



19 February 2024

Case 5/2023

FINAL DECISION

[.]

v

the Single Resolution Board

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

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FINAL DECISION

In Case 5/2023,

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 1093/2010¹ (hereinafter the “**SRMR**”),

[.] with headquarters in [.], (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 (Rapporteur), Helen Louri-Dendinou and Kaarlo Jännäri,

makes the following final decision:

Background of facts

1. This appeal relates to the joint decision of 30 May 2023 – [.] (hereinafter the “**Contested Joint Decision**”) determining the minimum requirement for own funds and eligible liabilities (hereinafter the “**MREL**”) for [.] as agreed by the SRB, [.]. On a precautionary basis [.] which implemented the Contested Joint Decision by instructing the relevant national resolution authorities.
2. The Contested Joint Decision has been adopted in the frame of the 2022 resolution planning cycle [...]. [...]
3. [...].
4. Pursuant to Article 88 of Directive 2014/59/EU (hereinafter the “**BRRD**”), the SRB is the group-level resolution authority of the significant (in accordance with Article 6(4) of

¹ OJ L 225, 30.7.2014, p.1.

Regulation (EU) No 1024/2013, hereinafter the “SSMR”) banking group having as parent company [.]. As group-level resolution authority the SRB has established a resolution college for the [.] and the resolution college is in charge, among other tasks, of drawing up the group resolution plan and of determining the external MREL to be complied with by [.] as resolution entity on a consolidated basis for the group and of the internal MREL for its subsidiaries. The resolution college includes [.], [.] and [.] ([.]), which are the resolution authorities of Member States that are not participating to the Banking Union and in which subsidiaries of [.] are established.

5. On 9 January 2023, the SRB communicated to [.] a draft joint decision of the resolution college determining the MREL for [.] and its group and invited [.] to submit its observations as part of a formal Right to be Heard process (hereinafter “RTBH”).
6. On 24 January 2023, [.] submitted to the SRB its comments and observations to the draft joint decision.
7. On 30 May 2023, the Extended Executive Session of the Board, taking note of the joint decision process, the outcome of the RTBH consultation [.] agreed with the other members of the resolution college on the Contested Joint Decision, as well as on the joint decision on the group resolution plan (hereinafter the “**2023 Joint Decision on the Resolution Plan**”); on the same day, the Extended Executive Session also adopted the Contested SRB Decision.
8. On 16 June 2023, the SRB communicated to [.] the Contested Joint Decision together with the 2023 Joint Decision on the Resolution Plan and a summary of the group resolution plan. In the cover letter, the SRB invited [.] to express its opinion in relation to the summary of the group resolution plan by 30 June 2023 and informed [.] that it had adopted the Contested SRB Decision as a separate decision and had instructed the relevant national resolution authorities to take the necessary actions to implement said decision by exercising their power under national law transposing BRRD.
9. [.], the [.] resolution authority notified [.] of the Contested SRB Decision determining the MREL requirement for [.] on an individual basis.
10. On 23 June 2023, the [.] national resolution authority notified [.] and [.] of its decisions [.] and [.] respectively implementing the Contested SRB Decision for the MREL requirement for [.] on a consolidated basis and for [.] on an individual basis.
11. On 30 June 2023, [.] sent its opinion in relation to the summary of the group resolution plan.
12. On 28 July 2023, [.] submitted the notice of appeal. The Chair of the Appeal Panel appointed as rapporteur Professor Marco Lamandini and the appeal was notified by the Secretariat of the Appeal Panel to the Board on 1 August 2023.

13. Given that the MREL determination is based on and intrinsically linked to the resolution plan, which does not fall within the competence of the Appeal Panel, the Appellant also lodged in parallel of the notice of appeal in the present proceedings also [...].
14. On 3 August 2023, the Appeal Panel sent to the parties a case management proposal as follows:

Dear parties in case 5/23,

Following the Board's request for the extension of the deadline to file its response in case 5/2023, filed on 2 August 2023, hereby attached, the Appeal Panel, feels that, in consideration of the complexity of the appeal and the significant number of grounds of appeals raised by the Appellants, of the traditional holidays in August and of the several appeals already pending, for which the Board is called to file its response in the next weeks, the deadline for the Board's response, and the following deadlines for the Appellants' reply and Board's rejoinder, needs to be set at dates which ensure the effectiveness of the right of defence for both parties and, at the same time, do not lead to an excessive duration of the written phase of these appeal proceedings. The Appeal Panel seeks therefore the agreement of both parties on the following timeline for the written phase of the procedure:

- A) 27 September 2023 for the Board's response;
- B) Four weeks from the notice of the Board's response for the Appellants' reply;
- C) Four weeks from the notice of the Appellants' reply for the Board's rejoinder.

The hearing, if any, would be set by the Appeal Panel upon consultation with the parties and would take place shortly after the expiry of the deadline for the Board's rejoinder.

Both parties are kindly invited to inform the Appeal Panel of their position on this timeline by the close of 4 August 2023.

15. Both parties confirmed in writing their agreement with the procedural timetable proposed by the Appeal Panel. Therefore, on 7 August 2023, the Appeal Panel informed of the case management directions adopted upon the agreement of the parties as follows:

Dear parties in case 5/23,

The Appeal Panel wishes to thank both parties for their agreement on the proposed timeline of the written phase of these appeal proceedings, the parties' replies hereby attached, and acknowledges and accepts that, if exceptional circumstances or unforeseen factors so justify, both parties may request an extension of the deadline for their reply and rejoinder which shall not be excessive and, in accordance with the principle of parity of arms, shall be the same.

The Appeal Panel, by way of case management directions based upon the agreement of the parties, definitely sets out the following timeline for the written phase of the procedure:

- 27 September 2023 for the Board's response;
- Four weeks from the notice of the Board's response for the Appellants' reply;
- Four weeks from the notice of the Appellants' reply for the Board's rejoinder.

The hearing, if any, would be set by the Appeal Panel upon consultation with the parties and would take place shortly after the expiry of the deadline for the Board's rejoinder.

16. On 27 September 2023, the Board timely filed its response in the appeal.
17. On 26 October 2023, the Appellant timely submitted its rejoinder to the Board's response.
18. On 22 November 2023, the Board timely submitted its reply to the Appellant's reply.
19. On 1 December 2023, the Appeal Panel, taking into account both the season's holidays from end December until the first week of January and its planned activities in December 2023 until mid-January 2024, informed the parties that the hearing would take place in Brussels on 22 January 2024.
20. 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.
21. At the hearing and with communication of 22 January 2024, the Appeal Panel authorised the parties to submit their speaking notes at the hearing by 29 January 2024. The Board submitted its written pleading at the hearing as resulting from the speaking note.
22. On 30 January 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

23. The main arguments of the parties on the merit of the appeal 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

24. The Appellant raises several grounds of appeal against the Contested Joint Decision, and for precautionary reasons also against the Contested SRB Decision. The appeal is grouped around three sub-appeals addressing respectively (i) the external MREL determination for [.]; (ii) the rejection of the waiver request with respect to [.] and (iii) the determination of the MREL for [.]. The Appellant asks the Appeal Panel to declare those parts of the Contested Joint Decision (and, as noted, for precautionary reasons of the Contested SRB Decision) unlawful and to remit the case to the Board for the adoption of an amended decision.

(a) First sub-appeal

25. With the first sub-appeal of the notice of appeal [.] relies on four grounds.

26. First, the Contested Joint Decision is based on, and intrinsically linked to, the resolution joint decision on the group resolution plan and resolvability assessment [.] would no longer stand if such resolution decision were annulled by the General Court.

27. Second, the Board has violated certain provisions of law and namely (i) Article 12e SRMR by failing to apply this provision to [.] despite the fact that this is an EU G-SII, (ii) Articles 12d(1), 12d(3)(6) and (8) SRMR by failing to demonstrate both the necessity of the market confidence charge (hereinafter “MCC”) in light of the specific characteristics of [.] and the criteria set out in Article 12d(3)(6) SRMR, as well as the appropriateness of the amount of the MCC in light of the criteria set out in Articles 12d(3)(8) SRMR and (iii) Articles 12d(8) and 12e(4) SRMR by failing to carry out a full assessment of all relevant elements of the MREL calculation and to state reasons for its assessment.

28. Third, the Board has breached its obligation to state reasons by failing to provide all the elements necessary for the Appellant to understand on which basis and according to what methodology the MREL was determined, and for a court to exercise its judicial review.

29. Fourth, the MREL Policy, on which the Contested Joint Decision and the Contested SRB Decision are based, violates the SRMR and constitutes a misuse of powers by the SRB, insofar as it manifests a normative choice in the field of resolution and infringes on the powers of the legislator.

(b) Second sub-appeal.

30. With the second sub-appeal of the notice of appeal [.] relies on six grounds.

31. First, the Board has erred in the interpretation of Articles 12h(1) and (2)(c) SRMR.

32. Second, the Board has exceeded its powers under the SRMR, by substituting a requirement set out in the SRMR by another requirement not intended by the legislator.

33. Third, the Board has committed manifest errors of fact and of assessment in its assessment of the condition under Articles 12h(1) and (2)(c) SRMR, and has violated the principle of good administration by failing to carefully assess all relevant elements of the case, including contractual provisions.
34. Fourth, the Board has violated the fundamental principle of protection of legitimate expectations, by failing to apply its own MREL Policy.
35. Fifth, the Board has failed to state reasons by failing to adequately explain the reason for the refusal of the waiver.
36. Sixth, the MREL Policy, on which the Contested Joint Decision and the Contested SRB Decision are based, violates the SRMR and constitutes a misuse of powers by the SRB, insofar as it manifests a normative choice in the field of resolution and infringes on the powers of the legislator.

(c) Third sub-appeal

37. With the third sub-appeal of the notice of appeal [.] relies on six grounds.
38. First, the Board has violated Articles 12d(6)(6) and (8) SRMR, by failing to demonstrate the necessity of the MCC in light of the criteria set out in Article 12d(6)(6) SRMR, as well as the appropriateness of the amount of the MCC in light of the criteria set out in Articles 12d(6)(8) SRMR.
39. Second, the Board has violated the principle of protection of legitimate expectations by failing to apply its own MREL Policy, specifically the criteria of “complexity” and “strong reliance on wholesale funding”.
40. Third, the Board has violated the principle of good administration and equal treatment, as well as Article 12d(1) SRMR, by setting the MCC on the basis of an inherently flawed, non-transparent, and arbitrary methodology.
41. Fourth, the Board has violated Articles 12d(8) SRMR by failing to carry out a full assessment of all relevant elements of the MREL calculation and to state reasons for its assessments concerning [.].
42. Fifth, the Board has breached its obligation to state reasons by failing to provide all the elements necessary in order for [.] to understand on which basis and according to what methodology the MREL was determined, and for a court to exercise its judicial review.
43. Sixth, the MREL Policy, on which the Contested Joint Decision and the Contested SRB Decision are based, violates the SRMR and constitutes a misuse of powers by the SRB, insofar

as it manifests a normative choice in the field of resolution and infringes on the powers of the legislator.

44. 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 in its response and to accede to the Appellant's order sought and conclusion as set forth in the notice of appeal. In addition, the Appellant requested the production of the following documents: (i) the full assessment that the SRB claims to have made as to the lack of necessity to adjust the MCC, for both [.] and [.], (ii) the exchanges between the SRB and the ECB alleged by the SRB to have occurred (i.e. the letter of [.] and the feedback provided by the ECB in a letter of [.]), in each case in order for the Appellant to be able to verify the veracity of the SRB's claims and thereby exercise their substantive and procedural rights as guaranteed notably by Article 41 of the Charter.

Board

45. The Board argues that based on the facts of the case and the legal framework the appeal is unfounded. With regard to all pleas in the three sub-appeals challenging the legality of the MREL Policy, the Board argues that these please are inadmissible.

(a) First sub-appeal

46. With regard to the first sub-appeal, the Board submits that (i) the subject of the appeal is the Contested Joint Decision on MREL alone, (ii) it has properly applied Articles 12d and 12e SRMR when determining MREL and (iii) it has duly stated reasons in the Contested Joint Decision.

(b) Second sub-appeal

47. With regard to the second sub-appeal, the Board submits that (i) it correctly interpreted Article 12h(1)(c) and 12h(2) SRMR, (ii) it acted within its competence when interpreting Article 12h(1)(c) and 12h(2) SRMR, (iii) it has not committed any error of facts or of assessment or violated the principle of good administration when assessing the guarantees provided by the Appellant in order to obtain an iMREL waiver, (iv) it has not violated the principle of legitimate expectations, and (v) it has duly stated the reasons for setting MREL in the Contested Joint Decision.

(c) The third sub-appeal.

48. With regard to the third sub-appeal, the Board argues that (i) it correctly applied Articles 12d(6)(6) and 12d(6)(8) SRMR, (ii) it has not violated the principle of legitimate expectations, (iii) it complied with the principles of good administration and equal treatment and Article

12d(1) SRMR, and (iv) it fully complied with Article 12d(8) SRMR and the general obligation to state reasons.

49. With its reply, the Board argued that the Appellant seemed to have misrepresented a number of arguments submitted by the Board with its response, reiterated and further clarified such arguments and replied to the arguments raised by the Appellant with its rejoinder and insisted that it has correctly applied the SRMR. As to the documents whose production was requested by the Appellant with the rejoinder, the Board argued, as to the documents showing the assessment relating to the lack of necessity to adjust the MCC, that there was no necessity to adjust the default amount and therefore there is not such a document. As to the request to produce its internal correspondence with the ECB as proof of the Board's consultation with the same, the Board argues that a full description of the circumstances and results of the consultation with the ECB are already provided in the Contested Joint Decision (at recital (13) and Section V RTBH). Moreover, those exchanges are part of the decision-making process and cannot be disclosed pursuant to Article 88 SRMR and Article 4(3) of the SRB decision on public access to the SRB documents of 9 February 2017.

Findings of the Appeal Panel

50. The parties have filed written submissions on the appeal, which is for all substantive purposes subdivided into three sub-appeals referring individually to each of the three entities of the [.] group which filed, in a single notice of appeal, a single appeal against distinct parts of the same Contested Joint Decision and, only for precautionary reasons, also Contested SRB Decision. The parties have also made oral representations at the hearing and have 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 Contested SRB Decision on a precautionary basis.

51. [....].

52. [...].

(ii) The pleas against the MREL Policy and their inadmissibility

53. In each of the three sub-appeals the Appellant has raised a plea against the MREL Policy (fourth plea of the first sub-appeal and sixth plea of the second and third sub-appeal). The allegations, repeated across the three sub-appeals, are, first, that the Board is an agency without legislative or policy powers, and that it cannot be delegated such powers, in light of

the legal framework, which attributes such powers only to the European Commission, and, second, that several provisions of the MREL Policy are against the normative choices of the SRMR.

54. The Board in its reply submitted that the pleas against the MREL Policy are inadmissible, as they fall outside the Appeal Panel remit, as defined in the SRMR, considering that the Appeal Panel's competence constitutes an exception to the general jurisdiction of the Court of Justice, in accordance with Article 86 SRMR.

55. The issue has been more recently addressed by the Appeal Panel in its final decision of 14 April 2023 in case 1/2022 [.] and, in the Appeal Panel's view, there are no new factors in the present case that would justify a finding different from the one held in that decision. Article 85 (1) of the SRMR states that:

“Any natural or legal person, including resolution authorities, may appeal against a decision of the Board referred to in Article 10(10), Article 11, Article 12(1), Articles 38 to 41, Article 65(3), Article 71 and Article 90(3) which is addressed to that person, or which is of direct and individual concern to that person”.

56. Article 12 (1) SRMR in turn, states that:

The Board, after consulting the competent authorities, including the ECB, shall determine the requirements for own funds and eligible liabilities as referred to in Articles 12a to 12i, subject to write-down and conversion powers, which are to be met at all times by the entities and groups referred to in Article 7(2) and by the entities and groups referred to in point (b) of Article 7(4) and in Article 7(5) when the conditions for the application of these paragraphs are met.

57. Article 12(1) refers to the determination of MREL for individual institutions. This means that acts such as the MREL Policy fall outside the remit of the Appeal Panel. The Appeal Panel has stated as much, not only in case 1/2022 but also in its decision in case 2/2021, paragraph 99, as well as in its decision in case 3/2021, paragraph 79.

58. The Appeal Panel considers that the MREL Policy is not one of the enumerated decisions of the Board included in the *numerus clausus* of decisions which fall within the Appeal Panel remit. Article 85 SRMR must be interpreted and applied in conformity with its textual meaning, and, in light of the clear intention of the legislator to confine the Appeal Panel's remit only to the matters expressly enumerated in Article 85 SRMR, there are no contextual or teleological indications that would support a different reading from the one flowing from the literal meaning of that provision.

59. As already noted in the Appeal Panel's decision of 14 April 2023 in case 1/2022, however, this should not mean that the content of the MREL Policy is irrelevant in deciding this appeal.

60. First, as stated in the Appeal Panel's decision in case 3/2021, at paragraph 81, the MREL Policy is not a regulatory act, which should bind the Appeal Panel decision, but it is an

exercise of interpretation undertaken by the Board. It helps to communicate to the market the way in which the Board intends to apply those provisions. As a consequence, it also allows the Appeal Panel to better understand how the Board construes certain provisions, and ascertains their meaning, and it provides a context legally relevant for individual decisions.

61. Second, and as a result of the above, the MREL Policy may be, as a matter of principle, a potential source of legitimate expectations on the side of the Appellant and as such of legal effects that are intrinsically underlying the individual decision determining MREL.
62. In conclusion, the Appellant's pleas against the MREL Policy (fourth plea of the first sub-appeal, sixth plea of the second sub-appeal and of the third sub-appeal) are as such inadmissible. However, the MREL Policy will be referred to in this decision strictly for the purposes outlined above.

(b) The first sub-appeal

63. [...].

(1) The first ground of appeal of the first sub-appeal [...]

64. [.].

65. [...].

66. [...].

67. [...].

68. Therefore the Appeal Panel, as it did already in [.], having due regard to its powers of case management set out in Article 11 of the Appeal Panel's Rules of Procedure and having considered by analogy Article 69, letter d) of the Rules of Procedure of the General Court, finds that a prudent pondering of the parameters of proper administration of the administrative and judicial review requires to stay the present appeal solely with regard to the first ground of the first sub-appeal, until the final outcome of the [.] currently pending before the General Court.

(2) The second ground of appeal of the first sub-appeal.

69. With the second ground of appeal of the first sub-appeal, the Appellant raises three claims discussed in three different limbs. Such limbs are considered separately here below.

(i) The first limb of the second ground of appeal.

70. In the first limb the Appellant submits that the Board has violated Article 12e SRMR by failing to apply this provision to [.] despite the fact that it is an EU G-SII. The Appellant notes that,

in the case of an EU G-SII, Article 12e(1)(b) SRMR requires that the MREL for such entity be set in the form of (a) TLAC + (b) any additional requirement determined by the Board specifically in relation to that entity in accordance with paragraph 3 of such Article (hereinafter, the “**MREL add-on**”). The Appellant further holds that Article 12e(3) SRMR requires that an MREL add-on be imposed only where strictly necessary, i.e. “only” (a) where the [TLAC requirement] is not sufficient to fulfil the conditions set out in Article 12d, i.e. to ensure the loss-absorption and recapitalization of the post-resolution entity, and (b) to an extent that ensures that those conditions are satisfied. In the Appellant’s view, it follows that for these entities, the SRB is therefore required to (1) demonstrate that the TLAC is not sufficient to meet the criteria set out in Article 12d(1) SRMR, (2) determine the total TLAC + MREL amount that would be sufficient to meet these criteria on the basis of the specific characteristics of the entity, and (3) set the MREL add-on as the difference between the two.

71. The Appellant claims that the Board has not followed this methodology or made this demonstration, although it is expressly required by SRMR. It has instead applied Article 12d SRMR exclusively, without any regard for Article 12e SRMR. The Appellant submits that this is evidenced by recital (3) of the Contested Joint Decision, that allegedly contains “an affirmation, not a demonstration”, is tautological, shows a “circular reasoning”, is contradictory, and deprives Article 12e SRMR of any useful effect.
72. The Board argues that the claim is unfounded and completely disregards the reasoning and explanations provided in Section V of the Contested Joint Decision (in particular its pages 42-45) which further justify the assessment summarized in recital (3) of Section I of the Contested Joint Decision. The Board argues that in Section V it is explained why specifically for [.], taking into account the concrete resolution strategy and its recapitalisation needs following resolution, an MREL equal to the minimum TLAC was not sufficient to fulfil the conditions of Article 12d SRMR. The Board concludes therefore that it did not disregard Article 12e SRMR in the assessment, but fully and correctly applied it.
73. The Appeal Panel refers, first, [.], 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 possibility for the Board of setting a level of MREL higher than the common minimum of the TLAC standard is expressly allowed by the applicable provisions, and by the TLAC standard itself. If such possibility is used, however, the Board must justify the need of a MREL add-on in the given circumstances of each specific case.
74. In the specific circumstances of the instant case, the Appeal Panel, whilst noting that recital (3) of section I of the Contested Joint Decision does not expand much on the reasons why the Board has concluded that “the minimum requirements which the resolution entity must fulfil pursuant to the direct application of Article 92a and 494 CRR are not sufficient to fulfil the conditions set out in Article 12d SRMR”, finds, conversely, that this succinct statement must systematically be read in conjunction with the reasons stated in section V (the RTBH

assessment memorandum) of the Contested Joint Decision in response to a similar comment of the Appellant. In fact, as already noted in its decision of 11 January 2023 in case 2/2022 at paragraph 80, the Appeal Panel considers that the RTBH assessment memorandum is expressly made an integral part of the Contested Joint Decision and it thus complements from a systematic perspective the reasons stated in other Sections of the Contested Joint Decision (see also judgment of 7 December 2022, T-330/19, PNB Banka v ECB, ECLI:EU:T:2022:775, paragraph 131).

75. The Appellant claims with its rejoinder that the reasons included in the RTBH assessment memorandum were not included in the draft decision provided to the Appellant in the context of the RTBH process and taking account of those reasons would therefore violate its rights under Article 41 of the Charter of Fundamental Rights. The Appeal Panel notes that this claim, to the extent that it would amount to a new plea in law, would be inadmissible pursuant to Article 16(3) Rules of Procedure. More importantly, the Appeal Panel finds that the Appellant's argument is without merit. The right to be heard in the administrative process does not include multiple rounds of comments from the Appellant, in response to the reasons stated by the Board in the RTBH assessment memorandum. Multiple rounds of written comments could potentially trigger a circle of exchanges which would leave the procedure open until the Appellant had no comments to make. The joint reading of Article 12e SRMR and Article 41 of the Charter does not suggest that the Appellant should be granted a right to be heard twice, or more, with regard to the MREL add-on. Moreover, in this case the Appellant was heard during the RTBH, and is now granted a right to challenge the reasons stated in the RTBH assessment as part of its appeal against the Contested Joint Decision before the Appeal Panel, and thus still in an administrative procedure where its right to be heard is fully safeguarded. Thus, it is actually a matter of whether the justification offered by the Board in the decision, including the RTBH assessment memorandum, are sufficient to comply with Article 12e SRMR.
76. The reasons stated by the Board in the RTBH assessment memorandum refer first to the resolution strategy adopted in the resolution plan (a strategy that also [.] agreed in its major options), which is the bail-in tool at single point of entry at parent entity level, as already communicated to the Appellant on [.]. Then, they refer to the fact that [.] is the parent of a highly complex and interconnected group, and complementary or alternative strategies in resolution, such as transfer tools, are still the object of ongoing interactions between the SRB's internal resolution team (hereinafter "**IRT**") and [.], and would be included in the resolution plan only once the operationalisation of the use of transfer tools is more advanced. Thus, such alternative strategies cannot constitute the basis for calculating MREL, at least not yet. Incidentally, the Appeal Panel notes that this statement of the Board marks an advance on this issue in respect to the decisions adopted in previous RPCs [.]. Accordingly, given this context, there are reasons for the Appeal Panel being hopeful and to some extent confident that in the ongoing RPC these interactions may finally come to an agreed conclusion as to the

operationalisation and credibility of at least some transfers, which in the end may help defusing existing differences between the parties as to the MREL amount.

77. Based upon those premises, and crucially, the Board reasons that Article 92 CRR minima would not suffice to meet the requirements of Article 12d SRMR due to the size, business model, funding model and risk profile of the bank, because MREL requirements calculations based on the balance sheet data reflecting such aspects “reveal clearly the insufficiency of the Article 92a CRR minima in order to achieve a successful recapitalization in the event of failure and resolution”.
78. At page 44 of Section V of the Contested Joint Decision it is specifically stated that:
- [...].
79. It is therefore apparent, in the Appeal Panel’s view, that, contrary to the Appellant’s allegations, the Board has not violated Article 12e SRMR which requires that a MREL add-on is applied only (a) where the [TLAC requirement] is not sufficient to fulfil the conditions set out in Article 12d SRMR, i.e. to ensure the loss-absorption and recapitalization of the post-resolution entity, and (b) to an extent that ensures that those conditions are satisfied. The Appeal Panel agrees with the Appellant that the textual construction of Article 12e SRMR and in particular the use of the word “only” suggests that the Board must indeed offer a robust justification when it applies a MREL add-on, and must show (i) that 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 on the basis of the specific characteristics of the entity, and (3) the MREL add-on is the difference between the two.
80. In the Appeal Panel’s view, this is precisely what the Board has done with its response in the RTBH assessment memorandum, which, as already referred, is an integral part of the Contested Joint Decision. In its assessment of comment 1 of the Appellant, the Board has specifically and individually considered the recapitalization needs of [.], reasoning that the [.] capital requirements after resolution are expected to be (i) a minimum [.] of Pillar I requirement, plus (ii) a Pillar 2 requirement which it is not foreseen to be lower to the current one ([.]). In this regard, the Board has also noted “that Pillar 2 capital requirement set by the ECB, which is a key input to the overall MREL determination, is very much the product of a unique, bank-specific analysis by the supervisor”. The Board has further considered that it would be essential to maintain the market confidence and that, considering the potential losses raised in the context of the failing or likely to fail (hereinafter “**FOLTF**”) and valuation process to be carried out in the context of the FOLTF, it is foreseen that the loss absorbing amount (hereinafter “**LAA**”) will be written down and the recapitalisation amount (hereinafter “**RCA**”) will be required to recapitalise the bank.
81. Thus, the Board has used an analytical approach, where it justifies the necessity and quantity of each and every individual component of MREL, bearing in mind, for those components

that so allow, the perspective of the individual entity. The result is that the TLAC amount would be insufficient to accomplish loss absorbency and recapitalisation, while sustaining market confidence for the individual entity. Thus, in the Appeal Panel's view, the Board has duly justified why it considers necessary a MREL add-on, and namely because the LAA and the recapitalisation needs of the target is [.] of TREA and [.] of LRE, which is above the minimum of 18% TREA mentioned in article 92a CRR.

82. The first limb of the second ground must therefore be dismissed.

(ii) The second limb of the second ground.

83. In the second limb the Appellant submits that in setting the MCC for [.] the Board has violated Article 12d SRMR by failing to determine the reference period, by failing to establish the necessity to impose a MCC on the basis of the specific characteristics of [.] and by failing to assess an adjustment of the MCC.

84. More specifically, the Appellant claims that recital (8) of the Contested Joint Decision merely states that “the resolution authorities have increased the RCA [...] to ensure that, following resolution, the resolution entity is able to sustain market confidence for an appropriate period not exceeding one year”, without any explanation as to why the MCC was necessary in the specific case of [.] and to what period (within the maximum of one year) would have been appropriate. The Appellant argues that, while the amount of the MCC is clear, since it derives mechanically from the text of the SRMR and the MREL Policy, the SRB provides (i) no explanation as to why the MCC is necessary or for what time within one year the MCC is appropriate in light of the specific characteristics of [.], as required by Article 12d(1) and Article 12d(3)(6) SRMR, and (ii) no assessment as to whether the amount of MCC needed to be adjusted, as required by Article 12d(3)(8) SRMR. On this latter point, the Appellant argues that “the Board has not conducted such assessment” because it is not mentioned anywhere in the Contested Joint Decision, and “there is no evidence that it has consulted the competent authorities, including the ECB, in relation specifically to such assessment”. It follows, in the Appellant's view, that the SRB has violated Articles 12d(3)(6), 12d(3)(8) and 12d(1) SRMR.

85. The Board argues that the “appropriate period, which shall not exceed one year” mentioned in subparagraph 6 of Article 12d(3) SRMR “serves as a reference point to assess the needs to sustain market confidence but does not oblige the SRB to specify in the MREL decision a period less than one year for which the MCC will serve to sustain market confidence” and “the amount of the MCC, if considered necessary by the SRB, will not change depending on whether the SRB would consider that the bank would need to maintain market confidence for one day, 30 days, or 365 days after resolution”. The Board further notes that, as to the consultations with the ECB, the Contested Joint Decision records that the SRB consulted with the ECB “on the MREL determination, including the MCC calibration, on [.] and that the ECB provided feedback in a letter of [.] but that in this regard the ECB did not bring any

comment or criticism to the attention of the SRB”. As to the necessity of the MCC, the Board argues that the Contested Joint Decision clarifies that the MCC “serves to ensure that [.] is sufficiently recapitalised after resolution” and that “this assessment took into account the concrete resolution strategy for [.] and its recapitalisation needs following resolution in line with the resolution strategy”. In this assessment the Board referred to the size, business model, funding model and risk profile of [.].

86. The Appeal Panel notes that the MCC is an addition to the recapitalisation amount, contemplated under Article 12d(3) paragraphs (6), (7) and (8) SRMR. These state 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.

87. Thus, the MCC 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 recapitalisation amount resulting from Article 12d(3) first sub-paragraph (a)(ii) SRMR, to impose the amount needed to sustain such market confidence. To make the calculation more concrete, the rule provides a “base amount”, equal to the combined buffer requirement (hereinafter “**CBR**”) applicable after resolution tools, 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’s decision of 14 April 2023, in case 1/2022 at paragraph 158).
88. Article 12d(8) SRMR, in turn, refers to the Board’s general 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”.

89. [...].

90. [...].

91. In the specific circumstances of the instant case, the Appeal Panel notes that this limb of the ground of appeal reiterates a complaint that the Appellant made in the RTBH, commenting recital (8) of the Contested Joint Decision. In its response to comment 3 of the Appellant the Board has first clarified in the RTBH assessment memorandum that:

[...].

92. The Board has also explained in the RTBH assessment memorandum that:

[...].

93. In the Appeal Panel’s view, therefore, this shows that the Board has considered necessary a MCC to ensure that the entity post resolution would have a CBR as it currently has before resolution, with the difference that, in light of the preferred resolution strategy and considering the estimated balance sheet depletion, this has been determined in an amount ([.] TREA) smaller than “the CBR that applied to the group at the reference date” (which was equivalent to [.] TREA). This also indicates that, since the CBR is entity specific, contrary to the Appellant’s claim, the Board has not failed to justify the necessity to impose a MCC taking into account the characteristics of the Appellant (i.e., [.]).

94. The Appellant argues, however, that the Board provides no explanation for what time within one year the MCC is appropriate in light of the specific characteristics of [.], as required by Article 12d(1) and Article 12d(3)(6) SRMR. The Appeal Panel acknowledges that pursuant to Article 12d(3)(6) SRMR the MMC must be set in an “appropriate amount necessary to ensure that, following resolution, the entity is able to sustain market confidence for an appropriate period, which shall not exceed one year”. In the Appeal Panel’s view, this reference to “one year” signals 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. Only in this sense the Appeal Panel agrees with the statement of the Board in the RTBH assessment that “the reference to such a time horizon is to be considered as an input for the resolution authority to assess the need to ensure market confidence for a defined period ‘after’ resolution”.

95. Conversely, the (overly) broad statement of the Board, under comment 3 of the RTBH assessment memorandum, according to which Article 12d(3)(6) SRMR “does not mean that the MCC must apply for a period that does not exceed one year”, needs further qualification, as it depends on the determination that the Board makes of such MCC.
96. 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 point, 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.
97. In light of this, if the MCC is set at an amount higher than the existing CBR at the reference date, in the Appeal Panel’s view, the Board would need to justify that determination, including the period, within one year, for which the strengthened requirement would be appropriate to sustain market confidence in that special situation.
98. Conversely, if, as it happens in the case at hand, 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.
99. In other words, and in line with what the Appeal Panel held in case 1/2022, aligning the MCC with the reference, or base amount of MCC stated in the legislation does not mean that the Board failed to make a determination of the appropriate levels of MCC in light of the specific characteristics of [.], as required by Article 12d(1) and Article 12d(3)(6) SRMR. It meant that, in the Board’s view, an MCC 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.
100. The Appellant further claims that the Board has not made the assessment as to whether the amount of MCC could or should be adjusted, as required by Article 12d(3)(8) SRMR and that “there is no evidence that the Board has consulted the competent authorities, including the ECB, in relation specifically to such assessment”.
101. In the Appeal Panel’s view, the fact that the Board set an MCC 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).

102. In turn, recital (13) of the Contested Joint Decision and the RTBH assessment memorandum clearly refer to the consultation with the ECB, which started on [.]. The RTBH further states that “the ECB provided feedback via letter dated [.]” but “in this regard the ECB did not bring any comment or criticism to the attention of the SRB”. The Appellant requested the Appeal Panel to order the SRB to produce such internal correspondence with the ECB. The Appeal Panel finds however that there is no need to order such production because there is nothing in the file that could suggest that the statements in the Contested Joint Decision and in the RTBH are false, 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. As to the confidentiality of the exchanges between the ECB and the SRB as part of the internal decision-making process the Appeal Panel further refers to its decision of 10 November 2023, in case 6/2023.
103. The second limb of the second ground must therefore be dismissed.
- (ii) *The third limb of the second ground of appeal.*
104. In the third limb of the second ground, the Appellant submits that the Board has violated Articles 12d(8) and 12e(4) SRMR (i) by failing to carry out a full assessment of all relevant elements of the MREL calculation and (ii) by failing to include such assessment and to state the reasons for its calculation of MREL in the Contested Joint Decision. More specifically, the Appellant argues that the Contested Joint Decision is failing with respect to the following elements.
105. In the calculation of MREL-TREA and MREL-LRE: (a) The SRB has failed to make a full assessment of (i) the “proposed change in post-resolution capital needs” in respect of TREA (Recital 7). If it has made such assessment, it has failed to include it in the Contested Joint Decision, and to state reasons for (a) such adjustment, the nature of which is not explained, and (b) its impact on the Adjusted RCA(TREA) amount of EUR [.], which is not explained either; (b) The SRB has failed to make a full assessment of (i) the “proposed change in post-resolution capital needs” in respect of LRE (Recital 12). If it has made such assessment, it has failed to include it in the Contested Joint Decision, and to state reasons for (a) such adjustment, the nature of which is not explained, and (b) its impact on the Adjusted RCA(LRE) amount of EUR [.], which is not explained either. (c) The SRB has failed to make a full assessment of the impact of the requirements set out in Article 27(7) SRMR on MREL-LRE, as required by Article 12d(3), Sub 4 SRMR. If it has made such assessment, it has failed to include it in the Contested Joint Decision, and to state reasons for its decision to apparently not adjust MREL-LRE on that basis.

106. In the calculation of the MCC, as argued already above: (a) The SRB has failed to make a full assessment of whether an MCC was in fact necessary to sustain market confidence in the specific case of the Appellant. If it has made such assessment, it has failed to include it in the Contested Joint Decision, and to state reasons as to why an MCC was necessary; (b) The SRB has failed to make a full assessment of whether a downwards or upwards adjustment to the MCC was required pursuant to Article 12d(3), Sub 8 SRMR and to consult the ECB thereon. If it has made such assessment, and consulted the ECB thereon, it has failed to include the result of such assessment in the Contested Joint Decision, and to state reasons as to why no downwards or upwards adjustment was required in this specific case, and why, as a result, the amount thereof was appropriate in the specific case of the Appellant.
107. In the setting of the MREL add-on over TLAC, as also argued above: The SRB failed to properly justify and reason the MREL add-on over TLAC under 12e(3) SRMR in line with Article 12e(4) SRMR, because it failed to carry out a full assessment of the elements under Article 12e(3) SRM and failed to include reasons why specifically for the Appellant as a G-SII resolution entity its TLAC is not sufficient to meet the conditions in Article 12d SRMR.
108. The Appellant further claims that providing explanations in the RTBH assessment or in other documents does not satisfy the clear requirement set out in Article 12d(8) SRMR, which is that the full assessment and statement of reasons be set out in the MREL decision itself. [.].
109. The Board argues that it fully complied with the requirements as set out in Article 12d(8) and 12e(4) SRMR. The Board preliminarily notes that the RTBH assessment memorandum contained in Section V of the Contested Joint Decision is expressly made part of the Contested Joint Decision (as also acknowledged, in a similar case concerning the ECB, by the General Court in T-330/19 PNB Banka v ECB ECLI:EU:T:2022:775 at paragraph 131) and contains further details on the assessment and reasons for the MREL determination. Moreover, the Contested Joint Decision contains a summary of “the results of previous interactions” with the bank, including those at the MREL workshop for the 2022 RPC held on [.] specified at page 46 of the Contested Joint Decision.
110. The Board further argues that the statement of reasons of the Contested Joint Decision covers all relevant elements on the setting of the MREL, and in particular (i) information on the resolution strategy/group resolution plan, (ii) calibration of MREL-TREA and MREL -LRE and (iii) setting of the MCC and consultation with the ECB. Furthermore, the Board argues that the Contested Joint Decision duly justified the MREL add-on over TLAC.
111. The Appeal Panel has discussed at length the issue of the requisite standard of the statement of reasons in a G-SII’s MREL determination in its decision of 14 April 2023 in case 1/2022, and refers to the principles stated in that decision. It also refers to its decision of 15 December 2023 in joined cases 2/2023 and 3/2023 where it held, at paragraphs 80 and 81, that:

80. (...) 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”.

112. In the specific circumstances of the instant case, the Appeal Panel finds that, contrary to the Appellant’s allegations, the Contested Joint Decision, including its RTBH assessment memorandum, shows that the Board has carried out a full assessment of all relevant elements for the MREL calculation. The Appeal Panel further refers to its decision of 14 April 2023 in case 1/2022, at paragraph 188 where it held that also interactions between the SRB and the Appellant can be relevant to explain how the Board has come to its MREL determination, provided that such interactions and their content are summarized and expressly acknowledged in the Contested Joint Decision.
113. Specifically, the Board has assessed and sufficiently justified the preferred resolution strategy (bail-in tool at single point of entry), as summarized e.g., in the RTBH assessment memorandum in response to comment 1 of [.]. The Board has also explained that the use of complementary transfer strategies, in the Board’s view, still need more internal work from [.] on separability and thus on the operationalisation of such transfers. It is clear from the appeal that the Appellant disagrees with the Board’s conclusions on this. However, it is also clear from the Contested Joint Decision that the Board has made the assessment on the preferred resolution strategy and has justified it, as required by the law. The Appeal Panel sides on this with the Board’s remark that, first, the Contested Joint Decision “enabled the bank to form a judgment on whether it [was] worth making a substantive challenge – something the Appellant has clearly done. Second, the breadth and depth of the Appellant’s substantive argument shows that the Appellant disagrees with the SRB’s reasoning, and was able to ascertain it, which is not the same thing as that reasoning being deficient”.

114. The Contested Joint Decision also shows how the calibration of MREL-TREA and MREL-LRE has been done. Recital (7) of Section I describes the calibration of MREL-TREA with reference to the resolution plan for the group which “has identified, explained and quantified an immediate change in TREA of the resolution entity” as a result of balance sheet depletion at the moment of resolution and shows that “considering the change in post-resolution TREA, the resolution authorities have, for the purposes of determining the RCA component of MREL-TREA, adjusted the TREA to EUR [.] for the resolution entity”. This is further detailed in the response to comment 2 in the RTBH assessment memorandum, where it is clarified that the balance sheet depletion is not the simple occurrence of losses but rather a reflection of losses assumed within the resolution plan (under the assumption of an unchanged risk density) on TREA (and LRE) applied by the SRB. In turn, recitals (9) to (12) (and in particular the latter) of Section I shows how the calibration of MREL-LRE has been done, and here again with reference to the resolution plan which “has identified, explained and quantified an immediate change in LRE of the resolution entity” as a result of balance sheet depletion and shows that “the resolution authorities have, for the purposes of determining the RCA component of MREL-LRE adjusted the LRE to EUR [.] for the resolution entity”. The Appeal Panel finds that, although the amount of the foreseen balance sheet depletion at the moment of resolution is not described and explained in the summary of the resolution plan communicated to the Appellant (as it would have been somehow preferable), the information given in the Contested Joint Decision, including the RTBH assessment memorandum together with the exchanges with the bank referred to in it and namely the slides of the MREL workshop of [.] referred to under comment 2 of the RTBH assessment memorandum at page [.] (see in particular slide 11), are sufficient to show that the Board has not failed to make a full assessment of the “*proposed change in post-resolution capital needs*” in respect of TREA and LRE and that the Appellant (having regard also to its highly sophisticated nature and its full awareness of the components of it TREA and LRE) could understand such adjustment, its nature and its impact on the Adjusted RCA.
115. The Appeal Panel finds that the same conclusion is valid also for the setting of the MCC and the consultation with the ECB and refers in this regard, for all legal purposes and for sake of brevity, to its findings discussing the second limb of this ground of appeal.
116. The Appeal Panel further finds that, for the reasons already stated above discussing the first limb of this ground of appeal (to which it refers, for sake of brevity), the Board has complied with Article 12e(4) SRMR and has duly justified the MREL add-on over TLAC considering the specific situation of [.].
117. For all these reasons, also the third limb of the second ground of appeal must be dismissed.

(3) The third ground of appeal of the first sub-appeal.

118. Under the third ground of the first sub-appeal the Appellant submits that the Board has breached the obligation to state reasons under Article 296 TFEU as interpreted and applied by the European courts. The Appellant in essence repeats the allegations made under the second ground of Appeal with regard to Articles 12d(8) and 12e(4) SRMR.
119. The Board contends that, on the contrary, the Contested Joint Decision provides all the elements necessary in order for [.] to understand on which basis and according to what methodology the MREL was determined and for a court to exercise its judicial review.
120. In the specific circumstances of the instant case, the Appeal Panel finds that, for all the reasons stated above discussing the previous grounds of the first sub-appeal, the Board, in light of the statements in the Contested Joint Decision, in the RTBH assessment memorandum and in the exchanges with the Appellant referred to in the Contested Joint Decision, including the RTBH assessment memorandum and most notably the slides of the MREL workshop of [.] referred to under comment 2 of the RTBH assessment memorandum at page 46 (see in particular slides 11 to 14) has sufficiently complied with its duty to state reasons for the [.] MREL calculation, on the calibration of MREL-TREA and LRE taking into account the estimated balance sheet depletion, the setting of the MCC to be applied for the MREL-TREA component, and the MREL add-on over TLAC
121. For those reasons also the third ground of appeal must be dismissed.

(c) The second sub-appeal

122. With the second sub-appeal the Appellant challenges Section IIc of the Contested Joint Decision by which the Board has refused to grant a waiver from the internal MREL to [.]. The Appellant notes that the Board considers that the conditions provided for under Articles 12h(1) and 12h(2)(c) SRMR are not satisfied and in particular, as stated in recital (12) of Section IIc of the Contested Joint Decision, that “there is no sufficient comfort that, in absence of prepositioned internal MREL, losses suffered by [.] would be up-streamed to the resolution entity in a situation in which the subsidiary has reached the point of non-viability” and “the absence of a sufficiently robust loss-transfer mechanism would itself constitute a material impediment (both legal and practical in nature) to the prompt transfer of own funds or repayment of liabilities by the resolution entity/parent to [.], as required under point (c) of Article 12h(1) and (2) SRMR”. Recitals (13) to (16) of Section IIc of the Contested Joint Decision specify that the conclusion is based on the assessment made by the SRB that the existing commitments provided by [.] to the ECB in [.] and [.] (collectively hereinafter referred to as the “**ECB Guarantee**”) for purposes of the capital and liquidity waivers granted by the ECB would not be “suitable to ensure absence of impediments to the transfer of own funds or repayment of liabilities (...) in the circumstances contemplated under” sub-paragraph (c) of Article 12h(1) SRMR.

(i) The first ground of the second sub-appeal

123. With the first ground of the second sub-appeal the Appellant claims that the Board has erred in the interpretation of Articles 12h(1) and 12h(2)(c) SRMR.
124. The Appellant argues that the recitals of Section IIc of the Contested Joint Decision show that the Board requires, in order for a subsidiary to satisfy the waiver conditions, the parent to have provided a guarantee that meets certain conditions additional to those set out in the ECB Guarantee. Indeed, in Recitals 14-15, the Board explains why it deems the ECB Guarantee insufficient, and what additional features it expects a guarantee to have in order to be able to grant the waiver. In so doing, in the Appellant's view, the Board has substituted the requirement under letter (c) with a new requirement, for a guarantee meeting certain specific characteristics, that is not provided for in Article 12h(1) and (2) SRMR and was not intended by the legislator.
125. The Board refers to the decision of the Appeal Panel of 8 June 2022 in case 3/2021 where it held that the SRB did not err in law by requiring as a condition for granting an MREL waiver under Article 12h(1)(c) SRMR the issuance of a guarantee of the commitments of the subsidiaries by its parent company. It also argues that it cannot be inferred from the Contested Joint Decision that the Board considers that the condition of the absence of impediments only requires, to be fulfilled, the existence of a guarantee.
126. The Appeal Panel wishes to, first of all, recall that with its decision of 27 January 2022 in case 2/2021 and with its decision of 8 June 2022 in case 3/2021 it has already addressed a similar plea and refers in particular to paragraphs 69 to 77 of its decision of 8 June 2022 where it stated the following:

69. With reference to the first plea in law of the Appellant, the Appeal Panel's position is as follows. The Appeal Panel has already found in its decision in case 2/2021 and needs to reiterate in the instant case that, although the Appeal Panel considers quite unfortunate, within a broader normative context, that the requirements for the grant of a waiver set out in Article 45(12), and now Article 45f(3) and 45f(4) BRRD and Article 12h SRMR are not aligned and that the legislative history, to the extent that it could be verified through public available information by the Appeal Panel, does not seem to entirely illuminate on the reasons why there is such a textual difference, the Appeal Panel is however persuaded that the objective of the condition set out under letter c) of Article 12h is to ensure that, in the resolution context (and thus in a "gone concern" scenario of the banking group or at least of the relevant subsidiary for which the iMREL waiver is requested), the group resolution action is not prevented. Thus, there must be a positive assessment that resolution can be rolled-out smoothly along the lines set out in the resolution plan (unless adjustments are needed at the point of non-viability for unforeseen changes in relevant circumstances), without undue legal or practical impediments in the up-streaming of losses by the subsidiary to the resolution entity and/or in the down-streaming of funds by the resolution entity to the subsidiary. More specifically, the provision aims at ensuring that the choice to waive the iMREL requirement is neutral in respect of the alternative of the prepositioned iMREL at the level of the subsidiary as to the resolvability of the group and it is so, because other arrangements are in place, within the group, which can act as functional substitutes of the iMREL with equivalent effects as the conversion or write down of iMREL at the level of the subsidiary. In principle, therefore, also a guarantee of the parent company may serve to this scope and may be one (but not the only one, as it will be further discussed below)

of the arrangements available as an alternative to the prepositioning of iMREL, having equivalent effects.

70. The Appeal Panel has found therefore in its decision in case 2/2021 and needs to reiterate in the instant case that, having regard to the objectives and finality of Article 12h(c) SRMR, the textual difference between Article 12h SRMR and Article 45(12) now Article 45f(3) and 45f(4) BRRD cannot *per se* be construed as precluding the SRB from requiring under Article 12h(c) the parent company to guarantee the commitments entered into by its subsidiary on the assumption that *ubi lex voluit, dixit, ubi non dixit, noluit*. Instead, the Appeal Panel concluded that the text of Article 12h SRMR suggests that the SRB is given, in the specific SRMR context, a margin of appreciation in considering whether such a guarantee is necessary in order to positively assess the negative condition of the “no impediment” under letter c) of said Article 12h. In other words, in the Appeal Panel’s view, the Board is not obliged to require such a guarantee as a precondition for the waiver, as it would be if the positive condition set out in Article 45(12) and now 45f(3) and 45f(4) BRRD had been transposed also in Article 12h SRMR, but has a margin of appreciation to subject its positive assessment that no practical or legal impediments are in place also to the fact that the parent company issues such a guarantee. This means that, whereas under the BRRD the verification of the meeting of the additional positive condition of the guarantee is mandatory for the competent resolution authority, and it must be done before exercising its discretion in granting or not granting the iMREL waiver, in the SRMR the guarantee is not mandated by law, but may be still required by the competent authority in the exercise of its assessment on whether there are impediments to the up-streaming of losses or down-streaming of funds in the resolution context.

71. The Appeal Panel sides therefore with the Board that, if the iMREL requirement is to be waived, there must be in place sufficient arrangements to ensure that, should [.] be failing or likely to fail, the resolution strategy of restoring its viability by absorbing its losses and recapitalising it is promptly available and the resolution entity can be obliged to take action functionally equivalent to the writing down or conversion of the prepositioned iMREL (which would be held by that resolution entity in the absence of a waiver). Therefore, the Appeal Panel finds and reiterates that, although it is certainly unfortunate within a broader normative context that Article 12h SRMR is ambiguous when read in conjunction with Article 45f BRRD, in the specific setting and circumstances of the present case the Board did not err in law in the application of Article 12h, nor did it exceed its powers by concluding that it may require [.] to issue an appropriate parent company guarantee as a means to ensure that no practical or legal impediments are in place pursuant to letter c) of Article 12h.

72. The Appellant further argues, in this case, that, even assuming that – as the Appeal Panel already found in case 2/2021 – under Article 12(h)(1)(c) SRMR the SRB may, without being required to do so, request in individual cases such a guarantee in order to be satisfied that there are no impediments to the prompt transfer of own funds, once such request is made in a systemic manner in all cases under an internal policy such as the MREL Booklet, which guides the practice of the IRT, such guarantee is made de facto a necessary condition, thereby violating Article 12h(1) SRMR. As a matter of principle, the Appeal Panel sides with the Appellant when it says that, in the face of the literal text of Article 12h(1) SRMR the SRB must be careful in not establishing a practice whereby, de facto, a requirement which is not set in the SRMR is imposed in all circumstances by way of internal policy and IRT’s practice. It is one thing to have the possibility for the SRB to ask for a guarantee in individual cases based upon the specific circumstances of each different case and their appreciation to the effect of Article 12h(1)(c) SRMR. It is another thing to transform this possibility into a must-be in all cases and thus a fully-fledged de facto requirement of a parent company guarantee for all credit institutions willing to apply for an iMREL waiver, irrespective of their

individual specificities. This is clearly not established in the SRMR, as opposed to the corresponding provisions of the BRRD and CRR recalled above.

73. The Appeal Panel, however, is not persuaded that the Appellant has proved, in the present case, that the SRB practice and the MREL Booklet do not grant sufficient leeway to the IRT and the Board to grant iMREL waiver also in cases where no parent companies guarantee is in place. On one hand, the Contested Decision itself evidences that a waiver could be granted to [.] as the Board concluded that satisfactory evidence was provided that [.] guaranteed the obligations of the subsidiary, because (i) [.] is incorporated as a “société en commadite par actions” and thus [.] as a general partner is statutory liable, without any limitation, for the debts of [.], with a statutory liability which “is independent from the will of [.], known to the public and unlimited in time and in amount”; (ii) all creditors of [.] would have recourse against [.] as general partner, after having given (non-judiciary) formal notice to no avail; (iii) a possible right of recourse of [.] against [.] would be sterilised by bailing in such liability in case of resolution of the subsidiary. In a similar line, the Appeal Panel is also persuaded that special statutory provisions under applicable national law may lead to similar outcomes, e.g. in the context of cooperative banking groups (having in mind, however, that from a factual and legal perspective the organization of such groups still differs significantly across the Banking Union: see for an example judgment of 13 December 2017, T-712/15, *Crédit mutuel Arkéa v ECB*, ECLI:EU:T:2017:900). In turn, it cannot be ruled out in principle that group contractual arrangements or general national company law provisions on the group of companies or national insolvency law provisions may, in some circumstances, be considered sufficient by the competent IRT and by the Board to ensure that there will not be legal or factual impediments to the down-streaming of funds from the parent company to the subsidiary, also in a gone context scenario. In turn, the MREL Booklet aimed at ensuring as much as possible horizontal consistency in the resolution practice to avoid any risk of discrimination (which would dramatically affect the credibility of the European resolution framework), but leaves sufficient leeway for individual case-by-case adjustments and deviations, where appropriate.

74. In this context, since, as mentioned above, the Board enjoys a margin of technical appreciation when assessing whether the impediments mentioned in letter c) of Article 12h SRMR exist, the Board has sufficient leeway not to require, if it deems it not necessary, a guarantee of the parent company.

75. By the same token, the margin of appreciation extends to the assessment of the contents of such guarantee, where a guarantee is considered necessary. In that context the Board needs to be reasonably satisfied that such a guarantee is functionally equivalent to the prepositioned iMREL in a gone concern scenario. Accordingly, this means that, in the instant case, the Board needed to be reasonably satisfied that there was not the risk that, at the point-of-non-viability of [.], [.] and its directors could hypothetically decide to pull out, and to not down-stream funds and absorb losses nor recapitalise the subsidiary but rather abandon it to insolvency or liquidation for legal or economic reasons. The Appeal Panel sides with the Appellant that such an event may be to some extent remote, because if there are capital and liquidity guarantees in place which are satisfactory to the ECB, as it happens in the case at hand, it is likely that capital shortages or liquidity constraints of the subsidiary would be timely addressed by [.] in a going concern scenario, implementing the guarantees granted in order to obtain the prudential waivers from capital and liquidity requirements. However, as the IRT noted on [.]:

A. On one hand, the guarantee for the iMREL waiver needs to be actionable in a gone-concern scenario. Although, in some circumstances, it can be argued that the 2014 Guarantee or the 2015 Guarantee might be triggered in a crisis situation, thus avoiding the gone-concern by virtue of the

aid provided by the guarantor, it is possible that the deterioration of the situation of the subsidiary leads to its default when the financial assistance by the guarantor has not been provided yet. In such case, it could be argued that the purposes of the guarantees no longer apply. It is therefore not assured that an actionable right of [.], where existing, persists in case of default, failure or FOLTF determination of [.], and/or whether in that case the creditors of [.] could invoke themselves an enforceable right against the guarantor, so that ultimately the guarantor would be relieved of its legal obligation when it is most needed, in a crisis or failure of [.].

B. On the other hand, the prompt transfer of own funds or repayment of liabilities by the parent undertaking needs to be ensured to the subsidiary in respect of which a determination of non-viability has been made in accordance with Article 21(3) SRMR. Such determination is linked to the FOLTF determination, which can occur in a situation in which the entity is still able to meet its obligations as they come due, i.e. in a situation in which the 2014 and 2015 Guarantees are not yet triggered, thus not usable to provide the required support”.

76. This shows that, although such risk may be to some extent remote, a risk that the 2014 Guarantee and the 2015 Guarantee may not work in a gone concern scenario may exist nonetheless, and cannot be *prima facie* dismissed as plainly unrealistic. Indeed, the very intrinsic logic of the resolution planning exercise is, in itself, based on hypothetical and remote, yet still possible scenarios. This does not prevent the Board to consider risks that are remote, provided that they are realistic on the basis of duly pondered scenarios. In fact, it requires the Board to prepare in advance for the materialisation of those risks. In such a technical assessment, however, the Board must also state the reasons (as will be further discussed below) properly justifying its findings and the reasonableness of the same and must not err in fact or in law in the interpretation of the validity and/or enforceability of such guarantee under applicable law.

77. In light of the above, the Appeal Panel is not persuaded by the argument of the Appellant that, by its systematic request for a guarantee and its inclusion of this element in the MREL Booklet, the Board has turned an exercise of discretion into a *de facto* requirement. The MREL Booklet clearly specifies that case-by-case deviations from the policy guidance are warranted and simply need to be adequately justified and communicated to the Executive Session.

127. The Appeal Panel is aware that its decision in case 3/2021 has been challenged by France before the General Court and that therefore the findings of the Appeal Panel on this issue are currently under the scrutiny of the General Court in case T-540/22. However, there has not been a ruling by the General Court yet, the parties in case T-540/22 are not the same as in this case, and neither party in this case has requested a stay of this ground of appeal to wait for a final judgment in case T-540/22. Thus, whereas, once a final judgment is rendered, the Appeal Panel shall fully conform to it, and will welcome and benefit from the guidance offered by the courts on a novel and important issue, in the present circumstances the Appeal Panel finds that there is no reason to stay of its own motion the first ground of appeal of the second sub-appeal in the present case.
128. Likewise, as long as the European *courts* have not otherwise ruled on this matter, the Appeal Panel finds that it must confirm and restate its previous findings in its decisions in cases 2/2021 and 3/2021 for the reasons discussed at length in those decisions. The fundamental points of law raised by the first ground of appeal of this second sub-appeal are the same as in

case 3/2021, and thus the findings in law of the Appeal Panel in that case do apply *mutatis mutandis* in this ground of appeal.

129. However, the Appellant argues that, unlike in cases 2/2021 and 3/2021, currently the requirement of a guarantee is no longer simply a matter of the SRB's margin of appreciation in the context of the individual assessment of each bank, but that it is now the SRB official normative approach as set forth in Annex II of the MREL Policy. Therefore, the Appellant claims that the decisions in cases 2/2021 and 3/2021 cannot be considered a valid precedent in this case. In the Appeal Panel's view, this conclusion cannot be drawn from the textual and contextual interpretation of Annex II of the MREL Policy, which expressly sets out "conditions mirror[ing] the ECB criteria for the assessment of whether there are no current or foreseen material, practical or legal impediments to the prompt transfer of own funds or repayment of liabilities", with the note of caution that those criteria have been "amended to capture transfers by the resolution entity/parent undertaking to the subsidiary, in particular when resolution action is taken".
130. Thus, as stated by the Board, Annex II identifies criteria guiding the assessment of whether a robust and enforceable intra-group loss transfer mechanism is in place. As also noted by the Board, under Annex II "a contractual guarantee is merely a possible means, among others, for the bank to demonstrate the existence of a robust loss-transfer mechanism capable of ensuring the prompt recapitalization of the subsidiary".
131. Most notably, Annex II specifies that:
- the SRB verifies that: (i) national insolvency or company laws do not materially affect the transfer of funds in a pre-FOLTF scenario or in a resolution scenario; (ii) the shareholding and legal structure of the group does not hamper the transferability of own funds or repayment of liabilities; (iii) the formal decision-making process regarding the transfer of own funds between the parent undertaking and subsidiary ensures prompt transfers; (iv) the by-laws of the parent/resolution entity and of the subsidiaries, any shareholder's agreement, or any other known agreements do not contain any provisions that may obstruct the transfer of own funds or repayment of liabilities by the parent undertaking; (v) there have been no previous serious management difficulties or corporate governance issues which might have a negative impact on the prompt transfer of own funds or the repayment of liabilities; (vi) no third parties are able to exercise control over or prevent the prompt transfer of own funds or repayment of liabilities; (vii) the granting of a waiver has been taken into account in the recovery plan (where possible, if not, it will be taken into account in the following recovery plan) and the group financial support agreement (if applicable); and (viii) the waiver has no negative effects on the implementation of the preferred resolution strategy.
132. It is certainly true that Annex II further specifies that to demonstrate the free transferability of funds in a resolution scenario, banks applying for a waiver are normally expected to submit, among the other documents listed in the Annex, also a guarantee. However, Annex II also notes that "where the specificities of an individual case so justify, the SRB may adopt a different approach to its assessment of compliance with Article 12h(1)(c) or 12h(2)(c) SRMR and that:

It is not necessary for the guarantee to take the form of a contractual arrangement, provided that other legal arrangements (for example the applicable legal or regulatory framework including relevant provisions of company law) achieve the same result. When the guarantee is not of a contractual nature, the bank has to demonstrate whether and how the different legal arrangement would achieve the same outcome. The reference to a “guarantee” is not intended to connote any sort of triparty arrangement giving rights to the creditors of the subsidiary against the parent or the resolution entity. The objective of the SRB is to verify the existence of a robust loss transfer arrangement that would ensure the ability of the subsidiary to compel support from the parent or the resolution entity when the subsidiary is at the PONV

133. This means, as the Board noted, that Annex II of the MREL Policy clarifies that not only legal arrangements other than a contractual guarantee can be used to achieve the same result (i.e., to demonstrate the existence of a robust and enforceable intra-group loss-transfer mechanism) but also that the SRB can take different approaches in individual cases. In the Appeal Panel’s view, this is still in line with its findings in cases 2/2021 and 3/2021, and refers for instance to paragraph 77 of its decision of 8 June 2022 where it rejected the argument that “by its systematic request for a guarantee and its inclusion of this element in the MREL Booklet, the Board ha[d] turned an exercise of discretion into a de facto requirement”, noting that, similarly to Annex II of the MREL Policy, “the MREL Booklet clearly specifies that case-by-case deviations from the policy guidance are warranted”.

134. It is also true that Annex II of the MREL Policy offers now more details, and thus more certainty, on the Board’s expectations concerning the legal content of the guarantees “normally expected” for the assessment of the “no impediment” condition pursuant to Article 12h(1)(c) SRMR:

The guarantee is expected to be enforceable, meaning that it is given in the form of a binding commitment by the resolution entity or parent undertaking to the subsidiary and can be called on by the subsidiary if it reaches a PONV, i.e. meets the conditions listed in Article 21(3) SRMR. The SRB expects to receive guarantees with a maturity that mirrors the one year maturity rule for MREL ensuring the permanence of loss-absorption for an assumed crisis period (i.e. the guarantee should not be capable of revocation by the guarantor with less than one year’s notice). The guarantee should not entitle the guarantor to object or delay the due prompt transfer of funds or reduce its exposure under the guarantee by virtue of any counterclaim or set-off rights it may have against the subsidiary. The guarantee should also be known by the creditors/shareholders of the guarantor with the ordinary diligence, for example in financial statements or annual reports.

135. Yet, the Appeal Panel considers that the mere publication of such criteria, which are meant to enhance transparency and safeguard the legitimate expectations of the banks, cannot be equated to a normative approach, because whether or not the SRB requires a guarantee to grant an iMREL waiver in the specific circumstances of each case remains subject to an individual assessment of the loss-transfer mechanism in place.

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

(ii) The second ground of the second sub-appeal

137. With the second ground of the second sub-appeal, the Appellant contends that the Board exercised normative powers, thereby exceeding its competences under Union law, by requiring a parent company to issue a guarantee for the commitments of its subsidiary in order to fulfil the requirements for an iMREL waiver under letter (c) of Article 12h(1) SRMR.
138. The Appeal Panel refers also on this ground to its findings as to the first ground of this sub-appeal and reiterates that, also after the adoption of Annex II of the MREL Policy, the Board still retains a margin of appreciation to subject or not its positive assessment that there are no practical or legal impediments for the transfer of funds to the requirement that the parent company issues a guarantee, and has still leeway to not require a guarantee of the parent company to grant an iMREL waiver, if it deems it unnecessary, in light of other loss-transfer mechanisms in place in the individual case. The Appeal Panel further refers to its finding in paragraph 135 that the mere publication of criteria for guarantees for reasons of transparency cannot be equated to the SRB establishing a normative approach as regards the application of Article 12h(1)(c) SRMR.
139. The second ground must therefore be dismissed.
- (iii) The third ground of the second sub-appeal.*
140. With the third ground of the second sub-appeal, the Appellant argues that the Board has committed manifest errors of fact and of assessment and has violated the principle of good administration because it has failed to examine carefully and impartially all the relevant elements of the situation and specifically the features of the ECB Guarantees issued by [.] in the context of the capital and liquidity waivers granted by the ECB to [.].
141. In particular, the Appellant contends that the SRB states in recital (14) of Section IIc of the Contested Joint Decision that the ECB Guarantee would “cease to be valid should the capital and liquidity waivers for which they have been issued cease to be applied”. The SRB then states that “the possibility that the supervisor in the future revokes those waivers cannot be excluded”. In the Appellant’s view, by following this type of reasoning, the Board has failed to take account of relevant elements of the ECB Guarantees, has committed a manifest error in fact and in reasoning, has failed to understand contract law, and has thereby breached the principle of good administration.
142. The Appellant further claims that the ECB Guarantee is a contract entered into between [.] and [.], which does not provide for any termination in case of withdrawal or cessation of the waivers for which it has been sought. If the waiver is revoked or ceases to apply for any reason, the ECB Guarantee will remain in place in accordance with its terms. It is therefore a manifest error by the Board to consider that the ECB Guarantee, i.e., a bilateral contract, can be terminated upon a unilateral act of one party ([.] deciding to no longer apply the waiver) or of a third party (the ECB deciding to revoke the waiver). The Appellant further notes that the Board appears to consider that, simply because the ECB Guarantee is designed to allow the

subsidiary to meet its solvency and liquidity requirements (i.e., implicitly, in a “going concern” situation), it will not function in a gone-concern situation, and that this reasoning “is spurious and confirms that the SRB either has not examined” the ECB Guarantee, or fails to understand the nature of such a guarantee.

143. The Appellant argues in this regard that “the fact that a contract (in this case the ECB Guarantee) was entered into for certain purposes, i.e., in order to obtain the benefit from the supervisory waiver, does not mean that it suddenly disappears if the context in which it was entered into changes. The fact that “the purposes of the guarantees no longer apply” does not mean that the guarantee cannot be called. Whether or not a guarantee can be called depends on the contents and terms of the guarantee contract, i.e., whether or not it provides for termination of the right of the beneficiary to call the guarantee in a gone-concern situation. In the present case, the ECB Guarantee does not provide for any right by [.] to terminate its guarantee commitments.
144. The Board argues in response that it has duly exercised its margin of appreciation in the assessment of the guarantees and that it fully complied with the principle of good administration. The Board contends that the ECB Guarantee was provided for a specific purpose, i.e., securing [.]’s prudential liquidity and capital requirements to obtain a waiver from the ECB as prudential supervisor and does not contain a blanket coverage to cover [.]’s iMREL target. In fact, in the Board’s view, there is nothing in the wording of the ECB Guarantees suggesting that they should apply or can be enforced in any other context but the one explicitly mentioned. Moreover, the ECB Guarantees were set up years before the Appellant considered to apply for an iMREL waiver. Hence, it is unlikely that [.] even considered that the Guarantees could – contrary to their express wording – also cover [.]’s MREL.
145. The Board argues therefore that, given the express purpose of the ECB Guarantee, it is only reasonable for the SRB to conclude that it would cease to be valid should the capital and liquidity waivers for which they have been given be revoked, as they would no longer serve any purpose. This, in the Board’s view, is supported by the wording of the ECB Guarantee which explicitly states that “[t]his declaration will end as soon as the ECB or the ACPR will state that prudential requirements apply to [.] on an individual basis.” The fact that the Appellants themselves contemplated the scenario of a revocation of the waivers demonstrates that it is a reasonable scenario the SRB was obliged to consider in the assessment of the suitability of the ECB Guarantees in the context of Article 12h(1)(c) SRMR.
146. The Board further argues that it did not commit any factual error in finding that there is no assurance that an actionable right of [.] based on the ECB Guarantees persist in case of a gone concern scenario. While the ECB Guarantee as such may still exist, its mere existence does not equal an actionable right of [.] obliging [.] to take action functionally equivalent

to the writing down or conversion of the iMREL that would have been issued by [.] and held by [.] in the absence of a waiver.

147. Finally, the Board also notes that, while the ECB Guarantee may not provide for any express termination rights for [.], it also does not contain any express provisions preventing [.] from unilaterally revoking them nor specifies a minimum period of time for its validity.
148. The Appeal Panel preliminarily refers to its decision of 8 June 2022 in case 3/2021 and its decision of 14 April 2023 in case 1/2022. In the latter decision, the Appeal Panel expressly drew the attention of the Board to the fact that any decision on an iMREL waiver should also “carefully address the substantive issue of the terms of the parent guarantee requested by the Board to ensure that there are no legal or factual impediments in the transfer of funds”. The Appeal Panel further noted that “in so doing, the Board is invited to also duly consider the clarifications given by the Appeal Panel, in its decision of 8 June 2022 in case 3/2021 at paragraphs 111-115:

111. (...) [I]f the Appellant had challenged also the substantive legality of the reasons stated by the Board in the Contested Decision, the Appeal Panel could have further addressed those reasons from a different perspective, i.e., whether the Contested Decision was taken on a sufficiently solid factual and legal basis and in particular if the finding that the guarantees would have not survived and remained fully actionable in a “gone concern” scenario was warranted under applicable law.

112. The Appeal Panel further recalls, in this connection, that, according to settled case-law, in the event of a challenge of the substantive legality, it is the task of the competent European authorities to establish that the reasons relied on against the person concerned are well founded, and not the task of that person to adduce evidence of the negative, that those reasons are not well founded (judgments of 18 July 2013, Commission and Others v Kadi, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 121; judgment of 5 November 2014, Mayaleh v Council, T-307/12 and T-408/13, EU:T:2014:926, paragraph 128 and the case-law cited; judgment 30 November 2016, Rotenberg v Council, T-720/14, EU:T:2016:689, paragraph 72).

113. In reviewing substantive legality, moreover, as the Appeal Panel has already acknowledged in its decision in case 2/2021, reference to national law in the context of the assessment of a guarantee (issued under national law) provided to meet the condition of Article 12h(c) SRMR does not transform nor incorporate that national law into EU law. Such national law, in the context of the review of the substantive legality, would be approximated to the factual sphere (and would be checked in the assessment on whether the reasons given had a solid factual basis).

114. However, as already noted, it is clear from the appeal that the Appellant has not raised a ground of appeal based on the substantive legality of the Contested Decision in fact and/or in law, e.g. it has never alleged a false or mistaken application of European or [.] law in the assessment of the enforceability of the guarantee in a gone concern scenario, which could also translate into an incorrect assessment by the Board that the condition of letter c) of Article 12h SRMR was not met (see, by way of analogy, Opinion of Advocate General Kokott of 27 January 2011, Edwin Co. Ltd, C-263/09 P, ECLI:EU:2011:C:30, paragraphs 55, 57 and 64). Thus, in the present appeal, the Appeal Panel cannot look at those issues and must limit its review to ascertain if the Board duly fulfilled its obligation to state reasons laid down in Article 296 TFEU as an essential procedural requirement.

115. The Appeal Panel further notes that [.]' position expressed in the context of the right to be heard phase of the administrative procedure on 24 January 2021 cannot be considered in this context. [.]' arguments were that the guarantees of 10 July 2015 provided for by [.] do not contain any restriction related to a failing or likely to fail determination of [.] or the entry into resolution of the [.] and Article 45f(3) BRRD requires a commitment towards competent authorities, and therefore it is not necessary to provide a guarantee which creates an enforceable right of creditors towards the guarantor. Those arguments also clearly pertain to the substantive legality of the Contested Decision and, lacking a plea in this regard from the Appellant, 540/22.

149. As noted above, even though the Appeal Panel decision in case 3/2021 is currently under scrutiny of the General Court in case T-540/22 France v SRB, for the reasons stated above there are no grounds for the Appeal Panel to stay this ground of appeal of its own motion to wait for a judgment of the General Court. Furthermore, in case 3/2021 the appellant did not contest the substantive legality of the Contested Joint Decision, unlike in the present case, meaning that this constitutes a new issue, not decided in case 3/2021.
150. In the specific circumstances of the instant case, the Board was required to make an assessment involving a question of interpretation and application of national law as to the enforceability of the ECB Guarantees, and a complex assessment on whether, based upon the ECB Guarantee and their enforceability, the Board could conclude that there were no factual or legal impediments to the transfer of funds in resolution. In light of this, the Appeal Panel finds that the Board has provided, in recital (14) of Section IIc of the Contested Joint Decision, a reasonable assessment with considerations of facts and of law also as to the interpretation of the scope and enforceability of the ECB Guarantee under applicable law, and the Appellant has failed to show, for the purposes at stake, the unreasonableness of the Board's assessment.
151. The Appellant and the Board disagree on the assessment of the ECB Guarantee under [.] law. The Appellant considers that the absence of any restriction as to the circumstances in which it may be called, and the parties' intent to render the Guarantee enforceable in the broadest range of scenarios mean that the guarantee was enforceable also in a gone-concern scenario. The Board considers that the ECB Guarantee were provided for a specific purpose, i.e., securing the subsidiary's prudential liquidity and capital requirements, and nothing in its language suggested that it could not be revoked, or that it could be used in a different scenario, and thus there was a risk that the Guarantee could be not enforceable in a gone concern scenario.
152. The key point to determine the reasonableness of each respective position is the language of Article 12h (1) (c) SRMR. This provides that the Board "may" waive the application of Article 12g to a subsidiary, if certain conditions are met, one of which is that, according to letter (c) "there is no current or foreseen material practical or legal impediment to the prompt transfer of funds or repayment of liabilities". The language of the provision implies a technical margin of appreciation (see to this effect, Appeal Panel decisions in case 2/2021, paragraph 91, and

in case 3/2021, paragraph 70) on the assessment of “current or foreseen”, “material”, “legal or practical impediments” to the “prompt” transfer of funds or repayment of liabilities.

153. Thus, the Board is not required to prove that a Guarantee “will” be revoked, or unenforceable. Only that there is a “current or foreseen”, “material”, “legal or practical” impediment to the “prompt” transfer of funds. If there is a reasonable prospect that the transfer of funds may encounter legal or practical obstacles to its effective and prompt transfer, then condition (c) is not fulfilled. Thus, in light of this the Board is required to raise reasonable objections about the potential obstacles for the transfer, and, if that happens, the bank is required to overcome the specific objections, proving that they are as such ungrounded.
154. In the present case, in Recital (14) of the decision the Board makes several statements. The statement that “such guarantees would cease to be valid should the capital and liquidity waivers for which they have been issued cease to be applied” might be challenged as legally inaccurate if it were to be understood as a prediction of what would happen. However, the rest of the Recital uses a different language, stating that “The possibility that the supervisor in future revokes those waivers cannot be excluded”, that “no evidence has been provided that the actionable right of Banking Union subsidiary 3 to a transfer of funds persists in case of default, failure or failing or likely to fail determination”, that its features “may render the guarantees not suitable to serve the purposes of the MREL waiver”, or that, even if the guarantees could be triggered in a crisis situation in some circumstances, in case a default takes place before the financial assistance has been provided “it could be argued that the purposes of the guarantees no longer apply”. Thus, the Board is not arguing that the guarantees would invariably be unenforceable in a gone concern scenario. Only that there is a risk of that happening, and that no evidence has been offered to dispel those doubts. This, in the Appeal Panel’s view, suffices to meet, in the specific circumstances of the instant case, the requirements under letter (c).
155. Conversely, the Appellant vehemently criticises the Board’s assessment (calling its reasoning “spurious”, in the notice of appeal at paragraph 144, and a “gross misunderstanding of and manifest errors as to, basic contract law” in the reply, at paragraph 98) but entirely bases its criticism on [.], made in its reply, at paragraphs. 101 and 102 and reiterated at the hearing. According to the Appellant, under the former, “contract provisions cannot be interpreted in a manner that contradicts their clear and precise terms”, and, according to the latter, “a contract must be interpreted in accordance with the parties’ intent”. However, in the Appeal Panel’s view, it is clear that the Board and the Appellant disagree precisely about the clarity of those terms, and about the parties’ intent, and the Appellant has failed to offer compelling evidence, including at the hearing where the matter was specifically raised by the Appeal Panel, about how these general provisions of contract law have been interpreted in practice by the courts, in the specific context of parent guarantees in gone concern scenarios, or in precedents that can be directly applicable by analogy to such context. If the Board’s reasoning is truly spurious, and a gross misunderstanding of basic contract law, it should not be too hard for the

Appellant, a sophisticated entity well-versed on matters of national law, to enlighten and duly clarify the matter with the Board by offering some concrete examples showing how basic [.] contract law works in practice, and dispelling any doubts about any impediment that could, legally or practically, prevent or delay the transfer of funds.

156. In this regard, the Appeal Panel further notes that the ECB Guarantees were originally issued in 2014 and 2015 for a specific and different purpose, i.e. securing [.] prudential liquidity and prudential requirements to obtain a waiver from the ECB. Therefore, the Appeal Panel considers plausible the Board's argument that, in accordance [.], in principle the ECB Guarantee could be interpreted in light of the parties' intention at the time of the issuance, and thus the use of the ECB Guarantees as a loss-transfer and fund-transfer mechanism in a different context and for a different purpose, i.e. in resolution and in case of default, failure or likely to fail of [.], could be challenged and become problematic, because it would in the end contradict the express purpose and intent of the parties at the time of issuance of the ECB Guarantee. Nor the confirmation letter sent by [.] to the SRB on [.], which states that the terms of the guarantee as well as the commitments of [.] under the contract, and the financing arrangements between [.] and [.], do not contain any restrictions related to a [FOLTF] determination of [.] or the entry into resolution of [.] provides sufficient assurance, because, on one hand, its wording only implies that the confirmation letter purports to clarify the original scope of the ECB Guarantee, yet without complementing the original, targeted commitment with a broader one, capable of including the clear enforceability of the ECB Guarantee also in the context of resolution and, on the other hand, because the fact that there are no restrictions related to FOLTF or entry resolution in documents issued respectively in [.] and [.] at a time when resolution planning was not yet operational, does not prove that those ECB Guarantees, clearly issued for a different purpose and in a different context, even if they "do not contain any restrictions related to a [FOLTF] determination of [.] or the entry into resolution of [.]" were intended to be also applicable in a completely different insolvency context.

157. The third ground must therefore be dismissed.

(iv) The fourth ground of the second sub-appeal.

158. With the fourth ground of the second sub-appeal the Appellant claims that the Board violated the principle of protection of legitimate expectations as it did not assess the waiver request on the basis of Annex II of the MREL Policy. More specifically, the Appellant argues that with its MREL Policy, in Annex II, the SRB had stated that it would assess the absence of impediment to the prompt transfer of funds on the basis of certain criteria, as already mentioned above, discussing the first ground of this second sub-appeal.

159. However, Section IIc of the Contested Joint Decision concerning [.] does not contain, in the Appellant's view, a single reference to any of the above items and, specifically, any explicit

assessment of: (i) [.] insolvency law; (ii) The shareholding structure of [.] and the Group (iii) The formal decision-making process regarding the transfer of funds; (iv) The by-laws of [.]; (v) Prior governance issues (vi) Influence of third parties (vii) Impact in the recovery plan (viii) Impact on PRS.

160. It follows, in the Appellant's view, that, while [.] is of the view that the above conditions are met, the SRB has entirely failed to apply its own stated policy when assessing whether or not the condition under Article 12h SRMR were met.
161. The Appellant further argues that Annex II of the MREL Policy refers to the fact that banks applying for a waiver are normally expected to submit certain documents, including (i) "*a description of the functioning of the financing arrangements to be used in case an institution faces financial difficulties or where a resolution action is taken; this should include information about how those arrangements ensure that funds are available at will and freely transferable*" and (ii) "*Evidence that the resolution entity or parent undertaking has guaranteed the obligations of the subsidiary for an amount that is equal to, at least, the amount of the hypothetical internal MREL requirement which would had been set if the subsidiary were not waived*". In the Appellant's view, the bank has provided these documents. In particular, the ECB Guarantee constitutes a financial arrangement requiring [.] to provide to [.] all the financial assistance it needs, without any limitation in case of failure of [.] and without capping it to an amount lower than the hypothetical MREL requirement.
162. However, the Appellant claims that the Board, instead of examining the waiver request on the basis of Annex II of the MREL Policy, based its refusal to grant the waiver on elements which – in addition to being based on errors of law and assessment – are not set out in Annex II or the MREL Policy.
163. The Board argues, on the contrary, that it followed the MREL Policy, which requires banks applying for a waiver, such as [.], to demonstrate the free transferability of funds in a resolution scenario. Therefore, under the MREL Policy (in particular p. 47-48), such banks should normally submit evidence that the resolution entity or parent undertaking has guaranteed the obligations of the subsidiary for an amount that is equal to, at least, the amount of the hypothetical iMREL which would have been set for the subsidiary if it were not waived. Annex II of the MREL Policy then further specifies that the guarantee is expected to be (i) enforceable, (ii) not capable of revocation by the guarantor with less than one year's notice, (iii), should not entitle the guarantor to object or delay the due prompt transfer of funds or reduce its exposure under the guarantee by virtue of any counterclaim or set-off rights it may have against the subsidiary, and (iv) should be known to the creditors/shareholders of the guarantor, e.g., published in financial statements.

164. The Board concludes that, in the case at stake, the Board duly assessed these criteria and rejected the ECB Guarantee provided by the Appellant based on the fact that it was not irrevocable and that there is no evidence that it would remain actionable in case of default or a FOLTF-scenario.
165. The Appeal Panel preliminarily refers to its decision of 14 April 2023 in case 1/2022 [.] where it held that the principle of legitimate expectation presupposes that precise, unconditional and consistent assurances, originating from authorised, reliable sources, have been given to the person concerned by the competent authorities of the European Union (judgment of 16 July 2016, Tadej Kotnik and Others, C-526/14, ECLI:EU:C:2016:570, or judgment of 6 October 2021, Ukrselhosprom Versobank v ECB, T-351/18 and T-584/18, ECLI:EU:T:2021:669 paragraphs 357-361). When such precise, unconditional and consistent assurances are received from an institution, body or agency of the European Union, the addressee can entertain well-founded expectations (judgments of 16 December 2010, Kahla Thüringen Porzellan v Commission, C-537/08 P, EU:C:2010:769, paragraph 63, and of 13 June 2013, HGA and Others v Commission, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 132).
166. European courts have also explicitly acknowledged the situation where institutions, bodies or agencies have chosen to adopt guidelines or similar instruments to guide their actions. For example, in judgment of 16 July 2016, Tadej Kotnik and Others, C-526/14, ECLI:EU:C:2016:570 where the relevant instrument was the Commission Banking Communication, and its requirement of burden-sharing, the Court held, in paragraphs 40-41 of its judgment that:
- (40) In accordance with settled case-law, in adopting such guidelines and announcing by publishing them that they will apply to the cases to which they relate, the Commission imposes a limit on the exercise of that discretion and cannot, as a general rule, depart from those guidelines, at the risk of being found to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (judgment of 8 March 2016, Greece v Commission, C-431/14 P, EU:C:2016:145, paragraphs 69 and 70 and the case-law cited).
- (41) That said, the Commission cannot waive, by the adoption of guidelines, the exercise of the discretion that Article 107(3)(b) TFEU confers on it (see, to that effect, judgment of 8 March 2016, Greece v Commission, C-431/14 P, EU:C:2016:145, paragraph 71). The adoption of a communication such as the Banking Communication does not therefore relieve the Commission of its obligation to examine the specific exceptional circumstances relied on by a Member State, in a particular case, for the purpose of requesting the direct application of Article 107(3)(b) TFEU, and to provide reasons for its refusal to grant such a request (judgment of 8 March 2016, Greece v Commission, C-431/14 P, EU:C:2016:145, paragraph 72).
167. Thus, in the Appeal Panel's view, and as stated in its decision in case 1/2022 at paragraph 216, 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 those policy, at the risk of being in breach of principles such as equal treatment or the protection of legitimate expectations.

This being said, the adoption of the MREL Policy did not relieve the Board of the obligation to examine specific circumstances, if this was required by the law. Indeed, as acknowledged by that case-law, the assurances should be “consistent with the applicable rules” for the expectations to be actionable, i.e., expectations may be created beyond what the law says, but not against it.

168. In the specific circumstances of the instant case, the Appeal Panel finds that the Board did not depart from the MREL Policy, because, as shown discussing the previous grounds of this sub-appeal, the Board, as it results also from recital (12) has “carefully assessed [the request for the waiver] and has considered that “at this stage and based on the documentation provided there [was] no sufficient comfort that, in the absence of prepositioned iMREL, losses suffered by [.] would be up-streamed to the resolution entity in a situation in which the subsidiary had reached the point of non-viability”. In other words, the Appeal Panel finds that the Board has examined the documentation provided by the Appellant in light of the MREL Policy and of its Annex II and that the fundamental divergence between [.] and the SRB has been centred around the suitability of the ECB Guarantee to serve as a credible loss-transfer and fund-transfer mechanism in resolution. As noted above, Annex II refers to the use of a guarantee issued by the resolution entity as the usual tool of choice, if there are no other loss-transfer mechanisms in place, to satisfy the no impediment condition set out in Article 12h(1)(c) SRMR. In other words, the Appeal Panel finds that the Board has assessed the absence of impediments to the prompt transfer of funds on the basis of the criteria set out in its MREL Policy, including Annex II, without violating the principle of legitimate expectation, yet came to the conclusion that the ECB Guarantee submitted by [.] was not enough, for the reasons stated by the Board in Section IIc of the Contested Joint Decision in recitals (14) and (15), to ensure such absence of impediments.

169. The fourth ground of this appeal must therefore be dismissed.

(v) The fifth ground of the second sub-appeal.

170. With the fifth ground of the second sub-appeal, the Appellant claims that the Board has breached its obligation to state reasons, first as a result of its creation of a new condition (a guarantee meeting certain specific conditions) not provided for by the SRMR and thus failing to assess whether there was in fact any impediment to the transfer of funds. Second, because the Board has put forward possible risks associated with certain events that may or not occur, on a purely hypothetical basis, failing to provide any actual facts supporting its position. Third, because the Board has not offered a clear explanation as to why the ECB Guarantee, which in the Appellant’s view remains valid in resolution, is not sufficient.

171. The Board contends that the Appellant with its first argument is alleging an error of assessment rather than a lack of reasoning. As to the Appellant’s second argument the Board notes that given that the specific circumstances of a potential gone concern scenario for any

bank are inherently difficult to predict, the SRB can only base its assessment on hypotheticals and refers on this also to the Appeal Panel decision in case 3/2021. Finally, and contrary to the Appellant's allegation, the Board argues that it has provided sufficient explanations for the Appellant to understand why the ECB Guarantees provided by the Appellant were insufficient for the purpose of Article 12h(1)(c) SRMR in Recitals 14 and 15 of Section IIc of the Contested Joint Decision.

172. The Appeal Panel refers to its decision of 8 June 2022, in case 3/2021, where it held that:

the margin of appreciation [of the Board] extends to the assessment of the contents of such guarantee, where a guarantee is considered necessary. In that context the Board needs to be reasonably satisfied that such a guarantee is functionally equivalent to the prepositioned iMREL in a gone concern scenario. Accordingly, this means that, in the instant case, the Board needed to be reasonably satisfied that there was not the risk that, at the point-of-non-viability of [.], [.] and its directors could hypothetically decide to pull out, and to not down-stream funds and absorb losses nor recapitalise the subsidiary but rather abandon it to insolvency or liquidation for legal or economic reasons. The Appeal Panel sides with the Appellant that such an event may be to some extent remote, because if there are capital and liquidity guarantees in place which are satisfactory to the ECB, as it happens in the case at hand, it is likely that capital shortages or liquidity constraints of the subsidiary would be timely addressed by [.] in a going concern scenario, implementing the guarantees granted in order to obtain the prudential waivers from capital and liquidity requirements. However, as the IRT noted on [.]: A. On one hand, the guarantee for the iMREL waiver needs to be actionable in a gone-concern scenario. Although, in some circumstances, it can be argued that the 2014 Guarantee or the 2015 Guarantee might be triggered in a crisis situation, thus avoiding the gone-concern by virtue of the aid provided by the guarantor, it is possible that the deterioration of the situation of the subsidiary leads to its default when the financial assistance by the guarantor has not been provided yet. In such case, it could be argued that the purposes of the guarantees no longer apply. It is therefore not assured that an actionable right of [.], where existing, persists in case of default, failure or FOLTF determination of [.], and/or whether in that case the creditors of [.] could invoke themselves an enforceable right against the guarantor, so that ultimately the guarantor would be relieved of its legal obligation when it is most needed, in a crisis or failure of [.]. B. On the other hand, the prompt transfer of own funds or repayment of liabilities by the parent undertaking needs to be ensured to the subsidiary in respect of which a determination of nonviability has been made in accordance with Article 21(3) SRMR. Such determination is linked to the FOLTF determination, which can occur in a situation in which the entity is still able to meet its obligations as they come due, i.e. in a situation in which the 2014 and 2015 Guarantees are not yet triggered, thus not usable to provide the required support”.

76. This shows that, although such risk may be to some extent remote, a risk that the 2014 Guarantee and the 2015 Guarantee may not work in a gone concern scenario may exist nonetheless, and cannot be prima facie dismissed as plainly unrealistic. Indeed, the very intrinsic logic of the resolution planning exercise is, in itself, based on hypothetical and remote, yet still possible scenarios. This does not prevent the Board to consider risks that are remote, provided that they are realistic on the basis of duly pondered scenarios. In fact, it requires the Board to prepare in advance for the materialisation of those risks. In such a technical assessment, however, the Board must also state the reasons (as will be further discussed below) properly justifying its findings and the reasonableness of the same and must not err in fact or in law in the interpretation of the validity and/or enforceability of such guarantee under applicable law.

173. In the specific circumstances of the instant case, for all the reasons stated above discussing the previous grounds of this sub-appeal, the Appeal Panel finds that the Appellant's contentions that the Board (i) has failed to assess whether there was in fact any impediment to the transfer of funds, (ii) has put forward possible risks associated with certain events that may or not occur, on a purely hypothetical basis, failing to provide any actual facts supporting its position and (iii) has not offered a clear explanation as to why the ECB Guarantee, which in the Appellant's view remains valid in resolution, is not sufficient are without merit.
174. As already noted above, the Board, in the Appeal Panel's view, has duly assessed to what extent the loss-transfer and fund-transfer mechanisms in place would ensure that no impediment to the transfer of funds in resolution and, by necessity, due to "the very intrinsic logic of the resolution planning exercise [which] is, in itself, based on hypothetical and remote, yet still possible scenarios" (as the Appeal Panel already noted in case 3/2021), the Board has considered risks that are remote, yet plausible and has stated the reasons supporting its finding that the ECB Guarantee was not enough to ensure the necessary level of certainty as to the enforceability of the transfer mechanism in a situation in which [.] has reached the point of non-viability, with considerations of facts and of law also as to the interpretation of the scope and enforceability of the ECB Guarantee under applicable law which the Appellant has not shown unreasonable, implausible or contrary to settled case-law of [.] courts.

(d) The third sub-appeal

175. With the third sub-appeal, the Appellant challenges Section IIf of the Contested Joint Decision by which the Board has set the amount of iMREL for [.] and, in connection with the setting of the recapitalisation amount, decided to impose a MCC in the amount of [.] EUR, stating that such a MCC was deemed necessary based on "the systemic importance and reliance on funding from wholesale markets of [.]".

(i) The first ground of appeal of the third sub-appeal

176. With the first ground of appeal of the third sub-appeal the Appellant argues that, in setting the MCC, the Board has violated Articles 12d(6) and 12d(8). More specifically, the Appellant contends that the Board has failed to conduct the required assessment on whether a downwards or upwards adjustment of the MCC was appropriate in light of the circumstances specific to the credit institution and there is no evidence that it has consulted the competent authorities, including the ECB. In addition, the Appellant claims, that the Board has failed to determine the reference period, not exceeding one year, for which a MCC is necessary and has selected two proxies, in order to assess the appropriateness of the MCC, which are in fact decorrelated from the factors that are relevant pursuant to Article 12d SRMR.
177. The Board responds that it complied with subparagraph 8 of Article 12d(6) SRMR. This provision, which is in essence identical to Article 12d(3), subparagraph 8 SRMR for resolution entities, provides that the SRB increases/decreases the default amount for the MCC (under

subparagraph 7 of Article 12d(6) SRMR) if, after consulting with the ECB, the SRB determines that it would be feasible and credible for a lower amount to be sufficient or that a higher amount is necessary to sustain market confidence. As mentioned in recital (13) of the relevant section of the Contested Joint Decision, the SRB consulted with the ECB on the reasoned proposals on MREL for the resolution entity and for the Banking Union subsidiaries (i.e., including [.]) on [.]. The ECB provided feedback with letter dated 4 November 2022. The ECB did not raise any comment or criticism to the attention of the SRB on the setting of the MCC for [.]. The Board argues that it applied the default amount of the MCC under subparagraph 7 of Article 12d(6) SRMR taking into account paragraph 29 of the MREL Policy, and, in accordance with subparagraph 8 of Article 12d(6) SRMR, it determined that (i) it was neither feasible nor credible for a lower amount to be sufficient, and that (ii) an higher amount would not have been necessary to sustain market confidence. The Board notes that that under the latter provision, any determination by the SRB to adjust the default amount of the MCC entails an exercise of discretion on its side.

178. The Appeal Panel preliminarily refers to [.] that the Board did not deviate from the reference amount under subparagraph 7 of Article 12d(6) SRMR cannot lead to infer that the Board omitted to make the assessments supporting a possible determination in accordance with subparagraph 8.
179. In the specific circumstances of the instant case, the Appeal Panel notes that in recital (7) of Section Iif of the Contested Joint Decision the Board acknowledges that the resolution authorities have increased the recapitalisation amount by EUR [.] having considered such amount necessary to sustain sufficient market confidence for a period not exceeding one year, “such amount being equal to the combined buffer requirement that is to apply after the application of the resolution tool”, less the greater of (a) the countercyclical capital buffer and (b) [.] basis points. Recital (7) further specifies that the application of the MCC in the determination of the MREL-TREA for [.] was deemed necessary “considering the systemic importance and reliance on funding from wholesale markets” of such credit institution.
180. The RTBH assessment memorandum (Section VII of the Contested Joint Decision) further specifies that as to its systemic relevance, [.] is designated as other systemically important institution (hereinafter O-SII) in Luxembourg and as to its funding, its reliance from wholesale markets “results in exceeding the wholesale funding indicator threshold considered appropriate by the SRB”.
181. With the first limb and the first aspect of the second limbs of this first ground the Appellant raises arguments with respect to the application of Article 12d(6)(6) and (8) SRMR on possible downward adjustments and on an alleged failure to determine the reference period that are in substance the same as those raised in connection with the application of the MCC to [.]. The Appeal Panel has dismissed those arguments in the first sub-appeal. It also

dismisses them in this sub-appeal for the same reasons, to which the Appeal Panel refers for the sake of brevity.

182. However, in a second aspect of the second limb of this first ground the Appellant also challenges the suitability of the criteria put forward by the Board to justify the application in respect to [.] of the MCC.
183. The Appeal Panel preliminarily refers to its decision of 14 April 2023 in case 1/2022 at paragraph 281, where it noted that:

Here the Appeal Panel must also consider that the Board chose to provide guidance in its MREL Policy on how it intended to apply the relatively broad framework set forth under Article 12d(6) SRMR. Paragraph 30 of said MREL Policy states that: “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”. As stated by the Appeal Panel in the fifth ground of the first sub-appeal, regarding the protection of legitimate expectations, based on case-law such as Kotnik, once it adopted its MREL Policy, the Board imposed a limit on the exercise of its discretion. Thus, the Board could not, as a general rule, depart from its MREL Policy, at the risk of being in breach of principles such as equal treatment or the protection of legitimate expectations.

184. The Appeal Panel further refers to paragraphs 287-289 of its decision of 14 April 2023 in case 1/2022 where it discussed the issue of complexity and systemic relevance. In this regard, the Board also referred to the link identified by the European Banking Authority between complexity and systemic importance in its Guidelines on criteria to assess O.SIIs, EBA/GL/2014/10, p. 3, p. 8 paragraph 6 and p. 12, annex I, table 1. Finally, the Appeal Panel refers to its decision in case 1/2022, 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.

185. The same conclusion can be reached in the present case. The Appellant relies on the concept of “wholesale funding” under Commission Implementing Regulation (EU) 2018/1624 of 23 October 2018 (hereinafter “**CR 1624**”), which 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 and dismisses the Board’s reliance on the definition of “wholesale funding” under Commission Delegated Regulation 2021/451 (hereinafter “**CR 451**”), which implements Regulation 575/2013 (CRR) and is “unrelated to the BRRD/SRMR framework”.

186. However, as stated in its decision in case 1/2022, at paragraph 292, the Appeal Panel considers 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.
187. The Appeal Panel further notes that in the instant case the Contested Joint Decision in its assessment of comment 1 in Section VII of the RTBH assessment memorandum expressly emphasizes the fact that (i) [.] is qualified as O-SIIs in Luxembourg and performs activities (also cross border) [.]“, (ii) is acting as [.]” (the Appeal Panel refers on this to paragraph 290 of the Appeal Panel’s decision of 14 April 2023 in case 1/2022) and (iii) according to the wholesale funding indicator included in the MREL Policy and based upon a definition of wholesale funding derived from Commission Implementing Regulation No 2021/451 [.] shows a ratio “significantly higher than the defined threshold”. This is, in the Appeal Panel’s view, in line with the findings at paragraphs 297-298 of its decision of 14 April 2023, where the Appeal Panel held that:

Crucially, in Section V (Right to be Heard Assessment Memorandum), the Board (i) expressly refers to the concept of “wholesale funding” of Commission Implementing Regulation No 2021/451, (ii) brings into the decision the methodology discussed during the interactions with the entity, [.], and (iii) states that the entity ([.]) has “a ratio significantly higher than the defined threshold”. This, in the Appeal Panel’s view, meets the burden that the Board had imposed on itself of providing clarity as to its interpretation and methodology related to “wholesale funding”. The Board’s choice of words in the MREL Policy may have been ambiguous, but the Board sought to dispel such ambiguity during its interactions with the Appellant, and to formally incorporate the result of those interactions in the justification of the decision.

188. The Appeal Panel further finds that it is not persuaded by the claim raised by the Appellant that the criteria adopted by the MREL Policy are “decorrelated” from Article 12d(6) SRMR because they are pre-resolution point in time figures which allegedly do not provide an indication whether after resolution a MCC is needed to sustain market confidence. In the Appeal Panel’s view, it is reasonable and plausible for the Board to foresee that an entity – whose expected post-resolution adjusted TREA is described in recital (6) of Section II of the Contested Joint Decision – may actually need higher recapitalisation capacity to sustain market confidence after the application of write down and conversion powers at its level, where its funding is highly dependent on non-retail counterparties and its operations are significantly cross-border.
189. The first ground of appeal must therefore be dismissed.
- (ii) *The second ground of appeal of the third sub-appeal*

190. With the second ground of appeal, the Appellant argues that the Board infringed the principle of legitimate expectations by failing to apply its own MREL Policy on the setting of the MCC for [.], specifically the criteria “complexity” and “reliance on wholesale funding”, in paragraph 30 of the MREL Policy. The Appellant also claims that allegedly the SRB established an “exceptional nature” of a MCC for non-resolution entities in its MREL Policy and failed to respect this principle when it applied a MCC for [.].
191. The Board contends that it acted in accordance with the MREL Policy and the principle of legitimate expectations. As to the “complexity” criterion, the Board acknowledges that it indeed applied the complexity criterion mentioned in paragraph 30 of the MREL Policy when it set the MCC for [.]. The Board considers that the “complexity” of a subsidiary/its operations can be determined taking into account a number of factors of the subsidiaries’ operations (such as, the business model, the nature of its operations and cross-border activity), which signal that the subsidiary may likely need higher recapitalisation capacity to sustain market confidence after the application of write down and conversion powers at the level of the concerned subsidiary, if its funding relies strongly on wholesale external investors (captured by the other criterion). The Board considers that the qualification of the subsidiary as O-SII as well as a key liquidity entity strongly indicates such “complexity” of the subsidiary. For this reason, the RTBH assessment memorandum for [.] contains a discussion of the O-SII status of [.] highlighting the operations of [.] across various business fields and functions, also taking into account the link identified by the European Banking Authority between complexity and O-SII status.
192. As to the “wholesale funding” criterion, the Board acknowledges that it applied it in the Contested Joint Decision and argues that it has done so as mentioned in the MREL Policy and thus fully complying with the principle of legitimate expectations. The Board notes that the Appellant does not dispute that the SRB applied the criterion “reliance on wholesale funding” as mentioned in the MREL Policy, but in essence claims that the SRB should have applied a different concept of “wholesale funding” and refers to CR 1624. However, this disagreement on the concept of wholesale funding as mentioned in the MREL Policy does not imply an infringement of legitimate expectations, since the SRB applied the wholesale funding criterion as mentioned in the MREL Policy.
193. The Appeal Panel refers to its findings discussing the first ground of this sub-appeal because for the same reasons already stated above the Appeal Panel finds that the Board has not violated the principle of legitimate expectation and has acted in conformity with its MREL Policy.
194. The second ground of appeal must therefore be dismissed.
- (iii) *The third ground of the third sub-appeal.*

195. With the third ground, the Appellant claims that the SRB has violated the principle of good administration and equal treatment and Article 12d(1) SRMR by setting the MCC for [.] on the basis of an allegedly inherently flawed, non-transparent and arbitrary methodology with regard to the wholesale funding criterion the SRB applied. More specifically, the Appellant argues that the SRB's refusal to explain and publicize the manner in which it calculates this "certain threshold", reserving itself the possibility to use a different threshold from year to year and across entities, constitutes a violation of the principle of good administration and equal treatment. Furthermore, this methodology, based on entities exceeding the "third quartile" is, in the Appellant's view, inherently flawed. The third quartile is not an absolute, objective, marker. It is a relative number, which reflects the wholesale funding ratio of "other non-resolution entities under the SRB remit". As a result, the decision to impose an MCC to a given entity depends not on characteristics of the entity itself, but on characteristics of all other non-resolution entities under the SRB remit. To illustrate this point, an entity could have exactly the same size, business model and funding model in years X and Y, but it could have an MCC imposed in year X and not year Y depending solely on the evolution of the wholesale funding ratios of all other non-resolution entities.
196. The Appellant concludes therefore that, by deciding to impose an MCC based on this methodology, the SRB fails, by construction, in both (1) its "duty [...] to examine carefully and impartially all the relevant aspects of the individual case, which is a violation of the principle of good administration and (2) its obligation under Article 12d(1) SRMR to calculate MREL on the basis of the "size, business model and funding model" of the relevant entity.
197. The Board contends, on the contrary, that Article 12d(6) SRMR on the setting of MCC confers discretion to the SRB, so that the SRB can in the MREL Policy specify how it intends to exercise this discretion. However, the SRB is not obliged to include details on the methodology applied for the wholesale funding criterion in the public MREL Policy. The MREL Policy is necessarily a summary document, which describes the principles of how the SRB intends to exercise its discretion conferred for the setting of an MCC for non-resolution entities. At the same time the SRB provides reasoning in the context of individual MREL decisions on the methodology applied and justifications for its assessment.
198. With regard to the statement of the Appellant that the SRB may amend the threshold it applies or the wholesale criterion from year to year, the Board notes first that it is – in line with technical discretion conferred to it in Article 12d(6) SRMR – in principle free to indeed amend the MREL Policy it intends to apply for the respective RPC. In particular, the SRB transparently informed [.] in the workshop on the [.] on [.]. In this workshop, the SRB disclosed the MREL Policy it intends to apply and highlighted any changes compared to the previous RPC. In particular with regard to the wholesale funding criterion, the SRB disclosed to [.] the threshold calculated on the basis of the data from banks under its remit year end 2021.

199. With regard to the claim that the methodology followed by the Board is by construction in violation with the principle of good administration and Article 12d(1) SRMR, the Board contends that the method applied is objective and non-discriminatory as (i) it is based on the bank's data reported to the Board on wholesale funding and thus relies on the most up to date data from all non-resolution entities on liquidity risks; and (ii) the Board's reliance on the results of a statistical distribution excludes any arbitrary decisions.
200. The Appeal Panel finds that the Board has transparently informed the Appellant on the criteria applicable to its determination of the need of a MCC for [.] and that this methodology relies on a statistical distribution and the most recent data of the relevant credit institution, and is thereby an objective and non-arbitrary methodology.
201. The Appeal Panel is also not persuaded by the Appellant's argument that the Board has failed "to examine carefully and impartially all the relevant aspects of the individual case" because it has used a methodology that relies on a statistical distribution, and classifies an entity taking into account not only the wholesale funding data of the relevant bank but also the wholesale funding data of all other banks, which may change from year to year.
202. The Appeal Panel acknowledges that the methodology adopted relies not only on the specific data pertaining to the wholesale funding of [.] but also on a ranking of such credit institution in terms of wholesale funding vis-à-vis all other credit institutions and its inclusion in a quartile which is deemed by the SRB significant of high reliance on wholesale funding. In the Appeal Panel's view, however, this methodology appears justified by the desire to ensure equal treatment. Furthermore, the Appellant has not shown why this criterion yields unreasonable results, nor has shown 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 under the Board's remit. The Appeal Panel refers in this regard to the case-law of the European court which shows that the Appeal Panel cannot set aside a Board's assessment if it is factually supported by the evidence, 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; 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).

(iv) the fourth and fifth grounds of the third sub-appeal

203. With the fourth and fifth grounds of the third sub-appeal, which can be considered together and which are in essence identical to the ground of appeal raised with regard to the setting of MREL for the resolution entity (first sub-appeal, second ground, third limb, and third ground), the Appellant claims that the SRB infringed Article 12d(8) SRMR and its general duty to state

reasons by failing to carry out a full assessment of relevant elements of the MREL calculation and to state reasons on the MREL calculation for [.].

204. The Board contends that both grounds have to be rejected for the same reasons, *mutatis mutandis*, already discussed by the Board in opposing the second and third grounds of the first sub-appeal. More specifically, the Board argues that it conducted a full assessment relevant for the determination of MREL-TREA and MREL-LRE for [.], including the adjustment made to pre-resolution values of the asset based denominators used in the calculation of the RCA, based on the resolution actions foreseen in the resolution plan and resulting change in post-resolution regulatory capital needs as mentioned in recitals (6) and (12) of the relevant section of the Contested Joint Decision concerning the MREL calculation for [.]. The adjusted amounts for MREL-TREA (EUR [.]) and MREL-LRE (EUR [.]) are mentioned as well as the respective reference amounts (Recital 2), so that the bank is informed which adjustments have been made. In addition, the SRB included in the decision information and explanations on the resolution plan and resolution strategy for [.] group, including [.].
205. With regard to the MCC for [.], the Board explained and reasoned the setting of the MCC in recital (7) of the relevant section of the Contested Joint Decision concerning the MREL calculation for [.] (Section II(f)), and Section VII (RTBH assessment memorandum for [.]). These explanations serve as a summary of communications with the Appellants in the [.] and [.] RPC during which the SRB provided information on the methodology applied.
206. The Appeal Panel has dismissed similar arguments of the Appellant raised in the first sub-appeal with regard to the setting of MREL for the resolution entity (first sub-appeal, second ground, third limb, and third ground) and for the same reasons, to which the Appeal Panel refers for the sake of brevity, finds that also the fourth and fifth grounds of this appeal must be dismissed.

On those grounds, the Appeal Panel hereby:

[.],

[.]

dismisses the appeal for the rest.

Helen Louri Dendrinou
[SIGNED]

Kaarlo Jännäri
[SIGNED]

Luis Silva Morais
Vice-Chair
[SIGNED]

Marco Lamandini
Rapporteur
[SIGNED]

Christopher Pleister
Chair
[SIGNED]

For the Secretariat of the Appeal Panel:

[.]