



23 September 2016

case 1/16

DECISION ON ADMISSIBILITY

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Scope of the SRMR – Charter of Fundamental Rights – monetary claims against the SRB – redetermination of contributions – definition of a decision – existence of substantial new facts

[Case 1/16]

[Appellant]

v

the Single Resolution Board

Hélène M. Vletter-van Dort, Chair
Christopher Pleister, Rapporteur
Yves Herinckx, Vice-Chair
Kaarlo Jännäri
Marco Lamandini

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DECISION ON ADMISSIBILITY

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"),

██████████ ("██████████"), ██████████, represented by ██████████, appellant,

v

the Single Resolution Board ("SRB")

THE APPEAL PANEL,

composed of Hélène M. Vletter-van Dort, Chair, Christopher Pleister, Rapporteur, Yves Herinckx, Vice-Chair, Kaarlo Jännäri, Marco Lamandini

makes the following decision on admissibility of the appeal.

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. To this purpose, the Appeal Panel requested both parties to file by 4 July 2016 their observations, addressing in particular the question whether the appeal, to the extent directed against the demands for payment dated 23 March 2015 and 17 December 2015, is not out of time or, to the extent directed against the decision dated 3 February 2016, does not concern an act which is merely confirmatory in nature or which falls outside the Appeal Panel's jurisdiction under Article 85(3) of the SRM Regulation. The Appeal Panel, with the same procedural order, also instructed the SRB to provide the Appeal Panel, with a copy to [appellant], with an English translation of all German language documents that are from time to time part of the record, including the parties' submissions and the evidence; and invited the parties to submit their observations to the Appeal Panel ultimately by 4 July 2016, and to inform the Appeal Panel whether they wished to make oral representations on the admissibility of the appeal.
3. The SRB filed its observations on 30 June 2016 and [appellant], in turn, filed its observations on 4 July 2016. The Appeal Panel, having examined the observations,

granted both parties the possibility to respond to the other's party submissions by 1 August 2016. The SRB filed its response on 26 July 2016. The appellant did not file any further response.

A. ADMISSIBILITY OF THE APPEAL

(1) Main arguments of the parties

4. The main arguments of the parties are briefly summarized below, to the extent only that they are necessary for the determination of the matters dealt with in this procedural order.

[Appellant]'s arguments:

5. [Appellant] considers first that the SRM Regulation does not apply to [appellant], because [appellant] is no longer an entity falling within the scope of application of the SRM Regulation, in accordance with the clear wording of Article 2 of the SRM Regulation. [Appellant] argues therefore that the present appeal is grounded upon, and should be solely governed by the Treaty on the Functioning of the European Union (TFEU), as supplemented by the Charter of Fundamental Rights of the European Union (2010/C 83/02) ('the Charter') and the European Code of Good Administrative Behavior. In this vein, [appellant] submits that the admissibility of the appeal follows from the fact that in accordance with Article 41 of the Charter every person, therefore including [appellant], has the right to good administration. That right to good administration includes, inter alia, the right to have decisions taken by administrative authorities reviewed as part of a special administrative procedure. In addition, [appellant] notes that the SRB's own conduct created a legitimate expectation on the admissibility of the appeal since the SRB drew explicit attention to the possibility of lodging an appeal in its contested decision of 3 February 2016. In [appellant]'s view, the SRB would be acting in bad faith (*venire contra factum proprium*) if it were first to inform [appellant] of its right of appeal but then subsequently rely on the fact that an appeal is in any case inadmissible.
6. Should the SRM Regulation apply, [appellant] contends that the appeal is nonetheless admissible under Article 85(3) because it is directed against acts of the SRB as provided for in Article 65(3) of the SRM Regulation: such are indeed, in the appellant's view, the SRB's determinations on [appellant]'s contributions to the administrative expenditure of the SRB for the years 2015 and 2016. On this count, the appellant distinguishes between the contributions requested by the SRB for 2015 and those requested for 2016.

7. On the request for contributions 2015, the appellant notes that its appeal is not directed against the SRB's original request for the advance payment of 23 March 2015 (the 'debit note' - in German: '*Lastschriftanzeige*'). The appeal acknowledges already that that request for advance payment was originally lawful. It is, however, the appellant's view that, after [April~August 2015], "the request for advance payment became unlawful going forward and that, therefore, [appellant] is entitled to have the request for advance payment set aside and annulled, and to recover part of the advance payment made", because on [April~August 2015] [appellant] sold approximately [>50%] of its shares in [REDACTED] ("[REDACTED]") as a result of which it allegedly ceased to hold control of [REDACTED] and thereby did no longer fall within the scope of the SRM Regulation. The SRB refused to adopt such a decision setting aside that request in its formal decision of 3 February 2016. In the words of the appellant, "[a]s an *actus contrarius*, the refusal is likewise a decision within the meaning of Article 65(3) of the SRM Regulation, since that refusal thereby expressly alleges that there is a duty to make advance payments for the period from [April~August 2015] onwards, even though the appellant has not been subject to the SRM Regulation or to Commission Delegated Regulation (EU) No 1310/2014 of 8 October 2014 ('SRM Contributions Regulation'), adopted on the basis of Article 65(5) of the SRM Regulation, since [April~August 2015]". In this perspective, the appellant observes that the decision of 3 February 2016 is specifically not a decision confirming the debit note of 23 March 2015. The appellant had in fact not even contested the collection of a contribution by the SRB in the spring of 2015. The appellant had argued that the continued effects of the request for the advance payment of contributions were unlawful after [April~August 2015]. Therefore, as to the contributions relating to 2015, in the appellant's view the SRB decided for the first time on 3 February 2016 that an advance payment of contributions continues to be requested and that advance payments would be retained by the SRB even if the conditions governing the duty to make advance payments are no longer met, because neither the SRM Regulation nor the SRM Contributions Regulation applies to the entity concerned. Finally, and "solely by way of precaution" [appellant] also argues that the debit note of 23 March 2015 is not a decision within the meaning of Articles 64(3) and 85(3) of the SRM Regulation either in form or in substance.
8. On the request for contributions 2016, the appellant claims that the 'installment notice' issued by the SRB on 17 December 2015 is not a decision within the meaning of Article 65(3) of the SRM Regulation. This, in the [appellant]'s view, is grounded on both formal and substantive considerations. The wording used by the SRB in characterizing the "installment notice" suggests that this is not a decision, which is further substantiated if one considers the requirement laid down by Article 65(3) of the SRM Regulation which stipulates that the SRB "(...) determine and raise, in accordance with the delegated acts referred to in Paragraph 5 of this Article, the contributions due by each entity referred to in Article 2 in a decision [Hervorhebung durch den Verfasser] addressed to the entity concerned." In turn, submissions from [appellant] were not heard

prior to the SRB sending the installment notice of 17 December 2015. According to [appellant], if the installment notice of 17 December 2015 were a decision, this would constitute an infringement of Article 16(2) of the European Code of Good Administrative Behaviour. The appellant also argues that the substance of the letter from the SRB of 17 December 2015 would not be consistent with that of a formal decision. The appellant notes in this respect that the letter contains virtually no description of the facts and no description of the legal circumstances at all, whereas a formal decision of a body of the European Union must, however, contain a statement of legal grounds as a minimum requirement, since otherwise the addressee of such a decision would be wholly unaware whether the orders made therein ‘have a basis in law and [whether] their content complies with the law’ (see Articles 4 and 18 of the European Code of Good Administrative Behaviour). It is also clear from the absence of any information on legal remedies that the installment notice is not intended to be a formal decision of the SRB, since this would otherwise constitute an infringement of Article 19 of the European Code of Good Administrative Behaviour.

9. The appellant concludes therefore that only the SRB’s decision of 3 February 2016 is a formal decision within the meaning of Articles 65(3) and 85(3) of the SRM Regulation. This decision also contains information on legal remedies and, in the appellant’s view, this is also a clear and unambiguous indication that — for the first time in the administrative proceedings concerning the collection of advance payments of contributions to the administrative expenditure — the SRB regards this decision as a proper decision in the legal sense of the word.
10. On the timely nature of the appeal, [appellant] notes that, in accordance with the second subparagraph of Article 85(3) of the SRM Regulation, the appeal, together with a statement of grounds, must be filed within six weeks of the date of notification of the decision. Since the appeal is directed against the decision of 3 February 2016, which was served on 10 February 2016 and received by the Secretariat of the Appeal Panel on 9 March 2016, the six-week deadline was met. Finally, [appellant] also submits that, even if the view were to be taken that [appellant]’s appeal is (also) directed against the installment notice of 17 December 2015, the filing of the appeal would not be late. In [appellant]’s view, serious procedural errors preclude SRB’s reliance on an alleged failure to comply with the time-limit for filing an appeal, which in itself should also be allowed in order to safeguard [appellant]’s fundamental rights.

SRB’s arguments

11. The SRB notes that the SRB Regulation is applicable with general effect since 1 January 2016 and that “according to the unequivocal wording of Article 85 SRM Regulation, the existence of capacity as an undertaking within the meaning of Article 2 SRM Regulation is neither an additional criterion for the admissibility of an appeal to the Appeal Panel nor a criterion for the applicability of Article 85 SRM Regulation”.

The SRB further notes that the appellant itself, in its email of 3 May 2016, at point C.4, made reference to the applicability of Article 85(2) and that, if the SRM Regulation were inapplicable, the Appeal Panel would not have competence to hear and decide on the appeal.

12. The SRB further argues that the appellant's arguments in relation to the applicability of the Charter of Fundamental Rights of the European Union and the European Code of Good Administrative Behaviour are without merit. In the SRB's view, during the administrative procedure, the appellant requested a review of the decisions of the SRB relating to the various advance payment requests. The SRB conducted such a review, whereupon the SRB responded to the appellant by letter of 3 February 2016. The SRB argues that independently of the SRB's review of its decisions within the administrative procedure, the appellant was at liberty to refer the matter to the European Court of Justice or the European Ombudsman, in accordance with the applicable criteria relating to their competence.
13. The SRB further submits that, according to Article 85(3) SRM Regulation, the competence of the Appeal Panel is restricted to the decisions of the SRB listed therein. Article 85(3) SRM Regulation does not grant competence to the Appeal Panel in the case of a refusal of a request by the appellant for a review of the previous decision within the administrative procedure, nor to decide on a waiver and/or cancellation of an advance payment request nor to rule on a request for a partial repayment of the advance payment amount. In the SRB's words, "the appellant's assertion that the refusal of its request constitutes an 'actus contrarius' to a decision according to Article 65(3) SRM Regulation, and that such a refusal is therefore also a decision within the meaning of Article 65(3) SRM Regulation, is not convincing", because "the appellant presents no reasons why an 'actus contrarius' contrary to the wording of Article 85(3) SRM Regulation should also be deemed to be a decision within the meaning of the decisions referred to in Article 65(3) SRM Regulation".
14. As to "the essence of the debit notes of 25 March and 17 December 2015" the SRB argues that they were decisions. This, in the SRB's view, has several implications:
 1. Since these "decisions" were adopted in 2015 and, under the terms of Article 99(2) SRM Regulation, Article 85 did not enter into force until 1 January 2016, no appeal to the Appeal Panel was possible at the time the decisions were adopted and this would make an appeal against such decisions of the SRB dating from 2015 inadmissible. The SRB further submits that this cannot be countered by possible reservations concerning the availability of legal remedies to the appellant, as the rule under Article 263 TFEU was already in effect in 2015. It was therefore possible for the appellant to appeal to the Court of Justice of the European Union after the appellant became aware of the decisions;

2. Also if it were to be assumed that an appeal to the Appeal Panel would also be admissible against decisions the SRB made in 2015, the appeal would still be inadmissible, because the time limit for appeals laid down in Article 85(3) has lapsed;
3. The SRB argues that the appeal does not become admissible simply because of the fact that the appellant made an application to the SRB, by email of 29 December 2015 and by letter of 14 January 2015, to review the decisions of 23 March 2015 and 17 December 2015. In the SRB's view, the appeal procedure as defined in Article 85(3), and an application to the SRB to review one of its own decisions given as part of its administrative procedure, are two entirely different procedures, between which a choice should be made, where allowable, by the appellant. Neither procedure constitutes criteria for admissibility under the respective other procedure. The SRB notes in this regard that the two procedures also differ significantly as regards criteria for admissibility, scope of application, course of procedure and decision making. Neither a prior application to the SRB to review a decision, nor even the existence of a decision of the SRB under the administrative procedure, is required in order for the appellant to be entitled to lodge an appeal with the Appeal Panel. If the appellant wishes to avail itself of the opportunity to have the measure reviewed by the SRB under the administrative procedure, and also to have it reviewed by the Appeal Panel, it must adhere to all the valid criteria of each of the procedures in question separately. This also includes, in particular, the time limit for an appeal to the Appeal Panel as laid down in Article 85(3) SRMR
15. As to the inclusion only in the letter from the SRB of 3 February 2016 of the available remedies, the SRB denies that they "constitute statements specifically tailored to the appellant in relation to possible remedies", and that they were instead "general details in relation to possible remedies against measures of the SRB in accordance with the requirements of the European Code of Good Administrative Behaviour". It was up to the appellant, in the SRB's view, to discern, from the information in the letter of 3 February 2016, that it would have been necessary to lodge an appeal against the advance payment requests of 17 December 2015 promptly with the Appeal Panel or the European Court of Justice.
16. Finally on the timeliness of the appeal, the SRB submits that, contrary to its claims, the appellant could have realized, from the content of the advance payment request of 17 December 2015 as a whole, that the advance payment request was directed to it even if some administrative errors were made. This should have become clear by the explanation regarding the calculation of the advance payment amount, which contained a further reference to the appellant's assets, and explicitly mentioned the appellant on two further occasions. Appellant should have responded accordingly.

(2) Findings of the Appeal Panel

B. OBJECT OF THE APPEAL

17. The notice of appeal states (in its first paragraph) that the appeal is directed “against the decision of the Board of 3 February 2016 (...) a copy of which is enclosed”. In its dispositive part (section 6), however, the notice of appeal does not seek the annulment of the decision of 3 February 2016 but seeks instead the cancellation of “SRB’s request for payment of installments of 23 March 2015” and “SRB’s request for payment of installments of 17 December 2015”. The request dated 23 March 2015 is a demand for payment of administrative contributions for the year 2015, the request dated 17 December 2015 is a demand for payment of administrative contributions for the year 2016, and the decision dated 3 February 2016 dismisses various applications made by [appellant] for a reimbursement of the 2015 contributions and a cancellation of the 2016 contributions.
18. The Appeal Panel finds that claims, if and to the extent they are ambiguous in their literal expression, should be read according to their finality and in a way to ensure to the appellant the maximum degree of administrative review that is compatible with the reasonable content and finality of the appeal. This is consistent with the scope of the Appeal Panel's jurisdiction and with the tasks of general interest conferred to the Appeal Panel under the SRM Regulation and is instrumental to the proper enforcement of the fundamental right of good administration under the Charter. To this end, the Appeal Panel finds it must treat the appeal as being directed against each of the three acts (23 March 2015, 17 December 2015 and 3 February 2016) at least to the extent necessary to contest the determination of the contributions requested from the appellant and assess for each of them, to the extent necessary in view of the finality of the appeal, whether the appeal is admissible.

C. WHETHER THE SRM REGULATION APPLIES

19. To the purpose of determining whether the appeal is admissible, it must be first considered whether Article 85 of the SRM Regulation is applicable. The Appeal Panel considers that it does. The SRM Regulation indeed established the SRB as a Union agency with a specific structure corresponding to its tasks. According to Article 44 of the SRM Regulation, the SRB must act in compliance with Union law, in particular with the Council and the Commission decisions pursuant to the SRM Regulation. According to Article 99(1), the SRM Regulation entered into force on the 20th day following that of its publication in the OJ (the date of publication being the 30 July 2014) and although the vast majority of the provisions of the Regulation became applicable from 1 January 2016 as specified in Article 99(2), several provisions of the

same were phased-in before that date by Article 99 (3) to (5), and were made applicable either from 19 August 2014 (paragraph 4, that contemplates also the powers under Articles 61 to 65 that are relevant in the present case) or from 1 November 2014 (paragraph 5) or from 1 January 2015 (paragraph 3). Conformity of the actions taken and the decisions adopted by the SRB must be assessed therefore not only with regard to primary EU law and fundamental rights, but also to the secondary EU law enshrined in the SRM Regulation. This means that the claim of [appellant] not to be subject to any contribution because it has ceased to be an entity falling within the scope of the Regulation as set out in Article 2 of the SRM Regulation, must be considered against the provisions not only of the TFEU and the Charter of Fundamental Rights, but also of the Regulation.

20. The Appeal Panel finds therefore that:
- (a) to the purpose of this appeal, it does not matter whether [appellant] falls under the substantive provisions of the SRM Regulation: under Article 85(3) an appeal to the Appeal Panel is open to “[a]ny natural or legal person (...) against a decision of the Board (...) which is addressed to that person, or which is of direct and individual concern to that person”. Whether [appellant] is within the scope of the SRM Regulation, pursuant to its Article 2, may affect the SRB’s power to make decisions addressed to [appellant] and hence the validity of the decision (and can therefore be relevant on the merit) but, once such a decision is made by the SRB (and is of a type that is appealable under Article 85(3)), [appellant] may appeal against it and this appeal is governed by the SRM Regulation.
 - (b) the Appeal Panel has no power whatsoever beyond the powers conferred upon it by Article 85 of the SRM Regulation and cannot derive any power to decide on an appeal directly based on the fundamental principles enshrined in the Charter. If an appeal to the Appeal Panel is to be admissible, such appeal must necessarily fall within the ambit of the SRM Regulation and its Article 85.
21. A different question is that posed by the fact that Article 85 is not mentioned in Article 99, paragraphs (3) to (5) and therefore the Appeal Panel started operations on 1 January 2016. This could have the – probably unintended (by the co-legislators) – consequence to make the internal review of decisions adopted by the SRB in the matters referred to in Article 85(3) in the initial, phase-in, period of operation of the SRB, unavailable. This could have practical relevance in the present case only if the Appeal Panel were to conclude that the appealed decisions were those adopted before 1 January 2016 and that the appeal to the Appeal Panel was not available for such decisions. The issue shall be considered therefore only to the extent that it will become relevant.

D. ADMISSIBILITY – PAYMENT REQUEST OF 23 MARCH 2015

22. [Appellant] expressly states (submission of 4 July 2016, point II.1(b)) that its appeal is not directed against the payment request of 23 March 2015. This clarifies its initial notice of appeal, which demanded the cancellation of that payment request.
23. To the extent that it was initially directed against that payment request, the appeal is treated as withdrawn. The questions whether such a payment request constitutes a “decision” and whether decisions made before the entry into force of the SRM Regulation on 1 January 2016 may be appealed to the Appeal Panel, are therefore moot.

E. Admissibility – letter of 3 February 2016, re 2015 contributions

24. With regard to the 2015 contributions, SRB's decision of 3 February 2016 rejects a demand for a refund of contributions that were already set and paid. [Appellant] does not dispute the validity of the demand for payment of these contributions at the time it was made. It argues that, due to subsequent circumstances, it became entitled to a refund of contributions. This request for the reconsideration of the initial demand for payment was lodged by [appellant] on 16 September 2015, but was considered by the SRB only with its decision of 3 February 2016, that rejected the request for a re-determination and restitution of the pro rata contributions referring to the time period following [April~August 2015] when [appellant] ceased to be a regulated entity.
25. The Appeal Panel has jurisdiction with regard to decisions referred to in Article 65(3) of the SRM Regulation, and more specifically with regard to decisions whereby the Board “determine[s] and raise[s], in accordance with the delegated acts referred to in paragraph 5 of this Article, the contributions due”. To the purposes of this appeal, it must be considered, therefore: (a) whether the jurisdiction is limited only to the first SRB decision that determines the contributions due by a regulated entity, or whether it also extends to possible subsequent decisions that re-determine the same in the face of the occurrence of new facts and relevant circumstances (here, impinging on the entity status); and (b) whether the jurisdiction is limited only to SRB's positive action and more specifically a positive decision (a decision formally determining a certain amount of contributions due) or encompasses also negative action, i.e. a negative decision (a decision refusing to re-determine the contributions due despite the occurrence of new facts and relevant circumstances).
26. Article 65(3) and the delegated acts it refers to, do not contemplate the possibility of refunding contributions on the basis of subsequent changes in circumstances like the loss of regulated status (Article 6 of Delegated Regulation 1310/2014 foresees only a “settlement arrangement system”, based upon the idea that there may be other relevant circumstances requiring subsequent re-determination of the initial contributions but

they will be operated through “adjustments made by decreasing or increasing the contributions” for the following years, on the clear assumption that, in these cases, the contributing entity will be still subject to the SRM Regulation). A decision of the Board in respect of a request for refund is therefore not one of the decisions referred to in this provision.

27. This is consistent with the general setup of the Appeal Panel. None of the matters about which the Appeal Panel has jurisdiction involve monetary claims made against the SRB: claims in respect of non-contractual liability of the SRB belong to the Court of Justice (Article 86(3) and (5) of the SRM Regulation); claims in respect of its contractual liability belong to the national courts (Article 274 TFEU) or to arbitration by the Court of Justice (Article 86(2) of the SRM Regulation); compensation claims against the SRB for breach of the NCWO principle (Article 76(1)(e) of the SRM Regulation) are not in the Article 85(3) list giving jurisdiction to the Appeal Panel. The Appeal Panel may only “confirm” or “remit” a contested decision (Article 85(8) of the SRM Regulation); it may not order the SRB to make a payment of money to the appellant.
28. This is not to say, however, that the Appeal Panel cannot consider a decision on the re-determination of the contributions. The Appeal Panel is indeed of the view that this is something different from determining whether the appellant is entitled or not to a refund. Logically the former is a determination antecedent to the latter. In other terms, the Appeal Panel finds that any decision of the SRB by which it determines a contribution falls within the scope of its jurisdiction, even if the Appeal Panel cannot order the SRB to make any restitution, but must limit its decision to either confirming the decision taken by the Board or remitting the case to the latter. The Appeal Panel further finds that a decision of the SRB relevant to the effect of Article 65(3) is not only any positive decision determining a certain amount of contribution due, but also any negative decision whereby the SRB refuses to re-determine contributions in the face of the occurrence of new facts and relevant circumstances. In conclusion, therefore, the Appeal Panel finds that, since the SRB only decided on the relevance of the new occurrences relating to the 2015 contributions due by [appellant], which were brought to its attention for the first time in September 2015 and then again on 29 December 2015 and January 2016 by [appellant] (solely and for the first time) with its decision of 3 February 2016, the Appeal Panel may have jurisdiction over this decision, even if this decision was a (negative) decision, since also a decision refusing to re-determine a contribution is a decision on the determination of the contributions, provided this decision is not merely confirmatory by nature (an issue that is dealt with here below).

F. ADMISSIBILITY – PAYMENT REQUEST OF 17 DECEMBER 2015

29. To the extent that the appeal may be construed as also directed against the payment request of the SRB of 17 December 2015, the Appeal Panel notes that, according to

Article 99 of the SRM Regulation, decisions made by the SRB before 1 January 2016 were not yet appealable to the Appeal Panel until 1 January 2016 when, according to the SRM Regulation, the Appeal Panel started its operations. This poses the question whether the period of six weeks of the date of notification of the decision could lapse before that date and whether an appeal to the Appeal Panel could be admissible at all, if filed against a decision adopted before 1 January 2016. This question would be, however, of practical relevance to the purpose of the present appeal only if the Appeal Panel were to find that, in respect of the 2016 contributions, [appellant] could not validly appeal the Board's decision of 3 February 2016, as a decision refusing to re-determine the 2016 contributions, and would in particular consider such 3 February 2016 decision as merely confirmatory of the payment request of 17 December 2015. The test of the admissibility of the appeal against the payment request of 17 December 2015 must therefore be postponed until after it has been determined whether the appeal against the February 2016 decision is admissible and will be further considered only if, and to the extent that, it will prove to be relevant after the former question has been dealt with (which will be done in the subsequent paragraphs below). The Appeal Panel further notes that the question of admissibility of the appeal against the payment request of 17 December 2015, if relevant at all in light of the findings on the admissibility of the appeal on the decision of 3 February 2016 on the 2016 contributions, should also consider three additional points.

30. First, that the appellant is claiming that the request for payment was beyond the powers of the SRB and would in fact be an act *ultra vires* directed to, and impinging on the rights of, an entity outside the scope of the SRM regulation.
31. Second, that the act was purportedly tainted by several other serious irregularities (on language, identification of the addressee, due process) that, taken altogether, could make the claim transcend invalidity and give rise to a claim that the contested act is legally non-existent. If this were the case, it should also be considered that time limitations for the filing of the appeal would not apply (CJEU, Judgment 10 December 1969, in joint cases 6 and 11/69, *Commission v France*; CJEU Judgment of 15 June 1994, c-137/92 P *Commission v BASF*, at p. 48-51; The Appeal Panel also refers to the latter judgment to acknowledge that an act can be considered as legally nonexistent only in exceptional circumstances).
32. Third, that it is doubtful that the payment request of 17 December 2015 could be considered a decision: the payment request, although it was probably issued by the SRB with the intent of creating a legal obligation to pay upon its addressee, was qualified by the SRB as an "installment notice" and in the CJEU case-law, in the context of annulment proceedings brought against Commission measures involving payment/reimbursement of money, the Court held, in some occasions, that a letter of the Commission inviting the applicant to pay certain sums and informing it of the consequences of non-payment was not a decision and thus did not constitute a

challengeable act (EGC, order of 13 September 2011, case T-224/09, *CEVA v Commission*, at paras 52 *et seq.*). The Appeal Panel further notes, in this respect, that the installment notice issued by the Board does not seem per se enforceable as it is apparent from Article 7(6) of delegated Regulation No 1310 that states – with reference to penalty interests – that: “Enforcement shall be governed by the applicable procedural rules in the participating Member State. The order for its enforcement shall be appended to the decision without other formality than verification of the authenticity of the decision by the authority which the government of each participating Member State shall designate for that purpose and which it shall make known to the Board and to the Court of Justice”. It is, in other terms, to national courts to issue an enforceable order to pay according to the applicable procedural rules in the participating Member State. The General Court, in its CEVA judgment, clarified that a request for payment that is not enforceable and therefore does not create legal effects vis-à-vis of the addressee:

“43 Seule une décision de la Commission formant titre exécutoire au sens de l’article 256 CE, telle qu’envisagée par l’article 72, paragraphe 2, du règlement n° 1605/2002, du 25 juin 2002 (JO L 248, p. 1, ci-après le « règlement financier »), au terme de la procédure de recouvrement forcé, constituerait un acte susceptible de faire l’objet d’un recours en annulation

G. Admissibility – letter of 3 February 2016, re 2016 contributions

33. In light of the foregoing, it is now time to turn to the question of admissibility of the appeal against the part of the SRB decision of 3 February 2016 that relates to the 2016 contributions and rejects a demand for re-determination based upon the same new facts and relevant circumstances that were presented by [appellant] with regard to the 2015 contributions. As already noted and in particular for the reasons stated above in paragraph 12, the Appeal Panel may have jurisdiction over this decision, although this is a negative decision consisting of a refusal to re-determine contributions, since also such a decision is a decision on the determination of the contributions, provided this decision is not merely confirmatory of a previous decision.
34. The Appeal Panel notes preliminarily that, despite the similarities in the arguments referred to the 2015 and 2016 contributions, there is also a difference. Whilst the new facts and relevant circumstances occurred *after* the SRB determined the 2015 contributions were determined and a request for payment was adopted and sent to [appellant], they occurred (and were at least known by the SRB) before the SRB determined and requested payment of [appellant] on 17 December 2015. This may have legal implications with respect to the confirmatory or non-confirmatory nature of the decision, which circumstance shall also be taken into consideration.

H. ADMISSIBILITY – LETTER OF 3 FEBRUARY 2016, RE 2015 AND 2016 CONTRIBUTIONS: CONFIRMATORY NATURE OF A PREVIOUS DECISION?

35. As also recently stated by the General Court of the CJEU in its judgment of 4 February 2016, in Case T676/13, *Italian International Film v EACEA*

35 According to settled case-law, a decision is a mere confirmation of an earlier decision where it contains no new factors as compared with the earlier measure and is not preceded by any re-examination of the situation of the addressee of the earlier measure (judgments of 14 April 1970 in *Nebe v Commission*, 24/69, ECR, EU:C:1970:22, paragraph 8; 10 December 1980 in *Grasselli v Commission*, 23/80, ECR, EU:C:1980:284, paragraph 18; and 11 June 2002 in *AICS v Parliament*, T365/00, ECR, EU:T:2002:151, paragraph 30).

36. Consistently, the Appeal Panel finds that the decision of 3 February 2016 cannot be considered as confirmatory of the 2015 request for payment of 23 March 2015, even if such a request for payment was to be considered a decision (a matter which does not need to be determined at this time), because the request of 23 March 2015 was based on a situation of fact different from the one that came into existence on [April–August 2015] when [appellant] ceased to be a regulated entity. The decision of 3 February 2016 was adopted precisely (on one count) to re-examine the original request for the 2015 contributions in light of this new situation of the addressee of the earlier measure and therefore, according to the case-law of the CJEU, on significant new facts of which neither the applicant nor the administration was aware of when the earlier request for payment was taken and which are liable to bring about a significant change in the applicant's position (CJEU, Joined Cases C-138/03, C-324/03 and C-431/03, *Italy v Commission*, at paras 36-37) and as such cannot be considered confirmatory, even if it were found that the payment request of March 2015 was a decision (a question that is therefore irrelevant to the purpose of this appeal). The appeal against the decision of 3 February 2016, as aforementioned understood is therefore admissible, at least in respect of its determination of the 2015 contributions. The Appeal Panel considers that things may be different as to the content of the decision of 3 February 2016 on its second count, concerning 2016 contributions, if the payment request of December 2015 were to be considered as a decision adopted by the SRB when it was already aware of the new status of [appellant] (notified to it in September 2015). Indeed, the new status of [appellant] had already come into existence when the request for payment of 17 December 2015 was made to [appellant] and such a request was sent out by the SRB after it had been notified of such new status, (i.e. in September 2015).
37. To decide whether the decision of 3 February 2016 was confirmatory or not, it is first appropriate to determine whether the request for payment of 17 December 2015 was indeed a decision and more specifically a decision subject (at least) to the remedies set out in Articles 86 SRM Regulation and 263 et seq. TFEU.

38. In addressing this issue, valuable guidance is offered by the above mentioned judgment of the General Court of 4 February 2016, in Case T676/13, *Italian International Film v EACEA*. The Court, deciding on a claim of inadmissibility in respect of a decision of another EU agency, summarized the state of the CJEU case law as follows:

“26 The mere fact that a letter has been sent to its addressee by an institution, body, office or agency of the European Union in response to a request by the addressee does not suffice for it to be regarded as a decision within the meaning of the fourth paragraph of Article 263 TFEU, thereby opening the door to an action for annulment (see, to that effect, order of 27 January 1993 in *Miethke v Parliament*, C25/92, ECR, EU:C:1993:32, paragraph 10; judgment of 22 May 1996 in *AITEC v Commission*, T277/94, ECR, EU:T:1996:66, paragraph 50; and order of 5 November 2003 in *Kronoply v Commission*, T130/02, ECR, EU:T:2003:293, paragraph 42).

27 While an action for annulment is available against all measures taken by the institutions of the European Union, whatever their nature or form, and in certain cases, subject to the specific conditions and arrangements authorized by the fifth paragraph of Article 263 TFEU, against measures taken by bodies, offices and agencies of the European Union, that is conditional, where the action is brought by a natural or legal person, on those measures being intended to produce binding legal effects which are capable of affecting the interests of the applicant by bringing about a distinct change in his legal position (see, to that effect, judgments of 11 November 1981 in *IBM v Commission*, 60/81, ECR, EU:C:1981:264, paragraphs 9 and 10; 13 October 2011 in *Deutsche Post and Germany v Commission*, C463/10 P and C475/10 P, ECR, EU:C:2011:656, paragraph 37 and the case-law cited; and order of 13 March 2015 in *European Coalition to End Animal Experiments v ECHA*, T673/13, ECR, EU:T:2015:167, paragraph 22).

28 The EACEA is an agency of the European Union with legal personality (judgment of 21 October 2010 in *Agapiou Joséphidès v Commission and EACEA*, T439/08, EU:T:2010:442, paragraph 35) (...).

29 Only, therefore, if it were shown that the letter of 8 October 2013 produced binding legal effects for the applicant capable of affecting its interests by bringing about a distinct change in its legal position would an action by the applicant for the annulment of that letter be admissible (see, to that effect, judgments in *IBM v Commission*, cited in paragraph 27 above, EU:C:1981:264, paragraph 9; of 5 April 2006 in *Deutsche Bahn v Commission*, T351/02, ECR, EU:T:2006:104, paragraph 35; and order of 19 November 2013 in *I. garantovaná v Commission*, T42/13, EU:T:2013:621, paragraph 20).

30 To determine whether an act produces such effects, it is necessary to look to its substance (judgment in *IBM v Commission*, cited in paragraph 27 above, EU:C:1981:264, paragraph 9; orders of 29 April 2004 in *SGL Carbon v Commission*, T308/02, ECR, EU:T:2004:119, paragraph 39; and 9 October 2012 in *Région Poitou-Charentes v Commission*, T31/12, EU:T:2012:528, paragraph 32).

31 First, that has the consequence that the fact that the EACEA used the word ‘decision’ in its letter of 8 October 2013 is merely one indication among others which may be taken into consideration by the EU judicature for defining the substance of the act at issue, but cannot in itself enable that court to classify it as a decision within the meaning of the fourth paragraph of Article 263 TFEU. (...).”

39. The Appeal Panel finds that, making application of this well settled case-law of the CJEU to the case in dispute, the payment request of 17 December 2015 was a mere “installment notice”/letter inviting the appellant to pay certain sums and informing it about the general criteria adopted in determining such amount, but no more. The Appeal Panel makes reference therefore to EGC, order of 13 September 2011, case T-224/09, *CEVA v Commission*, at paras 52 *et seq.* The Appeal Panel notes further that certain procedural deficiencies alleged by [appellant] (e.g. on the language, clearly not in compliance with Regulation 1/1958 if the installment notice were a decision) confirm the finding that this was not a decision. Also, the claim that the authority was lacking power to make such request can guide, albeit exceptionally, in this determination (the Appeal Panel refers here to the Opinion of 12 July 1990 of AG Tesouro in Case C-366/88, *France v Commission*, paras 14 and 18).
40. But even if one was willing to assume that the payment request of 17 December 2015 was a decision, the Appeal Panel finds that the requests for its reconsideration lodged by [appellant] on 29 December 2015 and 14-16 January 2016 were such as to make the decision of 3 February 2016 something different, and something more, than a pure confirmatory act against which no appeal is possible.
41. The Appeal Panel acknowledges that it is a matter of public policy that time limits for bringing an appeal against a decision cannot be circumvented by simply requesting the authority to reconsider its decision and by then bringing an appeal against the decision not to reconsider. This is so because the time limit is established in order to ensure that legal positions are clear and certain and to avoid any discrimination or arbitrary treatment in the administration of justice (CJEU, 13 November 2012, T278/11, *ClientEarth*, paragraph 30; CJEU, 7 February 2001, T186/98, *Inpesca*, paragraph 40; CJEU, 15 March 1995, T514/93, *Cobrecap*, paragraph 40).
42. Where a person allows the time limit for bringing an action against a decision unequivocally laying down a measure with legal effects affecting his interests and binding on him to expire, he cannot start the clock ticking again by asking the authority to reconsider its decision and by subsequently bringing an action against the refusal to reconsider the decision taken previously. This is why an action for the annulment of a decision which merely confirms a previous decision not contested within the time-limit for initiating proceedings, is inadmissible (*Inpesca*, paragraph 44; *Cobrecap*, paragraph 44; CJEU, 4 March 2015, T496/11, *United Kingdom v ECB*, paragraphs 59 to 61; CJEU, 23 May 2014, T553/11, *European Dynamics Luxembourg*, paragraph 39; CJEU, 15 September 2011, T407/07, *CMB Maschinenbau & Handels*, paragraph 96; CJEU, 10 October 2006, T106/05, *Evropaiki Dinamiki*, paragraph 46 and 55).
43. As noted above, a measure is regarded as merely confirmatory of a previous decision if it contains no new factor as compared with the previous measure, and was not preceded by a re-examination of the circumstances of the person concerned. However,

if the measure constitutes the reply to a request in which substantial new facts are relied on, and whereby the authority is requested to reconsider its previous decision, that measure cannot be regarded as merely confirmatory in nature since it constitutes a decision taken on the basis of those facts and thus contains a new factor as compared with the previous decision (*CMB Maschinenbau & Handels*, paragraphs 89 to 91; *Evropaiki Dinamiki*, paragraphs 46 to 49; *Inpesca*, paragraphs 44 to 46; CJEU, 4 February 2016, T676/13, *Italian International Film*, paragraph 35; CJEU, 29 April 2004, T308/02, *SGL Carbon*, paragraph 51 to 53).

44. The existence of substantial new facts may justify the submission of a request for reconsideration of a previous decision that has become definitive. An action brought against a decision refusing to reconsider a decision that has become definitive will be declared admissible if it appears that the request was actually based on substantial new facts. On the other hand, if it appears that the request was not based on such facts, an action against the decision refusing to reconsider it will be declared inadmissible (*CMB Maschinenbau & Handels*, paragraph 91; *SGL Carbon*, paragraphs 53 and 54; *Inpesca*, paragraphs 48 and 49).
45. In order for a fact to be new, it is essential that neither the appellant nor the SRB was aware of, or in a position to be aware of, the fact in question when the previous decision was adopted (*CMB Maschinenbau & Handels*, paragraph 92; *Inpesca*, paragraph 50).
46. It is therefore necessary to determine whether [appellant]’s request that the SRB reconsider its decision of 17 December 2015, which gave rise to the contested letter of 3 February 2016, was based on substantial new facts in conformity with the above.
47. [Appellant] requested the SRB to reconsider its earlier decision by an email dated 29 December 2015. The ground for reconsideration advanced in this mail is that “[appellant] is not a financial institution and since [April~August 2015] [REDACTED] ([REDACTED]) is no longer part of [REDACTED] ([REDACTED]). The [REDACTED] is also no longer part of [REDACTED] [since end-2014]. [Appellant] is not regulated by [REDACTED], ECB, EBA or the Single Resolution Board and is not a significant entity”¹. This was reiterated in shorter form in [appellant]’s letter to the SRB dated 14 January 2016: “We would also like to point out that [appellant] is no longer a financial holding company or sole shareholder of [REDACTED] as of [April~August 2015]”². The same ground was already communicated by [appellant] to the SRB in its letter of 16 September 2015, when

¹ The original is in English.

² In the German original: “Wir weisen darauf hin, dass die [appellant] seit dem [April~August 2015] keine Finanzholdinggesellschaft und Alleingesellschafterin der [REDACTED] mehr ist”.

requesting a refund of the 2015 contributions: “Our company is not any longer, since [April~August 2015], a parent company or a finance holding company”³.

48. To determine on this, it is first necessary to consider that a comparison between the SRB decision of 17 December 2015 and that of 3 February 2016 shows that only in the latter the SRB expressly addressed the issues raised by [appellant] relating to its new status as non-regulated entity; this issue, albeit in principle known to the SRB at least since September 2015, was not addressed in any way in its letter of 17 December 2015. This means that the rejection of the arguments raised by [appellant] on the fact that the imposition of contributions for 2016 would in fact exceed the agency’s statutory authority because [appellant] was now clearly out of the scope of the SRM Regulation as defined by Article 2 thereof, was at best implicit in the request for payment, but not substantiated in any form.
49. The Appeal Panel also notes that, as is clear from the wording of the SRB’s decision itself, the decision of 3 February 2016 was intended to be the first official response to the [appellant] claim that, starting from [April~August 2015], it was not subject to any obligation to pay contributions because it ceased to be a regulated entity. This is shown by the overall content of the decision and is also clearly suggested by the first lines of the decision, where the SRB expressly acknowledged that: “We refer to your letter dated 16 September 2015, your email dated 29 December 2015 and your letter dated 16 January 2016”. On the whole, this suggests that the SRB seemingly considered the new facts - albeit since September 2015, as to its request for contributions 2015 and merely (on 29 December 2015 as to its request for contributions 2016 - only in February 2016 for the purpose of responding with one single decision to the separate claims made by [appellant] for the two different annuities.
50. In other terms, there is no evidence in the file that the new facts which occurred on [April~August 2015] and were notified to the SRB for the limited purpose of contesting the contributions 2015, were in fact considered and processed by the SRB in order to determine the contributions 2016. A reasonable reading of the first lines of the decision of 3 February 2016 seems to suggest the contrary. This is also supported by the fact that the request for payment of 17 December 2015 did not tackle this argument in any way. In other words, it is as if, in this way, the initial requests for payment by the SRB should simply be considered as a first stage of a procedure involving several stages, and only the February 2016 decision marked the end of such procedure; it was only that decision (the first that, consistently, characterized itself as a proper decision subject to appeal and judicial remedy) which definitively determined the position of the agency (the

³ In the German original: “Unsere Gesellschaft ist seit dem [April–August 2015] keine Muttergesellschaft und keine Finanzholdinggesellschaft mehr”.

Appeal Panel refers here to TFI, Judgment of 17 February 2000, in Case T-241/97, *Stork Amsterdam*, para 49).

51. If this holds true, the mere finding that the facts based on which [appellant] sought a reconsideration of the decision of 17 December 2015 predate that decision and were previously notified by [appellant] to the SRB prior to that decision, does not suffice to affirm that the decision of 3 February 2016 was adopted by the SRB with the necessary awareness of such facts and, therefore, that the February 2016 decision was simply confirmatory. In light of the evidence brought to the attention of the Appeal Panel by both parties and considering also that the burden of proof on this is reasonably on the SRB, who has proximity to the relevant evidence (because it disposes of the internal records of its decisions), the SRB failed to show that when deciding to send out to [appellant] the installment notice of 17 December 2015, the SRB was effectively aware of those new and relevant circumstances – impinging on the status of the entity and thus on the scope of the SRM Regulation (with possible serious implications in terms of *ultra vires* and fundamental rights protection) – and that these facts were duly considered when calculating the contributions for 2016. The fact that the SRB, in December 2015, had not adopted any formal position on the request for reimbursement filed by [appellant] as to the 2015 contributions since September 2015 and that this position on the new facts and circumstances was adopted by the SRB only in February 2016, further supports that in December 2015, albeit the information had been notified to the office, the SRB had not processed such information. Lacking the proof that it was, it seems only reasonable to conclude that, also as to the 2016 contributions, the decision of 3 February 2016 was the first to address the issue of the relationship between the new status of [appellant] and the duty to pay contributions in the transitional period also for 2016 and to determine on it and, therefore, that its nature was not confirmatory even if the payment request of 17 December 2016 were, as the Appeal Panel believes it is not, a decision.
52. In other words, and to conclude on this, the Appeal Panel acknowledges that according to the case-law of the CJEU, significant new facts are those “which neither the applicant nor the administration was aware of when the earlier decision was taken and which are liable to bring about a significant change in the applicant’s position (CJEU, Joined Cases C-138/03, C-324/03 and C-431/03, *Italy v Commission*, at paras 36-37) and adopts, rather than a merely literal, a functional interpretation, in search of the finality of the principle stated by the Court. In the view of the Appeal Panel, when, for instance recently, the General Court in its judgment of 4 February 2016, in Case T676/13, *Italian International Film v EACEA* made reference to “new factors as compared with the earlier measure” and to “any re-examination of the situation of the addressee of the earlier measure” citing the judgments of 14 April 1970 in *Nebe v Commission*, 24/69, ECR, EU:C:1970:22, paragraph 8; 10 December 1980 in *Grasselli v Commission*,

23/80, ECR, EU:C:1980:284, paragraph 18; and 11 June 2002 in AICS v Parliament, T365/00, ECR, EU:T:2002:151, paragraph 30, showed that what matters is whether or not certain facts were or were not considered in order to adopt the decision, irrespective of the date of their occurrence and even irrespective of the fact that they may be known at the time when the first decision was adopted (if despite of their knowledge they were not taken into consideration). The finality of this criterion finely distinguishes between a situation where two subsequent decisions are the same because they are based on the same facts already considered in the earlier decision from a situation where two subsequent decisions, albeit identical in their final result, are not the same because they consider different facts, and namely only the second considers for the first time (and even rejects possible consequences on the original determination) new facts.

53. The appeal directed against the letter of 3 February 2016, also to the extent that it relates to the 2016 contributions, must therefore be regarded as admissible.

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

1. Notes the withdrawal of the appeal against the payment request of 23 March 2015;
2. Declares that the appeal is admissible to the extent that it is directed against the decision of 3 February 2016 in respect of the 2015 and 2016 contributions;
3. Invites the parties to file their observations on the merits of the appeal by 9 am CET Monday 10 October 2016 and their rebuttal observations by 9 am CET Monday 17 October 2016;
4. Invites the parties to inform the Appeal Panel, at the latest with their first observations to be submitted according to point 3 above, whether they will wish to make oral representations on the merits of the appeal.

Marco Lamandini

Kaarlo Jännäri

Yves Herinckx

Vice-Chair

Christopher Pleister

Hélène M. Vletter-van Dort

Rapporteur

Chair

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