, and was communicated to the Appellant not merely as a matter of deference, to keep the Appellant informed. It was communicated because it is a legal requirement under Articles 45h BRRD, and 92 CDR 2016/1075. This legal requirement is a pre-condition to "ensure compliance with Articles 45e and 45f BRRD" (Article 45h(1) BRRD), and is imposed in order to monitor the application of the decision (Article 93 CDR 2016/1075). Thus, even if the decisions by the national authorities are the ones that implement and render effective the Contested Decision, and the Board decision containing the instructions on implementation, the Contested Decision may also be considered to be "addressed" to the Appellant, as per the reasons underlying its communication to the Appellant (as stated above).

56. The Appeal Panel considers that its findings in case 1/2022 do not mean that the Board has erred in the language used for the adoption of the Contested Joint Decision.

57. The Appeal Panel recalls that, according to Article 81(4) SRMR "the Board may agree with each national resolution authority on the language or languages in which the documents to be sent to or by the national resolution authorities shall be drafted".

58. It is not disputed between the parties that both the draft and the final Contested Joint Decision of 5 April 2023 were notified to the Appellant with a [.] translation and that the RTBH procedure on the draft Contested Joint Decision was conducted in [.].

59. In this context, the Appeal Panel finds that the process for the adoption, notification and implementation of the Contested Joint Decision and its implementing Contested SRB Decision must adapt the linguistic requirements under Article 81 SRMR to its multistage and multilateral nature, because the process leading to the MREL determination implies a sequence of procedural steps and multiple interactions, exchanges and communications of the SRB both with the national resolution authorities (hereinafter "**NRAs**") and the relevant credit institution.

60. The Appeal Panel is of the view that, in its use of the languages throughout this multistage process, the Board has acted in conformity with the applicable legal framework and has not violated Regulation 1/1958 nor Article 81 SRMR.

61. Indeed, the Board has documented that in the written arrangements for the establishment of the Appellant's resolution college it is stipulated, under Article 3.1.14, that "the language of communication among the members and observers of the College shall be English in its spoken and written forms. Documents directly drafted by resolution college members and observers shall always be in English". This is in line, in the Appeal Panel's view, with an option given to the Board by Article 81(4) SRMR. It follows that the use of the English language for the adoption of the Contested Joint Decision is lawful.

62. The Appeal Panel further notes that the Appellant (i) has received from the Board a [.] translation of the draft Contested Joint Decision, (ii) has made its comments in writing during the RTBH procedure in [.] (iii) has received on 22 May 2023 from the Board a [.] translation of the adopted Contested Joint Decision and (iv) has received on 26 May 2023 from [.] a

notice of decision including the Contested SRB Decision implementing the Contested Joint Decision in [.] .

63. In this context, all those procedural steps show, in the Appeal Panel's view, that the Board has adopted appropriate linguistic measures to ensure compliance with Regulation 1/58 and to ensure that the Appellant's procedural rights were fully respected, in a way which was consistent with the objective of not making devoid of purpose the choice of English as language of the college.

64. Nor has the Appellant provided any compelling evidence that the linguistic approach followed by the Board had any harmful consequences on its legal position. The Appellant in substance complains that since the [.] versions of the draft and of final Contested Joint Decision were qualified as translations, whereas the English text was qualified as authentic, English had therefore to prevail over the translation in case of discrepancies. The Appellant argues that this amounts to a violation of its procedural rights. The Appeal Panel disagrees.

65. A contextual and functional reading of Article 81(1) and 81(4) SRMR, in the Appeal Panel's view, suggests that the decision of the Board to send to the Appellant a [.] translation of the draft Contested Joint Decision was justified by the need to respect its undertakings as to the functioning of the college, including the language arrangements, which required that the authentic version of the Contested Joint Decision be in English. However, the [.] translation simultaneously provided by the Board has fully enabled the Appellant to properly understand the content of the draft Contested Joint Decision to the effect of the unfettered exercise of its procedural rights in the language chosen by the same Appellant for its communications with the Board.

66. Furthermore, in the Appeal Panel's view, the mention in the Contested Joint Decision that English is the authentic language has duly informed the Appellant that the language of the college is English and in this way has also fairly drawn the attention of the Appellant on the very fact that, in case of discrepancies between the authentic language of the decision used by the relevant authorities for its adoption and its [.] translation made for the convenience of the Appellant, the Appellant must have had regard to the English text. This, in the Appeal Panel's view, does not violate nor limits in any way the full right given to the Appellant to use [.] to properly understand and, if deemed necessary, challenge the Contested Joint Decision; yet it warns the Appellant that, should there be parts or sentences of the Contested Joint Decision which may result ambiguous or unclear in the [.] text, a careful consideration of the English text may dispel doubts, to the extent that those doubts may result from discrepancies of the translation with the original text in English.

67. In the present appeal, the Appellant has not even identified any specific difference between the [.] and English text of the Contested Joint Decision, and has rather raised an issue of principle, which is based however only on purely hypothetical arguments on a possible, yet undemonstrated, difference in the texts in [.] and English which could lead to misunderstandings to the detriment of the Appellant. Asked by the Appeal Panel at the

hearing, the Appellant argued that it has not made a word-by-word comparison of the two texts because it considered that the burden of such a word-by-word comparison could not lie with the Appellant. This is however not consistent, in the Appeal Panel's view, with settled case law (see to this effect, Joined Cases T-134/03 and T-135/03, Common Market Fertilizers SA v Commission, ECLI:EU:T:2005:339, at para 87).

68. Even more importantly, the Appeal Panel notes that the [.] version of the Contested Joint Decision has allowed the Appellant to file timely its appeal before the Appeal Panel and that there is no discussion in this appeal between the parties as to the proper understanding of the Contested Joint Decision. In other words, there are no contentious issues which derive from actual differences of the [.] and English versions of the Contested Joint Decision.

69. In conclusion, the first ground of appeal raised against the Contested Joint Decision cannot be upheld.

(c) The second ground of appeal in case 2/2023

70. With the second ground of appeal, the Appellant claims that the Contested Joint Decision violates Article 12d(8) SRMR and Article 296(2) TFEU, because it does not contain a complete and sufficiently detailed and concrete statement of reasons for the determination of the level of the MREL-LRE, and in particular it does not sufficiently explain why it set such level at [.] TLOF.

71. The Board contends that no breach of the duty to state reasons has occurred in light of the principles established by the case-law of the European courts, because the Board has duly stated the reasons for its decisions, the MREL Policy gives further guidance and the Appellant has fully understood how its MREL was set, taking into account the context of the administrative process leading to the Contested Joint Decision, including the exchanges with the Appellant in the RTBH procedure.

72. The Appeal Panel preliminarily notes that Article 12d(8) SRMR sets out that:

> 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.

73. In turn, Article 12d(3) subparagraph 4 SRMR stipulates that "[w]hen setting the individual requirement provided in point (b) of the first subparagraph of this paragraph, the Board shall take into account the requirements referred to in Article 27(7)".

74. Article 27(7) SRMR stipulates that:

> The Fund may make a contribution referred to in paragraph 6 only where:

> (a) a contribution to loss absorption and recapitalisation equal to an amount not less than 8 % of the total liabilities including own funds of the institution under resolution, measured at the time of resolution action in accordance with the valuation provided for in Article 20(1) to (15), has been made by shareholders, the holders of relevant capital instruments and other bail-inable liabilities through write-down, conversion or otherwise; and
>
> (b) the contribution from the Fund does not exceed 5 % of the total liabilities including own funds of the institution under resolution, measured at the time of resolution action in accordance with the valuation provided for in Article 20(1) to (15).

75. It is not disputed between the parties that, should the Board not have exercised its discretion to adjust upwards the MREL requirement in order to meet the [.] TLOF level to the effect of Article 27(7) SRMR, the MREL-LRE requirement for the Appellant calculated pursuant to Article 12d(4) SRMR would have been lower, with a minimum for the Appellant, which is a top tier bank, of 5% LRE. The upward adjustment to meet the [.] TLOF level has therefore had quite significant implications in terms of funding needs for the Appellant, and related funding costs, as thoroughly discussed by the parties at the hearing, also responding to the Appeal Panel questions.

76. The Contested Joint Decision justifies the upward adjustment in recital 12 of section I as follows:

> *[…..]*.

77. The Appellant claims that "this is clearly not enough" to satisfy the requirement for the statement of reasons, because the Board (i) [.], (ii) [.] and (iii) [.].

78. Preliminarily, as to the requirement of the statement of reasons, the Appeal Panel wishes to recall that, in its decision of 27 January 2022, in case 2/2021 it has held, at paragraph 108, that:

> […] in accordance with settled case-law, the duty to state reasons pursuant to Article 296 TFEU is of very fundamental importance (consider to this effect, judgment of 21 November 1991, Hauptzollamt München v Technische Universität München, C-269/90, paragraph 14). Only in this way can the court (and in the present appeal, the Appeal Panel) verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present. The Appeal Panel further notes that the duty to state reasons is particularly important in the prudential and resolution context, as also significantly acknowledged by the General Court, in its judgment of 16 May 2017, Landeskreditbank Baden-Württemberg v ECB, T-122/15, ECLI:EU:T:2017:377 paragraph 122-124 and the case-law cited and in its very recent judgment of 6 October 2021, Ukrselhosprom Versobank v ECB, T-351/18 and T-584/18, ECLI:EU:T:2021:669 paragraphs 385-387. (…) In that vein, first of all, the statement of reasons required under Article 296 TFEU must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to carry out its review. As regards, in particular, the reasons given for individual decisions, the purpose of the obligation to state the reasons on which an individual decision is based is, therefore, in addition to permitting review by the courts, to provide the person concerned with sufficient information to ascertain whether the decision may be vitiated by an error enabling its validity to be challenged. Furthermore, the

> requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the statement of reasons to specify all the relevant matters of fact and law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.

79. The Appeal Panel recalls therefore that, in line with settled case-law, the statement of reasons must "provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged" (judgment of 16 May 2017, Landeskreditbank Baden-Württemberg v ECB, T-122/15, paragraphs 122-124 and the case-law cited and judgment of 6 October 2021, Ukrselhosprom Versobank v ECB, T351/18 and T-584/18, paragraphs 385-387).

80. However, to determine whether the statement of reasons is sufficient, context and individual circumstances matter. In its decision of 13 February 2023 in case 3/2022, the Appeal Panel noted for instance that:

> as Advocate General Wathelet noted in its Opinion in Weiss (Case C-493/17, ECLI:EU:C:2018:815, at paragraph 132) "although the obligation to provide a statement of reasons which is incumbent [on the authority] is important, compliance with that obligation must be assessed with reference not only to the wording of the measure concerned, but also to its context and the whole body of legal rules governing the matter in question" (see also to that effect, judgment of 16 June 2015, Gauweiler, paragraph 70). In Weiss, this was done by looking at the minutes of the ECB Governing Council and to the introductory statements of the President of the ECB.

81. As to the reliance on prior exchanges with the relevant credit institution the Appeal Panel, in case 1/2022 has found, at paragraphs 184-186 of its decision of 14 April 2023, that the argument "that the banking group was well aware of the choices made by the Board as regards the resolution strategy, and the reasons for it, because such aspects had been extensively discussed during various workshops, calls, and information exchanges (…) is an important aspect", with the precision that the intense process of dialogue and cooperation (regardless of whether the parties agree or disagree) must find expression and continuity in the decision itself" or its annexes, including "the Right to be Heard Assessment Memorandum which is a specific annex of the MREL decision". The Appeal Panel has further specified in that context that "the content need not be as detailed as that of specific interactions, but if the aim is to incorporate the substance of such interactions as part of the assessment and statement of reasons, there must be a formal acknowledgement of such interactions, and their content".

82. Finally, the Appeal Panel wishes to recall that, as noted in its decision of 13 February 2023 in case 3/2022 (at paragraph 69), according to the case-law of the European courts, a decision of the Board which implies complex technical assessments and is based on forecasts and hypotheticals (a situation where among possible alternative, future and hypothetical scenarios, the SRB has to choose one), cannot be set aside if the Board's assessment is plausible (see in particular case judgment of 6 July 2022, T-280/18, ABLV Bank AS v SRB, ECLI:EU:T:2022:429, paragraphs 91-94; judgment of 15 November 2023, T-732/19, PNB

Banka v SRB, ECLI:EU:T:2023:721, paragraph 100) and the assessment is factually supported by the evidence, is proportionate, reasonable and not discriminatory (see to this effect, judgment of 7 December 2022, T-301/19, PNB Banka v ECB, ECLI:EU:T:2022:774; judgment of 4 May 2023, C-389/21, ECB v Crédit Lyonnais, ECLI:EU:C:2023:368, paragraph 55).

83. Based upon the foregoing, the Appeal Panel considers that, although the reasons stated in recital (12) of the Contested Joint Decision are very succinct and could in principle benefit from complementary considerations, in the specific and individual circumstances of the present case the underpinning reasoning of the Board is sufficiently clear, and its meaning is further complemented by the context in a way that "provides the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged" (judgment of 16 May 2017, Landeskreditbank Baden-Württemberg v ECB, T-122/15, paragraphs 122-124 and the case-law cited and judgment of 6 October 2021, Ukrselhosprom Versobank v ECB, T351/18 and T-584/18, paragraphs 385-387).

84. […..].

85. In these circumstances, although succinct, the statement of reasons in recital (12) of the Contested Joint Decision, was sufficient, also in light of the clear meaning of Article 27(7) SRMR, to understand the reasoning underpinning the setting of the MREL-LRE at [.] TLOF and for the Appellant to challenge its validity on the merit. The determination of the MREL level by the SRB is context-specific for each individual case. In the Appeal Panel's view, it is significant that neither in the RTBH procedure nor in exchanges during the 2022 resolution planning cycles, nor in previous resolution planning cycles did the Appellant ever raise any objections to the setting of the level of [.] TLOF for its MREL-LRE. Considering how important this determination was, it is not credible that the Appellant failed to understand the reasons behind the upward adjustment without showing any disagreement, or making comments, or asking for a clarification. The silence on this point of the RTBH assessment is therefore significant because, in the Appeal Panel's view, it shows, in a contextual interpretation, that the Appellant understood and, until this appeal, had no objection with the [.] TLOF adjustment for its MREL-LRE.

86. [.].

87. The Appellant also claims that the SRB has failed to provide sufficient reasoning on the decision not to make any downward adjustment of the subordination requirement under Article 12c(4) SRMR. Also on this point, however, the Appeal Panel finds that a contextual interpretation of the Contested Joint Decision, based upon the exchanges between the Appellant and the SRB as reflected in the summary of the resolution plan, which is annex III to the communication notified by the SRB to the Appellant on 22 May 2023 together with the Contested Joint Decision, shows that the Appellant is in fact aware of the fact that the Contested Joint Decision did not apply a downward adjustment due to the persistence, in the Board's view, of […].

88. In conclusion, the second ground of appeal raised against the Contested Joint Decision cannot be upheld.

(d) The third ground of appeal in case 2/2023

89. With the third ground of appeal, the Appellant claims that the Contested Joint Decision violates Article 12d(3) subparagraph 4 SRMR read in conjunction with Article 27(7)(a) SRMR, because it sets the MREL-LRE at [.] TLOF including in the computation of TLOF the liabilities arising from pass-through promotional loans. The Appellant argues that the infringement in law follows from two alternative errors.

90. First, the Contested Joint Decision wrongfully considered the liabilities arising from pass-through promotional loans to be part of the Appellant's TLOF under Article 27(7)(a) SRMR and, in the Appellant's view, this is contrary to the nature of such loans, which are fully secured and even risk-free as a result of the assignment of the Appellant's claims against the respective primary institutions and those of the primary institution against the end customer. For this reason, in the Appellant's view, the state-owned promotional banks can claim the full amount of these receivables directly from the primary institution or the end customer in the event of an order placing the Appellant under resolution. In the Appellant's view, therefore, the possibility of claims being made against the Appellant by a state-owned promotional bank on the basis of passed-through promotional loans in the event of resolution is effectively excluded. The Appellant further claims that the meaning and purpose of Article 27(7)(a) SRMR show that, in this context, only liabilities capable of making loss absorption or recapitalization necessary are to be included in the TLOF. This is also demonstrated, in the Appellant's view, by Article 5(1)(f) of Commission Delegated Regulation 2015/63 which excludes the liabilities arising from the pass-through loans from the calculation of ex ante contributions to the SRF.

91. Second, in the event that liabilities arising from pass-through promotional loans should not be directly deducted from the liabilities referred to in Article 27(7)(a) SRMR, the Contested Joint Decision, in the Appellant's view, should at least have taken into account the circumstance that such liabilities "are of purely technical nature and incapable of giving rise to loss absorption or recapitalization of the Appellant" and the Board failed to do so in the exercise of the discretion which is granted to it by Article 12d(3) subparagraph 4 SRMR. The latter stipulates that the SRB has to "take into account" the requirements pursuant to Article 27(7) SRMR. The Appellant claims therefore that the Board has exercised its discretion incorrectly by taking the liabilities arising from pass-through promotional loans into account when it increased the MREL-LRE pursuant to Article 12d(3) subparagraph 4 SRMR, despite the fact that those pass-through loans are "objectively incapable of necessitating loss absorption or recapitalization".

92. The Board contends that liabilities stemming from promotional loans do form part of the Appellant's TLOF under the applicable rules and refers also to an interpretative position expressed in this regard by the European Commission [.]. The Board also notes that, as

recognized by the European Commission, the fact that said liabilities are excluded from the calculation of ex ante contributions to the SRF is not relevant in this different context because the two situations are not similar.

93. The Board further argues that it did not commit any error of assessment by not excluding said liabilities when determining the Appellant's MREL-LRE in accordance with Article 12d(3) subparagraph 4 SRMR.

94. The Appeal Panel notes that pursuant to Article 12d(3) SRMR in conjunction with Article 27(7) SRMR MREL-LRE may be increased to the effect that it becomes equal to the nominal amount equivalent to 8% TLOF so that, if need be, Article 27(5) to 27(7) SRMR may apply. They stipulate as follows:

> 5. In exceptional circumstances, where the bail-in tool is applied, certain liabilities may be excluded or partially excluded from the application of the write-down or conversion powers where:
>
> (a) it is not possible to bail-in that liability within a reasonable time notwithstanding the good faith efforts of the relevant national resolution authority;
>
> (b) the exclusion is strictly necessary and is proportionate to achieve the continuity of critical functions and core business lines in a manner that maintains the ability of the institution under resolution to continue key operations, services and transactions;
>
> (c) the exclusion is strictly necessary and proportionate to avoid giving rise to widespread contagion, in particular as regards eligible deposits held by natural persons and micro, small and medium-sized enterprises, which would severely disrupt the functioning of financial markets, including of financial market infrastructures, in a manner that could cause a serious disturbance to the economy of a Member State or of the Union; or
>
> (d) the application of the bail-in tool to those liabilities would cause a destruction in value such that the losses borne by other creditors would be higher than if those liabilities were excluded from bail-in.
>
> The Board shall carefully assess whether liabilities to institutions or entities that are part of the same resolution group without themselves being resolution entities and that are not excluded from the application of write-down and conversion powers under point (h) of paragraph (3) should be excluded or partially excluded under points (a) to (d) of the first subparagraph to ensure the effective implementation of the resolution strategy.
>
> Where a bail-inable liability or class of bail-inable liabilities is excluded or partially excluded under this paragraph, the level of write-down or conversion applied to other bail-inable liabilities may be increased to take account of such exclusions, provided that the level of write-down and conversion applied to other bail-inable liabilities complies with the principle laid down in point (g) of Article 15(1).
>
> 6. Where a bail-inable liability or class of bail-inable abilities is excluded or partially excluded pursuant to paragraph 5, and the losses that would have been borne by those liabilities have not been passed on fully to other creditors, a contribution from the Fund may be made to the institution under resolution to do one or both of the following:

> (a) cover any losses which have not been absorbed by bail-inable liabilities and restore the net asset value of the institution under resolution to zero in accordance with point (a) of paragraph 13;
>
> (b) purchase instruments of ownership or capital instruments in the institution under resolution, in order to recapitalise the institution in accordance with point (b) of paragraph 13.
>
> 7. The Fund may make a contribution referred to in paragraph 6 only where:
>
> (a) a contribution to loss absorption and recapitalisation equal to an amount not less than 8 % of the total liabilities including own funds of the institution under resolution, measured at the time of resolution action in accordance with the valuation provided for in Article 20(1) to (15), has been made by shareholders, the holders of relevant capital instruments and other bail-inable liabilities through write-down, conversion or otherwise; and
>
> (b) the contribution from the Fund does not exceed 5 % of the total liabilities including own funds of the institution under resolution, measured at the time of resolution action in accordance with the valuation provided for in Article 20(1) to (15).

95. It is apparent that Article 27(7)(a) textually refers to "a contribution to loss absorption and recapitalisation equal to an amount not less than 8 % of the total liabilities including own funds of the institution under resolution". There are no indications in the legislative history of this provision, to the knowledge of the Appeal Panel, that suggest that one or more liabilities of the relevant credit institution should be excluded from the computation of TLOF to the effect of Article 27(7)(a) SRMR.

96. In contrast, an express exclusion of certain liabilities, including liabilities arising from promotional loans, from the computation of TLOF is expressly contemplated, for instance, in Article 5(1)(f) of Commission Delegated Regulation 2015/63 which regulates the liabilities to be used for the calculation of ex-ante contributions to the SRF. In turn, Article 429a(1)(e) CRR excludes promotional loans from the LRE amount.

97. Commission Delegated Regulation 2015/63 stipulates in its recital (13) that:

> Some credit institutions are promotional banks whose purpose is to advance the public policy objectives of a Member State's central or regional government, or local authority predominantly through the provision of promotional loans on a non-competitive, not for profit basis. The loans that such institutions grant are directly or indirectly partially guaranteed by the central or regional government or the local authority. Promotional loans are granted on a non-competitive, not for profit basis in order to promote public policy objectives of the Union or a Member State's central or regional government. The promotional loans are sometimes extended via another institution as intermediary (pass through loans). In such cases, the intermediary credit institution receives promotional loans from a multilateral development bank or a public sector entity and extends them to other credit institutions which would provide them to the final clients. As the intermediary credit institutions pass through liquidity of these loans from the originating promotional bank towards a lending institution or another intermediary institution, such liabilities should not be included in the total liabilities to be considered for the purpose of calculating the basic annual contribution.

98. In recital (5) the Commission Delegated Regulation 2015/63 further clarifies that "pursuant to Article 103(2) of Directive 2014/59/EU, annual contribution should reflect an institution's

size, as the contribution should be based on a fixed amount determined on the basis of that institution's liabilities (basic annual contribution); second, it reflects the risk level of the relevant activities of an institution as the basic annual contribution should be adjusted in proportion to the risk profile of that institution (additional risk adjustment)".

99. Article 3 of Commission Delegated Regulation 2015/63 specifies that:

> (11) 'total liabilities' means total liabilities as defined in Section 3 of Council Directive 86/635/EEC, or as defined in accordance with the International Financial Reporting Standards referred to in Regulation (EC) No 1606/2002 of the European Parliament and of the Council
>
> (28) promotional loan' means a loan granted by a promotional bank or through an intermediate bank on a non-competitive, non for profit basis, in order to promote the public policy objectives of central or regional governments in a Member State
>
> (29) intermediary institution' means a credit institution which intermediates promotional loans provided that it does not give them as credit to a final customer

100. Article 1 of Commission Delegated Regulation 2015/63 specifies that the Regulation lays down the rules specifying the methodology for the calculation and the adjustment to the risk profile of institutions

101. Article 5 sets out the provisions concerning the "risk adjustment of the basic annual contribution" and, in paragraph (1), letter (f), it stipulates that:

> in case of institutions operating promotional loans, the liabilities of the intermediary institution towards the originating or another promotional bank or another intermediary institution and the liabilities of the original promotional bank towards its funding parties in so far as the amount of these liabilities is matched by the promotional loans of that institution.

102. In the Appeal Panel's view, it is therefore apparent from a contextual and teleological interpretation that, whereas the liabilities arising from promotional loans are excluded from the calculation of the contributions to the SRF as part of the risk adjustment to the risk profile of the relevant institution, the expression "total liabilities" employed in Article 12d (4) SRMR refers to the definition of liabilities set out in Article 4 of Directive 86/635/EEC, or in accordance with IFRS, and as such it also includes the liabilities arising from promotional loans. Such difference can be explained by the "risk-adjusted" nature of the SRF contributions, in contrast to the TLOF measure, which appears to be non-risk adjusted, and thus does not contemplate any adjustments to the risk profile in the context of the MREL-LRE determination of the 8% TLOF. The difference between the two provisions was confirmed by the European Commission [.]". In light of this, the Appeal Panel sides with the European Commission's view that one cannot derive any contextual argument from Commission Delegated Regulation 2015/63 supporting the Appellant's claim that liabilities arising from promotional loans should be excluded from the liabilities to be considered in the calculation of TLOF to the effect of the 8% requirement under Article 27(7) SRMR.

103. In turn, Article 429a(1)(e) CRR stipulates that promotional loans are excluded from the LRE amount. Crucially, the exclusion is made expressly in the law, and this exclusion, as noted in the RTBH Assessment attached to the Contested Joint Decision, is not cross-referenced with regard to the TLOF, which is the relevant one in the SRMR context. Moreover, the Appeal Panel finds convincing the observations of the Board in the RTBH Assessment that:

a) "within SRMR, neither the generic term 'liability' nor the concept of 'total liabilities' is subject to any specific definition", something which, in the Appeal Panel's view, should in principle suggest that the general definitions in Directive 86/635 and in the IFRS apply;

b) "within the SRMR, where the legislator wished to exclude any value from a bank's total liabilities, it did so expressly (e.g. the exclusion of covered deposits and own funds in Article 70(2)(a) SRMR). Accordingly, had the legislator intended to exclude any value from the total liabilities (as that denominator is used within Article 12c SRMR), it is reasonable to assume that the legislator would have done so expressly".

104. In the Appeal Panel's view this is not contradicted by the fact that the 8% TLOF refers to the MREL-LRE. Although the requirement of MREL-LRE under Article 12(2)(b) SRMR needs to be expressed as a percentage of "the total exposure measure of the relevant entity referred to in paragraph 1 of this Article, calculated in accordance with Articles 429 and 429a of Regulation (EU) No 575/2013", which is computed taking into account the exclusion of promotional loans under Article 429(1)(e) CRR, *once* the Board has decided to adjust upwards such requirement to meet the 8% level required by Article 27(7) SRMR, the calculation of such 8% needs to take as a reference for the denominator the TLOF of the credit institution, and not any amounts taken from the LRE. In this context, the liabilities of the Appellant vis-à-vis the state promotional banks are not "exposures" and the legislator has not cross-referenced the exclusion from Article 429a CRR also to Article 27(7) SRMR.

105. It is not for the Appeal Panel to assess the reasonableness of the legislative choice made by the SRMR to anchor the upward adjustment under Article 12d(3) subparagraph 4 to MREL-LRE, yet to use as a metric of such adjustment a definition of TLOF which does not incorporate on the liability side the exclusions of promotional loans from LRE adopted by the CRR. It is however plausible that, since the 8% TLOF is used as a safeguard for the funds available in the SRF, in the sense that it enables the SRF intervention only if a significant contribution to recapitalisation has come from MREL, the co-legislators may have considered appropriate to use as denominator a metric fully aligned with the liability side balance-sheet data of the credit institution without more, also to ensure that an higher amount of MREL is used before the SRF can be called into play. Nothing, in the Appeal Panel's view, would prevent in the future the co-legislators from amending the provision, if deemed preferable, to include the exclusion of the liabilities stemming from promotional loans from the definition of liabilities to be used for the purpose of Article 27(7) SRMR. However, this would require, in the Appeal Panel's view, a legislative change. And responding to a question of the Appeal Panel, the Appellant conceded at the hearing that there are proposals of reform of the SRMR pending before the co-legislators which may legislatively address this issue in the future.

106. The Appeal Panel further holds that, although promotional loans are pass-through loans, and they are secured, they are notwithstanding liabilities of the Appellant vis-à-vis the state promotional bank. This clearly results from the contractual terms of such loans. The Appeal Panel refers here to [.]. Therefore, the Board is right, in the Appeal Panel's view, where it argues that "the Appellant's obligation to repay the funds borrowed from state-owned promotional loans remains legally and in accounting terms a liability recorded on the Appellant's balance sheet".

107. In turn, the TLOF metric does not make any distinction based upon the secured or unsecured, risky or riskless nature of the liabilities concerned, nor it excludes from the computation as liabilities to be included in the relevant metric liabilities excluded from the scope of the bail-in in accordance with Article 44(2) BRRD and Article 27(3) SRMR.

108. The Appeal Panel finds therefore that the first limb of the third ground of appeal is without merit.

109. As to the second limb of the third ground of appeal, the Appel Panel finds that the Appellant has not shown that the fact that promotional pass-through loans are "objectively incapable of necessitating loss absorption or recapitalization" makes it implausible that, in the event of resolution, the recapitalization of the Appellant may need the intervention of the SRF and that, therefore, as the Appellant claims, "the Board has exercised its discretion incorrectly by taking the liabilities arising from pass-through promotional loans into account when it increased the MREL-LRE pursuant to Article 12d(3) subparagraph 4 SRMR".

110. The loss absorption or recapitalisation potential of specific liabilities is not a factor when determining the increased MREL-LRE pursuant to Article 12d(3) subparagraph 4 SRMR. This provision assumes the possibility of an SRF intervention under Article 27(7) SRMR, and requires the Board to take into account the amount of MREL-LRE necessary to make such intervention possible. Such an amount, in turn, is determined based on Article 27(7), which makes no distinction between liabilities, and considers their total amount as the denominator. Once the possibility of an SRF intervention is contemplated as part of the MREL assessment, contrary to the Appellant's assertions, the Board does not have discretion to exclude certain liabilities from the calculation.

111. Thus, as noted above, the Board was compelled to take the liabilities arising from pass-through promotional loans vis-à-vis the state promotional banks into account when it determined the denominator of the [.] TLOF to the effect of Article 27(7) SRMR. Conversely, the Appellant has provided no indication that the Board in the Contested Joint Decision did not consider the part of the Appellant's balance sheet represented by pass-through loans when determining the adequacy of an MREL-LRE upward adjustment. The amount of liabilities arising from promotional loans resulting from the liability data report submitted by the Appellant in March 2022 were [.]. The TLOF was [.]. Promotional loans were "equivalent approximately [.] of the TLOF", as the Appellant noted in its notice of appeal. […] (see,

recently, judgment of 15 November 2023, T-732/19, PNB Banka v SRB, ECLI:EU:T:2023:721, paragraph 100).

112. In conclusion, also the third ground of appeal raised against the Contested Joint Decision cannot be upheld.

(e) The fourth ground of appeal in case 2/2023.

113. With the fourth ground of appeal, the Appellant claims that the Contested Joint Decision violates Article 12c(4) SRMR, because it sets the MREL at [.] TLOF while including the liabilities arising from pass-through promotional loans despite their purely technical nature and determines that it must be met using subordinated instruments.

114. The Board contends that no increase of the Appellant's MREL requirement took place on the basis of Article 12c(4) SRMR but only on the basis of Article 12d(3) subparagraph 4 SRMR in conjunction with Article 27(7) SRMR. The Board further refers to its arguments put forward in connection to the third ground of appeal, as regards the determination of total liabilities and submits that it did not conduct any discretionary downward adjustment of the subordination requirement because of [.].

115. A first limb of this ground of appeal, as originally raised by the Appellant, was that the Board had gone beyond the limits of the powers available to it under Article 12c(4) subparagraph 1, sentence 1 SRMR by increasing the Appellant's MREL on the basis of Article 12c(4) SRMR as well. In light of the response of the Board that has conceded that on this point the reasoning of the Contested Joint Decision could lead to misunderstandings, yet it has clarified that no increase of MREL-LRE was based on Article 12c(4) SRMR, the Appellant has waived this limb of the fourth ground of appeal. There is therefore no longer a need to rule on the alleged lack of power of the Board to increase the quantum of MREL on the basis of Article 12c(4) SRMR.

116. As to the second limb of this ground of appeal, that reiterates also in respect to Article 12c(4) subparagraph 1 sentence 1 SRMR the argument that the Contested Joint Decision wrongly determined the total liabilities of an institution and thus set the subordination requirement based on the flawed determination of the total liabilities, because it included the liabilities arising from pass-through promotional loans, the Appeal Panel finds the argument unfounded for the same reasons stated above, with regard to the parallel issue of the liabilities to be included in the TLOF under Article 12d(3) subparagraph 4 SRMR read in conjunction with Article 27(7) SRMR.

117. As to the third limb of this ground of appeal, the Appellant claims that the Contested Joint Decision is vitiated by an error of assessment because there are no risks of "no creditor worse off" and, in the Appellant's view, Article 12c(4) subparagraph 1 sentence 2 SRMR provides for a downward adjustment of the subordination requirement insofar as there are no such risks and the requirements under Article 72b(3) CRR are met. In the Appellant's view, moreover, the [.] would not preclude the downward adjustment.

118. However, in the Appeal Panel's view, the Board is correct where it argues that in Article 12c(4) SRMR the absence of a material "no creditor worse off" risk is a necessary condition for the downward adjustment, but does not automatically lead to a downward adjustment, and even less to the possibility to claim such an adjustment as a matter of right if there is "no creditor worse off risk" present. Indeed, as shown by the use of the word "may" in Article 12c(4) SRMR, the Board still retains discretion on whether or not to apply said downward adjustment, when all the conditions set out in that provision are met.

119. In the instant case, the Board argues that the Contested Joint Decision has not adopted the downward adjustment of the subordination level "as a prudent approach" in light of the [.] in the summary of the resolution plan, which is annex III to the communication notified by the SRB to the Appellant on 22 May 2023 together with the Contested Joint Decision (as discussed above in paragraph 87). In the Appeal Panel's view the Appellant has failed to show that those concerns are implausible, and thus incapable of supporting the decision not to derogate from the default value of the subordination level (i.e. the floor, as the Board qualifies it in its submissions) as set out in Article 12c(4) SRMR.

120. In conclusion, also the fourth ground of appeal raised against the Contested Joint Decision cannot be upheld.

(f) The fifth ground of appeal in case 2/2023

121. With its fifth ground of appeal, the Appellant claims that, if liabilities arising from pass-trough promotional loans should not be deducted as a matter of law, then Article 12(d)3 subparagraph 4 SRMR read in conjunction with Article 27(7)(a) SRMR and Article 12c(4) SRMR are in breach of Articles 16, 17, 20 and 52 of the Charter of Fundamental Rights.

122. The Board contends, with its response, that the plea should be rejected as inadmissible because a decision declaring the illegality of the SRMR provisions falls outside the Appeal Panel's remit.

123. The Appellant, in light of the response of the Board, specifies in its rejoinder that it is not seeking a decision declaring the above-mentioned provisions to be illegal; rather, it is requesting the Appeal Panel to review the legality of the Contested Joint Decision in light of the Appellant's fundamental rights.

124. The Appeal Panel recalls that in paragraph 230 of its decision of 14 April 2023 on the merits in case 1/2022 it held that a decision on an alleged illegality of SRMR provisions for being contrary to the right to property, the freedom to conduct a business, or the principle of proportionality would fall outside the Appeal Panel's remit and is reserved by the Treaties to European courts only. The Appeal Panel further recalls that in its decision in case 1/2016 the Appeal Panel noted that:

> The Appeal Panel also preliminarily acknowledges that it is settled case law of the Court of Justice of the European Union that a regulation adopted by a Union institution is presumed to be lawful and

> accordingly remains fully effective as long as it has not been found to be unlawful by a competent court. This principle also imposes upon all persons subject to Union law the obligation to acknowledge that regulations are fully effective so long as they have not been declared to be invalid by a competent court (CJEU, 13 February 1979, 101/78, Granaria, paragraphs 4 and 5; CJEU, 7 June 1988, 63/87, Commission v Greece, paragraph 10; CJEU, 5 October 2004, C-475/01, Commission v Greece, paragraph 18). The power to declare the invalidity of an act of a Union institution belongs exclusively to the Court of Justice of the European Union (CJEU, 6 October 2015, C-362/14, Schrems, paragraph 61; CJEU, 22 June 2010, C-188/10 and C-189/10, Melki and Abdeli, paragraph 54). That power cannot be exercised by national courts (Schrems, paragraph 62; CJEU, 28 April 2015, C-456/13, T&L Sugars, paragraphs 45 to 48; CJEU, 3 October 2013, C-583/11, Inuit Tapiriit Kanatami, paragraphs 92 and 96; CJEU, 10 January 2006, C-344/04, IATA, paragraphs 27 to 30; CJEU, 22 October 1987, C-314/85, Foto-Frost, paragraphs 14 to 17), by national administrative or supervisory authorities (Schrems, paragraph 52; Granaria, paragraph 6; CJEU, 14 June 2012, C-533/10, CIVAD, paragraph 43), by Union bodies (CJEU, 30 September 1998, T-13/97, Losch, paragraph 99; CJEU, 30 September 1998, T-154/96, Chvatal, paragraph 112), nor by authorities dealing with administrative appeal procedures (CJEU, 12 March 2014, F-128/12, CR v Parliament, paragraphs 35, 36 and 40; CJEU, 17 September 2008, T-218/06, Neurim Pharmaceuticals v OHIM, paragraph 52; CJEU, 12 July 2001, T-120/99, Kik v OHIM, paragraph 55). An exception to the above principle is made only where the act subject to an illegality exception is tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the legal order of the Union and must be treated as having no legal effect, even provisional, that is to say it must be regarded as legally non-existent (CJEU, 5 October 2004, C-475/01, Commission v Greece, paragraph 19; CJEU, 22 November 2011, T-275/10, mPAY24 v OHIM, paragraph 26, and the references). This exception may however apply in quite extreme situations.

125. In light of the above, and considering that there is nothing in the file, in the Appeal Panel's view, which taints the relevant SRMR provisions as applied by the Contested Joint Decision of "an irregularity whose gravity is so obvious that it cannot be tolerated by the legal order of the Union and must be treated as having no legal effect" (in the words of the case-law mentioned above), the Appeal Panel cannot declare illegal Article 12(d)3 subparagraph 4 SRMR read in conjunction with Article 27(7)(a) SRMR and Article 12c(4) SRMR the SRMR. Nor can the Appeal Panel, as requested by the Appellant, render those provisions ineffective by remitting to the Board a decision "on grounds that it is based on a secondary law provision which would be in violation of the fundamental rights".

126. As highlighted in detail above, in the Appeal Panel's view the Contested Joint Decision is in conformity with the applicable provisions of the SRMR. Thus, in accordance with the legality principle, both the Board and the Appeal Panel are obliged to implement those secondary law provisions as they stand. Moreover, in the Appeal Panel's view, there is not any alternative reading of those provisions which could respect the clear meaning of those provisions as they stand. In other terms, unlike in case 1/2016, in the Appeal Panel's view, this is not a matter of interpretation that can be decided without implicating or declaring the unlawfulness of the applicable legal provisions of the SRMR as they stand.

127. In conclusion, the exclusion of the liabilities arising from pass-through promotional loans from the MREL calculations cannot be inferred from the existing provisions of the SRMR, read in conjunction with the fundamental rights granted by the Charter. As a consequence, this exclusion cannot be allowed by way of administrative practice by the Board or by the

Appeal Panel, but needs either to be (i) provided for by the co-legislators if they wish to do so via a legislative change or (ii) scrutinized by the European courts in the context of a claim of invalidity (if any) of the applicable legal provisions in respect to the fundamental rights enshrined in the Charter.

128. For these reasons, also the fifth ground of appeal cannot be upheld.

On those grounds, the Appeal Panel hereby:

dismisses the appeal.

Helen Louri-Dendrinou Co-Rapporteur	Kaarlo Jännäri	Luis Silva Morais Vice-Chair
[SIGNED]	[SIGNED]	[SIGNED]

Marco Lamandini Co-Rapporteur	Christopher Pleister Chair
[SIGNED]	[SIGNED]

For the Secretariat of the Appeal Panel:

[.] on behalf of [.]

[SIGNED]