30 August 2024

Case 4/2024

DECISION ON SUSPENSION

[.]

v

the Single Resolution Board

Christopher Pleister, Chair
Luis Silva Morais, Vice-Chair
Marco Lamandini, Co-Rapporteur
David Ramos Muñoz, Co-Rapporteur
Helen Louri Dendrinou

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FINAL DECISION

In Case 4/2024,

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] (hereinafter the "**SRMR**"),

[.]., having its [.], [.], [.], and with address for service [.], [.], [.], [.]., of which [.], lawyers, with the right of substitution, represent [.] in these proceedings (hereinafter, the "**Appellant**")

v

the Single Resolution Board (hereinafter the "**Board**" or "**SRB**"), represented in these proceedings by its agents [.]

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

THE APPEAL PANEL,

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

makes the following decision on the suspension request by the Appellant:

Background of facts

1. On 18 July 2024, the Appellant submitted an appeal against the Joint Decision of [.] notified to the Appellant on [.], determining the minimum requirement for own funds and eligible liabilities for [.] ("[.]") and [.], [.], [.], [.] [.] and [.] (the "[.]") (the "**Contested Decision**")

2. The Appeal was notified by the Secretariat of the Appeal Panel to the Board on 24 July 2024 informing the parties that the appeal is considered submitted as of the date of 24 July 2024 and that the Board was granted six weeks starting to run from 24 July 2024 (and thus until 4 September 2024) to serve its response.

3. The Appeal included a request to the Appeal Panel to suspend the Contested Decision on the basis of Article 10(2) of the Appeal Panel's Rules of Procedure (RoP) in conjunction with Article 85(6) SRMR (paras 76-82 of the notice of appeal) and a suspension request of the instruction to [.] ([.]) (para. 83 of the notice of appeal). The notice of appeal further

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

included a request for motivation evidence pursuant to Article 15 of the Appeal Panel's RoP (para. 84) (hereafter the "**Suspension Request**").

4. On 25 July 2024, the Secretariat of the Appeal Panel notified to the parties the composition of the Appeal Panel for case 4/2024 and informed that the Chair had meanwhile appointed professors Marco Lamandini and David Ramos Muñoz as co-rapporteurs of the case.

5. On 25 July 2024, the Board filed a reasoned request for an extension of three weeks of the deadline of 4 September 2024 to submit its response. The Board's request was communicated by the Secretariat of the Appeal Panel to the Appellant on 26 July 2024, asking for observations, if any, by 30 July 2024.

6. On 26 July 2024, the Appellant submitted the [.]'s decision of [.] implementing the Contested Decision (hereafter the "**Implementing Decision**"), and a request to the Appeal Panel to consider the Suspension Request made with the notice of appeal as a matter of urgency.

7. On 26 July 2024, the Appeal Panel issued its procedural order no. 1. In this procedural order the Appeal Panel held that:

> The Appeal Panel considers however, in the first place, that the Appellant has not given in the notice of appeal compelling evidence of the occurrence in the present case of exceptional circumstances that could justify the immediate suspension of the application of the contested decision without having previously granted to the parties the possibility to fully discuss the request for suspension. More specifically, the Appellant has failed to clearly indicate the timeline of the required disclosures mentioned in the suspension request and there is no evidence in the file, in the Appeal Panel's view, that a decision on the suspension request after the full discussion of the suspension between the parties would not be timely enough to respond to the concerns raised by the Appellant not only on the required disclosures, but also on the setting up of certain financial structures necessary to meet the iMREL requirement and the issuance of instruments. As a matter of fact, the Appellant does not suggest that the relevant financial measures need to be adopted in August or early September (the time reasonably necessary to ensure the full respect of the right to be heard on the suspension request to both parties).
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> The Appeal Panel recalls moreover to the parties that pursuant to Article 85(6) SRMR, the Appeal Panel may suspend the application of a 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.
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> 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 CJEU's 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 CJEU's 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 court 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 order to determine whether the interim measures sought are urgent, 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). 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).

It is in the light of those criteria that the Appeal Panel invites the parties to fully discuss the suspension request and to this purpose the Appeal Panel, in addition and with no prejudice to the term granted to the Board to submit its response on the merits, hereby grants to the parties the following terms for the expedite written discussion of the suspension request:

a) The Board is granted until 12 August 2024 to submit its observations, if any, to the Appellant's suspension request;

b) The Appellant is granted until 19 August 2024, for a rejoinder, if any, to such observations on the suspension request;

c) The Board is granted until 26 August 2024 for a reply, it any, to the Appellant's rejoinder on the suspension request.

8. On 30 July 2024, the Appellant filed its observations regarding the Board's request for an extension, indicating that it had no objections to said request, but that this made it more pertinent to deal with the Suspension Request with urgency.

9. On 31 July 2024, the parties were informed that the Appeal Panel grants the Board the extension to file its response by three weeks, meaning by 25 September 2024; with the same communication, the parties were informed that the Appeal Panel will deal with the issue of the suspension request expeditiously.

10. On 12 August 2024, the Board submitted its observations to the Appellant's suspension request.

11. On 19 August 2024, the Appellant submitted its Rejoinder.

12. On 26 August 2024, the Board submitted its Reply to the Appellant's Rejoinder.

Main arguments of the parties

13. The main arguments of the parties regarding the Suspension Request are briefly summarised below. However, to avoid unnecessary duplications, the description in this section of the Appeal Panel's decision is limited to the illustration of the essential elements of the pleas of the Appellant and of the responses of the Board to such pleas, because the more detailed arguments of both parties are then thoroughly described and considered in the findings of the Appeal Panel's decision. 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

14. The Appellant has argued that the Suspension Request must be granted because, first, the iMREL requirement would otherwise become applicable to [.] following the Implementing Decision, and the higher requirement would also need to be reported by [.], and be subject to Pillar III disclosure requirements of the parent company. Second, because, for [.] to meet the internal MREL, certain financing structures would need to be set-up, resulting in an adjustment of the capital structure of the bank. Third, even if the internal MREL of [.] would be financed internally, there would still need to be an issuance at the level of its parent company to finance the higher iMREL-TREA of [.], with implications of cost, and disclosure to the market of financing needs, an irreversible impact.

15. In its Rejoinder the Appellant replied to the Board's objections to the admissibility of the Suspension Request, arguing that it had to challenge the Contested Decision as the legal act effecting a distinct change in the Appellant's legal situation, that the Contested Decision referred to the Implementing Decision through which the MREL determination must take effect, and that the partial suspension of the Contested Decision should also be admissible. The Appellant further complemented its arguments regarding the requirements for suspension, including the *fumus bonis juris*, discussing why in its view it has established a *prima facie* case, and the urgency, and why the suspension would be proportionate.

Board

16. The Board argues, first, that the Suspension Request is inadmissible, because it does not comply with the requirements for a suspension request under the case-law of European Courts, by failing to offer any evidence that could justify the adoption of a suspensive measure, and because it seeks to suspend the instructions to the National Resolution Authority (NRA), the [.] ([.]), which are not contained in the Contested Decision, but in the Board's decision [.], setting the MREL for the Appellant. In second place, the Board argues that the Suspension Request is unfounded because the circumstances of the case do not meet the requirements of *fumus bonis juris*, or *prima facie* case, urgency, and proportionality, considering the need to ensure the resolvability of the Appellant.

17. In its reply to the Appellant's rejoinder the Board complements its previous arguments on the (in)admissibility, and the requirements of *prima* facie case, urgency and proportionality, and replies to some of the Appellant's observations.

Findings of the Appeal Panel

18. The legal basis for a suspension is Article 10(2) of the Appeal Panel's Rules of Procedure (RoP) in conjunction with Article 85(6) SRMR. Article 85(6) SRMR states that:

> An appeal lodged pursuant to paragraph 3 shall not have suspensive effect.
>
> However, the Appeal Panel may, if it considers that circumstances so require, suspend the application of the contested decision.

19. Article 10 RoP, for its part, states that:

> 1. An appeal does not have suspensive effect, but by Article 85(6) of Regulation 806/2014 the Appeal Panel may, if it considers that the circumstances so require, suspend the application of the contested decision.
>
> 2. The procedures set out in these rules (including those set out below as to directions and pre-hearing conference) apply as the Chair shall deem appropriate to the determination of any question regarding the suspension of a decision by the Board. In exceptional circumstances, the Appeal Panel may also suspend the application of the contested decision for a period sufficient to permit full discussion of the suspension.
>
> 3. The decision of the Appeal Panel determining any question as to suspension shall be given in writing, and shall be adopted in accordance with Article 85(9) of Regulation 806/2014. The Appeal Panel may amend its decision to suspend or not suspend at any time on the application of any of the parties.

20. The wording of Article 85(6) SRMR recalls that of Article 278 TFEU, and this provision, together with Articles 279 and 256(1) TFEU, and Article 156 of the Court of Justice's Rules of Procedure have been the basis for the case-law by European courts on interim measures of suspension. The Appeal Panel and the parties in their submissions on suspension agree

that this case-law applies also to the interim measures requested to the Appeal Panel, and the parties have made their respective submissions on this basis.

(a) Admissibility

21. The Board argues that the Suspension Request is inadmissible, and it considers that the Appeal Panel itself found that the requirements for a suspension were not present in the original Suspension Request, citing para. 8 of the Appeal Panel's procedural order no. 1, where the Appeal Panel held that *"the Appellant has not given in the notice of appeal "compelling evidence of the occurrence in the present case of exceptional circumstances that could justify the immediate suspension of the application of the contested decision".*

22. However, the Appeal Panel expressly referred only to the exceptional circumstances *that could justify the immediate suspension of the application of the contested decision without having previously granted to the parties the possibility to fully discuss the request for suspension"* (emphasis added).

23. In other words, contrary to the Board's allegations, the procedural order did not hold that the requirements for a suspension were not present, but rather explained why the Appeal Panel considered that the Appellant had failed to demonstrate the exceptional circumstances that could justify the granting of the immediate suspension of the Contested Decision *inaudita altera parte* (without hearing both parties). Thus, the Appeal Panel's statement cannot be taken out of context.

24. In the Appeal Panel's view, the Board's further arguments, concerning the minimum requirements that must be fulfilled by an application for interim measures, must be equally dismissed. The Appeal Panel considers that the Suspension Request, albeit very succinct in the notice of appeal, was "intelligible in itself" (Order of the President of 23 February 2022, T-603/21 R, WO v EPPO, ECLI:EU:T:2022:92, paragraph 10) and the Appellant, following the Appeal Panel's procedural order no. 1, better substantiated and clarified its arguments to establish a *prima facie* case, urgency and proportionality with its rejoinder to the Board's reply to the Suspension Request.

25. The Appellant included its Suspension Request as part of its Appeal (Sections V and VI). In the Appeal Panel's view, asking the Appellant to reiterate factual grounds stated in previous sections does not seem consistent with procedural economy.

26. The Board also objects that the Appellant requests the suspension of the Contested Decision, whereas it also refers to the "instructions to [.]", the National Resolution Authority (NRA), which are contained in the SRB Decision [.] (SRB MREL Decision), which is not subject to appeal.

27. The Appeal Panel wishes to recall its finding in its admissibility decision of 29 June 2022 in case 1/2022, where it has held that an appeal against a joint decision of the resolution

college, as is the case of the Contested Decision is admissible, and its implications for its implementing decisions. A request to suspend the Contested Decision is therefore admissible, In Section VI of its Appeal the Appellant refers to the *"instruction in the Joint Decision to [.] to implement the Joint Decision".* In the Appeal Panel's view, this request needs to be interpreted to refer to specific parts of the Contested Decision and to the implications of its possible remittal, and to this extent it is admissible.

28. With the caveat above, the Suspension Request is considered admissible.

(b) Substance.

29. The parties agree on the test to determine whether a suspension of the Contested Decision is warranted. This is the test set by the case-law of European courts. The parties disagree about whether the different elements of that test are met.

30. 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 court 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, ECLI:EU:T:2016:427, paragraph 12).

31. European courts, and, by extension, administrative bodies with the power to order 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 assessment may involve 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).

32. In the circumstances of the present case, it is appropriate to examine first whether the condition relating to urgency is satisfied.

33. The purpose of the procedure for interim relief is to guarantee the full effectiveness of the future final decision. 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).

34. In cases where the harm referred to by the party requesting suspension is of a financial nature, European Courts have found that 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, ECLI:EU:C:2014:1749, paragraph 46 and the case-law cited).

35. This is not the case, in the Appeal Panel's view, for the Appellant nor the Appellant claims that it is.

36. In some cases, European courts have relied on the ability of the undertakings to withstand the measures, taking also into account its shareholders and/or the group structure where they were inserted in (Case C-12/95 P, Transacciones Marítimas and others v. Commission, EU:C:1995:62, paragraph 12). In the Appeal Panel's view there is no doubt that the group to which the Appellant is affiliated has the ability to withstand the effects of the Contested Decision, albeit at a price. This is also correctly acknowledged by the Appellant.

37. The Appellant, however, rightly claims that European courts have also found that a "serious and irreparable" harm was present, and thus the requisite urgency was met in cases where the harm was "objectively considerable", or even "not insignificant", regardless of its importance, relative to the size and financial resources of the Applicant (The Appellant refers for instance to the order of the Vice-President of the Court, Case C-551/12 P(R), EDF v Commission, ECLI:EU:C:2013:157, paragraphs 33 and ff.)

38. The Appeal Panel notes that the order in *EDF v Commission* dealt with the concept of "serious" harm. However, it did not reject the size of an undertaking as a relevant consideration when assessing whether the harm is serious. In fact, in paragraph 32, the Court of Justice held that:

> "the size of the undertaking may have an influence on the assessment of the seriousness of the financial harm alleged, since that harm will be all the more serious where it is significant compared to the undertaking's size and correspondingly less serious if the contrary applies. Thus, in certain circumstances, the arguments concerning the seriousness of the harm alleged may be rejected by simply comparing it to the turnover of the undertaking which may suffer that harm (see, to that effect, orders of the President of the Court in Case 20/81 R Arbed and Others v Commission [1981] ECR 721, paragraph 14, and in Cases C-51/90 R and C-59/90 R Comos-Tank and Others v Commission [1990] ECR I-2167, paragraphs 25 and 26)".

39. In turn, the Court stated in paragraph 33 that:

> However, it cannot be excluded that financial harm which is objectively significant and which allegedly results from the obligation to make a final commercial choice of some magnitude within a disadvantageous time-scale, could be considered as 'serious', or even that the seriousness of such harm could be considered as obvious, even in the absence of information concerning the size of the undertaking concerned. Thus, the fact that the appellant failed to provide, in the application for interim measures, information concerning the size of the undertaking to which it belongs is not in

> itself sufficient to justify rejection of that application on the ground that the appellant failed to establish the seriousness of the alleged harm".

40. Thus, what the Court held was that some nuance, and careful consideration, was necessary, to not dismiss out of hand a claim of serious harm in the absence of information that could match the harm with the size and financial resources of the applicant. However, not just any harm that is "not insignificant" can qualify as "serious" under this criterion.

41. In this sense, the Appeal Panel finds that the information offered by the Appellant suggests a harm that does not meet the requisite legal standard. The Applicant provides an estimated amount between EUR [.] in additional issuance costs, which, while not insignificant, does not appear to meet the requisite criterion of seriousness to justify an interim suspension, in light of the size and importance of the group to which the Appellant is affiliated. Moreover, as rightly noted by the Board, this is a potential financial harm that could be made good by the Board, if the Contested Decision would be remitted to the Board in the merit at the end of these proceedings or annulled by European courts if an application of annulment be subsequently filed against the Appeal Panel's decision.

42. Furthermore, according to the Appellant's observations in its rejoinder, this harm would result from the need for an external issuance of instruments by the parent company, which would be down-streamed to the Appellant. However, the necessity of such external issuance is due to the fact that, in addition to iMREL levels, the Appellant is also subject to a self-imposed internal management buffer. The parties agree that legally speaking, the Appellant is presently compliant with required iMREL levels.

43. The Appellant alleges that the internal management buffer is used to prevent breaches in a more adverse or stressed scenario and should thus not be used to comply with regulatory requirements. While such practice appears commendable, it is not mandatory and, transitorily at least, until a final decision is adopted by the Appeal Panel ([.]), it seems unlikely to the Appeal Panel that the "use" of self-imposed internal management buffer to meet the additional iMREL requirement (without the need to make new external issuances) would expose the Appellant and its group to a substantial risk. Therefore, the entity has also the option between issuing external MREL or suspending the application of the internal management buffer, pending the Appeal Panel decision, [.].

44. In fact, the Appeal Panel notes that in *EDF v Commission,* relied upon by the Appellant, although the Court of Justice quashed the Order of the President of the General Court as wrong in law with regard to the requirement that the harm must be "serious", the Court then proceeded to adjudicate on the interim measures, finding that the Applicant had failed to establish that it would suffer "the existence of serious harm the occurrence of which would be foreseeable with a sufficient degree of probability". This was because the harm was dependent not only on the measures appealed, but also on market conditions, and on the applicant's own strategic and operational choices (*EDF v Commission* at paragraphs 45-52).

45. The Appeal Panel further acknowledges that the uncertainty resulting from compliance with reporting and disclosure obligations, as claimed by the Appellant in the Suspension Request, is, admittedly, undesirable, but in the Appeal Panel's view it does not appear to acquire the degree of gravity that Courts consider necessary to comply with the requirement of "serious" harm.

46. Furthermore, and even more importantly, the harm need not only be "serious", but also "irreparable", which is why European courts' case-law insists that financial harm justifies suspension measures when it "imperils the existence" of the applicant (Orders of the President of the Court of First Instance in case T-246/08 Melli Bank v Council, ECLI:EU:T:2008:301, paragraph 34, or in Case T-181/02 R Neue Erba Lautex v Commission [2002] ECR II-5081, paragraph 84), because otherwise it can be compensated.

47. Indeed, again in *EDF v Commission* the Court of Justice, after reversing the General Court's findings on the "seriousness" of the harm, and the absolute relevance of the size and resources of the applicant, relied on these same factors to establish the "irreparability" of the harm, holding that the harm was not irreparable because it did not imperil the financial viability of the applicant and could be estimated (*EDF v Commission* at paragraphs 54-58).

48. As noted above, in its allegations the Appellant itself has provided estimates of potential harm, resulting from issuance costs which do not present a threat to its financial viability. Nor can the uncertainty resulting from changes in the financial metrics being reported be considered irreparable due to that same uncertainty. Even if it may be difficult to establish *ex ante* what could be the consequences of variations, even substantial variations of reported regulatory requirements, the Appellant has failed to offer compelling evidence that such harm could endanger the viability of the Appellant or be irreparable for other reasons.

49. Since the requirements for interim measures are cumulative, and the Appellant has failed to offer sufficient arguments or evidence to justify a suspension of the Contested Decision on grounds of "serious and irreparable" harm, and thus failed to justify the urgency of the measures, it is not necessary to consider the requirement of *fumus boni juris*, or *prima facie* case, or analyse the proportionality of a hypothetical suspension. Since the requirements to justify a suspension are not met with respect to any of the consequences of the Contested Decision, it is not necessary to analyze the issue of whether the Contested Decision included "instructions" to the NRA, and whether an interim suspension could be ordered with respect to those alleged instructions.

On those grounds, the Appeal Panel hereby:

Dismisses the request for suspension.

David Ramos Muñoz	Helen Louri Dendrinou	Luis Silva Morais
Co-Rapporteur	SIGNED	Vice-Chair
SIGNED		SIGNED

Marco Lamandini	Christopher Pleister
Co-Rapporteur	Chair
SIGNED	SIGNED

For the Secretariat of the Appeal Panel:

[.]
SIGNED