30 October 2024

Case 3/2024

FINAL DECISION

[.],
Appellant,

v

the Single Resolution Board

Christopher Pleister, Chair and Co-Rapporteur
Helen Louri-Dendrinou, Vice-Chair
Marco Lamandini, Co-Rapporteur
David Ramos Muñoz
Kaarlo Jännäri

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FINAL DECISION

In Case 3/2024,

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

[.], a legal entity with headquarters in [.], [.] (hereinafter "**[.]**" or the "**Appellant**")

v

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

(together referred to as the "**parties**"),

THE APPEAL PANEL,

composed of Christopher Pleister (Chair and Co-Rapporteur), Helen Louri-Dendrinou (Vice-Chair), Marco Lamandini (Co-Rapporteur), David Ramos Muñoz, Kaarlo Jännäri,

makes the following final decision:

Background of facts

1. This appeal originally related to the SRB decision [.] [.] (hereinafter, the "**Amended Decision**") which amended the SRB decision [.], [.] after the Appeal Panel had remitted the case with its decision of 13 February 2023 in case 3/2022. However, due to the iterative nature of the resolution planning cycles (hereinafter the "**RPC**"), on [.] the Board adopted a new decision determining for the 2023 RPC the minimum requirement for own funds and eligible liabilities (hereinafter "**MREL**") for the Appellant. The new decision is decision [.] (hereinafter the "**Contested Decision**") which has repealed and replaced the Amended Decision [.].

2. With the Contested Decision, in continuity with the Amended Decision, the Board considered that [.] failure may occur at a time of broader financial instability and system-wide events and concluded also for the 2023 RPC that, in such a context, the Appellant needs to be considered a resolution entity. Its winding up under national insolvency proceedings at a time of broader financial instability of system wide events would likely result in significant adverse effects on the financial stability of [.] in the sense of Article 14(2)(b) SRMR.

3. Consistently, the Contested Decision, in the determination of the MREL, sets out in Section I an MREL for the Appellant on an individual basis at [.] of the total risk exposure amount

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

(hereinafter the "**TREA**") and [.] of the leverage ratio exposure (hereinafter the "**LRE**") and grants to the Appellant a transitional period until [.] to meet such requirements (the transitional period being one year longer than the one envisaged in the Amended Decision).

4. The Amended Decision was originally appealed with notice of appeal filed by post on [.], with documents delivered on [.], immediately before a Bank Holiday and the Easter holidays.

5. On 4 April 2024, the Secretariat of the Appeal Panel notified to the Board the notice of appeal informing that the response should be submitted to the Secretariat within six weeks by 16 May 2024.

6. On 15 May 2024, the Board submitted a communication whereby it informed the Appeal Panel that on [.] the Board had meanwhile adopted the Contested Decision. The Contested Decision had repealed and superseded, as specified in Article 6(2) of the same, the Amended Decision [.]. In the same letter the Board submitted a plea of inadmissibility of the appeal alleging that, due to the replacement of the Amended Decision [.], the Appellant's interest in bringing proceedings against the Amended Decision had disappeared.

7. On 21 May 2024, the Appeal Panel notified the parties of its procedural order no 1 whereby it declared the original appeal against the Amended Decision [.] inadmissible but, pursuant to Article 6-A of the Appeal Panel's Rules of Procedure (hereinafter the "**RoP**"), it granted the Appellant six weeks to modify, within the present proceedings of case 3/2024, the original appeal to take into account the Contested Decision by way of a statement of modification in compliance with the requirements set out in Article 6(2) to (5) RoP. With the same procedural order, the Appeal Panel also invited the parties to an agreement, if possible, on the language of the proceedings.

8. The relevant parts of the procedural order no 1 are as follows:

> As already held by the Appeal Panel in case 1/22 and it is now clearly set out in Article 6-A RoP, the adoption in the course of appeal proceedings of a new or amended MREL decision is 'a new factor allowing the appellant to continue its appeal and to adapt its claims and pleas in law in the existing proceedings also to challenge, in the same proceedings, the new decision', whereas, once the amended decision is adopted, the appellant no longer has an interest in an Appeal Panel's decision on the appeal of the Contested Decision challenged with the original notice of appeal.
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> Based upon the foregoing, having regard to Article 6-A RoP, the Appeal Panel concludes that the original appeal against the Contested Decision has become inadmissible, but pursuant to Article 6-A RoP:
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> I. the Appellant is hereby granted six weeks to modify within the present proceedings, if it so wishes, the appeal to take account of the new Board's decision [.] by way of a statement of modification in compliance with the requirements set out in Article 6(2) to (5) RoP. Pursuant to Article 5-A of the RoP the Appellant is also invited to take position with the statement of modification, if any, (i) on whether it agrees on the use of the English language as the language of the proceedings, in order to ensure the most efficient conduct of the appeal, (ii) or, as a second best solution, should the Appellant not agree on the use of the English language, whether the Appellant

> accepts a language arrangement for the instant case such as the one adopted in case 3/22, where, considering that the working language of the Appeal Panel is English, both parties filed their submissions in [.] with a translation into English, the oral hearing, if any, was held in [.] and English, with simultaneous translation and the final decision was delivered in English (working language of the Appeal Panel) and [.] (official language of the appeal proceedings), with the [.] version of the final decision following the adoption and delivery of the English version, because it will need to be translated from the English one.
>
> II. Should the Appellant file a statement of modification of the original appeal, the Board is hereby granted four weeks of service of the notice of the statement of modification to file its response.

9. On 12 June 2024, the Appellant filed the statement of modification as permitted by procedural order no 1. The Appellant agreed to the same language arrangement that had been previously applied in case 3/2022 between the same parties. The parties agreed in particular to use [.] as official language of the proceedings, yet with the agreement that (i) the parties' submissions would be in [.] with translations in English, (ii) the hearing would be conducted in [.] and English with simultaneous interpretation and (iii) the final decision would be drafted by the Appeal Panel in English and would be delivered in English and [.], with the English version to be delivered within the terms set out in the Appeal Panel's RoP and the [.] version following thereafter, due to the time necessary for the official translation services to translate it into [.].

10. The Chair appointed as Co-Rapporteurs himself and Professor Marco Lamandini.

11. The Appellant's statement of modification was served by the Secretariat of the Appeal Panel to the Board on 13 June 2024. The Secretariat informed that the response of the Board had to be submitted to the Secretariat of the Appeal Panel within four weeks, and thus by 11 July 2024.

12. On 11 July 2024, the Board submitted its response in English. The response was notified to the Appellant on 15 July 2024, specifying that the Appellant was granted three weeks, running however from the date the Board would have submitted the [.] version of its response, to file its reply, if any.

13. On 17 July 2024, the Appeal Panel adopted the procedural order no 2, whereby it dismissed the request for suspension of the Contested Decision filed by the Appellant with the statement of modification. The procedural order no 2 is as follows:

> On 11 July 2024, the Board has submitted its response in English (attached hereto together with the Board's accompanying email), informing that the [.] version of the response shall follow by 31 July 2024. The Appeal Panel, in its meeting of 17 July 2024, has determined the following.
>
> *(a) Case management instructions following the Board's response*
>
> Although the language of these proceedings is [.], the Appeal Panel finds that a timely submission of the Board's response in English can be accepted considering that English is the internal working language of the SRB, the SRB needs to outsource the official translation to the EU translation center for the bodies of the EU and the timeline of such translation center is beyond the control of the SRB. This, however, provided that (i) the official version of the Board's response in [.] is then identical to the English version, (ii) follows in a reasonable timeframe and (iii) the deadline for the Appellant

to reply to the Board's response starts to run only from the date of submission of the [.] version of the response.

The Appeal Panel has therefore determined that, pursuant to Article 6(8) of the Appeal Panel's Rules of Procedure, the Appellant is hereby granted 3 weeks starting to run from the communication by the Secretariat to the Appellant of the [.] version of the Board's response to submit a rejoinder to the Board's response in [.], with courtesy translation in English. In turn, the Board is hereby granted 3 weeks starting from the communication by the Secretariat of the Appellant's rejoinder in [.], with courtesy translation in English, to submit a reply to the Appellant's rejoinder.

(b) Request for suspension

The Appeal Panel has examined the request for suspension of the Contested Decision of [.].

The Appeal Panel understands that the request for suspension originates from a difference between the Board and the Appellant on the original MREL implementation deadline of [.] as set out in the SRB Decision [.] ([.]), which was referred back to the Board by the Appeal Panel with its decision of 13 February 2023 in case 3/2022.

As evidenced by the comment 1 in the RTBH Assessment Memorandum attached to the Contested Decision, the Appellant considers that such an original deadline that was still envisaged in the draft of the Contested Decision notified to the Appellant in the RTBH process would have disregarded the fact that "the initial MREL decision of 2022 was remitted by the Appeal Panel and was therefore no longer enforceable". In the Appellant's view, therefore, "a non-enforceable decision cannot give rise to any legal consequences which means that [.] was no longer initially obliged to take measures to comply with the MREL requirements".

The Board contends on the contrary that "while the Appeal Panel remitted the case 3/2022 to the Board, the contested SRB Decision [.] has never ceased to apply until it was superseded by the MREL Decision of 2 April 2024". In the Board's view, "in accordance with Article 85(6) SRMR an appeal lodged before the Appeal Panel does not have suspensive effect in relation to the contested Decision, unless the Appeal Panel decides otherwise".

Before considering the suspension request of the Appellant, the Appeal Panel wishes to acknowledge that, further to the comment 1 of the Appellant in the RTBH process and despite the clarification on Article 85(6) SRMR in the assessment of such comment, with the Contested Decision (recital 14 and Article 2(1) of section I of the Contested Decision) the Board has eventually extended the final deadline for the resolution entity to meet the MREL requirements to [.], thereby granting an additional calendar year to the Appellant vis-à-vis the original deadline set out in the SRB Decision [.] as well as in the SRB Decision [.] ([.]) amending the former following the Appeal Panel's decision of 13 February 2023.

The Board, in its response, opposes the suspension of the Contested Decision and argues that the request should be declared inadmissible. The arguments raised by the Board are as follows:

(81) In section (3.) of the statement of modification, the Appellant asks the Appeal Panel to suspend the application of the Appealed Decision. To support this application, the Appellant argues that "[t]*he MREL decision [.], which was referred back, was no longer enforceable due to the decision of the Appeal Panel of 13 February 2023 until the revised MREL decision [.] was issued, which was* replaced *by the New MREL Decision. In our opinion, the New MREL Decision is also flawed – partly due to the same deficiencies – and should therefore again be referred back to the SRB. Against this background, it would appear contradictory if the MREL Decision were to be enforceable again in the meantime.*"

(82) As a preliminary consideration, the SRB finds appropriate to recall that the Appellant did not apply in its appeal against the MREL decision [.] for the suspension of the application of that decision, as it is now doing in this statement of modification in relation to the Appealed Decision.

(83) The SRB considers, in any case, that the Appellant's request must be rejected as completely unsubstantiated.

(84) Article 85(6) SRMR clearly states that an appeal lodged before the Appeal Panel does not have suspensive effect but, if the Appeal Panel considers, however, that circumstances so require, it may suspend the application of the decision appealed. The Appellant has not alleged any circumstances justifying the suspension of the Appealed Decision.

(85) That requirement for setting out the reasons supporting the application for suspension is also reflected in the RoP, in Article 5(2)(c), which requires the Appellant to state the grounds of such application. Once again, the Appellant limits itself to state that the Appealed Decision is, in its view, flawed and it would therefore appear contradictory if the Appealed Decision were to be enforceable after it is (eventually) referred back to the SRB. That alleged contradiction is therefore the only ground stated by the Appellant.

(86) Article 156(4) of the Rules of Procedure of the General Court provides that an application to suspend the operation of any measure adopted by an institution must state the subject matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measure applied for. It must also contain all the evidence and offers of evidence available to justify the grant of interim measures. Moreover, it is also settled case-law of the EU Courts that an application for interim measures must be sufficient in itself to enable the opposing party to prepare its observations and the Judge to rule on it, and the essential elements of fact and law on which the application is founded must be set out in a coherent manner. Where an application does not comply with that requirement, the application must be declared inadmissible.

(87) Again, the SRB notes that the Appellant's application does not comply with any of those requirements since it limits itself to state that it would be contradictory if the Appealed Decision remain enforceable should the Appeal Panel decide to remit it back to the SRB. No reference to the subject matter of the proceedings, the circumstances giving rise to urgency or the pleas of fact and law establishing a *prima facie* case are mentioned in the Appellant's application.

(88) It follows from the above that the application for suspension must be declared inadmissible.

The Appeal Panel recalls that pursuant to Article 85(6) SRMR, the Appeal Panel may suspend the application of the Contested Decision "if it considers that circumstances so require". That wording reflects Article 278 TFEU, which lays down the circumstances in which European courts may suspend the application of a contested act. The Appeal Panel therefore considers that a decision on a suspension request should follow the case law of the European courts on similar requests.

It is apparent from reading Articles 278 and 279 TFEU together with Article 256(1) TFEU that European courts hearing an application for interim measures may, if they consider that the circumstances so require, order that the operation of a measure challenged be suspended or prescribe any necessary interim measures, pursuant to Article 156 of the Rules of Procedure. Nevertheless, Article 278 TFEU establishes the principle that actions do not have suspensory effect, since acts adopted by the institutions of the European Union are presumed to be lawful. It is therefore only exceptionally that the judge hearing an application for interim measures may order the suspension of operation of an act challenged or prescribe any interim measures (order of 19 July 2016, Belgium v Commission, T-131/16 R, EU:T:2016:427, paragraph 12).

The first sentence of Article 156(4) of the Rules of Procedure provides that applications for interim measures are to state ''the subject matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measure applied for''. The European courts hearing an application for interim measures may order suspension of operation of an act and other interim measures, if it is established that such an order is justified, prima facie, in fact and in law, and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, it must be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, and consequently an application for interim measures must be dismissed if any one of them is not satisfied. The European courts hearing an application for interim measures is also to undertake, when necessary, a weighing of the competing interests (see order of 2 March 2016, Evonik Degussa v Commission, C-162/15 P-R, ECLI:EU:C:2016:142, paragraph 21 and the case-law cited).

In the context of that overall examination, the European courts hearing the application for interim measures enjoy a broad discretion and are free to determine, having regard to the particular circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of law imposing a pre-established scheme of analysis within which the need to order interim measures must be assessed (see order of 19 July 2012, Akhras v Council, C-110/12 P(R), not published, ECLI:EU:C:2012:507, paragraph 23 and the case-law cited).

In the circumstances of the present case, and without there being any need to rule on the admissibility of the application for suspension, it is appropriate to examine first whether the condition relating to urgency is satisfied.

In order to determine whether the interim measures sought are urgent, it should be noted that the purpose of the procedure for interim relief is to guarantee the full effectiveness of the future final decision, in order to prevent a lacuna in the legal protection. To attain that objective, urgency must generally be assessed in the light of the need for an interim order to avoid serious and irreparable harm to the party requesting the interim measure. That party must demonstrate that it cannot await the outcome of the main proceedings without suffering serious and irreparable harm (see order of 14 January 2016, AGC Glass Europe and Others v Commission, C-517/15 P-R, ECLI:EU:C:2016:21, paragraph 27 and the case-law cited; more recently, order of 9 February 2024, Bytedance v Commission, T-1077/23 ECLI:EU:T:2024:94)

It is in the light of those criteria that the Appeal Panel finds that the Appellant has not succeeded in demonstrating urgency.

The Appeal Panel considers, in the first place, that the decision of the Appeal Panel in this case 3/2024 can be reasonably expected within one month after the closure of the written phase of these proceedings (which is expected by the end of September 2024) if the parties do not request a hearing, and in any event well before the end of the year 2024 should the parties wish to discuss orally the case. Since the current deadline for the Appellant to meet the MREL requirements is set by the Contested Decision on [.], it is hard to see what irreparable harm the Appellant would derive from the Contested Decision before the Appeal Panel renders its final decision on the merits.

The Appeal Panel further recalls that where the harm referred to by the party requesting suspension is of a financial nature, the interim measures sought are justified where, in the absence of those measures, the party applying for those measures would be in a position that would imperil its financial viability before final judgment is given in the main action (see order of 12 June 2014, Commission v Rusal Armenal, C-21/14 P-R, EU:C:2014:1749, paragraph 46 and the case-law cited). This is not the case, in the Appeal Panel's view, for the Appellant (nor the Appellant claims that it is).

In the second place, the Appeal Panel finds that the requirement of urgency is failing also if the suspension is requested by the Appellant as a means to justify, should the Contested Decision be referred back to the Board, a future request to the Board to extend beyond [.] the transitional period to comply with the MREL, so as to leave out the time during which the Contested Decision was appealed. The Appeal Panel finds indeed that these suspensory effects could in principle be granted by the Appeal Panel also with the final decision in the merit, without any necessity to grant it now as an interim measure, should the Appeal Panel find the appeal founded in fact and in law.

It follows from the foregoing that the application for suspension as an interim measure to be adopted before the final decision must be dismissed since the applicant has failed to prove that the condition relating to urgency is satisfied, without it being necessary to rule on any other aspect of admissibility or whether there is a prima facie case or to carry out a weighing of interests. The Appeal Panel reserves to determine on the suspension of the legal effects of the Contested Decision with its final decision, should the Appeal Panel not confirm the Contested Decision at the end of these proceedings.

14. On 26 July 2024, the Board submitted the [.] version of its response, that was served by the Secretariat of the Appeal Panel to the Appellant.

15. On 30 July 2024, the Appellant submitted a reasoned request for an extension of the deadline to submit its reply. The required extension was granted by the Appeal Panel until 30 August 2024.

16. On 29 August 2024, the Appellant submitted its reply to the Board's response, in [.] and with an English translation. On 30 August 2024, the Secretariat of the Appeal Panel served to the Board both documents, and invited the Board to submit its rejoinder, if any, by 20 September 2024.

17. On 3 September 2024, having regard to a proposal for settlement put forward by the Appellant with its reply to the Board's response, the Appeal Panel adopted its procedural order no 3 and invited the Board to take position on the settlement proposal. The tenor of Procedural Order no 3 is as follows:

> The Appeal Panel notes that the Appellant, with its reply to the Board's response, has made a proposal for the conclusion of these proceedings, offering to withdraw the appeal and set aside its reservations on the legality of the Contested Decision, "if the SRB were to extend the transitional period by a further year, i.e., until [.]".
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> The Appeal Panel, also by reasons of good administration and procedural efficiency, invites the Board to express, with its rejoinder to the Appellant's reply, its position on this proposal.
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> In connection with the Appellant's proposal, the Appeal Panel wishes to recall to both parties that the present appeal raises the question on whether a decision which is referred back to the Board by the Appeal Panel *at the end of an appeal* can still be considered effective and a source of legal obligations for the addressee as of the date of the Appeal Panel's decision and until the adoption of the amended decision. This issue is different from the question of the suspension of a contested decision *during the proceedings before the Appeal Panel* and has not been decided by the Appeal Panel nor by the European courts so far.
>
> On this issue there is a difference between the Board and the Appellant.
>
> The Appellant considers that the initial MREL decision of 2022 was remitted by the Appeal Panel on 13 February 2023 and was therefore no longer enforceable until the date of adoption of the amended decision [.]. In the Appellant's view, therefore, "a non-enforceable decision cannot give rise to any legal consequences which means that [.] was no longer initially obliged to take measures to comply with the MREL requirements" in the (almost) one year period from 13 February 2023 to 2 February 2024. For this reason, the Appellant considers that a further extension of the transitory period would be exceptionally justified.
>
> The Board contends on the contrary that "while the Appeal Panel remitted the case 3/2022 to the Board, the contested SRB Decision [.] has never ceased to apply until it was superseded by the MREL Decision of 2 April 2024". In the Board's view, "in accordance with Article 85(6) SRMR an appeal lodged before the Appeal Panel does not have suspensive effect in relation to the contested Decision, unless the Appeal Panel decides otherwise".
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> In case the parties do not reach an agreed solution, the Appeal Panel shall consider this issue in its final decision on the merits, addressing the first ground of appeal raised by the Appellant.
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> Article 11 (1) of the Appeal Panel Rules of Procedure states that:

"The Chair may give directions on behalf of the Appeal Panel by way of case management for the efficient conduct of the appeal at any stage in the appeal".

The Rules of Procedure of the General Court, to which the Appeal Panel refers by analogy, indicate, in Article 89(2), that: "Measures of organisation of procedure shall, in particular, have as their purpose: […] (d) to facilitate the amicable settlement of proceedings", and Articles 124 and 125a of the same Rules indicate that an amicable settlement of disputes is a possibility to be examined at all stages of the procedure.

In light of this, the Appeal Panel notes, first, that any considerations concerning the possibility of an amicable settlement should be irrespective of the merits of the appeal and with no prejudice to its final determination. Second, the Appeal Panel also notes that, albeit a settlement of an administrative appeal is a rare event the case is characterized by quite exceptional and unique circumstances, including, *inter alia* (i) the reliance by the Board on novel arguments of substance to justify the change of crisis management strategy for the Appellant, (ii) the fact that the Contested Decision extended the transitory period by one year, although for reasons different from those relied upon by the Appellant, and (iii) the length of the time employed by the Board, after the initial MREL decision of 2022 was remitted in February 2023, to adopt the amended decision, on 2 February 2024.

In light of these relatively exceptional circumstances, the Appeal Panel considers that a discussion of the possibility of an amicable settlement is pertinent, and non-prejudicial for the merits of the dispute.

In light of this, and upon submission by the Board of its rejoinder:

- should the Board disagree about the pertinence of exploring an amicable solution to the dispute, the Appeal Panel shall proceed to take all necessary steps concerning the oral discussion of the case, and reserves all other relevant determinations.

- should both parties consider that there is room to reach a settlement, the Appeal Panel would be prepared to grant additional time, after the closure of the written phase of these proceedings and before the hearing, for their discussions, if any.

18. On 10 September 2024, the Board filed a reasoned request for an extension until 27 September 2024 of the deadline of 20 September 2024 for the submission of its reply to the Appellant's rejoinder.

19. On 12 September 2024, the Appeal Panel granted the required extension until 24 September 2024 and informed the parties of its intention to hold a hearing for the oral discussion of the case on 27 September 2024. The communication sent to the parties by the Appeal Panel is as follows:

Further to the request of the Board for an extension of one week of the deadline to submit its reply, which is attached hereto, the Appeal Panel wishes to inform the parties of its intention to hold an hearing in this case on Friday 27 September 2024, at 11 am in Brussels, at the SRB premises and with [.] English simultaneous translation services provided by the European Commission, unless the Board with its reply confirms its agreement to enter discussions with the Appellant to settle the case. As informed by the [.] due to technical and administrative reasons to be verified by the interpreting service of the European Commission, the date of the hearing will only be confirmed early next week.

> In light of the extension request of the Board and of the scheduled date of the hearing, the Appeal Panel wishes to inform the parties that in the circumstances it hereby grants to the Board an extension of the deadline for the submission of its reply by the close of business of Tuesday 24 September 2024. […]

20. On 20 September 2024, the Secretariat of the Appeal Panel informed the parties that the interpretation services of the European Commission had confirmed their availability for the hearing scheduled for 27 September 2024 and that, therefore, such hearing would take place in Brussels at the SRB premises on that date.

21. On 24 September 2024, the Board submitted its rejoinder to the Appellant's reply in English with the [.] version to follow. The Secretariat, in view of the forthcoming hearing, provided an automatic translation of the document into [.] and served both versions in English and [.] to the Appellant on the same day.

22. On 27 September 2024, the hearing was held in Brussels. Both parties appeared and presented oral arguments, where they reiterated their respective positions, adding further considerations of fact and law. The parties also answered questions from the Appeal Panel for the clarification of facts relevant for the just determination of the appeal. At the end of the hearing, the Chair of the Appeal Panel invited the parties, if they wish so, to submit the written text of their pleadings at the hearing, without amendments, by the close of business of 4 October 2024.

23. On 4 October 2024, the Appellant submitted the written text of its pleadings at the hearing whilst the Board had filed its written text already on 27 September 2024 for the benefit of interprets.

24. On 4 October 2024, the Appeal Panel served to the parties its procedural order no 4 inviting the parties to answer in writing some questions by the close of business of 11 October 2024. The tenor of procedural order no 4 was as follows:

> The Appeal Panel wishes to thank both parties for their speaking notes at the hearing of 27 September 2024 which have meanwhile been submitted and for the helpful clarifications given in answering at the hearing the questions posed by the members of the Appeal Panel.
>
> The Appeal Panel, before declaring the appeal lodged to the effect of Article 20 of the Appeal Panel's RoP and as a final request to the parties, invites the parties to answer in writing, by the close of business of Monday, 14 October 2024, the following questions:
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> 1. At the hearing the Board, upon request of the Appeal Panel, specified that the RCA of the MREL requirement set out in the Contested Decision for the Appellant amounts to about EUR [.]. Could both parties confirm or otherwise specify that amount?
> 2. According to [.] half year report as of 30 June 2024 the Appellant's total capital ratio applying the credit risk standard approach was [.], and its Common Equity Tier 1 capital ratio was [.]. The leverage ratio was around [.]. The MREL requirement for the Appellant set out by the Contested Decision is [.] of TREA (adjusted) and [.] of LRE (adjusted). Could both parties indicate the exact amount of the MREL-TREA and MREL-LRE already built-up by the Appellant as of 30 June 2024 and also specify the amount of the existing shortfall of MREL-

TREA and MREL-LRE as a difference between the MREL built-up as of 30 June 2024 and the required targets to be achieved by [.], and its expected linear or non-linear evolution in that time frame?

3. […]. Could both parties provide all relevant details of such issuance and of its placement to investors?
4. At the hearing the Board has alluded to the fact that, under [.] insolvency law, it would be hardly possible for the Appellant to transfer bank deposits in the context of a transfer of business included in an approved insolvency plan. Could both parties offer further specifications on this point?
5. […]. Could the parties offer additional information on whether […] are also possible, as a matter of law or as a matter of practice, in insolvency, e.g. to support a transfer of business of the insolvent entity in the context of an insolvency plan, so as to close the funding gap between assets and liabilities transferred?
6. The Appellant alluded in the RTBH assessment memorandum of the Contested Decision, in comment 2c, at page 23, to a stress test conducted in [.] by [.] and the [.] […]. Could both parties deposit with the Appeal Panel the relevant documentation and point at the differences between the scenarios of the [.] and […]?

- Could the Board clarify the elements of the contagion model, explaining it step by step, including (i) how the losses propagate; (ii) for how many rounds and (iii) the number of simulations that are conducted (iv) whether the indirect contagion (non-contractual channels) is incorporated in the simulation, and, if so, how, and how does this differ from the "qualitative assessment" under recital (9).

25. On 9 October 2024, the Board requested an extension of one week of the deadline to submit the answers. The Appeal Panel granted the requested extension to both parties.

26. On 18 October 2024, the Board submitted its written answers, in response to procedural order no 4. In turn, on 21 October 2024 also the Appellant submitted its written answers.

27. On 24 October 2024, the Appeal Panel notified the parties that the Chair considered that the evidence was complete and thus that the appeal had been lodged for the purposes of Article 85(4) of Regulation 806/2014 and 20 of the Rules of Procedure.

Main arguments of the parties

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

Appellant

29. The Appellant argues that the Contested Decision errs in law and should therefore be remitted to the Board. To support that conclusion, the Appellant relies on the following pleas.

30. First, the Board errs when it assumes that the decision [.] adopted by the Board in the 2021 RPC was enforceable after the decision of the Appeal Panel of 13 February 2023 in case 3/2022. In the Appellant's view, the decision [.] was not enforceable from the date of the Appeal Panel decision and until the adoption of the Amended Decision. Therefore, the

Appellant was not obliged to initiate measures to comply with the MREL requirements set out in the decision [.] in the period between the 13 February 2023 and 2 February 2024. The Board should have duly considered this factor when assessing and determining the appropriate duration of the transitional period granted to the Appellant to comply with the MREL requirement set out in the Contested Decision. The Board, in the Appellant's view, has failed to do so.

31. The Appellant acknowledges that the Contested Decision extends the transitional period until [.], whereas the Amended Decision had reconfirmed the same deadline originally set by the decision [.] ([.]). Yet the Appellant argues that this postponement of the original deadline of one year has been granted for reasons which did not take into account that from 13 February 2023 and until 2 February 2024 the Appellant was not under any obligation to proceed further with the linear build-up of MREL as originally required by the decision [.]. Accordingly, the Appellant claims that the Board should have also extended the transitional period set out in the Contested Decision also by approximately one additional year.

32. Second, the Appellant argues that the Contested Decision errs when considering that the Appellant fulfils the criteria to be classified as a resolution entity. In particular, with different limbs of the same plea, the Appellant argues the following.

33. (a) The Contested Decision has failed to adequately justify the classification of the Appellant as a resolution entity and, therefore, has not fulfilled its obligation to abide by the Appeal Panel's findings in case 3/22.

34. (b) The Contested Decision has been guided by political reasons and is based on an incorrect exercise of discretion.

35. (c) The Contested Decision has incurred "*substantive errors*" in the classification of the Appellant as a resolution entity, because the results of the EBA and the ECB stress tests would not be suitable to justify contagion effects on other [.] banks in a system-wide event that could not be countered in the context of normal insolvency proceedings.

36. (d) The Contested Decision has also committed errors as regards the additional quantitative and qualitative factors used to analyse and measure contagion effects, which would consist mainly of unprovable assumptions.

37. (e) The Contested Decision fails to recognise the stabilising effect of the stabilising effect of the [.] institutional protection scheme (hereinafter the "**IPS**") to which the Appellant is affiliated in a hypothetical default scenario of the Appellant and fails also to demonstrate the unsuitability of [.] insolvency law, in particular through prepacked insolvency arrangements largely known under [.] law, to achieve the objectives pursued with the resolution strategy to the same extent.

38. The Appellant further complemented its arguments in support of the appeal with its reply to the Board response and in the oral discussion of the case.

Board

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

40. With regard to the first plea of the appeal, the Board submits that the Appellant's allegations must be rejected since they are based on a misunderstanding of Article 85 SRMR and the legal effects of the proceedings before the Appeal Panel, which do not have suspensive effect of the decision appealed. In any case, the Board further submits that setting a transitional period to comply with the MREL is not a right of the Appellant, but a power of the Board based on its discretionary assessment of the objective criteria laid down in Article 12k SRMR. The transitional period set out in the Contested Decision has been determined in accordance with those criteria.

41. With regard to the second plea of the appeal, the Board considers that it has correctly classified the Appellant a resolution entity.

42. In particular, with regard to the first limb of the second plea, the Board considers that, with the Contested Decision, the Board has provided sufficient reasons to justify the Appellant's classification as a resolution entity, thus addressing the shortcomings identified with respect to the decision of 2022 by the Appeal Panel in its final decision of 13 February 2023 in case 3/2022.

43. As to the second limb of the second plea, in the Board's view the Appellant does not substantiate in any way its allegations concerning the political nature of the Contested Decision, and the Board has correctly exercised its resolution planning powers.

44. As to the third limb of the second plea, the Board has not committed any manifest error in its technical assessments supporting the classification of the Appellant as a resolution entity and the use of the EBA and the ECB stress tests is an appropriate assumption of a broader financial instability scenario and an appropriate first proxy to justify contagion effects on [.].

45. As to the fourth limb of the second plea, the Board argues that the additional quantitative and qualitative factors used to analyse and measure contagion effects are based on concrete entity-specific and sector-specific facts and assumptions that support the findings on the risk of contagion effects.

46. As to the fifth limb of the second plea, the Board argues that it cannot assume any stabilising effect of the IPS on the Appellant. The Contested Decision correctly concludes, therefore, on the unlikelihood of such stabilisation on the rest of the IPS' members and also that the [.] [.] would be unsuitable to achieve the objectives pursued with the resolution strategy to the same extent given the differences between both regimes in terms of tools available to tackle the failure, timelines to handle it and objectives pursued.

47. The Board further complemented its arguments in support of the appeal with its rejoinder and in the oral discussion of the case.

Findings of the Appeal Panel

(a) The factual background.

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

49. The Appellant is [...], with assets of around […]. It is the […]. Although the Appellant […].

50. Given its size and significance, the Appellant is [.] and is under the responsibility of the SRB for drawing up the corresponding resolution plan and adopting all decisions relating to resolution, including the MREL decision.

51. According to its half year report as of 30 June 2024 the Appellant's total capital ratio applying the credit risk standard approach was [.], and its Common Equity Tier 1 capital ratio was [.]. The capital ratios improved compared to the end of 2023. This was due to […]. The leverage ratio was around [.] and thus remained [.] than the minimum requirement of 3 percent.

52. The Appellant is a member of an […]. The IPS is governed [….]:

[…]

[…]

[…]

[…]

[…]

[…]

[…]

[…].

[…].

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

54. The SRB has implemented this revised approach to the public interest assessment (as set out in the Addendum 2021) for the first time as regards the Appellant during the 2021 RPC with the decision [.], [.]. This decision was challenged by the Appellant in case 3/2022, leading to the Appeal Panel decision of 13 February 2023. In its decision in case 3/2022 the Appeal Panel remitted the case to the Board. This led to the adoption of the Amended Decision [.], which in turn was replaced in the 2023 RPC by the Contested Decision.

55. With the decision [.], the Board changed the preferred crisis management strategy for the Appellant (and this change of strategy was confirmed in the Amended Decision and in the Contested Decision): the Board changed from liquidation under normal insolvency proceedings to resolution via application of the sale of business tool according to Article 22(2)(a) SRMR. The reason for that change is that, according to the Board, it cannot be excluded that the failure of the Appellant and its winding up under normal insolvency proceedings, *at a time of broader financial instability or system-wide events* as now envisaged by the Addendum 2021, would likely result in significant adverse effects on the financial stability of [.] in the sense of Article 14(2)(b) SRMR.

56. The economic justification for the Board's conclusion is described in recital (4) with regard to the description of the adverse scenario used as a reference and more specifically set out in recitals (7) to (17) of the Contested Decision as follows:

> (7) The above conclusion is based on the Board's assessment of the financial stability effects that would be caused under the adverse scenario by the failure of [.], which is the [.] […], taking into consideration different channels of contagion and based on a set of qualitative and quantitative indicators of financial linkages. Direct contagion risks, whereby the failure of a bank directly affects other banks, have been assessed by using data on interbank exposures and intra-financial sector holdings of own funds and debt instruments issued by the resolution entity. Indirect contagion risks have been assessed by the Board based on several financial linkages and qualitative indicators such as potential contagion to banks with the same characteristics, business model and risk profile, and potential indirect contagion through market reactions and the behaviour of market participants.
>
> (8) First, the Board has performed a set of quantitative analyses, including on the basis of the network model developed by the Board. The model takes into account the interbank exposures across Banking Union banks and estimates the propagation of initial exogenous loss through a network of Banking Union banks, capturing different losses linked to the liquidation of a bank, losses by creditors following the write-down of liabilities of the failed bank as well as mark-to-market losses for the trading portfolio of all banks in that network. The outcome of that analysis under the system wide event scenario places [.] […][.] banks under SRB remit. The model considers that system losses at or above the median are an indication that a bank has […] of contagion to the rest of the sector.
>
> Further, applying the Board's model for assessing indirect contagion, which considers non-contractual channels of contagion, such as the similarity of the business models of [.] with other [.] banks under the remit of the Board, [.] has been classified as having […] of indirect contagion. In particular, taking into account that […] is one of the conditions for an approval of an [.] by the supervisory authority, the Board is of the view that the indirect contagion risk of [.] [.], is a non-negligible element in the specific case of [.], in particular in the system-wide event circumstances detailed above.

Finally, the Board has also performed additional quantitative analyses, measuring […], following the failure of [.], in terms of their combined risk-weighted assets and implied supervisory capital ratios. The outcome of this analysis reveals a reduced capacity of individual IPS members under system-wide event circumstances to absorb other IPS members, without external financing. In particular, the outcome of the analysis shows that, following the failure of […], is reduced by between […] under system-wide scenario, as compared to the idiosyncratic scenario.

(9) The Board has supplemented the outcome of the above quantitative analysis applying its expert judgement on the basis of qualitative factors specific to the case of [.] (i.e. […], in the case of the failure of the latter, and the role played by the [.]). Those factors, which are of particular relevance under a system wide events scenario, are further explained below.

Indirect contagion effects would be particularly relevant for other [.] ([.]) and members of the so-called [.]), which in turn might cause serious disturbance to the overall [.] banking sector as well as the real economy. Additionally, the Board assumes that the […] ([…]), in which the […].

(10) [.] belongs to the [.], […]. The [.] within the [. …]. […]. The [.] [.] banks sector comprises [.] local [.] banks, make up ca. [.] of [.]'s domestic banking assets and some [.] of [.]'s total loan volume to non-MFIs. [.] is the [.] entity of the [.] [.] banks sector. It offers a wide range of financial services for private and corporate clients in the [.]. It serves about [.] clients (deposits) and has a notable footprint in the region: while its market share at national level of "Deposits - households" is ca. [.], its market share at regional level of the same economic function is ca. [.] ([.] clients).

(11) The Board considers that the failure of the [.] [.] bank in [.], i.e. [.], would be seen as a sign of weakness for the entire [.], endangering the trust in the "[.]" [.] and damaging the reputation of and the confidence in the entire [.] banks sector, in particular under a system wide events scenario. This is particularly so given the importance of [.] in one of [.]'s main cities and the number of clients it covers. In particular, a failure of [.], the [.] [.] [.] bank, under the economic circumstances described in recitals (4) and (8), and given the qualitative factors referred to in recital (9), as well as the considerations in recital (10), could trigger the loss of trust and confidence on the [.] among the public and investors, leading to serious risks of withdrawal of customer funds (deposits) and the migration of credit customers to competitors (such as larger [.] private banks). The Board also took into account in its assessment that the increasing and generalised access to internet banking by a majority of customers has made deposits much more volatile and exacerbates the abovementioned risks.

(12) Further, the Board has assessed the role played by the IPS in which [.] participates as member, in a scenario of broader financial instability in which the IPS would not have impeded the failure of [.]. The IPS has been recognised as a statutory deposit guarantee scheme under the [.] [.], which transposes the Directive 2014/49/EU into [.] law. It would therefore have to repay covered depositors of [.] in the event of its failure. The amount of covered deposits that would be protected by this obligation is [.], of which [.] are household deposits ([.] reports [.] household clients. The amount of pre-paid funds available to the DGS at that date (year-end 2022) was EUR [. (ca. [.] less than [.] covered deposits), [.] and would have to be covered by ex-post contributions from the IPS members or other sources. In addition, even ahead of the repayment of covered deposits, it is assumed that, under the system-wide events scenario, (i) the IPS' funding capacity would have been already reduced by its (unsuccessful) attempt to support [.], and therefore (ii) would actually have an even lower funding capacity when it will need to prevent contagion to its other members after the failure of [.]. Based on these numbers and considerations, and for the reasons described below, the Board concludes that, following the failure of the [.] [.] [.] bank, i.e. [.], the IPS

would not have sufficient funds to be able to preserve the confidence of the market in all other members of the [.].

(13) This finding is because under the system wide events scenario, the remaining [.] banks members of the [.], [.] than [.], would have a lower capacity to support other members and to continue providing the same level of support to the real economy. In this scenario, […] [.]. As mentioned in recital (4) above, the application of the capital depletions reduces substantially the excess capacity of the [.] IPS members under the remit of the Board above their minimum P2R (from around [. to around [.]). This figure is well below the size of the deposit funding base of the same institutions ([.] of covered deposits and [.] of uncovered deposits). […]. In conclusion, the Board does not consider credible that in a system wide events scenario, and with the IPS not having been able to avoid the failure of [.], the [.] of the [.] banks in [.], the IPS would nevertheless be able to support other members of the IPS to avoid contagion.

(14) The above conclusion is also based on the likely loss of the IPS's preferential supervisory treatment following the failure of [.], the insufficient funding of the IPS and its complex governance structure. As regards the first point, where the IPS fails to support its [.] [.] bank member, [.], the Board is of the view that the capital and liquidity relief stemming from Articles 49(3) and 113(7) of Regulation (EU) No 575/2013 would likely be revoked, and the excess capital in the IPS, and therefore its capacity to prevent contagion, would be further reduced. [..]. As regards to the third point, the complex governance of the IPS further reinforces the Board's doubts on the capacity of the IPS to prevent contagion in the specific case of the failure of the [.] [.] [.] bank under a system wide event.

(15) The Board has also analysed the impact of the provision of transactional accounts ([.]) by [.] on the contagion effects that would be caused on financial stability in case of the failure of [.] under system-wide events scenario. As of 31 December 2022, [.] provided approximately [.] transactional accounts to [.] customers. In this regard, the Board considered that the discontinuation of the provision of these transactional accounts is likely to increase the loss of trust and confidence on the [.] among the public and investors, and thus lead to higher contagion of risks through reputational effects, as mentioned in recital 11 above. This further reinforces the assessment of the Board that the winding up of [.], under normal insolvency proceedings, at a time of broader financial instability or system wide events, would likely result in significant adverse effects on the financial stability of [.] in the sense of Article 14(2)(b) of Regulation (EU) 806/2014.

(16) Finally, while the Board acknowledges that the [.] insolvency framework allows in principle for the implementation of certain transfer strategies, the Board considers that it is not credible that the [.] insolvency regime would allow for the implementation of a transfer strategy meeting the objectives pursued by the resolution strategy of [.] to the same extent. This stems from the time needed to implement that strategy under the [.] insolvency framework and the more constrained powers of [.] judicial insolvency courts compared to resolution authorities.

(17) In terms of timing, the [.] insolvency framework regime is a judicial procedure, which needs longer timelines than the resolution procedure to implement transfer strategies. In particular, price adjustments in [.] insolvency proceedings take substantially longer and may lead to adverse market reactions. These factors are even more relevant in the case of [.], where the main reason of the positive public interest assessment is the risk of contagion effects to other [.] banks in [.]. As observed in previous cases of insolvency proceedings in [.], the process to determine the final recovery rates may take months or even years and may in the meantime prevent market participants to correctly price liabilities, due to the uncertainty associated with the process. During this period, the bank would be unable to continue its operations (access to deposits or processing payments, among others). It follows that the [.] insolvency framework would likely fail to achieve the same

> objectives as the resolution strategy, in particular, avoiding significant adverse effects on financial stability by preventing contagion. On the contrary, the resolution regime is devised to provide clarity on the extent and conditions of the resolution action over a particularly short period of time, and to maintain the core operations the bank provides.

57. Those reasons have been further discussed and complemented in the right to be heard assessment memorandum (hereinafter the "RTBH") which constitutes Section II of the Contested Decision, specifically in connection to the comments 2 to 2e made by the Appellant.

58. The Contested Decision also sets a transitional period for the Appellant to comply with the MREL, which goes to [.]. This extends by one year the deadline set out in the MREL decision [.] (which was [.] and was also reconfirmed as such in the Amended Decision). The reasons why the Board considers the extension of the transitional period justified are described in recital (14) of Section I of the Contested Decision and are further explained in the RTBH assessment memorandum in connection to comment 1 made by the Appellant.

(b) On the first ground of appeal*:* implications for the determination of the transitional period of the previous decision of the Appeal Panel of 13 February 2023

59. With the first ground of appeal the Appellant claims that the Contested Decision is unlawful because the Board, in determining the transitional period for the Appellant to ensure the linear build-up of MREL towards the requirements set out in Section I, has not taken into account that the MREL decision [.] (which set out for the first time that MREL requirement, including a recapitalisation amount, for the Appellant) was remitted to the Board and was therefore not enforceable between the decision of the Appeal Panel of 13 February 2023 in case 3/2022 and the adoption by the Board of the Amended Decision [.].

60. In the Appellant's view, if this factor would be taken into account, the transitional period should be extended by approximately one additional year.

61. The Appellant further argues that it would be against good faith to ignore the interim non-enforceability of the original MREL decision [.] and this would also violate the legitimate expectation of effective legal protection. The Appellant argues that it would not be compatible with fundamental principles of Union law if the Appellant, despite the Appeal Panel had remitted the original MREL decision [.] and the Board is bound pursuant to Article 85(8) SRMR by the decision of the Appeal Panel, had still to take all necessary measures to implement in a timely manner that MREL decision, albeit recognised as flawed by the Appeal Panel. This would be the practical effect, in the Appellant's view, if the transitional period stipulated in the MREL decision [.] continued to run.

62. If this were the case, the Appellant further considers that "the successful Appellant would be worse off than if he had lost the appeal proceedings, because it could have brought an action before the Court of Justice against a negative decision by the Appeal Panel and could have moved for a stay of the enforcement".

63. Finally, the Appellant notes, with respect to the Contested Decision, that, although the Contested Decision, unlike the Amended Decision, had ultimately granted an extension of the transitional period of one year until [.], this does not remedy the contested lack of consideration by the Board of the one-year period lapsed between 13 February 2023 and 2 February 2024. In the Appellant's view this is so because "the granted extension of the transitional period ([as explained in] Section I, recital (14) and Section II, No. 1 of the Contested Decision) was granted for a different reason and is therefore not relevant in the present case".

64. The Board, for its part, objects that the Appellant is mistaken in considering that a decision of the Appeal Panel in accordance with Article 85(8) SRMR to remit the case to the Board implies the automatic suspension of the legal effects of the decision examined in that case, including any transitional period that that decision may include.

65. The Board submits that the issue has constitutional nature, because the Treaties reserve only to European courts the power to annul, and thus deprive of legal effect, a decision of European agencies or institutions. Those decisions are to be presumed valid until declared invalid by a court. In the Board's view, the Appellant is therefore mistakenly attaching a legal effect to Article 85(8) SRMR which is contrary to the textual, contextual and purposive interpretation of that provision.

66. According to the Board, Article 85(8) SRMR does not provide for the automatic suspensive effect of the decision challenged before the Appeal Panel where the latter decides to remit the case to the Board. Attaching such automatic legal effect to the Appeal Panel's decision would be contrary to the exceptional nature of that remedy, as established in Article 278 TFEU.

67. The Board further argues that Article 85(6) SRMR explicitly preserves the presumption of legality of acts of the European Union institutions, bodies, offices and agencies, and offers the only appropriate procedural means to decide on the exceptional interim relief of suspension, i.e., to grant that suspension where the circumstances of the case so require.

68. It follows according to the Board that such suspension can only be granted where an application in that sense has been made and the requirements established by settled-case law on Article 278 TFEU are considered to be met. The Appellant's interpretation of Article 85(8) SRMR would on the contrary imply an automatic grant of the interim relief without observing any of the strict conditions established by the case-law on the correct interpretation and application of Article 278 TFEU.

69. The Board further notes that the Appellant draws a wrong parallelism between the Appeal Panel and European courts. While acknowledging that the Appeal Panel cannot declare a decision null and void, the Appellant nevertheless concludes that, after the Appeal Panel's decision to remit the case to the Board, the decision challenged in that case no longer applies to the Appellant as if, *de facto*, the decision had been declared null and void.

70. In the Board's view, this conclusion is incorrect since it obviates the rule of law principles embedded in the Treaties as interpreted by the European courts. Only the Court of Justice has jurisdiction to declare an act of the European Union invalid. The reason for that exclusivity is to ensure legal certainty through the uniform application of Union law. It follows from that principle that any act of the European Union will produce legal effects until such time as it is withdrawn, amended or annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality.

71. The Board argues thus that the Appellant also errs when drawing an automatic parallel between Article 278 TFEU and Article 85(6) SRMR and it considers on that basis that Article 85(6) SRMR is only relevant for the period during which the appeal proceedings are running.

72. In the Board's view, the purpose of interim relief pursuant to Article 278 TFEU is indeed to grant protection until European courts decide on the validity of the acts concerned and, therefore, on the annulment of its legal effects. However, in light of the nature of the Appeal Panel, and since its decision to remit the case to the Board does not annul the legal effects of the act concerned, the legal protection intended by the Union legislature under Article 85(6) SRMR, differently from the legal protection in Article 278 TFEU, can be extended, in the Board's view, beyond the period of duration of the appeal proceedings before the Appeal Panel, provided that all necessary requirements to grant such protection are fulfilled.

73. In other words, according to the Board, Article 85(6) SRMR would grant the Appeal Panel, when adopting a decision to remit the case, the power to suspend the effects of the concerned SRB's decision until when an amended decision is ultimately adopted. However, this would be possible only upon scrupulous observance of all relevant conditions, namely, that a complete application in that sense has been made by the Appellant and the requirements established by settled case-law on Article 278 TFEU are effectively met.

74. On a different count, the Board also argues that SRB's powers to assess and determine the appropriateness of the transitional period to comply with the MREL in accordance with Article 12k SRMR is subject to an assessment which, in turn, needs to be based on the exhaustive list of factors listed in paragraphs 1 and 7 of Article 12k SRMR.

75. According to the Board, the alleged non-enforceability of the original MREL decision [.] could not in any case be taken as such into account since it is not part of the factors laid down by the co-legislators in Article 12k SRMR to justify an extension of the transition period for the compliance with the MREL.

76. In that respect, the Board also notes that the Appellant not only brings no argument to question the assessment carried out by the SRB to determine the transitional period contained in the Contested Decision, but consciously refuses to engage in such assessment by stating that such assessment is not relevant to the issue at hand.

77. In this case the parties present for the consideration of the Appeal Panel the issue of the legal effect of an Appeal Panel decision which remits the case to the Board. On this point of law there is a stark difference between the Board and the Appellant.

78. The Appellant considers that the initial MREL decision [.] was remitted by the Appeal Panel on 13 February 2023 and was therefore no longer enforceable until the date of adoption of the Amended Decision [.]. In the Appellant's view, therefore, a non-enforceable decision cannot give rise to any legal consequences and the Appellant could thus not be expected nor required to continue the linear build-up of MREL during that period.

79. The Board contends on the contrary that "while the Appeal Panel remitted the case 3/2022 to the Board, the contested SRB Decision [.] has never ceased to apply until it was superseded by the MREL Decision of 2 April 2024". In the Board's view, "in accordance with Article 85(6) SRMR an appeal lodged before the Appeal Panel does not have suspensive effect in relation to the Contested Decision, unless the Appeal Panel decides otherwise".

80. The Appeal Panel acknowledges that there is a degree of ambiguity in Article 85 SRMR as to the precise effect of a decision of the Appeal Panel to remit the case to the Board and that this ambiguity is also reflected in the practice of other agencies where similar boards of appeal are established.

81. However, the Appeal Panel is not persuaded by the Board's argument that, following a decision of the Appeal Panel to remit the case to the Board, the appealed decision remains effective and enforceable until the amended decision is adopted by the Board. The Appeal Panel is rather more persuaded by the alternative interpretative conclusion, witnessed also in the literature, that once an appealed decision is remitted to the Board, that decision is no longer enforceable as a matter of course.

82. In this connection, the Appeal Panel wishes to clarify that, in its view, one question is whether a decision which is remitted to the Board by the Appeal Panel *at the end of an appeal* can still be considered effective and a source of legal obligations for the addressee as of the date of the Appeal Panel's decision and until the adoption of the amended decision. Another question is whether a contested decision can, or should, be suspended *during the proceedings before the Appeal Panel.*

83. Suspension is governed by Article 85(6) SRMR which mirrors Article 278 TFEU. As it happens with the suspension granted by European courts, the suspension operates only during the proceedings. Therefore, the Appeal Panel considers that an appellant cannot request, nor obtain by the Appeal Panel, an order of suspension that would remain in place after the decision on the merits of the appeal.

84. The Appeal Panel is aware of the fact that in the context of the recent Regulation (EU) 2024/1620 of 31 May 2024 establishing the Authority for Anti-Money Laundering (hereinafter "**AMLA**"), the AMLA's Administrative Board of Review, pursuant to Article

74(4) of the Regulation, may suspend the application of the decision for which the request for review has been lodged "until the Executive Boards adopts a new decision pursuant to paragraph 3 [of the same Article 74]". However, in the case of AMLA, the fact that the appealed decision remains in force until the adoption of the new decision unless it is suspended by the Administrative Board of Review derives, in the Appeal Panel's view, from the different nature and procedural character of the review of the AMLA's Board of Review. First, unlike the Appeal Panel's decisions, the AMLA Administrative Board of Review findings are opinions, as it is also the case with the Administrative Board of Review of the ECB according to Article 24 of Regulation (EU) 1024/2013 (unlike the AMLA's Administrative Board of Review, the ECB Administrative Board of Review, however, cannot grant any suspension but can only propose to the Governing Council of the ECB to consider such suspension), and these opinions are not binding upon the Executive Board. Second, this opinion is part of a two-staged administrative process where, if a request for review is lodged, the case is in any event remitted for the preparation of a new decision of the Executive Board. In so doing the Executive Board, taking into account the opinion of the Administrative Board of Review, abrogates the initial decision and replaces it with either a decision of identical content or an amended decision. In light of these differences, the Appeal Panel considers that the power to suspend of the Appeal Panel cannot be inferred by the AMLA Regulation by analogy.

85. The Appeal Panel wishes also to point out that, to the Appeal Panel's knowledge, on this specific point of law there is no settled case-law of the European courts nor the parties have relied on caselaw that could be applied by analogy. Thus, the Appeal Panel must decide without the comfort of the guidance of European courts. Such guidance may come eventually, perhaps even in the context of the judicial scrutiny of this decision. The Appeal Panel wishes to anticipate that, should the European courts disagree on this point of law with the conclusions reached by the Appeal Panel, it shall thereafter immediately align its future practice to the guidance of the courts.

86. The Appeal Panel finds that, at the end of the appeal (i) either the appeal is dismissed and the Contested Decision is confirmed, and thus the Contested Decision's legal effects remain fully enforceable (with the further qualification that, if there was a suspension granted during the proceedings, that suspension ceases to operate and the appealed decision resumes its enforceability) (ii) or the Contested Decision is found unlawful and is thus deprived of its legal effects and its enforceability and is remitted to the Board for the adoption of an amended decision. Only the amended decision shall then become enforceable again.

87. This conclusion, in the Appeal Panel's view, is the interpretation to be preferred in the reading of the text of Article 85 SRMR, for textual, contextual and teleological reasons.

88. The Appeal Panel considers, in agreement with the parties, that Article 85(8) SRMR is the relevant provision to determine the effects of an Appeal Panel decision. The text of the provision reads as follows:

> The Appeal Panel may confirm the decision taken by the Board, or remit the case to the latter. The Board shall be bound by the decision of Appeal Panel and it shall adopt an amended decision regarding the case concerned.

89. The Appeal Panel notes that this provision implements, in the context of the SRMR, Article 263(5) TFEU, according to which:

> Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

90. The Board contends that only the Court of Justice has jurisdiction to declare an act of the European Union invalid, the reason being to ensure legal certainty through the uniform application of EU law, with the consequence that, in the Board's words, "any act of the European Union will produce legal effects until such time as it is withdrawn, amended or annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality". The Board relies to that effect in the judgment of the Court of Justice of 14 June 2012, case C-533/10 CIVAD, ECLI:EU:C:2012:347, paragraphs 39 and 40, and case law cited therein.

91. The Appeal Panel notes, however, that in *CIVAD* the Court of Justice considered the legal effects of a decision by the Dispute Settlement Body (DSB) of the World Trade Organisation (WTO), and thus the findings of that case cannot be applied by analogy to the present context. The Appeal Panel is not only regulated in secondary EU legislation, such as the SRMR, but it is also one the arrangements concerning actions brough by natural or legal persons against acts of bodies, offices and agencies of the Union pursuant to Article 263(5) TFEU. Consistently, unlike the DSB of the WTO, which is entrusted with the application of WTO Treaties, the Appeal Panel applies EU law.

92. This finding, in the Appeal Panel's view, already contradicts the Board's argument of constitutional nature, according to which a decision of the Appeal Panel which would deprive of its enforceability the Board's decision from the date the appealed decision is remitted would clash with the rule of law principles embedded in the Treaties as interpreted by the European courts.

93. The Appeal Panel is further not persuaded by this constitutional argument as a matter of principle and as a matter of practice.

94. As a matter of principle, European courts have held that acts of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects, even if they are tainted by irregularities, until such time as they are annulled or withdrawn (judgment of the Court of Justice of 15 June 1994, case C-137/92 P, Commission v BASF, EU:C:1994:247, paragraphs 48-50). This presumption seeks to reconcile two fundamental, but sometimes conflicting, requirements namely stability of legal relations and respect for legality (judgment

of the Court of Justice of 8 July 1999, case C-200/92, ICI v Commission, EU:C:1999:359, paragraph 70).

95. The logic of this balance is that an act of an institution, agency or body, is presumed legal and produces legal effects until the act is declared unlawful, or is withdrawn or replaced by the institution, agency or body. Thus, the relevant question is whether bodies other than European courts can have authority to declare unlawful an act by EU institutions, agencies or bodies.

96. The function of the Appeal Panel is to review the Board's decisions to ensure that they are correct in fact and in law, and that therefore they do not violate EU law. The limit to its review is only that it cannot substitute its decision for that of the Board through a de novo assessment of the Board's determination.

97. Despite its administrative nature, the Appeal Panel is vested with the task of ensuring the legality of Board's actions. This is in common with most of the other boards of appeal established within European agencies, which, as acknowledged by the Court of Justice, "perform quasi-judicial functions through adversarial procedures" (judgment of the Court of Justice of 9 March 2023, Case C-46/21 P *ACER v Aquind,* EU:C:2023:182, paragraph 59).

98. The link between this review role and the legality of EU acts has been strengthened after the 2019 reform, and the more recent 2024 revision of Article 58a of Protocol 3 of the Statute of the Court of Justice. The 2019 reform has stipulated that "an appeal brought against a decision of the General Court, which, in turn, follows the decision of an independent board of appeal of EUIPO, CPVA, ECHA and EUASA shall not proceed unless the Court of Justice first decides that it should be allowed to do so". The Appeal Panel has been inserted in the list of the boards of appeal to which this provision applies with the 2024 reform of Article 58a of Protocol 3.

99. The result is that most of the boards of appeal, despite their administrative nature, have a recognized role as (first instance) participants to the integrated system of judicial protection of the European Union. This has a clear legal basis in Article 263(5) TFEU and Article 58a of Protocol 3, without depriving them of their administrative nature, further attaches a dimension of weight to their role as first instance safeguards for the protection of rights (see to this effect, recently, the Opinion AG Pikamäe of 12 September 2024, Case C-93/23 P EUIPO v Neoperl, ECLI:EU:2024:C:751, paras 49-52 and 93-94).

100. Therefore, as a matter of principle, administrative appeal bodies have the authority to control the lawfulness of an act, which is the principle underpinning the *presumption* of legality and display of legal effects.

101. The Board's constitutional argument is also contradicted, in the Appeal Panel's view, by the practice of other EU boards of appeal. Some such appeal bodies contemplate expressly the possibility to annul the authority's acts in their Rules of Procedure (see Article 56 of the Presidium of the EUIPO Boards of Appeal Decision 2020-1 of February 2020, on the Rules

of Procedure before the Boards of Appeal). Others customarily and unceremoniously declare the acts of the corresponding agencies null and void (see the Decisions of the ECHA Board of Appeal of 13 August 2024, case A-001-2023, or 23 April 2024, case A-010-2022, 9 April 2024, case A-008-2022, or 19 September 2023, case A-009-2022, the Decisions of the EUIPO Grand Board of Appeal, of 16 February 2018, Case R 459/2016-G, or 26 September 2006, Case R 331/2006-G).

102. Thus, there is no principle of constitutional nature which prevents administrative boards of appeal from declaring acts to be null. This also shows that annulment and remittal may also operate together.

103. In conclusion, the Appeal Panel is persuaded that the principle whereby it is for European courts to declare invalid an act of European institutions needs to be read in conjunction with Article 263(5) TFEU, which allows the establishment by means of a regulation of boards of appeal for the administrative review of the decisions adopted by the European agencies and defers to such regulation also the definition of the powers conferred upon such boards of appeal. Such powers need also to be read in light of Article 58a of Protocol 3 of the Statute of the Court of Justice as amended.

104. It is therefore a matter of construction of the SRMR, and not the result of the overriding application of an overarching principle of constitutional nature as claimed by the Board, the precise identification of the meaning, and effects, of the decision of the Appeal Panel to remit a case to the Board.

105. One may then claim that, even if other administrative boards of appeal may have the power to annul, the Appeal Panel lacks this power, as a result of the specific statutory scheme contemplated in the SRMR.

106. An analysis of the relevant secondary law texts, and Rules of Procedure, shows that there are indeed some differences in the appeal bodies' powers when it comes to the operative part of their decision. The following table shows those differences.

Appeal body	Relevant provision	Text
EUIPO	71 Regulation 2017/1001	The Board of Appeal may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution.
	Article 56 RoP	Where, pursuant to Article 71(1) and (2) EUTMR or Article 60(1) and (2) CDR respectively, the Board of Appeal decides to annul the contested decision and remits the case to the instance that took the decision, the Registrar shall make the case file available to that instance.

CVPO	Article 72 (Council Regulation 2100/94	The Board of Appeal may exercise any power which lies within the competence of the Office, or it may remit the case to the competent body of the Office for further action. The latter one shall, in so far as the facts are the same, be bound by the ratio decidendi of the Board of Appeal.
ECHA	Article 93 (3) Regulation 1907/2006 (REACH)	The Board of Appeal may exercise any power which lies within the competence of the Agency or remit the case to the competent body of the Agency for further action.
ACER	Article 28 (5) Regulation 2019/942	The Board of Appeal may confirm the decision, or it may remit the case to the competent body of ACER. The latter shall be bound by the decision of the Board of Appeal.
ERA	Article 62 (3) Regulation 2016/796	Where the Board of Appeal finds that the grounds for appeal are founded, it shall remit the case to the Agency. The Agency shall take its final decision in compliance with the findings of the Board of Appeal and shall provide a statement of reasons for that decision. The Agency shall inform the parties to the appeal proceedings accordingly.
EASA	Article 113 Regulation 2018/1139	Where the Board of Appeal finds that the appeal is admissible and that the grounds for appeal are founded, it shall remit the case to the Agency. The Agency shall take a new reasoned decision taking into account the decision by the Board of Appeal.
ESAs	Article 60 (5) Regulation 1093/2010, 1094/2010, 1095/2010	The Board of Appeal may confirm the decision taken by the competent body of the Authority, or remit the case to the competent body of the Authority. That body shall be bound by the decision of the Board of Appeal and that body shall adopt an amended decision regarding the case concerned.
SRB	Art. 85 (8) SRMR	The Appeal Panel may confirm the decision taken by the Board, or remit the case to the latter. The Board shall be bound by the decision of Appeal Panel and it shall adopt an amended decision regarding the case concerned.

107. There are boards that can exercise the powers of the agency *or* remit the case to the agency (EUIPO, CVPO, ECHA) and there are boards that can confirm or remit the case to the agency (ACER, ERA, EASA, ESAs, SRB). Thus, another important question to address is whether the Appeal Panel cannot annul a decision of the Board because, to annul an act of the agency, it is necessary that the administrative board of appeal can "exercise any power" of the agency.

108. The Appeal Panel is persuaded that the possibility to annul a decision is not dependent on the possibility to exercise any power of the agency.

109. An analysis of the rules and practice of the boards of appeal suggests that the annulment is linked to the decision to remit an act due to its being unlawful. Article 56 of the RoP of the EUIPO Board of Appeal, expressly states that "the Board of Appeal decides to annul the contested decision and remits the case to the instance". The provision itself is entitled "Remittal to the instance that took the contested decision".

110. This is also confirmed by the ECHA Board of Appeal, for example in its decision of 9 April 2024, case A-008-2022. In paragraphs 239 and 240 of its decision the Board of Appeal states that:

> Under Article 93(3), the Board of Appeal is competent to replace a substance evaluation decision with its own decision or remit the case to the Agency for further action. […] However, before replacing a substance evaluation decision with its own decision, the Board of Appeal must examine whether the available evidence allows it to do so".

111. The Board decided, in paragraphs 241-245 that it did not have sufficient elements (nor an adequate procedure) to replace the Board's decision with one of its own and decided to remit the case. In its operative part, the Board's decision "annuls the Contested Decision."[2]

[2] This is also confirmed by the decision of ACER Board of Appeal of 14 February 2019, PRISMA European Capacity Platform A-002-2018. In that decision the Board of Appeal annulled the Agency's decision of 16 October 2018 and remitted the case to the Director of the Agency, because the Agency had infringed its duty to duly reason its decision, and to duly document the procedure leading up to it, in breach of the principle of good administration. However, the ACER Board of Appeal, in its more recent practice, stated that it lacks the power to retroactively annul the acts of the agency (decision of ACER Board of Appeal of 22 May 2020, E-Control and others, A-001-2017 R, paragraph 47), partly as a result of an amendment of Regulation (UE) No 713/2009, by Regulation (EU) No 942/2019, which has left the Board of Appeal with the power to confirm or remit the case. A recent paper by Jean-Yves Ollier and Andris Pielbags, former Chair and Vice-Chair of the ACER Board of Appeal explains how the Board of Appeal came to change its view about its powers as a result of the amendment of the Regulation (Ollier & Pielbags, 'The appeal procedure in the application of the EU Energy Law – experience from ACER's Board of Appeal 2016-2021', Robert Schuman Centre for Advanced Studies Florence School of Regulation, RSC PP 2023/06, p. 19).Whilst the Appeal Panel sees the view of other boards of appeal and their members with utmost deference, in this case it cannot but differ from the interpretation by ACER's Board of Appeal, and the research paper. First, the paper bases its interpretation on the practice of other boards of appeal, such as the Board of Appeal of the European Supervisory Authorities (ESAs) and the SRB Appeal Panel. However, the decisions cited therein (BoA of ESAs, 27 February 2019, Svenska Handelsbanken AB & others v. ESMA (Shadow ratings), D-2019-01 to 04; SRB Appeal Panel, 11 April 2019, case 4/2019, 15 April 2020, case 9/2019) in fact remit the case to the respective authority, but do not state in any part that their remittal does not annul the decision. And since the BoA decision remitted a sanctioning decision, such remittal would have been in fact devoid of purpose if, until the adoption of the amended decision, the pecuniary sanctions were still enforceable. In fact, what both boards have done is to rather draw an analogy between the administrative appeals before themselves and an action for annulment before the Court of Justice of the European Union. This is the case of the BoA of the ESAs (see, e.g., BoA of ESAs, 19 July 2023, Euroins Insurance Group AD v EIOPA, BoA-D-2023-02, Summary and paragraph 54; and of 30 July 2024, NOVIS v EIOPA, BoA-D-2024-05, paragraphs 88-89), and of the SRB Appeal Panel (see, e.g., SRB Appeal Panel, 19 June 2019, case 18/2018, paragraph 20, and references to cases 2/18 and 3/18). Second, the rationale for the analogy between appeal and action for annulment is that appeal bodies do not resemble a quasi-agency, which may replace the decision with a new one, but a quasi-court, which controls the legality of the decision. If the analogy operates to, e.g., limit the scope of reviewable acts only to binding decisions, and to protect the authority's discretion, avoiding a *de novo* review, it must also operate to effectively control legality. In its Order of 6 September 2023, in case T-212/20, Operator Gazociągów Przesylowych Gaz-System S.A. v ACER, EU:T:2023:525 paragraph 36, the General Court disagreed with the ACER Board of Appeal's inference that the change in its remedial powers operated by Regulation 942/2019 affected the status of its review. Although the Court's finding is circumscribed to the scope and standard of review, and not to the consequences of the remittal, it cautions against reading too much into the differences between boards. Their status as bodies entrusted with a review of the legality of

112. In such a context, the Appeal Panel considers that, from a textual and contextual perspective, the provision that the Board is bound by the decision of the Appeal Panel pursuant to Article 86(8) SRMR needs to be read in conjunction with the principle of legality (to which European agencies and institutions are subject). This implies that, since the Appeal Panel to remit the case must necessarily find that the appealed decision is unlawful, from the date of the Appeal Panel's decision, the Board, whose action must be legal, is prevented from enforcing or in any way to claim the enforceability of, an MREL requirement until the adoption of the amended decision.

113. In the Appeal Panel's view this reading is also confirmed by a purposeful interpretation of Article 85 SRMR, in light of the general principles of European law of good administration, legal certainty and effective judicial protection.

114. The Appeal Panel further notes that, during the proceedings, the Board argued that the Appeal Panel could find the decision unlawful, remit the case to the Board, and suspend the effects of the decision until the Board adopted a new decision using the power to suspend pursuant to Article 85(6) SRMR.

115. The Appeal Panel, however, is not persuaded by this alternative because this would mean that the power to suspend pursuant to Article 85(6) SRMR conferred upon the Appeal Panel would be different and wider, that the power to suspend pertaining to European courts pursuant to Article 278 TFEU. However, Article 278 TFEU is identical to Article 85(6) SRMR.

116. The Board argues indeed that under Article 86(5) SRMR the Appeal Panel would be exceptionally granted the power to suspend the enforceability of the decision also at the end of the appeal and further added at the hearing, responding to a question of the Appeal Panel, that this power could be exercised solely upon request of the appellant and not on its own initiative.

117. The Appeal Panel finds however hard to see how, despite the identical text of Article 85(6) SRMR and 278 TFEU, an appellant could be burdened in the SRMR context with a request for suspension of the enforceability of the Board's decision that the Appeal Panel would ultimately find unlawful and why such suspension should be subject to the requirements of urgency and irreparable harm, which are justified to filter the request for suspension during the proceedings, when there is no final determination yet on the merits of the case, but would appear without cause once the determination on the merits has been reached in favor of the appellant.

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the decision is well-established. This favors the conclusion that a finding that an agency decision is unlawful results in that decision being unenforceable.

118. The Appeal Panel considers therefore that, when it remits a case to the Board, the Appeal Panel finds that the appealed decision is vitiated and thus no longer enforceable from the date of the Appeal Panel's decision until the adoption of the amended decision.

119. The Board's concern, i.e., that if an act, like an MREL determination, is remitted and it is immediately deprived of legal effects, this would have serious consequences is a legitimate concern[3]. However, in the Appeal Panel's view, this lends to a different remedy.

120. The Appeal Panel considers indeed that, by analogy with the European courts' practice, provided that a Board's decision is remitted for the infringement of a procedural requirement, but there is no error affecting the act's aim or substantive content, is for the Appeal Panel to declare, at the Board's request, that the act should not be deprived of legal effects until it is replaced by the amended decision.

121. Likewise, the Court of Justice, in its judgment of 15 July 2021, Joined Cases C-584/20 and C-621/20 P, Commission v Landesbank Baden-Württemberg, EU:C:2021:601, maintained the effects of the decision of the Executive Session of the Single Resolution Board of 11 April 2017 on the calculation of the 2017 ex ante contributions to the Single Resolution Fund (SRB/ES/SRF/2017/05), holding, in paragraph 175, that:

> ''on grounds of legal certainty, the effects of such an act may be maintained, in particular where the immediate effects of its annulment would give rise to serious negative consequences for the persons concerned and where the lawfulness of the act in question is contested, not because of its aim or content, but on grounds of lack of competence or infringement of an essential procedural requirement''

122. Based upon the foregoing, in the case at hand, the Appeal Panel sides with the Appellant that following the Appeal Panel's decision of 13 February 2023 and until the adoption of the Amended Decision on 2 February 2024 the MREL decision [.] was not enforceable and therefore the Appellant was no longer subject to the MREL determination set out in the decision [.] and in particular to the obligation to proceed with the linear build-up of its MREL requirement as set out in the MREL decision [.].

123. The above conclusion, however, does not support, in the Appeal Panel's view, the upholding of the first ground of appeal raised by the Appellant.

124. The Appeal Panel notes in this regard that the current appeal is not directed against the Amended Decision, which had reconfirmed the [.], and has been meanwhile replaced and superseded by the Contested Decision, but against the Contested Decision. However, the

[3] The concern may be less acute in the context of the iterative resolution planning cycles, because in principle, if the decision of the following cycle is remitted, and becomes therefore unenforceable, the bank still remains subject to the MREL determination resulting from the decision of the previous RPC (a decision that is no longer superseded and replaced by the decision that is meanwhile remitted). In normal circumstances, this should prevent undesirable disruptions in the build-up of MREL The case at hand is somehow exceptional because, as noted above, the decision of [.] changed the public interest assessment for the Appellant and identified for the first time the Appellant as a resolution entity and thus required a RCA component for the MREL.

Contested decision has further extended by one year the transitional period originally set out in the MREL decision [.] (and reconfirmed as such by the Amended Decision). The new deadline is [.].

125. The Appeal Panel acknowledges that, as the Appellant claims, neither recital (14) of Section I of the Contested Decision nor comment 1 of the RTBH assessment memorandum in Section II justify such extension as a direct effect of the (almost) one year lapsed between the Appeal Panel's decision of 13 February 2023 and the Amended Decision [.].

126. Nonetheless, to the effect of the determination of the transitional period, the Board has duly assessed in the 2023 RPC the updated financial situation of the Appellant including the state of the Appellant's build-up of MREL towards the requirement, in light of the criteria set out in Article 12k SRMR.

127. Those criteria pursuant to Article 12 SRMR include "the development of the entity's financial situation" and "the prospect that the entity will be able to ensure compliance in a reasonable timeframe with the requirement".

128. In such an assessment the Board has therefore included by necessity also a consideration of the delay, or disruption, in the linear build-up of MREL that may have followed the remittal of the MREL decision [.] due to a voluntary (yet legitimate) stay, if any, in the build-up of MREL of the Appellant between 13 February 2023 and 2 February 2024. In so doing the Contested Decision has not neglected the factual implications of the non-enforceability of the decision [.] for the Appellant's strategy towards the build-up of the MREL requirement.

129. The Board, with the Contested Decision, in light of the updated financial situation of the Appellant and of its prospects, has further determined that an extension of one year was justified and appropriate.

130. The Appellant argues that this extension has been motivated by reasons other than the unenforceability of the original MREL decision after 13 February 2023, which conversely would justify an additional grace period of roughly one year beyond the [.].

131. This argument, in the Appeal Panel's view, disregards the crucial fact that, in assessing in the context of the 2023 RPC the development of the financial situation of the Appellant, including the prospects for the Appellant to meet the MREL requirement within the original deadline, the Contested Decision has taken into consideration a factual situation and prospects of the Appellant, which also included the factual effects of the Appellant's strategy on the build-up of MREL after the Appeal Panel's decision of 13 February 2023.

132. This is clearly shown from comment 1, letter b) of the RTBH assessment memorandum in Section II of the Contested Decision, where it results that the Board has also considered the likely developments of the financial situation of the Appellant up to 2025, has analysed updated financial projections presented by the Appellant, including the existing build-up of

MREL and its prospects, as well as the successful issuance of eligible liabilities by the Appellant for around EUR [.] in [.].

133. The Appeal Panel further notes that, also responding to a written question of the Appeal Panel, the parties have confirmed that at reference date June 2024, the Appellant already complies with the MREL-TREA target with a significant surplus ([.] including CBR, and [.] as overall surplus).

134. This further shows, in the Appeal Panel's view, that the Board has not erred in deciding, as shown by recital (14) of Section I of the Contested Decision, that "it is justified and appropriate to set [.]". The Appeal Panel considers indeed credible that the Appellant, also in light of its successful issuance in 2023, would also meet its requirements of [.] of TREA and [.] of LRE at the final deadline of [.].

135. The Appellant, in its written answers to the Appeal Panel questions with procedural order no 4, widely explained however why it reasonably forecasts that, at the date of [.], the MREL RCA requirement is likely to result in the higher amount of EUR [.] and analytically described the reasons why it expects that the existing MREL capacity, which already meets the MREL-TREA and MREL-LRE targets as specified in the Contested Decision [.] with the [.] of eligible liabilities and [.]. The Appeal Panel appreciates this concern of the Appellant, yet remains persuaded that nothing in file shows to date that the Appellant would not be able to meet, at [.], the MREL target. However, since such target shall be finally set by the next MREL decision in the next RPC, which is expected before [.], the Appeal Panel is further confident that, should the final target differ significantly from the one set in the Contested Decision and/or should the Board identify in the next RPC other objective reasons that, despite the due diligence already shown by the Appellant in the timely build-up of MREL in compliance with the Contested Decision, would justify according to the factors set out in Article 12k SRMR a further extension of the deadline of [.] for the achievement of the MREL requirement, the Board would consider to possibly grant an appropriate extension, taking into account the significance of the increase, if any, of the RCA component of the MREL requirement vis-à-vis the one set by the Contested Decision and in light of the updated Appellant's situation at the reference date of the future MREL decision.

136. Based upon the foregoing, the first ground of appeal must be dismissed.

(c) **On the second ground of appeal: the Appellant as a resolution entity.**

137. By the second ground of appeal, the Appellant claims that the Contested Decision errs when it considers that the Appellant fulfils the criteria to be classified as a resolution entity. The ground is articulated in different limbs. However, the substance of the Appellant's claim is that resolution would not be necessary for the Appellant and the Contested Decision fails (i) on one hand, to demonstrate the unsuitability of [.] insolvency law, in particular by means of prepacked insolvency plans largely known in the practice under [.] insolvency law, to achieve the objectives pursued with the resolution strategy to the same extent and (ii) on the

other hand, to recognise [.] and to credibly demonstrate that the Appellant's failure under normal insolvency proceedings would [.] in a system-wide event which would likely result in significant adverse effects on the financial stability of [.] in the sense of Article 14(2)(b) SRMR.

138. The Appeal Panel considers that all the different limbs of the second ground of appeal are strictly interrelated and wishes therefore to address all of them together.

139. The Appeal Panel preliminarily notes that the Board has identified the Appellant as a resolution entity considering its resolution as in the public interest and that the resolution strategy envisaged by the Board for the Appellant in the resolution plan is the sale of business tool. The Appeal Panel recalls that Article 18(5) SRMR provides that:

> For the purposes of point (c) of paragraph 1 of this Article, a resolution action shall be treated as in the public interest if it is necessary for the achievement of, and is proportionate to one or more of the resolution objectives referred to in Article 14 and winding up of the entity under normal insolvency proceedings would not meet those resolution objectives to the same extent.

140. According to Article 14 SRMR the resolution objectives are the following:

> (a) to ensure the continuity of critical functions; (b) to avoid significant adverse effects on financial stability, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline; (c) to protect public funds by minimising reliance on extraordinary public financial support; (d) to protect depositors covered by Directive 2014/49/EU and investors covered by Directive 97/9/EC; (e) to protect client funds and client assets.

141. In the present case the parties agree that the resolution objective which has been identified by the Board as the justification for the resolution action is "to avoid significant adverse effects on financial stability, in particular by preventing contagion".

142. The parties differ however in their assessment on whether resolution of the Appellant is truly necessary to avoid significant adverse effects on financial stability in [.], in particular by preventing contagion. The Appellant considers, in particular, that the Board errs in assuming that national insolvency proceedings would not meet to the same extent as the implementation of resolution measures the objective of avoiding significant adverse effects to financial stability. The Appellant states, first, that [.] insolvency law provides for various measures similar to the resolution tool of the sale of business, and namely prepackaged insolvency plans envisaging a transfer of business in insolvency. Second, that the timing foreseen by the national insolvency framework could allow for a sufficiently quick implementation of the transfer of business in insolvency. Third, that while the main purpose of national insolvency proceedings is to satisfy creditors by realising the debtor's assets, insolvency proceedings could also include a consideration, to a certain extent, of financial stability concerns.

143. The Board contends on the contrary that [.] insolvency law confers upon [.] insolvency courts powers in crisis management which are more constraint than those available to the Board in resolution. That, therefore, the implementation of a prepackaged insolvency plan

would present uncertainties and would require a significant longer time compared to the sale of business in the resolution framework.

144. On this point the Appeal Panel sides with the Board and agrees, in particular, that, although [.] insolvency law allows for [.], these [.] can only be implemented with the explicit consent of the creditors of the insolvent entity. This requirement to seek the creditors' consent is, inevitably, a first cause of uncertainty about the successful outcome of the insolvency plan. This is even more so in the context of the particular situation of banks, which present a large number of creditors with very short-term and liquid assets, including hundreds of thousands of depositors, as the Board noted in its written answer to a question of the Appeal Panel with its procedural order no 4. Such uncertainty is, on the contrary, removed if the resolution framework and its measures are deployed.

145. In addition, the Appeal Panel sides with the Board that the timing of implementation of an insolvency plan under [.] insolvency law may not be quick enough to ensure a timely transfer of business, comparable to the sale of business in resolution.

146. The parties referred in the course of the appeal to several provisions of the [.] Insolvency Code which [….]. All of those requirements are aimed at safeguarding the rights of individual creditors, rather than financial stability. Thus, they may jeopardise the feasibility of executing a transfer of business within the very short timeframe to implement a resolution scheme – typically the two-days "resolution weekend", or less, as in the Banco Popular resolution – and even within the brief, but less narrow period for a pay-out of covered deposits by the deposit guarantee scheme.

147. The Appeal Panel further notes that, in an insolvency scenario, there would also be the risk of bank licence withdrawal which may further complicate the preservation of the ongoing banking business for the time necessary to the implementation of the transfer of business under the insolvency plan. Moreover, at the hearing and in its written answers to the Appeal Panel's questions with procedural order no 4, the Board argued that, since [. . .], this reinforces the conclusion that the actual implementation of transfer strategies under an insolvency plan may be frustrated by the absence of an expedited and flexible tool aiming at minimising disruptions and access to deposits.

148. The Appeal Panel further notes that in weighing resolution against ordinary insolvency an advantage of resolution is that the Appellant could count on a recapitalization amount of EUR [.]. This is the RCA component of the MREL requirement set by the Contested Decision, as specified by the parties at the hearing and in their written answers to the Appeal Panel's questions with procedural order no 4. It is calculated applying adjustments related to the [.], taking also account of the fact that the Appellant is [.]. This recapitalisation amount would be used to support the [.] envisaged by the resolution plan of the Appellant as resolution strategy, to close the funding gap, if any, between the amount of the deposits and other liabilities to be transferred and the available assets.

149. In an insolvency plan proceeding under [.] insolvency law, on the contrary, this recapitalisation amount would not be available in the form of prepositioned MREL in its RCA component (nor the parties claim that it would: the prepositioning of a RCA component of MREL in liquidation is allowed by the legal framework, yet only in exceptional circumstances as shown *a contrario* by recital (8) of Directive 2024/1174 and neither party has argued that this would be the case for the Appellant).

150. Even assuming (quod non) that a transfer of business could be achieved and implemented under an insolvency plan in similar conditions to resolution, using the monetary support contributed externally by the IPS, this would add additional uncertainty due to the [.]. The Appellant cannot claim a right to such a support and the IPS (deliberation processes may need time).

151. Those uncertainties may also include, in the Appeal Panel's view, the fact that the [.] Rules for the IPS do not, at least expressly, contemplate support measures in insolvency. The Appeal Panel notes in this connection that [.]. Also the parties agree on this point with their written answers to the questions raised by the Appeal Panel with its procedural order no 4: the Board concluded that, under the current [.] Rules and the applicable [.] insolvency law "it is not possible to initiate [.] [.] after the opening of the insolvency proceedings" and "it is not possible to use [.] to support [.] of an insolvent entity in the context of an insolvency plan". In turn, the Appellant acknowledged that "as a general rule, IPS support measures can be expected to no longer be permitted once insolvency proceedings have been instituted" (albeit adding that, before and outside of insolvency, the IPS can "still get involved in the run-up to an impending insolvency and provide support for a transfer of business").

152. The Appeal Panel finds therefore that the Board did not commit any error in assessing that, even assuming that the Appellant in case of failure could try to implement a business transfer by means of an insolvency plan under [.] insolvency law, there are significant uncertainties surrounding the successful and timely implementation of such a plan. The Board was therefore correct in finding that resolution objectives could not be satisfied to the same extent through the use of national insolvency proceedings.

153. This conclusion is however not sufficient to dismiss the second ground of appeal.

154. The Appellant also raises with the second ground of appeal several additional claims to argue that, regardless of whether the Appellant could be liquidated promptly under [.] insolvency law, even if the failure of the Appellant triggered the repayment of covered deposits by the IPS, the Board was wrong in finding that this would trigger "significant adverse effects on financial stability" in [.], as required by Article 14(2)(b) SRMR. In other words, in the Appellant's view, the Board erred in considering resolution necessary to prevent adverse effects on financial stability and that the failure of the Appellant under ordinary insolvency law would have contagion effects, including within the system of the [...], which would jeopardise the [.] banks sector in [.] and then financial stability in [.].

155. In this connection, the Appellant challenges the conclusions of the Board with several arguments, which form the different limbs of the second ground of appeal. The Appellant claims, in the first limb, that the Contested Decision provides insufficient reasoning to support its conclusions; in the second limb, that the Board incorrectly exercised its discretion; in the third limb, that the Board committed substantive errors in the inferences drawn from the EBA and ECB stress tests; in the fourth limb, that the Board committed errors in the assessment of quantitative and qualitative factors to assess contagion effects; and, in the fifth limb that the Board neglected possible stabilising effects of the [.] institutional protection.

156. The Appeal Panel wishes first to acknowledge that the reasoning of the Contested Decision, measured against the reasoning of the MREL decision [.] remitted to the Board with the Appeal Panel's decision of 13 February 2023 for insufficient reasoning, shows the good faith engagement of the Board in complying with the Appeal Panel's decision. The Appeal Panel appreciates that the Contested Decision offers, in comparison with the MREL decision [.], a broader set of arguments, data and specifications directed at substantiating the economic underpinnings of the assessment that resolution is, in the case of the Appellant, in the public interest in an adverse scenario of system-wide event.

157. The Appellant claims, however, that the Board erred in its inference of results from […] in the identification of the adverse scenario of system-wide event.

158. On this point, the Appeal Panel agrees with the Board that the [.] from the [..] are an appropriate reference as a first proxy to the health of banks collectively and individually in a system-wide event. The […] estimate the impact on banks' capital that would result from an underlying extreme but plausible macroeconomic deterioration affecting all banks simultaneously. The […] is carried out on a sample of banks covering approximately 75% to 80% of the banking sector assets in the Euro area.

159. The Appellant argues, however, that it is incorrect to attempt to draw inferences on the basis of a sample of entities that are not homogeneous, or similar enough to the [.] […]. […]. The Appellant states, in further support of this argument, that this is also in line with a stress […] by [.] and the [.] […]. On this aspect, the Appellant reiterates a comment already made in the RTBH, namely in comment 2c, at page 23 of Section II of the Contested Decision.

160. The Board contends, on the contrary, that, as reported by the […] for euro area banks, smaller banks tend to have a higher capital depletion under the adverse scenario because they are more characterised by a lower income generation capacity and higher loan losses over the projection horizon ([…]).

161. The Appeal Panel can understand that, as stated by the Board in its written answers to the questions raised by the Appeal Panel with procedural order no 4, in principle the Board relies on EBA/ECB stress tests because, as the Board noted, "with a single scenario, methodology and timeline [they] ensure homogeneity, consistency and, ultimately, a level playing field amongst entities in terms of shock applied to the Banking Union banks in the system wide

event scenario". The Appeal Panel is however concerned that additional available specific data are left aside. If more specific data for [.] [.] banks' capital depletion in adverse (stressed) scenarios are available, as it happens to be the case of the [.] and [.] [..], their results should not be neglected. Instead, they should be taken into account in possibly adjusting the results arising from the […], at least in a situation where it may be reasonable to argue that there could be different conclusions on the expected capital depletion from the stress test data performed for the different clusters of significant and less significant banks. This is a concern reinforced in the case at hand by the observation that, should most of the other [.] banks affiliated to the IPS (which are not captured in the [..]) suffer a capital depletion similar to the one suffered by the Appellant in the EBA/ECB stress test, the actual difference in capital depletion for all [.] [..] would not be entirely negligible.

162. However, although the Appeal Panel wishes that in its future practice the Board could additionally consider in its analysis any targeted stress test performed by national competent authorities, if available and pertinent, the Appeal Panel is not persuaded that this would have changed the assessment in the present case. The Appeal Panel thus considers that the failure from the Board to include in its assessment the data resulting from the [.] and [.] [..]as an additional ("shading" or "mitigating") factor to the […] of relevance for [.] banks is not sufficient to uphold the second ground of appeal and to conclude that the Board was mistaken in concluding that the liquidation of the Appellant may have contagion and financial stability effects which justify resolution.

163. The Appeal Panel further acknowledges that, as mentioned by the Board in the RTBH assessment memorandum (comment 2b, at page 20, of Section II of the Contested Decision), […] were within the scope of the [..]. This, in the Appeal Panel's view, supports a finding of overall reasonableness and plausibility of the Board's assessment. However, as noted, the Appeal Panel would wish that in future RPCs the Board could offer more granular and specific estimates of capital depletion for all [.] […] in the adverse scenario, also taking into account as an additional factor targeted […] performed by the national competent authorities, if available.

164. Even accepting, with the above qualifications, the baseline scenario identified by the Board, it remains to be seen if the Board has committed errors in the assessment of the quantitative and the qualitative factors used to measure contagion effects or has neglected possible […].

165. First of all, the Appeal Panel notes that resolution planning requires making assumptions of future scenarios to minimize the harmful consequences in each scenario. Unlike other areas of policy, bank crisis management requires factoring in unlikely events (including "black swans"). This means that the Board is not required to estimate what will happen in a probable scenario, but what may happen in an improbable, even remote one. This type of assessment, thus, is framed not so much in terms of risk, but of uncertainty. Given the uncertainty and the economic stakes, the public interest assessment now simultaneously considers two hypothetical failure scenarios: one idiosyncratic; the other in the context of a system-wide

crisis. The system-wide 'events' scenario was adopted by the SRB starting from the 2021 MREL Addendum. The co-legislators have shared with logic and are currently considering taking this logic a step forward in the context of the CMDI initiative, but the assessment of bank failure in the context of a system-wide event is in line with the current text of the SRMR, and neither party has argued otherwise. The idea of "system-wide event" captures the logic of preventative decisions under uncertainty.

166. Thus, it is important to note that, in justifying the more burdensome strategy of prepositioning an MREL recapitalisation amount (RCA), the Board is contemplating a scenario of possible contagion effects which may trigger financial instability at a level in the midst of a systemic crisis. The Board plainly accepts that the idiosyncratic failure of the same bank outside of a system-wide crisis could be managed with insolvency and liquidation strategies.

167. The Appeal Panel wishes also to acknowledge that a [.], [.] or [.] entities affiliated to an institutional protection scheme present special features which call for targeted adjustments of the prudential framework and have also indirect implications in the crisis management context. This is duly reflected by the special provisions of Article 10 and 113(7) CRR. This also has clear implications for crisis prevention. As noted above, the IPS operates a scheme to safeguard the solvency and liquidity of its members within the meaning of Article 113(7) of the CRR. [….].

168. Therefore, the Board is correct to consider, in the context of its public interest assessment, how the failure of one or more IPS-affiliated banks may play out vis-à-vis the IPS itself and all the other affiliated members. It is also correct to include an assessment of the capacity of the IPS *after* the failure of one of its members to trigger contagion effects to other members of the same IPS. This is a remote, yet possible scenario, and resolution planning must consider remote, yet possible scenarios as its starting point.

169. The Appeal Panel wishes also to acknowledge that in [.], history offers a comforting track record of successful recovery actions promoted and supported in the past by IPS, which have so far prevented insolvency and contagion[4].

170. In this context, and specifically in connection with the case at hand, a fundamental question is what the evidentiary burden is to be discharged by the Board to support complex technical assessments based on future, hypothetical scenarios concerning contagion within the network of the members affiliated to the IPS and its possible effects on financial stability for [.].

171. In antitrust, where fundamental rights concerns trump over any other considerations, there has traditionally been a call to treat 'false positives' (e.g., erroneous antitrust convictions and over-deterrence) as costlier than 'false negatives' (i.e., erroneous acquittals and under-

[4] For a useful and still valid discussion of the strengths and weaknesses of the IPS, compare R. Haselmann, J.P. Krahnen, T. H. Tröger, *Institutional Protection Schemes: What are their differences, strengths, weaknesses and track records*, In-Depth Analysis requested by the ECON Committee, European Parliament, April 2022, PE 699.527. [.] sustained however also quite extraordinary fiscal costs in connection with the crisis of state owned [.] during the financial crisis,

deterrence) and ask for a higher evidentiary burden for those alleging an antitrust violation, through a 'preponderance of evidence' (in American terms) or 'balance of probability' in European terms.

172. The Appeal Panel considers, however, that this cannot be extrapolated as such to resolution, where the financial stability implications of false negative are potentially catastrophic and financial stability concerns trump over other considerations (save for procedural safeguards for fundamental rights).

173. When addressing supervisory and resolution decisions, European courts have acknowledged a degree of technical discretion needed by supervisory and resolution authorities, while providing a demanding scrutiny that the evidence relied on by the ECB and SRB is factually accurate, reliable and consistent, it constitutes *all* the relevant information which must be taken into account in order to assess a complex situation *and* is capable of supporting the conclusions drawn from it (judgment of the General Court 1 June 2022, Fundación Tatiana Pérez v SRB, T-481/17, ECLI:EU:T:2022:311, Del Valle Ruiz v SRB, T-510/17, ECLI:EU:T:2022:312, Eleveté Invest Group v SRB, T-523/17, ECLI:EU:T:2022:313, Algebris v Commission, T-570/17 ECLI:EU:T:2022:314 and, Aeris Invest v Commission and SRB, T-628/17 ECLI:EU:T:2022:315).

174. The administrative review of the SRB Appeal Panel is even more exacting on the technical assessment of facts because this can be better appraised if the composition of administrative bodies ensures technical expertise beyond legal knowledge. This is stated in the case law of the Court of Justice (see judgment of the Court (Fifth Chamber) of 9 March 2023, case C-46/21 P ACER v Aquind ECLI:EU:C:2023:182, paragraphs 56-57, 59, 63-67), and recently reiterated by the General Court (Order of 6 September 2023, in case T-212/20, Operator Gazociągów Przesylowych Gaz-System S.A. v ACER, ECLI:EU:T:2023:525).

175. However, there are also limits to the review undertaken by the Appeal Panel. First, the Appeal Panel's review is based on an adversarial procedure (*ACER v Aquind,* paragraph 59; judgment of the General Court of 20 September 2019, case T-125/17 BASF v ECHA, ECLI:EU:T:2019:638) and cannot lead to a de novo evaluation (case T-125/21, *BASF v ECHA* paragraphs 59, 121). It is also, predominantly, a review of the legality of the decision, even if, for that purpose, the Appeal Panel takes into consideration the decision's elements of fact and law (Order of 6 September 2023, in case T-212/20, Operator Gazociągów Przesylowych Gaz-System S.A. v ACER, ECLI:EU:T:2023:525, paragraphs 35-36). This needs to respect the margin of appreciation of the Board conferred by the applicable rules.

176. The applicable rules, the SRMR, suggest that in this case the Appeal Panel must review the plausibility of the Board's assessment. This is not because the Appeal Panel exercises a marginal review, but because the statutory scheme of the SRMR in this case requires the Board to make its assessment not by estimating the probable scenario, but by simulating, under conditions of uncertainty, scenarios that are improbable, but plausible and reasonable.

177. In light of this principle, the Appeal Panel finds that the second ground of appeal cannot be upheld, because the conclusions reached by the Board cannot be subject to a de novo evaluation of the Appeal Panel and they can be considered, for the reasons explained below, as plausible.

178. As acknowledged by recital (7) of the Contested Decision, the financial stability effects that, in the Board's view, would originate in the adverse scenario of a system-wide event from the failure of the Appellant, are assessed in the Contested Decision taking into consideration different channels of contagion and using a set of qualitative and quantitative indicators of financial linkages.

179. The Board has performed, on one hand, a three-pronged quantitative analysis, as indicated in recital (8) of the Contested Decision.

180. First, the Board has used a network model internally developed, in order to measure direct contagion effects. Recital 7 states that direct contagion risks are assessed "using data on interbank exposures and intra-financial sector holdings of own funds and debt instruments issued by the resolution entity". Recital 8 further explains that "the model takes into account the interbank exposures across Banking Union banks and estimates the propagation of initial exogenous loss through a network of Banking Union banks, capturing different losses linked to the liquidation of a bank, losses by creditors following the write-down of liabilities of the failed bank as well as mark-to-market losses for the trading portfolio of all banks in that network."

181. The Appeal Panel sought clarification from the Board of the specifics of the contagion model, and the Board duly complied, providing its written answers to the questions of the Appeal Panel with it procedural order no 4. In light of these answers, the robustness of the model does not appear to be in question. However, the post-hearing exchange with the Board suggests that the Board could have been more detailed in the information provided to the Appellant regarding the functioning of the model, and the Appeal Panel considers that the more determinant a specific technical tool, such as a model, is for an assessment that leads to a binding decision, such as the classification of an entity as a resolution entity, the determination of the resolution tool of choice, or the level of MREL, the greater the detail that the Board should provide to the addressee of the decision.

182. The Appeal Panel considers, however (and the parties seem to agree on this), that the outcome of the contagion model analysis for the Appellant was close, […]. This indicates that a bank […], but that the quantitative analysis of direct contagion effects based on the network model is per se inconclusive and thus does not per se corroborate the conclusion that the failure of the Appellant would imply a [..] of direct contagion to the rest of the sector. Even if the Board could have been more generous in describing the model in the Contested Decision, the Appeal Panel considers therefore that its failure to do so is not sufficient to remit the case and to uphold the second ground of appeal nor to conclude that the Board was mistaken in

assessing that the liquidation of the Appellant may have contagion and financial stability effects which justify resolution.

183. Having found that the quantitative analysis of direct contagion effects based on the network model, albeit relevant, was not per se conclusive, the Board has assessed indirect contagion, having essentially regard to the similarity of the business model. Based on this, the Board classified the Appellant as having a medium risk of indirect contagion. The Appeal Panel considers that the Appellant has not shown, nor there is compelling evidence in the file that shows, that the outcome of this technical assessment is not plausible and reasonable.

184. First, Recital 10 describes the membership of the Appellant in the *[.]* and refers to the similarity of the [….] [.] banks, their operation in the market […]. Recital 11 draws from those interlinkages the conclusion that since the Appellant is the [.] bank in [.], the Appellant's failure would damage the reputation and the public confidence in the entire [.] banks sector in [.].

185. Second, recital 15 refers to the provision of a large number of transactional accounts by the Appellant and posits that the disruption of the provision of those services would be likely to further increase that loss of trust and public confidence on the *[.]* and thus would lead to higher contagion effects through reputational risk. The Appeal Panel considers that both the reference to the transactional accounts and the effects of possible disruption are reasonable factors that the Board has taken into account, and also on this the evidence in the file does not show that the conclusions drawn from these aspects are not reasonable and plausible.

186. The Appeal Panel wishes finally to recall that the Contested Decision clarifies in recitals (10) and (11) the reasons why the Board considers that, in the context of a system-wide event, the failure of the Appellant, if not properly and timely managed by way of resolution, may in the end trigger contagion which would have adverse effects on the financial stability of [.].

187. In the Board's technical appraisal and expert judgment, the failure of the […] bank, despite its [.] and modest market share at national level, could trigger the loss of trust and confidence on the entire *[.]* ([…]) among the public and investors. This would then lead to serious risks of withdrawal of customer funds (deposits) and the migration of credit customers to competitors (such as larger […]). The Board has also taken into account in its assessment that the increasing and generalised access to internet banking by a majority of customers has made deposits much more volatile and exacerbates the abovementioned risks.

188. This is, in the Appeal Panel's view and within the limits of its review as described above (which cannot transcend into a de novo assessment), a plausible and reasonable conclusion, and the Appellant has not shown any decisive factor which can support the opposite. In this regard, it is important to reiterate that the Board must base its assessment on the extreme but plausible scenario referred to above. In this scenario, the failure of the Appellant would take place in the context of a broader, system-wide event. Thus, even if the simulation of loss contagion, with multiple iterations, yields inconclusive results, such system-wide event

seldom involves solely a pure transmission of losses. Typically, such contagion of losses is accompanied by perceptions among depositors, investors and market actors about the fragility of other financial sector members.

189. The Board's reference in its submissions to the recent examples of US banks did not seek to consider that situation, and the present situation, analogous. It sought to illustrate that, nowadays, in scenarios of broader instability, contagion can happen, and quickly, between entities that are perceived to be similar, or similarly fragile, even if they are not directly exposed to each other's losses.

190. In that sense, the Board has presented a plausible case that, in the context of a system-wide event, the failure of the Appellant, in a system-wide event with broader financial instability (and, one must add, the increased alert of market actors) could result in contagion to other banks with similar business models, […]. This may not be the likeliest outcome, nor the Appeal Panel is persuaded that it would be likeliest. It need not be. It suffices for it to be a credible outcome in a scenario of broader financial instability, since the Board must ensure that banks are also prepared for such unlikely events.

191. Third, the Board has measured the capacity of the remaining […] to acquire or support other […] to counter possible bank runs. The Appeal Panel considers, in this regard, that the Board correctly assumed, in light of the significant uncertainties surrounding the successful implementation of a prepackaged insolvency plan for the Appellant, that following the failure of the Appellant, the IPS may need to repay the Appellant's covered deposits, as explained in recitals (7) and (12) of the Contested Decision. The Appeal Panel wishes to stress again that this conclusion is valid in the remote, yet possible, scenario that the IPS may have not been able to prevent the Appellant from failing. The Appeal Panel acknowledges that, also in light of the historic track record of the [.], this event may be particularly remote for […] [.], and yet it is not unplausible nor unreasonable to assume that the Appellant's failure in extreme situations may occur without the IPS being in condition to prevent such failure.

192. The Appeal Panel acknowledges that, in this respect, the Contested Decision offers concrete information and data to support the finding of possible indirect contagion effects. The Contested Decision fairly describes the expected reduced capacity of the largest IPS members in the adverse scenario of a system-wide event and thus their limited capacity to further support or absorb other IPS members, without external financing.

193. The availability of such external financing in such circumstances has been ruled out by the Board, and the Appeal Panel, within the limits of a review which should not transcend into a de novo evaluation, considers that this is a plausible and reasonable assumption in the context of the highly critical overall situation for the [.] banks affiliated to the IPS in an adverse scenario of system-wide events. Furthermore, the Appeal Panel agrees that the Board could not assume any extraordinary public financial support.

194. The Appeal Panel reiterates that it can make a full review of the assessment made by the Board, its assumptions, and technical analysis, but it cannot use a de novo evaluation to substitute its view for the expert judgment of the Board. In light of this, the Appeal Panel finds that also on the conclusions reached on possible adverse effects on financial stability in [.] the Contested Decision in the scenario considered by the Board is plausible and reasonable, and the Appellant has not shown any decisive factor which can support the opposite conclusion.

On those grounds, the Appeal Panel hereby:

Dismisses the appeal

Helen Louri-Dendrinou Vice-Chair	Kaarlo Jännäri	David Ramos Muñoz
SIGNED	SIGNED	SIGNED

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

For the Secretariat of the Appeal Panel:

SIGNED