draft final: [16 November 2016]

Single Resolution Board Appeal Panel

23 November 2016

case 1/16

FINAL DECISION

Extract published pursuant to Article 24 of the Rules of Procedure

Scope of the SRMR and of the Commission Regulation No 1310/2014 – provisional administrative contributions – entities subject to contributions – effectiveness of regulations – interpretation of silence of the Regulation 1310/2014 – cessation of being an entity within the scope of DR 1310/2014 and the SRMR

[Appellant]

v

the Single Resolution Board

Christopher Pleister, Chair and Rapporteur
Yves Herinckx, Vice-Chair
Kaarlo Jännäri
Marco Lamandini
Luis Morais

TABLE OF CONTENTS

Main arguments of the parties....4

Findings of the Appeal Panel....5

FINAL DECISION

In Case 1/16,

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

[redacted] ("[redacted]"), [redacted], represented by [redacted], appellant,

v

the Single Resolution Board

THE APPEAL PANEL,

composed of Christopher Pleister, Chair and Rapporteur, Yves Herinckx, Vice-Chair, Kaarlo Jännäri, Marco Lamandini and Luis Morais

makes the following final decision.

1. This appeal relates to [appellant]'s contributions to the administrative expenditures of the SRB for the years 2015 and 2016. The Notice of Appeal is dated 29 February 2016 and was received by the Secretariat of the Appeal Panel on 9 March 2016.

2. On 10 June 2016 the Appeal Panel issued a procedural order whereby it determined that the language of the procedure is German and that it would first rule on the admissibility of the appeal. On 23 September 2016 the Appeal Panel, having granted suitable terms to both parties to file their observations issued a decision on admissibility, whereby it declared the appeal admissible to the extent that it is directed against the decision of the SRB of 3 February 2016 in respect of the 2015 and 2016 contributions and invited the parties to file their observations on the merits of the appeal by 10 October 2016 and their rebuttal by 17 October 2016. Upon request of the

parties those deadlines were shortly postponed. The parties filed their observations and rebuttals and did not request an oral hearing. Upon careful consideration of these final observations and rebuttals and their translations into English together with all briefs and documents filed throughout the entire proceeding, the Appeal Panel has come to this final decision.

Main arguments of the parties

3. The main arguments of the parties are briefly summarised below, to the extent only that they are necessary for the determination on the merits.

[Appellant]'s arguments:

4. [Appellant] notes that it is not a bank nor an investment firm or a financial institution and ceased to be the parent undertaking of a banking group from [April~August 2015]; the appellant considers therefore that [appellant] is and was not obliged to contribute to part I of the budget of the Board in accordance with Article 65 of the SRM Regulation ("SRMR") from [April~August 2015], because from that date [appellant] is no longer an entity falling within the scope of application of the SRMR, in accordance with Article 2 SRMR, that specifically provides:

> "This Regulation shall apply to the following entities: (a) credit institutions established in a participating Member State; (b) parent undertakings, including financial holding companies and mixed financial holding companies established in a participating Member State, where they are subject to consolidated supervision carried out by the ECB in accordance with Article 4(1)(g) of Regulation (EU) No 1024/2013; (c) investment firms and financial institutions established in a participating Member State, where they are covered by the consolidated supervision of the parent undertaking carried out by the ECB in accordance with Article 4(1)(g) of Regulation (EU) No 1024/2013"

5. [Appellant] points to the fact that Article 65 SRMR regulates the contributions to the administrative expenditures of the Board making clear, in paragraph 1 and 3, that such contributions are due "by the entities referred to in Article 2" [of the SRMR]. The appellant acknowledges that Article 65(5) SRMR empowered the Commission to adopt delegated acts on contributions – *inter alia*, in order to "determine the annual contribution necessary to cover the administrative expenditure of the Board before it becomes fully operational" – and that Commission delegated regulation (EU) No 1310/2014 is such regulation. [appellant] argues that also under Regulation No 1310/2014 only the entities referred to in Article 2 SRMR shall pay contributions and further notes that the fact that [appellant] was in the list of significant entities

published by the ECB on 4 September 2014 is "without legal and factual consequences" from [April~August 2015].

SRB's arguments

6. The Board notes, in turn, that Regulation No 1310/2014 established a two-step approach for the collection of administrative contributions consisting of a provisional system and a final system. The provisional system is a "simplified system for the collection of contributions from a limited number of addressees (recitals 5, 6 and 11 and Article 4 of the [Commission] Regulation)". The rationale behind the provisional system lies, in the view of the Board, on the fact that at the initial stage of operation "the SRB needed to rely on a predetermined budget and to establish a simple and feasible procedure to collect contributions which allowed the SRB to become operational with immediate effect". The Board refers further to recitals (4) and (5) of Regulation 1310/2014 and to the definition of "significant entities" to be read in Article 3(d), to conclude that the Commission Regulation "intentionally" fixed a specific scope of addressees falling under the obligation to pay administrative contributions during the transitional period, and namely all the entities mentioned in the list published on the ECB's website on September 2014, "which does not coincide with the credit institutions falling within the scope of Article 2 SRMR and "avoided any reference to variable factors for the calculation and collections of contributions", because this "would imply a procedure for checking possible status changes, a reliable determination of the effective date for such change of status a reliable re-calculation of contributions, decisions on repayments and a possible follow-up system for invoicing the new institutions falling within the definition of Article 3(d)" of the Commission Regulation. The Board further notes that the transitional period is still ongoing according to Article 3(f) of Regulation 1310/2014 because "as of today, no final system of administrative contributions has been adopted" and that until the date the final system of administrative contributions will be in place no reimbursements may be made to credit institutions. Finally, in its submission of 28 October 2016 the Board also states that "after the Transitional Period elapses [...], the SRB will pay back any potential overpaid contributions to entities such as [appellant], that are listed on the ECB's list of 4 September 2014 but which no longer fall within the scope of Articles 2 and 4(1) of the SRM Regulation" (paragraph 5). It is indeed possible that the delegated regulation that will organise the final system of contributions will address this issue and will provide for a cash refund of past excess instalments in those cases where a mere credit would be inadequate. At present, however, Regulation 1310/2014 does not provide for such cash refunds.

Findings of the Appeal Panel

7. The Appeal Panel finds that both the SRMR, under Article 2, and the Commission Regulation No 1310/2014, under Article 4, restrict their scope of application to the "entities referred to in Article 2" SRMR. This is fully consistent with the finality of the SRMR as shown in recitals (10), (14) and (15) SRMR, that clarified (i) that the integration of the resolution framework for *credit institution and investment firms* was necessary in order to bolster the Union, restore financial stability and lay the basis for financial recovery and (ii) that following the establishment of the SSM by Regulation (EU) No 1024/2013 there was a misalignment between the Union supervision of banks and the national treatment of those banks in the resolution proceedings. In other terms, the SRMR applies only to the entities regulated under the SRMR, and namely, as specified in Article 2, "(a) *credit institutions* established in a participating Member State; (b) parent undertakings, including financial holding companies and mixed financial holding companies established in a participating Member State, *where they are subject to consolidated supervision carried out by the ECB* in accordance with Article 4(1)(g) of Regulation (EU) No 1024/2013; (c) investment firms and financial institutions established in a participating Member State, *where they are covered by the consolidated supervision of the parent undertaking carried out by the ECB* in accordance with Article 4(1)(g) of Regulation (EU) No 1024/2013".

8. In turn, also Article 65(1) SRMR makes clear that only "the entities referred to in Article 2 shall contribute to part I of the budget of the Board". It also specifies that this must be in accordance "with this Regulation and the delegated acts on contributions adopted pursuant to paragraph 5 of this Article". It is certainly true – as pointed out by the Board – that delegated Commission Regulation No 1310/2010 envisages a provisional system of instalments on contributions essentially centred on provisional contributions only by significant entities and that this is meant to simplify the determination and collection of these instalment in the first stage of operation of the SRB. Nonetheless, both Articles 2 and 4(1) and (3) of Regulation No 1310/2010 clearly restrict this provisional regime "to the entities referred to in Article 2 of Regulation (EU) No 806/2014".

9. The Appeal Panel finds that this offers a clear indication of the fact that provisional contributions must be paid only by those entities that are indeed included in such Article 2 of the SRMR.

10. To be true, recital (6) and Article 4(3) of Regulation No 1310/2014 restrict only to significant entities as defined in Article 3(d) the circle of those called to pay during

the provisional period the provisional *instalments* on contributions, and provide in particular that "the calculation and collection of contributions during the provisional period from entities referred to in Article 2 of Regulation (EU) No 806/2014 *other than significant entities* shall be *deferred* until the end of the provisional period". In turn, Article 6 sets out the settlement arrangements to recalculate and settle in accordance with the final system of administrative contributions the amount finally due by all entities referred to in Article 2 SRMR.

11. The Appeal Panel acknowledges, in this respect, that Article 3(d) offers a "snapshot" of the relevant "significant entities" and refers to this effect to the list published on the ECB website on 4 September 2014 (a list that, at the time, included also [appellant]). The Appeal Panel notes further that this list was expressly meant by the Commission to be a closed list, but only in the sense that "the entities which would be considered significant and notified as such by the ECB between 5 September 2014 and the end of the provisional period should not be subject to the obligation of payment of instalments on contributions" (recital 6, second period). *However, in the view of the Appeal Panel nothing in the Regulation addresses expressly the situation of a significant entity originally included in the ECB list ceasing to be such during the provisional period.*

12. The Appeal Panel also preliminarily acknowledges that it is settled case law of the Court of Justice of the European Union that a regulation adopted by a Union institution is presumed to be lawful and accordingly remains fully effective as long as it has not been found to be unlawful by a competent court. This principle also imposes upon all persons subject to Union law the obligation to acknowledge that regulations are fully effective so long as they have not been declared to be invalid by a competent court (CJEU, 13 February 1979, 101/78, *Granaria*, paragraphs 4 and 5; CJEU, 7 June 1988, 63/87, *Commission v Greece*, paragraph 10; CJEU, 5 October 2004, C-475/01, *Commission v Greece*, paragraph 18). The power to declare the invalidity of an act of a Union institution belongs exclusively to the Court of Justice of the European Union (CJEU, 6 October 2015, C-362/14, *Schrems*, paragraph 61; CJEU, 22 June 2010, C-188/10 and C-189/10, *Melki and Abdeli*, paragraph 54). That power cannot be exercised by national courts (*Schrems*, paragraph 62; CJEU, 28 April 2015, C-456/13, *T&L Sugars*, paragraphs 45 to 48; CJEU, 3 October 2013, C-583/11, *Inuit Tapiriit Kanatami*, paragraphs 92 and 96; CJEU, 10 January 2006, C-344/04, *IATA*, paragraphs 27 to 30; CJEU, 22 October 1987, C-314/85, *Foto-Frost*, paragraphs 14 to 17), by national administrative or supervisory authorities (*Schrems*, paragraph 52; *Granaria*, paragraph 6; CJEU, 14 June 2012, C-533/10, *CIVAD*, paragraph 43), by

Union bodies (CJEU, 30 September 1998, T-13/97, *Losch*, paragraph 99; CJEU, 30 September 1998, T-154/96, *Chvatal*, paragraph 112), nor by authorities dealing with administrative appeal procedures (CJEU, 12 March 2014, F-128/12, *CR v Parliament*, paragraphs 35, 36 and 40; CJEU, 17 September 2008, T-218/06, *Neurim Pharmaceuticals v OHIM*, paragraph 52; CJEU, 12 July 2001, T-120/99, *Kik v OHIM*, paragraph 55). An exception to the above principle is made only where the act subject to an illegality exception is tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the legal order of the Union and must be treated as having no legal effect, even provisional, that is to say it must be regarded as legally non-existent (CJEU, 5 October 2004, C-475/01, *Commission v Greece*, paragraph 19; CJEU, 22 November 2011, T-275/10, *mPAY24 v OHIM*, paragraph 26, and the references). This exception may however apply in quite extreme situations. It follows from the above, that the Board was obliged to apply Regulation 1310/2014 as it stands.

13. Nonetheless, the Appeal Panel finds that the relation between Articles 2(1) and 4(1) and (3), on one side, and Articles 3(d), on the other side, is a matter of interpretation that can be decided without implicating (or even declaring) the unlawfulness of Regulation 1310/2014 as it stands. In particular, in the face of a case not expressly contemplated by Regulation 1310/2014, special attention must be paid to the fact that among the possible interpretative options that are offered by the ambiguous wording of Regulation 1310/2014, it is to be adopted the one that would better deliver its "*effet utile*" (CJEU, 14 October 1999, C-223/98, *Adidas*), i.e. the one that is more consistent with, and proportionate to the finality of this Regulation (which is to make *regulated* entities contribute to the functioning of the Board) and the one that would not make the Regulation unlawful (and thus subject to challenge before the Court of Justice). This would likely be, however, the outcome, in the view of the Appeal Panel, if the Regulation were read as if the Commission in the exercise of the delegation under Article 65(5) SRMR had imposed the payment of instalments to entities that were not, or ceased to be, entities as referred to in Article 2 SRMR. In other words, the Appeal Panel believes that, in the silence of the Regulation 1310/2014 on this, the Regulation cannot be interpreted as if the list published on the ECB website on 4 September 2014 would crystallise the status of any entity listed herein for the entire provisional period if, during such period, the entity lost its original status.

14. This interpretation is also grounded on the need to avoid the imposition of (even provisional) economic burdens and other regulatory duties that are specific to regulated entities on legal persons that fall outside the scope of such regulation and/or are no longer within the scope of such regulation and therefore need not to be

resolved, in case of failure, under the rules of the SRMR. Even assuming that this might imply an administrative burden for the SRB, this seems to be a reasonable price to be paid to ensure the proportionality between the obligations imposed upon any private entity and its actual finality and to confine the exercise of administrative power conferred upon the SRB by the SRMR within its scope.

15. The Appeal Panel finds that this interpretation is also confirmed by a functional and systematic construction of other provisions of Regulation 1310/2014. Actually, from a normative standpoint and in overall terms, Regulation 1310/2014 acknowledges that a *dynamic* perspective has to be taken into consideration since the nature of potentially covered entities may change during the provisional period. However, it only expressly contemplates **(i)** the cases in which entities have meanwhile become regulated entities, while not expressly specifying a solution as regards **(ii)** entities which have ceased to be regulated entities during the provisional period at stake. In fact, it should be noted, in this respect, that, whilst Article 6 of Regulation 1310/2014 provides a workable settlement system for entities that still are or have meanwhile become regulated entities as referred to in Article 2 SRMR, this is not the case for entities that, albeit in the ECB list of 2014, are no longer entities referred to in Article 2 SRMR. Article 6(2) established indeed a settlement arrangement whereby "any difference between the instalments paid on the basis of the provisional system and the contributions referred to in paragraph 1 calculated in accordance with the final system *shall be settled in the calculation of the contributions to cover the administrative expenditure of the Board for the year which follows the provisional period. That adjustment shall be made by decreasing or increasing the contributions to the administrative expenditures of the Board for that year."* In turn, Article 6(3) clarifies that, if necessary, "the adjustment shall continue in the subsequent year". This is so on the assumption that these entities are in fact subject to contribution under Article 2. Therefore, although Regulation 1310/2014 does not expressly contemplate the case of an entity that initially contributed the instalments because it was originally in the list, then ceased to be a relevant entity during the provisional period, and is not an entity under Article 2 of Regulation 806/2014 at the date the final system is implemented, it is clear that such an entity cannot be required to contribute any instalment once it ceased to be an entity referred to in Article 2 SRMR.

16. In conclusion, the Appeal Panel finds that [appellant] was definitely bound to pay the instalments on the provisional contributions until [April~August 2015]. The question then arises whether the request for contribution issued by the Board in 2015 can legitimately embrace the entire year 2015. The Appeal Panel acknowledges, in fact,

that the debit note issued by the SRB on 23 March 2015 was expressly meant to "cover the contributions to the administrative expenditures of the Board for the years 2014 and 2015". This is consistent with the finding that the SRM Regulation provides for an *annual* budgetary cycle and links the determination of the contributions to the Board's budgeted administrative expenditures (Articles 58(1) and 59(1)); it expressly *qualifies* the contributions as "*annual*", also in the case of contributions due for the period before the Board becomes fully operational (Article 65(5)(c)). Accordingly, the Appeal Panel finds that the Regulation appears to be indivisibly setting contributions for a full calendar year and that this is not inconsistent with the SRM Regulation. Furthermore, while also a different approach, providing for some sort of *pro rata temporis* calculation, would ultimately be justified in the normative context at stake - and could still be adopted by the Commission with the delegated regulation meant to govern the final system of contributions so as to ensure, as the Board fairly noted in its final submissions of 28 October 2016, that "after the Transitional Period elapses [...], the SRB will pay back any potential overpaid provisional contributions to entities such as [appellant], that are listed on the ECB's list of 4 September 2014 but which no longer fall within the scope of Articles 2 and 4(1) of the SRM Regulation" (paragraph 5)" - it must be recognized that the Commission was undoubtedly within the bounds of its delegation when it decided as it did for the provisional contributions, establishing overall solutions for each full calendar year. *The appeal must therefore be dismissed to the extent that it is directed against the decision of 3 February 2016 in respect of the 2015 contributions*.

17. The assessment of the decision of 3 February 2016 in respect of the 2016 contributions is, however, different. Since on 16 September 2015 the SRB was informed, that [appellant] was no longer an entity as referred to by the Regulation 1310/2014 and by the SRMR, the Board should have derived from this new occurrence the conclusion that [appellant] was not subject to the obligation to pay the annual provisional contributions for 2016 and any subsequent year(s). *Therefore, the decision adopted by the SRB on 3 February 2016 in respect of the 2016 contributions must be amended correspondingly*.

On these grounds, the Appeal Panel, by a majority of 4 of its 5 components

declares that the decision of 3 February 2016 in respect of the 2016 installments on contributions requested to [appellant] must be amended and remits the case to the Board to the effect of Article 85(8) SRMR;

Kaarlo Jännäri	Marco Lamandini	Luis Morais

Yves Herinckx	Christopher Pleister
Vice-Chair	Chair and Rapporteur

This decision has been signed in German and in English. The German version is authentic; the English version is a translation.