



29 June 2022

Case 1/2022

DECISION ON ADMISSIBILITY

[.]

v

the Single Resolution Board

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

TABLE OF CONTENTS

Background of facts3
Main arguments of the parties 10
Appellant 11
Board 11
Findings of the Appeal Panel 12
Tenor38

FINAL DECISION

In Case 1/2022,

APPEAL under Article 85(3) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010¹ (the “SRMR”),

[.], with headquarters [.], [.], [.], [.], with headquarters in [.], [.], [.], and [.], with headquarters [.], [.] all represented by [.] (hereinafter, each of them and all of them together, 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), Marco Lamandini (Co-Rapporteur), David Ramos Muñoz (Co-Rapporteur) and Kaarlo Jännäri,

makes the following final decision:

Background of facts

1. This appeal relates to the joint decision of 4 November 2021 – RC/JD/2020/53 (hereinafter the “Contested Decision”) determining the minimum requirement for own funds and eligible liabilities for [.] (hereinafter “[.]”) and [.], [.], [.], [. [.], [.], [.] and [.] [.]. as agreed by the SRB, [.] ([.]), [.] ([.]) and [.] ([.]).
2. Pursuant to Article 88 of Directive 2014/59/EU (the Bank Recovery and Resolution Directive, hereinafter “BRRD”), BRRD the SRB is the group-level resolution authority of the significant (in accordance with Article 6(4) of Regulation (EU) No 1024/2013) banking group whose parent company is [.]. In this capacity, the SRB has established a resolution college for the [.], which is in charge, among others, of drawing up the group resolution plan and of determining the MREL to be complied with by [.] as resolution entity on a consolidated basis for the group. The resolution college includes [.] ([.]), [.] ([.]) and [.] ([.]), which are the resolution authorities of Member States that are not participating to the Banking Union and in which subsidiaries of [.] are established.
3. On [.], the SRB communicated to [.] a draft joint decision of the resolution college determining the MREL for the group as agreed by SRB and the other three authorities participating to the resolution college and invited [.] to submit its observations as part of a formal right to be heard process.

¹ OJ L 225, 30.7.2014, p.1.

4. On [.], [.] submitted to the SRB its observations to the draft joint decision. On the same date, [.] also provided in a separate letter to the SRB certain confirmations as to [.].
5. On 7 April 2021, [.] addressed a further letter to the SRB, highlighting certain legal developments.
6. The Executive Session of the Board for the 2020 resolution planning cycle took place from [.] to [.] by means of written procedure. The Board took note of the outcome of the joint decision process within the resolution college for [.] (including the [.], [.] and the [.]), but since BRRD2 was not yet transposed in [.] at the time the SRB could not adopt a final decision for the 2020 resolution planning cycle.
7. 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.
8. On 4 November 2021, the Board in its Extended Executive Session finally agreed to (i) the joint decision on the group resolution plan and the resolvability assessment and (ii) the joint decision on MREL determination for the group and the relevant group entities (Joint Decision of 4 November 2021 – RC/JD/2020/53, which is the Contested Decision in the instant case) and the SRB adopted on this ground the further decision of 4 November 2021 - SRB/EES/2021/44.
9. On [.], all Board's decisions referred to in paragraph 8 above, including the Contested Decision, were formally communicated to the Appellant, with cover letter SRB.B.B2(2021)7965320.
10. On [.], the [.] / [.] implemented the Contested Decision insofar as it concerned [.] entities by means of an instruction addressed to the group.
11. The notice of appeal was submitted by the Appellant to the Appeal Panel on 30 December 2021. The Chair of the Appeal Panel appointed as co-rapporteurs Professor Marco Lamandini and Professor David Ramos Muñoz and the appeal was notified by the Secretariat of the Appeal Panel to the Board on 11 January 2022.
12. 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 Panel forwarded such request to the Appellant, asking for observation by 21 January 2022. The Appellant submitted observations.
13. On 21 January 2022, the Appeal Panel did not grant the requested stay of the proceedings but granted an extension until 25 February 2022 of the deadline for the Board to submit its response.

14. On 15 February 2022, the Appeal Panel informed the parties that its final decision in case 2/2021 was published on the SRB website.
15. On the same day, 15 February 2022, the Board informed the Appeal Panel that it was of the view that the appeal was not admissible, due to the fact that, in its view, the Appellant had appealed the wrong decision. On this basis, the Board requested that the Chair gave directions for the conduct of the appeal by splitting the procedure into two stages: an initial stage, where only issues of admissibility were considered, and, if the case were found admissible, a second, subsequent stage, to consider the merits of the case.
16. On 16 February 2022, the Appeal Panel forwarded the Board's communication of 15 February 2022 to the Appellant and granted the Appellant until 17 February 2022 to file its observations. The Appellant submitted its observations by such deadline.
17. On 17 February 2022, the Appeal Panel adopted and sent to the parties a procedural order as follows:

In case 1/2022, within the time to file its response, on 15 February 2022 the Single Resolution Board (SRB) raised an objection to the admissibility of the Appeal, under Article 85 (3) SRMR.

The objection raised by the SRB was accompanied by a request to permit the SRB to make a separate submission, at this stage of the proceedings, on the admissibility of the Appeal, and to stay the proceedings on the merits, which would be resumed if and when the Appeal Panel determines the Appeal to be admissible.

The SRB's request was communicated to the Appellant on 16 February 2022. In that communication the Appeal Panel requested the Appellant to indicate its views, i.e., whether it agreed with the SRB's request or not, and whether it had any grounds (briefly stated) to support its position no later than 17 February 2022, at 15:00.

The Appellant duly complied with this request, sending its observations by the due date and time. The Appellant contended that the SRB's request was contrary to Article 6 of the Rules of Procedure, and that the rules of the General Court could not be applied by analogy. The Appellant also contended that the SRB's request does not act in the interest of the procedure because it is tardy, because case 02/2021 does not rule on admissibility issues (and thus does not explain the request) and because the allegations of inadmissibility are false, since the Decision appealed is the final Decision setting MREL for the applicants under Article 12 SRMR, and the SRB does not substantiate its allegation to the contrary.

* * *

Article 11(1) of the Appeal Panel Rules of Procedure (RoP) allows the Panel to give directions by way of case management for the efficient conduct of the Appeal.

Differentiating in the procedure between an initial stage, where the admissibility of the complaint is considered, and a subsequent stage, where the merits of the dispute, to the extent that they are admissible, are subject to analysis, offers, especially in complex cases, clear advantages. It makes it possible to detect serious admissibility objections early, and/or, to the extent that some grounds of appeal are affected by admissibility problems, while others are not, to concentrate on the grounds that are admissible.

The RoP of the Appeal Panel allow the separate consideration of admissibility matters. Article 9, paragraph one, states that:

“If the Board contends that the appeal is not admissible under Article 85(3) of Regulation 806/2014, the Appeal Panel shall determine whether or not it is admissible before examining whether it is well founded under Article 85(7) of Regulation 806/2014”.

And paragraph 2 allows the Appeal Panel to raise questions as to admissibility of its own motion, and to declare a written submission as not qualifying as an appeal.

The previous case law of the Appeal Panel has relied on the use of both tools in the past.

This is not prevented by the application of Article 6 of the Rules of Procedure. Such specific provision refers namely to the Board’s response, which shall include contentions as to non-admissibility. This provision, however, does not prevent the Appeal Panel from deciding that, if admissibility objections exist, those should be decided first. It is therefore always possible to the Appeal Panel to request the parties to deal first with admissibility issues, if the Appeal Panel, upon request of the SRB or on its own motion, and in any case in the duly exercise of its powers, finds that one or more issues of admissibility call, in the special circumstances of each case, for a preliminary determination in the interest of procedural economy and in the interest of all parties involved (also in terms of costs).

As to the Appellant’s allegations that the admissibility objections are false, this is precisely the question that needs to be answered. Should such allegations be, indeed, false, this would allow the Appeal Panel to proceed to the merits without any objections on admissibility. Should they turn to be correct, in all or in part, it would save time and resources. In either case, procedural efficiency is enhanced, which is the overriding consideration retained by the Appeal Panel.

Thus, on the whole, deciding on admissibility issues first will enhance procedural efficiency, while not endangering procedural fairness. In order to fully ensure that, the Appeal Panel will grant the Appellant the opportunity to file a rejoinder, focusing on admissibility aspects only, with a time of 21 days after the SRB files its response.

Therefore, in light of these considerations, the Chair, on behalf of the Appeal Panel disposes the following:

1. That, within the deadline set for its response, the Board shall file a response focusing on the admissibility of the appeal.
2. That the Appeal Panel shall proceed to consider the admissibility first. In what regards the merits of the case, the times for the procedure can be considered stayed.
3. That, once the Board files its response, focused specifically on matters of admissibility, the Appellant shall have twenty-one (21) days to file a rejoinder, focusing only on aspects of admissibility.

The Appeal Panel will give the parties further instructions on subsequent steps after the Board’s response, and the Appellant’s rejoinder, are filed. However, all parties are invited to cooperate actively in order to facilitate as much as possible a timely determination by the Appeal Panel on the inadmissibility issues, considering the overriding interest of a swift overall resolution of the case. To this effect, both parties are requested to state clearly and comprehensively their position on all inadmissibility issues, the SRB with its response and the Appellant with its reply.

18. On 25 February 2022, the Board timely filed its response in the appeal addressing only, in compliance with the Appeal Panel procedural order, the issue of admissibility.
19. On 21 March 2022, the Appellant timely submitted its reply to the Board's response on inadmissibility.
20. On the same day, 21 March 2022, the Board submitted a letter informing the Appeal Panel that the Appellant had lodged an application before the General Court challenging the same Contested Decision in case [.].
21. On 22 March 2022, the Appeal Panel adopted and sent to the parties a new procedural order as follows:

1. The Appeal Panel issued a Procedural Order on 17 February 2022, where it concluded that it would decide on the admissibility of this appeal, and, if the appeal were admissible, on a subsequent stage it would decide on the merits. Thus, the Appeal Panel decided:

1. That, within the deadline set for its response, the Board shall file a response focusing on the admissibility of the appeal.
2. That, once the Board files its response, focused specifically on matters of admissibility, the Appellant shall have twenty-one (21) days to file a reply to the Board's response, focusing only on aspects of admissibility.

The Board filed its response on 25 February 2022, from whence the time for the Appellant to file its reply started to count.

The Appellant's reply was received on 21 March 2022, within the time limit set forth by the Appeal Panel.

In the same Procedural Order of 17 February 2022, the Appeal Panel indicated that: *"The Appeal Panel will give the Parties further instructions on subsequent steps after the Board's response, and the Appellant's rejoinder, are filed"*.

In light of the relevance and novelty of the arguments raised by both Parties as to the admissibility of the appeal with the response and the reply respectively, the Appeal Panel considers appropriate to grant both Parties the opportunity to further discuss the admissibility issue having now full knowledge of the other Party position and, to this effect, the Appeal Panel has determined (i) to grant to the Board the opportunity to file a reply to the Appellant's reply and (ii) to grant to the Appellant the opportunity to file a rejoinder to the Board's reply, to complete the information necessary to decide on admissibility.

To that effect, the Appeal Panel grants the Board a further two weeks from the date of notice of this procedural order to file its reply and the Appellant two weeks from the notice of the Board's reply to file its rejoinder.

2. As a second consideration, in its Letter of 21 March 2022, the Board has informed the Appeal Panel that the Appellant has filed case [.] before the General Court.

The filing of such case was announced by the Appellant when it filed this appeal. In that appeal, the Appellant explained that it would challenge before the General Court (i) the joint decision on the

Group resolution plan and resolvability assessment for [.] and its subsidiaries both inside and outside the Banking Union agreed by SRB and each of the RA of [.], [.] and [.] on 4 November 2021, with reference RC/JD/2020/52 (the “joint decision on resolution plan”), and (ii) the joint decision determining the intermediate MREL targets by initiating an action against the External MREL decision.

The Appeal Panel has understood, from the reading of the appeal, that the Appellant considered that those two decisions were not appealable before the Appeal Panel.

In its letter of 21 March 2022, the Board has expressed its concerns about the potential overlap between this appeal and [.], and requested the Appeal Panel to ask the Appellant to (i) provide the Appeal Panel with additional information on case [.], and (ii) clarify the relationship between [.] and the appeal and their mutual implications.

As a matter of procedural efficiency and transparency, but also having due consideration to potential implications on the admissibility issue of the Appellant’s decision to challenge the abovementioned decision before the General Court, the Appeal Panel requests the Appellant to provide some additional information on the state of the procedure before the General Court, including its implications for the present appeal with the rejoinder to be filed by the Appellant as indicated above.

22. On March 25, the Board requested the Appeal Panel “in accordance with Article 8(1) of the Rules of Procedure of the Appeal Panel to extend the time period to file the SRB’s Reply in case 01/2022 by two working weeks”, based on reasons including “[.].”, the fact that “there are multiple absences of key members of the SRB Legal Service due to annual leave and a mission to Luxembourg next week for three working days”, and also the fact that “due to the relevance of the subject, the preparation of the Reply will also require input from and consultation with several stakeholders in the SRB across all hierarchical levels and, potentially, outside the SRB.”
23. On 28 March, the Appeal Panel issued a Procedural Order where it found as follows:

In case 1/2022, the Appeal Panel issued a Procedural Order on March 22, 2022 where it gave instructions to the Parties on the subsequent steps of the procedure.

In light of the relevance and novelty of the arguments raised by both Parties as to the admissibility of the appeal, the Appeal Panel granted to the Parties “the opportunity to further discuss the admissibility issue having now full knowledge of the other Party position and, to this effect, the Appeal Panel has determined (i) to grant to the Board the opportunity to file a reply to the Appellant’s reply and (ii) to grant to the Appellant the opportunity to file a rejoinder to the SRB’s reply, to complete the information necessary to decide on admissibility”.

Thus, the Appeal Panel granted “*the Board a further two weeks from the date of notice of this procedural order to file its reply and the Appellant two weeks from the notice of the Board’s reply to file its rejoinder*”.

On 25 March 2022, the Board requested the Appeal Panel “*in accordance with Article 8(1) of the Rules of Procedure of the Appeal Panel to extend the time period to file the SRB’s Reply in case 01/2022 by two working weeks*”.

The reasons given were, first, “[.].”, second, the fact that “*there are multiple absences of key members of the SRB Legal Service due to annual leave and a mission to Luxembourg next week for*

three working days”, and, third, the fact that “due to the relevance of the subject, the preparation of the Reply will also require input from and consultation with several stakeholders in the SRB across all hierarchical levels and, potentially, outside the SRB.”

The Appeal Panel has often granted extensions of time when it was appropriate to do so, taking into account the circumstances alleged by the Parties, the complexity of the issues at stake, and the opportunities that the Parties had to express their views.

In this regard, in addition to the Board’s reasons, we must also take into account that:

(i) In the present stage of the proceedings the only arguments being considered are those on admissibility, and not the substantive arguments, a decision taken on procedural efficiency grounds at the request of the Board.

(ii) The Board had already been granted a time extension to file its reply, and

(iii) Should there be any further aspects that still need discussion in depth beside the written complementary replies currently at stake, there will be ample opportunity in terms of due process to bring up such aspects at a hearing, to which the Parties, willing, are entitled, where the presence of both Parties may facilitate the immediacy of the exchange, and any clarifications needed on matters of fact and law.

For these reasons, the Appeal Panel considers appropriate to grant one extra week for the Board to file its submissions, as the granting of a full two-week period, as specifically requested, would not be fully justified, in light of the above considerations and circumstances.

In the interest of fair treatment of the Parties, the Appeal Panel also grants one extra week to the Appellant to file its subsequent reply.

24. On 13 April 2022, the Board submitted its reply to the Appellant’s reply on admissibility.
25. On 4 May 2022, the Appellant submitted its rejoinder to the Board’s reply on admissibility.
26. On 6 May 2022, the Chair of the Appeal Panel wrote to the parties to ask whether the parties intended to discuss the admissibility of the case at a hearing or preferred to waive their right to a hearing. On 11 May 2022, both parties indicated their intention to have a hearing.
27. On 18 May 2022, the Appeal Panel informed the parties that the hearing would take place in Brussels on 8 June 2022.
28. On 3 June 2022, a Friday, after the close of business the Board communicated to the Secretariat that on 4 May 2022 a new Joint Decision had been adopted, which, according to the Board, states the following: “[t]his joint decision repeals and supersedes joint decision (RC/JD/2020/53) dated 04.11.2021”. The inference drawn by the Board was that “*in the Board’s view, the Board seriously questions that the Appellant could demonstrate an interest in the confirmation of a decision that it no longer exist*”.
29. Since 6 June 2022, a Monday, was Bank Holiday in Belgium, on 7 June 2022 in the morning the Secretariat of the Appeal Panel sent the Board’s communication to the Appellant, who conveyed its preliminary views on the very same day.

30. On 8 June 2022, at the hearing, the Chair, due to the timing of the communication of the new joint decision, and as an exception to the general practice that all relevant arguments and elements of fact must be submitted before the hearing, gave extra directions to the parties, consisting in the following. The Board was asked to produce the new joint decision by the close of business of 9 June 2022, and it would then be given 5 working days to provide some observations, to draw implications from the new joint decision. Subsequently, the Appellant would also be granted another 5 days to make its own observations, and draw its own inferences.
31. At the hearing both parties appeared and presented oral arguments, where they reiterated their respective positions, adding further considerations of fact and law. The parties also answered questions from the Appeal Panel for the clarification of facts relevant for the just determination of the question of admissibility of the appeal.
32. After the hearing, the Board timely produced the new joint decision, and provided its additional observations and drew its additional inferences from that decision on 15 June. Subsequently, the Appellant timely provided its own observations and inferences on 22 June.
33. On 23 June 2022, after these additional observations and inferences were provided, the Appeal Panel notified the parties that the Chair considered that the evidence on admissibility was complete and thus that the Appeal Panel would have determined on admissibility within the term set out in Article 85(4) of Regulation 806/2014 and 20 of the Rules of Procedure.

Main arguments of the parties on admissibility

34. The main arguments of the parties on the admissibility of the appeal 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. Since the question of inadmissibility has been raised by the Board, the views of the Board are summarized here below first, and then those of the Appellant.

Board

35. The Board argues, in the first place, that, since the Appellant has appealed as Contested Decision the joint decision RC/JD/2020/53 and not the SRB's decision SRB/EES/2021/44 the appeal is inadmissible. In the Board's view, the Contested Decision is not a "decision of the Board" within the meaning of Article 85(3) SRMR, because (i) only a decision taken solely by the SRB would qualify as such and (ii) the Contested Decision is not intended to create any external binding effects but only reflects the consensus reached by the college. For these reasons, in the Board's view, the Contested Decision cannot be appealed before the Appeal Panel under Article 85(3) SRMR.
36. The Board further argues, in the second place, that the Contested Decision is not addressed to the Appellant and is not of direct concern to the Appellant either because it is not a decision that definitively determines the position of the Board upon the conclusion of the

administrative procedure and is not intended to have legal effects capable of affecting the interests of the Appellant. The Contested Decision, in the Board's view, is only a preliminary step (a preparatory act) in the adoption of the SRB's decision SRB/EES/2021/44, which, in its view, is the only appealable act under Article 85(3) SRMR.

37. The Board further argues, in the third place, that the appeal is also inadmissible due to the lack of interest of the Appellant, because, even assuming that the Appeal Panel would remit the case to the Board, the Board could not amend the Contested Decision, which is a joint decision of the resolution college, while the Board can amend solely its own decision, as it is the case of the SRB's decision SRB/EES/2021/44. For this reason, the Board considers that the appeal would be deprived of effects if the appeal were successful.
38. The Board finally noted that to declare the appeal not admissible under Article 85(3) SRMR would not breach Article 47 of the Charter.
39. With its reply on admissibility the Board reiterated its arguments and further replied to the arguments put forward by the Appellant to support the admissibility of the appeal.
40. Finally, in its additional observations of 3 June 2022, and its additional submissions filed on 15 June 2022, the Board argued that, even if the above arguments were dismissed, the Appellant would still lack an interest in the proceedings, since the Contested Decision has, in the meantime, been repealed and superseded by a new joint decision, which results in the present proceedings being devoid of purpose.

Appellant

41. The Appellant argues that the appeal is admissible and that the SRB has misinterpreted and violated the rules governing the MREL determination process, because (i) the joint decision process on MREL does not allow the SRB to adopt a separate decision determining the MREL subsequent to the Contested Decision, which is a decision of the SRB agreed by the resolution authorities, and (ii) the SRB conflates the concepts of binding legal effects and effective date. In the Appellant's view, the Contested Decision is a binding decision setting the final determination on MREL and is attributable to the SRB, and as such, is also amenable to the review of the Appeal Panel. In this context, the subsequent SRB/EES/2021/44 decision is in substance identical to the Contested Decision and therefore only confirmatory.
42. The Appellant further argues that the Contested Decision directly affects the legal situation of the Appellant who has an interest in obtaining that the Contested Decision is remitted to the Board and that, therefore, on one hand, the Contested Decision is of direct and individual concern to the Appellant and, on the other hand, the Appellant has interest in bringing the appeal against the Contested Decision.

43. In its rejoinder to the Board's reply, the Appellant has reiterated its position and further replied to the arguments put forward by the Board with its reply to support the claim of inadmissibility of the appeal. In its rejoinder, the Appellant also briefly discussed the relationship between case [.] and Case 1/22.
44. Finally, in its additional submissions, filed on 7 June 2022, and complemented with post-hearing submissions on 22 June 2022, the Appellant argued that the Contested Decision could not be repealed and superseded, but only updated and amended, and, in any event, that the consequence of that should be to entitle the Appellant to amend its pleas to the new joint decision, but that in no circumstance should this result in a finding that the Appellant has lost its interest in the Appeal, or that the proceedings have been deprived of purpose.

Findings of the Appeal Panel

45. The parties have filed written submissions on their diverging views on the admissibility 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 further acknowledges that the admissibility issues debated in this appeal are new and raise interesting and complex questions on the interaction between the group-level resolution authority and the resolution college, the role of the resolution college and the relation existing between a joint-decision of the resolution college on MREL and the SRB's decision instructing the relevant national competent authority in the Banking Union on the binding MREL determined by the joint-decision and on its implementation. The Appeal Panel acknowledges and duly appreciates the key technical contributions of their legal counsels to enlighten in detail all relevant aspects of this complex issue.
46. A large part of the issue of admissibility in this case shows the conflict between, on the one hand, the views based on how the Board and the national resolution authorities (NRAs) execute their current administrative practice, and conceive that practice; and, on the other hand, on how the results of such practice, such as the Contested Decision are perceived by the financial institutions that must execute the acts resulting from that practice. The Appeal Panel has taken due consideration of such diverging views, and will make the corresponding references to the relevant submissions on this. At the same time, the issue of admissibility, as such and as raised in the present procedure, is not an issue of administrative practice, or perceptions, but ultimately an issue of law, and thus the Appeal Panel will address it by primarily relying on the applicable legal framework.
 - (a) *The applicable legal framework.*
47. This appeal poses interpretative questions which result from combining a complex legal framework, composed by the SRMR, and the BRRD provisions on resolution colleges, complemented by Commission Delegated Regulation 2016/1075 (hereinafter "CDR 2016/1075"). CDR 2016/1075 regulates, among other things, the operational functioning of such resolution colleges.

48. Article 45h(1) BRRD states as follows:

The resolution authority of the resolution entity, the group-level resolution authority, where different from the former, and the resolution authorities responsible for the subsidiaries of a resolution group that are subject to the requirement referred to in Article 45f on an individual basis shall do everything within their power to reach a joint decision on: (a) the amount of the requirement applied at the consolidated resolution group level for each resolution entity; and (b) the amount of the requirement applied on an individual basis to each entity of a resolution group which is not a resolution entity.

The joint decision shall ensure compliance with Articles 45e and 45f and it shall be fully reasoned and provided to: (a) the resolution entity by its resolution authority; (b) the entities of a resolution group which are not a resolution entity by the resolution authorities of those entities; (c) the Union parent undertaking of the group by the resolution authority of the resolution entity, when that Union parent undertaking is not itself a resolution entity from the same resolution group.

49. Articles 86 to 93 of CDR 2016/1075, for their part, regulate with much detail the procedure for the adoption of the joint decision by resolution authorities, referred to in Article 45h(1) BRRD.

50. Article 45h(3) BRRD states that:

In the absence of such a joint decision within four months, a decision shall be taken in accordance with paragraphs 4 to 6.

51. Article 45h(7) BRRD states that:

The joint decision referred to in paragraph 1 and any decisions taken by the resolution authorities referred to in paragraphs 4, 5 and 6 in the absence of a joint decision shall be binding on the resolution authorities concerned.

The joint decision and any decisions taken in the absence of a joint decision shall be reviewed and where relevant updated on a regular basis.

52. Article 12(1) SRMR, for its part, states that:

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

53. Article 12(5) states that:

The Board shall address its determination to the national resolution authorities. The national resolution authorities shall implement the instructions of the Board in accordance with Article 29. The Board shall require that the national resolution authorities verify and ensure that entities and groups maintain the requirements for own funds and eligible liabilities laid down in paragraph 1 of this Article.

54. The Appeal Panel must decide primarily on the basis of the provisions referenced above and their necessary textual, contextual and teleological interpretation, duly mindful of all systematic implications.

(b) Whether the Contested Decision is a preparatory or a final act.

55. The Board raises an objection to the admissibility of this appeal based on the allegation that the Contested Decision adopted through the resolution college is (i) not a decision, and, (ii) in any event, not a “final decision”, i.e., in the Board’s view, the Contested Decision, being the joint decision of the resolution college but not the final SRB’s decision, is a preparatory act of the SRB’s decision SRB/EES/2021/44, which, in turn, is the final decision.

56. According to settled case law, intermediate measures whose aim is to prepare the final decision do not, in principle, constitute acts which may form the subject-matter of an action for annulment (see judgment of 13 October 2011, Joined Cases C-463/10 P and C-475/10 P, *Deutsche Post AG v Commission*, EU:C:2011:656, paragraph 50; judgment of 15 March 2017, case C-415/15 P, *Stichting Woonpunt and Others v Commission*, EU:C:2017:216, paragraph 44; judgment of 26 January 2010, Case C-362/08 P *Internationaler Hilfsfonds eV v Commission*, EU:C:2010:40, paragraph 52; judgment of 17 July 2008, Case C-521/06 P *Athinaiki Techniki v Commission* [2008] ECR I-5829, paragraph 46; judgment of 11 November 1981, Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraphs 9 and 10).

57. The rationale for this distinction is expressed in some cases as follows: “an action for annulment against measures expressing a provisional opinion of the Commission might make it necessary for the EU judicature to arrive at a decision on questions on which the institution concerned has not yet had an opportunity to state its position and would as a result anticipate the arguments on the substance of the case, confusing different procedural stages both administrative and judicial. To allow such an action would thus be incompatible with the system of the division of powers between the Commission and the EU judicature and of the remedies laid down by the Treaty, as well as the requirements of the sound administration of justice and the proper course of the administrative procedure to be followed in the Commission” (judgment of 13 October 2011, Joined Cases C-463/10 P and C-475/10 P, *Deutsche Post AG v Commission*, EU:C:2011:656, at para. 51).

58. Although, within the current state of case law there is yet no specific guidance in the SRMR on whether the admissibility of an appeal by the Appeal Panel should be guided by this distinction between “preparatory” and “final” acts, in the Appeal Panel’s view the distinction is inspired by weighty reasons that, all relevant normative aspects being here considered, should be followed also in this context.

59. For purposes of the distinction, European courts have held that the intermediate acts are, first and foremost, acts which express a provisional opinion of the institution (judgment of 13 October 2011, Joined Cases C-463/10 P and C-475/10 P, *Deutsche Post AG v Commission*,

EU:C:2011:656, at para. 50). Thus, “in principle an act is open to review only if it is a measure definitively laying down the position of the Commission or the Council on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision” (judgment of 11 November 1981, Case 60/81 IBM v Commission [1981] ECR 2639, paragraph 10).

60. In *ABLV v ECB* (order of 6 May 2019, T-281/18, EU:T:2019:296) and in *Bernis and Others v ECB* (order of 6 May 2019, T-283/18:EU:T:2019:295) as well as, on appeal, in *Joined Cases C-551/19 P and C-552/19 P* (judgment of 6 May 2021, EU:C:2021:369) the European Courts addressed the issue of the preparatory nature of the failing and likely to fail (FOLTF) assessment in the SRMR context and found that the FOLTF assessment made by the ECB is a preparatory act (and could therefore not be challenged for annulment per se before the Union courts) because the ECB’s assessment of the condition referred to in point (a) of the first subparagraph of Article 18(1) SRMR is not a binding act and, in particular does not put the SRB in a position where its powers in respect of that assessment are circumscribed (judgment of 6 May 2021, *Joined Cases C-551/19 P and C-552/19 P, ABLV Bank and Ernest Bernis v ECB*, EU:C:2021:369 at paragraphs 67-68). As the CJEU noted, at paragraph 68-71:

“It cannot be ruled out that the SRB may not agree entirely or at all with the ECB’s analysis, or that it may detect an irregularity which it is then required to remedy, so as to ensure that it is not subsequently penalised by the Courts of the European Union in any action for annulment as envisaged in Article 86(2) of Regulation No 806/2014. It must, in that regard, be emphasised that, as has been recalled in paragraph 62 of the present judgment, the SRB does have the power, if it so decides, to assess the first of the conditions referred to in the first subparagraph of Article 18(1) of that regulation, and is therefore in a position, for that purpose, to use the documents made available to it by the ECB.

It is true that, in fact, the ECB’s expertise and its knowledge of supervisory information relating to the entity concerned are such that the SRB will probably in most cases endorse the ECB’s assessment. However, as the Advocate General stated in point 111 of his Opinion, while there is ‘no objection to the assumption that the ECB’s assessment may carry *auctoritas* within the classical sense of that term, and that the SRB could not refrain from taking it into account or reject its content uncritically’, ‘this does not mean ... that it is also vested with the *potestas* inherent in legal decisions that are imposed in relations between institutions in the case where one of them may not depart from the substance of what the other has agreed or decided to do’.

In the second of the situations mentioned in paragraph 67 of the present judgment, the SRB is, again, not legally bound by the ECB’s assessment. Admittedly, if the ECB comes to the conclusion that the entity concerned is not failing or is not likely to fail, no assessment is sent to the SRB and the resolution procedure is not, therefore, initiated, since the third subparagraph of Article 18(1) of Regulation No 806/2014 provides that the ECB must communicate its assessment to the Commission and to the SRB only if it assesses that the entity is failing or is likely to fail”.

61. European courts have also analysed the reviewability of acts within composite procedures involving both national and European authorities, also to the purpose of allocating jurisdiction between national and European Courts. In particular, the Court of Justice has held that Article 263 TFEU (action of annulment) confers upon the Court of Justice of the European Union exclusive jurisdiction to review the legality of acts adopted by the EU institutions and that the

involvement of national authorities in the procedure does not alter their classification as EU acts “where the acts of the national authorities constitute a stage of a procedure in which an EU institution exercises, alone, the final decision-making power without being bound by the preparatory acts or the proposals of the national authorities” (judgment of 18 December 2007, *Sweden v Commission*, C-64/05 P, EU:C:2007:802, at paras. 93 and 94; judgment of 18 December 2003, T-326/99, *Fern Olivieri v Commission and EMEA*, EU:T:2003:351, at paras. 51-54). Conversely, when the act adopted by the national authority is a necessary stage of a procedure where the subsequent EU act is one where the EU institutions have limited or no discretion, national courts can have jurisdiction (judgment of 3 December 1992, *Oleificio Borelli v Commission*, C-97/91, EU:C:1992:491, at paras. 9 and 10).

62. In the *Berlusconi* case, the Court of Justice considered the application of the principle in *Sweden v Commission* (exclusive jurisdiction of European courts over final acts, and no national court jurisdiction over preparatory acts) to a composite procedure concerning the acquisition of qualifying holdings in a credit institution in the Banking Union (judgment of 19 December 2018, in case C-219/17, *Silvio Berlusconi and Fininvest v Banca d’Italia*, EU:C:2018:1023; compare also, more recently, judgment 11 May 2022, in case T-913/16, *Silvio Berlusconi and Fininvest v ECB*, EU:T:2022:279, paragraphs 240-258). This criterion has also been applied *mutatis mutandis* in the context of the SRM, in *Iccrea Banca* concerning the calculation of the *ex-ante* contributions to the Single Resolution Fund, where it was held that in that context the SRB exclusively exercises the final decision-making power and adopts a binding act, and the role of the national resolution authority is confined to provide operational support, including the communication to the credit institution of the amount of the *ex-ante* contribution to be paid as determined by the SRB (judgment of the Court of Justice of 3 December 2019, Case C-414/18, *Iccrea Banca v Banca d’Italia*, ECLI:EU:C:2019:1036). In line with the same rationale, it follows that, in the context of the present case, like the national resolution authority’s acts (i) which communicate to credit institutions the *ex-ante* contributions due to the Single Resolution Fund or (ii) which implement and communicate to a credit institution a resolution plan prepared by the SRB and endorsed by the European Commission, also the [.] resolution authority’s act implementing the SRB MREL decision cannot be challenged before a national court relying on the alleged invalidity of the binding European acts. When the national resolution authorities implement, as in the case at hand, a European act which is to be found in two separate decisions, the question lies on which of the two separate European act is the one which needs to be challenged.
63. In a situation where a credit rating agency had challenged a draft regulatory standard adopted by the European Banking Authority which had been submitted for endorsement to the European Commission, the same criterion as in *Sweden v Commission*, *Berlusconi* and *ICCREA* has been applied by the Joint Board of Appeal (BoA) of the European Supervisory Authorities (ESAs) in *Creditreform Rating* (Decision of the Joint Board of Appeal of 13 September 2019, *Creditreform Rating AG*, BoA-D-2019-05, at paragraphs. 60-67), finding that only the final, and binding act of the European Commission could be validly challenged under Article 263 TFEU and that therefore the Board of Appeal lacked competence to

determine on the validity of the preparatory act of the European Banking Authority, which was not binding upon the European Commission.

64. Moreover, according to settled case law and precedents, for purposes of distinguishing between intermediate and final acts, it is necessary to observe an integrated legal approach, looking to the substance of the contested acts, as well as the intention of those who drafted them, as well as the purpose and context of the acts in question (judgment of 11 November 1981, Case 60/81, *IBM v Commission* [1981] ECR 2639, paragraphs 13-14; judgment of 13 October 2011, Joined Cases C-463/10 P and C-475/10 P, *Deutsche Post AG v Commission*, EU:C:2011:656, paragraph 38). By way of example, in *IBM v Commission* the Court of Justice considered a statement of objections and the initiation of a procedure by the Commission as non-reviewable (in the sense that these did not indicate the final position of the Commission); while in *Deutsche Post* the Court considered an information injunction in the context of a state aid procedure as reviewable, despite this did not constitute the act closing the procedure.
65. Finally, the General Court also recently decided on the issue of admissibility of a decision adopted in the context of a complex procedure in several cases concerning the resolution of Banco Popular. Specifically, in the case *Fundación Tatiana Pérez de Guzmán el Bueno*, the General Court found that the appeal against the decision adopting a resolution scheme was admissible, and considered the issue of admissibility at length as a matter of public policy, despite the fact that such admissibility had not being challenged by the Board (judgment of the General Court of 1 June 2022, Case T-481/17, *Fundación Tatiana Pérez de Guzmán el Bueno v SRB*, ECLI:EU:T:2022:311, paragraphs 107-150). The General Court considered that the appeal against the SRB's decision was admissible, despite the fact that the SRMR framework contemplates the subsequent endorsement of the SRB's decision by a subsequent decision from the European Commission. According to the General Court, the fact that the decision was subject to endorsement to avoid an actual transfer of responsibility, in accordance with the *Meroni* case law (judgment of the Court of 13 June 1958, *Meroni/High Authority* (9/56, EU:C:1958:7), the additional fact that the Commission's approval constituted a necessary act, *and* the fact that the decision could not enter into force until it was approved by the Commission could not deprive the SRB's decision from its autonomous legal effects (judgment of the General Court of 1 June 2022, Case T-481/17, *Fundación Tatiana Pérez de Guzmán el Bueno v SRB*, at paragraph 127-130). The fact that the Commission had to approve the SRB's decision, and could endorse it, or present objections to its discretionary elements did not mean that it could claim for itself the SRB's competences, nor modify the resolution scheme, or its legal effects (judgment of the General Court of 1 June 2022, Case T-481/17, *Fundación Tatiana Pérez de Guzmán el Bueno v SRB*, at paragraph 132). Critically, the Court also held that, within the framework of the complex administrative procedure established under SRMR it could not be considered that the objective of the adoption of the resolution scheme was to prepare the Commission's decision (judgment of the General Court of 1 June 2022, Case T-481/17, *Fundación Tatiana Pérez de Guzmán el Bueno v SRB*, at paragraph 137).

66. In order to determine on the first objection raised by the Board as to the admissibility of the present appeal, the Appeal Panel needs to apply the above principles, in so far as they are consistently applicable by analogy, in the specific (and different) context of a resolution college, in which the SRB is the resolution authority of the parent resolution entity. Although the Board has insisted throughout these proceedings that the joint decision is a *sui generis* act, and that precedents do not cover the same situation, in the Appeal Panel's view the underpinning principles expressed by the Court of Justice and the General Court are on the whole still relevant to ensure consistency.
67. This leads to the Contested Decision (which is the decision adopted in the form of Joint Decision RC/JD/2020/53). The context of this decision is the procedure envisaged in Article 45h(1) BRRD (and namely the procedure for determining the minimum requirement for own funds and eligible liabilities) and Article 88 BRRD (regarding resolution colleges). These provisions are supplemented by Articles 86-93 CDR 2016/1075 which regulate the "joint decision process on minimum requirements for own funds and eligible liabilities". It is also important to note that, in light of recital 91 and Article 5 SRMR, these provisions of the BRRD and of CDR 2016/1075 bind the SRB, the European Commission and the Council when they act in the context of the procedures established by the SRMR.
68. The context for Article 88 BRRD is given by the BRRD recitals. As pointed out by the Board, Recital (98) BRRD provides that: "The resolution college should not be a decision-making body, but a platform facilitating decision-making by national authorities. The joint decisions should be taken by the national authorities concerned".
69. Yet, in the Appeal Panel's view, the fact that resolution colleges seek to facilitate consensus, and have no *stricto sensu* independent decision-making as a college does not mean that the process results in no decision. To the contrary, the same recital makes reference to the adoption of decisions by the authorities concerned. Article 88(1) BRRD further supports this view, when it states that: "group-level resolution authorities shall establish resolution colleges to carry out the tasks referred to in Articles 12, 13, 16, 18, 45 to 45h, 91 and 92, and, where appropriate, to ensure cooperation and coordination with third-country resolution authorities". Thus, resolution colleges are established to coordinate the exercise of tasks that involve decision-making powers, including group resolution plans (articles 12-13 BRRD), resolvability assessment (article 16 BRRD), and the power to remove impediments to resolvability (article 18 BRRD) or resolution action (articles 91 and 92 BRRD).
70. In the Appeal Panel's view, the essence of the joint decision adopted in the framework of a resolution college is that of a bundle of individual decisions, adopted together and in parallel by each resolution authority being part of the college, unless one or more of them disagree, in which case the decisions will be adopted in parallel, but separately. Formally, the joint decision may result in a single document prepared by the resolution authority of the parent resolution entity, to which it is also attached the individual consent of the other national resolution authorities. Yet, in substance, that document indicates that all resolution authorities being part of the college did not disagree with the joint decision, and thus adopted in parallel

the content of such decision to the effect of making it binding in their respective territory and remit.

71. The function of coordinating decision-making via resolution colleges extends to the determination of “minimum requirements for own funds and eligible liabilities” (MREL). Article 45h(1) BRRD provides that the relevant competent authorities “shall do everything within their power to reach a joint decision on: (a) the amount of the requirement applied at the consolidated resolution group level for each resolution entity; and (b) the amount of the requirement applied on an individual basis to each entity of a resolution group which is not a resolution entity”. Its second paragraph further provides that: “The joint decision shall ensure compliance with Articles 45e and 45f and it shall be fully reasoned and provided to: (a) the resolution entity by its resolution authority; (b) the entities of a resolution group which are not a resolution entity by the resolution authorities of those entities; (c) the Union parent undertaking of the group by the resolution authority of the resolution entity, when that Union parent undertaking is not itself a resolution entity from the same resolution group”.
72. Accordingly, it results from the clear and unambiguous wording of the text of Article 45h BRRD and from its contextual and teleological interpretation that this is a “decision”, and that this decision marks the end of the process at the college level. Furthermore, from a literal consideration of the relevant provisions in the BRRD, the joint decision, contrary to the Board’s view, does not merely “constitute a basis”, nor “forms the consensus”, for a subsequent decision by resolution authorities. On the contrary, the decision itself “shall ensure compliance” with the relevant provisions on MREL.
73. Article 45h(7) BRRD states, in turn, that “the joint decision referred to in paragraph 1 [...] shall be binding on the resolution authorities concerned”.
74. The MREL determination resulting from the joint decision is, then, provided to the resolution entity, and to the entities of a resolution group, by their relevant resolution authorities, and to the Union parent undertaking. Thus, the text of both Article 88 and 45h BRRD, duly read in their overall normative context, imply that the joint decision is not a preliminary decision, but a final decision which is binding on the resolution authorities concerned, unless they have disagreed.
75. This is consistent with the provisions of Articles 86-93 of CDR 2016/1075, which regulate the procedure for the joint decision. This procedure includes (i) a planning stage (subject to article 86 CDR 2016/1075); (ii) a proposal at consolidated and Union parent undertaking level, made by the group level resolution authority (subject to article 87 CDR 2016/1075), and at subsidiary level, made by the subsidiaries’ resolution authorities (subject to article 88 CDR 2016/1075); (iii) a subsequent dialogue (subject to article 89 CDR 2016/1075); (iv) a process for drafting the joint decision (subject to article 90 CDR 2016/1075); and (v) the point where the joint decision is reached (subject to article 90 CDR 2016/1075), which, most significantly – and as noted - is binding on all the resolution authorities, unless they have disagreed.

76. This is a carefully crafted process to ensure that consensus is sought between the relevant authorities, and, as such, it includes several intermediate steps, which could, themselves, give rise to preliminary acts. Yet, in the wake of such steps which are part of an extremely balanced process, the culmination of that process is the joint decision with its substantive determination of the MREL requirements. There is no subsequent step, actual or hypothetical that can be deduced from the text of the BRRD or the CDR 2016/1075. This is also confirmed by the text of article 91 CDR 2016/1075, which indicates that the draft joint decision shall be sent to all the resolution authorities concerned (Article 91(1)), and these authorities will transmit their written agreement (Article 91(2)). Thus, “the final joint decision shall consist of the joint decision document drafted in accordance with Article 90 and of the written agreements” (article 91 (3)). Following by analogy the approach of the General Court in case *Tatiana Pérez de Guzmán v SRB* at 137, according to the text of the BRRD and the CDR 2016/1075, the purpose of the Contested Decision was not to prepare the ground for a subsequent decision by the Board. Thus, observing here as aforementioned an integrated legal approach, both in form, as well as in substance, and as regards underlying intent or purpose, as the culmination of the process, the joint decision is final, and therefore not a preliminary or intermediate act.

(c) Whether the subsequent decision SRB/EES/2021/44 was “a confirmatory decision”.

77. A second objection by the Board in this case is that, if the Contested Decision is to be considered not a preliminary, but a final act, then the subsequent decision by the Board SRB/EES/2021/44 could be considered a confirmatory or implementing decision, which should not be subject to appeal, which would, in turn, supposedly contradict the findings of the Appeal Panel in its Decision 2/2021 (and now also 3/2021), where it allowed the Appellant, a NRA, to appeal a similar decision by the Board, where it gave the NRA instructions concerning the implementation of MREL targets.

78. This argument is also based on the case law of European courts. According to such case law, another relevant factor when deciding whether certain measures adopted by EU institutions or agencies are subject to appeal is whether the acts are “confirmatory” in nature (judgment of 15 November 2018, case C-334/17 P *Estonia v Commission*, EU:C:2018:914, paragraph 46; judgment of 31 May 2017, case C-228/16 P, EU:C:2017:409, paragraph 33; judgment of 3 April 2014, case C-224/12 P *Commission v Netherlands and ING Groep*, EU:C:2014:213, paragraph 69; judgment of 12 September 2006, case C-131/03 P *Reynolds Tobacco*, EU:C:2006:541, paragraph 55; judgment of 14 September 2006, case C-417/05 P *Commission v Fernández Gómez*, EU:C:2006:582, paragraph 46; judgment of 9 December 2004, case C-123/03 P *Greencore v Commission*, EU:C:2004:783, paragraph 39).

79. According to settled case law, a measure which contains no new factor as compared with a previous measure constitutes a purely confirmatory measure (judgment of 3 April 2014, case C-224/12 P *Commission v Netherlands and ING Groep*, EU:C:2014:213, paragraph 69). The Court considered as merely “confirmatory” the notices of payment which were subsequently sent to the applicant each month and which contained a statement of his pecuniary rights which corresponded to an initial statement, sent by the head of the relevant division, stating

the retiree's rights under a pension scheme. Conversely, the Court considered that a Commission's letter expressly refusing to pay interest on a sum was not a mere confirmation of a previous act consisting in the payment of the principal sum, but not the interest, thus rejecting the Commission's view that it was an implied rejection; and the Court also held that the Commission's "initial examination of a single aid measure carried out in the context of the exceptional circumstances of a global financial crisis that required the adoption of emergency measures" was not merely "confirmed" by a "final decision on the compatibility with the internal market of three aid measures of a significantly greater amount" (judgment of 3 April 2014, case C-224/12 P Commission v Netherlands and ING Groep, EU:C:2014:213, paragraph 71).

80. According to the facts, in this case the two decisions in question, i.e., the Contested Decision (namely Joint Decision of 4 November 2021 – RC/JD/2020/53) and the SRB's further decision of 4 November 2021 - SRB/EES/2021/44 have a similar, but not identical content, shaped by the different legal provisions that constitute their legal framework. The recitals of the Contested Decision (Joint Decision RC/JD/2020/53) are referenced to the provisions of the BRRD, and CDR 2016/1076. The recitals of SRB's Decision SRB/EES/2021/44 are referenced to the SRMR. Then, Articles 1-3, and the corresponding Annexes IIa-IIg are practically identical, but Article 4 of the Contested Decision (Joint Decision RC/JD/2020/53) includes a reference to the subsidiaries in [.] and [.] that is not present (for obvious reasons) in the SRB's Decision SRB/EES/2021/44, and the SRB's Decision SRB/EES/2021/44 also contains in its Article 4 (not present in Joint Decision RC/JD/2020/53) a reference to the waiver of one of the subsidiaries. This difference, however, does not alter the rights and obligations of the parties, since the actual waiver, under Annex IIc, is contemplated in identical terms.
81. The main difference between the two decisions, however, is in Article 5 of SRB's Decision SRB/EES/2021/44, which contemplates the instructions to the NRA. This also affects the structure of the subsequent sections of both decisions. Whereas the headings of the sections in the Contested Decision (joint decision RC/JD/2020/53) read "MREL for [name of the entity]", the headings for the Sections in the SRB's Decision SRB/EES/2021/44 read "MREL for [name of the entity] *addressed to* [name of the authority]". The contents of each section are practically identical (save for the references to the provisions of BRRD, and SRMR) but the headings certainly provide for a differentiated treatment.
82. Therefore, in light of the above, in the Appeal Panel's view the fundamental difference between the Contested Decision and the following SRB's Decision SRB/EES/2021/44 is that the former is the final MREL determination adopted by the SRB and the other national resolution authorities sitting in the resolution college for the institution, whereas the latter is the specific instruction addressed by the SRB to the NRA under the SRMR to the effect of having the binding MREL determination duly communicated and implemented at the national level within the Banking Union.

83. This means, in the Appeal Panel's view, that, seen from the viewpoint of the credit institution, the Contested Decision is the decision which has finally determined the MREL requirement, whereas the following SRB's decision SRB/EES/2021/44 is only confirmatory of such determination, since the SRB's decision does not introduce any new factor as compared with the Contested Decision *vis-à-vis* the credit institution. Indeed, the Contested Decision was duly notified to [.] and [.]'s right to be heard was granted before the adoption of the Contested Decision.

84. In contrast, seen from the viewpoint of the national resolution authority within the Banking Union, the SRB's decision SRB/EES/2021/44 is not confirmatory, because it is the first SRB measure containing the specific instruction to the national resolution authority to implement the MREL determination adopted with the joint decision of the resolution college. This clarifies why, in cases 2/2021 and 3/2021, the appeals brought by the national resolution authority against the SRB's decisions instructing such NRA within the Banking Union to implement a joint decision adopted by the college were considered admissible. Thus, there is no contradiction with the reasoning concerning the Contested Decision in the present case.

(d) Whether the Contested Decision (Joint Decision RC/JD/2020/53) is a binding decision, capable of affecting the interests of the applicant by bringing about a distinct change in its legal position.

85. In the Board's objections to the admissibility of this appeal based on the distinction between "preparatory v final" acts, or the concept of "confirmatory or implementing" acts, there is an additional, and pervading argument, which may be synthesized as follows: even if the BRRD framework may suggest that the joint decision is a "decision", and therefore final, this is only so for the purpose of establishing the consensus of the authorities. It is then incumbent upon each of the authorities to ensure that the agreed MREL targets become binding, by adopting its own decision, where it ensures that those targets are compliant with the requirements of the legal framework applicable to each NRA. Since, in the college, the Board is the only authority representing the territory of the Banking Union, it is incumbent upon the Board to adopt such subsequent act. Since that act is the only binding one, the text of the BRRD and the CDR 2016/1075 must be reinterpreted (and, where necessary, corrected). Thus, in the Board's view, the BRRD and CDR 2016/1075 provisions describe a process leading to an act that is incomplete, and that, by the need to combine the BRRD and CDR 2016/1075 *plus* the other legislation, can only be preliminary, and not binding. This argument is less based on the text of the BRRD and CDR 2016/1075, and its normative grounding and implications, and more on the joint operation of these legal texts with the SRMR, and the administrative practice that has resulted from it, which allegedly determines the (non)binding nature of the decision. As such, it is given separate consideration.

86. It is settled case law that an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects (Joined Cases C-138/03, C-324/03 and C-431/03 *Italy v Commission* [2005] ECR I-10043, paragraph 32; Case 22/70 *Commission v Council* [1971] ECR 263, paragraph 42;

Case C-325/91 *France v Commission* [1993] ECR I-3283, paragraph 9). Therefore, only measures the legal effects of which are binding on, and capable of affecting the interests of the applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment.

87. European courts often link this requirement of “binding legal effects” to the distinction between “preparatory” or “intermediate”, and “final” acts, analysed above, because it is in principle those measures which definitively determine the position of the relevant institution or agency upon the conclusion of an administrative procedure, and which are “binding”, i.e., intended to have legal effects capable of affecting the interests of the complainant, and thus open to challenge. This is not the case for intermediate measures, whose purpose is to prepare for the definitive decision, or measures which are mere confirmation of an earlier measure which was not challenged within the prescribed period.
88. European courts also link this requirement to the characterization of acts as “confirmatory”, because “a letter that merely confirms an initial decision does not constitute a decision against which an action for annulment may be brought, for it does not bring about a distinct change in its addressee’s position” (judgment of 9 December 2004, case C-123/03 P *Greencore v Commission*, EU:C:2004:783, paragraph 26). Thus, it is not only preparatory acts which fall outside the scope of the judicial review but “any act not producing legal effects which are binding on and capable of affecting the interests of the individual, such as confirmatory measures and implementing measures” (judgment of 12 September 2006, case C-131/03 P *Reynolds Tobacco*, EU:C:2006:541, paragraph 55), and “a measure which contains no new factor as compared with a previous measure constitutes a purely confirmatory measure and cannot therefore have the effect of setting a fresh time-limit in favour of the person to whom the earlier measure was addressed” (judgment of 10 December 1980, case 23/80, *Grasselli v Commission*, EU:C:1980:284, paragraph 18).
89. In fact, in *Reynolds* the Court rejected the binary categorisation of acts as “preparatory” or “final”, holding that other acts (in that case, confirmatory acts) could be excluded from review, as long as they lacked binding legal effect (*Reynolds*, at paragraph 56).
90. Thus, the “binding legal effect” of an act is the key concept pervading the test of admissibility, which, in turn, finds its expression in both the distinction between “preparatory” and “final” acts, and the characterization of acts as “confirmatory”, but cannot be confined to these categories.
91. As a consequence, in order to assess whether the Contested Decision is open to review, we must examine whether that decision constitutes an act which is intended to have binding legal effects (see also judgment of the General Court of 16 October 2014, case T-517/12 *Alro SA v European Commission* EU:T:2014:890, paragraph. 24).
92. In order to characterize an act as having binding legal effects, in the sense of “bringing a distinct change of legal position” much hinges on the context. The binding legal effects of a

measure must be assessed in accordance with objective criteria, such as the contents of that measure, and taking into account, as appropriate, the context in which it was adopted (judgment of 13 February 2014, Case C-31/13 P, Hungary v Commission, EU:C:2014:70, paragraph 55). In the case *ABLV v ECB* (order of 6 May 2019, T-281/18, EU:T:2019:296), as already noted, EU courts considered that the FOLTF assessment undertaken by the ECB was not a binding act because it was subsequently subject to the possible amendment by the SRB, and there was no provision stating that the ECB's assessment should enter into force. Conversely, in *Fundación Tatiana Pérez de Guzmán el Bueno v SRB* (judgment of 1 June 2022, Case T-481/17, *Fundación Tatiana Pérez de Guzmán el Bueno v SRB* ECLI:EU:T:2022:311), the General Court held that there was a provision made for the entry into force of the SRB's decision adopting a resolution scheme, and even if this required the Commission's endorsement to have such an effect, the decision adopting the resolution scheme was still binding and had autonomous legal effects (*Fundación Tatiana Pérez de Guzmán el Bueno* at paragraph 127). Such objective criteria must primarily rely on the legal provisions that regulate the procedure, content and consequences of said acts, if such provisions exist, as they do in the case at hand.

93. This leads to the current context, and to the Contested Decision (Joint Decision RC/JD/2020/53). As described above, the Contested Decision is based on Articles 45h and 88 BRRD, and Articles 86-93 CDR 2016/1076.
94. First of all, the act is formally characterized as a “decision” and Article 45h (7) BRRD states that: “The joint decision [...] shall be binding on the resolution authorities concerned”. This clearly indicates that the SRB, which is one of the resolution authorities concerned in the present case, is bound by the joint decision once it is adopted and cannot deviate from its content in its subsequent implementation. This conclusion is reinforced, in a situation such as the one of the instant case, where the SRB has prepared and has proposed to all members of the college the draft joint decision and has adopted it, with the agreement of the other national resolution authorities sitting in the college. It is hard to see, in light of the principle of good administration, which also requires consistency in administrative action, how the SRB could deviate from the content of an act which has been formed by the same in its subsequent implementation, unless new and unexpected circumstances arise which may require an exceptional reconsideration of the joint decision.
95. Furthermore, Article 45h(1) BRRD states that “the joint decision shall ensure compliance with Articles 45e and 45f”. This provision implies that the decision itself is conceived to ensure compliance with the provisions on MREL. This is a confirmation that the decision is of a binding nature.
96. This is further confirmed by the subsequent text of Article 45h, which indicates that the decision “shall be fully reasoned and provided to: (a) the resolution entity by its national resolution authority; (b) the entities of a resolution group which are not a resolution entity by the resolution authorities of those entities; (c) the Union parent undertaking of the group by the national resolution authority of the resolution entity, when that Union parent undertaking

is not itself a resolution entity from the same resolution group”. The requirement under Article 45h (1) BRRD is developed by Article 92 of CDR 2016/1076. This requirement to provide the decision to the resolution entity and/or the Union parent undertaking, as well as the subsidiaries, suggests that the MREL determination set out in the joint decision is final, and shall become applicable to the entities once notified to the same.

97. The Board’s argues that the communication under Article 45h(1) and Article 92 CDR 2016/1076 was made for information purposes only, and that the indication under Article 45h(7) that the joint decision shall be binding “on the resolution authorities concerned” means, *a contrario*, that it is not binding on the entities concerned. This is contested by the Appellant. The Appeal Panel sides with the arguments made by the Appellant on this count.
98. In the Appeal Panel’s view, the problem with the Board’s view is twofold: first, it is hard to see how a MREL determination which is binding for the SRB cannot be considered also binding for the credit institution under the resolution remit of the SRB itself, even assuming that that binding determination may become effective only once it has been communicated by the national resolution authority in the implementation stage. Second, nothing in the text of the BRRD, or of CDR 2016/2076 suggests that the communication of the joint decision adopted in the resolution college is made “for information purposes only”, in wait of any further actual binding decision, or decisions. Article 45h BRRD regulates both the “joint decision”, under its paragraphs (1) and (2) for cases where there is agreement, and the individual decisions of resolution authorities in its paragraphs (3) to (6), for cases where there is no agreement. There is no mention whatsoever in the BRRD of any subsequent acts that could be needed to render the decision binding on the group entities.
99. The Appeal Panel further notes that also an MREL determination adopted by the SRB outside the context of the college, which is certainly binding once finally adopted by the SRB, can nonetheless become effective only once it is communicated by the NRA upon instruction received from the SRB. Article 12(5) SRMR states that: “The Board shall address its determination to the national resolution authorities. The national resolution authorities shall implement the instructions of the Board in accordance with Article 29. The Board shall require that the national resolution authorities verify and ensure that entities and groups maintain the requirements for own funds and eligible liabilities laid down in paragraph 1 of this Article”. Yet, also in that case it is clear, as noted above, that the SRB determination is the binding act which needs to be challenged, whereas the NRA’s implementing act cannot be challenged for errors pertaining to the SRB determination before a national court. However, the SRB binding decision cannot be effective vis-à-vis the relevant credit institution before being notified by the NRA.
100. The above conclusion is further confirmed by Articles 86-93 CDR 2016/1076. As noted above, the text of CDR 2016/1076 describes in minute detail the steps necessary for planning, proposing, discussing, drafting, and reaching the joint decision (Articles 86-91 CDR 2016/1076), and then refers to the “communication” of the decision (Article 92 CDR 2016/1076), and the “monitoring” of its application (Article 92 CDR 2016/1076). Then,

Article 93(4) CDR 2016/1076 states that “the group-level resolution authority and the resolution authorities of subsidiaries shall monitor the application of the joint decision on minimum requirements for own funds and eligible liabilities at consolidated, parent and each subsidiary level, for all entities of the group subject to the joint decision, and at consolidated level”. This suggests the joint decision is “applied” to the entities of the group, which are, in turn, “subject” to that decision.

101. There is no mention in the text of the CDR 2016/1076 to any subsequent steps that must be taken by authorities. Such steps may take place, but, for all relevant legal purposes, they are not a necessity mandated by the regulation. Thus, according to the text of the BRRD and CDR 2016/1076, the procedure closes with the joint decision, which is, itself, the binding act, which the group entities are subject to.
102. Since the provisions of the BRRD and the CDR 2016/1075 clearly indicate that the joint decision is not only final, but that it is also binding, the question is whether the text of the SRMR might indicate that this conclusion should be reconsidered (and thus a proper consideration of this text is undertaken below).
103. Article 12(1) SRMR states that:

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

This provision allocates to the Board the competence to set the MREL levels for entities and groups within the Banking Union. However, such provision needs to be read in conjunction with recital 91 and Article 5 SRMR, which expressly bind the SRB when it acts under the SRMR to the procedures laid down by the BRRD under Articles 88 and 89 and by CDR 2016/1075 on resolution colleges. Thus, although Article 12 SRMR is phrased having regard to a situation where the SRB is the only competent resolution authority, if the provision is interpreted, as it should, jointly with the provisions of the BRRD and CDR 2016/1075, as it happens when the SRB is part of a resolution college, it must be understood in the sense that the determination of the MREL is adopted by the SRB as part of the resolution college *by means of the joint decision*, which – as already noted – in the Appeal Panel’s view is a bundle of individual decisions including the one due by the SRB.

104. The parties disagree about how to interpret these SRMR provisions together with the BRRD and CDR 2016/1075 provisions. According to the Appellant, the joint decision process envisaged in Article 45h and CDR 2016/1075 does not allow the SRB to adopt a separate decision determining MREL subsequent to the joint decision of the college, and thus, in doing so, the SRB violated the rules governing the MREL determination process. Conversely, in the Board’s view, the SRMR provisions demanded that the SRB adopted its own decision on MREL to give the MREL targets of the joint decision binding effect. In the Appeal Panel’s

view, the correct, joint interpretation of the two frameworks lies somewhere between those extremes.

105. In the Appeal Panel's view, the provisions under BRRD and CDR 2016/1075 do not preclude a subsequent decision from the Board. Thus, the Board is correct in its submissions in pointing that "it cannot be inferred from the fact alone, that BRRD and CDR 2016/1075 do not mention a separate SRB individual decision on MREL for college banks, that no such SRB's decision is needed or permitted. CDR 2016/1075 regulates the joint decision process as it might apply anywhere in the EU (i.e., it is not adapted to the specificities of the Banking Union and is not intended to be). Hence, it is not surprising that it does not mention the SRB's individual decisions on MREL because CDR 2016/1075 is made pursuant to BRRD, which itself is entirely blind to the specificities of the Banking Union".
106. Yet, from this it does not follow that Article 12 SRMR must be read as requiring the SRB to make its own MREL determination unilaterally, or separately from that of the resolution college, or, above all, that this subsequent determination is the only binding act. Whereas Article 45h BRRD, or Articles 86-93 CDR 2016/1075 clearly state that a binding "decision" must be adopted, and regulate the procedure for its adoption and its communication to the entities and the monitoring of its application (Articles 86-93 CDR 2016/1075), Article 12(1) simply states that the Board "shall determine the requirements for own funds and eligible liabilities [...] which are to be met at all times by the entities and groups", but does not state how the Board shall make such determination.
107. Thus, in a context where the SRB is part of a resolution college, the Board must act in compliance with BRRD provisions to make the determination within the framework of the joint decision by the college, unless it disagrees to the effect of the BRRD provisions. By seeking consensus with other authorities in a college, the SRB does not relinquish its power, nor does it fail to discharge its duty, to determine MREL levels under Article 12 (1) SRMR. It merely exercises this power and competence in a collegial context, as required by BRRD.
108. As already noted, this is textually confirmed by the cross-references between the BRRD and SRMR framework. Recital (91) of SRMR states that "since the Board replaces the national resolution authorities of the participating Member States in their resolution decisions, the Board should also replace those authorities for the purposes of the cooperation with non-participating Member States, including in the resolution colleges as referred to in Directive 2014/59/EU as far as the resolution functions are concerned". Article 5(1) SRMR in turn provides that "where, pursuant to this Regulation, the Board performs tasks and exercises powers, which pursuant to Directive 2014/59/EU are to be performed or exercised by the national resolution authority, the Board shall, for the application of this Regulation and of Directive 2014/59/EU, be considered to be the relevant national resolution authority or, in the event of cross-border group resolution, the relevant group-level resolution authority". If BRRD and CDR provisions refer to the result of the process as a "joint decision", which has the substance of a binding act, this conclusion is not altered by the language and intent of SRMR provisions.

109. In fact, in its letter of [.] the Board suggests as much, when it states that: “[.]”. The text of the letter, or even the Board’s own official position on the joint meaning of the SRMR and the BRRD, are not binding for the Appeal Panel, which has based its findings on the text of the relevant legal provisions, their context and logic, and the case law of European courts. However, it shows that, even if the Board officially contends that its own decision is the only binding act, even its own indications do not uniformly and systematically confirm that view.
110. If we consider the situation in the alternative to the joint decision under BRRD when there is no consensus, this consists in several, separate, resolution authorities’ decisions, which are not bundled in one joint decision. This alternative is regulated under Article 45h paragraphs (3) to (6) BRRD. In this scenario, the “decision” by the Board would be an individual decision by the group resolution authority, and it would be a binding decision. Thus, it would be hard to justify why the same “decision” would be a binding act when adopted alone by the group resolution authority, and a non-binding act when adopted with the added consent of the other resolution authorities.
111. Since Article 12(1) SRMR must be interpreted in the sense that the Board makes its MREL determinations through a joint decision when it acts in a resolution college, this leaves the element that Article 12 SRMR actually adds to the framework of the BRRD and CDR 2016/1075, which is not in its paragraph (1), but in its paragraph (5). This states that “the Board shall *address* its determination to the national resolution authorities” (emphasis added). It also states that “the national resolution authorities shall implement the instructions of the Board”.
112. A related provision, which the Board referred to, and relied upon during the hearing, is Article 31(2) SRMR, which states that
- Article 13(4) to (10) and Articles 88 to 92 of Directive 2014/59/EU shall not apply to relations between national resolution authorities. The joint decision and any decision taken in the absence of a joint decision as referred to in Article 45h of Directive 2014/59/EU shall not apply. The relevant provisions of this Regulation shall apply instead.
113. The Board suggested that this provision excluded the BRRD, and, by extension, CDR 2016/1075 provisions on resolution colleges from the relationship between the Board and the NRAs of participating Member States, which, in the Board’s view, made it necessary for the Board to adopt a subsequent act to render the decision binding. Yet, such conclusion cannot be drawn from the above provisions, which, in the Appeal Panel’s view, merely reiterate the same idea of Recital (91) and Article 5 (1) SRMR. This is that the SRB acts as the sole resolution authority of the Banking Union *ad extra*, i.e., *vis-à-vis* the national resolution authorities of non-participating Member States, while *ad intra*, i.e., *vis-à-vis* the national resolution authorities of Banking Union Member States, it shall operate under the more “vertical” setting of the SRMR. Article 12 (5) SRMR clearly signals an element that is specific to the SRM context and absent from BRRD and CDR 2016/1075 provisions. The duty to “address its determination to the national resolution authorities”, and to accompany this with the necessary “instructions” justifies the existence of a separate decision by the Board.

However, nowhere in the SRMR is it stated that such specific “determination” to be addressed – for the purposes of the functioning of the SRM - to the national resolution authorities of the Banking Union undermines the final, and binding nature of the joint decision, as it results from the text of the BRRD and the CDR 2016/1075.

114. Thus, the integrated analysis of the text of the BRRD, the CDR 2016/1075, and the SRMR indicate that the joint decision adopted by the Board and other resolution authorities in the context of a college is a binding legal act (not a preparatory act). While the Board’s instructions to the national resolution authority are a “new factor as compared with a previous measure”, which prevent the subsequent Board decision containing the instructions from being a purely confirmatory act solely from the view point of the national resolution authority addressed by the instruction, this cannot affect the “determination” of MREL, which is already done by the joint decision, as it only affects the position of the addressed national resolution authorities. That is why, as previously noted, the relevant national resolution authority could appeal in cases 2/2021 and 3/2021 the subsequent Board decision, as the one that would be “binding” upon it, as an act that brings a distinct change of legal position to the instructed national resolution authority (which as such involves no element of contradiction with the present case).
115. Conversely, the group parent company should, in principle, not be able to appeal the subsequent Board decision, as it would not bring a distinct change of legal position to it, since the subsequent Board decision would simply replicate the substance of the MREL determination of the joint decision, which is binding on the SRB, without adding further considerations of relevance to the parent company, or the other companies in the group.
116. In conclusion, given that (i) the framework of BRRD and CDR 2016/1075 refers to the joint decision in terms that suggest that it is a binding decision; (ii) that the SRMR does not change this conclusion, as it does not require a separate Board decision addressed to the group entities to fulfil the requirement that the Board “shall determine” MREL levels, the Appeal Panel concludes that joint decision RC/JD/2020/53 was the decision binding for the entities.

(e) Whether the Contested Decision (Joint Decision RC/JD/2020/53) is “a decision” of the Board that was “addressed” to, or of “direct and individual concern” to the Appellant.

117. Article 85 (3) SRMR states that: “Any natural or legal person, including resolution authorities, may appeal against a decision of the Board referred to in Article 10(10), Article 11, Article 12(1), Articles 38 to 41, Article 65(3), Article 71 and Article 90(3) which is addressed to that person, or which is of direct and individual concern to that person”. This raises two questions: (i) First, whether the Contested Decision (Joint Decision RC/JD/2020/53) was “a decision of the Board”; and (ii) Second, whether it was “addressed” to the Appellant, or of “direct and individual concern” to the Appellant.
118. On the first point, as already noted, the Board argues that the Contested Decision (Joint Decision RC/JD/2020/53) is not a “decision”, but merely a “preparatory” or “intermediate”

act. The Appeal Panel, for the reasons stated above has rejected this interpretation. However, the Board has also argued that the Contested Decision (Joint Decision RC/JD/2020/53) “cannot be attributed to the Board”, because the decision was reached by the resolution college, and reflects the consensus between the authorities that form that college, which “underlines the collective and consensual nature of the joint decision, which is rather a contract than a decision”. In the Appeal Panel’s view, also this argument is unfounded.

119. Articles 90 and 91 of CDR 2016/1075 regulate the adoption of the decision. Article 90 (1) of CDR 2016/1075 states that:

1. The group-level resolution authority shall prepare a draft joint decision on minimum requirements for own funds and eligible liabilities at consolidated, parent and each subsidiary level, taking into account the use of waivers, if any, under Article 45(11) or (12) of Directive 2014/59/EU.

120. Article 91 of CDR 2016/1075, for its part, states that:

1. The group-level resolution authority shall send the draft joint decision on minimum requirements for own funds and eligible liabilities at consolidated, parent and each subsidiary level to the resolution authorities of subsidiaries without undue delay setting a time limit for the resolution authorities of subsidiaries to provide their written agreement, to that joint decision, which may be sent by electronic means of communication.

2. Upon receipt of the draft joint decision the resolution authorities of subsidiaries not disagreeing with it shall transmit their written agreement to the group-level resolution authority within the time limit set out in paragraph 1.

3. The final joint decision shall consist of the joint decision document drafted in accordance with Article 90 and of the written agreements referred to in paragraph 2 of this Article and the one of the group-level resolution authority attached thereto and shall be provided to the resolution authorities of subsidiaries agreeing with the joint decision by the group-level resolution authority.

121. Therefore, the process leading the joint decision is a negotiated process, but the form of the joint decision itself is not a negotiated act. Rather, as already noted, in the Appeal Panel’s view it is a bundle of individual decisions documented in a single document prepared and adopted by the group resolution authority, to which the other resolution authorities adhere via individual decisions. Therefore, the Contested Decision, which has been drafted by the Board, as the group-level resolution authority, certainly is, in the Appeal Panel’s view, a decision of the Board.

122. In fact, in its letter of [.] the Board suggests as much, when it states that: “[.]”. Again, although neither the text of the communication, nor the Board’s position are binding on the Appeal Panel, they are indicative of the fact that even the members of the Board itself have occasionally transpired the view of the joint decision as the Board’s decision.

123. Furthermore, even if one were to accept the Board’s suggestion about “the collective and consensual nature of the joint decision, which is rather a contract than a decision”, it would be unclear what legal implications should be drawn from this. The alleged “contract” would still need to be subject to some legal regime, and although the Board does not venture an

explanation of what would be this legal regime, it seems clear that its framework would still be the BRRD, the CDR 2016/1075, and the SRMR, given that they are the provisions that regulate the planning, negotiation, drafting and conclusion of the decision. Thus, even if one changes the qualification of the act that may not change the nature of the powers that serve as its framework. This should not stop the Appeal Panel from reviewing the act in question. Nothing in Article 12(1) or Article 85(3) SRMR suggests that the “determination”, “instructions” or “decision” adopted by the Board must abide by a specific format. Thus, even if the full authorship of the joint decision were not attributable to the Board (which it is, pursuant to CDR 2016/1075), its consent to the decision would. Thus, its consent, together with the decision, would still be “a decision of the Board referred to in [...] Article 12(1)”.

124. On the second point, i.e., whether the Contested Decision (Joint Decision RC/JD/2020/53) was “addressed” to the Appellant and/or of “direct and individual concern” to it, the Board argues that the decision was not addressed to the Appellant, nor of direct and individual concern to it. The Appellant disputes this.
125. To argue that the Contested Decision was not “addressed” to the Appellant, the Board relies in its submissions on its argument that the decision was not intended to have any “binding external effects”, and was sent to the Appellant “for information purposes only”. Yet, as shown above, in the Appeal Panel’s view, the Contested Decision had such binding effects, and was communicated to the Appellant not merely as a matter of deference, to keep the Appellant informed. It was communicated to the Appellant because it is a legal requirement under Articles 45h BRRD, and 92 CDR 2016/1075. This legal requirement is a pre-condition to “ensure compliance with Articles 45e and 45f BRRD” (Article 45h(1) BRRD), and is imposed in order to monitor the application of the decision (Article 93 CDR 2016/1075). Thus, even if the decisions by the national authorities are the ones that implement and render effective the Contested Decision, and the Board decision containing the instructions on implementation, the Contested Decision may also be considered to be “addressed” to the Appellant, as per the reasons underlying its communication to the Appellant (as stated above).
126. The parties also bring up the judgment of the General Court of 28 November 2019, case T-365/16 *Portigon v SRB* EU:T:2019:824. The Appellant contends that this supports the idea that the Appellant was the addressee of the Contested Decision, because the decision was sent to it. The Board disputes this, stating that the *Portigon v SRB* judgment concerned a decision of the SRB on the calculation of the contribution to the Single Resolution Fund which the SRB addressed to a NRA which then had to collect the calculated amount (i.e., contribution) from the relevant bank under national law, while in the present case, the issue at stake revolves around the relationship between a joint decision reached within the framework of a resolution college and a decision of the SRB, and thus, according to the Board, those two cases are not comparable.
127. The relevant paragraphs of the *Portigon* decision reads as follows: “The NRAs are, in practice and in implementation of the applicable rules, the only bodies to which the issuer of the decision in question is required to send it and, therefore, ultimately, the persons to which that

decision is addressed within the meaning of the fourth paragraph of Article 263 TFEU [...] The finding that the NRAs are the addressees of the SRB's decision within the meaning of the fourth paragraph of Article 263 TFEU is moreover corroborated by the fact that, in the system established by Regulation No 806/2014 and under Article 67(4) of that regulation, they are responsible for raising the individual contributions decided on by the SRB from the institutions" (*Portigon*, at paragraphs 74-75).

128. In effect, the situations are different, but that does not mean, in the Appeal Panel's view, that no useful inferences can be drawn from the case. The General Court concluded that the NRAs were "the only addressees", because they were "the only bodies to which the issuer of the decision in question is required to send it". Conversely, in the case of the Contested Decision, the Board had to send the Contested Decision to the Appellant, as entities subject to the Contested Decision, and its instructions to the national resolution authorities. In light of this, and following this logic the former should be the addressees of the Contested Decision, and the latter the addressees of the subsequent instructions.
129. Finally, the Board objects that the Contested Decision did not make any mention of the possibility of an appeal, whereas the SRB's decision SRB/EES/2021/44 made the following reference:

Pursuant to Article 85(3) first sub-paragraph of Regulation (EU) No 806/2014, any natural or legal person, including resolution authorities, may appeal against a decision of the Board determining MREL addressed to that person or against a decision which is of direct and individual concern to that person [...].

130. In turn, the letters sent by the national resolution authority on the [.] to [.] and its subsidiaries make an express mention to the appealability of the SRB's decision.
131. Yet, leaving aside that the reference in SRB's decision SRB/EES/2021/44 is somewhat circular (it says that a decision is appealable if it fulfils the requirements of Article 85(3) SRMR, not whether the decision itself fulfils those requirements) the argument itself is unfounded and ultimately contradictory. In fact, accepting it, as such, would mean leaving the matter of appealability entirely in the hands of the Board itself, which could, by stating so, render a decision appealable or not appealable. Whether a decision is appealable, however, is a matter of law, not something left to the discretion of the authority adopting such decision.
132. Even if the Contested Decision were not to be considered "addressed" in the proper sense to the Appellant, because it is the communication sent by the national resolution authority implementing the instruction to this effect of the SRB, the Appellant is directly and individually concerned by the Contested Decision. According to the Court of Justice and the General Court, "natural or legal persons other than those to whom a decision is addressed may claim to be individually concerned by that decision only if it affects them by reason of certain attributes which are peculiar to them or, by reason of factual circumstances in which they are differentiated from all other persons and, by virtue of these factors, distinguishes them individually just as in the case of the person addressed" (see judgment of the Court of 15 July

1963, *Plaumann v Commission*, 25/62, EU:C:1963:17, p. 107, and judgment of the Court of Justice of 2 April 1998, *Greenpeace Council and Others v Commission*, C-321/95 P, EU:C:1998:153, paragraphs 7 and 28). In particular, the “direct concern” requires the contested measure to affect directly the legal situation of the individual and leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules without the application of other intermediate rules (see judgment of 5 November 2019, *Joined Cases C-663/17 P, C-665/17 P and C-669/17 P, ECB v Trasta Komercbanka AS*, EU:C:2019:923, at paragraph 103; judgment of 22 March 2007, *Regione Siciliana v Commission*, C-15/06 P, EU:C:2007:183, paragraph 31; judgment of 13 October 2011, *Joined Cases C-463/10 P and C-475/10 P, Deutsche Post AG v Commission*, EU:C:2011:656, paragraph 66; judgment of 5 March 1998, case C-404/96 P *Glencore v Commission* EU:C:1998:196, paragraph 41; judgment of 27 February 2014, case C-132/12 P *Stichting Woonpunt v Commission*, EU:C:2014:100, paragraph 68; Order of 27 November 2012, case T-541/10 *ADEDY v Council*, EU:T:2012:626, paragraph 64).

133. In this case, the facts leave no doubt as to the fulfilment of these conditions. Not only Article 45h (7) BRRD provides that the Contested Decision is binding on the authorities. The content of the Contested Decision indicates in no uncertain terms which should be the MREL levels for the entities in the group. SRB’s decision SRB/EES/2021/44 is, in what regards matters pertaining to MREL, identical to the Contested Decision. As discussed above, the only discretion regarding implementation exercised by the Board concerns the instructions to the national resolution authorities, which are the addressees of decision SRB/EES/2021/44. Therefore, in the Appeal Panel’s view it can only be concluded that the Appellant is directly concerned by the Contested Decision.
134. Finally, the Board objects to the admissibility of this appeal stating that the Appellant lacks an “interest” in this appeal. The “interest” requires that the relief sought must be capable, in itself, of having legal consequences and the legal action, if successful, may procure an advantage for the applicant. The Board contends that the decision to remit a case to the SRB can only be effective if the SRB can amend the appealed decision, and that the SRB can amend its own decision, while it cannot amend unilaterally a joint decision that was jointly agreed with other resolution authorities. To be effective, the Board argues, “the Appeal would require the Appeal Panel to order the SRB to re-establish the [.] Resolution College, whose relevant members would then have to agree with the new amended joint decision”, and that, since “the Appeal Panel does not have such a power under Article 85(8) SRMR” because it can only confirm the decision taken by the Board, or remit the case to the latter, “the decision of the Appeal Panel would be deprived of any effects as the SRB will not be able to amend joint decision RC/JD/2020/53”. Consequently, the Board argues, “the relief sought by the Applicant would be deprived of legal consequences as the SRB will not be able to amend joint decision RC/JD/2020/53. The Appeal will not procure any advantage to the Appellant” and thus “the Appellant does not have any interest in lodging the Appeal, which is accordingly not admissible”.

135. In the Appeal Panel's view this argument is unfounded. If the appealable act were the SRB's decision SRB/EES/2021/44, the Board could raise a similar problem concerning an alleged absence of remedy. Article 45h (7) BRRD provides that the joint decision shall be binding on the resolution authorities. Therefore, should the SRB's decision SRB/EES/2021/44 be considered the appealable act, and should the Appeal Panel find the decision unlawful, and remit the case to the Board, the Board could then allege that its decision SRB/EES/2021/44 simply follows joint decision RC/JD/2020/53, adding the instructions to the national resolution authorities, and that it could not unilaterally alter its own decision SRB/EES/2021/44 because it is bound by that joint decision, under Article 45h (7) BRRD. Potentially, the situation would be more difficult, since the remedy to the unlawfulness of one decision would be the modification of two decisions, including a decision not subject to appeal.
136. Furthermore, it has been the practice of the Appeal Panel, whenever it has found a decision unlawful, to remit the decision to the Board, without specifically dictating how the new decision should be amended to abide by the findings, in fact and in law, of the Appeal Panel's decision, but instead leaving some leeway to the Board on how to adopt a new decision, provided that the new decision fully respects and incorporates the findings of the Appeal Panel, in the spirit of sincere and loyal cooperation that characterizes the Appeal Panel relationship with the Board. This would not be different in the present case. It is simply not credible to state that, should there be any vice of invalidity affecting the Contested Decision, the Board would be unable to convene the resolution college to adopt a new decision, being, as it is, the group resolution authority responsible for setting up the college. In any event, the fact that some particularities of the legal framework make it more difficult to amend an act should not, in itself, determine the competence to review that act.

(f) Whether the adoption of a subsequent Joint Decision has resulted in the appeal being moot.

137. On 3 June 2022, the Board informed the Appeal Panel that the resolution college had adopted on 4 May 2022 its new joint decisions with respect to the group resolution plan and the MREL determination for the 2021 resolution planning cycle, which "repeal and supersede" the Contested Decision. The parties discussed both in writing before and after the hearing and orally at the hearing the implications of the new joint decision on MREL on the present appeal. The Board claims that the new joint decision has rendered the appeal moot. The Appellant, on the contrary, argues that there are two possible ways to consider the effects of the new joint decision, and neither of them results in the appeal being moot.
138. It is settled case law of the European courts that if the subject-matter of the action disappears in the course of proceedings, the Court cannot rule on the substance, since such a Court decision cannot procure an advantage for the applicant (judgment of the General Court of 19 January 2010, Joined Cases T-355/04 and T-446/04 *Co-Frutta v Commission*, EU:T:2010:15 paragraphs 43 to 45). Such disappearance of the subject matter can, *inter alia*, result from the withdrawal or replacement of the contested act in the course of the proceedings (judgment of the Court of Justice of 1 June 1961, Joined Cases 5/60, 7/60 and 8/60 *Meroni*

and Others v High Authority EU:C:1961:10, [1961] ECR 107, p. 111; Order of the Court of Justice of 11 November 1985 in Case 82/85 *Eurasian Corporation v Commission* [1985] ECR 3603, paragraph 11; and Order of the General Court of 17 September 1997, in Case T-26/97 *Antillean Rice Mills v Commission* [1997] ECR II-1347, paragraphs 14 and 15).

139. Yet European courts have tended to consider the subject matter of the action to have disappeared in cases where the contested decision was withdrawn or repealed, *and* the subject-matter of the controversy itself had disappeared, and/or the appellant refused to amend its complaint to the new decision repealing the contested decision. This has been the case where an appeal against a decision refusing access to documents was followed by a subsequent decision whose purpose was to “withdraw the [contested] decision ... and to adopt a new decision in reply to the applicant’s confirmatory application”, and, in addition, in his reply the applicant explicitly stated that he did not wish to adapt his claims in order to cover the new decision (Order of the General Court of 12 January 2011, Case T-411/09, *Terezakis v Commission* EU:T:2011:4, at paragraphs 7, 18-19), or when the documents initially requested were made available by a third party, and the applicant could make use of them as if he had obtained them under the provisions on access to documents (Order of the General Court of 15 October 2013, case T-638/11, *European Dynamics v EMA*, EU:T:2013:530 at paras. 73-74). In *Antillean Rice Mills* the General Court declared devoid of purpose the action against a Commission Regulation, which had been replaced by a Council Regulation, which had also been appealed by the applicant, with pleas in law identical to those of the first action (Order of the Court of First Instance of 17 September 1997, EU:T:1997:131, paras. 5-8), and thus the Court held that the adoption of the decision had “given the applicant the result it sought to achieve by the present application, namely the removal of Regulation No 21/97 from the Community legal order” (*ibidem*, at paragraph 15). In *CTRS v Commission* the applicant brought an action for a declaration that the European Commission had failed to act, by failing to adopt a final decision in relation to the applicant’s application for a marketing authorisation, and subsequently the Commission informed the Court that it had adopted a decision refusing to grant the MA (judgment of the General Court of 4 July 2012 in Case T-12/12, *Laboratories CTRS v Commission*, not published in the ECR, EU:T:2012:343, paragraphs. 52-55, referred to in Order of the General Court of 8 April 2014, case T-12/12, *CTRS v Commission*, EU:T:2014:231, at paragraph 10), or where the applicant itself indicated that, while not accepting the inadmissibility objections of the Commission, it asked the Court that there was no need to adjudicate (Order of the General Court of 23 January 2018, case T-845/16, case *QG v Commission*, EU:T:2018:36, at paragraphs 24-26).
140. In its Order of 20 December 2021, case T-321/17 *Niemelä v ECB*, EU:T:2021:942, relied on by the Board, the General Court found that the action had become devoid of purpose, and the applicant had lost its interest in bringing proceedings because the contested decision had been replaced during the course of the proceedings. In that case, the rationale for the decision was based on the particularities of the administrative review by the ABoR and the SSM, which is organized in such a way “that the replacement of the reviewed decision by an amended decision must be made with retroactive effect to the time at which the reviewed decision took

effect, as otherwise the final decision cannot have any practical effect” (*Niemelä v ECB* at paragraph 44), and therefore, “the replacement of the initial decision by an identical or amended decision at the end of the review procedure results in the definitive disappearance of the original decision from the legal order” (*Niemelä v ECB* at paragraph 44).

141. Conversely, in other cases, where decisions have been repealed and replaced by other decisions, this has been considered “as a new factor which allows the applicant to amend its heads of claim and pleas in law”, and this because “it would not be in the interests of the due administration of justice and the requirements of procedural economy to oblige the applicant to make a fresh application” (Orders of the General Court of 24 May 2011, case T-176/09, *Gibraltar v Commission*, EU:T:2011:239, at paragraph 47; and of 18 November 2005, case T-299/04, *Abdelgani Selmani v Council and Commission* EU:T:2005:404, at paragraph 68, and case law cited therein). In fact, Article 86(3) of the Rules of Procedure of the General Court expressly contemplates the situation where a measure the annulment of which is sought is replaced or amended by another measure with the same subject-matter and grants to the applicant the right, before the oral part of the procedure is closed, to modify the application to take account of that new factor.
142. With these elements we must consider the context of the Contested Decision. The Appeal Panel notes that the MREL determination, is, by its own nature, subject to periodic reviews. The BRRD states that “The joint decision and any decisions taken in the absence of a joint decision shall be reviewed and where relevant updated on a regular basis” (Article 45h(7) BRRD). This corresponds to the cyclical nature of the MREL determination process, where the SRB is conducting “on a regular basis” (yearly) resolution planning and MREL cycles. In this context, since justice cannot be rendered instantly, especially if the MREL determination of a given cycle is appealed before the Appeal Panel and subsequently before the European Courts, the MREL determination of such cycle will inevitably be reviewed and where relevant updated, by one or more determination(s) of subsequent cycle(s) before the appeal of the original MREL determination is finally settled by a judgment with the effects of *res judicata*. Under this rationale, the correct approach, in the Appeal Panel’s view, is to follow the very consistent body of case law that considers that, where a decision is, during the proceedings, replaced by another decision with the same subject-matter, this is not a factor that renders the existing appeal moot but rather a new factor allowing the appellant to continue its appeal and to adapt its claims and pleas in law in the existing proceedings also to challenge, in the same proceedings, the new decision. Conversely, the factual circumstances of the present case are far from the cases where a new decision gave the applicant the result it sought to achieve, namely the removal of the act in question from the legal order, or the substantive outcome intended with the appeal. The new joint decision adopted on 4 May 2022 still sets MREL levels in a similar way to the Contested Decision. Furthermore, it is not necessary at this stage to decide whether the language used by the joint decision, which, in its own words “repeals and supersedes” the Contested Decision (new joint decision, para. 21), is correct in light of the mandate of Article 45h (7) BRRD that decisions must be “reviewed and where relevant updated”, because, in the decision’s own words, the decision “will be applicable from and

including the date of its adoption”. Thus, the circumstances are far from those that served the basis for *Niemelä v ECB*, based on the particularities of the system of administrative review of the SSM, and on the retroactive effect of the adoption of a new decision.

143. In this regard, in the Appeal Panel’s view, even if the Appeal Panel’s Rules of Procedure do not specify the possibility of amending the pleas in the same detail as Article 86(3) of the Rules of Procedure of the General Court does, the general principle of procedural economy underpinning those rules is clearly also present in the Rules of Procedure of the Appeal Panel, and can thus apply accordingly with analogous effect, in light of the discretion to give directions by way of case management for the efficient conduct of the appeal, at any stage of the appeal (Article 11 (1) RoP). Even if that competence is delegated on the Chair by the Rules, the directions can also be given by way of a procedural decision by the Appeal Panel, such as this decision on admissibility.
144. Finally, the Appeal Panel considers that, given the fact stated above that the MREL determination is cyclical in nature, if the original appeal were considered moot in a situation as the one of the present appeal, the yearly (or less than yearly, as in the current case) reconsideration of MREL determinations may de facto prevent their legal review, because, as noted, justice cannot be rendered instantly, neither by the Appeal Panel, nor, subsequently, by European Courts. If several years may pass until the matter is settled with a judgment with the effects of *res judicata* the initial appeal would have been rendered moot several times over. This would run counter to the necessary coherence and the *effet utile* of a system of judicial protection provided for by EU law and would contrast with Article 47 of the Charter of Fundamental Rights of the European Union, which constitutes a reaffirmation of the principle of effective judicial protection and requires, in its first paragraph, that any person whose rights and freedoms guaranteed by EU law are violated should have the right to an effective remedy before a court in compliance with the conditions laid down in that article. The very existence of effective judicial review (in this case, preceded by effective administrative review by the Appeal Panel) designed to ensure compliance with provisions of EU law is of the essence of the rule of law (judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, at paragraph 73; Grand Chamber judgment of 6 October 2020, *Bank Refah Kargaran*, C-134/19 P, EU:C:2020:793 at paragraph 36).
145. To this effect, the Appeal Panel hereby finds that the appeal is not moot and grants to the Appellant the possibility to modify its appeal in the present proceedings to take into account the new joint decision adopted on 4 May 2022. The modification of the appeal shall be made by the Appellant by submitting a separate document within the time limit of six weeks from the notification of the present decision and shall justify the extension of the appeal to the new joint decision and any other modification of the appeal which may be sought in light of such new factor. All following submissions of the parties in accordance with the applicable Rules of Procedure shall be made after the expiry of the term granted by the Appeal Panel for the modification of the original appeal and in case this occurs as per the statement of Appellant in its letter of 22 June 2022.

On those grounds, the Appeal Panel hereby:

Declares the appeal admissible and that the appeal is not moot as a result of the adoption of the new joint decision adopted on 4 May 2022; the Appeal Panel shall now examine whether the appeal is well founded under Article 85(7) SRMR.

For the expedient continuation of these proceedings, the Appeal Panel hereby:

Allows the Appellant to modify its appeal to take into account the new joint decision adopted on 4 May 2022; the modification of the appeal shall be made by the Appellant by serving on the Board and filing with the Secretariat a separate document within the time limit of six weeks set out in Article 85 SRMR, running from the notification of the present decision; such document shall justify the extension of the appeal to the new joint decision and any other modification of the appeal which may be sought in light of such new factor.

Allows the Board to file its response on the merits of the appeal and thus on whether the appeal is founded by serving it on the Appellant and filing with the Secretariat within two (2) weeks of service of the modification of the appeal by the Appellant; the Board may opt for an extension of another two (2) weeks providing for a reasoning.

Allows the Appellant to file a reply to the Board's response by serving it on the Board and filing with the Secretariat within two (2) weeks of service of the response of the Board;

Allows the Board to file a rejoinder to the Appellant's response by serving it on the Appellant and filing with the Secretariat within two (2) weeks of service of the reply of the Appellant;

Reserves to adopt the following procedural measures in due course.

David Ramos Muñoz
Co-Rapporteur

Kaarlo Jännäri

Luis Silva Morais
Vice-Chair

Marco Lamandini
Co-Rapporteur

Christopher Pleister
Chair

For the Secretariat of the Appeal Panel: