Single
Resolution Board
Appeal Panel

**16 October 2018**

case 8/18

# FINAL DECISION

**[•]**

**Appellant**

**v**

**the Single Resolution Board**

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

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**FINAL DECISION**

In Case 8/18,

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

[•], represented by [•] with address for service at [•] (hereinafter the "Appellant")

v

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

(together referred to as the "Parties"),

THE APPEAL PANEL,

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

makes the following final decision.

## Background of facts

1. This appeal relates to the SRB decision of 22 March 2018 (hereinafter, the "Appealed Decision") whereby the SRB determined the minimum requirements for own funds and eligible liabilities (hereinafter, the "MREL") for [•] at the consolidated level of [•] (hereinafter, the "Relevant Credit Institution").

2. The Appealed Decision was adopted in English and was notified to the Appellant [•] on 13 April 2018. The Appellant further notified the Appealed Decision to the Relevant Credit Institution on 23 May 2018.

3. The Appealed Decision was adopted by the SRB on ground of (a) Article 12 SRMR; (b) Article 45 BRRD, as transposed in [•] by the [National] Banking Law of [•] and (c) the Commission Delegated Regulation (EU) 2016/1450 of 23 May 2016 (hereinafter, "Commission DR 2016/1450").

4. The notice of appeal was submitted on 23 May 2018. The Appeal Panel appointed as Co-Rapporteurs in the present case the Members Professor Helen Louri-Dendrinou and Professor Marco Lamandini. On 25 June 2018 the SRB submitted its response to the appeal; on 13 July 2018 the Appellant submitted its reply to the SRB response; on 8 August 2018 the SRB submitted its rejoinder to the Appellant's reply.

5. On 27 June 2018, the Appeal Panel wrote to the parties to convene the hearing for their oral representations according to Article 85(7) SRMR and Article 18 of the Appeal Panel's Rules of

Procedure on 19 July 2019. Upon request and agreement with the parties, the hearing was convened on 10 September 2018.

6. On 10 September 2018 the hearing was held in Brussels at the SRB premises. Both parties appeared and made oral representations and answered the questions posed by the Appeal Panel. The arguments of the parties at the hearing are briefly summarised in the minutes of the hearing and, as clarified to the parties at the hearing and with their consent, the Secretariat, for internal use, ensured the recording of the hearing.

7. At the hearing the Appellant formally informed the Appeal Panel for all due purposes that its first ground of appeal was waived. The Appellant further clarified that the minutes of the Extended Executive Session of the Board held on 22 March 2018, which had previously not been circulated by the Board to the attendees of such meeting, and for which the Appellant had sought an order to disclose by the Appeal Panel, had been in the meantime exchanged by the Board with the Appellant and were now approved. The Appellant insisted that these minutes, being relevant for the determination of the present appeal, should be made available by the Board also to the Appeal Panel as evidence and, since they were not produced in the proceeding, insisted for an order of the Appeal Panel to this effect.

8. On 11 September 2018 the Appeal Panel, having considered the Appellant's disclosure request on ground of the clarifications given by the parties at the hearing, ordered the Board to deposit with the Appeal Panel Secretariat, under appropriate arrangements to ensure their confidentiality, two hard copies of the minutes of the Extended Executive Session of the Board held on 22 March 2018 by the close of 14 September 2018. The Board timely complied with the order on 14 September 2018.

9. On 18 September 2018 the Appeal Panel, having examined the documents deposited by the Board on 14 September 2018, notified the Parties that the Chair considered that the evidence was complete and thus that the appeal had been lodged for the purposes of Article 85(4) of Regulation 806/2014 and Article 20 of the Rules of Procedure.

**Main arguments of the parties**

10. The main arguments of the parties are briefly summarised below. However, to avoid unnecessary duplications, some arguments raised by the parties may be considered, to the extent necessary for the just determination of this appeal, where this decision sets out the findings of the Appeal Panel. It is moreover specified that the Appeal Panel considered every argument raised by the parties, irrespective of the fact that a specific mention to such argument is or is not expressly reflected in this decision.

Appellant

11. The Appellant challenges the Appealed Decision on 5 (five) grounds; the first, however, was waived by the Appellant at the hearing held on 10 September 2018.

12. With the first ground, the Appellant argued that, pursuant to Article 81(1) SRMR and Regulation No. 1/1958 the Appealed Decision, being sent and legally addressed to a [Nationality redacted] legal entity, should have been drafted by the SRB in accordance with the [National] linguistic legislation and not in the English language.

13. With the second ground, the Appellant argues that the Appealed Decision is in violation of Article 12(7)(c) SRMR and Article 45(6)(f) BRRD (as transposed in [●] by [●] of the Banking Law) and of Articles 5 and 7 of Commission DR 2016/1450 because in the Appealed Decision the SRB (a) did not consider the scenario of the resolution of the Relevant Credit Institution in case of a systemic crisis; (b) did not assess whether, in particular in that scenario of a systemic crisis, access to the Single Resolution Fund (hereinafter, the "SRF) might become necessary to resolve the Relevant Credit Institution; (c) did not assess the adverse effects on financial stability of a failure to apply the resolution scheme to the Relevant Credit Institution, and consequently (d) it did not assess whether the requirement of Article 44(5) BRRD might be relevant for the determination of the MREL.

14. With the third ground, the Appellant argues that the Appealed Decision violates Article 12(6) SRMR, Article 45(6)(c) BRRD (as transposed in [●] by [●] of the Banking Law) and Articles 3 and 7 of the Commission DR 2016/1450 because the Appealed Decision did not consider whether certain liabilities are reasonably likely to be excluded from bail-in even though the Resolution Plan of the Relevant Credit Institution (hereinafter, the "Resolution Plan") anticipated that certain classes of eligible liabilities might in fact be excluded from bail-in. More specifically, the Appellant refers to the exclusion of not-covered deposits from bail-in and the difficulties to bail-in instruments in the same category of such deposits given the "no-creditor-worse-off" (hereinafter, "NCWO") principle, as acknowledged in the Resolution Plan.

15. With the fourth ground, the Appellant argues that the Appealed Decision violates Article 12(8) SRMR and Article 45(7) BRRD (as transposed in [●] by [●] of the Banking Law) because it determines the MREL for the Relevant Credit Institution at the consolidated level but does not provide for an MREL determination on an individual basis.

16. With the fifth ground, the Appellant argues that a sufficiently subordinated MREL of 8% of total liabilities including own funds (hereinafter, "TLOF") is necessary to ensure the continuity of the critical functions of the Relevant Credit Institution. The Appellant argues therefore that, if Articles 3, 5 and 7 of the Commission DR 2016/1450 were applied, and the Board considered the possibility of ''tail-events'', in which an institution may experience losses which exceed its

own funds requirements, an 8% TLOF MREL should have been ensured with liabilities subordinated to operational deposits identified as critical functions.

Board

17. The Board argues that all the Appellant's pleas are without merit and that the MREL determination in the Appealed Decision complied with Article 12 SRMR, read in conjunction with Article 45 BRRD and the relevant provisions of Commission DR 2016/1450. The Board requests therefore that the Appellant's claims be dismissed.

18. As to the first ground the Board notes that the Plenary Session of the Board adopted on 28 June 2016 a Decision establishing the framework for the practical arrangements for the cooperation within the Single Resolution Mechanism between the Single Resolution Board and national resolution authorities (SRB/PS/2016/07, hereinafter, "CoFra Decision"). The CoFra Decision was endorsed by the Appellant and according to Article 4 of the CoFra Decision, the operational working language between the SRB and the national resolution authorities is English. In the Board's view, since the Appellant voted in favour of CoFra, it is not possible for the Appellant to maintain that the Appellant did not agree on the language arrangement contained herein (and this also to the effect of Article 81(4) SRMR). The Board further notes that – contrary to the Appellant's argument – the Relevant Credit Institution is not an addressee of the Appealed Decision, and for this reason the Board had no obligation to draft the Appealed Decision in the language chosen by the Relevant Credit Institution or, in absence of that choice, in a language that would be identified by interpreting the national linguistic legislation of the Member State in which the Relevant Credit Institution is established. In the Board's view, both, the reading of the applicable provisions of the SRMR and the DR 2016/1450 and their teleological interpretation make it clear that the Appellant, as competent national resolution authority, is the only addressee of the Appealed Decision. At the hearing the Board further noted that also the Relevant Credit Institution had previously agreed on the use of English.

19. As to the second ground, the Board submits that all regulatory requirements have been duly complied with by the Appealed Decision. Preliminarily the Board notes that the second ground in the appeal was amended with the Appellant's reply to include (a) a new plea that the Appealed Decision was not sufficiently reasoned and that the Board attempted with its response in the present case to add arguments and reasoning *ex post* to justify the Appealed Decision and (b) a new plea that the Resolution Plan of the Relevant Credit Institution does not specify how the resolution strategy could be executed in case of systemic crisis; as such, these alleged new pleas, in the Board's view, are inadmissible. In any event, in the Board's view, the Appellant's second ground, both in its original form and as amended, is unfounded, because the Appealed Decision duly implemented the requirements of Article 44(5)(a) BRRD, as also confirmed by paragraph 3.3.1. of the Resolution Plan, which illustrates that "the preferred resolution strategy neither includes an access to the SRF nor does prevent such access".

20. As to the third ground, the Board denies that possible discretionary exclusions from the application of the bail-in tool had not been duly assessed in the Appealed Decision in line with the criteria set out in Articles 27(5) and 12(6) SRMR. The Board notes that, contrary to the Appellant's argument, in its MREL determination it was considered that also not-preferred and

not-covered deposits were available although they did not meet the MREL eligibility criteria under Article 45(4) BRRD and that certain liabilities not counted in the MREL may still be subject to bail-in to reach the 8% threshold to get access to the SRF. The Board concludes that the Relevant Credit Institution, at the time of the MREL determination, possesses enough bail-in eligible instruments and that additional MREL-eligible liabilities are not needed. This means, in the Board's view, that the SRB has duly assessed the resolvability of the Relevant Credit Institution with the bail-in tool, considering also all possible inclusions and exclusions from bail-in.

21. As to the fourth ground, the Board acknowledges that the legal framework mandates the SRB to determine MREL on a consolidated basis and on an individual level, submitting however that the consolidated target is (and must be) calculated first, and that the individual target follows by necessity and must be separately assessed. The Board further argues that the data available for the Relevant Credit Institution's subsidiaries, collected through the Liability Data reports, were not sufficiently granular to allow the Board to perform an accurate calculation of the individual targets. Therefore, the Board concludes that only the consolidated MREL could be calculated at this stage. The Board further argues that the alleged violation of Article 12(8) SRMR and 45(7) BRRD would amount to an alleged failure to act by the Board and is therefore beyond the competence of the Appeal Panel under Article 85 SRMR.

22. As to the fifth ground, the Board reiterates the same arguments already raised in respect of the Appellant's second ground and submits that, for the same reasons, the Board has duly assessed the resolvability of the institution when adopting its MREL determination below the 8% TLOF. The SRB further notes that the Appellant's claim would require an economic re-assessment on the merits of the Appealed Decision which, in the Board's view, would be beyond the competence of the Appeal Panel and that the Appellant has failed to provide any plausible scenario justifying why the MREL target should be legally recalibrated at a level of 8% of TLOF in the case at hand (a recalibration that would imply a deviation of almost 50% of the target calculated by the Board in accordance with legal requirements).

**Findings of the Appeal Panel**

**On the first plea: alleged violation of Article 81 SRMR and of Articles 3 and 8 of Council Regulation No. 1 of 1958**

23. The Appeal Panel notes that, since the Appellant has formally waived at the hearing on 10 September 2018 its first plea, there remains no object to decide on this count and the appeal must be declared moot on the first ground of appeal.

**On the second plea: Alleged violation of Article 12(7)(c) SRMR, Article 45(6)(f) BRRD, and Articles 5 and 7 of Commission DR 2016/1450**

24. On the second plea, the Board states as a preliminary objection that the Appellant, during the present proceeding, has extended its plea beyond the original one and such an extension is inadmissible. The Appeal Panel notes, in this respect, that the Appellant has rather clarified its position with its reply in such terms that the Appeal Panel regards as already originally raised

with the appeal in support of the second ground. In the Appeal Panel's view, these further specifications and clarifications, contrary to the Board's objections, do not amount therefore to new and inadmissible pleas. They are rather arguments, in reply to the Board's response, which further elaborate and expand on the reasons why the Appellant raised the original second plea and which offer additional support, in the Appellant's view, to the original plea. Consequently, the Appeal Panel does not hold that the original plea was amended or widened by the Appellant's reply. In particular, in the Appeal Panel's view the Appellant already claimed in the first place that the Appealed Decision failed to justify why the Relevant Credit Institution would remain resolvable in a systemic crisis if the MREL determination is below 8% TLOF and contested therefore the credibility of the resolution strategy identified in the Resolution Plan, at least in the context of a systemic crisis. The second ground is thus admissible as presented in the appeal and further clarified and specified in the Appellant's reply.

25. In the Appeal Panel's view this plea is, however, unfounded. The Appeal Panel preliminarily notes that the Appellant's claim fails to consider that, in the case at hand, the adopted resolution strategy is the open bank bail-in, whereby at the point of non-viability (hereinafter, the "PONV") the Relevant Credit Institution is fully recapitalised and no critical functions are discontinued. This strategy, in principle, should ensure viability of the resolved Relevant Credit Institution in all circumstances, without the necessity to find at the PONV competitors or other investors willing to acquire, in whole or in part, assets and liabilities of the failing entity: something that, in the case at hand, is envisioned in the Resolution Plan only as a possible phase 2 after bail-in (as may be read at p. 32 of the Resolution Plan) and could prove particularly challenging to achieve in a systemic crisis. The open bank bail-in should therefore minimize the execution risks also in the context of a systemic crisis. As such, in the Appeal Panel's view, the bail-in tool is, in principle, a credible option also in a systemic crisis scenario, [●] for an entity as the Relevant Credit Institution [●]. In other words, the adoption of the open bank bail-in tool as the preferred resolution strategy offers, in the present case, a first indication that the Board, when adopting the Appealed Decision, must have considered, in light of the elements at stake, that the resolution could (and should) possibly be executed in the context either of an idiosyncratic crisis or of a systemic crisis and, in so doing, the Board considered the criteria set out in Article 12(7) SRMR and 45(6)(f) BRRD.

26. In turn, the Appeal Panel holds that the circumstance that the MREL determination, in the case at hand, was below 8% TLOF is no evidence of the contrary. On this, the Appellant fails to consider that the contribution of the SRF, as provided for in Article 44(4) and 44(5) BRRD can occur when:

> *"a contribution to loss absorption and recapitalisation equal to an amount of not less than 8% of the total liabilities, including own funds of the institution under resolution, measured at the time of resolution action in accordance with the valuation provided for in Article 36, has been made by the shareholders and the holders of other instruments of ownership, the holders of relevant capital instruments and other eligible liabilities through write down, conversion or otherwise".*

From the clear reading of this provision it results that the 8% contribution threshold, necessary to be reached at the PONV before the SRF can provide funds to the institution in resolution, can

be reached not only via loss absorption and recapitalisation through MREL instruments but also through other bail-in eligible liabilities, even if they do not qualify as MREL, provided these additional bail-in eligible liabilities are not excluded from bail-in. This means that, (a) even if the MREL target has been set, in the present case, at [below 8%] of TLOF and (b) even if some additional bail-in eligible liabilities have been excluded from the MREL calculation (herein included some which, in principle, could account for MREL, like not covered deposits with a residual maturity of more than one year as those described on page 52 of the Resolution Plan), this does not exclude, *per se*, that the Relevant Credit Institution holds sufficient liabilities, not excluded from bail-in, that, if necessary, could be used, together with MREL instruments, to reach the 8% TLOF threshold, should the recourse to the SRF become necessary at PONV in order to ensure the execution of the bail-in strategy.

27. This conclusion is confirmed, in the present case, by the Resolution Plan (specifically on pages 9, 29, 52 and 61) and by the analysis of the liabilities of the Relevant Credit Institution. This shows that, in the case at hand, in order to reach the 8% TLOF threshold, at the reference date adopted to the effect of the MREL determination, the bail-in should be applied also to a small portion of existing deposits, but only to those deposits which are not covered and not preferred and which amount to around [●] Million (they compare, at the reference date, with more [●] Billion not covered but preferred deposits and almost [●] Billion covered and preferred deposits). Moreover, according to a Board's statement at the hearing which was not specifically contested by the Appellant, only a small fraction of these not covered and not preferred deposits are SMEs' or individuals' deposits, making it highly unlikely that the bail-in of such a limited fraction of not covered and not preferred deposits may pose a threat to financial stability or raise undue issues of financial contagion.

28. If the option to access the SRF is not *per se* excluded by the MREL determination adopted by the Board with the Appealed Decision (and the Appellant does not actually evidence that existing not covered and not preferred deposits would not be available at PONV in a systemic crisis), it is hard to see how one could infer from the MREL determination that the Board did not consider, among all possible scenarios, also the most extreme one, and namely that the resolution could be implemented in the context of a systemic crisis. The Appeal Panel holds therefore that (a) the Resolution Plan and the Appealed Decision comprehend elements that reasonably evidence that the Board envisioned as the most likely scenario one where the bail-in could be successfully implemented without any need to reach the 8% TLOF threshold; (b) in any case, the liability structure of the Relevant Credit Institution shows that, even in a "tail event" where the bail-in could be successfully implemented only reaching the 8% TLOF threshold, the Board would likely have the possibility, at the time of adoption of the resolution decision at the PONV, to bail-in additional bail-in eligible liabilities exceeding MREL instruments to make possible the recourse to the SRF pursuant to Article 50(1) letter c) and d) SRMR.

29. The Appellant argues, however, that, in the Resolution Plan, the Board considered all deposits as critical functions whose continuity was to be ensured by the preferred resolution strategy and that, therefore, a bail-in tapping into deposits (even if only not covered and not preferred ones) would be intimately contradictory with the purported objectives of the Resolution Plan and its preferred resolution strategy. The Appeal Panel acknowledges that the reference without further qualifications to deposits in the Resolution Plan (for instance on page 16) as critical functions

was not an ideal formulation because it could give rise to ambiguities and such ambiguities were to some extent amplified by the exclusion from MREL of not covered and not preferred deposits with a maturity exceeding one year (see Resolution Plan, page 3 and page 26). The Appeal Panel holds, however, that - in accordance with patterns of reasonability - this reference in the Resolution Plan should be interpreted as likely referring only to covered and preferred deposits, on the assumption that, if continuity of such deposits is not ensured, due to their sheer amount, the national deposit guarantee scheme would not hold enough promptly available resources to provide the required coverage and would be forced to call for additional contributions by its members and in its way may trigger contagion (compare, to this effect, the explanations on page 24 of the Resolution Plan). The Appeal Panel further notes, nonetheless, that even assuming that also not covered but preferred deposits were considered critical functions in the Resolution Plan, no evidence was found in all the relevant materials of the case to show that not covered and not preferred deposits, although they are excluded from MREL, are to be considered critical functions. In the present case, MREL was calculated in such a way that, even in an extremely adverse scenario where the 8% TLOF had to be reached, all covered deposits (amounting to almost [●] Billion) and all not covered but preferred deposits (amounting to more than [●] Billion) would remain fully unscathed by the bail-in tool, whereby ensuring the continuity of more than 95% of all deposits of the Relevant Credit Institution. The Appeal Panel concludes therefore that the Appellant failed to show (a) why not covered and not preferred deposits amounting to roughly [●] Million (an extremely limited portion of which being attributable to SMEs and retail clients) should be considered critical functions, (b) why their bail-in could jeopardise the resolution objectives and (c) why their bail-in, in a systemic crisis, should be ruled out and not be possible in the event that the successful implementation of the bail-in would require to reach the 8% TLOF to protect financial stability. The Appeal Panel notes, in this respect that the Appellant did not provide, as the burden of proof would have required, any compelling evidence if at all feasible (also through inferences from past comparable experiences) that these deposits would not be available, also considering their maturity dates, for that purpose at the PONV.

30. The Appeal Panel further notes that the Appellant conceded, at the hearing, that it considers quite unlikely the materialisation of the resolution scenario, and even more unlikely a resolution of the Relevant Credit Institution amidst a systemic crisis where the 8% TLOF threshold should be reached to tap into the SRF. However, the Appellant warned that a suitable ammunition of MREL should be prepared in good times, when no systemic crisis is in sight and explained that, for this reason, it considers insufficient the MREL amount determined by the Appealed Decision, also noting that only a handful of banks within the Banking Union had their MREL determined below 8% TLOF. Whilst the Appeal Panel agrees, in principle, that a thoughtful MREL ammunition should be made in good times, conversely the Appeal Panel also notes (a) that in the calibration of MREL requirements the Board enjoys a margin of technical discretion because the MREL calibration implies, by its very nature, a technical assessment of all specific factual circumstances and a balancing of interests and (b) that it is not the Appeal Panel's role to second-guess the Board's technical assessment. The MREL determination may have far-reaching implications on the return on capital, the business model and the competitive level playing field for all involved institutions and cannot be considered in isolation from the actual and prospective responsiveness of capital markets to the issue of large amounts of MREL-securities. Their assessment falls within the technical remit of the Board and a margin of discretion is essential to grant to the Board the necessary flexibility in tailoring the MREL requirements to the individual circumstances of the

case, taking into account all the above mentioned aspects. It is the Appeal Panel's role to verify that, in all events, the Board's MREL determination fully satisfies all applicable legal requirements and upon close and thorough scrutiny by the Appeal Panel (which can also rely for that purpose on the economic expertise of some of its members given the nature of the matter at stake) the decision is not affected by violations of the applicable legal framework or by any manifest error.

31. The Appeal Panel holds that this margin of technical discretion granted to the Board encompasses also the identification of what is or are considered the most likely scenario(s) in which the resolution strategy is expected to be implemented, provided these are duly grounded. In the Appeal Panel's view, in the present case the Board determined, with the Appealed Decision, the MREL requirement for the Relevant Credit Institution considering quite unlikely a major systemic crisis in [●]. Nonetheless, the Board made also sure that, even in the unlikely scenario of a systemic crisis where the 8% TLOF threshold had to be reached to tap into the SRF, the Relevant Credit Institution was likely to have enough bail-in eligible liabilities to properly implement the Resolution Plan and to reach the 8% threshold, if necessary. The Appeal Panel refers, in this respect, to the judgements of 13 July 2018 of the General Court of the European Union, in cases T-733/16, Banque Postale v ECB EU:T:2018:477; T-745/16, BPCE v ECB, EU:T:2018:476, T-751/16, Confédéeration nationale du Crédit mutuel v ECB, EU:T:2018:475; T-757/16, Société Générale v ECB, EU:T:2018:473; T-758/16 Crédit agricole v ECB, EU:T:2018:472 and T-768/16, BNP Paribas v ECB, EU:T:2018:471). In these cases, the Court acknowledged that, in order to ensure the *effet utile* of those prudential rules which grant a margin of technical discretion to the competent authorities in assessing *ex ante* future scenarios relevant for the implementation of such rules, the authorities should make sure that they assume as a reference (only) credible scenarios (GCEU, judgements of 13 July 2018, case T-733/16, Banque Postale v ECB EU:T:2018:477, paragraphs 79 and 90-91).

32. In the case at hand, the Appeal Panel considers that the Board acted in conformity with these principles. A possible scenario that would in fact make the MREL determination adopted with the Appealed Decision insufficient, would be an increase of risk-weighted assets (hereinafter, "RWA") by 45% which uses as reference the 2014 EBA stress tests. The Board stressed, however, that this is quite an unlikely assumption in the current circumstances and that in the 2016 EBA stress tests the average increase of RWA in the adverse scenario was 10% and for the [●] [of the same nationality] participating G-SIIs was below 20%. Moreover, the Board noted that the Appellant has not provided any evidence why this risk would, in the Appellant's view, be plausible in the existing circumstances in general or in the specific case, also considering that there is factual evidence in the file that the [●] designated macro-prudential authority has applied the macro-prudential add-on on the RWA to all banks within its remit significantly below that level.

33. The Board has further produced at the hearing a document including a peer comparison of MREL and SREP 2016 Capital Requirement computed as a percentage of RWA evidencing that, in the present case, the MREL target determined by the Appealed Decision for the Relevant Credit Institution is twice its 2016 SREP 2016 Capital Requirement (26,1% v 13,3%), which is comparable to other peers. Furthermore, the MREL target of the Relevant Credit Institution (fixed at 26,1% of RWA) compares in a balanced way with the average [●] banks (26,2% of

RWA) and the average Banking Union banks (27,2% RWA), while an increase to 8% of TLOF would imply an increase of MREL to 42,7% of RWA, the highest percentage asked from a bank and hardly in accordance with the bank's size, business model and risk profile. Based upon the foregoing, the Appeal Panel considers that the Appellant failed to demonstrate that the Appealed Decision violates Article 12(7) SRMR and Article 45(6) BRRD and Commission DR 2016/1450 or is affected by manifest error.

34. The Appeal Panel further points out that the Board has appropriately shown that the MREL calibration in the present case is consistent with the O-SII buffer of the Relevant Credit Institution (0.75% of RWA) as set by the competent macro-prudential authority on the basis of the systemic risk posed by the Relevant Credit Institution and for which there are no indications by the same authority that it has to be increased. The Board further clarifies that in the calculation of the MREL requirement for the Relevant Credit Institution both the O-SII and other macro-prudential measures are automatically included. In this context, based upon the elements brought to its attention, the Appeal Panel holds that there are no reasons to reject the Board's argument that, in such circumstances, an increase of MREL to 8% of TLOF would most likely imply a disproportionate approach vis-à-vis peers active in the [same national] market but also in the Banking Union and could possibly have unintended consequences of serious distortion of the competitive level playing field.

35. Specifically, in this respect, the Appeal Panel finds that the approach of the Board was correct, in as much as it emphasised the role of the principle of proportionality, which represents a general principle of EU law. According to settled case law, Union competences must be exercised in a proportionate manner, so that the act adopted does not exceed what is necessary and appropriate for attaining its legitimate objectives (judgment of 8 June 2010, case C-58/08, The Queen, on application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform, EU:C:2010:321; compare also judgment of 22 January 2013, case C-283/11, Sky Osterreich, EU:C:2013:28 paragraph 50).

36. The principle of proportionality is embedded also in the BRRD, which establishes in its Article 1(1) that resolution and competent authorities have to take into account in enforcing the BRRD and in applying the available resolution tools factors like the nature of the business, the legal form, the risk profile, the size, the level of interconnectedness to other institutions or the broader financial system, the business scope and complexity. This is fully consistent with well-established case-law, which considers proportionality a comprehensive and guiding principle for competent authorities in their exercise of technical discretion in banking (compare, in the field of monetary policy, judgment of 16 June 2015, Case C-62/14, Peter Gauweiler and Others v Deutscher Bundestag EU:C:2015:400, paragraph 66 ff.; in the field of resolution judgment of 19 July 2016, Case C-526/14, Tadej Kotnik and others v Državni zbor Republike Slovenije EU:C:2016:570EU:C:2016:570, paragraphs 52-54; compare also, judgment of 20 September 2016, Joined Cases C-8/15 and C-10/15 Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB) EU:C:2016:701, paragraphs 56-58). Therefore, in the Appeal Panel's view, the approach of the Board was in this respect sound. The Appealed Decision duly followed, in its MREL determination, the principle of proportionality so as to (a) on the one hand, properly calibrate the MREL requirement on a case-by-case basis to ensure that the MREL target of the Relevant Credit Institution (fixed at 26,1% of RWA) compared in a

balanced way with the average [same nationality] banks (26,2% of RWA) and the average Banking Union banks (27,2% RWA); and (b) on the other hand, ensuring that it was thus avoided, as part of the same calibration process inherent to the proportionality reasoning, that an increase to 8% of TLOF could in turn imply an increase of MREL to 42,7% of RWA, which would represent the highest percentage to be asked from a bank in the Banking Union, when - in light of the Board's assessment that the Appeal Panel finds no reason to question here - nothing in the bank's size, business model and risk profile indicates that this would be proportionate to the actual risk.

37. To conclude on this ground, even if the Appeal Panel acknowledges that the Appealed Decision could be more extensively motivated and all technical reasons considered above could be more widely described in the Appealed Decision, the MREL calibration adopted by the Board in the present case, as results from the grounds of such decision duly evidenced by the Board in the context of this proceeding , does not violate, for all due purposes, the applicable legal framework nor does it show a manifest error. Even if the Board adopted for the Relevant Credit Institution an MREL target below 8% TLOF departing from its 8% benchmark (as the Board did only in very few cases so far), this was justified to tailor at a level sufficiently proportionate the MREL target in respect of the most credible scenario, knowing, as aforementioned, that, even in a "tail event", there were additional bail-in eligible liabilities of the Relevant Credit Institution which, albeit excluded from MREL, were nonetheless likely to be available to be bailed-in at PONV if necessary to reach the 8% threshold to tap into the SRF.

**On the third plea: Alleged violation of Article 12(6) SRMR, Article 45(6)(c) BRRD, and Articles 3 and 7 of Commission DR 2016/1450**

38. Article 12(6) SRMR provides that MREL:

> *"shall not exceed the amount of own funds and eligible liabilities sufficient to ensure that, if the bail-in were to be applied, the losses [...] could be absorbed and the CET1 ratio [...] could be restored to a level necessary to enable them to comply with the conditions for authorization and to continue to carry out the activities[...] and to sustain sufficient market confidence".*

A similar, albeit not identical provision, is set out in Article 45(6), letters (b) and (c) BRRD.

39. In the Appeal Panel's view the above provision grants a margin of discretion to the Board. The Board must indeed determine the amount of MREL which is deemed enough, in a credible scenario, to ensure that all losses are absorbed and CET1 is restored. The Board exercised such discretion in the Appealed Decision and the Appellant did not show, in the Appeal Panel's view, any violation of the applicable provisions nor any manifest error. As the Board clarified, the MREL target of [below 8%] of TLOF ensures, in the Board's assessment of the most likely scenario, the resolvability of the Relevant Credit Institution. However, if needed, it can be further supported by an additional buffer of MREL eligible instruments, thereby increasing the loss absorbing capacity of the Relevant Credit Institution to around 2,5 times its 2016 SREP Capital Requirement. If other available bail-in eligible instruments (excluding preferred deposits) are

added, then the total loss absorbing capacity reaches more than 4 times the 2016 SREP Capital Requirement.

40. The Appellant argues that the Appealed Decision did not consider whether some of the liabilities were in fact reasonably likely to be excluded from bail-in and refers again, specifically, to the exclusion of MREL eligible and non-eligible deposits and the difficulties to bail-in instruments in the same category of deposits given the NCWO principle. This shows, in the Appeal Panel's view, that also with respect to the third plea, the key issue is the treatment that, in the bail-in context envisaged by the Resolution Plan of the Relevant Credit Institution, would be reserved to not covered and not preferred deposits.

41. As already noted, the Appellant claims that, in case of systemic crisis, losses of the Relevant Credit Institution could exceed the MREL target and that, therefore, the bail-in tool could be successfully implemented only if the resolved entity could also tap into the SRF for additional funding. This, in the Appellant's view, would however require the bail-in of at least 8% of TLOF through MREL eligible instruments, that the Relevant Credit Institution is not mandated to hold by the Appealed Decision. The Board replies that, even if not covered but preferred deposits are excluded, not covered and not preferred deposits (although they were excluded from MREL) could nonetheless be bailed-in, in addition to MREL eligible instruments, without giving rise to special difficulties (incidentally, the Board further notes that currently the Relevant Credit Institution has 6,5% of TLOF of MREL eligible instruments).

42. In the Appeal Panel's view, although (a) the Board did not (and could not, under the applicable legal framework) calculate not covered and not preferred deposits with a maturity not exceeding one year as MREL and (b) the Board also decided to exclude from MREL not covered and not preferred deposits with a residual maturity of more than one year (Resolution Plan, p. 26) and, clearly enough, (c) the Board acted on the assumption that, when applying the bail-in tool in its most likely scenario(s), all deposits could be in principle excluded from bail-in because the MREL target would be enough to cover all losses and to recapitalise the Relevant Credit Institution, not covered and not preferred deposits still represent liabilities that, if necessary, the Board may nonetheless bail-in, in whole or in part (compare Article 27(14) SRMR), at the PONV. The Appeal Panel finds therefore that the inclusion or exclusion of such liabilities from bail-in would be determined by the Board at the PONV with the adoption of the resolution decision depending on the specific circumstances and if not covered and not preferred deposits were bailed-in, there is no evidence in the file that the NCWO principle would stand in the way of the bail-in of instruments in the same category. Moreover, as already noted above, if not covered and not preferred deposits are not excluded from bail-in, then the 8% threshold would likely be reached at PONV and the Relevant Credit Institution under resolution could tap into the SRF according to Article 76(1)(f) SRMR.

43. The Appeal Panel holds that, contrary to the Appellant's arguments, the Board, when adopting the Appealed Decision, considered that certain liabilities (and specifically not covered and not preferred deposits) are reasonably likely to remain unaffected by bail-in in the most likely scenario – the one envisioned by the Board in which existing MREL liabilities would be enough to implement successfully the bail-in tool. At the same time, the Appeal Panel holds that the Board also considered that, in an extreme scenario as the one envisioned by the Appellant

(deemed highly unlikely by the Board), where such MREL liabilities would not be enough, bail-in, at the PONV, of not covered and not preferred deposits would likely be enough to reach the 8% threshold so as to ensure viability of the Relevant Credit Institution through the intervention of the SRF.

44. Finally, in the Appeal Panel's view the Appellant failed to show that the Board, with the Appealed Decision, violated any applicable provision or manifestly erred in the exercise of the margin of discretion which is granted to it by omitting to impose a formal subordination requirement for the MREL liabilities determined with the Appealed Decision. The Appeal Panel notes, in this respect, that – although a legislative process is ongoing as to the possible introduction of a subordination requirement for MREL instruments through an amendment to the existing legal framework – the applicable legal framework in force at the time of the adoption of the Appealed Decision (and still in force) does not require the imposition of such subordination requirement. Moreover, as rightly pointed out also by the Board, the MREL target for the Relevant Credit Institution, in the present case, is fully satisfied with own funds instruments, which are subordinated by legal design.

**On the fourth plea: Alleged violation of Article 12(8) SRMR, Article 45(7) BRRD**

45. The Appellant argues that the Appealed Decision violates Article 12(8) SRMR and Article 45(7) BRRD (as transposed in [●] by [●] of the Banking Law) because it determines the MREL for the Relevant Credit Institution at the consolidated level but does not provide for an MREL determination on an individual basis.

46. The Appeal Panel notes preliminary, in this respect, that, even assuming merely for the sake of the argument that under Article 12(8) SRMR, the MREL determination should be made, at the same time, at the consolidated and at the individual level, conversely no provision whatsoever of the applicable legal framework supports the view that the determination at the consolidated level is void or in violation of Article 12(8) if it is not accompanied by a simultaneous MREL determination at the individual level.

47. This indicates, in the Appeal Panel's view, that the lack of an MREL determination at the individual level could only amount to an alleged failure to act by the Board. Accordingly, the Appeal Panel has no competence to hear this plea. That is so because under Article 85(8) SRMR the Appeal Panel can hear appeals only on decisions which have been taken by the Board and has therefore no competence on a failure to act. This is confirmed by the clear reading of Article 85(8) SRMR which provides that: *''The Appeal Panel may confirm the decision taken by the*

*Board or remit the case to the latter" […]''*, in this way clarifying that the Appeal Panel's review postulates the existence of an appealed decision.

48. The fourth ground, to the extent that it challenges the lack of adoption by the Board of a simultaneous decision at the individual level, is thus inadmissible.

**On the fifth plea: A sufficiently subordinated MREL of 8% liabilities including own funds necessary to ensure the continuity of the critical functions of the Relevant Credit Institution**

49. With the fifth ground, the Appellant argues that a sufficiently subordinated MREL of 8% of total liabilities including own funds is necessary to ensure the continuity of the critical functions of the Relevant Credit Institution, especially in the context of a systemic crisis. Based upon the foregoing and for all the reasons already extensively discussed above, specifically discussing the second plea, also the fifth plea must be rejected.

50. As already noted, in the Appeal Panel's view the Board enjoys a margin of technical discretion in the calibration of MREL requirements. The Appeal Panel holds that this margin of technical discretion encompasses also the identification of the most likely scenarios in which the resolution strategy is expected to be implemented.

51. In the present case, the MREL target was set below 8% TLOF following an assessment by the Board that in the most plausible scenario(s) a MREL of [below 8%] TLOF was enough to cover losses and recapitalise the Relevant Credit Institution in accordance with the resolution strategy envisioned in the Resolution Plan and the Appellant failed to produce convincing evidence of the contrary. As already noted, although it is acknowledged that the Appellant's proposed scenario of an abrupt increase of RWA by 45% mirrors the EBA stress test in 2014, in the 2016 EBA stress tests the average increase of the RWA under the adverse scenario was 10% and for the two participating [same nationality as the Appellant] banks was below 20% (respectively [•] and [•]).

52. Moreover, the Appellant failed to consider that the contribution to the implementation of the resolution strategy by the SRF, as provided for in Article 44(4) and 44(5) BRRD, can occur when:

> *"a contribution to loss absorption and recapitalisation equal to an amount of not less than 8% of the total liabilities, including own funds of the institution under resolution, measured at the time of resolution action in accordance with the valuation provided for in Article 36, has been made by the shareholders and the holders of other instruments of ownership, the holders of relevant capital instruments and other eligible liabilities through write down, conversion or otherwise".*

As already discussed above, this means that also other bail-in eligible liabilities (like not covered and not preferred deposits), albeit they were not included in the MREL calculation, may still be subject to bail-in in resolution. The Board showed for all due purposes and in the context of the elements produced before the Appeal Panel, that the Relevant Credit Institution held, at the time

of the MREL determination, enough not covered and not preferred deposits that, if need be, could likely be bailed-in in order to reach the 8% TLOF.

53. This confirms that, as noted above, the circumstance that the MREL target has been set, in the present case, at [below 8%] of TLOF does not exclude, *per se*, that the Relevant Credit Institution holds sufficient non excluded (from bail-in) liabilities that, if necessary, could be used, together with MREL instruments, to likely reach the 8% TLOF threshold, should the recourse to the SRF for recapitalisation be needed in order to ensure the unimpaired execution of the bail-in strategy.

54. But, as noted above, if the option to access the SRF is not per se excluded by the MREL determination adopted by the Appealed Decision, with the reach and scope ultimately evidenced by the Board, it is hard to see how one could infer from the MREL determination that the Appealed Decision did not consider at all, among the possible scenarios, also the most extreme and negative one, and namely resolution in the context of a systemic crisis. The reality is that with the Appealed Decision the Board showed that it considered this scenario as currently unlikely. The Appeal Panel incidentally notes that the MREL determination is, by its very nature, a dynamic exercise and this allows the Board to adjust its MREL determination over time to all relevant changes in factual assumptions, if any (compare also the Appealed Decision, paragraph 8). Therefore, in the present case, the MREL determination was calculated at [below 8%] TLOF with reference to the most credible scenario. In any case, even assuming that a "tail event" could materialise (e.g., a very disruptive event like the ones referred to by the Appellant mentioning Allied Irish Bank, Bankia and Banco Popular although these cases in the Appeal Panel's view and in light of the elements brought to its attention in the present case do not show actual pertinence with the Relevant Credit Institution) and even if the Board adopted for the Relevant Credit Institution a MREL target below 8% TLOF departing from its 8% benchmark (as the Board did only in very few cases so far), the Board ultimately managed to evidence that there are additional bail-in eligible liabilities of the Relevant Credit Institution which, albeit excluded from MREL, could likely be bailed-in at PONV if necessary to reach the 8% threshold to tap into the SRF. The Appellant's claim that a sufficiently subordinated MREL of 8% TLOF is necessary is therefore, in the Appeal Panel's view, not sufficiently proved.

On those grounds, the Appeal Panel hereby:

**(1) Declares the appeal moot as to the first plea and inadmissible as to the forth plea;**

**(2) Rejects the appeal as to all remaining pleas.**

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| Kaarlo Jännäri | Luis Silva Morais<br>Vice-Chair | Helen Louri-Dendrinou<br>Co-Rapporteur |
| Marco Lamandini<br>Co-Rapporteur | Christopher Pleister<br>Chair | |