



**8 June 2022**

Case 3/2021

# **FINAL DECISION**

[ . ],

**Appellant,**

**v**

**the Single Resolution Board**

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

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## FINAL DECISION

In Case 3/2021,

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<sup>1</sup> (the “SRMR”),

[ . ], with headquarters in [ . ], represented by [ . ] (hereinafter the “Appellant”)

v

**the Single Resolution Board** (hereinafter the “Board” or “SRB”)

(together referred to as the “Parties”),

### THE APPEAL PANEL,

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

makes the following final decision:

#### **Background of facts**

1. This appeal relates to the SRB decision of 4 November 2021 - SRB/EES/2021/44 (hereinafter the “Contested Decision”) determining the minimum requirement for own funds and eligible liabilities for [ . ] (hereinafter [ . ]), [ . ] (hereinafter [ . ]), [ . ] (hereinafter [ . ]), [ . ], [ . ] and [ . ]
2. On [ . ], after having been unsuccessful (for other reasons than those discussed in the instant case) with a previous request during the 2019 resolution planning cycle, [ . ] filed with the SRB a new waiver application from the internal minimum requirement of eligible liabilities (hereinafter “iMREL”) for its subsidiaries [ . ] and [ . ] in the 2020 resolution planning cycle pursuant to Article 12h(1) SRMR.
3. Article 12h(1) of the SRMR as amended by Regulation 877/2019 reads as follows:

#### Article 12h

Waiver of the minimum requirement for own funds and eligible liabilities applied to entities that are not themselves resolution entities

1. The Board may waive the application of Article 12g in respect of a subsidiary of a resolution entity established in a participating Member State where:
  - (a) both the subsidiary and the resolution entity are established in the same participating Member State and are part of the same resolution group;

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<sup>1</sup> OJ L 225, 30.7.2014, p.1.

(b) the resolution entity complies with the requirement referred to in Article 12f;

(c) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary in respect of which a determination has been made in accordance with Article 21(3), in particular where resolution action is taken in respect of the resolution entity.

4. As to the fulfilment of the condition set out in Article 12h(1)(c) SRMR, [ . ] referred to its commitments made in the context of (i) the waiver application from the liquidity requirement on an individual basis pursuant to Article 8 of Regulation (EU) No. 575/2013 (hereinafter “CRR”), and namely exchanges of letters dated [ . ] and [ . ] (hereinafter the “2014 Guarantee”) and (ii) the waiver application from the capital requirements on an individual basis pursuant to Article 7(1) CRR, namely a commitment by the resolution entity dated [ . ] (hereinafter the “2015 Guarantee”).

5. Article 7(1) CRR reads as follows:

1. Competent authorities may waive the application of Article 6(1) to any subsidiary of an institution, where both the subsidiary and the institution are subject to authorisation and supervision by the Member State concerned, and the subsidiary is included in the supervision on a consolidated basis of the institution which is the parent undertaking, and all of the following conditions are satisfied, in order to ensure that own funds are distributed adequately between the parent undertaking and the subsidiary:

(a) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by its parent undertaking;

(b) either the parent undertaking satisfies the competent authority regarding the prudent management of the subsidiary and has declared, with the permission of the competent authority, that it guarantees the commitments entered into by the subsidiary, or the risks in the subsidiary are of negligible interest;

(c) the risk evaluation, measurement and control procedures of the parent undertaking cover the subsidiary;

(d) the parent undertaking holds more than 50 % of the voting rights attached to shares in the capital of the subsidiary or has the right to appoint or remove a majority of the members of the management body of the subsidiary.

6. Article 8(1) CRR reads as follows:

1. The competent authorities may waive in full or in part the application of Part Six to an institution and to all or some of its subsidiaries in the Union and supervise them as a single liquidity sub-group so long as they fulfil all of the following conditions:

(a) the parent institution on a consolidated basis or a subsidiary institution on a sub-consolidated basis complies with the obligations laid down in Part Six;

(b) the parent institution on a consolidated basis or the subsidiary institution on a sub-consolidated basis monitors and has oversight at all times over the liquidity positions of all institutions within the group or sub-group, that are subject to the waiver, monitors and has oversight at all times over the

funding positions of all institutions within the group or sub-group where the net stable funding ratio (NSFR) requirement set out in Title IV of Part Six is waived, and ensures a sufficient level of liquidity, and of stable funding where the NSFR requirement set out in Title IV of Part Six is waived, for all of those institutions;

(c) the institutions have entered into contracts that, to the satisfaction of the competent authorities, provide for the free movement of funds between them to enable them to meet their individual and joint obligations as they become due;

(d) there is no current or foreseen material practical or legal impediment to the fulfilment of the contracts referred to in (c).

7. On [ . ], the SRB emailed the Appellant expressing some concerns regarding the new iMREL waiver application of [ . ] and namely about the sufficiency of the liquidity and capital commitments provided through the 2014 Guarantee and the 2015 Guarantee respectively by [ . ]. The SRB sought the Appellant's views on those concerns.
8. On [ . ], the Appellant addressed to the SRB a provisional memorandum, still subject to management approval, prepared internally. Such memorandum shared the SRB's concerns and suggested that the SRB should revert to [ . ] to ask for a legal analysis of an external legal counsel to better clarify all those points of concern.
9. On the same day, [ . ], the SRB resolution team (hereinafter "IRT") concluded its assessment of the two waiver applications. The IRT's opinion was that:
  - a) a waiver could be granted to [ . ], as satisfactory evidence was provided that [ . ] guaranteed the obligations of the subsidiary, because (i) [ . ] is incorporated as a [ . ] 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;
  - b) a waiver could not be granted to [ . ], because there were impediments to the prompt transfer of own funds and repayment of liabilities from the parent entity to the subsidiary. The reasons supporting such conclusion were stated in the IRT's opinion as follows:
 

[...]
10. On [ . ], the Head of the Legal Department of the Appellant clarified that the provisional memorandum sent by the Appellant to the SRB on [ . ] did not express the formal position of the Appellant, which was, instead, that the 2014 Guarantee and the 2015 Guarantee provided by [ . ] (also) to meet the requirement under Article 12h(3) SRMR were "robust enough".
11. On [ . ], the IRT sent an email to [ . ] concerning, among others, also the issue of the iMREL waiver for [ . ]. The relevant part of such email was as follows:

[...]

12. On [ . ], the Board, in its Extended Executive Session, endorsed, on a preliminary basis, also with the vote in favour of the Appellant, the draft joint decision on MREL for [ . ]. In this session the Board expressed its intention to grant a waiver from iMREL to [ . ], but not to [ . ]. The Board considered, in this respect, that at that stage of the procedure and based upon the documentation provided by [ . ] there was “no sufficient comfort that, in absence of prepositioned MREL, there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity/parent to [ . ]”. The Board further noted that the guarantees provided by the resolution entity (namely the 2014 Guarantee and the 2015 Guarantee) were “for the specific purposes of the capital and liquidity waivers to which they are instrumental and are not suitable to ensure absence of impediments to the transfer of own funds”.
13. On [ . ], the SRB informed [ . ] of the preliminary decision of the Board and invited [ . ] to submit its observations in the context of its right to be heard in the course of the same proceeding.
14. On [ . ], [ . ] submitted its observations and submitted in particular that: (i) a guarantee provided for by the parent company for the purposes of the waivers of capital and liquidity requirements under CRR is valid also for the purposes of iMREL waiver under the SRMR and the SRB should therefore not have higher demands than the ECB, (ii) 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 (iii) 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. In addition, [ . ] also noted that the [ . ] risk management framework entailed that [ . ] would take remediation actions such as recapitalisation before [ . ] would enter into resolution.
15. On [ . ], the IRT addressed a communication to [ . ] providing a list of key features of the guarantee that the IRT deemed relevant to further assess the waiver application during the 2020 resolution planning cycle and reiterated that it considered that the guarantees provided to that date by [ . ] (and namely the 2014 Guarantee and the 2015 Guarantee) did not reach the necessary level of comfort for resolution purposes.
16. On [ . ], [ . ] addressed a further letter to the SRB.
17. The Executive Session of the Board for the 2020 resolution planning cycle took place from [ . ] 2021 by means of written procedure. The Board took note of the outcome of the joint decision process within the resolution college for [ . ] (a college which includes, in addition to the SRB, also the [ . ]), but since BRRD2 was not yet transposed in [ . ] at the time the SRB noted that it could not adopt a final decision for the 2020 resolution planning cycle.
18. Nonetheless, on [ . ], the SRB addressed a letter to [ . ] explaining the expected MREL determination for the group and an assessment of the comments received during the right to

be heard stage of the proceeding. Regarding the negative assessment for the waiver request for [ . ], the Board reiterated that “the existing commitments – which have been duly examined – do not provide sufficient comfort that, in absence of prepositioned internal MREL, there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the parent to the subsidiary”.

19. On [ . ], the Board of the SRB, in its Extended Executive Session, finally agreed to the joint decision on the group resolution plan and the resolvability assessment and the joint decision on MREL determination for the group and the relevant group entities; following the colleges’ joint decision, the SRB adopted the Contested Decision, which instructs the Appellant to implement the MREL determination.
20. On [ . ], the Contested Decision was formally communicated to the Appellant, which on [ . ] implemented in turn the Contested Decision insofar as it concerned [ . ] entities by means of an instruction addressed to the group of [ . ], including [ . ].
21. The notice of appeal was submitted by the Appellant to the Appeal Panel on 20 December 2021. The Chair of the Appeal Panel appointed as Co-Rapporteurs the Members Professor Helen Louri-Dendrinou and Professor Marco Lamandini and the appeal was notified by the Secretariat of the Appeal Panel to the Board on 21 December 2021.
22. On 17 January 2022, the Board requested a stay of the proceedings until the Appeal Panel had rendered its decision in case 2/2021, noting that both cases discussed parallel legal questions (the appeal grounds being the same) and involved the same parties (albeit not the same credit institutions).
23. On 21 January 2022, the Appeal Panel granted the requested stay of the proceedings with procedural order no. 1 as follows:

*The Appeal Panel has carefully considered the request for a stay of the proceeding in case 3/2021 submitted by the Board. Also in light of the position communicated by the Appellant on such request, the Appeal Panel, considering that both cases raise parallel legal issues, has decided to stay case 3/2021 until the adoption and communication to the parties of its final decision in case 2/2021. The Appeal Panel informs the parties that the final decision in case 2/2021 can be reasonably expected before the end of January 2022 and that, once communicated to the parties, both parties shall be asked to inform the Appeal Panel within one week of the possible implications that the parties may draw from the decision in case 2/2021, if any, for case 3/2021, in line with a settled practise followed in similar cases by the European courts.*
24. On 28 January 2022, the Appeal Panel sent to the parties its final decision in case 2/2021 and asked both parties to comment within one week on the implications, if any, the Parties would like to draw from such decision in case 2/2021 for the pending case 3/2021.
25. On 4 February 2022, the Appellant submitted its comments on the possible implications of the decision in case 2/2021 for the instant case. On 3 February 2022, the Board asked for a postponement of the deadline for comments, which was granted by the Appeal Panel until 18

February 2022; on that date, the Board submitted its comments on the implications that the Board drew from the Appeal Panel's decision in case 2/2021 for the instant case.

26. On 18 February 2022, the Appeal Panel notified the parties that, having considered the submissions of both parties on the possible implications of the decision rendered in case 2/2021 in the pending case, the appeal was resumed; the Appeal Panel granted to the Board the term of two weeks to file its response on the merit of the case. On 4 March 2022, the Board timely submitted its response to the appeal.
27. On 11 March, the Appellant asked a postponement of the term of two weeks to reply to the Board's response, which was granted by the Appeal Panel until 5 April 2022.
28. On 4 April 2022, the Appellant timely submitted its reply to the Board's response.
29. On 6 April 2022, the Chair of the Appeal Panel wrote to the parties to ask whether the parties intended to discuss the case at a hearing or preferred to waive their right to a hearing and whether the SRB intended to file a rejoinder to Appellant's reply. On the same day, the Appellant confirmed that it wished to make oral representations at a hearing. The Board, on 7 April 2022, informed that it could waive its right to a hearing but asked to file a rejoinder to the Appellant's reply.
30. On 11 April 2022, the Appeal Panel informed the parties that the hearing would take place in Brussels on 20 May 2022 and granted to the Board the deadline to file its rejoinder to the Appellant's reply.
31. On 2 May 2022, the Board timely submitted its rejoinder to the Appellant's reply.
32. On 20 May 2022, both parties appeared at the hearing and presented oral arguments; the Appeal Panel also asked questions to both parties for the clarification of facts relevant for the just determination of the appeal. The parties answered all questions raised by the Appeal Panel during the hearing and concluded by making final oral rebuttals.
33. On 23 May 2022, the Appeal Panel considered that the evidence was complete and the Chair notified the parties that the appeal had been lodged for the purposes of Article 85(4) of Regulation 806/2014 and 20 of the Rules of Procedure.

### **Main arguments of the Parties**

34. The main arguments of the Parties are briefly summarised below. 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



35. The Appellant argues, in the first place, that, with the Contested Decision, the Board has denied the requested waiver, because it has imposed additional conditions for the granting of a waiver other than those set out in the SRMR. The Appellant notes, in this respect, that although Article 12h SRMR requires that there must not be current or foreseen practical or legal impediments to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary for which the waiver is sought, the SRB introduced via its MREL Booklet - which was adopted without sufficient consideration, in the Appellant's view, of the concerns raised by the Appellant itself - a new condition, requiring credit institutions to provide "evidence that the resolution entity or parent undertaking has guaranteed the obligations of the subsidiary in an amount that is equal to, at least, the amount of an hypothetical MREL requirement which would had been set if the subsidiary were not waived". The Appellant further argues that this requirement had been presented by the SRB initially as a separate condition and afterward as part of the condition on the absence of material practical or legal impediments to the prompt transfer of funds under Article 12h(2)(c)(1) SRMR as amended. Since the request for such a guarantee is presented by the SRB in a way that it makes it not an option, which may be considered on a case-by-case basis, but rather a necessity for the obtainment of the waiver, in the Appellant's view the SRB is in this way *de facto* imposing an additional condition for the granting of the iMREL and such condition is not contemplated by the relevant provision of the SRMR.
36. The Appellant further claims that, in so doing, the SRB has made virtually impossible for credit institutions pertaining to a group to obtain the waiver from the iMREL and that in this way the SRB has deprived the provisions that allow a waiver to be granted of their practical effect.
37. With its first plea, therefore, the Appellant claims that the SRB erred in law in the exercise of its discretion by disregarding the objectives pursued by the provisions it sought to apply and by depriving them of any practical legal effect by making the waiver virtually impossible to obtain. This first plea is in fact identical to the first plea in law that the Appellant had raised, with respect to the denial of a iMREL waiver requested by credit institutions affiliated to a different banking group, in case 2/2021.
38. With its second plea, the Appellant argues that the Board has violated the principle of legal certainty as a result of the SRB's lack of clarity regarding the conditions that need to be fulfilled to benefit from the waiver and further complains about the unforeseeable and recurring changes in those conditions. The uncertain context originated by the SRB behaviour did, in the Appellant's view, make it impossible for [ . ] to successfully apply for a waiver. In the Appellant's view, due to the SRB's behaviour, the conditions for the granting of the waiver "were subject to constant instability and were neither clear and precise".
39. With its third plea, the Appellant argues that the Board also infringed the principle of good administration set out in Article 41 of the Charter, because such principle entails the duty of the European institutions and agencies to examine carefully and impartially all the relevant aspects of the individual case and includes both the right of a person to be heard before any

individual measure is taken which would affect adversely such person and the obligation to state reasons in the decision. In the Appellant's view, in the first place, at the time [ . ] exercised its right to be heard, "the MREL policy was very unclear and unstable in respect of the conditions for the granting of waivers for individual MREL requirements and it remained so until the Contested Decision". In the second place, in the Appellant's view the reasons on which the Contested Decision relies not to grant a waiver to [ . ] are unlawful, "since the provision of a guarantee for granting an iMREL waiver is not enshrined in Article 12h of the SRMR". The Contested Decision, in the Appellant's view, "should have contained the reasons grounding it so that the Court may review the assessment made by the SRB and the significance given to the respect of guarantees in the administrative proceedings".

40. The Appellant asks therefore the Appeal Panel to remit the case to the Board.
41. The Appellant further requests that the decision of the Appeal Panel be published in accordance with Article 24 of the Rules of Procedure of the Appeal Panel.
42. In its reply to the Board's response, the Appellant maintains that its three pleas in law are well-founded, reiterates and further supplements its arguments, and maintains its initial requests. In particular, the Appellant claims, in the first place, that the content of the MREL Booklet acquired the status of a true requirement, which directly affects resolution authorities and banks and has legal effects because it is worded in an imperative manner, any deviations thereof should be adequately justified and communicated to the Executive Session. Moreover, such MREL Booklet was presented to [ . ] as a document setting out conditions that had to be fulfilled in order to obtain the waiver. In second place, the Appellant argues that by its systematic request for a guarantee and its inclusion of this element in the MREL Booklet, the Board has turned a discretion (a discretion acknowledged by the Appeal Panel in its decision in case 2/2021) into a *de facto* obligation. In the third place, the Appellant argues that the Board has failed to prove its assertion that it has not deprived the provisions it sought to apply of any practical effect. In the fourth place, the Appellant argues that the Board violated the principle of legitimate expectation that "the application made by [ . ] would be assessed based only on the level 1 criteria, with no gold plating". In the Appellant's view, such assurances were given by publishing the MREL Policy 2020 and by disclosing to [ . ] the MREL Booklet 2020. In the fifth place, the Appellant maintains that the Board has acted in violation of the principle of good administration and argues, in particular, that the reasons stated in the Contested Decision do not provide "the detailed legal arguments that allow to reach [the] conclusion [that the guarantee provided by [ . ] may not apply in a gone concern scenario] and to mention the absence of an 'actionable right' of creditors in such circumstances is nowhere explained". In the Appellant's view "this is a striking deficiency in the statement of reasons".

#### Board

43. The Board argues that the appeal is to be rejected as unfounded.

44. With regard to the first plea, the Board argues that the claim made by the Appellant is identical to a claim already made by the same Appellant in case 2/2021, which has already been rejected by the Appeal Panel with its final decision in case 2/2021. In the Board's view, the request of the guarantee made by the SRB in the instant case is fully in line with the SRMR, is a supporting documentation necessary to demonstrate the absence of impediments to the prompt transfer of funds under Article 12h(1)(c) SRMR and has not made impossible to obtain a waiver.
45. With regard to the second plea, the Board argues that the Appellant's argument conflates the question whether the SRB has lawfully applied certain provisions of the SRMR (i.e., Article 12h(1)(c) SRMR) with the question whether the SRB has infringed the principle of legal certainty, which concerns however EU rules in general. In this regard the SRB submits that the Contested Decision involves the application of EU legislation to a particular case and, therefore, it cannot be considered to breach the principle of legal certainty, as interpreted by the case-law of the Court of Justice of the European Union. In addition, the SRB argues that the Contested Decision was based on clear, stable and constant criteria applicable to obtain an iMREL waiver in the 2020 resolution planning cycle as contained in (i) first, Article 12h(1) SRMR and (ii) second, the 2020 MREL Policy, which was published on 20 May 2020 on the SRB website (which indicated the need for the credit institutions to evidence robust intra-group loss transfer mechanisms). The Board further notes that, in the present case, the SRB has not given precise, unconditional and consistent assurances to [ . ] on the waiving of the application of MREL under Article 12g SRMR in respect to [ . ] and, on the contrary, the SRB expressed in several occasions and in a consistent manner its concern that the requirement under Article 12h(1)(c) SRMR could not be considered met in light of the documentation offered by [ . ].
46. With regard to the third plea, the SRB argues that the Contested Decision has fully respected the right to be heard and the obligation to give reasons. In particular, the SRB argues that the SRB has fully respected [ . ]' right to be heard within the administrative procedure leading to the adoption of the Contested Decision and [ . ] duly exercised such right by submitting its comments on 29 January 2021 and had further opportunities to continue its dialogue with the SRB to clarify the guidance provided before the SRB adopted the Contested Decision. As to the statement of reasons, the SRB first elaborates on the findings of the Appeal Panel in case 2/2021 and argues that the conclusions reached by the Appeal Panel on this are not shared by the SRB; in any event, the SRB submits that the circumstances of the present case are different from those of case 2/2021 where the Appeal Panel found that the reasons stated were insufficient; then it maintains that the reasoning of the application of MREL under Article 12h SRMR in respect of [ . ] included in the Contested Decision (at Section II d, Sub-Section 1, pages 31-32, paragraphs 12 to 17 and in the Assessment Memoranda on submissions of BNP in the hearing procedure, pages 68-72) are clear, precise, sufficient and fully comply with the principles established by Union courts on the duty to state reasons. The reasons stated by the Board explain that [ . ]' request for a waiver is based on existing guarantees provided in relation to [ . ] for the purpose of capital and liquidity waivers; yet, in the Board's view, both

existing guarantees were not suitable to ensure absence of impediments to the prompt transfer of own funds or repayment of liabilities by [ . ] to [ . ] in a gone concern scenario. Furthermore, creditors could not invoke an enforceable right against the guarantor.

47. In its rejoinder the Board has reiterated its position, arguing that, as regards the first plea, it has not exceeded the powers conferred to it by the SRMR in its assessment of the iMREL waiver request, that the MREL Booklet is an internal and confidential document that does not have any binding effect but instead is merely intended to provide internal guidance to the resolution teams as a ‘starting point’ in their assessment in order to ensure ‘horizontal consistency’ and equal treatment; yet resolutions teams remain free to deviate from this initial approach, if the circumstances of the case so require, by submitting a different proposal for any individual case to the Executive Board. As to the second plea, the Board maintains that it has not breached the principles of legal certainty and protection of legitimate expectations and it did not give to [ . ] any precise, unconditional and consistent assurances as regards its intention to grant an iMREL waiver. As regards the third plea, the Board maintains that it has not breached the right to be heard and did not add any new requirements in order to grant the iMREL waiver after the closure of the right to be heard process. According to the Board, during the 2020 resolution planning cycle the requirements have remained the same. The Board further insists that it has duly complied with its duty to state reasons. Finally, the Board reiterates a request to the Appeal Panel to redact in the public version of its decision any direct quotes from certain documents submitted as documentary evidence.

### **Findings of the Appeal Panel**

48. The parties have filed written submissions on their diverging views on the merit of the appeal and have made oral representations at the hearing. All the parties’ contentions have been taken into account by the Appeal Panel, whether expressly referred to herein or not. The Appeal Panel wishes to acknowledge that the parties’ submissions and oral representations have been important to highlight several aspects of detail of the present appeal and have been much appreciated by the Appeal Panel; furthermore, the Appeal Panel wishes to note that the statements at the hearing of the SRB’s head of division responsible for the IRT and of Madame [ . ] for the Appellant have been also important for the Appeal Panel to better penetrate aspects of the practice, both at the level of the IRT as well as of the technical and governing bodies of the SRB, which are relevant for a better understanding of the present appeal. The Appeal Panel wishes also to underline that both Parties have shown, despite the difference in their positions as to the legal aspects underpinning the present appeal, a strong and ongoing commitment to sincere and loyal cooperation in the fulfilment of their duties under the SRMR. Within its remit, the Appeal Panel welcomes and encourages this attitude.
49. The Appeal Panel recalls that the Contested Decision is based on Article 12h of SRMR as amended in 2019, and that the waiver requested by [ . ] for [ . ] has been denied because the Board has considered that, despite the existence and submission by the resolution entity of the

2014 Guarantee and the 2015 Guarantee, accepted as valid substitutes of capital and liquidity requirements by the European Central Bank (which found them compliant with the specific requirements specified in Article 7 and 8 CRR for capital and liquidity waivers), the condition set out in Article 12h(1)(c) was still not met, because such 2014 Guarantee and 2015 Guarantee were not deemed by the SRB suitable to ensure absence of impediments to the prompt transfer of own funds or repayment of liabilities by [ . ] to [ . ] in a gone concern scenario. Therefore, the Appeal Panel is confronted here with a legal question which is unprecedented in the case-law, and the Appeal Panel needs to determine to what extent a valid guarantee provided for in the supervisory context under CRR may be not enough in the resolution context under SRMR.

*(a) The first plea of the Appellant.*

50. The Appeal Panel preliminarily notes that the first plea in law of the Appellant reiterates to a larger extent the same arguments that the same Appellant had raised in case 2/2021 albeit in respect to a different credit institution and group. Those arguments in law, to the extent that they argue that under Article 12h(1) SRMR the SRB would be prevented from requiring a specific guarantee from the resolution entity, have been rejected by the Appeal Panel with its decision in case 2/2021. The Appellant further argues, in this case, that, even assuming that – as the Appeal Panel 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 by the SRB in a systemic manner in all cases under an internal policy such as the MREL Booklet, which guides the practice of the IRT, the release of such a guarantee is made de facto a necessary condition, thereby violating Article 12h(1) SRMR.
51. The Appeal Panel wishes, first, to recall, as it has already done in the decision in case 2/2021, that a condition like the one set out in letter c) of Article 12h(1) of the SRMR (namely that “there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by its parent undertaking”) is also present, but in a different context and with regard to possible derogations from the application of prudential requirements on an individual basis, in the CRR.
52. There is however a textual difference between Article 12h SRMR and Article 7 CRR on the need of a parent guarantee as a condition for the waiver, because such need is expressly set out only in letter (b) of Article 7 CRR (as an alternative to the situation where the risks of the subsidiary are of negligible interest), and as a positive condition which adds to the negative condition set out in letter (a) of the same Article 7, which requires that “there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by its parent undertaking”.
53. The same textual difference exists between the original Article 45(12) BRRD and now Article 45(f)(3) and 45(f)(4) BRRD as amended in 2019 and Article 12h SRMR, because also Article 45(12) and now Article 45(f)(3) and 45(f)(4) BRRD set out expressly, as a condition for the

waiver, not only the negative condition of “no impediments” is met (Article 45(12)(d) BRRD; Article 45f(3)(c) and 45f(4)(c)), but also that the positive condition of a suitable parent company guarantee is in place (Article 45(12)(e) and now 45f(3)(d) and 45f(4)(d) BRRD).

54. The Appeal Panel has considered, therefore, in its decision in case 2/2021 if, due to the difference in wording between Article 12h SRMR and Articles 7 CRR, 45(12) and now 45f(3) and (4) BRRD, according to a literal, contextual and teleological interpretation, one can construe the negative condition (notably the absence of “current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities”) set out in Article 12h, letter c) as capable of implying also a positive condition consisting in the issuance of a guarantee by the resolution entity in a text approved by the SRB.
55. With its first plea the Appellant considers that the SRB introduced such positive requirement of an express guarantee of the parent company as a new condition in its policy for assessment of iMREL waivers, requiring notably credit institutions to provide “evidence that the resolution entity or parent undertaking has guaranteed the obligations of the subsidiary in an amount that is equal to, at least, the amount of an hypothetical MREL requirement which would had been set if the subsidiary were not waived”. The Appellant further argues that this requirement had been presented initially as a separate condition and afterward as part of the condition on the absence of material practical or legal impediments to the prompt transfer of funds under Article 12h(2)(c)(1) SRMR as amended. The Appellant claims that, in so doing, the SRB has (i) supplemented by way of internal policy and on a general basis the list of requirements set out in Article 12h, thereby exercising *de facto* regulatory powers, (ii) made virtually impossible for credit institutions pertaining to a group to obtain the waiver from the iMREL (in this way depriving the SRMR provisions allowing for a waiver of their practical effect) and therefore (iii) erred in law and exceeded its powers.
56. The Appeal Panel, in its decision in case 2/2021, has concluded that the Board did not act beyond its mandate nor committed an error of law in finding that Article 12h SRMR allows the Board to require, as a condition for the granting of a waiver, the issuance by the parent company of a guarantee of the commitments of the subsidiary.
57. The Appeal Panel has noted in its decision in case 2/2021 that, in accordance with settled case law, the interpretation and application of Article 12h SRMR cannot be limited to its textual interpretation but need also to take account of the background of the relevant provision and of the objectives it pursues. A teleological interpretation is particularly relevant regarding EU provisions pertaining to banks’ prudential supervision and resolution, as held by the CJEU with its judgment of 2 October 2019, *Crédit Mutuel Arkea v ECB*, C-152/18, ECLI:EU:C:2019:810 at paragraph 53.
58. The Appeal Panel has also noted in its decision in case 2/2021 that Article 12h(1) expressly provides that “the Board may waive the application of Article 12g in respect of a subsidiary of a resolution entity established in a participating Member State”, where the conditions set out in the same Article are met. This means that, once the Board has ascertained that all

conditions are met, the Board has still a margin of discretion in granting or not granting the waiver, as made clear by the word “may” used by the relevant provision. According to the case-law of the General Court of the European Union, when a prudential rule confers to the competent authority the power to grant derogations from the applicable prudential regime when certain conditions are met, this means that the authority is given a discretion to refuse such derogations “even when the conditions set out in that provision are met” (see to this effect judgment of 13 July 2018, *La Banque Postale v European Central Bank*, T-733/16, ECLI:EU:T:2018:477, at paragraph 58; see also judgment of 13 July 2018, *BPCE v European Central Bank*, T-745/16, ECLI:EU:T:2018:476 and judgment of 13 July 2018, *Crédit Agricole v European Central Bank*, T-758/16, ECLI:EU:T:2018: 472; compare also judgment of 14 April 2021, *Crédit Lyonnais*, T-504/19, ECLI:EU:T:2021:185).

59. However, such discretion is not the one applying in the instant case, as it was not in case 2/2021. In the present appeal the contested issue is not whether the Board has correctly exercised such discretion, once all conditions were met, but instead whether the Board has erred in law in considering that one of those conditions (namely the one set out in Article 12h(1)(c) SRMR) was not met. Thus, the matter is, under the first plea in law, whether the Board acted beyond its powers by imposing such a positive condition and, under the second plea in law, whether the imposition of such a condition was in violation of the principles of legal certainty, legitimate expectation and good administration.
60. In its decision in case 2/2021 the Appeal Panel has found that Article 12h SRMR requires a two-pronged test from the resolution authority, in order to finally determine the response to the request for a waiver. In the first place, an assessment that the conditions set out in Article 12h are met; if they are met, the SRB must, in the second place, perform a more discretionary assessment and determine discretionally, according to the informed judgment of the authority and taking into consideration all factual elements of the case, if such a waiver may be granted.
61. This has important implications for the review of decisions such as the one under appeal in the present case 3/2021. The authority is indeed bound by the conditions set forth in Article 12h SRMR, not only in the sense that it is not entitled to grant a waiver if those conditions are not met, but also in the sense that, if the conditions are met, it is then obliged to acknowledge that these conditions are actually met, to then move on in its ulterior assessment on whether it considers technically sound and appropriate to grant the requested waiver. In the instant case, however, as it was also in case 2/2021, the parties have diverging views on whether the conditions were met and it is clear that the Board never reached the stage of deciding whether to grant the waiver based upon its discretionary and technically informed assessment. Rather, it is acknowledged by both parties that the SRB concluded that the condition under Article 12h(1)(c) SRMR was not met.
62. In its decision in case 2/2021 the Appeal Panel further found that the assessment whether the conditions of Article 12h are met is not an exercise of discretion in the proper sense, but rather a verification that the factual and legal requirements of Article 12h(1)(c) are satisfied. Nonetheless, due to the relative open-ended nature of the requirements set out in letter (c), the

assessment is not automatic either, and it implies a complex, factual and legal assessment on whether or not “there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary in respect of which a determination has been made in accordance with Article 21(3), in particular where resolution action is taken in respect of the resolution entity”. This assessment of the occurrence of condition (c) entails, therefore, for the Board a certain margin of appreciation, which, in the Appeal Panel’s view is, however, more constrained and limited than the one granted in the second stage of the assessment, where the Board is literally given the discretionary power not to grant the waiver, even if all conditions are met. Such crucial distinction is hereby, for all relevant legal purposes of the present case, fully reiterated by the Appeal Panel.

63. The assessment on whether the conditions set out in Article 12h are met must be also fully respectful of general principles of EU law.
64. As to these principles, the Appeal Panel recalled in its decision in case 2/2021, as a matter of background, that with regard, first, to the principle of legal certainty, according to the Court’s settled case-law, that principle requires, on the one hand, that the rules of law be clear and precise and, on the other hand, that their application be foreseeable for those subject to the law, in particular, where they may have adverse consequences for individuals and undertakings. Specifically, in order to meet the requirements of that principle, legislation must enable those concerned to know precisely the extent of the obligations imposed on them, and those persons must be able to ascertain unequivocally their rights and obligations and take steps accordingly (see judgment of 11 July 2019, *Agrenergy and Fusignano Due*, C-180/18, C-286/18 and C-287/18, EU:C:2019:605, paragraphs 29 and 30 and the case-law cited). Furthermore, the Court has recalled that the imperative of legal certainty must be observed all the more strictly in the case of rules liable to have financial consequences (judgment of 21 June 2007, *ROM-projecten*, C-158/06, EU:C:2007:370, paragraph 26 and the case-law cited). More recently the CJEU was adamant in reiterating those principles also in the context of bank resolution in its judgment of 29 April 2021, *Banco de Portugal, Fundo de Resolução, Novo Banco SA, Sucursal en España v VR*, C-504/19, ECLI:EU:C:2021:335.
65. As to the principle of legitimate expectations, the Appeal Panel recalled in its decision in case 2/2021 that, in accordance with settled case-law (see, in a resolution context, judgment of 16 July 2016, *Tadej Kotnik and Others*, C-526/14, ECLI:EU:C:2016:570 and in the supervisory context judgment of 6 October 2021, *Ukrselhosprom Versobank v ECB*, T-351/18 and T-584/18, ECLI:EU:T:2021:669 paragraphs 357-361), the right to rely on that principle 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. That right applies to any individual in a situation in which an institution, body or agency of the European Union, by giving that person precise assurances, has led him to 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).

66. As to the principle of good administration, Article 41 of the Charter sets out that “every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. This right includes: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions”. A component of such fundamental right may therefore be considered the duty to state reasons, and also the respect of the proportionality principle.
67. The alleged violation of the proportionality principle has been clearly put forward by the Appellant, for the first time, in its reply. However, under Article 16(3) of the Appeal Panel Rules of Procedure “no new plea in law may be introduced in the course of the appeal unless it is based on matters of law or of fact that come to light in the course of the proceedings”. The Appeal Panel considers therefore that a separate plea of violation of the proportionality principle is inadmissible; nonetheless, according to settled case-law of the European courts (see recently judgment of 11 May 2022, T-913/16, Fininvest and Silvio Berlusconi v ECB, EU:T:2022:279, at paragraphs 129-130), a claim which represents merely a widening of plea timely raised is still receivable to the extent that it shows a close connection (‘lien étroit’) with such plea (judgment of 16 December 2010, AceaElectrabel Produzione/Commission, C-480/09 P, EU:C:2010:787, paragraph 111; judgment of 12 November 2009, SGL Carbon/Commission, C-564/08 P, EU:C:2009:703, paragraphs 20 à 34). The Appeal Panel considers therefore that the relevance of the proportionality principle can incidentally be pondered as part of the third plea, to the extent that it was closely connected to the plea on the violation of the principle of good administration and strictly within the sense of the aforementioned settled case-law.
68. The Contested Decision substantiated the Board’s decision not to waive the application of MREL under Article 12g SRMR, because the condition set out in Article 12h(1)(c) was not met, in points or recitals 13-17 of its section II d, Sub-Section 1. In this context, the reasoning of the SRB is made particularly adamant in recitals 14-16 as follows:

*14. In order to fulfil such condition, the application relies on (i) a commitment provided by the resolution entity to the ECB on [ . ], in the context of a successful application for a waiver for Banking Union Subsidiary [ . ] under Article 7(1) of Regulation (EU) No 575/2013, pursuant to which the resolution entity declares to the ECB that it “agrees to guarantee the commitments entered into by [ . ] thus ensuring it will meet its solvency requirements”, and (ii) the exchange of letters (lettre d’engagement) dated [ . ] and [ . ] between the resolution entity and Banking Union Subsidiary 4, provided to the ECB as part of an application for a waiver from the liquidity requirement on an individual basis, pursuant to Article 8 of Regulation (EU) No 575/2013.*

*15. Both existing guarantees provided by the resolution entity and relating to the liabilities of Banking Union Subsidiary [ . ] serve the specific purposes of the capital and liquidity waivers to*

*which they are instrumental and are not suitable to ensure absence of impediments to the transfer of own funds or repayment of liabilities to Banking Union Subsidiary [ . ] in the circumstances contemplated under point (c) of Article 12h(1) of Regulation (EU) No 806/2014. Such guarantees would cease to be valid should the capital and liquidity waivers for which they have been issued cease to be applied. Where existing, no evidence has been provided that the actionable right of Banking Union Subsidiary [ . ] to a transfer of funds persists in case of default, failure or failing or likely to fail determination with respect to Banking Union Subsidiary [ . ], nor that the creditors of Banking Union Subsidiary [ . ] would in that case have an enforceable right against the guarantor. Furthermore, the resolution entity guarantees the commitments of Banking Union Subsidiary [ . ] as they come due with a view to and for the purposes of ensuring that the beneficiary meets, respectively, its liquidity and solvency requirements. However, such features may render the guarantees not suitable to serve the purposes of the MREL waiver for the following reasons. On one hand, the guarantee for the internal MREL waiver needs to be actionable in a gone-concern scenario. Although, in some circumstances, it can be argued that the existing guarantees 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.*

*16. It is therefore not assured that an actionable right of Banking Union Subsidiary [ . ], where existing, persists in case of default, failure or failing or likely to fail determination of Banking Union Subsidiary [ . ], and/or whether in that case the creditors of Banking Union Subsidiary [ . ] could invoke an enforceable right against the guarantor, so that ultimately financial resources of the resolution entity may be unavailable to assist Banking Union Subsidiary [ . ] when needed the most, i.e. in a crisis or failure of Banking Union Subsidiary [ . ]. On the other hand, the prompt transfer of own funds or repayment of liabilities by the resolution entity 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) of Regulation (EU) No 806/2014. Such determination is linked to the failing or likely to fail 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 existing guarantees are not yet triggered, thus not available to provide the required support.*

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 repositioning 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 [ . ] 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.
78. Thus, the first plea in law of the Appellant cannot be upheld. It results from the foregoing that with the Contested Decision the Board did not err in law in the interpretation and application of Article 12h nor committed a manifest error in assessment in the exercise of the margin of appreciation granted to it by the open-texture provision of Article 12h, letter c).
79. Furthermore, the Appeal Panel notes that this appeal relates to the Contested Decision, which is an individual decision concerning [ . ] and its group, whereas it does not refer to the SRB's iMREL policy nor to the internal documents which reflect such a policy, which, as such, are outside the scope of this appeal and, in any event, beyond the remit of the Appeal Panel. The Appellant's claims concerning the iMREL policy are therefore inadmissible.
80. In this point, the Appeal Panel wishes however to further acknowledge that, as noted by the Appellant in its oral representations, the development and adoption of internal guidance for the resolution teams and of public policies should be made by the SRB in a spirit of sincere and loyal cooperation with the national resolution authorities which are a fundamental element of the SRM governance. In this spirit, concerns or suggestions raised by national resolution authorities in the different *fora* within the SRB where such policies are discussed and worked out should be given due consideration. At the same time, the Appeal Panel wishes also to remind that, for the proper functioning of the SRM, it is of fundamental importance that a consistent interpretation and application of the SRMR is ensured horizontally and that the decision-making competences of the Board are fully preserved. The simultaneous achievement of both effective cooperation and centralisation may occasionally lead to frictions; however, there is no evidence in the file, that in the instant case, this may have been conducive to the illegality of the MREL Booklet.
81. The Appeal Panel further reiterates, in this respect, that, as already noted in case 2/2021, the Board's interpretation and application of Article 12h, even if supported and generalized through the adoption of internal policy documents such the MREL Booklet, remains an exercise of interpretation and application of the applicable legal provision in the specific case and does not as such morph into a de facto exercise of regulatory powers. The Appeal Panel concurs in principle with the Appellant's general view that European non legislative institutions or agencies cannot, by interpretation, claim tasks reserved to the EU co-legislators. This applies even to courts, as the CJEU held in its judgment of 23 March 2000, *Sagpo*, Joined Cases C-310/98 and C-406/98, ECLI:EU:C:2000:154, where the Court concluded that "the

Court is not entitled to assume the role of the Community legislature and interpret a provision in a manner contrary to its express wording. It is for the Commission to submit proposals for appropriate legislative amendments to that end”. However, the Court of Justice has also distinguished between the role of institutions, agencies or bodies when they exercise legislative or regulatory powers, and their function when they adopt policies or guidelines, where they exercise a “power to exhort and to persuade, distinct from the power to adopt acts having binding force” (judgment of 15 July 2021, in case C-911/19, *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)* EU:C:2021:599, at paragraph 48).

82. In the case at hand, for the reasons stated above, the Appeal Panel finds that the concrete interpretation and application of Article 12h SRMR made by the Board in the instant case is not contrary to the wording of Article 12h(c) SRMR and is, instead, compatible with the broad wording of the provision and ultimately in line with its contextual and teleological interpretation.
83. Finally, the Appeal Panel also notes that, contrary to the Appellant’s claim, this interpretation and application of Article 12h(1)(c) SRMR does not make it virtually impossible for credit institutions pertaining to a group to obtain the waiver from iMREL (in this way depriving the SRMR provisions allowing for a waiver of their practical effect), as it is also precisely shown by the fact that in the decision in case 2/2021 it was acknowledged that it was pending a proposal to the Supervisory Board of the IRT, preliminarily endorsed by the Board, to grant such a waiver to another credit institution in the current cycle in the Extended Executive Session from [ . ] 2022. Also, the Board, in the present appeal, has further acknowledged that [ . ] waivers from iMREL have been already granted, and the practice of the MREL determination is still very recent within the SRM. Thus, even excluding from the number of waivers granted (as one should do), those waivers granted because the subsidiary, in the resolution plan, would be liquidated and not resolved as part of the resolution strategy, the remaining waivers in the Appeal Panel’s view, offer, for all relevant legal purposes at stake in the present case, sufficient assurance that waivers from iMREL are not ruled out in practice and that therefore the relevant provision of the SRMR is not made by practice devoid of purpose.

*(b) The second plea in law*

84. With its second plea, the Appellant argues that the Board violated the principle of legal certainty, because the SRB’s lack of clarity regarding the conditions that need to be fulfilled to benefit from the exemption and due to the unforeseeable and recurring changes of these conditions which made it impossible for [ . ], in such an uncertain context as the one originated by the SRB behaviour, to successfully apply for a waiver. In the Appellant’s view, due to the SRB behaviour, the conditions for the granting of the waiver were subject to constant instability and “were neither clear and precise nor foreseeable”.

85. The Appeal Panel acknowledges, as it has done in its decision in case 2/2021, that the principle of legal certainty, which is a fundamental principle of EU law, requires that EU legislation must allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them (for an application of this general principle as to the requirement of the previous publication of the relevant legislation, compare judgment of 11 December 2007, Case C-161/06, *Skoma-Lux sro*, ECLI:EU:C:2007:773). The Appeal Panel also notes that, over the resolution cycles 2019 and 2020, the Board's position on the fulfilment of the letter c) condition under Article 12h SRMR and the need of a suitable guarantee progressively evolved from a more lenient to a stricter approach. This was perhaps not ideal, but reasonably due to the novelty of the matter and the need also for the SRB to reach a final position through experience.
86. The Appeal Panel acknowledges, moreover, that the Board explained the evolution of its approach also referring to exchanges of views with the ECB on the parallel experience on prudential waivers and the extent of its desirable (in the authorities' perspective) transposition in the resolution context. In this context, it is opportune to recall once again that Article 12h SRMR does not expressly require a guarantee, whereas Articles 7(1)(b) and 8(1)(c) CRR do. Specifically, Article 7 requires a parent company guarantee whereas Article 8 requires that "the institutions have entered into contracts that, to the satisfaction of the competent authorities, provide for the free movement of funds between them to enable them to meet their individual and joint obligations as they become due". In light of this, the Board's finding that even guarantees provided for under CRR may not be sufficient to meet the conditions set out in Article 12h SRMR, which does not expressly require a guarantee, seem to have been unexpected for [ . ] and the Appellant.
87. Nevertheless, to evaluate whether the Board's insistence on the guarantee was unforeseeable for [ . ], and against legal certainty, the broader context of the interactions between the SRB and [ . ] needs to be considered. In this regard, the Appeal Panel also recalls that well before the adoption of the Contested Decision:
- a) On [ . ], the IRT sent an email to [ . ] concerning, among others, also the issue of the iMREL waiver for [ . ].
- b) On [ . ], the Board, in its Extended Executive Session, endorsed, on a preliminary basis, also with the vote in favour of the Appellant, the draft joint decision on MREL. In this session the Board addressed also the waiver from iMREL to [ . ] and noted that at that stage of the procedure and based upon the documentation provided by [ . ] there was "no sufficient comfort that, in absence of prepositioned MREL, there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity/parent to [ . ]". The Board further noted that the existing guarantees provided by the resolution entity were guarantees "for the specific purposes of the capital and liquidity waivers to which they are instrumental and are not suitable to ensure absence of impediments to the transfer of own funds".



c) On [ . ], the SRB informed [ . ] of the preliminary decision of the Board and invited [ . ] to submit its observations in the context of its right to be heard in the course of the same proceeding.

d) On [ . ], [ . ] submitted its observations.

e) On [ . ], the IRT addressed a communication to [ . ] providing a list of key features of the guarantee that the IRT deemed relevant to further assess the waiver application during the 2020 resolution planning cycle and reiterated that it considered that the existing guarantees provided to that date did not reach the necessary level of comfort for resolution purposes.

88. In light of the foregoing, and of the conclusions reached by the Appeal Panel as to the first plea in law, the Appeal Panel finds that, although [ . ] never agreed with the findings of the SRB that the commitments provided for by [ . ] under Articles 7 and 8 CRR through the 2014 Guarantee and the 2015 Guarantee were not suitable for resolution purposes, it was clear at the time of the adoption of the Contested Decision what were the conditions that needed to be fulfilled, in the Board's view, to benefit from the waiver from the iMREL for [ . ]. Contrary to the Appellant's claim, at the time of adoption of the Contested Decision and in the months which preceded it, there is no evidence in the file that there were indeed unforeseeable and recurring changes of these conditions, which could have made it impossible for [ . ], in such an uncertain context as the one originated by the SRB behaviour, to successfully apply for a waiver.
89. During these proceedings, when making reference to the principle of legal certainty the Appellant also referred to the principle of the protection of legitimate expectations. The principle was not the subject of separate treatment, but it is a distinct principle, as outlined above. The principle 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).
90. In the present case, the Appeal Panel, on the basis of its thorough examination of the elements which were part of the file, finds that the exchanges between the parties (and with [ . ]) did not contain precise, unconditional and consistent assurances from the Board suggesting that it would agree with the Appellant's interpretation of the sufficiency of the commitments undertaken by [ . ] under Articles 7 and 8 CRR, or grant the waiver as requested. Therefore, this was not a situation where, following precise assurances from an institution, body or agency of the European Union, the Appellant could 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).

91. The Appeal Panel further notes that the Appellant has neither provided evidence of precise, unconditional and consistent assurances previously given by the Board that the Board would have then violated with the Contested Decision, nor persuaded the Appeal Panel that such assurances could actually be convincingly found in the guidance set out in the MREL Policy 2020 (or in the public presentation of the relevant parts of the MREL Booklet 2020).
92. For the reasons set out above, the Appeal Panel finds that also the second plea of the Appellant cannot be upheld.

*(c) The third plea in law.*

93. With its third plea, the Appellant argues that the Board also infringed the principle of good administration set out in Article 41 of the Charter, because such principle entails the duty of the European institutions and agencies to examine carefully and impartially all the relevant aspects of the individual case and includes, first, the right of a person to be heard before any individual measure which would affect adversely such person and, second, the obligation to give reasons in the decision.
94. In the Appellant's view, in first place, at the time [ . ] exercised its right to be heard, "the MREL policy were very unclear and unstable in respect of conditions for granting waivers for individual MREL requirements and it remained so until the Contested Decision".
95. In second place, the reasons on which the Contested Decision relied to not grant a waiver to [ . ] are unlawful, "since the provision of a guarantee for granting an iMREL waiver is not enshrined in Article 12h of the SRMR". The Contested Decision, in the Appellant's view, "should have contained the reasons grounding it so that the Court may review the assessment made by the SRB and the significance given to the respect of guarantees in the administrative proceedings".
96. On the first limb of the third plea in law pertaining to the right to be heard, the Appeal Panel, having duly considered all documentation submitted by the Parties and in particular all exchanges between [ . ] and the SRB during the administrative procedure, including those during the right to be heard phase, finds that the right has been respected, the conditions to be met were sufficiently clear during the procedure and the SRB has given due considerations to the submissions made by [ . ] as also shown in the assessment memorandum (pages 55 to 76) of the Contested Decision. Furthermore, the Appellant has not shown what additional arguments, if any, raised during the procedure, could have led the SRB to a different outcome or made at least possible such a different outcome (compare judgment of 18 June 2020, Commission/RQ, C-831/18 P, EU:C:2020:481, paragraph 106).
97. On the second limb of the third plea in law pertaining to the duty to state reasons, the Appeal Panel recalls and reiterates, in the first place, its findings in decision in case 2/2021. In accordance with settled case-law, the duty to state reasons pursuant to Article 296 TFEU is of fundamental importance (consider to this effect, judgment of 21 November 1991, Hauptzollamt München v Technische Universität München, C-269/90, paragraph 14). Only

in this way can the court (and in the present appeal, the Appeal Panel) verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present. The Appeal Panel further reiterates, despite the different views expressed on this by the legal counsels of the Board in the course of these proceedings, that the duty to state reasons is particularly important in the prudential and resolution context, as also amply acknowledged by the General Court, in its judgment of 16 May 2017, *Landeskreditbank Baden-Württemberg v ECB*, T-122/15, ECLI:EU:T:2017:377 paragraph 122-124 and the case-law cited and in its very recent judgment of 6 October 2021, *Ukrseľhosprom Versobank v ECB*, T-351/18 and T-584/18, ECLI:EU:T:2021:669 paragraphs 385-387. This translates into a strict standard of review, because fundamental rights of economic nature (such as those enshrined in Articles 16 and 17 of the Charter) are in principle potentially and deeply affected by the exercise of its power by the resolution authority and the sufficiency of the reasons given needs to be such as to allow a clear understanding of whether the decision is taken in compliance with the rule of law and is proportionate.

98. The Appeal Panel further recalls, however, that the obligation to state reasons laid down in Article 296 TFEU is a procedural requirement, and is therefore distinct from the question whether the specific reasons given are correct and well-founded, which goes to the substantive legality of the contested measure.
99. This has important consequences. According to settled case-law of the European courts the obligation to state reasons is infringed if the reasons given for an act adversely affecting a person are not sufficient to enable that person to understand the scope of the measure concerning him and making it possible to determine if the act is vitiated by an error permitting its validity to be contested before courts of the European Union. The European courts have clarified that it is not necessary for the statement of reasons to specify all relevant matters of fact and law, since the question whether the statement of reasons is sufficient must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 5 November 2014, *Mayaleh v Council*, T-307/12 and T-408/13, EU:T:2014:926, paragraph 87 and the case-law cited; judgment 30 November 2016, *Rotenberg v Council*, T-720/14, EU:T:2016:689, paragraph 49).
100. The statement of reasons required under Article 296 TFEU must, moreover, be appropriate to the measure in question. Thus, the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations.
101. Yet, the question of the assessment of the sufficiency of the statement of reasons is completely different from the question whether that statement of reasons is well-founded, which does not concern the procedural requirement but the substantive legality of the act at issue. The reasoning on which an act is based consists in a formal statement of the grounds on which that act is based. If those grounds are vitiated by errors, the latter will vitiate the substantive legality of the act, but not necessarily the statement of reasons in it, which may be adequate

for its specific legal purposes as already mentioned, even though it sets out reasons which are incorrect (see judgment of 5 November 2014, *Mayaleh v Council*, T-307/12 and T-408/13, EU:T:2014:926, paragraph 96 and the case-law cited; judgment 30 November 2016, *Rotenberg v Council*, T-720/14, EU:T:2016:689, paragraph 58).

102. Based upon the foregoing, the Appeal Panel finds that the statement of reasons given by the Board, as to why the 2014 Guarantee and the 2015 Guarantee provided by [ . ] were deemed inadequate, is sufficient.
103. As noted above, the Contested Decision substantiated the Board's decision not to waive, in the instant case, the application of MREL under Article 12g SRMR, because the condition set out in Article 12h(1)(c) was not met, in points 13-17 of its section IIa as follows:

*13. The Group submitted a request for waiver from individual MREL dated [ . ] for Banking Union Subsidiary [ . ]. The request has been carefully assessed by the Board. However, the Board considers that at this stage and based on the documentation provided there is no sufficient comfort that, in absence of prepositioned internal MREL, there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity/parent to Banking Union Subsidiary [ . ], as required under point (c) of Article 12h(1) and (2) of Regulation (EU) 806/2014.*

*14. In order to fulfil such condition, the application relies on (i) a commitment provided by the resolution entity to the ECB on [ . ], in the context of a successful application for a waiver for Banking Union Subsidiary [ . ] under Article 7(1) of Regulation (EU) No 575/2013, pursuant to which the resolution entity declares to the ECB that it "agrees to guarantee the commitments entered into by [ . ] thus ensuring it will meet its solvency requirements", and (ii) the exchange of letters (lettre d'engagement) dated [ . ] and [ . ] between the resolution entity and Banking Union Subsidiary [ . ], provided to the ECB as part of an application for a waiver from the liquidity requirement on an individual basis, pursuant to Article 8 of Regulation (EU) No 575/2013.*

*15. Both existing guarantees provided by the resolution entity and relating to the liabilities of Banking Union Subsidiary [ . ] serve the specific purposes of the capital and liquidity waivers to which they are instrumental and are not suitable to ensure absence of impediments to the transfer of own funds or repayment of liabilities to Banking Union Subsidiary [ . ] in the circumstances contemplated under point (c) of Article 12h(1) of Regulation (EU) No 806/2014. Such guarantees would cease to be valid should the capital and liquidity waivers for which they have been issued cease to be applied. Where existing, no evidence has been provided that the actionable right of Banking Union Subsidiary [ . ] to a transfer of funds persists in case of default, failure or failing or likely to fail determination with respect to Banking Union Subsidiary [ . ], nor that the creditors of Banking Union Subsidiary [ . ] would in that case have an enforceable right against the guarantor. Furthermore, the resolution entity guarantees the commitments of Banking Union Subsidiary [ . ] as they come due with a view to and for the purposes of ensuring that the beneficiary meets, respectively, its liquidity and solvency requirements. However, such features may render the guarantees not suitable to serve the purposes of the MREL waiver for the following reasons. On one hand, the guarantee for the internal MREL waiver needs to be actionable in a gone-concern scenario. Although, in some circumstances, it can be argued that the existing guarantees 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.*

16. *It is therefore not assured that an actionable right of Banking Union Subsidiary [ . ], where existing, persists in case of default, failure or failing or likely to fail determination of Banking Union Subsidiary [ . ], and/or whether in that case the creditors of Banking Union Subsidiary [ . ] could invoke an enforceable right against the guarantor, so that ultimately financial resources of the resolution entity may be unavailable to assist Banking Union Subsidiary [ . ] when needed the most, i.e. in a crisis or failure of Banking Union Subsidiary [ . ]. On the other hand, the prompt transfer of own funds or repayment of liabilities by the resolution entity 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) of Regulation (EU) No 806/2014. Such determination is linked to the failing or likely to fail 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 existing guarantees are not yet triggered, thus not available to provide the required support.*

17. *Furthermore, Banking Union Subsidiary [ . ] is waived from the individual capital requirement, but remains subject to a sub-consolidated capital requirement that includes a specific Pillar 2 Capital buffer set by the ECB. Therefore, the absence of capital requirements at individual level for Banking Union Subsidiary [ . ] is not in itself an indicator that this entity should not be subject to individual MREL. In the absence of the latter, implementation of the preferred resolution strategy may still be hampered and the resolvability would be threatened due to the possible lack of recapitalisation resources to preserve the entity.*

104. In the Appeal Panel’s view, in the case at hand, the Board justified its decision on the basis of its having a technical margin of appreciation, as per Article 12h(1)(c) SRMR, which refers to (i) current or foreseen, (ii) material, (iii) practical or (iv) legal impediment to the transfer of funds. Thus, the statement of reasons specifically related to the justification of these elements.
105. In that context, in the Appeal Panel’s view, the Board offered in the Contested Decision reasons which, unlike in case 2/2021, in the instant case sufficiently meet the procedural requirement of a proper statement of reasons.
106. As noted above, the Board came to the conclusion that the commitments provided for by [ . ] in the context of a successful application for a waiver under Articles 7 and 8 CRR were not enough because (i) in first place, such guarantees serve the specific purposes of the capital and liquidity waivers and are not suitable to ensure transfer of funds or repayment of liabilities in resolution, since they “would cease to be valid should the capital and liquidity waivers for which they have been issued cease to be applied” and would not be actionable in a gone concern scenario and no evidence has been provided that “the actionable right of [ . ] to a transfer of funds persists in case of default, failure or likely to fail determination with respect to [ . ]” and (ii) in second place, no evidence has been provided that “the creditors of [ . ] would in that case have an enforceable right against the guarantor”.
107. The Appeal Panel expressed its doubts in its decision in case 2/2021 on an aspect of the latter justification, namely that a guarantee required under Article 12h SRMR should also be enforceable by the creditors of [ . ]. The Appeal Panel noted in its decision in case 2/2021, that Article 19(9) BRRD, in the different but neighbouring context of group financial support agreements, expressly sets out that “Member States shall ensure that any right, claim or

action arising from the group financial support agreement may be exercised only by the parties to the agreement, with the exclusion of third parties”, i.e. entities not pertaining to the group.

108. Yet, from the perspective of the duty to state reasons, with its key constitutive elements as stated above, the Appeal Panel considers that the two reasons stated by the Board in the Contested Decision meet the requisite standard. From the Contested Decision it is possible to clearly deduce what were the matters of concern pertaining to the guarantees provided for by [ . ]. Specifically, it was possible to apprehend that the Board was not satisfied in fact and in law that the guarantees would have “survived” and remained fully actionable in a “gone concern scenario” of [ . ] and this raised a (material) legal and/or practical impediment. This was so, in the Board’s view, because, as the IRT had noted already in its [ . ] assessment, the prudential guarantees could be revoked if [ . ] decided to replace such guarantees with capital and liquidity requirements at the level of [ . ]. But, even more importantly, because in the Board’s view, it could be possible that the deterioration of the situation of the subsidiary could lead to its default when the financial assistance by the guarantor had not been provided yet. In such a case, it could be argued, according to the SRB, that the purposes of the guarantees no longer apply. As the IRT noted, “it is therefore not assured that an actionable right of [ . ], persists in case of default, failure or FOLTF determination, so that ultimately the guarantor would be relieved of its legal obligation when it is most needed, in a crisis or failure of [ . ]”. This also connects to the other concern that “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”.
109. As already noted, according to settled case-law, it is not necessary for the statement of reasons to specify all relevant matters of fact and law, and therefore, as to the procedural requirement, this is sufficiently met.
110. In turn, this also shows that the measure adopted is proportionate to the reasons which support it. Indeed, once the SRB could conclude that the two prudential guarantees (the 2014 Guarantee and the 2015 Guarantee) may not be sufficient in a gone concern scenario, the Board was left no other (more proportionate) alternative than either requiring to [ . ] to provide a more suitable guarantee (which the SRB proposed to [ . ], and [ . ] preferred not to pursue as an option so far) or to deny the requested waiver (compare by analogy judgments of 25 September 2015, *VECCO e a. v Commission*, T-360/13, EU:T:2015:695, paragraph 73, and judgment of 19 June 2018, *Le Pen v Parliament*, T-86/17, EU:T:2018:357, paragraphs 198-202).
111. The third plea in law must thus be rejected. If 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 [ . ] cannot be considered in this context. [ . ]’ arguments were that the guarantees of [ . ] 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, they remain therefore, for overriding procedural grounds, beyond the scope of the appeal.

116. What is enough to determine on the third plea of the present appeal, regardless of which construction, in fact and in law, of those guarantees is correct between the opposite views of the Board and [ . ] and the Appellant, is therefore that, within the specific circumstances of the case, the Board provided a sufficient justification of its findings on such critical points, to sufficiently state the reasons why, in the Board's view, the 2014 Guarantee and the 2015 Guarantee provided by [ . ] were deemed inadequate in a gone concern scenario of the subsidiary and this made fully perceptible all relevant technical grounds of the Contested Decision on this point. In light of this, the Contested Decision did not fail to "disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure", and it did "provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged" (judgment of 16 May 2017, *Landeskreditbank Baden-Württemberg v ECB*, T-122/15, paragraphs 122-124 and the case-law cited and judgment of 6 October 2021, *UkrSELHOSPROM Versobank v ECB*, T-351/18 and T-584/18, paragraphs 385-387).
117. Based upon all the foregoing, the Appeal Panel cannot uphold the third plea in law in the sense discussed above.

On those grounds, the Appeal Panel hereby:

**Dismisses the appeal.**

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Helen Louri-Dendrinou  
Co-Rapporteur

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Kaarlo Jännäri

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Luis Silva Morais  
Vice-Chair

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Marco Lamandini  
Co-Rapporteur

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Christopher Pleister  
Chair

For the Secretariat of the Appeal Panel: