14 April 2023

Case 1/2022

FINAL DECISION

BNP Paribas S.A., BNP Paribas Personal Finance and BGL BNP Paribas

v

the Single Resolution Board

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

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FINAL DECISION

In Case 1/2022,

APPEAL under Article 85(3) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010[1] (hereinafter the "**SRMR**"),

BNP Paribas S.A., with headquarters in 16 Boulevard des Italiens, 75009 Paris, France, **BNP Paribas Personal Finance S.A.**, with headquarters in 1 Boulevard Haussmann, 75009 Paris, France, and **BGL BNP Paribas**, with headquarters in 50 Avenue J.F. Kennedy, L-2951 Luxembourg, all represented by Me Amélie Champsaur and Me Aurèle Delors, Cleary Gottlieb Steen & Hamilton LLP, 12 rue de Tilsitt, 75008 Paris (hereinafter, individually and/or collectively as the case may be, the "**Appellant**")

v

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

(the Appellant and the Board collectively referred to hereinafter as the "**parties**"),

THE APPEAL PANEL,

composed of Christopher Pleister (Chair), Luis Silva Morais (Vice-Chair), Marco Lamandini (Co-Rapporteur), David Ramos Muñoz (Co-Rapporteur) and Kaarlo Jännäri,

makes the following final decision:

Background of facts

1. This appeal was originally filed against the joint decision of 4 November 2021 – RC/JD/2020/53 (hereinafter the "**First Contested Decision**") determining the minimum requirement for own funds and eligible liabilities (hereinafter the "**MREL**") for BNP Paribas S.A. (hereinafter "**BNP Paribas**") and Bpost Bank, BNP Paribas Fortis SA, BNP Paribas Securities Services, BNP Paribas Personal Finance SA (hereinafter "**BNP PF**"), Banca Nazionale del Lavoro SpA, Findomestic Banca SpA, BGL BNP Paribas (hereinafter "**BGL BNP**") and BNP Paribas Bank Polska S.A. as agreed by the SRB, Magyar Nemzeti Bank (Central Bank of Hungary), Finanstilsynet (Danish Financial Supervisory Authority) and Bankowy Fundusz Gwaracyjny (Polish Bank Guarantee Fund). Following the Appellant's statement of modification of the appeal authorized by the Appeal Panel with its decision on admissibility of 29 June 2022, the appeal was extended to the joint decision of 4 May 2022 – RC/JD/2021/14 (hereinafter the "**Second Contested Decision**") which replaced the First Contested Decision. The Second Contested Decision has the same purpose of the First Contested Decision which it replaces and namely to set the MREL requirements for BNP

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

Paribas and its subsidiaries and imposes largely similar MREL requirements as those set by the First Contested Decision.

2. Pursuant to Article 88 of Directive 2014/59/EU (hereinafter the "**BRRD**"), the SRB is the group-level resolution authority of the significant (in accordance with Article 6(4) of Regulation (EU) No 1024/2013, hereinafter the "**SSMR**") banking group having as parent company BNP Paribas. As group-level resolution authority the SRB has established a resolution college for the BNP group and the resolution college is in charge, among other tasks, of drawing up the group resolution plan and of determining the external MREL to be complied with by BNP Paribas as resolution entity on a consolidated basis for the group and of the internal MREL for its subsidiaries. The resolution college includes Magyar Nemzeti Bank (Central Bank of Hungary), Finanstilsynet (Danish Financial Supervisory Authority) and Bankowy Fundusz Gwaracyjny (Polish Bank Guarantee Fund), which are the resolution authorities of Member States that are not participating to the Banking Union and in which subsidiaries of BNP Paribas are established.

3. On [.], the SRB communicated to BNP Paribas a draft joint decision of the resolution college determining the MREL for BNP Paribas and its group and invited BNP Paribas to submit its observations as part of a formal Right to be Heard process.

4. On [.], BNP Paribas submitted to the SRB its observations to the draft joint decision. On the same date, BNP Paribas also provided in a separate letter to the SRB certain confirmations as to BNP PF.

5. On [.], BNP Paribas addressed a further letter to the SRB, highlighting certain legal developments.

6. The Executive Session of the Board for the 2020 resolution planning cycle took place from [.] by means of written procedure. The Board took note of the outcome of the joint decision process within the resolution college for BNP Paribas but since at the time the 2019 amendments to BRRD (hereinafter "**BRRD2**") had not been yet transposed in [.] and the [.] is part of the resolution college the SRB could not adopt a final decision for the 2020 resolution planning cycle.

7. Nonetheless, on [.], the SRB addressed a letter to BNP Paribas explaining the expected MREL determination for the group and an assessment of the comments received during the Right to be Heard stage of the proceeding.

8. On [.], the Board in its Extended Executive Session finally agreed to adopt (i) the joint decision on the group resolution plan and the resolvability assessment and (ii) the joint decision on MREL determination for the group and the relevant group entities. Based upon such decisions, the SRB also adopted the further decision of [.] – [.].

9. On [.], the Board's decisions referred to in paragraph 8 above, including the First Contested Decision, were formally communicated to the Appellant, with cover letter [.].

10. On [.], the French competent authority (*Autorité de contrôle prudentiel et de résolution*) implemented the First Contested Decision insofar as it concerned the French entities affiliated to the BNP Paribas group by means of an instruction addressed to the group.

11. The notice of appeal was submitted by the Appellant to the Appeal Panel on 30 December 2021. The Chair of the Appeal Panel appointed as co-rapporteurs Professor Marco Lamandini and Professor David Ramos Muñoz and the appeal was notified by the Secretariat of the Appeal Panel to the Board on 11 January 2022.

12. On 17 January 2022, the Board requested a stay of the proceedings until the Appeal Panel had rendered its decision in case 2/2021, noting that both cases discussed connected legal questions. The Appeal Panel forwarded such request to the Appellant, asking for observations by 21 January 2022. The Appellant timely submitted its observations.

13. On 21 January 2022, the Appeal Panel rejected the requested stay of the proceedings and granted an extension until 25 February 2022 of the deadline for the Board to submit its response, which the Board had presented as a subordinate and reasoned request, should the stay not be granted.

14. On 15 February 2022, the Appeal Panel informed the parties that its final decision in case 2/2021 was published on the SRB's website.

15. On the same day of 15 February 2022, the Board informed the Appeal Panel that it was of the view that the appeal was inadmissible. For this reason, the Board requested that the Chair gave directions for the conduct of the appeal by splitting the procedure into two stages, one discussing first the admissibility of the appeal, and the second, if the appeal was found admissible, the merits of the case.

16. On 16 February 2022, with its procedural order No 1, the Appeal Panel forwarded the Board's communication of 15 February 2022 to the Appellant and granted the Appellant until 17 February 2022 to file its observations. The Appellant timely submitted its observations.

17. On 17 February 2022, the Appeal Panel adopted and sent to the parties its procedural order No 2 as follows:

> In case 1/2022, within the time to file its response, on 15 February 2022 the Single Resolution Board (SRB) raised an objection to the admissibility of the Appeal, under Article 85 (3) SRMR.
>
> The objection raised by the SRB was accompanied by a request to permit the SRB to make a separate submission, at this stage of the proceedings, on the admissibility of the Appeal, and to stay the proceedings on the merits, which would be resumed if and when the Appeal Panel determines the Appeal to be admissible.

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

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

* * *

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

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

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

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

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

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

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

As to the Appellant's allegations that the admissibility objections are false, this is precisely the question that needs to be answered. Should such allegations be, indeed, false, this would allow the Appeal Panel to proceed to the merits without any objections on admissibility. Should they turn to

be correct, in all or in part, it would save time and resources. In either case, procedural efficiency is enhanced, which is the overriding consideration retained by the Appeal Panel.

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

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

1. That, within the deadline set for its response, the Board shall file a response focusing on the admissibility of the appeal.

2. That the Appeal Panel shall proceed to consider the admissibility first. In what regards the merits of the case, the times for the procedure can be considered stayed.

3. That, once the Board files its response, focused specifically on matters of admissibility, the Appellant shall have twenty-one (21) days to file a rejoinder, focusing only on aspects of admissibility.

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

18. On 25 February 2022, the Board timely filed its response in the appeal addressing, in compliance with the Appeal Panel procedural order No 2, solely the issue of admissibility.

19. On 21 March 2022, the Appellant timely submitted its reply to the Board's response on inadmissibility.

20. On the same day of 21 March 2022, the Board submitted a letter informing the Appeal Panel that the Appellant had lodged an application for annulment before the General Court challenging the First Contested Decision in case T-71/22.

21. On 22 March 2022, the Appeal Panel adopted and sent to the parties its procedural order No 3 as follows:

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

1. That, within the deadline set for its response, the Board shall file a response focusing on the admissibility of the appeal.

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

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

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

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

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

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

2. As a second consideration, in its Letter of 21 March 2022, the Board has informed the Appeal Panel that the Appellant has filed case T-71/22 before the General Court.

The filing of such case was announced by the Appellant when it filed this appeal. In that appeal, the Appellant explained that it would challenge before the General Court (i) the joint decision on the Group resolution plan and resolvability assessment for BNP Paribas and its subsidiaries both inside and outside the Banking Union agreed by SRB and each of the RA of Hungary, Denmark and Poland on 4 November 2021, with reference RC/JD/2020/52 (the "joint decision on resolution plan"), and (ii) the joint decision determining the intermediate MREL targets by initiating an action against the External MREL decision.

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

In its letter of 21 March 2022, the Board has expressed its concerns about the potential overlap between this appeal and case T-71/22 and requested the Appeal Panel to ask the Appellant to (i) provide the Appeal Panel with additional information on case T-71/22, and (ii) clarify the relationship between case T-71/22 and the appeal and their mutual implications.

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

22. On 25 March 2022, the Board requested the Appeal Panel "in accordance with Article 8(1) of the Rules of Procedure of the Appeal Panel to extend the time period to file the SRB's reply in case 1/2022 by two working weeks", based on reasons including "the heavy involvement of the members of the SRB Legal Service in the aftermath of the recent SRB's resolution decisions of Sberbank d.d. and Sberbank banka d.d.", the fact that "there [were] multiple absences of key members of the SRB Legal Service due to annual leave and a mission to Luxembourg next week for three working days", and also the fact that "due to the relevance of the subject, the preparation of the Reply [would] also require input from and consultation with several stakeholders in the SRB across all hierarchical levels and, potentially, outside the SRB."

23. On 28 March 2022, the Appeal Panel issued its procedural order No 4 as follows:

> In case 1/2022, the Appeal Panel issued a Procedural Order on March 22, 2022 where it gave instructions to the Parties on the subsequent steps of the procedure.
>
> In light of the relevance and novelty of the arguments raised by both Parties as to the admissibility of the appeal, the Appeal Panel granted to the Parties "the opportunity to further discuss the admissibility issue having now full knowledge of the other Party position and, to this effect, the Appeal Panel has determined (i) to grant to the Board the opportunity to file a reply to the Appellant's reply and (ii) to grant to the Appellant the opportunity to file a rejoinder to the SRB's reply, to complete the information necessary to decide on admissibility".
>
> Thus, the Appeal Panel granted *"the Board a further two weeks from the date of notice of this procedural order to file its reply and the Appellant two weeks from the notice of the Board's reply to file its rejoinder"*.
>
> On 25 March 2022, the Board requested the Appeal Panel "*in accordance with Article 8(1) of the Rules of Procedure of the Appeal Panel to extend the time period to file the SRB's Reply in case 01/2022 by two working weeks*".
>
> The reasons given were, first, "*the heavy involvement of the members of the SRB Legal Service in the aftermath of the recent SRB's resolution decisions of Sberbank d.d. and Sberbank banka d.d."*, second, the fact that "*there are multiple absences of key members of the SRB Legal Service due to annual leave and a mission to Luxembourg next week for three working days",* and, third, the fact that "*due to the relevance of the subject, the preparation of the Reply will also require input from and consultation with several stakeholders in the SRB across all hierarchical levels and, potentially, outside the SRB."*
>
> The Appeal Panel has often granted extensions of time when it was appropriate to do so, taking into account the circumstances alleged by the Parties, the complexity of the issues at stake, and the opportunities that the Parties had to express their views.
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> In this regard, in addition to the Board's reasons, we must also take into account that:
>
> (i) In the present stage of the proceedings the only arguments being considered are those on admissibility, and not the substantive arguments, a decision taken on procedural efficiency grounds at the request of the Board.

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

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

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

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

24. On 13 April 2022, the Board timely submitted its reply to the Appellant's response on admissibility.

25. On 4 May 2022, the Appellant timely submitted its rejoinder to the Board's reply on admissibility.

26. On 6 May 2022, the Chair of the Appeal Panel wrote to the parties to ask whether the parties intended to discuss the admissibility of the case at a hearing or preferred to waive their right to a hearing. On 11 May 2022, both parties indicated their intention to discuss orally the admissibility of the appeal at a hearing.

27. On 18 May 2022, the Appeal Panel informed the parties that the hearing would take place in Brussels on 8 June 2022.

28. On 3 June 2022, a Friday, and after the close of business, the Board communicated to the Secretariat that on 4 May 2022 a new joint decision of the resolution college, and namely the Second Contested Decision had been adopted and that the Second Contested Decision states the following: "*[t]his joint decision repeals and supersedes joint decision (RC/JD/2020/53) dated 04.11.2021*". The inference drawn by the Board was that *"in the Board's view, the Board seriously questions that the Appellant could demonstrate an interest in the confirmation of a decision that it no longer exist".*

29. The 6 June 2022 was a Monday and a Bank Holiday in Belgium. Therefore, on 7 June 2022 in the morning, the Secretariat of the Appeal Panel sent the Board's communication to the Appellant, which conveyed its preliminary views on this to the Appeal Panel on the very same day.

30. On 8 June 2022, at the hearing, the Chair, due to the timing of the communication to the Appeal Panel by the Board of the adoption of the Second Contested Decision, and as an exception to the general practice that all relevant arguments and elements of fact must be submitted before the hearing, gave the following extra directions to the parties. The Board

was asked to deposit with the Appeal Panel the Second Contested Decision by the close of business of 9 June 2022, and it would then be given 5 working days to provide some observations, to draw implications from the Second Contested Decision. Subsequently, the Appellant would also be granted another 5 days to make its own observations and draw its own inferences from the Second Contested Decision.

31. At the hearing both parties appeared and presented oral arguments, where they reiterated their respective positions, adding further considerations of fact and law. The parties also answered questions from the Appeal Panel for the clarification of facts relevant for the just determination of the question of admissibility of the appeal.

32. After the hearing, on 15 June 2022, the Board timely produced the Second Contested Decision and provided its additional observations and drew its additional inferences from the Second Contested Decision. Subsequently, on 22 June 2022, the Appellant timely provided its own observations and inferences from the Second Contested Decision.

33. On 23 June 2022, after these additional observations and inferences were provided, the Appeal Panel notified the parties that the Chair considered that the evidence on admissibility was complete and thus that the Appeal Panel would have determined on admissibility within the term set out in Article 85(4) of Regulation No 806/2014 and Article 20 of the Appeal Panel's Rules of Procedure.

34. The Appeal Panel adopted its decision on admissibility on 29 June 2022 and concluded that the appeal was admissible and that the present appeal proceeding could also be extended by the Appellant to include the Second Contested Decision and that therefore the appeal had not become moot as a consequence of the adoption on 4 May 2022 of the Second Contested Decision. The conclusions of the Appeal Panel's decision on admissibility were as follows:

> [The Appeal Panel]
>
> Declares the appeal admissible and that the appeal is not moot as a result of the adoption of the new joint decision adopted on 4 May 2022; the Appeal Panel shall now examine whether the appeal is well founded under Article 85(7) SRMR.
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> For the expedient continuation of these proceedings, the Appeal Panel hereby:
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> Allows the Appellant to modify its appeal to take into account the new joint decision adopted on 4 May 2022; the modification of the appeal shall be made by the Appellant by serving on the Board and filing with the Secretariat a separate document within the time limit of six weeks set out in Article 85 SRMR, running from the notification of the present decision; such document shall justify the extension of the appeal to the new joint decision and any other modification of the appeal which may be sought in light of such new factor.
>
> Allows the Board to file its response on the merits of the appeal and thus on whether the appeal is founded by serving it on the Appellant and filing with the Secretariat within two (2) weeks of service of the modification of the appeal by the Appellant; the Board may opt for an extension of another two (2) weeks providing for a reasoning.

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

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

Reserves to adopt the following procedural measures in due course.

35. On 4 August 2022, the Appellant filed a reasoned request for the extension of the deadline to submit its statement of modification. After being granted an extension by the Appeal Panel on 8 August 2022, on 29 August 2022, the Appellant filed the statement of modification of the Appeal. The Appellant extended its original form of order sought to cover also the Second Contested Decision, seeking to obtain the annulment of the Second Contested Decision. The Appellant maintained the entirety of the pleas in law and arguments in support of the original notice of appeal, noting that, in the Appellant's view, they remain fully valid also with respect to the Second Contested Decision, subject to the adaptation of certain arguments to take into account some new elements included in the Second Contested Decision and duly specified in the statement of modification of the appeal.

36. The Appellant also informed the Appeal Panel that in the context of the proceedings pending before the General Court in case T-71/22, BNP Paribas had also submitted before the General Court, on 16 August 2022, a statement of modification of its application pursuant to Article 86 of the Rules of Procedure of the General Court, in order to include the 2022 joint decision on resolution and the Second Contested Decision which had replaced the 2021 acts for which the Appellant had originally brought forward an action for annulment in case T-71/22.

37. With its statement of modification of the appeal, the Appellant requested the Appeal Panel the following:

a. Declare the 2021 and 2022 External MREL Decisions unlawful on the basis of the grounds set out above in paragraphs 28 to 31 and in Sections 2 to 8 of Paragraph C of the Notice of Appeal and remit it to the SRB, which shall be bound by the decision of the Appeal Panel and shall adopt an amended decision regarding the case, in accordance with Article 85(8) SRMR; or

b. If it declares the 2021 and 2022 External MREL Decisions lawful on the basis of the grounds set out above in paragraphs 28 to 31 and in Sections 2 to 8 of Paragraph C of the Notice of Appeal, stay its decision as to the unlawfulness of the 2021 and 2022 External MREL Decisions until the full outcome of the action for annulment pending before the General Court in case T-71/22 against the 2021 and 2022 Joint Decisions on Resolution or lodged by the Appellants against the 2021 and 2022 Joint Decisions on Resolution referred to in paragraph 2 above before the General Court (and as the case may be the Court of Justice); and, if the 2021 or the 2022 Joint Decision on Resolution are annulled, remit the 2021 and 2022 External MREL Decision to the SRB in accordance with Article 85(8) SRMR;

c. Declare the 2021 and 2022 PF Decisions unlawful and remit it to the SRB, which shall be bound by the decision of the Appeal Panel and shall adopt an amended decision regarding the case, in accordance with Article 85(8) SRMR;

d. Declare the 2021 and 2022 BGL Decisions unlawful and remit it to the SRB, which shall be bound by the decision of the Appeal Panel and shall adopt an amended decision regarding the case, in

accordance with Article 85(8) SRMR;

e. Order the SRB to pay the Appellants' costs.

38. On 30 August 2022, the Board filed a reasoned request for the extension of the deadline to file its response to the statement of modification of the appeal until 11 October 2022.

39. The Appeal Panel notified such request to the Appellant asking for comments. Since the Appellant informed on 1 September 2022 that it had no objections to the new deadline requested by the Board, the extension was granted on 2 September 2022.

40. On 11 October 2022, the Board submitted its response on the merits of the case. The response was notified to the Appellant.

41. On 19 October 2022, the Appellant filed a reasoned request for the extension of the deadline to file its reply to the Board's response until 6 December 2022.

42. On 20 October 2022, the Appeal Panel granted to the Appellant the requested extension.

43. On 7 November 2022, the Appeal Panel notified to the parties its procedural order No 5 as follows:

> 1. In its appeal 1/2022 the Appellant requests the Appeal Panel to:
>
> Declare the External MREL Decision unlawful on the basis of the grounds set out in Sections 2 to 8 of Paragraph C and remit the External MREL Decision to the SRB, which shall be bound by the decision of the Appeal Panel and shall adopt an amended decision regarding the case, in accordance with Article 85(8) SRMR;
>
> or
>
> b. If it declares the External MREL Decision lawful on the basis of the grounds set out in Sections 2 to 8 of Paragraph C, stay its decision as to the unlawfulness of the External MREL Decision on the basis of the ground set out in paragraph [1] of Section C until the full outcome of the action for annulment of the Resolution Decision referred to in Section II above before the Tribunal (and as the case may be the Court of Justice); and, if the Resolution Decision is annulled, remit the External MREL Decision to the SRB in accordance with Article 85(8) SRMR;
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> The reason for this request is that, according to ground III.1.C of the Appellant's appeal *"The External MREL Decision is based on, and intrinsically linked to, the Resolution Decision, and cannot stand if the Resolution Decision is annulled". This is because, according to the Appellant, "the recitals of Section I of the MREL Decision show that the determination of the MREL amount is the direct result, with respect to at least some aspects, of elements contained in the Resolution Plan,"* [Appeal, para. 68].
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> 2. In its amended appeal of 29 August 2022 the Appellant maintains this request in the request for relief sought, letter b.
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> It its response on the merits of the case, of 11 October 2022 the Board points out, in its point "Sub Appeal 1 – BNP Paribas" no. 1, that "Subject of the Appeal is the 2022 Joint Decision on MREL alone, but not the 2022 joint decision on the group resolution plan". However, in points nos. 2.1.3. and 2.1.4. of that same Sub Appeal, it points out that: "2.1.3. The statutory rule for calibrating the RCA mandates the use of the resolution plan", and that "2.1.4. BNP Paribas' recovery plan is not the SRB's resolution plan", thus reiterating the strength of the connection between the Resolution Plan and the MREL determination.

Then, under its point G. (OBSERVATIONS ON THE ORDERS SOUGHT) the Board remarks the following in paras. 321-322:

321. In its Statement of Modification, the Appellant argues that only if the Appeal Panel is minded to remit the 2022 MREL Joint Decision to the Board in accordance with 85(8) SRMR, the Appeal Panel can take a decision on the merits of the Appeal. Otherwise, if the Appeal Panel would be minded to decide in the SRB's favour and reject the Appeal, the Appellant asks the Appeal Panel not to take a decision on the merits but rather to stay the proceedings.

322. Contrary to the Appellant's allegations, the Appeal Panel is not a "stand-by" body to take a decision only if it suits the Appellant. The Appellant suggests that while the Appeal Panel can decide to remit the 2022 Joint Decision on MREL, it cannot decide to confirm it pursuant to Article 85(8) SRMR. However, the legal framework does not foresee such possibility. It rather tasks the Appeal Panel to render decision on the appeals brought before it which, in turn, may be subject to an action of annulment before the General Court pursuant to Article 86(1) SRMR and Article 263(5) TFEU.

3. In turn, the Appeal Panel draws the attention of both Parties to the fact that, after its decision 3/2021 concerning certain points of law which are also raised by the Appellant in its sub-appeal 2 against the BNP Personal Finance decision, an application for annulment has been lodged by France against the SRB before the GCEU in case T-540/22.

CONSIDERATIONS

4. Both parties consider relevant the link between the Resolution Plan and the MREL determination. At the same time, each party draws different inferences with regard to the existence of parallel proceedings before the General Court, in case T-71/22, where the validity of the Resolution Plan has been challenged. Whereas the Appellant seems to deduce that it can bifurcate its request for remedies, asking the Appeal Panel to either remit the case to the Board, in case of unlawfulness of the MREL determination, or, in case of lawfulness, to stay the decision pending the case before the General Court, the Board considers this remedial request untenable.

In light of these considerations, the Appeal Panel determines, first, that, for the just determination of this appeal, it is necessary for the Appeal Panel to examine, under strict confidentiality vis-à-vis the Appellant and any third party, the 2021 and 2022 BNP Resolution Plan as adopted by the Board.

To that effect, 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 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 any third party, corresponding exclusively to a mere element intended for comprehensive information and due diligence on the case on the part of the Appeal Panel.

5. Second, in light of pending cases T-71/22 and T-540/22 the Appeal Panel invites both parties to substantiate, and duly specify – with the reply and rejoinder respectively – considering their different inferences on the existence of parallel proceedings before the General Court, the implications, also on the remedies sought, of case T-71/22 with regard to plea 1 of the appeal against Section I of the MREL decision and of case T-540/22 with regard to the sub-appeal 2 against the BNP Personal Finance decision.

44. On 18 November 2022, the Appellant submitted written observations to the procedural order No 5.

45. On 21 November 2022, the Appeal Panel notified to the parties its procedural order No 6 as follows:

> In its notification of 18 November 2022, with the title "Observations on the Procedural Order of 7 November 2022" the Appellant makes observations regarding the Appeal Panel's Procedural Order of 7 November 2022. The observations can be summarized as follows:
>
> 1. The Appellants will respond to the invitation set out in point (c) above in their reply due on 6 December 2022.
>
> 2. The Appellant alleges that, in the SRMR framework, the review of the Board's decisions is split between the Appeal Panel and the General Court, and that this explains the Appellant's remedial request.
>
> 3. The Appellant alleges that the Appeal Panel's request to review the Resolution Plans has no legal basis, because the arguments and remedial requests made by the Appellants in the appeal do not relate to the legality of the resolution decisions, but only to the legality of the MREL Decision, on the basis of arguments that are specific to the MREL Decision.
>
> 4. The Appellant alleges that the Appeal Panel errs in law when it considers that the Resolution Plans, if communicated by the SRB, should be kept confidential from the Appellants because the Resolution Plans do not contain any confidential information vis-à-vis the Appellants. The Appellant also alleges that, in doing so, the Appeal Panel is violating the Appellant's due process rights.
>
> 5. The Appellant also alleges that the Procedural Order commits several procedural violations, including calling into question the Appellant's remedial request, and order the production of documents that are to be kept confidential from the Appellants and this without a valid statement of reasons as to the "untenable" nature of the remedial request.
>
> **CONSIDERATIONS**
>
> The purpose of this Procedural Order is twofold:
>
> 1. To seek the reaction of the Board in light of the reaction from the Appellant.
>
> 2. To clarify the grounds on which such reaction is sought.
>
> By way of clarification, the Appellant alleges that the Appeal Panel has found its remedial request untenable. This is incorrect. The paragraph to which the Appellant seems to be referring is para. 4 of the Procedural Order of 7 November 2022. This paragraph, after quoting verbatim from the Appellant's request in its Appeal, and from the Board (SRB)'s response, states:
>
> "Both parties consider relevant the link between the Resolution Plan and the MREL determination. At the same time, each party draws different inferences with regard to the existence of parallel proceedings before the General Court, in case T-71/22, where the validity of the Resolution Plan has been challenged. Whereas the Appellant seems to deduce that it can bifurcate its request for remedies, asking the Appeal Panel to either remit the case to the Board, in case of unlawfulness of the MREL determination, or, in case of lawfulness, to stay the decision pending the case before the General Court, the Board considers this remedial request untenable."
>
> The underlining has been added for clarification purposes, because the Appellant seems to have drawn incorrect assumptions from it. What the paragraph above states is that:
>
> 1. Each party has a different view about the Appellant's remedial request. The Appellant considers this remedial request valid, and *the Board* (i.e., *the Single Resolution Board*) considers the request untenable.
>
> Thus, the Procedural Order asked the Appellant to substantiate its remedial request in light of the fact that the Board (the Single Resolution Board) has alleged that such request is untenable, and the Appellant had not substantiated specifically such request in its Appeal.

The purpose of this is to ensure that the Appellant has an opportunity to make allegations on all relevant points of substance and procedure, especially on a specific point that has been contested by the Board, and that was not substantiated by the Appellant in the Appeal, in order to grant the Appeal Panel the opportunity to decide on this specific point having considered the arguments of both parties.

2. Both parties seem to draw different inferences about (i) the actions that would be adopted by competent authorities and/or resolution authorities following the Resolution Plan previously or contemporaneously to the bail-in strategy; and that (ii) the impact that such actions would have in the calculation of the MREL requirements for purposes of executing the bail-in. The Appellant suggests that such actions would reduce the size of the entity, and this should call for lower MREL levels; the Board suggests that there is no certainty that such actions would be adopted, and thus this should not affect the MREL levels.

Thus, the Appeal Panel seeks to examine the Resolution Plan because both parties seemed to suggest that the actions in the Resolution Plan, adopted previously, or contemporaneously to, the bail-in could have different impacts of the entity's size and configuration.

The Board refers at length to the fact that the actions should be those contemplated in the Resolution Plan.

If the Appellant is suggesting that the actions adopted, and which would have an impact in the size of the entity (and thus, on MREL levels) would be contemplated elsewhere, i.e., not in the Resolution Plan, and that therefore as stated in its observations, it considers such Resolution Plan irrelevant the Appellant may clarify this in its rejoinder.

ORDER

The Appeal Panel hereby orders:

1. That the Appellant's observations are relayed to the Board, with the request that it reacts to them.

2. That the Board reacts to the Appellant's observations in light of the clarifications hereby made by the Appeal Panel, i.e., notably, that the allegation that the Appellant's remedial request is "untenable" was not made by the Appeal Panel, as mistakenly alleged by the Appellant, but by the Board.
3. That both parties include, respectively, in their Reply, and Rejoinder to the Reply, a specific clarification about the relevance of the Resolution Plan in the adoption of the actions prior or contemporaneous to the bail-in, and the impact of these in the calculation of MREL and on their views on the confidential or non-confidential, vis-à-vis the Appellant, disclosure of the Resolution Plan in the current proceedings before the Appeal Panel.

4. That the confidential disclosure of the Resolution Plan as requested with the Procedural Order of 7 November 2022 is suspended until after the submission of the Rejoinder to the Reply and the need for such a disclosure shall be re-examined by the Appeal Panel in light of the clarifications expected by the Parties with their Reply and Rejoinder respectively.

46. On 6 December 2022, the Appellant timely submitted its reply to the Board's response.

47. On 9 February 2023, the Board timely submitted its rejoinder to the Appellant's reply.

48. On 14 February 2023, the Appeal Panel informed the parties that it considered that for the just determination of the appeal an oral hearing was necessary and called the parties to make their oral representations at an in-person hearing on 13 March 2023 in Brussels. Both parties confirmed their attendance.

49. On 13 March 2023, the hearing was held in Brussels. Both parties appeared and presented oral arguments. Both parties 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.

50. At the hearing and with communication of 17 March 2023, the Appeal Panel authorised the parties to submit their speaking notes at the hearing by 17 March 2023. Both parties submitted their written pleadings at the hearing as resulting from their speaking notes.

51. On 27 March 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 No 806/2014 and Article 20 of the Appeal Panel's Rules of Procedure. The communication sent to the parties was as follows:

> Attached to this communication and further to the Appeal Panel Secretariat email of 17 March 2023, inviting the parties, if they so wish, to file with the Appeal Panel their pleadings at the oral hearing held on 13 March 2023, you will find the documents submitted by both parties.
>
> We hereby inform you that, according to Article 20 of the Appeal Panel's Rules of Procedure, the Chair of the Appeal Panel, having verified the submissions by the parties, considers that the evidence is now complete and therefore, the above mentioned appeal is as of today lodged for the purposes of Article 85(4) of Regulation 806/2014.
>
> The parties are thereby also informed that, in light of the clarifications given by the parties, the Appeal Panel has considered that the disclosure of the full text of the resolution plan in the context of these proceedings - suspended with procedural order of 21 November 2022 - is not necessary any longer for the just determination of the appeal and that therefore the order of disclosure set out in the procedural order of 7 November 2022 is revoked.

Main arguments of the parties

52. The main arguments of the parties on the merit of the appeal are briefly summarised below. However, to avoid unnecessary duplications, the description in this section of the Appeal Panel's decision is limited to the illustration of the essential elements of the pleas of the Appellant and of the responses of the Board to such pleas, because the more detailed arguments of both parties are then thoroughly described and considered in the findings of the Appeal Panel's decision with respect to each of the several grounds of appeal raised by the Appellant. It is specified that the Appeal Panel considered all arguments raised by the parties, irrespective of the fact that a specific mention to each of them is not expressly reflected in this decision.

<u>Appellant</u>

53. The Appellant raises several grounds of appeal against the First Contested Decision with the notice of appeal and against the Second Contested Decision with the statement of modification. The appeal is grouped around three sub-appeals addressing respectively (i) the

external MREL determination for BNP Paribas; (ii) the rejection of the waiver request with respect to BNP PF with the First Contested Decision and the Board's silence on the waiver request of BNP PF with the Second Contested Decision and (iii) the determination of the MREL for BGL BNP. The Appellant asks the Appeal Panel to declare those parts of the First Contested Decision and of the Second Contested Decision unlawful and to remit the case to the Board for the adoption of an amended decision.

(a) First sub-appeal

54. With the first sub-appeal of the notice of appeal the Appellant (in particular BNP Paribas) challenges Section I of the First Contested Decision and relies on eight grounds.

55. First, the First Contested Decision is based on, and intrinsically linked to, the resolution decision challenged by the Appellant in a proceeding for annulment before the General Court of the European Union in case T-71/22 and would no longer stand if the resolution decision were annulled by the General Court. For this reason, the Appellant asks the Appeal Panel to stay the proceedings of this appeal in order to wait for the judgment of the General Court only if it declares the decision lawful.

56. Second, the Board has committed an error of law in interpreting and applying the provisions of the SRMR because it failed to take into account the post-resolution banking group in its MREL determination and the post-resolution combined buffer requirement (hereinafter "**CBR**") in the determination of the market confidence charge (hereinafter "**MCC**") and has failed to carry out a full assessment of all relevant elements of the MREL calculation and to state reasons for its calculations of MREL.

57. Third, the Board has committed manifest errors of assessment in the determination of MREL and has breached the principle of good administration, in so far as the Board failed to carry out a careful and impartial assessment of the BNP Paribas group post-resolution, and in particular to take into account the effect of resolution on the size and business model of the BNP Paribas group.

58. Fourth, the Board has violated the principle of legitimate expectations, by failing to apply several provisions of its own MREL Policy with respect to MREL adjustments.

59. Fifth, the Board has breached the principle of proportionality, the right of property and the freedom to conduct business, by setting an amount of MREL that is disproportionate in light of the resolution objectives.

60. Sixth, the Board has failed to state reasons, by not including in the First Contested Decision all the elements necessary in order for BNP Paribas to understand on which basis and according to what methodology the MREL was determined and why such methodology departed from the general methodology set forth in the MREL Policy.

61. Seventh, the Board has violated the Appellant's Right to be Heard by refusing as a matter of principle to take into account certain comments.

62. Eighth, the MREL Policy, on which the First Contested Decision is based, violates the SRMR and constitutes a misuse of powers by the Board, in so far as it manifests a normative choice in the field of resolution and infringes on the powers of the legislator.

63. With the statement of modification, BNP Paribas maintains the entirety of the pleas in law and arguments developed in support of the notice of appeal, and argues that they are fully valid with respect to the Second Contested Decision, subject to the adaptation of certain arguments to take into account of the new elements included in the Second Contested Decision, as specified in the statement of modification. In particular, as to the first plea, reference is made to the 2022 resolution decision; as to the seventh plea, the Appellant acknowledges that in the assessment memorandum included as an attachment to the Second Contested Decision the Board expanded in certain respects on its observations in response to the BNP Paribas 2022 Right to be Heard response when compared with the First Contested Decision. However, in the Appellant's view, the longwinded nature of the responses does not change the fact that the Board ultimately disregarded the comments and factual elements put forward by BNP Paribas without providing any valid reason for doing so, on the basis of arguments that, in the Appellant's view, are either circular, irrelevant or non-responsive, as further specified in the statement of modification. Therefore, BNP Paribas reiterates all of the arguments made in its Right to be Heard response, which have not been addressed by the Board in the assessment memorandum attached to the Second Contested Decision.

64. With the statement of modification, moreover, the Appellant develops several arguments in reply to the Board's response and crucially argues, also in response to the request of the Appeal Panel with its procedural order of 21 November 2022 to include a specific clarification about the relevance of the resolution plan in the instant case, that since the MREL must be calculated on the basis of the post-resolution group, i.e. "the resolution group resulting from resolution" as set out expressly in Article 12d(3)(a)(ii) SRMR and taking into account the criteria set forth in Article 12d(1) SRMR, including the size, business model, funding model and risk profile of the entity, reference must be made not to the resolution group resulting from the resolution plan (as the Board believes) but to the groups resulting from "resolution", which is not the same thing. For this reason, the Appellant argues that the Board's position according to which it is required to take into account resolution actions set out in the resolution plan, excluding anything else, cannot stand.

65. As to the procedural implications of pending case T-71/22, the Appellant refers, in its reply to the Board's response, to the arguments made with the notice of appeal regarding the request to stay these proceedings, as to the first plea of the first sub-appeal until a judgment is reached in case T-71/22; the Appellant argues that it believes that its position is more aligned with the principles of judicial economy and efficiency, but defers in the end to the wisdom of the Appeal Panel on this.

(b) Second sub-appeal.

66. With the second sub-appeal of the notice of appeal the Appellant (in particular BNP PF) challenges the section of the First Contested Decision which relates to BNP PF and relies on five grounds.

67. First, the Board has committed errors of law in the interpretation and application of the SRMR. The Board has erred in the interpretation of Article 12h(1) and (2)(c) SRMR setting a condition for a waiver of internal MREL requirements which is not provided for in the SRMR, and has committed an error in the application of such condition, thereby depriving the waiver of practical effect.

68. Second, the Board has exceeded its powers under the SRMR by substituting one of the requirements set out in the SRMR by another requirement that was not intended by the legislator.

69. Third, the Board has violated the fundamental principles of protection of legitimate expectations, by imposing to BNP PF, in order to be waived of internal MREL requirements, a requirement that was not foreseeable and by failing to apply the reasoning set forth in its own MREL Policy.

70. Fourth, the Board has failed to state reasons by failing to adequately explain the reason for the refusal of the waiver and by providing in the First Contested Decision a reasoning that is devoid of legal justification and contradictory.

71. Fifth, the MREL Policy, on which the First Contested Decision is based, violates the SRMR and constitutes a misuse of powers by the Board, in so far as it manifests a normative choice in the field of resolution and infringes on the powers of the legislator.

72. With the statement of modification, the Appellant notes that the Second Contested Decision does not rule on the waiver request of BNP PF as it was the case in Section IId of the First Contested Decision and that the SRB indicated orally to the Appellant that it considered the 2022 waiver request as late and not applicable in the context of the adoption of the Second Contested Decision. The Appellant argues therefore that, in essence, the Board merely ignored the waiver request submitted by the Appellant on 24 January 2022 and, in its view, there are two ways of interpreting the silence of the Second Contested Decision on this aspect, with different implications for the appeal. If the silence on the waiver request of the Second Contested Decision means that the refusal to grant the waiver as stated by the First Contested Decision has not been replaced and is thus still in force, also the Second Contested Decision would be implicitly based on the same reasoning of the First Contested Decision and would be vitiated for the same errors of law and violations of EU law and principles as stated in the notice of appeal, extended also to the Second Contested Decision. If, instead, the silence on the 2022 waiver request implicitly rejected the waiver request, the Second Contested Decision should be remitted on this point, because the Board breached its obligation to state reasons in

so far as the Second Contested Decision fails to contain any justification to the implicit refusal opposed to the waiver request. Also in this context, however, in the Appellant's view, arguments and case-law put forward in the notice of appeal remain entirely relevant also in respect to the Second Contested Decision.

73. As to the procedural implications of case T-540/22, the Appellant believes that the appeal by France in that case does not warrant a stay of the present proceedings, yet considers an option for the Appeal Panel, if thought appropriate, to stay the sub-appeal 2 while allowing sub-appeals 1 and 3 to proceed.

(c) Third sub-appeal

74. With the third sub-appeal of the notice of appeal the Appellant (in particular BGL BNP) challenges the section of the First Contested Decision which relates to BGL BNP and relies on six grounds.

75. First, the Board has committed an error of law in interpreting and applying the provisions of the SRMR. The Board has failed to carry out a full assessment of all the relevant elements of the MREL calculation and to state reasons for its calculation of MREL.

76. Second, the Board has committed manifest errors of assessment when assessing that it was appropriate to impose an MCC on BGL BNP and has violated the principle of good administration by failing to carefully assess all the relevant elements, and in particular BNP BGL's funding structure.

77. Third, the Board has violated the fundamental principles of protection of legitimate expectations by interpreting the wholesale funding condition in the MREL Policy in a manner that was not foreseeable and by failing to explain the specific circumstances in which the MCC would be applied in a foreseeable manner.

78. Fourth, the Board has failed to state reasons by not including in the First Contested Decision all the elements necessary in order for BGL BNP to understand on which basis and according to what methodology the MCC was imposed and why the Board departed from the general methodology set forth in the MREL Policy.

79. Fifth, the Board has violated the Appellant's Right to be Heard by refusing to take into account the Appellant's comments.

80. Sixth, the MREL Policy on which the First Contested Decision is based violates the SRMR and constitutes a misuse of powers by the SRB, in so far as it manifests a normative choice in the field of resolution and infringes on the powers of the legislator.

81. In the statement of modification the Appellant in substance extends the same grounds of appeal also to the Second Contested Decision, with some additional specifications pertaining

to the 2022 BGL BNP assessment included in the section of the Second Contested Decision pertaining to BGL BNP.

Board

82. The Board argues that both the notice of appeal and the statement of modification are to be rejected as unfounded.

(a) First sub-appeal

83. With regard to the first sub-appeal, the Board submits that (i) the subject of the appeal is the Second Contested Decision on MREL alone, (ii) it has properly applied Articles 12d and 12e SRMR when determining MREL, (iii) it has properly applied Article 12d(3) SRMR in applying the MCC, (iv) it has correctly applied Articles 12d(8) and 12e(4) SRMR, (v) it has neither committed any manifest error of assessment nor breached the principle of good administration, (vi) it has complied with the principle of legitimate expectations, (vii) it has not breached the principle of proportionality, the right to property or the freedom to conduct a business, (viii) it has complied with the Right to be Heard, and (ix) it has duly stated the reasons. In addition, the Board considers that the last ground of the first sub-appeal on the MREL Policy is inadmissible.

84. With its rejoinder, the Board reiterates its arguments raised with the response and further maintains that it has properly applied Article 12d and 12e SRMR including with respect to the assessment of their application to G-SIIs and the application of the MCC.

85. As to the possible implications of pending case T-71/22, the Board notes that the action of annulment brought by BNP Paribas (but not BNP PF and BGL BNP) against the First Contested Decision and the Second Contested Decision in case T-71/22 overlaps with the first sub-appeal but touches on substantive questions which may also influence the second and third sub-appeals and is, thus, of the view that there are reasons to support a potential stay of the appeal proceedings in their entirety until the General Court takes a decision in case T-71/22.

(b) Second sub-appeal

86. With regard to the second sub-appeal, the Board submits as a preliminary remark that (i) the Appellant did not submit a timely waiver request for BNP PF in the context of the 2021 resolution planning cycle (hereinafter "**RPC**") and, in the alternative, (ii) that the waiver application would have been rejected for the same reasons as it had done in the 2020 RPC with the First Contested Decision. Furthermore, the Board also submits that (iii) it has correctly applied the SRMR to determine BNP PF's MREL (iv) it has not violated the principle of protection of legitimate expectations, and that (v) the Appellant fully knows the reasons for the SRB's decisions. In addition, the Board considers that the last ground of the second sub-appeal on the MREL Policy is inadmissible.

87. With its rejoinder the Board further argues that the Appellant did not submit a complete and timely waiver request for BNP PF and that the Board has correctly applied the provisions of the SRMR and the request for a guarantee is not inconsistent with those provisions.

88. As to the implications of pending case T-540/22, the Board notes that, although that case has been brought by France and not by the Appellant, it concerns the assessment of waivers under Article 12h SRMR and thus it overlaps in substance with the second sub-appeal and could potentially influence the outcome of the present appeal. The Board, as the Appellant, would however defer to the wisdom of the Appeal Panel to decide on the potential stay of sub-appeal 2 in light of these proceedings before the General Court.

(c) The third sub-appeal.

89. With regard to the third sub-appeal, the Board argues that (i) it correctly applied the SRMR rules to determine BGL BNP's MREL, (ii) it did not commit a manifest error of assessment or breach of the principle of good administration, (iii) it has not violated the principle of legitimate expectations, (iv) it has duly stated the reasons for its decisions, and (v) it has duly respected the Appellant's Right to be Heard. In addition, the Board submits that the last ground of the third sub-appeal on the MREL Policy is inadmissible.

90. With its rejoinder, the Board reiterates the arguments raised with the response, and insists that it has correctly applied the SRMR rules to determine BGL BNP's MREL.

Findings of the Appeal Panel

91. The parties have filed written submissions on the appeal, which is for all substantive purposes subdivided into three sub-appeals referring individually to each of the three entities of the BNP Paribas group which filed, in a single notice of appeal and in the subsequent statement of modification, a single appeal against distinct parts of the same First Contested Decision and Second Contested Decision respectively. The parties have also made oral representations at the hearing and have answered questions raised by the Appeal Panel. All the parties' contentions have been taken into account by the Appeal Panel, whether expressly referred to herein or not (in the latter case, in order not to increase the length of the Appeal Panel's decision beyond what is strictly necessary given the complexity of the three sub-appeals contained in the single notice of appeal). The Appeal Panel further acknowledges that the issues debated in this appeal are new and raise interesting and complex questions. The Appeal Panel acknowledges and duly appreciates the key technical contributions of the parties' legal counsels to enlighten in detail all relevant aspects of this complex appeal.

(a) Preliminary questions

(i) On whether the appeal against the First Contested Decision has become moot.

92. A preliminary question raised by the Board and to be addressed after the adoption of the Second Contested Decision which has repealed and replaced the First Contested Decision and after that the Appellant's statement of modification of the appeal has extended the grounds of appeal originally brought forward by the Appellant against the First Contested Decision (also) against the Second Contested Decision is whether the Appellant has still an interest in obtaining a decision of the Appeal Panel on the First Contested Decision.

93. The Appeal Panel notes, in this respect, that according to settled case-law of the European courts in order to obtain a decision on the substance it is not enough that the Appellant had an interest at the time when it brought its action. The Appellant's interest must continue until the final decision. Consequently, the interest may disappear in the course of the proceedings, when a decision on the merits cannot bring the applicant any benefit. This is notably the case when the defendant institution, or body or agency repeals the contested measures and replaces it with a subsequent measure after the action has been brought.

94. The conditions governing the admissibility of an action are a matter of public policy and can be examined also on own motion by the Appeal Panel. In the present appeal, however, the Board has argued that after the adoption of the Second Contested Decision, there is no reason for the Appeal Panel to determine on the First Contested Decision.

95. The Appeal Panel finds that the Second Contested Decision has repealed and replaced to all legal effects the First Contested Decision as it is apparent from the unambiguous text of recital (21), which states that "the joint decision RC/JD/2020/53 dated 04.11.2021 is repealed and superseded with this joint decision that will be applicable from and including the date of its adoption. For the resolution entity and the subsidiaries subject to MREL, the MREL determinations laid down in this joint decision will take effect as of the communication of the national implementing act issued by the relevant national resolution authority of the respective entity, whereupon any previous MREL determination will be superseded". Therefore, since the Appellant is currently bound, as to its MREL requirements, only by the Second Contested Decision the Appeal Panel finds that the Appellant has no longer an interest in appealing the First Contested Decision to the effect of obtaining a possible remittal of the First Contested Decision to the Board. Thus, the appeal against the First Contested Decision has become moot.

96. As a consequence, in the present decision the Appeal Panel shall consider in the merits only the grounds of appeal brought forward by the Appellant against the Second Contested Decision and all references below to the grounds of appeal need to be understood as referring exclusively to the Second Contested Decision.

(ii) The pleas against the MREL Policy: admissibility and significance.

97. In each of the three sub-appeals the Appellant has combined several pleas against the Second Contested Decision, and pleas against the MREL Policy, one plea in each sub-appeal. These latter are the eighth plea of the first sub-appeal, the fifth plea of the second sub-appeal, and

the sixth plea of the third sub-appeal. The allegations, repeated across the three sub-appeals, are, first, that the Board is an agency without legislative or policy powers, and that it cannot be delegated such powers, in light of the legal framework, which attribute such powers only to the European Commission, and, second, that several provisions of the MREL Policy are against the normative choices of the SRMR.

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

99. Article 85 (3) of the SRMR states that:

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

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

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

101. Article 12(1) refers to the determination of MREL for individual institutions. This means that acts such as the MREL Policy fall outside the remit of the Appeal Panel. The Appeal Panel has stated as much, in its decision in case 2/2021, paragraph 99, as well as in its decision in case 3/2021, paragraph 79.

102. This, however, should not mean that the content of the MREL Policy is irrelevant, and should on the whole be disregarded by the Appeal Panel.

103. First of all, as stated in its decision in case 3/2021, at paragraph 81, to the Appeal Panel the MREL Policy is not a regulatory act, which should bind the Appeal Panel decision, but it is an exercise of interpretation undertaken by the Board. As such, it allows the Appeal Panel to better understand how the Board construes certain provisions, and ascertains their meaning, and it provides a context for individual decisions, such as the Second Contested Decision, which do fall within the Appeal Panel remit, and thus helps the Appeal Panel to ascertain the lawfulness and correctness of the individual decision also in light of the correctness of the interpretation of the MREL Policy, if the individual decision follows the MREL Policy.

104. In second place, to the extent that the MREL Policy helps to ascertain the Board's understanding of certain provisions, and to indicate its interpretation, and its position with

regard to them, it will be analysed below as a potential source of legitimate expectations on the side of the Appellant and as such of legal effects that are intrinsically underlying the individual decision determining MREL.

105. In conclusion, the Appellant's pleas against the MREL Policy (eighth plea of the first sub-appeal, fifth plea of the second sub-appeal, sixth plea of the third sub-appeal) are as such inadmissible. However, the MREL Policy will be referred to in this decision strictly for the purposes outlined above.

(b) The first sub-appeal.

106. This appeal poses new interpretative questions, in the review context, on the MREL determination, which result from a complex legal framework, composed by several provisions of the SRMR and the BRRD complemented by a Commission's delegated regulation, which are differently read and understood by the parties.

(1) The first ground of appeal of the first sub-appeal and its relationship with pending case T-71/22

107. This appeal also preliminarily poses a procedural issue pertaining to the relation between the first ground of the first sub-appeal and case T-71/22 pending before the General Court.

108. With the notice of appeal, the Appellant requested the Appeal Panel "if it declares the [First Contested Decision] lawful on the basis of the grounds set out in Sections 2 to 8 of Paragraph C [of the notice of appeal], stay its decision as to the unlawfulness of the [First Contested Decision] on the basis of the ground set out in Section 1 of Paragraph C until the full outcome of the action for annulment of the Resolution Decision referred to in Section II above before the General Court (and as the case may be the Court of Justice); and, if the Resolution Decision is annulled, remit the [First Contested Decision] to the SRB in accordance with Article 85(8) SRMR".

109. With its first ground of appeal, the Appellant challenged the First Contested Decision noting that, from the context and language of the First Contested Decision, it is clear that it is based on, and intrinsically linked to, the 2021 joint resolution decision and cannot stand if the resolution decision is annulled. The Appellant noted, in particular, that in the First Contested Decision the determination of the MREL amount is the direct result, with respect to at least some aspects, of elements contained in the resolution plan, as approved by the resolution decision. This is specifically the case of the preferred resolution strategy and its implications and of the actions that the resolution plan considers credible and feasible before or at the resolution date. In the Appellant's view, since the resolution decision sets certain key parameters of the calculation of MREL, if the resolution decision is annulled, the First Contested Decision can no longer stand because the amount of MREL would no longer be determinable.

110. With its statement of modification, the Appellant reiterated the same ground of appeal also in respect of the Second Contested Decision, noting that also the latter is based and intrinsically linked to the 2022 joint resolution decision and reconfirmed its request to the Appeal Panel to stay its decision "until the full outcome of the action for annulment pending before the General Court in case T-71/22", though it requested a stay only in case the Second Contested Decision were declared lawful. In its reply, the Appellant elaborated further on the interplay between the first ground of the first sub-appeal before the Appeal Panel and pending case T-71/22, informed that the action for annulment in case T-71/22 was extended with a statement of modification allowed by the General Court also in respect to the 2022 joint resolution decision and the Second Contested Decision and submitted that, if the joint resolution decision is eventually annulled, and meanwhile the current appeal on the first ground is stayed, the Appeal Panel would have an opportunity to decide what impact the annulment should have on the pending case (assuming that this is not expressly set out in the judgment of the General Court). At the hearing, however, the Appellant formally stated that it waived in the present proceedings its request for a stay of this appeal on the first ground of appeal.

111. The Board, with its response, observed that the joint resolution decision enjoys (as each act of a Union institution or agency) the presumption of legality (and referred to Schrems, C-362/14, ECLI:EU:C:2015:650 paragraph 52 and Commission v Greece, C-475/01, ECLI:EU:C:2004:585, paragraph 18 and the case-law cited) and that, therefore, it is legitimate for the Appeal Panel to assume for the purposes of the appeal proceedings that the joint decision on the resolution plan is lawful. The Board further observed that the Appeal Panel is tasked with rendering a decision on the subject of the appeal, which is only the joint decision on the determination of MREL, yet not the joint decision on the resolution plan, also because the latter falls beyond the remit of the Appeal Panel pursuant to Article 85(3) SRMR. The Board further noted that even if the 2022 joint decision on the resolution plan were to be annulled, it would be for the General Court to determine the implications of such annulment for the Second Contested Decision (on MREL). However, with its rejoinder the Board acknowledged that a potential annulment of the joint decision on the resolution plan could partially impact the Appeal Panel's decision in this case to the extent that some elements of the content of the resolution plan inform the setting of the MREL (i.e. for example the choice of the preferred resolution strategy) and concluded that "in light of the above the SRB is of the view that there are reasons to support a potential stay of the appeal proceedings until the General Court takes a decision in case T-71/22".

112. The Appeal Panel notes, in the first place, that pursuant to Article 86(1) SRMR proceedings may be brought before the Court of Justice in accordance to Article 263 TFEU contesting a decision taken by the Appeal Panel or, where there is no right of appeal to the Appeal Panel, by the Board. The Appeal Panel notes, in the second place, that pursuant to Article 85(3) SRMR any natural or legal person may appeal against a decision of the Board referred to in Article 12(1) SRMR. Therefore, an MREL determination is a decision for which there is a right of appeal to the Appeal Panel to the effects of Article 86 SRMR.

113. Under the first paragraph of Article 264 TFEU, if an action for annulment before the General Court is well-founded, the court will declare the contested act void. According to settled case-law of the European courts, the power of the court is limited to the annulment of the contested act. Pursuant to Article 266(1) TFEU the Union institution, body, office or agency whose act has been declared void is required to take the necessary measures to comply with the judgment. The extent of the obligation to comply with the judgment is determined by both the operative part and the grounds underpinning the operative part of the judgment.

114. Based upon the foregoing, the Appeal Panel considers that, despite the Appellant's statement at the hearing that the Appellant waives its request for a stay, the Appeal Panel can still examine the question whether the (partial) *lis pendens* justifies a stay of these proceedings, both on ground of the request made by the Board and of the Appeal Panel's own motion.

115. The Appeal Panel holds, in the first place, that an action before the General Court for the annulment of the MREL determination by the Board under Article 12 SRMR is admissible, according to the language and finality of Article 86 SRMR, only after the applicant has previously exhausted the possibilities of appeal, i.e., after the Appeal Panel has adopted its decision on the disputed decision of the Board. In the Appeal Panel's view, the textual interpretation of Article 86(1) SRMR clearly points to such conclusion, because Article 86(1) SRMR expressly limits the direct access to the application for annulment before the General Court "where there is no right of appeal to the Appeal Panel". This is also in line with a contextual and teleological interpretation, because the obligation to exhaust administrative remedies before contesting an agency's decision in court is a common feature of the provisions establishing boards of appeal entrusted with the task of reviewing administrative decisions of the EU agencies.[2]

116. In the second place, the Appeal Panel acknowledges that the joint resolution decision is clearly outside its remit pursuant to Article 85(3) SRMR. Indeed, the Appellant has directly challenged the validity of the joint resolution decision in case T-71/22 before the General Court.

117. These findings have, in the Appeal Panel's view, implications for the decision on the stay in the instant case. The Appeal Panel considers that, should the General Court find inadmissible the action for annulment against the Second Contested Decision because the Appellant did not exhaust its administrative remedies before the Appeal Panel against such a decision, yet without waiting for the Appeal Panel's decision, the General Court, in case T-71/22 would not annul the Second Contested Decision even if the Court declared void the 2022 joint resolution decision.

118. In such a situation, the claim of the Appellant with the first ground of the first sub-appeal that, if the resolution decision is annulled by the European courts, the Second Contested Decision

[2] This finding is widely shared in the literature: Chirulli and De Lucia, ELRev 40 (2015) 835; Kaufhold, in Brussels Commentary, European Banking Union, eds. Binder, Gortsos, Lackhoff, Ohler (Beck & Hart, 2022), 1165.

can no longer stand because the amount of MREL would no longer be determinable, would still need to be considered by the Appeal Panel, in order to allow to the Appellant to exhaust the administrative remedies against the Second Contested Decision before bringing forward that issue to the General Court.

119. The Appeal Panel understands that, due to the cyclical and iterative nature of the RPCs and, thus, due to the yearly issuance by the Board of a new joint resolution decision and a new joint MREL determination it is also likely that, at the time the General Court renders its judgment on the validity of the 2021 and 2022 joint resolution decisions challenged in case T-71/22, the Appellant may have no longer an interest in the annulment of the Second Contested Decision which is currently appealed in this case 1/22 before the Appeal Panel (as noted above, according to settled case-law of the European courts the interest must continue until the court's final judgment, and the Appeal Panel considers that principle applicable by analogy to the Appeal Panel's review). Nonetheless, as it happened already in the course of these proceedings, the Appellant may, at that point in time, still ask for a modification of the appeal to extend the first ground of appeal of the first sub-appeal to the new joint MREL determination in force at the time of final judgment by the General Court, or the Court of Justice, if the Appellant considers that the appeal, if successful on the first ground of the first sub-appeal, may still bring an advantage to it.

120. The Appeal Panel is persuaded that the procedural complexities addressed herein on the interplay between the Court's and Appeal Panel's reviews are unintended and result from the co-legislators' choice to limit the Appeal Panel's review only to the MREL determination, without extending it also to the Board's decision which adopts the resolution plan. Such policy seems premised on the assumption, that the resolution plan and the MREL decision can be scrutinised separately, as their content is different, an assumption that seems to be contradicted by the practice, as in the present case. As a matter of principle, it would be preferable, for the effectiveness and timeliness of the overall system of review that both the decision adopting the resolution plan and the decision determining the MREL could be appealed before the Appeal Panel and then, if the appellant were unsuccessful, the Appeal Panel's decision could be challenged with an action for annulment before the General Court.

121. Yet the legislative choice on the remit of the Appeal Panel is clear, and the Appeal Panel is obviously bound by its mandate as set out in Article 85(3) SRMR. Therefore the Appeal Panel, having due regard to its powers of case management set out in Article 11 of the Appeal Panel's Rules of Procedure and having considered by analogy Article 69, letter d) of the Rules of Procedure of the General Court, finds that a prudent pondering of the parameters of proper administration of the administrative and judicial review requires to stay the present appeal, however solely with regard to the first ground of the first sub-appeal, until the final outcome of the case T-71/22 currently pending before the General Court.

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

122. With the second ground of appeal of the first sub-appeal, the Appellant argues that the Second Contested Decision, similarly to the First Contested Decision which it replaces, is vitiated by several errors of law and violation of SRMR, since, among other things, the Board failed: (A) to take into account the post-resolution banking group in its MREL determination, and to properly apply the TLAC standard; (B) to conduct the assessment required pursuant to sub-paragraph 8 of Article 12d(3) SRMR when determining the market confidence charge (hereinafter the "**MCC**") applicable to BNP Paribas; and (C) to carry out a full assessment of all relevant elements of the MREL calculation and to state reasons for the calculation of MREL.

(A) *The first limb of the second ground: the Appellant's allegations that the Board committed errors of law in the interpretation and application of SRMR.*

123. On the first limb of its second ground of appeal the Appellant alleges that the Board committed errors of law in the interpretation and application of SRMR and violated SRMR because the Board (i) failed to take into consideration the post-resolution group, and it (ii) failed to take into account the TLAC standard. The arguments used by the Appellant to support the first limb of the second ground of appeal are also used, in substance, to support the third ground of appeal, whereby the Appellant argues that the Board has committed manifest errors of assessment in the determination of MREL and has breached the principle of good administration, in so far as the Board failed to carry out a careful and impartial assessment of the BNP Paribas group post-resolution, and in particular to take into account the effect of resolution on the size and business model of the BNP Paribas group. The findings on the first limb of the second ground are therefore also relevant to the effect of the third ground.

(i) On whether the external MREL was determined by the Second Contested Decision in compliance with Article 12d SRMR by taking into account the post-resolution banking group as resulting from the resolution plan.

124. The Appellant argues that it follows from a literal interpretation of Article 12d SRMR as well as from the context of that provision and from the objectives of SRMR (including as amended by Regulation (EU) No 2019/877 of 20 May 2019, hereinafter "**SRMR II**") that the recapitalisation amount must in all cases not just take into account the preferred resolution strategy and resolution actions set out in the resolution plan, but also be adjusted to the post-resolution banking group, and that those are two distinct and separate conditions. In other words, the Board is required, in the Appellant's view, to take into account not only the actions expressly set out in the resolution plan, but also the size and profile of the banking group after resolution, i.e., the impacts that resolution would necessarily have on the banking group even where no specific actions are set out in the resolution plan.

125. This argument is based by the Appellant, on one hand, on Article 12d(3)(a)(ii) SRMR which reads as follows:

> For resolution entities, the amount referred to in the first subparagraph of paragraph 2 shall be the following:
>
> (a) for the purpose of calculating the requirement referred to in Article 12a(1), in accordance with point (a) of Article 12a(2), the sum of:
>
> (ii) a recapitalisation amount that allows the resolution group resulting from resolution to restore compliance with its total capital ratio requirement referred to in point (c) of Article 92(1) of Regulation (EU) No 575/2013 and its requirement referred to in Article 104a of Directive 2013/36/EU at the consolidated resolution group level after the implementation of the preferred resolution strategy;

126. This argument is further based by the Appellant, on the other hand, on Article 12d(3)(b)(ii) SRMR which reads as follows:

> For resolution entities, the amount referred to in the first subparagraph of paragraph 2 shall be the following:
>
> (b) for the purpose of calculating the requirement referred to in Article 12a(1), in accordance with point (b) of Article 12a(2), the sum of:
>
> (ii) a recapitalisation amount that allows the resolution group resulting from resolution to restore compliance with the leverage ratio requirement referred to in point (d) of Article 92(1) of Regulation (EU) No 575/2013 at the consolidated resolution group level after the implementation of the preferred resolution strategy.

127. For further reference the Appellant refers also to recital (12) SRMR II, which provides that "the MREL should allow institutions and entities to absorb losses expected in resolution or at the point of non-viability, as appropriate, and to be recapitalised after the implementation of actions provided for in the resolution plan or after the resolution of the resolution group". In the Appellant's view the sentence shows that the resolution group post-resolution is not only the result of the implementation of actions provided in the resolution plan, but also the result of the effect of resolution itself of the group, and that this second effect must be taken into account.

128. In practical terms, the argument of the Appellant reiterates a point raised by the Appellant also in the Right to be Heard stage, and namely that in the Appellant's view, considering also the measures foreseen in the recovery plan adopted by the group and approved by the ECB, the group's size would necessarily be significantly reduced prior to the application of the bail-in tool (which is the tool of choice of the resolution plan adopted for the group by the SRB), because at least some of the transfers envisaged in the recovery plan would in all likelihood be implemented in the period prior to the entry into resolution or would be implemented upon entry in resolution as resolution actions, and must therefore be taken into account in the calibration of the recapitalisation amount.

129. The Appellant alleged in this respect, in the Right to be Heard stage, that "the group has a proven track record second to none in Europe for acquiring, integrating, restructuring, selling

and winding down businesses, which is relevant in the context of its recovery and resolution strategy and cannot therefore be simply ignored by the SRB without breaching the principle of good administration. In addition, during the recovery dry run exercise of [.], the group further demonstrated its ability to prepare and run a sale process for a large subsidiary in a very short period of time. The minutes of this exercise have been shared with the SRB. At the workshop of [.] with the internal resolution team (hereinafter "**IRT**") the group also demonstrated that a fast moving scenario leading to an entry into resolution within 3 months was almost impossible and that a slow moving scenario leading to an entry into resolution within 12 months was extremely unlikely. Accordingly, the group would necessarily implement several recovery actions (out of a catalogue of 26) before entering in resolution and several others would be in advanced stage of preparation or implementation upon entry in resolution. (…)". The Appellant further listed "[.]".

130. The Board contends, on the contrary, that it has duly computed the recapitalisation amount in accordance with the conditions of Article 12d(3) SRMR, which, when calibrating the recapitalisation amount, requires the SRB to work backwards from pre-resolution values of the asset-based denominators, and to adjust those values *only* to account for changes resulting from resolution actions contemplated in the resolution plan. The Board notes in this regard that the preferred resolution strategy for the Appellant in the resolution plan is (only) bail-in, without any combination with complementary asset transfers. The Board argues, therefore, that the interpretation of SRMR suggested by the Appellant is "*contra legem"*.

131. The Board refers in particular to Article 12d(3) fifth subparagraph, letter (a) SRMR which provides that TREA value shall only be "adjusted for any changes resulting from resolution actions set out in the resolution plan" and notes that the SRB did not adjust further the values of TREA and LRE to account for recovery options which did not feature in the bank's resolution plan and which the SRB did not consider credible or feasible to execute in resolution. The Board also refers to the EBA Q&A No 2019/4901 drafted by the European Commission according to which "when calibrating the recapitalisation amount, the resolution authority shall assess the impact of all the resolution actions that are planned for the implementation of the preferred resolution strategy by that resolution authority as provided in the group resolution plan (…). There are therefore, two factors to be considered when determining whether recovery or other measures are relevant to the setting of the recapitalisation amount: (a) they are included in the resolution plan as a resolution action that forms part of the preferred resolution strategy; and (b) in case they are not implemented by the resolution entity or other entities of the group prior to resolution, the resolution authority has deemed it feasible and credible to implement them in resolution".

132. For this reason, the Board concludes that the SRB may not take into consideration putative recovery options that could not credibly be executed in resolution and that do not feature in the resolution plan.

133. The Appeal Panel notes that, indeed, the fifth subparagraph of Article 12d(3) SRMR expressly provides that "when setting the recapitalisation amounts referred to in the previous subparagraphs, the Board shall: (a) use the most recently reported values for the relevant total risk amount or total exposure measure, *adjusted for any changes resulting from resolution actions set out in the resolution plan*" (emphasis added).

134. The Appeal Panel perceives the argument raised by the Appellant that, following the wording of such provision, there might be a risk that in setting the external MREL the Board may overlook recovery actions which are highly likely before resolution, if those actions are not contemplated in the resolution plan and that this, to some extent, may seem to collide with the wording of Article 12d(3)(a)(ii) SRMR and Article 12d(3)(b)(ii) SRMR which refer the recapitalisation amount to the "resolution group resulting from resolution" (with no limitation solely to the actions foreseen in the resolution plan).

135. The Appeal Panel also gave particular attention to the Appellant's proposed reading of Article 12d(3) SRMR, which purports that the provision "requires the SRB to adjust the TREA measure for any changes resulting from resolution actions set out in the resolution plan, but nowhere does it prohibit the SRB from taking into account other adjustments, provided that they are relevant and in line with the principles of MREL determination set out in Article 12d(1)".

136. Yet, the Appeal Panel notes that the textual interpretation advocated by the Board of Article 12d(3), fifth subparagraph SRMR is also confirmed by the interpretation given to it by the European Commission with the Q&A EBA No 2019/4901. In contrast, the contextual interpretation proposed by the Appellant to counter the textual interpretation and which relies on recital (12) of SRMR II is not conclusive. The reference in such recital to the recapitalisation to be made after the implementation of actions provided for in the resolution plan "or after the resolution of the resolution group" can be understood, in the Appeal Panel's view, in the sense that the co-legislators envisaged not only the situation of a resolution scheme adopted along the lines of the resolution plan but also the possible alternative of a resolution scheme departing, at the point of non-viability of the credit institution, from the resolution strategy adopted with the resolution plan, as expressly permitted by Article 23 SRMR, in which case any potential recovery actions adopted before resolution would also be disregarded for purposes of calculating the recapitalisation amount.

137. The Appeal Panel also acknowledges that the SRB MREL Policy under the Banking Package of May 2021 (applicable "ratione temporis" to the Second Contested Decision) may have contributed to the divergence of views between the Appellant and the Board as to the "adjustments related to balance sheet size" (as described at section 2.4.1., for all strategies). Paragraph 23, which refers to "bank-specific adjustments related to balance sheet depletion, binding restructuring plans and recovery options", does not expressly require that the bank-specific adjustments described in the MREL Policy be contemplated in the resolution plan.

138. However, the Appeal Panel is persuaded that a contextual and teleological interpretation confirms that, since the MREL determination is based on the profile (and balance-sheet size) of the resolution entity that the SRB envisages at the time of resolution, and since a meaningful resolution plan cannot but refer to such foreseen profile (and balance-sheet size), the adjustments for balance sheet depletion, for divestments and sales firmly embedded in a going concern divestment/restructuring plan, and credible and feasible recovery options provided for in section 2.4.1. of the MREL Policy need to be contemplated in the resolution plan to account for MREL adjustments.

139. In other words, the Appeal Panel, while restraining itself to the limits of its remit, admits as possibly less fortunate that the MREL Policy did not expressly clarify that the balance-sheet size relevant for the MREL determination is the one envisaged at resolution by the resolution plan as suggested by the fifth subparagraph of Article 12d(3) SRMR, and that the resolution plan can contemplate, on a bank-by-bank basis and with due justification, the three adjustments described at paragraphs 23-26 of the MREL Policy. Nonetheless, the centrality of the resolution plan also for the MREL determination, which is functionally aimed at preparing the "ammunition" necessary to implement the envisaged resolution strategy of the resolution plan (and notably, in the case at hand, bail-in), makes, in the Appeal Panel's view, compelling the conclusion that the MREL determination accepts only adjustments to the balance-sheet size of the resolution entity recognised by the resolution plan. If it were not so, i.e., if the MREL determination could be based on ex ante balance-sheet size's adjustments, which are not reflected in the resolution plan, one should conclude that the MREL determination may result in an amount less than that which is needed according to the resolution strategy adopted by the resolution plan. This would however disregard the clear instrumentality and the functional link existing between the MREL determination and the resolution plan as evidenced also by Article 8(9)(o) SRMR which prescribes that MREL be part of the resolution plan and that a resolution plan contains a deadline to meet the MREL. As noted, this would also expose the resolution plan to the risk of being backed by an insufficient recapitalisation amount in respect of the resolution strategy adopted, and thus of running the risk of being devoid of purpose. As noted in the specialised literature, "the SRMR sees the determining the MREL as part of the resolution planning process, which explains the positions of Articles 12 to 12k SRMR in the chapter on resolution planning.[3]"

140. For the reasons stated above, the Appeal Panel finds that the Board was bound to consider, when determining the MREL with the Second Contested Decision, only the changes set out in the resolution plan, disregarding therefore the recovery actions envisaged in the recovery plan which had not been included in the resolution plan. Accordingly, the Appeal Panel sides with the Board on this point. An entirely different issue is whether the resolution plan should disregard the recovery actions envisaged in the recovery plan and in considering such actions as not credible and feasible prior to or at resolution and whether the resolution plan made

[3] Compare M. Haentjens, in Brussels Commentary, *European Banking Union*, eds. Binder, Gortsos, Lackhof, Ohler (Beck Hart Nomos, 2022), 593.

therefore a proper assessment of this important issue and its statement of reasons was sufficient in this respect. As noted above, however, these are issues for the determination of the European courts, because the resolution plan is outside the remit of the Appeal Panel. This also addresses the Appellant's argument that the Board, for purposes of setting MREL levels, relied on an objective of "long term viability", which is not among resolution objectives. Long-term viability is required when using bail-in as a resolution tool, pursuant to Article 27 (2) SRMR, and the selection of bail-in as the resolution strategy, and the objectives that must be guaranteed by the use of bail-in are choices made in the resolution plan, and the MREL determination depends on the previous choices made in said resolution plan.

141. Consequently, the Appeal Panel finds that, it is precluded from considering the legality of the Board's determination not to include the recovery actions in the resolution plan, and, as a result, the effects of such determination on the MREL adjustments consented by Article 12d(3) fifth subparagraph, letter (a) SRMR. If the Appeal Panel could incidentally disregard the choice made by the Board with the resolution plan, this would be tantamount as circumventing the clear intention of the co-legislators to reserve the competence on the review of the legality of the resolution plan solely to the European courts.

142. The Appeal Panel further considers that, should the Appellant not be persuaded by the legislative choice as explained by the reasons stated above, it has other options of judicial review of such legislative choices in this field (see e.g., S.P.C.M. and Others, C-558/07, ECLI:EU:C:2009:430, paragraphs 39-40). Yet again, those are issue of validity of the legislative texts, which, in turn, are clearly beyond the remit of the Appeal Panel and for the European courts.

(ii) The Board's application of the TLAC standard, and the possibility of an MREL add-on.

143. In the second limb of the second ground, the Appellant submits that "the Appellant is a G-SII resolution entity, that is already subject to a TLAC requirement, which has the same purpose as MREL. The Appellant argues that Article 12e(3) SRMR requires that an MREL add-on be imposed only where strictly necessary, and that, "the portion of the MREL requirement set by the SRB that corresponds to the difference between (1) such MREL requirement and (2) the MREL amount if the RCA and MCC had been calculated based on the post-resolution entity, constitutes an excess that goes beyond what is necessary to comply with the conditions of Article 12d SRMR, and the imposition of which is not permissible under Article 12e(3) SRMR".

144. The Board, for its part, argues that "although Article 92a CRR establishes a Pillar 1 'floor' to the MREL of a G-SII, the SRB is still required to perform the calculations required under Article 12d(2)-(3) SRMR for G-SII in exactly the same way as it does for all banks", and that, although "[s]uperficial analysis of Article 12e SRMR may give the impression that the SRB must provide some special or distinct explanation as to why a given G-SII needs 'more' MREL than the CRR minimum […] [i]n fact, no special explanation is required".

145. The Appeal Panel notes that the Total-Loss Absorbing Capacity (TLAC) standard was adopted by the Financial Stability Board (FSB) on 9 November 2015, and was introduced in the EU legal order by the following parallel amendments:

- Amendments to regulation 575/2013 (CRR) by Regulation 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012 (hereafter "**CRR II**").

- Amendments to Directive 2014/59/EU (BRRD) by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC (hereafter "**BRRD II**").

- Amendments to Regulation 806/2014 (SRMR) by Regulation (EU) 2019/877 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 806/2014 as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms (SRMR II).

146. Recitals (15) and (16) of CRR II state the following (emphasis added):

> (15) On 9 November 2015, the FSB published the Total Loss-absorbing Capacity (TLAC) Term Sheet (the 'TLAC standard') which was endorsed by the G20 at the November 2015 summit in Turkey. The TLAC standard requires G-SIBs, to hold a sufficient amount of highly loss absorbing (bail-inable) liabilities to ensure smooth and fast absorption of losses and recapitalisation in the event of a resolution. The TLAC standard should be implemented in Union law.
>
> (16) The implementation of the TLAC standard in Union law needs to take into account the existing institution- specific minimum requirement for own funds and eligible liabilities (MREL), set out in Directive 2014/59/EU of the European Parliament and of the Council (8). As the TLAC standard and the MREL pursue the same objective of ensuring that institutions have sufficient loss absorption capacity, the two requirements should be complementary elements of a common framework. Operationally, the harmonised minimum level of the TLAC standard should be introduced into Regulation (EU) No 575/2013 through a new requirement for own funds and eligible liabilities, while the institution-specific add-on for G-SIIs and the institution-specific requirement for non-G-SIIs should be introduced through targeted amendments to Directive 2014/59/EU and Regulation (EU) No 806/2014 of the European Parliament and of the Council (9). The provisions introducing the TLAC standard in Regulation (EU) No 575/2013 should be read together with the provisions that are introduced into Directive 2014/59/EU and Regulation (EU) No 806/2014, and with Directive 2013/36/EU.

147. Recitals (1) and (2) of BRRD II and SRMR II have the same text, and offer the same message of Recitals (15) and (16) of CRR II, emphasizing the idea that TLAC is a new standard implemented in the EU, that it has the same objective as MREL, and that "the two

requirements should be complementary elements of a common framework", while Recital (3) of both BRRD II and SRMR II adds that "the absence of harmonised Union rules in respect of the implementation of the TLAC standard in the Union creates additional costs and legal uncertainty and […] also results in distortions of competition in the internal market…" which justifies using Article 114 TFEU as a legal basis.

148. Recital (17) of BRRD II, and recital (15) of SRMR both state:

> "To enhance their resolvability, resolution authorities [the Board] should be able to impose an institution-specific MREL on G-SIIs in addition to the TLAC minimum requirement set out in Regulation (EU) No 575/2013. That institution-specific MREL should be imposed if the TLAC minimum requirement is not sufficient to absorb losses and to recapitalise a G-SII under the chosen resolution strategy".

149. Since the Recitals of the CRR and SRMR expressly refer to the "TLAC standard", approved by the Financial Stability Board (FSB), and expressly indicate that the reforms "implement" the TLAC standard in Union law, this standard is recognised as well as an authoritative source of interpretation, and it is pertinent to refer to it. The said TLAC standard includes the following principles:

(1) **There must be sufficient loss-absorbing and recapitalisation capacity available in resolution to implement an orderly resolution that minimises any impact on financial stability, ensures the continuity of critical functions, and avoids exposing taxpayers (that is, public funds) to loss with a high degree of confidence.** This is the main guiding principle from which the other principles flow. Instruments or liabilities that are not eligible as TLAC will still be subject to potential exposure to loss in resolution, in accordance with the applicable resolution law.
Calibration of the amount of TLAC required
(ii) Authorities should determine a firm-specific Minimum Total Loss-absorbing Capacity (TLAC) requirement for each G-SIB which respects principles (iii), (iv), and (v). In calibrating the individual requirement for specific firms, authorities will take into account the recovery and resolution plans of individual G-SIBs, their systemic footprint, business model, risk profile and organisational structure.
(iii) Each G-SIB should be required to meet a firm-specific Minimum TLAC requirement that is at least equal to the common minimum agreed by the FSB. A common minimum is necessary to help achieve a level playing field internationally and to ensure that there is market confidence that each G-SIB has a minimum amount of loss-absorbing capacity that would be available to absorb losses and recapitalise it in resolution.
(iv) In setting firm-specific Minimum TLAC requirements, authorities should make appropriately prudent assumptions about losses incurred prior to resolution, as well as losses realised in the prudent valuation necessary to inform resolution actions. The FSB Key Attributes of Effective Resolution Regimes for Financial Institutions require that resolution action is taken at a sufficiently early point, if there is no reasonable prospect of recovery outside of resolution, with the aim of preserving value. Furthermore, the early intervention of supervisory authorities should moderate those losses. There could therefore be some positive net asset value at entry into resolution. But,

> balanced against this, experience shows that the valuation in resolution reveals losses that had not previously been realised, that the resolution may be followed by additional losses, and that overly-optimistic risk weightings may need to be revised upward.

150. The previous text acknowledges that the TLAC seeks to establish a level playing field internationally (beyond the EU), yet that such level playing field is based on a "common minimum", which is a "firm-specific minimum" that is "at least equal to the common minimum" agreed by the FSB, and that, in setting the firm-specific minimum TLAC requirements, authorities should make "appropriately prudent assumptions about losses".

151. The TLAC principles are accompanied by a TLAC Term Sheet, which, in its point 4 (calibration) provides that:

> "Minimum TLAC must be at least 16% of the resolution group's RWAs ("TLAC RWA Minimum") as from 1 January 2019 and at least 18% as from 1 January 2022. This requirement does not include any applicable regulatory capital (Basel III) buffers, which must be met in addition to the TLAC RWA Minimum.
>
> Minimum TLAC must be at least 6% of the Basel III leverage ratio denominator ("TLAC LRE Minimum") as from 1 January 2019. As from 1 January 2022, the TLAC LRE Minimum must be at least 6.75% of the Basel III leverage ratio denominator. This requirement does not limit authorities' powers to set a requirement above the common minimum or put in place buffers in addition to the TLAC LRE Minimum".

152. And its point 5 (additional firm-specific external TLAC requirements) provides that:

> "Home authorities of resolution entities, in consultation with the CMG and subject to review in the Resolvability Assessment Process (RAP), should apply additional firm-specific requirements above the common Minimum TLAC if they determine that this is necessary and appropriate to implement an orderly resolution, minimise the impact on financial stability, ensure the continuity of critical functions, or avoid exposing public funds to loss with a high degree of confidence".

153. Thus, under a textual, contextual and finalistic interpretation of the text of the relevant provisions, including also the international standard on which such provisions were based, the Appeal Panel holds that the Board did not breach the law simply by setting a level of MREL that was higher than the common minimum of the TLAC standard. This possibility is expressly allowed by the applicable provisions, and the TLAC standard itself and it cannot be ruled out, as a matter of principle, that, in accordance with Article 12e(3) SRMR the Board may assess that for EU G-SIIs the amount of the common minimum of TLAC "is not sufficient to fulfil the conditions set out in Article 12d SRMR" and that the add-on necessary to ensure that the conditions set out in Article 12d SRMR are fulfilled is assessed in an amount determined by the Board.

154. Nonetheless, in the Appeal Panel's view, this does not mean that the SRB can impose an MREL add-on over TLAC without justifying the need of such add-on in the given circumstances of each specific case. The peculiarity of the EU MREL for G-SIIs consists of

the fact that, in accordance with section 2.5 of the SRB MREL Policy, the SRB sets an additional requirement for all EU G-SIIs where the amount of TLAC is less than the amount that would be applicable if the general MREL calibration based on Article 12d SRMR would have been applied, and the additional requirement is equal to the difference between the two. This aspect, however, is considered below, under the third limb of the second ground of appeal, specifically related to the requirement of a full assessment of the relevant elements of the MREL calculation, and the statement of reasons. In that context, it is also considered the argument of the Appellant that Article 12d(1)(d) SRMR requires the SRB to determine MREL on the basis of certain specific characteristics of the entity, such as "the size, the business model, the funding model and the risk profile" of the entity and a determination of a requirement of an add-on for all EU G-SIIs equal to the difference between TLAC and MREL would not meet this condition.

(B) The second limb of the second ground of the first sub-appeal: the adjustments of the Market Confidence Charge (MCC).

155. In the second limb of the second ground of the first sub-appeal the Appellant submits that the Board erred in at least two respects in the calculation of the MCC. The MCC was calculated as a figure equal to the Combined Buffer Requirement (hereinafter "**CBR**") less the greater of (a) the institution-specific counter-cyclical buffer, referred to in Article 128(6)(a) CRD and (b) 93.75 basis points. In the Appellant's view, this failed, first, to take into account the application of resolution tools, and, second to make an assessment of the possibility of a downwards adjustment.

156. The Board submits that it applied the MCC appropriately, because it applied the percentage of the CBR to the post-resolution size of the group, as envisaged in the resolution plan, because it could not assume that the Appellant would cease to be a G-SII, and because it was not compelled to make any downwards adjustment to the MCC.

157. The MCC is an addition to the recapitalisation amount, contemplated under Article 12d(3) paragraphs (6), (7) and (8) SRMR. These state as follows (emphasis added):

> The Board shall be able to increase the requirement provided in point (a)(ii) of the first subparagraph by an appropriate amount necessary to ensure that, following resolution, the entity is able to sustain sufficient market confidence for an appropriate period, which shall not exceed one year.
>
> Where the sixth subparagraph of this paragraph applies, the amount referred to in that subparagraph shall be equal to the combined buffer requirement that is to apply after the application of the resolution tools, less the amount referred to in point (a) of point (6) of Article 128 of Directive 2013/36/EU.
>
> The amount referred to in the sixth subparagraph of this paragraph shall be adjusted downwards if, after consulting the competent authorities, including the ECB, the Board determines that it would be feasible and credible for a lower amount to be sufficient to sustain market confidence and to ensure both the continued provision of critical economic functions by the institution or entity referred to in Article 12(1) and its access to funding without recourse to extraordinary public financial support

> other than contributions from the Fund, in accordance with Article 27(7) and Article 76(3), after implementation of the resolution strategy. That amount shall be adjusted upwards if, after consulting the competent authorities, including the ECB, the Board determines that a higher amount is necessary to sustain sufficient market confidence and to ensure both the continued provision of critical economic functions by the institution or entity referred to in Article 12(1) and its access to funding without recourse to extraordinary public financial support other than contributions from the Fund, in accordance with Article 27(7) and Article 76(3), for an appropriate period which shall not exceed one year.

158. Thus, the MCC allows the Board, once it determines that the resolution entity may need, in order to sustain market confidence for a period not exceeding a year, an amount higher than the basic recapitalisation amount resulting from Article 12d(3) first sub-paragraph (a)(ii) SRMR, to impose the amount needed to sustain such market confidence. To make the calculation more concrete, the rule provides a "base amount", equal to the CBR applicable after resolution tools, minus or plus a (downwards or upwards) adjustment set by the Board after consulting with the competent supervisory authority, including the ECB.

159. The Appellant's first allegation questions that the Board did not take into account the CBR applicable *"after application of resolution tools"*. This submission replicates the Appellant's submission under the first limb, i.e., that the Board has failed to take into consideration the post-resolution group, only this time the allegation concerns the more specific calculation of the MCC. In Section V of the Second Contested Decision it is referred that the Appellant argues that *"*the amount mentioned seems to only take into account the balance sheet depletion effect. We kindly request the SRB to consider the MCC as it should apply after resolution, in line with SRMR2 Article 12d(3). In our view, the MCC should consider reduced buffer requirements, notably as the size of the group would necessarily be significantly reduced and as it should apply for a period that doesn't exceed 1 year*"*. This suggests that the Appellant's main argument is that the CBR should apply over a post-resolution group of reduced size, presumably after the application of recovery options, irrespective of the fact that such recovery options were not included in the resolution plan.

160. As stated under the first limb above, the Appeal Panel considers that, although the TLAC standard provides that "in calibrating the individual requirement for specific firms, authorities will take into account the *recovery* and resolution plans of individual G-SIBs, their systemic footprint, business model, risk profile and organisational structure" (emphasis added), Article 12d(3) SRMR requires that the balance-sheet size and profile of the resolution entity relevant for the calculation of the recapitalisation amount shall be those contemplated under the resolution plan, and therefore that the Board is under no obligation to consider recovery options not contemplated under such resolution plan for the calculation of the recapitalisation amount. The conclusion should be no different for the MCC adjustment to the recapitalisation amount. The Appellant has not suggested that the reference to the entity "following resolution", or *"after the application of the resolution tools"* should be understood differently from the reference to the total exposure measure, adjusted for "resolution actions set out in the resolution plan", and, from a contextual and teleological perspective, it would make little

sense that the same provision took as a reference different values to calculate the recapitalisation amount, and the adjustment to that amount to sustain market confidence (i.e., the MCC).

161. The Appellant's second allegation under this limb refers to the possibility of a downwards adjustment. The Appellant focuses on the literal language of subparagraph (8) of Article 12d(3) SRMR, which states that the MCC's base amount "shall be adjusted downwards", and that, by failing to take all relevant factors into consideration, including the possibility that the Appellant would cease to be a G-SII, it failed to comply with its obligations under the SRMR.

162. Article 12d(3) subparagraph (8) SRMR states that the amount "shall be adjusted downwards if, after consulting the competent authorities, including the ECB, the Board determines that it would be feasible and credible for a lower amount to be sufficient to sustain market confidence…" and that the amount "shall be adjusted upwards if, after consulting the competent authorities, including the ECB, the Board determines that a higher amount is necessary to sustain sufficient market confidence…". Thus, (i) there *shall* be an adjustment, (ii) once the Board *determines* (iii) after *consulting* the competent supervisor, (iv) that a different amount is needed, (v) which may be lower, if feasible and credible, or higher, if necessary.

163. The Board has a legal obligation to consult with the supervisor, the ECB for the Appellant. This was done by the Board, as argued by the Board in its submissions and not contested by the Appellant, and the ECB did not recommend any upwards or downwards adjustments.

164. After consulting with the ECB, the Board has to *determine* the adjustment, which entails an exercise of discretion on its side. The fact that no adjustment has been made based on the feasibility or credibility of a lower amount, or the necessity of a higher amount, does not mean that the law has been breached. It means that a decision has been made not to make a downwards adjustment of the size suggested by the Appellant. A different, yet related question, is to what extent such a (negative) decision has been justified in the statement of reasons of the Second Contested Decision, which needs however to be considered separately.

165. As to the determination made by the Board, the Appellant's allegations on this second limb claim that the Board has been excessively mechanistic in its assessment of the MCC. However, making the determination of the MCC requires projecting into the future which amount may be necessary to sustain market confidence for a period not exceeding a year. This is a complex, and uncertain exercise, which is why the legislator provides a reference point, or base amount, the CBR post-resolution. In the Appeal Panel's view, it cannot be inferred from the fact that the Board did not deviate from the reference amount, that the Board omitted to make the relevant determination. Conversely, the Appellant has not offered conclusive and compelling evidence that the Board committed a manifest error, or even an error of assessment in not requiring a lower MCC, nor why, in its view, the hypothesis that the Appellant may

continue to be a G-SII after resolution is not plausible or reasonable. On that specific substantive point the Appeal Panel sides therefore with the Board.

166. Conversely, although there is no evidence that the Board committed an error of assessment in not requiring a lower MCC, the mandatory step consisting in the consultation with the ECB also imposed on the Board a duty to justify the result of that interaction. This, however, is considered separately under the third limb of this second ground of the present appeal.

(C) The third limb of the second ground of the first sub-appeal: the assessment of the elements of the MREL calculation and the statement of reasons.

167. In its third limb of its second ground the Appellant submits that the Board breached Articles 12d(8) and 12e(4) SRMR by failing to carry out a full assessment of all relevant elements of the MREL calculation and to state reasons for its calculation of MREL. This, in turn, includes several arguments, pertaining to Article 12d(8) SRMR, and Article 12e(4) SRMR. The arguments used by the Appellant to support the third limb of the second ground of appeal are also used, in substance, to support the third ground of appeal (whereby the Appellant argues that the Board has committed manifest errors of assessment in the determination of MREL and has breached the principle of good administration, in so far as the Board failed to carry out a careful and impartial assessment of the BNP Paribas group post-resolution, and in particular to take into account the effect of resolution on the size and business model of the BNP Paribas group) and the sixth ground (whereby the Appellant argues that the Board has failed to state reasons, by not including in the Second Contested Decision all the elements necessary in order for BNP Paribas to understand on which basis and according to what methodology the MREL was determined and why such methodology departed from the general methodology set forth in the MREL Policy). The findings on this third limb of the second ground are therefore also relevant to the effect of the third and sixth ground.

168. The Board, for its part, submits that it made a full assessment of all relevant elements of the MREL calculation using its margin of appreciation, and that its duty to give explicit reasons extends to providing an explanation on those factors which have influenced the calibration of MREL but not those factors which have not, and which are mathematically incapable of influencing that calibration.

169. For purposes of this limb, the most important provisions are Articles 12d(8) and 12e(4) SRMR, which regulate respectively the assessment and justification of MREL calculation in general, and the assessment and justification in cases of G-SIIs, where the TLAC standard is also applicable. These are considered in order.

(i) The duty to make a full assessment and to provide reasons under Article 12d (8) SRMR.

170. Article 12d(8) SRMR refers to the Board's general duty to make a full assessment and provide reasons, and it states that (emphasis added):

> "Any decision by the Board to impose a minimum requirement of own funds and eligible liabilities under this Article shall contain the reasons for that decision, including a full assessment of the elements referred to in paragraphs 2 to 7 of this Article, and shall be reviewed by the Board without undue delay to reflect any changes in the level of the requirement referred to in Article 104a of Directive 2013/36/EU".

171. The Board is correct in pointing out that the full assessment demanded by Article 12d(8) SRMR in fact primarily refers to paragraphs (2) and (3) of Article 12d SRMR, since the others are not applicable to G-SIIs, or cannot affect the quantum of MREL. With these qualifications, the provision requires the statement of reasons to include a full assessment of all the relevant elements.

172. This necessarily brings back the intrinsic connection between the MREL decision and the resolution plan. In particular, Recital (7) of the Second Contested Decision states that *"*the resolution plan for the Group has identified, explained and quantified an immediate change in TREA as a result of resolution action foreseen in the resolution plan for the Group. This change has been considered in the resolvability assessment to be both feasible and credible, without adversely affecting the provision of critical functions, and without recourse to extraordinary financial support other than contributions from resolution financing arrangements".

173. This cross-reference continues throughout the decision. A search through the text shows that there are approximately 79 references to the "resolution plan" in the Second Contested Decision. Although a copy of the resolution plan was not provided to the entity, the Board notified a "*summary of key elements"* of the plan together with the MREL decision.

174. This notification of the summary of the resolution plan was made on the basis of Article 8 SRMR, which regulates resolution plans. Article 8 SRMR states, in its paragraph (8) that the Board "may require institutions to assist it in the drawing up and updating of the plans", while paragraph (9) for its part, provides the minimum contents of the resolution plan, a very long list comprising letters (a) to (r). Of these, *"(a) a summary of the key elements of the plan;"* must be disclosed to the resolution entity. Article 22 of Commission Delegated Regulation 2016/1075 (CDR 2016/1075) completes this by listing the categories of information to be included in resolution plans, in its paragraphs (1) to (8), where paragraph (1) refers to a "a summary of the plan, including a description of the institution or group and a summary of items referred to in points (2) to (8)".

175. The concepts of "summary" or "key elements" are not defined in either the SRMR or the CDR 2016/1075. They are open textured concepts. Thus, they must be assessed pursuant to the function they perform in the specific situation. In the specific context of MREL determination, that function is to serve as a justification of the MREL calculation, and its contents must be evaluated in that light.

176. In the Appeal Panel's view, the choice under Article 8 SRMR to require an institution to assist in the drawing and updating of the plans pertaining to it, and then to require the Board (unlike the practice followed by several other resolution authorities worldwide) to disclose only a summary of the plan to the institution is a choice made by the co-legislators, and it is not for the Appeal Panel to evaluate that normative choice. Nor can the Appeal Panel assess the correctness of the choices made in the resolution plan, as already stated in the first limb of this second ground of appeal. However, if and to the extent that the Board, in its MREL decision, decides to justify many of its choices by referring to the resolution plan without specifically describing in the MREL decision the relevant content of the resolution plan to which reference is made, and also to the extent that the summary of the resolution plan is the only document facilitated to the institution to explain those choices, the summary of the plan becomes as such inevitably part of the "assessment", which informs the "reasons" given under Article 12d(8) SRMR. Accordingly, and strictly in that context it must, in turn, be scrutinised by the Appeal Panel. In other terms, the Board may choose to explain the assessment made in the MREL decision itself, or by attaching the summary of the resolution plan to the decision and referring to it, but the Appeal Panel's scrutiny of the Board's assessment under Article 12d (8) SRMR cannot be excluded due to the formal aspect that the said assessment is contained in a document that falls outside the remit of the Appeal Panel.

177. This is in line with the Appeal Panel's own findings in case 3/2022.

178. In this context, the Appeal Panel notes, as a first general consideration after examining the text of the summary, that the summary of the key elements of the resolution plan is structured including sections on (i) strategic business analysis, (ii) preferred resolution strategy, (iii) financial/operational continuity in resolution, (iv) governance, information and communication plan, and (v) conclusion on the resolvability assessment. Notably, the part on "preferred resolution strategy" comprises both the choice of strategy itself, and the calculation of MREL, confirming the relevance of the link between the two and also that, as noted above, MREL is part of the resolution plan (in accordance with Article 8(9)(o) SRMR).

179. A second general consideration of the Appeal Panel is that a comparison between the summaries facilitated with the First Contested Decision and the Second Contested Decision, shows that some contents of the summary are replicated from one cycle to another, but some contents also vary from one cycle to another. Notably, in general terms the contents of the summary for the 2022 cycle are more specific and detailed than the contents of the 2021 summary. This shows that Board understands not only the need to make robust methodological choices, but to explain those choices in a clear manner as well.

180. As a more specific consideration for the "preferred resolution strategy" the summary of the resolution plan highlights, first, the material adverse impact that the failure of the group under domestic insolvency law would have in the local and European financial system, and, second, that the preferred resolution strategy is a Single Point of Entry (SPE) at the parent entity level, including the application of the bail-in tool. The summary of key elements provided in 2021

stopped there, adding no further detail. The summary of key elements provided in 2022, however, also adds that no variant strategies have been yet identified for the group, and further analysis is considered necessary to consider the possibility of complementary tools.

181. The comparison between the summaries in 2021 and 2022 shows that there has been progress in the Board's explanation of its choice of resolution strategy. However, in the Appeal Panel's view, this progress is still insufficient to the purposes discussed herein, for two main reasons.

182. First, this part of the summary is drafted in very general or abstract terms, which do not explain the choices made in light of concrete factors specific to the group. By way of contrast, the summary is more detailed, and, importantly, more group-specific in other parts. Notably, the section on financial/operational continuity in resolution, in its part on liquidity and funding makes reference to the exercises conducted by the group to map the set-up and liquidity connections between entities, and in its part on operational continuity makes reference to very concrete areas. The resolvability assessment provides a breakdown of the aspects where the group has made most progress, and those where it has shown least progress.

183. In contrast, the explanation of the resolution strategy remains considerably high-level and does not refer to any relevant features of the group. There is no attempt to link the choice of resolution strategy, or the lack of identification of a variant, to aspects such as the ones included under the strategic analysis, or the resolvability assessment, or to any of the group-specific elements included in the summary of key elements.

184. Second, the explanation of the resolution strategy makes no reference to the process leading there, nor to the interactions between the Board and the group, where such choice was explained or discussed. In contrast, by way of example other parts of the summary of key elements highlight the fact that the banking group worked to develop a methodology at the request of the IRT (for example, in the case of liquidity and funding) or that "the IRT extensively interacted with the Bank, through a number of dedicated workshops and calls" (Operational continuity), or that "the IRT agreed with the Group" on a specific course of action (access to FMIs).

185. This second aspect is important because, as acknowledged by the Board in its documents, the work on resolvability "is an iterative process between the SRB and banks" (SRB Expectations for Banks, 2020, p. 8), a quote that is also found in the formal, high-level communications between the Board members and the group (see, e.g., the reference "[.]" in the cover letters to communicate the joint decision on the group resolution plan). One of the arguments relied upon by the Board in its written submissions, as well as in the oral hearing, is that the banking group was well aware of the choices made by the Board as regards the resolution strategy, and the reasons for it, because such aspects had been extensively discussed during various workshops, calls, and information exchanges. The Appeal Panel believes that this is an important aspect. In fact, the documentation provided by the Board in this appeal shows a regular and assiduous interaction between the Board and the group, including presentations in

workshops and high-level meetings (see, e.g., the presentations of the application of MREL of [.] or [.], the presentation on resolution planning of [.], or the presentations for the IRT Workshops on MREL Policy, of [.], and [.]) or exchanges of correspondence, both at a technical level (see, e.g., the exchanges of communication between [.]), and at a high level (see, e.g., the communication by the Appellant of [.] and the response by the Board, in the person of its Chair and the responsible Board member, of [.]). These show that the Board, far from detached, acted in an engaged and conscientious manner.

186. However, to be fully in line with the legal requirements and due legal process the intense process of dialogue and cooperation (regardless of whether the parties agree or disagree) must find expression and continuity in the decision itself, and in the summary of the resolution plan if, and to the extent that this is the instrument used to explain how and where the Board has made a "full assessment" of the relevant elements. In the Appeal Panel's view, unlike the Right to be Heard Assessment Memorandum which is a specific annex of the MREL decision, all previous communications lack a clear legal status without a proper formal acknowledgement and indeed, some of the Board presentations include ample disclaimers stating that they are not intended to create any binding legal effects (see, e.g., MREL Policy presentation of [.]; or IRT workshop presentations of [.] and [.]).

187. Even if these previous interactions, put together, could hypothetically create binding effects, based on the principle of the protection of legitimate expectations, in the Appeal Panel's view the requirement under Article 12d(8) SRMR of a statement of reasons including the full assessment of the relevant elements requires that the results of all those interactions - which are relevant for the MREL decision - expressly and clearly result from the MREL decision itself and accompanying documents. The content need not be as detailed as that of specific interactions, but if the aim is to incorporate the substance of such interactions as part of the assessment and statement of reasons, there must be a formal acknowledgement of such interactions, and their content.

188. The Board appears to understand this need to accompany substance with form, and other parts of the summary of the resolution plan attached to the MREL decision show such continuity between the interactions and the decision, which makes explicit reference to those interactions. In contrast, when it comes specifically to the relevant determinations for the calculation of MREL, including the resolution strategy, the interactions between the group and the Board do not find the necessary expression in the MREL decision, which remains too high-level on those aspects to be sufficient.

189. As an additional consideration, even though the more intense interaction during MREL determination takes place between the Board and the credit institution, the Board also has a regular interaction with the competent supervisory authority, in this case the ECB. In fact, the interaction with the ECB informs certain assessments to the MREL amount, such as the potential adjustments to the default level set for the Market Confidence Charge (MCC) as discussed under the second limb of the second ground of this first sub-appeal (analysed under

letter (B). To the extent that this interaction is relevant, its results should also be reflected in the Board's statement of reasons.

190. On this point, the Appeal Panel holds that, indeed, the statement of reasons should have at a minimum succinctly confirmed that the consultation with the ECB and the assessment required pursuant to subparagraph (8) had been made, even if the final determination was that it would not be feasible and credible for a lower amount to be sufficient to sustain market confidence and to ensure the provision of critical economic function and access to funding. Having failed to even take note of the result of the interaction, the Board breached its duty to state its reasons in the Second Contested Decision for its assessment, in consultation with the ECB, on possible downward or upward adjustments of the MCC.

191. In summary, in the Appeal Panel's view the Board has failed to comply with the requirement under Article 12d(8) SRMR, by failing to provide a sufficiently detailed and concrete explanation of how it has made a full assessment of the relevant elements, and/or the process of interaction with the group leading to such assessment, and with the competent supervisory authority.

(ii) The duty to justify the MREL add-on over TLAC under Article 12e (4) SRMR.

192. Under this part of the second ground, the Appellant alleges that the Board failed to adequately make a proper assessment and to state the reasons for the MREL add-on over TLAC. In the first limb of the second ground the Appeal Panel concluded that the Board did not breach the law simply by setting a level of MREL that was higher than the common minimum of the TLAC standard. However, in the Appeal Panel's view, the assimilation for EU G-SIIs to the MREL of the TLAC standard, as set by the Second Contested Decision in accordance with the more general MREL Policy (and its paragraphs 38 and 39), imposed on the Board certain additional obligations.

193. Article 92a of CRR, as amended by CRR II, states, in its Section (1) that:

> Subject to Articles 93 and 94 and to the exceptions set out in paragraph 2 of this Article, institutions identified as resolution entities and that are G-SII entities shall at all times satisfy the following requirements for own funds and eligible liabilities:
>
> (a) a risk-based ratio of 18 %, representing the own funds and eligible liabilities of the institution expressed as a percentage of the total risk exposure amount calculated in accordance with Article 92(3) and (4);
>
> (b) a non-risk-based ratio of 6,75 %, representing the own funds and eligible liabilities of the institution expressed as a percentage of the total exposure measure referred to in Article 429(4).

194. Paragraph (3) of the same provision at the time of the decision (though since deleted by Regulation 2022/2036, of 19 October) stated that:

> Where the aggregate resulting from the application of the requirement laid down in point (a) of paragraph 1 of this Article to each resolution entity of the same G-SII exceeds the requirement for own funds and eligible liabilities calculated in accordance with Article 12a of this Regulation, the resolution authority of the EU parent institution may, after having consulted the other relevant resolution authorities, act in accordance with Article 45d(4) or 45h(2) of Directive 2014/59/EU.

195. The text of Article 12e of the SRMR, as amended by SRMR II (practically identical to the text of the BRRD, as amended by the BRRD II), completes this, by stating in its paragraph (1) that:

> The requirement referred to in Article 12a(1) for a resolution entity that is a G-SII or part of a G-SII shall consist of the following:
>
> (a) the requirements referred to in Articles 92a and 494 of Regulation (EU) No 575/2013; and
>
> (b) any additional requirement for own funds and eligible liabilities that has been determined by the Board specifically in relation to that entity in accordance with paragraph 3 of this Article.

196. Paragraph (3), referred to above, also states that:

> The Board shall impose an additional requirement for own funds and eligible liabilities referred to in point (b) of paragraph 1 and point (b) of paragraph 2 only:
>
> (a) where the requirement referred to in point (a) of paragraph 1 or point (a) of paragraph 2 of this Article is not sufficient to fulfil the conditions set out in Article 12d; and
>
> (b) to an extent that ensures that the conditions set out in Article 12d are fulfilled.

197. Finally, paragraph (4) of this provision states that:

> "Any decision by the Board to impose an additional requirement for own funds and eligible liabilities under point (b) of paragraph 1 of this Article or point (b) of paragraph 2 of this Article shall contain the reasons for that decision, including a full assessment of the elements referred to in paragraph 3 of this Article, and shall be reviewed by the Board without undue delay to reflect any changes in the level of the requirement referred to in Article 104a of Directive 2013/36/EU that applies to the resolution group or the Union material subsidiary of a non-EU G-SII".

198. Thus, the FSB TLAC Principles and Termsheet grant each jurisdiction some leeway on TLAC implementation, in particular on the possibility of topping up TLAC with some additional requirements. However, the provisions of EU law that implement TLAC also state clearly that TLAC and MREL are two (complementary) standards, that G-SIIs can be subject to an "additional requirement", (only) where the common minimum of the TLAC requirement is not sufficient to ensure the objectives of MREL-setting (Articles 45c (1) BRRD II, 12d SRMR II), yet that the decision to impose an additional requirement shall contain the reasons for that decision, including a full assessment of the reasons why the requirement is not sufficient to ensure the objectives and conditions of the MREL-setting objectives, and why the additional requirement ensures the objectives and conditions are fulfilled.

199. The Board translated this legislative choice in its MREL Policy as follows (paragraphs 38 and 39) (emphasis added):

> Resolution entities of EU G-SIIs and material subsidiaries of non-EU G-SIIs are subject to specific MREL requirements. The definition of G-SII entities covers all subsidiaries of all G-SIIs identified by the FSB. They are subject to requirements articulated in a statutory Pillar 1 TLAC requirement set out in Article 92a and 92b CRR, and any potential additional requirement determined by the SRB where the minimum TLAC requirement is deemed to be insufficient for fulfilling the conditions of MREL calibration set out in Article 12d SRMR. In addition, Article 72e CRR extends the existing deduction regime for own funds instruments to eligible liabilities items for G-SII entities that are identified as resolution entities. The rules for calculating the precise amounts that must be deducted are fully harmonised in CRR.
>
> The SRB sets an additional requirement where the requirement set out in Article 92a and 92b CRR is lower than general MREL calibration (LAA+RCA) based on Article 12d SRMR. The additional requirement should be equal to the difference between the two. The possible addition helps ensure that all resolution groups are capable of absorbing losses and being recapitalised in line with the provisions set out in Article 12d SRMR, as for non-GSIIs; the resolvability rationale underpinning the calibration of the LAA and RCA does not differ between G-SIIs and non-G-SIIs. Thus, with this policy, the SRB implements current principles of MREL calibration for EU G-SIIs established in the Banking Union, in alignment with the approach of other FSB jurisdictions to set requirements on loss-absorbing resources at a level potentially higher than the minimum TLAC defined in the TLAC term sheet.

200. Recital (3) of the Second Contested Decision applies this approach by stating that (i) the entity is a G-SII or part of a G-SII, (ii) that the TLAC requirement under Article 92a CRR II is insufficient to fulfil the conditions under Article 12d SRMR II, and that, (iii) as a result, the resolution authorities have decided to impose additional MREL to ensure the fulfilment of these criteria.

201. Although the First Contested Decision offered no further justification, this was, as stated above, superseded by the Second Contested Decision, which contains a more elaborate Section V, with the Assessment Memorandum on the Right to be Heard. Specifically, in Section V question number 2, concerning section 3 of the MREL decision, contains a justification of the MREL-TLAC add-on. Yet, this explanation states that (i) Article 92a CRR establishes a Pillar 1 'floor', (ii) that MREL constitutes a 'Pillar 2' exercise, (iii) that the Board must apply Article 12d (2) and (3) SRMR to all banks, G-SIIs or not, and that, as a result, an additional requirement results when MREL is higher than TLAC. It is apparent that this justification mirrors the one used in the MREL Policy, according to which "the resolvability rationale underpinning the calibration of the loss absorption amount (LAA) and recapitalisation amount (RCA) does not differ between G-SIIs and non G-SIIs".

202. This justification of the MREL add-on is, in the Appeal Panel's view, not fully in line with the requirements of the SRMR. Imposing an additional MREL add-on is, as mentioned above, and siding here with the Board, permitted by the FSB TLAC Principles and Termsheet already cited, as well as by the CRR II, BRRD II, and SRMR II. However, that TLAC calibration can

only be based upon an individual and specific assessment of the given circumstances of each case. For this reason, in the Appeal Panel's view, the MREL Policy – where it indicates that the MREL add-on always equals MREL minus TLAC – may have misguided the Board in adopting in the Second Contested Decision an insufficient statement of reasons which fails to explain why in the specific and individual case of BNP Paribas an additional MREL add-on had to be imposed.

203. In other words, the argument made by the MREL Policy and followed by the Second Contested Decision is circular, and the inevitable conclusion is that, to the Board, MREL appears to be the only relevant standard. The Board supports this argument by stating that the "calculator" of Article 12d paragraphs (3) SRMR is the same for all entities, G-SIIs or not. This is tantamount to stating that Article 12d(3) SRMR, through its common methodology, somehow rules out the possibility of reading Article 12e SRMR, which states that an MREL add-on shall be imposed only when the conditions of Article 12d SRMR are fulfilled, as allowing a separate TLAC-MREL methodology for G-SIIs. Even if, absent a court decision, there is no authoritative interpretation of the interplay between Articles 12d and 12e SRMR, it is hard for the Appeal Panel to read Article 12d(3) SRMR in the deterministic way proposed by the Board. The provision imposes the elements of the concrete methodology, i.e., the LAA, the RCA, as well as the possibility of adjustments, such as the Market Confidence Charge (MCC). Yet, that does not lay out the methodology to calculate these elements for G-SIIs or entities that are not G-SIIs. The fact that the Board had to develop a methodology of its own is testimony that the SRMR sets certain conceptual elements for the methodology, which are common, but does not go as far as to dictate such methodology, nor does it state whether the methodology should be the same for G-SIIs and other banks.

204. For the same reason, in the Appeal Panel's view it is lawful to decide, yet on a case-by-case basis, to apply the same MREL methodology for G-SIIs and entities that are not G-SIIs. However, the Board takes its emphasis on consistency one step further, and, in the Appeal Panel's view, one step too far, by insisting that the only justification needed for the MREL add-on over TLAC is that MREL is higher than TLAC. This is, in the Appeal Panel's view, not in line with what Article 12e SRMR requires. The Appeal Panel sides on this with the Appellant. If the Board makes no distinction between G-SIIs and no G-SIIs, it becomes hard to understand why the SRMR has created a provision specific to G-SIIs (such as Article 12e SRMR) in the first place, instead of simply relying on Article 12d SRMR.

205. For the sake of clarity, the Appeal Panel cannot decide whether having two standards, TLAC and MREL, is a wise decision or not. However, once TLAC has been incorporated and acknowledged as a separate "standard" by the FSB and translated into law by the co-legislators, it has to be acknowledged as such. The SRMR, the BRRD and the CRR explain in their recitals that TLAC and MREL are *two* standards that should be *"complementary elements of a common framework"*, and Article 12e of SRMR (and Article 45d BRRD) states that the way to do so is by imposing MREL *only* when TLAC does not ensure the objectives

pursued by MREL, and by specifically justifying why TLAC, in the given circumstances of each individual case, does not fulfil those objectives. In such an assessment, the SRB needs to engage not only with arguments concerning the commonalities in the resolvability rationale between EU G-SIIs and non G-SIIs, but also with the approach to add-ons to TLAC followed in other jurisdictions with respect to non-EU G-SIIs, not only because different approaches may have implications for the competitive level playing field at a global level, but also because this offers a clear indication that the equation "across the board" between MREL and TLAC (plus a ''one-size-fits-all'' add-on) is not the only possible outcome of an individual assessment of G-SIIs' resolvability. Emphasizing the need to avoid double standards for EU G-SIIs and other EU banks may have some merit. However, it does not explain the insufficiency of TLAC in a manner that fulfils the specific requirements of Article 12e SRMR. TLAC tries to ensure a level playing field among G-SIIs, and not just between G-SIIs and the rest of the banks, and there is no specific reference to these or other factors.

206. The Board appears to acknowledge that the presence of the TLAC standard means something more than a statement that MREL is higher. In its written response, and during the oral hearing for example, the Board stated that the Appellant does not have MREL levels substantially higher than other G-SIIs, and in fact has relatively low levels compared to other G-SIIs. In some of the communications between the Board and the Appellant different factors of TLAC are discussed. This is notably the case in the letter from the Appellant of 5 August 2020 and the Board's response of 28 August 2020. The response includes an Annex with Technical remarks. These technical remarks not only mention the fact that the portion above TLAC (i.e., resulting from MREL) applies to all EU G-SIIs, but also discuss the relevance of factors such as RWA density or balance sheet volatility. Again, it is unclear whether these factors have any bearing in the calculation of the MREL add-on for the Appellant because the letter does not make the link explicit, but they could help, if sufficiently expanded, to justify why the MREL add-on is justified, as well as the factors that should be considered when making inter-G-SIIs comparisons. Yet, as already stated in the previous point, the lack of continuity and formal expression of these arguments in the Second Contested Decision, including its Section V on the Right to be Heard means that the Board did not include them as part of its formal justification of the rationale for the MREL add-on. As already indicated above, by merely indicating that MREL applies to all entities, and that its levels are higher than TLAC's the Board did not, in the Appeal Panel's view, fulfil the requirement of Article 12e(4) SRMR.

207. In conclusion, the Board has breached its duty to offer with the Second Contested Decision a specific, individual and concrete justification for the imposition to the Appellant of an additional MREL add-on, pursuant to Article 12e(4) SRMR.

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

208. Under the third ground of the first sub-appeal the Appellant submits that the Board "committed manifest errors of assessment in the determination of MREL and breached the principle of good administration" by failing to examine carefully and impartially all the elements of the

situation, as it failed to take into account the “post-resolution group”, for purposes of the calculation of the recapitalisation amount.

209. The arguments put forward by the Appellant largely replicate, in substance, the arguments under the first limb and the third limb of the Appellant’s second ground of appeal of the first sub-appeal, where the Appellant submits that the Board failed to take into account the post-resolution group for determining MREL (first limb) and that it failed to examine carefully and impartially all the relevant elements, as required specifically by Article 12d(8) SRMR, and under Article 12e(4) SRMR.

210. The Appeal Panel has considered these arguments in detail under the first and third limb of the second ground of the first sub-appeal. Therefore, under the present ground, the Appeal Panel refers to the assessment made and conclusions reached therein, which justify the dismissal of the ground.

(4) The fourth ground of appeal of the first sub-appeal: the principle of the protection of legitimate expectations.

211. Under the fourth ground of appeal of the first sub-appeal the Appellant submits that the Board failed to apply several provisions of its own MREL Policy and thus violated the principle of legitimate expectations.

212. The Board, for its part, submits that it correctly applied the MREL Policy, but that the MREL Policy does not fetter the Board’s discretion because the MREL Policy did not contain any precise, consistent and unconditional assurances, and it could not be relied upon for any legal purposes.

213. The principle of legitimate expectations presupposes that precise, unconditional and consistent assurances, originating from authorised, reliable sources, have been given to the person concerned by the competent authorities of the European Union (judgment of 16 July 2016, Tadej Kotnik and Others, C-526/14, ECLI:EU:C:2016:570, or judgment of 6 October 2021, Ukrselhosprom Versobank v ECB, T-351/18 and T-584/18, ECLI:EU:T:2021:669 paragraphs 357-361). When such precise, unconditional and consistent assurances are received from an institution, body or agency of the European Union, the addressee can entertain well-founded expectations (judgments of 16 December 2010, Kahla Thüringen Porzellan v Commission, C-537/08 P, EU:C:2010:769, paragraph 63, and of 13 June 2013, HGA and Others v Commission, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 132).

214. Thus, the case-law of European courts on the principle of the protection of legitimate expectations contemplates, in the first place, requirements such as the existence of "precise, unconditional and consistent assurances” originating from “authorised and reliable sources”, so as to create legitimate expectations, and consistent with the applicable rules (see judgments of 17 March 2011 in AJD Tuna, C-221/09, ECR, EU:C:2011:153, paragraphs 71 and 72; of 14 March 2013 in Agrargenossenschaft Neuzelle, C-545/11, ECR, EU:C:2013:169,

paragraphs 23 to 25 and the case-law cited; of 18 June 2010 in Luxembourg v Commission, T-549/08, ECR, EU:T:2010:244, paragraph 71; and of 27 September 2012 in Applied Microengineering v Commission, T-387/09, ECR, EU:T:2012:501, paragraphs 57 and 58 and the case-law cited, as well as judgment of the General Court of 7 October 2015 in Accorinti v ECB, T-79/13 ECLI:EU:T:2015:756 at paragraph 75). The Courts have, in the second place, held that "when a prudent and circumspect economic operator is able to foresee the adoption of an EU measure likely to affect his interests, he cannot rely on that principle if the measure is adopted. Nor can economic operators have a legitimate expectation that an existing situation which is capable of being altered by the EU institutions in the exercise of their discretion will be maintained", especially in areas the subject-matter of which is constantly being adjusted according to variations in the economic situation (see *Accorinti v ECB* at paragraph 76, and authorities cited therein).

215. However, European courts have also explicitly acknowledged the situation where institutions, bodies or agencies have chosen to adopt guidelines or similar instruments to guide their actions. For example, in judgment of 16 July 2016, Tadej Kotnik and Others, C-526/14, ECLI:EU:C:2016:570 where the relevant instrument was the Commission Banking Communication, and its requirement of burden-sharing, the Court held, in paragraphs 40-41 of its judgment that:

> (40) In accordance with settled case-law, in adopting such guidelines and announcing by publishing them that they will apply to the cases to which they relate, the Commission imposes a limit on the exercise of that discretion and cannot, as a general rule, depart from those guidelines, at the risk of being found to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (judgment of 8 March 2016, Greece v Commission, C-431/14 P, EU:C:2016:145, paragraphs 69 and 70 and the case-law cited).
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> (41) That said, the Commission cannot waive, by the adoption of guidelines, the exercise of the discretion that Article 107(3)(b) TFEU confers on it (see, to that effect, judgment of 8 March 2016, Greece v Commission, C-431/14 P, EU:C:2016:145, paragraph 71). The adoption of a communication such as the Banking Communication does not therefore relieve the Commission of its obligation to examine the specific exceptional circumstances relied on by a Member State, in a particular case, for the purpose of requesting the direct application of Article 107(3)(b) TFEU, and to provide reasons for its refusal to grant such a request (judgment of 8 March 2016, Greece v Commission, C-431/14 P, EU:C:2016:145, paragraph 72).

216. Thus, in the Appeal Panel's view, once it adopted its MREL Policy, as the Commission when adopting the Banking Communication, the Board imposed a limit on the exercise of its discretion, and could not, as a general rule, depart from those guidelines, at the risk of being in breach of principles such as equal treatment or the protection of legitimate expectations. This being said, the adoption of the MREL Policy did not relieve the Board of the obligation to examine specific circumstances, if this was required by the law. Indeed, as acknowledged by that case-law, the assurances should be "consistent with the applicable rules" for the expectations to be actionable, i.e., expectations may be created beyond what the law says, but not against it.

217. In the present case, the Appeal Panel considers that the MREL Policy did not create legitimate expectations beyond what the law says. The text of the SRMR provides that the calculation of the RCA shall be made taking into account the actions contemplated in the resolution plan. Paragraphs 23 and 26 of the MREL Policy, referred to by the Appellant, as well as paragraph 25 of the same policy, state that:

> "23. **The SRB may apply bank-specific adjustments related to balance sheet depletion, binding restructuring plans and recovery options.** The SRB will allow, on a bank-by-bank basis with due justification, adjusting downwards the projected TREA post-resolution that serves as a basis for determining the RCA of the MREL-TREA, including the market confidence charge. The same adjustment would apply for determining the RCA of the MREL-LRE.
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> […]
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> **25. Divestments and sales firmly embedded in a going-concern divestment/restructuring plan may warrant an adjustment in RCA**. To this end, they may include the removal of riskier assets with associated higher risk weighting from the balance sheet through mandatory deleveraging actions. If actions as formulated in going-concern divestment and restructuring plans are legally binding and time-bound, the SRB may take into account the possible impact of these actions on the parameters that are used for determining the RCA of MREL.
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> **26. The SRB may apply downward adjustments based on recovery options, but only in exceptional cases and subject to conditions.** Provided the SRB assesses actions for implementing these options as (i) credible and feasible in accordance with Article 12d(3) SRMR; (ii) implementable immediately in resolution; and (iii) having a positive impact in any loss scenario, then such measures may be eligible, subject to a case-by-case assessment. The SRB will consider the effects of such measures on the TREA/LRE of the post-resolution bank balance sheet up to a reduction equal to 5% of TREA, when determining the RCA of MREL".

218. The downwards adjustment of the RCA based on recovery options, divestments, restructurings plans is contemplated as a possibility, but subject to conditions, and, in the case of recovery options, in "exceptional cases". Thus, the Board states how it intends to apply its discretion. However, as stated in the first limb of the second ground of this first sub-appeal (under point (2) (A) (i)) the Appeal Panel acknowledged that the SRB MREL Policy under the Banking Package of May 2021 (applicable "ratione temporis" to the Second Contested Decision) may have contributed to the disagreement between the Appellant and the SRB as to the "adjustments related to balance sheet size" (as described at section 2.4.1., for all strategies). By referring to "bank-specific adjustments related to balance sheet depletion, binding restructuring plans and recovery options" without expressly requiring that the bank-specific adjustments described in the MREL Policy be contemplated in the resolution plan.

219. Although the Appeal Panel concluded that a contextual and teleological interpretation could confirm that those adjustments should be contemplated in the resolution plan to account for MREL adjustments, the MREL Policy made the issue ambiguous, by failing to mention this issue specifically.

220. Thus, rather than creating a legitimate expectation, the MREL Policy created an ambiguity, and thus placed on the Board the burden of solving the ambiguity by means of an adequate justification. The Appeal Panel has already concluded, on the third limb of the second ground of this first sub-appeal (in point (2) (C) (i)) above) that the explanation of the resolution strategy provided by the Board in the MREL decision, and the summary of the resolution plan referred to in such decision was insufficiently specific, and did not adequately incorporate in the decision the process leading there in a way that could be considered sufficient to discharge the Board's duty to state reasons.

221. In conclusion, there are no grounds to conclude that the Board breached the principle of the protection of legitimate expectations. The Appeal Panel therefore sides with the Board on that particular point. The ambiguity resulting from the MREL Policy constitutes a different issue relevant to determine the Board's compliance with its duty to provide reasons for its decision, including a full assessment of the relevant factors, and has been assessed by the Appeal Panel under those grounds.

(5) The fifth ground of appeal of the first sub-appeal: proportionality, property and freedom to conduct a business

222. Under the fifth ground of appeal of the first sub-appeal the Appellant submits that the Board has breached the principle of proportionality, the right to property and the freedom to conduct a business. The Appellant submits that these principles have a fundamental nature under EU law, and that they have been expressly incorporated within the framework of the SRMR, and then argues that, by determining MREL in a simplistic manner based solely on the pre-resolution group (save for one change of balance sheet depletion, not related to any specific resolution action), and failing to assess and take into account the likely size and profile of the Appellant's group post-resolution in such determination, the SRB has set an amount of MREL that is disproportionate in light of resolution objectives, and thus violates those principles. In the Appellant's view, the need to maintain an extremely significant amount of MREL is an interference with property and the freedom to conduct a business, disproportionate in light of the MREL objectives, considering that the institution is already subject to the TLAC requirement. In the Appellant's view the MREL amount would have satisfied this requirement if the RCA and MCC had been calculated based on the most likely balance-sheet size and profile of the post-resolution entity, including some recovery actions taken prior or at resolution, but not in the absence of such an assessment. To the Appellant, there is no credible scenario in which the exceedingly high level of MREL imposed by the SRB would be of use to achieve the objectives of continuity and financial stability, which means that the MREL amount set is arbitrary.

223. The Board does not contest the fundamental nature of the general principles of EU law, nor the fact that they form part of the SRMR. However, the Board submits that principles such as the right to property and the freedom to conduct a business are not absolute, and can be subject to proportionate limits by legislation that pursues objectives of general interest. The Board

elaborates on these objectives, adding that the levels of MREL are necessary to achieve the objectives set forth in the resolution framework, and this is so especially in the case of credit institutions, which are a special kind of institution, and even more so in the case of G-SIIs, to avoid the too-big-to-fail problem, and that the legal framework provided by the SRMR ensures that the interference with property is proportionate. On the principle of proportionality, the Board submits that it must be reconciled with the discretion conferred on EU institutions, agencies and bodies, which, in the case of MREL, is justified by the technical nature of the exercise, which, in the Board's view, is subject to limited review. Finally, the Board points that the MREL levels of the Appellant are lower than those of other G-SIIs; in fact, among the lowest. On the freedom to conduct a business, the Board mostly reiterates the arguments made in relation to the right to property and the principle of proportionality.

224. As a basis to analyse the compatibility of the measures being challenged and the right to property, freedom to conduct a business, and the principle of proportionality, the Appeal Panel preliminarily acknowledges that:

(i) these are fundamental principles under EU law, as acknowledged by Articles 16 and 17 of the Charter of Fundamental Rights of the European Union, Article 5 of the Treaty of the European Union (TEU), and, as better specified below under (iii), the case-law that applies the principle of proportionality to determine whether the interference with a fundamental right (comprising the right to property and the freedom to conduct a business) is lawful;

(ii) they have been expressly incorporated in the SRMR in the following recital (121):

> (121) "This Regulation respects the fundamental rights and observes the rights, freedoms and principles recognised in particular by the Charter, and, in particular, the right to property, the protection of personal data, the freedom to conduct a business, the right to an effective remedy and to a fair trial and the right of defence, and should be implemented in accordance with those rights and principles".

(iii) the right to property and the freedom to conduct a business are not absolute, and their exercise may be restricted, provided that those restrictions comply with the conditions of Article 52(1) of the Charter of Fundamental Rights of the European Union, which states that: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others". The case-law of European courts has also analysed such restrictions, providing that they must correspond to objectives of public interest pursued by the European Union and cannot constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of that right (see judgment of 20 September 2016, Ledra Advertising and Others v Commission and ECB, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraphs 69 and 70 and the case-law cited).

225. Furthermore, as pointed out by the Board, credit institutions and financial services in general, are special businesses. As stated by the Court of Justice in judgment of 16 July 2016, Tadej Kotnik and Others, C-526/14, ECLI:EU:C:2016:570:

> (50) As regards the adoption of points 40 to 46 of the Banking Communication on the basis of that provision, it must be observed that financial services play a central role in the economy of the European Union. Banks and credit institutions are an essential source of funding for businesses that are active in the various markets. In addition, the banks are often interconnected and a number of them operate internationally. That is why the failure of one or more banks is liable to spread rapidly to other banks, either in the Member State concerned or in other Member States. That is likely, in its turn, to produce negative spill-over effects in other sectors of the economy.

226. The European courts have acknowledged that safeguarding financial stability, avoiding contagion, protecting taxpayers money, or limiting moral hazard, among others, are objectives of general interest, which can justify an interference with the right to property or freedom to conduct a business (see *Ledra Advertising* above, at paragraphs 71-72, or judgment 10 July 2012, European Court of Human Rights (ECtHR) Grainger and Others v, United Kingdom, CE:ECHR:2012:0710DEC003494010, paragraphs 39 and 42; see also judgment of 8 November 2016, Dowling and Others, C-41/15, EU:C:2016:836, paragraphs 51 and 54; judgment of 21 July 2016, Mamatas and Others v. Greece, CE:ECHR:2016:0721JUD006306614, paragraph 103, and judgment of 13 July 2018, Chrysostomides, T-680/13, ECLI:EU:T:2018:486, paragraphs 255-256).

227. European courts have justified regulatory or supervisory measures that resulted in relevant interferences, duly pondering and balancing concrete interests at stake. In *Adusbef* (judgment of 16 July 2020, OC, Adusbef and others v Banca d'Italia, C-686/18, ECLI:EU:C:2020:567) the Court considered lawful legislative measures consisting in imposing a threshold for the assets of people's banks constituted as cooperatives, and where the shares were subject to redemption. Cooperative banks with assets above the threshold could only divest, liquidate, or convert into companies limited by shares, or face sanctions and supervisory measures (including a ban on new operations, or the revocation of the authorisation). The Court reasoned as follows:

> (88) The essence of the freedom to conduct a business, guaranteed by Article 16 of the Charter, and of the right to property under Article 17 thereof is respected by national legislation, such as that at issue in the main proceedings, providing for the ability to limit the redemption of shares in the event of withdrawal of a shareholder, which is intended to satisfy the condition set out in Article 29(2)(b) of Regulation No 575/2013 so that the shares qualify as Common Equity Tier 1 instruments.
>
> (89) First, that ability does not lead to a deprivation of property and therefore does not constitute interference that undermines the very substance of the right to property. Second, even if it were concluded that that ability limited the freedom to conduct a business, it respects the essence of that freedom since it does not prevent the exercise of banking activities. In that regard, the Court has recognised that cooperative societies conform to particular operating principles, which

> clearly distinguish them from other economic operators (see, to that effect, judgment of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 55).
>
> (90) As regards the objectives pursued by the legislation at issue in the main proceedings, as well as being intended, by providing for that possibility, to implement that condition, the referring court states that the legislation seeks to ensure that the legal form is appropriate to the size of a people's bank as well as compliance with EU prudential rules governing banking activities. According to the referring court, that legislation is thus intended to make the legal form of people's banks more in line with the specific dynamics of the reference market, to guarantee greater competitiveness for those banks and to promote greater transparency in their organisation, operation and functions.
>
> (91) Such objectives, which are capable of ensuring good governance in the cooperative banking sector, the stability of that sector and prudent exercise of banking activities, help to prevent the default of the institutions concerned, or even a systemic risk, and, as a result, help to guarantee the stability of the banking and financial system.

228. In *Kotnik, Dowling, Ledra* or *Chrysostomides* the European courts considered necessary and proportionate crisis management measures that were intrusive, such as the write-down and conversion of capital and debt instruments (these including in some cases non-insured deposits), also in cases where there was no specific European statutory text to expressly contemplate them, as there is now with the BRRD and the SRMR.

229. Unlike the relatively drastic measures in those cases, in the present case the measures involved are preventative in nature, as the setting of MREL levels is, and based on a detailed and harmonised European framework.

230. In this setting, the Appellant has not alleged that the SRMR provisions are unlawful for being contrary to the right to property, the freedom to conduct a business, or the principle of proportionality, and, in any event, such a decision of illegality would fall outside the Appeal Panel's remit and is reserved by the Treaties to European courts only. Thus, as stated by recital (121) of the SRMR, "this Regulation respects the fundamental rights", and an MREL determination in compliance with the SRMR should respect those principles.

231. Under this premise, if the Appellant's claim is that, by breaching the SRMR the MREL determination also breached general principles such as the right to property, the freedom to conduct a business, or the principle of proportionality, then this plea is subsumed in the pleas of illegality, manifest error, or the lack of an objective assessment, or the lack of an adequate statement of reasons. The Appeal Panel has already analysed these under the first and especially the second ground of this appeal and refers therefore to the conclusions reached in that part of the present decision. The ground must therefore be dismissed.

232. If the Appellant's claim is interpreted as an independent claim, i.e., that even if complying with the SRMR the Board's determination of MREL would be unlawful for being contrary to the right to property, the freedom to conduct a business or the principle of proportionality, the

claim cannot succeed either. The Appellant claims that, by determining MREL in a simplistic manner based solely on the pre-resolution group and failing to take into account the post-resolution group the Board set an MREL level that was disproportionate, and thus violates the principles referred to above. However, the "simplicity" of the Board's assessment cannot be the guiding principle. The Appellant is also subject to the TLAC standard, whose common minimum is set in an even simpler manner, at a minimum level of 18% of TREA, which does not take into account the entity's post-resolution balance sheet, nor its individual capital requirements. Yet, the Appellant does not object to its being subject to TLAC. In fact, it argues that it is the fact that its MREL levels are above the common minimum of TLAC level that renders such MREL levels disproportionate.

233. Finally, if the Appellant's claim were interpreted as indicating that the TLAC sets the threshold of what is proportionate, and by deviating from it, the Board breached the principle of proportionality, then the Appeal Panel reiterates what it has stated before (under the first limb of the second ground of this sub-appeal), and namely that the Board is entitled to set an MREL add-on over TLAC, as contemplated in the TLAC provisions themselves (and the FSB TLAC Principles and Termsheet), and thus the fact that the Board determined MREL levels higher than TLAC cannot be considered per se against the law, nor against the principle of proportionality. The Appeal Panel also held however, under the third limb of the second ground of this sub-appeal, that such MREL add-on may be imposed if a specific and individual justification is offered, and that such requirements had not been fulfilled by the Board in the instant case.

234. Thus, and for all relevant legal purposes, the Appellant has failed to demonstrate that the MREL level set by the Board was disproportionate under a yardstick different from the methodological requirements set forth under the SRMR, or that the MREL levels were so high that they did not respect the essence of the right to property or the freedom to conduct a business. For these reasons, the fifth ground must be dismissed.

(6) The sixth ground of appeal of the first sub-appeal: the obligation to state reasons.

235. Under the sixth ground of appeal of the first sub-appeal the Appellant submits that the Board has breached its obligation to state reasons. The Appellant submits that, in addition to the express requirement imposed on the SRB under Articles 12d(8) SRMR and 12e(4) SRMR it is a general principle of EU law, set out in Article 296 of the TFEU, that EU institutions must state reasons for any decision, and must do so in the decision itself.

236. The Board submits that it complied with the duty to state reasons because it set out the facts and the legal considerations having decisive importance in the context of the decision, and because the reasons were sufficient because the decision was adopted in circumstances known to the Appellant, i.e., in the context of the RPC, and the successive exchanges between the parties, circumstances that enabled it to understand the scope of the measure concerning it. According to the Board, the duty to state reasons must also be weighed against practical

realities, such as the presence of a consistent decision-making, or the publication of a methodology, such as the one present in the MREL Policy.

237. In its judgment of 15 July 2021, European Commission and others v Landesbank Baden-Württemberg, C-584/20 P, ECLI:EU:C:2021:601 the Court of Justice dealt with the standard applicable to the statement of reasons required from the Board in the following manner:

> (103) The statement of the reasons for the decision of an EU institution, body, office or agency is particularly important in so far as it allows persons concerned to decide in full knowledge of the circumstances whether it is worthwhile to bring an action against the decision and the court with jurisdiction to review it, and it is therefore a requirement for ensuring that the judicial review guaranteed by Article 47 of the Charter is effective (see, to that effect, judgments of 9 November 2017, *LS Customs Services*, C-46/16, EU:C:2017:839, paragraph 40, and of 24 November 2020, *Minister van Buitenlandse Zaken*, C-225/19 and C-226/19, EU:C:2020:951, paragraph 43 and the case-law cited).
>
> (104) It is also clear from the Court's case-law that the statement of reasons must be adapted to the nature of the legal act at issue and to the context in which it was adopted. In that regard, it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons is sufficient must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question and, in particular, in the light of the interest which the addressees of the act may have in obtaining explanations. Consequently, the reasons given for an act adversely affecting a person are sufficient if that act was adopted in a context which was known to that person and which enables him to understand the scope of the act concerning him (see, to that effect, judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 122 and the case-law cited).

238. In that case, the Court of Justice set aside the judgment of the General Court, which had previously annulled the Board decision setting *ex ante* contributions, declaring that such contributions were set in accordance with applicable legislation, and thus duly reasoned, since the Board calculated such contributions balancing the relative position of private operators, which justified a limited disclosure of information. The precedents of the Appeal Panel on the requirement of the statement of reasons are fully in line with *Landesbank Baden-Württemberg.*

239. The Appeal Panel has considered in detail under the third limb of the second ground of the first sub-appeal the arguments concerning the justification by the Board of its MREL calculation, including the RCA under Article 12d(8) SRMR, as well as the more specific justification of the MREL add-on on TLAC, under Article 12e(3) SRMR. In that limb the Appeal Panel has weighed the need for a justification that enables the Appellant to understand the reasons for the decision, highlighted by the Appellant, against the relevance of context, including the fact that the justification of the MREL calculation was made within the framework of the RPC, following the MREL Policy released by the Board, and accompanied by a more specific reasoning under the Right to be Heard, as highlighted by the Board. In light of these considerations, the Appeal Panel has indicated where the Board's justification was sufficient, and where it was insufficient, and thus did not comply with the duty to state reasons.

Since all the relevant elements regarding the statement of reasons were considered under that third limb, the Appeal Panel refers, for purposes of this ground of appeal, to the considerations made therein.

(7) The seventh ground of appeal of the first sub-appeal: the Right to be Heard.

240. Under the seventh ground of appeal of the first sub-appeal the Appellant submitted that the Board breached its Right to be Heard. The Appellant's arguments referred to the First Contested Decision, specifically the Section dedicated to the Right to be Heard, where the Board replied to a large number of observations by merely stating that the comments provided by the Appellant "are to be understood as referring to the implementation of Level 1 text (BRRD2) in the SRB MREL Policy and therefore not subject to the Right to be Heard proceedings", as they could not be considered factual elements. Yet, as stated before, the Second Contested Decision superseded the First Contested Decision, rendering the appeal over that First Contested Decision moot.

241. In its modification of appeal the Appellant acknowledged that, in Section V (Right to be Heard Assessment Memorandum) of the Second Contested Decision, the Board expanded in certain respects on its observations when compared with the First Contested Decision, but objected that the longwinded nature of the responses did not change the fact that the Board ultimately disregarded the comments and factual elements put forward by the Appellant, without providing any valid reason for doing so, on the basis of arguments that were circular, irrelevant or non-responsive.

242. The Board, for its part, acknowledges that the Right to be Heard guarantees every person the opportunity to make known its views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely, in order to enable the competent authority effectively to take into account all relevant information, thus enabling the person affected by the decision to correct an error or submit such information relating to his or her personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content. The Board submits however that, in the Second Contested Decision, the comments made by the Appellant were duly taken into account, whether factual or not.

243. The Appeal Panel notes that the Right to be Heard obviously does not confer a right to have the authority change its decision, or even change its justification. It only imposes a duty to the authority to let the voice of the person addressed by the decision be heard and his or her views be fairly and duly taken into consideration in reaching the final determination and its justification.

244. Having carefully examined Section V of the Second Contested Decision the Appeal Panel finds that the Board complied with the Right to be Heard under Article 41 of the Charter of Fundamental Rights of the European Union. The Appellant had a specific opportunity to

convey its opinions on and objections to the Board's assessment of MREL and in the Second Contested Decision each objection or concern raised by the Appellant was specifically addressed. The Appellant's general allegation in the statement of modification of the appeal that the Board's longwinded responses ultimately disregarded the comments and factual elements is insufficiently specific. In its more concrete allegations (paragraph 30 of its amended appeal, letters (a), (b), (c), (d), (e), (f) and (g) thereof) the Appellant does not seem to specifically contest the fact that it had an opportunity to make its objections known, or that the Board replied to those concerns. It objects that the Board's arguments in response to its concern were insufficient, or wrong and/or indicated that the Board had failed to conduct a proper assessment.

245. The Appellant alleges that the Board's response included circular reasoning on the determination of a TLAC add-on, that the explanation of why balance sheet depletion was considered as a resolution action was insufficient, that the decision to consider only "immediate" changes in the bank as relevant for purposes of calculating the recapitalisation amount was legally wrong, and, in any event, inadequately justified, that the calibration of the Market Confidence Charge (MCC) was not properly justified, that the Board's decision that the recovery options presented by the Appellant were not "credible or feasible" meant that the Board had failed to take into account relevant factual elements, that the Board's statement that it disregarded the recovery actions where there was no certainty that they would be available was against the law and an excess of powers, or that, when the Appellant commented about the existence of a large amount of bail-inable liabilities, the Board's response that such liabilities were not MREL-eligible meant that the Board failed to consider a relevant source of loss-absorption. In each case, the Appellant alleges that the Board's conduct breached the law, and/or resulted in a manifest error of assessment, and/or breached the principle of good administration, and/or the principle of proportionality, and/or the protection of legitimate expectations, and/or the obligation to state reasons, not specifically that the Appellant was not heard on these issues.

246. The Appeal Panel has dealt with all the above aspects of substance of the Appellant's claims under the previous grounds, and it fails to see any allegation(s) that cannot be encompassed within those grounds, and that specifically concerns the denial by the Board of the Appellant's Right to be Heard.

247. In conclusion, the Appeal Panel concludes that the Appellant's Right to be Heard was respected. The seventh ground must therefore be dismissed.

(c) The second sub-appeal.

248. With the second sub-appeal against the Second Contested Decision, the Appellant claims that the Board has disregarded its waiver request submitted on 24 January 2022 and, by remaining silent on such a request, the Board breached its obligation to state reasons. The Appellant further argues that, assuming the Second Contested Decision is based on the same reasoning

of the First Contested Decision, which considered the waiver request but rejected it expressly, the implicit reasoning (by implied reference to the First Contested Decision) would be vitiated by the same errors of law and violations of EU law and principles already claimed by the Appellant with the notice of appeal against the First Contested Decision.

249. The Board, in its response, acknowledged that with the Second Contested Decision the Board did not assess whether to award a waiver from iMREL pursuant to Article 12h SRMR for BNP PF because the Appellant did not submit a complete waiver request on time in the context of the 2021 RPC.

250. The Appeal Panel preliminarily wishes to recall the conclusions reached in case 2/2022 on the iMREL waiver request (§§ 106 to 110 of the Appeal Panel's decision of 27 January 2022):

> 106. The Appeal Panel notes that, according to Article 12h and 12i SRMR the SRB "may" waive internal MREL for subsidiary institutions qualifying as non-resolution entities or for affiliated credit institution of a central body if the conditions respectively set out in Article 12h and 12i SRMR are met.
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> 107. The Appeal Panel further notes, as a relevant point of law, that the SRMR does not expressly require a formal application for an iMREL waiver. Article 12h and 12i SRMR, from a textual point of view, provide for that "the Board may waive" the application of the iMREL without a specification that this can occur solely "upon request" or "if the credit institution so requires".
>
> 108. The SRB MREL Policy of May 2021 - applicable at the time of adoption of the Contested Decision, which was 23 March 2022 – stipulates at its section 4.2. that "the SRB may exercise its discretion to grant waivers where the minimum conditions set out in Article 12h SRMR are met and where "the files *sent* to the SRB are complete" and further notes, at footnote 77 of page 25, that "provided that *the complete application* is submitted at an early stage of the resolution planning cycle, the SRB decision as to whether to grant a waiver will be reflected in the MREL decision. If the review is completed outside of the cycle, the SRB conclusion may lead to a revision of the existing MREL decision". The same MREL Policy, of May 2021, further specifies, at § 83, that "*waiver applicants* must demonstrate that there is no impediment to the prompt transfer of own funds or repayment of liabilities" and that "the *bank applying* for an MREL waiver is expected to demonstrate that the loss transfer mechanism between the subsidiary and the resolution entity in place is commensurate with the size of the subsidiary and substitutes the need for a prepositioning of loss-absorbing and recapitalisation capacity, even if the resolution entity itself is in a FOLTF situation". The current MREL Policy, June 2022 edition (adopted after the Contested Decision and thus not applicable in the instant case) also includes identical statements at page 24, text and footnote 76 and at § 83.
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> 109. The Appeal Panel further notes that, according to Article 12g, paragraph (3) SRMR the Board may also permit the iMREL to be met in full or in part with a collateralised guarantee. The Appeal Panel acknowledges therefore that, in the context of Article 12g, paragraph (3) SRMR, the co-legislators may have indeed assumed that the credit institution *makes an application*, because the Board's decision needs to be supported by a collateralised guarantee provided by the resolution entity, and failing such guarantee the Board cannot consider the compliance with iMREL through this alternative means. In this context, therefore, the necessary submission of such document, in the Appeal Panel's view, would clearly imply an active role of the credit institution in asking for the waiver through a request for the waiver duly accompanied by the requisite collateralised guarantee.

> 110. The Appeal Panel finds, however, that the same conclusion cannot be inferred by analogy from Article 12g, paragraph (3) SRMR also for the iMREL waivers permitted pursuant to Articles 12h and 12i SRMR. The conditions to be satisfied under Articles 12h and 12i SRMR are indeed different than those under Article 12g SRMR, and most notably do not require a collateralised guarantee.

251. Consistently, the Appeal Panel finds in the instant case that the Board erred in law, first, in disregarding with the Second Contested Decision the BNP PF's request for a waiver which was dated 24 January 2022 and was submitted on 25 January 2022 and, second, in omitting to state any reason in the Second Contested Decision regarding such a waiver request. The Appeal Panel notes that the waiver request was formally made only one day after the Appellant's answer to the Right to be Heard process and thus at a stage when the Board was still in the process of considering the position of the Appellant to the effect of the decision to be taken on the MREL determination. If a consultation was considered necessary with the ECB, there was time enough to conduct such consultation. Moreover, in the instant case, the waiver request followed previous exchanges between the Appellant and the Board in October 2021 and also followed the rejection of a parallel waiver request in the previous RPC with the First Contested Decision, whose implementation via instructions to the national resolution authority was challenged in case 3/2021, which was already pending on 25 January 2022.

252. The Appeal Panel further notes that, in its decision in case 2/2021 of 27 January 2022 (notified to the Board shortly after the submission of the waiver request in the instant case), the Appeal Panel remitted to the Board an iMREL decision concerning a different credit institution and where the Board had rejected a waiver request. The Appeal Panel found that the statement of reasons of the Board's decision was insufficient. Thus, that Appeal Panel's decision had already signalled to the Board, well ahead of the adoption of the Second Contested Decision, the crucial importance of the statement of reasons when addressing iMREL waivers' requests, and this should have warned the Board against simply disregarding the Appellant's waiver request, without offering any justification in the reasoning of the Second Contested Decision. This is, in the Appeal Panel's view, even more so in the given circumstances of the case at hand, where discussions with the Appellant on this subject had been ongoing for long and an appeal against the decision not to grant the iMREL waiver in the previous RPC was pending.

253. In conclusion, the Board has breached its duty to state reasons for its decision to reject the Appellant's iMREL waiver request for BNP PF of 25 January 2022. The Second Contested Decision needs therefore to be remitted to the Board (also) on this point.

254. Accordingly, in the Appeal Panel's view, the statement of reasons of the amended decision which shall be adopted in compliance with this Appeal Panel's decision shall also carefully address the substantive issue of the terms of the parent guarantee requested by the Board to ensure that there are no legal or factual impediments in the transfer of funds. In so doing, the Board is invited to also duly consider the clarifications given by the Appeal Panel, in its decision of 8 June 2022 in case 3/2021 at paragraphs 111-115:

> 111. (…) [I]f the Appellant had challenged also the substantive legality of the reasons stated by the Board in the Contested Decision, the Appeal Panel could have further addressed those reasons from a different perspective, i.e., whether the Contested Decision was taken on a sufficiently solid factual and legal basis and in particular if the finding that the guarantees would have not survived and remained fully actionable in a "gone concern" scenario was warranted under applicable law.
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> 112. The Appeal Panel further recalls, in this connection, that, according to settled case-law, in the event of a challenge of the substantive legality, it is the task of the competent European authorities to establish that the reasons relied on against the person concerned are well founded, and not the task of that person to adduce evidence of the negative, that those reasons are not well founded (judgments of 18 July 2013, Commission and Others v Kadi, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 121; judgment of 5 November 2014, Mayaleh v Council, T-307/12 and T-408/13, EU:T:2014:926, paragraph 128 and the case-law cited; judgment 30 November 2016, Rotenberg v Council, T-720/14, EU:T:2016:689, paragraph 72).
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> 113. In reviewing substantive legality, moreover, as the Appeal Panel has already acknowledged in its decision in case 2/2021, reference to national law in the context of the assessment of a guarantee (issued under national law) provided to meet the condition of Article 12h(c) SRMR does not transform nor incorporate that national law into EU law. Such national law, in the context of the review of the substantive legality, would be approximated to the factual sphere (and would be checked in the assessment on whether the reasons given had a solid factual basis).
>
> 114. However, as already noted, it is clear from the appeal that the Appellant has not raised a ground of appeal based on the substantive legality of the Contested Decision in fact and/or in law, e.g. it has never alleged a false or mistaken application of European or French law in the assessment of the enforceability of the guarantee in a gone concern scenario, which could also translate into an incorrect assessment by the Board that the condition of letter c) of Article 12h SRMR was not met (see, by way of analogy, Opinion of Advocate General Kokott of 27 January 2011, Edwin Co. Ltd, C-263/09 P, ECLI:EU:2011:C:30, paragraphs 55, 57 and 64). Thus, in the present appeal, the Appeal Panel cannot look at those issues and must limit its review to ascertain if the Board duly fulfilled its obligation to state reasons laid down in Article 296 TFEU as an essential procedural requirement.
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> 115. The Appeal Panel further notes that BNP Paribas' position expressed in the context of the right to be heard phase of the administrative procedure on 24 January 2021 cannot be considered in this context. BNP Paribas' arguments were that the guarantees of 10 July 2015 provided for by BNP Paribas do not contain any restriction related to a failing or likely to fail determination of BNP PF or the entry into resolution of the BNP Paribas and Article 45f(3) BRRD requires a commitment towards competent authorities, and therefore it is not necessary to provide a guarantee which creates an enforceable right of creditors towards the guarantor. Those arguments also clearly pertain to the substantive legality of the Contested Decision and, lacking a plea in this regard from the Appellant, they remain therefore, for overriding procedural grounds, beyond the scope of the appeal.

255. In light of the differences existing between the Second Contested Decision and the First Contested Decision (including its implementing decision instructing the national resolution authority which was appealed in case 3/2021 and is currently discussed in pending case T-540/22, France v SRB), the Appeal Panel considers that the outcome of case T-540/22 does not potentially influence the outcome of the present appeal and that, therefore, there is no need to stay this second sub-appeal waiting for the outcome of case T-540/22. As a matter of fact,

the Second Contested Decision did not even consider the iMREL waiver request nor stated any reasons whatsoever in that regard.

(d) The third sub-appeal.

256. With the third sub-appeal against the Second Contested Decision, the Appellant claims that, in setting an amount of internal MREL that also includes a Market Confidence Charge (MCC) for BGL, a subsidiary of the banking group, which is not, however, a resolution entity, the Board has (i) committed errors of law in interpreting and applying the SRMR; (ii) committed manifest errors of assessment and violated the principle of good administration; (iii) violated the principle of the protection of legitimate expectations; (iv) breached the obligation to state reasons; (v) failed to comply with the right to be heard; and (vi) violated SRMR through its MREL Policy. As stated above, in point (a) (ii) of this decision, the ground concerning the MREL Policy itself is inadmissible. The Appeal Panel proceeds to analyse the other five grounds in order.

(1) The first ground of the third sub-appeal: the adjustments to the MCC, and the assessment of relevant elements to calculate the internal MREL.

257. In the first ground of the third sub-appeal the Appellant submits that the Board has violated Article 12d(6) subparagraph 8 SRMR, and Article 12d(8) SRMR, by failing to make the necessary adjustments to the MCC, and failing to carry out a full assessment of the relevant elements to calculate the MREL.

258. The Board, for its part, submits that it respected the said provisions, and followed the law when not making any adjustments to the MCC, and that it carried out a full assessment of the relevant elements.

259. The Appellant's submission on the adjustments to the MCC is limited to arguing that the Board disregarded Article 12d(6) sub-paragraph 8 SRMR.

260. The text of Article 12d(6) sub-paragraph 8 SRMR, which regulates the adjustments to the MCC in the determination of MREL for entities that are not themselves resolution entities, such as BGL, is almost a verbatim copy of the text of Article 12d(3) subparagraph 8 SRMR, which regulates the adjustments to the MCC in the determination of MREL for resolution entities. The *full* text of that provision states that (emphasis added):

> "The Board shall be able to increase the requirement provided in point (a)(ii) of the first subparagraph of this paragraph by an appropriate amount necessary to ensure that, following the exercise of the power to write down or convert relevant capital instruments and eligible liabilities in accordance with Article 21, the entity is able to sustain sufficient market confidence for an appropriate period which shall not exceed one year.
>
> Where the sixth subparagraph of this paragraph applies, the amount referred to in that subparagraph shall be equal to the combined buffer requirement that is to apply after the exercise of the power

> referred to in Article 21 of this Regulation or after the resolution of the resolution group, less the amount referred to in point (a) of point (6) of Article 128 of Directive 2013/36/EU.
>
> The amount referred to in the sixth subparagraph of this paragraph shall be adjusted downwards if, after consulting the competent authorities, including the ECB, the Board determines that it would be feasible and credible for a lower amount to be sufficient to ensure market confidence and to ensure both the continued provision of critical economic functions by the institution or entity referred to in Article 12(1) and its access to funding without recourse to extraordinary public financial support other than contributions from the Fund, in accordance with Article 27(7) and Article 76(3), after the exercise of the power referred to in Article 21 or after the resolution of the resolution group. That amount shall be adjusted upwards if, after consulting the competent authorities including the ECB, the Board determines that a higher amount is necessary to sustain sufficient market confidence and to ensure both the continued provision of critical economic functions by the institution or entity referred to in Article 12(1) and its access to funding without recourse to extraordinary public financial support other than contributions from the Fund, in accordance with Article 27(7) and Article 76(3) for an appropriate period which shall not exceed one year".
>
> "The amount referred to in the sixth subparagraph of this paragraph shall be adjusted downwards if, after consulting the competent authorities, including the ECB, the Board determines that it would be feasible and credible for a lower amount to be sufficient to ensure market confidence and to ensure both the continued provision of critical economic functions by the institution or entity referred to in Article 12(1) and its access to funding without recourse to extraordinary public financial support other than contributions from the Fund, in accordance with Article 27(7) and Article 76(3), after the exercise of the power referred to in Article 21 or after the resolution of the resolution group. That amount shall be adjusted upwards if, after consulting the competent authorities including the ECB, the Board determines that a higher amount is necessary to sustain sufficient market confidence and to ensure both the continued provision of critical economic functions by the institution or entity referred to in Article 12(1) and its access to funding without recourse to extraordinary public financial support other than contributions from the Fund, in accordance with Article 27(7) and Article 76(3) for an appropriate period which shall not exceed one year".

261. As held earlier by the Appeal Panel on the second limb of the second ground of the first sub-appeal, the text of the provision contemplates that: (i) there *shall* be an adjustment, (ii) once the Board *determines* (iii) after *consulting* the competent supervisor, (iv) that a different amount is needed, (v) which may be lower, if feasible and credible, or higher, if necessary.

262. The Second Contested Decision states in its Recital (13) that the consultation with the ECB took place, a point stressed by the Board in its Response and not subsequently disputed by the Appellant.

263. In addition, as a second limb of this first ground, the Appellant also argues that the Board failed to make a full assessment of the relevant elements, and to include the reasons for its decision, pursuant to Article 12d(8) SRMR, and specifically that it failed to make an assessment of the post-resolution TREA, and its impact on the recapitalisation amount, and the leverage ratio exposures.

264. Although this limb is formulated in a succinct manner, it seems that the allegation is similar to that of the first limb of the second ground of the first sub-appeal, i.e., that the MREL decision failed to take into account the post-resolution group.

265. In the first limb of the second ground of the first sub-appeal the Appeal Panel held that, when calculating MREL for the resolution entity (the parent company) under Article 12d (3) SRMR, especially the recapitalisation amount (RCA), the Board was entitled to make such calculation taking into account the balance sheet size and entity's profile at and after resolution as contemplated in the resolution plan, and disregarding actions, such as asset disposals, not contemplated in the resolution plan. In the calculation of the RCA for entities that are not resolution entities (as in this case, the relevant subsidiary) the relevant provision is different, i.e., Article 12d(6) subparagraph 1 SRMR. However, its wording is relatively similar. Specifically, the RCA is regulated in Article 12d(6) subparagraph 1, letters (a) (ii) (referenced both to the total risk exposure amount (TREA)), and (b) (ii) (referenced to the leverage ratio exposures (LRE)).

266. Under Article 12d (6) subparagraph 1, letter (a) (ii) (emphasis added):

> "[the] recapitalisation amount [shall] allow the entity to restore compliance with its total capital ratio requirement referred in point (c) of Article 92(1) of Regulation (EU) No 575/2013 and its requirement referred to in Article 104a of Directive 2013/36/EU <u>after the exercise of the power to write down or convert relevant capital instruments and eligible liabilities in accordance with Article 21 of this Regulation or after the resolution of the resolution group</u>;"

267. Under Article 12d(6) subparagraph 1, letter (b) (ii) (emphasis added):

> *"*[the] recapitalisation amount [shall] allow the entity to restore compliance with its leverage ratio requirement referred to in point (d) of Article 92(1) of Regulation (EU) No 575/2013 <u>after the exercise of the power to write down or convert relevant capital instruments and eligible liabilities in accordance with Article 21 of this Regulation or after the resolution of the resolution group</u>".

268. Furthermore, Article 12d(6) subparagraph 5, for its part, states (emphasis added):

> "When setting the recapitalisation amounts referred to in the previous subparagraphs, the Board shall:
>
> (a) use the most recently reported values for the relevant total risk exposure amount or total exposure measure, adjusted for any changes <u>resulting from actions set out in the resolution plan</u>; and
>
> (b) after consulting the competent authorities including the ECB, adjust the amount corresponding to the current requirement referred to in Article 104a of Directive 2013/36/EU downwards or upwards to determine the requirement that is to apply to the relevant entity after the exercise of the power to write down or convert relevant capital instruments and eligible liabilities in accordance with Article 21 of this Regulation or after the resolution of the resolution group".

269. In light of the wording of this provision the Appeal Panel's conclusion, in this sub-appeal on the calculation of the RCA for the relevant subsidiary, is analogous to the conclusion reached

on the first sub-appeal for the calculation of the RCA of the parent entity; namely that the Board was entitled to disregard any actions, such as asset disposals or other actions that could shrink the entity's balance sheet, but that are not set out in the resolution plan.

(2) The second, third and fourth grounds of the third sub-appeal: the alleged errors of assessment, the principle of good administration and the duty to state reasons.

270. Under the second ground of the third sub-appeal the Appellant submits that the Board has committed manifest errors of assessment and breached the principle of good administration when setting the levels of iMREL. And this because, according to the Appellant, the Board failed to understand that the relevant subsidiary (BGL) did not have recourse to market-based funding, as required by the law in order to set the market confidence charge (MCC). This ground is inextricably linked to the third ground of the third sub-appeal, where the Appellant submits that the Board violated the fundamental principles of protection of legitimate expectations, because it went against its own MREL Policy, and the fourth ground, where the Appellant submits that the Board breached its obligation to state reasons.

271. The Board, for its part, submits that it carried out a careful, diligent and impartial assessment, that it reviewed and assessed all relevant facts, and that its assessment did not contain any manifest error. With regard to the protection of legitimate expectations, the Board submits that it never gave the Appellant "precise, unconditional and consistent assurances", and that the MREL Policy does not constitute such assurances.

272. Throughout the proceedings, the arguments under these connected grounds of the third sub-appeal were the ones that received more attention, including both the written stage and the oral hearing. In essence, the point of controversy is whether the Board correctly decided that the amount of internal MREL for BGL should include, as part of the recapitalisation amount (RCA), a Market Confidence Charge (MCC), whether it used the correct criteria for reaching that decision, and whether it duly justified its decision.

273. The Appellant relies on the idea that, since the MCC is a surcharge to sustain "market" confidence, it should only apply to entities that resort to "market" funding, which should inform the meaning of "wholesale funding" in the MREL Policy. In the Right to be Heard process, the Appellant indicated that it disagreed with the characteristics of "systemic importance and reliance on funding from wholesale markets", both in terms of the characteristics of the entity, and of the definition of wholesale funding. It argued that this assessment is contrary to the idea of "market" confidence, and to the approach of the MREL Policy itself.

274. The Board, for its part, states that the key concept is that of "market confidence", which confers the Board a margin of technical discretion. In its view, the relevant entity had ample funding from deposits from large, non-financial corporates, which are extremely unstable in deteriorating financial conditions, which calls for having adequate levels of own funds,

including an MCC. The Board also states, as it did during the Right to be Heard process, that the entity is considered as systemically important in a domestic market (i.e., [.]) and, [.].

275. The relevant rule is Article 12d (6) SRMR, which states that (emphasis added):

> "The Board shall be able to increase the requirement provided in point (a)(ii) of the first subparagraph of this paragraph by an appropriate amount necessary to ensure that, following the exercise of the power to write down or convert relevant capital instruments and eligible liabilities in accordance with Article 21, the entity is able to sustain sufficient market confidence for an appropriate period which shall not exceed one year"

276. The text of Article 12d(6) SRMR provides the Board discretion on whether to set an MCC for non-resolution entities, with a language analogous to that of the provision applicable to resolution entities, analysed under the second limb of the second ground of the first sub-appeal. Under this provision alone, "market confidence" is the only relevant term. Also, the language of the provision grants the Board a margin of technical discretion. The Appellant's argument that the MCC is justifiable only if the entity relies significantly on access to the financial markets, i.e., market-based funding for its financing and liquidity needs is not supported by any specific reference to the recitals, or the legislative history of the provision, and, in any event, would simply raise the question of what is such 'market-based' funding, and why it should be interpreted restrictively, especially in light of the broad language of the legislative provision.

277. In principle, in the Appeal Panel's view, the rationale that funds such as corporate deposits are more volatile, and can precipitate the crisis of a bank is sound, and is illustrated by recent cases such as Silicon Valley Bank (SVB). To the extent that such model is considered as a basis to calculate the recapitalisation amount, there is a *prima facie* basis to impose an MCC.

278. Furthermore, the case-law of the General Court suggests that, when assessing a scenario of liquidity risk and liquidity shortages the authorities (both competent supervisory and resolution authorities) should take all relevant factors into consideration. In its judgment of 6 July 2022, case T-280/18 *ABLV Bank AS v. SRB,* ECLI:EU:T:18, at paragraphs 95 and 96, the General Court upheld the ECB's analysis of the ABLV's liquidity crisis for purposes of its Failing-or-Likely-to-Fail (hereinafter the "**FOLTF**") assessment, and rejected that, in making such analysis, the ECB (or the SRB) should be constrained by regulatory definitions, such as the definition of 'liquidity' under Regulation No 575/2013 (CRR). The assessment required taking into account all the relevant surrounding circumstances, and not only the liquidity ratios, as defined in the specific regulation.

279. The Appeal Panel is well aware of the fact that the analysis of a liquidity crisis under an FOLTF assessment is not equivalent to the analysis of the existence of liquidity risk as a determinant of the need for an MCC. However, in such scenario the Board must reason backwards from the moment where the crisis is triggered, the resolution measures implemented, and the entity is recapitalised and must sustain market confidence. Thus, an

approach that takes into consideration factors such as the prevalence of corporate, or non-retail deposits, which have proven relevant in past crises, appears reasonable and proportionate to assess the need of an additional amount to sustain market confidence in plausible scenarios.

280. Furthermore, the Board relied on a methodology that classified the entities in accordance with this risk, measured by their reliance on funding other than retail deposits. According to such methodology, the entities were classified in a statistical distribution, and only the entities above a certain threshold were treated for purposes of an MCC. According to the information made available by the parties, BGL substantially exceeded the threshold, whereas other entities in the Appellant's group did not.

281. Yet, even if the Board's approach and methodology were in line with the relevant legal text, a separate consideration is whether the justification given by the Board in the Second Contested Decision was also adequate. Here the Appeal Panel must also consider that the Board chose to provide guidance in its MREL Policy on how it intended to apply the relatively broad framework set forth under Article 12d(6) SRMR. Paragraph 30 of said MREL Policy states that:

> "An MCC does not seem essential for ensuring the viability of a subsidiary that will be recapitalized by the resolution entity at the point of non-viability without placing it under resolution, except in specific circumstances. Accordingly, the SRB does not set the MCC for internal MREL for non-resolution entities, except (i) for the operating bank that is a direct subsidiary of a holding company identified as a resolution entity; or (ii) where the SRB concludes that the MCC is necessary to sustain market confidence because of the subsidiary's complexity and strong reliance on wholesale funding".

As stated by the Appeal Panel in the fifth ground of the first sub-appeal, regarding the protection of legitimate expectations, based on case-law such as *Kotnik*, once it adopted its MREL Policy, the Board imposed a limit on the exercise of its discretion. Thus, the Board could not, as a general rule, depart from its MREL Policy, at the risk of being in breach of principles such as equal treatment or the protection of legitimate expectations.

282. In other words, since the MREL Policy sets out that the MCC for iMREL for entities that are not resolution entities is applied only "where the SRB concludes that the MCC is necessary to sustain market confidence because of the subsidiary's complexity and strong reliance on wholesale funding" this means that, by choosing "complexity" and "strong reliance on wholesale funding" as proxies to determine the need of an MCC, the Board chose to make these terms relevant to properly discharge its duty to state reasons in the iMREL decisions.

283. At the same time, since the Board chose open-textured terms, such as "complexity" and "wholesale funding", it also assumed the burden of providing certainty about those terms, by choosing definitions that were acceptable, and properly explaining them, and by also explaining why the entity fulfilled the conditions under those terms.

284. There were attempts by the Board to clarify the terms, and explain why BGL fulfilled the conditions under those terms, in the Second Contested Decision and in the interactions with the Appellant. The Board initially offered a cursory explanation in the First Contested Decision, which merely stated that the MCC amount for the relevant entity should ensure that it could sustain market confidence for an appropriate period not exceeding one year, while providing very little explanation about "complexity" or "wholesale funding". Yet, the Second Contested Decision included a more detailed explanation in Recital (8) of Section IIIf, and stated that (emphasis added):

> "[.]".

285. Furthermore, Section V of the Second Contested Decision (the Right to be Heard Assessment Memorandum) sought to complete this explanation in the following way:

> "[.].

286. The joint analysis of the MREL Policy and the Second Contested Decision suggests that the Board did not discharge the burden of clarifying the "complexity" element, but that it did so in the case of the element of "strong reliance on wholesale funding".

287. First, the Second Contested Decision refers to the entity's "systemic importance". Yet, in the Appeal Panel's view, it is not evident that "complexity" may be assimilated, in this context, with systemic importance. A contextual interpretation of that term in the prudential regulatory framework suggests otherwise. Article 131 of Directive 2013/36/EU regulates the identification of systemically important institutions. It states, in its paragraph (2), that the identification methodology for G-SIIs shall be based on the following categories:

> "(a) size of the group; (b) interconnectedness of the group with the financial system; (c) substitutability of the services or of the financial infrastructure provided by the group; (d) complexity of the group; (e) cross-border activity of the group, including cross border activity between Member States and between a Member State and a third country."

288. For O-SIIs, paragraph (3) of the same provision states that the methodology shall take into account:

> "(a) size; (b) importance for the economy of the Union or of the relevant Member State; (c) significance of cross-border activities; (d) interconnectedness of the institution or group with the financial system".

289. Thus, in the prudential context, "complexity" is an element to identify G-SIIs, but it is not equivalent to systemic importance. A complex entity may not necessarily be a G-SII, and an entity may be classified as a G-SII despite not being excessively complex, depending on how it scores on the other categories.[4] For O-SIIs, complexity is not even one of the relevant factors of assessment. Thus, the statement that the relevant subsidiary is "systemically important", in

[4] See, e.g., the BCBS methodology and dashboard in https://www.bis.org/bcbs/gsib/.

recital (8) of Section IIIf of the Second Contested Decision, and the statement in Section V (Right to be Heard) that the entity is considered systemically important in a domestic market (*"BGL is designated as a Systemically important institution in Luxembourg"*) do not properly justify, in the Appeal Panel's view, that the entity is "complex", in the sense of the MREL Policy.

290. During the course of the oral hearing, it also emerged that the entity is a "Key Liquidity Entity" within the group, which enhances its importance. However, there is no reference to this aspect in the Second Contested Decision, nor to how this is connected with the "complexity" element.

291. The situation of the "strong reliance on wholesale funding" also presents some challenges. As exposed during the proceedings, this is a concept fraught with uncertainty. The Appellant understands it in narrower terms, as funding from interbank markets, coming from counterparties such as other financial institutions, money market funds etc. and including transactions such as e.g., repos, for which the Appellant refers to Commission Implementing Regulation No 2018/1624, of 23 October 2018. [.].

292. Commission Implementing Regulation No 2018/1624 contemplates the Implementing Technical Standards (ITS) on templates and provision of information for purposes of resolution plans. Although it does not include a provision on formal definitions, it includes a definition of wholesale funding, as "lending and borrowing activities in wholesale markets to and from financial counterparties (credit institutions and other financial corporations)". The information provided under this conception of "wholesale funding" is used to identify "Critical functions and core business lines" provided by the group.[5]

293. Commission Implementing Regulation No 2021/451, for its part, regulates supervisory reporting, and the part on liquidity is based on the Basel Framework for the liquidity ratio.[6] In its statement on the Right to be Heard Assessment Memorandum the Board stated that, under this Regulation *[.]*.

294. In principle, choosing, like the Board did, a definition of "wholesale funding" that focuses on the entity's needs, or sources of funding, appears to the Appeal Panel reasonable, given that, according to the MREL Policy, the MCC is imposed in light of the *reliance* on wholesale funding.

295. More importantly, the Board sought to explain its choice during the exchanges with the entity and in the Right to be Heard Process. In its presentation of the IT Workshop of [.] Slide 4 of that presentation (*calibration changes*) states that:

[5] As stated by sub-section II.7.1 (General remarks) the purpose of the templates is to *"provide key data and qualitative assessments of the impact, substitutability and criticality of economic functions the group is providing"*
[6] DIS 85 https://www.bis.org/basel_framework/chapter/DIS/85.htm?inforce=20191215&published=20191215.

"[.]"

296. [.].

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

298. In light of the above, the Appeal Panel concludes that the evidence does not suggest that the Board has breached its duty to examine carefully and impartially all the relevant elements of the situation in question. It also concludes, however, that, in light of the principle of the protection of legitimate expectations and the obligation to state reasons, the Board did not adequately justify the "complexity" of BGL to the purpose of imposing the MCC.

(3) The fifth ground of appeal of the third sub-appeal: the Right to be Heard.

299. Under the fifth ground of appeal of the third sub-appeal the Appellant submits that the Board breached its Right to be Heard. The Appellant's arguments in its appeal were primarily referred to the First Contested Decision, specifically the Section dedicated to the Right to be Heard, where the Board replied that the Appellant's observation on the calculation of the MCC "is to be considered as and horizontal comment referring to the implementation of Level 1 text (BRRD2) in the SRB Policy and therefore is not subject to the Right to be Heard proceedings".

300. The arguments on the Right to be Heard under this third sub-appeal are analogous to the Appellant's arguments on the Right to be Heard under the first sub-appeal.

301. The Appeal Panel notes that, as stated above discussing the preliminary question (a) (i), the Second Contested Decision superseded the First Contested Decision, rendering the appeal over that First Contested Decision moot.

302. The Appellant then did not offer in its statement of modification of the appeal distinct arguments to justify that also the Second Contested Decision did not respect its Right to be Heard with regard to the MREL determination for BGL. The approach adopted by the Board in the Second Contested Decision with regard to BGL's Right to be Heard was analogous to the one adopted by the Board in the MREL determination for BNP Paribas, the parent company, and analysed above by the Appeal Panel discussing point seven (7) of sub-appeal

one. The Appeal Panel concluded in that point that the Right to be Heard had been respected. There is no reason to justify a different conclusion in this case.

(e) Costs

303. The Appellant in its appeal introduced a request that the Appeal Panel order the Board to pay its costs. Article 25(2) of the Appeal Panel's Rules of Procedure (RoP) states that *"Each party shall cover its own costs arising from the proceedings before the Appeal Panel, including the costs regarding attendance of the hearing and possible expert evidence introduced on its demand"*. Thus, in application of the RoP each party shall cover its own costs in the present proceedings.

On those grounds and within the limits set out above, the Appeal Panel hereby:

Remits the case to the Board.

David Ramos Muñoz Co-Rapporteur SIGNED	Kaarlo Jännäri SIGNED	Luis Silva Morais Vice-Chair SIGNED

Marco Lamandini Co-Rapporteur SIGNED	Christopher Pleister Chair SIGNED

For the Secretariat of the Appeal Panel:

[.]
SIGNED