13 February 2023

Case 3/2022

FINAL DECISION

[.],
Appellant,

v

the Single Resolution Board

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

TABLE OF CONTENTS

FINAL DECISION

In Case 3/2022,

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 1093/2010[1] (the "SRMR"),

[.], a legal entity with headquarters in [.], [.] 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 and Co-Rapporteur), Luis Silva Morais (Vice-Chair), Marco Lamandini (Co-Rapporteur), Helen Louri-Dendrinou, Kaarlo Jännäri,

makes the following final decision:

Background of facts

1. This appeal relates to the SRB decision of 20 April 2022, SRB/EES/[.] (hereinafter the "**Contested Decision**"), which sets the minimum requirement for own funds and eligible liabilities (hereinafter "**MREL**") for [.]. The Contested Decision has been adopted in the 2021 resolution planning cycle (hereinafter the "**RPC**") and has repealed and superseded decision SRB/EES/[.], previously adopted in the 2020 RPC. The winding up of [.] under national insolvency proceedings was considered appropriate by decision SRB/EES/[.] where [.] failure was only assessed in times of normal market conditions. However, with the Contested Decision the Board took into consideration that [.] failure may occur at a time of broader financial instability and system wide events. Under this premise, winding up under national insolvency proceedings was no longer credible in a scenario of system wide event, and instead the application of resolution tools and the exercise of resolution powers is considered necessary. Consistently, the Contested Decision, in the determination of the MREL, set out in Section I also a recapitalisation amount and a market confidence amount for [.] and noted, in recital (6), that under the resolution plan adopted by the Board for [.], the resolution strategy is based on [.].

2. On 1 July 2022, the Appellant filed the appeal.

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

3. The Chair appointed as Co-Rapporteurs himself and the Appeal Panel's member Professor Marco Lamandini and the appeal was served by the Secretariat of the Appeal Panel to the Board on 7 July 2022. The Secretariat informed the Board that the case was considered submitted as of that date and that the response of the Board had to be submitted to the Secretariat of the Appeal Panel within two weeks, by 21 July 2022.

4. On 18 July 2022, upon a reasoned request of the Board, the Appeal Panel extended the deadline to submit the Board's response by four weeks.

5. Following a request of the Appellant that the hearing should be held in [.], with communication of 14 July 2022, the Board raised the issue of the language of this proceeding. The communication of 14 July 2022 of the Board was sent by the Secretariat of the Appeal Panel to the Appellant, and the Appellant replied to the considerations of the Board with the Appellant's communication of 22 July 2022, received by the Appeal Panel on 27 July 2022.

6. On 5 August 2022, the Appeal Panel, having considered the positions expressed by the parties on the language of the procedure, adopted and sent to the parties the procedural order No 1 as follows:

> Reference is made to the Appellant's original request to conduct in [.] the oral hearing, if any, of the case, to the considerations of the Board raised on the language of the procedure with its communication of 14 July 2022 and to the reply to such considerations of the Appellant of 22 July 2022 (received by the Appeal Panel on 27 July 2022).
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> The Appeal Panel understands that, with its last communication, the Appellant requests that the language of the whole procedure, and not only the language at the hearing, be [.] and refers to this purpose to Regulation No 1 1958.
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> The Appeal Panel notes that Article 5(2) of its Rules of Procedure (RoP) is as follows:
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> 2. The language of the Notice of Appeal and of the appeal proceedings shall be the language chosen by the Appellant in conformity with Article 81(1) of Regulation 806/2014 and Article 2 of Council Regulation Nº. 1 of 1958. Unless otherwise required under Council Regulation Nº. 1 of 1958, the language of the Notice of Appeal and of the appeal proceeding shall be the language of the contested decision. However, the parties can agree on a language other than that of the contested decision. If the contested decision was issued in more than one language of the Union and the English language is among such languages, the language of the appeal shall be English, save if the parties instead agree on a different language. The parties are invited to deposit a courtesy copy in English therefore saving time as the official translation from the language of the procedure to the internal working language of the Appeal Panel may delay the process. (it being understood that the language of courtesy translations does not constitute the language of the contested decision). As the internal working language of the Appeal Panel and the Board is English, the deadlines and timelines related to the appeal proceedings, including those concerning the exchange of written submissions or documents and the notification of the decision in the language of the appeal, may be extended due to translation periods, where the language of the appeal is not English. Electronic submissions are considered as documents in the sense of this Article.

> The Appeal Panel considers therefore that, under Regulation No 1 of 1958 and the first period of Article 5(2) the Appellant is entitled to have the appeal proceedings conducted in the language chosen by the Appellant, and thus the [.] language.
>
> The Appeal Panel acknowledges that the second and third period of Article 5(2) state, as argued by the Board, that: "Unless otherwise required under Council Regulation Nº. 1 of 1958, the language of the Notice of Appeal and of the appeal proceeding shall be the language of the contested decision. However, the parties can agree on a language other than that of the contested decision"; yet, the Appeal Panel considers in this respect that, where the second period of Article 5(2) refers to the language of the contested decision, it does so having in mind the situation where the Appellant is the addressee of the contested decision and thus it can be reasonably inferred from the language of the contested decision that also the proceedings before the Board leading to the contested decision were validly held in English because the Appellant and the Board had agreed on the English language in conformity with Regulation No 1 of 1958.
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> In the instant case, however, the contested decision is addressed to the National Resolution Authority and therefore it cannot be inferred from the language of the contested decision that the Appellant and the Board have previously agreed on the use of the English language on the issue pertaining to the MREL determination. The Appellant submits that their practice has been in fact the opposite, and [.] has always been used by the Appellant in its relationship with the SRB.
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> In such a situation the Appeal Panel considers that the Appellant request to have the appeal conducted in [.] is validly grounded in Regulation No 1 1958 and must be accepted.
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> For an efficient conduct of the appeal, since the working language of the Appeal Panel is English, both parties are requested to file their submissions in [.] with a translation into English and the oral hearing, if any, shall be held in [.] and English, with simultaneous translation. The final decision shall be delivered in English (working language of the Appeal Panel) and [.] (official language of the appeal proceedings). The [.] version of the final decision may however follow the adoption and delivery of the English version, because it will need to be translated from the English one.

7. On 8 August 2022, the Board sent a communication to the Appeal Panel requesting the Appeal Panel to reconsider its procedural order No 1 of 5 August 2022 on the language of the proceedings, or to limit the [.] language to the oral hearing, if any, or to extend the deadline to submit its response in [.] until 5 September 2022.

8. On 11 August 2022, the Appeal Panel confirmed its procedural order No 1 on the language of the proceedings and granted to the Board the extension required, with a parallel extension also of the deadline for the rejoinder of the Appellant.

9. On 5 September 2022, the Board submitted its response in English and asked for a further extension of the deadline for the submission of the same in [.], due to delays in the translation by the competent external translation office. The extension was granted by the Appeal Panel.

10. On 13 September 2022, the Board submitted its response in [.].

11. Given that with its response, at point (33) the Board requested once again the Appeal Panel to reconsider its procedural order No 1 on the language of the proceedings, the Appeal Panel sent to the parties on 14 September 2022 the following communication:

Reference is made to the Board's request, at point (33) of its response, that the Appeal Panel, "*in accordance with Article 11(2) of the RoP declares sufficiently early and at least prior to the decision of the appeal on the merits the English language as the language of the proceedings unless otherwise agreed by the parties*".

This is the second request filed by the Board to ask the Appeal Panel to reconsider its order on the language of the appeal proceedings issued on 5 August 2022 and reconfirmed on 11 August 2022.

The Appeal Panel finds unusual the reiteration by the parties of requests and arguments already dismissed by it and would normally not engage in further exchanges with the parties on the reasons already stated to justify its orders. However, in the circumstances, the Board argues that the Appeal Panel's order on the language is not only contrary to Article 5(2) of the RoP (which, in the Board's view, "clearly provides that the language of the Notice of Appeal and of the appeal proceedings must be the language of the contested decision", thus, in the case at hand, the English language), but also that, in the Board's view, the Appeal Panel's order on the language of the appeal endangers "the predictability of and the reliability on the RoP as the cornerstone of the safeguards of the parties' procedural rights before the Appeal Panel", and thus legal certainty.

In response to this new request of the Board at point (33) of its response, the Appeal Panel wishes to reiterate that the language of the proceedings in case 3/22 is [.], unless otherwise agreed by the parties to the appeal.

Further to the reasons already stated in the order of 5 August 2022 and in an attempt to better clarify its position, the Appeal Panel notes that Article 5(2) of the RoP must be interpreted and applied giving weigh, to textual, contextual and teleological arguments.

As to the textual interpretation, the first and second periods of Article 5(2) expressly provide, first, that "the language of the Notice of Appeal and of the appeal proceedings shall be the language chosen by the Appellant in conformity with Article 81(1) of Regulation 806/2014 and *Article 2 (emphasis added)* of Council Regulation Nº. 1 of 1958" and, second, that "*unless otherwise required under Council Regulation Nº. 1 of 1958* (emphasis added), the language of the Notice of Appeal and of the appeal proceeding shall be the language of the contested decision". Both sentences acknowledge, in the Appeal Panel's view, that Article 2 of Council Regulation No 1/1958 applies to the notice of appeal and that the language of the contested decision shall be the language of the appeal "*unless otherwise required under Council Regulation No 1/1958*" and thus unless the appellant does not exercise the right conferred upon him by Article 2 of Regulation No 1/1958 to select one of the official languages of the European Union other than the one of the contested decision. The Appeal Panel does not agree therefore with the Board that Article 5(2) must be interpreted as identifying the language of the contested decision as the only possible language of the appeal pursuant to Article 6 of Regulation No 1, because this interpretation obliterates, in the Appeal Panel's view, the clear wording of Article 5(2) of the RoP not to deprive the appellant of the right conferred upon him by Article 2 of Regulation No 1. In the Appeal Panel's view, the only circumstance in which one could infer from the previous behaviour (and choice) of the appellant that he accepted to waive his right under Article 2 of Regulation 1/1958 in the appeal is where the appellant agreed with the SRB the language of the proceedings leading to the contested decision (lodging the appeal in a language different from the one chosen by the same appellant during the proceedings would be tantamount as *venire contra factum proprium*).

As to the contextual or systematic argument, the Appeal Panel notes that Article 2 of Regulation No 1/1958 is, to use the words of the Board in its response at point (32), a cornerstone of the safeguards of the parties procedural rights vis-à-vis the SRB in its communications and proceedings with entities or persons other than national resolution authorities (as also witnessed by the framework for

> the practical arrangements within the SRM; the same principle applies in the SSM context pursuant to Article 24(1) of Regulation (EU) No 468/2014). Also a systematic interpretation of the RoP rules out that the RoP intended to deprive the appellant of such a right, because it would appear unreasonable that the right under Article 2 of Regulation No 1/1958 would be derogated in the SRB context solely with respect to appeals to the Appeal Panel.
>
> As to the teleological arguments, the Appeal Panel considers that, as noted by AG Maduro in his Opinion in *Spain v Eurojust*[2] the question of linguistic requirements "*must be linked with rights, with a principle and with an objective which are fundamental to the European Union*". The fundamental principle requires that the linguistic rights of those individuals who have *direct* access to the Union institutions or bodies will be recognized. This means that there may be exceptions to the principle embedded in Article 2 of Regulation No 1/1958, as is clear from the judgement of 9 September 2003 in Case C-361/01 P *Kik* v *OHIM* ECLI:EU:C:2003:434 where the Court rejected the idea of a general principle of EU law that confers a right on every citizen to have a version of anything that might affect his interests drawn up in his language '*in all circumstances*'. Yet, those circumstances in which that right of Article 2 of Regulation 1/1958 cannot be applied, must be limited. This has two implications. First, any provision departing from the principle that linguistic rights are recognized needs to be interpreted restrictively. Second, any such provision must expressly, unambiguously and for justified reasons derogate to that right. In the Appeal Panel's view this is not the case of Article 5(2) of the RoP which, in contrast, as already noted, expressly provides that "the language of the Notice of Appeal and of the appeal proceedings shall be the language chosen by the Appellant in conformity with Article 81(1) of Regulation 806/2014 and *Article 2* of Council Regulation Nº. 1 of 1958" and clarifies that the language of the contested decision is the language of the appeal unless otherwise required by Regulation No 1/58.

12. On 26 October 2022, the Appellant filed its rejoinder to the Board's response.

13. On 28 October 2022, the Board submitted a reasoned request for an extension of the deadline for the submission of its reply to the Appellant's rejoinder until 8 December 2022. The extension was granted.

14. On 9 November 2022, the Appeal Panel notified to the parties the procedural order No 2 as follows:

> The Appeal Panel has determined that, for the just determination of the appeal in case 3/2022 and in particular to verify, in accordance with settled case-law (Cases T-481/17, Fundación Tatiana Pérez v SRB, ECLI:EU:T:2022:311, T-510/17 Del Valle Ruiz v SRB, ECLI:EU:T:2022:312, Case T-523/17, Eleveté Invest Group v SRB, ECLI:EU:T:2022:313, Case T-570/17 Algebris v Commission ECLI:EU:T:2022:314 and T-628/17 Aeris Invest v Commission and SRB ECLI:EU:T:2022:315) not only if the evidence relied on by the SRB in its resolvability decision is factually accurate, reliable and consistent, but also whether if constitutes all the relevant information which must be taken into account in order to assess a complex situation and whether that information is capable of supporting the conclusions drawn from it, it is necessary for the Appeal Panel to examine, under strict confidentiality vis-à-vis the Appellant:
>
> (1) the minutes of the Board and

[2] Case C-160/03 *Kingdom of Spain v Eurojust*, Opinion of Advocate General (AG) Poiares Maduro [2004] ECLI:EU:C:2004:817, paras 34-38.

(2) any other relevant internal and preparatory document(s) of the SRB where the SRB has analysed, discussed and/or reached the conclusion that it cannot exclude that the winding down of [.] under normal insolvency proceedings at a time of broader financial instability or system wide events would likely result in significant adverse effects on the financial stability of [.] in the sense of Article 14(2)(b) of Regulation (EU) 806/2014.

For this purpose, as a measure of inquiry weighing confidentiality against the right to an effective legal remedy at this stage of the proceedings, having regard also to Article 103 of the General Court's Rules of Procedure, the Appeal Panel orders the Board to deposit with the Secretariat of the Appeal Panel by **the close of business of Monday, 21 November 2022** at the SRB's premises, one or more numbered hardcopies of the above documents and subject to the adoption of appropriate technical means and all necessary security measures, to allow remote access to the Appeal Panel Members via electronic devices to an electronic copy of the same for reading only. Having regard also to Article 103 of the General Court's Rules of Procedure, the above documents deposited by the SRB shall neither be communicated to the other Party nor shall be part of the file of these proceedings open to the access of the Appellant or of any third parties, corresponding exclusively to a mere element intended for comprehensive information and due diligence on the case on the part of the Appeal Panel.

Furthermore, as to the second plea of the Appellant, and with no prejudice to the examination in due course of such second plea as regards the implications that the Appellant draws from the fact that, in its view, the fishing request was manifestly unlawful and the SRB should have therefore considered that it was not bound by that manifestly erroneous request, the Appeal Panel, in light of the statements of the Appellant at § D.II., pages 19-20 of its Reply of 26 October 2022 which invite the Appeal Panel to express its opinion on the proceedings against [.] acts adopted in the context of MREL determination under appeal, in a spirit of cooperation with the parties to help clarifying complex procedural interplays between European and national courts in this domain, wishes to draw to the attention of the Appellant that, in principle, European courts have held so far that there are two possible approaches in composite procedures, where a final decision is adopted by a EU Agency upon proposal of a National Authority: if the EU Authority is not bound by the National Authorities' decision, EU courts would control the legality of the final act (Case C-64/05 P Sweden v Commission [2007] ECLI:EU:C:2007:802); if the EU authority is bound by the national decision, national courts would control the legality of the national act (Case C-97/91 Oleificio Borelli v Commission [1992] ECLI:EU:C:1992:491). This principle has been applied, in the context of the Banking Union, in Case C-219/17, Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v. Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS) [2018] ECLI:EU:C:2018:102 as well as in Case C-414/18, Iccrea Banca v Banca d'Italia [2019] ECLI:EU:C:2019:1036. This may suggest, therefore, that if the fishing request is binding upon the SRB – without prejudice to the question on whether the Board should have considered an allegedly manifest unlawfulness of the [.] request – the legality of such fishing request of the National Competent Authority needs to be assessed by the national competent court. In turn, in Case T-365/16 Portigon v SRB [2019] ECLI:EU:T:2019:824 European courts have clarified that when a decision of the SRB is not directed to the bank, but to a National Resolution Authority (NRA) which has to issue its own implementing act to render it effective vis-à-vis the bank, nonetheless if the European Authority's determination is final and binding, such European decision needs to be challenged and this can be done via an application for annulment before the General Court. This may suggest, therefore, that [.] implementing act (notice to the bank) of the Board's MREL decision – without prejudice to the question on whether the Board should have considered an allegedly manifest unlawfulness of the [.] fishing request before adopting its MREL decision – is dependent on the legality of the SRB MREL decision, whose legality needs to be assessed by the Appeal Panel and the European courts.

15. On 21 November 2022, the Board deposited the following communication in response to the procedural order No 2:

> I refer to the Procedural Order no. 2, dated 9 November 2022, in the above-mentioned Appeal by which the Appeal Panel orders the Single Resolution Board (the "**SRB**") to deposit with the Secretariat of the Appeal Panel by 21 November 2022, one or more numbered hardcopies of the following documents:
>
> "(1) the minutes of the Board and
>
> (2) any other relevant internal and preparatory document(s) of the SRB where the SRB has analysed, discussed and/or reached the conclusion that it cannot exclude that the winding down of [.] under normal insolvency proceedings at a time of broader financial instability or system wide events would likely result in significant adverse effects on the financial stability of [.] in the sense of Article 14(2)(b) of Regulation (EU) 806/2014."
>
> Given the sensitivity and confidentiality of the documents to which access is requested, the SRB considers of utmost importance that the confidential treatment of those documents is guaranteed before its submission to the Appeal Panel. Therefore, and without prejudice to any other legal consideration that the SRB may consider necessary to make in relation to the Appeal Panel's request, the SRB would only be able to provide access to those documents after the Appeal Panel has confirmed that those documents will remain confidential *vis-à-vis* the Appellant.

16. On 24 November 2022, the Secretariat of the Appeal Panel sent to the Appellant the Board's communication and the following communication of the Appeal Panel:

> This is to inform the Appellant of the letter filed by the Board on 21 November 2022, hereby attached, in reply of the Appeal Panel's Procedural Order of 9 November 2022.
>
> The Appellant is informed that the Appeal Panel would consider to confirm, having due regard by analogy to Article 103 of the Rules of Procedures of the General Court and to the weighing of interests set forth therein, that the documents mentioned in the said Procedural Order would in fact remain confidential vis-à-vis the Appellant. If the Appellant wishes to comment, the Appellant should do so by 1 December 2022.

17. On 25 November 2022, the Appeal Panel Secretariat invited both parties to confirm that they would attend the hearing scheduled on 16 January 2023 in Brussels to discuss orally the case. Both parties confirmed.

18. On 29 November 2022, the Appellant responded to the Appeal Panel's communication of 24 November 2022 with the following communication:

> We agree that the Appeal Panel, taking due account of and applying by analogy Art. 103 of the Rules of Procedure of the Court and the balancing of interests provided for therein, shall consider whether the information or documents to be submitted by the SRB are relevant to the decision on the proceedings and are to be treated confidentially vis-à-vis the complainant.
>
> In our view, it is of particular importance that the procedure described in Art. 103 (3) of the Rules of Procedure of the Court is followed, i.e. that the Appeal Panel decides only after knowledge and examination of the information and documents to be submitted by the SRB whether the special confidentiality claimed by the SRB outweighs the right of the complainant to effective legal

> protection. The right to effective legal protection includes the possibility of being able to comment on any aspect relevant to the decision and is an elementary principle of any procedure under the rule of law. A restriction can therefore only be considered in justified exceptional cases. Whether such a case exists in the present case depends on the outcome of the Appeal Panel's examination. A confirmation by the Appeal Panel, already issued in advance, that the information and documents of the SRB would in no case be disclosed to the complainant, does not appear to be compatible with this.
>
> Moreover, the complete non-disclosure of the information and documents to be submitted by the SRB is the ultima ratio. Milder means, according to Art. 103 (3) of the Rules of Procedure of the Court, are (1) a special obligation on the part of the complainant to treat the information and documents confidentially, (2) an excerpt disclosure of the information and documents, or (3) at least a summary disclosure of the essential content of the information and documents, insofar as they are not particularly confidential. It should be borne in mind that this concerns specific information that relates to the complainant herself, the confidentiality of which vis-à-vis the complainant cannot therefore be considered in the normal course of events.
>
> We would be grateful if you could take the above considerations into account in your decision-making.

19. On 2 December 2022, the Appeal Panel adopted and sent to the parties an amendment to its procedural order No 2 as follows:

> Further to the Procedural Order No 2 dated 9 November 2022, the Appeal Panel thanks the Board for its communication of 21 November 2022 and the Appellant for its response of 29 November 2022 to the Appeal Panel email of 24 November 2022. The Appeal Panel acknowledges the importance of the arguments raised by both parties with respect to the Procedural Order No 2 and of better calibrating the requests laid down therein.
>
> In light of the arguments raised by the parties concerning the confidentiality of the documents contemplated in the Procedural Order No 2, having regard to the purpose of the request for documents of Procedural Order No 2, the Appeal Panel considers that it is appropriate to better specify the content of the documents sought to limit their submission to what, at this stage of the procedure, appears likely useful for the Appeal Panel's assessment of the case and invites therefore the Board to submit (1) a duly redacted version of (i) the preparatory documents and (ii) minutes of the Board where the SRB has analyzed the reasons why, and reached the conclusion that it cannot exclude that the winding down of [.] under normal insolvency proceedings at a time of broader financial instability or system wide events would likely result in significant adverse effects on the financial stability of [.] in the sense of Article 14(2)(b) SRMR and (3) a summary of the essential content of the documents mentioned in point (1)(i) above, insofar as they do not contain classified information, which could be disclosed under a duty of confidentiality with the Appellant.
>
> The Procedural Order No 2 is amended accordingly. The Appeal Panel reserves any further request, if needed, in the following stages of the procedure, after having considered the documents listed in point (1)(i) and (ii) above.

20. On 13 December 2022, the Secretariat of the Appeal Panel informed the Board that a specific folder was created on a virtual data room (VDR) for case 3/2022 where the Board could upload the confidential documents following the Appeal Panel's procedural order no. 2, as amended. The Appeal Panel further invited the Board to make available said documents by 9 January 2023.

21. On 9 January 2023, the Board made available in the VDR for the confidential examination by the Appeal Panel a redacted version of [.] resolution plan and redacted versions of the relevant minutes of the Board, noting that the summary for the benefit of the Appellant of the essential content of such documents should be considered already included in the reasoning of the Contested Decision.

22. On 16 January 2022, the hearing was held in Brussels. 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 appeal.

23. On 23 January 2023, the Appeal Panel notified the parties that the Chair considered that the evidence was complete and thus that the appeal had been lodged for the purposes of Article 85(4) of Regulation 806/2014 and Article 20 of the Rules of Procedure.

Main arguments of the parties

24. The main arguments of the parties are briefly summarised below. It is specified that the Appeal Panel considered all arguments raised by the parties, irrespective of the fact that a specific mention to each of them is not expressly reflected in this decision.

Appellant

25. The Appellant argues that with the Contested Decision, the Board erred in law and to support this conclusion, the Appellant relies on two pleas.

26. With the first plea, the Appellant argues that [.] does not meet the criteria to be classified as a resolution entity within the meaning of Article 3(1)(24a) SRMR for the purposes of Article 12d(5) SRMR. The Appellant claims that [.] classification as a resolution entity is largely based on the SRB's resolution plan, but information on this plan was only made available to [.] in the form of a very aggregated brief summary on 31 March 2022. Furthermore, the Appellant argues that the Contested Decision, in recitals 3 to 7, contains very general, summary statements on the classification as a resolution entity without a sufficiently specific reference to [.]. As a result, the Appellant claims that such recitals represent "a list of allegations, which, by their very nature, cannot be challenged or refuted in this form". The Appellant further clarifies the reasons why, in its view, the recitals 3 to 7 of the Contested Decision are not correct in their findings.

27. In this context, the Appellant notes, in the first place, that the institution-based protection scheme of the [.], of which the Appellant is a member, has sufficient loss-absorbing capacity ([.]) that would be enough to prevent, in case of need, the failure of [.] and would ensure its stabilisation. In so doing, [.] would also prevent any reputational damage for the [.] brand. The Appellant further draws the attention to the fact that, in the past, when economic difficulties arose in the [.] ([.]) there were no indirect contagion effects for [.].

28. In the second place, the Appellant argues that [.] is not classified as systemically relevant at prudential level. According to the critical functions report filed as of 31 December 2021, no critical functions have been identified for [.]. Moreover, due to [.] focus on the [.], the Appellant claims that [.] significance for the national banking market is very remote. […].

29. In the third place, the Appellant argues that, due to […], the vast majority of which are [….], any financial difficulty experienced by one of those institutions cannot be expected to have any supra-regional impact. This is witnessed, in the Appellant's view, by past experiences, when crisis situations at [.] ([….]) had no noticeable negative impact on the [.] in general or on [.] in particular.

30. With the second plea, the Appellant argues that the SRB was not bound by the request (the so called "fishing request") made by *[.]* (hereinafter "**[.]**") to apply the requirements of Article 12d(4) SRMR because that request was erroneous and unlawful. The Appellant acknowledges that pursuant to Article 12d, paragraph 5, sub-paragraph 1 SRMR, the SRB applies, upon request of the national resolution authority, the requirements under paragraph 4 of Article 12d SRMR to the resolution entity. In the present case, however, the Appellant claims that [.] request under Article 12d, paragraph 5 SRMR was erroneous and "this was recognised by the SRB, in particular prior to the issuance of the [Contested Decision]".

31. In particular, the Appellant argues that, whilst [.] assumes that [.] would not encounter major obstacles in accessing capital markets for the subordinated eligible liabilities to be issued following the fishing request, the SRB, in the Appellant's view, acknowledges that, although [.] had issued unsecured securities in the past, had "no experience in issuing non-preferred debt". The Appellant further claims that there are considerable practical concerns (e.g., sales of very large volumes in a comparatively short period of time, current challenging market environment) which "were evidently not taken into account by [.]".

32. The Appellant asks therefore that the Appeal Panel remits the case to the Board.

33. With its rejoinder, the Appellant reiterates, in the first place, that the SRB did not sufficiently justify the classification of [.] as a resolution entity and, in particular, did not disclose the underlying analysis and assessment. The Appellant notes that the classification as a resolution entity in the Contested Decision has far-reaching effects on [.] business activities (e.g., in the form of comprehensive implementation requirements of regulatory requirements, resource build-up, restrictive and cost-intensive requirements for the structuring of the liabilities' side). However, in the Appellant's view, "a proper discussion of the Contested Decision is not possible in ignorance of the reasons and derivations used to support it. This is a violation of the right to fair proceedings".

34. The Appellant further claims that it perceived, in the course of various contacts with the SRB, that its classification as a resolution entity had been less a legal than a political decision. In this respect, the Appellant argues that "an authority must exercise a discretion incumbent upon

it in a proper manner, namely on the basis of law and statute; the imposition of a political agenda is not compatible with this" and would render the decision unlawful.

35. The Appellant further argues that the Appeal Panel may review the Contested Decision "both with regard to any errors in exercising discretion and with regard to its substantive correctness". This includes a review of all "prior issues" that are relevant for the MREL determination, including the classification of [.] as resolution entity; otherwise, in the Appellant's view, "a control-free space would arise that is incompatible with the rule of law".

36. Finally, on the second plea, the Appellant reiterates that the SRB is not bound by a fishing request of [.] which is recognizably erroneous. This is so, in the Appellant's view, because otherwise the SRB's actions would end up being inconsistent.

Board

37. The Board submits that the appeal is unfounded and should therefore be rejected.

38. With regard to the first plea, the Board argues that the decision to classify [.] as a resolution entity is lawful. The Board claims that the internal resolution team (hereinafter "**IRT**") provided detailed information to [.] as to the reasons why it was reclassified as a resolution entity and its right to be heard was fully respected before the adoption of the Contested Decision. All [.] arguments were duly examined and are addressed in the Contested Decision. The fact that the Appellant disagrees with the outcome of the public interest assessment does not make the Contested Decision unlawful. The resolution plan, by definition, must consider hypothetical and remote, yet plausible scenarios. To that end, the Board enjoys a margin of discretion since the resolvability assessment is the result of complex factual, legal and technical analysis as regards the resolution objectives at risk, including the potential risks of contagion effects of the failure of a particular credit institution. The Appellant has not shown that the scenarios and assumptions contemplated by the Board and the conclusions reached in the Contested Decision are unrealistic or implausible.

39. With regard to the second plea of the appeal, the Board argues that the Appellant's claim is based on the assumption that the request made by [.] under Article 12d(5) SRMR is unlawful. The review of the legality of that request falls however under the exclusive competence of [.] courts. In the Board's view, the SRB is bound by the request and has no margin of discretion in that respect. It follows that the SRB could only ascertain that [.] had properly made the request. The SRB further explains that, in the present case, the request complied with all the procedural requirements and was *prima facie* proper. Therefore, in the Board's view, contrary to the allegations made by the Appellant, the SRB was legally bound to comply with it.

40. The Board asks therefore the Appeal Panel to dismiss the appeal.

41. With its reply to the Appellant's rejoinder, the Board challenges as inadmissible the new pleas in law or new facts not already included in the notice of appeal, and specifically the claims that the Board had committed "errors in the exercise of discretion" for an alleged violation of

the requirement of full transparency and an alleged abuse of power due to an alleged politically-driven reclassification of [.] as a resolution entity.

42. The Board further argues that the new arguments raised by the Appellant in its rejoinder are unfounded, noting that, in its view, the Contested Decision "already includes all the relevant elements for the Appellant to fully understand the reasoning of the SRB". The Board further denies that the classification of [.] as a resolution entity was a political decision, arguing that the allegation "is completely speculative and unfounded".

43. As to the scope of review of the Appeal Panel, the Board considers that the case-law on the standard of review of resolution actions is fully applicable to the review of the resolution planning stage. As a consequence, the Appeal Panel can only carry out a limited review of the resolvability assessment to verify that the SRB did not commit any manifest error.

44. As to the merit of the first plea, the Board reiterates the arguments already raised with the response and further notes that the possible intervention of the relevant institutional protection scheme ([.]) to prevent [.] failure is irrelevant, because the starting point of the public interest assessment in the Contested Decision was precisely the imminent failure of [.]. In other words, the Board argues that "the SRB relied on the adverse scenario underlying the 2021 EU-wide stress test performed by the European Banking Authority, considering as a starting working assumption that in such a system-wide events scenario neither support nor benefits from the IPS to its members could be assumed because all IPS members' capital position would be stressed and the failure of a member would cause them additional losses via the pay-out of covered deposits by the deposit guarantee system and the IPS regulatory benefits would be put in question".

45. The Board further argues, as to the sufficiency of the reasons stated in the Contested Decision, that [.] is […]. […] and thus the impact of its failure on the rest of [.] and the risk of contagion arising from that failure is not the same as the impact of the failure of any other […].

46. Concerning the alleged lack of detailed quantitative data in the Contested Decision, the Board submits that "further detailed data were not necessary to understand the reasoning that led the SRB to classify [.] as resolution entity". The rationale of this classification relies – according to the Board – mainly on the size of [.], the fact that it is the […], as well as qualitative data such as the similarities of the business model and branding image with the other […] members of the said institutional protection scheme.

47. As to the second plea, the Board reiterates its argument that the review of the lawfulness of the fishing request falls under the exclusive competence of the national courts and denies that the Contested Decision reveals any recognition by the SRB of an alleged error of [.] and why.

Findings of the Appeal Panel

(a) The factual background.

48. The Appeal Panel considers useful to briefly recall the circumstances of fact from which the present appeal originates.

49. […].

50. On 31 May 2021, the SRB published its "Addendum to the Public Interest Assessment: SRB Approach" (hereinafter the "**Addendum 2021**") containing a revised approach to the public interest assessment in resolution planning, which took into account for the first time the fact that a bank's failure may take place not only under an idiosyncratic scenario, but also at a time of broader financial instability or system wide events as set out in Article 8(6) fourth subparagraph SRMR. The aim of that revised approach to the public interest assessment is to strengthen, at the resolution planning stage, the choice of the best resolution strategy to safeguard the resolution objectives set out in Article 14(2) SRMR.

51. The SRB has implemented this revised approach to the public interest assessment for the first time during the 2021 RPC.

52. On 13 July 2021, in the context of the 2021 RPC, an informative workshop meeting between the IRT and [.] took place. During that meeting, the IRT informed the Appellant of the likely outcome of the public interest assessment 2021 for the Appellant following the revised approach to that assessment under the Addendum 2021.

53. In particular, the Appellant was informed of the IRT's intention to propose to the Board the change of the outcome of the public interest assessment of previous RPCs from negative to positive, i.e., to change the preferred strategy from liquidation under normal insolvency proceedings to resolution.

54. The reason for that change was that, according to the SRB, it could not be excluded that the failure of the Appellant and its winding up under normal insolvency proceedings, at a time of broader financial instability or system wide events, would likely result in significant adverse effects on the financial stability of [.] in the sense of Article 14(2)(b) SRMR and, in particular, would likely have "[…] indirect contagion effects on the real economy both at regional and national level"

(b) The Board's exception of inadmissibility as to new or amended pleas

55. The parties agree that the original pleas raised by the Appellant are admissible. However, the Board has raised an exception of inadmissibility with its reply to the Appellant's rejoinder, concerning the Appellant's alleged new pleas in law and/or new facts not already included in the notice of appeal, and specifically the claims that the Board had committed "errors in the exercise of discretion" for an alleged violation of the requirement of full transparency and an alleged abuse of power due to an alleged politically-driven reclassification of [.] as a resolution entity.

56. The Appeal Panel notes that pursuant to Article 16(3) of its Rules of Procedure "no new plea in law may be introduced in the course of the appeal unless it is based on matters of law or of fact that come to light in the course of the proceedings".

57. The Appeal Panel finds, on the one hand, that the claim that the Board had committed errors in the exercise of discretion for an alleged violation of the requirement of full transparency can be considered a development of the arguments of the first plea raised with the notice of appeal, which would, as such, be implied in the arguments outlined therein, and is therefore admissible.

58. On the other hand, the Appeal Panel considers that the alleged abuse of power consisting in the allegation that the classification of [.] as a resolution entity would have been "politically driven" and not based on legal considerations is a new argument, which is not present in the notice of appeal; nor does it have any connection whatsoever with any of the pleas developed in the notice of appeal or with the arguments put forward by the Board in the response. For this reason, such a new plea is not based on matters of law or of fact that have come to light in the course of the proceedings and is therefore inadmissible.

(c) The first plea of the appeal

59. With the first plea the Appellant claims that the Contested Decision is unlawful, because [.] does not meet the criteria to be classified as a resolution entity within the meaning of Article 12d, paragraph 5 SRMR in conjunction with Article 3, paragraph 1, no 24a SRMR. The Appellant further claims that the reasons given by the Contested Decision to justify the classification of [.] as a resolution entity in the recitals 3, 4, 5, 6 and 7 of the Contested Decision are erroneous. In its rejoinder, the Appellant further specifies that the SRB's refusal to "comprehensively disclose its considerations regarding [.] classification as resolution entity" is contrary to the rule of law and the right to an effective judicial protection.

60. The Appeal Panel wishes preliminarily to acknowledge that, when the SRB prepares and implements a resolution strategy, including its assessment whether resolution is in the public interest and is preferable to liquidation under domestic insolvency law, it enjoys a margin of technical discretion. The Board is indeed required to make choices of technical nature, which are necessarily based on forecasts and complex assessments. This means that such margin of technical discretion needs to be respected unless there is a manifest error of assessment.

61. At the same time, the Appeal Panel holds however that, in accordance with settled case-law of the European courts, a review of the compliance of the SRB with certain procedural guarantees when it makes choices based on technical discretion is of fundamental importance. Those guarantees include the obligation to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions (see to this effect judgment of 16 June 2015, Gauweiler and Others, C-62/14 ECLI:EU:C:2014:400, paragraph 69; Opinion of Advocate General Wathelet of 4 October 2018, Weiss, C-493/17 ECLI:EU:C:2018:815, paragraph 125).

62. As to the standard of review of the manifest error of assessment, the Appeal Panel wishes, furthermore, to recall that this is the standard of review applied by European courts when the applicable legal framework grants to the authority discretion proper, or "policy discretion", in the taxonomy recently proposed by Advocate General Emiliou in his recent Opinion in *Crédit Lyonnais*[3] but also when the open-texture nature of the relevant rules entails a margin of appreciation in adopting the appealed decision ("technical discretion" due to relatively undetermined legal concepts, in the above mentioned taxonomy of Advocate General Emiliou).

63. European courts do not perform a *de novo* assessment of the subject-matter brought before them and respect technical discretion. Yet, as part of their legality review, European courts closely scrutinize all possible factual and legal errors (and thus all aspects pertaining to the substantive legality of the decision for which an application for annulment has been lodged) as well as the respect of procedural rights and apply an appropriate standard on the duty to state reasons.

64. As to the crucial importance of the statement of reasons, this has been emphasised in the context of resolution planning also by the Appeal Panel in its decision of 27 January 2022 in case 2/2021 (at paragraph 108), where the Appeal Panel recalled that:

> […] in accordance with settled case-law, the duty to state reasons pursuant to Article 296 TFEU is of very fundamental importance (consider to this effect, judgment of 21 November 1991, Hauptzollamt München v Technische Universität München, C-269/90, paragraph 14). Only in this way can the court (and in the present appeal, the Appeal Panel) verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present. The Appeal Panel further notes that the duty to state reasons is particularly important in the prudential and resolution context, as also significantly acknowledged by the General Court, in its judgment of 16 May 2017, Landeskreditbank Baden-Württemberg v ECB, T-122/15, ECLI:EU:T:2017:377 paragraph 122-124 and the case-law cited and in its very recent judgment of 6 October 2021, Ukrselhosprom Versobank v ECB, T-351/18 and T-584/18, ECLI:EU:T:2021:669 paragraphs 385-387. The obligation to state reasons laid down in Article 296 TFEU is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. In that vein, first of all, the statement of reasons required under Article 296 TFEU must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to carry out its review. As regards, in particular, the reasons given for individual decisions, the purpose of the obligation to state the reasons on which an individual decision is based is, therefore, in addition to permitting review by the courts, to provide the person concerned with sufficient information to ascertain whether the decision may be vitiated by an error enabling its validity to be challenged. Furthermore, the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the statement of reasons to specify all the relevant matters of fact and law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard

[3] Opinion of 27 October 2022, Case C-389/21 P, European Central Bank v Crédit Lyonnais, ECLI:EU:C:2022:844 paras 47-48

> not only to its wording but also to its context and to all the legal rules governing the matter in question.

65. More specifically, the Appeal Panel held in case 2/2021 that, in the given circumstances, the statement of reasons was insufficient because the decision failed to "disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure", and it did not "provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged" (judgment of 16 May 2017, Landeskreditbank Baden-Württemberg v ECB, T-122/15, paragraphs 122-124 and the case-law cited and judgment of 6 October 2021, Ukrselhosprom Versobank v ECB, T-351/18 and T-584/18, paragraphs 385-387).

66. This is consistent also with the findings on the statement of reasons reached, in the banking supervisory context, by the Administrative Board of Review (ABoR) of the ECB, according to a recent ECB statement[4] which disclosed that:

> A recurring element in ABoR opinions has been the need for the ECB to provide adequate reasoning of its decisions in a manner that is comprehensible for the contesting party. The ABoR includes a standard statement in its opinions on the need for reasoning to be more extensive the more incisive a decision is adopted: "Discretionary measures taken by the ECB need to be consistent and proportionate. The more intrusive the measures, the greater the level of reasoning that is called for." The ABoR has insisted that an ECB decision "respects the business model and specificities of the credit institution" and has recently asserted that "for supervisory decisions to be effective and considered legitimate, adequate reasoning should be provided", while for a supervisory measure of an intrusive nature "reasoning is all the more important" and should go "beyond mere reliance on the law and explain the prudential need to adopt the decision".

67. As to the review of factual or legal errors in the resolution context, European courts, with variations often determined by the specific features of each case, have considered it necessary to verify not only whether the evidence relied on by the SRB in its decision is factually accurate, reliable and consistent. They have also assessed whether the information relied upon by the Board constitutes *all* the relevant information which must be taken into account in order to asses a complex situation, and whether that information is capable of supporting the conclusions drawn from it (Cases T-481/17, Fundación Tatiana Pérez v SRB, ECLI:EU:T:2022:311, T-510/17 Del Valle Ruiz v SRB, ECLI:EU:T:2022:312, Case T-523/17, Eleveté Invest Group v SRB, ECLI:EU:T:2022:313, Case T-570/17 Algebris v Commission ECLI:EU:T:2022:314 and T-628/17 Aeris Invest v Commission and SRB ECLI:EU:T:2022:315).

68. In light of this, the Appeal Panel considers that a full assessment of facts, to the extent that the Appeal Panel's procedural rules allow it, and a stringent review of the interpretation and application of law, and thus of all aspects pertaining to the substantive legality of the

[4] Administrative Board of Review – eight years of experience reviewing ECB supervisory decisions, available at https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.aborreview202212~ce9fb4e503.en.pdf.

Contested Decision is necessary to properly satisfy the requisite standard of legal accountability and review.

69. This may also require, when the Appeal Panel is confronted with complex technical assessments based on forecasts and hypotheticals (a situation where among possible alternative, future and hypothetical scenarios, the SRB has to choose one), that the Appeal Panel has to verify:

(a) at a minimum, according to the case-law of the European courts developed so far in the supervisory and resolution context (see in particular Case T-280/18 ABLV Bank AS v SRB [2022] ECLI:EU:T:2022:429, paragraphs 91-94), that the Board's assessment is not implausible.

(b) that the assessment is factually supported by the evidence in the file and is proportionate, reasonable and not discriminatory (see to this effect, in the supervisory context, judgment of 7 December 2022, T-301/19, PNB Banka v ECB, ECLI:EU:T:2022:774).

70. The Appeal Panel acknowledges that its composition is different from the composition of the European courts and includes also economic experts. Due to its mixed composition and economic expertise, a more thorough review by the Appeal Panel of the SRB's economic assessment than the one produced by European courts may be pondered, looking at whether any such technical assessment is "erroneous", and not only "manifestly erroneous". The Appeal Panel is however not persuaded that this is the right course of action.

71. The Appeal Panel is aware that this would, at first sight, appear in line with the case-law of the European courts, still in the making, concerning the standard of review of other boards of appeal of European agencies outside the realm of finance, and in particular the findings of the General Court as to the boards of appeal of ECHA and ACER. [5]

72. In *BASF* the General Court held that the board of appeal of ECHA is not called "to conduct a 'de novo' evaluation (…), that is to say an evaluation of the question whether, at the time when it rules on the action, in the light of all the relevant elements of fact and law, in particular scientific issues, a new decision with the same operative part as the decision contested before it may be lawfully adopted"[6]. However, "the review, by the board of appeal, of scientific assessments in an ECHA decision is not limited to verifying the existence of manifest errors. On the contrary, in that regard, by relying on the legal and scientific competences of its members, that board must examine whether the arguments put forward by the applicant are

[5] Case T-125/17, BASF v ECHA [2019] ECLI :EU:T:2019:638, paras 60 and 65, and paras 87-89; Case T-735/18 Aquind v ACER [2020] ECLI:EU:T:2020:542, paras 50-70. Aquind is currently on appeal in Case C-46/21 P ACER v Aquind [2021] ECLI:EU:C.2021:633 (pending); on appeal the application for interim suspension was rejected with order of the Vice-President of the Court of 16 July 2021. BASF is closed, because the appeal in case C-565/17 BASF v ECHA [2018] ECLI:EU:C:2018:340 was dismissed with order of the Vice-President of the Court of 28 May 2018.

[6] Case T-125/17, BASF v ECHA, paragraph 59

capable of demonstrating that the considerations on which that decision of the ECHA is based are vitiated by error". [7]

73. In *Aquind* the General Court noted that the board of appeal of ACER can *exercise the powers which lie within the competence of the agency* or remit the case.[8] Thus, it reaffirmed that it should undertake a full review not limited to manifest errors in decisions entailing complex technical and economic assessments. *Aquind* was appealed, and the appeal is pending; in his Opinion on such appeal, Advocate General Campos Sanchez-Bordona has however invited the Court to confirm the General Court's finding.[9]

74. No matter the final outcome of *Aquind*, an important factor in both *BASF* and *Aquind*, which should not be overlooked, is that the nature of the review by the appeal body heavily relies on the regulatory scheme where the review mechanism is inserted.

75. Thus, in *BASF* the General Court's main reasoning about the Board of Appeal of ECHA was directed at establishing why the concrete regulatory scheme of Regulation 1907/2006 did not justify a *de novo* assessment, both from the perspective of the scope of review (*BASF* at paragraphs 59-86) and the intensity of review (*BASF* at paragraphs. 90-129). It is also important to note that the Court emphasized the 'adversarial' nature of the proceedings (*BASF* at paragraph 61), which meant that "the scope of the examination conducted by that board is thus limited by the arguments put forward by the applicant" (*BASF* at paragraphs 59-86, 140).

76. In *Aquind*, for its part, the General Court's conclusion about the nature of review was firmly based on "the provisions on the organisation and powers of the Board of Appeal of ACER" (*Aquind* at paragraph 52), and notably the fact that the Board of ACER could "exercise any power which lies within the competence of the Agency" (*Aquind* paragraphs 54, 60, 67).

77. Indeed, in the Appeal Panel's view, this is an important difference between ECHA's and ACER's Boards of Appeal, as well as the Boards of Appeal of EUIPO, CPVO and EPO, and the Appeal Panel of the SRB. Whereas these Boards of Appeal can exercise on appeal *any power which lies within the competence of the agency* or remit the case, the Appeal Panel of the SRB can only confirm or remit. Such difference seems to be associated with the institutional design of these entities, and, as such, it warns against a too linear inference by analogy from the case-law in *BASF* and *Aquind*.

78. Furthermore, the more sweeping assessment by the General Court in *Aquind* was prompted not only by the formal test applied by the Board of Appeal, but by the concern that the review undertaken by the Board was too limited in practice (*Aquind* at paragraph 86). The implication is that the thoroughness of the review is also a relevant element when assessing its adequacy under the system of safeguards envisaged by EU law.

[7] Case T-125/17, BASF v ECHA, paragraph 89
[8] Case T-735/18 Aquind v ACER, paragraph 27
[9] Opinion of 15 September 2022, Case C-46/21 ACER v Aquind [2022] ECLI:EU:2022:C:695

79. Finally, *BASF* and *Aquind* emphasize that there must be a correspondence between the technical expertise in the composition of the appeal body, and the possibility of reviewing the technical and economic aspects of the decision adopted by the agency with an intensity commensurate with the appeal body's specific expertise, which should be greater than that of the EU judicature (*BASF* paragraphs 87-89; *Aquind* paragraph 61).

80. By application of the parameters stated above as these currently stand, for the purposes of the instant case, the Appeal Panel needs, on one hand, to perform a full assessment of facts (to the extent that its procedural rules allow it) and a review of the interpretation and application of law made by the Contested Decision, since the Appellant claims, with its first plea, that the Contested Decision is unlawful, because [.] does not meet the criteria to be classified as a resolution entity within the meaning of Article 12d, paragraph 5 SRMR in conjunction with Article 3, paragraph 1, no 24a SRMR.

81. On the other hand, to the extent, however, that the Contested Decision, in its public interest assessment, is based on forecasts and complex economic assessments, the Appeal Panel review needs also to verify this assessment in line with the case-law of the European courts and without overstepping the margin of technical discretion which lies with the Board.

82. Yet, since the Appellant also argues that the reasons given by the Contested Decision to justify the classification of [.] as a resolution entity in recitals (3) to (7) of the Contested Decision are erroneous and insufficient, the Appeal Panel needs also to scrutinize if the reasoning of the Contested Decision satisfies the requirement to state reasons laid down in the second paragraph of Article 296 TFEU so that the persons concerned are able to ascertain the reasons for the measure and the Appeal Panel first, and the European courts then, are able to exercise their power of review.

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

84. The statement of reasons of the Contested Decision concerning the public interest assessment is in the recitals from (3) to (7) of the Contested Decision (and, in parallel, also in the Right to Be Heard Assessment Memorandum, Section III of the Contested Decision) and is as follows:

> (3) The Board has assessed whether the application of resolution tools and the exercise of resolution powers would be necessary and proportionate to achieve one or more of the five resolution objectives, as set out in in Article 14(2) of Regulation EU) 806/2014; and whether winding up the institutions under normal insolvency proceedings would not meet those objectives to the same extent, in accordance with Article 18(5) of Regulation (EU) 806/2014, under both an idiosyncratic scenario and

a scenario of broader financial instability or system wide events. To this purpose, the Board has considered the likely impact of the liquidation of any of the two entities mentioned in recital (1) above, carried out pursuant to the [.] Insolvency Code ([.]), as complemented by special rules in particular [...], on the financial system of [.] and of the Union to ensure achieving the resolution objectives, as set out in in Article 14(2) of Regulation (EU) 806/2014.

(4) To simulate the system wide event scenario, the Board has taken into account the adverse scenario underlying the 2021 EU-wide stress test performed by the European Banking Authority, in cooperation with the European Systemic Risk Board and the European Central Bank. The estimated impact on banks' capital reflects the effects of an underlying extreme but plausible macroeconomic deterioration affecting all banks simultaneously, that assumes a prolonged Covid-19 scenario in a "lower for longer" interest rate environment. With a cumulative drop in GDP over the three-year horizon by 3.6 percent in the EU, and a negative cumulative drop in the GDP of every Member State, the 2021 adverse scenario is very severe, also having in mind the weaker macroeconomic starting point in 2020 as a result of the pandemic. Under the adverse scenario, the EU banking system as a whole would see a reduction of 4.85 per cent core equity tier 1 (CET1) on a fully-loaded basis (4.97 per cent on a transitional basis), after three years. Across the [.] banks in the scope of the stress test, the impact would be of [.] per cent on banks' CET 1 fully loaded capital ratio ([.] per cent on a transitional basis). Additionally, the Board assumes that the Institutional Protection Scheme of the […] ([…]), in which the entities participate as members, would not have impeded the failure of any of the two entities.

(5) The Board has concluded that it cannot be excluded that the winding up of [.] under normal insolvency proceedings, at a time of broader financial instability or system wide events, would likely result in significant adverse effects on the financial stability of [.] in the sense of Article 14(2)(b) of Regulation (EU) 806/2014. To the contrary, the Board considers that the application of the sale of business tool according to Article 22(2)(a) of Regulation (EU) 806/2014 could achieve the resolution objectives to a better extent.

(6) The above conclusion is based on the Board's assessment of the direct and indirect contagion effects that would be caused under the adverse scenario by the failure of any of the two entities mentioned in recital (1) above, taking into consideration different channels of contagion and based on a set of qualitative and quantitative indicators of financial linkages. Direct contagion risks, whereby the failure of a bank directly affects other banks, have been assessed by using data on interbank exposures and intra-financial sector holdings of own funds and debt instruments issued by the resolution and the liquidation entity. Indirect contagion risks have been assessed by the Board based on several financial linkages and qualitative indicators such as potential contagion to banks with the same business model, characteristics and risk profile, and potential indirect contagion through market reactions and the behaviour of market participants.

(7) In particular, assuming that the Institutional Protection Scheme of the [.] ([.]), in which the entities participate as members, would not have impeded the failure of any of the two entities, including in a scenario of broader financial instability, the Board cannot exclude that the failure of [.] and its winding up under normal insolvency proceedings, would be likely to have indirect contagion effects (with a risk of potential spill-over effect to the real economy) within the [.] sector, which would be affected by severe potential reputational risks, in the case of failure of [.], as the latter is the [.] in [.]. The Board observes that [.] sector in [.] comprises […], which, as a result, makes it more plausible to trigger a contagion from a bank like [.], being the […] in [.]. [.]. […].

85. The Appeal Panel, being mindful of the European courts' views in *Gauweiler* and *Weiss* which also referred to a contextual analysis extended to the preparatory acts and to the minutes of the relevant decision-making bodies, invited the Board, with its procedural order No 2 of 9 November 2022, to allow the confidential examination by the Appeal Panel of (1) the minutes of the Board and (2) any other relevant internal and preparatory document(s) of the SRB where the SRB has analysed, discussed and/or reached the conclusion that it could not exclude that the winding down of [.] under normal insolvency proceedings at a time of broader financial instability or system wide events would likely result in significant adverse effects on the financial stability of [.] in the sense of Article 14(2)(b) of Regulation (EU) 806/2014.

86. Due to the concerns raised by the Board with its communication of 21 November 2022 regarding the confidential examination of such documents and in light of the comments of the Appellant of 29 November 2022, the Appeal Panel further calibrated the requests of its procedural order No 2 with the specifications communicated to the parties on 2 December 2022, to limit their submission to (1) a duly redacted version of (i) the preparatory documents and (ii) minutes of the Board where the SRB has analyzed the reasons why, and reached the conclusion that it could not exclude that the winding down of [.] under normal insolvency proceedings at a time of broader financial instability or system wide events would likely result in significant adverse effects on the financial stability of [.] in the sense of Article 14(2)(b) SRMR and (3) a summary of the essential content of the documents mentioned in point (1)(i) above, insofar as they do not contain classified information, which could be disclosed under a duty of confidentiality with the Appellant.

87. The Board was invited to deposit such documents by 9 January 2023 and the Board deposited by that deadline, for the confidential examination of the Appeal Panel, only a redacted version of [.] resolution plan and some heavily redacted minutes of the Board. The Appeal Panel carefully examined those documents to better appreciate if factual findings and analytical data present in those documents may further contribute to the proper review of the Contested Decision.

88. Upon careful consideration of the textual content of the Contested Decision and, in addition, of (i) all the evidence in the file, including the documents deposited for the confidential examination by the Appeal Panel only, offering fundamental contextual information on how the Board has reached its conclusion that the winding down of [.] under normal insolvency proceedings, at a time of broader financial instability, would likely result in significant adverse effects on the financial stability of [.] in the sense of Article 14(2)(b) SRMR, and (ii) of the helpful discussion of the parties and of their counsels at the hearing, including the answers to the questions of the Appeal Panel, the Appeal Panel finds that the reasoning of the Contested Decision is on the whole insufficient.

89. The Appeal Panel sides, on this with the Appellant and finds that the statements in recitals (4) to (7) of the Contested Decision (as well as those in the Right to Be Heard Assessment Memorandum) are too broad and too high level to "provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged" (judgment of 16 May 2017, Landeskreditbank Baden-Württemberg v ECB, T-122/15, paragraphs 122-124 and the case-law cited and judgment of 6 October 2021, Ukrselhosprom Versobank v ECB, T-351/18 and T-584/18, paragraphs 385-387).

90. In this assessment, the Appeal Panel recalls its precedent in case 2/2021, which – as noted above – is also in line with the conclusions reached by the Administrative Board of Review of the ECB, that the more intrusive a decision and its measures, the greater the level of reasoning that is called for. This principle is even more compelling in a case such as this, where a decision by the Board reverses the previous approach followed by the same agency, and includes, for the first time, simulations of effects at a time of system wide events, and

impinges on the business model and specificities of the credit institution concerned, because [.] is called to access capital markets in an unprecedented way for the marketing of MREL securities required for the preparation of a resolution instead of a liquidation.

91. As a starting point, when performing its assessment on whether the exercise of resolution powers are necessary to achieve one or more of the resolution objectives set out in Article 14(2) SRMR or whether the winding down of the credit institution under normal insolvency proceedings would meet those objectives to the same extant, the Board is required by Article 8(6), fourth subparagraph, SRMR to "take into consideration relevant scenarios, including that the event of failure may be idiosyncratic or may occur at a time of broader financial instability or system wide events".

92. Furthermore, as rightly noted by the Board, the Board must indeed assume a remote, but possible event of failure of [.], and thus needs also to assume that an intervention of the [.] may have proven not enough, in the given circumstances, to prevent [.] from failing (as the Contested Decision does at recital 4, last paragraph). This is part of the assessment of the conditions of a resolution scheme, which includes, pursuant to Article 18 (1) (b) SRMR, the assessment that *"there is no reasonable prospect that any alternative private sector measures, including measures by an IPS, […] taken in respect of the entity, would prevent its failure within a reasonable timeframe;"* (emphasis added). If [.] failure and that the [.] could not prevent such failure could not be considered as a basis, the Board would be unable to comply with the express mandate of the law.

93. In addition, the Appeal Panel incidentally notes that the assumption of [.] failure and that the [.] could not prevent such failure was also the basis of the decision SRB/EES/[.] in the previous RPC (not challenged by the Appellant). The main difference is that in that previous decision, the Board having considered the event of failure of [.] only in an idiosyncratic crisis scenario, concluded that [.] could be liquidated under the [.] as complemented by the special rules of […] without more.

94. Instead, crucial to the purpose of this appeal is the assessment made by the Board of the expected contagion effects of [.] failure. The Board considers plausible that, in a system wide adverse scenario modelled using the 2021 EU-wide stress test performed by the European Banking Authority in cooperation with the European Systemic Risk Board and the European Central Bank (whose details are published on the EBA website), "it cannot be excluded that the winding up of [.] under normal insolvency proceedings, at a time of broader financial instability or system wide events, would likely result in significant adverse effects of the financial stability of [.] in the sense of Article 14(2)(b) SRMR".

95. The risk of contagion effects that would be caused, according to the Board, under the adverse scenario by the failure of [.] is specifically addressed in recital (7) where the Contested Decision states that "the Board cannot exclude" that the [.] failure and its winding up under normal insolvency proceedings "would be likely to have indirect contagion effects". These comprise, according to the definition given in recital (6), contagion risks to banks with the

same business model, characteristics and risk profile also due to market reactions and the behaviour of market participants "within the [.], which would be affected by severe potential reputational risks", also because [.] is "the [.] in [.]".

96. From the text of the Contested Decision, it is apparent, however, that, despite its extremely relevant implications, the Contested Decision does not offer any quantitative data nor any other measurable and objective reference as specific reasons to justify its conclusion that [.] liquidation under insolvency proceedings would indeed plausibly bring about a risk of indirect contagion for the […] as a whole, with a risk of potential spill-over effect to the real economy, to support its finding that resolution, instead of liquidation, is necessary.

97. The data offered in recital (4), which describe the severe, remote, yet presumably plausible macroeconomic adverse scenario as simulated by the EBA under its 2021 EU-wide stress test, simply suggest that on average the [.] banks in the scope of the stress test would experience a reduction of [.] per cent of banks' CET1 fully loaded capital ratio in a system wide event of such magnitude. Yet those data do not explain how these figures would specifically translate into […] capital shortfalls. Nor, and crucially, it does not provide any detail as to how the relevant figures for [.] would be impacted by [.] failure if [.] were to be liquidated under normal insolvency proceedings.

98. The hypothetical indirect effects of [.] liquidation on all [.] which are alleged by the Contested Decision in recital (7) (and in the Right to Be Heard Assessment Memorandum, Section III of the Contested Decision, at point 1) are not supported, in the Contested Decision, by the disclosure of supporting data and analysis. Thus, they remain vague and broad statements which do not "disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure" nor do they allow the Appellant, nor the Appeal Panel or the European courts, to review the Contested Decision. In other terms, recital (7) and the Right to Be Heard Assessment Memorandum do not provide "sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged" (judgment of 16 May 2017, Landeskreditbank Baden-Württemberg v ECB, T-122/15, paragraphs 122-124 and the case-law cited and judgment of 6 October 2021, Ukrselhosprom Versobank v ECB, T-351/18 and T-584/18, paragraphs 385-387).

99. This failure to show in the Contested Decision qualitative and quantitative information, data and measurable assumptions is even more noticeable, in the Appeal Panel's view, because the SRB Addendum 2021 of 31 May 2021, correctly noted that "*when performing the assessment of the impact on each resolution objective, the SRB relies on both qualitative and quantitative information* (emphasis added). The qualitative assessment takes into account how bank and country specific factors increase or reduce financial stability risk due to the failure of the bank under the system wide event scenario. The quantitative assessment is conducted using the same methodology as for the public interest assessment analysis under the assumption of a bank's failure under normal market circumstances, however in a context where the rest of the banking system has been affected by an adverse scenario". This shows that the Board itself is aware of the relevance of such qualitative and quantitative information and of the

methodology used to draw from them inferences and conclusions on the contagion effects, which may plausibly be expected. Such meaningful elements, to the extend these might have been elaborated and analyzed by the Board, cannot be, therefore, kept completely confidential vis-à-vis the Appellant who is "directly concerned" by the Contested Decision, if the Appellant's right to properly understand the Contested Decision and to ask for a meaningful review of it is to be taken seriously.

100. The textual insufficiency of the reasons stated by the Contested Decision to support the finding that [.] failure would cause indirect contagion effects is also confirmed by the contextual analysis made by the Appeal Panel through the confidential examination of the redacted version of the resolution plan and of the widely redacted minutes of the Board deposited by the Board following the procedural order No 2 of the Appeal Panel.

101. The redacted version of the resolution plan shows some additional data and diagrams which were neither disclosed to the Appellant with the summary of the key elements of the group resolution plan for [.] sent to the Appellant by the SRB on 31 May 2022 nor with the Contested Decision.

102. This confirms that, in contrast with the resolution plan, the Contested Decision has failed to produce qualitative and quantitative data and analyses and the methodologies related thereto, to support its consequential conclusion that [.] liquidation would indeed cause indirect contagion effects.

103. In addition to the insufficiencies outlined above, the Appeal Panel wishes to further add that the reasoning of the Contested Decision, is clear in specifying that the SRB assumes that the [.] in a systemic wide event scenario would not have impeded the failure of [.] "because of the prior depletion of its resources" (see to this effect the right to be heard assessment in Section III of the Contested Decision, under point 1). Yet, this mere statement, as such, does not explain nor duly supports with data and analysis why the institutional protection scheme [.], even if it could not prevent the [.] from failing, would not be able to preserve the confidence of the market in all other [.]. The IPS' structure and funding is mentioned in the redacted resolution plan yet not in the Contested Decision. The Appeal Panel notes in this regard that the statement of reasons of the Contested Decision fails to explain and to support with measurable data and analyses why the institutional protection scheme and its resources, even if somehow depleted in a system wide event and even assuming that [.] failure could not be prevented by the [.], would not be enough within the whole applicable normative framework at stake in the case to preserve the confidence of the market in the other [.], considering also that the institutional protection scheme is equally authorised as a depositors' protection scheme and considering […] (which in past crises contributed in averting the risk of contagion effects at the national level).

104. Finally, the statement of reasons of the Contested Decision fails to discuss to what extent, assuming that [.] were liquidated under normal insolvency proceedings, this would prevent the implementation of transfer strategies, even possibly sponsored by the [.] itself if permitted

under the least cost rule, such as a sale of business or the transfer of deposits and assets and why therefore the sale of business tool, that the Contested Decision describes as the preferred resolution strategy for [.] in recital (5), would be available only in resolution.[10]

105. In conclusion, the Appeal Panel considers that this appeal presents a case of great interest, and also of great importance, because the Contested Decision not only has far-reaching implications for [.] capital structure, access to capital markets and business model but also calls into question certain fundamental features of the [.] in [.] (and potentially in other Member States with similar or comparable mechanisms, even if differing on specific legal aspects) and of the role of institutional protection schemes in system wide events.

106. In such a context, the Appeal Panel's view is that, whereas the SRB's determination on the public interest assessment rests, by necessity, on complex hypotheticals and forecasts of remote, yet possible, scenarios, the statement of reasons of decisions with so far reaching implications must offer sufficient indication of the specific qualitative and quantitative data and of the methodology used in order to clearly show all relevant inferences on plausible direct or indirect contagion effects, and their likely significant adverse effects on the financial stability of a Member State in the sense of Article 14(2)(b) SRMR.

107. In the instant case, instead, the statement of reason of the Contested Decision failed to provide sufficient entity-specific and sector-specific evidential support to its broad conclusions and refrained from offering qualitative and quantitative data which could be analysed, tested, understood or challenged by the Appellant; in this way the Contested Decision does not allow the Appellant, the Appeal Panel and the European courts, to properly review the Contested Decision, with sufficient data and information to know whether the decision is, or is not vitiated. For this reason, the Contested Decision needs to be remitted to the Board.

108. Given that the main factors underpinning the Board's assessment of potential indirect contagion effects were not shared with the Appellant in the Contested Decision, the Appellant did not have an actual opportunity to challenge the basis and methodology of such assessment. Since the procedure before the Appeal Panel is adversarial in nature, and the scope of the examination conducted by the Appeal Panel is, in itself, limited by the arguments put forward by the Appellant, given that the arguments of the Appellant could not contest the elements of the assessment that were not shared by the Board, and given that those elements as shared with the Appellant provided an insufficient justification of the decision adopted, the Appeal Panel cannot decide on the sufficiency of the elements actually used by the Board to substantiate its assessment, i.e., the conclusion of the Contested Decision that [.] liquidation would cause indirect contagion effects to other [.] in [.] and in turn would likely result in significant adverse effects on the financial stability of [.] in the sense of Article 14(2)(b) SRMR.

[10] According to a European Commission "Study on the differences between bank insolvency laws and their potential harmonisation" (Brussels, November 2019, [.] of the country report for [.]), […]

(d) The second plea of the appeal

109. With the second plea the Appellant argues that the SRB was not bound by the request made by [.] to apply the requirements of Article 12d(4) SRMR, because that request was erroneous and unlawful.

110. The Appeal Panel, with its procedural order No 2 of 9 November 2022, already informed the parties, in a spirit of cooperation to help timely clarifying complex procedural interplays between European and national courts in this domain, that:

> […] in principle, European courts have held so far that there are two possible approaches in composite procedures, where a final decision is adopted by a EU Agency upon proposal of a National Authority: if the EU Authority is not bound by the National Authorities' decision, EU courts would control the legality of the final act (Case C-64/05 P Sweden v Commission [2007] ECLI:EU:C:2007:802); if the EU authority is bound by the national decision, national courts would control the legality of the national act (Case C-97/91 Oleificio Borelli v Commission [1992] ECLI:EU:C:1992:491). This principle has been applied, in the context of the Banking Union, in Case C-219/17, Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v. Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS) [2018] ECLI:EU:C:2018:102 as well as in Case C-414/18, Iccrea Banca v Banca d'Italia [2019] ECLI:EU:C:2019:1036. This may suggest, therefore, that if the fishing request is binding upon the SRB – without prejudice to the question on whether the Board should have considered an allegedly manifest unlawfulness of the [.] request – the legality of such fishing request of the National Competent Authority needs to be assessed by the national competent court. In turn, in Case T-365/16 Portigon v SRB [2019] ECLI:EU:T:2019:824 European courts have clarified that when a decision of the SRB is not directed to the bank, but to a National Resolution Authority (NRA) which has to issue its own implementing act to render it effective vis-à-vis the bank, nonetheless if the European Authority's determination is final and binding, such European decision needs to be challenged and this can be done via an application for annulment before the General Court. This may suggest, therefore, that [.] implementing act (notice to the bank) of the Board's MREL decision – without prejudice to the question on whether the Board should have considered an allegedly manifest unlawfulness of the [.] fishing request before adopting its MREL decision – is dependent on the legality of the SRB MREL decision, whose legality needs to be assessed by the Appeal Panel and the European courts.

111. Article 12d(5) SRMR reads as follows:

> At the request of the national resolution authority of a resolution entity, the Board shall apply the requirements laid down in paragraph 4 of this Article to a resolution entity which is not subject to Article 92a of Regulation (EU) No 575/2013 and which is part of a resolution group the total assets of which are lower than EUR 100 billion and which the national resolution authority has assessed as reasonably likely to pose a systemic risk in the event of its failure.
>
> When taking a decision to make a request as referred to in the first subparagraph of this paragraph, the national resolution authority shall take into account:
>
> (a) the prevalence of deposits, and the absence of debt instruments, in the funding model;
>
> (b) the extent to which access to the capital markets for eligible liabilities is limited;

> (c) the extent to which the resolution entity relies on Common Equity Tier 1 capital to meet the requirement referred to in Article 12f.
>
> The absence of a request by the national resolution authority pursuant to the first subparagraph of this paragraph is without prejudice to any decision of the Board under Article 12c(5).

112. Article 12d(5) SRMR sets out indeed specific rules for certain designated entities, and namely resolution entities that are part of a resolution group with total assets below [...]. Those entities are outside the scope of paragraph 4 of the same Article 12d SRMR, but may be designated by the national resolution authority as likely to pose a systemic risk in the event of failure to the effect of making paragraph 4 applicable to them. More specifically, upon such a "fishing request" made by the national resolution authority, the SRB shall apply the requirements of paragraph 4 also to such designated entity.

113. The Appeal Panel considers that pursuant to Article 12d(5) SRMR the Board is bound by the request of the national resolution authority and has no margin of discretion in amending or rejecting the request. This is a point also expressed by the Board in the Right to Be Heard Assessment Memorandum at Section III of the Contested Decision, under point 2.

114. The text of Article 12d(5) SRMR specifies that "the Board *shall* apply" the requirements of paragraph 4 "at the request of the national resolution authority", without leaving any discretion to the Board. This is also confirmed by a contextual and teleological interpretation.

115. The Appeal Panel further recalls that, according to settled case-law, "if an EU authority is bound by a national decision, national courts would control the legality of the national act" (Case C-97/91 Oleificio Borelli v Commission [1992] ECLI:EU:C:1992:491). In the Appeal Panel's view, this applies in vertical composite proceedings not only where the act of the national authority is a decision, but also where such an act is a request, to the extent that, as it happens in the instant case, this request is necessary to justify the exercise of power by the European authority and is binding upon the European agency in the double sense that it requires the European agency to take the requested decision and it informs the final content of that decision (which stems directly from Article 12d(4) SRMR, once its application is triggered by the "fishing request").

116. Therefore, the Appeal Panel finds that, in accordance with *Oleificio Borelli*, the legality of the [.] "fishing request" needs to be reviewed by [.] courts and is clearly beyond the remit of the Appeal Panel.

117. The Appeal Panel further considers that the Appellant has failed to show that the [.] "fishing request" was *manifestly* unlawful. Quite on the contrary, the evidence in the file, including the opinion of [.] on the proposed "fishing request" of 10 December 2021, shows that, although the Appellant challenges under several aspects the legality of the [.] "fishing request", and [.], the SRB and the Appellant have quite different views on the challenges for [.] to access capital markets in order to issue and place MREL securities, [.] "fishing request" does not show any manifest illegality which could be found by the Board and could justify

the Board's refusal to duly implement the fishing request. In the Appeal Panel's view, however, only the [.] competent court may decide upon the claims raised by the Appellant against the "fishing request" and pertaining to the validity of such decision in accordance with [.] administrative law.

118. The second plea is therefore inadmissible.

On those grounds, the Appeal Panel hereby:

Remits the case to the Board.

Helen Louri-Dendrinou	Kaarlo Jännäri	Luis Silva Morais Vice-Chair
(SIGNED)	(SIGNED)	(SIGNED)

Marco Lamandini Co-Rapporteur	Christopher Pleister Chair and Co-Rapporteur
(SIGNED)	(SIGNED)

For the Secretariat of the Appeal Panel:

[.]

(SIGNED)